The Double Jeopardy Clause of the **Fifth Amendment** to the **United States Constitution and Violation of Rights**

Edward Anthony
2210 Bungalow Rd
Augusta, Ga 30906

Nov. 16, 2018

To whom it may concern:

This is Edward Anthony and I'm writing you all, because the courts in North Augusta Magistrate Office at Services Center 537 Edgefield Road, North Augusta, SC 29841.Have failed to respond to my complaint about the multiple errors at hand. In violation of the 5th,and 6th Constitutional Amendment of the United States. On May 1st 2018, I sent a motion stating the fact about the error, but the courts failed to respond. Now on July 7, 2017,and May 1,2018. No one has sent me a letter from the Magistrate Courts correcting the error in the law.

Timelines

The very first thing you need to do is to determine when your response is due. Always check your court's local rules as well as the Federal Rules of Civil Procedure. Generally, a party served with a complaint must respond within 21 days after being served. *See* Fed. R. Civ. P. 12(a)(1)(A). However, there are a few exceptions. First, if service is waived, then a response is due within 60 days after the request for waiver was sent (or 90 days if it was sent to a defendant outside of the United States). *See id.* Alternatively, the judge may also set a schedule for when an answer is due, or a party may move the court for an order extending the deadline to answer. Regardless of which it is, keep track of this deadline. A failure to timely respond can result in an entry of a default judgment. *See* Fed. R. Civ. P. 55(a).

On or before the deadline to file a responsive pleading (unless your local rules state otherwise) and after conferral, you may move to dismiss the claim, to make parts of it more definite and certain, or to strike parts of the complaint. Such motions typically extend the time you have to answer until after the court rules on your motion. If you file only a partial motion to dismiss, check the law in your jurisdiction to make sure you do not need to file a responsive pleading to those claims that are not the subject of your motion to dismiss. *See Gerlach v. Mich. Bell Tel. Co.*, 448 F. Supp. 1168 (E.D. Mich. 1978). If the court denies the motion or postpones its disposition until trial, the answer must be served within 14 days after notice of the court's action, unless the court sets a different time schedule. *See* Fed. R. Civ. P. 12(a)(4)(A). If the court grants a motion for a more definite statement, the answer must be served within 14 days after the more definite statement is served unless the court orders otherwise. *See* Fed. R. Civ. P. 12(a)(4)(B).

The answer is the defendant's pleading responsive to the complaint. It is designed to narrow the issues and give the plaintiff notice of the defendant's legal defenses, including affirmative defenses, counterclaims, and cross-claims. For each allegation in the complaint, the answer must admit, deny, or deny based on lack of information. *See*Fed. R. Civ. P. 8(b)(1)(B). The failure to deny any allegation in the complaint, except for the amount of damages, constitutes an admission. *See* Fed. R. Civ. P. 8(b)(6).

Denials. There are different forms of denials to a complaint's allegations: general and specific denials, denials of part of an allegation, and denials based on lack of knowledge or information. *See* Fed. R. Civ. P. 8.

Conclusion

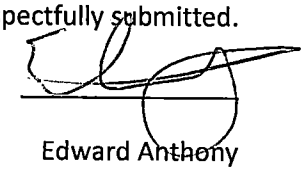
Now as you can see there is an error at hand that is discrimination. Race discrimination involves treating someone (an applicant or employee) unfavorably because he/she is of a certain race or because of personal characteristics associated with race (such as hair texture, skin color, or certain facial features). Color discrimination involves treating someone unfavorably because of skin color complexion.

Race/color discrimination also can involve treating someone unfavorably because the person is married to (or associated with) a person of a certain race or color. Discrimination can occur when the victim and the person who inflicted the discrimination are the same race or color.

In contrast to the **Fifth Amendment** right to an attorney, the **Sixth Amendment** right to counsel is offense-specific, meaning that once invoked, the **Fifth Amendment** right to an attorney forbids police to question a suspect on any matter until the suspect has a chance to speak to an attorney. If you investigate this matter as well, you would see the error again and again.

So with your jurisdiction, lay hands to correct the error.

Respectfully submitted.



Edward Anthony

CITY OF / COUNTY OF: Aiken — VERSUS

FIRST NAME	MIDDLE NAME	LAST NAME
Edward	Rodriguez	Anthony

STREET AND NO.: 2210 Bungalow Rd — CITY: Augusta — STATE: GA — ZIP CODE: 30906

STATE LICENSED	DRIVER'S LICENSE NO.	CDL	DRI. LIC. CLASS
GA	045450530	☐ YES ☒ NO	C

VEH. LIC. NO.	STATE	MAKE OF VEH.	YEAR	COMM. VEH.	AUTO	HI PSGR VEH.	COMB.
				HAZ. MT.	MOPED	MTRCYCL	OTHER

YOU ARE SUMMONED TO APPEAR BEFORE THE TRIAL OFFICER

NAME OF TRIAL OFFICER: Edmonds — STREET AND NO.: 537 Edgefield Rd (803)202-3580 — CITY: N. Augusta — STATE: SC — ZIP CODE: 29841

DATE OF TRIAL: 11/09/2011 — TIME OF TRIAL: 1000

VIOLATION - COURT APPEARANCE REQUIRED: (YES) NO — VIOLATION SECTION NO.: 16-13-110(B)(1)

Shoplifting $2,000

OWNER OF VEHICLE

ADDRESS OF OWNER

DATE OF ARREST: 10/24/2011

DATE OF VIOLATION: 10/24/2011

COPY

BAIL DEPOSITED: ATL — NAME OF ARRESTING OFFICER: J. Roberts — RANK: DEP

DESCRIPTION OF ACCUSED

RACE	SEX	BIRTH DATE	HT.	HAIR	WT.	EYES
B	M	09/09/63	6'01	Blk	320	Blu

COUNTY: Aiken — NUMBER: 02

BADGE: 5471 — DISTRICT: 01

DATE BAIL REC'D. ____ 20__ BY ____

D A Y	S	M	T	W	T	F	S
	1	2	3	4	5	6	7

DOCKET NO.

CASE BEFORE: MAGISTRATE ☒ MUN. COURT ☐ CIRCUIT COURT ☐ FAMILY COURT ☐ FEDERAL COURT ☐

TIME OF VIOLATION: 2:10 A.M. P.M. — WEATHER: CLR

NAME OF TRIAL OFFICER IF DIFFERENT FROM ABOVE

DISTANCE IN FEET FROM INTERSECTION OF: 1003 Jefferson Davis — AND: North Augusta

DEFENDANT: DID NOT APPEAR ☒ APPEARED ☐

DISPOSITION: NOLLE PROSSED ☐ FORFEITED BOND ☐ GUILTY ☐ PLED: NOLO CONTENDERE ☐

MILES: N 1 E 2 S 3 W 4 — HWY NO. — CITY

TRIAL BY: TRIAL OFFICER ☒ JURY ☐

VERDICT OF TRIAL IF ANY: GUILTY ☒ NOT GUILTY ☐ — DATE OF TRIAL IF ANY: 3/6/12

Lat. ° ' "

JAIL SENTENCE	FINE	AMT. COLLECTED	AMT. SUSPENDED
30	$130		

Long. ° ' "

COMMITTED TO: To Kershaw County — Vehicle Seized ☐ — Arrest Warrant Issued ☐ — OFFENSE CODE: 12-528 — B.A. LEVEL

CERTIFIED CORRECT: Judge Shirley — DATE: 3/6/12

55533 FA

TRIAL OFFICER'S COPY

Z-1

11-067439

Feb 2 20 12
CCCP. & G.S.
Deputy Clerk

M-035590

STATE OF SOUTH CAROLINA

[X] County/ [ ] Municipality of

Aiken

THE STATE 11-067969

against

Edward Rodriquez Anthony

Address: 2210 Bungalow Rd

Augusta, GA 30906-

Phone: SSN: [redacted]

Sex: M Race: B Height: 6 1 Weight: 321

DL State: GA DL #: [redacted]

[redacted] Agency ORI #: SC0020000

Prosecuting Agency: Aiken County Sheriff

Prosecuting Officer: Dep. Molly Isom Hahn - 5760

Offense: Shoplifting / Shoplifting, value $2,000 or less

Offense Code: 0528

Code/Ordinance Sec: 16-13-0110(B)(1)

This warrant is CERTIFIED FOR SERVICE in the [ ] County/ [ ] Municipality of _____. The accused is to be arrested and brought before me to be dealt with according to the law.

(L.S.)

Signature of Judge

Date:

RETURN

A copy of this arrest warrant was delivered to defendant Edward Rodriquez Anthony on 12/7/11

5653

Signature of Constable/Law Enforcement Officer

RETURN WARRANT TO:

North Augusta Summary Court
537 Edgefield Road
P O Box 6493
North Augusta, SC 29841

ORIGINAL ORIGINAL ORIGINAL ORIGINAL

[X] County/ [ ] Municipality of)

Aiken)

AFFIDAVIT SCCA 518

Personally appeared before me the affiant Dep. Molly Isom Hahn who being duly sworn deposes and says that defendant Edward Rodriquez Anthony did within this county and state on or about 10/06/2011 violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Aiken) in the following particulars:

DESCRIPTION OF OFFENSE Shoplifting / Shoplifting, value $2,000 or less

I further state that there is probable cause to believe that the defendant named above did commit the crime set forth and that probable cause is based on the following facts:

That between October 6, 2011 and October 24, 2011 in the county of Aiken, one Edward Rodriquez Anthony did take possession of ~~and/or carry away several cases of beer and a case of powerade~~ valued at $2000 or less, merchandise of Gregg's Gas Plus located at 6034 Jefferson Davis Highway North Augusta, S.C. with the intention of depriving the merchant of the possession of such merchandise without paying the full retail value.

COPY

Signature of Affiant Molly I Hahn 5760

STATE OF SOUTH CAROLINA)

[X] County/ [ ] Municipality of)

Aiken)

Affiant's Address 420 Hampton Avenue North East
Aiken, SC 29801-

Affiant's Telephone (803)642-1763

ARREST WARRANT

TO ANY LAW ENFORCEMENT OFFICER OF THIS STATE OR MUNICIPALITY OR ANY CONSTABLE OF THIS COUNTY:

It appearing from the above affidavit that there are reasonable grounds to believe that on or about 10/6/2011 defendant Edward Rodriquez Anthony did violate the criminal laws of the State of South Carolina (or ordinance of [X] County/ [ ] Municipality of Aiken) as set forth below:

DESCRIPTION OF OFFENSE: Shoplifting / Shoplifting, value $2,000 or less

Having found probable cause and the above affiant having sworn before me, you are empowered and directed to arrest the said defendant and bring him or her before me forthwith to be dealt with according to law. A copy of this Arrest Warrant shall be delivered to the defendant at the time of its execution, or as soon thereafter as is practicable

Sworn to and subscribed before me on 10/26/2011 (L.S.)

Signature of Issuing Judge

Patrick Dorn Sullivan

Judge Code: 5035

Judge's Address Post Office Box 40
New Ellenton, SC 29809

Judge's Telephone (803)652-3609

Issuing Court: [X] Magistrate [ ] Municipal [ ] Circuit

ORIGINAL ORIGINAL ORIGINAL

Rule 8. General Rules of Pleading

(a) CLAIM FOR RELIEF. A pleading that states a claim for relief must contain:

(1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support;

(2) a short and plain statement of the claim showing that the pleader is entitled to relief; and

(3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

(b) DEFENSES; ADMISSIONS AND DENIALS.

(1) *In General.* In responding to a pleading, a party must:

(A) state in short and plain terms its defenses to each claim asserted against it; and

(B) admit or deny the allegations asserted against it by an opposing party.

(2) *Denials—Responding to the Substance.* A denial must fairly respond to the substance of the allegation.

(3) *General and Specific Denials.* A party that intends in good faith to deny all the allegations of a pleading—including the jurisdictional grounds—may do so by a general denial. A party that does not intend to deny all the allegations must either specifically deny designated allegations or generally deny all except those specifically admitted.

(4) *Denying Part of an Allegation.* A party that intends in good faith to deny only part of an allegation must admit the part that is true and deny the rest.

(5) *Lacking Knowledge or Information.* A party that lacks knowledge or information sufficient to form a belief about the truth of an allegation must so state, and the statement has the effect of a denial.

(6) *Effect of Failing to Deny.* An allegation—other than one relating to the amount of damages—is admitted if a responsive pleading is required and the allegation is not denied. If a responsive pleading is not required, an allegation is considered denied or avoided.

(c) AFFIRMATIVE DEFENSES.

(1) *In General.* In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

- accord and satisfaction;
- arbitration and award;
- assumption of risk;
- contributory negligence;
- duress;
- estoppel;
- failure of consideration;
- fraud;
- illegality;
- injury by fellow servant;
- laches;
- license;
- payment;
- release;
- res judicata;
- statute of frauds;
- statute of limitations; and
- waiver.

(2) *Mistaken Designation.* If a party mistakenly designates a defense as a counterclaim, or a counterclaim as a defense, the court must, if justice requires, treat the pleading as though it were correctly designated, and may impose terms for doing so.

(d) Pleading to Be Concise and Direct; Alternative Statements; Inconsistency.

(1) *In General.* Each allegation must be simple, concise, and direct. No technical form is required.

(2) *Alternative Statements of a Claim or Defense.* A party may set out 2 or more statements of a claim or defense alternatively or hypothetically, either in a single count or defense or in separate ones. If a party makes alternative statements, the pleading is sufficient if any one of them is sufficient.

(3) *Inconsistent Claims or Defenses.* A party may state as many separate claims or defenses as it has, regardless of consistency.

(e) Construing Pleadings. Pleadings must be construed so as to do justice.

Notes

(As amended Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 30, 2007, eff. Dec. 1, 2007; Apr. 28, 2010, eff. Dec. 1, 2010.)

Notes of Advisory Committee on Rules—1937

Note to Subdivision (a). See [former] Equity Rules 25 (Bill of Complaint—Contents), and 30 (Answer—Contents—Counterclaim). Compare 2 Ind.Stat.Ann. (Burns, 1933) §§2–1004, 2–1015; 2 Ohio Gen.Code Ann. (Page, 1926) §§11305, 11314; Utah Rev.Stat.Ann. (1933), §§104–7–2, 104–9–1.

See Rule 19(c) for the requirement of a statement in a claim for relief of the names of persons who ought to be parties and the reason for their omission.

See Rule 23(b) for particular requirements as to the complaint in a secondary action by shareholders.

Note to Subdivision (b). 1. This rule supersedes the methods of pleading prescribed in U.S.C., Title 19, §508 (Persons making seizures pleading general issue and providing special matter); U.S.C., Title 35, [former] §§40d (Providing under general issue, upon notice, that a statement in application for an extended patent is not true), 69 [now 282] (Pleading and proof in actions for infringement) and similar statutes.

2. This rule is, in part, [former] Equity Rule 30 (Answer—Contents—Counterclaim), with the matter on denials largely from the Connecticut practice. See Conn.Practice Book (1934) §§107, 108, and 122; Conn.Gen.Stat. (1930) §§5508–5514. Compare the English practice, *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 17–20.

Note to Subdivision (c). This follows substantially English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r. 15 and N.Y.C.P.A. (1937) §242, with "surprise" omitted in this rule.

Note to Subdivision (d). The first sentence is similar to [former] Equity Rule 30 (Answer—Contents—Counterclaim). For the second sentence see [former] Equity Rule 31 (Reply—When Required—When Cause at Issue). This is similar to English Rules Under the Judicature Act (The Annual Practice, 1937) O. 19, r.r. 13, 18; and to the practice in the States.

Note to Subdivision (e). This rule is an elaboration upon [former] Equity Rule 30 (Answer—Contents—Counterclaim), plus a statement of the actual practice under some codes. Compare also [former] Equity Rule 18 (Pleadings—Technical Forms Abrogated). See Clark, Code Pleading (1928), pp. 171–4, 432–5; Hankin, *Alternative and Hypothetical Pleading* (1924), 33 Yale L.J. 365.

Note to Subdivision (f). A provision of like import is of frequent occurrence in the codes. Ill.Rev.Stat. (1937) ch. 110, §157(3); 2 Minn.Stat. (Mason, 1927) §9266; N.Y.C.P.A. (1937) §275; 2 N.D.Comp.Laws Ann. (1913) §7458.

Notes of Advisory Committee on Rules—1966 Amendment

The change here is consistent with the broad purposes of unification.

Notes of Advisory Committee on Rules—1987 Amendment

The amendments are technical. No substantive change is intended.

Committee Notes on Rules—2007 Amendment

The language of Rule 8 has been amended as part of the general restyling of the Civil 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 former Rule 8(b) and 8(e) cross-references to Rule 11 are deleted as redundant. Rule 11 applies by its own terms. The force and application of Rule 11 are not diminished by the deletion.

Former Rule 8(b) required a pleader denying part of an averment to "specify so much of it as is true and material and * * * deny only the remainder." "[A]nd material" is deleted to avoid the implication that it is proper to deny something that the pleader believes to be true but not material.

Deletion of former Rule 8(e)(2)'s "whether based on legal, equitable, or maritime grounds" reflects the parallel deletions in Rule 1 and elsewhere. Merger is now successfully accomplished.

Changes Made After Publication and Comment. See Note to Rule 1, supra.

Committee Notes on Rules—2010 Amendment

Subdivision (c)(1). "[D]ischarge in bankruptcy" is deleted from the list of affirmative defenses. Under 11 U.S.C. § 524(a)(1) and (2) a discharge voids a judgment to the extent that it determines a personal liability of the debtor with respect to a discharged debt. The discharge also operates as an injunction against commencement or continuation of an action to collect, recover, or offset a discharged debt. For these reasons it is confusing to describe discharge as an affirmative defense. But § 524(a) applies only to a claim that was actually discharged. Several categories of debt set out in 11 U.S.C. § 523(a) are excepted from discharge. The issue whether a claim was excepted from discharge may be determined either in the court that entered the discharge or — in most instances — in another court with jurisdiction over the creditor's claim.

Changes Made After Publication and Comment.

No changes were made in the rule text.

The Committee Note was revised to delete statements that were over-simplified. New material was added to provide a reminder of the means to determine whether a debt was in fact discharged.

‹ Rule 7.1. Disclosure Statement up Rule 9. Pleading Special Matters ›

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) TIME TO SERVE A RESPONSIVE PLEADING.

(1) *In General.* Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) *United States and Its Agencies, Officers, or Employees Sued in an Official Capacity.* The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) *United States Officers or Employees Sued in an Individual Capacity.* A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) *Effect of a Motion.* Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) HEARING BEFORE TRIAL. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

NOTES

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993; Apr. 17, 2000, eff. Dec. 1, 2000; Apr. 30, 2007, eff. Dec. 1, 2007; Mar. 26, 2009, eff. Dec. 1, 2009.)

NOTES OF ADVISORY COMMITTEE ON RULES—1937

Note to Subdivision (a). 1. Compare [former] Equity Rules 12 (Issue of Subpoena—Time for Answer) and 31 (Reply—When Required—When Cause at Issue); 4 Mont.Rev.Codes Ann. (1935) §§9107, 9158; N.Y.C.P.A. (1937) §263; N.Y.R.C.P. (1937) Rules 109–111.

2. U.S.C., Title 28, §763 [now 547] (Petition in action against United States; service; appearance by district attorney) provides that the United States as a defendant shall have 60 days within which to answer or otherwise defend. This and other statutes which provide 60 days for the United States or an officer or agency thereof to answer or otherwise defend are

continued by this rule. Insofar as any statutes not excepted in Rule 81 provide a different time for a defendant to defend, such statutes are modified. See U.S.C., Title 28, [former] §45 (District courts; practice and procedure in certain cases under the interstate commerce laws) (30 days).

3. Compare the last sentence of [former] Equity Rule 29 (Defenses—How Presented) and N.Y.C.P.A. (1937) §283. See Rule 15(a) for time within which to plead to an amended pleading.

Note to Subdivisions (b) and (d). 1. See generally [former] Equity Rules 29 (Defenses—How Presented), 33 (Testing Sufficiency of Defense), 43 (Defect of Parties—Resisting Objection), and 44 (Defect of Parties—Tardy Objection); N.Y.C.P.A. (1937) §§277–280; N.Y.R.C.P. (1937) Rules 106–112; *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 25, r.r. 1–4; Clark, *Code Pleading* (1928) pp. 371–381.

2. For provisions authorizing defenses to be made in the answer or reply see *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 25, r.r. 1–4; 1 Miss.Code Ann. (1930) §§378, 379. Compare [former] Equity Rule 29 (Defenses—How Presented); U.S.C., Title 28, [former] §45 (District Courts; practice and procedure in certain cases under the interstate commerce laws). U.S.C., Title 28, [former] §45, substantially continued by this rule, provides: "No replication need be filed to the answer, and objections to the sufficiency of the petition or answer as not setting forth a cause of action or defense must be taken at the final hearing or by motion to dismiss the petition based on said grounds, which motion may be made at any time before answer is filed." Compare Calif.Code Civ.Proc. (Deering, 1937) §433; 4 Nev.Comp.Laws (Hillyer, 1929) §8600. For provisions that the defendant may demur and answer at the same time, see Calif.Code Civ.Proc. (Deering, 1937) §431; 4 Nev.Comp.Laws (Hillyer, 1929) §8598.

3. [Former] Equity Rule 29 (Defenses—How Presented) abolished demurrers and provided that defenses in point of law arising on the face of the bill should be made by motion to dismiss or in the answer, with further provision that every such point of law going to the whole or material part of the cause or causes stated might be called up and disposed of before final hearing "at the discretion of the court." Likewise many state practices have abolished the demurrer, or retain it only to attack substantial and not formal defects. See 6 Tenn.Code Ann. (Williams, 1934) §8784; Ala.Code Ann. (Michie, 1928) §9479; 2 Mass.Gen.Laws (Ter.Ed., 1932) ch. 231, §§15–18; Kansas Gen.Stat.Ann. (1935) §§60–705, 60–706.

Note to Subdivision (c). Compare [former] Equity Rule 33 (Testing Sufficiency of Defense); N.Y.R.C.P. (1937) Rules 111 and 112.

Note to Subdivisions (e) and (f). Compare [former] Equity Rules 20 (Further and Particular Statement in Pleading May Be Required) and 21 (Scandal and Impertinence); *English Rules Under the Judicature Act* (The Annual Practice, 1937) O. 19, r.r. 7, 7a, 7b, 8; 4 Mont.Rev.Codes Ann. (1935) §§9166, 9167; N.Y.C.P.A. (1937) §247; N.Y.R.C.P. (1937) Rules 103, 115, 116, 117; Wyo.Rev.Stat.Ann. (Courtright, 1931) §§89–1033, 89–1034.

Note to Subdivision (g). Compare Rules of the District Court of the United States for the District of Columbia (1937), Equity Rule 11; N.M. Rules of Pleading, Practice and Procedure, 38 N.M.Rep. vii [105–408] (1934); Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI (e) and (f).

. *Note to Subdivision (h)*. Compare Calif.Code Civ.Proc. (Deering, 1937) §434; 2 Minn.Stat. (Mason, 1927) §9252; N.Y.C.P.A. (1937) §§278 and 279; Wash.Gen.Rules of the Superior Courts, 1 Wash.Rev.Stat.Ann. (Remington, 1932) p. 160, Rule VI (e). This rule continues U.S.C., Title 28, §80 [now 1359, 1447, 1919] (Dismissal or remand) (of action over which district court lacks jurisdiction), while U.S.C., Title 28, §399 [now 1653] (Amendments to show diverse citizenship) is continued by Rule 15.

Notes of Advisory Committee on Rules—1946 Amendment

Subdivision (a). Various minor alterations in language have been made to improve the statement of the rule. All references to bills of particulars have been stricken in accordance with changes made in subdivision (e).

Subdivision (b). The addition of defense (7), "failure to join an indispensable party", cures an omission in the rules, which are silent as to the mode of raising such failure. See Commentary, *Manner of Raising Objection of Non-Joinder of Indispensable Party* (1940) 2 Fed.Rules Serv. 658 and (1942) 5 Fed.Rules Serv. 820. In one case, *United States v. Metropolitan Life Ins. Co.* (E.D.Pa. 1941) 36 F.Supp. 399, the failure to join an indispensable party was raised under Rule 12(c).

Rule 12(b)(6), permitting a motion to dismiss for failure of the complaint to state a claim on which relief can be granted, is substantially the same as the old demurrer for failure of a pleading to state a cause of action. Some courts have held that as the rule by its terms refers to statements in the complaint, extraneous matter on affidavits, depositions or otherwise, may not be introduced in support of the motion, or to resist it. On the other hand, in many cases the district courts have permitted the introduction of such material. When these cases have reached circuit courts of appeals in situations where the extraneous material so received shows that there is no genuine issue as to any material question of fact and that on the undisputed facts as disclosed by the affidavits or depositions, one party or the other is entitled to judgment as a matter of law, the circuit courts, properly enough, have been reluctant to dispose of the case merely on the face of the pleading, and in the interest of prompt disposition of the action have made a final disposition of it. In dealing with such situations the Second Circuit has made the sound suggestion that whatever its label or original basis, the motion may be treated as a motion for summary judgment and disposed of as such. *Samara v. United States* (C.C.A.2d, 1942) 129 F.(2d) 594, cert. den. (1942) 317 U.S. 686; *Boro Hall Corp. v. General Motors Corp.* (C.C.A.2d, 1942) 124 F.(2d) 822, cert. den. (1943) 317 U.S. 695. See also *Kithcart v. Metropolitan Life Ins. Co.* (C.C.A.8th, 1945) 150 F.(2d) 997, aff'g 62 F.Supp. 93.

It has also been suggested that this practice could be justified on the ground that the federal rules permit "speaking" motions. The Committee entertains the view that on motion under Rule 12(b)(6) to dismiss for failure of the complaint to state a good claim, the trial court should have authority to permit the introduction of extraneous matter, such as may be offered on a motion for summary judgment, and if it does not exclude such matter the motion should then be treated as a motion for summary judgment and disposed of in the manner and on the conditions stated in Rule 56 relating to summary judgments, and, of course, in such a situation, when the case reaches the circuit court of appeals, that court should treat the motion in the same way. The Committee believes that such practice, however, should be tied to the summary judgment rule.

The term "speaking motion" is not mentioned in the rules, and if there is such a thing its limitations are undefined. Where extraneous matter is received, by tying further proceedings to the summary judgment rule the courts have a definite basis in the rules for disposing of the motion.

The Committee emphasizes particularly the fact that the summary judgment rule does not permit a case to be disposed of by judgment on the merits on affidavits, which disclose a conflict on a material issue of fact, and unless this practice is tied to the summary judgment rule, the extent to which a court, on the introduction of such extraneous matter, may resolve questions of fact on conflicting proof would be left uncertain.

The decisions dealing with this general situation may be generally grouped as follows: (1) cases dealing with the use of affidavits and other extraneous material on motions; (2) cases reversing judgments to prevent final determination on mere pleading allegations alone.

Under group (1) are: *Boro Hall Corp. v. General Motors Corp.* (C.C.A.2d, 1942) 124 F.(2d) 822, cert. den. (1943) 317 U.S. 695; *Gallup v. Caldwell* (C.C.A.3d, 1941) 120 F.(2d) 90; *Central Mexico Light & Power Co. v. Munch* (C.C.A.2d, 1940) 116 F.(2d) 85; *National Labor Relations Board v. Montgomery Ward & Co.* (App.D.C. 1944) 144 F.(2d) 528, cert. den. (1944) 65 S.Ct. 134; *Urquhart v. American-La France Foamite Corp.* (App.D.C. 1944) 144 F.(2d) 542; *Samara v. United States* (C.C.A.2d, 1942) 129 F.(2d) 594; *Cohen v. American Window Glass Co.* (C.C.A.2d, 1942) 126 F.(2d) 111; *Sperry Products Inc. v. Association of American Railroads* (C.C.A.2d, 1942) 132 F.(2d) 408; *Joint Council Dining Car Employees Local 370 v. Delaware, Lackawanna and Western R. Co.* (C.C.A.2d, 1946) 157 F.(2d) 417; *Weeks v. Bareco Oil Co.* (C.C.A.7th, 1941) 125 F.(2d) 84; *Carroll v. Morrison Hotel Corp.* (C.C.A.7th, 1945) 149 F.(2d) 404; *Victory v. Manning* (C.C.A.3rd, 1942) 128 F.(2d) 415; *Locals No. 1470, No. 1469, and 1512 of International Longshoremen's Association v. Southern Pacific Co.* (C.C.A.5th, 1942) 131 F. (2d) 605; *Lucking v. Delano* (C.C.A.6th, 1942) 129 F.(2d) 283; *San Francisco Lodge No. 68 of International Association of Machinists v. Forrestal* (N.D.Cal. 1944) 58 F.Supp. 466; *Benson v. Export Equipment Corp.* (N. Mex. 1945) 164 P.2d 380 (construing New Mexico rule identical with Rule 12(b)(6); *F. E. Myers & Bros. Co. v. Gould Pumps, Inc.* (W.D.N.Y. 1946) 9 Fed.Rules Serv. 12b.33, Case 2, 5 F.R.D. 132. Cf. *Kohler v. Jacobs* (C.C.A.5th, 1943) 138 F.(2d) 440; *Cohen v. United States* (C.C.A.8th, 1942) 129 F.(2d) 733.

Under group (2) are: *Sparks v. England* (C.C.A.8th, 1940) 113 F.(2d) 579; *Continental Collieries, Inc. v. Shober* (C.C.A.3d, 1942) 130 F.(2d) 631; *Downey v. Palmer* (C.C.A.2d 1940) 114 F.(2d) 116; *DeLoach v. Crowley's Inc.* (C.C.A.5th, 1942) 128 F.(2d) 378; *Leimer v. State Mutual Life Assurance Co. of Worcester, Mass.* (C.C.A.8th, 1940) 108 F.(2d) 302; *Rossiter v. Vogel* (C.C.A.2d, 1943) 134 F.(2d) 908, compare s. c. (C.C.A.2d, 1945) 148 F.(2d) 292; *Karl Kiefer Machine Co. v. United States Bottlers Machinery Co.* (C.C.A.7th, 1940) 113 F.(2d) 356; *Chicago Metallic Mfg. Co. v. Edward Katzinger Co.* (C.C.A.7th, 1941) 123 F.(2d) 518; *Louisiana Farmers' Protective Union, Inc. v. Great Atlantic & Pacific Tea Co. of America, Inc.* (C.C.A.8th, 1942) 131 F.(2d) 419; *Publicity Bldg. Realty Corp. v. Hannegan* (C.C.A.8th, 1943) 139 F.(2d) 583; *Dioguardi v. Durning* (C.C.A.2d, 1944) 139 F.(2d) 774; *Package Closure Corp. v. Sealright*

Co., Inc. (C.C.A.2d, 1944) 141 F.(2d) 972; *Tahir Erk v. Glenn L. Martin Co.* (C.C.A.4th, 1941) 116 F.(2d) 865; *Bell v. Preferred Life Assurance Society of Montgomery, Ala.* (1943) 320 U.S. 238.

The addition at the end of subdivision (b) makes it clear that on a motion under Rule 12(b)(6) extraneous material may not be considered if the court excludes it, but that if the court does not exclude such material the motion shall be treated as a motion for summary judgment and disposed of as provided in Rule 56. It will also be observed that if a motion under Rule 12(b)(6) is thus converted into a summary judgment motion, the amendment insures that both parties shall be given a reasonable opportunity to submit affidavits and extraneous proofs to avoid taking a party by surprise through the conversion of the motion into a motion for summary judgment. In this manner and to this extent the amendment regularizes the practice above described. As the courts are already dealing with cases in this way, the effect of this amendment is really only to define the practice carefully and apply the requirements of the summary judgment rule in the disposition of the motion.

Subdivision (c). The sentence appended to subdivision (c) performs the same function and is grounded on the same reasons as the corresponding sentence added in subdivision (b).

Subdivision (d). The change here was made necessary because of the addition of defense (7) in subdivision (b).

Subdivision (e). References in this subdivision to a bill of particulars have been deleted, and the motion provided for is confined to one for a more definite statement, to be obtained only in cases where the movant cannot reasonably be required to frame an answer or other responsive pleading to the pleading in question. With respect to preparations for trial, the party is properly relegated to the various methods of examination and discovery provided in the rules for that purpose. *Slusher v. Jones* (E.D.Ky. 1943) 7 Fed.Rules Serv. 12e.231, Case 5, 3 F.R.D. 168; *Best Foods, Inc. v. General Mills, Inc.* (D.Del. 1943) 7 Fed.Rules Serv. 12e.231, Case 7, 3 F.R.D. 275; *Braden v. Callaway* (E.D.Tenn. 1943) 8 Fed.Rules Serv. 12e.231, Case 1 (". . . most courts . . . conclude that the definiteness required is only such as will be sufficient for the party to prepare responsive pleadings"). Accordingly, the reference to the 20 day time limit has also been eliminated, since the purpose of this present provision is to state a time period where the motion for a bill is made for the purpose of preparing for trial.

Rule 12(e) as originally drawn has been the subject of more judicial rulings than any other part of the rules, and has been much criticized by commentators, judges and members of the bar. See general discussion and cases cited in 1 *Moore's Federal Practice* (1938), Cum.Supplement §12.07, under "Page 657"; also, Holtzoff, *New Federal Procedure and the Courts* (1940) 35–41. And compare vote of Second Circuit Conference of Circuit and District Judges (June 1940) recommending the abolition of the bill of particulars; *Sun Valley Mfg. Co. v. Mylish* (E.D.Pa. 1944) 8 Fed.Rules Serv. 12e.231, Case 6 ("Our experience . . . has demonstrated not only that 'the office of the bill of particulars is fast becoming obsolete' . . . but that in view of the adequate discovery procedure available under the Rules, motions for bills of particulars should be abolished altogether."); *Walling v. American Steamship Co.* (W.D.N.Y. 1945) 4 F.R.D. 355, 8 Fed.Rules Serv. 12e.244, Case 8 (". . . the adoption of the rule was ill advised. It has led to confusion, duplication and delay.") The tendency of some courts freely to

grant extended bills of particulars has served to neutralize any helpful benefits derived from Rule 8, and has overlooked the intended use of the rules on depositions and discovery. The words "or to prepare for trial"—eliminated by the proposed amendment—have sometimes been seized upon as grounds for compulsory statement in the opposing pleading of all the details which the movant would have to meet at the trial. On the other hand, many courts have in effect read these words out of the rule. See *Walling v. Alabama Pipe Co.* (W.D.Mo. 1942) 6 Fed.Rules Serv. 12e.244, Case 7; *Fleming v. Mason & Dixon Lines, Inc.* (E.D.Tenn. 1941) 42 F.Supp. 230; *Kellogg Co. v. National Biscuit Co.* (D.N.J. 1941) 38 F.Supp. 643; *Brown v. H. L. Green Co.* (S.D.N.Y. 1943) 7 Fed.Rules Serv. 12e.231, Case 6; *Pedersen v. Standard Accident Ins. Co.* (W.D.Mo. 1945) 8 Fed.Rules Serv. 12e.231, Case 8; *Bowles v. Ohse* (D.Neb. 1945) 4 F.R.D. 403, 9 Fed.Rules Serv. 12e.231, Case 1; *Klages v. Cohen* (E.D.N.Y. 1945) 9 Fed.Rules Serv. 8a.25, Case 4; *Bowles v. Lawrence* (D.Mass. 1945) 8 Fed.Rules Serv. 12e.231, Case 19; *McKinney Tool & Mfg. Co. v. Hoyt* (N.D.Ohio 1945) 9 Fed.Rules Serv. 12e.235, Case 1; *Bowles v. Jack* (D.Minn. 1945) 5 F.R.D. 1, 9 Fed.Rules Serv. 12e.244, Case 9. And it has been urged from the bench that the phrase be stricken. *Poole v. White* (N.D.W.Va. 1941). 5 Fed.Rules Serv. 12e.231, Case 4, 2 F.R.D. 40. See also *Bowles v. Gabel* (W.D.Mo. 1946) 9 Fed.Rules Serv. 12e.244, Case 10 ("The courts have never favored that portion of the rules which undertook to justify a motion of this kind for the purpose of aiding counsel in preparing his case for trial.").

Subdivision (f). This amendment affords a specific method of raising the insufficiency of a defense, a matter which has troubled some courts, although attack has been permitted in one way or another. See *Dysart v. Remington-Rand, Inc.* (D.Conn. 1939) 31 F.Supp. 296; *Eastman Kodak Co. v. McAuley* (S.D.N.Y. 1941) 4 Fed.Rules Serv. 12f.21, Case 8, 2 F.R.D. 21; *Schenley Distillers Corp. v. Renken* (E.D.S.C. 1940) 34 F.Supp. 678; *Yale Transport Corp. v. Yellow Truck & Coach Mfg. Co.* (S.D.N.Y. 1944) 3 F.R.D. 440; *United States v. Turner Milk Co.* (N.D.Ill. 1941) 4 Fed.Rules Serv. 12b.51, Case 3, 1 F.R.D. 643; *Teiger v. Stephan Oderwald, Inc.* (S.D.N.Y. 1940) 31 F.Supp. 626; *Teplitsky v. Pennsylvania R. Co.* (N.D.Ill. 1941) 38 F.Supp. 535; *Gallagher v. Carroll* (E.D.N.Y. 1939) 27 F.Supp. 568; *United States v. Palmer* (S.D.N.Y. 1939) 28 F.Supp. 936. And see *Indemnity Ins. Co. of North America v. Pan American Airways, Inc.* (S.D.N.Y. 1944) 58 F.Supp. 338; Commentary, *Modes of Attacking Insufficient Defenses in the Answer* (1939) 1 Fed.Rules Serv. 669 (1940) 2 Fed.Rules Serv. 640.

Subdivision (g). The change in title conforms with the companion provision in subdivision (h).

The alteration of the "except" clause requires that other than provided in subdivision (h) a party who resorts to a motion to raise defenses specified in the rule, must include in one motion all that are then available to him. Under the original rule defenses which could be raised by motion were divided into two groups which could be the subjects of two successive motions.

Subdivision (h). The addition of the phrase relating to indispensable parties is one of necessity.

Notes of Advisory Committee on Rules—1963 Amendment

This amendment conforms to the amendment of Rule 4(e). See also the Advisory Committee's Note to amended Rule 4(b).

Notes of Advisory Committee on Rules—1966 Amendment

. *Subdivision (b)(7).* The terminology of this subdivision is changed to accord with the amendment of Rule 19. See the Advisory Committee's Note to Rule 19, as amended, especially the third paragraph therein before the caption "Subdivision (c)."

Subdivision (g). Subdivision (g) has forbidden a defendant who makes a preanswer motion under this rule from making a further motion presenting any defense or objection which was available to him at the time he made the first motion and which he could have included, but did not in fact include therein. Thus if the defendant moves before answer to dismiss the complaint for failure to state a claim, he is barred from making a further motion presenting the defense of improper venue, if that defense was available to him when he made his original motion. Amended subdivision (g) is to the same effect. This required consolidation of defenses and objections in a Rule 12 motion is salutary in that it works against piecemeal consideration of a case. For exceptions to the requirement of consolidation, see the last clause of subdivision (g), referring to new subdivision (h)(2).

Subdivision (h). The question has arisen whether an omitted defense which cannot be made the basis of a second motion may nevertheless be pleaded in the answer. Subdivision (h) called for waiver of "* * * defenses and objections which he [defendant] does not present * * * by motion * * * or, if he has made no motion, in his answer * * *." If the clause "if he has made no motion," was read literally, it seemed that the omitted defense was waived and could not be pleaded in the answer. On the other hand, the clause might be read as adding nothing of substance to the preceding words; in that event it appeared that a defense was not waived by reason of being omitted from the motion and might be set up in the answer. The decisions were divided. Favoring waiver, see *Keefe v. Derounian*, 6 F.R.D. 11 (N.D.Ill. 1946); *Elbinger v. Precision Metal Workers Corp.*, 18 F.R.D. 467 (E.D.Wis. 1956); see also *Rensing v. Turner Aviation Corp.*, 166 F.Supp. 790 (N.D.Ill. 1958); *P. Beiersdorf & Co. v. Duke Laboratories, Inc.*, 10 F.R.D. 282 (S.D.N.Y. 1950); *Neset v. Christensen*, 92 F.Supp. 78 (E.D.N.Y. 1950). Opposing waiver, see *Phillips v. Baker*, 121 F.2d 752 (9th Cir. 1941); *Crum v. Graham*, 32 F.R.D. 173 (D.Mont. 1963) (regretfully following the Phillips case); see also *Birnbaum v. Birrell*, 9 F.R.D. 72 (S.D.N.Y. 1948); *Johnson v. Joseph Schlitz Brewing Co.*, 33 F.Supp. 176 (E.D.Tenn. 1940); cf. *Carter v. American Bus Lines, Inc.*, 22 F.R.D. 323 (D.Neb. 1958).

Amended subdivision (h)(1)(A) eliminates the ambiguity and states that certain specified defenses which were available to a party when he made a preanswer motion, but which he omitted from the motion, are waived. The specified defenses are lack of jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)–(5)). A party who by motion invites the court to pass upon a threshold defense should bring forward all the specified defenses he then has and thus allow the court to do a reasonably complete job. The waiver reinforces the policy of subdivision (g) forbidding successive motions.

By amended subdivision (h)(1)(B), the specified defenses, even if not waived by the operation of (A), are waived by the failure to raise them by a motion under Rule 12 or in the responsive pleading or any amendment thereof to which the party is entitled as a matter of course. The specified defenses are of such a character that they should not be delayed and brought up for the first time by means of an application to the court to amend the responsive pleading.

Since the language of the subdivisions is made clear, the party is put on fair notice of the effect of his actions and omissions and can guard himself against unintended waiver. It is to be noted that while the defenses specified in subdivision (h)(1) are subject to waiver as there provided, the more substantial defenses of failure to state a claim upon which relief can be granted, failure to join a party indispensable under Rule 19, and failure to state a legal defense to a claim (see Rule 12(b)(6), (7), (f)), as well as the defense of lack of jurisdiction over the subject matter (see Rule 12(b)(1)), are expressly preserved against waiver by amended subdivision (h)(2) and (3).

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

Subdivision (a) is divided into paragraphs for greater clarity, and paragraph (1)(B) is added to reflect amendments to Rule 4. Consistent with Rule 4(d)(3), a defendant that timely waives service is allowed 60 days from the date the request was mailed in which to respond to the complaint, with an additional 30 days afforded if the request was sent out of the country. Service is timely waived if the waiver is returned within the time specified in the request (30 days after the request was mailed, or 60 days if mailed out of the country) and before being formally served with process. Sometimes a plaintiff may attempt to serve a defendant with process while also sending the defendant a request for waiver of service; if the defendant executes the waiver of service within the time specified and before being served with process, it should have the longer time to respond afforded by waiving service.

The date of sending the request is to be inserted by the plaintiff on the face of the request for waiver and on the waiver itself. This date is used to measure the return day for the waiver form, so that the plaintiff can know on a day certain whether formal service of process will be necessary; it is also a useful date to measure the time for answer when service is waived. The defendant who returns the waiver is given additional time for answer in order to assure that it loses nothing by waiving service of process.

Committee Notes on Rules—2000 Amendment

Rule 12(a)(3)(B) is added to complement the addition of Rule 4(i)(2)(B). The purposes that underlie the requirement that service be made on the United States in an action that asserts individual liability of a United States officer or employee for acts occurring in connection with the performance of duties on behalf of the United States also require that the time to answer be extended to 60 days. Time is needed for the United States to determine whether to provide representation to the defendant officer or employee. If the United States provides representation, the need for an extended answer period is the same as in actions against the United States, a United States agency, or a United States officer sued in an official capacity.

An action against a former officer or employee of the United States is covered by subparagraph (3)(B) in the same way as an action against a present officer or employee. Termination of the relationship between the individual defendant and the United States does not reduce the need for additional time to answer.

GAP Report. No changes are recommended for Rule 12 as published.

Committee Notes on Rules—2007 Amendment

The language of Rule 12 has been amended as part of the general restyling of the Civil 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.

Former Rule 12(a)(4)(A) referred to an order that postpones disposition of a motion "until the trial on the merits." Rule 12(a)(4) now refers to postponing disposition "until trial." The new expression avoids the ambiguity that inheres in "trial on the merits," which may become confusing when there is a separate trial of a single issue or another event different from a single all-encompassing trial.

Changes Made After Publication and Comment. See Note to Rule 1, supra.

Committee Notes on Rules—2009 Amendment

The times set in the former rule at 10 or 20 days have been revised to 14 or 21 days. See the Note to Rule 6.

Taxonomy upgrade extras

civil procedure

‹ Rule 11. Signing Pleadings, Motions, and Other Papers; Representations to the Court; Sanctions | up | Rule 13. Counterclaim and Crossclaim ›

DEFENDANT'S BRIEF

IN SUPPORT OF

MOTION TO DISMISS

Case number: M-035590 and 55533FA

STATE OF SOUTH CAROLINA,

Plaintiff,

v.

Edward Anthony,

Defendant.

NOW COMES the Defendant, by and through uncounsel, and respectfully submits the following brief in support of the Defendant's Motion to Dismiss.

STATEMENT OF THE ISSUES

1. The subjection of an individual to a second trial or punishment for the same offense or crime for which he has already been tried or punished.

2. Once Jeopardy has attached, the State unilaterally declare a mistrial?

3. Can the State be granted a mistrial, despite the fact that the Court entered no Findings of Fact, nor any Conclusions of Law which could allow for a mistrial to be properly entered, and none was entered on the official Court Minutes?

STATEMENT OF THE ARGUMENT

Issue 1

The subjection of an individual to a second trial or punishment for the same offense or crime for which he has already been tried or punished.

Black's law dictionary defines former jeopardy as a plea that a person cannot be tried for an offense more than once. Double jeopardy is a fundamental common law and constitutional right of a defendant that affords protection against being tried again for the same offense. Black's Law Dictionary, 6th Ed.

In *United States v. Felix* 503 U.S. 378 (1992), the U.S. Supreme Court ruled: "a[n]...offense and a conspiracy to commit that offense are not the same offense for double jeopardy purposes."[3][4]

Sometimes the same conduct may violate different statutes. If all elements of a lesser offense are relied on to prove a greater offense, the two crimes are the "same offense" for double jeopardy purposes, and the doctrine will bar the second prosecution. In *Blockburger v. United States*, 284 U.S. 299 (1932), the Supreme Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not".[5] The test was applied in *Brown v. Ohio*, 432 U.S. 161 (1977), where the defendant had first been convicted of operating an automobile without the owner's consent, and later of stealing the same automobile. The Supreme Court concluded that the same evidence was necessary to prove both offenses, and that in effect there was only one offense. Therefore, it overturned the second conviction.

In other cases, the same conduct may constitute multiple offenses under the same statute, for instance where one robs many individuals at the same time. There is no explicit bar to separate prosecutions for different offenses arising under the same "criminal transaction", but it is not permissible for the prosecution to re-litigate facts already determined by a jury. In *Ashe v. Swenson*, 397 U.S. 436 (1970), the defendant was accused of robbing seven poker players during a game. John Ashe was first tried for, and acquitted of, robbing only one of the players; the defense did not contest that a robbery actually took place. The state then tried the defendant for robbing the second player; stronger identification evidence led to a conviction. The Supreme Court, however, overturned the conviction. It was held that in the first trial, since the defense had not presented any evidence that there was no robbery, the jury's acquittal had to be based on the conclusion that the defendant's alibi was valid. Since one jury had held that the defendant was not present at the crime scene, the State could not re-litigate the issue.

In the instant matter, Defendant was properly charged, via citation, with driving while impaired, speeding to endanger, driving while license revoked, and possession of a revoked driver's license. Thus, element (1) is met. On October 06, 2011, Defendant was arraigned by the assistant district attorney and entered a plea of not guilty in the District Court. Thus, elements (3) and (4) are met. Subsequently, the Honorable Edmonds called the matter trial and the State proceeded with trial after I requested a public testified on behalf of the state. Thus elements for the alleged charge was never meet.

Issue 2

The defendant may not be punished twice for the same offense. In certain circumstances, however, a sentence may be increased. It has been held that sentences do not have the same "finality" as acquittals, and may therefore be reviewed by the courts.[citation needed]

The prosecution may not seek capital punishment in the retrial if the jury did not impose it in the original trial. The reason for this exception is that before imposing the death penalty the jury has to make several factual determinations and if the jury does not make these it is seen as the equivalent of an acquittal of a more serious offense.

In *Arizona v. Rumsey*, 467 U.S. 203 (1984), a judge had held a separate hearing after the jury trial to decide if the sentence should be death or life imprisonment, in which he decided that the circumstances of the case did not permit death to be imposed. On appeal, the judge's ruling was found to be erroneous. However, even though the decision to impose life instead of death was based on an erroneous interpretation of the law by the judge, the conclusion of life imprisonment in the original case constituted an acquittal of the death penalty and thus death could not be imposed upon a subsequent trial. Even though the acquittal of the death penalty was erroneous in that case, the acquittal must stand.

Double jeopardy also does not apply if the later charge is civil rather than criminal in nature, which involves a different legal standard (crimes must be proven beyond a reasonable doubt, whereas civil wrongs need only be proven by preponderance of evidence or in some matters, clear and convincing evidence). Acquittal in a criminal case does not prevent the defendant from being the defendant in a civil suit relating to the same incident (though *res judicata* operates within the civil court system). For example, O. J. Simpson was acquitted of a double homicide in a California criminal prosecution, but lost a civil wrongful death claim brought over the same victims.[12]

If the defendant happened to be on parole from an earlier offense at the time, the act for which he or she was acquitted may also be the subject of a parole violation hearing, which is not considered to be a criminal trial. Since parolees are usually subject to restrictions not imposed on other citizens, evidence of actions that were not deemed to be criminal by the court may be re-considered by the parole board. This legal board could deem the same evidence to be proof of a parole violation. Most states' parole boards have looser rules of evidence than is found in the courts – for example, hearsay that had been disallowed in court might be considered by a parole board. Finally, like civil trials parole violation hearings are also subject to a lower standard of proof so it is possible for a parolee to be punished by the parole board for criminal actions that he or she was acquitted of in court.

In the American military, courts-martial are subject to the same law of double jeopardy, since the Uniform Code of Military Justice has incorporated all of the protections of the U.S. Constitution. The non-criminal proceeding non-judicial punishment (or NJP) is considered to be akin to a civil case and is subject to lower standards than a court-martial, which is the same as a civilian court of law. NJP proceedings are commonly used to correct or punish minor breaches of military discipline. If a NJP proceeding fails to produce conclusive evidence, however, the commanding officer (or ranking official presiding over the NJP) is not allowed to prepare the same charge against the military member in

question. In a court-martial, acquittal of the defendant means he is protected permanently from having those charges reinstated.

The most famous American court case invoking the claim of double jeopardy is probably the second murder trial in 1876 of Jack McCall, killer of Wild Bill Hickok. McCall was acquitted in his first trial, which Federal authorities later ruled to be illegal because it took place in an illegal town, Deadwood, then located in South Dakota Indian Territory. At the time, Federal law prohibited all except Native Americans from settling in the Indian Territory. McCall was retried in Federal Indian Territorial court, convicted, and hanged in 1877. He was the first person ever executed by Federal authorities in the Dakota Territory.

1. Once Jeopardy has attached, may the State unilaterally declare a mistrial, without giving proper justification, and making a motion for mistrial upon which a Judge must rule?

Now concluding that Jeopardy has attached on the above styled matters, the remaining issue is whether a mistrial could be properly declared without motion by the State, but rather through the assistant district attorney' s unilateral declaration.

The granting of a mistrial by the presiding judge on motion by the State is proper only in very limited circumstances:

1. Upon motion of the State, the judge may declare a mistrial if there occurs during the trial, either inside or outside the courtroom, **misconduct resulting in substantial and irreparable prejudice to the State's case and the misconduct was by a juror or the defendant, his lawyer, or someone acting at the behest of the defendant or his lawyer.** If there are two or more defendants, the mistrial may not be declared as to a defendant who does not join in the motion of the State if:

(1) Neither he,no lawyer, nor a person acting at his or his lawyer's behest participated in the misconduct; or

(2) The State's case is has committed prejudiced to him.

Clearly, in the instant matter, the State's unilateral declaration of a mistrial is fatally flawed in more ways than one. First, the State failed to make a motion to the court moving for a mistrial. Rather, Assistant District Attorney unilaterally, without consent of the Judge or Defense counsel, attempted to declare a mistrial, and unilaterally terminated any further proceedings that day. The State has the absolute discretion to terminate a trial at any point prior to the final entry of Judgment, when the matter is then in the Court's hands. However, if the State chooses to unilaterally terminate the trial after Jeopardy has attached, it is barred from further prosecution.

Issue 3

1. Can the State be granted a mistrial, despite the fact that the Court entered no Findings of Fact, nor any Conclusions of Law which could allow for a mistrial to be properly entered, and none was entered on the official Court Minutes?

Even if it is assumed that the State had valid grounds to argue for a mistrial in compliance no such argument was made, no findings of fact were made, and no conclusions of law were made. Furthermore, no Order of mistrial was entered on the Judgment, nor on the shuck, nor on the Court Minutes.

In order for a mistrial to be proper, "[b]efore granting a mistrial, the judge must make finding of facts with respect to the grounds for the mistrial and insert the findings in the record of the case.The judge made erred,.There are two other instances where a mistrial may be declared, but only when there is a motion made to the court.

Mistrial for prejudice to defendant.

Upon motion of a defendant or with his concurrence the judge may declare a mistrial at any time during the trial. The judge must declare a mistrial upon the defendant's motion if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case.

Furthermore, neither party consented that any Order could be issued later out of term or out of session.

As a result of the proceedings, and because none of the above referenced statutes were followed or even applicable, this Court must find that Jeopardy attached in the matters.

Respectfully submitted this the 1st day of May, 2018.

Edward Anthony
Defendant

STATE OF SOUTH CAROLINA
COUNTY OF AIKEN

IN THE COURT OF GENERAL SECESSION:

Aiken County

Vs.

Edward Anthony

C/O: M-035590
C/O: 55533 FA

MOTION TO DISMISS

****

NOW COMES, Petitioner Edward Anthony, by and through, and pursuant to SECTION 17-23-20 of the South Carolina Criminal Procedure, and the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution, moves this Court to dismiss the above-captioned case. In support of this motion, Mr. Anthony shows the following:

STATEMENT OF THE FACTS

1. The Defendant is charged by Information in this case with Count 1- Shoplifting and Count 2 – of Shoplifting

2. The Petitioner was charged for the Second time, with the same place crimes at Gregg's Plus store.

3. At the Petitioner's, plea deal that he made on November 9, 2011, for the first offense of Shoplifting. A warrant was issued on the same day for the same place crime, that allegedly happen on the same day, and never existed to arrest or detain Mr. Anthony. Because all of the elements to establish Probable Cause for the alleged shoplifting crime was lacking. There was No Merchandise to establish probable cause to arrest on October 24, 2011; Mr. Anthony had nothing in his possession. In doing the search of Mr. Anthony he never walked outside with beer in hand, when the officers searched the trash can and the petitioners car. They failed to discovery evidence to once again probable cause to detain him.

4. But when the two officers walked the petitioner in front of the store. One of the officers left and walked the petitioner to the back of the store. So the officers planted evidence. Because if there is no evidence and front of the petitioner at front and he come back to the trash can and now their evidence that comes out of the trash. Then something is wrong with the picture.

5. The petitioner asked for attorney and was denied the right to an attorney was well.

ARGUMENT

1. False evidence, fabricated evidence, forged evidence or tainted evidence is information created or obtained illegally, to sway the verdict in a court case. Falsified evidence could be created by either side in a case (including the police/prosecution in a criminal case), or by someone sympathetic to either side. Misleading by suppressing evidence can also be considered a form of false evidence (by omission), however, in some cases, suppressed evidence is excluded because it cannot be proved the accused was aware of the items found or of their location. The analysis of evidence (forensic evidence) may also be forged if the person doing the forensic work finds it easier to fabricate evidence and test results than to perform the actual work involved. Parallel construction is a form of false evidence in which the evidence is truthful but its origins are untruthfully described, at times in order to avoid evidence being excluded as inadmissible due to unlawful means of procurement such as an unlawful search.

2. Apart from the desire for one side or another to succeed or fail in its case, the exact rationale for falsifying evidence can vary. Falsifying evidence to procure the conviction of those honestly believed guilty is considered a form of police corruption even though it is intended to (and may) result in the conviction of the guilty; however it may also reflect the incorrect prejudices of the falsifier, and it also tends to encourage corrupt police behavior generally. In the United Kingdom this is sometimes called 'Noble Cause Corruption'. A "throw down", i.e. the planting of a weapon at a crime scene might be used by the police to justify shooting the victim in self-defense, and avoid possible prosecution.

3. The Fourth Amendment originally enforced the notion that "each man's home is his castle", secure from unreasonable searches and seizures of property by the government. It protects against arbitrary arrests, and is the basis of the law regarding search warrants, stop-and-frisk, safety inspections, wiretaps, and other forms of surveillance, as well as being central to many other criminal law topics and to privacy law.

4. The Fourth Amendment of the U.S. Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

5. The Fifth Amendment creates a number of rights relevant to both criminal and civil legal proceedings. In criminal cases, the Fifth Amendment guarantees the right to a grand jury, forbids "double jeopardy," and protects against self-incrimination. It also requires that "due process of law" be part of any proceeding that denies a citizen "life, liberty or property" and requires the government to compensate citizens when it takes private property for public use.

6. The Amendment's Double Jeopardy Clause provides the right to be tried only once in federal court for the same offense. The Amendment also has a Due Process Clause (similar to the one in the 14th Amendment) as well as an implied equal protection requirement (Bolling v. Sharpe).

7. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

8. The Sixth Amendment guarantees the rights of criminal defendants, including the right to a public trial without unnecessary delay, the right to a lawyer, the right to an impartial jury, and the right to know who your accusers are and the nature of the charges and evidence against you.

9. The 13th Amendment to the Constitution declared that "Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction." Formally abolishing slavery in the United States, the 13th Amendment was passed by the Congress on January 31, 1865, and ratified by the states on December 6, 1865. The Thirteenth Amendment applies to the actions of private citizens, while the Fourteenth and Fifteenth Amendments apply only to state actors. The amendment also enables Congress to pass laws against sex trafficking and other modern forms of slavery. Congress proposed a compromise amendment banning franchise restrictions on the basis of race, color, or previous servitude. After surviving a difficult ratification fight, the amendment was certified as duly ratified and part of the Constitution.

10. The Fourteenth Amendment addresses many aspects of citizenship and the rights of citizens. The most commonly used -- and frequently litigated -- phrase in the amendment is "equal protection of the laws", which figures prominently in a wide variety of landmark cases, including Brown v. Board of Education (racial discrimination), Roe v. Wade (reproductive rights), Bush v. Gore (election recounts), Reed v. Reed (gender discrimination), and University of California v. Bakke (racial quotas in education)

11. In subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

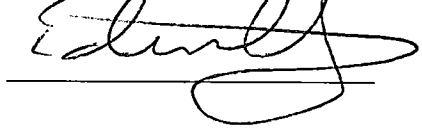
12. Illegally obtained evidence applies to criminal cases only and is typically "evidence acquired by violating a person's constitutional protection against illegal searches and seizures; evidence obtained without a warrant or probable cause" (Blackwell, 2004). This ties in with the legal principle known as the exclusionary rule, which states "evidence collected or analyzed in violation of the U.S. Constitution is inadmissible for a criminal prosecution in a court of law (that is, it cannot be used in a criminal trial)". This provision was developed to provide maximum protection of an individual's rights and civil liberties and to ensure that law enforcement procedures are conducted properly. The exclusionary rule is also designed to provide a remedy and disincentive, which is short of criminal prosecution in response to prosecutors and police who illegally gather evidence in violation of the Fifth Amendment in the Bill of Rights.

13. The double jeopardy clause prohibits the state from indicting a defendant twice for the same place theft by naming a different employee to testify. (Coleman V. State)

Conclusion

WHEREFORE, for the above reasons, Mr. Anthony respectfully requests that he is not equal to the rights that he is awarded or afforded from his constitution amendments of the United States that protect him from being deprived of his rights, life, and freedom. So with your Jurisdiction, the petitioner hopes this Court would Vacate his conviction. Because the petitioner never waived his rights and order such other relief as is just and proper.

Respectfully submitted, this the 7th day of July, 2017.

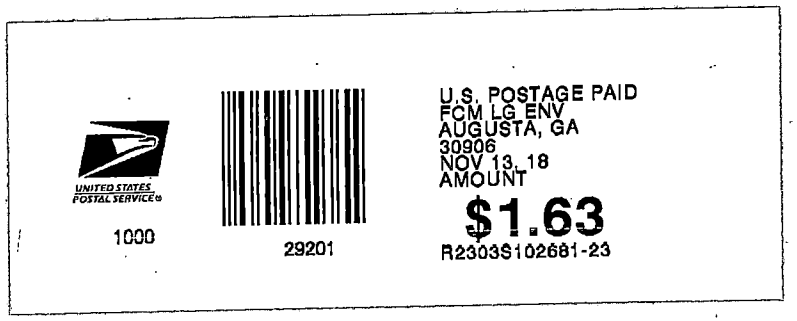


Edward Anthony
2210 Bungalow rd
Augusta, ga 30906

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion was served on July 7, 2017, 537 Edgefield Rd, North Augusta, SC 29841, by deposit in the United States mail, first-class and postage prepaid.

This 7th day of July, 2017.



Ward Anthony
Bungalow Rd
ta, Ga 30906

Supreme Court of South Carolina.
1231 Gervais Street
Columbia, SC 29201