ORIGINAL

19-8715

No. 20-_____

IN THE SUPREME COURT OF THE UNITED STATES

TIMOTHY ROBERT TREFFINGER, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

On Petition For A Writ Of Certiorari To The
United States Court of Appeals
For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

TIMOTHY ROBERT TREFFINGER
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Pro Se

QUESTIONS PRESENTED

Question 1:

Do law enforcement officers have an implied license to cross the clearly marked and defined curtilage of a home to conduct a "knock and talk" where the homeowner has taken numerous steps to ensure privacy and security, thus giving express orders to the public and for private citizens not to enter? Or, in the alternative, does such an action violate the owner/occupant's reasonable expectation of privacy as guaranteed by the Fourth Amendment?

Question 2:

Does counsel provide effective assistance, as guaranteed by the Sixth Amendment, when he fails to investigate obvious avenues of merit involving serious Fourth Amendment violations of seizure and detainment within the curtilage of a home, flagrant police coercion, and warrantless search--issues that would have led to a different outcome at trial?

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PETITION FOR WRIT OF CERTIORARI

Timothy Robert Treffinger respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case. Mr. Treffinger further requests that, should a writ be granted, he be appointed counsel to argue the merits of his case before the Court.

OPINIONS AND ORDERS BELOW

Treffinger was indicted in August 2008 on five counts stemming from a law enforcement investigation of a marijuana grow operation at his residence in Alachua County, Florida. Entering a plea of not guilty, Treffinger retained counsel and trial began on January 5, 2009. The jury returned a verdict of guilty on all counts, and on April 6, 2009, the Court sentenced Treffinger to 517 months in prison (case no. 1:08-cr-00023-WTH-GRJ). On appeal, the Circuit Court affirmed in part and vacated and remanded in part, and Treffinger was resenteced on November 7, 2012 by the District Court to 426 months in prison (appeal no. 09-1221-GG).

On October 21, 2013, Treffinger filed a motion under 28 U.S.C. § 2255 (no. 13-00209) and was granted a COA as well as an evidentiary hearing, which was held on February 3, 2017 (App. 99). The District Court denied the § 2255 motion on June 26, 2017 (App. 9)*. Treffinger appealed to the Eleventh Circuit (no. 17-13028), which was denied on January 6, 2020 (App. 2). A request for panel rehearing was then denied on February 12, 2020 (App. 94). He now presents this Petition for writ of certiorari.

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* Magistrate's Report and Recommendation is reprinted at App. 12.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution 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.

The Sixth Amendment of the United States Constitution provides that, "In all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense." U.S. Const. amend. VI.

STATEMENT OF THE CASE

This case presents an important issue affecting the substantial right of American citizens to be secure in their right to be free from unreasonable search and seizure.

In Florida v. Jardines, 569 U.S. 1 (2013), this Court held that the Fourth Amendment's guarantees would be of "little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity." This is such a case. However, the Eleventh, along with the Eighth and Tenth Circuits, stand alone in ignoring this precept, putting them at tension with other circuits as well as with Supreme Court precedent.

Further, counsel was ineffective as he failed to address, investigate, or file motions regarding these issues, as requested by the defendant and as required by the standard set in Strickland v. Washington, 466 U.S. 668 (1984).

LEGAL BACKGROUND

In 1967, Justice Steward wrote in Katz v. United States, 389 U.S. 347 (1967) that "[W]herever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures." Since that time, the concept of "reasonable expectation of privacy" (as first phrased by Justice Harlan in his concurrence in Katz) has been expanded from private conversations to, in certain circumstances, "the whole of physical movements" (Carpenter v. United States, 201 L. Ed. 2d 507 (2018)), and, of course, a man's home and curtilage to that home.

In Florida v. Jardines, 569 U.S. 1 (2013), Justice Antonin Scalia wrote,

> When it comes to the Fourth Amendment, the home is first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion.... This right would be of little practical value if the State's agents could stand in a home's porch or side garden and trawl for evidence with impunity; the right to retreat would be significantly diminished if the police could enter a man's property to observe his repose from just outside the front window. We therefore regard the area immediately surrounding and associated with the home--what our cases call the curtilage--as part of the home, itself for Fourth Amendment purposes.

Florida v. Jardines, 569 U.S. 1 (2013) (internal quotes omitted)

REASONS FOR GRANTING THE PETITION

I. THE COURT'S INTERVENTION IS NECESSARY TO DECIDE THE SPLIT BETWEEN THE CIRCUITS AS TO WHAT CONSTITUTES EXPRESS ORDERS PROHIBITING ENTRY ONTO CURTILAGE AND REVOKING THE IMPLIED LICENSE TO CONDUCT A "KNOCK AND TALK."

The Eighth, Tenth, and now the Eleventh Circuits are split with the Fourth, Sixth, and Ninth circuits on these matters of

law. The resolution would affect the significant rights of the American citizen as well as a significant number of federal prisoners.

In the instant case, it is undisputed that DEA agents and other law enforcement officers crossed the curtilage to conduct a "knock and talk," and information-gathering tool of law enforcement, and an exception to the Fourth Amendment protection. ("Absent express orders from the person in possession, an officer may walk up the steps and knock on the front door of any man's castle with the honest intent of asking questions of the occupant thereof." Davis v. United States, 327 F.2d 301, 303 (9th Cir. 1964) (internal quotes omitted).

What is not clear, and has caused a circuit split, is what constitutes "express orders from the person in possession."

The Fourth, Sixth, and Ninth Circuits have ruled that crossing curtilage with clearly marked "No Trespassing" signs (as in the instant case) violates the Fourth Amendment's reasonable expectation of privacy, absent exigent circumstances or emergency. "The homeowner can reasonably expect all visits to cease when he has manifested his intent to exclude strangers by sealing the property around his home and posting "NO TRESPASSING" sign." Edens v. Kennedy, 112 Fed. Appx. 870 (4th Cir. 2004). "Jardines, and more recently, Collins[v. Virginia, 201 L. Ed. 2d 9 (2018)], made clear that, outside the same implied invitation to all guests, if the government wants to enter one's curtilage, it needs to secure a warrant or to satisfy one of the exceptions to the warrant requirements." Morgan v. Fairfield City, 903 F.3d 553

(6th Cir. 2018).

The Ninth Circuit concurs in a case with many similarities to the instant case. "Here, the undisputed facts clearly show the features of plaintiff's home did not give rise to an implied license to pass through the gate onto the property. Indeed, the property is encircled by a barbed wire chain link fence. Prominently featured by the closed front gate were two ominous signs reading "NO TRESPASSING" and "BEWARE OF DOG." No reasonable person could have stood at the front gate, in plain view of such signage, and concluded they had an implied invitation to enter. The "NO TRESPASSING" sign alone explicitly communicates that no such invitation exists. The knock and talk exception therefore cannot justify the deputies' entry upon the property." Bush v. Cnty., of San Diego, 2016 U.S. Dist LEXIS 143517 (S.D. Cal. Oct. 17, 2016) (emphasis added).

Meanwhile, the Eighth, Tenth, and now, Eleventh Circuits have ruled the opposite, allowing police officers to ignore the revokation of license and cross curtilage to conduct the "knock and talk." ("We have held that police entry through an unlocked gate on a driveway to approach the front door of a residence for a 'knock and talk' is a reasonable, limited intrusion for legitimate law enforcement objectives." United States v. Bearden, 780 F.3d 887 (8th Cir. 2014) (No Trespassing signs were noted by the court). "We conclude that, under the circumstance presented here, the 'No Trespassing' signs place about Carloss' home would not have conveyed to an objective officer that he could not go to the front door and knock, seeking to speak consensually with

Carloss." United States v. Carloss, 818 F.3d 988 (10th Cir. 2016).

The remaining circuits, after review of case law, have not addressed the issue with facts as put forth in the present matter.

So, the question before the Court is, Do law enforcement officers have an implied license to cross the clearly marked and defined curtilage of a home to conduct a "knock and talk" where the home owner has taken numerous steps to ensure privacy and security, thus giving express orders to the public and for private citizens not to enter. Or, in the alternative, does such an action violate the owner/occupant's reasonable expectation of privacy as guaranteed by the Fourth Amendment?

It is most important to note that in the dissent in Carloss, then-Judge, now Justice, Neil Gorsuch wrote,

> In the constant competition between constable and quarry, officers sometimes use knock and talks in ways that test the boundaries of consent on which they depend. So, for example, courts have found that a homeowner's consent isn't freely given when officers appear with a display of force designed to overbear ... Courts have found consent lacking and a Constitutional violation, too, when officers mislead homeowners into thinking they have no choice but to cooperate ... A home's curtilage--that area "immediately surrounding and associated with the home"--is protected by the Fourth Amendment much like the home itself. So not only do officers need a warrant, exigent circumstances, or consent to enter a home, they also generally need one of these things to reach the home's front door in the first place.

Carloss, 818 F.3d at 1003 (Gosruch, dissenting).

It is also clear in the instant case that intent of the "knock and talk" conducted by Agent Andrews was not for investigatory purposes, but for a search of the property. The fact that he (Andrews) did not question the only occupant (at that time) of the home, Mr. Treffinger's spouse, his admission that he knew Mr.

Treffinger was not home at the time of the "knock and talk," then ordering Mr. Treffinger's spouse to call her husband, who was then ordered home by Officer Andrews, indicates behavior that "objectively reveals a purpose to conduct a search, which is not what anyone would think he had a license to do." Jardines, 569 U.S. at 10.

As Justice Sonia Sotomayor wrote in Collins,

> Although courts traditionally use a "totality of circustances" approach when determining whether an implied license has been revoked, the Holmes court (United States v. Holmes, 143 F. Supp. 1252 (M.D. Fla. 2015) noted many relevant factors the court may use to make this determination. For example, the court might consider: "whether the property is rural or urban; the size of the property; whether there is a guard dog;... or a security camera; whether the mail is delivered to a box on the street or at the house; whether the trash is collected on the property or at the curb; whether the meter is read remotely or at the house;... whether the house is visible from the street; whether there is a walkway or path to the door and if so, whether it is paved; whether there is a fence surrounding the property ...whether there is a gate, whether the gate is open, or closed, or ajar, or locked; whether there is a sign, whether neighbors are aware of the sign, whether law enforcement saw the sign, whether it was the Defendant who posted the sign, the age of the sign, the number of signs, the location of the signs, the size of the signs, the size of lettering on the signs, the message on the signs, be it "No Trespassing" or "Do Not Enter" or "Beware of Dog' or "Private Property" or "Keep Out."

Collins, 201 L. Ed. 2d at 9.

In the instant case, it is clear that most, if not all, of these factors were present at the time of the search of Mr. Treffinger's property and subsequent arrest:

> 1. The home was in a rural setting and large:
>
> Q: So did you have neighbors that were close or nearby?
>
> A: No. The neighbor is kind of not nearby, because it's like for what I understand when you have to have like five acres, and I think five acres.

Testimony of Josephine Burns at evidentiary hearing of February 3, 2017 (App. 118A).

2. There was a guard dog, the property was fenced, and there were signs posted:

> The property is all gated, it's all fenced. And also said "No Trespassing" and "Beware of Dog." And the property is always closed. We always put the chain shut because of the dog, we don't want the dog to go out.

Id.

> ...I heard the dog bark. And I went to go into--go by the door and I heard this--it started with this multiple door bell.

Id. at 119A).

> Predominantly I always kept it locked. Every morning when I left to go to work the gate was usually always locked. We kept it locked most all of the time, unless we knew somebody was coming out then we left it unlocked.

Testimony of Timothy Treffinger, evidentiary hearing of February 3, 2017 (App. 126A).

3. There was a security system and the home was minimally visible from the street:

> I had the trees grow along the fence line so it maintained an area of privacy from the view of the few neighbors I did have.... I also had surveillance beams that I had on the property, motion detectors.

Id. at 124A.

4. Mail and newspapers were delivered outside the fence:

> The mailboxes were located about 150 yards away from the property along the main dirt road coming to my dirt road, which is kind of an offshoot of that main dirt road.

Id. at 125A.

None of these factors were disputed at trial nor at the evidentiary hearing, but for one--whether the gate was locked. Mr. Treffinger and his spouse, Ms. Burns, both testified that the

gate was locked. Officer Wayne Andrews' testimony differed:

> Q: ...You deemed that the property was open to the public or law enforcement?
>
> A: If the gate had been locked and closed I would not have done it that way. The gate was open, so that meant that I could go up to the front door of the residence. If I didn't have the option of that, my only path would have been to have gotten a search warrant for the residence.

Testimony of Wayne Andrews. evidentiary hearing of February 3, 2017 (App. 55A).

But that testimony is contradicted by the findings of the Court in United States v. Hambelton, 2009 U.S. Dist. LEXIS 25139 (N.D. Fla. 2009):

> The gate was locked when Agent Wayne Andrews of the Drug Enforcement Administration arrived at Defendant's house to conduct a knock and talk....[A]ccording to Agent Andrews had developed a plan to talk with Defendant to elicit his cooperation. Agent Andrews and task force officers Divinney, Merritt and Wolfe climbed over the fence and walked up the driveway to Defendant's house.

Hambelton, 2009 U.S. Dist. LEXIS at 3-4 (emphasis added).

To put this in time context, the search of Hambelton's property (later deemed illegal by the court, more on that later) occurred on June 24, 2008. The search of the Treffinger property occurred on July 14, 2008, just 20 days after the Hambelton arrest. Clearly, Agent Andrews' mindset just 20 days prior was that it was acceptable to climb a locked fence, and nothing indicates an intervening factor to change that, until the court suppressed the evidence in the Hambelton case on March 18, 2009. It should also be noted that Officers Divinney and Merritt, who climbed the fence with Agent Andrews at the Hambelton home, were also present at the time Agent Andrews invaded the privacy of the Treffinger home.

Again, as previously noted, Agent Andrews intended to search the Treffinger property, under the guise of a "knock and talk," but invading the curtilage of the home, where Mr. Treffinger maintained a reasonable expectation of privacy by taking proactive steps to maintain that privacy: choosing a large parcel of property in a rural area down a dead-end dirt road on which he had taken multiple steps to ensure privacy and security, including fencing the entire five-acre parcel with security fencing, planting trees and dense foilage around the entire property perimeter, installing gates with chains and locks, posting on the gates obvious "NO TRESPASSING" and "BEWARE OF DOG" signs, having a guard dog on the premises, installing security motion detectors, and placing the mailbox outside of the fence and away from the property--all of which invalidated the implied license to enter.

As Justice Sotomayor continued in Collins,

> Like the automobile exception, the Fourth Amendment's protection of curtilage has long been a black letter law. "When it comes to the Fourth Amendment, the home is first among equals." Florida v. Jardines. "At the Amendment's 'very core' stands 'the right of a man to retreat into his own home and there be free from unreasonable government intrusion.'" Ibid. To give full practical effect to that right, the Court considers curtilage--"the area 'immediately surrounding and associated with the home'"--to be "part of the home itself for Fourth Amendment purposes.'" Jardines, 569 U.S. at 6. "The protection afforded the curtilage is essentially a protection of families and personal privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." California v. Ciraolo, 476 U.S. 207 ... When a law enforcement officer physically intrudes on the curtilage to gather evidence, a search within the meaning of the Fourth Amendment has occurred. Jardines, 569 U.S. at 11 ... Such conduct thus is presumptively unreasonable absent a warrant.

Collins, 201 L. Ed. 2d at 19.

II. THE COURT'S ASSISTANCE IS NEEDED TO CLARIFY LIMITATIONS WHEN LAW ENFORCEMENT INTRUDES WITHIN THE CURTILAGE OF A HOME AND VIOLATES THE CITIZEN'S FOURTH AMENDMENT RIGHTS BY USING OFFICIAL INTIMIDATION AND SHOW OF FORCE TO SEIZE AND DETAIN A HOME'S OCCUPANTS AND ELICIT COOPERATION THROUGH COERCION TO CONSENT TO A WARRANTLESS SEARCH.

The Fourth Amendment violations did not end with Agent Andrews entering the curtilage to search the property. As Justice Gorsuch noted in Carloss, when there is a "display of force designed to overbear," or "when officers mislead homeowners into thinking they have no choice but to cooperate," the "consent" to search is then coerced, and thus not a valid consent." Carloss, 818 F.3d at 1003.

It is important to remember that at this time no warrant had been obtained, nor had it even been sought (App. 138A). Upon arriving at the front door, knowing that Mr. Treffinger was not home (App. 132A), the officers rang the attached doorbell, frightening Ms. Burns (App. 132A) to the extent that she call the police, noting that the men in the yard had guns, including "a long rifle" and thought she was going to be killed (App. 122A), and was finally ordered to go outside the home by the 911 operator, who had then been in contact with Agent Andrews at the home, via police radio. The officers did not question Ms. Burns regarding the true reason they were present, but also would not allow her or her child to go back into the home until Mr. Treffinger, her husband, arrived home a few hours later (App.

123A-124A). In fact, the officers instructed Ms. Burns to call Mr. Treffinger on her phone, then Agent Andrews took the phone from Ms. Burns and spoke to Treffinger personally. Agent Andrews was also obviously aware that he was not welcome on the property:

> And we asked if she would call him back so that we could talk to him, because she didn't want us on the property.

Agent Andrews testimony, evidentiary hearing of February 3, 2017 (App. 133A) (emphasis added).

As stated in Hopkins v. Bonvicino, 573 F.3d 752 (9th Cir. 2018). "An arrest--or to use the Fourth Amendment's terminology, a 'seizure'--occurs when a law enforcement officer, through coercion, 'physical force[,] or a how of authority, in some way restricts the liberty of a person.'" United States v. Washington, 387 F.3d 1060, 1069 (9th Cir. 2004). "A person's liberty is restrained when, 'taking into account all of the circumstances surrounding the encounter,' the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." Id. (quoting Florida v. Bostick, 501 U.S. 429, 437 (1991).

Justice Anthony Kennedy wrote in Bailey v. United States, 568 U.S. 186 (2013), "This Court has stated 'the general rule' that Fourth Amendment seizures are 'reasonable' only if based on probable cause to believe that the individual has committed a crime."

There is no indication that Agent Andrews believed Josephine Burns or her six-year-old son had committed a crime, yet clearly they were "seized" when they were not allowed to go back into the home for several hours, then were not allowed to leave the

premises, and Ms. Burns was ordered to call Mr. Treffinger, then had the phone taken from her.

As stated in United States v. Diaz,

> We have identified six non-exclusive factors for determining whether a suspect is in custody: (1) whether the suspect was informed at the time of questioning that the questioning was voluntary, that the suspect was free to leave or request the officers to do so, or that the suspect was not considered under arrest; (2) whether the suspect possessed unrestrained freedom of movement during questioning; (3) whether the suspect initiated contact with the authorities or voluntarily acquiesced to official requests to respond to questions; (4) whether strong arm tactics or deceptive strategems were employed during questioning; (5) whether the atmosphere of the questioning was police dominated; or (6) whether the suspect was placed under arrest at the termination of the questioning.

United States v. Diaz, 736 F.3d 1143 (8th Cir. 2013).

In applying the above factors to the instant case, (1) Ms. Burns and her son were not informed any answers were voluntary, were not free to leave, and had requested the officers to leave, but they did not do so; (2) she was restrained in movement; (3) she did not initiate contact and only acquiesced after being told to do so by the 911 operator; (4) the officers appeared with handguns and AR-15's during questioning; (5) certainly several armed officers around a petite Filipino woman was police-dominated; and (6) she was not arrested after the event.

Cleraly, Ms. Burns and her son were illegally seized contrary to Fourth Amendment protection.

Once Treffinger arrived at his home, he too was "seized," by definition, forcing cooperation with the police and DEA. Agent Andrews testified,

> I could have said that we can't allow you to go inside because we have guns that are supposedly inside, unless it's secured and--or until it's secured, but we have to stay out here until we gather a search warrant. That could have been what I said. He could have interpreted it that way, but my statement to him was that I can't let you go inside or her go inside the residence knowing there's guns inside....
>
> Q: Did you consider him in custody at that time?
>
> A: Not necessarily at that time. I believed we had a possible situation there and that I wanted to secure the residence and ask for his assistance prior to determining that there was nothing there to be afraid of or not. But he was not free to go at that time.

Testimony of Wayne Andrews, evidentiary hearing of February 3, 2017 (App. 133A, 135A, emphasis added).

Officer Andrews' and the other officers' behavior, as well as Andrews' testimony, clearly indicate "fact-gathering" was not the purpose of the knock and talk, but the intent was to search the property, and force a "consent" as he had done three weeks earlier to Hambelton (Hambelton, 2009 U.S. Dist. LEXIS 25139 at

"The scope of the knock and talk exception is limited," the Court wrote in United States v. Walker 799 F.3d 1361 (11th Cir. 2015), "it ceases where an officer's behavior 'objectively reveals a purpose to conduct a search.'" (quoting Jardines, 569 U.S. at 10.

In the instant case, Officer Andrews and his men clearly crossed fenced-off and maked curtilage, knowing that their intended target was not home, and waited more than 20 minutes after knocking, while roaming the entirety of the curtilage and property, until Mr. Treffinger's spouse was instructed to answer the door ("This implicit license typically permits the visitor to approach the home by the front path, knock prompty, wait briefly

to be received, and then (absent invitation to linger longer) leave." Jardines, id.). But, in the instant case, that license had been revoked.

Then the officers held Ms. Burns and her son, under the guise of fear of guns in the home (although they knew before approaching the home there were guns present (App. 131A)), and then held Mr. Treffinger until he "voluntarily consented." Again, in Jardines, "One virtue of the Fourth Amendment property rights baseline is that it keeps easy cases easy. That the officers learned what they learned only by physically intruding on (the) property to gather evidence is enough to establish a search incurred." Jardines, 569 U.S. at 8.

Or as the Court in Barnes succinctly put it, in suppressing evidence obtained by the government,

> The "knock and talk" exception does not apply here for two reasons. First, the officers' conduct prior to their entry into the home demonstrates the encounter was initiated to conduct a search, as opposed to simply talking with [the Defendant] from outside the home. Second, the implied license to enter [the Defendant's] porch had been revoked by his alterations to the home, and thus, the agents went beyond a "minor departure" from the entry way. Walker, 799 F.3d at 1363. Therefore, the knock and talk exception is not available as a justification for conducting the search without a warrant.

United States v. Barnes, 2017 U.S. Dist. LEXIS 220278 (M.D. Fla. 2017).

The government would argue next that, even if they illegally entered the property to conduct a search (which they do not concede), Mr. Treffinger subsequently "voluntarily consented" to a search of his property. This argument also fails.

The Court in Barnes also went on to say,

> For consent given after an illegal seizure to be valid, the Government must prove two things: that the consent is voluntary, and that the consent was not a product of the illegal seizure. Thus the voluntariness of consent is only a threshold requirement; a voluntary consent to search does not remove taint of an illegal siezure. Rather, the second requirement focuses on causation: 'Whether granting establishment of the primary illegality, the evidence to which the instant objection is made has been come at by exploitation of that illegality or instead by means sufficiently distinguishable to be purged by the primary taint.' (quoting Wong Sun v. United States, 371 U.S. 471, 488 (1963)). Where the presence of a number of officers "tends to suggest an undertaking which is not entirely dependent on the consent and cooperation of the susped," the suspect's consent is prompted "by a show of official authority" and is not given voluntarily. United States v. Edmonson, 791 F.2d 1512, 1515 (11th Cir. 1986); see also United States v. Newbern, 731 F.2d 744, 748 (11th Cir. 1984); United States v. Tobin, 923 F.2d 1506, 1512 (11th Cir. 1991).

United States v. Barnes, 2017 U.S. Dist. LEXIS 220278 (M.D. Fla. 2017), citing United States v. Santa, 236 F.3d 662 (11th Cir. 2000).

In the case at bar, the facts found in the Report and Recommendation by the Magistrate Judge (App. 140A-141A) concluded that no attenating factors of time, nor intervening circumstance between the illegal entry and Treffinger's consent, stating only that law enforcement's entry was not coercive, contrary to Hambelton. However, the case facts and testimony support a stare decisis conclusion of cercion, as the Magistrate stated both cases are "strikingly similar." Id.

As Justice Souter wrote in his dissent in Drayton,

> A perfect example of police conduct that supports no colorable claim of seizure is the act of an officer who simply goes up to a pedestrian on the street and asks him a question ... A pair of officers questioning a pedestrian, without more, would presumably support the same conlcusion. Now consider three officers, one of whom stands behind the pedestrian, another at his side toward the open sidewalk, with a third addressing questions to the pedestrian a foot or two from his face. Finally, consider the same scene in a narrow alley. On such

> barebone facts, one may not be able to say that a seizure occurred, even in the last case, but one can say without qualification that the atmosphere of the encounters differed significantly from the first to the last examples. In the final instance there is every reason to believe that the pedestrian would have understood, to his considerable discomfort, what Justice Stewart described as the "threatening presence of several officers," United States v. Mendenhall, 446 U.S. 544, 554 [] (1980). The police not only carry legitimate authority but also exercise power free from immediate check, and when the attention of several officers is brought to bear on one civilian the imbalance of immediate power is unmistakeable.

United States v. Drayton, 536 U.S. 194 (2002) (Justice Souter dissenting, with Justices Stevens and Ginsburg joining).

Once Treffinger arrived home, after being instructed to do so by officers, he was immediately accosted by officers. In fact, even before he arrived home, he was followed by police officers (App. 134A-135A), increasing the "imbalance of immediate power." He arrived facing several officers with small arms and automatic weapons, and then was asked to cooperate. Any citizen would then feel compelled to do so. Add to that the fact that Treffinger was not allowed to check on the wellbeing of his family, and consent was the only alternative he could reasonably see that would assure their safety. And this was done within minutes of arriving on the property (App. 129A).

There is no question, based on case law and testimony, that Treffinger was coerced into his "consent."

> To determine whether the consent was an independent act of free will and, thus, broke the causal chain between the consent and the illegal detention, we must consider: 1) the temporal proximity of the illegal conduct and the consent; 2) the presence of intervening circumstances; and 3) the purpose and flagrancy of the initial misconduct.

United States v. Jones, 234 F.3d 234 (5th Cir. 2000).

Treffinger was followed home; his family had been illegally seized after officers illegally entered the curtilage of his home to conduct a search under the guise of a "knock and talk" (knowing Treffinger was not home, and being asked by the occupant to leave); there were several officers on the property with guns; and he was not allowed to speak to his family.

Taken in full context of the events of July 14, 2008, Agent Andrews and other agents clearly (based on case law and testimony) illegally entered the curtilage of Treffinger's property to conduct a warrantless search of his property under the guise of a "knock and talk," but knowing he was not home, violating his Fourth Amendment right to be free from unreasonable searches of his home and violating his reasonable expectation of privacy, which he had given express orders to protect.

Treffinger (as well as his wife and son) were illegally seized in violation of their Fourth Amendment rights to be free from unreasonable seizures.

And, in light of the foregoing, as a result of the Fourth Amendment violations noted herein, Treffinger's "consent" was not voluntary, but coerced, thus rendering any evidence obtained tainted.

> ...[T]he Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admontion in Boyd v. United States, 116 U.S. 616, 635 [] (1886): "It may be that it is the most obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely by silent approaches and slight devi-

> ations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of the person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to a gradual depreciation of the right, as if it consisted more in sound than substance. It is the duty of the courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

It remains the duty of the courts to ensure the Constitutional rights of the people, and not allow the "gradual depreciation" of those rights by finding excuses to allow law enforcement to violate those rights. The testimony and case law clearly show that Agent Andrews and the officers violated the right of Treffinger and his family, and thus, enforcement of the guarantees of the Fourth Amendment must be ensured, and the evidence obtained during the search of July 14, 2008 must be excluded.

III. THE COURT'S INTERVENTION IS NECESSARY TO DEFINE COUNSEL'S DUTY TO INVESTIGATE ALL PLAUSIBLE LINES OF DEFENSE RELATING TO MERITORIOUS AND POSSIBLY DECISIVE CLAIMS, AND TO WHAT EXTENT A DEFENDANT'S WISHES AND INTERACTIONS WITH COUNSEL ARE RELEVANT TO COUNSEL'S DECISION TO FILE A PRE-TRIAL SUPPRESSION MOTION, AND TO HOW THE CASE IS TRIED.

In 1984, in its decision in Strickland v. Washington, 466 U.S. 668 (1984), this Court established a two-prong test to determine whether a defendant received effective assistance from his counsel in court proceedings: "1) that counsel's performance was deficient, which requires a showing that counsel was not functioning as the counsel guaranteed by the Sixth Amendment; and 2) that

the deficient performance prejudiced the defense, which requires a showing that counsel's errors were so serious as to deprive the defendnat of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687. This has been the cornerstone to a determination of ineffective assistance. But, also stated in that ruling is the Court's assertion that "Counsel, however, can also deprive a defendant of the right to effective assistance simply by failing to render "adequate legal assistance." Id. at 686.

Included in that constitutionally afforded assistance (but not exclusively so) is,

> that counsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case. Because that testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various defense strategies, we noted that "counsel has a duty to make reasonable investigations or to make a reasonable decision that particular investigations unnecessary.

Kimmelman v. Morrison, 477 U.S. 365 (1986), citing Strickland.

Accordingly,

> It is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction. The investigation should include efforts to secure information in the possession of the prosecution and law enforcement authorities. The duty to investigate exists regardless of the accused's admissions or statements to the lawyer of facts constituting guilt or the accused's stated desire to plead guilty.

1 ABA Standards for Criminal Justice, 4-4.1 (3d ed. 1993).

In the instant case, the Court found that "Mr. Berstein testified that there was 'serious separation' between the facts that Petitioner [Treffinger] had relayed to him and what was in discovery, as far as law enforcement actions and what kind of pres-

sure was placed on Petitoner at the scene." United States v. Treffinger, 2017 U.S. Dist. LEXIS 98464 (N.D. Fla. Mar. 16, 2017).

Such "serious separation" certainly would spur any reasonable attorney into conducting a deeper investigation of the events leading to the search of Treffinger's property and subsequent arrest. And, in fact, Treffinger's counsel did hire an investigator, Michael C. Thompson. At issue were curtilage questions, including steps Mr. Treffinger had taken to ensure his reasonable expectation of privacy, "knock and talk" procedures, coercion of officers to obtain a consent, among others.

However, according to Thompson's testimony at the evidentiary hearing, Bernstein (Treffinger's attorney) did not go into any detail as to information Mr. Thompson wished to glean:

> Q: At any time did he [Bernstein] ever discuss the term knock and talk with you?
>
> A: Well, he probably mentioned it was a knock and talk type case, but I don't have any recollection that we went in any specific detail about it questioning the circumstances surrounding it.

Testimony of Michael Thompson, evidentiary hearing of February 3, 2017 (App. 108A-109A).

> Q: And those photographs, I don't know if you can recall or not, were those done at your own direction or at the direction of Mr. Bernstein/
>
> A: My recollection is when I went out to the scene I would have just taken these photographs. I generally take photographs.
>
> Q: And do you recall, after providing those to Mr. Bernstein, if you were given any further direction to take different photographs or more detailed?
>
> A: ...No.

Id. (App. 110A-111A).

Further, Bernstein did not request for Thompson to be present

at trial (App. 112A), Thompson conveyed to Bernstein that he "doubted or had some hesitation" about what agents had said (App. 113A-114A), and he received no specific request to investigate whether or not the gates were open or locked," (App. 115A-116A), all of which are crucial to the decision to file a motion to suppress evidence, especially in light of Mr. Treffinger's request to file such a motion of numerous occasions, and also address and settle the circuit split of what constitutes express orders against possible trespass and how the circuits are interpreting the application of the implied license to knock and talk. And, equally important, to what extent counsel's failure to investigate constitutes ineffective assistance of counsel. And, finally, what role a defendant's wishes figure into counsel's failure to file a suppression motion--a fact which is abundantly clear in trial and evidentiary hearing testimony. In fact, Treffinger was very clear in his desire that Bernstein should file a motion to suppress, which Bernstein chose to ignore, relying primarily on discovery presented to him by the prosecution and without adequate investigation of his own.

In fact, Bernstein never visited the property (App. 102A), did not develop "any other sources" for the information for the allegation that he made (App. 105A), and never filed a motion to suppress because he didn't want Treffinger to testify at that hearing (id.), although he later admitted he could have established curtilage without calling Treffinger to the stand, which completely negates Bernstein's only reasoning for not filing for suppression, which cannot be justified as a reasonable strategy

(App. 106A). Effectively, Bernstein's decision was not based on a thorough investigation, but principally on the belief in the accuracy of discovery provided to him by the prosecution. All the while, another attorney was developing a motion to suppress in a case involving the same agents and 99% of the same case facts. See Hambelton, 2009 U.S. Dist. LEXIS 25139.

Bernstein simply failed to "conduct a prompt investigation of the circumstances and to explore all avenues leading to facts," and made his decision to not file a motion to suppress based on the aforementioned reasons, and his own previously failed attempt to suppress in a different case (App. 104S).

In Anderson v. Johnson, 338 F.3d 382 (5th Cir. 2003), a case in which defense counsel's effectiveness was brought into question, the court noted that counsel's failure to interview a potential witness (and counsel stated, "there is nothing in the discovery that I was provided from the police and from the D.A.'s office that gave me any indication that he would be a favorable witness..." id. at 391) "rose to the level of a constitutionally-deficient performance. Counsel conceded that he relied exclusively on the investigative work of the state ... there is no evidence that counsel's decision to forgo investigation was reasoned at all, and it is in our opinion, far from reasonable. Counsel's failure to investigate was not part of a calculated trial strategy but is likely the result of indolence or incompetence." Id. at 392.

Here, Bernstein's actions indicate similar behavior, relying solely on information gleaned from police officers and prosecu-

tion, inadequately instructing his investigator, ignoring comments made by that same investigaor questioning discovery, failing to talk to witnesses, and failing to view the property or take into account Treffinger's wishes regarding suppression.

And, had Bernstein done these simple, but expected tasks, the results quite conceivably would have resulted in the suppression of evidence, as it did in Hambelton. (It should be noted here that Treffinger and Hambelton did, in fact, enjoy the same district court judge in their respective cases.) And certainly, had the evidence been suppressed, the outcome of the trial would be different.

Furthermore, as Treffinger insisted counsel file a suppression, and counsel still refused without any rational, reasonable, or strategic reason for not doing so, counsel denied Treffinger his Sixth Amendment right to decide how his case would be tried.

> With individual liberty and in capital cases, life at stake, it is the defendant's prerogative, not counsel's, to decide on the objective of his defense.... As this Court explained, "the right to defend is personal, and a defendant's choice in exercising that right, must be honored out of respect for the individual which is the life blood of the law. (quoting Illinois v. Allen, 397 U.S. 327 (1970). The choice is not all or nothing. To gain assistance, a defendant need not surrender control entirely to counsel. For the Sixth Amendment in granting to the accused the right to make his defense, speaks of the assistance of counsel, and an assistant, however expert, is still an assistant. (The Sixth Amendment contemplates a norm in which the accused, and not a lawyer, is master of his own defense.)

McCoy v. Louisiana, 200 L. Ed. 2d 821 (2008).

Thus, applying Strickland, the evidence and testimony, as well as extablished case law, shows that 1) counsel's performance was deficient as he failed to pursue all avenues of defense and

adequately investigate the matter, relying almost exclusively on discovery from prosecution, and 2) because of those deficiencies, Treffinger was "deprived of a fair trial, a trial whose result is reliable." Strickland, 466 U.S. at 687.

CONCLUSION

Based on the foregoing, Treffinger prays that the Court will find that defense counsel failed to provide effective counsel as mandated by the Sixth Amendment, and further, find that his Fourth Amendment rights were violated by the officers' intrusion upon his reasonable expectation of privacy, by the illegal seizure of himself, his wife and son, and his coerced consent, based on the aforementioned violations.

Mr. Treffinger also feels the Court should address and settle the circuit split of what constitutes express orders against any possible trespass within a home's curtilage, and how the circuits are interpreting the application of the implied license to "knock and talk." And, equally important, to what extent counsel's failure to investigate constitutes ineffective assistance of counsel. Finally, what role does a defendant's wishes figure into counsel's decision to file a motion to suppress, and defendant's right to dictate the manner in which his case is tried.

Therefore, Mr. Treffinger prays this Honorable Court vacate the conviction based on illegally-obtained evidence and remand the case back to the lower court for action consistent with the ruling.

The petition for a writ of certiorari should be granted.

I declare under the penalties of perjury that the foregoing is true and correct to the best of my abilities.

Respectfully submitted,

Timothy Robert Treffinger June 2, 2020

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CERTIFICATION OF TIMELY FILING BY AN INMATE
CONFINED AT AN INSTITUTION

I, Timothy Robert Treffinger, certify that I am the pro se petitioner in this case and that on this 3 day of June, 2020, I submitted the enclosed Petition for Writ of Certiorari to the legal mail system at the U.S. Penitentiary in Yazoo City, Mississippi, postage prepaid, for mailing to the Clerk of Court at the address, below.

Clerk of Court
U.S. Supreme Court
One First Street NE
Washington, DC 20543

I declare under the penalties of perjury that the foregoing is true and correct to the best of my abilities.

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