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OF THE
JUDICIAL CONFERENCE OF THE UNITED STATES
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MEMORANDUM

DATE: May 12, 2011

TO: Honorable Lee H. Rosenthal, Chair, Standing Committee on Rules of Practice and Procedure

FROM: Honorable Richard C. Tallman, Chair, Advisory Committee on Federal Rules of Criminal Procedure

RE: Report of the Criminal Advisory Committee

I. Introduction

The Advisory Committee on the Federal Rules of Criminal Procedure (“the Committee”) met on April 11-12, 2011, in Portland, Oregon, and took action on a number of proposals. The Draft Minutes are attached.

This report presents four action items:

- (1) approval to transmit to the Judicial Conference proposed amendments to Rules 5 and 58 (initial appearance in extradition cases and consular notification);
- (2) approval to transmit to the Judicial Conference a proposed Rule 37 (indicative rulings);
- (3) approval to transmit to the Supreme Court Rule 15 (depositions in foreign countries when the defendant is not physically present); and
- (4) approval to publish a proposed amendment to Rule 12 (motions that must be made before trial), and a conforming amendment to Rule 34.

The report also includes a discussion of the Committee’s decision not to move forward at this time with an amendment to Rule 16 dealing with discovery practices and exculpatory evidence. Instead, the Committee will work with the Federal Judicial Center on recommendations for amending the DISTRICT JUDGES BENCHBOOK, preparation of a Best Practices Guide for Criminal Discovery, and in-service training for judges on improving pretrial criminal discovery practices.

II. Action Items—Recommendations to Publish Amendments to the Rules

1. ACTION ITEM—Rules 5 and 58

The proposed amendments to Rule 5 and Rule 58 were designed to (1) deal with unique aspects of the international extradition process and (2) ensure that certain treaty obligations of the United States are fulfilled. After reviewing public comments concerning these amendments, the Advisory Committee recommends that they be transmitted to the Judicial Conference as published.

Rule 5(c)(4)

The amendment to Rule 5(c) clarifies where an initial appearance should take place for persons who have been surrendered to the United States pursuant to an extradition request to a foreign country. The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person’s transportation for the purpose of holding an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant’s transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending. It should also be noted that during foreign extradition proceedings, the extradited person, assisted by counsel, has already been afforded an opportunity to review the charging document, United States arrest warrant, and supporting evidence.

The Committee received two comments on this rule. The National Association of Criminal Defense Lawyers (NACDL) and the Federal Magistrate Judges Association (FMJA) suggested that the amendment be revised to require the initial appearance to be held “without unnecessary delay.” The Advisory Committee declined to make this revision because the rule itself already makes this clear. Subdivision (a) of Rule 5 contains the timing requirements for all initial appearances, and subdivision (c) governs the place of initial appearances. Rule 5(a)(1) already requires all defendants who have been arrested to be taken before a magistrate judge “without unnecessary delay,” and

contains a provision that directly addresses cases in which the defendant has been arrested outside the United States.

Rule 5(a)(1)(B) now provides:

(B) A person making an arrest outside the United States must take the defendant *without unnecessary delay* before a magistrate judge, unless a statute provides otherwise.

(Emphasis added). The Advisory Committee concluded that this provision—which is referred to in the Committee Note—addresses the concerns noted by the NACDL and FMJA. The Committee declined to add an additional statement regarding timing to subdivision (c), which governs only the *place* of the initial appearance, not its timing.

Rules 5(d) and 58

The proposed amendments to Rules 5(d) and 58(b) are 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. 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. *Sanchez-Llamas v. Oregon*, 548 U.S. 331 (2006). This amendment—which was proposed by the Department of Justice after consultation with the State Department—does not address those questions.

Comments were received from the NACDL and the FMJA. The NACDL endorsed the proposed amendment in principle, but suggested modifications to define “held in custody,” to expand on the warnings given to defendants, and to make it clear that consular notification should not be delayed until the initial appearance. The Advisory Committee concluded that the term “held in custody” was sufficiently clear for this purpose, and declined to require a more detailed explanation or colloquy about consular notification at the initial appearance.

The Committee also concluded that the rule need not be revised to address administrative warnings that should take place prior to the initial appearance. The amendment was designed to be an additional assurance, in the nature of a “failsafe” provision, not the primary means of satisfying the United States’ obligations under the Vienna Convention and other bilateral treaties. Consular notification advice is required to be given “without delay,” and arresting officers are primarily responsible for providing this advice. *See* 28 C.F.R. 50.5 (requiring Department of Justice officers to inform foreign nationals they arrest of policies regarding consular notification). The Committee was advised that the government has taken substantial measures to ensure prompt compliance with the notification requirements, including implementing Justice Department regulations establishing

a uniform procedure for consular notification when non-United States citizens are arrested or detained by officers of the Department; State Department instructions for federal, state, and local law enforcement officials on providing consular notification advice, which are available on a public website and published in a booklet; and which are regularly covered in training of law enforcement authorities provided by the State Department.

The Committee also took note of two FMJA observations: (1) reservations about the necessity of procedural rules concerning consular notification, which is principally an executive function, and (2) the need to take great care to insure that the new procedures do not result in defendants being asked to incriminate themselves. The FMJA concluded that the proposed amendment was adequate.

The Committee voted unanimously to recommend that the amendment be approved as published and forwarded to the Judicial Conference.

Recommendation—The Advisory Committee recommends that the proposed amendments to Rules 5 and 58 be approved as published and forwarded to the Judicial Conference.

2. ACTION ITEM—Rule 37

Appellate Rule 12.1 and Civil Rule 62.1, both of which went into effect on December 1, 2009, create a mechanism for obtaining “indicative rulings.” They establish procedures facilitating the remand of certain post-judgment motions filed after an appeal has been docketed in a case where the district court indicated it would grant the motion. Proposed Rule 37, which was published for comment in 2010, parallels Civil Rule 62.1 and clarifies that this procedure is available in criminal cases. After reviewing the comments received following publication, the Advisory Committee recommends that the amendment be approved as published and forwarded to the Judicial Conference.

The Committee received two comments concerning Rule 37. The FMJA stated that it “endorses the proposed changes.” Writing on behalf of the NACDL, Peter Goldberger expressed support for the proposal and suggested two additions to the Committee Note that might be helpful to practitioners with little experience in appellate procedures:

(1) a parenthetical mentioning the possibility that the conditions of release or detention pending execution of sentence or pending appeal may be modified in the district court without resort to the new procedure; and

(2) a reference to the availability of the procedure in Section 2255 cases. The NACDL proposed adding such a reference to the portion of the Committee Note that reads:

In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule

33(b)(1) (*see United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court's authority to act in the face of a pending appeal.

After discussion, the Advisory Committee declined both of the NACDL's suggestions. The Committee determined that the first suggestion went substantially beyond the focus of the amendment itself, running the risk of being either over- or under-inclusive and violating the Standing Committee's policy of keeping Committee Notes short. Regarding the NACDL's second suggestion, the language the NACDL identified for purposes of adding a Section 2255 reference tracks the language of the Committee Note accompanying Appellate Rule 12.1, which was approved by the Standing Committee after considerable discussion. Prior to publishing proposed Criminal Rule 37, the Advisory Committee wrestled with whether to include a reference to the use of the indicative rulings procedure in Section 2255 cases. It eventually decided that the Committee Note as written already makes clear that the identified uses are not exclusive. The Advisory Committee maintained that conclusion after considering the NACDL's comments.

At the conclusion of this discussion, the Advisory Committee voted unanimously to recommend that Rule 37 be forwarded to the Standing Committee as published.

Recommendation—The Advisory Committee recommends that proposed Rule 37 be approved as published and forwarded to the Judicial Conference.

3. ACTION ITEM—Rule 15

The proposed amendment to Rule 15 would authorize the taking of depositions outside the United States without the defendant's presence in special limited circumstances with the district judge's approval.

The purpose of the amendment

The amendment, which applies only to depositions taken outside the United States, provides a procedural mechanism to address cases in which important witnesses—both government and defense witnesses—live in, or have fled to, countries where they cannot be reached by the court's subpoena power.

The amendment authorizes *only* the taking of pretrial depositions; it does not speak to their ultimate admissibility at trial. As stated in the Committee Note, questions of admissibility are left to the courts to resolve on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

Issues concerning the propriety of allowing depositions for witnesses outside the United States and the procedures under which such depositions may be taken have arisen, and will continue

to arise, in cases such as *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 1312 (2009).¹ The Committee concluded that it was appropriate to distill the analysis in cases such as *Ali* and use it to set forth a procedural framework in the Federal Rules of Criminal Procedure.

The amendment requires case-specific findings regarding (1) the importance of the witness's testimony, (2) the likelihood that the witness's attendance at trial cannot be obtained, and (3) why it is not feasible to have face-to-face confrontation by either (a) bringing the witness to the United States for a deposition at which the defendant can be present or (b) transporting the defendant to the deposition outside the United States.

The new procedure does not apply if it is possible to bring the witness to the United States for trial or for a deposition at which the defendant can be present, or if it is feasible for the defendant to be present at a deposition outside the United States. The proposal thus creates a very limited exception to the requirement that the defendant must be present at any deposition under Rule 15 unless the defendant waives the right to be present or is excluded by the court for being disruptive.

Although the amendment would not predetermine the admissibility of any deposition taken pursuant to it, in drafting the amendment the Committee was attentive to both criteria developed in the lower courts and to Supreme Court Confrontation Clause precedent.

The history of the amendment

The Department of Justice wrote to the Advisory Committee in 2006 proposing that Rule 15 be amended. After a period of study and discussion from 2006 to 2008, the Advisory Committee sought and received Standing Committee approval to publish the proposed amendment for public comment in 2008.

After making several changes in response to public comments, in April 2009 the Advisory Committee recommended that the Standing Committee approve the proposed amendment and forward it to the Judicial Conference. Four comments were received in response to the publication

¹ The defendant in *Ali* was convicted of multiple crimes arising from his affiliation with an al-Qaeda terrorist cell and its plans to carry out terrorist acts in United States. Before trial Ali sought to suppress a confession he made in Saudi Arabia, alleging it was the product of torture by Mabath security officials. As Saudi citizens residing in Saudi Arabia, the Mabath officers were beyond the district court's subpoena power. The Saudi government denied the United States's request to allow the officers to testify at trial in the United States but permitted the officers to sit for depositions in Riyadh. The Saudi government had never before allowed such foreign access to a Mabath officer. After finding it was not feasible for Ali (who was in custody following his earlier extradition from Saudi Arabia) to be transported to Riyadh for the depositions, the district court adopted procedures similar to those outlined in the proposed amendment. Ali had defense counsel both in Riyadh and with him in the United States, the Saudi officials testified under oath, defense counsel was able to cross-examine the Mabath witnesses extensively, and a two-way video link allowed the defendant, judge, and jury to observe the demeanor of the witnesses. At trial the videotape presented side-by-side footage of the Mabath officers testifying and the defendant's simultaneous reactions to the testimony. On appeal the Fourth Circuit held that introduction of deposition testimony taken under those procedures did not violate the Confrontation Clause.

of the proposed amendment, and one witness representing the Federal Defenders testified concerning the amendment. The Magistrate Judges Association endorsed the proposal. The General Counsel of the Drug Enforcement Administration raised some issues concerning the drafting of the rule. The Federal Defenders and the National Association of Criminal Defense Lawyers opposed the rule and urged that it be withdrawn, or, at a minimum, substantially redrafted.

The principal arguments in the lengthy submissions from the Federal Defenders and NACDL concerned the effect of the proposed amendment on the defendant's rights under the Confrontation Clause of the Sixth Amendment. They argued that *Crawford v. Washington*, 541 U.S. 36 (2004), interprets the Confrontation Clause as providing an unqualified right to face-to-face confrontation that would preclude the admission of testimony preserved by a deposition taken under the proposed rule. There is no indication that the Supreme Court will continue to allow any exception to the right of face-to-face confrontation even when this would serve an important public policy interest and there are guarantees of trustworthiness. Moreover, the proposed amendment may not be confined to a small number of exceptional cases. The amendment is not, in the opponents' view, limited to cases where an interest as significant as national security is at issue, nor does it guarantee the level of participation by the defendant that was provided in *United States v. Ali*, 528 F.3d 210 (4th Cir. 2008), *cert. denied*, 129 S.Ct. 1312 (2009).

Specifically, as published the amendment (1) was not limited to transnational cases, (2) was not limited to felonies, (3) did not require a showing that the evidence sought is "necessary" to the government's case, and (4) imposed no obligation on the government to secure the witness's presence.

NACDL argued that the real significance of the amendment is not the taking of the depositions per se, but rather that it would enable the prosecution to present evidence at trial that has not been subject to confrontation. They argued that the amendment would in effect create a right to introduce the resulting deposition at trial, and as such exceed the authority of the Rules Enabling Act. It would also be a back door means of achieving the goals of the failed 2002 attempt to amend Rule 26. Rather than create inevitable constitutional challenges, they urge the Committee to await either legislation or further clarification from the case law. They also urged that the safeguards and limits in the proposed amendment are insufficient to restrict its scope and to guarantee the defendant's participation. In their view, "meaningfully participate . . . through reasonable means" creates only a vague and subjective test that offers little real protection. Similarly, the showing required would encompass every witness beyond the court's subpoena power. Finally, they noted there is reason to doubt the credibility and reliability of the testimony of the potential witnesses who are willing to be deposed, but not travel to the United States to testify. These will include, for example, persons who have fled justice in this country and know that their oath taken abroad will have no practical significance.

The Committee also heard testimony stressing the frequency with which the technology is inadequate or fails, as well as other problems that defense attorneys experience in taking foreign

depositions, such as the requirement in some countries that only local counsel can question witnesses.

The Advisory Committee adopted several amendments intended to address some of the issues raised during the comment period. It explicitly limited the amendment to felonies. After discussion, the Committee declined to adopt a requirement that the Attorney General or his designee certify or determine that the case serves an important public interest. Although there was support for a mechanism that would guarantee that requests under the new rule would be rigorously reviewed within the Department of Justice and made only infrequently, members were concerned that adding a provision in the rules requiring the action by the Attorney General might raise separation of power issues. (The Committee did add a provision requiring the attorney for the government to establish that the prosecution advances an important public interest, but this provision was deleted by the Standing Committee.)

The Committee also incorporated several minor changes suggested during the comment period and by the style consultant to improve the clarity of the proposed amendment.

The Committee did not adopt three other suggestions. First, it declined to limit the rule to government witnesses, though it recognized that there will be only a small number of cases in which a defendant will wish to use this procedure.² Second, the Committee declined to require the government to show that the deposition would produce evidence “necessary” to its case, viewing that standard as unrealistic when the government is still assembling its case. Third, the Committee declined to add a requirement that the government show it had made diligent efforts to secure the witness’s testimony in the United States. In the Committee’s view, this might actually water down the requirement in the rule as published that the witness’s presence “cannot be obtained.”

The Committee discussed the Confrontation Clause issues at length. Members emphasized that when that the government (or a codefendant) seeks to introduce deposition testimony, the court will rule on admissibility under the Rules of Evidence as well as the Sixth Amendment. Members stressed that providing a procedure to take a deposition did not guarantee its later admission, which could turn on a number of factors. For example, if the technology does not work well enough to allow the defendant to participate or to create a high quality recording, the deposition would likely not be admitted. Similarly, the situation might change so that it would be possible for the witness to testify at the trial. The decision to allow the taking of the deposition in no way forecloses a Confrontation Clause challenge to admission or one based on the Rules of Evidence. The Committee Note was amended to make this point clear.

² In cases involving a single defendant, Rule 15 would pose no difficulties if the defendant consented not to be present at the deposition of his witness, and there would be no Confrontation Clause barrier to the introduction of the deposition. However, in a case involving multiple defendants, one defendant might wish to depose a witness overseas, and another defendant who could not be present at the deposition might object to the admission of the evidence.

The proposed amendment is intended to meet the criteria developed in lower court decisions such as *Ali*, as well as the Supreme Court's Confrontation Clause decisions. Although there will undoubtedly be issues arising from the use of technology, members felt that the district courts have ample authority and experience to handle those issues on a case by case basis.

The Advisory Committee voted, with three dissents, to approve the proposed amendment to Rule 15, as revised, and to send it to the Standing Committee. The Standing Committee approved the amendment in June 2009, and the Judicial Conference approved it in September 2009.

In 2010 the Supreme Court remanded the proposed amendment to the Advisory Committee for further consideration. No statement accompanied the Court's action.

The Committee's recommendation

At its April meeting the Committee voted, with one dissent, to recommend that the Standing Committee approve and transmit a revised Rule 15 proposal to the Judicial Conference. The revised proposal makes no change in the text of the amendment approved in 2009, but the Committee Note has been substantially revised to clarify that compliance with the procedural requirements for the taking of the foreign testimony does not predetermine its admissibility at trial. Because the text of the amendment remained unchanged, there was no need for republication.

As revised, the Committee Note emphasizes that the proposed amendment does not predetermine whether depositions conducted outside the presence of the defendant would be admissible at trial. Rather, it is limited to providing assistance in pretrial discovery. As is the case with all depositions, courts determine admissibility on a case-by-case basis, applying the Federal Rules of Evidence and the Constitution.

The revised Committee Note emphasizes the limited scope of the proposed amendment, which is significantly different from an earlier amendment to Rule 26 that the Supreme Court declined to transmit to Congress. *See* 207 F.R.D. 89, 93-104 (2002). The focus of the proposed 2002 amendment to Rule 26 was the admissibility of evidence at trial; the amendment would have authorized the use of two-way video transmissions in criminal cases in (1) "exceptional circumstances," with (2) "appropriate safeguards," and if (3) "the witness is unavailable."

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 15 be approved as revised and forwarded to the Judicial Conference.

4. ACTION ITEM—Rule 12

With one dissent, the Advisory Committee voted to recommend that a proposed amendment to Rule 12 be published for public comment. Because the discussion of this recommendation is lengthy and includes an appendix which sets forth the research basis for the recommendations in greater detail, it is provided in a separate document and electronic file.

Recommendation—The Advisory Committee recommends that the proposed amendment to Rule 12 be approved for publication.

III. Discussion Items

A. Rule 16

In its consideration of whether Rule 16 should be amended and whether such an amendment could or should do more than restate existing Supreme Court authority on a prosecutor's disclosure obligations, the Advisory Committee conducted the largest survey in the Federal Judicial Center's history and held a special mini-conference in Houston, Texas, to discuss the survey's results and solicit feedback. Participants included defense counsel, prosecutors, judges, academics, agency counsel, and crime victims representatives. Judge Emmet Sullivan accepted the Committee's invitation to attend three of its meetings and to discuss the results of the Committee's ongoing study efforts. Chief Judge Mark Wolf also participated in Committee meetings. Additionally, the Committee heard from the Department of Justice's national discovery coordinator and other Department representatives regarding changes the Department is making internally to address the concerns Judge Sullivan raised.

After extended discussion at its April 2011 meeting, the Advisory Committee voted 6 to 5 not to pursue an amendment to Rule 16 at this time. The reasons for the Committee's decision can be summarized as follows:

First, the survey shows there is a lack of consensus among the federal judiciary as to whether an amendment is necessary.

Second, the Committee was impressed with the extent of institutional structural changes in policies, procedures, and training the Department of Justice has implemented following the *Stevens* case and the Committee was not persuaded that a rule change was required to ensure that those changes will carry over from one administration to the next.

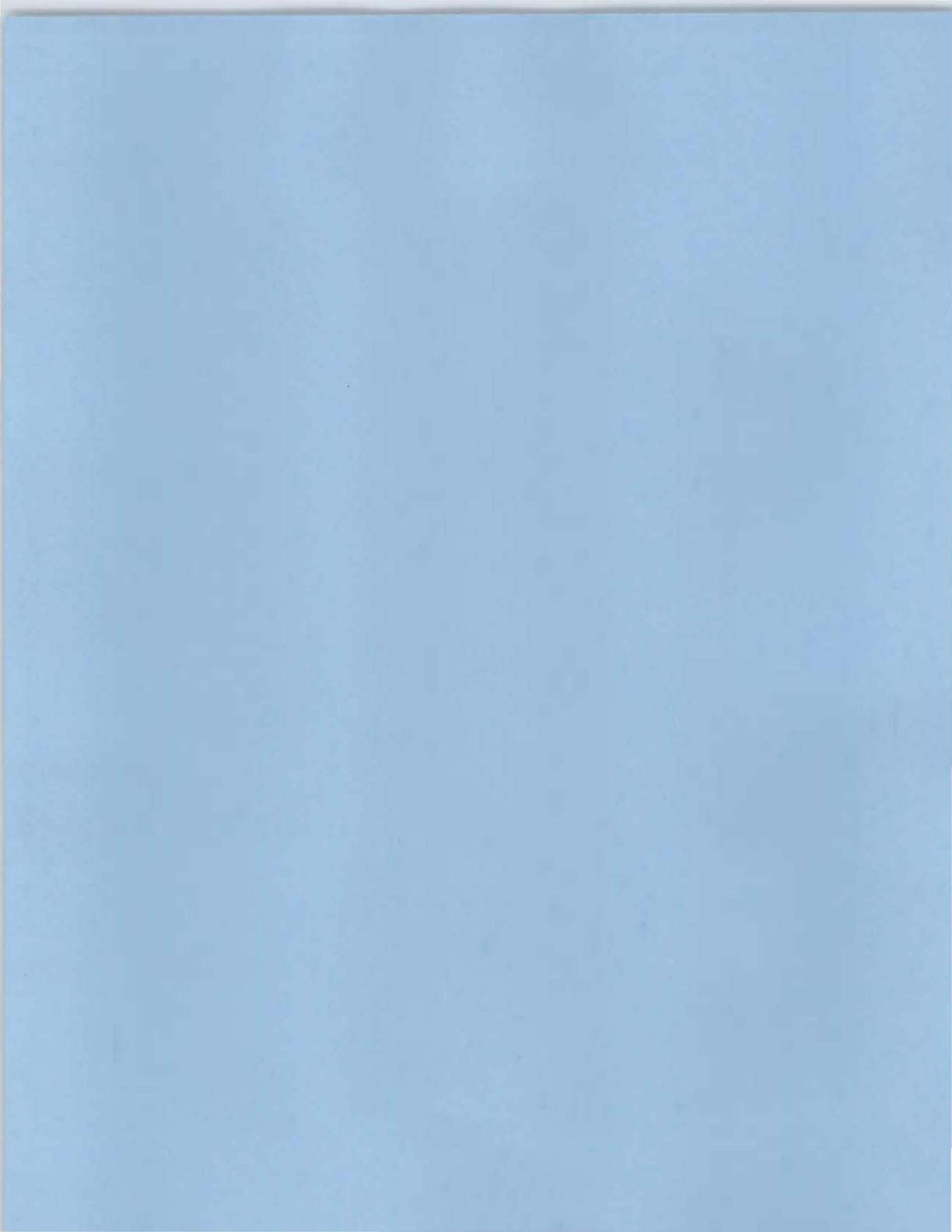
Third, the Committee was not convinced that the problem is so severe as to warrant a rule change when existing Supreme Court authority on a prosecutor's disclosure obligations is clear and for which substantial sanctions are available for non-compliance. No rule can effectively prevent intentional misconduct by prosecutors who knowingly withhold exculpatory information. While people agree that it is important to have the disclosure obligation effectively implemented, it is unclear that merely repeating a long-standing constitutional requirement in a rule would be an effective way to improve compliance. On the other hand, drafting a rule that goes beyond the existing constitutional obligations proved enormously difficult in ways that would clearly defeat the support necessary for such a rule change.

The Committee wrestled with several drafts of amendments. In doing so, some of the specific challenges the Committee encountered include:

- A conflict in timing. Through the Jencks Act, 18 U.S.C. § 3500, Congress has clearly restricted when actual witness statements may be disclosed, which may contain impeachment material. It is Judicial Conference policy to try to avoid making rule changes that create conflicts with existing law, so the Committee was reluctant to propose a rule that would conflict with the statutory timing under the Jencks Act and invite congressional rewriting of a carefully drafted discovery rule.
- Districts take a variety of approaches in this area and, especially in light of the lack of consensus, the Committee was reluctant to propose a rule that might interfere with each district's continuing ability to experiment with different discovery techniques.
- The Committee could not reach a consensus on the extent to which the rule needed to be amended to accommodate everyone's concerns. For example, the Committee struggled to find ways to amend the rule that would not jeopardize the government's ability to protect witnesses from harm, or to promote national security without creating an exception that some thought was too broad and fraught with danger. There was also concern that an amendment might discourage foreign governments from cooperating with the United States during international criminal investigations.
- The Committee could not reach consensus on a mechanism for unilateral withholding of discovery by prosecutors where witness safety concerns exist but are supported by less than evidence of probable harm.
- The Committee recognized that while any rule would generate litigation about its precise terms in the myriad of circumstances presented by criminal cases, a rule that attempted to codify a constitutional obligation could generate excessive litigation.
- The Department of Justice opposed any new rule and argued that pretrial disclosure should be bilateral, which would have raised significant issues.
- A rule attempting to restate the constitutional obligations stated in *Brady/Giglio* may not fit well with the common-law development of those obligations. Further, the *Brady/Giglio* obligations are not easily reduced to a list that parties and judges can reference and thereby know their obligation—the presumed object of a rule of procedure.
- The Committee was concerned that trying to avoid some of the *Brady/Giglio* problems by

eliminating the materiality requirement would significantly expand disclosure requirements beyond those constitutionally required and invite more litigation in any case of non-disclosure: (1) was there constitutional error from the non-disclosure; and (2) even if not, was there Rule error? If so, what should the consequences be?

The Committee is not, however, abandoning efforts to make improvements in this area and it also gave extended consideration to alternatives that could be implemented more quickly and effectively. After its most recent meeting, the Committee proposed to the Federal Judicial Center the creation of a Best Practices Guide for Criminal Discovery, inclusion of a discovery checklist in the DISTRICT JUDGES BENCHBOOK, and implementation of more educational programs for district judges on overseeing pretrial criminal discovery. These are alternatives that can be implemented more quickly than a rule change and which experience has shown are likely to be effective.





AGENDA ACTION ITEM—RULE 12

**Criminal Rules Advisory Committee
May 2011 Report to Standing Committee**

TABLE OF CONTENTS

A. INTRODUCTION

B. THE DECISION TO CLARIFY THE STANDARDS OF REVIEW IN RULE 12

- 1. The Standing Committee’s role in the development of the current proposal*
- 2. The need for clarification*

C. THE CHOICE OF “CAUSE AND PREJUDICE” AS THE SHOWING REQUIRED TO OBTAIN CONSIDERATION OF MOST LATE-FILED RULE 12 MOTIONS

- 1. Retaining (but clarifying) the Current Standard*
 - a. The “Waiver” standard of the present Rule 12*
 - b. The “Good Cause” standard of the present Rule 12*
- 2. The “Cause and Prejudice” Standard Also Applies in the Courts of Appeals*
- 3. The Decision to Specify in the Rule that Rule 12 Controls, Not Rule 52*

D. WHY THE COMMITTEE USED A DIFFERENT STANDARD FOR MOTIONS CHALLENGING THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE

- 1. The Committee’s Original Proposal to Amend Rule 12*
- 2. The Committee’s Revised Proposals in Response to Standing Committee Concerns*

E. WHY THE COMMITTEE INCLUDED DOUBLE JEOPARDY CLAIMS IN THE CATEGORY SUBJECT TO A SHOWING OF PREJUDICE ONLY

F. OTHER FEATURES OF THE PROPOSAL

- 1. Jurisdictional Issues*
- 2. Deleting (b)(2)*
- 3. Spelling Out the Claims That Must Be Raised Before Trial*
- 4. The Availability Requirement*
- 5. The Capable-of-Determination-Without-Trial Requirement*
- 6. Reorganization*
- 7. Conforming Amendment to Rule 34*

APPENDIX

A. SUPREME COURT PRECEDENT ON THE REVIEW OF LATE-RAISED ERROR

- 1. Consideration of error "waived" under Rule 12: The Supreme Court's standard.*
- 2. Olano and the development of plain error review under Rule 52(b) for unraised errors; confusion about the meaning of "waiver" under Rule 52.*

B. COURT OF APPEALS INTERPRETATIONS TODAY: WHICH STANDARD APPLIES?

- 1. Consider the claim if the defendant can meet the Rule 12 exception for "good cause."*
- 2. Require the defendant to meet the Rule 12 exception for "good cause," then if cause is established, review the late claim for plain error under Rule 52(b).*
- 3. Apply plain error under Rule 52(b) instead of Rule 12.*
- 4. Determine if district court would have abused its discretion had it been raised.*

C. THE TEXT OF THE COMMITTEE'S PAST AND PRESENT PROPOSALS

- 1. The current proposal*
- 2. The January 2011 proposal*
- 3. The June 2009 proposal*

A. INTRODUCTION

The Criminal Rules Committee has been studying a proposal to amend Fed. R. Crim. P. 12 since 2006. It returns for the third time to the Standing Committee seeking authorization to publish for notice and comment a substantially revised rule. In response to the Standing Committee's suggestions and concerns raised in January 2011, the Advisory Committee undertook at its Spring meeting a final and more fundamental revision of Rule 12. The current proposal responds to each of the three major issues raised by the Standing Committee six months ago. It makes the following new changes:

1. Deleting use of the terms "waiver" and "forfeiture"

The revised proposal no longer employs the terms "waiver" or "forfeiture." Numerous participants at the Standing Committee expressed concern that even as restructured in January 2011, subdivision (e) ("Consequences of Not Making a Motion Before Trial as Required") still used the problematic terms "waiver" and "forfeiture." 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.

After discussion the Advisory Committee concluded that it would be feasible and desirable to revise the rule to avoid these terms. Although the elimination of these terms was not part of the purpose of the amendment as originally envisioned by the Advisory Committee, there was agreement that the use of the term "waiver" has been a source of considerable confusion (see cases discussed in the Appendix to this report). Redrafting to avoid the terms "waiver" and "forfeiture" will achieve clarity and avoid traps for the unwary.

2. The standard for review of late-raised claims and the relationship to Rule 52

The revised proposal, like the earlier proposal in June 2009 and the January 2011 proposal, 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 Rule 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 detail below, 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 failure to state an offense or double jeopardy, the amendment provides 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 is also intended to 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).

Finally, the amendment directly addresses the relationship between these provisions and Rule 52. It provides that “Rule 52 does not apply.”

3. *Outrageous government conduct and reorganization*

The revised amendment also reflects two other changes responsive to the comments of the Standing Committee and its style consultant in January 2011. First, because at least one circuit (the Seventh) does not recognize the defense of outrageous government conduct, the proposal omits any reference to the defense of outrageous government conduct. Second, the current proposal reflects some reorganization recommended by Professor Joseph Kimble to solve an organizational problem present in the current rule. Currently subdivision (d) (ruling on the motion) comes between the timing provisions in (c) and the consequences of failing to meet the timing requirements in (e). Professor Kimble recommended moving the provision on the consequences of failing to meet the deadline to solve this organizational problem. The current proposal bifurcates subdivision (c) and moves the redrafted provisions governing the consequences of failure to make a timely motion from Rule 12(e) to new paragraph (c)(2). Although the new proposal deletes current subdivision (e), it avoids renumbering the remainder of the rule by reserving subdivision (e).

The remainder of the memorandum will discuss in detail the Committee’s rationale for each aspect of the amended proposal. An Appendix providing case authority and the Advisory Committee’s current and prior proposals are provided at the end of the memorandum.

B. THE DECISION TO CLARIFY THE STANDARDS OF REVIEW IN RULE 12

Several reasons prompted the Advisory Committee to propose a clarification of the standard for consideration of claims and defenses not raised within the time prescribed by Rule 12(b)(3). The Advisory Committee expanded the scope of its initial proposal and explored the relationship between Rule 12 “waiver,” on the one hand, and the concepts of forfeiture and plain error under Rule 52(b) at the urging of the Standing Committee. The results of the Advisory Committee’s research have been described in the Appendix. Although the Supreme Court defined “good cause” under Rule 12 in its decisions in *Davis v. United States*, 371 U.S. 341, 364 (1963), and *Shotwell Mfg. Co. v. United States*, 411 U.S. 233 (1973), there has been a great deal of litigation and a multiplicity of approaches have developed in different circuits. The Advisory Committee concluded that an amendment clarifying the standard of review would benefit courts and litigants, and would eliminate the current disparity in treatment of similar cases that arise in different circuits.

1. The Standing Committee’s role in the development of the current proposal

Although the Advisory Committee initially proposed a very narrow amendment to Rule 12 dealing solely with failure-to-state-an offense claims, the Standing Committee twice urged the Advisory Committee to undertake a more comprehensive examination of the Rule. The amendment proposed by the Advisory Committee in 2009 merely added a new standard of relief from waiver for claims of a failure to state an offense if a defendant showed prejudice to his substantial rights. The Standing Committee remanded this proposal with instructions to give additional consideration to the concepts of “waiver” and “forfeiture” and how Rule 12 interacted with Rule 52. After the Advisory Committee reworked the rule more substantially, allowing for certain claims to be considered “forfeited,” not waived, and to be considered for relief on a showing of plain error, the Standing Committee again remanded. Members urged the Advisory Committee to consider not using the terms “waiver” and “forfeiture.” They also expressed concern that using plain error review for more favored claims might be too demanding a standard. The Advisory Committee responded to the latest Standing Committee remand by eliminating the terms “waiver” and “forfeiture” and instead simply specifying the circumstances under which a late-filed motion may be considered, adding that the Rule 12 standards are to be used and not those of Rule 52. Thus the Advisory Committee’s latest clarification of the Rule 12 standards is in answer to specific suggestions of the Standing Committee.

2. The need for clarification

There is applicable Supreme Court precedent interpreting the current Rule 12(e), and in particular its “good cause” standard, which some lower courts have been failing to follow. In *Shotwell Mfg. Co. v. United States*,¹ reviewing on direct appeal the defendants’ untimely objection to jury selection, the Court held that the standard for relief from waiver under Rule 12 included an inquiry into prejudice. And in *Davis v. United States*,² the Court held that “a claim once waived pursuant to [Rule 12] 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.”³ The Court has never questioned the interpretations of Rule 12’s “good cause” standard that it announced in *Shotwell* and *Davis*. Indeed, in later cases it has reiterated both key points about that standard: First, the standard is cause *and prejudice*,⁴ and second, the standard applies on direct appeal as well as in the district court.⁵

Despite *Shotwell* and *Davis*, courts of appeals have divided over the standard for reviewing claims that should have been raised before trial under Rule 12, but were instead raised for the first time on appeal. Although none of the Court’s cases discussing Rule 52 – including *Olano v. United*

¹371 U.S. 341, 364 (1963).

²411 U.S. 233 (1973).

³*Id.* at 242 (emphasis added).

⁴*See Murray v. Carrier*, 477 U.S. 478, 494 (1986) (“the former Rule 12(b)(2) . . . as interpreted in [*Shotwell* and *Davis*] treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule”); *United States v. Frady*, 456 U.S. 152, 185 (1982) (Brennan, J., dissenting) (stating that the Court in *Shotwell* “construed the cause exception to Rule 12(b)(2) as encompassing an inquiry into prejudice.”)

⁵*See Wainwright v. Sykes*, 433 U.S. 72, 84 (1986) (noting that in *Davis*, “we concluded that review of [a claim waived under Rule 12] should be barred on habeas, *as on direct appeal*, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation”).

*States*⁶ – even mention Rule 12, some courts of appeals have applied plain error review to such claims. Four approaches have emerged:

- (1) The majority of circuits will not consider the claim unless the defendant can meet the Rule 12 exception for “good cause” and do not apply plain error;
- (2) Several decisions from the Seventh Circuit require the appellant to establish first “good cause” under Rule 12 and then, in addition, establish plain error under Rule 52(b);
- (3) Cases from the Fifth Circuit, and a number of cases from various circuits, reason that even without showing of cause under Rule 12, the claim should be remedied if it amounts to plain error; and
- (4) Several recent decisions of the Seventh Circuit require the appellate court to ask whether it *would have been* within the trial court’s discretion to have denied a claim as untimely if the claim *had been* raised in the trial court.

These approaches and cases following each are explained in more detail in the Appendix.

Clarifying the rule’s standards will benefit litigants and courts alike, giving litigants clearer expectations regarding the precise consequences of a failure to timely file their required motions and guiding courts out of the present disagreement. Recent appellate decisions have noted the need for clarification.⁷ Finally, clarifying the rule’s standards will promote a uniformity of treatment for Rule 12 motions in place of the current confusion, which has resulted in similar situations receiving different treatment depending on the particular circuit and even sometimes based on the particular panel within the same circuit.

⁶ 507 U.S. 725 (1993). The Supreme Court cases reviewing late-raised error, including *Shotwell*, *Davis*, and *Olano*, are examined in more detail in the Appendix.

⁷ See *United States v. Burke*, 633 F.3d 984, 988 (10th Cir. 2011) (noting “confusion in this area” and deciding to “clarify” by holding that Rule 12 and not Rule 52 applies to suppression motions raised for the first time on appeal); *United States v. Rose*, 538 F.3d 175, 183–84 (3d Cir. 2008) (noting that court has chosen to “analyze and resolve explicitly the tension between Rule 52(b) and Rule 12 where suppression motions are concerned”).

C. THE CHOICE OF “CAUSE AND PREJUDICE” AS THE SHOWING REQUIRED TO OBTAIN CONSIDERATION OF MOST LATE-FILED RULE 12 MOTIONS

1. Retaining (but clarifying) the Current Standard

Rule 12 as presently written provides that a party “waives” any defense, objection, or request that he has not timely filed, but that “[f]or good cause, the court may grant relief from the waiver.” Fed. R. Crim. P. 12(e). There are two important aspects of this standard: (1) the notion of “waiver” as stated in the present rule was intended to bar any consideration of a late-filed motion unless the court found an adequate basis to excuse the waiver (for “good cause”); and (2) the “good cause” standard for relief from the waiver as interpreted by the Supreme Court encompasses a showing of both “cause,” – *i.e.*, a satisfactory reason for the party’s meeting the deadline – and prejudice. The Advisory Committee found no reason to change either aspect of the standard as applied to the majority of motions that fall within the Rule (though it did slightly modify the language to more clearly state that standard).

a. The “Waiver” standard of the present Rule 12

It is clear from the present rule that it was meant to extinguish and bar judicial consideration of a late-filed motion, absent a court’s finding of “good cause.” As discussed in detail in *United States v. Chavez-Valencia*, 116 F.3d 127, 130–31 (5th Cir. 1997), and *United States v. Rose*, 538 F.3d 175, 177–79 (3rd Cir. 2008), both the text and history of the Rule demonstrate that it was meant to require certain motions to be raised before trial, and that the failure to do so would result in a waiver of that claim, not a mere forfeiture. The Supreme Court has confirmed that meaning of the Rule in *Davis v. United States*, 411 U.S. 233 (1973). In that case, the Supreme Court described the question before it as a construction of Rule 12’s waiver provision, when it said, “We are called upon to determine the effect of Rule 12(b)(2) of the Federal Rules of Criminal Procedure on a postconviction motion for relief which raises for the first time a claim of unconstitutional discrimination in the composition of a grand jury.” *Id.* at 234. The district court denied Davis’s habeas petition, finding that he had waived the claim by not raising it under Rule 12(b), and that there was no cause to excuse the waiver. *Id.* at 235–36.

On Supreme Court review, the defendant argued that a fundamental constitutional right cannot be waived absent a finding after a hearing that the defendant had understandingly and knowingly relinquished the right. *Id.* at 236. The Supreme Court rejected that argument, noting that “[b]y its

terms,” the Rule “applies to both procedural and constitutional defects in the institution of prosecutions which do not affect the jurisdiction of the trial court.” *Id.* at 236–37. The Court found defendant’s reliance on other Supreme Court precedent on waiver inapposite where a specific rule, “promulgated by this Court and, pursuant to 18 U.S.C. § 3771, ‘adopted’ by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived.” *Id.* at 241. The Court therefore 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.” *Id.* at 242.

Davis thus makes clear that Rule 12 was intended to completely bar consideration of a claim that the Rule requires a party to raise before trial when the party fails to raise it on time, unless the party has shown cause and prejudice for his omission. While it is true that the notion of waiver often means a knowing and intentional relinquishment, the Supreme Court explained in *Davis* that that concept of waiver did not apply where the express waiver provision of Rule 12 governed to warn a litigant that his failure to comply with the rule would result in its waiver. *Davis*, 411 U.S. at 239–40.⁸

Several members of the Standing Committee suggested that it would avoid confusion if Rule 12 omitted use of the term “waiver” because the Rule’s concept of waiver is different from the definition most people consider typical of a waiver. The Advisory Committee’s current draft omits the term “waiver” and avoids using the word “forfeiture,” and instead expresses the same idea in different language. In doing so, the Advisory Committee did not intend to change the basic policy of the Rule with respect to the majority of motions the Rule requires to be raised pretrial: that is, that a claim not raised by the deadline the court sets is extinguished, absent a showing of cause and prejudice. Indeed, no one advocated a change in this standard; as a previous memo to the Advisory Committee explained, the Rule 12 Subcommittee found no basis for replacing the Rule’s present

⁸ In *United States v. Olano*, 507 U.S. 725, 733 (1993), the Supreme Court described the concept of waiver as “the ‘intentional relinquishment or abandonment of a known right,’” but it went on to clarify that certain features of a waiver, including “whether the defendant’s choice must be particularly informed or voluntary, all depend on the right at stake.” Lower courts have thus found that *Olano* and *Davis* are not inconsistent with each other, and that *Olano*, which never mentioned Rule 12 or *Davis*, did not overrule *Davis*. See *United States v. Weathers*, 186 F.3d 948, 957 (D.C. Cir. 1999) (finding no indication that *Olano* meant to redefine the meaning of Rule 12 as established in *Davis*); see also *Rose*, 538 F.3d at 183 (finding no indication that the Rule 12 concept of waiver—extinguishing an unraised claim—is at odds with *Olano*).

standard with plain error review, finding that “the reasons for denying relief for untimely claims absent a showing of cause and prejudice remain unchanged.” March 14, 2010, Memo Regarding Proposed Amendments to Rules 12 and 34 from Reporters Sara Beale and Nancy King to Criminal Rules Committee.

The Supreme Court explained one rationale for Rule 12’s waiver provision in *Davis*, 411 U.S. at 241, describing the kind of “sandbagging” that the Rule seeks to avoid:

If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult.

In addition, quite apart from the concern about “sandbagging,” considerations of judicial efficiency and economy also favor requiring litigants to file in advance of trial certain motions that are collateral to the merits and that can be resolved before trial. Moreover, for some motions that seek suppression of evidence or dismissal of an indictment, pre-trial resolution is important in order to allow for the possibility of an interlocutory appeal by the government, no longer available once jeopardy has attached (*see* 18 U.S.C. § 3731). *See United States v. Pope*, 467 F.3d 912, 919 (5th Cir. 2006). And in the case of suppression motions, if no motion has been made before trial, the government may rely on that in choosing the quantity or quality of evidence it introduces, a decision that might be quite different if it knew that a suppression motion could be entertained later. *United States v. Chavez-Valencia*, 116 F.3d 127, 132 (5th Cir. 1997). For all these reasons, the Advisory Committee saw no basis for making any substantive change in the “waiver” except for “good cause” standard of Rule 12 for the majority of motions governed by the Rule. Avoiding the term “waiver,” the proposed amendment now speaks in terms of “consequences” of an untimely motion under Rule 12(b)(3), and states that a court “may consider the defense, objection or request” only under certain specified circumstances.

b. The “Good Cause” standard of the present Rule 12

The second aspect of the present Rule 12 is the feature that allows relief from the waiver of a claim if the party shows “good cause.” The Advisory Committee also saw no reason to change that aspect of the Rule’s standard, believing that the Rule was intended – and should continue – to significantly restrict relief for untimely claims. The Advisory Committee did, however, conclude that the language of the Rule should be modified slightly to bring it in line with the Supreme Court’s reading of the Rule in *Davis*. As noted above and described in more detail in the Appendix, the Supreme Court was quite clear in *Davis*, drawing from its decision in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 363 (1963), that the “good cause” provision of Rule 12 must include a showing of actual prejudice as well as a reason for the late filing (*see Davis*, 411 U.S. at 243–45; *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)]”)).

In later cases involving the “cause and prejudice” standard as applied to other types of defaulted claims brought on collateral attack, the Court referred to *Davis*, reiterating that the same test applied in the Rule 12(b) context. In *Murray v. Carrier*, 477 U.S. 478 (1986), for example, both Justice O’Connor’s opinion for the Court and Justice Stevens’ opinion concurring in the judgment agreed on the content of Rule 12’s “cause” standard. 477 U.S. at 494 (“the former Rule 12(b)(2) of the Federal Rules of Criminal Procedure, as interpreted in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341, 83 S. Ct. 448, 9 L.Ed.2d 357 (1963), and *Davis v. United States*, 411 U.S. 233, 93 L.Ed.2d 216 (1973), treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule”) (opinion of the Court); *id.* at 502–03 (though “[t]he term ‘prejudice’ was not used in Rule 12(b)(2),” the Court in *Shotwell* “decided that a consideration of the prejudice to the defendant, or the absence thereof, was an appropriate component of the inquiry into whether there was ‘cause’ for excusing the waiver that had resulted from the failure to follow the Rule”) (Stevens, J., concurring in the judgment). *See also Coleman v. Thompson*, 501 U.S. 722, 745 (1991) (noting that *Davis* had held that a defaulted Rule 12 claim could not be heard absent a showing of cause and actual prejudice).

The Advisory Committee found, however, that some confusion had developed in the federal appellate courts regarding the meaning of the “good cause” requirement in Rule 12. Many courts have

held, consistently 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.⁹ But other opinions reflect confusion about the need for a showing of prejudice. See *Rose*, 538 F.3d at 184; *United States v. Anderson*, 472 F.3d 662, 670 (9th Cir. 2006); *United States v. Campbell*, 999 F.2d 544 (9th Cir. 1993), 1993 WL 263432, *6 n.2 (unpublished); *United States v. Cathey*, 591 F.2d 268, 271 n.1 (5th Cir. 1979).

The Advisory Committee saw no reason to depart from the standard of “good cause” as interpreted by the Supreme Court and applied by the majority of courts of appeals. If the Rule’s policy of strictly requiring timely motions is to have any teeth, a party should not be permitted to raise an untimely claim unless he can show both a good reason not to have met the deadline and some actual prejudice to his case if his claim is not heard. As the Supreme Court explained in *Davis*, there are good reasons to require that certain motions be raised and resolved in the district court when objections can be remedied before a trial commences. 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 same reasons that motivated the rule – the concern for preventing “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 argue against allowing consideration of the 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).

Because, however, of the disagreement that has developed among some courts as to whether “good cause” includes a requirement to show prejudice, and because this particular use of the term “good cause”—to include both a sufficient reason and prejudice—is not obvious from the face of the rule, the Advisory Committee thought it advisable to modify the language of the rule to ensure that

⁹ *See United States v. Kopp*, 562 F.3d 141, 143 (2d Cir.), *cert. denied*, 130 S. Ct. 529 (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).

the current standard is read as construed by *Davis* and *Shotwell*. Thus the proposed amendment provides that an untimely motion may still be considered if “the party shows cause and prejudice.”¹⁰

2. *The “Cause and Prejudice” Standard Also Applies in the Courts of Appeals*

Although there has been no question that the “good cause” or “cause and prejudice” standard of Rule 12 applies whenever a late-filed motion is presented to the district court, the appellate courts are divided on the question of the applicable standard when a party raises a Rule 12 motion for the first time in the court of appeals. As discussed in the Appendix, eight circuits have applied Rule 12’s “good cause” standard when a party raises for the first time on appeal a claim that Rule 12 requires to be raised before trial.¹¹ But other courts have decided or assumed that at the appellate level Rule 52(b)’s plain error rule applies, although sometimes in combination with Rule 12’s good cause standard.¹² (And some courts take differing views even within the same circuit.¹³)

¹⁰ No other similar example of the use of the term “good cause” with this particular meaning has been brought to the Advisory Committee’s attention; thus it did not appear necessary to change that term as it appears elsewhere in the rules.

¹¹ *E.g.*, *United States v. Weathers*, 186 F.3d 948, 954–58 (D.C. Cir. 1999); *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003); *United States v. Rose*, 538 F.3d 175, 182–85 (3d Cir. 2008); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004); *United States v. Collier*, 246 Fed. Appx. 321 (6th Cir. 2007) (unpublished); *United States v. Anderson*, 472 F.3d 662, 668–69 (9th Cir. 2006); *United States v. Burke*, 633 F.3d 984, 988–91 (10th Cir.), *cert. denied*, 2011 WL 939018 (2011); *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006).

¹² *See United States v. Lugo Guerrero*, 524 F.3d 5, 11 (1st Cir. 2008) (assuming claim could be reviewed for plain error despite Rule 12 waiver); *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, 730–31 (7th Cir. 2005).

¹³ *Compare Nix*, 438 F.3d at 1288 (finding claim waived) *with United States v. Sanders*, 315 Fed. Appx. 819, 821 (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, 626–27 (7th Cir. 1992) (finding multiplicity claim waived), *and United States v. Welsh*, 721 F.2d 1142, 1145 (7th Cir. 1983) (finding suppression

The Advisory Committee concluded that it would be desirable to clarify the rules to promote uniformity on this important point, and that the amendment should make it clear 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 to be raised before trial. In so doing, the proposed amendment adopts the position taken by the majority of circuits.¹⁴

There are a number of reasons for specifying that Rule 12’s standard must be applied both at the district court level and in the court of appeals, and that Rule 12 rather than Rule 52(b)’s plain error standard governs in the court of appeals.

Applying Rule 52(b) rather than Rule 12(e) would undercut the policy expressed in Rule 12¹⁵ and create a perverse incentive to raise late claims on appeal rather than in the district court. Indeed, in *Davis* the Supreme Court emphasized that it was important to continue using Rule 12’s scheme of waiver/good cause beyond the trial court proceedings in order to preserve the policy of the Rule. It was argued in *Davis*, a proceeding under Section 2255, that Rule 12’s waiver standard did not apply to bar consideration of the defendant’s claim on collateral attack. After noting that “Congress did not deal with the question of waiver in the federal collateral relief statutes,” the Court determined that Rule 12’s express waiver standard must apply throughout the criminal proceedings in order to give effect to the Rule. It explained:

claim waived), with *United States v. Percival*, 756 F.2d 600, 611 (7th Cir. 1985) (finding plain error), and *United States v. Clarke*, 227 F.3d 874, 880-881 (7th Cir. 2000) (using plain error in the alternative).

¹⁴See, e.g., *Weathers*, 186 F.3d at 954–58; *Rose*, 538 F.3d at 182–85; *Anderson*, 472 F.3d at 668-669; *Burke*, 633 F.3d at 988-991.

¹⁵A related line of analysis has been persuasive to many appellate courts, which have concluded that the more specific provisions of Rule 12, rather than the more general provisions of Rule 52(b), should be controlling when appellate courts review claims not raised before trial as required by Rule 12(b)(3). See *Rose*, *supra*, 538 F.3d at 183; *Burke*, 633 F.3d at 989; *Weathers*, 186 F.3d at 955. These cases reflect a recognition that the more specific standard of Rule 12(e) that is expressed as waiver with relief for good cause is not consistent with the more general plain error/forfeiture standard of Rule 52(b), and application of Rule 52(b) would nullify Rule 12.

We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of ‘cause’ for relief from waiver, nonetheless intended to perversely negate the Rule’s purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim 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. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

411 U.S. at 242.

It would be odd indeed if the waiver/good cause standard of Rule 12 applied in the district court and again on collateral review, but the more generous plain error standard applied in the court of appeals. If it would “perversely negate the Rule’s purpose” to use a different standard on collateral review, surely it would also be perverse to use a different standard on direct review. The Court must have meant, when it said that a “claim once waived . . . may not later be resurrected either in the criminal proceedings or in federal habeas” that “criminal proceedings” includes direct appeal.

And it is quite clear, also from Supreme Court case law, that a plain error standard is both different from and more lenient than the “waiver except for cause and prejudice” standard of Rule 12. In *United States v. Frady*, 456 U.S. 152 (1982), the Court considered a claim of error in the jury instructions, a claim that the defendant had failed to raise either in the trial court or on appeal. On collateral attack, he argued that his default should be reviewed according to the plain error standard of Rule 52(b), but the Supreme Court disagreed and held that the court of appeals was wrong to have used that standard, which is appropriate for correcting obvious injustices on direct appeal, but is not for use on collateral review. Instead, referring to previous cases that had made the same point, the Court reiterated that a defendant must “clear a significantly higher hurdle” on collateral review “than would exist on direct appeal” and that the plain error standard was not sufficiently stringent at the collateral stage. *Frady*, 456 U.S. at 166. The Court then referred back to *Davis* and held that the proper standard was the “cause and actual prejudice” standard enunciated there, which it had later

confirmed applied not only in the Rule 12 context but in other cases when a defendant sought relief on collateral attack from a trial error to which no objection had previously been made. *Id.* at 167–68.

See also 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*)).

In short, the Supreme Court has unequivocally stated that the same “cause and actual prejudice” standard described in *Davis* is a far harder standard to meet than Rule 52’s plain error standard. Thus, the reasoning in decisions of the courts cited in the Appendix, *infra*, is correct: if the courts of appeal revert to Rule 52’s plain error standard when a Rule 12 claim is raised for the first time on appeal, the effect is to give the defendant a more lenient standard to satisfy than he would have faced if his motion were late but still made in the district court. This is an illogical result if Rule 12’s policy of requiring certain motions to be made before trial is to have any real meaning. And such a result would also mean that Rule 12’s stringent standard actually adds nothing to Rule 52(b)’s forfeiture standard, rendering Rule 12 entirely ineffective. This is true whether plain error is used exclusively on appeal or if it is used as an alternative to Rule 12’s good cause requirement. Once it is established that good cause has not been shown, Rule 12 should allow no further consideration of the claim, even for plain error, or the effect of the waiver is nullified.

Nor should the two standards, “cause and prejudice” and plain error, be applied in combination, as some courts have done.¹⁶ *Frady* itself indicates that the two standards are distinct – either one or the other is appropriate, but not both – and mutually exclusive. If only one of the two standards, not both, is appropriate on collateral review, it is hard to see why they should be combined on direct appeal. In addition, overlaying the two standards forces an appellant to satisfy *two* demanding standards instead of just one, a result that seems even harsher than Rule 12’s policy of allowing relief from a waiver if the litigant can satisfy the stated standard.

One major concern prompting an appellate court’s refusal to apply Rule 12’s cause and prejudice standard is the view that Rule 12’s cause and prejudice standard must apply only at the trial court level because “cause and prejudice” is the sort of factually based determination that can only be

¹⁶ *See, e.g. United States v. King*, 627 F.3d 641, 647 (7th Cir. 2010) (“King has not established good cause for his failure to present the illegal entry argument previously. And even if he passed that threshold, King has not shown error, much less plain error, in the district judge’s decision.”).

made by a district court. See *United States v. Acox*, 595 F.3d 729, 731 (7th Cir. 2010). *Acox*, while recognizing that Rule 52(b) should not be used “to undercut an express provision of Rule 12(e)” (*id.* at 731), went on to conclude that Rule 12’s waiver provision is for the district court only. Though the Rule says that “the court” may grant relief from the waiver, not specifically “the district court,” *Acox* reasoned that it must mean the district court because “Rule 12 as a whole governs pretrial proceedings in federal district courts.” *Id.* at 731. The court then determined that the court of appeals could only review what the district court had decided regarding whether to find “good cause,” and if no relief from the waiver was requested of the district court, the court of appeals would determine whether, had a motion for relief been made and denied, the district court would have abused its discretion in finding no good cause. *Id.* at 732.

But when the text of the rule is not limited to consideration of “good cause” by district courts alone, it seems odd to conclude that Rule 12 contemplates appellate review of a district court action that did not occur. And in other decisions, the Seventh Circuit has indicated that the appellate court could indeed assess cause itself.¹⁷ Thus the concerns expressed in *Acox* have not deterred that court from using the cause standard in other cases. And while *Acox* distinguished a “handful” of that court’s prior decisions assessing cause in the first instance, it did not distinguish or even mention the decisions in footnote 17. So it is not at all clear that *Acox* represents the settled view of the Seventh Circuit on this point.

¹⁷See *United States v. Dimitrova*, 266 Fed. Appx. 486, 489 (7th Cir. 2008) (“Dimitrova has offered no cause or explanation for her failure to raise the suppression issue before trial . . . [She] did not offer a ‘good cause’ explanation sufficient under Rule 12(e) and *Johnson* in her posttrial motion, nor has she done so on appeal.”); *United States v. Quintanilla*, 218 F.3d 674, 678–79 (7th Cir. 2000) (“Although it is the appellant’s burden to establish ‘cause’ for his failure to raise the no-knock issue in a motion to suppress, Quintanilla’s brief fails to even suggest a reason for the failure . . . Furthermore . . . [g]iven the circumstances surrounding the actual entry into the defendant’s home . . . [w]e are convinced that Quintanilla has failed to establish cause for his failure to raise the authorization of a no-knock entry in a motion to suppress.”); *United States v. Evans*, 131 F.3d 1192, 1193 (7th Cir. 1997) (“Evans has not tried to establish ‘cause’ for neglecting this subject earlier; indeed, his opening brief does not mention the fact that the issue was not presented to the district court. His reply brief halfheartedly contends that trial counsel was ineffective for failing to make the necessary motion to suppress, but this argument is too late and too undeveloped to be considered.”).

Record concerns have not prevented most appellate courts from applying the Rule 12 cause and prejudice standard. When the record does contain enough information, courts have either reviewed the record to evaluate the propriety of the district court's determination,¹⁸ or reviewed the record themselves to evaluate the cause claimed for the first time on appeal.¹⁹ When no record on cause and prejudice exists, either because no attempt was made to show good cause to the district court or because no motion was ever made in the district court, some courts of appeals seem to invite a showing of good cause on appeal by either noting that appellant has made no attempt to

¹⁸*United States v. Rodriguez-Lozada*, 558 F.3d 29, 37–38 (1st Cir.) (record showed no abuse of discretion in district court's rejection of claim of good cause), *cert. denied*, 130 S. Ct. 283 (2009); *United States v. Mendoza-Acevedo*, 950 F.2d 1, 3 (1st Cir. 1991) (same); *United States v. Blair*, 214 F.3d 690, 699–701 (6th Cir. 2000) (upholding district court's rejection of good cause because "George has failed to demonstrate an objective external factor that prohibited him from raising an objection to the jury selection plan prior to his trial"); *United States v. Moore*, 98 F.3d 347, 351 (8th Cir. 1996) (district court correctly denied claim of good cause when defendants were personally present during the stop they belatedly challenged and they were responsible for informing counsel of those facts).

¹⁹*United States v. Heilman*, 377 Fed. Appx. 157, 201 n.33 (3d Cir.) ("we are not persuaded by Napoli's argument that the second superseding indictment was so vague as to preclude a misjoinder argument" when defense counsel received relevant materials a month before trial, allowing plenty of time to develop a basis for a severance motion), *cert. denied*, 131 S. Ct. 490 (2010).

show cause or evaluating in the first instance the proffered showing.²⁰ Other courts suggest a remand for an evidentiary hearing on the issue.²¹ And some decisions state that attorney ineffectiveness as cause should be presented in a motion under 28 U.S.C. § 2255.²² Finally, some appellate courts have decided that in the absence of a record on cause, the appellant simply loses on his request for relief from waiver.²³

²⁰*See United States v. Howard*, 998 F.2d 42, 52 (2d Cir. 1993) (“counsel offers no reason for her failure to discuss with her client the circumstances of his arrest before the court’s April 26 deadline” and in the absence of “a demonstration of cause, we need not address the merits of Santana’s fourth amendment argument”); *United States v. Collier*, 246 Fed. Appx. 321, 335 (6th Cir. 2007) (unpublished) (“record reflects no attempt on Defendant’s part to demonstrate good cause before the district court, or even to assert these challenges during trial. Nor does Defendant’s brief on appeal address or explain his Rule 12(e) waiver.”); *United States v. Anderson*, 472 F.3d 662, 668–69 (9th Cir. 2006) (though appellant never asked district court for relief from waiver, appellate court has “authority to decide whether there is good cause;” based on representations in reply brief and absence of document necessary to appellant’s claim in the docket, court of appeals found good cause and granted relief from waiver); *United States v. Suescun*, 237 F.3d 1284, 1286–87 (11th Cir. 2001) (noting that appellant did not ask district court for relief from his waiver, and that “[a]rguably, he could have asked us to grant relief from the waiver, but he has not done so”).

²¹*See Weathers*, 186 F.3d at 958–59 (where appellant claimed ineffective assistance of counsel as cause for waiver of claim, court remanded to district court for factual development of ineffectiveness claim); *Rose*, 538 F.3d at 184 (where cause argued for first time on appeal, court could remand for evidentiary hearing, but no need here where appellant offered no colorable explanation for his failure to file timely claim).

²²*See Evans*, 131 F.3d at 1193; *United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006); *Rudisill v. United States*, 222 Fed. Appx. 844, 846 (11th Cir. 2007).

²³*See United States v. Nunez*, 19 F.3d 719, 722 (1st Cir. 1994) (“we have not had occasion, nor are we disposed, *sua sponte*, to conjure relief from waiver under Rule 12(f) in circumstances where no cause for relief appears and the district court record does not enable reliable appellate review on the merits”); *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) (“Murad had ample opportunity to raise and develop this argument before the District Court and he has not provided, much less established, any reasonable excuse for his failure to do so. Accordingly, we hold that Murad has waived this argument.”); *United States v. Crowley*, 236 F.3d 104, 109–10 (2d Cir. 2000) (where

In sum, for all the reasons explained above, the Advisory Committee concluded that the better-reasoned view was that Rule 12's cause and prejudice standard should apply both at the district court level and on appeal, and the Advisory Committee therefore chose to clarify the Rule so that courts and litigants will clearly understand that any request for relief from the waiver must be judged by the same standard whenever it is presented.

3. The Decision to Specify in the Rule that Rule 12 Controls, Not Rule 52

Finally, the Advisory Committee chose to state explicitly in Rule 12 that Rule 52 does not apply, making it clear that the new standards in Rule 12 *substitute* for the default standards provided in Rule 52. Providing more clarity about the relationship between the two Rules is something the Standing Committee requested in 2009.

The Advisory Committee wanted to foreclose any argument that by including the language drawn from Rule 52(a), while being silent about plain error and Rule 52(b), the Rule would leave open the possibility of applying plain error. In *United States v. Vonn*, 535 U.S. 55 (2002), the Court held that plain error review under Rule 52(b) applies to untimely Rule 11 errors, despite the language in Rule 11(h), which provides: "A variance from the requirements of this rule is harmless error if it does not affect substantial rights." The Court concluded (with only Justice Stevens dissenting), that "there are good reasons to doubt that expressing a harmless-error standard in Rule 11(h) was meant to carry any implication beyond its terms. At the very least, there is no reason persuasive enough to think 11(h) was intended to repeal Rule 52(b) for every Rule 11 case." *Vonn*, 535 U.S. at 74. Although the present amendment could be distinguished from the provision interpreted in *Vonn*, the Advisory Committee concluded that *Vonn* demonstrates the value of explicitly addressing the relationship between the proposed amendment and Rule 52.

Furthermore, addressing this issue in the text of the rule is preferable to addressing it in the Committee Note. As a policy matter, any substance should be addressed in the rules rather than in the

district court gave no explanation of how defendants had shown cause for non-compliance with Rule 12 "and we have found nothing in the record that would explain why defendants did not raise their objection to the specificity of the indictment before trial," district court's decision to grant relief from waiver was legal error).

accompanying note. Addressing the applicability of Rule 52(b) in the text of the rule is particularly appropriate because of the continuing confusion in the lower courts, as noted above, about what standard of review Rule 12 requires for untimely claims. Adding language to the text of the Rule would eliminate uncertainty and resulting litigation costs.

D. WHY THE COMMITTEE USED A DIFFERENT STANDARD FOR MOTIONS CHALLENGING THE INDICTMENT FOR FAILURE TO STATE AN OFFENSE

1. The Committee's Original Proposal to Amend Rule 12

The proposal to amend Rule 12 had as its genesis a proposal in 2006 from the Department of Justice. The Department urged Rule 12 to be amended to take account of the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002), which held that an indictment's failure to state an offense does not deprive the court of jurisdiction. One justification for the present Rule 12's provision that allows such claims to be raised at any time, even on appeal, was that they were thought to be jurisdictional defects. The *Cotton* decision undercut this rationale for not requiring that this particular error in the indictment be raised prior to trial. The Department therefore proposed that claims challenging the indictment for failure to state an offense should be added to the list of motions that must be raised before trial.

In April 2009, the Advisory Committee approved a proposal to amend Rule 12, but its proposal did not simply move failure-to-state-an-offense claims to the list of motions that must be filed before trial or be subject to the same waiver provision in current Rule 12(e). Rather, the Advisory Committee's proposed amendment provided for two different standards for obtaining relief from the waiver. The amendment would have allowed the court to grant relief from the waiver for good cause – as in the current rule – *or* “when a failure to state an offense in the indictment or information has prejudiced a substantial right of the defendant.”

The more generous standard for relief from waiver of a late-filed Rule 12 claim was chosen in recognition that an indictment's failure to state an offense could at times implicate important constitutional rights of a 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 (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); *United States v. Hosseini*, 506 F. Supp. 2d 269, 270–71 (N.D. Ill. 2007) (one count of indictment challenged as

failing to state an offense after jury sworn; though indictment could have been cured if motion made earlier, no question that it failed to allege each element of the offense and count was dismissed). Because of these qualitatively different and potentially more serious consequences, the Advisory Committee has consistently taken the position that a defendant should face an easier standard for relief from the consequences of a late-filed Rule 12 motion if his late motion claims that the indictment fails to state an offense. Specifically, recognizing that an oversight by a defendant's attorney will generally not qualify as "cause" under the standard of review applied by most courts to other untimely claims under Rule 12, the Advisory Committee decided that requiring a showing of "cause" as well as prejudice would be inappropriate if an indictment failed to state an offense.

2. The Committee's Revised Proposals in Response to Standing Committee Concerns

As explained more fully in the Appendix, the Standing Committee remanded the Advisory Committee's 2009 proposal for further study of the concepts of "waiver" and "forfeiture" and how Rule 12 interacts with Rule 52. The Advisory Committee determined that the Rule would in fact benefit from a broader reworking so as to clarify several aspects of the Rule, but it continued to believe that the standard for obtaining consideration of a late-filed claim that the indictment fails to state an offense should be a more lenient one for the defendant. The Advisory Committee first attempted to accomplish this by providing that untimely claims of failure to state an offense (as well as two others, double jeopardy and statute of limitations) could nevertheless be considered if the defendant met the requirements of plain error under Rule 52(b). While all other claims would continue to be considered waived if not timely raised, unless cause and prejudice were shown, this second category of claims would be considered merely forfeited if untimely raised. Because the plain error standard from Rule 52(b) did not include a showing of cause, the Advisory Committee believed that the choice of that standard would appropriately provide a less stringent showing to excuse the late filing.

The Standing Committee also remanded that proposal, concerned that the plain error standard might be too demanding for late-filed claims of failure to state an offense, in light of the Advisory Committee's expressed intention of making it easier to excuse the untimeliness of such claims. The Standing Committee also expressed concern about the continued use of the term "waiver" differently from the usual definition of that concept. After further discussion, the Advisory Committee agreed with both suggestions of the Standing Committee.

The Advisory Committee redrafted the Rule’s language to delete the words “waiver” and “forfeiture” and instead to describe the *consequences* of untimely motions, a provision now moved to follow immediately after the timing provisions. And to best describe the circumstances under which untimely motions could still be considered, the proposal now provides that a party must show cause and prejudice, or, for claims of failure to state an offense, he may show prejudice only. This makes clear that for most untimely motions, a party must meet the demanding standard of cause and prejudice or his claim is foreclosed, but that for failure to state an offense, untimeliness may be more easily excused. The Advisory Committee agreed that a defendant might not be able to satisfy all four prongs of the plain error standard yet be deserving of relief from an indictment that fails to state an offense. It thus determined that its original notion — that a defendant should not suffer prejudice to his case from an untimely discovery that the indictment failed to state an offense — was the desired principle, and that it would be appropriate to allow consideration of such a claim on a showing of prejudice alone.²⁴ By making these additional changes, the Advisory Committee believes it has both

²⁴The Advisory Committee recognized that in *United States v. Cotton*, 535 U.S. 625, 634 (2002), the Supreme Court applied Rule 52(b) plain error review to the indictment error in that case, the failure to include drug quantity, a fact required under *Apprendi v. New Jersey*, 530 U.S. 466 (2000), for defendant’s enhanced sentences. The Advisory Committee concluded that *Cotton* created no obstacle to its proposal to prejudice — rather than plain error — as the standard for review of late claims alleging the failure to state an offense. In applying the default provisions of Rule 52, the Court in *Cotton* did not consider what standard of review should apply to claims of failure to state an offense if such claims were added to the list of those that must be raised prior to trial in Rule 12, nor did it mention Rule 12 at all. The *Cotton* Court stated:

“Freed from the view that indictment omissions deprive a court of jurisdiction, we proceed to apply the plain-error test of Federal Rule of Criminal Procedure 52(b) to respondents’ forfeited claim. See *United States v. Olano*, 507 U.S. 725, 731, 113 S.Ct. 1770, 123 L.Ed.2d 508 (1993). “Under that test, before an appellate court can correct an error not raised at trial, there must be (1) ‘error,’ (2) that is ‘plain,’ and (3) that ‘affect[s] substantial rights.’ ” *Johnson v. United States*, 520 U.S. 461, 466-467, 117 S.Ct. 1544, 137 L.Ed.2d 718 (1997) (*quoting Olano, supra*, at 732, 113 S.Ct. 1770). “If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.” 520 U.S. at 467, 117 S.Ct. 1544 (internal quotation marks omitted) (*quoting Olano, supra*, at 732, 113 S.Ct. 1770).”

clarified and simplified the rule, while achieving the original goal of requiring any defective indictment to be challenged before trial without sacrificing basic fairness to a defendant.

E. WHY THE COMMITTEE INCLUDED DOUBLE JEOPARDY CLAIMS IN THE CATEGORY SUBJECT TO A SHOWING OF PREJUDICE ONLY

After a study of the issue, the Advisory Committee decided to add one more type of claim to the category of those whose late filing would be excused more readily – claims of a double jeopardy violation. This was done to preserve as closely as possible the current treatment of such claims without adding further complexity with a third standard of review.

Many courts of appeals currently apply plain error review, rather than cause and prejudice, to double jeopardy challenges to the charge that were available, but not raised, before trial.²⁵ Moreover, cases reviewing double jeopardy claims after a guilty plea have expressly recognized that a double jeopardy violation clear on the face of the indictment is not waived by the plea. In this situation courts have reviewed the double jeopardy claims either de novo²⁶ or using plain error.²⁷ Designating the

²⁵See *United States v. Mahdi*, 598 F.3d 883 (D.C. Cir. 2010); *United States v. Robertson*, 606 F.3d 943 (8th Cir. 2010) (collecting authority); *United States v. Mungro*, 365 Fed. Appx. 494 (4th Cir. 2010); *United States v. Hansen*, 434 F.3d 92 (1st Cir. 2006). *But compare United States v. Whitfield*, 590 F.3d 325 (5th Cir. 2009) (stating that unraised double jeopardy objection is waived, but assuming arguendo that plain error and not waiver applies); *United States v. Flint*, 394 Fed. Appx. 273 (6th Cir. 2010) (describing as waived and declining to reach merits of double jeopardy claim raised for the first time on appeal by defendant found guilty after trial).

²⁶See, e.g., *United States v. Moreno-Diaz*, 257 Fed. Appx. 435 (2d Cir. 2007) (quoting *Menna* and noting that guilty plea does not waive double jeopardy claim when, judged on its face, charge is one that government may not constitutionally prosecute); *United States v. Poole*, 96 Fed. Appx. 897, 899 (4th Cir. 2004) (granting relief on defendant’s unraised double jeopardy claim, despite defendant’s guilty plea: “Because on its face the superseding indictment exposed Poole to multiple sentences for a single offense, we conclude that Poole has not waived his claim of multiplicity on appeal”); *United States v. Saldua*, 120 Fed. Appx. 553 (5th Cir. 2005) (remanding to vacate one of defendant’s convictions and noting that the government chose not to argue that appeal waiver barred relief); *United States v. Zalapa*, 509 F.3d 1060, 1063 (9th Cir. 2007) (“we recognize the distinction between objections to multiplicity in the indictment, which can be waived, and objections to multiplicitous sentences and convictions, which cannot be waived. See *United States v. Smith*, 424 F.3d 992, 1000

& n.4 (9th Cir. 2005) (“Multiplicity of sentences is unlike the issue of multiplicity of an indictment which can be waived if not raised below.”) This conclusion is consistent with our holding in *Launius v. United States*, 575 F.2d 770 (9th Cir. 1978). In that case, we held that a defendant’s guilty plea to a multiplicitous indictment did not constitute a waiver of the right to raise a double jeopardy claim as to his multiplicitous convictions and sentences. *Id.* at 771–72. We also recognized that Rule 12 of the Federal Rules of Criminal Procedure, the rule relating to pretrial motions, “‘applies only to objections with regard to the error in the indictment itself.’” *Id.* at 772.”); *United States v. Williams*, 2011 WL 462156, *1 (11th Cir. 2011) (“Williams’s appeal is not waived because he does not seek to introduce evidence from outside of the plea hearing to demonstrate that the conduct at issue in the sentencing phase of the first trial and the conduct at issue in the indictment of the second trial were the same offense.”); *United States v. Bonilla*, 579 F.3d 1233 (11th Cir.2009) (defendant can raise double jeopardy claim if he does not need to go outside record at plea hearing, the case here as to indictment with multiplicitous charges of both identity theft and aggravated identity theft); *United States v. Harper*, 398 Fed. Appx. 550, 553 (11th Cir. 2010) (noting that entering a guilty plea generally waives all non-jurisdictional challenges to a conviction, with a few exceptions, including one for certain double jeopardy challenges, when the government is precluded from haling the defendant into court at all, citing *Menna v. New York*, 423 U.S. 61, 62 (1975)).

²⁷Several appellate decisions apply plain error review in this situation, including *United States v. Kelly*, 552 F.3d 824 (D.C. Cir. 2009); *United States v. Cesare*, 581 F.3d 206 (3d Cir. 2009) (finding plain error); *United States v. Grober*, 624 F.3d 592 (3d Cir. 2010) (holding that even if claim was not waived by guilty plea, it could not, in circumstances of this case, survive plain error review); *United States v. Lebreux*, 2009 WL 87505 (6th Cir.2009) (considering claim but rejecting it on plain error review); *United States v. Plenty Chief*, 561 F.3d 846 (8th Cir. 2009) (court’s review “limited to plain error”).

Other appellate decisions, however, state that in guilty plea cases the appropriate standard is waiver rather than plain error. *See, e.g. United States v. Adams*, 256 Fed. Appx. 796, 798 (7th Cir. 2007) (“Adams entered unconditional guilty pleas and therefore waived his right to appeal the denial of any pretrial motions based on his indictment”); *United States v. Moreno-Diaz*, 257 Fed. Appx. 435, 436 (2d Cir. 2007).

plain error standard for untimely double jeopardy claims would preserve this current treatment. The Advisory Committee considered but rejected as unduly complex a proposal to have three tiers of review:

- prejudice alone for claims of failure to state an offense,
- “plain error” for double jeopardy claims, and
- “cause and prejudice” for everything else.

The Advisory Committee concluded that the standard of showing prejudice alone was appropriate for violations of the fundamental right not to be twice placed in jeopardy or punished more than once for the same offense. Allowing review for untimely double jeopardy claims on the basis of prejudice alone would simplify the analysis without changing the result in most or all double jeopardy cases. The second and fourth prongs of the *Olano* test – which look to whether the error is “plain” and whether it “seriously affects the fairness, integrity, or public reputation of judicial proceedings” – have not made much difference when courts review alleged double jeopardy violations.²⁸

Although double jeopardy claims arise in a number of different situations,²⁹ we have been unable to identify a case in which the second and fourth prongs would not be satisfied if a defendant has been (or could be) convicted for an offense that judging from the indictment before trial should have been barred by double jeopardy. If indeed plain error review is applied whenever a defendant objects during trial, or after conviction, to a double jeopardy error available and resolvable before trial

²⁸See, e.g., *United States v. Robertson*, 606 F.3d 943, 952 (8th Cir. 2010) (concluding that failing to remedy such a clear violation of a core constitutional principle would be error so obvious that failure to notice it would seriously affect the fairness integrity, or public reputation of the judicial proceedings and result in a miscarriage of justice); *United States v. Ogba*, 526 F.3 214, 238 (5th Cir. 2008) (same); *United States v. Fortenberry*, 914 F.2d 671, 673 (5th Cir. 1990) (same) (reversing conviction on plain error review after finding a double jeopardy violation in part because the defendant was subjected to multiple special assessments).

²⁹The Double Jeopardy clause bars a charge following an acquittal or conviction for the same offense, after an acquittal definitively rejecting a necessary element of the charged offense, or after an earlier mistrial lacking manifest necessity. It also bars a conviction on one count charging the same offense as another count of conviction.

and which he failed to raise before trial or plea, it appears to make sense to dispense with the second and fourth prongs of the *Olano* test and, for the sake of simplicity, to use the same “prejudice only” standard as for claims of failure to state an offense.

F. OTHER FEATURES OF THE PROPOSAL

As noted above, the core elements of the proposed amendment are that it deletes the language in Rule 12(b)(3)(B) that allows a failure to state an offense claim to be raised “at any time while the case is pending,” and requires claims that an indictment fails to state an offense to be raised prior to trial. The amendment also clarifies the standard for consideration of claims not raised before trial as required by Rule 12(b)(3): except for failure to state an offense and double jeopardy – which may be reviewed whenever “prejudice” is shown – the courts may consider a claim only if the party who wishes to raise it can show “cause and prejudice.”

Several other features of the proposed amendment also warrant some discussion. The proposal includes the following elements:

- It continues to provide that a jurisdictional error can be raised at any time while a case is pending and places the jurisdictional provision in a more prominent position.
- It enumerates in Rule 12(b)(3) a non-exclusive list of common claims that must be raised before trial.
- For all of the defenses, objections and requests listed in Rule 12(b)(3), it introduces a new criterion for determining which must be raised before trial: whether the “basis” for the defense/objection/request is “then available.”
- It shifts from (b)(2) the requirement that motions raised prior to trial be those that “the court can determine without a trial of the general issue” to (b)(3), and also rephrases that limitation to provide that “the motion can be determined without a trial on the merits.”
- It shifts the provisions on the consequences of failing to make a timely motion from subdivision (e) to subdivision (c), solving an organizational problem within the current rule.
- It provides a conforming amendment to Rule 34.

The discussion that follows explains each of these elements.

1. Jurisdictional Issues

At present, Rule 12(b)(3)(B) allows review of “a claim that the indictment or information fails to invoke the court’s jurisdiction” at “any time while the case is pending.” The Advisory Committee concluded that it was important to retain this provision, but that it should be moved to a separate subdivision. At present, it is stated as an exception to one of the defenses and claims subject to the timing requirements of Rule 12(b)(3).³⁰ The proposed amendment places this new subdivision in Rule 12(b)(2). This placement was possible because the Advisory Committee recommends the deletion of current (b)(2), as discussed below.

2. Deleting (b)(2)

Rule 12(b)(2) presently provides that “any defense, objection, or request that the court can determine without trial of the general issue” *may* be raised by a motion before trial. The 1944 Advisory Committee Notes explain that the purpose of this provision was to make clear that pretrial motions could be used to raise matters previously raised “by demurrers, special pleas in bar and motions to quash.” The Advisory Committee concluded that the use of motions is now so well established that it no longer requires explicit authorization. The deletion of (b)(2) would be consistent with a decision made in 2002 as part of the restyling of the Criminal Rules. At that time, language in Rule 12(a) abolishing “all other pleas, and demurrers and motions to quash” was deleted as unnecessary.

The Advisory Committee was also concerned that there is, inevitably, some tension between (b)(2) and (b)(3) if (b)(2) is read literally. The drafters of the original Rule 12 envisioned two categories of motions, those that may and those that must be raised before trial.³¹ See the 1944

³⁰This provision is now stated as an exception to the rule that “a motion alleging a defect in the indictment or information” “must be raised before trial.” *See* Rule 12(b)(3)(B).

³¹The Advisory Committee note describes the two categories and explains that the defenses and objections that must be raised before trial are generally those that were generally raised before trial “by plea of abatement, demurrer, motion to quash, etc.” The other group, which may but need not be raised before trial, were issues that “have been heretofore raised by demurrers, special pleas in bar, and motions to quash.” 1944 Advisory Committee note to Rule 12(b)(1) and (2). The latter

Committee note to Rule 12(b)(1) and (2). As noted, (b)(2) says that any defense, objection, or request that is capable of being determined before trial “may” be raised by pretrial motion. The difficulty is that the permissive term “may” might be understood to indicate that each party has the *option* of bringing or not bringing *all* such motions before trial. This is in tension with (b)(3), which provides a list of motions that *must* be brought before trial.

Since the “may be raised” language now found in (b)(2) is no longer needed and it might create confusion, the Advisory Committee concluded it should be deleted. The limitation that the motion be one that can be determined without trial was shifted to (b)(3), as discussed in paragraph 5, below.

The decision to delete the language now found in (b)(2) raised the possibility that the subdivisions that followed (b)(2) would all be renumbered. The subdivisions of Rule 12 were reordered (or relettered) in 2002, and this has caused courts and litigants some difficulty in researching and writing about the rule. For that reason, several judges contacted members of the Advisory Committee to request that the current revision avoid another renumbering or relettering. The Advisory Committee was sensitive to this concern, and concluded that it was preferable to use this subdivision for the new separate jurisdictional provision, thereby avoiding the necessity of renumbering the later subdivisions.

3. Spelling Out the Claims That Must Be Raised Before Trial

The Advisory Committee’s proposal retains the current categories of claims that Subdivision (b)(3) requires to be raised before trial: two general categories of claims (defects in “instituting the prosecution” and defects “in the indictment or information”) as well as three specific categories (discovery, suppression, and joinder). For claims not specifically listed in Rule 12(b)(3) today, courts must determine whether a claim is a “defect in the indictment” or “the institution of the prosecution,”

group was described as including some issues – double jeopardy and statute of limitations – that many courts now generally regard as falling within the terms of Rule 12(b)(3). See note 32 *infra*.

As noted in point 3, public comments may address the advisability of including these or other defenses and claims in the text of Rule 12(b)(3).

to determine whether it must be raised prior to trial.³² To add

³²This has been an issue, for example, with claims based on the statute of limitations. Most courts have treated a statute of limitations claim as a defect in the institution of the prosecution or the sufficiency of the indictment, finding it is waived if not raised prior to trial. *See United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir. 1987); *United States v. Ramirez*, 324 F.3d 1225, 1227–28 & n. 6 (11th Cir. 2003); *United States v. Clark*, 319 Fed.Appx. 46, 48–49 (2d Cir. 2009); *United States v. Kelly*, 147 F.3d 172, 177 (2d Cir.1998); *United States v. Gaudet*, 966 F.2d 959, 962 (5th Cir. 1992). However, in *United States v. Baldwin*, 414 F.3d 791, 795–96 n.2 (7th Cir. 2005), the court noted that the Seventh Circuit had taken a different approach. Noting that the defendant raising a statute of limitations defense for the first time on appeal was entitled “at best” to review for plain error, the court explained:

We say “at best” because there is an argument, not made by the government, that under Fed. R. Crim. P. 12(b)(3) Baldwin has waived and not merely forfeited his statute of limitations defense. Rule 12(b)(3) specifies motions that must be made before trial; the rule includes motions “alleging a defect in instituting the prosecution” or “a defect in the indictment or information.” Rule 12(e) provides that matters covered by Rule 12(b)(3) that are not raised by the pretrial motion deadline set by the court are waived, subject to the district court’s authority to grant relief from the waiver “[f]or good cause.” Other circuits apply Rules 12(b)(3) and the waiver rule of (e) to statute of limitations arguments. *United States v. Ramirez*, 324 F.3d 1225, 1228-29 (11th Cir.2003); *United States v. Gallup*, 812 F.2d 1271, 1280 (10th Cir.1987). In this circuit, statute of limitations arguments not timely raised in the district court are considered forfeited, not waived, and are accorded plain-error review. *United States v. Ross*, 77 F.3d 1525, 1536 (7th Cir. 1996). The holding in *Ross* is premised upon certain language in the advisory committee note to Rule 12(b) suggesting that a statute of limitations defense is among those matters that *may*, not *must*, be raised by pretrial motion." *Id.* *The government has not argued that Ross should be revisited in light of the clear text of the rule and the apparent conflict with other circuits*; the government cited *Ross* for the proposition that Baldwin's statute of limitations argument should be considered forfeited and reviewed for plain error.

Id. (emphasis added). In contrast, concluding that “the plain language of Rule 12 dictates that defenses based upon the sufficiency of the indictment must be brought before trial,” the Eleventh Circuit rejected the argument that the advisory committee note permits statute of limitations

clarity and provide guidance to litigants, the proposed rule lists the more common claims that fall into these two general categories, using the word “including” to make it clear that the lists are not exhaustive.³³ The Advisory Committee attempted to draft these lists broadly, to include all of the common claims that courts have found to be included in these general categories. If the proposed amendment is approved for publication, the lists might be expanded or trimmed on the basis of public comments.

In response to a comment at the January 2011 meeting of the Standing Committee, the Advisory Committee deleted the defense of “outrageous government conduct” from the list in Rule 12(b)(3)(A) because one circuit has held that the defense “does not exist.” See *United States v. Boyd*, 55 F.3d 239, 241 (7th Cir. 1995). Identification of the defense on the list of “defects in the institution of the prosecution” might imply that the defense does exist, despite case law to the contrary. Although the Seventh Circuit appears to be the only circuit that has flatly held that the defense of outrageous government conduct does not exist, other circuits have expressed doubt about the continued vitality

defenses to be raised after trial begins. *United States v. Ramirez*, 324 F.3d 1225, 1227 n.6 (11th Cir. 2003).

Relying on the fourth prong of the *Olano* test, the court in *Baldwin* found no plain error and denied relief because the sentence for the allegedly time-barred charge was to run concurrently to a non-barred sentence and the government had missed the statute of limitations by only one day. 414 F.3d at 795–96. In *United States v. Parker*, 508 F.3d 434, 435 (7th Cir. 2007), the Seventh Circuit overruled *Baldwin* insofar as it held that concurrent sentences could not constitute plain error, but the court has not revisited the other issues concerning the statute of limitations discussed in *Baldwin*.

³³The proposal includes “a violation of the constitutional right to Speedy Trial” as one of the defects in the institution of a prosecution that must be raised before trial under (b)(3)(A). See, e.g., *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995). The Advisory Committee did not include statutory speedy trial violations because the Speedy Trial Act already specifies that a defendant must raise any claim under the act before trial. See 18 U.S.C. § 3162(a)(2).

of the defense or recognized but discouraged it. And there are few — if any — cases in which the courts have granted relief on this basis.³⁴ Under these circumstances, the Advisory Committee concluded it would be prudent to delete the defense from (b)(3)(A). Because the list is illustrative and not exhaustive, failure to list the outrageous government conduct defense would not suggest a position one way or the other on its continued viability. Inclusion, on the other hand, might generate opposition on the ground that it would imply the defense is viable.

4. The Availability Requirement

As a general rule, the types of claims and defenses subject to Rule 12(b)(3) will be available before trial and they can – and should – be resolved then. Except for jurisdictional errors, the proposal brings virtually all claims and defenses within subdivision (b)(3), which requires that they be raised by motion before trial. It provides that if (b)(3) claims and defenses – other than failure to state an offense and double jeopardy – are not raised before trial they are “untimely” and subject to further review only upon a showing of cause and prejudice.³⁵

The Advisory Committee recognized, however, that in some exceptional cases, it may not be possible to raise particular claims that fall within the general categories subject to Rule 12(b)(3). If the basis for the motion was not available to a party before trial, some courts conclude the claim is not affected by Rule 12 and need not have been raised before trial.³⁶ Others conclude that the claim is

³⁴See, e.g., *United States v Luisi*, 482 F.3d 43, 59 (1st Cir. 2007) (“The outrageousness doctrine permits dismissal of criminal charges only in those very rare instances when the government's misconduct is so appalling and egregious as to violate due process by ‘shocking ... the universal sense of justice.’ While the doctrine is often invoked by criminal defendants, it has never yet been successful in this circuit.”) (citations omitted).

³⁵As discussed more fully in the Part E (text accompanying notes 25-28), claims of failure to state an offense and double jeopardy are subject to review if “prejudice” can be established.

³⁶Decisions finding no waiver when ground for claim was not available before trial include *United States v. Sturdivant*, 244 F.3d 71, 76 (2d Cir. 2001) (“... we will not find a defendant has waived a duplicity argument where the claimed defect in the indictment was not apparent on its face at the institution of the proceeding”); *United States v. Coiro*, 922 F.2d 1008, 1013 (2d Cir. 1991) (multiplicity challenge not waived when neither nature of defendant's conduct nor fact that counts charged same conduct was evident from face of indictment, and could only be known upon the

waived under Rule 12, but that there was good cause for not raising it earlier.³⁷ The Advisory Committee concluded that (1) the failure to raise a claim one could not have raised should never be considered waiver and (2) it would be desirable to make this point explicit in the rule rather than assuming that the courts that do not already exempt such claims from the requirements of (b)(3) will

receipt of evidence); *United States v. Collins*, 372 F.3d 629, 632–633 (4th Cir. 2004) (if an indictment properly alleges venue, but the proof at trial fails to support the venue allegation, an objection to venue can be raised at the close of the evidence; a defendant does not waive venue unless the indictment clearly reveals the venue defect but the defendant fails to object); *United States v. Zalapa*, 509 F.3d 1060 (9th Cir. 2007) (by failing to object to the indictment before pleading guilty, defendant waived any objection to the form of the indictment but did not waive his right to object to his sentences and convictions as multiplicitous on appeal). *Cf. United States v. Pitt*, 193 F.3d 751, 760–761 (3d Cir. 1999) (defense of outrageous government conduct must be raised pretrial unless the evidence supporting the claim is not known to the defendant prior to trial).

³⁷Decisions treating unavailability of grounds as “good cause” affording relief from waiver include *United States v. Anderson*, 472 F.3d 662, 668–670 (9th Cir. 2006) (granting relief from waiver for pro se defendant who had no access to translated copy of Costa Rican extradition order until after deadline set by the district court for pretrial motions); *United States v. Madeoy*, 912 F.2d 1486, 1490–91 (D.C. Cir. 1990) (noting in dicta that a defendant who receives Jencks Act material only after his trial has begun, and is thus first apprised of the facts upon which his motion to dismiss the indictment is based, may be in a position to argue good cause for his failure to have moved for dismissal prior to trial); *United States v. Chavez*, 902 F.2d 259 (4th Cir. 1990) (concluding trial court abused its discretion in denying defendant's request to file for suppression hearing out of time where request was made almost two weeks prior to trial and one day after defense counsel received grand-jury transcript that revealed answer to inquiry that defendant had unsuccessfully made at preliminary hearing); *United States v. Roberts*, 2009 WL 2960409 (E.D. Tenn. Sept. 9, 2009) (recognizing good cause when discovery materials not previously available to the defendants are uncovered). *Cf. United States v. Cameron*, 729 F.Supp.2d 418, 419–21 (D.Me. 2010) (finding cause when newly appointed counsel uncovered a potentially serious and dispositive Fourth Amendment violation that “only beg[an] to receive legal attention” after the deadline has passed); *United States v. Slay*, 673 F.Supp. 336, 342, (E.D. Mo. 1987) (good cause shown when a subsequent Supreme Court decision after trial but before sentencing for the first time provided a basis for challenging intangible rights theory of indictment).

recognize that it is contained within the concept of “good cause.” Accordingly, the Advisory Committee added the language that limits the requirement that defenses, objections, and claims “must” be raised before trial to those in which “the basis for the motion is then reasonably available” This standard is intended to be similar to that of the Jury Selection and Service Act, which requires claims to be raised promptly after they were “discovered or could have been discovered by the exercise of due diligence.” 28 U.S.C. § 1867(a) & (b).

The addition of this language means that if a party raises an issue governed by Rule 12(b)(3) at any time after the trial has begun, the first step in the analysis should be to determine whether the basis for raising the issue was “reasonably available” before trial to the party who wishes to raise it (and the second step, discussed below, would be to determine whether it would have been possible for the court to resolve the issue at that time, before trial). For example, Rule 12(b)(3)(A) requires that a defect in the prosecution ordinarily be raised before trial. If, however, in a particular case the information necessary to raise such a defect first becomes “available” during the trial, the defendant’s failure to raise the issue earlier would not be considered untimely under the Rule. Similarly, Rule 12(b)(3)(C) requires suppression motions to be made before trial, but the proposal would provide that the rule is applicable only if the basis for a motion to suppress was “reasonably available” before trial.

5. The Capable-of-Determination-Without-Trial Requirement

The Advisory Committee was also concerned that parties not be encouraged to raise (or punished for not raising) claims that depend on factual development at trial. Presently (b)(2) accomplishes this by the negative implication that issues that depend on a trial “of the general issue” may not be raised prior to trial. The Advisory Committee’s proposal shifts this requirement to the introductory language of (b)(3), which provides that only those issues which can be determined “without a trial on the merits” “must be raised by motion before trial,” and if not so raised are subject to cause and prejudice analysis (or “prejudice only” for failure to state an offense and double jeopardy). Recognizing that the Rule’s language “determine without a trial of the general issue” has a well-settled 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,³⁸ the Advisory Committee

³⁸*E.g., Serfass v. United States*, 420 U.S. 377, 389 (1975) (citing *United States v. Covington*, 395 U.S. 57, 60 (1969)); *United States v. Sisson*, 399 U.S. 267, 302 & n. 56 (1970) (plurality opinion) (“We think a defense to a pre-induction suit based on conscientious objections that require factual determinations is so intertwined with the general issue that it must be tried with the general issue.

substituted the modern phrase “trial on the merits” for the more archaic phrase “trial of the general issue” now found in (b)(2). No change in meaning is intended.

6. Reorganization

At the January 2011 meeting, Professor Joseph Kimble, our style consultant, urged the Advisory Committee to use the proposed amendment to solve an organizational problem in the current rule. At present, the organization of the subdivisions separates the provisions requiring certain motions to be made before trial and the deadline for those motions (which are now in subdivisions (b) and (c)) from the provision governing the consequences of failure to file a timely motion (which is found in subdivision (e)). Professor Kimble noted that subdivision (d) (Ruling on a Motion) interrupts the logical sequence and makes it more difficult to find the critical provisions on the consequences of failure to file in a timely fashion.

The Advisory Committee accepted Professor Kimble’s suggestion that it relocate the provision governing the “Consequences of Not Making a Timely Motion” to subdivision (c), so that it would address both the deadline for pretrial motions and the consequences for failure to meet this deadline. The Advisory Committee agreed that this was the logical placement of the provisions, and it concluded that there were also advantages to the reorganization. In general, the Advisory Committee thought that it was important not to renumber (reletter) the provisions of Rule 12. In this case, however, the provisions now found in Rule 12(e) are being significantly changed to eliminate the word “waiver” and add a new provision concerning failure-to-state-an-offense and double jeopardy claims. Researchers will be able easily to determine whether a case was decided under the older version of the rule if the court applies Rule 12(e) rather than Rule 12(c)(2). The proposed amendment avoids the need to renumber the later subdivisions of the rule any future confusion by reserving subdivision (e).

7. Conforming Amendment to Rule 34

... A defense is thus ‘capable of determination’ if trial of the facts surrounding the commission of the alleged offense would be of no assistance in determining the validity of the defense. Rule 12(b)(4) allows the District Court in its discretion to postpone determination of the motion to trial, and permits factual hearings prior to trial if necessary to resolve issues of fact peculiar to the motion.”).

If the Advisory Committee's proposal is approved, it will revive the need for the conforming amendment to Rule 34 (included below) that was approved by the Advisory Committee.

APPENDIX

Because the proposed amendment to Rule 12 has a lengthy history, and has already been twice presented to the Standing Committee, we set forth in this Appendix more fully the legal research we undertook during the course of our deliberations. Both the Advisory Committee's current proposal, and the earlier versions reviewed by the Standing Committee in January 2011, and also in June 2009, are discussed to permit comparison and facilitate review.

The 2009 proposal

The Advisory Committee's original proposal, presented to the Standing Committee in June 2009, was narrowly drafted to respond to the Supreme Court's decision in *United States v. Cotton*, 535 U.S. 625 (2002). *Cotton* held that an indictment's failure to state an offense does not deprive the court of its jurisdiction. In 2006, in the wake of *Cotton*, the Department of Justice asked the Advisory 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 proposed amendment to Rule 12(b) made two related changes. First, it amended Rule 12(b)(3)(B) to add failure to state an offense to the list of requests, defenses, and objections that must be raised prior to trial. Second, it provided for the consequence of failure to raise the objection as required by the amended rule. Under Rule 12(e), claims not raised in timely fashion under (b)(3)(B) are "waived," but for "good cause, the court may grant relief from the waiver." The Advisory Committee deemed that standard too strict for failure to state an offense, and proposed amending Rule 12(e) to allow such claims to be considered, even if not raised prior to trial, if the failure to state an offense "has prejudiced a substantial right of the defendant."

The Standing Committee remanded the proposed amendment to the Advisory Committee for further study on two points: (1) the concepts of "waiver" (the term used in Rule 12(e)) and "forfeiture" (the term used in the Supreme Court's decision in *Cotton*); and (2) how Rule 12 interacted with Rule 52.

The January 2011 proposal

Responding to the Standing Committee's concerns, the Advisory Committee 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 (failure to state an offense, 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 expressed general approval of the Advisory Committee's approach of specifying the types of motions falling within the various categories of Rule 12(b)(3). But the proposal was remanded 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 three favored claims. Third, concern was expressed about the inclusion of the defense of "outrageous government conduct." And finally, the Reporters were also urged to consider some reorganization.

A. SUPREME COURT PRECEDENT ON THE REVIEW OF LATE-RAISED ERROR

1. Consideration of error "waived" under Rule 12: The Supreme Court's standard.

Rule 12(e), subtitled "Waiver of a Defense, Objection, or Request," presently provides: "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. For good cause, the court may grant relief from the waiver."

The Court has addressed this provision limiting the review of claims not raised in accordance with Rule 12(b) in two cases: *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963), and *Davis v. United States*, 411 U.S. 233 (1973). Because these cases are critical to some of the Advisory Committee’s proposed changes to Rule 12, and because there is so much disagreement about the meaning of Rule 12(e), it is useful to set out in some detail the Court’s discussion of this aspect of Rule 12 in each case.

In *Shotwell*, the defendants’ direct appeal was remanded to the trial court for fact finding.³⁹ While on remand in the trial court, the defendants challenged jury selection for the first time. The district court, and then the court of appeals, found that consideration of the claim was barred by Rule 12 because the defendants had failed to show a reason that would excuse a delay of four years after a conviction before raising their jury claims, and also found no prejudice from any error.⁴⁰ In the Supreme Court, the defendants argued that it was improper for the courts below to have considered

³⁹During the pendency of the petition for certiorari the Supreme Court granted the motion of the Solicitor General to remand the case to the District Court for further proceedings on the suppression issue. The District Court again denied suppression and also denied motions for a new trial and overruled challenges to the original grand and petit jury arrays, which had been brought for the first time during the remand. 371 U.S. 341, 344–45.

⁴⁰The court of appeals described the rulings below as follows (287 F.2d 667, 673):

In denying the motions, which ruling defendants now say was erroneous, the district court held that defendants “failed to establish any sufficient grounds which (would) justify the granting of relief from the waiver.” However, exhibiting an extraordinary desire to cover all points, he then found that the jurors. . . possessed the necessary legal qualifications [,] . . . that no one was excluded because of race, color, economic status, political conviction, geographical location, religious beliefs or social status, and [the use of volunteers was not unconstitutional]. Inasmuch as defendants have not shown that these findings are without support in the record or that they were actually prejudiced by the method by which the jurors were selected, we hold that their motions were properly denied.

prejudice as well as cause under Rule 12. The Supreme Court rejected this argument.⁴¹ The Court stated:

. . . In denying the motions the District Court found that the facts concerning the selection of the grand and petit juries were notorious and available to petitioners in the exercise of due diligence before the trial. The same method of selecting jurors in the district had been followed by the clerk and the jury commissioner for years. Inquiry as to the system employed could have been made at any time. . . .

Finally, *both courts below* have found that petitioners were not prejudiced in any way by the alleged illegalities in the selection of the juries. Nor do petitioners point to any resulting prejudice. In *Ballard* it was said that ‘reversible error does not depend on a showing of prejudice in an individual case.’ However, where, as here, objection to the jury selection has not been timely raised under Rule 12(b)(2), *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.*”

We need express no opinion on the propriety of the practices attacked. It is enough to say that we find no error in the two lower courts’ holding that the objection has been lost.

371 U.S. at 364 (emphasis added; footnote and citations omitted).

In *Davis*, a decade later, the Supreme Court took on the task of defining the conditions under which a court may review the merits of a claim raised in an application for relief under 28 U.S.C. § 2255, when that claim should have been raised in the district court before trial under Rule 12. The Court explained:

Shotwell held that a claim of unconstitutional grand jury composition raised four years after conviction, but while the appeal proceedings were still alive, was governed by Rule 12(b)(2). Both the reasons for the Rule and the normal rules of statutory construction clearly indicate

⁴¹As Justice Brennan later wrote, the Court in *Shotwell* “construed the cause exception to Rule 12(b)(2) as encompassing an inquiry into prejudice.” *United States v. Frady*, 456 U.S. 152, 185 (1982) (Brennan, J., dissenting).

that no more lenient standard of waiver should apply to a claim raised three years after conviction simply because the claim is asserted by way of collateral attack rather than in the criminal proceeding itself.

The waiver provisions of Rule 12(b)(2) are operative only with respect to claims of defects in the institution of criminal proceedings. If its time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial. If defendants were allowed to flout its time limitations, on the other hand, there would be little incentive to comply with its terms when a successful attack might simply result in a new indictment prior to trial. Strong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when re prosecution might well be difficult.

Rule 12(b)(2) promulgated by this Court and, pursuant to 18 U.S.C. § 3771, ‘adopted’ by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived. . . . But Congress did not deal with the question of waiver in the federal collateral relief statutes We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of ‘cause’ for relief from waiver, nonetheless intended to perversely negate the Rule’s purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim 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*. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

411 U.S. at 241–42 (emphasis added).

The Court has never questioned the interpretations announced in *Shotwell* and *Davis*, even though it has mentioned Rule 12 in several cases. Later decisions have reiterated both key points

about the standard for reviewing error "waived" under Rule 12: First, the standard is "cause and prejudice,"⁴² and second, that standard applies on direct appeal as well as in the district court.⁴³

2. *Olano and the development of plain error review under Rule 52(b) for unraised errors; confusion about the meaning of "waiver" under Rule 52.*

The Supreme Court has used the term "waiver" to refer to both deliberate relinquishment and what is commonly considered forfeiture.⁴⁴ But in 1993, in the course of interpreting Rule 52(b), the

⁴²See *Murray v. Carrier*, 477 U.S. 478, 494 (1986) ("the former Rule 12(b)(2) . . . as interpreted in [*Shotwell* and *Davis*] treated prejudice as a component of the inquiry into whether there was cause for noncompliance with that rule"); *United States v. Frady*, 456 U.S. 152, 185 (Brennan, J., dissenting) (stating that the Court in *Shotwell* "construed the cause exception to Rule 12(b)(2) as encompassing an inquiry into prejudice.").

⁴³Consider *Wainwright v. Sykes*, 433 U.S. 72, 84 (1986), where the Court described its decision in *Davis* this way (emphasis added):

We noted that the Rule "promulgated by this Court and, pursuant to 18 U.S.C. § 3771, 'adopted' by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived," . . . and held that this standard contained in the Rule, rather than the *Fay v. Noia* concept of waiver, should pertain in federal habeas *as on direct review*. Referring to previous constructions of Rule 12(b)(2), we concluded that review of the claim should be barred on habeas, *as on direct appeal*, absent a showing of cause for the noncompliance and some showing of actual prejudice resulting from the alleged constitutional violation.

⁴⁴For example, in *Peretz v. United States*, 501 U.S. 923, 936 (1991), the Court stated:

The most basic rights of criminal defendants are similarly subject to waiver. See, e.g., *United States v. Gagnon*, 470 U.S. 522, 528, 105 S. Ct. 1482, 1485, 84 L.Ed.2d 486 (1985) (absence of objection constitutes waiver of right to be present at all stages of criminal trial); *Levine v. United States*, 362 U.S. 610, 619, 80 S. Ct. 1038, 1044, 4 L.Ed.2d 989 (1960) (failure to object to closing of courtroom is waiver of right to public trial); *Segurola v. United States*, 275 U.S. 106, 111, 48 S. Ct. 77, 79, 72 L.Ed. 186 (1927) (failure to object constitutes waiver of Fourth Amendment right against unlawful search and seizure); *United States v. Figueroa*, 818 F.2d 1020, 1025 (CA1 1987) (failure to object results in forfeiture of claim of unlawful

Court in *Olano* addressed the differences between the concepts of “waiver” and “forfeiture,” and announced that plain error review applies only to error “forfeited,” and not to error that is “waived.” The Court stated:

The first limitation on appellate authority under Rule 52(b) is that there indeed be an “error.” Deviation from a legal rule is “error” unless the rule has been waived. For example, . . . [b]ecause the right to trial is waivable, and because the defendant who enters a valid guilty plea waives that right, his conviction without a trial is not “error.”

Waiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the “intentional relinquishment or abandonment of a known right.” *Johnson v. Zerbst*, 304 U.S. 458 (1938); see, e.g., *Freytag v. Commissioner*, 501 U.S. 868, 894, n. 2 (1991) (SCALIA, J., concurring in part and concurring in judgment) (distinguishing between “waiver” and “forfeiture”); . . . Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake. . . . Mere forfeiture, as opposed to waiver, does not extinguish an “error” under Rule 52(b). Although in theory it could be argued that “[i]f the question was not presented to the trial court no error was committed by the trial court, hence there is nothing to review,” . . . this is not the theory that Rule 52(b) adopts. If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then

postarrest delay); *United States v. Bascaro*, 742 F.2d 1335, 1365 (CA11 1984) (absence of objection is waiver of double jeopardy defense), *cert. denied sub nom. Hobson v. United States*, 472 U.S. 1017, 105 S. Ct. 3476, 87 L.Ed.2d 613 (1985); *United States v. Coleman*, 707 F.2d 374, 376 (CA9) (failure to object constitutes waiver of Fifth Amendment claim), *cert. denied*, 464 U.S. 854, 104 S. Ct. 171, 78 L.Ed.2d 154 (1983). See generally *Yakus v. U.S.*, 321 U.S. 414, 444, 64 S. Ct. 660, 677, 88 L.Ed. 834 (1944) (“No procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right”). Just as the Constitution affords no protection to a defendant who waives these fundamental rights, so it gives no assistance to a defendant who fails to demand the presence of an Article III judge at the selection of his jury.

there has been an “error” within the meaning of Rule 52(b) despite the absence of a timely objection.

Olano, 507 U.S. 725, 733–34 (1993) (citations to law reviews and treatise omitted).

This paradigm meaning for the term “waiver”—as intentional relinquishment—is different than the meaning assigned to the very same term in Rule 12 by the Court in *Shotwell* and *Davis*.⁴⁵ Although the Court never mentioned Rule 12 in *Olano* or in *any* of the cases involving plain error that have followed *Olano*,⁴⁶ courts of appeals have become divided over the relationship between Rule 12 and Rule 52, particularly for claims that are raised for the first time on appeal.⁴⁷

⁴⁵Even in *Olano* itself, the Court seemed to recognize that not all waivers will fit this paradigm. As the Tenth Circuit noted in *United States v. Burke*, 633 F.3d 984, 991 (10th Cir. 2011):

[I]n *Gonzalez v. United States*, 553 U.S. 242, 128 S. Ct. 1765, 170 L.Ed.2d 616 (2008), the Court recognized defendants could waive certain rights (i.e., what arguments to pursue, what evidentiary objections to raise, and what stipulations to make regarding the admission of evidence) without doing so knowingly and voluntarily. *Id.* at 248–49, 128 S. Ct. 1765. Even *Olano* itself stated, “[W]hether the defendant must participate personally in the waiver; whether certain procedures are required for waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake.” 507 U.S. at 733, 113 S. Ct. 1770.

⁴⁶*United States v. Marcus*, 130 S. Ct. 2159 (2010); *Puckett v. United States*, 129 S. Ct. 1423 (2009); *United States v. Dominguez Benitez*, 542 U.S. 74 (2004); *Nguyen v. United States*, 539 U.S. 69 (2003); *United States v. Cotton*, 535 U.S. 625 (2002); *United States v. Vonn*, 535 U.S. 55 (2002); *Jones v. United States*, 527 U.S. 373 (1999); *Johnson v. United States*, 520 U.S. 461 (1997).

⁴⁷Although *Olano* appears to have aggravated the disparity in approaches in the courts of appeals, the differential treatment was evident even prior to *Olano*. Many courts of appeals applied Rule 12’s “good cause” exception to claims raised for the first time on appeal and thus “waived” under the terms of the Rule, demanding both cause and prejudice be shown before considering an untimely claim. *E.g.*, *United States v. Coppola*, 526 F.2d 764, 773 (10th Cir. 1975) (refusing to grant an exception to waiver of claim of unauthorized prosecutor on appeal when defendant failed to demonstrate good cause for non-compliance with Rule 12(b), and “In neither his opening brief nor

B. COURT OF APPEALS INTERPRETATIONS TODAY: WHICH STANDARD APPLIES?

Courts of appeals⁴⁸ evaluating claims raised for the first time on appeal⁴⁹ that should have

in his reply brief, [did] appellant indicate how he may have been prejudiced by the special attorney's appearance before the grand jury"). Other approaches were used as well, sometimes in the same circuit. Compare *United States v. Simone*, 931 F.2d 1186, 1192 (7th Cir. 1991) (grant relief from waiver only if cause is shown, and, in addition, the defendant establishes plain error) with *United States v. Gio*, 7 F.3d 1279, 1284-85 (7th Cir. 1993) (use plain error review if cause can not be established) and with *United States v. Griffin*, 765 F.2d 677, 682 (7th Cir. 1985) (find claim waived and that plain error did not apply, reasoning that *Frady* "bars Griffin from arguing that the plain error standard of Fed. R. Crim. P. 52(b) should govern the question of whether he waived his right to challenge his allegedly multiplicitous indictment").

⁴⁸Although Rule 52 is regularly applied by trial courts, particularly when a claim is raised in a motion for new trial, trial courts generally require "good cause," applying some version of the Rule 12 exception, regardless of whether the claim is raised prior to trial but after the deadline for pretrial motions, during trial, or in a post-conviction motion for new trial.

⁴⁹The diverging approaches appear most pronounced when courts of appeals review claims raised for the first time on appeal. Before and after *Olano*, courts of appeals have generally reviewed *district court decisions* to grant or deny relief from waiver using the abuse of discretion standard. See e.g., *United States v. Sobin*, 56 F.3d 1423, 1427 (D.C. Cir. 1995) (upholding denial of untimely suppression motion filed day of trial); *United States v. Madeoy*, 912 F.2d 1486, 1491 (D.C. Cir. 1990) ("Because we find that the appellants have shown neither cause for the untimeliness of their motion, nor actual prejudice from its denial, we conclude that the district court did not abuse its discretion in refusing to relieve them from their waiver of the right to challenge their indictment"); *United States v. Rodriguez-Lozada*, 558 F.3d 29, 37-38 (1st Cir.) (not abuse of discretion to deny suppression motion as untimely when filed during trial), *cert. denied sub nom. Rivera-Garcia v. United States*, 130 S. Ct. 283 (2009); *United States v. Gomez-Benabe*, 985 F.2d 607, 611 (1st Cir. 1993) (no abuse of discretion to reject as waived late motion to suppress); *United States v. Mendoza-Acevedo*, 950 F.2d 1, 3 (1st Cir. 1991) (suppression not raised until the fifth day of trial was waived when record shows no reason for the delay that would have permitted the court to grant relief from the waiver, noting relief under Rule 12(f) should be granted only upon showing of cause and prejudice); *United States v. Kopp*, 562 F.3d 141, 143 (2d Cir.) (no abuse of discretion to deny

been filed before trial under Rule 12 have disagreed about how to review such claims. Part of the difficulty is reconciling the command in *Olano* that Rule 52 applies unless there is true “waiver” by

untimely motion to suppress when defendant has failed to show cause and prejudice), *cert. denied*, 130 S. Ct. 529 (2009); *United States v. Forrester*, 60 F.3d 52, 59 (2d Cir. 1995) (no abuse of discretion for trial court to deny motion to dismiss based on violation of constitutional speedy trial rights brought after conviction when no cause demonstrated); *United States v. Nunez-Rios*, 622 F.2d 1093, 1098–99 (2d Cir. 1980) (denying defense of outrageous governmental conduct affirmed, this “should normally be raised prior to trial, so that the trial court can conduct a hearing with respect to any disputed issues of fact. . . [b]y failing to raise this issue prior to trial, [defendant] waived the right to assert it on appeal); *United States v. Rad-O-Lite of Philadelphia, Inc.*, 612 F.2d 740, 744-45 (3d Cir. 1979) (affirming district court’s denial of late filed motion to strike, when no cause shown for delay); *United States v. Ferguson*, 778 F.2d 1017, 1019-20 (4th Cir. 1985) (no abuse of discretion in denying severance motion raised after closing arguments based on new theory when no cause or prejudice shown); *United States v. Payne*, 341 F.3d 393, 402-03 (5th Cir. 2003) (no abuse of discretion to refuse relief from waiver of duplicity objection); *United States v. Hirschhorn*, 649 F.2d 360, 364 (5th Cir. 1981) (denial of suppression motion filed two days before trial as waived not abuse of discretion when no prejudice shown); *United States v. Blair*, 214 F.3d 690, 699–701 (6th Cir. 2000) (district court properly denied late constitutional challenge to grand jury composition); *United States v. Trobee*, 551 F.3d 835, 838 (8th Cir.) (denial of tardy suppression motion not abuse of discretion), *cert. denied*, 130 S. Ct. 279 (2009); *United States v. Bloate*, 534 F.3d 893, 901 (8th Cir. 2008), *rev’d on other grounds*, 130 S. Ct. 1345 (2008) (denial of motion as untimely was not abuse of discretion when no cause shown); *United States v. Moore*, 98 F.3d 347, 351 (8th Cir. 1996) (denial of late suppression motion not abuse of discretion); *United States v. Tekle*, 329 F.3d 1108, 1112 (9th Cir. 2003); *United States v. Vasquez*, 2011 WL 1533495, at *3 (10th Cir. April 25, 2011) (no abuse of discretion to find late suppression claim waived); *United States v. Salom*, 349 Fed.Appx. 409, 411 (11th Cir.) (district court did not abuse its discretion by denying motion as untimely, defendant had not shown cause), *cert. denied*, 130 S. Ct. 2130 (2009).

For cases finding that a district court had abused its discretion, see *United States v. Crowley*, 236 F.3d 104, 110 (2d Cir. 2000) (error for district court to grant relief from waiver of challenge to specificity of indictment when no cause shown); *United States v. Chavez*, 902 F.2d 259 (4th Cir. 1990) (error for court to reject cause); *United States v. Salahuddin*, 509 F.3d 858 (7th Cir. 2007) (same).

intentional relinquishment, with the command in Rule 12 that says claims are “waived” whenever they are raised late. Four basic approaches have emerged.

1. *Consider the claim if the defendant can meet the Rule 12 exception for “good cause”*

The courts of appeals for eight circuits—D.C.,⁵⁰ Second,⁵¹ Third,⁵² Fourth,⁵³ Sixth,⁵⁴

⁵⁰See *United States v. Hemphill*, 514 F.3d 1350, 1365 (D.C. Cir. 2008) (challenge to flawed ground in indictment was waived absent showing of cause, citing *Weathers*); *United States v. Burroughs*, 161 Fed. Appx. 13, 14 (D.C. Cir. 2005) (venue claim raised for first time on appeal waived when defendant failed to show “good cause” for his failure to raise objection on time); *United States v. Mathis*, 216 F.3d 18 (D.C. Cir. 2000) (duplicity challenge to indictment waived, citing *Weathers*); *United States v. Weathers*, 186 F.3d 948, 955 (D.C. Cir. 1999) (multiplicity challenge to indictment waived absent showing of cause and prejudice, noting “We cannot conclude that the Court intended *Olano*, a case which mentioned neither Rule 12 nor *Davis*, to overrule *Davis* by redefining sub silentio the meaning of the word “waiver” in Rule 12”). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, see *United States v. Hewlett*, 395 F.3d 458, 460–461 (D.C. Cir. 2005) (suppression issue not raised was waived); *United States v. Gaviria*, 116 F.3d 1498, 1517 n. 22 (D.C. Cir. 1997) (venue challenge waived).

⁵¹See *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003) (rejecting plain error review and stating, “we will find complete waiver of a suppression argument that was made in an untimely fashion before the district court unless there is a showing of cause”).

⁵²See *United States v. Rose*, 538 F.3d 175, 177–83 (3d Cir. 2008) (suppression issues raised for the first time on appeal are waived absent good cause under Rule 12, concluding, after lengthy analysis, “Though each of Rule 52(b) and Rule 12 appears applicable when read alone, when considered together we believe Rule 12’s waiver provision must prevail.”); *United States v. Pitt*, 193 F.3d 751, 759–61 (3d Cir. 1999) (failure to raise before trial waived claim of outrageous governmental conduct, where defendant made no showing of cause or prejudice).

⁵³ See *United States v. Richardson*, 276 Fed. Appx. 320, 323 (4th Cir. 2008) (per curiam) (“Because Richardson failed to raise the issue of suppression based on invalid search prior to or during trial, and he does not allege cause for his failure to do so, we find he has waived his right to raise the issue on appeal”); *United States v. Collins*, 372 F.3d 629, 633 (4th Cir. 2004) (failure to object to venue before trial waives claim); *United States v. Colton*, 231 F.3d 890, 909 (4th Cir. 2000) (failure to object to a count on grounds of multiplicity prior to trial waives objection, unless party can demonstrate cause for the failure to object and actual prejudice resulting from the defect). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, see *United States v. Whorley*, 550 F.3d 326, 337 (4th Cir. 2008) (suppression argument waived), *cert. denied*, 130 S. Ct. 1052 (2010).

Ninth,⁵⁵ Tenth,⁵⁶ and Eleventh⁵⁷—have stated that they will not consider a claim first raised on

⁵⁴See *United States v. Auston*, 355 Fed. Appx. 919, 922–24 (6th Cir. 2009) (new basis for venue challenge raised for the first time on appeal waived, no cause shown), *cert. denied*, 130 S. Ct. 1558 (2010); *United States v. Collier*, 246 Fed. Appx. 321, 334–36 (6th Cir. 2007) (rejecting plain error review finding suppression challenge not raised below waived, “record reflects no attempt on Defendant’s part to demonstrate good cause before the district court, or even to assert these challenges during trial. Nor does Defendant’s *brief on appeal* address or explain his Rule 12(e) waiver. Accordingly, Defendant’s “omission below to make a facial showing of the ‘good cause’ required” by Rule 12(e) precludes our review”). For a case finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, see *United States v. Deitz*, 577 F.3d 672 (6th Cir. 2009) (severance objection waived), *cert. denied*, 130 S. Ct. 1720 (2010); *United States v. Brown*, 498 F.3d 523, 528 (6th Cir. 2007) (delayed indictment claim waived); *United States v. Neumann*, 887 F.2d 880, 885–86 (8th Cir. 1989) (en banc) (suppression issue waived); *United States v. Abboud*, 438 F.3d 554, 567–68 (6th Cir. 2006) (suppression argument waived); *United States v. Hamilton*, 263 F.3d 645, 655 (6th Cir. 2001) (*Miranda* claim waived).

⁵⁵See *United States v. Anderson*, 472 F.3d 662, 668–669 (9th Cir. 2006) (granting relief from waiver of challenge based on dual criminality and speciality, remanding issue to district court); *United States v. Technic Services*, 314 F.3d 1031, 1039 (9th Cir. 2002) (duplicity challenge waived, noting defendant do not argue that they had cause), *overruled on other grounds*, *United States v. Contreras*, 593 F.3d 1135 (9th Cir. 2010); *United States v. Wright*, 215 F.3d 1020, 1026–27 (9th Cir. 2000) (defendant “waived any dispute about the legality of his arrest and placed the issue beyond this court’s ability to review for plain error” and has “advanced no cause for failing to first raise his illegal arrest claim to the district court in a pre-trial suppression motion”). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, see *United States v. Mausali*, 590 F.3d 1077, 1081 (9th Cir.) (severance motion waived), *cert. denied*, 131 S. Ct. 342 (2010); *United States v. Kahlon*, 38 F.3d 467, 469 (9th Cir. 1994) (failure to raise grand jury defects before trial results in waiver); *United States v. Klinger*, 128 F.3d 705, 708 (9th Cir. 1997) (duplicity and multiplicity challenges to the indictments waived).

⁵⁶*United States v. Burke*, 633 F.3d 984, 988–89 (10th Cir. 2011) (suppression argument waived, noting defendant made no effort to demonstrate cause, nor does impediment to timely filing appear in record, rejecting plain error review), *cert. denied*, 2011 U.S. LEXIS 2907 (U.S. April 18, 2011); *United States v. Schneider*, 594 F.3d 1219, 1228 n.9 (10th Cir. 2010) (duplicitous indictment not raised until appeal, waived, unless good cause can be shown); *United States v. Haber*, 251 F.3d 881,

appeal that should have been raised before trial under Rule 12 unless the defendant can meet the Rule 12 exception for “good cause;” they do not apply plain error review.⁵⁸

888-89 (10th Cir. 2001) (duplicity argument waived, no cause shown). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Rodriguez-Chavez*, 291 Fed. Appx. 915, 917 n.1 (10th Cir. 2008) (argument that indictment was ambiguous was waived); *United States v. Dirden*, 38 F.3d 1131, 1139 n. 10 (10th Cir.1994) (suppression issue waived).

⁵⁷*United States v. Suescun*, 237 F.3d 1284, 1286–87 (11th Cir. 2001) (challenge to authority of prosecutor was required to be presented prior to trial under Rule 12 and defendant has not “asked us to grant relief from the waiver”). For cases finding simply that the claim first raised on appeal was waived and not addressing good cause option for relief, *see United States v. Nix*, 438 F.3d 1284, 1288 (11th Cir. 2006) (suppression motion waived); *United States v. Dabbs*, 134 F.3d 1071, 1078 (11th Cir. 1998) (venue objection waived).

⁵⁸The Fifth Circuit also has decisions following this approach. *See United States v. St. Martin*, 119 Fed. Appx. 645, 649–650 (5th Cir. 2005) (joinder and severance objections waived, and need not be addressed, when defendant does not provide any excuse for her failure to raise these objections before trial); *United States v. Mann*, 161 F.3d 840, 862 (5th Cir. 1998) (appellants failed to show cause, severance argument waived). More decisions from the Fifth Circuit appear to take a different approach. *See* note 62 *infra*.

The Seventh Circuit, too, has many decisions following the majority approach. *United States v. Quintanilla*, 218 F.3d 674, 678-79 (7th Cir. 2000) (“Although it is the appellant's burden to establish ‘cause’ for his failure to raise the no-knock issue in a motion to suppress, Quintanilla’s brief fails to even suggest a reason for the failure. . . . [he] has failed to establish any possible prejudice from the inclusion of authorization for a no-knock entry in the warrant. We are convinced that Quintanilla has failed to establish cause for his failure to raise” the argument); *United States v. Evans*, 131 F.3d 1192, 1193 (7th Cir. 1997) (“Evans has not tried to establish ‘cause’ for neglecting this subject earlier”); *United States v. Dimitrova*, 266 Fed. Appx. 486, 487 (7th Cir. 2008) (noting the defendant offered no cause or explanation for her failure to raise the suppression issue before trial, did not offer a “good cause” explanation sufficient under Rule 12(e) and *Johnson* in her posttrial motion, “nor has she done so on appeal”). Another approach in the Seventh Circuit is discussed at note 63 *infra*.

2. *Require the defendant to meet the Rule 12 exception for “good cause,” then if cause is established, review the late claim for plain error under Rule 52(b).*

Several decisions from the Seventh Circuit require the appellant raising a claim that should have been raised before trial first to meet the Rule 12 exception for “good cause” and then establish

Decisions from the Fifth and Seventh Circuits also find late claims waived without mentioning cause: *United States v. Cano*, 519 F.3d 512, 515 (5th Cir. 2008) (suppression arguments not raised are waived); *United States v. Whitfield*, 590 F.3d 325, 359 (5th Cir. 2009) (failure to make motion alleging defect in the indictment before trial “generally constitutes waiver” error in indictment was waived), *cert. denied*, 131 S. Ct. 136 (2010); *United States v. Creech*, 408 F.3d 264 (5th Cir. 2005) (duplicity objection waived); *United States v. Chavez-Valencia*, 116 F.3d 127, 130–31 (5th Cir. 1997) (suppression claim waived, rejecting plain error review); *United States v. Pineda-Buenaventura*, 622 F.3d 761, 777 (7th Cir. 2010) (defendant waived issue on appeal of whether co-tenants had authority to actually give consent, since defendant did not object to magistrate judge’s recommendation finding that they had authority, not discussing plain error).

whether there was plain error under Rule 52(b).⁵⁹ In other words both cause and plain error are required.

3. Apply plain error under Rule 52(b) instead of Rule 12.

A number of cases from the circuits above have applied plain error under Rule 52(b) to late claims that should have been raised prior to trial under Rule 12, either failing to mention Rule 12,⁶⁰

⁵⁹*E.g.*, *United States v. King*, 627 F.3d 641, 647 (7th Cir. 2010) (“If a party raises new arguments for suppression on appeal, Court of Appeals reviews for plain error if the defendant can show good cause for failing to make those arguments in the district court. . . . King has not established good cause for his failure to present the illegal entry argument previously. And even if he passed that threshold, King has not shown error, much less plain error, in the district judge’s decision . . .”); *United States v. Figueroa*, 622 F.3d 739, 742 (7th Cir. 2010) (“If a party filed a motion to suppress in the district court but raises new arguments for suppression on appeal . . . we review for plain error if the defendant can show good cause for failing to make those arguments in the district court.”); *United States v. Brodie*, 507 F.3d 527, 530–31 (7th Cir. 2007); *United States v. Hargrove*, 508 F.3d 445, 450 (7th Cir. 2007) (“Hargrove has given us no explanation for his failure to seek suppression of this identification evidence before trial as required by Rule 12. . . . [He] has not made the good cause showing required by Rule 12(e) for the waiver. We need not move on to the question of whether he was prejudiced to the degree required in plain error review.”); *United States v. Murdock* 491 F.3d 694, 698 (7th Cir. 2007) (“before we will review a forfeited suppression argument for plain error, the defendant must first show good cause for failing to make that argument in the district court”); *United States v. Johnson*, 415 F.3d 728, 730-31 (7th Cir. 2005) (“Before we even reach the question of plain error, however, we must consider the antecedent question implicit in the language of Rule 12(e) that we just quoted—namely, whether Johnson has shown good cause for his failure to make a timely motion to suppress on the *Miranda* ground.”).

⁶⁰*United States v. Moore*, 104 F.3d 377, 382 (D.C. Cir. 1997) (“Where, as here, a defendant fails to move for severance of a charge at the trial level, we will review only for ‘plain error’ not mentioning Rule 12); *United States v. Rumley*, 588 F.3d 202, 205 (4th Cir. 2009) (noting that “because Rumley did not challenge the constitutionality of the search in the district court, we review only for plain error”); *United States v. Stevens*, 487 F.3d 232, 242 (5th Cir. 2007) (“Because Raul Stevens raises his *Miranda*-based argument for the suppression of his statement of consent for the first time on appeal, we review for plain error.”), *cert. denied*, 552 U.S. 936 (2007); *United States v. Deitz*, 577

or suggesting that even without showing cause under Rule 12, an untimely claim should be remedied if it amounts to plain error.⁶¹ This latter approach appears to be the predominant view in the Fifth Circuit.⁶²

F.3d 672 (6th Cir. 2009) (applying plain error), *cert. denied*, 130 S. Ct. 1720 (2010); *United States v. Sanders*, 315 Fed. Appx. 819 (11th Cir. 2009); *United States v. Galdos*, 308 Fed. Appx. 346, 357 (11th Cir. 2009) (“Because Galdos did not move for a severance of the charges in the district court and raises the severance issue for the first time on appeal, we review this issue only for plain error.”); *United States v. Lewis*, 492 F.3d 1219, 1222 (11th Cir. 2007) (en banc) (“We now hold, consistent with *Olano*, that a waiver is the intentional relinquishment of a known right, whereas the simple failure to assert a right, without any affirmative steps to voluntarily waive the claim, is a forfeiture to be reviewed under the plain error standard embodied in Rule 52(b). Lewis took no affirmative steps to waive his right against double jeopardy; he simply failed to assert his right. Accordingly, Lewis forfeited his right to a double jeopardy defense, and his claim is entitled to plain error review”).

⁶¹*United States v. Brown*, 16 F.3d 423, 427 (D.C. Cir. 1994) (stating that if the defendant waived misjoinder issue under Rule 12(f), we will not reverse a conviction, even if Rule 8 would not have permitted joinder, unless there is plain error resulting in actual prejudice to the defendant, denying relief); *United States v. Lopez-Medina*, 461 F.3d 724, 738–39 (6th Cir. 2006) (finding suppression argument raised for the first time on appeal waived and that defendant has shown no good cause, but reviewing for plain error, noting question in circuit as to whether plain error should apply in addition to Rule 12, and finding no plain error); *United States v. Buchanon*, 72 F.3d 1217, 1227 (6th Cir. 1995) (a suppression argument forfeited under Rule 12(f) could be reviewed for plain error under Rule 52(b)); *United States v. Jones*, 530 F.3d 1292, 1298 (10th Cir. 2008) (where defendant failed to raise the misjoinder claim prior to trial, the court of appeals, with the agreement of both defendant and the government, reviewed for plain error); *United States v. Milian-Rodriguez*, 828 F.2d 679, 683–84 (11th Cir. 1987) (concluding that the defendant's failure to raise timely (without good cause) a suppression argument was a waiver under Rule 12(f), but then went on to review the argument for plain error); *United States v. Dewitt*, 946 F.2d 1497, 1502 (10th Cir. 1991) (holding that suppression issue was waived under Rule 12, but then noting that the Court did “not find plain error in the district court's admission of the evidence”).

⁶²*United States v. Scroggins*, 599 F.3d 433 (5th Cir.) (noting that the Fifth Circuit follows the view that “a defendant who fails to make a timely suppression motion cannot raise that claim for the first

4. Determine if district court would have abused its discretion had it been raised.

Several recent decisions of the Seventh Circuit require the appellate court to ask whether it *would have been* within the trial court’s discretion to have denied a claim as untimely if the claim *had been* raised in the trial court.⁶³

time on appeal,” but that “[n]onetheless, our cases identifying such waiver have often proceeded to evaluate the issues under a plain error standard for good measure”), *cert. denied*, 131 S. Ct. 158 (2010); *United States v. Baker*, 538 F.3d 324, 329 (5th Cir. 2008) (“The *Pope* decision considered at some length reasons supporting its conclusion that arguments not urged in a motion to suppress may not be considered on appeal, [but] also conducted a plain-error analysis and concluded there was no plain error as did our court in *United States v. Maldonado*. We follow the same course today.”) (footnotes omitted); *United States v. Whittington*, 269 Fed. Appx. 388, 401 (5th Cir. 2008) (unraised severance motion waived, but in the alternative will be reviewed for plain error); *United States v. Pope*, 467 F.3d 912, 917–20 (5th Cir. 2006) (suppression argument waived, but no plain error either).

⁶³See *United States v. Acox*, 595 F.3d 729, 731-32 (7th Cir. 2010) (stating that the cause standard is for the district court alone to apply and requiring the appellate court to ask, in the absence of a district-court decision on good cause, “if a motion for relief had been made and denied, [whether] the district court would have abused its discretion in concluding that the defense lacked good cause”); *United States v. Bright*, 578 F.3d 547, 550-51 (7th Cir. 2009) (“Rule 12 mandates that Bright must have filed a suppression motion before his trial or risk losing it, and because he did not, it cannot be said that the district court committed any error, let alone plain error, when it followed the federal rules as written.”); *United States v. Kirkland*, 567 F.3d 316, 322 (7th Cir. 2009) (“Considering that Kirkland gives no explanation for his failure to raise these arguments in his initial motion, it would have been within the district court’s discretion to refuse to consider them in the first instance”), *cert. denied*, 130 S. Ct. 1120 (2010).

Other decisions of the Seventh Circuit, gathered in note 59 *supra*, appear to recognize the appellate court’s authority to assess the presence of cause under Rule 12, and insist on such a showing as an antecedent to plain error review.

Finally, the First⁶⁴ and the Eighth⁶⁵ Circuits have expressly declined to decide the issue.

⁶⁴*United States v. Guerrero*, 524 F.3d 5, 11-12 (1st Cir. 2008) (“Assuming that we may review the claim for plain error despite the Rule 12(e) waiver, *see United States v. Perez-Gonzalez*, 445 F.3d 39, 44 (1st Cir. 2006) (noting that this remains an open question in this circuit), it is clear from the record that no Miranda violation occurred . . .”); *United States v. Colon-Munoz*, 192 F.3d 210, 218 (1st Cir. 1999) (participation of interim United States Attorney in grand jury waived when not raised until after verdict, declining to resolve whether Rule 12 waiver precludes plain error review, noting error harmless as a matter of law under *Mechanik*). But see *United States v. Calderon*, 578 F.3d 78, 99 (1st Cir.) (motion to sever never raised before trial was waived, defendant failed to identify any cause, much less good cause), *cert. denied sub nom Pomales-Pizarro v. United States*, 130 S. Ct. 437 (2009); *United States v. Pimentel*, 539 F.3d 26, 31 (1st Cir. 2008) (lack of specificity in indictment waived); *United States v. Page*, 521 F.3d 101, 110 (1st Cir. 2008) (severance motion waived when raised for the first time on appeal and defendant “has presented no additional argumentation as to how the denial of severance might have caused him actual prejudice”); *United States v. Negron*, 23 Fed. Appx. 10, 11 (1st Cir. 2001) (“Appellant’s submissions wholly fail to show cause for his failure to raise [challenge that he was not indicted by a vote of at least 12 grand jurors] before his trial”); *United States v. Hansen*, 434 F.3d 92, 101–04 (1st Cir. 2006) (“[W]here a defendant has failed altogether to file a motion to suppress below, and as such, we will not consider Hansen’s suppression arguments on appeal.”); *United States v. Lopez-lopez*, 282 F.3d 1 (1st Cir. 2002) (defendant has not shown cause for relief from his waiver of late suppression motion so his argument is waived); *United States v. Batista*, 239 F.3d 16, 19 (1st Cir. 2001) (stating that relief from waiver under Rule 12 is proper “only where there is a showing of cause and prejudice”); *United States v. Rodriguez-Marrero*, 390 F.3d 1, 11–12 (1st Cir. 2004) (challenge to the specificity of the indictment was waived where it was not raised prior to trial); *United States v. Valerio*, 48 F.3d 58, 63 (1st Cir. 1995) (“Baez never objected to Count II for duplicity, or any other grounds, in the district court. He accordingly has waived his argument.”).

⁶⁵*See United States v. Eagle*, 498 F.3d 885, 892 (8th Cir. 2007) (“We have not yet decided whether the failure to raise a suppression matter in a timely pretrial motion precludes plain error review”); *United States v. Frazier*, 280 F.3d 835, 845 (8th Cir. 2002) (declining to decide “interesting question” of whether a court of appeals is barred altogether from reviewing an issue that has been “waived” under Rule 12(f)).

But see *United States v. Oslund*, 453 F.3d 1048 (8th Cir. 2006) (finding claim of pre-charge

The Advisory Committee’s proposal adopted the majority approach, specifying that for all but two specified claims, a late claim—whether raised in the district court or the court of appeals—may only be considered if the party shows cause and prejudice. Plain error analysis under Rule 52, the Advisory Committee decided, is irrelevant. The reasons for adopting this approach are spelled out in detail in Section C of the accompanying report. The proposed language, then, omits any reference to the confusing term “waiver” and simply dictates the circumstances of the failure to raise on time and the circumstances under which a court may consider the claim:

delay waived); *United States v. Cordova*, 157 F.3d 587, 597 (8th Cir. 1998) (venue objection waived).

Rule 12. Pleadings and Pretrial Motions *

1 * * * * *

2 **(b) Pretrial Motions.**

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

4 **(2) ~~Motions That May Be Made Before Trial.~~** A

5 party may raise by pretrial motion any defense,

6 objection, or request that the court can determine

7 without a trial of the general issue. Motion That

8 May Be Made at Any Time. A motion that the

9 court lacks jurisdiction may be made at any time

10 while the case is pending.

11 **(3) *Motions That Must Be Made Before Trial.*** The

12 following defenses, objections, and requests must

13 be raised by motion before trial if the basis for the

14 motion is then reasonably available and the

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

15 motion can be determined without a trial on the
16 merits:
17 (A) ~~a motion alleging~~ a defect in instituting the
18 prosecution, including:
19 (i) improper venue;
20 (ii) preindictment delay;
21 (iii) a violation of the constitutional
22 right to a speedy trial;
23 (iv) double jeopardy;
24 (v) the statute of limitations;
25 (vi) selective or vindictive
26 prosecution; and
27 (vii) an error in the grand-jury
28 proceeding or preliminary hearing;
29 (B) ~~a motion alleging~~ a defect in the indictment
30 or information, including:
31 (i) joining two or more offenses in the
32 same count (duplicity);

- 33 (ii) charging the same offense in more
34 than one count (multiplicity);
35 (iii) lack of specificity;
36 (iv) improper joinder; and
37 (v) failure to state an offense.

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

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

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

45 (E) ~~a Rule 16 motion for discovery~~ under Rule
46 16.

47 (4) *Notice of the Government’s Intent to Use*
48 *Evidence.*

49 (A) *At the Government’s Discretion.* At the
50 arraignment or as soon afterward as

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

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

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

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

69 practicable, set a deadline for the parties to make
70 pretrial motions and may also schedule a motion
71 hearing.

72 **(2) Consequences of an Untimely Motion**
73 **under Rule 12(b)(3).** If a party does not meet the
74 deadline – or any extension the court provides –
75 for making a Rule 12(b)(3) motion, the motion is
76 untimely. In such a case, Rule 52 does not apply,
77 but a court may consider the defense, objection,
78 or request when:

79 (A) the party shows cause and
80 prejudice; or

81 (B) if the defense or objection is
82 failure to state an offense or double
83 jeopardy, the party shows prejudice
84 only.

85 **(d) Ruling on a Motion.** The court must decide
86 every pretrial motion before trial unless it finds

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.

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 “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").

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 two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made. 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.

Rule 12(e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(2).

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.~~

* * * * *

Advisory 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.

**AS SUBMITTED TO THE
STANDING COMMITTEE
JANUARY 2010**

Rule 12. Pleadings and Pretrial Motions *

1

* * * * *

2

(b) Pretrial Motions.

3

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

4

(2) ~~*Motions That May Be Made Before Trial.*~~ A

5

~~party may raise by pretrial motion any defense,~~

6

~~objection, or request that the court can determine~~

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~~without a trial of the general issue.~~*Motion That*

8

May Be Made at Any Time. A motion that the

9

court lacks jurisdiction may be made at any time

10

while the case is pending.

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

- 11 **(3) *Motions That Must Be Made Before Trial.*** The
12 following defenses, objections, and requests must
13 be raised by motion before trial if the basis for the
14 motion is then reasonably available and the
15 motion can be determined without a trial on the
16 merits:
- 17 (A) ~~a motion alleging~~ a defect in instituting the
18 prosecution, including:
- 19 (i) improper venue;
20 (ii) preindictment delay;
21 (iii) a violation of the constitutional
22 right to a speedy trial;
23 (iv) double jeopardy;
24 (v) the statute of limitations;
25 (vi) selective or vindictive
26 prosecution;

27 (vii) outrageous government conduct;

28 and

29 (viii) an error in the grand jury

30 proceeding or preliminary hearing;

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

32 or information, including:

33 (i) joining two or more offenses in the

34 same count (duplicity);

35 (ii) charging the same offense in more

36 than one count (multiplicity);

37 (iii) lack of specificity;

38 (iv) improper joinder; and

39 (v) failure to state an offense;

40 ~~— but at any time while the case is pending, the~~

41 ~~court may hear a claim that the indictment or~~

- 42 ~~information fails to invoke the court's jurisdiction~~
43 ~~or to state an offense;~~
- 44 (C) ~~a motion to suppression of~~ evidence;
- 45 (D) ~~a Rule 14 motion to severance of~~ charges or
46 defendants under Rule 14; and
- 47 (E) ~~a Rule 16 motion for discovery under Rule~~
48 16.

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

- 51 (A) *At the Government's Discretion.* At the
52 arraignment or as soon afterward as
53 practicable, the government may notify the
54 defendant of its intent to use specified
55 evidence at trial in order to afford the
56 defendant an opportunity to object before
57 trial under Rule 12(b)(3)(C).

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

67 (c) **Motion Deadline.** The court may, at the
68 arraignment or as soon afterward as practicable,
69 set a deadline for the parties to make pretrial
70 motions and may also schedule a motion hearing.

71 (d) **Ruling on a Motion.** The court must decide
72 every pretrial motion before trial unless it finds
73 good cause to defer a ruling. The court must not
74 defer ruling on a pretrial motion if the deferral

75 will adversely affect a party's right to appeal.

76 When factual issues are involved in deciding a

77 motion, the court must state its essential findings

78 on the record.

79 (e) ~~Waiver of a Defense, Objection, or Request.~~

80 Consequence of Not Making a Motion Before

81 Trial as Required.

82 (1) Waiver. A party waives any Rule 12(b)(3)

83 defense, objection, or request – other than failure

84 to state an offense, double jeopardy, or the statute

85 of limitations – not raised by the deadline the

86 court sets under Rule 12(c) or by any extension

87 the court provides. ~~For good cause~~ Upon a

88 showing of cause and prejudice, the court may

89 grant relief from the waiver. Otherwise, a party

90 may not raise the waived claim.

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 “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 the failure to raise a claim a party could not have raised on time is not deemed to be “waiver” or “forfeiture” under the Rule. 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”).

Rule 12(e). Rule 12(e) has also been amended to clarify when a court may grant relief for untimely claims that should have been raised prior to trial under Rule 12(b)(3). Rule 12(e) has been subdivided into two sections, each specifying a different standard of review for untimely claims of error.

Subdivision (e)(1) carries over the “waiver” standard of the existing rule, applying it to all untimely claims except for those that allege a violation of double jeopardy or the statute of limitations or that the charge fails to state an offense. The rule retains the language that provides a party “waives” all other challenges by not raising them on time as required by Rule 12(b)(3), as well as the language that relief is available only if the defendant makes a certain showing, previously described as “good cause.” “Good cause” for securing relief for an untimely claim “waived” under Rule 12 has been interpreted by the Supreme Court as well as most lower courts to require two showings: (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. To clarify this standard, with no change in meaning intended, the words “for good cause” in the existing rule have been replaced by “upon a showing of cause and prejudice.”

Subdivision (e)(2) provides a different standard for three specific claims, those that allege a violation of double jeopardy, a violation of the statute of limitations, or that the charge fails to state an offense. The Committee concluded that the “cause” showing required for excusing waiver of other sorts of claims is inappropriate for these claims. The new subdivision provides that a court may

grant relief for such a claim whenever the error amounts to plain error under Rule 52(b). This new standard is also consistent with the Court’s holding in *Cotton*, that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet “the plain-error test of Federal Rule of Criminal Procedure 52(b).” *Cotton*, 535 U.S. at 631.

1 **Rule 34. Arresting Judgment**

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

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

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

* * * * *

Advisory 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.

- 15 (C) a motion to suppress evidence;
- 16 (D) a Rule 14 motion to sever charges or
- 17 defendants; and
- 18 (E) a Rule 16 motion for discovery.

19 * * * * *

20 **(e) Waiver of a Defense, Objection, or Request.**

21 **(1) Generally.** A party waives any Rule 12(b)(3)

22 defense, objection, or request not raised by the deadline

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

24 court provides.

25 **(2) Relief from Waiver.** ~~For good cause,~~ The court

26 may grant relief from the waiver:

27 (A) for good cause; or

28 (B) when a failure to state an offense in the

29 indictment or information has prejudiced a

30 substantial right of the defendant.

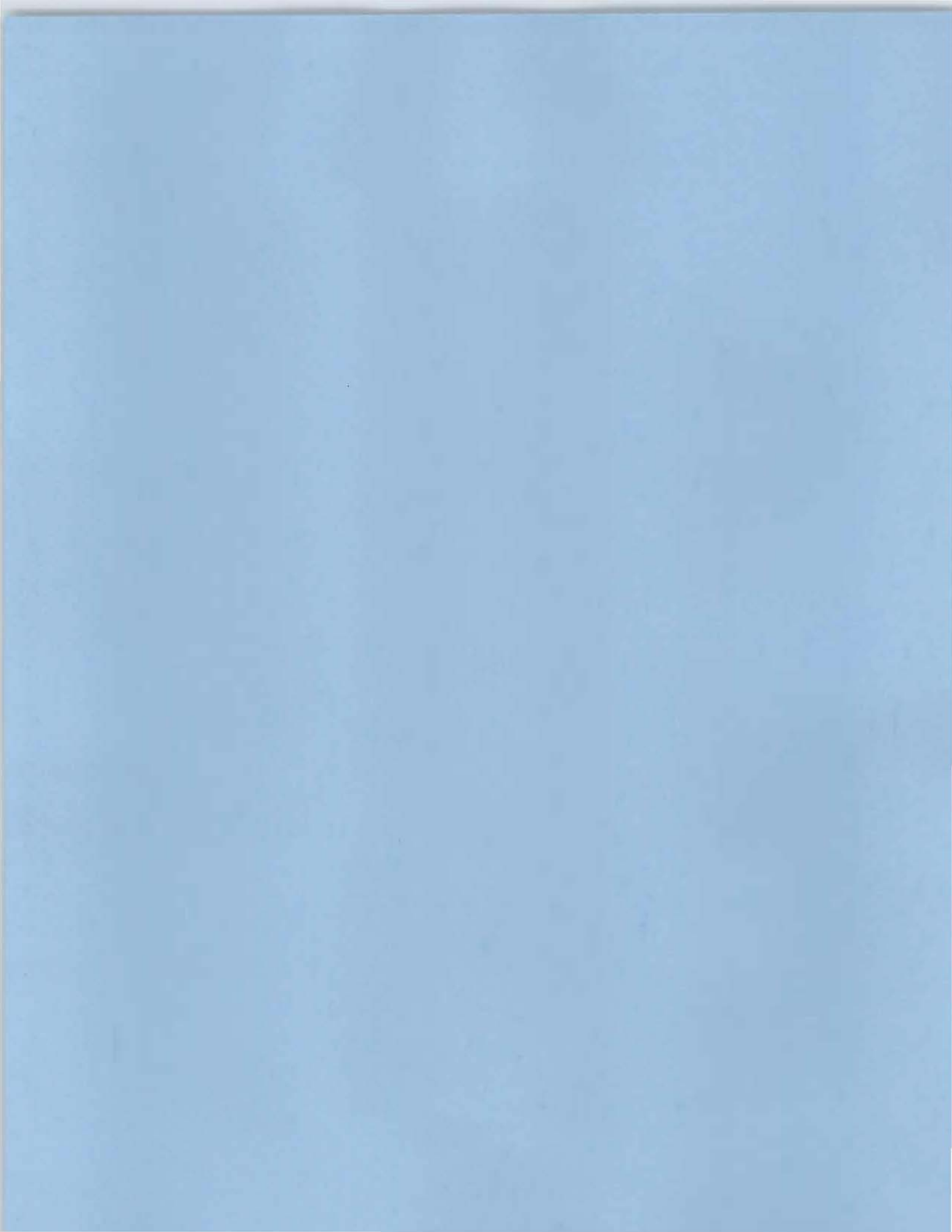
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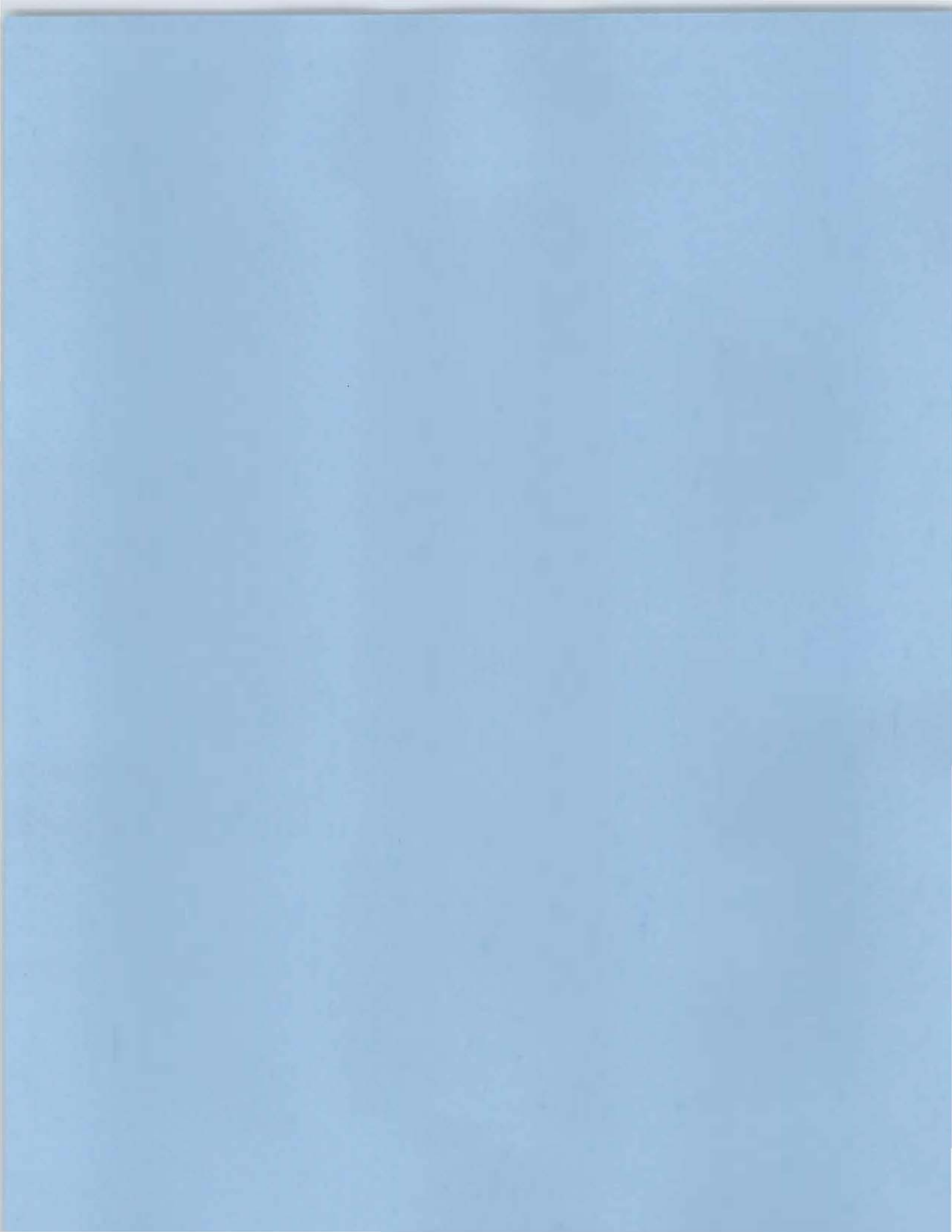
Committee Note

Rule 12(b)(3)(B) has 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 “jurisdictional,” fatal whenever raised, and was excluded from the general requirement that charging deficiencies be raised prior to trial. The Supreme Court abandoned this 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”). The Court in *Cotton* held that a claim that an indictment failed to allege an essential element, raised for the first time after conviction, was forfeited and must meet “the plain-error test of Federal Rule of Criminal Procedure 52(b).” *Cotton*, 535 U.S. at 631.

The amendment requires the failure to state an offense to be raised before trial, like any other deficiency in the charge. Under the amended rule, a defendant who fails to object before trial that the charge does not state an offense now “waives” that objection under Rule 12(e). However, Rule 12(e) has also been amended so that even when the objection is untimely, a court may grant relief whenever a failure to state an offense has prejudiced a substantial right of the defendant, such as when the faulty charge has denied the defendant an adequate opportunity to prepare a defense.

The amendment is not intended to affect existing law concerning when relief may be granted for other untimely challenges “waived” under Rule 12(e).





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

Rule 5. Initial Appearance

* * * * *

1 **(c) Place of Initial Appearance; Transfer to**
2 **Another District.**

* * * * *

3
4 **(4) Procedure for Persons Extradited to the**
5 **United States.** If the defendant is surrendered
6 to the United States in accordance with a
7 request for the defendant's extradition, the
8 initial appearance must be in the district (or one
9 of the districts) where the offense is charged.

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

11 **(1) Advice.** If the defendant is charged with a
12 felony, the judge must inform the defendant of
13 the following:

* * * * *

14
15 (D) any right to a preliminary hearing; ~~and~~

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

17 (E) the defendant's right not to make a
18 statement, and that any statement made
19 may be used against the defendant; and
20 (F) if the defendant is held in custody and is
21 not a United States citizen, that an attorney
22 for the government or a federal law
23 enforcement officer will:
24 (i) notify a consular officer from the
25 defendant's country of nationality that
26 the defendant has been arrested if the
27 defendant so requests; or
28 (ii) make any other consular notification
29 required by treaty or other
30 international agreement.

* * * * *

Committee Note

Subdivision (c)(4). The amendment codifies the longstanding practice that persons who are charged with criminal offenses in the United States and surrendered to the United States following extradition in a foreign country make their initial appearance in the jurisdiction that sought their extradition.

This rule is applicable even if the defendant arrives first in another district. The earlier stages of the extradition process have already fulfilled some of the functions of the initial appearance. During foreign extradition proceedings, the extradited person, assisted by counsel, is afforded an opportunity to review the charging document, U.S. arrest warrant, and supporting evidence. Rule 5(a)(1)(B) requires the person be taken before a magistrate judge without unnecessary delay. Consistent with this obligation, it is preferable not to delay an extradited person's transportation to hold an initial appearance in the district of arrival, even if the person will be present in that district for some time as a result of connecting flights or logistical difficulties. Interrupting an extradited defendant's transportation at this point can impair his or her ability to obtain and consult with trial counsel and to prepare his or her defense in the district where the charges are pending.

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.

PUBLIC COMMENTS CONCERNING RULE 5

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 (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.

Rule 12. Pleadings and Pretrial Motions *

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(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. *Motion 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 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:

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

- 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
21 right to a speedy trial;
 - 22 (iv) double jeopardy;
 - 23 (v) the statute of limitations;
 - 24 (vi) selective or vindictive
25 prosecution; and
 - 26 (vii) an error in the grand-jury
27 proceeding or 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
33 than 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 severance of~~ charges or
43 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 (2) Consequences of an Untimely Motion
71 under Rule 12(b)(3). If a party does not meet the
72 deadline – or any extension the court provides –
73 for making a Rule 12(b)(3) motion, the motion is
74 untimely. In such a case, Rule 52 does not apply,
75 but a court may consider the defense, objection, or
76 request when:

77 (A) the party shows cause and
78 prejudice; or

79 (B) if the defense or objection is
80 failure to state an offense or double
81 jeopardy, the party shows prejudice
82 only.

83 **(d) Ruling on a Motion.** The court must decide every
84 pretrial motion before trial unless it finds good
85 cause to defer a ruling. The court must not defer
86 ruling on a pretrial motion if the deferral will
87 adversely affect a party’s right to appeal. When
88 factual issues are involved in deciding a motion,

89 the court must state its essential findings on the
90 record.

91 (e) **[Reserved]** ~~Waiver of a Defense, Objection, or~~
92 **Request.** ~~A party waives any Rule 12(b)(3)~~
93 ~~defense, objection, or request not raised by the~~
94 ~~deadline the court sets under Rule 12(c) or by any~~
95 ~~extension the court provides. For good cause, the~~
96 ~~court may grant relief from the waiver.~~

97 * * * * *

Committee Note

Rule 12(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.

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 “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”).

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 two paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made. 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.

Rule 12(e). The effect of failure to raise issues by a pretrial motion have been relocated from (e) to (c)(2).

Rule 15. Depositions

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1 **(c) Defendant’s Presence.**

2 **(1) *Defendant in Custody.*** Except as authorized by Rule
3 15(c)(3), the ~~The~~ officer who has custody of the defendant
4 must produce the defendant at the deposition and keep the
5 defendant in the witness’s presence during the
6 examination, unless the defendant:

- 7 (A) waives in writing the right to be present; or
8 (B) persists in disruptive conduct justifying exclusion
9 after being warned by the court that disruptive
10 conduct will result in the defendant’s exclusion.

11 **(2) *Defendant Not in Custody.*** Except as authorized by Rule
12 15(c)(3), a ~~A~~ defendant who is not in custody has the right
13 upon request to be present at the deposition, subject to any
14 conditions imposed by the court. If the government
15 tenders the defendant’s expenses as provided in Rule 15(d)
16 but the defendant still fails to appear, the defendant —
17 absent good cause — waives both the right to appear and
18 any objection to the taking and use of the deposition based
19 on that right.

20 (3) *Taking Depositions Outside the United States Without*
21 *the Defendant's Presence.* The deposition of a witness
22 who is outside the United States may be taken without the
23 defendant's presence if the court makes case-specific
24 findings of all the following:

25 (A) the witness's testimony could provide substantial
26 proof of a material fact in a felony prosecution;

27 (B) there is a substantial likelihood that the witness's
28 attendance at trial cannot be obtained;

29 (C) the witness's presence for a deposition in the United
30 States cannot be obtained;

31 (D) the defendant cannot be present because:

32 (i) the country where the witness is located will
33 not permit the defendant to attend the
34 deposition;

35 (ii) for an in-custody defendant, secure
36 transportation and continuing custody cannot be
37 assured at the witness's location; or

38 (iii) for an out-of-custody defendant, no reasonable
39 conditions will assure an appearance at the
40 deposition or at trial or sentencing; and
41 (E) the defendant can meaningfully participate in the
42 deposition through reasonable means.

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Committee Note

Subdivision (c)(3). This amendment provides a mechanism for taking depositions in cases in which important witnesses — government and defense witnesses both — live in, or have fled to, countries where they cannot be reached by the court’s subpoena power. Although Rule 15 authorizes depositions of witnesses in certain circumstances, the Rule to date has not addressed instances where an important witness is not in the United States, there is a substantial likelihood the witness’s attendance at trial cannot be obtained, and it would not be possible to securely transport the defendant or a co-defendant to the witness’s location for a deposition.

The Committee recognized that authorizing the taking of a deposition under new Rule 15(c)(3) would not determine whether the resulting deposition will be admissible, in part or in whole, at trial. As is true of any other deposition, questions of admissibility of the evidence taken by means of these depositions are left to resolution by the courts, on a case by case basis, applying the Federal Rules of Evidence and the Constitution.

Recognizing that important witness confrontation principles and vital law enforcement and other public interests are involved in these instances, the amended Rule authorizes a deposition outside a defendant’s physical presence only in very limited circumstances where case-specific findings are made by the trial court. New Rule 15(c)(3) delineates these circumstances and the specific findings a trial court must make before permitting parties to depose a witness

outside the defendant's presence. The party requesting the deposition shoulders the burden of proof — by a preponderance of the evidence — as to the elements that must be shown

This amendment does not supersede the relevant provisions of 18 U.S.C. § 3509, authorizing depositions outside the defendant's physical presence in certain cases involving child victims and witnesses, or any other provision of law.

Rule 34. Arresting Judgment

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

- 4 ~~(1) the indictment or information does not charge an offense;~~
- 5 or
- 6 ~~(2) the court does not have jurisdiction of the charged offense.~~

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Advisory 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.

1 **Rule 37. Indicative Ruling on a Motion for Relief That Is**
2 **Barred by a Pending Appeal**

3 **(a) Relief Pending Appeal.** If a timely motion is
4 made for relief that the court lacks authority to
5 grant because of an appeal that has been docketed
6 and is pending, the court may:

7 **(1) defer considering the motion;**

8 **(2) deny the motion; or**

9 **(3) state either that it would grant the motion if the**
10 court of appeals remands for that purpose or that the
11 motion raises a substantial issue.

12 **(b) Notice to the Court of Appeals.** The movant must
13 promptly notify the circuit clerk under Federal Rule of
14 Appellate Procedure 12.1 if the district court states that
15 it would grant the motion or that the motion raises a
16 substantial issue.

17 **(c) Remand.** The district court may decide the motion if
18 the court of appeals remands for that purpose.

Committee Note

This new rule adopts for any motion that the district court cannot grant because of a pending appeal the practice that most courts follow when a party makes a motion under Rule 60(b) of the Federal Rules of Civil Procedure to vacate a judgment that is pending on appeal. After an appeal has been docketed and while it remains pending, the district court cannot grant a Rule 60(b) motion without a remand. But it can entertain the motion and deny it, defer consideration, or state that it would grant the motion if the court of appeals remands for that purpose or state that the motion raises a substantial issue. Experienced lawyers often refer to the suggestion for remand as an “indicative ruling.” (Federal Rule of Appellate Procedure 4(b)(3) lists three motions that, if filed within the relevant time limit, suspend the effect of a notice of appeal filed before or after the motion is filed until the judgment of conviction is entered and the last such motion is ruled upon. The district court has authority to grant the motion without resorting to the indicative ruling procedure.)

The procedure formalized by Federal Rule of Appellate Procedure 12.1 is helpful when relief is sought from an order that the court cannot reconsider because the order is the subject of a pending appeal. In the criminal context, the Committee anticipates that Criminal Rule 37 will be used primarily if not exclusively for newly discovered evidence motions under Criminal Rule 33(b)(1) (*see United States v. Cronin*, 466 U.S. 648, 667 n.42 (1984)), reduced sentence motions under Criminal Rule 35(b), and motions under 18 U.S.C. § 3582(c). Rule 37 does not attempt to define the circumstances in which an appeal limits or defeats the district court’s authority to act in the face of a pending appeal. The rules that govern the relationship between trial courts and appellate courts may be complex, depending in part on the nature of the order and the source of appellate jurisdiction. Rule 37 applies only when those rules deprive the district court of authority to grant relief without appellate permission. If the district court concludes that it has authority to grant relief without appellate permission, it can act without falling back on the indicative ruling procedure.

To ensure proper coordination of proceedings in the district court and in the appellate court, the movant must notify the circuit clerk under Federal Rule of Appellate Procedure 12.1 if the district court

states that it would grant the motion or that the motion raises a substantial issue. Remand is in the court of appeals' discretion under Federal Rule of Appellate Procedure 12.1.

Often it will be wise for the district court to determine whether it in fact would grant the motion if the court of appeals remands for that purpose. But a motion may present complex issues that require extensive litigation and that may either be mooted or be presented in a different context by decision of the issues raised on appeal. In such circumstances the district court may prefer to state that the motion raises a substantial issue, and to state the reasons why it prefers to decide only if the court of appeals agrees that it would be useful to decide the motion before decision of the pending appeal. The district court is not bound to grant the motion after stating that the motion raises a substantial issue; further proceedings on remand may show that the motion ought not be granted.

PUBLIC COMMENTS CONCERNING RULE 37

10-CR-001. Peter Goldberger on behalf of the National Association of Criminal Defense Lawyers. NACDL “is pleased with” the proposed rule, but suggests amendments to the committee note to provide additional guidance to practitioners.

10-CR-002. Federal Magistrate Judges Association. FMJA “endorses” the proposed rule.

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:

* * * * *

- (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) 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:

- 22 (i) notify a consular officer from the
23 defendant's country of nationality that the
24 defendant has been arrested if the
25 defendant so requests; or
26 (ii) make any other consular notification
28 required by treaty or other international
28 agreement.

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COMMITTEE NOTE

Subdivision (b)(2)(H). 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.

PUBLIC COMMENTS CONCERNING RULE 58

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 (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 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.