No. _____

In the

Supreme Court of the United States

JESUS FRANCISCO FERNANDEZ, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

On Petition for Writ of Certiorari to the

United States Court of Appeals

for the Tenth Circuit

Petition for Writ of Certiorari

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Question Presented

Federal Rule of Criminal Procedure 12(c)(3) provides that certain pretrial motions are "untimely" if not raised by the deadline set by the district court, but a "court may consider the defense, objection, or request if the party shows good cause."

> When, on appeal, a defendant emphasizes certain undisputed facts to support a derivative theory of one raised in a suppression motion filed in district court, is plain error review available as the Fourth, Fifth, Sixth, and Eleventh Circuits have held, or does 'good cause' replace plain error in Federal Rule of Criminal Procedure 52(b) as in the First, Second, Seventh, Eighth, Ninth and Tenth Circuits?

Related Proceedings

United States Supreme Court

Jesus Francisco Fernandez v. United States, Case No. 21A639

Application to extend the time to file a petition for a writ of certiorari granted until June 3, 2022

United States Court of Appeals for the Tenth Circuit

United States v. Jesus Francisco Fernandez, Case No. 20-2106

Initial Opinion Entered: December 17, 2021

Initial Opinion Amended and Revised Opinion Entered after Petition for Rehearing Denied: February 3, 2022

Mandate Entered: February 11, 2022

United States District Court for the District of New Mexico

United States v. Jesus Francisco Fernandez, Case No. 17-CR-3237-JAP

Judgment Entered: July 21, 2020

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In the

Supreme Court of the United States

JESUS FRANCISCO FERNANDEZ, Petitioner

v.

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Petition for Writ of Certiorari

Jesus Francisco Fernandez petitions for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Tenth Circuit in his case.

Opinions Below

The decision of the United States Court of Appeals for the Tenth Circuit in *United States v. Fernandez*, Case No. 20-2106, is published at 24 F.4th 1321.[1] The district court's memorandum opinion and order is available at 2018 WL 4901214.[2]

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[1] App. 1a-36a. "App." refers to the attached appendix. The record on appeal contained four volumes. Fernandez refers to the documents and pleadings in those volumes as Vol. __ followed by the bates number on the bottom right of the page (e.g. Vol. I, 89). 'AOB' refers to Appellant's Opening Brief filed in the Tenth Circuit. 'GAB' refers to the Government's Answer Brief and 'ARB' is the Appellant's Reply Brief.

[2] App. 39a-56a.

Jurisdiction

On February 3, 2022, the Tenth Circuit entered its judgment.[3] A timely petition for panel rehearing and rehearing en banc was denied on February 3, 2022.[4] On April 25, 2022, Justice Gorsuch extended the time within which to file a petition for a writ of certiorari to and including June 3, 2022. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

Pertinent Federal Criminal Rules of Procedure

Rule 12. Pleadings and Pretrial Motions

(b) **Pretrial Motions**

. . . .

(3) **Motions That Must Be Made Before Trial**. The following defenses, objections, and requests 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:

(A) a defect in instituting the prosecution, including:
(i) improper venue;
(ii) preindictment delay;
(iii) a violation of the constitutional right to a speedy trial;
(iv) selective or vindictive prosecution; and
(v) an error in the grand-jury proceeding or preliminary hearing;
(B) a defect in the indictment or information, including:
(i) joining two or more offenses in the same count (duplicity);
(ii) charging the same offense in more than one count (multiplicity);
(iii) lack of specificity;
(iv) improper joinder; and
(v) failure to state an offense;
(C) suppression of evidence;
(D) severance of charges or defendants under Rule 14; and
(E) discovery under Rule 16 . . .

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[3] App. 1a-36a. The Tenth Circuit's initial decision was published on December 17, 2021. Fernandez filed a petition for panel rehearing and rehearing en banc, which was denied on February 3, 2022. On that day, the court amended its December 17, 2021 opinion and replaced it with the revised opinion attached to this petition. App. 37a-38a.

[4] App. 37a-38a.

(c) Deadline for a Pretrial Motion; Consequences of Not Making a Timely Motion.

(1) **Setting the Deadline**. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. If the court does not set one, the deadline is the start of trial.

(2) **Extending or Resetting the Deadline**. At any time before trial, the court may extend or reset the deadline for pretrial motions.

(3) **Consequences of Not Making a Timely Motion Under Rule 12(b)(3)**. 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(b)(3), (c) (2014).

Rule 52. Harmless and Plain Error

. . . .

(b) Plain Error. 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) (2002).

Pertinent Constitutional Provision

The Fourth Amendment to the Constitution of the United States

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

A. Proceedings in the district court.

A jury found Fernandez guilty of possessing methamphetamine with intent to distribute it, in violation of 21 U.S.C. § 841(b)(1)(A).

The charge was based on a search and seizure of Fernandez's travel bag. Officers first searched then seized the bag from the overhead luggage rack of a Greyhound bus that Fernandez was on. Inside the bag, they found bundles wrapped in brown tape that contained methamphetamine. They did not have probable cause to search the bag. In the district court, Fernandez moved to suppress the methamphetamine found by the officers.

Fernandez argued that after the passengers got off the bus in Albuquerque, New Mexico, the officers boarded the empty bus and physically examined bags inside the passenger compartment. Quoting *United States v. Nicholson*, 144 F.3d 632, 638-39 (10th Cir. 1998), Fernandez contended the officers "sweep" of the bus was a search that required probable cause. Without it, their actions were unconstitutional and any evidence and statements so seized had to be suppressed.

The government's response did not specifically discuss the officers inspection of passengers' belongings while the bus was empty. Instead, it defended the officers' conduct by arguing generally that the "handling" of Fernandez's bag was neither a search nor a seizure. It too cited *Nicholson*, 144 F.3d at 638, and argued that the handling of the bag was not a tactile inspection aimed at discovering the nature of the bag's contents.

At the evidentiary hearing, officers Perry and Lemmon testified about how and why they inspected Fernandez's bag. During layovers, passengers must get off the bus while it is cleaned and refueled. Vol. IV, 1056. Passengers

receive a pass to reboard. The officers use this time to examine the luggage and carry-ons while no one is around. *Id.* 259-60, 280, 1056-57; 1138. Perry grabbed a lone black bag from the overhead rack and examined it in his hands for 30 seconds.[5] *Id.* 238, 260, 280-81. He did this to gauge how "heavy it was" and to "observe all sides."[6] *Id.* 260-61. Perry gleaned it was "partially full of clothing . . . didn't have a lot of contents inside . . . [and contained] something very heavy." *Id.* 237, 243. He handed it to Lemmon for his assessment.[7] *Id.* 1059, 1139. Lemmon said besides being heavy, it "was sagging at the bottom." *Id.* 1247. After gathering this evidence, Perry put the bag back in its place. *Id.* 1058-59.

The district court denied the motion to suppress in a written order. App. 39a-56a. It characterized the issue as whether the officers conducted an "improper warrantless 'pre-search' of the bag before passengers again boarded the bus . . . ." App. 45a n. 3. It found that the officers had removed the bag from the rack and noticed its "heft" compared to its "size." App. 46a. Because the agents had not "squeezed, manipulated [] or pressed in the sides of the bag [] to determine its contents," its handling was not a search as defined by *Nicholson*. *Id.* The court emphasized that the officers' "actions did not depart from the type of handling a commercial bus passenger would reasonably expect his baggage to be subjected to." App. 46a-47a.

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[5] For the first time, under government questioning, the officer mentions how long he held the bag.

[6] Answering the court's question, the officer explains why he held the bag.

[7] For the first time, the officer admits passing the bag for his colleague to inspect.

B. Proceedings in the court of appeals.

Fernandez appealed the district court's order to the Tenth Circuit. He argued the officers' handling of his bag was an unconstitutional search. Bus travelers place carry-ons overhead and expect casual contact by other passengers. A bag may be moved slightly or even picked up momentarily to place another item on the same rack. But no one knowingly exposes their bag to the type of prolonged scrutiny undertaken by the officers. When Perry pulled Fernandez's bag from the rack, held it in his hands, and appraised its shape, volume, and weight (which were otherwise unknowable), he infringed Fernandez's reasonable expectation of privacy in his bag and searched it. Fernandez said it was unreasonable to believe anyone would tolerate another boarding the bus and, with no one watching, take a bag off the rack and consider what was inside. Since the officers handled his bag in a manner calculated to determine its contents, the degree of intrusion exceeded the contact one might reasonably expect from another passenger and, therefore, constituted a search. Fernandez cited *Carpenter v. United States*, 138 S.Ct. 2206 (2018), *Bond v. United States*, 529 U.S. 334 (2000), *Arizona v. Hicks*, 480 U.S. 321 (1987) and *United States v. Nicholson*, 144 F.3d 632, 638-39 (10th Cir. 1998) as the primary cases supporting his argument. AOB 52-64.

The government responded that Fernandez had "affirmatively waived" the search issue in the district court. GAB 45. In its view, by "conceding" that the officers testified they had not squeezed the bag or felt its contents, defense counsel had "disclaimed any suggestion" the officers had searched the bag "by lifting [it] to judge its weight." *Id.* Although it admitted that the district court had ruled on the issue Fernandez raised on appeal, it maintained Fernandez's "waiver" made the fact irrelevant. The government

never mentioned Federal Rule of Criminal Procedure 12. It did say that, in the alternative, Fernandez's search argument failed on the merits.

Fernandez replied that the government's argument he abandoned the search issue was wrong. Citing to the record, Fernandez detailed how he had preserved the search issue for appeal. Defense counsel only acknowledged the officers believed they did not do "anything untoward to the bag." ARB 2 (quoting Vol. IV, 408). Counsel agreed only that in their "direct testimony," they said they "didn't squeeze" the bag or "feel the contents." *Id.* Counsel did not "concede" or "disclaim" the search issue. *Id.* Indeed, at the end of the evidentiary hearing, when the district court asked counsel "to address the question of how what [] Perry did exceeds the scope of a permissible handling of bags," defense counsel recounted aspects of the officers' testimony that illustrated there was a "*Bond* violation." Vol. IV, 407. He explained that "unaccompanied" officers "board the bus and start handling bags." *Id.* 405. They "physically examined" Fernandez's bag, taking it in their hands. *Id.* 399, 406. The court could infer Perry's actions constituted a search because he "doesn't have to open the bag" to investigate what might be inside. *Id.* 406-07. The government's response to the court's question returned to abandonment. ARB 3 (citing Vol. IV, 414-22). In effect, it said whatever the agents did wrong was excused by Fernandez allegedly abandoning the bag later. *Id.*

Most importantly though, Fernandez stated that the precise issue he raised in his appeal was "passed upon" by the district court. ARB 4. The court had deliberated on whether the officers' unmonitored handling of his bag was a search. ARB 3. It found, as a matter of law, it was not. In its opinion, it wrote that the officers' actions were not any different from "the

type of handing" a bus passenger "would reasonably expect his baggage to be subject to." ARB 3 (citing App. 47a). Fernandez noted the government did not object to the court's decision and accepted it without request for reconsideration or amendment. ARB 4. Over four pages, Fernandez then argued that even if he had forfeited the argument, he had also satisfied all four elements for plain error review. ARB 9-13.

Fernandez did not persuade the Tenth Circuit to review the search issue on the merits. Citing *United States v. Bowline*, 917 F.3d 1227, 1236 (10th Cir. 2019), the panel said under Fed. R. Crim. P. 12(c)(3) that waiver also applies when "'a defendant fails to assert a particular argument in a pretrial motion that he did file.'" App. 10a (quoting *United States v. White*, 584 F.3d 935, 948 (10th Cir. 2009)). It found not only had Fernandez not argued "good cause" but the record showed he never made a "lifting-duration" argument. App. 10a-12a. Curiously, it never mentioned defense counsel's inferred *Bond* violation in its review of the record. Vol. IV, 407.

In response to the fact the district court ruled on the search issue in a written opinion, the panel said the district court did not "address a lifting-duration argument." App. 13a. "Although the district court held *generally* that the agents' handling of the bag did not run afoul of the Fourth Amendment, it did not *specifically* address the 'particular argument,' [] that the agents crossed the line by lifting the bag for 30 seconds while the passengers were gone." *Id.* (emphasis in original). The panel remarked further that there was "no reason to believe that the court was even thinking about how long the agents held the bag, much less considering whether that

period of time was constitutionally excessive."[8] *Id.* It therefore affirmed the district court's denial of the suppression motion without reaching the merits. App. 13a.

Fernandez filed a timely petition for a panel rehearing and rehearing en banc, which the court of appeals denied. App. 37a-38a.

Reasons for Granting the Writ

Fernandez petitions the Court to intervene and resolve a weighty issue that arises frequently and has divided the circuits; namely, whether appellate courts can categorically dismiss issues as waived when the defendant stresses different but undisputed facts on appeal or makes an argument derivative of the one in the district court.

This Court should grant certiorari to address the deep division in the courts of appeal on whether Rule 12's 'good cause' standard for untimely pretrial motions, as amended in 2014, displaces the plain error standard for forfeited claims in Rule 52(b).

Rule 12 directs that certain motions, including suppression motions, must be made before trial. Fed. R. Crim. P. 12(b)(3) (2014). Prior to 2014, Rule 12 used the term "waiver" to describe a party's failure to raise a Rule 12(b)(3) defense by the deadline set by the court or any extension provided by the

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[8] On appeal, Fernandez did not argue that the time the officers held the bag was "constitutionally excessive." He argued that in light of the aggregate circumstances, how the officers examined Fernandez's bag went beyond the handling one would expect from a fellow passenger because they did so to gather information about its contents. AOB 52-64; ARB 14-19. The panel added that plain error review was "unavailable," which, "in any event," Fernandez "did not adequately raise." App. 13a. Its comment necessarily ignores the four pages in which Fernandez relied on this Court's decision in *Florida v. Jardines,* 569 U.S. 1 (2013) to show the district court plainly erred by finding there was no search. ARB 9-13. Fernandez also recalls that the Tenth Circuit's original opinion claimed he had not discussed plain error at all. After Fernandez's petition for rehearing pointed out the claim was untrue, the panel amended its opinion to now find his argument was inadequate.

court. *See* Fed. R. Crim. P. 12(e) (2002) ("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.").

In 2014, Rule 12 was amended to eliminate references to "waiver." Rule 12 now simply states that "[i]f a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause." Fed. R. Crim. P. 12(c)(3). The Advisory Committee Note explains that the Committee removed the "waiver" language because "the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right," and such intentional relinquishment had never been required under Rule 12. Advisory Committee's Notes on 2014 Amendments to Fed. R. Crim. P. 12(c). "[T]o avoid possible confusion" arising from this imprecise usage, the Committee "decided not to employ the term 'waiver'" in the amended rule. *Id.*

The plain error standard in Rule 52(b), by contrast, has continued virtually unchanged since enactment. That rule allows "[a] plain error that affects substantial rights [to] be considered even though it was not brought to the court's attention." Fed. R. Crim. P. 52(b) (2002). Thus, an issue that is not deliberately waived in a criminal proceeding can be reviewed on appeal for plain error. The elimination of the term "waiver" from Rule 12 should mean that an argument not timely raised under that rule can be reviewed on appeal for plain error.

In *United States v. Olano*, this Court explained that "Rule 52(b) defines a single category of forfeited-but-reversible error." 507 U.S. 725, 732 (1993). Whether a deviation from a legal rule constitutes error depends on whether the rule has been waived or merely forfeited: "Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). "Mere forfeiture, as opposed to waiver, does not extinguish an 'error" under Rule 52(b)." *Id.* The "theory" behind Rule 52(b) provides for appellate review of forfeited errors. *Id.* at 733. In other words, "[i]f a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733-34.

Fernandez's case highlights an important issue that has produced conflicting opinions in the courts of appeal: whether Rule 12's 'good cause' standard supplants Rule 52(b)'s plain error standard, thereby extinguishing any error and precluding appellate review of a large class of pretrial motions, including those predicated on a violation of an individual's constitutional rights.

A. The circuit courts are deeply divided on whether plain error review or waiver apply to an argument supporting a claim that was raised in the lower court.

The current version of Fed. R. Crim. P. 12 has generated significant controversy among the circuit courts. Ever since the term "waiver" was deleted from the rule in 2014, the courts sharply disagree as to whether the rule allows for plain error review under Fed. R. Crim. P. 52(b). The Fifth, Sixth and Eleventh Circuits have held that it does. *United States v. Vazquez*,

899 F.3d 363, 372-73 (5th Cir. 2018); *United States v. Soto*, 794 F.3d 635, 652 (6th Cir. 2015); *United States v. Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015). The Fourth Circuit, although not discussing the terms of the amended rule, allows for review where there is plain error. *United States v. Robinson*, 855 F.3d 265, 270 (4th Cir. 2017). Arguably, so does the District of Columbia Circuit. *See United States v. Burroughs*, 810 F.3d 833, 837-38 (D.C. Cir. 2016) (acknowledging split and noting that it has reviewed for plain error challenges not raised in district court); *United States v. Vega*, 826 F.3d 514, 541 (D.C. Cir. 2016) (reviewing forfeited arguments for plain error).

In *Vazquez*, the Fifth Circuit noted that it had previously construed Rule 12's "waiver" to carry the "usual legal consequences" of that term – that is, "extinguishing any errors." 899 F.3d at 372. Because "the amendment and [Advisory Committee] note make clear that [this] prior approach does not endure," the court held that it would review untimely pretrial motions for plain error under the current rule. *Id.* at 372-73. Similarly, in *Soto*, 794 F.3d at 655, the Sixth Circuit analyzed the 2014 amendments to Rule 12 and concluded that it would no longer "treat the failure to file a motion as a waiver unless the circumstances of the case indicate that the defendant intentionally relinquished a known right." In *Sperrazza*, 804 F.3d at 1119-20, the Eleventh Circuit likewise held that while untimely Rule 12 motions under the old rule were "[n]ot subject to appellate review except 'for good cause' shown," such motions would be reviewable for plain error under the current version of the rule.

In contrast, four circuits have expressly held that even after the amendment, there is no review for plain error. In those circuits, untimely Rule 12(b)(3) motions can be reviewed only on a showing of good cause, and

plain error review is otherwise unavailable under the current version of Rule 12. *See United States v. Guerrero*, 921 F.3d 895, 897-98 (9th Cir. 2019) (per curiam) (noting that were it not bound by circuit precedent it would apply Rule 52(b)'s plain error to review forfeited argument, but Advisory Committee left it to courts to decide whether to use Rule 12's 'good cause' standard or Rule 52(b)'s plain error and an earlier panel decided on the former); *United States v. Bowline*, 917 F.3d 1227, 1236 (10th Cir. 2019) ("[T]he 2014 amendments did not . . . authorize plain-error review . . . even when there was no good cause for the failure to raise a timely Rule 12 motion."); *United States v. McMillian*, 786 F.3d 630, 636 n. 3 (7th Cir. 2015) (2014 "amendment did not alter the applicable [good cause] standard"); *United States v. Anderson*, 783 F.3d 727, 741 (8th Cir. 2015) (applying 'good cause' standard under "current version of Rule 12").[9]

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[9] The Ninth and Tenth Circuits believe the Third Circuit decision *United States v. Fattah*, 858 F3.d 801, 807-08 & n.4 (3d Cir. 2017), follows the 'good cause' standard under the current version of Rule 12. *See Guerrero*, 921 F.3d at 897; *Bowline*, 917 F.3d at 1236. As Fernandez explains, the decision is more nuanced than either circuit understands. The Third Circuit still considers the availability of plain error review for claims not timely raised under Rule 12 to be an open question. *United States v. Ferriero*, 866 F.3d 107, 122 n. 17 (3d Cir. 2017).

In *Bowline*, the Tenth Circuit suggested the Second Circuit reaffirmed the 'good cause' standard after the 2014 amendments. 917 F.3d at 1236 (citing *United States v. Martinez*, 862 F.3d 223, 234 (2d Cir. 2017)). But the *Martinez* court only quoted the current version of Rule 12 and did not discuss the changes. Instead, it relied on a case decided under the version of the rule that included the term "wavier" to conclude an untimely suppression argument is waived. 862 F.3d at 234. In *United States v. O'Brien*, 926 F.3d 57, 82-84 (2d Cir. 2019), the court cited the current version of Rule 12 and applied the 'good cause' standard but, again, did not address the availability of plain error review.

Additionally, in *United States v. Hopper*, 934 F.3d 740, 761-62 (7th Cir. 2019), the court hinted at an inherent unfairness in adhering to precedent. There, Hopper had only forfeited his appellate argument, yet the court was barred by previous decisions from reviewing the district court decision for plain error. The Ninth Circuit in *Guerrero* had the same concern. Were it not for precedent, it would have

In the eight years since Rule 12 was amended, at least seven circuits have pointedly addressed whether the excising of the term "waiver" changed the appellate standard of review for untimely defenses, objections or requests covered by Rule 12(b)(3). As this rule expects a wide variety of issues be raised pretrial, the issue here is one with broad impact. Indeed, just as issues and arguments may be overlooked at trial and sentencing, so may they be missed before trial. Whether an appellate court will review a forfeited Rule 12(b)(3) defense, objection or request should not depend on geography. But as the entrenched split demonstrates, it does.

The circuit split is well developed. The opposing viewpoints have been explored at length in cases like *Soto* from the Sixth Circuit, 794 F.3d at 647-56, and *Bowline* from the Tenth Circuit, 917 F.3d at 1231-38. The Advisory Committee ostensibly invited the circuits to take sides[10] and they have – nothing is gained by waiting for the remaining circuits to choose sides. Given the intractable split of authority, this Court should grant certiorari to resolve the question of whether Rule 12(c)(3)'s 'good cause' standard displaces the default plain error standard in Rule 52(b).

B. The availability of appellate review for untimely Rule 12 motions is a question of significant and recurring importance.

The need to ensure the "proper and uniform administration of the Federal Rules of Criminal Procedure" is of sufficient importance to warrant this Court's grant of certiorari. *United States v. Robinson*, 361 U.S. 220, 222

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reviewed Guerrero's reasonable suspicion argument for plain error under Rule 52(b). 921 F.3d at 897.

[10] *Bowline*, 917 F.3d at 1236; *Guerrero*, 921 F.3d at 897-98.

(1960) (construing federal criminal rule on extensions of time); *see also Lott v. United States*, 367 U.S. 421, 424 (1961) (interpreting federal criminal rule regarding timeliness of appeal). This importance extends to circuit conflicts on the proper appellate standard of review for asserted violations of the federal criminal rules. As standards of review provide the framework by which appellate courts review the issues presented by the parties, this Court has acknowledged the importance of unifying these standards by repeatedly granting certiorari to resolve circuit conflicts on the standards of review. For instance, in *United States v. Vonn*, 535 U.S. 55, 62 (2002), the Court granted certiorari "to resolve conflicts among the Circuits on the legitimacy of . . . placing the burden of plain error on a defendant appealing on the basis of Rule 11 error raised for the first time on appeal." Similarly, in *McLane v. EEOC*, 137 S.Ct. 1159, 1164 (2017), the Court agreed to resolve "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." *See also*, *Guerrero-Lasprilla v. Barr*, 140 S.Ct. 1062, 1067 (2020) (addressing whether statutory phrase 'question of law' "includes the application of a legal standard to undisputed or established facts."); *U.S. Bank v. Village at Lakeridge, LLC*, 138 S.Ct. 960, 963 (2018) (deciding how appellate courts should review lower courts' determination, "de novo or for clear error?"); *United States v. Lane*, 474 U.S. 438, 439-40 (1986) (granting certiorari to "resolve a conflict among the Circuits as to whether a misjoinder under Rule 8 of the Federal Rules of Criminal Procedure is subject to the harmless-error rule . . . ."); *cf. Concrete Pipe & Prods. Of Cal., Inc. v. Construction Laborers Pension Tr. for S.Cal.*, 508 U.S. 602, 625-26 (1993) (explaining that case turned on proper standard of review). This Court's guidance is needed here as well. Because of the

prevalence of pretrial issues and given that many involve the adjudication of an individual's constitutional rights, appellate courts must apply the same standard when reviewing these issues. Since the circuits do not, the established conflict among them needs to be resolved. Only this Court can do that.

Additionally, the sheer number of pretrial motions that fall under Rule 12(b)(3)'s "must be made before trial" category heightens the need for this Court's intervention. As originally promulgated in 1944, Rule 12 required only that defenses and objections based on "defects in the institution of the prosecution or in the indictment and information, other than lack of jurisdiction or failure to charge an offense[,]" be raised in a pretrial motion. Advisory Committee's Notes on 1944 Adoption of Fed. R. Crim. P. 12(b)(l) and (b)(2); Fed. R. Crim. P. 12(b)(2) (1946). In 1975, suppression motions, requests for discovery, and requests for a severance of charges or defendants came within Rule 12's "must be made before trial" ambit. Fed. R. Crim. P. 12(b)(3)-(5) (1975); Advisory Committee's Notes on 1974 Amendment to Fed. R. Crim. P. 12(b). Most recently, in 2014, claims of failure to state an offense - originally differentiated from other defects in the indictment and information - were added to the list of motions that must be raised prior to trial, now located in Rule 12(b)(3). Fed. R. Crim. P. 12(b)(3)(B)(v) (2014); Advisory Committee's Notes on 2014 Amendments to Fed. R. Crim. P. 12(b)(3).

The circuits' published decisions on the current version of Rule 12 demonstrate the Rule's wide-ranging applicability across a variety of substantive claims and factual scenarios. Here, Fernandez's counsel filed a timely motion to suppress in which he challenged the officers' search of his

bag on an empty bus as well as his later seizure of the bag. The district court's written opinion addressed that search and on appeal Fernandez stressed certain testimony from the officer in arguing that the search was unconstitutional. In *Guerrero*, trial counsel filed a timely suppression motion challenging reasonable suspicion for a traffic stop, but raised a different reasonable suspicion argument on appeal. 921 F.3d 896-97. In *Bowline*, the defendant filed a vindictive prosecution motion 23 days after the deadline set by the district court. *Bowline*, 917 F.3d at 1229. The defendants in *Anderson* did not raise a double jeopardy challenge prior to trial, but a co-defendant did. 783 F.3d at 740. Despite the differences in the types of claims raised, in the timing of their initial presentation, and what those claims encompassed, the result in each case is the same: a finding of waiver.

By contrast, defendants in circuits that reject a one-size-fits-all waiver rule have been able to obtain merits review of other untimely defenses, objections, and requests. In *Vasquez*, the Fifth Circuit addressed, at length, defendant's challenge to the extraterritoriality of 21 U.S.C. § 848(e)(l)(A) - even though the claim was first presented in a post-verdict motion for acquittal rather than in a pretrial motion to dismiss. 899 F.3d at 373-78. The Eleventh Circuit conducted plain error review of an untimely claim that the indictment was factually inaccurate, first raised in a post trial motion. *Sperrazza*, 804 F.3d at 1117, 1126. And the Sixth Circuit reviewed a claim of misjoinder of counts for plain error despite the fact that it was raised for the first time on appeal. *Soto*, 794 F.3d at 647, 656-57.

This Court has granted certiorari as to whether particular types of forfeited claims are reviewable for plain error under Rule 52(b). *See Puckett v. United States*, 556 U.S. 129, 131 (2009) ("The question presented by this

case is whether a forfeited claim that the Government has violated the terms of a plea agreement is subject to the plain-error standard of review set forth in Rule 52(b) of the Federal Rules of Criminal Procedure."). The need for the Court's intervention is even more pressing in the context of a widely applicable federal rule of criminal procedure. As Fernandez's case shows, the Tenth Circuit continues to use *Bowline* to find waiver when it should review the claim at least for plain error. *See also*, *United States v. Muhtorov*, 20 F.4th 558, 649 (10th Cir. 2021); *Jordan v. Maxim Healthcare Services, Inc.*, 950 F.3d 724, 728 (10th Cir. 2020); *United States v. Williams*, 942 F.3d 1187, 1191 (10th Cir. 2019); *United States v. Warwick*, 928 F.3d 939, 944 (10th Cir. 2019); *United States v. Quezada-Lara*, 831 Fed.Appx. 371, 376 (10th Cir. 2020); *United States v. Ockert*, 829 Fed.Appx. 338, 343 (10th Cir. 2020); *United States v. Stein*, 819 Fed.Appx. 666, 672 (10th Cir. 2020).

C. The Tenth Circuit incorrectly ruled that Fernandez waived his Fourth Amendment search issue on appeal when he emphasized certain facts from the evidentiary hearing, which, as a matter of law, the district court considered.

The decision here illustrates the most extreme use of waiver under Rule 12(c)(3). In essence, because appellate counsel stressed different testimony from the totality of the circumstances than trial counsel, the Tenth Circuit found Fernandez waived the entire search issue. Its decision ignores that the district court ruled on the issue challenged on appeal; namely, whether the officers' actions inside the empty bus constituted a search. *See* App. 45a-47a. The district court said it would address the issue because defense counsel "suggested . . . one could infer an improper warrantless 'pre-search' of the bag before passengers again boarded the bus . . . ." App. 45a n. 3. Thus, whatever

the officers did on the bus before passengers reboarded became part of the district court's consideration.

The Tenth Circuit's unsparing ruling cannot be reconciled with the fact that the district court's analysis used the same factual record as Fernandez did on appeal. Nor is it in harmony with this Court's holding that appellate courts can review an issue "'so long as it has been passed upon' . . . by the court below." *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *United States v. Williams*, 504 U.S. 36, 41 (1992)).

In *LeBron*, the plaintiff argued below that Amtrak, a private entity, was still subject to constitutional requirements because it was closely connected with federal entities. 513 U.S. at 378-79. In this Court, the plaintiff argued for the first time that Amtrak was itself a federal entity. *Id.* at 379. The Court allowed the difference. It noted the "traditional rule" that "'once 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.'" *Id.* (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)); *see also Hemphill v. New York*, 142 S.Ct. 681, 689 (2022) (court may consider "any argument" raised in support of constitutional claim). By this Court's reasoning, the Tenth Circuit should have reviewed Fernandez's search issue, especially when it had been "passed upon" by the district court.

An issue is "passed upon" when a court renders an opinion in which it rules on the issue. *See* Black's Law Dictionary (defining "pass" and "render") (10th ed. 2014). Without a doubt, that happened here. The district court ruled the officers' "actions did not depart from the type of handling a commercial bus passenger would reasonably expect . . . and therefore did not constitute a search within the meaning of the Fourth Amendment." App. 47a.

The officers' actions were the sole focus of the district court ruling. Notably, the court referred to the officers' actions collectively, never specifying which ones it considered. Now the Tenth Circuit parses the decision and demands a specificity from Fernandez that the district court failed to supply. It writes "although the district court held *generally* that the agents' handling of the bag did not run afoul of the Fourth Amendment, it did not *specifically* address the 'particular argument,' *White*, 584 F.3d 948, that the agents crossed the line by lifting the bag for 30 seconds while the passengers were gone." App. 13a (emphasis in original).

When a district court decides a Fourth Amendment issue, it does not view isolated facts but considers them all in the aggregate. As clarified by this Court, "the reasonableness of a search is in the first instance a substantive determination to be made by the trial court *from the facts and circumstances of the case* and in the light of the 'fundamental criteria' laid down by the Fourth Amendment and in opinions of [this] Court applying that Amendment." *Ker v. California*, 374 U.S. 23, 33-34 (1963) (emphasis added). In other words, whether an officer violated Fourth Amendment rights does not depend upon any one factor but on the totality of the circumstances. As a matter of law, a district court's Fourth Amendment deliberation "must be based upon all the circumstances." *United States v. Cortez*, 449 U.S. 411, 418 (1981).

Here, the "facts and circumstances of the case" included "lifting the bag for 30 seconds while the passengers were gone." This specific fact necessarily became part of the district court's deliberation because it was part of the "totality of the circumstances – the whole picture." *Cortez*, 449 U.S. at 417-18. This is how the officers themselves described their "handling of the

bag" to the district court. Vol. IV 238, 260, 280-81. Moreover, the officers said why they both did this was "to gauge how heavy it was and to observe all sides." AOB 6, ARB 1; App. 40a; Vol. IV, 238, 260-61, 1059, 1139.

Per this Court's instruction, all the facts, circumstances, and reasons the officers handled Fernandez's bag were constituent elements of the court's search analysis. The district court's own description of the particular search issue before it delineated the relevance of how the officers handled the bag: "With regards to touching or handling a traveler's luggage, if the officer's *manner of handling* the bag is the sort that a traveler leaving the bag in its position reasonably might expect, the manner of touch will not be considered unreasonable." App. 45a (emphasis added). It framed the issue this way given the "briefing, arguments and evidence" presented. App. 39a.

Herein lies the crux of the issue on appeal. In short, Fernandez argues, below and here, that no traveler leaving a bag unattended in its position reasonably might expect someone to lift it up - not momentarily, but for 30 seconds - to gauge how heavy it was and to observe all sides, *and then*, pass it to another person to do the same thing. The record shows Fernandez's argument relied on all the facts and circumstances of the case and derived directly from the district court's ruling. It also establishes he supported the argument with officer testimony - the same facts upon which the court's ruling was based. App. 40a-41a, 46a. Therefore, the search issue examined by the district court required at least a plain error review, if not de novo.

The panel's analysis is intellectually suspect for several reasons. First, because of *Bowline*, waiver is the Tenth Circuit's default ruling for any arguments it feels do not precisely align. Its reflexive use of *Bowline* is ill-advised because it leads to illogical results like the one here. Nevertheless, it

has yet to try the more enlightened and refined approach to review used by the Third Circuit. There, guidelines are used to objectively assess waiver. Second, it relies on an allegation that trial defense counsel did not emphasize the officers' actions correctly and so it assumes the district court did not consider all their acts. Third, its reasoning strains to disallow a fully preserved, fully presented issue on appeal in contravention of *LeBron*. In fact, the Tenth Circuit never said the record here was not sufficiently developed. Its only criticism was that Fernandez did not specifically stress below that "the agents crossed the line by lifting the bag for 30 seconds while the passengers were gone." App 13a.

1. The Tenth Circuit's decision rests on the mistaken premise that waiver replaces Rule 52's plain error standard for forfeited arguments.

The fact that Rule 12 was amended in 2014 to remove the term waiver, which had been part of the rule until then, should be reason enough to understand that elimination affected a change. An issue that is not waived in a criminal proceeding can be reviewed for plain error under Rule 52(b). *See Olano*, 507 U.S. at 732 (Rule 52 governs criminal appeals and gives appellate court "power to correct errors that were forfeited because not timely raised in district court.").[11] Nothing in Rule 12 suggests that it displaces Rule 52(b)'s plain error standard for forfeited claims. *Soto*, 794 F.3d at 652-54. The Tenth Circuit believes otherwise. It maintains that it "could not be clearer" that

[11] Forfeiture is "the failure to make the timely assertion of a right," whereas "waiver is the intentional relinquishment or abandonment of a known right." *Olano*, 507 U.S. at 733 (citation, quotation marks omitted). Under Rule 52(b), a district court's errors are not expunged by forfeiture. *Id.* In other words, "[i]f a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.* at 733-34.

Rule 12 retained the same meaning it had when the rule contained waiver language. *Bowline*, 917 F.3d at 1235. The court is mistaken. Applying familiar canons of statutory construction to Rule 12's plain language and rulemaking history, the Tenth Circuit should have reviewed Fernandez's search argument on the merits, rather than deeming it waived.

In construing the provisions of a federal rule, this Court turns to "'traditional tools of statutory construction,'" "begin[ning] with the language of the Rule itself." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 163 (1988) (citation omitted). Rule 12, as presently worded, contains no waiver rule for untimely pretrial motions. Rather, the rule simply provides that "[i]f a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely. But a court may consider the defense, objection, or request if the party shows good cause." Fed. R. Crim. P. 12(c)(3). By its terms, Rule 12 does not override Rule 52(b)'s plain error standard. Although it sets forth a good cause standard, Rule 12 does not state that good cause provides the only means of obtaining appellate review. *Cf. Class v. United States*, 138 S. Ct. 798, 806 (2018) ("[B]y its own terms, . . . Rule 11(a)(2) itself does not say whether it sets forth the exclusive procedure for a defendant to preserve a constitutional claim following a guilty plea."). Indeed, the Rule does not clearly speak to the issue of appellate review at all.

Further, Rule 12(c)(3)'s reference to "a court" does not unequivocally cover the courts of appeal in addition to district courts. If anything, the unadorned reference to a "court" signals the drafters' intention to limit the good cause standard to district courts. In the criminal rules, the term "Court" means "a federal judge performing functions authorized by law." Fed. R. Crim. P. l(b)(2). The Advisory Committee Note makes clear that this

definition of "court" "continues the traditional view that '*court' means district judge*," while also recognizing that a magistrate or circuit judge may take on district court functions. Advisory Committee Note on 2002 Amendments to Fed. R. Crim. P. l(b) (emphasis added). "In the absence of a clear legislative mandate, the Advisory Committee Notes provide a reliable source of insight into the meaning of a rule, especially when, as here, the rule was enacted precisely as the Advisory Committee proposed." *Vonn*, 535 U.S. at 64 n.6.

Nor can an intent to displace Rule 52(b)'s default plain error standard be gleaned through Rule 12(c)(3)'s use of an indefinite article - "a court" - rather than "the court" referenced elsewhere in the Rule.[12] Prior to the 2014 amendments, the good cause standard was phrased in terms of "the court." Fed. R. Crim. P. 12(e) (2002) ("For good cause, the court may grant relief from the waiver."); Fed. R. Crim. P. 12(f) (1975) ("[T]he court for cause shown may grant relief from the waiver."). There is no indication that this change was substantive or that "a court" has any consistent meaning throughout the Federal Rules of Criminal Procedure. Other uses of "a court" in the criminal rules refer to district courts generally, *see* Fed. R. Crim. P. 32.2(a) (specifying required notice for "a court" to enter forfeiture judgment), or to individual

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[12] The Tenth Circuit disagrees. It "thinks" it is "clear" that "a court" refers to "an appellate court or perhaps a court hearing a postconviction challenge as well as the trial court." *Bowline*, 917 F.3d at 1230. In *Soto*, the Sixth Circuit noted the "absurdity" of this "thinking." 794 F.3d at 653 & n. 14. First, in nearly all of its subparts, Rule 12 refers repeatedly to "the court," and "each subpart clearly addresses the functions of district courts – not appellate courts." Second, if the rule was meant to apply to appellate courts as well, then Rule 12 (c) & (d) would not make sense. Appellate courts do not conduct arraignments, nor set deadlines for pretrial motions and hearings because appellate courts "do not conduct trials." 794 F.3d at 653 n. 14. Similarly, appellate courts do not decide pretrial motions nor can they find facts. *Id.*

district courts in the context of setting special local hours, *see* Fed. R. Crim. P. 56(c).

The Tenth Circuit's reading of Rule 12's good cause provision also is inconsistent with the canon of construction providing that "repeals by implication are disfavored." *Blanchette v. Conn. Gen. Ins. Corps.*, 419 U.S. 102, 133 (1974). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551 (1974). The same canon of construction applies to federal rules of equal dignity, such as Rule 12 and Rule 52.

This Court rejected a similar attempt to partially repeal Rule 52(b) by implication in *Vonn*. There, the Court construed Federal Rule of Criminal Procedure 11, which governs guilty pleas. The defendant argued that appellate review of unpreserved Rule 11 errors was for harmless error only, because Rule 11(h) contained an express harmless error provision. *Id.* at 63. The question in *Vonn* was "whether Congress's importation of the harmless-error standard into Rule 11(h) without its companion plain-error rule was meant to eliminate a silent defendant's burden under . . . Rule 52(b) plain-error review[.]" *Id.*

The *Vonn* Court reasoned that "the formally enacted Rule 52" possessed "apparently equal dignity with Rule 11(h)" and applied "by its terms to error in the application of any other Rule of criminal procedure." *Id.* at 65. It therefore characterized the defendant's argument as requiring a partial repeal by implication of Rule 52(b)'s plain-error standard by Rule 11(h), "a result sufficiently disfavored . . . as to require strong support." *Id.* (citation

omitted). Because it concluded that the meaning of Rule 11(h)'s text was "equivocal" and "subject to argument," *id.* at 66, 65, the Court declined to declare a partial repeal by implication based on plain language alone. Without Rule 12's former "waiver" terminology, the requisite "strong support" for a partial repeal by implication is similarly lacking here. Because Rule 12 and Rule 52 are capable of co-existence, the Tenth Circuit erred by not giving effect to them both.

The rulemaking history of the 2014 amendments supports Fernandez's view of the interplay between Rule 12 and Rule 52(b). In *Soto*, the Sixth Circuit noted that it had "previously treated the failure to file a timely motion listed in Rule 12(b)(3) as a waiver[,]" "based . . . on the previous wording of Rule 12(e)." 794 F.3d at 648. The court's extensive review of Rule 12(c)(3)'s rulemaking history led it to conclude, however, that "one of the primary reasons to eliminate the term 'waiver' from the rule was because the committee believed that courts were incorrectly treating the failure to file a timely pretrial motion as an intentional relinquishment of a known right, and therefore an absolute bar to appellate review." *Id.* at 652. It further determined that the rulemaking history "strongly indicates that the Rule's drafters were crafting a rule to apply to the district courts, and not to the court of appeals." *Id.* at 654.

The Advisory Committee considered - and rejected - a proposal that would have instructed appellate courts that Rule 52's plain error standard "does not apply" to untimely Rule 12 motions. *See Bowline*, 917 F.3d at 1235-36.

However, the reference to Rule 52 was deleted from the final rule revision:

> The Subcommittee ultimately agreed it was best not to try to tie the hands of the appellate courts. Accordingly, it agreed to delete from the proposed rule the statement that Rule 52 does not apply. This would allow the appellate courts to determine whether to apply the standards specified in Rule 12(c) or the plain error standard specified in Rule 52 when untimely claims are raised for the first time on appeal.

April 25, 2013, Minutes, Advisory Committee on Criminal Rules, at 4, available at https://www.uscourts.gov/rules-policies/ archives/ meetingminutes/advisory-committee-rules-criminal-procedure-april-2013 (last visited May 18, 2022); *see also* Advisory Committee's Notes on 2014 Amendments to Fed. R. Crim. P. 12 (Changes Made After Publication and Comment) ("In subdivision (c), the cross reference to Rule 52 was omitted as unnecessarily controversial.").

Although Rule 12's drafters contemplated that the appellate courts would determine in the first instance whether Rule 12(c)'s 'good cause' standard or Rule 52(b)'s plain error standard would apply to untimely claims raised for the first time on appeal, they could not have anticipated the confusion and division that would ensue. The rulemaking history, like the waiver-less plain language it produced, evinces no clearcut intention to partially repeal Rule 52(b)'s plain error standard by implication. Here, as in *Bowline*, the Tenth Circuit errs by adhering to its precedent to the contrary. *See Bowline*, 917 F.3d at 1229 (rejecting "view" that amendments "effect any relevant change" and reaffirming its decision that applied waiver to forfeited claims).

2. The Tenth Circuit's inflexible waiver rule is inconsistent with this Court's precedent and results in the unwarranted dismissal of meritorious constitutional claims.

In the Tenth Circuit, unless a party makes exactly the same argument on appeal and in the district court, the entire issue is waived. The circuit's

uncompromising waiver rule invites panels to comb the record for any perceived deviation. Without an objective way to analyze whether appellate arguments are based on the same facts and core arguments as those considered by the district court, minute or perceived deviations suffice. The decision here is illustrative.

The panel's ruling that Fernandez waived the search issue hinges on two unsupported claims. First, it said Fernandez argued only that the "period of time" the officers held his bag was "unconstitutionally excessive." App. 10a, 13a. Misrepresenting his search argument in this reductive manner lends plausibility to its waiver decision. It also neatly prepares its second claim that there was no record the district court "was even thinking about how long the agents held the bag" when it made its Fourth Amendment ruling. *Id.* To Fernandez's point, there is a record of what the court thought about: the transcript of what the officers did. This facile critique would not pass for a thoughtful waiver analysis in the Third Circuit.

There, the search issue would have been reviewed on the merits. There, an argument that "depends on both the same legal rule . . . or standard . . . *and the same facts* . . . presented in the District Court" cannot be waived. *United States v. Abreu*, 32 F.4th 271, 2022 WL 1298569, *2 (3d Cir. 2022) (citation, quotation marks omitted) (emphasis added). The "ultimate question" is whether the parties gave the District Court the opportunity to consider the argument." *Id.* at *2. Parties are then "free to place greater emphasis and more fully explain an argument on appeal than they did in the District Court." *Id.* at *3. They also have "leeway to change the way they present their arguments on appeal" as long as the core argument does not change. *Id.* Using these guidelines, Abreu had not waived his argument on appeal;

though framed "slightly differently," it was essentially "the same argument." *Id.*

The logic of the Third Circuit parallels this Court's traditional rule that once an issue is passed upon by the lower court, a party can make any argument supporting it. *Lebron*, 513 U.S. at 379. In the district court, Abreu argued he was ineligible for a sentencing guideline enhancement for a prior conspiracy conviction that did not fit the guideline text's definition of a crime of violence. 2022 WL 1298569 at *1. The guideline commentary said irrespective of its elements a conspiracy conviction could be a crime of violence. Abreau argued the commentary had to be disregarded because it was inconsistent with the text. *Id.* The district court applied the enhancement because it believed earlier precedent held commentary could add to the guideline text. On appeal, Abreu said the guideline text unambiguously excludes conspiracy from its crime of violence definition and it would be improper for a sentencing court to defer to commentary that says otherwise. *Id.* at *3. The Third Circuit agreed. It held not only were both arguments based on "the same facts presented in the District Court" and the same "tension between the commentary and the definition of 'crime of violence' in the text" but the record showed the issue had been passed upon below. *Id.* (citation, quotation marks omitted).[13]

Here, too, both of Fernandez's arguments were based on the same facts and invoked the same legal standard - whether the officers' actions

[13] In *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008), the court said although the argument had "a new twist" on appeal, it would review *de novo* the district court's career offender determination rather than for plain error. Evidently, the Seventh Circuit, like the Third Circuit and unlike the Tenth, does not find an argument waived when it is not exactly the same in both courts.

constituted a search because they departed from the type of handling a passenger might reasonably expect from fellow passengers. AOB 56-62 (citing *Nicholson*, 144 F.3d at 639); ARB 11; App. 45a-46a (citing *Nicholson*, 144 F.3d at 634-36, 639). During the officers' testimony, the government elicited the time spent holding the bag and it became part of the factual record used in the court's search analysis.[14] Vol. IV, 238, 260, 280-81. It was the court that asked the officers their purpose in pulling the bag off the rack.[15] Vol. I, 229; Vol. IV, 260-62. It is unlikely that the record before it and a question it asked would be missing from its deliberations since the time held and its purpose distinguish the act from a fellow passenger's. *See* App. 46a. If acts are aimed at discovering contents, it is a search. The appellate argument simply emphasized the facts related to why *and* how Fernandez's bag was handled. Contrary to the Tenth Circuit's conclusion, nothing in the record shows Fernandez limited his search argument to how long the officers held his bag. The length of time was but one factor in a totality of circumstances that demonstrated their actions as a whole constituted a search - the same totality that had already "suggested an improper warrantless 'pre-search'" to the district court. App. 45a n. 3.

In sum, as in *Abreu*, the record unequivocally demonstrates the district court had "the opportunity to consider the argument" and expressly ruled on the issue. *See Abreu*, 2022 WL 1298569 at *3. Its ruling depended on the

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[14] Q: When you initially picked up that bag, how long would you estimate you had that bag?
A: I probably had it for maybe 30 seconds.
Vol. IV, 238.

[15] They said their purpose was to gauge how "heavy it was" and to "observe all sides." Vol. I, 229; Vol. IV, 260-61.

same facts and legal standard that Fernandez used in his search argument on appeal. The Tenth Circuit concluded otherwise because it never thought to examine whether the basis for each was the same. Instead, it once again trotted out *Bowline*. It is unreasonable to believe by the plain language of Rule 12 that Fernandez waived the search issue. And which precedent will guide an appellate court's reasoning cannot be left to chance geography.

D. Fernandez's case is ideal for this Court to decide whether Rule 12(c)(3)'s good cause standard or Rule 52(b)'s plain error standard applies to forfeited arguments.

This case unequivocally presents the issue on which the courts of appeal are in conflict: whether Rule 12's 'good cause' standard displaces Rule 52(b)'s plain error standard, which ordinarily applies to issues that were not properly preserved in district court. There are no procedural impediments to this Court deciding the merits of this important question. The Tenth Circuit's resolution of Fernandez's search issue turned solely on waiver, without any analysis of the substantive Fourth Amendment argument. App. 9a-13a. Even if the Tenth Circuit's belief is correct, that Fernandez made a different argument on appeal, he forfeited but did not waive the argument. A decision in his favor on the question presented would require the Tenth Circuit to at least review his search issue for plain error under Rule 52(b).

The manifest injustice caused by waiver in some circuits but not others is enough for this Court to grant certiorari and resolve the conflict. The Court has reversed and remanded before solely on the issue of whether the incorrect standard of review was applied by the court of appeals. *See*, *e.g.*, *McLane*, 137 S.Ct. at 1170 (remanding to court of appeals to apply the correct standard of review and not engaging in any "first view" issues when the "the Court of Appeals has not had the chance to review the District Court's decision under

the appropriate standard."); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 557-558 (1994) (reversing and remanding for the lower court to apply the correct legal standard in the first instance).

Besides, had the Tenth Circuit reviewed Fernandez's search issue, as numerous other circuits would have, he would be entitled to relief. Fernandez made a compelling argument that the district court plainly erred, as a matter of law, because the officers' physical intrusion on his bag was a search as described in this Court's property-based precedent. ARB 9-13.

In *Florida v. Jardines*, 569 U.S. 1 (2013), whether an officer's particular interaction with a person's property is a search depends on three primary factors: (1) whether the officer had "implicit license" to interact with the property as he did; (2) whether the degree of the officer's physical intrusion fell within that license; and (3) whether the purpose of his intrusion is covered by that license. *Jardines*, 569 U.S. 7-15. When, like here, "the Government obtains information by physically intruding" on a person's "effect," a "search within the original meaning of the Fourth Amendment has undoubtedly occurred," irrespective of the person's reasonable privacy expectation. *Jardines*, 569 U.S. at 5, 11. Given that the officers' purpose was to surreptitiously "gather evidence," which they "learned only by physically intruding" on Fernandez's bag, the bag handling was not one that bus passengers had given them an "implicit license" to undertake. It was a search. *Jardines*, 569 U.S. at 8, 11.

For actions to not be a search within the meaning of the Fourth Amendment, an officer may do "no more than any private citizen might do." *Jardines*, 569 U.S. at 8 (citation, quotation marks omitted). When an officer intrudes or trespasses on a person's effects, he risks exceeding the boundaries

of "implicit license." "[F]or most of our history the Fourth Amendment was understood to embody a particular concern for government trespass upon the areas . . . it enumerates." *United States v. Jones*, 565 U.S. 400, 406 (2012).

Trespass alone does not make an officer's actions a search. It becomes a search when trespass is "conjoined with . . . an attempt to find something or to obtain information." *Jones*, 565 U.S. at 408 n. 5. Thus, the lawful expedient of "an implied license" to intrude in a particular manner is dependent upon the "specific purpose" of the intrusion. *Jardines*, 569 U.S. at 9-11. Applied to commercial bus travel, "background societal norms" may allow "highly limited contact" to discreetly move another's bag to make room for one's own, *Nicholson*, 144 F.3d at 637, but do not give license to stealthily handle a bag with the specific purpose "of discovering incriminating evidence." *Jardines*, 569 U.S. at 9; *see also Nicholson*, 144 F.3d at 638 (handling will exceed what passenger reasonably expects his bag to endure when agent is "expert examiner" whose purpose is to discover "the nature of the contents of the bag.") (citation, quotation marks omitted).

What happened here was beyond limited contact. The officers did not have license to handle Fernandez's bag as they did. Bus passengers do not implicitly permit another to pull their travel bag off the rack and inspect it with their hands to assess its contents. That contact far exceeds moving a bag to make room for one's own. And its purpose is unlike another passenger's. By wrongfully interfering with Fernandez's "dignitary interest" in the "inviolability" of his bag, the officers' covert inspection amounted to a common law trespass. *United States v. Ackerman*, 831 F.3d 1292, 1307 (10th Cir. 2016). That they acted with the unmistakable intent of discovering information from the bag made it a search. *Id.* ("trespass to chattels"

combined with agent's purpose to obtain information is a search); *see also Carpenter v. United States*, 138 S.Ct. 2206, 2217-18 (2018) (government access to cell-site records a search because it acquires personal information "otherwise unknowable").

The property-based search analysis and its relevant factors are "clear and obvious under current law." *Olano*, 507 U.S. at 734. *Jardines* clarified the "*Katz* reasonable-expectations test has been added to, not substituted for the traditional property-based understanding of the Fourth Amendment and so is unnecessary to consider when the government gains evidence by physically intruding on constitutionally protected areas." 569 U.S. at 11 (citation, quotation marks omitted). Here, the officers' evidence was gained by "physically intruding" on Fernandez's constitutionally protected property. By overlooking and failing to apply the property-based factors, the district court plainly erred in its search decision.

Because of the court's error, the government used unconstitutionally seized evidence to charge and prosecute Fernandez before a jury. In turn, the jury used the tainted evidence to convict Fernandez, seriously affecting his right to liberty. The court's error undermined the fairness and integrity of the proceedings because illegally obtained evidence was the single reason Fernandez was convicted and sentenced to 15 years imprisonment. *See Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1908 (2018) ("'what reasonable citizen wouldn't bear a rightly diminished view of the judicial process and its integrity if courts refused to correct obvious errors of their own devise that threaten to require individuals to linger longer in federal prison than the law demands?'") (quoting *United States v. Sabillon-Umana*, 772 F.3d 1328, 1333-34 (10th Cir. 2014)). If the Tenth Circuit were to review

this issue under Rule 52(b), it might find that Fernandez established the four elements of plain error.

Conclusion

Fernandez's petition for a writ of certiorari should be granted.

Respectfully submitted,

DATED: May 27, 2022

s/Esperanza S. Lujan

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