No. 21-8033

IN THE SUPREME COURT OF THE UNITED STATES

JESUS FRANCISCO FERNANDEZ, 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.

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OPINIONS BELOW

The revised opinion of the court of appeals (Pet. App. 1a-34a) is reported at 24 F.4th 1321. The opinion and order of the district court (Pet. App. 39a-56a) is not published in the Federal Supplement but is available at 2018 WL 4901214.

JURISDICTION

The judgment of the court of appeals was entered on February 3, 2022, and a petition for rehearing was denied on the same date (Pet. App. 37a-38a). 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, and the petition was filed on May

27, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of New Mexico, petitioner was convicted of possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. 39a. The court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3. The court of appeals affirmed. Pet. App. 1a-34a.

1. In October 2017, petitioner was traveling from Phoenix, Arizona, to Colorado Springs, Colorado, by Greyhound bus. Pet. App. 2a-3a. While petitioner was at the Albuquerque, New Mexico, bus station waiting for a connection, federal Drug Enforcement Administration (DEA) special agent Jarrell Perry identified himself and had a consensual conversation with petitioner. Id. at 3a. Special Agent Perry saw that petitioner's bus ticket had been issued to "Frank Dreke" while his medical paperwork, which he used for identification, listed "Jesus F. Fernandez-Rodriguez." Ibid. (citation omitted). Petitioner consented to a pat-down of his person and a search of his black duffle bag. Ibid. Special Agent Perry did not find any contraband. Ibid.

Three days later, passengers on a Greyhound bus disembarked at the Albuquerque station while routine maintenance was

performed. Pet. App. 3a. After the bus was serviced, but before the passengers reboarded, Special Agent Perry and Special Agent Kirk Lemmon boarded the bus to examine the bags. Ibid. Special Agent Perry noticed a "drooping," apparently partially full, black duffle bag in an overhead bin. Ibid. (citation omitted). He picked it up to look for a nametag, but did not find one. Ibid. In doing so, he noticed that the bag was very heavy. Ibid. In his experience, a very heavy bag that is only partially full is "consistent with" transporting illegal drugs. 4 C.A. Record (R.) 1058. The bag was out of the bin for a total of about 30 seconds, during which Special Agent Perry briefly handed it to Special Agent Lemmon. Id. at 238; see Pet. App. 3a-4a. Neither of them manipulated, squeezed, or opened the bag. Pet. App. 40a.

The special agents left the bus and then reboarded as the passengers returned. Pet. App. 40a. Special Agent Perry approached passengers to ask about their travel plans and sometimes to search their belongings. Id. at 4a. When petitioner reboarded the bus and saw Special Agent Lemmon, petitioner appeared almost panicked. Ibid. Petitioner took a seat in the middle of the bus and repeatedly peered over his shoulder, apparently watching Special Agent Perry interacting with other passengers. Ibid. Petitioner then got up, went to the lavatory at the back of the bus, and shut the door, opening it only briefly to peek at Special Agent Perry talking to a passenger. Ibid. Approximately a minute

later, petitioner returned to his seat and continued to peer over his shoulder at Special Agent Perry. Ibid.

When Special Agent Perry approached petitioner and asked permission to speak with him, petitioner responded, "Again?", laughed, and agreed to talk. Pet. App. 5a (citation omitted). He handed Special Agent Perry his bus ticket with the name "Frank Dreke." Ibid. (citation omitted). At that point, Special Agent Perry recognized petitioner from their encounter a few days earlier. Ibid. Special Agent Perry twice asked if petitioner had luggage with him on his current trip and petitioner twice denied having any. Ibid. After petitioner consented to a pat down, Special Agent Perry asked if petitioner had been traveling with a bag a few days earlier. Ibid. Petitioner initially denied having a bag on the earlier trip, but when Special Agent Perry recalled that petitioner had been traveling with a bag, petitioner acknowledged that he had been traveling with a black or brown bag then, but again denied having luggage on the current trip. Ibid.

After no passenger claimed the heavy black duffle bag without a nametag, Special Agent Perry picked it up and carried it down the aisle, asking if it belonged to anyone. Pet. App. 5a. When Special Agent Perry reached petitioner, petitioner said, "Yeah, that's my bag," and asked, "You want to check it out?" Ibid. (citation omitted). After confirming he had permission to search the bag, Special Agent Perry opened it and found an oblong bundle

wrapped in brown tape, consistent with the packaging of illegal drugs, and arrested petitioner. Id. at 5a-6a. Petitioner then made the unprompted assertion that it was not in fact his bag. Id. at 6a.

The DEA recovered seven bundles from the bag with a combined gross weight of 3.9 kilograms, all of which tested positive for methamphetamine. Pet. App. 44a. The bag also contained medical records with the name "Fernandez Rodriguez, Jesus F." Ibid. (citation omitted).

2. A grand jury indicted petitioner for possessing methamphetamine with intent to distribute, in violation of 21 U.S.C. 841(a)(1) and (b)(1)(A). Pet. App. 39a.

Petitioner filed a timely motion to suppress the drugs found in the heavy black duffle bag. See D. Ct. Doc. 21 (Feb. 12, 2018). Petitioner argued in relevant part that Special Agent Perry had improperly seized the bag when he carried it down the aisle and asked if it belonged to anyone. 1 R. 36, 40-43. The government responded that petitioner had abandoned any possessory interest in the bag when he had repeatedly told Special Agent Perry that he had no luggage. Id. at 50-52.

At a hearing, the district court asked petitioner during his closing argument "where [the agents] went over the limits in the manner that they handled" the bag. 4 R. 406. Petitioner replied that the Fourth Amendment violation occurred when Special Agent

Perry went to carry the bag down the aisle because the agent interfered with petitioner's possessory interests. Id. at 406-407 ("I think the moment occurs when he's on board and passengers are in their seats. He's already conducted encounters with the passengers, and he's going to go get that bag. At that moment in time, that's an interference with the owner of the bag."). Petitioner then added that "[w]hether or not there is an initial * * * violation from the initial encounter of the bag, I think inferences can be drawn. But * * * the direct testimony is the agents * * * didn't do anything untoward to the bag. They didn't squeeze it. They didn't feel the contents." Id. at 407-408.

The district court denied petitioner's motion to suppress. Pet. App. 39a-56a. As an initial matter, the court explained that while petitioner had not "directly raise[d] an unlawful 'pre-search' challenge [during] his initial briefing," it would "address[] the argument" on the theory that petitioner had suggested in his closing argument that the court could "infer an improper warrantless 'pre-search' of the bag before the passengers again boarded the bus." Id. at 45a n.3. Citing United States v. Nicholson, 144 F.3d 632 (10th Cir. 1998), and Bond v. United States, 529 U.S. 334 (2000), the court found that the agents had not searched the bag because they had not manipulated, squeezed, or pressed it to determine its contents, and Special Agent Perry's "actions did not depart from the type of handling a commercial bus

passenger would reasonably expect his baggage to be subjected to." Pet. App. 46a-47a. The court then found that Special Agent Perry had not interfered with petitioner's possessory interest when he later carried the bag down the aisle looking for its owner, because petitioner had at that point abandoned the bag by repeatedly claiming that he did not have any luggage. Id. at 49a-53a.

Petitioner requested that the district court reopen the suppression hearing after he received discovery containing a note from a different case in which a government attorney summarized a conversation with Special Agent Perry about "pre-search[ing]" a bag. 1 R. 618-623. In his motion, petitioner mentioned that Special Agent Perry handled the black duffle bag in this case for 30 seconds, but argued exclusively that Special Agent Perry had perjured himself during his testimony at the hearing. Id. at 617-620. The court denied the motion on the ground that the agents had credibly testified they did not manipulate or squeeze the bag. Id. at 685-689.

Following a trial, the jury found petitioner guilty. See 4 R. 1364. The district court sentenced petitioner to 180 months of imprisonment, to be followed by five years of supervised release. Judgment 2-3.

3. The court of appeals affirmed. Pet. App. 1a-34a.

On appeal, in addition to renewing his claim that Special Agent Perry had impermissibly seized the bag when he later carried

it down the aisle, Pet. C.A. Br. 66-72, petitioner "focuse[d] on the testimony by the [special agents] that," during their initial encounter with the bag while the bus was empty, "they held the bag for about 30 seconds," Pet. App. 10a. Petitioner "argue[d] that their handling of it for that long a period of time constituted an illegal search even if the agents did not squeeze or manipulate the bag." Ibid.; see Pet. C.A. Br. 52-65. Petitioner did not challenge the district court's finding that the agents did not squeeze or manipulate the bag while they examined it.

The government explained that petitioner had not preserved his "lifting-duration" claim, Pet. App. 10a, for two reasons. First, that argument had not been the basis of petitioner's suppression motion even though he had all the relevant information at that time. Gov't C.A. Br. 42; see Fed. R. Crim. P. 12(c)(3) (providing that failure to make a suppression request before trial is "untimely" but may be considered "if the party shows good cause"). Second, petitioner had affirmatively waived the lifting-duration claim during his closing argument at the suppression hearing, when he discussed the initial handling of the bag but then asserted that the Fourth Amendment violation occurred later -- when Special Agent Perry carried the bag down the aisle asking who owned it. Gov't C.A. Br. 42-46.

The government emphasized that petitioner's decision not to raise the lifting-duration claim in the district court prevented

the government from developing the record, specifically by demonstrating that Special Agent Perry's lifting the bag did not affect petitioner's subsequent consent to Special Agent Perry's opening the bag and that Special Agent Perry would have carried the unclaimed bag down the aisle to find its owner even if he had not earlier lifted the bag. C.A. Gov't Br. 46. The government also observed that, under relevant precedent, Special Agent Perry's lifting the bag was not a search. Id. at 47-61. In reply, petitioner asserted that he had preserved his lifting-duration claim and that lifting the bag was a search because the agents had physically intruded on the bag and exceeded a passenger's reasonable expectations of how a fellow passenger would handle the bag. Pet. C.A. Reply Br. 1-19.

Emphasizing that petitioner had not even attempted to show good cause under Rule 12(c)(3) for failing to raise the lifting-duration claim in a timely motion in the district court, the court of appeals declined to consider it. Pet. App. 10a-13a. The court observed that petitioner had not "derive[d] any argument" in his motion to suppress, his arguments at the suppression hearing, or in his motion to reopen the suppression hearing from the fact that Special Agent Perry held the bag for approximately 30 seconds. Id. at 11a-12a. The court of appeals further observed that the district court had not addressed a lifting-duration claim in its general discussion of the agents' initial handling of the bag.

Id. at 12a-13a. And with respect to the later carrying of the bag down the aisle, the court of appeals agreed with the district court that petitioner abandoned his bag and that Special Agent Perry's actions had not violated the Fourth Amendment. Id. at 13a-17a.

ARGUMENT

Petitioner contends (Pet. 9-35) that the court of appeals erroneously applied Federal Rule of Criminal Procedure 12(c)(3) in declining to consider his lifting-duration claim and that this Court should grant review in light of purportedly conflicting appellate interpretations of that provision. The court of appeals' disposition of petitioner's request for suppression was correct, and this Court's review is unwarranted. Although 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 -- particularly in this case, where petitioner could not satisfy the plain-error standard that he views as applicable. 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), and it should follow the same course here.

1. Rule 12 provides that certain "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." Fed. R. Crim. P. 12(b)(3). The Rule covers, inter alia, claims of "suppression of evidence," as well as claims of "defect[s] in the indictment or information," "selective or vindictive prosecution," severance, and discovery. Fed. R. Crim. P. 12(b)(3)(A)-(E). Rule 12(c)(1) states that the deadline for filing pretrial motions is the date set by the court during pretrial proceedings or, if "the court does not set [a deadline], the deadline is the start of trial." Fed. R. Crim. P. 12(c)(1). And Rule 12(c)(3) establishes the "[c]onsequences of [n]ot [m]aking a [t]imely [m]otion [u]nder Rule 12(b)(3)." Fed. R. Crim. P. 12(c)(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." Ibid.

Rule 12(c)(3), by its plain terms, forecloses consideration of an untimely "defense, objection, or request" without a showing of good cause. And the court of appeals correctly applied the Rule here in declining to consider petitioner's untimely lifting-duration claim, which he raised for the first time only on appeal.

Petitioner's arguments on the merits and in support of this Court's review largely overlap with those raised in a petition for

a writ of certiorari currently pending before the Court, Alexander v. United States, No. 21-7876, that seeks review of another recent Tenth Circuit decision applying Rule 12(c)(3). The government's brief in opposition in Alexander addresses those contentions in detail, Gov't Br. in Opp. at 7-20, Alexander, supra (No. 21-7876), and its discussion of both the merits of the issue and the claim of a circuit conflict is equally pertinent here.

Petitioner raises only two additional arguments, neither of which has merit. First, he invokes (Pet. 25) the canon disfavoring implied repeals, but that canon is inapposite here. As petitioner recognizes (Pet. 26), Rule 12's good-cause standard is "capable of co-existence" with Federal Rule of Criminal Procedure 52(b)'s plain-error standard, undermining any claim that the former repealed the latter. Instead, in order to "giv[e] effect to them both," Pet. 26, a defendant must satisfy them both. See, e.g., United States v. McMillian, 786 F.3d 630, 636 (7th Cir. 2015) ("Although plain error review generally applies to forfeited arguments, Federal Rule of Criminal Procedure 12(c)(3) imposes an antecedent good-cause requirement when a defendant fails to file a timely motion to suppress.") (emphasis added). Second, petitioner asserts (Pet. 28-30) a direct conflict with United States v. Abreu, 32 F.4th 271 (3d Cir. 2022). But, among other relevant distinctions, the Third Circuit's decision in Abreu did not involve Rule 12(c)(3).

2. In any event, this case would be an unsuitable vehicle for reviewing the question presented, because petitioner would not prevail even under the plain-error standard that he views as applicable to any appellate review of his lifting-duration claim. 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 v. United States, 556 U.S. 129, 135 (2009) (citations omitted; 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. (citation and emphasis omitted). Petitioner's claim independently fails to satisfy multiple elements of that test.

As an initial matter, petitioner cannot show error -- let alone plain error -- with respect to his lifting-duration claim. As the court of appeals has previously recognized, "an officer's touching of a bag's exterior does not necessarily constitute a search." United States v. Nicholson, 144 F.3d 632, 637-638 (10th Cir. 1998) (collecting cases); cf. Bond v. United States, 529 U.S. 334, 339 (2000). In particular, merely lifting a bag -- as opposed to squeezing it -- is not a search under the Fourth Amendment, because it does not infringe on any interest that the Fourth Amendment protects. See, e.g., United States v. Hall, 978 F.2d

616, 619 (10th Cir. 1992) ("[N]o seizure occurs when an officer merely picks up an individual's property to look at it, because this interference with the individual's possessory interest is not meaningful."); see also United States v. Ward, 144 F.3d 1024, 1032 (7th Cir. 1998) (explaining that an "officer merely handl[ing] a bag in the passenger area of the bus * * * invades no interest protected by the Fourth Amendment"). Among other things, another bus passenger looking to create additional room in the luggage rack could have someone else's bag in hand for 30 seconds or more.

Petitioner's reliance (Pet. 32-34) on Florida v. Jardines, 569 U.S. 1 (2013), is misplaced. That case involved employment of a drug-sniffing police dog on the porch of a home, a place that enjoys heightened levels of protection, which an overhead luggage rack on a common-carrier bus does not. Id. at 6. Petitioner does not challenge the district court's finding that the officers did not squeeze or manipulate the bag. Pet. App. 46a. And contrary to petitioner's suggestion (Pet. 33), the officers' purpose of recovering narcotics did not transform their handling of the bag into a search; the "subjective intent of the law enforcement officer is irrelevant in determining whether that officer's actions violate the Fourth Amendment." Bond, 529 U.S. at 338 n.2.

Moreover, petitioner has not shown that any potential error involving the officers' lifting of the bag affected his substantial rights. Petitioner does not dispute that he abandoned the bag

after the initial lifting, Pet. App. 15a, or that he affirmatively consented to Special Agent Perry searching the bag, id. at 54a n.6. Petitioner has not offered any sound reason why the agent's initial handling of the bag when petitioner was not present tainted his later affirmative consent to the search. Cf. Wong Sun v. United States, 371 U.S. 471, 487-488 (1963) ("[N]ot * * * all evidence is 'fruit of the poisonous tree' simply because it would not have come to light but for the illegal actions of the police."). Any error that petitioner might be able to show with respect to his lifting-duration claim would therefore be immaterial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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