Team # P17

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 to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

October 21, 2018

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1. Whether warrantless searches conducted by law enforcement acting as community caretakers extend to the home under the Fourth Amendment?
2. Whether the Sixth Amendment right to effective counsel attaches during plea negotiations prior to federal indictment?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

United States Supreme Court Cases

United States Courts of Appeal Cases

United States District Court Cases

Constitutional Provisions

Statutes and Rules

Other Authorities

OPINIONS AND ORDERS ENTERED IN THIS CASE

The District Court denied Mr. David's Motion to Suppress Evidence and his Motion to be Re-Offered the Plea Deal. *United States v. David*, No.: PKS09-20-RCN15 (Staples S.D. 2017) (unpublished). The Circuit Court affirmed the Denial of the Motion to Suppress Evidence and affirmed in part the Denial of the Motion to be Re-Offered the Plea Deal. *David v. United States*, No.: 125-1-7-720 (13th Cir. 2018) (unpublished).

CONSTITUTIONAL PROVISIONS INVOLVED

U.S. Const. amend. IV.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. VI.

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

On January 15, 2017, Petitioner Chad David was taken into custody and held at a federal detainment facility. R. at 1.[1] Three days later, on January 18, 2017, Mr. David was charged by indictment with one count of possession of a controlled substance with the intent to distribute in

[1] Citations to the factual record will be represented by the letter R. at [Page #].

violation of 21 U.S.C. § 841 (2010). R. at 3-4. Mr. David moved to suppress evidence in violation of the Fourth Amendment. R. at 5. Mr. David also moved to be re-offered a plea deal that lapsed due to a violation of the Sixth Amendment. R. at 5.

On July 15, 2017, the United States District Court for the Southern District of Staples denied both of Mr. David's motions. R. at 1-12. The Court held that the community caretaking exception extended to the home, and although the right to counsel attached to the plea negotiations, there was no showing of prejudice. R. at 12. Mr. David was convicted at trial and sentenced to the statutory minimum of ten years in prison. R. at 14. On appeal, the United States Court of Appeals for the Thirteenth Circuit upheld the denials of both motions. R. at 14, 17. The Court agreed with the lower court's ruling on the Motion to Suppress Evidence and decided that the Sixth Amendment right to counsel does not attachment prior to formal indictment. R. at 18. This Court granted Mr. David's petition for certiorari.

STATEMENT OF THE FACTS

Mr. David is a 72-year-old well-respected minister in Lakeshow. R. at 2. Officer James McNown frequently attended Mr. David's church services. Ex. A, pg. 2[2]. When Officer McNown arrived at the service on January 15, 2017, Mr. David was not there. R. at 2. Julianne Alvarado, a church attendee, told Officer McNown that she was concerned about Mr. David's well-being because he did not answer her telephone call. R. at 2. Another attendee told Officer McNown that he thought he saw Mr. David the night before at a bar. R. at 2. Officer McNown told the attendees that he would stop by Mr. David's house with hot tea during his patrol route and asked Ms. Alvarado for Mr. David's address since he did not have it. R. at 2; Ex. A, pg. 3.

[2] Citations to the exhibits will be represented by the letters Ex. [Exhibit #], pg. [Page #].

When the service ended, Officer McNown began his patrol shift and stopped to get the tea for Mr. David. R. at 2. Officer McNown was on shift, dressed in his uniform, and in his patrol car when he arrived at Mr. David's gated community. Ex. A, pg. 3. He was surprised that Mr. David lived in one of the nicest gated communities in town because he did not expect a minister to live in such an expensive area. Ex. A, pg. 3. Mr. David lives in a gated community and does not typically have visitors because he likes his privacy. Ex. C, pg. 2. Since Officer McNown was in his patrol car, the security guard let him enter without asking any questions. Ex. A, pg. 4.

When Officer McNown pulled into Mr. David's gated community, he saw a black Cadillac SUV with Golden State license plates. R. at 2. Based on twelve years of experience as a City of Lakeshow police officer, Officer McNown found this unusual. Ex. A, pg. 4. He knew that these vehicles had been popular among drug dealers and that there had recently been an increase in drugs entering Lakeshow from Golden State. Ex. A, pg. 4. In order to combat the increased entry of narcotics from other states, the Drug Enforcement Agency ("DEA") had recently established a task-force in Lakeshow. R. at 3.

When Officer McNown approached Mr. David's front door, he heard loud metal music, which he found unusual. R. at 3; Ex. A, pg. 4. After knocking on Mr. David's door and waiting a couple of minutes, Officer McNown looked into Mr. David's home through a window and saw *The Wolf of Wall Street* playing on the TV. R. at 3. He found this unusual due to Mr. David's profession. R. at 3. He attempted to open the front door, but it was locked. R. at 3. At this point, Officer McNown did not believe that there was an emergency that required his attention and he was unsure if Mr. David was home, or if anyone else lived in the home with Mr. David. Ex. A, pg. 7. Officer McNown did not see any evidence of a break-in and did not believe that anyone had unlawfully entered Mr. David's home. Ex. A, pg. 7.

Officer McNown did not attempt to retrieve a warrant even though he had the time to do so. Ex. A, pg. 6. Instead, he went into Mr. David's backyard, opened a back door without knocking, and went inside Mr. David's home without a warrant. R. at 3; Ex. A, pg. 5-7. When Officer McNown walked into Mr. David's home, he did not see Mr. David but heard the music coming from upstairs. Ex. A, pg. 5-6. Instead of going upstairs, Officer McNown walked over to Mr. David's TV and found a notebook with Ms. Alvarado's name written next to the words "one ounce, paid." Ex. F. Without searching the rest of the first floor, Officer McNown followed the music upstairs to "check it out" and see if Mr. David was there. R. at 3; Ex. A, pg. 5-6. He opened a closed door and saw Mr. David packaging cocaine. R. at 3. Officer McNown immediately knew that the substance was cocaine based on his experience and recent drug training. Ex. A, pg. 6. Officer McNown handcuffed Mr. David and called local DEA agents. R. at 3.

DEA Agent Colin Malaska arrived at Mr. David's home and Officer McNown pointed him to the drugs and notebook. R. at 3. When DEA Agent Malaska asked Mr. David who his supplier was, Mr. David said he would not give up his suppliers because they would burn down his church and kill him. Ex. F. Mr. David, who had never been arrested, was taken to a federal detainment facility, and the notebook and cocaine were collected as evidence. Ex. B, pg. 2; Ex. F.

That night, Mr. David called Keegan Long, a criminal defense attorney. R. at 3-4. No charges had been filed against Mr. David at this point. Ex. B, pg. 2. Mr. Long went to the detainment facility to see Mr. David, who had many questions about the process and had no idea what to expect. Ex. B, pg. 2. Mr. David told Mr. Long that he was scared of going to jail and getting stabbed. Ex. B, pg. 2.

DEA Agent Malaska believed that Mr. David had credible information about a suspected drug kingpin and would be able to help secure an arrest. R. at 4. However, he was concerned that

public knowledge of Mr. David's arrest would tip off the kingpin. R. at 4. DEA Agent Malaska encouraged the prosecution to offer Mr. David a favorable plea deal prior to filing any formal charges to avoid public knowledge of his arrest. R. at 4. The prosecution delayed filing formal charges against Mr. David, in compliance with DEA Agent Malaska's request. R. at 4.

On January 16, 2017, the prosecution emailed Mr. Long a plea offer for Mr. David. R. at 4. Pursuant to the terms of the plea offer, Mr. David would plead guilty and receive a sentence of one-year in prison in exchange for information of suppliers leading to the arrest of one person. Ex. D. The plea offer would remain valid for only thirty-six hours. R. at 4. The next day the prosecutor left a voicemail at Mr. Long's office concerning the status of the plea offer. R. at 4. However, Mr. Long failed to timely communicate the plea offer to Mr. David. R. at 4.

On January 18, 2017, Mr. David was promptly indicted. R. at 4. The prosecutor asked Mr. Long why Mr. David did not accept the plea offer. R. at 4. Mr. Long realized his mistake and immediately contacted Mr. David. R. at 4. Mr. Long read Mr. David the lapsed plea offer, and Mr. David seemed very angry and immediately fired Mr. Long. Ex. B, pg. 4. They did not have a chance to discuss whether Mr. David would have accepted the plea offer. Ex. B, pg. 4. Mr. David then hired a different criminal defense attorney, Michael Allen. R. at 4.

Two days later, Mr. Allen informed the prosecutor that Mr. Long was removed as counsel by Mr. David on Wednesday due to Mr. Long's failure to timely communicate the plea offer to Mr. David. R. at 5; Ex. E. Mr. Allen also informed her that Mr. David had the information requested as part of the plea offer and "seemed very enthusiastic" about accepting a new plea offer as soon as possible. Ex. E. The prosecutor told Mr. Allen that she spoke with the DEA, and they could not make another plea offer since the information would most likely no longer be valuable and said that Mr. David should have taken the plea deal when he could. R. at 5; Ex. E.

At the pre-trial evidentiary hearing on Mr. David's motions, Mr. David testified that he would have accepted the plea offer had it been timely communicated to him. Ex. C, pg. 3. This was a "no brainer" for him because he preferred to give up his suppliers in exchange for one year in prison and avoid going to trial and risking a ten-year sentence. Ex. C, pg. 3. At this hearing before Mr. David's trial, he also testified that if the prosecution re-offered him the plea offer, he would immediately give up information about his drug suppliers "without a doubt" because he would "do anything to avoid the risk of trial." Ex. C, pg. 3. Mr. David was subsequently convicted at trial and given the statutory minimum sentence of ten years in prison. R. at 14.

SUMMARY OF THE ARGUMENT

Officer McNown's warrantless search of Mr. David's home was unreasonable under the Fourth Amendment because it did not fall within the community caretaking exception to the warrant requirement. Additionally, Mr. David suffered prejudice when a plea offer was not timely communicated to him due to counsel's deficient performance in violation of the Sixth Amendment right to effective assistance of counsel.

The community caretaking exception does not apply to searches of the home. This narrow exception applies in the context of vehicles for protection of the *public*, justified by a vehicle's heavy regulation, ready mobility, common police-citizen encounters, and tendency to become disabled on public highways. *Cady v. Drombroski*, 413 U.S. 433, 441 (1973). In creating this narrow exception, this Court recognized that there is a "constitutional difference between searches of…houses," and searches of a vehicle. *Id*. at 442.

Furthermore, the underlying rationales of the community caretaking exception are entirely inapplicable in the setting of the home. This Court "already has declined to expand the scope of other exceptions to the warrant requirement to permit warrantless entry into the home." *Collins v.*

Virginia, 138 S. Ct. 1663, 1672 (2018). This is because "when it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). Even if this Court finds that the community caretaking exception extends to the home, the warrantless search in this case was unreasonable because it was not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441.

Moreover, Mr. David suffered prejudice due to ineffective assistance of counsel in violation of the Sixth Amendment. This Court's "conclusion that the right to counsel attaches at the initiation of adversary judicial proceedings is far from a mere formalism." *United States v. Gouveia*, 467 U.S. 180, 189 (1984). The commencement of judicial proceedings was utilized as the point for attachment of the right to counsel because it produces a situation that requires Sixth Amendment protection. *Id.* The initiation of plea negotiations demonstrates the prosecution's decision to charge the accused, and their positions have thus become adverse. *Id.* In deciding whether or not to accept a plea offer, the accused is confronted with prosecutorial procedures and the complexities of criminal law concerning pleas, waiver of trial, and other complex issues. *Id.*

The recognition that the situation produced by plea negotiations requires the right to counsel supports the conclusion that plea negotiations require the Sixth's Amendment's effective assistance of counsel guarantee, irrespective of the point in time they are initiated. Mr. David suffered prejudiced when counsel failed to timely advise him of the plea offer that would have resulted in a lesser sentence than the sentence he received after trial.

Therefore, the warrantless search of Mr. David's home and the ineffective assistance of his counsel, in violation of the Fourth and Sixth Amendments, require reversal of the Judgment below.

STANDARD OF REVIEW

When there is a constitutional issue based on the application of the law, this Court will review the decision of the lower court *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996).

ARGUMENT

I. THE JUDGMENT OF THE THIRTEENTH CIRCUIT COURT OF APPEAL SHOULD BE REVERSED BECAUSE OFFICER MCNOWN'S WARRANTLESS SEARCH OF MR. DAVID'S HOME VIOLATED THE FOURTH AMENDMENT

When Officer McNown entered Mr. David's home without probable cause or a warrant approved by a neutral and detached magistrate, he violated Mr. David's Fourth Amendment right to be free from unreasonable searches.

The Fourth Amendment to the United States Constitution guarantees "[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. A search occurs for purposes of the Fourth Amendment when there is an infringement on a subjective expectation of privacy that society is willing to recognize as reasonable. *Kyllo v. United States*, 533 U.S. 27, 33 (2001) (quoting *California v. Ciraolo*, 476 U.S. 207, 211 (1986)). A search also occurs for Fourth Amendment purposes when the government trespasses onto a house, paper or effect. *United States v. Jones*, 535 U.S. 400, 410 (2012). Searches conducted without a warrant are "per se unreasonable under the Fourth Amendment – subject only to a few specifically established and well delineated exceptions. *Mincey v. Arizona*, 437 U.S. 385, 390 (1978) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). The warrant and probable cause requirements of the Fourth Amendment "safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Camara v. Municipal Court*,

387 U.S. 523, 528 (1967)). One of these specifically established and well delineated exceptions is the community caretaking exception. *Cady*, 413 U.S. at 448.

Here, Officer McNown physically trespassed into Mr. David's home, and, infringed on Mr. David's reasonable expectation of privacy in his home. As a result, the warrantless entry of Mr. David's home by Officer McNown constituted a search within the meaning of the Fourth Amendment under both tests articulated by this Court. The warrantless search of Mr. David's home did not fall within the purview of the community caretaking exception because the exception does not extend to the home.

A. The Scope of the Community Caretaking Exception was Intended to be Limited to Vehicles

The community caretaking exception was created in the context of vehicles and extending the exception to warrantless searches of the home would be inconsistent with the policy and rationale that justified the exception.

In *Cady*, this Court used the community caretaking exception for the first time when it allowed the warrantless search of a vehicle. *Id*. at 441. The case involved an off-duty Chicago police officer who had an accident while driving under the influence. *Id*. at 435-36. The officer was arrested and taken to a nearby hospital while his car was towed to a private garage. *Id*. The arresting officer knew that off-duty police officers were required to carry their service revolvers at all times. *Id*. at 437. He was concerned that Cady's revolver would fall into the wrong hands. *Id*. Due to the imminent concern for safety, police officers were sent back to search Cady's vehicle for the revolver, without a warrant. *Id*. While conducting the search, the officers also found evidence of a recent homicide. *Id*.

This Court reasoned in *Cady* that a community caretaking exception to the warrant requirement was justified in the context of vehicles for several policy reasons. *Id*. at 441. First,

vehicles on public highways are extensively regulated by state law through the issuance of license plates and registrations. *Id*. Second, "the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." *Id*. Additionally, the frequency in which vehicles become disabled on public highways had become a public nuisance. *Id*. Finally, this Court determined that the community caretaking exception was justified by the "concern for the safety of the general public who might be endangered" if someone were to find the revolver. *Id*. at 447.

This Court explicitly recognized and relied on the Constitutional difference between the search of a home and the search of a vehicle to justify the warrantless search at issue in *Cady*. *Id*. at 442. The community caretaking exception was created solely to be used in the context of vehicles due to the vehicles' "ambulatory character…and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." *Id*. Furthermore, this Court included a subjective element by holding that an officer who acts as a community caretaker must be "totally divorced from detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id*. at 441.

This Court's intent in expressly drawing a constitutional difference between searches of the home and searches of vehicles shows that the community caretaking exception was not meant to be extended beyond its narrow applicability. *Id*. at 442. The justification for the narrow exception would be misconstrued if the exception were broadened to apply in situations that are inconsistent with its underlying rationale. The home is not subject to the same heavy regulations that are placed on vehicles. Furthermore, the amount of contact between police officers and citizens is much less frequent in the home. Finally, there is no public nuisance issue to address in

regard to the home, because the home does not have mobility, and thus will not become disabled in the middle of the road. The inapplicability of these policies to the home establishes that the community caretaking exception cannot logically be extended to the home and should instead be confined to its original purpose -- the context of vehicles. Extending this exception to the home would erode the safeguards afforded to individuals by the Fourth Amendment and this Court's jurisprudence.

A reading of *Cady* and its rationale shows that this Court took measures to ensure that the community caretaking exception would be limited to situations that did not involve the home.

B. The Scope of the Community Caretaking Exception Should Not be Extended to the Home Because the Home Has Always Been Given the Highest Protection Under the Fourth Amendment

The community caretaking exception should not be extended to the home because the home is afforded the highest protection under the Fourth Amendment.

"The physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980); *United States v. United States District Court*, 407 U.S. 297, 313 (1972). "At the very core of the Fourth Amendment stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). The full protections afforded by the Fourth Amendment are guaranteed to the people and their property whether or not there is suspicion of criminal activity. *See Camara*, 387 U.S. at 530. "Even the most law-abiding citizen" should concern himself with preventing entry of his home by the government, "for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security." *Id.* at 530-531. "The right of officers to thrust themselves into a home is . . .of

grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

Consistent with the heightened protection afforded to the home, this "Court has already declined to expand the scope of other exceptions to the warrant requirement to permit the warrantless entry into the home." *Collins*, 138 S. Ct. at 1672.

Just last term, this Court refused to extend the application of the automobile exception to the home and its curtilage. *Id*. at 1673. The automobile exception to the Fourth Amendment allows police officers to conduct a warrantless search of a vehicle based on probable cause to believe that the vehicle contains contraband. *Carroll v. United States*, 267 U.S. 132 (1925). This Court has explained that "the rationales underlying the automobile exception are specific to the nature of a vehicle and the ways in which it is distinct from a house." *Cady*, 138 S. Ct. at 1672. Thus, it was determined that the rationales "do not account for the distinct privacy interest in one's home or curtilage." *Id*. Accordingly, this Court held that the automobile exception does not permit a police officer to enter the curtilage of a home to search a vehicle. *Collins*, 138 S. Ct. at 1668.

Another well-delineated exception that this Court has been unwilling to extend to the home is the exception for warrantless arrests made in public. In *Payton*, this Court held that "the reasons for upholding warrantless arrests in a public place do not apply to warrantless invasions of the privacy of the home." 445 U.S. at 576. Among the places where an individual is entitled to Fourth Amendment protection, "[i]n none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Id*. at 589. Thus, this Court made clear that in regard to searches and seizures, "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Id*. at 590.

Furthermore, the plain view doctrine allows officers to seize evidence of contraband or instrumentalities of a crime when the officer has lawful access to it. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987). However, when law enforcement officers detect evidence of contraband or instrumentalities of a crime from outside the home, this Court has denied them access to such evidence under the guise of the plain view doctrine. *Soldal v. Cook County*, 506 U.S. 56, 66 (1992). Such evidence or contraband can only be seized from an individual's home under the plain-view exception if the seizure is "unaccompanied by unlawful trespass." *Id*.

The community caretaking exception cannot be extended to the home for the same reasons this Court has already declined to expand warrantless entry to the home under the plain view doctrine, the automobile exception, and the exception for warrantless public arrests. Its limitation was clearly established in *Cady* when this Court articulated the policies behind the rule, and none of those policy considerations apply in the context of the home. 413 U.S. at 441. The obvious disconnect between the justifications for the community caretaking exception and the importance of the protection afforded to the home by the Fourth Amendment, demonstrates that the community caretaking exception should be barred from being extended to the home.

Several Circuit Courts of Appeal have used this Court's prior decisions to hold that the community caretaking exception does not extend to the home. In *Ray v. Township of Warren*, the Third Circuit refused to extend the reach of the community caretaking exception. 626 F.3d 170, 177 (2010). In *Ray*, police officers entered a home without a warrant claiming they were acting as community caretakers. *Id*. at 172-73. The court found that the rationales for the community caretaking exception: extensive regulation of vehicles, the frequency of disabled automobiles on public highways, and the extent of police-citizen contact involving vehicles, had been tailored to deal with automobiles and did not justify a warrantless search of the home. *Id*. at 175. The court

found that the distinction between the automobile and the home was too great to allow the community caretaking exception to extend to the home. *Id*. at 177. *See also United States v. Pichany*, 687 F.2d 204, 208-09 (7th Cir. 1982) (refusing to extend the community caretaking exception to business buildings or homes); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (relying on the constitutional difference between searches of the home and searches of a vehicle, to limit the exception to vehicles only); *United States v. Erickson*. 991 F.2d 529, 532 (9th Cir. 1993) (declining to extend the community caretaking exception to the home).

On the other hand, in *United States v. Rohrig*, the Sixth Circuit Court of Appeal held that a warrantless entry of the home was necessary because the government interest in ending an ongoing nuisance was compelling enough to justify the intrusion. 98 F.3d 1506, 1522 (6th Cir. 1996). However, the Sixth Circuit has recognized the potential for abuse of the exception and has declined to extend the doctrine whenever a warrantless search of a home is conducted as a pretext. *United States v. Williams*, 354 F.3d 497, 508 (6th Cir. 2003). In *Williams*, the owner of a leased property entered the home in search of a water leak and found drug activity. *Id*. at 500. She called DEA agents and one of them entered the home without a warrant for the alleged purpose of finding the water leak and once inside the officer was able to see the drug activity inside of the home. *Id*. at 500-01. The district court applied the community caretaking exception to hold that the warrantless search was justified. *Id*. at 502. The Circuit Court found that entry into the home was not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id* at. 508. The Court cautioned that despite the "doctrine in *Rohrig*, we doubt that community caretaking will generally justify warrantless searches into private homes." *Id*.

The Circuit Courts of Appeal that have extended the community caretaking exception to the home have had to be vigilant to ensure that the exception is not abused by government agents seeking to use it as a mere pretext for crime fighting purposes. As the dissent and the other Circuit Courts of Appeal have pointed out, extending the doctrine would be a constitutional danger to the Fourth Amendment. *See* Gregory T. Helding, *Stop Hammering Fourth Amendment Rights: Reshaping the Community Caretaking Exception with the Physical Intrusion Standard*, 97 Marq. L. Rev. 123, 160 (2013).

Additionally, law enforcement officers already have a way to enter the home under the emergency aid doctrine. Police officers may enter the home in order "to protect or preserve life or avoid serious injury" without a warrant, because the warrant requirement is obviated by the exigency. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006). An expansion of this doctrine would be inconsistent with this Court's precedent. *See Mincey*, 437 U.S. at 393-94 ("[A] warrantless search must be strictly circumscribed by the exigencies which justify its initiation."). The community caretaking exception and its rationale does not raise to the level of urgency that justifies a warrantless entry into the home in this context.

C. The Warrantless Search by Officer McNown was Not Totally Divorced from the Detection, Investigation, or Acquisition of Evidence Relating to the Violation of Criminal Statute

Even if this Court finds that the community caretaking exception applies to the home, it did not justify the warrantless search in this case because Officer McNown's purpose was investigatory in nature. This Court in *Cady* went to great lengths to hold that when an officer is acting as a community caretaker, he must be "totally divorced from detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." 413 U.S. at 441.

Here, Officer McNown was not acting as a community caretaker; he was investigating unusual circumstances involving Mr. David. Officer McNown became suspicious when Mr. David did not attend the Sunday service. R. at 2. His suspicions were aroused again when he was told by a church attendee that Mr. David was in a bar the previous night. R. at 2. When Officer McNown arrived at Mr. David's gated community, he spotted a black Cadillac SUV leaving the community which he knew to be a preferred vehicle for drug dealers in Golden State. R. at 2. Additionally, Officer McNown heard loud music as he approached the house and saw an R-rated movie playing on Mr. David's TV after looking in through a window. R. at 3. Officer McNown found the music and movie unusual due to Mr. David's profession. R. at 3. Furthermore, although Officer McNown did not see Mr. David when he entered the home, he did hear the loud music coming from upstairs. Ex. A, pg. 5. However, instead of looking for Mr. David, Officer McNown walked over to Mr. David's TV where he found the notebook with incriminating evidence. Officer David's behavior, before and during the warrantless entry of Mr. David's home demonstrate that he was not completely removed from investigating crime. Instead of being "totally divorced from detection, investigation, or acquisition of evidence" relating to a crime, Officer McNown entered Mr. David's home in order to detect, investigate, and acquire evidence of a crime.

II. THE JUDGMENT OF THE THIRTEENTH CIRCUIT COURT OF APPEAL SHOULD BE REVERSED BECAUSE MR. DAVID SUFFERED PREJUDICE AS A RESULT OF THE INEFFECTIVE ASSISTANCE OF COUNSEL DURING PRE-INDICTMENT PLEA NEGOTIATIONS

Mr. David suffered prejudice due to ineffective assistance of counsel during pre-indictment plea negotiations in violation of the Sixth Amendment. "In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence." U.S. Const. amend. VI. This guarantee attaches upon the initiation of adversary judicial proceedings. *Gouveia,* 467 U.S. at 189. The accused "requires the guiding hand of counsel at every step in the proceedings against

him." *Powell v. Alabama*, 287 U.S. 45, 69 (1932). Due to the inability of the accused to defend himself, counsel's role "is critical to the ability of the adversarial system to produce justice." *Strickland v. Washington*, 466 U.S. 668, 685 (1984). In order to give the Sixth Amendment meaning, the right to counsel requires the "effective assistance of counsel." *Missouri v. Frye*, 566 U.S. 134, 138 (2012).

The right to counsel guarantee applies to "critical stages" of the proceeding, before and during trial where the accused is confronted "by the procedural system, or by his expert adversary, or by both…in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *Gouveia*, 467 U.S. at 189. Plea negotiations, due to their prevalence and crucial role in our system of justice, require assistance of counsel during negotiations because "[a]nything less…might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Frye*, 566 U.S. at 144.

Plea negotiations are a critical stage of the proceeding, before and after indictment, because they present the concerns that the Sixth Amendment seeks to protect. As a result, Mr. David was entitled to the effective assistance of counsel when the prosecution made him a plea offer before seeking an indictment. Mr. David suffered prejudice as a result of counsel's deficient performance because counsel's failure to timely communicate a plea offer subjected Mr. David to a longer prison sentence. Therefore, Mr. David should be re-offered the prosecution's initial plea deal in order to remedy the Sixth Amendment violation.

A. The Purposes Served by the Sixth Amendment and this Court's Precedent Establish that the Right to Effective Assistance of Counsel Attaches to Pre-Indictment Plea Negotiations

The purposes of the Sixth Amendment and this Court's precedent establish that the right to the effective assistance of counsel is required for plea negotiations that occur before and after

indictment. The language of the Sixth Amendment demonstrates, that "[b]y its very terms, it becomes applicable only when the government's role shifts from investigation to accusation." *Moran v. Burbine*, 475 U.S. 412, 430 (1986). The guidance of counsel is crucial for an accused, because he is incapable of defending himself against "a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462-63 (1938). As a result, the accused "need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out" when it may affect his right to a fair trial. *United States v. Wade*, 388 U.S. 218, 224 (1967). Instead, he is guaranteed effective assistance of counsel at all "critical stages…of a criminal proceeding…in which defendants cannot be presumed to make critical decisions without counsel's advice." *Lafler v. Cooper*, 566 U.S. 156, 165 (2012).

The contention that a "bright-line" rule establishes that the right to counsel attaches only by way of "formal charge, preliminary hearing, indictment, information, or arraignment," is inconsistent with the text of the Sixth Amendment, the purposes it serves, and this Court's decisions construing the guarantee. *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972).

In *Kirby*, a plurality of the Court explained that despite contradicting views among the Justices concerning when the right to counsel attaches, its prior decisions all "involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way or formal charge, preliminary hearing, indictment, information, or arraignment." *Id*. The Court then explained the significance of this point in time:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is

> this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Kirby, 406 U.S. at 689-90. Several years later in *Gouveia*, this Court explained that the purposes served by the Sixth Amendment right to counsel and the plain language of the text, support the conclusion that attachment occurs once adversary judicial proceedings have been initiated. 467 U.S. at 188. The Court identified that the purpose of the right to counsel guarantee is to aid "the unaided layman at critical confrontations with his adversary." *Id*. at 189.

However, *Kirby* and *Gouveia* addressed the right to counsel in contexts that are entirely different and distinguishable from situations where the prosecution initiates plea negotiations with an accused prior to seeking a formal indictment. *Kirby* declined to adopt a "per se exclusionary rule" for testimony of pre-indictment lineups and *Gouveia* held that federal inmates were not entitled to the appointment of counsel solely because they were moved from the general prison population to administrative segregation. *Kirby*, 406 U.S. at 690; *Gouveia*, 467 U.S. at 185.

There is one critical distinction between the confrontations analyzed in those cases and the confrontation of the accused during pre-indictment plea negotiations – the existence of a subsequent trial to expose improprieties that occurred pre-indictment. In *Kirby* and *Gouveia*, the absence of counsel during pre-indictment confrontations with the government did not in any way compromise the right to trial. If the government decides to proceed with formal charges after a pre-indictment line-up or arrest, the accused is entitled to effective assistance of counsel at his trial. This provides the accused with the opportunity to expose any improprieties through pre-trial motions, and during trial through cross-examination of the government's witnesses and presentation of his own defense evidence and witnesses. Additionally, the accused who proceeds to trial will have the opportunity to appeal his conviction and sentence, but an accused who enters

into a plea agreement with the government will have much more limited access to postconviction relief. *See* Fed. R. Crim. P. 11(e) (Once the trial court imposes a sentence for a guilty or nolo contendere plea, the defendant may not withdraw the plea and the plea can only be set aside on direct appeal or collateral attack).

In the denial to extend the right to counsel to the pre-indictment procedures in these cases, this Court recognized the importance of alternative existing protections for the accused. *See Gouveia,* 467 U.S. at 192 (The Court specified the existing protections in the situation at hand, including statutes of limitations and the Due Process Clause); *See also Kirby*, 406 U.S. at 691-92 (The Court explained that pre-indictment lineups "are not beyond the reach of the Constitution," and are scrutinized under the Due Process Clause of the Fifth and Fourteenth Amendments).

More importantly, both decisions utilized "the initiation of adversary judicial proceedings" as the point of attachment for the right to counsel because of the situation that it creates. An accused confronted by the prosecution during pre-indictment plea negotiations is subjected to the same type of situation. Before a prosecutor files or recommends charges pursuant to a pre-charge plea agreement, he should include "the most serious readily provable charge" that has "an adequate factual basis," and makes it likely that an appropriate sentence will be imposed. U.S. DEP'T OF JUSTICE, FED. PRINCIPLES OF PROSECUTION, JUSTICE MANUAL, § 9-27.430 (2018).

A prosecutor's decision to "bring charges" via a pre-charge plea agreement for a charge that is provable, based on known facts, and likely to result in an appropriate sentence undoubtedly constitutes a commitment to prosecute the accused. A prosecutor's decision to request that an accused waive his constitutional right to a fair trial by pleading guilty to a crime that the prosecutor did not intend to pursue would be the epitome of injustice and contrary to clearly established law and ethical standards. Additionally, it is undoubted that the positions of the government and

accused become adverse when a prosecutor requests that the accused forego constitutional rights and agree to restrictions on his liberty.

Furthermore, an accused is confronted by the "prosecutorial forces of organized society" and the complexities of the criminal law during pre-indictment plea negotiations due to his lack of legal knowledge and the pressure to obtain a favorable outcome in the case. For example, an accused may be likely to accept a plea offer solely out of fear that he will receive a much harsher penalty if he exercises his constitutional right to a fair trial. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE ASSISTANCE, PLEA AND CHARGE BARGAINING – RESEARCH SUMMARY 2 (2011) ("Defendants tend to receive harsher sanctions if they exercise their right to a jury trial.").

Moreover, the accused's decision to accept a plea is "more than an admission of past conduct; it is the defendant's consent that judgment of conviction may be entered without a trial—a waiver of his right to trial before a jury or a judge." *Brady v. United States*, 397 U.S. 742, 748 (1970). When an accused decides to plead guilty and waive his constitutional right to a trial, his decision must be voluntary, knowing, and intelligent. *Id*. This decision requires counsel to make "difficult judgments" based on incomplete and unknown facts. *McMann v. Richardson*, 397 U.S. 759, 769 (1970). Thus, a decision by the accused to plead guilty is often "impossible without the assistance of an attorney." *Brady*, 397 U.S. at n.6.

Additionally, in neither *Kirby* nor *Gouveia* did the Court hold that a formal charge, preliminary hearing, indictment, information, or arraignment, were the *only* situations where the right to counsel may attach. 406 U.S. at 689; 467 U.S. at 185. The Court's explanation of disagreement among the Justices as to attachment in specific contexts followed by specific instances where the Court agreed that the right to counsel had attached, is inconsistent with establishment of a bright-line rule. Instead, it demonstrates that the Court merely listed examples,

and that the rule from *Kirby* and *Gouveia* is that the right to counsel attaches in other similar contexts that constitute the initiation of adversary judicial proceedings.

A finding that the Sixth Amendment right to counsel extends to pre-indictment plea negotiations is warranted because of their prevalence and the critical role they play in our criminal justice system. Plea bargaining cannot be classified as "some adjunct to the criminal justice system; it *is* the criminal justice system." *Frye*, 566 U.S. at 143. More importantly, this Court has repeatedly recognized "that the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010); *Lafler*, 566 U.S. at 177; *Frye*, 566 U.S. at 141.

The number of cases disposed of through plea bargaining has continually increased and has now reached an all-time high. *See* William T. Pizzi, *The Effects of the "Vanishing Trial" on Our Incarceration Rate*, 28 FED. SENT'G. REP. 330, 331 (2016) ("In 1974, 80% of our convictions came from plea bargaining; now the percentage is much higher – close to 96 or 97%.").

A conclusion that the Sixth Amendment right to counsel does not extend to plea negotiations that occur prior to federal indictment would establish a dangerous precedent by allowing the prosecution to circumvent established protections guaranteed by the Constitution and this Court's jurisprudence. It would further enable the prosecution to delay seeking formal charges, as it did in this case, in order to initiate pre-indictment plea negotiations with an accused deprived of the Sixth Amendment right to effective assistance of counsel. R. at 4. In today's society, "the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant." *Frye*, 566 U.S. at 144. Without counsel, the accused is an "unaided layman at critical confrontations with his adversary." *United States v. Ash*, 413 U.S. 300, 307 (1973). Plea negotiations, both before and after indictment, "might well settle the accused's fate."

Gouveia, 467 U.S. at 189. Therefore, "[i]f a plea bargain is offered, a defendant has the right to effective assistance of counsel in considering whether to accept it." *Lafler*, 566 U.S. at 168.

Consistent with the purposes of the Sixth Amendment and this Court's precedent, several lower courts have recognized that the right counsel may attach prior to indictment. *See Roberts v. State of Me.*, 48 F.3d 1287, 1291 (1st Cir. 1995) ("We recognize the possibility that the right to counsel might conceivably attach before an indictment or arraignment, in circumstances where the 'government had crossed the constitutionally significant divide from fact-finder to adversary.'"); *Chrisco v. Shafran*, 507 F. Supp. 1312, 1319 (D. Del. 1981) ("Recognizing the important role played by counsel in plea bargaining, I conclude that there can be factual contexts in which the sixth amendment right to counsel attaches prior to the time of formal charges have been filed.").

B. <u>Mr. David Suffered Prejudice Due to Counsel's Deficient Performance</u>

The right to effective assistance of counsel is violated where the defense is prejudiced by counsel's deficient performance. *Strickland*, 466 U.S. at 687. Counsel's performance is deficient where he allows a favorable plea offer to expire without communicating it to the defendant. *Frye*, 566 U.S. at 145. To establish prejudice, the defendant must demonstrate that, had he received effective assistance of counsel, there is a reasonable probability that: 1) the outcome of the proceeding would have been "more favorable," because the plea offered a lesser sentence or a lesser charge; 2) he would have accepted the plea offer; and 3) the plea would not have been refused by the trial court or withdrawn by the prosecution. *Id*. at 147.

In this case, it is undisputed that Mr. Long's performance was deficient when he failed to timely communicate the prosecution's plea offer to Mr. David. R. at 4. Additionally, Mr. David has demonstrated that he suffered prejudice as a result of Mr. Long's deficient performance. First, Mr. David has demonstrated a reasonable probability that the outcome of the case would have been

more favorable to him because the prosecution offered him a sentence of one-year in prison, and after being convicted at trial Mr. David received the ten-year minimum mandatory sentence. R. at 4, 14. *See id*. at 147 ("Any amount of additional jail time has Sixth Amendment significance.").

Additionally, Mr. David was angry and immediately fired Mr. Long upon learning of the lapsed plea offer. Ex. B, pg.4. Mr. David had not yet been taken into custody when he told DEA Agent Malaska that he would not give up his suppliers, and Mr. David had never before been arrested. R. at 3; Ex. B, pg. 2. However, once in custody, he told Mr. Long that he was scared of going to jail and being harmed. Ex. B, pg. 2. Furthermore, prior to his trial, Mr. David testified that he would have accepted the plea offer and given up his suppliers while the offer was open and was willing to enter into the same plea agreement on the date of the pre-trial hearing because he would do "anything to avoid the risk of trial." Ex. C, pg. 3.

Finally, because the overwhelming majority of federal convictions are secured through plea negotiations, there is a reasonable probability that the prosecution and the trial court would have proceeded forward with the initial plea deal offered to Mr. David. *See* U.S. DEP'T OF JUSTICE, BUREAU OF JUSTICE STATISTICS, OFFICE OF JUSTICE PROGRAM, FED. JUSTICE STATISTICS, 2014-STATISTICAL TABLES, TABLE 4.2, 17 (2017) (In 2014, 97% of all federal convictions were obtained through plea negotiations).

C. Mr. David Should be Re-Offered the Initial Plea Deal as a Remedy for the Sixth Amendment Violation

The appropriate remedy is to require the prosecution to re-offer Mr. David a plea bargain with a one-year prison sentence. The appropriate remedy for a Sixth Amendment violation should "neutralize the taint" of the constitutional violation. *Lafler*, 566 U.S. at 170. Where a mandatory sentence limits the trial court's ability to resentence the defendant consistent with the terms of the initial plea offer, "the proper exercise of discretion to remedy the constitutional injury may be to

require the prosecution to reoffer the plea proposal." *Id*. at 171. The trial court can then set aside the conviction and accept the plea or leave the conviction intact. *Id*.

Although the information sought by the prosecution in the initial plea offer may no longer be as valuable, this remedy does not "infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 364 (1981). The trial court may consider information that was discovered *after* the constitutional violation when it decides to either vacate Mr. David's conviction and accept the new plea offer or leave his conviction and sentence intact. *See Lafler*, 566 U.S. at 171-72. As a result, neither the prosecution nor Mr. David can be entirely restored to the positions they were in prior to the constitutional violation. This will save the prosecution the cost of conducting a new trial, and it will give Mr. David the possibility of receiving the lesser sentence that was offered by the prosecution, but not timely communicated to him, due to the ineffective assistance of counsel. *See id*. at 172 ("The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding a remedy that does not require the prosecution to incur the expense of conducting a new trial.").

CONCLUSION

For the reasons stated above, Mr. David respectfully requests this Honorable Court reverse the Judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,

_____

Team # P17