No. 19-7112

IN THE SUPREME COURT OF THE UNITED STATES

GABRIEL GALINDO-SERRANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the instruction in the Federal Rules of Criminal Procedure that "if the [defendant] shows good cause," "a court may consider" an "untimely" motion to suppress, Fed. R. Crim. P. 12(c)(3), permits appellate review of the merits of such a motion even if the defendant cannot show good cause.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. B1-B25) is reported at 925 F.3d 40.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1) was entered on May 30, 2019. A petition for rehearing was denied on July 19, 2019 (Pet. App. D1). On October 10, 2019, Justice Breyer extended the time within which to file a petition for a writ of certiorari to and including December 16, 2019, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Puerto Rico, petitioner was convicted on one count of carjacking, in violation of 18 U.S.C. 2119(1); one count of carjacking resulting in serious bodily injury, in violation of 18 U.S.C. 2119(2); two counts of using and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Pet. App. C1-C2. The district court sentenced petitioner to concurrent terms of 120 months of imprisonment on the carjacking and felon-in-possession counts, and consecutive terms of 84 and 396 months on the brandishing counts, for an aggregate term of 600 months of imprisonment, to be followed by five years of supervised release. Id. at C3-C4. The court of appeals affirmed. Id. at B1-B25.

1. In 2014, petitioner committed two armed carjackings, violently raping one of his victims. First, in June 2014, petitioner and his codefendant, Jean Morales-Rivera, approached a man and a woman standing near a red SUV. Pet. App. B2; Presentence Investigation Report (PSR) ¶ 11. Morales-Rivera pointed a revolver at the man and demanded his belongings. Ibid. Meanwhile, the woman rushed into the SUV. Gov't C.A. Br. 4. Morales-Rivera then demanded her belongings and threatened to shoot her. PSR ¶ 12.

When the woman got out of the SUV, petitioner repeated the demand that she give them her belongings, as well as her car keys. Ibid. When she complied, petitioner drove away in the SUV. Pet. App. B2; PSR ¶ 12.

Three weeks later, in the early morning hours of July 8, 2014, petitioner approached another woman who had stopped at a traffic light while driving to work. Pet. App. B2-B3; PSR ¶ 14; Gov't C.A. Br. 4-5. Petitioner pointed a gun at the woman through the driver's side window and ordered her to move over. PSR ¶¶ 14-15; Gov't C.A. Br. 5. After driving her around for several hours, petitioner parked the car on a basketball court in a sparsely populated area and raped her. Pet. App. B3; PSR ¶¶ 15-16; Gov't C.A. Br. 5. As the victim struggled, petitioner pinned her hands above her head with one hand and choked her with his other hand. PSR ¶ 16; Gov't C.A. Br. 5. Petitioner then forcibly penetrated her vagina repeatedly, cleaned himself with her jacket, and drove away in her car, leaving her on the basketball court, bleeding heavily. Pet. App. B3; PSR ¶¶ 16-17; Gov't C.A. Br. 5-6. Petitioner's victim eventually found help and was taken to the hospital, where medical personnel used a rape kit to collect samples. PSR ¶ 17; Gov't C.A. Br. 6.

A grand jury sitting in the United States District Court for the District of Puerto Rico indicted petitioner on one count of carjacking, in violation of 18 U.S.C. 2119(1); one count of

carjacking resulting in serious bodily injury, in violation of 18 U.S.C. 2119(2); two counts of using and brandishing a firearm during and in relation to a crime of violence, in violation of 18 U.S.C. 924(c)(1)(A)(ii); and one count of possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1). Indictment 1-3.

2. A jury trial commenced in January 2016. On the second day of trial, petitioner moved to suppress statements that he made to agents with the Federal Bureau of Investigation (FBI) on the day after his arrest, in which "he confessed to both carjackings and to the sexual assault." Pet. App. B3. Petitioner argued that the district court should suppress the statements under the "McNabb-Mallory rule," as modified by 18 U.S.C. 3501, because they were made more than six hours after his arrest but before his initial appearance in front of a magistrate judge. Gov't C.A. Br. 9; Pet. Mot. to Suppress 1-4; see Corley v. United States, 556 U.S. 303, 309 (2009) ("[T]he rule known simply as McNabb-Mallory 'generally render[s] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of Rule 5(a)'" of the Federal Rules of Criminal Procedure.) (citation omitted; brackets in original).

The government objected to the motion to suppress as untimely, noting that it had disclosed to petitioner the circumstances surrounding his arrest and his confession to FBI agents nearly "a year and a half" earlier. Suppression Hr'g Tr. 4; see Pet. App.

B11. The government explained that, while it had filed its formal designation of evidence eight days prior to trial, it had produced FBI reports discussing petitioner's confession in August 2014 and had indicated then that it was designating all the evidence listed in the accompanying discovery letter for use at trial. Suppression Hr'g Tr. 4-7; see Pet. App. B11 n.4. When the district court asked defense counsel why the suppression motion had not been filed prior to trial, defense counsel responded, "I don't know why I didn't. I overlooked it." Suppression Hr'g Tr. 5; see Pet. App. B11. The district court stated that the motion had "been filed belatedly," Suppression Hr'g Tr. 3, "did not make any express finding as to whether [petitioner] had shown 'good cause' for the untimeliness of the motion to suppress," Pet. App. B12, but decided to hold a suppression hearing "anyway," Suppression Hr'g Tr. 8.

After an evidentiary hearing, the district court denied the suppression motion, finding that the statements were trustworthy and that the delay in bringing petitioner before a magistrate judge was "not unreasonable" and was "necessary." Suppression Hr'g Tr. 41-44. Petitioner had been arrested around 7:00 p.m. on July 9, 2014, was interviewed at around 2 p.m. on July 10, and was presented to the magistrate judge "[s]hortly" thereafter. Pet. App. B13; see Gov't C.A. Br. 9-11. In finding the delay justified, the court relied on a number of factors, including that FBI agents were busy pursuing a search warrant for petitioner's residence the

night of July 9 and other agents were helping local police quell a potential riot in the area. Suppression Hr'g Tr. 43-44; see Pet. App. B13-B16.

At trial, both female victims testified and positively identified petitioner as their attacker. Pet. App. B3. The government also presented testimony from the 911 operator who took the first victim's call and individuals who assisted the second victim after she was abandoned on the basketball court. Ibid. The government additionally presented evidence that petitioner's DNA matched the samples from the rape kit. Ibid. And the government presented officer testimony "that they had heard [petitioner's] confession following his arrest and observed [petitioner] driving [the second victim's] car while in possession of a firearm." Id. at B3-B4. The jury found petitioner guilty on all counts. Id. at B4.

The district court sentenced petitioner to concurrent terms of 120 months of imprisonment on the carjacking and felon-in-possession counts, and consecutive terms of 84 and 396 months on the brandishing counts, for an aggregate term of 600 months of imprisonment. Pet. App. C3. The court imposed an aggregate five-year term of supervised release. Id. at C4.

3. On appeal, petitioner contended that the district court erred in admitting his confession at trial, arguing that the "substantial delay in presenting him to a magistrate judge" was

"neither reasonable nor necessary." Pet. App. B7. The court of appeals affirmed. Id. at B1-B25.

The court of appeals determined that Federal Rule of Criminal Procedure 12(c)(3) foreclosed consideration on appeal of petitioner's suppression claim first raised in the middle of trial. Pet. App. B10-B12, B17 (citing, e.g., United States v. Sweeney, 887 F.3d 529, 534 (1st Cir.), cert. denied, 139 S. Ct. 322 (2018); United States v. Walker-Couvertier, 860 F.3d 1, 9 (1st Cir. 2017), cert. denied, 138 S. Ct. 1303, and 138 S. Ct. 1339 (2018)). Rule 12(c)(3) states that, "[i]f a party does not meet the deadline for making" a motion listed in Rule 12(b)(3) -- which includes a motion to suppress evidence, Fed. R. Crim. P. 12(b)(3)(C) -- "the motion is untimely." Fed. R. Crim. P. 12(c)(3). The Rule further provides that "a court may consider the defense, objection, or request if the party shows good cause." Ibid. Because petitioner did not demonstrate "good cause" for his failure to raise his suppression claim prior to trial, the court found that Rule 12(c) barred consideration of that claim. Pet. App. B10-B12.

The court of appeals further determined that "[t]he fact that the District Court addressed the merits of the suppression motion d[id] not cure [petitioner's] waiver." Pet. App. B12. The court of appeals explained that "'[e]ven when the [D]istrict [C]ourt rules on an untimely motion, as the [C]ourt did here, an untimely motion to suppress is deemed waived unless the party seeking to

suppress can show good cause as to the delay,' which defense counsel has not." Ibid. (quoting Sweeney, 887 F.3d at 534) (brackets in original).

The court of appeals nonetheless noted that it was "troubled" by aspects of the district court's analysis of whether the delay in bringing petitioner before a magistrate judge "'was not unreasonable' and 'was necessary.'" Pet. App. B12; see id. at B12-B17. Thus, "in order to clarify the law in this area," the court of appeals "explain[ed] the source of [its] concern." Id. at B13. The court emphasized, however, that "even if the confessions should have been suppressed," it "ha[d] no occasion to consider whether [petitioner] was prejudiced thereby," because petitioner was not entitled to appellate review of the issue. Id. at B17.

ARGUMENT

Petitioner contends (Pet. 19-28) that the court of appeals should have considered his untimely suppression claim even if he could not show good cause for the untimeliness. The decision below was correct, and circuit disagreement on the application of Federal Rule of Criminal Procedure 12(c)(3) does not warrant this Court's review, particularly in light of the recency of the Rule's amendment, the limited number of circuit decisions that have considered the issue in any depth, and the lack of clarity as to the issue's practical significance. In any event, this case is

not a suitable vehicle for resolving the question presented because petitioner would not be entitled to relief even if his claim were reviewed on the merits -- particularly under the plain-error standard that he acknowledges would apply to any such review. The Court recently denied further review of a petition for a writ of certiorari presenting a substantially similar question. See Bowline v. United States, No. 19-5563 (Feb. 24, 2020).[1] The same result is warranted here.

1. The court of appeals correctly construed Rule 12(c)(3) as precluding appellate review of an untimely suppression claim without a showing of good cause.

a. Rule 12 provides that certain "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." Fed. R. Crim. P. 12(b)(3). The Rule covers, inter alia, claims of "suppression of evidence," as well as claims of "defect[s] in the indictment or information," "selective or vindictive prosecution," severance, and discovery. Fed. R. Crim. P. 12(b)(3)(A)-(E). Rule 12(c)(1) states that the deadline for filing pretrial motions is the date set by the court during pretrial proceedings or, if "the court

[1] A similar question is also presented in the petition for a writ of certiorari in Guerrero v. United States, No. 19-6825 (filed Nov. 27, 2019).

does not set [a deadline], the deadline is the start of trial." Fed. R. Crim. P. 12(c)(1). And Rule 12(c)(3) establishes the "consequences of not making a timely motion under Rule 12(b)(3)." Fed. R. Crim. P. 12(c)(3) (capitalization altered). Specifically, Rule 12(c)(3) 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." Ibid.

Rule 12(c)(3), by its plain terms, forecloses consideration of an untimely claim without a showing of good cause. Petitioner accordingly does not appear to dispute that a district court must find the good-cause standard satisfied before considering the merits of an untimely Rule 12 claim. He nonetheless asserts (Pet. 21-22), without directly addressing the text of Rule 12, that plain-error review under Fed. R. Crim. P. 52(b) should govern an appellate court's consideration of a claim so long as the claim was raised in the district court, even if the claim was only untimely raised in the district court. Nothing in the text of Rule 12, however, limits the Rule's good-cause standard to the trial court, nor makes an exception where the claim was belatedly raised in the trial court and then raised again on appeal.

The Rule establishes generally when "a court may consider" an untimely assertion of a defense, objection, or request within Rule 12's ambit. Fed. R. Crim. P. 12(c)(3). Rule 12(c)(3) is therefore

best read to "refer[] to an appellate court (or perhaps a court hearing a postconviction challenge) as well as the trial court." United States v. Bowline, 917 F.3d 1227, 1230 (10th Cir. 2019), cert. denied, No. 19-5563 (Feb. 24, 2020). Other portions of the Federal Rules of Criminal Procedure suggest that the word "court" can include an appellate court. See Fed. R. Crim. P. 1(a)(1) ("These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States."); Fed. R. Crim. P. 1(b)(2) (defining "court" as "a federal judge performing functions authorized by law"); Fed. R. Crim. P. 1(b)(3)(A) (defining "federal judge" by reference to 28 U.S.C. 451, which states that the term includes "judges of the courts of appeals [and] district courts").

The Rule's application to both district and appellate courts reflects sound practical considerations regarding timely presentation of claims and judicial economy. Appellate courts are not well-situated to consider claims, such as suppression claims, that often times have not been the subject of a hearing (possibly including prosecution evidence) and decision below. And as this Court explained in interpreting the original version of Rule 12, "[i]f [these] time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense

of a trial." See Davis v. United States, 411 U.S. 233, 241 (1973). But "[i]f defendants were allowed to flout [the] time limitations, * * * there would be little incentive to comply with [their] terms when a successful attack might simply result in a new indictment prior to trial." Ibid. Indeed, "[s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." Ibid.

b. Petitioner's interpretation of the Rule to require appellate consideration of untimely claims rests on the elimination of the term "waiver" from Rule 12 in 2014. See, e.g., Pet. 24. Before the amendments, Rule 12 provided that "[a] party waives" any objection or defense within the ambit of the Rule by failing to raise the claim before trial, but the court "[f]or good cause * * * may grant relief from the waiver." Fed. R. Crim. P. 12(b)(3)(B) and (e) (2012). In 2014, all variations on the term "waiver" were removed from the Rule. Petitioner appears to argue that the absence of an explicit reference to an untimely claim as "waive[d]" necessarily means that on appeal such a claim is reviewable for plain error under Rule 52(b) in the same manner generally applicable to forfeited claims not subject to Rule 12,

rather than under the good-cause standard provided by Rule 12 itself. That argument is incorrect.

As the Tenth Circuit recently explained in its extensive analysis of Rule 12(c)(3), the general framework of "waiver" as "the 'intentional relinquishment or abandonment of a known right'" and "forfeiture" as other failures to raise a claim -- described in United States v. Olano, 507 U.S. 725, 733 (1993) (citation omitted) -- does not itself describe all of the legal rules that may apply in all circumstances. Bowline, 917 F.3d at 1232. Instead, "there are common circumstances in which appellate review of an issue is precluded even when a party's failure to raise the issue was not an intentional relinquishment of a known right." Id. at 1231. For example, a defendant's failure to raise an issue in his opening brief may relieve the court of appeals from considering the issue (under plain error or otherwise) regardless of the defendant's intentions. Ibid. And a statute of limitations may bar a cause of action or claim for post-conviction relief regardless of whether the delay in seeking such relief was intentional or negligent. Id. at 1232.

This Court's decision in Davis v. United States, supra, makes clear that Rule 12 operates in a similar manner. In Davis, this Court interpreted the original 1944 version of Rule 12, which provided in part that "[f]ailure to present any * * * defense or objection" covered by the Rule (with specified exceptions)

"constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." Fed. R. Crim. P. 12(b)(2) (1944). The defendant in Davis, who sought to attack the composition of the grand jury for the first time in a post-conviction proceeding under 28 U.S.C. 2255 (1970), argued that he was entitled to raise his claim because he had not "deliberately bypassed or understandingly and knowingly waived his claim." 411 U.S. at 236 (internal quotation marks omitted). In other words, "[t]he meaning the defendant sought to give waiver matched that later set forth in Olano." Bowline, 917 F.3d at 1232. Relying on the plain language of the Rule, this Court rejected Davis's argument, reasoning that, "when a rule 'promulgated by this Court and . . . adopted by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived,' the standard specified in the rule controls." Id. at 1233 (quoting Davis, 411 U.S. at 241). The Court thus determined that "the necessary effect of the congressional adoption of [the Rule was] to provide that a claim once waived pursuant to that Rule [could] 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.

The current version of Rule 12, no less than the pre-2014 version or original version, continues to define for itself the circumstances when a court may consider an untimely claim covered

by the Rule. See Fed. R. Crim. P. 12(c)(3) ("[A] court may consider the defense, objection, or request if the party shows good cause."); see pp. 9-12, supra; see also Pet. 24 (acknowledging that "the 2014 amendments to Rule 12 did not eliminate the good-cause standard"). Particularly because the term "waiver" in Rule 12 never meant the affirmative relinquishment of a known right, the elimination of that term in the 2014 amendments to Rule 12 does not carry the significance petitioner attributes to it.

c. The Advisory Committee note to the 2014 amendments illustrates that the word "waiver" was removed specifically because it was descriptively imprecise -- and not because any substantive change from Davis was intended.

At the time of the amendments, "the Olano standard had become dominant in the case law in determining when there had been a waiver, rendering the use of that term in Rule 12 idiosyncratic." Bowline, 917 F.3d at 1235. The Advisory Committee note explained:

> Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

Fed. R. Crim. P. 12 advisory committee's note (2014 Amendments). In other words, the elimination of the word "waiver" was intended to avoid confusion with the Olano framework, not create it.

As the Advisory Committee note further explained: "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 interests in the particular case." Fed. R. Crim. P. 12 advisory committee's note (2014 Amendments). And because this Court in Davis had already made clear that Rule 12's good-cause standard applied throughout the criminal proceedings, the Committee would have understood the retention of that standard to apply equally to both district and appellate courts. See 411 U.S. at 242 ("[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.").

Petitioner is mistaken in relying (Pet. 24) on the Advisory Committee's decision to not expressly resolve within the text of Rule 12 whether Rule 52 applies to untimely Rule 12(b)(3) motions. The Advisory Committee considered but ultimately decided to omit a provision that would have stated that "Rule 52 does not apply" to review of untimely claims. Advisory Committee Report 376 (May 2011). In that same report, the Advisory Committee noted that "[i]t would be odd indeed if the waiver/good cause standard of Rule 12 applied in the district court * * * , but the more generous plain error standard applied in the court of appeals."

Id. at 387. In later omitting a specific reference to Rule 52, the Advisory Committee did not disavow that view. Rather, it "merely wished to avoid debate that threatened to delay or prevent adoption of the rule amendments" by "explicitly mandating" that approach. Bowline, 917 F.3d at 1236; see Fed. R. Crim. P. 12 advisory committee's note, Changes Made after Publication and Comment (2014 Amendments) ("[T]he cross reference to Rule 52 was omitted as unnecessarily controversial."). At most, the deletion of that explicit reference left the courts to decide the question presented here. And the rest of the text, structure, and history of the Rule all support the court of appeals' approach in this case.

d. Petitioner contends (Pet. 23-24) that appellate courts are "less well-versed in applying Rule 12's good-cause standard, which often requires developing and analyzing facts to determine whether a defendant has shown good cause for the late filing." Appellate courts, however, have been required to apply the good-cause standard since Rule 12's 1944 enactment. See Davis, 411 U.S. at 241-242. And appellate courts regularly apply the analogous "cause" prong of the cause and prejudice standard with respect to the review of procedurally defaulted claims. See, e.g., Dretke v. Haley, 541 U.S. 386, 388 (2004) ("[A] federal court will not entertain a procedurally defaulted constitutional claim in a petition for habeas corpus absent a showing of cause and prejudice

to excuse the default."). Petitioner fails to identify any significant obstacle to the appellate courts' continuing to apply this now long-established standard.

e. Petitioner appears to contend (Pet. 20, 22-23) that even if Rule 12(c)(3)'s good-cause standard applies generally, it should not apply when a defendant has raised his suppression claim, "albeit untimely," in the district court. But he provides no textual basis for such an exception to the Rule. As the court of appeals stated, "[t]he fact that the District Court addressed the merits of the suppression motion does not cure" petitioner's untimeliness. Pet. App. B12. A district court may reasonably "opt to address" an unpreserved claim "simply to create a record in the event that the appellate court does not deem the argument" unpreserved. Ibid. (quoting United States v. Walker-Couvertier, 860 F.3d 1, 9 (1st Cir. 2017), cert. denied, 138 S. Ct. 1303, and 138 S. Ct. 1330 (2018)). Doing so does not thereby excuse the defendant from showing the "good cause" that Rule 12 requires as a prerequisite to appellate consideration of the issue on the merits. See, e.g., Bowline, 917 F.3d at 1229 (applying Rule 12(c)(3)'s good-cause standard on appeal, where district court had alternatively denied the defendant's untimely motion on the merits

below); United States v. Sweeney, 887 F.3d 529, 534 (1st Cir.) (same), cert. denied. 139 S. Ct. 322 (2018).[2]

f. Finally, petitioner appears to suggest (Pet. 18-19) that applying Rule 12(c)(3)'s procedural bar to his untimely suppression claim deprived him of his constitutional right to present a defense. But requiring a defendant to comply with normal procedural rules, and holding the defendant to the consequences of a failure of compliance, comports with the Constitution. Cf. Olano, 507 U.S. at 731 ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.") (citation and internal quotation marks omitted); Holmes v. South Carolina, 547 U.S. 319, 326 (2006) (courts do not violate the Constitution by requiring defendants to comply with ordinary rules on the admission or exclusion of evidence).

2. Although some disagreement exists among the courts of appeals regarding whether a defendant must satisfy the good-cause standard before an appellate court can review an untimely claim

[2] To the extent that petitioner suggests (Pet. 22) that no court below specifically found that he had failed to show good cause, any absence of an explicit (rather than implied) finding on that point would at most be factbound error that would not warrant this Court's review.

subject to Rule 12, that disagreement does not warrant this Court's review.

Most courts of appeals to have addressed the question have, like the court below, recognized that amended Rule 12 precludes consideration of untimely claims without a showing of good cause. See Pet. App. B10-B12; United States v. O'Brien, 926 F.3d 57, 82-84 (2d Cir. 2019); United States v. Guerrero, 921 F.3d 895, 897-898 (9th Cir. 2019) (per curiam), petition for cert. pending, No. 19-6825 (filed Nov. 27, 2019); United States v. Fattah, 858 F.3d 801, 807-808 & n.4 (3d Cir. 2017)[3]; United States v. McMillian, 786 F.3d 630, 635-636 & n.3 (7th Cir. 2015); United States v. Anderson, 783 F.3d 727, 740-741 (8th Cir.), cert. denied, 136 S. Ct. 199, 136 S. Ct. 200, and 136 S. Ct. 347 (2015); Bowline, 917 F.3d at 1237.

Petitioner identifies (Pet. 21-22) three courts of appeals -- the Fifth, Sixth, and Eleventh Circuits -- that have reviewed untimely claims subject to Rule 12 for plain error, without regard to a showing of good cause. See United States v. Vasquez, 899 F.3d 363, 372-373 (5th Cir. 2018), cert. denied, 139 S. Ct. 1543 (2019); United States v. Soto, 794 F.3d 635, 652 (6th Cir. 2015),

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[3] The Third Circuit subsequently stated that the availability of plain-error review of an untimely Rule 12 claim was an open question. See United States v. Ferriero, 866 F.3d 107, 122 n.17 (3d Cir. 2017), cert. denied, 138 S. Ct. 1031 (2018). Ferriero, however, did not cite the Third Circuit's prior decision in Fattah.

cert. denied, 136 S. Ct. 2007 (2016); United States v. Sperrazza, 804 F.3d 1113, 1119 (11th Cir. 2015), cert. denied, 136 S. Ct. 2461 (2016). Only one of those decisions (the Sixth Circuit's decision in Soto), however, examined the question in any depth, and none considered the significance of this Court's interpretation of Rule 12 in Davis as to the proper construction of the Rule. Particularly considering the Tenth Circuit's recent, comprehensive opinion on the issue in Bowline, the issue would, at a minimum, benefit from further consideration of the question by other courts in light of that analysis.

Moreover, notwithstanding petitioner's assertion that the issue of the standard of appellate review of untimely Rule 12 claims is "exceptionally important," Pet. 28 (capitalization omitted), it is not clear that, in practice, the disagreement will affect the outcome in any meaningful number of cases. To begin with, plain-error review itself is discretionary. See Puckett v. United States, 556 U.S. 129, 135 (2009) (explaining that even where the requirements of plain error are otherwise met, "the court of appeals has the discretion to remedy the error"). And a defendant's failure to timely raise a suppression motion in the district court will often present a particularly strong case for the court of appeals to decline to exercise such discretion. See, e.g., United States v. Ramamoorthy, No. 19-1033, 2020 WL 595988, at *4-*6 (6th Cir. Feb. 7, 2020) (reasoning that it is generally

not a proper exercise of discretion under Rule 52 to "perform plain-error review of a forfeited suppression claim which turns on unresolved questions of fact").

In addition, Rule 12 applies only where the defense or objection is one for which "the basis for [a pre-trial] motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). And Rule 12's good-cause standard is generally understood to require a defendant to show "cause for his untimeliness" in filing such a motion and "prejudice suffered as a result of the error." Bowline, 917 F.3d at 1234; see Pet. App. B10; United States v. Edmond, 815 F.3d 1032, 1044 (6th Cir. 2016), cert. denied, 137 S. Ct. 619, and vacated on other grounds, 137 S. Ct. 1577 (2017). The plain-error standard similarly requires a showing of prejudice, see Fed. R. Crim. P. 52(b) (requiring a "plain error that affects substantial rights"), meaning that many claims that would be precluded by Rule 12(c)(3) would also fail plain-error review. Furthermore, in cases in which defense counsel fails to timely raise a motion covered by Rule 12(b)(3) without good cause, and the defendant could otherwise demonstrate plain error on appeal, defendants may pursue a remedy in post-conviction proceedings based on a claim of ineffective assistance of counsel. See Edmond, 815 F.3d at 1044 (suggesting that the availability of such ineffective-assistance claims

"narrows the set of affected defendants * * * perhaps * * * to nil").

3. In any event, this case would not be a suitable vehicle for resolving whether an untimely claim covered by Rule 12 may be reviewed on appeal, even without a showing of good cause, because petitioner fails to demonstrate that he would be entitled to relief based on his suppression claim even if plain-error review were permitted by Rule 12, particularly considering the overwhelming evidence of his guilt.

To prevail under the plain-error standard that petitioner would apply here, a defendant must show (1) "'[d]eviation from a legal rule,'" (2) that is "clear or obvious," and (3) that "'affected the outcome of the district court proceedings.'" Puckett, 556 U.S. at 135 (quoting Olano, 507 U.S. at 732-734) (brackets in original). If the defendant does so, a "court of appeals has the discretion to remedy the error" if it "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Ibid. (quoting Olano, 507 U.S. at 736) (emphasis omitted).

Fed. R. Crim. P. 5(a)(1) requires an arrested defendant to be brought "without unnecessary delay before a magistrate judge." "To protect this right, 'the rule known simply as McNabb-Mallory "generally render[s] inadmissible confessions made during periods of detention that violat[e] the prompt presentment requirement of

Rule 5(a).”’” Pet. App. B8 (quoting Corley v. United States, 556 U.S. 303, 309 (2009)) (brackets in original); see Mallory v. United States, 354 U.S. 449 (1957); McNabb v. United States, 318 U.S. 332 (1943). Congress modified the McNabb-Mallory rule through 18 U.S.C. 3501, which provides “a safe harbor period for certain voluntary confessions that are given within six hours of a defendant’s arrest.” Pet. App. B8-B9 (quoting United States v. Jacques, 744 F.3d 804, 813 (1st Cir. 2014)) (brackets omitted); 18 U.S.C. 3501(c) (confession given within six hours after arrest “shall not be inadmissible solely because of [the] delay in bringing such person before a magistrate judge”).

Here, petitioner sought to suppress the statements he made to the FBI agents -- in which he admitted that he committed both carjackings as well as the sexual assault -- on the theory that the roughly 18-hour delay between his arrest and presentation to the magistrate judge was not reasonable or necessary. Notwithstanding petitioner’s contrary suggestion (e.g., Pet. 25-26), the court of appeals did not determine that the district court plainly erred in ruling that the delay was justified. The court of appeals noted that it was “troubled” by certain parts of the district court’s analysis, Pet. App. B12, and discussed what it perceived to be gaps in the evidence justifying the delay. See, e.g., id. at B15 (noting that “no agent testified at the suppression hearing as to how many FBI agents were in fact involved

in containing -- or needed to contain -- any impending riot or as to how long they were in fact there"); id. at B16 (asking "why," given that FBI agents went to a magistrate judge to obtain a search warrant, petitioner could "not [have] accompanied [the agents] to [the same magistrate] for arraignment at that time") (citation omitted; brackets in original). But on plain-error review, "the burden of establishing entitlement to relief for plain error is on the defendant claiming it." United States v. Dominguez Benitez, 542 U.S. 74, 82 (2004). The court of appeals did not directly address whether petition could meet that burden on this record, and it is far from clear that he could.

In any event, even assuming that petitioner were entitled to suppression of the confession based on presentment delay, petitioner would not be able to demonstrate that any error had an effect on the outcome of his trial, given the overwhelming evidence of his guilt. Both victims positively identified petitioner as the perpetrator, and the second victim did so after spending several hours with petitioner during the carjacking and rape; petitioner's DNA matched the DNA samples from the second victim's rape kit; and a police commander saw petitioner driving the second victim's car the same day that it was carjacked and she was raped. See Gov't C.A. Br. 4-7; Pet. App. B3-B4. Accordingly, even without his incriminating statements, overwhelming evidence demonstrated petitioner's guilt, and petitioner therefore would not be able to

demonstrate his entitlement to relief under the third component of plain-error review.

For similar reasons, petitioner also would not be able to satisfy the fourth component of the plain-error test. Because of the overwhelming evidence of his guilt, "this record [presents] no basis for concluding that the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Johnson v. United States, 520 U.S. 461, 470 (1997) (second set of brackets in original). "Indeed, it would be the reversal of a conviction such as this which would have that effect." Ibid.; see United States v. Cotton, 535 U.S. 625, 634 (2002) (similar). Petitioner would therefore not be entitled to relief, even if the Court were to adopt his view of the applicable standard of review for his untimely suppression claim.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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