

NO. 20-5639

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

**REPLY BRIEF IN SUPPORT OF
PETITION FOR WRIT OF CERTIORARI**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	
iii	
REPLY ARGUMENT.....	1
I. The split is well developed and ripe for review	1
II. The Tenth Circuit is wrong to apply Rule 12(c)(3)'s good cause requirement on appeal	2
III. This case is a good vehicle for deciding the question presented	5
CONCLUSION.....	7

TABLE OF AUTHORITIES

	Page
Cases	
<i>Davis v. United States</i> , 140 S. Ct. 1060 (2020)	5
<i>Henderson v. United States</i> , 568 U.S. 266 (2013)	4
<i>Molina-Martinez v. United States</i> , 136 S. Ct. 1338 (2016)	5
<i>Rosales-Mireles v. United States</i> , 138 S. Ct. 1897 (2018)	3, 5
<i>United States v. Bowline</i> , 917 F.3d 1227 (10th Cir. 2019)	1
<i>United States v. Fall</i> , 955 F.3d 363 (4th Cir. 2020)	1
<i>United States v. Ferriero</i> , 866 F.3d 107 (3d Cir. 2017)	1
<i>United States v. Soto</i> , 794 F.3d 635 (6th Cir. 2015)	1, 2, 3, 4
<i>Zivotofsky v. Clinton</i> , 566 U.S. 189 (2012)	5
Rules	
Fed. R. Crim. P. 12	1, 2, 3, 4, 5
Fed. R. Crim. P. 12(b)(3)	2
Fed. R. Crim. P. 12(c)(3)	2

REPLY ARGUMENT

I. The split is well developed and ripe for review.

Most of the courts of appeals have taken a side on the question presented, and all have decided cases involving unpreserved Rule 12 issues. By the government's own count, at least six courts of appeals, including the Tenth Circuit, have held that untimely Rule 12 issues are not reviewable on appeal; while at least three courts of appeals have held that untimely Rule 12 issues may be reviewed for plain error. Brief in Opp. 12-13.¹ There are thoroughly reasoned decisions on both sides of the question. *Compare United States v. Bowline*, 917 F.3d 1227, 1229-38 (10th Cir. 2019) (holding that untimely Rule 12 claims are waived and unreviewable on appeal, absent good cause); *with United States v. Soto*, 794 F.3d 635, 647-56 (6th Cir. 2015) (holding that untimely Rule 12 issues are forfeited and subject to appellate review for plain error). In addition to the nine that have clearly taken a side, the three remaining courts of appeal have in fact decided appeals raising unpreserved Rule 12 issues, albeit without taking a position on the question presented. There is no realistic prospect that the divide will resolve without this Court's intervention. No further development is necessary.

¹ This count excludes the Third Circuit, which has previously deemed an unpreserved Rule 12 issue waived, but has since stated the question remains open, *see United States v. Ferriero*, 866 F.3d 107, 122 n.17 (3d Cir. 2017); and the Fourth Circuit, which has previously reviewed an unpreserved Rule 12 issue for plain error, but has since stated the question remains open, *see United States v. Fall*, 955 F.3d 363, 373 (4th Cir. 2020).

II. The Tenth Circuit is wrong to apply Rule 12(c)(3)'s good cause requirement on appeal.

The government is wrong to insist that the Tenth Circuit correctly “determined that Rule 12(c)(3) precludes appellate review of an untimely suppression argument without a showing of good cause,” Brief in Opp. 5. As the Sixth Circuit’s well reasoned decision in *United States v. Soto*, 794 F.3d 635 (2015), explains, the term “waiver” was eliminated from the rule precisely “because the [Advisory Committee] believed that courts were incorrectly treating the failure to file a timely pretrial motion as an intentional relinquishment of a known right, and therefore an absolute bar to appellate review.” *Id.* at 652. This “conscious decision to abandon the term ‘waiver’” precludes the courts of appeals from continuing to “treat a party’s failure to file a timely Rule 12(b)(3) pretrial motion as an intentional relinquishment of a known right.” *Id.*

The good cause standard set forth in Rule 12(c)(3) applies to district courts only. Although it is true that the Federal Rules of Criminal Procedure generally apply to federal criminal proceedings in the federal courts of appeal and define “court” to mean “a federal judge performing functions authorized by law,” *see* Brief in Opp. 6-7 (citing Fed. R. Crim. P. 1), “the more specific Rule 12 refers repeatedly to ‘the court’ in nearly all of its subparts, and each subpart clearly addresses the functions of district courts—not appellate courts,” *Soto*, 794 F.3d at 653. To the extent that the text of the rule is ambiguous, the “rulemaking history of the 2014

amendment to Rule 12 strongly indicates that the Rule’s drafters were crafting a rule to apply to the district courts, and not to the courts of appeals.” *Id.* at 654.

Contrary to the arguments made by the government (at 7-8, 13-15), it makes sense to apply the good cause standard to untimely Rule 12 issues asserted in the district court, while applying the plain error standard to untimely Rule 12 claims raised on appeal. The two standards serve distinct purposes and are fully compatible as a matter of sound legal practice.

The good cause standard requires the defendant to provide an excuse for his delay. *See Soto*, 794 F.3d at 655 n.18. For example, good cause may exist when the basis for the Rule 12 motion was not previously available. If the defendant is able to provide an excuse, then his motion will be decided by the trial court in the first instance, with a full opportunity to develop the record. And if the defendant fails to persuade the trial court to grant his motion, the issue will then be preserved for appeal.

The plain error standard, by contrast, is an appellate standard of review that allows appellate courts to reach unpreserved issues in order to correct obvious errors in the interests of justice. To prevail under this standard, an appellant must show that a “clear or obvious” error occurred, which affected his substantial rights, and “seriously affects the fairness, integrity or public reputation of judicial proceedings.” *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1904-05 (2018). If the inadequacies in the record developed before the district court prevent the claimed error from meeting this standard, *see* Brief in Opp. 14, the appeal will fail.

A defendant who is able to meet the good cause standard always has an incentive to do so. Indeed, the application of the plain error standard to Rule 12 issues raised on the first time on appeal actually “*encourages* parties to meet deadlines set by district courts and to seek leave in the district court to file late motions.” *Soto*, 794 F.3d at 655 (emphasis added). “By bringing the error to the district court’s attention in the first instance, the late movant has a better opportunity to develop a record to address why the motion is untimely and how the error is prejudicial,” as well as the opportunity to “address non-obvious defects, which an appellate court would not be authorized to correct” on plain error review. *Id.* at 655-56. There is no tactical reason why a defendant would intentionally deprive himself of these benefits in order to raise a Rule 12 issue for the first time on appeal, subject to the more onerous requirements of the plain error standard. *Cf. Henderson v. United States*, 568 U.S. 266, 276 (2013) (“If there is a lawyer who would deliberately forego 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.”).

Nor is there any merit to the government’s contention (at 15) that a post-conviction ineffective assistance of counsel claim would provide an adequate substitute for appellate review of forfeited Rule 12 claims. Mr. Cain would not be entitled to assistance of counsel in any post-conviction proceeding. Shunting plain errors into post-conviction proceedings would be inefficient and undermine the interest in finality. Instead of requiring defendants with obvious, but forfeited, Rule

12 claims to institute new post-conviction proceedings on their own, the courts of appeal should review those claims for plain error when presented on direct appeal—as they do in countless other cases on a daily basis.

III. This case is a good vehicle for deciding the question presented.

This decision below was decided on a single ground: Mr. Cain’s purported waiver of any claim that his interrogation was unconstitutional. Regardless of the merits of the underlying constitutional claims, the question presented warrants this Court’s consideration. Indeed, this Court typically decides threshold legal questions without addressing the merits, instead “remand[ing] for resolution of any claims the lower courts’ errors prevented them for addressing.” *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012); *e.g.*, *Davis v. United States*, 140 S. Ct. 1060, 1062 (2020) (deciding antecedent procedural question regarding standard of review and remanding to the court of appeals to address merits); *Rosales-Mireles*, 138 S. Ct. at 1911 (same); *Molina-Martinez v. United States*, 136 S. Ct. 1338, 1349 (2016) (same).

To be clear, however, Mr. Cain’s underlying claims are serious, and if the Tenth Circuit had reached them, it is likely that he would have prevailed. The admissions Mr. Cain made at gunpoint, while surrounded by police officers and bleeding to death in a field, were plainly involuntary. The government does not even attempt to argue otherwise.

Rather, it contends that any error in admitting the evidence was harmless because the gun itself would have been admissible anyway, and the conviction for unlawful possession of ammunition would stand. *See Brief in Opp.* 16-17. But Mr.

Cain's theory at trial was that the police had planted the gun in order to cover up the shooting of an unarmed man—a theory compelling enough that the first jury was unable to reach a verdict. Against this backdrop, evidence that Mr. Cain had effectively admitted possessing the firearm in response to police questioning was prejudicial, even assuming the gun was otherwise admissible under the inevitable discovery doctrine.

Nor is it true that any error was harmless with respect to the ammunition count. The ammunition in question consisted of a handful of bullets near the bottom of the center console in Mr. Cain's truck, on top of some loose change and beneath a couple of letters addressed to his mother. Mr. Cain's defense was essentially that he didn't know they were there. The unlawfully admitted evidence—and particularly the evidence that Mr. Cain had admitted possessing a firearm to the law enforcement officers—undermined that defense in at least two ways. First, the evidence that he knowingly possessed a firearm, standing alone, supported an inference that he also knowingly possessed ammunition. Second, the contradiction between the statements Mr. Cain made in response to police questioning and his defense at trial undermined his credibility, reducing the likelihood that the jury would believe he was unaware of the bullets in his vehicle. Under these circumstances, there is a reasonable probability that the unlawfully admitted evidence affected the jury's verdict on the ammunition count as well.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,
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