No. 4–422

IN THE

Supreme Court of the United States

NOVEMBER TERM, 2018

CHAD DAVID,

PETITIONER,

V.

UNITED STATES OF AMERICA,

RESPONDENT.

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

BRIEF FOR PETITIONER

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STATEMENT OF ISSUES PRESENTED

I. Whether police officers may rely on the community caretaking exception to conduct warrantless searches of the home under the Fourth Amendment.

II. Whether defendants have the right to effective counsel when prosecutors engage in plea negotiations prior to federal indictment.

STATEMENT OF THE FACTS

Chad David was a well-respected minister in Lakeshow, Staples. R. at 2. Despite being seventy-two years old, he was known for leading high-energy services at the Lakeshow Community Revivalist Church. R. at 2. Minister David would jump and sing throughout his uplifting services and many church-goers found his energy inspirational. Ex. A, pg. 2.

Officer James McNown was a four-month member of Minister David's church and regularly attended his Sunday morning service. Ex. A, pg. 2. On January 15, 2017, Minister David missed his 7:00 AM Sunday service. R. at 2. A church-goer, Julianne Alvarado, attempted to call Minister David, but he did not respond. R. at 2. Officer McNown noticed that Ms. Alvarado was shaking and sweating that morning. Ex. A, pg. 2. When discussing Minister David's absence, another church-goer said he saw Minister David out at a bar the prior night. R. at 2. Yet, Officer McNown assumed Minister David was home with the flu due to his elderly age. R. at 2.

After the service ended at 8:50 AM, Officer McNown began his patrol at 9:00 AM and drove to Minister David's home to check on him. R. at 2. Minister David lived in one of the nicest gated communities in town, which he chose because he valued his privacy. Ex. A, pg. 3; Ex. C, pg. 2. Although the neighborhood security guard knew that Minister David preferred not to have guests, the security guard nevertheless allowed Officer McNown through the gates that morning. Ex. C, pg. 2. As Officer McNown entered the community, he drove past a black Cadillac SUV with Golden State license plates. R. at 2. In addition to knowing that there was a recent influx of Golden State drugs into Lakeshow, Officer McNown recognized this type of automobile as one commonly driven by drug dealers. R. at 2.

As Officer McNown approached Minister David's home, he saw that Minister David's front door was closed and his car was in the driveway. R. at 2. When Officer McNown reached the front door, he heard music coming from inside and saw a movie playing through the window. R. at 3. He knocked, rang the doorbell, and tried opening the door. R. 3. After he discovered the front door was locked, Officer McNown walked behind the house and let himself in through the back door. Ex. A, pg. 5. Despite believing Minister David could not hear him knock at the front door, Officer McNown did not knock again or announce himself before entering. Ex. A, pg. 5. Once inside, Officer McNown walked to the television to turn it off. He noticed a notebook with the words "ounce" and "paid" written on it next to Julianne Alvarado's name—the same woman who was shaking and sweating earlier. Ex. A, pg. 5. After seeing the notebook, Officer McNown "was definitely concerned something was wrong." Ex. A, pg. 5. He realized the music was coming from the second floor and proceeded to walk up the staircase. R. at 3. When he followed the music to a door upstairs, he opened it to find Minister David packaging cocaine. R. at 3. Officer McNown called the police department and a Drug Enforcement Agency (the "DEA") investigator arrived shortly after. Ex. A, pg. 6. Minister David was arrested and immediately retained Keegan Long as his counsel. R. at 4. He met with Mr. Long that same day. Ex. C, pg. 3. Because Minister David had never been through the legal system before, he had questions for Mr. Long. Ex. C, pg. 3.

Before Minister David was formally charged with a crime, the DEA investigator from his arrest sought to garner information from Minister David regarding his suppliers. R. at 4. In doing so, the prosecutor and the DEA investigator created a favorable plea deal for Minister David. R. at 4. The prosecutor emailed the plea deal to Mr. Long on January 16, 2017, at 8:00 AM, and it was set to expire in thirty-six hours. R. at 4. The plea offered one year in prison in

exchange for the relevant contact and identifying information of Minister David's suppliers, one of which had to lead to an arrest. Ex. D. If Minister David rejected this plea deal, he risked serving ten years in prison—the statutory minimum sentence after conviction. R. at 14.

Mr. Long was drinking at a bar when he received the plea deal through his email. R. at 4. He did not convey the offer to Minister David that night. The next day when the offer was set expire, the prosecutor called Mr. Long to inquire about the status of the plea, but the call went to voicemail. R. at 4. Mr. Long never conveyed the offer to Minister David and allowed it to expire without Minister David ever knowing about it. R. at 4. After the plea expired, the prosecutor formally charged Minister David with one count of possession of a controlled substance in excess of ten kilograms, with the specific intent to distribute under 21 U.S.C. § 841. R. at 4. The prosecutor called Mr. Long to ask why Minister David had not accepted the plea. R. at 4. Mr. Long responded that he believed the offer was open for thirty-six days as opposed to hours. R. at 4. After Mr. Long conveyed his mistake to Minister David, Minister David fired him and hired new counsel. R. at 4.

On January 20, 2017, Minister David reached out to the prosecutor to discuss another plea deal, explaining that he was "enthusiastic" about accepting a new plea as soon as possible. Ex. E. The prosecutor refused to extend another plea, believing Minister David's information about his suppliers was no longer useful. R. at 5. However, Minister David assured the prosecutor that his knowledge of their contact information and identifying characteristics was still valuable. Ex. E.

Procedural History

Minister David's new counsel then filed two pre-trial motions in the Southern District of Staples. R. at 1. The first was a motion to suppress the evidence obtained from Minister David's

home on the day of his arrest because Officer McNown did not have a warrant. R. at 5. The second was a motion to be re-offered the plea deal that Minister David's counsel failed to communicate to him because his counsel was ineffective. R. at 5. During pretrial evidentiary hearings, Minister David stated that had the plea been communicated to him, he would have taken it because it was a "no brainer" given that it would have shaved nine years off his prison sentence. Ex. C, pg. 3.

The United States District Court for the Southern District of Staples improperly denied both motions. R. at 12. Minister David's case proceeded to trial where he was convicted for possession of a controlled substance with the intent to distribute and sentenced to ten years in prison. R. at 14. Minister David appealed the District Court's denial of both motions and his conviction. R. at 14. The Thirteenth Circuit improperly affirmed the District Court's decision. R. at 14. Minister David appealed, and this Court granted certiorari.

SUMMARY OF THE ARGUMENT

I.

Minister David's Fourth Amendment rights were violated when Officer McNown unreasonably entered his home under the community caretaking exception. The community caretaking exception to the Fourth Amendment should not apply to the home. This exception is intended to allow police to protect people in the public sphere, making its function incompatible within the private sphere of the home. While police-citizen contact in the home is rare, it is common in the public domain, such as with automobiles. This Court has applied the community caretaking exception to automobiles because the government's interest in maintaining public safety is higher than the invasion of privacy to the individual. Further, the majority of circuit courts have refused to extend the community caretaking exception to the home.

Should this Court extend the community caretaking exception to the home, the exception nevertheless would not justify Officer McNown's warrantless entry into Minister David's home. Minister David had a reasonable expectation of privacy in his home and took additional steps to ensure that privacy. Further, Officer McNown acted unreasonably by relying on limited facts and disregarding contradictory testimony to use the community caretaking exception to justify his search. Officer McNown's failure to use less intrusive means to check on Minister David, rendered his actions unreasonable. For courts that have extended the community caretaking exception to the home, the trend is to do so in two limited circumstances: immediate emergency aid and extreme disturbance in the community. Neither of these narrow applications apply here.

Finally, even if the community caretaking exception applies to the home and Officer McNown could have entered Minister David's home, once inside, Officer McNown exceeded the scope of the exception. When Officer McNown saw the notebook with payment and drug amounts in it, he was no longer justified in using the community caretaking exception to search Minister David's home. At that point, Officer McNown's actions were no longer totally divorced from criminal activity and he should have exited Minister David's home instead of walking upstairs to investigate further.

II.

Minister David's right to effective counsel under the Sixth Amendment attached during his pre-indictment plea negotiations, and that Sixth Amendment right was violated when his counsel was ineffective. Extending this right to pre-indictment plea negotiations protects the freedom of average defendants, such as Minister David, and strengthens the integrity of the criminal justice system.

Although this Court has only extended the right to effective counsel post-indictment, the underlying principles for that rule support extending this right to pre-indictment plea negotiations. In accordance with those principles, pre-indictment plea negotiations, such as Minister David's, are the true commencement of adversarial proceedings today. Additionally, the current bright-line rule is outdated, causes unfair outcomes for defendants, and does not align with the original meaning of the Sixth Amendment.

Furthermore, under *Strickland v. Washington*, Minister David had ineffective counsel. His counsel's performance was deficient when his attorney failed to convey to him a pre-indictment plea offer. Minister David suffered prejudice because it is reasonably probable that he and the government would have adhered to the plea, and the trial court would have accepted it. In light of the fact that Minister David's right to counsel attached when his attorney was ineffective, the proper remedy is for the government to re-open plea negotiations.

STANDARD OF REVIEW

When there is a motion to suppress evidence based on a constitutional challenge, appellate courts review legal conclusions *de novo*, and review factual findings for clear error. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). When a district court rejects a claim of ineffective assistance of counsel, appellate courts review the decision *de novo*. *United States v. Stuart*, 773 F.3d 849, 852 (7th Cir. 2014).

ARGUMENT

I. POLICE MAY NOT USE THE COMMUNITY CARETAKING EXCEPTION TO THE FOURTH AMENDMENT TO CONDUCT WARRANTLESS SEARCHES OF THE HOME.

Extending the community caretaking exception to the home is like handing the government a key to our front door. To do so would allow the government to shatter the vital

boundary between the public sphere and the private domain of our home. When we retreat to our homes, we let down our guard from the rest of the world. It is the one place we feel safe enough to put our memories and personhood on display, from photographs of our loved ones to the pile of laundry we have not yet washed. Warrantless searches of the home are presumably unreasonable under the Fourth Amendment because they trample upon an individual's expectation of privacy that society would deem reasonable. *See Katz v. United States*, 389 U.S. 347, 357 (1967); *see also United States v. Jacobsen*, 466 U.S. 109, 113 (1984). The government is only justified in encroaching on these protected rights when its interests outweigh an individual's reasonable expectation of privacy. *See Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

The community caretaking exception to the Fourth Amendment serves a purpose outside of the home because it allows police to fulfill their duties of protecting the general public. *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (finding that police could search an automobile to retrieve a gun and prevent it from falling into the wrong hands). This Court has not extended the exception beyond the automobile. *See Colorado v. Bertine*, 479 U.S. 367, 381 (1987). Further, when police action is investigative, the community caretaking exception may never safeguard officers from the Fourth Amendment warrant requirement. *Cady*, 413 U.S. at 441. This is because the exception only applies when police action is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* More specifically, this exception becomes inappropriate when police action transforms from caretaking to investigating.

All citizens—from convicted felons to nuns—have the same interest in Fourth Amendment protections against warrantless searches of their homes. *See Camera v. Municipal*

Court of City & County of San Francisco, 387 U.S. 523, 530–31 (1967). The all-encompassing nature of the community caretaking exception could allow police to use the exception to circumvent the Fourth Amendment.[1] Expanding the community caretaking exception to the home would undermine the purpose of the Fourth Amendment and rid it of its power to protect individuals from unreasonable government intrusion in their own homes.

This Court should find that Minister David's Fourth Amendment rights were violated when Officer McNown unjustifiably entered Minister David's home to conduct a search under the community caretaking exception. This Court should reverse the holding of the Thirteenth Circuit and find that the community caretaking exception does not apply to the home. Applying the exception to this case would ignore the very interest the Fourth Amendment seeks to protect—a man's privacy in the comfort of his castle. *See Weeks v. United States*, 232 U.S. 383, 390 (1914). If this Court finds that the community caretaking exception applies to the home, Officer McNown's justifications to enter Minister David's home were objectively unreasonable and his actions were not totally divorced from criminal investigation. Therefore, this Court should suppress the evidence collected at the time of Minister David's arrest.

A. This Court should not extend the community caretaking exception to the home.

The community caretaking exception is intended for public domains, making the exception incompatible within the private sphere of the home. Given the heightened privacy interest in the home, the community caretaking exception should not apply to Minister David's home.

[1] In contrast, the exigent circumstances exception only allows police to enter a home when the delay of obtaining a warrant would cause serious bodily harm or death, the destruction of evidence, or allow a suspect to flee. *See Stuart*, 547 U.S. at 403. This exception presumes that police could obtain a warrant absent the immediacy of the situation, while the community caretaking exception does not. Here, the parties have agreed that Officer McNown's warrantless entry does not fall under the exigent circumstances exception. R. at 7.

1. Minister David had a reasonable expectation of privacy in his home.

When a man's home is his castle, such as with Minister David, society is prepared to accept that expectation of privacy as reasonable. The primary purpose of the Fourth Amendment is to protect individuals in the sanctity of their home, allowing them to be free from unreasonable government intrusion. *See Silverman v. United States*, 365 U.S. 505, 511 (1961); *United States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972) ("[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed."). Here, Minister David expected to be able to walk through the door of his home into a private space and not fear that the police would enter behind him without reason. Therefore, Minister David's reasonable expectation of privacy falls squarely in line with what the Fourth Amendment was designed to protect.

Minister David also took additional steps to ensure his home was protected, which further enhanced his reasonable expectation of privacy. When individuals take extra steps to shield their homes from the public, society is even more prepared to accept that as reasonable. *See, e.g.*, *Edens v. Kennedy*, 112 Fed. Appx. 870, 875 (4th Cir. 2004) (finding that when the defendant locks his door and posts "No Trespassing" signs he creates an elevated expectation of privacy); *United States v. King*, 212 F. Supp. 3d 1113, 1121 (W.D. Okla. 2015) (finding that when the defendant took extra steps, such as hiring security guards and fencing off his premises, he had a reasonable expectation of privacy). Because Minister David values his privacy, he purchased a home in a gated community, never allowed visitors over, and intentionally locked his front door. Ex. C, pg. 2; R. at 3. Minister David's purposeful steps solidified his reasonable expectation of privacy.

2. The community caretaking exception is intended for public domains.

Extending the community caretaking exception to the home is wholly inconsistent with the purpose the exception is meant to serve. This Court first recognized the community caretaking exception in relation to automobiles. *See Cady*, 413 U.S at 441. Automobiles are mobile and heavily regulated for public safety, leading to greater police-citizen contact. *See id.*; *see also South Dakota v. Opperman*, 428 U.S. 364, 367–68 (1976) (recognizing that there is a lower expectation of privacy for automobiles because of "the obviously public nature of automobile travel"); *Carroll v. United States*, 267 U.S. 132, 153 (1925) (recognizing that the government has a higher interest in searching an automobile than a home because of its mobility). In fact, this Court itself noticed a "constitutional difference" between the home and the automobile. *Cady*, 413 U.S at 439. Extending the community caretaking exception to Minister David's home would not reflect this Court's reasoning for acknowledging the exception and its practical application in the automobile context.

3. The majority of circuits do not extend the community caretaking exception to the home.

The community caretaking exception could allow for an unprecedented increase of unconstitutional invasions of privacy in the home. The Third, Seventh, Ninth, and Tenth Circuits have refused to allow warrantless searches in the home under the community caretaking exception because doing so would be a dangerous expansion of this Court's holding in *Cady v. Dombrowski*. *See, e.g.*, *United States v. Pichany*, 687 F.2d 204, 209 (7th Cir. 1982) (recognizing that the Supreme Court's intent was to "confine the holding" in *Cady* to automobiles); *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993) (recognizing that expanding the community caretaking exception to the home would be a "severe invasion of privacy"); *United States v. Bute,* 43 F.3d 531, 535 (10th Cir. 1994). However, it appears that the only two situations in

which courts have applied the community caretaking exception to the home are immediate emergency aid and extreme disturbance in the community. *See infra* Section I.B.1. This Court should not apply the community caretaking exception to Minister David's home because it is a severe invasion of privacy and could lead to regular government intrusions unwillingly becoming the societal norm.

B. Should this Court choose to extend the community caretaking exception to the home, the exception nonetheless does not apply to Officer McNown's entry into Minister David's home.

Officer McNown's use of the community caretaking exception was unreasonable for two reasons. First, the trend is for courts to apply the community caretaking exception to the home in two narrow circumstances, immediate emergency aid and extreme disturbance in the community. Neither of these circumstances apply here. Second, Officer McNown relied on limited facts and failed to take simple steps that would have made his actions reasonable.

1. Officer McNown's actions do not fall under two of the possible applications of the community caretaking exception to the home.

Officer McNown was not justified in entering Minister David's home because there was no need for immediate emergency aid. Some courts have found that police may rely on the community caretaking exception to enter a home when there is credible evidence that they must provide emergency aid to an individual. *See, e.g.*, *United States v. Smith*, 820 F.3d 356, 362 (8th Cir. 2016) (extending the exception to the home when police had information that an abusive and potentially armed man was holding his ex-girlfriend in his home); *State v. York*, 829 N.W.2d 191, *5 (Iowa Ct. App. 2013) (extending the exception to the home when police were in search of a missing suicidal juvenile); *State v. Pinkard*, 785 N.W.2d 592, 584 (Wis. 2010) (extending the exception to the home when police had information about potential overdose victims).

However, there is nothing in the record to indicate that Minister David required any immediate emergency aid. In fact, Officer McNown was not even sure if Minister David was home that morning. *See* Ex. A, pg. 3. Therefore, without reason to believe that Minister David needed immediate emergency aid, Officer McNown could not have used this narrow application of the community caretaking exception to search Minister David's home.

Similarly, Officer McNown was not justified in entering Minister David's home because there was no extreme disturbance or complaint in the community. Police may enter the home under the community caretaking exception when there is a complaint about a nuisance or extreme disturbance in the neighborhood. *See, e.g., People v. Ray,* 981 P.2d 928, 939 (Cal. 1999) (holding that police may enter the home when neighbors reported the front door wide-open all day, revealing a scene that resembled a burglary); *United States v. Rohrig*, 98 F.3d 1506, 1520 (6th Cir. 1996) (holding that police may enter the home when neighbors complained of loud and disturbing music at almost two in the morning). Here, there was no complaint or indication that any of Minister David's neighbors heard, let alone experienced, a disturbance. In fact, Officer McNown could not hear anything until he reached Minister David's front door. R. at 2–3. Therefore, without any complaint or disturbance, Officer McNown was not justified in using the community caretaking exception to enter Minister David's home.

2. Officer McNown's use of the community caretaking exception was unreasonable because he relied on limited facts and failed to use less intrusive means to enter Minister David's home.

Officer McNown's justification for using the community caretaking exception to enter Minister David's home was objectively unreasonable because he relied on limited facts and his own assumptions. When evaluating warrantless searches under the Fourth Amendment, courts use a standard of objective reasonableness where the police officer's intent is irrelevant. *See,*

e.g., *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (2006); *see also United States v. Williams*, 354 F.3d 497, 508 (6th Cir. 2003) (holding that police may not enter the home when a complaint is speculative and there is no noticeable harm). With the limited knowledge that Minister David did not show up to work and that he did not respond to a church-goer's phone call, Officer McNown assumed Minister David was home sick with the flu due to his elderly age. Ex. A, pg. 2–3. However, he also knew that, despite his age, Minister David was very energetic and that he may have been spotted at a bar the night before. Ex. A, pg. 2–3. Because Officer McNown relied on limited facts and disregarded testimony that presented an alternate narrative, his use of the community caretaking exception was unreasonable.

Further, there were less intrusive means for Officer McNown to enter Minister David's home that could have made his entry reasonable under the community caretaking exception. Searches of the home under the community caretaking exception may be unreasonable when officers fail to use less intrusive means available to them. *See, e.g.*, *Com. v. Waters*, 20 Va. App. 285, 290 (Va. Ct. App. 1995); *see also United States v. Johnson*, 410 F.3d 137, 146 (4th Cir. 2005) (holding that when a search is more intrusive than necessary, it raises questions about whether police used the community caretaking exception as a pretext to enter the home). Officer McNown did not attempt to call Minister David again since the start of the service, which was a two-hour time lapse. *See* R. at. 2. Even though Officer McNown knocked on the front door, once he reached the back door, he did not knock or call out to Minister David, or even wait a moment to see if he saw someone through the window. Ex. A, pg. 5. Officer McNown failed to use less intrusive means during his search, rendering it unreasonable under the community caretaking exception.

C. Even if Officer McNown could have entered Minister David's home, Officer McNown's actions within the home exceeded the scope of the community caretaking exception when they became investigatory.

Once Officer McNown suspected Minister David's involvement in drug activity, his actions became investigatory, and thus exceeded the bounds of the community caretaking exception. While a police officer may begin a search under the community caretaking exception, his actions fall outside the scope of the exception when they are no longer totally divorced from investigating criminal activity. *See, e.g.*, *United States v. Lugo*, 978 F.2d 631, 636 (10th Cir. 1992) (finding that once police secured the defendant's weapon, the subsequent search of his car was investigatory and exceeded the community caretaking exception). Officer McNown knew of the recent influx of Golden State drugs into Lakeshow and saw a black Cadillac with Golden State plates in Minister David's neighborhood—the same type of vehicle he knew was popular among drug dealers. Ex. A, pg. 4. When Officer McNown entered Minister David's home, he saw a notebook with indications of weight and payment amounts written in it. Ex. A, pg. 5. When he looked at the notebook, he noticed Julianne Alvarado's name written inside—the same church-goer he saw nervously sweating and shaking earlier that day. Ex. A, pg. 5. Similar to any reasonable person, when Officer McNown saw the notebook, he "was definitely concerned something was wrong." Ex. A, pg. 5. Instead of leaving the home, he continued to search by going upstairs and opening a closed door. Ex. A, pg. 5. Just as adding a drop of arsenic to water would poison the entire glass, seeing the notebook poisoned Officer McNown's entire search. This notebook pushed Officer McNown's actions from caretaking to investigating in violation of Minister David's Fourth Amendment rights.

II. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL ATTACHES DURING PRE-INDICTMENT PLEA NEGOTIATIONS.

Criminal defendants without effective counsel during pre-indictment plea negotiations are like defenseless sheep up against ravenous wolves—their freedom lies at the behest of trained, ambitious prosecutors whose goal is to put them behind bars. However, by guaranteeing the right to counsel to every "accused" in a "criminal prosecution," the Sixth Amendment shields defendants who are untrained in the law from the government's power to punish. U.S. CONST. amend. VI; *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). This Court has already recognized the right to counsel during post-indictment plea negotiations because they are a critical stage in determining whether a defendant will spend his life behind bars. *Missouri v. Frye*, 566 U.S. 134, 144 (2012). In *Kirby v. Illinois*, 406 U.S. 682 (1972), this Court created a bright-line rule, finding the right to counsel attaches after federal indictment because it is the "initiation of adversary judicial proceedings." *Id.* at 690. Despite the vital role pre-indictment plea negotiations play, these proceedings are not afforded that same Sixth Amendment protection.

Today, adversary proceedings start as early as pre-indictment plea negotiations. The mass incarceration of defendants before they have even reached trial crystallizes their adversarial nature. The United States detains more people before trial than most countries have incarcerated in total: 536,000. Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POLICY INITIATIVE (Mar. 14, 2018), https://www.prisonpolicy.org /reports/pie2018.html. Pretrial detention is responsible for all of the net jail growth in the last twenty years. *Id.*

Because the right to an attorney attaches during pre-indictment plea negotiations, those defendants who suffered from deficient counsel during their pre-indictment plea negotiations may seek relief through an action for ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). *Id.* at 686. This is because the right to counsel is not the right

to an attorney that falls asleep during a defendant's trial—it is the right to be free from incompetent counsel. *Id.*

A. Failing to attach Minister David's right to effective counsel to his pre-indictment plea negotiations undermines the goals of the Sixth Amendment.

The right to effective counsel should attach to pre-indictment plea negotiations to uphold the aims of the Sixth Amendment. First, the adversary process begins when a prosecutor makes a pre-indictment plea offer. Second, changes within the criminal justice system show that *Kirby*'s bright-line rule is anachronistic. Third, unjust consequences arise when criminal defendants lack counsel during pre-indictment plea negotiations. Finally, under a historical interpretation of the Sixth Amendment, there is no distinction between pre- and post-indictment plea negotiations.

1. Minister David's pre-indictment plea negotiations initiated adversary proceedings.

The adversary process began when the prosecutor in Minister David's case offered a pre-indictment plea because such an offer demonstrated a commitment to prosecute. The right to counsel commences when the government commits itself to prosecute. *Kirby*, 406 U.S. at 698. The prosecution demonstrates such a commitment when it extends a formal plea offer to the defendant. *See Turner v. United States*, 885 F.3d 949, 981 (6th Cir. 2018) (Stranch, J., dissenting), *cert.granted*, No. 18-106 (U.S. filed July 20, 2018). Here, the prosecutor showed a willingness to move the proceedings against Minister David forward by offering a formal plea. R. at 4. Further, the prosecutor put in time and consideration to the plea by discussing it with an investigator and following up with Minister David's attorney. R. at 4. Additionally, the short expiration of the plea offer—thirty-six hours—showed that the prosecutor took this case

seriously and wanted to move it forward quickly. R. at 4. Therefore, when the government showed a commitment to prosecuting Minister David, it initiated adversary proceedings.

Further, the adversary process commenced when the prosecutor in Minister David's case offered a pre-indictment plea because her role shifted from investigator to accuser. When the prosecutor transitions from investigator to accuser, the government and the defendant's adverse positions solidify. *Kirby*, 406 U.S. at 689. Prosecutors effectively accuse the defendant when offering a plea because the government can only make such an offer after reasonably believing they have sufficient facts to support a conviction without further investigation. *Turner*, 885 F.3d at 981 (Stranch, J., dissenting); *see* U.S. Dep't of Justice, U.S. Attorneys' Manual §§ 9-27.330-440 (2018). Therefore, upon offering a plea, the prosecutor implicitly became Minister David's accuser.

Finally, the adversary process initiated when the prosecutor in Minister David's case offered the plea because had he known of it, Minister David would have had to face the intricacies of criminal law. The Sixth Amendment right to counsel attaches when criminal defendants confront the prosecutorial forces of organized society. *Kirby*, 406 U.S. at 689. When evaluating pre-indictment plea offers, a defendant must tackle such forces by assessing the charges, risks of a trial, strengths of his case, and possible prison sentences. *See Turner*, 885 F.3d at 981 (Stranch, J., dissenting). If Minister David knew he had a plea offer, he would have had to strategically evaluate it against his chances at trial. Therefore, he would have had to be prepared to understand criminal law in order to effectively participate in the adversary process.

2. <u>The criminal justice system has evolved since this Court decided *Kirby*.</u>

The right to counsel must attach to pre-indictment plea negotiations in order to meet the needs of the modern criminal justice system. When the criminal justice system evolves to

develop new contexts that could determine a defendant's fate, the Sixth Amendment right to counsel can grow with it. *United States v. Ash*, 413 U.S. 300, 311 (1973); *see Frye*, 566 U.S. at 144 ("[P]lea bargaining is . . . not some adjunct to the criminal justice system; it is the criminal justice system." (quoting Scott & Stuntz, *Plea Bargaining as Contract*, 101 YALE L. J. 1909, 1912 (1992))). When *Kirby* was established, the percentage of convictions resulting from guilty pleas was approximately seventy-eight percent. Paul J. Hofer, *Has Booker Restored Balance? A Look At Data On Plea Bargaining and Sentencing*, 23 FEDERAL SENTENCING REPORTER 326, 327 (2011). After forty years, this percentage has increased to make up nearly the entire criminal justice system: almost ninety-eight percent in 2017. United States Courts, *Judicial Business 2017 Tables*, Table D-4 (2017), http://www.uscourts.gov/sites/default/files/data_tables /jb_d4_0930.2017.pdf (last visited Oct. 20, 2018). Given the significant transition between the criminal justice system now and when *Kirby* was decided, the right to counsel should attach during pre-indictment plea negotiations.

Kirby's distinction between pre- and post-indictment plea negotiations is arbitrary because counsel is equally as important during both plea negotiations. The scope of the right to counsel is assessed by an attorney's usefulness to the defendant at a particular proceeding and the potential dangers of proceeding without counsel. *Paterson v. Illinois*, 487 U.S. 285, 298 (1988); *see also United States v. Wilson*, 719 F. Supp. 2d 1260, 1268 (D. Or. 2010) (holding that not applying the right to counsel during pre-indictment plea negotiations "elevate[s] form over substance" and "undermine[s] the[ir] reliability"). Yet, under this Court's jurisprudence and the Thirteenth Circuit's holding, defendants only have a right to counsel during post-indictment plea negotiations. *Frye*, 566 U.S. at 143–44; R. at 18. Here, if Mr. Long had communicated Minister David's plea offer to him, Minister David could have been counseled on the benefits and costs of

accepting the plea. In fact, Minister David had expressed that he had questions for his attorney about the process, having never been through the legal system before. Ex. C, pg. 3. Mr. Long's usefulness in giving legal advice regarding the process and his obligation to communicate the plea offer to Minister David existed before indictment, signaling the right to counsel existed pre-indictment as defined by this Court. Therefore, distinguishing between the right to counsel pre- and post-indictment is arbitrary.

3. Failing to attach the right to counsel to pre-indictment plea negotiations causes unjust consequences.

Circuit courts have defied *Kirby*'s bright-line rule and attached the right to counsel to pre-indictment plea negotiations because the finality of such negotiations leave defendants vulnerable to unjust outcomes. *See Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999); *United States v. Burgess*, 141 F.3d 1160 (4th Cir. 1998) (per curiam); *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992). These unfair outcomes include entering false guilty pleas, the risk of serving longer prison sentences, entering involuntary guilty pleas, and the government's ability to subvert norms of criminal procedure.

a. *Extending the right to effective counsel to pre-indictment plea negotiations could help curb the entering of false guilty pleas.*

Waiting to extend the right to counsel until after indictment could result in innocent defendants pleading guilty. Between 2015 and 2017, two out of every five exonerations occurred after a defendant pleaded guilty. *See* National Registry of Exonerations, http://www.law.umich.edu/special/exoneration/Pages/detaillist.aspx (last visited Oct. 20, 2018). However, this figure is grossly underestimated due to the actual barriers of exoneration and difficulty in obtaining data. Russell D. Covey, *Plea Bargaining After Lafler and Frye*, 51 DUQ. L. REV. 595,

616 (2013). There are three common reasons why innocent defendants believe they should plead guilty: (1) the prosecution's evidence will nonetheless persuade jurors; (2) the plea offer is too good to refuse; and (3) they will not receive a fair trial. *Id.* at 616–17. Effective counsel during pre-indictment plea negotiations may quell these beliefs, facilitating fewer false guilty pleas. Therefore, extending the right to effective counsel to pre-indictment plea negotiations may help stop the imprisonment of innocent people.

b. *Failing to attach the right to counsel to pre-indictment plea negotiations creates a risk that defendants will serve longer prison sentences.*

Lacking counsel during pre-indictment plea negotiations is unfair because average defendants risk serving longer prison sentences, losing more of their life behind bars than if they had counsel pre-indictment. Average unrepresented defendants do not have the legal skills to effectively bargain for their freedom when up against prosecutors who are trained and knowledgeable in this field. *United States v. Gouveia*, 467 U.S. 180, 189 (1984); *see also Premo v. Moore*, 562 U.S. 115, 125 (2011) (noting that "[t]he art of negotiation is at least as nuanced as the art of trial advocacy"). Minister David, an average defendant, neither received his plea, nor was counseled regarding his plea. R. at 4. Consequently, he is now serving a prison sentence ten times longer than he would have if he had the opportunity to take the plea. R. 4. Therefore, Minister David suffered an injustice because he had neither the skill to engage in plea bargaining nor a skilled attorney.

c. *Pre-indictment plea negotiations that occur without counsel subvert federal law because they are not voluntary.*

Pleas are only voluntary after the defendant carefully deliberates it. FED R. CRIM. PRO. 11(b)(1); *Brady v. United States*, 397 U.S. 742, 748 (1970). A court should only accept a plea as voluntary if the defendant fully understands the plea's ramifications. FED R. CRIM. PRO. 11(b)(2).

Yet, in one study, nearly one half of defendants who believed their plea decision was made voluntarily were actually found to have been uninformed regarding the conditions of the plea. Alison D. Redlich, *Understanding Guilty Pleas Through the Lens of Social Science*, 23 PSYCH. PUB. POL. & L. 458, 459 (2017). Without the right to counsel during pre-indictment pleas there is a risk that they are not voluntary and undercut federal law.

d. *Without counsel during pre-indictment plea negotiations, prosecutors may gain unfair advantages over the defendant by being able to circumvent procedural norms.*

Kirby's bright-line rule allows the government to subvert the procedural norms of criminal prosecution. *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000). For example, prosecutors would be able to elicit incriminatory information through depositions, a step normally taken after indictment, while defendants remain unrepresented. *See id.* at 675 (noting that the court felt "somewhat queasy" that *Kirby*'s rule allows the prosecution to "have their cake and eat it too"). Allowing prosecutors to take such steps would give the government unfair advantages over the defendant, when the government already has legal expertise. Therefore, failing to attach the right to counsel to pre-indictment plea negotiations allows prosecutors to engage in methods that undermine the integrity of the criminal justice system.

4. Drawing the line between pre- and post-indictment plea negotiations is inconsistent with the original meaning of the Sixth Amendment.

Minister David is an "accused" in a "criminal prosecution" in accordance with the historical interpretation of the Sixth Amendment. Prominent dictionaries from the Founding-era broadly defined the terms "accused" and "criminal prosecutions" to encompass certain pre-indictment proceedings. *See Turner*, 885 F.3d at 958 (Bush, J., concurring *dubitante*). Furthermore, Founding-era courts also broadly interpreted "accused" and "criminal prosecutions" to apply to certain Sixth Amendment rights pre-indictment. U.S. CONST. amend.

VI; *see, e.g.*, *Ex parte Burford*, 7 U.S. 448, 452 (1806) (Marshall, C.J.) (holding that the Sixth Amendment right to be "informed of the nature and cause of the accusation" applies pre-indictment); *see also, e.g.*, *United States v. Burr*, 25 F. Cas. 30, 33 (C.C.D. Va. 1807) (holding that the Sixth Amendment right to compel witnesses applies pre-indictment). To maintain consistency in the interpretation of the Sixth Amendment, the right to counsel should attach to pre-indictment plea negotiations.

B. Minister David's counsel was unconstitutionally ineffective under *Strickland*.

Under *Strickland*, Minister David's Sixth Amendment right to counsel was violated due to his counsel's error in not conveying the pre-indictment plea offer. Given that his counsel's deficient performance caused Minister David prejudice, *Strickland* is satisfied. Therefore, this Sixth Amendment violation against Minister David demands that he be granted the remedy of re-opening plea negotiations.

1. *Strickland* is satisfied because Minister David suffered prejudice as a result of his counsel's deficient performance.

To establish a claim of ineffective assistance of counsel, a defendant must prove both that his counsel's performance was deficient and that the deficient performance prejudiced the defendant.[2] *Strickland*, 466 U.S. at 687. To show prejudice when a plea offer has lapsed, the defendant must show there was a reasonable probability that he, the government, and the trial court would have accepted the plea. *Frye*, 566 U.S. at 147–48. Because both parties have stipulated that Minister David's counsel made errors so serious that he was not functioning as "counsel" under the Sixth Amendment, his performance was deficient under *Strickland*. R. at

[2] In *Strickland*, this Court, in addition to the two-prong test, considered the fundamental fairness of the proceeding which this system relies on to produce just outcomes from trials. 466. U.S. at 696. However, this Court has declined to consider this principle in regards to plea offers. *See Frye*, 466 U.S. 134; *Lafler*, 466 U.S 156.

10–11. Further, Minister David suffered prejudice because it is reasonably probable that he would have accepted the plea had he known of it, and that the government and trial court would have adhered to the plea. Therefore, Minister David had ineffective assistance of counsel under *Strickland*.

a. *If Minister David's counsel had informed him of the plea offer, it is reasonably probable that Minister David would have accepted it.*

Minister David's pre-trial statements that he would have taken the plea were credible, establishing a reasonable probability that he would have accepted the original plea. This Court has recognized that pre-trial, in court statements are presumed to be credible and dependable. *Blackledge v. Allison*, 43 U.S. 63, 74 (1977). Further, when coupled with objective evidence, such as a significant sentencing disparity, a defendant's statement that he would have accepted a plea offer is sufficient to establish his statements as credible. *See United States v. Brown*, 623 F.3d 104, 112 (2d Cir. 2010); *see also Lafler*, 566 U.S. 174 (finding that defendant's post-trial statements regarding his plea deal were trustworthy). Here, Minister David's statement that he would have taken the plea was made pre-trial and in court. Ex. C, pg. 3. Because the plea offer would have spared him nine of years of his life in prison, Minister David was adamant that this deal was a "no brainer." Ex. C, pg. 3. Therefore, it is reasonably probable that Minister David would have taken the plea because he expressly stated before trial that he would have accepted it.

Minister David's acceptance of the plea is reasonably probable because the plea offer saved him nine years of prison time. A significant sentencing disparity between a plea offer and a statutory minimum after trial conviction indicates there is a reasonable probability a defendant would take a plea. *See Lafler*, 566 U.S. at 174 (holding that a defendant was likely to take a plea when it was three and half times lower than the statutory minimum sentence). Minister David's plea offer was ten times lower than the statutory minimum sentence after conviction. R. at 14.

Given the weight of the evidence against him, the plea's favorability, and the significant disparity in the prison lengths, acceptance of the plea offer is reasonably probable.

When Minister David asked the prosecutor for another plea, it showed a reasonable probability he was willing to take the original plea. When defendants indicate a willingness to negotiate a plea offer, they demonstrate a reasonable probability of acceptance. *See Frye*, 566 U.S. at 147, 150 (holding that there was reasonable probability that the defendant would have accepted the plea because the defendant pleaded guilty to a more serious charge); *Lafler*, 566 U.S. 174 (holding that there was a reasonable probability that the defendant would have accepted the plea because the defendant wrote a letter stating he was willing to negotiate a plea). Here, Minister David reached out to the prosecutor to discuss another plea deal, explaining that he was "enthusiastic" about accepting a new plea as soon as possible. Ex. E. Therefore, Minister David showed a willingness to negotiate, indicating it is reasonably probable that he would have taken the plea had he known of it.

b. *It is reasonably probable that the government would have adhered to the plea and that the trial court would have entered it.*

Prejudice has been established because it is reasonably probable that the government and the trial court would have accepted the plea. Under federal law, a prosecutor's plea offer binds the government to that deal once a judge accepts it. *See* FED. R. CRIM. P. 11(e). Unless there are intervening circumstances or particular facts that would warrant non-approval of a plea, it is not difficult to determine that a trial judge would accept a plea. *Frye*, 466 U.S. at 149. There was nothing out of the ordinary about Minister David's plea. The government and Minister David would have both benefited from it. *See* R. at 4. Therefore, it is reasonably probable that both the trial court and the government would have adhered to the plea deal.

2. Minister David's unconstitutionally ineffective counsel affords him the remedy of re-opening plea negotiations.

The appropriate remedy here is for the government to re-open plea negotiations with Minister David. When the defendant does not receive a plea offer due to ineffective counsel, the correct remedy is to re-offer a plea. *See Lafler*, 566 U.S. at 175. Remedies stemming from Sixth Amendment violations should balance the defendant's injury against the prosecution's competing interests. *United States v. Morrison*, 449 U.S. 361, 362 (1981). Here, re-opening plea negotiations would rectify Minister David's injury and would bolster the prosecution's ability to combat drugs in Lakeshow. The amount of cocaine found with Minister David demonstrates that he had a connection to major drug suppliers and would be able to provide their relevant contact information and physical identifying characteristics. *See* R. at 8; Ex. E. Further, Minister David would be a necessary corroborating witness to pinpoint these suppliers when they are caught. Therefore, re-opening plea negotiations benefits the government while remedying the violation of Minister David's constitutional right. If Minister David is not granted a remedy, he would remain in jail shackled to a criminal justice system that affords no reprieve to defendants who suffer unjust outcomes because of incompetent counsel.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the judgment of the United States Court of Appeals for the Thirteenth Circuit be reversed.

Respectfully Submitted,
/s/ P10
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Counsel for the Petitioner