No. 4-422

IN THE

Supreme Court of the United States

Chad David,

Petitioner,

v.

The United States of America,

Respondent.

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

BRIEF FOR PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES CIRCUIT COURT OF APPEALS CASES

UNITED STATES DISTRICT COURT CASES

STATE SUPREME COURT CASES

STATUTES

THE CONSTITUTION PROVISIONS

ONLINE SOURCES

STATEMENT OF THE ISSUES

I. Does the community caretaking exception to the Fourth Amendment justify Officer McNown's warrantless entry and search of Mr. David's home?

II. Did Mr. David's Sixth Amendment right to counsel attach when the Assistant United States Attorney made a formal pre-indictment plea offer?

STATEMENT OF THE FACTS

On Sunday, January 15, 2017, Chad David ("Mr. David"), a well-respected minister in Lakeshow, missed church because he thought it was a Saturday. R. at 2; Ex. C. Church member Julianne Alvarado ("Ms. Alvarado"), appearing nervous and shaky, brought Mr. David's absence to the attention to Lakeshow Police Officer and church attendee, James McNown ("Officer McNown"). R. at 2. Officer McNown thought Ms. Alvarado was overreacting and assumed Mr. David was sick but agreed that he would check on Mr. David after he finished his patrol. R. at 2.

After the church service ended, Officer McNown, wearing his full police uniform and driving a marked patrol vehicle, began his usual Sunday shift. Ex. A. While on duty, Officer McNown diverted from his usual duties and drove to Mr. David's home with a cup of tea. R. at 2. Upon arriving at Mr. David's gated community, Officer McNown found it suspicious that a black Cadillac SUV with Golden State license plates was leaving the community. Ex. A. This suspicion arose because based upon Officer McNown's training and experience, black Cadillac SUV's were indicative of drug dealing. R. at 2.

Despite this suspicion, Officer McNown proceed to drive towards Mr. David's home, where security let his patrol car through without asking any questions. Ex. A. Officer McNown arrived at Mr. David's residence at 9:30 a.m. and did not find anything indicating a break-in or an emergency but was surprised to hear cursing scream-o music coming from inside the seventy-two-year-old house. Ex. A. Officer McNown subsequently walked into the curtilage of Mr. David's home, knocked and announced his presence, and after no answer, began looking through the windows. R. at 3-4; Ex. A.

While looking through the windows, he saw that the TV playing the Rate R movie, *The Wolf of Wall Street*, and decided to enter Mr. David's home. R. at 3-4; Ex. A. In an attempt to do

so, Officer McNown tried to open Mr. David's front door, but the door was locked. Ex. A. He then decided to walk around the home, where he entered Mr. David's house through an unlocked back door without knocking or announcing his presence. Ex. A.

Once in the home, Officer McNown read a notebook which had the words "ounce" and paid," leading him to believe that "something was wrong." Ex. A. He then proceeded to walk up the stairs where he opened a closed bedroom door and found Mr. David packaging cocaine. Ex. A. Seeing this, Officer McNown arrested Mr. David and called Drug Enforcement Agent Colin Malaska ("Agent Malaska"), who processed the cocaine and notebook. R. at 3. Agent Malaska asked him where he had gotten the drugs, but Mr. David indicated he would be killed, and his church burnt to the ground if he gave up his suppliers. R. at 3; Ex. F.

While in custody, Mr. David called the only defense attorney he knew, Keegan Long ("Mr. Long"). R. at 4. Mr. David told Mr. Long that Officer McNown had shown up unannounced, found him packaging cocaine, and had called Agent Malaska. Ex. B. Mr. David asked Mr. Long about the criminal process as he had never been arrested before, had no idea what to expect, and was scared of going to jail and getting stabbed. Ex. C. Despite Mr. David's concerns, Mr. Long never discussed or explained the implications of going to trial or the repercussions of pleading guilty. Ex. B.

As Mr. David sat in jail awaiting his fate, Agent Malaska asked the Assistant United States Attorney, Kayla Marie ("AUSA Marie"), to delay indicting Mr. David so as to not tip off any of the drug suppliers. R. at 4. Instead, Agent Malaska urged AUSA Marie to offer Mr. David a plea deal in an effort to catch the drug kingpin traveling through Lakeshow. R. at 4. Finding this to be strategic advantage, AUSA Marie agreed, and on Monday, January 16, 2017, at 8:00 a.m., she sent an email to Mr. Long offering one year in prison in exchange for Mr.

David's commitment to bringing down his suppliers. R. at 4; Ex. D. AUSA Marie stated that the plea offer would only be open for thirty-six hours, and would expire on January 17, 2017, as she found the found the offer to be "more than generous." R. at 4; Ex. D.

When Mr. Long received AUSA Marie's offer, he was drunk, misread thirty-six hours as thirty-six days, and only communicated the plea offer to Mr. David after it expired. Ex. C. Once the plea offer lapsed, AUSA Marie indicted Mr. David for possession of cocaine with the intent to distribute. R. at 1. Following the indictment, Mr. David quickly fired Mr. Long and hired Michael Allen ("Mr. Allen"). Ex. B.

Mr. Allen informed AUSA Marie that Mr. David never received her offer, but without a doubt, would enthusiastically accept the offer because his information was still valuable, and serving one year in prison instead of ten was a no brainer. Ex. C. But AUSA Marie refused, explaining that the drug dealers were already tipped off and Mr. David's information was useless. Ex. E. Mr. David later told the court that had he been informed of the plea offer, he without a doubt, would have taken the deal in a heartbeat to avoid the risk of trial. Ex. C.

PROCEDURAL HISTORY

On January 18, 2017, Mr. David was indicted on one count of possession with intent to distribute a controlled substance under 21 U.S.C. § 841. R. at 1. Mr. David filed a Motion to Suppress and a supplemental motion to be re-offered his plea deal, which the District Court for the Southern District of Staples denied on July 15, 2017. R. at 13. On July 20, 2017, the District Court convicted Mr. David, and sentenced him to ten years in prison. R. at 14. On November 28, 2017, both parties appealed to the Thirteenth Circuit and the Court of Appeals, who affirmed Mr. David's conviction. R. at 18. This Court granted Mr. David's petition for Certiorari following the decision of the Thirteenth Circuit Court of Appeals. R. at 25.

SUMMARY OF THE ARGUMENT

The first issue concerns the limits of the community caretaking exception to the Fourth Amendment. Contrary to the government's assertion, the community caretaking exception does not justify Officer McNown's warrantless entry and search of Mr. David's home since the exception only applies to automobiles, not private homes. This confusion amongst lowers courts arises because of the nuanced distinction between caretaking home entries and entries pursuant to exigent circumstances. Moreover, even if the community caretaking exception applies to homes, Officer McNown's actions still violated the Fourth Amendment because he was not totally divorced from detection, investigation, or acquisition of evidence. Therefore, his actions were unreasonable.

The second issue requires this Court to determine whether the Sixth Amendment right to counsel attaches to pre-indictment plea negotiations. This Court has long held that the Sixth Amendment right to counsel attaches only during formal adversarial proceedings, but in modern times, this rule overlooks the critical stage of pre-indictment plea negotiations. Mr. David's right to effective assistance of counsel attached when the United States Attorney went from fact finder to adversarial opponent by engaging in pre-indictment plea negotiations. Additionally, because Mr. Long was ineffective in failing to communicate the plea offer to his client, Mr. David suffered prejudice when he was sentenced to ten years in prison, which was nine years longer than the plea offer he never had the opportunity to consider.

As a result, Mr. David respectfully asks this Court to reverse the decision of the Thirteenth Circuit Court of Appeals and to grant his Motion to Suppress. Or in the alternative, Mr. David politely urges this Court to find that his Sixth Amendment right to counsel attached and that he suffered prejudice. Therefore, Mr. David should be re-offered the original plea offer.

STANDARD OF REVIEW

The issue of whether Officer McNown's actions fall under any established exceptions to the Fourth Amendment's warrant requirement is a question of law, which should be reviewed *de novo*. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996); *see also United States v. Breza*, 308 F.3d 430, 433 (4th Cir. 2002) (any conduct of law enforcement that infringes upon rights guaranteed by the Fourth Amendment is subject to *de novo* review). The underlying factual findings are reviewed for clear error. *United States v. Rusher,* 966 F.2d 868, 873 (4th Cir. 1992).

The issue of whether the Sixth Amendment right to counsel attaches in pre-indictment plea negotiations is a question of law, which should be reviewed *de novo*. *United States v. Moody*, 206 F.3d 609, 613 (6th Cir. 2000).

ARGUMENT

I. THE COMMUNITY CARETAKER EXCEPTION DOES NOT JUSTIFY OFFICER MCNOWN'S WARRANTLESS ENTRY AND SEARCH OF MR. DAVID'S HOME AND THE CONTRABAND SEIZED MUST BE SUPPRESSED.

The Fourth Amendment safeguards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. It is a "basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980). Accordingly, if a warrantless search occurs, the government bears the burden of proving an "established and well-delineated exception." *Katz v. United States,* 389 U.S. 347, 356-57 (1967). If the government cannot meet their burden in proving an exception, the exclusionary rule suppresses any and all fruit obtained from the unreasonable search and seizure. *See Mapp v. Ohio,* 367 U.S. 643, 653-55 (1961).

Here, the government relies solely on the community caretaking exception to justify Officer's McNown's warrantless entry and search of Mr. David's home. R. at 15. For the reasons set forth below, the community caretaking exception does not apply, the judgment of the Thirteenth Circuit Court of Appeals should be reversed, and Mr. David's Motion to Suppress should be granted.

A. Officer McNown's Warrantless Entry and Search of Mr. David's Home Cannot be Justified Under the Community Care Exception Because the Exception Only Applies to Automobiles, Not Homes, and Courts Conflate Caretaking Entries with Entries Pursuant to Exigent Circumstances.

The community caretaking exception does not apply to homes because there is "constitutional difference between houses and cars" under this Court's Fourth Amendment jurisprudence. *Cady v. Dombrowski,* 413 U.S. 433, 439 (1973) (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)) (finding that "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars"); *see also Ray v. Township of Warren,* 626 F.3d 170, 176 (3rd. Cir. 2010) (observing that confusion among the Circuit Courts of Appeals arises because the courts ignore "the community caretaking doctrine established in *Cady*" and "instead apply . . . exigent circumstances").

To date, this Court has never allowed the community caretaking exception to justify a warrantless entry and search of a home, as precedent demonstrates that the community caretaking exception applies to automobiles, not homes. The current confusion among the Circuit Courts of Appeals is a result of the conflation of the community caretaking exception and exigent circumstances, when analyzing the entry and search of a home to render emergency aid. A proper analysis, as described below, shows that no Fourth Amendment exception applies in this case, and this Court should reverse the decision of the Thirteenth Circuit Court of Appeals and grant Mr. David's Motion to Suppress.

1. *The Community Caretaking Exception Does Not Apply to Homes Because There is a Constitutional Difference Between Homes and Automobiles.*

The Third, Seventh, Ninth, Tenth, and Eleventh Circuits have all declined to extend the community caretaking exception to warrantless entries and searches of a home. *See Ray,* 626 F.3d at 176 (3rd Cir. 2010) (rejecting the application of the community caretaking exception to warrantless searches of private homes); *United States v. Pichany,* 687 F.2d 204, 207 (7th Cir. 1982) (limiting the community caretaking exception to automobiles and refusing to create a "warehouse exception" because of the greater Fourth Amendment concerns implicated); *United States v. Erickson* 991 F.2d 529, 532 (9th Cir. 1993) (adopting this Court's reasoning in *Cady* which drew a constitutional distinction between automobiles and homes for Fourth Amendment purposes); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (observing that a search of a manufacturing plant under the community caretaking doctrine was unconstitutional under the *Cady* Court's distinction between homes and automobiles); *United States v. McGough,* 412 F.3d 1232, 1238 (11th Cir. 2005) (finding that the community caretaking exception cannot justify a "warrantless entry into a private home").

Unlike homes, automobiles are involved in accidents on public roads, are subject to pervasive state regulation, and lead to greater police-citizen contact which is "substantially greater that police-citizen contact in a home." *Cady,* 413 U.S. at 441. Thus, the community caretaking exception to the warrant requirement was recognized as a function of the frequent interaction between officers, vehicles, and drivers given the lesser expectation of privacy. *See South Dakota v. Opperman,* 428 U.S. 364, 367 (1976) (acknowledging that community caretaking function applies to automobiles because of "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home"); *see also Colorado v.*

Bertine, 479 U.S. 367, 372-74 (1987) (recognizing that the community caretaking function is unique to automobiles given the lesser expectation of privacy).

By applying these standards to the present case, the community the caretaking exception cannot justify Officer McNown's warrantless entry and search of Mr. David's home because the exception only applies to cars, not houses. *See Taylor v. Mich. Dep't of Nat. Res.*, 502 F.3d 452, 462 (6th Cir. 2007) (Aldrich, J., dissenting) (reasoning that the community caretaking function articulated in *Cady* has most often been applied to the warrantless searches of automobiles). Here, Officer McNown entered and searched Mr. David's home without prior judicial authorization. R. at 3. Thus, since the entry and search of Mr. David's home occurred without a warrant, Officer McNown's actions are *per se* unreasonable, *Payton,* 445 U.S. at 586, and the contraband found in Mr. David's home is fruit of a poisonous tree, which should have been suppressed. *See Wong Sun v. United States*, 371 U.S. 471, 487 (1963). As a result, the Thirteenth Circuit Court of Appeals decision should be reversed and Mr. David's Motion to Suppress should be granted.

2. *The Community Caretaking Exception Should Not be Conflated With Exigent Circumstances Because Doing So Confuses the Focus of the Analysis.*

The Fourth, Sixth, and Eighth Circuit Courts of Appeals have reached the incorrect conclusion when analyzing police officer warrantless entries into home due to widespread conflation of the community caretaking exception and the exigent circumstances exception. *See Ray*, 626 F.3d at 175 (observing that "[t]here is some confusion among the circuits as to whether the community caretaking exception set forth in *Cady* applies to warrantless searches of the home"). While some overlap exists between the "community caretaking" and the "exigent circumstances" exceptions, "the community caretaking doctrine requires a court to look at the

function performed by a police officer, while the emergency exception requires an analysis of the circumstances to determine whether an emergency requiring immediate action existed." *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009); *see also Mincey v. Arizona,* 437 U.S. 385, 394 (1978) (quoting *McDonald v. United States,* 335 U.S. 451, 456 (1948)) (finding that the emergency aid exception allows an officer to make a warrantless entry and search of a home if "'the exigencies of the situation' make the needs of law enforcement so compelling that the warrantless search is objectively reasonable under the Fourth Amendment").

Most, if not all, of the confusion arises when federal courts apply the community caretaking exception, rather than exigent circumstances to justify a police officer entering a home to provide emergency aid. *See Hunsberger,* 570 F.3d at 554 (justifying a warrantless entry into a home to find a teenage girl because "the objective circumstances at the time of Wood's entry would cause a reasonable officer to believe that there was an emergency requiring prompt entry"); *United States v. Rohrig*, 98 F.3d 1506, 1521 (6th Cir. 1996) (reasoning that the police officers' warrantless entry into the defendant's home in middle of night to turn down loud music that was disturbing neighbors, after unsuccessful attempts to contact occupant, was justified by exigent circumstances); *see also United States v. Quezada*, 448 F.3d 1005, 1008 (8th Cir. 2006) (concluding that an emergency existed when a sheriff, attempting to serve a person, found an apartment door open with the lights and television on because a reasonable officer could have found that someone was unable to respond inside the apartment).

In this case, the exigent circumstances exception does not justify a warrantless entry and search under the guise of emergency aid. Mr. David did not require immediate assistance and no reasonable officer could have believed that he did. He is not a missing teenage girl who went out partying with her friends. *See Hunsberger,* 570 F.3d at 553-54. Mr. David's neighbors did not

call to report a noise disturbance at 1:30 a.m. in the morning. *See Rohrig*, 98 F.3d at 521. His front door was not left open, and he was not being served with court documents. *See Quezada,* 448 F.3d at 1007-08. Mr. David was not bleeding or calling for immediate medical attention. *See Michigan v. Fisher*, 558 U.S. 45, 48 (2009). Mr. David was not in a burning building, *Michigan v. Tyler,* 436 U.S. 499, 509 (1978), and Officer McNown did not witness Mr. David fighting with a juvenile. *See Brigham City, Utah v. Stuart*, 547 U.S. 389, 406-07 (2006).

Instead, Mr. David is an adult, who was in his own bedroom, listening to music at a reasonable volume, in the picture of health, not subject to any legal proceedings, and is entitled to be free from government intrusion. Ex. C; *Katz,* 389 U.S. at 356-57. These circumstances were all corroborated when Officer McNown testified to not seeing, observing, or even thinking that an emergency was occurring in Mr. David's home. Ex. A. Thus, the government cannot justify Officer McNown's warrantless entry and search of Mr. David's home under any version of emergency aid, the Thirteenth Circuit Court of Appeals should be reversed, and his Motion to Suppress should be granted.

B. Even If the Community Caretaking Exception Applied to Homes, Officer McNown's Actions Were Not Totally Divorced From Criminal Detection, Investigation, or Acquisition of Evidence, and Therefore His Actions Were Unreasonable.

Even if the community caretaking exception applied to homes, it would still require that police officer serve as community caretakers and their work be completely unrelated to criminal investigation. *See Cady,* 413 U.S. at 441. As indicated in *Quezada*, there is a "concern that a police officer might use his or her caretaking responsibilities as a pretext for entering a residence." *Quezada*, 448 F.3d at 1008. To "determin[e] whether a search is reasonable within the meaning of the Fourth Amendment, the governmental interest motivating the search must be

balanced against the intrusion on the individual's Fourth Amendment interests." *Erickson*, 991 F.2d at 531 (citing *Maryland v. Buie,* 494 U.S. 325, 331 (1990)).

Here, Officer McNown's entrance and search of Mr. David's home was not totally divorced from criminal investigation. It may appear as Officer McNown's subjective intent was to ensure the well-being of Mr. David, but his warrantless entry and search of Mr. David's home was objectively unreasonable. Thus, this Court should reverse the decision of the Thirteenth Circuit of Appeals and should grant Mr. David's Motion to Suppress.

1. *The Community Caretaking Function Does Not Apply Because Officer McNown's Actions Were Not Totally Divorced From Criminal Detection, Investigation, or Acquisition of Evidence, Since He Realized Criminal Activity Was Afoot Prior to Approaching the Home.*

The community caretaking exception only applies when a law enforcement officer is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady,* 413 U.S. at 441-42. In *Cady,* an off-duty policeman became intoxicated and drove his vehicle off the road. *Id.* On-duty police officers then arrested the off-duty policeman for drunk driving and towed the disabled vehicle to a nearby garage. *Id.* at p. 440-43. Based upon the belief that police officers must carry their service revolvers with them at all times, one of the arresting officers searched the off-duty policeman's vehicle for the gun. *Id.* The search subsequently revealed evidence implicating the off-duty policeman in a recent homicide, and this Court upheld the search under the community caretaking exception to protect "the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Id.* at 447.

Since *Cady*, courts have tried to apply *Cady's* "totally divorced" standard. *See Quezada*, 448 F.3d at 1007 (defining totally divorced as circumstances, in which police officers perform duties to help those in danger and to protect property, with an objective unrelated to the officer's

duty to investigate and uncover criminal activity); *State v. Pinkard*, 785 N.W.2d 592, 602-03 (Wis. 2010) (quoting *State v. Kramer*, 759 N.W.2d 598, 609 (Wis. 2009)) (observing that a court "may consider an officer's subjective intent in evaluating whether the officer was acting as a bona fide community caretaker [if] . . . he has met the standard of acting as a bona fide community caretaker . . . [by being] totally divorced from law enforcement functions"); *see also United States v. Smith*, 820 F.3d 356, 361 (8th Cir. 2016) (holding that officers were totally divorced from criminal investigation when they conducted a welfare check on a resident of a half-way house).

Applying *Cady* to this case, Officer McNown's were driven by criminal "detection, investigation, or acquisition of evidence." *Cady,* 413 U.S. at 441-42. Upon approaching Mr. David's home, Officer McNown had developed a suspicion that criminal activity was afoot. First, he detected unusual activity at his church when Mr. David was absent, by speaking to a nervous Ms. Alvarado, and when he observed Cadillac SUV's with Golden State license plates leaving Mr. David's gated community. Ex. A. Second, Officer McNown began investigating when he walked into the curtilage of Mr. David's home, peered through a window that did not have its blinds drawn, and began looking into Mr. David's home. Ex. A. Lastly, Officer McNown engaged in the acquisition of evidence pertaining to a crime when he found, opened, and read the words "ounce" and "paid" on Mr. David's notebook, leading him to believe that "something was wrong." Ex. A.

Taken together, all of these "specific and articulable facts and their rational inferences" demonstrate that Officer McNown believed that criminal activity was afoot in Mr. David's home and was acting on that belief. *See Michigan v. Long,* 463 U.S. 1032, 1049 (1983). This Court should examine the facts in their totality when making the determination that Officer McNown

was not totally divorced from criminal investigation. *See United States v. Arvizu,* 534 U.S. 266, 274-75 (2002) (noting that totality of the circumstances test bars the judicial divide-and-conquer analysis). Thus, under the "totally divorced" standard articulated in *Cady*, if the community caretaking exception applies, this Court should find that Officer McNown's entry and search of Mr. David's home was improper under the community caretaking exception. *Cady,* 413 U.S. at 441-42.

Even if Officer McNown entered and searched Mr. David's home out of a genuine concern for his safety, Officer McNown's subjective intent does not eliminate Mr. David's privacy interest protected by the Fourth Amendment. *See Maryland v. Macon,* 472 U.S. 463, 470-71 (1985) (reasoning that a Fourth Amendment violation requires an objective assessment of the officer's actions, not the officer's subjective "state of mind" when the alleged violation occurred); *see also Winters v. Adams,* 254 F.3d 758, 767 (8th Cir. 2001) (holding that an individual's Fourth Amendment rights are not lost simply because police are "acting in a non-investigatory capacity") (Bye, J., concurring). Therefore, this Court should reverse the decision of the Thirteenth Circuit of Appeals and grant Mr. David's Motion to Suppress.

2. *The Warrantless Entry and Search of the Mr. David's Home was Unreasonable Because Mr. David's Individual Fourth Amendment Interests Outweighs the Government's Interest in the Search.*

Regardless if the community caretaking exception applies, Officer McNown's warrantless entry and search of Mr. David's home was unreasonable. *See Erickson*, 991 F.2d at 531 (defining reasonableness as balancing the government's interest in the search "against the intrusion on the individual's Fourth Amendment interests"); *Camara v. Mun. Court of City & Cty. of San Francisco,* 387 U.S. 523, 534–35 (1967) (finding that the reasonableness standard requires courts "to focus upon the governmental intrusion which allegedly justifies official

intrusion upon the constitutionally protected interests of the private citizen"); *see also People v. Ray*, 21 Cal. 4th 464, 479 (Cal. 1999) (holding that "a balance must be maintained between the recognition of the liberty of a citizen to be free from unreasonable searches and seizures and the recognition of the common sense performance of law enforcement activities").

Before us, the government ignores that basic principle that any "physical entry of the home [by law enforcement] is the chief evil which the wording of the Fourth Amendment is directed." *United States v. United States Dist. Court*, 407 U.S. 297, 313 (1972). The Fourth Amendment guarantees the right of every man or woman "to be free from unreasonable government intrusion" while in the privacy of their own home. *See Payton,* 445 U.S. at 590; *see also Buie,* 494 U.S. at 331 (reasoning that "[u]nder this [balancing] test, a search of the house or office is generally not reasonable without a warrant issued on probable cause"). Thus, the government bears "a heavy burden" to justify the warrantless search. *Coolidge v. New Hampshire,* 403 U.S. 443, 455 (1971).

But here, the government has failed to meet its burden. In order to conduct a search of the home, a law enforcement officer must either have a search warrant or be prepared with a reason as to why the officer does not need one. *United States v. Leon*, 468 U.S. 897, 904 (1984). Yet, on these facts, the government has done neither. Instead, the government has ignored the Fourth Amendments "strong preference" for warrants, *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984), and the government cannot reasonably believe that Officer McNown had a "good-faith" basis for his unlawful conduct. *See Leon,* 468 U.S. at 922.

Officer McNown's actions are sufficiently culpable and warrant suppression because a reasonably-well-trained officer should have known that the warrantless entry executed in this case was illegal in light of all the circumstances. *See Herring v. United States*, 555 U.S. 135, 145

(2009). Thus, the contraband found in Mr. David's home is fruit of a poisonous tree, *Wong Sun*, 371 U.S. at 487, and this Court should reverse the decision of the Thirteenth Circuit Court of Appeals and grant Mr. David's Motion to Suppress.

II. MR. DAVID'S SIXTH AMENDMENT RRIGHT TO COUNSEL ATTACHED WHEN HE WAS OFFERED A PRE-INDICTMENT PLEA OFFER AND HE SUBSEQUENTLY SUFFERED PREJUDICE WHEN MR. LONG NEVER COMMUNICATED THAT OFFER TO HIM.

The Sixth Amendment provides that "in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. Amend. VI. A defendant is guaranteed the right to have counsel present at all "critical" stages of criminal proceedings. *See Montejo v. Lousiana*, 556 U.S. 778, 786 (2009). While the "core purpose" is ensuring that criminal defendants receive assistance of counsel at trial, the Sixth Amendment has been expanded much beyond that of the trial stage. *United States v. Ash*, 413 U.S. 300, 309, 311-12 (1973). "[A]s a general rule, defense counsel has the duty to communicate [all] formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012).

Mr. David's Sixth Amendment right to counsel attached when AUSA Marie delayed indicting Mr. David and instead made him a formal plea offer to gain a tactical advantage in an on-going criminal investigation. This Court should use the plain meaning of the Sixth Amendment to instruct lower courts that the right to counsel attaches during pre-indictment plea negotiations. Further, Mr. David suffered prejudice when his inept counsel failed to communicate the pending plea offer from AUSA Marie. Therefore, Mr. David respectfully urges this Court to Thirteenth Circuit Courts of Appeals and to order AUSA Marie to re-extend the original plea offer.

A. The Sixth Amendment Right to Counsel Attaches When a United States Attorney Delays in Bringing a Criminal Indictment and Proposes a Formal Pre-indictment Plea Offer.

This Court has specified that the Sixth Amendment right to counsel attaches only at the critical stages of formal judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. *See United States v. Gouveia*, 467 U.S. 180, 188 (1984); *Ash*, 413 U.S. at 311-12 (observing that the right had been expanded to certain pretrial "trial like confrontations"); *Frye,* 566 U.S. at 140 (finding that critical stages also includes "arraignments, post-indictment interrogations, post-indictment lineups and entry of a guilty plea").

In this case, Mr. David's Sixth Amendment right to counsel attached when AUSA Marie crossed the line from fact-finder to adversary and made a formal pre-indictment plea offer to Mr. David. Thus, this Court should reverse the decision of the Thirteenth Circuit Court of Appeals and should grant Mr. David a remedy.

1. *Mr. David's Sixth Amendment Right to Counsel Attached When the Assistant United States Attorney Crossed the Line from Fact-Finder to Formal Adversary by Delaying Indictment.*

A person's Sixth Amendment right to counsel attaches at the time adversarial judicial proceedings begin. *See Gouveia*, 467 U.S. at 187; *United States v. Wade*, 388 U.S. 218, 235 (1967) (reasoning that the Sixth Amendment right to counsel attaches when the state becomes aligned against the accused); *see also United States v. Busse*, 814 F. Supp. 760, 763 (E.D. Wis. 1993) (finding "[t]here is support for the proposition that, under the circumstances, the Sixth Amendment right to counsel attaches prior to the time formal charges have been filed"); *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (observing that the right to counsel attaches when government's role "shifts from investigation to accusation"); *Rothgery v. Gillespie Cnty.*, 554

U.S. 191, 212 (2008) (noting that the Sixth Amendment attaches when the government exercises its judicial discretion to signal a commitment to prosecute).

Here, AUSA Marie crossed the line from fact finder to adversary when she delayed convening a grand jury to indict Mr. David. R. at 4; *see Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (concluding that "the right to counsel might conceivably attach before any formal charges are made . . . in which the government as crossed the constitutionally significant divide from fact-finder to adversary"). Agent Malaksa approached AUSA Marie and suggested that prosecutors delay filing charges against Mr. David so that authorities could attempt to apprehend Lakeshow's drug kingpin. R. at 4. Per Agent Malaksa's suggestion, AUSA Marie did in fact delay indicting Mr. David because she did not want to tip off the subjects of her investigation. R. at 4-5. These facts demonstrate that the government was committed to prosecuting Mr. David but was strategically delaying an indictment in order to obtain an advantage in an on-going investigation. R. at 4.

Put another way, AUSA Marie used Mr. David in an attempt to catch his suppliers and in doing so, prohibited his Sixth Amendment right to counsel from attaching sooner. Thus, this Court should not "exalt form over substance," as for all practical purposes, Mr. David was already indicted. *See Escobedo v. Illinois*, 378 U.S. 478, 486 (1964); *Gouveia*, 467 U.S. at 189 (concluding that "it is only at the time that the government has committed itself to prosecute, and only then, that the adverse positions of the government and defendant have solidified"); *see also United States v. Wilson*, 719 F. Supp. 2d 1260, 1266 (D. Or. 2010) (affirming that "effective assistance of counsel rests on the nature of the confrontation between the defendant and the government rather than a mechanical inquiry into whether the government has formally obtained an indictment"). Therefore, because AUSA Marie delayed indicting Mr. David to gain a tactical

advantage in an ongoing criminal investigation, this Court should find that Mr. David's Sixth Amendment right to counsel attached when the process shifted from fact-finder to formal adversary.

2. *The Assistant United States Attorney's Formal Pre-Indictment Plea Offer Came at a Critical Stage Because the Offer Triggered Mr. David's Sixth Amendment Right to Effective Assistance of Counsel.*

In today's criminal just system, plea negotiations are a critical stage in the plea-bargaining process because the current system is, "for the most part, a system of pleas, not a system of trials." *Lafler v. Cooper*, 566 U.S. 156, 157 (2012); *see also Frye*, 566 U.S. at 143 (2012). In *Frye*, after charging the defendant with a felony, the prosecutor sent two plea offers to Frye's counsel, but the offers were not relayed to Frye himself. *Id*. at 138-39. As a result, the offers lapsed, and the court subsequently held that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id*. at 145. In justifying its holding, this Court reasoned that the plea-bargaining process was a critical stage which warranted the Sixth Amendment right to counsel. *Id*. at 140. Further, "there can be no doubt that criminal defendants require the effective assistance of counsel during plea negotiations" as "plea bargaining rather than the unfolding of trial is almost always the critical point for a defendant." *Id*. at 141.

Here, the facts of *Frye* are analogous to the present case because AUSA Marie made a formal plea offer to Mr. David's lawyer, Mr. Long. Ex. C. The offer was that in exchange for giving up his suppliers, Mr. David would only serve one year in prison, but if he did not take the plea, he could face a more severe punishment. Ex. C. Just as Frye's counsel failed to inform him of the pending offer, Mr. Long also failed to communicate the plea offer to Mr. David. Ex. C; *Frye*, 566 U.S. at 138-39. The only distinction between *Frye* and the present case is that the

conduct in the current case happened pre-indictment, whereas the conduct in *Frye* occurred post-indictment. *Id.* But this distinction is not fatal to Mr. David's Sixth Amendment claim because the plea offer came at a critical stage in the adversarial process. *See Johnson v. Zerbst*, 304 U.S. 458, 462 (1938) (observing that the right to counsel embodies the realistic recognition of the "obvious truth" that the average defendant does not have the professional legal skills to protect himself whereas the prosecution is represented by "an experienced and learned counsel").

Courts acknowledge the plight of not having counsel present on a person in Mr. David's position and have since recognized that the Sixth Amendment can apply "where the government's conduct occurs pre-indictment." *Goodman v United States (In re Grand Jury Proceedings*), 33 F.3d 1060, 1062 (9th Cir. 1994). Consequently, the conduct of AUSA Marie can be deemed the functional equivalent of post-indictment plea negotiations. The plea offer was communicated to Mr. David's attorney at a critical stage because the outcome of the offer jeopardized his liberty. It would be fundamentally unfair to deny his Sixth Amendment right to the effective assistance of counsel solely because it was not termed a critical stage or formal proceeding. *See Maine v. Moulton*, 474 U.S. 159, 170 (1985) (reasoning that the essence of "the right to the [effective] assistance of counsel is shaped by the need for the assistance of counsel"). This rationale was proclaimed by this Court in *Frye* when it extended the definition of "critical stage" to include all post-indictment plea negotiations, and so too, this Court should expand this definition to include pre-indictment plea negotiations. *Frye*, 566 U.S. at 143.

Lawyers, judges, and law professors all agree that such a decision is a reasonable interpretation of the Sixth Amendment because ninety-seven percent of federal convictions and

ninety-four percent of state convictions, are the result of plea deals.[1] A pre-indictment plea negotiation is "surely as critical as that of a formal plea negotiation, arraignment, or preliminary hearing." *See Escobedo*, 378 U.S. at 486. Therefore, given the importance of plea negotiations, whether before or after indictment, this Court should find that Mr. David's Sixth Amendment right to counsel attached when AUSA Marie communicated a formal pre-indictment plea offer to Mr. Long.

B. This Court Should Apply the Plain Meaning of the Sixth Amendment to Instruct Lower Courts that the Right to Counsel Attaches at Pre-Indictment Plea Negotiations.

The Circuit Courts are severely divided as to whether the Sixth Amendment right to counsel attaches to pre-indictment plea negotiations and this Court should resolve the confusion by holding that it does. *See Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (recognizing the possibility that the right to counsel may conceivably attach before formal charges or indictment in "extremely limited" cases); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3rd Cir. 1999) (finding that this crucial moment may occur before the government files charges if the state has committed itself to prosecution); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992) (holding that there is a rebuttable presumption against attachment of the right in the absence of the initiation of adversary proceedings); *but see United States v. Moody*, 206 F.3d 609, 614 (6th Cir. 2000) (reasoning that "it is beyond our reach to modify this rule even in cases where facts so clearly demonstrate that the rights protected by the Sixth Amendment are endangered"); *contra Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018) (noting that the Sixth Amendment right to counsel does not attach in pre-indictment plea negotiations).

[1] Devers, Lindsey, *Plea and Charge Bargaining*: U.S. Department of Justice (2011), available at https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf (recognizing that guilty pleas account for ninety-five percent of all criminal convictions).

Despite the Circuit Court's confusion, several District Courts have explicitly held that the assistance of counsel provided by the Sixth Amendment does apply to pre-indictment plea negotiations. *See United States v. Wilson*, 719 F. Supp. 2d 1260, 1268 (D. Or. 2010) (concluding that the "petitioner had no right to counsel 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"); *Crisco v. Shafran*, 507 F. Supp. 1312, 1319 (D. Del. 1981) (observing that under certain circumstances the Sixth Amendment right to counsel attaches before indictment when "the government has made a commitment to prosecute and that the adverse positions of the government and the defendant have solidified in much the same manner as when formal charges are brought"); *United States v. Busse*, 814 F. Supp. 760, 763-64 (E.D. Wis. 1993) (reasoning that "the government at this juncture should not be able to avail itself of a posture which states that the sixth amendment right to counsel does not attach until adversary judicial proceedings have been initiated").

This Court should harmonize the differing views amongst the lowers courts by relying on the plain and ordinary meaning of the Sixth Amendment which protects an "accused" in any "criminal" proceeding. U.S. Const. amend. VI. In this context, Mr. David was surely an accused man since AUSA Marie made it clear that she would be prosecuting him, as it was not a matter of if, but when. Ex. D. Nothing can be more adversarial or accusatory than an Assistant United States Attorney suggesting, in effect, that if "you do not take this generous plea offer prior to indictment, you will be indicted and prosecuted to the fullest extent of the law." *See* Ex. D.

Thus, this Court should find that Mr. David was an "accused" person in "a criminal prosecution" under the plain and ordinary meaning of the Sixth Amendment, and his right right to counsel attached. U.S. Const. amend. VI; *see Kirby v. Illinois*, 406 U.S. 682, 689 (1972)

(reasoning that "given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings 'is far from a mere formalism"). As a result, this Court should rely on the plain meaning of the Sixth Amendment to find that Mr. David's right to counsel attached during pre-indictment plea negotiations.

C. Mr. David Suffered Prejudiced by Mr. Long's Ineffective Assistance of Counsel and This Court Should Order the Assistant United States Attorney to Extend the Original Plea Offer.

Ineffective counsel requires satisfying the two prongs of *Strickland*. First, the Defendant must show that counsel's performance was deficient as a reasonably-competent defense attorney. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, the defendant must show that the lawyers deficient performance prejudiced the outcome of his case. *Id*. Here, Mr. Long provided ineffective assistance of counsel and Mr. David suffered prejudice as a result. Thus, this Court should reverse the ruling of the Thirteenth Circuit Court of Appeals and should order that Mr. David be re-offered AUSA Marie's original plea offer.

1. *Mr. Long's Performance was Deficient Because He Never Communicated the Pending Plea Offer to Mr. David.*

To satisfy the first prong of *Strickland,* the defendant must first show that his counsel failed to act in a manner of a reasonably-competent defense attorney. *Strickland*, 466 U.S. at 687-88 (reasoning that "[t]he proper measure of attorney performance remains simply reasonableness under prevailing professional norms"); *but see Maryland v. Kulbicki,* 136 S. Ct. 2, 4 (2015), internal citations and quotations omitted (reasoning that the prevailing norm is to view a claim of ineffective assistance of counsel under a "contemporary assessment of counsel's conduct"). Under either traditional or contemporary standards of reasonably-competent defense attorneys, Mr. Long actions fell well below the standard of accepted conduct. *Strickland*, 466

U.S. at 687-88. He received a pre-indictment plea offer from AUSA Marie, read the offer, misinterpreted the length of the offer, and then failed to relay the offer to Mr. David before it expired. Ex. B. Accordingly, on these facts, it is undisputed that Mr. David satisfies the first prong of *Strickland* because Mr. Long's performance as an attorney was deficient.

2. *Mr. David Suffered Severe Prejudice Because There is a Reasonable Probability that He Would Have Taken the Plea Offer Had Mr. Long Communicated It to Him.*

The second prong of *Strickland* requires the "defendant [to] show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 691, 694 (reasoning that "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment"). The defendant is also required to show that the plea would have been entered without the prosecution's canceling it or the trial court refusing to accept it. *Frye*, 566 U.S. at 135.

On these facts, Mr. David unequivocally stated that if the plea offer was communicated to him, he would have taken it, and the result of the proceeding would have been different. Ex. C; *Frye*, 566 U.S. at 147 (finding that "it is necessary to show that a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time"). Additionally, upon realizing the offer had lapsed, Mr. David's new attorney, Mr. Allen, immediately asked AUSA Marie to re-issue the plea offer because Mr. David was willing to give up his suppliers. Ex E. Mr. Allen's email stated that Mr. David was "very enthusiastic" about accepting the plea offer, and since the offer had just recently expired, the prosecutors would have benefitted, and the trial court would not have refused Mr. David's still credible information. Ex E; *Frye*, 566 U.S. at 135. Despite Mr. David's

overwhelming desires to give up his suppliers “in a heartbeat," AUSA Marie refused to re-extend the offer. Ex. C.

The vast disparity between Mr. David’s two sentences is also critical to the prejudice Mr. David suffered. *See Glover v. United States*, 531 U.S. 198, 203 (2001) (noting that “any amount of jail time has Sixth Amendment significance”). Mr. David conceded that it was a “no brainer” to choose one year in prison compared to the ten-year sentence he now faces after being convicted at trial. Ex. C. This Court cannot ignore the simple truth that ten-years in prison is not comparable to one-year in prison, and this sad reality demonstrates Mr. David was severely prejudiced by Mr. Long's incompetence. *Strickland*, 466 U.S. at 687-88. Thus, Mr. David satisfies the second prong of *Strickland* because he was prejudiced by his lawyer's ineffective assistance of counsel.

3. *This Court Should Order the United States Attorney to Extend the Original Plea Offer to Mr. David.*

The remedies for Sixth Amendment violations should be “tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on the competing interests.” *United States v. Morrison*, 449 U.S. 361, 364 (1981). In this case, Mr. David’s constitutional violation occurred when he was sentenced to ten years in prison instead of serving one-year in prison under the proposed plea offer. R. at 14. These two sentences are vastly disproportionate, and contrary to the what the government asserts, justice requires this Court to re-extend the original plea off to Mr. David. *Morrison*, 449 U.S. at 364. Mr. David's interest in effective assistance of counsel against the governments interest in apprehending drug dealers, Mr. David's constitutional liberty must prevail in order to preserve the essence of the Sixth Amendment. *Id.* Therefore, this Court should reverse the ruling of the Thirteenth Circuit Court of Appeals and order AUSA Marie to re-offer Mr. David the original plea offer.

CONCLUSION

Mr. David respectfully urges this Court to grant his Motion to Suppress or in the alternative, to order AUSA Marie to re-offer the original plea offer which was never communicated. Regarding the first issue, the Motion to Suppress should be granted because the community caretaking exception does not apply to homes, only automobiles. This limited holding confuses lower court because they conflate caretaking entries with entries pursuant to exigent circumstances. Moreover, even if the community caretaking exception does apply to homes, Officer McNown was not totally divorced from detection, investigation, or acquisition of evidence, and therefore his actions were unreasonable.

Regarding the second issue, the original plea offer should be re-extended to Mr. David because his right to counsel attached at a critical stage when AUSA Marie went from factfinder to formal adversary in communicating a pre-indictment plea offer. Further, by relying on the plain meaning of the Sixth Amendment, this Court should instruct the lower courts that the right to counsel attaches during pre-indictment plea negotiations. Therefore, since Mr. David suffered prejudice due to the ineffectiveness of Mr. Long, this Court should provide him with the remedy he seeks.