No. _____

IN THE

Supreme Court of the United States

TERRY LEE OCKERT, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

KEITH BRADLEY
Counsel of Record
BRENT R. OWEN
SCHELEESE GOUDY
SQUIRE PATTON BOGGS
(US) LLP
1801 California Street
Denver, CO 80202
(303) 830-1776
keith.bradley@squirepb.com
brent.owen@squirepb.com
scheleese.goudy@squirepb.com

QUESTION PRESENTED

Before 2014, Federal Rule of Criminal Procedure 12(e) said that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline," but "[f]or good cause, the court may grant relief from the waiver." A 2014 amendment deleted that provision and replaced it with Rule 12(c)(3), which now says, "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."

The question presented is:

Whether, under current Rule 12, after a defendant has made a timely motion to suppress evidence that did not include a particular argument, should the court of appeals review that argument for plain error under Rule 52, without requiring any special good-cause showing—the rule in four circuits—or must the defendant first prove good cause to the court of appeals—as in the Tenth Circuit and four other circuits?

PARTIES TO THE PROCEEDING

The caption contains the names of all of the parties to the proceedings.

RELATED PROCEEDINGS

United States v. Ockert, No. 19-3049 (10th Cir. Oct. 5, 2020) (decision below)

United States v. Ockert, No. 6:17−cr−10151−EFM−1 (D. Kan. Feb. 22, 2019) (judgment of conviction)

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

TABLE OF AUTHORITIES—Continued

Page(s)

Constitutional Provisions

Statutes

Other Authorities

INTRODUCTION

Petitioner Terry Ockert was convicted of unlawful possession of a firearm after a warrantless search, conducted at length in the dead of night, around his mother's car parked at his girlfriend's house. His conviction turned on the admissibility of evidence from that search, which was the subject of an extensive hearing. The Tenth Circuit refused to entertain Ockert's arguments that searching around the car in the private driveway was unconstitutional, because it deemed them insufficiently similar to the arguments he made to the district court. In the Tenth Circuit, an argument regarding suppression that was not made in a pretrial motion is automatically waived, available only in the "rarely granted" case the circuit court finds good cause.

The Tenth Circuit's waiver rule originally came from the old text of Federal Rule of Criminal Procedure 12(e). That rule used to say that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised" before trial. Fed. R. Crim. P. 12(e) (2012). A 2014 amendment deleted Rule 12(e). Multiple circuits have recognized that Rule 12 now has a different meaning: The amendment eliminated the automatic waiver rule. But the Tenth Circuit and several others adhere to the old doctrine anyway.

There is a deep and acknowledged split on the question presented. In some parts of the country, a defendant in Ockert's position would at least receive plain-error review of his claim for exclusion; such review would likely result in a reversal of his conviction. In the Tenth Circuit and in several others, review is barred on the grounds of waiver. This Court's intervention is necessary. The rules for criminal

procedure in the federal courts must be uniform throughout the country, and the split is unlikely to resolve itself without this Court's guidance.

This case is an ideal vehicle. Because Ockert did move before trial for the suppression of the key evidence, the district court developed a copious factual record to support plain-error review, and the district court's error was indeed plain.

At bottom, the Tenth Circuit and the circuits joining its position are wrong. Just last Term, the Court stressed that the circuit courts should adhere to what the Federal Rules say, without creating their own extra-textual exceptions. *Davis v. United States*, 140 S. Ct. 1060 (2020). "Our cases," the Court pointed out, "do not purport to shield any category of errors from plain-error review." *Id.* at 1061. Nothing in the current Rules suggests a failure to make a particular argument should constitute an automatic waiver. The Tenth Circuit persists in a doctrine that is based on the history of the Federal Rules instead of their actual text.

The petition should be granted.

OPINIONS AND ORDERS BELOW

The decision of the Tenth Circuit is reported at 829 F. App'x 338 and is reproduced at Pet. App. 1a. The district court judgment under review was unreported and is reproduced at Pet. App. 20a.

JURISDICTION

The Tenth Circuit entered judgment on October 5, 2020. Pet. App. 1a. This petition is timely filed pursuant to this Court's order of March 19, 2020. The Court has jurisdiction under 28 U.S.C. 1254(1).

RULES INVOLVED

Pertinent provisions of the Federal Rules of Criminal Procedure are reproduced at Pet. App. 39a and 44a.

STATEMENT

1. Federal Rule of Criminal Procedure 12 authorizes pretrial motions for "any defense, objection, or request that the court can determine without a trial on the merits." Fed. R. Crim. P. 12(b)(1). Certain objections and defenses 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 deadline for such motions is the beginning of trial, unless the court sets an earlier deadline. Fed. R. Crim. P. 12(c)(1).

Originally, Rule 12(b) covered only motions "based on defects in the institution of the prosecution or in the indictment or information"; and it stated that "[f]ailure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." Fed. R. Crim. P. 12(b)(2) (1944). That version was the parallel of Federal Rule of Civil Procedure 12, under which certain case-initiation defects are waived if not raised in a pre-answer motion. Fed. R. Civ. P. 12(h). *See* Advisory Committee's 1944 Note on Fed. R. Crim. P. 12, 18 U.S.C. App., p.64.

A 1974 amendment expanded the set of claims that must be raised before trial to encompass motions to suppress evidence. Subsequent amendments eventually moved the waiver concept to Rule 12(e). At that point, Rule 12 said, "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." Fed. R. Crim. P. 12(e) (2012).

2. The Tenth Circuit, and many others, interpreted Rule 12(e) to mean a defendant has waived any motion covered by Rule 12(b)(3) that the defendant did not make before trial. *United States v. Burke*, 633 F.3d 984, 988 (10th Cir. 2011). Moreover, even if the defendant had made the requisite pretrial motion, the defendant waived any "specific argument" not raised in that motion. *Id.*; *see also United States v. Pope*, 467 F.3d 912, 918-19 (5th Cir. 2006). A court might still review such an argument if the defendant could show "good cause" for not having raised the argument before trial, but "[w]e rarely . . . grant relief under the good-cause exception." *Burke*, 633 F.3d at 988.

The Tenth Circuit recognized that the strict waiver rule was in tension with the general prescription in Rule 52 that an unpreserved claim is reviewed for plain error. *Id.* The automatic waiver doctrine was also contrary to *United States v. Olano*, 507 U.S. 725 (1992). "[T]he failure to make the timely assertion of a right," *Olano* explained, constitutes "forfeiture." *Id.* at 733. "Waiver is different from forfeiture[:] . . . [W]aiver is the intentional relinquishment or abandonment of a known right." *Id.* Explaining the application of Rule 52, *Olano* held that "[i]f a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733-34. Under that rubric, a suppression issue not raised

before trial should ordinarily be only forfeited, and subject to plain-error review if raised on appeal, absent circumstances indicating a genuine waiver.

Still, Rule 12(e) plainly said such claims were "waived." In 2011, the Tenth Circuit noted that nearly 20 years had passed since *Olano*, and "[t]here has been ample opportunity to change the language of Rule 12(e)." *Burke*, 633 F.3d at 991. That the waiver language in Rule 12(e) remained, the court concluded, justified adhering to a waiver doctrine that would otherwise seem contrary to the broader rules.

3. The 2014 amendment made the necessary change; it deleted paragraph (e) entirely. Now (and throughout Ockert's case) nothing in Rule 12 mentions waiver. Instead, the rule says, "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). The Advisory Committee Notes explain:

> "Rule 12(e) provided that a party 'waives' a defense not raised within the time set under Rule 12(c). 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)." Advisory Committee's 2014 Note on Fed. R. Crim. P. 12, 18 U.S.C. App., p.68.

4. In 2019, the Tenth Circuit "reject[ed] the view that the amendments effect any relevant change." *United States v. Bowline*, 917 F.3d 1227, 1229 (10th Cir. 2019). *Bowline* relied on *Davis v. United States*, 411 U.S. 233 (1973), which had enforced waiver under the old Rule 12 but "did not require an intentional relinquishment of a known right"; "a waiver barred appellate (or collateral) review absent a showing of

cause and prejudice." 917 F.3d at 1232 (citing 411 U.S. at 234). Although *Davis* itself had operated under a rule that explicitly imposed a "waiver," the Tenth Circuit concluded that "elimination of the word *waiver* from the Rule did not change the operative standard." *Id.* at 1235. Thus, in the Tenth Circuit it remains the law, despite the 2014 amendment, that an argument not made in a pretrial motion to suppress is automatically waived, and can be considered on appeal only if the defendant shows, to the satisfaction of the court of appeals, good cause for the waiver. *Id.* at 1237.

5. On June 18, 2017, petitioner Ockert was headed to visit his girlfriend. *See generally* Pet. C.A. Br. 5-12 (reciting the factual background).

Just after 1 a.m., police officer Kaleb Dailey, responding to an unrelated call, drove up behind Ockert. *Id*. at 5. Officer Dailey did not turn on his emergency lights, and the dark highway gave Ockert no way to see that the car coming up behind him was a police car. *Id*. at 6. (Dailey did have his dashboard camera running, and the resulting video is in the record. *See id*. at 3, n.1.) During this interaction, Ockert's wheels briefly touched the centerline of the highway. *Id*. at 7.

Eventually Ockert pulled into a residential driveway—the driveway of his girlfriend's house, the house he was visiting. *Id*. at 7, 9. As he did so, Officer Dailey activated his emergency lights and prepared to stop Ockert for possibly violating Kansas's law requiring a driver to stay in his lane. *Id*. at 7.

6. Ockert stepped out of the car and Officer Dailey detained him. *Id*. at 9. Their interactions took place near Officer Dailey's vehicle, a substantial distance from the car Ockert was driving. *Id*. Another officer, Officer Rexroat, arrived. *Id*. at 10. While

Ockert was talking with Officer Dailey, Officer Rexroat walked over to the car, parked some distance away up a small rise in the driveway of the house. *Id*. Rexroat stated loudly that he thought he smelled marijuana, and he then scrutinized the environs of the car, and the car itself, with his flashlight. *Id*. at 11. After Officers Rexroat and Dailey (in turn) conducted a couple of these searches, they saw a baggie in the front seat. *Id*. at 11-12. After several more searches, they saw a gun in the front seat of the car. *Id*.

Eventually, the officers arrested Ockert for driving without a license. *Id*. at 9-10.

7. A grand jury indicted Ockert for violating 18 U.S.C. 922(g)(1), which prohibits a person with a prior felony conviction from possessing a firearm. *Id*. at 12. The key evidence would be the firearm found in the front seat of the car Ockert was driving.

Ockert moved to suppress that evidence. 1 R. 106-108. He objected that the traffic stop was an unreasonable seizure and that, during the stop, the officers had conducted a search without a warrant. 1 R. 120. The government had the burden to prove that some exception justified the warrantless search. *See McDonald v. United States*, 335 U.S. 451, 456 (1948); *United States v. Maestas*, 2 F.3d 1485, 1491 (10th Cir. 1993) (citing 1 Wayne LaFave, Criminal Procedure § 10.4, at 790 (1984)).

The government asserted what it called the "automobile exception," under which "[p]robable cause to search a vehicle is established if, under the totality of the circumstances, there is a fair probability that the car contains contraband or evidence." *United States v. Vasquez-Castillo*, 258 F.3d 1207, 1212 (10th Cir. 2001); Gov't C.A. Br. 10. The government relied on Officer Rexroat's claim to smell marijuana, which

it said gave the officers probable cause to search for that substance. *Id.* at 10. The officers described their activity as a "plain-view search." 3 R. 66. In the course of that search, the government said, the officers saw the baggie inside the car in plain view. *Id.* at 66-67. Because the baggie might contain methamphetamine (it was never tested and was not the basis of a charge), the government continued, the officers were justified in their continued searching during which they eventually discovered the firearm. 1 R. 139-40.

In reply, Ockert urged the district court not to believe Rexroat had smelled marijuana. 1 R. 156-57. Without that claim, the government's excuse for a warrantless search would collapse. Ockert also contended that even had the search around the car been justified, the baggie could not justify any further warrantless searching under "plain view" doctrine because it was not actually in plain view and was not obviously incriminating. 1 R. 157-58.

8. The district court declined to believe Officer Rexroat had smelled marijuana. It noted that "I'm suspicious enough of that that I'm putting no stock in their smelling marijuana with respect to anything that happened that night. 3 R. 137.

The court nonetheless held "[t]he Deputies had probable cause to search the vehicle under the plain view doctrine" because they had seen the plastic bag. Pet. App. 28a. Explaining how the officers saw the plastic bag in the first place, the district court reasoned, "Deputy Dailey had a lawful right of access to the vehicle because he stopped Ockert pursuant to a lawful traffic stop." Pet. App. 30a.

After the denial of his motion to suppress, Ockert pleaded guilty, conditional upon the outcome of an appeal regarding the denial.

9. On appeal, Ockert contended the traffic stop was unlawful, Pet. C.A. Br. 24-30, and he argued the district court was incorrect to hold the officers could search the car just because there was a traffic stop, *id.* at 36-39. The occurrence of a traffic stop does not, he said, justify full and untrammeled access to a vehicle and its environs. Ordinarily a traffic stop occurs on a public road, and officers are able to walk around the car and look where they like because the car and officers are on public property. This Court has never accepted, and has in fact, rejected, claims that simply because the police have detained a driver they are entitled to search the car. In this case, the car was parked in a private, residential driveway. To search around the car, the officers had to walk a substantial distance from Ockert, who was detained, and invade the curtilage of the private residence he was visiting. They had no entitlement to do that without a warrant. The "plain view" doctrine applies only when an officer is lawfully in the place from which he views incriminating evidence; because Officers Dailey and Rexroat had no justification to search around the driveway without a warrant, they could not lawfully be in position to walk repeatedly around the car peering in its windows.

The parties disputed whether Ockert can raise this issue on appeal. The government said Ockert had not raised to the trial court whether the officers could conduct a warrantless search on a private driveway. Gov't C.A. Br. 28. Ockert pointed out

that during the district-court proceedings he had contested the justification for a warrantless search as the government had offered it. The notion that the officers did not even need probable cause because the traffic stop gave them the right to search the car arose newly in the district court's decision. Pet. C.A. Reply Br. 11-13.

10. The Tenth Circuit affirmed the judgment. It held, over a dissent by Judge Lucero, that the traffic stop itself was reasonable. Pet. App. 8a-10a. With respect to the search during the stop, the court refused to consider the substance of Ockert's argument. Relying on *Bowline*, the panel (unanimously on this point) held that Ockert had waived his arguments because his appeal argument "about why the plain view doctrine should not apply to the seized evidence is notably different than the plain view doctrine argument that he brought below." Pet. App. 11a. The panel recognized that "both here and below he argued that the plain view doctrine should not apply"; but Ockert's specific argument that the officers "were not 'lawfully in position' to access Ockert's vehicle because it was on a private driveway" was, it held, not the exact argument he made to the trial court. Pet. App. 11a-12a.

Under Tenth Circuit precedent, an appellant can ordinarily challenge a district court's decision as made, even though it addresses an issue that the appellant had not raised to the district court. Pet. App. 13a (citing *Tesone v. Empire Marketing Strategies*, 942 F.3d 979, 992 (10th Cir. 2019)). But that avenue was not available to Ockert, the Tenth Circuit said, because an appellant cannot raise on appeal an issue that he had waived; and an argument for suppression not presented in a timely Rule

12(b)(3) motion is automatically waived—even under the post-2014 version of Rule 12 applicable to this case. Pet. App. 13a.

Ockert remains incarcerated pursuant to the district court's judgment.

REASONS FOR GRANTING THE PETITION

I. THERE IS AN ACKNOWLEDGED AND DEEP SPLIT ON THE QUESTION PRESENTED.

The circuits are fundamentally divided on what Rule 12 means for an argument about the suppression of evidence that the defendant did not present during pretrial proceedings.

A. Four circuits hold that a Rule 12(b)(3) issue not raised to the district court receives plain-error review on appeal.

The Sixth Circuit, analyzing the 2014 amendment at length, concluded that a defendant cannot be considered to waive an issue not raised in a pretrial motion, and that a court of appeals reviews such an unpreserved issue for plain error, without requiring the defendant to show good cause for the omission. *United States v. Soto*, 794 F.3d 635 (6th Cir. 2015).

First, the court noted that the 2014 deletion of the word "waived" was "quite intentional." *Id.* at 652. "[T]he 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.* The Sixth Circuit noted the statement of Judge Sutton, a judge of that court who was chair of the Standing Committee, that the old Rule 12(e) concept of waiver was "drafted before *Olano* and 'makes no sense now.'" *Id.* at 6 (quoting *Advisory Committee on Criminal Rules, Minutes* 3 (Apr. 25, 2013)). Accordingly, "[w]e hold that under the current version of

Rule 12(c)(3), we do not treat the failure to file a motion as a waiver unless the circumstances of the case indicate that the defendant intentionally relinquished a known right." *Id.* at 655.

The Sixth Circuit further considered whether the "good cause" standard in new Rule 12(c)(3) limits the availability of appellate review. The rule says "a court" may consider an untimely objection "if the party shows good cause." Fed. R. Crim. P. 12(c)(3). *Soto* concluded that the "court" to which this sentence is addressed is the district court, which is thereby authorized to entertain an untimely motion. 794 F.3d at 653-54. The Sixth Circuit considered whether, by using the phrase "a court" instead of "the court," the rule prescribes a good-cause standard for the appellate court as well as the trial court. *Id.* at 653. But the court noted it would be unusual, given that overall Rule 12 is clearly addressed to district courts, for this one usage of "court" in Rule 12 to be a restriction on courts of appeals. *Id.* at 654. The Sixth Circuit then examined the history of the 2014 amendment closely, and it cited multiple lines of evidence showing the drafters of the amendment intended Rule 12(c)(3) to be addressed to district courts. *Id.*

Accordingly, the court held that the "good cause" provision in Rule 12(c)(3) authorizes a district court, when it finds good cause, to entertain an untimely motion. *Id.* at 655. If the district court finds good cause, the motion will then be properly before the district court, and the district court's decision on it will be subject to the same sort of review as other preserved issues. *See id.* at 656 (noting that after a good-

cause finding, a district court could "address non-obvious defects" that would not constitute plain errors). But for a Rule 12(b)(3) motion not made before trial and not later accepted by the district court under a good-cause finding—in *Soto*, a motion to sever counts for separate trial—the Sixth Circuit simply "review[s] for plain error." *Id.* The defendant is not required to show good cause to the court of appeals to earn that plain-error review.

The Fifth and Eleventh Circuits are in accord. According to the Fifth Circuit, "[t]aken together, the amendment and the [Advisory Committee Notes] make clear that our prior approach does not endure." *United States v. Vasquez*, 899 F.3d 363, 372-73 (5th Cir. 2018). *Vasquez* then reviewed an unpreserved challenge to the sufficiency of the indictment for plain error, without requiring a showing of good cause for the failure to raise the issue before trial. *Id.* The Eleventh Circuit, addressing an unpreserved claim of a multiplicitous indictment, held that "[u]nder the new version of the rule . . . [defendant's] challenge is forfeited rather than waived," so "we review for plain error" without requiring a showing of good cause. *United States v. Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015).[1] The Fourth Circuit has followed the Sixth Circuit as well. *United States v. Mathis*, 932 F.3d 242, 256 (4th Cir. 2019) (citing *Soto*; holding district court had not abused its discretion by rejecting motion as untimely; and proceeding to review the substance of the untimely argument).

[1] An unpublished decision from the Eleventh Circuit has said that the court's pre-2014 cases about waiver of Rule 12(b)(3) motions are still binding. *United States v. Stiff*, 795 F. App'x 685, 689 n.3 (11th Cir. 2019) (unpublished). Under Eleventh Circuit rules, "[u]npublished opinions are not considered binding precedent," 11th Cir. R. 36-2; and that court's published decision in *Sperrazza* held quite clearly that the 2014 amendment changed the import and effect of Rule 12.

B. Five circuits hold that appellate review is available only in the rare case when a defendant shows "good cause" for omitting a pretrial argument.

By contrast, the Tenth Circuit, as described above, holds a defendant has waived any particular Rule 12(b)(3) argument not made before trial, and "we will not review an untimely Rule 12 argument absent good cause." *Bowline*, 917 F.3d at 1237. Several other circuits are in accord. *See United States v. Sweeney*, 887 F.3d 529, 534 (1st Cir. 2018) ("Even when the district court rules on an untimely motion, as the court did here, an untimely motion to suppress is deemed waived unless the party seeking to suppress can show good cause as to the delay."); *United States v. O'Brien*, 926 F.3d 57, 82-83 (2d Cir. 2019); *United States v. Daniels*, 803 F.3d 335, 351-52 (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) (per curiam).[2] The Seventh Circuit acknowledged the language change, but nonetheless relied on pre-amendment precedent to conclude there is "an antecedent good-cause requirement." *United States v. McMillian*, 786 F.3d 630, 635-36 (7th Cir. 2015).

C. The split is firmly established.

The Tenth Circuit has explicitly acknowledged the split. *Bowline*, 917 F.3d at 1236-37 ("We recognize that other circuits have said that they would apply plain-error review to untimely Rule 12 claims raised for the first time on appeal without requiring good cause."). The government has also acknowledged the split. U.S. Br.

[2] A Third Circuit case with "an unusual posture" created uncertainty about whether that circuit adheres to its pre-2014 precedents. *United States v. Fattah,* 858 F.3d 801, 807 (3d Cir. 2017) (declining to enforce waiver because raising the argument would have been a "wasteful formality"). A subsequent decision made clear that the question remains open in the Third Circuit. *United States v. Ferriero*, 866 F.3d 107, 122 n.17 (3d Cir. 2017).

in Opp. at 18-19, *Bowline v. United States*, 140 S. Ct. 1129 (2020) (No. 19-5563) ("[D]isagreement 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").

Since then, the split has only deepened. The Tenth Circuit adheres to its view and applied the *Bowline* waiver doctrine in Ockert's appeal. Meanwhile, the Sixth Circuit has reiterated its position. While *Soto*, discussed above, involved a question about the propriety of joinder, the Sixth Circuit has now applied its reading of post-2014 Rule 12 specifically to suppression motions. *United States v. Prabhu Ramamoorthy*, 949 F.3d 955, 962 (6th Cir. 2020). That is the same type of claim that Ockert raised.

Thus, it is now clear that a defendant like Ockert gets starkly different criminal process in the Fourth, Fifth, Sixth, and Eleventh Circuits than what is available in the Tenth Circuit and other courts following it. Had Ockert been convicted within one of those first four circuits, he would have been able to raise his suppression arguments on appeal, and at worst would have faced plain-error review. Instead, he was deemed to have waived any specific argument he did not make in his original suppression proceedings. It is theoretically possible to obtain appellate review by showing good cause, but the Tenth Circuit has repeatedly stressed how rare and unusual it is for that court to accept a good-cause showing. *See Burke*, 633 F.3d at 989, 991 (noting the Court "rarely . . . grant[s] relief under the good-cause exception"); *see also*

United States v. Hamilton, 587 F.3d 1199, 1216 (10th Cir. 2009) ("Relief under this 'narrow exception' is 'rarely granted.' ").

Courts on both sides of the split have analyzed the question extensively. *Soto* and *Bowline*, representing the two competing views, both reviewed the history of the 2014 amendment and discussed their reasoning at length. Many of the other opinions cited above reached their respective conclusions with full awareness of the 2014 amendment and of the consequences for concluding either that the current rule either does or does not require an appellate good-cause finding. Given the entrenched views on both sides, there is no prospect that these courts will change their positions absent this Court's guidance.

II. THE QUESTION PRESENTED IS IMPORTANT AND RECURRING.

A. The Court should promote uniform administration of the Federal Rules.

Ockert's petition raises an issue of critical importance about the interpretation of the Federal Rules of Criminal Procedure. This Court has regularly regarded conflicts on such issues as warranting the Court's review. *See, e.g.*, *Holguin-Hernandez v. United States*, 140 S. Ct. 762, 764-65, (2020) (resolving split over whether "defendant's district-court argument for a specific sentence . . . preserved his claim on appeal"). The Court has previously granted certiorari to "resolve conflicts among the Circuits on the legitimacy of . . . placing the burden of plain error on a defendant appealing on the basis of Rule 11 error raised for the first time on appeal," *United States v. Vonn*, 535 U.S. 55, 62 (2002); to resolve a conflict "as to whether misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is subject to the harmless-

error rule," *United States v. Lane*, 474 U.S. 438, 439 (1986); and to "resolve [a] conflict" about the "articulation of *Olano*'s fourth prong," *Rosales-Mireles v. United States*, 138 S. Ct. 1897, 1906 (2018). Here too, this court should exercise its authority to ensure the "proper and uniform administration of the Federal Rules of Criminal Procedure." *United States v. Robinson*, 361 U.S. 220, 222 (1960).

B. Requiring a good-cause showing for unpreserved Rule 12(b)(3) issues makes a material difference to many defendants' substantive rights.

The Tenth Circuit's approach effectively precludes appellate review of a broad class of evidentiary issues. In contrast, the plain-error standard provides a meaningful opportunity for appellate courts to correct particularly significant errors—precisely as Rule 52(b) contemplates.

The good-cause standard, on the one hand, is exceedingly narrow and difficult to satisfy. The Tenth Circuit has said it is a "narrow exception" only "rarely granted," and thus virtually never allows appellate review of issues to which it applies. *Hamilton*, 587 F.3d at 1215-16 (the "narrow exception" of good cause "can offer" the defendant "no succor").

Plain-error review is also "difficult," *Puckett v. United Sates*, 556 U.S. 129, 135 (2009), but not so nearly impossible as the good-cause showing that the Tenth Circuit demands. There are copious examples of courts that have found plain error, warranting reversal, regarding the admissibility of evidence. *E.g. United States v. Wernick*, 691 F.3d 108, 117 (2d Cir. 2012); *United States v. Moore*, 375 F.3d 259, 264-65 (3d Cir. 2004); *United States v. France*, 164 F.3d 203, 207 (4th Cir. 1998); *United States v. Merriweather*, 78 F.3d 1070, 1077-78 (6th Cir. 1996); *United States v. Williams*,

133 F.3d 1048, 1051-53 (7th Cir. 1998); *United States v. Millard*, 139 F.3d 1200, 1208 (8th Cir. 1998); *United States v. Cabrera*, 222 F.3d 590, 595 (9th Cir. 2000); *United States v. Hill*, 749 F.3d 1250, 1263 (10th Cir. 2014); *United States v. Hawkins*, 934 F.3d 1251, 1264 (11th Cir. 2019).

More fundamentally, the plain-error and good-cause standards measure different, indeed opposite, aspects of a claim. In plain-error review, a court assesses whether the asserted error was "clear or obvious"; whether the issue was "intentionally relinquished"; and whether there was a "reasonable probability that, but for the error, the outcome of the proceeding would have been different." *Rosales-Mireles*, 138 S. Ct.at 1904-05. The standard is "focus[ed] . . . on principles of fairness, integrity, and public reputation." *Id.* at 1906. By contrast, good cause turns simply on whether "sufficient information was available to defense counsel before trial that would have enabled him to frame" the argument later presented on appeal. *Burke*, 633 F.3d at 988 (quoting *United States v. Wilson*, 115 F.3d 1185, 1191 (4th Cir. 1997)). A defendant cannot assert good cause based on the clarity or obviousness of the error, and it does not matter that the error was particularly harmful. Quite the opposite: The more glaring and consequential an error—and thus the stronger the case for a plain-error reversal—the harder it would be for a defendant to show he could not have spotted and raised the issue before trial.

This difference plays out in real cases. For example, in *United States v. Buchanon*, the Sixth Circuit held that a traffic stop was an unconstitutional seizure; the resulting evidence should have been suppressed; and the convictions had to be

reversed. 72 F.3d 1217, 1226, 1228 (6th Cir. 1995). One defendant had "forfeited" the argument by not making it with sufficient specificity in his pre-trial motion. *Id.* at 1226-27. There could not have been good cause for that omission, since the co-defendant had made the necessary arguments in his motion. *See id.* at 1226.[3] Yet the Sixth Circuit found the error plain and reversed the conviction of the forfeiting defendant too. *Id.* at 1227. This is exactly the sort of situation in which, in the Tenth Circuit, a defendant absolutely loses the opportunity to appeal an issue, with no chance for even plain-error review. *See Hamilton*, 587 F.3d at 1213-14 ("When a motion to suppress evidence is raised for the first time on appeal, we must decline review. . . . We have held that this waiver provision applies not only to the failure to make a pre-trial motion, but also to the failure to include a particular argument in the motion.") (citations omitted); Pet. App. 11a ("This 'waiver provision,' . . . 'applie[s] not only to the failure to make a pretrial motion, but also to the failure to include a particular argument in the motion.'").

Thus, if *Buchanon* had been decided under the law of the Tenth Circuit, the forfeiting defendant would have remained in prison, despite the existence of an error that was indeed plain and prejudicial. Conversely, if Ockert's case had been decided in the Sixth Circuit—or the Fourth, Fifth, or Eleventh Circuit—he would have

[3] The Sixth Circuit already, before 2014, did not employ the Tenth Circuit's stringent reading of Rule 12 under which a defendant who has made a timely Rule 12(b)(3) motion nonetheless waives any specific argument not made in the motion. The divergence has become even more severe now that, after the 2014 amendment, the Sixth Circuit and courts on that side of the split do not require good cause for an appeal even in the absence of a Rule 12(b)(3) motion.

obtained at least plain-error review of his argument that the officers could not lawfully search around the vehicle parked on a private residential driveway.

C. The possibility of postconviction claims for ineffective assistance of counsel does not obviate plain-error review.

In the government's opposition to the *Bowline* petition, it suggested that the good-cause restriction has no practical consequence because a defendant could file a post-conviction petition claiming ineffective assistance of counsel. U.S. Br. in Opp. at 21, *Bowline v. United States*, 140 S. Ct. 1129 (2020) (No. 19-5563). That notion is no reason to allow the split to persist.

Most obviously, the government's theory runs headlong into this Court's longstanding observation that "[h]abeas corpus . . . is not designed as a substitute for direct review." *Teague v. Lane*, 489 U.S. 288, 306 (1989) (quoting *Mackey v. United States*, 401 U.S. 667, 682 (1971) (HARLAN, J., concurring in the judgment and dissenting in part)). The differences are legion. For example, on direct review a court assesses whether an error was plain in light of the law, including applicable precedent, existing during the appeal. *Henderson v. United States*, 568 U.S. 266 (2013). If the law shifted after trial, a defendant is unlikely to be able to show counsel was ineffective for not anticipating it. After all, as the Court observed in *Henderson*, the district court may well have "known that his ruling (at the time he made it) was not error." *Id.* at 277. Trial counsel would not likely be ineffective for thinking the same.

Moreover, direct review is the prescribed process for correcting trial errors, and accordingly a defendant has a right to counsel for a direct appeal. The Court "has never held that the Constitution guarantees a right to counsel" for postconviction

proceedings. *Davila v. Davis*, 137 S. Ct. 2058, 2068 (2017). An unrepresented defendant likely will not present a given claim as effectively as the defendant assisted by counsel. It is inappropriate to suggest that the possibility of litigating an unpreserved evidentiary argument indirectly through the vehicle of a postconviction ineffective-assistance claim is a real substitute for simply reviewing the actual suppression claim, directly, on appeal.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THE CIRCUIT SPLIT.

Ockert's case squarely presents the question whether, in light of the 2014 amendments to Rule 12, a defendant must show good cause to the court of appeals to obtain plain-error review of an argument not presented in a Rule 12(b)(3) motion. Resolution of the question in Ockert's favor would lead, ultimately, to the vacatur of his conviction.

A. The underlying claim, which the Tenth Circuit's interpretation of Rule 12 foreclosed, is meritorious.

If the Court reverses the Tenth Circuit's decision with respect to its imposition of a good-cause requirement, the Tenth Circuit can then review Ockert's suppression argument for plain error. He will prevail in that review.

The district court's error was clear and obvious. The police officers could not have made any initial observation of objects inside the car without walking around it shining their flashlights inside. Pet. App. 22a. The district court noted that an officer can proceed on the basis of evidence observed in plain view if, among other prerequisites, the officer "was lawfully in a position from which the object seized was in plain

view." Pet. App. 29a. Indeed, this Court has repeatedly said that "[i]t is . . . an essential predicate to any valid warrantless seizure of incriminating evidence that the officer did not violate the Fourth Amendment in arriving at the place from which the evidence could be plainly viewed." *Kentucky v. King*, 563 U.S. 452, 463 (2011) (quoting *Horton v. California*, 496 U.S. 128, 136 (1990) (alterations in original)).

The district court did not find that the "automobile exception" justified the officers' investigation; it specifically discredited Officer Rexroat's claim to smell marijuana, the government's sole assertion of probable cause for searching the car. 3 R. 137. Instead, the district court's sole explanation of why the officers were lawfully in a position to peer inside the car in the first place was that "they viewed the firearm . . . during a lawful traffic stop." Pet. App. 31a. That premise—that officers are authorized to search around a vehicle because they have conducted a lawful seizure—is squarely foreclosed by this Court's cases.

In *Coolidge v. New Hampshire*, a state contended that the search of a defendant's car, parked in the driveway while officers arrested him in the house, was permissible without a proper warrant. 403 U.S. 443 (1971). A four-Justice plurality rejected all those arguments, including an appeal to the plain-view doctrine. "[I]t seems abundantly clear that there is a significant constitutional difference between stopping, seizing, and searching a car on the open highway, and entering private property to seize and search an unoccupied, parked vehicle not then being used for any illegal purpose." *Id.* at 460 n.20 (opinion of STEWART, J.). Later, another plurality said the

Fourth Amendment does not bar a police officer from looking inside a car with a flashlight during a traffic stop on a public street. The plurality reiterated that "[a] different situation is presented, however, when the property in open view is situated on private premises to which access is not otherwise available for the seizing officer." *Texas v. Brown*, 460 U.S. 730, 737 (1983) (opinion of REHNQUIST, J.) (quotation marks and citation omitted).

In 2018, the Court squarely decided that a search of a vehicle parked on a private driveway requires a warrant or some valid exception to the warrant requirement. *Collins v. Virginia*, 138 S. Ct. 1663 (2018). In *Collins*, an officer, seeing a motorcycle parked in a driveway, entered the driveway, lifted a tarp covering the motorcycle, and photographed the license plate to identify it as stolen. *Id.* at 1668-69. The Court held first that the driveway was "curtilage," subject to the Fourth Amendment protections of the residence. *Id.* at 1671. The next "question before the Court is whether the automobile exception justifies the invasion of the curtilage." *Id.*

> "The answer is no. . . . Virginia asks the Court to expand the scope of the automobile exception to permit police to invade any space outside an automobile even if the Fourth Amendment protects that space. Nothing in our case law, however, suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant." *Id.*

Collins specifically considered whether the plain-view doctrine can justify a search of a vehicle in a driveway:

> "[U]nder the plain-view doctrine, any valid warrantless seizure of incriminating evidence requires that the officer have a lawful right of access to the object itself. . . . [S]earching a vehicle parked in the curtilage involves not only the invasion of the Fourth Amendment interest in the vehicle but also an invasion of the sanctity of the curtilage. . . . Just as

> an officer must have a lawful right of access to any contraband he discovers in plain view in order to seize it without a warrant, and just as an officer must have a lawful right of access in order to arrest a person in his home, so, too, an officer must have a lawful right of access to a vehicle in order to search it pursuant to the automobile exception. The automobile exception does not afford the necessary lawful right of access to search a vehicle parked within a home or its curtilage because it does not justify an intrusion on a person's separate and substantial Fourth Amendment interest in his home and curtilage." *Id.* at 1672.

In light of *Collins*, as well as *Brown* and *Coolidge*, the district court's statement that an officer automatically has a right to search a car because the officer has stopped the driver is clearly incorrect. And no other exception, such as search incident to arrest, applies. *See Riley v. California*, 573 U.S. 373, 384-85 (2018) (explaining grounds for search incident to arrest). At the time of the search, Ockert was a substantial distance from the car; the officers had detained him on suspicion of a traffic violation, and then arrested him for driving without a license; and the district court specifically did not believe the officers had probable cause to suspect any additional violation before they investigated the car. 3 R. 137.

The government's primary response below was to invoke *Brown* as showing that using a flashlight to look inside a car is not *per se* a search. Gov't C.A. Br. 33. But, as noted above, that case involved a stop on a public road, and the *Brown* plurality observed that "a different situation is presented . . . on private premises." *Brown*, 460 U.S. at 738.

The government also contended that Ockert lacks standing to contest the search, because the house was not his residence and because, the government asserted, the car was stolen. Gov't C.A. Br. 10. The record does not support the latter contention;

the evidence showed the car was registered to Ockert's mother, and he said at the outset he was driving it with her permission. 1 R. 159; Pet. C.A. Reply Br. 19-20. Precedent forecloses the prior argument. "[S]tatus as an overnight guest is alone enough to show that [the defendant] had an expectation of privacy in the home." *Minnesota v. Olson*, 495 U.S. 91, 96-97 (1990); *see also United States v. Rhiger*, 315 F.3d 1283, 1286 (10th Cir. 2003) ("[A social guest has a sufficient expectation of privacy to challenge unreasonable searches of his host's home."). The record showed Ockert was a social guest visiting the home of his girlfriend, and the district court rejected arguments to the contrary. 3 R. 125-26; *see* Pet. C.A. Reply. Br. 22-23.

Ockert did not "intentionally relinquish or abandon" the issue. For an ordinary waiver "there must be some evidence that the waiver is 'knowing and voluntary'"; there can be no waiver "without any evidence that defense counsel knew of the argument or considered making it." *United States v. Zubia-Torres*, 550 F.3d 1202, 1207 (10th Cir. 2008). There was no such evidence here. The Tenth Circuit held Ockert waived the issue automatically by operation of Rule 12(c)(3). Whether the rule actually does impose such an automatic waiver is part of the question Ockert asks this Court to resolve.

The error certainly affected Ockert's substantial rights, in that there is a "reasonable probability" that, absent the error, the outcome would have been different. *Rosales-Mireles*, 138 S. Ct. at 1904-05. Indeed there is a virtual certainty the error altered the outcome. The district court's mistaken assumption that every traffic stop carries a right to explore around the car led it to deny Ockert's motion to suppress

the evidence of a firearm, the key evidence leading to his conviction. The importance of the issue is evident from the fact that after the district court denied his motion, Ockert entered a plea agreement conditional on an appeal of that decision.

The error "seriously affects the fairness, integrity, or public reputation of judicial proceedings." "[W]hat reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise . . .?" *Rosales-Mireles*, 138 S. Ct. at 1908. The error here is of that character. In a situation where the government had the burden to prove its warrantless search and seizure was lawful, *see supra* at 8, the government tried to satisfy that burden by arguing the police officers had probable cause because one of them smelled marijuana. The district court disbelieved that claim but ruled for the government anyway, on a premise (that a traffic stop entitles the police to search the car) that the government had not even advocated and that is clearly contrary to this Court's cases. An error like that calls out for plain-error reversal.

B. Ockert did not waive his claim.

The opinion below noted that Ockert did not argue the plain-error standard of review in his opening brief. Pet. App. 13a n.13. The footnote reiterated that he had waived his substantive argument by operation of the Tenth Circuit's version of Rule 12(c)(3), the subject of this petition:

> "Ockert contends that he forfeited—rather than waived—his plain view argument because nothing shows that he affirmatively wished to forgo it. But the argument would still be waived here even if Ockert's failure to preserve it below was unintentional. First, as explained above, suppression-related arguments are automatically waived if not preserved below. Second, Ockert failed to argue the plain error standard of review

> in his opening brief before us. And this court has found that non-preserved arguments are typically waived on appeal if the litigant did not argue for plain error in his opening brief.' *United States v. Leffler*, 942 F.3d 1192, 1196 (10th Cir. 2019)." *Id.*

This footnote does not bar the Tenth Circuit from considering Ockert's claim on remand or indicate that the court would refuse to do so.

The footnote does not decide that Ockert waived the opportunity for plain-error review; it simply observes that an unpreserved substantive argument like Ockert's "plain view argument" is "typically waived on appeal" when the appellant has not argued plain error in the opening brief. That statement, and the footnote as a whole, depends on and results from the application of the Tenth Circuit's Rule 12 waiver doctrine. Given Tenth Circuit precedents, it could not be otherwise. The *Leffler* case cited in the footnote explains that a defendant can "argue error in an opening brief and then allege plain error in a reply brief after the Government asserts waiver." 942 F.3d at 1199. "[R]aising an alternative plain error argument" in the opening brief "is not mandated by . . . our . . . precedents." *Id.* Consequently, the Tenth Circuit can consider a plain-error argument not presented until a reply brief, so long as doing so "permit[s] the appellee to be heard and the adversarial process to be served." *Id.* (alteration in original; citation omitted).

Consistent with that procedure, Ockert's opening brief asserted a right to harmless-error review, on grounds that he presented his objection to the unlawful search to the district court. Pet. C.A. Br. 13, 24. After the government contended his appeal argument was outside the scope of his pretrial motion, Ockert argued in reply that it

was encompassed within the motion, and that even if the plain-error standard applies, the district court's decision is due for reversal under that standard. Pet. C.A. Reply Br. 10-15, 23-25. This "was a permissible way to invoke plain-error review." *United States v. Yurek*, 925 F.3d 423, 445 (10th Cir. 2019).

In cases not involving Rule 12(e) (now Rule 12(c)(3)) waiver, the Tenth Circuit routinely conducts plain-error review in circumstances just like this. *E.g. United States v. Zander*, 794 F.3d 1220, 1232 n.5 (10th Cir. 2015) (plain-error review available if a defendant "adequately addressed the issue of plain error review in his reply to the government's brief, after arguing in his opening brief that the objections below were sufficiently raised to be preserved for review on appeal"); *United States v. Courtney*, 816 F.3d 681, 684 (10th Cir. 2016) (reviewing error where party argued "plain error . . . in the reply brief"); *Yurek*, 925 F.3d at 445 (reviewing plain-error argument from reply brief where defendant "assume[d] in her opening brief that she had preserved her challenge [but] argued in her reply brief that the error would be considered plain even if she had forfeited the issue").

Thus, if the Court reverses the imposition of automatic waiver under Rule 12, the Tenth Circuit will be both able to and likely to consider Ockert's plain-error argument.

IV. THE TENTH CIRCUIT'S DECISION WAS INCORRECT.

The deep split about Rule 12(c)(3) demands this Court's resolution regardless, but moreover the Tenth Circuit's interpretation is incorrect. The current text of Rule 12 says nothing about waiver. It says simply 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." Fed. R. Crim. P. 12(c)(3). Ockert filed a timely Rule 12(b)(3) motion. But the Tenth Circuit holds that he has waived any specific argument not made in that motion, because old Rule 12(e) specified a waiver rule and "elimination of the word *waiver* from the Rule did not change the operative standard." *Bowline*, 917 F.3d at 1235; *cf.* Pet. App. 10a ("[W]aiver applies to suppression-related arguments not raised in the defendant's original motion to suppress.").

Imposing waiver as the Tenth Circuit does has no basis in the Federal Rules. The Rules simply do not say a Rule 12(b)(3) motion that is untimely—much less an argument not made in an otherwise timely motion—is waived. The Tenth Circuit relied on *Davis*, 411 U.S. 233, a case that the government has also said is of special significance in these matters. 917 F.3d at 1235; U.S. Br. in Opp. at 18-19, *Bowline v. United States*, 140 S. Ct. 1129 (2020) (No. 19-5563); U.S. Br. in Opp. at 13-14, *Galindo-Serrano v. United States*, 140 S. Ct. 2646 (2020) (No. 19-7112). But *Davis* interpreted the 1944 version of Rule 12, which explicitly said failure to make a timely Rule 12(b)(3) motion "constitutes a waiver thereof." 411 U.S. at 236.[4] Indeed, *Davis* distinguished one of this Court's precedents, which had allowed postconviction review of claims like Ockert's, namely that "illegally seized evidence had been admitted against

[4] *Davis* noted that the original drafters were "continu[ing] existing law" regarding failure to object to case-initiating defects like a defective indictment or, as in *Davis*, the composition of the indicting grand jury. 411 U.S. at 237 (citing *United States v. Gale*, 109 U.S. 65 (1883)). That observation has no bearing on motions to suppress, because the original Federal Rules did not subject such motions to Rule 12(e) waiver.

him." *Id.* at 239 (discussing *Kaufman v. United States*, 394 U.S. 217 (1969)). The difference, said *Davis*, was the adoption of "the sort of express waiver provision contained in Rule 12(b)(2) [later 12(e)]." *Id.*[5]

Since *Davis* turned on the "express waiver" text of old Rule 12(e), it cannot determine the interpretation of new Rule 12 in which that very text has been deleted.

The Tenth Circuit also invoked "compelling policy reasons," derived from *Davis*, for restricting appellate review of various issues. *Bowline*, 917 F.3d at 1234. But *Davis* itself explained its overarching policy thus: "Rule 12(b)(2) . . . governs ***by its terms*** the manner in which the claims of defects in the institution of criminal proceedings may be waived." 411 U.S. at 243 (emphasis added). "[T]he necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived ***pursuant to that Rule*** may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." *Id.* at 242 (emphasis added). Just so. "The best evidence of [a statute's] purpose is the statutory text." *W. Va. Univ. Hosps. v. Casey*, 499 U.S. 83, 97 (1991). *Davis* adhered to the text of old Rule 12, and no amount of policy rationale can justify departing from the current text.

The Tenth Circuit further criticized the Sixth and other circuits for "conclud[ing] that the *Olano* standard must be pasted into Rule 12." *Bowline*, 917 F.3d at 1234 (citing *Buchanon*, the case discussed above, *supra* at 19-20). This criticism rings

[5] At the time of *Kaufman*, suppression motions were not subject to Rule 12(e) waiver; they were added through a 1974 amendment.

hollow in light of this Court's clarification last Term that "[o]ur cases . . . do not purport to shield any category of errors from plain-error review." *Davis*, 140 S. Ct. at 1061. Rule 52, by its plain terms, applies to all errors; a court does not "paste" it into Rule 12 by applying Rule 52(b) to an error just because the defect in preservation was a failure to use the process set forth in Rule 12.

At bottom, stripped of the Tenth Circuit's adherence to its pre-amendment precedents, Rule 12 cannot justify the rule applied below that Ockert's argument was automatically waived. Whether a defendant like Ockert must nonetheless show good cause should turn on the text of Rule 12(c)(3), in its current form.

On this point, the Sixth Circuit's analysis in *Soto* is correct. Granted, Rule 12(c)(3) says "a court" may hear an untimely motion if good cause is shown. But Rule 12 is clearly directed to district courts. Meanwhile, finding good cause for events that occurred before trial would ordinarily be the province of the trial court, and a task for which an appellate court would be ill-suited. Given that context, the most natural reading is that Rule 12(c)(3) simply empowers a district court to entertain an untimely motion if the district court finds good cause for the delay. The materials from meetings of the Advisory Committee, discussed by the Sixth Circuit in *Soto*, confirm that impression.

Moreover, the Sixth Circuit's interpretation of Rule 12(c)(3) produces a straightforward, sensible process through trial and appeal. If a defendant misses the deadline for a Rule 12(b)(3) motion, the district court may accept the motion anyway, upon a showing of good cause. If it does, the claims in the motion will be presented,

properly, to that court, and thus receive harmless-error review on appeal pursuant to Rule 52(a). If the district court rejects a late motion, those claims would rank as unpreserved, and be subject only to plain-error review under Rule 52(b).

By contrast, the Tenth Circuit's interpretation produces a fundamental inconsistency in the rules. If Rule 52 applies to claims like Ockert's, it directs an appeals court to review for plain error—no good-cause prerequisite. The Tenth Circuit reads Rule 12(c)(3) to displace that standard for the issues covered by Rule 12(b)(3). If so, then if good cause is shown, a Rule 12(b)(3) issue would be reviewable on its own merits, without application of Rule 52 standards. There is no textual basis for applying both the Rule 12(c)(3) gate *and* the strictures of Rule 52(b), because Rule 52(b) by its plain terms applies regardless of the procedural reason an error was not preserved. The Tenth Circuit has not, of course, reached this conclusion, since a defendant almost never shows good cause to that court's satisfaction. But this outcome is the logical consequence of the Tenth Circuit's interpretation, and is reason enough to reject the view that Rule 12(c)(3) is a limitation on appellate review.

Finally, even if current Rule 12(c)(3) could instruct an appeals court to reject claims when there was no timely Rule 12(b)(3) motion, it certainly cannot support the further restriction that the Tenth Circuit imposes. As discussed above, *supra* at 6, the Tenth Circuit holds a defendant has waived any argument not specifically made below, even though the defendant filed a timely pretrial motion. Old Rule 12(e) might have justified that approach, because the old rule said "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline." Fed. R. Crim. P.

12(e) (2012). Presumably, even though a defendant made a motion, a particular argument not made in it counts as an "objection . . . not raised by the deadline." Current Rule 12(c)(3) is different. It says, "If 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) (emphasis added). Ockert did file the requisite motion by the deadline. The rule does not render his motion untimely, and there is no other basis in the text of the rule for restricting appellate review of Ockert's suppression arguments. The Tenth Circuit's argument-specific waiver doctrine is particularly untethered from the text of Rule 12.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted.

KEITH BRADLEY
Counsel of Record
BRENT R. OWEN
SCHELEESE GOUDY
SQUIRE PATTON BOGGS (US) LLP
1801 California Street
Denver, CO 80202
(303) 830-1776
keith.bradley@squirepb.com
brent.owen@squirepb.com
scheleese.goudy@squirepb.com

MARCH 4, 2021