NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 2018

IAN ALEXANDER BOWLINE,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Tenth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal Rule of Criminal Procedure 12 previously read that the failure to timely raise certain claims in a pretrial motion waived those claims, absent a showing of good cause. The rule was amended in 2014 to remove the waiver language, and to state instead that the failure to raise claims by the appropriate deadline made them untimely. The question presented, which has sharply divided the courts of appeals, involves the interplay between the new version of the rule and the plain-error provision of Federal Rule of Criminal Procedure 52(b).

Specifically, the question is the following:

> **Federal Rule of Criminal Procedure 12 no longer provides that the consequence of not timely making a required, pretrial motion is a waiver. Can an appellate court review a defense, objection, or request that is not timely made under Rule 12 for plain error, pursuant to Federal Rule of Criminal Procedure 52(b)?**

STATEMENT OF RELATED CASES

This case involves an appeal from the second trial of Mr. Bowline in the United States District Court for the Eastern District of Oklahoma. His convictions in the first case, in United States v. Bowline, No. 14-cr-00049 (E.D. Okla.), were for charges relating to the distribution of Oxycodone. Those convictions were reversed for insufficient evidence. United States v. Bowline, 674 F. App'x 781 (10th Cir. 2016).

The indictment in the first case named the following as codefendants: Amanda Dawn Cookson, Daniel Wayne Maudlin, Robert James Kohne, Joshua Allen Barnett, Elizabeth Portugal and Eric Stanfield Cochrane-Cline. None of these other people took an appeal. Mr. Bowline was charged alone in the indictment underlying his present convictions.

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PRAYER

Petitioner, Ian Alexander Bowline, respectfully prays that a Writ of Certiorari be issued to review the opinion of the United States Court of Appeals for the Tenth Circuit that was handed down on March 11, 2019.

OPINIONS BELOW

The decision of the United States Court of Appeals for the Tenth Circuit, United States v. Bowline, 917 F.3d 1227 (10th Cir. 2019), is found in the Appendix at A1. The district court's ruling on the underlying order is found in the Appendix at A13.

JURISDICTION

The United States District Court for the Eastern District of Oklahoma had jurisdiction over this criminal action pursuant to 18 U.S.C. § 3231. The United States Court of Appeals for the Tenth Circuit had jurisdiction under 28 U.S.C. § 1291.

This Court's jurisdiction is premised upon 28 U.S.C. § 1254(1). Justice Sotomayor has extended the time in which to petition for certiorari to, and including, August 7, 2019, see A20, so this petition is timely.

FEDERAL RULES INVOLVED

This petition involves Federal Rule of Criminal Procedure 12, and specifically its provision dealing with untimely pre-trial motions, as well as the plain-error provision of Federal Rule of Criminal Procedure 52(b). The full text of Rule 12 is set forth in the Appendix at A21-23. The parts of the rule relevant here are as follows:

Rule 12. Pleadings and Pretrial motions.

* * *

(b) Pretrial Motions.

(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.

* * *

(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.

Fed. R. Crim. P. 12(b)(3), (c) (2014).

Federal Rule of Criminal Procedure reads as follows:

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.

Fed. R. Crim. P. 52.

STATEMENT OF THE CASE

Ian Bowline was initially charged with three counts relating to the distribution of Oxycodone. One was for a conspiracy to distribute the drug, a crime punishable by at most twenty years in prison. The other two were Travel Act counts, each of which carried a maximum penalty of five years in prison. The government dismissed one of the Travel Act counts before the case was submitted to the jury.

The government's theory was that Mr. Bowline wrote false prescriptions for the drug, which others passed at various pharmacies. See generally United States v. Bowline, 674 F. App'x 781, 783 (10th Cir. 2016). The pills obtained were sometimes split between Mr. Bowline and those who passed the false prescriptions. Id. At times, some who played a role in the passing of the false prescriptions received cash instead, or a combination of cash and pills. Id.

Mr. Bowline was convicted of the distribution-related conspiracy and of the Travel Act count that went to the jury. Id. His maximum statutory exposure was twenty-five years. The district court sentenced him to a term of 108 months. Id.

On appeal, the United States Court of Appeals for the Tenth Circuit held that the evidence was insufficient to show distribution, and that this required the vacating of both of the convictions. Id. at 784-86. It concluded Mr. Bowline's agreement with people who passed the false prescriptions to transfer the pills obtained to him "can't form the basis of a conspiracy to distribute." Id. at 782; see also id. at 784. And the government, the Tenth Circuit also held, did not prove anybody who passed false prescriptions shared a distribution objective with Mr. Bowline. Id. at 782, 786.

In closing, the Tenth Circuit noted the government had presented sufficient proof that Mr. Bowline had conspired to possess Oxycodone. Id. at 786. And it had also presented sufficient evidence that he had "conspired 'to acquire or obtain possession of a controlled substance by misrepresentation, fraud, forgery, deception or subterfuge.' 21 U.S.C. § 843(a)(3)." Bowline, 674 F. App'x at 786. The court then remanded with instructions for the district court to vacate its judgment and sentence. Id.

The new indictment

After the appeal, government did not elect to proceed on what the Tenth Circuit observed it had proven at the original trial. It did not seek to

try Mr. Bowline for a conspiracy to possess Oxycodone. Nor did the government seek to convict him for conspiring to obtain or acquire the drug by misrepresentation, fraud, forgery, deception or subterfuge. The latter conspiracy, one to violate 21 U.S.C. § 843(a)(3), would carry a penalty of four years in prison.

Instead, just eleven days after the Tenth Circuit's December 30, 2016 decision, the government filed a new indictment against Mr. Bowline charging him with substantive offenses that it had not pursued the first time. Eleven of the charges were for violating § 843(a)(3) itself. Each charge was pegged to the pass (or in two cases, the attempted pass) of a false prescription that was described to the first jury. And each of the § 843(a)(3) charges was paired with a charge under 21 U.S.C. § 843(a)(2), for using a registration number of another, in relation to those false prescriptions.

Under the new indictment, Mr. Bowline's maximum exposure was four years on each count, for a total of eighty-eight years. 21 U.SC. § 843(d)(1) (penalty provision). Even after the dismissal of the first two counts of the indictment, which dated from 2010, that still left his

maximum exposure at eighty years. This was far more than the thirty years that were possible on the original indictment, or the total of twenty-five years available on the two counts that were tried to the first jury. And it was twenty times Mr. Bowline's exposure for the § 843(a)(3) conspiracy that the evidence at the first trial would support.

The motion to dismiss for vindictive prosecution

Mr. Bowline moved to dismiss the second indictment for vindictive prosecution. Vol. 1 at 119-126. He urged that by charging him in twenty-two counts, the government was punishing him for his successful appeal of the convictions it had obtained on the first indictment. Id. at 121.[1]

Mr. Bowline did not claim to have proof of actual vindictiveness. Instead, he argued that the circumstances warranted a presumption of vindictiveness, which would entitle him to relief unless the government were to rebut it. In making this argument, Mr. Bowline relied heavily on the Tenth Circuit's decision in United States v. Wood, 36 F.3d 945 (10th Cir.

[1] Citations to the record on appeal in the Tenth Circuit are provided for the Court's convenience, in the event this Court deems it necessary to review the record to resolve this petition. See Sup. Ct. R. 12.7.

1994). Vol. 1 at 121 (noting similarity of this case to Wood), 121-124 (describing Wood and arguing similarity of that case to this one).

Mr. Bowline argued that the similarities between this case and Wood "are striking." Id. at 123. The new indictment in this case was filed long (some twenty-one months the motion said) after the first trial, id., similar in Wood to the filing of the new indictment more than two years after the first trial there. Here, as there, the basis for the new indictment was known to the government before the first trial. Id. The new charges here, Mr. Bowline asserted in an echo of Wood, were "not based on any new evidence or any separate events." Id. And the new indictment was obtained against Mr. Bowline soon after he took action to the government's disadvantage (his successful appeal), id. at 124, which paralleled the fact that, in Wood, the indictment came soon after Mr. Wood took action to the government's disadvantage (his successful motion to dismiss).

Mr. Bowline argued that all of this, as in Wood, made the indictment inherently suspect under controlling Tenth Circuit law, id. at 123 (title of section of motion), and warranted a presumption of vindictiveness, id. at 124. He requested that the court dismiss the indictment. Id.

The government's response and the district court's ruling

The prosecution responded to Mr. Bowline's motion by arguing that no presumption of vindictiveness should apply. It took on at length his claim that the presumption was appropriate under Wood. Vol. 1 at 131-33. The prosecution did not make any claim that, if the presumption applied, it could rebut the presumption by showing "'legitimate, articulable, objective reasons'" that justified its charging decision. Wood, 36 F.3d at 946 (quotation omitted). See generally Vol. 1 at 128-35.

In arguing against application of a presumption, the prosecution urged that Mr. Bowline's admissions in his testimony at his first trial was new evidence that it could use at the second trial. Id. at 131-33. But in an earlier pleading, it had taken the position that it had "compelling proof," id. at 92, wholly apart from that prior testimony, that would enable it to more than meet its burden of proving guilt beyond a reasonable doubt, id. at 92-93.

The district court denied Mr. Bowline's vindictiveness motion. A13-19. The district court first noted the motion was filed on April 1, after the deadline of March 9, and days before the trial was to start. A14.. The basis

for the motion, the court observed, was known since the indictment was returned. Id. As there was no showing made of good cause for a motion not filed by an established deadline, the district court dismissed the motion as untimely, citing Federal Rule of Criminal Procedure 12(c)(3) (2014). A14.

The district court proceeded to address the merits of the motion, and to deny it on the merits. A14-19 The court considered this case to be distinguishable from Wood, A17, largely embracing the arguments made in the prosecution's response to the motion, Vol. 1 at 128-36.

A jury convicted Mr. Bowline of sixteen counts, and acquitted him of four counts. The district court sentenced him to sixteen months in prison. A3. With credit for time served on the initial indictment, id., Mr. Bowline served no additional time in prison.

The Tenth Circuit appeal

On appeal, Mr. Bowline argued he was entitled to relief on his vindictive-prosecution claim under the Tenth Circuit's decision in Wood. He maintained that, under the present version of Rule 12, his claim should be reviewed for plain error.

Before Rule 12 was amended in 2014, it deemed late-filed motions to result in a waiver. The prior version of the rule stated a party "waives" any issue required to be raised under the rule pre-trial that was not raised by the deadline set by the court. Fed. R. Crim. P. 12(e) (2002). "For good cause," the rule continued, "the court may grant relief from the waiver." Id.

The current version of the rule does not contain this waiver language. It instead provides a motion not filed by the deadline is "untimely." Fed. R. Crim. P. 12(c)(3) (2014). The rule then states that a court may consider an untimely motion if the party shows good cause. Id.

Mr. Bowline argued that with the late filing no longer deemed to be a waiver, plain-error review was available under Federal Rule of Criminal Procedure 52(b). Filing a motion late, without more, does not show waiver in the usual (non-deemed) sense: "'the intentional relinquishment or abandonment of a known right.'" United States v. Olano, 507 U.S. 725, 733 (1993) (quotation omitted). Instead, he maintained, it works only a forfeiture, id., allowing relief under Rule 52(b) if plain error is shown.

Acknowledging a deep divide in the circuits, A10-11, the Tenth Circuit held plain-error review to be unavailable. The court first reasoned that Rule 12 only allows consideration of an untimely motion if good cause is shown. A4-5. It noted the rule generally speaks of "the" court, "clearly referring to the court in which the trial is pending." A4. But in the good-cause passage, the rule speaks of "a" court. Id. The Tenth Circuit held that, given the general definitions in the federal rules, the use of "a court" showed the good-cause standard applied not only in the district courts, but also in the courts of appeals. A4-5.

The Tenth Circuit did not think the elimination of the term "waiver" at all changed the standard in the rule. A9. It cited in this regard the Advisory Committee Notes that the new provision "'retains the existing standard for untimely claims.'" Id. (quoting 2014 Advisory Committee Notes to Rule 12) (emphasis deleted). At the same time, the court of appeals recognized that the Advisory Committee considered, but did not adopt, language that would have expressly precluded plain-error review. Id. This left it for the "appellate courts to independently interpret Rule 12 and determine which standard to apply." A10.

The Tenth Circuit concluded that "the 2014 amendments did not purport to reject Davis [v. United States, 411 U.S. 233 (1973)]" -- which was decided under a prior version of the rule that deemed any late-filed motion to be a waiver -- "and [to] authorize plain-error review under the Olano standard." A10. So, "as a matter of first impression," it would "adhere to the Davis standard." Id. It also determined that circuit precedent under the prior version of the rule called for it to reach the same result "[b]ecause the 2014 amendments did not change the standard for appellate review." Id.

REASONS FOR GRANTING THE WRIT

This Court's review is needed to resolve an important issue about the availability of plain-error review under Federal Rule of Criminal Procedure 12, an issue that arises frequently and that has divided the circuits.

Before it was amended in 2014, Federal Rule of Criminal Procedure 12 had a subsection entitled "Waiver of a Defense, Objection, or Request." Fed. R. Crim. P. 12(e)(2002) (bolding omitted). The rule provided that if a party did not make a required pretrial motion in a timely manner, it "waive[d]" any such defense, objection or request. Id.

The 2014 amendments did away with the waiver language. The amended subsection, which is now subsection (c)(3) of Rule 12, provides only that a required pretrial motion not raised by the deadline is merely "untimely." Fed. R. Crim. P. 12(c)(3) (2014).

Ordinarily, an issue that is not waived in a criminal proceeding can be reviewed on appeal for plain error under Federal Rule of Criminal Procedure 52(b). See United States v. Olano, 507 U.S. 725, 732-34 (1993). Indeed, this Court in Olano described the forfeited errors that Rule 52(b) is designed to cover as those that "are not timely raised in district court," id. at 731, language echoed in the present Rule 12(c)(3). But where there is

waiver, as the prior version of Rule 12 stated was the consequence of a tardy motion, Rule 52(b) has no application. Id. at 732.

The question here is whether, with the elimination of the waiver language from Rule 12, an issue not timely raised under that rule can be reviewed on appeal for plain error. Given the variety of motions that must be raised pretrial under Rule 12, see Fed. R. Crim. P. 12(b)(3) (2014), this question arises frequently. Indeed, it has already generated a deep circuit split. This Court's review is needed to address this important question and to ensure Rule 12(c)(3) is consistently applied throughout the country.

A. The courts of appeals are deeply split on whether plain-error review is available for a claim not timely raised under Rule 12.

Although the present version of Federal Rule of Criminal Procedure 12 has been around only since the end of 2014, it has already generated considerable controversy. The courts of appeals have sharply split as to whether the newly worded rule, by deleting the waiver language of the earlier versions of the rule, allows for plain-error review under Federal Rule of Appellate Procedure 52(b). The Fifth, Sixth and Eleventh circuits have squarely held it does. United States v. Vasquez, 899 F.3d 363, 372-73

(5th Cir. 2018), cert. denied, 139 S.Ct. 1543 (2019); United States v. Soto, 794 F.3d 635, 652 (6th Cir. 2015); United States v. Sperrazza, 804 F.3d 1113, 1119 (11th Cir. 2015). Another circuit, although not discussing the language of the amended rule, allows for review where there is plain error. United States v. Robinson, 855 F.3d 265, 270 (4th Cir. 2017).

Four circuits have expressly taken the opposite view. The Eighth and Ninth Circuits, as well as the Tenth Circuit in this case, have held that even after the amendment, there is no review for plain error. Rather, the availability of review depends on a showing of good cause. United States v. Anderson, 783 F.3d 727, 740-41 (8th Cir. 2015); United States v. Guerrero, 921 F.3d 895, 897-98 (9th Cir. 2019) (per curiam). The Seventh Circuit also requires a showing of good cause under the new rule, United States v. Daniels, 803 F.3d 335, 351-52 (7th Cir. 2015), and may, in addition, require that plain error be shown, United States v. McMillan, 786 F.3d 630, 635-36 & n.3 (7th Cir. 2015).[2]

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[2] The Second Circuit in United States v. Martinez, 862 F.3d 223, 233-34 (2d Cir.), cert. denied, 138 S.Ct. 489 (2017), quoted the current version of Rule 12 as to what motions must be raised. Then, without referring to the amended part of the rule at issue here, and in sole reliance on a case decided under the version with the waiver language, that court stated that an untimely suppression argument is waived. Id. at 234. The Tenth Circuit

The quickness with which this circuit split has developed attests to the importance of the issue and its pervasiveness. Just as issues may be overlooked at trial and sentencing, so may they be missed before trial. And as Rule 12 calls for a wide array of issues to be raised pretrial, see Fed. R. Crim. P. 12(b)(3) (2014), the issue here is one with broad impact.

The circuit split is well-developed. The opposing viewpoints have been explored at length in cases like the Sixth Circuit's decision in Soto, see Soto, 794 F.3d at 647-56, and the Tenth Circuit's decision in this case, A3-12. There is nothing to be gained by waiting for the remaining circuits to choose sides. The only result of waiting will be that defendants who do not timely file a required pretrial motion under Rule 12 will continue to be

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counted Martinez as having held that the present version of Rule 12 does not allow for plain-error review. It also counted the Third Circuit as so holding, citing United States v. Fattah, 858 F.3d 801 (3d Cir. 2017). See A10. But that court still considers the availability of plain-error review for a claim not timely raised under Rule 12 to be an open question. United States v. Ferriero, 866 F.3d 107, 122 n.17 (3d Cir. 2017), cert. denied, 138 S.Ct. 1031 (2018).

If the Second or Third Circuits, or both, are included in the tally, it would only deepen the already pronounced circuit split. In addition, the First Circuit has in *dicta* stated the view that review of a claim not raised in the district court is available only on a showing of good cause. United States v. Walker-Couvertier, 860 F.3d 1, 9 & n.1 (1st Cir. 2017), cert. denied, 138 S.Ct. 1339 (2018).

treated differently on appeal depending on the circuit in which their cases arise.

B. The Tenth Circuit wrongly concluded that the present version of Rule 12 -- which has been stripped of the waiver language in prior versions of the rule -- treats the failure to file a timely, pretrial motion as a waiver.

The Tenth Circuit's decision in this case contains the most extensive discussion of the position that all untimely motions result in a waiver under Rule 12(c)(3), and that this rule precludes plain-error review under Rule 52(b). The decision, however, is unpersuasive.

Prior to the 2014 amendments, Rule 12 expressly deemed the failure to make a timely, pretrial motion that was required under the rule to be a waiver. It was this fact that drove this Court's decisions in Shotwell Mfg. Co. v. United States, 371 U.S. 341 (1963) and Davis v. United States, 411 U.S. 233 (1973).

For example, Mr. Davis argued that his claim of unconstitutional discrimination in the composition of the grand jury could be raised on collateral review, even though it was not raised pretrial or on appeal. Davis, 411 U.S. at 234-35. Invoking Kaufman v. United States, 394 U.S. 217

(1969), he maintained that collateral review was available as long as he had not deliberately bypassed, or understandingly and knowingly waived, his claim. Id. at 236. This Court rejected the argument. It explained Kaufman did "not deal[] with the sort of express waiver provision contained in Rule 12(b)(2) which specifically provides for the waiver of a particular kind of constitutional claim if it be not timely asserted." Id. at 239-40 (citing Fed. R. Crim. P. 12(b)(2) (1944)). The simple fact that the version of Rule 12 then in effect made every failure timely to raise a claim in a pretrial motion a waiver thus controlled the outcome in Davis, as well as the earlier decision in Shotwell Mfg., on which this Court relied in Davis. Id. at 237-39.

Put another way, the rule as it existed at the time of Davis and Shotwell Mfg. Co. could (and did) define what resulted in a waiver. This did not have to match with what would lead to a waiver in the absence of such a rule, like the intentional relinquishment of a known right that this Court described in Olano. Olano, 507 U.S. at 732. The prior version of the rule spelled out that the *consequence* of not timely raising certain pretrial claims, for whatever reason, was a waiver. It defined "by its terms the

manner in which the claims of defects in the institution of criminal proceedings may be waived." Davis, 411 U.S. at 241.

The 2014 amendment removed the waiver language. It severed the link that drove the result in Davis. That Davis reached the result it did *with* the waiver language of the prior version of Rule 12 does not inform what the right result is in the context of the present rule *without* the waiver language.

The fact that Rule 12 was amended in 2014 to remove the waiver language that was carried forward until then would ordinarily be strong reason to think it affected a change in this regard. This language was the basis for the reading this Court gave Rule 12 in Shotwell Mfg. and Davis. And removing the waiver language would naturally indicate a return to the waiver/forfeiture regime of Olano, the default standard in this regard absent a contrary rule or statute.

Had the intent in amending Rule 12 been to retain the consequence of a waiver for all failures timely to make a required pretrial motion, while avoiding a use of "waiver" that did not comport with Olano, A8-9, it would have been easy enough to accomplish. Rule 12 could have been

drafted to state, for example, that failure to raise a claim in a timely manner "foreclosed" consideration of the claim. See Davis, 411 U.S. at 238 (describing the holding of Shotwell Mfg. in these terms). Or it could have been drafted to state that such inaction "extinguish[ed]" the right to have the claim considered. Olano, 507 U.S. at 733 (describing effect of waiver).

But the 2014 amendment to Rule 12 does not speak in any such terms. Instead, it describes a motion not raised by the deadline set by the district court (or the default deadline in the rule of the beginning of trial) as "untimely." Fed. R. Crim. P. 12(c)(3) (2014). This wording does not have the natural meaning of foreclosing (or extinguishing, or precluding, or barring) consideration of the claim.

Quite to the contrary, the rule now speaks in the same language this Court used in Olano to describe a forfeiture, as to which plain-error review under Federal Rule of Criminal Procedure 52(b) operates. Olano, 507 U.S. at 731. This Court explained that Rule 52(b), "which governs on appeal from criminal proceedings, provides a court of appeals a limited power to correct errors that were forfeited *because not timely raised* in district court." Olano, 507 U.S. at 731 (emphasis added).

The Tenth Circuit nevertheless thought it "could not be clearer" that Rule 12 retained the same meaning it had when the rule contained waiver language. A9. It invoked the following passage from the Advisory Committee Notes:

> "New paragraph 12(c)(3) *retains the existing standard for untimely claims*. The party seeking relief *must show 'good cause'* for failure to raise a claim by the deadline, a flexible standard that requires consideration of all the interests in the particular case."

Id. (quoting Advisory Comm. Notes to Fed. R. Crim. P. 12 (2014)) (emphasis by the Tenth Circuit). But the fact that the standard was retained does not define *when* the standard is to be used. Its retention may reflect only that what a district court must find before it can address an untimely claim remains the same, "and not . . . the impact of that standard on appellate review." Soto, 794 F.3d at 651. The passage does not show that the usual standard that obtains under Rule 52(b) for claims "not timely raised in district court," Olano, 507 U.S. at 731 -- that is, forfeited claims -- was displaced. Cf. United States v. Vonn, 535 U.S. 55, 62-63 (2002) (inclusion of standard for Rule 11 violation that tracks Rule 52(a) does not displace Rule 52(b) where claim of violation is not properly raised in the district court).

The Tenth Circuit was no more persuasive in stating the text of Rule 12(c)(3) clearly supports its conclusion. A9. The court of appeals wrote that "the plain text of the Rule still states that review of any untimely claim subject to Rule 12 is permissible only if the party shows 'good cause.'" Id. The rule does not in fact speak of "review," which sounds more in appellate terms, but rather of what "a court may consider." Fed. R. Crim. P. 12(c)(3) (2014). And just as with the Advisory Committee Notes, the text of the rule does not answer in which court (or courts) the standard is to apply.

It is true, as the Tenth Circuit stated in the sentence following the one just quoted, that magic words may not be essential to make clear that a claim that Rule 12 calls for being raised pretrial is waived by inaction. A9. The rule could, for instance, have spoken of the effect of failing to raise a claim in a way that left no doubt that what resulted was a waiver, which could be lifted for good cause shown. But the present version does not come close to doing this. Its description of such a motion being "untimely" is the language of forfeiture. And that the rule contains a standard for when a court may consider an untimely claim hardly evinces a clear intent

to displace the usual appellate standard for a claim "not timely raised," Olano, 507 U.S. at 731, the terms in which Rule 12(c)(3) now speaks.

The Tenth Circuit also relied on the fact that Rule 12 consistently refers to "the" court, except in subsection (c)(3), where it refers to "a" court. A4. The Tenth Circuit reasoned that "the" court "clearly refer[s] to the court where the trial is pending." Id. The change to "a" court in the subsection dealing with untimely claims, it continued, meant that in Rule 12(c)(3) "the Rule is referring to an appellate court (or perhaps a court hearing a postconiction challenge) as well as the trial court." Id. The Tenth Circuit thought this followed from the definitions that apply generally in the Federal Rules of Criminal Procedure. Id. The rules define "court" to "mean[] a federal judge performing functions authorized by law," Fed. R. Crim. P. 1(b)(2), and "federal judge" takes the meaning of 28 U.S.C. § 451, see Fed. R. Crim. P. 1(b)(3)(A), which includes "'judges of the courts of appeals [and] district courts,'" A5 (quoting § 451) (brackets by the Tenth Circuit).

But the courts of appeals generally perform their roles through three-judge panels. So using the word "court," which means actions taken by "*a*

federal judge," Fed. R. Crim. P. 1(b)(2) (emphasis added), would be a very odd way to identify the standard a court of appeals should use. This is so whether the reference is to "a court" or "the court."

The advisory committee notes to Rule 1 likewise belie the Tenth Circuit's reading. The notes explain that the term "court" was "almost always synonymous with the term 'district judge," but might be thought not to cover "the many functions performed by magistrate judges" and "circuit judges who may be authorized to hold a district court." Advisory Comm. Notes to Fed. R. Crim. P. 1 (2002). And so, the definition "continues the traditional view that '*court' means district judge*, but also reflects the current understanding that magistrate judges act as the 'court' in many proceedings." Id. (emphasis added).

Finally, there is the fact that the Advisory Committee considered a provision that would have "direct[ed] the appellate courts that 'Rule 52 does not apply.'" A9 (quotation omitted). As the Tenth Circuit recognized, the Committee "thus permitted the appellate courts to independently interpret Rule 12 and determine which standard applies." A10. This is strong indication that Rule 12(c)(3) does not dictate that plain-error review

is unavailable in situations like this one. Given that the rule was amended to replace waiver language with the language of forfeiture, there is every reason to conclude that, in this situation, the default standard of plain-error review in Rule 52(b) in fact applies.

C. This case is a good vehicle to decide the question presented.

This case squarely raises the question presented. The question was litigated in the Tenth Circuit, and there is nothing that would prevent this Court from reaching it. And under Olano, the mere fact that Mr. Bowline raised his vindictive-prosecution claim after the deadline set by the trial court would be only a forfeiture. A decision in his favor on the question presented would therefore enable him to obtain appellate review of his claim under Rule 52(b).

With this case a good vehicle to decide the important question presented, this Court should grant view.

CONCLUSION

This Court should grant Mr. Bowline a writ of certiorari.

Respectfully submitted,

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