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via e-mail

Peter G. McCabe, Secretary
Standing Committee on Rules of Prac. and Proc.
Judicial Conference of the United States
Administrative Office of the U.S. Courts
Thurgood Marshall Federal Judiciary Bldg.
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COMMENTS OF THE
NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS
Concerning Proposed Amendments to Rule 12,
Federal Rules of Criminal Procedure
Published for Comment in August 2011

Dear Mr. McCabe:

The National Association of Criminal Defense Lawyers is pleased to submit our comments on the proposed changes to Rule 12 of the Federal Rules of Criminal Procedure. NACDL's comments on the proposal concerning Criminal Rule 11 and on the proposed amendments to the Evidence and Appellate Rules have been submitted separately. We deeply appreciate the agreement of your office to accept the following comments after the deadline. Our organization has more than 10,000 members; in addition, NACDL's 94 state and local affiliates, in all 50 states, comprise a combined membership of over 30,000 private and public defenders. NACDL, which celebrated its 50th Anniversary in 2008, is the preeminent organization in the United States representing the views, rights and interests of the defense bar and its clients.

Introduction and Summary

Our comments on the proposed amendments to Rule 12 are addressed to: (1) the amendments to subparagraphs (b)(2) & (3) that affect which defenses, objections or requests must be raised by motion before trial, need not be raised before trial, and may be made at any time; and, (2) the amendments to subparagraph (c)(2) and (e) which alter the showing required to obtain relief from not filing a motion timely. Overall, NACDL seeks to assist the Committee in finding a rule that does not unnecessarily hamper

defendants' efforts to ensure that they have the benefit of all applicable legal rights and protections in the prosecution process. The ideal rule will of course still allow that process to move forward with fairness to all, including clarity, simplicity, and reasonable efficiency.

1. The proposed amendments to subparagraphs (b)(3) would limit the motions that must be filed before trial to those for which the "basis is reasonably available" and which "can be determined without a trial on the merits." Proposed Amendment to Rule 12(b)(3). As the Committee Report explains, the phrase "can be determined without a trial on the merits" has a well-established meaning, "specifically that trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the motion . . ." Criminal Rules Advisory Committee, May 2011 Report to Standing Committee ("May 2011 Report"), Section F.5 (footnote omitted). Under the amended Rule then, the only motions that must be filed before trial would be the five types of motions listed in Rule 12(b)(3)(A)-(E), for which the basis was then reasonably available and the decision of which would not be aided by the trial of the facts surrounding the commission of the alleged offense.

Conversely, a motion listed in Rule 12(b)(3)(A)-(E) would not need to be filed before trial where the basis was not reasonably available or if decision of the motion might be aided by the trial of the facts surrounding the commission of the alleged offense. We fully support the proposed amendments that would effect these changes, as they would provide helpful guidance in determining which motions must be filed before trial, and would leave to counsel's judgment whether other motions, even if not required to be filed before trial, nevertheless should be, or whether they should be deferred until trial of the facts. We propose below further refinements in the amendments to achieve those goals, most importantly making sure the text of the Rule and not merely the Advisory Committee notes make clear that the reference to a motion that "can be determined without a trial on the merits" means a motion as to which a trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining. We also urge the Committee not to include the specific examples of types of motions under subsections (A) & (B), as they are unnecessary and in some instances analytically incorrect.

The proposed amendment to the text of subparagraph (b)(2) limit the motions that may be made at any time. The Rule now makes clear that two types of motions made be made at any time, the first being motions alleging that the indictment or information fails to invoke the court's jurisdiction, and the second being motions that allege the indictment or information fails to state an offense. This proposed is based on the false premise advanced by the Department of Justice that *United States v. Cotton*, 535 U.S. 625 (2002) "held that an indictment's failure to state an offense does not deprive the court of jurisdiction." May 2011 Report, Section D.1. *Cotton* involved the failure to allege a heightened drug quantity, in a count which nevertheless fully described and alleged a federal offense and unquestionably invoked the district court's jurisdiction. The defendant was thereafter sentenced as if the indictment had alleged the sentence-aggravating fact, which the Court ruled did not rise to plain error. As explained below, *Cotton* does not remotely provide authority, justification, or a rationale for altering the existing provisions of the Rule.

2. The proposed amendments creating a new subparagraph (c)(2) and deleting subparagraph (e) would change the showing required to have an untimely motion considered by the court – from the current showing of "good cause" to the proposed showing of "cause and prejudice" for all untimely motions except double jeopardy motions and those alleging the failure to state an offense, which would be subject to a showing of prejudice alone. The fundamental problem with the proposed amendment is that it seeks to establish a single standard to govern the entire procedural spectrum, from motions that are untimely because they were not filed within the time required by a trial court's scheduling order even though they are raised prior to trial, to claims presented during trial, to those first raised on appeal, to claims raised only in a habeas corpus petition after a conviction has become final on direct review. Current case law interprets the "good cause" standard of Rule 12 according to the procedural context in which it is being applied, so that consideration of prejudice is part of the good cause inquiry for a claim that is first made post-conviction, but not necessarily as to untimely claims raised before judgment. Adoption of an across-the-board "cause and prejudice" standard would thus change the law at least as to pretrial and in-trial untimely claims and would be unworkable in the pre-conviction context as it would require counsel to advocate his or her own ineffectiveness, raising ethical dilemmas and conflict issues. The current standard of good cause, as interpreted by existing case law, is sufficiently flexible to avoid these problems, while at the same time accommodating the different interests that apply post-conviction. At a minimum, the proposed amendment should be changed to make clear that "cause and prejudice" only applies to post-conviction claims.

<u>Motions which must be filed before trial or within the time set by the court</u>

Rule 12 currently separates pretrial motions into three categories: the first, under (b)(2), are motions that *may* be made before trial, which are defined as motions "that the court can determine without a trial of the general issue"; the second, under (b)(3), are five types of motions, listed in subparagraphs (A-E), that "must be raised before trial"; and the third, under (b)(3)(B), are motions that may be made at any time.

The proposed amendment would eliminate the provision currently in Rule 12(b)(2) that certain motions may be filed before trial on the basis that it is unnecessary. The proposal would also modify Rule 12 (b)(3) to define the criteria that determines which motions "must be raised by motion before trial." Finally, the amendment would limit the motions that may be made at any time to motions alleging that the indictment or information fails to invoke the court's jurisdiction.

We agree that there is probably no longer a need for a provision that expressly authorizes a defendant to file motions prior to trial. At the same time, we sympathize with the concerns expressed by our friends in the Federal Public Defender Offices, in their comments (Submission 11-CR-008). The Defenders fear that it may risk too much confusion to eliminate a provision long relied upon, while intending no change. The practice of filing pretrial motions is sufficiently well-established that explicit authorization to do so may indeed be unnecessary, especially given that there is nothing that prevents or restricts a defendant from filing prior to trial a motion that raises a defense, objection or request that "the court can determine without a trial of

the general issue." *See* Fed.R.Crim.P. 47 (authorizing the defense to file a motion for whatever relief it seeks). Further, under Rule 12(d), the court may defer ruling on the motion if it finds good cause to do so. Accordingly, we take no position on this aspect of the proposal.

We fully support the amendments to Rule 12(b)(3) that would for the first time provide criteria to be used in determining which motions must be filed before trial. The current Rule lists five types of motions that in all cases must be made before trial. The amendment would add two criteria that would clarify and limit the circumstances in which the listed motions must be filed before trial. The first criterion, that the basis for the motion is then reasonably available, is obviously sensible. This will eliminate the need to file motions to protect the record in circumstances where the factual basis for filing a motion is not yet available to counsel, but counsel suspects or even anticipates that grounds for the requested relief may arise at a later time. As the Committee Report explains, this provision essentially codifies case law interpreting "good cause" under Rule 12(e) for consideration of motions filed after the time set by the trial court to include the basis for the motion not having been available previously. *See* May 2011 Report, Section F.4., and note 36.

The second criterion is that the motion "can be determined without a trial on the merits." As noted above, the Committee Report explains that the phrase "can be determined without a trial on the merits" has a well-established meaning, "specifically that trial of the facts surrounding the commission of the alleged offense would be of *no assistance* in determining the validity of the motion . . ." May 2011 Report, Section F.5 (footnote omitted; emphasis added). Under the amended Rule then, the only motions that would be required to be filed before trial would be the five types of motions listed in Rule 12(b)(3)(A)-(E), for which the basis was then reasonably available *and* the decision of which would not be aided in any way by the court hearing the testimony and receiving other evidence to be presented at the trial of the facts surrounding the commission of the alleged offense. This would still require that a defense, objection or request be raised by motion before trial if the trial would clearly be of no assistance in determining the defense, objection or request, and at the same time sensibly limit the motions that must be filed before trial to those for which factual development at trial will be of no assistance.

This is a much better approach than the current Rule which simply lists types of motions that must be filed before trial, without regard to whether they would be better filed or adjudicated after factual development of the kind that occurs at trial. The reality is that oftentimes the circumstances of the particular case will affect whether a trial of the facts surrounding the alleged offense will aid in determining a defense, objection or request. Some speedy trial claims, for example, cannot be adjudicated without determining whether delay has caused prejudice to the defense; some severance claims have the same characteristic. In sum, as the Committee Report puts it, this provision will help insure "that parties not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial." May 2011 Report, Section F.5. For the amendments to achieve this purpose to the fullest extent possible, the text of the Rule and not merely the Advisory Committee notes should make clear that the reference to a motion that "can be determined without a trial on the merits" means a motion as to which a trial of the facts surrounding the

commission of the alleged offense would necessarily be of absolutely no assistance in determining. Unless that point is made clear in the text, it is likely if not inevitable that litigants and courts will understand the reference to motions that "can be determined without a trial on the merits" to mean motions that *might* be able to determined without a trial, leading to the filing of unnecessary motions before trial, the penalizing of defendants for their lawyers' good faith judgments as to which motions need to be filed when, and the refusal of courts to consider later-filed motions that under Rule 12b)(3) are properly made optional before trial.

The Committee need not be concerned that its amendment making more motions optional and fewer mandatory before trial will lead to "sandbagging" by the defense. Lawyers who believe they have a meritorious pretrial motion will ordinarily want to file it early, in hopes of either winning dismissal of the case or a narrowing of the charges or evidence. Effective pretrial motions practice enhances the defendant's position in plea negotiations, which after all is how the vast majority of cases are and ought to be resolved. Lawyers will not withhold motions until after the trial begins, just because under the revised Rule that can (and thereby sometimes prevent the government from taking an appeal), even in cases where the defendant has elected to risk a trial. Much more often than not, that reckless strategy would lose more than it could possibly win for the defendant.

The proposed amendments to Rule 12(b)(3) include listing specific examples of the first two types of motions under Rule 12(b)(3), *i.e.*, motions which allege "a defect in instituting the prosecution" (Rule 12(b)(3)(A)), and motions which allege a "defect in the indictment or information . . ." (Rule 12(b)(3)(B)). The listings of specific examples of these two types of motions are not only unnecessary, but could easily be misleading and are likely to cause unnecessary confusion.

The Committee Report explains that the proposal to list specific examples of these two categories of claims is intended to help litigants and courts in determining "whether a claim is a 'defect in the indictment' or 'the institution of the prosecution,' to determine whether it must be raised prior to trial." May 2011 Report, Section F.3 (footnote omitted). Determining whether and which types of claims come within these two categories can admittedly be difficult. But under the Committee's proposed revision, it makes no difference whether a motion falls into one subcategory or the other. They now would be subject to exactly the same criteria, with the exception for jurisdictional claims moved into a new, separate subsection dealing with consequences. Why after reorganizing the Rule this way the Committee has preserved the distinction between subsection (b)(3)(A) and (b)(3)(B), trying to clarify it at the cost of further complicating and extending the length of the Rule, is not apparent to us at all.

Even if Rule 12(b)(3) continues to maintain the categorical distinction between the two kinds of "defects," however, it would not be helpful to include specific examples of motions that might come within them for two reasons. First, they will inevitably come to be seen as exhaustive – or at least exemplary – rather than merely illustrative. Second, the categories are simply not capable of the neat and uniform classification the amendment attempts to achieve. One example that illustrates both these problems is the inclusion of a motion alleging "a violation of the constitutional right to a speedy trial" under the category of a "defect in instituting the prosecution."

Proposed Amendment, Rule 12(b)(3)(A)(iii). It is hard to understand why this should be considered a "defect in instituting the prosecution," given that the violation of the right to a speedy trial ordinarily arises, by its nature, well after the prosecution was instituted. ("Double jeopardy," likewise, is sometimes "a defect in instituting the prosecution," as where there has been a prior conviction or acquittal for "the same offense," but sometimes it only bars multiple convictions or duplicative sentencing.) Similarly, listing "a violation of the constitutional right to a speedy trial" and not a violation of the *statutory* right to a speedy trial might be interpreted wrongly to suggest that the later need not necessarily be filed prior to trial, when in fact the exact opposite is true under current law. *See* 18 U.S.C. § 3162(a)(2); *see* May 2011 Report, Section F.3, n. 33. This example also illustrates the need to make clear in the amended Rule, or at least the accompanying Advisory Committee Note, that as amended the Rule will supersede that statute (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, 28 U.S.C. § 2072(b).

Motions which may be filed at any time

Rule 12(b)(3)(B) currently provides that motions alleging that the indictment or information fails to invoke the court's jurisdiction, and motions alleging that the indictment or information fails to state an offense may be raised at any time. The proposed amendments would move the motions that may be made at any time, including while the case is on appeal, to subparagraph (b)(2), and limit such motions to those alleging that the indictment or information fails to invoke the court's jurisdiction, and not motions alleging the failure to state an offense.

The failure to state an offense is presently included among the claims that can be raised at any time because they are understood to be equivalent to "jurisdictional defects." May 2011 Report, Section D.1. The premise of the proposed amendments to remove them from the list of motions that may be made at any time is the view advanced by the Department of Justice that *United States v. Cotton*, 535 U.S. 625 (2002), "held that an indictment's failure to state an offense does not deprive the court of jurisdiction." May 2011 Report, Section D.1. While the stated proposition was reiterated in *Cotton*, there has been no recent change or clarification in Supreme Court precedent in that regard. *See* 535 U.S. at 630-31 (citing cases so holding, from 1916 and 1951). Accordingly, nothing in *Cotton* explains or justifies the proposed change in the Rule.

Cotton involved an indictment's failure to allege a drug quantity to support an enhanced sentence, which the Court ruled did not rise to plain error. The indictment in *Cotton* fully and properly alleged a federal offense under 21 U.S.C. § 841(a), at a level punishable under *id.*(b)(1)(C) (20 year maximum). Nevertheless, the court had sentenced Cotton and his co-defendants, without objection, to 30 years in some cases and to life terms in others, based on then-prevalent circuit law treating drug quantity as a sentencing factor. After *Apprendi* was decided, however, while their case was pending on appeal, the defendants-appellants argued for the first time that their

sentences were illegal and unconstitutional (because they exceeded the 20-year statutory maximum triggered by the facts alleged in the indictment). Without deciding whether drug quantities under § 841(b) are "elements" of differently graded offenses or simply "sentence-enhancing facts" that *Apprendi* requires to be pleaded and proved, the Court held that the respondents' illegal-sentence claims were subject to the plain error standard, and upheld them, because there was no genuine dispute about the pertinent facts, no surprise to any defendant, and no miscarriage of justice. 535 U.S. at 631-34. The Court discussed whether the indictment's terms were "jurisdictional" because that was the respondents' (fallacious) argument why the sentencing court had no power to impose the sentences it did. The "error" found in *Cotton* not to have been "plain" was the imposition of sentences exceeding the maximum implicated by the terms of the indictment; the respondents' pertinent failure to advance a timely objection, therefore, had occurred at the sentencing stage. The case has nothing whatever to do with any defect in the indictment (in fact, there was none) or with the timing of pretrial motions.

The real issue before the Committee is whether the failure of an indictment to charge an offense is so fundamental, or "structural," that it should be allowed to be raised at any time. This is a substantive issue concerning enforcement of the Fifth Amendment's Grand Jury Clause, not merely a procedural issue, and one which the Supreme Court has not decided. See *United States v. Resendiz-Ponce*, 549 U.S. 102 (2007) (cert. granted to decide "whether the omission of an element of a criminal offense from a federal indictment can constitute harmless error," *id.* at 103, which was then not reached); *id.* at 116-17 (Scalia, J., dissenting, contending error is structural). While the right to grand jury indictment can surely be knowingly and intelligently waived, *see* Fed.R.Crim.P. 7(b), it is quite another thing to say that counsel's missing the deadline for noticing the omission of an element from an indictment can properly result in federal prosecution for an offense that no grand jury ever actually found, as required by the Fifth Amendment, and that such constitutional errors will ordinarily be overlooked on that basis alone.

The amendment now proposed would require the defendant, on appeal after failing to challenge the indictment pretrial (or pre-plea), to demonstrate some sort of "prejudice" from being prosecuted on a defective indictment. We are unsure what that standard could mean in this context. Perhaps it requires demonstration of some reason to think the grand jury would not have found probable cause as to the omitted indictment. How could that be shown, where grand jury records are secret and not part of the record? And would not *United States v. Mechanik*, 475 U.S. 66 (1986), seem to preclude a finding of "prejudice" from such error on appeal after a trial jury verdict or guilty-plea admission of all the elements? Or perhaps "prejudice" in this context will be interpreted to mean that the defendant was, in the end, convicted of or sentenced for a different offense, or a more serious offense, than s/he thought was charged, creating unfairness in trial preparation or plea negotiations. The present proposal offers no clue what answer the Committee intends to these questions.

There is no significant risk of "sandbagging" created by allowing challenges to the sufficiency of an indictment to continue to be raised "at any time while the case is pending." First, even when such challenges are first made during trial, resulting in a mistrial and dismissal, the Supreme Court has held there is no double jeopardy bar to

a new trial on a corrected indictment. See *Illinois v. Somerville*, 410 U.S. 458 (1973). Second, when the failure of the indictment to charge an offense is not raised until after trial, the Supreme Court has long held that the indictment will be liberally, rather than literally construed. *Hagner v. United States*, 285 U.S. 427, 433 (1932). Thus, under existing and settled precedent, there is a significant disincentive to defense counsel's deliberately withholding a known challenge to the sufficiency of the indictment, and little if any advantage in doing so.

The standard under Rule 52(b) for showing an adverse impact from a late-raised claim of failure to charge an offense is not "prejudice" but rather an "[e]ffect" on the defendant's "substantial rights." A showing of prejudice is one way to demonstrate such an effect, but structural error is another, as is rebuttably presumed prejudice. The Fifth Amendment right not to be prosecuted for a felony except after an independent finding of probable cause by a grand jury that the defendant committed a federal offense (that is to say, all the elements of a federal offense) is surely "substantial" within the meaning of Rule 52(b). Whether prejudice need be shown from a felony prosecution without a valid indictment, or rather some other form of effect on substantial rights, is the constitutional question that the Supreme Court was going to decide in *Resendiz-Ponce*, and presumably will soon grant certiorari in another case to decide. The Rules Committee should not presume to decide that constitutional question now – a question that is not even clearly one of "practice and procedure" under 28 U.S.C. § 2072(a), rather than "substantive" under id. § 2072(b) – at least not on any basis less favorable to the defendant than that which applies under the current Rule.

Showing required for consideration of untimely motions

Rule 12(e) currently provides that a party "waives" any defense, objection or request under Rule 12(b)(3) that is not raised within the deadline set by the court, but provides that the court may grant relief from the waiver for "good cause." The proposed amendments eliminate this subparagraph, and proposes a new subparagraph (c)(2) that would alter the standard governing a defendant's request that a court consider a motion that is "untimely," from the current "good cause" to "cause and prejudice," except if the defense or objection is the failure to state an offense or double jeopardy, in which case the defendant would only need to show prejudice. The proposed amendment also states explicitly that Rule 52's plain error standard does not apply.

The Committee's apparent goal is to adopt a single standard in the interest of uniformity, and it defends adoption of the "cause and prejudice" standard on the ground that the Supreme Court has interpreted Rule 12's good cause standard to require a showing of cause and prejudice. The cases the Report cites for this proposition, however, are a procedurally highly unusual direct appeal (*Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963)), and a collateral challenge (*Davis v. United States*, 411 U.S. 233 (1973)). May 2011 Report, Section B.2. These cases viewed the absence of prejudice as a factor to be considered in determining whether there was "good cause" to grant relief from the waiver under the circumstances of those cases. *See, e.g., Shotwell*, 371 U.S. at 363 (explaining that "it is 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 that Rule," where the ruling at issue was a challenge to the jury pool, made for the first time four years after trial, at the time of an evidentiary hearing ordered on an entirely unrelated issue after a second appellate remand). *Shotwell Manufacturing*, in other words, like *Davis*, essentially involved a post-conviction collateral challenge. Neither case bears any resemblance to the ordinary situation of a pretrial motion filed after the expiration of the district court's deadline, or an issue raised at trial that the court determines did not implicate any facts to be developed there, or even an issue raised for the first time on appeal that might have been brought up by pretrial motion.

Even assuming that an explicit cause and prejudice standard might be appropriate for claims that are untimely because they are first made post-appeal, that does not support incorporating the same standard into Rule 12 generally, because Rule 12 applies – in the ordinary and most common situation – pre-conviction (indeed, pretrial and pre-plea) as well. The Supreme Court has never interpreted Rule 12's "good cause" provision to require a showing of cause and prejudice in the pre-conviction context, or even on direct appeal, and as the Committee Report indicates elsewhere, courts have applied the "good cause" requirement in the pre-conviction context without requiring a showing of prejudice. May 2011 Report, Section F.4, n. 37 (citing decisions "treating unavailability of grounds as 'good cause' affording relief from waiver" under Rule 12(e)).

To impose cause and prejudice in the pre-conviction context would not only be contrary to precedent, but would be problematic as to both prongs. A common instance of "cause" is ineffective assistance of counsel. See, *e.g.*, *Murray v. Carrier*, 477 U.S. 478, 488 (1986). A lawyer might well have to advocate his or her own ineffectiveness in order to establish cause, at least in the alternative, thereby creating an ethical dilemma and conflict of interest, leading in many cases to a time-wasting and inefficient change of defense counsel and in many cases the defendant's loss of the Sixth Amendment constitutional right to have the assistance of counsel of choice. The only sensible meaning of "prejudice" in that context would be the failure to file the motion, and not whether it would likely succeed, in order to preserve the more favorable standard of review that would apply if the motion had in fact been filed.

What this brief survey suggests is that "good cause" has been interpreted according to the procedural context in which it arises. If as in *Shotwell Manufacturing* and *Davis* a defendant first raises a jury selection claim after the decision of the initial direct appeal, or even after the conviction has become final, "good cause" under Rule 12 will be interpreted to include an inquiry into prejudice, especially if the claimed error might have been cured had it been made timely. On the other hand, where a lawyer misses a filing deadline for reasons equivalent to excusable neglect or unintentional mistake, the "good cause" standard is, as it ought to be, sufficiently flexible to be interpreted by the trial court to allow the exercise of its discretion to allow the motion to be considered.

This is a far better approach, which is consistent with and can build on existing case law, than adopting a new standard that cannot be uniformly applied in the broad procedural spectrum encompassed by Rule 12 and will often lead to the loss of

defendant's rights to a fair prosecution, due only to routine and harmless mistakes by counsel.

In sum, although we respect the time and effort that have already gone into the Rule 12 project, NACDL believes the present proposal should not be adopted without making the changes we have suggested.

The National Association of Criminal Defense Lawyers is grateful for the opportunity to submit its views on this important matter. We look forward to continuing to work with the Committee in the years to come.

Very truly yours,
s/William J. Genego
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