Team P18

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 PETITIONER

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ISSUES PRESENTED FOR REVIEW

1. Whether the community caretaking exception should extend to the warrantless search of homes under the Fourth Amendment; and if violation of the Fourth Amendment occurred, should the evidence be suppressed as result of the unreasonable search?
2. Whether the Sixth Amendment right to effective counsel attaches to all plea negotiations regardless of whether such negotiations occur prior to or after federal indictment; and if so, should this Court, consistent with its precedents, remand the case to tailor a remedy for Petitioner in accordance with such precedents?

STATEMENT OF FACTS

Chad David ("Petitioner") was a 72-year-old minister at Lakeshow Community Revivalist Church in Lakeshow, Staples. Officer McNown regularly attended Petitioner's Sunday services for about four months prior to January 15, 2017. Officer McNown described Petitioner's services as "really high energy." Petitioner would jump around, scream and sing during almost the entire sermon. "[I]t was awesome seeing someone so old exert that much energy." Ex. A, pg. 2.

On January 15, 2017, Officer McNown attended the 7:00 AM service. However, Petitioner was absent which was unusual because he regularly attended services. R. at 2. Around 7:15 AM Julianne Alvarado ("Ms. Alvarado"), a parishioner, called Petitioner to check if he was okay, but there was no answer. Officer McNown thought Ms. Alvarado and Petitioner were "pretty close." He also stated that Ms. Alvarado seemed freaked out for some reason and she seemed to be "nervous and was sweating and shaking." Ex. A, pg. 2. Jacob Ferry ("Mr. Ferry"), another parishioner, mentioned he thought he saw Petitioner the prior night at a bar stumbling around. However, no one took that seriously because he was not known to drink. Instead, Officer McNown assumed Petitioner was sick at home because the Bandwagon Flu was going around. Ex. A, pg. 3.

After the service, at 9:00 AM, Officer McNown began patrolling Lakeshow. He wanted to check on Petitioner and bring him hot tea, but he did not know where Petitioner lived. He asked Ms. Alvarado to text him Petitioner's address. He was surprised to learn it was in one the nicest gated communities in town. He "did not expect the minister to live in such an expensive area." Ex. A, pg. 3. As Officer McNown pulled into the gated community, he noticed a black Cadillac SUV leaving the complex with Golden State license plates. Based on his 12 years of experience, he knew drug dealers typically drive these types of SUVs and there had been an increase in drugs coming into Lakeshow from Golden State in recent months. He had no reason to believe the SUV

had any connection to Petitioner. Ex. A, pg. 1, 4. Officer McNown was in his patrol car and entered the gated community without being stopped by the guard. Ex. A, pg. 4.

Officer McNown did not notice anything unusual when he first arrived at Petitioner's home. He saw the church van in the driveway and assumed Petitioner was home. As he approached Petitioner's front door, he heard loud scream-o metal music playing, which he thought unusual for a minister to listen to. Ex. A, pg. 4. He knocked and rang the doorbell. He did not think anyone could hear him, because the music was so loud. *Id*. He tried to open the door but it was locked. After waiting approximately two minutes, he peered through the window. R. at 3. No one appeared to be inside, but he noticed that *The Wolf of Wall Street* was on TV. *Id.* This struck him as "strange" because he assumed Petitioner would not watch that kind of movie. Ex. A, pg. 4. Given the music and movie selection, he believed someone else may be in the house. *Id*. Officer McNown knew Petitioner was not married but did not know if Petitioner lived alone or had a guest. Ex. A, pg. 7. Officer McNown walked to the backyard and entered through the unlocked back door without knocking or announcing his presence. He was not sure, nor did he suspect something was wrong. He was just "eager to check the well-being" of Petitioner and "give him his tea". Ex. A, pg. 5.

Upon entering, Officer McNown noticed that everything was messy; it looked more like his frat house in college. Ex. A, pg. 5. Additionally, he testified he did not, either before or after entering the house, notice any evidence of break-in. Ex. A, pg. 7. Officer McNown testified that he did not search for Petitioner on the first floor. He did however turn off the loud TV, and while doing so read a small notebook with the name "Julianne Alvarado" written on it and the words "ounce" and "paid". He was "definitely concerned that something was wrong at this point." Ex. A, pg. 5. He then went upstairs to the room where the music was coming from, opened the door

without knocking or announcing and found Petitioner packaging cocaine. Ex. A, pg. 6. Based on his experience and recent training he detained Petitioner and contacted the DEA. *Id*.

The DEA sent Agent Colin Malaska ("Agent Malaska") a member of a "recently established task-force in Lakeshow to combat the flow of narcotics from other states." R. at 3. Agent Malaska asked Petitioner who his supplier was, but Petitioner stated "there is no way in hell I will tell you. They will kill me and burn my church down if I give you their names." Ex. F. After arriving at the federal detainment facility, Petitioner called Keegan Long ("Mr. Long"), the only criminal defense lawyer he knew. R. at 3. Mr. Long's visited Petitioner at the federal detainment facility. During that visit, Petitioner expressed fear of being stabbed in jail. Ex. B, pg. 2.

Agent Malaska contacted prosecutor Kayla Marie ("Ms. Marie") expressing his desire to obtain information from Petitioner about a drug kingpin travelling through Lakeshow. R. at 4. Agent Malaska believed Petitioner could provide valuable information that would lead to the drug kingpin's arrest. *Id*. Agent Malaska was concern that once charges were filed, Petitioner's arrest would become public which would tip-off the drug kingpin. Agent Malaska encouraged the prosecution to offer a favorable plea deal before filing any charges. *Id*. Ms. Marie prepared the plea bargain of one year in prison in exchange for the names of Petitioner's suppliers. She emailed the plea bargain offer to Mr. Long on Monday, January 16, 2017 at 8:00 AM. The offer was set to expire on January 17, 2017 at 10:00 PM. Ex. D. Mr. Long did not inform Petitioner of the offer until after it lapsed. Ex. B, pg. 3.

On the morning of January 18, 2017, Petitioner was charged with one count of 21 U.S.C. § 841. R. at 4. When Mr. Long eventually contacted Petitioner to inform him there was a plea offer that had lapsed, Petitioner immediately fired Mr. Long and subsequently hired Michael Allen ("Mr. Allen") to represent him. *Id.*

On January 20, 2017, Mr. Allen emailed Ms. Marie informing her that Mr. Long never communicated the plea offer to Petitioner and requested the plea be reoffered as Petitioner was "very enthusiastic about accepting that plea offer." Ex. E. On January 23, 2017, Ms. Marie emailed Mr. Allen to inform him that extending another plea offer would be pointless because Petitioner's suppliers may be tipped off and the government would not receive any substantial benefit by extending another plea offer. R. at 5. Petitioner testified "of course I would have taken [the plea]. One year in prison compared to risking at least ten at trial. It's a no brainer. I would give [my suppliers] up in a heartbeat. I'll do anything to avoid the risk of trial." Ex. C, pg. 3.

Petitioner filed two pretrial motions: (1) a motion to suppress evidence because Officer McNown's entry and search of Petitioner's house violated the Fourth Amendment; and (2) a motion seeking the plea deal be reoffered because Petitioner's counsel was ineffective in violation of the Sixth Amendment. R. at 5. Both motions were denied. Petitioner was subsequently convicted and sentenced to 10 years in prison. R. at 14. On appeal, his conviction and the District Court's rulings on the foregoing motions were affirmed. R. at 18. This Court granted certiorari.

SUMMARY OF ARGUMENT

The Thirteenth Circuit's decision should be reversed. First, the community caretaking exception was never intended to allow the government to conduct unreasonable searches into homes. The Fourth Amendment generally prohibits unreasonable searches without a warrant. Warrantless searches, as conducted here, are presumptively unreasonable, but there are a number of well-established exceptions. However, this Court has only recognized the community caretaking exception in connection with searches of vehicles. It has never been applied to the search of a home. As Justice Scalia stated in *Florida v. Jardines*, 569 U.S. 1 (2013), "[w]hen it comes to Fourth Amendment, the home is first among equals." *Jardines*, 569 U.S. at 6.

Accordingly, applying the community caretaking exception to the warrantless search of a home eviscerates society's most sacred expectation of privacy. This is not to diminish the caretaking function, but to recognize that allowing the community caretaking exception to apply to homes would grant open-ended discretion to police officers that will justify a warrantless search whenever an officer can point to some interest unrelated to the detection of crime. Since Officer McNown's entry into Petitioner's home was a ruse for investigation, the exception does not apply, and the evidence should be suppressed.

Second, an accused's Sixth Amendment right to effective counsel should apply to pre-indictment plea offers because they are a critical stage of criminal proceedings, they indicate when the prosecution has committed itself to prosecute, and the plain language of *Missouri v. Frye*, 566 U.S. 134 (2012) and *Lafler v. Cooper*, 566 U.S. 156 (2012) should control. In any event, Petitioner's right to effective counsel had attached to the government's pre-indictment plea offer. In this case, he suffered prejudice as a result of ineffective counsel, was prepared to accept the plea, and in the event the seized evidence it not suppressed, the matter should be remanded to the district court for Petitioner to accept the plea and be resentenced pursuant thereto.

STANDARD OF REVIEW

This Court reviews applications of law to fact de novo. *Ornelas v. United States*, 517 U.S. 690, 691 (1996). The Fourth Amendment issues in this case are applications of law to fact. When reviewing a motion to suppress, this Court reviews findings of fact for clear error and applies the de novo standard to legal conclusions. *United States v. Rodriguez*, 356 F.3d 254, 257 (2004). Therefore, this Court reviews each issue without any deference to the lower court's legal determinations.

This Court reviews claims of ineffective counsel pursuant to *Strickland v. Washington,* 466 U.S. 668. 687 (1984): "First, the defendant must show that counsel's performance was deficient. . . Second, the defendant must show that the deficient performance prejudiced the defense." However, in cases that involve a lapsed or rejected plea due to defense counsel's ineffectiveness, as in this case, the second showing in *Strickland* is modified by *Frye* and *Lafler*.

ARGUMENT

I. BECAUSE THE FOURTH AMENDMENT PROTECTS PEOPLE FROM UNREASONABLE SEARCHES AND SEIZURES BY THE GOVERNMENT THE ENTRY INTO PETITIONER'S HOUSE WAS UNREASONABLE

The Fourth Amendment requires that no search and seizure shall be unreasonable or conducted without a warrant based upon probable cause. U.S. Const. amend. IV; *United States v. Leon*, 468 U.S. 897, 904 (1984). The Fourth Amendment has been made applicable to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 654 (1961). Entry of a home is the greatest priority and any search of a home without a warrant is *per se* unreasonable unless it falls within one of the judicially recognized exceptions to the Fourth Amendment. *Payton v. New York,* 445 U.S. 573, 586 (1980).

The recognized exigent circumstance exceptions to the warrant requirement are exclusively limited to "hot pursuit of a fleeing felon, imminent destruction of evidence, the need to prevent suspects' escape, or the risk of danger to the police or to other persons inside or outside of dwelling." *Minnesota v. Olson*, 495 U.S. 91, 100 (1990). More recently in *Brigham City, Utah v. Stuart,* 547 U.S. 398 (2006), this Court explained that another exigent circumstance exception "is the need to assist persons who are seriously injured or threatened with such injury . . . "'[t]he need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal

absent an exigency or emergency.'" *Brigham City,* 547 U.S. at 403, quoting *Mincey v. Arizona,* 37 U.S. 385, 392 (1978).

"Accordingly, law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City*, 547 U.S. at 403. However, this exception does not justify the warrantless search of Petitioner's home by Officer McNown.

A. THIS COURT HAS NOT RECOGNIZED THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANTLESS ENTRY OF A HOME

This Court has recognized the community caretaking exception primarily for the warrantless search of a vehicle, when by necessity, police officers must "engage in what, for want of a better term, may be described as [a] community caretaking exception[], totally divorced from the detention, investigation, or acquisition of evidence relation to the violation of a criminal statute." *Cady v. Dombrowski* 413 U.S. 433, 441 (1973). In *Cady*, this Court concluded that the warrantless search of *Cady*'s car was incident to the caretaking function of the local police to protect "the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Cady*, 413 U.S. at 447.

The *Cady* decision focused primarily on the warrantless search of the *car*, rather than a home noting that "[t]he Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking 'search' conducted here of a vehicle that was neither in the custody nor on the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained." *Cady*, 413 U.S. at 447-448.

In *United States v. Erickson,* 991 F.2d 529 (9th Cir. 1993), the Ninth Circuit held that absent exigent circumstances, Fourth Amendment probable cause warrant requirements applied

when a police officer pulled back a plastic sheet covering a window to look inside the basement of defendant's home during a burglary investigation. Despite the officer's protestation that he was only performing a community caretaking task by investigating the burglary, the Ninth Circuit rejected the governments' assertion "that such a caretaking search…. is permissible without a warrant or probable cause." *Erickson,* 991 F.2d at 531. The government argued "that community safety demands that a police officer, without a warrant or probable cause, and in the absent of exigent circumstances, be allowed to conduct a search of a private home to determine if a crime has occurred." *Erickson,* 991 F.2d at 532. The *Erickson* court disagreed, explaining that "[i]t is precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amendment requires be made by a neutral and objective magistrate, not a police officer.'" *Id.,* quoting *Mincey*, 437 U.S. at 395.

Similar to *Cady,* in *Erickson* the Ninth Circuit did not recognize community caretaking as an exception to the warrantless search of a home. *Erickson* emphasized that the only circumstances in which this Court has referenced the exception is in limited cases involving automobiles. *Erickson,* 991 F.2d at 532. Accordingly, in this case Petitioner contends that the community caretaking exception primarily applies to the warrantless search of a vehicle, rather than a home.

B. APPLYING THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANTLESS SEARCH OF A HOME EVISCERATES SOCIETY'S MOST SACRED EXPECTATION OF PRIVACY

"In determining whether a search is reasonable with the meaning of the Fourth Amendment, the government interest motivating the search must be balanced against the intrusion on the individuals' Fourth Amendment interests" *Maryland v. Buie*, 494 U.S. 325, 331 (1990). "Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause." *Buie,* 494 U.S. at 331. As stated by this Court in *Welsh v. Wisconsin,* 466 U.S.

740, 748 (1984) "[i]t is axiomatic that the 'physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed.'" For this reason, it is "a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton*, 445 U.S. at 586. In other words, a warrantless entry of a home is "presumptively unreasonable."

Nevertheless, despite the sanctity of the home, the government may enter without a warrant under certain exigent circumstances. *Katz v. United States*, 398 U.S. 347, 357 (1967). However, these exigent circumstances are limited to the right to respond to emergency situations. As this Court analyzed in *Mincey*, "we do not question the right of the police to respond to emergency situations. Numerous state and federal cases have recognized that the Fourth Amendment does not bar police officers from making warrantless entries and searches when they reasonably believe that a person within is in need of immediate aid." *Mincey*, 437 U.S. at 392.

Simply "performing a community caretaking function…. cannot itself justify a warrantless search of a private evidence." *Erickson,* 991 F.2d at 531. As a result, it is imperative to define the meaning of community caretaking functions that was initially phrased by this Court in *Cady* as officers engaging in services to protect the welfare of citizens or property "totally divorced from the detection, investigation, or acquisition of evidence." *Cady,* 413 U.S. at 441. In other words, police may protect the welfare of person or property, but not to investigate for purpose of investigating a crime. *Cady*, 413 U.S. at 440. Accordingly, this Court has recognized that a warrantless search of an impounded vehicle may be conducted as long as such search is to inventory items in the vehicle and not a "ruse for a general rummaging in order to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990). Thus, if the Court is prepared to formally extend the community caretaking exception from the warrantless entry and search of

automobiles to homes it must promulgate a workable definition. "Quite unlike the automobile search performed in *Cady*, the warrantless search of [a defendant's] home constitute[s] a severe invasion of privacy. The fact that [the officer] may have been performing a community caretaking function at the time cannot alone justify the intrusion." *Erickson,* 991 F.2d at 532.

Petitioner contends, that absent exigent circumstances involving emergency situations, or community caretaking functions involving vehicles, the community caretaking exception should not apply to the search of a home. Such application would throw a dagger into the heart of one's most sacred expectation of privacy. This is not to diminish the caretaking function, but rather to recognize that allowing the community caretaking exception to apply to homes would grant open-ended discretion to police officers that will justify a warrantless search whenever an officer can point to some interest unrelated to the detection of crime.

As mentioned above, a warrantless entry and search in to the home may be justified when the officer believes that a person within is in need of immediate aid and provided such belief, entry and search is totally divorced from the detection, investigation, or acquisition of evidence. Regardless, Petitioner argues that no such exception can apply to the facts of this case. Petitioner was not in need of immediate aid and Officer McNown's actions were not "totally divorced from the detection, investigation, or acquisition of evidence." *Cady,* 413 U.S. at 441.

C. IF THE COMMUNITY CARETAKING EXCEPTION APPLIES TO WARRANTLESS SEARCHES OF A HOME IT SHOULD ONLY APPLY IF THERE IS A TRUE EMERGENCY

The community caretaking doctrine requires a court to look at the function performed by a police officer, while the emergency exception requires an analysis of the circumstances to determine whether an emergency requiring immediate action existed. *Hunsberger v. Wood,* 583 F.3d 219, 224 (4th Cir. 2009). In *Sutterfield v. City of Milwaukee,* 751 F.3d 542 (7th Cir. 2014),

the Seventh Circuit summarized three doctrines numerous lower courts have developed whereby police may enter a home without a warrant: community caretaking, emergency aid, and exigent circumstances. *Sutterfield* recognized that the community caretaking exception is applicable when police take actions not for any criminal law enforcement purpose but rather to protect members of the public." *Sutterfield,* 751 F.3d at 553.

Sutterfield continued its analysis by articulating that in addition to the Seventh Circuit, the Third, Ninth, and Tenth Circuits have confined the community caretaking exception to automobiles.[1] *Id.* at 556. "In contrast the Fifth, Sixth, and Eight Circuits have relied on the community caretaking to justify warrantless search of the home." *Id*.[2] While lower courts are split as to whether a community caretaking exception should apply to a home, the reluctance seems to be how to determine the officer's motive. Despite the lower courts different approaches, this Court has not and must not extend the exception to the search of a home. *United States v. Bute,* 43 F.3d 531, 535 (10th Cir. 1994).

In *United States v. Quezeda,* 448 F.3d 1005 (8th Cir. 2006), an officer arrived at an apartment to serve papers. He had been there before and believed the occupant lived alone. After knocking, the door opened slightly. He could see lights were on and heard the TV. There was no response to him announcing his presence, so he entered the apartment only to discover the defendant in possession of a weapon. *Quezada* stressed that "a police officer may enter a residence without a warrant as a community caretaking where the officer has a reasonable belief that an

[1] See *Ray v. Tp. of Warren*, 626 F.3d 170, 177 (3rd Cir. 2010); *Bute,* 43 F.3d at 535 (2–1 decision); *Erickson*, 991 F.2d at 531–33.

[2] See *Quezada*, 448 F.3d at 1007–08; *United States v. Rohrig*, 98 F.3d 1506, 1521–25 (6th Cir. 1996) (2–1 decision); *United States v. York*, 895 F.2d 1026, 1029–30 (5th Cir. 1990).

emergency exists requiring his or her attention." *Quezeda,* 448 F.3d at 1007, quoting *Mincey*, 437 U.S. at 392-393; *United States v. Nord,* 586 F.2d 1288, 1291 n. 5 (8th Cir. 1978).

In *Brigham City*, the Court upheld a warrantless home entry pursuant to a claimed exigency. The Court made clear that in general "an action is 'reasonable' under the Fourth Amendment, regardless of the individual officers' state of mind, 'as long as the circumstances, viewed objectively, justify the action.'" *Brigham City*, 547 U.S. at 404. This objective test was well articulated in a plurality opinion in *People v. Ray*, 21 Cal.4th 464 (1999), which involved the warrantless entry of a home in response to a neighbor's report that the front door had been open the entire day and that the inside of the home was in "shambles." Therefore, it was suspected that a burglary was in progress or had already occurred. *Ray*, 21 Cal.4th at 468. Acting upon that information, officers entered without a warrant. They found a large quantity of cocaine and money in plain view. The *Ray* court relied on the community caretaking exception to find the warrantless entry of the home was proper. *Ray*, 21 Cal.4th at 487.

Ray suggested an appropriate standard under the exception is one of reasonableness viewed objectively; "[g]iven the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions? Which is not to say that every open door . . . will justify a warrantless entry to conduct further inquiry. Rather, as in other contexts, 'in determining whether the officer acted reasonably, due weight must be given not to his unparticularized suspicions or 'hunches', . . . he must be able to point to specific and articulable facts from which he concluded that his action was necessary,'" *Ray*, 21 Cal.4th at 476-477, quoting *People v. Block*, 6 Cal.3d 239, 244 (1971).

Petitioner maintains that reasonable belief is simply another way of setting forth the objective standard, in which a reasonable officer in the same or similar circumstances would be

motivated to act by the existence of an emergency. Unlike *Ray* (where a burglary was in progress or had already occurred) and *Brigham City* (where emergency assistance to an injured occupant or to protect them from imminent injury can be articulated), there are no specific and articulable facts in this case to justify the entry into Petitioner's home. Therefore, the community caretaking exception is not applicable.

Furthermore, Petitioner contends the entry was not totally divorced from the detection, investigation, or acquisition of evidence. In fact, when Officer McNown entered the home, his only motive was to investigate whether criminal activity was afoot. Considering Petitioner's age, his absence from service, the strain of the Bandwagon Flu going around, and the comments from other parishioners, it may have been reasonable for Officer McNown to consider looking into Petitioner's welfare. However, those same facts were the seeds of reasonable suspicion forming in Officer McNown's mind. Ms. Alvarado was nervous, sweating, shaking, and was freaked out for some reason. R. at 2. Mr. Ferry mentioned that he thought he saw Petitioner the prior night at a bar stumbling around. *Id*. Officer McNown had apparently dismissed these observations and comments when he told the parishioners he would check on Petitioner after work. *Id*. He asked Ms. Alvarado to search her phone for Petitioner's address and text it to him. Ex. A, pg. 2. Surprised that he lived in one of the nicest gated communities in town, Officer McNown immediately departed for Petitioner's house. *Id*. His criminal investigation had begun.

Upon arriving at the gated community, Officer McNown saw a black SUV with Golden State license plates leaving. R. at 2. Officer McNown stated that based upon his experience (a twelve year veteran), "those cars have been popular among drug dealers and there has been an increase in the flow of drugs from Golden State." Ex. A, pg. 4. Even though he did not know where the SUV was coming from this only added to his suspicion and intensified his true motive.

Tellingly, Officer McNown bypassed the guard at the front gate of the community. Although he indicates that was the guard's choice (*Id*.), if he had really been interested in Petitioner's well-being and not in the middle of an investigation he would have asked the guard if Petitioner was home and if so, to ring the house. Instead, he was cautious not to alert Petitioner to his presence. A reasonable officer acting as a caretaker would have asked the guard if Petitioner was home or to ring the house to see if he was home. Only then could Officer McNown have known if Petitioner was in need of aid or if he should continue his search for Petitioner elsewhere. Since Officer McNown did not do so, the entry into the community itself was a violation of the Fourth Amendment.

As Officer McNown approached the home, his suspicions were further heightened when he heard loud scream-o music playing. R. at 3. He knocked and apparently rang the doorbell, but no one answered. *Id*. From the curtilage of Petitioner's house, he peered into the window and saw no one, but noticed *The Wolf of Wall Street* was on TV. *Id*. He tried the front door, but it was locked. Unyielding, Officer McNown took it upon himself to walk to the back of the home and to enter the home without knocking or announcing through an unlocked door. Ex. A, pg. 5. Officer McNown testified that he did not see any signs of a break in either before or after entering, nor are there any facts which would lead a reasonable officer to think someone was in the immediate need of aid. Ex. A, pg. 7.

Despite that the house was messy and looked like a frat house, Officer McNown was able to locate a notebook and fully read its contents. R. at 3. A reasonable officer concerned for Petitioner's welfare would not have stopped to read the notebook. Only after searching the house would the officer have read the notebook to see if it contained any helpful information. It was at that point that he became "definitely concerned that something was wrong." Ex. A, pg. 5. At this

point Officer McNown's motives were investigatory and not to render aid. At no point while in the house did he call out for Petitioner or announce his presence nor did he exit the location and seek a search warrant even though he testified he had time to retrieve one. Ex. A, pg 6. Instead, he marched up the stairs to the second floor and burst through a closed door to further investigate. *Id*. Therefore, Petitioner maintains Officer McNown's motives do not fall within the community caretaking exception. Accordingly, the entry violated the Fourth Amendment.

II. <u>BECAUSE OFFICER MCKNOWN VIOLATED THE FOURTH AMENDMENT THE EVIDENCE SHOULD BE SUPPRESSED</u>

The fact that a Fourth Amendment violation occurred does not necessarily mean that the exclusionary rule applies. *Illinois v. Gates*, 462 U.S. 213, 223 (1983). Whether it applies "turns on the culpability of the police and the potential of exclusion to deter wrongful police conduct." *Herring v. United States*, 555 U.S. 135, 137 (2009). Here, Police Officer McNown just wandered into a house without knocking or announcing with a mind to investigate. He and the government now claim that he was acting as a community caretaker, but the facts indicate otherwise. He admitted that he had time to secure a warrant. However, Officer McNown began his investigation long before entering the home. Under the facts of this case, the warrantless entry to Petitioner's home under the community caretaking functions was a ruse for an investigation.

Accordingly, to deter police wrongfully using the community caretaking exception to freely enter and search houses, this Court must suppress the evidence offered against Petitioner at trial. As held in *United States v. Cervantes*, 703 F.3d 1135 (9th Cir. 2012), when a search and seizure "was not justified by the community caretaking exception to the Fourth Amendment's warrant requirement . . . [e]vidence seized in violation of the Fourth Amendment, including any

"fruit of the poisonous tree," may not be used in a criminal proceeding against the victim of the illegal search and seizure."[3] *Cervantes*, 703 F.3d at 1143.

III. <u>THE SIXTH AMENDMENT GUARANTEES THE ACCUSED'S RIGHT TO EFFECTIVE COUNSEL DURING ALL PLEA NEGOTIATIONS</u>

The Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). In a pair of companion cases, *Frye* and *Lafler*, this Court was presented with "[t]he initial question [of] whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective counsel with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance. . . including the question of proper remedies." *Frye*, 566 U.S. at 138. By extending an accused's right of effective assistance of counsel to plea offers that lapse as a result of defense counsel's failure to convey the offer to their client, this Court answered the initial question in *Frye* in the affirmative.

The reality that this Court did not distinguish between pre and post-indictment plea offers in *Frye* and *Lafler* should foreclose upon any lower court taking a different position. Nevertheless, confusion still remains in the federal district courts and federal courts of appeal as to whether an accused's right to effective counsel extends to pre-indictment plea offers. This confusion has led to the inconsistent decisions of the District Court for the Southern District of Staples and the Court of Appeals for the Thirteenth Circuit in this case.[4] As a result, Petitioner maintains *Frye* and *Lafler* should extend to all plea offers because this Court did not distinguish between the two, or, at the

[3] See also *Wong Sun v. United States*, 371 U.S. 471, 487 (1963); and *Mapp*, 367 U.S. at 656.
[4] See District Court's rulings. R. at 8. See also Court of Appeals for the Thirteenth Circuit Opinion. R. at 14.

very least, should apply to the plea offer made by the government in this case for the reasons set forth below.

A. THE RIGHT TO EFFECTIVE COUNSEL SHOULD ATTACH TO PRE-INDICTMENT PLEA OFFERS BECAUSE THIS COURT HAS INDICATED THAT SIXTH AMENDMENT RIGHTS MAY ATTACH BEFORE AN INDICTMENT

Notwithstanding that *Frye* and *Lafler* make no distinction between pre and post-indictment plea offers, certain courts have taken the position there is one. Although the Sixth Circuit claims "[t]here is [. . .] no circuit split on this issue" (*Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018)), an argument agreed with by the Court of Appeals for the Thirteenth Circuit in this case, rulings in other federal district courts and federal courts of appeal tell a different story.[5]

By way of example, the Sixth Circuit and other courts who follow this Court's decision in *United States v. Gouveia*, 467 U.S. 180 (1984), "view that the right to counsel does not attach until the initiation of adversary judicial proceedings. . . [i]t is only at that time "that the government has committed itself to prosecute."" *Gouveia*, 487 U.S. at 188-189. While it can be argued that *Gouveia* did not expressly give courts the right to recognize a defendant's right to effective counsel during plea negotiations prior to indictment, *Gouveia* clearly stands for the principle that "Sixth Amendment right[s] may attach before an indictment." *Gouveia*, 487 U.S. at 190.

B. THE RIGHT TO EFFECTIVE COUNSEL SHOULD ATTACH TO ALL PRE-INDICTMENT PLEA OFFERS BECAUSE THEY ARE A CRITICAL STAGE OF PROSECUTION

The Sixth Circuit has conceded that following "*Frye* and *Lafler*, it is clear that plea negotiations are a "critical stage" of prosecution." *Maslonka v. Hoffner*, 900 F.3d 269, 278 (6th

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[5] See R. at 21 (O'neal, J., dissenting). See also Brandon K. Breslow, *Signs of Life in the Supreme Court's Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining*, The Fed. Law. at 34, 36 (October/November 2015) ("[T]he U.S. Court of Appeals have split as to whether to strictly follow the bright-line test.")

Cir. 2018).[6] "In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 566 U.S. at 144. As noted by Judge O'Neal in his dissent, "ninety five percent of cases are resolved through plea bargaining, regardless of whether charges have been filed." R. at 20, citing Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, Bureau of Just. Assistance U.S. Dept. of Just., January 24, 2011 at 1. Therefore, it is no less critical if charges have not been filed.

Whether or not the offer is made pre or post-indictment, the repercussions on the defendant are the same. Further, the defendant who takes a pre-indictment plea saves the government more time and expense than the defendant who pleas after indictment. By not recognizing a defendant's right to effective counsel in connection with those offers, the Court has established a high reward no risk situation for prosecutors who do offer pre-indictment pleas.

In response, lower courts have extended Sixth Amendment rights of effective counsel to plea offers made pre-indictment as the District Court did in this case. R. at 8.[7] "Considering the frequency and importance of pre-indictment plea negotiations as well as the adversarial nature of all plea negotiations, the conflict should be resolved in favor of attaching the right to effective assistance of counsel to all plea negotiations." Breslow, *supra* note 3, at 39. "[W]e have long recognized that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Since plea negotiations are a critical stage, an accused's right to effective counsel during such negotiations should not turn on when they occur.

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[6] See *Nunes v. Mueller*, 350 F.3d 1045, 1053 (9th Cir. 2003); and *United States v. Wilson*, 719 F. Supp. 2d 1260, 1267 (D. Or. 2010).

[7] See *Chrisco v Shafran*, 507 F. Supp. 1312, 1318-1319 (D. Del. 1981), quoting *Gallarelli v. United States*, 441 F.2d 1402, 1405 (3d Cir. 1971). In accord *United States v. Busse*, 814 F. Supp. 760, 764 (D. Wis. 1993).

To reiterate, these negotiations are so critical because it has been "demonstrate[d] that if a defendant opts to invoke the Sixth Amendment right to trial by jury, he or she will likely have a more unfavorable outcome." Devers, *supra*, at 2. Defendants are pressured with the high-risk gamble of determining when it is more advisable to go to trial or to sign the plea deal. Their liberty hangs in the balance. Balancing the two requires evaluating their likelihood of success at trial. Only counsel can properly weigh whether a defendant may be successful at trial. The need for counsel is even more prevalent during pre-indictment plea negotiations when the defendant cannot make an informed decision because they do not know what charges may be filed. At that point only counsel can determine what charges are likely. Since "what makes a stage critical is what shows the need for counsel's presence" (*Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 212 (2008)), pre-indictment plea negotiations should be declared just as critical as post-indictment plea negotiations.

C. THE RIGHT TO EFFECTIVE COUNSEL SHOULD ATTACH TO PRE-INDICTMENT PLEA OFFERS BECAUSE SUCH OFFERS INDICATE THE GOVERNMENT HAS COMMITTED ITSELF TO PROSECUTE

Notwithstanding the plain language of *Frye* and *Lafler*, based on Sixth Circuit precedent, Respondent maintains "[i]t is 'firmly established' that a person's Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him."" *Turner*, 885 F.3d at 953, quoting *Gouveia*, 467 U.S. at 187. R. at 17. However, as pointed out in *Turner*, "the right to counsel *should* attach during preindictment plea negotiations. The current rule leads to unduly harsh consequences for criminal defendants. It allows prosecutors to exploit uncounseled criminal defendants, and leaves counseled defendants, just like Turner [and Petitioner], without a claim for ineffective assistance of counsel when their attorneys render deficient performance. . .[B]y offering a specific plea deal, [as in this case] the government has

"committed itself to prosecute," solidifying "the adverse positions of government and defendant." It should not matter that in this context the defendant has yet to be formally charged or indicted." *Turner*, 885 F.3d at 976.

This sea change in *Turner* means even if we assumed pre-indictment plea offers are not a critical stage of prosecution, the right to effective counsel should still attach because once the prosecutor has made the offer they have committed themselves to prosecute. Here, a specific plea deal was offered to defendant's counsel. Ex. D. Other courts agree that the plea offer "is proof that the government made a commitment to prosecution, and that the parties' adverse position had solidified in much the same way as when formal charges are filed." *United States v. Wilson*, 719 F. Supp. 2d at 1267 (D. Or. 2010).

Alternatively, in this case, the record shows that the prosecution was ready to prosecute, but Agent Malaska encouraged the prosecution to offer a favorable plea deal before filing any charges. R. at 4. The prosecutors listened to Agent Malaska and held off on filing any charges. They instead came up with the plea bargain of one year in prison in exchange for the names of his suppliers, valid for only 36 hours. *Id*. That offer was made via email on January 16, 2017. *Id*. After it lapsed, Petitioner was indicted on January 18, 2017, only two days later. *Id*.

Clearly, the government was committed to prosecute as evidenced by filing charges only two days later. As noted by the district court "the prosecution clearly had the intention of moving forward with criminal charges against Petitioner only to be caught up in plea negotiations prior to doing so." R. at 9. Therefore, this Court should not allow the delay in filing charges to result in Petitioner losing his Sixth Amendment rights during those two days. Any holding that the right

to effective counsel did not attach during that two day period would open the door for abuse of the plea process by prosecutors.[8]

IV. PETITIONER HAD A RIGHT TO EFFECTIVE COUNSEL, WAS PREJUDICED BY INEFFECTIVE COUNSEL AND THIS COURT SHOULD REMAND SO THE DISTRICT COURT CAN TAILOR A REMEDY

"If there is a right to effective counsel with respect to [pre-indictment plea] offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance." *Frye*, 566 U.S. at 138. The questions of whether counsel was ineffective, petitioner was prejudiced and petitioner deserves a court tailored remedy are reviewed under *Strickland v. Washington*, 466 U.S. 668 (1984). In that seminal case, the Court established that in order for a defendant to make a valid ineffective counsel claim, he first "must show that counsel's performance was deficient" and then "must show that the deficient performance prejudiced the defense." *Strickland*, 466 U.S. at 687. The parties stipulate to the fact that Mr. Long's performance was deficient. As in *Frye,* "[h]ere defense counsel did not communicate the formal offer to the defendant. As a result of that deficient performance, the offers lapsed. Under *Strickland*, the question then becomes what, if any, prejudice resulted from the breach of duty." *Frye*, 566 U.S. at 147. However, in the context of a lapsed or unwisely rejected plea, *Frye* and *Lafler* modify *Strickland* such that "[t]o show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsels deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer." *Frye*, 566 U.S. at 147.

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[8] R. at 22. ("Prosecutors, knowing that the criminally accused will not have a remedy prior to the filing of formal charges under the Sixth Amendment, will simply postpone filing charges when making favorable plea offers. There is no loss sustained by the Government in these situations, only the criminally accused [sustains a loss].")

A. PETITIONER SUFFERED PREJUDICE BECAUSE HE WAS PREPARED TO ACCEPT THE PLEA OFFER

Respondent contends that Petitioner "suffered no prejudice by the plea offer not being communicated." R. at 8. The district court agreed that "he had not shown a reasonable probability that he would have accepted the favorable plea." R. at 14-15. However, not only was there a reasonable probability that Petitioner would have accepted the plea offer, when the district court made its ruling prior to trial, Petitioner was seeking the plea be reoffered so he could accept it. Further, Petitioner's counsel contacted the prosecution 3 days after the plea had lapsed indicating Petitioner would accept the plea if reoffered. Ex. E.

Nevertheless, Respondent alleges it is not reasonably probable Petitioner would have accepted the plea. Respondent cites statements made by Petitioner that "he would not give up his suppliers – indicating that doing so could lead to his death" (R. at 3.), and "he was scared of going to jail and getting stabbed." Ex. B, pg. 2. However, these statements were made before an offer was on the table. Therefore, they are irrelevant to whether he would have accepted the plea. Further, if the government truly believed he was not willing or was too scared to take the plea, then there was no reason to offer one. The fact that they made the offer proves they thought it reasonably probable he would accept it. Finally, petitioner indicated at the pretrial evidentiary hearing that he "would have taken it. One year in prison compared to risking at least ten at trial. It's a no brainer. I would give [my suppliers] up in a heartbeat. I'll do anything to avoid the risk of trial." Ex. C, pg. 3.

Unfortunately Petitioner was not given that chance. Instead he stood trial, was convicted for 21 U.S.C. § 841 and sentenced to 10 years in prison. As set forth in *Lafler* "[i]f a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. If that right is denied, prejudice can be shown if loss of the plea opportunity led to a

trial resulting in a conviction on more serious charges or the imposition of a more severe sentence." *Lafler*, 566 U.S. at 168. Thus, given the ample evidence he would have accepted the plea, but was instead convicted at trial for 9 more years than he would have served had he been allowed to plead, prejudice is a foregone conclusion.

B. PETITIONER SUFFERED PREJUDICE BECAUSE NEITHER THE PROSECUTION NOR THE COURT WOULD HAVE PREVENTED THE PLEA FROM BEING IMPLEMENTED

"In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented." *Frye*, 566 U.S. at 148.

Respondent has not cited any federal law, rule or regulation that would have allowed the prosecution to cancel the plea agreement. Regardless, they contend the plea offer was time sensitive and cannot be reoffered because the person for whom the prosecution sought information had probably been tipped off. When Mr. Allen inquired about the plea being reoffered Ms. Marie told Mr. Allen that extending another plea offer would be pointless. R. at 5. Ms. Marie reasoned that the only purpose for offering the initial plea deal was to obtain the names of Petitioner's suppliers. *Id.* She further explained that offering any more plea deals would be futile because the suppliers may be tipped off by now. *Id*.

First, there is no evidence Petitioner's suppliers had been tipped off. If the government is allowed to speculate, then it is just as likely that the driver of the black Cadillac SUV Officer McNown observed leaving the gated community where Petitioner lived also observed Officer McNown arriving in his patrol car and sent a lookout to the community to confirm whether

Petitioner was taken into custody. Given that, it is just as likely that Petitioner's suppliers had been tipped off prior to the prosecution's plea offer. Accordingly, it should not be a reason for not reoffering the plea deal. Second, even if his suppliers had been tipped off, the effect on the government would have been minimal. It seems unlikely the "drug kingpin" the DEA believed was travelling through the area would have discontinued selling drugs once Petitioner was arrested. Additionally, if Petitioner had provided useful information, such information would still need to be confirmed and/or otherwise corroborated by the DEA. No arrest would have been imminent; further investigation would have been required. This was part of a recently established a task-force in Lakeshow to combat the flow of narcotics from other states. R. at 3. Obviously, the DEA would have expected the kingpin to leave the area even if he was not tipped off. Since the DEA has national reach, the fact that information was not provided within a week, nor an immediate arrest made does not seem to be a burden on the task-force. Since any arrest would not have been immediate, the information was not as time sensitive as Respondent suggests.

More importantly, there is no showing the prosecution or trial court would have prevented the offer from being accepted or implemented because to do so would jeopardize prosecutors reliance on criminal informants. If defense attorneys know plea deals will not be honored, they will not encourage their clients to inform.

C. BECAUSE PETITIONER SUFFERED PREJUDICE AND THAT WAS NEVER PROPERLY CONSIDERED BY ANY OF THE LOWER COURTS, THE CASE SHOULD BE REMANDED FOR THE DISTRICT COURT TO TAILOR A REMEDY

After "a defendant shows ineffective assistance of counsel has caused the rejection [or lapse] of a plea leading to a trial and a more severe sentence, there is the question of what constitutes an appropriate remedy. . . [If] the defendant has shown a reasonable probability that but for counsel's errors he would have accepted the plea. . ., the court may exercise discretion in

determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." *Lafler*, 566 U.S. at 170-171.

Neither of the lower courts discussed remedies. Therefore, the matter should be remanded for further consideration. On remand, the District Court should compel the government to reoffer the plea deal. After Petitioner accepts it, he should be sentenced in accordance with its terms. The information he can provide may still prove invaluable. Alternatively, further proceedings should be held by the District Court to determine the appropriate remedy.

CONCLUSION

For the reasons stated above, the evidence was seized in violation of the Fourth Amendment. As fruit of the poisonous tree it should have been suppressed at trial. As a result, Petitioner's conviction should be reversed. Alternatively, the Court should use this case to settle the Sixth Amendment issue by pronouncing the right to effective counsel attaches to all pre-indictment plea offers, or conversely, that such right had attached to the government's pre-indictment plea offer in this case. If attached, the matter should be remanded.

Dated: October 21, 2018

Respectfully submitted,

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