No. _____

In The
Supreme Court of the United States

ABASI S. BAKER,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Tenth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, under Fed. R. Crim. P. 12(e), a defendant's failure to file a pretrial motion to suppress evidence as obtained in violation of the Fourth Amendment automatically waives plain error review of the issue under Fed. R. Crim. P. 52(b).

2. Whether this Court's handing down of a new Fourth Amendment rule while a case is pending on direct appeal is "good cause" under Fed. R. Crim. P. 12(e) for failing earlier to move to suppress the evidence.

3. Whether the constitutional rule of *Griffith v. Kentucky*, 479 U.S. 314 (1987), trumps ordinary, rule-based procedural waiver doctrines.

4. Whether the Tenth Circuit erred in refusing to apply *United States v. Jones*, 132 S. Ct. 945 (2012), to review for plain error the admission of the evidence in this case, which was pending direct appeal at the time *Jones* was handed down.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Abasi S. Baker respectfully prays the Court to issue a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case.

OPINIONS BELOW

The opinion of the Tenth Circuit (Appendix 1-10) is reported at 713 F.3d 558. The district court's final judgment (App. 11-24) is unreported.

JURISDICTION

The panel of the Tenth Circuit entered its judgment on April 11, 2013 (App. 1). Mr. Baker's timely petition for rehearing and rehearing en banc was denied on May 14, 2013 (App. 25). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the Constitution of the United States provides, in relevant part: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be

made, under their Authority; . . . to Controversies to which the United States shall be a Party."

The Fourth Amendment to the Constitution of the United States 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.

Fed. R. Crim. P. 12 states, in relevant part:

> (b) PRETRIAL MOTIONS. . . .
>
> (3) *Motions That Must Be Made Before Trial.* The following must be raised before trial: . . .
>
> (C) a motion to suppress evidence; . . .
>
> (c) MOTION DEADLINE. The court may, at the arraignment or as soon afterward as practicable, set a deadline for the parties to make pretrial motions and may also schedule a motion hearing. . . .
>
> (e) WAIVER OF A DEFENSE, OBJECTION, OR REQUEST. A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by any extension the court provides. For

> good cause, the court may grant relief from the waiver. . . .

Fed. R. Crim. P. 52(b) states, "PLAIN ERROR. A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."

STATEMENT OF THE CASE

A grand jury in the U.S. District Court for the District of Kansas indicted Petitioner Abasi Baker on seven counts each of robbery affecting commerce, in violation of 18 U.S.C. § 1951, use (brandishing) of a firearm in relation to a crime of violence, in violation of 18 U.S.C. § 924(c)(1)(A), and being a convicted felon in possession of a firearm, in violation of 18 U.S.C. § 922(g)(1) (App. 2). The charges stemmed from seven separate alleged "armed robberies of retail stores and check-cashing businesses . . . in the Kansas City, Kansas, area between January and March 2011" (App. 2).

"During the investigation of some of the earlier robberies, surveillance-camera footage led police to believe that the robbers were using a car owned by [Mr. Baker]'s girlfriend" (App. 2). After locating the car and, openly admitting at trial that they had no warrant to do so, in the early morning hours of March 2, 2011, FBI agents "slapped" "a GPS tracking device on the car [and] then monitored its movements" (App. 2; Court of Appeals Appendix ("CAA") 790-92).

On March 3, 2011, this "GPS surveillance allowed [agents] to link the car to a just-completed robbery," whereupon they used the live-time GPS monitoring of the vehicle to follow it and set up a roadblock, at which Mr. Baker "was pulled over and arrested along with an accomplice," Mark Davis (App. 2-3; CAA 823-28, 1088-89). In the car, agents discovered all the direct evidence later admitted at trial against Mr. Baker, including "cash from the robbery and a loaded .40 caliber Glock semi-automatic handgun, serial number EHN980," which was the gun specifically described in all seven brandishing and felon-in-possession counts (App. 3).

After a jury trial, Mr. Baker was convicted of all 21 counts (App. 2). On January 18, 2012, he was sentenced to 164 years in prison, primarily due to mandatory minimum consecutive 25-year terms for the seven use-of-a-firearm counts (App. 14; CAA 106-08, 1293-94, 1297-98).

Five days later, on January 23, 2012, Mr. Baker filed his notice of appeal to the U.S. Court of Appeals for the Tenth Circuit (CAA 117). That same day, this Court handed down *United States v. Jones*, 132 S.Ct. 945 (2012). In *Jones*, the Court unanimously quelled a conflict among several circuits and held "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search' " within the meaning of the Fourth Amendment. 132 S.Ct. at 949.

A "search" conducted without a warrant is "per se unreasonable under the Fourth Amendment." *Katz v. United States*, 389 U.S. 347, 357 (1967). A conviction after admission of evidence from an unreasonable search is reversible error if "there is a reasonable probability that the evidence complained of might have contributed to the conviction." *Fahy v. Connecticut*, 374 U.S. 85, 86-87 (1963). Applying these principles, *Jones* affirmed the D.C. Circuit's decision in *United States v. Maynard*, 615 F.3d 544, 564-66 (D.C. Cir. 2010), which had reversed a conviction due to the warrantless GPS tracking and monitoring of a vehicle as that in this case.

Before trial, Mr. Baker had not moved to suppress the evidence obtained from the warrantless installation and monitoring of the GPS device on his car. In his opening brief before the Tenth Circuit, however, he argued that, under the new rule of *Jones*, the warrantless GPS search obviously violated the Fourth Amendment, making admission of the evidence plain error (App. 2). He invoked *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), which held that "a new rule for the conduct of criminal prosecutions" announced by this Court "is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past" (App. 7).

In response, the Government primarily made standard Fourth Amendment-based counterarguments, including "inevitable discovery" (that the Government

would have obtained the evidence anyway without the warrantless GPS tracking) and "good faith" (that the FBI agents acted in good faith reliance on prior precedent from other circuits in not seeking a warrant). Additionally, though, the Government argued that, under Fed. R. Crim. P. 12(e), Mr. Baker's failure to move the district court to suppress the evidence waived even plain error review of its admission under Fed. R. Crim. P. 52(b) (App. 5-6). To this last argument, Mr. Baker replied that Rule 12(e)'s "waiver" provision does not preclude plain error review and, even if it did, the *Griffith* constitutional retroactivity rule trumps ordinary procedural waivers, as this Court previously held in *Powell v. Nevada*, 511 U.S. 79 (1994), and constitutes "good cause" under Rule 12(e) for applying plain error review anyway (App. 7-8).

The Tenth Circuit affirmed Mr. Baker's conviction (App. 2, 10). But it did not address any of the Government's Fourth Amendment-based counter-arguments (App. 4-9). Instead, it held Mr. Baker "waived his right to raise the issue" even for plain error (App. 4). Restating the Tenth Circuit's earlier holding in *United States v. Burke*, 633 F.3d 984, 988 (10th Cir. 2011), the court held Mr. Baker's "suppression argument raised for the first time on appeal is waived (i.e., completely barred) absent a showing of good cause for why it was not raised before the trial court" (App. 5). It held *Burke* "ended any doubt in this circuit that plain-error review under Fed. R.

Crim. P. 52(b) is not available when an issue has been waived under Rule 12(e)" (App. 9).

The panel further held Mr. Baker could not establish Rule 12(e) "good cause" because his counsel "knew about the GPS monitoring issue soon enough to raise a timely suppression motion," and defendants "need not, and often do not, await a Supreme Court precedent directly in point before raising a constitutional challenge to a search or seizure" (App. 6). It then disagreed that "*Griffith*'s rule 'trumps Rule 12(e)'s ordinary waiver principles'" (App. 7).

REASONS FOR GRANTING THE WRIT

This Court should grant certiorari in this case to resolve an ongoing split among the circuits as to the effect on plain error review of a criminal defendant's failure to file a pretrial motion to suppress evidence. Does such a failure waive even plain error review of the issue on appeal, as the Tenth Circuit below and five sister circuits have held, or does it waive merely standard review and allow for plain error review, as other circuits have held.

In holding that, under Rule 12(e), plain error review under Rule 52(b) of the admission of evidence is unavailable – "completely barred" (App. 5) – when the defendant did not move the district court to suppress the evidence, the Tenth Circuit's opinion below merely continues this nationwide split. Published

decisions of the Second, Sixth, Seventh, Eleventh, and D.C. Circuits have held otherwise.

Additionally, the Court should issue its writ of certiorari to correct the Tenth Circuit's wholesale departure from the heretofore unquestioned rule of *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987), that, without exception, all new constitutional rules handed down by this Court are to be applied to all cases then pending on direct review. Left to stand, the Tenth Circuit's opinion refusing to apply *United States v. Jones*, 132 S.Ct. 945 (2012), retroactively to this case will be the *only* federal appellate decision ever successfully to have held a party "waived" retroactive application of a new rule of constitutional law handed down by this Court while the case was pending direct review – and the first ever to have created any exception to the *Griffith* rule.

In the only two post-*Griffith* appellate decisions to have held anything similar – *Powell v. State*, 838 P.2d 921, 924-25 (Nev. 1992), and *United States v. Levy*, 391 F.3d 1327, 1328 (11th Cir. 2004) (Hull, J., concurring in denial of rhg. en banc) – this Court reversed and directed the lower court to apply the new law. *Powell v. Nevada*, 511 U.S. 79, 84 (1994); *Levy v. United States*, 545 U.S. 1101 (2005) (GVR order). The Court should grant certiorari and do the same in this case.

I. This Court should resolve the split among the circuits as to whether a criminal defendant's failure to file a pretrial motion to suppress evidence as obtained in violation of the Fourth Amendment automatically bars plain error review of the issue on appeal or, instead, merely waives ordinary review and allows for plain error review.

Fed. R. Crim. P. 52(b) states, "A plain error that affects substantial rights may be considered even though it was not brought to the court's attention." Thus, while an appellate court "normally will not correct a legal error . . . unless the defendant first brought the error to the trial court's attention," Rule 52(b) "creat[es] an exception to the normal rule." *Henderson v. United States*, 133 S.Ct. 1121, 1124 (2013). Under Rule 52(b), "as long as [an] error was plain as of . . . the time of appellate review[,] the error is 'plain' within the meaning of the Rule." *Id.* at 1124-25.

Plain error occurs when there is "(1) 'error,' (2) that is 'plain,' and (3) that 'affect[s] substantial rights.' If all three conditions are met, an appellate court may then exercise its discretion to notice a forfeited error, but only if (4) the error 'seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings.'" *Johnson v. United States*, 520 U.S. 461, 467 (1997) (quoting *United States v. Olano*, 507 U.S. 725, 732 (1993)) (internal citations omitted).

As such, if "(1) the law changes in the defendant's favor, (2) the change comes after trial but before the

appeal is decided, (3) the error affected the defendant's 'substantial rights,' and (4) the error 'seriously affect[ed] the fairness, integrity or public reputation of judicial proceedings,'" plain error review can offer a method to apply the new change retroactively to the defendant if not previously raised. *Henderson*, 133 S.Ct. at 1128-29 (quoting *Olano*, 507 U.S., at 732) (internal citations omitted). Admitting evidence obtained in violation of the Fourth Amendment has been held to be plain error affecting the defendant's substantial rights and seriously affecting the fairness, integrity, and public reputation of judicial proceedings. *See, e.g., United States v. Buchanon*, 72 F.3d 1217, 1226-28 (6th Cir. 1995) (reversing conviction due to plain error in admitting evidence obtained in violation of the Fourth Amendment when the defendant did not move the district court to suppress the evidence).

Even plain error review usually cannot apply, however, to claims that have been "waived." *Olano*, 507 U.S. at 732-33 (1993). But "[w]aiver is different from forfeiture. Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the 'intentional relinquishment or abandonment of a known right.'" *Id.* at 733 (citation omitted). Thus, "If a legal rule was violated during the district court proceedings, and if the defendant did not waive the rule, then there has been an 'error' within the meaning of Rule 52(b) despite the absence of a timely objection." *Id.*

Fed. R. Crim. P. 12 governs criminal "Pleadings and Pretrial Motions." Rule 12(b)(3) lists "a motion to

suppress evidence" among its "motions that must be made before trial." Rule 12(c) allows district courts to set pretrial motion deadlines. Rule 12(e) then provides, "A party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c). . . . For good cause, the court may grant relief from this waiver."

In *United States v. Burke*, 633 F.3d 984, 988 (10th Cir. 2011), which the opinion below cited and restated at length (App. 5-6, 9), the Tenth Circuit previously addressed the interplay of Rule 52(b) with Rule 12(e)'s use of the word "waiver." *Burke* held that, while Rule 52(b) provided a "general provision for plain error review," and the Tenth Circuit had "[i]n several cases . . . engaged in plain-error review even after a defendant has failed to make a motion to suppress evidence prior to trial," nonetheless "Rule 12, and not Rule 52, applies to pretrial suppression motions and a suppression argument raised for the first time on appeal is waived (i.e., completely barred) absent a showing of good cause for why it was not raised before the trial court." 633 F.3d at 988.

As *Burke* recognized, however, "in the Rule 52(b) context, the Supreme Court [has] defined 'waiver' in a way that makes Rule 12's use of the term necessarily inconsistent with Rule 52(b)." *Id.* at 990 (citing *Olano*, 507 U.S. at 733). Nonetheless, *Burke* concluded that, "Although we recognize the conundrum *Olano* and the rules have placed on us, we still think our reading of Rule 12 is appropriate." *Id.* The opinion below agreed and followed *Burke*, holding Mr. Baker's

Fourth Amendment suppression argument under *United States v. Jones*, 132 S.Ct. 945 (2012), automatically was "completely barred" from any plain error review because he did not raise it before the district court in a timely motion to suppress (App. 5, 9).

For some time, however, there has been "a division of authority among the circuit courts as to whether arguments not raised in a motion to suppress are waived or are merely forfeited and subject to plain-error review using the standard established in *United States v. Olano*." *United States v. Baker*, 538 F.3d 324, 328 (5th Cir. 2008). In holding that failure to move the district court to suppress evidence constitutes a waiver that "completely bars" plain error review of the issue (App. 5), the opinion below only continues this nationwide split. This Court should grant its writ of certiorari to resolve this question and provide needed guidance to the lower courts.

In this case and, previously in *Burke*, the Tenth Circuit joins the First, Third, Fifth, Eighth, and Ninth Circuits in adopting the viewpoint that plain error review is waived – completely and automatically barred – by the failure to file a pretrial suppression motion. *See United States v. Walker*, 665 F.3d 212, 227-28 (1st Cir. 2011); *United States v. Rose*, 538 F.3d 175, 182-84 (3d Cir. 2008); *Baker*, 538 F.3d at 328-29; *United States v. Green*, 691 F.3d 960, 964-66 (8th Cir. 2012); *United States v. Wright*, 215 F.3d 1020, 1026 (9th Cir. 2000). Even then, cases "identifying such waiver have often proceeded to evaluate the

issues under a plain error standard for good measure." *United States v. Scroggins*, 599 F.3d 433, 448 (5th Cir. 2010).

Conversely, the D.C. Circuit has rejected the view that, under Rule 12(e), a defendant's failure to raise an argument in a pretrial motion under Rule 12(b) waives plain error review. *United States v. Mahdi*, 598 F.3d 883, 887-88 (D.C. Cir. 2010) ("We need not resolve the parties' waiver dispute. Because Mahdi did not object in the district court . . . , we review his arguments for plain error"). The Second Circuit agrees. *United States v. Yousef*, 327 F.3d 56, 144 (2d Cir. 2003) (holding defendant did not establish "good cause" for his "waiver" such that only plain error review was available). In these circuits, if the defendant establishes "good cause" under Rule 12(e), then review is under the usual standard of review for a preserved suppression claim, whereas otherwise review is for plain error. *Mahdi*, 598 F.3d at 887-88.

The Eleventh Circuit takes a view in the middle, holding that Rule 12(b) issues "are waived unless raised by motion prior to trial, absent good cause for the failure," unless the issue alleges "outrageous governmental conduct." *United States v. Augustin*, 661 F.3d 1105, 1122 n.10 (11th Cir. 2011).

In the Sixth and Seventh Circuits, there is an ongoing, intra-circuit split over this issue. *See United States v. Caldwell*, 518 F.3d 426, 430 (6th Cir. 2008) (recognizing intra-circuit split, citing *United States v. Bonds,* 12 F.3d 540, 569 (6th Cir. 1993) (failure to file

suppression motion waives plain error review), and *Buchanon,* 72 F.3d at 1226-27 (failure to file suppression motion merely is forfeiture per *Olano* that does not waive plain error review)); *see also United States v. Johnson*, 415 F.3d 728, 730 (7th Cir. 2005) (failure to file suppression motion is forfeiture per *Olano* that does not waive plain error review); *United States v. Acox*, 595 F.3d 729, 731 (7th Cir. 2010) (failure to file suppression motion waives plain error review).

Finally, in the Fourth Circuit, "It is an open question . . . whether we review [such] an unpreserved challenge for plain error or whether it is altogether waived." *United States v. Lawing*, 703 F.3d 229, 235 n.7 (4th Cir. 2012). In *Lawing* (as the Fifth Circuit observed is usual in this situation, *Scroggins*, 599 F.3d at 448), the Fourth Circuit held it need not answer this "open question" because, even under plain error review, any error in that case was "harmless." 703 F.3d at 235 n.7. At the same time, the Fourth Circuit recently has engaged in plain error review of a Fourth Amendment claim not raised before the district court but which later was the subject of a new rule this Court decided while the case was pending direct appeal. *See United States v. Rumley*, 588 F.3d 202, 205 n.1 (4th Cir. 2009) (reviewing for plain error under *Griffith v. Kentucky*, 479 U.S. 314 (1987), claim that evidence was obtained in violation of the Fourth Amendment, per *Arizona v. Gant*, 556 U.S. 1230 (2009), when the defendant did not move to suppress evidence before district court but *Gant* was decided while case was pending direct review).

As a result of this ongoing, direct conflict among the circuits, the Tenth Circuit's opinion below is "in conflict with the decision of [other] United States court[s] of appeals on the same important question." S. Ct. R. 10(a). And this is an important question. The availability of plain error review is a vital component of due appellate process, as a "'rigid and undeviating judicially declared practice under which courts of review would invariably and under all circumstances decline to consider all questions which had not previously been specifically urged would be out of harmony with . . . the rules of fundamental justice.'" *Henderson*, 133 S.Ct. at 1126 (quoting *Olano*, 507 U.S. at 732 (quoting *Hormel v. Helvering*, 312 U.S. 552, 557 (1941)).

But the Tenth Circuit's per se view (shared by five other circuits) that failure to file a motion to suppress evidence for violation of the Fourth Amendment completely bars any and all review of the issue, even when intervening authority of this Court has confirmed the Fourth Amendment violation, creates just such an impermissibly rigid and undeviating practice. The importance of whether this is correct is heightened by the fact that still other circuits plainly have disagreed and held that the rule is not so rigid and undeviating in this manner.

This Court should issue its writ of certiorari, intervene in this dispute, and adopt the less "confusing" approach of these other courts, *Burke*, 633 F.3d at 990, that equally fits Rules 12(e) and 52(b), per *Olano*. Under Rule 12(e), a defendant "waives" an

issue not raised in a Rule 12(b)(3) suppression motion unless he can establish "good cause." If he can establish "good cause," the "waiver" is a nullity and any appellate review is governed by the standard of review for preserved suppression claims – in the Tenth Circuit, "review[ing] de novo the district court's ultimate determination of reasonableness under the Fourth Amendment, but . . . accept[ing] the district court's factual findings unless they are clearly erroneous and . . . view[ing] the evidence in the light most favorable to the prevailing party." *United States v. Ruiz*, 664 F.3d 833, 838 (10th Cir. 2012). If he cannot establish "good cause," then any review on appeal is for plain error under Rule 52(b), as with any other ordinary unpreserved claim affecting substantial rights (such as those under the Fourth Amendment).

Based on the text and history of Rules 52(b) and 12(e), this view makes more sense. "In context the word 'waiver' in Rule 12(e) does not carry the strict implication of an 'intentional relinquishment of a known right' that precludes all appellate review." *Johnson*, 415 F.3d at 730. "[A] true waiver occurs only through an intentional relinquishment of an argument, while a forfeiture is the result of a neglectful failure to pursue an argument. If a defendant, out of neglect, fails to move to suppress evidence . . . , that conduct is more akin to a forfeiture than a waiver." *Id.* Thus, where "there [is] no indication that [the defendant] intentionally decided to abandon his [suppression] argument, . . . [the appellate court must]

view his argument as forfeited and subject to plain error review." *Id.*

II. This Court should intervene and correct the Tenth Circuit's departure from the otherwise universally accepted and usual course of judicial proceedings in refusing to apply the new rule of *United States v. Jones* to this case that was pending direct review at the time *Jones* was handed down, in violation of *Griffith v. Kentucky*.

Even if Rule 12(e) generally were to bar plain error review as to ordinary suppression claims, despite the split among the circuits on the subject, the Tenth Circuit's decision in this case that it also bars retroactive application of a new rule of constitutional law handed down by this Court while the case was pending direct appeal separately warrants this Court's intervention.

The Tenth Circuit's conclusions that the fact *United States v. Jones*, 132 S.Ct. 945 (2012), was handed down the same day Mr. Baker filed his notice of appeal is not Rule 12(e) "good cause" (App. 6) and that plain error review of his *Jones* claim is not "compelled by" *Griffith v. Kentucky*, 479 U.S. 314 (1987) (essentially holding Mr. Baker waived his *Jones* claim before *Jones* ever existed) (App. 6-8), are without precedent. They conflict with this Court's clear and unmistakable direction that the retroactivity rule announced in *Griffith* necessarily must trump ordinary procedural default on direct appeal.

Without this Court's intervention, the Tenth Circuit's decision in this case will be the only appellate opinion post-*Griffith* successfully to have announced an exception to the otherwise unwavering *Griffith* rule. The only two previous decisions to have sought to sidestep *Griffith* in this manner both were reversed by this Court. *Powell v. State*, 838 P.2d 921, 924-25 (Nev. 1992), *rev'd sub nom. Powell v. Nevada*, 511 U.S. 79, 84 (1994); *United States v. Levy*, 391 F.3d 1327, 1328 (11th Cir. 2004), *rev'd sub nom. Levy v. United States*, 545 U.S. 1101 (2005).

In *Griffith*, this Court directed that, under the "cases and controversies" provision of U.S. Const. art. III, § 2, "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication." 479 U.S. at 322. The Court held that, "after we have decided a new rule in the case selected, the integrity of judicial review requires that we apply that rule to *all similar cases pending on direct review*." *Id.* at 322-23 (emphasis added). The Court allowed for no exceptions, such as when the new rule constituted a "clear break" with the past. *Id.* at 328.

As such, *Griffith*'s constitutional concerns must override the ordinary rules governing how and whether an issue may be raised on direct appeal. If the "failure to apply a newly declared constitutional rule to criminal cases pending on direct review violates basic norms of constitutional adjudication," *id.* at 322, plainly that failure would violate constitutional norms as much in the case of a defendant, like

Mr. Baker, whose counsel did not anticipate a new rule of constitutional law that was unavailable during the time for pretrial motions as it would in the case of a defendant whose counsel did anticipate the new rule.

Indeed, this Court in *Griffith*, itself, held this: "at a minimum, *all defendants whose cases [a]re still pending on direct appeal* at the time of the law-changing decision should be entitled to invoke the new rule." *Id.* (emphasis added). The Court did not distinguish between parties who preserved their claims and those who did not, but rather between "cases that have become final and those that have not." *Id.* The *Griffith* rule requires "full retroactive effect *in all cases still open on direct review and as to all events*, regardless of whether such events predate or postdate [the] announcement of the rule." *Harper v. Va. Dep't of Transp.*, 509 U.S. 86, 97 (1993) (emphasis added).

Simply put, "There are no exceptions to the *Griffith* rule." *Levy*, 391 F.3d at 1352 (11th Cir. 2004) (Barkett, J., dissenting from denial of rhg. en banc), *vacated and remanded sub nom. Levy*, 545 U.S. at 1101. "Any attempt to read into *Griffith* an unarticulated . . . exception – for defendants who failed to preserve . . . objections – is unconvincing." *Id.*

Thus, "To avoid a constitutional conflict with *Griffith*," a procedural rule otherwise procedurally barring an issue must "be read to exclude issues that

are raised by a new rule of criminal procedure announced" pending direct appeal. *Id.* at 1354.

> Such a reading comports with the rule of statutory interpretation set forth in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988) ("where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"). The Federal Rules of [Criminal] Procedure are statutory law subject to the *DeBartolo* rule, and there can be no doubt that *Griffith* is a constitutional holding.

Id. at 1354-55 (internal citation modified).

Accordingly, as Rule 12(e) already incorporates a "good cause" "safety valve for counsel's inadvertent failure to raise an argument at a suppression hearing," *Burke*, 633 F.3d at 991, the *Griffith* rule necessarily commands that the valve be opened to apply new constitutional law retroactively, if only for plain error. *Cf. United States v. Andrews*, 681 F.3d 509, 517 (3d Cir. 2012) (*Griffith* rule trumps procedural waiver of plain error review under "invited error" doctrine such that new constitutional rule handed down during direct review must be retroactively applicable, despite ordinary procedural waiver).

Besides the Tenth Circuit's opinion in this case, only two other times since *Griffith* has an appellate

court held that retroactive application of a new constitutional rule this Court decided during direct review and raised for the first time on appeal was waived by some ordinary procedural doctrine: *Powell*, 838 P.2d at 924-25 (refusing to apply *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991), due to procedural waiver by defendant under Nevada state law), and *Levy*, 391 F.3d at 1328 (Hull, J., concurring in denial of rhg. en banc) (refusing to apply *Blakely v. Washington*, 542 U.S. 296 (2004), when raised for first time in motion for rehearing after panel opinion); *but see id.* at 1335-51 (Tjoflat, J., dissenting); *id.* at 1351-56 (Barkett, J., dissenting). Notably, *in both cases*, this Court reversed and remanded, directing the lower court to apply the new rule retroactively. *Powell*, 511 U.S. at 84; *Levy*, 545 U.S. at 1101 (GVR order).

Nonetheless, in this case, the Tenth Circuit holds the *Griffith* rule has no such constitutional effect on ordinary procedural waiver, instead merely "mean[ing] no more than that [a new case] should be treated the same as law that had been settled years earlier" (App. 7). It also concludes *Powell* supports this holding because *Powell* declined to decide "the consequences of [the defendant]'s failure to raise [the] federal question" at issue (App. 7-8). Plainly, however, these conclusions cannot be squared with *Griffith*, *Powell*, or how this Court consistently has applied the *Griffith* rule in similar situations, *requiring* application of a new opinion even if the predicate issue otherwise was not raised earlier.

Contrary to the Tenth Circuit's observation, *Powell* holds the opposite: that, regardless of some ordinary procedural waiver rule under state or federal law, the constitutional rule of *Griffith* mandates all defendants whose cases are pending direct review at the time this Court announces a new rule of constitutional law be entitled to invoke that new rule. *Cf. Griffith*, 479 U.S. at 322 ("all defendants whose cases [a]re still pending on direct appeal at the time of the law-changing decision should be entitled to invoke the new rule"). "Retroactive application under *Griffith* lifts what would otherwise be a categorical bar to obtaining redress for the government's violation of a newly announced constitutional rule." *Davis v. United States*, 131 S.Ct. 2419, 2430 (2011).

In *Powell*, a Nevada state case, the defendant was arrested without a warrant and was held for four days before he was brought before a magistrate. 511 U.S. at 81-82; 838 P.2d at 924. The law of Nevada was that "an accused waives his right to a speedy arraignment when he voluntarily waives his right to remain silent and his right to counsel," which the defendant had done. 511 U.S. at 82; 838 P.2d at 924-25.

While the case was on direct appeal before the Nevada Supreme Court, this Court decided *McLaughlin*, 500 U.S. at 56-57, announcing a new constitutional rule that an arrestee must be brought before a judicial officer within 48 hours of a warrantless arrest. *Powell*, 511 U.S. at 83-84; 838 P.2d at 705. The Nevada Supreme Court, however, refused to apply *McLaughlin* retroactively, holding the defendant "had

waived his right under state law to a speedy arraignment." *Id.* at 82; 838 P.2d at 705 n.1.

This Court reversed: regardless of Nevada's procedural waiver rules, the Nevada court could not "decline to apply a recently rendered . . . decision of [the Supreme Court] to a case pending on direct appeal." *Id.* at 83. This was because the *Griffith* rule controlled: "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final." *Id.* at 84 (quoting *Griffith*, 479 U.S. at 328) (emphasis added). Thus, "the Nevada Supreme Court erred in failing to recognize that *Griffith v. Kentucky* calls for retroactive application of *McLaughlin*'s 48-hour rule," despite the defendant's erstwhile waiver. *Id.* at 85.

On remand, the Nevada Supreme Court duly followed this Court's direction, ignored the ordinary waiver rule, and applied *McLaughlin* retroactively to the defendant's case. *Powell v. State*, 930 P.2d 1123, 1124-26 (Nev. 1997). It analyzed the defendant's claim under the new *McLaughlin* standard and, ultimately, held that the undue delay error was harmless within the circumstances of that case. *Id.*

Through this process, the defendant in *Powell* was able to have a full and fair review of his claim under the new rule the Court had announced in *McLaughlin*. In this case, however, the Tenth Circuit has denied Mr. Baker any such review for his claim under the new rule of *Jones*. But *Griffith* guarantees

him review under *Jones* as much as it did for the defendant in *Powell* under *McLaughlin*. *Powell*, 511 U.S. at 83-84. The Tenth Circuit's refusal to afford Mr. Baker that review directly contravenes *Griffith* and *Powell*. It is wholly without precedent.

The *Griffith* rule operates to open otherwise-closed doors and require application of a new constitutional rule to all cases then pending on direct review. "It may 'make more sense to speak in terms of the 'redressability' of violations of new rules, rather than the 'retroactivity' of such new rules.' Retroactive application does not determine what 'appropriate remedy' (if any) the defendant should obtain." *Davis*, 131 S.Ct. at 2431 (quoting *Danforth v. Minnesota*, 552 U.S. 264, 271 (2008)). "Remedy is a separate, analytically distinct issue." *Id.*

"As a result, the retroactive application of a new rule of substantive Fourth Amendment law," such as *Jones* in this case, "raises the question whether a suppression remedy applies; it does not answer that question." *Id.* "When this Court announced its decision in [*Jones*], [Mr. Baker's] conviction had not yet become final on direct review. [*Jones*] therefore applies retroactively to this case. [Mr. Baker] may invoke its newly announced rule of substantive Fourth Amendment law as a basis for seeking relief." *Id.*

As the *Griffith* jurisprudence rule makes plain, a litigant's previous failure to have raised a claim based on a new, intervening decision of this Court cannot waive that claim. Were it otherwise, the reasons the

Court advanced in *Griffith* for that rule – preserving the integrity of judicial review and treating temporally similarly situated parties the same – would be vitiated.

In this case, the Tenth Circuit's refusal retroactively to apply *Jones* is even more troublesome given that Mr. Baker has a meritorious *Jones* claim. An FBI agent testified he made the decision "to slap on a GPS tracker" on the car that had "been identified as . . . Mr. Baker's vehicle" (CAA 790). He admitted that, "at about 330 or 4 o'clock in the morning," he and his agents "located the vehicle . . . in Kansas City, Missouri," and he and "two other" agents "went out there and . . . took the device and put it on . . . the [undercarriage] of the car" (CAA 791). Asked whether he obtained a warrant or court order authorizing this, he responded, "No," because it was not "required" (CAA 790).

The GPS device sent an e-mail to a designated address "whenever the vehicle starts and the vehicle stops," and additionally could be pulled up "live time on a computer screen" that displayed "a map" on which agents could "follow along where th[e] vehicle is" (CAA 791). The FBI agent admitted that the device was the only way in which he could obtain a "definitive" placement of the car (CAA 790, 1158). Moreover, the monitoring of the GPS tracker warrantlessly placed on the car was the only way in which the Government directly was able to connect Mr. Baker to the robberies, pull the car over, and arrest him, resulting in all the direct evidence against

him, including the firearm specifically charged in the seven firearms use counts comprising the bulk of his 164-year sentence (App. 2-3; CAA 823-28, 1088-89).

Under *Jones*, this evidence was obtained in violation of the Fourth Amendment. In *Jones*, the Government applied for and was granted a search warrant authorizing it to install a GPS tracking device on a vehicle that was registered to Mr. Jones's wife. 132 S.Ct. at 948. Agents located the vehicle and covertly installed the device one day after the warrant expired. *Id.* As in this case, it then used the device to track the vehicle's movements live, eventually catching Mr. Jones. *Id.*

Later, Mr. Jones and others were indicted for several drug conspiracy crimes. *Id.* Before trial, Mr. Jones moved to suppress the evidence the Government had obtained through use of the GPS device. *Id.* The district court overruled the motion, holding "a person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another." *Id.* (quoting *United States v. Jones*, 451 F.Supp.2d 71, 88 (D.D.C. 2006)). On appeal, the D.C. Circuit reversed Mr. Jones's conviction outright, holding the admission of evidence obtained through the warrantless use of the GPS device – as in this case, all the direct evidence against the defendant – violated the Fourth Amendment. *United States v. Maynard*, 615 F.3d 544, 568 (D.C. Cir. 2010).

This Court affirmed the D.C. Circuit, articulating a "physical trespass" rationale. *Jones*, 132 S.Ct. at 954. Observing the Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures," the Court stated, "It is beyond dispute that a vehicle is an 'effect' as that term is used in the Amendment." *Jones*, 132 S.Ct. at 949 (citing *United States v. Chadwick*, 433 U.S. 1, 12 (1977)). Thus, the Court held, "the Government's installation of a GPS device on a target's vehicle, and its use of that device to monitor the vehicle's movements, constitutes a 'search.'" *Id.*

Jones and this case are virtually identical. Mr. Baker has a strong argument that the admission of the evidence against him obtained from the warrantless placement and monitoring of a GPS tracker on his car violated the Fourth Amendment and should not have been admitted. Under *Griffith* and its progeny, whose rule of retroactivity to all cases pending direct review has no exceptions, Mr. Baker must have the right to plain error review of his *Jones* claim.

The Tenth Circuit's unprecedented conclusion otherwise departs wholesale from *Griffith*. Mr. Baker's trial counsel should not be faulted for failing to forecast *Jones*. This Court should grant certiorari to correct this injustice and reaffirm the *Griffith* rule.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

PUBLISH

UNITED STATES COURT OF APPEALS

TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ABASI S. BAKER, Defendant-Appellant.	No. 12-3023 (Filed Apr. 11, 2013)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS (D.C. NO. 2:11-CR-20020-CM-1)

Jonathan Sternberg, Jonathan Sternberg, Attorney, P.C., Kansas City, Missouri, for Defendant-Appellant.

James A. Brown, Assistant United States Attorney, (Barry R. Grissom, United States Attorney), Topeka, Kansas, for Plaintiff-Appellee.

Before **HARTZ**, **BALDOCK**, and **GORSUCH**, Circuit Judges.

HARTZ, Circuit Judge.

Defendant Abasi Baker was convicted in the United States District Court for the District of Kansas on seven counts each of robbery affecting commerce, *see* 18 U.S.C. § 1951, use of a firearm in relation to a crime of violence, *see id.* § 924(c)(1)(A), and being a convicted felon in possession of a firearm. *See id.* § 922(g)(1). Defendant appeals his convictions, raising two arguments: (1) that use of a global-positioning-system (GPS) tracking device on his car violated his Fourth Amendment rights, and (2) that the evidence was insufficient to convict him on the eight firearms counts associated with the first four robberies. We do not reach the merits of Defendant's Fourth Amendment argument because he waived the argument by failing to raise it before trial. And we reject Defendant's argument that the evidence was insufficient for a rational jury to find that he possessed the identified firearm at the times charged. Exercising jurisdiction under 28 U.S.C. § 1291, we affirm Defendant's convictions.

I. BACKGROUND

A series of seven armed robberies of retail stores and check-cashing businesses was carried out in the Kansas City, Kansas, area between January and March 2011. During investigation of some of the earlier robberies, surveillance-camera footage led police to believe that the robbers were using a car owned by Defendant's girlfriend. Officers placed a GPS tracking device on the car, then monitored its movements. On March 3, 2011, the GPS surveillance

allowed police to link the car to a just-completed robbery in Overland Park, Kansas. Defendant was pulled over and arrested along with an accomplice. Cash from the robbery and a loaded .40 caliber Glock semi-automatic handgun, serial number EHN890, were taken from the car.

The handgun had been lawfully purchased in late 2009 by Enjoli Collier, a friend of Defendant's. Each of the counts of the indictment charging use or possession of a firearm identified the firearm as "a .40 caliber Glock pistol, Model 27, serial number EHN890." Aplt. App., Vol. 1 at 16-26. At trial Collier testified as follows: From the time she purchased the gun until Defendant's arrest, she kept the gun in the spare-tire compartment in the trunk of her car. She had used it on January 1, 2011, but had not seen it since. She would leave the car unlocked when it was parked in her garage. Defendant paid to stay with Collier for a couple weeks in February 2011. Before then, however, in January and early February, he visited her house on multiple occasions and had unrestricted access to every part of her house while visiting. She never told Defendant where she kept her handgun or gave him permission to take or use it, but she did tell a mutual friend of theirs where it was. Also, the government presented evidence that Defendant's cell phone received a call from a cell tower serving Collier's house on the day of one of the January robberies, meaning that the phone was in the general vicinity of Collier's house approximately an hour and a half before the robbery. And for each

robbery a witness testified that the gun used by the robber looked like Collier's gun.

II. DISCUSSION

A. The GPS Tracking

Defendant argues that the GPS evidence of his location at the time of the crimes should have been excluded because the GPS device was installed without a warrant in violation of the Fourth Amendment. He relies on *United States v. Jones,* 132 S. Ct. 945 (2012), in which the Supreme Court held that attachment of a GPS tracking device to monitor movement of a suspect's car is a search governed by the Fourth Amendment. Although he did not move to suppress this evidence in district court, he now asks us to grant relief under the plain-error doctrine, which allows review of some issues not raised in the lower court. *See* Fed. R. Crim. P. 52(b) ("A plain error that affects substantial rights may be considered even though it was not brought to the court's attention."). We hold that Defendant has waived his right to raise the issue and therefore we deny relief.

Federal Rule of Criminal Procedure 12(b)(3) provides: "Motions That Must Be Made Before Trial. The following must be raised before trial: . . . (C) a motion to suppress evidence. . . ." Rule 12(c) permits district courts to set deadlines for pretrial motions. And Rule 12(e) provides that "[a] party waives any Rule 12(b)(3) defense, objection, or request not raised by the deadline the court sets under Rule 12(c) or by

any extension the court provides. For good cause, the court may grant relief from this waiver." We have held that Rule 12 dictates that "a suppression argument raised for the first time on appeal is waived (i.e., completely barred) absent a showing of good cause for why it was not raised before the trial court." *United States v. Burke,* 633 F.3d 984, 988 (10th Cir. 2011). We identified several reasons why it is appropriate to bar defendants from raising suppression arguments on appeal that were never presented to the district court:

> First, because the exclusionary rule was crafted more to benefit society at large by deterring overzealous police conduct than to personally benefit defendants, the exclusionary rule should be used sparingly in instances where its deterrent effect on police violations is minimal (as with appellate review for plain error). Furthermore, in most circumstances fairness concerns militate in favor of a waiver rule because although the government can appeal an adverse ruling on a suppression motion prior to trial, it cannot do so once jeopardy has attached. Moreover, if a defendant has not raised a suppression issue before the district court, the Government (under an assumption that its proffered evidence was admissible) may plausibly conclude during trial that it does not need to accumulate and introduce additional evidence to prevail. Finally, allowing a defendant to challenge the inclusion of evidence on appeal places the government in the difficult

> position of defending itself based on a potentially meager record.

Id. at 989-90 (citations and internal quotation marks omitted).

In construing Rule 12(e) we have held that the "good cause" necessary to avoid waiver must be a cause why the defendant "failed to raise the argument below." *Id.* at 988 (internal quotation marks omitted). We cited with approval the Fourth Circuit's ruling that good cause was lacking when "'[t]he record show[ed] that sufficient information was available to defense counsel before trial that would have enabled him to frame his [argument for] suppression.'" *Id.* (quoting *United States v. Wilson,* 115 F.3d 1185, 1191 (4th Cir. 1997)).

There is no doubt that Defendant knew about the GPS monitoring soon enough to raise a timely suppression motion. His sole argument is that he did not know that there had been a violation of the Fourth Amendment because *Jones* was not decided until he had been sentenced. We reject the argument. Defendants need not, and often do not, await a Supreme Court precedent directly in point before raising a constitutional challenge to a search or seizure. Indeed, the very argument unpressed by Defendant had been raised in other circuits before his trial and, most notably, had prevailed in the D.C. Circuit in *United States v. Maynard,* 615 F.3d 544 (D.C. Cir. 2010). There was not good cause justifying Defendant's failure to raise his issue before trial.

Defendant nevertheless argues that our consideration of the merits of his Fourth Amendment claim is compelled by retroactivity doctrine. He points to the Supreme Court's statement that "a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review or not yet final, with no exception for cases in which the new rule constitutes a 'clear break' with the past." *Griffith v. Kentucky,* 479 U.S. 314, 328 (1987). In Defendant's view the holding of *Griffith* "mandates application of the 'good cause' safety valve' in Rule 12(e) . . . and trumps Rule 12(e)'s ordinary waiver principles in applying *Jones* to this case." Reply Br. at 12.

Defendant reads too much into *Griffith*'s holding. To say that *Jones* should be the governing law on this direct appeal is to say no more than that it should be treated the same as law that had been settled years earlier. And arguments based on years-ago decisions certainly can be forfeited and waived (otherwise nothing could be waived under Rule 12(e)), even though there could be no dispute that those decisions "apply" to cases on appeal. In *Griffith* no question of waiver or forfeiture arose because the defendant had preserved at trial his claim of constitutional error. *See Griffith,* 479 U.S. at 317.

Those questions did arise, however, in *Powell v. Nevada,* 511 U.S. 79 (1994). The defendant had sought on direct appeal to take advantage of a United States Supreme Court opinion postdating his arrest that required warrantless arrests to be followed by a

judicial determination of probable cause within 48 hours. *See id.* at 83. Nevada's highest court had ruled that the Supreme Court's opinion did not apply to Powell's earlier arrest. *Powell* reversed and remanded, holding that the 48-hour rule did apply to the arrest because the case was on direct appeal and not yet final. But it continued:

> It does not necessarily follow, however, that Powell must be set free or gain other relief, for several questions remain open for decision on remand. In particular, the Nevada Supreme Court has not yet closely considered the appropriate remedy for a delay in determining probable cause (an issue not resolved by [the 48-hour case]), *or the consequences of Powell's failure to raise the federal question,* or the district attorney's argument that introduction at trial of what Powell said on November 7, 1989, was "harmless" in view of a similar, albeit shorter, statement Powell made on November 3, prior to his arrest. Expressing no opinion on these issues, we hold only that the Nevada Supreme Court erred in failing to recognize that *Griffith v. Kentucky* calls for retroactive application of [the] 48-hour rule.

Id. at 84-85 (emphasis added) (citations, footnote, and internal quotation marks omitted). *Powell* thus clearly forecloses Defendant's argument that *Griffith*'s rule "trumps Rule 12(e)'s ordinary waiver principles." Reply Br. at 12.

Finally, Defendant argues that appellate courts have routinely engaged in plain-error review when Supreme Court decisions have been issued while a case was on direct review, and he cites several such cases applying the doctrine of *Apprendi v. New Jersey,* 530 U.S. 466 (2000) (sentence upper limit is set by facts found by jury). But those cases did not involve issues subject to the waiver requirement of Rule 12(e). Our decision in *Burke,* 633 F.3d at 988, ended any doubt in this circuit that plain-error review under Fed. R. Crim. P. 52(b) is not available when an issue has been waived under Rule 12(e).

Thus, we hold that Defendant's Fourth Amendment claim was waived and cannot provide a basis for disturbing his conviction.

B. Sufficiency of the Evidence

Defendant challenges the sufficiency of the evidence for conviction on the eight counts charging possession or brandishing of a gun in connection with the robberies on January 6, 10, 12, and 16, 2011. He contends that the government failed to prove that he possessed and used the specific gun charged in those counts (namely, Collier's gun). Our review of the sufficiency of the evidence is de novo. *See United States v. Smith,* 641 F.3d 1200, 1204 (10th Cir. 2011). "We view the evidence in the light most favorable to the verdict to ascertain whether any rational trier of fact could have found the defendant guilty beyond a reasonable doubt." *Id.* at 1204-05.

The evidence established that Defendant had the gun when he was arrested in March 2011, and witnesses to each of the robberies described him as having a gun resembling Collier's. Defendant acknowledges that there was adequate circumstantial evidence that he possessed the gun during the robberies that occurred after he took up residence at Collier's house on February 14. But he argues that a juror could only speculate that Defendant had the gun before February 14 because there was no evidence that he could have known of the gun or its location before he moved in with Collier.

We are not persuaded. It is undisputed that Collier *never* told Defendant where the gun was. Yet he possessed it when arrested; so he must have learned of its location without Collier's help. And the date that Defendant moved into Collier's residence is not determinative, because he had free access to her home in January and early February, before he moved in. Also, Defendant overlooks Collier's testimony that she had told a friend of Defendant's where the gun was. We reject Defendant's challenge to the sufficiency of the evidence.

III. CONCLUSION

We AFFIRM Defendant's convictions.

United States District Court
District of Kansas

UNITED STATES OF AMERICA	**JUDGMENT IN A CRIMINAL CASE**
v.	Case Number: 2:11CR20020-001-CM
ABASI S. BAKER	USM Number: 20897-031
	Defendant's Attorney Willis L. Toney

THE DEFENDANT:

[ ] pleaded guilty to count(s): _____

[ ] pleaded nolo contendere to count(s) _____ which was accepted by the court.

[x] was found guilty on counts 1 through 18, 20, 21, and 22 of the Indictment after a plea of not guilty.

The defendant is adjudicated guilty of these offenses:

Title & Section	Nature of Offense	Offense Ended	Count
See next page.			

The defendant is sentenced as provided in pages 2 through 7 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s) _____.

[ ] Count(s) (is) (are) dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and United States attorney of material changes in economic circumstances.

January 18, 2012
Date of Imposition of Judgment

s/ Carlos Murguia
Signature of Judge

Honorable Carlos Murguia,
U. S. District Judge
Name & Title of Judge

1/18/2012
Date

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Offense Ended	Count
18 U.S.C. §§ 1951 and 2	Robbery, Class C felonies	01/06/11	1
		01/10/11	4
		01/12/11	7
		01/16/11	10
		02/16/11	13
		02/22/11	16
		03/03/11	20
18 U.S.C. §§ 924(c)(1)(A)(ii) and 2	Use of a Firearm During and in Relation to a Crime of Violence, Class A felonies	01/06/11	2
		01/10/11	5
		01/12/11	8
		01/16/11	11
		02/16/11	14
		02/22/11	17
		03/03/11	21
18 U.S.C. §§ 924(g)(1), 924(a)(2) and 2	Felon in Possession of a Firearm, Class C felonies	01/06/11	3
		01/10/11	6
		01/12/11	9
		01/16/11	12
		02/16/11	15
		02/22/11	18
		03/03/11	22

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 164 years.

This term of imprisonment consists of 84 months on each of Counts 1, 3, 4, 6, 7, 9, 10, 12, 13, 15, 16, 18, 20, and 22, to be served concurrently; 84 months on Count 2, to be served consecutively; and 25 years on each of Counts 5, 8, 11, 14, 17 and 21, with each of those counts to be served consecutively.

[x] The court makes the following recommendations to the Bureau of Prisons: That the defendant be considered for designation to a facility in Leavenworth, Kansas, to facilitate family ties.

[x] The defendant is remanded to the custody of the United States Marshal.

[ ] The defendant shall surrender to the United States Marshal for this district.

  [ ] at ____ on ____.

  [ ] as notified by the United States Marshal.

[ ] The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons:

  [ ] before ____ on ____.

  [ ] as notified by the United States Marshal.

  [ ] as notified by the Probation or Pretrial Services Officer.

RETURN

I have executed this judgment as follows:

_____

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____
UNITED STATES MARSHAL

By _____
Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years.

This term of supervised release consists of 3 years on each of Counts 1 through 18, 20, 21, and 22, with all counts to run concurrently.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state or local crime.

The defendant shall not unlawfully possess a controlled substance.

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as determined by the court.

[ ] The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check if applicable)

[x] The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or any other dangerous weapon. (Check if applicable)

[x] The defendant shall cooperate in the collection of DNA as directed by the probation officer. (Check if applicable)

[ ] The defendant shall register as a sex offender, and keep the registration current, in each jurisdiction where the defendant resides, where the defendant is an employee, and where the defendant is a student. For initial registration purposes only, the defendant shall also register in the jurisdiction in which convicted, if such jurisdiction is different from the jurisdiction of residence. Registration shall occur not later than 3 business days after being sentenced, if the defendant is not sentenced to a term of imprisonment. The defendant shall, not later than 3 business days after each change in name, residence, employment, or student status, appear in person in at least one jurisdiction in which the defendant is registered and inform that jurisdiction of all

changes in the information required. (Check if applicable)

[ ] The defendant shall participate in an approved program for domestic violence. (Check if applicable)

If this judgment imposes a fine or restitution, it is to be a condition of supervised release that the defendant pay in accordance with the Schedule of Payments sheet of this judgment.

The defendant must comply with the standard conditions that have been adopted by this court as well as with any additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;

2) the defendant shall report to the probation officer in a manner and frequency directed by the court or the probation officer;

3) the defendant shall answer truthfully all inquiries by the probation officer and follow instructions of the probation officer;

4) the defendant shall support his or her dependents and meet other family responsibilities;

5) the defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training or other acceptable reasons;

6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;

7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substances or any paraphernalia related to any controlled substances, except as prescribed by a physician;

8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) the defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer;

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) the defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer;

12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;

13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

1. The defendant is prohibited from possessing or purchasing a firearm, ammunition, destructive device, or other dangerous weapon.

2. The defendant shall submit his/her person, house, vehicle(s), papers, business or place of employment and any property under the defendant's control to a search, conducted by the United States Probation Officer at a reasonable time and in a reasonable manner, based upon reasonable suspicion of contraband or evidence of a violation of a condition of release. Failure to submit to a search may be grounds for revocation. The defendant shall warn any other residents that the premises may be subject to searches pursuant to this condition.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the total criminal monetary penalties under the Schedule of Payments set forth in this Judgment.

	Assessment	Fine	Restitution
Totals:	$ 2,100.00	$	$ 7,344.00

[ ] The determination of restitution is deferred until _____. An *Amended Judgment in a Criminal Case* (AO 245C) will be entered after such determination.

[x] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, pursuant to 18 U.S.C. § 3664(i), all nonfederal victims must be paid before the United States is paid.

Name of Payee	Total Loss*	Restitution Ordered	Priority or Percentage
Advance America Payday Loans	$ 458.00	$ 458.00	
Radio Shack	$ 300.00	$ 300.00	
Advance America Payday Loans	$ 1,249.00	$ 1,249.00	
Check Into Cash	$ 4,027.00	$ 4,027.00	
Check Into Cash	$ 1,300.00	$ 1,300.00	
Totals:	$ 7,334.00	$ 7,334.00	

[ ] Restitution amount ordered pursuant to plea agreement $ __

[ ] The defendant shall pay interest on any fine or restitution of more than $2,500, unless the fine or restitution is paid in full before the fifteenth day after the date of the judgment, pursuant to 18

U.S.C. § 3612(f). All of the payment options on set forth in this Judgment may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[x] the interest requirement is waived for the [ ] fine and/or [x] restitution.

[ ] The interest requirement for the [ ] fine and/or [ ] restitution is modified as follows:

*Findings for the total amount of losses are required under Chapters 109A, 110, 110A, and 113A of Title 18 for offenses committed on or after September 13, 1994, but before April 23, 1996.

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal monetary penalties are due as follows:

A [ ] Lump sum payment of $ due immediately, balance due

[ ] not later than _____ , or

[ ] in accordance ( ) C, ( ) D, ( ) E, or ( ) F below; or

B [x] Payment to begin immediately (may be combined with ( ) C, (x) D or, (x) F below); or

C [ ] Payment in monthly installments of not less than 5% of the defendant's monthly gross household income over a period of ____ years to commence ___ days after the date of this judgment; or

D [x] Payment of not less than 10% of the funds deposited each month into the inmate's trust fund account and monthly installments of not less than 5% of the defendant's monthly gross household income over a period of three years, to commence 30 days after release from imprisonment to a term of supervision; or

E [ ] Payment during the term of supervised release will commence within ___ (e.g., 30 or 60 days) after release from imprisonment. The court will set the payment plan based on an assessment of the defendant's ability to pay at that time; or

F [x] Special instructions regarding the payment of criminal monetary penalties:

If restitution is ordered, the Clerk, U.S. District Court, may hold and accumulate restitution payments, without distribution, until the amount accumulated is such that the minimum distribution to any restitution victim will not be less than $25.

Payments should be made to Clerk, U.S. District Court, U.S. Courthouse – Room 259, 500 State Avenue, Kansas City, Kansas 66101.

Unless the court has expressly ordered otherwise, if this judgment imposes imprisonment, payment of criminal monetary penalties is due during imprisonment. All criminal monetary penalties, except those

payments made through the Federal Bureau of Prisons' Inmate Financial Responsibility Program, are made to the clerk of the court.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

[ ] Joint and Several

Defendant and Co-Defendant Names and Case Numbers (including defendant number), Total Amount Joint and Several Amount and corresponding payee, if appropriate.

Case Number (including Defendant Number)	Defendant Name	Joint and Several Amount

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[x] The defendant shall forfeit the defendant's interest in the following property to the United States: The court orders the forfeiture of the defendant's interest in the .40-caliber Glock pistol, Model 27, serial number EHN890, and ammunition, seized in connection with this case.

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) fine interest, (6) community

restitution, (7) penalties, (8) costs, including cost of prosecution and court costs.

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. ABASI S. BAKER, Defendant-Appellant.	No. 12-3023

ORDER

(Filed May 14, 2013)

Before **HARTZ**, **BALDOCK**, and **GORSUCH**, Circuit Judges.

Appellant's petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service. As no member of the panel and no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court

/s/ Elisabeth A. Shumaker
ELISABETH A. SHUMAKER, Clerk