No. 20-7372

In the
Supreme Court of the United States

Terry Lee Ockert, Jr.,
Petitioner,

v.

United States of America,
Respondent.

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

Brief of The Federal Public Defender's Office for the Districts of Colorado and Wyoming as Amicus Curiae in Support of Petitioner

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Interests of Amicus Curiae[1]

The Office of the Federal Public Defender for the Districts of Colorado and Wyoming provides direct representation to indigent defendants pursuant to the Criminal Justice Act (CJA). Annually, amicus represents an average of 860 defendants in the Districts of Colorado and Wyoming. The Tenth Circuit's CJA Plan designates amicus as the primary source of its appointments, and amicus provides appellate representation to about 125 men and women per year, with cases originating in district courts in Colorado, Kansas, New Mexico, Oklahoma, Utah, and Wyoming.

This case involves a question of law that impacts amicus's clients: are suppression arguments subject to normal preservation rules on appeal, or are they—unlike any other type of claim—waived entirely if not preserved? Amicus's experience at the trial and appellate levels gives it unique institutional insight into the scope of the problem created by the Tenth Circuit's continued application of the latter, firm waiver rule. Amicus represented the appellant in *United States v. Bowline*, the first published case where the circuit applied its firm waiver rule after its textual basis was removed. 917 F.3d 1227 (10th Cir. 2019). And many

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[1] Pursuant to Rule 37.2(a), counsel for amicus curiae provided notice of the intention to file this brief to counsel of record for all parties. Counsel of record for Petitioner and Respondent have both consented to the filing of this brief. Pursuant to Rule 37.6, amicus affirms that no counsel for a party authored this brief in whole or in part, and no person other than amicus or its counsel made a monetary contribution to this brief's preparation or submission.

more of amicus's clients are likely to be harmed if the Court does not grant this petition and reverse.

Introduction and Summary of Argument

This case presents a persistent and important split among circuits about whether suppression arguments are subject to normal preservation rules on appeal, as four circuits have held; or whether, as the Tenth Circuit has held, unpreserved suppression arguments are waived entirely, even if the district court actually ruled on the issue. Specifically, Mr. Ockert challenges this unique and firm waiver rule's troubling survival beyond the removal of its textual justification from Rule 12 of the Federal Rules of Criminal Procedure, and its application in a case where he in fact filed a timely motion to suppress.

Amicus curiae writes here to draw the Court's attention to several troubling practical results of the Tenth Circuit's incorrect retention of its firm waiver rule, many of which led to the denial of Mr. Ockert's appeal.

Since 2011, and even after the 2014 amendment of Rule 12 removed any reference to waiver, the Tenth Circuit's waiver rule has served as a complete bar to consideration of any argument that the court decides was not sufficiently articulated by defense counsel in a timely motion below. This bar applies even if the new argument is based on Supreme Court law that did not exist at the time of trial, and even where the district court actually considered and ruled on the very issue raised on appeal. And although the Tenth Circuit contemplates a showing of good cause that can excuse a waiver, in ten years it has *never* found a claim that met

that showing. Instead, it has denied appeal after appeal where no practical barrier—only its own mistaken interpretation of Rule 12—stood in the way of review.

Application of the firm waiver rule is particularly problematic in cases where a defendant actually filed a timely motion to suppress, as Mr. Ockert did here. Defendants in federal criminal cases have limited access to discovery, meaning that they often are not privy to all the facts and circumstances of a search before a suppression hearing is held. Moreover, the government is permitted to change theories during the course of litigation, and the district court may deny a motion to suppress on a ground not raised by either party. The Tenth Circuit's rule does not accommodate any of these practical realities. And—as it did in Mr. Ockert's case—the rule can improperly relieve the government of its burden to prove the reasonableness of warrantless searches and seizures. This Court should grant review.

Argument

A. "[G]ood cause" is a chimera, as the waiver rule precludes appellate review even where it would be simple, fitting, and just.

1. Since 2011, the Tenth Circuit has applied a firm waiver rule whenever a criminal defendant raises even a slightly different argument on appeal than he raised in a pretrial motion in the district court. Under this rule, it matters not if the waiver was knowing, intelligent, and voluntary. The rule is absolute. Arguments not raised are unreviewable, even for plain error.

The Tenth Circuit first announced its firm waiver rule in *United States v. Burke*, where it refused to consider a challenge to the sufficiency of a warrant affidavit under any standard of review, because in the district court the defendant had only challenged the particularity of the warrant. 633 F.3d 984, 987–89 (10th Cir. 2011). The court recognized some "mixed messages" in its prior cases. *Id.* at 988–90. That is, it often used the word "waiver," which connotes a purposeful relinquishment of a known right—but then applied the plain error standard associated with a forfeiture, which occurs where arguments are simply overlooked. *Id.* But it ruled that the language of Rule 12 barred consideration of any suppression argument raised for the first time on appeal absent a showing of "good cause." *Id.* at 989.

In reaching this conclusion, the Tenth Circuit found persuasive that the text of Rule 12 had been amended after this Court's recent definition of "'waiver' as the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 991 (quoting *United States v. Olano*, 507 U.S. 725 (1992)). Because the Advisory Committee decided to "ke[ep] the term 'waiver' in place" even after *Olano*, the Tenth Circuit ruled that even a forfeiture normally subject to plain error review should be treated as a waiver in this single circumstance, notwithstanding *Olano*'s requirement that waiver be intentional. *Id.* at 991 (quoting *United States v. Rose*, 538 F.3d 175, 183 (3d Cir. 2008)).

Even though the Advisory Committee removed the words "waives" and "waiver" from Rule 12 in 2014, however, the Tenth Circuit has adhered to its firm waiver rule. *United States v. Bowline*, 917 F.3d 1227, 1229 (10th Cir. 2019) (holding that *Burke*'s waiver rule

survived the 2014 amendment). The firm waiver rule applies not only where the defendant-appellant filed no motion below, but also where he filed a motion but simply omitted a particular argument that he later tried to pursue on appeal. *United States v. Warwick*, 928 F.3d 939, 944 & n.2 (10th Cir. 2019) (finding involuntary consent argument waived where appellant argued lack of consent below).

2. The Tenth Circuit purported to temper its holding in *Burke* by stating that the "good cause" exception to its firm waiver rule "protects against a miscarriage of justice as capably as plain error review." 633 F.3d at 991. It called this "a safety valve for counsel's inadvertent failure to raise an argument at the suppression hearing." *Id.* But the court later "held that an attorney's failure to raise an argument in a suppression hearing cannot qualify as 'good cause.'" *United States v. Franco*, 632 F. App'x 961, 963 (10th Cir. 2015) (unpublished) (*citing United States v. Augustine*, 742 F.3d 1258, 1266 (10th Cir. 2014)). And it has applied its waiver bar in every case involving an argument that could have been raised in a Rule 12 pretrial motion, without exception.

For example, the Tenth Circuit allows no exception to its firm wavier rule where a new claim is based on intervening Supreme Court precedent. Under plain error review, a court of appeals can address a forfeited claim that was only obvious at the time of the appeal, despite the fact that "it was not brought to the trial court's attention." *Henderson v. United States*, 568 U.S. 266, 268 (2013) (quotation and alteration marks omitted). Both before and after the 2014 amendment, however, the Tenth Circuit has held that its firm

waiver rule is different: failure to file a motion to suppress, for example, cannot be excused where a defendant knew the relevant facts, but "did not know that there had been a violation of the Fourth Amendment" until after a Supreme Court decision published post-sentencing. *See United States v. Baker*, 713 F.3d 558, 561 (10th Cir. 2013); *accord Franco*, 632 F. App'x at 963–64.

The Tenth Circuit even applies its firm waiver rule where it typically would not even find a forfeiture. In the usual case, "when the district court *sua sponte* raises and explicitly resolves an issue of law on the merits, the appellant may challenge the ruling on appeal on the ground addressed by the district court even if he failed to raise the issue in district court." *United States v. Hernandez-Rodriguez*, 352 F.3d 1325, 1328 (10th Cir. 2003). Not so in the Rule 12 context. In *United States v. Madsen*, the defendant filed a late duplicity motion below, after his trial had concluded. 614 F. App'x 944, 947 (10th Cir. 2015) (unpublished). Despite the tardiness of the motion, the district court actually considered and denied it on the merits. *Id.* at 948. Notwithstanding that fact, the Tenth Circuit refused to review the denial of the motion, finding the duplicity argument waived. *Id.* at 952.[2]

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[2] The circuit recognized that its rule would be controversial, noting this discussion of contrary authority in a leading treatise: "[I]f the district court entertains the belated motion [to suppress evidence] and decides it on the merits, it cannot be argued on appeal that it has been waived." *Id.* at 952 (quoting 3A Charles Alan Wright & Sarah N. Welling, Federal Practice and Procedure § 689, at 236 (4th ed. 2010)).

The same thing happened in Mr. Ockert's case. The district court explicitly ruled that certain items in the car were in plain view, because a police officer "had a lawful right of access to the vehicle because he stopped Ockert pursuant to a lawful traffic stop." ROA, Vol. I, p. 177. Mr. Ockert appealed that ruling, arguing that the police did not have a lawful right of access to the vehicle—even if the traffic stop was lawful—since the car was within the curtilage of private property and he was detained elsewhere. 10th Cir. Opening Br. at 10, 39–45. But the Tenth Circuit refused to consider the argument, explaining that a district court cannot "preserve" a Rule 12 issue for appeal—no matter how thoroughly it addresses it—if the defendant himself did not timely "raise" the argument below. *Ockert*, 829 F. App'x at 344.

3. In the ten years since *Burke*, the Tenth Circuit has found arguments waived under Rule 12 in at least 30 cases.[3] All but four of those cases involved suppres-

[3] *United States v. Ross*, 837 F. App'x 617 (10th Cir. 2020) (unpublished); *United States v. Quezada-Lara*, 831 F. App'x 371 (10th Cir. 2020) (unpublished); *United States v. Ockert*, 829 F. App'x 338 (10th Cir. 2020); *United States v. Stein*, 819 F. App'x 666 (10th Cir. 2020) (unpublished); *Warwick*, *supra*, 928 F.3d 939; *United States v. Griffith*, 928 F.3d 855 (10th Cir. 2019); *Bowline*, *supra*, 917 F.3d 1227; *United States v. Vance*, 893 F.3d 763 (10th Cir. 2018); *United States v. Shrader*, 665 F. App'x 642 (10th Cir. 2016) (unpublished); *United States v. Williams*, 646 F. App'x 624 (10th Cir. 2016) (unpublished); *United States v. Ibarra-Diaz*, 805

sion arguments, including 18 cases where the defendant in fact moved to suppress evidence before trial.[4] In

F.3d 908 (10th Cir. 2015); *Franco*, 632 F. App'x 961; *United States v. Garcia-Escalera*, 632 F. App'x 942 (10th Cir. 2015) (unpublished); *Madsen*, *supra*, 614 F. App'x 944; *United States v. McCoy*, 614 F. App'x 964 (10th Cir. 2015) (unpublished); *Augustine*, 742 F.3d 1258; *United States v. Burtons*, 590 F. App'x 761 (10th Cir. 2014) (unpublished); *United States v. Juarez-Sanchez*, 558 F. App'x 840 (10th Cir. 2014) (unpublished); *Baker*, *supra*, 713 F.3d 558; *United States v. Ontiveros*, 550 F. App'x 624 (10th Cir. 2013) (unpublished); *United States v. Stewart*, 528 F. App'x 879 (10th Cir. 2013) (unpublished); *United States v. Ruiz*, 664 F.3d 833 (10th Cir. 2012); *United States v. Reese*, 505 F. App'x 733 (10th Cir. 2012) (unpublished); *United States v. Lancaster*, 496 F. App'x 877 (10th Cir. 2012) (unpublished); *United States v. Johnson*, 479 F. App'x 811 (10th Cir. 2012) (unpublished); *United States v. Rodriguez*, 466 F. App'x 751 (10th Cir. 2012) (unpublished); *United States v. Lopez-Merida*, 466 F. App'x 731 (10th Cir. 2012) (unpublished); *United States v. Rendon-Martinez*, 437 F. App'x 685 (10th Cir. 2011) (unpublished); *United States v. Vazquez-Villa*, 423 F. App'x 812 (10th Cir. 2011) (unpublished); *United States v. Vasquez*, 422 F. App'x 713 (10th Cir. 2011) (unpublished).

[4] Timely suppression motions were filed in *Ross*, *supra*, 837 F. App'x 617; *Quezada-Lara*, *supra*, 831 F. App'x 371; *Ockert*, *supra*, 829 F. App'x 338; *Stein*, *supra*, 819 F. App'x 666; *Warwick*, *supra*, 928 F.3d 939; *Vance*, *supra*, 893 F.3d 763; *Williams*, *supra*, 646 F. App'x 624; *Franco*, *supra*, 632 F. App'x 961; *Garcia-Escalera*, *supra*, 632 F. App'x 942; *McCoy*, *supra*, 614 F. App'x 964; *Augustine*, *supra*, 742 F.3d 1258; *Burtons*, *supra*, 590 F. App'x 761; *Ontiveros*, *supra*, 550 F. App'x 624; *Stewart*, *supra*, 528

all 18 of those cases, the suppression motion had targeted the exact same search, seizure, or statement that the defendant-appellant was trying to challenge on appeal, and the district court had in fact held a hearing.

Every single one of those appeals could have been resolved, as a practical matter, on plain error review.[5] Where an argument was inadequately presented or lacking a sufficient record for review, the appellant would not have been able to meet his plain-error burden. But many cases involved pure questions of law or factual records easily susceptible to such an analysis, and so—unlike the chimera of "good cause"—plain error review could have protected against miscarriages of justice.

F. App'x 879; *Lancaster*, *supra*, 496 F. App'x 877; *Johnson*, *supra*, 479 F. App'x 811; *Lopez-Merida*, *supra*, 466 F. App'x 731; and *Ruiz*, *supra*, 664 F.3d 833. Untimely motions or no motions at all were made in the remaining cases: *Griffith*, *supra*, 928 F.3d 855; *Shrader*, *supra*, 665 F. App'x 642; *Juarez-Sanchez*, *supra*, 558 F. App'x 840; *Baker*, *supra*, 713 F.3d 558; *Rodriguez*, *supra*, 466 F. App'x 751; and *Rendon-Martinez*, *supra*, 437 F. App'x 685; *Vazquez-Villa*, *supra*, 423 F. App'x 812; and *Vasquez*, *supra*, 422 F. App'x 713.

[5] In fact, the Tenth Circuit has performed an *alternative* plain error analysis in a handful of cases, explaining that the claims would fail even if not waived. *E.g., Vance*, 893 F.3d at 770–71. Note that this is very different from the many pre-*Burke* cases that applied plain error review as a *result* of finding waiver (rather than in the alternative). *E.g., United States v. Orr*, 864 F.2d 1505, 1508 (10th Cir. 1988).

Take, for example, the question of the sufficiency of a search warrant affidavit. In *Burke*, the appellant raised such a challenge on appeal, arguing that the affidavit was insufficient because it contained conclusory allegations rather than facts upon which a magistrate could make an independent assessment of probable cause. 633 F.3d at 987. This is a pure question of law involving no facts beyond the affidavit itself, *see, e.g., United States v. Quezada-Enriquez,* 567 F.3d 1228, 1232 (10th Cir. 2009), and as such it easily could have been addressed on plain error review. But because Mr. Burke had not raised the sufficiency argument below, the Tenth Circuit found it waived and did not address it on the merits. *Burke*, 633 F.3d at 987–91; *accord Garcia-Escalera*, 632 F. App'x at 945.

Many other "waived" claims have involved pure legal questions readily addressed on plain error review. *See, e.g., Stein*, 819 F. App'x at 672 (warrant particularity); *Franco*, 632 F. App'x at 963 (reasonableness of statutory interpretation); *Ontiveros*, 550 F. App'x at 635–36 (affidavit staleness).

And in still other cases, the factual records seem sufficiently developed to address the appellant's legal argument under plain error review. *See, e.g., Lopez-Merida*, 466 F. App'x at 733, 735–36 (refusing to review claim of no traffic violation where reasons for stop were discussed in briefing and at suppression hearing); *Ruiz*, 664 F.3d 841–42 (10th Cir. 2012) (refusing to address argument regarding legitimate expectation of privacy in items remaining in house, where question of abandonment of house itself was raised and ruled on below); *Vasquez*, 422 F. App'x at 715–17 (refusing to rule on question of voluntariness of statement that arose at trial).

The Tenth Circuit often reviewed these "waived" claims for plain error—until instructing itself not to in *Burke* in 2011, 633 F.3d at 988–89. *See, e.g., United States v. Collamore*, 330 F. App'x 708 (10th Cir. 2009) (unpublished); *United States v. Jones*, 530 F.3d 1292 (10th Cir. 2008); *United States v. Rodriguez-Vargas*, 76 F. App'x 248 (10th Cir. 2003) (unpublished); *United States v. Meraz-Peru*, 24 F.3d 1197, 1198 (10th Cir. 1994); *United States v. Dewitt*, 946 F.2d 1497 (10th Cir. 1991); *United States v. Rascon*, 922 F.2d 584, 588 (10th Cir. 1990).

And they did so easily. *Burke* did not identify any practical problems with the review process, because there are none. If the claims are not easily resolvable as a matter of law, or if the factual record is insufficient to expose the plainness of an alleged error, it is easy enough for the court of appeals to deny the appeal on plainness grounds. *E.g., Meraz-Peru*, 24 F.3d at 1198 ("On this record, it is not obvious or clear that the stop, investigative detention or subsequent consent violated the Fourth Amendment because the facts are hardly unanimous that the encounter was unconstitutional."); *Rascon*, 922 F.2d at 588 ("Appellant has shown no plain error . . . . [While t]he circumstances surrounding the stop at the border checkpoint were examined at trial, . . . appellant did not designate a trial transcript as part of the record.").

Thus, the pre-*Burke* regime—currently embraced by four circuits, though not the Tenth—allowed for reversal where the record plainly revealed a constitutional violation or other legal error. The post-*Burke* regime does not.

B. Firm waiver interacts poorly with discovery rules and improperly eases the government's burden in no-warrant cases.

The Tenth Circuit's waiver rule is now so firm, so universally applicable, that it leaves no room for litigants to demonstrate that their "waiver" was not only unintentional, but practically impossible to avoid given the limitations of federal discovery rules. And, in cases like Mr. Ockert's, the rule operates to relieve the government of its universally recognized burden to demonstrate that warrantless searches and seizures are reasonable, and that statements made during the course of a custodial interrogation are voluntary.

1. The Tenth Circuit uncontroversially requires a motion to suppress to "raise *factual allegations* that are sufficiently definite, specific, detailed, and nonconjectural to enable the court to conclude that contested issues of fact are in issue" in order "[t]o warrant an evidentiary hearing." *United States v. Barajas-Chavez*, 358 F.3d 1263, 1267 (10th Cir. 2004) (quotation and alteration marks omitted) (emphasis added).

This makes sense, as discovery in a criminal case will generally suffice to put a defense attorney on notice that a constitutional violation might have occurred, and it will provide enough factual details for a defendant to obtain a hearing. The defendant has the right to discover the content of any of his own statements, and any evidence that might be used against him at trial. Fed. R. Crim. P. 16(1)(A), (B), (E)(ii) & (iii). He will likely obtain tangible items (like police reports) that would be material to the preparation of suppression motions. Fed. R. Crim P. 16(1)(E)(i). He

can meet this burden where appropriate and obtain an evidentiary hearing.

2. But problematically, the Tenth Circuit has gone further. Even if a defendant raises such factual allegations, and even if he obtains a hearing, and even if questions of fact are fully developed at that hearing, and even if the relevant factual disputes are in fact resolved, the threat of waiver still looms. That is because the Tenth Circuit still will not address any *legal arguments* that were not personally articulated by the defendant below, even if they stem from the same claim, the set of operative facts, and even the same legal doctrine. *See, e.g., Ockert*, 829 F. App'x at 343 (finding parts of plain-view argument relating to officer's search of car and discovery of firearm preserved, and other parts waived).

This is problematic for at least two reasons. First, law enforcement can testify in ways that defendants do not anticipate. Police testimony at a suppression hearing is not limited by the contents of officer reports or other discoverable items. Defendants do not have the right to depose government witnesses before a hearing in the absence of "exceptional circumstances." Fed. R. Crim. P. 15(a)(1). And as a practical matter—in the experience of amicus curiae—defense attorneys are generally unable to obtain even informal statements from law enforcement officers prior to a hearing. Yet the Tenth Circuit considers an argument waived even where a police officer offers a different explanation for a stop at a suppression hearing, and the appellate argument relates to this new explanation. *Vance*, 893 F.3d at 768–70.

Second, the government often makes arguments at a hearing that defendants do not anticipate. The Fourth Amendment is generally concerned only with objective reasonableness, *Whren v. United States*, 517 U.S. 806, 813 (1996), and so the subjective intent of law enforcement as articulated by police officers in their reports may only hint at what the government will argue. Defendants do not have the right to work product from the government that might articulate theories not set out in government briefing. *See* Fed. R. Crim. P. 16(2). Yet the Tenth Circuit considers arguments waived even where they relate to claims that the government made for the first time at the suppression hearing—and even where those new government arguments represent a change from the theories advanced in its briefing. *See, e.g., Vance*, 893 F.3d at 770 ("[T]his assertion does not come close to demonstrating good cause.").

3. The firm waiver rule becomes all the more problematic in the many situations where the government bears the burden to prove that evidence was constitutionally obtained. *See, e.g., Illinois v. Rodriguez*, 497 U.S. 177, 181 (1990) (authority to consent to search); *Murray v. United States*, 487 U.S. 533, 540 (1988) (source independent of unlawful search); *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984) (exigent circumstances of warrantless home entry); *Florida v. Royer*, 460 U.S. 491, 500 (1983) (plurality opinion) (scope and duration of seizure justified by reasonable suspicion); *United States v. Mendenhall*, 446 U.S. 544, 557 (1980) (consensual nature of police encounter); *United States v. Matlock*, 415 U.S. 164, 177 (1974) (consent to search); *Kastigar v. United States*, 406 U.S. 441, 460 (1972) (source independent of compelled testimony);

Lego v. Twomey, 404 U.S. 477, 489 (1972) (voluntariness of confession); *Miranda v. Arizona*, 384 U.S. 436, 475 (1966) (knowing and intelligent waiver of rights during custodial interrogation).

Take, for example, a traffic stop that eventually leads to criminal charges. In such a case, the government bears the burden to prove that the stop was reasonable at its inception and continued to be reasonable through the discovery of whatever evidence the defendant is trying to suppress. *Royer*, 460 U.S. at 500. It is also the government's burden to prove the reasonableness of any accompanying warrantless search. Wayne R. LaFave, 6 Search & Seizure § 11.2(b), n.53 (6th ed.) (citing cases).

Problematically, the waiver rule does not account for this well-established burden of proof. And so the practical effect of preventing a defendant from challenging plainly unreasonable searches and seizures on appeal is that it absolves the government of proving reasonableness in those many cases where that in fact is the government's burden.

This Court's cases provide no support for relieving the government of its burden where a constitutional violation has plainly occurred. To the contrary, this Court's statements about the purposes of the exclusionary rule make clear that its deterrent effect depends on whether the police committed misconduct that can be deterred—such as where they plainly violate the constitution—not on when and how a litigant raises the issue. *See, e.g.*, *United States v. Leon*, 468 U.S. 897, 920 (1984) (explaining that "the ends of the exclusionary rule" are furthered where officers "may

properly be charged with knowledge[]that [a] search was unconstitutional") (quotation marks omitted).[6]

This back-door burden-shifting problem is readily apparent in Mr. Ockert's felon-in-possession case—as is almost every other problem identified in this brief.

From discovery, Mr. Ockert identified a warrantless search. First, after detaining Mr. Ockert some distance from his vehicle, an officer claimed to smell marijuana, and then claimed to rely on the smell of marijuana to go up a private driveway to repeatedly peer into Mr. Ockert's car with a flashlight. Pet. 7. Then, claiming to have spotted a baggy of methamphetamine (but no marijuana), officers continued searching by flashlight until they saw a gun as well. *Id.* Mr. Ockert was charged with criminal possession of that gun. *Id.* And so he filed a motion to suppress, arguing that the search leading to its discovery was unconstitutional. *Id.*

The government bore the burden to justify the officers' conduct. The government argued that the search was reasonable because the smell of marijuana provided officers with probable cause to search the car. Pet. 7–8. During the course of the search that followed,

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[6] *Burke* avers without explanation that the "deterrent effect" of the exclusionary rule "is minimal" in the instance of "appellate review for plain error." *See* 633 F.3d at 990 (quotation marks omitted). But this statement is quite puzzling. If police erred so clearly that a court can plainly identify the constitutional violation, then deterrence is that much *more* important; and if a conviction is reversed as a result of misconduct rather than, say, having charges dismissed before trial, then the deterrence effect surely would not be any less.

the government argued, officers saw what may have been a baggy of methamphetamine in plain view, and that justified continuing the search until the gun was found as well. Pet. 8.

Mr. Ockert challenged the veracity of the officer's statement about marijuana. Pet. 8. If that statement was untrue, he argued, police did not have the right to investigate at all. *Id.* But even if he did smell marijuana, giving the police the right to investigate the smell, authorities did not actually find any marijuana; and the baggy in the car was not so obviously incriminating that the plain view doctrine would have justified the further search that led to the discovery of the gun. *Id.*

The district court denied the motion on a ground not raised by either party. As the defense urged, the court discredited the officer's testimony about smelling marijuana. Pet. 8. But it determined that the search was nonetheless reasonable, despite an absence of probable cause, because the plain view doctrine justified *all* of the police officers' actions. *Id.* The officers "had a lawful right of access to the vehicle" from the get-go, because of the traffic stop itself. *Id.* And so everything they saw inside the car was admissible as being in plain view. *Id.*

Mr. Ockert challenged this ruling on appeal. He explained that the officers did not have a lawful right of access to the car because he was not nearby and the car was parked on a private driveway, within the curtilage of a home. *Id.* at 9. He argued that this issue was fully preserved below. *Id.* at 9–10.

Applying its firm waiver rule, however, the Tenth Circuit denied the appeal in an unpublished opinion,

relying on the ten years of precedent discussed above. *Ockert*, 829 F. App'x at 343–44. It did not matter that Mr. Ockert in fact timely challenged the constitutionality of the search. It did not matter that the government bore the burden to demonstrate the search was reasonable. It did not matter that the government made a fact-based argument and the district court determined that the facts were not as the government's witness represented them. It did not matter that the district court rejected the government's legal justification for the search. It did not matter if the district court indeed ruled on the exact argument being raised on appeal. All that mattered was that Mr. Ockert had not anticipated this turn of events and therefore did not explicitly tell the district court that the traffic violation itself did not give police the right to walk up the private driveway to peer inside of the car—even though the government never argued that the police had the right to walk up the private driveway to peer inside of the car if they did not in fact smell marijuana. *Id.* Even though the government was the party that was supposed to justify the search.

This case exemplifies many of the problems with the Tenth Circuit's firm waiver rule. The rule applies no matter what discovery says, what officers say on the stand, what facts are resolved below, what arguments the government makes below, who bears the burden of proof, and even if the district court relies upon an unrequested and (clearly) legally erroneous ruling to deny the motion to suppress. This is not what waiver means in any other circumstance, and there is no actual escape hatch, the court's language about "good cause" aside. And—critically—the case was decided

long after the Advisory Committee removed the textual basis for the waiver rule from the Federal Rules of Criminal Procedure.

This Court should grant review.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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