ADVISORY COMMITTEE
ON
CRIMINAL RULES

Washington, DC
October 29-30, 2012

TABLE OF CONTENTS

THIS PAGE INTENTIONALLY BLANK

AGENDA
CRIMINAL RULES COMMITTEE MEETING
OCTOBER 29-30, 2012
WASHINGTON, D.C.

I. PRELIMINARY MATTERS

A. Chair's Remarks and Administrative Announcements

B. Review and Approval of Minutes of April 2012 meeting in San Francisco

C. Status of Criminal Rules: Report of the Rules Committee Support Office

II. CRIMINAL RULES UNDER CONSIDERATION (INFORMATION ITEMS/NO MEMOS)

A. Proposed Amendment Approved by the Supreme Court and forwarded to Congress

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged,.

2. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant relief because appeal has been docketed.

B. Proposed Amendment Approved by the Judicial Conference

1. Rule 11. Advice re Immigration Consequences of Guilty Plea; Advice re Sex Offender Registration and Notification Consequences of Guilty Plea.

C. Proposed Amendments Approved By the Standing Committee for Publication in August 2012

1. Rule 5. Initial Appearance. Proposed amendment providing that non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

III. CONSIDERATION OF PUBLIC COMMENTS AND SUBCOMMITTEE RECOMMENDATIONS ON PROPOSED AMENDMENTS PUBLISHED AUGUST 2011 (Memos and attachments)

1. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

2. Rule 34. Arresting Judgment; Conforming Changes to Implement Amendment to Rule 12.

IV. RULES AND PROJECTS PENDING BEFORE CONGRESS, STANDING COMMITTEE, JUDICIAL CONFERENCE, AND OTHER COMMITTEES.

A. Status Report on Legislation Affecting Federal Rules of Criminal Procedure (No Memo)

B. Benchbook revisions

C. Synonym Subcommittee

D. Other

V. DESIGNATION OF TIMES AND PLACES FOR FUTURE MEETINGS

A. Spring Meeting, April 25-26, 2013, Duke Law School, Durham, N.C. (No Memo)

ADVISORY COMMITTEE ON CRIMINAL RULES

Chair, Advisory Committee on Criminal Rules	**Honorable Reena Raggi** United States Court of Appeals 704S United States Courthouse 225 Cadman Plaza East Brooklyn, NY 11201-1818
Reporter, Advisory Committee on Criminal Rules	**Professor Sara Sun Beale** Georgetown University Law Center 415 New Jersey Avenue, NW Hotung Room 6016 Washington, DC 20001 **Professor Nancy J. King** Vanderbilt University Law School 131 21st Avenue South, Room 248 Nashville, TN 37203-1181
Members, Advisory Committee on Criminal Rules	**Honorable Lanny A. Breuer** Assistant Attorney General Criminal Division (ex officio) United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 107 Washington, DC 20530-0001 **Rachel Brill, Esq.** 263 Domenech Avenue San Juan, PR 00918 **Carol A. Brook, Esq.** Executive Director Federal Defender Program for the Northern District of Illinois 55 East Monroe Street, Suite 2800 Chicago, IL 60603 **Leo P. Cunningham, Esq.** Wilson Sonsini Goodrich & Rosati, P.C. 650 Page Mill Road Palo Alto, CA 94304-1050 **Honorable Morrison C. England, Jr.** United States District Court 501 I Street – Suite 14-230 Sacramento, CA 95814-7300

Members, Advisory Committee on Criminal Rules *(cont'd.)*	**Kathleen Felton, Esq.** Deputy Chief, Appellate Section – Criminal Division United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 1264 Washington, DC 20530-0001 **Honorable David E. Gilbertson** Chief Justice Supreme Court of South Dakota 500 E. Capitol Pierre, SD 57501 **Honorable John F. Keenan** United States District Court 1930 Daniel Patrick Moynihan U.S. Courthouse 500 Pearl Street New York, NY 10007-1312 **Honorable David M. Lawson** United States District Court Theodore Levin United States Courthouse 231 West Lafayette Boulevard, Room 802 Detroit, MI 48226 **Professor Andrew D. Leipold** University of Illinois College of Law 504 E. Pennsylvania Avenue Champaign, IL 61820 **Honorable Donald W. Molloy** United States District Court Russell E. Smith Federal Building 201 East Broadway Street Missoula, MT 59802 **Honorable Timothy R. Rice** United States District Court James A. Byrne United States Courthouse 601 Market Street, Room 3041 Philadelphia, PA 19106 **Jonathan Wroblewski, Esq.** Director, Office of Policy & Legislation Criminal Division United States Department of Justice 950 Pennsylvania Avenue, N.W. - Room 7728 Washington, DC 20530-0001

Members, Advisory Committee on Criminal Rules *(cont'd.)*	**Honorable James B. Zagel** United States District Court 2588 Everett McKinley Dirksen U.S. Courthouse 219 South Dearborn Street Chicago, IL 60604
Clerk of Court Representative, Advisory Committee on Criminal Rules	**James N. Hatten** Clerk United States District Court Richard B. Russell Federal Building and United States Courthouse 75 Spring Street, S. W., Room 2217 Atlanta, GA 30303-3309
Liaison Member, Advisory Committee on Criminal Rules	**Honorable Marilyn L. Huff** *(Standing)* United States District Court Edward J. Schwartz U.S. Courthouse Suite 5135 940 Front Street San Diego, CA 92101
Secretary, Standing Committee	**Peter G. McCabe** Secretary Committee on Rules of Practice & Procedure Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 4-180 Washington, DC 20544 Phone 202-502-1800 Fax 202-502-1766 Peter_McCabe@ao.uscourts.gov
Chief Counsel	**Andrea L. Kuperman** Chief Counsel to the Rules Committees 11535 Bob Casey U.S. Courthouse 515 Rusk Ave. Houston, TX 77002-2600 Phone 713-250-5980 Fax 713-250-5213 Andrea_Kuperman@txs.uscourts.gov
Rules Committee Officer	**Jonathan C. Rose** Rules Committee Officer Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1820 Fax 202-502-1755 Jonathan_Rose@ao.uscourts.gov

Deputy Rules Committee Officer and Counsel	**Benjamin J. Robinson** Deputy Rules Committee Officer and Counsel to the Rules Committees Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E., Room 7-240 Washington, DC 20544 Phone 202-502-1516 Fax 202-502-1755 Benjamin_Robinson@ao.uscourts.gov

Advisory Committee on Criminal Rules

Members	Position	District/Circuit	Start Date		End Date
Reena Raggi Chair	C	Second Circuit	2011		2014
Lanny A. Breuer*	DOJ	Washington, DC	----		Open
Rachel Brill	ESQ	Puerto Rico	2006		2012
Carol A. Brook	FPD	Illinois (Northern)	2011		2014
Leo P. Cunningham	ESQ	California	2006		2012
Morrison C. England, Jr.	D	California (Eastern)	2008		2014
David E. Gilbertson	CJUST	South Dakota	2010		2013
John F. Keenan	D	New York (Southern)	2007		2013
David M. Lawson	D	Michigan (Eastern)	2009		2015
Andrew Leipold	ACAD	Illinois	2007		2013
Donald W. Molloy	D	Montana	2007		2013
Timothy R. Rice	M	Pennsylvania (Eastern)	2009		2015
James B. Zagel	D	Illinois (Northern)	2007		2013
Sara Sun Beale Reporter	ACAD	North Carolina	2005		Open
Principal Staff: Jonathan C. Rose 202-502-1820					

* Ex-officio

LIAISON MEMBERS

Liaison for the Advisory Committee on Appellate Rules	**Dean C. Colson**	***(Standing)***
Liaison for the Advisory Committee on Appellate Rules	**Honorable Adalberto Jordan**	***(Bankruptcy)***
Liaison for the Advisory Committee on Bankruptcy Rules	**Judge James A. Teilborg**	***(Standing)***
Liaison for the Advisory Committee on Civil Rules	**Judge Arthur I. Harris**	***(Bankruptcy)***
Liaison for the Advisory Committee on Civil Rules	**Judge Diane P. Wood**	***(Standing)***
Liaison for the Advisory Committee on Criminal Rules	**Judge Marilyn L. Huff**	***(Standing)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Judith H. Wizmur**	***(Bankruptcy)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Paul S. Diamond**	***(Civil)***
Liaison for the Advisory Committee on Evidence Rules	**Judge John F. Keenan**	***(Criminal)***
Liaison for the Advisory Committee on Evidence Rules	**Judge Richard C. Wesley**	***(Standing)***

ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS

Peter G. McCabe
Secretary
Committee on Rules of Practice & Procedure
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-180
Washington, DC 20544
Phone 202-502-1800
Fax 202-502-1766
Peter_McCabe@ao.uscourts.gov

Jonathan C. Rose
Rules Committee Officer
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755
Jonathan_Rose@ao.uscourts.gov

Benjamin J. Robinson
Deputy Rules Committee Officer
and Counsel to the Rules Committees
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1516
Fax 202-502-1755
Benjamin_Robinson@ao.uscourts.gov

Julie Wilson
Attorney Advisor
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-3678
Fax 202-502-1766
Julie_Wilson@ao.uscourts.gov

James H. Wannamaker III
Senior Attorney
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-254
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
James_Wannamaker@ao.uscourts.gov

Scott Myers
Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-250
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Scott_Myers@ao.uscourts.gov

Bridget M. Healy
Attorney Advisor
Bankruptcy Judges Division
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 4-273
Washington, DC 20544
Phone 202-502-1900
Fax 202-502-1988
Bridget_Healy@ao.uscourts.gov

Bernida D. Evans
Management Analyst
Thurgood Marshall Federal Judiciary Building
One Columbus Circle, N.E., Room 7-240
Washington, DC 20544
Phone 202-502-1820
Fax 202-502-1755
Bernida_Evans@ao.uscourts.gov

FEDERAL JUDICIAL CENTER

Joe Cecil *(Rules of Practice & Procedure)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4084 Fax 202-502-4199 jcecil@fjc.gov	**Marie Leary** *(Appellate Rules Committee)* Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4069 Fax 202-502-4199 mleary@fjc.gov
Molly T. Johnson *(Bankruptcy Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 315-824-4945 mjohnson@fjc.gov	**Emery G. Lee** *(Civil Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4078 Fax 202-502-4199 elee@fjc.gov
Laural L. Hooper *(Criminal Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4093 Fax 202-502-4199 lhooper@fjc.gov	**Tim Reagan** *(Evidence Rules Committee)* Senior Research Associate Research Division Thurgood Marshall Federal Judiciary Building One Columbus Circle, N.E. Washington, DC 20002-8003 Phone 202-502-4097 Fax 202-502-4199 treagan@fjc.gov

THIS PAGE INTENTIONALLY BLANK

TAB 1

THIS PAGE INTENTIONALLY BLANK

TAB 1A

THIS PAGE INTENTIONALLY BLANK

ADVISORY COMMITTEE ON CRIMINAL RULES
DRAFT MINUTES
April 22-23, San Francisco, California

I. ATTENDANCE AND PRELIMINARY MATTERS

The Criminal Rules Advisory Committee ("Committee") met in San Francisco, California on April 22-23, 2012. The following persons were in attendance:

Judge Reena Raggi, Chair
Rachel Brill, Esq.
Carol A. Brook, Esq.
Leo P. Cunningham, Esq.
Kathleen Felton, Esq.
Judge Morrison C. England, Jr.
Chief Justice David E. Gilbertson (by telephone)
James N. Hatten, Esq.
Judge John F. Keenan
Judge David M. Lawson
Professor Andrew D. Leipold
Judge Donald W. Molloy
Judge Timothy R. Rice
Jonathan Wroblewski, Esq.
Judge James B. Zagel
Professor Sara Sun Beale, Reporter
Professor Nancy King, Reporter

Judge Mark R. Kravitz, Chair of the Committee on Rules of Practice and Procedure (Standing Committee)
Judge Marilyn L. Huff, Standing Committee Liaison

The following persons were absent:

Assistant Attorney General Lanny A. Breuer

The following persons were present to support the Committee:

Andrea L. Kuperman, Esq. (by telephone)
Laural L. Hooper, Esq.
Peter G. McCabe, Esq.
Jonathan C. Rose, Esq.
Benjamin J. Robinson, Esq.

The following individuals were also present:

Andrew D. Goldsmith, Esq.
(on Tuesday, April 23, 2012, on behalf of the Department of Justice)

Peter Goldberger, Esq.
(on behalf of the National Association of Criminal Defense Lawyers)

II. CHAIR'S REMARKS AND OPENING BUSINESS

A. Chair's Remarks

Judge Raggi welcomed the members and, on behalf of the entire Committee, thanked Judge Richard C. Tallman, the Committee's previous Chair, for arranging the meeting at the James R. Browning United States Courthouse in San Francisco.

B. Review and Approval of Minutes of October 2011 Meeting

A motion to approve the minutes of the October 2011 Committee meeting in St. Louis, Missouri, having been moved and seconded,

The Committee unanimously approved the October 2011 meeting minutes by voice vote.

C. Other Opening Business

The members indicated their review of the Draft Minutes of the January 2012 Meeting of the Standing Committee and the Report of the September 2011 Proceedings of the Judicial Conference.

III. CRIMINAL RULES UNDER CONSIDERATION

A. Proposed Amendments Approved by the Judicial Conference

Judge Raggi reported that the following proposed amendments, approved by the Judicial Conference, were likely also to be approved by the Supreme Court and transmitted to Congress before May 1, 2012, whereupon they would take effect on December 1, 2012, unless Congress acts to the contrary:

1. Rule 5. Initial Appearance. Proposed amendment providing that initial appearance for extradited defendants shall take place in the district in which defendant was charged.

2. Rule 15. Depositions. Proposed amendment authorizing deposition in foreign countries when the defendant is not physically present if the court makes case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness

to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

3. Rule 37. Indicative Rulings. Proposed amendment authorizing district court to make indicative rulings when it lacks authority to grant belief because appeal has been docketed.

Judge Raggi reported that the following proposed amendment was approved by the Judicial Conference at its March 2012 meeting, and would be transmitted to the Supreme Court for review this fall, as part of a larger package of proposed Rules amendments:

1. Rule 16. Proposed technical and conforming amendment clarifying protection of government work product.

B. Proposed Amendments Recommitted by the Supreme Court for Further Consideration

Judge Raggi informed members that two proposed rule amendments had been recommitted by the Supreme Court for further consideration:

1. Rule 5(d). Initial Appearance. Proposed amendment providing that in felony cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

2. Rule 58. Initial Appearance. Proposed amendment providing that in petty offense and misdemeanor cases non-citizen defendants in U.S. custody shall be informed that upon request a consular official from the defendant's country of nationality will be notified, and that the government will make any other consular notification required by its international obligations.

At the meeting, Judge Raggi identified possible concerns that the proposed amended rules could be construed (1) to intrude on executive discretion in conducting foreign affairs both generally and specifically as it pertains to deciding how to carry out treaty obligations, and (2) to confer on persons other than the sovereign signatories to treaties, specifically, criminal defendants, rights to demand compliance with treaty provisions.

Ms. Felton and Mr. Wroblewski stated that, on behalf of the Justice Department, they had conferred with counterparts at the Department of State, and the departments now jointly proposed some changes to the proposed rule amendments to alleviate concerns such as those identified by Judge Raggi.

After extended discussions, the Committee agreed that Rules 5(d) and 58 should still be amended to address the questions of consular notification, but that the amendments should be redrafted as illustrated in the following version of Rule 5. Judge Raggi noted that, as redrafted, the amendments are a substantive departure from what was published and that it might be prudent to republish them. Judge Raggi further noted that this language would have to be

reviewed by the Standing Committee's style consultant, and that the Reporters would review the Committee Notes to determine whether any changes should be made in light of the return by the Supreme Court and the new language approved by the Committee. She stated that the Reporters would circulate the final language (with any style changes) as well as the accompanying Committee Notes for approval before submission to the Standing Committee.

Rule 5. Initial Appearance

* * * * *

(d) **Procedure in a Felony Case**.

(1) Advice. If the defendant is charged with a felony, the judge must inform the defendant of the following:

* * * * *

(F) if the defendant is held in custody and is not a United States citizen:

(i) that the defendant may request that an attorney for the government or a federal law enforcement officer notify a consular officer from the defendant's country of nationality that the defendant has been arrested; and

(ii) that in the absence of a defendant's request, consular notification may nevertheless be required by treaty or other international agreement.

* * * * *

A motion being made and seconded,

With the proviso that final language after restyling and any accompanying changes to the Committee Notes would be circulated for final approval, the Committee unanimously decided by voice vote to adopt the proposed amendments to Rules 5(d) and 58 and to transmit the matter to the Standing Committee.

C. Proposed Amendments Approved by the Standing Committee for Publication in August 2011

Judge Raggi reported that the following proposed amendments had been published for notice and public comment with the approval of the Standing Committee:

1. Rule 11. Advice re Immigration Consequences of Guilty Plea.

Judge Raggi reported that the August 2011 publication of the Committee's proposal to amend Rule 11 had prompted six written comments. Judge Rice, Chair of the Rule 11 Subcommittee, stated that the subcommittee had reviewed and discussed these comments at

length. A majority continued to endorse the language of the proposed amendment as published. In discussion among the full Committee, some members voiced concern that the amendment shifts a burden that belongs to defense counsel onto the court, creates a "slippery slope" for expanding Rule 11 procedures in ways that distract from the key trial rights being waived, and is overbroad. A majority nevertheless remained of the view that deportation is qualitatively different from other collateral consequences that may follow from a guilty plea and, therefore, should be included on the list of matters that must be discussed during a plea colloquy. Mr. Wroblewski stated that the Department of Justice supported the proposed amendment as published and had already begun to instruct its prosecutors to include appropriate language in plea agreements concerning the collateral immigration consequences of a guilty plea.

Members agreed that the Committee Note should be modified to address certain concerns raised in the public comments. The Reporters were asked to add language emphasizing that courts should use general statements rather than targeted advice to inform defendants that there may be immigration consequences from conviction.

The full text of the proposed amendment and revisions to the Committee Note follow:

Rule 11. Pleas.

* * * * *

(b) Considering and Accepting a Guilty or Nolo Contendere Plea.

(1) Advising and Questioning the Defendant. Before the court accepts a plea of guilty or nolo contendere, the defendant may be placed under oath, and the court must address the defendant personally in open court. During this address, the court must inform the defendant of, and determine that the defendant understands, the following:

* * * * *

(M) in determining a sentence, the court's obligation to calculate the applicable sentencing-guideline range and to consider that range, possible departures under the Sentencing Guidelines, and other sentencing factors under 18 U.S.C. § 3553(a); ~~and~~

(N) the terms of any plea-agreement provision waiving the right to appeal or to collaterally attack the sentence; and~~.~~

(O) that, if convicted, a defendant who is not a United States citizen may be removed from the United States, denied citizenship, and denied admission to the United States in the future.

* * * * *

Committee Note

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S. Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

A motion being made and seconded,

The Committee decided, with nine votes in favor and three opposed, to amend Rule 11 by adopting the language published for public comment with the Reporters' suggested revisions to the Committee Note, and to transmit the matter to the Standing Committee with the recommendation that the proposed amendment be approved and sent to the Judicial Conference.

2. Rule 12(b). Clarifying Motions that Must Be Made Before Trial; Addresses Consequences of Motion; Provides Rule 52 Does Not Apply To Consideration Of Untimely Motion.

3. Rule 34, Arresting Judgment: Conforming Changes To Implement Amendment to Rule 12.

Judge Raggi reported that the proposed amendment to Rule 12 and the conforming changes to Rule 34 were published for public comment in August 2011, and that numerous submissions were received, including detailed objections and suggestions from defense bar organizations. Judge England, Chair of the Rule 12 Subcommittee, reported that, after a lengthy teleconference, subcommittee members unanimously determined that the concerns raised by the public comments should be considered at a face-to-face meeting, which would be held in conjunction with the full Committee's April meeting in San Francisco. To assist the subcommittee, Professors Beale and King prepared a comprehensive memorandum analyzing the history of the proposed amendment, the relevant law, and each comment received. Judge England and several members praised the Reporters' substantial research and thanked them for their analytical support.

Judge England informed members that the subcommittee would continue to work on the matter over the summer and expected to present its recommendation to the Committee at its fall meeting.

D. Proposed Amendment Referred for Review by Subcommittee

1. Rule 6. Grand Jury Secrecy.

Judge Keenan, Chair of the Rule 6 Subcommittee, reported on its review of Attorney General Eric Holder's October 18, 2011 proposal to amend Rule 6(e) to establish procedures for the disclosure of historically significant grand jury materials. The amendment (as proposed by the Department of Justice) would (1) allow district courts to permit disclosure, in appropriate circumstances, of archival grand jury materials of great historical significance, and (2) provide a temporal end point for grand jury materials that had become part of the National Archives.

Judge Keenan stated that the subcommittee had held two lengthy teleconferences to discuss the Attorney General's proposal. It also reviewed written and oral comments from (1) Public Citizen Litigation Group (PCLG) (which litigated *In re Kutler* and other cases on behalf of historians seeking access to grand jury materials), (2) District Judge D. Lowell Jensen (former chair of the Advisory Committee on Criminal Rules), (3) former Attorney General and District Judge Michael Mukasey, and (4) former U.S. Attorneys for the Southern District of New York, Robert Fiske (a former member of the Advisory Committee) and Otto Obermaier. Further, the Reporters prepared a research memorandum exploring general principles governing the relationship between the court and the grand jury, precedents relating to inherent judicial authority to disclose grand jury material, and background materials to the Committee's past amendments to Rule 6(e). Judge Keenan reported that, at the close of the second teleconference, all members of the subcommittee–other than those representing the Department of Justice–voted to recommend that the Committee not pursue the proposed amendment.

Discussion among the full Committee revealed consensus that, in the rare cases where disclosure of historically significant materials had been sought, district judges had reasonably resolved applications by reference to their inherent authority, and that it would be premature to set out standards for the release of historical grand jury materials in a national rule.

Judge Raggi summarized a telephone conversation she had with Counsel for the Archivist of the United States, the Chief Administrator for the National Archives and Records Administration (NARA), and a supporter of the proposed rule. She explained that a rule amendment providing for a presumption that grand jury materials would be disclosed after a specified number of years—seventy-five in the case of the proposal—would significantly recalibrate the balance that had long been applied to grand jury proceedings, which presumed that proceedings would forever remain secret absent an extraordinary showing in a particular case. Judge Raggi explained that the Committee might not be inclined to effect such a historic change by a procedural rule, particularly in the absence of a strong showing of need. Judge Keenan added that subcommittee members generally agreed that NARA should not become the gatekeeper for grand jury materials. Several members agreed that no real problem exists that presently warrants a rule amendment.

Mr. Wroblewski thanked Judge Keenan and the subcommittee members for the careful consideration given to the Attorney General's suggestion. He explained that the Department will continue to object to requests for disclosure based on Supreme Court precedent that the Department interprets as establishing a rule that rejects district judges' assertions of inherent authority to release historically significant grand jury materials. Mr. Wroblewski made clear, however, that the Department does think the prudent policy is to permit release under appropriate circumstances.

Judge Kravitz observed that Congress may weigh in on this issue, which also counsels against pursuing further action by rule.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

IV. NEW PROPOSALS FOR DISCUSSION

A. Rule 16 (a)(1)(A)-(C), Pretrial Disclosure of Defendant's Statements

The Committee discussed correspondence from Judge Christina Reiss of the District of Vermont suggesting that Rule 16(a) be amended to require pretrial disclosure of a broader range of defendants' prior statements. Discussion revealed consensus among members that no serious problem exists warranting the proposed amendment, which could produce unintended, adverse consequences in cases involving long-term investigations into large-scale criminal organizations.

A motion being made and seconded,

The Committee unanimously decided by voice vote to take no further action on the proposal and to remove it from the Committee's agenda.

V. INFORMATION ITEMS

A. Report of the Rules Committee Support Office and Status Report on Legislation Affecting Criminal Rules

1. Mr. Robinson reported on recent congressional hearings concerning the prosecution of the late Alaska Senator Ted Stevens and the court-ordered investigation into possible prosecutorial misconduct. He advised that legislation introduced by Senator Murkowski would expand prosecutorial disclosure obligations.

2. Judge Raggi reported on the progress of the Federal Judicial Center's Benchbook Committee to identify "best practices" for judges in addressing *Brady*/*Giglio* issues, which would be included in a forthcoming draft of the Federal Judicial Center's *Benchbook for U.S. District Court Judges*.

3. Mr. Robinson reported further on the "Daniel Faulkner Law Enforcement Officers and Judges Protection Act," which would abrogate the application of Civil Rule 60(b)(6) in petitions brought under 28 U.S.C § 2254.

4. Mr. Wroblewski noted that the Justice Department planned to monitor an upcoming hearing on crime victims' rights before the House Judiciary Committee, and would report any issues pertaining to the work of the Committee following the hearing.

VI. ELECTRONIC DISCOVERY

At the Committee's October 2011 meeting, Mr. Wroblewski reported that the Justice Department was participating in a Joint Electronic Technology Working Group (JETWG) with Federal Defenders, the Administrative Office, and the Federal Judicial Center to develop a protocol for discovery of electronically stored information (ESI) in federal criminal cases. The Committee invited Andrew D. Goldsmith, National Criminal Discovery Coordinator for the Department of Justice and a co-chair of the JETWG, to attend its April 2012 meeting to discuss the protocol, which was released in February.

Mr. Goldsmith recounted the formation of the JETWG and development of the protocol, which is intended to encourage early discussion of electronic discovery issues, the exchange of data in industry standard or reasonably usable formats, notice to the court of potential discovery issues, and resolution of disputes without court involvement wherever possible. He reviewed with the Committee the four parts of the protocol: (1) an introductory section, which describes several basic discovery principles; (2) a set of recommendations for ESI discovery; (3) strategies and commentary on ESI discovery; and (4) an ESI discovery checklist. Following questions, observations, and suggestions from members, Judge Raggi thanked Mr. Goldsmith and noted that future discussion of the protocol may be warranted after it becomes widely deployed and implemented.

VII. FUTURE MEETINGS AND CLOSING BUSINESS

The Committee mourned the loss of former member Donald J. Goldberg, a well respected private attorney who had contributed significantly to the work of the Committee and became a good friend to many members. Professor Beale recalled with fondness Mr. Goldberg's leadership of the Rule 16 Subcommittee. Other members expressed their condolences.

Judge Raggi also expressed the Committee's deep appreciation for the many contributions of Rachel Brill and Leo P. Cunningham, two distinguished members whose terms will expire before the fall meeting. Members added their sincere thanks for the hard work performed by and friendships forged with Ms. Brill and Mr. Cunningham. Judge Raggi invited Ms. Brill and Mr. Cunningham to attend the fall meeting as guests of the Committee.

Judge Raggi announced that the Committee will next meet on Monday and Tuesday, October 29-30, 2012, at the Thurgood Marshall Federal Judiciary Building in Washington, D.C.

All business being concluded, Judge Raggi adjourned the meeting.

THIS PAGE INTENTIONALLY BLANK

TAB 1B

THIS PAGE INTENTIONALLY BLANK

Meeting of June 11-12, 2012
Washington, D.C.
Draft Minutes

TABLE OF CONTENTS

ATTENDANCE

The winter meeting of the Judicial Conference Committee on Rules of Practice and Procedure was held in Washington, D.C., on Monday and Tuesday, June 11 and 12, 2012. The following members were present:

Judge Mark R. Kravitz, Chair
Dean C. Colson, Esquire
Roy T. Englert, Jr., Esquire
Gregory G. Garre, Esquire
Judge Neil M. Gorsuch
Judge Marilyn L. Huff
Chief Justice Wallace B. Jefferson
Dean David F. Levi
Judge Patrick J. Schiltz
Judge James A. Teilborg
Larry D. Thompson, Esquire
Judge Richard C. Wesley
Judge Diane P. Wood

Deputy Attorney General James M. Cole was unable to attend. The Department of Justice was represented throughout the meeting by Elizabeth J. Shapiro, Esquire, and at various points by Kathleen A. Felton, Esquire; H. Thomas Byron III, Esquire; Jonathan J. Wroblewski, Esquire; Ted Hirt, Esquire; and J. Christopher Kohn, Esquire.

Judge Jeremy D. Fogel, Director of the Federal Judicial Center, participated in the meeting, as did the committee's consultants – Professor Geoffrey C. Hazard, Jr.; Professor R. Joseph Kimble; and Joseph F. Spaniol, Jr., Esquire.

Providing support to the committee were:

Professor Daniel R. Coquillette	The committee's reporter
Peter G. McCabe	The committee's secretary
Jonathan C. Rose	Chief, Rules Committee Support Office
Benjamin J. Robinson	Deputy Chief, Rules Committee Support Office
Julie Wilson	Attorney, Rules Committee Support Office
Andrea L. Kuperman	Rules law clerk to Judge Kravitz
Joe Cecil	Research Division, Federal Judicial Center

Also attending were Administrative Office attorneys James H. Wannamaker III, Bridget M. Healy, and Holly T. Sellers, and the judiciary's Supreme Court fellows.

Representing the advisory committees were:

Advisory Committee on Appellate Rules —
Judge Jeffrey S. Sutton, Chair
Professor Catherine T. Struve, Reporter
Advisory Committee on Bankruptcy Rules —
Judge Eugene R. Wedoff, Chair
Professor S. Elizabeth Gibson, Reporter
Professor Troy A. McKenzie, Associate Reporter
Advisory Committee on Civil Rules —
Judge David G. Campbell, Chair
Professor Edward H. Cooper, Reporter
Professor Richard L. Marcus, Associate Reporter
Advisory Committee on Criminal Rules —
Judge Reena Raggi, Chair
Professor Sara Sun Beale, Reporter
Advisory Committee on Evidence Rules —
Judge Sidney A. Fitzwater, Chair
Professor Daniel J. Capra, Reporter

INTRODUCTORY REMARKS

Judge Kravitz reported that he would retire as committee chair on September 30, 2012, and the Chief Justice had nominated Judge Sutton to succeed him. He congratulated Judge Sutton and thanked the Chief Justice for making an excellent selection.

Judge Kravitz reported that the Supreme Court in April 2012 had adopted the proposed amendments to the bankruptcy and criminal rules recommended by the Conference at its September 2011 session. The changes will take effect by operation of law on December 1, 2011, unless Congress acts to reject, modify, or defer them.

REPORT OF THE ADMINISTRATIVE OFFICE

Mr. Robinson reported that there had been no further significant legislative action related to electronic discovery since the committee's January 2012 meeting.

He said that the House Judiciary Committee had held a hearing on the Class Action Fairness Act, at which no calls were made either for an overhaul of FED. R. CIV. P. 23 (class actions) or for dramatic changes to the rule. One witness, though, criticized the continuing reliance on cy près in class actions.

Mr. Robinson said that there had been no recent action on legislation addressing sunshine in regulatory decrees and settlements. He suggested that legislative attention now seemed to focus more on the criminal rules. A hearing, he reported, had been held before the Senate Judiciary Committee in June 2012 addressing the obligations of prosecutors to disclose exculpatory materials to the defense. At the hearing Senator Murkowski summarized her legislation on the subject, introduced in the wake of the prosecution of the late Senator Stevens and the ultimate dismissal of the criminal case.

Mr. Robinson reported that Judge Raggi had submitted a letter in connection with the hearing, in which she set out in broad terms the extensive work of the Advisory Committee on Criminal Rules over the last decade on FED. R. CRIM. P. 16 (discovery and inspection in criminal cases). The letter, he said, had a 909-page attachment describing that work in detail. In addition, Carol Brook, the federal defender for the Northern District of Illinois and a member of the advisory committee, testified at the hearing. He added that the legislators and witnesses appeared to agree that there were problems with non-disclosure of *Brady* materials that should be addressed, but most concluded that the pending legislation did not offer the right solution to the problems.

He reported that Senator Leahy had introduced legislation underscoring the nation's obligations under article 36 of the Vienna Convention to provide consular notification when foreign nationals are arrested. The legislation, he said, had been added to a State Department appropriations bill. He pointed out that language had been removed from the bill that would have duplicated the substance of proposed amendments to FED. R. CRIM. P. 5 and 58. The committee report accompanying the bill, moreover, encouraged the ongoing work of the rules committees and the Uniform Law Commission in facilitating compliance with the Vienna Convention by federal, state, and local law-enforcement officials. Mr. Robinson thanked the Judicial Conference's Federal-State Jurisdiction Committee for monitoring the legislation and informing the Senate of the activities of the rules committees.

He reported that the House Judiciary Committee had favorably reported out legislation to require bankruptcy asbestos trusts to report claimant filing information to the bankruptcy courts on a quarterly basis. The substance of the legislation, he noted, had previously been proposed as an amendment to the bankruptcy rules, but was not adopted by the Advisory Committee on Bankruptcy Rules. He added that the legislation would continue to be monitored.

Mr. Robinson noted that Magistrate Judge Paul W. Grimm, a member of the Advisory Committee on Civil Rules, had testified at the Senate hearing on his nomination to a district judgeship on the U.S. District Court for the District of Maryland. In addition, a Senate vote was expected shortly to confirm the nomination of Justice Andrew D. Hurwitz, a recent alumnus of the Advisory Committee on Evidence Rules, to a judgeship on the U.S. Court of Appeals for the Ninth Circuit.

APPROVAL OF THE MINUTES OF THE LAST MEETING

The committee without objection by voice vote approved the minutes of the last meeting, held on January 5 and 6, 2012.

REPORT OF THE ADVISORY COMMITTEE ON APPELLATE RULES

Judge Sutton and Professor Struve presented the report of the advisory committee, as set forth in Judge Sutton's memorandum and attachments of May 8, 2012 (Agenda Item 7).

Amendments for Final Approval

FED. R. APP. P. 13, 14, 24(b)

Judge Sutton reported that 26 U.S.C. § 7482(a)(2), enacted in 1986, authorizes permissive interlocutory appeals from the United States Tax Court to the courts of appeals. The statute, however, has never been implemented, and the appellate rules currently do not distinguish between appeals of right from the Tax Court and interlocutory appeals from the court.

The proposed changes to FED. R. APP. P. 13 (review of a Tax Court decision) and FED. R. APP. P. 14 (applicability of other appellate rules to review of a Tax Court decision) would implement the statute and specify the procedures applicable in each type of appeal. The proposed change to FED. R. APP. P. 24(b) (leave to proceed in forma pauperis) would clarify the rule by recognizing that the Tax Court is not an administrative agency.

Judge Sutton reported that the advisory committee had consulted closely with the Tax Court and the Tax Division of the Department of Justice in developing the proposals. He added that no public comments had been received and no changes made in the proposals following publication.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FED. R. APP. P. 28 and 28.1(c)

Judge Sutton explained that the proposed change to FED. R. APP. P. 28(a) (appellant's brief) would revise the list of the required contents of an appellant's brief by combining paragraphs 28(a)(6) and 28(a)(7). Paragraph (a)(6) now requires a statement of the case, and (a)(7) a statement of the facts. The new, combined provision, numbered Rule 28(a)(6), would require "a concise statement of the case setting out the facts relevant to the issues submitted for review, describing the relevant procedural history, and identifying the rulings presented for review, with appropriate references to the record (see Rule 28(e))." Conforming changes would be made in Rule 28(b), governing appellees' briefs, and Rule 28.1(c), governing briefs in cross-appeals.

Judge Sutton pointed out that most lawyers will choose to present the factual and procedural history of a case chronologically. The revised rule, though, gives them the flexibility to follow a different order. In addition, the committee note specifies that a statement of the case may include subheadings, particularly to highlight the rulings presented for review.

He reported that the proposed amendments had attracted six public comments, four of them favorable. Some comments expressed concern that deleting the current rule's reference to "the nature of the case, the course of proceedings, and the disposition below" might lead some to conclude that the procedural history of a case may no longer be included in the statement of the case. Therefore, after publication, the committee inserted into proposed Rule 28(a)(6)'s statement of the case the phrase "describing the relevant procedural history." The committee note was also modified to reflect the addition. He noted, too, that the Supreme Court's rule – which similarly requires a single, combined statement – appears to have worked well.

A member noted that a prominent judge had argued in favor of maintaining separate statements of the case and of the facts, predicting that combined statements will require judges to comb through a great deal of detail to find the key procedural steps in a case – the pertinent rulings made by the lower court. She suggested that the judge's concern might be addressed by requiring that the combined statement begin with the ruling below.

Judge Sutton said that the committee note contemplates that approach, emphasizing that lawyers are given flexibility in presenting their statements. Most, he said, will state the facts first and then the issues for review. He suggested that the judge would have been pleased with simply reversing the order of current paragraphs (a)(6) and (a)(7) to set out the statement of facts first, followed by the statement of the case. Professor Struve added that a circuit could have a local rule that specifies a particular order of subheadings.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

FORM 4

Judge Sutton explained that Questions 10 and 11 on the current version of Form 4 (affidavit accompanying a motion for permission to appeal in forma pauperis) require an IFP applicant to provide the details of all payments made to an attorney or other person for services in connection with the case. The questions, he said, ask for more information than needed to make an IFP determination. In addition, some have argued that the form's disclosures implicate the attorney-client privilege. But, he said, research shows that the payment information is very unlikely to be subject to the privilege. Sometimes, though, it might constitute protected work product.

The proposed amendments, he pointed out, combine the two questions into one. The new question asks broadly whether the applicant has spent, or will spend, any money for expenses or attorney fees in connection with the lawsuit – and if so, how much. Only one public comment was received, which proposed an additional modification to the form

to deal with the Prison Litigation Reform Act. The committee, he said, decided not to incorporate the suggestion into the current amendment, but to add the matter to its study agenda as a separate item.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Publication

FED. R. APP. P. 6

Professor Struve noted that the advisory committee was proposing several amendments to FED. R. APP. P. 6 (appeals in bankruptcy cases from a district court or bankruptcy appellate panel to a court of appeals). The modifications dovetail with the simultaneous amendments being proposed to Part VIII of the Federal Rules of Bankruptcy Procedure, which govern appeals from a bankruptcy court to a district court or bankruptcy appellate panel.

Revised FED. R. APP. P. 6 would update the rule's cross-references to the new, renumbered Part VIII bankruptcy rules. New subdivision 6(c) will govern permissive direct appeals from a bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2), enacted as part of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005. It specifies that the record on a direct appeal from a bankruptcy court will be governed by FED. R. BANKR. P. 8009 (record on appeal and sealed documents) and FED. R. BANKR. P. 8010 (completing and transmitting the record). New Rule 6(c) takes a different approach from Rule 6(b), where the record on appeal from a district court or bankruptcy appellate panel is essentially the record in the mid-level appeal to the district court or panel.

She noted that proposed new Bankruptcy Rule 8010(c) deals with electronic transfer of the record from the bankruptcy court. It specifies that the bankruptcy clerk must transmit to the clerk of the court where an appeal is pending "either the record or a notice that it is available electronically."

In the proposed amendments to FED. R. APP. P. 6(b)(2)(C), she said, the clerk of the district court or bankruptcy appellate panel must number the documents constituting the record and "promptly make it available." The amended appellate rule, she said, is very flexible and works well with the revised Part VIII bankruptcy rules. It allows the clerk to make the record available either in paper form or electronically.

The committee without objection by voice vote approved the proposed amendments for publication.

Informational Items

Judge Sutton reported that he had sent a letter to each chief circuit judge explaining that the advisory committee, like the circuits themselves, was divided on the wisdom of amending FED. R. APP. P. 29 (amicus briefs) to treat federally recognized Native American tribes the same as states. The proposal would allow tribes to file amicus briefs as of right and exempt them from the rule's authorship-and-funding disclosure requirement. The committee, he said, had informed the chief judges that the issue warrants serious consideration, will be maintained on the committee's agenda, and will be revisited in five years.

He noted that the advisory committee had removed from its agenda an item providing for introductions in briefs. Many of the best practitioners, he said, currently include introductions in their briefs to lay out the key themes of their argument. The committee's proposed amendment to FED. R. APP. P. 28(a)(6), he said, was sufficiently flexible to permit inclusion of an introduction as part of a brief's statement of the case. Moreover, it would be difficult to specify how an introduction differs from the statement of the issues presented for review in FED. R. APP. P. 28(a)(5).

REPORT OF THE ADVISORY COMMITTEE ON BANKRUPTCY RULES

Judge Wedoff and Professors Gibson and McKenzie presented the report of the advisory committee, as set forth in Judge Wedoff's memorandum and attachments of May 14, 2012 (Agenda Item 5).

Judge Wedoff noted that the advisory committee had 14 action items to present, six of them for final approval by the Judicial Conference and eight for publication. He suggested that the most important were the amendments dealing with the Supreme Court's decision in *Stern v. Marshall*, the revision of the Part VIII bankruptcy appellate rules, and the modernization of the bankruptcy forms.

Amendments for Final Approval

FED. R. BANKR. P. 1007(b)(7) and 5009(b) and 4004(c)(1)

Judge Wedoff explained that the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005 has required virtually all individual debtors to complete a personal course in financial management as a pre-condition for receiving a discharge. He noted that FED. R. BANKR. P. 1007(b)(7) (required schedules and statements) and 5009(b) (case closing) implement the statute by requiring individual debtors to file an official form (Official Form 23) certifying that they completed the course after filing their petition. FED. R. BANKR. P. 1007(c) imposes deadlines for filing the certification. In

Chapter 7 cases, for example, the debtor must file it within 60 days after the first date set for the meeting of creditors under 11 U.S.C. § 341.

If the debtor has not filed the form within 45 days after the first meeting of creditors, FED. R. BANKR. P. 5009(b) instructs the bankruptcy clerk to warn the debtor that the case will be closed without a discharge unless the certification is filed within Rule 1007's time limits. FED. R. BANKR. P. 4004(c) then specifies that the court may not grant a discharge if the debtor has not filed the certificate.

Judge Wedoff reported that the advisory committee recommended amending FED. R. BANKR. P. 1007(b) to allow the provider of the financial-management course to notify the court directly that the debtor has completed the course. This action would relieve the debtor of the obligation to file Official Form 23. FED. R. BANKR. P. 5009(b) would be amended to require the bankruptcy clerk to send the warning notice only if: (1) the debtor has not filed the certification; and (2) the course provider has not notified the court that the debtor has completed the course.

A conforming amendment to FED. R. BANKR. P. 4004(c)(1)(H) (grant of discharge) specifies that the court does not have to deny a discharge if the debtor has been relieved of the duty to file the certification. In addition, language improvements would be made in the rule. Paragraph (c)(1) currently instructs a court to grant a discharge promptly unless certain acts have occurred. The amendment reformulates the text to instruct the court affirmatively not to grant a discharge if those acts have occurred.

Section 524(m) of the Bankruptcy Code, added in 2005, specifies that when a debtor files a reaffirmation agreement, the court must determine whether the statutory presumption that the agreement is an undue hardship for the debtor has been rebutted, *i.e.,* by finding that the debtor is apparently able to make payments under the agreement. A judge needs to make that determination before a discharge is granted. Therefore, FED. R. BANKR. P. 4004(c)(1)(K) tells the court to delay the discharge until the judge considers the debtor's ability to make the payments.

The proposed amendment to FED. R. BANKR. P. 4004(c)(1)(K) would make it clear that the rule's prohibition on entering a discharge due to a presumption of undue hardship ends when the presumption expires or the court concludes a hearing on the presumption. As a result, there would be no delay if the judge has already ruled on the matter.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference. The proposed amendments to FED. R. BANKR. P. 4004(c)(1) were approved without publication.

FED. R. BANKR. P. 9006(d), 9013, and 9014

Judge Wedoff noted that FED. R. BANKR. P. 9006 is entitled "computing and extending time," but it also specifies the default time for filing motions and affidavits in response to motions. Unlike FED. R. CIV. P. 6 (computing and extending time; time for motion papers), the civil rules counterpart on which it is based, FED. R. BANKR. P. 9006 does not indicate by its title that it also addresses time periods for motions. Nor is it followed immediately by another rule that addresses the form of motions, as the civil rules do. FED. R. CIV. P. 7 (pleadings, motions, and other papers) specifies the pleadings allowed and the form of motions and other papers.

The advisory committee, he said, was proposing amendments to highlight Rule 9006(d). First, the rule's title would be expanded to add a reference to "time for motion papers." Second, cross-references to Rule 9006(d) would be added to both FED. R. BANKR. P. 9013 (form and service of motions) and FED. R. BANKR. P. 9014 (contested matters) to specify that motions must be filed "within the time determined under FED. R. BANKR. P. 9006(d)."

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

OFFICIAL FORM 7

Judge Wedoff explained that Official Form 7 (statement of financial affairs) is a lengthy form that details many of the debtor's financial transactions. It makes frequent references to "insiders." The current definition of "insider" on the form refers to any owner of 5% of more of the voting or equity securities of a corporate debtor. That definition, though, has no basis in bankruptcy law, and it is not clear why it was adopted. The advisory committee would replace it with the Bankruptcy Code's definition of "insider," which includes any "person in control" of a corporate debtor.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Amendments for Final Approval Without Publication

OFFICIAL FORMS 9A-I and 21

Professor McKenzie noted that there are several variations of Official Form 9 (notice of a bankruptcy filing, meeting of creditors, and deadlines), based on the nature of the debtor and the chapter of the Bankruptcy Code under which a case is filed. Form 9 is directed at creditors, notifying them that a bankruptcy case has been filed and informing them of upcoming case events and what steps they need to take. The form includes identifying information about the debtor that allows recipients of the notice to determine whether they are in fact a creditor of the debtor. In the case of individual debtors, the identifying information includes the debtor's social security number.

Debtors are required to provide their social security numbers to the bankruptcy clerk on Official Form 21 (statement of social security number). That form is submitted separately and not included in the court's public electronic records. The social security number is revealed to creditors on their personal copies of Form 9 purely for identification purposes, but only a redacted version of Form 9 is included in the case file.

The Court Administration and Case Management Committee expressed concern that bankruptcy forms may be mistakenly filed with the courts in ways that publicly reveal debtors' private identifying information. In some cases, creditors may file a copy of their unredacted Form 9 with their proofs of claim without redacting the debtor's social security number. Debtors, moreover, may file Form 21 with other case papers, rather than submit it to the clerk separately.

Professor McKenzie explained that the advisory committee would add prominent warnings on both Form 9 and Form 21 alerting users that the forms should not be filed with the court in a way that makes them publicly available. He pointed out that the advisory committee had made two minor changes in the language of Form 21's warning after the agenda book had been distributed. A corrected version was circulated to the members.

Judge Wedoff reported that the Court Administration and Case Management Committee had suggested that the debtor's full social security number be eliminated entirely from the forms to prevent any problems of inadvertent disclosure. But, he said, the advisory committee was convinced that social security numbers are still needed for some creditors to be able to identify the debtors. The full number, for example, is essential for the Internal Revenue Service. He added, though, that the committee will revisit the matter if the situation changes in the future.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

OFFICIAL FORM 10

Professor McKenzie pointed out that the current version of Official Form 10 (proof of claim) contains a requirement at odds with FED. R. BANKR. P. 9010(c) (power of attorney). The form instructs an authorized agent of a creditor filing a proof of claim to attach to the claim a copy of its power of attorney, if any. Rule 9010(c) generally requires an agent to give evidence of its authority to act on behalf of a creditor in a bankruptcy case by providing a power of attorney. But it does not apply when an agent files a proof of claim. Therefore, Form 10 would be amended to delete the instruction to attach a power of attorney.

In addition, Form 10 would be amended to require additional documentation in certain cases. For claims based on an open-end or revolving consumer-credit agreement, the filer of the proof of claim will have to attach the information required by FED. R. BANKR. P. 3001(c)(3)(A) (proof of claim based on open-end or revolving consumer credit agreement), scheduled to take effect on December 1, 2012. If a claim is secured by the debtor's principal residence, the filer will have to attach the Mortgage Proof of Claim Attachment (Official Form 10, Attachment A), required as of December 1, 2011.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference without publication.

Amendments for Publication

FED. R. BANKR. P. 1014(b)

Professor McKenzie explained that Rule 1014(b) (dismissal and change of venue) deals with the procedure when petitions involving the same debtor or related debtors are filed in different districts. The current rule specifies that, upon motion, the court in which the petition is filed first may determine the district or districts in which the cases will proceed. All other courts must stay proceedings in later-filed cases until the first court makes its venue determination, unless the first court orders otherwise. As a result, later cases are stayed by default while the venue question is pending before the first court.

The rule, he said, has been the subject of game playing because it allows an attorney who wants to stay all further proceedings to do so by filing a motion, or threatening to file a motion, in the first case. Therefore, the advisory committee proposal would change the default requirement to state that proceedings in later-filed cases are stayed only on express order of the first court. The change, he said, will prevent disruption of the other cases unless the judge in the first court determines affirmatively that a stay of a related case is needed while he or she makes the venue determination. In addition, the advisory committee made style changes in the rule.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7004(e)

Professor McKenzie reported that the proposed amendment to FED. R. BANKR. P. 7004(e) would reduce the amount of time that a summons remains valid after it is issued. Currently, a summons must be served within 14 days after issuance. The proposed amendment to Rule 7004(e) would reduce that time to seven days.

Under the civil rules, a defendant's time to respond to a summons and complaint (30 days) begins when the summons and complaint are actually served. Under the bankruptcy rules, however, the defendant's response time is calculated from the date that the summons is issued.

He noted that concern had been expressed that seven days may be too short a period to effect service. Nevertheless, he said, the advisory committee believed that the time is sufficient and will encourage prompt service after issuance of a summons. He added that bankruptcy service is relatively easy and may be effected anywhere in the United States by first-class mail. Moreover, the necessary paperwork is usually generated by computer.

He added that the bankruptcy system has a strong objective in favor of moving cases quickly. In addition, calculating the time for service from the date of issuance, rather than service, provides clarity because issuance is noted on the court's docket. Finally, he explained that the time for service had traditionally been 10 days in the bankruptcy rules, but was increased to 14 days as a result of the omnibus 2009 time-computation amendments.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 7008, 7012(b), 7016, 9027, and 9033(a)

Professor McKenzie reported that the advisory committee was recommending publishing proposed amendments to five bankruptcy rules to deal with the recent Supreme Court decision in *Stern v. Marshall,* 564 U.S. ___, 131 S.Ct. 2594 (2011). In *Stern,* the Court held that a non-Article III bankruptcy judge could not enter final judgment on a debtor's state common-law counterclaim against a creditor who filed a proof of claim against the bankruptcy estate. Even though the governing statute, 28 U.S.C. § 157(b), specifies that the counterclaim is a "core proceeding" that a bankruptcy judge may hear and determine with finality, the Court held that it was unconstitutional for Congress to assign final adjudicatory authority over the matter to a bankruptcy judge.

Professor McKenzie noted that the Federal Rules of Bankruptcy Procedure incorporate the statutory distinction between "core" and "non-core" proceedings and recognize that a bankruptcy judge's authority is much more limited in "non-core proceedings" than in "core proceedings." Under the current rules, a party filing a motion has to state whether the proceeding is "core" or "non-core," and a response must do the same.

Since *Stern,* however, a core proceeding under the statute may not be a "core proceeding" under the Constitution. Therefore, the advisory committee, he said, decided that it was necessary to remove the words "core" and "non-core" from the rules entirely.

Instead, the advisory committee would amend FED. R. BANKR. P. 7016 (pretrial procedures and formulating issues) to make clear that a bankruptcy judge must consider his or her authority to enter final orders and judgment in all adversary proceedings. The judge's decision, moreover, will be informed by the statements of the parties as to whether they consent to the judge's exercise of that authority. This broad approach, he said, will allow the law to continue to develop without having to change the rules again in the future.

Judge Wedoff reported that it is unclear since *Stern* whether a bankruptcy judge may enter a final judgment in a preference action or fraudulent conveyance action. He pointed out that under the proposed amendments, however, there will be no need to distinguish between core and non-core proceedings. Rather, the parties will only have to decide whether they consent to entry of final orders or judgment by the bankruptcy judge. The judge will then decide whether to: (1) hear and determine the proceeding; (2) hear it and issue proposed findings of fact and conclusions of law; or (3) take some other action.

A member commended the advisory committee for an elegant solution to a difficult problem. He suggested that the revised heading to revised Rule 9016 ("procedure") may be too limited.

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 8001-8028

Judge Wedoff explained that the advisory committee's thorough revision of Part VIII of the Federal Rules of Bankruptcy Procedure – the bankruptcy appellate rules – was the result of a multi-year project to bring the rules into closer alignment with the Federal Rules of Appellate Procedure, to make the rules simpler and clearer, and to recognize that bankruptcy documents today are normally filed, served, and transmitted electronically, rather than in paper form.

He thanked Professor Gibson, emphasizing that she deserved enormous credit for having coordinated the huge revision project. He noted that she had immersed herself in all the details of appellate practice, had conducted considerable research, and had drafted a great many documents for the committee. He also thanked James Wannamaker and Bridget Healy, attorneys in the Bankruptcy Judges Division of the Administrative Office, for their dedication and professional assistance to the project. In addition, he expressed the committee's appreciation to Professor Struve, Professor Kimble, and Mr. Spaniol for their incisive and important contributions to the project, often made on very short notice.

He and Professor Gibson proceeded to describe each Part VIII rule not previously presented to the Standing Committee (Rules 8013-8028) and some additional changes made in the rules presented at the January 2012 meeting (Rules 8001-8011).

Fed. R. Bankr. P. 8001

Professor Gibson reported that since the January 2012 Standing Committee meeting, the advisory committee had made two additional changes in Rule 8001 (scope of Part VIII, definition of "BAP," and method of transmitting documents). The draft rule presented in January had included a general definition of the term "appellate court" to mean either the district court or the bankruptcy appellate panel – the court in which the first-level bankruptcy appeal is pending or will be taken. It did not, though, include the court of appeals.

It was suggested at the last meeting that the term is misleading because "appellate court" in common parlance generally refers to the court of appeals. As a result, she said, the advisory committee had eliminated the general definition. Each of the revised rules now refers specifically to the district court or the "BAP." Despite the objections of the style consultants, she added, the advisory committee decided to use the universally recognized abbreviation for a bankruptcy appellate panel and to define BAP in Rule 8001(b).

She said that there was a need to highlight a strong presumption in the revised rule in favor of electronic transmission of documents. Accordingly, revised Rule 8001(c) states specifically that a document must be sent electronically under the Part VIII rules, unless: (1) it is being sent by or to a pro se individual; or (2) a local court's rule permits or requires mailing or other means of delivery. She added that the advisory committee was comfortable with using the term "transmitting."

Fed. R. Bankr. P. 8007

Professor Gibson stated that Rule 8007 (stay pending appeal, bonds, and suspension of proceedings) had been restyled and subheadings added. In addition, the

advisory committee corrected the omission of a reference to the court of appeals in subdivision (c).

A member pointed out that under proposed Rule 8007(b), the showing required for making a motion for relief in the appellate court deals with two situations: (1) where moving first in the bankruptcy court would be impracticable; and (2) where the bankruptcy court has already ruled. But, he said, the Federal Rules of Appellate Procedure cover a third possibility – where a motion was filed below but not ruled on.

Judge Wedoff agreed to revise Rule 8007(b)(2)(B) to require the moving party to state whether the bankruptcy court has ruled on the motion, and, if so, what the reasons were for the ruling.

Fed. R. Bankr. P. 8009

Professor Gibson noted that proposed Rule 8009 (record on appeal and sealed documents) was incorporated by reference in the proposed new FED. R. APP. P. 6(c), which will govern permissive direct appeals from a bankruptcy court to a court of appeals.

Fed. R. Bankr. P. 8010

Professor Gibson reported that the advisory committee had made several changes in Rule 8010 (completing and transmitting the record) since the January 2012 meeting after conferring with clerks of the bankruptcy courts, the clerk of a bankruptcy appellate panel, and Administrative Office staff. She noted that bankruptcy courts generally use recording devices to take the record. If a transcript of a proceeding is ordered, it is produced for the court from the electronic record, usually by a contract service provider.

The rule requires the "reporter" to prepare and file the transcript with the bankruptcy clerk, but there is some question as to the identity of the reporter when a recording device is used. The advisory committee, she said, decided that the "reporter" should be defined in Rule 8010(a) as the person or service that the bankruptcy court designates to transcribe the recording.

In addition, the rule requires reporters to file all documents with the bankruptcy clerk. In the Federal Rules of Appellate Procedure, by contrast, reporters file certain documents in the appellate court and others in the district court. The reporter in a bankruptcy case, though, may not know where an appeal is pending.

Fed. R. Bankr. P. 8011

Professor Gibson reported that a minor typographical error had been corrected in Rule 8011 (filing, service, and signature) since the last Standing Committee meeting.

With regard to proof of service, a member questioned whether affidavits of service still serve a useful purpose in light of the universal use of CM/ECF in the federal courts. He noted that service in virtually all his civil cases is accomplished through CM/ECF, and there is no need to make the parties file an affidavit of service. He suggested that the Advisory Committee on Civil Rules consider removing the requirement of a certificate of service in the future.

Fed. R. Bankr. P. 8013

Professor Gibson noted that proposed Rule 8013 (motions and intervention) would change current bankruptcy practice. Currently, a person filing a motion or response may file a separate brief. The new rule, however, would not permit briefs to be filed in support of or in response to motions. Instead, it adopts the practice in FED. R. APP. P. 27 (motions), requiring that legal arguments be included in the motion or response.

She reported that proposed FED. R. BANKR. P. 8013(g) is a new provision for the bankruptcy rules. It is also not included in the Federal Rules of Appellate Procedure. It will authorize motions for intervention in an appeal pending in a district court or bankruptcy appellate panel. The party seeking to intervene must state in its motion why it did not intervene below.

Fed. R. Bankr. P. 8014

Professor Gibson explained that Rule 8014 (briefs) largely tracks the Federal Rules of Appellate Procedure and incorporates the proposed amendment to FED. R. APP. P. 28(a)(6) (briefs), which combines the statements of the case and of the facts into a single statement. (See pages 5 and 6 of these minutes.) In a change from current bankruptcy practice, revised Rule 8014 follows the Federal Rules of Appellate Procedure and requires inclusion of a summary of argument in the briefs. New Rule 8014(f) adopts the provision of FED. R. APP. P. 28(j) regarding the submission of supplemental authorities. Unlike the appellate rule, the proposed Rule 8014(f) proposes a definite time limit of seven days for any response, unless the court orders otherwise.

She emphasized that the advisory committee was attempting to make the bankruptcy rules as similar as practicable to the Federal Rules of Appellate Procedure to make it easier for the bar to handle double appeals, *i.e.,* an appeal first to a district court or bankruptcy appellate panel, and then to the court of appeals.

Fed. R. Bankr. P. 8015

Professor Gibson noted that Rule 8015 (form and length of briefs, appendices, and other papers) was modeled on FED. R. APP. P. 32 (form and length of briefs, appendices, and other papers). The new bankruptcy rule adopts the provisions of the appellate rule governing the length of briefs, but not those prescribing the colors for brief covers. She added that the change is likely to attract comments during the publication period because new Rule 8015(a)(7) reduces the length of principal and reply briefs currently permitted in the bankruptcy rules. To achieve consistency with FED. R. APP. P. 32(a)(7), it reduces the page limits for a principal brief from 50 pages to 30, and those for a reply brief from 25 to 15.

Fed. R. Bankr. P. 8016

Professor Gibson reported that Rule 8016 (cross-appeals) was new to bankruptcy and modeled on FED. R. APP. P. 28.1 (cross-appeals). A member noted, though, that proposed Rule 8016(e) does not exactly parallel the appellate rule. Moreover, it does not include a provision, similar to that in Rule 8018(a), allowing a district court or bankruptcy appellate panel by local rule or order to modify the rule's time limits.

Judge Wedoff suggested that it would be possible to incorporate the Rule 8018 language on local court modifications into Rule 8016. He added that Rules 8016 and 8018 should be internally consistent, even though there may be some differences between them and the counterpart appellate rules. A participant recommended making both the bankruptcy and appellate rules internally consistent and consistent with each other. The same provisions should apply in both sets of rules.

Another participant recommended not including any provision in the bankruptcy rules allowing a local court to extend the time limits of the national rules. He suggested that it will only encourage extensions.

Fed. R. Bankr. P. 8017

Professor Gibson reported that Rule 8017 (amicus briefs) was new to bankruptcy and was derived from FED. R. APP. P. 29 (amicus briefs). She pointed out that proposed Rule 8017(a) would allow a bankruptcy court on its own motion to request an amicus brief.

Fed. R. Bankr. P. 8018

Professor Gibson reported that Rule 8018 (serving and filing briefs) would continue the existing bankruptcy practice that allows an appellee to file a separate appendix. It differs from FED. R. APP. P. 30 (appendix to briefs), which requires all the

parties to file a single appendix. Rule 8018(a) lengthens the period for filing initial briefs from the current 14 days to 30. Since requests for extensions of time are very common, she said, it just makes sense to increase the deadline to 30 days.

Fed. R. Bankr. P. 8019

Professor Gibson noted that proposed Rule 8019 (oral argument) tracks FED. R. APP. P. 34(a)(1) (oral argument) and is more detailed than the current bankruptcy rule. Rule 8019(a) would alter the existing bankruptcy rule by: (1) authorizing the court to require the parties to submit a statement about the need for oral argument; and (2) permitting a statement to explain why oral argument is not needed, rather than only why it should be allowed. Rule 8019(f) gives the court discretion, when the appellee fails to appear for oral argument, either to hear the appellant's argument or to postpone it.

Fed. R. Bankr. P. 8020

Professor Gibson reported that Rule 8020 (frivolous appeal and other misconduct) was derived from FED. R. APP. P. 38 (frivolous appeals, damages and costs) and FED. R. APP. P. 46(c) (attorney discipline). It applies to misconduct both by parties and attorneys.

Fed. R. Bankr. P. 8021

Professor Gibson noted that Rule 8021 (costs) would continue the existing bankruptcy practice that gives the bankruptcy clerk the entire responsibility for taxing costs on appeal. The practice under FED. R. APP. P. 39 (costs), on the other hand, involves both the court of appeals and the district court in taxing costs.

Rule 8021(b) was added to govern costs assessed against the United States. Derived from FED. R. APP. P. 39(b), it is not included in the current bankruptcy rules.

Fed. R. Bankr. P. 8022

Professor Gibson reported that Rule 8022 (motion for rehearing) would continue the current bankruptcy practice of requiring that a motion for rehearing be filed within 14 days after entry of judgment on appeal. It differs from FED. R. APP. P. 40(a)(1) (time to file a petition for rehearing), which gives parties 45 days to file a rehearing motion in any civil case in which the United States is a party. She added that the Department of Justice reported that it had no problem with the rule.

Fed. R. Bankr. P. 8023

Professor Gibson reported that proposed Rule 8023 (voluntary dismissal) deviates from both the existing bankruptcy rule and the Federal Rules of Appellate Procedure. It would provide for a voluntary dismissal only after an appeal is pending in the district court or bankruptcy appellate panel. Under the current rules, a case on appeal from a bankruptcy judge is not docketed in the district court or bankruptcy appellate panel until the record is transmitted, and an appeal may be voluntarily dismissed in the bankruptcy court prior to the docketing of the appeal. But under new Rules 8003 and 8004, the appeal will be docketed immediately after the notice of appeal is filed. The notice, moreover, will normally be transmitted electronically to the district court or bankruptcy appellate panel. The advisory committee, she said, concluded that it is very unlikely that an appeal will be voluntarily dismissed before it is docketed.

Fed. R. Bankr. P. 8024

Professor Gibson reported that Rule 8024 (clerk's duties on disposition of an appeal) contained virtually no changes, other than stylistic, from the current bankruptcy rule.

Fed. R. Bankr. P. 8025

Professor Gibson reported that Rule 8025 (stay of a district court or BAP judgment) contained only stylistic changes from the existing bankruptcy rule. She pointed out, though, that subdivision (c) was new. It specifies that if the district court or bankruptcy appellate panel affirms a bankruptcy court ruling and the appellate judgment is stayed, the bankruptcy court's order, judgment, or decree will be automatically stayed to the same extent as the stay of the appellate judgment.

Fed. R. Bankr. P. 8026

Professor Gibson reported that Rule 8026 (rules by circuit councils and district courts, and procedure when there is no controlling law) contained only stylistic changes from the current bankruptcy rule.

Fed. R. Bankr. P. 8027

Professor Gibson reported that Rule 8027 (notice of mediation procedure) was a new rule with no counterpart in the Federal Rules of Appellate Procedure. It provides that if a district court or bankruptcy appellate panel has a mediation procedure applicable to bankruptcy appeals, the clerk of the district court or the panel must notify the parties

promptly after the appeal is docketed whether the mediation procedure applies, what its requirements are, and how it affects the time for filing briefs in the appeal.

Fed. R. Bankr. P. 8028

Professor Gibson explained that Rule 8028 (suspension of rules in Part VIII) was derived from current FED. R. BANKR. P. 8019 (suspension of rules in Part VIII) and FED. R. APP. P. 2 (suspension of rules). It authorizes a district court, bankruptcy appellate panel, or court of appeals to suspend the requirements or provisions of the Part VIII rules, except for certain enumerated rules. The new rule expands the current list of rules that may not be suspended.

Professor Gibson reported that the current FED. R. BANKR. P. 8013 (disposition of appeal and weight accorded fact findings) would be eliminated. The first part of that rule specifies what a district court or bankruptcy appellate panel may do on an appeal, *i.e.*, affirm, modify, reverse, or remand. She noted that there is no similar provision in the Federal Rules of Appellate Procedure. The second part of the current rule specifies the weight that must be given to a bankruptcy judge's findings of fact. She explained that the provision is not needed because it is already covered by FED. R. CIV. P. 52 (findings and conclusions) and incorporated by FED. R. BANKR. P. 7052 (findings by the court).

The committee without objection by voice vote approved the proposed amendments for publication.

FED. R. BANKR. P. 9023 and 9024

Judge Wedoff explained that FED. R. BANKR. P. 9023 (new trials and amendment of judgments) and FED. R. BANKR. P. 9024 (relief from a judgment or order) would be amended to add a cross-reference in each rule to the procedure set forth in proposed new Rule 8008, governing indicative rulings.

The committee without objection by voice vote approved the proposed amendments for publication.

MODERNIZATION OF THE OFFICIAL FORMS

Judge Wedoff explained that the bankruptcy process is driven in large measure by forms. Several of the current forms, however, are difficult to complete, especially for people unfamiliar with the bankruptcy system. In addition, the forms take little cognizance of electronic filing in the bankruptcy courts.

He explained that forms modernization has been a major, multi-year project of the advisory committee, working under the leadership of Judge Elizabeth L. Perris and in

close coordination with the Administrative Office and the Federal Judicial Center. The major goals of the project have been: (1) to improve the quality and clarity of the forms in order to elicit more complete and accurate information from debtors and creditors; and (2) to enhance the interface between the forms and modern technology, especially the "next generation" of CM/ECF currently under development.

He said that the advisory committee and the forms-project team had reached out extensively to users of the bankruptcy system to seek their input in redesign and testing of the forms. In addition, the committee had made an important policy decision at the outset to separate the forms used by individual debtors from those used by entities other than individuals.

He explained that the first nine forms, now presented for authority to publish, are a subset of the larger package of individual forms filed by debtors at the beginning of a case. He emphasized that the forms used by individuals need to be less technical in language because individuals are generally less sophisticated than other entities and may not have the assistance of experienced bankruptcy counsel. As a result, he said, the revised individual forms are written in more conversational language, have a more approachable format, and contain substantially more instructions.

OFFICIAL FORMS 3A AND 3B

Judge Wedoff explained that debtors who cannot pay the filing fee have two options – either to ask the court for permission to pay the fee in installments (Form 3A) or to waive the fee (Form 3B). The latter option is available only to individuals whose combined family monthly income is less than 150% of the official poverty guideline last published by the Department of Health and Human Services.

In addition to major stylistic and formatting changes common to all the new forms, three minor substantive changes were made in Form 3B. First, the opening question asks for the size of the debtor's family, as listed on Schedule J. That information is currently required on Schedule I. Second, the income portion of the form was changed to specify that non-cash governmental assistance, such as food stamps or housing subsidies, will not count against the debtor as income in determining eligibility for a fee waiver. The information, though, will continue to be reported for purposes of determining the debtor's ability to pay the filing fee. Third, the new form eliminates the declaration and signature section for non-attorney bankruptcy petition preparers because the same declaration is already required on Official Form 19.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 6I and 6J

Judge Wedoff noted that some substantive changes had been made on Forms 6I (statement of the debtor's income) and 6J (statement of the debtor's expenses) to elicit more accurate and useful information from individual debtors. First, the debtor will have to provide more information on Forms 6I and 6J about non-traditional living arrangements, such as living with an unmarried partner or living and sharing expenses in a household with non-relatives. Form 6I asks for all financial contributions to the household. Second, Form 6J asks for separate information on dependents who live with the debtor, dependents who live separately, and other members of the household. Third, in Chapter 13 cases, Form 6J asks for the debtor's expenses at two different points in time – when the debtor files the bankruptcy petition and when the proposed Chapter 13 plan is confirmed. Fourth, a line has been added to the form setting out a calculation of the debtor's monthly net income.

The committee without objection by voice vote approved the proposed forms for publication.

OFFICIAL FORMS 22A-1, 22A-2, 22B, 22C-1, and 22C-2

Judge Wedoff explained that Form 22, commonly referred to as the "means test" form, has five variations. It is used to determine a debtor's "current monthly income" under 11 U.S.C. § 101(10A) and, in Chapter 7 and Chapter 13 cases, to determine the debtor's income remaining after deducting certain specified expenses.

In Chapter 7 cases, the form is used to assess whether the debtor qualifies under the statute to file a petition under Chapter 7. In Chapter 13, cases, it determines how much the debtor is able to pay under the plan. Other than stylistic changes, no changes were made in the form's Chapter 11 version (Form 22B). But four changes would be made in the Chapter 7 and Chapter 13 versions.

First, the advisory committee separated both the Chapter 7 and Chapter 13 forms into two distinct forms each because debtors with income below the median of their state do not have to list their expenses. As a result, the vast majority of debtors will only have to fill out the income portion. Thus, all debtors will complete an income form (Form 22A-1 or 22C-1), but only some will have to file the expense form (Form 22A-2 or 22C-2).

Second, the revised forms modify the deduction for cell phone and internet expenses to reflect more accurately the Internal Revenue Service allowances incorporated by the Bankruptcy Code.

Third, line 60 on the current Chapter 13 form (Form 22C) will not be included in the new chapter 13 expense form (Form 22C-2)) because it is rarely used. It allows

debtors to list, but not deduct from income, "other necessary expense" items not included within the categories specified by IRS.

Fourth, Form 22C-2 reflects the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010). *Lanning* requires taking a "forward-looking approach" in calculating a Chapter 13 debtor's projected disposable income by considering changes in income or expenses that have occurred or are virtually certain to occur by the time the plan is confirmed. The changes may either increase or decrease the debtor's disposable income. Part 3 of Form 22C-2 will require the debtor to report those changes.

The committee without objection by voice vote approved the proposed forms for publication.

Information Items

FED. R. BANKR. P. 3007(a)

Judge Wedoff reported that proposed amendments to FED. R. BANKR. P. 3007(a) (objections to claims), published in August 2011, would have specified the time and manner of serving objections to claims. The rule currently requires that notice of an objection be provided at least 30 days "prior to the hearing" on the objection. The proposal would have authorized a negative notice procedure – requiring notice of an objection to be made at least 30 days before "any scheduled hearing on the objection or any deadline for the claimant to request a hearing."

He noted that at its March 2012 meeting, the advisory committee decided to withdraw the proposed amendments temporarily and consider them as part of its project to draft a national Chapter 13 form plan.

OFFICIAL FORM 6C

Judge Wedoff reported that the advisory committee had decided not to proceed with amending Form 6C (property claimed as exempt) by adding a box to give debtors the option of declaring that the value of property claimed as exempt is the "full fair market value of the exempted property." The amendment, published in August 2011, was intended to reflect the Supreme Court's decision in *Schwab v. Reilly,* 560 U.S. ___, 130 S. Ct. 2652 (2010).

He said that representatives of the Chapter 7 and Chapter 13 trustee associations had objected to the change on the grounds that it would encourage debtors to claim the full market value of property even when the exemption is capped by statute at a specific dollar amount. They predicted that the revision would lead to gamesmanship and a

"plethora of objections." On the other hand, supporters of the amendment, including representatives of the consumer bankruptcy attorneys' association, disputed the prediction. They argued that it was consistent with *Schwab* and would be beneficial to debtors.

Judge Wedoff reported that the advisory committee decided not to proceed with the amendment because: (1) it is unnecessary since debtors already incorporate the *Schwab* language into the existing form; and (2) courts are divided on whether it is always improper for a debtor to claim as exempt the full fair market value of property when the exemption is capped at a specific dollar amount. The advisory committee decided, therefore, that any amendment to the form should await further case law development. It might also be considered as part of the forms modernization project.

OFFICIAL FORMS 22A AND 22C

Judge Wedoff reported that the advisory committee had decided to defer final approval of proposed amendments to Forms 22A and 22C (the means test forms) that would have: (1) reflected changes in the IRS standards on telecommunication expenses; and (2) changed the Chapter 13 version of the form to respond to the Supreme Court's decision in *Hamilton v. Lanning*, 560 U.S. ___, 130 S. Ct. 2464 (2010).

He said that it would be better to avoid having the proposed amendments take effect in 2012, only to have substantially reformatted versions of the same forms take effect in 2013 as part of the forms modernization project. The proposed amendments, he added, had been incorporated into the first set of modernized forms to be published for comment in August 2012. (See pages 22-24 of these minutes.)

OFFICIAL FORM FOR CHAPTER 13 PLAN AND RELATED RULE AMENDMENTS

Judge Wedoff explained that the advisory committee was working on drafting a national form for Chapter 13 plans. He pointed out that a wide variety of local forms and model plans are currently used in the bankruptcy courts. They impose different requirements and distinctive features from district to district. The lack of a national form, he said, makes it difficult for lawyers who practice in several districts, and it adds transactional costs that are passed on to debtors.

He reported that a recent survey of the bankruptcy bench had established that a majority of chief bankruptcy judges support developing a national form plan. Therefore, he said, the advisory committee had established a working group that expects to have a draft ready soon for informal circulation and comment. He added that it became apparent during the course of the group's work that the effectiveness of a national form plan will

depend on making some simultaneous amendments to the bankruptcy rules to harmonize practice among the courts and clarify certain procedures.

MINI-CONFERENCE ON NEW MORTGAGE FORMS

Judge Wedoff reported that the advisory committee will hold a mini-conference in conjunction with its September 2012 meeting to discuss the effectiveness of the new mortgage-information disclosure forms that took effect on December 1, 2011.

ELECTRONIC SIGNATURES

Judge Wedoff noted that the advisory committee was considering the use of electronic signatures as part of its forms modernization project. In particular, it was focusing on whether, and under what circumstances, bankruptcy courts should accept for filing documents signed electronically without also requiring retention of a paper copy with an original signature. If retention of an original signature is required, moreover, who should maintain it? He noted that the committee was exploring a range of options and contemporary practices.

FORMS MODERNIZATION PROJECT

Judge Wedoff reported that the forms modernization project had nearly completed its work on all the individual-debtor forms and had begun its work on revising the non-individual forms.

REPORT OF THE ADVISORY COMMITTEE ON CIVIL RULES

Judge Campbell and Professor Cooper presented the report of the advisory committee, as set forth in Judge Campbell's memorandum and attachments of May 8, 2012 (Agenda Item 4).

Amendments for Final Approval

FED. R. CIV. P. 45 and 37

Judge Campbell reported that the advisory committee had undertaken a multi-year project to revise Rule 45 (subpoenas) by simplifying the rule and addressing several problems brought to its attention. He noted that during the course of its study, the advisory committee came to appreciate that Rule 45 is an important workhorse in civil litigation that governs virtually all discovery involving non-parties and accomplishes several other important procedural purposes.

After reviewing the pertinent literature on the rule and canvassing the bar, the committee developed a list of 17 concerns that might potentially be addressed through rule amendments. The list was eventually boiled down to four proposed changes: (1) simplification of the rule; (2) transfer of subpoena-related motions; (3) trial subpoenas for distant parties and party witnesses; and (4) notice of service of documents-only subpoenas. A revised rule incorporating those changes was published for public comment in August 2011, and some minor modifications were made after publication. The revised rule, he said, was now ready for final approval by the Judicial Conference.

1. Simplification of the rule

He noted that the first category of proposed changes would simplify an overly complex rule. As Rule 45 is now written, he explained, a lawyer has to look in three different parts of the rule to determine where a subpoena may be issued, where it may be served, and where performance may be required.

First, Rule 45(a)(2) specifies which court may issue a subpoena. It may be a different court for trial, for deposition discovery, or for document discovery. Second, Rule 45(b)(2) specifies four different possibilities for the place where a subpoena may be served. It may be within the district, outside the district but within 100 miles of the place of compliance, anywhere in the state where the district sits if state law permits, or anywhere in the United States if federal law authorizes it. Third, Rule 45(c) imposes limits on the place of enforcement. A non-party, for example, cannot be required to travel more than 100 miles to comply with a subpoena, except to attend a trial. In that case, attendance may be anywhere in the state if the person does not have to incur "substantial expense" to travel. He said that it was the experience of all the judges on the advisory committee that even good lawyers get the various provisions of the rule wrong from time to time.

The advisory committee's proposed simplification addresses those problems and should eliminate most of the confusion. First, revised Rule 45(a)(2) specifies that the court that issues a subpoena is the court that presides over the case. There are no other possibilities. Second, Rule 45(b)(2) specifies that a subpoena may be served at any place in the United States. Third, Rule 45(c)(3) specifies where performance may be required. Essentially, it preserves the performance requirements of the current rule, but eliminates its reference to state law.

There is, he said, precedent in the rules for authorizing nationwide service. Rule 45(b)(2)(D), he noted, currently authorizes service in another state if there is a federal statute that authorizes it. In addition, the Federal Rules of Criminal Procedure authorize nationwide service (FED. R. CRIM. P. 17)(e)).

Professor Marcus said that the public comments on simplification of the rule were very favorable, and some offered suggestions for additional clarification. As a result, the

committee made some changes in the committee note, dealing with depositions of party witnesses and subpoenas for remote testimony. In essence, though, the changes made after publication were very minor.

Professor Marcus pointed out that under the committee's proposal, as published, Rule 45(c)(2) would have left it essentially to the parties to designate the place for production of Rule 34 discovery materials. It provided that a subpoena could command production "at a place reasonably convenient for the person who is commanded to produce." But, he explained, that simplification did not work and could lead to mischief. Accordingly, the committee revised Rule 45(c)(2) to specify that a subpoena may command production "at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person." That formulation essentially preserves the current arrangements, but states them more clearly.

2. Transfer of subpoena-related motions

Judge Campbell explained that the modified rule, like the current rule, specifies that a party receiving a subpoena typically has to litigate the enforceability of the subpoena in the court in the district where the performance is required. The producing party, thus, enjoys the convenience of having its dispute handled locally and does not have to travel to a different part of the country to litigate.

Rule 45, however, does not currently allow the court where production is required to transfer a dispute back to the court having jurisdiction over the case. Yet, there are certain situations in which the court in the district of performance should be allowed to refer a dispute to the judge presiding over the case. There is, he said, a split in the case law on the matter, and some courts in fact transfer disputes. The current rule, though, does not authorize the practice expressly.

The proposed new Rule 45(f) would resolve the matter and explicitly allow certain disputes to be resolved by the judge presiding over the case. It would allow the local court to transfer the case either on the consent of the person subject to the subpoena or if the court finds "exceptional circumstances." He reported that some public comments questioned whether exceptional circumstances was the appropriate standard for authorizing a transfer, but the advisory committee ultimately concluded unanimously that it was.

The proposed amendment to FED. R. CIV. P. 37 (failure to make disclosures or cooperate in discovery) would conform that rule to the proposed amendments to Rule 45(f). A new second sentence in Rule 37(b)(1) deals with contempt of orders entered after a transfer. It provides that failure to comply with a transferee court's deposition-related order may be treated as contempt of either the court where the discovery is taken or the court where the action is pending..

Professor Marcus pointed out that the August 2011 publication had highlighted the new transfer provision and expressly invited comment on two questions: (1) whether consent of the parties should be required in addition to consent by the person served with the subpoena; and (2) whether "exceptional circumstances" should be the standard for transfer if the non-party does not consent. Considerable public comment argued that it was inappropriate to require party consent. As long as the recipient of the subpoenas consents to the transfer, the parties should have no veto over the matter. The advisory committee, he said, revised the rule to remove the party-consent feature.

With regard to the appropriate standard for authorizing a transfer in the absence of consent, considerable public support was voiced for a more flexible, less demanding standard. But formulating an appropriate lesser standard, while still protecting the primary interests of the producing party, had been very challenging. The advisory committee and its discovery subcommittee discussed the matter at considerable length and decided to retain the exceptional circumstances standard, but add some clarifying language to the committee note. The note was recast to state that if the local non-party served with a subpoena does not consent to a transfer, the court's prime concern should be to avoid imposing burdens on that person. In some circumstances, though, a transfer may be warranted to avoid disrupting the issuing court's management of the underlying litigation. In short, transfer is appropriate only if those case-management interests outweigh the interests of the producing party in obtaining local resolution of the dispute.

A member praised the work of the advisory committee and said that the proposed changes were long overdue. He noted that few rules of procedure are used more often, yet are harder to work with, than Rule 45. Nevertheless, he said, the "exceptional circumstances" standard may be too high. It may underestimate the needs of a judge presiding over a big, hotly disputed civil case to have flexibility in controlling the case. It may also underestimate how easy it is today to conduct hearings and resolve disputes by telephone or video-conference. He noted that when subpoena disputes arise, it is common for the judge in the district of compliance to call the judge having jurisdiction over the underlying case to discuss the matter.

In addition, he said, the language in the committee note stating that transfers should be "truly rare" events is much too restrictive. It tells judges, in essence, that transfers should almost never occur. He added that a more generous standard is warranted, and "good cause" should be considered as a substitute. He recommended combining a good cause standard with an appropriate explanation in the committee note to give judges the flexibility they need to decide what is best in each case.

Judge Campbell explained that some public comments had suggested a good cause standard, and the advisory committee considered them carefully. But it ultimately concluded that it had to err in favor of protecting third parties who receive subpoenas and

sparing them from assuming undue burdens and hiring counsel in other parts of the country. The exceptional circumstances standard, he said, will afford them more protection than the good cause standard.

He said that the committee was concerned that if the rule were to contain a "good cause" standard, many busy district judges faced with subpoena disputes in out-of-district cases would be readily inclined to transfer them routinely to the issuing court. The rule, he said, should make those busy district judges pause and carefully balance the reasons for a transfer against the burdens imposed on the subject of the subpoena. In essence, he explained, the committee concluded that it was essential to have a higher threshold than mere good cause.

Professor Marcus added that it is very difficult to achieve just the right balance in the rule. It is, he said, particularly difficult to draft a standard that falls somewhere between "exceptional circumstances," which is very difficult to satisfy, and "good cause," which is quite easy to satisfy. He added that the comments from the ABA Section on Litigation were very supportive of retaining the exceptional circumstances standard in order to protect non-party witnesses.

A member argued in favor of retaining the exceptional circumstances standard, and emphasized that it was important to resolve the current conflict in the law and explicitly authorize transfers in appropriate, limited circumstances. She added that the rule should be designed for the average civil case, not the exceptional case. The great majority of subpoena disputes, she said, involve local issues and should be resolved locally. As a practical matter, a good cause standard would lead to excessive transfers.

A participant spoke in favor of the good cause standard, but recommended that if the exceptional circumstances standard were retained, the committee note should be toned down and revised to eliminate the current language stating that transfers should be "truly rare." In addition, it would be useful to refer in the note to the difference between the average case with a local third party and complex litigation in which the lawyers hotly dispute every aspect of a case, including the subpoenas. He added that not all subpoenaed persons are in fact uninvolved, uninterested third parties. Often, the subpoenaed person, although not a party to the case, may well have a direct financial interest in the litigation.

A member agreed that the word "truly" should be eliminated from the note, but supported the advisory committee's decision to retain the exceptional circumstances standard. A member recommended resolving the matter by eliminating the second sentence in the third paragraph of the portion of the committee note dealing with Rule 45(f). As revised, it would read: "In the absence of consent, the court may transfer in exceptional circumstances, and the proponent of transfer bears the burden of showing that such circumstances are presented."

A member expressed concern about the language added to the committee note after publication regarding the issuance of subpoenas to require testimony from a remote location. He suggested that the committee should consider amending Rule 45(c)(1) itself to clarify that it applies both to attendance at trial and testimony by contemporary transmission from a different location under Rule 43(a).

3. Trial subpoenas for distant parties and party officers

Judge Campbell explained that the third change in the rule resolves the split in the case law in the wake of *In re Vioxx Products Liability Litigation,* 438 F. Supp. 2d 664 (E.D. La. 2006). The district court in that case read Rule 45 as permitting a subpoena to compel a party officer to testify at a trial at a distant location. Other courts, though, have ruled that parties cannot be compelled to travel long distances from outside the state to attend trial because they have not been served with subpoenas within the state, as required by Rule 45(b)(2).

The advisory committee, he said, was of the view that *Vioxx* misread Rule 45, in part because the current rule is overly complex. The proposed amendments, he said, would overrule the *Vioxx* line of cases and confirm that party officers can only be compelled to testify at trial within the geographical limits that apply to all witnesses. He noted that the committee had highlighted the matter when it published the rule by including in the publication an alternative draft text that would have codified the *Vioxx* approach.

The public comments, he said, were split, with no consensus emerging for either position. The advisory committee decided ultimately that it should not change the original intent of a rule that has worked well for decades. Professor Marcus added that the committee's concern was that if the rule were amended to codify *Vioxx,* subpoenas could be used to exert undue pressures on a party and its officers. Moreover, there are alternate ways of dealing with the problems of obtaining testimony from party witnesses, including the use of remote testimony under Rule 43(a).

4. Notice of service of documents-only subpoenas

Judge Campbell explained that the current Rule 45 requires parties to notice other parties that they are serving a subpoena. But the provision is hidden as the last sentence of Rule 45(b)(1), and many lawyers are unaware of it. The advisory committee proposal, he said, relocates the provision to a more prominent place as a separate new paragraph 45(a)(4), entitled "notice to other parties before service." In addition, the revised rule requires that a copy of the subpoena be attached to the notice.

Judge Campbell said that the advisory committee realized that many other reasonable notice provisions might have been added to the rule. For example, it could have required that: notice be given a specific number of days in advance of service of the subpoena; additional notice be given if the subpoena is modified by agreement; notice be given when documents are received; and copies of documents be provided by the receiving party to the other parties in the litigation. The rule could also have specified the sanctions for non-compliance with the notice requirements.

The advisory committee, however, concluded that those provisions, though sensible, should not be included because the primary purpose of the amendments is to get parties to give notice of subpoenas. Just accomplishing that objective should resolve most of the current problems. The remaining issues can generally be worked out if lawyers are left to their own devices to consult with opposing counsel to obtain copies of whatever documents they need. The committee, he said, was concerned about the length and complexity of the current rule and did not want to add to that length and complexity by dictating additional details. He added, though, that the committee could return to the rule in the future if problems persist.

Professor Marcus said that many competing suggestions had been received for additional provisions. He added that, at the urging of the Department of Justice, the committee had made a change in the rule following publication to restore the words "before trial" to the notice provision. It also added in Rule 45(c)(4) the word "pretrial" before "inspection of premises."

Judge Campbell noted that the advisory committee had considered whether the time limit in current Rule 45(c) for serving objections to subpoenas was too short, but decided not to change it. He added that the matter rarely results in litigation, as courts allow extensions of time when appropriate. He agreed to a member's suggestion that language in lines 43 and 44 of the committee note be deleted. It had suggested that parties may ask that additional notice requirements be included in a court's scheduling order.

The committee unanimously by voice vote approved the proposed amendments for final approval by the Judicial Conference.

Information Items

PRESERVATION AND SPOLIATION

Judge Campbell reported that one of the panels at the committee's 2010 Duke Law School conference had urged the committee to approve a detailed civil rule specifying when an obligation to preserve information for litigation is triggered, the scope of that obligation, the number of custodians who should preserve information, and

the sanctions to be imposed for various levels of culpability. After the conference, Judge Kravitz, then chair of the advisory committee, tasked the committee's discovery subcommittee with following up on the recommendations.

The subcommittee began its work in September 2010 by asking the Federal Judicial Center to study the frequency and nature of sanctions litigation in the district courts. The Center's research found that litigation is rare, as only 209 spoliation motions had been filed in more than 130,000 civil cases studied, only about half of which involved electronic discovery. The subcommittee also studied a large number of federal and state laws that impose various preservation obligations.

The subcommittee, he said, then drafted three possible rules to address preservation. The first was a very detailed rule that provided specific directives and attempted to prescribe which events trigger a duty to preserve, what the scope of the preservation duty is, and what sanctions may be imposed for a failure to preserve. The committee, however, found it exceedingly difficult to draft a detailed rule that could be applied across all the broad variety of potential cases and give any meaningful certainty to the parties.

The second rule also addressed the triggering events for preservation, the scope of retention obligations, and sanctions for violations, but it did so in a much more general way. Essentially it provided broad directions to behave reasonably and preserve information in reasonable anticipation of litigation.

The third rule focused just on sanctions under Rule 37 in order to promote national uniformity and constraint in imposing sanctions. Currently, there is substantial dispute among the circuits on what level of culpability gives rise to sanctions for failure to preserve. The prevailing standards now range from mere negligence to wilfulness or bad faith.

The third rule specified that a court may order curative or remedial measures without finding culpability. Imposition of sanctions of the kind listed in Rule 37(b), on the other hand, would require wilfulness or bad faith. The proposed rule identified the factors that a court should consider in assessing the need for sanctions. Those factors, moreover, should also provide helpful guidance to parties at the time they are considering their preservation decisions.

Judge Campbell said that the three draft rules had been discussed with about 25 very knowledgeable people at the committee's September 2011 mini-conference in Dallas. A wide range of views was expressed, but no consensus emerged. Many written comments were received by the committee and posted on the judiciary's website. They embrace a full range of proposals. Some groups argued that there is an urgent need for a very detailed rule on preservation and spoliation with bright-line standards. One, for

example, suggested that a duty to preserve should only be triggered by the actual commencement of litigation. Others contended that no rule is needed at all, as the common law should continue its development. The Department of Justice, he said, took the position that it is premature to write a rule on these subjects.

The subject area, he said, continues to be very dynamic. In April 2012, the RAND Corporation completed a study of large corporations, documenting that they spend millions of dollars in trying to comply with preservation obligations. About 73% of the costs are spent on lawyers reviewing materials and 27% on the preservation of information itself. A recent in-house study by the Department of Justice generally corroborated the conclusion of the Federal Judicial Center that spoliation disputes in court are rare. Another recent study, by Professor William Hubbard, found that the problem arises only in a small percentage of cases, but when it does it can be extraordinarily expensive.

Judge Campbell pointed out that the Seventh Circuit was conducting a pilot program on electronic discovery and preservation that emphasizes the need for the parties to cooperate and discuss preservation early in the litigation. The pilot, he said, was entering its third phase and producing a good deal of helpful information. The Southern District of New York recently launched a complex-case pilot program that also includes preservation as an element. The Federal Circuit promulgated clear guidelines on discovery of electronically stored information and has placed some important limits on discovery in patent cases. A Sedona Conference working group has been working for months on a consensus rule for the committee's consideration. The group, he noted, had not yet reached consensus on potential rule amendments. Finally, he said, the case law continues to evolve, as trial judges are taking imaginative steps to deal with preservation problems and restrain unnecessary costs.

Judge Campbell reported that the advisory committee was still leaning towards a sanctions-only rule, rather than a rule that tries to define trigger and scope. Nevertheless, the subcommittee was still absorbing and discussing the many sources of information coming before it. He suggested that the subcommittee may have a more concrete draft available for the advisory committee's consideration at its November 2012 meeting.

He noted that the advisory committee was aware that some are frustrated with the pace of the project. But, he said, the delay in producing a rule has not been for lack of effort. Rather, the issues are particularly difficult, and the views expressed to the subcommittee have been very far apart. He noted that even if the committee were to approve a rule at its next meeting, it could not take effect before December 2015.

He reported that in December 2011, the House Judiciary Subcommittee on the Constitution had held a hearing on the costs and burdens of civil discovery. The proceedings included substantial discussion on electronic discovery issues. The basic

message from the majority was that preservation obligations and electronic discovery cost corporations substantial money and are a drain on innovation and jobs. He pointed out that the witnesses testified that the federal rules process works well, and the rules committees should continue their efforts to solve the current problems. After the hearings, the subcommittee chair wrote a letter urging the advisory committee to approve a strong rule. The subcommittee minority, though, followed with a letter asking the committee to proceed slowly and let the common law work its course.

Professor Marcus pointed out that the advisory committee had not resolved two critical policy questions and invited input on them from the members. First, he said, a decision must be made on whether a new rule should be confined just to electronic discovery or apply to all discoverable information. Second, in light of the strikingly divergent views expressed to the committee on the subject, a basic decision must be made on how urgently a new rule is needed and how aggressive it should be.

A member argued that national uniformity is very important because preservation practices and litigation holds cost parties a great deal of money. The precise contents of the new rule may not be clear at this point, but the advisory committee should continue to proceed deliberately and carefully study the various pilot projects underway in the courts. Eventually, however, it needs to produce a national rule. A participant added that the primary risk of moving too slowly is that courts will develop their own local rules and become attached to them, making it more difficult to impose a uniform national rule.

A participant pointed out that efforts have been made, without much result so far, to prod the corporate community into developing a series of best practices to deal with preservation of information. Corporations, he said, need to balance their legitimate need to get rid of information in the normal course of business against the competing need to preserve certain information in anticipation of eventual litigation. There is, he said, reluctance on the part of corporate management even to consider the matter, but there may be some movement in that direction in the future.

He suggested that a sanctions-only rule is appropriate. It would also be desirable, he said, to include a more emphatic emphasis in Rules 16 and 26 on getting the parties and the judge to address preservation obligations more directly at the outset of a case.

A member expressed great appreciation for the advisory committee's work and agreed with its inclination to pursue a narrow rule that focuses just on Rule 37 sanctions. He emphasized that the Rules Enabling Act restricts the rules committees' authority to matters of procedure only. Preservation duties, though, generally go beyond procedure and simply cannot be fixed by a rule.

Moreover, he said, the committee cannot the preservation problems because most litigation is conducted in the state courts, not the federal courts. He suggested that the

more the committee sticks to procedure and avoids matters of substantive conduct, the more likely the states will follow its lead. A member added that there is an important opportunity for the committee to achieve greater national uniformity by working with the state courts. If the committee produces a good rule, he said, effective complementary state-court rules could be promoted with the support and encouragement of the Conference of Chief Justices.

DUKE CONFERENCE SUBCOMMITTEE

Judge Campbell pointed out that it is difficult to speak about preservation without considering more broadly what information should be permitted in the discovery process, especially electronically stored information. He reported that the advisory committee had established a separate subcommittee, chaired by Judge John G. Koeltl, to evaluate the many helpful ideas for discovery reform raised at the Duke conference and to recommend which should be proposed as rule amendments. Eventually, he said, the advisory committee will marry the work of the Duke Conference subcommittee with that of the discovery subcommittee on spoliation because the two are closely related.

He reported that Professor Cooper had produced very helpful and thought-provoking drafts of several potential rule amendments to implement the Duke recommendations. The proposals, he explained, can be categorized as falling into three sets of proposed changes.

The first set of proposals was designed to promote early and active case management. They include: reducing the time for service of a complaint from 120 days to 60; reducing the time for holding a scheduling conference from 120 days to 60 or 45; requiring judges to actually hold a scheduling conference in person or by telephone; no longer allowing local court rules to exempt cases from the initial case-management requirements; requiring parties to hold a conference with the court before filing discovery motions; and allowing written discovery to be sought before the Rule 26(f) conference is held, but providing that requests do not have to be answered until after the case-management conference. The latter provision would let the parties know what discovery is contemplated when they meet with the judge to discuss a discovery schedule. Those and other ideas were designed to get the courts more actively involved in the management of cases and at an earlier stage.

Judge Campbell noted that the second category of possible changes was designed to curtail the discovery process and make it more efficient. One set of proposals would take the concept of proportionality and move it into Rule 26(b)((1)'s definition of discoverable information. It is already there by cross-reference in the last sentence of that provision, but the proposals would make it more prominent. In essence, the revised definition would define discoverable information as relevant, non-privileged information that is proportional to the reasonable needs of the case.

In addition, he said, the subcommittee was considering limiting discovery requests by lowering presumptive numbers and time limits, such as reducing the number of depositions from 10 to 5, the time of depositions from 7 hours to 4, and the number of interrogatories from 25 to 15, and by imposing caps of 25 requests for production and 25 requests for admissions. Although courts may alter them, just reducing the presumptive limits may reduce the amount of discovery that occurs and change the prevailing ethic that lawyers must seek discovery of everything.

Another proposal, he noted, would require parties objecting to a request for production to specify in their objection whether they are withholding documents. A responding party electing to produce copies of electronically stored information, rather than permitting inspection, would have to complete the production no later than the inspection date in the discovery request. Rule 26(g) would be amended to require the attorney of record to sign a discovery response to attest that the response is not evasive. Another proposal would defer contention interrogatories and requests to admit until after the close of all other discovery. The subcommittee, he said, was also considering cost-shifting provisions and may make cost shifting a more prominent part of discovery. All these changes are designed to streamline the discovery process and reduce the expenses complained about at the Duke conference.

Judge Campbell reported that a third category of proposals was designed to emphasize cooperation among the attorneys. One amendment would make cooperation an integral part of Rule 1. The rule, thus, might specify that the civil rules are to be construed and used to secure the just, speedy, and inexpensive determination of cases, and the parties should cooperate to achieve these ends.

Judge Campbell said that the advisory committee will study these drafts at its November 2012 meeting. It will likely marry them with the proposed rule on preservation to produce a package of rule amendments to make litigation more efficient. Professor Cooper added that it would be very beneficial for the Standing Committee members to review the proposed drafts carefully and point out any flaws and make additional suggestions that the advisory committee might consider.

A member praised the comprehensive and impressive efforts of the committee. She noted, though, that several corporate counsel had expressed concern about giving proportionality a more prominent place in the rules. They fear that it would give attorneys an excuse to litigate more discovery disputes.

A participant pointed out that the objective of fostering cooperation among the parties is excellent, but specifying a cooperation requirement in the text of the rules is troublesome. Cooperation inevitably is entwined with attorney conduct, an area on the edge of the Rules Enabling Act that may impinge on the role of the states in regulating attorney conduct.

Another participant suggested that consideration be given to appointing special masters to handle discovery in complex cases because busy judges often do not have the time to devote undivided attention to overseeing discovery. Some way would have to be found to pay for masters, but at least in large corporate cases, the parties may be able to work it out. He also recommended reducing the presumptive limit for expert-witness depositions to 4 hours.

A member commended the advisory committee for undertaking the discovery project. He suggested that anything the committee can do to limit the number of discovery requests and reduce discovery time periods, at least in the average case, will be beneficial. He also commended the proposed modest recommendations on cost-shifting and proportionality. He urged the committee to carry on the work and move as quickly as possible.

His only reservation, he said, concerned adding a cooperation requirement to the rules. The concept, he said, was fine, but it may conflict with an attorney's ethical duty to pursue a client's interests zealously. He asked how much lawyers can be reasonably expected to cooperate in discovery when they are not expected to cooperate very much in other areas. The adversarial process, he said, is a highly valued attribute of the legal system, and the committee should avoid intruding into the states' authority over attorney conduct.

Members noted that some states have imposed effective, stricter limits on depositions that led lawyers to reassess how long they really need to take a deposition. A member added that depositions of expert witnesses have been eliminated completely in his state. It was noted that the original intent of Rule 26(a)(2)'s report requirement was to reduce the length of depositions of expert witnesses or even to eliminate them in many cases. That benefit, however, has not been realized.

PLEADING STANDARDS

Professor Cooper reported that the advisory committee was continuing to monitor case law developments in the wake of the Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007) and *Iqbal v. Ashcroft,* 556 U.S. 662 (2009). There is, he said, no sense that the lower courts have unified around a single, identifiable pleadings standard for civil cases, but there is also no sense of a crisis or emergency. The committee, he said, was essentially biding its time and did not plan to move forward quickly. It has several potential proposals on the table, including directly revising the pleading standards in FED. R. CIV. P. 8 (general rules of pleading), addressing pleading indirectly through Rule 12(e) motions for a more definite statement, or integrating pleading more closely with discovery, particularly in cases where there is an asymmetry of information.

Dr. Cecil reported that the Federal Judicial Center had begun pilot work on its new study of all case-dispositive motions in the district courts. The study, he said, will be different from earlier studies because it will take a more comprehensive, holistic look at all Rule 12 motions and summary judgment issues and explore whether there are any tradeoffs, such as whether an increase in motions to dismiss has led to a reduction in motions for summary judgment. In addition, the Center is collaborating closely with several civil procedure scholars and hopes to reach a consensus with them about what is actually going on in the courts regarding dispositive motions. The study, he said, will be launched in September 2012 with the help of law professors and students in several schools.

.

FED. R. CIV. P. 84 AND FORMS

Judge Campbell reported that the advisory committee was examining FED. R. CIV. P. 84 (forms), which states that the forms appended to the rules "suffice" and illustrate the simplicity and brevity that the rules contemplate. He explained that many of the forms are outdated, and some are legally inadequate.

Professor Cooper pointed out that the Standing Committee had appointed an ad hoc forms subcommittee, chaired by Judge Gene E. K. Pratter of the civil committee, to review now the advisory committees develop and approve forms. The subcommittee, he said, made two basic observations: (1) in practice, the civil, criminal, bankruptcy, and appellate forms are used in widely divergent ways; and (2) the process for generating and approving forms differs substantially among the advisory committees.

The civil and appellate forms, for example, adhere to the full Rules Enabling Act process, including publication, approval by the Judicial Conference and the Supreme Court, and submission to Congress. The bankruptcy rules, on the other hand, follow the process partly, only up through approval by the Judicial Conference. At the other extreme, the criminal rules have no forms at all. Instead, the Administrative Office drafts the criminal forms, sometimes in consultation with the criminal advisory committee. He said that the subcommittee ultimately concluded that there is no overriding need for the advisory committees to adopt a uniform approach.

Professor Cooper explained that the civil advisory committee was now in the second phase of the forms project and was focusing on what to do specifically with the civil forms. He noted that the project had received an impetus from the Supreme Court's *Twombly* and *Iqbal* decisions on pleading requirements and from the widely held perception that the illustrative civil complaint forms are legally insufficient. There is, he said, a clear tension between the simplicity of those forms and the pleading requirements announced in the Supreme Court decisions.

He noted that the advisory committee was considering several different options. One would be just to eliminate the pleading forms. An alternate would be to develop a set of new, enhanced pleading forms for each category of civil cases consistent with *Twombly* and *Iqbal*. There was, though, no enthusiasm in the committee for that approach. Going further, the committee could consider getting back into the forms business full-bore and spend substantial amounts of time on improving and maintaining all the forms. At the other extreme, the committee could eliminate all the forms and allow the Administrative Office to generate the forms, with appropriate committee consultation.

CLASS ACTIONS AND RULE 23 SUBCOMMITTEE

Judge Campbell reported that the advisory committee had appointed a Rule 23 subcommittee to consider several topics involving class-action litigation and whether certain amendments to the class-action rule were appropriate.

Professor Marcus said that the subcommittee had begun its work and was examining a variety of controversial issues that have emerged as a result of several Supreme Court decisions in the past couple of years, recent litigation developments, and experience under the Class Action Fairness Act. Among the topics being considered are: (1) the relationship between considering the merits of a case and determining class action certification, particularly with regard to the predominance of common questions; (2) the viability of issues classes under Rule 23(c)(4); (3) monetary relief in a Rule 23 (b)(2) class action; (4) specifying settlement criteria in the rule; and (5) revising Rule 23 to address the Supreme Court's announcement in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), that the fairness and adequacy of a settlement are no substitute for full-dress consideration of predominance.

Professor Marcus noted that the list of issues continues to evolve and many were discussed at the panel discussion during the Standing Committee's January 2012 meeting. He pointed out that the project to consider appropriate revisions to Rule 23 will take time, since several topics are controversial and will pose drafting difficulties.

REPORT OF THE ADVISORY COMMITTEE ON CRIMINAL RULES

Judge Raggi and Professor Beale presented the report of the advisory committee, as set forth in Judge Raggi's memorandum and attachments of May 17, 2012 (Agenda Item 8).

Amendment for Final Approval

FED. R. CRIM. P. 11(b)

Judge Raggi reported that the proposed amendment to FED. R. CRIM. P. 11(b)(1) (pleas) would add a new subsection (o) to the colloquy that a court must conduct before accepting a defendant's guilty plea. It would require a judge to advise defendants who are not United States citizens that they may face immigration consequences if they plead guilty.

She noted that at every stage of the advisory committee's deliberations, a minority of members questioned whether it is wise or necessary to add further requirements to the already lengthy Rule 11 plea colloquy. Moreover, the Supreme Court's decision in *Padilla v. Kentucky*, 559 U.S. ___, 130 S. Ct. 1473 (2012), addressed the duty of defense counsel, not the duty of courts, to provide information on immigration consequences to the defendant. Nevertheless, a majority of the advisory committee concluded that immigration is qualitatively different from other collateral consequences that may flow from a conviction. Moreover, a large number of criminal defendants in the federal courts are aliens who are affected by immigration consequences.

The committee, she said, recognized the importance of not allowing Rule 11(b) to become such a laundry list of every possible consequence of a guilty plea that the most critical factors bearing on the voluntariness of a plea do not get lost, *i.e.*, knowledge of the important constitutional rights that the defendant is waiving. She added that the only change made after publication was a modest change in the committee note.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. CRIM. P. 5(d) and 58(b)

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 5(d) (initial appearance) and FED. R. CRIM. P. 58(b)(2) (initial appearance in a misdemeanor) dealt with advising detained foreign nationals that they may have their home country's consulate notified of their arrest.

The amendments had been approved by the Judicial Conference in September 2011, but returned by the Supreme Court in April 2012. The advisory committee then discussed possible concerns that the Court may have had, such as that the possibility that the language of the amendments could be construed to intrude on executive discretion or

confer personal rights on a defendant. She suggested that there may have been concern over the proposed language in Rule 5(d)(1)(F), which specified that a detained non-citizen be advised that an attorney for the government or law-enforcement officer will do either of two things: (1) notify a consular office of the defendant's country, or (2) make any other consular notification required by treaty or international agreement.

She suggested that use of the word "will" might have been seen as potentially tying the hands of the executive in conducting foreign affairs. In addition, despite language in the committee note that the rule did not create any individual rights that a defendant may enforce in a federal court, the rule might have been seen as taking a step in that direction,

After the rule was returned by the Court, the advisory committee went back to the drawing board and produced a revised draft of the amendments. As revised, the first part provides that the defendant must be told only that if in custody, he or she "may request" that an attorney for the government or law-enforcement officer notify a consular office. It does not guarantee that the notification will in fact be made. The second part of the amendments was not changed. It specifies that even without the defendant's request, consultation notification may be required by a treaty or other international agreement.

Judge Raggi pointed out that the primary concern in revising the amendments was to assuage any concerns that the Supreme Court may have had with the amendments as originally presented. She noted that the Department of Justice had been consulting closely with the Department of State, which is very eager to have a rule as an additional demonstration to the international community of the nation's compliance with its treaty obligations.

A member noted that the Vienna Convention only requires notification of a consular office if a defendant requests it. She said that the Supreme Court might have found the original language of proposed Rule 5(d)(1)(F)(i) too strong in stating that the government will notify a consular office if the defendant requests. But the new language in Rule 5(d)(1)(F)(ii) may go too far in the other direction by requiring notification without the defendant's request if required by a treaty or international agreement.

Ms. Felton explained that several bilateral treaties, separate from the Vienna Convention, require notification regardless of the defendant's request. She added that the Departments of Justice and State had proposed the amendments to Rules 5 and 58 primarily as additional, back-up insurance that consular notification will in fact be made.

The main thrust of the amendments, she said, was to inform defendants of their option to request consular notification. In the vast majority of cases, however, the notification will already have been made by a law-enforcement officer or government attorney at the time of arrest. That is what the Vienna Convention contemplates. The

proposed amendments, which apply at initial appearance proceedings, will help catch any cases that may have slipped through the cracks.

Judge Raggi noted that this factor was part of the discussion on whether a rule is needed at all because there are no court obligations under the Convention and treaties. The rule, essentially, is a belt-and-suspenders provision designed to cover the rare cases when a defendant has not been advised properly. It only states that a defendant may request notification, and that is as far as it can go. If were to imply that the notice will in fact be given, which is what some treaties actually require, there would be concern that the rule itself was creating an enforceable individual right in the defendant.

Professor Beale added that the revised amendments were acceptable to the Departments of Justice and State. They may be more acceptable to the Supreme Court because they do not in any way tie the hands of the executive and avoid creating any individual rights or remedies. A member noted that the last part of the committee notes makes that point explicitly.

Judge Raggi pointed out that it was up to the Standing Committee to decide whether to republish the rule. Although the changes made after the return from the Supreme Court simply clarify the intent of the amendments, the advisory committee had reason to think that they were different enough to warrant publishing the rule again for further comment.

The committee unanimously by voice vote approved the proposed amendments for republication.

Information Items

FED. R. CRIM. P. 12 and 34

Judge Raggi explained that the proposed amendments to FED. R. CRIM. P. 12 (pleadings and pretrial motions) and the conforming amendment to FED. R. CRIM. P. 34 (arresting judgment) deal with motions that have to be made before trial and the consequences of an untimely motion. The amendments, she said, had been prompted by a proposal by the Department of Justice to include motions objecting to a defect in the indictment in the list of motions that must be made before trial.

The proposal, she said, had now come to the Standing Committee for the third time. The last draft was published for public comment in August 2011. It generated many thoughtful comments, which led the advisory committee to make some additional changes. It is expected that the ad hoc subcommittee reviewing the rule will present a final draft to the advisory committee in October 2012, and it may be presented to the Standing Committee for final approval in January 2013.

FED. R. CRIM. P. 6(e)

Judge Raggi reported that the advisory committee had received a letter from the Attorney General in October 2011 recommending that FED. R. CRIM. P. 6(e) (grand jury secrecy) be amended to establish procedures for disclosing historically significant grand jury materials. She noted that applications to release historic grand jury materials had been presented to the district courts on rare occasions, and the courts had resolved them by reference to their inherent supervisory authority over the grand jury.

The Department of Justice, however, questioned whether that inherent authority existed in light of Rule 6(e)'s clear prohibition on disclosure of grand jury materials. Instead, it recommended that disclosure should be permitted, but only under procedures and standards established in the rule itself. The Department submitted a very thoughtful memo and proposed rule amendments that would: (1) allow district courts to permit disclosure of grand jury materials of historical significance in appropriate circumstances and subject to required procedures; and (2) provide a specific point in time at which it is presumed that materials may be released.

She noted that a subcommittee, chaired by Judge John F. Keenan, had examined the proposal and consulted with several very knowledgeable people on the matter. In addition, the advisory committee reporters prepared a research memorandum on the history of Rule 6(e), the relationship between the court and the grand jury and case law precedents on the inherent authority of a judge to disclose grand jury material. After examining the research and discussing the proposal, all members of the subcommittee, other than the Department of Justice representatives, recommended that the proposed amendment not be pursued.

The full advisory committee concurred in the recommendation and concluded that in the rare cases where disclosure of historic materials had been sought, the district judges acted reasonably in referring to their inherent authority. Therefore, there is no need for a rule on the subject.

Judge Raggi added that she had received a letter from the Archivist of the United States strongly supporting the Department of Justice proposal. She spoke with him at length about the matter and explained that it would be a radical change to go from a presumption of absolute secrecy, which is how grand juries have always operated, to a presumption that grand jury materials should be presumed open after a certain number of years. A change of that magnitude, she said, would have to be accomplished through legislation, rather than a rule change. She noted that the archivist has a natural, institutional inclination towards eventually releasing historical archived documents and might consider supporting a legislative change.

FED. R. CRIM. P. 16

Judge Raggi reported that a suggestion had been received from a district judge to amend FED. R. CRIM. P. 16(a) (government's disclosure) to require pretrial disclosure of all the defendant's prior statements. There was, however, a strong consensus on the advisory committee that there are no real problems in criminal practice that warrant making the change. The committee, accordingly, decided not to pursue an amendment.

Judge Raggi reported that the Senate Judiciary Committee was considering legislation addressing the government's obligations to disclose exculpatory materials under *Brady* and *Giglio*. The committee had asked the judiciary for comments and a witness at the hearings. She said that she had decided not to testify but wrote to the committee to document the work of the advisory committee and the Standing Committee on the subject over the last decade. Attached to the letter were 900 pages of the public materials that the committee had produced.

She explained in the letter that the advisory committee had tried to write a rule that would codify all the government's disclosure obligations under case law and statute, but concluded that it could not produce a rule that fully captures the obligations across the wide range of federal criminal cases. In addition, she said, her letter alluded to a Federal Judicial Center survey of federal judges showing, among other things, that judges see non-disclosure as a problem that only arises infrequently. Although the advisory committee decided not to pursue a rule change, she added, the subject is being addressed in revisions to the *Bench Book for U.S. District Court Judges*. She noted that the Federal Judicial Center's Bench Book Committee was close to completing that work.

REPORT OF THE ADVISORY COMMITTEE ON EVIDENCE RULES

Judge Fitzwater and Professor Capra presented the report of the advisory committee, as set forth in Judge Fitzwater's memorandum and attachments of May 3, 2012 (Agenda Item 6). Judge Fitzwater noted that the advisory committee had no action items to present.

Amendments for Final Approval

FED. R. EVID. 803(10)

Judge Fitzwater reported that the proposed amendment to FED. R. EVID. 803(10) (hearsay exception for the absence of a public record) was needed to address a constitutional infirmity as a result of the Supreme Court's decisions in *Melendez-Diaz v. Massachusetts,* 557 U.S. 305 (2009). It raised the concern that "testimonial" evidence is being allowed when a certificate that a public record does not exist is introduced in

evidence without the presence of the official who prepared the certificate. The proposed amendment would create a notice-and-demand procedure that lets the prosecution give written notice of its intention to use the information. Unless the defendant objects and demands that the witness be produced, the certificate may be introduced.

The proposed procedure, he said, had been approved in *Melendez-Diaz*. The advisory committee received two comments on the amendment, one of which endorsed it and the other approved it in principle with some comments.

The committee unanimously by voice vote approved the proposed amendment for final approval by the Judicial Conference.

Amendments for Publication

FED. R. EVID. 801(d)(1)(B)

Judge Fitzwater reported that FED. R. EVID. 801(d) (declarant-witness's prior statement) specifies that certain prior statements are not hearsay. Under Rule 801(d)((1)(B), the proponent of testimony may introduce a prior consistent statement for its truth, *i.e*. to be admitted substantively, but not for another rehabilitative purpose, such as faulty recollection.

He said that two problems have been cited with the way the rule is now written. First, the prior consistent statement of the witness is of little or no use for credibility unless the jury actually believes the testimony to be true anyway. The jury instruction, moreover, is very difficult for jurors to follow, as it asks them to distinguish between prior consistent statements admissible for the truth and those that are not. Second, the distinction has little, if any, practical effect because the proponent of the testimony has already testified in the presence of the trier of fact.

The proposed amendment would allow a prior consistent statement to be admitted substantively if it otherwise rehabilitates the witness' credibility.

The committee without objection by voice vote approved the proposed amendment for publication.

FED. R. EVID. 803(6)-(8)

Judge Fitzwater noted that FED. R. EVID. 803(6), (7), and (8) are the hearsay exceptions, respectively, for business records, the absence of business records, and public records. When the admissibility requirements of the rule are met, the evidence is admitted as an exception to the hearsay rule unless the source, method, or circumstances indicate a lack of trustworthiness.

During the restyling of the rules, he said, a question arose as to who has the burden on the issue of lack of trustworthiness. By far the vast majority of court decisions have held that the burden is on the opponent of the evidence, not the proponent. But a few decisions have placed the burden on the proponent. Since the case law was not unanimous, the advisory committee decided that it could not clarify the matter as part of the restyling project because a change would constitute a matter of substance.

Although the ambiguity was not resolved during the restyling project, the Standing Committee suggested that the advisory committee revisit the rule. The advisory committee initially was of the view that no further action was needed until it was informed that the State of Texas, during its own restyling project, had looked at the restyled federal rules and concluded that FED. R. EVID. 803(6)-(8) had placed the burden on the proponent of the evidence. This, clearly, was not the advisory committee's intention. At that point, it decided to make a change in the rules to make it clear that the burden is on the opponent of the evidence.

At members' suggestions, minor changes were made in the proposed committee notes. Line 34 of the note to Rule 806(8) was corrected to conform to the text of the rule, and an additional sentence was added to the second paragraph of the note to Rule 806(6).

The committee without objection by voice vote approved the proposed amendments for publication.

Information Items

SYMPOSIUM ON FED. R. EVID. 502

Judge Fitzwater noted that the advisory committee's next meeting will be held on October 4 and 5, 2012, in Charleston, South Carolina. A symposium on Rule 502 will be held in conjunction with the meeting, with judges, litigators, and academics in attendance. There is concern, he said, that Rule 502 (limitations on waiver of attorney-client privilege and work product) is not being used as widely as it should be as a means of reducing litigation costs. He noted that Professor Marcus will be one of the speakers at the program, and he invited the members of the Standing Committee to attend.

REPORT OF THE E-FILING SUBCOMMITTEE

Judge Gorsuch noted that the ad hoc committee, which he chaired, was comprised of representatives from all the advisory committees. It was convened to consider appropriate terminology that the rules might use to describe activities that previously had only involved paper documents but now are often processed electronically. Although the

impetus for the subcommittee's formation arose in connection with the appropriate terminology to use in the pending amendments to Part VII of the bankruptcy rules and FED. R. APP. P. 6, the subcommittee took a comprehensive look at all the federal rules. Professor Struve served as the subcommittee reporter, and Ms. Kuperman compiled a comprehensive list of all the terms used in each set of federal rules to describe the treatment of the record and other materials that may be either in paper or electronic form.

He noted that the subcommittee had identified four possibilities for defining its work and listed them from the most aggressive to the least. First, he said, it could conduct a major review of all the federal rules in order to achieve uniformity in terminology across all the rules. That major project would be conducted along the lines of the recent restyling efforts. Second, the subcommittee could compile a glossary of preferred terms. Third, it could serve as a screen for all future rule amendments, and advisory committees would have to run their proposals through the subcommittee. And fourth, the subcommittee could simply make itself available for assistance at the request of the advisory committees.

He reported that the subcommittee opted for the last alternative, largely because the others would all take a great deal of time and effort. Moreover, it recognized that technology is changing so rapidly that it may not be timely to undertake a more aggressive approach at this juncture. At some point in the future, though, terminology will have to be addressed more comprehensively. He added that the most valuable result of the subcommittee's work was to make the reporters cognizant of the extraordinary number of synonyms currently in use in the rules and to encourage them to coordinate with each other on terminology.

INTERIM ASSESSMENT OF THE JUDICIARY'S STRATEGIC PLAN

Judge Kravitz noted that he would work with the advisory committees to prepare a response to Judge Charles R. Breyer, the Judicial Planning Coordinator, on the committee's progress in implementing the *Strategic Plan for the Federal Judiciary.*

NEXT MEETING

The committee will hold its next meeting on Thursday and Friday, January 3 and 4, 2013 in Boston, Massachusetts.

Respectfully submitted,

Peter G. McCabe,
Secretary

TAB 2

THIS PAGE INTENTIONALLY BLANK

TAB 2A

THIS PAGE INTENTIONALLY BLANK

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 12

DATE: October 4, 2012

The Criminal Rules Committee has been studying a proposal to amend Fed. R. Crim. P. 12 since 2006. The Committee's proposed amendment to Rule 12 and a conforming change to Rule 34 were published in August 2011, and public comments totaling 47 pages were received from five groups. The reporters prepared a 60 page memorandum analyzing each of the issues raised in the comments. The comments and the reporters' memorandum were considered at length by the Rule 12 Subcommittee, which held a half-day face-to-face meeting in conjunction with the Advisory Committee's April meeting in San Francisco and a follow up teleconference.

This memorandum begins with a brief history of the proposed amendment, and then presents (1) the Subcommittee's response to the public comments, (2) the Subcommittee's recommendations for changes in the published amendment, and (3) the text of the proposed amendment with the changes proposed by the Subcommittee.

We also provide the reporters' memorandum to the Subcommittee (updated with additional case citations), a memorandum analyzing double jeopardy claims on a circuit-by-circuit basis (accompanied by a table of cases), and the full text of the public comments.

I. THE HISTORY OF THE PROPOSED AMENDMENT

In 2006, in the wake of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), the Department of Justice asked the Criminal Rules Committee to consider amending Rule 12(b)(3)(B) to require defendants to raise *before trial* any objection that the indictment failed to state an offense by eliminating the provision that required review of such a claim even when raised for the first time after conviction.

The proposal evolved substantially between 2006 and publication in 2011. Two aspects of the development warrant special mention. First, the proposal expanded to address other features of Rule 12's treatment of pretrial motions in general. The proposed amendment, as published:

- states that the requirement that certain claims and defenses be raised before trial applies only if the basis for the motion is "reasonably available" before trial;

- enumerates the common types of motions that courts have found to constitute defects "in instituting the prosecution" and "in the indictment or information" that must be raised before trial; and

- clarifies the general standard for relief from the rule that late-filed claims may not be considered, resolving confusion created by the non-standard use of the term "waiver" to reach situations in which there was no intentional relinquishment of a known right.

One of the most difficult issues has been what standard the courts should apply when a defendant does not raise the failure-to-state-an-offense (FTSO) claim before trial. As described below, the Committee considered a number of different standards for relief from the rule barring consideration of late-filed claims. The proposed rule adopts a two-tier standard: it requires a showing of "cause and prejudice" to consider all untimely claims except for double jeopardy and failure to state an offense, which may be reviewed upon a showing of "prejudice."

2008 – "good cause" – rejected by the Criminal Rules Committee:

In 2008 the Rule 12 Subcommittee (then chaired by Chief Judge Mark Wolf) proposed an amendment that would have subjected untimely FTSO claims to the standard already applied to all other untimely claims under Rule 12(e). The Committee rejected that draft and asked the Subcommittee to prepare an amendment that would not require a defendant to show "cause" in order to receive relief when the failure to state an offense prejudiced him.

2009 – "prejudice to the substantial rights of the defendant" -- approved by the Rules Committee but remanded by the Standing Committee:

Responding to the Committee's concern, in 2009 the Subcommittee tried a different tack, bifurcating the standard for untimely claims and providing a more generous standard for FTSO claims. The proposed amendment revised 12(e) to provide relief from the waiver "when a failure to state an offense in the indictment or information *has prejudiced a substantial right of the defendant*." The existing "good cause" standard, applied to all other untimely claims, remained unchanged. The amendment was approved by the Committee and sent on to the Standing Committee. The Standing Committee, however, remanded the proposal to the Committee in June 2009, indicating that additional consideration should be given to the concepts of "waiver" and "forfeiture" and how Rule 12 interacted with Rule 52.

2010-January 2011 – "good clause" for claims that are "waived" and "plain error" for claims that have been "forfeited" – approved by the Rules Committee but remanded by the Standing Committee

Responding to the Standing Committee's concerns, the Subcommittee redrafted the proposed amendment to Rule 12, this time attempting to clarify exactly which sorts of claims must be raised, and when a claim was considered "waived" under the rule. To address the confusion in the courts over whether Rule 52(b) plain error review applied and when, the proposed amendment (1) expressly designated plain error review under Rule 52(b) as the standard for obtaining relief for three specific claims (FTSO, double jeopardy, and statute of limitations) under a new subsection entitled "forfeiture," and (2) left in place the "good cause" standard already applied to all other untimely claims, changing the language to "cause and prejudice" to reflect the Supreme Court's interpretation of the "good cause" standard, and moving this into a separate subsection entitled "waiver."

At its January 2011 meeting, the Standing Committee remanded the proposal once again to allow the Advisory Committee to consider several concerns. First, some members expressed concern that the Rule continued to employ the term "waiver" to mean something other than deliberate and knowing relinquishment. Second, some members were concerned that requiring a defendant to show plain error under Rule 52 could be even more difficult than showing "cause and prejudice." If so, the proposed amendment would not create a more generous review standard for three favored claims. Finally, the Reporters were also urged to consider some reorganization.

June 2011 – eliminating terms "waiver" and "forfeiture" – specifying "cause and prejudice" for untimely claims, but "prejudice only" for failure-to-state-an-offense and double jeopardy – Rule 12 governs and Rule 52 does not apply

In response to the Standing Committee's additional suggestions and concerns, the Advisory Committee undertook a final and more fundamental revision of Rule 12. It was this proposal that was approved by the Standing Committee in June 2011 and published in August 2011. The key elements of the proposal are noted below.

The 2011 proposal no longer employs the terms "waiver" or "forfeiture." Because the ordinary meaning of waiver is a knowing and intentional relinquishment of a right, the non-standard use of that term in Rule 12 creates unnecessary confusion and difficulties. The Advisory Committee was urged to consider revising the rule to avoid using these terms. Although the elimination of these terms was not part of the purpose of the amendment as originally envisioned, there was agreement that the use of the term "waiver" has been a source of considerable confusion. Rule 12's initial use of the term waiver predated the Supreme Court's clarification of the difference between waiver and forfeiture and the meaning of plain error in *United States v. Olano*, 507 U.S. 725, 731-32 (1993). Redrafting to avoid the terms "waiver" and "forfeiture" achieves clarity and avoid traps for the unwary.

As published the proposed rule (like earlier proposals in June 2009 and January 2011) bifurcates the standard applicable when a defense, claim, or objection subject to Rule 12(b)(3) is raised in an untimely fashion, depending upon the type of claim at issue.

- Omitting any reference to the term waiver, the Rule specifies that for all but two specific

types of claims, an untimely claim may be considered only if the party who seeks to raise it shows "cause and prejudice." As explained in greater detail in the reporters' updated March 2012 memorandum to the Rule 12 Subcommittee (included infra), the Committee replaced the phrase "good cause" with "cause and prejudice" to reflect the Supreme Court's interpretation of the current rule.

- For claims of FTSO or double jeopardy, the amendment as published provided that the court may consider the claim if the party shows "prejudice only." This is a more generous test than that applicable to other claims raised late under Rule 12, because it does not require the objecting party to demonstrate "cause," i.e. the reason for failing to raise the claim earlier. It may also be a more generous test than plain error under Rule 52(b) – the standard included in the January 2011 proposal – because it does not require the objecting party to show, in addition to prejudice, that the error was "plain" or that "the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Olano*, 507 U.S. 725, 731-32 (1993).

- Because of the continuing controversy in the appellate courts on the question whether review of untimely claims is governed by Rule 12(e) or Rule 52(b), the Advisory Committee added an express statement that if a party files an untimely motion "Rule 52 does not apply," and then setting forth the criteria of "cause and prejudice" and "prejudice only" for FTSO and double jeopardy claims.

Additionally, the Committee made other changes in language and organization to improve clarity.

II. THE PUBLIC COMMENTS AND THE SUBCOMMITTEE'S RESPONSE

Following publication, comments in support of the proposed amendment were received from the Department of Justice and the Federal Magistrate Judges Association, and letters that oppose various aspects of the proposed amendment were received from the New York Council of Defense Lawyers (NYCDL), The Federal Defenders, and National Association of Criminal Defense Lawyers (NACDL). The proposal generated neither requests to testify nor comments from the bench other than the letter in support from FMJA. The full text of the public comments appears infra.

As described more fully in the reporters' memorandum, the critical letters from the defense groups raised the following arguments and concerns. The Subcommittee's responses to each of these concerns are noted below as well. With two exceptions (noted briefly below and discussed in Part III), the Subcommittee does not recommend changes based on the public comments.

A. Objections to adding FTSO claims of failure to the list that must be raised before trial.

As expected, defense commentators opposed requiring FTSO claims to be raised before trial. They argued that this aspect of the proposed amendment is neither supported by the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), nor justified by the risk of sandbagging. They also expressed concern that the proposed amendment would violate the Rules Enabling Act, lead to violations of the Fifth and Sixth Amendment rights, and prejudge Supreme Court resolution of open questions.

The Rule 12 Subcommittee considered and reaffirmed the decision that FTSO claims should be subject to Rule 12's requirement that they be raised before trial. The Subcommittee agreed that *Cotton*–which did not mention or address Rule 12–does not require the amendment. But in holding that the failure to state an offense is not jurisdictional, the Supreme Court opened the door to permit such an amendment. Members concluded that there is significant value to requiring that FTSO claims be raised before trial. Despite the argument that the defense has no incentive to delay raising FTSO claims, cases have arisen in which courts felt sandbagging had occurred leading to a waste of judicial resources. Indeed, one court decried such sandbagging and urged that the Rules be amended to address the problem. *See United States v. Panarella*, 277 F.3d 678, 686 (3d Cir. 2002) ("Requiring a defendant to raise this defense before pleading guilty respects the proper relationship between trial and appellate courts and prevents the waste of judicial resources caused when a defendant deliberately delays raising a defense that, if successful, requires reversal of the defendant's conviction and possibly reindictment."). Moreover, the Subcommittee perceived no Rules Enabling Act barrier to adding an additional claim to the other constitutional issues that Rule 12 now requires to be raised before trial.

The Subcommittee also concluded that the Fifth and Sixth Amendment issues raised by the Federal Defenders are separate from those addressed by Rule 12 and the proposed amendment. The Federal Defenders expressed concern that the amended rule might prohibit a defendant from raising constitutional challenges to jury instructions at trial, e.g., claims that an instruction stating an element omitted from the indictment constructively amended the indictment or deprived him of notice. The Federal Defenders note that the government has at times argued that by failing to raise a Fifth Amendment problem before trial (when it could be easily addressed by a superseding indictment) a defendant waives his chance to complain later about what is essentially the same problem: lack of grand jury review of one or more essential elements. The Federal Defenders maintain that regardless of the failure of a defendant to raise an indictment's defect, an objection to the instructions alleging constructive amendment or lack of notice should remain available.

The proposed amendment, however, speaks only to the consideration of objections to the indictment or information. Neither the proposed amendment nor the Committee Note addresses a defendant's ability to object to jury instructions on the ground that those instructions constructively amend the indictment in violation of the Fifth Amendment, or change the theory of prosecution or otherwise surprise the defense, depriving the defendant of the notice guaranteed by the Sixth Amendment. The Subcommittee concluded that whether a judge should grant a constitutional challenge to jury instructions in a case in which a defendant failed to object to a defective indictment is a matter to be resolved by the courts if and when such cases arise. The amendment does not

purport to preclude such challenges, nor is it intended to limit in any way the appropriate resolution of these separate questions.

B. Objections to the specification of other claims that must be raised before trial.

Defense commentators also focused on several other kinds of claims that the proposed amendment lists among those that must be raised before trial. They argued that double jeopardy, statute of limitations, multiplicity, and duplicity claims should not be required before trial. One comment also opposed listing specific kinds of claims in 12(b)(3)(A) and (B) and retaining the distinction between (A) and (B).

The Subcommittee recommends making no changes in the listing of claims that must be raised before trial. The list of claims and defenses in the proposed amendment was drawn from the cases interpreting two general categories in the present rule: defects "in instituting the prosecution" and "in the indictment or information."

1. Double jeopardy

NYCDL correctly recognizes requiring double jeopardy claims to be raised before trial would be a change in some courts. Although many courts have required double jeopardy and statute of limitation claims to be presented before trial when clear from the face of the indictment, not all courts do so.[1] The courts that require these particular motions be filed before trial generally reason that they are "defects in the indictment." But some other courts rely on the 1944 Committee Note as support for distinguishing double jeopardy and statute of limitations from the claims that must be raised before trial.[2] The Committee has recognized that the treatment of double jeopardy is a difficult issue. The amendment provides an opportunity to resolve some of the disagreement and confusion. Clarification seems particularly appropriate when the confusion has arisen, at least in part, from the difficulty of reconciling the text of the rule with the Committee Note. Moreover, the law regarding both double jeopardy and statute of limitations defenses has developed significantly

[1]We provide extensive citations for these points in footnotes 15-22 of our March 31, 2012 memorandum to the Rule 12 Subcommittee (updated with new cases August 16, 2012), which is included infra. Also included infra is a memorandum providing a circuit-by-circuit analysis of the double jeopardy cases.

[2]The courts that have allowed these claims to be raised during trial often point to the Advisory Committee Note from 1944, which states that motions that "may" but need not be brought before trial include "such matters as former jeopardy, former conviction, former acquittal, statute of limitations . . . ."

since the drafting of the 1944 Committee Note, undermining some of the assumptions that may have undergirded it.

2. Multiplicity and duplicity

The Subcommittee recognized that under some circumstances it is not possible to raise multiplicity and duplicity claims before trial. However, the proposed amendment applies only when the basis of a claim is "reasonably available" before trial. That limitation should take care of the concerns in the public comments about claims that become apparent only after trial begins.

3. Listing specific claims and keeping (3)(A) and (B) separate

More generally, members reaffirmed the conclusion that the listing of specific claims that must be raised before trial will assist courts and advocates, and should be retained. If it were writing on a clean slate, the Subcommittee felt there would be some merit in the suggestion that it should merge the list of claims in (3)(A) and (B) (defects in "instituting the prosecution" and in "the indictment or information"). However, the Subcommittee decided to retain the current structure. Throughout the consideration of the amendment, the Committee has tried to avoid renumbering to the extent possible to assist future researchers. Merging these two categories would make future research on some of the most heavily litigated issues under Rule 12 more difficult.

4. Distinguishing statutory deadlines

The Subcommittee agreed, however, with the suggestion of the NACDL that it would be useful to amend the Committee Note, adding a statement that the Rule is not intended to affect or supersede statutory provisions that establish the time to make specific motions, such as the Jury Selection and Service Act. The Subcommittee's proposal in discussed in Section III below.

C. Objections to standards for relief.

Defense commentators also raised a host of arguments concerning the standards for relief from the consequences of failing to raise an issue before trial. Most fundamentally, they challenged the requirement of "cause and prejudice" on several grounds. Some of the comments focused on the application of cause and prejudice in the trial court before conviction. They argued this standard is not supported by precedent and is unworkable and inappropriate for challenges prior to conviction. Two comments argued in favor of different standards when a claim is first raised at different procedural stages (in the district court, on appeal, and on collateral attack). Another comment argued that the meaning of "prejudice" was not clear, and using the term in Rule 12 would

lead to substantial uncertainty and litigation. This comment also argued that requiring a showing of prejudice would lead to wasteful substitution of defense counsel.

The Subcommittee recommends that no change be made in the standard of "cause and prejudice." As described more fully on pages 42-48 of the reporters' updated March 31 memorandum (infra), the Supreme Court's opinions stating that the standard under Rule 12 is cause and prejudice give no indication that this requirement is applicable only to claims raised for the first time after conviction. Moreover, we identified cases from six circuits supporting an assessment of prejudice as well as cause in considering relief for untimely claims raised before conviction. (However, as described more fully below, the Subcommittee recognized that district judges should have substantial leeway in determining how best to manage claims raised before trial, and it proposes making more explicit the district court's authority to extend or reset the deadline for motions before trial).

Moreover, though it might be desirable to have different standards for consideration of late-raised claims different procedural stages, moving to continuum of review standards would be a dramatic break from decades of precedent and would raise of host of difficult issues. "Good cause" under Rule 12 (defined as cause and prejudice) has been applied for decades to claims raised late in both the district and appellate courts. The Subcommittee does not advocate a dramatic break with current practice. Similarly, given the long history of applying the Rule 12 standards, the Subcommittee was unpersuaded that it would generate uncertainty and litigation to make explicit the requirement that "prejudice" must be shown by a party who failed to raise a claim or defense before trial as required by Rule 12(b)(3). For the same reason, there is no reason to believe that the proposal will lead to new and wasteful substitution of counsel.

Finally, the Subcommittee was not persuaded by the suggestion in one comment that all late-raised constitutional claims should be subject to review upon a showing of "prejudice only." This, again, would be a dramatic break with present practice.

D. Objection to deleting language in (b)(2)

The Federal Defenders expressed concern that the deletion of certain language in (b)(2) could be interpreted as removing the authority of courts to consider particular motions before trial that do not require a trial on the merits. As discussed in Section III below, the Subcommittee proposes that the language in question be restored and relocated in (b)(1).

E. Objection to language defining issues that can be determined without "trial on the merits"

One comment expressed concern that the amended rule would be interpreted so broadly that counsel would file unnecessary motions before trial and courts would later hold that other motions were untimely. The language to which this comment refers, however, is little changed by the proposed amendment. The current rule refers to motions "that *the court can determine without trial* of the general issue," and the proposed amendment refers to motions that "*can be determined without*" a trial on the merits. There is no reason to think that this change would lead to a different interpretation.

III. THE SUBCOMMITTEE'S RECOMMENDATIONS FOR CHANGES IN THE AMENDMENT AS PUBLISHED

As noted above, the Subcommittee concluded that it would be beneficial to (1) restore language that was omitted from (b)(2) in the published amendment, and (2) amend the proposed rule to make clarify the district court's authority to consider issues raised before trial, and (3) make it clear that the amendment does not supersede statutes that establish the time for filing specific motions. The Subcommittee also considered other changes proposed Professor Joseph Kimble, our Style Consultant.

A. Proposed addition to subdivision (a)

The Subcommittee proposes restoring language that the published amendment deleted from (b)(2) and relocating it to (b)(1) with slight stylistic revisions.

As published, the amendment deleted the following language now found in Rule 12(b)(2): "A party *may* raise by pretrial motion any defense, objection, or request that the court can determine without trial of the general issue." (Emphasis added). This language was deleted because of a concern that the permissive word "may" could be misleading. It implies that a party may *or may not* raise such a motion. But Rule 12 does not permit the parties to wait to raise certain motions that can be resolved without a trial on the merits. Indeed, it requires many motions to be made before trial. The Committee concluded that this potentially confusing language could be deleted because it was no longer necessary. When Rule 12 was adopted in 1944, it abolished pleas in abatement, demurrers, and other forms of pleading. The language in question stated that motions to dismiss were the new vehicle for raising these claims and defenses. Nearly 60 year later, motions to dismiss are well established, and thus the language was no longer considered necessary.

In their public comment and during the Subcommittee deliberations, the Federal Defenders expressed concern that courts might interpret the change as stripping the courts of authority to consider certain motions before trial, especially in the case of pretrial motions to dismiss for insufficient evidence on stipulated facts when the government did not object.

Although Rule 12 does not contain any analogue to the Civil Rule's motion for summary judgment and at least one circuit has categorically prohibited summary judgment dismissals,[3] several appellate courts have recognized that in narrow circumstances the court can rule on the legal sufficiency of the government's case before trial. A recent Fourth Circuit decision summarized the cases:

> Although there is no provision for summary judgment in the Federal Rules of Criminal Procedure, the district court's pretrial dismissal of the § 922(h) charges was procedurally appropriate under Rule 12(b)(2). That rule provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." Fed.R.Crim.P. 12(b)(2). *As circuit courts have almost uniformly concluded, a district court may consider a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts*. See United States v. Flores, 404 F.3d 320, 325 (5th Cir.2005); United States v. Yakou, 428 F.3d 241, 247 (D.C.Cir.2005) (citing United States v. Phillips, 367 F.3d 846, 855 & n. 25 (9th Cir.2004); United States v. DeLaurentis, 230 F.3d 659, 660–61 (3d Cir.2000); United States v. Alfonso, 143 F.3d 772, 776–77 (2d Cir.1998); United States v. Nabors, 45 F.3d 238, 240 (8th Cir.1995); United States v. Hall, 20 F.3d 1084, 1087–88 (10th Cir.1994); United States v. Levin, 973 F.2d 463, 470 (6th Cir.1992); United States v. Risk, 843 F.2d 1059, 1061 (7th Cir.1988)).

United States v. Weaver, 659 F.3d 353, 355 n. * (4th Cir. 2011) (emphasis added).

After discussion, the Subcommittee concluded that it would be desirable to restore the language in question to the text of the rule and to relocate it in (b)(1). This improves the rule by placing a general statement about the availability of pretrial motions in its proper place, and it also addresses the Federal Defender's concern that deletion of this language might have unintended effects.

Subsection (b)(1) (captioned "*In general*"), now begins abruptly, stating only "Rule 47 applies to a pretrial motion." The Subcommittee agreed that it would be an improvement to begin the Rule's treatment of pretrial motions with the more general statement "A party may by pretrial motion raise any defense, objection, or request that the court can determine without a trial on the merits." Although the language would still be permissive, it would be followed by subsections (b)(2) and (3), which clearly indicate that some motions may be made at any time and others must

---

[3] *United States v. Critzer*, 951 F.2d 306, 307 (11th Cir. 1992). See also *United States v. Nabors*, 45 F.3d 238 (8th Cir. 1995) (reversing dismissal of indictment for failure of proof, noting "There being no equivalent in criminal procedure to the motion for summary judgment that may be made in a civil case, see Fed.R.Civ.P. 56(c), the government has no duty to reveal all of its proof before trial.").

be raised before trial. The more modern phrase "trial on the merits," used later in the rule, was substituted for "trial of the general issue." No change in meaning was intended.

As revised, the rule would provide:

(b) **In General.** A party may, by pretrial motion, raise any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to all pretrial motions.

The Subcommittee's proposal does involve relocating the provision in question from (b)(2) to (b)(1). In general, the Committee has attempted, when possible, to avoid renumbering in order to facilitate research, especially when the provision in question has been the subject of extensive litigation. In this case, however, the change in placement seems warranted, particularly in comparison to the alternatives (deletion of the language, or merely a reference in the Committee Note).

The Subcommittee also proposes the following addition to the Committee Note:

Subdivision (b)(1). The language formerly in (b)(2), which provided that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

B. Proposed addition to subdivision (c)

The Subcommittee also recommends new language that would explicitly state the district court's authority to extend or reset the deadline for pretrial motions at any time before trial. In the Subcommittee's view, it is critical that the changes in Rule 12 not have the unintended effect of restricting the ability of district courts to deal efficiently with claims and defenses before trial. The present rule implicitly recognizes that the district court may extend the time to consider claims not raised by the deadline for pretrial motions. Rule 12(e) now states that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) *or by any extension the court provides*." (Emphasis added.) The Subcommittee concluded that it would be beneficial to explicitly state the court's authority to extend or reset the deadline, and to make it clear that a motion made before the new deadline would be timely.

The Subcommittee proposes that a new subparagraph (c)(2) be added:

(c) ~~Motion Deadline.~~ **Deadline for a Pretrial Motion; Consequences of Not Making a**

Timely Motion.

(1) *Setting the Deadline.* The court may, at the arraignment or as soon afterward as practicable, set the deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set a deadline, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of an Untimely Motion Under Rule 12(b)(3).* If a party does not meet the deadline [set under (c)(1) or (2)] ~~= or any extension the court provides =~~ for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52[(b)] does not apply, but a court may consider the defense, objection, or request if:

(A) the party shows cause and prejudice; or

(B) the defense or objection is failure to state an offense or double jeopardy, and the party shows prejudice [only].

As published, (c)(2)–now renumbered (c)(3)–drew from present Rule 12(e) and referred only to a date that had been extended, but not one that the court had reset. The Subcommittee's proposal, however, recognizes that the district court may extend or reset the deadline (which might, for example, shorten the deadline). The Subcommittee concluded that courts and litigants might be confused if the dashed phrase in (c)(3) referred only to deadlines that had been extended, and not those that had been reset. Accordingly, the Subcommittee proposes striking the phrase currently set off by dashes. To make it completely clear that all references in (b)(1), (2), and (3) refer to the same deadline, the references to "a" deadline were changed to "the" deadline. Thus in (1) the court sets "the deadline," in (2) the court may extend or reset "the deadline," and (3) states that a motion is untimely if not made before "the deadline [set under (c)(1) or (2)]." The Subcommittee bracketed "set under (c)(1) or (2)" to highlight the question whether the language is sufficiently clear without the cross reference. Professor Kimble thinks the cross reference is unnecessary, and recommends its deletion.

The Subcommittee also proposes that the Committee Note be revised to reflect the addition of the new paragraph in the text:

> As amended, subdivision (c) contains ~~two~~ three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subsection (e) of the present rule contains the language "or by any extension the court provides," which anticipates that a district court has the discretion to extend the deadline for pretrial motions. The new paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's statement of it to a more logical place: after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. New paragraph (c)~~(2)~~(3) governs review of untimely claims, which were previously addressed in Rule 12(e).

C. Proposed changes to the language in subdivision ©

In his review of the proposed rule, Professor Kimble raised two question concerning the language of proposed subdivision (c)(3).

1. Cross reference to Rule 52

First, Professor Kimble noted that the rule as published stated that if a motion is untimely, "Rule 52 does not apply, but a court may consider the defense, objection, or request" if the standards in A or B are met. He asked whether the Committee intended to make inapplicable all of Rule 52, or only Rule 52(b) (which provides that a "plain error" must be shown if an error was not brought to the district court's attention).

In general, the cases addressing the question whether Rule 12 or Rule 52 govern when claims are raised belatedly have focused on Rule 52(b), not (a), and Subcommittee members did not identify any problems that would be posed by restricting the reference to Rule 52(b).

The Subcommittee and reporters provisionally agreed that the reference could be limited to Rule 52(b), but they would appreciate hearing the full Committee's view on this issue.

2. Reference to "prejudice only"

Second, Professor Kimble objected to the world "only" in proposed subparagraph (c)(3)(B) (shown in brackets on line 7 below):

(3) ***Consequences of an Untimely Motion Under Rule 12(b)(3).*** If a party does not meet the deadline [set under (c)(1) or (2)] ~~= or any extension the court provides =~~ for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52(b) does not apply, but a court may consider the defense, objection, or request if:

(A) the party shows cause and prejudice; or

(B) the defense or objection is failure to state an offense or double jeopardy, and the party shows prejudice [only].

The Subcommittee understood that the addition of "only" was intended to counter the likelihood that courts might add requirements other than prejudice to the showing required for untimely double jeopardy and failure-to-state-an-offense claims. There has been some confusion and disagreement among the appellate courts on the question what showing is required. For example, some decisions have required a showing of both good cause and plain error for late raised double jeopardy claims.

However, the Subcommittee also acknowledged Professor Kimble's point that as a literal

matter the standards under (A) and (B) ("cause and prejudice" versus "prejudice") are clear: in contrast to (A), (B) requires only prejudice even without the word "only." Moreover, Professor Kimble argued that adding "only" here sets a dangerous precedent: it might suggest that if other provisions in the rules setting standards or requirements do not add "only," the courts may add additional requirements. Professor Kimble suggested that this would be such a serious problem he would likely seek the views of the Style Subcommittee of the Standing Committee if the Advisory Committee does not agree to delete "only."

The Subcommittee requests discussion on the question whether to delete the word "only."

D. Proposed addition to Committee Note

The Subcommittee also proposes an addition to the Committee Note addressing the concern raised by the National Association of Criminal Defense Lawyers that:

> Listing only the constitutional right to a speedy trial might be interpreted to suggest that statutory motions need not be filed prior to trial. The Rule, or at least Note, should make clear that the amended Rule "will supersede that statute [the Speedy Trial Act] or any other that purports to set a specific pretrial motion deadline, such as 18 U.S.C. § 3237(b) (certain venue motions) or 28 U.S.C. § 1867(b)(jury selection challenges), by virtue of the Rules Enabling Act.. . ." (NACDL Public Comment at 6).

The Subcommittee proposes following addition to the Committee Note:

> The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

E. The need for republication

Although the determination whether republication is necessary will be made by the Standing Committee, it will wish to know the Advisory Committee's views. Accordingly, it would be useful for the Advisory Committee to turn to this issue once it has determined what changes (if any) it approves in the text and Committee Note as published.

The Subcommittee has proposed the following changes (including changes in the Committee Note accompanying changes in the text):

- restoring language presently in Rule 12(b)(2) and relocating it to (b)(1);

- making explicit in new (c)(2) the district court's authority to extend or reset the deadline for pretrial motions (which is recognized implicitly now in Rule 12(e));

- accepting two of the Style Consultant's recommendations regarding the language of 12©; and

- amending the Committee Note to state explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act.

Subcommittee members doubted that republication would be necessary or beneficial. Although the published rule certainly generated controversy and critical commentary from several defense groups, each of the changes after publication would seek to clarify the proposal without changing it in any significant way.

Restoring the omitted language from (b)(2) would simply make clear that the amendment worked no unintended change. This is consistent with the intention stated in the published Committee Note describing the deletion of the language. Moreover, the change responds to a concern raised during the public comment period.

Subcommittee members viewed the addition of new (c)(2) as a significant improvement, but nonetheless it is doubtful that it warrants republication. Subcommittee members expressed the view that it was extremely important for district judges to have sufficient flexibility to deal with untimely pretrial motion before trial, and republication would be advisable if the addition to the text of new (c)(2) were deemed to constitute a major change in the proposed amendment. However, subdivision (e) of the present rule contains the language "or by any extension the court provides," and thus anticipates that a district court has the discretion to extend the deadline for pretrial motions. Accordingly, in the Subcommittee's view the proposed amendment merely makes explicit the authority that the district courts now possess, and integrates this authority with the overall revision of Rule 12.

Similarly, the Subcommittee's proposed addition to the Committee note and the changes recommended by the Style Consultant respond to concerns about perceived ambiguities in the rule as published. In the Subcommittee's view, they are all intended to state more clearly the intent of the original proposal, and they are responsive to concerns raised in the public comment period.

THIS PAGE INTENTIONALLY BLANK

TAB 2B

THIS PAGE INTENTIONALLY BLANK

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** A party may, by pretrial motion, raise any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) ~~***Motions That May Be Made Before Trial.*** A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue.~~***Motions That May Be Made at Any Time.*** A motion that the court lacks jurisdiction may be made at any time while the case is pending.

(3) ***Motions That Must Be Made Before Trial.*** The following defenses, objections, and requests must be raised by pretrial motion ~~before trial~~ if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) ~~a motion alleging~~ a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) double jeopardy;

(v) the statute of limitations;

(vi) selective or vindictive prosecution; and

(vii) an error in the grand-jury proceeding or preliminary hearing;

(B) ~~a motion alleging~~ a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

~~— but at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or to state an offense~~;

(C) ~~a motion to~~ suppression of evidence;

(D) ~~a Rule 14 motion to~~ severance of charges or defendants under Rule 14; and

(E) ~~a Rule 16 motion for~~ discovery under Rule 16.

(4) ***Notice of the Government's Intent to Use Evidence.***

(A) *At the Government's Discretion*. At the arraignment or as soon afterward as practicable, the government may notify the defendant of its intent to use specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

(B) *At the Defendant's Request*. At the arraignment or as soon afterward as practicable, the defendant may, in order to have an opportunity to move to suppress evidence under Rule 12(b)(3)(C), request notice of the government's intent to use (in its evidence-in-chief at trial) any evidence that the defendant may be entitled to discover under Rule 16.

(c) ~~Motion Deadline.~~ Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) *Setting the Deadline.* The court may, at the arraignment or as soon afterward as practicable, set the deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set a deadline, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of an Untimely Motion Under Rule 12(b)(3).* If a party does not meet the deadline [set under (c)(1) or (2)] ~~– or any extension the court provides –~~ for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52(b) does not apply, but a court may consider the defense, objection, or request if:

(A) the party shows cause and prejudice; or

(B) the defense or objection is failure to state an offense or double jeopardy, and the party shows prejudice [only].

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

(e) [Reserved] ~~**Waiver of a Defense, Objection, or Request.** A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver~~

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

Rule 12(b)(2). As revised, subdivision (b)(2) states that lack of jurisdiction may be raised at any time the case is pending. This provision was relocated from its previous placement at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.

Rule 12(b)(3). The amendment clarifies which motions must be raised before trial.

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to 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). Cf. 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked.

Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any time while the case is pending to hear a claim that the "indictment or information fails . . . to state an offense." This specific charging error was previously considered fatal whenever raised and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned any jurisdictional justification for the exception in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar as it held that a defective indictment deprives a court of jurisdiction").

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3). The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

As amended, subdivision (c) contains ~~two~~ three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the

present rule contains the language "or by any extension the court provides," which anticipates that a district court has the discretion to extend the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place - after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. New paragraph (c)(3) governs review of untimely claims, which were previously addressed in Rule 12(e).

Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

The standard for review of untimely claims under new paragraph 12(c)(3) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(3)(A), which requires that the party seeking relief show "cause and prejudice" for failure to raise a claim by the deadline. Although former Rule 12(e) referred to "good cause," no change in meaning is intended. The Supreme Court and lower federal courts interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963). Each concept – "cause" and "prejudice" – is well-developed in case law applying Rule 12. The amended rule reflects the judicial construction of Rule 12(e).

Subparagraph (c)(3)(B) provides a different standard for two specific claims: failure of the charging document to state an offense and violations of double jeopardy. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, subparagraph (c)(3)(B) provides

that the court can consider these claims if the party "shows prejudice [alone]." Unlike plain error review under Rule 52(b), the new standard under Rule (12)(c)(3)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing. For example, in some cases in which the charging document omitted an element of the offense the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Rule 12(e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(3).

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES

CHANGES MADE AFTER PUBLICATION

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to rule on pretrial motions. New subparagraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was restricted to Rule 52(b). And in (c)(3)(B), "only" was deleted from the phrase "prejudice only" because it was superfluous. Finally, the Committee Note was amended to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

PUBLIC COMMENTS

Assistant Attorney General Lanny Breuer (11-CR-003) supported the amendment because it requires claims of failure to state an offense to be raised before trial; provides clarity

by listing specific claims and defenses that must be raised before trial; includes language stating that a motion must be made before trial only when the basis for the motion is "reasonably available"; eliminates the confusing term "waiver" and clarifies the good cause standard, specifying that "cause and prejudice" must generally be shown; and provides a more lenient standard for the review of objections based upon double jeopardy and failure to state a claim.

The Federal Magistrate Judges Association (FMJA) (11-CR-004) endorsed the amendment to clarify when certain motions must be made and the consequences of failure to raise the issues in a timely manner.

The New York Council of Defense Lawyers (NYCDL) (11-CR-007) noted that the amendment would bring "valuable clarity to many facets of Rule 12," but urged significant changes before adoption. NYCDL (1) objected to requiring that defendants raise before trial claims alleging double jeopardy, statute of limitations, multiplicity, duplicity, and other constitutional claims; and (2) argued that the "cause and prejudice" standard for claims presented for the first time in the district court and on appeal "is unduly harsh and prejudicial to defendants."

The Federal Public Defenders (FPD) (11-CR-008) opposed the amendment on the ground that it would create uncertainty regarding what motions can be decided before trial and "potentially alter existing settled law" in this regard; increase litigation; "[c]reate an impossibly high and confusing standard for defendants"; "[u]nduly circumscribe traditional and necessary judicial discretion in the handling of courtroom proceedings"; and "[p]otentially" violate their clients' Fifth and Sixth Amendment rights "by allowing grand jury indictments to be broadened through the use of jury instructions."

The National Association of Criminal Defense Lawyers (NACDL) (11-CR-010) praised certain aspects of the amendment, but urged that it should not be adopted without multiple significant changes: deleting the list of claims and defenses that must be raised before trial; clarifying that the rule does not affect statutory time limits for filing certain motions;

retaining failure to state an offense as an claim that can be raised at any time; and altering the showing required for untimely motions, which should vary depending on the procedural stage at which the motion is first made.

TAB 2C

THIS PAGE INTENTIONALLY BLANK

To: **Rule 12 Subcommittee**

From: **Sara Beale and Nancy King**

Re: **Discussion of Comments Received on Rule 12**

Date: **March 31, 2012 (updated with new cases August 24, 2012)**

This memo summarizes and discusses the comments received on the proposed amendments to Rule 12. Attachment A is the proposed change to the Rule with accompanying Committee Note; Attachment B is the relevant portion of the Court's opinion in *Cotton v. United States*; Attachment C contains the comments received on the Rule, including the comment in support from the Department of Justice, the comment in support from the Federal Magistrate Judges Association, and three letters that oppose various aspects of the proposed amendment from the New York Council of Defense Lawyers, The Federal Defenders, and NACDL. The proposal generated neither requests to testify nor comments from the bench other than the letter in support from FMJA.

At this stage, the Advisory Committee has several options. It can reject the critical comments of the Federal Defenders, NACDL, and the New York Council of Defense Lawyers and recommend that the Standing Committee transmit the amendment to the Judicial Conference as published. Alternatively, the Advisory Committee may make minor changes, make more fundamental changes (which might require republication), or may withdraw the amendment.

In our view, the most important issues raised by the comments are the following:

(1) Whether the rule should specify that cause *and prejudice* must be shown to obtain relief for almost all late-raised claims. The Committee has taken the view that bringing the language of the rule into conformity with the Supreme Court's decisions interpreting Rule 12 would be beneficial. As expected, the defense bar strongly opposes the change. In our view, the amendment need not stand or fall on this issue. It would be possible to revise the amendment to retain the existing "good cause" language but make other beneficial changes, such as clarifying that only claims that are "reasonably available" must be raised before trial and enumerating some of the common claims that must be raised before trial.

(2) A closely related question is whether the cause and prejudice standard should be applicable in the trial court, even in instances in which a claim is raised before (or during) trial, though after the deadline set by the court. The defense bar argues that this would change the practice in the district courts. The defense comments suggest that courts

interpret the current "good cause" standard differently when issues are raised in the first instance in the district courts. Concerns have also been expressed that the proposed amendment unwisely deprives the district courts of needed flexibility. It would be possible to attempt to draft an amended Rule that retains "good cause" as the standard in the district court only, but that would raise a host of questions we note on page 53.

(3) Whether to require claims that the indictment fails to state an offense (FTSO) to be brought prior to trial, and to restrict late-raised FTSO claims. As a matter of history, the Department of Justice proposal to subject FTSO claims to the general timing standards of Rule 12 was the reason the Committee first considered making changes in the rule. But this aspect of the rule is controversial, and it is not essential to the other fundamental changes now under consideration.

(4) Whether to make changes to the enumerated list of claims that must be raised before trial. The critical comments have focused principally on the treatment of double jeopardy and the statute of limitations. These issues were among the most difficult confronted by the Advisory Committee.

Discussion of Specific Objections – Outline

I. Objections to adding claims of failure to state an offense to the list that must be raised before trial

A. The Proposed amendment would violate the Rules Enabling Act
B. The amendment would lead to violations of the Fifth and Sixth Amendment rights
C. The amendment would prejudge Supreme Court resolution of open questions
D. The amendment is not supported by *Cotton*
E. The amendment is not justified by the risk of sandbagging

II. Objections to the specification of other claims that must be raised before trial

A. Double jeopardy and statute of limitations claims should not be required before trial
B. Multiplicity and duplicity claims should not be required before trial
C. Retaining the first two categories (b)(3) as separate categories is a bad idea
D. Listing claims included in 12(b)(3)(A) and (B) is a bad idea

III. Objections to standards for relief

A. Applying "prejudice" to FTSO claims will generate more litigation
B. Requiring a showing of "cause and prejudice" before conviction
   1. Is not supported by precedent
   2. Is unworkable and inappropriate for challenges prior to conviction
   3. Will cause wasteful substitution of conflicted counsel
C. Prejudice without cause, and not plain error, should be the standard for all constitutional claims
D. Different standards should apply to claims first raised in the district court, first raised on appeal, and first raised on collateral review

IV. Objections to deleting language in (b)(2)

V. Objections to language defining issues that can be determined without trial on the merits

I. Objections to adding claims of failure to state an offense to the list that must be raised before trial

The issue that prompted the initial proposal to amend Rule 12 was whether the Rule should be amended so that a challenge that a charge fails to state an offense (FTSO) no longer retains its special status as a challenge that can be raised anytime a case is pending, even for the first time on appeal. Two of the comments received–from NACDL and from the Federal Defenders–oppose the Committee's decision to answer yes to this question.

A. The proposed amendment would violate the rules enabling act

An amendment requiring a showing of "prejudice" as a condition for relief for late challenges based on failure to state an offense decides a constitutional question, not one of "practice and procedure" under 28 U.S.C. § 2072(a). (FD at 12-13; cf. NACDL at 8).

The Federal Defenders argue that jury instructions broadening the basis for conviction beyond the terms of an indictment violate the Fifth Amendment Grand Jury Clause; accordingly, to the degree the proposed amendment would preclude a defendant from challenging the jury instructions on constitutional grounds, the amendment would be substantive and outside the authority prescribed by the Rules Enabling Act (FD at 12-13).

RESPONSE:

The amendment does not violate the Rules Enabling Act. The Defenders' argument misses the mark for several reasons.

First, as explained in Section B, below, it is doubtful that the proposed amendment would affect a defendant's ability to challenge jury instructions.

Even if the amended Rule were interpreted as barring a defendant who fails to object to a defective charge from objecting to a trial judge's efforts to cure the defect with appropriate jury instructions, rules such as Rules 12, 12.1, 12.2, and 12.3-which specify the time or manner for raising constitutional claims as well as defenses such as alibi or insanity–have been understood to be procedural, not substantive, rules. Similarly, rules like Rule 12, 30(b), and 52–which spell out the consequences of those limitations for relief–are also procedural. If demanding prejudice, cause, or some other showing as a condition for relief from an untimely claim would violate Section 2072(a), then Rules 12 and 52 violate that statute as well, for they limit relief for a wide variety of constitutional claims.

NACDL makes a related argument (at 6-8) that the proposed amendment decides a substantive constitutional question-namely whether the failure of an indictment to state an element of the offense charged is a fundamental "structural" error that may be raised at any time and remedied regardless of prejudice. NACDL argues that requiring proof of prejudice if a defendant has not timely raised the omission of an element would be inconsistent with treating

the omission as a structural error, and would constitute a substantive rather than merely procedural rule.

This argument is difficult to reconcile with the current rules. Rule 12(b)(3)(A) presently requires that "a motion alleging a defect in instituting the prosecution" be raised before trial. This language encompasses, inter alia, discrimination in the selection of the grand jury, which the Supreme Court has held to be a "structural error." *Johnson v. United States,* 520 U.S. 461, 468-69 (1997) (listing, among examples of structural error, *Vasquez v. Hillery*, 474 U.S. 254 (1986) (unlawful exclusion of grand jurors of defendant's race)). In *Davis v. United States,* 411 U.S. 233, 237-39 (1973), the Court stated "Rule 12(b)(2) precludes untimely challenges to grand jury arrays, even when such challenges are on constitutional grounds," and rejected the petitioners argument that the Rule did not apply to "fundamental constitutional right[s]." The proposed amendment would apply the timing requirement now applicable to claims of discrimination in the selection of the grand jury to claims that the indictment failed to state an offense. That Rule 12 operates to limit relief for fundamental constitutional rights does not make it substantive rather than procedural.[1]

As Section C, below, explains, the proposed amendment would not intrude upon the Supreme Court's authority to return to the question left open in *United States v. Resendiz-Ponce*, 549 U.S. 102, 103-04 (2007) (not reaching question whether omission of an element in a criminal indictment can constitute harmless error when raised before trial). The proposed amendment would impose a prejudice requirement for *untimely* claims that an indictment failed to state an offense, and the Court itself has already reviewed such claims with an even more limiting standard that includes a prejudice component, plain error under Rule 52(b). See the discussion of *Cotton,* in Section D, below. An excerpt from *Cotton* is included as Attachment B. See also the court of appeals cases collected in Section III. A., below.

In sum, *Davis* and *Cotton* suggest that the Rules Enabling Act is not violated by Federal Rules that designate timing requirements for raising fundamental constitutional objections and attach consequences to the failure to meet those timing requirements.[2] The Defenders' letters do not cite any case that concludes otherwise.

[1] The same can be said about Rule 52(b). For example, the due process violation that results from a breach of a plea agreement may be remedied on appeal without an assessment of prejudice, but in *Puckett v. United States*, 556 U.S. 129 (2009), the Court construed Rule 52(b) to limit relief for *untimely* claims of breach to those cases in which the *Olano* test (including prejudice) can be met. Nowhere in *Puckett* did the Court suggest that by imposing a more rigorous standard of review for untimely claims than for timely claims Rule 52(b) ceased being a procedural rule and became a substantive one. Instead, the Court began its analysis with the statement: "No procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Id*. at 134 (quoting *Yakus v. United States*, 321 U.S. 414, 444 (1944)) (emphasis added).

[2] *See also Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co*., 130 S.Ct. 1431, 1442 (2010) (noting test for Rules Enabling Act "is not whether the rule affects a litigant's substantive rights," because "most procedural rules do;" a rule is valid if it regulates "'the manner and the means" by which the litigants' rights are "enforced,'" but not if it "alters 'the rules of decision by which [the] court will adjudicate [those] rights'").

B. Would lead to violations of the Fifth and Sixth Amendment rights

"To the extent that the proposed modification of Rule 12 would preclude a defendant from challenging unconstitutional jury instructions at trial," -- that is, instructions that "broaden the basis for conviction beyond the terms of the indictment" or that "are materially different from the terms of the indictment issued by the grand jury" – the amendment would lead to violations of the defendant's Fifth Amendment right to grand jury review and Sixth Amendment right to be informed of the nature of the charge. (FD 11-13)

Under the existing rule, a claim that the charge fails to state an offense must be considered no matter when raised, but the proposed amendment would prevent a judge from considering a claim raised after the date for pretrial motions to be filed unless "prejudice" from the defect is shown. The Federal Defenders suggest that the amended rule might prohibit a defendant from raising constitutional challenges to jury instructions at trial, by claiming, for example, that the instructions constructively amended the indictment or deprived him of notice.

RESPONSE:

The proposed amendment speaks only to the consideration of objections to the indictment or information. Neither the proposed amendment nor the Note addresses a defendant's ability to object to jury instructions on the ground that those instructions constructively amend the indictment in violation of the Fifth Amendment, or change the theory of prosecution or otherwise surprise the defense, depriving the defendant of the notice guaranteed by the Sixth Amendment.

During deliberations on the proposed amendment, Committee members have debated how courts should resolve these issues concerning jury instructions that include an element that was omitted from the charge. The government has argued that the failure to object that an indictment was incomplete should operate as a waiver not only of the objection to the indictment but also of any later objection to a trial judge's attempt to cure the omission by providing proper jury instructions including the omitted element. The government has argued that by failing to raise the Fifth Amendment problem before trial when it could be easily addressed by obtaining a superseding indictment, a defendant waives his chance to complain later about what was essentially the same problem–lack of grand jury review of one or more essential elements. The government acknowledged that that the jury instructions would be limited by the defendant's right to have fair notice of the charges against him, but it argued that the requisite notice may be provided by other means. Defenders have argued that the failure to object to an omission from the indictment should not operate as a waiver of any separate constitutional claim based upon instructions to the jury. They maintain that regardless of the failure of a defendant to raise an

The Court's decisions suggest that the standard for reviewing *untimely* claims is procedural, even if one concludes that the standard of review for an alleged violation when raised on time is part-and-parcel of a constitutional right, as do some authorities collected in 7 Wayne R. LaFave, et al., Criminal Procedure § 27.6(c), at note 66 (3d ed. 2007 & Annual Supp.) (hereinafter LaFave et al, Crim. Pro.).

indictment's defect, an objection to the instructions alleging constructive amendment or lack of notice should remain available. To the extent that Rule 12 would preclude a defendant from raising these claims, they argued, the Rule would lead to violations of the Fifth and Sixth Amendments.

The Committee concluded that whether a judge should grant a constitutional challenge to jury instructions in a case in which a defendant failed to object to a defective indictment will depend on the circumstances. The amendment does not purport to preclude such challenges, nor is it intended to limit in any way the appropriate resolution of these separate questions.

C. The amendment would prejudge Supreme Court resolution of open questions

"A showing of prejudice is one way to demonstrate [an] effect [on substantial rights under Rule 52(b)], but structural error is another . . . . Whether prejudice need be shown from a felony prosecution without a valid indictment, or rather some other form of effect on substantial rights is the constitutional question that the Supreme Court was going to decide in Resendiz-Ponce, and presumably will soon grant certiorari in another case to decide. The Rules Committee should not presume to decide that constitutional question now . . . ." (NACDL, 8)

NACDL also suggests that the amendment improperly takes a position on the question whether the omission of an element is a "structural" error.

RESPONSE:

The proposed amendment is not intended to – and does not – resolve two closely related questions left open by the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002): whether a showing of prejudice (or lack thereof) is required when a court reviews a *timely* FTSO claim, either because it is a "structural" error or for some other reason; and whether or not "structural" error that requires relief without regard to harmlessness when timely raised necessarily "demonstrate[s]" an effect on "substantial rights."

Although most constitutional claims are subject to harmless error analysis under Rule 52(a), the Supreme Court has recognized that automatic relief is required for a small class of errors. Among the errors requiring relief without a showing of prejudice are "structural" errors. A circuit split developed after the Supreme Court's decision in *Cotton* on the question whether the failure of an indictment to charge an offense can constitute harmless error. Some courts continued to follow the traditional rule of treating such errors as requiring automatic relief, but others applied harmless error analysis. The Supreme Court granted certiorari but then did not reach the question whether harmless error analysis is applicable to FTSO claims in *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007).

The proposed amendment does not speak to this question, because it addresses the special issues raised when FTSO claims that have *not* been timely raised, rather than the question of the appropriate standard of relief for timely-raised FTSO claims.

NACDL's letter also objects that the amendment takes a position on a different open question about the construction of Rule 52(b): whether or not "structural" error that requires relief without regard to harmlessness when timely raised also "demonstrate[s]" an effect on "substantial rights," i.e., whether a structural error necessarily satisfies the third, prejudice prong of *Olano*. Most recently, the Court ducked this issue in *Puckett v. United States*, and its explanation there is worth quoting in full in the margin.[3] We believe, however, that even if the

[3] *Puckett v. United States*, 556 U.S. 129, 140-41 (2009) (footnote and parallel citations omitted; emphasis added):

Court does decide that *timely* and valid FTSO claims require automatic relief,[4] the proposed amendment to Rule 12 that would require a showing of prejudice before granting relief for *untimely* FTSO claims does not prejudge any "constitutional question" that the Supreme Court alone must decide.

First, as discussed in Section I.A., above, the scope of relief for *untimely* claims has never been considered part of the substantive constitutional right, but is instead a procedural rule that may be adjusted through the rulemaking process. Second, in *Cotton* the Court has already applied a standard for relief to late-raised FTSO claims that is *more* restrictive than the proposed standard of prejudice alone. See discussion in Section D below. It is difficult to understand why a court rule mandating a *less* restrictive standard than the one the Court has already applied would be a problem. Third, as discussed in Part IV A., below, a number of lower courts, even those that grant automatic relief for timely-raised FTSO claims, have held after *Neder v. United States,* 527 U.S. 1 (1999) and *Cotton* that relief for *untimely* FTSO claims is subject to the prejudice inquiry under Rule 52(b), as are untimely constructive amendment claims, which raise the same Fifth and Sixth Amendment concerns as FTSO claims and are exempt from harmless error review when timely raised.

> This Court has several times declined to resolve whether "structural" errors—those that affect "the framework within which the trial proceeds," *Arizona v. Fulminante,* 499 U.S. 279, 310 (1991)—automatically satisfy the third prong of the plain-error test. *Olano, supra,* at 735; *Johnson,* 520 U.S., at 469; *United States v. Cotton,* 535 U.S. 625, 632 (2002). Once again we need not answer that question, because breach of a plea deal is not a "structural" error as we have used that term. We have never described it as such, see *Johnson, supra,* at 468–469, 117 S.Ct. 1544, and it shares no common features with errors we *have* held structural. A plea breach does not "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," *Neder v. United States,* 527 U.S. 1, 9 (1999) (emphasis deleted); it does not "defy analysis by 'harmless-error' standards" by affecting the entire adjudicatory framework, *Fulminante, supra,* at 309; and the "difficulty of assessing the effect of the error," *United States v. Gonzalez–Lopez,* 548 U.S. 140, 149, n. 4 (2006), is no greater with respect to plea breaches at sentencing than with respect to other procedural errors at sentencing, which are routinely subject to harmlessness review. . . .
>
> *Santobello* did hold that automatic reversal is warranted when objection to the Government's breach of a plea agreement has been preserved, but that holding rested not upon the premise that plea-breach errors are (like "structural" errors) somehow not *susceptible,* or not *amenable,* to review for harmlessness, but rather upon a policy interest in establishing the trust between defendants and prosecutors that is necessary to sustain plea bargaining—an "essential" and "highly desirable" part of the criminal process, 404 U.S. , at 261–262, 92 S.Ct. 495. But the rule of contemporaneous objection is equally essential and desirable, and when the two collide we see no need to relieve the defendant of his usual burden of showing prejudice. See *Olano,* 507 U.S., at 734.

[4] NACDL's objection assumes that the Court will resolve the harmless error question raised in *Resendiz-Ponce* to preserve automatic reversal for timely FTSO claims, and that the Court will do so because it decides that this particular indictment defect is "structural." In *Puckett,* the Court characterized "structural" errors as those that are "somehow not *susceptible*, or not *amenable*, to review for harmlessness," that "necessarily render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence," or that "defy analysis by 'harmless-error' standards" by affecting the entire adjudicatory framework." *See Puckett* (quoted in note 3). Because the Court refused in *Neder* to classify the failure to present an element to the *trial* jury as "structural," it seems doubtful that the Court will decide that a similar failure to present an element to the *grand* jury is "structural."

D. The amendment is not supported by *Cotton*

"[N]othing in Cotton *explains or justifies the proposed change in the Rule." (NACDL 6-7)*

RESPONSE

Cotton itself does not *compel* a change in the Rule. But *Cotton*, combined with *Johnson* and *Neder*, does make the change possible.

Cotton rejected the argument that a court is deprived of jurisdiction to impose judgment for an offense when the indictment fails to state an essential element of that offense. *Cotton* applied the plain error standard to what amounted, in effect, to a constructive amendment of the indictment (the addition of an *Apprendi* element) for sentencing purposes.[5]

The Defenders argue that because the facts in *Cotton* involved only the failure to allege drug amount, a fact required under *Apprendi* for sentencing, and because Cotton's indictment did state a federal offense without that element, *Cotton* does not speak to indictments that charge no offense at all. But the language of the Court is unmistakable in reaching any indictment that "does not charge a crime against the United States." A longer excerpt from the opinion is appended to this memo (see attachment B), but in the relevant paragraphs, the Court stated:

> Post-*Bain* cases confirm that defects in an indictment do not deprive a court of its power to adjudicate a case. In *Lamar v. United States,* 240 U.S. 60 (1916), the Court rejected the claim that "the court had no jurisdiction because the indictment does not charge a crime against the United States." *Id.,* at 64, 36 S.Ct. 255. Justice Holmes explained that a district court "has jurisdiction of all crimes cognizable under the authority of the United States ... [and][t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Id.,* at 65.[6] Similarly, *United States v. Williams,* 341 U.S. 58, 66 (1951), held that a ruling "that the

[5] *See also* notes 42-45, collecting lower courts that have applied plain error when indictments omitted essential elements, citing *Cotton*.

[6] The Court in *Williams* also stated:

> That statute has led federal courts to uphold charges of perjury despite arguments that the federal court at the trial affected by the perjury could not enter a valid judgment due to lack of diversity jurisdiction, or due to the unconstitutionality of the statute out of which the perjury proceedings arose.
>
> Where a federal court has power, as here, to proceed to a determination on the merits, that is jurisdiction of the proceedings. The District Court has such jurisdiction. Though the trial court or an appellate court may conclude that the statute is wholly unconstitutional, or that the facts stated in the indictment do not constitute a crime or are not proven, it has proceeded with jurisdiction and false testimony before it under oath is perjury.

United States v. Williams, 341 U.S. 58, 68-69 (1951) (footnotes omitted).

indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment."

Thus, this Court some time ago departed from *Bain's* view that indictment defects are "jurisdictional." *Bain* has been cited in later cases such as *Stirone v. United States*, 361 U.S. 212 (1960), and *Russell v. United States*, 369 U.S. 749 (1962), for the proposition that "an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form," *id.*, at 770 (citing *Bain, supra*). But in each of these cases proper objection had been made in the District Court to the sufficiency of the indictment. We need not retreat from this settled proposition of law decided in *Bain* to say that the analysis of that issue in terms of "jurisdiction" was mistaken in the light of later cases such as *Lamar* and *Williams*. Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled.

United States v. Cotton, 535 U.S. 625, 630-31 (2002) (parallel citations omitted).

Rule 12's special treatment of the failure to state an offense was traditionally based, at least in part, on the view that this defect deprived the court of jurisdiction.[7] If *Cotton* had held that a court has no jurisdiction to sentence a defendant for an offense greater than what was charged in the indictment, the proposed amendment would have been dead on arrival.

The Court's decision in *Cotton* allowed the Committee to consider the policy question "whether the failure of an indictment to charge an offense is so fundamental . . . that it *should* be allowed to be raised at any time." (NACDL at 7) (emphasis added). The proposed amendment is premised on the view that the answer to that question is "No." A majority of the Committee concluded that there is no persuasive basis for exempting this defect in the charge – the failure of the indictment or information to state an offense – from the group of constitutional errors that are subject under Rules 12 and 52 to a narrower scope of relief when raised late.

Consider, for example, claims of vindictive prosecution and claims of preindictment delay. Both of these errors violate a defendant's rights under the Due Process Clause. Despite the fact that these particular constitutional protections are so fundamental that – unlike the Grand Jury Clause – they have been held to bind the states as well as the federal government, each is nonetheless subject to the timing rules prescribed by Rule 12.[8] Similarly, plain error review

[7] See LaFave et al., Crim. Pro. §19.2.

[8] *United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007) ("Brown never moved to dismiss the indictment based on delay. His argument on appeal is therefore waived."); *United States v. Cote*, 544 F.3d 88, 104 n.5 (2d Cir. 2008) (Sotomayor, J.,) (noting that "Under Federal Rule of Criminal Procedure 12(b)(1), a defense based on "defects in the institution of the prosecution" must be raised before trial."). *Cote* in turn cited *United States v. Taylor*, 562 F.2d 1345, 1355 (2d Cir. 1977) (finding defense of selective prosecution waived because it was not raised prior to trial); *United States v. Dufresne*, 58 Fed.Appx. 890, 895 (3d Cir. 2003) (vindictive prosecution claim properly raised in a pretrial motion to dismiss under Rule 12); *United States v. Ballard*, 779 F.2d 287, 294 (5th Cir 1986) (claim of vindictive prosecution untimely under Rule 12 when not raised prior to trial); and *Jarrett v. United States* 822 F.2d 1438, 1442 (7th Cir. 1987) (Section 2255 case, stating "Rule 12(b) requires that motions for selective and vindictive prosecution must be brought prior to trial or they will be deemed waived"). *See also United States v.*

under Rule 52 has been applied to some of the most fundamental constitutional errors, including failure to instruct a trial jury on an element of the offense, *Johnson*, or to inform the defendant pleading guilty of an element of the offense, *Vonn*. Finally, unlike jurisdictional error, which is uniquely impervious to waiver or forfeiture, the right to grand jury review can be waived as well as forfeited. *Cotton*, 535 U.S. 625, 630 (stating "the grand jury right can be waived," citing Rule 7(b) and *Smith v. United States*, 360 U.S. 1, 6 (1959)).

In rejecting the defendant's claim that plain error review is inappropriate for FTSO claims, the Court in *Cotton* explained:

> "Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power. No doubt that is true. See, *e.g.,* 3 Story, Commentaries on the Constitution § 1779 (1883), reprinted in 5 The Founders' Constitution 295 (P. Kurland & R. Lerner eds. 1987). But that is surely no less true of the Sixth Amendment right to a petit jury, which, unlike the grand jury, must find guilt beyond a reasonable doubt. The important role of the petit jury did not, however, prevent us in *Johnson* from applying the longstanding rule "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . ."

Cotton, 535 U.S. at 634.

Schmidt, 935 F.2d 1440, 1450 (4th Cir. 1991) (rejecting selective prosecution claim, stating "failure to comply with the requirements of Rule 12(b)(1) constitutes a waiver . . . of any claim that the prosecution was instituted for discriminatory reasons"); *United States v. Choi*, 818 F.Supp.2d 79 (D.D.C. 2011) (issuing writ forbidding magistrate judge from considering mid-trial motion to dismiss for vindictive prosecution that was untimely under Rule 12).

E. The amendment is not justified by the risk of sandbagging.

There is no significant risk of sandbagging created by permitting such challenges to be raised late (NACDL 5, 7-8)

NACDL argues that the defense has no incentive to sandbag FTSO claims. "Lawyers who believe they have a meritorious pretrial motion will ordinarily want to file it early, in hopes of either winning dismissal of the case or a narrowing of the charges or evidence. Effective pretrial motions practice enhances the defendant's position in plea negotiations . . . Lawyers will not withhold motions until after the trial begins . . . even in cases where the defendant has elected to risk a trial. Much more often than not, that reckless strategy would lose more than it could possibly win for the defendant." As for FTSO claims specifically, NACDL argues that sandbagging is unlikely because "even when such challenges are first made during trial, resulting in a mistrial and dismissal, the Supreme Court has held there is no double jeopardy bar to a new trial on a corrected indictment. . . . Second, when the failure of the indictment to charge an offense is not raised until after trial, the Supreme Court has long held that the indictment will be liberally, rather than literally construed. . . . Thus, . . . there is a significant disincentive to defense counsel's deliberately withholding a known challenge to the sufficiency of the indictment, and little if any advantage in doing so."

RESPONSE:

The risk of sandbagging continues to be a concern to many judges, and exempting this particular error from Rule 12 requirements perpetuates the risk. Even if sandbagging rarely, if ever, occurs, the amendment is an improvement over the existing rule because it creates an incentive for defendants to identify this defect in the indictment *before* trial and raise it at a time that will spare everyone unnecessary costs.

The problem of "sandbagging" was identified by court of appeals judges that urged the Committee to change the rule.[9] Under the existing rule, a defendant who knows he has been

[9] *United States v. Panarella*, 277 F.3d 678, 686-87 (3d Cir. 2002):

> [P]ermitting a defendant who enters an unconditional plea of guilty to challenge his conviction on the ground that the specific facts alleged in the charging instrument fail to constitute an offense has a number of harmful consequences. First, this rule reduces criminal defendants' incentives to raise defenses in a timely fashion in district court. Commentators have noted that the rule permitting defendants to challenge an indictment's failure to charge an offense at any time has led to strategic decisions by defendants to delay raising the defense. . . . .Allowing appeals such as this also undermines judicial economy and finality in criminal adjudication. Defendants convicted after pleading guilty have little to lose by arguing, either on direct or collateral review, that the statute under which they were convicted does not reach the conduct alleged in the charging instrument. Requiring a defendant to raise this defense before pleading guilty respects the proper relationship between trial and appellate courts and prevents the waste of judicial resources caused when a defendant deliberately delays raising a defense that, if successful, requires reversal of the defendant's conviction and possibly reindictment. Finally, by reaching the merits of Panarella's appeal, we interfere with the ability of defendants (within the Third Circuit) to waive their right to challenge the sufficiency of the charging document in exchange for concessions from the prosecution,

charged under an indictment that is clearly deficient (even under liberal construction rules) could wait until after conviction or sentence to raise that claim, ensuring that the government would have to start over, regardless of loss of evidence or witnesses.[10] Even if most defense counsel would not do so, that does not entirely eliminate the problem. The Supreme Court has also taken "sandbagging" risks seriously.[11] Addressing this particular concern was one of the key contributions of Rule 12 itself.

> Professor Jerold Israel has explained:
>
> The third element of pleading reform incorporated in the federal rules was an expansive waiver doctrine that forced most pleading objections to be raised before trial. The original version of Federal Rule 12(b) provided that "Defenses and objections based on defects … in the indictment or information other than it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial." Rule 12(b) further stated that the failure to present any such objection pretrial constituted a "waiver," although the court "for good cause shown" was given discretion to "grant relief from the waiver." The only exceptions were "lack of jurisdiction or the failure of the indictment or information to charge an offense" which were to "be noticed by the court at any time during the pendency of the proceeding."
>
> thereby making it more difficult for defendants and prosecutors to enter plea agreements that benefit both the parties and society as a whole. . . "

See also LaFave, et al, Crim. Pro. § 19.3(e):

> Allowing the essential elements requirement to be raised for the first time after conviction, even though previously known to the defense, arguably provides an incentive to the defense to delay making the objection. Where made before trial, a successful objection is likely to result only in the production of a new indictment or information which cures the defect by correctly alleging all of the elements. While the delay resulting from the process of forcing the prosecution to start over again may be of value to the defense under certain circumstances, that advantage hardly compares to the value of overturning a conviction. Here too, the prosecution is likely to return with a new indictment or information that now alleges all of the elements, but the defense has gained a second opportunity to avoid a conviction (and sometimes a somewhat stronger plea-bargaining position where the prosecution prefers not to force upon the complainant and other witnesses the inconvenience of another trial). In considering essential elements objections first raised after conviction, appellate courts are fully aware of the defense incentive to sandbag and they often react accordingly.

[10] *See, e.g.*, *United States v. Hamer*, 10 Fed.Appx. 205, 210 (4th Cir. 2001) (the standards to which we hold indictments when they are timely challenged yield to other considerations when the challenge is raised for the first time on appeal. When a challenge to an indictment is raised for the first time on appeal, the government has lost its usual remedy for a defect, "obtain[ing] a superseding indictment with little or no delay in the scheduled trial," *Hooker,* 841 F.2d at 1232, and an entire trial must be repeated if a conviction is to be again sought. This counter-vailing consideration led to our rule that, when reviewing an indictment for plain error, "[i]ndictments and informations are construed more liberally [than when they were objected to before the district court] ... and every intendment is then indulged in support of the sufficiency.")*.*

[11] *See Puckett v. United States*, 556 U.S. 129, 134 (2010) (" the contemporaneous-objection rule prevents a litigant from " 'sandbagging' " the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his favor").

> This provision sharply restricted the defense tactic of "sandbagging" that was available in many jurisdictions under common law pleading. Recognizing that there was a defect in the pleading, defense counsel in those jurisdictions often would forego raising the defect before trial, when a successful objection would merely result in an amendment of the pleading (or a new pleading). If the trial ended in a conviction, counsel would then raise the defect on a motion in arrest of judgment and obtain a new trial. Federal Rule 12 eliminated this tactic as to all pleading objections except the failure to show jurisdiction or to charge an offense. While those objections could be raised for the first time at any point in the proceeding (including the appeal), any lesser objection to the pleading would be lost if not raised before trial (absent a showing of good cause and a favorable exercise of trial court discretion). . . . [12]

Even if the Committee concludes that defense failures to raise such claims before trial are generally unintentional, there is no reason to treat this particular error any differently than other unintentionally forfeited errors, which are also presently lost if not raised in time under Rule 12 absent a showing of "good cause." See Section D, above.

Finally, a rule requirement that this error be raised prior to trial has advantages even though there is "no double jeopardy bar to a new trial" if a trial judge granted a motion to dismiss on this basis after jeopardy attaches. The need to resolve an objection prior to trial in order to protect the government's right to appeal or reprosecute the case is an important reason to include motions to suppress, for example, in the list of those required before trial under Rule 12. But a motion need not create this risk in order to be appropriately resolved before rather than during trial. For example, mid-trial dismissals for defects in the information or indictment, or lack of venue,[13] for example, also raise no double jeopardy bar to a new trial, but such errors must be raised before trial under Rule 12 nonetheless.[14] Efficiency and fairness concerns also support encouraging parties to raise before trial objections that can and should be resolved then.

[12] *See* LaFave, et al., Crim. Proc. § 19.1(d) (footnotes omitted, footnote 51 stated: "The facts of various cases indicate that the practice of sandbagging, by deliberating postponing the objection, continues as to these defects, particularly the failure to charge an offense. See, e.g., *Brown v. State*, 44 Md.App. 71, 410 A.2d 17 (1979); *People v. Johnson*, 69 Ill.App.3d 248, 25 Ill.Dec. 732, 387 N.E.2d 388 (1979). . . .").

[13] *See generally United States v. Scott*, 437 U.S. 82, 98-99 (1978) (a "defendant, by deliberately choosing to seek termination of proceedings against him on a basis unrelated to factual guilt or innocence of the offense of which he is accused, suffers no injury cognizable under the double jeopardy clause if the Government is permitted to appeal from such a ruling of the trial court in favor of the defendant"); *Wilkett v. United States* , 655 F.2d 1007 (10th Cir.1981) (midtrial dismissal for lack of venue did not bar appeal or retrial).

[14] *See, e.g., Davis*; *United States v. Burroughs*, 161 Fed.Appx. 13, 14 (D.C. Cir. 2005) ("the Government argues that Burroughs may not now challenge venue as to the charge for theft of government property because he failed to do so before trial. We agree."); *United States v. Auston*, 355 Fed.Appx. 919, 922 (6th Cir.2009) (no good cause for waiver of venue-selection challenges under Rule 12(b)(3)); *United States v. Adams*, 803 F.2d 722 (6th Cir. 1986) (venue challenge waived by not raising before trial); *United States v. Billups*, 522 F. Supp. 935 (E.D.Va. 1981) (rejecting post-trial venue motion as waived under Rule 12 because not raised prior to trial). *See also United States v. Sandini*, 803 F.2d 123, 127 (3d Cir. 1986) (collecting cases and noting " all circuits reaching this question have mitigated the harshness of this rule by holding that venue objections are waived only "when the indictment ... clearly reveals [the venue] defect but the defendant fails to object." . . . Consequently, where there is a proper allegation of venue in the indictment, but the government fails to prove that allegation at trial, a challenge to venue

II. Objections to the specification of other claims that must be raised before trial

The notes accompanying the publication of the proposed amendment and the report to the Standing Committee indicated that the Advisory Committee would review and perhaps revise the enumeration of claims on the basis of the comments. We now turn to an assessment of the comments regarding the treatment of specific claims other than the claim that the indictment or information fails to state an offense.

A. Double jeopardy and statute of limitations claims should not be required before trial

"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 acquittal, statute of limitations, immunity, lack of jurisdiction, [and] failure of indictment or information to state an offense') (emphasis added). . . . 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 or the expiration of the statute of limitations may be presented even after trial has commenced (or are silent as to by what point in the trial proceedings such claims may be raised).. . . 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." (NYCDL at 5, 8)

NYCDL, but not the Federal Defenders or NACDL, objected to the proposal to add double jeopardy and statute of limitations claims to the list of examples of objections that must be raised before trial.

RESPONSE:

Precedent. NYCDL correctly recognizes that this would be a change in some courts. Many courts have required double jeopardy and statute of limitation claims to be presented before trial when clear from the face of the indictment.[15] But not all courts do so. The courts that

in a motion for acquittal is timely).

[15] Double jeopardy: *E.g., United States v. Branham*, 97 F.3d 835, 841-42 (6th Cir. 1996) (holding Rule 12(b)(1) of the Federal Rules of Criminal Procedure required Allen to raise the jeopardy issue by motion prior to trial, reviewing for plain error, and rejecting on merits because no former jeopardy had attached in forfeiture proceeding); *United States v. Gamboa*, 439 F.3d 796, 809 (8th Cir. 2006) (noting that Rule 12 "requires such an objection to have been made before trial or it is deemed waived pursuant to Fed.R.Crim.P. 12(f). We have, in prior cases, enforced the waiver rule. . . . In other cases, we have proceeded to do a plain error analysis. . . . We noted the open nature of the issue in *United States v. Frazier*, 280 F.3d 835, 845 (8th Cir.), cert. denied, 537 U.S. 911 (2002), and declined to join either side of the debate. Because we find no double jeopardy violation under any standard of review, we again decline to decide whether the failure to raise the objection pretrial precludes plain error review.").

have insisted these particular motions be filed *before* trial reason that they are "defects in the indictment."[16] In contrast, the courts that have allowed these claims to be raised *during* trial often point to the Advisory Committee Note from 1944, which states that motions that "may" but need not be brought before trial include "such matters as former jeopardy, former conviction, former acquittal, statute of limitations . . . ."[17]

The Advisory Committee found the proper approach to double jeopardy claims to be a difficult issue. The Committee recognized that courts were divided and hoped that the amendment would resolve some of the disagreement and confusion. The need for clarification through amendment seems particularly appropriate when the confusion has arisen at least in part from the difficulty of reconciling the text of the Rule with the Committee Note.

Principles. Stepping away from the conflicting precedent concerning the meaning of the existing rule and examining the question afresh, the proposed amendment reflects the Committee's conclusion that there are no persuasive reasons to exempt these claims from the timing requirements in Rule 12. The remainder of this section explores possible reasons for exempting double jeopardy and statute of limitations claims, including those raised by NYCDL.

Statute of Limitations: *E.g.*, *United States v. Ramirez*, 324 F.3d 1225, 1227-32 (11th Cir. 2003) (finding statute of limitations defense should have been raised before trial under Rule 12, rejecting argument based on Committee Note that it could have been raised during trial); *United States v. Mendez-Santana,* 645 F.3d 822 (6th Cir. 2011) (statute of limitations motion to dismiss untimely under Rule 12 when raised in motion to withdraw guilty plea) (dicta); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987). *See also United States v. Botsvynyuk*, CRIM. 10-159-1, 2012 WL 2885928 (E.D. Pa. July 16, 2012) (statute of limitations defense raised in trial court after conviction was waived, and is in any event meritless).

[16] *E.g.*, *Branham, supra* note 15, and *Ramirez, supra* note 15 *("*The defendants assert that the Advisory Committee Notes to Rule 12 make clear that they had the option of bringing their motion before trial, but that they were not required to do so, because a statute of limitations defense is a matter that can be brought in a permissive pretrial motion under Rule 12(b).. . . [H]owever, the defendants' statute of limitations defense is a defense based upon the sufficiency of the indictment. As the plain language of Rule 12 dictates that defenses based upon the sufficiency of the indictment must be brought before trial, there is no need to look to the notes. See *United States v. Vonn*, 535 U.S. 55, 122 S.Ct. 1043, 1049 n. 6, 152 L.Ed.2d 90 (2002) ("In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule....")").

[17] *See* cases collected in notes 8 and 9 NYCDL at 6. *See also United States v. Baldwin*, 414 F.3d 791, 795 n. 2 (7th Cir. 2005) (emphasis added):

> [T]here is an argument, not made by the government, that under Fed. R. Crim. P. 12(b)(3) Baldwin has waived and not merely forfeited his statute of limitations defense. Rule 12(b)(3) specifies motions that must be made before trial; the rule includes motions "alleging a defect in instituting the prosecution" or "a defect in the indictment or information." . . . Other circuits apply Rule 12(b)(3) and the waiver rule of (e) to statute of limitations arguments. . . . In this circuit, statute of limitations arguments not timely raised in the district court are considered forfeited, not waived, and are accorded plain-error review. *United States v. Ross*, 77 F.3d 1525, 1536 (7th Cir.1996). The holding in *Ross* is premised upon certain language in the advisory committee note to Rule 12(b) suggesting that a statute of limitations defense is among those matters that may, not must, be raised by pretrial motion. *Id. The government has not argued that Ross should be revisited in light of the clear text of the rule and the apparent conflict with other circuits . . .*

Late-arising issues and issues that require factual development. One explanation for the earlier suggestion in the 1944 Committee Note that double jeopardy and statute of limitations claims need not be raised before trial may be that some double jeopardy or statute of limitations claims are not apparent until trial, or, alternatively, require further factual development.[18] Evidence may show that the events occurred earlier than expected or that a continuous series of events was not as continuous as supposed, raising a statute of limitations issue not clear from the indictment. The risk of double jeopardy may not arise until evidence reveals two counts are actually the same offense or until jury instructions describe the same offense in two separate counts. If this is the type of double jeopardy or statute of limitation claim at issue, it makes no sense to penalize a litigant for not raising it before trial. (The same problem arises with venue claims, which at times are revealed only with the evidence at trial).

The solution to this problem, however, is not to exempt all double jeopardy or statute of limitations claims from the requirement that they be raised prior to trial. A better solution is the approach taken by the proposed amendment, which provides that no matter what the type of claim, it need not be raised before trial unless (1) the basis for the claim is reasonably available before trial and (2) the claim can be resolved without trial. Double jeopardy and statute of limitations claims not meeting these two requirements need not be raised before trial begins. To the extent that courts rely upon these concerns (or, to the extent the 1944 Note relied on these concerns) in exempting double jeopardy and statute of limitations claims from Rule 12's pretrial requirement, proposed amendment addresses the concerns and indeed provides a better solution.

Not subject to waiver and incurable. The 1944 Committee may have suggested special treatment for double jeopardy and statute of limitations claims for another reason. Lumped together with double jeopardy and statute of limitations defenses were claims of "immunity," a defense very unlikely to develop only after the trial was underway. Together, these three claims suggest a different idea at work, i.e., to allow any defense that would completely and inevitably bar retrial to be raised at any time. In 1944, all of the errors listed as optional to raise after trial began – " *former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, [and] failure of indictment or information to state an offense"* – were fatal and not subject to waiver, cure, harmless or plain error review. Since then, however, these absolute rules for relief have significantly altered.

If not preserved by timely objection, these previously absolute protections are now subject to plain error review, as NYCDL recognizes. They are also subject to waiver.[19] Since

[18] *See* 2 *Lester B. Orfield, Criminal Procedure Under the Federal Rules*, at 244- 255 (1966) (noting "It is in the discretion of the trial court whether the [statute of limitation] issue be determined before or at trial," and "if issues of fact as to dates are presented, a motion to dismiss an indictment on the ground that the offense is barred by limitations may be denied without prejudice to the renewal of the motion at the trial"). Cf. *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987) ("statute of limitations is an affirmative defense which is waived unless raised at trial," finding evidence presented at trial showed no limitations problem); note 11 page 7 NYCDL Letter (noting there may be a factual dispute as to whether a charged offense continued in to the period of limitations).

[19] *See United States v. Broce*, 488 U.S. 563, 568 (1989) ("*Ricketts v. Adamson,* 483 U.S. 1 (1987), made clear that the protection against double jeopardy is subject to waiver"). *See also Peretz v. United States*, 501 U.S. 923,

1989, a claim of former jeopardy, former conviction, or former acquittal survives a guilty plea when present on the face of the indictment, but not otherwise.[20] The statute of limitations, an affirmative defense, is also subject to waiver, and is sometimes waived intentionally as part of a plea deal.[21] Several courts have held that statute of limitations claims not raised before[22] or during[23] trial are considered waived and will not be the basis for relief. And, as reviewed in Part

936 (1991) ("The most basic rights of criminal defendants are similarly subject to waiver. *See, e.g.*, . . . *United States v. Bascaro*, 742 F.2d 1335, 1365 (11th Cir. 1984) (absence of objection is waiver of double jeopardy defense) ").

In 2007, the Fourth Circuit held that *Bascaro*, the case cited favorably by the Supreme Court in *Peretz* as authority that unraised double jeopardy claims are waived, had been undermined by the Supreme Court's 2003 holding clarifying the distinction between waiver and forfeiture in *Olano*. *Olano*, the court of appeals reasoned, meant that unraised double jeopardy claims are not waived, but should be reviewed for plain error. *See United States v. Lewis*, 492 F.3d 1219, 1222 (11th Cir. 2007) (collecting authority from other circuits)

[20] *United States v. Broce*, 488 U.S. 563, 575-76 (1989) (noting *Menna* held that a plea of guilty to a charge does not waive a claim that - judged on its face - the charge is one which the State may not constitutionally prosecute, and holding that claim is waived when defendant could not prove claim by relying on the indictment and existing record); *United States v. Kaiser*, 893 F.2d 1300, 1303 (11th Cir.1990) (notwithstanding guilty plea, defendant could raise double jeopardy claim that cumulative punishment not permitted for greater and lesser included offenses, as whether there were greater and lesser included offenses here "can be determined from the face of the indictment").

[21] *See e.g., United States v. Cote*, 544 F.3d 88, 103, (2d Cir. 2008) (Sotomayor, J.) (rejecting claim that waiver of statute of limitations was coerced, noting "Without the agreement, Coté would have remained vulnerable to prosecution for a death-eligible violation of Section 242, because there is no period of limitations for that charge. . . . The tolling agreement merely replaced that possibility with continued exposure to less serious charges."). *See also* 5 Crim. Proc. § 18.5(a) (3d ed.) (noting that good reasons for such an intentional waiver will sometimes exist, collecting authority).

[22] *United States v. Ramirez*, 324 F.3d 1225, 1228 (11th Cir. 2003):

> Although we recognize that there may be times when a statute of limitations defense cannot be raised before trial because the development of facts pertaining to that defense is necessary, this is not one of those times. Nothing in this case warranted waiting until after opening statements to raise this defense; the defendants merely waited to gain a strategic advantage by raising the defense after jeopardy attached. This tactic is precisely what Rule 12 was designed to prevent. *See United States v. Oldfield,* 859 F.2d 392, 397 (6th Cir. 1988). As the Sixth Circuit noted, Rule 12
>
> > sharply restricts the defense tactic of "sandbagging" that was available in many jurisdictions under common law pleading. Recognizing that there was a defect in the pleading, counsel would often forego raising that defect before trial, when a successful objection would merely result in an amendment of the pleading. If the trial ended in a conviction, he could then raise the defect on a motion in arrest of judgment and obtain a new trial. Federal Rule 12 eliminated this tactic as to all objections except the failure to show jurisdiction or to charge an offense.
>
> *Id.* (internal quotation marks omitted). As a result, the defendants waived their defense by failing to raise it before trial.

[23] The Fifth Circuit appears to treat statute of limitations objections not raised at trial as waived as well. See *United States v. Gaudet*, 966 F.2d 959, 962 (5th Cir. 1992) ("Gaudet points out for the first time on appeal that Counts 1-14 were time-barred by the Statute of Limitations, . . . [but] did not argue to the district court that any of his offenses were time-barred. Thus, he did not give the district court a chance to confront this alleged inconsistency. We are restrained by the plain error standard which compels us to conclude that Gaudet waived this issue by failing to contemporaneously object to the district court's alleged inconsistent treatment of his offenses."). *See also United*

I, the Supreme Court has approved of plain error review rather than automatic relief for FTSO claims. There is nothing about the nature of double jeopardy or statute of limitations claims that wholly insulates them from forfeiture and waiver rules applied to other constitutional claims.

Sandbagging. The Defenders advance another argument for exempting double jeopardy and statute of limitations claims from Rule 12, namely that because a viable claim would preclude retrial, defendants have no incentive to sandbag. (NYCDL at 7). As pointed out in Section I, subpart D, above, this same argument could also be made regarding a number of claims that are also considered untimely under Rule 12 if not raised prior to trial, including vindictive and discriminatory prosecution, unconstitutional pre-indictment delay, and Sixth Amendment speedy trial claims.[24] And the same response to the similar objection raised regarding FTSO claims applies here. Even if sandbagging is of little concern with double

States v. Barakett, 994 F.2d 1107, 1110 (5th Cir. 1993) (holding failure to raise this defense at trial is waiver, and precludes review); *United States v. Arky*, 938 F.2d 579, 581 (5th Cir. 1991) (same).

In *United States v. Baldwin*, 414 F.3d 791, 795 (7th Cir.2005), the Seventh Circuit has suggested waiver is appropriate, but noted that the government failed to make this argument so it applied plain error instead. The Court found that because the sentence for the allegedly time barred charge was run concurrently to a non-barred sentence, and because the government missed the statute of limitations by only one day, that there was no plain error, relying on the fourth prong of the Olano test. The first, but not the second, basis for this conclusion was later overruled, when the court later held that it is not appropriate to deny relief under the plain error test for a double jeopardy error leading to a barred sentence simply because it is served concurrently to another sentence. *United States v. Parker*, 508 F.3d 434, 439-41 (7th Cir. 2007). The court has not revisited its argument in Baldwin that relief in the case was not appropriate because the statute was missed by one day, nor has it resolved whether waiver is a more appropriate standard of review than plain error for untimely statute of limitations claims.

In the First and Fourth Circuits, an objection to the statute of limitations based on the indictment is waived by pleading guilty. *Acevedo-Ramos v. United States*, 961 F.2d 305, 308 (1st Cir. 1992); *United States v. Husband*, 119 Fed. Appx. 475 (4th Cir. 2005), rev'd on other grounds. *See also Rivera-Colon v. United States*, 2008 WL 4559684, *3 (D.P.R. 2008) (noting later unpublished First Circuit application of this same rule). But the First Circuit has also stated that the objection must be raised at trial, or else reviewed for plain error. *United States v. Thurston*, 358 F.3d 51, 62-63 (1st Cir. 2004), rev'd on other grounds.

[24] *See* note 8 *supra* (collecting authority). *Strunk* bars retrial after a denial of the Sixth Amendment right to speedy trial, yet courts require these claims to be raised before trial. *See, e.g.*, *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995). In 1944, when the Committee identified double jeopardy, limitations, and immunity claims in the Note to Rule 12, the Supreme Court had yet to decide *Strunk* and hold that the only remedy for a Sixth Amendment Speedy Trial violation was dismissal. Given the chance to amend the Note after *Strunk*, would the Committee have added this claim to their list along with double jeopardy and statute of limitations? NACDL also argues at one point that a speedy trial violation isn't really a defect in "instituting the prosecution" because it happens well after the prosecution is instituted. While it is awkward to consider this a defect in "instituting the prosecution," late speedy trial claims under the Sixth Amendment have been treated (see *Forrester*) as waived under the existing Rule 12.

If one is interested identifying those claims that forbid prosecution so absolutely that they must be vindicated before trial or not at all -- that is, when relief on appeal is too late and the protection intended by the right is irretrievably lost once trial begins -- perhaps reference to interlocutory review precedent would be helpful. Claims of the violation of double jeopardy and immunity under the Speech and Debate Clause possess this quality, while violations of the constitutional speedy trial right, the statute of limitations, denial of other types of immunity, and vindictive prosecution do not. See LaFave et al., Crim. Pro. § 27.2(d).

jeopardy and statute of limitations claims,[25] adding these claims to the list in Rule 12 makes it even more likely that they will be raised prior to trial, minimizing unnecessary cost and delays. NYCDL argues that requiring these claims to be raised early would not conserve resources because a successful claim would result in the immediate termination of the criminal proceedings. (NYCDL at 7.) Since the same argument does not justify exemptions from Rule 12's timing requirements for a number of other defenses that are equally conclusive when successful, it is not clear why this argument should have special strength when advanced for exempting double jeopardy or statute of limitations claims.

Standard of review for untimely claim-double jeopardy. NYCDL does not specifically object to the proposed standard of review – "prejudice" alone – for double jeopardy claims, but this standard is tied to the Committee's decision to include a specific reference to double jeopardy claims in the itemized list of defects that must be raised under the rule. For double jeopardy claims that were clear from the indictment and thus should be raised prior to trial, the proposed amendment provides a standard of review – prejudice – that is *more generous* to defendants than what they receive now for untimely claims of double jeopardy in most courts. Under the existing rule, most courts employ plain error review when considering double jeopardy claims that could have been raised before trial but instead were raised for the first time on appeal or after plea.[26] Plain error review would remain unchanged for double jeopardy claims

[25] At least one court has noted concerns about sandbagging in this situation, *see* note 22 *supra*.

[26] Reviewing for plain error after trial: *See*, *e.g., United States v. Mahdi*, 598 F.3d 883, 887-88 (D.C. Cir. 2010) (declining to resolve dispute over whether multiplicity claim raised for the first time on appeal was waived under Rule 12, but noting that because defendant "did not object in the district court to the alleged multiplicity, we review his arguments for plain error"); *United States v. Mungro*, 365 Fed.Appx. 494, 505 (4th Cir. 2010) (holding that defendant did not move to dismiss the indictment or assert that his prosecution for the second conspiracy somehow contravened the Double Jeopardy Clause based on prior prosecution, reviewing for plain error); *United States v. Whitfield*, 590 F.3d 325, 346-47 (5th Cir. 2009) (stating unraised double jeopardy objection is waived, but assuming arguendo that plain error and not waiver applies); *United States v. Robertson*, 606 F.3d 943, ? (8th Cir. 2010) (collecting authority).

But compare United States v. Flint, 394 Fed.Appx. 273, 279 (6th Cir. 2010) (describing as waived and declining to reach merits of double jeopardy argument that two statutes of which the defendant was convicted had same elements and punished the same crime, noting that claim was raised for the first time on appeal, also declining to reach government's argument that this was essentially a challenge to the indictment that the defendant waived by failing to raise it to the district court before trial). See also note [22] *supra.*

Reviewing for plain error after guilty plea: *United States v. Kelly*, 552 F.3d 824, 829 (D.C. Cir. 2009); *United States v. Cesare*, 581 F.3d 206, 209 (3d Cir. 2009) (finding plain error); *United States v. Grober*, 624 F.3d 592, 611 (3d Cir. 2010) ("Even if this argument was not waived by his plea of guilty to all six counts in the superseding indictment, it surely cannot, under the circumstances of this case, survive plain error review") (citations omitted); *United States v. Lebreux*, 2009 WL 87505 (6th Cir. 2009) (considering under plain error but rejecting based on dual sovereignty double jeopardy claim raised after guilty plea); *United States v. Plenty Chief*, 561 F.3d 846, 851 (8th Cir. 2009) (court notes its review "is limited to plain error").

But compare United States v. Moreno-Diaz, 257 Fed.Appx. 435, 436 (2d Cir. 2007) (citing *United States v. Kurti*, 427 F.3d 159, 162 (2d Cir. 2005), for the proposition that where "a defendant has validly entered a guilty plea, he essentially has admitted he committed the crime charged against him, and this fact results in a waiver of

when the basis for those claims developed only after trial began, and the claim was not raised then. But for any claim that was apparent and should have been raised before trial, the proposed rule requires relief if there is prejudice *alone*. In the context of double jeopardy claims reviewed after conviction, the difference between the prejudice only and the plain error standard is negligible if present at all.

As we wrote in an earlier memo to the Committee on this topic[27]:

> "Allowing review for untimely-raised double jeopardy claims on the basis of prejudice alone would simplify the analysis without changing the *result* in most or all double jeopardy cases. The second and fourth prongs of the *Olano* test – which look to whether the error is "plain" and whether it "seriously affects the fairness, integrity, or public reputation of judicial proceedings" – have not made much difference when reviewing double jeopardy violations.[[28]]
>
> Although double jeopardy claims arise in a number of different situations, we have not been able to identify a case in which the second and fourth prongs would not be satisfied if a defendant has been (or could be) convicted for an offense that judging from the indictment before trial should have been barred by double jeopardy. If indeed plain error review is applied whenever a defendant objects during trial, or after conviction, to a

double jeopardy claims."); *United States v. Adams*, 256 Fed.Appx. 796, 798 (7th Cir. 2007) (rejecting defendant's claim that the indictment charged the same offense multiple times, stating "Adams entered unconditional guilty pleas and therefore waived his right to appeal the denial of any pretrial motions based on his indictment." Also noting, "any argument that his sentence violates his right against double jeopardy would be frivolous because the government could have charged each instance of downloading the images or movies in a separate count").

[27] Memo to Committee from Reporters, dated March 8, 2011.

[28] *See, e.g., United States v. Robertson*, 606 F.3d 943, 952 (8th Cir. 2010) ("In light of the double jeopardy violation, the additional $100 special assessment subjects Robertson to multiple punishments for the same offense." "Failing to remedy [such] a clear violation of a core constitutional principle would be error 'so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice.' ") (citing *United States v. Ogba*, 526 F.3d 214, 238 (5th Cir.2008) (quoting *United States v. Fortenberry*, 914 F.2d 671, 673 (5th Cir.1990) (reversing a conviction on plain error review after finding a double jeopardy violation in part because the defendant was subjected to multiple special assessments)). *See also United States v. Cesare*, 581 F.3d 206, 208-09 (3d Cir. 2009) (granting relief for plain error, although defendant did not raise the issue on appeal after guilty plea, when trial court imposed concurrent sentences and separate special assessments for both lesser included and greater offense, noting " leaving this error uncorrected would seriously affect the fairness and integrity of this proceeding").

Olano's fourth prong has been enlisted as a basis for denying relief in one case in which the problem was failure to challenge jury instructions at trial (as opposed to a double jeopardy problem that was clear before trial). Again, this situation would be unaffected by Rule 12 because it would not be a claim that must be raised prior to trial. *United States v. Irving*, 554 F.3d 64, 79 (2d Cir. 2009) ("even if the first three *Olano* factors were met, we could not conclude that Irving's convictions on both counts 4 and 5 seriously affect the fairness, integrity, or public reputation of judicial proceedings. It was within Irving's power to request clarifying instructions or a special verdict to have the jury particularize the bases of its verdicts on those counts. It hardly serves the interests of fairness to overturn verdicts that his inaction allowed to be ambiguous and that may be substantively unflawed.").

double jeopardy error available and resolvable before trial that he failed to raise before trial or plea, it arguably makes some sense to dispense with the second and fourth prongs of the *Olano* test."

Standard of review for untimely claim – Statute of limitations. NACDL, p. 8, argues, however, that if statute of limitations claims must be raised before trial, "At the very least . . . the untimely presentation of a statute of limitations claim should be excusable upon a showing of prejudice only." They argue that because no lawyer would intentionally delay making such a motion for strategic reasons, ineffective assistance will always be "cause," thus leaving only prejudice to be determined. This is essentially the same issue addressed under the subsection "sandbagging" above.

Options for Committee. If the Committee is persuaded that some change should be made in the treatment of double jeopardy and/or the statute of limitations claims that are clear from the face of the indictment, it has three options:

(1) deleting double jeopardy and statute of limitations from the enumerated list of defects in the institution of the prosecution in 12(b)(3)(A), and deleting 12(c)(2)(B) (which permits relief for untimely double jeopardy for prejudice only);

(2) deleting all of the enumerated items from 12(b)(3)(A) and (B) and also deleting 12(c)(2)(B) (which permits relief for untimely double jeopardy for prejudice only); or

(3) retaining the enumerated lists in (b)(3)(A) and (B), but adding statute of limitations claims to the prejudice only standard under 12 (c)(2)(B).

Options (1) and (2) address both double jeopardy and statute of limitations claims, leaving open the possibility that some courts will conclude that these claims are not subject to the time limits imposed by Rule 12. Because this option leaves open the question whether double jeopardy and statute of limitations claims are subject to Rule 12's timing requirement, it is not possible to provide a different, and more favorable, standard for relief applicable in courts that find these claims to be subject to Rule 12. Option (1) targets only those claims, leaving the other enumerated claims unaffected. Option (2), by deleting all of the enumerated lists, would deprive courts or litigants of guidance in determining which claims must be raised before trial.

Option 3 would make no change in the treatment of double jeopardy, and would afford statute of limitations claims the same favorable standard for relief. The Advisory Committee at one point favored this treatment for statute of limitations claims (and indeed its proposal to the Standing Committee in January 2011 provided for parallel treatment). However, after further study the Committee concluded that this would be a significant change in some circuits, which have subjected statute of limitations claims to the same standard as other claims governed by Rule 12(b)(3). Additionally, as a policy matter requiring a showing cause in addition to prejudice would allow courts to distinguish strategic waiver of statute of limitations claims from failures resulting from ineffective assistance.

B. Multiplicity and duplicity claims should not be required before trial

"[C]laims of duplicity and multiplicity are generally required to be raised prior to trial . . . However, . . . [w]e 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." (NYCDL at 8)

Only NYCDL raises this issue; it is not mentioned in letters from NACDL or the Federal Defenders. Because trial judge can cure these problems after trial begins with jury instructions or by not imposing multiple sentences, NYCDL argues, and these problems "are not realized until the conclusion of trial," the defendant should not have to point them out before trial.

RESPONSE:

The proposed rule reflects what most courts already require – that a defendant should raise before trial claims challenging an indictment on the grounds that it charges the same offense more than once (multiplicity) or charges two separate offenses in one count (duplicity).[29]

[29] *E.g., United States v. Cabrera–Beltran*, 660 F.3d 742, 753-54 (4th Cir. 2011) ("Because the defendant fails to provide a showing of good cause, his claim that the indictment was defective is waived.") (citing *United States v. Price*, 763 F.2d 640, 643 (4th Cir.1985) (applying waiver rule to multiplicity and duplicity challenges where a defendant failed to raise the issues prior to trial)); *United States v. Walker*, 665 F.3d 212, 227-28 (1st Cir. 2011) (footnote omitted):

> It is an open question in this circuit whether the words "waiver" and "waives," as used in Rule 12(e), should be taken literally. See *United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008). Several other courts of appeals have pondered this question. The majority view is that a party's failure to raise Rule 12(b)(3) defenses prior to trial—such as a challenge to the form of an indictment—constitutes a waiver in the classic sense and, thus, precludes appellate review of the defaulted challenge. . . . We believe that Rule 12(e) says what it means and means what it says. Great weight must be given to the plain language of the rule, particularly since Congress amended it in 2002 (after the Supreme Court had made the distinction between waiver and forfeiture pellucid) and left the "waiver" terminology intact. See Fed.R.Crim.P. 12 advisory committee's notes; see also *Olano*, 507 U .S. at 733 (explaining waiver/forfeiture distinction). What is more, the matters that fall within the compass of Rule 12(b)(3) (and thus Rule 12(e)) are normally correctable before trial if seasonably brought to the attention of the district court and the government. It strikes us as manifestly unfair for a defendant to sit silently by, take his chances with the jury, and then be allowed to ambush the prosecution through a post-trial attack. Accordingly, we join the majority view and hold that a failure to challenge a defect in an indictment before trial, as required by Rule 12(b)(3), results in an unreviewable waiver of that challenge pursuant to Rule 12(e). Because the appellant did not raise either duplicity or multiplicity challenges at any time prior to trial, he has waived those challenges.
>
> This framework does not risk a miscarriage of justice due to the presence of a key exception: if a defendant can show "good cause" for a failure to raise a Rule 12(b)(3) challenge prior to trial, that challenge may be entertained by the district court and reviewed on appeal. See Fed.R.Crim.P. 12(e); see also *Acox*, 595 F.3d at 731. Here, however, the appellant did not make a good cause argument in the district court at any time, and he has not made a cognizable showing of good cause in this court. Given these circumstances, there is no unfairness in holding him to his waiver.

See also United States v. Seher, 562 F.3d 1344, 1359 (11th Cir. 2009) (concluding, after review of authority, that challenge to indictment as duplicitous waived under Rule 12 if challenge not brought before trial, but declining to apply waiver because government did not raise this argument).

NYCDL does not contest that most courts already require these claims to be raised before trial under Rule 12. Instead it argues that the Committee should depart from this approach and make it clear that these claims can be presented after trial has commenced.

The possible reasons for exempting these particular defects in the indictment from Rule 12's timing requirements are not persuasive. Requiring that these problems with the charging document be flagged before trial gives the judge the option of either dismissing a charge or taking remedial steps to cure the problem. If multiplicity is the problem, the judge could limit proof at trial and reduce the number of counts going to the jury. If the charging document is duplicitous, the judge can require a unanimous finding for each offense. Should the defendant object to multiplicity or duplicity in the indictment only as the jury is instructed, or after conviction or before sentencing, the amended rule would allow the judge to consider the challenge to the indictment at that point if she finds cause and prejudice, but not otherwise.

Although the amended rule would limit late challenges to flaws clear in *the indictment*, it is important to distinguish challenges to the form of the indictment from challenges to jury instructions alleged to violate the Double Jeopardy Clause or deny a unanimous verdict, because the latter are constitutional challenges that ripen after trial. Under the proposed amendment, defendants who fail to raise multiplicity or duplicity claims before trial would not forfeit their ability to object to the imposition of multiple punishments for the same offense in violation of the double jeopardy clause or to the denial of unanimous jury verdict. Moreover, if the basis for the double jeopardy or jury right challenge was not reasonably available before trial, as when the problem is not apparent from the face of the indictment and only arises during trial as the evidence is developed, then under the proposed Rule 12 there would be no pretrial motion required because the basis of the claim would not be available at the time the motions are due.[30]

When a multiplicity problem *is* clear on the face of the indictment, many, but not all, courts that presently consider the challenge to the indictment waived under Rule 12 if not raised before trial have concluded that the defendant may – despite that waiver – raise a double

[30] *See United States v. Coiro*, 922 F.2d 1008, 1013 (2d Cir. 1991):

> Defendant's assertion that two counts in indictment failed to charge cognizable offenses and were multiplicitous by charging same conduct were not waived by defendant's failure to make such challenges before trial; neither nature of defendant's conduct nor fact that counts charged same conduct was evident from face of indictment. This could only be known upon the receipt of evidence that Coiro on a single occasion on May 7, 1982 reviewed false stories to be given to the investigators with Ruggiero, Carneglia, Gotti, Debany, and Dellentash, until Coiro approved the one that would be used. Further, we find that the two issues, which go to whether the conduct proved is punishable under the statute charged, are cognizable on appeal under the plain error doctrine, even though Coiro failed to raise them post-trial. See *United States v. DiGeronimo*, 598 F.2d 746, 752 (2d Cir. 1979).

See also United States v. Buczkowski, No. 09-4938, 2011 WL 6358035, at *5 n.* (4th Cir. Dec. 20, 2011) (The transportation counts were not plainly "ineluctably" multiplicitous until trial, thus good cause under Rule 12(e) relieved defendant of the waiver) (citing *United States v. Williams*, 89 F.3d 165, 167 n.1 (4th Cir. 1996) (granting relief from Rule 12's waiver provision because the defect in the indictment did not become apparent until trial, when the government's evidence established that the counts in the indictment were "ineluctably contradictory")) .

jeopardy (multiple-punishment) challenge to an instruction or sentence.[31] At least one case from the Seventh Circuit seems to have adopted the contrary position that if the basis for the double

[31] *United States v. Castro*, 227 Fed.Appx. 386, 386 (5th Cir. 2007) ("Generally, a defendant must file a pretrial motion challenging duplicitous charges to preserve the issue for appeal. . . . However, a complaint challenging *multiplicitous sentences* may be raised for the first time on appeal. . . . Simultaneous convictions and sentences for the same criminal act involving possession of a firearm and possession of ammunition violate double jeopardy."); *United States v. Dixon*, 273 F.3d 636, 642 (5th Cir. 2001) ("Unlike a claim of multiplicity of convictions, "[a] complaint about the multiplicity of sentences ... can be raised for the first time on appeal." . . . We review defendant's contention of multiplicitous sentences, which involves an issue of double jeopardy, for plain error.") (citations omitted); *United States v. Galvan*, 949 F.2d 777, 781 (5th Cir. 1991) (defendant waived objection to multiplicity in indictment by failing to raise pretrial motion, but could still raise multiplicity of sentences); *United States v. Rosenbarger*, 536 F.2d 715, 721-22 (6th Cir. 1976) (noting that waiver rule applies only to objection with regard to an error in the indictment itself, and defendant did not waive his right to object to imposition of multiple sentences by his failure to object to multiplicitous nature of indictment).).

The explanations in the following cases are helpful:

United States v. Abboud, 438 F.3d 554, 566-67 (6th Cir. 2006):

> A conflict exists in this Court's precedent on the issue of whether a defendant who does not raise a claim of multiplicity before trial waives the claim not only with respect to the error in the indictment but also to the error affecting substantive rights. One line of cases has found that where a defendant fails to make a pretrial motion claiming multiplicity in the indictment, the defendant waives not only the claim based on the technical correctness of the indictment, but also the claim of multiplicity based on substantive rights, such as duplicative sentencing. . . . Although the defendant in Rosenbarger could not object to the indictment, he could object to the resulting substantive error of multiple sentences in violation of the Double Jeopardy Clause. This view has been acknowledged by the Court, both in the multiplicity context, . . . , and in the duplicity context, see *United States v. Adesida*, 129 F.3d 846, 849 (6th Cir.1997) (holding that a defendant who fails to object to a duplicitous indictment, i.e., an indictment that charges two crimes under the same count, waives his challenge as to the technical error in the indictment but not to the substantive error with respect to his right to a unanimous jury verdict for each crime). Defendants never claimed violation of a substantive right, such as sentences in violation of double jeopardy. As a result, Defendants waived their claim of multiplicity with respect to the indictment.

United States v. Zalapa, 509 F.3d 1060, 1063-64 (9th Cir. 2007):

> Zalapa challenges only his multiplicitous convictions and sentences, not the form of the indictment. Zalapa voluntarily pleaded guilty to all three counts and did not object to the form of the indictment in the district court. By failing to object to the multiplicitous indictment before pleading guilty, Zalapa waived any objection to the form of the indictment. Klinger, 128 F.3d at 708. Zalapa did not, however, waive his right to object to his sentences and convictions as multiplicitous on appeal. . . . [Going on to find, however:] the district court plainly erred when it entered judgment and sentenced Zalapa on both firearm counts. . . . The multiplicitous convictions and sentences affect Zalapa's substantial rights because they have collateral consequences, including the possibility of an increased sentence under a recidivist statute for a future offense.. . . These collateral consequences affect Zalapa's substantial rights and therefore justify vacating the multiplicitous conviction and sentence.. . . . . Because the multiplicitous convictions and sentences carry with them significant potential for collateral consequences, we conclude that the district court's error seriously affected the fairness of the judicial proceedings. By convicting and sentencing Zalapa on both firearm counts, the district court's plain error exposed Zalapa to double jeopardy, which makes his convictions fundamentally unfair.

United States v. Latham, 379 Fed.Appx. 570, 573 (9th Cir. 2010) (footnote and parallel citations omitted):

> Latham's double jeopardy claim is raised for the first time on appeal; we review for plain error. *United States v. Olano,* 507 U.S. 725, 732 (1993). Latham was convicted of both Receipt of Child Pornography (Count 3)

jeopardy challenge is apparent from the face of the pleading, the failure to object to the indictment is a forfeiture under Rule 12 of the double jeopardy claim as well.[32] Although the

> and Possession of Child Pornography (Count 4). The two Counts were based on the same images. Because possession is a lesser-included offense of receipt, the district court plainly erred by imposing convictions on both counts.

United States v. Morehead, 959 F.2d 1489, 1506 & n. 11 (10th Cir. 1992) (footnote and parallel citations omitted):

> We review multiplicity claims, to the extent they raise the possibility of multiple sentences for the same offense, notwithstanding the Defendants' failure to raise a pretrial motion to dismiss based on multiplicity. See Dashney, 937 F.2d at 540-41. . . . The government cites *United States v. Marroquin*, 885 F.2d 1240 (5th Cir.1989), for the proposition that failure to object to an indictment on multiplicity grounds prior to trial constitutes a waiver of the objection. We agree with the Marroquin court to the extent that Defendants, having failed to object prior to trial, cannot now complain about the possible prejudice to them in the eyes of the jury. See *United States v. Mastrangelo*, 733 F.2d 793, 800 (11th Cir.1984). However, as the Marroquin court recognized, a failure to object on multiplicity grounds prior to trial does not waive the multiple sentences issue. 885 F.2d at 1245. See also Mastrangelo, 733 F.2d at 800.

A similar approach has been taken to duplicity and unanimous verdict objections. See *United States v. Robinson*, 627 F.3d 941, 957 (4th Cir. 2010) (footnote omitted):

> Duplicitous indictments present the risk that a jury divided on two different offenses could nonetheless convict for the improperly fused double count. *See, e.g., United States v. Spencer,* 592 F.3d 866, 874-75 (8th Cir. 2010). But Robinson did not present this objection prior to the trial as called for by Rule 12(b)(3) of the Federal Rules of Criminal Procedure. To enforce this requirement, the Rules add that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by [the proper deadline]" unless it can show good cause. Fed.R.Crim.P. 12(e); *see also United States v. Colton,* 231 F.3d 890, 909 (4th Cir. 2000) (enforcing waiver of a multiplicity claim); *United States v. Price,* 763 F.2d 640, 643-44 (4th Cir. 1985) (same). Robinson fails to raise any argument approaching a showing of good cause. Several courts, however, have held that newly raised duplicity claims that go beyond technicalities to allege that the conviction could have rested on an impermissibly divided jury deserve plain error review. *See, e.g., United States v. Lloyd,* 462 F.3d 510, 514 (6th Cir.2006); *United States v. Hammen,* 977 F.2d 379, 382 (7th Cir. 1992); *United States v. Gordon,* 844 F.2d 1397, 1400-01 (9th Cir. 1988). Out of an abundance of caution, we address and reject Robinson's duplicity claim under that standard as well. Even assuming that § 924(c) creates separate offenses and that the indictment's conjunctive charges were plainly duplicitous, there is considerable doubt whether Robinson can demonstrate an impact upon his substantial rights and no doubt at all that he cannot demonstrate a miscarriage of justice.

See also United States v. Barrington, 648 F.3d 1178, 1190 (11th Cir. 2011) (analyzing failure to raise objection to indictment as duplicitous under Rule 12 good cause standard and finding it was waived, and separately analyzing the failure to raise an objection to the jury instructions under plain error).

[32] In *United States v. Wilson*, 962 F.2d 621, 626 (7th Cir. 1992), the court stated:

> In *United States v. Griffin*, 765 F.2d 677, 681-82 (7th Cir. 1985), we held that Rule 12(b)(2) of the Federal Rules of Criminal Procedure requires defendants to raise multiplicity challenges to indictments before trial, and that failure to do so amounts to waiver. This approach promotes fairness and efficiency by allowing courts to assess double jeopardy defects in indictments while evidence is still fresh, id. at 682, and by preventing defendants from making a tactical decision to delay raising such a challenge to make it more difficult, at trial or on appeal, for the prosecutor to reconstruct the evidence, much less justify multiple charges. Id. at 681 Wilson chose not to challenge the superseding indictment before or during trial for purely tactical reasons. This is precisely the sort of maneuver we sought to forestall by adopting the waiver rule in Griffin. By sitting on the double jeopardy issue, Wilson denied the government a chance to deal with it before trial. See id. at 682.

case law here is in some disarray, the Committee's intent in specifying multiplicity and duplicity on the list of defects in the indictment that must be raised prior to trial was to follow those cases that distinguish between an indictment defect and the different constitutional challenges that ripen later at trial or sentencing.

We think this would be the appropriate interpretation under the proposed amendment. First, an objection *to multiple judgments or sentences* for the same offense would be unavailable before sentencing/conviction, because a defendant would not know until then whether the judge would be able to avoid problem. Likewise, if jury instructions fail to adequately preserve the right to a unanimous jury verdict on each offense, the defendant should be able to challenge the instructions under Rule 30, even though he may have failed to challenge the indictment for duplicity. The amended rule should not be interpreted to require the defendant to object before trial to hypothetical jury instructions and sentences, since those instructions or sentences have not yet materialized and may never do so.

Second, the argument that a double jeopardy problem clear on the face of an indictment is forfeited by the failure to raise it before trial is difficult to reconcile with *Menna v. New York*, 423 U.S. 61 (1975) (per curiam), which seems to stand for the proposition that a double jeopardy challenge that is clear from the face of an indictment is not waived by a guilty plea. See *United States v. Broce*, 488 U.S. 563 (1989) (quoting *Menna*'s conclusion that "We do not hold that a double jeopardy claim may never be waived. We simply hold that a plea of guilty to a charge

United States v. Griffin, 765 F.2d 677, 681-82 (7th Cir.1985), discussed in *Wilson*, was a Section 2255 case, in which the court stated:

> If the defendant was required to set forth his claim before trial, the evidence may possibly show that the statute was violated twice and that the Double Jeopardy claim was without basis. In other words, the prosecutor's interpretation of the statute may very well follow the legislature's intent but, if the defendant is allowed to bring a multiplicity claim after trial, the prosecutor may no longer be able to reconstruct the evidence much less justify the multiple charges. We are not only concerned*682 with the individual's rights but also with society's right to charge the defendant with each offense committed. "While all judges have the obligation to protect individual rights the judge must not lose sight of the common good of all mankind ... Our laws are for the protection of all mankind and not just for the criminal." *United States v. Madison*, 689 F.2d 1300, 1314-15 (7th Cir.1982). Because efficiency and fairness would be better served by allowing courts to determine multiplicity claims based on the indictment while the evidence is still available to assess the defendant's claim, we join the First, Second and Eighth Circuits and hold that Fed.R.Crim.P. 12(b)(2) requires a criminal defendant to raise a multiplicity claim based on the indictment before trial. [6] Because Fed.R.Crim.P. 12(b)(2) requires defendants to bring multiplicity claims based on the indictment before trial, the Supreme Court's decision in *United States v. Frady*, 456 U.S. 152, 102 S.Ct. 1584, 71 L.Ed.2d 816 (1982), bars Griffin from arguing that the plain error standard of Fed.R.Crim.P. 52(b) should govern the question of whether he waived his right to challenge his allegedly multiplicitous indictment.

Compare also *United States v. Adesida*, 129 F.3d 846, 849–850 (6th Cir. 1997):

> Although Count One of the indictment charges two offenses and is duplicitous, defendant's arguments in regard to the harm caused by the duplicitous indictment, which involve allegations that he was denied his right to a unanimous jury verdict on Count One and that he did not have effective assistance of counsel, had to be raised during trial or on direct appeal and were waived by defendant's failure to do so.FN5 In accordance with the law of the case doctrine, defendant may not for the first time raise these two issues before the district court on a remand for resentencing.

does not waive a claim that – judged on its face – the charge is one which the State may not constitutionally prosecute.")[33] If a guilty plea does not waive a challenge to double jeopardy that is clear from the face of the indictment, it is not obvious how a failure to file a multiplicity challenge could do so.[34]

In sum, the proposed amendment would make explicit the incentive to flag multiplicity or duplicity in the charging instrument early when the it could be cured most efficiently, thereby reducing any alleged juror prejudice or confusion from multiple counts. But if the charging instrument is not challenged, that failure should not deprive the defendant of the option of raising the claim that the instructions, sentence, or judgment violated his rights to a unanimous verdict or not to be punished twice for the same offense.

Should the Committee wish to approach multiplicity and duplicity differently, there are several options available, including:

1) Make no change in the text of the proposed rule, but add language in the Committee Note (a) distinguishing between objections to the form of the indictment and objections to the lack of jury unanimity or the imposition of multiple punishments, and (b) recognizing that courts have taken differing approaches to whether the latter claims may be raised after the trial has begun and, if so, what standard for relief is applicable.

2) Change the text of the rule to eliminate the reference to duplicity and multiplicity (with or without any discussion in the Committee Note).

[33] *See, e.g., United States v. Moreno-Diaz*, 257 Fed.Appx. 435, 436 (2d Cir. 2007) ("Generally, the rights afforded by the Double Jeopardy Clause are personal and can be waived by a defendant." . . . Where a defendant has validly entered a guilty plea, he essentially has admitted he committed the crime charged against him, and this fact results in a waiver of double jeopardy claims. . . . However, the Supreme Court has established an exception to this rule: A guilty plea does not waive a subsequent double jeopardy claim where judged on its face-the charge is one which the [second prosecuting party] may not constitutionally prosecute.") (citations and quotation marks omitted); *United States v. Poole*, 96 Fed.Appx. 897, 898-99 (4th Cir. 2004) (rejecting the government's argument that under Rule 12(b) defendant's unraised double jeopardy error was waived, granting relief, despite defendant's guilty plea, reasoning: "Because on its face the superseding indictment exposed Poole to multiple sentences for a single offense, we conclude that Poole has not waived his claim of multiplicity on appeal"); *United States v. Williams*, 413 Fed.Appx. 220, 221 (11th Cir. 2011) (per curiam) ("Williams's appeal is not waived because he does not seek to introduce evidence from outside of the plea hearing to demonstrate that the conduct at issue in the sentencing phase of the first trial and the conduct at issue in the indictment of the second trial were the same offense."); *United States v. Harper*, 398 Fed.Appx. 550, 554 (11th Cir. 2010) (per curiam) (stating in case in which double jeopardy violation did not appear on the face of the indictment, "In order for us to conclude that Harper's double jeopardy challenge has not been waived, we must determine that "his guilty plea admitted no factual predicate that sufficed to make irrelevant his double jeopardy claim.").

[34] *See also United States v. Ehle*, 640 F.3d 689, 693 (6th Cir. 2011) (noting that the *Menna* rule "is not limited to successive prosecutions, i.e., situations involving one prosecution and conviction, a lapse of time, and then a separate prosecution and conviction for the same criminal activity. On the contrary, the reasoning in *Menna* logically applies just as well to simultaneous prosecutions on separate charges for the same criminal conduct.")

3) Change the text of the rule to eliminate the non-exclusive list of commonly raised claims under all of the subdivisions of the rule.

4) Change the text of the rule to retain the designation of duplicity and multiplicity as objections that must be raised before trial (if reasonably available), but provide for a less demanding standard for relief, i.e., prejudice only.

Options 1-3 would work no substantive change in the proposal. Options 2 and 3 would eliminate language intended to assist the courts and counsel and to ensure that typical claims are not overlooked. A significant drawback of Option 2 is that it would overstate the disagreement about whether these objections to the indictment should be raised prior to trial. All circuits require some of these challenges to the indictments to be raised before trial, though they differ on what happens when that does not occur.

C. Retaining the first two categories in (b)(3) as separate categories is a bad idea

*The two categories need not be retained if the claims within them are "subject to exactly the same criteria. Why after reorganizing the Rule this way the Committee has preserved the distinction between subsection (b)(3)(A) and (b)(3)(B), trying to clarify it at the cost of further complicating and extending the length of the Rule, is not apparent to us at all." (*NACDL at 5)

RESPONSE:

This is an interesting point that the Committee has not previously considered. The proposal could easily be modified to combine these two categories into one: "a defect in instituting the prosecution, or in the indictment or information, ..." Or, "a defect, in the indictment, the information, or in instituting the prosecution . . . "

The Committee may be able to accomplish the above without renumbering or relettering by reserving the omitted subpart.

D. Listing claims included in 12(b)(3)(A) and (B) is bad idea

Including the specific examples is undesirable because the categories "are simply not capable of the neat and uniform classification the amendment seeks to achieve," and they "will inevitably come to be seen as exhaustive – or at least exemplary – rather than illustrative." (NACDL at 5)

Listing only the constitutional right to a speedy trial might be interpreted to suggest that statutory motions need not be filed prior to trial. The Rule, or at least Note, should make clear that the amended Rule "will supersede that statute [the Speedy Trial Act] or any other that purports to set a specific pretrial motion deadline, such as 18 U.S.C. § 3237(b)(certain venue motions) or 28 U.S.C. § 1867(b)(jury selection challenges), by virtue of the Rules Enabling Act.. . ." (NACDL at 6)

The other two defender groups did not identify itemizing itself as a problem.

RESPONSE:

The text signals clearly that the lists are not exhaustive. It refers to defects in the institution of the prosecution and in the indictment "including" various claims. Moreover, we think any risk that the list might be seen as exhaustive would be outweighed by the benefits of flagging these issues for both the courts and counsel.

The Committee did not consider the possibility that the amendment might be interpreted as superseding specific statutory deadlines. There is at least one case where this argument was raised (and rejected) under the existing rule, [35] so it is possible that defendants might raise this argument if the rule is amended. Since the Committee had no intent to supplant statutory provisions specifying the timing of certain motions, it may wish to make it clearer in the text or the Note that nothing in the amendment affects other statutory deadlines for filing motions in criminal cases.

[35] *United States v. Westbrook*, 119 F.3d 1176, 1185 (5th Cir. 1997):

> [W]e note that Rule 12(f) and § 3162(a)(2) conflict over whether courts can permit a defendant to make a Speedy Trial Act objection if he failed to raise such an objection before trial (or at least before a plea of guilty or nolo contendere); Rule 12(f) explicitly allows courts to grant relief from any waiver, but § 3162(a)(2) does not. Although we have found no case recognizing this conflict, it can be easily resolved under existing authority. A statute that takes effect after the effective date of a federal rule repeals the rule to the extent that it actually conflicts. *Jackson v. Stinnett,* 102 F.3d 132, 135 (5th Cir.1996). Rule 12(f) was added to the Federal Rules on April 22, 1974 and made effective on December 1, 1975. Section 3162(a)(2) was enacted on January 3, 1975 and made effective "to all cases commenced by arrest or summons and all informations or indictments filed, on or after July 1, 1980." Thus, § 3162(a)(2) trumps Rule 12(f).

Also, at least one court has held that one statute's deadline for raising a claim of error, the Speedy Trial Act, cannot be accelerated to an earlier date by court order or under Rule 12. [36]

[36] See *United States v. Hale*, 11-40488, 2012 WL 2369572 (5th Cir. June 25, 2012) (interpreting § 3162(a)(2) ("Failure of the defendant to move for dismissal prior to trial or entry of a plea of guilty or nolo contendere shall constitute a waiver of the right to dismissal under this section.") and stating, "Making compliance with Rule 12(b) (required pretrial motions), Rule 12(c) (scheduling orders), and Rule 12(e) (waiver) applicable to motions to dismiss based on Speedy Trial Act violations would thus impermissibly force a defendant to prospectively waive his right to a speedy trial for the period of time between the filing deadline and the start of trial."). The Court relied upon *Zedner v. United States*, 547 U.S. 489, 500–03, 126 S.Ct. 1976, 164 L.Ed.2d 749 (2006), which held that a defendant could not prospectively waive his right to make a Speedy Trial Act claim.

III. Objections to Standards for Relief.

A. Applying "prejudice" to FTSO claims will generate more litigation

The amendment adopts an "ill-defined" standard of "prejudice" for review of such claims when raised late. (FD at 13)

"We are unsure what that standard ["prejudice"] could mean in this context. Perhaps it requires demonstration of some reason to think the grand jury would not have found probable cause as to the omitted indictment [element]. How could that be shown, where grand jury records are secret and not part of the record? And would not United States v. Mechanik, . . . seem to preclude a finding of 'prejudice' from such error on appeal after a trial jury verdict or guilty-plea admission of all the elements? Or perhaps 'prejudice' in this context will be interpreted to mean that the defendant was, in the end, convicted of or sentenced for a different offense, or a more serious offense, than s/he thought was charged, creating unfairness in trial preparation or plea negotiations. The present proposal offers no clue what answer the Committee intends to these questions."(NACDL at 7)

RESPONSE:

As reflected in the case analysis below, the Defenders are correct that there is some uncertainty about how to measure if and when omitting an essential element from an indictment creates "prejudice." The question for the Committee is whether the proposed amendment (or a modified version) can provide a standard that creates a strong incentive to raise these claims prior to trial while avoiding injustice for defendants whose attorneys fail to do so. Put differently, do the benefits of increasing the likelihood of resolving these claims before trial outweigh the cost of any litigation as courts apply the "prejudice" standard? The proposed amendment is premised upon the conclusion that the expected benefits do indeed outweigh the costs.

A window into the potential cost of creating more litigation is offered by the experience of courts already assessing "prejudice" as part of plain error review when reviewing similar claims – indictments missing elements and constructive amendments. The small number of cases has not led to a consensus on how this analysis should be conducted, but they suggest that such an analysis is feasible. These cases are discussed below.

The concept of prejudice in the proposed amendment is lifted from the third prong of the *Olano* test under Rule 52(b). The assessment of prejudice under Rule 12, like the assessment of prejudice under Rule 52, will always depend upon the context and the claim. When reviewing the omission of an *Apprendi* element from the indictment for plain error, the Court in *Cotton* itself applied only the fourth prong of *Olano*, and found no need to assess what prejudice required in this context. Lower courts applying plain error since *Cotton*, however, have assessed whether a defendant was prejudiced when his indictment failed to include an essential element and thus fails to state an offense.

When a defendant is prosecuted based on an indictment or information that fails to state an offense, three types of prejudice could arise: (1) deprivation of adequate notice regarding the charge to facilitate the preparation of the defense; (2) impairment of the ability to plead double jeopardy later; and (3) deprivation of the right to grand jury review. In assessing prejudice, a court should be attentive to each of these concerns.

Notice. Courts have addressed whether a defendant was prejudiced by gaps in knowledge about the charge when assessing claims of improper amendments to informations and indictments, and various insufficiencies in the charging instrument, when those claims are raised before,[37] during, and after trial.[38] For example, when the record establishes that a defendant knew of the charge he was facing, even though an essential element was missing from the charging instrument, allegations of this sort of prejudice should be rejected. This kind of analysis is regularly undertaken by appellate judges assessing constructive amendment for plain error.[39] This task may be even easier for trial judges – both before and after conviction if raised in a motion for new trial, for example – given their first hand exposure to the words and conduct of the defendant and defense attorney. Indeed, assessing prejudice to a defendant's ability to defend himself is something trial judges must do with some regularity when evaluating other claims such as unconstitutional delay in charge and trial. (Notice would presumably be the only source of prejudice when the FTSO claim is based not on the omission of an essential element, but instead on the allegation that the underlying statute is unconstitutional.[40])

[37] *Compare United States v. James*, 980 F.2d 1314, 1318-19 (9th Cir.1992) (the defendant must have been given adequate knowledge of the missing elements in order to satisfy the due process requirement . . . James was aware of all of the elements to be proven at trial. The Government provided James with a copy of the grand jury proceedings which included the testimony of an agent of the Federal Bureau of Investigation who testified to the fact that both James and the victim were enrolled Indians, and that the crime occurred on an Indian reservation. These facts were never contested by James and were proven again at trial beyond a reasonable doubt. . . . The facts presented at trial conclusively proved that both James and the victim were enrolled Indians within the meaning of section 1153, and that the crime took place on an Indian reservation. It is inconceivable that James would have presented a different defense if the indictment had been corrected. James was not prejudiced by the indictment's failure to state that he was an Indian) with *United States v. Sunia* , 643 F.Supp.2d 51, 78 (D.D.C. 2009) (dismissing indictment missing essential element after rejecting government's argument that defendant must have known charge he was facing).

[38] *See* notes 42-45 *infra*.

[39] *See* cases collected in notes 42-45 *infra*.

[40] *E.g., United States v. Maybee*, No. 11-30006, 2011 WL 2784446, *5-6 (W.D. Ark. July 15, 2011) (rejecting 13th Amendment challenge). Courts have held that a claim that the indictment fails to "charge an offense" includes a claim that the statute creating the offense is unconstitutional. *United States v. Hedaithy,* 392 F.3d 580, 587 (3d Cir. 2004) ("We also declined the Government's invitation to apply Rule 12(b)(2) narrowly to cover only those cases in which the charging instrument completely neglected to mention an element of the offense. Instead, we felt compelled by our previous decisions to hold that for purposes of Rule 12(b)(2), a charging document fails to state an offense if the specific facts alleged in the charging document fall beyond the scope of the relevant criminal statute, as a matter of statutory interpretation.").

Double jeopardy. Prejudice to the ability to plead double jeopardy in a later prosecution has been evaluated by courts assessing claims of insufficiency in the indictment or information,[41] and presumably would be evaluated similarly here.

Grand jury review. The third type of "prejudice" that could arise is the failure to present the complete offense to a grand jury for review. The Court's decision in *Cotton*, combined with lower court's applications of plain error to missing element cases, suggest how this analysis would play out. In *Cotton* itself, the Court applied plain error review to the claim that the grand jury had not reviewed the fact at issue, and although declining to rely on the third "prejudice" prong and instead applying the fourth prong of the *Olano* test, the Court evaluated whether to grant relief by asking whether the *grand jury would have found* the omitted element *given the evidence available at trial*: "The evidence that the conspiracy involved at least 50 grams of cocaine base was 'overwhelming' and 'essentially uncontroverted.'. . . *Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base*." *Cotton*, 535 U.S. at 633. The Court in *Cotton* did not find it impossible to predict what the grand jury would have done had it been asked to determine this omitted factual question, and referenced its rejection of a similar impossibility in *Neder v. United States*, 527 U.S. 1 (1999).[42]

Since *Cotton, Johnson*, and *Neder*, several lower courts, specifically the DC, 1st, 4th, 5th 8th, 9th, and 10th Circuits, have evaluated a defendant's post-conviction claim of an omitted element or of constructive amendment using the plain error rules that apply to other untimely constitutional claims. While many of these decisions have, like *Cotton*, been resolved using the fourth prong of the plain error test,[43] some have evaluated the third prong.[44] Others have

[41] See *United States v. Allen*, 406 F.3d 940, 945-49 (8th Cir. 2005) (emphasis added):

> The two primary purposes of an indictment are to give the defendant clear notice of the allegations that he will have to defend himself against at trial, and to allow the defendant to plead prior prosecution as a bar to future prosecution. *See United States v. Miller*, 471 U.S. 130, 134–35 (1985). There is no dispute that Allen had complete and timely notice of the allegations against him, through the combination of the indictment and the notice of intent to seek the death penalty, and that his defense during both the guilt and penalty phases was in no way prejudiced. *Nor is there any dispute that the indictment was sufficiently clear to allow Allen to use it as a bar to being prosecuted again for the same conduct*.

See also United States v. Rucker, 417 F. App'x 719, 724 (10th Cir. 2011) ("One test to determine constructive amendment is whether a defendant could be exposed to double-jeopardy, *i.e.*, a second trial based on the same possession. *United States v. Hamilton*, 992 F.2d 1126, 1130 (10th Cir.1993). . . . Rucker does not complain he did not have notice of the evidence against him and does not suggest he may possibly be subject to double-jeopardy on the basis of the jury's conviction in this case.").

[42] *Cotton*, 535 U.S. at 634 ("Respondents emphasize that the Fifth Amendment grand jury right serves a vital function in providing for a body of citizens that acts as a check on prosecutorial power. No doubt that is true. . . . But that is surely no less true of the Sixth Amendment right to a petit jury, which, unlike the grand jury, must find guilt beyond a reasonable doubt. The important role of the petit jury did not, however, prevent us in *Johnson* from applying the longstanding rule "that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . .").

[43] *E.g.*, *United States v. Lopez*, 392 Fed.Appx. 245, 249-50 (5th Cir. 2010); *United States v. Gavin*, 583 F.3d 542, 547 (8th Cir. 2009) (we "conclude the instructions altered the offense's essential elements. . . . When it added

the element of intimidation, and failed to reference the use of physical force, the court constructively amended the indictment." . . . We find this amendment does not rise to the level of plain error. There is simply no showing that the error "affected [Gavin's] substantial rights" or "seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.". . . There is no reasonable probability Gavin would have been acquitted under the correct jury instruction."); *United States v. Casas*, 444 Fed.Appx. 184, 187 (9th Cir. 2011) ("As to Counts 3, 4, 7, 8, and 10, the jury instructions constructively amended the indictment by allowing the jury to find only an *agreement* to possess drugs with intent to distribute them, rather than requiring the jury to find *actual* possession or distribution as charged in the indictment. Assuming without deciding that this was plain error that affected Casas's substantial rights, . . . we nonetheless exercise our discretion to leave Casas's sentence intact. . . . Even if we were to reverse Casas's sentence as to Counts 3, 4, 7, 8, and 10, the separate 200–month sentence would not be affected. We thus conclude that the error as to Counts 3, 4, 7, 8, and 10 did not 'seriously affect the fairness, integrity or public reputation' of Casas's trial and sentence. *See Olano,* 507 U.S. at 736"); *United States v. Hall*, 610 F.3d 727, ___ (D.C. Cir. 2010) ("Hall maintains that to show plain error, as he must because he did not object to the instruction at trial, he need not show prejudice because the Constitution protects a defendant's right to be tried only on 'charges returned by a grand jury,'. . . , and the violation of this fundamental right always affects substantial rights. *See Stirone,* 361 U.S. at 217–18. We need not decide this question. In [*Cotton]*, the Supreme Court avoided deciding whether this type of error affected the defendant's substantial rights because in that case the error did not 'seriously affect the fairness, integrity or public reputation of judicial proceedings,' the fourth prong of the plain error analysis.. . . The same is true here."); *United States v. McGilberry*, 480 F.3d 326, 330-31 (5th Cir. 2007) ("it is apparent that the indictment in this case, referencing only 'possess[ion] ... during and in relation to' a drug trafficking crime failed to list all the elements of any offensive conduct. . . . the next step in the analysis is typically to consider whether the error affected McGilberry's substantial rights . . . . While this inquiry normally requires a finding that the error was prejudicial, it is unclear what type of showing must be made to prove that a defective indictment affected substantial rights. *See [Cotton; Olano].* The Supreme Court has repeatedly avoided answering that question . . . . We follow the Supreme Court's lead in turning directly to the fourth step of the plain error analysis," denying relief); *United States v. Sinks*, 473 F.3d 1315, 1320-21 (10th Cir. 2007) ("Sinks argues that by failing to charge the interstate commerce element of Count One, the indictment failed to charge an offense. . . . A defendant may challenge an indictment for its failure to charge an offense for the first time on appeal. . . . Although we review Sinks' claim on the merits, we do so only for plain error. [*Cotton]*. . . . The government concedes that the omission of the interstate commerce element was error, and was plain. However, when the evidence proving an element is 'overwhelming' and 'essentially uncontroverted,' the failure to allege that element does not 'seriously affect[ ] the fairness, integrity or public reputation of judicial proceedings.' *[Cotton]*. . . . Because the interstate commerce element was proven by overwhelming and essentially uncontroverted evidence, the failure to charge it does not rise to the level of plain error.").

[44] *United States v. Bunchan*, 626 F.3d 29, 32 (1st Cir. 2010) ("A primary objective of the rule against constructive amendments is to ensure that the defendant has notice of the charges against him. … . Plain error review applies to an unpreserved claim such as this")*;*

United States v. Bohuchot, 625 F.3d 892, 897 (5th Cir. 2010):

> Prior to the Supreme Court's decision in *Olano,* this court had held that '[c]onstructive amendments are reversible *per se.*' Our post- *Olano* decisions, however, have concluded that plain error review applies even if there has been a constructive amendment. Although there is 'tension between plain error review and the "automatic reversal" rule of *Mize,*' it is clear in this Circuit that we have 'reconciled [that tension] in favor of plain error review.' Our inquiry is therefore whether there was plain error in the district court proceedings." . . . We will assume, without deciding, that there was a constructive amendment of the indictment. We cannot conclude, however, that any such error affected the defendants' substantial rights, that is, that it affected the outcome of the district court proceedings. . . . It is improbable that the jury would have concluded that Wong and Bohuchot were innocent if only the evidence of which the defendants now complain had been excluded .. . . Any such error did not seriously affect the fairness, integrity, or public reputation of the judicial proceedings. Wong and Bohuchot were not surprised by the evidence they now challenge. . . . There is no contention that the defendants were unable to meet the government's

evidence. And, as noted, the evidence of guilt was very substantial. Accordingly, we will not reverse the convictions on the basis of a constructive amendment of the indictment. (endnotes omitted).

United States v. Salazar-Lopez, 506 F.3d 748, 752-54 (9th Cir. 2007):

> We held in *Du Bo* "that, if properly challenged prior to trial, an indictment's complete failure to recite an essential element of the charged offense is not a minor or technical flaw subject to harmless error analysis, but a fatal flaw requiring dismissal of the indictment." *Id.* at 1179. The reach of *Du Bo* has been limited somewhat, as we have distinguished it from situations where the challenge to the indictment was untimely, because no objection was made at trial. *United States v. Velasco-Medina,* 305 F.3d 839, 846-47 (9th Cir.2002) (applying plain error review to an indictment's failure to allege an element of the crime, and refusing relief because the defendant suffered no prejudice from the omission). . . .
>
> . . . there may be cases where the failure to include a relevant fact in the indictment makes any conclusion as to harmlessness too speculative, but the existence of that potential difficulty need not preclude the use of harmless error analysis in every case. *Cf. Cotton,* 535 U.S. at 632-33, 122 S.Ct. 1781 (refusing to find that a failure to allege drug quantity "seriously affect[ed] the fairness, integrity, or public reputation of judicial proceedings" where the evidence "was 'overwhelming' and 'essentially uncontroverted,' " so that "[s]urely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base") (quoting *Johnson v. United States,* 520 U.S. 461, 470, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). Additionally, while the grand jury's restraining function-which *Du Bo* emphasized, 186 F.3d at 1179-is no doubt important, the Supreme Court has since recognized that the "check on prosecutorial power" provided by "the Fifth Amendment grand jury right" is "surely no less true of the Sixth Amendment right to a petit jury, which, unlike the grand jury, must find guilt beyond a reasonable doubt," *Cotton,* 535 U.S. at 634, 122 S.Ct. 1781. Yet the failure to submit elements to the petit jury is reviewed for harmlessness. *Neder v. United States ,* 527 U.S. 1, 8-15, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999).

United States v. Velasco-Medina, 305 F.3d 839, 847 (9th Cir. 2002):

> Reviewing for plain error, we find none. "The key question [as to whether an indictment is adequate] is whether an error or omission in an indictment worked to the prejudice of the accused..... Absent such prejudice, the conviction may not be reversed for any omission in the indictment." *Id.* at 1316-17 (internal quotations omitted) (alteration in original). At oral argument, Velasco-Medina's attorney conceded that his client's trial counsel was aware of the nature of the alleged offense and knew that the government needed to prove specific intent even though that element was missing from the indictment. Moreover, Velasco-Medina's indictment specifically referred to 8 U.S. C. § 1326, which prescribes the penalty for "any alien who (1) has been ... deported ... and thereafter (2) ... attempts to enter ... the U.S. ." 8 U.S. C. § 1326(a). Reference to this statute put Velasco-Medina on notice of the charge against him and the specific intent necessary to support a conviction. In addition, the district judge's instructions to the jury eliminated any risk of prejudice. The judge directed the jury to convict Velasco-Medina under 8 U.S. C. § 1326 only if it found beyond a reasonable doubt that he "voluntarily attempted to reenter the U.S. without the consent of the [INS]," and he "intended to reenter the U.S. after his deportation." These instructions conveyed the essence of specific intent and assured that the jury would not convict without finding it existed. Thus, any defect in the indictment was harmless and provides no basis for reversing Velasco-Medina's conviction.

See also United States v. Alverio-Melendez, 640 F.3d 412, 421, n.4 (1st Cir. 2011) ("We need not address this issue. Even if the district court did constructively amend the indictment, the defendants must still prove that prejudice resulted. . . . For the reasons discussed below, they cannot do so."); *United States v. Partida,* 385 F.3d 546, 559 (5th Cir.2004) (finding no plain error on review of claim that jury instruction allowed jury to convict on un-indicted charge of attempted conspiracy, after considering that "neither the prosecution nor the defense argued for a finding of attempted conspiracy, nor was evidence of a mere attempt placed before the jury" and noting the "overwhelming evidence of a fully formed conspiracy"); *United States v. Presbitero*, 569 F.3d 691, ___ (7th Cir. 2009) (applying plain error review because defendant "failed to raise a timely objection in the trial court on the constructive amendment of the indictment grounds he now raises," finding no constructive amendment); *United States v. Alarcon-Martinez*, 51 F. App'x 757, 757-58 (9th Cir. 2002) ("Absent prejudice to the accused, the

assessed missing element claims for harmlessness under Rule 52(a) (the issue the Court was going to resolve in *Resendez-Ponce*), an analysis that requires some evaluation of prejudice.[45]

conviction may not be reversed for any omission in the indictment. Alarcon-Martinez had notice of the elements of the attempt charge and was not prejudiced by the language in the indictment and thus, no basis for reversal exists."); *United States v. Langford*, 641 F.3d 1195, 1196 (10th Cir. 2011) (finding plain error when essential element omitted from information, " the distinction between plain error review and de novo review is academic because the government did not merely fail to allege Langford's Indian status as an element of the crime. Rather, it failed to produce *any* evidence whatsoever of Langford's Indian status.")

But see United States v. Soerbotten, 398 Fed.Appx. 686, 687 (2d Cir. 2010) ("A constructive amendment is, however, '*per se* prejudicial' for the purpose of the third prong of plain error review. *United States v. Thomas,* 274 F.3d 655, 671 (2d Cir. 2001). Nevertheless, we find no error in this case, plain or otherwise."); *United States v. Vosburgh*, 602 F.3d 512, 531-32 (3d Cir. 2010) ("A variance that sufficiently informs the defendant of the charges against him and allows him to prepare his defense without being misled or surprised at trial does not prejudice the defendant's substantial rights. Constructive amendments, by contrast, are "per se reversible under harmless error review, [and] are presumptively prejudicial under plain error review."); *United States v. Jenkins*, 347 Fed.Appx. 793, 796 (3d Cir. 2009) (finding that "there was clear and obvious error [constructive amendment] which, under the circumstances of this case, affected Jenkins's substantial rights, we will exercise our discretion and vacate Jenkins's conviction on Count Three.").

The Fourth Circuit appears to be divided. Compare the dicta in *United States v. Robinson*, 627 F.3d 941, 958 (4th Cir. 2010) ("in this circuit constructive amendments are erroneous per se and require reversal regardless of preservation," but rejecting constructive amendment claim), with the holding in *United States v. Carr*, 303 F.3d 539, 543-44 (4th Cir. 2002), where the arson indictment was missing an essential element:

> At oral argument Carr's lawyer emphasized the importance of the Fifth Amendment right to a grand jury to support Carr's claim that the indictment defect seriously affected the fairness, integrity, or public reputation of judicial proceedings. Specifically, the lawyer argued that it is essential to the basic fairness and integrity of the criminal process that the indictment set forth every ingredient of the crime charged. However, in *Cotton* the Supreme Court, citing *Johnson,* rejected essentially the same argument.. . . . As the Court explained in *Cotton,* if the defect in the trial court's instructions to the petit jury in *Johnson* did not seriously affect the fairness, integrity, or public reputation of judicial proceedings, then neither does a similar defect in the grand jury indictment.. . . This assumes, of course, that the faulty indictment still provided the defendant with adequate notice of the offense charged. Here, as in *Cotton* and *Johnson,* there is no question that the evidence unequivocally and overwhelmingly supported the missing element, namely, that the apartment building was damaged or destroyed by fire. And, while the element of "by fire or an explosive" was omitted from the grand jury indictment, it was included in the charge to the petit jury, which found the element beyond a reasonable doubt when it returned a guilty verdict. Thus, we can say with confidence that the grand jury, having charged Carr with damaging or destroying the building, would also have charged him with using fire as the means, if the grand jury had been properly advised. In addition, Carr does not suggest that any of the substantive concerns underlying the Fifth Amendment right to a grand jury, such as adequate notice of the offense charged, *see United States v. Miller,* 471 U.S. 130, 134-35, 105 S.Ct. 1811, 85 L.Ed.2d 99 (1985), are implicated here.. . . Carr was thus aware all along that he was charged with damaging or destroying the apartment building "by means of fire or an explosive." In these circumstances, the defect in Carr's indictment did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. Accordingly, we affirm his conviction.

[45] *E.g.,* LaFave et al., Crim. Proc. § 19.3(a) ("[B]y a conservative count, at least five federal circuits have abandoned the traditional position mandating automatic reversal, and substituted harmless error review, for appellate review of a timely challenge to an indictment's failure to allege an essential element of the offense.").

Consider, for example, *United States v. James*, 980 F.2d 1314, 1318-19 (9th Cir.1992) ("The indictment should have contained allegations that James was an Indian and that the victim was an Indian. The fact that both he and the victim were Indians was established in the grand jury proceedings and at trial beyond a reasonable doubt . . . . ."). *See also United States v. Pickett*, 353 F.3d 62, 68 (D.C. Cir. 2004) ("This circuit has never considered the

Like the Supreme Court in *Cotton*, these courts have managed to address when the failure to provide grand jury review of a particular element has (or has not) "prejudiced" a defendant.

Most of these courts, perhaps because they have evaluated claims raised at or after trial, have referenced the *evidence available for trial* in assessing prejudice. And it appears that most of these consider the effect on the trial jury's decision, rather than the decision of the grand jury. At least one case has evaluated prejudice by asking, as *Cotton* did, whether the *grand jury* would have found probable cause to believe the omitted information, but like *Cotton* they answer this question by looking at the evidence available for trial. Although there is some logic to considering only the evidence that actually was presented to the grand jury in assessing the impact of the prosecution's failure to present an element, courts may conclude that other approaches are preferable.[46] A variety of factors may influence this analysis. When available evidence unquestionably supports an omitted element, requiring the government to return to the grand jury and seek a new indictment will often have little or no deterrent effect. When that requirement is imposed *after a trial has begun* (e.g., evidence taken, jury sworn), the remedy may impose a cost far greater than any deterrent benefit produced. In addition, the importance of preserving grand jury secrecy may support an approach that avoids disclosing grand jury transcripts to every defendant who raises an untimely motion to dismiss on this basis. On the other hand, a defendant might also complain that he lost the opportunity for nullification by the

question of whether an indictment flawed by omission of an essential element is subject to harmless error review, nor need we today. Contrary to the Government's assertions, the evidence of an "investigation or review" is neither overwhelming nor uncontroverted. Indeed, the evidence is so far from overwhelming that it would have been difficult for Pickett to find it in order to controvert it.").

[46] In *United States v. Allen*, 406 F.3d 940, 945-49 (8th Cir. 2005), the Eighth Circuit recognized that there are multiple ways a court could assess this question, and resolved the case without expressing an opinion on which method was required:

> We are presented with three possible ways to conduct that harmless-error inquiry in this case. One approach would be to limit our review to the evidence presented to the grand jury when it was asked to indict Allen. Another approach would be to review the entire record, including the evidence presented to the petit jury at the trial and penalty phase. A third approach would be to view the petit jury's verdict, which unanimously found the existence of the mens rea requirement and the aggravating factors beyond a reasonable doubt, as proof that the grand jury in this case would have charged the requisite mental state and the aggravating factors in the indictment.
>
> . . . In this case, the narrowest method of conducting harmless-error review is to limit ourselves to the evidence presented to the grand jury at the time it was asked to indict Allen. Because application of this method satisfies us beyond a reasonable doubt that the error in this case was harmless, we express no present opinion on the validity of conducting harmless-error review with reference to the entire record, cf. *United States v. Wright*, 248 F.3d 765, 766–67 (8th Cir.2001), or the validity of using the petit jury's verdict on the aggravating factors and the mens rea requirement as proof that the grand jury would have charged the aggravating factors and the requisite mental state in the indictment, cf. *United States v. Mechanik*, 475 U.S. 66, 70, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986).

The court went on to find that "the grand jury testimony persuades us beyond a reasonable doubt that, if the grand jury had been asked to charge the grave-risk-of-death-to-others statutory aggravating factor, it would have done so. The government would have needed to persuade only a simple majority of the twenty-three-member grand jury to find probable cause. . . . The failure to charge this statutory aggravating factor in the indictment was therefore harmless error. . . . We reach the same conclusion about the mens rea requirement. . . ."

grand jury. That argument, however, seems even less likely to succeed in this context than nullification arguments raised in objection to harmless error analysis of trial errors.[47]

In our view, if the Committee wants to require FTSO claims to be raised before trial, requiring a showing of prejudice remains the best option. Prejudice it is no less well defined – and is more generous to defendants – than any of the other potential standards for reviewing *untimely* error: "good cause," "plain error," or "cause and prejudice."[48] If there are to be any consequences attached to the failure to raise this claim on time, a simple showing of prejudice is a fairly low bar.

If the Committee concludes that it would be important to make it clearer how prejudice should or could be assessed in this context, language could be added to either the Note or the text of the amended Rule.

[47] *See also United States v. Horsman,* 114 F.3d 822, 829 (8th Cir.1997) (the deprivation of a chance at grand jury nullification "does not transform a harmless error into a prejudicial one").

[48] As the Attorney General points out in his letter of February 13, 2012, at p. 7: "we agree with the Advisory Committee's conclusion that a defendant might not be able to satisfy all prongs of the plain error standard (showing an error that is plain, affects substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings) yet nevertheless may be deserving of relief where an indictment fails to state an offense. For that reason, we concur with the proposal that a showing of prejudice is sufficient to obtain consideration for this type of untimely motion."

B. Requiring a showing of "cause and prejudice" before conviction

1. Is not supported by precedent

"Current case law interprets the 'good cause' standard of Rule 12 according to the procedural context in which it is being applied, so that consideration of prejudice is part of the good cause inquiry for a claim that is first made post-conviction, but not necessarily as to untimely claims raised before judgment. . . At a minimum the proposed amendment should be changed to make clear that 'cause and prejudice' only applies to post-conviction claims. (NACDL at 3)

Case law does not support the prejudice requirement as applied to trial courts when considering a motion filed before trial concludes. (FD at 7-8)

"The Supreme Court has never interpreted Rule 12's 'good cause' provision to require a showing of cause and prejudice in the pre-conviction context, or even on direct appeal, and. . . courts have applied the 'good cause' requirement in the pre-conviction context without requiring a showing of prejudice." (NACDL at 9)

RESPONSE:

There is, indeed, no unanimity on requiring prejudice under Rule 12 today, a point the Committee considered at length. Because the courts have been divided on this issue, the Committee concluded that it would be beneficial to resolve the issue and provide a clear standard in the amended Rule. A majority of members were persuaded by the line of authority, starting with *Shotwell,* that indicates the appropriate standard is cause and prejudice, regardless of whether the late claim is raised before or after conviction.

Supreme Court Precedent. Although the Defenders are correct that the Supreme Court precedents upon which the Committee relied involved claims raised for the first time after conviction, the opinions gave no indication that the Court's interpretation of Rule 12 was applicable only at that procedural stage. To the contrary, the language in these opinions is broad and general. See, e.g., *Murray v. Carrier*, 477 U.S. 478, 494 (1986) (stating that "It may be true that the former Rule 12(b)(2) of the Federal Rules of Criminal Procedure, as interpreted in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), and *Davis v. United States*, 411 U.S. 233 (1973), treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule," but finding that both cause and prejudice are required for habeas review of defaulted claim challenging state court conviction) (parallel citation omitted, emphasis added); *id*. at 502-503 (stating that although " [t]he term 'prejudice' was not used in Rule 12(b)(2)," the Court in *Shotwell* "decided that a consideration of the prejudice to the defendant, or the absence thereof, was an appropriate component of the inquiry into whether there was

'cause' for excusing the waiver that had resulted from the failure to follow the Rule") (Stevens, J., concurring in the judgment).[49]

Lower court precedent. The Defenders contend that when claims are belatedly raised in the *district* courts, prejudice has generally played no part in the determination whether to relieve a defendant of waiver under Rule 12. The authority the Defenders cite for this is discussed in the margin.[50] Our research for this memo has identified at least four other decisions, not cited by the

[49] In a later case, *Goodwin v. United States*, 457 U.S. 368, 371 n. 3 (1982), considering a claim of vindictive charging on direct appeal, the Court noted only this regarding the motion to dismiss in that case: "The District Court considered the merits of respondent's motion even though it was not timely filed in accordance with Rule 12(b)(1) of the Federal Rules of Criminal Procedure. The District Court found sufficient "cause" for respondent's procedural default pursuant to Federal Rule of Criminal Procedure 12(f). The Court of Appeals did not consider the propriety of the District Court's ruling in this regard and neither do we."

[50] In the two court of appeals cases cited (FD at 8), the courts had no need to consider prejudice. Since no cause was shown in either case, there was no occasion to consider any other factor. *United States v. Rodriguez-Lozada*, 558 F.3d 29, 38 (1st Cir. 2009); *United States v. Moore*, 98 F.3d 347 (8th Cir. 1996). The Defenders also quote one additional case as a representative ruling, an unpublished decision allowing a late-filed discovery motion. Additionally, on p. 9 the Defenders note that another panel of the First Circuit has described good cause without expressly requiring a showing of prejudice.

Other recent examples of court of appeals decisions omitting mention of prejudice when finding no cause, include *United States v. McCreary*, 10-1593, 2012 WL 2874019 (6th Cir. July 16, 2012) (finding no cause for failure to raise suppression ground before trial stating, "Good cause is a flexible standard heavily dependent on the facts of the particular case as found and weighed by the district court in its equitable discretion. At a minimum, it requires the party seeking a waiver to articulate some legitimate explanation for the failure to timely file.") (citation omitted); *United States v. Tolentino*, 11-3588, 2012 WL 2581001 (3d Cir. July 5, 2012) ("Tolentino has not only failed to address why it was impossible for him to file a 12(b) motion, but his brief fails to even argue that his wavier deserves excuse.");*United States v. Collins*, 2012 WL 2362527 (9th Cir. June 22, 2012) (grand jury error waived, citing *Shotwell*); *United States v. Rodriguez,* 466 Fed.Appx. 751 (10th Cir. 2012) (suppression motion waived, noting whether good cause exists because of ineffective assistance of counse must await post conviction proceeding).

There is an additional, older court of appeals case that supports the defenders position, *United States v. Hall*, 565 F.2d 917, 920 (5th Cir. 1978) (stating, in case where district judge allowed but denied suppression motion after start of trial, "We believe the district court's desire to avoid penalizing a criminal defendant for the inadvertence of his attorney constitutes "cause" under 12(f) and is within the court's discretion," but rejecting suppression argument and affirming conviction).

Recent district court decisions finding no cause and not mentioning prejudice include *United States v. Ferguson*, 10-20535, 2012 WL 1957059 (E.D. Mich. May 31, 2012) (finding no cause for jury selection claim raised during voir dire, concluding that "the factual and legal bases for the defendants' challenge were available prior to trial," also rejecting claim on its merits); United States v. Johnson, 2:09-CR-232 JVB, 2012 WL 1301241 (N.D. Ind. Apr. 16, 2012) (no cause to excuse waiver when defendant first moved to exclude the statements at issue in the midst of the trial);

Recent district court decisions refusing *before trial* to extend a motion deadline and excuse a late motion after finding no cause and not mentioning prejudice include *United States v. Pappas*, CR12-0025, 2012 WL 1978042 (N.D. Iowa June 1, 2012) (finding that lawyer's "attempt[] to deflect responsibility for properly noting the deadline on his calendar," by blaming it on his ill secretary was not good cause, refusing to address suppression motion filed a week following the motion deadline, but three weeks before trial); *United States v. Gant*, 11-CR-2042-LRR, 2012 WL 2576466 (N.D. Iowa July 3, 2012) (denying late motion to sever filed prior to trial).

Defenders, that provide additional examples of district judges applying Rule 12's "good cause" requirement, before conviction, by evaluating only the reason for late filing, without inquiring into prejudice.[51] This approach may also be followed by other trial judges today.

Countering this cause-only approach, however, are many decisions regarding "good cause" under Rule 12 for filing a motion late but before conviction, in which either a district court evaluated both cause *and prejudice*,[52] or in which a court of appeals instructed the district court to do so. Support for an assessment of prejudice as well as cause in considering relief for untimely claims filed before conviction can be found in decisions from six circuits: the D.C.,[53]

[51] *See United States v. Hasan*, 747 F.Supp.2d 642, 700 (E.D.Va. 2010) (granting permission to file late motion to dismiss based on double jeopardy "in light of the reasons articulated by Ali's counsel, the novelty and complexity of this case, the Government's filing of a Superseding Indictment in the midst of motion practice, the sheer number of motions filed, and the relatively insignificant time of the delay in filing the instant motion," but denying motion to dismiss on its merits); *United States v. Grace*, 434 F.Supp. 2d 879, 883-884 (D. Mont. 2006) (finding good cause exists for granting relief from the waiver from late filing of motion to dismiss that alleged a violation of the statute of limitations, reasoning "the deadlines set forth in the Scheduling Order have been as often honored in the breach as in the observance, and . . . in each case thus far it has been the government who has failed to comply and the Defendants who have been inconvenienced, fairness dictates that the Defendants be allowed this dilatory filing," also ,"to date, the failures to timely comply . . . have not jeopardized the trial date," and granting motion to dismiss); *United States v. Miller*, 382 F.Supp. 2d 350, 365 (N.D.N.Y. 2005) (finding that although both the government and the defense had waived arguments regarding suppression under Rule 12, "the court elects to consider the merits of both since the factual record has been adequately developed," never mentioning any standard for overcoming waiver under Rule 12); *United States v. Neal*, No. 3:11-CR-69, 2012 WL 529553, *2 (E.D.Tenn. Feb. 17, 2012) (finding good cause to allow late filing of motions before trial after deadline, noting "the motions do not overlap or appear to be attempts to relitigate matters raised by prior counsel. Second, two of the three motions relate to the provision of information on the charges or discovery, and the Court notes that provision of discovery in this case was prolonged because portions of the investigation occurred in Chicago and elsewhere. Finally, the Court finds that the hearing of these motions would not compromise the June 26, 2012 trial date in this case.").

[52] *See United States v. Davis*, 645 F.Supp.2d 541, 546 (W.D.N.C. 2009) ("Having provided an explanation for its untimely filing, and in light of the actual prejudice that would result if the Objections were not allowed, the Court concludes that the Government has demonstrated good cause for relief from the waiver of its objections. Accordingly, the Government's Objections will be allowed.").

[53] The D.C. Circuit has taken the position that prejudice is a necessary part of the inquiry in this context, but has declined to decide whether prejudice must always be shown or might somehow be balanced with "cause." *United States v. Madeoy*, 912 F.2d 1486, 1490 (D.C. Cir. 1990), considered the district court's decision to reject a motion alleging grand jury misconduct filed four days after the trial started. It stated (emphasis added):

> In deciding whether to grant relief from a Rule 12 waiver, a district court should take into account the reason for the defendant's tardiness a*nd whether he has shown that he is actually prejudiced* by the defect in the indictment of which he complains. See id. at 243–45, 93 S.Ct. at 1583–84; *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 361–63, 83 S.Ct. 448, 460–61, 9 L.Ed.2d 357 (1963). The Supreme Court has left open whether the defendant must always show both excuse for his noncompliance with Rule 12(b) and actual prejudice, or whether a court should somehow balance these factors in deciding whether the defendant has shown "cause" for relief from waiver under Rule 12. *Murray v. Carrier*, 477 U.S. 478, 494, 106 S.Ct. 2639, 2648, 91 L.Ed.2d 397 (1986). Since we are not persuaded by the appellants' arguments with respect to either prejudice or excuse, however, we need not resolve that issue today.. . . As the Supreme Court stated in Davis, "The presumption of prejudice which supports the existence of the right [to a constitutionally-composed grand jury] is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely

First,[54] Second,[55] Fifth,[56]

> manner." . . . Davis thus strongly suggests that relief from a Rule 12(b)(2) waiver is indicated only upon the defendant's showing actual prejudice.
>
> The appellants have made no showing of actual prejudice. They point to three isolated remarks made in the course of two years of hearings—hardly enough to make it likely that, but for the remarks, the grand jury would not have indicted them on the same counts. Because we find that the appellants have shown neither cause for the untimeliness of their motion, nor actual prejudice from its denial, we conclude that the district court did not abuse its discretion in refusing to relieve them from their waiver of the right to challenge their indictment. We therefore do not reach the merits of the appellants' constitutional claim.

[54] The First Circuit has made conflicting statements, sometimes referencing prejudice and sometimes not, as the Defenders point out. With the *Rodriguez-Lozada* case and *Grandmont* cases cited in the Federal Defenders' letter, *compare United States. v. Santos Batista*, 239 F.3d 16, 19–20 (1st Cir. 2001) (finding no abuse of discretion and upholding district court's denial of motion filed during trial, stating, " Where defendant delayed efforts to suppress evidence until the trial for tactical purposes, there was no showing of cause *and prejudice* to avoid waiver of suppression issues arising when the defendant does not file a pre-trial motion under Rule 12(b)(3).") (emphasis added).

[55] The Second Circuit has repeatedly stated that a showing of prejudice as well as cause is required for relief under Rule 12, even when a motion is filed late, but before conviction. See *United States v. Howard*, 998 F.2d 42, 52 (2d Cir.1993) (considering suppression motion filed late but prior to trial, finding no cause and stating: "The failure to file a timely motion constitutes a waiver, see Fed.R.Crim.P. 12(f); however, a district court may grant relief from the waiver upon a showing of: (1) cause for the defendant's non-compliance, and (2) actual prejudice arising from the waiver."); *United States v. Kopp,* 562 F.3d 141, 143 (2d Cir. 2009) (upholding denial of untimely motion to suppress, stating "even assuming that Appellant could establish cause, he has failed to show how he was prejudiced by the denial of his suppression motion"). See also *United States v. Crowley*, 236 F.3d 104, 110 & n.8 (2d Cir. 2000) (finding the district court abused its discretion in granting a motion for new trial filed after conviction based on lack of specificity when the court did not explain how defendants had shown cause for their non compliance and nothing in the records explains it either, and also noting, in language not limited to the post-conviction context, "We have suggested that as to claims that must be raised before trial pursuant to Rule 12(b)(1) or Rule 12(b)(3), but that are not raised then, the waiver that results by operation of Rule 12(f) can be overcome only by a showing of cause and prejudice [citing *Forrester, infra* and *Howard*, *supra*]. Here, because we hold [defendants] have not shown that there was cause for their failure to raise their objection to the specificity of the indictment before trial, we do not reach the question of whether they were prejudiced by their waiver of this claim, or whether the prejudice rule of *Forrester* and *Howard* applies to Rule 12(b)(2) cases such as this one."); *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir.1995) (upholding denial of post-trial motion to dismiss for Speedy Trial violation as untimely under Rule 12, noting , "A district court may, in its discretion, relieve a defendant of the constitutional waiver effected by failure to timely file where the defendant has established: (1) cause for the non-compliance; and (2) actual prejudice," and citing *Howard*).

[56] A Fifth Circuit case on which the Seventh Circuit later relied, *Brooks v. United States*, 416 F.2d 1044, 1048 n. 1 (5th Cir.1969), cert. denied, 400 U.S. 840 (1970), involved a motion to quash the indictment and the petit jury venire based on unconstitutional jury selection, a motion filed on the day trial was to begin after the deadline for motions had passed. In upholding the trial judge's decision to deny the motion as untimely under Rule 12, the court reasoned, "Absence of prejudice is properly taken into account in determining whether to grant relief from the effect of the Rule when the motion is untimely made."

Cited after that statement as authority were *Shotwell*; *Frazier v. United States*, 335 U.S. 497 (1948), a case that rejected a jury selection challenge raised after trial began, but did not discuss Rule 12; and *Pinkney v. United States*, 380 F.2d 882 (5th Cir. 1967), a case in which the Fifth Circuit upheld a district court's rejection of a motion challenging the jury selection raised only during voir dire, because it was untimely. In *Pinkney*, the court stated, "It is clear that motions attacking the jury panel are encompassed by Rule 12(b)(2). . . See [*Shotwell; Frazier*] It is, of course, not the makeup of a particular panel which determines prejudice to the defendant in a criminal trial but the

Sixth,[57] and Seventh Circuits.[58]

The Federal Defenders raise arguments to distinguish some of these decisions, and argue that most are built upon cases first announcing the prejudice standard in connection with post-conviction review. Not all of these decisions can be traced back to *Shotwell* or another post-conviction case. But even if they could be, the fact remains that a substantial number of courts have adopted the "cause and prejudice" interpretation of "good cause" under Rule 12, even when an untimely motion is first raised before conviction, and those courts have required that approach for decades. Moreover, we have not found, nor have any of the comments cited, a single case expressly considering *and rejecting* this interpretation. None mention, for example, any of the reasons that the Defenders have argued against the use of prejudice in evaluating a late motion before conviction. Instead, there is little evidence that courts are concerned about, or even aware of, any inconsistency on this point between circuits or among decisions of a single court.[59]

After reviewing the cases cited in submissions commenting on the proposed amendment, both supporting and opposing the "cause and prejudice" standard, and after our own research into this issue, it is fair to say that (1) there is relatively little precedent deciding whether district judges evaluating late motions raised before conviction must find not only cause but also prejudice before granting relief (reflecting, perhaps, the reality that most cases deny relief after

manner of the selection of names to be placed in the jury wheel. There is no showing here as to how juries are selected in the Middle District of Florida nor in what respect the jury selective system in that District is illegal, nor in what manner the appellant has been prejudiced by the jury selective system, whatever it may be. . . . The assignment of error based on this ruling is patently devoid of substance. In the instant case, this Court finds no prejudice and, therefore, will not disturb the trial court's denial of the untimely motion.").

Brooks was followed later by the Fifth Circuit in *United States v. Hirschorn,* 649 F.2d 360, 364 (5th Cir. 1981), which upheld a district court's denial of a suppression motion filed after the deadline but before trial as untimely, stating "For one reason, absence of prejudice by itself may justify a district court's refusal to grant relief from the waiver resulting from non-timely filing, *Brooks*, supra, 416 F.2d at 1048 (n.1), and here the ground for suppression asserted by the amended motion did not justify suppression."

[57] *United States v. Oldfield,* 859 F.2d 392, 397 (6th Cir. 1988) (finding motion to dismiss indictment raised before conviction untimely and not excused by cause, stating "A district court's ruling on an untimely 12(b)(2) motion challenging an indictment is proper only when the district court finds that cause and actual prejudice exist"). The two cases that the court cited here were a case in which the court of appeals assumed the district judge had found cause to address the merits before rejecting the late motion, and an appeal of a district court's denial of a motion to vacate under Section 2255.

[58] The Second Circuit in *Howard* relied upon the Seventh Court's decision in *United States v. Hamm*, 786 F.2d 804, 806-07 (7th Cir.1986). In *Hamm*, the defendant filed a motion to suppress after the filing deadline but before trial, and the court upheld the district court's denial of the motion as untimely under Rule 12. The court stated: "In order to gain relief under Rule 12(f), a party must present a legitimate explanation for his failure to make a timely motion, *United States v. Davis*, 663 F.2d 824, 831 (9th Cir.1981), and absence of prejudice, *Brooks v. United States*, 416 F.2d 1044, 1048 n. 1 (5th Cir.1969), cert. denied, 400 U.S. 840 (1970). '[A]bsence of prejudice by itself may justify a district court's refusal to grant relief from the waiver resulting from non-timely filing . . . .' *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir.1981) . . . ."

[59] There is, by contrast, growing recognition and discussion of the conflicting positions on the standard an appellate court must apply when reviewing a motion "waived" under Rule 12 and raised for the first time on appeal. *See, e.g.*, authority cited on pages 4-5 of the letter to Judge Raggi from the Department of Justice dated February 12, 2012.

finding no cause), and (2) what precedent exists is not uniform. Both points were previously considered the Committee, which recognized that in some unknown percentage of cases, some federal judges at both the trial and appellate levels have evaluated only cause and not prejudice when addressing a late claim under Rule 12.

Summary. Given this inconclusive precedent, the Committee recognized that it must choose between the two competing interpretations of the "good cause" requirement – one that includes a showing of prejudice, and one that does not – when applied prior to conviction. As the Defenders emphasize, it is important that Rule 12 not unduly restrict the district courts' ability to allow late-filed claims to be considered before trial in appropriate cases. The question for the Committee is whether the proposed amendment strikes the right balance between providing this flexibility and reducing the harmful consequences of late objections.

The amended Rule provides the district court with three options for dealing with motions filed late but before conviction, depending upon when the motion was filed and why it was filed at that time:

First, any time a party raises an objection after the filing deadline but before trial begins, a court may respond to the late motion by simply extending the deadline for filing.. In April, the Subcommittee expressed interest in language that would make it clear the district court has the discretion to extend or reset the deadline at any time before trial in the interests of justice, and the reporters have drafted language incorporating this proposal.

Second, as mentioned earlier in this memo, the proposed amendment makes it clear that the requirement to raise claims before trial applies *only* when the basis for the claim is reasonably available before trial. Rule 12 does not regulate review of any claim that is based on circumstances arising or apparent only after trial begins. Specifically, a motion filed after trial begins is untimely under the proposed amendment only if "if the basis for the motion" was "reasonably available" before trial. If the basis for the motion was *not* reasonably available before trial, a motion filed when the basis first becomes available would not be late under the proposed amendment and no showing of cause *or* prejudice would be required. Contrast this to the analysis of the same situation under the existing Rule. Under the existing Rule, a defendant filing a mid-trial motion based on circumstances not reasonably available before trial would have to argue that his inability to discover the basis for filing the motion before trial establishes "cause" for his failure to file the motion earlier. The Defenders (p. 8) cite only one case as an example of a trial judge applying cause only without prejudice, and it is just such a case. The judge concluded that good cause for the delay in filing a discovery motion was established because the discovery materials in question were "not previously available to Defendants." It is possible, and perhaps probable, that this is the situation in most of the cases that the Defenders are concerned about – cases in which a trial judge today would consider a late motion upon a finding of "cause" alone. If so – if trial judges who analyze cause alone do so primarily when the defendant could not have been expected to have access to the basis for the motion before the deadline for filing motions – then for all such cases, the proposed amendment would not disadvantage defendants. The third option under the proposed amendment for a trial judge faced with a motion raised before conviction – consideration upon a showing of cause and prejudice – arises only in cases that don't fit either of the patterns above. Only if the motion is

filed after trial begins, *and* if the reason for not filing the motion earlier is something other than lack of access to the basis for the motion, would the amended rule condition relief upon a finding of both cause for the delay and prejudice.

Other than the precedent-related argument summarized above, the Defenders advance several additional arguments for rejecting the use of prejudice for motions considered prior to conviction. Each should be carefully considered in determining whether or not the proposed amendment strikes the correct balance. We consider them separately in the next sections of this memo. First is the claim in all three letters submitted by Defenders that the prejudice enquiry in this situation is indeterminate, difficult to apply, and ill-adapted to the pre-conviction setting. The second, raised by NACDL, is that the prejudice standard will cause wasteful substitution of counsel. The third is that it would be more appropriate to use plain error when a motion is raised after conviction. We conclude this part with a discussion of questions that would have to be addressed if the Committee decides to pursue those suggestions and revisit its choice to clarify "good cause" with the "cause and prejudice" language.

2. Is unworkable and inappropriate for challenges prior to conviction

*The application of the cause and prejudice 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' . . . but not prejudice." (*NYCDL at 12-13)

The cause and prejudice approach "does not work in any meaningful sense" when the defendant "seeks to file a motion before trial either commences or concludes, but after a court-imposed deadline.. . ."

" A standard that requires a demonstration of actual harm at trial . . . has little relevance before a trial, when the court has little basis to know whether the refusal to consider a late-filed motion will work to a party's 'actual and substantial disadvantage, infecting [an]entire trial with error of constitutional dimension.'. . . Even if a party can establish legitimate 'cause' for the late filing, how could that party ever show anything but the "possibility of prejudice" if the court fails to consider the motion?" If prejudice means "tangible harm at trial, not the possibility of harm, it does not fit easily into a court's consideration of whether to excuse a late filed motion before trial." (FD at 4-10)

RESPONSE:

An evaluation of "prejudice" allows the district court to consider a range of factors. Assessing "prejudice" to a party need not always be a backward-looking endeavor, for example, and may take account of the risk of harm as well as actual harm. District judges currently assess "prejudice" to a defendant before and during trial in a wide variety of circumstances. These include pretrial claims of inadequate notice or specificity; unconstitutional delay before charge or trial; objections to motions to amend an information; change of venue motions; and motions to sever under Rule 14. Mid-trial claims require assessments of prejudice as well, including allegations of variance; sanctions for discovery violations that surface only during trial; and a range of evidentiary rulings which routinely require trial judges to evaluate "prejudice." Trial judges should have no more difficulty assessing prejudice before conviction under the amended rule than they do in any of these other contexts. Indeed, in those cases in which trial judges have considered prejudice in determining whether to grant a motion raised prior to conviction but late under Rule 12, there has been no mention of any difficulty in making that assessment.[60]

[60] See notes [45-47] *supra*, collecting authority.

3. Will cause wasteful substitution of conflicted counsel

“Adoption of an across-the-board ‘cause and prejudice’ standard would . . .be unworkable in the pre-conviction context as it would require counsel to advocate his or her own ineffectiveness, raising ethical dilemmas and conflict issues." (*NACDL at 3)*

"A lawyer may well have to advocate his or her own effectiveness in order to establish cause, at least in the alternative, thereby creating an ethical dilemma and conflict of interest, leading in many cases to a time-wasting and inefficient change of defense counsel and in many cases the defendant's loss of the Sixth Amendment constitutional right to have the assistance of counsel of choice." (NACDL at 9)

RESPONSE:

"Good cause" under the existing rule has always included ineffective assistance, yet the Defenders cite no case in which there is even a suggestion the existing Rule poses an ethical dilemma. Clarifying the standard as "cause and prejudice" works no change.

C. Prejudice without cause, and not plain error, should be the standard for all constitutional claims

NYCDL argues that the prejudice standard should apply to all constitutional claims, not just double jeopardy and FTSO claims. (NYCDL at 11-12).

RESPONSE:

There seems to be some disagreement among the defense bar about when, if ever, relief for untimely claims should be conditioned on a showing of prejudice. NACDL argues that the prejudice standard is always unworkable before conviction, but the NYCDL here urges it as a more favorable standard that should apply to all constitutional claims that Rule 12 requires to be raised before trial.

It would be a drastic change from the existing Rule if the Committee were to adopt the suggestion to remove the "cause" requirement entirely for all constitutional claims not timely raised under Rule 12(b)(3). The proposed amendment specifies a standard that is already being applied in at least *some* courts today. NYCDL cites no court, trial or appellate, that has granted relief from a Rule 12 "waiver" of suppression claims under the present rule without first requiring the defendant to establish cause for delay in raising the objection.

D. Different standards should apply to claims first raised in the district court, first raised on appeal, and first raised on collateral review

"[F]or claims presented for the first time on appeal, defendants should be required to demonstrate only plain error.. . . The 'cause and prejudice' standard should be reserved for claims raised for the first time on collateral review. . . ." (NYCDL 12-13)

Current subdivision 12(e)'s provisions on waiver of late raised claims should be deleted, and the following language should be added to the end of (c): "for good cause, may grant relief from the failure to file a motion by the deadline." (FD at 13)

These comments focus on the standards that should be applicable to claims raised for the first time at different stages. They reject the cause and prejudice standard as appropriate for any context other than collateral review, and propose different standards depending upon when the untimely objection is first raised.

RESPONSE:

If the Committee were writing on a clean slate, it might be advantageous to combine the ideas in Rules 12 and 52 to provide a gradual continuum of review standards for claims that should have been raised before trial, thereby making it easiest to obtain relief when the late claim is raised for the first time during trial, harder for claims raised after conviction, and hardest for claims raised for the first time on collateral review. Sensible options might include requiring a good reason alone (cause) when raised during trial, plain error if not raised until after conviction (in a motion for new trial, motion to withdraw plea, or on appeal), and cause and prejudice if raised in a motion to vacate under Section 2255.

Although these arguments have some appeal, the Committee is not writing on a clean slate. "Good cause" under Rule 12 has been applied by courts of appeals and district courts for decades in *all* of these contexts. Appellate application of good cause, incorporating both cause and prejudice, formed the basis of the Supreme Court's later formulation of other standards of review, including plain error and that applied in proceedings brought under Section 2255. In other words, "good cause" in Rule 12 is the foundation on which these other standards were built.

Outside of the context of double jeopardy claims and possibly statute of limitations claims (see discussion in Part II.A.), only a small fraction of appellate decisions have applied plain error *instead of* Rule 12's "good cause" to claims that should have been brought before trial under Rule 12.[61] Instead, most cases demand some form of "good cause" either alone or, less commonly, *in addition to* plain error.[62] Thus, specifying that only plain error and not good cause apply in the courts of appeals would be a clear break with existing precedent.[63]

[61] See the cases collected in note 3 p. 3 NYCDL Letter.

[62] As a panel of the D.C. Circuit explained in *United States v. Weathers*, 186 F.3d 948, 955 (1999):

Although *Olano* indicates that untimely objections are generally regarded as forfeitures subject to Rule 52(b), *Davis* dictates that untimely objections that come within the ambit of Rule 12(b)(2) must be considered waivers and may not be revived on appeal. We cannot conclude that the Court intended *Olano*, a case which mentioned neither Rule 12 nor *Davis*, to overrule *Davis* by redefining sub silentio the meaning of the word "waiver" in Rule 12.

In addition to the cases from the 2d, 3d, 4th, 9th, 10th, and 11th Circuits, collected in note 2, page 4 of the Assistant Attorney General's letter to Judge Raggi dated February 13, 2012, the following more recent cases from the 1st, 3d, 4th, 6th, 7th, 8th, 9th, 10th, and 11th Circuits all reject plain error review of claims that should have been raised earlier under Rule 12: *United States v. Crooker*, __ F.3d __ , 10–2372, 2012 WL 3064846 (1st Cir. July 27, 2012) (considering at length and rejecting defendant's argument that plain error and not waiver applies to late suppression claim, concluding that "[t]here is the potential for both unfairness to the government and needless inefficiency in the trial process if defendants are not required, at the risk of waiver, to raise all of their grounds in pursuing a motion to suppress," also noting that even if a successful ineffective assistance of counsel claim could constitute good cause, the record on appeal was insufficiently developed); United States v. Harrison, No. 11–2566, 2012 WL 3171561 (3d Cir. August 7, 2012) (It is well-settled that suppression arguments raised for the first time on appeal are waived absent good cause"); *United States v. Berrios*, 676 F.3d 118, 130 (3d Cir. 2012) (finding suppression argument first raised on appeal waived under Rule 12, noting " because the plain error doctrine is inapplicable, [Rose], we do not reach its dubious merits."); *United States v. Gonzalez*, 472 Fed.Appx. 132 (3d Cir. Mar. 30, 2012) (rejecting suppression claim raised after guilty plea as "waived" under Rule 12); *United States v. Valentine*, 451 Fed.Appx. 87, 91 (3d Cir. 2011) ("Contrary to his claimed right to plain error review, the waiver provision of Rule 12 'trumps Rule 52(b)'s plain error standard in the context of motions to suppress.' . . . Thus, Valentine's reliance on Rule 52(b) is misguided. Moreover, Valentine has not demonstrated good cause for delaying his arguments until appeal."); *United States v. Ware*, 450 Fed.Appx. 94, 96 (3rd Cir. 2011) ("Where a defendant argues 'cause' for the first time on appeal, and the proper disposition is not clear to [the appellate court, the court] could remand the case for an evidentiary hearing. . . . However, there is no need for remand where the defendant presents no 'colorable explanation why he failed to raise' his suppression theories before the district court . . . . Ware does not bother to explain his failure to raise his abandonment theory before the district court, and no explanation is apparent to us. Thus, Ware has failed to show good cause for advancing a new suppression argument on appeal, and we will consider any suppression issue waived."); *United States v. Taylor*, No. 11-4539, 2011 WL 6062057, *2 (4th Cir. Dec. 7, 2011) ("We can discern no good cause for Taylor's failure to have raised this [suppression] issue below; accordingly, we decline to consider it on appeal."); *United States v. Rantanen*, No. 10-1695, 2012 WL 718068, *3 (6th Cir. Mar. 7, 2012) (not considering *Miranda* claim, stating "Although Rule 12(e) allows courts to grant relief from waiver for 'good cause,' we have held that even plain error review is precluded when 'a defendant completely fails to file a pretrial motion to suppress evidence.' Though Rantanen may pursue this claim through a collateral appeal by arguing that his attorney was ineffective for failing to raise a timely motion to suppress, . . . it is precluded from review here."); *United States v. Hackworth*, 2012 WL 2086941 (6th Cir. June 8, 2012) (objection based on failure to specify state statute in indictment waived under Rule 12, not considered on appeal); *United States v. Johnson*, 668 F.3d 540, 542 (7th Cir. 2012) (finding defendant had established good cause for not raising *Miranda* claim before trial on superseding indictment when trial judge had, before dismissing initial indictment for Speedy Trial Act violation, held evidentiary hearing and denied the defendant's motion to suppress); *United States v. Collins*, 684 F.3d 873 (9th Cir. 2012) ("Having failed to raise the alleged defects in the instructions to the October 2008 Grand Jury prior to his conviction, and having shown no good cause for granting relief from Rule 12's mandated waiver, Collins has relinquished his opportunity to raise the instructional challenges on appeal"); *United States v. Hernandez–Flores*, No. 10-10504, 2012 WL 235633, *1 (9th Cir. Jan. 26, 2012) ("A party's failure to raise a motion to suppress is treated as a waiver of the issue that is "absolute: this court cannot even review the issue for plain error" -- relief from the waiver is available only if the party can show good cause as to why the motion was not timely made. Here the defendant has not provided any explanation for his failure to raise his motion on time."); *United States v. Vazquez-Villa*, 423 Fed.Appx. 812, 816 (10th Cir. 2011) ("Rule 12's waiver provision, not Rule 52(b)'s plain error provision, governs motions to suppress evidence, including specific arguments to suppress evidence, raised for the first time on appeal. Such motions and arguments are waived absent a showing of good cause for why they were not raised below."); *United States v. Rodriguez*, 452 Fed.Appx. 883, 886 (11th Cir. 2012) ("Here, the Defendant never filed a pretrial motion to suppress, nor did he object during trial.

If the Committee decides to consider an amendment that would specify one standard for motions raised before conviction and another for motions raised later, or one standard for trial judges and another for appellate review, drafting an amendment to Rule 12 that would accomplish either result would raise new questions and require more work. For example:

* Which standard would apply in a motion for new trial? Plain error or good cause? What about motions brought after conviction but before sentence?

* Should the rule be the same for challenges in cases involving guilty pleas and guilty verdicts?

* Should the rule be the same for suppression motions as for other types of errors?

* If the Rule used both the term "good cause" and the term "cause and prejudice" to describe separate standards of review, would this suggest that "good cause" can never require a showing of "cause and prejudice"? (That might pose a problem when so many courts, including the Supreme Court, have said that "good cause" does require both cause and prejudice, at least in some contexts.)

* Is it better to use the word "cause" alone to describe the pre-judgment standard, and "cause and prejudice" to describe the standard that applies after judgment, abandoning the term "good cause" altogether? (A standard for late claims raised *during trial* that is stricter than the standard used for claims first raised after conviction might create a "perverse incentive" to avoid raising the claim until the trial is over. See Letter to Judge Raggi from the Assistant Attorney General, dated February 13, 2012.)

Instead, he argues this issue for the first time on appeal, without first seeking a waiver in the district court. Under Rule 12(b)(3)(C) he has waived any challenge to the photo array.").

But compare United States v. Hill, 10-4889, 2012 WL 1354464 (4th Cir. Apr. 19, 2012) (proceeding to apply plain error and reject suppression argument, after finding argument waived under Rule 12); *United States v. McCreary*, 10-1593, 2012 WL 2874019 (6th Cir. July 16, 2012) (finding no good cause for waiver of post-trial motion when defendant would have known before trial of the error and any ineffective assistance of counsel claim that might provide cause was not ripe for review and declining to "decide whether or not plain error review is precluded by waiver to resolve this case" because "[r]egardless of whether a Rule 12(e) waiver precludes plain error review under Rule 52(b)," McCreary has failed to demonstrate plain error") (quoting United States v. Lopez–Medina, 461 F.3d 724, 739 (6th Cir.2006)); *United States v. Harper*, 11-3547, 2012 WL 2479592 (6th Cir. June 28, 2012) (stating "even if Harper had presented "good cause," he still cannot prevail. New suppression arguments raised for the first time on appeal are subject to review for plain error."); *United States v. Pierre*, No. 11–12837, 2012 WL 3205434 (11th Cir. Aug. 7, 2012) ("Pierre provides no good cause to excuse his failure to comply with Rule 12(b)(3)(C). . . The district court did not plainly err by admitting the evidence.").

There are also some opinions, as NYCDL points out at note 7 page 5 of its letter, that consider a claim "waived" under Rule 12 to be absolutely barred. As it states, the proposed amendment "eliminates the confusing reference to waiver and makes clear that appellate courts may indeed consider these claims."

[63] The Advisory Committee's interim proposal that relief from certain untimely claims be considered for plain error under Rule 52(b) was rejected by the Standing Committee. See May 2011 Report to the Standing Committee on Rule 12, pp 22-23 (describing previous action).

* Should different standards apply depending on which court applies it? (Neither Rule 12 nor Rule 52 does this now; "good cause" is regularly applied by both district courts and courts of appeals, and trial judges also regularly apply Rule 52 when evaluating procedural error raised in a motion for new trial as well as grand jury error under *Bank of Nova Scotia*, for example.)

IV. Objections to deleting language in (b)(2)

*By removing the language "A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue "the Committee runs the real risk of creating more, rather than less, litigation in an area that is well-settled and currently promotes both efficiency and conservation of judicial resources." (*FD at 2-3).

The Defenders argue that courts continue to rely on the language in Rule 12(b)(2) for their discretion to consider motions to dismiss before trial, and they urge retaining the language expressly stating that "a party may raise by pretrial motion" while substituting the words "without a trial on the merits" for "without a trial of the general issue"

RESPONSE:

The proposed amendment relocated the reference to issues that can be determined without trial. It now appears as a limitation on which motions a party *must* bring before trial. As the Note points out, the Committee removed the language from (b)(2). The Committee was concerned that retaining the permissive language "may" in (b)(2) might be misleading, because (b)(3) (presently and as proposed) does not permit the parties to wait until after the trial to raise certain motions that can be determined without a trial on the merits. The proposed modification suggested by the Defenders would not address this problem.

Instead, the Defenders raise a different issue. They argue that if the Rule no longer expressly *permits* parties to file before trial "any" defense, objection or request that can be determined without a trial on the merits, and instead limits motions that *must* be filed before trial to those that can be determined without trial, courts could construe this change as *removing their authority* to considering particular motions before trial that do not require a trial of the merits.

Only two of the many cases cited in the letter (FD at 2-3)[64] arguably tie the language in Rule 12(b)(2) to a district court's authority to consider a motion before trial. These two decisions did not hold that Rule 12(b)(2) provides the authority to file a pretrial motion, or the authority to consider a motion prior to trial. They hold only that the government cannot complain that a pretrial motion to dismiss for sufficiency of evidence is premature or that that the district court lacks jurisdiction to dismiss for sufficiency of evidence prior to trial unless the government raises

[64] None of the other cases that the Federal Defenders cite as "relying" on (b)(2) were cases in which there is any suggestion that without (b)(2) the district court would have felt constrained to postpone ruling on the motion until after trial began (or the court of appeals would have decided that it should have postponed that ruling). In *Jones*, the government argued that in ruling on the motion to dismiss, the judge should not have looked beyond the face of the indictment, not that the judge erred in ruling before trial. In *Weaver*, too, "the government did not challenge the trial court's authority to decide the motion" but instead the court's construction of the criminal offense. *Flores* also involved a dispute over how the district court resolved the motion to dismiss, not *when*, as did *Alfonso*, *Levin*, and *Risk*. *DeLaurentis* actually disapproved of the district court's decision to grant the motion to dismiss before trial and did not cite Rule 12 ("we simply cannot approve dismissal of an indictment on the basis of predictions as to what the trial evidence will be. . . . The case must therefore be remanded to the district court for trial on all counts.").

that objection before the motion is granted.[65] By citing these cases, the Defenders appear to be most concerned that judges would be less willing to consider such insufficiency claims before trial without the separate provision in (b)(2) that tells courts they have the authority to resolve any motions that can be determined without a trial of the merits.

The Committee has not considered this particular objection. It is difficult to understand why courts would regard the proposed amendment as limiting their authority to consider pretrial motions. As the Committee Note points out, "The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization." Under the proposed amendment, the Rule would say nothing about which objections may or may not be raised before trial. It does not limit or change a district court's discretion to decide which may be considered and which may not. Instead, the amended rule would simply define which objections *must* be raised before trial. If some motions *must* be raised before trial, no separate provision is needed to make it clear that motions *may* be made before trial. The Defenders may be concerned, however, that a judge could read the amendment as implying that any motion that is not within the "must" category is no longer allowed before trial.[66]

[65] In both cases the government appealed a district court's decision to grant a pretrial motion to dismiss for insufficient evidence. In *United States v. Yakou*, 428 F.3d 241, 246 (D.C.Cir. 2005), the government argued there was nothing in the Rules of Criminal Procedure that authorized what was essentially a motion for summary judgment. The court of appeals stated (emphasis added):

> There is no federal criminal procedural mechanism that resembles a motion for summary judgment in the civil context . . . Instead, Rule 12(b) of the Federal Rules of Criminal Procedure provides that "[a] party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial of the general issue." The "general issue" has been defined as "evidence relevant to the question of guilt or innocence." . . . . While Rule 12(b) does not explicitly authorize the pretrial dismissal of an indictment on sufficiency-of-the-evidence grounds, the U.S. failed to object in the district court to its pretrial determination of whether Yakou was a "U.S. person" covered by the Brokering Amendment and the ITAR. . . . . Although "it is an 'unusual circumstance[ ]' for the district court to resolve the sufficiency of the evidence before trial because the government is usually entitled to present its evidence at trial and have its sufficiency tested by a motion for acquittal under Rule 29 . . . , we join those circuits in upholding the district court's pretrial dismissal of the indictment based on a question of law where the government has not made a timely objection."

In *Hall*, the government argued that the district court had no jurisdiction to grant the motion prior to trial, but the Court of Appeals recognized that previous cases had established that a district court had authority to "dismiss charges at the pretrial stage under the limited circumstances where the operative facts are undisputed *and the government fails to object to the district court's consideration of those undisputed facts in making the determination regarding a submissible case*." Finding the government failed to properly object here, it upheld the dismissal. Rule 12(b)(2) was referenced in the decision only as follows:

> Rule 12(b) of the Federal Rules of Criminal Procedure provides that "[a]ny defense, objection, or request which is capable of determination without trial of the general issue may be raised before trial by motion." In its disposition of a Rule 12(b) motion, the court is allowed to consider factual issues. In this respect, Rule 12(e) provides that "[w]here factual issues are involved in determining a motion, the court shall state its essential findings on the record." The government contends, however, that the trial court cannot make findings of fact on the "general issue" of the sufficiency of Count V.

[66] On this point NACDL agrees with the Committee's proposal and not with the FD letter. Indeed, NACDL, as explained in Section V. below, appears to have just the opposite concern, that instead of being unduly reluctant to

If the Committee concludes that clarification is needed, it could revise the Committee Note by adding the underlined language: “"The Committee concluded that the use of pretrial motions to settle issues that can be determined without a trial of the merits is so well established that it no longer requires explicit authorization."

[More on this issue appears in the August 24 memo]

V. Objections to language defining issue that can be determined without a trial on the merits

“[T]he text of the Rule and not merely the Advisory Committee notes should make clear that the reference to a motion that "can be determined without a trial on the merits" means a motion as to which a trial of the facts surrounding the commission of the alleged offense would necessarily be of absolutely no assistance in determining.” (emphasis added). (NACDL at 4-5)

NACDL argues that without this more specific language in the text, courts will understand the language of the Rule to require parties to file motions that *might* be able to be determined without a trial, leading to the filing of unnecessary motions before trial, and the refusal of courts to consider later-filed motions that under Rule 12(b)(3) are properly made optional before trial.

RESPONSE

NACDL has not suggested that there has been a problem under the existing rule, which also lacks the specific language suggested. The present rule refers to claims, defenses, and motions "that the *court can determine without* a trial of the general issue." It is difficult to understand how changing from "can determine without" to the passive voice in the proposed revision --"can be determined without" -- should suddenly create a problem. Of the three critical letters received, NACDL's was the only one raising this concern.

The concept captured by both the existing language and the slightly modified version in the proposed amendment is well established and needs no further clarification. Interpreting an even earlier version of this language, formerly in Rule 12(b)(1), which 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,” the Supreme Court has stated that a defense may be properly raised pursuant to Rule 12 “if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense.” *United States v. Covington*, 395 U.S. 57, 60 (1969). Lower courts have assumed the same meaning applies to the current version of Rule 12. E.g., *United States v. Ali*, 557 F.3d 715, 719 (6th Cir. 2009); *United States v. Boren*, 278 F.3d 911, 914 (9th Cir. 2002); *United States v. Pope*, 613 F.3d 1255, 1259-61 (10th Cir. 2010); *United States v. Poulin*, 588 F.Supp.2d 58, 61 (D.Me. 2008).

consider issues subject to resolution before trial, judges under the Rule as amended will be unduly eager to do so. NYCLD did not mention this.

If the Committee is concerned that a different meaning is risked by the use of the passive voice, or if it wishes to confirm no change in meaning is intended, it could add a citation to the *Covington* case in the Note.

EXCERPT FROM COTTON (footnotes omitted):

Bain's elastic concept of jurisdiction is not what the term "jurisdiction" means today, *i.e.,* "the courts' statutory or constitutional *power* to adjudicate the case." *Steel Co. v. Citizens for Better Environment,* 523 U.S. 83, 89, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). This latter concept of subject-matter jurisdiction, because it involves a court's power to hear a case, can never be forfeited or waived. Consequently, defects in subject-matter jurisdiction require correction regardless of whether the error was raised in district court. See, *e.g., Louisville & Nashville R. Co. v. Mottley,* 211 U.S. 149, 29 S.Ct. 42, 53 L.Ed. 126 (1908). In contrast, the grand jury right can be waived. See Fed. Rule Crim. Proc. 7(b); *Smith v. United States,* 360 U.S. 1, 6, 79 S.Ct. 991, 3 L.Ed.2d 1041 (1959).

Post-*Bain* cases confirm that defects in an indictment do not deprive a court of its power to adjudicate a case. In *Lamar v. United States,* 240 U.S. 60, 36 S.Ct. 255, 60 L.Ed. 526 (1916), the Court rejected the claim that "the court had no jurisdiction because the indictment does not charge a crime against the United States." *Id.,* at 64, 36 S.Ct. 255. Justice Holmes explained that a district court "has jurisdiction of all crimes cognizable under the authority of the United States ... [and][t]he objection that the indictment does not charge a crime against the United States goes only to the merits of the case." *Id.,* at 65, 36 S.Ct. 255. Similarly, *United States v. Williams,* 341 U.S. 58, 66, 71 S.Ct. 595, 95 L.Ed. 747 (1951), held that a ruling "that the indictment is defective does not affect the jurisdiction of the trial court to determine the case presented by the indictment."

Thus, this Court some time ago departed from *Bain's* view that indictment defects are "jurisdictional." *Bain* has been cited in later cases such as *Stirone v. United States,* 361 U.S. 212, 80 S.Ct. 270, 4 L.Ed.2d 252 (1960), and *Russell v. United States,* 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962), for the proposition that "an indictment may not be amended except by resubmission to the grand jury, unless the change is merely a matter of form," *id.,* at 770, 82 S.Ct. 1038 (citing *Bain, supra*). But in each of these cases proper objection had been made in the District Court to the sufficiency of the indictment. We need not retreat from this settled proposition of law decided in *Bain* to say that the analysis of that issue in terms of "jurisdiction" was mistaken in the light of later cases such as *Lamar* and *Williams.* Insofar as it held that a defective indictment deprives a court of jurisdiction, *Bain* is overruled.

Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents' forfeited claim. See *United States v. Olano,* 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). "Under that test, before an appellate court can correct an error not raised at trial, there must be (1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' " *Johnson v. United States,* 520 U.S. 461, 466-467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (quoting *Olano, supra,* at 732, 113 S.Ct. 1770). "If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness,

integrity, or public reputation of judicial proceedings." 520 U.S., at 467, 117 S.Ct. 1544 (internal quotation marks omitted) (quoting *Olano, supra,* at 732, 113 S.Ct. 1770).

The Government concedes that the indictment's failure to allege a fact, drug quantity, that increased the statutory maximum sentence rendered respondents' enhanced sentences erroneous under the reasoning of *Apprendi* and *Jones.* The Government also concedes that such error was plain. See *Johnson, supra,* at 468, 117 S.Ct. 1544 ("[W]here the law at the time of trial was settled and clearly contrary to the law at the time of appeal[,] it is enough that an error be 'plain' at the time of appellate consideration").

The third inquiry is whether the plain error "affect[ed] substantial rights." This usually means that the error "must have affected the outcome of the district court proceedings." *Olano, supra,* at 734, 113 S.Ct. 1770. Respondents argue that an indictment error falls within the "limited class" of "structural errors," *Johnson, supra,* at 468-469, 117 S.Ct. 1544, that "can be corrected regardless of their effect on the outcome," *Olano, supra,* at 735, 113 S.Ct. 1770. Respondents cite *Silber v. United States,* 370 U.S. 717, 82 S.Ct. 1287, 8 L.Ed.2d 798 (1962) *(per curiam),* and *Stirone v. United States, supra,* in support of this position.[2] The Government counters by noting that *Johnson's* list of structural errors did not include *Stirone* or *Silber,* see 520 U.S., at 468-469, 117 S.Ct. 1544, and that the defendants in both of these cases preserved their claims at trial.

As in *Johnson* (see *id.,* at 469, 117 S.Ct. 1544), we need not resolve whether respondents satisfy this element of the plain-error inquiry, because even assuming respondents' substantial rights were affected, the error did not seriously affect the fairness, integrity, or public reputation of judicial proceedings. The error in *Johnson* was the District Court's failure to submit an element of the false statement offense, materiality, to the petit jury. The evidence of materiality, however, was "overwhelming" and "essentially uncontroverted." *Id.,* at 470, 117 S.Ct. 1544. We thus held that there was "no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " *Ibid.*

The same analysis applies in this case to the omission of drug quantity from the indictment. The evidence that the conspiracy involved at least 50 grams of cocaine base was "overwhelming" and "essentially uncontroverted."[3] Much of the evidence implicating respondents in the drug conspiracy revealed the conspiracy's involvement with far more than 50 grams of cocaine base. Baltimore police officers made numerous state arrests and seizures between February 1996 and April 1997 that resulted in the seizure of 795 ziplock bags and clear bags containing approximately 380 grams of cocaine base. 20 Record 179-244. A federal search of respondent Jovan Powell's residence resulted in the seizure of 51.3 grams of cocaine base. 32 *id.,* at 18-30. A cooperating co-conspirator testified at trial that he witnessed respondent Hall cook one-quarter of a kilogram of cocaine powder into cocaine base. 22 *id.,* at 208. Another cooperating co-conspirator testified at trial that she was present in a hotel room where the drug operation bagged one kilogram of cocaine base into ziplock bags. 27 *id.,* at 107-108. Surely the grand jury, having found that the conspiracy existed, would have also found that the conspiracy involved at least 50 grams of cocaine base.

United States v. Cotton, 535 U.S. 625, 630-33, 122 S. Ct. 1781, 1785-86, 152 L. Ed. 2d 860, 02 Cal. Daily Op. Serv. 4314, 2002 Daily Journal D.A.R. 5463, 15 Fla. L. Weekly Fed. S 287, 2002 WL 1008494 (2002)

TAB 2D

THIS PAGE INTENTIONALLY BLANK

To: Judge Raggi
From: Nancy King and Sara Beale
Re: Treatment of Double Jeopardy Claims Not Raised in Trial Court, by Circuit
Date: September 29, 2012

You requested that we (1) review the rationale for having two different standards for excusing the failure to raise a claim before trial (with a more favorable standard for failure to state an offense and double jeopardy), and (2) provide a breakdown of how each circuit reviews double jeopardy claims that were not raised in the district court.

A. The rationale for a two-tier standard

Since 2008 the Criminal Rules Committee has been committed to requiring failure to state an offense claims to be raised before trial, and also to allowing relief from waiver under a more generous standard than "good cause." In 2008 the Rule 12 Subcommittee (then chaired by Chief Judge Mark Wolf) first proposed adding failure to state an offense to the claims that must be raised before trial and are waived under Rule 12(e) if note timely raised absent a showing of "good cause." The Criminal Rules Committee endorsed the idea of requiring failure to state an offense to be raised before trial, but rejected making such claims subject to "good cause," concluding that a more generous standard should be applicable. During the years from 2009-2011 the Committee proposed various alternatives to the Standing Committee, including a two-tier system of good cause and plain error. The Standing Committee expressed reservations about these proposals, and recommitted them to the Criminal Rules Committee.

During its study of the issue, the Advisory Committee decided to add one more type of claim to the category of those whose late filing would be excused more readily: claims of a double jeopardy violation. This was done to preserve as closely as possible the current treatment of such claims without adding further complexity with a third standard of review.

As discussed in more detail below, many courts of appeals currently apply plain error review, rather than cause and prejudice, to double jeopardy challenges to the charge that were available, but not raised, before trial. Moreover, cases reviewing double jeopardy claims after a guilty plea have expressly recognized that a double jeopardy violation clear on the face of the indictment is not waived by the plea. In this situation, courts have reviewed the double jeopardy claims either de novo or using plain error. Designating the plain error standard for untimely double jeopardy claims would preserve this current treatment. The Rule 12 Subcommittee considered but rejected as unduly complex a proposal to have <u>three</u> tiers of review:

- prejudice alone for claims of failure to state an offense,
- "plain error" for double jeopardy claims, and
- "cause and prejudice" for everything else.

The Subcommittee concluded, and the Committee agreed, 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. Allowing review for untimely double jeopardy claims on the basis of prejudice alone would simplify the analysis without changing the result in most or all double jeopardy cases. The second and fourth prongs of the *Olano* test – which look to whether the error is

"plain" and whether it "seriously affects the fairness, integrity, or public reputation of judicial proceedings" – have not made much difference when courts review alleged double jeopardy violations.[1]

Although double jeopardy claims arise in a number of different situations,[2] we have been unable to identify a case in which the second and fourth prongs would not be satisfied if a defendant has been (or could be) convicted for an offense that judging from the indictment before trial should have been barred by double jeopardy. If indeed plain error review is applied whenever a defendant objects during trial, or after conviction, to a double jeopardy error available and resolvable before trial and which he failed to raise before trial or plea, it appears to make sense to dispense with the second and fourth prongs of the *Olano* test and, for the sake of simplicity, to use the same "prejudice only" standard as for claims of failure to state an offense."

B. A Circuit-by-Circuit breakdown

A brief summary of the law in each circuit follows; a more detailed chart is appended. Several points serve mention:

- Plain error review has been applied in <u>every</u> circuit to the review of double jeopardy claims not raised in the district court.

- Some circuits have <u>also</u> applied some version of waiver, particularly when the defendant has pleaded guilty to two separate counts, then later claimed that they punish the same offense.

- In all cases granting relief, the court found that all four prongs of the *Olano* test were met; no case rejected a double jeopardy claim that met the prejudice, or third prong. Instead, each court to consider the fourth prong found that relief was warranted. This supports the Committee's argument that requiring prejudice (alone) will lead to the same results as plain error review.

[1] *See, e.g., United States v. Robertson*, 606 F.3d 943, 952 (8th Cir. 2010) (concluding that failing to remedy such a clear violation of a core constitutional principle would be error so obvious that failure to notice it would seriously affect the fairness integrity, or public reputation of the judicial proceedings and result in a miscarriage of justice); *United States v. Ogba*, 526 F.3 214, 238 (5th Cir. 2008) (same); *United States v. Fortenberry*, 914 F.2d 671, 673 (5th Cir. 1990) (same) (reversing conviction on plain error review after finding a double jeopardy violation in part because the defendant was subjected to multiple special assessments).

[2] The Double Jeopardy clause bars a charge following an acquittal or conviction for the same offense, after an acquittal definitively rejecting a necessary element of the charged offense, or after an earlier mistrial lacking manifest necessity. It also bars a conviction on one count charging the same offense as another count of conviction.

The cases cited below all applied plain error, the cases prefaced "but see" applied waiver.

DC Circuit

U.S. v. Kelly, 552 F.3d 824 (D.C. Cir. 2009) (following guilty plea, no relief (no error))
U.S. v. Mahdi, 598 F.3d 883 (D.C. Cir. 2010) (following trial, no relief (error not plain))

First Circuit

U.S. v. Catalan-Roman, 585 F.3d 453 (1st Cir.2009) (following trial, no relief (no error))
U.S. v. Hansen, 434 F.3d 92 (1st Cir. 2006) (same)
U.S. v. Winter, 70 F.3d 655 (1st Cir. 1995) (same)

Second Circuit

U.S. v. Irving, 554 F.3d 64 (2d Cir.2009) (following trial, no relief (fails all 4 prongs))
U.S. v. Wilke, 2012 WL 1948665 (2d Cir. 2012) (following trial, no relief (error not plain))
U.S. v. Calhoun, 450 Fed.Appx. 74 (2d Cir. 2011) (following plea, no relief (error not plain))
U.S. v. Polouizzi, 564 F.3d 142 (2d Cir. 2009) (following trial, relief granted)
But see
U.S. v. Kurti, 427 F.3d 159 (2d Cir. 2005) (following guilty plea, waived)
U.S. v. Moreno-Diaz, 257 Fed.Appx. 435 (2d Cir.2007) (same)
U.S. v. Ashraf, 320 Fed.Appx. 26 (2d Cir. 2009) (stating claim waived by failing to raise at trial, and, in the alternative, no error because prosecution in NY and VA were not the same)

Third Circuit

U.S. v. Grober, 624 F.3d 592 (3d Cir.2010) (following guilty plea, no relief (no error))
U.S. v. Tann, 577 F.3d 533 (3d Cir.2009) (following guilty plea, granting relief)
U.S. v. Cesare, 581 F.3d 206 (3d Cir.2009) (following trial, granting relief)
U.S. v. Jenkins, 347 Fed.Appx. 793 (3d Cir. 2009) (following trial, no relief (no error))

Fourth Circuit

U.S. v. Jarvis, 7 F.3d 404 (4th Cir. 1993) (following trial, granting relief)
U.S. v. Bird, 409 Fed.Appx. 681 (4th Cir. 2011) (following trial, no relief (error not plain)) (Justice O'Connor joining unpublished opinion)
U.S. v. Ganeous, 400 Fed.Appx. 794 (4th Cir. 2010) (following trial, no relief (no error))
U.S. v. Mungro, 365 Fed.Appx. 494 (4th Cir. 2010) (same)

Fifth Circuit

U.S. v. Whitfield, 590 F.3d 325 (5th Cir. 2009) (following trial, no relief (no error))
U.S. v. Garcia, 567 F.3d 721 (5th Cir. 2009) (same)
U.S. v. Ogba, 526 F.3d 214 (5thCir. 2008) (following trial, granting relief)

Sixth Circuit

U.S. v. Ehle, 640 F.3d 689 (6th Cir. 2011) (following guilty plea, granting relief)
U.S. v. Turpin, 317 Fed.Appx. 514 (6th Cir.2009) (following trial, no relief (no error))
U.S. v. Lebreux, 2009 WL 87505 (6th Cir. 2009) (same)
US v. Branham, 97 F.3d 835 (6th Cir. 1998) (same)
But see
U.S. v. Flint, 394 Fed.Appx. 273 (6th Cir. 2010) (following trial, waived)

Seventh Circuit

U.S. v. Halliday, 672 F.3d 462 (7th Cir. 2012) (following trial, no relief (failed prong 3))
U.S. v. Rea, 621 F.3d 595 (7th Cir. 2010) (following trial, granting relief)
U.S. v. Faulds, 612 F.3d 566 (7th Cir. 2010) (following trial, no relief (no error))
U.S. v. Warren, 593 F.3d 540 (7th Cir. 2010) (same)
U.S. v. Doyle, 121 F.3d 1078 (7th Cir. 1997) (same)
U.S. v. Penny, 60 F.3d 1257 (7th Cir. 1995) (same)

Eighth Circuit

U.S. v. Muhlenbruch, 634 F.3d 987 (8th Cir. 2011) (following trial, granting relief)
U.S. v. Robertson, 606 F.3d 943 (8th Cir. 2010) (following trial, granting relief)
U.S. v. Plenty Chief, 561 F.3d 846 (8th Cir. 2009) (following trial, no relief, (no error))
But see
U.S. v. Stock, 445 Fed.Appx. 894 (8th Cir. 2011) (following guilty plea, waived, citing *Menna*)

Ninth Circuit

U.S. v. Lynn, 636 F.3d 1127 (9th Cir. 2011) (following plea, granting relief)
U.S. v. Latham, 379 Fed.Appx. 570 (9th Cir. 2010) (following trial, granting relief)
U.S. v. Davenport, 519 F.3d 940 (9th Cir.2008) (following plea, granting relief)

Tenth Circuit

U.S. v. Wampler, 624 F.3d 1330 (10th Cir. 2010) (PREtrial, no relief, "it is either waived or at least forfeited")
U.S. v. Rowe, 47 Fed.Appx. 862 (10th Cir. 2002) (following trial, granting relief)
U.S. v. Hooks, 33 Fed.Appx. 371(10th Cir. 2002) (same)
U.S. v. Contreras, 108 F.3d 1255 (10th Cir. 1997) (following trial, no relief (no error))
But see
U.S. v. Carpenter, 163 Fed.Appx. 707 (10th Cir. 2006) (following plea, waived)

Eleventh Circuit

U.S. v. Walden, 2012 WL 1537915 (11th Cir. 2012) (following trial, no relief (no error))
U.S. v. Bobb, 577 F.3d 1366 (11th Cir. 2009) (same)
U.S. v. Lewis, 492 F.3d 1219 (11th Cir. 2007) (same, rejecting waiver rule)
But see U.S. v. Harper, 398 Fed.Appx. 550 (11th Cir. 2010) (following plea, waived)
U.S. v. Thomas, 313 Fed.Appx. 280 (11th Cir. 2009) (following trial, waived)
U.S. v. Kaiser, 893 F.2d 1300 (11th Cir. 1990) (following plea, de novo review, not waived or forfeited, granting relief)

Not included are cases addressing double jeopardy claims that materialized after trial began, such as those that should have been first raised at sentencing, (e.g. U.S. v. McCall, 352 Fed.Appx. 811 (4th Cir. 2009) (sentence enhancement), or a case where the alleged double jeopardy violation occurred after trial began (e.g. U.S. v. Ware, 404 Fed.Appx. 133 (9th Cir. 2010) (juror replacement)). These cases are reviewed with plain error review, but would not be affected by Rule 12.

	Guilty plea conviction		Conviction by trial	
	Waived	Plain error	Waived	Plain Error
DC		**U.S. v. Kelly ,** 552 F.3d 824 C.A.D.C.,2009. (Henderson) We apply plain error review to the double jeopardy issue because Kelly "allow[ed][the] alleged error to pass without objection" below. *In re Sealed Case,* 283 F.3d 349, 352 (D.C.Cir.2002); [failing prong 1:] double jeopardy plainly does not bar Kelly's prosecution on the section 924(c) count before us on review. Even if the same gun supported both charges, the predicate offense required for each charge to stand-conspiracy in Maryland and PWID cocaine here-are different "for double jeopardy purposes."		**U.S. v. Mahdi,** 598 F.3d 883 C.A.D.C.,2010. (Henderson) multiplicity claims of *****379 *888*** the kind presented here are defenses based on 'defects in the indictment' within the meaning of Rule 12(b) (2), and hence are waived under Rule 12(f) if not raised prior to trial."); *see* Fed.R.Crim.P. 12(b)(3) (formerly 12(b)(2)); *id.* R. 12(e) (formerly 12(f)). Mahdi asserts, in turn, he can show "good cause" for his failure to raise an objection below so as to excuse the waiver. *See id.* ("For good cause, the court may grant relief from the waiver."); *Weathers,* 186 F.3d at 952–53. We need not resolve the parties' waiver dispute. Because Mahdi did not object in the district court to the alleged multiplicity, we review his arguments for plain error. *See United States v. Kelly,* 552 F.3d 824, 829 (D.C.Cir.2009) ("We apply plain error review to the double jeopardy issue because [the defendant] 'allow[ed][the] alleged error to pass without objection' below.' " (quoting *In re Sealed Case,* 283 F.3d 349, 352 (D.C.Cir.2002)) (alteration in original); Finding no plain error (prongs one and two failed): Thus, " 'absent precedent from either the Supreme Court or this court' " that VICAR does not authorize cumulative unishments, the " 'asserted error ... falls far short of plain error.' "
1			**U.S. v. Chuong Van Duong,** 665 F.3d 364 C.A.1 (Mass.),2012. Duong did not raise double jeopardy as an objection to his sentence below. Nor is it clear in his appellate brief whether he is actually raising double jeopardy as a ground for appeal. Under these circumstances, to the extent he invokes double jeopardy at all, it is waived. *See United States v. Zannino,* 895 F.2d 1, 17 (1st Cir.1990) [issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived] N/A BECAUSE BASED ON FAILURE TO ARGUE ON APPEAL	**U.S. v. Catalan-Roman,** 585 F.3d 453 C.A.1 (Puerto Rico),2009 (Lipez) The government has sensibly conceded that the convictions for the offenses in counts eight and nine violated the Double Jeopardy Clause.. . . On the other hand, we reject Catalán's contention that his convictions on counts two and eight constitute a violation of double jeopardy. Because he did not raise this claim below, we review it for plain error. *United States v. Winter,* 70 F.3d 655, 659 (1st Cir.1995).... find no error, let alone plain error, in Catalán's conviction on count two. **U.S. v. Hansen,** 434 F.3d 92 C.A.1 (Mass.),2006 (Smith) Hansen contends that his indictment and conviction for violations of 18 U.S.C. §§ 924(c) and (j), and the underlying violent crimes pursuant to 18 U.S.C. § 1951, violate the Double Jeopardy Clause of the Fifth Amendment because these counts involve the same criminal conduct. We review for plain error because this argument was not raised below. [finding no error] **U.S. v. Winter,** 70 F.3d 655 C.A.1 (Mass.),1995. (Stahl) Finally, Winter argues that imposition of the contempt sentence violated the Double Jeopardy Clause of the United States Constitution.. . . Winter failed to raise these arguments, except for the first, before the district court. Thus, the arguments raised for the first time on appeal are forfeited and reversible only if Winter establishes "plain error.". . . the district court imposed Winter's contempt sentence for disobedience of its direct order-an offense completely independent of the charges under which he was already incarcerated. ...Moreover, it was within the court's discretion to impose the sentence consecutively instead of concurrently in order to preserve the incentive value of the contempt citation. ... Thus, Winter's contention that he is twice punished for the crimes to which he pleaded guilty or that the consecutive sentence impermissibly increased a prior-imposed punishment is unavailing.

2	**U.S. v. Kurti,** 427 F.3d 159 C.A.2 (N.Y.),2005 (MURTHA, with WINTER, KATZMANN) For the first time on appeal, he claims the information's two conspiracy charges are multiplicitous and his plea to these two charges violates the Double Jeopardy Clause . . . Where, as here, a defendant has validly entered a guilty plea, he essentially has admitted he committed the crime charged against him, and this fact results in a waiver of double jeopardy claims. See, e.g., United States v. Leyland, 277 F.3d 628, 632 (2d Cir.2002); United States v. Chacko, 169 F.3d at 145-46; United States v. Brown, 155 F.3d 431, 434 (4th Cir.1998). "Conscious relinquishment of the double jeopardy claim is not required because the guilty plea constitutes an admission sufficient to establish that defendant committed a crime, not an inquiry into a defendant's subjective understanding of the range of potential defenses." Leyland, 277 F.3d at 632 (quotations omitted). Furthermore, the narrow exception to the waiver rule does not apply in this case. Some courts have noted that an exception to the waiver rule applies when a double jeopardy claim is so apparent either on the face of the indictment or on the record existing at the time of the plea that the presiding judge should have noticed it and rejected the defendant's offer to plead guilty to both charges. See Thomas v. Kerby, 44 F.3d 884, 888 (10th Cir.1995). In this case, the double jeopardy claim the defendant now attempts to raise was not apparent on the face of the information, which charged two separate conspiracies. In addition, this claim was not apparent from the record before the trial court in that, during his plea allocution, Kurti acknowledged conduct which supported his plea to participation in two separate conspiracies **U.S. v. Moreno-Diaz,** 257 Fed.Appx. 435 C.A.2 (N.Y.),2007.(summary order, STRAUB , HALL, HAIGHT) Moreno–Diaz's guilty plea constitutes a	**U.S. v. Calhoun,** 450 Fed.Appx. 74 C.A.2 (N.Y.),2011(Summary order, RAGGI , CARNEY, KAHN) First, because the challenged convictions were based on Calhoun's own guilty pleas, which effectively conceded the commission of two different crimes, he cannot complain of double jeopardy unless it is apparent from the face of the information and the record existing at the time he pleaded guilty that the charges are constitutionally duplicative. See United States v. Broce . . . Second, because Calhoun did not raise a double jeopardy claim in the district court, we review only for plain error. See United States v. Irving . . An error cannot be deemed plain in such a circumstance "where there is a genuine dispute among the other circuits." Id. Calhoun cannot clear the hurdles erected by this precedent . . . in the absence of authoritative law on the point in this court and these holdings of sister circuits, Calhoun cannot show that any double jeopardy violation was "so egregious and obvious" as to constitute plain error	**U.S. v. Ashraf,** 320 Fed.Appx. 26 C.A.2 (N.Y.),2009(Summary order, Cabranes, Hall, Sullivan) By failing to raise his double jeopardy claim at trial, Ashraf has waived it on appeal. See Aparicio v. Artuz, 269 F.3d 78, 96 (2d Cir.2001) ("It is well-settled constitutional law that the constitutional protection against double jeopardy is a personal right and, like other constitutional rights, can be waived if it is not timely interposed at trial.") [Artuz was a coram nobis case – NK]. Waiver notwithstanding, Ashraf's conviction was not obtained in violation of the Double Jeopardy Clause because the prosecutions undertaken in New York and Virginia are not "in fact and in law the same."	**U.S. v. Irving,** 554 F.3d 64 C.A.2 (N.Y.),2009 (KEARSE, J. joined by SACK, and RAGGI) In the district court, Irving raised no double jeopardy issue with respect to the counts charging him with receiving and possessing child pornography, either by requesting a jury instruction or a special verdict that would have required the jury to specify which of the 76 images it relied on in returning verdicts of guilty on the respective child pornography counts, or by requesting that the court enter judgment on only count 4 or 5, but not both, on the ground that they resulted in two convictions for the same offense. And in this Court, Irving made no double jeopardy challenge to the district court's entry of judgment on both counts, either in his initial appeal or in his original briefs in the present appeal. Nonetheless, "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed.R.Crim.P. 52(b). . . . We conclude that Irving has not met this standard. . . . even if the jury based its verdicts on counts 4 and 5 on the same images, it is questionable whether we could call that result a "plain" error given the lack of a clearly established principle that possessing child pornography is a lesser-included offense of receiving such pornography. At the time of trial, no court of appeals had so held . . . even if the first three *Olano* factors were met, we could not conclude that Irving's convictions on both counts 4 and 5 seriously affect the fairness, integrity, or public reputation of judicial proceedings. It was within Irving's power to request clarifying instructions or a special verdict to have the jury particularize the bases of its verdicts on those counts. It hardly serves the interests of fairness to overturn verdicts that his inaction allowed to be ambiguous and that may be substantively unflawed **U.S. v. Wilke,** Slip Copy, 2012 WL 1948665 C.A.2 (N.Y.),2012(summary order,. KEARSE, POOLER, LIVINGSTON) Wilke's next contention is that the Double Jeopardy Clause was violated by his conviction for both receipt and possession of child pornography. He did not make an objection at trial, so we review this contention for plain error. . . . In the absence of binding circuit precedent and the clear possibility of a conviction based on Wilke's having the video on separate devices, we cannot say conviction on both counts was plain error. . . . Though we find there is no plain error, we note that the government's contention that because Wilke's sentences are concurrent, declining to exercise our discretion to correct any Double Jeopardy error would not impugn the integrity or reputation of judicial proceedings, is problematic. In Ball v. United States, 470 U.S. 856, 864 (1985), the Supreme Court held that where there is a Double Jeopardy violation, the only remedy is for one of the convictions to be vacated, and not for the sentences merely to be run concurrently. . . . We are not convinced that declining to correct an error which, at a minimum, imposes an unlawful and unauthorized punishment, and which the Supreme Court has told us might delay a person's rightful eligibility for parole, an unwarranted increase in later sentences and additional social stigma would not impugn the integrity or reputation of judicial proceedings. **U.S. v. Polouizzi,** 564 F.3d 142 C.A.2 (N.Y.),2009(KATZMANN, with LEVAL and RAGGI) Polizzi argues for the first time on appeal that his multiple convictions for possession constitute a Double Jeopardy violation. Nonetheless, "[a] plain error that affects substantial rights may be considered*154 even though it was not brought to the [district] court's attention." Fed.R.Crim.P. 52(b); see United States v. Irving . . The multiple convictions for possession affect Polizzi's substantial rights because "[t]he separate conviction[s], apart from the concurrent sentence, ha[ve] potential adverse collateral consequences that may not be ignored," Ball. . . Rutledge v. United States, 517 U.S. 292. . . Finally, the government has identified no interest of the prosecution or the public, and we can think of none, that would be served by subjecting Polizzi to eleven convictions for possession rather than the single count of conviction authorized by law. Moreover, . . . maintaining these convictions would seriously affect the fairness, integrity, or public reputation of judicial proceedings.

	waiver of his double jeopardy claim because neither of his U.S. indictments was barred by double jeopardy "on its face." Menna, . . . On appeal, Moreno–Diaz argues for the first time that his case falls under the Bartkus exception . . . Ordinarily we would not consider such a contention if it was not raised before the District Court. Nevertheless, we find this argument to be without merit. The record contains no facts that would have entitled Moreno–Diaz to the Bartkus exception, even had the District Court been asked to consider his double jeopardy claim. . . . Moreno–Diaz waived his double jeopardy defense by pleading guilty before the District Court, and there is no basis upon which to reverse the judgment of the District Court or to remand the case for factual determinations.			
3		**U.S. v. Grober,** 624 F.3d 592 C.A.3 (N.J.),2010. (Barry, joined by SLoviter, dissent by Hardiman on other grounds, agreed on the dj point) [Grober] argues, first, that all six counts of conviction must merge into a single continuing offense of possession to avoid violating the Double Jeopardy Clause ... Even if this argument was not waived by his plea of guilty to all six counts in the superseding indictment, *see United States v. Broce,* 488 U.S. 563, 570 (1989); *United States v. Pollen,* 978 F.2d 78, 84 (3d Cir.1992), it surely cannot, under the circumstances of this case, survive plain error review. **U.S. v. Tann,** 577 F.3d 533 C.A.3 (Del.),2009. (CHAGARES) Tann contends that his two convictions for violating § 922(g) constitute a single unit of prosecution, and that the District Court erred in entering judgments of conviction and sentences on both counts. FN2 Tann, however, failed to raise this argument before the District Court. [Rule] 52(b) grants reviewing courts limited authority		**U.S. v. Cesare,** 581 F.3d 206 C.A.3 (Pa.),2009. (Nygaard, with Fuentes and Jordan) Cesare does not argue that his conviction for bank robbery under 18 U.S.C. § 2113(a) is a lesser included offense of his conviction for armed bank robbery under 2113(d), and, as such, must be vacated. He only challenges his ultimate sentence. We choose, nonetheless, to exercise our limited authority under FED.R.CRIM.P. 52(b) to correct this error. Under Rule 52(b), a plain error that affects substantial rights may be considered even though it was not brought to the court's attention. *See also United States v. Young,* 470 U.S. 1, 15, 105 S.Ct. 1038, 84 L.Ed.2d 1 (1985) (noting that Rule 52(b) is to be used sparingly and "to correct only 'particularly egregious errors.' "). The Rule prescribes a plain error standard of review in these circumstances . . . In both *Miller, Jackson*, and most recently in *United States v. Tann,* 577 F.3d 533, 2009 WL 2581433 (3d Cir.2009), we determined that although a district court imposes concurrent sentences for separate convictions, its entry of the convictions "seriously affected the fairness of the sentencing proceedings because the defendant received two special assessments of $100 instead of one." *Id.* (citing *Jackson,* 443 F.3d at 301). We apply that holding here and find that the entry of separate convictions on Counts One and Two seriously affected the fairness of the District Court's proceedings. Put another way, leaving this error uncorrected would seriously affect the fairness and integrity of this proceeding. Therefore, under the plain error standard, we may notice this double jeopardy error present in Cesare's dual convictions. **U.S. v. Jenkins,** 347 Fed.Appx. 793 C.A.3 (Pa.),2009 (FISHER, with CHAGARES and COWEN) Jenkins contends that his convictions for Counts One and Four, the two conspiracy charges, violate the Double Jeopardy Clause because the evidence showed only one agreement. We review for plain error, as Jenkins failed to raise this argument at any point in the District Court proceedings. *See United States v. Miller,* 527 F.3d 54, 60 (3d Cir.2008). While we acknowledge a certain amount of overlap in the evidence, we nevertheless agree with the Government that Jenkins has failed to carry his burden of demonstrating plain error. [finding no error]

		to correct errors not timely raised and prescribes a plain error standard of review in these circumstances . . .[meets firt 3 prongs:] Tann's substantial rights have been affected by the entry of separate convictions for Counts One and Two. Tann's second conviction, at a minimum, carried with it a concurrent sentence and an additional $100 assessment. Moreover, it is clear that Tann may face adverse consequences based on the second § 922(g) conviction alone. Following *Ball* and *Rutledge,* numerous courts of appeals,[FN7] ***540** including this Court in *Miller,* have concluded that a defendant's substantial rights are affected by the additional, unauthorized conviction, even when the immediate practical effect may not increase the defendant's prison term, or may only be a negligible assessment. .. . [rejecting conflicting intra circuit authority] and on 4th prong: The Government argues, citing *Gricco,* that a concurrent sentence and additional assessment "hardly amount[ ] to a miscarriage of justice warranting the exercise of the Court's discretion under Rule 52(b)." We disagree ... In *Miller,* we concluded, on the basis of the Supreme Court's decisions in Ball and *Rutledge,* that an additional, unauthorized conviction-together with its concurrent sentence, additional assessment, and the potential for adverse collateral consequences-seriously affected the fairness of the district court proceedings. 527 F.3d at 73-74. Following the Supreme Court's direction, we exercised our discretion under Rule 52(b) and concluded that one of the convictions, as well as its concurrent sentence and assessment, must be vacated. *Id.* at		

		74 (citing *Ball*, 470 U.S. at 864, 105 S.Ct. 1668). We note that other courts of appeals have similarly exercised their discretion in circumstances analogous to those presented in *Miller* and in the present case.[FN10] FN10. *See, e.g.*, *Ogba*, 526 F.3d at 237-38 (concluding that the multiplicitous conviction and sentence amounted to double jeopardy, and that "[f]ailing to remedy a clear violation of a core constitutional principle would be error so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice" (quotations and citations omitted) (alteration in original)); *Zalapa*, 509 F.3d at 1065 ("By convicting and sentencing Zalapa on both firearms counts, the district court's plain error exposed Zalapa to double jeopardy, which makes his convictions fundamentally unfair."); *Parker*, 508 F.3d at 440-41 (overruling prior precedent and concluding that multiplicitous convictions, with concurrent sentences and assessments, amounted to miscarriage of justice). We hold that leaving this error uncorrected would seriously affect the fairness and integrity of these proceedings and, therefore, conclude that we will exercise our discretion to grant relief under Rule 52(b).		
4				**U.S. v. Jarvis,** 7 F.3d 404 C.A.4 (Va.),1993. (ERVIN, Chief Judge, and HALL and PHILLIPS, Circuit Judges.) Because Jarvis failed to object to his prosecution on former jeopardy grounds at some point during the proceedings below, and therefore forfeited the objection, we may review the proceedings only for plain error in this respect. . . with respect to the third consideration, we cannot doubt that the bringing of a second conspiracy prosecution against Jarvis in the Eastern District of Virginia clearly "affec [ted]" the defendant's "substantial rights." Speaking for the Court in Olano, Justice O'Connor *413 wrote that "in most cases[,]" the phrase "affecting substantial rights" generally "means that the error must have been prejudicial: It must have

affected the outcome of the District Court proceedings." Id., 507 U.S. at ––––, 113 S.Ct. at 1777–78.FN2 It is difficult to imagine an error capable of more drastically effecting the outcome of judicial proceedings than permitting the Government to obtain a conviction for an offense whose prosecution was barred ab initio by the constitutional guarantee of freedom from being "twice put in jeopardy of life or limb." U.S. Const. amend. V. We therefore conclude that permitting Jarvis's prosecution for conspiracy to proceed in the Eastern District of Virginia constituted "plain error." . . .

We cannot imagine a course more likely to "seriously affect the fairness, integrity, or public reputation of judicial proceedings," Olano, 507 U.S. at ––––, 113 S.Ct. at 1779, than for us to permit Jarvis's conspiracy conviction, obtained in such flagrant violation of the Double Jeopardy Clause, to stand.

Jarvis's conspiracy prosecution in the Eastern District of Virginia constitutes a "particularly egregious error," Young, 470 U.S. at 15, 105 S.Ct. at 1046, that has caused a "miscarriage of justice," id., in the instant case. Because the conspiracy count charged the "same offense," Ragins, 840 F.2d at 1188; using the "same evidence," Ragins, 840 F.2d at 1188, as the conspiracy of which Jarvis was convicted in the Southern District of Florida, we hereby exercise our discretion under Rule 52(b) to correct the district court's plain error in permitting the Government to prosecute Jarvis for conspiracy. Accordingly, we vacate his conspiracy conviction and the sentence that resulted therefrom, and remand the cause for resentencing.

U.S. v. Bird, 409 Fed.Appx. 681 C.A.4 (N.C.),2011 (Judge KEENAN wrote the opinion, in which Associate Justice O'CONNOR and Chief Judge TRAXLER joined.) [fails second prong]

Bird next argues that his convictions and sentences for attempted murder and for assault with the intent to commit murder constitute multiple punishments for the same offense, in violation of his constitutional protection against being placed in double jeopardy. Because Bird did not assert this defense in the district court, we review his argument on appeal for plain error. . . .[Olano] We emphasized in Beasley that to qualify as plain error, the error must be plain under "current law." Id. at 149 (citing Olano, 507 U.S. at 734, 113 S.Ct. 1770). We further explained that for purposes of plain error review, it is sufficient that an error be plain at the time of appellate consideration. Id. at 149–150 (citing Johnson v. United States, 520 U.S. 461, 468, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997)). In the case before us, there was no controlling Supreme Court or circuit precedent on this double jeopardy issue when Bird was sentenced by the district court, and there is no controlling precedent on that issue today. Therefore, we cannot conclude that the district court plainly erred under established law in imposing convictions and sentences for both attempted murder and assault with the intent to commit murder

U.S. v. Ganeous, 400 Fed.Appx. 794 C.A.4 (W.Va.),2010. (per curiam, DUNCAN, DAVIS, and WYNN)

Ganeous argues that his convictions violated the prohibition against double jeopardy because the indictment was multiplicitous, as assault with a deadly weapon is a lesser included offense of maiming. As Ganeous did not raise this issue in the district court, it is reviewed for plain error. *See United States v. White,* 405 F.3d 208, 215 (4th Cir.2005).[white was booker claim, not dj] ... assault with a deadly weapon is not a lesser included offense of maiming as each offense requires an element of proof that the other does not. Therefore, Ganeous was not ***796*** convicted of multiple counts charging the same offense and his double jeopardy rights were not violated

U.S. v. Mungro, 365 Fed.Appx. 494 C.A.4 (N.C.),2010.(per curiam, WILKINSON and KING, Circuit Judges, and HENRY E. HUDSON] Mungro objected on double jeopardy grounds only to the admission of certain evidence concerning the two-year overlap. He did not, by contrast, move to dismiss the indictment or assert that his prosecution for the second conspiracy somehow contravened the Double Jeopardy Clause. We have already determined that a double jeopardy challenge must be raised in the district court or it will be forfeited on appeal. *See United States v. Jarvis,* 7 F.3d 404, 409 (4th Cir.1993). Because Mungro failed to preserve this issue in the district

				court, we review it for plain error only. [finding no error]
5				**U.S. v. Whitfield**, 590 F.3d 325 C.A.5 (Miss.),2009. (GARWOOD, with BENAVIDES and HAYNES), [Ashe claim] To begin with, these claims were not raised in the trial court. ...The Supreme Court has made it clear that failure to raise a double jeopardy defense in the trial court constitutes a waiver thereof. See Peretz ... ("The most basic rights of criminal defendants are ... subject to waiver... United States v. Myers, 104 F.3d 76, 79 n. 2 (5th Cir.1997); United States v. Moore, 958 F.2d 646, 650 (5th Cir.1992); Grogan v. United States, 394 F.2d 287, 289 (5th Cir.1967). See also United States v. Scott, 464 F.2d 832, 833 (D.C.Cir.1972); FED.R.CRIM.P. 12(b)(3), 12(e) The appellants' failure to raise this issue in their original briefs in this court (or even in their reply briefs) likewise clearly constitutes a waiver or forfeiture of their contentions in this respect. . . . We assume, arguendo only, that the claims of Minor and Whitfield in this respect are merely forfeited, rather than waived, so that they may be reviewed for plain error under FED. R.CRIM. P. 52(b). See, e.g., United States v. Lewis, 492 F.3d 1219 (11 Cir. en banc, 2007) (reviewing under Rule 52(b) claim of double jeopardy timely raised on appeal but not raised in the district court, finding no error). . . . [finding failed prongs one and two:] we conclude that it is certainly *not* clear or obvious—as it must be even if the claim is not waived but merely forfeited—that the jury at the first trial either by its acquittal of Whitfield on Count Five (section 1343 wire fraud based on Radlauer's August 27, 2002 wire transfer of funds to pay off Whitfield's loan) *necessarily* found that Whitfield engaged in no honest services deprivation scheme with Minor respecting the *Marks* case, or that by its acquittal of Minor on Count Four (section 1341 mail fraud based on Whitfield's September 27, 2002 transmittal by public carrier of his note to Radlauer) *necessarily* found that Minor engaged in no honest services deprivation scheme with Whitfield respecting the *Marks* case **U.S. v. Garcia**, 567 F.3d 721 (5th Cir. 2009) (Elrod, with Hicks and Garza) ...the first trial's evidence was insufficient to support a verdict on either charge, and that the first trial's insufficiencies triggered Double Jeopardy Clause protections prohibiting his reprosecution in the second trial. Because Arriaga–Guerrero did not raise this argument in the district court, we review only for plain error. . . . [D's dj] argument fails because the government placed him in jeopardy only once.
6		**U.S. v. Ehle,** 640 F.3d 689 C.A.6 (Ky.),2011 (Rogers, with BATCHELDER, Chief Judge; KEITH) guilty pleas do not waive double jeopardy issues predicated on multiple punishments where, as here, the issues appear on the face of the indictment and can be resolved without an additional evidentiary hearing." *Id.* (citing *Broce*, 488 U.S. at 575–76, 109 S.Ct. 757). ... [M]oreover, it is not clear that we are limited to plain error review. In *Ragland*, we went on to find that the double jeopardy challenge was forfeited, rather than waived, and was subject to plain error review. *Id.* We relied in *Ragland* on our application of plain error review in *United States*	**U.S. v. Flint,** 394 Fed.Appx. 273 C.A.6 (Mich.),2010. (BATCHELDER, with MOORE and COOK,) D argues that he was subjected to double jeopardy because the charge of sex trafficking of children is subsumed into the charge of interstate transportation of minors for prostitution . . . The government answers that Flint has waived or forfeited this claim by failing to raise it to the district court as a pretrial challenge to the indictment. *See United*	**U.S. v. Turpin.** 317 Fed.Appx. 514 C.A.6 (Ohio),2009 (Cook, with Norris, and Griffin) Turpin raises two Fifth Amendment challenges for the first time on appeal. Because she did not raise double jeopardy before the district court, she forfeits these claims. *United States v. Branham*, 97 F.3d 835, 841-42 (6th Cir.1996). Although plain error might save Turpin's claims for our review, we find no error at all, much less plain error **U.S. v. Lebreux,** Slip Copy, 2009 WL 87505 C.A.6 (Ohio),2009. (Restani, with DAUGHTREY and KETHLEDGE) Moore claims that his federal conviction violates the **Double Jeopardy** Clause because in 2003, he was convicted in an Ohio state court of trafficking in drugs based on the same conduct. Because Moore did not raise a double jeopardy claim before the district court, we review his claim for plain error. *See United States v. Branham*, 97 F.3d 835, 842 (6th Cir.1996). Moore's claim lacks merit, as successive state and federal prosecutions based on the same conduct do not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns. **U.S. v. Branham,** 97 F.3d 835, 841-42 (6th Cir.1996) (Aldrich, with SUHRHEINRICH and SILER) Our initial concern in this matter is whether Allen raised his double jeopardy argument prior to trial. Rule 12(b)(1) of the Federal Rules of Criminal Procedure dictates that Allen was required to raise the jeopardy issue by motion prior to trial. Review of the record before us indicates that Allen failed to raise the jeopardy issue at any time prior to or during his criminal prosecution. "As a general rule, we will not consider issues not presented to and considered by the district court." . . . Nonetheless, Rule 52(b) of the Federal Rules of Criminal Procedure provides us with the

		v. Branham, 97 F.3d 835, 841–42 (6th Cir.1996), which held that a double jeopardy claim premised on multiplicity of punishments was forfeited (not waived) when the claim had not been raised with the trial court. *In the present case, in contrast*, Ehle at sentencing made arguments that support a double jeopardy claim, although without explicitly relying on the Double Jeopardy Clause. ... There is a double jeopardy violation in Ehle's convictions for both receiving and possessing the same child pornography. . . Finally, we would reach the same conclusion even under a plain error analysis if we were to conclude that the defendant did not adequately raise the foregoing argument below. Finally, the error "affected substantial rights" and "seriously affected the fairness, integrity, or public reputation of the judicial proceedings." As this court explained in an earlier double jeopardy case, "[t]here can be no doubt that the district court erred by letting stand [defendant's] convictions and sentences on both Count One and Count Three and that this error affects [defendant's] substantial rights and undermines the fairness and integrity of the judicial proceedings." *United States v. Garcia*, No. 96–1073, 121 F.3d 710, 1997 WL 420557, at * 10 (6th Cir. July 8, 1997). The Third and Ninth Circuits reached the same conclusion when they undertook a plain error analysis of double jeopardy challenges to the child-pornography statutes.	*States v. Hart*, 70 F.3d 854, 859-60 (6th Cir.1995) ("As this issue [multiplicity implicating double jeopardy] was not raised prior to trial, we find that Hart **waived** this issue."); *United States v. Colbert*, 977 F.2d 203, 208 (6th Cir.1992) (holding that a defendant's failure to object to the indictment on multiplicity grounds prior to trial constitutes a waiver); *see also* Fed.R.Crim.P. 12(b)(3)(B); 12(e). We conclude that we need not resolve this issue on the merits because Flint has waived this claim by failing to raise or argue it in the district court	authority to correct plain errors that were not raised during the proceedings before the district court. . . . The Supreme Court recently clarified the appropriate procedure for review by the appellate courts of objections not raised in the district court. See Olano...). The Olano Court made it clear that although forfeited rights are reviewable, waived rights are not, even for plain error. Id. at 733, 113 S.Ct. at 1777. ("Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)."). Distinguishing the two, the Court explained that forfeiture is "the failure to make the timely assertion of a right," whereas waiver is the "relinquishment or abandonment of a known right." Id. (citations and quotations omitted). . . . The defense of double jeopardy is personal and is capable of waiver. United States v. Broce, ... However, in Allen's case, it appears that he simply failed to raise this issue below, and took no affirmative steps to voluntarily waive his claim. In similar circumstances, three other circuits have concluded that a failure to assert double jeopardy at the trial level constituted a forfeiture of that right, and not a waiver. See United States v. Penny, 60 F.3d 1257, 1261 (7th Cir.1995), cert. denied, 516 U.S. 1121, 116 S.Ct. 931, 133 L.Ed.2d 858 (1996); United States v. Jarvis, 7 F.3d 404, 409–10 (4th Cir.1993), cert. denied, 510 U.S. 1169, 114 S.Ct. 1200, 127 L.Ed.2d 549 (1994); United States v. Rivera, 872 F.2d 507, 509 (1st Cir.), cert. denied, 493 U.S. 818, 110 S.Ct. 71, 107 L.Ed.2d 38 (1989). Absent evidence of a voluntary and intelligent choice by Allen, we agree with the rationale of these decisions and conclude that Allen's failure to object constituted a forfeiture of his claim. Accordingly, we review his jeopardy claim for plain error . . . because Allen failed to contest the administrative forfeiture he was not a party to the proceeding, and thus jeopardy did not attach. Accordingly,*844 we find no plain error and reject Allen's double jeopardy claim
7				**U.S. v. Halliday,** 672 F.3d 462 C.A.7 (Ill.),2012 (WILLIAMS, with EASTERBROOK, Chief Judge, and WOOD). Also argues possession is lesser included of receipt. Because Halliday did not raise a double jeopardy claim below, this court will review the claim for plain error. Fed.R.Crim.P. 52(b); *United States v. Van Waeyenberghe*, 481 F.3d 951, 958 (7th Cir.2007). . . . we need not decide in this case whether to align ourselves with them on the issue of whether possession of child pornography is a lesser-included offense of receipt. . . . . we find under the facts of this case that because there was ample proof of separate videos that formed the bases of the receipt and possession convictions, any error was harmless and therefore did not affect the defendant's

				substantial rights under a plain error analysis. **U.S. v. Rea,** 621 F.3d 595 C.A.7,2010 (Kanne, with Ripple and Sykes) Rea argues that the district court's imposition of two concurrent life sentences for conspiracy and for engaging in a CCE violates the Fifth Amendment's Double Jeopardy Clause because the convictions and sentences were based on the same underlying conduct-an agreement. Because Rea did not raise his double jeopardy defense before the district court, we review the district court's judgment for plain error. Fed.R.Crim.P. 52(b); *United States v. Crowder,* 588 F.3d 929, 938 (7th Cir.2009). . . . under *Rutledge* the conspiracy alleged in his indictment is a lesser included offense of the CCE and that, along with a special assessment for each, his concurrent sentences thus amount to cumulative punishment not authorized by Congress. Because the government concedes Rea's argument, and we agree, we vacate Rea's conviction and sentence for conspiracy. [NOTE: RELIEF BUT DIDN"T INQUIRE INTO 4th PRONG] **U.S. v. Faulds**, 612 F.3d 566 C.A.7 (Ill.),2010 (GRIESBACH with BAUER and SYKES) Faulds now argues that his conviction on both counts violates [DJ]... because Faulds did not raise his double jeopardy defense in the district court, this Court reviews his claim for plain error. . . . there was no error, plain or otherwise. **U.S. v. Warren,** 593 F.3d 540 C.A.7 (Ind.),2010 (Tinder with EASTERBROOK, Chief Judge, MANION) No objection to the retrial was raised in the district court, so we review the double jeopardy claim for plain error. . . . find no error, let alone plain error, in the district court's determination that the first jury was unable to reach a verdict even with further deliberations. **U.S. v. Doyle,** 121 F.3d 1078 C.A.7 (Ill.),1997. (Bauer, with Cummings, and Flaum) Doyle is thus unable to meet his burden of showing that the two indictments charged him with the same conspiracy, and he cannot show that any error, much less plain error, tainted his conviction. **U.S. v. Penny,** 60 F.3d 1257 C.A.7 (Ill.),1995 (Ripple, with Bauer and Reynolds) We agree with our colleagues in the Fourth Circuit, see United States v. Jarvis, 7 F.3d 404, 409-10 (4th Cir.1993), cert. denied, 510 U.S. 1169, 114 S.Ct. 1200, 127 L.Ed.2d 549 (1994), that failure to assert the double jeopardy defense in the trial court constituted a forfeiture. We can review such a claim, therefore, for plain error. [finding no error]
8	**U.S. v. Stock**, 445 Fed.Appx. 894 C.A.8 (Iowa),2011 (per curiam: MURPHY, BYE, and SMITH) "a guilty plea does foreclose a double jeopardy attack on a conviction unless, as in *Menna*, 'on the face of the record the court had no power to enter the conviction or impose the sentence.' " *United States v. Vaughan,* 13 F.3d 1186, 1188 (8th Cir.1994) (quoting *United States v. Broce,* 488 U.S. 563, 569, (1989)). In *Broce*, the Supreme Court made clear that by pleading guilty "to two counts with facial allegations of distinct offenses" a defendant concedes "that he has committed two separate	.		**U.S. v. Muhlenbruch,** 634 F.3d 987 C.A.8 (Iowa),2011 (Meam with Bye and Smith) Muhlenbruch contends that his convictions and sentences for both receiving child pornography, in violation of 18 U.S.C. § 2252(a)(2), and possessing child pornography, in violation of 18 U.S.C. § 2252(a)(4)(B), violate the Double Jeopardy Clause of the Fifth Amendment. Although Muhlenbruch did not raise the double jeopardy issue below, it does not appear that he intentionally relinquished his claim and we will review his claim for plain error. . .. Although Muhlenbruch's sentences for both convictions were to run concurrently, we also find that the double jeopardy violation affected Muhlenbruch's "substantial rights." As the Court in *Ball* explained, "[t]he second conviction, whose concomitant sentence is served concurrently, does not evaporate simply because of the concurrence of the sentence. The separate *conviction,* apart from the concurrent sentence, has potential adverse collateral consequences that may not be ignored." 470 U.S. at 864–65, 105 S.Ct. 1668 (emphasis in original). We also note that the district court imposed a mandatory $100 special assessment for each offense. . . In light of the double jeopardy violation, the additional $100 special assessment subjects [Muhlenbruch] to multiple punishments for the same offense." RELIEF BUT NO INQUIRY INTO 4th PRONG

	crimes," and in that situation there was no double jeopardy violation on the face of the record. …By pleading guilty to two counts of possession of child pornography, Stock admitted that he had committed two separate crimes. He has therefore waived his double jeopardy challenge.			**U.S. v. Robertson**, 606 F.3d 943 C.A.8 (N.D.),2010 (GRUENDER with Loken and Colloton) Robertson first argues that abusive sexual contact (Count II) is a lesser-included offense of aggravated sexual abuse (Count I) and that his being convicted on both Counts I and II therefore violates the Fifth Amendment's prohibition against double jeopardy. Robertson failed to raise this issue at trial. There is a conflict in our circuit over whether a defendant may raise a double jeopardy claim for the first time on appeal. *See* *United States v. Plenty Chief*, 561 F.3d 846, 851 n. 3 (8th Cir.2009) (recognizing the conflict); *United States v. Two Elk*, 536 F.3d 890, 897 (8th Cir.2008) (same). We have held in some casesthat double jeopardy claims raised for the first time on appeal are waived, *see, e.g.*, *United States v. Bentley*, 82 F.3d 222, 223 (8th Cir.1996), but in other cases we have reviewed double jeopardy claims raised for the first time on appeal for plain error, *see, e.g.*, *United States v. Sickinger*, 179 F.3d 1091, 1092–93 (8th Cir.1999). "When we are confronted with conflicting circuit precedent, the better practice normally is to follow the earliest opinion, as it should have controlled the subsequent panels that created the conflict." **…** Our refusal to review double jeopardy claims raised for the first time on appeal has the longer history in our precedents. *See, e.g.*, *United States v. Conley*, 503 F.2d 520, 521 (8th Cir.1974) (refusing to consider a double jeopardy claim raised for the first time on appeal and observing that "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" (quoting ***950** *Ferina v. United States*, 340 F.2d 837, 838 (8th Cir.1965))). But the Supreme Court's intervening decision in *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993), "arguably justified the [subsequent] departure" from that line of cases, *see* *Ingram*, 443 F.3d at 960 ("[I]t is well settled that a panel may depart from circuit precedent based on an intervening opinion of the Supreme Court that undermines the prior precedent."). In *Olano*, the Supreme Court clarified the difference between waiver and forfeiture, 507 U.S. at 733–34, 113 S.Ct. 1770, defining forfeiture as "the failure to make the timely assertion of a right," *id.* at 733, and waiver as "the intentional relinquishment or abandonment of a known right," *id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938)). The Court then held that Federal Rule of Criminal Procedure 52(b) allows appellate courts to review forfeited claims for plain error. *Id.* at 732–35, 113 S.Ct. 1770. Because there is no evidence in this case that Robertson intentionally relinquished his double jeopardy claim, *see* *Olano*, 507 U.S. at 733, 113 S.Ct. 1770, we will review his claim for plain error.[FN3] FN3. After *Olano*, our sister circuits have reviewed double jeopardy claims not raised in the district court for plain error.*See* *United States v. Polouizzi*, 564 F.3d 142, 153–54 (2d Cir.2009); *United States v. Kelly*, 552 F.3d 824, 829(D.C.Cir.2009); *United States v. Henry*, 519 F.3d 68, 71 (1st Cir.), *cert. denied*, 555 U.S. ––––, 129 S.Ct. 423, 172 L.Ed.2d 306 (2008); *United States v. Lewis*, 492 F.3d 1219, 1221–22 (11th Cir.2007) (en banc); *United States v. Jackson*, 443 F.3d 293, 301 (3d Cir.2006); *United States v. Hernandez–Guardado*, 228 F.3d 1017, 1028–29 (9th Cir.2000); *United States v. Lankford*, 196 F.3d 563, 577 (5th Cir.1999); *United States v. Contreras*, 108 F.3d 1255, 1261 (10th Cir.1997); *United States v. Branham*, 97 F.3d 835, 842 (6th Cir.1996); *United States v. Penny*, 60 F.3d 1257, 1261 (7th Cir.1995); *United States v. Jarvis*, 7 F.3d 404, 409–10 (4th Cir.1993). ON 4th PRONG:"Failing to remedy [such] a clear violation of a core constitutional principle would be error 'so obvious that our failure to notice it would seriously affect the fairness, integrity, or public reputation of [the] judicial proceedings and result in a miscarriage of justice.' " *United States v. Ogba*, 526 F.3d 214, 238 (5th Cir.2008) (first alteration in original) (quoting *United States v. Fortenberry*, 914 F.2d 671, 673 (5th Cir.1990)) (reversing a conviction on plain error review after finding a double jeopardy violation in part because the defendant was subjected to multiple special assessments). Accordingly, we conclude that the double jeopardy violation is a plain error, warranting reversal of Robertson's conviction and sentence on Count II. *See* *Rutledge v. United States*, 517 U.S. 292, 302–03, 116 S.Ct. 1241, 134 L.Ed.2d 419 (1996) (vacating a second

				conviction because the $50 assessment on the second count "amounts to cumulative punishment not authorized by Congress"); *Ball,* 470 U.S. at 865, 105 S.Ct. 1668 ("[T]he second conviction, even if it results in no greater sentence, is an impermissible punishment."); *United States v. Tann,* 577 F.3d 533, 539–40 (3d Cir.2009) ("Following *Ball* and *Rutledge,* numerous courts of appeals ... have concluded that a defendant's substantial rights are affected by the additional, unauthorized conviction, even when the immediate practical effect may not increase the defendant's prison term, or may only be a negligible assessment."); *United States v. Parker,* 508 F.3d 434, 436, 440–41 (7th Cir.2007) (reversing a conviction on plain error review where the defendant was subjected to "an additional $100 special assessment").[FN5] FN5. We reached the opposite conclusion in *United States v. Bailey,* 206 Fed.Appx. 650 (8th Cir.2006) (per curiam), holding that "[t]he special assessment, though an additional punishment, 'is not serious enough to be described as a miscarriage of justice and thus constitute plain error,' " *id.* at 652 (quoting *United States v. McCarter,* 406 F.3d 460, 464 (7th Cir.2005)). We are not bound by *Bailey,* however, since unpublished opinions have no precedential value in our circuit. *See* 8th Cir. R. 32. 1A; *United States v. Marston,* 517 F.3d 996, 1004 n. 5 (8th Cir.2008). In *Bailey,* we relied on *McCarter,* which the Seventh Circuit expressly overruled in *Parker,* 508 F.3d at 436 (concluding that *McCarter* is "inconsistent with Supreme Court precedent and out of step with other circuits"). Because *Bailey* conflicts with *Rutledge* and *Ball,* we decline to follow it. *Cf. United States v. King,* 554 F.3d 177, 180 (1st Cir.) ("One might contend that even if the double conviction were plain error and prejudicial, the extent of prejudice—a nominal second conviction with concurrent sentence and a $100 assessment—does not meet the 'miscarriage of justice' requirement. Yet [*Rutledge* and *Ball*] reach the opposite result ...." (internal citation omitted)), *cert. denied,* 556 U.S. ––––, 129 S.Ct. 2169, 173 L.Ed.2d 1165 (2009). **U.S. v. Plenty Chief,** 561 F.3d 846 C.A.8 (S.D.),2009 (Smith with MELLOY, BOWMAN) Because our review of the record reveals that Plenty Chief never asked the district court to dismiss either of these counts on such a ground,[FN2] our review is limited to plain error.[FN3] . . . We recognize that there are "two lines of cases" concerning whether a defendant may raise a double jeopardy challenge for the first time on appeal. *United States v. Two Elk,* 536 F.3d 890, 897 (8th Cir.2008). In *Two Elk,* the defendant argued that "this court reviews for plain error a double jeopardy challenge not raised in the district court." *Id.* (citing *United States v. Sickinger,* 179 F.3d 1091, 1092–93 (8th Cir.1999); *United States v. Bercier,* 506 F.3d 625, 633 (8th Cir.2007)). In response, the government argued that a defendant may not raise such a claim for the first time on appeal. *Id.* (citing *United States v. High Elk,* 442 F.3d 622, 624 (8th Cir.2006); *United States v. Goodwin,* 72 F.3d 88, 91 (8th Cir.1995); *United States v. Garrett,* 961 F.2d 743, 748 & n. 7 (8th Cir.1992)). We found it unnecessary to "reconcile these two lines of cases" because we concluded that, even under plain error review, no such error occurred. *Id.*In the present case, because the government argues that plain error review applies, we once again need not resolve these two competing lines of cases.[finding no error]
9		**U.S. v. Lynn,** 636 F.3d 1127 C.A.9 (Cal.),2011 (GOULD, with SCHROEDER and THOMAS) Where, as here, a claim of a double jeopardy violation was not properly raised before the district court, we review for plain error. . . . As in *Schales*, *Giberson*, and *Brobst,* the entry of judgment convicting Lynn of both receipt and possession of child pornography in this case was plain error affecting Lynn's substantial rights,[FN13] and		**U.S. v. Latham,** 379 Fed.Appx. 570 C.A.9 (Nev.),2010. (memo, RYMER and McKEOWN, Circuit Judges, and FAWSETT) Latham's double jeopardy claim is raised for the first time on appeal; we review for plain error. [Olano]Latham was convicted of both Receipt of Child Pornography (Count 3) and Possession of Child Pornography (Count 4). The two Counts were based on the same images. Because possession is a lesser-included offense of receipt, the district court plainly erred by imposing convictions on both counts. *United States v. Davenport,* 519 F.3d 940, 947 (9th Cir.2008). ...The remedy for this error is generally to remand to the district court so that it can decide, in its discretion, which conviction to vacate. Whichever conviction is vacated can be reinstated without prejudice if the other conviction is overturned on direct or collateral review. *Id.* at 948. Here, however, the district court recognized that it should not impose a sentence on both counts and declined to impose a sentence on Count 4. Given that the district court seems to have been aware of the Double Jeopardy problem and that it chose to impose a sentence only on Count 3, remand is unnecessary. We therefore vacate the conviction under

		this error threatens the fairness, integrity, and public reputation of judicial proceedings. *See* Davenport, 519 F.3d at 947–48. We hold that the district court, to avoid the double jeopardy violation, must vacate one of the convictions and then resentence based on the remaining conviction		Count 4 without prejudice. **U.S. v. Davenport,** 519 F.3d 940, 947 (9th Cir.2008) (Gould with Canby, dissent by Graber finding no error) Although we normally review de novo claims of double jeopardy violations, ...we review issues, such as the present one, not properly raised before the district court for plain error. *See* Fed.R.Crim.P. 52(b); *United States v. Olano,* 507 U.S. 725, 730-36, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993); *United States v. Valenzuela,* 495 F.3d 1127, 1130 (9th Cir.2007) . . . The district court's error was plain, and it affected Davenport's substantial rights by imposing on him the potential collateral consequences of an additional conviction. Finally, because the prohibition against double jeopardy is a cornerstone of our system of constitutional criminal procedure, this error threatens the fairness, integrity, and public reputation of our judicial proceedings. We therefore exercise our discretion under Olano to correct it.
10	**U.S. v. Carpenter** 163 Fed.Appx. 707 C.A.10 (Wyo.),2006 (Ebel with McKay and Henry) Third, Mr. Carpenter claims that prosecution in both federal court and tribal court for drug counts arising out of the same activity violates his Fifth Amendment right to be free from double jeopardy. His guilty plea has waived this claim. In addition, because he asserts that the tribal drug counts "were stayed pending federal prosecution," his federal convictions cannot amount to double jeopardy since there has been no prior instance of jeopardy. Mr. Carpenter's claim thus does not cast doubt on the federal convictions we are reviewing here.			PRETRIAL DOUBLE JEOPARDY OBJECTION : G0rsuch, J., with Ebel and Arguello **U.S. v. Wampler,** 624 F.3d 1330 C.A.10 (Okla.),2010. The defendants didn't pursue a double jeopardy argument before the district court and so it is either waived or at least forfeited. *See* McKissick v. Yuen, 618 F.3d 1177, 1189 (10th Cir.2010). FN6 And even if we were inclined to overlook this problem, another insurmountable barrier would still block the defendants' way. The Supreme Court has told us that a claim of double jeopardy must be at least "colorable" to confer interlocutory jurisdiction on an appellate court. .. [finding no jurisdiction to entertain appeal prior to trial] **U.S. v. Rowe,** 47 Fed.Appx. 862 C.A.10 (Okla.),2002 (EBEL, LUCERO, and HARTZ) Although Defendant did not raise a double jeopardy objection at either trial or sentencing, we have held that a "double jeopardy claim, if established, would be plain error affecting the fairness of the district court proceedings." United States v. Contreras, 108 F.3d 1255, 1261 (10th Cir.1997). The government concedes that Defendant is entitled to relief under United States v. Hooks, 33 Fed.Appx. 371 (10th Cir.2002), and United States v. Johnson, 130 F.3d 1420, 1426 (10th Cir.1997). We agree. Accordingly, we REMAND with instructions to VACATE one of the two convictions. **U.S. v. Hooks**, 33 Fed.Appx. 371 C.A.10 (Okla.),2002. (EBEL, KELLY, and LUCERO) While Hooks did not raise the double jeopardy argument at trial, we nonetheless may consider it if plain error or defects affecting substantial rights are involved. Fed.R.Crim.P. 52(b). A double jeopardy violation is plain error that may be considered by an appeals court despite failure to object in the trial court. United States v. Contreras, 108 F.3d 1255, 1261 (10th Cir.1997). Again, the United States does not dispute that we may consider the double jeopardy claim on appeal. Because Hooks has shown that he was convicted twice for the same offense in violation of his double jeopardy rights and because we exercise our discretion to consider this plain error, we agree with the parties that one of Hooks' convictions must be vacated **U.S. v. Contreras**, 108 F.3d 1255 C.A.10 (N.M.),1997 (BRORBY, with BALDOCK, and DANIEL) Here, Ms. Contreras' double jeopardy claim, if established, would be a plain error affecting the fairness of the district court proceedings. Thus, we exercise our discretion under Rule 52(b) and review Ms. Contreras' double jeopardy claim for plain error [finding no error]
11	**U.S. v. Harper,** 398 Fed.Appx. 550 C.A.11 (Fla.),2010 (per curiam, BLACK, PRYOR and MARTIN) Harper argues for the first time on appeal that his convictions for possessing and receiving child pornography violate DJ. . . . "we review issues not properly raised before the		**U.S. v. Thomas,** 313 Fed.Appx. 280 C.A.11 (Ala.),2009 (per curiam, TJOFLAT, HULL and ANDERSON) In this case, appellant failed to challenge his indictment on	**U.S. v. Walden,** 2012 WL 1537915 (11th Cir. 2012) (per curiam TJOFLAT, EDMONDSON and MARCUS) because Walden did not raise a double jeopardy argument in district court, we review his argument for plain error, and find none. Unlike in *Bobb,* Walden's indictment for receipt and possession of child pornography did not charge separate offenses on two distinctly different dates, but the date of the charges in the indictment—which provided that Walden with receiving child pornography from May 2, 2001, through November 9, 2006, and possessing child pornography on November 9, 2006—overlap on November 9, 2006. Research has not revealed

	district court, such as the instant one, for plain error." *United States v. Bobb,* 577 F.3d 1366, 1371 (11th Cir.2009). As a threshold matter, we must first consider whether Harper waived his double jeopardy challenge by pleading guilty. . . . . "[A] defendant does not waive a double jeopardy challenge when, judged on the basis of the record that existed at the time the guilty plea was entered, the second count is one the government may not constitutionally prosecute." *United States v. Smith,* 532 F.3d 1125, 1127 (11th Cir.2008) . . . "In other words, a defendant may challenge his conviction if he does not need to go outside what was presented at the plea hearing to do so." *Bonilla,* 579 F.3d at 1240 (citing *United States v. Broce,* 488 U.S. 563, 575–76, (1989)). In order for us to conclude that Harper's double jeopardy challenge has not been waived, we must determine that "his guilty plea admitted no factual predicate that sufficed to make irrelevant his double jeopardy claim." *Jackson v. Coalter,* 337 F.3d 74, 80 (1st Cir.2003). ...the problem for Harper: his claim depends upon his discrediting the factual basis of his conviction. As the Supreme Court stated in *Broce,* "a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede[s] that he has committed two separate crimes." 488 U.S. at 570, 109 S.Ct. at 763. We must therefore conclude that, by pleading guilty, Harper has waived his double jeopardy challenge.		multiplicity or double jeopardy grounds prior to trial. He therefore waived those grounds, and we do not consider them here. . . . The problem appellant faces is that, at sentencing, he did not object to his sentences on the ground that they were multiplicitous, or barred by the Double Jeopardy Clause, although the court gave him an opportunity*283 to voice the objection. His failure to object waived the objection, and we do not consider it. *See Wilson,* 983 F.2d at 225–26. [THIS IS REALLY A CASE WHERE SHOULD HAVE BEEN RAISED AT SENTENCING]	controlling law addressing this specific issue and under plain error review, this alone shows that any error is not plain. *Chau,* 426 F.3d at 1322 .[FN3] Accordingly, we affirm. Alt gd, note 3: because Counts 1 and 2 of his indictment charged different acts that were supported by different evidence. Because Walden's violation of two distinct statutory provisions was supported by separate evidence, and they were not a part of the "same act or transaction" under the *Blockburger* test, and therefore did not violate the Double Jeopardy Clause **U.S. v. Bobb,** 577 F.3d 1366 C.A.11 (Fla.),2009. (Tjoflat with Carnes and Bowen) we review issues not properly raised before the district court, such as the instant one, for plain error. Fed.R.Crim.P. 52(b); *United States v. Evans,* 478 F.3d 1332, 1338 (11th Cir.2007) . . . finding no error: the record shows that the indictment charged Bobb with two separate offenses, and the Government introduced evidence sufficient to convict him of those distinct offenses.

THIS PAGE INTENTIONALLY BLANK

TAB 2E

THIS PAGE INTENTIONALLY BLANK

U.S. Department of Justice

Criminal Division

11-CR-003

Assistant Attorney General *Washington, D.C. 20530*

February 13, 2012

The Honorable Reena Raggi
Chair, Advisory Committee
on the Criminal Rules
United States Court of Appeals
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201-1818

Dear Judge Raggi:

The Department of Justice appreciates this opportunity to comment on the proposed amendment to Rule 12 of the Federal Rules of Criminal Procedure. The proposed Rule is the result of a comprehensive and intensive effort over a period of several years, and we are grateful for the hard work that has gone into its development. It requires defendants who claim that an indictment fails to state an offense to raise that claim before trial, in accord with the Supreme Court's decision that such claims are not jurisdictional. The amendment also clarifies several aspects of the Rule that have been a source of confusion for the courts, striking a fair balance among competing interests. We offer the following comments for your consideration.

1. Claims of Failure to State an Offense to be Raised Before Trial

We support the key element of the proposed amendment, which deletes the language in Rule 12(b)(3)(B) that permits a defendant to raise "at any time while the case is pending" a claim that the indictment fails to state an offense. While the Rule continues to provide that a claimed jurisdictional error can be raised at any time while the case is pending, a claim that the indictment is insufficient must now be raised prior to trial. As noted in the Advisory Committee's Report, the Department requested this revision in 2006 to account for *United States v. Cotton*, 535 U.S. 625 (2002), in which the Supreme Court held that the failure of an indictment to state an offense is not a jurisdictional defect.

Requiring that claims regarding the facial validity of the indictment or criminal information be raised prior to trial, just like other claimed defects in the indictment, is consistent with Rule 12's general purpose of requiring parties to raise before trial those claims that can be remedied before trial, before resources are expended on trials, pleas, and sentencings. It also disallows the defense from recognizing a defect in a charging instrument but unfairly waiting to

see whether a conviction results and only then raising the defect to obtain a new trial. *See Davis v. United States*, 411 U.S. 233, 241 (1973); *United States v. Ramirez*, 324 F.3d 1225, 1228 (11th Cir. 2003).

2. Inclusion of Specific Examples of Claims that Must be Raised Before Trial

The Advisory Committee's proposal retains the current categories of claims that subsection (b)(3) requires be raised before trial: two general categories of claims – defects in "instituting the prosecution" and defects "in the indictment or information"; and three specific categories – claims relating to discovery, suppression, and joinder. As part of the Committee's broader effort to clarify certain aspects of Rule 12 that have confused or divided the courts, however, the proposed Rule now lists the more common claims that fall within the first two general categories, and uses the word "including" to make clear that those enumerated claims are not an exhaustive list.

We support this clarification. When courts have had to determine whether a claim constitutes a "defect in the indictment" or a "defect in instituting the prosecution," the answer has not always been consistent. Most courts have treated a statute of limitations claim, for example, as a defect in instituting the prosecution or the sufficiency of the indictment, and have found such a claim waived if not raised before trial. But the Seventh Circuit has considered such a claim among those that *may* but not *must* be raised before trial. *Compare United States v. Ramirez*, 324 F.3d at 1228-1229; *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987), *with United States v. Baldwin*, 414 F.3d 791, 795-796 at n.2 (7th Cir. 2005). Clarifying this portion of the Rule will aid courts and litigants and promote uniformity.

3. The Availability Requirement

We also support the inclusion of specific language in the Rule that makes clear that the requirement that certain claims must be raised before trial applies only to the extent that those claims are "reasonably available" before trial.

As a general matter, claims subject to Rule 12(b)(3) will be available before trial and should be resolved then. The Advisory Committee recognized, however, that in some rare cases, the basis for such a claim may not be known to a party before trial. In that circumstance, it can hardly be fair to later penalize a defendant for his untimeliness in raising a claim he had no reason to know of. Rather than leaving these decisions to the discretion of the district courts – some which may determine that Rule 12(b)(3) does not apply, and some which may decide that

the claim is subject to the Rule but may find "good cause" for the failure to timely raise it[1] – the proposed Rule spells out that a court should consider, as a first step in its analysis, whether the claim was "reasonably available" before trial. If it was not, the court should find Rule 12(b)(3) inapplicable, whether or not the claim was of a type otherwise required to be raised before trial. We believe this provision adds needed clarity and affords the defendant a fair standard under which his failure to raise a claim is judged.

4. Clarifying the Standards for Consideration of Late-Filed Claims

The current Rule 12, in subparagraph (e), provides that a party "waives" any untimely "Rule 12(b)(3) defense, objection, or request" unless the court grants relief from the waiver upon a showing of "good cause." The exact meaning of the phrase "good cause" has prompted a great deal of litigation, despite the Supreme Court's definition of that term in *Davis v. United States*, 411 U.S. at 242, and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362-363 (1963). The term "waiver" has also been construed variously by different courts. At the urging of the Standing Committee, the Advisory Committee undertook a comprehensive examination of the Rule and, in particular, explored the relationship between Rule 12 waiver and the concepts of forfeiture and plain error from Rule 52(b). As a result, the Advisory Committee determined that a fundamental revision of several aspects of Rule 12 was necessary. We fully support each of these changes.

a. Elimination of the Term "Waiver" from Rule 12

It is clear from both the text and history of the current Rule 12 that it intended to require that certain motions be raised before trial, and that the failure to do so would result in a waiver of that claim, not a mere forfeiture. The Rule thus bars any judicial consideration of a late-filed motion in the absence of a court's finding of "good cause." *See United States v. Rose*, 538 F.3d 175, 177-179 (3d Cir. 2008); *United States v. Chavez-Valencia*, 116 F.3d 127, 130-132 (5th Cir. 1997). The Supreme Court confirmed this understanding of the Rule in *Davis, supra,* when it held that an untimely claim under Rule 12 "once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Davis*, 411 U.S. at 242. In particular, the Court held that while "waiver" often requires a knowing and intentional relinquishment of a claim, it is a different matter where the waiver provision in Rule 12 expressly warns a litigant that his failure to comply with the rule will result in the waiver of his claim. *Davis*, 411 U.S. at 239-242.

---

[1] *See, e.g., United States v. Anderson*, 472 F.3d 662, 668-670 (9th Cir. 2006) (finding Rule 12 waiver applicable but granting relief from waiver for pro se defendant with no access to translated copy of Costa Rican extradition in time to meet deadline for pretrial motions); *United States v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001) (finding no waiver of claim when alleged defect in indictment was not apparent on its face at the institution of the proceeding).

Despite *Davis*, the courts of appeals have taken a variety of approaches when claims are raised on appeal that should have been raised before trial under Rule 12.[2] Because of the resulting confusion in the courts, and because the notion of "waiver" as used in Rule 12 differs from the definition of that term in many other contexts, the Standing Committee suggested eliminating that term from Rule 12. At the same time, the Committee saw no reason to change the Rule's original policy that failing to abide by the time limits set by the court results in extinguishment of a claim, absent a showing of cause and prejudice – the approach taken by the majority of courts. To accomplish the same result, but using different terms, the Advisory Committee deleted the reference to "waiving" a claim in Rule 12(e) and added to subsection (c) new language explaining the consequences of filing untimely motions and specifying the limited circumstances under which such an untimely claim may nevertheless be considered.

We agree that it is helpful to drop the confusing term "waiver" and adopt new, clearer language. Clarifying Rule 12 in this way will result in more uniformly correct application of the Rule, and will enhance fairness by making unambiguous the consequences of defaulting on a claim.

b. Retention of "Cause and Prejudice" as the Showing Required to Obtain Consideration of Most Late-Filed Motions

(1) *Clarification of "Good Cause" Standard*

Current Rule 12 allows consideration of a late-filed claim if the party shows "good cause." Fed. R. Crim. P. 12(e). As the Supreme Court held in *Davis*, the "good cause" provision of Rule 12 requires both a showing of actual prejudice and a reason for the late filing. *See Davis*, 411 U.S. at 243-245; *Shotwell*, 371 U.S. at 363 (finding it "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(b)(3)]"). Despite the holding in *Davis*, the Advisory

---

[2] Most courts will consider a late-raised claim only if Rule 12's "good cause" standard has been shown, and do not apply plain error review. *See, e.g., United States v. Burke*, 633 F.3d 984, 988-989 (10th Cir.), *cert. denied*, 131 S. Ct. 2130 (2011); *Rose*, 538 F.3d at 177-183; *United States v. Hemphill*, 514 F.3d 1350, 1365 (D.C. Cir. 2008); *United States v. Collier*, 246 Fed. Appx. 321, 334-336 (6th Cir. 2007); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004); *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003); *United States v. Suescun*, 237 F.3d 1284, 1286-1287 (11th Cir. 2001); *United States v. Wright*, 215 F.3d 1020, 1026-1027 (9th Cir. 2000). Others, however, have applied plain error review to such claims. *See, e.g., United States v. Rumley*, 588 F.3d 202, 205 & n.1 (4th Cir. 2009); *United States v. Stevens*, 487 F.3d 232, 242 (5th Cir. 2007); *United States v. Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997). And some have even required a showing of *both* good cause *and* plain error. *See, e.g., United States v. King*, 627 F.3d 641, 647 (7th Cir. 2010); *United States v. Hargrove*, 508 F.3d 445, 450 (7th Cir. 2007).

Committee found that some confusion remained: while many district courts have held, consistent with *Davis*, that a party must show both a reason for failing to raise the claim and prejudice to his case in order to have his late-filed claim considered by the court,[3] other courts have been less clear about the need for a showing of prejudice. *See Rose*, 538 F.3d at 184; *United States v. Anderson*, 472 F.3d at 670; *United States v. Campbell*, 999 F.2d 544 (9th Cir.), 1993 WL 263432, *6 at n.2 (unpublished); *United States v. Cathey*, 591 F.2d 268, 271 at n.1 (5th Cir. 1979).

Because of the inconsistency in application by the courts, and because the particular use of the term "good cause" in Rule 12 (*i.e.*, requiring both a sufficient reason for untimeliness and resulting prejudice) is not obvious from the face of the Rule, the Committee elected to modify the language. The proposed amendment thus explicitly provides that an untimely motion may be considered if "the party shows cause and prejudice."

We support this clarification of the Rule. If the Rule's policy of strictly requiring timely motions is to have any teeth, a party should be held to his waiver unless he can show both a good reason for failing to meet the deadline and some real prejudice to his case if his claim is not heard. As the Supreme Court explained in *Davis*, 411 U.S. at 241, there are good reasons to require that certain motions be raised and resolved in the district court when the objections can be remedied before a trial begins. If a required motion is not timely filed, and a sufficient reason is shown for a party's failure to abide by the Rule, but the party has suffered no prejudice from the failure to address his claim, the animating principles of the Rule – the desire to prevent "sandbagging" as a defense tactic, judicial economy and the desire not to interrupt a trial for auxiliary inquiries that should have been resolved in advance, and the resulting prejudice, in some cases, to the government's interests in having one fair chance to convict (*see* 6 Wayne R. La Fave, *Search and Seizure* § 11.1(a) at 8 (2004 ed.)) – all weigh against allowing consideration of the untimely motion. *See, e.g.*, *Kopp*, 562 F.3d at 143 (even if cause were shown, no prejudice demonstrated where defendant testified and admitted substance of statements he sought to have suppressed).

(2) *Specifying that "Cause and Prejudice" Standard Also Applies on Appeal*

The revised Rule also eliminates confusion among the courts of appeals regarding the proper standard of review to be used when a defendant raises a Rule 12 motion for the first time on appeal. As noted above, most circuits apply the same "good cause" test from Rule 12 in these

---

[3] *See United States v. Kopp*, 562 F.3d 141, 143 (2d Cir. 2009); *United States v. Santos Batista*, 239 F.3d 16, 19-20 (1st Cir. 2001); *United States v. Oldfield*, 859 F.2d 392, 397 (6th Cir. 1988); *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981); *United States v. Williams*, 544 F.2d 1215, 1217 (4th Cir. 1976).

circumstances.[4] Others, however, have decided or assumed that Rule 52(b)'s plain error rule applies on appeal, although sometimes in combination with Rule 12's good cause standard.[5] And, some courts take differing views even within the same circuit.[6]

The Advisory Committee concluded that the Rule should be clarified to promote uniformity, and it decided to specify, in line with the majority of appellate courts, that Rule 12's "good cause" standard, rather than the plain error standard of Rule 52(b), applies when a party raises for the first time on appeal a claim that Rule 12 requires be raised before trial.

We support the Committee's effort to promote a uniform standard of appellate review and to adopt the same standard at both the district court and appellate levels. Because the plain error standard is different from and more lenient than the "waiver except for cause and prejudice" standard of Rule 12, *see United States v. Frady*, 456 U.S. 152, 166-167 (1982) (plain error standard not sufficiently stringent for collateral review, where cause and actual prejudice standard applies), *United States v. Evans*, 131 F.3d 1192, 1193 (7th Cir. 1997) ("'Cause' is a more stringent requirement than the plain-error standard of Fed. R. Crim. P. 52(b)" (citing *Frady*)), application of the more lenient Rule 52(b) on appeal would undercut Rule 12's goal of promoting pretrial consideration of motions, by creating a perverse incentive to raise late claims on appeal instead of in the district court.

---

[4] *See, e.g., Burke*, 633 F.3d at 988-991; *Rose*, 538 F.3d at 182-185; *Anderson*, 472 F.3d at 668-669; *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006); *Collier*, 246 Fed. Appx. at 334-336; *Collins*, 372 F.3d at 633; *Yousef*, 327 F.3d at 125; *United States v. Weathers*, 186 F.3d 948, 954-958 (D.C. Cir. 1999).

[5] *See United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008); *United States v. Scroggins*, 599 F.3d 433, 448 (5th Cir.), *cert. denied,* 131 S. Ct. 158 (2010); *United States v. Johnson*, 415 F.3d 728, 730-731 (7th Cir. 2005).

[6] *Compare Nix*, 438 F.3d at 1288 (using cause) *with United States v. Sanders*, 315 Fed. Appx. 819, 822 (11th Cir. 2009) (using plain error); *and compare Scroggins*, 599 F.3d at 448 (using plain error) *with United States v. St. Martin*, 119 Fed. Appx. 645, 649 (5th Cir. 2005) (using cause); *and compare United States v. Wilson*, 962 F.2d 621, 626-627 (7th Cir. 1992) (finding multiplicity claim waived), and *United States v. Welsh*, 721 F.2d 1142, 1145 (7th Cir. 1983) (finding suppression claim waived), *with United States v. Percival*, 756 F.2d 600, 611 (7th Cir. 1985), and *United States v. Clarke*, 227 F.3d 874, 880-881 (7th Cir. 2000) (using plain error in the alternative).

c. More Lenient Standard of Review for Motions Challenging the Indictment for Failure to State an Offense or Alleging Double Jeopardy

(1) *Review of Motions Challenging Insufficient Indictments*

Proposed subdivision (c)(2)(B) provides a different standard of review for two specific claims: failure of the charging instrument to state an offense, and double jeopardy violations. In either case, a defendant need show "prejudice only." Further, subdivision (c) makes clear that Rule 52(b)'s "plain error test" does *not* apply.

We concur with the proposed more lenient standard of review where the late-filed claim is that the indictment fails to state an offense. As the Advisory Committee concluded, insufficient indictments could implicate the constitutional rights of the defendant, such as due process, the need for adequate notice of the offense charged, or the ability to present a defense. *See, e.g. United States v. Hathaway*, 318 F.3d 1001, 1009-1010 (10th Cir. 2003) (where indictment contained no language to indicate offense charged was felony assault, late Rule 12 objection allowed to prevent defendant from being sentenced as a felon). Recognizing these qualitatively different and potentially more serious consequences, we agree that it should be sufficient to show prejudice, without the need to show cause for the default, in order to obtain consideration of a late-filed motion claiming that the indictment fails to state an offense.

Although the Department originally proposed that Rule 52(b)'s "plain error" test should govern a late-filed motion alleging failure to state an offense, we agree with the Advisory Committee's conclusion that a defendant might not be able to satisfy all prongs of the plain error standard (showing an error that is plain, affects substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings) yet nevertheless may be deserving of relief where an indictment fails to state an offense. For that reason, we concur with the proposal that a showing of prejudice is sufficient to obtain consideration for this type of untimely motion.

(2) *Review of Late-Filed Motions Alleging a Double Jeopardy Violation*

The Advisory Committee also elected to add claimed double jeopardy violations to the category of claims whose late filing would be excused more easily. The intention was to preserve as closely as possible the current treatment of such claims by the courts, without adding yet a third standard of review. Many courts of appeals currently apply plain error review, rather than a "cause and prejudice" standard, to double jeopardy challenges that were available but not raised before trial. *See United States v. Robertson*, 606 F.3d 943, 949-950 & n.3 (8th Cir. 2010) (collecting cases); *United States v. Mahdi*, 598 F.3d 883, 887-888 (D.C. Cir.), *cert. denied*, 131 S. Ct. 484 (2010);*United States v. Mungro*, 365 Fed. Appx. 494, 505 (4th Cir.), *cert. denied*, 131 S. Ct. 210 (2010); *United States v. Hansen*, 434 F.3d 92, 104 (1st Cir. 2006). And courts

have also recognized that, even when a defendant pleads guilty, a double jeopardy violation that is clear on the face of the indictment is not waived. Courts reviewing those claims use either de novo or plain error review. *See, e.g.*, *United States v. Harper*, 398 Fed. Appx. 550, 553 (11th Cir. 2010) (guilty plea does not waive double jeopardy challenge on the face of the indictment), *cert. denied*, 131 S. Ct. 2133 (2011); *United States v. Cesare*, 581 F.3d 206, 209 (3d Cir. 2009) (finding plain error); *United States v. Kelly*, 552 F.3d 824, 829-831 (D.C. Cir. 2009) (finding no plain error); *United States v. Poole*, 96 Fed. Appx. 897, 899 (4th Cir. 2004) (granting relief on double jeopardy challenge despite guilty plea where indictment on its face allowed multiple sentences for a single offense).

Allowing review of untimely double jeopardy claims on a showing of prejudice alone would simplify the analysis without changing the result in most or all cases involving claimed double jeopardy violations. Accordingly, the Advisory Committee elected to include double jeopardy claims in the "prejudice only" category instead of adding a third standard for relief for untimely claims. We agree, and support the proposal.

Conclusion

We believe the proposed amendments to Rule 12 are carefully considered and will achieve clarity of purpose, fairness to all litigants, and consistency in application. We thank the Committee for this opportunity to offer our views.

Sincerely,

Lanny A. Breuer
Assistant Attorney General

FEDERAL MAGISTRATE JUDGES ASSOCIATION

50TH ANNUAL CONVENTION - DENVER, COLORADO
JULY 23 - 25, 2012
www.fedjudge.org

February 10, 2012

11-CV-018
11-CR-004
11-EV-001

Peter G. McCabe, Secretary
Committee on Rules of Practice & Procedure
of the Judicial Conference of the United States
Administrative Office of the United States Courts
Thurgood Marshall Federal Judiciary Building
Washington, DC 20544

Re: Comments on Proposed Amendments to Federal Rules of Criminal Procedure and Evidence

Dear Peter:

I am very pleased to submit the attached comments to the Rules Advisory Committee on behalf of The Federal Magistrate Judges Association. These well thought out comments were thoroughly discussed and considered by our Standing Rules Committee. The learned members of this committee include:

Honorable S. Allan Alexander, Northern District of Mississippi, Chair
Honorable David E. Peebles, Northern District of New York, Co-Chair
Honorable Clinton E. Averitte, Northern District of Texas
Honorable William Baughman, Jr., Northern District of Ohio
Honorable Alan J. Baverman, Northern District of Georgia
Honorable Hugh W. Brenneman, Jr., Western District of Michigan
Honorable Geraldine Soat Brown, Northern District of Illinois
Honorable Joe B. Brown, Middle District of Tennessee
Honorable Martin C. Carlson, Middle District of Pennsylvania
Honorable Waugh B. Crigler, Western District of Virginia
Honorable Judith Dein, District of Massachusetts
Honorable Marilyn D. Go, Eastern District of New York
Honorable Steven Gold, Eastern District of New York
Honorable David A. Sanders, Northern District of Mississippi
Honorable Nita L. Stormes, Southern District of Pennsylvania
Honorable Mary Pat Thynge, District of Delaware

The committee members come from all size districts and their collective experiences encompasses all types of judicial duties. In addition, the committee members often consulted with their colleagues in the course of preparing these comments. The committee's comments were reviewed and unanimously approved by the Officers and Directors of the Federal Magistrate Judges Association.

We are pleased to have this opportunity, once again, to present written comments representing the views of the Federal Magistrate Judges Association, and we welcome the opportunity to testify, if requested.

Sincerely,

Malachy E. Mannion
President
Federal Magistrate Judges Association

Chief United States Magistrate Judge
Middle District of Pennsylvania

COMMENTS OF
THE FEDERAL MAGISTRATE JUDGES ASSOCIATION
ON PROPOSED AMENDMENTS TO

THE FEDERAL RULES OF CIVIL PROCEDURE,

THE FEDERAL RULES OF CRIMINAL PROCEDURE

and

THE FEDERAL RULES OF EVIDENCE
(Class of 2013)

COMMENTS OF FEDERAL MAGISTRATE JUDGES ASSOCIATION RULES COMMITTEE ON PROPOSED CHANGES TO THE FEDERAL RULES OF CIVIL PROCEDURE, THE FEDERAL RULES OF CRIMINAL PROCEDURE and THE FEDERAL RULES OF EVIDENCE (Class of 2013)

I. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CIVIL PROCEDURE

A. PROPOSED RULE 45 – SUBPOENA

COMMENT: The proposed new Rule 45 substantially re-writes that rule in an attempt to make it clearer and more concise. The FMJA generally endorses the proposed amendment.

However, the FMJA has concerns that the terminology in subsection 45(c)(1)(B)(ii) is not consistent with terminology elsewhere in the Rule and that, as written, it will significantly increase motion practice for the trial judge in determining the meaning of the term "substantial expense" where a person must travel more than 100 miles to attend trial and deciding who has the burden of proof in the matter.

The FMJA also offers an unsolicited suggestion to establish a presumptive time for the target of the subpoena to comply with a subpoena.

Finally, the FMJA believes strongly that the decision whether to transfer a discovery motion to the issuing court should not be limited to "exceptional circumstances" or subject to veto by either a party or the non-party target, but should be left to the discretion of the court under a standard of "the interests of justice," giving due consideration to the non-party's interests.

D**ISCUSSION:**

1. Rule 45(c)(1)(B)(ii): The new provision alters the geographic scope of Rule 45 trial subpoenas. It extends the geographic boundaries beyond 100 miles from the location of the court provided: a) the target of the subpoena resides or works within the state; and b) the person can comply without "substantial expense."

The FMJA has two concerns. First, the terminology within the Rule, as a whole, is not uniform and is subject to diverse and potentially inconsistent interpretations, depending on the circumstances. Although some terms are carry-overs from the old Rule, it is clear that the new Rule was intended to both simplify and clarify practice as well as to eliminate ambiguity as best it can.

Proposed Rule 45(c)(1)(B)(ii), establishing the geographic scope of a trial subpoena, uses the standard "substantial expense" although Rule 45(d)(3)(a)(iv) specifies "undue burden" as the standard under which a subpoena must be quashed. A third standard appears in Rule 45(d)(1), which places a burden on the party issuing a subpoena to avoid imposing "undue burden or expense." Finally, Rule 45(d)(2)(B)(ii) protects a non-party responding to a document subpoena from "significant expense."

The FMJA is uncertain whether the drafters intended for different standards to be applied in these different contexts. Different terminology implies different standards, but the differences in terminology here are difficult to define and apply. For example, do the drafters intend to distinguish between "substantial" and "significant"? If the intent is that courts should apply different standards, the terms setting those standards should be more clearly defined. If not, then the Rule should employ the same language throughout.

A greater concern relates to who bears the burden of establishing whether the subpoena is quashed or enforced under the proposed "substantial expense" standard of Rule

45(c)(1)(B)(ii). As it stands, the proposed Rule seems to place the burden on the issuing party to show that compliance will not require substantial expense. We believe the subpoena target is in the best position to provide information concerning the burden and expense of compliance and, thus, is in the better position to assert any opposition to the subpoena based on that information. The FMJA believes that this is what is contemplated by proposed Rule 45(c)(1)(B)(ii), but suggests that a better place to set forth the standard would be in subparagraph 45(d)(3)(A) in the context of quashing or modifying a subpoena.

2. **Rule 45(d)(3)(A)(i):** There are no changes proposed here, but the FMJA suggests that the phrase "fails to allow a reasonable time to comply" could be better defined. Many districts have invoked presumptive time periods to lend some consistency to what the court will deem "reasonable." The question often arises and should be addressed more definitively by the proposed Rule.

   The FMJA suggests establishing a presumptively reasonable time, such as fourteen days, for compliance with a subpoena. Doing so would eliminate uncertainty from district to district, assuring more consistency among the circuits. The presumption, of course, should be rebuttable depending upon the circumstances of the case.

3. **Rule 45(f):** The new provision would allow under some circumstances a court in one district to transfer motions relating to a subpoena to the issuing court.

   The FMJA endorses the concept of transferring such disputes, but feels strongly that limitations built into the proposed Rule are unduly restrictive and may undercut an issuing court's ability to manage effectively and consistently cases pending before it. In fact, the FMJA believes that transfer of such disputes should be the preferred practice.

The first sentence of the Rule permits the court where compliance is required to transfer a motion to the issuing court in only two circumstances: a) Where the parties and the target of the subpoena consent; or b) where the court finds "exceptional circumstances." The comment to the Rule states that "transfers will be truly rare events."

The FMJA, whose members have substantial responsibility for supervising discovery in civil cases, including disputes arising under Rule 45, is of the opinion that neither party should have "veto" power. It is entirely possible that possession of such power may lead to forum shopping if a party is unhappy with previous rulings on similar matters in the issuing court. The real inconvenience, if any, will in most cases be visited upon the person who must comply with the subpoena, but the FMJA believes that although that person's concerns should be given careful consideration, even that person should not have absolute veto power.

Secondly, the FMJA believes that the transfer authority set out in the proposed rule is an important improvement that should not be limited to the parties' agreement or exceptional circumstances. Under the current rule, magistrate judges dealing with enforcement of a subpoena relating to a case in another district are required to make rulings in cases with which they have no familiarity, out of the context of the total case. Their ruling may conflict with or even interfere with previous rulings in the same case. The proposed rule addresses this problem by allowing transfer from the district where compliance is sought to the "issuing district," that is, the district where the case is pending. In most situations, the FMJA believes, a transfer will significantly advance the just and efficient resolution of the dispute. The issuing court will have entered prior orders or made prior rulings on discovery issues, and sometimes substantive issues, of which the other court will have no knowledge, particularly in complex cases or cases which have involved voluminous discovery or multiple parties or discovery being sought in multiple districts. It is frequently the case that the matters raised by such a motion are connected to other matters that have already been addressed in the issuing

court. In addition, if a motion is pending in another court, the issuing court has no control over when or how a motion may be decided, and the other court will have no knowledge of scheduling concerns known only to the issuing court, *i.e.*, whether the discovery sought will interfere with a discovery deadline, motion schedule or trial date.

Generally, magistrate judges would prefer to assume the full management of discovery matters in their pending cases to assure consistency and efficient case management. Moreover, magistrate judges have reservations about making rulings that may make things more difficult in a case pending elsewhere.

Before transferring a motion, the magistrate judge should give careful consideration to the interests of the subpoenaed party, but it is highly unlikely that the person subpoenaed would be required to actually appear in person in the issuing court. Magistrate judges are sensitive to the financial burdens that might be imposed by transfer and would be likely to decide the motion either on the papers or after a hearing via telephonic or other electronic means to minimize delay and expense. Any concerns the committee may have on this score could be addressed in the comment to the Rule making clear that courts should consider these alternative means of hearing the parties.

The FMJA believes that a more appropriate standard for determining whether an adversarial proceeding under Rule 45 should be transferred should be the interests of the person subpoenaed and the interests of justice. The decision should be left to the sound discretion of the transferring court.

B. PROPOSED RULE 37. Failure to Make Disclosures or to Cooperate in Discovery; Sanctions

COMMENT: The FMJA endorses the purpose behind the proposed conforming amendment to Rule 37(b)(1), but suggests re-wording the amendment to conform the terminology to that used in amended Rule 45.

DISCUSSION:

The proposed amendment to Rule 37(b)(1) is needed, but the FMJA suggests that because its purpose is to conform it to amended Rule 45, both rules should use consistent terminology to assure that the intent of each is clear. The FMJA respectively suggests that substituting the following language will accomplish the same purpose as that intended by the proposed amendment with a minimum of confusion:

If a motion is transferred pursuant to Rule 45(f), and the deponent fails to obey an order by the issuing court to be sworn or to answer a question, the failure may be treated as contempt of either the issuing court or the court where the motion was brought.

II. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE

A. PROPOSED RULE 11 – PLEAS

COMMENT: Proposed new Rule 11(O) adds a requirement that the court must advise a defendant as a part of a plea colloquy that a defendant who is not a United States citizen may be removed from the country, denied citizenship and denied future admission to the United States. The FMJA endorses the proposed amendment.

B. PROPOSED RULE 12 – PLEADINGS AND PRETRIAL MOTIONS

COMMENT: The amendments to Rule 12 clarify when certain motions must or may be raised and the consequences of failure to raise issues via motion in a timely matter. The FMJA endorses the proposed amendment.

III. PROPOSED AMENDMENTS TO THE FEDERAL RULES OF EVIDENCE

PROPOSED AMENDMENT TO RULE 803(10) – EXCEPTIONS TO THE RULE AGAINST HEARSAY – REGARDLESS OF WHETHER THE DECLARANT IS AVAILABLE AS A WITNESS

COMMENT: The intent of the proposed amendment is to conform admissibility requirements relating to a testimonial certificate to the Supreme Court's holding in *Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009). The FMJA endorses the proposed amendment.

NEW YORK COUNCIL OF DEFENSE LAWYERS

c/o Audrey Strauss, Esq.
Fried, Frank, Harris, Shriver & Jacobson LLP
One New York Plaza, New York, New York 10004
TELEPHONE: 212.859.8544 FAX: 212.859.4000
E-MAIL: audrey.strauss@friedfrank.com

11-CR-007

February 15, 2012

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.*

[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]

[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.

---

[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*

[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).

---

[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

[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]

[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

---

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.

* * *

[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)
Jeremy H. Temkin
Chair, NYCDL Ethics, Rules,
and Legislative Committee

FEDERAL PUBLIC DEFENDER
EASTERN DISTRICT OF VIRGINIA
1650 KING STREET, SUITE 500
ALEXANDRIA, VIRGINIA 22314
TELEPHONE: (703) 600-0800
FAX: (703) 600-0880

11-CR-008

Michael S. Nachmanoff
Federal Public Defender
Direct Line (703) 600-0860

February 15, 2012

Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Dear Mr. McCabe:

On behalf of the 193 Federal Defender offices and branches across the country and the thousands of clients that we serve in both the trial and appellate courts, we are pleased to submit these comments to the Advisory Committee regarding its proposal to modify Rule 12 of the Federal Rules of Criminal Procedure. We appreciate the extensive time and study the Committee has devoted to this proposal, however we believe several of the proposed changes would severely interfere with our clients' Fifth and Sixth Amendment rights.

Specifically, we believe the proposed changes would:

(1) Create more rather than less uncertainty regarding what motions can be decided pretrial and potentially alter existing settled law;

(2) Create more rather than less litigation;

(3) Create an impossibly high and confusing standard for defendants to meet when filing motions in the trial court after a specified pretrial deadline;

(4) Unduly circumscribe traditional and necessary judicial discretion in the handling of courtroom proceedings; and

(5) Potentially violates our clients' Fifth and Sixth Amendment rights by allowing grand jury indictments to be broadened through the use of jury instructions.

Rule 12(b) currently creates three categories of pretrial motions: (1) motions that raise issues that can be disposed of without a trial; (2) motions to dismiss for lack of jurisdiction or failure to state an offense; and (3) motions that must be filed pretrial by a court-imposed deadline absent a showing of "good cause." The proposed Amendment would eliminate the language relied upon by courts to support the first category, require motions for failure to state an offense to be filed by the pretrial deadline, and change the standard specified in Rule 12(e) from "good cause" to "cause and prejudice." Each of these changes would negatively impact our clients and introduce a substantial and unnecessary degree of uncertainty into the pretrial process.

I. The Proposed Change to Rule 12(b)(2) Would Remove Language Relied Upon By A Majority of Circuit Courts in Ruling on Pretrial Motions

The proposed amendment would delete language in Rule 12(b)(2) that permits a party to raise "any defense, objection, or request that the court can determine without a trial of the general issue," because "the use of pretrial motions is so well established that it no longer requires explicit authorization." Criminal Rules Advisory Committee, May 2011 Report to Standing Committee at 23 (hereinafter "Report"). Although we recognize that the Committee intends no change in meaning and we agree that the filing of pretrial motions is now a well-established practice, the decision as to which motions may be filed remains within the discretion of the court. In deciding how to exercise that discretion, a majority of courts continue to rely upon the specific

language that the proposed amendment would eliminate.[1] This line of cases goes back at least to the 1970s. *See, e.g.*, *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976).

In *United States v. Weaver*, 659 F.3d 353, 355 n.* (4th Cir. 2011), for example, the court relied on that exact language to find that "a district court may consider a pretrial motion to dismiss an indictment where the government does not dispute the ability of the court to reach the motion and proffers, stipulates, or otherwise does not dispute the pertinent facts." *Accord* cases cited in footnote 1, *supra*.

The current language has been interpreted to give trial judges the discretion to determine how best to run their courtrooms to promote efficiency and conserve judicial resources and much law has been decided based on it. *See, e.g.*, *United States v. Flores*, 404 F.3d 320, 325 (5th Cir. 2005), where the court recognized that proceeding to trial on a case with no legal merit is simply a "waste of judicial resources." This view is consistent with Fed. R. Crim. P. 2's mandate to interpret the Criminal Rules "to eliminate unjustifiable expense and delay." And of course it is consistent with Fed. R. Crim. P. 57(b)'s , which states in part that: "A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district."

Thus, despite the Committee's stated intent to maintain the status quo, by removing the traditional basis for this line of authority, the Committee runs the real risk of creating more, rather than less, litigation in an area that is well-settled and currently promotes both efficiency

---

[1] *Accord* United States v. Flores, 404 F.3d 320, 325 (5th Cir. 2005); United States v. Yakou, 428 F.3d 241, 247 (D.C. Cir. 2005) (citing United States v. Phillips, 367 F.3d 846, 855 & n.25 (9th Cir. 2004)); United States v. DeLaurentis, 230 F.3d 659, 660–61 (3d Cir. 2000); United States v. Alfonso, 143 F.3d 772, 776–77 (2d Cir.1998); United States v. Hall, 20 F.3d 1084, 1087–88 (10th Cir.1994); United States v. Levin, 973 F.2d 463, 470 (6th Cir. 1992); United States v. Risk, 843 F.2d 1059, 1061 (7th Cir.1988).

and conservation of judicial resources. We suggest the better course would be to retain the language in the Rule and substitute the words "without a trial on the merits" for "without a trial of the general issue."

II. The Supreme Court Has Never Construed Rule 12 to Require a Showing of Both "Cause" and "Prejudice"

The Advisory Committee has proposed adding a prejudice component to the Rule 12 requirement that a litigant establish cause for filing an untimely pretrial motion. This proposal rests on the premise that the courts already require a showing of prejudice; the proposed amendment would, it is said, formalize an already existing requirement. This premise fails to appreciate that Rule 12 operates in more than one context, and that prejudice can have radically different dimensions, depending on the context that is being considered. Careful consideration of the case law reveals that a requirement of prejudice is not required in at least one of these contexts.

There are four contexts to consider: (1) defendant seeks to file a motion before trial either commences or concludes, but after a court-imposed deadline; (2) defendant files a motion for new trial and includes a claim that could have been raised pretrial; (3) defendant raises on appeal for the first time a claim of error that could have been filed pretrial; and (4) defendant raises in a 28 U.S.C. § 2255 proceeding for the first time a claim that could have been filed pretrial. The Advisory Committee would impose in all three contexts a cause and prejudice requirement that has found its fullest expression in post-conviction cases. (Rule 12 does not govern section 2255 proceedings, and the proposal does not envision any change in habeas proceedings.) This unitary approach ignores the nature of a prejudice inquiry, which, whatever its merit in the second, third, and fourth contexts, does not work in any meaningful sense in the first context. Moreover,

although the cases have mentioned prejudice in the second, third, and fourth contexts, there is little support in the cases for imposing prejudice in the first context.

The Advisory Committee would impose in the first context the prejudice standard developed in habeas corpus cases, especially cases involving state court convictions. This standard developed not only to promote finality of convictions, but also to avoid excessive intrusions on the sovereignty of the individual states. Notions of finality and federalism have no legitimate role to play in providing guidance to district court judges for the exercise of discretion in managing their dockets. Moreover, the concept of prejudice developed in the habeas cases is essentially backward-looking. That is, the habeas judge, with the benefit of a trial record, must gauge what impact the newly raised claim would have upon an already completed trial. Applying the concept of "prejudice" as it has developed in the context of habeas corpus proceedings makes little sense in the district court before trial. Prejudice, as it has been defined in habeas cases, requires "not merely that the errors at [a] trial created a possibility of prejudice, but that they worked to his [the defendant's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. This "actual prejudice" standard is at the heart of the Report, yet this standard is inherently backward-looking. A standard that requires a demonstration of actual harm at trial makes sense for use in collateral proceedings. But it has little relevance *before* a trial, when the court has little basis to know whether the refusal to consider a late-filed motion will work to a party's "actual and substantial disadvantage, infecting [an] entire trial with error of constitutional dimensions."

Moreover, the Supreme Court has "not identified with precision what constitutes 'cause' to excuse a procedural default" in habeas corpus proceedings. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Nor is there a settled definition of "actual prejudice" in collateral proceedings.

Amadeo v. Zant, 486 U.S. 214, 221 (1988); *United States v. Pettigrew*, 346 F.3d 1139, 1144 (D.C. Cir. 2003)("the required showing [of actual prejudice] has not been precisely delineated.").

Even if a party can establish legitimate "cause" for the late filing, how could that party ever show anything but the "possibility of prejudice" if the court fails to consider the motion? In other words, because "actual prejudice" has been defined as a tangible harm at trial, not the possibility of harm, it does not fit easily into a court's consideration of whether to excuse a late-filed motion before trial.

When one considers the cases upon which the Advisory Committee relies, one realizes that they do not support the claim that current practice requires the district court to assess prejudice when it is asked to permit a late filing before trial has actually commenced or concluded. The earliest Supreme Court case on which the Advisory Committee relies, *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), involved a challenge to the grand and petit juries that was made four years after the trial, and after the case had been remanded from the Supreme Court on a different issue. The district court found there was no "cause" for waiting so long to make the challenge, since years earlier the defendants had knowledge of the facts on which they relied in eventually making the challenge. In affirming, the Supreme Court approved the lower court's ruling that the defendant's earlier knowledge of the facts gave them no "cause," and further noted that the defendants had not made any claim of prejudice. This truncated analysis did not set out any test for prejudice. *Id*. at 461-62. Moreover, the Court's brief statement about prejudice does not ordain a two-part test. If anything, it suggests that when a litigant cannot establish cause, he or she might be able to seek relief if prejudice can be established.

In *Davis v. United States*, 411 U.S. 233 (1973), the Court considered an appeal of a post-conviction petition brought by a federal prisoner. The petitioner challenged jury composition years after his trial. The Court ruled that the context of habeas corpus should give him no greater freedom to avoid Rule 12. Just like the defendants in *Shotwell*, he had to show "cause" for not making a pretrial filing. Since the facts underlying his claim were available to him pretrial, he had no "cause" to bring his claim years after the trial. As in *Shotwell*, the district court also found that there was no prejudice. Davis argued that racial discrimination in jury selection carried a presumption of prejudice. The Court deflected this argument by reasoning that the prejudice inquiry as to the substance of the right was not the same as the prejudice inquiry as to the timing of the motion. As in *Shotwell*, the Court did not give any affirmative content to the prejudice inquiry under Rule 12. As in *Shotwell*, the Court did not make an explicit finding that prejudice was a separate and necessary requirement for avoiding waiver. Most importantly, the context did not involve a claim that was sought to be filed before trial.

Since *Shotwell* and *Davis*, the Court has stated a cause and prejudice test to be used in habeas cases brought by state prisoners. The history of this doctrine is long and tangled, but it has little to say about the first context. True, the Court in the habeas cases has drawn parallels and analogies with cases arising under Rule 12, and for habeas cases the Court has imposed a more rigid two-part test, which it has extended to section 2255 cases. *United States v. Frady*, 456 U.S. 152 (1982). But these statements do not fully track the boundaries of Rule 12, since, as we have demonstrated, Rule 12 covers more than one context. To date, the Court has not resolved a Rule 12 case in which the defendant asked leave to file a motion before trial but after a court-imposed

deadline. Its statements about habeas for state prisoners do not set up such a firm barrier to consideration of a motion filed before trial has been completed.

This situation has arisen, however, in several Court of Appeals decisions, and although the cases are not unanimous, the best reading is that only cause, not prejudice, is required. For example, in *United States v. Rodriguez-Lozada*, 558 F.3d 29, 38 (1st Cir. 2009), the Court ruled that a severance motion filed during the trial came too late and that there was no cause for the late filing, since defense counsel knew the relevant facts before the trial started. In summing up the governing legal principles, the First Circuit made no mention of a prejudice requirement. Likewise, in *United States v. Moore*, 98 F.3d 347 (8th Cir. 1996), the Court ruled there was no abuse of discretion in refusing to consider a motion to suppress that was filed during the trial. Since the defendants had knowledge of the relevant facts, they did not show cause for ignoring their tardiness. The Court made no mention of prejudice as part of the relevant inquiry. In practice, district courts, when presented with a request before trial, focus on cause; and prejudice has little, if any, role to play. A representative ruling is as follows:

> Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, this Court may set a deadline for the parties to file pretrial motions, and it is within the Court's discretion to extend this deadline and grant relief for the waiver that normally attaches to motions not filed within this deadline, where good cause has been shown. Fed. R. Crim. P. 12(c). Because the second discovery motion which the Defendants seek leave to file relates to discovery materials not previously available to the Defendants, the Court finds that the Defendants have shown good cause for relief from waiver with respect to this particular motion. Accordingly, the Defendants' Motion for Leave [**Doc. 70**] to file a second discovery motion out of time is **GRANTED**, and the Court will address the substantive merits of the attached discovery motion [Doc. 70-1].

United States v. Robert, 2009 WL 2960409 (E.D. Tenn. 2009).

To be sure, appellate courts have differed as to the standard that applies *on appeal* when an issue covered by Rule 12 is raised for the first time post-verdict. But the tension on appeal between Rule 52(b) and Rule 12 is not a reason to alter the standard applied in the district court. Put differently, the standard applied to late-filed motions *in the district court* should not be changed because appellate courts disagree as to the standard applied to defaulted issues raised for the first time *on appeal*.

As for the Advisory Committee's finding on page 10 of the Report that federal courts currently disagree about the meaning of "good cause" in the district court, that difference is primarily due to courts that erroneously apply the *habeas corpus* standard before trial. Indeed, one of the cases cited by the Proposal is actually an appeal of a 28 U.S.C. § 2255 petition.[2] The other cases cited as applying a "cause" and "actual prejudice" standard to Rule 12 late-filed motions in the trial court can be traced back to Supreme Court discussions of the standard applied on collateral review,[3] or to the Fifth Circuit's decision in *Brooks v. United States*, 416 F.2d 1044, 1048 n.1 (5th Cir. 1969),[4] which merely says that "[a]bsence of prejudice is properly

---

[2] United States v. Williams, 544 F.2d 1215 (4th Cir. 1976).

[3] United States v. Kopp, 562 F.3d 141, 143 (2d Cir. 2009); United States v. Oldfield, 859 F.2d 392, 397 (6th Cir. 1988). One court cited by the Advisory Committee, United States v. Santos Batista, 239 F.3d 16 (1st Cir. 2001), cites only to 1 Charles A. Wright, Federal Practice and Procedure § 193, at 339 & n.24, even though that treatise currently does not endorse the "cause" and "prejudice" reading of Rule 12's "good cause" requirement. Additionally, another panel from the First Circuit has described "good cause" without expressly requiring a showing of prejudice. United States v. Grandmont, 680 F.2d 867, 872-73(1st Cir. 1982) (suggesting that "good cause" can include insufficient time to file a motion; no prior notice of an error, defect, or objectionable action despite due diligence; or ineffective counsel).

[4] United States v. Kopp, 562 F.3d 141, 143 (2d Cir. 2009); United States v. Hirschhorn, 649 F.2d 360, 364 (5th Cir. 1981). Tracing the line of authority is straightforward. In *Kopp*, for example, the court cites *United States v. Crowley*, 236 F.3d 104, 110 n.8 (2d Cir.

taken into account in determining whether to grant relief from the effect of the Rule when the motion is untimely made." As discussed above, the fact that "prejudice" may be taken into account does not mean it is an independent and necessary requirement in order to show "good cause." *Murray*, 477 U.S. at 494.

The application of these standards to late-filed motions in the trial court therefore raises the significant prospect of introducing uncertainty at the trial court level. In other words, because "cause" and "prejudice" have never been precisely defined in the context of collateral proceedings, incorporation of those standards into Rule 12 promises to increase litigation in the district court over the meaning of these terms. The present rule, on the other hand, relies upon the trial court's discretion in determining whether to consider a late-filed motion by the defense or argument made by the government. *See, e.g. United States v. Dupree*, 617 F.3d 724,727-32 (3d Cir. 2010)(finding government failed to show cause for failure to raise argument earlier under Rule 12(e)).

III. Motions to Dismiss for Failure to State a Claim Should Be Permitted To Be Filed After the Pretrial Motions Deadline

At present, Rule 12 provides that motions challenging whether an indictment states an offense may be raised at any time, although courts apply a more stringent standard of review to motions filed post-verdict.[5] The proposed amendment would eliminate the distinction between

---

2000). The *Crowley* court, in turn, cites *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995), and *United States v. Howard*, 998 F.2d 42, 52 (2d Cir. 1993). *Forrester* relies on *Howard*. *Howard* cites to a Seventh Circuit decision, *United States v. Hamm*, 786 F.2d 804, 806-07 (7th Cir. 1986), and to Wright and Miller's federal procedure treatise citing *Wainwright v. Sykes*. *Hamm* relies on *Brooks v. United States*, 416 F.2d 1044, 1048 n.1 (5th Cir. 1969).

[5] *See* United States v. Jenkins-Watts, 574 F.3d 950, 968 (8th Cir. 2009)("When an indictment is challenged for the first time after the verdict is returned, we apply a deferential

pre-verdict and post-verdict challenges to the indictment in favor of a pre-motions deadline/post-motions deadline distinction. Under the Committee's proposal, a motion challenging an indictment for failure to state an offense may be raised after the motions deadline only upon a showing of both "cause" and "prejudice."

Our primary objection to this change is that it remains in tension with the basis for the traditional rule permitting such challenges to be raised at any time. The traditional rule is based upon the fact that the charging document is the foundation of the criminal prosecution. As the Supreme Court pointed out in 1876, whether an indictment charges an offense "is a question which has to be met at almost every stage of criminal proceedings." *Ex Parte Parks*, 93 U.S. 18, 20 (1876). Accordingly, a district court that refuses to consider a late-filed motion challenging whether an indictment states an offense must still confront difficult issues tied to a defendant's constitutional rights.

Specifically, the Fifth Amendment to the Constitution requires felony prosecution by a grand jury indictment that "must set forth each element of the crime that it charges."[6] Moreover, the Sixth Amendment guarantees a defendant the right to be informed of the nature of the accusation against him. U.S. Const. amend. VI. Incident to these fundamental constitutional principles, the Supreme Court has held that "charges may not be broadened through amendment

---

standard of review, upholding the indictment unless it is so defective that by no reasonable construction can it be said to charge the offense for which the defendants were convicted."); *accord* United States v. Vitillo, 490 F.3d 314, 324 (3d Cir. 2007); United States v. Sutton, 961 F.2d 476, 479 (4th Cir. 1992); United States v. Teh, 535 F.3d 511, 516 (6th Cir. 2008); United States v. Richardson, 687 F.2d 952, 965 (7th Cir. 1982); United States v. Awad, 551 F.3d 930, 937 (9th Cir. 2009); United States v. Gama-Bastidas, 222 F.3d 779, 786 (10th Cir. 2000).

[6] Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998).

except by the grand jury."[7] Likewise, a jury must "decide each and every element of the offense with which [the defendant] is charged."[8]

Jury instructions that broaden the basis for conviction beyond the terms of the indictment violate these basic constitutional principles.[9] Similarly, jury instructions that are materially different from the terms of the indictment issued by the grand jury constitute error.[10] Indeed, errors arising from jury instructions implicate constitutional rights distinct from the right to a grand jury indictment, occur during trial, and are subject to objection at trial pursuant to Federal Rule of Criminal Procedure 30(d).[11] To the extent that the proposed modification of Rule 12

---

[7] Stirone v. United States, 361 U.S. 212, 215-16 (1960); *accord* United States v. Cotton, 535 U.S. 625, 631 (2002) (reaffirming "this settled proposition of law"); Russell v. United States, 369 U.S. 749, 770 (1962); *see also* Schmuck v. United States, 489 U.S. 705, 717 (1989) ("It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him.").

[8] United States v. Gaudin, 515 U.S. 506, 522-23 (1995); *accord* Ring v. Arizona, 536 U.S. 584, 609 (2002).

[9] Stirone, 361 U.S. at 215; *see, e.g.*, United States v. Gomez-Rosario, 418 F.3d 90, 104 (1st Cir. 2005); United States v. Rivera, 415 F.3d 284, 287 (2d Cir. 2005); United States v. Floresca, 38 F.3d 706, 710 (4th Cir. 1994) (en banc); United States v. Jones, 418 F.3d 726, 729 (7th Cir. 2005); United States v. Johnston, 353 F.3d 617 (8th Cir. 2003); United States v. Castro, 89 F.3d 1443, 1452-53 (11th Cir.1996).

[10] United States v. Miller, 471 U.S. 130, 144-45 (1985); *see also* United States v. Milestone, 626 F.2d 264, 269 (3rd Cir. 1980) ("any amendment that transforms an indictment from one that does not state an offense into one that does" is prohibited).

[11] Federal Rule of Criminal Procedure 30(d) provides:

> **Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

would preclude a defendant from challenging unconstitutional jury instructions at trial, the modification would violate the basic principle that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure," but that those rules "shall not abridge, enlarge or modify any substantive right."[12]

The proposed amendment would result in unnecessary confusion in this settled area of law. Indeed, it could unravel the uniform standard applied to post-verdict challenges in favor of a "prejudice" standard that remains ill-defined. Moreover, here too courts should retain substantial discretion to consider late-filed motions challenging an indictment because proceeding with a criminal case based upon a defective indictment will necessarily complicate the litigation. In sum, district courts should not be precluded from considering late-filed motions challenging whether an indictment fails to charge an offense because the charging document is critical at every stage of litigation.

IV. Proposed Amendment

The Committee raises a concern related to the confusion engendered by the use of the word "waiver" in Rule 12(e) rather than "forfeiture." One simple way to resolve this issue would be to eliminate subsection (e), and instead add language to subsection (c) to read as follows:

> **(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. The court may extend that deadline, and, for good cause, may grant relief from the failure to file a motion by the deadline.**

---

[12] 28 U.S.C. § 2072(b); *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (federal courts may make rules "not inconsistent with the statutes or Constitution of the United States.").

Such an amendment would eliminate reference to the word "waiver" and would specify the standard applied to defaulted claims in the subsection related to the deadline. It also has the added benefit of explicitly preserving the court's discretion in managing its courtroom.

We very much appreciate the opportunity to provide our comments to the Committee.

Very truly yours,

_____/s/_____

Michael S. Nachmanoff, Federal Public Defender, Eastern District of Virginia

Marianne Mariano, Federal Public Defender, Western District of New York

Geremy C. Kamens, First Assistant Federal Public Defender, Eastern District of Virginia

William H. Theis, Chief Appellate Attorney, Federal Defender Program for the Northern District of Illinois

11-CR-010

February 21, 2012
via e-mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
One Columbus Circle, N.E., suite 4-170
Washington, DC 20002

COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to Rule 12,
Federal Rules of Criminal Procedure
Published for Comment in August 2011

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rule 12 of the Federal Rules of Criminal Procedure. NACDL's comments on the proposal concerning Criminal Rule 11 and on the proposed amendments to the Evidence and Appellate Rules have been submitted separately. We deeply appreciate the agreement of your office to accept the following comments after the deadline. Our organization has more than 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

Introduction and Summary

Our comments on the proposed amendments to Rule 12 are addressed to: (1) the amendments to subparagraphs (b)(2) & (3) that affect which defenses, objections or requests must be raised by motion before trial, need not be raised before trial, and may be made at any time; and, (2) the amendments to subparagraph (c)(2) and (e) which alter the showing required to obtain relief from not filing a motion timely. Overall, NACDL seeks to assist the Committee in finding a rule that does not unnecessarily hamper

defendants' efforts to ensure that they have the benefit of all applicable legal rights and protections in the prosecution process. The ideal rule will of course still allow that process to move forward with fairness to all, including clarity, simplicity, and reasonable efficiency.

1. The proposed amendments to subparagraphs (b)(3) would limit the motions that must be filed before trial to those for which the "basis is reasonably available" and which "can be determined without a trial on the merits." Proposed Amendment to Rule 12(b)(3). As the Committee Report explains, the phrase "can be determined without a trial on the merits" has a well-established meaning, "specifically that trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the motion . . ." Criminal Rules Advisory Committee, May 2011 Report to Standing Committee ("May 2011 Report"), Section F.5 (footnote omitted). Under the amended Rule then, the only motions that must be filed before trial would be the five types of motions listed in Rule 12(b)(3)(A)-(E), for which the basis was then reasonably available and the decision of which would not be aided by the trial of the facts surrounding the commission of the alleged offense.

Conversely, a motion listed in Rule 12(b)(3)(A)-(E) would not need to be filed before trial where the basis was not reasonably available or if decision of the motion might be aided by the trial of the facts surrounding the commission of the alleged offense. We fully support the proposed amendments that would effect these changes, as they would provide helpful guidance in determining which motions must be filed before trial, and would leave to counsel's judgment whether other motions, even if not required to be filed before trial, nevertheless should be, or whether they should be deferred until trial of the facts. We propose below further refinements in the amendments to achieve those goals, most importantly making sure the text of the Rule and not merely the Advisory Committee notes make clear that the reference to a motion that "can be determined without a trial on the merits" means a motion as to which a trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining. We also urge the Committee not to include the specific examples of types of motions under subsections (A) & (B), as they are unnecessary and in some instances analytically incorrect.

The proposed amendment to the text of subparagraph (b)(2) limit the motions that may be made at any time. The Rule now makes clear that two types of motions made be made at any time, the first being motions alleging that the indictment or information fails to invoke the court's jurisdiction, and the second being motions that allege the indictment or information fails to state an offense. This proposed is based on the false premise advanced by the Department of Justice that *United States v. Cotton*, 535 U.S. 625 (2002) "held that an indictment's failure to state an offense does not deprive the court of jurisdiction." May 2011 Report, Section D.1. *Cotton* involved the failure to allege a heightened drug quantity, in a count which nevertheless fully described and alleged a federal offense and unquestionably invoked the district court's jurisdiction. The defendant was thereafter sentenced as if the indictment had alleged the sentence-aggravating fact, which the Court ruled did not rise to plain error. As explained below, *Cotton* does not remotely provide authority, justification, or a rationale for altering the existing provisions of the Rule.

2. The proposed amendments creating a new subparagraph (c)(2) and deleting subparagraph (e) would change the showing required to have an untimely motion considered by the court – from the current showing of "good cause" to the proposed showing of "cause and prejudice" for all untimely motions except double jeopardy motions and those alleging the failure to state an offense, which would be subject to a showing of prejudice alone. The fundamental problem with the proposed amendment is that it seeks to establish a single standard to govern the entire procedural spectrum, from motions that are untimely because they were not filed within the time required by a trial court's scheduling order even though they are raised prior to trial, to claims presented during trial, to those first raised on appeal, to claims raised only in a habeas corpus petition after a conviction has become final on direct review. Current case law interprets the "good cause" standard of Rule 12 according to the procedural context in which it is being applied, so that consideration of prejudice is part of the good cause inquiry for a claim that is first made post-conviction, but not necessarily as to untimely claims raised before judgment. Adoption of an across-the-board "cause and prejudice" standard would thus change the law at least as to pretrial and in-trial untimely claims and would be unworkable in the pre-conviction context as it would require counsel to advocate his or her own ineffectiveness, raising ethical dilemmas and conflict issues. The current standard of good cause, as interpreted by existing case law, is sufficiently flexible to avoid these problems, while at the same time accommodating the different interests that apply post-conviction. At a minimum, the proposed amendment should be changed to make clear that "cause and prejudice" only applies to post-conviction claims.

Motions which must be filed before trial or within the time set by the court

Rule 12 currently separates pretrial motions into three categories: the first, under (b)(2), are motions that *may* be made before trial, which are defined as motions "that the court can determine without a trial of the general issue"; the second, under (b)(3), are five types of motions, listed in subparagraphs (A-E), that "must be raised before trial"; and the third, under (b)(3)(B), are motions that may be made at any time.

The proposed amendment would eliminate the provision currently in Rule 12(b)(2) that certain motions may be filed before trial on the basis that it is unnecessary. The proposal would also modify Rule 12 (b)(3) to define the criteria that determines which motions "must be raised by motion before trial." Finally, the amendment would limit the motions that may be made at any time to motions alleging that the indictment or information fails to invoke the court's jurisdiction.

We agree that there is probably no longer a need for a provision that expressly authorizes a defendant to file motions prior to trial. At the same time, we sympathize with the concerns expressed by our friends in the Federal Public Defender Offices, in their comments (Submission 11-CR-008). The Defenders fear that it may risk too much confusion to eliminate a provision long relied upon, while intending no change. The practice of filing pretrial motions is sufficiently well-established that explicit authorization to do so may indeed be unnecessary, especially given that there is nothing that prevents or restricts a defendant from filing prior to trial a motion that raises a defense, objection or request that "the court can determine without a trial of

the general issue." *See* Fed.R.Crim.P. 47 (authorizing the defense to file a motion for whatever relief it seeks). Further, under Rule 12(d), the court may defer ruling on the motion if it finds good cause to do so. Accordingly, we take no position on this aspect of the proposal.

We fully support the amendments to Rule 12(b)(3) that would for the first time provide criteria to be used in determining which motions must be filed before trial. The current Rule lists five types of motions that in all cases must be made before trial. The amendment would add two criteria that would clarify and limit the circumstances in which the listed motions must be filed before trial. The first criterion, that the basis for the motion is then reasonably available, is obviously sensible. This will eliminate the need to file motions to protect the record in circumstances where the factual basis for filing a motion is not yet available to counsel, but counsel suspects or even anticipates that grounds for the requested relief may arise at a later time. As the Committee Report explains, this provision essentially codifies case law interpreting "good cause" under Rule 12(e) for consideration of motions filed after the time set by the trial court to include the basis for the motion not having been available previously. *See* May 2011 Report, Section F.4., and note 36.

The second criterion is that the motion "can be determined without a trial on the merits." As noted above, the Committee Report explains that the phrase "can be determined without a trial on the merits" has a well-established meaning, "specifically that trial of the facts surrounding the commission of the alleged offense would be of *no assistance* in determining the validity of the motion . . ." May 2011 Report, Section F.5 (footnote omitted; emphasis added). Under the amended Rule then, the only motions that would be required to be filed before trial would be the five types of motions listed in Rule 12(b)(3)(A)-(E), for which the basis was then reasonably available *and* the decision of which would not be aided in any way by the court hearing the testimony and receiving other evidence to be presented at the trial of the facts surrounding the commission of the alleged offense. This would still require that a defense, objection or request be raised by motion before trial if the trial would clearly be of no assistance in determining the defense, objection or request, and at the same time sensibly limit the motions that must be filed before trial to those for which factual development at trial will be of no assistance.

This is a much better approach than the current Rule which simply lists types of motions that must be filed before trial, without regard to whether they would be better filed or adjudicated after factual development of the kind that occurs at trial. The reality is that oftentimes the circumstances of the particular case will affect whether a trial of the facts surrounding the alleged offense will aid in determining a defense, objection or request. Some speedy trial claims, for example, cannot be adjudicated without determining whether delay has caused prejudice to the defense; some severance claims have the same characteristic. In sum, as the Committee Report puts it, this provision will help insure "that parties not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial." May 2011 Report, Section F.5. For the amendments to achieve this purpose to the fullest extent possible, the text of the Rule and not merely the Advisory Committee notes should make clear that the reference to a motion that "can be determined without a trial on the merits" means a motion as to which a trial of the facts surrounding the

commission of the alleged offense would necessarily be of absolutely no assistance in determining. Unless that point is made clear in the text, it is likely if not inevitable that litigants and courts will understand the reference to motions that "can be determined without a trial on the merits" to mean motions that *might* be able to determined without a trial, leading to the filing of unnecessary motions before trial, the penalizing of defendants for their lawyers' good faith judgments as to which motions need to be filed when, and the refusal of courts to consider later-filed motions that under Rule 12b)(3) are properly made optional before trial.

The Committee need not be concerned that its amendment making more motions optional and fewer mandatory before trial will lead to "sandbagging" by the defense. Lawyers who believe they have a meritorious pretrial motion will ordinarily want to file it early, in hopes of either winning dismissal of the case or a narrowing of the charges or evidence. Effective pretrial motions practice enhances the defendant's position in plea negotiations, which after all is how the vast majority of cases are and ought to be resolved. Lawyers will not withhold motions until after the trial begins, just because under the revised Rule that can (and thereby sometimes prevent the government from taking an appeal), even in cases where the defendant has elected to risk a trial. Much more often than not, that reckless strategy would lose more than it could possibly win for the defendant.

The proposed amendments to Rule 12(b)(3) include listing specific examples of the first two types of motions under Rule 12(b)(3), *i.e.*, motions which allege "a defect in instituting the prosecution" (Rule 12(b)(3)(A)), and motions which allege a "defect in the indictment or information . . ." (Rule 12(b)(3)(B)). The listings of specific examples of these two types of motions are not only unnecessary, but could easily be misleading and are likely to cause unnecessary confusion.

The Committee Report explains that the proposal to list specific examples of these two categories of claims is intended to help litigants and courts in determining "whether a claim is a 'defect in the indictment' or 'the institution of the prosecution,' to determine whether it must be raised prior to trial." May 2011 Report, Section F.3 (footnote omitted). Determining whether and which types of claims come within these two categories can admittedly be difficult. But under the Committee's proposed revision, it makes no difference whether a motion falls into one subcategory or the other. They now would be subject to exactly the same criteria, with the exception for jurisdictional claims moved into a new, separate subsection dealing with consequences. Why after reorganizing the Rule this way the Committee has preserved the distinction between subsection (b)(3)(A) and (b)(3)(B), trying to clarify it at the cost of further complicating and extending the length of the Rule, is not apparent to us at all.

Even if Rule 12(b)(3) continues to maintain the categorical distinction between the two kinds of "defects," however, it would not be helpful to include specific examples of motions that might come within them for two reasons. First, they will inevitably come to be seen as exhaustive – or at least exemplary – rather than merely illustrative. Second, the categories are simply not capable of the neat and uniform classification the amendment attempts to achieve. One example that illustrates both these problems is the inclusion of a motion alleging "a violation of the constitutional right to a speedy trial" under the category of a "defect in instituting the prosecution."

Proposed Amendment, Rule 12(b)(3)(A)(iii). It is hard to understand why this should be considered a "defect in instituting the prosecution," given that the violation of the right to a speedy trial ordinarily arises, by its nature, well after the prosecution was instituted. ("Double jeopardy," likewise, is sometimes "a defect in instituting the prosecution," as where there has been a prior conviction or acquittal for "the same offense," but sometimes it only bars multiple convictions or duplicative sentencing.) Similarly, listing "a violation of the constitutional right to a speedy trial" and not a violation of the *statutory* right to a speedy trial might be interpreted wrongly to suggest that the later need not necessarily be filed prior to trial, when in fact the exact opposite is true under current law. *See* 18 U.S.C. § 3162(a)(2); *see* May 2011 Report, Section F.3, n. 33. This example also illustrates the need to make clear in the amended Rule, or at least the accompanying Advisory Committee Note, that as amended the Rule will supersede that statute (or any other that purports to set a specific pretrial motion deadline, such as 18 U.S.C. § 3237(b) (certain venue motions) or 28 U.S.C. § 1867(b) (jury selection challenges)), by virtue of the Rules Enabling Act, 28 U.S.C. § 2072(b).

Motions which may be filed at any time

Rule 12(b)(3)(B) currently provides that motions alleging that the indictment or information fails to invoke the court's jurisdiction, and motions alleging that the indictment or information fails to state an offense may be raised at any time. The proposed amendments would move the motions that may be made at any time, including while the case is on appeal, to subparagraph (b)(2), and limit such motions to those alleging that the indictment or information fails to invoke the court's jurisdiction, and not motions alleging the failure to state an offense.

The failure to state an offense is presently included among the claims that can be raised at any time because they are understood to be equivalent to "jurisdictional defects." May 2011 Report, Section D.1. The premise of the proposed amendments to remove them from the list of motions that may be made at any time is the view advanced by the Department of Justice that *United States v. Cotton*, 535 U.S. 625 (2002), "held that an indictment's failure to state an offense does not deprive the court of jurisdiction." May 2011 Report, Section D.1. While the stated proposition was reiterated in *Cotton*, there has been no recent change or clarification in Supreme Court precedent in that regard. *See* 535 U.S. at 630-31 (citing cases so holding, from 1916 and 1951). Accordingly, nothing in *Cotton* explains or justifies the proposed change in the Rule.

Cotton involved an indictment's failure to allege a drug quantity to support an enhanced sentence, which the Court ruled did not rise to plain error. The indictment in *Cotton* fully and properly alleged a federal offense under 21 U.S.C. § 841(a), at a level punishable under *id.*(b)(1)(C) (20 year maximum). Nevertheless, the court had sentenced Cotton and his co-defendants, without objection, to 30 years in some cases and to life terms in others, based on then-prevalent circuit law treating drug quantity as a sentencing factor. After *Apprendi* was decided, however, while their case was pending on appeal, the defendants-appellants argued for the first time that their

sentences were illegal and unconstitutional (because they exceeded the 20-year statutory maximum triggered by the facts alleged in the indictment). Without deciding whether drug quantities under § 841(b) are "elements" of differently graded offenses or simply "sentence-enhancing facts" that *Apprendi* requires to be pleaded and proved, the Court held that the respondents' illegal-sentence claims were subject to the plain error standard, and upheld them, because there was no genuine dispute about the pertinent facts, no surprise to any defendant, and no miscarriage of justice. 535 U.S. at 631-34. The Court discussed whether the indictment's terms were "jurisdictional" because that was the respondents' (fallacious) argument why the sentencing court had no power to impose the sentences it did. The "error" found in *Cotton* not to have been "plain" was the imposition of sentences exceeding the maximum implicated by the terms of the indictment; the respondents' pertinent failure to advance a timely objection, therefore, had occurred at the sentencing stage. The case has nothing whatever to do with any defect in the indictment (in fact, there was none) or with the timing of pretrial motions.

The real issue before the Committee is whether the failure of an indictment to charge an offense is so fundamental, or "structural," that it should be allowed to be raised at any time. This is a substantive issue concerning enforcement of the Fifth Amendment's Grand Jury Clause, not merely a procedural issue, and one which the Supreme Court has not decided. See *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007) (cert. granted to decide "whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error," *id.* at 103, which was then not reached); *id.* at 116-17 (Scalia, J., dissenting, contending error is structural). While the right to grand jury indictment can surely be knowingly and intelligently waived, *see* Fed.R.Crim.P. 7(b), it is quite another thing to say that counsel's missing the deadline for noticing the omission of an element from an indictment can properly result in federal prosecution for an offense that no grand jury ever actually found, as required by the Fifth Amendment, and that such constitutional errors will ordinarily be overlooked on that basis alone.

The amendment now proposed would require the defendant, on appeal after failing to challenge the indictment pretrial (or pre-plea), to demonstrate some sort of "prejudice" from being prosecuted on a defective indictment. We are unsure what that standard could mean in this context. Perhaps it requires demonstration of some reason to think the grand jury would not have found probable cause as to the omitted indictment. How could that be shown, where grand jury records are secret and not part of the record? And would not *United States v. Mechanik*, 475 U.S. 66 (1986), seem to preclude a finding of "prejudice" from such error on appeal after a trial jury verdict or guilty-plea admission of all the elements? Or perhaps "prejudice" in this context will be interpreted to mean that the defendant was, in the end, convicted of or sentenced for a different offense, or a more serious offense, than s/he thought was charged, creating unfairness in trial preparation or plea negotiations. The present proposal offers no clue what answer the Committee intends to these questions.

There is no significant risk of "sandbagging" created by allowing challenges to the sufficiency of an indictment to continue to be raised "at any time while the case is pending." First, even when such challenges are first made during trial, resulting in a mistrial and dismissal, the Supreme Court has held there is no double jeopardy bar to

a new trial on a corrected indictment. See *Illinois v. Somerville*, 410 U.S. 458 (1973). Second, when the failure of the indictment to charge an offense is not raised until after trial, the Supreme Court has long held that the indictment will be liberally, rather than literally construed. *Hagner v. United States*, 285 U.S. 427, 433 (1932). Thus, under existing and settled precedent, there is a significant disincentive to defense counsel's deliberately withholding a known challenge to the sufficiency of the indictment, and little if any advantage in doing so.

The standard under Rule 52(b) for showing an adverse impact from a late-raised claim of failure to charge an offense is not "prejudice" but rather an "[e]ffect" on the defendant's "substantial rights." A showing of prejudice is one way to demonstrate such an effect, but structural error is another, as is rebuttably presumed prejudice. The Fifth Amendment right not to be prosecuted for a felony except after an independent finding of probable cause by a grand jury that the defendant committed a federal offense (that is to say, all the elements of a federal offense) is surely "substantial" within the meaning of Rule 52(b). Whether prejudice need be shown from a felony prosecution without a valid indictment, or rather some other form of effect on substantial rights, is the constitutional question that the Supreme Court was going to decide in *Resendiz-Ponce*, and presumably will soon grant certiorari in another case to decide. The Rules Committee should not presume to decide that constitutional question now – a question that is not even clearly one of "practice and procedure" under 28 U.S.C. § 2072(a), rather than "substantive" under id. § 2072(b) – at least not on any basis less favorable to the defendant than that which applies under the current Rule.

Showing required for consideration of untimely motions

Rule 12(e) currently provides that a party "waives" any defense, objection or request under Rule 12(b)(3) that is not raised within the deadline set by the court, but provides that the court may grant relief from the waiver for "good cause." The proposed amendments eliminate this subparagraph, and proposes a new subparagraph (c)(2) that would alter the standard governing a defendant's request that a court consider a motion that is "untimely," from the current "good cause" to "cause and prejudice," except if the defense or objection is the failure to state an offense or double jeopardy, in which case the defendant would only need to show prejudice. The proposed amendment also states explicitly that Rule 52's plain error standard does not apply.

The Committee's apparent goal is to adopt a single standard in the interest of uniformity, and it defends adoption of the "cause and prejudice" standard on the ground that the Supreme Court has interpreted Rule 12's good cause standard to require a showing of cause and prejudice. The cases the Report cites for this proposition, however, are a procedurally highly unusual direct appeal (*Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963)), and a collateral challenge (*Davis v. United States*, 411 U.S. 233 (1973)). May 2011 Report, Section B.2. These cases viewed the absence of prejudice as a factor to be considered in determining whether there was "good cause" to grant relief from the waiver under the circumstances of those cases. *See, e.g., Shotwell*, 371 U.S. at 363 (explaining that "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 that Rule," where the ruling at issue was a challenge to the jury pool, made for the first time four years after trial, at the time of an evidentiary hearing ordered on an entirely unrelated issue after a second appellate remand). *Shotwell Manufacturing*, in other words, like *Davis*, essentially involved a post-conviction collateral challenge. Neither case bears any resemblance to the ordinary situation of a pretrial motion filed after the expiration of the district court's deadline, or an issue raised at trial that the court determines did not implicate any facts to be developed there, or even an issue raised for the first time on appeal that might have been brought up by pretrial motion.

Even assuming that an explicit cause and prejudice standard might be appropriate for claims that are untimely because they are first made post-appeal, that does not support incorporating the same standard into Rule 12 generally, because Rule 12 applies – in the ordinary and most common situation – pre-conviction (indeed, pretrial and pre-plea) as well. The Supreme Court has never interpreted Rule 12's "good cause" provision to require a showing of cause and prejudice in the pre-conviction context, or even on direct appeal, and as the Committee Report indicates elsewhere, courts have applied the "good cause" requirement in the pre-conviction context without requiring a showing of prejudice. May 2011 Report, Section F.4, n. 37 (citing decisions "treating unavailability of grounds as 'good cause' affording relief from waiver" under Rule 12(e)).

To impose cause and prejudice in the pre-conviction context would not only be contrary to precedent, but would be problematic as to both prongs. A common instance of "cause" is ineffective assistance of counsel. See, *e.g.*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A lawyer might well have to advocate his or her own ineffectiveness in order to establish cause, at least in the alternative, thereby creating an ethical dilemma and conflict of interest, leading in many cases to a time-wasting and inefficient change of defense counsel and in many cases the defendant's loss of the Sixth Amendment constitutional right to have the assistance of counsel of choice. The only sensible meaning of "prejudice" in that context would be the failure to file the motion, and not whether it would likely succeed, in order to preserve the more favorable standard of review that would apply if the motion had in fact been filed.

What this brief survey suggests is that "good cause" has been interpreted according to the procedural context in which it arises. If as in *Shotwell Manufacturing* and *Davis* a defendant first raises a jury selection claim after the decision of the initial direct appeal, or even after the conviction has become final, "good cause" under Rule 12 will be interpreted to include an inquiry into prejudice, especially if the claimed error might have been cured had it been made timely. On the other hand, where a lawyer misses a filing deadline for reasons equivalent to excusable neglect or unintentional mistake, the "good cause" standard is, as it ought to be, sufficiently flexible to be interpreted by the trial court to allow the exercise of its discretion to allow the motion to be considered.

This is a far better approach, which is consistent with and can build on existing case law, than adopting a new standard that cannot be uniformly applied in the broad procedural spectrum encompassed by Rule 12 and will often lead to the loss of

defendant's rights to a fair prosecution, due only to routine and harmless mistakes by counsel.

In sum, although we respect the time and effort that have already gone into the Rule 12 project, NACDL believes the present proposal should not be adopted without making the changes we have suggested.

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on this important matter. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,
s/William J. Genego
s/Peter Goldberger

Alexander Bunin
Houston, Texas
Cheryl Stein
Washington, D.C.
William J. Genego
Santa Monica, CA
Peter Goldberger
Ardmore, PA

National Association of Criminal Defense Lawyers
Committee on Rules of Procedure

Please reply to:
Peter Goldberger
50 Rittenhouse Place
Ardmore, PA 19003
(610) 649-8200
peter.goldberger@verizon.net

THIS PAGE INTENTIONALLY BLANK

TAB 3

THIS PAGE INTENTIONALLY BLANK

Benchbook for U.S. District Court Judges 5th ed.

Section 5.06 Duty to Disclose Information Favorable to Defendant (*Brady* and *Giglio* Material)

This is a final draft by the *Benchbook* committee. The material is not in the *Benchbook* format and should not be cited; pagination will change.

5.06 Duty to Disclose Information Favorable to Defendant (*Brady* and *Giglio* Material)

Introduction

Federal criminal discovery is governed by Rule 16 of the Federal Rules of Criminal Procedure and for certain specified matters by portions of Rules 12, 12.1, 12.2, and 12.3.[1] The Jencks Act, 18 U.S.C. § 3500, and Rule 26.2 govern the disclosure of witness statements at trial, and the Classified Information Procedures Act, 18 U.S.C. App. 3, governs discovery and disclosure when classified information related to national security is implicated. Prosecutors and defense lawyers should be familiar with these authorities, and judges typically know where to find the relevant law in deciding most discovery issues.

However, it sometimes is more challenging to understand the full scope of a prosecutor's obligations with respect to a defendant's constitutional right to exculpatory

1. See also Rule 15, governing depositions for those limited circumstances in which depositions are permitted in criminal cases, and Rule 17, governing subpoenas.

information under *Brady v. Maryland,* 373 U.S. 83 (1963), and impeachment material under *Giglio v. United States*, 405 U.S. 150 (1972), and to deal effectively with related disclosure disputes. Applying *Brady* and *Giglio* in particular cases can be difficult; it requires familiarity with Supreme Court precedent, circuit law, and relevant local rules and practices.

This section of the *Benchbook* is intended to give judges general guidance on the requirements of *Brady* and *Giglio* by providing a basic summary of the case law interpreting and applying these decisions. For further reference, the Appendix provides three other sources of information: a link to the Federal Judicial Center's recent report summarizing a national survey of Rule 16 and disclosure practices in the district courts; a link to the "Policy Regarding Disclosure of Exculpatory and Impeachment Information" in the *United States Attorneys' Manual* of the Department of Justice; and a list of examples of exculpatory or impeachment information, disclosure of which may be required under *Brady* or *Giglio*.

Because every *Brady* or *Giglio* inquiry is fact-specific, the depth of such an inquiry can vary considerably from case to case. Judges are encouraged, as part of efficient case management, to be mindful of the particular disclosure requirements in each case and to resolve disclosure disputes quickly to avoid unnecessary delay and expense later. The material provided in this section are for informational purposes only; they are not meant to recommend a particular course of action when disclosure issues arise.

Although *Brady* exculpatory material and *Giglio* impeachment material are sometimes distinguished, courts often refer to them together as "*Brady* material" or "exculpatory material," and this section generally follows that practice.

A. Duty to Disclose Exculpatory Information

1. In General

In *Brady*, the Supreme Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." 373 U.S. at 87. The Court later held that the prosecution has an obligation to disclose such information even in the absence of a defense request. *See Banks v. Dretke,* 540 U.S. 668, 695–96 (2004); *Kyles v. Whitley,* 514 U.S. 419, 433 (1995); *United States v. Agurs,* 427 U.S. 97, 107, 110–11 (1976).

In *Giglio*, the Supreme Court extended the prosecution's obligations to include the disclosure of information affecting the credibility of a government witness. *See* 405 U.S. at 154–55. As the Court later explained, "[i]mpeachment evidence, . . . as well as exculpatory evidence, falls within the *Brady* rule" because it is "evidence favorable to an accused, . . . so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." *United States v. Bagley,* 473 U.S. 667, 676 (1985) (quotations omitted).

2. Information from Law Enforcement Agencies

Under *Brady,* the prosecutor is required to find and disclose favorable evidence initially known only to law enforcement officers and not to the prosecutor. The individual prosecutor in a specific case has an affirmative "duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Kyles v. Whitley,* 514 U.S. at 437. *See also Youngblood v. West Virginia,* 547 U.S. 867, 869–70 (2006) (per curiam) ("*Brady* suppression occurs when the government fails to turn over even evidence that is 'known only to police investigators and not to the prosecutor'") (quoting *Kyles v. Whitley,* 514 U.S. at 438).

3. Ongoing Duty

A prosecutor's disclosure obligations under *Brady* are ongoing: they begin as soon as the case is brought and continue throughout the pretrial and trial phases of the case.[2] *See Pennsylvania v. Ritchie,* 480 U.S. 39, 60 (1987) ("the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress").[3] If *Brady* information is known to persons on the prosecution team, including law enforcement officers, it should be disclosed to the defendant as soon as reasonably possible after its existence is recognized.

4. Disclosure Favored

When it is uncertain whether information is favorable or useful to a defendant, "the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure." *Cone v. Bell,* 556 U.S. 449, 470 n.15 (2009). *See also Kyles v. Whitley,* 514 U.S. at 439–40; *Agurs,* 427 U.S. at 108.[4]

---

2. The Supreme Court has declined to extend *Brady* disclosure obligations to evidence that the government did not possess during the trial but only became available "after the defendant was convicted and the case was closed." *See District Attorney's Office for Third Judicial District v. Osborne,* 557 U.S. 52, 68–69 (2009) ("*Brady* is the wrong framework" for prisoner's post-conviction attempt to retest DNA evidence using a newer test that was not available when he was tried). "[A] post-conviction claim for DNA testing is properly pursued in a [42 U.S.C.] § 1983 action." *Skinner v. Switzer,* 131 S. Ct. 1289, 1293, 1300 (2011) (also noting that "*Brady* claims have ranked within the traditional core of habeas corpus and outside the province of § 1983"). *Cf. Whitlock v. Brueggemann,* 682 F.3d 567, 587–88 (7th Cir. 2012) (distinguishing *Osbourne*: "*Brady* continues to apply [in a post-trial action] to an assertion that one did not receive a fair trial because of the concealment of exculpatory evidence known and in existence at the time of that trial").

3. *See also Steidl v. Fermon,* 494 F.3d 623, 630 (7th Cir. 2007) ("For evidence known to the state at the time of the trial, the duty to disclose extends throughout the legal proceedings that may affect either guilt or punishment, including post-conviction proceedings."); *Leka v. Portuondo,* 257 F.3d 89, 100 (2d Cir. 2001) ("*Brady* requires disclosure of information that the prosecution acquires during the trial itself, or even afterward"); *Smith v. Roberts,* 115 F.3d 818, 819–20 (10th Cir. 1997) (same, applying *Brady* to impeachment evidence that prosecutor did not learn of until "[a]fter trial and sentencing but while the conviction was on direct appeal. . . . [T]he duty to disclose is ongoing and extends to all stages of the judicial process.").

4. *Cf. United States v. Moore,* 651 F.3d 30, 99–100 (D.C. Cir. 2011) ("This is particularly true where the defendant brings the existence of what he believes to be exculpatory or impeaching evidence or information

B. Elements of a Violation

There are three elements of a *Brady* violation: (1) the information must be favorable to the accused; (2) the information must be suppressed—that is, not disclosed—by the government, either willfully or inadvertently; and (3) the information must be "material" to guilt or to punishment. *See Strickler v. Greene,* 527 U.S. 263, 281–82 (1999).

1. Favorable to the Accused

Information is "favorable to the accused either because it is exculpatory, or because it is impeaching." *Strickler,* 527 U.S. at 281–82. Most circuits have held that information may be favorable even if it is not admissible as evidence itself, as long as it reasonably could lead to admissible evidence. *See, e.g., United States v. Triumph Capital Group, Inc.,* 544 F.3d 149, 162–63 (2d Cir. 2008) (*Brady* information "need not be admissible if it 'could lead to admissible evidence' or 'would be an effective tool in disciplining witnesses during cross-examination by refreshment of recollection or otherwise'") (quoting *United States v. Gil,* 297 F.3d 93, 104 (2d Cir. 2002)).[5]

2. Suppression, Willful or Inadvertent

Whether exculpatory information has been suppressed by the government is a matter for inquiry first by defense counsel making a request of the prosecutor. If defense counsel remains unsatisfied, the trial court may make its own inquiry and, if appropriate, require the government to produce the undisclosed information for *in camera* inspection by the court. See also discussion in *infra* section D, Disputed Disclosure.

---

to the attention of the prosecutor and the district court, in contrast to a general request for *Brady* material."), *cert. denied,* 132 S. Ct. 2772 (2012).

5. *See also United States v. Wilson,*605 F.3d 985, 1005 (D.C. Cir. 2010) (no *Brady* violation because undisclosed information was not admissible nor would it have led to admissible evidence or effective impeachment), *cert. denied,* 131 S. Ct. 841 (2010); *Ellsworth v. Warden,* 333 F.3d 1, 5 (1st Cir. 2003) ("we think it plain that evidence itself inadmissible *could* be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it"); *Spence v. Johnson,* 80 F.3d 989, 1005 at n.14 (5th Cir.) ("inadmissible evidence may be material under *Brady*"), *cert. denied,* 519 U.S. 1012 (1996); *Spaziano v. Singletary,* 36 F.3d 1028, 1044 (11th Cir. 1994) ("A reasonable probability of a different result is possible only if the suppressed information is itself admissible evidence or would have led to admissible evidence."), *cert. denied,* 513 U.S. 1115 (1995); *United States v. Phillip,* 948 F.2d 241, 249 (6th Cir. 1991) ("information withheld by the prosecution is not material unless the information consists of, or would lead directly to, evidence admissible at trial for either substantive or impeachment purposes"), *cert. denied,* 504 U.S. 930 (1992). *Cf. Wood v. Bartholomew,* 516 U.S. 1, 6 (1995) (per curiam) (where it was "mere speculation" that inadmissible materials might lead to the discovery of admissible exculpatory evidence, those materials are not subject to disclosure under *Brady*); *United States v. Velarde,* 485 F.3d 553, 560 (10th Cir. 2007) (if defendant "is able to make a showing that further investigation under the court's subpoena power very likely would lead to the discovery of [admissible material] evidence," defendant may "request leave to conduct discovery"); *Madsen v. Dormire,* 137 F.3d 602, 604 (8th Cir.) (citing *Wood*, there was no *Brady* violation where undisclosed information was not admissible and could not be used to impeach; court did not address whether it could lead to admissible evidence), *cert. denied,* 525 U.S. 908 (1998). *But cf. Hoke,* 92 F.3d 1350, 1356 at n.3 (4th Cir.) (reading *Wood* to hold that inadmissible evidence is, "as a matter of law, 'immaterial' for *Brady* purposes"), *cert. denied,* 519 U.S. 1048 (1996).

It does not matter whether a failure to disclose is intentional or inadvertent, since "under *Brady* an inadvertent nondisclosure has the same impact on the fairness of the proceedings as deliberate concealment." *Strickler,* 527 U.S. at 288; *Agurs,* 427 U.S. at 110 ("Nor do we believe the constitutional obligation is measured by the moral culpability, or the willfulness, of the prosecutor. . . . If the suppression of evidence results in constitutional error, it is because of the character of the evidence, not the character of the prosecutor."). *See also Porter v. White,* 483 F.3d 1294, 1305 (11th Cir.) ("The *Brady* rule thus imposes a no-fault standard of care on the prosecutor. If favorable, material evidence exclusively in the hands of the prosecution team fails to reach the defense—for whatever reason—and the defendant is subsequently convicted, the prosecution is charged with a *Brady* violation, and the defendant is entitled to a new trial."), *cert. denied,* 552 U.S. 1185 (2007); *Gantt v. Roe,* 389 F.3d 908, 912 (9th Cir. 2004) ("*Brady* has no good faith or inadvertence defense").

Information will not be considered "suppressed" for *Brady* purposes if the defendant already knew about it[6] or could have obtained it with reasonable effort.[7] However, suppression still may be found in this situation if a defendant did not investigate further because the prosecution represented that it had turned over all disclosable information or that there was no disclosable material. In *Strickler*, the prosecutor had an "open file" policy, but exculpatory information had been kept out of the files. The Supreme Court held that the "petitioner has established cause for failing to raise a *Brady* claim prior to federal habeas because (a) the prosecution withheld exculpatory evidence; (b) petitioner reasonably relied on the prosecution's open file policy as fulfilling the prosecution's duty to disclose such evidence; and (c) the Commonwealth confirmed petitioner's reliance on the open file policy by asserting during state habeas proceedings that petitioner had

---

6. *See, e.g., Parker v. Allen,* 565 F.3d 1258, 1277 (11th Cir. 2009) ("there is no suppression if the defendant knew of the information or had equal access to obtaining it"), *cert. denied,* 130 S. Ct. 1073 (2010); *United States v. Zichittello,* 208 F.3d 72, 103 (2d Cir. 2000) ("Even if evidence is material and exculpatory, it 'is not "suppressed"' by the government within the meaning of *Brady* 'if the defendant either knew, or should have known, of the essential facts permitting him to take advantage of any exculpatory evidence.'") (citations omitted), *cert. denied, Lysaght v. United States,* 531 U.S. 1143 (2001); *Rector v. Johnson,* 120 F.3d 551, 558–59 (5th Cir. 1997) (same), *cert. denied,* 522 U.S. 1120 (1998); *United States v. Clark,* 928 F.2d 733, 738 (6th Cir. 1991) ("No *Brady* violation exists where a defendant 'knew or should have known the essential facts permitting him to take advantage of any exculpatory information,' . . . or where the evidence is available to defendant from another source.") (citations omitted), *cert. denied,* 502 U.S. 846 (1991). *Cf. United States v. Quintanilla,* 193 F.3d 1139, 1149 (10th Cir. 1999) ("a defendant's independent awareness of the exculpatory evidence is critical in determining whether a *Brady* violation has occurred. If a defendant already has a particular piece of evidence, the prosecution's disclosure of that evidence is considered cumulative, rendering the suppressed evidence immaterial."), *cert. denied,* 529 U.S. 1029 (2000).

7. *United States v. Rodriguez,* 162 F.3d 135, 147 (1st Cir. 1998) ("government has no *Brady* burden when the necessary facts for impeachment are readily available to a diligent defender"), *cert. denied,* 526 U.S. 1152 (1999); *United States v. Dimas,* 3 F.3d 1015, 1019 (7th Cir. 1993) (when "the defendants might have obtained the evidence themselves with reasonable diligence . . . , then the evidence was not 'suppressed' under *Brady* and they would have no claim"); *Hoke v. Netherland,* 92 F.3d at 1355 ("The strictures of *Brady* are not violated, however, if the information allegedly withheld by the prosecution was reasonably available to the defendant.") .

already received 'everything known to the government.'" 527 U.S. at 283–89.[8] The Court reached the same conclusion in a later case in which the prosecution withheld disclosable information after having "asserted, on the eve of trial, that it would disclose all *Brady* material."[9]

Suppression may also be found when disclosure is so late that the defense is unable to make effective use of the information at trial. See discussion in *infra* section C, Timing of Disclosure.

3. Materiality

a. Definition

The most problematic aspect of *Brady* for prosecutors and trial judges is the third element: the requirement that the favorable information suppressed by the government be "material." Under *Brady,* information is considered "material" "when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith v. Cain,* 132 S. Ct. 627, 630 (2012) (quotations omitted). "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Id.* (quoting *Kyles v. Whitley,* 514 U.S. at 434) (alteration in original).[10]

---

8. The Court cautioned, however, that "[w]e do not reach, because it is not raised in this case, the impact of a showing by the State that the defendant was aware of the existence of the documents in question and knew, or could reasonably discover, how to obtain them." *Id.* at 288, n.33. *See also Carr v. Schofield,* 364 F.3d 1246, 1255 (11th Cir.) (citing and quoting *Strickland* for proposition that "if a prosecutor asserts that he complies with *Brady* through an open file policy, defense counsel may reasonably rely on that file to contain all materials the State is constitutionally obligated to disclose under *Brady*"), *cert. denied,* 543 U.S. 1037 (2004).

9. *Banks v. Dretke,* 540 U.S. 668, 693–96 (2004) ("Our decisions lend no support to the notion that defendants must scavenge for hints of undisclosed *Brady* material when the prosecution represents that all such material has been disclosed. As we observed in *Strickler*, defense counsel has no 'procedural obligation to assert constitutional error on the basis of mere suspicion that some prosecutorial misstep may have occurred.' 527 U.S. at 286–287"). *See also Gantt v. Roe,* 389 F.3d at 912–13 ("While the defense could have been more diligent, . . . this does not absolve the prosecution of its *Brady* responsibilities. . . . Though defense counsel could have conducted his own investigation, he was surely entitled to rely on the prosecution's representation that it was sharing the fruits of the police investigation."). *Cf. Bell v. Bell,* 512 F.3d 223, 236 (6th Cir.) (distinguishing *Banks* from instant case, in which the facts known to defendant "strongly suggested that further inquiry was in order, whether or not the prosecutor said he had turned over all the discoverable evidence in his file, and the information was a matter of public record"), *cert. denied,* 555 U.S. 822 (2008).

10. *See also Banks v. Dretke,* 540 U.S. at 698–99 ("[o]ur touchstone on materiality is *Kyles v. Whitley*"); *Kyles v. Whitley,* 514 U.S. at 434 ("The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence."); *Bagley,* 473 U.S. at 682 ("A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome.").

This definition of "materiality" necessarily is retrospective. It is used by an appellate court after trial to review whether a failure to disclose on the part of the government was so prejudicial that the defendant is entitled to a new trial. While *Brady* requires that materiality be considered even before or during trial, obviously it may not always be apparent in advance whether the suppression of a particular piece of information ultimately might "undermine [] confidence in the outcome of the trial."[11] For this reason, as noted earlier, the Supreme Court explicitly has recommended erring on the side of disclosure when there is uncertainty before or during trial about an item's materiality: "[T]here is a significant practical difference between the pretrial decision of the prosecutor and the post-trial decision of the judge. Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure."[12]At the same time, the Court reiterated the "critical point" that "the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial."[13]

---

11. *Smith v. Cain,* 132 S. Ct. at 630. *See also United States v. Jordan,* 316 F.3d 1215, 1252 n.79 (11th Cir.) ("In the case at hand, . . . the defendants' *Brady* claims involve material that was produced both before and during the defendants' trial. In such a scenario, because the trial has just begun, the determination of prejudice is inherently problematical."), *cert. denied,* 540 U.S. 821 (2003).

12. *Agurs,* 427 U.S. at 108. *See also Cone v. Bell,* 556 U.S. at 470 n.15 ("As we have often observed, the prudent prosecutor will err on the side of transparency, resolving doubtful questions in favor of disclosure."); *United States v. Starusko*, 729 F.2d 256, 261 (3d Cir. 1984) ("it is difficult to analyze, prior to trial, whether potential impeachment evidence falls within *Brady* without knowing what role a certain witness will play in the government's case"). *Cf. Jordan,* 316 F.3d at 1251 ("under *Brady,* the government need only disclose during pretrial discovery (or later, at the trial) evidence which, in the eyes of a neutral and objective observer, could alter the outcome of the proceedings. Not infrequently, what constitutes *Brady* material is fairly debatable. In such cases, the prosecutor should mark the material as a court exhibit and submit it to the court for in camera inspection."); *United States v. Cadet,* 727 F.2d 1453, 1469 (9th Cir. 1984) ("Any doubt concerning the applicability of *Brady* to any specific document . . . should have been submitted to the court for an in camera review.").

Some district courts have enacted local rules that eliminate the *Brady* materiality requirement for pretrial disclosure of exculpatory information. See discussion at pp. 16–17 in LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES (2011). *See also United States v. Price*, 566 F.3d 900, 913 n.14 (9th Cir. 2009) ("[f]or the benefit of trial prosecutors who must regularly decide what material to turn over, we note favorably the thoughtful analysis" of two district courts that held that "the 'materiality' standard usually associated with *Brady* . . . should not be applied to pretrial discovery of exculpatory materials").

13. *Agurs,* 427 U.S. at 109–10 (also cautioning that "[t]he mere possibility that an item of undisclosed information might have helped the defense, or might have affected the outcome of the trial, does not establish 'materiality' in the constitutional sense"). *See also United States v. Lemmerer,* 277 F.3d 579, 588 (1st Cir.) ("The same standard applies when the claim is one of delayed disclosure rather than complete suppression. However, in delayed disclosure cases, we need not reach the question whether the evidence at issue was 'material' under *Brady* unless the defendant first can show that defense counsel was 'prevented by the delay from using the disclosed material effectively in preparing and presenting the defendant's case.'"), *cert. denied,* 537 U.S. 901 (2002); *United States v. Coppa,* 267 F.3d 132, 140 (2d Cir. 2001) ("Although the government's obligations under *Brady* may be thought of as a constitutional duty arising

b. Cumulative Effect of Suppressed Evidence

Although each instance of nondisclosure is examined separately, the "suppressed evidence [is] considered collectively, not item by item" in determining materiality. *Kyles v. Whitley,* 514 U.S. at 436–37 & n.10 ("showing that the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a *Brady* violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the likely net effect of all such evidence and make disclosure when the point of 'reasonable probability' is reached").[14] The undisclosed evidence "must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." *Agurs,* 427 U.S. at 112.[15]

C. Timing of Disclosure

1. In Time for Effective Use at Trial

As noted earlier, information may be considered "suppressed" for *Brady* purposes if disclosure is delayed to the extent that the defense is not able to make effective use of the information in the preparation and presentation of its case at trial. How much preparation a defendant needs in order to use *Brady* material effectively— which determines how early disclosure must be made by the prosecution—depends upon the circumstances of each case. Disclosure before trial (and often well before trial) is always preferable and

---

before or during the trial of a defendant, the scope of the government's constitutional duty—and, concomitantly, the scope of a defendant's constitutional right—is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial. . . . The government therefore has a so-called '*Brady* obligation' only where non-disclosure of a particular piece of evidence would deprive a defendant of a fair trial."); *Starusko*, 729 F.2d at 261 (there is "no violation of *Brady* unless the government's nondisclosure infringes the defendant's fair trial right").

14. *See also Jackson v. Brown,* 513 F.3d 1057, 1071–72 (9th Cir. 2008) ("The materiality of suppressed evidence is 'considered collectively, not item by item.' . . . [E]ach additional . . .*Brady* violation further undermines our confidence in the decision-making process") (quoting *Kyles*); *Maharaj v. Sec'y for Dept. of Corrections,* 432 F.3d 1292, 1310 (11th Cir. 2005) ("the district court followed the appropriate methodology, considering each *Brady* item individually, and only then making a determination about the cumulative impact"), *cert. denied,* 549 U.S. 1072 (2006); *United States v. Sipe,* 388 F.3d 471, 477 (5th Cir. 2004) ("Even if none of the nondisclosures standing alone could have affected the outcome, when viewed cumulatively in the context of the full array of facts, we cannot disagree with the conclusion of the district judge that the government's nondisclosures undermined confidence in the jury's verdict.").

15. *See also United States v. Bowie,* 198 F.3d 905, 912 (D.C. Cir. 1999) (court must "evaluate the impact of the undisclosed evidence not in isolation, but in light of the rest of the trial record"); *Porretto v. Stalder,* 834 F.2d 461, 464 (5th Cir. 1987) ("Omitted evidence is deemed material when, viewed in the context of the entire record, it creates a reasonable doubt as to the defendant's guilt that did not otherwise exist.").

may be required if the material is significant, complex, or voluminous, or may lead to other exculpatory material after further investigation.[16] In some circumstances, however, disclosure right before, or even during, trial has been found to be sufficient.[17] "It is not feasible or desirable to specify the extent or timing of disclosure *Brady* and its progeny require, except in terms of the sufficiency, under the circumstances, of the defense's opportunity to use the evidence when disclosure is made. Thus disclosure prior to trial is not [always] mandated. . . . At the same time, however, the longer the prosecution withholds information, or (more particularly) the closer to trial the disclosure is made, the less opportunity there is for use." *Leka v. Portuondo,* 257 F.3d 89, 100 (2d Cir. 2001).[18]

---

16. *See DiSimone v. Phillips*, 461 F.3d 181, 197 (2d Cir. 2006) ("The more a piece of evidence is valuable and rich with potential leads, the less likely it will be that late disclosure provides the defense an 'opportunity for use.'"); *Leka,* 257 F.3d at 101 ("When such a disclosure is first made on the eve of trial, or when trial is under way, the opportunity to use it may be impaired. The defense may be unable to divert resources from other initiatives and obligations that are or may seem more pressing. And the defense may be unable to assimilate the information into its case. . . . Moreover, new witnesses or developments tend to throw existing strategies and preparation into disarray."). *See also United States v. Garner,* 507 F.3d 399, 405–07 (6th Cir. 2007) (defendant "did not receive a fair trial" where cell phone records that would have allowed impeachment of critical prosecution witness were not disclosed until the morning of trial and the defense was not given sufficient time to investigate records: "The importance of the denial of an opportunity to impeach this witness cannot be overstated."); *United States v. Fisher,* 106 F.3d 622, 634–35 (5th Cir. 1997) (new trial warranted where government did not disclose until last day of trial an FBI report containing impeachment evidence that directly contradicted testimony of key witness and defense was not able to make meaningful use of evidence), *abrogated on other grounds by Ohler v. United States,* 529 U.S. 753, 758–59 (2000).

17. A majority of the circuits that have addressed this point have held that disclosure may be deemed timely, at least in some circumstances, when the defendant is able to effectively use the information at trial, even if disclosure occurs after the trial has begun. *See, e.g., United States v. Houston,* 648 F.3d 806, 813 (9th Cir. 2011) ("there is no *Brady* violation so long as the exculpatory or impeaching evidence is disclosed at a time when it still has value"), *cert. denied,* 132 S. Ct. 1727 (2012); *United States v. Celis,* 608 F.3d 818, 836 (D.C. Cir.) ("the critical point is that disclosure must occur in sufficient time for defense counsel to be able to make effective use of the disclosed evidence"), *cert. denied,* 131 S. Ct. 620 (2010); *Powell v. Quarterman,* 536 F.3d 325, 335 (5th Cir. 2008) ("a defendant is not prejudiced [by untimely disclosure] if the evidence is received in time for its effective use at trial"), *cert. denied,* 129 S. Ct. 1617 (2009); *United States v. Rodriguez,* 496 F.3d 221, 226 (2d Cir. 2007) ("the Government must make disclosures in sufficient time that the defendant will have a reasonable opportunity to act upon the information efficaciously," that is, "in a manner that gives the defendant a reasonable opportunity either to use the evidence in the trial or to use the information to obtain evidence for use in the trial"); *Blake v. Kemp*, 758 F.2d 523, 532 n.10 (11th Cir.) ("In some instances [disclosure of potential *Brady* material the day before trial] may be sufficient. . . . However, . . . some material must be disclosed earlier. . . . This is because of the importance of some information to adequate trial preparation.") (citations omitted), *cert. denied,* 474 U.S. 998 (1985).

18. *See also Gantt v. Roe,* 389 F.3d at 912 ("That [relevant] pieces of information were found (or their relevance discovered) only in time for the last day of testimony underscores that disclosure should have been *immediate:* Disclosure must be made 'at a time when [it] would be of value to the accused.'") (citation omitted); *United States v. McKinney,* 758 F.2d 1036, 1049–50 (5th Cir. 1985) ("If the defendant received the material in time to put it to effective use at trial, his conviction should not be reversed simply because it was not disclosed as early as it might have and, indeed, should have been."); *United States v. Pollack,* 534 F.2d 964, 973–74 (D.C. Cir.) ("Disclosure by the government must be made at such a time as to allow the defense to use the favorable material effectively in the preparation and presentation of its case, even if

In light of these considerations, and because the effect of suppression usually cannot be evaluated fully until after trial, potential *Brady* material ordinarily should be disclosed as soon as reasonably possible after its existence is known by the government, and disclosures on the eve of or during trial should be avoided unless there is no other reasonable alternative.

2. Prior to a Guilty Plea?

The Supreme Court has held that disclosure of impeachment information is not required before a guilty plea is negotiated or accepted. *See United States v. Ruiz*, 536 U.S. 622, 629–30 (2002) ("impeachment information is special in relation to the *fairness of a trial*, not in respect to whether a plea is *voluntary*," and due process does not require disclosure of such impeachment information before a plea) (emphasis in original). The holding in *Ruiz* was limited to impeachment material because "the proposed plea agreement at issue … specifie[d that] the Government [would] provide 'any information establishing the factual innocence of the defendant,'" *Id.* at 631. The Court "has not addressed the question of whether the *Brady* right to *exculpatory* information, in contrast to *impeachment* information, might be extended to the guilty plea context." *United States v. Moussaoui*, 591 F.3d 263, 286 (4th Cir. 2010) (emphasis in original).[19]

---

satisfaction of this criterion requires pre-trial disclosure. . . . The trial judge must be given a wide measure of discretion to ensure satisfaction of this standard. . . . Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions."), *cert. denied,* 429 U.S. 924 (1976); *Grant v. Alldredge*, 498 F.2d 376, 382 (2d Cir. 1976) ("Although it well may be that marginal *Brady* material need not always be disclosed upon request prior to trial," evidence indicating that another suspect may have committed the crime "was without question 'specific, concrete evidence' of a nature requiring pretrial disclosure to allow for full exploration and exploitation by the defense" that "would have had a 'material bearing on defense preparation' . . . and therefore should have been revealed well before the commencement of the trial.") (citations omitted).

19. *Compare United States v. Conroy*, 567 F.3d 174, 179 (5th Cir. 2009) (rejecting defendant's argument that the limitation on the Supreme Court's discussion in *Ruiz* "to impeachment evidence implies that exculpatory evidence is different and must be turned over before entry of a plea"), *cert. denied,* 130 S. Ct. 1502 (2010), *with McCann v. Mangialardi*, 337 F.3d 782, 787–88 (7th Cir. 2003) ("*Ruiz* indicates a significant distinction between impeachment information and exculpatory evidence of actual innocence. Given this distinction, it is highly likely that the Supreme Court would find a violation of the Due Process Clause if prosecutors or other relevant government actors have knowledge of a criminal defendant's factual innocence but fail to disclose such information to a defendant before he enters into a guilty plea"). *See also United States v. Mathur,* 624 F.3d 498, 504–07 (1st Cir. 2010) (rejecting defendant's claim that "potentially exculpatory" information and impeachment information should have been disclosed before his plea, court held that the information was not material and added that: "Although we recognize that plea negotiations are important, that fact provides no support for an unprecedented expansion of *Brady*."); *Jones v. Cooper,* 311 F.3d 306, 315 n.5 (4th Cir. 2002) (in a death penalty case, "[t]o the extent that appellant contends that he would not have pled guilty had he been provided the [potentially mitigating] information held by the jailor, this claim is foreclosed by" *Ruiz*), *cert. denied,* 539 U.S. 946 (2003). *Cf. Ferrara v. United States,* 456 F.3d 278, 293 (1st Cir. 2006) (prosecution's "blatant misconduct" and "affirmative misrepresentations" in withholding material exculpatory information—which it was obligated to disclose not only under *Brady v. Maryland* but also under local court rules and a court order—rendered defendant's guilty plea involuntary under *Brady v. United States,* 397 U.S. 742 (1970)); *United States v. Wright,* 43 F.3d 491, 496

3. *Remedies for Untimely Disclosure*

Untimely disclosure that effectively suppresses *Brady* information may result in sanctions. The decision whether to impose sanctions is within the sound discretion of the trial judge: "Where the district court concludes that the government was dilatory in its compliance with *Brady,* to the prejudice of the defendant, the district court has discretion to determine an appropriate remedy, whether it be exclusion of the witness, limitations on the scope of permitted testimony, instructions to the jury, or even mistrial. The choice of remedy also is within the sound discretion of the district court. Fed. R. Crim. P. 16(d)(2) authorizes the district court in cases of non-compliance with discovery obligations to 'permit the discovery or inspection,' 'grant a continuance,' 'prohibit the party from introducing the evidence not disclosed,' or 'enter any other order that is just under the circumstances.'"[20]

In most cases, "[t]he customary remedy for a *Brady* violation that surfaces mid-trial is a continuance and a concomitant opportunity to analyze the new information and, if necessary, recall witnesses."[21] In fact, failure to request a continuance, or an "outright rejection of a proffered continuance," is taken as an indication that the defendant is able to use the information effectively despite the delay.[22]

In an extreme case, dismissal may be warranted: "*Brady* violations are just like other constitutional violations. Although the appropriate remedy will usually be a new trial, . . .

(10th Cir. 1994) ("under certain limited circumstances, the prosecution's violation of *Brady* can render a defendant's plea involuntary").

20. *United States v. Burke,* 571 F.3d 1048, 1054 (10th Cir.), *cert. denied,* 130 S. Ct. 565 (2009). *See also United States v. Johnston,* 127 F.3d 380, 391 (5th Cir. 1997) (district court has "real latitude" to fashion appropriate remedy for alleged *Brady* errors, including delayed disclosure), *cert. denied,* 522 U.S. 1152 (1998); *United States v. Josleyn,* 99 F.3d 1182, 1196 (1st Cir. 1996) ("The district court has broad discretion to redress discovery violations in light of their seriousness and any prejudice occasioned the defendant," and court properly refused to dismiss indictment for delay in disclosing *Brady* material), *cert. denied, Billmyer v. United States,* 519 U.S. 1116 (1997).

21. *Mathur,* 624 F.3d at 506. *See also United States v. Collins,* 415 F.3d 304, 311 (4th Cir. 2005) (continuance is preferable to motion to dismiss as remedy for late disclosure); *United States v. Kelly,* 14 F.3d 1169, 1176 (7th Cir. 1994) (when "a *Brady* disclosure is made during trial, the defendant can seek a continuance of the trial to allow the defense to examine or investigate, if the nature or quantity of the disclosed *Brady* material makes an investigation necessary").

22. *Mathur,* 624 F.3d at 506. *See also Lawrence v. Lensing,* 42 F.3d 255, 258 (5th Cir. 1994) (petitioner "cannot convert his tactical decision not to seek a recess or continuance into a *Brady* claim in this habeas petition"); *United States v. Adams,* 834 F.2d 632, 635 (7th Cir. 1987) (holding that delayed disclosure did not prejudice defendant partly based on fact that defendant did not request continuance or recess), *cert. denied,* 484 U.S. 1046 (1988); *United States v. Holloway,* 740 F.2d 1373, 1381 (6th Cir.) (where defense counsel made no request for a continuance after delayed disclosure, "we conclude that the timing of the disclosure did not prejudice" the defendant), *cert. denied,* 469 U.S. 1021 (1984).

a district court may dismiss the indictment when the prosecution's actions rise . . . to the level of flagrant prosecutorial misconduct."[23]

4. Jencks Act

There is no consensus among the circuits as to whether the government's constitutional obligation to produce *Brady* information in a timely manner supersedes the timing requirements of the Jencks Act, 18 U.S.C. § 3500.[24] Some courts have attempted to harmonize the two rules, usually by finding that the timing of disclosure was sufficient under either standard to allow the defendant to make effective use of the information.[25]

There may be instances in which the nature of impeaching information warrants a delay in disclosure by the government. Even if the information might be helpful to a defendant in impeaching a witness's testimony, the government might not determine whether it actually will call the witness until shortly before, or even during, the trial. There is also the chance that a witness will choose not to cooperate or could be put in jeopardy by early disclosure.[26]

---

23. *United States v. Chapman,* 524 F.3d 1073, 1086 (9th Cir. 2008) ("Because the district court did not clearly err in finding that the government recklessly violated its discovery obligations and made flagrant misrepresentations to the court, we hold that the dismissal was not an abuse of discretion."). *Accord Government of Virgin Islands v. Fahie,* 419 F.3d 249, 255 (3d Cir. 2005) ("While retrial is normally the most severe sanction available for a *Brady* violation, where a defendant can show both willful misconduct by the government, and prejudice, dismissal may be proper.").

24. *Compare, e.g., United States v. Rittweger,* 524 F.3d 171, 181 n.4 (2d Cir. 2008) ("Complying with the Jencks Act, of course, does not shield the government from its independent obligation to timely produce exculpatory material under Brady—a constitutional requirement that trumps the statutory power of 18 U.S.C. § 3500."), *cert. denied,* 129 S. Ct. 1391 (2009) *with United States v. Presser,* 844 F.2d 1275, 1283–84 (6th Cir. 1988) ("If impeachment evidence is within the ambit of the Jencks Act, then the express provisions of the Jencks Act control discovery of that kind of evidence. The clear and consistent rule of this circuit is that the intent of Congress expressed in the Act must be adhered to and, thus, the government may not be compelled to disclose Jencks Act material before trial. . . . Accordingly, neither *Giglio* nor *Bagley* alter the statutory mandate")

25. *See, e.g., Presser,* 844 F.2d at 1283–84 ("so long as the defendant is given impeachment material, even exculpatory impeachment material, in time for use at trial, we fail to see how the Constitution is violated. Any prejudice the defendant may suffer as a result of disclosure of the impeachment evidence during trial can be eliminated by the trial court ordering a recess in the proceedings in order to allow the defendant time to examine the material and decide how to use it."); *United States v. Kopituk,* 690 F.2d 1289, 1339 n.47 (11th Cir. 1982) ("It has been held that 'when alleged *Brady* material is contained in Jencks Act material, disclosure is generally timely if the government complies with the Jencks Act.'") (citations omitted), *cert. denied, Williams v. United States,* 461 U.S. 928 (1983).

26 *See, e.g., Rodriguez,* 496 F.3d at 228 at n.6 ("We recognize that in many instances the Government will have good reason to defer disclosure until the time of the witness's testimony, particularly of material whose only value to the defense is as impeachment of the witness by reference to prior false statements. In some instances, earlier disclosure could put the witness's life in jeopardy, or risk the destruction of evidence. Also at times, the Government does not know until the time of trial whether a potential cooperator will plead guilty and testify for the Government or go to trial as a defendant."); *Pollack,* 534 F.2d at 973–74 (noting that there can be "situations in which premature disclosure would unnecessarily encourage those dangers that militate against extensive discovery in criminal cases, *e. g.,* potential for

Brady and the Jencks Act serve different purposes, and although their disclosure obligations often overlap, they are not always coextensive, and there may or may not be a conflict between their respective timing requirements. "All Jencks Act statements are not necessarily *Brady* material. The Jencks Act requires that any statement in the possession of the government—exculpatory or not—that is made by a government witness must be produced by the government during trial at the time specified by the statute. *Brady* material is not limited to *statements* of witnesses but is defined as exculpatory *material*; the precise time within which the government must produce such material is not limited by specific statutory language but is governed by existing case law. Definitions of the two types of investigatory reports differ, the timing of production differs, and compliance with the statutory requirements of the Jencks Act does not necessarily satisfy the due process concerns of *Brady*." *Starusko,* 729 F.2d at 263 (emphasis in original).[27]

5. *Supervisory Authority of District Court*

"[I]t must be remembered that *Brady* is a constitutional mandate. It exacts the *minimum* that the prosecutor, state or federal, must do" to avoid violating a defendant's due process rights. *U.S. v. Beasley,* 576 F.2d 626, 630 (5th Cir. 1978) (emphasis added), *cert. denied,* 440 U.S. 947 (1979). As it is not otherwise specified by rule or case law, district courts have the discretionary authority "to dictate by court order when *Brady* material must be disclosed." *Starusko,* 729 F.2d at 261 ("the district court has general discretionary authority to order the pretrial disclosure of *Brady* material 'to ensure the effective administration of the criminal justice system.'") (citation omitted).[28] Some

---

manufacture of defense evidence or bribing of witnesses. Courts can do little more in determining the proper timing for disclosure than balance in each case the potential dangers of early discovery against the need that *Brady* purports to serve of avoiding wrongful convictions."). *Cf. United States v. Starusko,* 729 F.2d 256, 261 (3d Cir. 1984) ("We recognize that, generally, it is difficult to analyze, prior to trial, whether potential impeachment evidence falls within *Brady* without knowing what role a certain witness will play in the government's case.").

27. *See also Rodriguez,* 496 F.3d at 224–26 (oral statements by witness that were never written down or recorded did not fall under Jencks Act but could be disclosable under *Brady* or *Giglio*: "The Jencks Act requires the Government to produce to the defendant any 'statement' by the witness that 'relates to the subject matter as to which the witness has testified.' 18 U.S.C. § 3500(b); *see id.* § 3500(e) (defining 'statement'). The term 'statement,' however, is defined to include only statements that have been memorialized in some concrete form, whether in a written document or electrical recording. . . . The obligation to disclose information covered by the *Brady* and *Giglio* rules exists without regard to whether that information has been recorded in tangible form."); *United States v. Phibbs,* 999 F.2d 1053, 1088 (6th Cir. 1993) ("Unlike the Jencks Act, the force of *Brady* and its progeny is not limited to the statements and reports of witnesses."), *cert. denied,* 510 U.S. 1119 (1994). *Cf. Coppa,* 267 F.3d at 146 ("a District Court's power to order pretrial disclosure is constrained by the Jencks Act," and the district court exceeded its authority in ordering disclosure "of not only those witness statements that fall within the ambit of *Brady*/*Giglio,* and thus may be required to be produced in advance of trial despite the Jencks Act, but also those witness statements that, although they might indeed contain impeachment evidence, do not rise to the level of materiality prescribed by *Agurs* and *Bagley* for mandated production").

28. *See generally United States v. Hasting,* 461 U.S. 499, 505 (1983) ("[I]n the exercise of supervisory powers, federal courts may, within limits, formulate procedural rules not specifically required by the Constitution or the Congress. The purposes underlying use of the supervisory powers are threefold: to

districts have done this through local rules, setting pretrial deadlines for disclosure of *Brady* and *Giglio* material.[29] Otherwise, "[h]ow the trial court proceeds to enforce disclosure requirements is largely a matter of discretion to be exercised in light of the facts of each case." *United States v. Valera,* 845 F.2d 923, 927 (11th Cir. 1988), *cert. denied,* 490 U.S. 1046 (1989).[30]

D. Disputed Disclosure

If a defendant requests disclosure of materials that the government contends are not discoverable under *Brady*, the trial court may conduct an in camera review of the disputed materials.[31] "To justify such a review, the defendant must make some showing that the materials in question could contain favorable, material evidence. . . . This showing cannot consist of mere speculation. . . . Rather, the defendant should be able to articulate with some specificity what evidence he hopes to find in the requested materials, why he thinks the materials contain this evidence, and finally, why this evidence would be both favorable to him and material."[32]

---

implement a remedy for violation of recognized rights . . . ; to preserve judicial integrity by ensuring that a conviction rests on appropriate considerations validly before the jury . . . ; and finally, as a remedy designed to deter illegal conduct.") (citations omitted); *United States v. W.R. Grace,* 526 F.3d 499, 508–09 (9th Cir. 2008) (en banc) ("We begin with the principle that the district court is charged with effectuating the speedy and orderly administration of justice. There is universal acceptance in the federal courts that, in carrying out this mandate, a district court has the authority to enter pretrial case management and discovery orders designed to ensure that the relevant issues to be tried are identified, that the parties have an opportunity to engage in appropriate discovery and that the parties are adequately and timely prepared so that the trial can proceed efficiently and intelligibly"). *See also* Fed. R. Crim. P. 57(b) ("Procedure when there is no controlling law. A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district.").

29. See discussion of local rules in LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 11–18 (2011).

30. *See also United States v. Caro-Muniz,* 406 F.3d 22, 29 (1st Cir. 2005) ("methods of enforcing disclosure requirements in criminal trials are generally left to the discretion of the trial court"); *United States v. Runyan,* 290 F.3d 223, 245 (5th Cir.) (same), *cert. denied,* 537 U.S. 888 (2002); *United States v. Campagnuolo,* 592 F.2d 852, 857 n.2 (5th Cir. 1979) ("The government argues that it was not required to follow certain provisions of . . . the standing discovery order because those provisions were broader in scope than the requirements adopted by the Supreme Court in *Brady*. This argument is without merit. It is within the sound discretion of the district judge to make any discovery order that is not barred by higher authority.").

31. *See, e.g. United States v. Prochilo,* 629 F.3d 264, 268 (1st Cir. 2011).

32. *Id.* at 268–69 (citing *Pennsylvania v. Ritchie,* 480 U.S. 39, 58 at n.15 (1987)). *See also Riley v. Taylor,* 277 F.3d 261, 301 (3d Cir. 2001) ("A defendant seeking an in camera inspection to determine whether files contain *Brady* material must at least make a 'plausible showing' that the inspection will reveal material evidence. . . . Mere speculation is not enough."); *United States v. Lowder,* 148 F.3d 548, 551 (5th Cir. 1998) (same); *Love v. Johnson,* 57 F.3d 1305, 1313 (4th Cir. 1995) (same); *United States v. Navarro,* 737 F.2d 625, 631 (7th Cir.) ("Mere speculation that a government file may contain *Brady* material is not

E. Protective Orders

For good cause, such as considerations of witness safety or national security, a trial judge may fashion an appropriate protective order to the extent necessary in a particular case, consistent with the defendant's constitutional rights. *See, e.g., United States v. Williams Companies, Inc.,* 562 F.3d 387, 396 (D.C. Cir. 2009) (discussing balancing of "the prosecution's affirmative duty to disclose material evidence 'favorable to an accused,'" Rule 16(d) (1)'s provision that, "'for good cause,' the district court may 'deny, restrict, or defer discovery or inspection or grant other appropriate relief,'" and defendant's right to fair trial). *See also* the Classified Information Procedures Act, 18 U.S.C. App. 3, for procedures regarding protective orders for classified information.

F. Summary

The preceding sections are meant as a general guide to the *Brady* line of case law. Every case is different, however, and presents its own particular facts and circumstances that will affect the types of *Brady/Giglio* disclosure issues (if any) that may arise and how such issues may be handled most appropriately. Ideally, both prosecutors and defense attorneys will know and fulfill their respective responsibilities without significant judicial intervention. However, even if things appear to be going smoothly, a judge may want to monitor the situation, perhaps using status conferences to ask if information is being fully and timely exchanged. A district's particular legal culture is important. In districts where there is a history of poor cooperation between prosecutors and the defense bar, judges may need to take a more active role in ensuring *Brady* compliance than they might in districts where there is an "open file" discovery policy and a history of trust. A district's local rules or standing orders also may provide specific rules for handling disclosure.

---

sufficient to require a remand for *in camera* inspection, much less reversal for a new trial. A due process standard which is satisfied by mere speculation would convert *Brady* into a discovery device and impose an undue burden upon the district court."), *cert. denied, Mugercia v. United States,* 469 U.S. 1020 (1984).

APPENDIX

A. FJC Survey

The Federal Judicial Center recently conducted a comprehensive review of *Brady* practices in federal courts, surveying "all federal district and magistrate judges, U.S. Attorneys' Offices, and federal defenders, and a sample of defense attorneys in criminal cases that terminated during calendar year 2009. The surveys collected empirical data on whether to amend Rule 16 and collected views regarding issues, concerns, or problems surrounding pretrial discovery and disclosure in the federal district courts." LAURAL HOOPER ET AL., FED. JUDICIAL CTR., A SUMMARY OF RESPONSES TO A NATIONAL SURVEY OF RULE 16 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE AND DISCLOSURE PRACTICES IN CRIMINAL CASES 7 (2011).

In addition to the survey results, the *Summary* contains an analysis of district court rules and standing orders that cover disclosure requirements under *Brady* and *Giglio*. A separate appendix reprints the rules and orders from thirty-eight districts. The rules range from basic reiterations of *Brady* and *Giglio* to very detailed instructions and deadlines. The *Summary* and the *Appendices* can be accessed at http://cwn.fjc.dcn/fjconline/home.nsf/pages/1356.

B. Justice Department Policies and Guidance

Two documents set forth the current criminal discovery policies of the Department of Justice. The first is Section 9-5.001 of the *United States Attorney's Manual*, titled "Policy Regarding Disclosure of Exculpatory and Impeachment Information" (as updated June 10, 2010), which largely follows established case law in outlining a prosecutor's responsibilities to disclose exculpatory information, though in some instances it goes beyond what is required. It can be accessed at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/5mcrm.htm#9-5.001.

The second document is a memorandum issued by Deputy Attorney General David Ogden on January 4, 2010, which provides "Guidance for Prosecutors Regarding Criminal Discovery." It goes beyond *Brady* and *Giglio* and also outlines a prosecutor's obligations under Rules 16 and 26.2, as well as the Jencks Act, 18 U.S.C. § 3500. Usually called "The Ogden Memorandum," it is "intended to assist Department prosecutors to understand their obligations and to manage the discovery process," and can be found at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/crm00165.htm.

Note that these documents are internal policy guidelines. They do not, as the "Policy" states, "provide defendants with any additional rights or remedies," and they are "not intended to have the force of law or to create or confer any rights, privileges, or benefits." While it may be useful to know what information prosecutors are gathering and should be disclosing, these guidelines are not legal obligations to be enforced by a court. Unlike a violation of *Brady* or *Giglio*, a failure to follow Justice Department policies is not by itself a basis for a trial judge to impose sanctions, exclude evidence, or declare a mistrial, or for an appellate court to reverse a conviction.

C. Potential *Brady* or *Giglio* Information

Following is a list of the types of material that may be discoverable under *Brady* or *Giglio*. The examples are culled from case law, district court local rules, and the Department of Justice guidelines for prosecutors. The list is not exhaustive, and whether the disclosure of any item is or is not required must be determined in light of the specific facts and circumstances of each case.

[Ed. Note: We will have case cites for the following item where available. Those are still being collected and are not included here.]

1. Exculpatory Information Under *Brady*

a. information that is inconsistent with any element of any crime charged in the indictment or that tends to negate the defendant's guilt of any of the crimes charged

b. failure of any persons who participated in an identification procedure to make a positive identification of the defendant, whether or not the government anticipates calling the person as a witness at trial

c. any information that links someone other than the defendant to the crime (*e.g.,* a positive identification of someone other than the defendant)

d. information that casts doubt on the accuracy of any evidence—including but not limited to witness testimony—that the prosecutor intends to rely on to prove an element of any of the crimes charged in the indictment, or that might have a significant bearing on the admissibility of that evidence in the case-in-chief

e. any classified or otherwise sensitive national security material disclosed to defense counsel or made available to the court *in camera* that tends directly to negate the defendant's guilt

2. Impeachment Information under *Giglio*

a. all statements made orally or in writing by any witness the prosecution intends to call in its case-in-chief that are inconsistent with other statements made by that same witness

b. all plea agreements entered into by the government in this or related cases with any witness the government intends to call

c. any favorable dispositions of criminal charges pending against witnesses the prosecutor intends to call

d. offers or promises made or other benefits provided, directly or indirectly, to any witness in exchange for cooperation or testimony, including:

(1) dismissed or reduced charges;
(2) immunity or offers of immunity;
(3) expectations of downward departures or motions for reduction of sentence;
(4) assistance in other criminal proceedings, federal, state or local;

(5) considerations regarding forfeiture of assets, forbearance in seeking revocation of professional licenses or public benefits, waiver of tax liability, or promises not to suspend or debar a government contractor;

(6) stays of deportation or other immigration benefits;

(7) monetary benefits, paid or promised;

(8) non-prosecution agreements;

(9) letters to other law enforcement officials setting forth the extent of a witness's assistance or making recommendations on the witness's behalf;

(10) relocation assistance or more favorable conditions of confinement;

(11) consideration or benefits to culpable or at-risk third parties;

e. prior convictions of witnesses the prosecutor intends to call

f. pending criminal charges against any witness known to the government

g. prior specific instances of conduct by any witness known to the government that could be used to impeach the witness under Rule 608 of the Federal Rules of Evidence, including any finding of misconduct that reflects upon truthfulness

h. substance abuse, mental health issues, physical or other impairments known to the government that could affect any witness's ability to perceive and recall events

i. information known to the government that could affect any witness's bias such as:

(1) animosity toward the defendant;

(2) animosity toward a group of which the defendant is a member or with which the defendant is affiliated; or

(3) relationship with the victim.

THIS PAGE INTENTIONALLY BLANK

TAB 4

THIS PAGE INTENTIONALLY BLANK

MEMORANDUM

DATE: May 8, 2012

TO: Synonyms Subcommittee members and reporters

FROM: Judge Neil M. Gorsuch
Catherine T. Struve

RE: Subcommittee conference call agenda

Thank you for agreeing to serve on this subcommittee. We look forward to working with you. This memorandum outlines some issues for discussion on our initial conference call. Subject, of course, to your input and further guidance from the Standing Committee, we envision this Subcommittee as a forum for discussions among the Rules Committees concerning the choice of terms to describe activities that previously involved paper documents and now involve electronic files. In our initial call, we hope that you will mention any issues that your Committees are facing that involve such questions and as to which the Subcommittee could provide assistance. Such assistance could, for example, take the form of Subcommittee review of, and comments on, a proposed draft rule amendment.

As context for our discussions, Part I of this memo briefly surveys terminology, employed in one or more sets of national Rules, that might implicate questions of interest to the Subcommittee. This survey is not intended to suggest that a project is called for to overhaul the Rules' use of all (or any) of these terms. Rather, we hope to stimulate discussion concerning the contexts in which deliberations about terminology – coordinated through this Subcommittee – could assist committees that are in the process of considering rule amendments that may implicate choices about the ways in which the Rules refer to or encompass electronic filing and service.

Part II of this memo sets out the Subcommittee's first specific agenda item: the proposed amendments to Appellate Rule 6 that the Appellate Rules Committee will seek permission to publish this summer. It was during the presentation to the Standing Committee of a prior draft of this proposal that the idea of this Subcommittee arose. Thus, it seems appropriate for the Subcommittee to commence its work by providing input to the Appellate Rules Committee and the Standing Committee concerning the Appellate Rule 6 proposal.

I. Relevant terminology

After the Standing Committee – at its January 2012 meeting – decided to create this Subcommittee, Andrea Kuperman provided us with very helpful and thorough research

concerning the terms used in each set of national Rules for describing the treatment of the record (or of other materials that could be handled in both paper and electronic form). She compiled a list of provisions in the national rules that discuss activities that would previously have involved (and may still involve) sharing paper documents[1] – e.g., filing by a party or a court reporter, service by a party, transmission from one clerk's office to another, or transmission from the clerk's office to a litigant – and that may now or in the future involve accomplishing substantially the same result by electronic means.

Her findings concerning each set of Rules are enclosed. Also enclosed is a list of omitted terms, which Andrea compiled in order to memorialize the items that appeared to fall outside the scope of her search. In considering the implications of Andrea's careful and comprehensive research, it may be helpful to reorganize these data to show which terms appear in which sets of rules. Here is a table showing a rough analysis of that question. For the sake of simplicity, the table employs the simplest form as short-hand for related terms (e.g., "sent," "sending," or the like are listed as "send").

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Communicate [information] by telephone or other reliable electronic means				Y	
Deliver	Y	Y	Y	Y	Y
Personal delivery			Y		
Deposit	Y	Y	Y	Y	
Disclose	Y	Y	Y	Y	Y
Dispatch	Y				

[1] As participants in our discussions have noted, in choosing terminology that reflects the adjustment to electronic filing, drafters should keep in mind that – for the foreseeable future – some litigants will continue to make paper filings.

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Electronic access / remote electronic access		Y	Y	Y	
File	Y	Y	Y	Y	Y
File ... by electronic means / electronic filing	Y	Y	Y	Y	
File ... by mailing or dispatch	Y				
Forward	Y			Y	
Furnish	Y	Y	Y	Y	
Give	Y	Y	Y	Y	Y
Hand			Y		
Issue	Y	Y	Y	Y	Y
Issue ... electronically		Y			
Leave			Y	Y	
Mail	Y	Y	Y	Y	
Make available		Y	Y	Y	Y
Notice by electronic transmission		Y			
Notice / notify by mail		Y			
Notice by publication		Y	Y	Y	

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Post		Y			
Post a notice on an official internet government forfeiture site			Y		
Present	Y	Y	Y	Y	
Produce		Y	Y	Y	Y
Provide	Y	Y	Y	Y	Y
Publish		Y	Y	Y	
Report		Y	Y	Y	
Return	Y	Y	Y	Y	
Return by reliable electronic means				Y	
Send	Y	Y	Y	Y	
Send by electronic mail			Y		
Serve	Y	Y	Y	Y	Y
Serve ... by sending to electronic address			Y		
Serve by mail	Y	Y	Y	Y	
Personal service	Y	Y	Y	Y	
Serve by ... publication		Y	Y		

Term	Appellate	Bankruptcy	Civil	Criminal	Evidence
Serve ... in a sealed envelope			Y		
Submit	Y	Y	Y	Y	Y
Submit by reliable electronic means				Y	
Supply	Y	Y			
Transfer	Y				
Transmit	Y	Y	Y	Y	
Transmit by reliable electronic means				Y	
Transmission facilities			Y		
Turn over		Y			

This table suggests a few tentative observations. First, the Rules currently employ a large and diverse set of terms to describe activities that might be affected by the shift to electronic filing. Multiple terms are used to describe potentially similar concepts within a given set of rules. Some terms recur across multiple sets of rules. Some features are distinctive to a particular set of rules. For instance, the Bankruptcy Rules' use of the term "transmit" often occurs during discussions of transmission to the United States Trustee. For another example, the Criminal Rules confront a distinctive set of issues concerning communications between the government and the court (e.g., in the context of warrant applications or the like). Moreover, even where two sets of Rules use the same term, context and practice may imbue that term with different meanings for different sets of Rules.

II. The Appellate Rule 6 proposal

The Bankruptcy Rules Committee has prepared proposed amendments to Part VIII of the Bankruptcy Rules – the rules that govern appeals from bankruptcy court to a district court or bankruptcy appellate panel ("BAP"). In tandem with that project, the Appellate Rules Committee is at work on proposed amendments to Appellate Rule 6 (concerning appeals to the court of

appeals in a bankruptcy case). Both sets of proposed amendments will be placed before the Standing Committee this June for approval for publication.

The proposed amendments to Appellate Rule 6 would update the Rule's cross-references to the Bankruptcy Part VIII Rules; would amend Rule 6(b)(2)(A)(ii) to remove an ambiguity dating from the 1998 restyling; would add a new Rule 6(c) to address permissive direct appeals from the bankruptcy court under 28 U.S.C. § 158(d)(2); and – of most salience to this Subcommittee – would revise Rule 6 to take account of the range of methods available now or in the future for dealing with the record on appeal.

Both the Bankruptcy Rules Part VIII project and the project to revise Appellate Rule 6 have highlighted changes in the treatment of the record. The Appellate Rules as they currently exist were drafted on the assumption that the record on appeal would be available only in paper form. Reflecting the fact that the bankruptcy courts were ahead of other federal courts in making the transition to electronic filing, the proposed Part VIII Rules are drafted with a contrary presumption in mind: The default principle under those Rules is that the record will be made available in electronic form.

In revising Rule 6(b) and in drafting proposed new Rule 6(c), the Appellate Rules Committee sought to adopt language that could accommodate the various ways in which the lower-court record could be made available to the court of appeals – e.g., in paper form; or in electronic files that can be sent to the court of appeals; or by means of electronic links. The Committee considered a number of possible word choices, and concluded that neither "transmit" nor "furnish" nor "provide" captured the full range of methods for making the record available; in particular, none of these terms encompassed the provision of a set of electronic links by which to access the documents in the record. Ultimately, the Committee decided to refer to the lower-court clerk's "making the record available to" the court of appeals.

Part II.A below sets out the Rule 6 proposal. Part II.B surveys other places, in the sets of national Rules, where one can find references to "making" items "available." Part II.C. notes existing and proposed provisions (in the Appellate and Bankruptcy Rules) that discuss the transmission of the record from a lower court to an appellate court. With this information as background, we would like to seek your input – during the May 15 conference call – concerning the Appellate Rule 6 draft.

A. The Appellate Rule 6 draft

Here is the draft that the Appellate Rules Committee will submit for approval for publication at the Standing Committee's June meeting:

Rule 6. Appeal in a Bankruptcy Case ~~From a Final Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel~~

(a) Appeal From a Judgment, Order, or Decree of a District Court Exercising Original

Jurisdiction in a Bankruptcy Case. An appeal to a court of appeals from a final judgment, order, or decree of a district court exercising jurisdiction under 28 U.S.C. § 1334 is taken as any other civil appeal under these rules.

(b) Appeal From a Judgment, Order, or Decree of a District Court or Bankruptcy Appellate Panel Exercising Appellate Jurisdiction in a Bankruptcy Case.

(1) Applicability of Other Rules. These rules apply to an appeal to a court of appeals under 28 U.S.C. § 158(d)(1) from a final judgment, order, or decree of a district court or bankruptcy appellate panel exercising appellate jurisdiction under 28 U.S.C. § 158(a) or (b). ~~But there are 3 exceptions~~, but with these qualifications:

(A) Rules 4(a)(4), 4(b), 9, 10, 11, ~~12(b)~~ 12(c), 13-20, 22-23, and 24(b) do not apply;

(B) the reference in Rule 3(c) to "Form 1 in the Appendix of Forms" must be read as a reference to Form 5; ~~and~~

(C) when the appeal is from a bankruptcy appellate panel, ~~the term~~ "district court," as used in any applicable rule, means "appellate panel."; and

(D) in Rule 12.1, "district court" includes a bankruptcy court or bankruptcy appellate panel.

(2) Additional Rules. In addition to the rules made applicable by Rule 6(b)(1), the following rules apply:

(A) Motion for rRehearing.

(i) If a timely motion for rehearing under Bankruptcy Rule ~~8015~~ 8022 is filed, the time to appeal for all parties runs from the entry of the order

disposing of the motion. A notice of appeal filed after the district court or bankruptcy appellate panel announces or enters a judgment, order, or decree – but before disposition of the motion for rehearing – becomes effective when the order disposing of the motion for rehearing is entered.

(ii) ~~Appellate review of~~ If a party intends to challenge the order disposing of the motion – or the alteration or amendment of a judgment, order, or decree upon the motion – then ~~requires~~ the party, in compliance with Rules 3(c) and 6(b)(1)(B), ~~to amend a previously filed notice of appeal. A party intending to challenge an altered or amended judgment, order, or decree~~ must file a notice of appeal or amended notice of appeal. The notice or amended notice must be filed within the time prescribed by Rule 4 – excluding Rules 4(a)(4) and 4(b) – measured from the entry of the order disposing of the motion.

(iii) No additional fee is required to file an amended notice.

(B) The ~~r~~Record on ~~a~~Appeal.

(i) Within 14 days after filing the notice of appeal, the appellant must file with the clerk possessing the record assembled in accordance with Bankruptcy Rule ~~8006~~ 8009 – and serve on the appellee – a statement of the issues to be presented on appeal and a designation of the record to be certified and ~~sent~~ made available to the circuit clerk.

(ii) An appellee who believes that other parts of the record are necessary must, within 14 days after being served with the appellant's

designation, file with the clerk and serve on the appellant a designation of additional parts to be included.

(iii) The record on appeal consists of:

• the redesignated record as provided above;

• the proceedings in the district court or bankruptcy appellate panel; and

• a certified copy of the docket entries prepared by the clerk under Rule 3(d).

(C) ~~Forwarding~~ Making the r~~R~~Record Available.

(i) When the record is complete, the district clerk or bankruptcy-appellate-panel clerk must number the documents constituting the record and ~~send~~ promptly make it available ~~them promptly to the circuit clerk together with a list of the documents correspondingly numbered and reasonably identified~~ to the circuit clerk. ~~Unless directed to do so by a party or the circuit clerk~~ If the clerk makes the record available in paper form, the clerk will not send ~~to the court of appeals~~ documents of unusual bulk or weight, physical exhibits other than documents, or other parts of the record designated for omission by local rule of the court of appeals, unless directed to do so by a party or the circuit clerk. If ~~the exhibits are~~ unusually bulky or heavy exhibits are to be made available in paper form, a party must arrange with the clerks in advance for their transportation and receipt.

(ii) All parties must do whatever else is necessary to enable the clerk

to assemble the record and ~~forward the record~~ make it available. When the record is made available in paper form, t~~T~~he court of appeals may provide by rule or order that a certified copy of the docket entries be ~~sent~~ made available in place of the redesignated record~~, b~~. But any party may request at any time during the pendency of the appeal that the redesignated record be ~~sent~~ made available.

(D) Filing the r~~R~~ecord. ~~Upon receiving the record – or a certified copy of the docket entries sent in place of the redesignated record – the circuit clerk must file it and immediately notify all parties of the filing date~~ When the district clerk or bankruptcy-appellate-panel clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(c) Direct Review by Permission Under 28 U.S.C. § 158(d)(2).

(1) Applicability of Other Rules. These rules apply to a direct appeal by permission under 28 U.S.C. § 158(d)(2), but with these qualifications:

(A) Rules 3-4, 5(a)(3), 6(a), 6(b), 8(a), 8(c), 9-12, 13-20, 22-23, and 24(b) do not apply;

(B) as used in any applicable rule, "district court" or "district clerk" includes – to the extent appropriate – a bankruptcy court or bankruptcy appellate panel or its clerk; and

(C) the reference to "Rules 11 and 12(c)" in Rule 5(d)(3) must be read as a reference to Rules 6(c)(2)(B) and (C).

(2) Additional Rules. In addition, the following rules apply:

(A) **The Record on Appeal.** Bankruptcy Rule 8009 governs the record on appeal.

(B) **Making the Record Available.** Bankruptcy Rule 8010 governs completing the record and making it available.

(C) **Stays Pending Appeal.** Bankruptcy Rule 8007 applies to stays pending appeal.

(D) **Duties of the Circuit Clerk.** When the bankruptcy clerk has made the record available, the circuit clerk must note that fact on the docket. The date noted on the docket serves as the filing date of the record. The circuit clerk must immediately notify all parties of the filing date.

(E) **Filing a Representation Statement**. Unless the court of appeals designates another time, within 14 days after entry of the order granting permission to appeal, the attorney who sought permission must file a statement with the circuit clerk naming the parties that the attorney represents on appeal.

Committee Note

Subdivision (b)(1). Subdivision (b)(1) is updated to reflect the renumbering of 28 U.S.C. § 158(d) as 28 U.S.C. § 158(d)(1). Subdivision (b)(1)(A) is updated to reflect the renumbering of Rule 12(b) as Rule 12(c). New subdivision (b)(1)(D) provides that references in Rule 12.1 to the "district court" include – as appropriate – a bankruptcy court or bankruptcy appellate panel.

Subdivision (b)(2). Subdivision (b)(2)(A)(i) is amended to refer to Bankruptcy Rule 8022 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Subdivision (b)(2)(A)(ii) is amended to address problems that stemmed from the adoption — during the 1998 restyling project — of language referring to challenges to "an altered or amended judgment, order, or decree." Current Rule 6(b)(2)(A)(ii) states that "[a] party intending to challenge

an altered or amended judgment, order, or decree must file a notice of appeal or amended notice of appeal …." Before the 1998 restyling, the comparable subdivision of Rule 6 instead read "[a] party intending to challenge an alteration or amendment of the judgment, order, or decree shall file an amended notice of appeal …." The 1998 restyling made a similar change in Rule 4(a)(4). One court has explained that the 1998 amendment introduced ambiguity into that Rule: "The new formulation could be read to expand the obligation to file an amended notice to circumstances where the ruling on the post-trial motion alters the prior judgment in an insignificant manner or in a manner favorable to the appellant, even though the appeal is not directed against the alteration of the judgment." *Sorensen v. City of New York*, 413 F.3d 292, 296 n.2 (2d Cir. 2005). Though the *Sorensen* court was writing of Rule 4(a)(4), a similar concern arises with respect to Rule 6(b)(2)(A)(ii). Rule 4(a)(4) was amended in 2009 to remove the ambiguity identified by the *Sorensen* court. The current amendment follows suit by removing Rule 6(b)(2)(A)(ii)'s reference to challenging "an altered or amended judgment, order, or decree," and referring instead to challenging "the alteration or amendment of a judgment, order, or decree."

Subdivision (b)(2)(B)(i) is amended to refer to Rule 8009 (in accordance with the renumbering of Part VIII of the Bankruptcy Rules).

Due to the shift to electronic filing, in some appeals the record will no longer be transmitted in paper form. Subdivisions (b)(2)(B)(i), (b)(2)(C), and (b)(2)(D) are amended to reflect the fact that the record sometimes will be made available electronically.

Subdivision (b)(2)(D) sets the duties of the circuit clerk when the record has been made available. Because the record may be made available in electronic form, subdivision (b)(2)(D) does not direct the clerk to "file" the record. Rather, it directs the clerk to note on the docket the date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c). New subdivision (c) is added to govern permissive direct appeals from the bankruptcy court to the court of appeals under 28 U.S.C. § 158(d)(2). For further provisions governing such direct appeals, see Bankruptcy Rule 8006.

Subdivision (c)(1). Subdivision (c)(1) provides for the general applicability of the Federal Rules of Appellate Procedure, with specified exceptions, to appeals covered by subdivision (c) and makes necessary word adjustments.

Subdivision (c)(2). Subdivision (c)(2)(A) provides that the record on appeal is governed by Bankruptcy Rule 8009. Subdivision (c)(2)(B) provides that the record shall be made available as stated in Bankruptcy Rule 8010. Subdivision (c)(2)(C) provides that Bankruptcy Rule 8007 applies to stays pending appeal; in addition, Appellate Rule 8(b) applies to sureties on bonds provided in connection with stays pending appeal.

Subdivision (c)(2)(D), like subdivision (b)(2)(D), directs the clerk to note on the docket the

date when the record was made available and to notify the parties of that date, which shall serve as the date of filing the record for purposes of provisions in these Rules that calculate time from that filing date.

Subdivision (c)(2)(E) is modeled on Rule 12(b), with appropriate adjustments.

B. Other references to "making" an item "available"

The following list points out other places where the Rules employ the idea of "making" something "available":[2]

- Bankruptcy Rule 4002(b)(2): "Every individual debtor shall bring to the meeting of creditors under § 341, and make available to the trustee, the following documents or copies of them, or provide a written statement that the documentation does not exist or is not in the debtor's possession:"

- Criminal Rule 5.1(g): "The preliminary hearing must be recorded by a court reporter or by a suitable recording device. A recording of the proceeding may be made available to any party upon request. A copy of the recording and a transcript may be provided to any party upon request and upon any payment required by applicable Judicial Conference regulations."

- Criminal Rule 16(a)(1)(B): "Upon a defendant's request, the government must disclose to the defendant, and make available for inspection, copying, or photographing, all of the following:"

- Criminal Rule 32(i)(4)(C): "At sentencing, the court: … (C) must append a copy of the court's determinations under this rule to any copy of the presentence report made available to the Bureau of Prisons."

- Criminal Rule 57(c): "Copies of local rules and their amendments, when promulgated, must be furnished to the judicial council and the Administrative Office of the United States Courts and must be made available to the public."

    - See also Civil Rule 83(a)(1): "Copies of [local] rules and amendments must, on their adoption, be furnished to the judicial council and the Administrative Office of the United States Courts and be made available to the public."

- Criminal Rule 58(g)(2)(C): "The record consists of the original papers and exhibits in the case; any transcript, tape, or other recording of the proceedings; and a certified copy of the

---

[2] This list was compiled by running the following search in the USC database on Westlaw: pr,ci,ti(rule! & (appellate bankruptcy criminal evidence civil)) & (((make made) /6 available) "make available" "made available").

docket entries. For purposes of the appeal, a copy of the record of the proceedings must be made available to a defendant who establishes by affidavit an inability to pay or give security for the record."

- Civil Rule 26(a)(1)(A)(iii): "Except as exempted by Rule 26(a)(1)(B) or as otherwise stipulated or ordered by the court, a party must, without awaiting a discovery request, provide to the other parties: … (iii) a computation of each category of damages claimed by the disclosing party--who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered;"

- Civil Rule 36(a)(2): "Each matter must be separately stated. A request to admit the genuineness of a document must be accompanied by a copy of the document unless it is, or has been, otherwise furnished or made available for inspection and copying."

- Evidence Rule 902(11): "Before the trial or hearing, the proponent must give an adverse party reasonable written notice of the intent to offer the record--and must make the record and certification available for inspection--so that the party has a fair opportunity to challenge them."

- Evidence Rule 1006: "The proponent must make the originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court."

This survey of the existing uses of "make available" shows that the term is currently employed to denote:

- Debtors making documents available to a trustee
- A recording being made available to a party
- Items being made available for inspection, copying, and the like
- A presentence report being made available to the Bureau of Prisons
- Circuits making local rules available to the public
- A copy of the record being made available to an indigent defendant
- A litigant making a record available to an opponent before offering it into evidence

C. Other references to the treatment of the record on appeal

A search in the national Rules for discussions of the transmission of the record on appeal from a lower court to an appellate court reveals that this topic is currently treated in the Appellate and Bankruptcy Rules but not in the other sets of Rules. Here is a summary of the relevant Appellate and Bankruptcy Rules (and proposed Bankruptcy Rules):

- The current Appellate Rules

- The current Appellate Rules tend to use "forward" to denote the treatment of the record, though they occasionally use other terms instead or in addition.

- See Appellate Rule 5(d)(3) (providing, for appeals by permission, that "The record must be forwarded and filed in accordance with Rules 11 and 12(c)"); Appellate Rule 6(b)(2)(B); Appellate Rule 11 (treating "Forwarding the Record").[3]

- See also Appellate Rule 12(c) (referring to the circuit clerk "receiving" the record); Appellate Rule 13(d) (addressing Tax Court appeals and using both "forward[]" and "sen[d]"); Appellate Rule 16(b) (referring to the "fil[ing]" of a supplemental record on review of an agency determination); Appellate Rule 17 (in the context of review of agency determinations, using both "file" and "sen[d]"); Appellate Rule 39(e)(1) (discussing costs of "transmission of the record"); Appellate Rule 45(d) (discussing the "return[]" of "original papers constituting the record ... to the court or agency from which they were received").

- The current Bankruptcy Rules

  - The current Part VIII rules use "transmit" and its cognates to denote the treatment of the record. See Bankruptcy Rule 8006 ("All parties shall take any other action necessary to enable the clerk to assemble and transmit the record."); Bankruptcy Rule 8007 (discussing, inter alia, "Completion and Transmission of the Record");[4] Bankruptcy Rule 8014 (referring to "[c]osts incurred ... in the preparation and transmission of the record"); Bankruptcy Rule 8016(b) ("Original papers transmitted as the record on appeal shall be returned to the clerk on disposition of the appeal.").

  - Bankruptcy Rule 9027(h) refers to "deliver[ing]" or "suppl[ying]" court records in a removed case.

- The proposed Bankruptcy Part VIII Rules

  - The proposed Bankruptcy Part VIII rules continue to use the term "transmit," and operate on a presumption that the transmission will ordinarily be in electronic rather than paper form.

There are two questions that warrant particular attention in this context. First, will proposed

---

[3] Appellate Rule 11 also refers (variously) to the district clerk "retain[ing]" the record and to the district clerk "send[ing]" the record to the circuit clerk

[4] Rule 8007(b) also refers to the possibility of "additional copies of the record be[ing] furnished").

Appellate Rule 6's discussion of "making the record available" to the court of appeals fit well with the terms used elsewhere in the Appellate Rules? And second, with that usage fit well with the treatment of the record in the proposed Part VIII Rules? The Appellate Rules Committee believes that the answer to these two questions is yes, but it also is very interested in obtaining the views of this Subcommittee and of the Bankruptcy Rules Committee.

The Appellate Rules Committee noted that proposed Appellate Rule 6's references to "making the record available" would diverge from references, in other Appellate Rules, to "forwarding" the record. That divergence is not surprising given the idiosyncracies of appellate practice in bankruptcy cases. Rule 6(b) already makes special provision for direct appeals from a district court or BAP in a bankruptcy case; in that context, the record on appeal to the district court or BAP forms the basis for a redesignated record for purposes of the appeal to the court of appeals. Practitioners are unlikely to expect perfect parallelism between the terms used in Appellate Rule 6 and the terms used elsewhere in the Appellate Rules.

Perhaps more important, in practice, will be the question whether the procedures described in proposed Appellate Rule 6(c) – governing permissive direct appeals in bankruptcy cases – will dovetail with the relevant provisions in the proposed Part VIII Rules. Because the record in a bankruptcy case differs from trial-court records in other types of cases, it is necessary to treat specially the compilation of the record on appeal. Moreover, because – in a direct appeal – there will not have been a prior appeal, it is not possible to employ the redesignation approach currently used in Appellate Rule 6(b). Instead, the Appellate Rules Committee decided to incorporate by reference the Part VIII provisions that govern the treatment of the record on appeal. Thus, for example, proposed Appellate Rule 6(c)(2)(B) provides that "Bankruptcy Rule 8010 governs completing the record and making it available." Bankruptcy Rule 8010, in turn, refers to the "transmission" of the record. Although these terms are not identical, the Appellate Rules Committee believes that they are compatible. That seemed particularly true given that – in the draft of the Part VIII Rules that the Appellate Rules Committee had before it – the proposed Part VIII Rules defined "transmission" to mean electronic sending unless a pro se litigant is involved or "or the governing rules of the court expressly permit or require mailing or other means of delivery." Such a provision, the Committee believes, leaves room for a court of appeals to adopt a local rule directing a particular manner for making the record available to the court of appeals. Our upcoming conference call will provide an opportunity to seek input on this question from the Bankruptcy Rules Committee's representatives and other Subcommittee members.

III. Conclusion

To summarize, we are hoping that the Subcommittee's May 15 conference call will provide an opportunity for us to learn about topics that you believe the Subcommittee could usefully address. And we hope to discuss with you the pending Appellate Rules Committee proposal that is sketched in Part II of this memo. Thank you in advance for your participation.

Encls.