

Summary Dismissals

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INTRODUCTION

Pretrial motions to dismiss allow criminal defendants to avoid trial when the prosecution's legal theory is flawed. Federal Rule of Criminal Procedure (FRCrP) 12(b)(2) permits pretrial motions raising "any defense, objection, or request that the court can determine without a trial of the general issue."¹ This Comment examines courts' disagreement about a procedure under FRCrP 12(b)(2) that will be termed a motion for *summary dismissal*.² Such motions ask courts to examine undisputed material facts to determine whether the government can prove its case as a matter of law. In this way, summary dismissal is roughly analogous to summary judgment in civil procedure.

Consider an example. A defendant awaits trial under a statute that applies only to "US persons." The indictment alleges that he had once held lawful permanent resident (LPR) status. The government and defendant agree about certain facts outside the indictment's four corners: the defendant had moved away from the US after gaining LPR status and returned infrequently to visit family. These undisputed facts present two alternative conclusions: either he retains LPR status because it had not been formally revoked, or he abandons it by moving away.

In the case on which this example is patterned, the district court held that the defendant abandoned his LPR status as a matter of law and dismissed because the government could not prove the "US person" element.³ The DC Circuit agreed, and explicitly held that defendants may seek dismissal under FRCrP 12(b)(2) when the material facts are undisputed and the government does not object.⁴ But it warned that these motions are appropriate only in "unusual circumstance[s]" and

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¹ FRCrP 12(b)(2). "[G]eneral issue" refers to the defendant's "guilt or innocence." See Charles Alan Wright and Andrew D. Leipold, 1A *Federal Practice and Procedure* § 191 at 390–93 (West 4th ed 2008).

² This term is used in the unrelated context of collateral proceedings. See *Habeas Relief for State Prisoners*, 38 Georgetown L J Ann Rev Crim Pro 892, 930 & n 2762 (2009).

³ See *United States v Yakou*, 2004 WL 884545, *1 (DDC).

⁴ *United States v Yakou*, 428 F3d 241, 246–47 (DC Cir 2005) ("[U]ndisputed facts obviated the need for the district court to make factual determinations properly reserved for the jury.").

noted the absence of an explicit “criminal procedural mechanism that resembles a motion for summary judgment.”⁵

While one court refuses to allow summary dismissals at all,⁶ the majority of courts take the DC Circuit’s position—permitting summary dismissals whenever the relevant facts are undisputed, which in practice means stipulated.⁷ Others require the government to make a “full proffer of the evidence it intends to present at trial” before the evidence can be considered undisputed.⁸ Both the minority view rejecting, and the near-total scholarly silence regarding,⁹ summary dismissals likely reflect an overly formalistic, uncreative, and ultimately incorrect reading of the FRCrP.

Summary dismissals are also welfare maximizing. Prosecutors would like that they can take an interlocutory appeal from a dismissal, which they cannot do from directed acquittals before the jury returns a verdict.¹⁰ Defendants would like that the motion may allow them to avoid trial, and that the opportunity to litigate legal questions before trial fleshes out the expected risks and payoffs of pleading guilty.

This Comment explores and defends the summary dismissal motion in three parts. Part I outlines the history of pretrial motion practice and describes background case law on pretrial dismissals, the dismissal–acquittal distinction, and double jeopardy. Part II describes the minority no-dismissals position and shows that most circuits recognize one of two strong forms of summary dismissal. Part III lays out the competing policy concerns and argues that summary dismissals are generally welfare maximizing. A criminal analogue¹¹ to civil summary

⁵ Id at 247.

⁶ See *United States v Nabors*, 45 F3d 238, 240 (8th Cir 1995).

⁷ See *Yakou*, 428 F3d at 247. In most cases that are not pleaded out, defendants dispute the government’s factual allegations. See, for example, *United States v Todd*, 446 F3d 1062, 1068 (10th Cir 2006) (noting that pretrial summary dismissals are “the ‘rare exception,’ not the rule”); *United States v Levin*, 973 F2d 463, 466 (6th Cir 1992) (quoting the trial judge, who called it an “unusual criminal case” because the facts were undisputed).

⁸ See, for example, *United States v Alfonso*, 143 F3d 772, 777 (2d Cir 1998). Although Part II.B explores the distinctions between the proffered and stipulated evidence positions, Part III.C.2 argues that they should be understood as two sides of the same coin.

⁹ For the only other scholarly treatment of this issue, see generally James M. Shellow and Susan W. Brenner, *Speaking Motions: Recognition of Summary Judgment in Federal Criminal Procedure*, 107 FRD 139 (1985).

¹⁰ See 18 USC § 3731; Anne Bowen Poulin, *Government Appeals in Criminal Cases: The Myth of Asymmetry*, 77 U Cin L Rev 1, 15–20, 28–30 (2008) (explaining that the government can appeal from pretrial or midtrial dismissals, or a post-verdict directed acquittal, but not from a pre-verdict directed acquittal or a jury’s acquittal). See also Note, *Government Appeals of “Dismissals” in Criminal Cases*, 87 Harv L Rev 1822, 1829–32, 1834–35 (1974).

¹¹ For an argument supporting this kind of cross-pollination, see David Sklansky and Stephen Yeazell, *Comparative Law without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 Georgetown L J 683, 708 (2006) (speculating that the “puz-

judgment—a stipulated dismissal with burden shifting—turns out to be the procedure best able to deal with these policy concerns in the shadow of Supreme Court case law.

I. THE COMMON LAW, THE FEDERAL RULES, AND MODERN CRIMINAL PROCEDURE

This Part explains how summary dismissals fit within the FRCrP framework for pretrial motions. It identifies the common law motion most analogous to summary dismissal and describes how the FRCrP reformed—but never rejected—this analogous procedure. It then explains that criminal defendants normally litigate questions of law as requests for jury instructions but might litigate these questions at an earlier stage by using summary dismissals. This Part ends by distinguishing dismissals from acquittals: the government is constitutionally barred from retrying a defendant who is acquitted, but *not* one who wins a summary dismissal motion.

A. Motions to Dismiss in Criminal Procedure

Pretrial motions frame parties' strategies and narrow the genuine issues for trial. The drafters cross-pollinated the FRCrP with principles from the Federal Rules of Civil Procedure (FRCP), which predated them.¹² Two core rules address pretrial motions: FRCrP 47 governs motions' technical form, while FRCrP 12(b) governs motions' content.

FRCrP 12(b)(2) authorizes “permissive” pretrial motions for raising arguments that may, but need not, be made before trial. These arguments include “any defense, objection, or request that the court can determine without a trial of the general issue.”¹³ Courts interpret the last phrase as forbidding judges from determining the defendant's guilt or innocence—the “general issue” in a criminal case.¹⁴ Similarly, in *United States v Covington*,¹⁵ the Supreme Court interpreted an earlier, substantively identical version of FRCrP 12(b)(2) as permitting motions whenever “*trial of the facts* surrounding the commission of

zling” lack of a criminal procedural mechanism analogous to summary judgment reflects pre-modern practical realities of criminal procedure at common law).

¹² See Shellow and Brenner, 107 FRD at 169–72 (cited in note 9) (describing how Rule 47 of the Federal Rules of Criminal Procedure began its “career” as Rule 7(b) of the Federal Rules of Civil Procedure). Consider also FRCrP 49, Advisory Committee Note (Second Preliminary Draft 1944), reprinted in Madeline J. Wilkin and Nicholas Triffin, eds, 4 *Drafting History of the Federal Rules of Criminal Procedure* 177 (Hein 1991) (“The provision that a motion may be supported by affidavit may be considered in connection with the discussion of the speaking motion under the [FRCP].”).

¹³ FRCrP 12(b)(2).

¹⁴ Wright and Leipold, 1A *Federal Practice and Procedure* § 191 at 390–93 (cited in note 1).

¹⁵ 395 US 57 (1969).

the alleged offense *would be of no assistance* in determining the validity of the defense.”¹⁶

Defendants can thus seek dismissal by arguing that the indictment is structurally flawed for reasons including venue, immunity, double jeopardy, and the statute of limitations.¹⁷ This should be distinguished from challenges to the indictment’s technical sufficiency under FRCrP 12(b)(3)(B). Such challenges argue that the indictment is flawed in its *drafting*—for example, because it contains scrivener’s errors or fails to state an element of the offense¹⁸—rather than flawed in the merits of the legal question.

FRCrP 12(b)(2) prohibits defendants from making other arguments, as well. First, before trial, defendants cannot raise a “sufficiency of the evidence” challenge, arguing that the indictment’s factual allegations would not satisfy the prosecution’s burden of proof.¹⁹ Instead defendants must raise such challenges using an FRCrP 29 motion for a judgment of acquittal, testing whether “any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.”²⁰ Such motions “can be entertained, at the earliest, after the evidence on either side is closed.”²¹

Second, defendants cannot seek summary dismissal merely because the indictment’s factual allegations are untrue, as that is a jury question central to the “general issue” of guilt or innocence.²² Courts avoid invading the province of the jury by refusing to look at disputed facts that are material to the elements of the offense, whether they

¹⁶ *Id.* at 60 (emphasis added).

¹⁷ See, for example, *United States v Smith*, 866 F2d 1092, 1095–96 & n 3 (9th Cir 1989); James A. Adams and Daniel D. Blinka, *Pretrial Motions in Criminal Prosecutions* § 11-4 at 917 (Lexis 4th ed 2008).

¹⁸ See FRCrP 12(b)(3)(B). *Russell v United States*, 369 US 749 (1962), articulated the test for indictment sufficiency. Indictments must “contain[] the elements of the offense to be charged, and sufficiently apprise[] the defendant of what he must be prepared to meet,” with enough particularity to allow the defendant to avoid double jeopardy in a subsequent prosecution by “plead[ing] a former acquittal or conviction.” *Id.* at 762–64. See generally Note, *Indictment Sufficiency*, 70 Colum L Rev 876 (1970).

¹⁹ See, for example, *United States v Sampson*, 371 US 75, 78–79 (1962) (explaining that a mail fraud indictment need not include enough evidence to prove that the offense occurred, but must instead be “tested by its sufficiency to charge the offense”). Some courts have read *Sampson* as permitting defendants to challenge an indictment only for failure to state an offense. See, for example, *United States v King*, 581 F2d 800, 802 (10th Cir 1978); *United States v Vincenzi*, 1988 WL 98634, *3 (D Mass).

²⁰ *Jackson v Virginia*, 443 US 307, 317–19 & n 10 (1979). See also Wayne R. LaFave, et al, 6 *Criminal Procedure* § 24.6(c) at 447 (West 3d ed 2007).

²¹ *United States v Martin Linen Supply Co.*, 430 US 564, 570 n 8 (1977).

²² See, for example, *United States v Knox*, 396 US 77, 83 n 7 (1969) (explaining that issues of material fact are not resolvable in pretrial hearings); *United States v Nukida*, 8 F3d 665, 670 (9th Cir 1993) (noting that FRCrP 12’s limitation against deciding “guilt or innocence . . . helps ensure that the respective provinces of the judge and jury are respected”).

appear inside or outside the indictment's "four corners."²³ Where disputes are major or material to the litigated offense, judges are barred from *deciding* factual questions "so intertwined with the general issue that [the question of law] must be tried with the general issue."²⁴ But where factual disputes are minor or peripheral, judges can hold limited factual hearings—as long as findings are made on the record.²⁵

Reading the summary dismissal cases together reveals their general features. First, the facts are undisputed; the defendant does not dispute the indictment's factual allegations. If either party points to facts outside the indictment's four corners, the other party does not dispute those *external* facts.²⁶ Second, the motion challenges the government's case as legally flawed: even if the indictment's factual allegations—and relevant "external" facts—are true, the government cannot convict the defendant on its legal theory. Third, the motion raises a pure question of law that, if resolved in the defendant's favor, would prevent the government from satisfying its burden on at least one element.²⁷ Consider *United States v Yakou*,²⁸ the case described in the Introduction.²⁹ The defendant pointed to undisputed facts outside the indictment, urged that under these facts he was no longer an LPR as a matter of law, and argued that he could not be convicted because the government could not prove the "US person" element as a matter of law.³⁰

Most courts agree that under these circumstances, a district judge can hear the motion, resolve the legal question, and dismiss if the government has no case to prove. Such a procedure was available at common law, as Part I.B explains. The FRCrP drafting history detailed in Part I.C does not indicate why it would not be available today.

B. Speaking Motions at Common Law

The common law governed criminal procedure before 1946, when the Federal Rules went into effect. The Rules streamlined and replaced cumbersome and formalistic common law procedures.³¹ FRCrP 12(b)

²³ *United States v Welch*, 327 F3d 1081, 1090 (10th Cir 2003).

²⁴ *United States v Sisson*, 399 US 267, 301 (1970).

²⁵ See FRCrP 12(d); Wright and Leipold, 1A *Federal Practice and Procedure* § 194 at 435–50 (cited in note 1).

²⁶ See, for example, *United States v Yakou*, 428 F3d 241, 246–47 (DC Cir 2005).

²⁷ It could not raise a mixed question of law and fact, which would be a jury question. See *United States v Yasak*, 884 F2d 996, 1001 n 3 (7th Cir 1989).

²⁸ 428 F3d 241 (DC Cir 2005).

²⁹ See text accompanying notes 3–5.

³⁰ Brief of Appellee Sabri Yakou, *United States v Yakou*, No 04-3037, *6–9, 34–35 (DC Cir filed Sept 1, 2004) (available on Westlaw at 2004 WL 1950636).

³¹ See Wright and Leipold, 1A *Federal Practice and Procedure* § 190 at 382–83 (cited in note 1) (suggesting that "nobody, except possibly as a matter of nostalgia, mourned the discarding

consolidated procedures such as demurrers and motions to quash but retained the old procedures' substance.³²

The motion to quash allowed defendants to seek dismissal by identifying defects showing that “no judgment could be rendered on the indictment.”³³ Before trial, these motions could only raise questions of law.³⁴ Courts would not quash an indictment simply because the defendant disputed its factual allegations.³⁵ Otherwise, judges would decide whether the defendant's or prosecution's account of the disputed facts was correct, in turn abrogating the jury's factfinding role.³⁶ Doing so would also permit defendants to argue that inchoate facts alleged in the indictment were insufficient to convince a jury. Then as today, pleadings needed not include all of the government's trial evidence, but rather only enough to give the defendant notice of the charges he would have to defend against.³⁷ Allowing defendants to dispute the incomplete but sufficient facts set out in the indictment would be illogical, because allegations are not the government's case. The constitutional policy favoring jury trial thus precluded trial on the pleadings where defendants offered an untested version of the facts to counter prosecutors' allegations.³⁸

Courts nonetheless quashed indictments based on undisputed facts outside the indictment's four corners when they were the “grounds for the motion.”³⁹ Such motions “spoke” by pointing to extrinsic facts, and

of the fruitless learning on the complicated question[s]” of common law motion practice). Because federal common law criminal procedure was limited to the decisions of federal—not state—courts, see *United States v Murdock*, 284 US 141, 150 (1931), this Part examines only federal cases.

³² See Mark Rhodes, 2 *Orfield's Criminal Procedure under the Federal Rules* § 12:78 at 272–73 (West 2d ed 2009).

³³ P.W. Viesselman, ed, *Abbott's Criminal Trial Practice* § 62 at 112–13 (Lawyer's Co-op 4th ed 1939). See also *United States v Dustin*, 25 F Cases 944, 945 (CC SD Ohio 1869):

A motion to quash will not be sustained unless the indictment is bad beyond a reasonable doubt. This rule has been adopted in view of the fact that nearly all questions involving the sufficiency of the indictment may be available to the defendant, if a conviction follows, on a motion in arrest of judgment. It is true, if the indictment is so palpably defective that no judgment could be rendered on it after conviction, it is the duty of the court to sustain the motion to quash.

³⁴ See *United States v Grunberg*, 131 F 137, 138 (CC D Mass 1904).

³⁵ See Shellow and Brenner, 107 FRD at 155–56 (cited in note 9).

³⁶ See *United States v Brown*, 24 F Cases 1273, 1274 (D Or 1871). See also Viesselman, ed, *Abbott's Trial Practice* § 62 at 112–13 (cited in note 33). For the modern perspective, see note 20.

³⁷ See Roger Foster, 2 *A Treatise on Federal Practice, Civil and Criminal* § 497 at 1662 (Callaghan 1913).

³⁸ See Shellow and Brenner, 107 FRD at 156 (cited in note 9). Compare FRCP 12(d) (treating a motion for judgment on the pleadings as a motion for summary judgment under FRCP 56).

³⁹ Foster, 2 *Federal Practice* § 515 at 1704–05 (cited in note 37). See, for example, *United States v Tallman*, 28 F Cases 9, 11 (CC SDNY 1872); *United States v Coolidge*, 25 F Cases 622, 623 (CC D Mass 1815) (Story) (requiring affidavits to establish external facts supporting motions to quash).

would later be called *speaking motions*.⁴⁰ But courts would not hear *speaking demurrers*, which pointed to extrinsic facts but argued that the indictment was defectively drafted and failed to state an offense.⁴¹ The demurrer's challenge to "the viability of the claim alleged" was a technical question that could be determined on the face of the indictment,⁴² much like its equivalents in modern practice—FRCrP 12(b)(3)(B) and FRCP 12(b)(6).⁴³ "[E]xtrinsic evidence was irrelevant" to such questions.⁴⁴

The distinction between speaking motions and speaking demurrers disappeared when the Rules consolidated the old formalistic pleas, although courts largely follow the same functional rules today. Courts apply the four-corners rule in FRCrP 12(b)(3)(B) motions, as they did for speaking demurrers: extrinsic evidence remains irrelevant.⁴⁵ By contrast, courts' attitudes toward the four-corners rule for summary dismissal motions are bound up with whether they permit summary dismissals at all.⁴⁶

C. Drafting History of the Federal Rules

FRCrP 12(b) incorporated common law motions with little if any change to the substantive law described above.⁴⁷ The Rules' drafting history situates modern summary dismissals within the FRCrP framework.⁴⁸

Early drafts of FRCrP 12(b)(2) would have permitted defendants to seek pretrial bench hearings on "any issue of fact."⁴⁹ The drafters rightly rejected these drafts for two reasons. First, defendants might use such hearings illicitly "as a fishing expedition to find out just what the Government's evidence is."⁵⁰ Second, in such hearings, judges, not juries,

⁴⁰ See Shellow and Brenner, 107 FRD at 170 (cited in note 9).

⁴¹ See *id.* at 154–55. Modern procedure retains the demurrer in FRCrP 12(b)(3)(B). See note 18 and accompanying text.

⁴² Shellow and Brenner, 107 FRD at 155 (cited in note 9). See also James M. Kerr, 2 *A Treatise on the Law of Pleading and Practice under the Procedural Codes* § 874 at 1245–46 (Bender-Moss 1919).

⁴³ See Shellow and Brenner, 107 FRD at 155 (cited in note 9).

⁴⁴ *Id.* General demurrers argued that the alleged facts were insufficient to sustain judgment against the demurring party. Special demurrers argued that the indictment pleaded the alleged facts using improper form. Each type argued that the facts could not sustain a conviction even if they were true. For modern iterations, compare FRCrP 29 with FRCrP 12(b)(3)(B).

⁴⁵ See Note, 70 Colum L Rev at 884 (cited in note 18).

⁴⁶ For example, some courts consider extrinsic evidence whenever stipulated, but others only when the government makes a full proffer that includes that extrinsic evidence. See Part II.B.

⁴⁷ See Shellow and Brenner, 107 FRD at 190 (cited in note 9).

⁴⁸ For a full discussion of the drafting history, see *id.* at 157–75.

⁴⁹ See *id.* at 165–66.

⁵⁰ Joseph T. Votava, *Observations on Proposed Rule of Criminal Procedure 13(b)(4)*, in Wilkin and Triffin, eds, 2 *Drafting History* at 98 (cited in note 12).

would resolve factual disputes.⁵¹ Like common law courts, the drafters wanted to preserve Fifth Amendment jury-trial rights.⁵² Those asymmetrical rights give the government no guarantee of a trial at all—let alone a jury trial.⁵³ The judge and jury occupy distinct realms, permitting dismissals and directed acquittals without usurping the jury's role.⁵⁴

The drafters used FRCrP 47 to dictate what form motions would take. That Rule's commentary explains that defendants cannot challenge the sufficiency of the evidence using a speaking motion.⁵⁵ Courts interpret this as prohibiting defendants from challenging the sufficiency of the evidence before trial.⁵⁶ Evidence that has convinced a grand jury to indict is presumptively sufficient to satisfy the government's burden of persuading the petit jury.⁵⁷

The FRCrP preserved prior substantive law, which would have prevented pretrial challenges to the indictment's factual allegations but not necessarily to its legal allegations.⁵⁸ The drafters specifically analogized to summary judgment in civil procedure in determining that pretrial challenges to an indictment's factual allegations would be unavailable.⁵⁹ The FRCrP 47 commentary should be interpreted as reflecting

⁵¹ See Shellow and Brenner, 107 FRD at 165–68 (cited in note 9).

⁵² See note 36. Consider William Mack, ed, 22 *Cyclopedia of Law and Procedure* 416 (American Law 1906) (explaining that at common law motions to quash could not “be upon grounds invading the province of the jury”).

⁵³ But see *United States v Salman*, 378 F3d 1266, 1268 (11th Cir 2004), citing *United States v DeLaurentis*, 230 F3d 659, 661 (3d Cir 2000). *DeLaurentis* noted, without citing authority, that “[t]he government is entitled to marshal and present its evidence at trial, and have its sufficiency tested by a motion for acquittal pursuant to Federal Rule of Criminal Procedure 29.” 230 F3d at 661 (emphasis added). Notwithstanding *Salman* and *DeLaurentis*, extensive research uncovered no case holding that the government has a right to go to trial. Consider *Martin Linen Supply*, 430 US at 572 (noting that “the prosecution has no constitutionally sanctioned interest in receiving a verdict from the jury”). *Salman*'s position seems inconsistent with other asymmetrical rights—like the right to a directed verdict. See *Sullivan v Louisiana*, 508 US 275, 278 (1993).

⁵⁴ See *Pleasants v Fant*, 89 US (22 Wall) 116, 121–22 (1875) (suggesting that a court must “set[] aside a verdict . . . contrary to law” in order to “protect parties from unjust verdicts” delivered by a jury). Dismissal nonetheless implicates separation of powers concerns by “directly encroach[ing] upon the fundamental role of the grand jury.” *Whitehouse v United States District Court*, 53 F3d 1349, 1360 (1st Cir 1995). See also *United States v Lovasco*, 431 US 783, 790 (1977) (“[T]he Due Process Clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment.”).

⁵⁵ FRCrP 47, Advisory Committee Note to the 1944 Adoption.

⁵⁶ See, for example, *United States v Jones*, 542 F2d 661, 665 n 7 (6th Cir 1976); *United States v Greater Syracuse Board of Realtors*, 449 F Supp 887, 899 (NDNY 1978).

⁵⁷ See *United States v Hickey*, 367 F3d 888, 894 (9th Cir 2004) (describing the narrow “constitutional right not to be tried” and noting the corollary that, absent serious government misconduct, “courts generally may not look behind an indictment before trial”). See also note 19.

⁵⁸ See Shellow and Brenner, 107 FRD at 170–71, 196 (cited in note 9).

⁵⁹ *Id.* at 194–96.

the prohibition on challenging the indictment's factual sufficiency before trial.⁶⁰ Such challenges are available instead through FRCrP 29.⁶¹

D. Summary Dismissal in the Larger Context of Criminal Trials

Defendants can use summary dismissal motions to expedite resolution of legal questions that would otherwise be litigated as proposed jury instructions. But as noted above, they are not an ersatz pretrial FRCrP 29 motion: summary dismissals do not carry the same double jeopardy consequences as acquittals. This makes them more analogous to civil motions to dismiss under FRCP 12(b)(6) than to summary judgment under FRCP 56.

1. Jury instructions and the legal theory.

If not resolved pretrial, legal questions presented in summary dismissal motions will be resolved later: during trial, during requests for jury instructions, or on posttrial motions. In most cases, when facts are disputed, instructions constrain whatever conclusions the jury could reach based on its factual findings. For example, in *Yakou*, whether the defendant was a "US person" determined whether he could be convicted at all.⁶² Because the facts were undisputed, a jury could only have reached a single conclusion, constrained by the judge's ruling on the legal question. The district court simply decided that question earlier than it otherwise would have.⁶³

Jury instructions must accurately state the law and must outline the logic that the jury must follow in matching factual findings to legal conclusions.⁶⁴ Judges give instructions on the defendant's legal theory (in addition to the prosecution's) "if the theory is supported by law and has some foundation in the evidence."⁶⁵ Instructions must therefore allow the jury to "understand the defense theory, test it against

⁶⁰ See *Martin Linen Supply*, 430 US at 570 n 8.

⁶¹ See LaFave, et al, 6 *Criminal Procedure* § 24.6(c) at 447 (cited in note 20).

⁶² See notes 3–5 and accompanying text. In *Jackson v Virginia*, 443 US 307 (1979), Justice John Paul Stevens suggested that courts purporting to engage in sufficiency review were in fact occasionally considering "legal issues masquerading as sufficiency questions." *Id.* at 329 (Stevens concurring).

⁶³ See *United States v Yakou*, 2004 WL 884545, *4–8 (DDC).

⁶⁴ See *United States v Hach*, 162 F3d 937, 946 (7th Cir 1998) (affirming the district court's decision not to give defense instructions that were "incorrect or incomplete restatements of the law"); *United States v Piccolo*, 696 F2d 1162, 1170 (6th Cir 1983) ("A judge has a duty to give instructions that are meaningful and translated, not in terms of mere abstract law, but into facts of the particular case."), vac'd on other grounds, 723 F2d 1234 (6th Cir 1983) (en banc).

⁶⁵ *United States v King*, 126 F3d 987, 995 (7th Cir 1997). See also *United States v Tarwater*, 308 F3d 494, 510 (6th Cir 2002) (reversing for failure to instruct the jury on a plausible, factually supported defense theory, which deprived the jury of a theory on which it could rationally acquit).

the evidence presented at trial, and then make a definitive decision whether, based on that evidence and in light of the defense theory, the defendant is guilty or not guilty.”⁶⁶ If a jury could not convict on the undisputed facts and the government’s legal theory, it would be irrational to send the case to a jury.

FRCrP 30, which governs jury instructions, allows judges to decide such questions once parties articulate their legal theories—as early as during the trial.⁶⁷ Summary dismissal motions push this inquiry earlier, allowing parties to litigate their legal theories before trial when undisputed facts obviate the need for factual development.

2. Dismissals, acquittals, and double jeopardy.

Courts analogize summary dismissal to summary judgment,⁶⁸ but the analogy is imperfect for several reasons.

First, as Justice William Brennan once noted in an unrelated context, “[t]here is no such thing as a motion for summary judgment in a criminal case.”⁶⁹ The FRCrP contain no explicit textual provision akin to FRCP 56(c),⁷⁰ even though FRCrP 29 is essentially an asymmetrical version of civil judgment as a matter of law under FRCP 50.⁷¹ If it becomes clear during the trial that a rational jury could not convict, FRCrP 29 permits the judge to enter a judgment of acquittal. Second, while summary judgment can be entered for either party, courts cannot enter judgment *against* a defendant unless the jury returns a guilty verdict, and cannot do so *in favor of* a defendant until jeopardy attaches.⁷²

Third, dismissals and judgments trigger different collateral bars on relitigating claims in civil cases. Summary judgment is a final adjudication on the merits triggering *res judicata*, as is a dismissal with

⁶⁶ *United States v Barham*, 595 F2d 231, 244 (5th Cir 1979).

⁶⁷ See FRCrP 30. The availability of midtrial rulings is discretionary—as are nonbinding pretrial preliminary instructions. See LaFave, et al, 6 *Criminal Procedure* § 24.8(a) at 476–78 (cited in note 20).

⁶⁸ See notes 96 and 136–38.

⁶⁹ *Russell*, 369 US at 791 (Brennan dissenting).

⁷⁰ See *United States v Brown*, 481 F2d 1035, 1042 (8th Cir 1973).

⁷¹ See Charles Alan Wright and Peter J. Henning, 2A *Federal Practice and Procedure* § 461 at 320 n 2 (West 4th ed 2009).

⁷² See *United States v Thomas*, 150 F3d 743, 746–47 (7th Cir 1998) (Easterbrook concurring) (noting that courts cannot enter convictions pretrial). See also *Serfass v United States*, 420 US 377, 388 (1975) (“In the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a non-jury trial, jeopardy attaches when the court begins to hear evidence.”).

One commentator characterizes a summary dismissal as a pretrial directed acquittal. See James P. Fieweger, et al, *Posttrial Motions in Federal Criminal Cases*, in *Federal Criminal Practice* § 12.7 (HICLE 2008). The assumption that summary dismissal necessarily has preclusive effects for reindictment is unsettled, impractical at best, and untenable at worst. See text accompanying notes 74–86.

prejudice—but a dismissal without prejudice is not.⁷³ A similar distinction exists in criminal cases. Constitutional double jeopardy protections prevent the government from reindicting the acquitted defendant or appealing various rulings favoring the defendant.⁷⁴

Jeopardy does not attach at the summary dismissal stage, meaning the government can retry the defendant.⁷⁵ In determining when jeopardy attaches, courts prefer functionalism to formalism.⁷⁶ Double jeopardy rules protect the defendant from government harassment and the “continuing state of anxiety and insecurity” that comes with being haled into court for retrial on the same offense.⁷⁷ When a defendant seeks a summary dismissal, he has not yet gone through the trouble of trial. The government’s case is its first, not second, “bite at the apple.”⁷⁸

Double jeopardy has attracted attention elsewhere and is outside the scope of this Comment.⁷⁹ For present purposes, the primary doctrinal inquiry is “whether the ruling of the judge, whatever its label, actually represents a *resolution*, correct or not, of some or all of the factual elements of the offense charged.”⁸⁰ In *Serfass v United States*,⁸¹ the Supreme Court held that such resolution does not occur in pretrial dismissals.⁸² It occurs only when “a defendant is ‘put to trial before the trier of facts, whether the trier be a jury or a judge.’”⁸³ Defendants must waive jury trial explicitly under FRCrP 23(a) to get a bench trial; without a waiver, jeopardy cannot attach even if a judge determines

⁷³ See *Schmier v McDonalds*, 569 F3d 1240, 1242 (10th Cir 2009) (dismissal with prejudice); *Dowd v Society of St. Columbans*, 861 F2d 761, 764 (1st Cir 1988) (summary judgment); *Guzowski v Hartman*, 849 F2d 252, 255 (6th Cir 1988) (dismissal without prejudice).

⁷⁴ See US Const Amend V; 18 USC § 3731. See also note 10.

⁷⁵ See Sklansky and Yeazell, 94 Georgetown L J at 708 & n 92 (cited in note 11) (“Double jeopardy ‘attaches,’ barring relitigation, only with the empanelling of the jury, and thus does not come into effect with dismissals prior to trial.”), citing *Crist v Bretz*, 437 US 28, 35, 37 (1978).

⁷⁶ See *United States v Hunt*, 212 F3d 539, 543–44 (10th Cir 2000) (explaining that acquittal will not be upheld merely because the district court “labeled its decision an acquittal,” but will instead be upheld only if it “actually represents a resolution . . . of some or all of the factual elements of the offense charged”); *United States v Velazquez*, 490 F2d 29, 33–34 (2d Cir 1973) (suggesting that although jury empanelment creates a nondispositive presumption of jeopardy, disposition involves balancing the government’s and defendant’s interests).

⁷⁷ *Green v United States*, 355 US 184, 187–88 (1957).

⁷⁸ *Burks v United States*, 437 US 1, 17 (1978).

⁷⁹ See, for example, Anne Bowen Poulin, *Double Jeopardy and Judicial Accountability: When Is an Acquittal Not an Acquittal?*, 27 Ariz St L J 953, 975–76 & nn 105–06 (1995).

⁸⁰ *Martin Linen Supply*, 430 US at 571 (emphasis added). See Poulin, 77 U Cin L Rev at 15–20, 28–30 (cited in note 10) (providing a functional justification for the government’s ability to appeal rulings deferred for evidentiary insufficiency). See also *United States v Margiotta*, 662 F2d 131, 138–39 (2d Cir 1981) (adopting the definition of “a dismissal of a count or a portion thereof, for purposes of appeal, as the elimination of ‘any discrete basis for the imposition of criminal liability that is contained in the indictment’”).

⁸¹ 420 US 377 (1975).

⁸² See *id* at 389–93.

⁸³ *Id* at 388 (emphasis added).

“facts and evidence outside the indictment.”⁸⁴ Unless the defendant consents to a bench trial, *Serfass* indicates that jeopardy does not attach when a judge considers stipulated facts.⁸⁵

Before trial, judges are “without power to make any determination regarding [the defendant’s] guilt or innocence.”⁸⁶ Summary dismissal motions resolve legal, as compared to factual, disputes and should not trigger the preclusive effects of double jeopardy.

II. THE CONFLICTING CASE LAW

Courts have disagreed about summary dismissals since 1973.⁸⁷ Today they disagree about two core issues. The first is what form evidence must take for a defendant to seek summary dismissal. Courts take three positions. The first categorically prohibits summary dismissals. The second (majority) position permits summary dismissals whenever evidence is “undisputed,” a concept that will be explored in Part II.B.1. The final position permits summary dismissals based on “a full proffer of the evidence [the government] intends to present at trial.”⁸⁸ Courts also disagree about the positions that other circuits take, creating a muddled circuit split.⁸⁹ Three circuits have not squarely addressed the question, and district court case law in those circuits varies widely.⁹⁰ This Part unpacks the split, extracting doctrinal patterns and

⁸⁴ *Id.* at 389. See also *United States v Pecora*, 484 F2d 1289, 1293 (3d Cir 1973) (holding that stipulating facts merely to “attack[] the validity of the indictment did not constitute the waiver necessary under Rule 23(a)”).

⁸⁵ See 420 US at 393, abrogating dicta from *United States v Brewster*, 408 US 501, 506 (1972); *Sisson*, 399 US at 285.

⁸⁶ *Serfass*, 420 US at 389.

⁸⁷ In *United States v Brown*, 481 F2d 1035 (8th Cir 1973), the Eighth Circuit disagreed with *United States v Ponto*, 454 F2d 647 (7th Cir 1971), *affd en banc*, 454 F2d 657 (7th Cir 1971), which *Brown* contended had permitted a district court to “determine[] as a matter of law prior to trial that a defense was conclusively established.” *Brown*, 481 F2d at 1041.

⁸⁸ *United States v Alfonso*, 143 F3d 772, 776–77 & n 7 (2d Cir 1998).

⁸⁹ The DC Circuit characterizes the undisputed, proffer, and no-dismissal positions as a 5-3-1 split. See *Yakou*, 428 F3d at 247 (purporting to join the Sixth, Seventh, Ninth, and Tenth Circuits); *id.* (citing the Second, Third, and Eighth Circuits); *id.* (citing the Eleventh Circuit). But the Eighth Circuit does not support the proffer position. See *United States v Nabors*, 45 F3d 238, 240 (8th Cir 1995) (describing the government as under “no duty” to reveal all of its proof before trial). See also Part II.A. This may also mischaracterize the Eleventh Circuit’s position, as that court has recognized the proffer position in dicta. See text accompanying notes 135–38. Nonetheless, that court has suggested that four circuits, not one, reject summary dismissals. See *United States v Salman*, 378 F3d 1266, 1268 n 5 (11th Cir 2004) (purporting to join the Third, Eighth, and Ninth Circuits).

⁹⁰ For First Circuit cases discussing related issues, see *United States v Tavares*, 21 F3d 1, 3 (1st Cir 1994) (*en banc*) (discussing factual stipulations); *United States v Barletta*, 644 F2d 50, 58 (1st Cir 1981) (refusing on FRCrP 12(b) grounds to allow a court to consider “a substantially complete portion of the evidence to be introduced at trial” in a pretrial evidentiary ruling). For a district court case, see *United States v Booker*, 557 F Supp 2d 153, 155 (D Me 2008).

explaining the major points of tension before discussing each position in depth.

Courts also disagree on whether the government must consent to summary dismissal.⁹¹ They have suggested that this can mean express consent or implied consent (in the form of waiver).⁹² As explained in Part III.A.5, courts and litigants should take the consent requirement seriously, whatever form it takes.

A. Categorical Prohibition of Summary Dismissals

Courts have justified prohibitions on summary dismissals by pointing to the absence of an explicit summary judgment procedure in criminal law. The drafters did not write a procedure like FRCP 56(c) into the criminal rules.⁹³ The case that best represents this position is *United States v Nabors*.⁹⁴ The district court dismissed a racketeering prosecution because, while the indictment alleged that the racketeering enterprise consisted solely of the defendants, as a matter of law RICO liability could not attach under such circumstances.⁹⁵ The Eighth Circuit reversed. “There being no equivalent in criminal procedure to [a] motion for summary judgment,” the court held that the district court’s dismissal was improper.⁹⁶

For a Fourth Circuit case discussing related issues, see *United States v Forrest*, 1999 WL 436743, *1 (4th Cir) (applying the four-corners rule in a venue challenge). For district court cases, see *United States v Souder*, 2009 WL 88919, *7 (MD NC); *United States v Gosselin World Wide Moving*, 333 F Supp 2d 497, 505 (ED Va 2004) (considering the parties’ joint factual stipulations in a motion to dismiss), affd in part, revd in part on other grounds, 411 F3d 502 (4th Cir 2005). See also notes 116–18.

For Ninth Circuit cases, see *United States v Shortt Accountancy Corp*, 785 F2d 1448, 1452 (9th Cir 1986) (refusing to allow pretrial dismissals based on issues “substantially founded upon and intertwined with evidence concerning the alleged offense”); *United States v Nukida*, 8 F3d 665, 670 (9th Cir 1993) (refusing to allow FRCrP 12(b) to act as a pretrial FRCrP 29 in order to “ensure that the respective provinces of the judge and jury are respected”); *United States v Phillips*, 367 F3d 846, 855 n 25 (9th Cir 2004) (distinguishing *Shortt* and *Nukida* because “neither party contested the facts,” so “the district court neither ‘invade[d] the province of the’ jury nor determined an element”); *United States v Blanton*, 476 F3d 767, 771 (9th Cir 2007) (rejecting a pretrial FRCrP 29 motion). Because the *Phillips* defendant raised a jurisdictional issue under FRCrP 12(b)(3)(B), see 367 F3d at 855, that case does not directly conflict with prior cases and is not directly on point. It nonetheless makes the Ninth Circuit’s position *unclear*, because its logic would also apply under FRCrP 12(b)(2).

⁹¹ This is intertwined with the first issue. If the government must make a full proffer, then the government consents by proffering. If the parties must stipulate to each other’s factual allegations, then the government’s stipulation to the defendant’s facts also shows consent.

⁹² See *Yakou*, 428 F3d at 247 (cataloguing cases requiring waiver of objection). Compare *United States v Flores*, 404 F3d 320, 325 (5th Cir 2005) (express consent) with *United States v Levin*, 973 F2d 463, 466 (6th Cir 1992) (implied consent).

⁹³ See notes 69–70.

⁹⁴ 45 F3d 238 (8th Cir 1995).

⁹⁵ *Id.* at 240.

⁹⁶ *Id.*

Nabors rejected summary dismissal even though, in the dissent's words, "it [was] abundantly clear from the pretrial record that the government [could not] prove the charged violation at trial."⁹⁷ The majority expressed concern that defendants would use summary dismissal as a fishing expedition to discover the facts behind the government's theory. Because defendants have limited pretrial discovery rights, the court said, "the government has no duty to reveal all its proof before trial."⁹⁸

The Eighth Circuit's post-*Nabors* cases have reaffirmed its categorical prohibition.⁹⁹ Years ago, that court indicated in dicta that summary dismissals might be acceptable in certain circumstances, but that dicta should not be interpreted as surviving *Nabors*.¹⁰⁰ Indeed, *Nabors* and its progeny seem to be the only cases that categorically prohibit summary dismissals in all circumstances.

One might think that other courts would cite *Nabors* as authority for rejecting summary dismissals. But, curiously, courts nationwide instead overwhelmingly cite two Eleventh Circuit cases—*United States v Critzer*¹⁰¹ and *United States v Salman*¹⁰²—for that proposition.¹⁰³ Those two cases indicate disapproval of summary dismissals but include dicta suggesting that dismissal might be proper if the government were to proffer its evidence.¹⁰⁴ Interestingly, the Eleventh Circuit's position may derive in part from a misunderstanding of summary dismissal as a function of FRCrP 12(b)(3)(B)¹⁰⁵—in other words, misunderstanding it as a specific demurrer rather than as a motion to quash.

⁹⁷ *Id.* at 242–43 (Heaney dissenting).

⁹⁸ *Nabors*, 45 F3d at 240 (majority). For a discussion of pretrial discovery rights, see generally Victor Rocco and Eric Creizman, *Government Disclosure Pursuant to Rule 16 and 18 U.S.C. § 3500*, in Diana Parker, ed., *Defending Criminal Cases: Attacking the Government's Proof* § 4 (Law Journal Press 2009).

⁹⁹ See, for example, *United States v Ferro*, 252 F3d 964, 965–66 (8th Cir 2001) (reversing a summary dismissal that the district court mischaracterized as dismissal for "failure to state an offense"); *United States v Berner*, 587 F Supp 2d 1105, 1111 (D SD 2008) (denying the defendant's motion to dismiss because "there [was] no explicit authority to grant a pre-trial judgment as a matter of law on the merits" and suggesting that "a district court cannot employ a 'criminal summary judgment procedure' to dismiss an indictment").

¹⁰⁰ See *Brown*, 481 F2d at 1040–41. See also notes 86–87 and accompanying text.

¹⁰¹ 951 F2d 306 (11th Cir 1992).

¹⁰² 378 F3d 1266 (11th Cir 2004) (per curiam).

¹⁰³ See, for example, *Blanton*, 476 F3d at 771; *United States v Mummert*, 2005 WL 2291004, *4 (ND Iowa).

¹⁰⁴ See text accompanying notes 136–38.

¹⁰⁵ See *United States v Sharpe*, 438 F3d 1257, 1263 (11th Cir 2006) (citing *Salman* and *Critzer* for the proposition that "[t]he sufficiency of a criminal indictment is determined from its face"). Yet it does so in the context of a FRCrP 12(b)(3)(B) challenge—not a FRCrP 12(b)(2) challenge, for which most courts cite those cases. See note 44.

B. Undisputed Evidence: Stipulated or Proffered?

The rest of the circuits to have considered summary dismissals adopt either of the remaining positions, both of which agree that undisputed facts are necessary for dismissal. They disagree about whether facts must be proffered by the government, or undisputed in some other way. These positions allocate control to the government and to the defendant, respectively.

The undisputed-evidence requirement derives from *Covington*: when facts are undisputed, “trial of the facts” is “of no assistance.”¹⁰⁶ If either party disagrees with the other party’s allegations of material fact, the judge *must* deny the motion on procedural grounds, and the dispute must go to the factfinder.¹⁰⁷ Similarly, elements (materiality or reasonableness) and defenses (insanity or alibi) that involve mixed questions of law and fact would be inappropriate for resolution through summary dismissal.¹⁰⁸ The rest of this Part considers these two positions before attempting to reconcile them in Part III.C.2.

1. Undisputed (stipulated) evidence.

Most courts allow summary dismissals whenever the facts are undisputed, even if they do not articulate how parties indicate that the facts are undisputed. In practice, the parties would probably have to stipulate facts. For example, in *United States v DeLaurentis*,¹⁰⁹ the Third Circuit reversed a summary dismissal because it was not based on a “stipulated record.”¹¹⁰ Other than a stipulation, it is unclear how parties would even signal to a court that the facts are undisputed.¹¹¹

Litigants often stipulate facts in their briefs or filings. For example, in *United States v Risk*,¹¹² the government

provided [the defendant] with the documentation presented to the grand jury that entered his indictment . . . and [the defendant]

¹⁰⁶ 395 US at 60. See *United States v Pope*, 2010 WL 2872482, *4 (10th Cir) (interpreting *Covington* as permitting “courts [to] entertain motions that require [them] to answer only pure questions of law” because no trial of the facts is involved). Common law motions to quash recognized a similar requirement. See text accompanying notes 34–39.

¹⁰⁷ *Pope*, 2010 WL 2872482 at *3 (“If contested facts surrounding the commission of the offense would be of *any* assistance in determining the validity of the motion, Rule 12 doesn’t authorize its disposition before trial.”).

¹⁰⁸ See *Nukida*, 8 F3d at 669. See also note 27.

¹⁰⁹ 230 F3d 659 (3d Cir 2000).

¹¹⁰ *Id* at 660–61.

¹¹¹ Counsel can make stipulations orally or in writing. See FRCrP 47; *Serfass*, 420 US at 380. Consider *Pope*, 2010 WL 2872482 at *5 (“To warrant dismissal, it must be clear from the parties’ *agreed* representations about the facts surrounding the commission of the alleged offense that a trial of the general issue would serve no purpose.”).

¹¹² 843 F2d 1059 (7th Cir 1988).

appended these discovery materials to his motion to dismiss. . . . In its response, the government admitted that these facts presented by [the defendant] “essentially accurately summarize[d] the facts which give rise to the indictment.”¹¹³

And in *Serfass*, a draft-dodging case, the Supreme Court noted that the material facts were taken from the defendant’s affidavit and selective service file and from the oral stipulations of counsel.¹¹⁴

Most circuits that have considered the question—the Third, Fifth, Sixth, Seventh, Tenth, and DC Circuits—have adopted the undisputed evidence position.¹¹⁵ But other courts have also taken this approach. For example, in *United States v Gosselin World Wide Moving*,¹¹⁶ a district court in the Fourth Circuit considered stipulated evidence in resolving a summary dismissal motion. The parties stipulated facts “form[ing] the entire factual record for the purposes of the Defendants’ motion to dismiss.”¹¹⁷ The court refused to consider “*additional* facts that Defendants suppl[ied]” that were “not within the [parties’ joint] Statement of Facts.”¹¹⁸ The Fourth Circuit affirmed without even discussing the summary dismissal on procedural grounds.

As another example, consider *United States v Hall*.¹¹⁹ The Tenth Circuit dismissed an indictment for firearm possession in connection with drug offenses. Before trial, the parties “consistently acknowledged” that the material facts were undisputed: the gun was in a different part of the house during the underlying drug crime.¹²⁰ The district court agreed that the defendant could not be convicted for that firearm violation based “solely on the presence of the pistol somewhere in the defendant’s house.”¹²¹ The Tenth Circuit affirmed the dismissal,

¹¹³ *Id.* at 1061. Even though the government provided some voluntary discovery, it would not be a “proffer of evidence” in the sense described in Part II.B.2; the scope of the discovery was limited and was not consistent with the requirement that the government “make a *full* proffer of the evidence it intends to present at trial.” *Alfonso*, 143 F3d at 777 (emphasis added).

¹¹⁴ See 420 US at 380.

¹¹⁵ See *DeLaurentis*, 230 F3d at 660–61; *Flores*, 404 F3d at 323–25; *Levin*, 973 F2d at 470; *Risk*, 843 F2d at 1061; *United States v Hall*, 20 F3d 1084, 1086 (10th Cir 1994); *Yakou*, 428 F3d at 247. See also note 89. Consider *United States v Zayas-Morales*, 685 F2d 1272 (11th Cir 1982), which seems to approve of summary dismissals. See *id.* at 1277–78 (noting that the dismissal was based on “stipulated facts entered into in this case” and calling it akin to “summary judgment”). But *Critzer* abrogated *Zayas-Morales*. See *Salman*, 378 F3d at 1267 n 4 (noting that *Zayas-Morales* allowed district courts to look at extrinsic evidence and dismiss for “the government’s inability to meet its burden of proof as a matter of law”).

¹¹⁶ 333 F Supp 2d 497 (ED Va 2004), *affd* in part, *revd* in part on other grounds, 411 F3d 502 (4th Cir 2005).

¹¹⁷ 333 F Supp 2d at 505.

¹¹⁸ *Id.* at 505–06 (emphasis added).

¹¹⁹ 20 F3d 1084 (10th Cir 1994).

¹²⁰ *Id.* at 1085–86.

¹²¹ *Id.* at 1086.

noting that prior circuit precedent foreclosed the government's legal theory: the defendant's possession of the gun was not "in connection with" the drug offense.¹²² The prosecution was thus "incapable of proving its case" as a matter of law.¹²³

2. Proffered evidence.

The remaining circuit¹²⁴ to have explicitly considered whether to allow summary dismissals is the Second Circuit, which requires that they take a certain form. Specifically, *United States v Alfonso*¹²⁵ required that the government "make a full proffer of the evidence it intends to present at trial" if the court is to consider the evidence to be undisputed.¹²⁶

The source of the "full proffer" language is *United States v Mennuti*.¹²⁷ The defendants had filed a motion to dismiss, arguing that the government could not prove the interstate commerce element of the indicted offense. The prosecutor filed an affidavit in opposition to their motion, listing the facts the government would establish at trial in proving the element.¹²⁸ Neither the opinion of the district court nor that of the court of appeals suggested that the government's factual allegations were undisputed.¹²⁹ The government's proffer was ineffective; the facts could not establish the interstate commerce element. The district court dismissed the indictment, and the Second Circuit affirmed.

In *Alfonso*, the district court granted a motion to dismiss on the grounds that, as in *Mennuti*, the government could not prove the jurisdictional element on the alleged facts. The Second Circuit reversed because the government had not proffered evidence as it had in *Mennuti*.¹³⁰ The court also disapproved of the district court's dismissal sua sponte rather than on the defendant's motion.¹³¹ The government needed a meaningful chance to make a "detailed presentation of the entirety of the evidence that it would present to a jury."¹³² The court

¹²² Id at 1085–86, citing 18 USC § 924(c)(1).

¹²³ *Hall*, 20 F3d at 1088–90.

¹²⁴ The First, Fourth, and Ninth Circuits have not ruled squarely on the question. See note 90.

¹²⁵ 143 F3d 772 (2d Cir 1998).

¹²⁶ Id at 776–77.

¹²⁷ 639 F2d 107 (2d Cir 1981).

¹²⁸ Id at 108 n 1.

¹²⁹ See *United States v Mennuti*, 487 F Supp 539, 540–41 (EDNY 1980); *Mennuti*, 639 F2d at 108 n 1.

¹³⁰ *Alfonso*, 143 F3d at 776–77.

¹³¹ Id at 777.

¹³² Id.

also noted—without further explanation—that under its formal proffer rule “the formal consent of both parties would not be required.”¹³³

Alfonso remains the most eloquent (and most cited) exposition of the proffered-evidence requirement, and district courts nationwide have relied on its formulation.¹³⁴ Puzzlingly, however, no other circuits have expressly adopted its “full proffer” requirement. Although the Eleventh Circuit’s decisions in *Critzer* and *Salman* seem to embrace a hard-line disapproval of summary dismissal,¹³⁵ they nonetheless contain dicta that seem to support a full-proffer rule. *Critzer* reversed a summary dismissal, citing the lack of a mechanism “for a pretrial determination of sufficiency of the evidence.”¹³⁶ *Salman* reversed a summary dismissal for the same reason while asserting the government’s right “to present its evidence at trial and have its sufficiency tested under FRCrP 29.”¹³⁷ Despite this language, courts’ reliance on *Critzer* and *Salman* for the absolutist no-dismissal position is misplaced: they recognize limited exceptions based on proffered evidence.¹³⁸

III. BURDEN SHIFTING AND THE CIVIL PROCEDURE ANALOGUE

The last Part showed that courts have vacillated on whether to allow summary dismissals as a doctrinal matter, but that most nonetheless accept the procedure in one form or another. This Part shows that summary dismissals are welfare maximizing and explains why they should be recognized more uniformly in federal criminal procedure. It then proposes a burden-shifting mechanism that incorporates both the stipulated- and proffered-evidence positions. Finally, it articulates and defends this burden-shifting mechanism as consistent with Supreme Court decisions, the FRCrP, and the common law history.

A. Conflicting Policy Concerns

Whether courts permit summary dismissals is a function of their willingness to allow defendants to force litigation over pure legal questions before trial. Shifting the legal inquiry forward in this way serves several policies underlying the FRCrP, but also creates incentives for defendants and prosecutors to engage in strategic behavior.

¹³³ *Id.* at 777 n 7.

¹³⁴ See, for example, *Booker*, 557 F Supp 2d at 155 (citing *Alfonso* for the appropriate standard of review); *United States v Doyle*, 2006 WL 951881, *5 (ND Ill) (comparing the *Risk-Yakou* consent requirement to “the *Alfonso* court’s ‘full proffer’ requirement”).

¹³⁵ See note 103.

¹³⁶ 951 F2d at 307.

¹³⁷ 378 F3d at 1268. See also notes 53 and 115.

¹³⁸ See *Salman*, 378 F3d at 1268 n 3; *Critzer*, 951 F2d at 308 n 2.

1. Judicial economy.

Defendants, prosecutors, and the judiciary have competing interests at stake in summary dismissals. Each of these actors is nonetheless concerned with *judicial economy*—the goal of reducing litigation costs, defined as the time, effort, and resources expended in reaching a case’s final disposition.

This goal is so important that the Rules’ drafters enshrined it in a separate policy Rule as an interpretive canon. FRCrP 2 directs that all rules “be interpreted to provide for the just determination of every criminal proceeding, to secure *simplicity* in procedure and fairness in administration, and to *eliminate unjustifiable expense and delay*.”¹³⁹ Courts have thus read a broad policy of judicial economy into the Federal Rules, supporting “conservation of judicial resources by facilitating the disposition of cases without trial.”¹⁴⁰

In civil procedure, summary judgment serves an analogous policy goal by “cut[ting] litigation costs and reduc[ing] court dockets.”¹⁴¹ Summary judgment obviates the need for a full trial where undisputed facts make the factfinder unnecessary, thus allowing parties to litigate pure questions of law early. Summary dismissals shift the legal inquiry forward in the same way.¹⁴² Judges have discretion to give preliminary instructions to guide the jury at the beginning of a case.¹⁴³ But normally, “instructions on the law as it applies should be given at the close of the trial.”¹⁴⁴ FRCrP 30 does not explicitly permit litigants to request binding jury instructions before trial. Summary dismissals therefore offer defendants an alternative way to litigate the law governing the case before trial.¹⁴⁵

¹³⁹ FRCrP 2 (emphasis added).

¹⁴⁰ *United States v Smith*, 866 F2d 1092, 1097 (9th Cir 1989). See also *United States v Levin*, 973 F2d 463, 467 (6th Cir 1992).

¹⁴¹ Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 NYU L Rev 982, 1043–44 (2003).

¹⁴² See Part I.D.2.

¹⁴³ See LaFave, et al, 6 *Criminal Procedure* § 24.8(a) at 476–82 (cited in note 20).

¹⁴⁴ *Id* at 477. See also text accompanying note 67.

¹⁴⁵ The “law of the case” doctrine limits litigants’ ability to challenge rulings on legal issues from earlier stages of the same litigation. See *United States v Phillips*, 367 F3d 846, 856 (9th Cir 2004) (“Issues that a district court determines during pretrial motions become law of the case.”); *United States v Escobar-Urrego*, 110 F3d 1556, 1560 (11th Cir 1997). A ruling denying the defendant’s summary dismissal motion would analyze and decide at least some of the legal issues presented in the motion. If facts proven at trial turned out to be different from the “undisputed” facts presented on the pretrial record, the outcome of the *applied* legal principles might be different, but the underlying legal issues would remain the same.

Sometimes answers to these questions will be dispositive, justifying early resolution of the case. Consider *United States v Levin*.¹⁴⁶ The government charged the defendant with accepting Medicare-related kickbacks, but administrative opinion letters established that the defendant's indicted conduct "[did] not constitute reimbursement abuse."¹⁴⁷ The indictment did not mention the opinion letters, the existence of which was undisputed. The trial judge told the government that going to trial to "put on what we know the evidence will be" would be a waste of time.¹⁴⁸ The district court dismissed the indictment, holding that the government could not establish intent as a matter of law.¹⁴⁹ The Sixth Circuit affirmed, suggesting that the district court's concerns about judicial economy properly reflected the FRCrP's general policy "encourag[ing] district courts to entertain and dispose of pretrial criminal motions."¹⁵⁰

Summary dismissals allow the parties to forego litigation costs when the government's case is a loser as a matter of law. Proceeding to trial imposes substantial costs not only on the court, but also on the parties. These costs include preparatory and active litigation time, expenses, and lost opportunities to pursue other work.¹⁵¹ Even though a defendant triggers all of these costs by exercising his jury trial rights, he has a right to do so: courts cannot in the interests of efficiency penalize defendants for exercising procedural rights.¹⁵² If courts and litigants could *generally* channel cases toward summary dismissal,

¹⁴⁶ 973 F2d 463 (6th Cir 1992).

¹⁴⁷ See *United States v Levin*, 1990 WL 278295, *1 (ED Ky).

¹⁴⁸ *Levin*, 973 F2d at 466.

¹⁴⁹ *Id.*

¹⁵⁰ *Id.* at 467. See also *United States v Nukida*, 8 F3d 665, 670 (9th Cir 1993) ("Rule 12 serves to help conserve 'judicial resources by facilitating the disposition of cases without trial.'").

¹⁵¹ See, for example, Ellen Podgor, *The Challenge of White Collar Sentencing*, 97 J Crim L & Criminol 731, 751 (2007) ("Deciding whether to take the risk [of trial] may also be a function of money, as the cost of legal counsel can influence the ability to spend the sums necessary for a trial, thus forcing a plea negotiation to preserve assets for the offender's family.").

¹⁵² See *Bordenkircher v Hayes*, 434 US 357, 363 (1978) (suggesting that "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort," but finding that the coercion implicit in plea bargaining is not such a violation); *United States v Derrick*, 519 F2d 1, 4-5 (6th Cir 1975):

We simply hold that it is improper for a trial judge to impose a heavier sentence as a penalty for the exercise of the right of jury trial, or as an example to deter others from exercising the right. Such motives . . . have little if any relevance to the proper objectives of sentencing.

See also *United States v Jones*, 997 F2d 1475, 1481 (DC Cir 1993) (en banc) (Mikva dissenting) (noting the Supreme Court's willingness to allow "*players other than the judge* to plea-bargain, to horse-trade, to create incentives and disincentives for the way in which a criminal defendant plays his constitutional cards") (emphasis added). But see Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 Ohio St L J 801, 812 (2000) (recounting nonetheless that in practice some judges penalize parties who insist on going to trial).

however, institutional actors could apply their time and resources toward other judicial business.¹⁵³

It seems unexceptional that society would benefit if summary dismissal procedures resulted in a net reduction of these costs by avoiding unnecessary trials.¹⁵⁴ Even if summary dismissal procedures imposed their own costs,¹⁵⁵ they would not likely exceed trial costs. For cases that would have gone to trial anyway, channeling them toward summary dismissal would likely result in net cost reduction. In fact, net-cost-reduction concerns might partially account for the increase in civil cases disposed of at summary judgment.¹⁵⁶

If predictions that summary dismissals are welfare maximizing are correct, it should be unsurprising that several states have pretrial procedures similar (but not identical) to summary dismissal.¹⁵⁷ For example, in *Commonwealth v Brandano*,¹⁵⁸ the Massachusetts Supreme Judicial Court (SJC) outlined a procedure for pretrial dismissals on the merits that would “not be constitutionally offensive” in light of

¹⁵³ Consider *Smith*, 866 F2d at 1097 (noting that “conservation of judicial resources by facilitating the disposition of cases without trial . . . is served by many procedural rules”); *United States v Valle*, 697 F2d 152, 154 (6th Cir 1983) (“The district court is, therefore, without authority to dismiss an otherwise valid indictment on the basis of its belief that government resources should not be devoted to the prosecution of a particular defendant.”).

¹⁵⁴ Consider Frank H. Easterbrook, *Plea Bargaining as Compromise*, 101 Yale L J 1969, 1975 (1992) (suggesting that compromise benefits society by reducing prosecutors’ opportunity costs associated with trying any given defendant). Whether summary dismissal results in net cost reduction is an empirical question beyond the scope of this Comment.

¹⁵⁵ To the extent that such costs are speculative (but might be estimated in a future empirical analysis), for now they might be estimated as equal to the costs of summary judgment. Compare Miller, 78 NYU L Rev at 1043 (cited in note 141) (explaining how benefits outweigh costs) with id at 1048 (explaining criticisms that costs outweigh benefits).

¹⁵⁶ Id at 1044 n 332 (citing commentators who have spoken approvingly about summary judgment’s capability to cut costs). The opposite trend appears to have occurred in criminal procedure. Annual case-disposition rates in federal courts had several modal years (1971 to 1975) for the undifferentiated category of dismissals (which presumably included some pretrial dismissals). Those years coincide with the period of the Court’s decisions from *Sisson* to *Serfass*. Since then, the absolute number of annual dismissals has stayed reasonably steady while the absolute number of annual prosecutions has doubled; thus the relative annual rate of dismissal has halved in that time. See Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics Online* table 5.22.2008 (“BJS Online Sourcebook”), online at <http://www.albany.edu/sourcebook/pdf/t5222008.pdf> (visited Sept 1, 2010). Two preliminary explanations are possible. First, pretrial dismissals might not have the same salience among defense counsel as they had during the *Sisson-Serfass* era. (There is no indication that the standard for dismissal have become more onerous.) Second, counsel might have abandoned the process after determining that such motions did not result in net cost reduction. Absent better data, any such conclusions are speculative at best.

¹⁵⁷ For examples of procedures that allow pretrial dismissal in criminal cases involving undisputed facts, see *State v Dunn*, 916 P2d 952, 953–54 (Wash App 1996); Paul O’Neil, *Rule 3.190(c)(4): A Rule Meant to Be Broken?*, 37 Stetson L Rev 339, 367–68 (2007) (discussing Florida’s rule).

¹⁵⁸ 269 NE2d 84 (Mass 1971).

separation of powers concerns.¹⁵⁹ The procedure permits defendants to “file an affidavit in support of a dismissal which shall contain all the facts and the law relied upon,” authorizes the prosecution to “file a counter affidavit,” and grants trial judges discretion to hold hearings on disputed issues.¹⁶⁰ In *Rosenberg v Commonwealth*,¹⁶¹ the SJC reiterated the importance of government consent by limiting dismissal to cases where the prosecution “agrees to join in the affidavit procedure or in a stipulation of the facts.”¹⁶² Furthermore, the SJC invoked judicial economy in noting that *Brandano* dismissals would be appropriate when they would “avoid[] . . . the defendant’s ordeal in participating in what may be an unnecessary trial” or would “avoid[] . . . substantial and unnecessary public expense.”¹⁶³

2. Government appellate rights.

In addition to judicial economy, the Rules foster the policy of preserving litigants’ appellate rights. Specifically, FRCrP 12(d) admonishes courts not to “defer ruling on a pretrial motion if the deferral will adversely affect a party’s right to appeal.”¹⁶⁴ Because the government may not appeal from certain kinds of dispositive prodefense rulings, the *Alfonso* court noted that “the government may actually favor” summary dismissals when the district judge would otherwise rule for the defendant on a nonappealable motion, such as a pre-verdict directed acquittal.¹⁶⁵

Consider an example. If a defendant successfully moved for a directed acquittal after the government’s case-in-chief but before the jury returned its verdict, the government would not be able to appeal.¹⁶⁶ Had the defendant won on summary dismissal, the government would have been able to appeal.¹⁶⁷ By considering summary dismissals—and not deferring ruling on the defendant’s dispositive legal challenge—courts uphold the FRCrP 12(d) policy favoring appellate

¹⁵⁹ *Id.* at 86–87. See also *Commonwealth v Cheney*, 800 NE2d 309, 312–14 (Mass 2003) (holding that state-constitution separation of powers principles bar a court from dismissing an indictment over the prosecution’s objection merely to serve “the interests of public justice”).

¹⁶⁰ *Brandano*, 269 NE2d at 88.

¹⁶¹ 360 NE2d 333 (Mass 1977).

¹⁶² *Id.* at 336. Dismissal over the prosecution’s objection is still available through a “continuance without a finding” procedure, subject to the requirements of Mass Gen Laws Ann ch 278, § 18 (West). See *Cheney*, 800 NE2d at 312.

¹⁶³ *Rosenberg*, 360 NE2d at 336.

¹⁶⁴ FRCrP 12(d).

¹⁶⁵ 143 F3d at 777 n 7.

¹⁶⁶ See *Smith v Massachusetts*, 543 US 462, 467 (2005).

¹⁶⁷ See *Serfass*, 420 US at 389 (permitting appeal from a pretrial dismissal because jeopardy had not yet attached).

rights. Some courts have emphasized that a “post-verdict ruling under Rule 29” would be appealable and would serve the same purpose.¹⁶⁸ But judicial economy concerns undercut this suggestion: trial costs should be avoided if the defendant would ultimately prevail on his legal argument.

Because summary dismissals turn on pure legal questions, preserving appellate rights is also important for ensuring adequate judicial review of lower court rulings. Appellate review imposes uniformity across, and polices the boundaries of, federal criminal law. This could be especially important in marginal cases involving “creative” prosecutions¹⁶⁹ where the government is unsure whether the indicted conduct even fits within the statute.¹⁷⁰

3. Ex ante information in plea bargaining.

Defense counsel may feel uncomfortable with summary dismissals because jeopardy has not yet attached.¹⁷¹ They may want to wait until the directed-acquittal stage to raise a winning legal argument to take advantage of double jeopardy protections.¹⁷² But all else being equal, waiting would expose the defendant to an increased risk of criminal liability and would likely forfeit any sentencing discounts the defendant would receive by pleading guilty.¹⁷³

¹⁶⁸ *DeLaurentis*, 230 F3d at 660–61.

¹⁶⁹ See J. Kelly Strader, *White Collar Crime and Punishment: Reflections on Michael, Martha, and Milberg Weiss*, 15 *Geo Mason L Rev* 45, 52 (2007) (“[P]rosecutors have used new theories to expand the boundaries of white collar criminal law in ever more creative ways.”). See generally Harvey A. Silverglate, *Three Felonies a Day: How the Feds Target the Innocent* (Encounter 2009).

¹⁷⁰ Consider *Risk*, 843 F2d at 1061–62 (rejecting the government’s legal theory where the statute applied only to banks, not their employees).

¹⁷¹ Except if the defendant waives a jury trial. See Part I.D.2. Double jeopardy would not preclude the government from reindicting a defendant who successfully moved for summary dismissal. See *United States v Gamble*, 141 F3d 621, 623 (6th Cir 1998); Part I.D.2. Reindictment would be unlikely, however, if the original charges reflected the government’s strongest legal theory.

¹⁷² Thanks to Harvey Silverglate for this point. Consider *United States v Findley*, 439 F2d 970, 974 (1st Cir 1971):

If an appeal will lie in the present case, while it cannot if the defendant waits and subjects himself to jeopardy, informed counsel believing they have a defense on the merits will henceforth protect their clients by avoiding an expediting procedure otherwise beneficial to all concerned, and only ignorant and ill-advised defendants will subject their defense on the merits to a government appeal.

While *Serfass* suggested that amendments to 18 USC § 3731 abrogated *Findley*’s main holding, see *Serfass*, 420 US at 393, *Findley*’s concern for potential strategic behavior remains valid today.

¹⁷³ See Stephanos Bibas, *Plea Bargaining outside the Shadow of Trial*, 117 *Harv L Rev* 2463, 2546 (2004) (suggesting that prosecutors “induce pleas with deep discounts off inflated post-trial sentences” in order to avoid going to trial).

Summary dismissal motions—even unsuccessful ones—benefit defendants by providing additional information for evaluating whether to plead guilty.¹⁷⁴ Consider an example based on *United States v Kuchinski*,¹⁷⁵ in which the defendant pleaded guilty to knowingly receiving and possessing child pornography.¹⁷⁶ He admitted liability for 110 images, but was sentenced for another 15,000 images that existed in his computer’s temporary file cache.¹⁷⁷ The Ninth Circuit vacated and remanded for resentencing, noting that without specific evidence that the defendant had knowledge of and “dominion and control” over the cache files, the government could not prove knowledge—and should never have indicted him under those facts in the first place.¹⁷⁸

Kuchinski is inapposite because it did not involve a motion to dismiss.¹⁷⁹ But imagine an analogous prosecution for possession in which the indictment alleged that *all* of the images were in his computer’s cache files, even though the defendant and government agreed that someone else had downloaded the images.¹⁸⁰ If the defendant could use a summary dismissal method to test the *legal* question of whether the government could prove knowledge as a matter of law, that information would alter the expected payoffs of pleading guilty or going to trial.

Incomplete information about the viability of the government’s legal theory likely contributes to the high rate of guilty pleas in federal criminal cases.¹⁸¹ Factors in the plea-bargain calculus are more complex than can be described here,¹⁸² but even a coarse-grained analysis

¹⁷⁴ See *id.* at 2531–32 (noting that prosecutors and defendants, and especially “nonrepeat players” and innocent defendants, suffer from asymmetrical information about the likelihood of success at trial). See also *Mabry v Johnson*, 467 US 504, 508 (1984) (“[P]lea agreements are consistent with the requirements of voluntariness and intelligence—because each side may obtain advantages when a guilty plea is exchanged for sentencing concessions, the agreement is no less voluntary than any other bargained-for exchange.”). On the other hand, prosecutors might price their plea deals by requiring defendants to forego summary dismissal in exchange for a sentence reduction. See Easterbrook, 101 *Yale L J* at 1975 (cited in note 154). See also note 194 and accompanying text.

¹⁷⁵ 469 F3d 853 (9th Cir 2006).

¹⁷⁶ *Id.* at 856.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.* at 863.

¹⁷⁹ *Kuchinski* appealed his conviction and sentence. 469 F3d at 855–57.

¹⁸⁰ See, for example, *United States v Luken*, 515 F Supp 2d 1020, 1027–29 (D SD 2007) (invoking the Eighth Circuit’s no-dismissal position in rejecting summary dismissal on “knowledge” about child pornography contained in computer cache files).

¹⁸¹ See *BJS Online Sourcebook* at table 5.22.2008 (cited in note 156) (noting that in 2008 guilty pleas terminated 87 percent of all federal criminal prosecutions and 96 percent of prosecutions that result in a guilty judgment). Of course, uncertainty about the underlying factual issues likely contributes to many other guilty pleas.

¹⁸² See Talia Fisher, *The Boundaries of Plea Bargaining: Negotiating the Standard of Proof*, 97 *J Crim L & Criminol* 943, 957 (2007).

suggests that summary dismissals can provide valuable information. A successful motion confirms the defendant's decision not to plead guilty at the outset. By contrast, an unsuccessful motion tells the defendant that the pure legal argument is a loser. Absent other defenses that he can raise, he should consider pleading guilty before trial to take advantage of any remaining sentencing discounts.

4. Preserving the jury's role as factfinder.

Summary dismissals preserve the divide between the judge's and jury's respective roles. A jury cannot reasonably convict on a flawed legal theory, even if it is convinced by the facts. As explained in Part I.D.2, while a judge deciding a summary dismissal motion cannot "make any determination regarding [the defendant's] guilt or innocence," legal questions presented in such motions are not the *general* issue.¹⁸³ Such motions ask whether the government is incapable of proving its case due to a flawed legal theory—not a lack of convincing evidence of guilt. Summary dismissal thus does not inquire whether the defendant is guilty or innocent, or whether "the government could not prove its case," but rather inquires whether "*there was no case to prove.*"¹⁸⁴ Judges are well positioned to resolve such questions efficiently and economically, and to prevent cases from being submitted to the jury unnecessarily.

By limiting summary dismissals to cases where the government's legal theory is flawed and there are no factual disputes, courts maintain the institutional separation between judge and jury. The limitation also serves as a threshold question that screens the cases that are eligible for summary dismissal adjudication. Most cases that are not pleaded out or selected for bench trial will still go to juries; only in rare cases will defendants agree with the government's factual allegations yet nonetheless choose to litigate and challenge its legal theory.¹⁸⁵

5. Minimizing strategic behavior.

Courts sometimes require the government to "consent" to a summary dismissal procedure.¹⁸⁶ In one sense, consent might refer to the government's willingness to give the defendant a *nolle prosequi*.¹⁸⁷

¹⁸³ *Serfass*, 420 US at 389.

¹⁸⁴ *Risk*, 843 F2d at 1061 (emphasis added). See also *Hall*, 20 F3d at 1088 (noting that "[a]n indictment should be tested solely on the basis of the allegations made on its face, and such allegations are to be taken as true").

¹⁸⁵ See note 7.

¹⁸⁶ See *Yakou*, 428 F3d at 247 (collecting cases requiring consent).

¹⁸⁷ See, for example, FRCrP 48 (permitting federal prosecutors to dismiss an indictment without the defendant's consent).

In another sense, consent might simply be shorthand for the Supreme Court's apparent requirement that facts alleged for motions be truly undisputed.¹⁸⁸ For example, under *Alfonso's* "full proffer" rule, the government consents by proffering its evidence, ensuring that the defendant's motion to dismiss does not misrepresent the government's factual allegations. And under the majority stipulated-evidence rule, the government consents by stipulating to the defendant's allegations about facts outside the indictment. (The government need not "consent" in this way when the defendant stipulates to the *government's* allegations, because the underlying concern about undisputed evidence disappears.)

Practical reasons support a consent requirement. Without one, defendants would have incentives to make nonmeritorious motions routinely—either to delay or as part of a try-anything defense strategy.¹⁸⁹ Courts and prosecutors might therefore worry that summary dismissals present a serious "floodgates" problem.¹⁹⁰ But while summary dismissal motions would increase the government's pretrial litigation costs, some defendants' motions would be successful—in turn decreasing the government's trial litigation costs. Moreover, while the

¹⁸⁸ Consider *Smith v Mississippi*, 162 US 592 (1896); *Neal v Delaware*, 103 US 370 (1880). The Supreme Court held in these cases that for a defendant to challenge his conviction because the government had historically excluded black jurors, the government must not dispute his factual allegations. See *Smith*, 162 US at 601, citing *Neal*, 103 US at 396. In *Smith* and *Neal*, prosecutors denied and admitted the defendants' allegations, respectively. The *Smith* court refused to let the defendant bypass evidentiary rules by alleging facts in a motion—unless the government consented by stipulation or by waiving objection.

¹⁸⁹ Notwithstanding any possible incentives, some have argued that defense counsel are ethically obliged to pursue such strategies. See, for example, John Wesley Hall, Jr, *Professional Responsibility in Criminal Defense Practice* § 3:11.50 at 17–23 (West Supp 2010). See also *United States v Wade*, 388 US 218, 258 (1967) (White concurring in part and dissenting in part) (explaining that defense counsel often engage in strategic practices that "in many instances ha[ve] little, if any, relation to the search for truth," but that we nonetheless "countenance or require" because the practices serve the defendant's interests).

There may also be a risk that defense counsel will pretend that facts are undisputed to test the legal theory, but litigate the case full bore if the motion is denied—on the theory that stipulations are not proof and cannot estop the defense from changing arguments midstream. But there are two reasons why risk-averse defense counsel will not stipulate unnecessarily. First, stipulations may not be as flexible as assumed. See James Joseph Duane, *Screw Your Courage to the Sticking-Place: The Roles of Evidence, Stipulations, and Jury Instructions in Criminal Verdicts*, 49 *Hastings L J* 463, 470 n 35 (1998) ("[T]he better reasoned authorities have properly held that a voluntary defense stipulation amounts to a valid waiver of [the defendant's] right to a jury determination of that factual issue."). Second, judges and prosecutors enforce informal professional norms, providing a nominal check against abuse of the system. See *Brown*, 61 *Ohio St L J* at 812 (cited in note 152) ("Prosecutors can withhold favorable plea bargain terms from uncooperative defense counsel and discretionary favors such as open file discovery.").

¹⁹⁰ See generally Toby Stern, *Federal Judges and Fearing the "Floodgates of Litigation,"* 6 *U Pa J Const L* 377 (2003).

Nabors rule (rejecting summary dismissals) might mitigate floodgates concerns, it would decrease judicial economy.

Requiring consent also addresses concerns that summary dismissals would become fishing expeditions for illicit discovery.¹⁹¹ For example, it would be suboptimal if defendants could game the system by using a motion to dismiss to force the government to articulate specific facts underlying the indictment. An ideal solution would ensure that, if the government must respond, it would not have to reveal more evidence than necessary to show that a material fact is actually disputed.¹⁹²

Of course, prosecutors also have incentives to game the process. They might withhold consent nonmeritoriously, even in cases plainly satisfying the predicate requirements for summary dismissal.¹⁹³ For example, informational asymmetries allow the government to extract plea bargains at a higher rate than would occur with more complete information; similarly, prosecutors benefit from early case dispositions and price offers of leniency accordingly.¹⁹⁴ They might either condition a plea bargain on the defendant not seeking a summary dismissal or refuse to give consent under a consent requirement.

B. The Burden-Shifting “Summary Judgment” Rule

Courts sometimes compare summary dismissal to summary judgment.¹⁹⁵ FRCP 56(c) authorizes summary judgment when “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.”¹⁹⁶ Courts decide summary judgment motions based on evidence external to the pleadings.¹⁹⁷ As Part I.D.2

¹⁹¹ See text accompanying notes 50 and 98. Such concerns may be warranted. See Hall, *Criminal Defense Practice* § 3:11.50 at 21–22 (cited in note 189) (arguing that it would be ethical to file a suppression motion for ulterior motives, such as gaining an “opportunity to examine the police officers about the circumstances of finding contraband” when the defendant is not entitled to that evidence, and suggesting that such tactics are not uncommon).

¹⁹² See Part III.B.

¹⁹³ This is not an abstract concern: in circuits requiring waiver, district courts have refused to consider a motion as soon as the government objects. See, for example, *United States v China Star*, 375 F Supp 2d 1291, 1293 (D NM 2005).

¹⁹⁴ See Easterbrook, 101 Yale L J at 1975 (cited in note 154). See also text accompanying notes 151–54 and 170. Risk-averse prosecutors may tolerate lower likelihoods of success at trial if they can propose a conditional plea bargain. Consider Peter John Koenig, *An Economic Analysis of the Prosecutor* *37 (unpublished PhD dissertation, Ohio State University, 1981) (arguing that substitution and wealth effects undermine the “conventional wisdom that the prosecutor treats defendants pleading guilty more leniently than those demanding trials”).

¹⁹⁵ See notes 96 and 136–38.

¹⁹⁶ FRCP 56(c).

¹⁹⁷ See *Celotex Corp v Catrett*, 477 US 317, 322 (1986) (requiring postdiscovery summary judgment when a party bearing the burden of proof “fails to make a showing sufficient to establish the existence of an element essential to that party’s case”). See also *Matsushita Electrical Industrial Co v Zenith Radio*, 475 US 574, 586 (1986) (shifting the burden to the nonmoving

explained, however, there are serious limits to how accurate those comparisons are. Summary judgment features a burden-shifting mechanism that can nonetheless be imported into summary dismissal to address many of the policy concerns outlined in Part III.A.¹⁹⁸ Moreover, as Part III.C explains, *Covington* provides an example of how burden shifting would work.

Motion practice normally proceeds as follows: once the movant argues for dismissal, the burden shifts to the opponent to show why the motion should not be granted in the movant's favor. The kind of burden shifting proposed here is different. Not only must the government show why the defendant's legal argument is incorrect in order to defeat summary dismissal, it may also try to show that the court should not even address the merits of the motion because material facts are disputed. This is similar to the requirement that a party opposing civil summary judgment "come forward with specific facts showing that there is a genuine issue for trial," which would avoid adjudication of the summary judgment motion in the first place.¹⁹⁹ Burden shifting *on the merits* is thus distinct from burden shifting on whether the court should even engage in a *merits analysis*.

Burden shifting is quite simple. First, the defendant determines the government's legal and factual theory of the case. This may come about through the indictment's allegations, the defendant's own knowledge of the case, a bill of particulars, or (limited) pretrial discovery.

Second, the defendant moves to dismiss, stipulating to the indictment's factual allegations. As in a motion for summary judgment, this motion would allege "no factual dispute,"²⁰⁰ would point to any external evidence that would mean the government has no case to prove, and would develop a legal theory to that effect. In other words, the motion would concede the government's factual allegations, point to additional facts (if appropriate), and explain why the government's interpretation of the law is wrong.

Third, the burden shifts to the government to show why the district court should not decide the motion. To satisfy that burden, the government as nonmoving party would raise a new issue of material fact by "showing a need for further factual inquiries."²⁰¹ This procedure

party, who must present "specific facts showing that there is a genuine issue for trial," without which there is no factual dispute for the jury to try), quoting FRCP 56(e). For a procedural discussion of summary judgment, see Charles Alan Wright, Arthur R. Miller, and Mary Kay Kane, 10A *Federal Practice and Procedure* § 2726 at 440–54 (West 3d ed 1998).

¹⁹⁸ For a general discussion of summary judgment burden shifting, see Edward Brunet and Martin Redish, *Summary Judgment: Federal Law and Practice* § 5:1–5:9 at 89–119 (West 3d ed 2006).

¹⁹⁹ *Matsushita Electrical*, 475 US at 586–87. See also note 7.

²⁰⁰ *Covington*, 395 US at 60.

²⁰¹ Id at 60–61. See *United States v Smith*, 866 F2d at 1096 n 5.

would be tailored to the discretion of the trial judge. A default rule would direct the government to make the showing on the record—perhaps as a proffer of the evidence that the government would expect to prove at trial, as the *Alfonso* rule requires. In addition to this default rule, the trial judge could decide whether the interests of justice would be served by hearing the government’s showing, and related factual allegations, in camera. Trial judges often review sensitive evidence in camera, such as when the government opposes disclosure of potentially exculpatory evidence.²⁰² Other than the shift to in camera review—necessitated by the defendants’ limited pretrial discovery rights—the government would not have to make any more of a showing than the opponent of a civil summary judgment motion would have to make in “set[ting] out specific facts showing a genuine issue for trial.”

Fourth, on the basis of the motion and the government’s reply, the court determines whether the government made this showing. If it did, the motion would be properly denied and the case would go to trial. But if it failed to make this showing, the judge would decide the legal question presented in the motion.

Ultimately, the inquiry is whether the motion raises a pure question of law for which there is “no factual dispute” and about which a full trial on the merits would be “of no assistance in determining the validity” of the defendant’s legal argument.²⁰³ If the facts are truly undisputed, a jury trial would be “of no assistance”: the judge, not the jury, decides legal questions. Summary dismissal would be proper if the prosecution would necessarily fail if a certain legal question were resolved in the defendant’s favor, precluding the government’s ability to prove that element as a matter of law.

C. Burden Shifting, Case Law, and the Choice of Rules

The burden-shifting mechanism proposed in Part III.B is consistent with the Supreme Court’s case law, the FRCrP, and the pre-Rules common law framework. Moreover, this burden-shifting mechanism captures the functionality of *both* the majority stipulated-evidence rule and the *Alfonso* proffered-evidence rule.

1. Supreme Court case law.

The Supreme Court has never ruled that summary dismissals in criminal procedure are either proper or improper. But when several of

²⁰² See *United States v Agurs*, 427 US 97, 106 (1976); *Application of Storer Communications, Inc.*, 828 F2d 330, 335 (6th Cir 1987).

²⁰³ *Covington*, 395 US at 60.

its decisions are read together, they strongly support recognizing a summary dismissal mechanism.

In *Covington*, the defendant was indicted for not paying a state law marijuana tax. He claimed that doing so would reveal his involvement in underlying drug crimes and thereby violate his Fifth Amendment self-incrimination privilege. *Covington* concerned whether he had waived that privilege, which in turn relied on a factual question—although here, the facts were undisputed. Justice John Marshall Harlan’s majority opinion held that the defendant had not waived his defense.

Covington interpreted the then-applicable version of FRCrP 12(b)(2) as permitting pretrial motions whenever “*trial of the facts* surrounding the commission of the alleged offense *would be of no assistance* in determining the validity of the defense.”²⁰⁴ This reflected the Rule’s limitation on pretrial motions to those issues “capable of determination without trial of the general issue.” The opinion is not fully fleshed out, but it can be interpreted as follows: if the defendant claimed that the facts were undisputed, there would be no need to have “trial of the facts.” *Covington* and FRCrP 12(b)(2) are two sides of the same coin: at no point may the judge resolve factual disputes material to the issue of guilt or innocence,²⁰⁵ because doing so is the province of the jury. Yet the judge may resolve factual disputes over defenses and objections collateral to the merits, because these would not require “trial of the facts surrounding” the merits. And he may resolve legal disputes over the merits, because this involves neither “trial of [any] facts” nor “trial of the general issue.” The touchstone is *trial*: except in a bench trial, the judge’s decision on a *Covington* motion does not involve “trial” at all. Issues should be resolved pretrial when doing so does not address the question of guilt or innocence, and thus does not usurp the factfinder’s role.

Justice Harlan explained that “in most cases” involving the Fifth Amendment waiver question at issue in that case, “there will be no factual dispute,” making such questions amenable to resolution on a FRCrP 12(b)(2) motion.²⁰⁶ If the government disagreed about whether the facts were undisputed, the burden would shift to it to “show[] a need for further factual inquiries.”²⁰⁷ Because *Covington*’s behavior did not reflect waiver as a matter of law, and because the government did not demonstrate any need for further factual inquiries, the Court determined that it would be “just under the circumstances that the case be

²⁰⁴ *Id.* (emphasis added).

²⁰⁵ Except, of course, in a bench trial.

²⁰⁶ *Covington*, 395 US at 60.

²⁰⁷ *Id.* at 60–61.

finally disposed of at this level.”²⁰⁸ The Court thus tolerated a mechanism for dismissing a case on undisputed facts and a pure question of law.

The Court implicitly endorsed *Covington* several years later. In *Serfass*, the government appealed from a summary dismissal. The defendant had been indicted for dodging a draft induction order and moved for summary dismissal. He conceded that the government could make out a prima facie case but argued that the draft board had unlawfully given no reason for rejecting his conscientious objector status.²⁰⁹ The district court dismissed on the basis of certain evidence outside the indictment.²¹⁰ The Supreme Court affirmed, noting in dicta the district court’s finding that the defendant’s argument “was properly raised by motion before trial and that, although petitioner had not waived his right to trial by jury, his defense was properly to be determined by this court.”²¹¹ The Supreme Court was evidently untroubled: it did not analyze or pass judgment on the pretrial motion procedure it described in dicta,²¹² addressing instead whether double jeopardy barred government appeals from pretrial dismissals.²¹³ Moreover, the government’s brief cited *Covington* in conceding that the district court could look to the stipulated record to figure out whether the draft board had erred in its refusal to grant Serfass conscientious objector status. That brief never even suggested that pretrial dismissals on such grounds were improper.²¹⁴

In short, summary dismissal motions have never come squarely before the Court. *Covington* and *Serfass* are the closest examples. And dicta in *Serfass* reported the court of appeals’ conclusion that there was “no significant constitutional difference” between motions to dismiss arguing that “the defendant had established a defense as a matter of law” and those arguing that “there were insufficient facts as a matter of law to support a conviction.”²¹⁵ Absent any indications (from these or other cases) that the Court disapproves of the theory of summary dismissals, the Court’s unexceptional treatment of FRCrP 12(b)(2) motions so far suggests there are no obvious doctrinal barriers to their use.

²⁰⁸ Id at 61.

²⁰⁹ *Serfass*, 420 US at 379.

²¹⁰ Id at 379–80.

²¹¹ Id at 380 n 1, citing *Covington*, 395 US at 60.

²¹² See *Serfass*, 420 US at 380.

²¹³ See id at 382–83.

²¹⁴ See Brief for the United States, *Serfass v United States*, No 73-1424, *26–27 (US filed July 25, 1974) (available on Westlaw at 1974 WL 186318).

²¹⁵ 420 US at 382.

2. Reconciling the circuit split.

Recall that courts take three positions. *Nabors* rejects summary dismissals entirely. *Alfonso* requires the government to reply to the defendant's dismissal motion with a "full proffer" of its evidence before a court can consider the facts as the basis of the motion's legal argument. The rest of the courts require the evidence to be undisputed—which in practice means stipulated.

Nabors should be rejected wholesale. Its no-dismissal position is inconsistent with common law motions to quash.²¹⁶ It is inconsistent with the drafting history of the FRCrP, which implicitly reserved a place for summary dismissals. It is inconsistent with *Covington* and FRCrP 12(b)(2), which recognize that issues of law may be resolved pretrial if doing so does not involve the question of guilt or innocence.²¹⁷ And as a practical matter, if the government cannot establish an element, or if it cannot disprove an affirmative defense, it would be irrational *not* to dismiss the indictment. To the extent that *Nabors* preserves a role for the factfinder *even when* the factfinder "would be of no assistance," its holding is untenable.

The remaining two positions are reconcilable by reconfiguring the proffered-evidence rule and the stipulated-evidence rule as corollaries to the burden-shifting mechanism. First, the stipulated-evidence rule can be seen as the default rule under that mechanism. To satisfy *Covington* and FRCrP 12(b)(2), the evidence must be undisputed, and the defendant can signal that he does not dispute the evidence by stipulating explicitly to the indictment's factual (but not legal) allegations. This would remove any issue regarding a material fact alleged in the indictment.

Next, the proffered-evidence rule would serve as a response to any factual allegations the defendant made in the first instance in his motion to dismiss. In other words, within the burden-shifting mechanism, the *Alfonso–Mennuti* proffer rule would be lexically inferior to the stipulated-evidence rule. If the government *does not* dispute any of the defendant's own factual allegations, it could stipulate to them and remove any issue of material fact—clearing the way for the court to decide the summary dismissal motion on the merits. If the government *does* dispute any of the defendant's allegations and wants to prevent the court from deciding the motion's merits, then under the burden-shifting mechanism, it would have to "show[] a need for further factual

²¹⁶ See Part I.B.

²¹⁷ See text accompanying notes 204–06.

inquiries” by the factfinder.²¹⁸ The proffer rule provides one way of making this showing, and Part III.B’s suggestion of in camera review provides another.

The stipulated-evidence and proffered-evidence rules make more sense when considered together than separately. The defendant can stipulate to the government’s factual allegations, removing any issue pertaining to those facts, *even without* a formal or full proffer of the government’s evidence. And either the government can stipulate to the defendant’s factual allegations, *or* it can come forward with a proffer showing why the evidence is, in fact, undisputed. When these rules are put side-by-side, the parties indicate the absence of a dispute over any material fact through the burden-shifting mechanism described in Part III.B. Stipulation is a way for the parties to signal that the facts are not disputed; the burden shifts to the government to either stipulate or make a proffer showing that facts *are* disputed. If the facts are truly undisputed, a judge is well positioned to resolve a motion to dismiss by determining whether the factual allegations and the parties’ legal theories warrant going to trial and submitting the case to a jury.

CONCLUSION

The burden-shifting mechanism outlined here is consistent with most courts’ approval of a procedure that allows judges to consider pre-trial motions to dismiss when the parties stipulate facts or the government has proffered evidence. It is also consistent with those courts that require government consent. Even so, whether a defendant can seek a summary dismissal depends on the discretion of the trial judge.²¹⁹

Summary dismissals will help defendants who want to test the merits of a pure legal argument. Because jeopardy will not yet have attached, defendants may hesitate before relying on this mechanism: the government could simply reindict under a slightly different theory.

²¹⁸ *Covington*, 395 US at 60–61. See also *Smith*, 866 F2d at 1096 n 5. By proffering facts in response to a motion to dismiss, the prosecutor in *Memuti* seems to have been trying to do exactly this. See notes 127–29.

²¹⁹ If litigants cannot convince individual courts to adopt the burden-shifting mechanism articulated above, then the question may be ripe for administrative rulemaking. The Advisory Committee on Criminal Rules hears suggestions to amend the FRCrP. It recently considered (but tabled) a proposal to alter FRCrP 12(b)(3)(B) by requiring defendants to challenge the technical validity of an indictment before trial, rather than at any time. See Memorandum from the Honorable Richard C. Tallman, Chair, Advisory Committee on Federal Rules of Criminal Procedure, to the Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure, *Report of the Advisory Committee on Criminal Rules* *3–4 (Dec 15, 2008), online at <http://www.uscourts.gov/uscourts/RulesAndPolicies/rules/Reports/CR12-2008.pdf> (visited Sept 1, 2010). Similar administrative action on FRCrP 12(b)(2), officially recognizing summary dismissals, would be salutary.

Federal prosecutors might therefore *prefer* that defendants use summary dismissals rather than wait until midtrial to raise a FRCrP 29 motion, which would be unappealable in many circumstances.

Summary dismissals are not likely to become a major part of federal criminal practice, because the predicate circumstances—undisputed facts and a nonfrivolous legal argument that would dispose of the indicted charge if resolved in the defendant’s favor—rarely occur. Yet when they do occur, defense counsel should consider moving for summary dismissal. Not only would clients have more information in deciding whether to plead guilty, but if they won the motion, they would be out of prison temporarily—if not permanently—and earlier than they otherwise would be.