Team P14

No. 4-422

IN THE

Supreme Court of the United States

Chad David,
Petitioner

v.

United States,
Respondent

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

BRIEF FOR PETITIONER,
CHAD DAVID

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2. The Sixth Amendment right to counsel is meant to help the accused cope with legal problems and give assistance in meeting his adversary. When a prosecutor, well-versed in the intricacies of criminal law and procedure, approaches the accused before formal indictment with an offer to admit his guilt, is the accused entitled to his constitutional right to assistance of counsel?

STATEMENT OF FACTS

Chad David was a well-respected minister at the Lakeshow Community Revivalist Church in Lakeshow, Staples. R. at 2. Officer James McNown, a long-time police officer in Lakeshow, was a member of the church and frequently attended Mr. David's Sunday service. R. at 2.

On Sunday, January 15, 2017, Mr. David did not show up for his usual 7:00 AM Sunday service. R. at 2. Church attendee, Julianne Alvarado, called Mr. David to check on him but there was no answer. R. at 2. Alvarado told Officer McNown that Mr. David did not answer his phone, and expressed concern for his well-being. R. at 2. Officer McNown dismissed this concern as an overreaction, and assumed that Mr. David was home sick. R. at 2; Ex. A, pg.3. However, he offered to check on Mr. David during his patrol immediately after the service. R. at 2.

After the service ended around 8:50 AM, Officer McNown went to Mr. David's home, located inside a gated community. R. at 2. Because he was wearing his uniform and driving his patrol car, the guards at the gate waved him through without question. Ex. A, pg. 4. As he entered, Officer McNown saw a black SUV with Golden State license plates leaving the community, which he thought was suspicious because he knew it was the kind of car drug dealers from Golden State drive, and Lakeshow had recently been having problems with the flow of drugs from out of state. R. at 2, 3; Ex. A, pg. 4.

Upon arrival at Mr. David's home, Officer McNown saw Mr. David's car in the driveway and noticed nothing unusual about the house. R. at 2; Ex. A, pg. 4. When he walked up to the front door and knocked and announced his presence, he heard a loud music playing inside. R. at 3. After two minutes, he heard no response so he peered through a window next to the front door, where he saw *The Wolf of Wall Street* playing on the television inside. R. at 3. Both the music and the movie struck Officer McNown as odd, given Mr. David's profession. R. at 3. He thought there

might be someone else in the home, but did not suspect that anyone had broken in. R. at 3; Ex. A, pg. 4-5.

Officer McNown then entered the house through the unlocked back door. R. at 3. He did not knock before entering. Ex A, pg. 5. While inside, he saw a notebook with information about drug payments, and felt sure something was not right. R. at 3; Ex. A, pg. 5. He then walked upstairs to the source of the music, and opened a door to discover Mr. David with a large amount of cocaine. Ex. A, pg. 5-6.

Once in custody, Mr. David hired Keegan Long to represent him. R. at 3-4. In an effort to obtain information about the ongoing drug smuggling operation in Lakeshow, the prosecution offered Mr. David a plea of one year in prison in exchange for the names of Mr. David's suppliers, valid for 36 hours. R. at 4. The prosecutor, Kayla Marie, emailed the offer to Mr. Long, but Mr. Long was drinking when he received the email and never told Mr. David about the offer. R. at 4. The plea expired and Mr. David was charged with possession of a controlled substance with intent to distribute. R. at 4. After he was charged, Ms. Marie emailed Mr. Long to ask why Mr. David did not accept the offer. R. at 4. Mr. Long realized his mistake and contacted Mr. David to let him know his error. R. at 4. Mr. David fired Mr. Long immediately and hired a new lawyer, Michael Allen, to represent him. R. at 4.

Soon after, Mr. Allen emailed Ms. Marie requesting a new plea deal. R. at 5. Ms. Marie refused, stating that the government offered the deal to get information about Mr. David's suppliers, who were likely tipped off by now. R. at 5.

The case went to trial, and the District Court denied Mr. David's pre-trial motion to suppress evidence, as well as his motion to compel the government to re-offer the plea deal. R. at

1. Subsequently, Mr. David was convicted of possession of a controlled substance with the intent to distribute. R. at 1.

SUMMARY OF THE ARGUMENT

This Court should reverse the Thirteenth Circuit's ruling that a police officer acting as a community caretaker may lawfully enter a private residence without a warrant, and that Officer McNown's entry into Mr. David's home was reasonable under the circumstances. In addition, this Court should reverse the Thirteenth Circuit's holding that the Sixth Amendment does not protect defendants during pre-indictment plea negotiations with prosecutors, and further reverse the District Court's finding that Mr. David did not suffer prejudice as a result of receiving ineffective assistance of counsel.

In *Cady v. Dombrowski*, the Court held that police officers may search vehicles without a warrant while acting pursuant to their community caretaking duties, completely divorced from criminal investigation. However, the community caretaking does not apply to warrantless searches of homes, which are afforded greater constitutional protections than vehicles. Allowing searches of homes under the community caretaking exception would undercut the protections of the Fourth Amendment and allow police officers to enter a person's private home without probable cause. Furthermore, Officer McNown's entry into Mr. David's home was unreasonable under the totality of the circumstances. Any evidence collected during the course of this search should have been suppressed.

The Sixth Amendment right to counsel naturally attaches to preindictment plea negotiations. The centrality of plea negotiations in our criminal justice system warrants Sixth Amendment protection for defendants whether they occur pre or post indictment. The Court recognized in *Missouri v. Frye* that "the negotiation of a plea bargain, rather than the unfolding of

a trial, is almost always the critical point for a defendant." Plea negotiations are even more critical for a defendant because the prosecutor has the ability to charge bargain. Furthermore, application of the Sixth Amendment right to counsel to preindictment plea negotiations is consistent with the Court's pragmatic assessment of when the right attaches, in which it focuses on when the criminal proceeding crosses the line from investigative to prosecutorial, i.e. when the defendant is confronted with the intricacies of criminal law and procedure and needs counsel most. Denying a defendant the right to counsel when a prosecutor approaches him to obtain a guilty plea is denying him the right to counsel when he needs it most.

During the course of these proceedings, Chad David has been denied two of his constitutional rights. As a result, the Court should reverse his conviction to remedy the violations.

STANDARD OF REVIEW

A decision on a motion to suppress uses a mixed standard of review. Findings of fact are reviewed for clear error, while conclusions of law are reviewed *de novo*. *United States v. Davis*, 514 F.3d 596, 607 (6th Cir. 2008). Whether the Sixth Amendment right to counsel attaches in pre-indictment plea negotiations is a question of law that is reviewed *de novo*. *United States v. Moody*, 206 F.3d 609 (6th Cir. 2000). Lastly, *de novo* review also applies to a claim of ineffective assistance of counsel, which is a mixed question of law and fact. *McPhearson v. United States*, 675 F.3d 553, 559 (6th Cir. 2012).

ARGUMENT

I. EVIDENCE SEIZED FROM MR. DAVID'S HOME SHOULD HAVE BEEN SUPPRESSED BECAUSE IT WAS OBTAINED DURING THE COURSE OF AN ILLEGAL SEARCH.

The Fourth Amendment protects people from unreasonable searches and seizures by the government. U.S. Const. amend IV. Searches conducted without a warrant are *per se* unreasonable, "subject to only a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). At the core of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1960). "With very few exceptions, the question whether a warrantless search of a home is reasonable and hence constitutional must be answered no." *Kyllo v. United States*, 533 U.S. 27, 31 (2001).

Here, the Government cannot justify Officer McNown's warrantless search of Mr. David's home based on any established exception to the warrant requirement. Although the Government attempts to justify his search based on the community caretaking exception articulated in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973), *Cady*'s reasoning is inapplicable here because the community caretaking exception does not apply to homes. Therefore, the warrantless search was unconstitutional and any evidence obtained as a result should have been excluded.

A. The Community Caretaking Exception to the Warrant Requirement Does Not Permit Warrantless Searches of Homes.

In *Cady*, the Court held that a warrantless search of a vehicle may be reasonable when police officers are acting pursuant to their "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. In *Cady*, the police searched the trunk of an impounded vehicle because they reasonably believed it might contain a gun, and ultimately found incriminating

evidence which led to the defendant's conviction for first degree murder. *Id*. at 437. The Court justified the search on the grounds that the officer searched the car "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443.

In addition, the Court justified the search based on the constitutional difference between homes and vehicles, which "stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime." *Id*. at 442. This frequent, noncriminal contact gives people a lessened expectation of privacy in their cars than home, and allows for greater leniency in determining whether a warrantless search is justifiable. Given *Cady*'s reliance on this difference in justifying the search, applying the community caretaking doctrine to homes would improperly extend the scope and reasoning of *Cady.*

Recognizing this distinction, the Third, Seventh, Ninth, and Tenth Circuits have declined to extend the community caretaking exception to homes. For example, in *United States v. Pichany*, 687 F.2d 204, 209 (7th Cir. 1982), the Seventh Circuit found that *Cady* "intended to confine the holding to the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses." *See* also *United States v. Erickson*, 991 F.2d 529 (9th Cir. 1993) (finding that police may not search a home unless an exigent circumstance exists); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (limiting the community caretaking exception to vehicles); *Ray v. Twp. Of Warren*, 626 F.3d 170 (3d Cir. 2010) (declining to extend the community caretaking exception to homes). In addition, the Eleventh Circuit has expressed reluctance to apply the community caretaking exception homes. *United States v. McGough*, 412 F.3d 1232, 1238 (11th Cir. 2005). In *McGough*, the court found that applying the community caretaking exception "would undermine the [Fourth] Amendment's most

fundamental premise: searches inside the home, without a warrant, are presumptively unreasonable." *Id*. at 1239. Each of these circuits recognized that *Cady's* reliance on the constitutional difference between cars and homes in justifying the community care doctrine precluded its extension into people's homes.

Thus, allowing the community caretaking exception to apply to homes would "require [the court] to ignore the express language in the Cady decision confining the 'community caretaker' exception to searches involving automobiles." *Pichany*, 687 F.2d at 208. The reasoning in *Cady* expressly relied on the categorical difference between vehicles and homes for Fourth Amendment purposes and nowhere in its opinion does *Cady* suggest that officers acting as community caretakers may lawfully enter a home without a warrant. Therefore, applying *Cady* to a warrantless search of a home improperly expands the scope of the exception.

B. The Community Caretaking Exception Should Not Be Expanded to Include Warrantless Searches of Homes Because Doing So Would Undermine the Fourth Amendment's Warrant Requirement.

In addition, expanding the community caretaking exception so that it applies to homes would expressly contradict the Court's longstanding precedent that searches without warrants are presumptively unreasonable "subject only to a few specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357. Specifically, it would undermine the fact that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. District Court*, 407 U.S. 297, 313 (1972). As emphasized above, the Court justified applying the community caretaking exception to vehicles due to the constitutional difference between homes and vehicles. *Cady,* 413 U.S. at 442-443. However, unlike cars, a police officer may never search a person's home with less than probable cause. *Payton v. New York*, 445 U.S. 573, 585 (1980). Because it would allow officers to enter people's homes without probable

cause, applying the community caretaking exception to homes undermines the Fourth Amendment's fundamental principle that people have a right to privacy in their homes.

Community caretaking poses a threat to people's right to privacy in their home because it is not a well-established doctrine with clear-cut rules. *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009) ("What community caretaking involves and what boundaries upon it exist have simply not been explained to an extent that would allow . . . warrantless entry based on that justification."). This has led to confusion amongst courts as to if and when the community caretaking exception may justify a warrantless search of a home. *MacDonald v. Town of Eastham*, 745 F.3d 8, 15 (1st Cir. 2008) (holding that officers who searched a plaintiff's dwelling are entitled to qualified immunity because questions about when community caretaking may apply to homes are not resolved by clearly established law). As a result, circuits that have applied the exception to homes often use a test more similar to exigent circumstances rather than pure community caretaking, leading to inconsistent results. *Ray*, 626 F.3d at 176; *see* also *MacDonald*, 745 F.3d at 13 ("The question is complicated because courts do not always draw dine lines between the community caretaking exception and other exceptions to the warrant requirement.") For example, in *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006), the court held that "a police officer may enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists." Although *Quezada* characterized the officer's actions as community care, the analysis adopted by the court more closely resembled a modified version of the exigent circumstance exception. *Id.* Under this analysis, any officer who is not explicitly investigating a crime may enter a home with a mere "reasonable belief" as opposed to actual probable cause in direct conflict with the Fourth Amendment.

This application undermines the exigent circumstances exception and ignores the fact that "[e]ven the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of this home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security." *Camara v. Mun. Court of San Francisco*, 387 U.S. 523, 530-531 (1967). Although the community caretaking exception purports to only apply when the police are acting in a function "completely divorced" from a criminal investigation, "[e]xperience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent." *Olmstead v. United States*, 277 U.S. 438, 479 (1928) (Brandeis, J. dissenting.) For this reason, any warrantless entry into a person's home should be analyzed under the exigent circumstances doctrine to ensure police officers have probable cause before they may invade a person's home. This approach adequately balances an individual's Fourth Amendment rights with the government's need to safeguard the community.

Furthermore, the community caretaking exception improperly considers the officer's subjective reasoning when analyzing whether a search was reasonable by putting emphasis on the officer's "non-criminal" intentions in entering the home. However, inquiring into an officer's subjective state of mind expressly contradicts the Court's longstanding principle that an "action is 'reasonable' under the *Fourth Amendment*, regardless of the individual officer's state of mind, 'as long as the circumstances, viewed *objectively*, justify [the] action.'" *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)). The community caretaking exception essentially takes the opposite approach, reasoning that as long as the officer's subjective intention is unrelated to criminal investigation, he or she may enter a home with a mere reasonable belief as opposed to probable cause. Once one ignores the subjective "community care"

intentions of the officer and looks at the circumstances justifying his entry objectively, his warrantless entry is unreasonable because it lacks probable cause.

Ultimately, "[t]he right to be free from unreasonable searches and seizures does not extend only to those who are suspected of criminal behavior." *Erickson*, 991 F.2d at 531-532. Allowing police to search a person's home with anything less than probable cause violates that person's Fourth Amendment rights. Officers who enter a home as a "community caretaker" are not entitled to a "less exacting" standard than probable cause, which would allow entry so long as their motives are seemingly innocent.

C. Even if the Community Caretaking Exception Applies to Homes, the Government Cannot Justify Officer McNown's Search Based on This Exception.

Assuming, *arguendo*, the community caretaking doctrine applies to homes, an officer is not justified in searching a home under this exception if he is conducting any sort of criminal investigation, *Cady*, 413 U.S. at 433, or if it is objectively unreasonable for him to believe that a circumstance exists which justifies entering a home without a warrant. *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996). Both of these requirements preclude the government from justifying Officer McNown's search under the community caretaking exception in this case.

1. Officer McNown conducted the search to investigate suspicious conduct, not as a community caretaker.

The community caretaking exception cannot apply where the police have significant suspicion of criminal conduct. *United States v. Williams*, 354 F.3d 497, 508 (6th Cir. 2003). The Court has made clear that "the community caretaking function of the police applies only to actions that are 'totally divorced from the detection, investigation or acquisition of evidence relating to the violation of a criminal statute.'" *Williams*, 354 F.3d at 508 (quoting *Cady*, 413 U.S. 433.)

Thus, when an officer has mixed motives for entering a house, the community caretaking exception does not apply. *Id.* For example, in *Williams*, the Sixth Circuit declined to apply the community caretaking exception where officers had mixed motives in entering a home. *Id.* The court rejected community caretaking on the grounds that "even if we apply *Rohrig*'s conclusion that the warrant requirement is implemented to a 'lesser degree' when police act in their roles as community caretakers, [] it is not clear that the officers were acting solely in this capacity here." *Id.* at 508 (citation omitted). Therefore, community caretaking is inapplicable where officers have suspicion of criminal wrongdoing which motivates their entry.

Here, Officer McNown had suspicion of criminal activity from the moment he drove into Mr. David's gated community. First, Officer McNown went to Mr. David's home because he thought it was concerning that Mr. David was not at church. R. at 2. Next, he saw an SUV that he knew was associated with drug smuggling, which and further alerted his suspicions. R. at 2, Ex. A pg. 4. Finally, when he approached the house, he heard loud music with explicit language and saw a movie about drugs and criminal activity playing on the television. R. at 3, Ex. A pg. 4. All of this taken together made Officer McNown believe something criminal was going on. Therefore, he should have obtained a warrant prior to entering if he wanted to investigate.

However, even if suspicion of criminal activity did not motivate his initial entry, his search became impermissible after he saw the notebook on Mr. David's table. R. at 3, Ex. A pg. 5. The notebook, although not illegal itself, raised Officer McNown's suspicions to a point where he was certain Mr. David was engaged in criminal activity. At that point, any reasonable police officer would know to leave and get a warrant if he wanted to further investigate. This would not have been unreasonably burdensome for Officer McNown because, as Mr. David's lack of response indicated, he was unaware of Officer McNown's presence on the property, so there was no danger

that delay would result in harm or loss of evidence. McNown had plenty of time to obtain a warrant if he wanted to search the house, but chose not to. Ex. A pg. 7. He should not be allowed to assert community caretaking when he really was conducting a criminal investigation.

2. Officer McNown's entry was unreasonable under the totality of the circumstances because there was no reason for him to believe Mr. David was in danger or posed an ongoing harm to the community.

The "ultimate touchstone of the *Fourth Amendment* is 'reasonableness.'" *Stuart*, 547 U.S. at 403. "[W]arrants are generally required to search a person's home or his person unless 'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the *Fourth Amendment*." *Mincey v. Arizona*, 437 U.S. 385, 393-394 (1978) (quoting *McDonald v. United States*, 335 U.S. 451,456 (1948)). Although when acting as a community caretaker rather than a criminal investigator the standard is "less exacting" than probable cause, the officer conducting the search must still have a reasonable belief that an emergency exists requiring his or her attention, *Quezada*, 448 F.3d at 1007, and "delay is reasonably likely to result in injury or ongoing harm" to the individual or community at large. *United States v. Washington*, 573 F.3d 279, 289 (6th Cir. 2009). Officer McNown here had no reason to believe any such emergency existed or that delay would result in harm.

First, it was not reasonable for Officer McNown to believe Mr. David was in immediate danger. In *Quezada*, the Eighth Circuit upheld a search where officers had reason to believe that a person was inside but incapacitated and unable to respond. *Quezada*, 448 F.3d at 1008. *Quezada* is inapposite here because no similar assumption can be made on the present facts. Officer McNown noticed nothing suspicious or out of place about the home when he arrived other than some loud music and a movie playing in the living room. R. at 2-3, Ex. A pg. 4-5. He did not suspect that there had been a break-in or that Mr. David had been harmed. Ex. A at pg. 7. Officer

McNown assumed Mr. David was home sick, and did not come to the door because he couldn't hear the knocking, not because he was dead or otherwise incapacitated. R. at 3, Ex. A pg. 4.

No reasonable person would have concluded that Mr. David was in immediate danger based on the facts of this case. The only reason Officer McNown believed Mr. David needed assistance was because he did not show up at church and did not answer his phone. Although unusual, there is nothing actually suspicious or concerning about either of these activities. In fact, Officer McNown stated that he not worried about Mr. David's absence, because he assumed that he was at home with the flu. R. at 2, Ex. A. pg. 3. Although Officer McNown may have had good intentions, suspicion that someone has the flu is not a compelling enough reason to warrant immediate government action. Mr. David had the right "to retreat into his own home" and Officer McNown violated this right when he entered against Mr. David's wishes without a warrant. *Silverman*, 365 U.S. at 511.

Furthermore, while community caretaking has been applied when a defendant's actions are an ongoing nuisance to the community at large, Officer McNown had no reason to believe Mr. David's actions were disrupting his neighbors. In *United States v. Rohrig*, the Sixth Circuit applied the community caretaking exception to a home when officers entered to turn down loud music that was disturbing the neighbors. *Rohrig,* 98 F.3d at 1522. The court held the entry was reasonable because immediate government action was required to restore the neighbors' peaceful enjoyment of their homes, and requiring officers to obtain a warrant in that scenario would impermissibly "subject the community to a continuing and noxious disturbance for an extended period of time without serving any apparent purpose." *Id.* However, this case is distinguishable from *Rohrig* because none of Mr. David's actions were creating an ongoing nuisance that required immediate

action. No neighbors had called to complain about a disturbance, and the house looked completely normal when Office McNown arrived. R. at 2.

Finally, the court in *Rohrig* stressed that the defendant "undermined his right to be left alone by projecting loud noises into the neighborhood in the wee hours of the morning." *Id.* at 1522. In determining whether an entry is justified, the Court must balance the governmental interest served by the intrusion versus the individual interest served by requiring a warrant. *Rohrig*, 98 F.3d at 1517. Here, Mr. David did nothing that would undermine his individual interest in his "right to be left alone." In fact, Mr. David took extra precaution to safeguard his individual right to privacy in his home. He lived in a gated community, and did not generally allow visitors into his home. R. at 3, Ex. C pg. 2. He even had a policy of telling the guards at the gate to not allow any visitors inside. Ex. C pg. 2. Officer McNown was only allowed entry because he was in uniform. Ex. A pg. 4. Given the high constitutional protection afforded to the home, it was unreasonable for Officer McNown to enter Mr. David's home.

In conclusion, even if the community caretaking exception may apply to homes, Officer McNown's search does not fall under this category. Therefore, the search of Mr. David's home was unreasonable and the evidence found as a result should have been suppressed.

II. MR. DAVID'S SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS VIOLATED.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. Since defendants are both "accused" and in "criminal prosecutions" during plea negotiations with a prosecutor, the Sixth Amendment naturally attaches. Chad David was denied this basic right when his attorney failed to inform him of a favorable plea deal that would have greatly reduced his sentence.

A. The Sixth Amendment Right to Effective Assistance of Counsel Naturally Attaches to Preindictment Plea Negotiations.

The "core purpose" of the Sixth Amendment right to counsel is to ensure that criminal defendants receive effective assistance of counsel "at trial," *United States v. Ash*, 413 U.S. 300, 309 (1973). However, the Court has since recognized that the right to counsel applies to certain pretrial "critical stages" that present the same dangers that initially gave birth to the right itself. *Id.* at 311-12. Recently, the Court recognized the centrality of plea negotiations to our criminal justice system and held that the Sixth Amendment right to counsel protects a defendant during this critical stage in which his freedom is on the line. *See Lafler v. Cooper*, 566 U.S. 156, 164 (2012); *Missouri v. Frye*, 566 U.S. 134, 140 (2012).

Despite this, the Court has not explicitly attached the right to counsel to preindictment plea negotiations. But the right to counsel naturally attaches to pre-indictment plea negotiations because a defendant's need for counsel during plea negotiations is arguably greater if they occur pre-indictment. Furthermore, the Court's Sixth Amendment decisions and their reasoning support attachment of the right to counsel to preindictment plea negotiations. And attachment of the right to counsel to preindictment plea negotiations is supported by the text and history of the Sixth Amendment.

1. Preindictment plea negotiations warrant Sixth Amendment protection as much as, if not more than, negotiations occurring post indictment.

The Sixth Amendment right to counsel should attach to preindictment plea negotiations because plea negotiations are occurring before indictment at an increasing rate and defendants have more at stake in plea negotiations that occur before charges are filed. Recently, the Court faced the stark reality that our criminal justice system is truly "a system of pleas" and came to the inevitable conclusion that the Sixth Amendment right to counsel protects defendants during the

plea negotiations that typically decide their fate. *See Lafler* 566 U.S. at 164; *see* also *Frye*, 566 U.S. at 140. In *Frye*, the Court acknowledged the "simple reality" that ninety-seven percent of federal convictions were the result of guilty pleas. *Frye*, 566 U.S. at 140; *see* Overview of Federal Criminal Cases—Fiscal Year 2017 5 (United States Sentencing Commission) (explaining how guilty pleas have now grown to 97.2% of federal cases). As such, denying a defendant the right to counsel during plea negotiations would "deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Frye*, 566 U.S. at 144. While the Court did not explicitly state in *Lafler* or *Frye* that the right to counsel applies to both pre and post indictment plea negotiations, the increased frequency of preindictment plea negotiations and their significant impact on defendants' fate require attachment of the right to counsel.

Prosecutors are engaging in plea negotiations before indictment at an increasing rate. *See* 5 Crim. Proc. § 21.1(h) (4th ed.). In 1993 the Department of Justice's plea bargaining policy was amended to allow federal prosecutors to take the circumstances of a case into account when making charging decisions and negotiating plea deals. *Id.* This significant amendment has motivated more prosecutors to engage in plea bargaining preindictment. David N. Yellen, *Two Cheers for a Tale of Three Cities*, 66 S. Cal. L. Rev. 567, 570 (1992). For example, the National Association of Criminal Defense Lawyers found that in the Western District of Tennessee alone, the share of preindictment guilty pleas has increased twofold from 2016 to 2017, and fourfold from 2015. Brief for the National Association of Criminal Defense Lawyers as Amicus Curiae, p. 4, *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018).

Second, the advice of counsel is invaluable at preindictment plea negotiations because the defendant has more at stake in preindictment negotiations than post indictment. This is because dealing with a defendant prior to indictment allows a prosecutor to charge bargain, i.e., negotiate

what particular charges will be filed. Many federal statutes overlap, allowing the same alleged conduct to be punishable by "a range of different statutes carrying different maximum—and sometimes minimum—penalties." David A. Sklansky, *The Problem with Prosecutors*, 1 Ann. Rev. Criminology 451, 456 (2018). An unaided defendant who is not well versed in the intricacies of criminal law and procedure does not know about the different statutes under which he could be charged, or the effect a charging decision might have on the length of his sentence. In addition, he is unaware of what elements of the offenses must be proven in order to convict him. This lack of knowledge leaves him with effectively no bargaining power. Not only will a defendant likely come out with a less favorable deal than if he were aided by counsel, but he will likely face more serious charges if negotiations are unsuccessful. Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 Nw. U. L. Rev. 1635, 1663 (2003). And since the crime charged is the best predictor of a defendant's punishment, a defendant's fate is essentially sealed if preindictment negotiations do not go well. *See* Emily Owens, *Examining Racial Disparities in Criminal Case Outcomes among Indigent Defendants in San Francisco* 25 (Quattrone Center Report 2017) (explaining that the crime charged is the best predictor of a defendant's punishment looking at empirical data in San Francisco).

In addition, lower courts frequently acknowledge the persistence and significance of preindictment plea deals in criminal prosecutions. For instance, the Sixth Circuit acknowledged the sentencing guidelines' "role in pressuring prosecutors and defendants to engage in plea bargaining ever earlier in the criminal process," *United States v. Moody*, 206 F.3d 609, 617 (6th Cir. 2000), and the District of Oregon recognized that "[m]ost federal criminal cases are resolved through plea negotiations and a [defendant's] best chance of obtaining a reduced sentence occurs prior to indictment." *United States v. Wilson*, 719 F.Supp.2d 1260, 1268 (D. Or. 2010). As such,

it is necessary to afford defendants their Sixth Amendment right to counsel at this critical stage, regardless of whether it occurs pre or post indictment, because more and more criminal defendants are engaging in plea negotiations prior to indictment.

Therefore, the importance of preindictment plea negotiations and their increased frequency in the federal system necessitates Sixth Amendment protections for the accused in such pivotal negotiations.

2. The Court's Sixth Amendment jurisprudence supports attachment of the right to counsel to preindictment plea negotiations.

In addition to the practical reasons defendants in our criminal justice system need the right to counsel during preindictment plea negotiations, application of the right to counsel in this context is supported by the Court's Sixth Amendment jurisprudence. The Court has traditionally conducted a "pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel" in defining the scope of the Sixth Amendment right to counsel. *Paterson v. Illinois*, 487 U.S. 285, 298 (1988); *Massiah v. United States*, 377 U.S. 201, 204 (1964). A pragmatic assessment in the context of plea negotiations suggests that the right to counsel attaches to all plea negotiations whether they occur before or after indictment.

Even where the Court has drawn a bright-line for attachment of the right to counsel at indictment, it has continued to use a pragmatic assessment of the needs of counsel for the accused. *Kirby v. Illinois*, 406 U.S. 682 (1972). For example, in *Kirby*, the Court looked into the nature of preindictment police lineups and explained that the right to counsel during lineups does not apply until after indictment because "it is only then the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id.* at 689. The Court noted that preindictment lineups are part of "routine police investigation[s]" for which

there is no "rationally applicable" basis to have constitutionally guaranteed counsel. *Id.* at 690. On the other hand, a post-indictment lineup is no longer routinely investigatory, but instead designed to "determine the accused's fate." *Id.*

Similarly, in *United States v. Ash,* 413 U.S. 300, 313 (1973), decided after *Kirby*, the Court engaged in a thorough examination of a photo identification procedure to determine "whether the accused required aid in coping with legal problems or assistance in meeting his adversary." The Court ultimately declined to extend the right to counsel because the accused was not present and thus not susceptible to being overpowered by the intricacies of the law and his adversary. *Id.* Further, in *Massiah v. United States*, 377 U.S. 201, 204 (1964), the Court found that post-indictment interrogations may be "the only stage when legal aid and advice would help" the accused. While pre-indictment interrogations do not signal the shift "from investigation to accusation" that requires counsel to assure the "prosecution's case encounters the crucible of meaningful adversarial testing." *Moran v. Burbine*, 415 U.S. 412, 430 (1986).

Keeping with the Court's pragmatic assessment for attachment of the right to counsel, a bright-line at indictment is not warranted in the context of plea negotiations. Unlike interrogations and identification procedures, plea negotiations are inherently accusatory rather than investigatory. Asking a defendant to give up his presumptive innocence and plead guilty to a crime is accusatory regardless of whether it occurs pre or post indictment. While there may be an investigative element to many plea negotiations—such as asking a defendant to turn in coconspirators in return for a lesser sentence—the government has already committed to prosecuting the defendant engaged in negotiations, and the accused is entitled to the right to counsel for "assistance in meeting his adversary." *Ash*, 413 U.S. at 313.

When a criminal proceeding has crossed the line from investigative to prosecutorial is sometimes best ascertained as the time of formal charge, indictment, or other formal initiation of judicial proceedings. However, making indictment the exclusive stage at which the right to counsel attaches ignores the purpose of the Sixth Amendment right to counsel, and leaves criminal defendants without legal aid at a time they need it most. For, as Justice Kennedy recognized, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye,* 566 U.S. at 144.

This interpretation of the attachment of the right to counsel has been followed by many circuit courts. For example, the First Circuit recognized the possibility that the right to counsel might attach before the government initiates formal criminal proceedings in *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995). The Seventh Circuit in *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992), held that a rebuttable presumption against attachment of the right in the absence of an initiation of adversary criminal justice proceedings could be overcome by the defendant showing that the Government had crossed the line from "fact-finder to adversary." Similarly, in *United States v. Burgess*, 141 F.3d 1160, n.2 (4th Cir. 1998), the Fourth Circuit stated that the crucial inquiry for attachment of the right to counsel is whether authorities have committed themselves to prosecute, signifying the point at which the adverse position of the government and defendant have solidified.

Moreover, the Third Circuit affirmatively applied the right to counsel to a defendant who had not been indicted or formally charged. *Matteo v. Superintendent,* 171 F.3d 877, 892 (3d Cir. 1999). In *Matteo*, the court held that the right to counsel attached prior to the prosecution filing charges and before arraignment after the defendant was arrested and held in jail. *Id.* The court distinctly noted that "[t]he right also may attach at earlier stages, when '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 results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality.'" *Id.* (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)).

District courts take the same view and many have explicitly held that the Sixth Amendment guarantees the right to the effective assistance of counsel during pre-indictment plea bargaining. *See Wilson*, 719 F.Supp.2d at 1266-68; *United States v. Busse,* 814 F. Supp. 760, 763-64 (E.D. Wis. 1993); *Chrisco v. Shafran*, 507 F. Supp. 1312, 1319 (D. Del. 1981). The court in *Wilson* explained: "[t]o conclude that petitioner had no right to counsel in evaluating the government's plea offer simply because the government had not yet obtained a formal indictment would elevate form over substance, and undermine the reliability of the pre-indictment plea negotiation process." *Wilson*, 719 F.Supp.2d at 1268. Refusing a defendant the right to counsel during preindictment plea negotiations would not only undermine the reliability of the process, it would explicitly contradict the meaning and purpose of the Sixth Amendment right to counsel to aid the defendant when confronted with an experienced adversary.

Therefore, these circuit court decisions are consistent with the Court's Sixth Amendment jurisprudence in which it engages in a pragmatic assessment of the positions of the government and the accused to determine when the defendant is entitled to the right to counsel. And thus, attachment of the right to counsel to preindictment plea negotiations is consistent with the Court's Sixth Amendment right to counsel jurisprudence.

3. The text and history of the Sixth Amendment right counsel indicates that whether a defendant is "accused" in a "criminal prosecution" should be interpreted more broadly than the Circuit Court suggests.

Lastly, the Sixth Amendment's text and history supports attaching the right to counsel to preindictment plea negotiations. Judge Bush of the Sixth Circuit Court of Appeals explained in his

concurring opinion in *Turner* that drawing a bright-line for attachment of the Sixth Amendment exclusively at indictment is contrary to the original public meaning of the Sixth amendment. *Turner*, 885 F.3d at 956 (Bush., J., concurring). The Sixth Amendment protects an "accused" in "all criminal prosecutions." U.S. Const. amend. VI. Founding-era sources gathered by Judge Bush indicate that "accused" was understood to mean something broader than "indicted," and that a "criminal prosecution" encompassed more than merely the post-indictment stages of a criminal case. *Turner*, 885 F.3d at 956. When a prosecutor says to a defendant that the government believes he is guilty and will indict him for it unless he pleads guilty, the defendant is an "accused" in a "criminal prosecution" according to the original meaning of these terms.

Early nineteenth century decisions confirm the original meaning of these terms. For example, in 1807, Chief Justice John Marshall considered whether a defendant was entitled to compulsory process under the Sixth Amendment before being indicted. *United States v. Burr*, 25 F. Cas. 30, 32 (C.C. Va. 1807). The Compulsory Process Clause of the Sixth Amendment, like the Assistance of Counsel Clause, applies to an "accused" during a "criminal prosecution." U.S. Const. amend. VI. Chief Justice John Marshall held that the Sixth Amendment guarantees "a right, before as well as after indictment, to the process of the court to compel the attendance of his witnesses." *Id.* at 33. Thus, decisions dating back to just sixteen years after the ratification of the Bill of Rights interpreted "accused" and "criminal prosecutions" more broadly than simply drawing a bright-line at indictment in every case.

Therefore, the text and history of the Sixth Amendment show that the right to counsel was never meant to attach exclusively at indictment. In light of this, defendants in preindictment plea negotiations should be afforded the right to effective assistance of counsel.

B. Chad David's Sixth Amendment Right to Counsel was Violated When His Counsel's Deficient Performance Resulted in Him Receiving a Drastically Longer Sentence.

The United States District Court for the Southern District of Staples erred in finding that Chad David did not suffer prejudice when his attorney did not inform him of the government's plea offer. A defendant must show two things to establish an ineffective assistance of counsel claim: First, the defendant must show that counsel's performance was deficient, and second, the defendant must show that the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). It is abundantly clear that David's counsel was ineffective when he did not tell him about the government's plea offer, and the parties in this case have so stipulated. Thus, David only has to prove that he suffered prejudice.

Strickland defines "prejudice" as simply a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id.* at 694. Thus, to show prejudice in the plea context, a defendant only needs to show that the outcome of the plea process would have been different with competent advice from counsel. *Lafler*, 566 U.S. at 163. Specifically, to show prejudice where a plea offer has lapsed because of counsel's deficient performance, a defendant needs to demonstrate only a "reasonable probability" that, had he been afforded effective assistance of counsel, he would have accepted the more favorable plea offer and that the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it. *Frye*, 566 U.S. at 135.

Here, David would have accepted the plea deal had it been communicated to him. David exhibited a willingness to plead guilty from the beginning. As soon as David learned of the lapsed plea offer, he raised an ineffective assistance of counsel claim to try and correct the mistake by re-initiating plea negotiation. R. at 5. As the Circuit Court in this case correctly pointed out, if David

truly wanted to gamble with his fate, he would have waited to stand trial and then raised the effective assistance of counsel issue as a collateral attack. R. at 22 (J. O'Neal, dissenting).

There is also a reasonable probability that the plea would have been entered without issue because there were no intervening, aggravating circumstances affecting the plea's reasonableness. In *Frye*, the defendant could not prove that the prosecution and trial judge would have accepted the plea terms because since his initial prosecution for driving with a revoked license he was pulled over again for the same offense. *Frye*, 566 U.S. at 144. Thus, having incurred a second identical offense, the Court found that there was significant doubt as to whether the prosecutors and trial judge would have entered the favorable plea deal without cancelling it. *Id.*

Here, however, Mr. David had not incurred another drug charge, or any charge for that matter. Nor has any additional evidence come out incriminating David in any other drug operations or other crimes. Thus, there are no aggravating circumstances that would change the prosecutor's mind that David is a low-level offender worthy of a favorable deal. Moreover, had the plea deal been presented to the trial court, it likely would have been accepted because trial judges commonly defer to the prosecution's judgement in deciding the plea terms. *See United States v. Merlino*, 109 F.Supp.3d 368, n.2 (D. Mass. 2015) ("Although the court is not a party to the bargain, it is the unusual case in which the judge deviates in any material fashion from its negotiated terms.").

Thus, there is a reasonable probability that the prosecution would have accepted the plea deal and that the trial judge would have entered it. As such, David meets both prongs of the *Strickland* test to prove that he was denied his right to effective assistance of counsel guaranteed by the Sixth Amendment.

C. The Proper Remedy for the Violation of David's Sixth Amendment Right to Counsel is for the Court to Order the Government to Re-Offer the Plea Agreement.

Since David's Sixth Amendment rights were violated, the Court must determine the proper remedy. 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). In *Lafler*, the State argued that since the defendant was found guilty after a fair trial, vacating the conviction serves no purpose to remedy the constitutional violation. *Lafler*, 566 U.S. at 174. However, Justice Kennedy disagreed and proposed that "the correct remedy in these circumstances…is to order the State to re-offer the plea agreement." *Id.*

Chad David's Sixth Amendment rights were violated and all constitutional violations deserve a remedy. The Government argues that the plea agreement has outlived its usefulness, in that it is too late to go after David's suppliers because they have likely been tipped off. Even assuming this is true, when an accused's constitutional rights are violated the State must bear the burden. *O'Neal v. McAninch*, 513 U.S. 432, 443 (1995) ("[T]he State normally bears responsibility for the error that infected the initial trial."). Furthermore, the original plea agreement was contingent on David's information leading to at least one arrest. Ex. D. The Government can still pursue its investigative interests if this plea agreement is reinstated per Court order. Thus, the Court should remedy the violation of Chad David's constitutional right to counsel by ordering the Government to re-offer the original plea agreement.

CONCLUSION

Chad David's Fourth and Sixth Amendment rights were violated. Therefore, we respectfully ask that Mr. David's conviction be reversed.