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OF THE
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MEMORANDUM

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

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

Date: May 24, 2013

Re: Addendum to Report of the Advisory Committee on Criminal Rules

This addendum presents two additions to the May 8 Report of the Advisory Committee on Criminal Rules, each approved by email vote of the Advisory Committee during the past week.

I. Amendment to Rule 12 Committee Note

The first addition is a proposed modification of the Committee Note to proposed Rule 12. After the May 8 Report was completed, a Standing Committee member raised a concern that appellate courts might somehow construe the provisions in proposed Rule 12(c) to limit district court's existing ability to *decline* to extend or reset pretrial motion deadlines. The proposed changes published for comment and recommended by the Committee are designed to recognize, not to change or limit, the existing broad discretion of district judges regarding pretrial motion deadlines. To resolve any possible ambiguity on this point, the Committee agreed that the following change should be made to the proposed Committee Note accompanying the proposed amendments to Rule 12:

...

As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the existing provisions for establishing the time when pretrial motions must be made, and adds a sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the present rule contains the language "or by any extension the court provides," which anticipates that a district court has **the broad** discretion to extend, **reset, or decline to extend or reset**, the deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and relocates the Rule's mention of it to a more logical place - after the provision concerning setting the deadline and before the provision concerning the consequences of not meeting the deadline. **No change in meaning is intended.**

See Attachment A for a complete version of the proposed amendment to Rule 12 and accompanying Committee Note, including this proposed language.

II. ACTION ITEM – Rule 6

The second addition to the May 8 Report is a new Action Item proposing a technical and conforming amendment to Criminal Rule 6.

The Office of the Law Revision Counsel, U.S. House of Representatives, recently notified the Administrative Office that as of May 20, 2013, Chapter 15 of title 50, United States Code, was reorganized into four new chapters, and existing provisions have been transferred, without change, from one place to another in title 50. As a result, the statutory reference in Fed. R. Crim. P. 6(e)(3)(D) to the Code section defining counterintelligence -- "50 U.S.C. § 401a" -- is no longer correct. Section 401a was reclassified as 50 U.S.C. § 3003. The Committee recommends that Rule 6 be amended to reflect the correct citation, as follows:

An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § ~~401a~~**3003**) . . . to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties.

This technical or conforming amendment can be recommended for adoption without publication. Attachment B shows the amendment to Rule 6, with accompanying Committee Note.

Recommendation: The Advisory Committee recommends that the technical and conforming amendment to Rule 6 be transmitted to the Judicial Conference without publication.

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

2 * * * * *

3 **(b) Pretrial Motions.**

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

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

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

- 14 (A) ~~a motion alleging a defect in instituting the prosecution, including:~~
15 (i) improper venue;
16 (ii) preindictment delay;
17 (iii) a violation of the constitutional right to a speedy trial;
18 (iv) selective or vindictive prosecution; and
19 (v) an error in the grand-jury proceeding or preliminary hearing;
20 (B) ~~a motion alleging a defect in the indictment or information, including:~~
21 (i) joining two or more offenses in the same count (duplicity);
22 (ii) charging the same offense in more than one count
23 (multiplicity);
24 (iii) lack of specificity;
25 (iv) improper joinder; and
26 (v) failure to state an offense;

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

- 29 (C) ~~a motion to suppression of evidence;~~
30 (D) ~~a Rule 14 motion to severance of charges or defendants under Rule 14;~~

- 31 and
- 32 (E) ~~a Rule 16 motion for discovery under Rule 16.~~
- 33 **(4) *Notice of the Government's Intent to Use Evidence.***
- 34 (A) *At the Government's Discretion.* At the arraignment or as soon afterward
- 35 as practicable, the government may notify the defendant of its intent to use
- 36 specified evidence at trial in order to afford the defendant an opportunity to object
- 37 before trial under Rule 12(b)(3)(C).
- 38 (B) *At the Defendant's Request.* At the arraignment or as soon afterward as
- 39 practicable, the defendant may, in order to have an opportunity to move to
- 40 suppress evidence under Rule 12(b)(3)(C), request notice of the government's
- 41 intent to use (in its evidence-in-chief at trial) any evidence that the defendant may
- 42 be entitled to discover under Rule 16.

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

44 **Timely Motion.**

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

46 practicable, set the deadline for the parties to make pretrial motions and may also

47 schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

48 **(2) Extending or Resetting the Deadline.** At any time before trial, the court may extend

49 or reset the deadline for pretrial motions.

50 **(3) Consequences of Not Making a Timely Motion Under Rule 12(b)(3).** If a party does

51 not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a

52 court may consider the defense, objection, or request if:

53 (A) the party shows good cause; or

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

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

56 finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the

57 deferral will adversely affect a party's right to appeal. When factual issues are involved in

58 deciding a motion, the court must state its essential findings on the record.

59 **(e) [Reserved] Waiver of a Defense, Objection, or Request.** A party waives any Rule

60 ~~12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c)~~

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

63

64

Committee Note

65

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

71

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

75

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

77

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

90

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

97
98 Rule 12(b)(3)(B) has also been amended to remove language that allowed the court at any
99 time while the case is pending to hear a claim that the “indictment or information fails . . . to
100 state an offense.” This specific charging error was previously considered fatal whenever raised
101 and was excluded from the general requirement that charging deficiencies be raised prior to trial.
102 The Supreme Court abandoned any jurisdictional justification for the exception in *United States*
103 *v. Cotton*, 535 U.S. 625, 629-31 (2002) (overruling *Ex parte Bain*, 121 U.S. 1 (1887), “[i]nsofar
104 as it held that a defective indictment deprives a court of jurisdiction”).

105
106 **Rule 12(c).** As revised, subdivision (c) governs both the deadline for making pretrial
107 motions and the consequences of failing to meet the deadline for motions that must be made
108 before trial under Rule 12(b)(3).

109
110 As amended, subdivision (c) contains three paragraphs. Paragraph (c)(1) retains the
111 existing provisions for establishing the time when pretrial motions must be made, and adds a
112 sentence stating that unless the court sets a deadline, the deadline for pretrial motions is the start
113 of trial, so that motions may be ruled upon before jeopardy attaches. Subdivision (e) of the
114 present rule contains the language "or by any extension the court provides," which anticipates
115 that a district court has broad discretion to extend, reset, or decline to extend or reset, the
116 deadline for pretrial motions. New paragraph (c)(2) recognizes this discretion explicitly and
117 relocates the Rule's mention of it to a more logical place - after the provision concerning setting
118 the deadline and before the provision concerning the consequences of not meeting the deadline.
119 No change in meaning is intended.

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

127
128 The standard for review of untimely claims under new paragraph 12(c)(3) depends on the
129 nature of the defense, objection, or request. The general standard for claims that must be raised
130 before trial under Rule 12(b)(3) is stated in (c)(3)(A), which – like the present rule -- requires
131 that the party seeking relief show “good cause” for failure to raise a claim by the deadline. The
132 Supreme Court and lower federal courts have interpreted the “good cause” standard under Rule
133 12(e) to require both (1) “cause” for the failure to raise the claim on time, and (2) “prejudice”
134 resulting from the error. *Davis v. United States*, 411 U.S. 233, 242 (1973); *Shotwell Mfg. Co. v.*
135 *United States*, 371 U.S. 341, 363 (1963).

136
137 New subparagraph (c)(3)(B) provides a different standard for one specific claim: the
138 failure of the charging document to state an offense. The Committee concluded that judicial
139 review of these claims, which go to adequacy of the notice afforded to the defendant, and the
140 power to bring a defendant to trial or to impose punishment, should be available without a
141 showing of “good cause.” Rather, review should be available whenever a defendant shows
142 prejudice from the failure to state a claim. Accordingly, subparagraph (c)(3)(B) provides that the
143 court can consider these claims if the party “shows prejudice.” Unlike plain error review under
144 Rule 52(b), the standard under Rule (12)(c)(3)(B) does not require a showing that the error was
145 “plain” or that the error “seriously affects the fairness, integrity, or public reputation of judicial
146 proceedings.” Nevertheless, it will not always be possible for a defendant to make the required
147 showing of prejudice. For example, in some cases in which the charging document omitted an
148 element of the offense, the defendant may have admitted the element as part of a guilty plea after
149 having been afforded timely notice by other means.

150

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

153

154 **DRAFT: SUBJECT TO COMMITTEE APPROVAL OF CHANGES**
155 **CHANGES MADE AFTER PUBLICATION**

156

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

172

173 **PUBLIC COMMENTS**

174

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

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

182

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

186

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

194

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

202

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

16 official's duties. An attorney for the
17 government may also disclose any grand-jury
18 matter involving, within the United States or
19 elsewhere, a threat of attack or other grave
20 hostile acts of a foreign power or its agent, a
21 threat of domestic or international sabotage
22 or terrorism, or clandestine intelligence
23 gathering activities by an intelligence service
24 or network of a foreign power or by its agent,
25 to any appropriate federal, state, state
26 subdivision, Indian tribal, or foreign
27 government official, for the purpose of
28 preventing or responding to such threat or
29 activities.

30 * * * * *

COMMITTEE NOTE

Subdivision (e)(3)(D). This technical and conforming amendment updates a citation affected by the editorial reclassification of chapter 15 of title 50, United States Code. The amendment replaces the citation to 50 U.S.C. § 401a with a citation to 50 U.S.C. § 3003. No substantive change is intended.