No. _____

IN THE

Supreme Court of the United States

MATTHEW ALEXANDER,
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

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QUESTION PRESENTED

When a defendant files a motion to suppress, then raises a new argument to support suppression in the court of appeals, is the new argument waived absent a showing of good cause under Federal Rule of Criminal Procedure 12(c)(3), as five Circuits have held, or is the new argument reviewed, at a minimum, for plain error under Federal Rule of Criminal Procedure 52(b), as four Circuits have held?

RELATED PROCEEDINGS

United States v. Alexander, Case No. 6:19-cr-10102-EFM-1 (D. Kan. July 16, 2019)

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PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

The Tenth Circuit's unpublished opinion is available at 2022 WL 414341, and is included as Appendix A. The district court's unpublished order denying Mr. Alexander's motion to suppress is available at 2019 WL 6037421, and is included as Appendix B. The district court's supplemental order denying the motion to suppress is not available on a commercial legal database but is included as Appendix C.

JURISDICTION

The district court had jurisdiction under 18 U.S.C. § 3231. The Tenth Circuit had jurisdiction under 28 U.S.C. § 1291. The Tenth Circuit entered judgment on February 11, 2022. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

In federal criminal cases, certain motions, including motions to suppress, "must be raised by pretrial motion." Fed.R.Crim.P. 12(b)(3)(C). A failure to file a timely motion has consequences. "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).

There is an entrenched 5-to-4 conflict over whether Rule 12(c)(3)'s good-cause requirement applies in the courts of appeals. In the suppression context, this conflict yields unacceptable results: in five Circuits, new arguments made in support of a timely pretrial motion to suppress are effectively waived, whereas in four Circuits such arguments are reviewed, at a minimum, for plain error. As a practical matter, the doors in some courts are closed, but open in others. This Court's review is necessary.

And that is particularly true here, where the Tenth Circuit's doors were closed to Mr. Alexander's meritorious Fourth Amendment claim. An officer conducted a protective search of Mr. Alexander's vehicle with no valid basis to do so. Without conducting even minimal investigation, the officer searched the vehicle less than thirty seconds into the stop under a mistaken belief that Mr. Alexander (a young black male) was a different individual. The Tenth Circuit upheld the stop based on the subjective knowledge of another officer that did not conduct the search. But there was no basis to apply the collective-knowledge doctrine under the facts of this case. Mr. Alexander's trial attorney never mentioned the collective-knowledge doctrine, however, and so there was no plausible way in which Mr. Alexander could argue on appeal that the searching officer alone lacked the requisite suspicion necessary to conduct the search. That argument was waived in the Tenth Circuit, whereas at least

four other Circuits would have reached the merits of that meritorious claim. Review is necessary.

A. Legal Background

The Federal Rules of Appellate Procedure generally "govern procedure in the United States courts of appeals." Fed.R.App.P. 1(a)(1). In criminal cases, however, Federal Rule of Criminal Procedure 1(a)(1) also provides that the criminal procedure rules "govern the procedure" "in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States." Fed.R.Crim.P. 1(a)(1).

Although Federal Rule of Criminal Procedure 1(a)(1) indicates that the rules govern procedures at all stages of criminal litigation, many of the rules found within the Federal Rules of Criminal Procedure are plainly aimed at district courts. Title IV, for instance, is entitled "Arraignment and *Preparation for Trial*." (emphasis added). Within Title IV is Rule 12, which is entitled "Pleadings and *Pretrial* Motions." (emphasis added). Rule 12(b)(3) lists various "[m]otions that must be made *before trial*." Fed.R.Crim.P. 12(b)(3) (emphasis added). Rule 12(c)(1) in turn authorizes district courts to set deadlines for "*pretrial* motions." Fed.R.Crim.P. 12(c)(1) (emphasis added). Rule 12(c)(3) provides that, if the defendant files a pretrial motion after the deadline, "the motion is untimely." Fed.R.Crim.P. 12(c)(3). Under Rule 12(c)(3), "a court may consider the defense, objection, or request if the party shows good cause." Fed.R.Crim.P. 12(c)(3).

Rule 12(c)(3) was added to Rule 12 in 2014. Before the amendment, Rule 12(e) provided that "[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) (emphasis added). A waiver is the "intentional relinquishment or abandonment of a known right." *United States v. Olano*, 507 U.S. 725, 733 (1993). Waived claims are unreviewable on appeal because a district court commits "no error at all" by honoring a party's affirmative waiver. *Id.* Despite its use of "waives" and "waiver," Rule 12(e) was never meant to set forth a true waiver rule. Fed.R.Crim.P. 12, Advisory Comm. Notes, 2014 Amendments (Rule 12 "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"). To clarify the point, Rule 12(e) was replaced by Rule 12(c)(3), which does not use "waives" or "waiver." Fed.R.Crim.P. 12(c)(3).

While Rule 12(c)(3) governs untimely motions, other provisions govern unpreserved claims. Rule 51, for instance, governs "Preserving Claimed Error." Fed.R.Crim.P. 51. The rule is plainly aimed at the preservation of errors made by "the court," as it requires parties to object "to the court's action." Fed.R.Crim.P. 51(b). Parties need only preserve "claim[s]," not "arguments," for appeal. Fed.R.Crim.P. 51(b) ("A party may preserve a claim of error"). As this Court has long held, "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*

v. Nat'l R.R. Passenger Corp., 513 U.S. 374, 379 (1995) (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)).

Under Rule 52(b), "[a] plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Fed.R.Crim.P. 52(b). Rule 52(b) applies to forfeited (rather than preserved or waived) claims. *Olano*, 507 U.S. at 733. Thus, if a claim is not brought to the court's attention, as required by Rule 51(b), an appellate court can still review that claim for plain error under Rule 52(b). *Olano*, 507 U.S. at 733.

B. Factual Background

The facts of this case are a stark reminder that, when driving, we are all at the mercy of our local police officers. *See*, *e.g.*, *Morrison v. Olson*, 487 U.S. 654, 727-728 (1988) (Scalia, J., dissenting) ("We know that no local police force can strictly enforce the traffic laws, or it would arrest half the driving population on any given morning."). And that is especially true for those, like Mr. Alexander, who must "drive while black." *See*, *e.g.*, David A. Harris, The Stories, the Statistics, and the Law: Why "Driving While Black" Matters, 84 Minn. L. Rev. 265 (1999); *Utah v. Strieff*, 579 U.S. 232, 254 (2016) (Sotomayor, J., dissenting) ("it is no secret that people of color are disproportionate victims of this type of scrutiny").

That's the genesis of this case: Mr. Alexander, a young black man, was driving down the street (a four-lane road) in a non-high-crime area around noon on a sunny summer day in Wichita, Kansas. *See* Pet. App. 2a. He was doing nothing wrong. Just driving. Headed the other way were two officers of Wichita's Violent Crime

Community Response Team – Jared Henry and Jamie Thompson. Pet. App. 2a. As members of a violent-crimes team, the two were supposed "to respond to violent crime situations and address neighborhood complaints and violent offenders in the city." Pet. App. 2a. On this day, however, the officers were just driving around looking for someone (but no one in particular) to stop. R1.79-81.[1] As he drove, Officer Henry would look into other vehicles "to see if [he] recognize[d] anybody." R1.79. Mr. Alexander's vehicle "caught [his] eye. [H]e got a real quick glimpse of the driver of that vehicle, and thought that individual looked familiar." R1.79-80, 121; Pet. App. 2a.

Officer Henry whipped a U-turn "to catch the vehicle and kind of find out if [he]could get a little information about who the vehicle was registered to." R1.80; Pet. App. 2a. He sped up and actually ran a red light just to "get closer" to Mr. Alexander's vehicle. R1.81. Mr. Alexander then committed a minor traffic violation: he signaled to turn left, then changed the signal to turn right, and turned right into a Hardee's restaurant parking lot (remember, it was lunch time). R1.80; Pet. App. 2a. Because the signal came too late ("approximately 20 feet before" the turn), the turn violated Kansas law, and Officer Henry decided to conduct a traffic stop. R1.80, 82, 121.

According to Officer Henry, after Mr. Alexander entered the Hardee's parking lot, he "accelerate[d] as [his vehicle] rounded a curve, making a left-hand turn around the [Hardee's] drive-thru." R1.81. Officer Henry initially thought "that the vehicle was going to take off." Pet. App. 2a; R1.81-82. He also testified that Mr. Alexander's

[1] The Tenth Circuit's decision below omits many of the background facts. We thus cite the record on appeal in the Tenth Circuit when discussing facts omitted by the Tenth Circuit.

actions indicated Mr. Alexander's "nervousness," although he conceded that "seeing a cop generally creates at least a slight bit of nervousness among most drivers." R1.81. But Mr. Alexander did not "take off." Immediately after the officers blared the car's siren, Mr. Alexander stopped in the parking lot. Pet. App. 2a; R1.82, 86-87; Supp.R1. at 00:36. The recordings show that the stop occurred about halfway around the building, near the drive-thru lane, and that Mr. Alexander stopped around 10 seconds after he entered the parking lot. *See* Supp.R1. at 00:28-40.

Officer Thompson's testimony did not add much with respect to the stop. She confirmed that she had nothing to do with Officer Henry's decision to follow Mr. Alexander's vehicle. R1.137. She also confirmed that she witnessed the traffic infraction, that she thought that the vehicle "pick[ed] up speed . . . around the corner in the [Hardee's] parking lot," but that the vehicle stopped, as directed, in the parking lot. R1.137-138.

Although around noon on a sunny summer day in a Hardee's parking lot in a non-high-crime area of Wichita, and although the officers were investigating nothing other than an untimely-turn-signal infraction, what unfolded next was not your ordinary traffic stop. The officers (both armed) immediately exited the patrol car and approached Mr. Alexander's vehicle. R1.85-86, 128. The windows were not tinted; Officer Henry could see into the vehicle, and he didn't see anything suspicious. R1.123, 125. Officer Henry recognized Mr. Alexander ("What up, Matt?") and immediately opened the door and ordered him to "[h]op out." Supp.R1.6; *see also* R1.47, 86, 123-124. Mr. Alexander complied, and told Officer Henry that he was "just

getting something to eat." *Id.* Officer Henry told Mr. Alexander that he wasn't in trouble and asked Mr. Alexander if he had a weapon. *Id.* Mr. Alexander said no. *Id.* Officer Henry frisked Mr. Alexander, but didn't find anything. R1.47, 86, 123-125.

While frisking Mr. Alexander, Officer Henry told Officer Thompson that the driver was Matt Alexander. R1.87. On the recording, it sounds as if Officer Henry was introducing the two ("This is Matt Alexander."). Supp.R1 at 1:08. But rather than say hello (or anything at all), Officer Thompson "immediately went to the vehicle to conduct a sweep for weapons." Pet. App. 3a; R1.87; *see also* R1.47, Supp.R1 at 1:14 (showing that the search took place less than thirty seconds into the stop and just ten seconds after Mr. Alexander exited the vehicle). Before she searched the vehicle, Officer Thompson looked at Mr. Alexander's waistband and did not notice any weapons. R1.139. The government introduced no evidence that Officer Henry asked or directed Officer Thompson to search the vehicle.

Officer Thompson testified that she found it "significan[t]" that Officer Henry removed Mr. Alexander from the vehicle. R1.140-141. Based on this, she surmised that Officer Henry "did 'not want that driver to be near that car.'" Pet. App. 3a. "Just from my knowledge of Officer Henry, I would know that he recognized Matt Alexander at that point and knew we needed to sweep this area and this person for weapons because he's a dangerous felon." R1.149. Officer Thompson did not know, however, whether Officer Henry saw a weapon or anything else when he removed Mr. Alexander from the vehicle. R1.150. And to be clear, Officer Henry did not see

anything suspicious during the traffic stop. *See* R1.86, 123-131. Nor did Officer Henry instruct Officer Thompson to search the vehicle.

Although Officer Thompson provided this speculative (and ultimately inaccurate) testimony about Officer Henry's subjective thoughts, she made clear that she conducted the protective sweep "because of something based on [Mr. Alexander's] past, not something [she] knew [Officer Henry] saw in that car." R1.149. And with respect to Mr. Alexander's past, Officer Thompson testified that, after Officer Henry advised her that the driver was Matt Alexander, she "recognized that name from prior contact with him." R1.138. Specifically, about two years earlier, she "attempted to stop Mr. Alexander," but he fled in a vehicle, "and during the chase he threw a handgun out of the vehicle." R1.138-139, 147-148; *see also* Supp.R1.15 (after Officer Henry found the gun, Officer Thompson stated: "I was about to start looking around the parking lot because he's thrown one on us before."). She also testified that Mr. Alexander was a gang member, "had many violent felonies," and that "his name had come up in reference to a homicide investigation." R1.139. Again, Officer Thompson testified that she would not have conducted the vehicle protective search absent her purported prior knowledge of Mr. Alexander. R1.140.

There was a problem with this testimony, however: it was factually wrong. As the government admitted after the evidentiary hearing, Officer Thompson falsely testified that Mr. Alexander threw a gun during a car chase in 2017. R1.52, 72. The individual who threw the gun was a "Matthew H."; it was not Matthew Alexander.

R1.53, 72. Thus, Officer Thompson searched Mr. Alexander's vehicle because she thought that he was some other young black male.[2]

Although Officer Henry did not search the vehicle, and although the government did not introduce any evidence that Officer Henry instructed Officer Thompson to search the vehicle, and although the government did not introduce any evidence that Officer Thompson's decision to search the vehicle had anything to do with Officer Henry's subjective knowledge, the government elicited testimony from Officer Henry about his knowledge of Mr. Alexander. Officer Henry had known Mr. Alexander for around a decade, and first met him when Mr. Alexander was sixteen/seventeen years old (around 2009 or 2010). R1.83, 100. He admitted that he "had personal feelings for Matt," that he "liked him," that he "wanted to see him do well," and that he "kept track of him." R1.85, 100. The two "maintained sort of an 'I know you,' 'you know me' kind of relationship," and Officer Henry "tr[ied] to pay attention to him because [he] did run into him quite a bit." R1.131.

Officer Henry had arrested Mr. Alexander on four prior occasions (three following car stops). Pet. App. 4a-5a; R1.83-85. Mr. Alexander did not have a gun during any of these arrests. R1.112-114. Officer Henry also testified that, in 2016, while off-duty, he ran into Mr. Alexander at a gas station. R1.83-84. The two had a conversation. R1.84. Mr. Alexander had a cast on his arm, and he told Officer Henry that he had punched a window after he drank too much. Pet. App. 4a-5a; R1.84, 115. This encounter also did not involve a firearm (or a detention or anything else). R1.115.

[2] The government sensibly did not argue below that this was a reasonable mistake of fact under the facts and circumstances of this case.

Officer Henry testified about a prior incident that occurred some eighteen months prior to this stop, where Mr. Alexander was initially identified as a potential suspect in a homicide because some individuals used his name in interviews. Pet. App. 5a; R1.83-84, 115. Mr. Alexander was never arrested or charged for this homicide (the Presentence Investigation Report does not mention this homicide at all). Officer Henry also testified that he understood that Mr. Alexander's name appeared in a gang database and that he had prior gun-related convictions. Pet. App. 5a; R132-134. Officer Henry testified that based on his "knowledge of Mr. Alexander and his criminal history," Mr. Alexander "was known to carry firearms," and that this is why he ordered Mr. Alexander from the vehicle. R1.85-86.

While Officer Thompson searched the vehicle, Officer Henry "escorted" Mr. Alexander to a curb about 10 feet from the vehicle and told him to sit down. R1.86. Mr. Alexander had his back to the vehicle, and Officer Henry was standing directly over him. R1.126. During her search "for dangerous weapons," Officer Thompson found synthetic marijuana in the center console. Pet. App. 3a; R1.47, 139-141. Officer Thompson told Officer Henry to arrest Mr. Alexander. R1.47, 87, 99-100, 141, 145. All of this happened within the first few minutes. R1.132.

Officer Thompson continued to search, while Officer Henry conversed with Mr. Alexander. R1.88, 101-102. Officer Henry mentioned that it had "been awhile" since he had seen Mr. Alexander, Mr. Alexander commented that Officer Henry "always pull[s] up on him," and Officer Henry agreed ("I know"), but noted "I always let you go, don't I?" Supp.R1.7-8. During this conversation, Officer Henry noticed what he

termed a "bulge" near Mr. Alexander's crotch and ultimately conducted a full-blown search-incident-to-arrest (not just a pat-down *Terry* frisk) and found a gun in Mr. Alexander's shorts pocket. Pet. App. 3a; R1.47, 90, 105. He placed Mr. Alexander in the back of the patrol car. R1.91. During the entirety of the stop, Mr. Alexander readily complied with the officers' orders. R1.124-125, 130-131.

C. Proceedings in the District Court

Mr. Alexander was charged with possession of a firearm by a convicted felon under 18 U.S.C. § 922(g)(1). Pet. App. 1a. He moved to suppress the firearm because *the officers* conducted an unlawful vehicle protective search under *Michigan v. Long*, 463 U.S. 1032 (1983). Pet. App. 1a, 5a. Although Officer Thompson conducted the vehicle protective search, Mr. Alexander did not focus his argument on Thompson, but instead treated the officers' knowledge collectively. *See* Pet. App. 4a n.1.

The district court denied the motion. The district court concluded that the officers had reasonable suspicion to conduct the vehicle protective search based solely on two things: (1) "that Officer Henry knew that Alexander was a convicted felon who had a record of unlawfully possessing firearms"; and (2) that "Henry also knew that Alexander had been violent in the past." Pet. App. 18a. In relying solely on Officer's Henry's knowledge, the district court said nothing of the collective-knowledge doctrine or whether Officer Henry's knowledge could somehow be imputed to Officer Thompson (the officer who independently conducted the warrantless search). The district court expressly declined to give Officer Thompson's testimony any "weight" or "credence" in light of the fact that she searched the vehicle because she thought

that Mr. Alexander was a different young black male. Pet. App. 20a-21a. Thus, the district court upheld Officer Thompson's vehicle protective search based solely on Officer Henry's subjective knowledge of Mr. Alexander's prior criminal history. Pet. App. 18a-21a.

D. Proceedings in the Tenth Circuit

On appeal, Mr. Alexander argued, *inter alia*, that the district court erred in justifying Officer Thompson's search based on Officer's Henry's subjective knowledge of Mr. Alexander's prior criminal history. *See* Pet. App. 4a. Mr. Alexander explained that the collective-knowledge doctrine did not apply under the facts of this case because Officer Henry did not instruct or request Officer Thompson to conduct the warrantless search, nor did the officers share any information about Mr. Alexander. Br. 27-28. "[W]ithout such evidence, the government could not have established that the officers collectively had reasonable suspicion to search the vehicle." Br. 28. Thus, the district court erred when it "relied exclusively on Officer Henry's uncommunicated knowledge to justify Officer Thompson's search." Br. 28. And because Officer Thompson's basis to search was flawed, she did not have the requisite reasonable suspicion to conduct the vehicle protective search. Br. 37-38.

In response, the government argued that this argument was waived under Rule 12(c)(3) because Mr. Alexander did not present the argument in the district court. Gov't Br. 27-30 (citing, *inter alia*, *United States v. Vance*, 893 F.3d 763, 769 (10th Cir. 2018)).

In reply, Mr. Alexander conceded that Tenth Circuit precedent interpreting Rule 12(c)(3) foreclosed this claim. Pet. App. 4a n.1. Mr. Alexander noted the Circuit split on this issue, however, and "reserve[d] the right to petition for further review" on this issue if the Tenth Circuit were to affirm. Reply Br. 1.

In affirming the district court, the Tenth Circuit noted the collective-knowledge-doctrine argument, but did not reach the merits of that argument under the circumstances. Pet. App. 4a n.1. The Tenth Circuit then affirmed the district court after considering Officer Henry's subjective knowledge of Mr. Alexander's prior criminal history. Pet. App. 4a-10a.

This timely petition follows.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition to resolve an entrenched conflict over Rule 12(c)(3)'s application in the courts of appeals. The resolution of this conflict is critical because, as it currently stands, new arguments raised in support of timely suppression motions are foreclosed in some Circuits but not others. There is no rational basis for this differential treatment, and this differential treatment could be dispositive on appeal. Indeed, it is here. If the Tenth Circuit had considered Mr. Alexander's collective-knowledge-doctrine argument, it should have reversed the district court under the facts of this case. Review is necessary.

I. The Circuits Are Split.

There is an entrenched 5-to-4 conflict over whether Rule 12(c)(3)'s "good cause" requirement applies to an argument that was not raised in a timely pretrial motion,

but was raised for the first time in an appeal from the denial of a timely motion. Without this Court's resolution, this conflict will persist.

Five Circuits – the First, Third, Seventh, Ninth, and Tenth – hold that a defendant must establish "good cause" on appeal to raise a new argument in support of a claim raised in a timely pretrial motion to suppress. *United States v. Lindsey*, 3 F.4th 32, 41 (1st Cir. 2021); *United States v. Robinson*, 844 F.3d 137, 145 (3d Cir. 2016); *United States v. Sands*, 815 F.3d 1057, 1061 (7th Cir. 2015); *United States v. Guerrero*, 921 F.3d 895, 898 (9th Cir. 2019); *United States v. Vance*, 893 F.3d 763, 769-770 (10th Cir. 2018). In these Circuits, Rule 12(c)(3) applies to appellate courts, not just to district courts. *See id.* As such, a new argument in support of a preserved claim raised in a timely pretrial motion is "waived" absent a showing of "good cause" on appeal. *Vance*, 893 F.3d at 770; *see also United States v. Reyes*, 24 F.4th 1, 16 n.8 (1st Cir. 2022) (new arguments "are 'not entitled to plain error review'").

We know of no decision from any of these courts of appeals that has found that a defendant has met this "good-cause" showing on appeal. Nor would we expect to find such a decision. Appellate courts do not take evidence or find facts. *See*, *e.g.*, *Fassett v. Delta Kappa Epsilon (New York)*, 807 F.2d 1150, 1165 (3d Cir. 1986) ("The only proper function of a court of appeals is to review the decision below on the basis of the record that was before the district court."); *United States v. Gonzales*, 931 F.3d 1219, 1224 (10th Cir. 2019) ("We can't resolve this conflict in the evidence because we aren't a factfinder. The district court is the entity entrusted with factfinding"); *Monasky v. Taglieri*, 140 S. Ct. 719, 730 (2020) (distinguishing between "factfinding

courts" and "appellate courts"). Courts of appeals are limited to the record developed below. *See*, *e.g.*, *United States v. Bustamante-Conchas*, 850 F.3d 1130, 1144 (10th Cir. 2017) (en banc) (noting "the fundamental tenet that appellate courts 'will not consider material outside the record before the district court'"). And it is implausible to think that the record will demonstrate why a certain argument for suppression was not advanced in the district court. *See*, *e.g.*, *Massaro v. United States*, 538 U.S. 500, 504 (2003) (ineffective-assistance-of-counsel claims generally should not be raised on direct appeal because the defendant has not had "an opportunity fully to develop the factual predicate for the claim"). In practice, then, five Circuits hold that new arguments in support of claims raised in timely motions to suppress are waived on appeal.[3]

In contrast, four Circuits – the Fourth, Fifth, Sixth, and Eleventh – hold that Rule 12(b)(3)'s "good cause" requirement does not apply on appeal and that new arguments are reviewed, at a minimum, for plain error under Federal Rule of Criminal Procedure 52(b). *United States v. Ojedokun*, 16 F.4th 1091, 1113 (4th Cir. 2021); *United States v. Beaudion*, 979 F.3d 1092, 1101 (5th Cir. 2020) (citing *United States v. Vasquez*, 899 F.3d 363, 372 (5th Cir. 2018)); *United States v. Church*, 823 F.3d 351, 356 (6th Cir. 2016) (citing *United States v. Soto*, 794 F.3d 635, 650 n.11 (6th Cir.2015)); *United States v. Bruce*, 977 F.3d 1112, 1116 (11th Cir. 2020); *United States v. Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015). These Circuits recognize that,

[3] The Second Circuit has pre-2014 precedent consistent with this position. *United States v. Yousef*, 327 F.3d 56, 125 (2d Cir. 2003). But it does not appear as if the Second Circuit has revisited this precedent following the amendment to Rule 12 in 2014.

because Rule 12(c)(3) is aimed at district courts, not courts of appeals, a "waiver"-absent-"good-cause" rule is inconsistent with Rule 12 as amended in 2014 (which eliminated any reference to "waiver"). *Id.* And this is so even when a defendant does not file a timely suppression motion at all. *See*, *e.g.*, *Sperrazza*, 804 F.3d at 1119 (claim is "subject to review for plain error under the new rule even if [the defendant] does not show 'good cause' for failing to present the claim before trial"); *Vasquez*, 899 F.3d at 372-373 (same); *Soto*, 794 F.3d at 653-655 (same).[4]

This Circuit split is ripe for resolution. Many Circuits have openly acknowledged the split. *See*, *e.g.*, *United States v. Reyes*, 24 F.4th 1, 16 n.8 (1st Cir. 2022) ("there is a circuit split as to whether defendants may still receive plain error review for Rule 12 arguments not made before the district court"); *United States v. Ramamoorthy*, 949 F.3d 955, 962 n.3 (6th Cir. 2020) ("Our sister circuits do not agree on whether the plain-error standard applies to forfeited Rule 12(b)(3) claims after the 2014 amendment to the Rule."); *United States v. Guerrero*, 921 F.3d 895, 897 (9th Cir. 2019) ("[s]ince the 2014 amendments, our sister circuits have reached conflicting conclusions on the standard of review that should apply in this context," and noting that, "[w]ere we writing on a blank slate, we might have been inclined to follow [the other Circuits'] lead"); *United States v. Bowline*, 917 F.3d 1227, 1236 (10th Cir. 2019) (acknowledging Circuit split, but refusing to switch sides); *United States v. Burroughs*, 810 F.3d 833, 838 (D.C. Cir. 2016) (acknowledging the split without

[4] It is unclear which side of the split the Eighth Circuit lands on. Compare *United States v. Salkil*, 10 F.4th 897, 899 n.2 (8th Cir. 2021) (argument waived), with *United States v. Hill*, 8 F.4th 757, 760 (8th Cir. 2021) (argument reviewed for plain error).

choosing a side). There is no realistic chance that the lower courts will resolve this established conflict on their own. It's up to this Court to do so. This Court should grant this petition to resolve this entrenched conflict.

II. The Question Presented Is Critically Important To The Procedures That Govern Appeals Of Suppression Rulings.

The question presented merits this Court's review. Standards of review matter. And that is particularly true when waiver principles are involved, as waiver precludes any appellate review. *Olano*, 507 U.S. at 733. As it stands now, some Circuits refuse to consider arguments at all that other Circuits decide on the merits. That is not an acceptable outcome. Standards of review should not differ depending on the geographic location of the court of appeals. A party's arguments should not be considered in one federal court but ignored in another. *See, e.g.*, *Concrete Pipe v. Construction Laborers Pension*, 508 U.S. 602, 625-626 (1993) (explaining that the case turned on the proper standard of review); *United States v. Gallegos*, 314 F.3d 456, 463 (10th Cir. 2002) (explaining that the standard of review can have a "substantial impact on the resolution of a particular case").

This Court has often granted certiorari to resolve conflicts in the Circuits on standard-of-review issues. *See, e.g.*, *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1067 (2020) ("The question that these two consolidated cases present is whether the phrase 'questions of law' in the Provision includes the application of a legal standard to undisputed or established facts."); *Monasky v. Taglieri*, 140 S. Ct. 719, 723 (2020) ("Should the Court of Appeals have reviewed the District Court's habitual-residence determination independently rather than deferentially?"); *U.S. Bank v. Vill. at*

Lakeridge, LLC, 138 S.Ct. 960, 963 (2018) ("In this case, we address how an appellate court should review that kind of determination: de novo or for clear error?"); *McLane v. EEOC*, 137 S.Ct. 1159, 1164 (2017) (resolving "whether a court of appeals should review a district court's decision to enforce or quash an EEOC subpoena de novo or for abuse of discretion"); *Johnson v. California*, 543 U.S. 499, 502 (2005) ("We consider whether strict scrutiny is the proper standard of review for an equal protection challenge to that policy."); *Adarand Constructors v. Pena*, 515 U.S. 200, 204 (1995) (holding that "courts should analyze cases of this kind under a different standard of review than the one the Court of Appeals applied"); *Ornelas v. United States*, 517 U.S. 690, 695 (1996) (granting "certiorari to resolve the conflict among the Circuits over the applicable standard of appellate review").

This Court has also granted certiorari to resolve conflicts over the concepts of waiver and forfeiture in the federal rules of criminal procedure. *See*, *e.g.*, *Olano*, 507 U.S. at 727; *Henderson v. United States*, 568 U.S. 266, 270 (2013) (resolving conflict over Rule 52(b)'s interpretation); *Puckett v. United States*, 556 U.S. 129, 133 (2009) (similar); *Holguin-Hernandez v. United States*, 140 S.Ct. 762, 765 (2020) (similar); *Davis v. United States*, 140 S.Ct. 1060, 1061 (2020) (similar); *United States v. Marcus*, 560 U.S. 258, 262 (2010) (granting certiorari to resolve whether court of appeals' interpretation of Rule 52(b) was consistent with this Court's interpretation of the rule).

The same need for this Court's guidance exists here. This Court agrees to resolve so many standard-of-review issues because those issues control virtually every aspect

of any given case. Standards of review are the equivalent of rules to a game. If those standards differ in the appellate courts, then those courts will necessarily resolve legal issues differently. *See* Deanelle Tacha, Harry T. Edwards & Linda A. Elliott, FEDERAL COURTS STANDARD OF REVIEW v (2007) ("Take 'standard of review.' Now to the normal reader that is legalese. To the judge, it is everything."). Considering the prevalence and importance of Fourth Amendment suppression issues (not to mention all other pretrial motions governed by Rule 12), it is imperative that the appellate courts play by the same rules when reviewing such pretrial rulings. Because they currently do not, the conflict presented in this petition is in need of prompt resolution.

III. The Tenth Circuit Erred.

For at least four reasons, the Tenth Circuit's "waiver"-absent-"good-cause" rule is incorrect. First, by its plain terms, Rule 12(c)(3) does not apply to the courts of appeals. *Soto*, 794 F.3d at 653-654. Rule 12 is found within Title IV, which is entitled "Arraignment and Preparation for Trial." Rule 12 is entitled, "Pleadings and Pretrial Motions." Rule 12(b)(3) is entitled, "Motions That Must Be Made Before Trial." Rule 12(c) is entitled "Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion." And Rule 12(c)(3) is entitled, "Consequences of Not Making a Timely Motion Under Rule 12(b)(3)." Rule 12(c)(3) thus plainly applies to pretrial motions, and pretrial motions are brought and litigated in district courts, not appellate courts. Thus, there is no basis to apply Rule 12(c)(3)'s "good cause" requirement on appeal.

The "rulemaking history" supports this interpretation. *Soto*, 794 F.3d at 654-655. That history indicates that the rules drafters consciously directed Rule 12's

application to district courts and consciously avoided including any language within Rule 12 that would have indicated that it might apply on appeal. *Id.* A defendant must establish "good cause" in the district court to file an untimely pretrial motion. Rule 12(c)(3) means nothing more than that.

The Tenth Circuit has held that Rule 12(c)(3)'s reference to "a court" in its second sentence ("a court may consider the defense, objection, or request if the party shows good cause"), rather than "the court" (as used elsewhere in Rule 12), means that the rule applies to district courts and appellate courts. *Bowline*, 917 F.3d at 1230-1231. That argument is unpersuasive for two reasons. First, "a" is a "singular article" that normally precedes countable nouns. *Niz-Chavez v. Garland*, 141 S.Ct. 1474, 1480-1481 (2021). As normally understood, the phrase "a court" just signifies a single court. It makes no sense to read that phrase to include multiple courts (district courts and appellate courts). And read in context, "a court" is the district court where an untimely motion is pending. It is that court that "may consider the defense, objection, or request if the party shows good cause." Fed.R.Crim.P. 12(c)(3).

Even assuming that the phrase "a court" could refer to multiple courts, the Tenth Circuit's reasoning still doesn't follow for a second reason. While the rules can apply to appellate courts, *see generally* Fed.R.Crim.P. 1, the advisory committee notes explain that the term "court" was "almost always synonymous with the term 'district judge,'" but might be thought not to cover "the many functions performed by magistrate judges" and "circuit judges who may be authorized to hold a district court." Fed.R.Crim.P. 1, Advisory Comm. Notes, 2002 Amendments. And so, "'court' means

district judge, but also reflects the current understanding that magistrate judges act as the 'court' in many proceedings." *Id.* Rule 12(c)(3)'s reference to "a court," in the context of the consequences for failing to file a timely pretrial motion, most naturally was meant to include a magistrate judge (or any other judge) who fills in for district courts when resolving pretrial motions in the district court. *See* 28 U.S.C. § 636(b). The phrase "a court" cannot possibly turn a "good cause" requirement plainly aimed at pretrial motions filed in district courts into a predicate requirement for appellate review.

Second, even if Rule 12(c)(3) could be read to apply in the courts of appeals, Rule 12(c)(3) governs untimely "motions," not untimely arguments. Only if "the motion is untimely" does Rule 12(c)(3)'s "good cause" requirement apply. Fed.R.Crim.P. 12(c)(3). Yet, in the Tenth Circuit, Rule 12(c)(3)'s "good cause" requirement applies to new arguments not raised in timely pretrial suppression motions. *Vance*, 893 F.3d at 769-770. That is not a plausible reading of Rule 12(c)(3)'s text. If a defendant files a timely motion to suppress (as Mr. Alexander did here), that defendant need not meet Rule 12(c)(3)'s "untimely motion" good-cause requirement. The Tenth Circuit's contrary rule is incorrect.

Third, the Tenth Circuit's "good cause" requirement cannot be squared with the 2014 amendments to Rule 12. The 2014 amendments eliminated any reference to "waiver" to avoid any confusion that an untimely motion waived claims. *Vasquez*, 899 F.3d at 372-373; *Sperrazza*, 804 F.3d at 1118-1119. Yet, as explained above, the Tenth Circuit's "good cause" requirement inevitably leads the Court to find that a defendant

has waived the argument at issue. That's because an appeal is limited to the record on appeal, and that record will necessarily not include any reason (let alone a "good" reason) why counsel did not raise a specific argument in support of a suppression motion. *See Soto*, 794 F.3d at 655 ("the good-cause standard may be difficult to apply on appeal if the issue was not first raised at the district court because review for good cause often requires developing and analyzing facts to determine whether a defendant has shown good cause for the late filing"). Indeed, the most (and perhaps only) plausible "good cause" showing would be the trial attorney's ineffectiveness. But ineffective assistance of counsel claims aren't raised on direct appeal because such claims will inevitably have no factual support within the record on appeal. *Massaro*, 538 U.S. at 504; *United States v. Galloway*, 56 F.3d 1239, 1240 (10th Cir. 1995) (en banc) ("Ineffective assistance of counsel claims should be brought in collateral proceedings, not on direct appeal.").

Moreover, Rule 12(c)(3) refers to "untimely" motions, not "waived" claims. Even assuming Rule 12(c)(3) applies to claims (rather than motions, as the plain text indicates), "untimely" claims fall squarely within Rule 52(b)'s forfeiture/plain-error language. As this Court explained in *Olano*, Rule 52(b) "provides a court of appeals a limited power to correct errors that were forfeited *because not timely raised* in district court." 507 U.S. at 731 (emphasis added). At a minimum, the claim is forfeited, not waived. *See also United States v. Vonn*, 535 U.S. 55, 62-63 (2002) (inclusion of standard for Rule 11 violation that tracks Rule 52(a) does not displace Rule 52(b) for forfeited Rule 11 claims). Indeed, when amending Rule 12 in 2014, the rules drafters

expressly considered, but rejected, a provision that would have "direct[ed] the appellate courts that 'Rule 52 does not apply.'" Advisory Comm. on Crim. Rules Report (May 2011) at 376. Thus, Mr. Alexander's new argument in support of his suppression motion was entitled to at least plain-error review under Rule 52(b).

There is a fourth, and more fundamental, problem with the Tenth Circuit's approach. In terms of the Tenth Circuit's treatment of new arguments raised in support of timely suppression motions, its waiver rule conflicts with preservation decisions from this Court. This Court has long held that "[o]nce a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron*, 513 U.S. at 379 (quoting *Yee*, 503 U.S. at 534). As this Court explained over a century ago, "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899). In *Lebron*, for instance, this Court considered "a new argument to support what ha[d] been [the petitioner's] consistent claim." 513 U.S. at 379. Just this term, this Court considered new arguments in a criminal case under this line of precedent. *Hemphill v. New York*, 142 S. Ct. 681, 689 (2022) (citing *Yee*, 503 U.S. at 534).

This Court's precedent is consistent with Rule 51, which requires a party to preserve "a claim of error" made by the district court by "informing the court—when the court ruling or order is made or sought—of the action the party wishes the court to take." Fed.R.Crim.P. 51(b). By its plain terms, Rule 51(b) does not require parties to preserve "arguments," just "claims."

Many courts of appeals have recognized this point. *See*, *e.g.*, *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments."); *United States v. Hope*, 28 F.4th 487, 494 (4th Cir. 2022) ("for purposes of de novo appellate review, it is sufficient for counsel to articulate an objection based on multiple theories") (citing *Yee*); *Ohio Adjutant Gen.'s Dep't v. Fed. Lab. Rels. Auth.*, 21 F.4th 401, 406 (6th Cir. 2021) (considering new arguments on appeal because each argument "supports the consistently argued claims [] brought below"; "[o]n appeal, 'parties are not limited to the precise arguments they made below'"); *Black v. Wigington*, 811 F.3d 1259, 1268 (11th Cir. 2016) (Pryor, C.J.) ("'Although new claims or issues may not be raised, new *arguments* relating to preserved claims may be reviewed on appeal.'") (emphasis in original).

Here, Mr. Alexander has consistently claimed that the vehicle protective search violated the Fourth Amendment. That he raised a new argument in support of that claim on appeal – focusing solely on the searching officer and whether that officer had reasonable suspicion to conduct the search – should not mean that this new argument is somehow disfavored and subject to plain-error review (let alone waiver principles). Mr. Alexander did just what the petitioner did in *Lebron*: he raised "a new argument to support what ha[d] been his consistent claim." 513 U.S. at 379. That argument should have been treated as preserved (and certainly not considered waived). Because the claim was waived in the Tenth Circuit, review is necessary.

IV. This Case Is An Excellent Vehicle.

For two reasons, this case is an ideal vehicle to resolve the conflict.

First, the question presented arises on direct review. On appeal, Mr. Alexander raised a new argument in support of the same claim that he preserved in his timely suppression motion, but that argument was foreclosed from review under binding Tenth Circuit precedent. Pet. App. 4a n.1. Mr. Alexander recognized the point, identified the conflict in the Circuits on the question presented, and "reserve[d] the right to petition for further review" on that question if the Tenth Circuit were to affirm (which it did). Reply Br. 1. The question presented was properly preserved, and the conflict is ripe for review. There are no procedural hurdles to overcome for this Court to address the merits of this critically important question.

Second, if this Court grants certiorari and holds that a new argument raised in support of a timely suppression motion is not subject to Rule 12(c)(3)'s "good cause" requirement (and thus not waived), Mr. Alexander would likely prevail on the merits of this Fourth Amendment claim on remand in the Tenth Circuit (whether under de novo or plain-error review). The record is clear that it was Officer Thompson, not Officer Henry, who searched the vehicle. Yet, the lower courts upheld the search based on Officer Henry's subjective knowledge. Pet. App. 4a-10a. But Officer Henry's knowledge is relevant only if the collective-knowledge doctrine applies. It does not.

"Under the collective knowledge doctrine, the officer who makes a stop or conducts a search need not have reasonable suspicion or probable cause." *United States v. Pickel*, 863 F.3d 1240, 1249 (10th Cir. 2017). "Instead, the reasonable suspicion or

probable cause of one officer can be imputed to the acting officer." *Id.* This can happen in two ways, labeled vertical collective knowledge and horizontal collective knowledge. *Id.*

Under the vertical collective-knowledge doctrine, a search is justified when an officer that has reasonable suspicion "instructs another officer to act, even without communicating all of the information necessary to justify the action." *Id.* The government did not introduce any evidence below to establish that Officer Henry instructed Officer Thompson to conduct the warrantless search. Officer Henry did not testify that he communicated to Officer Thompson to search the vehicle, nor did Officer Thompson testify that she searched the vehicle because Officer Henry asked or directed her to do so. Rather, Officer Thompson testified that she searched the vehicle based solely on Mr. Alexander's prior criminal history. R1.140, 149. That testimony is consistent with the video recording of the stop, which does not depict any verbal or nonverbal communication to search from Officer Henry to Officer Thompson. Indeed, the district court did not find that Officer Henry directed or requested Officer Thompson to search the vehicle. R1.46-51. Under the facts of this case, the vertical collective-knowledge doctrine does not apply.

The same is true under the horizontal collective-knowledge doctrine. Under that doctrine, "a number of individual officers have pieces of the probable cause or reasonable suspicion puzzle, but no single officer has sufficient information to satisfy the necessary standard." *Pickel*, 863 F.3d at 1249 n.5. Under this doctrine, "the court must consider whether the individual officers have communicated the information

they possess individually, thereby pooling their collective knowledge to meet" the reasonable suspicion threshold. *United States v. Chavez*, 534 F.3d 1338, 1345 (10th Cir. 2008). But again, the government did not introduce any evidence that Officers Thompson and Henry "communicated the information they possess[ed]." *Id.* And without such evidence, the government could not have established that the officers collectively had reasonable suspicion to search the vehicle. Under the facts of this case, the horizontal collective-knowledge doctrine does not apply either.

Under the facts of this case, the district court erred when it considered Officer Henry's uncommunicated knowledge of Mr. Alexander's past to find reasonable suspicion to support Officer Thompson's warrantless vehicle search. And because the district court relied exclusively on Officer Henry's uncommunicated knowledge to justify Officer Thompson's search, and because Officer Thompson had no objectively reasonable basis to search the vehicle at all (remember, she thought Mr. Alexander was a different young black male), the district court erred when it denied Mr. Alexander's motion. On appeal, this meritorious argument was off limits under binding Tenth Circuit precedent (which considered the argument waived). The Tenth Circuit thus affirmed under the wrong standard of review and, in doing so, ultimately reached the wrong result. Review is necessary.

CONCLUSION

For the foregoing reasons, this Court should grant this petition.

Respectfully submitted,

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