No. 19-6825

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

Reply Brief for the Petitioner

AMY M. KARLIN
Interim Federal Public Defender
GIA KIM*
Deputy Federal Public Defender
321 East 2nd Street
Los Angeles, California 90012-4202
Telephone: (213) 894-4408
Facsimile: (213) 894-0081

Attorneys for the Petitioner
* Counsel of Record

Table of Contents

Page(s)

Table of Authorities

Page(s)

Federal Cases

Table of Authorities

Page(s)

Federal Cases (cont.)

State Cases

Federal Statutes

State Statutes

Federal Rules

Table of Authorities

In the

Supreme Court of the United States

JORGE GUERRERO, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

Reply Brief for the Petitioner

A. This Court's Review Is Warranted Now.

The government agrees that at least ten circuits have already weighed in on the question presented in this case: whether, in a case arising after the 2014 amendments to Rule 12, claims that were not timely raised in district court are subject to that rule's good-cause standard or to Rule 52(b)'s plain-error standard on appeal. Br. in Opp. 16-17. And it does not dispute that yet another circuit reviews such claims for *either* good cause *or* plain error. *See United States v. Robinson*, 855 F.3d 265, 270 (4th Cir. 2017). The last remaining circuit has acknowledged the split of authority but has declined to take a position. *See United States v. Burroughs*, 810 F.3d 833, 837-38 (D.C. Cir. 2016). At this point, the issue is unlikely to be clarified by further consideration in the courts of appeal.

This Court's review can provide the "blank slate," App. 5a, on which to write a definitive construction of new Rule 12. Notably, the Ninth Circuit in

this case did not tackle the Rule 12 issue as a matter of first impression. Rather, in light of prior circuit precedent construing Rule 12's good-cause standard as displacing Rule 52(b)'s plain-error standard, the three-judge panel considered only whether that "prior precedent 'is clearly irreconcilable with the text and history of subsequent legislation' or rulemaking" — a standard it characterized as "demanding." App. 6a. The Tenth Circuit, by contrast, indicated that "as a matter of first impression," it would treat untimely Rule 12 motions as waived, rather than forfeited, under the new rule. *United States v. Bowline*, 917 F.3d 1227, 1236 (10th Cir. 2019). Even so, the Tenth Circuit concluded that "circuit precedent" provided "an even more compelling reason" for rejecting plain-error review on appeal. *Id.* Thus, the weight of pre-amendment precedent may well limit the lower courts' consideration of new Rule 12.

This Court need not wait for other courts to examine the significance of *Davis v. United States*, 411 U.S. 233 (1973), on the proper construction of Rule 12. As the government notes, the Tenth Circuit addressed *Davis* in depth in *Bowline*, 917 F.3d at 1232-37. Those courts of appeal that now review for plain error in light of the 2014 amendments' elimination of "waiver" terminology — the Fifth, Sixth, and Eleventh Circuits — focused instead on the plain language of the new rule, buttressed by the rulemaking history. *See United States v. Vasquez*, 899 F.3d 363, 372-73 (5th Cir. 2018);

United States v. Sperrazza, 804 F.3d 1113, 1118-20 (11th Cir. 2015); *United States v. Soto*, 794 F.3d 635, 648-55 (6th Cir. 2015). That these courts did not discuss *Davis*'s holding on the old rule is therefore unsurprising. In any event, this Court is well-equipped to evaluate the precedential value of *Davis* without further input from the lower courts.

As of today, at least three pending petitions for certiorari from different circuits present variations on this simmering Rule 12 question.[1] Although the government characterizes the 2014 amendments as "recen[t]," Br. in Opp. 6, five years is a significant period of time in terms of rulemaking cycles. Indeed, Rule 12 has been amended approximately every ten years since 1974. The time is ripe for this Court's intervention.

B. The Ninth Circuit's Decision Is Wrong.

1. The government's effort to locate a textual basis for applying Rule 12 to appellate courts is unavailing. The government contends that "[n]othing in the text of Rule 12 . . . limits the Rule's good-cause standard to the trial court." Br. in Opp. 7. But there was no reason for the drafters to include this sort of express limitation, because the entire context of Rule 12 ("Pleadings and Pretrial Motions") relates to trial-court proceedings. Rule 12 governs, *inter alia*, trial pleadings, pretrial motions, pretrial-motion

---

1 In addition to this case, the issue is presented in *Bowline v. United States*, No. 19-5563 (petition for cert. filed Aug. 7, 2019, distributed for conference of Feb. 21, 2020), and *Galindo-Serrano v. United States*, No. 19-7112 (petition for cert. filed Dec. 16, 2019).

deadlines and rulings, and the recording of trial-court motion hearings. *See* Fed. R. Crim. P. 12(a)-(d), (f) (2014). In the context of Rule 12, "court" refers to "district court." *See Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 570 U.S. 338, 356 (2013) ("Text may not be divorced from context.").

Contrary to the government's argument, Br. in Opp. 8, the definitions in Rule 1 do not support reading "court" to include appellate courts. It is true that "court" is defined as "a federal judge performing functions authorized by law," Fed. R. Crim. P. 1(b)(2), and that "federal judge" includes judges of the courts of appeals as well as district judges, Fed. R. Crim P. 1(b)(3)(A) (citing 28 U.S.C. § 451). But the Advisory Committee Note clarifies that individual circuit judges were included in the meaning of "court" because circuit judges "may be authorized to hold a district court" — that is, they may act in a district-judge capacity, as opposed to in their usual role as appellate judges. Advisory Committee Note on 2002 Amendments to Fed. R. Crim. P. 1(b) (citing 28 U.S.C. § 291).[2]

Further, the criminal rules use the precise term "appellate court" alongside the term "the court," where it is clear that "the court" refers only to the district court. *See* Fed. R. Crim. P. 11(a)(2) ("With the consent of the

2 This statute provides that "[t]he chief judge of a circuit or the circuit justice may, in the public interest, designate and assign temporarily any circuit judge within the circuit, including a judge designated and assigned to temporary duty therein, to hold a district court in any district within the circuit." 28 U.S.C. § 291.

court and the government, a defendant may enter a conditional plea of guilty or nolo contendere, reserving in writing the right to have an appellate court review an adverse determination of a specified pretrial motion."); Fed. R. Crim. P. 29(d)(3)(A) ("If the court conditionally grants a motion for a new trial and an appellate court later reverses the judgment of acquittal, the trial court must proceed with the new trial unless the appellate court orders otherwise."); Fed. R. Crim. P. 33(b)(1) ("If an appeal is pending, the court may not grant a motion for a new trial until the appellate court remands the case."). This Court should decline to construe "court" to mean "district and appellate courts" in Rule 12 and only "district court" in other rules. *See Hamling v. United States*, 418 U.S. 87, 134-35 (1974) (rejecting interpretation of federal criminal rule that "would be inconsistent with interpretation in pari materia of Rule 30 and other relevant provisions of the Federal Rules of Criminal Procedure").

2. The removal of "waiver" language from Rule 12 eliminates a key textual basis for restricting appellate courts to "good-cause" review. "Waiver"— "ordinarily an intentional relinquishment or abandonment of a known right or privilege," *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938) — occurs in district court. . The effects of waiver, however, do not become apparent until later, when any error is deemed "extinguish[ed]" and hence unreviewable. *United States v. Olano*, 507 U.S. 725, 733 (1993). In *Davis*,

this Court relied on that second aspect of waiver in concluding that the petitioner's untimely challenge to the composition of the grand jury could not be considered in post-conviction proceedings: "[T]he necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule *may not later be resurrected*, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Davis*, 411 U.S. at 242 (emphasis added). But in the absence of the term "waiver," there is no reason to bind the appellate courts to Rule 12's good-cause standard.

3. The policy reasons underlying *Davis* also warrant re-examination in light of Rule 12's broadened scope. When *Davis* was decided, "[t]he waiver provisions of Rule 12(b)(2) [were] operative only with respect to claims of defects in the institution of criminal proceedings."[3] *Davis*, 411 U.S. at 241. In that context, the *Davis* Court reasoned that defendants would have little incentive to raise Rule 12 errors in a timely fashion, "when a successful attack might simply result in a new indictment prior to trial." *Id.* A strategic defendant might therefore "delay[] the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the

3 Suppression motions, requests for discovery, and requests for a severance of charges or defendants were not covered by the waiver provisions until the 1974 amendments. Fed. R. Crim. P. 12(b)(3)-(5) (1974); Advisory Committee's Notes on 1974 Amendment to Fed. R. Crim. P. 12(b).

claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." *Id.*

Such policy considerations do not apply to suppression motions. In urging this Court to adopt a "waiver" reading of Rule 12(b)(2) in *Davis*, the government emphasized the then-narrow scope of the rule and contrasted defects in the indictment and institution of proceedings with suppression motions challenging illegally procured evidence. *See* Brief for the United States, *Davis v. United States* (No. 71-6481), 1973 WL 172551, at *15 ("The Rule does not apply to objections or defenses which go to the fairness of the guilt determining processes or which affect the trial in any way."); *id.* at *29 ("*Kaufman* [394 U.S. 217 (1969)] involved a claim that the applicant had been convicted on the basis of unconstitutionally seized evidence. Here, . . . petitioner's collateral claims do not relate to the trial itself, or to the fairness and accuracy of the guilt-finding process . . . ."). The government recognized that defendants have no tactical reason to delay filing a suppression motion. *See id.* at *15 ("While an objection to the admissibility of evidence will result in its permanent suppression, an objection to a defect in the institution of the proceeding will generally result only in a new indictment."); *id.* at *33-*34 ("While nothing can undo an illegal search or a coerced confession, defects in the indictment and institution of the proceedings can be cured by a new indictment procured in the proper manner.").

The facts of this case show that a defendant has nothing to gain by belatedly raising an argument in support of suppression. Mr. Guerrero litigated a suppression motion on a closely related ground, complete with an evidentiary hearing; when that motion was denied, he pleaded guilty, rather than hoping an acquittal would materialize at trial. "If there is a lawyer who would deliberately forgo objection *now* because he perceives some slightly expanded chance to argue for 'plain error' *later*, we suspect, that like the unicorn, he finds his home in the imagination, not the courtroom." *Henderson v. United States*, 568 U.S. 266, 276 (2013). Policy considerations should not deter this Court from permitting plain-error review of Mr. Guerrero's newly raised suppression argument.

C. The Standard-of-Review Question Has Practical Implications.

The government urges this Court to deny review of the Rule 12 issue because "many claims that would be precluded by Rule 12(c)(3) would also fail plain-error review" for lack of prejudice. Br. in Opp. 18. To be sure, this Court has held that satisfying the plain-error standard is "difficult," regardless of the context. *See Puckett v. United States*, 556 U.S. 129, 135 (2009). But that has not stopped this Court from resolving conflicts as to whether the plain-error standard applies in the first place, even when the court of appeals has already ruled that the defendant cannot satisfy the

plain-error standard, and this Court has not granted certiorari to review that determination. *See id.* at 133-34; *Puckett v. United States*, 554 U.S. 945 (2008) (mem.) (limiting grant of certiorari to standard-of-review question).

In practice, defendants can prevail on plain-error review of suppression motions where, as here, the defendant moved to suppress evidence on a closely related ground, a hearing was held, and the record is sufficiently developed for appellate review. For instance, in *United States v. Buchanon*, 72 F.3d 1217 (6th Cir. 1995), Buchanon had filed a motion to suppress in district court and had "argued generally" that he had been seized in violation of the Fourth Amendment; unlike his co-defendant, however, Buchanon "did not specify when the seizure occurred," thereby forfeiting that particular argument. *Id.* at 1226-27. Relying on evidence in the record, including a videotape of the incident introduced at the suppression hearing, the Sixth Circuit concluded that the district court plainly erred by denying Buchanon's suppression motion. *Id.* at 1219-21, 1227-28. Plain-error review thus permits appellate courts to draw distinctions among different untimely Rule 12 claims, ranging from cases in which no motion was filed in district court to cases, such as Mr. Guerrero's, where an evidentiary hearing was held on the same claim (lack of reasonable suspicion) and specific incident (the traffic stop) at issue on appeal.

The availability of a remedy for meritorious, but untimely, Rule 12(b)(3) motions in post-conviction proceedings does not obviate the need for a definitive construction of new Rule 12. The government argues that any defendant who could demonstrate plain error on appeal could instead pursue an ineffective-assistance claim in post-conviction proceedings, presumably under 28 U.S.C. § 2255. Br. in Opp. 18-19. But an attorney's failure to object in district court underlies virtually every claim reviewed for plain error on appeal. *See, e.g.*, *Henderson*, 568 U.S. at 269 (reviewing for plain error where trial counsel did not object to sentence imposed to promote rehabilitation); *Olano*, 507 U.S. at 729, 732-41 (reviewing for plain error where trial counsel did not object to presence of alternate jurors during deliberations). Yet this Court did not simply shunt those forfeited claims to post-conviction proceedings. Rather, it granted certiorari to clarify the aspects of the plain-error doctrine. *See Henderson*, 568 U.S. at 270 ("[W]e granted the petition to resolve differences among the Circuits[]" as to temporal scope of "plain error"); *Olano*, 507 U.S. at 731 ("We granted certiorari to clarify the standard for 'plain error' review by the courts of appeals under Rule 52(b).").

Further, this Court has cautioned against drawing a false equivalence between a Fourth Amendment claim and a Sixth Amendment claim based on a failure to litigate a Fourth Amendment motion:

> We do not share petitioners' perception of the identity between respondent's Fourth and Sixth Amendment claims. While defense counsel's failure to make a timely suppression motion is the primary manifestation of incompetence and source of prejudice advanced by respondent, the two claims are nonetheless distinct, both in nature and in the requisite elements of proof.

Kimmelman v. Morrison, 477 U.S. 365, 374 (1986). Because the claims "have separate identities and reflect different constitutional values," *id.* at 375, they should not be treated as perfect substitutes. And the delay occasioned by post-conviction proceedings is not costless. Here, Mr. Guerrero was released from custody several months after the Ninth Circuit issued its decision on direct appeal.[4] While a successful Section 2255 motion could result in the vacatur of Mr. Guerrero's conviction, it would not affect the sentence he has already served.

D. The Case Is a Good Vehicle for Resolving the Standard-of-Review Question.

There is no dispute that Mr. Guerrero's case squarely presents the issue of whether, in light of the 2014 amendments to Rule 12, the good-cause standard for untimely claims in Rule 12(c)(3) displaces Rule 52(b)'s plain-error standard. The Ninth Circuit never passed on the merits of Mr. Guerrero's newly raised suppression theory, App. 1a-7a, and application of

4 *See* Federal Bureau of Prisons Inmate Locator, www.bop.gov/inmateloc/ (Jorge Guerrero, Reg. #65929-112).

the plain-error standard should be left to that court in the first instance. Nevertheless, Mr. Guerrero can prevail on plain-error review.

Below, Mr. Guerrero raised two related, but independent, bases for suppression. First, he argued that the officers who stopped the Kia Soul made an objectively unreasonable mistake of law by regarding California Vehicle Code § 22108 ("Duration of signal"), in itself, as a permissible basis for a traffic stop. Appellant's Opening Brief ("AOB"), *United States v. Guerrero*, 921 F.3d 895 (9th Cir. 2019) (No. 17-50384), 2018 WL 1914031, at *11-*13. Long before the stop, the California Court of Appeal had held that Section 22108 "does not specifically command a person to do or refrain from doing anything." *People v. Carmona*, 124 Cal. Rptr. 3d 819, 825 (Cal Ct. App. 2011). That is, Section 22108 is not "a distinct 'stand alone' penal provision." *Id.* at 824. Mr. Guerrero argued that the mistake of law was unreasonable under this Court's decision in *Heien v. North Carolina*, 574 U.S. 54 (2014), and therefore could not support reasonable suspicion. AOB, 2018 WL 1914031, at *11-*13. In the answering brief, the government did not address the *Heien* argument at all. Government's Answering Brief, *United States v. Guerrero*, 921 F.3d 895 (9th Cir. 2019) (No. 17-50384), 2018 WL 4035328. The government has thus waived any argument to that effect on appeal. *See United States v. Orozco*, 858 F.3d 1204, 1210 (9th Cir. 2017).

Second, even if the officers' mistake of law is "not entirely clear," the district court plainly erred by not suppressing the fruits of the traffic stop. *See United States v. Mariscal*, 285 F.3d 1127, 1131 (9th Cir. 2002). The driver, Alyssa Romero, turned left at a T-intersection where westbound Gemini Street dead-ends into Azusa Avenue, a divided road with one-way traffic on either side of a median. (ER 109.) The officers did not observe the lack of a signal until Ms. Romero was already in the process of making the left turn from Gemini to S. Azusa Avenue. (ER 36, 44, 70, 80.) At that point, there was no other direction in which Ms. Romero or the closely following officers could turn; Gemini Street was coming to an end, and the right turn onto N. Azusa Avenue had already passed. On this record, other traffic could not have been affected by the unsignaled left turn.

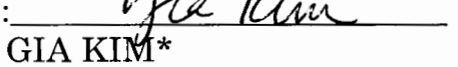
Conclusion

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

AMY M. KARLIN
Interim Federal Public Defender

DATED: February 18, 2020

By: 
GIA KIM*
Deputy Federal Public Defender

Attorneys for Petitioner
**Counsel of Record*