No. 21-7876

IN THE SUPREME COURT OF THE UNITED STATES

MATTHEW ALEXANDER, III, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in relying on Federal Rule of Criminal Procedure 12, which directs that a request for suppression of evidence "must be raised by pretrial motion" and that an "untimely" request may be considered only if the requesting "party shows good cause," Fed. R. Crim. P. 12(b)(3) and (c)(3), in declining to entertain an asserted ground for suppression that petitioner raised for the first time on appeal.

ADDITIONAL RELATED PROCEEDINGS

United States District Court (D. Kan.):

United States v. Alexander, No. 19-cr-10102 (Dec. 1, 2020)

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

United States v. Alexander, No. 20-3238 (Feb. 11, 2022)

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is not published in the Federal Reporter but is available at 2022 WL 414341. The order of the district court (Pet. App. 14a-19a) is not published in the Federal Supplement but is available at 2019 WL 6037421. The district court's supplemental order (Pet. App. 20a-22a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 11, 2022. The petition for a writ of certiorari was filed on May

12, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a guilty plea in the United States District Court for the District of Kansas, petitioner was convicted of possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Pet. App. 5a. The district court sentenced petitioner to 78 months of imprisonment, to be followed by three years of supervised release. ROA 193-194. The court of appeals affirmed. Pet. App. 1a-13a.

1. Officers Jared Henry and Jamie Thompson were driving on patrol when Officer Henry began following a car whose driver turned on the left-turn signal, quickly switched to the right-turn signal, and then abruptly turned into a restaurant parking lot -- violating a state law that requires drivers to continuously signal a turn for 100 feet. Pet. App. 2a; see Kan. Stat. Ann. 8-1548(b) (West 2019). The driver then accelerated around a curve, at which point Officer Henry activated his emergency lights and sirens. Pet. App. 2a. The car stopped, and Officer Henry recognized petitioner as the driver. Id. at 2a-3a; see 11/12/19 Tr. 9.

Officer Henry had stopped petitioner multiple times before and knew that he had prior firearms conviction, had been a suspect in a homicide investigation, and was listed in a law-enforcement database as a gang member. Pet. App. 4a-5a. Officer Henry asked

petitioner to step out of the vehicle and "relayed to" Officer Thompson that "'he knew it was'" petitioner. Id. at 3a (citation omitted). Petitioner exited the vehicle and Officer Henry patted him down. Ibid. That initial pat down did not uncover any weapons, and Officer Henry directed petitioner to sit on a curb near the vehicle. Ibid.

Officer Thompson conducted a protective sweep of the vehicle. Pet. App. 3a. In the center console, she found what appeared to her to be marijuana -- later determined to be synthetic marijuana -- and indicated that Officer Henry should arrest petitioner. Ibid.; 11/12/19 Tr. 14, 21, 68. After handcuffing petitioner, Officer Henry noticed a bulge near petitioner's groin, prompting Officer Henry to conduct a search incident to arrest. Pet. App. 3a. He discovered a handgun in petitioner's pants pocket. Ibid.

2. A federal grand jury indicted petitioner for possessing a firearm following a felony conviction, in violation of 18 U.S.C. 922(g)(1). Indictment 1-2; Pet. App. 3a. Petitioner filed a pretrial motion to suppress (among other things) the firearm and drugs. Pet. App. 3a. Petitioner argued in relevant part that the protective sweep was not justified under Michigan v. Long, 463 U.S. 1032 (1983), asserting that the officers -- whom he "treated * * * collectively" -- lacked a reasonable suspicion that petitioner was dangerous. Pet. 12; see ROA 18-21.

At the suppression hearing, Officers Henry and Thompson both testified about the traffic stop. Officer Henry explained the bases for his suspicion, including his knowledge of petitioner's lengthy record of violent conduct and firearms possession. Pet. App. 4a-5a. And Officer Thompson testified that she had conducted a protective sweep because Officer Henry's actions indicated petitioner was dangerous. 11/12/19 Tr. 76. Specifically, Officer Thompson testified that, based on her "knowledge of Officer Henry," she knew that his asking petitioner to exit the vehicle was "not normal" and meant that they "needed to sweep this area and this person for weapons because he's a dangerous felon." Ibid. Officer Thompson was also aware of petitioner's gang membership and "many violent felonies," and that his name had "come up in reference to a homicide investigation" a few days before the stop. Id. at 66.*

The district court denied the motion to suppress. Pet. App. 14a-19a. The court determined that "the totality of circumstances" indicated that "the officers had a reasonable and articulable suspicion that [petitioner] was dangerous and could potentially

* Officer Thompson additionally testified that she recognized petitioner from a 2017 incident in which a person threw a gun from a vehicle. 11/12/19 Tr. 65-66. Officer Thompson subsequently reviewed her records and determined that a different individual with a similar name had thrown a gun from a vehicle. Pet. App. 21a. The government promptly alerted the district court of Officer Thompson's mistaken testimony, and the court gave no weight to the testimony "related to mistaken prior experience." Ibid.

gain access to a weapon in the car." Id. at 18a. In particular, the court noted that Officer "Henry knew that [petitioner] was a convicted felon who had a record of unlawfully possessing firearms" and "also knew that [petitioner] had been violent in the past." Ibid.

Following a guilty plea, the district court sentenced petitioner to 78 months of imprisonment, to be followed by three years of supervised release. ROA 193.

3. The court of appeals affirmed in a nonprecedential order. Pet. App. 1a-13a. On appeal, petitioner argued for the first time that the collective-knowledge doctrine did not permit Officer Henry's knowledge of petitioner's dangerousness to be imputed to Officer Thompson, who conducted the protective sweep, Pet. C.A. Br. 27-28; that Officer Thompson independently lacked a reasonable suspicion to conduct the protective sweep, id. at 36-39; and that the district court had erroneously relied on Officer Henry's knowledge of petitioner's criminal history, id. at 28-32.

The government observed that petitioner had not argued in the district court that the collective-knowledge doctrine was inapplicable and that, under Federal Rule of Criminal Procedure 12(c)(3), petitioner's untimely suppression request could be reviewed only upon a showing of "good cause." Gov't C.A. Br. 27-30. The government also argued that, even if review were available, petitioner could obtain relief only if he could satisfy

the plain-error standard, which he had not addressed in his brief. Id. at 30-35. In his reply brief, petitioner "agree[d]" that he had "failed to raise [his] collective-knowledge-doctrine argument below"; that, under circuit precedent, he "would have to show 'good cause' under Federal Rule of Criminal Procedure 12(c)(3)" to obtain review; and that he "c[ould]not do so." Pet. C.A. Reply Br. 1.

Recognizing petitioner's "concession" that he had failed to ask the district court to suppress the fruits of the sweep based on an asserted lack of reasonable suspicion by Officer Thompson viewed in isolation, and "that he c[ould]not show 'good cause' under Federal Rule of Criminal Procedure 12(c)(3)" for untimeliness, the court of appeals declined to address that issue. Pet. App. 4a n.1 (citation omitted). Instead, mirroring the issue framed in the district court, the court of appeals considered the officers' collective knowledge had justified the protective sweep, and agreed with the district court's resolution of that issue. Id. at 6a-12a.

ARGUMENT

The court of appeals' disposition of petitioner's request for suppression was correct and does not warrant this Court's review. in the conceded absence of good cause. While some courts of appeals have reviewed untimely suppression requests under a plain-error standard, any disagreement in the circuits on that issue has little practical effect and does not warrant this Court's review

-- particularly in this case, where petitioner could not satisfy the plain-error standard. This Court has repeatedly and recently denied requests to review the same or similar questions. See, e.g., Lindsey v. United States, 142 S. Ct. 1170 (2022) (No. 21-6788); Ockert v. United States, 141 S. Ct. 2536 (2021) (No. 20-7372); Galindo-Serrano v. United States, 140 S. Ct. 2646 (2020) (No. 19-7112); Guerrero v. United States, 140 S. Ct. 1300 (2020) (No. 19-6825); Bowline v. United States, 140 S. Ct. 1129 (2020) (No. 19-5563). The same course is warranted here.

1. The court of appeals correctly determined that Federal Rule of Criminal Procedure 12(c)(3) precludes appellate review of an unpreserved suppression request in the absence of "good cause" -- which petitioner acknowledged that he lacked. Pet. App. 4a n.1.

a. Rule 12 provides that certain "defenses, objections, and requests" -- including for "suppression of evidence" -- "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) and (C). Rule 12(c)(1) states that the deadline for filing such pretrial motions is the date set by the court during pretrial proceedings or, if "the court does not set [a deadline], * * * the start of trial." Fed. R. Crim. P. 12(c)(1). Rule 12(c)(3) establishes the "[c]onsequences of [n]ot [m]aking a [t]imely [m]otion [u]nder Rule 12(b)(3)." Of central relevance here, "[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).

By its plain terms, Rule 12(c)(3) forecloses a court's consideration of an untimely suppression request without a showing of good cause. Petitioner accepts (Pet. 20-21) that, under the rule, a district court is barred from considering such a request in the absence of good cause. He nonetheless contends (ibid.) that Rule 12(c)(3)'s good-cause requirement is limited to district courts, and that appellate courts may consider in the first instance requests that the district court was barred from considering. That contention lacks a foundation in the Rule's text, history, or purpose.

As noted, Rule 12(c)(3) establishes when "a court may consider" an untimely defense, objection, or request within Rule 12(b)(3)'s ambit. As the court of appeals explained in a thorough analysis that provided the basis for the decision below, Rule 12(c)(3) is therefore most naturally read to "refer[] to an appellate court * * * as well as the trial court," and to bar appellate consideration of the relevant untimely requests without good cause. United States v. Bowline, 917 F.3d 1227, 1230 (10th Cir. 2019), cert. denied, 140 S. Ct. 1129 (2020). Other portions of the Federal Rules of Criminal Procedure indicate that the word "court" can include an appellate court. See Fed. R. Crim. P.

1(a)(1) ("These rules govern the procedure in all criminal proceedings in the United States district courts, the United States courts of appeals, and the Supreme Court of the United States."); Fed. R. Crim. P. 1(b)(2) (defining "court" as "a federal judge performing functions authorized by law"); Fed. R. Crim. P. 1(b)(3)(A) (defining "[f]ederal judge" by reference to 28 U.S.C. 451, which states that the term includes "judges of the courts of appeals[and] district courts").

Petitioner errs in suggesting (Pet. 21) that "a court" must refer only to one type of court; "a" can be an indefinite article that can refer to multiple members of a class. See United States v. Soto, 794 F.3d 635, 653 & n.15 (6th Cir. 2015), cert. denied, 136 S. Ct. 2007 (2016). An ordinance prohibiting visitors from bringing "a vehicle" into the park, for example, would be naturally understood to forbid bringing a car, a motorcycle, or both. And appellate courts routinely apply, for example, the Rule 52 plain-error standard, see Greer v. United States, 141 S. Ct. 2090, 2096 (2021) (applying the Rule 52 plain-error standard on appeal); United States v. Olano, 507 U.S. 725, 731 (1993) (explaining that courts of appeals apply Rule 52(b)), even though Federal Rule of Criminal Procedure 52 does not explicitly refer to appellate courts and its neighboring rules appear to apply exclusively to district courts, see, e.g., Fed. R. Crim. P. 43 (Defendant's Presence); Rule 55 ("The clerk of the district court must keep records.");

Rule 57 (District Court Rules). Provision titles and neighboring rules therefore cannot be determinative as to whether an appellate court applies any particular Federal Rule of Criminal Procedure.

Rule 12(c)(3)'s application to both district and appellate courts also reflects sound practical considerations. Appellate courts are not well-situated to consider in the first instance matters, such as suppression requests, that could have been illuminated with a hearing and decision if timely raised in the district court. As this Court explained in interpreting the original version of Rule 12, "[i]f [the rule's] time limits are followed, inquiry into an alleged defect may be concluded and, if necessary, cured before the court, the witnesses, and the parties have gone to the burden and expense of a trial." Davis v. United States, 411 U.S. 233, 241 (1973). But "[i]f defendants were allowed to flout [the] time limitations, * * * there would be little incentive to comply with [the] terms when a successful attack might simply result in a new indictment prior to trial." Ibid. Indeed, "[s]trong tactical considerations would militate in favor of delaying the raising of the claim in hopes of an acquittal, with the thought that if those hopes did not materialize, the claim could be used to upset an otherwise valid conviction at a time when reprosecution might well be difficult." Ibid. "There is the potential for both unfairness to the government and needless inefficiency in the trial process if

defendants are not required, at the risk of waiver, to raise all of their grounds in pursuing a motion to suppress." United States v. Lindsey, 3 F.4th 32, 41 (1st Cir. 2021) (citation omitted), cert denied, 142 S. Ct. 1170 (2022).

b. Petitioner's contention (Pet. 22-23) that an appellate court may consider untimely requests even in the absence of good cause rests on the elimination of the term "waiver" from Rule 12 in 2014. Before the 2014 amendments, Rule 12 provided that "[a] party waives" any objection or defense within the ambit of the Rule by failing to raise the claim before trial, but the court "[f]or good cause * * * may grant relief from the waiver." Fed. R. Crim. P. 12(e) (2012). In 2014, all variations on the term "waiver" were removed from the rule. Petitioner asserts (Pet. 23) that the absence of an explicit reference to an untimely claim being "waive[d]" necessarily means that on appeal such a claim is reviewable for plain error under Rule 52(b) in the same manner generally applicable to forfeited claims not subject to Rule 12, rather than under the good-cause standard Rule 12 provides. That is incorrect.

As the court below has previously explained, the "general" framework of "waiver" as "the 'intentional relinquishment or abandonment of a known right'" and "forfeiture" as to other failures to raise a claim -- described by this court in United States v. Olano, 507 U.S. at 733 (citation omitted) -- does not

itself describe all of the legal rules that may apply in all circumstances. Bowline, 917 F.3d at 1232. Instead, "there are common circumstances in which appellate review of an issue is precluded even when a party's failure to raise the issue was not an intentional relinquishment of a known right" -- for example, a defendant's failure to raise an issue in an opening brief may relieve the court of appeals from considering the issue (under plain error or otherwise) regardless of the defendant's intentions. Id. at 1231. And a statute of limitations may bar a cause of action or claim for post-conviction relief regardless of whether the delay in seeking such relief was intentional or negligent. Id. at 1232. This Court's decision in Davis v. United States, supra, makes clear that Rule 12 operates in a similar manner.

In Davis, this Court interpreted the original 1944 version of Rule 12, which provided in part that "[f]ailure to present any * * * defense or objection" covered by the Rule (with specified exceptions) "constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." Fed. R. Crim. P. 12(b)(2) (1944). The defendant in Davis, who challenged the composition of the grand jury for the first time in a post-conviction proceeding under 28 U.S.C. 2255, argued that he was entitled to raise his claim because he had not "deliberately bypassed or understandingly and knowingly waived his claim." 411 U.S. at 236 (internal

quotation marks omitted). In other words, "[t]he meaning the defendant sought to give waiver matched that later set forth in Olano." Bowline, 917 F.3d at 1232 (emphasis omitted). Relying on the plain language of Rule 12, this Court rejected the defendant's argument, reasoning that, "when a rule 'promulgated by this Court and . . . adopted by Congress, governs by its terms the manner in which the claims of defects in the institution of criminal proceedings may be waived,' the standard specified in the rule controls." Id. at 1233 (quoting Davis, 411 U.S. at 241). The Court thus determined that "the necessary effect of the congressional adoption of [the Rule was] to provide that a claim once waived pursuant to that Rule [could] not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires." Davis, 411 U.S. at 242.

The term "waiver" in Rule 12 thus never meant the affirmative relinquishment of a known right. Indeed, the Advisory Committee note to the 2014 amendments illustrates that the word "waiver" was removed specifically because it was descriptively imprecise -- and not because any substantive change from Davis was intended. At the time of the 2014 amendments, "the Olano standard had become dominant in the case law in determining when there had been a waiver, rendering the use of that term in Rule 12 idiosyncratic." Bowline, 917 F.3d at 1235. The Advisory Committee note explained:

> Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term "waiver" in new paragraph (c)(3).

Fed. R. Crim. P. 12 advisory committee's note (2014 Amendments). In other words, eliminating the term "waiver" was intended to avoid confusion with the Olano framework, not create it.

As the Advisory Committee note further explained, "[n]ew paragraph 12(c)(3) retains the existing standard for untimely claims. The party seeking relief must show 'good cause' for failure to raise a claim by the deadline, a flexible standard that requires consideration of all interests in the particular case." Fed. R. Crim. P. 12 advisory committee's note (2014 Amendments). And because this Court in Davis had already made clear that Rule 12's good-cause standard applied throughout criminal proceedings, the Committee would have understood the retention of that standard to apply equally to both district and appellate courts. See Davis, 411 U.S. at 242 ("[A] claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of 'cause' which that Rule requires.").

Petitioner's reliance (Pet. 23-24) on the Advisory Committee's consideration, but ultimate omission, of a provision

that would have stated that "Rule 52 does not apply" to review of untimely claims is misplaced. In its May 2011 Report, the Advisory Committee noted that "[i]t would be odd indeed if the waiver/good cause standard of Rule 12 applied in the district court * * * , but the more generous plain error standard applied in the court of appeals." Advisory Comm. on R. Crim. P. Rep. 387 (May 2011). In later omitting a specific reference to Rule 52, the Advisory Committee did not disavow that view. Rather, it "merely wished to avoid debate that threatened to delay or prevent adoption of the rule amendments" by explicitly mandating that approach. Bowline, 917 F.3d at 1236; see Fed. R. Crim. P. 12 advisory committee's note (2014 Amendments). At most, the omission of an explicit reference to Rule 52 left the courts of appeals to decide the question presented here based on the rest of the text, structure, and history of the rule -- all of which support the approach of the court below.

c. Petitioner further contends (Pet. 24-25) that the court of appeals' interpretation of Rule 12(c)(3) conflicts with this Court's decision in Lebron v. National Railroad Passenger Corp., 513 U.S. 374 (1995), on the theory that his officer-specific suppression is merely a new argument in support of his properly presented suppression claim, as opposed to a new claim. Based on that theory, he even suggests (Pet. 25-26) that his officer-specific theory is entitled to de novo review on appeal. That

contention is mistaken for many of the same reasons outlined above: it is contrary to the text, history, and purpose of Rule 12(c)(3).

In the district court, petitioner made a "request that the court" suppress certain evidence based on the officers' lack of knowledge that petitioner was dangerous. Fed. R. Crim. P. 12(b)(1); see pp. 3-5, supra. On appeal, he made a new and different request -- that the evidence be suppressed because the collective-knowledge doctrine was inapplicable and Officer Thompson individually lacked knowledge that petitioner was dangerous. See pp. 5-6, supra. Courts of appeals have determined that Rule 12(c)(3) "applies * * * when a defendant fails to assert a particular argument in a pretrial suppression motion." United States v. Vance, 893 F.3d 763, 770 (10th Cir. 2018); see, e.g., Lindsey, 3 F.4th at 41 ("Unpreserved legal arguments as to motions to suppress are unreviewable except upon a showing of good cause."). That understanding follows naturally from the rule's requirement to timely assert a "defense[,] objection[,] or request" in a "pretrial motion" for "suppression of evidence" if "the basis for the motion is * * * reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim P. 12(b)(c)(3). On petitioner's view, a defendant would nonsensically be entitled to raise a new "basis" for suppression on appeal, even if available and adjudicable in a pretrial motion, so long as he filed a motion to suppress based on any basis in the

district court. That textually implausible result would directly undermine the history and purpose of the rule, see pp. 10-15, supra, and petitioner cites no relevant precedent -- of this Court or any court of appeals -- supporting it. And to the extent that he may contend that the court of appeals erred in viewing his collective-knowledge argument as a separate "basis" for suppression, that fact-bound contention would not warrant this Court's review.

2. Although some disagreement exists among the courts of appeals regarding whether a defendant must satisfy the good-cause standard before an appellate court may review an untimely claim under Rule 12, that disagreement does not warrant this Court's review. Indeed, the Court has repeatedly denied petitions presenting this or similar questions. See p. 7, supra.

Most courts of appeals to have addressed the question have recognized that amended Rule 12 precludes consideration of an untimely claim if the defendant cannot show good cause. See Pet. App. 15; Lindsey, 3 F.4th at 40-41; United States v. Galindo-Serrano, 925 F.3d 40, 47-49 (1st Cir. 2019), cert denied 140 S. Ct. 2646 (2020); United States v. Diaz, 967 F.3d 107, 111 n.4 (2d. Cir. 2020) (per curiam), cert denied 141 S. Ct. 1424 (2021); United States v. O'Brien, 926 F.3d 57, 82-84 (2d Cir. 2019); United States v. Robinson, 844 F.3d 137, 145 (3d. Cir. 2016), cert. denied, 138 S. Ct. 215 (2017); United States v. Grayson Enters., Inc., 950

F.3d 386, 403 (7th Cir. 2020); United States v. Sands, 815 F.3d 1057, 1061 (7th Cir. 2015); United States v. McMillian, 786 F.3d 630, 635-636 (7th Cir. 2015); Vance, 893 F.3d at 769-770.

Petitioner identifies (Pet. 16) four courts of appeals -- the Fourth, Fifth, Sixth, and Eleventh Circuits -- that have reviewed untimely claims subject to Rule 12 for plain error, without regard to whether a defendant can show good cause. United States v. Ojedokun, 16 F.4th 1091, 1113 (4th Cir. 2021), cert. denied, 142 S. Ct. 2780 (2022); United States v. Beaudion, 979 F.3d 1092, 1101 (5th Cir. 2020) (citing United States v. Vasquez, 899 F.3d 363, 372-373 (5th Cir. 2018), cert. denied, 139 S. Ct. 1543 (2019); United States v. Church, 823 F.3d 351, 356 (6th Cir. 2016) (citing Soto, 794 F.3d at 650 n.11), cert. denied, 137 S. Ct. 255 (2016)); United States v. Bruce, 977 F.3d 1112, 1116 (11th Cir. 2020), cert. denied, 141 S. Ct. 2541 (2021); United States v. Sperrazza, 804 F.3d 1113, 1119 (11th Cir. 2015), cert. denied, 579 U.S. 902 (2016). Of these decisions, only the Sixth Circuit's decision in Soto and the Eleventh Circuit's decision in Sperrazza examined Rule 12(c)(3) in any depth, and none considered the significance of this Court's interpretation of Rule 12 in Davis to support the proper construction.

Moreover, it is not clear that applying the good-cause standard as opposed to the plain-error standard affects the outcome in a meaningful number of cases. To begin with, Rule 12 applies

only where the defense or objection is one for which "the basis for [a pretrial] motion is then reasonably available and the motion can be determined without a trial on the merits." Fed. R. Crim. P. 12(b)(3). Furthermore, plain-error review itself is discretionary. See Puckett v. United States, 556 U.S. 129, 135 (2009) (explaining that even where the requirements of plain error are otherwise met, "the court of appeals has the discretion to remedy the error") (emphasis omitted). And a defendant's failure to timely raise a suppression motion in the district court will often present a particularly strong case for the court of appeals to decline to exercise such discretion. See, e.g., United States v. Ramamoorthy, 949 F.3d 955, 962 (6th Cir. 2020) (reasoning that it is generally not a proper exercise of discretion under Rule 52 to "perform plain-error review of a forfeited suppression claim which turns on unresolved questions of fact").

In addition, Rule 12's good-cause standard is generally understood as requiring a defendant to show "cause for his untimeliness" and "prejudice suffered as a result of the error." Bowline, 917 F.3d at 1234. The plain-error standard similarly requires a showing of prejudice, see Fed. R. Crim. P. 52(b) (requiring a "plain error that affects substantial rights"), and leaves the ultimate question whether to grant relief to the court's "discretion," Puckett, 556 U.S. at 135. Accordingly, many claims precluded by Rule 12(c)(3) would also fail under plain-error

review. See, e.g., United States v. Hill, 8 F.4th 757, 760 (8th Cir. 2021) (argument not preserved under 12(c)(3) also fails on plain-error test); United States v. Mung, 989 F.3d 639, 642 (8th Cir. 2021) (same); Grayson Enters., 950 F.3d at 403 (same); Vance, 893 F.3d at 770 (same); United States v. Anderson, 783 F.3d 727, 741 (8th Cir. 2015) (same); see also O'Brien, 926 F.3d at 82 (rejecting challenge as both untimely and "lack[ing] merit"); United States v. Edmond, 815 F.3d 1032, 1044 (6th Cir. 2016) ("[T]he difference between the two standards is not apt to drive case outcomes frequently."), cert. denied, 137 S. Ct. 619, and cert. granted, vacated, and remanded, 137 S. Ct. 1577 (2017); United States v. Burroughs, 810 F.3d 833, 838 (D.C. Cir. 2016) (defendant failed to show good-cause and that error was plain). And even in a hypothetical case in which defense counsel failed to timely raise a claim covered by Rule 12(b)(3) without good cause, and the defendant could demonstrate plain error on appeal, the defendant may pursue a remedy in post-conviction proceedings based on a claim of ineffective assistance of counsel. See Edmond, 815 F.3d at 1044 (suggesting that the availability of such ineffective-assistance claims "narrows the set of affected defendants * * * perhaps * * * to nil").

3. In any event, this case would be an unsuitable vehicle for resolving the question presented because petitioner fails to

demonstrate that his untimely claim would prevail even if the plain-error standard applied.

The plain-error standard requires a defendant to show (1) "'[d]eviation from a legal rule,'" (2) that is "clear or obvious," and (3) that "'affected the outcome of the district court proceedings.'" Puckett, 556 U.S. at 135 (quoting Olano, 507 U.S. at 732-734) (brackets in original). If the defendant does so, a "court of appeals has the discretion to remedy the error" if it "'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings.'" Ibid. (quoting Olano, 507 U.S. at 736) (emphasis omitted).

Petitioner did not address the plain-error standard before the court of appeals. His petition asserts (Pet. 26-28) that the district court erred but fails to address the other three elements required for relief. See United States v. Leffler, 942 F.3d 1192, 1197-1200 (10th Cir. 2019) (no plain-error review when defendant did not address plain-error standard in opening brief). And his assertion of error is itself incorrect.

In Michigan v. Long, 463 U.S. 1032 (1983), this Court established, in the context of a roadside stop of a vehicle for a traffic offense, that a protective search may extend to areas of a vehicle where weapons might be placed or hidden if an officer has a reasonable suspicion that the suspect is dangerous and may gain immediate control of such weapons. Id. at 1049-1050.

Petitioner cannot show that the district court erred, let alone plainly so, in determining that the totality of the circumstances gave the officers a reasonable suspicion that he was dangerous. Pet. App. 9a-10a.

In particular, the record refutes petitioner's assertion (Pet. 9-10) that Officer Thompson conducted the protective sweep based solely on petitioner's criminal history. Petitioner's assertion that Officer Thompson searched the vehicle "because of something based on [petitioner's] past" relies on a quotation of defense counsel's question, not Officer Thompson's answer. Pet. 9 (quoting ROA 149). Officer Thompson in fact explained that she conducted the protective sweep based on her "knowledge of Officer Henry" and his decision to remove petitioner from the car, not petitioner's criminal history. ROA 149.

The district court did not plainly err in denying suppression based on the "totality of the circumstances." Pet. App. 8a (citation omitted). It is well accepted that "officers working closely together during a stop or an arrest can be treated as a single organism" and "such officers convey suspicions through nonverbal as well as verbal cues." United States v. Shareef, 100 F.3d 1491, 1504 n.6 (10th Cir. 1996); see Gov't C.A. Br. 31-35. And the court declined to give weight to Officer Thompson's (promptly corrected) misstatement that petitioner had thrown a gun out of a vehicle on a prior occasion. Pet. App. 20a-21a; see p.

4 n.*, supra. Petitioner accordingly cannot show error -- let alone plain error -- and would therefore not be entitled to relief irrespective of any consideration of the question presented in the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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