No. 4-422

In the

Supreme Court of the United States

Chad David,

Petitioner,

v.

The United States of America,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

Brief for the Petitioner

Team P11
Counsel for Petitioner

October 21, 2018

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QUESTIONS PRESENTED

1. Whether an individual's Fourth Amendment rights are violated where law enforcement enters the home under the pretext of the community caretaking exception and conducts a warrantless search to investigate potential criminal activity.

2. Whether the Sixth Amendment guarantees the right to effective assistance of counsel during the critical stage of preindictment plea negotiations.

STATEMENT OF THE CASE

A. Factual Background

Mr. Chad David, a well-respected and lively 72-year old priest from Lakeshow, was arrested after Officer James McNown ("McNown") illegally entered and searched his home without consent or a warrant. R. at 2-3. McNown found it unusual that Mr. David was absent from the 7:00 a.m. mass on the morning of January 15, 2017. One church goer was concerned about Mr. David's wellbeing and another stated that he saw him at a bar the night before. After beginning his shift patrolling Lakeshow, McNown decided to go to Mr. David's home to check up on him and bring him tea. R. at 2. McNown thought it was unusual that Mr. David lived in an expensive area, in one of the nicest private gated communities in town. Ex. A, pg. 3. When he arrived at the private gated community, McNown saw a black Cadillac SUV with Golden State license plates leaving the complex. According to his testimony, McNown thought the vehicle was out of place. McNown indicated that based on his experience, he knew that this exact vehicle was normally driven by drug dealers. There had been a recent increase in Golden State drugs entering Lakeshow. R. at 2; Ex. F.

All of the doors in Mr. David's home were shut when McNown walked up to the front door. R. at 2. McNown was surprised to hear loud music coming from inside as he knocked on the front door and announced his presence. R. at 3. Mr. David testified that he did not know that McNown knocked on the front door and he further testified that his doorbell was broken. In fact, Mr. David typically does not allow visitors and has instructed the security guard stationed at the entrance of the complex to tell visitors he is away. Ex. C, pg. 2. McNown then peeked inside Mr. David's window and saw that *The Wolf of Wall Street* was playing on the TV. McNown later testified that he found it unusual because the movie involves the seven deadly sins. Ex. A at 4. McNown tried

to enter Mr. David's home through the front door but it was locked. Without knocking first, McNown then entered Mr. David's home through the back door. R. at 3. Upon entry, McNown found a black notebook containing incriminating information including the names of church attendees along with information about payments. R. at 3. In his report, however, McNown indicated that he saw only one name with the words "one ounce, paid" next to it. Ex. F.

McNown followed the music up the stairs to Mr. David's closed bedroom door. R. at 3. Again, without knocking, McNown opened the bedroom door and found Mr. David packaging white powder into small ziplock bags. R. at 3; Ex. F. McNown handcuffed Mr. David and called local DEA agents to investigate the scene and arrest him. DEA Agent Malaska ("Malaska") asked Mr. David where he obtained the large quantity of drugs. To which Mr. David initially stated that there was no way he would give up his suppliers, and that if he did, the suppliers may kill him and burn down his church. R. at 3.

Mr. David was taken to a federal detainment facility where he called Keegan Long ("Long"), the only criminal defense lawyer he knew. R. at 3. Because Long was a church goer, Mr. David knew Long was an alcoholic but believed he would adequately represent him. R. at 3-4. However, Long never met with Mr. David nor did he ever inform Mr. David of the implications of going to trial. Ex. B, pg. 2. While Mr. David was in custody, Malaska encouraged the prosecution to offer a favorable plea deal to Mr. David in exchange for information regarding his suppliers. R. at 4. In Malaska's eyes, the plea deal could only be offered to Mr. David prior to filing formal charges because filing the charges would publicize the arrest and tip off Mr. David's suppliers. R. at 4.

At 8:00 a.m. on Tuesday, January 16, 2017, Long was out drinking heavily at a bar and playing darts, when the prosecutor, Kayla Marie ("Marie"), emailed him regarding a favorable plea bargain. The offer consisted of one year in prison in exchange for the names of Mr. David's

suppliers. R. at 4; Ex. B, pg. 2. The offer was valid for only 36 hours and would thus expire on January 17, 2017 at 10:00 p.m. R. at 4. Because Long had drank too much, he thought the plea offer stated 36 days instead of 36 hours and failed to immediately inform Mr. David of the offer. R. at 4; Ex. B, pg. 2. However, the number 36 does not appear anywhere in the plea offer and in fact, it states "[v]alid until Tuesday, January 17, 2017 at 10:00 p.m." Ex. D.

On the morning of January 17, before the offer expired, Marie attempted to call Long and check the status of the plea offer. Long purposely did not answer because he "[does not] like prosecutors" as he thinks "[t]hey are always mean to [him]." R. at 4; Ex. B, pg. 3. Long never communicated the offer to Mr. David during the 36-hour period it was valid. The offer then expired. On the morning of January 18, Mr. David was indicted on one count of 21 U.S.C. § 841. R. at 4.

On January 18, Marie emailed Long asking why he did not accept the plea offer and he stated that he read the time limitation incorrectly. R. at 4. After realizing that the offer expired because of his "pretty big mistake," Long contacted Mr. David and informed him of his error. R. at 4; Ex. B, pg. 3. Mr. David immediately fired Long and subsequently retained Michael Allen ("Allen") to represent him. R. at 4. Long was later disbarred for showing up drunk to trial. Ex. B, pg. 1.

On January 20, two days after the indictment, Allen emailed Marie requesting that she extend another plea offer to Mr. David. R. at 5. Allen indicated that Mr. David was "very enthusiastic about accepting the plea offer." Ex. E. However, Marie explained that extending another offer would be pointless because the only purpose for the original offer was to obtain the names of Mr. David's suppliers and any other offer would be futile. Marie stated that the government would not receive any benefit if it extended another plea offer to Mr. David because the suppliers were probably already tipped off about the arrest. R. at 5.

Mr. David testified that Long never informed him about the implications of pleading guilty and he did not find out about the plea deal until January 18, after it had expired. Ex. C, pg. 3. Prior to trial, Mr. David indicated that he would take the plea deal on various occasions. During the pre-trial evidentiary hearing, Marie asked him whether he would have taken the plea if he had been told about it in a timely matter, Mr. David responded with "[o]f course I would have taken it. One year in prison compared to risking at least ten at trial. It's a no brainer." Ex. C, pg. 3. Mr. David further stated that he would have given up his suppliers "in a heartbeat." Ex. C, pg. 3. When Marie asked him whether he would take the plea offer that day if it were offered, Mr. David responded that he would "[w]ithout a doubt" because "[he would] do anything to avoid the risk of trial." Ex. C, pg. 3. Mr. David was sentenced to 10 years in prison. R. at 14.

B. Procedural History

On the morning of January 18, 2017, Mr. David was indicted on one count of a controlled substance with intent to distribute in violation of 21 U.S.C. § 841. R. at 1. Mr. David filed a motion to suppress the evidence that McNown had obtained during the warrantless search of Mr. David's home. R. at 1. Mr. David also filed a motion to be re-offered the original favorable plea deal based upon Long's ineffective assistance of counsel. R. at 1.

The United States District Court for the Southern District of Staples denied both motions. R. at 1. The district court did not suppress the fruits of McNown's warrantless search of Mr. David's home concluding that the search met the community caretaking exception to the Fourth Amendment. The court concluded that the Sixth Amendment right to effective counsel extends to criminal proceedings prior to indictment. However, the district court did not re-offer the plea deal to Mr. David finding that he had not been prejudiced Long's ineffective assistance of counsel. R. at 12. Mr. David was sentenced to 10 years in prison. R. at 14.

Mr. David appealed both motions to the United States Court of Appeals for the Thirteenth Circuit. R. at 14. The Thirteenth Circuit affirmed the lower court's ruling regarding Mr. David's motion to suppress the fruits of McNown's warrantless search. The court also affirmed in part and denied in part the lower court's holding regarding Mr. David's motion to be re-offered the plea deal stating that the right to effective counsel does not attach prior to indictment. R. at 17.

The Thirteenth Circuit Judge Shaquille O'Neal wrote a dissenting opinion, arguing that both motions should have been granted. Judge O'Neal stated that "Mr. David has surely suffered from the majority's holding." Judge O'Neal reasoned that the community caretaking exception does not apply to homes and not only should the Sixth Amendment right to counsel attach during plea negotiations prior to an indictment but Mr. David did in fact suffer prejudice in this case. R. at 24. Mr. David subsequently filed a Writ of Certiorari which this Court granted.

SUMMARY OF ARGUMENT

This is a case about the numerous constitutional violations that Mr. David suffered through. First, McNown entered Mr. David's home and conducted an illegal, warrantless search in violation of the Fourth Amendment. Second, Mr. David's counsel allowed a favorable plea deal to lapse without even communicating the offer to Mr. David in violation of the Sixth Amendment right to the effective assistance of counsel.

I. The community caretaking exception to the Fourth Amendment warrant requirement does not extend to an individual's home. Rather, the Supreme Court, and the majority of circuit courts have consistently applied the community caretaking exception solely to automobiles. The exception only applies to automobiles because the expectation of privacy in homes is substantially greater than that of automobiles.

However, if this Court does find that the community caretaking exception to the Fourth Amendment applies to an individual's home, the standard was not met by McNown. McNown's reasons for entering Mr. David's home were not totally divorced from criminal investigation. In fact, McNown entered Mr. David's home under the pretext of the community caretaking exception when the real reason he entered Mr. David's home was to investigate potential criminal activity.

II. The Sixth Amendment guarantees the effective assistance of counsel during preindictment plea negotiations. All plea negotiations, pre and post indictment, are critical stages. Furthermore, once the government engages in plea negotiations, the government has shifted its focus from investigation to accusation.

Long did not provide Mr. David with the constitutional right to the effective assistance of counsel that the Sixth Amendment guarantees. Further, Mr. David satisfies the *Strickland* ineffective assistance of counsel test. Long's conduct was deficient where he failed to communicate the prosecution's plea offer to Mr. David. Mr. David suffered prejudice when he was convicted at trial and sentenced to an additional nine years in prison. The only appropriate remedy is to order the prosecution to re-offer the original plea deal.

Accordingly, this Court should reverse the Thirteenth Circuit's judgment and declare that both of Mr. David's motions should have been granted.

ARGUMENT

I. All Evidence Seized Must Be Suppressed Because Officer McNown Illegally Entered Mr. David's Home and Conducted a Warrantless and Illegal Search

The Fourth Amendment to the United States Constitution mandates that individuals have a right to be secure in their homes "against unreasonable searches and seizures." U.S. Const. amend. IV. This Constitutional right "shall not be violated" unless a valid warrant is issued upon probable cause. *Id.* According to the Supreme Court of the United States, warrantless searches are presumed

unreasonable, and thus, invalid. *Katz v. United States*, 389 U.S. 347, 357 (1967). Because the Fourth Amendment mandates a strong preference for warrants, the government has the burden of showing that one of the clearly defined exceptions to this rule applies, making the otherwise illegal search reasonable. *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984). In the case of *Cady v. Dombrowski*, this Court concluded that there is a community caretaking exception that may apply to warrantless searches of automobiles. 413 U.S. 433, 441-42 (1973). This Court defined community caretaking functions as those which are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441.

The government has not met its burden of proving that McNown's warrantless and thus, illegal, search is unreasonable and in violation of Mr. David's constitutional rights under the Fourth Amendment. McNown's warrantless search of Mr. David's home is not encompassed within the community caretaking exception because the exception is limited to automobiles and should not extend to homes. Mr. David, like all American citizens, has a constitutional right to be free from unreasonable government intrusions in the sanctity of his home. Additionally, even if this Court chooses to disregard precedent and determine that the exception could extend to homes, the function will not extend in this case because McNown's search was unreasonable. Therefore, Mr. David's conviction should be reversed because the evidence admitted against him at trial was obtained in violation of his Fourth Amendment rights and thus, should have been suppressed.

A. The Supreme Court Has Expressly Limited the "Community Caretaking" Exception to Automobiles

This Court has never addressed whether the community caretaking exception extends to homes. R. at 3, 16. In fact in *Cady*, this Court specifically ruled that the exception applies only to cars and not homes because there is a "constitutional difference" between the two. 413 U.S. at 439 (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)). This difference is based on the fact that

"the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." *Cady*, 413 U.S. at 441. This Court reasoned that police-citizen contact is substantially greater in cars "[b]ecause of the pervasive regulation of motor vehicles, which often calls on law enforcement officials to stop and examine cars, and because of the frequency with which cars break down or become involved in accidents on public roads." *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993). "As a result of this frequent contact, 'the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.'" *Id.* (quoting *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976)).

Following this Court's mandate, the Third, Seventh, Ninth, and Tenth Circuits limit the scope of the community caretaking exception to only searches of cars and do not extend it to searches of homes. *Ray v. Twp. Of Warren*, 626 F.3d 170, 175-77 (3d Cir. 2010). Additionally, this Court has long held that all citizens have a right to be free from unreasonable searches, especially in the "sanctity of [their] home[s]" and the illegal entry of official authority "is a serious threat to personal and family security." *Camara v. Mun. Court. Of. S.F.*, 387 U.S. 523, 530-31 (1976).

i. The Majority of Circuits Have Refused to Expand the Community Caretaking Exception Beyond Automobiles Because There is a Lesser Expectation of Privacy in Automobiles

"The majority of circuits have reasoned that the community caretaking doctrine announced in *Cady* is limited to searches of automobiles." *Ray*, 626 F.3d at 175. *See, e.g.*, *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994). In *Ray*, officials entered an individual's home without a warrant to search for a child who may have been in danger. *Id.* at 172. Agreeing with the majority of circuits, the Third Circuit concluded that "[t]he community caretaking doctrine cannot be used to justify warrantless searches of a home." 626 F.3d at 177.

Similarly, in *Erickson*, the Ninth Circuit held that officers' warrantless search of an individual's basement during the investigation of an unrelated burglary was unconstitutional. *Erickson*, 991 F.2d at 532. In the course of a burglary investigation, officers removed a black plastic sheet covering an open window in an individual's basement and found incriminating evidence. *Id.* at 530. The Ninth Circuit found that while investigating a burglary is part of the community caretaking function of officers, such investigation did not "itself justify a warrantless search of a private residence." *Id.* at 531. The court reasoned that *Cady* clearly turned on the "constitutional difference" between searching a car and a home, and thus, the exception could not apply to the officers' warrantless search of the individual's basement. *Id.* at 532.

Other courts have refused to extend the community caretaking exception to warrantless searches of not only homes, but other places, such as businesses, where police-citizen contact is also substantially lower. *See, e.g.*, *United States v. Pichany*, 687 U.S. 204, 209 (7th Cir. 1982). In *Pichany*, the Seventh Circuit held that the warrantless search of an individual's business in a warehouse for a victim of a burglary could not be justified under the exception. *Id.* at 209. There, officers searched an individual's unlocked warehouse while looking for a victim of an unrelated burglary and to investigate the burglary. *Id.* at 206. Though the officers were not investigating the individual's involvement in any crime, the court found that the search was not justified under the community caretaking exception, and the district court rightly suppressed the incriminating evidence. *Id.* at 205, 210. The court reasoned that the Supreme Court in *Cady* "intended to confine the holding to the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses." *Id.* at 209.

In this case, the lower courts incorrectly held that the community caretaking exception to the Fourth Amendment warrant requirement extends to warrantless searches of a home. R. at 8, 17. In

determining that McNown's illegal search of Mr. David's home was encompassed within the community caretaking exception, the lower courts in this case disregarded this Court's constitutional mandate in *Cady* clearly defining a "constitutional difference" between the search of a car and a home. The courts also disregarded the fact that a majority of the circuit courts have followed this Court's mandate in ruling that the exception does not extend to homes.

ii. Law Enforcement Cannot Use the Community Caretaking Exception as a Pretext to Intrude into the Sanctity of an Individual's Home

This Court has clearly indicated that "[t]he physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). "The warrantless search of a private residence strikes at the heart of the Fourth Amendment's protections." *Erickson*, 991 F.2d at 532. The Supreme Court has long held that all citizens have a right to be free from unreasonable searches especially in the "sanctity of [their] home[s]" and the illegal entry of official authority "is a serious threat to personal and family security." *Camara v. Mun. Court of. S.F.*, 387 U.S. 523, 530-31 (19767). "The right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

In *Cady*, this Court expressly distinguished searches of cars from searches of homes, stating that the search of a car may be reasonable "although the result might be opposite in a search of a home." 413 U.S. at 440. "That distinction recognizes that the sanctity of a home 'has been embedded in our tradition since the origins of the republic.'" *Ray*, 626 F.3d at 175 (quoting *Payton v. New York*, 445 U.S. 573, 601 (1980)).

Like any other citizen of the United States, Mr. David is entitled to be protected against the chief evil of an officer's illegal physical entry of his home. McNown did not have a warrant to

search Mr. David's home and Mr. David has a right to be free from all unreasonable searches in the sanctity of his home. It is clear that Mr. David enjoys his privacy because he lives in a private gated community where he typically does not allow visitors and in fact, he instructed the security guard at the front entrance to tell visitors he is away. R. at 2; Ex. C pg. 2. At the time of the search, all of Mr. David's doors were shut, including the door to his bedroom where McNown found him. R. at 3. Mr. David was enjoying the reasonable security and freedom from surveillance not only in the sanctity of his home, but in his bedroom. Therefore, McNown's warrantless and illegal search of Mr. David's home was a violation of Mr. David's constitutional rights and the evidence found while Mr. David was enjoying the sanctity and privacy of his home should be suppressed.

B. If the Community Caretaking Exception Extends to Warrantless Searches of an Individual's Home, McNown's Search Was Unreasonable Because He Was Investigating a Potential Crime

i. McNown's Search of Mr. David's Home Was Not Totally Divorced from Investigating Potential Criminal Activity

McNown's warrantless search of Mr. David's home was an unconstitutional violation of Mr. David's Fourth Amendment rights because the search is not encompassed within the community caretaking exception and it was unreasonable. Though the majority of the circuit courts hold that the community caretaking exception applies only to automobile searches, there is some confusion among a few other circuits as to whether the exception extends to warrantless searches of homes. *Ray*, 626 F.3d at 175-76. However, these few circuits do not only rely on the community caretaking exception to uphold warrantless searches of homes. *Id.* at 176. Instead, the courts "apply what appears to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaking role." *Id.*; *see, e.g.*, *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006) (the community caretaking exception may apply to a

warrantless search of a home if the officer had a "reasonable belief that an emergency exists requiring his or her attention").

The Sixth Circuit has noted that officers may enter a home without a warrant if their role as community caretakers is coupled with "typical exigent circumstances" such as the individual's diminished expectation of privacy. *United States v. Rohrig*, 98 F.3d 1506, 1521 (6th Cir. 1996). In *Rohrig*, officers entered a home to abate a significant noise nuisance after a neighbor's complaint. *Id.* at 1509. The court there held that the warrantless entry was permitted under the community caretaking exception because a typical exigent circumstance existed. *Id.* at 1521. The court found that the individual's expectation of privacy in his home was diminished when he projected a loud and disruptive noise thereby diminishing his neighbors' interests in maintaining the privacy of their homes. *Id.* at 1522.

Despite its holding in *Rohrig*, the Sixth Circuit has subsequently questioned whether the case actually extended the community caretaking exception to homes. *United States v. Williams*, 354 F.3d 497, 508 (6th Cir. 2003). In *Williams*, officers found evidence of narcotics incriminating an individual while searching an individual's home for a water leak. *Id.* at 501. The Sixth Circuit concluded that its decision in *Rohrig* was "fact-specific" and could not be broadly applied to other fact patterns. *Id.* At 507-08. The community caretaking exception did not apply in *Williams* because the police were suspicious of criminal activity prior to entering the home. *Id.* Citing *Cady*'s "totally divorced" standard, the court further noted that "despite references to the doctrine in *Rohrig*, [it is] doubt[ful] that community caretaking will generally justify warrantless entries into private homes." *Id.* at 508.

As applied in the Sixth and Eight Circuits, the community caretaking exception cannot justify McNown's warrantless entry of Mr. David's home. The parties and lower courts have all conceded

that McNown's warrantless entry in this case was not done due to an exigent circumstance or to render emergency aid, as the Sixth and Eight Circuits require. R. at 7, 15. Also, the Sixth Circuit's "fact-specific" holding in *Rohrig* does not apply here because McNown's entry into Mr. David's home was not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441.

Similar to the facts in *Williams*, McNown was suspicious of criminal activity before entering Mr. David's home. McNown's suspicion started to develop when Mr. David did not attend the 7:00 a.m. mass and a church attendee indicated that he saw Mr. David at a bar the night before. R. at 2. McNown's suspicion grew when he arrived at Mr. David's private gated community because he "didn't expect a minister to live in such an expensive area," and in "one of the nicest gated communities in town." Ex. A, pg. 3. This suspicion was further enhanced when McNown saw a black Cadillac SUV leaving the complex with Golden State license plates. Based on his experience, McNown knew that type of car was typically driven by drug dealers. R. at 2. McNown's suspicions grew even further when he heard loud music coming from inside Mr. David's home. McNown's suspicion was then solidified when he peeked inside Mr. David's window and thought it was unusual that *The Wolf of Wall Street* was playing on the TV. A movie related to drug activity and one which McNown knew "revolves around the seven deadly sins." R. at 2, Ex. A. at 4. McNown's actions were not as a community caretaker because all of these facts taken together, indicate that McNown had a suspicion that criminal activity could be taking place inside of Mr. David's home.

ii. McNown's Search Was Presumptively Unreasonable

Even if this Court finds that McNown's actions meet *Cady*'s totally divorced standard, his search is unconstitutional and in violation of Mr. David's Fourth Amendment rights because it was

unreasonable. According to this Court, "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady*, 413 U.S. at 439. "In determining whether a search is reasonable within the meaning of the Fourth Amendment, the governmental interest motivating the search must be balanced against the intrusion on the individual's Fourth Amendment interests." *Erickson*, 991 F.2d at 531; *see also*, *Rohrig*, 98 F.3d at 1522 (citing *Katz*, 389 U.S. at 351; *United States v. Santana*, 427 U.S. 38, 42 (1976)) (the Fourth Amendment does not protect what a person knowingly exposes to the public and an individual's "expectation of privacy diminishes beyond his doorway"). *See, e.g.*, *Williams*, 354 F.3d at 508 (The Sixth Circuit found it relevant that the water leak could not have damaged other residencies or disturbed others and thus, maintaining the individual's privacy interest in his home did not diminish anyone else's privacy interests).

To balance these interests, a court should consider the facts and circumstances surrounding the warrantless search at issue. *Cady*, 413 U.S. at 440. Courts look at the function performed by the officer as a requisite of the community caretaking exception. *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009). Importantly, an officer performing a community caretaking role is expected to act in a way to "preserve and protect *public safety*." *United States v. Smith*, 522 F.3d 305, 313 (3d Cir. 2008) (quoting *United States v. Rodriguez-Morales*, 929F.2d 780, 784-85 (1st Cir. 1991)) (emphasis added). Another yet, not dispositive factor, is the officer's intent when entering a home because an officer may use the exception as pretext to enter. *Quezada*, 448 F.3d at 1007.

It is clear that Mr. David's individual interest in maintaining the privacy of his home is a heavier constitutional interest when balanced against McNown's motivation in searching it. Like every American, Mr. David has a strong and reasonable interest in protecting his individual privacy, especially in his home. Though there was no indication that Mr. David was not safe, McNown took it upon himself to intrude into Mr. David's home without any consent while he was

on duty. McNown's motivation in entering and searching Mr. David's home was to check up on Mr. David and bring him some tea. R. at 2, Ex. A. at 3. While this is a nice gesture, it does not justify an illegal entry and search of a citizen's home.

Mr. David's expectation of privacy could not have been diminished in any way because he did not purposely expose anything to the public nor was he damaging or disturbing anyone else or their property. Mr. David was in the privacy of his own home, in his own bedroom, with every door closed. R. at 3. Like in *Williams*, maintaining Mr. David's privacy in his own home did not diminish anyone else's privacy interests. There is no evidence in the record that whatever Mr. David was doing in the privacy of his home, let alone his own bedroom, upstairs with the door closed, was disturbing anyone else or their property.

Checking up on someone and bringing them tea is not a community caretaking function. The only community concern here is the fact that church attendees were concerned for Mr. David's safety. However, this concern alone is not enough to rise to the level of a community caretaking action. McNown was not acting in a way that was preserving and protecting public safety when he entered Mr. David's home. While it could be said that McNown was trying to protect Mr. David, it is difficult to see how bringing someone tea could be of any sort of protection. Though McNown's alleged intent was to check up on Mr. David, such intent is clouded because it is reasonable to determine that McNown had a suspicion that criminal activity was taking place in Mr. David's home. Therefore, McNown's warrantless, illegal entry and search of Mr. David's home was unreasonable.

II. Mr. David is Entitled to the Effective Assistance of Counsel During Preindictment Plea Negotiations Because the Sixth Amendment Guarantees Counsel During All Criminal Proceedings

The Sixth Amendment guarantees the "Assistance of Counsel" to every individual during all "criminal prosecutions." U.S. Const. amend. VI. The right to counsel is not merely limited to the trial itself. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). Rather, the Sixth Amendment has been extended to certain pretrial proceedings that "might appropriately be considered parts of the trial itself." *United States v. Moody*, 206 F.3d 609, 613 (6th Cir. 2000) (citations omitted). The Sixth Amendment right to counsel applies during and throughout plea negotiations. *Missouri v. Frye*, 566 U.S. 134, 143 (2012).

Defense counsel must communicate all formal plea offers to the accused. *Id.* at 145. Where defense counsel fails to communicate such offers, the accused's right to effective assistance of counsel is violated. *Id.* Counsel's performance is presumed deficient and the accused is entitled to the appropriate remedy where there is a "reasonable probability" the accused would have accepted the plea. *Id.* at 147. The only appropriate remedy available is to order the prosecution to re-offer the plea deal. *Lafler v. Cooper*, 566 U.S. 156, 170 (2012).

A. The Assistance of Counsel is Necessary During Preindictment Plea Negotiations Because the Unrepresented Accused Cannot Adequately Protect Himself Against the Expert Adversary

Every American is guaranteed the effective assistance of counsel during all criminal proceedings. U.S. Const. amend. VI. Historically, the right to counsel has evolved to "meet the challenges presented" by an ever-changing legal system. *United States v. Ash*, 413 U.S. 300, 310 (1973) (holding that the Sixth Amendment applies to certain pretrial events). This Court has held, time and time again, that the Sixth Amendment assures the right, to all that need it, of the "guiding hand of counsel." *Id.* at 307-08.

i. Preindictment Plea Negotiations are a Critical Stage Because Counsel is Necessary to Protect the Accused from an Overbearing Prosecution

The right to counsel "attaches" during all "critical stages" of a criminal prosecution. *United States v. Wade*, 388 U.S. 218, 226 (1968) (holding that a postindictment lineup is a critical stage). A critical stage is "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." *Id.* The hallmark of a critical stage is "not its formal resemblance to a trial" but whether the proceeding is adversarial in nature. *United States v Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003) (holding that plea negotiations are adversarial and thus the accused is entitled to the effective assistance of counsel). A critical stage is any juncture in the proceeding during which the results of the confrontation may make the trial a mere formality. *Wade*, 388 U.S. at 224. Furthermore, during a critical stage, the unrepresented accused, is presumed unable to make critical decisions. *Lafler*, 566 U.S. at 165.

Recently, the Supreme Court held that plea negotiations are a critical stage and therefore the accused is entitled to the assistance of counsel throughout. *Frye*, 566 U.S. at 143 (2012). The Court made no reference to whether the negotiations came before or after formal charges were filed. *Id.*

Approximately 95% of all federal prosecutions are resolved through plea bargaining. *See* Devers, *Plea and Charge Bargaining: Research Summary*, Bureau of Justice Assistance, U.S. Department of Justice (2011), available at https://www.bja.gov/ Publications/PleaBargaining-ResearchSummary.pdf. More often than not, the plea negotiation stage is the only stage during which the assistance of counsel is even necessary. *Frye*, 566 U.S. at 142-143. Without the assistance of counsel during plea negotiations, the accused may be ignorant of contemplated defenses as well as the ramifications of proceeding to trial. *Hamilton v. Alabama*, 368 U.S. 52, 56 (1961) ("[o]nly the presence of counsel [enables the] accused to know all the defenses available to him."). Moreover, without the aid of defense counsel, the prosecutor, intentionally or not, may

exploit the accused's lack of knowledge and experience, in order to induce him or her to accept a less than favorable plea deal. *See generally Maine v. Moulton*, 474 U.S. 159, 176 (1985) ("[K]nowing exploitation by the [prosecutor] of an opportunity to confront the accused without counsel being present is…a breach of the [Sixth Amendment].").

Preindictment plea negotiations are a critical stage. *See Chrisco v. Shafran*, 507 F. Supp. 1312, 1319 (D. Del. 1981) (recognizing the possibility that the right to counsel attaches to preindictment plea negotiations); *United States v. Busse*, 814 F. Supp. 760, 763 (E.D. Wis. 1993) (same). There are no differences between pre and post indictment plea negotiations and as such, must be treated the same. *United States v. Sikora*, 635 F.2d 1175, 1181 (6th Cir. 1985) (Wiseman, J., dissenting).

This Court's ruling in *United States v. Gouveia* does not compel a contrary conclusion. 467 U.S. 180 (1984). There, the Court held that the Sixth Amendment right to counsel does not attach until the "initiation of adversary judicial criminal proceedings." *Id.* at 190. Specifically, this Court held that the government must file a formal charge for the right to counsel to attach. *Id.* However, this Court has further noted that the Sixth Amendment must evolve to "meet the challenges presented" by an ever-changing legal system. *Ash*, 413 U.S. at 310. The evolution of the Sixth Amendment right to counsel, in the area of plea bargaining, has clearly begun with the recent decisions in *Lafler* and *Frye*. *Lafler*, 566 U.S. at 165; *Frye*, 566 U.S. at 143.

ii. The Right to Counsel is Guaranteed Whenever the Government's Focus Shifts from Investigation to Accusation in Order to Protect the Accused from Involuntarily Forfeiting the Right to Trial

The Sixth Amendment guarantees the right to counsel where the accused is confronted with the "procedural system," an "expert adversary," or both. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999) (citations omitted) (holding that the right to counsel attached where the accused had been arrested for murder, incarcerated for a week, and retained private

counsel, notwithstanding the absence of a formal charge). The accused is confronted with the procedural system or expert adversary when the government's focus shifts from investigation to accusation. *Escobedo v. Illinois*, 378 U.S. 478, 492 (1964) ("[I]t would exalt form over substance to make the right to counsel…depend on whether at the time of the interrogation, the authorities had secured a formal indictment.").

The government's shift from investigation to accusation is a fact-specific determination. *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) ("[T]he right to counsel might conceivably attach before any formal charges are made."). The determination turns on whether the government crosses the constitutional divide from "fact-finder to adversary." *United States v. Larkin*, 978 F.3d 964, 969 (7th Cir. 1992). When the government crosses the divide from mere fact-finder to expert adversary, the Sixth Amendment guarantees the right to counsel. *Id.*

Every plea negotiation, pre and post indictment, is adversarial in nature. *Leonti*, 326 F.3d at 1117. During preindictment plea negotiations, the accused is faced with an "expert adversary," i.e. the prosecutor. *Matteo*, 171 F.3d at 892. The confrontation between the unrepresented accused and the experienced prosecutor can–and almost certainly will–make the ensuing trial a mere formality. *Id.* An unrepresented accused does not possess the requisite knowledge and training to successfully bargain with "experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). Without the assistance of counsel at this stage, the accused runs the risk of surrendering, involuntarily, his most fundamental right, the right to a trial. *Moody*, 206 F.3d at 615.

When the government engages in preindictment plea negotiations, the focus of the inquiry has clearly crossed the boundary from investigation to accusation. *Escobedo*, 378 U.S. at 492. During every plea negotiation, the full power of the "procedural system" bears down on the accused. *Matteo,* 171 F.3d at 892. It is at this point that the accused finds himself bargaining with

"experienced and learned counsel." *Zerbst*, 304 U.S. at 462-63. Once the government has crossed that line from "fact-finder to adversary," the accused needs the "guiding hand of counsel" more than ever. *Roberts*, 48 F.3d at 1291; *Ash*, 413 U.S. at 307-08.

The moment the government engages in plea bargaining, the government has crossed the divide from fact-finder to adversary. *Leonti*, 326 F.3d at 1117. The government is no longer investigating a possible crime but, rather the government is accusing that individual of committing that crime. *Shafran*, 507 F. Supp. at 1319. At this point, the government has committed itself to prosecute. *Id.*

If this Court continues to deny the right to the assistance of counsel in a situation where counsel is so obviously necessary, based upon an arbitrary line in the sand, that would be the epitome of "exalting form over substance." *Escobedo*, 378 U.S. at 492. Without this Court guaranteeing the assistance of counsel at this stage, the government will be able to circumvent the Sixth Amendment by simply delaying formal indictment. *Turner v. United States*, 885 F.3d 949, 983 (6th Cir. 2018) (Stranch, J., dissenting).

B. Mr. David Involuntarily Rejected the Prosecution's Plea Offer Resulting in an Additional Nine-Years of Jail Time

The Sixth Amendment right to counsel guarantees the *effective* assistance of counsel. *Frye*, 566 U.S. at 138. Every single person accused of a crime in the United States is guaranteed a "reasonably competent attorney." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Where the attorney's conduct cannot even be considered reasonably competent, and the defendant is then convicted of a crime, the resulting conviction is unreliable. *Id.* at 695. The conviction must be reversed. *Id.* Reversal is required where the offending attorney's conduct is so deficient that (1) the errors made by counsel are "so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment" and (2) "the deficient performance prejudiced

the defendant." *Id.* at 687. The specific remedy for a Sixth Amendment violation must "neutralize the taint" of the constitutional violation. *United States v. Morrison*, 449 U.S. 369, 365 (1981). The remedy must be "tailored to the injury" and "should not unnecessarily infringe on competing interests. *Id.* at 364.

Defense counsel has an affirmative duty to communicate formal plea offers to the accused. *Frye*, 566 U.S. at 145 (affirming an ineffective assistance of counsel claim where defense counsel failed to communicate the plea offer to the defendant). In this situation, defense counsel's performance is deemed *per se* ineffective. *Id.* The accused must then demonstrate a "reasonable probability" that he or she would have accepted the earlier plea had effective assistance of counsel been provided. *Id.* at 147.

The accused suffers prejudice where the subsequent trial results in a "conviction on a more serious charge or the imposition of a more severe sentence." *Cooper*, 566 U.S. at 168 ("any amount of [additional] jail time has Sixth Amendment significance."). The analysis now becomes a fact-specific inquiry into whether the accused would have accepted the plea agreement. *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991) (holding that "self-serving" statements after conviction were insufficient to prove prejudice).

The circumstances surrounding the rejection of the plea offer must be considered in order to determine whether the accused would have accepted the plea. *United States v. Day*, 969 F.2d 39, 47 (3d Cir. 1992). The court will consider statements made by the accused, particularly statements made prior to trial, as well as any interactions between the accused and the deficient attorney. *Id.* Furthermore, courts will look at the age of the defendant and the possible sentence ranges. *Id.* at 45 (holding that a fifty-five-year-old man would "think twice before risking over [5,000] extra days in jail just to gain the chance of acquittal of a crime that he knew that he had committed.").

Courts will presume that an elderly defendant would accept a favorable plea deal over risking a larger sentence and potentially dying in prison. *Id.*

The Supreme Court has rejected, over and over, that a "fair trial remedies errors not occurring at trial." *Cooper*, 566 U.S. at 165-66 (collecting cases). The only appropriate remedy is to order the prosecution to re-offer the plea agreement. *Id.* at 174. Only then will the district court be able to formally allocute the guilty plea and determine the appropriate sentence available to the accused. *Id.* 174-75. Further, in determining the new sentence, the district court can consider, "any circumstances that have changed since the plea offer was made, including, for example, information revealed at trial, as well as any legitimate (non-vindictive) reasons why the prosecution may no longer favor the plea agreement." *Day*, 969 F.2d at 47.

Here, as the Thirteenth Circuit held, there is no question that Keegan Long's representation was constitutionally defective. R. at 11. Long did not communicate the favorable plea deal to Mr. David as required by this Court. *Frye*, 566 U.S. at 145. Furthermore, Long was drunk at the time he accepted representation, at the time he received the favorable plea offer, and during the entire pendency of his short stint as Mr. David's attorney. R. at 4; Ex. B. Long's representation could not even begin to be considered "effective." *Strickland*, 466 U.S. at 687.

The second Long allowed the prosecution's plea deal to lapse, Mr. David suffered extreme prejudice. *Id.* Mr. David faced a single year in prison and through the incompetence of Long, he was sentenced to ten years. R. at 4, 14. An additional nine years of prison time is more than sufficient to make out a showing of prejudice. *Cooper*, 566 U.S. at 168.

If Mr. David was aware of the favorable plea offer, he would have accepted it. Ex. C. Mr. David raised the issue of ineffective assistance of counsel and the involuntary rejection of the plea offer *prior* to trial. Ex. C; *Day*, 969 F.2d at 47. Mr. David did not wait until he was convicted at

trial to affirmatively state that he would have accepted the plea offer. Ex. C, pg. 3. In fact, during a pre-trial evidentiary hearing, Mr. David unequivocally stated, "[o]f course I would have taken [the plea offer]. One year in prison as compared to risking at least ten years at trial. It's a no brainer." Further, Mr. David stated that he would have no issue giving up his suppliers in return for a reduced sentence. Ex. C, pg. 3. Moreover, Allen, at the very first chance he was able, emailed the prosecution and informed Marie of Mr. David's willingness to cooperate and accept the previously extended plea offer. Ex. E. Mr. David's pre-trial statements coupled with Allen's email are more than enough to establish a "reasonable probability" that Mr. David would have accepted the plea agreement had he been given the chance. *Frye*, 566 U.S. at 147.

Furthermore, Mr. David is a 72-year-old man and there is a strong possibility that he would die in prison if he received a ten-year prison. Sherry L. Murphy, Et Al., *Deaths: Final Data for 2015*, 66 National Vital Statistics Report, 1, 1 (2017) (U.S. life expectancy is 78.8 years). A one-year prison sentence allows Mr. David to serve his time and continue on with the remainder of his life. *Day*, 969 F.2d at 45. Again, pointing to the "reasonable probability" Mr. David would have accepted the plea deal. *Frye*, 566 U.S. at 147.

Similarly, in *United States v. Wilson*, the defendant, a fifty-six-year-old man, was offered a plea and initially stated that he could not "do six years." 719 F. Supp. 2d 1260, 1273 (D. Or. 2010). At the time the defendant made that statement he did not know that he was facing up to twenty years in prison. *Id.* The court held that because of the defendant's age, the potential sentence, his willingness to cooperate with the government, and his statements that he would have accepted the plea deal, there was a reasonable probability he would have accepted the plea offer. *Id.* at 1275. Here, Mr. David is a 72-year-old man who initially stated he would not give up his suppliers. R.

at 3. However, after consulting with a sober attorney, Mr. David stated, during a pretrial hearing, that he would gladly cooperate with the government and accept the plea deal. Ex. C.

The only remedy available to Mr. David is to order the prosecution to re-offer the plea agreement. *Lafler*, 566 U.S. at 171. Re-offering the plea agreement is the only remedy that will cure the constitutional violation and fairly balance the competing interests of Mr. David and the prosecution. *Id.* The plea deal would still be contingent upon Mr. David providing information that led to the arrest of at least one cocaine supplier; providing the government with a substantial benefit. Ex. D. Only after the plea deal has been offered, can the district court craft the appropriate sentence. *Day*, 969 F.2d at 47. The district court must then consider the substantial harm that Mr. David has already suffered, his statements prior to trial, the deficiency of counsel, as well as Mr. David's continued willingness to assist the prosecution. *Id.*

Johnson v. Duckworth does not compel a contrary conclusion. 79 F.2d 898 (7th Cir. 1986). There, the defendant's attorney rejected a plea agreement without the defendant's input. *Id.* at 899. The court held that the defendant could not make a showing of prejudice because the record was devoid of any indication the defendant would have accepted the plea deal had he been given the chance. *Id*. Further, the defendant never indicated, prior to his conviction, that he was dissatisfied with his attorney or that he wanted to accept the plea agreement. *Id.* at 902. Here, there are numerous indications throughout the record that Mr. David wanted to accept the plea agreement. Ex. C; Ex. E. Mr. David empathetically stated during a pre-trial evidentiary hearing that he was dissatisfied with his attorney, whom he fired prior to trial, and that he would have accepted the plea deal if given the chance. Ex. C, pg. 3. The statements were made prior trial, prior to conviction. Ex. C.

This Court should order the prosecution to re-offer the favorable plea deal because reoffering the plea is the only remedy that will rectify the Sixth Amendment violation suffered by Mr. David. Further, this remedy will put the government in the same position it would have been in, absent Long's deficient conduct.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

TEAM P11
Counsel for Petitioner

October 21, 2018

CONSTITUTIONAL PROVISIONS INVOLVED

A-1

U.S. Const. amend. IV

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. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATUTORY PROVISIONS INVOLVED

A-3

21 U.S.C. § 841

(a) Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally—
  (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
  (2) to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

(b) Penalties. Except as otherwise provided in section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861], any person who violates subsection (a) of this section shall be sentenced as follows:
  (1)
    (A) In the case of a violation of subsection (a) of this section involving—
      (i) 1 kilogram or more of a mixture or substance containing a detectable amount of heroin;
      (ii) 5 kilograms or more of a mixture or substance containing a detectable amount of—
        (I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;
        (II) cocaine, its salts, optical and geometric isomers, and salts of isomers;
        (III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or
        (IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);
      (iii) 280 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;
      (iv) 100 grams or more of phencyclidine (PCP) or 1 kilogram or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);
      (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);
      (vi) 400 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 100 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;
      (vii) 1000 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 1,000 or more marihuana plants regardless of weight; or
      (viii) 50 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 500 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its

isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 10,000,000 if the defendant is an individual or $ 50,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 20,000,000 if the defendant is an individual or $ 75,000,000 if the defendant is other than an individual, or both. If any person commits a violation of this subparagraph or of section 409, 418, 419, or 420 [21 USCS § 849, 859, 860, or 861] after two or more prior convictions for a felony drug offense have become final, such person shall be sentenced to a mandatory term of life imprisonment without release and fined in accordance with the preceding sentence. Notwithstanding section 3583 of title 18, any sentence under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 5 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 10 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(B) In the case of a violation of subsection (a) of this section involving—

(i) 100 grams or more of a mixture or substance containing a detectable amount of heroin;

(ii) 500 grams or more of a mixture or substance containing a detectable amount of—

(I) coca leaves, except coca leaves and extracts of coca leaves from which cocaine, ecgonine, and derivatives of ecgonine or their salts have been removed;

(II) cocaine, its salts, optical and geometric isomers, and salts of isomers;

(III) ecgonine, its derivatives, their salts, isomers, and salts of isomers; or

(IV) any compound, mixture, or preparation which contains any quantity of any of the substances referred to in subclauses (I) through (III);

(iii) 28 grams or more of a mixture or substance described in clause (ii) which contains cocaine base;

(iv) 10 grams or more of phencyclidine (PCP) or 100 grams or more of a mixture or substance containing a detectable amount of phencyclidine (PCP);

(v) 1 gram or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD);

(vi) 40 grams or more of a mixture or substance containing a detectable amount of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide or 10 grams or more of a mixture or substance containing a detectable amount of any analogue of N-phenyl-N- [1-(2-phenylethyl)-4-piperidinyl] propanamide;

(vii) 100 kilograms or more of a mixture or substance containing a detectable amount of marihuana, or 100 or more marihuana plants regardless of weight; or

(viii) 5 grams or more of methamphetamine, its salts, isomers, and salts of its isomers or 50 grams or more of a mixture or substance containing a detectable amount of methamphetamine, its salts, isomers, or salts of its isomers;

such person shall be sentenced to a term of imprisonment which may not be less than 5 years and not more than 40 years and if death or serious bodily injury results from the use of such substance shall be not less than 20 years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 5,000,000 if the defendant is an individual or $ 25,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 10 years and not more than life imprisonment and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 8,000,000 if the defendant is an individual or $ 50,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposed under this subparagraph shall, in the absence of such a prior conviction, include a term of supervised release of at least 4 years in addition to such term of imprisonment and shall, if there was such a prior conviction, include a term of supervised release of at least 8 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under this subparagraph. No person sentenced under this subparagraph shall be eligible for parole during the term of imprisonment imposed therein.

(C) In the case of a controlled substance in schedule I or II, gamma hydroxybutyric acid (including when scheduled as an approved drug product for purposes of section 3(a)(1)(B) of the Hillory J. Farias and Samantha Reid Date-Rape Drug Prohibition Act of 1999 [21 USCS § 812note]), or 1 gram of flunitrazepam, except as provided in subparagraphs (A), (B), and (D), such person shall be sentenced to a term of imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not less than twenty years or more than life, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $

1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 30 years and if death or serious bodily injury results from the use of such substance shall be sentenced to life imprisonment, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 2,000,000 if the defendant is an individual or $ 10,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 3 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 6 years in addition to such term of imprisonment. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person sentenced under the provisions of this subparagraph which provide for a mandatory term of imprisonment if death or serious bodily injury results, nor shall a person so sentenced be eligible for parole during the term of such a sentence.

(D) In the case of less than 50 kilograms of marihuana, except in the case of 50 or more marihuana plants regardless of weight, 10 kilograms of hashish, or one kilogram of hashish oil, such person shall, except as provided in paragraphs (4) and (5) of this subsection, be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Notwithstanding section 3583 of title 18, any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 4 years in addition to such term of imprisonment.

(E)

(i) Except as provided in subparagraphs (C) and (D), in the case of any controlled substance in schedule III, such person shall be sentenced to a term of imprisonment of not more than 10 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 15 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,500,000 if the defendant is other than an individual, or both.

(ii) If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of

imprisonment of not more than 20 years and if death or serious bodily injury results from the use of such substance shall be sentenced to a term of imprisonment of not more than 30 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 1,000,000 if the defendant is an individual or $ 5,000,000 if the defendant is other than an individual, or both.

(iii) Any sentence imposing a term of imprisonment under this subparagraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least 2 years in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a term of supervised release of at least 4 years in addition to such term of imprisonment.

(2) In the case of a controlled substance in schedule IV, such person shall be sentenced to a term of imprisonment of not more than 5 years, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 250,000 if the defendant is an individual or $ 1,000,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 10 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 500,000 if the defendant is an individual or $ 2,000,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph shall, in the absence of such a prior conviction, impose a term of supervised release of at least one year in addition to such term of imprisonment and shall, if there was such a prior conviction, impose a special parole term of at least 2 years in addition to such term of imprisonment.

(3) In the case of a controlled substance in schedule V, such person shall be sentenced to a term of imprisonment of not more than one year, a fine not to exceed the greater of that authorized in accordance with the provisions of title 18, United States Code, or $ 100,000 if the defendant is an individual or $ 250,000 if the defendant is other than an individual, or both. If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment of not more than 4 years, a fine not to exceed the greater of twice that authorized in accordance with the provisions of title 18, United States Code, or $ 200,000 if the defendant is an individual or $ 500,000 if the defendant is other than an individual, or both. Any sentence imposing a term of imprisonment under this paragraph may, if there was a prior conviction, impose a term of supervised release of not more than 1 year, in addition to such term of imprisonment.

(4) Notwithstanding paragraph (1)(D) of this subsection, any person who violates subsection (a) of this section by distributing a small amount of marihuana for no remuneration shall be treated as provided in section 404 [21 USCS § 844] and section 3607 of title 18, United States Code.

(5) Any person who violates subsection (a) of this section by cultivating or manufacturing a controlled substance on Federal property shall be imprisoned as provided in this subsection and shall be fined any amount not to exceed—

(A) the amount authorized in accordance with this section;

(B) the amount authorized in accordance with the provisions of title 18, United States Code;
(C) $ 500,000 if the defendant is an individual; or
(D) $ 1,000,000 if the defendant is other than an individual; or both.

(6) Any person who violates subsection (a), or attempts to do so, and knowingly or intentionally uses a poison, chemical, or other hazardous substance on Federal land, and, by such use—
(A) creates a serious hazard to humans, wildlife, or domestic animals,
(B) degrades or harms the environment or natural resources, or
(C) pollutes an aquifer, spring, stream, river, or body of water,
shall be fined in accordance with title 18, United States Code, or imprisoned not more than five years, or both.

(7) Penalties for distribution.
(A) In general. Whoever, with intent to commit a crime of violence, as defined in section 16 of title 18, United States Code (including rape), against an individual, violates subsection (a) by distributing a controlled substance or controlled substance analogue to that individual without that individual's knowledge, shall be imprisoned not more than 20 years and fined in accordance with title 18, United States Code.
(B) Definition. For purposes of this paragraph, the term "without that individual's knowledge" means that the individual is unaware that a substance with the ability to alter that individual's ability to appraise conduct or to decline participation in or communicate unwillingness to participate in conduct is administered to the individual.

(c) Offenses involving listed chemicals. Any person who knowingly or intentionally—
(1) possesses a listed chemical with intent to manufacture a controlled substance except as authorized by this title;
(2) possesses or distributes a listed chemical knowing, or having reasonable cause to believe, that the listed chemical will be used to manufacture a controlled substance except as authorized by this title; or
(3) with the intent of causing the evasion of the recordkeeping or reporting requirements of section 310 [21 USCS § 830], or the regulations issued under that section, receives or distributes a reportable amount of any listed chemical in units small enough so that the making of records or filing of reports under that section is not required;
shall be fined in accordance with title 18, United States Code, or imprisoned not more than 20 years in the case of a violation of paragraph (1) or (2) involving a list I chemical or not more than 10 years in the case of a violation of this subsection other than a violation of paragraph (1) or (2) involving a list I chemical, or both.

(d) Boobytraps on Federal property; penalties; "boobytrap" defined.
(1) Any person who assembles, maintains, places, or causes to be placed a boobytrap on Federal property where a controlled substance is being manufactured, distributed, or dispensed shall be sentenced to a term of imprisonment for not more than 10 years or fined under title 18, United States Code, or both.
(2) If any person commits such a violation after 1 or more prior convictions for an offense punishable under this subsection, such person shall be sentenced to a term of imprisonment of not more than 20 years or fined under title 18, United States Code, or both.

(3) For the purposes of this subsection, the term "boobytrap" means any concealed or camouflaged device designed to cause bodily injury when triggered by any action of any unsuspecting person making contact with the device. Such term includes guns, ammunition, or explosive devices attached to trip wires or other triggering mechanisms, sharpened stakes, and lines or wires with hooks attached.

(e) Ten-year injunction as additional penalty. In addition to any other applicable penalty, any person convicted of a felony violation of this section relating to the receipt, distribution, manufacture, exportation, or importation of a listed chemical may be enjoined from engaging in any transaction involving a listed chemical for not more than ten years.

(f) Wrongful distribution or possession of listed chemicals.

(1) Whoever knowingly distributes a listed chemical in violation of this title (other than in violation of a recordkeeping or reporting requirement of section 310 [21 USCS § 830]) shall, except to the extent that paragraph (12), (13), or (14) of section 402(a) [21 USCS § 842(a)] applies, be fined under title 18, United States Code, or imprisoned not more than 5 years, or both.

(2) Whoever possesses any listed chemical, with knowledge that the recordkeeping or reporting requirements of section 310 [21 USCS § 830] have not been adhered to, if, after such knowledge is acquired, such person does not take immediate steps to remedy the violation shall be fined under title 18, United States Code, or imprisoned not more than one year, or both.

(g) Internet sales of date rape drugs.

(1) Whoever knowingly uses the Internet to distribute a date rape drug to any person, knowing or with reasonable cause to believe that—

(A) the drug would be used in the commission of criminal sexual conduct; or

(B) the person is not an authorized purchaser;

shall be fined under this title or imprisoned not more than 20 years, or both.

(2) As used in this subsection:

(A) The term "date rape drug" means—

(i) gamma hydroxybutyric acid (GHB) or any controlled substance analogue of GHB, including gamma butyrolactone (GBL) or 1,4-butanediol;

(ii) ketamine;

(iii) flunitrazepam; or

(iv) any substance which the Attorney General designates, pursuant to the rulemaking procedures prescribed by section 553 of title 5, United States Code [5 USCS § 553], to be used in committing rape or sexual assault.

The Attorney General is authorized to remove any substance from the list of date rape drugs pursuant to the same rulemaking authority.

(B) The term "authorized purchaser" means any of the following persons, provided such person has acquired the controlled substance in accordance with this Act:

(i) A person with a valid prescription that is issued for a legitimate medical purpose in the usual course of professional practice that is based upon a qualifying medical relationship by a practitioner registered by the Attorney General. A "qualifying medical relationship" means a medical relationship that exists when the practitioner has conducted at least 1 medical evaluation with the authorized purchaser in the physical presence of the practitioner, without regard to whether portions of the evaluation are conducted by other

heath [health] professionals. The preceding sentence shall not be construed to imply that 1 medical evaluation demonstrates that a prescription has been issued for a legitimate medical purpose within the usual course of professional practice.

(ii) Any practitioner or other registrant who is otherwise authorized by their registration to dispense, procure, purchase, manufacture, transfer, distribute, import, or export the substance under this Act.

(iii) A person or entity providing documentation that establishes the name, address, and business of the person or entity and which provides a legitimate purpose for using any "date rape drug" for which a prescription is not required.

(3) The Attorney General is authorized to promulgate regulations for record-keeping and reporting by persons handling 1,4-butanediol in order to implement and enforce the provisions of this section. Any record or report required by such regulations shall be considered a record or report required under this Act.

(h) Offenses involving dispensing of controlled substances by means of the Internet.

(1) In general. It shall be unlawful for any person to knowingly or intentionally—

(A) deliver, distribute, or dispense a controlled substance by means of the Internet, except as authorized by this title; or

(B) aid or abet (as such terms are used in section 2 of title 18, United States Code) any activity described in subparagraph (A) that is not authorized by this title.

(2) Examples. Examples of activities that violate paragraph (1) include, but are not limited to, knowingly or intentionally—

(A) delivering, distributing, or dispensing a controlled substance by means of the Internet by an online pharmacy that is not validly registered with a modification authorizing such activity as required by section 303(f) [21 USCS § 823(f)] (unless exempt from such registration);

(B) writing a prescription for a controlled substance for the purpose of delivery, distribution, or dispensation by means of the Internet in violation of section 309(e) [21 USCS § 829(e)];

(C) serving as an agent, intermediary, or other entity that causes the Internet to be used to bring together a buyer and seller to engage in the dispensing of a controlled substance in a manner not authorized by sections [section] 303(f) or 309(e) [21 USCS § 823(f)or 829(e)];

(D) offering to fill a prescription for a controlled substance based solely on a consumer's completion of an online medical questionnaire; and

(E) making a material false, fictitious, or fraudulent statement or representation in a notification or declaration under subsection (d) or (e), respectively, of section 311 [21 USCS § 831].

(3) Inapplicability.

(A) This subsection does not apply to—

(i) the delivery, distribution, or dispensation of controlled substances by nonpractitioners to the extent authorized by their registration under this title;

(ii) the placement on the Internet of material that merely advocates the use of a controlled substance or includes pricing information without attempting to

propose or facilitate an actual transaction involving a controlled substance; or

(iii) except as provided in subparagraph (B), any activity that is limited to—

(I) the provision of a telecommunications service, or of an Internet access service or Internet information location tool (as those terms are defined in section 231 of the Communications Act of 1934 [47 USCS § 231]); or

(II) the transmission, storage, retrieval, hosting, formatting, or translation (or any combination thereof) of a communication, without selection or alteration of the content of the communication, except that deletion of a particular communication or material made by another person in a manner consistent with section 230(c) of the Communications Act of 1934 [47 USCS § 230(c)] shall not constitute such selection or alteration of the content of the communication.

(B) The exceptions under subclauses (I) and (II) of subparagraph (A)(iii) shall not apply to a person acting in concert with a person who violates paragraph (1).

(4) Knowing or intentional violation. Any person who knowingly or intentionally violates this subsection shall be sentenced in accordance with subsection (b).