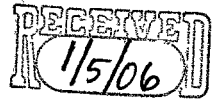




U.S. Department of Justice

Criminal Division



06-CR-B

Office of the Assistant Attorney General

Washington, D.C. 20530

January 3, 2006

The Honorable Susan C. Bucklew  
Chair, Advisory Committee  
on the Criminal Rules  
United States District Court  
109 United States Courthouse  
611 North Florida Avenue  
Tampa, FL 33602

Dear Judge Bucklew:

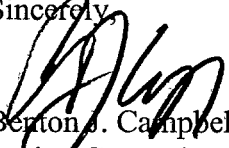
The Department of Justice recommends that Rule 12(b) of the Federal Rules of Criminal Procedure be amended to remove an anomaly in the Rule that allows defendants to belatedly challenge the facial validity of an indictment or information during – and even after – trial. We hope that the Advisory Committee will consider and vote on this proposal at its next meeting in April 2006.

Although Rule 12(b) generally requires defendants to raise **before trial** any allegation of a defect in the indictment or information, by its terms the Rule creates an anomaly that permits defendants to claim **at any time** that the indictment or information fails to state an offense. Under this anomaly, courts have allowed defendants to raise this claim for the first time even after they have been convicted at trial, have pleaded guilty and/or are on appeal – often long after the government's opportunity to amend the indictment or information has passed.

This proposal would require defendants to raise this claim in a timely manner before trial. Defendants who fail to raise such a claim in a timely fashion must satisfy the requirements of plain error if they first raise the claim after trial or on direct review, just like any other claim. We have attached a proposed amendment to the Rule along with a proposed Committee Note that more fully explains the basis for the amendment. We believe this proposal warrants timely and thorough consideration by the Advisory Committee.

We appreciate your assistance with this proposal and look forward to continuing our work with you to improve the federal criminal justice system.

Sincerely,



Bertone J. Campbell  
Acting Counselor to the  
Assistant Attorney General

cc: Professor Sara Sun Beale  
Mr. John Rabiej ✓

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

(a) Pleadings. The pleadings in a criminal proceeding are the indictment, the information, and the pleas of not guilty, guilty, and nolo contendere.

(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.

(3) Motions That Must Be Made Before Trial. The following must be raised before trial:

(A) a motion alleging a defect in instituting the prosecution;

(B) a motion alleging a defect in the indictment or information, including that it fails to state an offense --but at any time while the case is pending, the court may hear a claim that the district court lacks [indictment or information fails to invoke the court's] jurisdiction [or to state an offense];

(C) a motion to suppress evidence;

(D) a Rule 14 motion to sever charges or defendants; and

(E) a Rule 16 motion for discovery.

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

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

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

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

(d) Ruling on a Motion. The court must decide every pretrial motion before trial unless it finds good cause to defer a ruling. The court must not defer ruling on a pretrial motion if the deferral will adversely affect a party's right to appeal. When factual issues are involved in deciding a motion, the court must state its essential findings on the record.

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

(f) Recording the Proceedings. All proceedings at a motion hearing, including any findings of fact and conclusions of law made orally by the court, must be recorded by a court reporter or a suitable recording device.

(g) Defendant's Continued Custody or Release Status. If the court grants a motion to dismiss based on a defect in instituting the prosecution, in the indictment, or in the information, it may order the defendant to be released or detained under 18 U.S.C. § 3142 for a specified time until a new indictment or information is filed. This rule does not affect any federal statutory period of limitations.

(h) Producing Statements at a Suppression Hearing. Rule 26.2 applies at a suppression hearing under Rule 12(b)(3)(C). At a suppression hearing, a law enforcement officer is considered a government witness.

#### **Advisory Committee Note**

When enacted in 1944, Rule 12(b) provided that a motion alleging a defect in the indictment or information had to be raised before trial, except that at any time while the case is pending, the court may hear a claim that the indictment or information fails to invoke the court's jurisdiction or "to charge an offense." The latter exception, rephrased "to state an offense," is now found in Rule 12(b)(3)(B). This exception has been interpreted to allow defendants to raise an indictment's alleged failure to state an offense for the first time during or after trial, after a plea of guilty, or on direct appeal. *E.g.*, *United States v. Rosa-Ortiz*, 348 F.3d 33, 36 (1st Cir. 2003); *United States v. Panarella*, 277 F.3d 678, 682-86 (3d Cir. 2002).

This exception is inconsistent with Rule 12's general goal to require defendants to raise challenges to an indictment or information before trial, when the defect might be fixed, and before effort is expended in trials, pleas, sentencings and other proceedings based on an invalid indictment:

Rule 12 sharply restricts the defense tactic of "sandbagging" that was available in many jurisdictions under common law pleading. Recognizing that there was a defect in the pleading, counsel would often forego raising that defect before trial, when a successful objection would merely result in an amendment of the

pleading. If the trial ended in a conviction, he could then raise the defect on a motion in arrest of judgment and obtain a new trial. Federal Rule 12 eliminated this tactic as to all objections except the failure to show jurisdiction or to charge an offense.

*United States v. Ramirez*, 324 F.3d 1225, 1228 (11th Cir. 2003). Judges have called for Rule 12(b) to be amended to remove the exception for failure to charge an offense, which “reduces criminal defendants' incentives to raise defenses in a timely fashion in district court,” “has led to strategic decisions by defendants to delay raising the defense,” “undermines judicial economy and finality,” fails to “respect[] the proper relationship between trial and appellate courts,” causes “the waste of judicial resources,” and “mak[es] it more difficult for defendants and prosecutors to enter plea agreements that benefit both the parties and society as a whole.” *Panarella*, 277 F.3d at 686-88.

Indeed, the Supreme Court removed the justification and the need for the exception for failure to state an offense in *United States v. Cotton*, 535 U.S. 625 (2002). The Court rejected the assertion that the failure of an indictment to state an offense “was a 'jurisdictional' defect” which could be raised without regard to the rules for preservation of claims of error. *Id.* at 629. The Court explained that the source of this view, *Ex parte Bain*, 121 U.S. 1 (1887), was “a product of an era” in which “this Court could examine constitutional errors in a criminal trial only on a writ of habeas corpus, and only then if it deemed the error 'jurisdictional'”, which “led to a somewhat expansive notion of 'jurisdiction' which was 'more a fiction than anything else.’” *Cotton*, 535 U.S. at 629-30 (citations omitted). The Court ruled that, given the subsequent authorization of review by direct appeal and the subsequent expansion of collateral review, “*Bain's* elastic concept of jurisdiction” was neither needed nor valid, and the Court overruled *Bain* “[i]nsofar as it held that a defective indictment deprives a court of jurisdiction.” *Cotton*, 535 U.S. at 630-31. The Court held that a claim that an indictment which failed to allege an offense had to be timely raised, or it would be forfeited and would have to meet “the plain-error test of Federal Rule of Criminal Procedure 52(b).” *Cotton*, 535 U.S. at 631. Courts, however, have considered themselves bound by the language of Rule 12(b)(3)(B), and have “urged the Judicial Conference Advisory Committee on Criminal Rules to consider amending” the rule. *United States v. Hedaithy*, 392 F.3d 580, 586-89 & n.7 (3d Cir. 2004).

Accordingly, Rule 12(b)(3)(B) has been amended to remove this exception. The amended rule requires that claims that an indictment fails to state an offense be raised before trial as provided in Rule 12(b)(3), (c) and (e). A defendant who fails thus to raise such a claim forfeits it, and can obtain relief only by meeting Rule 52(b)'s plain-error test, or the “cause and prejudice” test if the claim is first raised under 28 U.S.C. § 2255. *United States v. Ratigan*, 351 F.3d 957, 964 (9th Cir. 2003).

The Supreme Court in *Cotton* did reiterate that defects in subject-matter jurisdiction -- “the courts' statutory or constitutional power to adjudicate the case' .... can never be forfeited or waived,” and can be corrected “regardless of whether the error was raised in district court.” 535 U.S. at 630. The jurisdictional exception is therefore retained in Rule 12(b)(3)(B), and permits

the district court's subject-matter jurisdiction to be challenged at any time while the proceedings initiated by the indictment or information are pending in the district court or on direct appeal. *United States v. Wolff*, 241 F.3d 1055, 1057 (8th Cir. 2001).