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Peter G. McCabe, Secretary
Committee on Rules of Practice and Procedure
of the Judicial Conference of the United States
Washington, D.C. 20544

Dear Mr. McCabe:

On behalf of the 193 Federal Defender offices and branches across the country and the thousands of clients that we serve in both the trial and appellate courts, we are pleased to submit these comments to the Advisory Committee regarding its proposal to modify Rule 12 of the Federal Rules of Criminal Procedure. We appreciate the extensive time and study the Committee has devoted to this proposal, however we believe several of the proposed changes would severely interfere with our clients' Fifth and Sixth Amendment rights.

Specifically, we believe the proposed changes would:

(1) Create more rather than less uncertainty regarding what motions can be decided pretrial and potentially alter existing settled law;

(2) Create more rather than less litigation;

(3) Create an impossibly high and confusing standard for defendants to meet when filing motions in the trial court after a specified pretrial deadline;

(4) Unduly circumscribe traditional and necessary judicial discretion in the handling of courtroom proceedings; and

(5) Potentially violates our clients' Fifth and Sixth Amendment rights by allowing grand jury indictments to be broadened through the use of jury instructions.

Rule 12(b) currently creates three categories of pretrial motions: (1) motions that raise issues that can be disposed of without a trial; (2) motions to dismiss for lack of jurisdiction or failure to state an offense; and (3) motions that must be filed pretrial by a court-imposed deadline absent a showing of "good cause." The proposed Amendment would eliminate the language relied upon by courts to support the first category, require motions for failure to state an offense to be filed by the pretrial deadline, and change the standard specified in Rule 12(e) from "good cause" to "cause and prejudice." Each of these changes would negatively impact our clients and introduce a substantial and unnecessary degree of uncertainty into the pretrial process.

I. The Proposed Change to Rule 12(b)(2) Would Remove Language Relied Upon By A Majority of Circuit Courts in Ruling on Pretrial Motions

The proposed amendment would delete language in Rule 12(b)(2) that permits a party to raise "any defense, objection, or request that the court can determine without a trial of the general issue," because "the use of pretrial motions is so well established that it no longer requires explicit authorization." Criminal Rules Advisory Committee, May 2011 Report to Standing Committee at 23 (hereinafter "Report"). Although we recognize that the Committee intends no change in meaning and we agree that the filing of pretrial motions is now a well-established practice, the decision as to which motions may be filed remains within the discretion of the court. In deciding how to exercise that discretion, a majority of courts continue to rely upon the specific

language that the proposed amendment would eliminate.[1] This line of cases goes back at least to the 1970s. *See, e.g.*, *United States v. Jones*, 542 F.2d 661, 664 (6th Cir. 1976).

In *United States v. Weaver*, 659 F.3d 353, 355 n.* (4th Cir. 2011), for example, the court relied on that exact language to find that "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." *Accord* cases cited in footnote 1, *supra*.

The current language has been interpreted to give trial judges the discretion to determine how best to run their courtrooms to promote efficiency and conserve judicial resources and much law has been decided based on it. *See, e.g.*, *United States v. Flores*, 404 F.3d 320, 325 (5th Cir. 2005), where the court recognized that proceeding to trial on a case with no legal merit is simply a "waste of judicial resources." This view is consistent with Fed. R. Crim. P. 2's mandate to interpret the Criminal Rules "to eliminate unjustifiable expense and delay." And of course it is consistent with Fed. R. Crim. P. 57(b)'s , which states in part that: "A judge may regulate practice in any manner consistent with federal law, these rules, and the local rules of the district."

Thus, despite the Committee's stated intent to maintain the status quo, by removing the traditional basis for this line of authority, the Committee runs the real risk of creating more, rather than less, litigation in an area that is well-settled and currently promotes both efficiency

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[1] *Accord* 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. 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).

and conservation of judicial resources. We suggest the better course would be to retain the language in the Rule and substitute the words "without a trial on the merits" for "without a trial of the general issue."

II. The Supreme Court Has Never Construed Rule 12 to Require a Showing of Both "Cause" and "Prejudice"

The Advisory Committee has proposed adding a prejudice component to the Rule 12 requirement that a litigant establish cause for filing an untimely pretrial motion. This proposal rests on the premise that the courts already require a showing of prejudice; the proposed amendment would, it is said, formalize an already existing requirement. This premise fails to appreciate that Rule 12 operates in more than one context, and that prejudice can have radically different dimensions, depending on the context that is being considered. Careful consideration of the case law reveals that a requirement of prejudice is not required in at least one of these contexts.

There are four contexts to consider: (1) defendant seeks to file a motion before trial either commences or concludes, but after a court-imposed deadline; (2) defendant files a motion for new trial and includes a claim that could have been raised pretrial; (3) defendant raises on appeal for the first time a claim of error that could have been filed pretrial; and (4) defendant raises in a 28 U.S.C. § 2255 proceeding for the first time a claim that could have been filed pretrial. The Advisory Committee would impose in all three contexts a cause and prejudice requirement that has found its fullest expression in post-conviction cases. (Rule 12 does not govern section 2255 proceedings, and the proposal does not envision any change in habeas proceedings.) This unitary approach ignores the nature of a prejudice inquiry, which, whatever its merit in the second, third, and fourth contexts, does not work in any meaningful sense in the first context. Moreover,

although the cases have mentioned prejudice in the second, third, and fourth contexts, there is little support in the cases for imposing prejudice in the first context.

The Advisory Committee would impose in the first context the prejudice standard developed in habeas corpus cases, especially cases involving state court convictions. This standard developed not only to promote finality of convictions, but also to avoid excessive intrusions on the sovereignty of the individual states. Notions of finality and federalism have no legitimate role to play in providing guidance to district court judges for the exercise of discretion in managing their dockets. Moreover, the concept of prejudice developed in the habeas cases is essentially backward-looking. That is, the habeas judge, with the benefit of a trial record, must gauge what impact the newly raised claim would have upon an already completed trial. Applying the concept of "prejudice" as it has developed in the context of habeas corpus proceedings makes little sense in the district court before trial. Prejudice, as it has been defined in habeas cases, requires "not merely that the errors at [a] trial created a possibility of prejudice, but that they worked to his [the defendant's] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions." *Frady*, 456 U.S. at 170. This "actual prejudice" standard is at the heart of the Report, yet this standard is inherently backward-looking. A standard that requires a demonstration of actual harm at trial makes sense for use in collateral proceedings. But it has little relevance *before* a trial, when the court has little basis to know whether the refusal to consider a late-filed motion will work to a party's "actual and substantial disadvantage, infecting [an] entire trial with error of constitutional dimensions."

Moreover, the Supreme Court has "not identified with precision what constitutes 'cause' to excuse a procedural default" in habeas corpus proceedings. *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000). Nor is there a settled definition of "actual prejudice" in collateral proceedings.

Amadeo v. Zant, 486 U.S. 214, 221 (1988); *United States v. Pettigrew*, 346 F.3d 1139, 1144 (D.C. Cir. 2003)("the required showing [of actual prejudice] has not been precisely delineated.").

Even if a party can establish legitimate "cause" for the late filing, how could that party ever show anything but the "possibility of prejudice" if the court fails to consider the motion? In other words, because "actual prejudice" has been defined as a tangible harm at trial, not the possibility of harm, it does not fit easily into a court's consideration of whether to excuse a late-filed motion before trial.

When one considers the cases upon which the Advisory Committee relies, one realizes that they do not support the claim that current practice requires the district court to assess prejudice when it is asked to permit a late filing before trial has actually commenced or concluded. The earliest Supreme Court case on which the Advisory Committee relies, *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), involved a challenge to the grand and petit juries that was made four years after the trial, and after the case had been remanded from the Supreme Court on a different issue. The district court found there was no "cause" for waiting so long to make the challenge, since years earlier the defendants had knowledge of the facts on which they relied in eventually making the challenge. In affirming, the Supreme Court approved the lower court's ruling that the defendant's earlier knowledge of the facts gave them no "cause," and further noted that the defendants had not made any claim of prejudice. This truncated analysis did not set out any test for prejudice. *Id*. at 461-62. Moreover, the Court's brief statement about prejudice does not ordain a two-part test. If anything, it suggests that when a litigant cannot establish cause, he or she might be able to seek relief if prejudice can be established.

In *Davis v. United States*, 411 U.S. 233 (1973), the Court considered an appeal of a post-conviction petition brought by a federal prisoner. The petitioner challenged jury composition years after his trial. The Court ruled that the context of habeas corpus should give him no greater freedom to avoid Rule 12. Just like the defendants in *Shotwell*, he had to show "cause" for not making a pretrial filing. Since the facts underlying his claim were available to him pretrial, he had no "cause" to bring his claim years after the trial. As in *Shotwell*, the district court also found that there was no prejudice. Davis argued that racial discrimination in jury selection carried a presumption of prejudice. The Court deflected this argument by reasoning that the prejudice inquiry as to the substance of the right was not the same as the prejudice inquiry as to the timing of the motion. As in *Shotwell*, the Court did not give any affirmative content to the prejudice inquiry under Rule 12. As in *Shotwell*, the Court did not make an explicit finding that prejudice was a separate and necessary requirement for avoiding waiver. Most importantly, the context did not involve a claim that was sought to be filed before trial.

Since *Shotwell* and *Davis*, the Court has stated a cause and prejudice test to be used in habeas cases brought by state prisoners. The history of this doctrine is long and tangled, but it has little to say about the first context. True, the Court in the habeas cases has drawn parallels and analogies with cases arising under Rule 12, and for habeas cases the Court has imposed a more rigid two-part test, which it has extended to section 2255 cases. *United States v. Frady*, 456 U.S. 152 (1982). But these statements do not fully track the boundaries of Rule 12, since, as we have demonstrated, Rule 12 covers more than one context. To date, the Court has not resolved a Rule 12 case in which the defendant asked leave to file a motion before trial but after a court-imposed

deadline. Its statements about habeas for state prisoners do not set up such a firm barrier to consideration of a motion filed before trial has been completed.

This situation has arisen, however, in several Court of Appeals decisions, and although the cases are not unanimous, the best reading is that only cause, not prejudice, is required. For example, in *United States v. Rodriguez-Lozada*, 558 F.3d 29, 38 (1st Cir. 2009), the Court ruled that a severance motion filed during the trial came too late and that there was no cause for the late filing, since defense counsel knew the relevant facts before the trial started. In summing up the governing legal principles, the First Circuit made no mention of a prejudice requirement. Likewise, in *United States v. Moore*, 98 F.3d 347 (8th Cir. 1996), the Court ruled there was no abuse of discretion in refusing to consider a motion to suppress that was filed during the trial. Since the defendants had knowledge of the relevant facts, they did not show cause for ignoring their tardiness. The Court made no mention of prejudice as part of the relevant inquiry. In practice, district courts, when presented with a request before trial, focus on cause; and prejudice has little, if any, role to play. A representative ruling is as follows:

> Pursuant to Rule 12 of the Federal Rules of Criminal Procedure, this Court may set a deadline for the parties to file pretrial motions, and it is within the Court's discretion to extend this deadline and grant relief for the waiver that normally attaches to motions not filed within this deadline, where good cause has been shown. Fed. R. Crim. P. 12(c). Because the second discovery motion which the Defendants seek leave to file relates to discovery materials not previously available to the Defendants, the Court finds that the Defendants have shown good cause for relief from waiver with respect to this particular motion. Accordingly, the Defendants' Motion for Leave [**Doc. 70**] to file a second discovery motion out of time is **GRANTED**, and the Court will address the substantive merits of the attached discovery motion [Doc. 70-1].

United States v. Robert, 2009 WL 2960409 (E.D. Tenn. 2009).

To be sure, appellate courts have differed as to the standard that applies *on appeal* when an issue covered by Rule 12 is raised for the first time post-verdict. But the tension on appeal between Rule 52(b) and Rule 12 is not a reason to alter the standard applied in the district court. Put differently, the standard applied to late-filed motions *in the district court* should not be changed because appellate courts disagree as to the standard applied to defaulted issues raised for the first time *on appeal*.

As for the Advisory Committee's finding on page 10 of the Report that federal courts currently disagree about the meaning of "good cause" in the district court, that difference is primarily due to courts that erroneously apply the *habeas corpus* standard before trial. Indeed, one of the cases cited by the Proposal is actually an appeal of a 28 U.S.C. § 2255 petition.[2] The other cases cited as applying a "cause" and "actual prejudice" standard to Rule 12 late-filed motions in the trial court can be traced back to Supreme Court discussions of the standard applied on collateral review,[3] or to the Fifth Circuit's decision in *Brooks v. United States*, 416 F.2d 1044, 1048 n.1 (5th Cir. 1969),[4] which merely says that "[a]bsence of prejudice is properly

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[2] United States v. Williams, 544 F.2d 1215 (4th Cir. 1976).

[3] United States v. Kopp, 562 F.3d 141, 143 (2d Cir. 2009); United States v. Oldfield, 859 F.2d 392, 397 (6th Cir. 1988). One court cited by the Advisory Committee, United States v. Santos Batista, 239 F.3d 16 (1st Cir. 2001), cites only to 1 Charles A. Wright, Federal Practice and Procedure § 193, at 339 & n.24, even though that treatise currently does not endorse the "cause" and "prejudice" reading of Rule 12's "good cause" requirement. Additionally, another panel from the First Circuit has described "good cause" without expressly requiring a showing of prejudice. United States v. Grandmont, 680 F.2d 867, 872-73(1st Cir. 1982) (suggesting that "good cause" can include insufficient time to file a motion; no prior notice of an error, defect, or objectionable action despite due diligence; or ineffective counsel).

[4] United States v. Kopp, 562 F.3d 141, 143 (2d Cir. 2009); United States v. Hirschhorn, 649 F.2d 360, 364 (5th Cir. 1981). Tracing the line of authority is straightforward. In *Kopp*, for example, the court cites *United States v. Crowley*, 236 F.3d 104, 110 n.8 (2d Cir.

taken into account in determining whether to grant relief from the effect of the Rule when the motion is untimely made." As discussed above, the fact that "prejudice" may be taken into account does not mean it is an independent and necessary requirement in order to show "good cause." *Murray*, 477 U.S. at 494.

The application of these standards to late-filed motions in the trial court therefore raises the significant prospect of introducing uncertainty at the trial court level. In other words, because "cause" and "prejudice" have never been precisely defined in the context of collateral proceedings, incorporation of those standards into Rule 12 promises to increase litigation in the district court over the meaning of these terms. The present rule, on the other hand, relies upon the trial court's discretion in determining whether to consider a late-filed motion by the defense or argument made by the government. *See, e.g. United States v. Dupree*, 617 F.3d 724,727-32 (3d Cir. 2010)(finding government failed to show cause for failure to raise argument earlier under Rule 12(e)).

III. Motions to Dismiss for Failure to State a Claim Should Be Permitted To Be Filed After the Pretrial Motions Deadline

At present, Rule 12 provides that motions challenging whether an indictment states an offense may be raised at any time, although courts apply a more stringent standard of review to motions filed post-verdict.[5] The proposed amendment would eliminate the distinction between

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2000). The *Crowley* court, in turn, cites *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995), and *United States v. Howard*, 998 F.2d 42, 52 (2d Cir. 1993). *Forrester* relies on *Howard*. *Howard* cites to a Seventh Circuit decision, *United States v. Hamm*, 786 F.2d 804, 806-07 (7th Cir. 1986), and to Wright and Miller's federal procedure treatise citing *Wainwright v. Sykes*. *Hamm* relies on *Brooks v. United States*, 416 F.2d 1044, 1048 n.1 (5th Cir. 1969).

[5] *See* United States v. Jenkins-Watts, 574 F.3d 950, 968 (8th Cir. 2009)("When an indictment is challenged for the first time after the verdict is returned, we apply a deferential

pre-verdict and post-verdict challenges to the indictment in favor of a pre-motions deadline/post-motions deadline distinction. Under the Committee's proposal, a motion challenging an indictment for failure to state an offense may be raised after the motions deadline only upon a showing of both "cause" and "prejudice."

Our primary objection to this change is that it remains in tension with the basis for the traditional rule permitting such challenges to be raised at any time. The traditional rule is based upon the fact that the charging document is the foundation of the criminal prosecution. As the Supreme Court pointed out in 1876, whether an indictment charges an offense "is a question which has to be met at almost every stage of criminal proceedings." *Ex Parte Parks*, 93 U.S. 18, 20 (1876). Accordingly, a district court that refuses to consider a late-filed motion challenging whether an indictment states an offense must still confront difficult issues tied to a defendant's constitutional rights.

Specifically, the Fifth Amendment to the Constitution requires felony prosecution by a grand jury indictment that "must set forth each element of the crime that it charges."[6] Moreover, the Sixth Amendment guarantees a defendant the right to be informed of the nature of the accusation against him. U.S. Const. amend. VI. Incident to these fundamental constitutional principles, the Supreme Court has held that "charges may not be broadened through amendment

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standard of review, upholding the indictment unless it is so defective that by no reasonable construction can it be said to charge the offense for which the defendants were convicted."); *accord* United States v. Vitillo, 490 F.3d 314, 324 (3d Cir. 2007); United States v. Sutton, 961 F.2d 476, 479 (4th Cir. 1992); United States v. Teh, 535 F.3d 511, 516 (6th Cir. 2008); United States v. Richardson, 687 F.2d 952, 965 (7th Cir. 1982); United States v. Awad, 551 F.3d 930, 937 (9th Cir. 2009); United States v. Gama-Bastidas, 222 F.3d 779, 786 (10th Cir. 2000).

[6] Almendarez-Torres v. United States, 523 U.S. 224, 228 (1998).

except by the grand jury."[7] Likewise, a jury must "decide each and every element of the offense with which [the defendant] is charged."[8]

Jury instructions that broaden the basis for conviction beyond the terms of the indictment violate these basic constitutional principles.[9] Similarly, jury instructions that are materially different from the terms of the indictment issued by the grand jury constitute error.[10] Indeed, errors arising from jury instructions implicate constitutional rights distinct from the right to a grand jury indictment, occur during trial, and are subject to objection at trial pursuant to Federal Rule of Criminal Procedure 30(d).[11] To the extent that the proposed modification of Rule 12

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[7] Stirone v. United States, 361 U.S. 212, 215-16 (1960); *accord* United States v. Cotton, 535 U.S. 625, 631 (2002) (reaffirming "this settled proposition of law"); Russell v. United States, 369 U.S. 749, 770 (1962); *see also* Schmuck v. United States, 489 U.S. 705, 717 (1989) ("It is ancient doctrine of both the common law and of our Constitution that a defendant cannot be held to answer a charge not contained in the indictment brought against him.").

[8] United States v. Gaudin, 515 U.S. 506, 522-23 (1995); *accord* Ring v. Arizona, 536 U.S. 584, 609 (2002).

[9] Stirone, 361 U.S. at 215; *see, e.g.*, United States v. Gomez-Rosario, 418 F.3d 90, 104 (1st Cir. 2005); United States v. Rivera, 415 F.3d 284, 287 (2d Cir. 2005); United States v. Floresca, 38 F.3d 706, 710 (4th Cir. 1994) (en banc); United States v. Jones, 418 F.3d 726, 729 (7th Cir. 2005); United States v. Johnston, 353 F.3d 617 (8th Cir. 2003); United States v. Castro, 89 F.3d 1443, 1452-53 (11th Cir.1996).

[10] United States v. Miller, 471 U.S. 130, 144-45 (1985); *see also* United States v. Milestone, 626 F.2d 264, 269 (3rd Cir. 1980) ("any amendment that transforms an indictment from one that does not state an offense into one that does" is prohibited).

[11] Federal Rule of Criminal Procedure 30(d) provides:

> **Objections to Instructions.** A party who objects to any portion of the instructions or to a failure to give a requested instruction must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate. An opportunity must be given to object out of the jury's hearing and, on request, out of the jury's presence. Failure to object in accordance with this rule precludes appellate review, except as permitted under Rule 52(b).

would preclude a defendant from challenging unconstitutional jury instructions at trial, the modification would violate the basic principle that "[t]he Supreme Court shall have the power to prescribe general rules of practice and procedure," but that those rules "shall not abridge, enlarge or modify any substantive right."[12]

The proposed amendment would result in unnecessary confusion in this settled area of law. Indeed, it could unravel the uniform standard applied to post-verdict challenges in favor of a "prejudice" standard that remains ill-defined. Moreover, here too courts should retain substantial discretion to consider late-filed motions challenging an indictment because proceeding with a criminal case based upon a defective indictment will necessarily complicate the litigation. In sum, district courts should not be precluded from considering late-filed motions challenging whether an indictment fails to charge an offense because the charging document is critical at every stage of litigation.

IV. Proposed Amendment

The Committee raises a concern related to the confusion engendered by the use of the word "waiver" in Rule 12(e) rather than "forfeiture." One simple way to resolve this issue would be to eliminate subsection (e), and instead add language to subsection (c) to read as follows:

> **(c) Motion Deadline. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. The court may extend that deadline, and, for good cause, may grant relief from the failure to file a motion by the deadline.**

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[12] 28 U.S.C. § 2072(b); *see also* Sibbach v. Wilson & Co., 312 U.S. 1, 9-10 (1941) (federal courts may make rules "not inconsistent with the statutes or Constitution of the United States.").

Such an amendment would eliminate reference to the word "waiver" and would specify the standard applied to defaulted claims in the subsection related to the deadline. It also has the added benefit of explicitly preserving the court's discretion in managing its courtroom.

We very much appreciate the opportunity to provide our comments to the Committee.

Very truly yours,

_____/s/_____

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