1A Fed. Prac. & Proc. Crim. § 146 (5th ed.)

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Federal Rules of Criminal Procedure

Chapter 4. Indictment and Information
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Rule 8. Joinder of Offenses or Defendants

§ 146 Remedies for Improper Joinder

Primary Authority

Fed. R. Crim. P. 8

Forms

5A West's Federal Forms, District Courts—Criminal Rules §§ 86:2, 86:12 to 86:17

A defendant can challenge the government's joinder decision on two grounds. As described in a later section, if the joinder itself is proper under Federal Rule of Criminal Procedure 8, the defendant can nevertheless allege that the joinder is excessively prejudicial, requiring severance under Federal Rule of Criminal Procedure 14.[1] Alternatively, or in addition, the accused can challenge the propriety of the initial joinder on the grounds of duplicity, multiplicity, or misjoinder.[2] It is important for the defendant to identify the correct challenge to the indictment, as the remedies for these defects differ.

Misjoinder occurs when the original joinder of offenses or defendants fails to satisfy Rule 8. If there has been misjoinder the court has no discretion to deny the motion,[3] but the proper remedy is severance, not a dismissal of the indictment.[4] Even if joinder is erroneous, mandamus will not lie from the court of appeals to compel severance prior to trial,[5] and the alleged misjoinder can be raised on appeal from a conviction.

A motion alleging misjoinder raises only a question of law and are reviewed de novo.[6] For many years there was disagreement about whether misjoinder was subject to harmless error review.[7] The argument against such review was that Rule 14 already provided for severance based on prejudice,[8] and thus there would be no independent remedy for a Rule 8 violation if the error could be harmless. The debate was resolved in 1986 when the Supreme Court held that misjoinder is not grounds for reversal if the prosecutor can show that the misjoinder did not have a "substantial and injurious effect or influence in determining the

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jury's verdict."[9] Although the inquiry into whether a misjoinder is harmless turns on the specific facts, set forth in the footnotes are illustrative cases where the court found that the misjoinder was harmless[10] and was not harmless.[11]

An indictment or information charging two separate offenses in a single count is duplicitous, but this flaw does not require dismissal of the indictment.[12] One proper remedy is to require the government to elect the single count on which it plans to rely, and as long as the evidence at trial is limited to only one of the charges in the duplicitous count, the defendant's challenge is likely to fail.[13] In addition, because one of the risks of duplicitous counts is that the jury will convict the defendant without being unanimous on a single charge, it may be appropriate for the court to instruct the jury that it must find unanimously that the defendant was guilty with respect to at least one distinct act.[14]

A pleading that charges the same offense in more than one count is multiplicitous,[15] but this also is not fatal and does not require dismissal of the indictment.[16] Defendant can move to have the prosecution elect one of the counts[17] and to have the other counts dismissed,[18] but even this is discretionary with the court.[19] Where there are two convictions, the second of which is for a lesser included offense to the first, courts have found it proper to dismiss the lesser charge and enter judgment on the greater offense.[20] The Ninth Circuit has concluded that where the defendant has been convicted of two counts that are the same for Double Jeopardy purposes, the decision of which count to vacate lies with the district court, not the prosecutor.[21]

The principal danger of multiplicity is that defendant will be given multiple sentences for the same offense[22] or will sustain multiple convictions for a single crime. As a result, a remedy is available at any time if defendant is given multiple sentences.[23] For multiple convictions, the problem is not removed simply because the court imposed concurrent sentences; if the two counts state only a single offense, one of the convictions must be vacated.[24]

As with misjoinder, whether the indictment is duplicitous or multiplicitous is a legal question that is reviewed de novo on appeal.[24.50] Pursuant to Federal Rule of Criminal Procedure 12, an objection to the indictment on the grounds of misjoinder, duplicity, or multiplicity is waived or forfeited if not raised prior to trial, absent a showing of good cause for the delay.[25] Rule 12 also states that a motion need only be filed prior to trial if "the basis for the motion is then reasonably available;"[26] thus, if the defect in the indictment only becomes apparent when evidence is introduced at trial, a motion during trial should not be considered untimely. The defendant then has the obligation to raise the issue at that point, however, rather than for the first time on appeal.[27]

§§ 147–150 are reserved for supplementary material.

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Footnotes

1 **Rule 14**
See §§ 221 to 227.

2 **Terms defined**
Multiplicity, duplicity, and misjoinder are defined in § 143.

See also
Determining on appeal whether separate charges were properly tried in the same case requires a two-step analysis: "First, we review de novo whether charges were properly joined under Federal Rule of Criminal Procedure 8(a). Second we review the district court's denial of the defendant's motion to sever for abuse of discretion." United States v. Annamalai, 939 F.3d 1216, 1222 (11th Cir. 2019).

3

No discretion to deny

"If defendants are improperly joined, severance is mandatory and not a matter of discretion within the trial court." United States v. Campbell, 963 F.3d 309, 318 (4th Cir. 2020) (internal quotation marks and citation omitted), cert. denied, 2020 WL 7132581 (U.S. 2020).

"If joinder of multiple defendants or multiple offenses does not comply with the requirements of Rule 8, the district court has no discretion on the question of severance." U.S. v. Chavis, 296 F.3d 450, 456 (6th Cir. 2002), **citing Wright** (internal quotation marks and citation omitted).

U.S. v. Bledsoe, 674 F.2d 647, 654 (8th Cir. 1982) (abrogated on other grounds by, U.S. v. Lane, 474 U.S. 438, 106 S. Ct. 725, 88 L. Ed. 2d 814 (1986)).

U.S. v. Scotto, 641 F.2d 47, 57 (2d Cir. 1980).

U.S. v. Hedman, 630 F.2d 1184, 1200 (7th Cir. 1980).

U.S. v. Kaplan, 588 F.2d 71 (4th Cir. 1978), on reh'g, 620 F.2d 1006 (4th Cir. 1980).

"In this connection, Rule 14 is quite different from its companion Rule 8, which deals with true misjoinder in the technical sense. * * * A defendant who has been misjoined with others within the meaning of Rule 8(b) is entitled to severance as a matter of law, and the trial court's discretion never enters the picture." U.S. v. McLaurin, 557 F.2d 1064, 1075 n.14 (5th Cir. 1977), **citing Wright**.

4

Severance not dismissal

"The remedy for misjoinder is severance." U.S. v. Natanel, 938 F.2d 302, 306 (1st Cir. 1991).

"Improper joinder under Rule 8 requires mandatory severance." U.S. v. Hedman, 630 F.2d 1184, 1200 (7th Cir. 1980).

U.S. v. Jenkins, 884 F. Supp. 2d 789 (E.D. Wis. 2012), **citing Wright & Leipold**.

U.S. v. Lowry, 409 F. Supp. 2d 732, 745 (W.D. Va. 2006), **citing Wright**.

See also

Where Count II properly joined the two defendants, but Count I was misjoined, the proper remedy was to keep the joint trial on Count II and sever Count I. U.S. v. Megahed, 2008 WL 681087, *2 (M.D. Fla. 2008).

But cf.

In U.S. v. Camacho, 939 F. Supp. 203, 210–211 (S.D. N.Y. 1996), the court concluded that the misjoinder of both offenses and defendants in a superseding indictment filed shortly before trial suggested prosecutorial bad faith and that this was a special circumstance justifying dismissal of the unrelated counts rather than merely severance.

5

Mandamus refused

Application of Edwards, 375 F.2d 108, 109 (2d Cir. 1967). The court suggested, however, that the writ might be available "were a long multi-defendant trial imminent which would be likely to present evidentiary problems creating prejudice."

6

Question of law

United States v. Mink, 9 F.4th 590, 603 (8th Cir. 2021), cert. denied, 142 S. Ct. 1166, 212 L. Ed. 2d 39 (2022).

United States v. Mason, 951 F.3d 567, 575 (D.C. Cir. 2020), cert. denied, 140 S. Ct. 2787, 206 L. Ed. 2d 952 (2020).

U.S. v. Reichel, 911 F.3d 910, 915 (8th Cir. 2018).

U.S. v. Sabean, 885 F.3d 27, 42 (1st Cir. 2018).

U.S. v. Fattah, 858 F.3d 801, 819 (3d Cir. 2017).

U.S. v. Hawkins, 776 F.3d 200, 206 (4th Cir. 2015).

U.S. v. Bagby, 696 F.3d 1074, 1086 (10th Cir. 2012).

U.S. v. Litwok, 678 F.3d 208, 216 (2d Cir. 2012).

U.S. v. States, 652 F.3d 734, 742 (7th Cir. 2011).

U.S. v. Locklear, 631 F.3d 364, 368 (6th Cir. 2011).

U.S. v. Whitfield, 590 F.3d 325, 355 (5th Cir. 2009).

U.S. v. Jawara, 474 F.3d 565, 572 (9th Cir. 2007).

U.S. v. Carson, 455 F.3d 336, 372–373 (D.C. Cir. 2006).

See also
"Although the parties dispute the standard of review for this issue, we would reach the same result under any standard of review, so we will review [defendants'] misjoinder argument de novo." United States v. Sanders, 966 F.3d 397, 402 (5th Cir. 2020).

But cf.
“We review claims of misjoinder under Rule 14 under an abuse of discretion standard.” U.S. v. Hill, 786 F.3d 1254, 1272 (10th Cir. 2015).

7 **Disagreement on harmless error**
Compare
“Although it is frequently said that a joinder not authorized by Rule 8 is prejudicial per se, an examination of the cases indicates that prejudice is assumed without further inquiry only where two or more defendants have been tried jointly on wholly unrelated cases. * * * We agree with the reasoning that led the Courts of Appeals for the District of Columbia and Second Circuits to conclude that [Federal Rule of Criminal Procedure] 52 is applicable to misjoinder.” U.S. v. Roselli, 432 F.2d 879, 901 (9th Cir. 1970), **citing Wright**.

With
“Just as Rule 14 does not permit the Government to circumvent the prohibition of Rule 8(b), neither does the Harmless Error Rule, Rule 52(a), have this effect. * * * It is not ‘harmless error’ to violate a fundamental procedural rule designed to prevent ‘mass trials.’” Ingram v. U.S., 272 F.2d 567, 570–571 (4th Cir. 1959).

The cases holding that misjoinder could not be harmless error often relied on the pre-Rules case of McElroy v. U.S., 164 U.S. 76, 17 S. Ct. 31, 41 L. Ed. 355 (1896). There the Court rejected a government claim that the judgment should be affirmed since there was no evidence that defendants were embarrassed or prejudiced by the misjoinder. Chief Justice Fuller wrote: “It cannot be said in such case that all the defendants may not have been embarrassed and prejudiced in their defense, or that the attention of the jury may not have been distracted to their injury in passing upon distinct and independent transactions.” 164 U.S. at 81, 17 S.Ct. at 33.

8 **Rule 14 prejudice**
See §§ 222 to 227.

9 **Supreme Court resolution**
U.S. v. Lane, 474 U.S. 438, 449, 106 S.Ct. 725, 732, 88 L.Ed.2d 814 (1986) (quoting Kotteakos v. U.S., 328 U.S. 750, 776, 66 S. Ct. 1239, 1253, 90 L. Ed. 1557 (1946) (internal quotation marks omitted)). The Court in Lane found the misjoinder harmless on the facts because of the overwhelming evidence of guilt, a proper limiting instruction from the trial court, and the likelihood that the evidence admitted on the misjoined count would have been admissible on a retrial. 474 U.S. at 450, 106 S.Ct. at 732.

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See also
"Whatever the standard of review, a claim of misjoinder requires reversal only if the misjoinder results in actual prejudice. The movement must show that her joinder had a substantial and injurious effect or influence in determining the jury's verdict." United States v. Simon, 12 F.4th 1, 45 (1st Cir. 2021), cert. denied, 142 S. Ct. 2812, 213 L. Ed. 2d 1037 (2022).

United States v. Martinez, 994 F.3d 1, 12 (1st Cir. 2021).

"Misjoinder requires reversal only if the misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict." United States v. Huntsberry, 956 F.3d 270, 287 (5th Cir. 2020)) (internal quotation marks and citation omitted).

"Even where joinder is erroneous, we will not reverse unless the misjoinder results in actual prejudice because it had [a] substantial and injurious effect or influence in determining the jury's verdict." United States v. Blaszczak, 947 F.3d 19, 44 (2d Cir. 2019) (internal quotation marks and citations omitted), cert. granted, judgment vacated on other grounds, 141 S. Ct. 1040, 208 L. Ed. 2d 513 (2021).

"[A] misjoinder is not reversible if it was harmless, and a misjoinder was harmless if [i]t did not result in 'actual prejudice.' Actual prejudice in this context means the substantial and injurious effect or influence in determining the jury's verdict." U.S. v. Zimny, 873 F.3d 38, 59 (1st Cir. 2017) (internal quotation marks and citations omitted), cert denied, 138 S.Ct. 1711 (2018).

"In determining whether the misjoinder had a substantial and injurious effect on the jury, courts look to the presence of instructions requiring the jury to consider each defendant separately, the likelihood that evidence relating to the misjoined count would have been admitted in a separate trial and the [strength of the] evidence of the defendant's guilt in [determining whether] the misjoinder [is] harmless." U.S. v. Daniels, 803 F.3d 335, 341 (7th Cir. 2015).

"An error involving misjoinder affects substantial rights and requires reversal only if the misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict." U.S. v. Hawkins, 776 F.3d 200, 209 (4th Cir. 2015) (internal quotation marks and citations omitted).

"A claim of misjoinder is a matter of law that we review de novo, but we may affirm if we find that misjoinder occurred but that the error was harmless." U.S. v. McRae, 702 F.3d 806, 820 (5th Cir. 2012).

"[M]isjoinder requires reversal only if it result[ed] in actual prejudice because it had substantial and injurious effect or influence on determining the jury's verdict." Factors that might lead a court to find prejudice include: "(1) failure to give limiting instructions; (2) evidence of guilt that is not overwhelming; (3) admission of evidence that would be inadmissible in a trial of only properly joined defendants and counts; (4) evidence on the improperly joined charges that is indistinct and not easily segregated; and (5) en masse trial of numerous defendants." U.S. v. Mann, 701 F.3d 274, 290 (8th Cir. 2012).

The court of appeals will "conduct a twofold inquiry: whether joinder of the counts was proper, and if not, whether misjoinder was prejudicial to the defendant." In addition, "[e]rroneous joinder requires reversal only if the misjoinder result[ed] in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict. To determine whether there was actual prejudice, we inquire whether evidence tending to prove the charge that should have been severed would nevertheless have been admissible * * *, and was admitted subject to appropriate limiting instructions." U.S. v. Litwok, 678 F.3d 208, 216 (2d Cir. 2012).

"[A] determination of misjoinder is subject to harmless-error review under Rule 52(a) of the Federal Rules of Criminal Procedure, which permits reversal only for trial errors that affect substantial rights. To affect a defendant's substantial rights, misjoinder must have a substantial and injurious effect or influence in determining the jury's verdict." U.S. v. Locklear, 631 F.3d 364, 369 (6th Cir. 2011) (internal quotation marks and citations omitted).

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A Rule 8 error only requires reversal on appeal where "the misjoinder results in actual prejudice because it had substantial and injurious effect or influence in determining the jury's verdict. In particular, overwhelming evidence of guilt and a proper limiting instruction are relevant to whether a misjoinder prejudiced [the] defendants." U.S. v. Jones, 530 F.3d 1292, 1299 (10th Cir. 2008).

See also

While the harmless error standard for misjoinder is "exacting," it is less exacting than the "manifest prejudice" standard that a defendant must satisfy the overturn a failure to sever under Rule 14. U.S. v. Jawara, 474 F.3d 565, 579–580 (9th Cir. 2007).

10

Found harmless

Even if defendants, who were rival sex traffickers competing for the same underage girls, were misjoined, the error was harmless. The evidence of guilt was strong, and the district court properly instructed the jury about the proper consideration of any spillover evidence. United States v. Sanders, 966 F.3d 397, 404-05 (5th Cir. 2020).

Where the judge specifically instructed the jurors to consider each count separately, and where the jury acquitted on one of the counts, showing that it distinguished among the charges, the error from joinder, if any, was harmless. U.S. v. Zimny, 873 F.3d 38, 59–60 (1st Cir. 2017), cert denied 138 S.Ct. 1711 (2018).

"[T]he overwhelming evidence of [co-defendant's] guilt on the respective counts convinces us that there was no prejudice stemming from the misjoinder." U.S. v. Daniels, 803 F.3d 335, 347 (7th Cir. 2015).

The improper joinder was harmless where "[t]he jury was instructed to keep the evidence of the crimes separate, this was not an en masse trial of multiple defendants, and the evidence of guilt was overwhelming." U.S. v. Mann, 701 F.3d 274, 291 (8th Cir. 2012).

Although the misjoinder resulted in the jury learning that defendant was a convicted felon and that he possessed four guns rather than one, the error was harmless where the evidence of defendant's guilt of bank robbery was "overwhelming." U.S. v. Locklear, 631 F.3d 364, 370 (6th Cir. 2011).

Even if charges and defendants were misjoined, the error was harmless where prior to trial the defendants who had been charged with the misjoined counts had pled guilty. U.S. v. Donnell, 596 F.3d 913, 923 (8th Cir. 2010).

Although the two counts failed to satisfy the requirements of Rule 8(a), as they were not part of a common plan or scheme nor were they of a same or similar character, the misjoinder did not have a substantial and injurious effect on the verdict where the trial judge properly instructed the jury to treat the charges separately, the evidence of guilt was overwhelming on both counts, and it was easy for the jury to distinguish the evidence on each count. U.S. v. Jawara, 474 F.3d 565, 579–581 (9th Cir. 2007).

Even if the initial joinder of counts was erroneous, defendant failed to demonstrate prejudice. The jurors were properly instructed, and the fact that they acquitted on many of the counts shows that they considered the counts separately. U.S. v. Butler, 429 F.3d 140, 147–148 (5th Cir. 2005).

Even assuming defendants were misjoined, there was no prejudice where there was ample evidence to support defendant's conviction and where codefendants were acquitted. U.S. v. Liveoak, 377 F.3d 859, 865 (8th Cir. 2004).

Rejecting the defendant's claim that he was prejudiced by being unable to testify on one count misjoined with another, and concluding that misjoinder was harmless given overwhelming evidence of guilt and jury instructions to consider charges separately. U.S. v. Chavis, 296 F.3d 450, 456 (6th Cir. 2002).

See also

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"Although the holding in Lane specifically concerned misjoinder of parties under Rule 8(b), the language of the opinion leaves no doubt that the harmless error standard applies equally to misjoinder of offenses under Rule 8(a)." U.S. v. Watson, 866 F.2d 381, 385 (11th Cir. 1989).

Cf.
On federal habeas review of a state conviction, "[j]oinder of offenses rises to the level of a constitutional violation only if it actually render[s] a petitioner's state trial fundamentally unfair and hence violative of due process." Lee v. Ricks, 388 F. Supp. 2d 141, 152 (W.D. N.Y. 2005) (internal quotation marks and citations omitted).

11 **Not harmless**
Although the district court had provided a limiting instruction, the court of appeals found that the misjoinder of armed carjacking counts with a later felon-in-possession offense was prejudicial. The evidence of the offenses would likely not have been cross admissible, there was some indication that the evidence of the felon in possession count influenced the carjacking counts, and the evidence of the carjacking was not "overwhelming." U.S. v. Hawkins, 776 F.3d 200, 209–212 (4th Cir. 2015).

Where there was no evidentiary overlap between the unreported income tax count in 1995 and the mail fraud count that occurred in 1997, but where the evidence of the first crime would "inevitably" color the jury's consideration of the second, prejudice from the misjoinder was shown. The evidence against defendant was not overwhelming, and no curative instructions were given by the trial court, increasing the likely prejudicial effect of the misjoinder on the jury. U.S. v. Litwok, 678 F.3d 208, 216–217 (2d Cir. 2012).

The inclusion of a weakly-supported firearm charge, and the evidence admitted based upon that charge, seriously prejudiced the defendant. U.S. v. Singh, 261 F.3d 530, 534 (5th Cir. 2001).

Two robbery counts were improperly joined when defendant allegedly used distinctly different methods in the two robberies, targeted distinctly different victims, so that the use of a gun in both and proximity in time and place did not sufficiently support joinder. The court also concluded that the error was not harmless. U.S. v. Tubol, 191 F.3d 88, 94–98 (2d Cir. 1999).

Given the meagerness of the evidence of guilt on the weapons charges, the fact that the jury heard irrelevant and clearly prejudicial evidence on the threats charge that would not have been admissible had the offenses been tried separately, and the improper remarks made by the prosecutor in closing argument, the misjoinder was not harmless and required reversal. U.S. v. Richardson, 161 F.3d 728, 734–735 (D.C. Cir. 1998).

Misjoinder of drug-possession and firearm counts in indictment was reversible error; counts were unrelated and it was highly probable that inculpatory characterization of defendant as drug dealer influenced jury's determination of charge that defendant was found in possession of firearm. U.S. v. Terry, 911 F.2d 272 (9th Cir. 1990).

12 **Dismissal not required**
U.S. v. Prieto, 812 F.3d 6 (1st Cir. 2016).

"Duplicitous pleading, however, is not presumptively invalid." U.S. v. Fernandez, 389 Fed. Appx. 194, 199 (3d Cir. 2010) (internal quotation marks and citations omitted).

"[A]lthough a duplicitous charge calls into questions the unanimity of a verdict of guilty * * * such a charge is not prejudicial *per se,* because proper jury instructions can mitigate the risk of jury confusion and alleviate the doubt that would otherwise exist as to whether all members of the jury had found the defendant guilty of the same offense." U.S. v. Lloyd, 462 F.3d 510, 514 (6th Cir. 2006) (internal quotation marks and citation omitted).

A duplicitous pleading "is not presumptively invalid." U.S. v. Olmeda, 461 F.3d 271, 280 (2d Cir. 2006).

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"Duplicitous charges, however, are not necessarily fatal to an indictment." U.S. v. Shumpert Hood, 210 F.3d 660, 663 (6th Cir. 2000).

U.S. v. Browning, Inc., 572 F.2d 720, 726 (10th Cir. 1978), **citing Wright**.

Reno v. U.S., 317 F.2d 499, 502 (5th Cir. 1963).

U.S. v. Hennings, 2018 WL 4221575, *5 (W.D.N.Y. 2018), **quoting Wright & Leipold**.

U.S. v. Sanford, Ltd., 859 F. Supp. 2d 102, 116 (D.D.C. 2012).

U.S. v. Acevedo Vila, 588 F. Supp. 2d 194, 200 n.1 (D.P.R. 2008), **citing Wright & Leipold**.

U.S. v. Witasick, 2008 WL 1924023, *2 (W.D. Va. 2008), **citing Wright & Leipold**.

But cf.
"An impermissibly duplicitous indictment is subject to dismissal." The court also noted that "duplicity does have constitutional dimensions, undermining the Government's suggestion that it is a mere pleading requirement." U.S. v. Rigas, 605 F.3d 194, 210, 212 (3d Cir. 2010) (en banc).

13 **Government must elect**
The risk that a duplicitous indictment will allow the jury to convict without being unanimous can be cured by requiring the government to specify the count on which it intends to rely and then instructing the jury only on that count. On the facts, the government informed the court that it intended to rely only on one of two statutory subsections set forth in the indictment, and the court instructed the jury only on that subsection, and thus defendant's duplicity challenge was denied. United States v. Hall, 979 F.3d 1107, 1116 (6th Cir. 2020).

"[D]uplicity to the defendant can be cured in various ways, for example, by the government electing to pursue only one of the alternatives charged, or by jury instructions and a verdict form that protect the defendant's right to a unanimous jury." U.S. v. Smith, 910 F.3d 1047, 1053 (8th Cir. 2018).

Duplicity is not fatal because the government can elect between the charges prior to submission to the jury, or the jury could agree beyond a reasonable doubt which offense the defendant committed. U.S. v. Ramirez-Martinez, 273 F.3d 903, 915 (9th Cir. 2001) (overruled on other grounds by, U.S. v. Lopez, 484 F.3d 1186 (9th Cir. 2007)).

U.S. v. Shumpert Hood, 210 F.3d 660, 663 (6th Cir. 2000).

U.S. v. Brown, 188 F.3d 519 (10th Cir. 1999).

U.S. v. McDermot, 58 F.3d 636, n.6 (5th Cir. 1995) **citing Wright**.

The district court concluded that "the only available remedy for Count 1's duplicity is to direct the Government to make an election. If the Government does not seek a superseding indictment, the Government will therefore be required to elect which of the sales underlying Count 1 it will seek to prove at trial." U.S. v. Hennings, 2018 WL 4221575, *6 (W.D.N.Y. 2018).

U.S. v. Sanford, Ltd., 859 F. Supp. 2d 102, 116 (D.D.C. 2012).

U.S. v. Acevedo Vila, 588 F. Supp. 2d 194, 200 n.1 (D.P.R. 2008), **citing Wright & Leipold**.

"[T]he cure for a duplicitous count is not necessarily dismissal. I grant the Motion to Dismiss Count One in part and give the government ten days to decide which single conspiracy theory they intend to pursue, tax fraud or insurance fraud." U.S. v. Witasick, 2008 WL 1924023, *2 (W.D. Va. 2008) (citation omitted).

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"If duplicity is established, a trial court may (1) allow election, provided the defendant is not prejudiced thereby and the election does not alter the nature of the charge, or (2) dismiss the offending count." U.S. v. W.R. Grace, 429 F. Supp. 2d 1207, 1219 (D. Mont. 2006).

Unless defects inherent in a duplicitous count have been obviated by contents of a bill of particulars or appropriate jury instructions the appropriate remedy is to require government to elect one of the multiple offenses embraced therein on which to proceed. U.S. v. Kearney, 444 F. Supp. 1290, 1295 (S.D. N.Y. 1978).

14 **Jury instructions**
"One cure for an otherwise duplicitous indictment is to give an augmented instruction requiring unanimity on one or the other of the acts charged within a count that otherwise appear to constitute separate offenses." U.S. v. Miller, 891 F.3d 1220, 1230 (10th Cir. 2018), cert. denied, 2019 WL 134703 (2019).

"It is black letter law that duplicitous indictments can be cured through appropriate jury instructions." U.S. v. Robinson, 627 F.3d 941, 958 (4th Cir. 2010).

"Generally, correct jury instructions cure deficiencies in the indictment." U.S. v. Grant, 850 F.3d 209, 216 (5th Cir. 2017).

A duplicitous charge "is not prejudicial *per se,* because proper jury instructions can mitigate the risk of jury confusion and alleviate the doubt that would otherwise exist as to whether all members of the jury had found the defendant guilty of the same offense." U.S. v. Savoires, 430 F.3d 376, 380 (6th Cir. 2005).

A defendant may move to require the government to elect either the count or the charge within the count upon which it will rely, or the court may particularize the distinct offense charged in each count in its jury instruction. U.S. v. Shumpert Hood, 210 F.3d 660, 663 (6th Cir. 2000).

Jury instructions, which required the jurors to agree which of the offenses in the disputed count defendant committed, were sufficient to cure the duplicity problem. U.S. v. Hawpetoss, 388 F. Supp. 2d 952, 963–965 (E.D. Wis. 2005), **citing Wright**.

Cf.
Although "[t]he district court did not explicitly direct the jury that unanimity on either the use or possession offense was necessary to a guilty verdict," the court nonetheless found that the duplicitous counts did not require reversal. The jury instructions clarified the two different offenses, and the verdict form, which only listed one of the offenses, ensured that all the jurors convicted of the same offense. U.S. v. Lloyd, 462 F.3d 510, 515 (6th Cir. 2006).

But cf.
Even if the judge erred in failing to give jury instructions that would have cured the claimed duplicity problem, defendant failed to request the instructions at trial, and could not show prejudice on appeal that would satisfy the plain error standard. United States v. Deason, 965 F.3d 1252, 1269 (11th Cir. 2020).

15 **Multiplicity defined**
See § 143.

16 **Not dismissed for multiplicity**
Defendant was not entitled to a new trial where he was improperly convicted of four counts rather than a single count of possession of child pornography, despite his claim that the multiplicitous counts prejudiced the jury. The proper remedy, said the court, was to vacate the multiplicitous convictions. U.S. v. Chilaca, 909 F.3d 289, 296–297 (9th Cir. 2018).

"[M]ultiplicitous indictments may be saved at the trial stage if the district court submits an appropriate instruction to the jury." U.S. v. Roy, 408 F.3d 484, 491 (8th Cir. 2005).

U.S. v. Reed, 639 F.2d 896, 904 n.6 (2d Cir. 1981), **citing Wright**.

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See also
"A multiplicitous indictment requires remand for a new trial only if the multiplicity prejudices the defendant." On the facts before it, the court found insufficient prejudice based on the claim that the multiplicitous pleading may have affected the jury's view of defendant. The district court had imposed concurrent sentences, and so defendant's remedy was to have the multiplicitous counts vacated, not to have his conviction vacated and the case remanded for a new trial. U.S. v. Emly, 747 F.3d 974, 980 (8th Cir. 2014).

17 **Election may be required**
U.S. v. Universal C. I. T. Credit Corp., 344 U.S. 218, 225, 73 S. Ct. 227, 231, 97 L. Ed. 260 (1952).

Defendant claimed that multiplicitous counts under 18 U.S.C.A. § 922(g) required the government to choose a single theory prior to trial, rather than try the case on alternative charges for a single gun possession. While noting that the district court has the discretion to require such an election prior to trial, the court of appeals refused to adopt a per se rule requiring it, and found no error in the decision to let the jury hear the alternative charges. The appeals court noted that [Federal Rule of Criminal Procedure] 7(c)(1) permits an indictment that alleges "that the defendant committed [the offense] by one or more specified means." The proper remedy on appeal for a multiplicitous indictment, said the court, was to merge the two counts into one count, not a retrial under a single theory of liability. U.S. v. Platter, 514 F.3d 782, 787 (8th Cir. 2008).

U.S. v. Johnson, 130 F.3d 1420, 1426 (10th Cir. 1997).

U.S. v. Smith, 591 F.2d 1105, 1108 (5th Cir. 1979), **quoting Wright**.

But cf.
"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. Should the jury return guilty verdicts for each count, however, the District Judge should enter judgment on only one of the statutory offenses." Ball v. U.S., 470 U.S. 856, 865, 105 S. Ct. 1668, 1674, 84 L. Ed. 2d 740 (1985).

18 **Other counts dismissed**
"When a defendant has been convicted of multiplicitous offenses—in this case, a greater and a lesser-included offense—the trial court shall enter judgment on only one of the statutory offenses." U.S. v. Brown, 701 F.3d 120, 127 (4th Cir. 2012) (internal quotation marks and citation omitted).

Where the four counts of being a felon in possession of a firearm were multiplicitous, the court of appeals remanded to the district court with instructions to dismiss all but one of the counts. U.S. v. Ankeny, 502 F.3d 829, 838–839 (9th Cir. 2007).

Where the four counts of receiving child pornography were multiplicitous, the convictions were vacated and the case remanded for reinstatement of the conviction on a single count and for resentencing. U.S. v. Buchanan, 485 F.3d 274 (5th Cir. 2007).

The case was remanded for the dismissal of one of two multiplicitous counts. U.S. v. Roy, 408 F.3d 484, 492 (8th Cir. 2005).

19 **Discretionary with court**
"The question whether the prosecution should be compelled to elect [between two counts of an indictment] was a matter purely within the discretion of the court." Pierce v. U.S., 160 U.S. 355, 356, 16 S. Ct. 321, 321, 40 L. Ed. 454 (1896).

"There is no inflexible rule that the exclusive remedy for multiplicitous counts is election between them. Requiring election is one option, but not the only option; the court may, for example, simply vacate both the conviction and the sentence as to all but one count, essentially merging the offending counts." U.S. v. Pires, 642 F.3d 1, 16 (1st Cir. 2011) (internal citation omitted).

U.S. v. Platter, 514 F.3d 782, 786 (8th Cir. 2008).

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U.S. v. Johnson, 130 F.3d 1420, 1426 (10th Cir. 1997).

U.S. v. Throneburg, 921 F.2d 654, 657 (6th Cir. 1990).

"An indictment that is multiplicitous is not fatal and does not require dismissal. The defendant may move to have the prosecution elect among the multiplicitous counts, with all but the one elected dismissed. This is a matter for trial court discretion, and is most appropriate when the mere making of the charges would prejudice the defendant with the jury." U.S. v. Reed, 639 F.2d 896, 904 n.6 (2d Cir. 1981), **citing Wright**.

"Although multiplicitousness is not per se grounds for election since it does not necessarily place the defendant in jeopardy of multiple offenses, the court has discretion to require election." U.S. v. Platter, 435 F. Supp. 2d 913, 916 (N.D. Iowa 2006) (internal quotation marks and citations omitted).

See also
"District courts presented with what are recognized before or during trial to be multiplicitous indictments will avoid any problem by requiring the prosecution to elect between counts charged rather than by merging the counts at sentencing." U.S. v. Polizzi, 257 F.R.D. 33, 36–37 (E.D. N.Y. 2009) (Weinstein, J.).

20 **Dismiss the lesser included**
"[T]he [district] court properly adhered to a long line of authorities directing vacation of the conviction that carries the more lenient penalty when a defendant is convicted of both a greater and a lesser-included offense." U.S. v. Brown, 701 F.3d 120, 128 (4th Cir. 2012).

U.S. v. Martorano, 697 F.3d 216, 220 (3d Cir.2012).

If a defendant is convicted of both a greater and lesser included offense, the lesser offense should be vacated. U.S. v. Dudeck, 657 F.3d 424, 431 (6th Cir.2011).

21 **District court decides**
U.S. v. Hector, 577 F.3d 1099 (9th Cir. 2009).

22 **Principal danger**
See the cases cited in § 143 at footnote 8.

See also
"[T]he Double Jeopardy Clause does not protect against simultaneous prosecutions for the same offense, so long as no more than one punishment is eventually imposed." U.S. v. Pires, 642 F.3d 1, 16 (1st Cir. 2011) (internal quotation marks and citation omitted).

U.S. v. Colton, 231 F.3d 890, 910 (4th Cir. 2000), **citing Wright**.

U. S. v. Sue, 586 F.2d 70, 72 (8th Cir. 1978), **citing Wright**.

23 **Remedy available**
A claim that defendant was given multiple sentences for a single crime could be reviewed on appeal despite the defendant's failure to raise a multiplicity challenge prior to trial. U.S. v. Moran, 778 F.3d 942, 964 (11th Cir. 2015).

A defendant must challenge the multiplicity of an indictment before trial or forfeit the issue. The defendant may, however, raise claims about the multiplicity of sentences for the first time on appeal. U.S. v. Reedy, 304 F.3d 358, 363 (5th Cir. 2002).

"The 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 convictions and permitting only a single sentence." U.S. v. Reed, 639 F.2d 896, 904 n.6 (2d Cir. 1981), **citing Wright**.

See also

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The effect on a potential remedy of failing to raise a multiplicity challenge at the appropriate time is discussed further in § 194.

24 **Multiple convictions**

Rutledge v. U.S., 517 U.S. 292, 301, 116 S. Ct. 1241, 1248, 134 L. Ed. 2d 419 (1996).

Ball v. U.S., 470 U.S. 856, 105 S. Ct. 1668, 84 L. Ed. 2d 740 (1985).

The court of appeals rejected the government's claim that four convictions for a single offense was harmless error because the offenses were grouped for purposes of the Sentencing Guidelines calculation, and defendant received four concurrent prison terms. "[C]oncurrent sentences do not make a double jeopardy violation harmless." Instead, said the court, "the appropriate remedy for a conviction for multiplicitous charges is to vacate the multiplicitous count convictions" and to resentence on the single count. U.S. v. Chilaca, 909 F.3d 289, 295–296, 297 (9th Cir. 2018).

"When no prejudice has been shown and the district court has imposed concurrent sentences on the multiplicitous counts, the appropriate remedy is a directive to vacate the convictions on the multiplicitous counts." U.S. v. Emly, 747 F.3d 974, 980 (8th Cir. 2014).

Where defendant was convicted of both a greater and a lesser included offense, the court of appeals remanded with instructions to vacate one of the convictions. U.S. v. Mann, 701 F.3d 274, 287 (8th Cir. 2012).

"When a defendant has been convicted of multiplicitous offenses-in this case, a greater and a lesser-included offense-the trial court shall enter judgment on only one of the statutory offenses." U.S. v. Brown, 701 F.3d 120, 127–128 (4th Cir. 2012). (internal quotation marks and citation omitted).

"[E]ven in cases such as this, where the imposed sentences run concurrently, unlawfully multiplicitous convictions carry serious collateral consequences that cannot be ignored. For example, the presence of two convictions on the record may delay the defendant's eligibility for parole or result in an increased sentence under a recidivist statute for a future offense. Moreover, the second conviction may be used to impeach the defendant's credibility and certainly carries the societal stigma accompanying any criminal conviction. Where we conclude that a defendant has suffered a double jeopardy violation because he was improperly convicted for the same offense under two separate counts, 'the only remedy consistent with the congressional intent is for the [d]istrict [c]ourt, where the sentencing responsibility resides, to exercise its discretion to vacate one of the underlying convictions.'" U.S. v. Bobb, 577 F.3d 1366, 1372 (11th Cir. 2009) (quoting Ball v. U.S., 470 U.S. 856, 864, 105 S. Ct. 1668, 1673, 84 L. Ed. 2d 740 (1985) (other internal quotation marks and citations omitted).

Although defendant was given concurrent sentences for convictions on duplicitous counts, and the only additional sanction for the second conviction was a $100 assessment, the court of appeals concluded that entering both convictions for a single crime under 18 U.S.C.A. § 924(c) was plain error, and vacated one of the convictions. U.S. v. King, 554 F.3d 177, 180–181 (1st Cir. 2009).

Where defendant was convicted of both traveling interstate with intent to have sex with a person under age 12, in violation of 18 U.S.C.A. § 2241(c), and of traveling interstate for the purpose of having illicit sexual contact with another person, in violation of 18 U.S.C.A. § 2423(b), he suffered multiple convictions for the same offense. The proper remedy was to vacate the latter count. U.S. v. DeCarlo, 434 F.3d 447, 455–457 (6th Cir. 2006).

Where two counts of simple assault were multiplicitous one count would be vacated, despite the fact that two sentences ran concurrently with a longer sentence for a different and more serious offense. The court of appeals found that, among other things, the special monetary assessment charged to defendant for each count "suffice[d] to give him an interest in not being wrongfully convicted of simple assault." U.S. v. Chipps, 410 F.3d 438, 448 (8th Cir. 2005).

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"[D]efendant contends that he should not have been charged with multiple counts of Section 472 possession when he was found in possession of counterfeit currency at a single time and in a single location. The indictment charged a separate count for each of the six serial numbers on the eleven counterfeit bills found in Leftenant's possession. The Government now concedes that its charging decision was erroneous and that the six charges in the indictment are multiplicitous, and that we should vacate all of Leftenant's convictions save one." U.S. v. Leftenant, 341 F.3d 338, 347 (4th Cir. 2003).

Concurrent sentencing is not a sufficient remedy for multiplicity, and thus the district court was ordered to vacate three of the five convictions under 18 U.S.C.A. § 924(c). U.S. v. Morris, 247 F.3d 1080, 1084–1085 (10th Cir. 2001).

Remedy for multiplicity is remand with instructions to the district court to vacate the convictions and resentence accordingly. U.S. v. Colton, 231 F.3d 890, 909–910 (4th Cir. 2000).

24.50

Appeal de novo

United States v. Haas, 37 F.4th 1256, 1260 (7th Cir. 2022).

Claims that the indictment is duplicitous is review de novo. United States v. Williams, 998 F.3d 716, 734 (6th Cir. 2021), cert. denied, 2022 WL 516306 (U.S. 2022).

Compare

"Although we review multiplicity rulings for an abuse of discretion, we actually conduct a legal analysis of the appellant's double jeopardy arguments which is essentially *de novo*." United States v. Stapleton, 39 F.4th 1320, 1328 n.3 (11th Cir. 2022) (internal quotation marks and citation omitted).

25

Before trial

Federal Rule of Criminal Procedure 12(b)(3)(B) provides that a motion alleging improper joinder, duplicity, or multiplicity "must be raised by pretrial motion before trial if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits." Rule 12(c)(3) provides that a court may excuse the late filing for good cause. The timing requirements of Rule 12, and the effect of filing an untimely motion, are discussed in § 193 and § 194.

Where the defendant fails to allege misjoinder prior to trial, the issue will be reviewed on appeal for plain error. U.S. v. Colhoff, 833 F.3d 980, 983 (8th Cir. 2016).

"A challenge to an indictment based on duplicity must be raised prior to trial * * * Raising the objection at the close of the government's case is too late." U.S. v. Ibarra-Diaz, 805 F.3d 908, 930 (10th Cir. 2015) (internal quotation marks and citations omitted).

Defendant failed to raise his multiplicity challenge prior to trial, and while his case was on appeal, Rule 12 was amended to make it clear that such a failure would render the claim untimely in the absence of good cause. The court of appeals considered the multiplicity claim for plain error. U.S. v. Lohse, 797 F.3d 515, 523 (8th Cir. 2015).

"We also hold that plain-error review applies to claims of misjoinder raised for the first time on appeal." U.S. v. Soto, 794 F.3d 635, 655 (6th Cir. 2015).

Defendant's failure to raise a duplicity challenge prior to trial meant that the court of appeals would review only for plain error. U.S. v. Blevins, 755 F.3d 312, 319 (5th Cir. 2014).

The failure to raise a multiplicity challenge prior to trial resulted in the claim being waived on appeal. U.S. v. Pacchioli, 718 F.3d 1294, 1308 (11th Cir. 2013).

"Because [the defendant] did not object in the district court to the alleged multiplicity, we review his arguments for plain error." U.S. v. Mahdi, 598 F.3d 883, 888 (D.C. Cir. 2010).

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"Where a defendant fails to object to an indictment as duplicitous before trial and fails to object to the court's jury instructions at trial, we review for plain error under Federal Rule of Criminal Procedure 52(b)." U.S. v. Arreola, 467 F.3d 1153, 1161 (9th Cir. 2006).

See also
A duplicitous indictment does not constitute a structural error. United States v. Deason, 965 F.3d 1252, 1268 n.3 (11th Cir. 2020).

"Where a defendant fails to object to an indictment before trial, however, the case proceeds under the presumption that the court's instructions to the jury will clear up any ambiguity created by the duplicitous indictment." United States v. Ramamoorthy, 949 F.3d 955, 960 (6th Cir. 2020) (internal quotation marks and citation omitted).

"Because the harm from a duplicitous indictment is inextricably intertwined with the jury instructions actually given, when a defendant raises a challenge to a duplicitous indictment for the first time on appeal the issue of whether our review is limited to plain error depends upon whether the defendant objected to the jury instructions which failed to cure the faulty indictment. Where the defendant does not object to the district court's instructions to the jury, review is limited to plain error." U.S. v. Kakos, 483 F.3d 441, 445 (6th Cir. 2007).

Although defendant's pretrial motion for a separate trial focused on Rule 14 rather than Rule 8, this did not waive defendant's rights under Rule 8 since the motion and supporting memorandum called the court's attention to the fact that the joint indictment recited crimes with no alleged connection to defendant. U.S. v. Hatcher, 680 F.2d 438, 441 (6th Cir. 1982).

Although a motion questioning joinder of counts against a single defendant should have been brought under Rule 8(a) rather than Rule 8(b), there has been enough confusion on this point that failure to move under the correct branch of the rule is not fatal on appeal. U.S. v. Diaz-Munoz, 632 F.2d 1330, 1335 n.4 (5th Cir. 1980).

Cf.
Defendant did not raise his duplicity claim prior to his first trial, which ended in a mistrial. On re-prosecution, defendant raised the duplicity issue for the first time, and the government argued that the claim was waived because that motion was not made prior to the initial trial. The court of appeals disagreed. "No controlling authority exists, but the long-established principle that '[t]he declaration of a mistrial renders nugatory all trial proceedings with the same result as if there had been no trial at all' militates strongly against the government's position. We apply this principle and hold that [defendant's] motion to dismiss the indictment was timely filed." U.S. v. Mauskar, 557 F.3d 219, 225 (5th Cir. 2009) (internal citations omitted).

26 **Reasonably available**
Fed. R. Crim. P. 12(b)(3).

Although normally a duplicity challenge must be raised prior to trial, the court of appeals noted cases finding that a defendant could not be faulted for his failure to raise the claim prior to trial when the duplicity did not become apparent until the evidence was presented at trial. U.S. v. Ibarra-Diaz, 805 F.3d 908, 930 & n.12 (10th Cir. 2015).

Although duplicity arguments generally must be made prior to trial, the "defendant has [not] waived a duplicity argument where the claimed defect in the indictment was not apparent on its face at the institution of the proceeding." U.S. v. Sturdivant, 244 F.3d 71, 76 (2d Cir. 2001).

Where the basis for misjoinder was revealed after conviction, new trial could be ordered on the count improperly tried with the felon-in possession charge, in a case that the court termed an "excellent example of 'retroactive misjoinder.'" U.S. v. Aldrich, 169 F.3d 526, 528 (8th Cir. 1999).

27 **First time on appeal**

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Where the defendant failed to raise the duplicity challenge in the trial court, the claim would be reviewed for plain error on appeal. United States v. Gandy, 926 F.3d 248, 262 (6th Cir. 2019).

Even assuming the duplicity issue only became apparent during the course of trial, defendant's failure to raise the issue during trial was fatal to his claim on appeal. U.S. v. Ibarra-Diaz, 805 F.3d 908, 930 (10th Cir. 2015).

“When a defendant asserts that an indictment is duplicitous for the first time on appeal, we apply plain-error review unless the defendant objected to the district court's jury instructions.” U.S. v. Singer, 782 F.3d 270, 275 (6th Cir. 2015).

Compare
"A defendant may challenge a duplicitous indictment anytime during trial or on appeal under the argument that the government violated his constitutional right to jury unanimity," although the failure to preserve the issue at trial will result in plain error review. United States v. Hall, 979 F.3d 1107, 1115-16 (6th Cir. 2020). See also § 193 of this Volume.

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