U.S. Department of Justice

Criminal Division

11-CR-003

Assistant Attorney General *Washington, D.C. 20530*

February 13, 2012

The Honorable Reena Raggi
Chair, Advisory Committee
on the Criminal Rules
United States Court of Appeals
704S United States Courthouse
225 Cadman Plaza East
Brooklyn, New York 11201-1818

Dear Judge Raggi:

The Department of Justice appreciates this opportunity to comment on the proposed amendment to Rule 12 of the Federal Rules of Criminal Procedure. The proposed Rule is the result of a comprehensive and intensive effort over a period of several years, and we are grateful for the hard work that has gone into its development. It requires defendants who claim that an indictment fails to state an offense to raise that claim before trial, in accord with the Supreme Court's decision that such claims are not jurisdictional. The amendment also clarifies several aspects of the Rule that have been a source of confusion for the courts, striking a fair balance among competing interests. We offer the following comments for your consideration.

1. Claims of Failure to State an Offense to be Raised Before Trial

We support the key element of the proposed amendment, which deletes the language in Rule 12(b)(3)(B) that permits a defendant to raise "at any time while the case is pending" a claim that the indictment fails to state an offense. While the Rule continues to provide that a claimed jurisdictional error can be raised at any time while the case is pending, a claim that the indictment is insufficient must now be raised prior to trial. As noted in the Advisory Committee's Report, the Department requested this revision in 2006 to account for *United States v. Cotton*, 535 U.S. 625 (2002), in which the Supreme Court held that the failure of an indictment to state an offense is not a jurisdictional defect.

Requiring that claims regarding the facial validity of the indictment or criminal information be raised prior to trial, just like other claimed defects in the indictment, is consistent with Rule 12's general purpose of requiring parties to raise before trial those claims that can be remedied before trial, before resources are expended on trials, pleas, and sentencings. It also disallows the defense from recognizing a defect in a charging instrument but unfairly waiting to

see whether a conviction results and only then raising the defect to obtain a new trial. *See Davis v. United States*, 411 U.S. 233, 241 (1973); *United States v. Ramirez*, 324 F.3d 1225, 1228 (11th Cir. 2003).

2. Inclusion of Specific Examples of Claims that Must be Raised Before Trial

The Advisory Committee's proposal retains the current categories of claims that subsection (b)(3) requires be raised before trial: two general categories of claims – defects in "instituting the prosecution" and defects "in the indictment or information"; and three specific categories – claims relating to discovery, suppression, and joinder. As part of the Committee's broader effort to clarify certain aspects of Rule 12 that have confused or divided the courts, however, the proposed Rule now lists the more common claims that fall within the first two general categories, and uses the word "including" to make clear that those enumerated claims are not an exhaustive list.

We support this clarification. When courts have had to determine whether a claim constitutes a "defect in the indictment" or a "defect in instituting the prosecution," the answer has not always been consistent. Most courts have treated a statute of limitations claim, for example, as a defect in instituting the prosecution or the sufficiency of the indictment, and have found such a claim waived if not raised before trial. But the Seventh Circuit has considered such a claim among those that *may* but not *must* be raised before trial. *Compare United States v. Ramirez*, 324 F.3d at 1228-1229; *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir. 1998); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987), *with United States v. Baldwin*, 414 F.3d 791, 795-796 at n.2 (7th Cir. 2005). Clarifying this portion of the Rule will aid courts and litigants and promote uniformity.

3. The Availability Requirement

We also support the inclusion of specific language in the Rule that makes clear that the requirement that certain claims must be raised before trial applies only to the extent that those claims are "reasonably available" before trial.

As a general matter, claims subject to Rule 12(b)(3) will be available before trial and should be resolved then. The Advisory Committee recognized, however, that in some rare cases, the basis for such a claim may not be known to a party before trial. In that circumstance, it can hardly be fair to later penalize a defendant for his untimeliness in raising a claim he had no reason to know of. Rather than leaving these decisions to the discretion of the district courts – some which may determine that Rule 12(b)(3) does not apply, and some which may decide that

the claim is subject to the Rule but may find "good cause" for the failure to timely raise it[1] – the proposed Rule spells out that a court should consider, as a first step in its analysis, whether the claim was "reasonably available" before trial. If it was not, the court should find Rule 12(b)(3) inapplicable, whether or not the claim was of a type otherwise required to be raised before trial. We believe this provision adds needed clarity and affords the defendant a fair standard under which his failure to raise a claim is judged.

4. Clarifying the Standards for Consideration of Late-Filed Claims

The current Rule 12, in subparagraph (e), provides that a party "waives" any untimely "Rule 12(b)(3) defense, objection, or request" unless the court grants relief from the waiver upon a showing of "good cause." The exact meaning of the phrase "good cause" has prompted a great deal of litigation, despite the Supreme Court's definition of that term in *Davis v. United States*, 411 U.S. at 242, and *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 362-363 (1963). The term "waiver" has also been construed variously by different courts. At the urging of the Standing Committee, the Advisory Committee undertook a comprehensive examination of the Rule and, in particular, explored the relationship between Rule 12 waiver and the concepts of forfeiture and plain error from Rule 52(b). As a result, the Advisory Committee determined that a fundamental revision of several aspects of Rule 12 was necessary. We fully support each of these changes.

a. Elimination of the Term "Waiver" from Rule 12

It is clear from both the text and history of the current Rule 12 that it intended to require that certain motions be raised before trial, and that the failure to do so would result in a waiver of that claim, not a mere forfeiture. The Rule thus bars any judicial consideration of a late-filed motion in the absence of a court's finding of "good cause." *See United States v. Rose*, 538 F.3d 175, 177-179 (3d Cir. 2008); *United States v. Chavez-Valencia*, 116 F.3d 127, 130-132 (5th Cir. 1997). The Supreme Court confirmed this understanding of the Rule in *Davis, supra,* when it held that an untimely claim under Rule 12 "once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Davis*, 411 U.S. at 242. In particular, the Court held that while "waiver" often requires a knowing and intentional relinquishment of a claim, it is a different matter where the waiver provision in Rule 12 expressly warns a litigant that his failure to comply with the rule will result in the waiver of his claim. *Davis*, 411 U.S. at 239-242.

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[1] *See, e.g., United States v. Anderson*, 472 F.3d 662, 668-670 (9th Cir. 2006) (finding Rule 12 waiver applicable but granting relief from waiver for pro se defendant with no access to translated copy of Costa Rican extradition in time to meet deadline for pretrial motions); *United States v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001) (finding no waiver of claim when alleged defect in indictment was not apparent on its face at the institution of the proceeding).

Despite *Davis*, the courts of appeals have taken a variety of approaches when claims are raised on appeal that should have been raised before trial under Rule 12.[2] Because of the resulting confusion in the courts, and because the notion of "waiver" as used in Rule 12 differs from the definition of that term in many other contexts, the Standing Committee suggested eliminating that term from Rule 12. At the same time, the Committee saw no reason to change the Rule's original policy that failing to abide by the time limits set by the court results in extinguishment of a claim, absent a showing of cause and prejudice – the approach taken by the majority of courts. To accomplish the same result, but using different terms, the Advisory Committee deleted the reference to "waiving" a claim in Rule 12(e) and added to subsection (c) new language explaining the consequences of filing untimely motions and specifying the limited circumstances under which such an untimely claim may nevertheless be considered.

We agree that it is helpful to drop the confusing term "waiver" and adopt new, clearer language. Clarifying Rule 12 in this way will result in more uniformly correct application of the Rule, and will enhance fairness by making unambiguous the consequences of defaulting on a claim.

b. Retention of "Cause and Prejudice" as the Showing Required to Obtain Consideration of Most Late-Filed Motions

(1) *Clarification of "Good Cause" Standard*

Current Rule 12 allows consideration of a late-filed claim if the party shows "good cause." Fed. R. Crim. P. 12(e). As the Supreme Court held in *Davis*, the "good cause" provision of Rule 12 requires both a showing of actual prejudice and a reason for the late filing. *See Davis*, 411 U.S. at 243-245; *Shotwell*, 371 U.S. at 363 (finding it "entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of [Rule 12(b)(3)]"). Despite the holding in *Davis*, the Advisory

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[2] Most courts will consider a late-raised claim only if Rule 12's "good cause" standard has been shown, and do not apply plain error review. *See, e.g., United States v. Burke*, 633 F.3d 984, 988-989 (10th Cir.), *cert. denied*, 131 S. Ct. 2130 (2011); *Rose*, 538 F.3d at 177-183; *United States v. Hemphill*, 514 F.3d 1350, 1365 (D.C. Cir. 2008); *United States v. Collier*, 246 Fed. Appx. 321, 334-336 (6th Cir. 2007); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004); *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003); *United States v. Suescun*, 237 F.3d 1284, 1286-1287 (11th Cir. 2001); *United States v. Wright*, 215 F.3d 1020, 1026-1027 (9th Cir. 2000). Others, however, have applied plain error review to such claims. *See, e.g., United States v. Rumley*, 588 F.3d 202, 205 & n.1 (4th Cir. 2009); *United States v. Stevens*, 487 F.3d 232, 242 (5th Cir. 2007); *United States v. Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997). And some have even required a showing of *both* good cause *and* plain error. *See, e.g., United States v. King*, 627 F.3d 641, 647 (7th Cir. 2010); *United States v. Hargrove*, 508 F.3d 445, 450 (7th Cir. 2007).

Committee found that some confusion remained: while many district courts have held, consistent with *Davis*, that a party must show both a reason for failing to raise the claim and prejudice to his case in order to have his late-filed claim considered by the court,[3] other courts have been less clear about the need for a showing of prejudice. *See Rose*, 538 F.3d at 184; *United States v. Anderson*, 472 F.3d at 670; *United States v. Campbell*, 999 F.2d 544 (9th Cir.), 1993 WL 263432, *6 at n.2 (unpublished); *United States v. Cathey*, 591 F.2d 268, 271 at n.1 (5th Cir. 1979).

Because of the inconsistency in application by the courts, and because the particular use of the term "good cause" in Rule 12 (*i.e.*, requiring both a sufficient reason for untimeliness and resulting prejudice) is not obvious from the face of the Rule, the Committee elected to modify the language. The proposed amendment thus explicitly provides that an untimely motion may be considered if "the party shows cause and prejudice."

We support this clarification of the Rule. If the Rule's policy of strictly requiring timely motions is to have any teeth, a party should be held to his waiver unless he can show both a good reason for failing to meet the deadline and some real prejudice to his case if his claim is not heard. As the Supreme Court explained in *Davis*, 411 U.S. at 241, there are good reasons to require that certain motions be raised and resolved in the district court when the objections can be remedied before a trial begins. If a required motion is not timely filed, and a sufficient reason is shown for a party's failure to abide by the Rule, but the party has suffered no prejudice from the failure to address his claim, the animating principles of the Rule – the desire to prevent "sandbagging" as a defense tactic, judicial economy and the desire not to interrupt a trial for auxiliary inquiries that should have been resolved in advance, and the resulting prejudice, in some cases, to the government's interests in having one fair chance to convict (*see* 6 Wayne R. La Fave, *Search and Seizure* § 11.1(a) at 8 (2004 ed.)) – all weigh against allowing consideration of the untimely motion. *See, e.g.*, *Kopp*, 562 F.3d at 143 (even if cause were shown, no prejudice demonstrated where defendant testified and admitted substance of statements he sought to have suppressed).

(2) *Specifying that "Cause and Prejudice" Standard Also Applies on Appeal*

The revised Rule also eliminates confusion among the courts of appeals regarding the proper standard of review to be used when a defendant raises a Rule 12 motion for the first time on appeal. As noted above, most circuits apply the same "good cause" test from Rule 12 in these

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[3] *See United States v. Kopp*, 562 F.3d 141, 143 (2d Cir. 2009); *United States v. Santos Batista*, 239 F.3d 16, 19-20 (1st Cir. 2001); *United States v. Oldfield*, 859 F.2d 392, 397 (6th Cir. 1988); *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981); *United States v. Williams*, 544 F.2d 1215, 1217 (4th Cir. 1976).

circumstances.[4] Others, however, have decided or assumed that Rule 52(b)'s plain error rule applies on appeal, although sometimes in combination with Rule 12's good cause standard.[5] And, some courts take differing views even within the same circuit.[6]

The Advisory Committee concluded that the Rule should be clarified to promote uniformity, and it decided to specify, in line with the majority of appellate courts, that Rule 12's "good cause" standard, rather than the plain error standard of Rule 52(b), applies when a party raises for the first time on appeal a claim that Rule 12 requires be raised before trial.

We support the Committee's effort to promote a uniform standard of appellate review and to adopt the same standard at both the district court and appellate levels. Because the plain error standard is different from and more lenient than the "waiver except for cause and prejudice" standard of Rule 12, *see United States v. Frady*, 456 U.S. 152, 166-167 (1982) (plain error standard not sufficiently stringent for collateral review, where cause and actual prejudice standard applies), *United States v. Evans*, 131 F.3d 1192, 1193 (7th Cir. 1997) ("'Cause' is a more stringent requirement than the plain-error standard of Fed. R. Crim. P. 52(b)" (citing *Frady*)), application of the more lenient Rule 52(b) on appeal would undercut Rule 12's goal of promoting pretrial consideration of motions, by creating a perverse incentive to raise late claims on appeal instead of in the district court.

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[4] *See, e.g., Burke*, 633 F.3d at 988-991; *Rose*, 538 F.3d at 182-185; *Anderson*, 472 F.3d at 668-669; *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006); *Collier*, 246 Fed. Appx. at 334-336; *Collins*, 372 F.3d at 633; *Yousef*, 327 F.3d at 125; *United States v. Weathers*, 186 F.3d 948, 954-958 (D.C. Cir. 1999).

[5] *See United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008); *United States v. Scroggins*, 599 F.3d 433, 448 (5th Cir.), *cert. denied,* 131 S. Ct. 158 (2010); *United States v. Johnson*, 415 F.3d 728, 730-731 (7th Cir. 2005).

[6] *Compare Nix*, 438 F.3d at 1288 (using cause) *with United States v. Sanders*, 315 Fed. Appx. 819, 822 (11th Cir. 2009) (using plain error); *and compare Scroggins*, 599 F.3d at 448 (using plain error) *with United States v. St. Martin*, 119 Fed. Appx. 645, 649 (5th Cir. 2005) (using cause); *and compare United States v. Wilson*, 962 F.2d 621, 626-627 (7th Cir. 1992) (finding multiplicity claim waived), and *United States v. Welsh*, 721 F.2d 1142, 1145 (7th Cir. 1983) (finding suppression claim waived), *with United States v. Percival*, 756 F.2d 600, 611 (7th Cir. 1985), and *United States v. Clarke*, 227 F.3d 874, 880-881 (7th Cir. 2000) (using plain error in the alternative).

c. More Lenient Standard of Review for Motions Challenging the Indictment for Failure to State an Offense or Alleging Double Jeopardy

(1) *Review of Motions Challenging Insufficient Indictments*

Proposed subdivision (c)(2)(B) provides a different standard of review for two specific claims: failure of the charging instrument to state an offense, and double jeopardy violations. In either case, a defendant need show "prejudice only." Further, subdivision (c) makes clear that Rule 52(b)'s "plain error test" does *not* apply.

We concur with the proposed more lenient standard of review where the late-filed claim is that the indictment fails to state an offense. As the Advisory Committee concluded, insufficient indictments could implicate the constitutional rights of the defendant, such as due process, the need for adequate notice of the offense charged, or the ability to present a defense. *See, e.g. United States v. Hathaway*, 318 F.3d 1001, 1009-1010 (10th Cir. 2003) (where indictment contained no language to indicate offense charged was felony assault, late Rule 12 objection allowed to prevent defendant from being sentenced as a felon). Recognizing these qualitatively different and potentially more serious consequences, we agree that it should be sufficient to show prejudice, without the need to show cause for the default, in order to obtain consideration of a late-filed motion claiming that the indictment fails to state an offense.

Although the Department originally proposed that Rule 52(b)'s "plain error" test should govern a late-filed motion alleging failure to state an offense, we agree with the Advisory Committee's conclusion that a defendant might not be able to satisfy all prongs of the plain error standard (showing an error that is plain, affects substantial rights, and seriously affects the fairness, integrity or public reputation of judicial proceedings) yet nevertheless may be deserving of relief where an indictment fails to state an offense. For that reason, we concur with the proposal that a showing of prejudice is sufficient to obtain consideration for this type of untimely motion.

(2) *Review of Late-Filed Motions Alleging a Double Jeopardy Violation*

The Advisory Committee also elected to add claimed double jeopardy violations to the category of claims whose late filing would be excused more easily. The intention was to preserve as closely as possible the current treatment of such claims by the courts, without adding yet a third standard of review. Many courts of appeals currently apply plain error review, rather than a "cause and prejudice" standard, to double jeopardy challenges that were available but not raised before trial. *See United States v. Robertson*, 606 F.3d 943, 949-950 & n.3 (8th Cir. 2010) (collecting cases); *United States v. Mahdi*, 598 F.3d 883, 887-888 (D.C. Cir.), *cert. denied*, 131 S. Ct. 484 (2010);*United States v. Mungro*, 365 Fed. Appx. 494, 505 (4th Cir.), *cert. denied*, 131 S. Ct. 210 (2010); *United States v. Hansen*, 434 F.3d 92, 104 (1st Cir. 2006). And courts

have also recognized that, even when a defendant pleads guilty, a double jeopardy violation that is clear on the face of the indictment is not waived. Courts reviewing those claims use either de novo or plain error review. *See, e.g.*, *United States v. Harper*, 398 Fed. Appx. 550, 553 (11th Cir. 2010) (guilty plea does not waive double jeopardy challenge on the face of the indictment), *cert. denied*, 131 S. Ct. 2133 (2011); *United States v. Cesare*, 581 F.3d 206, 209 (3d Cir. 2009) (finding plain error); *United States v. Kelly*, 552 F.3d 824, 829-831 (D.C. Cir. 2009) (finding no plain error); *United States v. Poole*, 96 Fed. Appx. 897, 899 (4th Cir. 2004) (granting relief on double jeopardy challenge despite guilty plea where indictment on its face allowed multiple sentences for a single offense).

Allowing review of untimely double jeopardy claims on a showing of prejudice alone would simplify the analysis without changing the result in most or all cases involving claimed double jeopardy violations. Accordingly, the Advisory Committee elected to include double jeopardy claims in the "prejudice only" category instead of adding a third standard for relief for untimely claims. We agree, and support the proposal.

Conclusion

We believe the proposed amendments to Rule 12 are carefully considered and will achieve clarity of purpose, fairness to all litigants, and consistency in application. We thank the Committee for this opportunity to offer our views.

Sincerely,

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