No. 20-5639

IN THE SUPREME COURT OF THE UNITED STATES

TJ CAIN, aka Thomas J. Cain, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH 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.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (E.D. Okla.):

United States v. Cain, No. 18-cr-44 (May 20, 2019)

United States Court of Appeals (10th Cir.):

United States v. Cain, No. 19-7030 (Apr. 7, 2020)

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-3a) is not published in the Federal Reporter but is reprinted at 800 Fed. Appx. 672.

JURISDICTION

The judgment of the court of appeals was entered on April 7, 2020. On March 19, 2020, the Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment or order denying a timely petition for rehearing. Under that extension order, the deadline for filing a petition for a writ of certiorari

in this case was September 4, 2020. The petition for a writ of certiorari was filed on September 3, 2020. 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 Eastern District of Oklahoma, petitioner was convicted on one count of possessing a firearm as a felon and one count of possessing ammunition as a felon, both in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e). Judgment 1. The district court dismissed the ammunition count on the government's motion, D. Ct. Doc. 114 (May 16, 2019), and sentenced petitioner to 120 months of imprisonment, to be followed by three years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-3a.

1. In the early morning on September 29, 2017, police learned that petitioner had fired a shot into the air from his truck outside a friend's house. Pet. App. 1a; Presentence Investigation Report (PSR) ¶ 11. Police later found petitioner in his truck and pursued him. Pet. App. 1a. After crashing his truck and fleeing on foot, petitioner exchanged numerous rounds of gun fire with an officer, who shot petitioner in the leg. Ibid.; PSR ¶ 12; see Trial Tr. 89-92. Petitioner continued to flee. Pet. App. 1a; PSR ¶ 12. The police found petitioner roughly 12 hours later, seriously wounded. Pet. App. 1a. After they read petitioner his Miranda rights, they asked him where the gun was, and petitioner nodded toward a nearby thicket. Id. at 1a-2a.

About five feet away, officers found a .40 caliber pistol. Id. at 2a; PSR ¶ 14. When officers located the gun, the slide was retracted, indicating that the gun's magazine had been emptied by discharging the weapon. Trial Tr. 209-210; PSR ¶ 14. They also found nine rounds of .22 caliber ammunition in petitioner's truck. Pet. App. 2a; PSR ¶ 15. Petitioner had been previously convicted of several felony drug and firearm offenses. PSR ¶¶ 16, 34-37.

2. A federal grand jury in the Eastern District of Oklahoma charged petitioner with possessing a firearm as a felon, in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e). Indictment 1. At trial, the jury was unable to reach a unanimous verdict, and the district court declared a mistrial. D. Ct. Doc. 50 (July 20, 2018). A federal grand jury in the Eastern District of Oklahoma then charged petitioner with one count of possessing a firearm as a felon and one count of possessing ammunition as a felon, both in violation of 18 U.S.C. 922(g)(1), 924(a)(2) and (e). Superseding Indictment 1-2. The jury found petitioner guilty on both counts. Verdict Form 1. The district court dismissed the ammunition count on the government's motion to avoid any potential multiplicity claim, D. Ct. Doc. 114, and sentenced petitioner to 120 months of imprisonment on the remaining count. Judgment 2.

3. The court of appeals affirmed in a nonprecedential order. Pet. App. 1a-3a.

Petitioner argued for the first time on appeal that his waiver of his Miranda rights was invalid and that his "confession" --

i.e., his nod toward the thicket in response to police officers' questions about where his gun was located -- was involuntary, and that the district court had therefore plainly erred by admitting his confession and the pistol. Pet. App. 2a. Petitioner acknowledged, however, that circuit precedent construed Rule 12(c)(3) to preclude consideration of his untimely claim without a showing of good cause. Ibid.; see United States v. Bowline, 917 F.3d 1227, 1228, 1237 (10th Cir. 2019), cert. denied, 140 S. Ct. 1129 (2020). And petitioner acknowledged that no good cause existed for his failure to timely raise it. Pet. App. 2a.

The court of appeals agreed that its precedent precluded consideration of petitioner's plain-error arguments on appeal and thus affirmed the district court's judgment. Pet. App. 2a-3a.

ARGUMENT

Petitioner contends (Pet. 6-13) that the court of appeals should have considered his untimely suppression claim notwithstanding his failure to show (or assert) 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. This Court has repeatedly denied petitions for writs of certiorari presenting materially identical questions. See Galindo-Serrano v. United States, 140 S. Ct. 2646 (2020) (No. 19-7112); Guerrero v. United States, 140 S. Ct. 1300 (2020) (No. 19-6825); Bowline v. United States, 140 S. Ct. 1129 (2020) (No. 19-5563). The same result is warranted here.

1. The court of appeals correctly determined that Rule 12(c)(3) precludes appellate review of an untimely suppression argument 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 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 acknowledges (Pet. 11-12) that a district court must find the good-cause standard satisfied before considering the merits of an untimely Rule 12 claim. He nonetheless asserts (ibid.) that Rule 12(c)(3)'s good-cause requirement is limited to district courts, and that appellate courts may consider claims in the first instance that the district court was barred from considering. But nothing in the text of Rule 12 limits the Rule's good-cause standard to the trial court.

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, 140 S. Ct. 1129 (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." 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 permit appellate consideration of untimely claims without a showing of good cause rests on the elimination of the term "waiver" from Rule 12 in 2014. 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 (Pet. 10-12) 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 explained in its extensive analysis of Rule 12(c)(3) in United States v. Bowline, supra, 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 postconviction 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 (citation and 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.

c. Petitioner contends (Pet. 11) that, in light of the elimination of the term "waiver" from Rule 12, Davis no longer controls. But 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. 5-7, supra. 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 that petitioner attributes to it.

Indeed, 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.").

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 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, have recognized that amended Rule 12 precludes consideration of untimely claims without a showing of good cause. See United States v. Galindo-Serrano, 925 F.3d 40, 47, 49 (1st Cir. 2019), cert. denied, 140 S. Ct. 2646 (2020); United States v. O'Brien, 926 F.3d 57, 82-84 (2d Cir. 2019); United States v. Fattah, 858 F.3d 801, 807-808 & n.4 (3d Cir. 2017);[1] 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, 577 U.S. 872, and 577 U.S. 925 (2015); United States v. Guerrero, 921 F.3d 895, 897-898 (9th Cir. 2019) (per curiam), cert. denied, 140 S. Ct. 1300 (2020); Bowline, 917 F.3d at 1237 (10th Cir.).

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[1] As petitioner notes (Pet. 8 n.1), 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, 122-123 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.

Petitioner identifies (Pet. 6-7) four courts of appeals -- the Fourth, Fifth, Sixth, and Eleventh Circuits -- that have reviewed untimely claims subject to Rule 12 for plain error, without a showing of good cause. See United States v. Robinson, 855 F.3d 265, 270 (4th Cir. 2017)[2]; 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), 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 in Soto), however, examined the question in any depth, and none considered the significance of this Court's interpretation of Rule 12 in Davis to the proper construction of the Rule. Particularly considering the Tenth Circuit's relatively 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 (Pet. 9) that "the need for clarity regarding the scope of appellate review available to untimely 12(b)(3) claims is particularly acute," it is not clear that, in practice, the disagreement will affect the

[2] In Robinson, the Fourth Circuit stated that it would not review an untimely Rule 12 claim "absent a showing of good cause or plain error," and it found neither. 855 F.3d at 270 (citations omitted). More recently, the Fourth Circuit has noted that whether unpreserved Rule 12 claims may be reviewed for plain error is an open question. See United States v. Fall, 955 F.3d 363, 373, cert. denied, No. 19-8678 (Oct. 5, 2020).

outcome in any meaningful number of cases. To begin with, Rule 12 applies only where the defense or objection is one for which "the basis for [a pretrial] motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). Furthermore, 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, 949 F.3d 955, 962 (6th Cir. 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'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 United States v. Edmond, 815 F.3d 1032, 1044 (6th Cir. 2016), cert. denied, 137 S. Ct. 619 (2017), 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. And 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 Bowline, 917 F.3d at 1237; 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 be an unsuitable vehicle for resolving whether an untimely claim covered by Rule 12 may be reviewed on appeal for plain error, 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.

To prevail under the plain-error standard that petitioner would apply, 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). Petitioner cannot meet that standard here.

Regardless whether petitioner's nod of his head was involuntary and whether he properly waived his Miranda rights, the gun inevitably would have been discovered when police searched the field. See Utah v. Strieff, 136 S. Ct. 2056, 2061 (2016) (illegally obtained evidence is admissible if it "would have been discovered even without the unconstitutional source"). Petitioner had fired his gun at police officers and had been shot in the leg when the officers returned fire. Pet. App. 1a; PSR ¶ 12. At the time when petitioner was found and questioned, the police were conducting a thorough investigation of the surrounding area -- including multiple officers using metal detectors. Trial Tr. 171. Had petitioner not indicated where the gun was, police undoubtedly would have searched the area immediately around petitioner and discovered the gun, which was within five feet of him. See PSR ¶ 14. Admission of the gun into evidence was therefore not error, much less plain error. And any error in admitting evidence of petitioner's head nod was harmless in light of the proximity of the gun to petitioner when it was found.

In any event, petitioner was also convicted of possessing ammunition as a felon based on bullets that were found in his truck. Verdict Form 1; Superseding Indictment 1-2; PSR ¶ 15. Petitioner does not dispute that the ammunition was found during a lawful search of his truck (which petitioner crashed and then

ran from while being pursued by police). His conviction for possession of ammunition would therefore not be affected by a finding that his post-Miranda confession about the whereabouts of the gun was invalid.

The ammunition conviction was dismissed on the government's motion to avoid any potential multiplicity issue that might be asserted based on petitioner's concurrent conviction for possession of a gun by a felon. See United States v. Hutching, 75 F.3d 1453, 1460 (10th Cir.) (stating that "[t]he simultaneous possession of multiple firearms generally constitutes only one offense unless there is evidence that the weapons were stored in different places or acquired at different times") (citation, ellipses, and internal quotation marks omitted), cert. denied, 517 U.S. 1246 (1996). But if petitioner's conviction for possessing the gun were vacated, his conviction for possessing the ammunition -- which arises under the same statutory provision and carries the same penalties -- could be reinstated. Cf. Rutledge v. United States, 517 U.S. 292, 305-306 (1996) (indicating approval of appellate courts' authority to "direct the entry of judgment for a lesser included offense when a conviction for a greater offense is reversed on grounds that affect only the greater offense").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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