No._____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD SMITH,

Petitioner,

-v-

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the district court violated Petitioner's Sixth Amendment rights by failing to return him to his original position absent the ineffective assistance of counsel.

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PETITION FOR WRIT OF CERTIORARI
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Petitioner Ronald Smith respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINION BELOW

The Ninth Circuit affirmed petitioner's convictions for conspiracy to commit bank fraud (18 U.S.C. § 1349) and aggravated identity theft (18 U.S.C. § 1028A(a)(1)). *See United States v. Smith*, No. 17-50075 (9th Cir. 2018). The Ninth Circuit's memorandum is attached to this petition as Appendix A.

JURISDICTION

On December 26, 2018, the Ninth Circuit filed its memorandum affirming Petitioner's convictions. This Court has jurisdiction under 28 U.S.C. § 1254(1).

RELEVANT PROVISION

The Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to… have the assistance of counsel for his defense."

STATEMENT OF THE CASE

I. Defense counsel allows the government's initial offer to elapse.

On February 2, 2011, a grand jury returned an indictment charging Petitioner Ronald Smith with several violations of 18 U.S.C. § 1349 (conspiracy to commit bank fraud), 18 U.S.C. § 1344 (bank fraud), 18 U.S.C. § 1028A(a) (aggravated identify theft). The indictment alleged that Smith and 19 other codefendants were involved in a scheme to obtain account information from customers of several large banks, and would use that information to, *inter alia*, issue fraudulent checks to withdraw funds from the accounts. *See* Appellant's Excerpts of Record ("ER") at 182-212.

Following Smith's indictment, the district court appointed attorney Robert Little to represent him under the Criminal Justice Act. On May 25, 2011—three months after the indictment—the government provided Little with a plea agreement for Smith. *See* ER 74-94. The offer carried a firm deadline of June 8, 2011. ER 74.

The proposed agreement contemplated the following Sentencing Guidelines calculations: a base offense level of 7 under U.S.S.G. § 2B1.1(a)(1), a +18 enhancement for amount of loss under U.S.S.G. § 2B1.1(b)(1)(J), and +4 enhancement for number of victims under U.S.S.G. § 2B1.1(b)(2). ER 84. With a

three-level reduction for acceptance of responsibility, the adjusted offense level would be 26, with the parties able to argue for additional adjustments and departures. ER 85. Considering Smith's criminal history, the Guideline range under that agreement would have been between 92-137 months.

Smith wanted to plead guilty. ER 124. But Little never conveyed the offer. He allowed the offer to elapse without discussing it with Smith. *Id.* He later brought the offer to Smith after the agreement had expired, but advised him that the terms were not favorable to him, and suggested that Smith would receive a better offer closer to trial. *Id.* In making that recommendation, Little had not reviewed key discovery showing that the government's offer was favorable to Smith. *Id.*

Relying on Little's advice, Smith did not attempt to revisit the expired plea agreement. Instead, on January 17, 2012, he entered an open plea to the indictment. *See* CR 524. The probation office prepared a presentence report shortly thereafter, and calculated the base offense level at 36 and a Guideline range of 292 to 365 months. *See* CR 682 at 4. These calculations included a 20-level enhancement for loss under U.S.S.G. § 2B1.1(a)(1) and six levels for number of victims under § 2B1.1(b)(2). *Id.* at 14.

II. Three years later, after Smith's new counsel brings Little's ineffective assistance to light, the government purports to re-extend the initial offer.

Shortly before sentencing, Little moved to withdraw from the case following the commencement of disciplinary proceedings against him by the State Bar of California. The district court granted the motion, and Smith received new appointed counsel. After investigating the case, Smith's new counsel uncovered Little's failure to timely advise Smith about the government's initial plea agreement, and discovered the erroneous advice given to Smith about the merits of that offer. To resolve the issue, Smith's counsel arranged a meeting with Little and the prosecutors assigned to the case. At that meeting, "Mr. Little admitted that: (1) He did not present the May 25, 2011 plea offer to Mr. Smith until after it expired; (2) Mr. Smith wanted to plead guilty, not go to trial; (3) Mr. Little did not review discovery that incriminated Mr. Smith and demonstrated that the plea offer was a good deal; and (4) Mr. Little advised Mr. Smith that the May 25, 2011 plea offer was not favorable, instead it was the kind of time Mr. Smith would receive after trial and the government's offer would likely get better as they got closer to trial." ER 124.

Following that conference, the government agreed to re-extend the plea agreement to Smith.[1] Smith promptly signed it and proceeded to a change of plea. The district court allowed Smith to withdraw his previous guilty plea, and Smith entered a new plea under the plea agreement. *Id.* The matter proceeded to sentencing.

III. The government argues vigorously for substantial sentencing enhancements, and asks the district court to consider evidence from later proceedings against codefendants in fashioning an appropriate sentence.

The probation office prepared a second presentence report. *Inter alia*, the report recommended a two-level enhancement for use of "sophisticated means" under U.S.S.G. § 2B1(b)(10)(C), and a four-level leadership enhancement under U.S.S.G. § 3B1.1(a). *See* Presentence Report ("PSR") at 17-19. In addressing the applicability of these enhancements, Smith asked the district court to account for Little's ineffective assistance of counsel. *See* ER 122-125. He argued that the government had not sought enhancements for "sophisticated means" or aggravating role against the defendants who had pleaded guilty early in the case, allowing them to receive the benefit of their bargain. *Id.* Smith pointed to the government's sentencing position as to codefendant Damian Wadsack. *Id.* In

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1 The government later acknowledged that, in re-extending the plea agreement, it was looking to "preempt a 2255 issue." ER 66.

urging the district court to fully adopt the Guidelines calculations from Wadsack's plea agreement—and impose no other enhancements—the government noted in that case that "[Wadsack] was among the first defendants to plead guilty in this matter. [...] *Because defendant chose to accept responsibility and plead guilty early on in this matter, defendant should receive the benefit of his plea bargain.* Accordingly, the government requests the Court s*entence consistent with the plea agreement.*" ER 155 (emphasis provided).

Smith reasoned that the government could have easily argued for a "sophisticated means" enhancement for Wadsack because he pleaded guilty to the same conspiracy as Smith. *Id.* The evidence also showed that Wadsack had a significant supervisory role in the case, but the government did not seek to hold him accountable for any type of leadership adjustment. *See* ER 128-157. For these reasons, Smith argued that imposing those enhancements in his case would penalize him for Little's ineffective assistance, as he would have been in the same position as Wadsack and other codefendants had his counsel been effective and enabled him to plead guilty three years earlier when the offer was first made. ER 124.

The government did not address Smith's request for a Sixth Amendment remedy in its position papers, stating only: "Defendant asserts that enhancements

for sophisticated means and role should not apply because others did not receive similar enhancements. This argument, however, is neither here nor there—it remains the case that the facts clearly support these enhancements." ER 113. The government then proceeded to vigorously argue for the district court to impose both enhancements, which amounted to a six-level increase in the base offense level agreed upon in the plea agreement. ER 104.[2] The government also asked the district court to consider the evidence "heard during trial of the co-defendants and evidentiary hearings conducted in this case" and the fact that "the Court has imposed sentences of 300 months incarceration" on codefendants Sharopetrosian, Brown, and Cox. ER 105, 113. Lastly, the government argued that these facts supported a sentence of 212 months. ER 115.

IV. The district court imposes the disputed enhancements and considers the extraneous evidence to sentence Smith to 192 months.

At sentencing, concerned about Little's ineffective assistance of counsel, the district court offered Smith the opportunity to withdraw his guilty plea and proceed to trial. ER 13-14. Smith advised that he did not wish to withdraw his plea, but wanted to be sentenced in the same position that he would have been but for

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2 The government later acknowledged that it sought these enhancements vindictively because it was "troubled" that "Smith would be getting the benefit of a plea agreement", when, in the government's mind, Smith had wanted to reject it all along. ER 70.

Little's ineffective assistance. He reasoned: "you can look at other defendants in this case like Damian Wadsack; had the exact same plea, pled early. And the Government came in and said -- argued for a sentence based on Offense Level 26 with no adjustment for sophisticated means and no upward adjustment for leadership, even though those would have applied. Why? Because he pled early. And so my whole point is if Mr. Smith had been given the opportunity to plead early, the Government's position here would be different." ER 18. But the district court rejected these arguments, stating only: "That's what I don't know. That's a supposition on your part." ER 18-19. The district court also observed that "Smith's lost opportunity to plea guilty back in 2011" was "not the Government's fault." ER 10.

The district court then proceeded to calculate the Guidelines and weigh the relevant sentencing factors. As it had done in its position papers, the government asked the district court to consider "the entirety of the scheme." ER 36. It asked the district court to consider the proceedings against Lewewllyn Cox. *Id.* It asked the court to consider the proceedings against codefendant Brown, as well as those against codefendant Sharopetrosian. *Id.* The district court focused on these arguments, asking "where does [Smith] lie in relation to Llewelyn Cox? I gave Mr. Cox 300 months," ER 34, and stating "Let's talk about Cox and Brown for a

moment because disparity concerns me." ER 37.[3]The district court also relied on the government's arguments to impose the disputed enhancements for "sophisticated means" and aggravating role. *See e.g.*, ER 40, 41. The court ultimately imposed a 192-month sentence on Smith.

Smith appealed, arguing that the district court erred in failing to restore him to his position at the time of the initial Sixth Amendment violation. But the Ninth Circuit affirmed petitioner's convictions, finding that "Smith has not established prejudice because he has not shown 'a reasonable probability that the end result of the criminal process would have been more favorable by reason of . . . a sentence of less prison time' if he had pled earlier." Appendix A at 2.

This petition follows.

REASON FOR GRANTING THE PETITION

Review is warranted because the district court violated Petitioner's Sixth Amendment rights failing to return him to his original position absent the ineffective assistance of counsel.

This Court's authority is clear: "As a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused... When defense counsel

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3 S*ee also* ER 40-41 (AUSA: "This defendant, it's important to keep in mind, although we're keeping him lower than Cox in terms of Government's recommendation, he's not that far away from Cox. The Court: Oh, I agree."

allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). "To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. *Id.* at 147. A Sixth Amendment violation occurs where both elements are met. *Id.*

Circuit precedent is also clear that district courts have a duty to remedy Sixth Amendment violations. An adequate Sixth Amendment remedy "*must 'neutralize the taint' of a constitutional violation*, while at the same time not grant a windfall to the defendant or needlessly squander the considerable resources the State properly invested in the criminal prosecution." *Lafler v. Cooper*, 566 U.S. 156, 170 (2012), *quoting United States v. Morrison*, 449 U.S. 361, 365 (1981)) (Emphasis provided and internal citations omitted). The court's remedy "should put the defendant back in the position he would have been in if the Sixth Amendment violation never occurred," *Chioino v. Kernan*, 581 F.3d 1182,1184 (9th Cir. 2009) (quotations omitted), but without "unnecessarily infring[ing] on competing interests." *Lafler, supra.* In the context of a defendant who has been deprived of

the opportunity to accept the plea offer, the Ninth Circuit has held that the proper remedy "will involve reinstating the original offer." *United States v. Blaylock*, 20 F.3d 1458, 1469 (9th Cir. 1994).

1. Smith's first counsel was ineffective as a matter of law, and prejudice resulted.

Here, the record is clear that Little provided ineffective assistance as a matter of law when he failed to advise Smith of the government's offer before it expired. *See Frye*, *supra*, at 145. The plea agreement expired automatically on June 8, 2011, and the evidence shows that Little did not discuss it with Smith until well after that date. *See* ER 124. Little then compounded the error by telling Smith that the offer was not favorable, that instead it was the "kind of time" Smith would receive after trial, and that the government's offer would "likely get better" as trial approached. *Id.* The government did not dispute or contradict these facts below, nor that the advice was erroneous. Instead, the government agreed with Smith's concerns about Little's representation, stating that it had re-extended the prior offer "in the interest of justice and fairness so we start out with a clean slate," "all this stuff about ineffective assistance, what Mr. Little did is really out the window," and that "it's ugly and it's messy… That's why we essentially cleaned the slate and went back to ground zero." ER 34-36. There was ineffective assistance in these circumstances.

And contrary to the Ninth Circuit's findings, Smith showed prejudice under *Frye*. Smith accepted the offer immediately once it was re-extended to him. *See Riggs v. Fairman*, 178 F.Supp.2d 1141, 1149 (C.D. Cal. 2001) ("Most persuasive evidence" of what defendant would have done "consists of what he actually did after he was advised properly; he attempted to recapture the lost plea opportunity.") Smith also pleaded guilty *without* a plea agreement once it became clear that—contrary to Little's claims—the government would not be offering a better deal as the case came closer to trial. Little also acknowledged that Smith wanted to plead guilty, not defend against the charges at trial. These facts all establish a reasonable probability that Smith would have signed the initial plea agreement but for Little's ineffective assistance during the early stages of the case. That establishes prejudice, thus meeting both prongs of the *Frye* test.

2. The district court failed to place Smith in his pre-violation position.

The record, then, supports a finding that Little's ineffective assistance resulted in a violation of Smith's Sixth Amendment rights. In those circumstances, the district court had to "neutralize the taint" by placing Smith "back in the position he would have been in if the Sixth Amendment violation never occurred." *Chioino*, 581 F.3d at 1184. But the district court failed to take the required

remedial action, and instead placed the burden on Smith to resolve the Sixth Amendment violation.

After Smith argued that he should be sentenced similarly to other defendants that pleaded in 2011, the district court declined to entertain the argument because in its opinion it was "not the Government's fault" that Smith lost the opportunity to plead guilty at that time. ER 10. That was error. Supreme Court authority is clear that "the Sixth Amendment mandates *that the State* bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986) (emphasis provided). Accordingly, a district court may not decline to remedy a Sixth Amendment violation because the measures required to resolve the issue may have a negative impact on the government's interests in the case.

The district court then compounded that mistake by proposing an inappropriate remedy—to allow Smith the opportunity withdraw his guilty plea and proceed to trial. *See* ER 11. That too was contrary to this Court's longstanding caselaw. The record shows that Smith did not want to proceed to trial—he pleaded guilty *without* a plea agreement to avoid that outcome, before his substitute counsel convinced the government to re-extend the initial offer. Smith *never* wanted to proceed to trial, as acknowledged by Little during his meeting with defense counsel and the prosecutors. *See* ER 124. Under this Court's precedent, faced with

a Sixth Amendment violation, the district court had to place Smith *back in the position he would have been in if the violation never occurred. Chioino*, 581 F.3d at 1184. In this case, that did not mean allowing Smith to withdraw his guilty plea. It meant returning Smith to the position he enjoyed in mid-2011, three months after the indictment in the case.

At that stage of the case, the government rewarded defendants that pleaded guilty with the "benefit of [their] plea bargain," as it did with codefendant Wadsack. ER 155. The government did not seek the same enhancements for Wadsack that it did for Smith, even though it could have done so because he and Smith had similar roles in the same conspiracy. *See* ER 128-150. In urging the district court to adopt the parties' recommendations in Wadsack's plea agreement, the government emphasized that he had "chose[n] to accept responsibility *and plead guilty early on in this matter.*" ER 155 (emphasis provided). But for Little's ineffective assistance, Smith too could have pleaded guilty early on the matter, and the district court erred in failing to take that into account.

Moreover, at that stage of the case—three months after indictment—neither the government nor the district court had the same knowledge about the case and the roles of each defendant that they brought to bear against Smith three years later after extensive litigation and with several codefendants having proceeded to trial.

See PSR at 7-8. This post-violation evidence played a major role at Smith's sentencing, with the government relying on it to argue for the disputed enhancements in its sentencing papers, and the district court repeatedly referring to the evidence and sentences from codefendants' cases. For example, in its sentencing position, the government asked the district court to consider the "trial of the co-defendants and evidentiary hearings conducted in this case." ER 105. The government also repeatedly referenced the "sentences of 300 months incarceration" imposed on codefendants Sharopetrosian, Brown, and Cox. ER 113. And the district court relied heavily on those sentences during its sentencing analysis in this case. *See e.g.*, ER 34 ("The Court: Where does he lie in relation to Lewellyn Cox? I gave Mr. Cox 300 months.") S*ee also* ER 40-41 (AUSA: "This defendant, it's important to keep in mind, although we're keeping him lower than Cox in terms of Government's recommendation, he's not that far away from Cox. The Court: Oh, I agree.") None of those facts would have been available to the government or the district court had Smith pleaded guilty and been sentenced in 2011.

In sum, the law required the district court to return Smith to the position he enjoyed before Little's ineffective assistance of counsel. Doing so meant the government could not argue for enhancements that it could not have supported or

recommended in 2011, nor could the district court consider evidence and arguments it learned from the intervening three years of litigation. Because the district court did entertain and adopt the government's arguments as to "sophisticated means" and leadership role in calculating the applicable Guideline range, and it did rely on the evidence obtained from presiding over codefendant proceedings after 2011, Smith's Sixth Amendment rights were violated. Because the Ninth Circuit erred in finding to the contrary, certiorari should be granted.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

Dated: March 25, 2019

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APPENDIX

A

NOT FOR PUBLICATION

FILED

DEC 26 2018

MOLLY C. DWYER, CLERK
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UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, v. RONALD SMITH, AKA Skeet, AKA Ski, Defendant-Appellant.	No. 17-50075 D.C. No. 8:09-cr-00248-DOC-13 MEMORANDUM*

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted December 7, 2018
Pasadena, California

Before: WARDLAW and OWENS, Circuit Judges, and DORSEY,** District Judge.

Ronald Smith appeals from his sentence imposed following his guilty plea to conspiracy to commit bank fraud (18 U.S.C. § 1349) and aggravated identity theft (18 U.S.C. § 1028A(a)(1)). "We review de novo whether a defendant received

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* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Jennifer A. Dorsey, United States District Judge for the District of Nevada, sitting by designation.

ineffective assistance of trial counsel." *United States v. Benford*, 574 F.3d 1228, 1230 (9th Cir. 2009). As the parties are familiar with the facts, we do not recount them here. We affirm.

Smith contends that his Sixth Amendment right to effective assistance of counsel was violated because his first counsel failed to communicate to Smith a plea agreement before it expired, even though Smith was later re-offered and accepted the original plea agreement. Specifically, Smith contends that the re-offer of the original plea agreement was insufficient to remedy his first counsel's failure to timely convey the plea agreement because Smith purportedly would have received a more lenient sentence if he had pled earlier. *See United States v. Blaylock*, 20 F.3d 1458, 1468 (9th Cir. 1994) ("[T]he remedy for counsel's ineffective assistance should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred[.]").

However, Smith has not established prejudice because he has not shown "a reasonable probability that the end result of the criminal process would have been more favorable by reason of . . . a sentence of less prison time" if he had pled earlier. *Missouri v. Frye*, 566 U.S. 134, 147 (2012). Further, Smith already received the sufficient remedy of the reinstatement of the original plea offer. *See Lafler v. Cooper*, 566 U.S. 156, 174 (2012) (holding that the "correct remedy" for the ineffective assistance of counsel that caused rejection of a plea leading to a

trial and a more severe sentence was "to order the State to reoffer the plea agreement"); *Blaylock*, 20 F.3d at 1468 (stating that where "the defendant was deprived of the opportunity to accept a plea offer, putting him in the position he was in prior to the Sixth Amendment violation ordinarily will involve reinstating the original offer").

AFFIRMED.