

Pretrial Motions and Evidentiary Hearings

Eric D. Placke

First Assistant Federal Public Defender

Middle District of North Carolina



Pretrial Motions

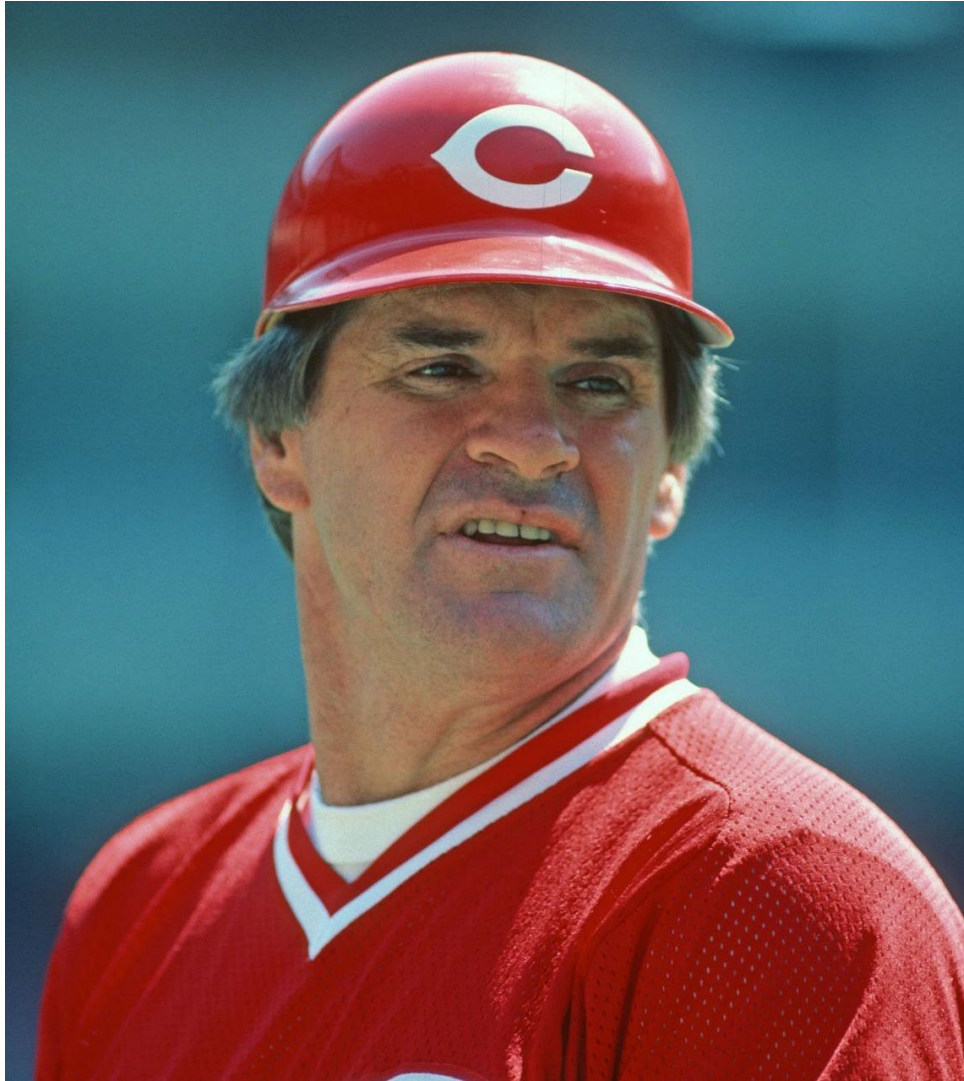
Lessons From Atticus



Pretrial Motions

Lessons From Baseball

Ethics First!
Know the Rules
Walk, Base Hit, or Swing for
the Fence?



Pretrial Motions

**Ethics
First!**

Pretrial Motions

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is **not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law.**

N.C. Rule 3.1 (Part I)

Pretrial Motions

By presenting to the court a pleading, written motion, or other paper ... an attorney ... certifies that (1) it is not being presented for any improper purpose, such as to... cause unnecessary delay ... (2) the claims, defenses, and other legal contentions are warranted by existing law or by a **nonfrivolous** argument for extending, modifying, or reversing existing law or for establishing new law; (3) the factual contentions have evidentiary support ... and (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b)

Pretrial Motions

A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer; (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be **directly adverse** to the position of the client and not disclosed by opposing counsel; or (3) offer evidence that the lawyer knows to be false.

N.C. Rule 3.3(a) (Part I)

Pretrial Motions

**Know the
Rules**



Pretrial Motions

Fed. R. Crim. P.

LCrR

Speedy Trial Act

Pretrial Motions

Fed. R. Crim. P. 12

12(b)(2) – Any Time

12(b)(3) – Pretrial

Pretrial Motions

Fed. R. Crim. P. 12(b)(3)

- (A) defect in instituting prosecution**
- (B) defect in indictment or information**
- (C) suppress evidence**
- (D) severance of charges or defendants**
- (E) discovery***

Pretrial Motions

Discovery motions filed by a defendant who is represented by counsel must include a statement that counsel has fully reviewed the government's case file before bringing the motion or a statement that such file is not available for counsel's review. The filing of a discovery motion which does not include such certification may cause the Court to deny the motion, to disapprove payment to court-appointed counsel in regard to a motion made unnecessary by examination of the file, or to impose other sanctions under LCrR57.3 in the discretion of the Court.

LCrR 16.1 (MDNC June 1, 2022)

Pretrial Motions

Motions to Suppress

Burden of Proof

Witness Statements

Pretrial Motions

As a general rule, the burden of proof is on the defendant who seeks to suppress the evidence. Once the defendant establishes a basis for his motion to suppress, the burden shifts to the government to prove, by a preponderance of the evidence, that the challenged evidence is admissible.

United States v. Seerden, 264 F. Supp. 3d 703, 708 (E.D. Va. 2017), *aff'd on other grounds*, 916 F.3d 360 (4th Cir. 2019), *as amended* (Feb. 21, 2019) (citations omitted).

Pretrial Motions

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.

Fed. R. Crim. P. 12(h).

Speedy Trial Act *and* Motions to Continue

Excludable Time – 18 USC 3161(h)

Motions to Continue – 18 USC 3161(h)(7)(A)

Factors to Consider – 18 USC 3161(h)(7)(B)



Pretrial Motions

**Walk, Base Hit,
or Swing for the
Fence?**



Pretrial Motions

**Motion
Granted!**

Pretrial Motions

Ethics First!

Know the Rules

Bunt, Base Hit, or Home Run



Pretrial Motions

**"It ain't over 'til
it's over."**