Team P20

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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I. The Fourth Amendment protects people from unreasonable searches and seizures by requiring police officers to obtain a valid warrant. If police are not acting in an investigative manner, the community caretaking exception may release them from the warrant requirement. Officer McNown entered a home without a warrant based on several observations that caused him to suspect there was someone in the home. Was Officer McNown acting under the community caretaking exception when he entered the home?

II. Under the Sixth Amendment, a defendant's right to effective counsel attaches when adversarial judicial proceedings have been initiated against them. After David's arrest, the prosecution offered a favorable plea deal to David's attorney. However, David's attorney let the deal expire before communicating it to David. Was David able to enjoy the Sixth Amendment right to effective counsel at the time of the pre-indictment plea negotiation?

STATEMENT OF FACTS

The petitioner, Mr. Chad David (hereinafter David) is a long-time resident and community member of Lakeshow, Staples. R. at 2. David is well known in the community for his work as a minister at the Lakeshow Community Revivalist Church. R. at 2. He regularly attended and led the church's Sunday morning services. R. at 2.

Officer James McNown (hereinafter McNown) is a patrol officer with the City of Lakeshow. R. at 2. On Sunday, January 15, 2017, McNown arrived at the community church to attend the sunrise service, as he had for the past four months. R. at 2, Ex. A, pg. 2. McNown attended the Sunday service in his patrol uniform in anticipation of his shift later that morning. R. Ex. A, pg. 3. Unusually, David was not in attendance on Sunday, January 15. R. at 2. Initially, McNown was not concerned about David's absence, instead he assumed David was merely at home sick. R. at 2. However, to ease the congregations' concerns, McNown offered to go to David's house after the service. R. at 2. At 9:00 that morning, after the church service, McNown began his patrol shift. R. at 2. He first stopped for some hot tea, and then drove to David's house. R. at 2. He had obtained David's address from another member of the congregation. R. at 2.

Almost immediately, McNown took notice of several things amiss. R. at 2, 3. First, McNown was surprised at David's address; the house was located in one of the "nicest" communities in town, which struck McNown as at-odds with David's career. R. Ex. A, pg. 3. Second, as McNown was entering David's gated community, he passed a large black Cadillac with Golden State license plates leaving the complex. R. at 2. McNown took special notice of the vehicle and testified that the make and model of the car was commonly associated with drug dealers. R. at 2. As McNown pulled into David's driveway, he noticed that David's car was still parked and all the windows and doors of the house were closed. R. at 2. McNown then approached

David's door and heard loud, profane "scream-o" music coming from inside the house. R. at 2-3, Ex. A, pg. 4. Considering the time of day, and David's profession, the music was very out-of-character. R. at 2. Further, McNown looked through the window and saw the movie *The Wolf of Wall Street* playing. R. at 3. Again, McNown was struck by the obscene movie given David's religious beliefs. R. at 3, Ex. A, pg. 4. In fact, McNown testified that the movie and music caused him to suspect someone nefarious was in the home. Ex. A, pg. 4.

McNown knocked and rang David's doorbell, but received no response. R. at 3. He then went to David's backdoor and found it unlocked. R. at 3. McNown entered the house and immediately happened upon an open notebook. R. at 3. This notebook had the names of several members of the congregation—some of whom McNown spoke with that morning—and incriminating information about drug transactions. R. at 3. Continuing with his search, McNown went upstairs towards the source of the music. R. at 3. When he entered the bedroom, he found David amongst a supply of cocaine. R. at 3. McNown immediately detained David and called in the local Drug Enforcement Agency (hereinafter DEA) to process the contraband. R. at 3. Upon the DEA's arrival, DEA Agent Colin Malaska asked David to provide the names of his suppliers. R. at 3. In fear for his life, David declined to reveal his suppliers' names. R. at 3.

When the authorities transported David to a detainment facility, he called the only defense attorney he knew, and a member of his congregation, Mr. Keegan Long (hereinafter Long). R. at 3. Long immediately committed to David's representation. R. at 3. Prior to filing formal charges, and after David's arrest, the Lakeshow prosecution intended to use David's charges as a bargaining chip. R. at 4. The prosecutor, Ms. Kayla Marie (hereinafter Marie) proposed a plea bargain of one year in prison in exchange for the names of David's drug suppliers. R. at 4. She sent this offer to

Long via email on January 16, 2017, with the instruction that it would expire in thirty-six hours. R. at 4, Ex. D.

Long, a known alcoholic, misread the email and allowed the plea deal to expire without ever communicating it to David. R. at 4, Ex. B, pg. 3. When Long was alerted of his mistake, he immediately informed David. R. at 4. Understandably, David terminated his relationship with Long and found replacement representation with Mr. Michael Allen (hereinafter Allen). R. at 4. Allen promptly tried to reinstate David's plea deal, but the prosecution was unwilling. R. at 5, Ex. E. The prosecutor, Marie, stated that the purpose of the plea deal was to gain information *before* David's suppliers were alerted. R. at 5, Ex. E. She argued that too much time had passed since David's arrest, thereby making the information irrelevant because the drug suppliers were likely already alerted. R. at 5, Ex. E.

David filed two pretrial motions before the District Court for the Southern District of Staples: (1) a motion to suppress evidence under the Fourth Amendment, and (2) a motion seeking to re-offer the plea deal by claiming ineffective counsel under the Sixth Amendment. R. at 5. The District Court denied both motions on July 15, 2017. R. at 1. David subsequently appealed to the Thirteenth Circuit Court of Appeals on November 28, 2017, and again his motions were denied on May 10, 2018. Thereafter, this Court granted certiorari.

SUMMARY OF ARGUMENT

The Fourth Amendment of the United States Constitution protects the rights of people to be secure in their homes and against unreasonable searches and seizures by the government. This Court has interpreted the amendment to require warrants for all searches and seizures, unless an exception applies. In this case, the lower courts relied on a narrow exception to this general warrant

requirement: the community caretaking doctrine. This exception allows police to enter homes without a warrant when they are acting in a way totally separated from investigating crime. Historically, this exception has only been applied to automobiles. Expanding the doctrine to homes and residences would go against the well settled constitutional distinction between automobiles and homes. When McNown entered David's home in January 2017, he was operating in investigative mode because he suspected crime was afoot. As seen in McNown's testimony, several combined factors had raised his suspicions. Thus, his actions exceeded the scope of the community caretaking exception. In sum, McNown's warrantless search should be deemed unjustified as a violation of the Fourth Amendment.

The Sixth Amendment of the United States Constitution guarantees the accused the right to counsel in all criminal prosecutions. Although this Court has not yet elected to extend the Sixth Amendment to pre-indictment proceedings, public policy supports expanding the rule to guarantee a defendant's right to counsel pre-indictment. The proceedings that occur *before* formal charges are filed—the pre-indictment proceedings—are legally complex and mark the beginning of the adversarial process. Therefore, in the interest of justice, defendants should be entitled to representation during this phase, as well as after formal charges have been filed. When David was arrested the prosecution attempted to negotiate a plea deal for a shorter sentence with David's attorney. However, the option of the deal was never communicated to David. As a result, David was prejudiced because his prison sentence was nine times longer than originally offered in the plea deal. Thus, he did not enjoy his Sixth Amendment protections of effective counsel. In sum, this Court should find David's Sixth Amendment rights were violated and this Court has the discretion to award him a remedy that provides adequate recompense.

STANDARD OF REVIEW

In reviewing the denial of David's motions to suppress, this Court looks at the district court's legal conclusions in relation to the facts *de novo*. *Wright v. West*, 505 U.S. 277, 297 (1992). This Court will also review *de novo* David's Sixth Amendment claim of ineffective counsel as a mixed question of law and fact. *Id.* at 288. When reviewing *de novo*, this Court will view the evidence "in the light most favorable to the party that prevailed" in the lower court. *Id.* at 284.

ARGUMENT

I. THE COMMUNITY CARETAKING EXCEPTION DOES NOT JUSTIFY MCNOWN'S WARRANTLESS SEARCH BECAUSE HIS ACTIONS EXCEEDED THE SCOPE OF THE EXCEPTION, THEREBY RENDERING HIS SEARCH UNJUSTIFIED

The sanctity of the privacy of the home is a value that has been embedded in our traditions since the origins of the republic. *Payton v. New York*, 445 U.S. 573, 601 (1980). It is a value long recognized in American jurisprudence and culture alike. *Id*. This case involves an unreasonable trespass into the sanctity of a man's home under the guise of caring for the community. The following argument will address first how the officer in question was not acting within the parameters of the community caretaking exception, and second why it would be contrary to public policy to expand the application of the exception to homes and residences.

A. Officer McNown had Switched into Investigative Mode When He Entered into David's Home, Thereby Exceeding the Parameters of the Community Caretaking Exception to the General Warrant Requirement

The Fourth Amendment of the United States Constitution protects the rights of people "to be secure in their persons, houses, papers and effects," and against unreasonable searches and seizures by governmental actors. USCS Const. Amend. IV. This Court has interpreted the Fourth Amendment to require warrants for searches and seizures by mandating strict adherence to the

judicial processes when conducting a search or seizure. *Katz v. United States*, 389 U.S. 347, 357 (1967). Thus, subject to several narrow exceptions, any search or seizure conducted without a warrant is presumptively unreasonable under the Fourth Amendment. *Id.* When a search or seizure is presumed unreasonable, the government then has the burden to provide adequate justification. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

This Court has previously established several exceptions to the warrant requirement, including when police are in hot pursuit, concerned about the destruction of evidence, or encounter a level of danger high enough to justify a warrantless entry. *See generally United States v. Santana*, 427 U.S. 38 (1976); *Vasquez v. United* States, 454 U.S. 975 (1981); *Dorman v. United States*, 419 U.S. 945 (1974). However, the most established exception to the general warrant requirement is an emergency, or exigent circumstances. *Mincey v. Arizona*, 437 U.S. 385, 393 (1978). This exception allows authorities to enter and search without a warrant if they reasonably believe that a person is in immediate need of aid. *Id*. Similarly, if authorities come upon a scene of a crime, they can conduct a warrantless search to check for other victims or the perpetrator. *Id.* The exigent circumstances doctrine is a historical exception and is comprehensively discussed in American jurisprudence. *See e.g. Welsh v. Wisconsin,* 466 U.S. 740, 749 (1984). The case at hand, however, focuses on a less discussed, more narrow exception to the general warrant requirement: the community caretaking exception.

Authorities act within a community caretaking role when they are totally divorced from investigating or detecting crime. *Cady v. Dombrowski*, 413 U.S. 433, 447-48 (1973). When the police are acting within this role, they may conduct a warrantless search or seizure. *Id*. In *Cady*, the authorities arrested an off-duty police officer from the scene of an accident and impounded his car. *Id.* at 436. Knowing that off-duty officers carried their service revolvers, the arresting officers

searched the car for the missing gun. *Id.* at 437. During their search, the officers came across evidence readily apparent as being part of a crime; bloody clothes and a damaged flashlight. *Id.* This Court upheld the search and established the community caretaking exception by stating that a police officer acting "totally divorced from the detection, investigation, or acquisition of evidence relating to a violation of a criminal statute" can search or seize without a warrant. *Id.* at 441, 450. The arresting officers were only searching for the gun to prevent harm to anyone who may happen upon it. *Id.* Because they did not suspect that any crime was afoot, the officers acted lawfully and did not violate the Fourth Amendment. *Id.*

Since the establishment of the exception in *Cady,* the doctrine has been embraced among district and circuit courts alike. The courts typically cite to the policy surrounding the exception as the primary reasoning in allowing the warrantless searches. Because police officers play a variety of roles in society, they are sometimes referred to as "jack[s]-of-all-emergencies." *United States v. Rodriguez-Morales*, 929 F.2d 780, 784, (1st Cir. 1991). As a society, it is beneficial to have police play these variable roles. *Id.* Being able to act in such a multifaceted manner, and step away from an investigative role, is what makes the police so integral to communities. *Id.* at 785. Though courts seem to have recognized the importance of these roles, they have also recognized the broad—and sometimes worrisome—authority that warrant exceptions give to police. *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006) (recognizing the concern that a police officer may "use his or her caretaking responsibilities as a pretext for entering the residence").

When police are acting pretextually, or in bad faith, the community caretaking exception does not apply. *United States v. Gillespie*, 332 F. Supp. 2d 923, 929 (Western Dist. of Va. 2004). In *Gillespie,* police officers went to the defendant's apartment to serve a warrant for failing to appear in court. *Id.* at 925. The defendant did not reply to knocking or the polices' verbal

announcements. *Id.* When the police went to the back door, they discovered that the defendant had fled. *Id.* Also, a nearby neighbor informed the police that she thought there were still young children inside the apartment, now left alone by the fleeing defendant. *Id.* Acting in concern for the children, the officers entered the home and found evidence incriminating the defendant. *Id.*

The court in *Gillespie* held the warrantless search was unreasonable. *Id.* at 930. It stated that although initially the police were not investigating criminal activity, their suspicions quickly escalated when no one answered the door and they found out the suspect had fled. *Id.* Thus, the officers had switched into investigative mode *before* entering the apartment, and their actions required a warrant. *Id. Cf. United States v. Gwinn*, 219 F.3d. 326, 335 (4th Cir. 2000) (holding that when an officer went into a defendant's trailer to get him clothes after his arrest he was not acting pretextually or attempting to investigate the crime any further).

Similarly, a warrantless search based purely on the community caretaking function is not sufficient justification. *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993). In *Erickson*, police searched a home where they erroneously suspected a burglary had just occurred. *Id.* at 530. In conducting their search of the backyard, police pulled aside a curtain leading to the basement to find a large marijuana operation. *Id.* The government argued that the search should be upheld under the community caretaking exception because the officers were not attempting to make a criminal case against the defendant; they were merely securing the premises after a suspected burglary. *Id.* at 531. The Ninth Circuit, however, invalidated the search by stating that although the officers were not attempting to make a criminal case against the defendant, it does not alone absolve them of the well-established warrant requirement. *Id.* The protections of the Fourth Amendment extend beyond suspected criminals and protect all law-abiding citizens. *Id.* at 532.

Here, McNown was also in investigative mode when he entered David's home. Similar to the officers in *Gillespie*, McNown's suspicions were raised before he entered the house. R. at 19. First, McNown testified that he was surprised by David's address because of the part of town he lived in. Ex. A, pg. 3. Next, McNown observed a large, black Cadillac exiting David's community, taking note that the car is typically associated with drug dealers. R. at 2. When McNown arrived at David's home, he immediately heard the loud music coming from inside the house and noted how out-of-character it was. R. at 2-3, Ex. A, pg. 3. Further, the movie that was playing inside the home also increased McNown's suspicions. R. at 3, Ex. A, pg. 4. In fact, McNown testified that the combination of oddities made him suspect there was "someone else in the home." Ex. A, pg. 4. Considering the totality of the circumstances, McNown was in investigative mode before he even entered David's house.

Later, when McNown actually entered the home, his suspicions escalated even further. Immediately upon entry through David's backdoor, McNown saw the notebook with incriminating information. R. at 3. As an experienced patrol officer, McNown reasonably understood the information in the notebook to be evidence of a drug transaction. Ex. A, pg. 5. McNown testified that at this point he was "definitely concerned something was wrong" and continued in his search. Ex. A, pg. 5.

The government argues that McNown's primary intent was to check on David's well-being. R. at 8. However, based on facts from McNown's own testimony, he was suspicious of criminal activity before he entered David's home. McNown's suspicion grew with the increasing oddities of the situation; the loud music, the vulgar movie, the black Cadillac commonly associated with drug dealers, and David's lack of response. R. at 2-3, Ex. A, pg. 4.

Much like the police in *Gillespie,* although McNown did not initially plan to investigate a crime when he entered David's home, his purpose quickly changed based on his suspicious observations. This switch in purpose—from caretaking to investigating—is determinative in this Court's analysis. McNown's actions were not completely divorced from the detection or investigation of a crime. Further, similar to *Erickson*, McNown's testimony that his aim was not to make a criminal case against David does not in itself justify his entry. Thus, under the ruling of this Court in *Cady*, McNown's warrantless search was unreasonable under the Fourth Amendment.

B. The Community Caretaking Exception was Not Intended to Extend to Searches of a Home Based on the Constitutional Distinction Between Automobiles and Residences as Outlined by This Court

The ability of governmental authorities to enter into a home is a serious concern regarding the reasonable security not just of individuals, but to society in general. *Johnson v. United States*, 333 U.S. 10, 14 (1948). This Court has long found a difference in the constitutional protections of automobiles and homes. *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976); *see also Cady*, 413 U.S. at 439.

This well settled constitutional distinction is based on the nature of automobiles in general. *Opperman*, 428 U.S. at 367. First, vehicles are inherently movable and are frequently involved in emergency situations. *Id.* In practice, this makes rigorously enforcing the warrant requirement for automobiles unreasonable and inefficient. *Id.* Second, automobiles are already subject to governmental regulation and monitoring. *Id.* at 368. State and local governments require licensing and inspection of automobiles which result in state actors stopping and examining vehicles regularly. *Id.* Further, the reasonable expectation of privacy in vehicles is naturally diminished by the public nature of automobile travel in general. *Id.* The portability of vehicles combined with the fact that people generally do not reside in their cars, results in a decreased expectation of privacy.

Id.; see also United States v. Ross, 456 U.S. 798, 805 (1982) (stating that historically, searches of wagons and carriages—as opposed to fixed buildings such as homes—had been considered reasonable by Congress).

It was based on the well-settled difference between automobiles and homes that the community caretaking exception arose. *Cady*, 413 U.S. at 439. In *Cady,* this Court initially extended the community caretaking exception to a vehicle and did not elaborate on expanding the scope to residences or homes. *Cady*, 413 U.S. at 439; *see also State v. Kinzy*, 141 Wn.2d 373, 387 (Wash. Sup. Ct. 2000) (holding that the community caretaking function also cannot justify the seizure of a person). Further, this Court has yet to rule on the expansion of the doctrine, making this a case of first impression.

In *Cady,* this Court cited to the reasonable expectation of privacy in automobiles compared to homes and recognized the vast authority the community caretaking exception grants to police. *Id.* at 442. Circuit courts have also spoken on this concern and strive for a balance between constitutional protections and recognizing the expansive nature of policing. *See Hunsberger v. Wood*, 570 F.3d 546, 552-53 (4th Cir. 2009); *Erickson*, 991 F.2d at 531.

In striking this balance, several courts have held that the community caretaking exception to the warrant requirement should *not* be extended to homes or residences. *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010); *see Matalon v. Hynnes,* 806 F.3d 627, 635-36 (1st Cir. 2015) (holding that the community caretaking exception cannot justify entry into homes, even in situations of ongoing manhunts). In *Ray,* police entered the appellant's home based on a concerned phone call from his estranged wife. *Ray*, 626 F.3d at 177. When the wife arrived to pick up their daughter for pre-arranged visitation the appellant did not respond to knocks or calls. *Id.* at 172-173. During their entry into the home, police confiscated evidence of criminal activity. *Id.* The

Third Circuit held the search was unreasonable because the community caretaking doctrine should not be used to justify the warrantless search of a home. *Id.* at 177. The court relied on the distinction made by this Court in *Cady* to make its determination. *Id.*

Moreover, courts have held that the narrow holding of *Cady* was not intended to expand even to warehouses where no one resides. *United States v. Pichany*, 687 F.2d 204, 208-9 (7th Cir. 1982). The police in *Pichany*, responded to a non-emergent burglary call by the owner of a storage warehouse. *Id.* at 205. Upon arrival, the police entered the building and found stolen tractor trailers. *Id.* at 206. The court determined the search was unreasonable based on the constitutional distinction between automobiles and fixed buildings. *Id.* at 209. In declining to extend the community caretaking exception to warehouses, the Seventh Circuit reaffirmed the narrow holding of *Cady*. *Id.*

Although other courts have expanded the exception to include homes, the cases are easily distinguishable from the case at hand. For example, the Sixth Circuit held that the community caretaking exception can apply to a warrantless entry in a home when the police entered to turn down excessively loud music. *United States v. Rohrig*, 98 F.3d 1506, 1509 (6th Cir. 1996). There, the police received several calls from neighbors complaining about blaring music coming from the defendant's home. *Id.* When they arrived, the police knocked and called out but received no reply. *Id.* They entered and found a marijuana growing operation in the home. *Id.* The court found the warrantless search reasonable, focusing on the police's limited intention of abating the nuisance and not investigating a crime. *Id.* at 1510.

Similarly, the Fourth Circuit upheld a warrantless entry of a home when police entered to serve a subpoena. *Phillips v. Peddle*, 7 Fed. Appx. 175, 180 (4th Cir. 2001). The police in *Phillips* were attempting to serve a subpoena to testify in an upcoming criminal trial, and after no response

they entered the home. *Id.* at 177. The authorities had previously told the defendant they would come to his house that afternoon, thus, he was expecting their arrival. *Id.* The court upheld the entry, reasoning that when the defendant did not answer the door, the police were justified in entering to check on his well-being. *Id.* at 180. Since the police were not investigating a criminal matter, the court upheld the search. *Id. Cf. State v. Vargas*, 213 N.J. 301, 329 (N.J. Sup. Ct. 2012) (holding that police may not use the community caretaking doctrine to justify warrantless entries into homes to conduct welfare checks).

Here, David's circumstances are distinguishable from those where the courts allowed the warrantless entries. First, although David was playing loud music, unlike *Rohrig* his neighbors were not involved. The record does not show that the volume, nor content of David's music alerted his neighbors at all. Thus, McNown was not acting in the same fashion as the officers in *Rohrig.* Had David's neighbors complained, perhaps McNown would have been more justified in entering David's home uninvited, however that is not the case here.

Further, in considering *Phillips*, David was not expecting McNown to visit him that morning. Ex. C, pg. 2. McNown's concern that David did not answer the door was very different from the officers in *Phillips.* There, the officers knew Phillips was expecting their visit, thus, when he did not answer their concern over his well-being increased. *Phillips*, 7 Fed. Appx. at 177. Here, the single fact that David was not at the Sunday service is not enough to justify McNown's actions like the court did in *Phillips.*

Should the community caretaking exception be extended to allow warrantless entries into homes, it will result in a slippery slope of ramifications. Such a standard could be easily manipulated by authorities to allow unjustified entries under the guise of "caretaking." Thus, affirmation here would set a dangerous precedent going forward. This Court's long recognized

sanctity of the home would be put in jeopardy by a mailable standard, and the protections of the Fourth Amendment lessened.

Moreover, reversal in this case does *not* restrict police from ever entering a home without a warrant. *Erickson*, 991 F.2d at 532-33. The government alludes to concerns that limiting the community caretaking exception to automobiles will impede authorities from carrying out their necessary duties of caring for their communities. R. at 16. However, this is not the case. As the Ninth Circuit discussed in *Erickson*, the previously established warrant exceptions provide entirely sufficient opportunities for police to warrantlessly enter homes when their duties so require. *Erickson*, 991 F.2d at 533. The integral responsibilities of police to investigate crime needs to be balanced against the significant invasions of privacy these searches could entail. *Id.* The existing exceptions "adequately accommodate" these competing societal interests. *Id.*

Should this Court choose to extend the community caretaking doctrine to homes and residences, David's case should still prevail. The issue of extension of the doctrine is extensively discussed in law review journals across this country, many of which propose novel, creative solutions to the legal debate. For instance, one journal proposes allowing the doctrine to apply to homes but imposing a prophylactic exclusionary rule. Mark Gorenczny, *Taking Care While Doing Right By the Fourth Amendment: A Pragmatic Approach to the Community Caretaking Exception*, 14 Cardozo Pub. L. Pol'y & Ethics J. 229, 250-53 (2015). In essence, this compromise would allow police to enter homes under a reasonable community caretaking intention yet exclude any evidence they happen to come across in the process. *Id.* A similar solution proposes a suspended plain view exception to seizures of evidence, which in practice would have the same effect. David Fox, *The Community Caretaking Exception: How the Courts Can Allow the Police to Keep Us Safe Without Opening the Floodgates to Abuse*, 63 Wayne L. Rev. 407, 409-10 (2018). However,

under either of these proposed alternatives David would still prevail. If McNown *was* justified in entering David's home, then the evidence of David's crime would not be admissible in his prosecution. Thus, the relief in this case would still be reversal.

In sum, the narrow holding of this Court's community caretaking exception should not be expanded to include warrantless entries of homes. Further, based on a compilation of suspicions, McNown was acting as an investigator when he entered David's home, thereby exceeding the scope of the exception. Aligning with the well-established constitutional distinctions between automobiles and homes, and in support of Fourth Amendment protections, this Court should reverse the holding of the Thirteenth Circuit Court of Appeals.

II. DAVID IS OWED THE RIGHT TO BE REOFFERED THE INITIAL PLEA DEAL BECAUSE THE SIXTH AMENDMENT RIGHT TO COUNSEL SHOULD APPLY TO PLEA NEGOTIATIONS PRIOR TO A FEDERAL INDICTMENT AND HE SUFFERED A PREJUDICIAL OUTCOME

As a basic principle of our adversarial system, the Sixth Amendment tries to cure the imbalance of power between the legally knowledgeable prosecution and a defendant who lacks the legal expertise in criminal law. Defendants cannot be expected to properly defend themselves during pre-indictment plea negotiations without the effective assistance of counsel. The following argument will first address the need for this Court to expand the right to effective counsel to pre-indictment plea negotiations, and second, why David's counsel was ineffective leading to a prejudicial outcome.

A. David's Sixth Amendment Right to Effective Counsel Should Attach to His Pre-Indictment Plea Negotiations Because the Adversarial Process Began When the Prosecutor Offered the Initial Plea Deal

According to the Sixth Amendment of the United States Constitution, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." USCS Const. Amend. XI. The general rule regarding the Sixth Amendment right to

effective counsel states that the right attaches only when the defendant is confronted with adversarial judicial proceedings. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *see also Turner v. United States*, 885 F.3d 949, 951 (6th Cir. 2018) (aligning with previously established precedent, the court declined to attach the right to effective counsel to pre-indictment plea negotiations).

This Court later expanded on this established rule, stating the right attaches only when the prosecutor brings formal charges, or after a defendant has appeared before a judge. *United States v. Gouveia*, 467 U.S. 180, 186 (1984). Once this right to counsel is attached, it is guaranteed at all "critical stages of the criminal proceedings." *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *see also Montejo v. Louisiana*, 556 U.S. 778, 802 (2009). Critical stages of criminal proceedings include arraignments, post-indictment interrogatories, post-indictment lineups, and the entry of a guilty plea. *Montejo*, 556 U.S. at 802. This Court also extended the definition of critical stage to include post-indictment plea negotiations and required defense attorneys to communicate any formal plea offers to their clients. *Frye*, 566 U.S. at 142; *see also Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (holding that a negotiation of a plea bargain is a critical phase in litigation).

In 1972, this Court in *Kirby* laid the foundation for the attachment of the Sixth Amendment right to counsel. *Kirby*, 406 U.S. at 689. Prior to any charges being filed, the victim of a robbery identified the defendant as the robber. *Id*. at 685. At the identification, the defendant was without an attorney and was not advised of his right to counsel. *Id*. The defendant argued that the Sixth Amendment right to counsel existed at the time of the victim's identification before any charges were filed against him. *Id*. at 686. However, this Court reasoned that the initiation of judicial proceedings marked the beginning of the adversarial process because that is when the government has secured its position to prosecute. *Id*. at 689. In other words, the right to effective counsel attaches by way of "formal charge, preliminary hearing, indictment, information, or arraignment."

Kirby, 406 U.S. at 689; *see also Gouveia*, 467 U.S. at 180. Thus, this Court concluded that the defendant did not have a right to counsel during the pre-indictment identification. *Kirby*, 406 U.S. at 689.

Later, this Court in *Frye* determined that once an individual's right to counsel attaches, the court will ensure its application during critical stages of criminal proceedings, specifically plea negotiations. *Frye*, 566 U.S. at 138. In *Frye*, the defendant was charged with driving with a revoked license. *Id*. When the defendant's attorney received two plea offers from the prosecutor, he failed to advise the defendant of these options. *Id*. Instead, the attorney let the offers expire and the defendant was sentenced to three years in prison, rather than the offered ninety-day sentence. *Id*. at 139. This Court reiterated its current rule describing the critical stages of a criminal proceeding but expanded the stages to include plea negotiations. *Id.* at 140. Because over ninety percent of convictions result in plea bargains, this Court reasoned that this stage in the criminal proceedings is crucial to the justice system, thereby warranting constitutional protection. *Id*. at 142.

Although this Court has not yet elected to extend the Sixth Amendment protections to pre-indictment procedures, some circuits have expressed dissatisfaction with this current bright-line rule. *United States v. Moody*, 206 F.3d 609, 612 (6th Cir. 2000). In *Moody*, the defendant was offered a plea bargain prior to any official charges, and the court believed he needed legal expertise to make an informed decision regarding the plea. *Id*. at 613. The court emphasized that the core purpose of the right to counsel is to assist the accused when they are "confronted with both the intricacies of the law and the advocacy of the public prosecutor." *Id*. The court went on to explain that the defendant was faced with a problem he could not solve without any legal expertise and the right to counsel should have applied, despite the lack of formal charges. *Id*. at 614. Although the Sixth Circuit followed this Court's bright-line rule applying the right to counsel only after the

initiation of formal charges, the court's discussion favored the expansion of the right to pre-indictment plea negotiations. *Id*.

Like in *Moody*, David knew he lacked the legal expertise to deal with his arrest, so he hired Long to represent him. R. at 4. Here, this Court should determine that David's constitutional right to effective counsel outweighs the current rule. When looking at when the right to counsel attaches, this Court stresses the importance of the beginning of the adversarial judicial proceedings. Here, given the severity of David's conduct, he and the prosecution became adversaries the moment of his arrest. R. at 3. At that point, David was faced with the prosecutorial forces and involved in the intricacies of the law. R. at 3.

This Court should expand a defendant's right to counsel to the pre-indictment plea negotiations because this stage marks the beginning of the adversarial process. In *Kirby*, this Court emphasized that it is only when the government commits itself to prosecution that the adverse positions of the parties are solidified. *Kirby*, 406 U.S. at 682. Here, given the severity of his actions, the government had committed itself to prosecute David at the moment of his arrest. David was found with a large quantity of cocaine; a crime serious enough to guarantee prosecution. R. at 4. Agent Malaska and Marie offered the plea deal not to determine *if* charges would be filed against David, but to gather information regarding other criminal actors. R. at 4. In other words, the question was not whether he would be charged with a crime, but to what extent the charges would be. Utilizing the reasoning in *Kirby*, the government had already committed itself to prosecution when it offered David the plea deal. Therefore, the right to effective counsel should have attached during these plea negotiations even though they occurred before the filing of official charges.

Without Sixth Amendment protections, defendants will not have the capacity and intellect to fairly negotiate with the prosecution. *Moody*, 206 F.3d at 614. This ultimately leads to a

constitutional imbalance. *Id*. The court in *Moody* explained that when the accused is faced with a plea offer, the defendant is usually not in the right position to properly understand the intricacies of the law. *Id*. Similar to *Moody*, David needed legal expertise during his pre-indictment plea negotiation process. David knew this, as evidenced by his prompt call seeking representation from Long. R. at 3.

Policy favors expanding the right to counsel prior to the filing of official charges. Although some courts have held adversarial proceedings do not begin until official charges have been filed, this argument ignores the potential for prosecutorial misconduct. If the right to effective counsel does not attach to pre-indictment plea negotiations, prosecutors may abuse their discretion, leaving the defendants powerless. Thus, this Court should expand the Sixth Amendment right to counsel by guaranteeing this right during pre-indictment plea negotiations.

B. David's Representation During the Pre-Indictment Plea Negotiation Was Deficient and He Suffered Prejudice Because His Prison Sentence Was Nine Times Longer Than the Original Plea Offer

When a defendant seeks a reversal of a conviction under the Sixth Amendment, he must prove two elements: (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993). The ineffective representation must be so glaring as to not abide by the constitutional right guaranteed by the Sixth Amendment. *Strickland*, 466 U.S. at 687. In deciding this, the court must look not only to the outcome of the case but inquire into the proceedings to determine if it was fundamentally unfair. *Lockhart*, 506 U.S. at 369 (1993). Fundamental unfairness is when counsel's errors are so serious that they strip the defendant of a fair trial. *Id*.; *see also Kimmelman v. Morrison*, 477 U.S. 365, 374 (1986) (holding the purpose of a claim of

ineffective counsel is to highlight the errors that created an adversarial imbalance between the defense and prosecution).

In considering the second prong of the *Strickland* test, a defendant demonstrates prejudice when there was a reasonable probability that he would have accepted the more favorable plea offer, and the plea would not have been revoked by the prosecution. *Frye*, 566 U.S. at 135; *see generally Williams v. Taylor*, 529 U.S. 362, 390 (2000) (defining a reasonable probability as a probability sufficient to undermine confidence in the outcome). In *Frye*, the defendant received a three-year prison sentence rather than the offered ninety-day sentence due to his attorney's failure to communicate the plea deal. *Id*. This Court established a rule to determine prejudice, stating that it is necessary to show that there would have been a more favorable result by reason of a plea to a lesser charge, or a sentence of less prison time. *Id.* at 147. Further, the defendant must show that there was a reasonable probability that the prosecution would not have revoked the offer and that the trial court would have implemented the offer. *Id.* at 148.

Recently, in reviewing the prejudice prong of the *Strickland* test, this Court determined that extended prison sentences constituted prejudice. *Lafler v. Cooper*, 556 U.S. 156, 172 (2012); *see also Roe v. Flores-Ortega*, 528 U.S. 470, 477 (2000) (stating that but for the counsel's ineffective actions, the defendant would have appealed earlier resulting in a shorter prison sentence). In *Lafler*, the defendant claimed ineffective assistance of counsel because he followed his attorney's advice to reject the plea offer, and instead risk going to trial. *Lafler*, 556 U.S. at 164. The jury found the defendant guilty and sentenced him to 185 to 360 months of imprisonment, as opposed to the originally offered 51 to 85 months. *Id*. at 161. This Court held that the defendant demonstrated that but for his ineffective counsel, his plea offer would have likely been presented

to and accepted by the court. *Id*. at 164. Thus, because the defendant's prison sentence was three times longer than the original plea, his ineffective counsel led to a prejudicial outcome. *Id*. at 170.

This Court then moved on to determine what the proper remedy is for those situations in which defendants are prejudiced. *Id*. It found a remedy must neutralize the taint of the constitutional violation. *Id*. This Court found that the "correct remedy in these circumstances . . . is to order the State to re-offer the plea agreement." *Id*. at 172; *see also United States v. Morrison*, 449 U.S. 361, 362 (1982) (holding that a constitutional violation should be remedied in a way that is specifically tailored to the injury).

When imposing a remedy for a violation of the Sixth Amendment right to effective counsel, the court must come as close as possible to remedying the constitutional violation. *Williams v. Jones*, 571 F.3d 1086, 1088 (10th Cir. 2009). In *Williams*, upon advice of his counsel, the defendant rejected an offered plea deal for a ten-year prison sentence. *Id*. As a result, the defendant was sentenced to life imprisonment without the possibility of parole. *Id*. On appeal, the court readily concluded that the defendant's counsel was ineffective, and then turned to determining prejudice. *Id*. The court found the defendant was prejudiced because had he been adequately counseled, he would have likely accepted the plea offer and limited his prison sentence to ten years. *Id*. at 1094. Thus, the Tenth Circuit turned to the discussion of a remedy. *Id.*

In the defendant's initial appeal, the appellate court remedied the constitutional violation by modifying his sentence to allow the possibility of parole. *Id.* at 1088. However, the Tenth Circuit reversed and held that remedy was inadequate. *Id*. at 1089. Although the court proposed some acceptable remedies, such as specific performance, it left the District Court with discretion to make the proper determination on remand. *Id*. at 1094. In the interest of justice, the court only

required that the District Court come as close as possible to remedying the constitutional violation. *Id*. at 1093.

Here, after being arrested and brought to the federal detainment facility, David called Long believing he would adequately represent him in his case against the government. R. at 3. However, when Long received a favorable plea deal from the prosecutors, he failed to communicate this offer to David. R. at 4. Thus, as stipulated in the record, Long was ineffective as David's representation. Similar to *Lafler*, David would have had the opportunity to receive a shorter prison sentence had he received effective assistance of counsel. The original plea offer was valid for only thirty-six hours and offered a one-year prison sentence in exchange for the names of David's suppliers. R. at 4. Thus, David's prolonged prison sentence of ten years constituted prejudice under this Court's previous rulings.

Applying the *Strickland* and *Frye* standards for prejudice, David explained that he would have accepted the plea bargain had he known about the existence of the deal. Ex. C, pg. 3. He understood one year in prison was more favorable than the minimum sentence for the amount of cocaine he was found with. Ex. C, pg. 3. The government argues that even with the plea deal, David would not have divulged the names of his drug supplies based on his conversation with DEA Agent Malaska at the time of his arrest. R. at 3. However, although David initially told Agent Malaska that he would not give up the names of his suppliers, he stated this before he was aware of any plea deal. R. at 4. Had David received notice of the plea deal, he would have been likely to accept because the minimum sentence for his crime was exponential compared to the offered sentence. Ex. C, pg. 3. Thus, applying *Lafler*, the correct remedy would be to re-offer the original plea deal to David.

Alternatively, considering the holding of *Williams*, this Court may also impose a remedy different than reoffering the initial plea deal so long as it comes as close as possible to remedying the constitutional violation. Proposed solutions include specific performance of the plea offer, remanding for a new trial, or modifying the existing prison sentence. *Williams*, 571 F.3d at 1094. Here, an ideal remedy to David's constitutional violation would be reoffering the plea deal. However, a modified prison sentence that comes close to the initial offer would also suffice. In the interest of justice, David's constitutional violation cannot go un-remedied; he is due a solution that properly remedies the gravity of the prejudice he suffered.

The judicial system's general notion of damages is to make litigants whole after their injuries; citizens walk through the courthouse doors in search of recompense for wrongdoings. As Justice Marshall once said, "Where there is a legal right, there is a legal remedy." Justin F. Marceau, *Sixth Annual Criminal Law Symposium: The Sixth Amendment: Panel Three: The Right to Counsel Before Trial: Remedying Pretrial Ineffective Assistance*, 45 Tex. Tech L. Rev. 277, 278 (2012). Here, the wrongdoing at issue is a violation of the United States Constitution; arguably the most serious of wrongs. As a result, and aligning with the general idea of damages, David is owed a remedy that will make him whole again. Understandably, in criminal cases the idea of damages is more convoluted than that of civil proceedings. *Id*. However, the judicial system must attempt to right the wrongs brought to its attention.

According to the holdings of *Lafler* and *Frye*, this Court seems open to creative remedies for constitutional violations. *Id*. In fact, some scholars have stated these decisions may mark a new era of "remedial creativity." *Id*. at 311. As seen in the use of open-ended language such as "as close as possible to a remedy," and "tailored to the injury suffered," this Court leaves the exact desired remedy open to interpretation. *Id*. at 310. In the interest of justice, defendants rely on the

Court's ability to indemnify them of their injuries. *Id*. at 312-13. As a result, today, this Court has the freedom to propose a novel remedy for such violations of the constitution. *Id*.

In sum, David suffered prejudice because his assistance of counsel was deficient, leading to a conviction sentence that was nine times longer than the original plea deal. The Sixth Amendment right to counsel should have applied during David's pre-indictment plea negotiations because this marked the beginning of adversarial judicial proceedings. Thus, this Court should reverse the ruling of the Thirteenth Circuit Court of Appeals. Affirmation here would leave defendants without a remedy, thereby denying them of their constitutional rights.

CONCLUSION

For the foregoing reasons, the Petitioner requests this Court reverse the Thirteenth Circuit's decision upholding the denial of Petitioner's motion to suppress evidence. Further, the Petitioner requests this Court reverse the Thirteenth Circuit's decision upholding the denial of Petitioner's motion to re-offer the plea deal.

Dated: October 21, 2018

Respectfully submitted,

/s/ Team P20_____
Team P20
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