No. 21-8033

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

Petitioner's Reply Brief

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Petitioner's Reply Brief

A. *Fernandez* represents an ideal case for the Court to resolve conflicts created by circuits like the Tenth that use Rule 12 to find waiver unless appellants limit themselves to the precise arguments made in the lower court.

Choosing words used in *Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 378-79 (1995), the government contends the Rule 12 waiver decision of the Tenth Circuit was correct because Fernandez presented a new "claim" on appeal. BIO 10-11. The record shows the government is wrong. Fernandez has consistently claimed the officers' handling of his bag constituted an illegal search by going beyond that reasonably expected of another passenger. The issue was passed upon by the district court. Pet. 18-31. On appeal, Fernandez again presented the same facts that the district court relied on in making its decision. He used the same legal standard from the same cases as the district court. He elaborated on his argument to explain why the district court was incorrect as allowed by *LeBron*. He supported the argument with more cases from this Court. The Tenth Circuit was only asked to determine whether the record supported Fernandez's legal position.

The Tenth Circuit instead found Fernandez waived the entire issue. In its view, Fernandez had made a new "lifting-duration" argument by elaborating on how the officers had examined his bag: holding it for thirty seconds to look at "all sides" and to see how "heavy it was." Pet. App. 10a-13a; Vol. IV. 260-61. Since this differed from the general description of handling in the district court's order, the panel refused to consider the illegal search issue on which the district court had ruled. Legitimate constitutional arguments cannot be treated as a chore and

magically made to disappear. In similar circumstances, a majority of other circuits have held the issue should be adjudicated.[1] Pet. 11-12. The Court cannot let the Tenth Circuit continue to misuse Rule 12 to so easily dispose of constitutional arguments.

The government's defense of the Tenth Circuit is unpersuasive. The district court passed upon the search issue and all factual predicates necessary for both courts to adjudicate it were fully litigated below. Yet, the government argues Rule 12(c)(3) requires Fernandez to show "good cause" why the search issue was not timely made. Under no interpretative rule can it be said that procedural requirements for pretrial motions are applicable to post-conviction direct appeals. *See Nichols v. United States*, 578 U.S. 104, 109-110 (2016) (rejecting government's request to read absent phrases into statute as drafters "could easily have said so" and "'[t]o supply omissions transcends the judicial function.'") (quoting *Iselin v. United States*, 270 U.S. 245, 251 (1926)). Appellate courts do not hold evidentiary hearings or decide motions pretrial. *United States v. Soto*, 794 F.3d 635, 653 n. 14 (6th Cir. 2015). There is no reasoned basis for using Rule 12(c)(3) to find waiver whenever the appellate argument and the one made below are not verbatim. The rule's text does not support such an application, especially when the words "argument" and "waiver" are absent. *Nichols*, 578 U.S. at 109-110; *Duncan v.*

[1] Since this petition was filed, more circuits have disagreed with the minority interpretation of Rule 12(c)(3) of the Tenth Circuit. They reviewed forfeited pretrial arguments for plain error. *See United States v. Abou-Khatwa*, 40 F.4th 666, 674 (D.C. Cir. 2022); *United States v. Donziger*, 38 F.4th 290, 302-03 (2d Cir. 2022); *United States v. Radford*, 39 F.4th 377, 386-88 (7th Cir. 2022); *United States v. Nunez-Hernandez*, 43 F.4th 857, 859 (8th Cir. 2022).

Walker, 533 U.S. 167, 173-74 (2001) (omission of certain word or phrase denotes drafters' intent to limit its application).

The panel adopted the government's factually inaccurate argument that Fernandez introduced a new "lifting-duration" claim for the first time on appeal. This invitation to invoke a Rule 12 waiver when a timely motion was made *and* passed on undermines the fairness and integrity of the courts. *See Rosales-Mireles v. United States*, 138 S.Ct. 1897, 1908 (2018) ("public legitimacy of our justice system relies on procedures that are neutral, accurate, consistent, trustworthy, and fair, and that provide opportunities for error correction.") (quotation marks and citation omitted). Neither the government nor the panel point where in the appellate record Fernandez made a "lifting-duration" argument. *See* ARB at 1-2 (detailing how *the officers* described handling Fernandez's bag before noting these "actions" informed the district court's search deliberations). Both know Fernandez made the same underlying illegal search claim in each court room, yet both ignore the record. His claim, predicated on *Bond* and *Nicholson*, maintains that an officer's tactile handling of a bus passenger's bag is a search when it exceeds the casual contact reasonably expected of other passengers.[2]

Fernandez's protest might appear overwrought but the record shows how arbitrarily the rule is applied. Here, his arguments were parsed and given a name. The named piece was said to be "new" and summarily dismissed as previously unmade. The argument wasn't new; the name was. By law, an argument could

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[2] *Bond v. United States*, 529 U.S. 334, 338-39 (2000); *United States v. Nicholson*, 144 F.3d 632, 636-39 (10th Cir. 1998).

never have been as narrow as characterized. Whether an officer violates Fourth Amendment rights does not depend upon one factor but on the totality of the circumstances. Fernandez could not have confined his argument to the duration of the bag's lifting when everything the officers did on the empty bus mattered. The government alleged Fernandez said that the officer violated the Fourth Amendment by "lifting" the bag to assess its weight. GAB 44-45. The panel claimed he said that holding the bag for over thirty seconds was "constitutionally excessive." Pet. App. 13a. He did neither. Fernandez argued whether an unconstitutional search occurred required weighing everything both officers described doing to the bag, the information gleaned, and the circumstances in which it all took place. Reviewing the bag's examination in its totality would determine if the agents' exam exceeded the limited contact one might reasonably expect of another passenger. Accordingly, the district court did consider the officers' "actions." Pet. App. 45a-47a; Vol. I, 234-36. It weighed whether "the degree of intrusion . . . departed from the type of handling a commercial bus passenger would reasonably expect his baggage to be subjected to . . ." and passed upon the search claim. *Id.* Herein lies the difficulty - a rule intended to guide pretrial litigation and promote the efficacy of pretrial duties is then misused to indiscriminately dismiss a viable claim on appeal.

While the government and the panel dispute what Fernandez argued, neither say his claim the officers illegally searched his bag was not "brought to the court's attention."[3] The court's memorandum decision is proof. Nor does either assert the search claim was not passed upon by the district court. Again, its

[3] Fed. R. Crim. P. 52(b).

memorandum proves that it was. Conversely, the silence of each supports the validity of Fernandez's appeal of the district court's decision. Rule 51 confirms it. A party "preserves a claim of error" when it tells the district court what it would like it to do and the "grounds" for doing so.[4] Fed. R. Crim. P. 51(b). Fernandez did both. When, as here, "a federal claim is properly presented, . . . parties *are not limited to the precise arguments they made below*." *Lebron*, 513 U.S. at 379 (emphasis added); *see also Romano v. U-Haul Intern.*, 233 F.3d 655, 663-64 (1st. Cir. 2000) (when party seeks "protection under the United States Constitution" it "may advance additional theories based on [a preserved] claim that may not have been addressed by the lower courts.").

Yet, Fernandez also exposes the constraints on Rule 51 within the Tenth Circuit. Its broad Rule 12 interpretation is incompatible with the other procedural rules that apply. Even a claim preserved by Rule 51 and *LeBron* is waived if the argument is deemed different from the one made below. *See*, *e.g.*, *United States v. Warwick*, 928 F.3d 939, 944 (10th Cir. 2019) (court must "decline review of any argument not made in a motion . . . "); *United States v. Burke*, 633 F.3d 984, 987 (10th Cir. 2011) (waiver extends not only to failure to make a pretrial motion, but failure to include a particular argument in it). Given the clear direction of Rule 51, the Tenth Circuit should have acknowledged Fernandez had preserved the search issue and reviewed it de novo. Alternatively, if Rule 12 precedent effectively found the issue "was not brought" below, plain error review was available under Rule 52.

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[4] The plain error standard of Rule 52 applies only if a claim "was not brought to court's attention."

The Tenth Circuit panel instead found the claim was waived. For the sake of the public expectations of the justice system recognized in *Rosales-Mireles*, the Court's guidance is urgently needed.

B. The Tenth Circuit decision is wrong and cannot be reconciled with this Court's traditional rule that claims are waived, not arguments, and parties can make any argument in support of a preserved claim on appeal.

The government maintains the Tenth Circuit application of Rule 12(c)(3) to post-conviction direct appeals is correct. It is not, for the following reasons. First, no interpretative rules support the circuit's theory that a Rule 12(c)(3) reference to "a court" rather than "the court" (the term otherwise used in Rule 12) means the rule applies to district courts *and* appellate courts. BIO 12 (referring to *Alexander v. United States*, No. 21-7876, BIO 8 (citing *United States v. Bowline*, 917 F.3d 1227, 1230 (10th Cir. 2019)). Read in context, as it must be, "a court" is the district court where pretrial motions are filed and decided and where an untimely motion would be pending. *See Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) (fundamental canon of statutory construction that statute's words read in "their context and with a view to their place in the overall statutory scheme."); *see also Gundy v. United States*, 139 S.Ct. 2116, 2126 (2019) (meaning not determined by looking to isolated words). It is the district court that "may consider [an untimely] defense, objection, or request if the party shows good cause." Fed. R. Crim. P. 12(c)(3). It is also the court that sets deadlines, which, if unmet, then examines whether the facts presented establish good cause. *See*, *e.g.*, *United States v. Nix*, 264 F.Supp.3d 429, 435 (W.D.N.Y. 2017) (good cause not shown for untimely

motion); *United States v. Davis*, 645 F.Supp.2d 541, 545-46 (W.D.N.C. 2009) (government showed good cause for untimely objections).[5] How a pretrial rule could ever apply in an appellate court, the government and the Tenth Circuit do not say. There is no contextual basis in its text to apply Rule 12 to an appeal. The solitary word "a" cannot make the 'good cause' requirement, which expressly refers to pretrial motions filed in district courts, a standing condition of appellate review.

Second, even if Rule 12(c)(3) were to apply to appellate courts, the rule governs untimely "motions," not untimely arguments. Nowhere does the rule mention arguments. Omission of a word or phrase in a statute or rule requires that an interpreter presume the drafters intended something different from what's missing. *Loughrin v. United States*, 573 U.S. 351, 358 (2014); *see also Duncan*, 533 U.S. at 173-74 (omission of certain word or phrase denotes drafters' intent to limit its application). Thus, 'good cause' in Rule 12(c)(3) is pertinent only when "the motion is untimely."

The Tenth Circuit not only inserts Rule 12 into the appellate courts, it uses an expansive interpretation to regularly find arguments made in timely pretrial motions are waived. *United States v. Vance*, 893 F.3d 763, 769-770 (10th Cir. 2018); *United States v. Johnson*, 43 F.4th 1100, 1114 (10th Cir. 2022) (citing *United States v. Fernandez*, 24 F.4th 1321, 1328 (10th Cir. 2022)). Again, no interpretative rule supports such a wide-ranging reading of the text of Rule 12(c)(3). *See Loughrin*, 573 U.S. at 358 (every word and clause given its intended effect) & *id.* at 362-63

[5] A 'good cause' argument is so unavailing on appeal that, in *Burke*, 633 F.3d at 988, the court noted it "rarely . . . grant[s] relief under the good-cause exception."

(statute's "reach" defined by its "textual limitation"). By definition, augmented or derivative arguments will never be precisely the same as the earlier argument; nonetheless, they are allowed. *LeBron*, 513 U.S. at 378-79. Fernandez filed a timely motion to suppress. All facts relevant to the issue were fully developed and passed on by the district court. Its "textual limitations" remove Rule 12(c)(3) from his appeal and it is unreasonable to expect its 'good cause' requirement to be satisfied there.

Third, the demand by the Tenth Circuit for 'good cause' is irreconcilable with amendments to Rule 12 made in 2014. Using the forfeiture wording of *United States v. Olano*, 507 U.S. 725, 731 (1993), the amended rule now says not raising certain pretrial motions as expected renders the motion "untimely." Fed. R. Crim. P. 12(c)(3). Any reference to "waiver" was removed to avoid the confusion that a motion made untimely also waived its claims. *United States v. Vasquez*, 899 F.3d 363, 372-373 (5th Cir. 2018). The choice of language is significant because forfeiture is subject to plain error review. Neither the Tenth Circuit nor the government explains why the wording of Rule 12 was changed to that of forfeiture if it meant to bar plain error review. As discussed in the interpretative rules above, by expressly eliminating "waiver," the drafters intended the usual standards of appellate review to apply, e.g. Rule 52(b).

Finally, the Tenth Circuit use of Rule 12 to summarily dismiss entire claims if the appellate argument does not precisely match the one made below is fundamentally unsound. Its view that derivative arguments or arguments that elaborate on the law or emphasize certain facts necessarily constitute waiver

conflicts with this Court's decisions on preservation. "'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.'" *Lebron*, 513 U.S. at 379 (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). It has been a guiding principle of appellate practice that "[p]arties are not confined here to the same arguments which were advanced in the courts below upon a federal question there discussed." *Dewey v. City of Des Moines*, 173 U.S. 193, 198 (1899). The Court labeled this a "traditional rule" because it has existed for over a century. *Lebron*, 513 U.S. at 379 (citing *Dewey*).

The government dismisses the Court's "traditional rule" because "it is contrary to the text, history and purpose of Rule 12(c)(3)." *Alexander* BIO 15-16. It is a peculiar argument to make when, in a factually similar circumstance, it adopted the argument Fernandez makes here. In *United States v. Williams*, the government was accused of not making the same argument on appeal as it had below. Having argued probable cause in the district court, the government expounded on its basis on appeal. In its reply, it said it was not prohibited by Rule 12 from making a different argument. 2015 WL 5022074, *4-9 (9th Cir. 2015). It explained that because the district court "specifically addressed this argument at length in its ruling," it had not waived the new argument. *Id.* at *4. The government also said a party does not have to make the specific argument below to avoid waiver. Citing Ninth Circuit precedent and this Court's cases, the government argued there is no requirement "to file comprehensive trial briefs on every argument that might support . . . an issue." *Id.* at *5. Once an issue is

"passed upon," arguments bolstering the position need not be identical. *Id.* at *8-9 (citing *Clark v. Arizona*, 548 U.S. 735 (2006); *United States v. Williams*, 504 U.S. 36, 41 (1992); *Blackmon-Malloy v. U.S. Capitol Police Bd.*, 575 F.3d 699, 707 (D.C. Cir. 2009)).

The Ninth Circuit agreed with the government. *United States v. Williams*, 846 F.3d 303, 311 (9th Cir. 2016). Although the government never argued probable cause based on a violation of Nevada's identity confirmation statute and N.R.S. § 171.123 had not been passed on, the claim of probable cause had been made. *Id.* Citing *Lebron*, the court held "it is claims that are deemed waived or forfeited, not arguments." *Id.* Citing *Yee*, it stressed that once a claim is properly presented, "a party can make any argument in support of that claim." *Id.* (quotations and citations omitted). In other words, on appeal, a party "is not circumscribed from advancing a more specific argument in support of its theory." *Id.* The Court concluded that the government had not waived the argument:

> Before the district court the government argued *generally* that the officers had probable cause to arrest Williams because he ran. On appeal the government argued *more specifically* that the officers had probable cause to arrest Williams for violating N.R.S. § 171.123 when he ran. The government, having advanced its probable cause theory before the district court, is able to make a more *precise* argument on appeal as to why the officers had probable cause.

Id. at 311-12 (emphasis added).

Williams refutes the Tenth Circuit notion that general arguments made more specific on appeal are waived under Rule 12(c)(3). This general to specific transition on appeal is uncontroversial in most circuits because it is germane to the appellate

process.[6] Not so in the Tenth. In direct conflict with others,[7] the Tenth Circuit insists that "secondary, back-up theories may [not] be mounted for the first time [on appeal]." *Fish v. Kobach*, 840 F.3d 710, 730 (10th Cir. 2016). Theory, as used here, is akin to argument. A new theory or argument on appeal - one different from below - will not be considered. *Id.* This Court should grant certiorari to define "new" and to clarify the degree of specificity needed to warrant de novo rather than plain error review. The circuit courts will then have a uniform way of knowing if a constitutional claim was preserved, or not.

C. The Court should grant Fernandez's petition because the standard of review has practical implications.

The government urges that Fernandez's petition be denied because "many claims precluded by Rule 12(c)(3) would also fail under plain-error review." *Alexander* BIO 19-20. In other words, there is no remedy with either. But whether Rule 12(c)(3) or Rule 52 is applied does matter. When, as here, a motion hearing

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[6] *See Ohio Adjutant General's Department v. Federal Labor Relations Authority*, 21 F.4th 401, 406-07 (6th Cir. 2021) (purposes of appellate litigation defeated if parties required "to raise the exact same arguments" as earlier).

[7] *Koch v. Cox*, 489 F.3d 384, 391 (D.C. Cir. 2007) (argument not forfeited when supported with new legal basis); *United States v. Litvak*, 808 F.3d 160, 175 n. 17 (2d Cir. 2015) (defendant can "submit additional support"); *United States v. Robinson*, 774 F.3d 293, 300 n. 6 (4th Cir. 2014) (review de novo though new argument made on appeal); *In re Under Seal*, 749 F.3d 276, 288 (4th Cir. 2014) (per *Yee* claim not waived by "variations" of same basic argument); *Gallenstein v. United States*, 975 F.2d 286, 290 n. 4 (6th Cir. 1992) (issue not waived by "alternative arguments," government allowed "any argument it wishes" in support); *United States v. Billups*, 536 F.3d 574, 578 (7th Cir. 2008) ("new twist" on argument with "additional authority" reviewed de novo); *United States v. Pallares-Galan*, 359 F.3d 1088, 1094-95 (9th Cir. 2004) (de novo review though "alternative" argument made on appeal); *United States v. Brown*, 934 F.3d 1278, 1306-07 (11th Cir. 2019) (government could "offer new arguments" on preserved claim).

was held and the record was sufficiently developed for appeal, Fernandez can prevail on plain error. *See*, *e.g.*, *United States v. Buchanon*, 72 F.3d 1217, 1219-21, 1227-28 (6th Cir. 1995) (district court plainly erred in denying suppression motion).

Indeed, absent summary dismissal under Rule 12, Fernandez had a persuasive plain error argument.[8] The government disagrees but it also misunderstands the import of property-based Fourth Amendment decisions like *Jardines*. BIO 12-15. This Court said, as it did again in *Carpenter*, that Fourth Amendment protections are invoked when an officer seizes information from the property that was otherwise unknowable without the trespass. *Florida v. Jardines*, 569 U.S. 1, 5-11 (2013); *Carpenter v. United States*, 138 S.Ct. 2206, 2218 (2018). It is incontrovertible the officers here hoped to gather information from their trespass. *Jardines*, 569 U.S. at 9 (trespassing "in hopes of discovering incriminating evidence"); *United States v. Jones*, 565 U.S. 400, 406, 408 n. 5 (2012).[9] With these rulings extant before his suppression motion, Fernandez easily satisfies the four requirements for plain error. Pet. 31-35. The government cannot predict whether a plain error argument will succeed. But some circuits routinely and inappropriately foreclose that possibility. By granting certiorari, the Court can eliminate this geographic lottery.

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[8] If Fernandez is right and *Lebron* controls, then review is de novo.

[9] The government believes the purpose for trespassing is irrelevant. According to this Court, in this context, purpose matters. *See Jardines*, 569 U.S. at 5, 8, 11 (purpose scrutinized to determine whether intrusion comes within "implicit license"); *Jones*, 565 U.S. at 408 n. 5 (search is trespass "conjoined with . . . an attempt to find something or obtain information."); *see also United States v. Ackerman*, 831 F.3d 1291, 1307 (10th Cir. 2016) (Gorsuch, J.) ("trespass to chattels" combined with agent's purpose to obtain information is a search).

Although a habeas petition is a nominal remedy for meritorious but "untimely" Rule 12(b) motions in post-conviction proceedings, a definitive construction of Rule 12 is still needed. Substituting plain error review with post-conviction ineffective assistance claims, as the government suggests, does not ameliorate the turmoil created by the misuse of Rule 12. *Alexander* BIO 20. Courts use widely different standards for "good cause," "plain error," and "ineffective assistance of counsel." Additionally, this Court has distinguished a Fourth Amendment claim from a Sixth Amendment claim for failing to litigate a Fourth Amendment motion. Each is "distinct, both in nature and in the requisite elements of proof." *Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986).[10] Because the claims "have separate identities and reflect different constitutional values," they cannot be treated as equal substitutes. *Id.* at 375.

This confusion among the circuits as to when to apply which rules and the scope of the applications is an "important matter" only this Court can resolve. Sup. Ct. Rule 10(a); *see also Henderson v. United States*, 568 U.S. 266, 270 (2013) (certiorari granted to resolve differences among the circuits as to the temporal scope of plain error); *Olano*, 507 U.S. at 731 (granting certiorari to clarify standard for plain error review by circuit courts). In the past, the Court resolved a conflict concerning when the plain error standard applies after a court of appeals already had decided that the standard could not be satisfied. *Puckett v. United States*, 556

[10] For example, defense counsel's failure to timely move to suppress evidence is "the primary manifestation of incompetence and source of prejudice" under the Sixth Amendment, whereas a Fourth Amendment claim burdens the government with proof and primarily centers on police conduct. 477 U.S. at 374.

U.S. 129, 133-34 (2009). The Court must now clarify the role of Rule 12, Rules 51 and 52, and the "traditional rule" preserved in *Lebron*. A practical solution is overdue and the government offers no convincing reason why the Court should not act.

Conclusion

Fernandez asks this Court to grant this Petition and review and reverse the Tenth Circuit's decision. At a minimum, the Court should hold this petition pending disposition of *Alexander v. United States*, No. 21-7876 or make *Fernandez* a companion case, as both petitioners ask this Court to consider whether new or alternative appellate arguments are waived, or reviewed at least for plain error.

Respectfully submitted,

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