No. 4-422

In The

Supreme Court of the United States

October Term, 2018

Chad DAVID,
Petitioner,

v.

The UNITED STATES of America,
Respondent.

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

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BRIEF FOR RESPONDENT

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1. Under *Cady*, certain warrantless community caretaking searches are valid under the Fourth Amendment. Officer McNown entered Petitioner's home—as a community caretaker—during a welfare check to discover Petitioner's condition. Officer McNown entered Petitioner's home and limited his search to discovering Petitioner's condition because he believed Petitioner was there and needed aid. Was Officer McNown's community caretaking entry of Petitioner's home reasonable under the Fourth Amendment?

2. Under *Kirby*, the right to effective counsel does not attach until indictment. Petitioner was offered a plea deal pre-indictment, and his attorney failed to communicate it with him. But it is unlikely Petitioner would have accepted the offer because it was contingent on naming Petitioner's suppliers and Petitioner feared his suppliers would kill him or burn down his church. Did Petitioner's right to effective counsel attach during pre-indictment plea negotiations?

STATEMENT OF FACTS

I. Officer McNown Entered Petitioner's Home—as a Community Caretaker—During a Welfare Check to Discover Petitioner's Condition.

Officer McNown performed a welfare check on Sunday, January 15, 2017 in response to concerns about Petitioner's well-being. R. at 2, 17–19. Because Petitioner—a seventy-two-year-old, well-respected minister—was absent from his service unannounced, the congregation was concerned something was wrong with Petitioner. R. at 2, lines 2–19. Officer McNown believed he was just going to Petitioner's home to check on Petitioner. Ex. A, pg. 8, line 1. Not find evidence of criminality. Ex. A, pg. 8, lines 1–2. During the welfare check, Officer McNown entered Petitioner's home to discover Petitioner's condition. R. at 3, line 8.

Petitioner never missed a service unless he was sick. Ex. C, pg. 4, lines 10–17. Because Petitioner was not at his service, Julianne Alvarado, a congregant close to Petitioner that regularly called him, tried to call Petitioner to check if he was okay. R. at 2, lines 10–11; Ex. A, pg. 2, lines 23–26; Ex. C, pg. 1, line 23. Petitioner did not answer. R. at 2, lines 11–12. Alvarado told Officer McNown and was visibly concerned. R. at 2, lines 12–13.

The congregation was concerned something was wrong with Petitioner because Petitioner's health was declining due to his elderly age. R. at 2, line 18; Ex. C, pg. 4, line 14. And there was an aggressive strain of Bandwagon Flu going around. Ex. A, pg. 3, line 8. Responding to the concerns, Officer McNown told the congregation he would perform a welfare check at Petitioner's home and bring Petitioner hot tea. R. at 2, lines 17–19.

Based on his training, Officer McNown knew he did not need a warrant to perform a welfare check because welfare checks are unrelated to criminal investigation. Ex. A, pg. 6, line 28; pg. 7, lines 1–2. Officer McNown got Petitioner's address from Alvarado. Ex. A, pg. 3, line

22. While entering Petitioner's gated community, Officer McNown noticed an SUV with Golden State license plates, like those popular among drug dealers. R. at 2, lines 24–27. However, Officer McNown neither knew where the SUV was coming from nor had any reason to believe it was connected to Petitioner. Ex. A, pg. 4, lines 5–6.

Officer McNown arrived and saw Petitioner's car in the driveway. R. at 2, lines 23–24. All the doors were shut, and there was no evidence of a break-in. R. at 2, line 24; Ex. F. As Officer McNown approached the front door, he heard loud music playing from inside. R. at 2, line 28; 3, line 1. Scream-o music. Ex. A, pg. 4, line 16. Petitioner's favorite music. Ex. C, pg. 2, line 16. Because Petitioner's car was in the driveway, there were no signs of a break-in, and music was playing, Officer McNown believed Petitioner was home. Ex. F.

After Petitioner did not answer when Officer McNown knocked, rang the doorbell, announced his presence, then waited two-minutes for Petitioner to respond, Officer McNown entered Petitioner's home because he believed Petitioner was there and needed aid. R. at 3; Ex. F. Officer McNown first looked inside the window next to the front door. R. at 3, lines 2–3. Officer McNown did not see Petitioner. Ex. A, pg. 4, lines 20–21. But he did notice the TV was on playing *The Wolf of Wall Street*. R. at 3, lines 4–5. Petitioner's favorite movie. Ex. C, pg. 2, line 14. Officer McNown tried to open the front door, but it was locked. R. at 3, lines 6–7. Officer McNown entered through the unlocked back door—believing Petitioner could not hear him over the loud music—to discover Petitioner's condition. R. at 3, lines 8–10.

Once inside, Officer McNown did not see anyone, so he went to turn off the TV because no one was there, and it was distracting him from his caretaking function. R. at 3, line 10; Ex. A, pg. 5, lines 21–22. The house was cluttered, like a frat house. Ex. A, pg. 5, line 19–20. Not like a burglarized house. Ex. A, pg. 7, lines 15–19. While approaching the TV, Officer McNown

noticed an open notebook in plain view. R. at 3, lines 10–11. The notebook contained incriminating information about Petitioner's drug deals with congregants. R. at 3, lines 11–12. Specifically, Julianne Alvarado. Ex. A, pg. 5, lines 22–23.

Because Petitioner was not on the first floor, Officer McNown did not search around. Ex. A, pg. 5, lines 26–28. The music was coming from upstairs. R. at 3, line 13. So, Officer McNown went to see if Petitioner was there. R. at 3, lines 13–14. The music was playing from a closed-door room. R. at 3, line 13. Officer McNown opened the door to see if Petitioner was there and found Petitioner packaging cocaine into ziplock bags. R. at 3, lines 14–15. Pursuant to departmental protocol, Officer McNown called-in the DEA because there was a large amount of cocaine. R. at 3, lines 17–18. Officer McNown had no idea entering Petitioner's home would result in finding a large amount of cocaine—Officer McNown thought he was just going in to check on Petitioner. Ex. A, pg. 8, lines 1–2.

II. Petitioner Was Offered a Plea Deal Pre-Indictment and Was Unlikely to Accept It Because It Was Contingent on Naming His Suppliers and Petitioner Feared His Suppliers Would Kill Him or Burn Down His Church.

When DEA Agent Colin Malaska arrived, Agent Malaska read Petitioner his Miranda rights and asked about Petitioner's suppliers. R. at 3, lines 23–24. Petitioner exclaimed he would never give up his suppliers. R. at 3, lines 24–25. If he did, Petitioner believed his suppliers would kill him or burn down his church. R. at 3, lines 24–26.

Petitioner called Keegan Long, a defense attorney and congregant. R. at 3, lines 27–28. Petitioner knew Long was a drunk, however, Petitioner believed Long was fit to represent him. R. at 4, lines 1–2. Petitioner told Long he believed he would be stabbed in jail. Ex. B, pg. 4, lines 18–19.

Believing Petitioner had valuable information about a suspected drug kingpin traveling through town, Agent Malaska asked the prosecution to seek a plea deal pre-indictment. R. at 4, lines 3–5. Agent Malaska believed Petitioner's information would lead to arresting the kingpin. R. at 4, lines 4–6. Agent Malaska persuaded the prosecutors to delay filing charges and offer a plea deal. R. at 4, lines 6–9. Agent Malaska sought a pre-indictment plea deal because he believed indicting Petitioner would subvert his efforts to reprimand the kingpin. R. at 4, lines 7–8. The offer needed to be accepted quickly because the kingpin was only traveling through town. R. at 4, lines 5–8.

To encourage Petitioner to accept the offer quickly, prosecutors imposed a thirty-six-hour time limit on the validity of the offer because if Petitioner did not provide his information within the temporal limit, his information would not be valuable because the kingpin would no longer be in town. R. at 4, lines 3–11. The offer was for one-year in prison, a reduction from the ten Petitioner faced, in exchange for the names of Petitioner's suppliers. Ex. D; Ex. C, pg. 3, line 22. And Petitioner's information must lead to an arrest. Ex. D.

Prosecutors emailed Long the plea offer. R. at 4, lines 11–12. Long never communicated the plea offer to Petitioner and it expired. R. at 4, lines 17–18. The parties stipulate Long was ineffective as Petitioner's counsel. But Petitioner never expressed to Long he would have accepted the offer. Ex. B, pg. 4, lines 15–17. It was not until the pretrial hearing, after calming down and contemplating the gravity of his plight, that Petitioner expressed he would have accepted the offer. Ex. C, pg. 3, lines 18–23.

Petitioner was indicted and charged with one count of violating 21 U.S.C. § 841. R. at 4, lines 19–21. The assigned prosecutor asked Long why the offer was not accepted, and Long admitted he misunderstood the time limit. R. at 4, lines 22–24. Long notified Petitioner and

Petitioner hired new counsel. R. at 4, lines 25–27. Petitioner's new counsel asked the prosecutor to re-offering the plea deal. R. at 5, lines 1–2. But reoffering would be pointless because the original purpose of extending an offer no longer applied because the kingpin was out of town and other suppliers may be tipped off. R. at 5, lines 4–6. Other authorities

SUMMARY OF THE ARGUMENT

This case is about promoting public safety and well-being and following the plain language of the Sixth Amendment and this Court's binding precedent. Officer McNown entered Petitioner's home, as a community caretaker, during a welfare check to discover Petitioner's condition. And Petitioner was offered a plea deal pre-indictment he was unlikely to accept. The Thirteenth Circuit properly held Petitioner's Fourth and Sixth Amendment rights were not violated. This Court should affirm the Thirteenth Circuit because the community caretaking exception extends to homes and the right to effective counsel does not attach pre-indictment.

The Thirteenth Circuit properly held Officer McNown lawfully entered Petitioner's home for three reasons. First, extending the community caretaking exception to homes promotes the underlying policy interests of the emergency aid doctrine in *Brigham City*—public safety and well-being. Second, general reasonableness is best suited to evaluate community caretaking under the Fourth Amendment. General reasonableness encourages officers to provide beneficial aid while also protecting individual privacy. Warrants and probable cause are inapplicable to community caretaking because of the impossibility of probable cause and officer discretion is limited to the subject and scope of the caretaking function. And preserving *Cady*'s "totally divorced" requirement precludes pretextual home searches. Third, Officer McNown entering Petitioner's home was reasonable because it was during a welfare check and his search was limited to discovering Petitioner's condition. This Court should affirm the Thirteenth Circuit

because the community caretaking exception extends to homes—promoting public safety and well-being.

The Thirteenth Circuit properly held the right to effective counsel does not attach to pre-indictment plea negotiations for three reasons. First, the right to effective counsel does not attach to pre-indictment plea negotiations because, under *Kirby*, the right does not attach pre-indictment. In *Kirby*, this Court established a bright-line rule that adversary judicial proceedings do not initiate until indictment. Second, *Kirby*'s bright-line rule applies to plea negotiations and pre-indictment negotiations are not "critical stages of a criminal proceeding" requiring counsel because criminal proceedings do not initiate until indictment. Third, even if the right to effective counsel attached to Petitioner's pre-indictment plea negotiations, Petitioner did not suffer prejudice under *Strickland* because there is not a reasonable probability Petitioner would have accepted the plea offer. This Court should affirm the Thirteenth Circuit because the right to effective counsel does not attach until indictment following the plain language of the Sixth Amendment and this Court's binding precedent.

STANDARD OF REVIEW

The Thirteenth Circuit affirmed the District Court denying Petitioner's motion to suppress and motion to reoffer the plea deal because, under the Fourth Amendment, officers acting as community caretakers may lawfully enter a home without a warrant and the Sixth Amendment right to effective counsel does not attach pre-indictment. Petitioner raises issues regarding Constitutional interpretation. And Constitutional interpretation is a question of law subject to *de novo* review. *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

ARGUMENT

I. This Court Should Affirm the Thirteenth Circuit Because the Community Caretaking Exception Extends to Homes and Officer McNown Lawfully Entered Petitioner's Home During a Welfare Check Because, Under *Cady*, Reasonable Caretaking Searches Are Constitutional.

The Fourth Amendment protects "against *unreasonable* searches" and warrants will only be issued upon probable cause of criminality. U.S. Const. amend. IV (emphasis added). The Fourth Amendment does not forbid warrantless searches; rather, it forbids *unreasonable* warrantless searches. *See Terry v. Ohio*, 392 U.S. 1, 9 (1968). Warrantless searches are presumptively unreasonable. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). However, "because the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" lacking a warrant is not dispositively fatal. *Id.*; *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973). The government must provide compelling reasons to justify the absence of a warrant. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (plurality opinion) (citing *McDonald v. United States*, 335 U.S. 451, 454 (1948)). In *Cady*, this Court established the community caretaking exception as a compelling reason to justify warrantless searches. 413 U.S. at 448.

Under *Cady*, warrantless searches made by officers performing "community caretaking functions" are only subject to general reasonableness. *Id.* at 448. Community caretaking functions are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* Community caretaking is different than exigent circumstances because community caretaking focuses on the function performed by an officer while exigency focuses on if the circumstances required immediate action. *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009). Therefore, the community caretaking exception has a more

expansive temporal reach than exigency. Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 277 (1998).

The purpose of community caretaking is to aid those in danger, preserve property, or "create and maintain a feeling of security in the community." *Id.* at 272 (quoting Standards for Criminal Justice §1-2.2 (1980)). The societal role officers play as community caretakers extends well beyond investigating crimes because "in addition to being an enforcer of the criminal law," an officer "is a 'jack-of-all-emergencies.'" *United States v. Rodriguez-Morales*, 929 F.2d 780, 784 (1st Cir. 1991), *cert. denied*, 502 U.S. 1030 (1992) (quoting Wayne LaFave, *Search and Seizure* § 5.4(c), at 525 (2d ed. 1987)). Specific to this case, it is common for officers—acting as community caretakers—to enter elderly people's homes while performing welfare checks to discover their condition. *See, e.g.*, Livingston, *supra*, at 272–73, 273 n.56.

This Court has upheld its holding and reasoning from *Cady* in two other cases: *South Dakota v. Opperman*, 428 U.S. 364 (1976) and *Colorado v. Bertine*, 479 U.S. 367 (1987). But states and federal circuits are split on whether warrantless community caretaking home entries are valid under the Fourth Amendment. The Fourth, Fifth, Sixth, and Eighth circuits have extended the exception to warrantless homes entries because there is no language in *Cady*, *Opperman*, or *Bertine* limiting the community caretaking exception to cars and extending the exception promotes public safety and well-being. *See, e.g.*, *Hunsberger*, 570 F.3d at 554; *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *United States v. Rohrig*, 98 F.3d 1506, 1523 (6th Cir. 1996); *United States v. York*, 895 F.2d 1026, 1029–30 (5th Cir. 1990) (framed as an exigent circumstances decision, but stressed the community caretaking role of officers). Because this Court has only applied the community caretaking exception to car searches, the Third, Seventh, Ninth, and Tenth circuits have—incorrectly—limited the exception to car

searches. *See, e.g.*, *Ray v. Township of Warren*, 626 F.3d 170, 177 (3d Cir. 2010); *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, 208–209 (7th Cir. 1982).

In this case, Officer McNown entered Petitioner's home during a welfare check to discover Petitioner's condition. This Court should affirm the Thirteenth Circuit for three reasons. First, Officer McNown lawfully entered Petitioner's home without a warrant because the community caretaking exception extends to homes. Extending the exception to homes promotes public safety and well-being. Second, general reasonableness is best suited to evaluate community caretaking home entries because it balances policy interests, warrants and probable cause are inapplicable, and *Cady*'s "totally divorced" requirement precludes pretextual entries. Third, Officer McNown entering Petitioner's home was reasonable because it was during a welfare check—totally divorced from criminal investigation—and the search was limited to discovering Petitioner's condition. Therefore, this Court should affirm the Thirteenth Circuit because the community caretaking exception extends to homes and promotes public safety and well-being.

A. Extending the Community Caretaking Exception to Homes Promotes the Underlying Policy Interests of the Emergency Aid Doctrine in *Brigham City*—Public Safety and Well-Being.

Extending the community caretaking exception to homes promotes public safety and well-being. In *Brigham City*, this Court explained public safety and well-being are the underlying policy interests of the emergency aid doctrine permitting warrantless home entry. 547 U.S. at 400. This Court first recognized the emergency aid doctrine in *Mincey v. Arizona* because when a person is in need of aid "[t]he need to protect or preserve life or avoid serious injury []

justify[es]" warrantless home entry. 437 U.S. 385, 392 (1978). Similarly, officers enter homes as community caretakers to provide aid—promoting public safety and well-being.

This Court's Fourth Amendment jurisprudence permits extending the community caretaking exception to homes to promote public safety and well-being. *See Ryburn v. Huff*, 565 U.S. 469, 474 (2012). In *Ryburn*, this Court explained that it is reasonable to interpret its Fourth Amendment jurisprudence to allow officers to enter a home to protect occupants when there is potential danger. *Id.* (citing *Brigham City*, 547 U.S. at 403 ("'The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.'" (quoting *Mincey*, 437 U.S. at 392))); *Georgia v. Randolph*, 547 U.S. 103, 118 (2006) ("[I]t would be silly to suggest that the police would commit a tort by entering [a residence] . . . to determine whether violence . . . is about to (or soon will) occur.").

Officers should be encouraged to make community caretaking home entries because even though aid is not imminently needed, aid is needed and beneficial. The difference between community caretaking and emergency aid is immanency to act. It is unquestioned that officers can enter a home when *immediate* aid is needed. *Mincey*, 437 U.S. at 392. And in *Brigham City*, this Court rejected the idea that officers need to wait until the need for aid was imminent. 547 U.S. at 406. Therefore, officers should enter homes as community caretakers without a warrant because providing aid is beneficial.

The community caretaking exception should extend to homes because community caretaking prevents or discovers exigency. Officers better serve their communities by preventing harm compared to only providing aid after the damage has been done. *See id.* Because community caretaking prevents or discovers exigency, officers can enter a home without a warrant or having to wait until the situation becomes exigent or exigency becomes apparent. *See*

id. ("The role of a peace officer includes preventing violence and restoring order, not simply rendering first aid to casualties; an officer is not like a boxing (or hockey) referee, poised to stop a bout only if it becomes too one-sided."). Because community caretaking prevents or discovers exigency, the community caretaking exception should extend to homes.

Extending the community caretaking exception to homes encourages officers to better protect and serve their communities. Requiring officers to obtain a warrant before acting or waiting until the circumstances become exigent will discourage officers from acting as community caretakers even when acting would be beneficial. This Court has recognized the need to dispense the warrant requirement when "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *Camara v. Mun. Court of S.F.*, 387 U.S. 523, 533 (1967). The burden of obtaining a warrant is likely to discourage officers from providing beneficial aid. Therefore, this Court should extend the community caretaking exception to homes to promote the underlying policy interests in *Brigham City*—public safety and well-being.

B. General Reasonableness Is Best Suited to Evaluate Community Caretaking Home Entries for Three Reasons: It Balances Policy Interests, Warrants and Probable Cause Are Inapplicable, and *Cady*'s "Totally Divorced" Requirement Precludes Pretextual Searches.

This Court should use the general reasonableness standard to evaluate community caretaking home entries under the Fourth Amendment for three reasons. First, general reasonableness encourages officers to provide beneficial aid while also protecting individual privacy. Second, warrants and probable cause are inapplicable to community caretaking because of the impossibility of probable cause and officer discretion is already limited to the subject and scope of the caretaking function. Third, preserving *Cady*'s "totally divorced" requirement

precludes pretextual home searches without probable cause, because community caretaking must be unrelated to criminal investigation.

1. General Reasonableness Is Best Suited to Evaluate Community Caretaking Home Entries Because It Balances Policy Interests by Encouraging Officers to Provide Beneficial Aid While Also Protecting Individual Privacy.

General reasonableness produces the perfect policy result because officers are encouraged to act as community caretakers and individual privacy is protected. Michael R. Dimino, Sr., *Police Paternalism: Community Caretaking, Assistance Searches, and Fourth Amendment Reasonableness*, 66 Wash. & Lee L. Rev. 1485, 1496–97 (2009). Community caretaking home entries should be evaluated for general reasonableness because only those entries that intrude on individual privacy without sufficient cause are unreasonable and therefore unconstitutional. *Id.* The constitutionality of a warrantless home entry by an officer acting as a community caretaker therefore depends on whether the caretaking function was reasonably exercised under the totality of the circumstances. *Wisconsin v. Pinkard*, 785 N.W.2d 592, 598–99 (Wis. 2010), *cert. denied*, 562 U.S. 1182 (2011). Under the general reasonableness standard, officers can enter homes to provide beneficial aid, but cannot enter arbitrarily or exceed the reasonable subject and scope of their caretaking function.

General reasonableness appreciates factual nuances and intricacies and is best suited to evaluate community caretaking entries that occur in a multitude of different factual circumstances. It would be impossible, and unwise, to try to catalogue all the possible reasonable community caretaking situations. Dimino, *supra*, at 1500. Officers should be able to react differently when presented with different facts. *Id.* And courts should have the latitude to evaluate each case based on its factual nuances and intricacies. *Id.* General reasonableness allows

officer to react to different factual situations and courts to evaluate each case based on its unique facts.

General reasonableness is a better rule than a balancing test because general reasonableness considers the public's interest in receiving community caretaking. The public has a manifest interest in receiving beneficial aid. General reasonableness considers the public's interest in benefiting from community caretaking. But balancing governmental and privacy interests fails to account for the public's interest in community caretaking. *See Erickson*, 991 F.2d at 531 (citing *Maryland v. Buie*, 494 U.S. 325, 331 (1990)). The balancing test for reasonableness disregards the integral societal utility of community caretaking by failing to account for the public's interest in community caretaking. Therefore, general reasonableness is the best rule for evaluating the constitutionality of community caretaking home entries.

2. Because of the Impossibility of Probable Cause, Warrants and Probable Cause Are Inapplicable to Community Caretaking. And Officer Discretion is Already Limited to the Subject and Scope of the Caretaking Function.

Officer's will not be able to obtain a warrant for a community caretaking home entry because probable cause is impossible during community caretaking because community caretaking must be "totally divorced" from criminal investigation. *Cady*, 413 U.S. at 448. Warrants are only issued upon probable cause of criminality. U.S. Const. amend. IV. Warrants provide the quintessential restraint on officer discretion by safeguarding against overly intrusive searches by officers "engaged in the often competitive enterprise of ferreting out crime." *See Johnson v. United States*, 333 U.S. 10, 14 (1948). And "community caretaking warrants" are not needed to rein-in overzealous officers because officers are not ferreting out crime. Livingston, *supra*, at 273 (arguing warrants and probable cause are inapplicable to community

caretaking because "the absence of a law-enforcement motive often mitigates the harms associated with intrusions on privacy for the purpose of criminal investigation"). Therefore, warrants and probable cause are inapplicable to community caretaking.

Because community caretaking does not detect violations of law and officer discretion is limited to the subject and scope of the caretaking function, administrative warrants or standard procedures are unnecessary. This Court requires administrative warrants and standard procedures for administrative and inventory searches to limit otherwise unfettered officer discretion. *See, e.g.*, *Opperman*, 428 U.S. at 372; *Camara*, 387 U.S. at 532. Administrative warrants are inapplicable because, like traditional warrants, they are issued to detect violations of the law and limit officer discretion. Therefore, while administrative warrants are issued without probable cause, the location of the search must be chosen by non-discretionary means and limited in subject and scope. *See Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 624 (1989); *Almeida-Sanchez v. United States*, 413 U.S. 266, 270 (1973). In *Opperman*, this Court stressed that inventory searches need "standard procedures" to limit the discretion of officers "to ensure that the intrusion would be limited in scope to the extent necessary." 428 U.S. at 375. But community caretaking does not seek out violations of law and self-imposes limits on the subject and scope of searches to the bounds of the caretaking function.

3. Preserving *Cady*'s "Totally Divorced" Requirement Precludes Pretextual Home Searches Without Probable Cause, Because Community Caretaking Must be Unrelated to Criminal Investigation.

Because community caretaking must be unrelated to criminal investigation, preserving *Cady*'s "totally divorced" requirement precludes pretextual home searches without probable cause. In *Whren v. United States*, this Court stressed the importance of probable cause to

overcome the harm of "bad faith" pretextual police action. 517 U.S. 806, 811–12, 817 (1996). However, *Whren* does not foreclose an inquiry into an officer's purpose as-part-of the calculus of reasonableness for community caretaking, which is "conducted in the *absence* of probable cause." *Id*. at 811. *Cady* requires community caretaking be "totally divorced" from criminal investigation—implicitly requires reviewing officers' subjective intent—because of the absence of probable cause. 413 U.S. at 448. Because community caretaking must be "totally divorced" from criminal investigation and pretextual searches are related to criminal investigation, pretextual searches without probable cause are not covered by the community caretaking exception and, therefore, unconstitutional. This Court should preserve *Cady*'s "totally divorced" requirement to preclude harmful pretextual home searches.

C. Officer McNown Entering Petitioner's Home Was Reasonable Because It Was During a Welfare Check—Totally Divorced from Criminal Investigation—and the Search Was Limited to Discovering Petitioner's Condition.

Officer McNown reasonably believed Petitioner was inside and needed aid because Petitioner's car was in the driveway, music was playing, and Petitioner—an elderly minister whose health was declining—did not answer the door. Officer McNown went to Petitioner's home to discover Petitioner's condition. Because Petitioner's car was in the driveway and music was playing from inside, Officer McNown believed Petitioner was inside. Once Petitioner did not answer the door—and considering Petitioner's reputation as a well-respected minister that never missed a service unless he was sick, an aggressive strain of Bandwagon Flu was going around, and Petitioner's health was declining because of his elderly age—Officer McNown believed he needed to enter Petitioner's home because Petitioner may need aid. Therefore, it was

reasonable for Officer McNown to enter Petitioner's home as a community caretaker upon a reasonable belief Petitioner was inside and needed aid.

Officer McNown entered Petitioner's home "totally divorced" from criminal investigation because Officer McNown entered Petitioner's home to discover Petitioner's condition. Not discover criminality. Considering the facts and circumstances known to Officer McNown at the time he entered Petitioner's home, Officer McNown had no reason to believe there was criminal activity at Petitioner's home. *See Carroll v. United States*, 267 U.S. 132, 162 (1925). Officer McNown had no reason to believe the SUV was connected to Petitioner. And Petitioner had a reputation as a well-respected minister. Officer McNown believed he was entering Petitioner's home only to discover Petitioner's condition and bring Petitioner hot tea. Not discover criminality Therefore, Officer McNown entered Petitioner's home "totally divorced" from criminal investigation.

Officer McNown did not search Petitioner's home more than needed to fulfill his community caretaking function—discovering Petitioner's condition. The subject and scope of Officer McNown's search of Petitioner's home was limited to discovering Petitioner's condition. Officer McNown only entered Petitioner's home because Petitioner failed to answer the door. If Petitioner answered the door, Officer McNown would have fulfilled the purpose of his community caretaking function and would not have searched further. Officer McNown turned off Petitioner's TV because no one was on the first floor and to better concentrate on finding Petitioner. And because no one was on the first floor, Officer McNown did not search the first floor and moved upstairs where the music was playing because the subject and scope of his search was limited to discovering Petitioner's condition.

If Officer McNown had found Petitioner in need of emergency aid and saved his life, Petitioner would be thankful Officer McNown entered his home and Officer McNown would be a hero. However, this case in an anomaly. Community caretaking home entries rarely uncover evidence of crime. Livingston, *supra,* at 273. In this case, Officer McNown's community caretaking search of Petitioner's home uncovered evidence of criminality. But Officer McNown believed entering Petitioner's home would only uncover Petitioner's condition.

Even if the entirety of Officer McNown's search and seizure is not covered by the community caretaking exception, the notebook he observed in plain view justified searching for evidence of Petitioner's drug deals. "Plain view" can justify additional action beyond the scope of the original justified warrantless search. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987) (quoting *Coolidge*, 403 U.S. at 465 (plurality opinion)). Officer McNown, while lawfully in Petitioner's home as a community caretaker, observed an open notebook with incriminating information about Petitioner's drug deals. The information found in the notebook provided probable cause to search Petitioner's home for evidence of drug dealing. Even if the community caretaking exception does not justify the entire search and seizure, it justified entering Petitioner's home and probable cause provided by information in the notebook Officer McNown observed in plain view justified expanding his search to discover evidence of Petitioner's drug deals. Therefore, this Court should affirm the Thirteenth Circuit.

II. This Court Should Affirm the Thirteenth Circuit Because, Under *Kirby*'s Bright-Line Rule, the Right to Effective Counsel Did Not Attach to Petitioner's Pre-Indictment Plea Negotiations Because Petitioner Did Not Face Adversarial Judicial Proceedings Until Indicted.

The Sixth Amendment requires "[in] all criminal *prosecutions*, the *accused* shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI

(emphasis added). Assistance of counsel is the right to effective counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 n.14 (1970)). The right only attaches at or after "adversary judicial proceedings" have been initiated. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (internal citations omitted). The plain language of the Sixth Amendment and this Court's precedent established a bright-line rule that the right to effective counsel does not attach until indictment—the start of criminal *prosecution, accusing* defendants of criminality. *See, e.g., id.* at 688–89. Because pre-indictment plea negotiations are not during criminal proceedings, the right to effective counsel does not attach.

This Court should affirm the Thirteenth Circuit for three reasons. First, the right to effective counsel does not attach to pre-indictment plea negotiations because the bright-line rule established in *Kirby* provides the right to effective counsel does not attach until indictment. Second, pre-indictment plea negotiations are not "critical stages of a criminal proceeding" because criminal proceedings do not commence until indictment. Third, even if the right attaches pre-indictment, Petitioner did not suffer prejudice because there is not a reasonable probability he would have accepted the plea offer. Therefore, this Court should affirm the Thirteenth Circuit because the right to effective counsel does not attach pre-indictment, and even if it did, Petitioner did not suffer prejudice.

A. The Right to Effective Counsel Does Not Attach to Pre-Indictment Plea Negotiations Because *Kirby* Established a Bright-Line Rule that the Right Does Not Attach Pre-Indictment.

In *Kirby*, this Court established a bright-line rule that the right to effective counsel does not attach pre-indictment. *Id.* (explaining the rights to effective counsel attaches "at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge,

preliminary hearing, indictment, information, or arraignment"). This bright-line rule tracks the language of the Sixth Amendment. The Sixth Amendment applies when there is a "criminal *prosecution*" and an "*accused*." U.S. Const. amend. VI (emphasis added). Prosecution is defined as "a criminal proceeding in which an accused person is tried," and accused is defined as "someone who has been blamed for wrongdoing, especially a person who has been arrested and brought before a magistrate or who has been formally charged with a crime (as by indictment or information)." Black's Law Dictionary (10th ed. 2014). Because the right to effective counsel does not attach until indictment—when criminal proceedings initiate, and the defendant is accused of criminality—the right does not attach to pre-indictment plea negotiations.

This Court consistently affirms *Kirby* holding the right to effective counsel does not attach pre-indictment. *See, e.g.*, *United States v. Gouveia*, 467 U.S. 180, 187–88 (1986) (citing *Kirby*, 406 U.S. at 688–89 and holding the right to effective counsel does not attach to pre-indictment identification procedures because pre-indictment actions are not part of criminal proceedings). Petitioner may argue *United States v. Ash* and *United States v. Wade* shows this Court deviates from *Kirby*'s bright-line rule. *See United States v. Ash*, 413 U.S. 300, 310–11 (1973); *United States v. Wade*, 388 U.S. 218, 224 (1967). However, this interpretation of this Court's jurisprudence is misplaced because *Gouveia*—which affirms *Kirby*'s bright-line rule—postdates *Ash* and *Wade*. *See Gouveia*, 467 U.S. at 187–88. *Ash* and *Wade* are therefore non-precedential, and this Court's prevailing attachment rule is *Kirby*. Therefore, the right to effective counsel did not attach to Petitioner's pre-indictment plea negotiations because criminal proceedings do not initiate until indictment under *Kirby*.

There is not a circuit split for this Court to resolve because *Kirby* remains binding precedent followed by lower courts. The majority of circuits follow *Kirby* holding the right to

effective counsel does not attach pre-indictment. *See, e.g.*, *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018); *United States v. Waldon*, 363 F.3d 1103, 1112 (11th Cir. 2004); *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000); *United States v. Mapp*, 170 F.3d 328, 334 (2d Cir. 1999); *United States v. Lin Lyn Trading, Ltd*., 149 F.3d 1112, 1117 (10th Cir. 1998); *United States v. Heinz*, 983 F.2d 609, 612–13 (5th Cir. 1993); *United States v. Sutton*, 801 F.2d 1346, 1365–66 (D.C. Cir. 1986). The remaining circuits have not definitively extended the right to effective counsel to pre-indictment plea negotiations because circuits that have suggested it does have done so in dicta. *Turner*, 885 F.3d at 953. Therefore, there is not a circuit split on whether the right to effective counsel attaches to pre-indictment plea negotiations for this Court to resolve. And *Kirby* remains binding precedent.

Kirby's bright-line rule is not arbitrary because it is the proper application of the Sixth Amendment and provides a judicially manageable standard. Looking to the initiation of criminal proceedings—indictment—as the point attaching the right to effective counsel "is fundamental to the proper application of the Sixth Amendment." *Moran v. Burbine*, 475 U.S. 412, 431 (1986). In *Escobedo v. United States*, this Court stated—for the purposes of the Fifth Amendment—it "should make no difference that the suspect had not yet been formally indicted." 378 U.S. 678, 486 (1964). However, this Court has clarified *Escobedo* is limited to the Fifth Amendment and its reasoning does not extend to the Sixth Amendment. *Moran*, 475 U.S. at 429–30. Under the Sixth Amendment, there is difference between pre and post-indictment mandating *Kirby*'s bright-line rule.

Kirby's bright-line rule already adequately determines when the government commits to prosecute because indictment proves the government is committed to prosecute. A rule determining attachment at the time the government commits to prosecute is vague and

unmanageable. Deviating from the bright-line rule puts defendants at risk of losing the right to effective counsel post-indictment because the point of attachment becomes unclear. If the right attaches at the time the government commits to prosecute, the government could argue that even though charges have been filed, it has not committed to prosecute for some reason. Courts will then be left to discern what constitutes "commitment" and what degree of commitment is necessary to attach the right regardless of whether or not charges have been filed.

Prosecutors are not encouraged to delay filing charges under *Kirby* when making favorable plea offers because statutes of limitations discourage delays and the Fifth Amendment requires courts to dismiss indictments if the government delays filing charges deliberately to gain an advantage over the defendant. *See Gouveia*, 467 U.S. at 192 (citing *United States v. Lovasco*, 431 U.S. 783, 789–90 (1977); *United States v. Marion*, 404 U.S. 324, 307 (1971)). Additionally, the possibility of a delay before charges are filed, delaying the appointment of counsel, is an insufficient basis to attach the Sixth Amendment. *Gouveia*, 467 U.S. at 191. In this case, while Petitioner may have benefitted for the aid and advice of counsel, the government did not delay filing charges to gain an advantage over Petitioner. The government delayed filing charges because they wanted valuable information about a drug kingpin traveling through town without alerting the kingpin.

B. *Kirby*'s Bright-Line Rule Applies to Plea Negotiations and Pre-Indictment Negotiations Are Not "Critical Stages of a Criminal Proceeding" Requiring Counsel Because Criminal Proceedings Do Not Initiate Until Indictment.

This case presents an "attachment question" distinct from a "critical stage question" because the right to effective counsel must attach before counsel can be required at a critical stage. *See Rothgery v. Gillespie County*, 554 U.S. 191, 212 (2008). "Once the adversary judicial

process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (internal citations omitted). It is a fundamental "mistake" to confuse the "critical stage question" with the "attachment question." *Rothgery*, 554 U.S. at 211 (internal quotation marks omitted). These questions must be kept "distinct." *Id.* at 212. The guarantee to have counsel present at all critical stages only applies once the right to effective counsel has attached. *Id.* (critical stage determines whether counsel must be present at a post-attachment proceeding). And under *Kirby*, the right attaches at indictment. 406 U.S. at 688–89. Therefore, pre-indictment plea negotiations cannot be a critical stage.

This Court explicitly designating *post-indictment* plea negotiations as critical stages applies the *Kirby* bright-line rule to plea negotiations. In *Frye* and *Lafler*, this Court addressed if post-indictment plea negotiations were "critical stages" requiring counsel present, but neither addressed attachment or pre-indictment plea negotiations. *Missouri v. Frye*, 566 U.S. 134, 144 (2012); *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). If this Court intended to remove the distinction between pre and post-indictment plea negotiations, it would have done so in *Frye* and *Lafler* and would not have explicitly designated only post-indictment plea negotiations as critical stages. Therefore, pre-indictment plea negotiations are not critical stages. *Kirby* applies to plea negotiations and the right to effective counsel does not attach to pre-indictment plea negotiations.

C. Even if the Right to Effective Counsel Attached to Petitioner's Pre-Indictment Plea Negotiations, Petitioner Did Not Suffer Prejudice Under *Strickland* Because There Is Not a Reasonable Probability Petitioner Would Have Accepted the Plea Officer.

Petitioner was unlikely to accept the pre-intendment plea offer because the offer was contingent on naming his suppliers, and Petitioner told Agent Malaska he would never give up

his suppliers because they would kill him or burn down his church. Because it is stipulated Petitioner's counsel was ineffective, Petitioner must only prove he suffered prejudice because of his counsel's deficient performance. *See Strickland*, 466 U.S. at 695. To show prejudice, Petitioner must demonstrate a reasonable probability he would have accepted the plea offer and the offer would not have been revoked or refused by the court. *See Frye*, 566 U.S. at 135. Petitioner fails to show a reasonable probability he would have accepted the pre-indictment plea offer because he made it clear he was unwilling to agree to naming his suppliers.

Given the thirty-six-hour time limit to accept the offer, Petitioner was unlikely to accept it during its temporal validity and the government was likely to revoke it because Petitioner feared for his life and the information the government sought was time sensitive. The government was likely to revoke the offer because the kingpin was only traveling through town. And if the offer was open, Petitioner's information would only be valuable if the kingpin was in town and the government would likely have revoked the offer if the kingpin left town early. And Petitioner expressed to his attorney he was afraid he would get stabbed when he got to jail. Because Petitioner feared for his life, it was unlikely Petitioner would have accepted the offer within the time limit. Petitioner later testified—after calming down and contemplating the gravity of his plight—he would have given up suppliers. However, this is unreliable hindsight.

Further, nothing in the record indicates the plea offer would not have been revoked or the court would accept it. Because the offer was for a year in prison, a significant decrease from the ten Petitioner faced, in exchange for just names, it is unlikely the court would have accepted the offer considering the severity of Petitioner's offense and evidence against him. Additionally, Petitioner naming his suppliers was not guaranteed to lead to an arrest required by the offer. But convicting Petitioner was very likely considering the evidence against him. Therefore, even if the

right to effective counsel attaches to pre-indictment plea negotiations, Petitioner fails to show prejudice and this Court should affirm the Thirteenth Circuit.

CONCLUSION

For the forgoing reasons, Respondent requests this Court affirm the judgment of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully submitted,
/s/ TEAM: R22
October 21, 2018
Counsel for Respondents