No. 24_____

In the Supreme Court of the United States

v.

RAFAEL CARDONA, SR., a/k/a Rafo,

Petitioner

v.

UNITED STATES OF AMERICA

Respondent

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Before 2014, Rule 12 of the Federal Rules of Criminal Procedure required certain enumerated types of motions to be filed before trial, and stated that a party "waives" any such motion, but that "[f]or good cause, the court may grant relief from the waiver." In 2014, the waiver provision was eliminated and replaced with a timeliness provision. Rule 12(c)(3) now 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."

The question presented is whether Fed. R. Crim. P. 12, as amended in 2014, mandates a forfeiture or waiver of a multiplicity claim not timely raised in the district court, and thus whether the issue is reviewable for plain error or unreviewable on appeal.

RELATED PROCEEDINGS

United States Court of Appeals (1st Cir.)

United States v. Rafael Cardona, Sr., Nos. 22-1415, 22-1416. Judgment entered on December 7, 2023.

United States District Court (D.Mass.)

United States v. Rafael Cardona, Sr., 17-CR-30022-TSH. Judgment entered on May 24, 2022.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Rafael Cardona, Sr. petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINION BELOW

The opinion of the United States Court of Appeals for the First Circuit is reported at 88 F.4th 69 (1st Cir. 2023). The Court of Appeals' order denying rehearing *en banc* is unreported. App. 25.

JURISDICTION

The judgment of the court of appeals was entered on December 7, 2023. On December 21, 2023, Petitioner filed a Petition for Rehearing *En Banc* review, which was also treated as a petition for panel rehearing. On January 23, 2024, the First Circuit Court of Appeals Denied the Petition for En Banc Review. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT RULE

Fed. R. Crim. P. 12(c)(3), as amended in 2014, provides:

(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.

STATEMENT OF THE CASE

Prior Proceedings

Following a jury trial, Rafael Cardona, Sr. was convicted on October 18, 2022 on one count of conspiracy to distribute and possess with intent to distribute cocaine and one count of conspiracy to distribute and possess with intent to distribute heroin. On May 6, 2022, the district court sentenced him to serve 146 months in prison on each count concurrently, followed by five years of supervised release. The court ordered him to pay $200.00 mandatory special assessments, $100.00 per count.

On appeal, Mr. Cardona argued that the two conspiracy convictions constituted multiple punishment for the same offense in violation of the Double Jeopardy Clause of the Fifth Amendment. The government argued that the issue was waived by virtue of Mr.

Cardona's failure to raise it by motion in the district court before trial. On December 7, 2023, the court of appeals affirmed, concluding that because the issue was waived under Rule 12 and was therefore not subject to appellate review.

Mr. Cardona filed a Petition for Rehearing *En Banc* on December 21, 2023. The court of appeals treated the petition as one both for panel rehearing and for rehearing *en banc*, and denied it on January 23, 2024.

The First Circuit held that the multiplicity claim was waived and not subject to review on appeal, and affirmed Mr. Cardona's convictions on both conspiracy counts.

District Court Proceedings

In the district court, there were multiple changes of counsel for Petitioner. Three weeks after the initial appearance, new counsel was appointed. Two years later, that attorney moved to withdraw, citing his age, a medical condition and the COVID pandemic as reasons. While that attorney was representing the Petitioner, a deadline for substantive motions was set for November 12, 2019. The attorney who ultimately tried the case was appointed in April, 2020. A year and a

half after that, on October 4, 2021, another attorney was appointed for the limited purpose of conflict.

The evidence at trial revealed that the agreements to sell cocaine and heroin were inextricably intertwined, both in the temporal sense and also in substance. The government presented evidence that Isaac Cardona, Petitioner's son, bought cocaine from a supplier, David Cruz, and sold a kilogram of the cocaine to a New Hampshire customer who did not pay. This left Isaac[1] in debt to Cruz, and Cruz in debt to his Mexican suppliers. Cruz devised a solution, which he testified that he presented to Isaac and Raphael. Isaac was to drive to California in a Nissan Juke used by Cruz, buy a kilo of heroin, bring it back to Massachusetts, and sell it in small quantities, producing enough cash to pay for the missing kilo of cocaine and also to cover the cost of the kilo of heroin. Raphael's participation in the conspiracy consisted of his presence and failure to oppose Cruz's proposed plan, and his communications with Isaac and Cruz when Isaac traveled to California

[1] First names are used for Rafael Cardona, Sr. and Isaac Cardona in this section where both are named, for simplicity and clarity.

in furtherance of the plan, and after his return. Trial counsel did not mount a double Jeopardy or multiplicity challenge in the district court.

The evidence on both conspiracy counts was presented through the same witnesses. David Cruz, who was not charged in this case, testified pursuant to a cooperation agreement. He identified and explained his communications with Isaac and Rafael, most of which were in recorded phone calls and texts. Cruz testified that Rafael was present when he proposed the California heroin buy to Isaac, and he did not disagree. Rafael was in phone contact with both Cruz and Isaac before, during and after Isaac's trip to California. Rafael was convicted on both conspiracy counts. The same government agents testified about surveillance of David Cruz, Isaac and others; evidence seized, travel documentation, records of communication and more as to both the heroin and cocaine aspects of the conspiracy. The same vehicle - the Nissan Juke - was used to transport both the heroin and the cocaine.

The Appeal

On appeal, Rafael Cardona argued that the district court plainly erred in entering judgments against him on both counts in violation of his Fifth Amendment right against double jeopardy. The government

argued that the issue was waived under Rule 12(c)(3) by virtue of defendant's failure to file a motion to dismiss before trial. Mr. Cardona addressed the waiver issue in his Reply Brief, citing cases decided in the First Circuit and also the divided decisions of other circuit courts, including the Sixth Circuit's decision in *United States v. Soto*, 794 F.3d 635 (6th Cir. 2015) and a First Circuit decision of the same name, *United States v. Soto*, 799 F.3d 68 (1st Cir. 2015)(hereinafter: "*Soto* 1st").

First Circuit Opinion

The panel concluded that the multiplicity issue was waived, because "a legal argument that is untimely under Rule 12(b)(3) and (c)(3) 'cannot be raised on appeal absent a showing of good cause.'" *Cardona*, App. 10. In rejecting Mr. Cardona's arguments, the First Circuit relied on three types of cases: (1) its own prior decisions in cases where the underlying issue was suppression, *e.g., United States v. Reyes*, 24 F.4th 1, 16 n.8 (1st Cir. 2022) (quoting *United States v. Lindsey*, 3 F.4th 32, 40- 41 (1st Cir. 2021); (2) cases from other circuits holding that Rule 12(c)(3) effectuated a waiver, *e.g., United States v. Bowline*, 917 F.3d 1227 (10th Cir. 2019); *United States v. Fry*, 792 F.3d

884 (8th Cir. 2014); and (3) its own earlier decisions interpreting an earlier version of Rule 12 when the word "waiver," was part of the Rule. *United States v. Walker*, 665 F.3d 212 (1st Cir. 2011) and *United States v. Walker-Couvertier*, 860 F.3d 1 (1st Cir. 2017)(applying pre-2014 rule in effect when motion was adjudicated).

The First Circuit's decision in *Walker* relied heavily on the inclusion of the word "waiver" in Rule 12. "We believe that Rule 12 (e) says what it means and means what it says." *Walker*, 665 F.3d at 228. But the *Cardona* court gave short shrift to the view of a panel in a 2015 case that after the 2014 amendments, the rule no longer imposed a waiver of late-raised issues. *Soto* 1st (rejecting government waiver argument because amended rule "eliminated any reference to waiver"). The *Cardona* court addressed this only by saying "[w]e did not . . . issue a holding as to whether the present version of Rule 12 precluded review of the defendant's claim." App. 12, n. 4.

The First Circuit opinion made no mention of the circuit split, but cited *Bowline* and *Fry*, both of which interpret Rule 12(c)(3) as a waiver provision. App. 11, 13.

Finally, the First Circuit cited the need to prevent sandbagging by defendants who, in the absence of a waiver rule, could "sit silently by," proceed to trial without raising the multiplicity claim then ambush the prosecution after trial. *Cardona*, App. 13.

REASONS FOR GRANTING THE PETITION

This Court should Grant Certiorari to Resolve the Division Among the Federal Circuit Courts as to Whether a Defendant's Failure to Timely Raise a Multiplicity Objection in the District Court Operates as a Waiver, Barring Appellate Review, or a Forfeiture, Allowing for Plain Error Review on Appeal.

This Court has recognized that multiplicitous convictions are prejudicial to defendants even when they do not increase the length of a defendant's sentence. *United States v. Rutledge*, 517 U.S. 292 (1996); *Ball. United States*, 470 U.S. 856 (1985). Because of the collateral consequences of an additional conviction, multiplicity claims are the type of argument that can meet the stringent four-prong plain error test. These errors are also easily corrected, often without the need for evidentiary hearings, retrials, or resentencings; the multiplicitous conviction is vacated and remanded for entry of judgment. Thus, a defendant gains no unfair advantage by waiting to raise a multiplicity claim until after trial.

A. The Circuit Split Over the Effect of Rule 12 on Multiplicity Arguments First Made on Appeal Existed Before the 2014 Amendments to Rule 12, and Remains Unresolved Ten Years After The Amendments.

There has long been a conflict among the circuit courts of appeals over whether certain defenses or objections not timely raised under Rule 12 are waived, barring appellate review, or forfeited and subject to plain error review. The conflict existed even before the 2014 amendments. Although Rule 12(e) expressly provided for waiver and most circuit courts found waiver, some courts applied plain error review. *See, e.g., United States v. Robinson*, 627 F.3d 941 (4th Cir. 2010); *United States v. Mahdi*, 598 F.3d 883, 887-888 (D.C. Cir. 2010). The 2014 amendments were intended to resolve the confusion, removing the words "waives" and "waiver," from Rule 12(e) and substituting Rule 12(c)(3), a timeliness provision, in its place. But the goal was not achieved; the circuit courts of appeals remain divided over the meaning of Rule 12(c)(3). *United States v. Bowline: The Federal Circuit Split Over Untimely Arguments From Criminal Defendants Absent a Showing of Good Cause for the Delay,* 43 Am. J. Trial Advoc. 471 (2020).

After the 2014 amendments, the Fifth, Sixth, and Eleventh Circuits have interpreted Rule 12(c)(3) as creating a forfeiture and not a

waiver, permitting review of untimely claims for plain error without a showing of good cause. *United States v. Vazquez*, 899 F.3d 363, 372 (5th Cir. 2018); *United States v. Soto*, 794 F.3d 635 (6th Cir. 2015); *United States v. Sperrazza*, 804 F.3d 1113, 1119 (11th Cir. 2015). The Third Circuit has applied plain error to a multiplicity claim first raised on appeal, but without reference to Rule 12. *United States v. Hodge*, 870 F.3d 184 (3d Cir. 2017), but has found waiver where suppression arguments are first made on appeal.[2] The First, Fourth, Seventh, Eighth, Ninth, and Tenth and Circuits have interpreted Rule 12(c)(3) as effectuating a waiver of such claims, barring appellate review. *United States v. Cardona,* 88 F.4th 69 (1st Cir. 2023)*; United States v. Robinson,* 855 F.3d 265 (4th Cir. 2017); *United States v. Lockett*, 859 F.3d 425 (7th Cir. 2017); *United States v. Anderson*, 783 F.3d 727 (8th Cir. 2015); *US v. Guerrero*, 921 F.3d 895 (9th Cir. 2019); *US v. Bowline*, 917 F.3d 1227 (10th Cir. 2019). This Court should grant certiorari to resolve the conflict over the availability of plain error review of

[2] *United States v. Fattah*, 858 F.3d 801 (3d Cir. 2017); *United States v. Robinson*, 844 F.3d 137 (3d Cir. 2016).

untimely multiplicity claims, as the conflict remains unresolved ten years after the removal of the "waiver" language from Rule 12.

B. The First Circuit Wrongly Concluded That the Removal of the Waiver Language From Rule 12 in the 2014 Amendments Made No Substantive Change to the Rule, and That Rule 12(c)(3) Bars Appellate Review of a Multiplicity Claim First Made on Appeal Absent a Showing of Good Cause.

The First Circuit opinion did not address the Sixth Circuit's opinion in *Soto* or any of the other circuit court opinions applying plain error to late-raised multiplicity claims. It relied heavily on the Tenth Circuit's opinion in *Bowline*.

The Sixth Circuit held in *Soto* that a multiplicity claim first raised on appeal is reviewed for plain error unless the record establishes that the defendant knowingly and intentionally waived the claim. *Soto*, 794 F.3d at 655**.** The Sixth Circuit reached this conclusion based on the language and rulemaking history of Rule 12(c)(3).

The *Soto* court explained that one of the primary reasons for the removal of "waiver" from Rule 12 was the Advisory Committee's belief "that courts were incorrectly treating the failure to file a timely pretrial motion as an intentional relinquishment of a known right." *Id.* at 652.

The Sixth Circuit concluded that Rule 12(c)(3), including the good cause provision, was addressed to the district courts and not the courts of appeals. It applied two canons of construction to interpret the use of the words "a court" and not "the court" in the last sentence of Rule 12(c)(3).[3] Acknowledging some ambiguity on this point, the Sixth Circuit reviewed the rulemaking history, which included a statement by Judge Sutton that "[g]iving district judges more flexibility before trial is very important," and "it's becoming clearer that this is a rule addressed to the district courts." *Id.*, *quoting*, *April 25, 2013 Advisory Committee Minutes*; *May 2013 Report to the Standing Committee.*

The Sixth Circuit also noted that the Advisory Committee had considered a cross-reference to Rule 52 but rejected it, "thereby permitting the Courts of Appeals to decide if and how to apply Rules 12

[3] First, "the specific governs the general. . . . Accordingly, because Rule 12 is more specific than Rule 1(b)(2), we should construe Rule 12(c) as an exception to the general rule that the Federal Rules of Criminal Procedure apply to the district and appellate courts." *Id.* at 653-654 (*citations omitted*). Second, under the *in pari materia* canon, "statutes addressing the same subject matter generally should be read as if they were one law." *Id.* at 654.

and 52" when motions that fall within the scope of Rule 12(b)(3) are first raised on appeal." *Id.*

The Tenth Circuit took the opposite view, relying heavily on this Court's decision in *Davis v. United States,* 411 U.S. 233 (1973). *Davis* held that the express waiver language of then-Rule 12(b)(2) applied to claims regarding the composition of the grand jury raised for the first time in a habeas proceeding. *Davis* broke no new ground regarding the interpretation of the express waiver provision contained in Rule 12(b)(2). Rather, it simply applied the rule to habeas proceedings, following this Court's decision in *Shotwell Mfg. Co. v. United States*, 371 U.S. 341 (1963)(challenge to grand and petit jury arrays first made several years after trial waived under Rule 12(b)(2)). *Shotwell* and *Davis* were both decided when Rule 12(b)(2) provided, in relevant part, that "[d]efenses and objections based on [non-jurisdictional] defects in the institution of the prosecution or in the indictment or information . . . may be raised only by motion before trial," and that . . . "[f]ailure to present any such defense or objection . . . constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver." App. 32.

The Tenth Circuit in *Bowline* opined that *Davis* had established that "there could be a waiver without satisfaction of the *Olano* intentional relinquishment standard." *Bowline*, at 1234. But there was no *Olano* standard in 1973 when *Davis* was decided, because *Olano* came two decades later.[4] *Bowline* expanded the meaning and significance of *Davis* beyond its reach.

The First Circuit opinion here made no mention of *Olano*. But in *Walker*, addressing the pre-2014 Rule 12(e), the First Circuit found significance in the fact that Congress left the waiver language intact in the 2002 amendments, "after the Supreme Court had made the distinction between waiver and forfeiture pellucid." *Walker*, 665 F.3d at 228. This observation is flawed. The 2002 amendments were purely stylistic. The significance of *Olano* is the distinction it drew between the concepts of waiver and forfeiture. The 2014 amendments to Rule 12 were substantive, and they replaced the "waiver" with "untimely,"

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[4] *Davis* applied the plain language of Rule 12(b)(2) and concluded that the waiver created by that rule was applicable in habeas proceedings. The only reference to "intentional relinquishment" in *Davis* appears in Justice Marshall's dissent, *Davis*, at 245, *citing Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The *Olano* distinction between waiver and forfeiture came two decades later.

because the rule had never required proof of an "intentional relinquishment of a known right." The 2014 amendment to Rule 12 used the language of forfeiture from *Olano* - timeliness - the clarify the meaning of the rule.

Though this Court has not decided a case interpreting Rule 12 since *Davis,* it applied plain error review to an unpreserved challenge to a non-jurisdictional indictment defect in *United States v. Cotton*, 535 U.S. 625 (2002). The defect in *Cotton* was the omission of a fact that enhances the statutory maximum sentence. Because this Court concluded that the defect was not jurisdictional, the unpreserved claim in *Cotton* was one of the objections required to be timely made under Rule 12. Nevertheless, this Court applied plain error review, without citation to Rule 12 or to *Davis*.

The Seventh, Eighth and Ninth Circuits reached the same conclusion as the Tenth Circuit did in *Bowline*, but with less analysis and on less than solid ground. The Seventh Circuit held in 2017 that the failure to raise a multiplicity claim results in waiver under Rule 12(c)(3), barring appellate review. *United States v. Lockett*, 859 F.3d 425 (7th Cir. 2017). *But see, United States v. Miles*, 86 F.4th 734 (7th Cir.

2023)(reviewing unpreserved multiplicity claim for plain error, remanding for resentencing without reference to Rule 12).

In *United States v. Anderson*, 783 F.3d 727 (8th Cir. 2015) and *United States v. Fry*, 792 F.3d 884 (8th Cir. 2015), the Eighth Circuit applied Rule 12(c)(3) and found waiver, but noted that under the pre-2014 Rule, 12(e), it would have applied plain error review, citing its earlier decision in *United States v. Robertson*, 606 F.3d 943 (8th Cir. 2010)(plain error review appropriate absent evidence that defendant intentionally relinquished double jeopardy claim). *Anderson*, at 740; *Fry* at 888 (Fry "at most might have claimed entitlement to plain error review under former circuit law". In sum, the Eighth Circuit applied plain error review when Rule 12(e) contained the word "waiver," but with that word removed in 12(c)(3), it focused on the "good cause" requirement (that appears in both versions of the rule), barring appellate review unless good cause was shown.

The Ninth Circuit aligned itself with the waiver majority in *United States v. Guerrero*, 921 F.3d 895 (9th Cir. 2019), with misgivings. Constrained to follow earlier panel decisions made before the 2014 amendments, the *Guerrero* court acknowledged the circuit

split and noted that "were we writing on a blank slate, we might have been inclined to follow" the sister circuits that review untimely defenses for plain error.

The First Circuit, after declaring in 2011 that the pre-2014 Rule 12 waiver provision "says what it means and means what it says," failed in this case to explain why the untimeliness provision of Rule 12(c)(3) does not also mean what it says, instead of what it no longer says after the word "waiver" was removed. The First Circuit's ruling in this case was wrong, and must be reversed.

C. This Case is a Good Vehicle for This Court to Decide the Question Presented.

This case directly raises the question presented. The question was litigated in the First Circuit, and there is nothing that would prevent this Court from reaching it. A decision in Mr. Cardona's favor would permit him to obtain review of his multiplicity claim for plain error.

With this case a good vehicle to decide the question presented, this Court should grant certiorari.

CONCLUSION

This Court should grant Mr. Cardona a writ of certiorari.

Respectfully submitted,

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CONCLUSION

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