APPENDIX

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United States Court of Appeals
Tenth Circuit

October 5, 2020

Christopher M. Wolpert
Clerk of Court

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

TERRY LEE OCKERT, JR.,

Defendant - Appellant.

No. 19-3049
(D.C. No. 6:17-CR-10151-EFM-1)
(D. Kan.)

ORDER AND JUDGMENT*

Before **LUCERO**, **HOLMES**, and **EID**, Circuit Judges.

Defendant-Appellant Terry Ockert appeals the district court's denial of his motion to suppress evidence seized from his car during a traffic stop. He contends that the police officer did not have the requisite reasonable suspicion to pull him over and initiate the traffic stop in the first place. He also argues that the plain view doctrine did not justify the subsequent search of his car because the officers on scene lacked lawful access to the vehicle. Exercising jurisdiction pursuant to 28 U.S.C. § 1291, we affirm the district court's judgment.

* This order and judgment is not binding precedent, except under the doctrines of law of the case, res judicata, and collateral estoppel. It may be cited, however, for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

I.

At around 1:00 a.m. on June 18, 2017, Officer Dailey was driving on a two-lane road and witnessed Terry Ockert's vehicle—which was roughly 1,000 feet ahead of his patrol car—veer to the left so much that it appeared to cross over into the on-coming lane of traffic. To catch up to Ockert, Officer Dailey increased his speed to 69 mph (the speed limit was 45 mph), then slowed to 63 mph, then slowed to 55 mph, which was the speed at which Ockert was driving. Ockert then veered into the lane of oncoming traffic again for about three seconds.

Ockert pulled off the road and into the gravel driveway of a private residence. After Ockert pulled off the road, Officer Dailey activated his emergency lights and stopped his patrol car behind Ockert's vehicle. Officer Dailey instructed Ockert to move away from the vehicle and shortly thereafter said, "I'm guessing the reason I saw you go left of center is probably 'cause you were watching me behind you, coming up behind you." ROA at 446.

Officer Dailey called for backup, and eventually Officer Rexroat arrived on scene. Both officers then peered through the windows of Ockert's car for roughly five minutes. During this time, Officer Rexroat observed a rifle in the front passenger seat. Rexroat also said that he smelled marijuana near the vehicle. When Officer Dailey asked Ockert about whether he had marijuana in the car, Ockert replied "no," but then added that "[i]f you would've said meth or something, [then] maybe." *Id*. at 323 (Presentence Investigation Report at 5); Aplt. Br. at 11.

Later during the stop, Officer Dailey observed what appeared to be narcotics inside of a bag located within a cigarette packet. He and Officer Rexroat then searched inside the car and eventually seized the bag of narcotics, the rifle in the front seat, and a drum magazine capable of holding 100 rounds of .22 caliber ammunition.

Ockert was indicted for being a felon in possession of a firearm in violation of 18 U.S.C. § 922(g)(1). He moved to suppress evidence derived from the traffic stop on the grounds that Officer Dailey lacked reasonable suspicion to pull him over, the stop was unreasonably delayed, and the officers lacked probable cause to search his vehicle. He specifically argued that the plain view doctrine could not justify the search because, according to him, the bag of narcotics was not in plain sight and the incriminating nature of the bag was not immediately apparent.

After conducting an evidentiary hearing on the matter, the district court denied the suppression motion. It found that Officer Dailey could have reasonably suspected Ockert to have violated the Kansas single-lane statute—K.S.A. § 8-1522(a)—mandating that drivers stay in their lane, reasoning that Ockert twice veered into the wrong lane and that there were no obstacles in the road or adverse weather conditions that would have made it impractical for Ockert to stay in the correct lane. The district court also found that the plain view doctrine gave the officers probable cause to search the vehicle because Officer Dailey saw a "white or clear substance" in the bag, he believed the substance was contraband, and he had a "lawful right of access

to the vehicle because he stopped Ockert pursuant to a lawful traffic stop." ROA at 177 (Order denying suppression motion at 10).

Ockert now appeals, challenging the initial traffic stop and the subsequent search of his vehicle. He argues that the government failed to show that it would have been practical for Ockert to maintain one lane, and that it therefore did not satisfy its burden of proving reasonable suspicion as articulated in *State v. Marx*, 215 P.3d 601 (Kan. 2009). He also argues that the plain view doctrine could not justify the officers' search of Ockert's car because the officers lacked a warrant to be on the private driveway and therefore lacked lawful access to the vehicle.

II.

When reviewing a lower court's denial of a motion to suppress evidence obtained during a traffic stop, this court reviews the ultimate question of reasonableness de novo and findings of fact for clear error. *United States v. Saulsberry*, 878 F.3d 946, 949 (10th Cir. 2017). When doing so, we "view the evidence in the light most favorable to the government." *Id*. We consider any arguments not raised by the defendant in the original suppression motion to be waived. *United States v. Vance*, 893 F.3d 763, 769 (10th Cir. 2018).

III.

The district court correctly found that Officer Dailey had reasonable suspicion to initiate the traffic stop.

A.

To initiate a traffic stop, an officer must have reasonable suspicion that the driver violated the law. *United States v. Winder*, 557 F.3d 1129, 1134 (10th Cir. 2009). Such reasonable suspicion depends on the totality of the circumstances. *Id*. The government here "bears the burden of proving" that Officer Dailey reasonably suspected Ockert of violating the Kansas single-lane statute—K.S.A. § 8-1522(a)—mandating that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane." *United States v. Lopez*, 849 F.3d 921, 925 (10th Cir. 2017).

The Kansas Supreme Court in *Marx* provided guidance for what is required of the government to show that an officer had reasonable suspicion of a § 8-1522(a) violation. There, after witnessing a motorhome cross over the fog line, overcorrect, then cross over the lane line, a police officer stopped the motorhome and eventually found narcotics onboard. *Id*. at 604. The trial court granted the defendants' subsequent motion to suppress the evidence on the ground that the officer lacked reasonable suspicion of a § 8-1522(a) violation. *Id*. The State appealed and the appellate court reversed, finding reasonable suspicion to exist. *Id*.

But the Kansas Supreme Court reversed the appellate court, finding that the State failed to meet its burden of proving reasonable suspicion. *Id*. at 613. To demonstrate reasonable suspicion of a § 8-1522(a) violation, the court asserted, "a detaining officer must articulate something more than an observation of one instance of a momentary lane breach." *Id*. at 612. Further, the court reiterated, it was the State's burden to show that the officer had an "objectively reasonable belief" that it

would have been practical for the driver to maintain a single lane. The government ultimately failed this burden, the court reasoned, because the officer observed only one lane departure, offered no testimony about how far the motorhome departed from its lane, and "shared no information . . . from which the court could . . . infer that it was practicable to maintain a single lane." *Id.* at 613.

Marx thus articulates two rules to consider when determining whether the government here met its burden of showing that Officer Daily reasonably suspected Ockert of violating § 8-1522(a). The first is that an officer must typically observe more than one lane departure, and therefore one momentary lane departure—by itself—is generally not enough to support reasonable suspicion. *Id.* Of note, however, this court has not interpreted *Marx* to categorically hold that drivers must leave their lane more than once. *See United States v. Barraza-Martinez*, 364 F. App'x 453, 457 (10th Cir. 2010) (unpublished) ("*Marx* rejected the notion that every intrusion upon a lane's marker lines gives rise to reasonable suspicion, but also stopped short of holding that a single swerve can never amount to reasonable suspicion.").[1]

The second rule is that the government must provide information "from which the court could . . . infer" that it was practical for the driver to stay in one lane. *Marx*, 215 P.3d at 613. Such information can consist of dashcam video showing the road and weather conditions during the traffic stop, even if the video does not show

[1] We may cite an unpublished opinion for its persuasive value consistent with Fed. R. App. P. 32.1 and 10th Cir. R. 32.1.

the conditions at the exact moments when the driver departed his lane. *See United State v. Angeles*, 725 F. App'x 624, 626–28 (10th Cir. 2018) (unpublished). For example, in *Angeles*, this court found that dashcam video of the weather and road conditions was sufficient to satisfy the government's burden to present evidence of "driving conditions" as required by *Marx*. *See id*. at 628. There, we affirmed the lower court's finding that an officer reasonably suspected a § 8-1522(a) violation where the driver departed his lane twice and dashcam video showed that the driving conditions were adequate. *Id*. at 627–28. We noted that the facts were different from those in *Marx* because 1) the driver departed his lane twice, 2) the government provided testimony about how far the driver's car crossed over the lane line, and 3) dashcam video depicted what the driving conditions were at the time. *Id*. Of note, the dashcam video in *Angeles* did not show what the driving conditions were at the exact time of the lane departures because, due to camera overexposure from sunlight during the relevant moments, "there was no clear footage of Mr. Angeles's car going over the fog line." *Id*. at 626 n.1.

It is possible that the behaviors of others on the road can justify a driver's lane departure. For example, in *United States v. Ochoa*, the district court found that an officer's driving behavior made such a "commotion" that it caused another driver to depart his lane. 4 F. Supp. 2d 1007, 1012 (D. Kan. 1998). There, a Lincoln was traveling along an interstate highway followed by a Toyota. *Id*. at 1009. The police officer pulled up along the Toyota and drove adjacent to it for fifteen seconds. *Id*. During this time the Lincoln briefly departed its lane, prompting the officer to pull it

over. *Id*. The officer eventually found drugs in the Lincoln, but the lower court suppressed this evidence, finding that the officer's driving caused the Lincoln to drift out of its lane, and thus that the officer lacked reasonable suspicion to initially pull the Lincoln over. *Id*. at 1012.

B.

We find that Officer Dailey had reasonable suspicion that Ockert violated K.S.A. § 8-1522(a) for failing to maintain a single lane. According to *Marx*, the government generally needs to present two things to show that an officer had the requisite reasonable suspicion: 1) evidence that the driver departed his lane at least twice, and 2) evidence of the driving conditions from which a court could infer that it would have been practical for the driver to stay in his lane. *See* 215 P.3d at 613.

Here, the government satisfied both of the *Marx* requirements. First, Officer Dailey testified that he observed Ockert depart his lane twice, and one of these lane departures was recorded by the officer's dashcam video. Second, the dashcam video conveyed that the weather and road conditions were clear at the time of Ockert's second lane departure, and thus that it would have been practical for Ockert to stay in his lane. It should be of no matter that the dashcam video did not also show what the road and weather conditions were at the exact time of the first lane departure. All that *Marx* requires is that the government provide "information about the traffic conditions . . . from which the court could . . . infer that it was practical to maintain a single lane." *Id*. And we can infer from the video—which began recording seconds after the first lane departure occurred—that the driving conditions during the first

lane departure were similarly adequate for Ockert to have safely stayed in one lane. Further, as this court found in *Angeles*, dashcam video of the driving conditions around the time of a lane departure can satisfy the *Marx* requirement even when the video does not capture the full extent of the lane crossing or weather conditions at the exact moment of the departure. *See Angeles*, 725 F. App'x at 626 n.1.

We are not persuaded by Ockert's reliance on *Ochoa* to show that Dailey's driving made it impractical for Ockert to stay in his lane. As the district court noted, *Ochoa* is distinguishable from the facts here. In *Ochoa*, the police officer created a "commotion" by driving directly alongside the tail vehicle of what appeared to be a caravan. 4 F. Supp. 2d at 1012. The officer's driving behavior in *Ochoa* was thus more disruptive than Officer Dailey's driving here, which entailed speeding up to—but staying directly behind—Ockert on the two-lane road. It is true that Officer Dailey later told Ockert that the reason he departed his lane was "probably" because he was "watching" Officer Dailey "coming up behind [him]." ROA at 446. But for several reasons, this statement does not detract from Officer Dailey's reasonable suspicion. First, according to Officer Dailey's testimony, he uttered the statement during the traffic stop in an effort to calm Ockert down. *Id.* Second, as Ockert concedes, Officer Dailey's subjective beliefs do not matter when determining whether he had reasonable suspicion. Aplt. Br. at 30 (*citing Winder*, 557 F.3d at 1134). Third, Officer Dailey's statement does not account for the first lane departure that occurred before Dailey sped-up towards Ockert.

For the above reasons, we conclude that Officer Dailey had reasonable suspicion to initiate the traffic stop.

IV.

We conclude that Ockert waived the argument he makes before us about why the plain view doctrine does not apply to the seized evidence. He currently argues that, even if the initial traffic stop was constitutional, the drugs and weapons seized from his car should be suppressed because the officers did not have lawful access to his vehicle at the time of the seizure. But Ockert did not raise this argument below.

When a litigant fails to raise an argument below, she typically either forfeits or waives that argument upon appellate review. If the litigant's failure was due to neglect, she is usually deemed to have forfeited her argument and therefore must prove plain error in order to succeed on appeal. *Tesone v. Empire Marketing Strategies*, 942 F.3d 979, 991 (10th Cir. 2019). By contrast, if evidence shows that the litigant was aware of the argument below yet consciously chose to forgo it, she is generally deemed to have waived the argument and therefore has no rights to appellate review. *Id.*

Specifically, this court has held that waiver applies to suppression-related arguments not raised in the defendant's original motion to suppress. *United States v. Burke*, 633 F.3d 984, 990–91 (10th Cir. 2011). Our holding in *Burke* relied on Fed. R. Crim. P. 12, which—up until 2014—established that a party "waives any Rule 12(b)(3) defense, objection, or request [which includes motions to suppress evidence] not raised" below. *Id.* at 987 (alterations in original). This "waiver provision," we

found, "applied not only to the failure to make a pretrial motion, but also to the failure to include a particular argument in the motion." *Id*. (quoting *United States v. DeWitt*, 946 F.2d 1497, 1502 (10th Cir. 1991)). And though Congress amended Rule 12 in 2014 by deleting the word "waives" from the rule's text, this court still interprets Rule 12 to bar appellate review of suppression-related arguments not raised below. *See United States v. Bowline*, 917 F.3d 1227, 1229 (10th Cir. 2019) ("reject[ing] the view that the [2014] amendments effect[ed] any relevant change" to Rule 12); *see also Vance*, 893 F.3d at 769 n.5 (noting that the 2014 amendments did not abrogate the "waiver rule set out in *Burke*").

Ockert's current argument about why the plain view doctrine should not apply to the seized evidence is notably different than the plain view doctrine argument that he brought below. It is true that both here and below he argued that the plain view doctrine should not apply. It is also true that Ockert's arguments here and below both challenge two of the four elements of the plain view doctrine articulated in *Corral*.[2] But the two *Corral* elements on which Ockert currently relies are separate and distinct from the other two elements that underscored his argument below.

When arguing below that the government failed to satisfy *Corral*, Ockert hinged his argument entirely on the first and fourth elements of the standard. He

[2] This court in *United States v. Corral* held that the plain view doctrine applies only when four elements exist: "(1) the item [wa]s indeed in plain view; (2) the police officer [wa]s lawfully located in a place from which the item c[ould] plainly be seen; (3) the officer ha[d] a lawful right of access to the item itself; and (4) it [wa]s immediately apparent that the seized item [wa]s incriminating on its face." 970 F.2d 719, 723 (10th Cir. 1992).

argued that the plain view doctrine did not apply to the officers because the bag of narcotics was never in plain sight and its incriminating nature was not immediately apparent. This challenge, Ockert argued, concerned only the first and fourth elements of the plain view doctrine articulated in *Corral*. ROA at 158 (Defendant's Reply to Response of United States to Defendant's Motion to Suppress at 9) ("The first and fourth elements are lacking here.").

Here, however, his argument relies completely on the second and third elements of *Corral*. As this court articulated in *Corral*, the second and third elements required for the plain view doctrine are, respectively, that the officer was "*lawfully located* in a place from which the item c[ould] plainly be seen," and that the officer had a "*lawful* right of *access*" to the seized item. *Corral*, 970 F.2d at 723 (emphasis added). These elements are the subject of Ockert's current argument that the officers were not "lawfully in a position" to access Ockert's vehicle because it was on a private driveway and the officers lacked a warrant. Aplt. Br. at 39.

Ockert contends that even if he did not personally preserve this argument below, he is still entitled to appellate review because the district court preserved it for him. He contends that if a litigant neglected to raise an argument below, yet the district court nonetheless addressed it sua sponte, the issue is deemed to have been preserved for appeal and the litigant can raise the issue without having to prove plain error. According to Ockert, the lower court addressed his argument—that the officers lacked lawful access to his vehicle because they were on a private driveway—when it generally found that the officers "had a lawful right of access to

the vehicle because [they] stopped Ockert pursuant to a lawful traffic stop." Reply Br. at 12 (quoting ROA at 177 (Order denying suppression motion at 11)).

But for two reasons we reject Ockert's contention that the district court preserved his "not lawfully located" argument for him. First, as this court articulated in *Tesone v. Empire Marketing Strategies*, the district court can only preserve arguments for appeal when the litigant merely would have forfeited such arguments rather than *waive* them. 942 F.3d at 992. And because Ockert waived—instead of merely forfeited[3]—his argument by failing to raise it in his suppression motion, the district court was unable to preserve the argument for appeal.

Second, even if the district court could have theoretically preserved Ockert's argument for appeal, it did not do so here because it did not adequately address the argument. For a district court to preserve an argument for appeal it must "appl[y] the relevant law to the relevant facts." *Tesone*, 942 F.3d at 992; *see also United States v. Verner*, 659 F. App'x 461, 466 (10th Cir. 2016) (unpublished) (finding that the district court did not preserve the government's new argument—that the smell of marijuana emanating from a vehicle broke the causal chain between an illegal arrest

[3] Ockert contends that he forfeited—rather than waived—his plain view argument because nothing shows that he affirmatively wished to forgo it. But the argument would still be waived here even if Ockert's failure to preserve it below was unintentional. First, as explained above, suppression-related arguments are automatically waived if not preserved below. Second, Ockert failed to argue the plain error standard of review in his opening brief before us. And this court has found that non-preserved arguments are typically waived on appeal if the litigant "did not argue for plain error in his opening brief." *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019).

and the seizure of evidence—because the lower court did not "make relevant factual findings about the purported smell of marijuana"). Here, the district court did not assess the most relevant fact in Ockert's new argument—that the vehicle was located on a private driveway—because, as Ockert concedes, he "did not explicitly point out [to the district court] that the officers intruded on private property." Reply Br. at 11.

V.

For the above reasons, we AFFIRM the district court's denial of Ockert's motion to suppress.

Entered for the Court

Allison H. Eid
Circuit Judge

No. 19-3049, United States v. Terry Ockert

LUCERO, J., concurring in part and dissenting in part:

I concur in the majority's conclusion that Terry Ockert waived his argument that the plain view doctrine does not apply to the seized evidence. However, I respectfully dissent from the majority's analysis of whether the state met its burden of showing that Deputy Dailey had an objectively reasonable belief that it would have been practicable for Ockert to stay in his lane despite the commotion caused by Dailey's driving. Because Dailey's driving created the conditions that led to Ockert briefly leaving his lane, Dailey's suspicion that Ockert violated K.S.A. § 8-1522(a), the Kansas single-lane statute, was unreasonable. Officers cannot cause a traffic violation and then rely on the violation they caused as reasonable suspicion for a traffic stop.

I

Ockert was driving on a poorly lit, two-lane country road. It was a dark night with no moonlight. At 1:20 AM, Dailey was driving about 1,000 feet behind Ockert when he saw Ockert briefly cross the center line of the road. Dailey could not see whether any obstructions caused this deviation.

Dailey then accelerated to 69 miles per hour, exceeding the road's speed limit of 45 miles per hour. He pulled up directly behind Ockert while driving over the speed limit and without turning on his lights or siren, in violation of Sedgwick County Sheriff's Office policy. At no point did Dailey provide any indication that he was a police officer.

Ockert tapped on his brakes several times as a warning, indicating his attention on Dailey's driving.

While Ockert was focused on Dailey's driving, the back-left tire of his vehicle touched the centerline for a few seconds. Only then did Dailey turn on his lights and pull Ockert over for violating § 8-1522(a), which requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane." Dailey approached the vehicle and, during his conversation with Ockert, said "I'm guessing the reason I saw you go left of center is probably cause you were watching me behind ya, coming up behind ya." He later testified that he said this to calm Ockert down, not because it was true.

Ockert challenged the validity of this stop, arguing that because Dailey's driving caused him to cross the center line, Dailey did not have reasonable suspicion that Ockert violated § 8-1522(a). The district court rejected this argument. The court reasoned that because Dailey observed Ockert's vehicle cross the center line twice and there were no obstacles in Ockert's lane of travel or adverse weather conditions, Dailey had reasonable suspicion and the stop was lawful under the Fourth Amendment. The court noted that while Dailey's driving is relevant to whether Ockert actually violated § 8-1522(a), his driving did "not affect the Court's ultimate determination of whether Deputy Dailey had reasonable suspicion that Ockert committed the traffic violation."

II

Section 8-1522(a) requires that "[a] vehicle shall be driven as nearly as practicable entirely within a single lane." This statute was interpreted by the Kansas Supreme Court

in State v. Marx, 215 P.3d 601 (Kan. 2009). Marx noted that § 8-1522(a) is not a strict liability offense. Id. at 612. It does not transform "any and all intrusions upon the marker lines" into violations. Id. Rather, the statute "only requires compliance with the single lane rule as nearly as practicable, i.e., compliance that is close to that which is feasible." Id. (emphasis in original). An "incidental and minimal lane breach" is not enough to violate § 8-1522(a). Id.

The burden is on the government to demonstrate that it was practicable for the driver to stay in his or her lane. Id. at 613. When determining whether an officer has reasonable suspicion, the focus is "on what [the officer] knew, when he knew it, and whether the known facts provided him with a reasonable and good faith belief that a traffic infraction had occurred." Id. If the officer knows of circumstances that render it impracticable for a driver to stay in his or her lane but still effects a stop, the officer's suspicion is not reasonable. Id.

The district court was correct that under normal circumstances, observing a vehicle depart from its lane twice within a short period of time and in the absence of obstacles may be enough to provide an officer with reasonable suspicion that § 8-1522(a) has been violated. However, when an officer's actions make it impracticable for a driver to stay in his or her lane, the officer cannot then rely on the lane departure for reasonable suspicion. By consequence, courts should not consider an officer-induced departure when determining if there was reasonable suspicion. The commotion caused by the officer does not need to be so great that it is impossible for the driver to stay in his or her

lane. Under Marx, the driver need only stay in his or her lane as "close to that which is feasible" under the conditions created by the officer's driving. Id. at 612.

Dailey was not justified in relying on Ockert's second departure to form reasonable suspicion. Under the circumstances, it was objectively unreasonable for Dailey to assume that Ockert's second departure was unrelated to his driving or that Ockert's compliance was not "close to that which is feasible." Dailey rapidly approached Ockert's vehicle from behind on a dark night without turning on his lights or siren. Before the back-left tire of Ockert's vehicle briefly crossed the center line, Ockert pushed on his brakes a few times as a warning. This action suggests that Ockert's attention was on Dailey, and reasonably so. Though Dailey's driving did not make it impossible for Ockert to stay in his lane, it caused a sufficient disturbance to justify briefly crossing the center line. Ockert's driving was not perfect, but it was close to that which is feasible. That is all § 8-1522(a) requires.

Removing the second lane departure from the reasonable suspicion analysis, Dailey did not have reasonable suspicion that Ockert violated § 8-1522(a). Dailey only observed one other brief lane departure, and, as the Kansas Supreme Court held, an "incidental and minimal lane breach" is not enough to violate § 8-1522(a). Id. Though the Kansas Supreme Court left open whether a single lane breach, if sufficiently egregious, can violate the statute, there is no evidence that Ockert's initial lane departure was egregious. Dailey testified that he saw Ockert briefly leave his lane and was unable to see if there was any obstruction that forced him to do so. Accordingly, I conclude that

Dailey did not have reasonable suspicion that Ockert violated § 8-1522(a) and the stop was therefore unlawful. I respectfully dissent.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

UNITED STATES OF AMERICA,

Plaintiff,

vs.

TERRY LEE OCKERT, JR.,

Defendant.

Case No. 17-10151-EFM-1

MEMORANDUM AND ORDER

Defendant Terry Lee Ockert, Jr., was travelling westbound on 63rd Street south when Sedgwick County Deputy Sheriff Kaleb Dailey stopped his vehicle for crossing the center line. After arresting Ockert for driving without a valid license, Deputy Dailey saw a large firearm and a cigarette box containing what he believed to be methamphetamine through the vehicle's window. Deputy Dailey and another deputy sheriff entered the vehicle and seized the firearm and methamphetamine.

Ockert now claims that the initial stop, his arrest, and the subsequent search of the vehicle were unconstitutional. He seeks to suppress the firearm and all other evidence seized from his car. Because the Court concludes that Deputy Dailey made a lawful traffic stop and had probable cause to search the vehicle, the Court denies Ockert's Motion to Suppress (Doc. 35).

I. Factual and Procedural Background

In the early hours of June 18, 2017, Deputy Dailey was travelling westbound in his patrol car on 63rd Street south near Haysville, Kansas. Around 1:20 a.m., Deputy Dailey observed Ockert also travelling westbound on 63rd Street about three to four blocks ahead of him. Deputy Dailey saw Ockert's vehicle cross the center line of 63rd Street. He sped up to close the distance between his patrol car and the vehicle but did not turn on his emergency lights. After the vehicle crossed the railroad tracks several blocks later, Deputy Dailey caught up to it and engaged his emergency lights, which activated the recording mechanism on the patrol vehicle's dash cam.[1]

Video recording from the dash cam shows that Deputy Dailey was initially traveling about 70 m.p.h. toward Ockert's vehicle, which is 25 m.p.h. over the posted speed limit.[2] At 1:22:12 a.m., the deputy's speed slowed to 63 m.p.h., and at 1:22:16, he slowed to 55 m.p.h. The video also shows that at 1:22:16 Ockert's vehicle crossed the center line of 63rd street for a couple of seconds and then returned to the center of the westbound lane.

No environmental factors caused or contributed to Ockert's failure to maintain his vehicle in the westbound lane of 63rd Street. The skies were clear and the temperature was approximately 75 degrees. There were no heavy winds or safety hazards blocking the roadway.

After crossing the railroad tracks, Ockert pulled into a private drive. Deputy Dailey followed him, and by the time he parked his patrol vehicle, Ockert was already getting out of his

[1] According to Deputy Dailey's testimony, the patrol vehicle's dash cam is on while the vehicle is running. The dash cam begins to record when the patrol vehicle's emergency lights are engaged. The dash cam's software, however, preserves the thirty seconds of video preceding the engagement of the emergency lights. Thus, the first thirty seconds of video lack audio recording, but there is audio and video recording from the time at which the emergency lights were initiated.

[2] During the hearing, Deputy Dailey admitted that travelling above the speed limit without turning on his emergency lights violated the Sheriff Department's policy. This admission, however, does not impact the Court's findings regarding the legality of the traffic stop.

car. Deputy Daily informed Ockert that he pulled him over because he drove left of center. He then asked Ockert if he had his driver's license or any other identification, to which Ockert responded that he did not. Deputy Dailey patted Ockert down for weapons and took his identifying information. He then said to Ockert "I'm guessing the reason I saw you go left of center is probably cause you were watching me behind ya, coming up behind ya." Ockert responded, "Yeah, I saw you come up really fast so." Deputy Dailey then told Ockert to "hang tight" and returned to his patrol car to contact Spider for outstanding warrants.

At 1:30:12 a.m., Sedgwick County Deputy Sheriff Cody Rexroat arrived to assist Deputy Dailey. Deputy Dailey explained to Deputy Rexroat why he pulled Ockert over and told Rexroat he was waiting on a report from Spider. Ockert then asked Deputy Dailey if he had any outstanding warrants. When Deputy Dailey responded that he didn't know, Ockert informed him that he had a warrant in "Abilene" and that his license was restricted for a DUI.

During this conversation, Deputy Rexroat approached the passenger side of Ockert's vehicle and looked in the windows using his flashlight. Deputy Dailey and Deputy Rexroat then had a conversation in which Rexroat indicated that he could smell marijuana coming from the car and that there was a firearm located in the car. Deputy Dailey testified that after this conversation he walked to the rear of Ockert's car and smelled marijuana as well. When he told Ockert this, Ockert denied that there was marijuana in the vehicle, but said "If you would've said meth or something maybe, no uh, no . . . ." Ockert also told Deputy Dailey that he could not search his car. At this point, at approximately 1:33:40 a.m., Deputy Dailey arrested Ockert for driving on a suspended license without an interlock device.

After arresting the Defendant, Deputies Dailey and Rexroat continued to walk around the vehicle and look inside its windows. Deputy Dailey commented about an odor of marijuana and

opined that he was "pretty sure" that Ockert was a convicted felon. A little later, Deputy Dailey looked into the front passenger window and saw a black and white cigarette box with a plastic bag sticking out of it. The bag contained a white or clear substance that he suspected was methamphetamine. Deputy Dailey opened the car door, removed the cigarette box from the passenger seat, and confirmed that it contained methamphetamine. The officers then searched the vehicle and seized a loaded .22 caliber rifle and a 100-round capacity drum magazine for the rifle. In addition, the investigation revealed that the VIN number plates had been changed and that the vehicle was stolen.

On October 11, 2017, the grand jury returned an indictment charging Reynolds with one count of possession of a firearm by a prohibited person. Ockert subsequently filed a Motion to Suppress asking the Court to suppress all evidence found within his vehicle. Ockert primarily challenges the initial stop of his vehicle, but in the alternative, he also challenges (1) the length of the traffic stop; (2) his arrest; and (3) the search of his vehicle. The Court held a hearing on Ockert's motion.

II. Analysis

A. The traffic stop did not violate the Fourth Amendment.

Ockert contends that the traffic stop in this case violates the Fourth Amendment because Deputy Dailey lacked reasonable suspicion that Ockert committed a traffic violation. The Fourth Amendment protects individuals from unreasonable searches and seizures. A traffic stop is a seizure under the Fourth Amendment, and thus must be reasonable.[3] "[A] traffic stop is reasonable if it is (1) justified at its inception and (2) reasonably related in scope to the circumstances which

[3] *United States v. West*, 219 F.3d 1171, 1176 (10th Cir. 2000).

justified the interference in the first place."[4] A stop is justified at its inception if the officer has reasonable suspicion that the motorist has violated an applicable traffic regulation.[5]

The Government argues that the traffic stop was reasonable because Deputy Dailey had reasonable suspicion that Ockert violated K.S.A. 8-1522(a). That statute provides: "A vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." The Kansas Supreme Court construed this statute in *State v. Marx*.[6] It concluded that "K.S.A. 8-1522(a) is not a strict liability offense" and requires "more than an observation of one instance of a momentary lane breach."[7] Whether the statute is violated depends on the entire context of the case, including weather conditions or obstacles in the road.[8] The *Marx* court held that a vehicle's crossing the line once, and then overcorrecting briefly across the centerline within a half-mile to one-mile distance, did not provide reasonable suspicion that the statute was violated.[9]

At the suppression hearing, Deputy Dailey testified that while he was travelling westbound on 63rd Street, he observed Ockert's vehicle, which was also travelling westbound on 63rd Street, cross the center line in violation of K.S.A. 8-1522(a). He also testified that as he accelerated to catch up to Ockert, he saw Ockert's vehicle cross the center line for a second time. The dash cam video only recorded the alleged second violation of K.S.A. 8-1522(a), but that recording shows

[4] *United States v. Karam*, 496 F.3d 1157, 1161 (10th Cir. 2007) (internal quotation marks and citation omitted).

[5] *United States v. Cunningham*, 630 F. App'x 873, 876 (10th Cir. 2015).

[6] 289 Kan. 657, 215 P.3d 601 (2009).

[7] *Id*. at 612.

[8] *Id*.

[9] *Id*. at 613.

Ockert's left rear tire crossing the center line for two to three seconds. In addition, based on Deputy Dailey's testimony and the dash cam video recording, there was no weather condition or other obstacle in the road that would make staying in one's lane impracticable. Accordingly, Deputy Dailey had reasonable suspicion to believe that Ockert violated the statute.

Ockert contends that Deputy Dailey did not have reasonable suspicion to stop his vehicle because his second alleged infraction of K.S.A. 8-1522(a) was caused by Deputy Dailey's own conduct. Ockert argues that it was not practical for him to maintain his lane of travel because Deputy Dailey was approaching him at a high rate of speed without engaging his emergency lights. According to Ockert, Deputy Dailey acknowledged this fact when he asked Ockert during the traffic stop whether he left his lane because the patrol vehicle was approaching so quickly from behind.

In support of his argument, Ockert relies on another case from this District—*United States v. Ochoa*.[10] In that case, a Lincoln was travelling along Interstate 70 closely followed by a Toyota. Two troopers, who were driving an unidentifiable patrol car, thought that the vehicles may be travelling together, so they pulled into a passing lane and traveled next to the Toyota for 15 seconds to observe its occupants.[11] During that time, they observed the Lincoln briefly drift out of its lane.[12] The troopers then pulled next to the Lincoln to observe its occupants and later pulled over the Lincoln for failing to maintain its lane of travel.[13] The troopers ultimately recovered 222

[10] 4 F. Supp. 2d 1007 (D. Kan. 1998).

[11] *Id.*

[12] *Id.*

[13] *Id.*

pounds of marijuana from the Lincoln, and the occupants of the Lincoln challenged the initial traffic stop.[14] Judge Marten held that the troopers' conduct could have caused the driver of the Lincoln to drift out of his lane, and thus the single crossing on the shoulder did not violate Kansas law.[15]

The Court does not find *Ochoa* persuasive. In that case, Judge Marten relied heavily on the fact that the defendant's vehicle initially did nothing wrong before the troopers decided to pull next to the Toyota, whereas in this case, Deputy Dailey testified that he observed Ockert crossing the center line before he accelerated his vehicle to catch up to him. Furthermore, the facts of this case are much subtler than those in *Ochoa*. As the Court noted, the driver of the Lincoln was being followed too closely by the Toyota with an unidentifiable patrol car maintaining a position directly beside it for a period of 15 seconds. This "commotion" could have caused a reasonable driver to become distracted and look to see what was going on, causing the vehicle to drift onto the shoulder.[16] Deputy Dailey's acceleration toward Ockert's vehicle did not create nearly such "commotion" here.

While Ockert has pointed to several facts that may be relevant to whether he actually violated K.S.A. 8-1522(a), *i.e.*, Deputy Dailey's speed in approaching his vehicle and Deputy Dailey's failure to use his emergency lights, these facts do not affect the Court's ultimate determination of whether Deputy Dailey had reasonable suspicion that Ockert committed the

[14] *Id*. at 1010-11.

[15] *Id*. at 1011.

[16] *Id*. at 1012.

traffic violation.[17] Reasonable suspicion requires "considerably less than proof of wrongdoing by a preponderance of the evidence."[18] As noted above, Deputy Dailey observed Ockert's vehicle cross the center line twice within a relatively short distance.[19] There were no obstacles in Ockert's lane of travel and no adverse weather conditions. Therefore, the traffic stop was lawful under the Fourth Amendment.

B. The traffic stop was not unreasonably delayed.

In the alternative, Defendant argues that Deputy Dailey unreasonably delayed the traffic stop by failing to run Ockert's information while waiting for Deputy Rexroat to arrive. "[A] traffic stop 'can become unlawful if it is prolonged beyond the time reasonably required to complete th[e] mission' of issuing a warning ticket."[20] In other words, "[t]he seizure remains lawful only 'so long as [unrelated] inquiries do not measurably extend the duration of the stop.' "[21] "Beyond determining whether to issue a traffic ticket, an officer's mission includes 'ordinary inquiries

[17] Although Deputy Dailey may have insinuated that Ockert crossed the center line because of his accelerated speed, Deputy Dailey never admitted this was the case. Deputy Dailey also explained at the hearing that he made such statement to diffuse the escalating tension between him and Ockert during the traffic stop.

[18] *United States v. Sokolow*, 490 U.S. 1, 7 (1989).

[19] In what the Court has interpreted as an attempt to undermine Deputy Dailey's credibility regarding what he observed before the dash cam began recording, Ockert argued at the hearing that Deputies Dailey and Rexroat did not actually smell marijuana coming from his vehicle during the stop. Although this argument is reasonable and supported by the evidence, the Court declines to address this issue because the alleged smell of marijuana is not relevant to the lawfulness of the traffic stop.

[20] *Rodriguez v. United States*, -- U.S. --, 135 S. Ct. 1609, 1614-15 (2015) (quoting *Illinois v. Caballes*, 543 U.S. 405, 407 (2005)).

[21] *Id*. at 1615 (quoting *Arizona v. Johnson*, 555 U.S. 323, 333 (2009)).

incident to [the traffic] stop.' "[22] This includes checking the driver's license and determining whether there are outstanding warrants against the driver.[23]

There was no unreasonable delay in this case between the initiation of the traffic stop and Defendant Dailey running Ockert's information on Spider. The dash cam video shows that upon meeting Ockert outside of his vehicle, Deputy Dailey asked him if he had his driver's license, and Ockert responded that he did not. Deputy Dailey then took Ockert's identifying information and contacted Spider. There is no evidence that Deputy Dailey engaged in any unrelated investigation that lengthened the roadside detention. Thus, Deputy Dailey did not unduly lengthen the duration of the stop.

C. Deputy Dailey had probable cause to arrest Ockert.

Ockert contends that his arrest was unlawful because he was arrested for merely exercising his constitutional rights and refusing to consent to a search of his vehicle. The evidence presented at the hearing does not support this argument. Moreover, Deputy Dailey had probable cause to arrest Ockert because he was driving on a suspended license. Under K.S.A. 8-262, "[a]ny person who drives a motor vehicle on any highway of this state at a time when such person's privilege so to do is canceled, suspended or revoked . . . shall be guilty" of a misdemeanor. An officer can arrest a person for driving without a valid license in violation of this statute.[24] Therefore, Ockert's arrest was not unlawful.

D. The Deputies had probable cause to search the vehicle under the plain view doctrine.

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[22] *Id.* (quoting *Caballes*, 543 U.S. at 408).

[23] *Id.*

[24] *See United States v. Sanchez*, 2011 WL 6091744, at *5 (D. Kan. 2011) (finding that a trooper had probable cause to arrest the defendant when he learned that he was driving on a suspended license).

Finally, Ockert challenges the seizure of evidence from his vehicle by arguing that the deputies did not have probable cause to search it. In response, the Government argues that the search was permissible under both the automobile exception and plain view doctrine. The Court concludes that both exceptions apply to this case.

The Fourth Amendment generally requires police to obtain a warrant before conducting a vehicle search.[25] Police officers, however, may search a vehicle if the circumstances are such that the "automobile exception" applies.[26] Under this exception, "police officers who have probable cause to believe there is contraband inside an automobile that has been stopped on the road may search it without obtaining a warrant."[27] "Probable cause to search an automobile exists 'where the known facts and circumstances are sufficient to warrant a man of reasonable prudence in the belief that contraband or evidence of a crime will be found.' "[28]

The "plain view doctrine" allows an officer to seize evidence of a crime without obtaining a warrant if "(1) the officer was lawfully in a position from which the object seized was in plain view; (2) the object's incriminating character was immediately apparent . . .; and (3) the officer had a lawful right of access to the object."[29] The plain view doctrine and automobile exception have been used in combination to uphold warrantless vehicle searches.[30] For example, "if an

[25] *California v. Carney*, 471 U.S. 386, 390 (1985).

[26] *United States v. Vasquez*, 555 F.3d 923, 930 (10th Cir. 2009) (citation omitted); *Florida v. Meyers*, 466 U.S. 380, 381 (1984) (per curiam).

[27] *Vasquez*, 555 F.3d at 930 (quoting *Meyers*, 466 U.S. at 381).

[28] *United States v. Montes-Ramos*, 347 F. App'x 383, 395-96 (10th Cir. 2009) (quoting *Ornelas v. United States*, 517 U.S. 690, 696 (1966)).

[29] *Id.* at 390 (quoting *United States v. Angelos*, 433 F.3d 738, 747 (10th Cir. 2006)) (internal quotation marks omitted).

[30] *United States v. Sparks*, 291 F.3d 683, 690 (10th Cir. 2002).

officer has lawfully observed an object of incriminating character in plain view in a vehicle, that observation, either alone or in combination with additional facts, has been held sufficient to allow the officer to conduct a probable cause search of the vehicle."[31]

Here, Deputy Dailey saw a cigarette box laying on the passenger seat while he was looking in Ockert's front passenger window. A plastic bag containing a white or clear substance was sticking out of the cigarette box. Based on his training and experience, Deputy Dailey believed the substance was contraband or a controlled substance. He then entered the vehicle, collected the cigarette box, and confirmed that the substance was methamphetamine.

The seizure of the cigarette box was justified under the plain view exception. First, Deputy Dailey saw the white or clear substance when looking through Ockert's vehicle. Second, he believed the substance to be contraband from his training and experience. And, third, Deputy Dailey had a lawful right of access to the vehicle because he stopped Ockert pursuant to a lawful traffic stop. Therefore, Deputy Dailey had authority to seize the cigarette box with the suspected methamphetamine under the plain view doctrine.

Deputy Dailey and Deputy Rexroat also had authority under the plain view doctrine to seize the firearm. Like the methamphetamine, the deputies observed the firearm when looking through the passenger window of Ockert's vehicle. The deputies also had probable cause to believe the firearm was contraband. Deputy Dailey testified that he knew Ockert from previous interactions with him while Deputy Dailey was employed in the detention division of the Sedgwick County Sheriff's Office. In addition, before he seized the firearm, Deputy Dailey received confirmation from the Sheriff's office records department that Ockert was a convicted felon. And

[31] *Id*.

finally, the deputies had a lawful right of access to the firearm because they viewed the firearm in Ockert's vehicle during a lawful traffic stop. Accordingly, the seizure of the firearm did not violate the Fourth Amendment.

III. Conclusion

Deputy Dailey reasonably believed that Ockert committed a traffic violation while driving on 63rd Street on June 17, 2018, and therefore, the traffic stop was lawful. Deputy Dailey did not unreasonably extend the scope or duration of the stop before contacting Spider to confirm Ockert's identity. Furthermore, Deputy Dailey's subsequent arrest of Ockert was not unlawful because it was not based on Ockert's refusal to consent to the search of his vehicle but because of his lack of a valid license. Finally, the deputies' seizure of evidence from the vehicle was lawful under the plain view and automobile exceptions to the Fourth Amendment's warrant requirement. Based on these findings, the Court will not suppress the evidence obtained from the search of Ockert's vehicle. Ockert's Motion to Suppress is denied.

IT IS THEREFORE ORDERED that Defendant's Motion to Suppress (Doc. 35) is **DENIED**.

IT IS SO ORDERED.

Dated this 31st day of July, 2018.

Eric F Melgren

ERIC F. MELGREN
UNITED STATES DISTRICT JUDGE

AO 245B (Rev. 02/18 - D/KS 02/18) Judgment in a Criminal Case
Sheet 1

United States District Court
District of Kansas

UNITED STATES OF AMERICA
v.
Terry Lee Ockert, Jr.

JUDGMENT IN A CRIMINAL CASE

Case Number: 6:17CR10151 - 001
USM Number: 21916-031
Defendant's Attorney: David M. Rapp

THE DEFENDANT:

☒ pleaded guilty to count: 1 of the Indictment.
☐ pleaded nolo contendere to count(s) ___ which was accepted by the court.
☐ was found guilty on count(s) ___ after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 922(g)(1) and 924(a)(2)	Felon in Possession of a Firearm, a Class C Felony	06/18/2017	1

The defendant is sentenced as provided in pages 1 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s) ___.

☐ Count(s) ___ is dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

02/21/2019
Date of Imposition of Judgment

s/ Eric F. Melgren
Signature of Judge

Honorable Eric F. Melgren, U.S. District Judge
Name & Title of Judge

2/22/2019
Date

AO 245B (Rev. 02/18 - D/KS 02/18) Judgment in a Criminal Case
Sheet 2 – Imprisonment

DEFENDANT: Terry Lee Ockert, Jr.
CASE NUMBER: 6:17CR10151 - 001

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 78 months .

Said sentence to run consecutively to the sentences imposed in Sedgwick County, Kansas District Court cases 16CR1790, 17CR171, 17CR2839, and 17CR2428.

☒ The Court makes the following recommendations to the Bureau of Prisons:
At the request of defense counsel, the Court recommends the defendant be designated to a facility that offers the Skills Program or the Challenge Program so that he may participate in cognitive behavioral treatment while in custody.

☒ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district.

☐ at ___ on ___.

☐ as notified by the United States Marshal.

☐ The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

☐ before ___ on ___.

☐ as notified by the United States Marshal.

☐ as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____

at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

DEFENDANT: Terry Lee Ockert, Jr.
CASE NUMBER: 6:17CR10151 - 001

SUPERVISED RELEASE

Upon release from imprisonment, you will be on supervised release for a term of 3 years .

MANDATORY CONDITIONS

1. You must not commit another federal, state, or local crime.

2. You must not unlawfully possess a controlled substance.

3. You must refrain from any unlawful use of a controlled substance. You must submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

   ☐ The above drug testing condition is suspended based on the court's determination that you pose a low risk of future substance abuse. *(Check if applicable.)*

4. ☐ You must make restitution in accordance with 18 U.S.C. §§ 3663 and 3663A or any other statute authorizing a sentence of restitution. *(Check if applicable.)*

5. ☒ You must cooperate in the collection of DNA as directed by the probation officer. *(Check if applicable.)*

6. ☐ You must comply with the requirements of the Sex Offender Registration and Notification Act (34 U.S.C. § 20901, *et seq*.) as directed by the probation officer, the Bureau of Prisons, or any state sex offender registration agency in the location where you reside, work, are a student, or were convicted of a qualifying offense. *(Check if applicable.)*

7. ☐ You must participate in an approved program for domestic violence. *(Check if applicable.)*

You must comply with the standard conditions that have been adopted by this court as well as with any other conditions on the attached page.

DEFENDANT: Terry Lee Ockert, Jr.
CASE NUMBER: 6:17CR10151 - 001

STANDARD CONDITIONS OF SUPERVISION

As part of your supervised release, you must comply with the following standard conditions of supervision. These conditions are imposed because they establish the basic expectations for your behavior while on supervision and identify the minimum tools needed by probation officers to keep informed, report to the court about, and bring about improvements in your conduct and condition.

1. You must report to the probation office in the federal judicial district where you are authorized to reside within 72 hours of your release from imprisonment, unless the probation officer instructs you to report to a different probation office or within a different time frame.
2. After initially reporting to the probation office, you will receive instructions from the court or the probation officer about how and when you must report to the probation officer, and you must report to the probation officer as instructed.
3. You must not knowingly leave the federal judicial district where you are authorized to reside without first getting permission from the court or the probation officer.
4. You must answer truthfully the questions asked by your probation officer.
5. You must live at a place approved by the probation officer. If you plan to change where you live or anything about your living arrangements (such as the people you live with), you must notify the probation officer at least 10 days before the change. If notifying the probation officer in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
6. You must allow the probation officer to visit you at any time at your home or elsewhere, and you must permit the probation officer to take any items prohibited by the conditions of your supervision that he or she observes in plain view.
7. You must work full time (at least 30 hours per week) at a lawful type of employment, unless the probation officer excuses you from doing so. If you do not have full-time employment you must try to find full-time employment, unless the probation officer excuses you from doing so. If you plan to change where you work or anything about your work (such as your position or your job responsibilities), you must notify the probation officer at least 10 days before the change. If notifying the probation officer at least 10 days in advance is not possible due to unanticipated circumstances, you must notify the probation officer within 72 hours of becoming aware of a change or expected change.
8. You must not communicate or interact with someone you know is engaged in criminal activity. If you know someone has been convicted of a felony, you must not knowingly communicate or interact with that person without first getting the permission of the probation officer.
9. If you are arrested or questioned by a law enforcement officer, you must notify the probation officer within 72 hours.
10. You must not own, possess, or have access to a firearm, ammunition, destructive device, or dangerous weapon (i.e., anything that was designed, or was modified for, the specific purpose of causing bodily injury or death to another person such as nunchakus or Tasers).
11. You must not act or make any agreement with a law enforcement agency to act as a confidential human source or informant without first getting the permission of the court.
12. If the probation officer determines that you pose a risk to another person (including an organization), the probation officer may require you to notify the person about the risk and you must comply with that instruction. The probation officer may contact the person and confirm that you have notified the person about the risk.
13. You must follow the instructions of the probation officer related to the conditions of supervision.

U.S. Probation Office Use Only

A U.S. probation officer has instructed me on the conditions specified by the court and has provided me with a written copy of this judgment containing these conditions. I understand additional information regarding these conditions is available at the www.uscourts.gov.

Defendant's Signature _____ Date _____

DEFENDANT: Terry Lee Ockert, Jr.
CASE NUMBER: 6:17CR10151 - 001

SPECIAL CONDITIONS OF SUPERVISION

1. You must participate as directed in a cognitive behavioral program and follow the rules and regulations of that program which may include MRT, as approved by the United States Probation and Pretrial Services Office. You must contribute toward the cost, to the extent you are financially able to do so, as directed by the U.S. Probation Officer.

2. You must submit your person, property, house, residence, vehicle, papers, computers (as defined in 18 U.S.C. § 1030(e)(1)), other electronic communications or data storage devices or media, or office, to a search conducted by a United States Probation Officer. Failure to submit to a search may be grounds for revocation of release. You must warn any other occupants that the premises may be subject to searches pursuant to this condition. An officer may conduct a search pursuant to this condition only when reasonable suspicion exists that you have violated a condition of supervision and that the areas to be searched contain evidence of this violation. Any search must be conducted at a reasonable time and in a reasonable manner.

3. You must successfully participate in and successfully complete an approved program for substance abuse, which may include urine, breath, or sweat patch testing, and/or outpatient treatment, and share in the costs, based on the ability to pay, as directed by the Probation Office. You must abstain from the use and possession of alcohol and other intoxicants during the term of supervision.

DEFENDANT: Terry Lee Ockert, Jr.
CASE NUMBER: 6:17CR10151 - 001

CRIMINAL MONETARY PENALTIES

The defendant must pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	JVTA Assessment*	Fine	Restitution
Totals:	$100	Not applicable	Waived	Not Applicable

☐ The determination of restitution is deferred until ___. An *Amended Judgment in a Criminal Case (AO 245C)* will be entered after such determination.

☐ The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss**	Restitution Ordered	Priority or Percentage
Totals:	$	$	

☐ Restitution amount ordered pursuant to plea agreement $ ___.

☐ The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

☐ The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

☐ the interest requirement is waived for the ☐ fine and/or ☐ restitution.

☐ the interest requirement for the ☐ fine and/or ☐ restitution is modified as follows:

*Justice for Victims of Trafficking Act of 2015, Pub. L. No. 114-22.
**Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

DEFENDANT: Terry Lee Ockert, Jr.
CASE NUMBER: 6:17CR10151 - 001

SCHEDULE OF PAYMENTS

Criminal monetary penalties are due immediately. Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows, but this schedule in no way abrogates or modifies the government's ability to use any lawful means at any time to satisfy any remaining criminal monetary penalty balance, even if the defendant is in full compliance with the payment schedule:

A ☐ Lump sum payment of $___ due immediately, balance due
☐ not later than ___, or
☐ in accordance with ☐ C, ☐ D, ☐ E, or ☐ F below; or

B ☒ Payment to begin immediately (may be combined with ☐ C, ☐ D, or ☒ F below); or

C ☐ Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ___ years to commence ___ days after the date of this judgment; or

D ☐ Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years, to commence ___ days after release from imprisonment to a term of supervision; or

E ☐ Payment during the term of supervised release will commence within ____ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F ☒ Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse - Room 204, 401 N. Market, Wichita, Kansas 67202.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

☐ Joint and Several

Defendant and Co-Defendant Names and Case Numbers (*including defendant number*), Total Amount, Joint and Several Amount and corresponding payee, if appropriate.

Case Number **Defendant and Co-Defendant Names** **(including defendant number)**	**Total Amount**	**Joint and Several Amount**	**Corresponding Payee, if appropriate**

☐ The defendant shall pay the cost of prosecution.

☐ The defendant shall pay the following court cost(s):

☒ The defendant shall forfeit the defendant's interest in the following property to the United States:

A. .22 GSG-522 rifle, serial number A497234; and
B. Any accompanying ammunition.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community restitution, (7) JVTA assessment, (8) penalties, and (9) costs, including cost of prosecution and court costs.

guilty or nolo contendere plea after the court imposes sentence. The provision makes it clear that it is not possible for a defendant to withdraw a plea after sentence is imposed.

The reference to a ''motion under 28 U.S.C. §2255'' has been changed to the broader term ''collateral attack'' to recognize that in some instances a court may grant collateral relief under provisions other than §2255. *See United States v. Jeffers*, 234 F.3d 277 (5th Cir. 2000) (petition under §2241 may be appropriate where remedy under §2255 is ineffective or inadequate).

Currently, Rule 11(e)(5) requires that unless good cause is shown, the parties are to give pretrial notice to the court that a plea agreement exists. That provision has been deleted. First, the Committee believed that although the provision was originally drafted to assist judges, under current practice few counsel would risk the consequences in the ordinary case of not informing the court that an agreement exists. Secondly, the Committee was concerned that there might be rare cases where the parties might agree that informing the court of the existence of an agreement might endanger a defendant or compromise an ongoing investigation in a related case. In the end, the Committee believed that, on balance, it would be preferable to remove the provision and reduce the risk of pretrial disclosure.

Finally, revised Rule 11(f), which addresses the issue of admissibility or inadmissibility of pleas and statements made during the plea inquiry, cross references Federal Rule of Evidence 410.

COMMITTEE NOTES ON RULES—2007 AMENDMENT

Subdivision (b)(1)(M). The amendment conforms Rule 11 to the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005). *Booker* held that the provision of the federal sentencing statute that makes the Guidelines mandatory, 18 U.S.C. §3553(b)(1), violates the Sixth Amendment right to jury trial. With this provision severed and excised, the Court held, the Sentencing Reform Act ''makes the Guidelines effectively advisory,'' and ''requires a sentencing court to consider Guidelines ranges, see 18 U.S.C.A. §3553(a)(4) (Supp. 2004), but it permits the court to tailor the sentence in light of other statutory concerns as well, see §3553(a) (Supp. 2004).'' *Id.* at 245–46. Rule 11(b)(M) incorporates this analysis into the information provided to the defendant at the time of a plea of guilty or nolo contendere.

Changes Made to Proposed Amendment Released for Public Comment. No changes were made to the text of the proposed amendment as released for public comment. One change was made to the Committee note. The reference to the Fifth Amendment was deleted from the description of the Supreme Court's decision in *Booker*.

COMMITTEE NOTES ON RULES—2013 AMENDMENT

Subdivision (b)(1)(O). The amendment requires the court to include a general statement that there may be immigration consequences of conviction in the advice provided to the defendant before the court accepts a plea of guilty or nolo contendere.

For a defendant who is not a citizen of the United States, a criminal conviction may lead to removal, exclusion, and the inability to become a citizen. In *Padilla v. Kentucky*, 130 S.Ct. 1473 (2010), the Supreme Court held that a defense attorney's failure to advise the defendant concerning the risk of deportation fell below the objective standard of reasonable professional assistance guaranteed by the Sixth Amendment.

The amendment mandates a generic warning, not specific advice concerning the defendant's individual situation. Judges in many districts already include a warning about immigration consequences in the plea colloquy, and the amendment adopts this practice as good policy. The Committee concluded that the most effective and efficient method of conveying this information is to provide it to every defendant, without attempting to determine the defendant's citizenship.

Changes Made After Publication and Comment. The Committee Note was revised to make it clear that the court is to give a general statement that there may be immigration consequences, not specific advice concerning a defendant's individual situation.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (f), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

AMENDMENT BY PUBLIC LAW

1988—Subd. (c)(1). Pub. L. 100–690 inserted ''or term of supervised release'' after ''special parole term''.

1975—Pub. L. 94–64 amended subds. (c) and (e)(1)–(4), (6) generally.

EFFECTIVE DATE OF 1979 AMENDMENT

Amendment of subd. (e)(6) of this rule by order of the United States Supreme Court of Apr. 30, 1979, effective Dec. 1, 1980, see section 1(1) of Pub. L. 96–42, July 31, 1979, 93 Stat. 326, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

EFFECTIVE DATE OF AMENDMENTS PROPOSED APRIL 22, 1974; EFFECTIVE DATE OF 1975 AMENDMENTS

Amendments of this rule embraced in the order of the United States Supreme Court on Apr. 22, 1974, and the amendments of this rule made by section 3 of Pub. L. 94–64, effective Dec. 1, 1975, except with respect to the amendment adding subd. (e)(6) of this rule, effective Aug. 1, 1975, see section 2 of Pub. L. 94–64, set out as a note under rule 4 of these rules.

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.* A party may raise by pretrial motion any defense, objection, or request that the court can determine without a trial on the merits. Rule 47 applies to a pretrial motion.

(2) *Motions 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 pretrial motion if the basis for the motion is then reasonably available and the motion can be determined without a trial on the merits:

(A) a defect in instituting the prosecution, including:

(i) improper venue;

(ii) preindictment delay;

(iii) a violation of the constitutional right to a speedy trial;

(iv) selective or vindictive prosecution; and

(v) an error in the grand-jury proceeding or preliminary hearing;

(B) a defect in the indictment or information, including:

(i) joining two or more offenses in the same count (duplicity);

(ii) charging the same offense in more than one count (multiplicity);

(iii) lack of specificity;

(iv) improper joinder; and

(v) failure to state an offense;

(C) suppression of evidence;

(D) severance of charges or defendants under Rule 14; and

(E) discovery under Rule 16.

(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) DEADLINE FOR A PRETRIAL MOTION; CONSEQUENCES OF NOT MAKING A TIMELY MOTION.

(1) *Setting the 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. If the court does not set one, the deadline is the start of trial.

(2) *Extending or Resetting the Deadline.* At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) *Consequences of Not Making a Timely Motion Under Rule 12(b)(3).* If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause.

(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) [RESERVED]

(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.

(As amended Apr. 22, 1974, eff. Dec. 1, 1975; Pub. L. 94–64, §3(11), (12), July 31, 1975, 89 Stat. 372; Apr. 28, 1983, eff. Aug. 1, 1983; Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002; Apr. 25, 2014, eff. Dec. 1, 2014.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivision (a). 1. This rule abolishes pleas to the jurisdiction, pleas in abatement, demurrers, special pleas in bar, and motions to quash. A motion to dismiss or for other appropriate relief is substituted for the purpose of raising all defenses and objections heretofore interposed in any of the foregoing modes. ''This should result in a reduction of opportunities for dilatory tactics and, at the same time, relieve the defense of embarrassment. Many competent practitioners have been baffled and mystified by the distinctions between pleas in abatement, pleas in bar, demurrers, and motions to quash, and have, at times, found difficulty in determining which of these should be invoked.'' Homer Cummings, 29 A.B.A.Jour. 655. See also, Medalie, 4 Lawyers Guild R. (3)1, 4.

2. A similar change was introduced by the Federal Rules of Civil Procedure (Rule 7(a)) which has proven successful. It is also proposed by the A.L.I. Code of Criminal Procedure (Sec. 209).

Note to Subdivision (b)(1) and (2). These two paragraphs classify into two groups all objections and defenses to be interposed by motion prescribed by Rule 12(a). In one group are defenses and objections which must be raised by motion, failure to do so constituting a waiver. In the other group are defenses and objections which at the defendant's option may be raised by motion, failure to do so, however, not constituting a waiver. (Cf. Rule 12 of Federal Rules of Civil Procedure [28 U.S.C., Appendix].)

In the first of these groups are included all defenses and objections that are based on defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense. All such defenses and objections must be included in a single motion. (Cf. Rule 12(g) of Federal Rules of Civil Procedure [28 U.S.C., Appendix].) Among the defenses and objections in this group are the following: Illegal selection or organization of the grand jury, disqualification of individual grand jurors, presence of unauthorized persons in the grand jury room, other irregularities in grand jury proceedings, defects in indictment or information other than lack of jurisdiction or failure to state an offense, etc. The provision that these defenses and objections are waived if not raised by motion substantially continues existing law, as they are waived at present unless raised before trial by plea in abatement, demurrer, motion to quash, etc.

In the other group of objections and defenses, which the defendant at his option may raise by motion before trial, are included all defenses and objections which are capable of determination without a trial of the general issue. They include such matters as former jeopardy, former conviction, former acquittal, statute of limitations, immunity, lack of jurisdiction, failure of indictment or information to state an offense, etc. Such matters have been heretofore raised by demurrers, special pleas in bar and motions to quash.

Note to Subdivision (b)(3). This rule, while requiring the motion to be made before pleading, vests discretionary authority in the court to permit the motion to be made within a reasonable time thereafter. The rule supersedes 18 U.S.C. 556a [now 3288, 3289], fixing a definite limitation of time for pleas in abatement and motions to quash. The rule also eliminates the requirement for technical withdrawal of a plea if it is desired to interpose a preliminary objection or defense after the plea has been entered. Under this rule a plea will be permitted to stand in the meantime.

Note to Subdivision (b)(4). This rule substantially restates existing law. It leaves with the court discretion to determine in advance of trial defenses and objections raised by motion or to defer them for determination at the trial. It preserves the right to jury trial in those cases in which the right is given under the Constitution or by statute. In all other cases it vests in the court authority to determine issues of fact in such manner as the court deems appropriate.

Note to Subdivision (b)(5). 1. The first sentence substantially restates existing law, 18 U.S.C. [former] 561 (Indictments and presentments; judgment on demurrer), which provides that in case a demurrer to an indictment or information is overruled, the judgment shall be *respondeat ouster*.

2. The last sentence of the rule that ''Nothing in this rule shall be deemed to affect the provisions of any act of Congress relating to periods of limitations'' is intended to preserve the provisions of statutes which permit a reindictment if the original indictment is found defective or is dismissed for other irregularities and the statute of limitations has run in the meantime, 18 U.S.C. 587 [now 3288] (Defective indictment; defect found after period of limitations; reindictment); *Id*. sec. 588 [now 3289] (Defective indictment; defect found before period of limitations; reindictment); *Id*. sec. 589 [now 3288, 3289] (Defective indictment; defense of limitations to new indictment); *Id*. sec. 556a [now 3288, 3289] (Indictments and presentments; objections to drawing or qualification of grand jury; time for filing; suspension of statute of limitations).

NOTES OF ADVISORY COMMITTEE ON RULES—1974 AMENDMENT

Subdivision (a) remains as it was in the old rule. It ''speaks only of defenses and objections that prior to the rules could have been raised by a plea, demurrer, or motion to quash'' (C. Wright, Federal Practice and Procedure: Criminal §191 at p. 397 (1969)), and this might be interpreted as limiting the scope of the rule. However, some courts have assumed that old rule 12 does apply to pretrial motions generally, and the amendments to subsequent subdivisions of the rule should make clear that the rule is applicable to pretrial motion practice generally. (See e.g., rule 12(b)(3), (4), (5) and rule 41(e).)

Subdivision (b) is changed to provide for some additional motions and requests which must be made prior to trial. Subdivisions (b)(1) and (2) are restatements of the old rule.

Subdivision (b)(3) makes clear that objections to evidence on the ground that it was illegally obtained must be raised prior to trial. This is the current rule with regard to evidence obtained as a result of an illegal search. See rule 41(e); C. Wright, Federal Practice and Procedure: Criminal §673 (1969, Supp. 1971). It is also the practice with regard to other forms of illegality such as the use of unconstitutional means to obtain a confession. See C. Wright, Federal Practice and Procedure: Criminal §673 at p. 108 (1969). It seems apparent that the same principle should apply whatever the claimed basis for the application of the exclusionary rule of evidence may be. This is consistent with the court's statement in *Jones v. United States*, 362 U.S. 257, 264, 80 S.Ct. 725, 4 L.Ed.2d 697 (1960):

This provision of Rule 41(e), requiring the motion to suppress to be made before trial, is a crystallization of decisions of this Court requiring that procedure, and is designed to eliminate from the trial disputes over police conduct not immediately relevant to the question of guilt. (Emphasis added.)

Subdivision (b)(4) provides for a pretrial request for discovery by either the defendant or the government to the extent to which such discovery is authorized by rule 16.

Subdivision (b)(5) provides for a pretrial request for a severance as authorized in rule 14.

Subdivision (c) provides that a time for the making of motions shall be fixed at the time of the arraignment or as soon thereafter as practicable by court rule or direction of a judge. The rule leaves to the individual judge whether the motions may be oral or written. This and other amendments to rule 12 are designed to make possible and to encourage the making of motions prior to trial, whenever possible, and in a single hearing rather than in a series of hearings. This is the recommendation of the American Bar Association's Committee on Standards Relating to Discovery and Procedure Before Trial (Approved Draft, 1970); see especially §§5.2 and 5.3. It also is the procedure followed in those jurisdictions which have used the so-called ''omnibus hearing'' originated by Judge James Carter in the Southern District of California. See 4 Defender Newsletter 44 (1967); Miller, The Omnibus Hearing—An Experiment in Federal Criminal Discovery, 5 San Diego L.Rev. 293 (1968); American Bar Association, Standards Relating to Discovery and Procedure Before Trial, Appendices B, C, and D (Approved Draft, 1970). The omnibus hearing is also being used, on an experimental basis, in several other district courts. Although the Advisory Committee is of the view that it would be premature to write the omnibus hearing procedure into the rules, it is of the view that the single pretrial hearing should be made possible and its use encouraged by the rules.

There is a similar trend in state practice. See, e.g., *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 133 N.W.2d 753 (1965); *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 141 N.W.2d 3 (1965).

The rule provides that the motion date be set at ''the arraignment or as soon thereafter as practicable.'' This is the practice in some federal courts including those using the omnibus hearing. (In order to obtain the advantage of the omnibus hearing, counsel routinely plead not guilty at the initial arraignment on the information or indictment and then may indicate a desire to change the plea to guilty following the omnibus hearing. This practice builds a more adequate record in guilty plea cases.) The rule further provides that the date may be set before the arraignment if local rules of court so provide.

Subdivision (d) provides a mechanism for insuring that a defendant knows of the government's intention to use evidence to which the defendant may want to object. On some occasions the resolution of the admissibility issue prior to trial may be advantageous to the government. In these situations the attorney for the government can make effective defendant's obligation to make his motion to suppress prior to trial by giving defendant notice of the government's intention to use certain evidence. For example, in United States v. Desist, 384 F.2d 889, 897 (2d Cir. 1967), the court said:

Early in the pre-trial proceedings, the Government commendably informed both the court and defense counsel that an electronic listening device had been used in investigating the case, and suggested a hearing be held as to its legality.

See also the ''Omnibus Crime Control and Safe Streets Act of 1968,'' 18 U.S.C. §2518(9):

The contents of any intercepted wire or oral communication or evidence derived therefrom shall not be received in evidence or otherwise disclosed in any trial, hearing, or other proceeding in a Federal or State court unless each party, not less than ten days before the trial, hearing, or proceeding, has been furnished with a copy of the court order, and accompanying application, under which the interception was authorized or approved.

In cases in which defendant wishes to know what types of evidence the government intends to use so that he can make his motion to suppress prior to trial, he can request the government to give notice of its intention to use specified evidence which the defendant is entitled to discover under rule 16. Although the defendant is already entitled to discovery of such evidence prior to trial under rule 16, rule 12 makes it possible for him to avoid the necessity of moving to suppress evidence which the government does not intend to use. No sanction is provided for the government's failure to comply with the court's order because the committee believes that attorneys for the government will in fact comply and that judges have ways of insuring compliance. An automatic exclusion of such evidence, particularly where the failure to give notice was not deliberate, seems to create too heavy a burden upon the exclusionary rule of evidence, especially when defendant has opportunity for broad discovery under rule 16. Compare ABA Project on Standards for Criminal Justice, Standards Relating to Electronic Surveillance (Approved Draft, 1971) at p. 116:

A failure to comply with the duty of giving notice could lead to the suppression of evidence. Nevertheless, the standards make it explicit that the rule is intended to be a matter of procedure which need not under appropriate circumstances automatically dictate that evidence otherwise admissible be suppressed.

Pretrial notice by the prosecution of its intention to use evidence which may be subject to a motion to suppress is increasingly being encouraged in state practice. See, e.g., *State ex rel. Goodchild v. Burke*, 27 Wis.2d 244, 264, 133 N.W.2d 753, 763 (1965):

In the interest of better administration of criminal justice we suggest that wherever practicable the prosecutor should within a reasonable time before trial notify the defense as to whether any alleged confession or admission will be offered in evidence at the trial. We also suggest, in cases where such notice is given by the prosecution, that the defense, if it intends to attack the confession or admission as involuntary, notify the prosecutor of a desire by the defense for a special determination on such issue.

See also *State ex rel. Rasmussen v. Tahash*, 272 Minn. 539, 553–556, 141 N.W.2d 3, 13–15 (1965):

At the time of arraignment when a defendant pleads not guilty, or as soon as possible thereafter, the state will advise the court as to whether its case against the defendant will include evidence obtained as the result of a search and seizure; evidence discovered because of a confession or statements in the nature of a confession obtained from the defendant; or confessions or statements in the nature of confessions.

Upon being so informed, the court will formally advise the attorney for the defendant (or the defendant himself if he refuses legal counsel) that he may, if he chooses, move the court to suppress the evidence so secured or the confession so obtained if his contention is that such evidence was secured or confession obtained in violation of defendant's constitutional rights. * * *

The procedure which we have outlined deals only with evidence obtained as the result of a search and seizure and evidence consisting of or produced by confession on the part of the defendant. However, the steps which have been suggested as a method of dealing with evidence of this type will indicate to counsel and to the trial courts that the pretrial consideration of other evidentiary problems, the resolution of which is needed to assure the integrity of the trial when conducted, will be most useful and that this court encourages the use of such procedures whenever practical.

Subdivision (e) provides that the court shall rule on a pretrial motion before trial unless the court orders that it be decided upon at the trial of the general issue or after verdict. This is the old rule. The reference to issues which must be tried by the jury is dropped as unnecessary, without any intention of changing current law or practice. The old rule begs the question of when a jury decision is required at the trial, providing only that a jury is necessary if ''required by the Constitution or an act of Congress.'' It will be observed that subdivision (e) confers general authority to defer the determination of any pretrial motion until after verdict. However, in the case of a motion to suppress evidence the power should be exercised in the light of the possibility that if the motion is ultimately granted a retrial of the defendant may not be permissible.

Subdivision (f) provides that a failure to raise the objections or make the requests specified in subdivision (b) constitutes a waiver thereof, but the court is allowed to grant relief from the waiver if adequate cause is shown. See C. Wright, Federal Practice and Procedure: Criminal §192 (1969), where it is pointed out that the old rule is unclear as to whether the waiver results only from a failure to raise the issue prior to trial or from the failure to do so at the time fixed by the judge for a hearing. The amendment makes clear that the defendant and, where appropriate, the government have an obligation to raise the issue at the motion date set by the judge pursuant to subdivision (c).

Subdivision (g) requires that a verbatim record be made of pretrial motion proceedings and requires the judge to make a record of his findings of fact and conclusions of law. This is desirable if pretrial rulings are to be subject to post-conviction review on the record. The judge may find and rule orally from the bench, so long as a verbatim record is taken. There is no necessity of a separate written memorandum containing the judge's findings and conclusions.

Subdivision (h) is essentially old rule 12(b)(5) except for the deletion of the provision that defendant may plead if the motion is determined adversely to him or, if he has already entered a plea, that that plea stands. This language seems unnecessary particularly in light of the experience in some district courts where a pro forma plea of not guilty is entered at the arraignment, pretrial motions are later made, and depending upon the outcome the defendant may then change his plea to guilty or persist in his plea of not guilty.

NOTES OF COMMITTEE ON THE JUDICIARY, HOUSE REPORT NO. 94–247; 1975 AMENDMENT

A. Amendments Proposed by the Supreme Court. Rule 12 of the Federal Rules of Criminal Procedure deals with pretrial motions and pleadings. The Supreme Court proposed several amendments to it. The more significant of these are set out below.

Subdivision (b) as proposed to be amended provides that the pretrial motions may be oral or written, at the court's discretion. It also provides that certain types of motions must be made before trial.

Subdivision (d) as proposed to be amended provides that the government, either on its own or in response to a request by the defendant, must notify the defendant of its intention to use certain evidence in order to give the defendant an opportunity before trial to move to suppress that evidence.

Subdivision (e) as proposed to be amended permits the court to defer ruling on a pretrial motion until the trial of the general issue or until after verdict.

Subdivision (f) as proposed to be amended provides that the failure before trial to file motions or requests or to raise defenses which must be filed or raised prior to trial, results in a waiver. However, it also provides that the court, for cause shown, may grant relief from the waiver.

Subdivision (g) as proposed to be amended requires that a verbatim record be made of the pretrial motion proceedings and that the judge make a record of his findings of fact and conclusions of law.

B. Committee Action. The Committee modified subdivision (e) to permit the court to defer its ruling on a pretrial motion until after the trial only for good cause. Moreover, the court cannot defer its ruling if to do so will adversely affect a party's right to appeal. The Committee believes that the rule proposed by the Supreme Court could deprive the government of its appeal rights under statutes like section 3731 of title 18 of the United States Code. Further, the Committee hopes to discourage the tendency to reserve rulings on pretrial motions until after verdict in the hope that the jury's verdict will make a ruling unnecessary.

The Committee also modified subdivision (h), which deals with what happens when the court grants a pretrial motion based upon a defect in the institution of the prosecution or in the indictment or information. The Committee's change provides that when such a motion is granted, the court may order that the defendant be continued in custody or that his bail be continued for a specified time. A defendant should not automatically be continued in custody when such a motion is granted. In order to continue the defendant in custody, the court must not only determine that there is probable cause, but it must also determine, in effect, that there is good cause to have the defendant arrested.

NOTES OF ADVISORY COMMITTEE ON RULES—1983 AMENDMENT

Note to Subdivision (i). As noted in the recent decision of *United States v. Raddatz*, 447 U.S. 667 (1980), hearings on pretrial suppression motions not infrequently neces-

sitate a determination of the credibility of witnesses. In such a situation, it is particularly important, as also highlighted by *Raddatz*, that the record include some other evidence which tends to either verify or controvert the assertions of the witness. (This is especially true in light of the *Raddatz* holding that a district judge, in order to make an independent evaluation of credibility, is not required to rehear testimony on which a magistrate based his findings and recommendations following a suppression hearing before the magistrate.) One kind of evidence which can often fulfill this function is prior statements of the testifying witness, yet courts have consistently held that in light of the Jencks Act, 18 U.S.C. §3500, such production of statements cannot be compelled at a pretrial suppression hearing. *United States v. Spagnuolo*, 515 F.2d 818 (9th Cir. 1975); *United States v. Sebastian*, 497 F.2d 1267 (2nd Cir. 1974); *United States v. Montos*, 421 F.2d 215 (5th Cir. 1970). This result, which finds no express Congressional approval in the legislative history of the Jencks Act, see *United States v. Sebastian*, supra; *United States v. Covello*, 410 F.2d 536 (2d Cir. 1969), would be obviated by new subdivision (i) of rule 12.

This change will enhance the accuracy of the factual determinations made in the context of pretrial suppression hearings. As noted in *United States v. Sebastian*, supra, it can be argued

> most persuasively that the case for pre-trial disclosure is strongest in the framework of a suppression hearing. Since findings at such a hearing as to admissibility of challenged evidence will often determine the result at trial and, at least in the case of fourth amendment suppression motions, cannot be relitigated later before the trier of fact, pre-trial production of the statements of witnesses would aid defense counsel's impeachment efforts at perhaps the most crucial point in the case. * * * [A] government witness at the suppression hearing may not appear at trial so that defendants could never test his credibility with the benefits of Jencks Act material.

The latter statement is certainly correct, for not infrequently a police officer who must testify on a motion to suppress as to the circumstances of an arrest or search will not be called at trial because he has no information necessary to the determination of defendant's guilt. See, e.g., *United States v. Spagnuolo*, supra (dissent notes that ''under the prosecution's own admission, it did not intend to produce at trial the witnesses called at the pre-trial suppression hearing''). Moreover, even if that person did testify at the trial, if that testimony went to a different subject matter, then under rule 26.2(c) only portions of prior statements covering the same subject matter need be produced, and thus portions which might contradict the suppression hearing testimony would not be revealed. Thus, while it may be true, as declared in *United States v. Montos*, supra, that ''due process does not require premature production at pre-trial hearings on motions to suppress of statements ultimately subject to discovery under the Jencks Act,'' the fact of the matter is that those statements—or, the essential portions thereof—are not necessarily subject to later discovery.

Moreover, it is not correct to assume that somehow the problem can be solved by leaving the suppression issue ''open'' in some fashion for resolution once the trial is under way, at which time the prior statements will be produced. In *United States v. Spagnuolo*, supra, the court responded to the defendant's dilemma of inaccessible prior statements by saying that the suppression motion could simply be deferred until trial. But, under the current version of rule 12 this is not possible; subdivision (b) declares that motions to suppress ''must'' be made before trial, and subdivision (e) says such motions cannot be deferred for determination at trial ''if a party's right to appeal is adversely affected,'' which surely is the case as to suppression motions. As for the possibility of the trial judge reconsidering the motion to suppress on the basis of prior statements produced at trial and casting doubt on the credibility of a suppression hearing witness, it is not a desirable or adequate solution. For one thing, as already noted, there is no assurance that the prior statements will be forthcoming. Even if they are, it is not efficient to delay the continuation of the trial to undertake a reconsideration of matters which could have been resolved in advance of trial had the critical facts then been available. Furthermore, if such reconsideration is regularly to be expected of the trial judge, then this would give rise on appeal to unnecessary issues of the kind which confronted the court in *United States v. Montos*, supra—whether the trial judge was obligated either to conduct a new hearing or to make a new determination in light of the new evidence.

The second sentence of subdivision (i) provides that a law enforcement officer is to be deemed a witness called by the government. This means that when such a federal, state or local officer has testified at a suppression hearing, the defendant will be entitled to any statement of the officer in the possession of the government and relating to the subject matter concerning which the witness has testified, without regard to whether the officer was in fact called by the government or the defendant. There is considerable variation in local practice as to whether the arresting or searching officer is considered the witness of the defendant or of the government, but the need for the prior statement exists in either instance.

The second sentence of subdivision (i) also provides that upon a claim of privilege the court is to excise the privileged matter before turning over the statement. The situation most likely to arise is that in which the prior statement of the testifying officer identifies an informant who supplied some or all of the probable cause information to the police. Under *McCray v. Illinois*, 386 U.S. 300 (1967), it is for the judge who hears the motion to decide whether disclosure of the informant's identity is necessary in the particular case. Of course, the government in any case may prevent disclosure of the informant's identity by terminating reliance upon information from that informant.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The amendment to subdivision (i) is one of a series of contemporaneous amendments to Rules 26.2, 32(f), 32.1, 46, and Rule 8 of the Rules Governing §2255 Hearings, which extended Rule 26.2, Production of Witness Statements, to other proceedings or hearings conducted under the Rules of Criminal Procedure. Rule 26.2(c) now explicitly states that the trial court may excise privileged matter from the requested witness statements. That change rendered similar language in Rule 12(i) redundant.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 12 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The last sentence of current Rule 12(a), referring to the elimination of ''all other pleas, and demurrers and motions to quash'' has been deleted as unnecessary.

Rule 12(b) is modified to more clearly indicate that Rule 47 governs any pretrial motions filed under Rule 12, including form and content. The new provision also more clearly delineates those motions that *must* be filed pretrial and those that *may* be filed pretrial. No change in practice is intended.

Rule 12(b)(4) is composed of what is currently Rule 12(d). The Committee believed that that provision, which addresses the government's requirement to dis-

the community. Prompt disposition of criminal cases may provide an alternative to the pretrial detention of potentially dangerous defendants. See 116 Cong.Rec. S7291–97 (daily ed. May 18, 1970) (remarks of Senator Ervin). Prompt disposition of criminal cases in which the defendant is held in pretrial detention would ensure that the deprivation of liberty prior to conviction would be minimized.

Approval of the original plan and any subsequent modification must be obtained from a reviewing panel made up of one judge from the district submitting the plan (either the chief judge or another active judge appointed by him) and the members of the judicial council of the circuit. The makeup of this reviewing panel is the same as that provided by the Jury Selection and Service Act of 1968, 28 U.S.C. §1863(a). This reviewing panel is also empowered to direct the modification of a district court plan.

The Circuit Court of Appeals for the Second Circuit recently adopted a set of rules for the prompt disposition of criminal cases. See 8 Cr.L. 2251 (Jan. 13, 1971). These rules, effective July 5, 1971, provide time limits for the early trial of high risk defendants, for court control over the granting of continuances, for criteria to control continuance practice, and for sanction against the prosecution or defense in the event of noncompliance with prescribed time limits.

NOTES OF ADVISORY COMMITTEE ON RULES—1974 AMENDMENT

The amendment designates the first paragraph of Rule 50 as subdivision (a) entitled ''Calendars,'' in view of the recent addition of subdivision (b) to the rule.

NOTES OF ADVISORY COMMITTEE ON RULES—1976 AMENDMENT

This amendment to rule 50(b) takes account of the enactment of The Speedy Trial Act of 1974, 18 U.S.C. §§3152–3156, 3161–3174. As the various provisions of the Act take effect, see 18 U.S.C. §3163, they and the district plans adopted pursuant thereto will supplant the plans heretofore adopted under rule 50(b). The first such plan must be prepared and submitted by each district court before July 1, 1976. 18 U.S.C. §3165(e)(1).

That part of rule 50(b) which sets out the necessary contents of district plans has been deleted, as the somewhat different contents of the plans required by the Act are enumerated in 18 U.S.C. §3166. That part of rule 50(b) which describes the manner in which district plans are to be submitted, reviewed, modified and reported upon has also been deleted, for these provisions now appear in 18 U.S.C. §3165(c) and (d).

NOTES OF ADVISORY COMMITTEE ON RULES—1993 AMENDMENT

The Rule is amended to conform to the Judicial Improvements Act of 1990 [P.L. 101–650, Title III, Section 321] which provides that each United States magistrate appointed under section 631 of title 28, United States Code, shall be known as a United States magistrate judge.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 50 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

The first sentence in current Rule 50(a), which says that a court may place criminal proceedings on a calendar, has been deleted. The Committee believed that the sentence simply stated a truism and was no longer necessary.

Current Rule 50(b), which simply mirrors 18 U.S.C. §3165, has been deleted in its entirety. The rule was added in 1971 to meet congressional concerns in pending legislation about deadlines in criminal cases. Provisions governing deadlines were later enacted by Congress and protections were provided in the Speedy Trial Act. The Committee concluded that in light of those enactments, Rule 50(b) was no longer necessary.

EFFECTIVE DATE OF 1976 AMENDMENT

Amendment of subd. (b) by the order of the United States Supreme Court of Apr. 26, 1976, effective Aug. 1, 1976, see section 1 of Pub. L. 94–349, July 8, 1976, 90 Stat. 822, set out as a note under section 2074 of Title 28, Judiciary and Judicial Procedure.

Rule 51. Preserving Claimed Error

(a) EXCEPTIONS UNNECESSARY. Exceptions to rulings or orders of the court are unnecessary.

(b) PRESERVING A CLAIM OF ERROR. A party may preserve a claim of error by informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take, or the party's objection to the court's action and the grounds for that objection. If a party does not have an opportunity to object to a ruling or order, the absence of an objection does not later prejudice that party. A ruling or order that admits or excludes evidence is governed by Federal Rule of Evidence 103.

(As amended Mar. 9, 1987, eff. Aug. 1, 1987; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

1. This rule is practically identical with Rule 46 of the Federal Rules of Civil Procedure [28 U.S.C., Appendix]. It relates to a matter of trial practice which should be the same in civil and criminal cases in the interest of avoiding confusion. The corresponding civil rule has been construed in *Ulm v. Moore-McCormack Lines, Inc.*, 115 F.2d 492 (C.C.A. 2d), and *Bucy v. Nevada Construction Company*, 125 F.2d 213, 218 (C.C.A. 9th). See, also, Orfield, 22 Texas L.R. 194, 221. As to the method of taking objections to instructions to the jury, see Rule 30.

2. Many States have abolished the use of exceptions in criminal and civil cases. See, e.g., Cal.Pen. Code (Deering, 1941), sec. 1259; Mich.Stat.Ann. (Henderson, 1938), secs. 28.1046, 28.1053; Ohio Gen Code Ann. (Page, 1938), secs. 11560, 13442–7; Oreg.Comp. Laws Ann. (1940), secs. 5–704, 26–1001.

NOTES OF ADVISORY COMMITTEE ON RULES—1987 AMENDMENT

The amendments are technical. No substantive change is intended.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 51 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

The Rule includes a new sentence that explicitly states that any rulings regarding evidence are governed by Federal Rule of Evidence 103. The sentence was added because of concerns about the Supersession Clause, 28 U.S.C. §2072(b), of the Rules Enabling Act, and the possibility that an argument might have been made that Congressional approval of this rule would supersede that Rule of Evidence.

REFERENCES IN TEXT

The Federal Rules of Evidence, referred to in subd. (b), are set out in the Appendix to Title 28, Judiciary and Judicial Procedure.

Rule 52. Harmless and Plain Error

(a) HARMLESS ERROR. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

Note to Subdivision (a). This rule is a restatement of existing law, 28 U.S.C. [former] 391 (second sentence): ''On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties''; 18 U.S.C. [former] 556; ''No indictment found and presented by a grand jury in any district or other court of the United States shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant, * * *.'' A similar provision is found in Rule 61 of the Federal Rules of Civil Procedure [28 U.S.C., Appendix].

Note to Subdivision (b). This rule is a restatement of existing law, *Wiborg v. United States*, 163 U.S. 632, 658; *Hemphill v. United States*, 112 F.2d 505 (C.C.A. 9th), reversed 312 U.S. 657. Rule 27 of the Rules of the Supreme Court provides that errors not specified will be disregarded, ''save as the court, at its option, may notice a plain error not assigned or specified.'' Similar provisions are found in the rules of several circuit courts of appeals.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 52 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only.

Rule 52(b) has been amended by deleting the words ''or defect'' after the words ''plain error''. The change is intended to remove any ambiguity in the rule. As noted by the Supreme Court, the language ''plain error or defect'' was misleading to the extent that it might be read in the disjunctive. *See United States v. Olano*, 507 U.S. 725, 732 (1993) (incorrect to read Rule 52(b) in the disjunctive); *United States v. Young*, 470 U.S. 1, 15 n. 12 (1985) (use of disjunctive in Rule 52(b) is misleading).

Rule 53. Courtroom Photographing and Broadcasting Prohibited

Except as otherwise provided by a statute or these rules, the court must not permit the taking of photographs in the courtroom during judicial proceedings or the broadcasting of judicial proceedings from the courtroom.

(As amended Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

While the matter to which the rule refers has not been a problem in the Federal courts as it has been in some State tribunals, the rule was nevertheless included with a view to giving expression to a standard which should govern the conduct of judicial proceedings, Orfield, 22 Texas L.R. 194, 222–3; Robbins, 21 A.B.A.Jour. 301, 304. See, also, *Report of the Special Committee on Cooperation between Press, Radio and Bar, as to Publicity Interfering with Fair Trial of Judicial and Quasi-Judicial Proceedings* (1937), 62 A.B.A.Rep. 851, 862–865; (1932) 18 A.B.A.Jour. 762; (1926) 12 *Id*. 488; (1925) 11 *Id*. 64.

COMMITTEE NOTES ON RULES—2002 AMENDMENT

The language of Rule 53 has been amended as part of the general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only, except as noted below.

Although the word ''radio'' has been deleted from the rule, the Committee does not believe that the amendment is a substantive change but rather one that accords with judicial interpretation applying the current rule to other forms of broadcasting and functionally equivalent means. *See, e.g., United States v. Hastings*, 695 F.2d 1278, 1279, n. 5 (11th Cir. 1983) (television proceedings prohibited); *United States v. McVeigh*, 931 F. Supp. 753 (D. Colo. 1996) (release of tape recordings of proceedings prohibited). Given modern technology capabilities, the Committee believed that a more generalized reference to ''broadcasting'' is appropriate.

Also, although the revised rule does not explicitly recognize exceptions within the rules themselves, the restyled rule recognizes that other rules might permit, for example, video teleconferencing, which clearly involves ''broadcasting'' of the proceedings, even if only for limited purposes.

Rule 54. [Transferred] [1]

COMMITTEE NOTES ON RULES—2002 AMENDMENT

Certain provisions in current Rule 54 have been moved to revised Rule 1 as part of a general restyling of the Criminal Rules to make them more easily understood and to make style and terminology consistent throughout the rules. Other provisions in Rule 54 have been deleted as being unnecessary.

Rule 55. Records

The clerk of the district court must keep records of criminal proceedings in the form prescribed by the Director of the Administrative Office of the United States Courts. The clerk must enter in the records every court order or judgment and the date of entry.

(As amended Dec. 27, 1948, eff. Oct. 20, 1949; Feb. 28, 1966, eff. July 1, 1966; Apr. 24, 1972, eff. Oct. 1, 1972; Apr. 28, 1983, eff. Aug. 1, 1983; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 29, 2002, eff. Dec. 1, 2002.)

NOTES OF ADVISORY COMMITTEE ON RULES—1944

The Federal Rules of Civil Procedure Rule 79 [28 U.S.C., Appendix], prescribed in detail the books and records to be kept by the clerk in civil cases. Subsequently to the effective date of the civil rules, however, the Act establishing the Administrative Office of the United States Courts became law (Act of August 7, 1939; 53 Stat. 1223; 28 U.S.C. 444–450 [now 332–333, 456, 601–610]). One of the duties of the Director of that Office is to have charge, under the supervision and direction of the Conference of Senior Circuit Judges, of all administrative matters relating to the offices of the clerks and other clerical and administrative personnel of the courts, 28 U.S.C. 446 [now 604, 609]. In view of this circumstance it seemed best not to prescribe the records to be kept by the clerks of the district courts and by the United States commissioners, in criminal proceedings, but to vest the power to do so in the Director of the Administrative Office of the United States Courts with the approval of the Conference of Senior Circuit Judges.

NOTES OF ADVISORY COMMITTEE ON RULES—1948 AMENDMENT

To incorporate nomenclature provided for by Revised Title 28 U.S.C., § 331.

NOTES OF ADVISORY COMMITTEE ON RULES—1966 AMENDMENT

Rule 37(a)(2) provides that for the purpose of commencing the running of the time for appeal a judgment

[1] All of Rule 54 was moved to Rule 1.