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Fourth Amendment Standing and the General Rule of Waiver

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The Fourth Amendment guarantees our right to be free from unreasonable government searches and seizures,[1] but this right can only be asserted in certain circumstances. The Supreme Court has noted that Fourth Amendment rights are "personal rights which, like some other constitutional rights, may not be vicariously asserted."[2] This means that a defendant seeking to suppress evidence gathered in a government search must demonstrate that the search violated the defendant's own personal rights of privacy—"that he personally has an expectation of privacy in the place searched and that his expectation is reasonable."[3] The courts call this requirement "standing."[4] Importantly, this is not jurisdictional standing under a statute or Article III, but rather standing based on substantive Fourth Amendment doctrine.[5] "[T]o

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[1] The Fourth Amendment 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.

U.S. CONST. amend. IV.

[2] Alderman v. United States, 394 U.S. 165, 174 (1969).

[3] United States v. Noble, 762 F.3d 509, 526 (6th Cir. 2014) (internal citations omitted).

[4] *Id.* The Supreme Court has expressed disapproval with the term "standing," however many courts still use the term. *See* Rakas v. Illinois, 439 U.S. 128, 133 (1978); Sherry F. Colb, *Standing Room Only: Why Fourth Amendment Exclusion and Standing Can No Longer Coexist* 28 CARDOZO L. REV. 1663, 1665 (2007) ("The Court has stopped referring to 'standing' because it considers the 'reasonable expectation of privacy' language of substantive Fourth Amendment law adequate to the task of describing both *when* a search has taken place . . . and *who* was victimized by a search such that if the search was unreasonable, then *he* would be one of the people authorized to suppress evidence from it") (emphasis added).

[5] *Rakas*, 439 U.S. at 139 (1978). This distinction is crucial because jurisdictional standing can never be waived by the parties. *See* United States v. Leon, 203 F.3d 162, 164 n.2 (2d Cir. 2000) (citing United States v. Heyward-Robinson Co., 430 F.2d 1077, 1080 (2d Cir. 1970).

say that a party lacks Fourth Amendment 'standing' is to say *his* reasonable expectation of privacy has not been infringed."[6] Put more simply, in order for a defendant to successfully argue that evidence should be suppressed, he must show that the government infringed on his own Fourth Amendment rights.

The issue of standing usually arises when a defendant seeks to invoke the exclusionary rule[7] and suppress evidence from a search even though the defendant's Fourth Amendment rights were not infringed. For example, the Sixth Circuit has held that drivers lack Fourth Amendment standing to challenge the "personal search of the passengers in their cars or the admissibility of the contraband found on them."[8] Thus, if a police officer searches a passenger and finds some evidence of wrongdoing, the driver cannot successfully move to suppress that evidence because his Fourth Amendment rights were not infringed.[9]

However, if the government does not argue that the defendant lacks standing, a defendant whose rights were not infringed may successfully bring a motion to suppress. Furthermore, because Fourth Amendment standing is not a question of jurisdiction or Article III,[10] some circuits hold that the question of standing can be waived if the government fails to raise the issue in the district court.[11] At least one other circuit, the Eighth Circuit, takes the opposite approach and holds that the government cannot waive the issue of Fourth Amendment standing.[12]

Even within the circuits that agree that Fourth Amendment standing can be waived, there is division about how to treat the government's failure to raise the standing argument in the district court. The most common approach suggests that "the government's failure to argue the standing issue before the district court represents a waiver that fully extinguishes the argument, even if the government catches its error on

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[6] United States v. Taketa, 923 F.2d 665, 669 (9th Cir. 1991).

[7] The exclusionary rule prohibits introduction of evidence seized during an unlawful search. Murray v. United States, 487 U.S. 533, 536 (1988) (citing Weeks v. United States, 232 U.S. 383 (1914)).

[8] *Noble*, 762 F.3d at 526 (citing United States v. Myers, 102 F.3d 227, 231 (6th Cir. 1996)).

[9] *See also Rakas*, 439 U.S. at 134 ("A person who is aggrieved by an illegal search and seizure through the introduction of damaging evidence secured by a search of a third person's premises or property has not had any of his Fourth Amendment rights infringed.").

[10] *Id.* at 139 (noting that Fourth Amendment standing is not jurisdictional or rooted in Article III).

[11] *Noble*, 762 F.3d at 527; United States v. Golson, 743 F.3d 44, 55 n.9 (3d Cir. 2014); United States v. Lightbourn, 357 Fed. App'x 259, 264 (11th Cir. 2009); United States v. Paopao, 469 F.3d 760, 764 (9th Cir. 2006); United States v. Gonzales, 79 F.3d 413, 419 (5th Cir. 1996); United States v. Price, 54 F.3d 342, 345 (7th Cir. 1995); United States v. Dewitt, 946 F.2d 1497-1500 (10th Cir. 1991).

[12] United States v. Rodriguez-Arreola, 270 F.3d 611, 617 (8th Cir. 2001).

appeal."[13] The Ninth Circuit, on the other hand, takes a hybrid approach and looks to the party bringing the appeal to determine whether standing arguments can be waived.[14] If the government appeals a grant of a suppression motion and did not making standing arguments in the district court, the Ninth Circuit treats the standing issue as waived.[15] However, if the defendant appeals a denial of his suppression motion and the government did not make standing arguments in the district court, the Ninth Circuit allows the government to contest the defendant's standing for the first time on appeal.[16]

All of these different approaches make some sense. The Eighth Circuit is correct that a claim brought without standing has fundamental justiciability problems.[17] Furthermore, allowing a waiver of this argument would permit more people to invoke the exclusionary rule, which may or may not be a good thing. But the rule followed by the majority of circuits also makes a good point: if there is no grounding in statute or Article III, then the general rule that a litigant waives or forfeits[18] an argument if it is not made in the district court should be followed. The Ninth's Circuit's hybrid approach also seems sufficient as it looks to the party bringing the appeal and the parties' respective burdens to determine whether waiver is appropriate. Although each of these arguments on their own is logically sound, they are irreconcilable.

The cases evaluating this topic do not look to the rationales behind the Fourth Amendment or the exclusionary rule, yet these rationales provide important justifications that could change the analysis of whether standing arguments should be waived. As noted above, whether a circuit allows waiver will affect the number of defendants who can successfully invoke the exclusionary rule and prevail on their motions to suppress. Theoretically, if a circuit allows waiver of standing arguments, more defendants could invoke the exclusionary rule and prevail on their motions to suppress. If a circuit does not allow waiver, and instead allows the government to raise standing challenges on appeal, fewer defendants might prevail on their motions to suppress. The

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[13] *Noble*, 762 F.3d at 527 (citing *Golson*, 743 F.3d at 55 n.9).

[14] United States v. Taketa, 923 F.2d 665, 670 (9th Cir. 1991).

[15] *Id.*

[16] *Id.*

[17] *Rodriguez-Arreola*, 270 F.3d at 617.

[18] As the Sixth Circuit in *Noble* points out, the courts have used the terms "forfeiture" and "waiver" loosely, even though these terms technically mean different things. "Forfeiture is the failure to make a timely assertion of a right; waiver is the intentional relinquishment or abandonment of a known right." *Noble*, 762 F.3d at 528 (citing United States v. Olano, 507 U.S. 725, 733 (1993)) (internal quotation marks omitted). For the sake of clarity, this Comment will use the term "waived" to mean both waived and forfeited.

rationales behind these original rights and rules could provide additional insight to the issue of waiver.

On the one hand, the exclusionary rule is an important check on police misconduct as it discards evidence obtained illegally.[19] Furthermore, the main purpose of the Fourth Amendment is to ensure and protect individual privacy. Courts might prefer waiver of these arguments because it errs on the side of protecting defendants' privacy and Fourth Amendment rights. However, as Justice Rehnquist once noted, "[e]ach time the exclusionary rule is applied it extracts a substantial social cost for the vindication of Fourth Amendment rights. Relevant and reliable information is kept from the trier of fact and the search for truth at trial is deflected."[20] The idea that the exclusionary rule helps the guilty evade justice, in conjunction with the fact that waiver would allow defendants whose rights were not infringed to invoke this rule, suggests that waiver may not be the appropriate rule.

This Comment will also analyze this issue of waiver by comparing it to other types of arguments that a defendant either can or cannot waive. The general rule for both criminal and civil cases is that arguments not made in the district court are waived and cannot be brought for the first time on appeal.[21] However, there are several crucial exceptions in the criminal context to this raise-or-waive rule. These include the court's lack of jurisdiction,[22] plain errors affecting substantial rights,[23] and petitioner's lack of an opportunity to raise objections at trial.[24] Of these three, the exception of plain error review is the most relevant to Fourth Amendment standing arguments. Although the rationales underlying standing and the exclusionary rule are interesting, relying on the general rule of waiver and its few exceptions provides a firmer ground on which courts should base their analysis.

This Comment will first analyze the approaches taken by the various circuits. The next section will scrutinize these approaches against

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[19] *See* Alderman v. United States, 394 U.S. 165, 174 (1969) ("The deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed."); *see also* Tracey Maclin, *The Central Meaning of the Fourth Amendment*, 35 WM. & MARY L. REV. 197, 201 (1993) (suggesting that the "central meaning of the Fourth Amendment is distrust of police power and discretion").

[20] Rakas v. Illinois, 439 U.S. 128, 137 (1978).

[21] Puckett v. United States, 556 U.S. 129, 134 (2009) ("No procedural principle is more familiar to this court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of that right before a tribunal having jurisdiction to determine it.") (citing Yakus v. United States, 321 U.S. 414, 444 (1944)).

[22] United States v. Leon, 203 F.3d 162, 164 n.2 (2d Cir. 2000).

[23] United States v. Marcus, 560 U.S. 258 (2010) (stating the Court's plain error rule) (citing FED. R. CRIM. P. 52(b)).

[24] This mostly arises in the context of ineffective assistance of counsel claims. *See* Evitts v. Lucey, 469 U.S. 387 (1985).

the rationales underlying the exclusionary rule. And finally, this Comment will compare the circuits' approaches against the general rule of waiver with a particular focus on plain error review. Ultimately, Supreme Court precedent, concerns of individual privacy and deterrence of police misconduct, as well as the general rule of waiver suggest that waiver of standing arguments might be the better approach.

I. THE CIRCUIT SPLIT

A. Standing Arguments Permitted on Appeal

The Eighth Circuit holds that the government cannot waive a Fourth Amendment standing argument, even if the government failed to bring the argument in the district court.[25] In *United States v. Rodriguez-Arreola*, the defendant argued that the government waived any arguments about Fourth Amendment standing because the government "never raised the argument before the district court."[26] The district court granted the defendant's motion to suppress evidence, and the government appealed that decision.[27] On appeal, the government argued that the defendant lacked Fourth Amendment standing, as the challenged search infringed on the rights of the defendant's companion rather than the rights of the defendant.[28] Despite the fact that the government did not make this argument in the district court, the Eighth Circuit held that "the government cannot waive [defendant's] lack of standing, and therefore any argument based on waiver must fail."[29] The court further noted: "it is elementary that standing relates to the justiciability of a case and cannot be waived by the parties."[30] This rule is an outlier among circuits and does not appear to have much support even within the Eighth Circuit.[31]

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[25] United States v. Rodriguez-Arreola, 270 F.3d 611, 617 (8th Cir. 2001); *see also* United States v. Lucas, 499 F.3d 769 (8th Cir. 2007) (The majority opinion makes no mention of the fact that the government failed to raise standing arguments in the district court; however, the dissenting opinion takes note of this fact and argues that the government's standing arguments should be waived.).

[26] *Id.* at 616.

[27] *Id.* at 613.

[28] *Id.* at 616.

[29] *Id.* at 617.

[30] *Id.*

[31] Interestingly, a district court within the Eighth Circuit questioned the holding of *Rodriguez-Arreola* and declined to follow the case in *United States v. Foster*, 763 F. Supp. 2d 1086, 1088 (D. Minn. 2011). In *Foster*, the court granted the defendant's motion for acquittal notwithstanding the verdict after hearing arguments from defendant's counsel that crucial evidence had been seized in violation of the Fourth Amendment. *Id.* at 1086–87. Without this evidence, the court determined that the remaining evidence could not support a guilty verdict. *Id.* The government moved for reconsideration and asserted that the defendant lacked Fourth Amendment standing to challenge the search, but at no point had the government made these arguments in the earlier proceedings.

B. Waiver of Standing Arguments

The majority of circuits hold that the government's Fourth Amendment standing arguments are waived if not brought in the district court. The Third, Fifth, Sixth, Seventh, Tenth, and Eleventh Circuits all follow the simple rule that "the government's failure to argue the standing issue before the district court represents a waiver that fully extinguishes the argument, even if the government catches its error on appeal."[32] These circuits rely on the two Supreme Court cases of *Rakas v. Illinois*[33] and *Steagald v. United States*.[34] In *Rakas*, the Court declined to extend its definition of Fourth Amendment standing and reiterated that defendants must demonstrate that their personal rights were violated in order to invoke the exclusionary rule.[35] Importantly, the Court also noted that Fourth Amendment standing is a different concept than jurisdictional standing, and is "more properly subsumed under substantive Fourth Amendment doctrine."[36]

In *Steagald*, the Court held that the government "may lose its right to raise factual issues of [standing] before this Court when it has made contrary assertions in the courts below."[37] Agents entered the defendant's house to execute an arrest warrant for another individual.[38] Agents then searched the home without a warrant, found cocaine, and arrested and indicted the defendant for drug charges.[39] At the trial court and in the brief to the Supreme Court, the government argued that the house searched was the defendant's primary residence and that the defendant had significant ties to the property, but at oral argument the government argued that the defendant lacked Fourth Amendment

Id. Citing *Rodriguez-Arreola*, the government argued that standing arguments could not be waived. *Id.* The district court disagreed with the government and the holding of *Rodriguez-Arreola*, and determined that two Supreme Court cases of *Rakas* and *Steagald v. United States*, 451 U.S. 204 (1981), superseded the holding of *Rodriguez-Arreola*. *Id.* at 1088–89. However, these two cases do not definitively state that the government's arguments to standing are waived, but rather suggest that they could be in certain circumstances. *Steagald*, 451 U.S. at 209 (noting in permissive terms that the government "may lose its right to raise factual issues of [standing]"). Although these cases support the majority rule adopted by most circuits, they by no means speak in definitive terms, and have been the cause of some confusion and differing interpretations among the circuits.

[32] United States v. Noble, 762 F.3d 509, 5267 (6th Cir. 2014) (citing United States v. Golson, 743 F.3d 44, 55 n.9 (3d Cir. 2014)); United States v. Paopao, 469 F.3d 760, 764 (9th Cir. 2006); United States v. Lightbourn, 357 Fed.App'x 259, 264 (11th Cir. 2009); United States v. Gonzales, 79 F.3d 413, 419 (5th Cir. 1996); United States v. Price, 54 F.3d 342, 345 (7th Cir. 1995); United States v. Dewitt, 946 F.2d 1497, 1497-1500 (7th Cir. 1995).

[33] 439 U.S. 128 (1978).

[34] 451 U.S. 204 (1981).

[35] *Rakas*, 439 U.S. at 138–39.

[36] *Id.* at 139.

[37] *Steagald*, 451 U.S. at 209.

[38] *Id.* at 207.

[39] *Id.*

standing and a reasonable expectation of privacy in the home.[40] Noting that the standing argument was in direct contradiction with the government's argument in the district court, the Court suggested that standing arguments could be waived if the government was contradicting its earlier stance.[41] Thus, the crucial issue for the Court in *Steagald* was whether the government's argument was contradicting or hindering findings of fact in the trial court.

The circuits distilled the majority rule from the separate rulings of *Rakas* and *Steagald*. The circuits tend to focus on the fact that Fourth Amendment standing is a different concept than jurisdictional standing, as noted by *Rakas*.[42] The Sixth Circuit noted in *United States v. Noble*[43] that "Fourth Amendment standing is akin to an element of a claim and does not sound in Article III."[44] The Third Circuit similarly noted that: "Fourth Amendment standing is one element of a Fourth Amendment claim, and does not implicate federal jurisdiction. Consequently, standing can be conceded by the government, and it is also subject to the ordinary rules that an argument not raised in the district court is waived on appeal."[45] The Sixth Circuit also looked to *Steagald* to support its proposition that "the government, like other litigants, can forfeit or waive an argument that defendants lack Fourth Amendment standing."[46]

The two cases of *Rakas* and *Steagald* do support the majority rule that the standing arguments can be waived by the government. However, these cases leave much to be decided. *Steagald* speaks in permissive terms (the government "may lose its right"), but does not state whether waiver is required or automatic.[47] Furthermore, it is unclear under *Steagald* if the government waives this argument only if it made contradictory assertions below, as opposed to not making any assertions at all. *Steagald* does not specify whether the government can retain this right in certain circumstances, even if it did not make the argument below.

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[40] *Id.*

[41] *Id.*

[42] *See, e.g.*, United States v. Noble, 762 F.3d 509, 527 (6th Cir. 2014).

[43] United States v. Noble, 762 F.3d 509 (6th Cir. 2014).

[44] *Id.* (citing Rakas *v. Illinois*, 439 U.S. 128, 139 (1978)).

[45] United States v. Golson, 743 F.3d 44, 55 n.9 (3d Cir. 2014) (internal citations omitted).

[46] *Noble*, 762 F.3d at 527 (citing *Steagald*, 451 U.S. at 209).

[47] *Steagald*, 451 U.S. at 209.

C. The Ninth Circuit's Hybrid Rule

The Ninth Circuit has developed its own approach to the issue of waiver. It looks to the party bringing the appeal, as well as to arguments made below, to determine if the issue was waived. If the government appeals the grant of a suppression motion and it did not make any arguments about standing in the district court, the Ninth Circuit treats the issue as waived.[48] However, if the defendant appeals the denial of his suppression motion, and the government did not make any standing arguments below, the government is allowed to raise standing arguments for the first time on appeal.[49] When a defendant appeals the denial of his motion, the burden is on him to prove standing.[50] Because this burden is on the defendant, the Ninth Circuit reasoned in *United States v. Taketa*,[51] it is acceptable for the government to raise challenges to the defendant's standing for the first time on appeal.[52]

The Ninth Circuit does have an exception to this general rule, however, for situations in which the government conceded in the trial court that the defendant had standing or made arguments that the defendant had a reasonable expectation of privacy in the area searched.[53] Even if the defendant is appealing the denial of his motion, the government cannot challenge the defendant's Fourth Amendment standing on appeal if the government "assented to contrary findings of fact."[54] This exception seems to follow the Court's concern in *Steagald*, that the government can argue or concede one thing in the trial court and then argue another on appeal.

D. The Exclusionary Rule and Standing

The concept of waiver does not exist in a vacuum, but rather is informed by the underlying rationales for the Fourth Amendment and the exclusionary rule. These rationales, which have not been interrogated by lower courts and circuits addressing this issue, provide a useful analytical framework.

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[48] United States v. *Taketa*, 923 F.2d 665, 670 (9th Cir. 1991).

[49] *Id.*

[50] *Id.* (citing U.S. v. Nadler, 698 F.2d 995, 998 (9th Cir. 1983)) ("The burden of demonstrating that the evidence should have been suppressed is on the [defendant] . . . [the defendant] must demonstrate that he had a reasonable expectation of privacy.").

[51] *Id.*

[52] *Id.*

[53] *Id.*

[54] *Id.* at 670. *See also* United States v. Paopao, 469 F.3d 760, 764 (9th Cir. 2006) (citing *Taketa*, 923 F.2d at 670) (noting that "where reliance [is] not an issue, and the government [is] not the party with the burden, the issue of standing could be raised for the first time on appeal").

As noted by Anthony Amsterdam, two competing perspectives dominate Fourth Amendment jurisprudence.[55] On the one hand, there is the "atomistic" perspective, which is the idea that the Fourth Amendment "should be viewed as a collection of protections of atomistic spheres of interest of individual citizens."[56] The Fourth Amendment protects isolated individuals as "atoms" by protecting "*my* person and *your* house and *her* papers and *his* effects."[57] The second is the "regulatory" perspective: the idea that the Fourth Amendment functions "as a regulation of governmental conduct."[58] Instead of intending to protect individual rights, the Fourth Amendment intends to protect the collective people from government intrusion, usually by deterring police misconduct.[59] These two ideas help to explain the rationales underlying the exclusionary rule and standing.

The exclusionary rule follows the regulatory model, as its main purpose is to deter police misconduct in order to protect society as a whole.[60]

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[55] Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 367 (1974) (noting that these two perspectives "combine to ask whether the [Fourth] [A]mendment should be viewed as protecting specific interests of specific individuals against specific abuses of specific police procedures or as regulating police practices broadly, generally and directly").

[56] *Id.*

[57] *Id.* (citing *Alderman*, 394 U.S. at 174) ("[T]he Supreme Court is operating on the atomistic view . . . [t]his is the premise upon which 'standing' to invoke the exclusionary rule has been demanded, the premise upon which the Court has said that 'Fourth Amendment rights are personal rights which . . . may not be vicariously asserted.'").

[58] *Id.*

[59] *Id.*

[60] The question of whether the exclusionary rule actually deters misconduct is hotly debated. Some empirical evidence suggests that the exclusionary rule does not function as a meaningful deterrent. *See* John B. Gould & Stephen D. Mastrofski, *Suspect Searches: Assessing Police Behavior Under the U.S. Constitution*, 3 CRIMINOLOGY & PUB. POL'Y 315 (2004) (concluding that there were Fourth Amendment violations in almost one-third of all observed police investigations, and thus that the exclusionary rule is not an effective deterrent of misconduct). Critics argue that most Fourth Amendment violations occur at the margins, or when an officer in good faith misunderstands the rule or interprets facts differently than the court does. These critics further argue that inadvertent violations cannot be prevented by deterrence. For officers who knowingly violate the Fourth Amendment, critics argue that deterrence could theoretically work but that the exclusionary rule is much too tenuous to effectively deter violations: many questionable searches and seizures do not result in an arrest and are therefore not litigated; when officers do arrest, many defense lawyers take a plea bargain rather than litigate, thus not invoking the rule; when lawyers do choose to litigate, suppression motions are often unsuccessful; and it is unclear whether the suppression is communicated to the offending officer. *See* Dalin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. CHI. L. REV. 665 (1970); Christopher Slobogin, *Why Liberals Should Chuck the Exclusionary Rule*, 1999 U. ILL. L. REV. 363 (1999).

Defenders of the exclusionary rule argue that the point of the rule is not specific deterrence, but general deterrence: that the "chief deterrent function of the rule is its tendency to promote institutional compliance with Fourth Amendment requirements on the part of law enforcement agencies generally." United States v. Leon, 468 U.S. 897, 953 (1984) (Brennan, J., dissenting); *see also* William J. Mertens & Silas Wasserstrom, *The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law*, 70 GEO. L.J. 365 (1981). Furthermore, these defenders argue that evidence of police misconduct does not necessarily mean that the rule is not an effective deterrent. For example, if there is evidence of police misconduct in one-third of searches

In *Mapp v. Ohio*,[61] the Court noted that "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'"[62] Because the purpose of the rule is to deter, the rule does not focus on protecting the rights of individuals or remedying the defendant's injury, but rather on excluding illegally obtained evidence as a punishment for violators.[63] Furthermore, the exclusionary rule fits the regulatory model because it focuses on protecting the rights of all people, not the rights of discrete individuals. Importantly for critics, the rule protects the rights of all people by protecting the rights of mostly guilty people.[64] In theory, by protecting the rights of the guilty and deterring police misconduct, the exclusionary rule helps protect the rights of the innocent.

The idea of standing rests on a wholly different rationale. The idea that a person may only raise a Fourth Amendment challenge if he was personally a victim of unlawful police activity is based on the "atomistic" perspective, as it rests on the idea that the Fourth Amendment is meant to protect only the rights and interests of individuals. The doctrine of standing does not engage with regulatory concerns of deterrence or protecting the rights of the collective. But standing does more than focus on the rights of individuals: it limits the exclusionary rule to only those defendants whose rights were personally infringed. Thus, the concept of standing restricts the pool of people who can invoke the exclusionary rule and suppress evidence. This sets up a strange, and perhaps irreconcilable, tension as standing appears to be in direct conflict with the goals and purpose of the exclusionary rule.[65]

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and seizures, defenders of the rule argue that this number could be higher without the rule, and thus the rule could be an effective deterrent. *See* Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and* United States v. Calandra, 69 NW. U. L. REV. 740, 763–64 (1974).

[61] 367 U.S. 643 (1961).

[62] *Id.* at 656 (quoting Elkins v. United States, 364 U.S. 206, 217 (1960)).

[63] The Court has noted that "the rule is calculated to prevent, not to repair." *Elkins*, 364 U.S. at 217 (1960).

[64] *See* United States v. Rabinowitz, 339 U.S. 56, 69 (1950) (noting that "not very nice people" raise most Fourth Amendment claims). The idea here is that most people who invoke the exclusionary rule are in fact guilty—if there was nothing to search or seize then the government wouldn't have made the arrest and brought charges and there would be nothing for the defendant to suppress. It is only once contraband or evidence of a crime has been found that (presumably guilty) defendants seek to exclude it. This fact, that mostly guilty people invoke the exclusionary rule, has led many critics to fault the rule for allowing criminals to go free. *See* Stone v. Powell, 428 U.S. 465, 490 (1976).

[65] "If the exclusionary rule is designed exclusively to prevent future harms and has nothing to do with redressing harm suffered by the moving defendant, it makes little sense for the Court to insist that a defendant may not move the suppress evidence unless the government conduct violated his rights when obtaining it." Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 274 (1988). *See generally* Colb, *supra* note 4 (suggesting that the exclusionary rule and

Yet the Supreme Court seems to have embraced this tension, as it has noted that the concept of standing only makes sense if it is treated as a meaningful limitation on the exclusionary rule, and that this idea is an important policy consideration underlying the doctrine of standing.[66] When deciding to limit the exclusionary rule to defendants that had standing, the Court noted that "the additional benefits of extending the exclusionary rule to other defendants [beyond those with standing] would [have to] justify further encroachment on the public interest in prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth."[67] The doctrine of standing seems to be the Court's determination that the exclusionary rule imposes costs on society (by allowing criminals to go free), and that such costs must be limited. This irreconcilable doctrinal tension between the exclusionary rule and standing might not be a defect of the system, but perhaps a crucial feature.

It is with these considerations in mind that one could consider the issue of waiver. Whether the government waives a challenge to Fourth Amendment standing implicates the concerns and rationales underlying the Fourth Amendment and the exclusionary rule. If the government does waive a challenge to a defendant's Fourth Amendment standing, more defendants will be able to invoke the exclusionary rule. Waiver, in essence, limits or checks the doctrine of standing by allowing some defendants who do not have standing to slip through the cracks and invoke the exclusionary rule even though they do not technically have standing to suppress evidence. In doing so, waiver makes standing a less effective check on the exclusionary rule. Thus, there is a scheme in which the exclusionary rule checks police misconduct, standing checks the exclusionary rule, and waiver checks challenges to standing. Waiver of challenges to standing might find support from those who think that the exclusionary rule is crucial to deterring misconduct and that standing unnecessarily constrains the exclusionary rule.

If courts did not allow waiver of the government's challenge to Fourth Amendment standing, and if the government were allowed to challenge a defendant's standing on appeal, fewer defendants would be able to invoke the exclusionary rule and suppress evidence. The Eighth Circuit's rule of not allowing the government to waive challenges to standing essentially creates a dual check on the exclusionary rule. The

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standing are logically irreconcilable, and that invoking one logically precludes invoking the other).

[66] Richard B. Kuhns, *The Concept of Personal Aggrievement in Fourth Amendment Standing Cases*, 65 IOWA L. REV. 493, 509–13 (1980) (citing Delaware v. Prouse, 440 U.S. 648, 653–55 (1979); Terry v. Ohio, 392 U.S. 1, 10 (1968); Camara v. Municipal Court, 387 U.S. 523, 534–39 (1967)).

[67] Alderman v. United States, 394 U.S. 165, 175 (1969).

doctrine of standing already limits the pool of defendants who can invoke the exclusionary rule and suppress evidence. Allowing the government to reargue in the appellate court that the defendant lacks standing would further limit the number of defendants who could invoke the exclusionary rule. For those who think that the exclusionary rule imposes costs that are too great, and that the rule allows too many criminals to go free, the Eighth Circuit's rule might appear to be the better approach.

A potential problem with this analysis is that it allows courts to determine and analyze whether waiver is appropriate based on whether they support the exclusionary rule. Relying on the exclusionary rule as a justification adds an element of political divisiveness to a procedural issue that might be best be resolved through other forms of analysis.

II. GENERAL RULE OF WAIVER AND ITS EXCEPTIONS

A more useful analysis involves looking to the general rule of waiver and its few exceptions and investigating how this should apply to waiver of standing arguments. As noted above, the general rule for civil and criminal cases is that arguments not brought in the district court are waived on appeal.[68] There are several crucial reasons for this general rule. First, it "induce[s] the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them."[69] Second, it also enables the record to be developed "when the recollections of the witnesses are freshest."[70] And third, district courts are often in the best position to consider and determine relevant facts as well as potential errors.[71] By timely raising these arguments and issues in the district court, "the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome."[72] This rule also prevents litigants from "sandbagging" the court—"remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in his favor."[73] Despite the important rationales of this general rule, there are several exceptions that allow arguments to be raised for the first time on appeal. These include

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[68] Puckett v. United States, 556 U.S. 129, 134 (2009) ("No procedural principle is more familiar to this Court than that a . . . right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it.").

[69] *Id.*

[70] Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

[71] *Puckett*, 556 U.S. at 134.

[72] *Id.*

[73] *Id.*

lack of jurisdiction,[74] lack of an opportunity to raise the issue at trial,[75] and plain errors affecting substantial rights.[76] This section will compare Fourth Amendment standing to the exceptions of jurisdiction and plain errors.[77]

A. Jurisdiction

The most straightforward exception to the general rule is a court's ability to hear arguments about jurisdiction. Jurisdictional issues can never be waived by the parties, and a court can hear arguments about jurisdiction on appeal regardless of whether those arguments were brought below.[78] As the Second Circuit has noted, "it is well settled that lack of federal jurisdiction may be raised for the first time on appeal, even by a party who originally asserted that jurisdiction existed or by the Court *sua sponte*."[79] And this rule applies for issues of Article III jurisdiction as well as statutory jurisdiction.[80]

As noted by several circuits that adopt the majority rule, Fourth Amendment standing is not a jurisdictional concept, but is rather "akin to an element of a claim and does not sound in Article III."[81] Although Fourth Amendment standing seems to implicate justiciability in a similar way to jurisdiction, courts treat Fourth Amendment standing as substantive Fourth Amendment doctrine, not as a jurisdictional issue or requirement.[82] Because Fourth Amendment standing "does not implicate federal jurisdiction,"[83] the majority of circuits found that Fourth Amendment standing should not fall under this exception to the general rule of waiver.

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[74] United States v. Leon, 203 F.3d 162, 164 n.2 (2d Cir. 2000).

[75] Evitts v. Lucey, 469 U.S. 387 (1985).

[76] United States v. Marcus, 560 U.S. 258 (2010) (citing Fed. R. Crim. P. 52(b)) (stating the Court's plain error rule).

[77] The issue of lack of an opportunity to raise the issue at trial arises in the ineffective assistance of counsel context, which is a very different context from Fourth Amendment standing. As this is not a useful parallel, this comment will not compare Fourth Amendment standing to ineffective assistance of counsel arguments.

[78] *See, e.g.*, Kontrick v. Ryan, 540 U.S. 443, 455 (2004) ("A litigant generally may raise a court's lack of . . . jurisdiction at any time in the same civil action, even initially at the highest appellate instance.").

[79] *Leon*, 203 F.3d at 164 n.2.

[80] *Id.*

[81] United States v. Noble, 762 F.3d 509, 527 (6th Cir. 2014) (citing Rakas v. Illinois, 439 U.S. 128, 139 (1978)).

[82] *Id.*; *see also* United States v. Golson, 743 F.3d 44, 55 n.9 (3d Cir. 2014) (internal citations omitted); United States v. Paopao, 469 F.3d 760, 764 (9th Cir. 2006); United States v. Lightbourn, 357 Fed. App'x 259, 264 (11th Cir. 2009); United States v. Gonzales, 79 F.3d 413, 419 (5th Cir. 1996).

[83] *Golson*, 743 F.3d at 55 n.9 (internal citations omitted).

B. Plain Errors

Another crucial exception to the general rule of waiver is the plain error rule. In the absence of a plain error, issues not raised before the trial court "will be deemed waived on appeal."[84] The plain error rule comes from Federal Rule of Criminal Procedure 52(b), which "permits an appellate court to recognize a plain error that affects substantial rights even if the claim of error was not brought to the district court's attention."[85] Under the Supreme Court's interpretation of this Rule, an appellate court may correct an error not raised at trial only when the appellant demonstrates:

> (1) there is an error; (2) the error is clear or obvious, rather than subject to reasonable dispute; (3) the error affected the appellant's substantial rights, which in the ordinary case means it affected the outcome of the district court's proceedings; and (4) the error seriously affects the fairness, integrity or public reputation of judicial proceedings.[86]

Even if an appellate court concludes that an error occurred, it may still affirm the trial court's judgment by finding that it was a "harmless" error.[87]

Meeting all four of the plain error prongs is quite difficult.[88] The Supreme Court has found that many types of errors are not plain errors but rather harmless errors that do not warrant reversal, including: coerced confessions,[89] certain grand jury procedural violations,[90] vari-

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[84] United States v. Keppler, 2 F.3d 21, 23 (2d Cir. 1993).

[85] United States v. Marcus, 560 U.S. 258, 262 (2010) (citing FED. R. CRIM. P. 52(b)).

[86] *Id.* (internal quotation marks omitted) (citing Puckett v. United States, 556 U.S. 129, 135 (2009)); United States v. *Olano*, 507 U.S. 725, 731–737 (1993); Johnson v. United States, 520 U.S. 461, 466–67 (1997); United States v. Cotton, 535 U.S. 625, 631–32 (2000).

[87] FED. R. CRIM. P. 52(a) ("Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.").

[88] Puckett 556 U.S. at 135 (citing United States v. Dominguez Benitez, 542 U.S. 74, 83 n.9 (2004)).

[89] *See* Arizona v. Fulminante, 499 U.S. 279 (1991); Glebe v. Frost, 135 S. Ct. 429 (2014).

[90] Bank of Nova Scotia v. United States, 487 U.S. 250, 256 (1988); United States v. Mechanik, 475 U.S. 66, 72–73 (1986) (grand jury errors rendered harmless when defendant convicted at subsequent trial); United States v. Hillman, 642 F.3d 929, 934 (10th Cir. 2011) (errors in grand jury proceedings did not prejudice defendant); United States v. Wilson, 565 F.3d 1059, 1070 (8th Cir. 2009) (victim's false testimony to grand jury harmless error after petit jury's guilty verdict).

ances between the indictment before the grand jury and the proof offered at trial,[91] misjoinder of defendants of offenses,[92] failure to determine if the defendant understands the nature of the charges,[93] juror misconduct,[94] prosecutorial misconduct,[95] errors in jury instructions,[96] sentencing errors,[97] and the absence of a defendant from trial proceedings.[98]

Certain types of errors, termed "structural errors," are never considered harmless and are corrected regardless of their effect on the outcome.[99] Structural errors involve "structural defects in the trial mechanism" so serious that "a criminal trial cannot reliably serve its function as a vehicle for determining guilt or innocence."[100] These errors affect substantial rights that are fundamental to a fair trial, and it is often difficult to assess the actual effect of these errors.[101] This category is

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[91] *See, e.g.*, United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 58 (1st Cir. 1991); United States v. Mangual-Santiago, 562 F.3d 411, 423–24 (1st Cir. 2009); United States v. Dupre, 462 F.3d 131, 140–43 (2d Cir. 2006) (variance not prejudicial where evidence at trial proved different wire transfers than the one in the indictment but overall charge of wire fraud was consistent); United States v. Beasley, 583 F.3d 384, 391 (6th Cir. 2009) (no reversal as a result of non-prejudicial variance because caliber of ammunition not relevant to fact of possession).

[92] *Compare* United States v. Sophie, 900 F.2d 1064, 1084–85 (7th Cir. 1990) (finding alleged misjoinder of post-conspiracy charges harmless when defendants part of a conspiracy and could have been tried along with other conspirators), *with* United States v. Serpoosh, 919 F.2d 835, 838 (2d Cir. 1990) (finding misjoinder of defendants with mutually antagonistic defenses in conspiracy prosecution reversible error because substantial prejudice resulted).

[93] United States v. Gonzalez, 202 F.3d 30, 28 (1st Cir. 2000) (failure to inform defendant that he would be subject to restitution as well as fine harmless); United States v. Mustafa, 238 F.3d 485, 401 (3d Cir. 2001) (same); United States v. Jones, 143 F.3d 1417, 1420 (11th Cir. 1998) (failure to inform defendant of mandatory minimum sentence harmless). *But see* United States v. Gonzalez, 420 F.3d 111, 132–33 (2d Cir. 2005) (failure to inform defendant that drug quantity could be tried to jury not harmless because violated defendant's substantial rights).

[94] United States v. Tavares, 705 F.3d 4, 13 (1st Cir. 2013) (any harm from prospective jurors who joked about defendants' nicknames, including comments that nicknames might indicate gang membership, was negated by defense counsel's own statements to jurors); United States v. White Bull, 646 F.3d 1082 (8th Cir. 2011) (unclear whether juror was truthful in voir dire but court's failure to conduct evidentiary hearing not plain error).

[95] United States v. Potter, 463 F.3d 9, 24 (1st Cir. 2006) (prosecutor's reference to other evidence that might exist harmless because court confident outcome not changed); United States v. Fields, 483 F.3d 313, 360–61 (5th Cir. 2007) (prosecutors' improper remarks harmless because of strong evidence of defendant's guilt).

[96] Hedgpeth v. Pulido, 555 U.S. 57 (2008) (error where jury was instructed on multiple theories of guilt, one of which was incorrect, subject to harmless error review).

[97] Washington v. Recuenco, 548 U.S. 212, 221–22 (2006) (failure to submit sentencing factor to jury subject to harmless error review); United States v. Crawford, 487 F.3d 1101, 1108 (8th Cir. 2007) (error permitting defendant to proceed pro se at sentencing without valid waiver of right to counsel harmless because court imposed statutory minimum sentence).

[98] *See, e.g.*, United states v. Toliver, 330 F.3d 607, 612–15 (3d Cir. 2003).

[99] United States v. Olano, 507 U.S. 725, 735 (1993) (defining the special category or structural errors).

[100] United States v. Fulminante, 499 U.S. 279, 309–10 (1991).

[101] United States v. Gonzalez-Lopez, 548 U.S. 140, 149 n.9 (2006).

very narrow and includes total deprivation of counsel,[102] lack of an impartial judge,[103] violation of the right to a public trial,[104] right to self-representation at trial,[105] and racial discrimination in grand jury selection.[106] A crucial difference between structural errors and plain errors is that the former can only be raised on appeal if it was preserved in the district court. If the error was not preserved, then the courts engage in plain error review instead of structural error review. However, defendants can point to the fact that the error they are asserting on plain error review would normally be a structural error, which could help the defendant meet the third prejudice prong of plain error analysis.

Fourth Amendment standing has never been deemed a structural error, and it should not be. Fourth Amendment standing is almost always invoked by the government trying to quash a defendant's motion to suppress, whereas structural errors turn on a fundamental violation of the defendant's rights. Furthermore, Fourth Amendment standing does not implicate "structural defects in the trial mechanism" but rather serves as a counter to a defendant's argument that evidence should be excluded. Because Fourth Amendment standing does not fit into the structural error exception the question then becomes, should courts review Fourth Amendment standing for plain error?

1. Plain Errors and Motions to Suppress

Plain error analysis can arise in the Fourth Amendment context. This usually occurs when a party fails to raise a suppression issue in the district court either by failing to file a motion to suppress or by failing to include a particular argument in the motion to suppress. Prior to 2014, most circuits concluded that suppression issues, such as failing to file a motion or failing to bring an argument in a motion, were not subject to plain error review.[107] This was because failure to file a motion to suppress in the district court fell under a different rule, Fed. R. Crim.

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[102] Gideon v. Wainwright, 372 U.S. 335 (1963).

[103] Arizona v. Fulminante, 499 U.S. 279, 309–10 (1991); Chapman v. California, 386 U.S. 18 (1967).

[104] Waller v. Georgia, 467 U.S. 39 (1984); United States v. Thompson, 713 F.3d 388 (8th Cir. 2013); United States v. Christi, 682 F.3d 138, 143 (1st Cir. 2012) (violation of the Sixth Amendment public trial right is structural error).

[105] McKaskle v. Wiggins, 465 U.S. 168 (1984) (denial of right to proceed pro se is not a harmless error).

[106] Berghuis v. Smith, 559 U.S. 314 (2010); Taylor v. Louisiana, 419 U.S. 522, 526–30 (1975); Vasquez v. Hillery, 474 U.S. 254, 262–65 (1986) (racial discrimination in grand jury selection is never harmless error and is automatically reversible).

[107] *See* United States v. Howard, 998 F.2d 42, 52 (2d Cir. 1993) (failure to file motion to suppress not subject to plain error review because it constituted a waiver); United States v. Chavez-Valencia, 116 F.3d 127, 130 (5th Cir. 1997) (same).

P. 12(e),[108] which prior to the 2014 amendments provided that motions and arguments not made in the district court were "waived." Courts understood the term "waived" in Fed. R. Crim. P. 12(e) to mean "waived" and only "waived," as opposed to including the concept of forfeiture.[109] This is a crucial distinction because plain error review only applies to claims that are "forfeited,"[110] not waived. Most circuits took the text of Fed. R. Crim. P. 12(e) to mean that plain error review under Fed. R. Crim. P. 52(b) could not apply to motions to suppress.[111] Despite this widely accepted interpretation, courts would occasionally engage in plain error review of motions to suppress "out of an abundance of caution."[112]

By occasionally and inconsistently applying plain error review, the courts created an abundance of confusion.[113] Attempting to dispel some of this confusion, the rule makers amended Rule 12(e) in 2014 and dropped the word "waives."[114] The Advisory Committee Notes to Rule 12(e) mention that the Committee realized the confusion created by the use of the term "waives" (with some courts treating the phrase as completely barring appellate review and others allowing some claims to proceed under plain error review) and intentionally removed that term "to avoid possible confusion."[115] Importantly, the rule makers did not address whether plain error review should apply to motions to suppress

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[108] The old version of FED. R. CRIM. P. 12(e) stated: "a party *waives* the ability to bring a motion [listed in 12(b)(3)] by failing to file a motion before the pretrial deadline."

[109] *See* United States v. Walden, 625 F.3d 961, 967 (6th Cir. 2010) (noting that FED. R. CRIM. P. 52(b) only applies to claims that are forfeited and does not apply to objections and arguments that the defendant waived). United States v. Walker, 665 F.3d 212, 228 (1st Cir. 2011) (noting that "Rule 12(e) says what it means and means what it says," and therefore a party's failure to file a motion to suppress or failure to include arguments in a motion to suppress, constituted a true waiver and plain error review was completely foreclosed).

[110] Although this Comment (and most courts addressing Fourth Amendment standing) has been using the term "waiver" as synonymous with, and including, the concept of "forfeiture," in the context of plain error review this distinction is crucial. Plain error review only applies to claims that have been forfeited (failure to make the timely assertion of a right), not to claims that have been waived (voluntary and intentional relinquishment or abandonment of a right).

[111] *See Walden*, 625 F.3d at 967 and *Walker*, 665 F.3d at 228 (noting that "Rule 12(e) says what it means and means what it says," and therefore a party's failure to file a motion to suppress or failure to include arguments in a motion to suppress, constituted a true waiver and plain error review was completely foreclosed).

[112] United States v. Robinson, 627 F.3d 941, 957 (4th Cir. 2010). *See also* United States v. Brooks, 438 F.3d 1231, 1240 n.4 (10th Cir. 2006) (noting that the court occasionally conducted plain error review of motions to suppress despite the widely accepted interpretation).

[113] *See, e.g.*, United States v. Soto, 794 F.3d 635, 650 (6th Cir. 2015) (noting that the court inconsistently held that plain error review did not apply to motions to suppress and occasionally applied plain error review to motions to suppress, and that this caused confusion).

[114] Current FED. R. CRIM. P. 12(e) states: "If a party does not meet the deadline for making a Rule 12(b)(3) motion, the motion is untimely."

[115] FED. R. CRIM. P. 12, 2014 Advisory Committee's note (noting that "Although the term waiver in the context of a criminal case ordinarily refers to the intentional relinquishment of a known right, Rule 12(e) has never required any determination that a party who failed to make a timely

now that the rule has changed, instead noting that it is up to "the Courts of Appeals to decide if and how to apply Rules 12 and 52 when arguments that should have been the subject of the [motion to suppress] are raised for the first time on appeal."[116]

The amendments to Rule 12 leave open the possibility for plain error review to apply to motions to suppress in general, and to Fourth Amendment standing specifically. Several circuits have noted that plain error review could apply to motions to suppress in light of the 2014 Amendment, but none have actually applied plain error review in the Fourth Amendment standing context.[117] At least two circuits, the D.C. Circuit and the Sixth Circuit, noted that plain error review could apply to the government's Fourth Amendment standing arguments, but in each case the court declined to apply plain error review and instead held that the government's standing arguments were waived and could not be reached by the appellate court.[118]

2. Plain Error Review Should Not Apply to Fourth Amendment Standing

In light of the 2014 amendments that suggest that plain error review applies to motions to suppress, two circuits suggested that plain error review could apply to the government's Fourth Amendment standing objections.[119] Courts should not take this approach and should instead hold that plain error review does not apply to the government's Fourth Amendment standing arguments. Rather, courts should hold that the government's failure to object to a defendant's Fourth Amendment standing in the trial court should fall under the general raise-or-waive rule and not under the plain error exception. Thus, courts should hold that failure to bring this argument in the district court represents

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motion intended to relinquish a defense, objection, or request that was not raised in a timely fashion. Accordingly, to avoid possible confusion the Committee decided not to employ the term 'waiver' in the new paragraph").

[116] REENA RAGGI, JUDICIAL CONFERENCE ADVISORY COMMITTEE ON FEDERAL RULES OF CRIMINAL PROCEDURE, MEMORANDUM TO THE STANDING COMMITTEE ON RULES OF PRACTICE AND PROCEDURE (May 8, 2013).

[117] *See Soto*, 794 F.3d at 655; United States v. Daniels, 803 F.3d 335, 351–52 (7th Cir. 2015).

[118] United States v. Sheffield, 832 F.3d 296, 303–05 (D.C. Cir. 2016) (noting that Fourth Amendment standing is simply an element of a claim that can be forfeited and thus could be subject to plain error review, but nonetheless holding that the error was not plain and the government could not raise this argument for the first time on appeal); United States v. Noble, 762 F.3d 509, 527–28 (6th Cir. 2014) (noting that the government's failure to raise this argument is forfeiture and could be subject to plain error review, but nonetheless holding that the government could not bring this argument for the first time on appeal).

[119] *Id.*

a waiver that fully extinguishes the argument and cannot be subject to plain error review.[120]

There are several important policy reasons for plain error review, but they are less compelling in the Fourth Amendment standing context. First, the denial of review for plain errors encourages parties to meet deadlines and to seek leave to file late motions in the district court.[121] Even though motions will be untimely, the movant will have a better opportunity to develop the factual record and establish how the error is prejudicial. Second, appellate review of plain errors that disadvantage the defendant "discourages overzealous advocacy by the government"[122] by preventing the government from taking advantage of known prejudicial errors not typically noticed by criminal defendants. But finally, and most importantly, the plain error rule serves to protect "substantial rights" and to correct errors that seriously affect the integrity of the judicial proceeding.[123] Although the government can also invoke plain error review, the justification behind the plain error rule seems to focus on fundamental rights of defendants and fairness in judicial proceedings; it does not focus on the government's failure to bring certain arguments.[124] Allowing the government a second opportunity to raise a defense to a defendant's motion does not fit under the policy objectives and purpose of the plain error rule. Courts should be more concerned about allowing the government to take a second bite at the apple than the potential error of a defendant bringing a successful motion to suppress.

Furthermore, defendants cannot invoke plain error review for many significant errors that seem to fundamentally affect defendants' rights, including prosecutorial misconduct, juror misconduct, coerced confessions, and errors in jury instructions.[125] The government's failure to raise an element of a claim or defense does not seem to be as crucial to defendants' rights and the integrity of the judicial process as coerced confessions and juror misconduct. Yet coerced confessions and juror misconduct, as well as many other significant errors, are not subject to

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[120] *See* United States v. Golson, 743 F. 3d 44, 55 n. 9 (3d Cir. 2014); United States v. Paopao, 469 F.3d 760, 764 (9th Cir. 2006); United States v. Lightbourn, 357 Fed. App'x 259, 264 (11th Cir. 2009); United States v. Gonzales, 79 F.3d 413, 419 (5th Cir. 1996); United States v. Price, 54 F.3d 342, 345 (7th Cir. 1995); United States v. Dewitt, 946 F.2d 1497, 1497–1500 (10th Cir. 1991).

[121] *Soto*, 794 F.3d at 655.

[122] *Id.*

[123] Puckett v. United States, 556 U.S. 129, 135 (2009).

[124] The government has been allowed to invoke plain error review in very limited circumstances, usually involving sentencing issues. *See* United States v. Gordon, 291 F.3d 181, 190 (2d Cir. 2002); United States v. Dickerson, 381 F.3d 251, 257 (3d Cir. 2004).

[125] *See, e.g.*, United States v. Potter, 463 F.3d 9, 24 (1st Cir. 2006); United States v. White Bull, 646 F.3d 1082 (8th Cir. 2011); Arizona v. Fulminante, 499 U.S. 279 (1991); Hedgpeth v. Pulido, 555 U.S. 57 (2008).

plain error review. Allowing plain error review for the government's failure to raise Fourth Amendment standing gives the government an unfair and unwarranted advantage. Allowing plain error review in this context does not serve the purpose of the plain error rule and might undermine it by giving the government an unfair advantage.

Unlike the purposes of the plain error rule, the policy concerns underlying the general rule of waiver are compelling in this context. As noted above, the general rule of waiver "induce[s] the timely raising of claims and objections, which gives the district court the opportunity to consider and resolve them."[126] Furthermore, district courts are often in the best position to consider and determine relevant facts as well as potential errors.[127] By timely raising these arguments and issues in the district court, "the district court can often correct or avoid the mistake so that it cannot possibly affect the ultimate outcome."[128] This rule also prevents litigants from "sandbagging" the court—"remaining silent about [an] objection and belatedly raising the error only if the case does not conclude in his favor."[129] These concerns are particularly compelling here. Raising the issue of Fourth Amendment standing early saves time and cost, as the district court could more swiftly adjudicate a defendant's motion to suppress. This is particularly relevant here because Fourth Amendment standing inquiries are fact specific, as they often involve questions about the defendant's activity and relationship to other parties in the proceeding.[130] Requiring the government to raise this issue early would help the factual record develop quickly and fully. This would also prevent the costly appeal of an issue that should be adjudicated in the district court. These concerns and incentives are crucial in this setting, and courts should incentivize the government to raise Fourth Amendment standing arguments in the district court.

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[126] *Puckett*, 556 U.S. at 134.

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] To return to the car example, there are easy cases where a passenger in a searched vehicle does not have any relationship with the driver and thus does not have standing to contest a search of the car or the driver. At the other end of the spectrum, there are cases in which the driver of the vehicle clearly has standing. However, there are some cases in between these, where a passenger might acquire standing with respect to the vehicle depending on his relationship to the vehicle or the driver (for example, whether he frequently received rides or stored his own items in the car). These sorts of questions are fact intensive, and forcing parties to raise them early on would save judicial resources.

3. The Government's Challenge to Fourth Amendment Standing Should be Waived

Without looking to concerns of deterrence of police misconduct, the exclusionary rule, or the rationale underlying standing, the majority of circuits has determined that waiver is appropriate.[131] These circuits look to Supreme Court precedent of *Rakas* and *Steagald*, as well as to the general rule that arguments not made in the district court are waived.[132] On their own, the arguments put forth in favor of the majority rule are quite convincing. They become even more so when one considers the importance of the exclusionary rule, and the problems with the dual check on the exclusionary rule created by the Eighth Circuit's approach. The circuits that do not yet follow the majority rule should consider switching to the majority rule.

Although the Ninth Circuit's hybrid approach might seem appealing as it allows waiver in some circumstances and precludes waiver in others,[133] it is not the ideal approach. The Ninth Circuit's rule might make more sense than the Eighth Circuit's in that it does not allow waiver when the defendant is bringing the appeal (and thus has the burden of proving that he has standing), but allows waiver when the government is bringing the appeal. The Ninth Circuit's rule is better than the Eighth's in that it contemplates some circumstances in which waiver is appropriate but not as good as the majority rule because it creates confusion as to when waiver is appropriate and gives the government a free pass for failing to make arguments that help develop the factual record.

A potential benefit to the Ninth Circuit's rule is that it might save judicial resources by allowing the government to make what it thinks is the best argument in the district court, while still giving the government an opportunity to raise standing issues when defendants appeal. Under the majority rule, the government has to make standing arguments even if it has more compelling arguments (such as consent to the search) in order to preserve its right to bring standing arguments on appeal. The majority rule sets up scenarios in which the government

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[131] *See* United States v. Golson, 743 F.3d 44, 55 n.9 (3d Cir. 2014); United States v. Lightbourn, 357 Fed. App'x 259, 264 (11th Cir. 2009); United States v. Paopao, 469 F.3d 760, 764 (9th Cir. 2006); United States v. Gonzales, 79 F.3d 413, 419 (5th Cir. 1996); United States v. Price, 54 F.3d 342, 345 (7th Cir. 1995); United States v. Dewitt, 946 F.2d 1497-1500 (10th Cir. 1991).

[132] *See, e.g.*, United States v. Noble, 762 F.3d 509, 527 (6th Cir. 2014); United States v. Golson, 743 F.3d 44, 55 n.9 (3d Cir. 2014).

[133] United States v. Taketa, 923 F.2d 665, 670 (9th Cir. 1991) (noting that if the government appeals the grant of a suppression motion and did not make any arguments about standing in the district court, the Ninth Circuit treats the issue as waived; but if the defendant appeals the denial of his suppression motion and the government did not make any standing arguments below, the government is allowed to raise standing arguments for the first time on appeal).

might have to assert many different arguments in the district court, even when they are not compelling or necessary, just to preserve its ability to raise standing arguments should there be an appeal. In the long run, this might lead to a greater expenditure of judicial resources because the government will want to develop arguments that might not be crucial or relevant, just to preserve the potential for appeal. By allowing the government to raise Fourth Amendment standing when a defendant appeals, the Ninth Circuit's rule might save judicial resources because it allows the government to only make the few arguments it thinks are necessary in the district court instead of throwing all possible arguments on the table to preserve arguments for appeal.

While this reasoning might seem appealing, it is quite flawed because it gives the government an unwarranted advantage in the name of judicial efficiency. Defendants do not often have this luxury; they do not get the chance to pick what they think is the best argument in the district court and then assert others on appeal. Defendants have to raise all possible arguments in the district court in order to preserve arguments for appeal, even though this might create inefficiencies and redundancies. And when defendants fail to make arguments in the district court, they have to go through rigorous plain error review which is often denied. There is no good reason to give the government this benefit while withholding it from defendants. The government should not get a special rule for Fourth Amendment standing arguments.

Furthermore, in light of the lingering confusion resulting from the plain error doctrine and its inconsistent application to motions to suppress, a baseline rule that is applied consistently to all scenarios is preferable. Regardless of which party is bringing the appeal, courts should treat similar cases alike and have one rule that they apply to a particular scenario. Courts should hold that the general rule of waiver applies to Fourth Amendment standing arguments and that these arguments cannot be brought for the first time on appeal.

III. CONCLUSION

Ultimately, the government's challenge to Fourth Amendment standing should be waived if not brought in the district court. The majority rule follows Supreme Court precedent that suggests that waiver is appropriate, and it prevents standing from being an unduly burdensome check on the exclusionary rule.

Even though this procedural issue of waiver arises only in a small amount of cases, it is significant. It is raised frequently enough for most circuits to have several cases discussing the issue, and it straddles both a defendant's procedural and substantive rights. The underlying ten-

sion between the exclusionary rule and standing make the issue an important one, as waiver tips the scale in favor of either the exclusionary rule or standing. Furthermore, waiver of Fourth Amendment standing arguments seems to fit with the policy considerations underlying the general raise-or-waive rule and does not fit into the few exceptions to this default rule. Concerns of individual privacy, deterrence of police misconduct, and baseline procedural rules suggest that Fourth Amendment standing arguments not brought in the district court should be waived.