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 THE PETITIONER

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STATEMENT OF THE ISSUES

I. Does the community caretaker doctrine extend to warrantless searches of the home?

II. Does a defendant have a Sixth Amendment right to effective assistance of counsel before deciding whether to plead guilty *vel non* during a plea negotiation even though the government has not yet filed charges?

STATEMENT OF THE CASE

I. Facts

On January 15, 2017, Officer James McNown arrived at Lakeshow Community Revivalist Church to attend Minister Chad David's 7:00 AM Sunday service. Ex. A at 2. McNown had been a member of the church for four months and attended every Sunday service. Ex. A at 2. David was not there that day. Ex. A. at 2. McNown found David's absence odd. Ex. A at 2. McNown noticed that a fellow parishioner, Julianne Alvarado, was nervous, sweaty and shaky. Ex. A at 2. She told McNown that she was concerned about David's well-being. Ex. A. at 2. That morning, McNown was on patrol duty and went to church dressed in his police uniform. Ex. A. at 3. He decided to investigate David's absence. Ex. A at 2–3. Alvarado gave McNown David's address. Ex. A at 3.

McNown did not know why David was absent, but he bought him tea. *See* R. at 2. He drove to and entered David's gated community. Ex. A at 3. He was surprised that David lived in such a nice community because he expected a minister to live more modestly. Ex. A at 3. As he entered David's community, McNown noticed a black Cadillac SUV with Golden State license plates. Ex. A at 3–4. This raised his suspicions, as he believed that Golden State was a key source for drugs coming into Lakeshow. Ex. A at 4. He also believed that drug dealers frequently drove that exact model of car. Ex. A at 4.

When McNown arrived at David's home, he could hear scream-o music coming from inside. Ex. A at 4. He peeked inside David's window and saw *The Wolf of Wall Street* playing on a television. Ex. A at 4. McNown had never been to David's home, and the record does not reflect that they interacted outside of church. *See* Ex. A at 1–3. Further, McNown had been a member of the church for four months. Ex. A at 2. Still, he concluded that the music and the movie were odd

for David. Ex. A at 4-5. McNown thought that someone else may have been in the house. Ex. A at 7. But he did not believe that David's home had been burglarized. Ex. A at 7.

McNown first knocked on the front door. Ex. A at 5. When no one answered, he tried and failed to open the locked door. Ex. A at 5. Because he could not enter through the front door, he went around the home and entered through the unlocked back door without knocking. Ex. A at 5. At no point did McNown believe that there was an emergency in David's home that required his attention. Ex. A at 7. He noted that David's car was in the driveway, and everything appeared normal. R. at 2. Therefore, according to McNown, he would have had time to get a search warrant to enter David's home. Ex. A 6–7. McNown had entered a home without a warrant before. Ex. A at 7. But in those instances, McNown was pursuing a fleeing suspect who had fled into someone's house. Ex. A at 7.

Once inside David's home, McNown turned off the movie and found a notebook. Ex. A at 5. Alvardo's name was written in the notebook with the "incriminating" words "ounce" and "paid" next to her name. R at 3; Ex. A at 5. Alvarado is the church member whom McNown had seen earlier that day and who had been nervous, shaky and sweaty. Ex. A at 2. Upon finding the notebook, McNown became concerned. Ex. A at 5. McNown expanded his search to the second floor of David's home. Ex. A at 5. Once upstairs, McNown came to a closed door, opened it, and found David bagging what McNown believed to be cocaine. Ex. A at 6. McNown immediately arrested David and called a federal drug enforcement official because he did not know how to handle the quantity of narcotics that David allegedly had. Ex. A at 6. The federal official arrested David and asked him to reveal his suppliers. R. at 3. David expressed reluctance at exposing their identities. R. at 3.

After his arrest, David hired Keegan Long, the only defense attorney he knew. Ex. C at 2. Long was a church member of Lakeshow. Ex. B at 2. Through David's interactions with Long at church, he knew that Long drank alcohol. Ex. C at 4. But he never believed that Long's drinking interfered with his work. Ex. C at 4. The government emailed a plea offer to Long. Ex. B at 1–2. If David had provided information about his suppliers and pleaded guilty, he would have received a one-year prison sentence instead of a ten-year sentence. R. at 4. The offer was valid for 36 hours. Ex. D. Long was drunk when he received the email. Ex. B at 2. Drinking impaired his memory of the entire week—the same week that his only son was born. Ex. B. at 3. When Long read the email, he thought it said that the offer was valid for 36 days, not 36 hours. Ex. B at 2. Long also ignored a phone call from the prosecutor who left a voice mail reminding Long of the offer's expiration date. Ex. B at 3.

The offer expired. Ex. B at 3. The government charged David the next morning after the offer expired. R. at 4. David fired Long. Ex. B at 4. He hired a new attorney who tried to convince the prosecutor to re-offer the plea deal. Ex. E. The prosecutor no longer believed that David could provide valuable information and therefore refused to re-offer the deal. Ex. E. David was found guilty at trial and sentenced to 10 years in prison. R. at 4. He filed a motion to suppress the evidence collected on the date of his initial arrest because, David alleged, McNown had entered his home and searched without a warrant in violation of the Fourth Amendment. R. at 5. He also filed a motion to re-offer the plea deal because, according to David, Long's assistance was ineffective, and he did not enjoy his Sixth Amendment right to counsel. R. at 5. The district court denied both motions and David brought an appeal. R. at 1, 14.

II. Proceedings Below

The Thirteenth Circuit affirmed the district court's holding. R. at 14. As for the motion to suppress the evidence, the court held that the community caretaker doctrine applied. R. at 17. Because the court held that the officer was acting as a community caretaker, the search was constitutional and the motion to suppress the evidence was denied. R. at 17. As for the motion to re-offer the plea, the court held that this Court established a "bright-line rule" that the Sixth Amendment's right to counsel does not "attach" until adversarial judicial proceedings have begun. R. at 18. Plea negotiations, the court held, did not amount to adversarial judicial proceedings because the prosecutor had not yet filed charges. *See* R. at 17–18. Therefore, the court denied the motion. R. at 18.

SUMMARY OF ARGUMENT

I. The community caretaker doctrine does not extend to warrantless searches of the home. Further, the doctrine does not extend to searches where a police officer suspects criminal activity. McNown entered David's home without a warrant. Before he arrived, McNown only knew that David was not at church and decided to go to his home in uniform to investigate his absence. When he entered the neighborhood he saw a vehicle associated with drug dealers. When he entered David's backdoor without knocking and without a search warrant, he found a notebook with the words "ounces" and "paid," raising his concerns that something was amiss at David's home. McNown expanded his search to the second floor of the home, not because he was "community caretaking," but, McNown alleged, because music was playing. McNown's intent in violating David's Fourth Amendment rights shifted to investigating a crime when he entered a home where, according to McNown, everything appeared normal except for loud music and a movie he deemed inappropriate for a minister. In upholding the district court's denial of David's motion to suppress

evidence, the Thirteenth Circuit failed to consider the core of the Fourth Amendment—to protect one's *home* against governmental intrusion. McNown subjected David to such an intrusion during his warrantless search of David's home.

II. A defendant has a Sixth Amendment right to effective counsel during pre-indictment plea negotiations. The Sixth Amendment aims to protect an individual once his interactions with the government become adversarial. Indeed, this Court has held that the right to counsel attaches only once the government has begun adversarial judicial proceedings. Federal courts have understood this "bright-line rule" to mean that the right to counsel attaches, at the earliest, when charges have been filed. But this Court's precedent has only considered a pre-indictment right to counsel when the government was still in its investigatory stage. When a prosecutor offers a plea deal, she has crossed a constitutionally significant line. The prosecutor is no longer a fact-finder, but an adversary. Further, a formalistic rule that places great importance on the filing of charges ignores a reality of the criminal justice system—that federal prosecutors secure an overwhelming majority of convictions through plea bargains. A formalist rule would allow the government to arrest defendants, detain them and then offer only two choices—a shorter or longer prison sentence—all without defense counsel present. This could not have been the Framers' intent.

STANDARD OF REVIEW

A claim of an unreasonable search under the Fourth Amendment is subject to *de novo* review on appeal. *See Ornelas v. United States*, 517 U.S. 690, 691 (1996). A claim of ineffective assistance of counsel is subject to *de novo* review on appeal. *See Lafler v. Cooper*, 566 U.S. 156, 162-63 (2012).

ARGUMENT

I. McNown's warrantless search of David's home violated the Fourth Amendment, and David's motion to suppress evidence should therefore be granted.

The core of the Fourth Amendment is the right to be free from unreasonable governmental searches in one's own home. *See Silverman v. United States*, 365 U.S. 505, 511 (1961) (citations omitted). With few exceptions, warrantless searches of homes are unreasonable and therefore unconstitutional. *Kyllo v. United States*, 533 U.S. 27, 31 (2001). The Fourth Amendment's protection of the home is so extensive that it even prevents non-physical governmental intrusions into the home. *See id.* at 40.

The community caretaking doctrine is no exception to this rule. *See Cady v. Dombrowski*, 413 U.S. 433, 439–42 (1973); *South Dakota v. Opperman*, 428 U.S. 364, 367–70 (1976). The doctrine is a recognition that law enforcement officers routinely perform functions that are "totally divorced" from criminal investigations. *Cady*, 413 U.S. at 441. But given the heightened privacy expectations surrounding the home, the community caretaker doctrine cannot apply to warrantless searches of homes. *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010).

A. The community caretaker warrant exception applies only to vehicles.

This Court has expressly limited the community caretaking doctrine to vehicles. *See Cady*, 413 U.S. at 441. Once a vehicle comes into police custody, the police may exercise community caretaking functions, such as securing the vehicle and protecting its contents. *See Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (citations omitted). Further, vehicles have an inherently public nature that reduces the expectation of privacy in a car. *See Opperman*, 428 U.S. at 367. Automobiles travel on public roads with their occupants and contents in plain view. *Cardwell v. Lewis*, 417 U.S. 583, 590-91 (1974) (citations omitted). Cars are inherently mobile, making rigorous enforcement of the Fourth Amendment's warrant requirement nearly impossible. *Id.*

(citations omitted). In addition, cars and their drivers are subject to pervasive governmental regulation, including inspection and licensing requirements *Id.* at 368. Every state requires vehicles to be registered and drivers to be licensed. *Cady*, 413 U.S. at 441. People also interact with police officers while in their cars more often than while in their homes. *See Opperman*, 428 U.S. at 368. Police routinely stop and inspect vehicles for a number of traffic violations. *See id*. Cars can also pose public safety hazards, and police officers may seize vehicles in these situations. *Id.* at 368-69.

Public safety is key. *See Cady*, 413 U.S. at 442-43 (emphasis added). In developing the community caretaking doctrine, this Court noted that officers frequently search *vehicles* when matters of public safety are at issue. *See id*. at 441 (emphasis added). In those circumstances, the officer does not need a warrant. *See id*. at 448. For example, in *Cady*, a police officer believed that a fellow officer had left his service revolver in an impounded car. *Id.* at 437. The officer searched the car in an attempt to retrieve the gun and prevent it from being stolen by vandals. *Id.* at 448. This Court held that the search was both standard police procedure and a matter of basic public safety. *Id.* at 442-43. Thus, the vehicle search was a constitutional community caretaking function. *Id.* at 447–48.

That the community caretaker doctrine applies only to vehicles is well settled in federal jurisprudence. *See Ray*, 626 F.3d at 177; *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994); *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993); *United States v. Pichany*, 687 F.2d 204, 208 (7th Cir. 1982). In *Bute*, a police officer became suspicious when he noticed an open garage door. *Bute*, 43 F.3d at 532–33. He shined his lights in the garage and, though he saw neither people nor signs of forced entry, decided to enter. *Id.* at 533. There were three doors in the garage, and the officer opened each. *Id.* When he opened the third door, he discovered a methamphetamine

lab. *Id.* The owners of the lab were convicted, but the conviction was overturned on appeal. *Id.* at 540. The court held that "the community caretaking exception to the warrant requirement is applicable *only* in cases involving automobile searches." *Id.* at 535 (emphasis added).

In *Erickson*, a police officer responded to a suspected burglary. *Erickson*, 991 F.2d at 530. The officer learned that the suspected burglars had gone through the backyard of a neighboring home, so he peeked through the neighboring home's glass door. *Id.* The officer did not see any signs of forced entry, but he continued his investigation by pulling back a sheet that served as a cover for an open basement window. *Id.* He saw numerous marijuana plants inside the basement and arrested the homeowner. *Id.* The court rejected the argument that the officer was performing a community caretaker function, holding that "*Cady* clearly turned on the 'constitutional difference' between searching a house and searching an automobile." *Id.* at 532 (citing *Cady*, 413 U.S. at 439).

Thus, McNown's search was unconstitutional. McNown was not performing a community caretaker function when he searched David's home without a warrant. McNown said that he visited David's home out of concern. Ex. A at 7. But in visiting David's home, McNown was not "taking care" of the community. Unlike the officers in *Erickson* or *Bute*, McNown's opportunity to enter Long's home was a result of his affirmative acts. *See* Ex. A 1–5. In *Bute*, an officer on patrol became suspicious when he *happened upon* an open garage door. *Bute*, 43 F.3d at 532–33. In *Erickson*, the officer was investigating a burglary *after receiving a call* that the suspects were in the area. *Erickson*, 991 F.2d at 530. But McNown retrieved David's address on his own. Ex. A at 3. He drove to his *gated community* where he necessarily passed through gates. Ex. A at 4. Though he thought everything appeared normal at David's home, McNown got out of his car and peered

through David's windows. Ex. A at 4. It was not until this point that McNown found it necessary to enter David's home. Ex. A at 5.

Further, this case exemplifies why for purposes of the Fourth Amendment, the home is different than a car. *See Opperman*, 428 U.S. at 382. There are parishioners who do not know where David lives or that he lives in a nice neighborhood. *See* Ex. A at 3. He lives in a gated community. Ex. A at 3. His front door was locked. Ex. A at 5. And the door to his room on the second floor of the home was closed. Ex. A at 6. David has shown a clear intent to maintain privacy despite his career as a minister. Ex. C at 2. Thus, in denying David's motion to suppress evidence, the Thirteenth Circuit failed to consider the "very core" of the Fourth Amendment.

B. McNown's warrantless search was not divorced from a criminal investigation.

For a search to qualify as community caretaking, it must be *completely* separate from a criminal investigation. *Cady*, 413 U.S. at 441 (emphasis added). Whether a search is unreasonable under the Fourth Amendment is determined by the *function* that the officer is performing. *See Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009) (emphasis added). Where an officer's function is that of a criminal investigator, a warrantless search is unreasonable. *See Cady*, 413 U.S. at 441.

This Court's community caretaker cases have concerned searches that were completely unrelated to criminal investigations and merely involved securing property in impounded vehicles. *Cady*, 413 U.S. at 437; *Opperman*, 428 U.S. at 366. This Court's decision in *Opperman* illustrates the limited scope of the community caretaker doctrine. *See Opperman*, 428 U.S. at 366. In *Opperman*, police saw a watch and other items on the dashboard and seats of an impounded car. *Opperman*, 428 U.S. at 366. As was standard practice, an officer inventoried the items. *Id.* This Court noted that police routinely inventory an automobile's contents to both protect the owner's

property and to protect themselves from claims about lost or stolen property. *Id* at 369. (citations omitted). Because this standard procedure had no connection to criminal investigations, this Court held that the search was a constitutional exercise of law enforcement's community caretaker functions. *See id.* at 375–76.

The Seventh Circuit properly declined to apply the community caretaking doctrine to a burglary investigation. *Pichany*, 687 F.2d at 205. In *Pichany*, the police responded to a reported burglary at an industrial park and entered an unlocked warehouse. *Id.* at 205–06. Once inside, they pulled back a curtain and discovered several stolen tractors. *Id.* at 206. Because the police had intended to investigate criminal activity, the court held that the community caretaker doctrine did not apply and suppressed the evidence. *Id.* at 207–09.

Here, McNown's search was related to criminal detection and investigation. *See* Ex. A at 5. McNown testified that when he entered David's neighborhood, he noticed an "unusual" black Cadillac SUV leaving the community with license plates from Golden State. Ex. A at 3–4. This raised McNown's suspicions of criminal activity, because he knew that type of car was popular among drug dealers. Ex. A at 4. Furthermore, McNown believed there had been "an increase in the flow of drugs from Golden State in Lakeshow in recent months." Ex. A at 4. Upon entering David's home without a warrant, McNown quickly found and read a notebook. Ex. A at 5. He saw the name "Julianne Alvarado" and the words "ounce" and "paid" written in the notebook. Ex. A at 5. His suspicion piqued, McNown continued his warrantless search, climbing the stairs to the second floor. Ex. A at 5–6.

Taking all of McNown's actions and statements together, it is reasonable to conclude that McNown's motives before entering the home were influenced by a motive to investigate crime. R. at 20. Because McNown's search was not *totally* divorced from a criminal investigation, it was not

protected by the community caretaker doctrine and was therefore unconstitutional. Thus, this Court should reverse the lower court's holding that the community caretaker doctrine applies in the instant case.

C. Even if the community caretaker warrant exception applies to home searches, it would not apply to McNown's search because there was no public nuisance or public safety risk.

Some federal circuit courts have extended the community caretaker doctrine to homes despite this Court's restrictive holding in *Cady* limiting the doctrine to vehicle searches. *See, e.g.*, *United States v. Rohrig*, 98 F.3d 1506, 1509 (6th Cir. 1996); *United States v. Smith*, 820 F.3d 356, 361–62 (8th Cir. 2016). But in those cases, the law enforcement officer was responding to a public nuisance or safety emergency. *See, e.g., Rohrig*, 98 F.3d at 1522; *Smith*, 820 F.3d at 361.

For example, in *Rohrig* police responded to a noise complaint regarding music coming from the defendant's home. *Rohrig*, 98 F.3d at 1509. The music was so loud that the police could hear it from a block away. *Id.* The police repeatedly banged on the defendant's door and tapped on all of his first-floor windows, but nobody answered. *Id.* Finally, the police entered the home to turn off the music. *Id.* The court held that the community caretaker doctrine applied because the noise was subjecting "the community to a continuing and noxious disturbance for an extended period of time without serving any apparent purpose." *Id.* at 1522.

The Eighth Circuit has held that police can carry out warrantless home searches as community caretakers only when they reasonably believe there is a safety risk which requires the attention of a first responder. *See Smith*, 820 F.3d at 362. In *Smith*, the police responded to a well-being check on a woman reported to be held against her will by her armed and dangerous ex-boyfriend. *Id.* at 358. The police knew that the woman had been at the ex-boyfriend's house earlier in the day. *Id.* When the ex-boyfriend refused to let the police enter the home, the police arrested

him on his outstanding warrants. *Id.* at 358–59. Despite not having a search warrant, the police entered his home and rescued the woman. *Id.* at 359.

Here, McNown did not even attempt to justify his warrantless search as either preventing "a continuing and noxious disturbance" or as halting an emergency that he believed required his immediate attention. *See* Ex. A at 7. Although David was playing music, the record does not reflect that there had been noise complaints. Ex. A at 4. McNown could not even hear the music until he got to the front door. Ex. A at 4. McNown expressly stated that he did not believe there was an emergency and that he had time to retrieve a warrant. Ex. A at 6–7.

Therefore, even if this Court expanded its restrictive holding in *Cady*, McNown's warrantless search was unconstitutional. There was no reason for him to enter David's home. Though McNown portrayed himself as a friend checking on his minister, he did not know where David lived. *See* Ex. A at 3. He had only been a member of the church for four months. Ex. A at 2. Furthermore, he appeared at David's home as an officer in uniform and on duty. Ex. A at 4.

***

The Court should grant David's motion to suppress evidence and find that McNown's search was unreasonable under the Fourth Amendment. McNown was not exercising a caretaking function. He let himself into David's home, found incriminating evidence and arrested David. He was enforcing the criminal law.

II. David's motion to re-offer the plea deal should be granted because the Sixth Amendment right to effective counsel "attaches" during a pre-indictment plea negotiation.

The Sixth Amendment right to effective counsel extends to plea negotiations. *See Hill v. Lockhart*, 474 U.S. 668, 687-92 (1984). A criminal defense attorney must promptly communicate all plea offers to her client. Model Rules of Prof'l. Conduct r. 1.4 cmt. 2 (Am. Bar Ass'n 2018); *see Missouri v. Frye*, 566 U.S. 134, 145 (2012). When defense counsel fails to communicate an

offer and allows it to expire before allowing the defendant to consider it, the attorney does not render the effective assistance that the Constitution requires. *Frye*, 566 U.S. at 145. If the attorney's failure to communicate affects the outcome of the plea process, the attorney's behavior is unconstitutionally prejudicial to the defense of her client. *Lafler v. Cooper*, 566 U.S. 156, 163 (2012). And the client will have a successful claim under the Sixth Amendment for ineffective assistance of counsel. *See Lafler*, 566 U.S. at 174.

There is no question that Long did not render the effective assistance of counsel that the Constitution requires. David hired Long as his criminal defense attorney—the only one whom he knew. R. at 3. As David's attorney, Long had a duty to promptly communicate the plea offer from the prosecutor to David. *Cf. Frye*, 566 U.S. at 145. But when he received the offer, Long was drinking too much and was not "really focused." Ex. B. He misread the offer and believed David had more than a month to respond as opposed to a day and a half. Ex. B. Therefore, he did not communicate the offer to David in a timely fashion. Ex. B. Though drinking could reasonably lead an attorney to misread an offer's expiration date, Long should have *promptly* notified David of the offer regardless of when it expired.

The outcome of the plea process would have been different absent Long's error. Although David expressed reluctance to reveal the identity of his suppliers, he was never presented with the opportunity to respond to a plea deal. R. at 3–4. Further, upon learning of the plea deal, David, through his new attorney, notified the prosecutor that he wanted to take the plea deal. Ex. E.

Despite Long's constitutionally deficient conduct, the Thirteenth Circuit held that David was not entitled to a Sixth Amendment claim. R. at 17-18. According to the lower court, this Court announced a bright-line rule that the right to effective assistance of counsel does not attach before a prosecutor files charges. R. at 17-18. In this regard, the court was wrong.

A. The Sixth Amendment's right to effective counsel attaches during pre-indictment plea negotiations when the prosecutor has become an adversary.

Whether a defendant is entitled to a Sixth Amendment right to effective assistance of counsel depends on the "nature of the confrontation" between the government and the criminal defendant. *United States v. Moody*, 206 F.3d 609, 613 (6th Cir. 2000). When the government is still in its investigatory stage, the Sixth Amendment right does not yet "attach." *Moran v. Burbine*, 475 U.S. 412, 430 (1986). But when the government's role transitions from fact-finder to adversary, the accused has a constitutional right to effective assistance of counsel. *See id*. (holding that the right is only applicable when the government's role shifts to "accusation").

During plea negotiations, the government has become an adversary. *Cf. McMann v. Richardson*, 397 U.S. 759, 771 (1970). When a federal prosecutor offers a plea deal, the government has to, in effect, present a case. *See* JM § 9-27.430 (2018). The prosecutor can only bring charges for which there is a factual basis. *See id*. Thus, upon presenting a plea offer, a prosecutor has committed to prosecute, thereby crossing the constitutionally significant line into her role as adversary. *Cf. United States v. Gouveia*, 467 U.S. 180, 189 (1984).

Functionally, a plea bargain operates no differently than an arraignment, and it is undisputed that a defendant has a right to effective assistance of counsel during an arraignment. *See Kirby v. Illinois*, 406 U.S. 682, 689; *Michigan v. Jackson*, 475 U.S. 625, 629 (1986). At both phases of the criminal justice process, a defendant has to decide whether to plead guilty. *Arraignment, Plea Bargain, Black's Law Dictionary* (10th ed. 2014). If a defendant enters a guilty plea, he has to also acknowledge that his plea is voluntary in both instances. *See Brady v. United States*, 397 U.S. 742, 747 n.4 (1970); JM § 9-27.440. A defendant is aware of the charge and possible sentence against him in both instances. *See, e.g., Jones v. United States*, 526 U.S. 227, 230-31 (1999); JM § 9-27.430. When deciding whether to accept a plea, a defendant is faced with

the "prosecutorial forces of organized society"—the point at which the Sixth Amendment's right to counsel is critical. *See United States v. Sikora*, 635 F.2d 1175, 1182 (6th Cir. 2000) (Wiseman, J., dissenting).

Therefore, this Court has extended the right to effective assistance of counsel to plea negotiations. *See Frye*, 162 U.S. at 144. In *Frye*, the defendant received two plea offers from the prosecutor after being charged with a felony. *Id*. at 138-39. The plea deal offered the choice between a more serious charge with a longer sentence and a less serious charge with a shorter sentence. *Id*. His attorney failed to notify the defendant of the plea deal, and he received the more serious charge and longer sentence. *Id*. at 139-40. Thus, this Court held that the attorney's behavior fell below the standards of objectively reasonable conduct. *See id*. at 145.

Here, when the prosecutor sent David's attorney a formal offer, she initiated the adversarial process. *See* R. at. 4. Had David been given the opportunity to consider the offer, he would have been confronted with both "the intricacies of the law and the advocacy of the public prosecutor, " *United States v. Ash*, 413 U.S. 300, 309 (1973). Similarly to an arraignment, the plea deal would have required David to (1) plead to a criminal charge that (2) carried a certain sentence. R. at. 4. The only things missing were the judge and the courtroom. Thus, David should have been given, at least, the *opportunity* to have competent advice on whether he should accept the guilty plea.

1. Once the prosecutor offers a plea bargain, the investigatory stage ends, and the Sixth Amendment right to effective assistance of counsel attaches.

When the government has not commenced "adversarial judicial proceedings," the defendant is not entitled to Sixth Amendment rights to effective assistance of counsel. *See Kirby*, 406 U.S. at 688 (1972). For example, the Court has held that a defendant who was indicted for burglary after a witness identified him during a line-up was not entitled to Sixth Amendment rights.

Id. 684-86. The government was still in its investigative stage and had not yet solidified its position as the defendant's adversary. *See id*. at 689-90.

Notably, the Court has only held this position in cases where a prosecutor *has not yet confronted the defendant*. *See e.g.*, *Moran*, 475 U.S. at 430 (emphasis added). In *Moran*, the defendant did not have a right to effective assistance of counsel during a police interrogation. *Moran*, 475 at 428-29. But the defendant had not yet been confronted by a prosecutor. *See id*. at 417-18. In *Gouveia*, the Court refused to extend the right to inmates held in administrative detention on charges committed while in prison. *Gouveia*, 467 U.S. at 192. But they had interacted only with prison officials and not a prosecutor. *See id*. at 183. Similarly, in *Kirby*, the Court refused to extend the right to a defendant who had been indicted after being identified in a police lineup. *Kirby*, 406 U.S. at 690. The defendant had only faced a police investigation and was not confronted by a prosecutor. *See id*.

The Sixth Circuit failed to note this distinction in *Moody*. *See* 206 F.3d at 614. There, the defendant was arrested after law enforcement officers seized drugs from his home. *Id*. at 611. The prosecutor offered a plea in exchange for information on other criminals. *Id*. The defendant's attorney advised him to turn down the offer. *Id*. *He was caught with drugs* after police officers executed a search warrant. *Id*. (emphasis added). The government's investigation was complete. *See id*. The court denied his Sixth Amendment claim. *See id.* at 613. Regarding only the words "adversarial judicial proceedings," the court failed to note the distinction in this Court's precedents where the Sixth Amendment right hinged on whether the government had solidified its position as an adversary, not a formalist distinction based on the filing of documents. *See id*.

Here, the government had completed its investigation when the prosecutor offered David the plea deal. *See* R. at 3. Similarly to the defendant in *Moody*, David was caught red-handed with

drugs, and no further investigation was necessary to charge David with a crime. *See* R. at 3. The government did not need to interrogate him or submit him to any other investigative procedures. *See* R. at 3. But unlike the defendants in *Moran*, *Gouveia* and *Kirby*, David was confronted by the prosecutor through her communication of a plea deal to David's attorney. *See* R. at 4. David's attorney received an exploding offer. *See* R. at 4. David would have to plead guilty or risk going to trial and receiving a severe punishment. R. at 4. This was a *confrontation*. *See* R. at. 4. The full weight of the "prosecutorial forces" of society were against David, and thus, he was entitled to the competent advice of counsel. Further, that the prosecutor was certain to file charges—and thus, needed no further investigation—is evidenced by her filing charges against David the morning after the offer expired. *See* R. at. 4.

B. With regard to plea bargains, the filing of charges is of no constitutional significance.

A distinction between pre and post-indictment plea deals is constitutionally untenable. *But cf. Turner v. United States*, 848 F.3d 767, 773 (6th Cir. 2017). Federal prosecutors, when offering plea deals, must follow the exact same instructions whether the plea deal is offered before charges are brought or afterward. *See* JM § 9-27.330. Further, plea bargains account for 97 percent of federal convictions. *See Lafler*, 566 U.S. at 170. If federal prosecutors could engage in plea negotiations without ever bringing charges, they could arrest defendants, hold them in detention and engage in negotiations that decide whether the defendants plead guilty and accept responsibility for criminal charges—all without a defense attorney present. *Cf. Ash*, 413 U.S. at 310 (holding that the right extends to pretrial proceedings where the defendant is confronted by the procedural system, his expert adversary or both). As Justice Kennedy noted in *Frye*, plea bargaining is no adjunct to the criminal justice system; it *is* the criminal justice system. *Frye*, 566

U.S. at 143 (emphasis supplied). The Framers could not have intended that prosecutors would have the latitude to simply skirt the Sixth Amendment by offering a plea deal before filing charges.

The Third Circuit correctly disregarded this formalist distinction in *Matteo* when it held that a defendant arrested and held in jail for more than a week prior to the filing of charges was entitled to the right to effective assistance of counsel. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999). Based on this Court's holding in *Gouveia*, the court noted that the right may attach at stages where the accused is "confronted, just as at trial, by the procedural system, or by his expert adversary or both." *Matteo*, 171 F.3d at 892 (quoting *Gouveia*, 467 U.S. at 189) (citations omitted).

The Sixth Amendment's purpose is to protect those in David's shoes when the full weight of the society's "prosecutorial forces" are against him. Here, David is confronted, as he would be at trial, by his expert adversary. *See* Ex. D. The weight of the prosecutorial forces could not be greater than when an accused has the choice between the risk of trial and the consequences of a guilty plea. The plea bargaining process is a confrontation that "settle[s] [the defendant's] fate and reduces the trial itself to a mere formality." *Gouveia*, 467 U.S. at 189 (quoting *United States v. Wade*, 388 U.S. 218, 224 (1967)). Prosecutors secure an overwhelming majority of convictions in this country through plea agreements. That a prosecutor would be allowed to deprive a defendant of his Sixth Amendment rights by strategically timing her indictments is constitutionally unacceptable.

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The Court should grant David's motion to re-offer the plea deal and find that he had a Sixth Amendment right to counsel when the prosecutor sent a formal plea deal. The prosecutor was an adversary, and any investigation necessary to bring the charges was complete. Therefore,

when faced with a decision whether to plead guilty or go to trial, David should have had the competent advice of counsel.

CONCLUSION

The Court should reverse the lower court's decision.

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Respectfully submitted,

/s/
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