Team P16

Docket No. 04-422

IN THE

Supreme Court of the United States

Fall Term 2018

Chad David,

Petitioner,

v.

The United States of America,

Respondent.

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

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PETITIONER'S BRIEF ON THE MERITS

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STATEMENT OF THE ISSUES

1. Under federal law, is a warrantless home search valid under the community caretaking doctrine when this Court limits the doctrine's use to automobile searches, the officer conducts the search when he is suspicious about criminal activity, the officer did not believe immediate action was required, and the homeowner's expectation of privacy in his own home outweighed any potential governmental interest?
2. Under federal law, do Sixth Amendment protections apply to pre-indictment plea negotiations when this Court applies the protections to plea negotiations generally, the prosecution transitions from fact-finder to adversary, and the defendant receives a significantly longer sentence at trial?

STATEMENT OF THE FACTS

I. Factual Overview

This case involves a police officer's warrantless search of Mr. David's home. It further involves Mr. David's ineffective assistance of counsel regarding a plea deal.

The Church Service. On January 15, 2017, Mr. Chad David, a well-respected minister at Lakeshow Community Revivalist Church, did not attend the seven o'clock morning service. R. at 2. Officer James McNown, a patrol officer who regularly attended the service, decided to stop by Mr. David's home to check on him and bring him tea. *Id.*

The Warrantless Home Search. When Officer McNown pulled into Mr. David's gated community, he immediately noticed cars—typically driven by drug dealers—with Golden State license plates. *Id.* Due to an increase of Golden State drugs in Lakeshow, local DEA recently established a task-force to combat the flow of narcotics from other states. *See* R. at 2–3. Officer McNown took mental note of the cars and continued into the complex. *See* R. at 2.

When Officer McNown arrived at Mr. David's home, he was surprised to hear unusually loud music playing from inside. R. at 3. Officer McNown knocked on the door, and after no answer his curiosity prompted him to look through the front window. *Id.* He saw *The Wolf of Wall Street* movie playing on the television and thought it was odd to see the vulgar movie playing inside a minister's home. *See id.* Growing suspicious, Officer McNown attempted to open the front door, but it was locked. *See id.* He refused to be denied entry, and entered Mr. David's home through the unlocked back door. *See id.* Officer McNown searched through the home, found incriminating evidence, and discovered Mr. David packaging powder cocaine. *See id.* Officer McNown handcuffed Mr. David and called DEA agents to come to the scene. R. at 3.

The Plea Deal. Shortly after Mr. David was detained, DEA Agent Colin Malaska contacted prosecution regarding his desire to obtain information from Mr. David. R. at 4. Agent Malaska and the prosecution intentionally delayed filing formal charges against Mr. David as a strategy to acquire information regarding a local drug kingpin. *Id.* The prosecutors offered a plea deal of one year in prison in exchange for the names of Mr. David's suppliers. *Id.*; Ex. D. The plea deal, sent at eight o'clock in the morning on a Monday, was received by initial defense counsel Mr. Keegan Long while he was at a bar drinking alcohol. R. at 4. Mr. Long never relayed the plea offer to Mr. David prior to its expiration thirty-six hours later. *Id.* Once the deal expired, the prosecution promptly filed charges against Mr. David. *Id.*

Mr. David fired Mr. Long when he discovered Mr. Long withheld the favorable plea deal. *Id.* Mr. David immediately hired new counsel, Mr. Michael Allen, who attempted to have prosecution offer another plea deal due to the miscommunication. R. at 5. Mr. Allen clearly articulated Mr. David's enthusiasm to accept a plea deal. Ex. E. Mr. David had the information required for the plea offer and was prepared to sign on the dotted line. *See id.* Nonetheless, the prosecutors refused to reoffer the plea deal. *Id.*

II. Procedural History

Mr. David Moves to Suppress Evidence and to be Re-Offered the Plea Deal. The District Court denied Mr. David's Motion to Suppress, and held Officer McNown's actions were "totally divorced" from investigatory intent and therefore valid under the community caretaker doctrine. R. at 8. The District Court further denied Mr. David's pre-trial Motion to be Re-Offered the Plea Deal, and held even though protections apply to pre-indictment plea negotiations, Mr. David was not prejudiced because trial had not yet occurred. R. at 11–12.

Mr. David Appeals the Motions. The Court of Appeals for the Thirteenth Circuit affirmed the denial of Mr. David's Motion to Suppress and determined Officer McNown was lawfully inside the home while acting as a community caretaker totally divorced from criminal investigation. R. at 17. The Thirteenth Circuit did not consider whether Mr. David suffered prejudice, but disagreed with the District Court's ruling that protections apply to pre-indictment plea negotiations. R. at 18. The Thirteenth Circuit therefore affirmed the District Court's holding. *Id.*

The Court Grants Petition for Certiorari. The Court granted certiorari to determine whether Officer McNown acted outside the scope of the community caretaking doctrine when he entered Mr. David's home and whether the Sixth Amendment right to effective counsel attached during pre-indictment plea negotiations. R. at 25.

SUMMARY OF THE ARGUMENT

Officer McNown's warrantless home search violated Mr. David's Fourth Amendment protections. The search was not valid under the community caretaking doctrine because this Court intentionally limited the doctrine's use to automobile searches. Even if this Court adopts a broader interpretation of the community caretaking doctrine and chooses to extend its use to home searches, Officer McNown's search was still unconstitutional. The search was investigatory, circumstances did not mandate immediate action, and Mr. David's reasonable expectation of privacy in his home outweighed any governmental interest. Thus, this Court should reverse the lower court's denial of the Motion to Suppress.

Further, Mr. Long's inaction injured Mr. David and he is entitled to relief. This Court extended Sixth Amendment protections to apply during the plea negotiation stage. Even though the plea negotiation took place pre-indictment, Sixth Amendment protections apply to Mr. David because the government switched from fact-finder to adversary. Mr. Long's inaction also prejudiced Mr. David when he received a significantly longer sentence at trial. Therefore, this Court should reverse the lower court's denial of the Motion to Re-Offer the Plea Deal and remand with instructions to re-offer Mr. David the original plea.

STANDARD OF REVIEW

The case at hand calls for a bifurcated standard of review. Appellate courts review the district court's legal conclusions—including Fourth and Sixth Amendment issues—de novo. *See United States v. Edgeworth*, 889 F.3d 350, 353 (7th Cir. 2018); *Atkins v. Holloway*, 792 F.3d 654, 657 (6th Cir. 2015). Findings of facts are review for clear error. *Edgeworth*, 889 F.3d at 353.

ARGUMENT

The Court of Appeals for the Thirteenth Circuit improperly affirmed the denial of the Motion to Suppress because the warrantless search of Mr. David's home was not permissible under the community caretaking doctrine. Additionally, the Thirteenth Circuit improperly denied relief to Mr. David for ineffective assistance of counsel. The Fourth Amendment protects "[t]he rights of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches . . . ." U.S. Const. amend. IV. The Sixth Amendment guarantees criminal defendants have sufficient assistance of counsel. U.S. Const. amend. VI. The provisions ensure community members are safe from unreasonable government intrusion, and have the necessary access to an attorney during critical criminal proceedings. *See Florida v. Jardines*, 569 U.S. 1, 6 (2013); *Missouri v. Frye*, 566 U.S. 134 (2012).

I. THE WARRANTLESS HOME SEARCH WAS NOT JUSTIFIED BY THE COMMUNITY CARETAKING DOCTRINE.

The Thirteenth Circuit improperly ruled the search of Mr. David's home was constitutional under the community caretaking doctrine. The Fourth Amendment's general warrant requirement protects against intrusions of privacy "by assuring citizens subject to a search or seizure that such intrusions are not the random or arbitrary acts of government agents." *Skinner v. Railway Labor Execs. Ass'n*, 489 U.S. 602, 621 (1989). Warrantless searches are therefore presumptively unreasonable, subject only to a few specifically established exceptions. *Payton v. New York*, 445 U.S. 573, 586 (1980); *Katz v. United States*, 389 U.S. 347, 357 (1967). A key consideration in these recognized exceptions is the reasonableness of the search, as reasonableness is the "ultimate touchstone" of the Fourth Amendment. *Brigham City v. Stuart*, 547 U.S. 398, 398 (2006).

This Court first recognized the community caretaking doctrine in *Cady v. Dombrowski*, and held the doctrine permitted a warrantless automobile search. 413 U.S. 433, 439 (1973). The

doctrine allows police officers to search an automobile without a warrant when officers act with a non-law enforcement purpose. *Id.* at 441. Under the community caretaking doctrine, an automobile search is only reasonable when the search stems from government actions "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.*

In this case, Officer McNown's warrantless search of Mr. David's home was unconstitutional because the community caretaking doctrine does not apply to searches of a home. Even if homes may at times fall under the doctrine, the search still violated Mr. David's Fourth Amendment rights because Officer McNown's search was investigatory, the circumstances did not require immediate action, and Mr. David's expectation of privacy outweighed any governmental interest.

A. The Warrantless Search was Unconstitutional Because the Community Caretaking Doctrine Does Not Extend to Home Searches.

The warrantless search of Mr. David's home was unconstitutional because this Court in *Cady* intentionally limited the use of the community caretaking doctrine to automobile searches. *See Cady*, 413 U.S. at 442. This Court introduced the community caretaking doctrine when it held a police officer's search of a vehicle to locate another officer's service revolver was not a Fourth Amendment violation. *Id.* at 447. In doing so, this Court discussed in depth the "constitutional difference between houses and cars" for purposes of the Fourth Amendment. *Id.* at 439 (citing *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)).

This "constitutional difference" between homes and automobiles recognizes that the two have different functions and expectations of privacy. *See Id.* For example, a car's mobility "may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property." *Id.* at 440 (citing *Cooper*

v. California, 386 U.S. 58, 59 (1967)). Additionally, the "extensive regulation of motor vehicles" coupled with the "frequency with which a vehicle can become involved in an accident on public highways" gives police officers substantially greater contact with a vehicle than with a home. *Id.* at 441. The officer's search of the vehicle, described by this Court as a community caretaking function, was in no way done to investigate a crime. *Id.* The search was therefore reasonable even though the officer had not obtained a warrant before the automobile search. *Id.* at 446.

Three years after *Cady*, this Court applied the community caretaking doctrine to inventory searches of automobiles and further emphasized the fundamental difference between automobiles and homes. *South Dakota v. Opperman*, 428 U.S. 364 (1976). In *Opperman*, the police officers were "indisputably engaged in a caretaking search of a lawfully impounded automobile." *Id.* at 376. The community caretaking doctrine therefore justified the warrantless search. *Id.* at 375. Again, a warrantless home search did not fall under this Court's rationale. *See id.*

Certainly, the extensive discussions regarding fundamental differences between automobiles and homes in *Cady* and *Opperman* were intentional. This Court's continued reliance on the constitutional distinction demonstrates the intent to create a narrow exception to the warrant requirement confined to automobiles. *United States v. Pichanty*, 687 F.2d 204, 208 (7th Cir. 1982) ("[This] Court intended to confine the holding [of *Cady*] to the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses."). This Court's discussions therefore show the community caretaking doctrine does not extend to home searches. *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993).

The Third, Seventh, Ninth, and Tenth Circuits correctly interpret this Court's precedent and refuse to extend the community caretaking doctrine to home searches. *See Ray v. Warren*, 626 F.3d 170, 177 (3d Cir. 2010); *United States v. Bute*, 43 F.3d 531 (10th Cir. 1994); *Erickson*, 991

F.2d at 531–32; *Pichanty*, 687 F.2d at 208–09. For example, in *Ray*, officers entered a home without a warrant for the "primary motivation" to check on a child. 626 F.3d at 172. Although the court recognized the officers' action as a community caretaking function, the court correctly refused to apply the doctrine to justify the warrantless search. *Id.* Instead, the court agreed with the majority of circuits and interpreted *Cady* as "being expressly based on the distinction between automobiles and homes for Fourth Amendment purposes. The community caretaking doctrine cannot be used to justify warrantless searches of a home." *Id.* at 177. The warrantless search was held unconstitutional because in a home search, the community caretaking doctrine "does not override the warrant requirement of the Fourth Amendment or the carefully crafted and well-recognized exceptions to that requirement." *Id.*

This Court did not intend *Cady* to allow officers to search a private residence to determine if a potential crime has occurred. *Erickson*, 991 F.2d at 532. "[T]he right to be free from unreasonable searches and seizures does not only extend to those who are suspected of criminal activity." *Id.* at 531–32. Indeed, the Fourth Amendment requires "precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search" to be decided by "a neutral and objective magistrate, not a police officer." *Mincey v. Arizona*, 437 U.S. 385, 395 (1978).

The case at hand demonstrates the need for this Court to reaffirm its intent to limit the community caretaking doctrine. The Fourth Amendment seeks to protect individuals from the "chief evil" this Court has recognized as the "physical entry of the home." *Payton*, 445 U.S. at 585. A home is not subject to the "extensive regulation" that automobiles face. *See Cady*, 413 U.S. at 440. Additionally, officers are not frequently faced with accidents that require police assistance within the home. *See id.* at 441. Officer McNown's warrantless search of Mr. David's home was therefore unreasonable and unjustifiable by the community caretaking doctrine. As such, the

Thirteenth Circuit expanded the doctrine beyond *Cady*'s objective in denying Mr. David's Motion to Suppress, and this Court should reverse.

B. Even if the Community Caretaking Doctrine May Extend to Home Searches, the Doctrine Did Not Justify Officer McNown's Warrantless Home Search.

Assuming, *arguendo*, a warrantless home search may be reasonable under the community caretaking doctrine, Officer McNown's search was still unconstitutional because the search was investigatory in nature, the circumstances did not require immediate action, and Mr. David's expectation of privacy outweighed any governmental interest. Although this Court has not extended the doctrine to home searches, some courts have misinterpreted the doctrine's application. Even under the analyses that extend the community caretaking doctrine, the warrantless search in the case at hand was still unreasonable.

1. *The community caretaking doctrine does not apply because Officer McNown's warrantless search was investigatory.*

The community caretaking doctrine cannot justify Officer McNown's warrantless search of Mr. David's home because the search was investigatory. This Court deliberately and explicitly limited the doctrine's use to searches "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. The community caretaking doctrine is therefore distinguished from other warrant requirement exceptions because it "requires a court to look at the *function* performed by a police officer." *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009) (emphasis in original). This "function" must be an act "aside from their criminal enforcement activities" to be justified by the community caretaking doctrine. *United States v. Rodriguez-Morales*, 929 F.2d 780, 785 (1st Cir. 1991).

When an officer conducts a search with suspicion of criminal activity, the community caretaking doctrine does not validate the warrantless search. *See Corrigan v. District of Columbia*,

841 F.3d 1022, 1034 (D.C. Cir. 2016); *Matalon v. Hynnes*, 806 F.3d 627, 636 (1st Cir. 2015); *United States v. Williams*, 354 F.3d 497, 508 (6th Cir. 2003). For example, in *Matalon*, police officers attempted to speak with an individual at his home about a recent crime. 806 F.3d at 631. An officer rang the doorbell, called into the home with no reply, and heard footsteps from inside the home. *Id.* Because the officers believed the individual may have been associated with the crime, the court determined the officers "indisputably engaged in ongoing criminal investigation when the warrantless search occurred." *Id.* at 636. The community caretaking doctrine therefore could not apply. *Id.* Similarly, in *Williams*, even though officers went into a tenant's apartment with the landowner to search for a leak because the landowner was scared to go in by herself, "[t]he officers too suspected drug activity prior to the entry." 354 F.3d at 507–08. Because the officers had some suspicion, the actions "cannot be said to have been solely related to [the officer's] 'community caretaking function.'" *Id.* at 508. It was thus irrelevant that the "officers were not concerned with arresting anyone at the time [of the search]," because the purpose could not be characterized as "altogether divorced from 'the detection, investigation, or acquisition of evidence relating to' a crime." *Corrigan*, 841 F.3d at 1034 (citing *Cady*, 413 U.S. at 441).

However, a search is not investigatory when it is done as standard procedure, and therefore may be justified by the community caretaking doctrine. *See Hunsberger*, 570 F.3d at 554; *Rodriguez-Morales*, 929 F.2d at 787. For example, firefighters' main function is to protect persons and property. *Hunsberger*, 570 F.3d at 554. An exception to the warrant requirement for their searches may therefore "be justified under a community caretaking rationale." *Id.* (citing *Michigan v. Tyler*, 436 U.S. 449 (1978)). This is consistent with precedent that searches "made for routine administrative purposes are deemed noninvestigatory." *Rodriguez-Morales*, 929 F.2d at 785.

In the present case, though, Officer McNown was suspicious about criminal activity when he conducted the warrantless search of Mr. David's home. Officer McNown did not act solely to ensure public safety. *See* R. at 2. The original intent to simply bring tea quickly turned investigatory in nature. Before entering Mr. David's home, Officer McNown became suspicious of criminal activity because he (1) saw cars that were often connected with drug dealers; (2) heard unusual music playing inside; (3) saw vulgar, immoral images on the television; and (4) was not greeted by Mr. David when he knocked and rang the doorbell. R. at 3. While these facts individually may seem insignificant, "[t]aken together, it is reasonable to believe that Officer McNown's motives prior to entering the home were surely influenced by the motive to investigate a crime." R. at 20 (Johnson, M. dissenting). As such, by the time he reached Mr. David, Officer McNown was "indisputably engaged" in an investigation. *See Matalon*, 806 F.3d at 631. Because Officer McNown had some suspicion, the actions "cannot be said to have been solely related to [his] 'community caretaking function.'" *See Williams*, 354 F.3d at 508. The Thirteenth Circuit thus impermissibly stripped Mr. David of Fourth Amendment protections and improperly affirmed the denial of Mr. David's Motion to Suppress evidence found during the warrantless search.

2. *Officer McNown's warrantless search was not reasonable because the circumstances did not require immediate action.*

The warrantless search of Mr. David's home violated the Fourth Amendment because an immediate action was not necessary and therefore the search was unreasonable. Circuit courts that have extended the community caretaking doctrine to home searches "do not simply rely on the community caretaking doctrine established in *Cady*. They instead apply what appears to be a modified exigent circumstances test." *Ray*, 626 F.3d at 176. The former "requires a court to look at the *function* performed by a police officer," while the latter "requires an analysis of the *circumstances* to determine whether an emergency requiring immediate action existed."

Hunsberger, 570 F.3d at 554 (emphasis in original). Nevertheless, courts incorrectly extend the community caretaking doctrine to home searches when circumstances necessitate immediate action. *See United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *United States v. McGough*, 412 F.3d 1232, 1239 (11th Cir. 2005); *United States v. Rohrig*, 98 F.3d 1506, 1519 (6th Cir. 1996).

Even under this extended application, the warrantless search in the case at hand was unreasonable because immediate action was not required. *See Corrigan,* 841 F.3d at 1034; *McGough*, 412 F.3d at 1239. In *Corrigan*, the D.C. Circuit did not even need to determine whether the community caretaking doctrine applied to a home search because the officers brought no evidence that the circumstances required immediate action. 841 F.3d at 1034. Instead, "[t]here was ample time and opportunity" for the officers to investigate further and seek a search warrant to fulfill their community caretaking function. *Id.* Additionally, in *McGough*, police officers "had the situation under control" before they began the search and they were not faced with an "immediate threat." *McGough*, 412 F.3d at 1239. Any potential reasons to conduct the warrantless search were therefore "not compelling enough to find that the officers' warrantless entry into [the defendant's] home was objectively reasonable." *Id.* The search was therefore not justified by the community caretaking doctrine. *Id.*

However, when there is serious concern regarding the community's safety that requires immediate action, some courts have held that a warrantless search is reasonable under the community caretaking doctrine. *See United States v. Smith*, 830 F.3d 356, 361 (8th Cir. 2016); *Rohrig*, 98 F.3d at 1521. In *Smith*, officers received a call from a concerned member of the community regarding the safety of another individual. 830 F.3d at 358. The officers had reason to believe an armed man was holding the individual hostage. *Id.* Because the officers had responded

to a potential emergency situation "to aid members of the community," the warrantless search was reasonable under the community caretaking doctrine. *Id.* at 361.

Ongoing confusion in the Sixth Circuit demonstrates the need for this Court to clarify that while immediate action is required for the exigent circumstances exception, it is not a requirement for the community caretaking doctrine. *See Williams*, 354 F.3d at 508; *Rohrig*, 98 F.3d at 1519–21; *United States v. Gordon*, No. 17-20636, 2018 WL 1905075, at *9 (E.D. Mich. Apr. 23, 2018). First, in *Rohrig*, the court concluded that a warrantless search was reasonable under the exigent circumstances test, but considered the community caretaking doctrine within the test. *See Rohrig*, 98 F.3d at 1519. The court determined that the warrant requirement is "implicated to a lesser degree when officers act in their roles as 'community caretakers.'" *Id.* at 1523. At the same time, to operate as community caretakers "[does] not lightly abrogate the constitutional presumption that police officers must secure a warrant before entering a private place." *Id.* at 1523–25.

This confused application of the community caretaking doctrine is further discussed in *Williams*. 354 F.3d at 508. There, the Sixth Circuit looked to this Court's precedent and explained that "despite reference to the doctrine in *Rohrig*, we doubt that community caretaking will generally justify warrantless entries into private homes." *Id.* When a district court was later faced with analyzing the community caretaking doctrine, it followed *William*'s holding and further strayed away from permitting the warrantless search under *Rohrig*'s hybrid analysis. *See Gordon*, 2018 WL 1905075, at *9. The court indicated that *Rohrig* found the home search constitutional not on the community caretaking doctrine alone. *Id.* "Indeed, governing case law in the Sixth Circuit suggests that in order to avail themselves of the community caretaking exception, officers must be faced with an immediate need to act *even assuming* it applies to the warrantless entry of a home (which this circuit has never held)." *Id.* (emphasis in original). Any reliance on *Rohrig* to

justify use of the community caretaking doctrine when immediate action is required ignores confusion that results from the hybrid analysis. *See id.*

Even if this Court chooses to apply the immediate action requirement, the facts at hand do not justify use of the community caretaking doctrine. When Officer McNown went to Mr. David's home, the facts indicate he "had the situation under control." *See McGough*, 412 F.3d at 1239. Officer McNown was never faced with an immediate threat and the situation did not render him concerned "regarding the safety of another community member." *See Smith*, 830 F.3d at 361. Instead, he noticed no evidence of a break-in and did not witness an individual flee from the home. Ex. A, pg. 7, lines 8, 16. Officer McNown has even stated he did not feel there was an emergency that required his attention. Ex. A, pg. 7, lines 5–6. Thus, "[t]here was ample time and opportunity" for Officer McNown to investigate further and seek a search warrant. *See Corrigan*, 841 F.3d at 1034. Officer McNown's desire to bring Mr. David tea is "not compelling enough to find that [his] warrantless entry into [Mr. David's home] was objectively reasonable." *See McGough*, 412 F.3d at 1239. To apply the community caretaking doctrine as an exception to the Fourth Amendment in this case would therefore "undermine the Amendment's most fundamental premise: searches inside the home, without a warrant, are presumptively unreasonable." *Id.* Consequently, this Court should reverse the lower court's denial of Mr. David's Motion to Suppress.

3. Officer McNown's warrantless home search was unconstitutional because Mr. David's expectation of privacy outweighed any governmental interest.

The warrantless search was unconstitutional because Mr. David's expectation of privacy in his own home outweighed any governmental interest in the search. This Court has repeatedly noted that the right to be free from unreasonable government intrusion in one's home is a fundamental protection of the Fourth Amendment. *Payton*, 445 U.S. at 586. However, it is true that one's expectation of privacy "can be reduced as a result of the activities of the home's

occupants." *United States v. York*, 895 F.2d 1026, 1029 (5th Cir. 1990). "For instance, occupants who leave window curtains or blinds open expose themselves to the public's scrutiny of activities within that part of the house that can be seen from outside the premises." *Id.*

With this rationale in mind, some courts have held that a search is reasonable under the community caretaking doctrine "if the governmental interest in law enforcement's exercise of that function, based on specific and articulable facts, outweighs the individual's interest in freedom from government intrusion." *Smith*, 820 F.3d 356 (citing *United States v. Harris*, 747 F.3d 1013, 1017 (8th Cir. 2016)). Under this balancing test, the community caretaking doctrine may justify a search where there is a "reasonably foreseeable intrusion of privacy." *United States v. Bomengo*, 580 F.2d 173, 176 (5th Cir. 1978). In *York*, an individual invited a guest and the guest's child to his home, and then became intoxicated and belligerent. 895 F.2d at 1229. Subsequently, the guest sought a police officer's assistance. *Id.* at 1230. The officer's actions were unrelated to any criminal investigation, and thus the accompanying search fell under the community caretaking doctrine. *Id.* at 1030. Because of the homeowner's violent behavior and willingness to invite guests into his home, the governmental interest in aiding the guest and his child outweighed the homeowner's expectation of privacy. *See id.*

The case at hand presents no evidence of Mr. David lowering his expectation of privacy in his home. Although his window was not covered up, peering through that window did not indicate any criminal activity. *See* R. at 3. Further, Mr. David chose to lock his front door, indicating his expectation of privacy. *See* R. at 3. Mr. David did not invite guests over, he did not answer the door when Officer McNown knocked, and there was no indication of violent behavior. *See* R. at 3. Further, nothing indicates a significant governmental interest to conduct an immediate search. Mr. David did nothing to lower his expectation of privacy. Thus, case law that applies the

community caretaking doctrine because governmental interest outweighs the privacy expectation is not applicable to permit the search here.

To allow the warrantless home search in a situation such as this undermines the "very core" of the Fourth Amendment that promises "the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (citing *Silverman v. United States*, 365 U.S. 505, 511 (1961)). Surely this Court, in its very limited application of the community caretaking doctrine, did not intend to weaken core Fourth Amendment protections. *See Cady*, 413 U.S. at 439. As such, this Court should rule consistently with its precedent that applies the community caretaking doctrine only in narrow circumstances and reverse the Thirteenth Circuit's decision to deny the Motion to Suppress.

II. MR. DAVID WAS ENTITLED TO EFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE SIXTH AMENDMENT APPLIES TO PLEA NEGOTIATIONS.

The Thirteenth Circuit improperly refused to extend the Sixth Amendment's protections to pre-indictment plea negotiations. The Sixth Amendment provides a criminal defendant with the opportunity to "have the assistance of counsel for his defense." U.S. Const. amend. VI. This Court has long provided relief for defendants who encountered ineffective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). Ineffective assistance is shown through a two-prong test that establishes (1) the attorney fell below a standard of reasonable competence, and (2) the lack of reasonable competence reasonably prejudiced the defendant. *Id.*

In this case, Mr. David was erroneously denied relief because recently, this Court extended the Sixth Amendment protections to plea negotiations. *Lafler v. Cooper*, 566 U.S. 156 (2012); *Frye*, 566 U.S. at 145. Additionally, the Sixth Amendment's protections attached because the prosecution shifted from fact-finder to adversary during the pre-indictment plea negotiations. *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992). Mr. Long's inaction also substantially

prejudiced Mr. David, which allows for relief to be granted on his claim. Mr. David urges this Court to vacate the sentence imposed by the trial court and to re-offer the original plea deal to him as proper Constitutional relief.

A. Sixth Amendment Protections Apply to Pre-Indictment Plea Negotiations.

The Thirteenth Circuit improperly concluded the Sixth Amendment protections did not apply to Mr. David. Since *Strickland*, this Court attaches Sixth Amendment protections to "critical pretrial proceedings" where the state has transitioned into an adversarial form. *Rothgery v. Gillespie*, 554 U.S. 191, 198 (2008); *United States v. Gouveia*, 467 U.S. 180, 189 (1984) (citing *United States v. Ash*, 413 U.S. 300, 310 (1973)). The right to counsel applies in these instances because the proceedings "might well settle the accused's fate and reduce the trial itself to a mere formality." *Gouveia,* 467 U.S. at 189 (citing *United States v. Wade*, 388 U.S. 218, 224 (1967)).

In the present case, the Sixth Amendment protections apply because Mr. Long never communicated the terms of the pre-indictment plea deal to Mr. David prior to expiration. This Court's recent holdings extend Sixth Amendment protections to the plea negotiation stage and do not distinguish between pre and post-indictment pleas. *See Frye*, 566 U.S. at 145. Thus, all defendants may receive relief for ineffective counsel during any plea negotiation stage. *See id.* However, even if this Court applies a narrower interpretation and requires an exceptional circumstance to attach protection to pre-indictment plea negotiations, such exceptional circumstances are present here. *See Roberts v. Maine*, 48 F.3d 1287 (1st Cir. 1995).

1. *This Court's recent holdings grant Sixth Amendment protections to plea negotiations.*

The Thirteenth Circuit misinterpreted this Court's precedent and improperly failed to apply Sixth Amendment protections to the present case. Over 40 years ago, this Court acknowledged that the right to counsel extends to an accused at any critical stage of the prosecution. *Kirby v.*

Illinois, 406 U.S. 682, 690 (1972) (internal quotations omitted). Since *Strickland*, this Court continues to elaborate that Sixth Amendment protections do not only attach to defendants during the trial phase of a case. *See Gouveia*, 467 U.S. at 188. This Court has identified several instances that activate the right to counsel, including a "formal charge, preliminary hearing, indictment, information, or arraignment" after the initiation of adversarial judicial proceedings. *Id.* These instances require protection because they may "settle the accused's fate and reduce the trial itself to a mere formality." *Id.* (citing *Wade*, 388 U.S. at 224). Some courts have since incorrectly interpreted *Gouveia* as a "bright-line rule" that dictates when Sixth Amendment protections apply. *See United States v. Mapp*, 170 F.3d 328, 334 (2d Cir. 1999) ("The Sixth Amendment right to counsel does not attach until a prosecution is commenced, that is, at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." (internal quotations omitted)). Courts at times turn to the bright-line rule to deny relief for ineffective assistance of counsel where injury occurred in the pre-indictment stage of trial. *See Id.*

However, in 2012, this Court issued two critical opinions regarding the right to counsel. *Lafler*, 566 U.S. at 168; *Frye*, 566 U.S. at 145. These cases analyzed the important role plea negotiations play in the criminal justice system, and ultimately extended the right to counsel to plea negotiations. *Id.* In particular, this Court in *Frye* held that as a general rule, defense counsels have a duty to communicate formal offers from the prosecution with a fixed expiration date. *Frye*, 566 U.S. at 145. Where defense counsel does not allow a defendant to even consider a plea offer, counsel did not render the effective assistance the Constitution requires. *Id.* In *Frye*, a defendant was offered a plea deal through defense counsel but defense counsel did not inform the defendant of the offer's details before it expired. *Id.* at 139. This Court discussed the "critical stages" listed

in *Gouveia*, but specifically added the words "and the entry of a guilty plea" into its analysis, and thus explicitly extended Sixth Amendment protections to the plea negotiation stage. *Id.* at 140.

In the present case, Mr. Long indisputably withheld information about the plea deal. In fact, he specifically admits he did not inform Mr. David about the plea deal before the offer expired. Ex. B, pg. 3, lines 8–9. Mr. Long's willful failure to relay the plea deal to Mr. David demonstrated ineffective assistance of counsel. *See Frye*, 566 U.S. at 145. Because this Court did not limit its holding to particular types of plea negotiations but rather extended the Sixth Amendment protections to plea deals in general, Mr. David is entitled to relief.

2. *The Sixth Amendment protections applied to the pre-indictment plea negotiation because prosecution flipped from fact-finder to adversary.*

Even if the Thirteenth Circuit focused on the plea offer's pre-indictment timing, the court incorrectly affirmed denial of relief because the prosecution transitioned from fact-finder to adversary. This Court determined Sixth Amendment protections extend to defendants during plea negotiations. *Frye*, 466 U.S. at 145. Nonetheless, a circuit split exists regarding whether the right to effective counsel applies to pre-indictment plea negotiations. *Compare United States v. Hayes*, 231 F.3d 663, 669 (9th Cir. 2000) (reluctantly holding the right to counsel does not apply at the pre-indictment stage), *with Larkin*, 978 F.2d at 969 (discussing even at a pre-indictment stage, a defendant is entitled to counsel when the government crosses from fact-finder to adversary).

Courts that apply Sixth Amendment protections to pre-indictment proceedings conclude these protections apply when the government crosses the line from "fact-finder to adversary." *Larkin*, 978 F.2d at 969. Even if charges have not yet been filed, once the government becomes adversarial, defendants are placed in a position "where the results of the confrontation might well settle the accused's fate and *reduce the trial itself to a mere formality*." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999) (en banc) (quoting *Gouveia*, 467 U.S. at 189)

(emphasis added). For example, the Seventh Circuit in *Larkin* discussed the right to counsel attached to a defendant once "the government had crossed the constitutionally significant divide from fact-finder to adversary." 978 F.2d at 969 (quoting *Hall v. Lane*, 804 F.2d 79, 82 (7th Cir. 1986)). The court even articulated the government should ensure a defendant has access to counsel in pre-indictment proceedings to avoid generating a substantial negative effect. *See id.*

Similarly, the Third Circuit interpreted this Court's precedent to determine Sixth Amendment protections apply where the government commits to prosecution. *See Matteo*, 171 F.3d at 892. The Third Circuit correctly interpreted this Court's rationale in *Gouveia* to attach protections to pre-indictment telephone conversations because the prosecution shifted from fact-finder to adversary. *See id.* The First Circuit illustrated when the crossover from fact-finder to adversary occurs. *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995). Once prosecution of a claim begins, Sixth Amendment protections apply. *See id.* The First Circuit pointedly identified that when the government intends to file charges, it may not intentionally delay filing such charges to avoid providing the defendant with counsel. *See id.*

In contrast, courts that believe this Court established a bright-line rule in *Kirby* and *Gouveia* determine Sixth Amendment protections do not apply to pre-indictment plea negotiations. *See Mapp*, 170 F.3d at 334; *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018); *United States v. Morris*, 470 F.3d 596, 602–03 (6th Cir. 2006). The Thirteenth Circuit relied heavily on the recent *Turner* decision to determine that this Court refuses to extend Sixth Amendment protections to pre-indictment proceedings. R. at 18; *Turner*, 885 F.3d at 953. In *Turner*, there was disagreement whether the defendant's attorney adequately informed him of the terms of a plea during the pre-indictment stage of federal charges. 885 F.3d at 952. The Sixth Circuit went too far, however, and claimed there is no circuit split on pre-indictment plea negotiations. *Id.* This Court's ruling that

the right to counsel applies to plea negotiations, *accepted or rejected*, is so new that very few circuits have had the chance to analyze the issue. *See Frye,* 566 U.S. at 145. In fact, *Turner* turned a blind eye to its own circuit's precedent. *See id; Morris*, 470 F.3d at 602–03. In *Morris*, the defendant was faced with a plea offer prior to a federal indictment. *Morris*, 470 F.3d at 599. The defendant was prejudiced during plea negotiations after subsequent charges were filed, and was therefore denied effective assistance of counsel. *Id.* The Sixth Circuit granted relief "in order to remedy the constitutional violation." *Id.* at 603. *Turner*'s reasoning is therefore misplaced and should not be followed by this Court.

The Ninth Circuit also determined this Court established a bright-line rule, but discussed its discomfort with the rule and applied it reluctantly. *Hayes*, 231 F.3d at 669. In *Hayes*, the defendant was illegally taped by the government before formal charges were filed. *Id.* at 668. Based on the Ninth Circuit's misinterpretation of this Court's precedent, the court placed an absolute bar on relief for pre-indictment proceedings. *Id.* at 676. However, the decision made the court "queasy" because, as interpreted, the rule could allow the prosecution to implement prejudicial procedures and manipulate the time of filing charges to the detriment of defendants. *Id.* at 675. Four judges dissented because of their concern that a bright-line rule may prevent courts from protecting against abuse in pre-indictment proceedings. *Id.* at 681.

In the present case, the government shifted from fact-finder to adversary. R. at 4. The only reason the prosecutors did not file charges before they offered the plea deal was because of their prosecutorial strategy to incite testimony that would lead to the arrest of a notable kingpin. R. at 4. Further, formal charges were made "promptly" after the window to accept the plea deal expired. R. at 4. Some courts believe to merely offer a plea deal triggers the "commitment to prosecute," which then initiates the adverse "critical proceedings" required by this Court. *See Chrisco v.*

Shafran, 507 F.Supp. 1312, 1319 (D. Del. 1981). However, even if this Court refuses to go so far, the government still showed the requisite "commitment to prosecute" because the government intentionally delayed filing charges but had every intention to file them. The prosecution here transitioned from fact-finder to adversary, and therefore Sixth Amendment protections attached and Mr. David should be permitted to seek relief.

B. Mr. Long's Inaction Prejudiced Mr. David.

The lower courts improperly determined Mr. Long's inaction did not prejudice Mr. David and denied Mr. David the relief he was entitled to. Once the Sixth Amendment ineffective assistance of counsel protections attach, courts use a two-prong test to determine whether to grant relief. *Frye*, 566 U.S. at 140; *Strickland*, 466 U.S. at 686. Both parties here stipulate that Mr. Long's actions amounted to ineffective counsel.

When counsel does not discuss a plea deal with the defendant and that plea deal expires, prejudice is shown when the defendant demonstrates he or she would have accepted the offer had it been presented. *Frye*, 566 U.S. at 147. The defendant must also show failure to enter into the plea deal resulted in a less favorable sentence. *Id.* This Court continuously holds that "*any* amount of actual jail time has Sixth Amendment significance." *Glover v. United States*, 531 U.S. 198, 203 (2001) (emphasis added). In *Frye,* this Court additionally discussed the importance of both the prosecution and judge's role in the acceptance of the plea deal. *Frye*, 566 U.S. at 148. However, this Court has not included this analysis in other Sixth Amendment protection decisions indicating this analysis may not be necessary. *See Lafler*, 566 U.S. at 174.

In *Glover*, this Court discussed whether a sentencing change from six months to twenty-one months prejudiced the defendant. 531 U.S. at 202. This Court identified that any increase in sentence length is significant, and determined that the 350% increase in sentence length was indeed

prejudicial. *Id.* at 204. Similarly, in *Woods*, the court considered a defendant who, because of his counsel's actions, was unaware of a plea deal with a maximum twenty-year sentence and was instead sentenced to forty-five years in prison. *Woods v. State*, 48 N.E.3d 374, 381 (Ind. Ct. App. 2015). The court held Woods was prejudiced by the 225% increase in sentence length, and suggested it was likely that the trial court would have accepted the plea deal "given how common plea agreements are in resolving criminal charges." *Id.* at 382–83.

In the present case, Mr. David's sentence did not only increase by 225% or 350% due to ineffective counsel, as in *Glover* and *Woods*, but rather his sentence increased by an astounding 1,000%. R. at 14; *See* Ex. D; *Glover*, 531 U.S. at 202; *Woods*, 48 N.E.3d at 381. Mr. David never had the opportunity to formally consider the plea deal before the offer expired because Mr. Long failed to ever communicate the terms of the offer. Ex. B, pg. 3, lines 8–9.

Promptly after Mr. Allen was hired as Mr. David's new counsel, he notified the prosecution about Mr. David's desire to enter into the offered plea deal. Ex. E. Mr. David received a considerably longer sentence due to prosecution's failure to re-offer the plea deal. R. at 14. As *Woods* demonstrates, the trial court would have likely allowed Mr. David to accept the plea deal, given the prevalence of plea deals and their role in judicial efficiency. *See Woods*, 48 N.E.3d at 381. Further, the prosecution indicated no intention to withdraw the plea deal. R. at 4. The prosecution was incentivized to allow the plea deal because of the valuable information they would receive to facilitate a notable kingpin's capture. *Id.* However, this Court's analysis does not hinge on the prosecution's reluctance to reoffer the plea a few days after its expiration. *See Lafler*, 566 U.S. at 174. Many courts, including this Court, do not address this additional factor. *See id.* Mr. Long's inaction therefore prejudiced Mr. David, and this Court should vacate the lower court's sentence and remand to allow the original plea deal to be re-offered.

C. Pre-Indictment Plea Negotiations Necessitate Effective Counsel as a Matter of Policy.

To impose a rule that prohibits Sixth Amendment protections during pre-indictment plea negotiations would immensely harm the majority of criminal defendants. About 90% to 95% of cases are resolved through plea bargaining. R. at 20 (O'Neal, J., dissent) (citing Lindsey Devers, *Plea and Charge Bargaining: Research Summary*, Bureau of Justice Assistance, U.S. Dep't of Justice (2011), https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.). Pleas are favored in the criminal justice system because they allow defendants to achieve favorable yet fair sentences, and also conserve financial expenses at trial and expedite the trial process. *See* Brandon K. Breslow, *Signs of Life in the Supreme Court's Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining,* 62 Fed. Law. 34, 39 (2015). In fact, the criminal justice system today consists mostly of pleas instead of trials. *Lafler*, 566 U.S. at 170. Plea bargaining "is not some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 144 (citing Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992)) (emphasis in original).

Because 90% to 95% of cases are resolved in plea bargaining, the dangers of prohibiting relief for a pre-indictment plea negotiation are undeniable. Such a ruling would incentivize savvy prosecutors to withhold charges until after the plea stage, because in these instances the defendant would not yet have the right to counsel. *See Roberts*, 48 F.3d at 1291. Prosecutor would therefore take advantage of defendants who lack sufficient protection. *See Hayes*, 231 F.3d at 676. This potential misuse of the criminal justice system must not be tolerated, especially in today's court system, where pleas tend to be the "critical proceeding" for a defendant within the criminal process. *Frye*, 566 U.S. at 143. To maintain a fair and just system, this Court should extend the

protections of ineffective counsel to pre-indictment plea negotiations to ensure prosecutors cannot game the system.

Conclusion

In sum, Officer McNown's warrantless search of Mr. David's home violated the Fourth Amendment because the community caretaking doctrine did not apply. Further, Mr. David is entitled to relief because the government shifted from fact-finder to adversary and Mr. Long's actions prejudiced Mr. David. Therefore, this Court should reverse the Thirteenth Circuit and remand to have the original plea deal re-offered to Mr. David.