No. 4-422

IN THE SUPREME COURT OF THE UNITED STATES

CHAD DAVID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR THE PETITIONER

P12
Counsel for Petitioner

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STATEMENT OF THE ISSUES

1. Does the community caretaker function, traditionally applied to vehicle searches, protect the warrantless intrusion of Mr. David's home where a law enforcement agent entered upon suspicion of criminal activity?

2. Did Mr. David's Sixth Amendment right to effective assistance of counsel attach and was it violated when a plea offer was made, but not communicated to him prior to Mr. David's federal indictment?

STATEMENT OF FACTS

Mr. David was a minister in Lakeshow, Staples. R. at 2, line 2. Mr. David lived in Lakeshow, Staples his entire life, had a good reputation in the community and was known to have energetic Sunday services at the Lakeshow Community Revivalist Church. R. at 2, lines 2-4.

Officer McKnown arrived at Mr. David's Sunday service shortly before he was set to patrol Lakeshow at 9:00 a.m. on Sunday, January 15, 2017. R. at 2, lines 5-10. Officer McNown regularly attended Mr. David's Sunday services, and noticed that Mr. David was absent from the service that morning. R. at 2, lines 8-10. The Sunday service ended at approximately 8:50 a.m., and Officer McNown decided to first purchase tea, and go to Mr. David's home. R. at 2, lines 20-23. Officer McNown arrived at Mr. David's house at 9:30 a.m., saw Mr. David's car in the driveway, all doors to the home closed, and did not notice anything unusual. R. at 2, lines 23-24. Officer McNown noticed a car with license plates typically driven by drug dealers, and heard loud music coming from inside the home. R. at 2-3.

Officer McNown knocked on the door, announced himself, and waited two minutes until he peeked into the window and saw a TV inside the home playing a popular R-rated movie. R. at 3, lines 2-6. Officer McNown attempted to open the front door, but could not because it was locked. R. at 3, lines 6-7. Officer McNown did not think there was an emergency, and did not notice any evidence of a break-in. Exhibit A, pg. 7, lines 5-9.

Officer McNown entered the property without a warrant, and gained access to the home by opening an unlocked back door, and did not announce himself upon entry into the home. R. at 3, lines 8-9. Exhibit A, pg. 5, lines 8-11. Exhibit A, pg. 7, lines 1-2. Officer McNown read a notebook inside the home and concluded that it contained names of church attendees with

corresponding drug payments, even though it simply said “Julianne Alvardo” “ounce” and “paid”. R. at 3, lines 10-12. Exhibit A, pg. 5, lines 22-24. Officer McNown heard music coming from upstairs in the home, followed a hunch that something was wrong, and opened a door to find Mr. David putting powder cocaine into bags. R. at 3, lines 13-15.

Officer McNown arrested Mr. David immediately and contacted the local Drug Enforcement Authority (“DEA”). R. at 3, lines 15-16. Upon arrest, Mr. David told the DEA that “there was no way her would give up his suppliers” because it “could lead to his death and his church being burnt down.” R. at 3, lines 24-25. Mr. David was taken to a federal detainment facility and contacted Mr. Long for representation, where Mr. Long agreed to represent Mr. David. R. at 3, lines 27-28.

On Monday, January 16, 2017 at 8:00 a.m., the prosecution, Ms. Marie, emailed a plea offer to Mr. Long, which was set to expire on January 17, 2017 at 10:00 p.m. R. at 4, lines 11-12. The plea offer requested a list of Mr. David’s suppliers in exchange for a sentence of one year in prison. R. at 4, line 10. On January 17, 2017, the prosecution called Mr. Long’s office to discuss the offer, but Mr. Long did not answer his phone, so the prosecution left a voicemail. R. at 4, lines 15-17. Mr. Long failed to communicate the offer to Mr. David, and the offer expired. R. at 4, lines 17-19. The prosecution contacted Mr. Long questioning why he did not respond to the offer, and Mr. Long realized the offer was only open for 36 hours, not 36 days. R. at 4, lines 22-24. Mr. Long then told Mr. David the mistake he made by misreading the plea offer email, and Mr. David fired Mr. Long and hired Mr. Allen as his new counsel. R. at 4, 23-27.

Mr. Long was drunk during the course of his representation of Mr. David. Exhibit B, pg. 3, lines 3-7. Mr. Long finished a beer prior to his first meeting with Mr. David. Ex. B, pg. 1, line 24. Mr. Long was at a bar when he received the email from Ms. Marie communicating the plea

offer for Mr. David's case. Exhibit B, pp. 2, line 19. Mr. Long's decision making was impaired by the alcohol at the time he received the email from Ms. Marie, contributing to his failure to communicate the plea offer to Mr. David. Exhibit B., pg. 2, lines 20-26. Mr. Long also has been disbarred for arriving to a trial under the influence of alcohol. Exhibit B, pg. 1, line 11.

Mr. David was charged with a violation of 12 U.S.C. 841, possession of a controlled substance with the intent to distribute, on January 18, 2017. R. 1. On Friday, January 20, 2017, Mr. Allen contacted the prosecution to see if the plea offer could be extended, and the prosecution declined, providing the reason that the information they wanted from Mr. David would not be needed since the suppliers would now be tipped off by the DEA investigation of Mr. David. R. at 5, lines 1-7. On July 15, 2017, the United State District Court for the Southern District of Staples denied Mr. David's motion to suppress the evidence collected on the date on his arrest, and his motion to be re-offered the original plea deal that the government conveyed to Mr. Long, Mr. David's first attorney in this matter. R. at 1. Mr. David unambiguously testified at a pretrial hearing that if he would have known about the plea offer made by Ms. Marie, that he would have taken it. R. at 22, lines 21-22. Exhibit C, pg. 3, lines 18-26. Mr. David was convicted at trial. R. at 22, line 23. Mr. David appealed his conviction timely, on November 28, 2017, 2018. R. at 13. On May 10, 2018, the Court of Appeals for the 13th Circuit issued its opinion and affirmed Mr. David's conviction at trial. R. at 14. The opinion upheld the denial of the suppression of evidence motion, and held that the right to effective assistance of counsel does not apply to plea offers made prior to an indictment. R. at 14.

SUMMARY OF THE ARGUMENT

The Fourth Amendment protects Mr. David's right to be free from warrantless, unreasonable searches in his home. The community caretaker exception to warrantless searches

alleged by Respondent permits searches of vehicles and should not be extended to the home. For purposes of the Fourth Amendment, there is a constitutional difference between houses and cars. Second, a home may not be entered without a warrant to investigate or acquire evidence of criminal activity. Thus, Mr. David's Fourth Amendment right to freedom from warrantless searches was violated by an officer entering his home under suspicion of criminal activity.

The Sixth Amendment right to effective assistance of counsel attached during the plea offer, prior to Mr. David's federal indictment because this was a critical stage in the adversarial process. Mr. David's Sixth Amendment right was violated, prior to the filing of an indictment, because he received ineffective assistance of counsel from Mr. Long during the critical plea negotiation stage. Mr. David's attorney at the time, Mr. Long, failed to disclose to Mr. David that a plea offer had been made. Mr. Long was drunk during the course of the representation of Mr. David, and this affected his performance in understanding the duty of promptly communicating a plea offer to Mr. David. The failure to communicate the plea offer prejudiced Mr. David because he instead was not communicated a plea offer as advantageous to his freedom, and was instead convicted after trial and sentenced to a much longer sentence. Mr. David testified that he would have taken the plea offer if he would have known about it, but was convicted at trial instead. Therefore, a reasonable probability existed that but for Mr. Long's unprofessional error, the result of the proceeding would have been different.

STANDARD OF REVIEW

The standard of review of a grant or denial of a motion to suppress evidence is de novo based on the totality of the circumstances. *United States v. Thomas,* 863 F.2d 622, 625 (9th Cir. 1988); accord *United States v. Alexander*, 835 F.2d 1406, 1408 (11th Cir. 1988).

The standard of review of the denial of a motion to be re-offered a plea deal is de novo because of the mixed question of law and fact that is presented are centered around Sixth Amendment constitutional violation that can never be harmless, and requires an automatic reversal. The performance and prejudice components of the *Strickland* test are mixed questions of law and fact. *Strickland v. Washington,* 466 U.S. 668, 698 (1984); Federal Rule of Civil Procedure 52 (a); *Cuyler v. Sullivan*, 446 U.S. 335, 342 (1980).

ARGUMENT

I. THE COMMUNITY CARETAKER FUNCTION DOES NOT JUSTIFY WARRANTLESS INTRUSIONS OF THE HOME, NOR DOES AN OFFICER FULFILL HIS CARETAKING ROLE WHEN CONDUCTING A SEARCH UNDER SUSPICION OF CRIMINAL ACTIVITY.

"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).

A. THE COMMUNITY CARETAKER EXCEPTION APPLIES ONLY TO WARRANTLESS SEARCHES OF VEHICLES.

The Fourth Amendment provides that "the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated . . ." U.S. Const. amend IV. All warrantless searches of a home or its curtilage are per se unreasonable under the Fourth Amendment with limited, well-delineated exceptions. *Katz v. United States,* 389 U.S. 347, 357 (1967). "Although vehicles are 'effects' within the meaning of the Fourth Amendment, 'for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars.'" *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973) (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)) (emphasis supplied).

The community caretaking function of police officers should not, and does not in six circuits, apply as an exception to the search warrant requirement for homes. The Supreme Court first explained the community caretaking function in the context of vehicle searches unaffiliated with investigations in *Cady v. Dombrowski*, 413 U.S. 433 (1973):

> Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Id. at 441.

The purpose of the community caretaking function is to clear traffic and preserve evidence after a vehicle accident, or to remove vehicles violating parking ordinances which jeopardize the public safety and efficient movement of traffic. *South Dakota v. Opperman*, 428 U.S. 364, 368-69 (1976). The Court carefully described the community caretaking function as applying only to vehicle, and not homes, for two reasons: (1) "the inherent mobility of automobiles creates circumstances of such exigency that, as a practical, rigorous enforcement of the warrant requirement is impossible," and (2) "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id.* at 367.

The Court further noted the limited validity of warrantless searches of homes as compared to vehicles: "warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not." *Id.* See also *Cady v. Dombrowski*, 413 U.S. at 440 (quoting *Cooper v. State of California*, 386 U.S. 58, 59 (1967) "[S]earches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property."). Thus, this Court has a well-established history of permitting

warrantless searches of vehicles, but limiting intrusions into the home under the same circumstances, preserving the Fourth Amendment's protection of privacy in the home.

Several circuit courts have followed the Supreme Court's lead in protecting the home from warrantless searches by refusing to apply the community caretaker exception to warrantless searches of the home. Specifically, the Third Circuit refused to extend the community caretaker exception to the search of a home after a wife attempted to pick up her child from her husband's house for visitation but received no response to knocks on the door. *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010). The court interpreted the Supreme Court's decision in *Cady v. Dombrowski* as "being expressly based on the distinction between automobiles and homes for Fourth Amendment purposes." *Id.* at 177. Thus, the Third Circuit declared "[t]he community caretaking doctrine cannot be used to justify warrantless searches of a home . . . It is enough to say that, *in the context of a search of a home, it does not override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement*." *Id.* (emphasis supplied).

The Ninth, Sixth, and Seventh Circuits also refused to extend the community caretaker exception to searches of home and offices to investigate possible burglaries. See *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993) (police dispatched to investigate suspected burglary at residence); *Taylor v. Michigan Dept. of Nat'l Resources*, 502 F.3d 452, 462-63 (6th Cir. 2007) (police concerned about potential burglar or trespasser investigated residential fences); *United States v. Pichany*, 687 F.2d 204, 208-09 (7th Cir. 1982) (police searched business warehouse after owner reported previous night's burglary).

Here, Mr. David's home was searched absent a warrant, absent Mr. David's consent, and absent Officer McNown's clear understanding of his community caretaking

function. The search was conducted in clear violation of the Fourth Amendment's protection of Mr. David's privacy in his home. Rather than waiting for Mr. David to call either a member of the congregation or the officer back, Officer McNown went to Mr. David's home. Ex. A, pg. 3. Although Mr. David lived in a private, gated community protected by a guard, Officer McNown proceeded to overstep his role as a community caretaker by entering the community without providing a reason for his presence. Ex. A., pg. 4, line 8. Although Mr. David's home's front door was locked, Officer McNown again violated Mr. David's privacy by peering through Mr. David's windows and walking around to the back of the house. Ex. A., pg. 4-5. Officer McNown most flagrantly violated the Mr. David's Fourth Amendment right to privacy in his home by entering the house through the back door without knocking, ignoring the inherent security of a locked front door and guarded, gated community. Ex. A., pg. 5. The officer visited his friend's home without respect for his friend's private community or locked home, violating the boundaries of the Fourth Amendment. Officer McNown's conduct falls squarely into the types of home intrusions that the community caretaker function cannot justify, and from which the Fourth Amendment protects.

This Court should continue to preserve Fourth Amendment protections from warrantless intrusions of the home by limiting application of the community caretaker doctrine to vehicles. Alternatively, warrantless searches of the home should not be permissible unless law enforcement personnel conduct searches to protect the residents of the home, not on suspicion of criminal activity.

B. THE COMMUNITY CARETAKER EXCEPTION DOES NOT APPLY WHERE AN OFFICER CONDUCTS A WARRANTLESS SEARCH OF A HOME ON SUSPICION OF CRIMINAL ACTIVITY.

In *Cady v. Dombrowski*, the Court explained the community caretaker function of law enforcement personnel applies only to searches "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. The Sixth Circuit interpreted the community caretaking function: "[a]s the Supreme Court has explained, the community caretaking function of the police applies only to actions that are 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.'" *United States v. Williams*, 354 F.3d 497, 508 (9th Cir. 2003) (quoting *Cady*, 413 U.S. at 441). Agents from the Drug Enforcement Agency received a tip from a landlord who suspected her tenants were engaged in "drug activity" after the landlord received a high water bill and were concerned about a water leak. *Id.* at 500. One DEA agent entered the residence after the landlord unlocked the door. *Id.* at 501. The agent discovered marijuana plants inside the home. *Id.* at 501. The Sixth Circuit held the "community caretaking function of the police cannot apply where, as here, there is significant suspicion of criminal activity." *Id.* at 507.

The Third Circuit agreed in *Ray v. Twp. of Warren*, 626 F.3d 170, 175 (3d Cir. 2010). Mr. Ray filed a complaint against the Township of Warren for violating 42 U.S.C. § 1983 by searching his home without a warrant in response to his wife calling the police. *Id.* at 1973. Mr. Ray's wife arrived at his house to pick up their child for visitation. After knocking on the door, seeing a man who looked like her husband walking around inside the house, but receiving no response, Mr. Ray's wife called the police. *Id.* at 171. The officers had previously been dispatched to Ray's home in response to reports of domestic problems and "were aware of the 'acrimonious nature of the Ray's divorce proceedings and child custody disputes at the home.'"

Id. at 171 (citation omitted). Upon receiving the wife's call, the police circled Mr. Ray's house, knocked on doors and windows, and called Mr. Ray on the telephone but received no response. *Id.* at 172. The Third Circuit noted "the primary motivation of the officers on the scene was to enter the home so that they could check on the child." *Id.* The officers entered Mr. Ray's house through an ajar, unlocked door, spoke with Mr. Ray's father and confirmed neither Mr. Ray nor the child were home. *Id.* at 173. The Township argued the search was constitutional because the officers conducted a warrantless search pursuant to the community caretaking exception to the warrant requirement. *Id.* at 174. The Third Circuit, however, held "[t]he community caretaking doctrine cannot be used to justify warrantless searches of a home . . . It is enough to say that, *in the context of a search of a home, it does not override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement*." *Id.* at 177 (emphasis supplied).

The Ninth Circuit also held in favor of protecting the right to be free from warrantless intrusions in the home. Police officers were dispatched to investigate a suspected burglary but found no signs of forced entry upon arrival to the residence in *United States v. Erickson*, 991 F.2d 529, 530 (9th Cir. 1993). The officers learned that neighbors saw two men drag heavy bags across the backyard of the residence, load the bags into a vehicle, and drive away. The officers looked through a sliding glass door, saw no one, found an open basement window, and peered through it to find numerous marijuana plants. *Id.* The Ninth Circuit rejected the government's argument that the officers acted as community caretakers to "protect the residents . . . rather than make a criminal case against them." *Id.* at 531. Rather, the court noted other cases where the community caretaking function could justify a warrantless search of a house where the exigent circumstances exception to the warrant requirement is *also* alleged. Here, the parties stipulated

that the focus of the appeal at bar is community caretaking. Thus, Mr. David's analysis focuses on the failure of Mr. McNown to properly exercise his community caretaking role in Mr. David's home.

The facts in Mr. David's case are most similar to those in *Ray v. Twp. of Warren*, 626 F.3d 170, 175 (3d Cir. 2010). In Mr. David's case, a concerned friend from his congregation told a police officer that Mr. David did not respond to a phone call after not appearing at church on Sunday morning to lead his congregation. Ex. A., pg. 3, line 15. Similar to Mr. Ray, Mr. David did not appear where he was expected, raising Officer McNown's suspicions about Mr. David's whereabouts. Like the officers in *Ray* concerned for a child's welfare, Officer McNown was concerned for Mr. David's welfare after he did not answer a friend's phone call. Ex. A., pg. 3, lines 24-25. After knocking on the front door of the house, Officer McNown did not receive a response, and investigated the house from the backyard, like the officers in *Ray*. Ex. A., pg. 5, line 9.

Despite concerns about Mr. Ray's whereabouts and continued investigation from the perimeter of the house, the Third Circuit rejected the Township's argument that the officers were justified in entering Mr. Ray's house while fulfilling their community caretaker function. Here, Respondent attempts to argue the community caretaker exception justifies its search of Mr. David's residence simply because no one answered Mr. David's phone or front door. This Court should reject Respondent's thin argument, like the Third Circuit rejected the Township's because "[t]he community caretaking doctrine cannot be used to justify warrantless searches of a home." *Id.* at 177.

Like the law enforcement agents in *Williams* and *Erickson*, Officer McNown could not have properly exercised his community caretaking function to protect the residents of Mr.

David's house because he entered the house on suspicion of criminal activity. Officer McNown witnessed a black Cadillac SUV leaving Mr. David's neighborhood. Ex. A., pg. 4, line 1. The officer suspected the vehicle could belong to a drug dealer due to the officer's experience as a law enforcement official. *Id.* His suspicions grew as he heard loud music coming from Mr. David's house, saw a film playing on Mr. David's television, was surprised by Mr. David's messy house, and found a small notebook with the words "paid" and "ounce" written inside. Ex. A., pg. 4, line 16, 25; pg. 5, lines 19-23. Officer McNown did not search the first floor of the house to ensure Mr. David's well-being as a community caretaker would. Rather, the officer searched the second floor of the house for the source of the loud music as an investigating officer would after becoming "definitely concerned something was wrong." Ex. A., pg. 5, line 23. Like the officer in *Erickson*, Officer McNown did not act reasonably as a community caretaker would. Officer McNown's focus shifted to investigating the circumstances under which Mr. David's house was loud, messy, and a potential drug dealer's recent stop. The Court should refuse the government's attempt to stretch the community caretaker doctrine far beyond its intended application to situations lacking suspicious or criminal activity.

II. MR. DAVID'S RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ATTACHED AT THE MOMENT THE PLEA OFFER WAS MADE TO HIM BECAUSE THIS WAS A CRITICAL STAGE IN THE ADVERSARIAL PROCESS.

The Sixth Amendment of the U.S. Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right to…have the Assistance of Counsel for his defence." U.S. CONST. Amend. VI. The Fourteenth Amendment of the U.S. Constitution made the right to counsel, in the Sixth Amendment of the U.S. Constitution, applicable to the states. U.S. CONST. Amend. XIV. The right to counsel means the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). A public and a privately retained

attorney are held to the same standard of constitutional scrutiny with respect to the right to effective assistance of counsel. *Cuyler v. Sullivan*, 446 U.S. 335 (1980).

A. THE POINT IN TIME WHEN THE PLEA OFFER WAS MADE WAS A CRITICAL STAGE IN THE ADVERSARIAL PROCESS BECAUSE MR. DAVID WAS IN CUSTODY AT A FEDERAL DETENTION CENTER, HAD HIRED AN MR. LONG, AND THE PROSECUTION WAS ALREADY COMMUNICATING WITH MR. LONG ABOUT THE CASE.

The right to effective assistance of counsel occurs "at all 'critical' stages of the criminal proceedings." *United States v. Wade*, 388 U.S. 208, 227-228 (1967). Critical stages of the criminal proceedings initially only included adversarial judicial proceedings. *Moore v. Illinois*, 434 U.S. 220 (1977). However, the definition of critical stages of criminal proceedings has been extended to include pre-indictment proceedings where the formal charging process has begun. *United States v. Wade*, 388 U.S. 208, 226-227 (1967). The Court has reasoned that, due to the vast majority of convictions resolved through the plea bargain process, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Missouri v. Frye*, 566 U.S. 134, 144 (2012).

Furthermore, the Court has held that a criminal defendant must have the effective assistance of counsel throughout plea negotiations, "anything less…might deny a defendant 'effective representation by counsel at the only stage when legal aid and advice would help him." *Spano v. New York*, 360 U.S. 315, 326 (1959) (Douglas, J., concurring). Here, Mr. David had a right to counsel because he is the subject of a criminal prosecution, or an "accused", the term used in the Sixth Amendment of the U.S. Constitution. U.S. CONST. Amend. VI. Also, the plea negotiations started while Mr. David was in custody at the federal detention center, when Mr. Long received the email and voicemail from the prosecution indicating the plea offer.

The Court has explained that "If a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it…[and] prejudice can be shown if loss of the plea opportunity led to a trial resulting in…the imposition of a more severe sentence." *Lafler v. Cooper*, 566 U.S. 156, 168 (2012).

The right to counsel attached to Mr. David at the critical stage in the proceeding where the plea offer was made. Although case law has not explicitly stated that the right to counsel attaches prior to an indictment, the offer of a plea was a critical stage in the proceeding, and case law has included the right to counsel at critical stages in the proceeding.

Without Mr. David's counsel, Ms. Marie would not have even been able to make the plea offer. Furthermore, Mr. David needed the advice of his counsel, Mr. Long to discern whether the plea offer was something that Mr. David wanted to proceed with, weighing the benefits and consequence of taking the offer. The plea offer that was made was formal enough to be considered a plea offer, rather than just an informal discussion between the prosecution and defense attorney because the offer was made in writing. In addition, the plea offer was only available for a limited time, making the communication of the plea offer important, as time was of the essence. Since the plea offer was in writing, and there was a limited amount of time to which it could be accepted, the plea offer is considered a point in time where the government has committed to the prosecution of Mr. David.

B. BUT FOR MR. LONG'S IRRESPONSIBLE FAILURE TO DISCLOSE THE PLEA OFFER IN A TIMELY MANNER TO MR. DAVID, THE OUTCOME OF MR. LONG'S CASE WOULD HAVE BEEN DIFFERENT, AND MR. DAVID WOULD NOT HAVE SUFFERED THE PREJUDICE OF NOT BEING ABLE TO ACCEPT THE PLEA OFFER, THUS FULFILLING THE *STRICKLAND* TWO-PART TEST.

In order to prove ineffective assistance of counsel, the claimant must show that attorney performed below the objective standard of care, and that the claimant suffered a prejudice due to

counsel's deficient performance. *Strickland v. Washington* 466 U.S. 668 (1984). Ineffective assistance of counsel with relation to a plea bargain is governed by the two-part test of *Strickland*. *Hill v. Lockhart,* 474 U.S. 52, 57 (1985); and *Padilla v. Kentucky*, 559 U.S. 356 (2010).

Mr. Long's performance fell below the objective standard of care because he failed to promptly communicate a time sensitive plea offer to his client, Mr. David. Furthermore, Mr. David suffered prejudice from Mr. Long's performance because Mr. David was unable to accept the plea offer once it expired, and was unable to ever receive an offer of that caliber again.

1. THE PERFORMANCE OF MR. LONG FELL BELOW THAT OF EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE EFFECT OF BEING DRUNK DURING THE REPRESENTATION OF MR. DAVID CONTRIBUTED TO HIS FAILURE TO INFORM MR. DAVID OF THE PLEA OFFER IN A TIMELY MANNER, BEFORE IT EXPIRED.

The duty of defense counsel includes communicating formal offers from the prosecution that may include terms and conditions favorable to the accused. *Missouri v. Frye*, 566 U.S. 134, 145 (2012). The performance prong of the *Strickland* test for ineffective assistance of counsel is met when the defense counsel allows a plea offer to expire without advising the client about the offer, or even communicating the offer to the client. *Missouri v. Frye*, 566 U.S. 134, 145-146 (2012).

The Court has held that defense counsel who failed to inform his client of a plea offer constituted the denial of the right to effective assistance of counsel. *Missouri v. Frye*, 566 U.S. 134 (2012). The criminal defendant in that case demonstrated at an evidentiary hearing that, but for his counsel's inadequate performance in failing to inform him of the plea offer, he would have accepted the plea offer, and not suffered the prejudice of a harsher punishment. Additionally, the Court reasoned that trial counsel's utter failure to communicate a formal offer

to a client, where there is no proof that counsel made any meaningful attempt to do so, fulfilled a prong of the performance prong of the *Strickland* test. *Missouri v. Frye*, 566 U.S. 134, 149 (2012).

Furthermore, the Court analyzed that there was a reasonable probability that the criminal defendant would have accepted the original offer, if the offer was communicated to him, when the criminal defendant demonstrates that he accepted a harsher punishment instead. *Missouri v. Frye*, 566 U.S. 134, 150 (2012). The Court does explain that there may be times when a criminal defendant must demonstrate more than the fact that he or she plead to a charge or harsher sentence than the original offer, but reasoned that it depends on the facts of each case. *Id.*

The facts of *Missouri v. Frye* are eerily similar to case before the Court now. Similar to *Missouri v. Frye*, Mr. David's counsel failed to inform him of a plea offer before the plea offer expired. Additionally, Mr. David did not interfere with his representation by Mr. Long in a manner that prevented Mr. Long from communicating the offer to Mr. David.

The performance of Mr. Long fell below the objective standard for effective assistance of counsel because Mr. Long admitted in his testimony that he was drunk during the time that he provided representation to Mr. David. Not only was Mr. Long drunk during the first meeting with his client, Mr. David, but Mr. Long was drunk during the time that he received the plea offer. This is important because Mr. Long misread the email containing the plea offer while inebriated, and continued on in the mental state that the email was unimportant due to the influence of the alcohol in his system throughout the time period the plea offer was valid.

The inaction by Mr. Long in failing to convey the plea deal fell below the standard of reasonable care because Mr. David was under the influence of alcohol during the representation

of Mr. David, contributing to his failure to communicate the plea offer to Mr. David in a timely manner.

2. MR. LONG'S FAILURE TO DISCLOSE A PLEA OFFER MEETS THE HIGH BAR OF THE STRICKLAND TEST AND PREJUDICED MR. DAVID BECAUSE MR. DAVID WAS NEVER OFFERED A BETTER DEAL, PROVED THAT HE WOULD HAVE TAKEN THE DEAL IF HE HAD KNOWN ABOUT IT, AND INSTEAD WAS CONVICTED.

To fulfill the prejudice prong of the *Strickland* test, the standard is that the claimant must prove two elements. First, the claimant must prove that there was a "reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel…" *Missouri v. Frye*, 566 U.S. 134, 147 (2012). Second, the claimant must show "a reasonable probability the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it if they had…that discretion under state law." *Missouri v. Frye*, 566 U.S. 134, 147 (2012).

The Court has held that "Even if the trial is free from constitutional flaw, the defendant who goes to trial instead of taking a more favorable plea may be prejudiced from either a conviction on more serious counts or the imposition of a more serious sentence." *Lafler v. Cooper*, 566 U.S. 156, 166 (2012).

Here, Mr. David must prove that he would have accepted the offer that Ms. Marie sent to Mr. Long. Since Mr. David would likely not be offered as great of an offer, advantageous to his freedom as the offer that Ms. Marie made, there is certainly a reasonable probability that Mr. David would have accepted the earlier plea offer if he would have known about it at the time it was offered, or within a reasonable time period before it expired. Clearly, Mr. David would have accepted the plea offer, and has met the first element of the *Frye* test.

The second element that Mr. David must prove is that there is a reasonable probability that the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept the offer, if they trial court had that discretion. In this case, there was absolutely no indication that, other than the time sensitive nature of the response to the plea offer, that Ms. Marie would retract the plea offer.

The Court has held that "Courts should not upset a plea solely because of post hoc assertions from a defendant about how he would have pleaded but for his attorney's deficiencies." *Lee v. United States*, 137 S. Ct 1958, 1967 (2017). However, in the same decision, the Court held that reasoning must be based on contemporaneous evidence that substantiates the defendant's preferences expressed in his claim. *Id.*

Here, there is clear evidence that substantiates Mr. David's preference to accept the plea offer that was not communicated to him in a timely fashion before it expired. Mr. David unequivocally stated that he would have taken the plea offer if he had known about it. Mr. David stated that he would have taken the offer and given up the names of his suppliers for a significantly shorter prison sentence and to avoid going to trial. Mr. David made this statement at a pre-trial hearing, prior to his conviction. This strongly supports the argument that Mr. David would have taken the offer regardless of the outcome of his trial. Therefore, the second element of the *Frye* test is fulfilled.

CONCLUSION

Petitioner David respectfully requests that this Court find that warrantless searches of the home do not fall under the community caretaker exception to the warrant requirement because homes are constitutionally different from vehicles and may not be entered without a warrant under suspicion of criminal activity.

Petitioner further requests that this Court find that Mr. David has been denied a right to effective assistance of counsel by Mr. Long's failure to communicate the critical plea offer to Mr. David. We therefore request that the Court order a reoffer of the plea agreement offered by Ms. Marie.