No. _____

In the

Supreme Court of the United States

JORGE GUERRERO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Ninth Circuit

Petition for Writ of Certiorari

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Question Presented

Federal Rule of Criminal Procedure 12(c)(3) provides that certain pretrial motions are "untimely" if not raised by the deadline set by the district court, but "a court may consider the defense, objection, or request if the party shows good cause."

> When a defendant raises a new theory on appeal in support of a suppression motion filed in district court, is the argument reviewable for plain error, as the Fourth, Fifth, Sixth, and Eleventh Circuits have held, or does Rule 12's good-cause standard displace the plain-error standard in Federal Rule of Criminal Procedure 52(b), as the First, Second, Third, Seventh, Eighth, Ninth, and Tenth Circuits have held?

Statement of Related Proceedings

- *United States v. Jorge Guerrero*,
  2:16-cr-00681-FMO-1 (C.D. Cal. Oct. 27, 2017)
- *United States v. Jorge Guerrero*,
  CA No. 17-50384 (9th Cir. Apr. 22, 2019)

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In the

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JORGE GUERRERO, Petitioner

v.

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Petition for Writ of Certiorari

Jorge Guerrero petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit in his case.

Opinions Below

The opinion of the court of appeals is reported at 921 F.3d 895. App. 1a-7a. The ruling of the district court is unreported. App. 10a-13a.

Jurisdiction

The judgment of the court of appeals was entered on April 22, 2019. App. 1a. A timely petition for rehearing en banc was denied on July 1, 2019. App. 8a. On September 13, 2019, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 28, 2019. App. 9a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Federal Rules Involved

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).

Rule 52. Harmless and Plain Error

. . . .

(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(b) (2002).

Statement of the Case

1. Mr. Guerrero pleaded guilty to being a felon in possession of a firearm and ammunition, in violation of 18 U.S.C. § 922(g)(1).

2. Law enforcement had recovered the firearm and ammunition underlying the indictment during a warrantless traffic stop of a car, driven by Alyssa Gonzales Romero, in which Mr. Guerrero was riding as a passenger. The asserted basis for the stop was Ms. Romero's failure to signal as she made a left turn.

3. In district court, Mr. Guerrero moved to suppress the evidence obtained during the traffic stop and any fruits thereof. He argued generally that the officers "did not have reasonable suspicion to conduct a traffic stop"

and "lack[ed] reasonable suspicion to stop the Kia Soul in which [he] was riding." (ER 14.) Specifically, Guerrero argued that Ms. Romero had in fact used her turn signal. (ER 14.) Guerrero also noted that the government bore the burden of showing that an exception to the Fourth Amendment's warrant requirement applied. (ER 14-15.)

The government defended the traffic stop based on a claimed violation of California Vehicle Code § 22108. (ER 34.) Section 22108 provides that "[a]ny signal of intention to turn right or left shall be given continuously during the last 100 feet traveled by the vehicle before turning." Cal. Veh. Code § 22108. Two officers had conducted the traffic stop: each filed a declaration stating that Ms. Romero had turned left without activating her turn signal, that this conduct violated Section 22108, and that there was "no other reason" for the stop. (ER 36, 44.)

At an evidentiary hearing, both officers, Mr. Guerrero, and Ms. Romero testified regarding the circumstances of the stop. In post-hearing briefing, Mr. Guerrero reiterated that the government bore the burden of proving a "valid basis" for the traffic stop. (ER 113, 115-116.) He then focused on the factual dispute regarding turn-signal use, arguing that the government could not prove by a preponderance of the evidence that Romero failed to use her turn signal. (ER 116-117.)

The government, for its part, contended that the officers were more credible than Mr. Guerrero and Ms. Romero with respect to use of the turn signal. (ER 121-124, 127-129.) It urged the district court to conclude that "the turn signal was off and the traffic stop therefore was valid." (ER 127.)

The district court denied the motion to suppress in a written order. App. 10a-13a. It characterized the disputed issue as follows: "whether the vehicle in which Guerrero was a passenger failed to use its left turn signal, thereby justifying the traffic stop that preceded his admission." App. 11a. Although the government had relied solely on Vehicle Code § 22108 ("Duration of signal") as the basis for the stop (ER 34), the district court regarded two additional California traffic laws as relevant to the reasonable-suspicion inquiry: Vehicle Code §§ 22107 ("Turning movements and required signals")[1] and 22110 ("Method of signaling").[2] App. 12a. It found the officers' testimony regarding the lack of a turn signal credible and denied the suppression motion. App. 12a-13a.

4. Mr. Guerrero appealed the denial of his suppression motion to the Ninth Circuit. On appeal, he did not challenge the district court's

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1 This statute provides: "No person shall turn a vehicle from a direct course or move right or left upon a roadway until such movement can be made with reasonable safety and then only after the giving of an appropriate signal in the manner provided in this chapter in the event any other vehicle may be affected by the movement." Cal. Veh. Code § 22107.

2 This statute provides that required signals "shall be given by signal lamp," with certain exceptions not relevant here. Cal. Veh. Code § 22110.

credibility-based finding as to whether Ms. Romero had activated her turn signal. He argued that the officers lacked reasonable suspicion for the traffic stop because the California Court of Appeal and the Ninth Circuit have interpreted Section 22108 ("Duration of turn signal") to contain no command as to when a turn signal must be used.[3] A stop based solely on a purported violation of Section 22108, Mr. Guerrero reasoned, was therefore based on an unreasonable mistake of law. Under California law, a turn signal is required only "in the event any other vehicle may be affected by the movement." Cal. Veh. Code § 22107. Mr. Guerrero argued that the government failed to present sufficient evidence that Ms. Romero's unsignaled left turn — at a T-intersection with no oncoming traffic — might have affected any other vehicle, as required for reasonable suspicion.

The government responded that the reasonable-suspicion argument was waived under Federal Rule of Criminal Procedure 12 and, in the alternative, failed on the merits. It did not address Mr. Guerrero's argument respecting an unreasonable mistake of law.

Mr. Guerrero replied that the government's waiver argument relied on caselaw predating the 2014 amendments to Rule 12. Those amendments removed the term "waiver" from Rule 12, Mr. Guerrero argued, thereby

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3 *See People v. Carmona*, 124 Cal. Rptr. 3d 819, 823-25 (Cal. Ct. App. 2011); *United States v. Caseres*, 533 F.3d 1068, 1068-69 (9th Cir. 2008).

allowing the court of appeals to apply its normal forfeiture principles to a new theory raised in support of the reasonable-suspicion claim presented below.

The Ninth Circuit affirmed the denial of the suppression motion in a published, per curiam opinion. App. 1a-7a. The Ninth Circuit explained that, prior to the 2014 amendments, it had construed Rule 12's good-cause standard for untimely motions "as displacing the plain-error standard under Federal Rule of Criminal Procedure 52(b), which ordinarily applies when a party presents an issue for the first time on appeal." App. 4a. It acknowledged the "conflicting conclusions" reached by other courts of appeal in the wake of the 2014 amendments: whereas three circuits had elected to review untimely Rule 12(b)(3) defenses, objections, and requests for plain error under Rule 52(b), five courts of appeal had continued to apply Rule 12(c)(3)'s good-cause standard. App. 5a.

The Ninth Circuit stated that were it "writing on a blank slate," it "might have been inclined" to review untimely defenses, objections, and requests for plain error. App. 5a. It noted that plain-error review under Rule 52(b) is the "default standard" for appellate review of issues not properly raised in the district court, and that this Court has "set a high bar" for creating exceptions to that standard. App. 5a. In addition, it explained that appellate courts are familiar with the plain-error standard but are "less

well-versed" in applying Rule 12's good-cause standard, which often requires factual development. App. 5a-6a.

Nevertheless, the Ninth Circuit concluded that its pre-amendment Rule 12 precedent was "not clearly irreconcilable" with the 2014 amendments and therefore remained binding. App. 6a. The Ninth Circuit pointed out that the 2014 amendments retained the good-cause standard and did not specify that Rule 52(b)'s plain-error standard applied. App. 6a. It also cited rulemaking history indicating that the Advisory Committee chose not to take a position on the interplay between Rule 12 and Rule 52, instead leaving that issue for the courts of appeal to decide. App. 6a. In the Ninth Circuit's view, Mr. Guerrero had not shown good cause for failing to present his new suppression theory below. App. 6a-7a. It therefore affirmed the denial of the suppression motion without reaching the merits. App. 1a-7a.

5. Mr. Guerrero filed a timely petition for rehearing en banc, which the court of appeals denied. App. 8a.

Reasons for Granting the Petition

This Court should grant certiorari to address the deep division in the courts of appeal on whether Rule 12's good-cause standard for untimely pretrial motions, as amended in 2014, displaces the plain-error standard for forfeited claims in Rule 52(b).

Rule 12 directs that certain motions, including suppression motions, must be made before trial. Fed. R. Crim. P. 12(b)(3) (2014). Prior to 2014, Rule 12 used the term "waiver" to describe a party's failure to raise a Rule 12(b)(3) defense by the deadline set by the court or any extension provided by the court. *See* Fed. R. Crim. P. 12(e) (2002) ("A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver.")

In 2014, Rule 12 was amended to eliminate references to "waiver." Rule 12 now simply states that "[i]f 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(c)(3). The Advisory Committee Note explains that the Committee removed the "waiver" language because "the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment

of a known right," and such intentional relinquishment had never been required under Rule 12. Advisory Committee's Notes on 2014 Amendments to Fed. R. Crim. P. 12(c). "[T]o avoid possible confusion" arising from this imprecise usage, the Committee "decided not to employ the term 'waiver'" in the amended rule. *Id.*

The plain-error standard in Rule 52(b), by contrast, has continued virtually unchanged since enactment. Under that rule, "[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(b) (2002).

In *United States v. Olano*, 507 U.S. 725 (1993), this Court explained that "Rule 52(b) defines a single category of forfeited-but-reversible error." *Id.* at 732. Whether a deviation from a legal rule constitutes error depends on whether the rule has been waived or merely forfeited: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error' under Rule 52(b)." *Id.* The "theory" behind Rule 52(b) provides for appellate review of *forfeited* errors. *Id.* at 733. In other words, "[i]f a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has

been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733-34.

Mr. Guerrero's case highlights an important issue that has produced conflicting opinions in the courts of appeal: whether Rule 12's good-cause standard supplants Rule 52(b)'s plain-error standard, thereby extinguishing any error and precluding appellate review of a large class of pretrial motions.

A. The Circuits Are Deeply Divided on the Applicability of Rule 12's Good-Cause Standard on Appeal.

1. In adhering to its pre-amendment precedent, the Ninth Circuit acknowledged that it was taking sides in what already constituted a clear circuit split on the effect of the 2014 amendments to Rule 12. App. 5a ("Since the 2014 amendments, our sister circuits have reached conflicting conclusions on the standard of review that should apply in this context."). The courts of appeal recognize the existence of a well-developed circuit split regarding the current rule's standard of appellate review. *See United States v. Bowline*, 917 F.3d 1227, 1236-37 (10th Cir. 2019) (discussing 7-4 circuit split), *petition for cert. pending*, No. 19-5563 (filed Aug. 7, 2019).[4] The D.C. Circuit, without taking a position, summarized the disagreement as follows:

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4 Two state Supreme Courts have also noted the recent amendment to Rule 12 and federal circuit split. *See Phillips v. People*, 443 P.3d 1016, 1024 (Colo. 2019) ("'[T]here is a division of authority among the circuit courts as to whether arguments not raised in a motion to suppress are waived or are merely forfeited and subject to plain-error review.'"); *Rodriguez v. State*, 435 P.3d 399, 410 n.6 (Wyo. 2019) (citing *United States v. Vance*, 893 F.3d 763, 769 n.5 (10th Cir. 2018), on circuit split).

> Rule 12 was recently amended in a manner that may affect appellate review. . . .
>
> Some circuit courts have read the newly amended version of Rule 12 — in particular, the deletion of the reference to "waiver" — to permit plain-error review when a defendant did not intentionally relinquish a claim within Rule 12's ambit, even if the defendant has not offered good cause for his or her failure to timely raise it. . . . Other circuits review unpreserved Rule 12 issues only when the defendant has made a showing of good cause, regardless of whether the defendant intentionally declined to raise those issues.

United States v. Burroughs, 810 F.3d 833, 837-38 (D.C. Cir. 2016).

2. The split of authority has only deepened since *Burroughs*, and has resulted in reasoned, published decisions on both sides of the question. At least four circuits have expressly held that untimely Rule 12(b)(3) motions can be reviewed only on a showing of good cause, and that plain-error review is otherwise unavailable under the current version of Rule 12. *See United States v. Guerrero*, App. 6a; *Bowline*, 917 F.3d at 1236 ("[T]he 2014 amendments did not . . . authorize plain-error review . . . even when there was no good cause for the failure to raise a timely Rule 12 motion."); *United States v. McMillian*, 786 F.3d 630, 636 n.3 (7th Cir. 2015) (holding that 2014 "amendment did not alter the applicable [good-cause] standard"); *United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015) (applying good-cause standard under "current version of Rule 12").[5]

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5 The Ninth and Tenth Circuits viewed the Third Circuit's decision in *United States v. Fattah*, 858 F.3d 801, 807-08 & n.4 (3d Cir. 2017), as reaffirming a good-cause standard under the current version of Rule 12. *See Guerrero*, App. 5a; *Bowline*, 917 F.3d at 1236.

3. Three circuits, on the other hand, have issued published decisions altering the appellate standard of review for untimely Rule 12(b)(3) motions in light of the 2014 amendments' elimination of "waiver" language.[6] The Fifth Circuit noted that it had previously construed Rule 12's "waiver" to carry the "usual legal consequences" of that term — that is, "extinguish[ing] any errors." *United States v. Vasquez*, 899 F.3d 363, 372 (5th Cir. 2018) (internal quotation marks omitted). Because "the amendment and [Advisory Committee] note make clear that [this] prior approach does not endure," the Fifth Circuit held that it would review untimely pretrial motions for plain

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But in *United States v. Ferriero*, 866 F.3d 107 (3d Cir. 2017), issued two months after *Fattah*, the Third Circuit indicated that it had "not decided the standard of review for Rule 12(b)(3) claims raised for the first time on appeal" and would not address it in that case. *Id.* at 122 n.7.

The Ninth Circuit regarded the First Circuit as having reaffirmed the good-cause standard in *United States v. Walker-Couvertier*, 860 F.3d 1, 9 & n.1 (1st Cir. 2017). *See Guerrero*, App. 5a. While the construction of current Rule 12 in *Walker-Couvertier* may have been dicta, 860 F.3d at 9 n.1, the First Circuit subsequently relied on *Walker-Couvertier* to deem an untimely suppression motion waived in *United States v. Sweeney*, 887 F.3d 529, 534 (1st Cir. 2018).

The Tenth Circuit treated the Second Circuit as having reaffirmed the good-cause standard after the 2014 amendments. *See Bowline*, 917 F.3d at 1236 (citing *United States v. Martinez*, 862 F.3d 223, 234 (2d Cir. 2017)). But the Second Circuit did not cite the 2014 amendments to Rule 12 in *Martinez*. *See id.* In a later case, *United States v. O'Brien*, 926 F.3d 57 (2d Cir. 2019), the Second Circuit cited the current language of Rule 12 and applied the good-cause standard, but it did not expressly address the availability of plain-error review. *Id.* at 82-84.

6 Relying on pre-amendment precedent, and without discussing or citing the current wording of the rule, the Fourth Circuit permits review of untimely Rule 12(b)(3) motions upon *either* a showing of good cause *or* for plain error. *United States v. Robinson*, 855 F.3d 265, 270 (4th Cir. 2017).

error under the current rule. *Id.* at 372-73. Similarly, in *United States v. Soto*, 794 F.3d 635 (6th Cir. 2015), the Sixth Circuit analyzed the 2014 amendments to Rule 12 and concluded that it would no longer "treat the failure to file a motion as a waiver unless the circumstances of the case indicate that the defendant intentionally relinquished a known right." *Id.* at 655. In *United States v. Sperrazza*, 804 F.3d 1113 (11th Cir. 2015), the Eleventh Circuit likewise held that while untimely Rule 12 motions under the old rule were "[n]ot subject to appellate review except 'for good cause' shown," such motions would be reviewable for plain error under the current version of the rule. *Id.* at 1119-20.

4. Thus, in the five years since Rule 12 was amended, at least seven circuits have expressly addressed whether the deletion of "waiver" language changed the appellate standard of review for untimely defenses, objections, or requests covered by Rule 12(b)(3). At present, whether a defendant can obtain appellate review of a forfeited Rule 12(b)(3) defense, objection, or request — no matter how meritorious the claim or how minor the default — depends on geography. Given this intractable split of authority, this Court should grant certiorari to resolve the question of whether Rule 12(c)(3)'s good-cause standard displaces the default plain-error standard in Rule 52(b).

B. The Availability of Appellate Review for Untimely Rule 12 Motions Is a Question of Significant and Recurring Importance.

The need to ensure the "proper and uniform administration of the Federal Rules of Criminal Procedure" is of sufficient importance to warrant this Court's grant of certiorari. *United States v. Robinson*, 361 U.S. 220, 222 (1960) (construing federal criminal rule on extensions of time); *see also Lott v. United States*, 367 U.S. 421, 424 (1961) (interpreting federal criminal rule regarding timeliness of appeal). This importance extends to circuit conflicts on the proper appellate standard of review for asserted violations of the federal criminal rules. Thus, this Court has granted certiorari "to resolve conflicts among the Circuits on the legitimacy of . . . placing the burden of plain error on a defendant appealing on the basis of Rule 11 error raised for the first time on appeal." *United States v. Vonn*, 535 U.S. 55, 62 (2002); *see also United States v. Lane*, 474 U.S. 438, 439-40 (1986) ("We granted certiorari to resolve a conflict among the Circuits as to whether a misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is subject to the harmless-error rule . . . .").

The sheer number of pretrial motions that fall under Rule 12(b)(3)'s "must be made before trial" category heightens the need for this Court's intervention. As originally adopted in 1944, Rule 12 required only that defenses and objections based on "defects in the institution of the prosecution

or in the indictment and information, other than lack of jurisdiction or failure to charge an offense[,]" be raised in a pretrial motion. Advisory Committee's Notes on 1944 Adoption of Fed. R. Crim. P. 12(b)(1) and (b)(2); Fed. R. Crim. P. 12(b)(2) (1946). In 1975, suppression motions, requests for discovery, and requests for a severance of charges or defendants came within Rule 12's "must be made before trial" ambit. Fed. R. Crim. P. 12(b)(3)-(5) (1975); Advisory Committee's Notes on 1974 Amendment to Fed. R. Crim. P. 12(b). Most recently, in 2014, claims of failure to state an offense — originally differentiated from other defects in the indictment and information — were added to the list of motions that must be raised prior to trial, now located in Rule 12(b)(3). Fed. R. Crim. P. 12(b)(3)(B)(v) (2014); Advisory Committee's Notes on 2014 Amendments to Fed. R. Crim. P. 12(b)(3).

The circuits' published decisions on the current version of Rule 12 demonstrate the Rule's wide-ranging applicability across a variety of substantive claims and factual scenarios. In Mr. Guerrero's case, trial counsel filed a timely suppression motion challenging reasonable suspicion for a traffic stop but raised a different reasonable-suspicion argument on appeal. App. 3a. In *Bowline*, the defendant filed a vindictive-prosecution motion 23 days after the deadline set by the district court. *Bowline*, 917 F.3d at 1229. The defendants in *Anderson* did not raise a double-jeopardy

challenge prior to trial, but a co-defendant did. *Anderson*, 783 F.3d at 740. Despite the differences in the types of claims belatedly raised, and in the timing of their initial presentation, the result in each case is the same: a finding of waiver.

By contrast, defendants in circuits that reject a one-size-fits-all waiver rule have been able to obtain merits review of other untimely defenses, objections, and requests. In *Vasquez*, the Fifth Circuit addressed, at length, defendant's challenge to the extraterritoriality of 21 U.S.C. § 848(e)(1)(A) — even though the claim was first presented in a post-verdict motion for acquittal, rather than in a pretrial motion to dismiss. *Vasquez*, 899 F.3d at 373-78. The Eleventh Circuit conducted plain-error review of an untimely claim that the indictment was factually inaccurate, first raised in a post-trial motion. *Sperrazza*, 804 F.3d at 1117, 1126. And the Sixth Circuit reviewed a claim of misjoinder of counts for plain error despite the fact that it was raised for the first time on appeal. *Soto*, 794 F.3d at 647, 656-57.

This Court has granted certiorari as to whether particular types of forfeited claims are reviewable for plain error under Rule 52(b). *See Puckett v. United States*, 556 U.S. 129, 131 (2009) ("The question presented by this case is whether a forfeited claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review set forth

in Rule 52(b) of the Federal Rules of Criminal Procedure.") The need for this Court's intervention is even more pressing in the context of a widely applicable federal rule of criminal procedure. The Ninth Circuit's decision in Mr. Guerrero's case, issued just earlier this year, has already been cited in multiple other cases to deem issues waived. *See United States v. VanDyck*, 776 F. App'x 495, 496 (9th Cir. Aug. 28, 2019) (unpublished); *United States v. Tejeda*, 2019 WL 3801530, at *2 (9th Cir. Aug. 13, 2019) (unpublished); *United States v. Browne*, 778 F. App'x 421, 423 (9th Cir. July 16, 2019) (unpublished). The same is true of the Tenth Circuit's decision in *Bowline*. *See United States v. Williams*, __ F.3d __, 2019 WL6001581, at *3 (10th Cir. Nov. 14, 2019); *United States v. Warwick*, 928 F.3d 939, 944 & n.2 (10th Cir. 2019); *United States v. Griffith*, 928 F.3d 855, 872 (10th Cir. 2019).

C. The Ninth Circuit's Decision Is Wrong.

Ultimately, the Ninth Circuit concluded that the amended language of Rule 12 was not "clearly irreconcilable" with its prior precedent applying the good-cause standard. App. 6a. It was mistaken: that prior precedent was premised on the "waiver" language that has been eliminated from the current version of Rule 12. Applying familiar canons of statutory construction to Rule 12's plain language and rulemaking history, the Ninth Circuit should have reviewed Mr. Guerrero's reasonable-suspicion argument on the merits, rather than deeming it waived.

1. The Ninth Circuit's prior precedent, like the decisions of other courts that have treated untimely Rule 12 motions as true "waivers," relied heavily on the Rule's now-defunct "waiver" terminology. *See United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000) ("[U]nder Rule 12(f) failure to bring a timely motion to suppress evidence constitutes a waiver of the issue[.]"); *United States v. Restrepo-Rua*, 815 F.2d 1327, 1329 (9th Cir. 1987) (per curiam) ("A failure to raise an objection until after trial constitutes a waiver of the objection. Fed. R. Crim. P. 12(f).").[7] Although these cases contain relatively little analysis of the Rule 12 issue, *Wright*'s citations to *United States v. Weathers*, 186 F.3d 948 (D.C. Cir. 1999), and *United States v. Chavez-Valencia*, 116 F.3d 127 (5th Cir. 1997),[8] underpin the Ninth Circuit's holding that a defendant's failure to raise a particular ground in a suppression motion "waived any dispute . . . and placed the issue beyond this court's ability to review for plain error." *Wright*, 215 F.3d at 1026.

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7 From December 1, 2002, to December 1, 2014, this waiver language was located in Rule 12(e). Fed. R. Crim. P. 12(e) (2002) ("A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For good cause, the court may grant relief from the waiver."). Prior to December 1, 2002, the waiver language was located in Rule 12(f). Fed. R. Crim. P. 12(f) (1975) ("Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.").

8 As discussed below, *see infra* pp. 20-21, the Fifth Circuit abrogated *Chavez-Valencia* in light of the 2014 amendments to Rule 12. *See Vasquez*, 899 F.3d at 372.

Weathers and *Chavez-Valencia*, in turn, place great emphasis on Rule 12's former "waiver" language. In *Chavez-Valencia*, the Fifth Circuit highlighted the "plain," "unmistakeable," and "precise" waiver language in the previous version of Rule 12. *Chavez-Valencia*, 116 F.3d at 129, 130, 131. Although the Fifth Circuit also discussed precedent and policy considerations, the "generally accepted" and "ordinary" meaning of the term "waiver" guided its analysis. *Id.* at 129, 131. Similarly, in *Weathers*, the D.C. Circuit reasoned that there was no tension between its treatment of untimely Rule 12 motions as true waivers and this Court's decision in *Olano*, which drew a clear distinction between waiver and forfeiture. *Weathers*, 186 F.3d at 955. This conclusion rested on Rule 12's use, at the time, of the term "waiver": "While Rule 52(b) does not mention 'waiver,' Rule 12(f) expressly does." *Id.*

Significantly, the Fifth Circuit has repudiated its reading of Rule 12 in light of the 2014 amendments, and the D.C. Circuit has indicated that the issue may need to be revisited, given Rule 12's new waiver-less wording. In *Vasquez*, decided last year, the Fifth Circuit reconsidered and rejected its prior precedent on Rule 12. *Vasquez*, 899 F.3d at 372. The Fifth Circuit noted that its "pre-amendment approach to Rule 12 ascribed great significance to the use of the word 'waived.'" *Id.* (citing *Chavez-Valencia*, 116

F.3d at 130). But it concluded that the new wording of Rule 12, plus the Advisory Committee's stated intent in deleting "waiver" language, "clarify that Rule 12 recognizes the traditional distinction between forfeiture and waiver." *Vasquez*, 899 F.3d at 372-73. And, as discussed above, *see supra* p. 12, the D.C. Circuit has indicated that the amendments to Rule 12 may affect appellate review, though it did not decide which standard applies; in any event, it noted that its pre-amendment approach to waiver had been "inconsistent," and that it was "not the only circuit to have struggled with Rule 12 in this way." *Burroughs*, 810 F.3d at 837.

The D.C. Circuit in *Weathers* also viewed itself as bound by this Court's decision in *Davis v. United States*, 411 U.S. 233 (1973), but *Davis* suffers from the same erroneous, outdated reliance on "waiver" terminology. In *Davis*, this Court held that Rule 12's waiver provision precluded a claim of unconstitutional discrimination in grand-jury composition first raised in a postconviction motion under 28 U.S.C. § 2255. *Id.* at 234, 242. It rejected the petitioner's argument that the case was controlled by *Kaufman v. United States*, 394 U.S. 217 (1969), which had permitted post-conviction review under 28 U.S.C. § 2255 of a suppression claim not raised on appeal. *Davis*, 411 U.S. at 238-39. Again, Rule 12's then-existing waiver language was crucial to the outcome: "[T]he Court in *Kaufman* was not dealing 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; *see also id.* at 240 ("*Kaufman*, therefore, is dispositive only if the absence of a statutory provision for waiver in § 2255 and the federal habeas statute by implication precludes the application to post-conviction proceedings of the *express waiver provision* found in the Federal Rules of Criminal Procedure.") (emphasis added); *id.* at 241 ("Rule 12(b)(2) . . . governs *by its terms* the manner in which the claims of defects in the institution of criminal proceedings may be waived.") (emphasis added). Because it is so dependent on "waiver" language that was deliberately removed, *Davis* is not dispositive of Rule 12's meaning.

2. In construing the provisions of a federal rule, this Court turns to "'traditional tools of statutory construction,'" "begin[ning] with the language of the Rule itself." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988). Rule 12, as presently worded, contains no waiver rule for untimely pretrial motions. Rather, the rule simply provides that "[i]f 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(c)(3). By its terms, Rule 12 does not override Rule 52(b)'s plain-error standard. Although it sets forth a good-

cause standard, Rule 12 does not state that good cause provides the *only* means of obtaining appellate review. *Cf. Class v. United States*, 138 S. Ct. 798, 806 (2018) ("[B]y its own terms, . . . Rule 11(a)(2) itself does not say whether it sets forth the *exclusive* procedure for a defendant to preserve a constitutional claim following a guilty plea."). Indeed, the Rule does not clearly speak to the issue of appellate review at all.

Further, Rule 12(c)(3)'s reference to "a court" does not unequivocally cover the courts of appeal in addition to district courts. If anything, the unadorned reference to a "court" signals the drafters' intention to limit the good-cause standard to district courts. In the criminal rules, the term "Court" means "a federal judge performing functions authorized by law." Fed. R. Crim. P. 1(b)(2). The Advisory Committee Note makes clear that this definition of "court" "continues the traditional view that *'court' means district judge*," while also recognizing that a magistrate or circuit judge may take on district-court functions. Advisory Committee Note on 2002 Amendments to Fed. R. Crim. P. 1(b) (emphasis added). "In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *Vonn*, 535 U.S. at 64 n.6.

Nor can an intent to displace Rule 52(b)'s default plain-error standard be divined through Rule 12(c)(3)'s use of an indefinite article — "*a* court" — rather than "*the* court" referenced elsewhere in the Rule. Prior to the 2014 amendments, the good-cause standard was phrased in terms of "the court." Fed. R. Crim. P. 12(e) (2002) ("For good cause, the court may grant relief from the waiver."); Fed. R. Crim. P. 12(f) (1975) ("[T]he court for cause shown may grant relief from the waiver."). There is no indication that this change was substantive or that "a court" has any consistent meaning throughout the Federal Rules of Criminal Procedure. Other uses of "a court" in the criminal rules refer to district courts generally, *see* Fed. R. Crim. P. 32.2(a) (specifying required notice for "a court" to enter forfeiture judgment), or to individual district courts in the context of setting special local hours, *see* Fed. R. Crim. P. 56(c).

3. The Ninth Circuit's reading of Rule 12's good-cause provision also runs afoul of the canon of construction providing that "repeals by implication are disfavored." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 133 (1974). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S.

535, 551 (1974). The same canon of construction applies to federal rules of equal dignity, such as Rule 12 and Rule 52.

This Court rejected a similar attempt to partially repeal Rule 52(b) by implication in *United States v. Vonn*, 535 U.S. 55 (2002). In *Vonn*, this Court construed Federal Rule of Criminal Procedure 11, which governs guilty pleas. The defendant argued that appellate review of unpreserved Rule 11 errors was for harmless error only, because Rule 11(h) contained an express harmless-error provision. *Id.* at 63. The question in Vonn was "whether Congress's importation of the harmless-error standard into Rule 11(h) without its companion plain-error rule was meant to eliminate a silent defendant's burden under . . . Rule 52(b) plain-error review[.]" *Id.*

The *Vonn* Court reasoned that "the formally enacted Rule 52" possessed "apparently equal dignity with Rule 11(h)" and applied "by its terms to error in the application of any other Rule of criminal procedure." *Id.* at 65. It therefore characterized the defendant's argument as requiring a partial repeal by implication of Rule 52(b)'s plain-error standard by Rule 11(h), "a result sufficiently disfavored . . . as to require strong support." *Id.* (citation omitted). Because it concluded that the meaning of Rule 11(h)'s text was "equivocal" and "subject to argument," *id.* at 66, 65, this Court declined to declare a partial repeal by implication based on plain language

alone. Without Rule 12's former "waiver" terminology, the requisite "strong support" for a partial repeal by implication is similarly lacking here. Because Rule 12 and Rule 52 are capable of co-existence, the Ninth Circuit erred by not giving effect to them both.

4. The rulemaking history of the 2014 amendments supports Mr. Guerrero's view of the interplay between Rule 12 and Rule 52(b). In *Soto*, the Sixth Circuit noted that it had "previously treated the failure to file a timely motion listed in Rule 12(b)(3) as a waiver[,]" "based . . . on the previous wording of Rule 12(e)." 794 F.3d at 648. The Sixth Circuit's extensive review of Rule 12(c)(3)'s rulemaking history led it to conclude, however, that "one of the primary reasons to eliminate the term 'waiver' from the rule was because the committee believed that courts were incorrectly treating the failure to file a timely pretrial motion as an intentional relinquishment of a known right, and therefore an absolute bar to appellate review." *Id.* at 652. It further determined that the rulemaking history "strongly indicates that the Rule's drafters were crafting a rule to apply to the district courts, and not to the court of appeals." *Id.* at 654.

The Advisory Committee considered — and rejected — a proposal that would have instructed appellate courts that Rule 52's plain-error standard "does not apply" to untimely Rule 12 motions. *See Bowline*, 917 F.3d at

1235-36. However, the reference to Rule 52 was deleted from the final rule revision:

> The Subcommittee ultimately agreed it was best not to try to tie the hands of the appellate courts. Accordingly, it agreed to delete from the proposed rule the statement that Rule 52 does not apply. This would allow the appellate courts to determine whether to apply the standards specified in Rule 12(c) or the plain error standard specified in Rule 52 when untimely claims are raised for the first time on appeal.

April 25, 2013, Minutes, Advisory Committee on Criminal Rules, at 4, *available at* https://www.uscourts.gov/rules-policies/archives/meeting-minutes/advisory-committee-rules-criminal-procedure-april-2013 (last visited Nov. 25, 2019); *see also* Advisory Committee's Notes on 2014 Amendments to Fed. R. Crim. P. 12 (Changes Made After Publication and Comment) ("In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial").

Although Rule 12's drafters contemplated that the appellate courts would determine in the first instance whether Rule 12(c)'s good-cause standard or Rule 52(b)'s plain-error standard would apply to untimely claims raised for the first time on appeal, they could not have anticipated the confusion and division that would ensue. The rulemaking history, like the waiver-less plain language it produced, evinces no clearcut intention to partially repeal Rule 52(b)'s plain-error standard by implication. The Ninth Circuit erred by reaffirming its precedent to the contrary.

D. Mr. Guerrero's Case Is a Suitable Vehicle for Resolving the Question Presented.

This case squarely presents the issue on which the courts of appeal are in conflict: whether Rule 12's good-cause standard displaces Rule 52(b)'s plain-error standard, which ordinarily applies to issues that were not properly preserved in district court. The suppression theory that the Ninth Circuit deemed waived was the only issue raised on appeal, and the Ninth Circuit's resolution of that issue turned solely on waiver, without any discussion of the merits. App. 3a, 6a-7a. Further, while the Ninth Circuit felt bound by its pre-amendment precedent, it did not endorse the reasoning of those cases wholeheartedly. Rather, the Ninth Circuit indicated that it might have reached a different conclusion on the Rule 12 issue had it been "writing on a blank slate." App. 5a-6a.

Granting certiorari in this case would definitively resolve the divisions and doubts expressed by the courts of appeal, free of any distorting effects of the deleted term "waiver." This case presents an ideal opportunity to address a thorny interpretive issue that has plagued appellate courts and created real practical problems for criminal defendants.

Conclusion

For the foregoing reasons, Mr. Guerrero respectfully requests that this Court grant his petition for a writ of certiorari.

Respectfully submitted,

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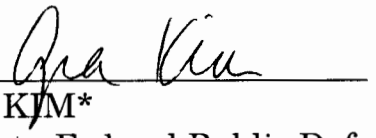
By: 
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