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Double Jeopardy Violations as “Plain Error” Under Federal Rule of Criminal Procedure 52(b)

Gabriel J. Chin*

I. INTRODUCTION

In United States v. Bascaro,1 defendant Antonio Bascaro, convicted of a drug conspiracy, thought that he might have pulled a rabbit out of his hat in his appeal to the Eleventh Circuit. He argued that his continuing criminal enterprise and RICO convictions were barred by the Double Jeopardy Clause2 because they were based on conduct for which he had already been tried and convicted in another proceeding.3 Although double jeopardy had not been raised in the district court, Bascaro might reasonably have hoped that the Eleventh Circuit would consider the issue under Federal Rule of Criminal Procedure 52(b). Rule 52(b) permits review of “plain errors or defects affecting substantial rights” for the first time on appeal.4 While the court of appeals acknowledged that the issue might be meritorious,5 it declined to apply Rule 52(b) analysis

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2. “[N]or shall any person be subject for the same offence to be twice put in jeopardy of life or limb.” U.S. CONST. amend. V.

3. Bascaro, 742 F.2d at 1364-65.

4. FED. R. CRIM. P. 52(b).

5. Bascaro, 742 F.2d at 1365 (“If true, this state of affairs would raise a question
and, thus, did not reverse the conviction as plain error. Instead, the court relied on Grogan v. United States, which held that a double jeopardy claim was "waived" by the failure to raise it at trial.

While Grogan held that the double jeopardy defense was waived by failing to raise it at trial, in another apparently similar case, McNeal v. Hollowell, the same court granted a writ of habeas corpus based on a double jeopardy violation, despite the dissenting judge's argument that the issue had not been raised in the state trial court. Even though McNeal was decided several years after Grogan, the court in Bascaro followed Grogan without distinguishing McNeal or explaining why it should not be followed.

Bascaro is illustrative of the apparently insurmountable body of adverse authority facing a defendant who wishes to raise a double jeopardy claim for the first time on appeal. Recently, in Peretz v. United States, the Supreme Court itself, citing Bascaro, suggested that double jeopardy was barred on appeal if the defendant failed to raise the issue at trial. Although the Supreme Court's opinion on the issue was dicta, the rule that "[t]he 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" has been followed by eleven circuits in scores of decisions. There are only a handful of decisions opposing this mass of authority applying what this

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6. Id.
7. 394 F.2d 287 (5th Cir. 1967), cert. denied, 393 U.S. 830 (1968).
8. Bascaro, 742 F.2d at 1365 (citing Grogan v. United States, 394 F.2d 287, 289 (5th Cir. 1967), cert. denied, 393 U.S. 830 (1968)). The Eleventh Circuit adopted the decisions of the former Fifth Circuit as binding precedent in Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc).
9. 481 F.2d 1145 (5th Cir. 1973).
10. Id. at 1152.
11. Id. at 1153 (Coleman, J., dissenting).
13. Id. at 2669. As an example of the kinds of rights that could be forfeited if not timely claimed, the Court cited Bascaro, and described its holding in a parenthetical as "absence of objection is waiver of double jeopardy defense." Id.
14. The holding of the case was that a jury could be selected by a magistrate in the absence of an objection by the defendant. Id. at 2668-69.
article calls the “rule of waiver.” They are few enough in number that they may fairly be described as “derelict[s] on the waters of the law;” although in the law books, like McNeal, they are routinely ignored.

The rule of waiver is a substantial disappointment to defendants who have been subjected to double jeopardy. The remedy for a timely, meritorious claim of double jeopardy is dismissal of barred charges. Hence, it is extremely consequential if it is unavailable to a defendant because of a procedural default. In addition, a double jeopardy claim is ordinarily apparent from the face of the record, cannot be cured, and represents an absolute defense, obviating the need for another trial. Thus, a defendant could argue with some cogency that the rule of waiver is unfair because, under the circumstances, the reasons for requiring contemporaneous objection apply with significantly less force.

This article examines the propriety of the federal courts’ application of the rule of waiver in light of the legal structure currently in place for review of unobjected-to error. The rule of waiver is doctrinally insupportable because the courts’ refusal to consider and evaluate the issue is contrary to the provisions of the Federal Rules of Criminal Procedure governing unobjected-to error. No court has articulated a sound reason to depart from the rules governing analysis of unobjected-to error. Therefore, courts should review double jeopardy claims under the “plain error” doctrine of Federal Rule of Criminal Procedure 52(b).

Part II introduces the basic substantive protections of the Double Jeopardy Clause. Part III discusses the structure established by Federal Rule of Criminal Procedure 52(b) for review on appeal of errors not objected to at trial. Part III argues further that under the standards applicable to plain error review, a meritorious claim of double jeopardy ordinarily constitutes plain error.

Part IV examines the reasons why a court might decline to apply the plain error rule to double jeopardy violations and concludes that there are no valid justifications warranting the exclusion of double jeopardy from the system established by the Federal Rules of Criminal Procedure. Many courts have held that double jeopardy claims were waived by a failure to follow Federal Rule of Criminal Procedure 12,
which requires that certain motions be made before trial on pain of waiver. Part IV explains why Rule 12 does not apply to double jeopardy claims, and thus is not a basis for a court to refuse to review a claim.

Part IV also explains that although many courts state, usually without elaboration, that failure to raise a claim in the trial court constitutes a “waiver,” these courts do not apply the rigorous standards applicable to waivers of constitutional rights which are designed to ensure a fair trial. Because there is no valid reason not to apply the plain error doctrine, Rule 52(b) is the proper governing rule of analysis for unobjected-to double jeopardy claims on appeal.

Further, Part IV attempts to explain why courts refuse to apply Rule 52(b) to double jeopardy claims. Two reasons appear to account for the courts’ treatment of double jeopardy claims. First, the courts often seem unaware of their own precedents and those of the Supreme Court. Although courts of appeals customarily consider themselves bound by decisions of prior panels on the same legal issue, in this context many panels have failed to follow, or even acknowledge, prior circuit authority. Moreover, while it is unusual for a panel to reach a decision contrary to an applicable Supreme Court decision without some attempt at an explanation, numerous appellate courts have held that a double jeopardy claim is waived if not raised, without acknowledging Supreme Court authority to the contrary. In fact, the Court has expressly recognized that double jeopardy is a constitutional claim that can only be waived knowingly, voluntarily, and intelligently.

Second, most of these lower court opinions can be explained by the rule that a court will address a double jeopardy claim raised for the first time on appeal when it is meritorious, regardless of any waiver principle. When the claim is not meritorious, however, the court will usually find that the claim is waived because it was not raised below, and then proceed to analyze the claim on the merits, explaining why it does not succeed. The problem with this approach is that some courts, as illustrated in Bascaro, apply the rule of waiver literally and refuse to consider meritorious claims. In addition, courts may review such claims less carefully than if the point had not been deemed waived.

This article argues that, contrary to near-unanimous belief, double jeopardy claims are reviewable as plain error even when raised for the

22. See infra notes 179-84, 201 and accompanying text.
23. See infra notes 184-247 and accompanying text.
24. See infra notes 248-89 and accompanying text.
25. See infra notes 253-79 and accompanying text.
first time on appeal, and, when meritorious, such claims are, indeed, plain error.

II. A BRIEF OVERVIEW OF THE SUBSTANTIVE LAW OF DOUBLE JEOPARDY

The Fifth Amendment to the United States Constitution provides in pertinent part: "[N]or shall any person be subject for the same offence to be twice placed in jeopardy of life or limb." The rationale for the prohibition against more than one prosecution for the same offense was set forth by the Supreme Court in Green v. United States:

The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.

The Double Jeopardy Clause is also designed to deny the prosecution an unfair tactical advantage by having a "practice" trial at which it can learn the defense's case. "[C]entral to the objective of the prohibition against successive trials is the barrier to affording the prosecution another opportunity to supply evidence which it failed to muster during the first proceeding." Implicit in this is the thought that if the Government may reprosecute, it gains an advantage from what it learns at the first trial about the strengths of the defense case and the weaknesses of


27. 355 U.S. 184 (1957).

28. Id. at 187-88.

its own." Once a trial begins, the clause also protects a defendant's right to have her trial completed by the tribunal that she had a role in selecting.\(^3\)

Because the Double Jeopardy Clause is "fundamental to the American scheme of justice," it has been applied to the states through the Due Process Clause of the Fourteenth Amendment.\(^3\) However, the states and the United States are considered "separate sovereigns" and, thus, the Double Jeopardy Clause does not prohibit prosecution by one sovereign following prosecution by the other.\(^3\) Nevertheless, a state and one of its political subdivisions are considered to be the same sovereign for double jeopardy purposes.\(^3\)

A. The Prohibition Against Successive Prosecutions for the Same Offense

The Double Jeopardy Clause prohibits the government from prosecuting a defendant in a second proceeding, unless the defendant himself upsets the finality of the first proceeding.\(^3\) Thus, a person may not be


\(^{34}\) Waller v. Florida, 397 U.S. 387, 392, 394-95 (1970) (holding that the defendant could not be tried by both the state of Florida and a municipality for the same offense).

\(^{35}\) Jeopardy attaches in a bench trial when the court begins to hear evidence, Serfass v. United States, 420 U.S. 377, 388 (1975), and in a jury trial, jeopardy attaches when the jury is sworn. See, e.g., Crist v. Bretz, 437 U.S. 28, 38 (1978); Downum v. United States, 372 U.S. 734 (1963). Double jeopardy is not limited to second trials; it includes any further fact-finding proceedings intended to determine elements of the offense. Smalis v. Pennsylvania, 476 U.S. 140, 145-46 (1986). Jeopardy is generally limited to criminal proceedings. See, e.g., Helvering v. Mitchell, 303 U.S. 391, 398-99 (1938). However, a civil penalty may give rise to jeopardy if it is so disproportionate that it "cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes." United States v. Halper, 490 U.S. 435, 448 (1989). A juvenile court prosecution, although nominally civil, may place a defendant in jeopardy because the consequences are similar or identical to those of a criminal prosecution. See, e.g., Breed v. Jones, 421 U.S. 519, 529-31 (1975).
prosecuted again following an acquittal or a conviction. Reproduction is prohibited following a mistrial unless the mistrial was declared for "manifest necessity," or with the consent of, or at the request of, the defendant. Likewise, a defendant may be retried if he successfully appeals or otherwise overturns the conviction unless the conviction is reversed for evidentiary insufficiency.

The Double Jeopardy Clause may also bar successive prosecution of a defendant even when the second proceeding does not charge the defendant with precisely the same crime as the first. For example, in Brown v. Ohio, the Court held that the defendant could not be prosecuted for the greater offense of auto theft after being convicted of the lesser-included offense of joyriding involving the same facts. Similarly, the

36. Sanabria v. United States, 437 U.S. 54, 64 (1978); United States v. Martin Linen Supply Co., 430 U.S. 564, 571 (1977); United States v. Ball, 163 U.S. 662, 669-71 (1896). An acquittal is "a resolution, correct or not, of some or all of the factual elements of the offense charged" in favor of the defendant. Martin Linen, 430 U.S. at 571. If a defendant is convicted of a lesser offense than the highest offense charged, the defendant is impliedly acquitted of the higher charges. Green v. United States, 355 U.S. 184, 190-91 (1957). If no further factual proceedings are necessary, a trial judge's finding of insufficiency following a jury's guilty verdict may be reviewed. United States v. Wilson, 420 U.S. 332, 352-53 (1975).


44. Id.

45. Id. at 167-68; see also Morris v. Mathews, 475 U.S. 237 (1986) (agreeing with the lower court that trial of defendant for aggravated murder where aggravating factor was a robbery for which defendant had already been convicted violated the Dou-
clause prohibits a subsequent prosecution for a lesser-included offense once there is a conviction on the greater offense.\textsuperscript{46}

In determining whether two charges constitute the same offense under the Double Jeopardy Clause, a court applies the test set forth in \textit{Blockburger v. United States},\textsuperscript{47} and examines whether “each provision requires proof of a fact which the other does not.”\textsuperscript{48} If each charge requires proof of an element that the other does not, the offenses are not the same and, thus, separate trials or cumulative punishments are not barred by the Double Jeopardy Clause.\textsuperscript{49}

\section*{B. The Prohibition Against Multiple Punishments for the Same Offense}

The Double Jeopardy Clause also prohibits multiple punishments for the same offense.\textsuperscript{50} To the extent that the multiple punishments are imposed in multiple proceedings, the prohibition on multiple punishments overlaps with the prohibition on multiple trials. The prohibition also applies when the punishments are imposed in a single proceeding.\textsuperscript{51} Mul-

\begin{itemize}
\item \textsuperscript{46} Payne v. Virginia, 468 U.S. 1062, 1062 (1984) (per curiam) (holding that conviction of felony murder precluded later prosecution for underlying felony of robbery);
\item \textsuperscript{47} Harris v. Oklahoma, 433 U.S. 682, 682-83 (1977) (per curiam) (holding that conviction of felony murder precluded later prosecution for robbery with firearms);
\item \textsuperscript{48} ex parte Nielsen, 131 U.S. 176, 190 (1889) (holding that a conviction for unlawful cohabitation precluded second prosecution for adultery).
\item \textsuperscript{49} 284 U.S. 299 (1932).
\item \textsuperscript{50} Id. at 304 (citing Gavieres v. United States, 220 U.S. 338, 342 (1911)).
\item \textsuperscript{51} Id. (citing Gavieres, 220 U.S. at 342 (quoting Morey v. Commonwealth, 108 Mass. 433, 443 (1871)) (“A single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other.”). For a short period of time, it was necessary to meet an additional test called the \textit{Grady} “same conduct” test. Grady v. Corbin, 495 U.S. 508, 521 (1990), overruled by United States v. Dixon, 113 S. Ct. 2849 (1993).
\item \textsuperscript{52} In Grady, the Supreme Court held that “the Double Jeopardy Clause bars any subsequent prosecution in which the government, to establish an essential element of an offense charged in that prosecution, will prove conduct that constitutes an offense for which the defendant has already been prosecuted.” Id. In particular, the court held that a prior prosecution for reckless driving prohibited a prosecution for manslaughter where the reckless driving would be used to prove the homicide. Under the traditional \textit{Blockburger} test, the offenses would not have constituted a “single offense” because each required proof of an element that the other did not. Id. at 510, 515-16. Subsequently, \textit{Grady} was overruled by United States v. Dixon, 113 S. Ct. 2849 (1993).
\item \textsuperscript{54} See, e.g., Brown v. Ohio, 432 U.S. 161, 168-69 (1977) (holding that the Double
\end{itemize}
Multiple punishments for the same offense can result from a “multiplicitous” indictment. Multiplicity is defined as “the charging of a single offense in more than one count.”

Multiplicity may occur in one of two forms: legal or factual. Under Blockburger, when an act violates two or more federal statutes, courts presume that Congress did not intend separate punishments and convictions, unless each statute requires proof of a fact that the other does not. Thus, legal multiplicity occurs when a defendant is convicted under two separate statutes for conduct that the legislature did not intend to result in separate convictions. Factual multiplicity, on the other hand, arises when a defendant is convicted of multiple violations of a statute based on facts constituting a single violation. This problem fre-

52. See, e.g., United States v. Hord, 6 F.3d 276, 280 (5th Cir. 1993) (citing United States v. Lemons, 941 F.2d 309, 317 (5th Cir. 1991) (per curiam)); United States v. Reed, 639 F.2d 896, 904 (2d Cir. 1981) (finding that the danger of multiplicitous indictment is that “it may lead to multiple sentences for the same offense”).

53. United States v. De La Torre, 634 F.2d 792, 794 (5th Cir. 1981); accord United States v. Hairrell, 521 F.2d 1264, 1266 (6th Cir.) (holding that the charges of possession of counterfeit money and transfer of same are not multiplicitous, but separate offenses), cert. denied, 423 U.S. 1035 (1975); see also United States v. Kazenbach, 824 F.2d 649, 651-52 (8th Cir. 1987) (holding that indictment not multiplicitous where defendant convicted of three assaults, each of which was based on a separate act despite arising out of a single altercation).


55. See, e.g., Ball v. United States, 470 U.S. 856, 862 (1985) (finding that absent specific congressional intent, felon could not be convicted of both receiving a firearm and possessing a firearm under two separate firearm statutes). This form of multiplicity could arise when the charged count is a lesser-included offense of another crime.

56. This problem is often referred to as determining the appropriate “unit of prosecution.” United States v. Song, 934 F.2d 105, 108 (7th Cir. 1991) (holding that indictment charging violations of 18 U.S.C. § 2320, which prohibits trafficking in counterfeit goods, was not multiplicitous because “unit of prosecution” was trafficking in each counterfeit trademark, not trafficking in counterfeit goods in general). For instance,
quently arises when the government attempts to divide a single conspiracy into several smaller conspiracies in order to increase the number of counts in the prosecution.\textsuperscript{57}

Multiple punishment for the same offense can also occur when a person is convicted of an offense, gets the conviction set aside, and is later reconvicted and resentenced. The defendant must then be given credit for time served under the original judgment; otherwise, he could serve more time than the sentence imposes and, possibly more time than is authorized by statute.\textsuperscript{58}

\textbf{C. Other Protections of the Double Jeopardy Clause}

The Double Jeopardy Clause provides some collateral estoppel protection. In \textit{Ashe v. Swenson},\textsuperscript{60} the Court held that the doctrine of collateral estoppel, familiar from the civil law, had some application in the criminal context: "[W]hen an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit."\textsuperscript{59} However, if it is unclear whether a particular issue was decided in defendant's favor, collateral estoppel will not apply.\textsuperscript{61}

\begin{thebibliography}{99}
\item[57.] Braverman v. United States, 317 U.S. 49, 53-54 (1942) (holding that a single conspiracy to commit several substantive offenses should result in only one conviction); United States v. Gomez-Pabon, 911 F.2d 847, 860-61 (1st Cir. 1990) (finding that the lower court erred by imposing sentence under two counts for a single conspiracy), \textit{cert. denied}, 111 S. Ct. 801 (1991); United States v. Keinzle, 896 F.2d 326, 328 (8th Cir. 1990) (stating that the Double Jeopardy Clause "prohibits the subdivision of a single conspiracy into multiple violations of one conspiracy statute") (citing \textit{Braverman}); United States v. Cerro, 775 F.2d 908, 913 (7th Cir. 1985); United States v. Peacock, 761 F.2d 1313, 1319 (9th Cir.) (Kennedy, J.), \textit{cert. denied}, 474 U.S. 847 (1985).
\item[59.] 397 U.S. 436 (1970).
\item[60.] Id. at 443; \textit{see also Turner v. Arkansas}, 407 U.S. 366 (1972) (per curiam). Collateral estoppel does not run against a defendant in a subsequent criminal proceeding. Simpson v. Florida, 403 U.S. 384, 386 (1971) (per curiam).
\item[61.] Dowling v. United States, 493 U.S. 342, 348-49 (1990) (finding that collateral estoppel is not available where defendant failed to show that issue was actually de-
The Double Jeopardy Clause generally does not prohibit an increase in a sentence on appeal or retrial. However, a penalty phase determination in a capital case that the defendant should be sentenced to life imprisonment is binding upon reconviction.

III. "PLAIN ERROR": REVIEW IN THE COURTS OF APPEALS OF ERRORS RAISED FOR THE FIRST TIME ON APPEAL

It is an ancient rule that for an error to be cognizable on appeal in the federal courts, it must have been properly objected to at trial. The exception to this rule, which is just as old, is that an appellate court, in its discretion, may choose to review an error despite a failure to object below. In United States v. Atkinson, the Court stated the principle as follows: "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity, or public reputation of judicial proceedings.


64. See, e.g., Ross v. Reed, 14 U.S. (1 Wheat.) 482, 483 (1816).

65. In two early cases, Murray v. The Schooner Charming Betsy, 6 U.S. (2 Cranch) 64, 123 (1804) and Himley v. Rose, 9 U.S. (5 Cranch) 312, 315 (1809), the Court reviewed errors apparent in the record despite the absence of proper exceptions.


67. Id. at 160 (citing New York Cent. R.R. Co. v. Johnson, 279 U.S. 310, 318 (1929); Brasfield v. United States, 272 U.S. 448, 450 (1926)).
When the Federal Rules of Criminal Procedure were adopted in 1944, the common law structure was retained.\footnote{5} Rule 51 abolished the necessity of formal "exceptions" and stated that "it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action that party desires the court to take or that party's objection to the action of the court and the grounds therefor."\footnote{59} Thus, Rule 51 retained the requirement that parties affirmatively object to events they believe are error, and affirmatively request actions they wish the court to take.\footnote{70}

Rule 52 retained a means for review of serious errors even if the defendant failed to properly preserve them.\footnote{71} Rule 52 provides:

> Rule 52. Harmless Error And Plain Error.

- (a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

- (b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.\footnote{72}

Rule 52 is mandatory; absent some other binding rule, federal courts are not free to impose a different test.\footnote{73}

Therefore, defendants are required to make objections to defects and errors in the district court.\footnote{74} Where a defendant fails to make a timely objection, absent some valid excuse,\footnote{75} review will be limited to the rig-

\footnotesize{68. See \textit{Fed. R. Crim. P. 52(b)} advisory committee's note.}
\footnotesize{69. \textit{Fed. R. Crim. P. 51}.}
\footnotesize{70. See, \textit{e.g.}, United States v. Terry, 729 F.2d 1063, 1069 (6th Cir. 1984) ("A defendant is required to object to the action of the trial court in order to preserve an alleged error for appellate review.") (citing, \textit{inter alia}, Rule 51).}
\footnotesize{71. According to the advisory committee's note, Rule 52(b) "is a restatement of existing law." \textit{Fed. R. Crim. P. 52(b)} advisory committee's note (citing Wiborg v. United States, 163 U.S. 632 (1896); Hemphill v. United States, 112 F.2d 505 (9th Cir. 1940), rev'd on other grounds, 312 U.S. 657 (1941)).}
\footnotesize{72. \textit{Fed. R. Crim. P. 52}.}
\footnotesize{73. See \textit{Bank of Nova Scotia v. United States}, 487 U.S. 250, 255 (1988) (holding district court improperly dismissed indictment as a sanction for grand jury misconduct that constituted harmless error under Rule 52(a); "Rule 52 is, in every pertinent respect, as binding as any statute duly enacted by Congress and federal courts have no more discretion to disregard the Rule's mandate than they do to disregard constitutional or statutory provisions").}
\footnotesize{75. Federal Rules of Criminal Procedure 51 provides, in pertinent part, that "if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice that party." \textit{Fed. R. Crim. P. 51}. See also \textit{United States v. Flores-Payon}, 942 F.2d 556, 558 (9th Cir. 1991) (commenting that contemporaneous objection may be excused when there has been a change in the law since the trial);}
orous plain error standard of Rule 52(b), which requires that the error be "particularly egregious." In the recent case of *United States v. Olano,* the Supreme Court defined the trial events that may constitute plain error. First, the Court explained that there must be an error, which the Court defined as a "[d]eviation from a legal rule." Second, the error must be "plain," which the Court described as synonymous with "clear" or "obvious." Third, the Court stated that the error must "affect substantial rights," which "in most cases... means that the error must have been prejudicial: It must have affected the outcome of the District Court proceedings." The Court also recognized that "[t]here may be a special

Guam v. Yang, 850 F.2d 507, 512 n.8 (9th Cir. 1988) (en banc) (stating that contemporaneous objection may be excused when an objection would have been futile because of binding circuit authority); United States v. Valentine, 820 F.2d 565, 571 (2d Cir. 1987) (stating that contemporaneous objection may be excused when defense counsel had no way of knowing about the error at the time).

76. Each of the courts of appeals has stated some formulation of the concept that the failure to object will limit appellate review to plain error. See Fed. R. Crim. P. 52(b); United States v. McLamb, 965 F.2d 1284, 1288 (4th Cir. 1993) ("Because McLamb failed to raise these objections at trial, we review the jury instructions against the background of the entire record for plain error prejudicing substantial constitutional rights"); United States v. Neely, 980 F.2d 1074, 1082 (7th Cir. 1992) ("Because [defendant] did not argue at trial that his letter was not hearsay, we cannot consider that error absent plain error"); United States v. Hegwood, 977 F.2d 492, 495 (9th Cir. 1992) (In the absence of contemporaneous defense objection, a court will review claim only for plain error), cert. denied, 113 S. Ct. 2348 (1993); United States v. Greenwood, 974 F.2d 1449, 1462 (5th Cir. 1992) (same), cert. denied, 113 S. Ct. 2354 (1993); United States v. Harman, 974 F.2d 1262, 1267 (11th Cir. 1992) (same); United States v. Carter, 973 F.2d 1509, 1512 (10th Cir. 1992) (same), cert. denied, 113 U.S. 1289 (1993); United States v. Panet-Collazo, 960 F.2d 256, 260 (1st Cir.) (same), cert. denied, 113 S. Ct. 220 (1992), and cert. denied, 113 S. Ct. 2417 (1993); United States v. Leo, 941 F.2d 181, 193 (3d Cir. 1991) (same); United States v. Torres, 901 F.2d 205, 207 (2d Cir.) (same), cert. denied, 498 U.S. 906 (1990); United States v. Hitow, 889 F.2d 1573, 1580 (9th Cir. 1989) (same); United States v. Capozzi, 883 F.2d 608, 612 n.8 (8th Cir. 1989) (same), cert. denied, 495 U.S. 918 (1990); United States v. Perholtz, 842 F.2d 343, 362 (D.C. Cir.) (same), cert. denied, 488 U.S. 821 (1988).


78. Id. at 1770 (1993).

79. Id. at 1777.

80. Id.

81. Id. at 1777-78.
category of forfeited errors that can be corrected regardless of their effect on the outcome" but did not identify what kind of errors those might be.\textsuperscript{82}

If a defendant demonstrates each of these requirements, then the court of appeals has the discretion to reach an issue even though no objection was properly raised.\textsuperscript{83} The court may exercise its discretion based on whether and to what extent the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings,"\textsuperscript{84} independent of the defendant's actual innocence.

If Rule 52(b) analysis is applicable, then, even in the absence of an objection, meritorious claims of violation of the Double Jeopardy Clause would ordinarily be plain error subject to review by a court of appeal.\textsuperscript{85} A double jeopardy claim, to be reviewable on appeal, will be apparent from the face of the record; in other words, it will be plain, clear, and obvious.\textsuperscript{86} Furthermore, a valid double jeopardy claim will always have affected the outcome in the district court. As one court explained, "[i]t is difficult to imagine an error capable of more drastically affecting the outcome of judicial proceedings than permitting the Government to obtain a conviction for an offense whose prosecution was barred \textit{ab initio} by the constitutional guarantee of freedom from being 'twice in jeopardy of life or limb.'"\textsuperscript{87}

Several other factors applied by the courts of appeals in determining whether to exercise their discretion indicate that double jeopardy claims should be reviewed for plain error. As many circuits have noted, plain error is found more readily when the error is constitutional.\textsuperscript{88} A conviction

\begin{itemize}
\item \textsuperscript{82} Id. at 1778.
\item \textsuperscript{83} Id. at 1778-79.
\item \textsuperscript{84} Id. at 1779 (quoting United States v. Atkinson, 297 U.S. 157, 160 (1936)).
\item \textsuperscript{86} Id. ("[I]t is abundantly 'clear under current law,' that multiple prosecutions which run afool of the Double Jeopardy Clause are constitutionally forbidden.").
\item \textsuperscript{87} Id. at 413 (citing U.S. Const. amend. V); see also United States v. Podell, 869 F.2d 328, 331-32 (7th Cir. 1989) (finding prosecution of multiplicitous indictments plain error).
\end{itemize}
obtained in violation of the Double Jeopardy Clause results from the most significant kind of constitutional error. In one context, however, the Supreme Court has indicated that a violation of the Double Jeopardy Clause cannot be harmless error.\textsuperscript{60}

Perhaps constitutional errors are more readily corrected even if unobjected to at trial because the Constitution embodies particularly fundamental and important principles. One constitutional value that will be promoted by reviewing unpreserved double jeopardy claims is the accuracy of the fact-finding process. An appellate dismissal cannot recoup for the defendant the costs and anxiety caused by a prosecution that should not have occurred. Nevertheless, the Double Jeopardy Clause contemplates that such anxiety and expense, as well as the knowledge gained by the government during the first prosecution, will amplify "the possibility that even the innocent . . . may be found guilty."\textsuperscript{60} Therefore, courts should be willing to reverse convictions obtained in violation of double jeopardy because those convictions are more likely to pertain to defendants who were convicted as the result of a miscarriage of justice than to defendants who were convicted after a single trial. In holding that a double jeopardy violation constituted plain error, one court has stated that "[w]e cannot imagine a course more likely to 'seriously affect the fairness, integrity, or public reputation of judicial proceedings,' than

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\textsuperscript{60} States, 390 F.2d 101, 103 n.3 (5th Cir. 1968) (same); \textit{see also} United States v. Miller, 468 F.2d 1041, 1044-45 (4th Cir. 1972) (finding violation of constitutional right to jury trial constituted plain error), \textit{cert. denied}, 410 U.S. 935 (1973).

\textsuperscript{89} In Price v. Georgia, 398 U.S. 323 (1970), the defendant was acquitted of murder in his first trial but convicted of the lesser included offense of manslaughter. He won a new trial on appeal, and was retried for murder, and again convicted of manslaughter. The Supreme Court held that the implied acquittal of murder in the first trial precluded a second prosecution of murder, and therefore, he should not have been tried again for murder. \textit{Id.} at 329. Although he was convicted only of manslaughter, a count not barred by double jeopardy, the Court rejected the argument that the error could be harmless under the harmless error doctrine of \textit{Chapman v. California}. \textit{Id.} at 330 (citing \textit{Chapman v. California}, 386 U.S. 18 (1967)). The \textit{Price} Court held that most constitutional errors do not require reversal if the prosecution can show that they were harmless beyond a reasonable doubt. In doing so the Court reasoned: "[W]e cannot determine whether or not the murder charge against petitioner induced the jury to find him guilty of the less serious charge of voluntary manslaughter rather than to continue to debate his innocence." \textit{Id.} at 331.

\textsuperscript{90} Green v. United States, 355 U.S. 184, 188 (1957). One commentator states: "In many cases, an innocent person will not have the stamina or resources effectively to fight a second charge."\textit{Martin Friedland, Double Jeopardy} at 4 (1969).
for us to permit [defendant's] ... conviction, obtained in such flagrant violation of the Double Jeopardy Clause, to stand.\textsuperscript{91}

While the adverse effects of multiple prosecutions on the defendant may be impossible to prove in any given case, there will undoubtedly be at least one significant blunder by trial counsel in each case where a meritorious double jeopardy violation is presented initially on appeal: the failure to raise the double jeopardy claim itself. Neither a defendant nor his attorney would ever intentionally fail to raise a meritorious claim of double jeopardy as part of a defense strategy.\textsuperscript{92} As the Seventh Circuit explained in United States v. Anderson,\textsuperscript{93} "[a] double jeopardy defense is normally not the type of claim that would be foregone for some strategic purpose."\textsuperscript{94} According to the Second Circuit, "[a] defendant would have to be foolish not to raise a known claim of former jeopardy that would be sufficient to secure the dismissal of the entire proceeding."\textsuperscript{95}

No court has advanced a plausible strategic reason for a defendant to forego a meritorious double jeopardy claim. In Ochoa v. Estelle,\textsuperscript{96} the district court for the Western District of Texas found that a defendant might hold back a double jeopardy claim as what might be termed an "ace in the hole."\textsuperscript{97} The court refused to consider a double jeopardy claim raised after trial because to do so "would allow the defendant a free shot at an acquittal at the second trial but, failing that, a certain reversal of the conviction in a later collateral proceeding."\textsuperscript{98} Professor Saltzburg has offered a compelling explanation for why the costs and risks of going to trial could not constitute a "free shot" at an acquittal.\textsuperscript{99}


\textsuperscript{92} A defendant might forego a known, meritorious double jeopardy defense for reasons other than trying to win the case. In some rare circumstances, a defendant might be willing to brave a trial to get a jury's verdict of acquittal for some reason of principle. Alternatively, a defendant might be willing to plead guilty to a jeopardy-barred count as part of a plea bargain disposing of other charges.

\textsuperscript{93} 514 F.2d 583 (7th Cir. 1975).

\textsuperscript{94} Id. at 586; see also United States v. Broce, 781 F.2d 792, 802 (10th Cir. 1986) (Seymour, J., concurring in part and dissenting in part from en banc decision) (quoting Anderson, 514 F.2d at 586), rev'd on other grounds, 488 U.S. 563 (1989); United States v. Spears, 671 F.2d 991, 993 (7th Cir. 1982) (quoting Anderson, 514 F.2d at 586).

\textsuperscript{95} United States ex rel. DiGiangiemo v. Regan, 528 F.2d 1262, 1270 (2d Cir. 1975), cert. denied, 426 U.S. 950 (1976).


\textsuperscript{97} Id. at 1081-82.

\textsuperscript{98} Id. at 1082.

\textsuperscript{99} Stephen A. Saltzburg, Pleas Of Guilty And The Loss Of Constitutional Rights: The Current Price Of Pleading Guilty, 76 MICH. L. REV. 1265, 1295-96 (1978). Professor Saltzburg explained how the Ochoa decision was wrong in claiming that holding
In addition, the Supreme Court has rejected the notion that a defendant or attorney might waive a meritorious and absolute defense at trial in the hopes of achieving a victory on collateral review. A defendant would

back on a double jeopardy claim gave a defendant a "free shot" at an acquittal:

In many instances, a defendant who goes to trial hardly receives a free shot at acquittal. If the defendant pays for his counsel, the costs associated with a trial are likely to be greater than the costs of raising a double jeopardy claim by motion before trial. If the defendant cannot secure release pending his trial, the various discomforts of jail and the loss of wages and opportunities combine to make the choice to undertake a trial rather than to file a pre-trial motion more onerous than simply a "free shot." Also, the defendant who proceeds to trial risks a sentence that may be considerably higher than the one attaching to a guilty plea. Unless the defendant knows with certainty that any conviction will be overturned on appeal, he assumes the risk that an unsuccessful double jeopardy claim will leave a higher sentence in effect. Moreover he may begin to serve the sentence while making the collateral attack. This is no small price for going to trial.

Id.

In addition, the Ochoa decision implicitly relies on the notion that an acquittal is somehow more desirable than another form of disposition in favor of a defendant. Many defendants would likely find the difference immaterial; even for white-collar criminals, who presumably have a greater interest in middle-class respectability than rapists or drug dealers, there appears to be little difference between a technical victory and an acquittal. According to the New York Times, for example, Lt. Col. Oliver North claimed that he was "totally exonerated" after his conviction was reversed and the indictment dismissed. Oliver North Beats the Rap, N.Y. TIMES, Sept. 17, 1991, at A20; see also Judge In Iran-Contra Trial Drops Case Against North After Prosecutor Gives Up, N.Y. TIMES, Sept. 17, 1991, at A1 (North "declared that he felt 'fully, completely' vindicated."). North got the full public relations benefit of a disposition in his favor even though his victory was premised on errors having little to do with guilt or innocence. See United States v. North, 910 F.2d 843 (D.C. Cir.), granting rehearing in part and denying in part, 920 F.2d 940 (D.C. Cir. 1990) (en banc); see also DEL. CODE ANN. tit. 8, § 145(c) (1991 & Supp. 1992) ("To the extent that a director, officer, employee or agent of a corporation has been successful on the merits or otherwise in defense of any action, suit or proceeding . . . he shall be indemnified against expenses . . . .") (emphasis added). Moreover, any notion that a person would voluntarily go to trial likewise applies to claims of being tried twice, because even a person who desired an acquittal on principle would presumably have no objection to being tried only once on a technically correct (i.e., non-multiplicitous) indictment.

100. Kimmelman v. Morrison, 477 U.S. 365, 382 n.7 (1986). The Court found it unlikely that defense attorneys would sandbag a meritorious Fourth Amendment suppression claim, hoping to raise the issue as an ineffective assistance of counsel claim on collateral review:

[C]ounsel's client has little, if anything, to gain and everything to lose through such a strategy. It should be remembered that the only incompetently litigated and defaulted Fourth Amendment claims that could lead to a
also be unlikely to sandbag a meritorious double jeopardy claim because the burden of proof is much more difficult under plain error review than when the claim is timely raised.\textsuperscript{101}

In a Seventh Circuit case, \textit{United States v. Griffin},\textsuperscript{102} the court suggested that a defendant might withhold a multiplicity claim until after conviction in the hope that evidence might be destroyed after the conviction but before the appeal was decided.\textsuperscript{103} The court hypothesized a situation where a defendant possesses two separate quantities of narcotics, one in his pants pocket and one in his car, but contends that there was only a single possession and, thus, a single offense.\textsuperscript{104} The court stated that the prosecution’s response would be to argue that because the drugs were stored in separate places, the defendant was not in continuous possession of both packages at the same time, and further, that the separate packages might contain drugs of different purity.\textsuperscript{105} The court reasoned that “[i]f the defendant were allowed to raise a multiplicity argument at any time after trial, the drugs would in all probability have been destroyed and the Government would have lost the factual basis for reversal of the defendant’s conviction on Sixth Amendment grounds are potentially outcome-determinative claims. No reasonable lawyer would forego competent litigation of meritorious, possibly decisive claims on the remote chance that his deliberate dereliction might ultimately result in federal habeas review.

\textit{Id.}

The Court also noted that in contrast to an ineffectiveness claim raised later on collateral review the burden of proof was less difficult to satisfy where the suppression claim is timely raised. \textit{Id.}

101. The general rule is that once the defendant has timely demonstrated a nonfrivolous claim of double jeopardy, the burden shifts to the government to show there is no violation. \textit{See, e.g., United States v. Garcia}, 919 F.2d 881, 886 (3d Cir. 1990) (“[A] defendant has the burden of ‘putting his double jeopardy claim in issue’ and . . . the burden of persuasion shifts to the government once he has met his burden”); \textit{United States v. Benefield}, 874 F.2d 1503, 1505 (11th Cir. 1989) (same); \textit{United States v. Ragins}, 840 F.2d 1184, 1192-93 (4th Cir. 1988) (same); \textit{United States v. Jabara}, 644 F.2d 574, 576-77 (6th Cir. 1981) (same). \textit{See generally, Note, The Burden of Proof in Double Jeopardy Claims}, 82 Mich. L. Rev. 365 (1983). On plain error review, however, the burden of proof of showing a prejudicial legal error is on the defendant. \textit{See Olano v. United States}, 113 S. Ct. 1770, 1778 (1993). Thus, a defendant who fails to timely raise a double jeopardy argument would be less likely to prevail on appeal or collateral review. As discussed \textit{supra} note 100, the Supreme Court has recognized that the more onerous standard of proof on post-conviction review makes it highly unlikely that a defendant would intentionally default on an outcome determinative claim.

102. 765 F.2d 677 (7th Cir. 1985).

103. \textit{Id.} at 681.

104. \textit{Id.}

105. \textit{Id.}

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proving the offenses were committed. If the evidence were destroyed before retrial, the defendant would be in a much stronger position.

However, the possibility of such a hypothetical situation actually occurring is remote at best. Only the most confident prosecutor would destroy evidence before the direct appeal of right was completed, and only the most foolish defendant would forego a meritorious claim of double jeopardy in the hope that the prosecutor would discard evidence upon the defendant's filing of the notice of appeal. Furthermore, retrials are always a foreseeable part of the criminal justice system for both defendants and the government.

More importantly, the prosecution has the burden to prove guilt beyond a reasonable doubt. The predicate for a trial is a plea of not guilty, and such a plea puts into issue every fact in the case as well as every element of the charged offense. If a prosecutor charges a defendant with two offenses, intending to secure a conviction on both, she must know that she is going to have to prove, as charged in the indictment, the elements of two distinct and separate crimes. When the claim raised on appeal is based on factual multiplicity and the defendant has been found guilty of the two offenses by a properly instructed jury, then

106. Id.
107. The chances of an incident as described in this hypothetical actually occurring are virtually impossible because in order to prosecute under two separate counts based on two quantities of suspected drugs, both substances would have to be tested to make sure they were controlled substances. Therefore, the chemical analysis of the purity of both samples would be available in such a case.
108. The Department of Justice has established policies to ensure that evidence is not discarded until it is clear that such evidence is no longer needed. 3 United States Department of Justice, United States Attorney's Manual, ¶ 4.380, at 19-20 (Oct. 1, 1990). Moreover, in the Southern District of Illinois, for example, the District where the Griffin case was tried, local rules provide that exhibits become part of the record maintained by the Clerk of the Court so that they can be available for the court of appeals to examine. See S.D. Ill. Loc. R. 15. Many districts require the clerk to maintain custody of exhibits; if they are retained by the parties, they are required to make them available for use on appeal. See, e.g., S.D. Cal. Loc. R. 79.1 (stating that it is "counsel's responsibility to produce any and all exhibits for the court of appeals"); D. Colo. Loc. R. 79.1 (providing that exhibits may not be removed from the custody of the clerk except by court order); D. Idaho Loc. R. 79.1(b) (same); D. Mass. Loc. R. 79.1(A) (requiring parties to retain exhibits until the final conclusion of the proceedings); E.D. Pa. Loc. R. 39 (providing that clerk retain custody of all exhibits). Therefore, even if a prosecutor wanted to discard evidence as soon as the district court proceedings were completed, in most cases it would be either criminal, impossible, or unethical to intentionally do so.
only where the evidence is legally insufficient to show two crimes will one of the convictions be set aside. In *Griffin*, the court had no difficulty in finding that the prosecution had pleaded and proved two separate crimes, despite the fact that the multiplicity challenge had not been raised until appeal. Where the issue is a question of law, that is, whether essentially undisputed facts constitute one crime or two, then there is little possibility of prejudice resulting to the government.

Because there is no strategic reason to sandbag a meritorious double jeopardy claim, when an appellate court reviews a meritorious claim of double jeopardy raised for the first time on appeal, the claim will ordinarily have been forfeited, not as part of a trial strategy, but as a result of counsel's incompetence. The error will often rise to the level of constitutionally ineffective assistance of counsel. A conviction is unfair and

110. United States v. Griffin, 765 F.2d 677, 682-83 (7th Cir. 1985).
111. A defendant alleging that his counsel was constitutionally ineffective must show two things:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.


All attorneys, even nonspecialists, are expected to be familiar with double jeopardy principles. See *In re Grand Jury Subpoena*, 739 F.2d 1354, 1358 (8th Cir. 1984) ("A competent attorney need not be schooled in the area of criminal law in order to know that the Fifth Amendment's [D]ouble [J]eopardy [C]lause prohibits more than one conviction for the same crime.").

The Court has stated that a single, serious error may constitute ineffective assistance of counsel. Kimmelman v. Morrison, 477 U.S. 365, 383 (1986) (citing United States v. Cronic, 466 U.S. 648, 657 n.20 (1984)). Notably, professors LaFave and Israel commented that failure to raise a meritorious claim of double jeopardy was the kind of single error that may constitute ineffective assistance of counsel: "A possible strategy 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 . . . ." LaFave & Israel, *supra* note 26, § 11.10(c) at 51 (West Supp. 1991).

Accordingly, many courts have held that failure to raise a double jeopardy defense founded in existing law constitutes ineffective assistance of counsel. In Murphy v. Puckett, 893 F.2d 95, 95 (5th Cir. 1990), for example, the court affirmed a grant of a writ of habeas corpus where defense counsel "failed to raise what was clearly a valid double jeopardy defense." Similarly, in Rice v. Marshall, 816 F.2d 1126, 1131-32 (6th Cir. 1987), the court affirmed a judgment granting a writ where defense counsel failed to object to the introduction of evidence that appellant possessed a firearm, when he had previously been acquitted of possessing that firearm. Accord Burgess v. Griffin, 585 F. Supp. 1564, 1572-73 (W.D.N.C.) (finding that advice to plead guilty to jeopardy-barred charges constituted ineffective assistance of counsel), *aff'd per curiam on opinion below*, 743 F.2d 1064 (4th Cir. 1984); Sandy v. Caspari, No. 91-1603 C(5), 1993 U.S.
casts doubt on the integrity of the judicial system when it results from inadequate representation by defense counsel. Moreover, it may be a false economy to refuse to review a meritorious double jeopardy claim raised for the first time on appeal, because often it will warrant collateral relief as ineffective assistance of trial counsel.

Double jeopardy should be reviewed for plain error for an additional reason. Double jeopardy is designed to limit the discretion of the prosecutor by restricting her ability to harass, intentionally or not, by pursuing multiple prosecutions. To allow prosecutors to violate this rule, and provide no remedy if they can simply get by defense counsel, would effectively encourage efforts to evade the rule. If the prosecutor believed in good faith that the second prosecution was constitutional, then again, it is in the interest of the system to have the court of appeals decide the case on the merits to determine whether, under the circumstances, the Double Jeopardy Clause permitted further prosecution.

Another consideration comes into play with regard to claims of multiple punishment for the same offense. By convicting and sentencing a defendant twice for conduct constituting a single crime, the district court is acting contrary to the intent of Congress. Separation of powers princi-
pies warrant imposition of a lawful sentence by the appellate court, regardless of the defendant's diligence in raising the issue. As the Supreme Court explained: "[T]he disruption to sound appellate process entailed by entertaining objections not raised below does not always overcome... 'the strong interest of the federal judiciary in maintaining the constitutional plan of separation of powers.'" It is unseemly for a court to impose an illegal sentence, in defiance of the legislative scheme.

The government will ordinarily not be prejudiced when a double jeopardy claim is raised for the first time on appeal. Although charges may be dismissed, the government will be in a similar, if not the same, position as if the claim had been raised before or during trial. In *United States v. Lorenzo,* the government suggested that double jeopardy claims should not be considered on appeal, stating that "plain error analysis is difficult to undertake because the issue turns on facts not in the record, a circumstance directly traceable to the appellant's failure to make a timely objection." The court did not find this objection dispositive because in order "[t]o prevail, [defendants] must show, based on the record" that a double jeopardy violation occurred. Accordingly, "appellants, rather than the government, pay the price for the inadequacy of the record." Therefore, the government will not suffer unfair prejudice because a conviction cannot be reversed for plain error unless the facts to be relied upon appear in the record.

IV. MOST FEDERAL COURTS REFUSE TO REVIEW DOUBLE JEOPARDY CLAIMS UNDER THE PLAIN ERROR STANDARD, BUT THEY FAIL TO EXPLAIN WHY IT IS SUBJECT TO UNIQUE TREATMENT

Federal courts generally do not review double jeopardy claims for plain error under Rule 52(b). Unlike most unobjected-to errors, federal
courts hold that a claim of double jeopardy left unobjected to is deemed absolutely waived. The Supreme Court, however, has never decided the issue. Nevertheless, the rule of waiver has been accepted by the

119. It is undisputed that a double jeopardy claim may be waived. See, e.g., Ricketts v. Adamson, 483 U.S. 1 (1987) (recognizing waiver through written plea agreement). The Supreme Court, however, has never been faced with the question of whether a waiver resulting from a failure to object at trial precludes review on appeal. Peretz v. United States, 111 S. Ct. 2661, 2669 (1991), discussed the issue in dicta, listing double jeopardy as one of a number of claims that could be forfeited by not being timely asserted, but said nothing about whether the issue could be raised as plain error. See supra notes 12-14 and accompanying text.

United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833), is occasionally cited for the proposition that double jeopardy must be raised in the pleadings or else it is deemed waived. See e.g., McNeal v. Hollowell, 481 F.2d 1145, 1153 (5th Cir. 1973) (Coleman, J., dissenting), cert. denied, 415 U.S. 951 (1974); Douglas v. Nixon, 459 F.2d 325, 327 (6th Cir.), cert. denied, 409 U.S. 1010 (1972); Brady v. United States, 24 F.2d 399, 405 (8th Cir. 1928). Wilson came to the Supreme Court upon a certificate of division of the judges of a circuit court, who were equally divided on the question of whether they had the power to impose a sentence for a crime where it appeared that the defendant, who pleaded guilty, may have received a presidential pardon for the offense. Wilson, 32 U.S. at 159-60. The Court held that following a judgment of conviction, "no subsequent prosecution could be maintained for the same offence, nor for any part of it, provided the former conviction was pleaded," and that the same rule applied to a pardon. Id. at 160. The defendant expressly rejected the benefit of the pardon at the time of sentencing in the circuit court. Id. at 158-59. The Court held that the defendant could be sentenced in spite of the pardon because it had not been pleaded. Id. at 161.

However, the Court made clear that the rule would be different if the waiver resulted not from the defendant's express determination not to accept the pardon, but from an unintentional failure to raise the issue. The Court accepted the proposition that an implied waiver resulting from pleading without raising the pardon would not be a bar; in such a case "the prisoner may avail himself of the pardon, by showing it to the court, even after waiving it, by pleading the general issue." Id. at 162. "[A] court would, undoubtedly, at this day, permit a pardon to be used, after [a plea to] the general issue." Id. The Court, however, made no mention of whether a claim waived through failure to raise would be cognizable for the first time on appeal, perhaps because there was no general right to appeal in a criminal case in the federal court system at that time. See Carroll v. United States, 354 U.S. 394, 400 n.9 (1957). Thus, if Wilson could be said to contain the seeds of the rule of waiver, it also served to foreshadow plain error review.

In United States v. La Franca, 282 U.S. 568 (1931), the Court held that a failure to accept a ruling of the district court overruling pleas of former jeopardy did not preclude consideration on appeal where the issues were brought to the court's attention and there was "nothing in the record to indicate waiver of the respondent's rights." Id. at 570-71. This was apparently not a relaxation of otherwise applicable preservation requirements for double jeopardy claims, but instead was based on the established rule that exceptions were not required for rulings on pleadings that ap-
Courts of Appeals for the District of Columbia and the First, Second, Third, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Twelve


121. United States v. Lopez-Pena, 912 F.2d 1542, 1548 (1st Cir. 1989) (dicta), vacated on other grounds sub nom., United States v. Martinez-Torres, 912 F.2d 1552 (1st Cir. 1990) (en banc), overruled by Peretz v. United States, 111 S. Ct. 2661, decision vacated rehe'g denied, 944 F.2d 51 (1st Cir.) (en banc), cert. denied, 111 S. Ct. 2886 (1991).

122. United States v. Proyect, 989 F.2d 84, 86 (2d Cir.) (dicta), cert. denied, 114 S. Ct. 80 (1993); United States v. Papadakis, 802 F.2d 618, 621 (2d Cir. 1986), cert. denied, 479 U.S. 1092 (1987); United States v. Walsh, 700 F.2d 846, 856 (2d Cir.) (dicta), cert. denied, 464 U.S. 825 (1983); United States v. Perez, 565 F.2d 1227, 1232 (2d Cir. 1977); see also United States v. Gumbs, 246 F.2d 441, 443 (2d Cir. 1957) (Hincks, J., concurring) (contending that defendant's guilty plea waived a double jeopardy claim based on multiplicity. The majority rejected the claim after reaching the merits); cf. United States v. DeFillipo, 590 F.2d 1228, 1233 (2d Cir.) (noting that Perez applied the rule of waiver, but stopping short of stating that the rule of waiver was still valid, and recognizing the possibility that a multiplicity argument could be raised on appeal), cert. denied, 442 U.S. 920 (1979).

123. United States v. Becker, 892 F.2d 265, 267-68 (3d Cir. 1989); United States v. Inmon, 568 F.2d 326, 330 (3d Cir. 1977) (dicta). In United States v. Young, 503 F.2d 1072, 1074 (3d Cir. 1974), the court held that "[i]t is manifest that a claim of double jeopardy is an affirmative defense which must be raised properly or may be deemed waived." The court, however, held that the district court did not err by deciding the claim even though it was not raised until the eleventh day of a twelve-day trial. Defense counsel explained that he raised the issue as soon as he learned the basis of the claim, that is, that the crime for which his client was already in custody was arguably the same offense for double jeopardy purposes. The court concluded that such an inadvertent failure to raise the issue did not appear to be a knowing and voluntary waiver of the right. Id. at 1075.

124. United States v. Moore, 958 F.2d 646, 650 (5th Cir. 1992); United States v. Milhim, 702 F.2d 622, 523-24 (5th Cir. 1983); United States v. Silva, 611 F.2d 78, 80 (5th Cir. 1980); Grogan v. United States, 394 F.2d 287, 289 (5th Cir. 1967), cert. denied, 393 U.S. 830 (1968); see also United States v. Beasley, 550 F.2d 261, 274-75 & 275 n.18 (5th Cir.) (noting that the appellant should have raised the double jeopardy argument before the second trial, but finding it meritless nonetheless), cert. denied, 434 U.S. 863 (1977); McNeal v. Hollowell, 481 F.2d 1145, 1153 (5th Cir. 1973) (Coleman, J., dissenting) (questioning whether the appellant had the right to raise a plea of double jeopardy on collateral review), cert. denied, 415 U.S. 951 (1974); Ochoa v. Estelle, 445 F. Supp. 1076, 1081-82 (W.D. Tex. 1976) (denying petition for habeas corpus; dicta as to federal law); United States v. Lawson, 57 F. Supp. 664, 667 (N.D. Tex. 1944) (sentencing memorandum).

125. United States v. Thomas, 875 F.2d 559, 562 n.2 (6th Cir.), cert. denied, 493 U.S. 867 (1989); Martin v. United States, 996 F.2d 1215, 1993 U.S. App. LEXIS 17552 (6th Cir. 1993) (finding no cause and prejudice that would warrant reviewing double jeop-
Ninth, Tenth, and Eleventh Circuits.

Another group of decisions hold that the issue cannot be raised by a state or federal prisoner on collateral review. These cases do not rely on the special procedural constraints applicable to defendants seeking a hearing on § 2255 motion; noting the general rule in the circuit that failure to raise an issue at an earlier stage constitutes waiver.


127. United States v. Conley, 503 F.2d 520, 521 (8th Cir. 1974); Pope v. United States, 434 F.2d 325, 329 (9th Cir. 1970), cert. denied, 401 U.S. 949 (1971); Wangrow v. United States, 399 F.2d 106, 112 (8th Cir.), cert. denied, 393 U.S. 933 (1968); Brady v. United States, 24 F.2d 399, 405 (8th Cir. 1928), cf. United States v. Standlefer, 948 F.2d 426, 430-33 (8th Cir. 1991) (refusing to consider legal theories not raised below in an interlocutory appeal of double jeopardy motion).

128. United States v. Avendano, 455 F.2d 975, 975 (9th Cir.) (per curiam), cert. denied, 407 U.S. 912 (1972); Haddad v. United States, 349 F.2d 511, 514 (9th Cir.), cert. denied, 382 U.S. 896 (1965); Levin v. United States, 5 F.2d 598, 606 (9th Cir.), cert. den được, 269 U.S. 562 (1925); see also United States v. Flick, 716 F.2d 735, 737 (9th Cir. 1983) (noting the rule in the case where the claim had been timely raised); cf. United States v. Hill, 473 F.2d 759, 763 (9th Cir. 1972) (noting that the defense of former jeopardy is usually pleaded and can be waived).

129. Mortan v. United States, 230 F.2d 30, 32 (10th Cir. 1956); Curtis v. United States, 67 F.2d 943, 948 (10th Cir. 1933); Callahan v. United States, 35 F.2d 633, 634 (10th Cir. 1929).

130. United States v. Bascaro, 742 F.2d 1335, 1365 (11th Cir. 1984), cert. denied, 472 U.S. 1017, and cert. denied, 472 U.S. 1021 (1985); see also United States v. LeQuire, 943 F.2d 1554, 1564 (11th Cir. 1991) (relying on Bascaro to find that the appellant waived his ex post facto law claim), cert. denied, 112 S. Ct. 3037 (1992).


ing post-conviction relief,\textsuperscript{133} but instead rely on cases involving direct appeals, applying the rule of waiver.\textsuperscript{134} The commentators are in accord on this matter.\textsuperscript{135}

Only in the Fourth Circuit is the rule that double jeopardy claims are reviewable absent an objection, and the point is established by a single case.\textsuperscript{136} The few cases in other circuits that state or imply that double jeopardy claims are reviewable for plain error—one each from the First,\textsuperscript{137} Third,\textsuperscript{138} Sixth,\textsuperscript{139} Seventh,\textsuperscript{140} and Tenth\textsuperscript{141} Circuits—have

\textsuperscript{133} In Engle v. Isaac, 456 U.S. 107 (1982), a habeas corpus case, and United States v. Frady, 456 U.S. 152, 167 (1982), a 28 U.S.C. § 2255 case, the Court held that where procedural rules required a defendant to raise a claim at trial, a defendant attempting to raise the issue for the first time on collateral review would have to show "cause" for the failure to raise the issue, and "prejudice" resulting therefrom.

\textsuperscript{134} Some cases find the fact that the issue was raised on collateral review instead of at trial to be determinative. See, e.g., Selsor v. Kaiser, No. 93-5002, 1994 U.S. App. LEXIS 9488, at *19-22 (10th Cir. May 2, 1994) (refusing to grant writ based on meritorious, but procedurally defaulted, double jeopardy claim); United States ex rel. DiGiangiemo v. Regan, 528 F.2d 1202, 1209-70 (2d Cir. 1975) (finding that, based on the circumstances of the case, a collateral estoppel claim could not be raised for the first time in a habeas proceeding), cert. denied, 426 U.S. 950 (1976); Rollowson v. United States, 405 F.2d 1078, 1081 (D.C. Cir. 1968) (per curiam), vacated on other grounds, 394 U.S. 575 (1969); Lotz v. Sacks, 292 F.2d 657, 659 (9th Cir. 1961); United States ex rel. Poch v. Hill, 71 F.2d 906, 907 (3d Cir.) (commenting that a federal prisoner cannot raise double jeopardy issue through habeas corpus, but should have done so on appeal), cert. denied, 293 U.S. 597 (1934).

However, in Washington v. James, 996 F.2d 1442, 1450 (2d Cir. 1993), Chief Judge Meskill suggested that double jeopardy was so fundamental that it was one of the few issues reviewable on habeas corpus in spite of a procedural default without reference to the cause and prejudice test.

\textsuperscript{135} Two leading commentators agree that an appellant may not raise a double jeopardy claim for the first time on appeal. See 8 JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 12.03[2] at 12-23 to 12-33 (2d ed. 1991); 1 CHARLES A. WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE & PROCEDURE § 193 at 706 (2d ed. 1982).

\textsuperscript{136} United States v. Jarvis, 7 F.3d 404 (4th Cir. 1993), cert. denied, 114 S. Ct. 1200 (1994).

\textsuperscript{137} United States v. Rivera, 872 F.2d 507, 509 (1st Cir.) (vacating conviction as plain error based on meritorious double jeopardy claim raised for the first time on appeal), cert. denied, 493 U.S. 818 (1989).

\textsuperscript{138} Virgin Islands v. Smith, 445 F.2d 1089, 1094 (3d Cir. 1971) (reversing conviction, sua sponte, as plain error, based on double jeopardy claim that had not been raised either at trial or on appeal); cf. United States ex rel. Poch v. Hill, 71 F.2d 906, 907 (3d Cir.) (rejecting double jeopardy claim raised for the first time on collateral review as untimely; noting in dicta that appellant should have raised the claim on direct appeal), cert. denied, 293 U.S. 597 (1934).

\textsuperscript{139} Reynolds v. United States, 280 F. 1, 4 (6th Cir. 1922) (reviewing claim raised for the first time after conviction in a motion for a new trial and for arrest of judgment). The Supreme Court held in an early case that any error noticeable in a motion for arrest of judgment would be noticeable on appeal through a writ of error. Slacom v. Pomery, 10 U.S. (6 Cranch) 221 (1810).

\textsuperscript{140} United States v. Anderson, 514 F.2d 583, 586 (7th Cir. 1975) (evaluating double
been ignored by other panels, even in their own circuits.\textsuperscript{142} One decision each in the Second,\textsuperscript{143} Sixth,\textsuperscript{144} Eighth,\textsuperscript{145} and Ninth\textsuperscript{146} Circuits hints

jeopardy issue "mentioned" although not formally raised in trial court, and finding it meritless; \textit{see also} United States v. Marren, 890 F.2d 924, 934 (7th Cir. 1989) (reviewing double jeopardy claim raised for the first time on appeal with no discussion of waiver or reviewability).

141. United States v. Gunter, 546 F.2d 861, 865 (10th Cir. 1976) (rejecting claim on merits, but recognizing that "[i]f in fact there were a violation of the defendant's Fifth Amendment right not to be twice placed in jeopardy for the same offense, such would surely be the type of 'plain error' which could be raised for the first time on appeal"), \textit{cert. denied}, 430 U.S. 947, \textit{and cert. denied}, 431 U.S. 920 (1977).

142. In spite of the prior opinions that have indicated the availability of plain error review, other panels in the First, Third, Sixth, and Seventh Circuits have restated the traditional rule of waiver without mentioning those earlier opinions which suggest the possibility of review despite the absence of a timely objection. See United States v. Lopez-Pena, 912 F.2d 1542, 1548 (1st Cir. 1989) (dicta), \textit{vacated on other grounds sub nom.}, United States v. Martinez-Torres, 912 F.2d 1552 (1st Cir. 1990) (en banc), \textit{overruled} by Peretz v. United States, 111 S. Ct. 2661, \textit{decision vacated rehe'g denied}, 944 F.2d 51 (1st Cir.) (en banc), \textit{cert. denied}, 111 S. Ct. 2886 (1991); United States v. Becker, 892 F.2d 265, 267-68 (3d Cir. 1989); United States v. Thomas, 875 F.2d 559, 562 n.2 (6th Cir.), \textit{cert. denied}, 493 U.S. 867 (1989); United States v. Brimberry, 744 F.2d 580, 586-87 (7th Cir. 1984) (dicta).

143. United States v. MacQueen, 596 F.2d 76, 81-82 (2d Cir. 1979) (declining to apply United States v. Perez, 565 F.2d 1227 (2d Cir. 1977) and distinguishing Blackledge v. Perry, 417 U.S. 21 (1974) and Menna v. New York, 423 U.S. 61 (1975) (characterizing as fundamental the right not to be hauled into court twice for the same offense; considering the right so important as to preclude waiver by a guilty plea in the second prosecution)); \textit{cf.} United States v. DeFillipo, 590 F.2d 1228, 1233 n.4 (2d Cir.) (noting Professor Westen's argument that under Blackledge v. Perry, 417 U.S. 21 (1974), the Constitution may require courts to take note of constitutional defenses even if not timely raised, but declining to take a firm position on the question), \textit{cert. denied}, 442 U.S. 920 (1979).

144. Douglas v. Nixon, 459 F.2d 325, 327 (6th Cir.) (finding that although "[i]t appears to be a rule of long standing that the facts constituting double jeopardy must be shown by pleading it as a defense . . . whether time and intervening decisions of the Supreme Court have eroded [this] ground for denial of the writ" is moot because the court predicted, incorrectly, that Waller v. Florida, 397 U.S. 387 (1970), would not be applied retroactively, based on Robinson v. Neil, 452 F.2d 370 (6th Cir. 1971), \textit{rev'd}, 409 U.S. 505 (1973)), \textit{cert. denied}, 409 U.S. 1010 (1972).

145. Parker v. United States, 507 F.2d 587, 588 (8th Cir. 1974) ("The question of whether counsel is empowered to effectively waive the double jeopardy defense without his client's knowledge is a difficult one which we leave to a future decision . . . ."), \textit{cert. denied}, 421 U.S. 916 (1975).

146. United States v. Lorenzo, 995 F.2d 1448, 1457-58 (9th Cir.) (declining to definitively resolve the plain error issue due to the failure of the double jeopardy claim on the merits), \textit{cert. denied}, 114 S. Ct. 225, \textit{and cert. denied}, 114 S. Ct. 227 (1993). The
that the rule of waiver might be reconsidered. Courts in subsequent cases, however, have disregarded these opinions. In addition, a handful of unpublished opinions have reviewed double jeopardy claims raised for the first time on appeal and found them meritless. However, these are, by their own terms, non-precedential.

The law is only slightly less one-sided on the reviewability of unobjected-to claims of "multiplicity." Multiplicity claims involve conviction and sentence on more than one count for conduct that by law is but a single offense. The overwhelming weight of authority holds that a multiplicity claim is waived unless objection to the indictment is made before trial. Panels in the District of Columbia, and First, Second, Sixth, and Eighth Circuits adhered to the general rule even after the rendering of the following decisions, among others: United States v. Papadakis, 802 F.2d 618, 621 (2d Cir. 1986) (court need not reach double jeopardy claim raised for the first time on appeal), cert. denied, 479 U.S. 1092 (1987); United States v. Thomas, 875 F.2d 559, 562 n.2 (6th Cir.) (defendant waived double jeopardy claim by failing to raise it at trial), cert. denied, 493 U.S. 867 (1989); United States v. Herzog, 644 F.2d 713, 716 (8th Cir.) (double jeopardy claim waived if not raised before trial), cert. denied, 451 U.S. 1018 (1981).

The court stated that "[i]t is not clear whether we can review for plain error a double jeopardy claim that has been waived." Id. In an appeal by one of Lorenzo's co-defendants, the court made clear that "Lorenzo is the law of this circuit and it establishes that Dewey waived her double jeopardy claim by failing to raise it until after her trial." United States v. Dewey, 1993 U.S. App. LEXIS 29240, at *3 (9th Cir. Nov. 2, 1993) (citing Lorenzo, 995 F.2d at 1457-58). This language from Dewey suggests that any uncertainty expressed in Lorenzo may have been resolved against plain error reviewability.


149. See supra note 53; United States v. UCO Oil Co., 546 F.2d 833, 835 (9th Cir. 1976) (stating that "an indictment may not charge a single offense in several counts without offending the rule against multiplicity"), cert. denied, 430 U.S. 966 (1977).

150. See infra notes 151-60.


152. United States v. Connolly, No. 93-1625, 1993 U.S. App. LEXIS 31591, at *4 n.4 (1st Cir. Dec. 7, 1993) (per curiam) (multiplicity claim waived where not raised be-
Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits have held that failure to raise an objection to a


153. United States v. Alessi, 638 F.2d 466, 476 (2d Cir. 1980) (failure to raise a multiplicity claim before trial serves as a bar to review on appeal); United States v. Private Brands, Inc., 250 F.2d 554, 557 (2d Cir. 1957) (any claim of multiplicity waived by failing to raise it before trial), cert. denied, 355 U.S. 957 (1958).


155. United States v. Lemons, 941 F.2d 309, 316 n.4 (5th Cir. 1991) (per curiam) ("Failure to object to an indictment on grounds of multiplicity prior to trial constitutes a waiver of that objection."); United States v. Gerald, 624 F.2d 1291, 1300 (5th Cir. 1980) (declining to evaluate defendant's multiplicity claim on the ground that defendant failed to raise the issue before trial), cert. denied, 450 U.S. 920 (1981).


157. United States v. Mitran, 996 F.2d 1220, 1993 U.S. App. LEXIS 12808 (7th Cir. 1993) (multiplicity claim waived where raised for the first time on appeal); United States v. Wilson, 962 F.2d 621, 626 (7th Cir. 1992) (failure to raise multiplicity claim at trial deemed a waiver of claim); United States v. Simone, 931 F.2d 1186, 1192 (7th Cir.) ("[F]ailure to object to alleged defects in the indictment before trial constitutes a waiver."); United States v. Moya-Gomez, 860 F.2d 706, 749 n.36 (7th Cir. 1988) (same), cert. denied, 492 U.S. 908 (1989); United States v. Mosely, 786 F.2d 1330, 1333 (7th Cir.) (restating rule that parties must raise claims of multiplicity and duplicity before trial), cert. denied, 476 U.S. 1184 (1986); United States v. Griffin, 765 F.2d 677, 680-81 (7th Cir. 1985) (noting the apparent division in the circuits, but holding that a multiplicity claim which could have been waived before trial is waived) (involving § 2255); see also United States v. Scherl, 923 F.2d 64, 66 (7th Cir.) (holding that failure to raise claim constitutes a waiver and finding no plain error), cert. denied, 111 S. Ct. 2272 (1991).

158. United States v. Garrett, 961 F.2d 743, 748 & n.7 (8th Cir. 1992) (multiplicity claim must be raised before trial otherwise it is deemed waived); United States v. Herzog, 644 F.2d 713, 716 (8th Cir.) (same), cert. denied, 451 U.S. 1018 (1981).

159. United States v. Berry, No. 92-16647, 1994 U.S. App. LEXIS 9524, at *3 (9th Cir. Apr. 20, 1994) (holding in an appeal of an order denying § 2255 motion multiplicity claim waived where it was not raised before trial).

160. United States v. Wilson, 983 F.2d 221, 225 (11th Cir. 1993) (defendant barred
multiplicitous indictment prior to trial constitutes waiver. Other panels in the Second,\textsuperscript{161} Third,\textsuperscript{162} Fifth,\textsuperscript{163} Sixth,\textsuperscript{164} Ninth,\textsuperscript{165} and Eleventh\textsuperscript{166}

from challenging bank fraud convictions on grounds of multiplicity for the first time on appeal); United States v. Solomon, 726 F.2d 677, 678 n.2 (11th Cir. 1984) (multiplicity claim waived where defendant plead guilty before trial). The Eleventh Circuit announced a new rule in United States v. Jones, 809 F.2d 1097, 1103 (11th Cir.), cert. denied, 498 U.S. 906 (1990), requiring all sentencing objections to be raised at the time of sentencing subject to waiver, in the absence of "manifest injustice." Wilson applied Jones to multiplicity cases, overruling the Eleventh Circuit cases cited infra notes 166, 173. If "manifest injustice" means plain error, then it is unnecessary. If, as appears to be the case, manifest injustice is a higher standard, Jones and Wilson raise the question of whether a federal appeals court has the power to decide prospectively to refuse to exercise its discretion under Rule 52(b).

161. United States v. Reed, 639 F.2d 896, 904 n.6 (2d Cir. 1981) (stating that when multiplicitous counts result in conviction, the situation "can be remedied at any time by merging the convictions and permitting only a single sentence"); United States v. Moss, 562 F.2d 155, 159 n.2 (2d Cir. 1977) (noting that government conceded point), cert. denied, 435 U.S. 914 (1978); see also United States v. DeFillipo, 590 F.2d 1228, 1233 (2d Cir.) (stating, in dicta, that a defendant might be able to raise a claim as to consecutive sentences), cert. denied, 442 U.S. 920 (1979); Natrelli v. United States, 516 F.2d 149, 152 n.4 (2d Cir. 1975) (claim raised for the first time on collateral review); Gorman v. United States, 456 F.2d 1258, 1259 (2d Cir. 1972) (per curiam) (claim raised for first time on collateral review).

162. Virgin Islands v. Brathwaite, 782 F.2d 399, 408 (3d Cir. 1986) (granting relief from multiplicitous sentences where co-defendant preserved issue); United States v. Marino, 682 F.2d 449, 454 & n.3 (3d Cir. 1982) (permitting challenge to multiplicitous sentences for the first time on appeal).


165. United States v. Blocker, 802 F.2d 1102, 1103 (9th Cir. 1986) (finding that failure to interpose pretrial objection does not waive right to object to unlawful multiple sentences); Launius v. United States, 575 F.2d 770, 772 (9th Cir. 1978) (per curiam) (same).

166. United States v. Bonavia, 927 F.2d 565, 571 (11th Cir. 1991) (on appeal a defendant may challenge only multiplicity of sentences when no pretrial objections was made); United States v. Grinkiewicz, 873 F.2d 253, 255 (11th Cir. 1989) (per curiam) (multiplicity of sentences may be challenged for the first time on appeal); United
Circuits agree that multiple convictions may be entered on each count of an allegedly multiplicitous indictment unless the defendant interposes a pretrial objection, but will permit a challenge to consecutive sentences for the first time on appeal. Panels in the District of Columbia, Second, Fifth, Seventh, Tenth, and Eleventh Circuits have entertained such claims raised for the first time on appeal, and have reversed both the conviction and the sentence.

States v. Davis, 799 F.2d 1490, 1494 (11th Cir. 1986) (per curiam) (same); United States v. Mastrangelo, 733 F.2d 793, 800 (11th Cir. 1984) (same). Subsequently, these cases have been overruled. See supra note 160.

167. See also United States v. Martin, 933 F.2d 609, 611 (8th Cir. 1991) (reviewing multiplicity claim for plain error and finding it meritless). The commentators agree that relief is available post-conviction, although they do not say precisely what the relief should be. Wright & Miller, supra note 135, § 145 at 526 ("A remedy is available at any time if defendant is given multiple sentences."); Moore, supra note 135, § 8.07[1] at 8-43 to 8-45; LaFave & Israel, supra note 26, § 17.4.


172. United States v. Morehead, 959 F.2d 1489, 1506-07 & 1506 n.11 (10th Cir.), adhered to on other grounds sub nom., United States v. Hill, 971 F.2d 1461 (10th Cir. 1992) (en banc).


174. At least one judge in the Third Circuit shares this view. In Virgin Islands v. Brathwaite, 782 F.2d 399, 408 n.9 (3d Cir. 1986), Judge Becker stated in a concurring opinion that the proper remedy for a multiplicity violation was vacatur of both conv-
The cases setting forth the rule of waiver tend to contain little analysis regarding the treatment other than simple citation of prior authority. Judge Aldrich of the First Circuit may have recognized this when he wrote that "a failure to allege double jeopardy might be thought plain error, but the law has been settled so long on this issue that it seems in a class by itself." If double jeopardy really is "in a class by itself," there must be some reason for its unique treatment.

Examination of possible justifications reveals no satisfactory rationale justifying refusal to apply the plain error doctrine of Rule 52. Federal Rule of Criminal Procedure 12 is often cited as a basis for refusing to consider double jeopardy claims for the first time on appeal, but close analysis of Rule 12 reveals that its waiver provision does not apply to double jeopardy claims.

The notion that failure to object constitutes a "waiver" independent of Rule 12 is also unsatisfying. If failure to object constitutes a waiver, Rule 52(b) becomes meaningless because it applies only where there has been a failure to object. In addition, the Supreme Court has established a test for waiver of constitutional rights, and that test is not satisfied by the mere failure to object.

A. Double Jeopardy Claims Are Not Among Those Which Rule 12 Requires To Be Made Before Trial On Pain Of Waiver

Rule 12(b) is the most significant potential basis for holding that double jeopardy claims are waived if not raised in the trial court. Rule 12(b) requires that certain objections be raised before trial or they are deemed waived. It now provides:

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion . . . . The following must be raised prior to trial:

viction and sentence. The other members of the panel agreed that a multiplicity claim can be raised for the first time on appeal, but favored reversal of only the sentence. Id. at 408.


176. Rule 52(b) sets forth the plain error doctrine: "Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." Fed. R. Crim. P. 52(b). See supra Section III. and accompanying text.

177. Rule 12 requires that certain objections be raised before trial or they are deemed waived. Fed. R. Crim. P. 12.

178. See supra Section III. and accompanying text.

Defenses and objections based on defects in the institution of the prosecution; or
Defenses and objections based on defects in the indictment or information (other than that it fails to show jurisdiction in the court or to charge an offense which objections shall be noticed by the court at any time during the pendency of the proceedings); or
Motions to suppress evidence; or
Requests for discovery under Rule 16; or
Requests for a severance of charges or defendants under Rule 14.

Failure to raise an objection or defense that is within rule 12(b) has significant consequences. Rule 12(f) provides that a failure to raise defenses or objections "which must be made prior to trial . . . shall constitute waiver thereof, but the court for good cause shown may grant relief from the waiver." In this context, "waiver" means extinguishment, such that the court can not consider the issue unless relief is granted from the waiver. This relief may only be granted for "cause," which suggests that waivers are reviewable only in extreme circumstances. Thus, if double jeopardy claims are within Rule 12(f), they are extinguished if not raised within the time limits imposed by the rule.

1. Rule 12 Does Not Require A Defendant To Claim Double Jeopardy Before Trial

Many courts of appeal rely on the conclusion that a double jeopardy claim is encompassed by Rule 12(b) and, thus, must be made prior to trial. These courts reason that a claim of being tried twice is subject...
to Rule 12(b)(1) or (2) because it is a defect in the institution of the prosecution\textsuperscript{185} or in the indictment.\textsuperscript{186} This conclusion is not without some logical force.\textsuperscript{187}

The drafters of the Rule, however, did not intend to include claims of being tried twice within the mandatory provisions. Courts relying on Rule 12 have ignored the Advisory Committee's Note, which expressly state that double jeopardy claims need not be made before trial, and are not subject to waiver under Rule 12(f).\textsuperscript{188} The Committee Notes explain that defenses and objections should be divided into two groups. One group includes "defenses and objections which must be raised by motion. Failure to do so constitutes a waiver."\textsuperscript{189} The other group consists of defenses and objections that may be raised on the defendant's motion. Failure to do so, however, does not constitute a waiver.\textsuperscript{190} Technical defects in the proceedings or the indictment are included in the group that must be raised on pain of waiver.\textsuperscript{191}

Errors that are more substantive because they are jurisdictional, incurable, or both, need not be raised before trial.

In the other group of objections and defenses, which the defendant at his option may raise by motion before trial, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc.\textsuperscript{192}


\textsuperscript{186} Id. at 12(b)(1).


\textsuperscript{188} FED. R. CRIM. P. 12 advisory committee's note.

\textsuperscript{189} Id.

\textsuperscript{190} Id.

\textsuperscript{191} The Notes explain:

In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than the lack of jurisdiction or failure to charge an offense . . . . Among the defenses and objections in this group are the following: Illegal 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, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc.

FED. R. CRIM. P. 12 advisory committee's note.

\textsuperscript{192} FED. R. CRIM. P. 12 advisory committee's note.
Thus, according to the Notes, claims of "former jeopardy, former conviction [and] former acquittal" need not be raised before trial.\footnote{193}

No case has explained why the Committee's understanding of Rule 12 should not be followed. The Supreme Court has repeatedly relied on the Advisory Committee Notes in construing the Federal Rules of Criminal Procedure.\footnote{194} In \textit{Davis v. United States}, the Supreme Court relied on the 1944 Committee Notes to determine which kinds of pretrial motions "are meant to be within the Rule's purview."\footnote{195} Consequently, the Notes appear to be controlling on this issue, and in light of \textit{Davis}, there is no reason to think that the Committee Notes inaccurately reflect the meaning of the rule.\footnote{196}

\footnote{193. Id. Authorities acknowledging the existence of the advisory committee's note follow them. In \textit{United States v. Smith}, 866 F.2d 1092, 1098 (9th Cir. 1989), \textit{United States v. Brimberry}, 744 F.2d 580, 586-87 (7th Cir. 1984), \textit{United States v. Garcia}, 721 F.2d 721, 723 & n.3 (11th Cir. 1983), \textit{United States v. DeFillipo}, 590 F.2d 1228, 1233 & n.3 (2d Cir.), \textit{cert. denied}, 440 U.S. 920 (1979), and \textit{United States v. Young}, 503 F.2d 1072, 1074 n.7 (3d Cir. 1974), the courts recognized that a double jeopardy claim was not waived merely for failure to raise it before trial, relying on the advisory committee's note. \textit{See also 2 Mark S. Rhodes, Orfield's Criminal Procedure Under the Federal Rules, § 12.85 at 278-79 (1985); Wright & Miller, supra note 135, § 193 at 705; Moore, supra note 135, ¶ 12.03[2] at 12-30; \textit{United States v. Pelletier}, 898 F.2d 297, 300 (2d Cir. 1990) (following that portion of the notes with regard to an immunity claim). In \textit{United States v. Papadakis}, 802 F.2d 618, 621 (2d Cir. 1986); \textit{cert. denied}, 479 U.S. 1092 (1987), the court acknowledged the advisory committee's note and concluded that even if they were controlling, such does not suggest that no motion at all is necessary and, thus, found a claim waived where no motion was made during trial.}


\footnote{195. \textit{Davis v. United States}, 411 U.S. 233, 237-38 (1973) (holding that a challenge to grand jury selection was subject to Rule 12(b)(1)).}

\footnote{196. There was also no indication that the rules were intended to continue the ef-}
The structure of 12(b)(1) and (2) supports the conclusion that double jeopardy is not the kind of claim that need be raised before trial. All errors subject to waiver under Rule 12(f) are easily cured and do not implicate the fundamental power of the government to prosecute and punish a defendant. A formal defect in the composition of a grand jury, or in an indictment, can generally be remedied without difficulty. For example, a complaint about unauthorized persons in the grand jury room, or an unsigned indictment, would almost certainly have been easily cured if timely raised, and the proceedings would have continued without affecting the outcome of the prosecution. Thus, a defendant who wishes to raise such an issue for the first time on appeal is essentially asking for reversal based on an error that was not prejudicial.

Those objections not subject to waiver pursuant to Rule 12 are different. They are either fundamental defects, such as the failure of an indictment to charge an offense, or they are not subject to cure by the prosecution (e.g., double jeopardy or the statute of limitations).

Some authorities, while admitting that, facially, the express waiver provision of Rule 12(f) applies only to those claims that the rule requires to be made before trial, suggest that Rule 12 "impliedly" requires the claim to be made before conclusion of the trial. To the extent that a
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double jeopardy claim should be raised before trial, these authorities are correct under generally applicable principles of contemporaneous objection embodied in Rule 51. But the waiver does not result from operation of Rule 12(f), which, on its face, applies only to the group of claims that must be made before trial. "Expressio unius est exclusio alterius." Therefore, there is neither room nor justification to extend the plain language of Rule 12(f) to claims which are not within its ambit.

2. Rule 12 Does Not Require A Defendant To Claim Multiplicity Before Trial

Virtually all cases holding that multiplicity claims are waived if not raised at trial rely on Rule 12. These courts hold that the failure to object results in either preclusion of the claim on appeal or limitation of the relief to vacation of a multiplicitous sentence, but not preclusion of the otherwise jeopardy-barred "conviction" itself.

(1969)).

None of these authorities, however, claim that Rule 12(f) causes the waiver. Instead, it appears that they rely on ordinary rules of contemporaneous objection and, thus, they do not suggest that plain error analysis is prohibited.

198. FED. R. CRIM. P. 51.

199. Leatherman v. Tarrant County Narcotics Unit, 113 S. Ct. 1160, 1163 (1993) ("The expression of one thing excludes other things."). Chief Justice Rehnquist, writing for a unanimous Court, cited this maxim in support of the conclusion that the requirement of pleading fraud with particularity, as imposed by Federal Rule of Civil Procedure 9(b), could not be extended to civil rights claims not expressly included in the rule. Even though it might be sensible to require particularized pleading of civil rights claims, "that is a result which must be obtained by the process of amending the Federal Rules, and not by judicial interpretation." Id.

200. Furthermore, Rule 12(f) was designed to extinguish those rights that, if untimely asserted, would potentially cause undue disruption to pretrial proceedings. The drafters apparently made a judgment that, as to other defenses, the ordinary requirements of Rules 51 and 52 were sufficient to balance the need for efficiency against the unfairness to the defendant of permitting important defenses to be extinguished through inattention.

Moreover, Rule 12 provides that one member of the group of defenses to which double jeopardy belongs (failure of an indictment to charge an offense) may be raised at any time. If one of the two specific deadlines in Rule 12 must be applied, it would be logical to borrow the deadline applicable to the defense of failure to charge an offense, rather than the deadline applicable to the other group.

201. See cases cited supra notes 151-66; see, e.g., United States v. Harris, 959 F.2d 246, 250 (D.C. Cir. 1992) (per curiam); United States v. Simone, 931 F.2d 1186, 1191-92 (7th Cir. 1991); United States v. Sheehy, 541 F.2d 123, 130 (1st Cir. 1976).

202. The compromise adopted by the cases cited supra notes 161-66, permitting the
With few exceptions, the cases applying Rule 12 to multiplicity claims simply assume that Rule 12 applies, rather than explaining why it governs. Where courts have applied the rule, they must have concluded that multiplicity is within the rule, that is, that multiplicity is a "defense" or "objection," which is "capable of being determined without the trial of the general issue," and is "based on defects in the indictment" or "institution of the prosecution." None of these assumptions, however, is correct.

Multiplicity is not a "defect" in an indictment. The Supreme Court has repeatedly upheld prosecutions under a multiplicitous indictment. In United States v. Universal C.I.T. Credit Corp., the Court explained that a prosecutor could charge a single offense in multiple counts of an indictment:

[A] draftsman of an indictment may charge crime in a variety of forms to avoid fatal variance of the evidence. He may cast the indictment in several counts whether the body of facts upon which the indictment is based gives rise to only one criminal offense or to more than one. To be sure, the defendant may call upon the prosecutor to elect or, by asking for a bill of particulars, to render the various counts more specific. In any event, by an indictment of multiple counts the prosecutor gives the necessary notice and does not do the less so because at the conclusion of the Government's case the defendant may insist that all the counts are merely variants of a single offense.

The Supreme Court reaffirmed and elaborated on this rule in Ball v. United States. In Ball, the prosecution charged the defendant, a convicted felon, with both possessing a firearm in violation of 18 U.S.C. § 922(h)(1), prohibiting felons from possessing firearms, and with receiving a firearm in violation of 18 U.S.C. app. § 1202(a)(1), prohibiting felons from receiving firearms. Because one could not receive a firearm sentence to be vacated while the conviction itself is affirmed, is unsatisfactory. "In a criminal case final judgment means sentence." Miller v. Aderhold, 288 U.S. 206, 210 (1933). Federal courts have no inherent power to "suspend" imposition of a sentence, ex parte United States, 242 U.S. 27, 52 (1916), except as authorized under a specific statute. See Affronti v. United States, 350 U.S. 79, 80 (1955). Therefore, it would appear to be, at a minimum, problematic to affirm a "conviction" on a charge with no associated sentence. "Congress does not create criminal offenses having no sentencing component." Ball v. United States, 470 U.S. 856, 861 (1985) (citations omitted).

203. FED. R. CRIM. P. 12 (b).
204. See, e.g., Ball v. United States, 470 U.S. 856, 865 (1985) (holding that a defendant could properly be indicted for two counts even when he could stand convicted of only one); United States v. Universal C.I.T. Credit Corp., 344 U.S. 218, 224 (1952) (finding that a prosecutor could draft an indictment charging a defendant with a single offense in multiple counts).
205. 344 U.S. 218 (1952).
206. Id. at 225.
without possessing it, the offenses were the same under Blockburger. Concluding that Congress did not intend multiple punishments for the two separate offenses, the Court did not permit convictions on both counts to stand.

The Court commented that no double jeopardy would result unless the defendant was actually convicted for two counts for conduct that under Blockburger constituted one offense. The Court stated that “[i]t is clear that a convicted felon may be prosecuted simultaneously for violations of §§ 922(h) and 1202(a) involving the same firearm. This Court has long acknowledged the Government’s broad discretion to conduct criminal prosecutions, including its power to select the charges to be brought in a particular case.” Thus, there was no defect or double jeopardy in an indictment charging an unlawful act in two counts that could ultimately lead to a conviction for only a single offense.

The Court even held that both offenses should go to the jury. The district judge had the duty to address the multiplicitous nature of the indictment only if and when the jury convicted the defendant of both offenses. The Ball Court reaffirmed that prosecution under a multiplicitous indictment was part of the “Government’s broad discretion to conduct criminal prosecutions.”

Other Supreme Court cases have also held that multiplicitous indictments may be used and do not violate the Double Jeopardy Clause unless multiple convictions result. Ohio v. Johnson involved an in-

209. Id. at 864-65.
210. Id. at 860 n.7
211. Id. at 859 (citing United States v. Goodwin, 457 U.S. 368, 382 (1982); Confiscation Cases, 74 U.S. (7 Wall.) 454, 457-59 (1869)).
212. Id. at 860.
213. Id. at 865. “If, upon the trial, the district judge is satisfied that there is sufficient proof to go to the jury on both counts, he should instruct the jury as to the elements of each offense.” Id.
214. Id. “Should the jury return guilty verdicts for each count, however, the district court should enter judgment on only one of the statutory offenses.” Id.
215. Id. at 869. Justice Stevens concurred in the judgment. He argued that even if the majority was correct in holding that a simultaneous prosecution for both offenses was constitutional, there was “no reason why [the] Court should go out of its way to encourage prosecutors to tilt the scales of justice against the defendant by employing such tactics.” Id. at 867 (Stevens, J. concurring).
216. See, e.g., Ohio v. Johnson, 467 U.S. 493, 500 (1984) (“While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on
dictment charging murder, aggravated robbery, and the lesser-included offenses of involuntary manslaughter and grand theft. The Court held that it was not unconstitutional to prosecute a defendant for both the lesser and greater crimes, even where the defendant could not be convicted and punished for both.

Similarly, in United States v. Gaddis, the Court held that there was "no impropriety" for a grand jury to charge a defendant with violating two different provisions of the federal bank robbery statutes, even where the defendant ultimately could not stand convicted of both offenses.

In accord with the Supreme Court's position, Federal Rule of Criminal Procedure 7(c)(1) permits multiplicitious indictments, even if only grudgingly. According to the Advisory Committee's Note, the rule "is intended to eliminate the use of multiple counts for the purpose of alleging the commission of the offense by different means or in different ways." However, the Rule provides that different means or ways "may" be alleged in the same count, thus disfavoring, but not prohibiting multiplicitous indictments.

However, none of the cases requiring a pre-trial motion in order to raise a multiplicity claim discuss these opinions. The significance of these cases is that a multiplicitous indictment is not "defective" because the prosecutor has discretion to bring multiple charges even when, as a matter of law, not all of them can result in convictions. Thus, Rule 12, which on its face applies only to "defects," is not applicable.

218. Id. at 495.
219. Id. at 500. "While the Double Jeopardy Clause may protect a defendant against cumulative punishments for convictions on the same offense, the Clause does not prohibit the State from prosecuting respondent for such multiple offenses in a single proceeding." Id.
221. Id. at 550.
222. FED. R. CRIM. P. 7(c)(1). Rule 7(c)(1) provides, in pertinent part: "It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that the defendant committed it by one or more specified means." Id.
223. FED. R. CRIM. P. 7 advisory committee's note.
224. See supra note 222.
225. See supra note 201.
226. See FED. R. CRIM. P. 12.
3. Rule 12 Is Inapplicable To Multiplicity Claims Because They Ordinarily Cannot Be Resolved Prior To A Verdict

A multiplicity objection is not ordinarily within Rule 12 because it is not "capable of determination without trial of the general issue." Even where it appears that the government will not be entitled to judgment on all counts, it will ordinarily be permitted to prove whichever counts it can.

As the Supreme Court explained in United States v. Universal C.I.T. Credit Corp., whether charged acts are considered a single offense or multiple offenses "may not be capable of ascertainment merely from the bare allegations of an information and may have to await the trial on the facts." The Court's statement that an objection to multiplicity could be made "at the conclusion of the Government's case" indicates that the prosecution will be permitted to wait until the end of trial to elect which counts to send to the jury or to have judgment entered upon. The question of whether sufficient evidence exists to submit particular counts to the jury will ordinarily require deferral until the conclusion of the prosecution's case because no summary judgment procedure exists in the federal criminal system. Rarely will it be clear before trial that the government cannot prove facts sufficient to convict on each count charged.

Moreover, as the Supreme Court explained in Ball, to prosecute under a multiplicitous indictment up to and including the jury's verdict does not constitute double jeopardy. The violation occurs only when a de-
fendant is convicted and sentenced for two counts that are essentially
the same offense. Until the close of the government's case, it is im-
possible to know whether there is sufficient evidence to submit
multiplicitous counts to the jury. Even then, the possibility of harm is
contingent. Until the jury has rendered a verdict, it is impossible to know
whether the jury will convict on two or more counts that are the same
offense under law.

A pre-trial motion to remedy any possible double jeopardy effect from
a multiplicitous indictment would be premature and unnecessary. Fur-
thermore, dismissal is not a permissible remedy for a multiplicitous in-
dictment. A defendant faced with a multiplicitous indictment, for ex-
ample, one charging two distinct conspiracies, where the defendant con-
tends there is, at most, only one, could remedy the situation in a number
of ways. The defendant could move for an election at the close of the
evidence. Alternatively, he could argue to the jury that the evidence
shows, at most, a single conspiracy rather than two. Further, the de-
fendant could request jury instructions explaining that a defendant can-
not be convicted of two violations of the same statute based on the same
facts. Where the evidence does not support the existence of one of

233. Id. at 861.
234. See, e.g., United States v. Burns, 990 F.2d 1426, 1439 (4th Cir.) (finding an
acquittal of one of two multiplicitous counts to render multiplicity claim moot), cert.
denied, 113 S. Ct. 2949 (1993); United States v. Wecker, 620 F. Supp. 1002, 1008 (D.
Del. 1985) (denying motion to dismiss pursuant to Rule 12 because defenses were
"contingent upon certain assumptions of fact").
235. In addition, it is inaccurate to think of a multiplicity claim as a "defense or
objection" to an indictment. According to Ball, the double jeopardy protection offered
by Blockburger is not that a defendant will not be prosecuted under a multiplicitous
indictment, but that the district court will enter a lawful judgment, one that does not
violate double jeopardy. Ball, 470 U.S. at 861. That expectation is not a defense,
because unlike a true defense, it is self-executing; a defendant is entitled to expect
that the judge will obey the law, even without a specific advance request. It is also
difficult to understand how a defendant could legitimately object to entirely proper
conduct on the part of the court and prosecutor.
236. See, e.g., United States v. Robinson, 651 F.2d 1188, 1195 (6th Cir.) ("Dismissal
of the indictment is not the proper remedy for multiplicity"), cert. denied, 454 U.S.
that "Dismissal is an inappropriate remedy to cure multiplicity"), aff'd, 669 F.2d 46
tion Corp., 659 F. Supp. 1487, 1495 (E.D.N.Y. 1987) ("Before trial, a court may, in its
discretion, compel election between multiplicitous counts, if the mere making of the
charges would prejudice the defendants in the eyes of the jury.")
238. Herring v. New York, 422 U.S. 853, 862-63 (1975) (recognizing that the Consti-
tution grants defendants the right to argue in summation to the jury); Fed. R. Crim.
P. 29.1 (granting defendants a right to closing argument).
239. Fed. R. Crim. P. 30 ("Any party may file written requests that the court in-

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the conspiracies, the defendant could move for a judgment of acquittal. Should the jury convict on both offenses and the defendant remain convinced that there was only one conspiracy, he could move that judgment be entered on only one count. A defendant's right to argue in summation to the jury, to request jury instructions, and to move for an acquittal are undisputed fixtures of the law that do not require a motion in advance. The defendant need not move before trial for an order to take part in the trial as provided by the Federal Rules of Criminal Procedure and the Constitution.

4. Rule 12 Does Not Require Collateral Estoppel Claims To Be Made Before Trial

Rule 12(b)(3) requires that motions to suppress evidence be made before trial. The 1974 Advisory Committee Notes reveal that the provision is intended to apply to "objections to evidence on the ground that
it was illegally obtained.\footnote{It was illegally obtained.} Thus, it applies to "application of the exclusionary rule of evidence."\footnote{Rule 12(b)(3), however, does not appear to have to have been intended to apply to claims of collateral estoppel since collateral estoppel operates to preclude proof of a fact, not to suppress any particular evidence.}

In short, Rule 12(b) does not require that a defense based on the constitutional prohibition against double jeopardy be raised before trial. Accordingly, the waiver provision of Rule 12(f) provides no basis for refusing to consider double jeopardy claims for plain error under Rule 52(b).\footnote{The waiver provision of Rule 12(f) provides no basis for refusing to consider double jeopardy claims for plain error under Rule 52(b).}

\section*{B. The Majority Of Courts Holding That Double Jeopardy Claims Cannot Be Reviewed For The First Time On Appeal Hold That The Claims Were ‘Waived,’ But Do Not Apply The Law Regarding Waiver Of Constitutional Rights}

Opinions holding double jeopardy claims waived if not raised at trial contain virtually no analysis other than citation to prior authority. No case fully explains why Rule 52(b) should not be applied, other than ritualistically repeating that the lack of objection constitutes a waiver.

In equating "failure to object" with a "waiver of rights," the courts following the rule of waiver are at odds with the very concept of plain error review under Rule 52(b). As the Supreme Court explained in \textit{United States v. Olano},\footnote{United States v. Olano\textsuperscript{,} 113 S. Ct. 1770, 1777 (1993) (explaining that, as a hypothetical example, it would not be error not to conduct a trial if a defendant validly waived her right to trial by pleading guilty.).} a right that has been waived is extinguished and, therefore, is not subject to plain error review.\footnote{A right that has been waived is extinguished and, therefore, is not subject to plain error review.} On the other hand, provides an avenue for review of errors "not brought to the attention of the court."\footnote{Thus, strict adherence to the rule of waiver for failure to object would render Rule 52(b) meaningless. If failure to object is considered a waiver, and waived claims are not subject to review, even for plain error, then no category of error is subject to plain error review. Such a construction contravenes the clear intent of Rule 52(b). The Supreme Court’s analysis in \textit{Olano} clearly indicates that a failure to raise a timely objection does not constitute a waiver.}

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not constitute a waiver rendering Rule 52(b) inapplicable: "If a legal rule was violated during the District Court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection."\(^{251}\)

In addition, non-constitutional issues may be reviewed for plain error.\(^{252}\) The end result is that courts treat claims based on constitutional double jeopardy grounds with less deference than non-constitutional claims that are reviewable for plain error. Nothing in Rule 52(b) singles out double jeopardy, or any other specific kind of error, for disfavored treatment.

The conclusion that mere failure to object constitutes a waiver extinguishing the right is precluded by the standard established by the Supreme Court for waiver of constitutional rights. In _Johnson v. Zerbst_,\(^{253}\) the defendant was convicted after a trial in which he was not represented by counsel. On habeas corpus, the defendant contended that his trial without representation was unconstitutional. The government argued that the defendant waived his right, if any, by failing to object or request counsel.\(^{254}\) The Court noted that "courts indulge every reasonable presumption against waiver" of fundamental constitutional rights\(^{255}\) and that we 'do not presume acquiescence in the loss of fundamental rights.'\(^{256}\) The Court concluded that "[a] waiver is ordinarily an intentional relin-

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252. See, e.g., United States v. Santana-Camacho, 833 F.2d 371, 374-75 (1st Cir. 1987) (holding that prosecutor's misrepresentations made during closing argument constituted plain error); United States v. Silverstein, 732 F.2d 1338, 1349 (7th Cir. 1984) (setting forth the plain error test in a case involving the court's response to a jury note), _cert. denied_, 469 U.S. 1111 (1985). "To be plain, an error must be conspicuous, at least in hindsight[;] . . . it must also be an error that probably changed the outcome of the trial . . . ." _Id._ at 1349. "Reversing a conviction on the basis of an error that the defendant's lawyer failed to bring to the judge's attention" is "justifiable only when the reviewing court is convinced that it is necessary in order to avert an actual miscarriage of justice . . . ." _Id._

253. 304 U.S. 458 (1938).

254. _Id._ at 464.

255. _Id._ (citing Aetna Ins. Co. v. Kennedy, 301 U.S. 380, 303 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882)).

256. _Johnson_, 304 U.S. at 464 (citing Ohio Bell Tel. Co. v. Public Util. Comm'n, 301 U.S. 292 (1937)).
quishment or abandonment of a known right or privilege.” 257 Thus, the defendant was permitted to raise the issue on appeal despite his lack of objection at trial because it did not appear on the record that he had waived his right to counsel under that standard. 258

In Green v. United States, 259 the Court specifically applied the Johnson standard to a double jeopardy claim. 260 In Green, the jury was given the option of convicting the defendant of either first or second degree murder. 261 After being convicted of second degree murder, the defendant successfully appealed and, over his objection, was retried for first degree murder. 262 The defendant was convicted of first degree murder at the second trial. 263 The state argued that Green waived his double jeopardy defense to the first degree murder charge by successfully appealing the second degree murder conviction. 264 The Court rejected the government’s position:

[W]e cannot accept this paradoxical contention. “Waiver” is a vague term used for a great variety of purposes, good and bad, in the law. In any normal sense, however, it connotes some kind of voluntary knowing relinquishment of a right. 265

In subsequent cases, the Court has consistently required a Johnson v. Zerbst waiver of a double jeopardy claim. In Schneckloth v. Bustamonte, 266 the Court observed that “the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal defendant in order to preserve a fair trial.” 267 The Court further noted that “the Johnson criteria [are applied] to assess the effectiveness of a waiver of . . . the right to be free from twice being placed in jeopardy.” 268

Similarly, in Menna v. New York, 269 the Court held that the defendant had not waived the right to appeal his conviction on charges barred by the Double Jeopardy Clause even when he had entered a guilty plea to the charges. 270 In noting that a counseled “plea of guilty to a charge

258. Johnson, 304 U.S. at 468.
260. Id. at 191-92.
261. Id. at 186.
262. Id.
263. Id.
264. Id. at 191.
265. Id. at 191 (citing Johnson v. Zerbst, 304 U.S. 458 (1938)).
266. 412 U.S. 218 (1973).
267. Id. at 237.
268. Id. at 237-38 (citing Green v. United States, 355 U.S. 184 (1957)).
269. 423 U.S. 61 (1975) (per curiam).
270. Id. at 62.

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does not waive a claim that—judged on its face—the charge is one which the State may not constitutionally prosecute, the Court distinguished \textit{Tollett v. Henderson}, \textit{McMann v. Richardson}, and \textit{Brady v. United States}, cases holding that a defendant could not raise claims of antecedent deprivation of constitutional rights following a knowing, voluntary, and intelligent plea of guilty. The Court explained that those cases recognized a plea of guilty as "remov[ing] the issue of factual guilt from the case." It further explained that in \textit{Green}, the claim [was] that the State may not convict petitioner no matter how validly his factual guilt is established. The guilty plea, therefore, does not bar the claim. Other cases suggest that double jeopardy claims are entitled to special consideration because they bar prosecution entirely.

\begin{itemize}
\item \textit{Id.} at 62 n.2.
\item 411 U.S. 258 (1973).
\item 397 U.S. 759 (1970).
\item 397 U.S. 742 (1970).
\item In \textit{Tollett}, the Court held that a defendant who pleaded guilty was not entitled to habeas corpus relief because the grand jury that indicted him was unconstitutionally selected. \textit{Tollett}, 411 U.S. at 266. In \textit{McMann}, the Court held that a guilty plea induced by a coerced confession was not involuntary, even though there was no procedure by which to test the voluntariness of the confession in advance of trial. \textit{McMann}, 397 U.S. at 771-72. In \textit{Brady}, the Court held that a guilty plea was not involuntary when made to avoid a death sentence under a penalty provision later held unconstitutional. \textit{Brady}, 397 U.S. at 755-56.
\item Menna v. New York, 423 U.S. 61, 62 n.2 (1975).
\item \textit{Id.}
\item \textit{Id.}
\item In \textit{Robinson v. Neil}, 409 U.S. 505, 511 (1973), the Court held that \textit{Waller v. Florida}, 397 U.S. 387, 395 (1970), which held that a state and municipality were the same sovereign for double jeopardy purposes, would be "accorded full retroactive effect." The Court distinguished \textit{Waller} from prior court decisions clarifying important rights that were not applied retroactively because it related to double jeopardy. "While this guarantee, like the others, is a constitutional right of the criminal defendant, its practical result is to prevent a trial from taking place at all, rather than to prescribe procedural rules that govern the conduct of a trial." \textit{Id.} at 509.
\item Similarly, in \textit{Blackledge v. Perry}, 417 U.S. 21 (1974), the defendant claimed that he had been vindictively prosecuted for a felony after successfully appealing a misdemeanor conviction for the same offense. Distinguishing \textit{McMann}, \textit{Brady}, and \textit{Tollett}, the Court reasoned that even though the defendant pleaded guilty to the felony in superior court, the protection offered by the Due Process Clause barred the conviction. \textit{Id.} at 29-31. The Court explained that the right not to be vindictively prosecuted, like the right not to be placed twice in jeopardy, was "distinctive" because "its practical result is to prevent a trial from taking place at all, rather than to prescribe
Many of the courts holding or implying that a double jeopardy defense may be raised on appeal despite failure to appropriately object before or at trial rely on Johnson v. Zerbst.\(^{280}\) Similarly, courts calling the rule of waiver into question rely on the problematic nature of a policy of automatic waiver in light of these cases.\(^{281}\) Further research has presented procedural rules that govern the conduct of a trial.\(^{"Id."}\) at 31 (quoting Robinson, 409 U.S. at 509).

280. See United States v. Jarvis, 7 F.3d 404, 412 (4th Cir. 1993) (concluding that failure to raise a formal objection at pleading or trial does not constitute waiver on appeal), cert. denied, 114 S. Ct. 1200 (1994); United States v. Devine, 934 F.2d 1325, 1343 (6th Cir. 1991) (same), reh'g en banc denied, 943 F.2d 1315 (5th Cir.), cert. denied, 112 S. Ct. 349 (1991), and cert. denied, 112 S. Ct. 952, and cert. denied, 112 S. Ct. 954, and cert. denied, 112 S. Ct. 1164, and cert. denied, 112 S. Ct. 1197 (1992); United States v. Rivera, 872 F.2d 507, 509 (1st Cir.) (same), cert. denied, 493 U.S. 818 (1989); United States v. Anderson, 514 F.2d 583, 586 (7th Cir. 1975) (recognizing waiver as the intentional abandonment of a known right).

Other courts have also recognized that a Johnson v. Zerbst waiver of protection against double jeopardy is required. See United States v. Hudson, 14 F.3d 536, 539 (10th Cir. 1994) (waiver of double jeopardy rights must be voluntary and intelligent); United States v. Rodriguez, 995 F.2d 234, 1993 U.S. App. LEXIS 13364, at *1 (9th Cir. 1993) (concluding that without a knowing and voluntary waiver, mistrial not based on "manifest necessity" will bar retrial); United States v. Atkins, 834 F.2d 426, 437 & n.9 (5th Cir. 1987) (stating that a deliberate decision to forego the right is required), overruled in part by Taylor v. Whitley, 933 F.2d 325, 327 (5th Cir. 1991) (acknowledging as binding authority, United States v. Broce, 488 U.S. 563 (1989)), cert. denied, 112 S. Ct. 1678 (1992); Adamson v. Ricketts, 780 F.2d 722, 737 (9th Cir. 1986) (arguing that a double jeopardy claim is subject to rule that waiver requires intentional relinquishment of a known right, but contending that there had been such a waiver) (Brunetti, J., joined by Kennedy, Alarcon & Beezer, JJ., dissenting from en banc opinion), rev'd, 483 U.S. 1 (1987); Lydon v. Justices of Boston Mun. Court, 698 F.2d 1, 9-10 (1st Cir. 1982) (waiver of double jeopardy claim requires intentional relinquishment of a known right), rev'd on other grounds, 466 U.S. 294 (1984); Hartung v. Omodt, 687 F.2d 1230, 1234 (8th Cir. 1982) (implicitly requiring voluntary waiver of double jeopardy claim, but finding waiver sufficient); United States v. Rich, 589 F.2d 1025, 1032-33 (10th Cir. 1978) (reiterating that the constitutional right not to be placed twice in jeopardy for the same offense requires a "knowing and intelligent" waiver); Launius v. United States, 575 F.2d 770, 772 (9th Cir. 1978) (per curiam) (same); United States v. Young, 503 F.2d 1072, 1075 (3d Cir. 1974) (same); Himmelfarb v. United States, 175 F.2d 924, 931 n.1 (9th Cir.) (same), cert. denied, 338 U.S. 860 (1949).

281. United States v. MacQueen, 596 F.2d 76, 81 (2d Cir. 1979) (citing Menno v. New York and Blackledge v. Perry, which "indicate that the right not to be haled into court twice for the same offense is a fundamental one, so important that it cannot be waived by a guilty plea to a second charge"); Parker v. United States, 507 F.2d 587, 588 (8th Cir. 1974) (noting that "[t]he question of whether counsel is empowered to effectively waive the double jeopardy defense without his client's knowledge [by failing to object] is a difficult one which we leave to a future decision"), cert. denied, 421 U.S. 916 (1975); Douglas v. Nixon, 459 F.2d 325, 327 (9th Cir.) (concluding that "whether time and intervening decisions of the Supreme Court have eroded" the rule of waiver is a moot question because the court found the double jeopardy issue
no federal court decisions that expressly hold that the Johnson v. Zerbst analysis is inapplicable to double jeopardy claims.

In United States v. Broce, 282 however, the Supreme Court held that when the defendants entered guilty pleas to two counts of an indictment, they were foreclosed from arguing that they had in fact committed only one offense. 283 Arguably, Broce could be read as limiting Johnson v. Zerbst in a guilty plea context. However, when fairly read, Broce does not limit Johnson, but continues to allow plain error review. The Court was reasonably clear that its rationale was not that a double jeopardy claim had been waived, but that the defendants would not be permitted to contradict the judicial admissions inherent in a valid plea to two offenses:

Just as a defendant who pleads guilty to a single count admits guilt to the specified offense, so too does a defendant who pleads guilty to two counts with facial allegations of distinct offenses concede that he has committed two separate crimes . . . When respondents pleaded guilty to two charges of conspiracy on the explicit premise of two agreements which started at different times and embraced separate objectives, they conceded guilt to two separate offenses. 284

This could be interpreted as an application of settled principles of law, such that a defense argument on appeal must be founded in the record and judicial admissions are binding and non-controvertible. 285

The Court noted, however, that a double jeopardy claim would still be viable, even after a guilty plea, if it did not require impeachment of the defendant's plea. 286 The Court explained that exceptions to the rule that a voluntary guilty plea forecloses attack on the conviction existed "where on the face of the record the court had no power to enter the conviction or impose the sentence." 287 The Court cited Menna as one of those exceptions, noting that in Menna "the indictment was facially duplicative of the earlier offense of which the defendant had been convicted and sen-

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283. Id. at 576.
284. Id. at 570-71.
285. See, e.g., 9 JOHN HENRY WIGMORE, EVIDENCE § 2590 at 882 (Chadbourne rev. ed. 1981) ("The vital feature of a judicial admission is universally conceded to be its conclusiveness upon the party making it; i.e., the prohibition of any further dispute of the fact by him and of any use of evidence to disprove or contradict it.").
286. Broce, 488 U.S. at 569.
287. Id. at 569, 576.
Accordingly, courts applying *Broce* have held that if the record itself demonstrates that the counts were multiplicitous, a double jeopardy challenge would be cognizable.

C. Where Did The Federal Courts Go Wrong?

This article contends that many federal courts have been fundamentally misapplying the law. Analysis of cases applying the rule of waiver suggests two possible explanations for the apparently erroneous application of the law. First, the courts have never incorporated changes in the law arising after the rule of waiver was formulated; instead, they appear unaware of their own precedents. Second, many courts claiming to apply the rule of waiver proceed to analyze the claims anyway, suggesting that they may actually be applying a form of plain error analysis without expressly acknowledging it.

1. Were The Courts Of Appeals Unaware Of Relevant Decisions?

The cases suggest a lack of judicial communication, both within individual circuits and between the courts of appeals and the Supreme Court. The rule of waiver was established in the federal courts in 1925 in *Levin v. United States*, which held that "waiver may be either express or implied [and] it is always implied when there is failure to raise the objection at the first opportunity." That conclusion may have been correct at the time. However, the rule warranted some reevaluation after the Court's decision in *Johnson v. Zerbst* in 1938 and, again, after the codification of the plain error doctrine in the Federal Rules of Criminal Procedure in 1944. Subsequently, *Green v. United States* in 1957, *Schneckloth v. Bustamonte* in 1973, and *Menna v. New York* in

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288. *Id.* at 575-76 (citing *Menna v. New York*, 423 U.S. 61, 62 (1975)).

289. See, e.g., *United States v. Pollen*, 978 F.2d 78, 84 (3d Cir. 1992) (double jeopardy claim may be raised after guilty plea if it "can be proven by reference solely to the indictment and existing record") (citing *Broce*, 488 U.S. at 574-76), *cert. denied*, 113 S. Ct. 2332 (1993), and *cert. denied*, 114 S. Ct. 697 (1994); *United States v. Kaiser*, 893 F.2d 1300, 1302 (11th Cir. 1990) (reviewing double jeopardy claim after guilty plea because it was apparent from the face of the record).

290. 5 F.2d 598 (9th Cir.), *cert. denied*, 269 U.S. 562 (1925). The rule was apparently first applied in a federal court in *Miller v. United States*, 41 App. D.C. 52, 62, *cert. denied*, 231 U.S. 755 (1913), but *Miller* has not been cited by other federal courts for the proposition.

291. *Levin*, 5 F.2d at 600.

292. 304 U.S. 458 (1938) (stating that a waiver must be knowing and voluntary).

293. *FED. R. CRIM. P.* 52.

294. 355 U.S. 184, 191 (1957) (waiver of double jeopardy claim requires knowing and voluntary relinquishment of the right).

295. 412 U.S. 218, 236-38 (1973) (requirement of knowing and voluntary waiver ap-
1975 shed further light on the issue. The courts of appeals, however, did not attempt to reconcile these decisions or the Advisory Committee Notes when holding that double jeopardy claims are waived if not raised before trial. Instead, the courts tended to continue following their own precedents and those of other circuits.

*United States v. Rivera,* one of the few cases to hold that claims of being tried twice are subject to plain error review, makes this observation. In *Rivera,* the First Circuit cited some of the numerous cases that have applied the rule of waiver, but indicated that no decision "persuasively addresses the principle that a waiver of a constitutional right must be 'voluntary, knowing, [and] intelligent.'" There may be a response to the Supreme Court cases, but no court applying the rule of waiver has made one.

One court has even suggested that some of the responsibility for the failure of the circuits to confront the applicability of *Johnson v. Zerbst* and its progeny to double jeopardy claims rests with defense counsel. In *United States v. MacQueen,* a 1979 decision, the Second Circuit declined to state that the rule of waiver was still valid. In attempting to explain why the rule of waiver had never been reevaluated in light of subsequent Supreme Court cases, the court remarked that *United States v. Perez,* a 1977 case following the rule of waiver, "was decided after *Blackledge* and *Menna,* but it does not distinguish them and those cases were not called to the panel's attention."

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296. 423 U.S. 61, 62 (1975) (per curiam) (concluding that defendant's guilty plea did not waive the right to raise double jeopardy claim).
297. 872 F.2d 507, 509 (1st Cir.) (holding that defendant's failure to plead double jeopardy did not constitute a knowing waiver), cert. denied, 493 U.S. 818 (1989).
298. Id.
299. Id. (quoting United States v. Christian, 571 F.2d 64, 69 (1st Cir. 1978) (discussing requirements for waiver of fundamental constitutional rights)).
300. See supra notes 253-79 and accompanying text.
301. United States v. MacQueen, 596 F.2d 76, 81 (2d Cir. 1979) (discussing defense counsel's double jeopardy argument on appeal in United States v. Perez, 565 F.2d 1227 (2d Cir. 1977)).
302. Id.
303. Id. at 82 (concluding that a defendant did not suffer double jeopardy when case was retried after mistrial).
304. 565 F.2d 1227, 1232 (2d Cir. 1977) (stating that the defendant must raise the issue of double jeopardy to avoid waiver).
305. *MacQueen,* 596 F.2d at 81; see *Menna v. New York,* 423 U.S. 61 (1975) (per
The explanation that these courts were applying the "law of the circuit," unaware of subsequent Supreme Court cases, is incomplete simply because there is a significant disparity of outcomes within the individual circuits.306 The Second Circuit provides a good example. In United States v. Private Brands,307 a 1957 case, the Second Circuit held that a failure to raise a multiplicity objection before trial constituted a waiver.308 Without mentioning Private Brands, the court in Natarelli v. United States,309 a 1975 case, went the other way, holding that challenges to multiplicitous sentences could be attacked for the first time on post-conviction review.310 Four years later, in United States v. DiGeronimo,311 the court found that a conviction on two counts that in law are the same offense could be remedied on direct appeal as plain error.312 The next year, however, in United States v. Alessi,313 a panel held that appellants were "barred by their procedural default from raising" the claim for the first time on appeal without mentioning the prior case law.314 Then, in 1981, in United States v. Reed,315 again without mentioning the court's prior pronouncements on the issue, the Second Circuit rejected the Alessi approach, stating that "[t]he principal danger in multiplicity—that the defendant will be given multiple sentences for the same offense—can be remedied at any time by merging the convic-

306. "In the case of a court that sits in panels, a decision of a panel constitutes a decision of the court and carries the weight of stare decisis in a subsequent case before the same or different panel. Moore, supra note 135, at ¶ 0.402[1], at 19. Based on this principle, the federal courts of appeals consider prior panel decisions binding "law of the circuit" unless overruled by the court sitting en banc or by the Supreme Court. See, e.g., Broderick v. Roache, 996 F.2d 1294, 1298 (1st Cir. 1993) (in a multi-panel circuit, new panels are bound by prior decisions on point); United States v. Hogan, 886 F.2d 1364, 1368 (11th Cir. 1993) (panels are bound by prior panel decisions, unless the holding is overruled en banc or by the Supreme Court); United States v. Ruff, 984 F.2d 635, 640 (5th Cir. 1993) (same), cert. denied, 114 S. Ct. 108 (1993); Lomas Mortgage USA v. Wies, 980 F.2d 1279, 1282 (9th Cir. 1993) (same), cert. granted, 113 S. Ct. 2925 (1993); Kronfeld v. TWA, 832 F.2d 726, 732 n.13 (2d Cir. 1987) (same), cert. denied, 485 U.S. 1007 (1988).
308. Id. at 557 (citing Anderson v. United States, 189 F.2d 202, 204 (6th Cir. 1951)).
309. 516 F.2d 149 (2d Cir. 1975).
310. Id. at 152 n.4.
312. Id. at 751-52.
313. 638 F.2d 466, 476 (2d Cir. 1980) (citing Fed. R. Crim. P. 12(f)).
314. Id. at 476.
315. 639 F.2d 896 (2d Cir. 1981).
tions and permitting only a single sentence."\textsuperscript{316} The 1991 case of United States v. Coiro\textsuperscript{317} set aside a multiplicitous conviction as plain error.\textsuperscript{318}

The Seventh Circuit has similarly waffled. In a 1979 case, United States v. Stavros,\textsuperscript{319} the court reviewed a multiplicity claim raised for the first time on appeal and concluded that "[i]f a plain constitutional infirmity in a criminal sentence has come to our attention, we think we should not disregard it."\textsuperscript{320} Six years later, in United States v. Griffin,\textsuperscript{321} the court held that Rule 12 required claims of multiplicity to be raised before trial, and therefore, they could not be raised under the plain error standard absent a showing of cause.\textsuperscript{322} Griffin was followed by another panel's decision a year later.\textsuperscript{323} In the 1989 case, United States v. Podell,\textsuperscript{324} a panel implicitly declined to follow Griffin, and reversed for plain error, even though there was no analysis or specific finding of "cause."\textsuperscript{325} A 1990 case followed Podell's analysis.\textsuperscript{326} The following year, in United States v. Simone,\textsuperscript{327} the Seventh Circuit cited Podell, but reverted to the Griffin test, requiring a finding of "cause" before it would consider the issue on appeal.\textsuperscript{328} Yet, in United States v. Bailin,\textsuperscript{329} a 1992 case, the court cited Podell approvingly for the proposition that double jeopardy violations were sometimes plain error,\textsuperscript{330} while another panel went the

\begin{itemize}
\item \textsuperscript{316} Id. at 904 n.6 (citing 1 CHARLES A. WRIGHT, FEDERAL PRACTICE AND PROCEDURE § 145 (1969)).
\item \textsuperscript{317} 922 F.2d 1008 (2d Cir. 1991).
\item \textsuperscript{318} Coiro, 922 F.2d at 1013-15 (citing United States v. Reed, 639 F.2d 896 (2d Cir. 1981)), cert. denied, 111 S. Ct. 2826 (1991).
\item \textsuperscript{319} 597 F.2d 108 (7th Cir. 1979).
\item \textsuperscript{320} Id. at 111.
\item \textsuperscript{321} 765 F.2d 677 (7th Cir. 1985).
\item \textsuperscript{322} Id. at 681-82. The defendant's task became even more daunting in that he did not raise the issue on direct appeal; instead, he waited until the § 2255 petition. Id. at 682.
\item \textsuperscript{323} United States v. Mosley, 786 F.2d 1330, 1333 (7th Cir.) (stating that a claim of multiplicity is waived if not raised before trial), cert. denied, 476 U.S. 1184 (1986).
\item \textsuperscript{324} 809 F.2d 328 (7th Cir. 1989).
\item \textsuperscript{325} Id. at 331-32.
\item \textsuperscript{326} United States v. Briscoe, 896 F.2d 1476, 1522 (7th Cir.), cert. denied, 498 U.S. 803 (1990).
\item \textsuperscript{327} 931 F.2d 1186 (7th Cir.), cert. denied, 112 S. Ct. 584 (1991).
\item \textsuperscript{328} Id. at 1192 & n.6.
\item \textsuperscript{329} 977 F.2d 270 (7th Cir. 1992).
\item \textsuperscript{330} Id. at 282 n.18.
\end{itemize}
other way that same year.\footnote{331} Other circuits occasionally appear unaware of their prior precedent as well.\footnote{332}

2. The Circuit Courts May Be Applying Plain Error Analysis Under A Different Name

One possible reconciliation of these inconsistent decisions may be that the courts are really applying plain error analysis, or its equivalent, without specifically saying so. Many of the cases holding double jeopardy claims waived because the issue was not raised below analyze the double jeopardy claims despite their putative adherence to the rule of waiver. For instance, the Eighth Circuit was an early follower of the rule of waiver,\footnote{332} but in \textit{Parker v. United States},\footnote{334} the court gave an illuminating commentary on the circuit’s prior cases:

\begin{quote}
The waiver "rule" may not be as absolute as we have stated it. Where we have purported to apply it, we have alternatively held that there was no double jeopardy, . . . reversed the conviction on other grounds, . . . or noted that the issue was still open to the petitioner in state court.\footnote{335}
\end{quote}

In \textit{Parker}, the court found that it did not have to decide the issue raised because the substantive double jeopardy issue was meritless.\footnote{336}

Similarly, in \textit{Virgin Islands v. Smith},\footnote{337} the Third Circuit reached a double jeopardy claim as plain error, observing that many courts have held that the failure to raise a constitutional claim at trial precludes raising the issue on appeal.\footnote{338} "In doing so, however, these courts have, nevertheless, proceeded to consider and decide the asserted constitutional guarantee claim."\footnote{339} Examination of the cases, involving both claims

\footnotesize{331. United States v. Wilson, 962 F.2d 621, 626 (7th Cir. 1992).
332. For example, in United States v. Harris, 959 F.2d 246, 250 (D.C. Cir.) (per curiam) (Ruth Bader Ginsburg, Thomas and Silberman, JJ.), \textit{cert. denied}, 113 S. Ct. 362, and \textit{cert. denied}, 113 S. Ct. 364 (1992), the court rejected a multiplicity claim because the defendant did not raise it until midway through the trial. The court surveyed the law in other circuits, as if reviewability of multiplicity claims were an open question in the circuit. \textit{Id.} Two years earlier, however, in United States v. Johnson, 909 F.2d 1517 (D.C. Cir. 1990) (Opinion of Buckley, J. with Ginsburg and Williams, JJ. joining), the court reached the issue when it had been raised even later, in a post-trial motion in the district court. \textit{Id.} at 1519. The court in \textit{Harris} did not mention \textit{Johnson}.
333. See cases cited \textit{supra}, note 127.
335. \textit{Id.} at 588 n.1.
337. 445 F.2d 1089 (3d Cir. 1971).
338. \textit{Id.} at 1094.
339. \textit{Id.}}
of being tried twice and of multiplicity, reveals that, in most instances, the courts concluded that the double jeopardy claims were meritless.\textsuperscript{340}

In actuality, what many courts may have been doing, distinct from what they said they were doing, is engaging in the equivalent of a plain error analysis. The courts' rote re-statement of the rule of waiver in the opinions may be viewed as tantamount to an affirmation of the principle that any alleged error must be raised at trial; otherwise, it will be reviewable on appeal solely for plain error. When the court then proceeds to analyze a double jeopardy claim raised for the first time on appeal and finds it meritless, it is in essence performing plain error analysis. Where the court finds no violation of double jeopardy, there is no plain error.

This hypothesis is sufficient to explain the multiplicity cases in the Second and Seventh Circuits discussed above.\textsuperscript{341} In the cases where the court reached the merits and found the double jeopardy claim to be meritless, the court pronounced that the rule of waiver barred further consideration of the claim. Where the claim was meritorious, the court reversed in spite of the rule of waiver bar.\textsuperscript{342}

\textsuperscript{340} In the cases cited supra notes 120-32, where a double jeopardy issue was presented, the courts found the double jeopardy claim meritless, except in the cases discussed infra notes 345-46. Similarly, in the multiplicity cases cited supra notes 151-60, excluding those cases cited infra note 344, the court either rejected the claim on the merits, or noted that concurrent sentences had been imposed. (Traditionally, the fact that the sentence on a challenged count ran concurrently with that of a valid count was an independent basis for an appellate court to decline to reach even a duly preserved appellate claim). See, e.g., United States v. Romano, 382 U.S. 136, 138 (1965). This approach was rejected in Ball v. United States, 470 U.S. 856, 864-65 (1985).

\textsuperscript{341} See supra notes 307-31 and accompanying text.

\textsuperscript{342} In two Seventh Circuit cases, the court did not reach the merits, but it was clear in each that the claim would have been unavailing. In United States v. Mosley, 786 F.2d 1330 (7th Cir.), cert. denied, 476 U.S. 1184 (1986), the defendant claimed that his conviction for one count of conspiracy and one count of interstate transportation of a stolen security was multiplicitous. \textit{Id.} at 1333. However, conspiracy and a substantive offense may be charged and punished separately, so this claim was empty. See, e.g., United States v. Felix, 112 S. Ct. 1377, 1384-85 (1992). In United States v. Wilson, 962 F.2d 621 (7th Cir. 1992), the court refused to decide whether a felon could, for the same act, be convicted under both 18 U.S.C. § 922(g), prohibiting felons from possessing firearms, and 18 U.S.C. § 924(e), imposing a significant mandatory minimum sentence on persons with three or more prior convictions for certain kinds of felonies when convicted of a violation of § 922(g). \textit{Id.} at 626. In an earlier case, United States v. Garrett, 903 F.2d 1105, 1113 (7th Cir.), cert. denied, 498 U.S. 905 (1990), the court held that there was no double jeopardy where the defendant was convicted under both § 922(g) and § 924. Hence, in the Seventh Circuit, the
If this hypothesis is correct, the failure of the courts to account for the *Johnson v. Zerbst* line of cases becomes much more comprehensible. The courts may recognize that the claims are not “waived” in the sense that they are extinguished, but simply that they were not properly objected to and, thus, are reviewable only for plain error.\textsuperscript{344} If so, there is no doctrinal inconsistency between the Supreme Court and the approach taken by the circuit courts.

If the courts engage in plain error analysis without admitting so, the harm from such imprecision is that some courts have taken the rule too literally. A number of courts have relied on the rule of waiver and affirmed a judgment without any analysis of the merits of a multiplicity\textsuperscript{344} or other double jeopardy claim.\textsuperscript{345} There are also a handful of courts that have denied relief based on the rule of waiver despite finding a mer-

\begin{footnotesize}
\textsuperscript{343} See, e.g., United States v. Jarvis, 7 F.3d 404, 409 (4th Cir. 1993) (reviewing double jeopardy claim for plain error and treating cases applying the rule of waiver as simply requiring an objection to be made before trial), cert. denied, 114 S. Ct. 1200 (1994).

\textsuperscript{344} See, e.g., United States v. Berry, No. 92-16647, 1994 U.S. App. LEXIS 9524, at *3 (9th Cir. Apr. 20, 1994) (multiplicity claim waived because not raised before trial); United States v. Connolly, No. 93-1625, 1993 U.S. App. LEXIS 31591, at *4 n.1 (1st Cir. Dec. 7, 1993); United States v. Wilson, 983 F.2d 221, 225 (11th Cir. 1993) (same); United States v. Colbert, 977 F.2d 203, 208 (6th Cir. 1992) (same); United States v. Wilson, 962 F.2d 621, 626 (7th Cir. 1992) (same); United States v. Garrett, 961 F.2d 743, 748 & n.7 (8th Cir. 1992) (same); United States v. Mosley, 786 F.2d 1300, 1333 (7th Cir.) (same), cert. denied, 476 U.S. 1184 (1986); see also United States v. Gerald, 624 F.2d 1291, 1300 (5th Cir. 1980) (declining to review claim raised for the first time on appeal where there was no cause shown to grant relief from waiver), cert. denied, 450 U.S. 920 (1981); United States v. Woods, 544 F.2d 242, 251 (6th Cir. 1976) (same), cert. denied, 429 U.S. 1062, and cert. denied, 430 U.S. 969, and cert. denied, 431 U.S. 954 (1977).

\textsuperscript{345} See, e.g., United States v. Papadakis, 802 F.2d 618, 621 (2d Cir. 1986) (stating that the defendant waived the contention that the second prosecution placed him in double jeopardy because he raised it for the first time on appeal), cert. denied, 479 U.S. 1092 (1987); United States v. Basbaro, 742 F.2d 1335, 1365 (11th Cir. 1984) (suggesting that a double jeopardy violation might exist, but refusing to reach it), cert. denied, 472 U.S. 1017, and cert. denied, 472 U.S. 1021 (1985); United States v. Silva, 611 F.2d 78, 80 (5th Cir. 1980) (refusing to consider double jeopardy claim raised for the first time on appeal); United States v. Conley, 503 F.2d 520, 521 (8th Cir. 1974) (reversing conviction on other grounds); Cox v. Crouse, 376 F.2d 878, 826 (10th Cir.) (per curiam) (habeas corpus case), cert. denied, 380 U.S. 865 (1967); Morlan v. United States, 230 F.2d 30, 32 (10th Cir. 1956) (double jeopardy claim waived because not raised below); Miller v. United States, 41 U.S. App. D.C. 52, 62, (refusing to consider double jeopardy claim not raised at trial), cert. denied, 231 U.S. 753 (1913); United States v. Cloyd, 45 F. Supp. 499, 501 (W.D. Ky. 1942) (finding an implied waiver of the defense where the defendant failed to raise the issue at trial); United States v. Harrison, 24 F. Supp. 249, 252 (S.D.N.Y.) (holding that a guilty plea waives the double jeopardy defense), aff'd, 99 F.2d 1017 (2d Cir. 1938).
\end{footnotesize}
itorious double jeopardy claim. There has only been one such case decided in the past half century.346

It is apparent that a double jeopardy claim may be analyzed less carefully when the court believes that the claim has been waived. Where a point is not deemed critical to the decision in a case it is likely to be dealt with much differently than where an issue is perceived to be determinative—illustrated by the courts’ failure to fully analyze the rule of waiver.

V. CONCLUSION

The apparent tension between the appellate courts’ desire to enforce the contemporaneous objection requirement and the unfairness of depriving a defendant of an absolute defense has resulted in considerable disparity in the reported decisions. Doctrinal consistency and fairness to the parties can be restored by discarding the rule of waiver and testing claims of double jeopardy, like other types of error, under the rigorous plain error standard. This is unlikely to diminish the number of meritorious double jeopardy claims raised in the district courts. Counsel’s responsibility to her client and the profession, in addition to the natural desire to win the case, will ensure that the issue is raised as soon as it is perceived. Accordingly, failure to raise a double jeopardy defense will almost never be strategic.

The few meritorious double jeopardy claims raised for the first time on appeal will ordinarily constitute plain error. As a result, defendants who have been tried and found guilty by constitutionally sufficient evidence will be entitled to reversal of convictions on jeopardy-barred counts. The calculus of whether it is better to allow a possibly guilty person to go free was originally decided by the framers of the Bill of Rights when they chose to provide for assistance of counsel and freedom from double

346. See, e.g., Caballero v. Hudspeth, 114 F.2d 545, 547 (10th Cir. 1940) ("The two counts of the indictment stating but a single offense, it follows that petitioner suffered double jeopardy under the sentence of the court. The question of double jeopardy may not, however, be raised by petitioner in the present proceeding."). overruled by United States v. Broce, 753 F.2d 811 (10th Cir. 1985) on rev’g, 781 F.2d 792 (10th Cir. 1986) (en banc), rev’d, 488 U.S. 563 (1989); Brady v. United States, 24 F.2d 399, 405 (8th Cir. 1928) (concluding that defendant waived meritorious double jeopardy claim); Ochoa v. Estelle, 445 F. Supp. 1076, 1081 (W.D. Tex. 1976) ("The court concludes that the sentence imposed by the second conviction is invalid because it violates double jeopardy. The court finds, however, that petitioner has waived that double jeopardy claim by not asserting it prior to his second trial.").
jeopardy. Thus, the only individuals who will go free after trial are those who, under the Constitution, never should have been tried in the first place.