No. 4-422

In the Supreme Court of the United States

CHAD DAVID,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondents.

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

PETITIONER'S BRIEF ON THE MERITS

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ISSUES PRESENTED

I. Whether the community caretaking exception justifies a local police officer's warrantless entry into a home, and the subsequent arrest of the occupant inside of his bedroom, when the officer claims he entered the home because he suspected that the occupant was sick, the officer entered the home while on duty and with knowledge of suspicious circumstances, and the officer concedes that he did not act under exigent circumstance.

II. Whether the Sixth Amendment right to effective assistance of counsel attaches at a critical stage such as the plea bargain when the prosecutor has decided to offer the plea deal before charging the defendant. If yes, under the *Strickland* test, does the inefficiency of counsel warrant re-offering the initial plea deal when the counsel was an alcoholic who failed to inform the defendant of the plea bargain and deprived the defendant of the opportunity to accept an offer which would have reduced his sentence by ninety percent?

STATEMENT OF FACTS

At the church. Chad David was a well-respected minister at the Lakeshow Community Revival Church in Lakeshow, Staples. R. at 2. On January 15, 2017, Officer McNown, a local police officer, was at the church to attend the 7:00 A.M. service when Mr. David failed to appear. Ex. A at 2. Officer McNown was dressed in uniform as he was scheduled to patrol directly following the service. R. at 2.

Suspicious reports. Mr. David's absence was unusual. R. at 2. Ms. Alvarado, a church member known to be close to Mr. David, approached Officer McNown sweating and shaking. Ex. A at 2, lines 23-28. She reported that she could not reach Mr. David on his home phone and that she was concerned for his well-being. R. at 2. Another church attendee reported that he saw Mr. David the prior night stumbling at a bar. Ex. A at 3, line 5. Officer McNown asked Ms. Alvarado for Mr. David's home address. Ex. A at 3, line 22.

The beginning of an investigative motive. At 9:00 AM, Officer McNown began his shift. R. at 2. He drove his patrol car to Mr. David's gated community where the guard let him through without question. Ex. A at 4, line 8. As Officer McNown entered the community, he observed a black Cadillac SUV with a Golden State license plate leaving the complex. R. at 2. He testified that based on his twelve years of police experience, he knew these SUVs are typically driven by drug dealers. Ex. A at 4, lines 1-4. Additionally, he knew there had recently been an increase in Golden State drugs coming into Lakeshow. Ex. A at 4, lines 1-4.

At Mr. David's house. At 9:30 AM, Officer McNown walked up to Mr. David's front door. R. at 2. He heard loud music coming from inside the home. R. at 2-3. He knocked and announced his presence, but no one answered. R. at 3.

A peek into the home. Finding the front door locked, Officer McNown waited for two-minutes before looking into Mr. David's home through the window. R at 3. Officer McNown noticed an R-rated film on the television. R. at 3. Both the music and the film seemed suspicious to Officer McNown given Mr. David's age and profession. R. at 3. At this point Officer McNown thought "that someone else might be in the home." Ex. A at 4, lines 26-28.

The warrantless entry. Officer McNown walked around to the back of the house. R. at 3. Without knocking, he opened the back door and entered the home. Ex. A at 5, lines 10-11. Once inside, Officer McNown found the house in disarray. Ex. A at 5, line 19. Officer McNown walked towards the television to turn it off. Ex. A at 5, lines 21-24. On his way towards the television, he found a notebook with Ms. Alvarado's name and the words "ounce" and "paid" written on the book. *Id*. He testified that he was "definitely concerned something was wrong at this point." *Id*.

In the bedroom. Officer McNown then moved upstairs where he heard the loud music coming from behind a closed door. R. at 3. Officer McNown opened the bedroom door where he found Mr. David packaging cocaine. Ex. F. Officer McNown arrested Mr. David and called in local DEA agents. R. at 3. Mr. David refused to tell DEA agents the names of his suppliers indicating that he feared for his life and his church. R. at 3.

6th Amendment implicated. Once arrested, Mr. David immediately contacted the only criminal defense attorney he knew. Ex. C at 2, line 23. Mr. David hired defense attorney Keegan Long. R. at 3. The prosecutor decided to offer Mr. David a plea deal after determining that Mr. David could provide information leading to the arrest of a suspected drug kingpin. R. at 4. Under the terms of the deal, Mr. David would plead guilty to one count of 21 U.S. Code § 841 and serve one year in federal prison. Ex. D. In exchange, Mr. David would provide the Department of Justice

with information on his suppliers. Ex. D. The plea deal was valid for only thirty-six hours and would expire at 10:00 PM on January 17, 2017. Ex. D.

Prejudice to Mr. David. The prosecutor sent the offer to Mr. Long who was intoxicated at the time he received the email. Ex. B at 2, line 23. Mr. Long read the email in his impaired state and thought the deal lasted for 36 days instead of 36 hours. Ex. B at 2, line 25. The plea offer expired without Mr. Long ever communicating the plea offer to Mr. David. R. at 4.

Once Mr. Long realized his mistake, he contacted Mr. David. R. at 4. Mr. David immediately fired Mr. Long and hired a new defense attorney (Michael Allen). R. at 4. Despite Mr. Allen's efforts, the prosecutor made it clear that she had no intention of offering a new deal. R. at 5. Instead of 1 year in prison, Mr. David was sentenced to 10 years in prison. R. at 22.

Procedural History. The trial court ruled in favor of the Government finding that: (1) Officer McNown's warrantless entry and search was justified under the community caretaking doctrine, and (2) although the Sixth Amendment right to counsel attached before indictment, Mr. David suffered no prejudice. R. at 12, lines 8-12. Mr. David appealed to the United States Court of Appeals for the Thirteenth Circuit. The appellate court upheld the decision of the lower court in part and reversed in part finding that the right to counsel does not attach prior to the prosecutor charging the defendant. R. at 18, lines 4-12.

SUMMARY OF THE ARGUMENT

This case presents two distinct issues sharing a common theme: improper governmental line drawing. Because the Thirteenth Circuit Court of Appeals' holding directly contradicts the purposes of the Fourth and Sixth Amendment, this Court should reverse.

In *Payton v. New York*, this Court established that "[T]he Fourth Amendment has drawn a firm line at the entrance to the house." *Payton v. New York*, 445 U.S. 573, 590. (1980). Officer

McNown's warrantless entry into Mr. David's home was an unreasonable violation of his Fourth Amendment right.

The Thirteenth Circuit erred in using this Court's community caretaking exception to swallow up the Fourth Amendment. The plain import from the language in *Cady* is that this Court intended to limit the community caretaking exception to automobile searches. In reaching its decision, this Court emphasized the constitutional difference between houses and cars.

Most circuits have honored this Court's distinction and have refused to extend the community caretaking exception to homes. The circuits who have permitted officers acting as community caretakers to enter homes without a warrant have only done so under exigent circumstances. Because the government concedes that Officer McNown did not act under exigent circumstance, this Court should reverse.

Even if the community caretaking exception extends to houses, Officer McNown's entry into Mr. David's home was unreasonable because he was not acting as a community caretaker. Officers act as community caretakers only when they perform police functions that are totally divorced from criminal investigations. Officer McNown used his alleged belief that Mr. David was ill as a pretext to search for criminal wrongdoing. Additionally, Officer McNown was not acting as a community caretaker under the Wisconsin Supreme Court's objective test because a reasonable officer would not have perceived the need to act under the circumstances.

Further, Officer McNown's entry unreasonable under the balancing-test. Alternatively, Officer McNown's search was unreasonable because it went beyond the scope permitted by the narrow purpose which justified the initial entry. Because Officer McNown's entry and search were unreasonable, the Thirteenth Circuit erred in denying Mr. David's motion to suppress.

Likewise, the Thirteenth Circuit failed to draw a correct line in analyzing the Sixth Amendment right to counsel. For this issue, the court drew a bright-line finding that the right to counsel attaches only after the prosecution files charges against the defendant. The Thirteenth Circuit reached this conclusion based on this Court's language in *Gouveia*. The right to counsel must extend to critical stages in the criminal justice process to satisfy the purpose of the Sixth Amendment. Because plea negotiations are a critical stage, this Court should reverse.

The purpose of the Sixth Amendment is to provide defendants with an opportunity to have a legal voice during a confrontation which might settle their fate. In *Frye*, this Court recognized that plea negotiations are a critical stage in the criminal justice process. This Court's holding is grounded in strong reasoning, as statistics indicate that ninety to ninety-five percent of defendants never make it past this stage. Finding that the Sixth Amendment attaches only after indictment incentives prosecutors to delay filing charges until after plea negotiations. Without legal representation during such a critical stage, the purpose of the Sixth Amendment is violated.

After finding that the right to an attorney attaches during plea negotiations prior to indictment, this Court should find that the ineffectiveness of Mr. David's counsel resulted in prejudice under the *Strickland* test. The *Strickland* test requires that the defendant prove that (1) the defense counsel was ineffective, and (2) the counsel's error prejudiced the defendant.

Mr. David's case is the perfect example of the kind of injustice that occurs when defendants are deprived of the Sixth Amendment right to effective counsel during plea negotiations. Mr. David was never offered a plea deal because his lawyer was drunk when the prosecutor emailed him the offer. Because of his lawyer's error, Mr. David never had the opportunity to accept the plea deal which would have reduced his sentence by ninety percent. Under the *Strickland* test, and in the interest of justice, this Court should find that Mr. David was prejudiced as a result of

ineffective counsel. For these reasons, the Thirteenth Circuit erred in denying Mr. David's motion to be re-offered the plea deal. Therefore, this Court should reverse.

STANDARD OF REVIEW

The lawfulness of a search under the Fourth Amendment is a question of constitutional law which this Court reviews *de novo*. *See Ornelas v. United States,* 517 U.S. 690*,* 699 (1996). Similarly, to determine whether the Sixth Amendment right to effective counsel attaches prior to indictment, this Court must interpret the language of the Sixth Amendment. This Court reviews questions of constitutional law on appeal *de novo. See Bachellar v. Maryland*, 397 U.S. 564, 566 (1970). Therefore, this Court is not bound by any legal determinations made by the lower courts.

ARGUMENT

I. Officer McNown's warrantless search of Mr. David's home, while Mr. David was upstairs behind the closed door of his bedroom, was neither reasonable nor justifiable under the circumstances and violated the Fourth Amendment to the United States Constitution.

The Fourth Amendment protects "the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by requiring officers to obtain a warrant. U.S. CONST. amend. IV; *Katz v. United States*, 389 U.S. 347, 357 (1967). The drafters of the Fourth Amendment sought to avoid the abuses of open-ended licenses to search. *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). Thus, an officer must obtain a warrant based on probable cause from a neutral and detached magistrate. *Id*. This Court, however, has recognized that "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Riley v. California*, 134 S. Ct. 2473, 2482 (2014) (quoting *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006)). Accordingly, the warrant requirement is subject to certain reasonable, and well-delineated, exceptions. *Id*.

a. The warrantless search of a home is presumptively unreasonable under the Fourth Amendment.

This Court has established that "physical entry into the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). Searches conducted without a warrant are per se unreasonable under the Fourth Amendment. *Katz*, 389 U.S. at 357. Thus, once a search is conducted without a warrant, then the government must establish that an exception to the warrant requirement made the search reasonable. *Coolige*, 403 U.S. at 455. Here, Justice O'Neal correctly opines in his dissent that the Government failed to meet this burden of reasonableness. R. at 19.

In this case, the Thirteenth Circuit found that the community caretaking exception justified Officer McNown's warrantless search of Mr. David's home. R. at 17. The community caretaking exception did not justify the entry, however, because the doctrine is limited to automobile searches. Even if the doctrine does extend to houses, Officer McNown's entry and search were unreasonable because his conduct fell outside the narrowly defined community caretaking exception. Alternatively, Officer McNown's search went beyond the scope of the search permitted by the community caretaking exception. Therefore, this Court should reverse the decision of the Thirteenth Circuit and remand with instructions to grant Mr. David's motion to suppress evidence.

b. The community caretaking exception is limited to automobile searches and cannot be used to justify the warrantless search of a home.

The community caretaking doctrine was first recognized by this Court in *Cady* as an exception to the warrant requirement when an officer searches a vehicle pursuant to the officer's "community caretaking functions." *Cady v. Dombrowski,* 413 U.S. 433, 441 (1973). In *Cady*, the defendant wrecked his vehicle while driving impaired. *Id*. at 435-36. The vehicle was impounded. *Id*. After learning that the defendant was a Chicago police officer, an officer searched the

defendant's vehicle for his service revolver. *Id*. at 437. Upon opening the trunk of the vehicle, the officer found evidence that eventually linked the defendant to a murder. *Id*. The defendant moved to suppress the evidence because the officer searched his vehicle without a warrant. *Id*.

This Court held that an officer's search of a vehicle is reasonable when the officer is acting "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id*. at 441. This Court, however, was careful to narrow its decision to automobile searches. *Id*. at 439-42. Local police officers frequently investigate car accidents on public highways. *Id*. at 441. When fulfilling this duty, police officers are acting for the purpose of protecting public safety and are not investigating criminal liability. *Id*. at 447.

i. This Court made clear the constitutional difference between houses and cars when it set forth the community caretaking exception in *Cady v. Dombrowski.*

This Court stated in its first paragraph of analysis that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." *Cady*, 413 U.S. at 339 (quoting *Chambers v. Maroney*, 399 U.S. 523, 258-29 (1967)). This Court expressly recognized that a warrantless search of a vehicle might be reasonable under the community caretaking doctrine "although the result might be the opposite in a search of a home." *Id*. at 440.

The rationales for allowing warrantless searches of automobiles are well established. The ready mobility of a vehicle served as the core justification for the automobile exception since it was first articulated in *Carroll v. United States*. 267 U.S. 132, 153 (1925). In *Carroll*, officers had probable cause to believe that a car contained illegal liquor. *Id*. at 144. The officers stopped and searched the car, seized the liquor, and arrested the occupants. *Id.* The Court upheld the search and seizure explaining that a "necessary difference" exists between houses and cars because of a vehicle's inherent mobility. *Id*. at 153.

Later cases then introduced a second rationale for warrantless searches of automobiles based on local police officers' frequent, noncriminal contact with cars. Unlike houses, cars are subject to continuous and pervasive government regulation. *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) (finding the community caretaking exception justifies the warrantless search of an automobile). Every day, local police officers stop and examine cars for a variety of violations such as expired license plates and faulty headlights. *Id*. at 368. Therefore, this Court has recognized that "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *Id*. at 367.

These rationales simply do not extend to houses. *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). In fact, the Fourth Amendment's protection of the home has long been black letter law. *See Weeks v. United States*, 232 U.S. 383, 394 (1914) ("The Fourth Amendment was intended to secure the citizen. . . against unlawful invasion of the sanctity of his home by officers of the law."); *see also Silverman v. United States*, 365 U. S. 505, 511 (1961) ("At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); *see also Florida v. Jardines*, 569 U. S. 1, 6 (2013) ("[W]hen it comes to the Fourth Amendment, the home is first among equals.").

In *Payton*, the defendant challenged a New York statute permitting officers to enter a private residence without a warrant. *Payton,* 445 U.S. at 578. This Court concluded the statute was unconstitutional, stating, "[T]he Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id*. at 590.

Most circuits agree that the community caretaking doctrine announced in *Cady* is limited to automobile searches. In *Erickson*, the Ninth Circuit held that *Cady* was based on the distinction

made between vehicles and homes. *United States v. Erickson,* 991 F.2d 529, 532 (9th Cir. 1993). The *Erickson* court echoed *Payton* in holding that an officer acting as a community caretaker may not enter a building without a warrant absent exigent circumstances. *Id*. at 533.

The Tenth Circuit also refused to extend the community caretaking doctrine beyond automobiles. *See United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994). In *Bute*, the officers noticed an open door on a commercial building. *Id*. at 533. The officers entered the building and noticed an unusual odor coming from behind a door. *Id*. The court held that the officers' entry was unreasonable despite the officers' claim that they were not investigating a crime. *Id*. at 539.

Similarly, in *Pichany,* the Seventh Circuit held that officers' warrantless search of a warehouse was unreasonable even if the officers were acting as community caretakers. *United States v. Pichany*, 687 F.2d 204, 207-09 (7th Cir. 1982). The court explained, "[T]he plain import from the language of the *Cady* decision is that the Supreme Court did not intend to create a broad exception to the Fourth Amendment." *Id*. at 208.

i. Some circuits have recognized a lower threshold for exigency when the officer is acting in a community caretaking role, but the Government conceded Officer McNown's entry was not done under exigent circumstance.

The exigent circumstances doctrine, which recognizes that an officer may reasonably enter a home without a warrant under emergency circumstances, is different from the community caretaking doctrine articulated in *Cady*. As stated by the Fourth Circuit, "[T]he 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*, 570 F.3d 546, 554 (4th Cir. 2009). The distinction is especially important in this case because the Government has conceded that Officer McNown's entry into Mr. David's home was not done under exigent circumstance. R. at 7.

Although some circuits appear to have relied on the community caretaking doctrine to uphold warrantless entries into houses, these courts have actually applied a modified exigent circumstances test. The result in these cases is a lower threshold for the exigency exception when the officers are acting as community caretakers.

For example, in *Quezada*, the Eighth Circuit held that the officer must act pursuant to a "reasonable belief that an emergency exists" for the community caretaking doctrine to apply to a warrantless search of a home. *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006). Affirming that view in *Smith*, the Eighth Circuit held that officers were justified in entering a home without a warrant when the officers “reasonably believed an emergency situation existed that required their immediate attention.” *United States v. Smith*, 820 F.3d 356, 360 (8th Cir. 2016).

Similarly, the Sixth Circuit recognizes a modified exigency exception when officers act as community caretakers. In *Rohrig*, police received a complaint of loud music coming from a neighbor’s house in the middle of the night. *United States v. Rohrig*, 98 F.3d 1506, 1509 (6th Cir. 1996). Officers entered the house to turn down the music and seized evidence in plain view. *Id*. The Sixth Circuit held that the entry was reasonable because the nuisance created an exigent circumstance requiring officers to maintain “the peace or good order of the neighborhood.” *Id*. at 1510. Despite this broad exigency exception, the court suggested limits, stating, “[W]e doubt that community caretaking will generally justify warrantless entries into private homes.” *United States v. Williams*, 354 F. 3d 497, 508 (6th Cir. 2003).

The exigent circumstances doctrine is well-established. That doctrine, however, is not at issue here. Absent exigent circumstances, an officer’s warrantless entry into a home is unreasonable. *Payton*, 445 U.S. at 590. Because no exigent circumstances are argued here, Officer

McNown's warrantless entry into Mr. David's home was unreasonable. Therefore, this Court should reverse the decision of the lower courts and grant Mr. David's motion to suppress.

c. Even if the community caretaking exception extends to houses, Officer McNown's conduct fell outside of the narrowly-circumscribed community caretaking exception.

The community caretaking doctrine articulated in *Cady* allows a warrantless search when an officer is acting "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. Because of the heightened privacy interest in a home, this Court should construe the term "community caretaker" narrowly when an officer searches a home rather than a vehicle. *Pichany*, 687 F.2d at 208. Therefore, officers are not acting as community caretakers when they enter a home to investigate a crime.

i. Officer McNown was not acting as a community caretaker.

Officer McNown was not acting as a community caretaker when he entered Mr. David's home for purposes of conducting a criminal investigation. As indicated in *Quezada*, there is a "concern that a police officer might use his or her caretaking responsibilities as a pretext for entering a residence." *Quezada*, 448 F.3d at 1007. Thus, this Court should consider all of the facts and circumstances objectively when determining the officer's intent. *United States v. Harris*, 747 F.3d 1013, 1018 (8th Cir. 2014). Although Officer McNown claims that he entered Mr. David's home to ensure Mr. David's well-being, the circumstances leading up to the entry and his actions while inside of Mr. David's home reveal a different motive.

This Court should conclude that Officer McNown entered Mr. David's home for purposes of conducting a criminal investigation on the following facts: (1) Officer McNown received a reliable report that Mr. David had engaged in unusual behavior the prior night; (2) Officer McNown obtained Mr. David's address from Ms. Alvarado after Ms. Alvarado reported her

concern for Mr. David sweating and shaking; (3) Officer McNown was surprised that a minister would live in one of the nicest gated communities in town; (4) Officer McNown observed a vehicle known to be associated with drug-trafficking leaving Mr. David's complex; (5) Officer McNown heard loud scream-o music coming from Mr. David's house; (6) Officer McNown looked through Mr. David's window and identified an R-rated movie on the television; and (7) after entering Mr. David's home, Officer McNown did not immediately check on Mr. David but stopped to read a notebook he found on his way to turn off the television.

The totality of the facts supports that Officer McNown did not act "totally divorced" from an investigative motive as required by *Cady*. Officer McNown could have made a reasonable inference that Mr. David was involved in an illicit activity based on the reports he received at the church, especially considering Ms. Alvarado's strange behavior. Ex. A at 2.

Further, Officer McNown's testimony that he was surprised that a minister would live in such a nice community indicates his supposition that Mr. David did not make a substantial income as a minister. Ex. A at 3. Thus, Officer McNown likely inferred that Mr. David had a second source of income. Pulling into the community, Officer McNown saw a vehicle associated with drug-trafficking leaving Mr. David's complex. Ex. A at 4. At this point, Officer McNown likely had a reasonable suspicion that Mr. David's second source of income came from an illegal activity.

Officer McNown's observation of the loud, scream-o music and the R-rated movie on the television likely bolstered Officer McNown's suspicion that Mr. David was not the man he held himself out to be. R. at 3. Even if he did not believe Mr. David had committed a crime, Officer McNown likely believed a crime had been committed. He testified at this point that he "thought someone else might be in the home." Ex. A at 4. These facts could have led Officer McNown to

believe a burglary had occured. Therefore, Officer McNown entered Mr. David's house, not to ensure Mr. David's well-being, but to investigate his reasonable suspicion.

Perhaps the strongest fact supporting this conclusion is Officer McNown's conduct while inside of Mr. David's home. Officer McNown, acting totally divorced from an investigative motive, would not have stopped to read Mr. David's private journal before checking on his well-being. Ex. A at 5. He testified that upon finding the journal, he was "definitely concerned something was wrong at this point." Ex. A at 5. This statement indicates that Officer McNown already had a concern, and at this point, his concern became *definite*. Thus, Officer McNown used his alleged belief that Mr. David was ill as a pretext to search for criminal wronging.

Furthermore, even if Officer McNown did enter Mr. David's house to check on his well-being, a reasonable officer would not have perceived the need to act under these circumstances. In *Pinkard*, the Wisconsin Supreme Court used an objective test to determine whether an officer was acting as a community caretaker. *State v. Pinkard*, 327 Wis. 2d 346, 350 (2010). The court found that the officers in *Pinkard* were acting as community caretakers when they entered an apartment because a reasonable officer would have inferred that the occupants had overdosed on drugs and acted to render aid under the circumstances. *Id*. at 370.

The facts are quite different here. First, in *Pinkard*, an anonymous caller reported to the officers that the occupants of *Pinkard's* home "appeared to be sleeping near drugs." *Id*. at 366. The court found this reasonably justified the officers' belief that the occupants could have overdosed. *Id*. at 368. In contrast, Officer McNown was merely speculating as to why Mr. David did not show up to church. Mr. David could have overslept, or he could have lost track of time visiting with a friend. Officer McNown could have arrived at any of these inferences based on Mr. David's absence. The fact that church attendees were worried about him do not change these possibilities.

Second, in *Pinkard*, the officers' initial concern for the safety of the occupants was corroborated by the fact that a door was left open and the occupants would not respond. *Id*. at 369. In contrast, Officer McNown heard loud music coming from the house and saw a movie playing on the television. R. at 3. Unlike in *Rohrig*, Officer McNown was not responding to a neighbor's complaint of loud music in the middle of the night. *Rohrig*, 98 F.2d at 1509. Instead, Officer McNown asserts that he entered Mr. David's home to ensure his well-being. Ex. A at 5. Even if Officer McNown initially thought Mr. David was ill, these facts did not corroborate that belief.

ii. The public is not willing to trade its right to protection from unreasonable government intrusion for a cup of tea.

Finally, in determining whether an officer's search was reasonable pursuant to a bona-fide community caretaking function, several courts have used a balancing test. *See Pinkard*, 327 Wis. 2d at 371; *see also Rohrig*, 98 F.3d at 1517; *see also Harris*, 747 F.3d at 1017. When functioning as community caretakers, officers act as public servants. Thus, the balancing test weighs the public's interest in the officer's actions against the defendant's privacy interest.

The *Pinkard* court found that the public's interest in police responding to emergency situations outweighed the defendant's privacy interest in his home. The court stated, "[T]he officers were presented with a significant exigency, for every passing minute could have been the difference between life and death." *Pinkard*, 327 Wis. 2d at 373. In contrast, Officer McNown was not presented with a life or death situation. In fact, he freely admits that he did not believe there was an emergency that needed his attention. Ex. A at 7, lines 5-6.

Further, Officer McNown admitted that at the point he entered through the unlocked back door, he was "just eager to check the well-being of Chad…and give him his tea." Ex. A at 5, lines 13-14. The public is not willing to trade its right to protection from unreasonable government intrusion for a cup of tea.

d. Alternatively, Officer McNown's search went beyond the scope permitted by the community caretaking exception.

A warrant assures the citizen that the government's intrusion is lawful and that it is narrowly limited in its objectives and scope. *Skinner v. Railway Labor Exec. Ass'n*, 489 U.S. 602, 621-22. Therefore, when acting pursuant to an exception to the warrant requirement, the officer's search is limited to the purpose which justified the initial entry. *See Arizona v. Hicks*, 480 U.S. 321, 325 (1987).

In *Hicks*, an officer entered a house under exigent circumstances. While inside, the officer noticed two expensive stereos. *Id*. at 323. Suspecting the stereos were stolen, he read and recorded their serial numbers. *Id*. This Court ruled that the entry was reasonable under the exigent circumstances exception, but the search was unreasonable because the serial numbers were not in the officer's plain view. *Id*. at 327. Thus, the officer's search went beyond the scope permitted by the exigent circumstances doctrine. *Id*. at 325. Similarly here, Officer McNown's search went beyond the scope permitted by the community caretaking doctrine. If Officer McNown was reasonable in entering Mr. David's home to ensure Mr. David's well-being, then this Court should find that the scope of his search was limited to that purpose.

Officer McNown saw the journal on his way to turn off Mr. David's television. Ex. A at 5, lines 19-24. Further, Mr. David stopped to read the journal. *Id*. The journal would not have come into Officer McNown's plain view if he did not deviate from his alleged purpose for entering Mr. David's home. Additionally, the words in the journal were not in Officer McNown's plain view because he had to stop to read them. If the Court accepts that the community caretaking doctrine extends to houses and that Officer McNown acted reasonably in entering Mr. David's home as a community caretaker, then this Court should find the search of the journal went beyond the scope

of the search permitted. Therefore, this Court should reverse and grant Mr. David's motion to suppress evidence.

II. The Court should attach the Sixth Amendment right to effective counsel to pre-indictment plea negotiations and find that because Mr. David suffered unfair prejudice, Mr. David is entitled to a remedy.

The Sixth Amendment right to counsel is a fundamental and important right to the legal system of the United States. The Sixth Amendment states, in pertinent part, that "in all criminal prosecutions, the accused shall enjoy… the Assistance of Counsel for his defense." U.S. CONST. Amend. VI.

Courts have interpreted the Sixth Amendment to mean that the right to counsel attaches whenever a prosecutor initiates a criminal proceeding or an adversarial process. *Kirby v.* Illinois, 406 U.S 682, 689 (1972). This means that the right to counsel attaches when the prosecutor charges the defendant with a crime. This rule was solidified in *United States v. Gouveia*. The Supreme Court in *Gouveia* held that the interpretation of the Sixth Amendment "requires the existence of both a criminal prosecution and an accused." *United States v. Gouveia*, 467 U.S. 180, 189 (1984).

In adherence to this rule, certain courts have refused to recognize the right to an effective counsel pre-indictment. For example, in *Turner v. United States,* a Sixth Circuit Court held that "the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations." *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018).

While the bright-line rule might seem efficient and effective, there have been issues in its application. One of such issues is the pre-indictment plea bargain. Over time the use of plea bargains to resolve criminal cases have grown to tremendous numbers. As of 2017, ninety-seven percent of all federal cases, and ninety-three percent of all state criminal cases were resolved through a plea bargain. *See* Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge*

Attachment of the Sixth Amendment Right to Counsel, 92 Wash. L. Rev. 213, 247 (2017). The plea bargain stage plays a critical role in the current criminal justice system. In *Missouri v.* Frye, the Supreme Court stated that "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always a critical point for a defendant." *Missouri v.* Frye, 566 U.S. 134, 144 (2012).

a. The Sixth Amendment right to counsel must attach during plea negotiations because plea negotiations are a critical stage in the criminal justice process irrespective of an indictment.

In *Missouri v. Frye,* the Supreme Court labeled the plea bargain stage as a critical pretrial stage. In *Frye*, the prosecutor informed the defendant's lawyer of two possible plea bargain options. One of the options was to plead guilty to a felony charge and get three years with a recommendation that the defendant gets ten days in jail as a shock time or plead guilty to a misdemeanor crime with a recommendation of a ninety day sentence. *Frye*, 566 U.S. at 138. The defendant's attorney failed to inform the defendant about the plea deal. Because of this inefficiency, the defendant accepted a plea deal that was not as favorable as the initial plea deal. *Id* at 139.

This Court in *Frye* recognized that the right to counsel attaches in many pretrial stages including plea bargains. In reaching this conclusion, this Court looked to both statistics and the reality of plea bargains. According to this Court, plea bargains resolve a substantial amount of cases. *Id.* at 143. This Court pointed out that "plea bargains have become so central to the administration of the criminal justice system that defense counsels have responsibilities in plea bargain process… to render assistance at a … critical stage." *Id.* at 143. This Court ultimately ruled that the defense counsel had the duty to communicate formal offers to an accused because our system of justice is "for the most part a system of pleas, not a system of trials." *Id.*

The facts in *Frye* are analogous to the facts in this case. The prosecutor communicated a plea deal to Mr. David's attorney offering Mr. David a reduced sentence in exchange for information on his suppliers. Ex. D. Mr. David's attorney, like Frye's attorney, failed to inform Mr. David of this plea bargain until the plea bargain had expired. Ex. B at 2, line 25. Mr. David was convicted and sentenced to a longer time in prison just like Frye. R. at 22, line 5-6.

Surprisingly, courts have come to a different decision in both cases. The only difference between Frye and Mr. David's plea was that Mr. David's plea was pre-indictment and Frye's plea deal was post indictment. In both instances, we have a prosecutor who offered a deal to the defendant in exchange for some action by the defendant. There is no difference between these two types of plea bargains. In both instances, the prosecutor confronted the defendant with a legal document that could seal the fate of the defendant. The choice of the prosecutor to file charges against the defendant should not determine if the defendant has a Sixth Amendment right to an attorney under such circumstances.

i. Courts are split on how to apply this Court's ruling in *Gouveia* when the prosecutor offers a plea deal before filing charges against the defendant.

It is undisputed among all courts that the right to counsel attaches post-indictment. *Gouveia*, 467 U.S. at 189. In *Gouveia,* this Court said that the Sixth Amendment "requires the existence of both a criminal prosecution and an accused…" *Id.* at 188. The problem with limiting this language only to post-indictment plea deals is that defendants who participate in plea bargains pre-indictment are not protected even though the plea bargains are the same.

Courts in different circuits are split about the application of a bright-line rule that gives rights to defendant's post-indictment but not pre-indictment. For example, in *Matteo,* the Third Circuit opposed the decision in *Turner v. United States* (no right to counsel pre-indictment stage).

The Third Circuit held that a defendant's right to counsel attached before the prosecutor charged the defendant with any crime. *Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 892 (3d Cir.1999). The court looked to the language of *Gouveia* but focused more on the purpose of the Sixth Amendment. The court said that "the right may attach at earlier stages when the accused is confronted, just as at trial, by the procedural system, or by its expert… in a situation where the results of the confrontation might well settle the accused fate…" *Id.* at 892.

Here, Mr. David's counsel failed to present the plea deal that the prosecutor had offered. Ex. B, pg. 2, line 18-21. Because of the ineffectiveness of counsel, Mr. David was deprived of the opportunity to accept a one-year deal and has now been sentenced to ten years in prison. R. at 22, line 4-5. Even though the Thirteenth Circuit accepted that counsel was inefficient, the court still ruled that Mr. David had no remedy because his right to counsel did not attach until after the prosecutor had charged him.

According to the court's holding, Mr. David's remedy was contingent on the prosecutor's decision to charge him. The application of the Sixth Amendment in such way is against its purpose. The Court should apply the reasoning of *Matteo* to this case because the prosecutor confronted Mr. David through his attorney when the prosecutor offered Mr. David a plea deal, and defense counsel's ineffectiveness sealed Mr. David's fate. Mr. David was sentenced to ten years in prison instead of one year. The application of the bright-line rule gives prosecutors an incentive to delay formally charging defendants. Applying a liberal approach helps avoid such behavior.

ii. The prosecutor has an incentive to delay formally charging suspects.

Applying the bright-line rule recognized in *Turner* gives prosecutors the incentive to delay formally charging an accused person. Turner and other circuits which have adopted a bright-line rule are giving the prosecutor an advantage in a critical stage of pretrial.

Under the bright-line approach, a prosecutor can decide to delay charging a defendant so that they can bargain with unsophisticated defendants who do not have attorneys. Applying the bright-line rule in such situations leaves the defendants unprotected and without legal help. An example of such act can be found in *Escobedo v. Illinois*. In *Escobedo*, the defendant requested for an attorney during interrogation and the officers denied his request. *Escobedo v. Illinois*, 378 U.S. 478, 485 (1964). This Court ruled "the interrogation here was conducted before petitioner was formally indicted. However, in the context of this case, that fact should make no difference." *Id.* at 485. Even though the ruling in *Escobedo* was a win for pre-indictment right to counsel advocates, the more recent decision in *Gouveia,* has given prosecutors a reason to continue the acts of the police officers in *Escobedo.* In situations like pre-indictment plea bargains, prosecutors can simply wait to charge a defendant so they can reach a more favorable result.

Decisions that ultimately decide the defendant's fate should not be done without a defense counsel present. This is unacceptable and against this Court's holding in *United States v. Wade.* This Court in *Wade* said that the right to counsel "encompasses counsel's assistance whenever necessary to ensure a meaningful defense." *United States v. Wade*, 388 U.S. 218, 225 (1967). As this Court ruled in *Frye,* the plea bargain stage is a critical stage. *Frye*, 566 U.S. at 143. For defendant's to enjoy a right to a meaningful defense, the right must attach during the plea bargain stage (pre or post-indictment) because most defendants never make it past this stage.

In addition to giving prosecutors an incentive to delay formal charges, the bright-line rule also provides no remedy to a defendant whose attorney has been ineffective. Defendants like Mr. David are just stuck with whatever repercussion might occur because of the ineffectiveness of their attorney. The Sixth Amendment was put in place so that such injustice would not occur.

Mr. David's case is the perfect example of why a bright-line rule is inadequate. This case presents the Court with an opportunity to approve a liberal application of the *Gouveia* ruling.

iii. Depriving individuals of their right to an attorney pre-indictment violates the purpose of the Sixth Amendment.

In the *Gouveia* case, the Court admitted that the purpose of the Sixth Amendment is to help the accused when he is confronted with the "intricacy of the law and the advocacy of the public prosecutor." *Gouveia*, 467 U.S. at 189. The Court also said that the right to counsel applies to certain critical pretrial proceeding if "the accused is confronted, just as at trial, by the procedural system, or by his expert adversary or by both… in a situation where the result of the confrontation might settle the accused fate" *Id.* at 189.

The purpose of the Sixth Amendment is to provide defendants with an opportunity to have a legal voice to help them through an often tough and confusing process. Defendants are usually not knowledgeable about what their rights are, and they tend to get bullied into doing what the government agent wants the defendant to do. The Court in *Gouveia* addressed the purpose of the Sixth Amendment when the Court said the Sixth Amendment applies in a situation where "the confrontation might settle the accused fate." *Id.* The language in *Gouveia* insinuates that at the very least, the right to counsel should apply at a plea bargain stage pre-indictment because there is a direct contact (confrontation) between the prosecutor and the defendant, and legal advice is critical at this stage.

Under a liberal interpretation of the language in *Gouveia*, Mr. David's right to counsel attached once the prosecutor emailed his attorney. Ex. A. In this case, the prosecutor (an expert adversary), put Mr. David in a situation that would have ultimately sealed his fate had his attorney informed him of the plea deal. Ex. A. This case meets all the criteria under the Sixth Amendment.

The purpose of the Sixth Amendment is to ensure the accused have effective counsel at all critical stages of the law, so they are not disadvantaged, and so they have a meaningful defense. *Wade*, 388 U.S. at 225.

b. The ineffectiveness of Mr. David's counsel resulted in prejudice under the *Strickland* test.

After determining that the Sixth Amendment right to counsel applies to the pre-indictment plea bargains, the next step of the analysis is to determine whether the ineffective assistance of Mr. David's counsel prejudiced him. In *Strickland,* the Supreme Court decided that when a defendant brings a claim of ineffective counsel, "first the defendant must show that counsel's performance was deficient… second, the defendant must show that the deficient performance prejudiced the defense." *Strickland v. Washington* 466 U.S. 668, 687 (1984).

Under the first prong of the Strickland test, this Court explained that the defendant must show that the "counsel made errors so serious that the counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment." *Id.* Under the second prong, the defendant must establish that "counsels' error was so serious as to deprive the defendant of a fair trial…." *Id.*

Although *Strickland* was about an attorney's performance at a capital hearing *Id.* at 672, this Court has also applied the *Strickland* test to ineffective counsel claims that occurred at the plea bargain stage. *See Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

i. Both parties have stipulated that Mr. Long was ineffective when acting as Mr. David's counsel.

Mr. Long failed to inform Mr. David of the plea deal because he was intoxicated. Both sides have stipulated that Mr. David's defense attorney was ineffective. Therefore, the first prong of the *Strickland* test is satisfied.

ii. Mr. Long prejudiced Mr. David by depriving him of the opportunity accept a plea deal which would have reduced his final sentence by ninety percent.

The second prong of the *Strickland* test is the prejudice test. Mr. David must show that his counsel's ineffectiveness prejudiced him. The Court in *Strickland* said that "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694.

The Court of Appeals' record supports Mr. David's claim of prejudice. On direct examination, Mr. David said "Of course I would have taken it [plea deal]. One year in prison compared to risking at least ten at trial. It's a no-brainer." Ex. C at 3, lines 22-23. Mr. David never saw the plea deal until after the deal had expired. Additionally, Mr. David's current attorney wrote an email to the prosecutor stating, "[Mr. David] has seemed very enthusiastic about accepting the plea offer… and would like to be offered a new plea as soon as possible." Ex. E. The prosecutor refused to offer Mr. David a new plea deal. Ex. E.

The ineffectiveness of Mr. David's lawyer changed the result of the proceeding and prejudiced Mr. David. The prejudice, in this case, is that instead of serving one year in prison, Mr. David will now serve ten years in prison. There is more than a reasonable probability that the result of the proceeding would have been different had Mr. David been offered the plea deal. Mr. David's statements prove that he would have accepted the deal had he known about it, and the email from the prosecutor proves that the prosecutor was ready to offer him this deal. To avoid any injustice, this Court should provide a remedy for Mr. David.

c. Because Mr. David suffered prejudice, Mr. David is entitled to a remedy.

Once this Court finds that the ineffectiveness of Mr. David's attorney prejudiced Mr. David, the next step is to decide what remedy should apply. There are two possible remedies in

this situation. This Court can either remand the issue so the trial court can offer an appropriate remedy, or the Court can instruct the prosecutor to re-offer the initial plea to Mr. David.

Courts have applied different remedies to situations that involve ineffective counsel at the plea bargain stage. In *United States v. Morrison*, this Court held that in cases involving Sixth Amendment violations, there is a "general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests" *United States v. Morrison*, 449 U.S. 361, 362 (1981). Agreeing with this principle, in *Lafler v. Cooper*, this Court said that the "correct remedy in these circumstances… is to re-offer the plea agreement." *Lafler v. Cooper*, 566 U.S. 156, 174 (2010).

In Mr. David's case, the harm he suffered was an extended time in prison instead of the one-year sentence offered in the plea deal. The best way for this Court to remedy Mr. David's situation is to put him back in the same position he would have been in had his counsel informed him of the plea deal. Therefore, this Court should remand this case with instructions to re-offer Mr. David the original plea deal.

In the alternative, the Court should remand the issue to the trial court with instruction to determine an appropriate remedy. The trial court may allow the prosecution to offer Mr. David a new plea deal.

CONCLUSION

Thomas Jefferson said, "[A] bill of rights is what the people are entitled to against every government on earth, general or particular, and what no just government should refuse." Mr. David has been refused his Fourth Amendment right to be free from government intrusion in his home and his Sixth Amendment right to effective counsel during every critical stage of the justice process. Therefore, this Court should reverse.