NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

TJ CAIN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner TJ Cain was convicted of being a felon in possession of a firearm. At trial, the government introduced evidence obtained as a result of police questioning conducted while Mr. Cain was outnumbered and held at gunpoint, bleeding and semi-conscious, in a remote rural area approximately twelve hours after he had been shot by a police officer. On appeal, Mr. Cain argued for the first time that this evidence should have been suppressed because his responses were plainly involuntary and his waiver of his *Miranda* rights was plainly invalid. The Tenth Circuit affirmed, finding that these suppression claims should have been filed before trial under Federal Rule of Criminal Procedure 12(b)(3), and that they were therefore unreviewable under Federal Rule of Criminal Procedure 12(c)(3), in the absence of good cause.

The following question is presented: When a criminal defendant does not timely file a pretrial motion raising a claim covered by Federal Rule of Criminal Procedure 12(b)(3), is his claim reviewable for plain error on appeal under Federal Rule of Criminal Procedure 52(b), as the Fifth, Sixth, and Eleventh Circuits have held, or is it unreviewable absent good cause under Federal Rule of Criminal Procedure 12(c)(3), as the Seventh, Eighth, Ninth, and Tenth Circuits have held?

RELATED PROCEEDINGS

- *United States v. Cain*, No. 19-7030, United States Court of Appeals for the Tenth Circuit. Judgment entered April 7, 2020.

- *United States v. Cain*, No. 6:18-cr-00044-RAW-1, United States District Court for the Eastern District of Oklahoma. Judgment entered May 20, 2019.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner TJ Cain respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINION BELOW

The decision of the United States Court of Appeals for the Tenth Circuit is reported at *United States v. Cain*, 800 F. App'x 672 (10th Cir. Apr. 7, 2020), and can be found in the Appendix at 1a.

JURISDICTION

The court of appeals issued its decision on April 7, 2020. App. 1a. On March 19, 2020, this Court extended the deadline to file petitions for writs of certiorari in all cases due on or after that date to 150 days from the date of the lower court judgment—in this case, that is September 4, 2020. This Court has jurisdiction 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.

. . . .

(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)(3) (2014).

Rule 52. Harmless and Plain Error

(a) Harmless Error. Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.

(b) Plain Error. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention.

Fed. R. Crim. P. 52 (2002).

STATEMENT OF THE CASE

I. Legal background

Federal Rule of Criminal Procedure 12 requires certain motions, including suppression motions, to be made before trial. Fed. R. Crim. P. 12(b)(3) (2014). Before it was amended in 2014, Rule 12 provided: "A party *waives* any Rule 12(b)(3) defense, objection, or request not raised" in a timely manner. Fed. R. Crim. P. 12(e) (2013) (emphasis added). The rule further provided that, "[f]or good cause, the court may grant relief from the waiver." *Id.*

In 2014, Rule 12 was amended to eliminate any reference to "waiver." The relevant provision was relocated to Rule 12(c)(3) and now states: "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(c)(3) (2014).

Ordinarily, when a defendant "fail[s] to make the timely assertion of a right," the claim is considered merely forfeited and may be reviewed for plain error under Federal Rule of Criminal Procedure 52(b). *United States v. Olano*, 507 U.S. 725, 733 (1993). By contrast, waived claims—that is, known claims that the defendant has "intentional[ly] relinquish[ed] or abandon[ed]"—are considered extinguished and unreviewable on appeal. *Id.* (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)).

II. Procedural history

Early in the morning of September 29, 2017, police received a report that Mr. Cain had shot a gun into the air outside a friend's house. Officers encountered Mr.

Cain's truck on the road, and a chase ensued. The chase ended when Mr. Cain crashed his truck into a ditch by a hayfield. Mr. Cain ran out of his truck into the field, where he was shot by police officer Darrel Dugger. Officer Dugger testified that Mr. Cain had fired the first shot, and that he (Officer Dugger) had shot him (Mr. Cain) in self-defense. Investigators eventually located six rounds from Officer Dugger's gun, but none from a firearm attributed to Mr. Cain.

Later that evening, over twelve hours after the shooting, four local police officers found Mr. Cain lying under a bush at the edge of the field. According to the officers who found him, Mr. Cain was near death. He "appeared to not be moving," and "to really not be very conscious at the time[,] as if he might have been injured in some way." His skin "looked almost a pale, yellow, white-ish color," and he was "very lethargic" and unresponsive. There was "a large amount of blood on his leg," which smelled like "rotting flesh or something along those lines" and was covered with flies.

While he was in this condition, and before he received any medical attention, Mr. Cain was held at gunpoint, arrested, handcuffed, and read his *Miranda* rights. When asked whether he understood his rights, Mr. Cain "wasn't very responsive." The officers then asked him "where the gun was that he supposedly had." In response, Mr. Cain "motion[ed] towards another area of the thicket," where officers found a Tanfoglio Model Witness .40 caliber handgun.

Mr. Cain was charged with one count of being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g), based on the .40 caliber Tanfoglio found

in the thicket. His defense was simple: The gun wasn't his, but had been planted to cover up the shooting of an unarmed man. As his original trial counsel put it to the jury: "Do you think the police have never shot someone and then put a gun down? It happens. It happens." The jury deadlocked.

The government filed a superseding indictment additionally charging Mr. Cain with possessing ammunition that had been found in his truck (which did not match the firearm found in the field). After the second trial, Mr. Cain was convicted of both counts. The ammunition count was dismissed at sentencing, and Mr. Cain was sentenced to the statutory maximum term of ten years' imprisonment.

Mr. Cain appealed. He argued that the district court erred by admitting evidence recovered as a result of his interrogation in the field, contending that his responses were involuntary in violation of the due process clause, and that his waiver of his *Miranda* rights was invalid. Mr. Cain acknowledged that, under Tenth Circuit precedent, these suppression claims were waived and unreviewable, absent good cause, because they had not been timely raised before trial. However, he argued that the plain error standard should apply, and that he could meet it.

The Tenth Circuit affirmed. Following its holding in *United States v. Bowline*, 917 F.3d 1227 (10th Cir. 2019), it found that Mr. Cain's untimely suppression arguments were not reviewable for plain error under Rule 52(b), but were waived and unreviewable, absent good cause. App. 2a. Because Mr. Cain conceded that no good cause existed, it affirmed the judgment of the district court without reaching the merits of his claims. App. 3a.

REASONS FOR GRANTING THE WRIT

I. The courts of appeal are deeply divided.

Since Federal Rule of Criminal Procedure 12 was amended in 2014, the courts of appeal have taken two opposing positions on the availability of appellate review for defenses, objections, and requests required to be made before trial by Federal Rule of Criminal Procedure 12(b)(3), but which were not timely made in the district court.

"Some circuit courts have read the newly amended version of Rule 12 . . . 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." *United States v. Burroughs*, 810 F.3d 833, 838 (D.C. Cir. 2016) (acknowledging split in authority, without taking sides). Specifically, the Fifth, Sixth, and Eleventh Circuits have squarely held that such claims are merely forfeited and therefore reviewable for plain error under Federal Rule of Criminal Procedure 52(b). *See United States v. Vasquez*, 899 F.3d 363, 372-73 (5th Cir. 2018); *United States v. Soto*, 794 F.3d 635, 648-56 (6th Cir. 2015); *United States v. Sperrazza*, 804 F.3d 1113, 1118-19 (11th Cir. 2015). These courts have reasoned that the "decision to delete the word 'waiver'" was intended to correct the practice of appellate courts' "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." *Soto*, 794 F.3d at 652; *see also Vasquez*, 899 F.3d at 372-73 (finding that the 2014 amendment of Rule 12(c)(3) "clarif[ies] that Rule 12

recognizes the traditional distinction between forfeiture and waiver," and therefore permits "untimely—that is, forfeited," Rule 12(b)(3) challenges to be reviewed "for plain error"); *Sperrazza*, 804 F.3d at 1119 (finding that because the amendments to Rule 12 "makes no mention of 'waiver,'" untimely Rule 12(b)(3) claims are subject to plain error review). The Fourth Circuit has also reviewed an untimely Rule 12(b)(3) claim for plain error, without addressing the language of the amended Rule 12. *See United States v. Robinson*, 855 F.3d 265, 270 (4th Cir. 2017).

Other courts, by contrast, treat untimely Rule 12(b)(3) claims as waived and "review [them] only when the defendant has made a showing of good cause, regardless of whether the defendant intentionally declined to raise those issues." *Burroughs*, 810 F.3d at 838. In particular, the Seventh, Eighth, Ninth, and Tenth Circuits have squarely held that untimely Rule 12(b)(3) claims are unreviewable, absent good cause, under Federal Rule of Criminal Procedure 12(c)(3), notwithstanding the 2014 amendments. *See United States v. Daniels*, 803 F.3d 335, 352 (7th Cir. 2015); *United States v. Anderson*, 783 F.3d 727, 740-41 (8th Cir. 2015); *United States v. Guerrero*, 921 F.3d 895, 897-98 (9th Cir. 2019); *Bowline*, 917 F.3d at 1229-38 (10th Cir. 2019). The First and Second Circuits have also treated untimely Rule 12(b)(3) claims as waived, absent good cause, without addressing the language of the 2014 amendments to Rule 12. *See United States v. Sweeney*, 887

F.3d 529, 534 (1st Cir. 2018); *United States v. Martinez*, 862 F.3d 223, 233-34 (2d Cir. 2017), *vacated on other grounds*, 139 S. Ct. 2772 (2019).[1]

II. This question is recurring and important.

The question of whether an untimely Rule 12(b)(3) claim can be reviewed on appeal recurs frequently. That much is clear from the fact that every circuit with jurisdiction over criminal appeals has encountered untimely Rule 12(b)(3) claims in the six years since the rule was amended. *E.g.*, *Sweeney*, 887 F.3d at 534 (1st Cir. 2018); *Martinez*, 862 F.3d at 233-34 (2d Cir. 2017); *Ferriero*, 866 F.3d at 122 n.17 (3d Cir. 2017); *Robinson*, 855 F.3d at 270 (4th Cir. 2017); *Vasquez*, 899 F.3d at 372-73 (5th Cir. 2018); *Soto*, 794 F.3d at 647-56 (6th Cir. 2015); *Daniels*, 803 F.3d at 352 (7th Cir. 2015); *Anderson*, 783 F.3d at 740-41 (8th Cir. 2015); *Guerrero*, 921 F.3d at 897-98 (9th Cir. 2019); *Bowline*, 917 F.3d at 1229-38 (10th Cir. 2019); *Sperrazza*, 804 F.3d at 1118-19 (11th Cir. 2015); *Burroughs*, 810 F.3d at 837-38 (D.C. Cir. 2016).

This question is also important. The need to ensure "the proper and uniform administration of the Federal Rule of Criminal Procedure" warrants the grant of certiorari, *United States v. Robinson*, 361 U.S. 220, 222 (1960), consistent with this

[1] Some courts have cited *United States v. Fattah*, 858 F.3d 801 (3d Cir. 2017), for the proposition that the Third Circuit deems untimely Rule 12(b)(3) claims waived and unreviewable, absent good cause. *E.g.*, *Bowline*, 917 F.3d at 1236 (citing *Fattah*, 58 F.3d at 807-08 & n.4). However, the statements regarding the availability of appellate review in *Fattah* were dicta, and the Third Circuit has since stated that it considers the reviewability of untimely Rule 12(b)(3) claims an open question. *See United States v. Ferriero*, 866 F.3d 107, 122 n.17 (3d Cir. 2017).

Court's "supervisory authority over the administration of criminal justice in the federal courts," *McNabb v. United States*, 318 U.S. 332, 341 (1943); *see also United States v. Lott*, 367 U.S. 421, 424 (1961) (granting certiorari to resolve circuit split over meaning of federal criminal rule governing time to appeal). Indeed, this Court regularly decides cases concerning the scope of review available to untimely claims made in federal criminal appeals. *E.g.*, *United States v. Olano*, 507 U.S. 725, 731 (1993) ("clarify[ing] the standard for 'plain error' review by the courts of appeals under Rule 52(b)"); *United States v. Vonn*, 535 U.S. 55, 58-59 (2002) (deciding whether a untimely Rule 11 claim is subject to plain error review); *United States v. Dominguez Benitez*, 542 U.S. 74, 76 (2004) (deciding when an untimely Rule 11 claim satisfies the plain error standard under Rule 52(b)); *Puckett v. United States*, 556 U.S. 129, 131 (2009) (deciding whether an untimely "claim that the Government has violated the terms of a plea agreement" is subject to plain error review); *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1341-42 (2016) (deciding when an untimely claim that the district court miscalculated the applicable Sentencing Guidelines range satisfies the plain error standard under Rule 52(b)); *Davis v. United States*, 140 S. Ct. 1060, 1061 (2020) (deciding whether untimely factual objections may be reviewed for plain error under Rule 52(b)).

The need for clarity regarding the scope of appellate review available to untimely Rule 12(b)(3) claims is particularly acute in light of the large, and growing, number of claims covered by that rule. As originally adopted in 1944, only defenses and objections based on "defects in the institution of the prosecution or in

the indictment and information other than it fails to show jurisdiction in the court or to charge an offense" were required to be raised before trial. Fed. R. Crim. P. 12(b)(2) (1946). The list of claims required to be brought in the form of pretrial motions was expanded in 1975 to include suppression motions, requests for discovery, and requests for severance of charges or defendants, *see* Fed. R. Crim. P. 12(b)(3)-(5) (1976), and again in 2014 to include the failure to state an offense, *see* 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). Without resolution by this Court, the reviewability of a broad swath of criminal claims—including claims enforcing critical constitutional rights—will depend on whether the appeal is heard in New Orleans, Cincinnati, or Atlanta, on the one hand, or in Chicago, St. Louis, San Francisco, or Denver, on the other.

III. The Tenth Circuit is wrong.

In concluding that Mr. Cain's claims were waived and unreviewable, the Tenth Circuit applied the rule it adopted in *United States v. Bowline*, 917 F.3d 1227 (2019). In that case, the Tenth Circuit concluded that untimely Rule 12(b)(3) claims are waived and unreviewable, absent good cause, following extensive discussion. Its reasoning, however, is unpersuasive, and its conclusion is wrong.

Prior to 2014, Rule 12 expressly deemed the failure to make a timely pretrial motion a "waiver." *See* Fed. R. Crim. P. 12(e) (2013) ("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*.") (emphases added). It was this language that drove this Court's decision in *Davis v. United States*, 411 U.S. 233 (1973). In *Davis*, this Court pointed to the "express waiver provision contained in Rule 12(b)(2)" in concluding that the petitioner's untimely challenge to the composition of the grand jury was waived. *Id.* at 239-40; *see* Fed. R. Crim. P. 12(b)(2) (1972).

That express waiver provision no longer exists. Since 2014, Rule 12 has instead stated that "[i]f a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is *untimely*." Fed. R. Crim. P. 12(c)(3) (2014) (emphasis added). In the absence of express language directing courts to treat untimely Rule 12(b)(3) claims as "waived," the courts of appeal should apply the general rule distinguishing waiver from forfeiture: "Whereas forfeiture is the failure to make the timely assertion of a right, wavier is the 'intentional relinquishment or abandonment of a known right.'" *Olano*, 507 U.S. at 733 (quoting *Johnson*, 304 U.S. at 464). Where, as here, the claim was not intentionally relinquished but is merely untimely, the courts of appeal should exercise their "limited power to correct errors that were forfeited because not timely raised in the district court," and review for plain error, pursuant to Federal Rule of Criminal Procedure 52(b). *Id.* at 731.

Contrary to the conclusion reached by the Tenth Circuit, *see Bowline*, 917 F.3d at 1230, that conclusion is not altered by language in Rule 12(c)(3) providing that "a court may consider the defense, objection, or request if the party shows good cause." This good cause requirement governs the circumstances under which a *district court* may elect to hear an untimely Rule 12(b)(3) motion; it does not control

the authority of an *appellate court* to review an untimely Rule 12(b)(3) claim for plain error. *See Soto*, 794 F.3d at 652-55 (concluding that "Rule 12(c)(3) applies to the district courts alone").

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

This case is a good vehicle for the resolution of the question presented. The untimely suppression issue deemed waived by the Tenth Circuit was the only issue raised on appeal, and the Tenth Circuit decided the case solely on the grounds of that waiver. App. 2a-3a.

This case is also a good vehicle because the Tenth Circuit waiver rule likely affected the outcome of the appeal. If the Tenth Circuit had reviewed Mr. Cain's claims for plain error—as the Fifth, Sixth, and Eleventh Circuits would have done—it is likely he would have prevailed.

Decades of Supreme Court and Tenth Circuit precedent make plain that the government may not constitutionally convict a defendant based on evidence obtained through questioning conducted while he was grievously injured, semiconscious, and held at gunpoint while lying in the dirt in a remote rural location. *E.g.*, *Mincey v. Arizona*, 437 U.S. 385, 389, 398-402 (1978) (finding statements involuntary when made several hours after the defendant had been found "lying on the floor, wounded and semiconscious," while he "was weakened by pain and shock, isolated from family, friends, and legal counsel, and barely conscious"); *United States v. Perdue*, 8 F.3d 1455, 1466-67 (10th Cir. 1993) (finding statements involuntary when made while defendant was lying in the dirt in a

remote rural area, outnumbered by police and held at gunpoint). The use of this unconstitutionally obtained evidence was also prejudicial. The evidence against Mr. Cain was not overwhelming. No physical evidence connected him to the firearm, and the first jury was unable to reach a verdict. If the Tenth Circuit had reviewed Mr. Cain's claims under the plain error standard, there is a substantial likelihood that it would have found that standard met.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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