COMMITTEE ON RULES OF PRACTICE AND PROCEDURE
OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
WASHINGTON, D.C. 20544

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MEMORANDUM

To: Honorable Jeffrey S. Sutton, Chair
Standing Committee on Rules of Practice and Procedure

From: Honorable Reena Raggi, Chair
Advisory Committee on Federal Rules of Criminal Procedure

Date: May 8, 2013

Re: Report of the Advisory Committee on Criminal Rules

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure ("the Advisory Committee") met on April 25, 2013, in Durham, North Carolina, and took action on a number of proposals. The Draft Minutes are attached. (Tab D).

This report presents two action item for Standing Committee consideration:

(1) approval to transmit to the Judicial Conference a proposed amendment to Rule 12 (pretrial motions), and a conforming amendment to Rule 34; and

(2) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (adding consular notification).

II. Action Items – Recommendations to Transmit Amendments to the Judicial Conference

1. ACTION ITEM – Rules 12 and 34

The Advisory Committee recommends approval of amendments to Rules 12 and 34. To facilitate consideration of this proposal, the following materials are attached:

Tab B.1 - 2013 Submitted Rule 12 Amendment – "clean" version (shows how Rule 12 would look if the Standing Committee approves of the Advisory Committee's proposed changes)
Tab B.2 - Blackline comparison of Current and Submitted Rule 12, showing proposed amendments
Tab B.3 - Blackline comparison of Current and Submitted Rule 34, showing proposed amendments
Tab B.4 - Reporters' 2013 Memorandum to Advisory Committee on Development of Rule 12 Amendment
Tab B.5 - 2011 Published Amendments to Rules 12 and 34

The proposed amendments originate in a 2006 request from the Department of Justice that "failure to state an offense" be deleted from current Rule 12(b)(3) as a defect that can be raised "at any time," in light of the Supreme Court's decision in *United States v. Cotton,* 535 U.S. 625, 629-31 (2002), holding that "failure to state an offense" is not a jurisdictional defect.

The Advisory Committee's efforts to effect such an amendment sparked extensive discussion within the Advisory Committee and between the Advisory and Standing Committees regarding various aspects of Rule 12. This resulted in three separate amendment proposals being presented to the Standing Committee, the third of which was approved for publication in August 2011. See Tab B.5. In response to the thoughtful public comments received and upon its own further review, the Advisory Committee has revised its third proposal for amendment further. These revisions will not require republication. A detailed chronology of the amendment's evolution, including the public comments received and changes made following publication, is contained in the Reporters' 2013 Memorandum to the Advisory Committee, a copy of which is attached. See Tab B.4.[1]

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[1]After publication, the Committee made the following six changes to the published amendment of Rule 12:

(1) restored language that had been removed from 12(b)(2) as to purpose of rule, and relocated it to (b)(1);
(2) deleted double jeopardy claims from the proposed list of 12(b)(3) claims that must be raised before trial;
(3) deleted statute of limitations from the proposed list of 12(b)(3) claims that must be raised before trial;
(4) added 12(c)(2) making explicit district courts' authority to extend or reset deadline for

The Advisory Committee now presents to the Standing Committee proposed amendments to Rules 12 and 34 that effect the original deletion requested by the Justice Department, clarify other aspects of the rules, and take into account public comments. See Tab B.1, B.2. The submitted proposals have the unanimous approval of the Advisory Committee.

The substantive features of the submitted amendment to Rule 12 (which also restyle these rules) can be summarized as follows:

(1) By contrast to current Rule 12(b)(1), which starts with an unexplained cross-reference to Rule 47 (discussing form, content, and timing of motions), submitted Rule 12(b)(1) achieves greater clarity by stating the rule's general purpose—the filing of pretrial motions (relocated from current rule 12(b))—before cross-referencing Rule 47.

(2) Submitted Rule 12(b)(2) identifies motions that may be made at any time separately from Rule 12(b)(3), which identifies motions that must be made before trial. This provides greater clarity—visually as well as textually—than current Rule 12(b)(3), which identifies motions that may be made at any time only in an ellipsis exception to otherwise mandatory motions alleging defects in the indictment or information.

(3) Submitted Rule 12(b)(2) recognizes lack of jurisdiction as the only motion that may be made "at any time while the case is pending," thus effecting the Justice Department's request not to accord that status to failure to state an offense.

(4) Submitted Rule 12(b)(3) provides clearer notice with respect to motions that must be made before trial.

(a) At the start, it clarifies that its motion mandate is dependent on two conditions:

i. the basis for the motion must be reasonably available before

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pretrial motions;
(5) deleted language referencing Rule 52;
(6) deleted proposed new language requiring showing of "cause and prejudice" and restored current "good cause" as standard for hearing late filed motions.

The third and sixth changes, made by the Advisory Committee at its April meeting, are not covered in the Reporter's March 2013 memo, but are explained in the draft minutes of the April meeting.

The Advisory Committee has amended the published Committee Note to reflect these changes to the rule's text and to state explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act. See Tab B.1, B.2.

trial, and

ii. the motion must be capable of resolution before trial.

This ensures that motions are raised pretrial when warranted while safeguarding against a rigid filing requirement that could be unfair to defendants.

(b) Submitted Rule 12(b)(3)(A)-(B) provide more specific notice of the motions that must be filed pretrial if the just referenced twin conditions are satisfied. While the general categories of "defect[s] in instituting the prosecution" (current Rule 12(b)(3)(A)) and "defect[s] in the indictment or information (current Rule 12(b)(3)(B)) are retained, they are now clarified with illustrative non-exhaustive lists.

Submitted Rule 12(b)(3)(A) thus lists as defects in instituting the prosecution that must be raised before trial:

i. improper venue,
ii. preindictment delay,
iii. violation of the constitutional right to a speedy trial,
iv. selective or vindictive prosecution, and
v. error in grand jury or preliminary hearing proceedings.

Submitted Rule 12(b)(3)(B) lists as defects in the indictment or information that must be raised before trial the following:

i. duplicity,
ii. multiplicity,
iii. lack of specificity,
iv. improper joinder, and
v. failure to state an offense.

The noted inclusion of failure to state an offense in Rule 12(b)(3)(B) completes the amendment originally sought by the Department of Justice.

The submitted rule does not include double jeopardy or statute of limitations challenges among required pre-trial motions in light of concerns raised in public comments. The Advisory Committee is of the view that subjecting such motions to a rule mandate is premature, requiring further consideration as to the appropriate standards for review for untimely filings.

(c) Submitted Rule 12(b)(3)(C)-(E) duplicate the current rule in continuing to

require that motions to suppress evidence, to sever charges or defendants, and to seek Rule 16 discovery must be made before trial.

(5) Submitted Rule 12(c) identifies both the deadlines for filing motions and the consequences of missing those deadlines. Grouping these two subjects together in one section is a visual improvement over the current rule, which discusses deadlines in (c) and consequences in later provision (e). More specifically,

(a) Submitted Rule 12(c)(1) tracks the current rule's language in recognizing the discretion afforded district courts to set motion deadlines. Nevertheless, it now adds a default deadline—the start of trial—if the district court fails to set a motion deadline. This affords defendants the maximum time to make mandatory pretrial motions, but it forecloses an argument that, because the district court did not set a motion deadline, a defendant need not comply with the rule's mandate to file certain motions before trial.

(b) Submitted Rule 12(c)(2) explicitly acknowledges district court discretion to extend or reset motion deadlines at any time before trial. This discretion, which is implicit in the current rule, permits district courts to entertain late-filed motions at any time before jeopardy attaches as warranted. It also allows district courts to avoide subsequent claims that defense counsel was constitutionally ineffective for failing to meet a filing deadline.

(c) Submitted Rule 12(c)(3)(A) retains current Rule 12(e)'s standard of "good cause" for review of untimely motions (with the exception of failure to state an offense discussed separately in submitted Rule 12(c)(3)(B)). At the same time, the submitted rule does not employ the word "waiver" as in the current rule because that term, in other contexts, is understood to mean a knowing and affirmative surrender of rights.

With respect to "good cause," the proposed Advisory Committee Note indicates that courts have generally construed those words, as used in current Rule 12(e), to require a showing of both cause and prejudice before an untimely claim may be considered. The published proposed amendment substituted cause and prejudice for good cause, thinking to achieve greater clarity, but after reviewing public comments and its own further consideration of the issue, the Advisory Committee decided to retain the term "good cause," to avoid both any suggestion of a change from the current standard and arguments based on some constructions of "cause and prejudice" in other contexts, notably, the miscarriage of justice exception to this standard in habeas corpus jurisprudence, not apt to Rule 12.

The amended rule, like the current one, continues to make no reference to

Rule 52 (providing for plain error review of defaulted claims), thereby permitting the Courts of Appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of required Rule 12(b)(3) motions are raised for the first time on appeal.

(d) Insofar as the submitted amendment, at Rule 12(b)(3)(B), would now require a defendant to raise a claim of failure to state an offense before trial, submitted Rule 12(c)(3)(B) provides that the standard of review when such a claim is untimely is not "good cause" (i.e., cause and prejudice) but simply "prejudice." The Advisory Committee thinks this standard provides a sufficient incentive for a defendant to raise such a claim before trial, while also recognizing the fundamental nature of this particular claim and closely approximating current law, which permits review without a showing of "cause."

A conforming amendment to Rule 34 that omits language requiring a court to arrest judgment if "the indictment or information does not charge an offense," is also presented for approval.

Recommendation: The Advisory Committee recommends that amendments to Rule 12 and 34 be transmitted to the Judicial Conference as amended following publication.

2. ACTION ITEM – Rules 5 and 58

The Advisory Committee recommends approval of its second proposal to amend Rules 5 and 58 to provide for advice concerning consular notification, as amended following publication. To facilitate review of this proposal, the following materials are attached:

Tab C.1 - 2013 Submitted Rules 5 and 58 Amendments – "clean" version (shows how Rules 5 and 58 would look if the Standing Committee approves of the Advisory Committee's proposed changes)
Tab C.2 - Blackline comparison of Current and Submitted Rules 5 and 58, showing proposed amendments
Tab C.3 - 2012 Published Amendments to Rules 5 and 58
Tab C.4 - Amendment Proposal Returned from the Supreme Court

In 2010, the Justice Department, at the urging of the State Department, proposed amendments to Rules 5 and 58, the rules specifying procedures for initial proceedings in felony and misdemeanor cases respectively, to provide notice to defendants of consular notification obligations arising under Article 36 of the multilateral Vienna Convention on Consular Relations ("Vienna Convention"), as well as various bilateral treaties.

The first proposed amendments responding to this request were published for public comment and subsequently approved by the Advisory Committee, the Standing Committee, and the

Judicial Conference. In April 2012, however, the Supreme Court returned the amendments to the Advisory Committee for further consideration. See Tab C.4.

At its April 2012 meeting, the Advisory Committee identified two possible concerns with the returned proposal: (1) perceived intrusion on executive discretion in conducting foreign affairs, both generally and specifically as it pertains to deciding how, or even if, to carry out treaty obligations; and (2) perceived conferral on persons other than the sovereign signatories to treaties—specifically, criminal defendants—of rights to demand compliance with treaty provisions.[2]

The amendments were redrafted to respond to these concerns. The redrafted amendments were carefully worded to provide notice without any attending suggestion of individual rights or remedies. Indeed, the Committee Note emphasizes that the proposed rules do not themselves create any such rights or remedies. The Standing Committee approved publication of the redrafted amendments in June 2012. See Tab C.3.

Upon review of received public comments, as well as its own further consideration, the Advisory Committee has made the following changes to the proposed amendments, none of which requires further publication. See Tab C.1-C.2.

(1) The introductory phrase of Submitted Rule 5(d)(1) and 58(b)(2), now provides for the specified advice to be given to all defendants, by contrast to the published rule, which had provided for consular notification to be given "if the defendant is held in custody and is not a United States citizen." See Tab C.3.

The change was made at the suggestion of the Federal Magistrate Judges Association ("FMJA") and the National Association of Criminal Defense Attorneys. The FMJA, in particular, observed that the quoted language could be construed to require the arraigning judicial officer to ascertain a defendant's citizenship, an inquiry that could involve self-incrimination. Providing consular notice to all defendants without such an inquiry parallels Rule 11(b)(1)(O) (which the Supreme Court has now transmitted to Congress), which provides for all defendants to be given notice at sentencing of possible immigration consequences without specific inquiry into their nationality or status in the United States.

As for the "in custody" requirement, interested parties disagreed as to when a defendant was

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[2]Insofar as Article 36 of the Vienna Convention provides for signatory nations to advise detained foreign nationals of other signatory nations of an opportunity to contact their home country's consulate, litigation has not yet resolved whether such a provision gives rise to any individual rights or remedies. *See Sanchez-Llamas v. Oregon,* 548 U.S. 331 (2006) (holding that suppression of evidence was not appropriate remedy for failure to advise foreign national of ability to have consulate notified of arrest and detention regardless of whether Vienna Convention conferred any individual rights). Thus, the Advisory Committee concluded that the remand of the amendment proposal from the Supreme Court could be understood to suggest that the rule may have gotten ahead of settled law on this matter.

"in custody" or "detained." Providing notice to all defendants at their initial appearance not only avoids the need to resolve this question, it avoids the need to consider a further notice requirement when defendants initially admitted to bail are subsequently remanded. Thus, while the Advisory Committee is mindful of the need to avoid adding unnecessary notice requirements to rules governing initial appearances, sentences, etc., it concludes, as now stated in the proposed Committee Note, that "the most effective and efficient method of conveying this [consular notification] information is to provide it to every defendant, without attempting to determine the defendant's citizenship."

(2) At Professor Coquillette's recommendation, the published Committee Note deletes a reference to the Code of Federal Regulations, which might become outdated if the regulation were revised.

Recommendation: The Advisory Committee recommends that the amendments to Rules 5 and 58 be transmitted to the Judicial Conference as amended following publication.

III. Information Item

The Department of Justice has urged amendment of Rule 4 to facilitate service of process on foreign corporations. It submits that the current rule impedes prosecution of foreign corporations that have committed offenses punishable in United States, but that cannot be served for lack of a last known address or principal place of business in the United States. It argues that this has created a "growing class of organizations, particularly foreign corporations" that have gained "'an undue advantage' over the government relating to the initiation of criminal proceedings." The Advisory Committee has referred the matter to a subcommittee for further study and report.

1 **Rule 12. Pleadings and Pretrial Motions**

2 * * * * *

3 **(b) Pretrial Motions.**

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

7 **(2)** ***Motions That May Be Made at Any Time.*** A motion that the court lacks
8 jurisdiction may be made at any time while the case is pending.

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

12 (A) a defect in instituting the prosecution, including:

13 (i) improper venue;

14 (ii) preindictment delay;

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

16 (iv) selective or vindictive prosecution; and

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

18 (B) a defect in the indictment or information, including:

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

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

22 (iii) lack of specificity;

23 (iv) improper joinder; and

24 (v) failure to state an offense;

25 (C) suppression of evidence;

26 (D) severance of charges or defendants under Rule 14; and

27 (E) discovery under Rule 16.

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

29 (A) *At the Government's Discretion.* At the arraignment or as soon afterward
30 as practicable, the government may notify the defendant of its intent to use

specified evidence at trial in order to afford the defendant an opportunity to object before trial under Rule 12(b)(3)(C).

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

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

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

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

(3) ***Consequences of Not Making a Timely Motion Under Rule 12(b)(3).*** If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if:

(A) the party shows good cause; or

(B) for a claim of failure to state an offense, the defendant shows prejudice.

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

(e) **[Reserved]**

Committee Note

Rule 12(b)(1). The language formerly in (b)(2), which provided that "any defense**,** objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial, has been relocated here. The more modern phrase "trial on the

60 merits" is substituted for the more archaic phrase "trial of the general issue." No change in
61 meaning is intended.
62
63 **Rule 12(b)(2).** As revised, subdivision (b)(2) states that lack of jurisdiction may be
64 raised at any time the case is pending. This provision was relocated from its previous placement
65 at the end of subsection (b)(3)(B) and restyled. No change in meaning is intended.
66
67 **Rule 12(b)(3).** The amendment clarifies which motions must be raised before trial.
68
69 The introductory language includes two important limitations. The basis for the motion
70 must be one that is "reasonably available" and the motion must be one that the court can
71 determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally
72 will be available before trial and they can – and should – be resolved then. The Committee
73 recognized, however, that in some cases, a party may not have access to the information needed
74 to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to
75 trial. The "then reasonably available" language is intended to ensure that a claim a party could
76 not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3).
77 Additionally, only those issues that can be determined "without a trial on the merits" need be
78 raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is
79 substituted for the more archaic phrase "trial of the general issue." No change in meaning is
80 intended.
81
82 The rule's command that motions alleging "a defect in instituting the prosecution" and
83 "errors in the indictment or information" must be made before trial is unchanged. The
84 amendment adds a nonexclusive list of commonly raised claims under each category to help
85 ensure that such claims are not overlooked. The Rule is not intended to and does not affect or
86 supersede statutory provisions that establish the time to make specific motions, such as motions
87 under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).
88

89 Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any
90 time while the case is pending to hear a claim that the "indictment or information fails . . . to
91 state an offense." This specific charging error was previously considered fatal whenever raised
92 and was excluded from the general requirement that charging deficiencies be raised prior to trial.
93 The Supreme Court abandoned any jurisdictional justification for the exception in *United States*
94 *v. Cotton,* 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), "[i]nsofar
95 as it held that a defective indictment deprives a court of jurisdiction").
96
97 **Rule 12(c).** As revised, subdivision (c) governs both the deadline for making pretrial
98 motions and the consequences of failing to meet the deadline for motions that must be made
99 before trial under Rule 12(b)(3).
100
101 As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the
102 existing provisions for establishing the time when pretrial motions must be made, and adds a
103 sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start
104 of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the
105 present rule contains the language "or by any extension the court provides," which anticipates
106 that a district court has the discretion to extend the deadline for pretrial motions. New paragraph
107 (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical
108 place - after the provision concerning setting the deadline and before the provision concerning
109 the consequences of not meeting the deadline.
110
111 New paragraph (c)(3) governs the review of untimely claims, previously addressed in
112 Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set
113 under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to
114 the intentional relinquishment of a known right, Rule 12(e) has never required any determination
115 that a party who failed to make a timely motion intended to relinquish a defense, objection, or
116 request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the
117 Committee decided not to employ the term "waiver" in new paragraph (c)(3).
118

The standard for review of untimely claims under new paragraph 12(c)(3) depends on the nature of the defense, objection, or request. The general standard for claims that must be raised before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule -- requires that the party seeking relief show "good cause" for failure to raise a claim by the deadline. The Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice" resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963).

New subparagraph (c)(3)(B) provides a different standard for one specific claim: the failure of the charging document to state an offense. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power to bring a defendant to trial or to impose punishment, should be available without a showing of "good cause." Rather, review should be available whenever a defendant shows prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the court can consider these claims if the party "shows prejudice." Unlike plain error review under Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing of prejudice. For example, in some cases in which the charging document omitted an element of the offense, the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

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

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES

CHANGES MADE AFTER PUBLICATION

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3)(A), the current language "good cause" was retained. In subparagraph (c)(3)(B), the reference to "double jeopardy" was omitted to mirror the omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only" because it was superfluous. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

PUBLIC COMMENTS

Assistant Attorney General Lanny Breuer (11-CR-003) supported the amendment because it requires claims of failure to state an offense to be raised before trial; provides clarity by listing specific claims and defenses that must be raised before trial; includes language stating that a motion must be made before trial only when the basis for the motion is "reasonably available"; eliminates the confusing term "waiver" and clarifies the good cause standard, specifying that "cause and prejudice" must generally be shown; and provides a more lenient standard for the review of objections based upon double jeopardy and failure to state a claim.

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

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

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

The National Association of Criminal Defense Lawyers (NACDL) (11-CR-010) praised certain aspects of the amendment, but urged that it should not be adopted without multiple significant changes: deleting the list of claims and defenses that must be raised before trial; clarifying that the rule does not affect statutory time limits for filing certain motions; retaining failure to state an offense as an claim that can be raised at any time; and altering the showing required for untimely motions, which should vary depending on the procedural stage at which the motion is first made.

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

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

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

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

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

(i) improper venue;

(ii) preindictment delay;

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

(iv) selective or vindictive prosecution; and

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

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

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

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

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

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

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

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

31 and

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

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

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

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

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

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

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

50 **(3)** ***Consequences of Not Making a Timely Motion Under Rule 12(b)(3).*** If a party does
51 not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a
52 court may consider the defense, objection, or request if:

53 (A) the party shows good cause; or

54 (B) for a claim of failure to state an offense, the defendant shows prejudice.

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

59 **(e)** **[Reserved]** ~~**Waiver of a Defense, Objection, or Request.** A party waives any Rule~~
60 ~~12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c)~~

~~or by any extension the court provides. For good cause, the court may grant relief from the waiver~~

Committee Note

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

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

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

The introductory language includes two important limitations. The basis for the motion must be one that is "reasonably available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can – and should – be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(3). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. Just as in (b)(1), the more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue." No change in meaning is intended.

The rule's command that motions alleging "a defect in instituting the prosecution" and "errors in the indictment or information" must be made before trial is unchanged. The amendment adds a nonexclusive list of commonly raised claims under each category to help ensure that such claims are not overlooked. The Rule is not intended to and does not affect or supersede statutory provisions that establish the time to make specific motions, such as motions under the Jury Selection and Service Act, 18 U.S.C. § 1867(a).

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

Rule 12(c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

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

120 New paragraph (c)(3) governs the review of untimely claims, previously addressed in
121 Rule 12(e). Rule 12(e) provided that a party "waives" a defense not raised within the time set
122 under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to
123 the intentional relinquishment of a known right, Rule 12(e) has never required any determination
124 that a party who failed to make a timely motion intended to relinquish a defense, objection, or
125 request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the
126 Committee decided not to employ the term "waiver" in new paragraph (c)(3).
127

128 The standard for review of untimely claims under new paragraph 12(c)(3) depends on the
129 nature of the defense, objection, or request. The general standard for claims that must be raised
130 before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule -- requires
131 that the party seeking relief show "good cause" for failure to raise a claim by the deadline. The
132 Supreme Court and lower federal courts have interpreted the "good cause" standard under Rule
133 12(e) to require both (1) "cause" for the failure to raise the claim on time, and (2) "prejudice"
134 resulting from the error. *Davis v. United States,* 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v.*
135 *United States*, 371 U.S. 341, 363 (1963).
136

137 New subparagraph (c)(3)(B) provides a different standard for one specific claim: the
138 failure of the charging document to state an offense. The Committee concluded that judicial
139 review of these claims, which go to adequacy of the notice afforded to the defendant, and the
140 power to bring a defendant to trial or to impose punishment, should be available without a
141 showing of "good cause." Rather, review should be available whenever a defendant shows
142 prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the
143 court can consider these claims if the party "shows prejudice." Unlike plain error review under
144 Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was
145 "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial
146 proceedings." Nevertheless, it will not always be possible for a defendant to make the required
147 showing of prejudice. For example, in some cases in which the charging document omitted an
148 element of the offense, the defendant may have admitted the element as part of a guilty plea after
149 having been afforded timely notice by other means.

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

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES

CHANGES MADE AFTER PUBLICATION

Language that had been deleted from Rule 12(b)(2) as unnecessary was restored and relocated in (b)(1). The change begins the Rule's treatment of pretrial motions with an appropriate general statement and responds to concerns that the deletion might have been perceived as unintentionally restricting the district courts' authority to rule on pretrial motions. The references to "double jeopardy" and "statute of limitations" were dropped from the nonexclusive list in (b)(3)(A) to permit further debate over the treatment of such claims. New paragraph (c)(2) was added to state explicitly the district court's authority to extend or reset the deadline for pretrial motions; this authority had been recognized implicitly in language being deleted from Rule 12(e). In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial. In subparagraph (c)(3)(A), the current language "good cause" was retained. In subparagraph (c)(3)(B), the reference to "double jeopardy" was omitted to mirror the omission from (b)(3)(A), and the word "only" was deleted from the phrase "prejudice only" because it was superfluous. Finally, the Committee Note was amended to reflect these post-publication changes and to state explicitly that the rule is not intended to change or supersede statutory deadlines under provisions such as the Jury Selection and Service Act.

PUBLIC COMMENTS

Assistant Attorney General Lanny Breuer (11-CR-003) supported the amendment because it requires claims of failure to state an offense to be raised before trial; provides clarity by listing specific claims and defenses that must be raised before trial; includes language stating that a motion must be made before trial only when the basis for the motion is "reasonably available"; eliminates the confusing term "waiver" and clarifies the good cause standard,

specifying that "cause and prejudice" must generally be shown; and provides a more lenient standard for the review of objections based upon double jeopardy and failure to state a claim.

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

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

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

The National Association of Criminal Defense Lawyers (NACDL) (11-CR-010) praised certain aspects of the amendment, but urged that it should not be adopted without multiple significant changes: deleting the list of claims and defenses that must be raised before trial; clarifying that the rule does not affect statutory time limits for filing certain motions; retaining failure to state an offense as an claim that can be raised at any time; and altering the showing required for untimely motions, which should vary depending on the procedural stage at which the motion is first made.

Rule 34. Arresting Judgment

(a) In General. Upon the defendant's motion or on its own, the court must arrest judgment if the court does not have jurisdiction of the charged offense. ~~if:~~

~~(1) the indictment or information does not charge an offense; or~~

~~(2) the court does not have jurisdiction of the charged offense.~~

* * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the “indictment or information fails . . . to state an offense.” The amended Rule 12 instead requires that such a defect be raised before trial.

NO COMMENTS OR CHANGES AFTER PUBLICATION

MEMO TO: Members, Criminal Rules Advisory Committee

FROM: Professors Sara Sun Beale and Nancy King, Reporters

RE: Rule 12

DATE: March 24, 2013

The Criminal Rules Committee has been studying a proposal to amend Fed. R. Crim. P. 12 since 2006. The Committee's proposed amendment to Rule 12 and a conforming change to Rule 34 were published in August 2011, and public comments totaling 47 pages were received from five groups. The reporters prepared a 60 page memorandum analyzing each of the issues raised in the comments. The comments and the reporters' memorandum were considered at length by the Rule 12 Subcommittee, which held a half-day, face-to-face meeting in conjunction with the Advisory Committee's April meeting in San Francisco and a follow-up teleconference. After the Advisory Committee's October meeting was cancelled due to Hurricane Sandy, the Subcommittee met by teleconference in February 2013 to consider whether to recommend additional changes.

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

This meeting will, we hope, bring to a successful conclusion eight years of work. We do not attempt to restate in this memorandum all of the analysis on each issue we discuss. Rather, this memorandum provides an overview of the issues and the Subcommittee's conclusions. For more in-depth analysis, we also provide the reporters' March 31, 2012 memorandum to the Subcommittee (updated with additional case citations), a memorandum analyzing double jeopardy claims on a circuit-by-circuit basis (accompanied by a table of cases), and the full text of the public comments. We request that members of the Advisory Committee review the supporting materials in preparation for a full discussion of the issues at the April meeting.

I. THE HISTORY OF THE PROPOSED AMENDMENT

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

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

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

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

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

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

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

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

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

Responding to the Committee's concern, in 2009 the Subcommittee tried a different tack, bifurcating the standard for untimely claims and providing a more generous standard for FTSO claims. The proposed amendment revised 12(e) to provide relief from the waiver "when a failure

to state an offense in the indictment or information *has prejudiced a substantial right of the defendant*." The existing "good cause" standard, applied to all other untimely claims, remained unchanged. The amendment was approved by the Committee and sent on to the Standing Committee. The Standing Committee, however, remanded the proposal to the Committee in June 2009, indicating that additional consideration should be given to the concepts of "waiver" and "forfeiture" and how Rule 12 interacted with Rule 52.

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

Responding to the Standing Committee's 2009 concerns, the Subcommittee redrafted the proposed amendment to Rule 12, this time attempting to clarify exactly which sorts of claims must be raised, and when a claim was considered "waived" under the rule. To address the confusion in the courts over whether Rule 52(b) plain error review applied and when, the proposed amendment (1) expressly designated plain error review under Rule 52(b) as the standard for obtaining relief for three specific claims (FTSO, double jeopardy, and statute of limitations) under a new subsection entitled "forfeiture," and (2) left in place the "good cause" standard already applied to all other untimely claims, changing the language to "cause and prejudice" to reflect the Supreme Court's interpretation of the "good cause" standard, and moving this into a separate subsection entitled "waiver."

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

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

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

<u>As published the proposed rule no longer employs the terms "waiver" or "forfeiture."</u> Because the ordinary meaning of waiver is a knowing and intentional relinquishment of a right, the non-standard use of that term in Rule 12 creates unnecessary confusion and difficulties. The Advisory Committee was urged to consider revising the rule to avoid using these terms. Although the elimination of these terms was not part of the purpose of the amendment as originally envisioned,

there was agreement that the use of the term "waiver" has been a source of considerable confusion. Rule 12's initial use of the term waiver predated the Supreme Court's clarification of the difference between waiver and forfeiture and the meaning of plain error in *United States v. Olano*, 507 U.S. 725, 731-32 (1993). Redrafting to avoid the terms "waiver" and "forfeiture" achieves clarity and avoid traps for the unwary.

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

- Omitting any reference to the term waiver, the amendment as published specifies that for all but two specific types of claims, an untimely claim may be considered only if the party who seeks to raise it shows "cause and prejudice." As explained in greater detail in the reporters' updated March 2012 memorandum to the Rule 12 Subcommittee (included infra), the Committee replaced the phrase "good cause" with "cause and prejudice" to reflect the Supreme Court's interpretation of the current rule.

- For claims of FTSO or double jeopardy, the amendment as published provided that the court may consider the claim if the party shows "prejudice only." This is a more generous test than that applicable to other claims raised late under Rule 12, because it does not require the objecting party to demonstrate "cause," i.e. the reason for failing to raise the claim earlier. It may also be a more generous test than plain error under Rule 52(b) – the standard included in the January 2011 proposal – because it does not require the objecting party to show, in addition to prejudice, that the error was "plain" or that "the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.' " *United States v. Olano*, 507 U.S. 725, 731-32 (1993) (quoting *United States v. Atkinson*, 297 U.S. 157, 160 (1936)).

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

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

II. THE PUBLIC COMMENTS AND THE SUBCOMMITTEE'S RECOMMENDATIONS

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

Because Hurricane Sandy caused the cancellation of the Advisory Committee's October meeting, Judge Raggi asked Judge Jeffrey Sutton, the chair of the Standing Committee, to provide comments for consideration by the Subcommittee in preparation for the April Advisory Committee meeting. Without taking a position on the question whether the published rule should be further amended, Judge Sutton noted the complexity of the proposal and the large number of difficult (and in some cases controversial) issues that it sought to resolve. Although it is appropriate to use the amendment process to resolve conflicts over the interpretation or application of the rules, Judge Sutton noted that the published rule is unusual in seeking to resolve so many conflicts and policy issues. The inclusion of so many difficult and/or controversial issues may have an effect at the later stages of the process, at the Standing Committee, the Judicial Conference, the Supreme Court, and Congress. After discussion of Judge Sutton's comments, the Subcommittee concluded that it would be desirable to consider whether the proposed amendment could and should be simplified in order to facilitate final approval of its core elements.

As described more fully in the reporters' updated March 31, 2012 memorandum (included infra), the critical letters from the defense groups raised a variety of arguments and concerns discussed below. After considering these issues and arguments (as well as more general arguments in favor of simplification and streamlining), the Subcommittee recommends that the Advisory Committee approve and transmit the proposed amendment to the Standing Committee after making the following post-publication changes (including changes in the Committee Note accompanying changes in the text):

- restoring language that had been deleted from (b)(2) and relocating it to (b)(1);
- deleting double jeopardy from the proposed list of claims that must be raised before trial;
- amending the Committee Note to state explicitly that the rule does not change statutory deadlines under provisions such as the Jury Selection and Service Act;
- making explicit in new (c)(2) the district court's authority to extend or reset the deadline for pretrial motions (which is recognized implicitly now in Rule 12(e));
- deleting the statement that "Rule 52(b) does not apply" to late-raised claims; and
- separating the standard for consideration of late-raised claims into separate paragraphs.

In addition, the Subcommittee considered, and requests discussion by the Advisory Committee, of one of the Style Consultant's recommendations regarding the language of 12(c) (concerning the phrase "prejudice only").

This section of the memorandum sets forth the Subcommittee's conclusions and recommendations concerning each of the issues raised during the public comment period, and its proposed responses to Judge Sutton's suggestion that the published rule might be streamlined or simplified.

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

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

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

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

The proposed amendment, however, speaks only to the consideration of objections to the indictment or information. Neither the proposed amendment nor the Committee Note addresses a defendant's ability to object to jury instructions on the ground that those instructions constructively

amend the indictment in violation of the Fifth Amendment, or change the theory of prosecution or otherwise surprise the defense, depriving the defendant of the notice guaranteed by the Sixth Amendment. The Subcommittee concluded that whether a judge should grant a constitutional challenge to jury instructions in a case in which a defendant failed to object to a defective indictment is a matter to be resolved by the courts if and when such cases arise. The amendment does not purport to preclude such challenges, nor is it intended to limit in any way the appropriate resolution of these separate questions.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain FTSO claims on the list of claims and defenses that must be raised before trial.

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

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

The list of claims and defenses in the published amendment was drawn from the cases interpreting two general categories in the present rule: defects "in instituting the prosecution" and "in the indictment or information." As discussed below, the Subcommittee recommends that the Advisory Committee retain the structure of the published amendment and the list of specific claims in (b)(3)(A) and (B), but make one change: deleting double jeopardy from the list of claims that must be raised before trial. The Subcommittee also recommends that language be added to the Committee Note to guard against any suggestion that the rule was intended to displace any statutory deadlines for pretrial motions.

<u>1. Listing specific claims and keeping (3)(A) and (B) separate</u>

The Subcommittee strongly endorses the conclusion that the listing of specific claims that must be raised before trial will assist courts and advocates. This is a central feature of the proposal, and it should be retained.

If it were writing on a clean slate, the Subcommittee agrees that there would be some merit in the suggestion that it should merge the list of claims in (3)(A) and (B) (defects in "instituting the prosecution" and in "the indictment or information"). But we are not writing on clean slate, and the Subcommittee recommends retaining the current structure. Throughout the consideration of the amendment, the Advisory Committee has tried to avoid renumbering to the extent possible to assist

future researchers. Merging these two categories would make future research on some of the most heavily litigated issues under Rule 12 more difficult. Retaining the current structure avoids those problems.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain the list of claims that must be raised before trial in (3)(A) and (B) (defects in "instituting the prosecution" and in "the indictment or information") and not merge (A) and (B).

2. Double jeopardy

The New York Council of Defense Lawyers correctly recognized requiring double jeopardy claims to be raised before trial would be a change in some courts. Although many courts have required double jeopardy and statute of limitation claims to be presented before trial when clear from the face of the indictment, not all courts do so.[1] The courts that require these particular motions be filed before trial generally reason that they are "defects in the indictment." But some other courts rely on the 1944 Committee Note as support for distinguishing double jeopardy and statute of limitations from the claims that must be raised before trial.[2]

Although there are strong arguments in favor of using this amendment to resolve the disagreement and provide a basis for uniform national treatment of double jeopardy claims, the Subcommittee was concerned that questions about – and objections to – the treatment of double jeopardy might be sufficient to derail the proposal as a whole. Accordingly, after reviewing the options the Subcommittee concluded that it would be prudent to delete double jeopardy from the enumerated list of claims that must be raised before trial. Because the list of claims that must be raised is not exhaustive, most circuits courts will continue to require double jeopardy claims to be raised before trial whether or not such claims are listed in Rule 12(b)(3)(B). But deleting double jeopardy from this list does not foreclose arguments that the original design of Rule 12 distinguished double jeopardy from the claims that must be raised before trial. Deleting double jeopardy from the list of claims thus avoids taking a position on this issue and alienating supporters of the minority view.

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

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

Omitting double jeopardy from the list of claims that must be raised before trial also removes another possible obstacle to final approval of the rule: debates about the proper standard of review if double jeopardy claims are subject to the timing requirements of Rule 12(b)(3). As noted in the reporters' supplemental memorandum on double jeopardy (included infra), the standard for review of late-raised double jeopardy claims in most courts is plain error. However, there is considerable variation in the appellate cases. Many circuits have at least a few decisions that also refer to "waiver" in this context. The published rule, however, applied the "prejudice" standard to double jeopardy (as well as failure to state a claim). Although the Committee has taken the view that there would be no difference in the effect of the "prejudice" and plain error standards in double jeopardy cases, this point was not obvious and it required extended explanation and defense. Moreover, authorizing relief upon a showing of prejudice would be a change from the various panel opinions that used waiver or waiver as well as plain error. Removing double jeopardy from the list of enumerated claims obviates the need to address this issue in the proposal.

The Subcommittee concluded that simplifying the proposed rule by omitting the references to double jeopardy would remove what might have been a significant obstacle to adoption of the proposal. The double jeopardy case law has varied considerably from circuit to circuit, perhaps because double jeopardy issues can arise in so many different contexts. Although there would be real advantages to a rule change that would settle all of these disputes about double jeopardy, the Subcommittee concluded, with some reluctance, that retaining the double jeopardy provisions might simply be taking on too much for a single proposal.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should delete double jeopardy from the list of claims that must be raised before trial. If this recommendation is accepted, the Advisory Committee should also delete the standard for review of late-raised double jeopardy claims.

3. Multiplicity, duplicity, and statutes of limitations

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

Similarly, the Subcommittee concluded that it should generally be possible to raise statute of limitations before trial, subject to the limitation that such claims are "reasonably available" at that time. As a matter of policy, the Subcommittee reaffirmed the judgment that statute of limitation claims should be raised before trial when reasonably available.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should retain multiplicity, duplicity, and statute of limitations in the list of claims that must be raised before trial.

4. Distinguishing statutory deadlines from claims that must be raised before trial

The National Association of Criminal Defense Lawyers raised a concern that one or more of the claims that must be raised before trial under the proposed rule might be interpreted to supersede statutory deadlines. It explained:

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

The amendment was not intended to have any effect on statutorily prescribed deadlines for pretrial motions. To make that point crystal clear, the Subcommittee proposes an addition to the Committee Note.

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should add the following language to the Committee Note:

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

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

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

As published, the amendment deleted the following language now found in Rule 12(b)(2): "A party *may* raise by pretrial motion any defense, objection, or request that the court can determine without trial of the general issue." (Emphasis added). This language was deleted because of a concern that the permissive word "may" could be misleading. It implies that a party may *or may not*

raise such a motion. But Rule 12 does not permit the parties to wait to raise certain motions that can be resolved without a trial on the merits. Indeed, it requires many motions to be made before trial. The Committee concluded that this potentially confusing language could be deleted because it was no longer necessary. When Rule 12 was adopted in 1944, it abolished pleas in abatement, demurrers, and other forms of pleading. The language in question stated that motions to dismiss were the new vehicle for raising these claims and defenses. Nearly 60 year later, motions to dismiss are well established, and thus the language was no longer considered necessary.

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

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

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

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

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

After discussion, the Subcommittee concluded that it would be desirable to restore the language in question to the text of the rule and to relocate it in (b)(1). This improves the rule by placing a general statement about the availability of pretrial motions in its proper place, and it addresses the Federal Defender's concern that deletion of this language might have unintended effects. This language has also been cited as authority for pretrial rulings on motions in limine, which make the trial process more efficient by narrowing the evidentiary issues and avoiding trial interruptions. *See, e.g.*, *United States v. Bulger*, 2013 WL 781925, at * 4 & n. 6 (D. Mass. Mar. 4, 2013) (noting conflicting authority on whether Rule 12 "expressly authorizes" motions in limine).

Subsection (b)(1) (captioned "*In general*") was unchanged in the published rule and now begins abruptly with the statement "Rule 47 applies to a pretrial motion." In the Subcommittee's view, it would be an improvement to begin the Rule's treatment of pretrial motions with the more general statement "A party may by pretrial motion raise any defense, objection, or request that the court can determine without a trial on the merits." Although the language would still be permissive, it would be followed by subsections (b)(2) and (3), which clearly indicate that some motions may be made at any time and others must be raised before trial. The more modern phrase "trial on the merits," used later in the rule, is substituted for "trial of the general issue." No change in meaning is intended.

As revised, Rule 12(b)(1) would provide:

1 **(1) In General.** A party may, by pretrial motion, raise any defense, objection, or request that
2 the court can determine without a trial on the merits. Rule 47 applies to all pretrial motions.
3

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

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

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

THE SUBCOMMITTEE'S RECOMMENDATION: the Advisory Committee should add the following language to the proposed amendment to Rule 12(b)(1):

> ***A party may, by pretrial motion, raise any defense, objection, or request that the court can determine without a trial on the merits.***

If the proposed language is added to the rule, the Committee Note should be amended as well.

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

NACDL expressed concern that the amended rule would be interpreted so broadly that counsel would file unnecessary motions before trial and courts would later hold that other motions were untimely. ("[I]t is likely if not inevitable that litigations and courts will understand references to motions that 'can be determined without a trial on the merits' to mean motions that *might* be able to be determined without a trial . . . .") The language to which this comment refers, however, is little changed by the proposed amendment. The current rule refers to motions "that *the court can determine without trial* of the general issue," and the proposed amendment refers to motions that "*can be determined without*" a trial on the merits. There is no reason to think that this change would lead to a different interpretation.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should make no change in the phrase "can be determined without a trial."

E. Concerns about the Court's authority to extend or reset the deadline for pretrial motions.

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

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

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

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

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

(3) ***Consequences of an Untimely Motion Under Rule 12(b)(3).***[4] If a party does not meet the deadline [set under (c)(1) or (2)] ~~– or any extension the court provides –~~ for making a Rule 12(b)(3) motion, the motion is untimely. In such a case, Rule 52[(b)] does not apply, but a court may consider the defense, objection, or request if:

(A) the party shows cause and prejudice; or

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

As published, (c)(2) – which the Subcommittee proposes to renumber (c)(3) – drew from present Rule 12(e) and referred in the phrase set off by dashes only to a date that had been extended, but not one that the court had reset. The Subcommittee's current proposal recognizes that the district court may extend or reset the deadline (which might, for example, shorten the deadline). Courts and litigants might be confused if the dashed phrase in (c)(3) referred only to deadlines that had been extended, and not those that had been reset. Accordingly, the Subcommittee proposes striking the phrase currently set off by dashes.

To make it completely clear that all references in (b)(1), (2), and (3) refer to the same deadline, the references to "a" deadline were changed to "the" deadline. Thus in (1) the court sets "the deadline," in (2) the court may extend or reset "the deadline," and (3) states that a motion is untimely if not made before "the deadline [set under (c)(1) or (2)]." The Subcommittee bracketed "set under (c)(1) or (2)" to highlight the question whether the language is sufficiently clear without the cross reference. Professor Kimble thinks the cross reference is unnecessary, and recommends its deletion.

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

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

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[4] As noted below, the Subcommittee also recommends additional changes to (c)(3).

anticipates that a district court has the discretion to extend the deadline for pretrial motions. The new paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's statement of it to a more logical place: after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. New paragraph (c)~~(2)~~(3) governs review of untimely claims, which were previously addressed in Rule 12(e).

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should add new subparagraph (c)(2) expressly stating the court's authority to extend or reset the deadline for pretrial motions, and make the conforming changes in the text of the rule and the Committee Note.

G. Objections to the standards for relief.

Defense commentators also raised a host of arguments concerning the standards for relief from the consequences of failing to raise an issue before trial. Most fundamentally, they challenged the requirement of "cause and prejudice" on several grounds. Some of the comments focused on the application of cause and prejudice in the trial court before conviction. They argued this standard is not supported by precedent and is unworkable and inappropriate for challenges prior to conviction. Two comments argued in favor of different standards when a claim is first raised at different procedural stages (in the district court, on appeal, and on collateral attack). Another comment argued that the meaning of "prejudice" was not clear, and using the term in Rule 12 would lead to substantial uncertainty and litigation. This comment also argued that requiring a showing of prejudice would lead to wasteful substitution of defense counsel. Finally, at various stages concern has been expressed with the phrase "Rule 52 does not apply."

1. Cause and prejudice

The Subcommittee recommends that no change be made in the standard of "cause and prejudice." As described more fully on pages 42-48 of the reporters' updated March 3, 2012 memorandum (infra), the Supreme Court's opinions stating that the standard under Rule 12 is cause and prejudice give no indication that this requirement is applicable only to claims raised for the first time after conviction. Moreover, we identified cases from six circuits supporting an assessment of prejudice as well as cause in considering relief for untimely claims raised before conviction. After reconsidering this question, the Subcommittee concluded that discarding the good cause review standard as it has been defined by the Supreme Court – as cause and prejudice – would be a dramatic break from precedent. The standard has been applied for decades to untimely claims under Rule 12, and courts assessing cause and prejudice under Rule 12 have encountered no difficulty doing so. Before publication, the Subcommittee, the Committee, and the Standing Committee had all recognized that not all courts interpreted good cause to require both cause and prejudice, but were persuaded that an amendment was the appropriate way to resolve the inconsistency, and did not choose to propose a dramatic break with current practice. Given the long history of applying the Rule 12 standards, the Subcommittee was unpersuaded that it would generate uncertainty and

litigation to make explicit the requirement that "prejudice" must be shown by a party who failed to raise a claim or defense before trial as required by Rule 12(b)(3). For the same reason, there is no reason to believe that the proposal will lead to new and wasteful substitution of counsel.

The Subcommittee also discussed the concern that district court discretion would be unduly limited if trial judges were required to find prejudice as well as cause before a late claim could be considered. The Subcommittee recognized that district judges should have substantial leeway in determining how best to manage claims raised before trial. It concluded that the "cause and prejudice" standard was consistent with that principle, particularly in light of the two new provisions in the rule: the proposed new (c)(2) spelling out the discretion of a judge to respond to a late claim filed any time before trial by simply extending the filing deadline, discussed above, and the proposed new language, to which there has been no objection, providing that the Rule does not bar consideration of any claim filed after the deadline, if the basis for the claim was not reasonably available before the deadline.

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

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should retain "cause and prejudice" as the standard for review of late-raised claims other than failure to state an offense.

The Subcommittee found other concerns relating to the standards for relief more persuasive. It recommends that the provision stating the consequences for untimely motions be amended to delete the statement that "Rule 52 does not apply" and that the standards for relief be separated and restated as described below. These recommendations, like the deletion of double jeopardy, are intended to eliminate controversial aspects of the proposal in order to pave the way for approval of the core elements. Additionally, as noted below, the Subcommittee considered and requests discussion of a stylistic change recommended by Professor Joe Kimble.

2. Deletion of "Rule 52 does not apply"

As modified, the proposal still sets forth the "consequences of an untimely motion" and states the standard for when "a court may consider the [untimely] defense, motion, or request." Because some appellate courts have applied "plain error" to late-raised claims, the statement that "Rule 52(b) does not apply," though not strictly necessary, was included to guard against the possibility that some courts might continue to require a showing of plain error as well as (or instead of) "cause and prejudice" for all late claims other than failure to state an offense (for which only a showing of "prejudice" is required). The reference to Rule 52, however, has proven to be a lightening rod at various stages. The Subcommittee weighed the benefits of including this language, and explicitly

mandating a uniform approach in the appellate courts, against the possibility that objections to this one aspect of the rule might be sufficient to prevent adoption of the proposal. The Subcommittee concluded that it would be prudent to delete this language, though members expressed the view that this was an important issue that should be considered and discussed by the Advisory Committee at the April meeting.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should delete "Rule 52 does not apply" from proposed Rule 12(c)(3).

3. Separation of standards of review

The Subcommittee also concluded that it would also be beneficial to revise the provision governing late raised claims to make it clearer that there is one general rule for considering untimely motions, and that general rule has just one exception for motions for failure to state an offense. As published, the proposal provided:

1 **(2)** ***Consequences of an Untimely Motion Under Rule 12(b)(3).*** If a party does not meet
2 the deadline – or any extension the court provides – for making a Rule 12(b)(3) motion, the
3 motion is untimely. In such a case, Rule 52[5] does not apply, but a court may consider the
4 defense, objection, or request if:
5 (A) the party shows cause and prejudice; or
6 (B) the defense or objection is failure to state an offense or double jeopardy, and the
7 party shows prejudice [only].

As noted above, the Subcommittee has proposed relocating the reference to the court's authority to extend the time for making a motion into a new paragraph (c)(2), which requires renumbering the remaining portion of subsection (c). The Subcommittee proposes revising what would become paragraph (c)(3) and adding a new paragraph (c)(4):

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[5]Professor Kimble noted that as published the amendment referred to Rule 52 as a whole; he asked whether the Committee intended to make all of the Rule 52 in applicable, or only Rule 52(b) (which provides that a "plain error" must be shown if an error was not brought to the district court's attention). In general, the cases addressing the question whether Rule 12 or Rule 52 govern when claims are raised belatedly have focused on Rule 52(b), and Subcommittee members did not identify any problems that would be posed by restricting the reference to Rule 52(b). Accordingly, the Subcommittee and the reporters provisionally agreed that the reference should be limited to Rule 52(b) if the provision is retained. If the provision is retained, however, Subcommittee members and reporters would appreciate hearing the full Committee's views on this issue.

1 **(3)** ***Consequences of an Untimely Motion Under Rule 12(b)(3).*** Except as provided in
2 paragraph (c)(4), if a party does not meet the deadline [set under (c)(1) or (2)] for making a
3 Rule 12(b)(3) motion, the motion is untimely. In such a case, a court may consider the
4 defense, objection, or request if the party shows cause and prejudice.
5 **(4)** ***Consequences of an Untimely Motion for Failure to State an Offense.***
6 Notwithstanding paragraph (c)(3), a court may consider an untimely motion for failure to
7 state an offense if the defendant shows prejudice [only].

In the Subcommittee's view, this separation and restatement of the standards makes it clearer that the general standard for untimely motions is cause and prejudice, and draws attention to the one exception: "prejudice only" for late raised claims that the charging document failed to state an offense.

THE SUBCOMMITTEE'S RECOMMENDATION: The Advisory Committee should revise proposed paragraph (b)(3) and add new paragraph (c)(4) for clarity.

4. Reference to "prejudice only"

Professor Kimble has objected to the world "only" in proposed subparagraph (c)(3)(B) of the proposal as published (shown in brackets on line 7 in the first version quoted above). The Subcommittee's revision places the same phrase in (c)(4) (shown on line 7 of the Subcommittee's proposed revision quoted above).

The Advisory Commission added "only" to counter the likelihood that courts might add requirements other than prejudice to the showing required for untimely double jeopardy and failure-to-state-an-offense claims. There has been some confusion and disagreement among the appellate courts on the question what showing is required. For example, some decisions have required a showing of both good cause and plain error for late-raised double jeopardy claims. The Advisory Committee felt that there was a danger that if the amendment were adopted, some courts would continue such practices absent the clearest possible signal in the text: "prejudice only."

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

THE SUBCOMMITTEE'S RECOMMENDATION: The Subcommittee requests discussion on the question whether to delete the word "only."

III. THE NEED FOR REPUBLICATION

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

Subcommittee members doubted that republication would be necessary or beneficial if the Advisory Committee approves the post-publication changes described above. Although the published rule certainly generated controversy and critical commentary from several defense groups, each of the changes after publication would seek to clarify the proposal without changing it in any significant way, or to delete provisions that had generated controversy and opposition.

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

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

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

Two changes – the deletion of double jeopardy from the list of claims that must be raised before trial, and the deletion of the statement that Rule 52(b) does not apply – remove provisions that generated controversy and opposition. The Advisory Committee's goal in requiring double jeopardy to be raised before trial and stating that Rule 52(b) does not apply to late-raised claims governed by Rule 12 was to settle circuit conflicts and avoid future litigation about the standard of review for late-raised claims. Although eliminating those provisions reduces in some respects the

benefits of the proposed amendment, leaving the law on these points unchanged should help defuse opposition to the amendment. In the Subcommittee's view, it is doubtful that such a scaling back of the proposal would warrant republication.

PROPOSED AMENDMENTS TO THE FEDERAL RULES OF CRIMINAL PROCEDURE[***]

Rule 12. Pleadings and Pretrial Motions

* * * * *

(b) Pretrial Motions.

(1) ***In General.*** Rule 47 applies to a pretrial motion.

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

(3) ***Motions That Must Be Made Before Trial.*** The following <u>defenses, objections, and requests</u> must be raised <u>by motion</u> before trial <u>if the basis for the</u>

[***]New material is underlined; matter to be omitted is lined through.

14 motion is then reasonably available and the motion

15 can be determined without a trial on the merits:

16 (A) a motion alleging a defect in instituting the

17 prosecution, including:

18 (i) improper venue;

19 (ii) preindictment delay;

20 (iii) a violation of the constitutional right to

21 a speedy trial;

22 (iv) double jeopardy;

23 (v) the statute of limitations;

24 (vi) selective or vindictive prosecution;

25 and

26 (vii) an error in the grand-jury proceeding or

27 preliminary hearing;

28 (B) ~~a motion alleging~~ a defect in the indictment

29 or information, including:

30 (i) joining two or more offenses in the

31 same count (duplicity);

32 (ii) charging the same offense in more than
33 one count (multiplicity);
34 (iii) lack of specificity;
35 (iv) improper joinder; and
36 (v) failure to state an offense.
37 ~~— but at any time while the case is pending, the~~
38 ~~court may hear a claim that the indictment or~~
39 ~~information fails to invoke the court's jurisdiction~~
40 ~~or to state an offense~~;
41 (C) ~~a motion to~~ suppression of evidence;
42 (D) ~~a Rule 14 motion to sever~~severance of
43 charges or defendants under Rule 14; and
44 (E) ~~a Rule 16 motion for~~ discovery under Rule
45 16.
46 **(4)** ***Notice of the Government's Intent to Use***
47 ***Evidence.***
48 (A) *At the Government's Discretion*. At the
49 arraignment or as soon afterward as

50 practicable, the government may notify the
51 defendant of its intent to use specified
52 evidence at trial in order to afford the
53 defendant an opportunity to object before
54 trial under Rule 12(b)(3)(C).

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

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

66 **(1)** ***Setting a Deadline.*** The court may, at the
67 arraignment or as soon afterward as practicable,

68 set a deadline for the parties to make pretrial
69 motions and may also schedule a motion hearing.
70 If the court does not set a deadline, the deadline is
71 the start of trial.
72 **(2)** ***Consequences of an Untimely Motion under Rule***
73 ***12(b)(3).*** If a party does not meet the deadline —
74 or any extension the court provides — for making
75 a Rule 12(b)(3) motion, the motion is untimely. In
76 such a case, Rule 52 does not apply, but a court
77 may consider the defense, objection, or request if:
78 (A) the party shows cause and prejudice; or
79 (B) the defense or objection is failure to state an
80 offense or double jeopardy, and the party
81 shows prejudice only.
82 **(d) Ruling on a Motion.** The court must decide every
83 pretrial motion before trial unless it finds good cause to
84 defer a ruling. The court must not defer ruling on a
85 pretrial motion if the deferral will adversely affect a

86 party's right to appeal. When factual issues are involved

87 in deciding a motion, the court must state its essential

88 findings on the record.

89 **(e)** **[Reserved]** ~~**Waiver of a Defense, Objection, or**~~

90 ~~**Request.** A party waives any Rule 12(b)(3) defense,~~

91 ~~objection, or request not raised by the deadline the court~~

92 ~~sets under Rule 12(c) or by any extension the court~~

93 ~~provides. For good cause, the court may grant relief~~

94 ~~from the waiver.~~

95 * * * * *

Committee Note

Subdivision (b)(2). The amendment deletes the provision providing that "any defense, objection, or request that the court can determine without trial of the general issue" may be raised by motion before trial. This language was added in 1944 to make sure that matters previously raised by demurrers, special pleas, and motions to quash could be raised by pretrial motion. The Committee concluded that the use of pretrial motions is so well established that it no longer requires explicit authorization. Moreover, the Committee was concerned that the permissive language might be misleading, since Rule 12(b)(3) does not permit the parties to wait until after the trial begins to make certain motions that can be determined without a trial on the merits.

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

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

The introductory language includes two important limitations. The basis for the motion must be one that is "available" and the motion must be one that the court can determine "without trial on the merits." The types of claims subject to Rule 12(b)(3) generally will be available before trial and they can — and should — be resolved then. The Committee recognized, however, that in some cases, a party may not have access to the information needed to raise particular claims that fall within the general categories subject to Rule 12(b)(3) prior to trial. The "then reasonably available" language is intended to ensure that a claim a party could not have raised on time is not subject to the limitation on review imposed by Rule 12(c)(2). *Cf.* 28 U.S.C. § 1867(a) & (b) (requiring claims to be raised promptly after they were "discovered or could have been discovered by the exercise of due diligence"). Additionally, only those issues that can be determined "without a trial on the merits" need be raised by motion before trial. The more modern phrase "trial on the merits" is substituted for the more archaic phrase "trial of the general issue" that appeared in existing (now deleted) (b)(2). No change in meaning is intended.

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

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

Subdivision (c). As revised, subdivision (c) governs both the deadline for making pretrial motions and the consequences of failing to meet the deadline for motions that must be made before trial under Rule 12(b)(3).

As amended, subdivision (c) contains two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. New paragraph (c)(2) governs review of untimely claims, which were previously addressed in Rule 12(e).

Rule 12(e) provided that a party "waives" a defense not raised within the time set under Rule 12(c). Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(2).

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

Subdivision (c)(2)(B) provides a different standard for two specific claims: failure of the charging document to state an offense and violations of double jeopardy. The Committee concluded that judicial review of these claims, which go to adequacy of the notice afforded to the defendant, and the power of the state to bring a defendant to trial or to impose punishment, should be available without a showing of "cause." Accordingly, paragraph (c)(2)(B) provides that the court can consider these claims if the party "shows prejudice only." Unlike plain error review under Rule 52(b), the new standard under Rule 12(c)(2)(B) does not require a showing that the error was "plain" or that the error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." Nevertheless, it will not always be possible for a defendant to make the required showing. For example, in some cases in which the charging document omitted an element of the offense the defendant may have admitted the element as part of a guilty plea after having been afforded timely notice by other means.

Subdivision (e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(2).

Rule 34. Arresting Judgment

1 **(a) In General.** Upon the defendant's motion or on its
2 own, the court must arrest judgment if the court does not
3 have jurisdiction of the charged offense.~~if:~~
4 ~~(1) the indictment or information does not charge an~~
5 ~~offense; or~~
7 ~~(2) the court does not have jurisdiction of the charged~~
8 ~~offense.~~
9 * * * * *

Committee Note

This amendment conforms Rule 34 to Rule 12(b) which has been amended to remove language that the court at any time while the case is pending may hear a claim that the "indictment or information fails . . . to state an offense." The amended Rule 12 instead requires that such a defect be raised before trial.

RULES 5 WITH PROPOSED MODIFICATIONS
WITH PROPOSED NOTES

Rule 5. Initial Appearance

* * * * *

1

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

3 **(1)** ***Advice.*** If the defendant is charged with a

4 felony, the judge must inform the defendant of

5 the following:

6 * * * *

7 (D) any right to a preliminary hearing; and

8 (E) the defendant's right not to make a

9 statement, and that any statement made

10 may be used against the defendant; and

11 (F) that a defendant who is not a United States

12 citizen may request that an attorney for the

13 government or a federal law enforcement

14 official notify a consular officer from the

15 defendant's country of nationality that the

16 defendant has been arrested — but that

17 even without the defendant's request, a

18 treaty or other international agreement may

19 require consular notification.

20

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES MADE AFTER PUBLICATION

In response to public comments the amendment was rephrased to state that the information regarding consular notification should be provided to all defendants who are arraigned. Although it is anticipated that ordinarily only defendants who are held in custody will ask the government to notify a consular official of their arrest, it is appropriate to provide this information to all defendants at their initial appearance. The new phrasing also makes it clear that the advice should be provided to every defendant, without any attempt to determine the defendant's citizenship. A conforming change was made to the Committee Note.

PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights in judicial proceedings and does not set a precise time at which law enforcement must give advice concerning consular notification.

12-CR-002. Federal Magistrate Judges Association. FMJA "endorses the purpose behind the proposed amendments but suggests rewording" to (1) require that the advice be given to all defendants, not just those "in custody," and (2) make it clear that judges should give warnings to all defendants, not seek to determine whether individual defendants are citizens. It also "remains concerned that incorporating any statement into the Rules regarding consular notification carries some risk that it will be interpreted as a substantive right."

12-CR-003. Peter Goldberger on behalf of the National

Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendment, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

PUBLIC COMMENTS CONCERNING RULE 5 AS PUBLISHED IN 2010

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL agrees with the amendment in principle, but suggests amendments to (1) clarify the meaning of "held in custody," (2) make clear that consular warnings may not be delayed until the initial hearing, and (3) make clear that the initial hearing in extradition cases must be held "without unnecessary delay."

10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed Rule 5(c)(4) be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **"(b) Pretrial Procedure.**

4 * * * * *

5 **(2) Initial Appearance.** At the defendant's initial appearance on
6 a petty offense or other misdemeanor charge, the magistrate judge must
7 inform the defendant of the following:

8 * * * * *

9 (F) the right to a jury trial before either a magistrate
10 judge or a district judge – unless the charge is a petty
11 offense; ~~and~~

12 (G) any right to a preliminary hearing under Rule 5.1,
13 and the general circumstances, if any, under which the
14 defendant may secure pretrial release; and

15 (H) that a defendant who is not a United States citizen
16 may request that an attorney for the government or a
17 federal law enforcement official notify a consular officer
18 from the defendant's country of nationality that the
19 defendant has been arrested — but that even without the
20 defendant's request, a treaty or other international
21 agreement may require consular notification.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

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PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2012

12-CR-001. George C. Lobb. Mr. Loeb criticizes the proposed amendment because it does not provide for the enforcement of individual rights that may be invoked in a judicial proceeding and does not define a precise time at which law enforcement must give advice concerning consular notification.

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RULES 5 WITH PROPOSED MODIFICATIONS WITH PROPOSED NOTES*

Rule 5. Initial Appearance

* * * * *

1

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

3 **(1)** ***Advice.*** If the defendant is charged with a

4 felony, the judge must inform the defendant of

5 the following:

6 * * * *

7 (D) any right to a preliminary hearing; ~~and~~

8 (E) the defendant's right not to make a

9 statement, and that any statement made

10 may be used against the defendant; and

11 (F) that a defendant who is not a United States

12 citizen may request that an attorney for the

13 government or a federal law enforcement

14 official notify a consular officer from the

15 defendant's country of nationality that the

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16 defendant has been arrested — but that

17 even without the defendant's request, a

18 treaty or other international agreement may

19 require consular notification.

20

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

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At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not

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Rule 58. Petty Offenses and Other Misdemeanors

* * * * *

"(b) Pretrial Procedure.

* * * * *

(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

* * * * *

(F) the right to a jury trial before either a magistrate judge or a district judge – unless the charge is a petty offense;~~ and~~

(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release~~.~~ ; and

(H) that a defendant who is not a United States citizen may request that an attorney for the government or a federal law enforcement official notify a consular officer from the defendant's country of nationality that the defendant has been arrested — but that even without the defendant's request, a treaty or other international agreement may require consular notification.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice.

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

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PUBLIC COMMENTS CONCERNING RULE 58 AS PUBLISHED IN 2012

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12-CR-003. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL generally supports the proposed amendments, but reiterates its 2010 concerns, noting particularly that it is unclear "whether the phrase 'is held' refers to the defendant's status at the commencement of, or at the conclusion of, the hearing."

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10-CR-002. Federal Magistrate Judges Association. FMJA (1) recommends that proposed rule be revised to require that the initial hearing for extradited defendants must be held "without unnecessary delay," (2) expresses some reservations about imposing upon courts the executive function of giving consular notification, and (3) notes that great care would have to be taken to ensure that defendants who are given this notice do not incriminate themselves.

RULES 5 AND 58 – AS PUBLISHED 2012*

Rule 5. Initial Appearance

* * * * *

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

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

5 * * * *

6 (D) any right to a preliminary hearing; ~~and~~

7 (E) the defendant's right not to make a
8 statement, and that any statement made
9 may be used against the defendant; and

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

12 (i) that the defendant may request that an
13 attorney for the government or a
14 federal law enforcement official notify
15 a consular officer from the defendant's

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16 country of nationality that the
17 defendant has been arrested; and
18 (ii) that even without the defendant's
19 request, consular notification may be
20 required by a treaty or other
21 international agreement.
22

* * * * *

Committee Note

Subdivision (d)(1)(F). Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. § 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that U.S. treaty obligations are fulfilled, and to create a judicial record of that action.

At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding

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and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

1 **Rule 58. Petty Offenses and Other Misdemeanors**

2 * * * * *

3 **"(b) Pretrial Procedure.**

4 * * * * *

5 **(2) Initial Appearance.** At the defendant's initial
6 appearance on a petty offense or other misdemeanor
7 charge, the magistrate judge must inform the defendant
8 of the following:

9 * * * * *

10 (F) the right to a jury trial before either
11 a magistrate judge or a district judge –
12 unless the charge is a petty offense; ~~and~~
13 (G) any right to a preliminary hearing
14 under Rule 5.1, and the general
15 circumstances, if any, under which the
16 defendant may secure pretrial release~~.~~ ; and

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17 (H) if the defendant is held in custody

18 and is not a United States citizen:

19 (i) that the defendant may request that an

20 attorney for the government or a federal law

21 enforcement officer notify a consular officer

22 from the defendant's country of nationality that

23 the defendant has been arrested; and

24 (ii) that even without the defendant's request,

25 consular notification may be required by a

26 treaty or other international agreement.

COMMITTEE NOTE

Section (b)(2)(H) Article 36 of the Vienna Convention on Consular Relations provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention, and bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 requires consular notification advice to be given "without delay," and arresting officers are primarily responsible for providing this advice. See 28 C.F.R. § 50.5 (requiring consular notification advice to arrested foreign nationals by Department of Justice arresting officers).

Providing this advice at the initial appearance is designed, not to relieve law enforcement officers of that responsibility, but to provide additional assurance that our treaty obligations are fulfilled, and to

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At the time of this amendment, many questions remain unresolved by the courts concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions. More particularly, it does not create any such rights or remedies.

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RULES 5 AND 58 AS SUBMITTED TO SUPREME COURT – INCLUDING PORTIONS RETURNED FOR RECONSIDERATION*

Rule 5. Initial Appearance

* * * * *

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

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

5 * * * * *

6 (D) any right to a preliminary hearing; ~~and~~

7 (E) the defendant's right not to make a
8 statement, and that any statement made
9 may be used against the defendant; and

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11 not a United States citizen, that an attorney
12 for the government or a federal law
13 enforcement officer will:

14 (i) notify a consular officer from the

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15 defendant's country of nationality that

16 the defendant has been arrested if the

17 defendant so requests; or

18 (ii) make any other consular notification

19 required by treaty or other

20 international agreement.

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Committee Note

Subdivision (d)(1)(F). This amendment is designed to ensure that the United States fulfills its international obligations under Article 36 of the Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Vienna Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of this amendment, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment does not address those questions.

Rule 58. Petty Offenses and Other Misdemeanors

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(b) Pretrial Procedure.

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(2) Initial Appearance. At the defendant's initial appearance on a petty offense or other misdemeanor charge, the magistrate judge must inform the defendant of the following:

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(G) any right to a preliminary hearing under Rule 5.1, and the general circumstances, if any, under which the defendant may secure pretrial release~~.~~ ; and

(H) if the defendant is held in custody and is not a United States citizen, that an attorney for the government or a federal law enforcement officer will:

(i) notify a consular officer from the

22 defendant's country of nationality that

23 the defendant has been arrested if the

24 defendant so requests; or

25 (ii) make any other consular notification

26 required by treaty or other

27 international agreement.

COMMITTEE NOTE

Section (b)(2)(H). This amendment is part of the government's effort to ensure that the United States fulfills its international obligations under Article 36 of The Vienna Convention on Consular Relations, and other bilateral treaties. Bilateral agreements with numerous countries require consular notification whether or not the detained foreign national requests it. Article 36 of the Convention provides that detained foreign nationals shall be advised that they may have the consulate of their home country notified of their arrest and detention. At the time of these amendments, many questions remain unresolved concerning Article 36, including whether it creates individual rights that may be invoked in a judicial proceeding and what, if any, remedy may exist for a violation of Article 36. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). These amendments do not address those questions.