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 RESPONDENT

Packet # 23

Counsel for Respondent.
THE UNITED STATES OF AMERICA

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

STATEMENT OF THE ISSUES

1) Does the government's substantial interest in public safety outweigh an individual's interest such that the community caretaking exception applies to homes, when objectively reasonable, and allow for the admission of evidence seized in plain view?

2) Does the government's substantial interest in public safety mandate that community caretaking exception apply to homes when objectively reasonable and allow for the admissibility of evidence seized in plain view?

STATEMENT OF THE FACTS

Petitioner's Drug Arrest

Officer James McNown (McNown) of the Lakeshow Police Department (LPD) attended the 7 AM service at his church, the Lakeshow Community Revivalist Church, in uniform, before his shift on Sunday, January 15, 2017. When the minister, Chad David (Petitioner), who had a reputation for always showing up to lead services, had not shown up by 7:15 people began to worry. Ex. A at 1:18, 2:19-23, 2:26-27, 3:16-18. One of the other church members, Julianne, attempted to call Petitioner, but there was no answer. *Id.* at 2:23-25. Like many McNown laughed when someone said Petitioner had been at a bar the night before; McNown "assumed he was sick at home because there was a nasty strain of the Bandwagon Flu going around." *Id.* at 3:5-8. Someone else lead the service and afterwards, "[a]s a concerned member of the church, [McNown] wanted to go check on [Petitioner]" and "bring him some hot tea from Starbucks to make him feel better." *Id.* at 3:15-16. Julianne texted McNown petitioner's address and McNown went to Starbucks and got tea, then drove his patrol car to Petitioner's address. *Id.* at 3:22, 4:8, 5:15.

Petitioner lived in a nice, gated community. Ex A at 3:23. As McNown was entering, he noticed a black Cadillac SUV with Golden State plates leaving. *Id.* at 3:23, 4:1-2; 4:7-8. Even though he knew this car was popular with drug dealers, McNown did not know where in the community the car was coming from and it did not raise his suspicions. *Id*. 4:5-6. McNown believed Petitioner was home because when he arrived at Petitioner's residence he saw Petitioner's car was in the driveway and heard "loud, scream-o metal music." *Id.* at 4:14-16, 7:10-12.

McNown knocked on the door and rang the doorbell. Ex. A. at 4:18-19. After waiting about two minutes, McNown believed no one inside could not hear him over the music, so he looked in the window. *Id.* at 4:19-20. McNown did not see anyone but noticed the TV was on and the movie

The Wolf of Wall Street was playing. *Id.* at 4:21-25. McNown then tried to enter, but the front door was locked. *Id.* at 5:5-7. Eager to "check-on" Petitioner and "give him his tea," and trained that he did not need a warrant if he was not acting as part of a criminal investigation, McNown walked around the house to the backdoor, which was unlocked, and entered. *Id.* at 5:9, 5:14-15, 7:1-2. The TV's volume was high so McNown went to turn it off and saw a small open notebook with the name "Julianne Alvarado" and "ounce paid" written on it. *Id.* at 5:21-32. McNown did not seize the notebook. He could hear the music was coming from upstairs so he "didn't search around much on the first floor" and went to see if Petitioner was upstairs. R. at 3; Ex. A. at 5:26-27.

McNown followed the music to a room and opened the door to find Petitioner "packaging cocaine into some tiny ziplock baggies." Id at 6:2-6. McNown detained Petitioner and called for a DEA Agent per LPD protocol for substantial narcotics finds. R. at 3:15-18. When DEA agent Colin Malaska (Malaska) arrived, McNown showed him the over 10 kilograms of cocaine and the notebook. R. at 3:22-23; Ex. F. Malaska read Petitioner his Miranda rights and asked Petitioner where he got the cocaine. R. at 3:23-24; Ex. F. Petitioner responded, "there is no way in hell I will tell you. They will kill me and burn my church down if I give you their names." Ex. F. Petitioner was then taken into custody and the cocaine and notebook seized. Ex. F.

Prosecution Plea Offer

Despite Petitioner's unwillingness to cooperate during initial questioning, Malaska, who was seeking information on a suspected drug kingpin, contacted the prosecution for Petitioner's case, and requested that they delay filing charges in order to maintain Petitioner's low profile. R. at 4. Malaska believed if the drug kingpin he was tracking did not find out about Petitioner's arrest, then the DEA could use information provided by Petitioner to arrest the kingpin. R. at 4. To assist Malaska in his efforts, the prosecutors put together a plea offer for petitioner. R. at 4. According

to the offer, if Petitioner named his suppliers and this information led to an arrest, he would serve one year in prison. R. at 4. *See* R. at 3-4. Due to the time-sensitive nature of the offer, it was only valid for 36 hours. R. at 4. They sent the offer at 8:00 AM Monday, January 16, 2017 less than 24 hours after Petitioner's arrest, with a deadline at 10:00 PM Wednesday, January 17, 2017. R. at 4.

Petitioner's attorney, Keegan Long (Long), who he hired immediately after his arrest, received the offer via email while drinking at a bar. R. at 3-4. Petitioner hired Long despite knowing Long was an alcoholic. R. at 4. Due to his intoxication, Long misread the 36-hour expiration time as 36 days and ignored the email. R. at 4. The following morning, the prosecutor attempted to reach Long and left a voicemail regarding the plea offer. R. at 4. The plea offer expired. R. at 4. The next day, the prosecutor contacted Long to ask why Petitioner rejected the plea offer, and Long realized his error. R. at 4. He contacted Petitioner, who fired him after learning of the mistake, and hired a new attorney. R. at 4.

When Petitioner's new attorney contacted the prosecutor on Friday, January 20, 2017 regarding the plea offer, she informed him that there would no longer be any benefit to the government, so they could not reoffer the deal. R. at 5. The suppliers they were seeking were likely already aware that Petitioner had been caught, and therefore his information was no longer useful to them. R. at 4.

Procedural Posture

Petitioner was convicted in the Southern District of Staples for possession of a controlled substance with intent to distribute. R. at 14. He appealed to the Thirteenth Circuit on the grounds that the District court erred in denying his motion to suppress evidence and his motion to require the government to re-offer his initial plea deal. R. at 14. The Thirteenth Circuit affirmed his conviction. R. at 14. The Supreme Court granted his petition for certiorari. R. at 25.

SUMMARY OF THE ARGUMENT

The government has a significant interest in the safety and well-being of the community separate from the investigation and prevention of crime. When law enforcement acts in this non-investigatory capacity they are acting as community caretakers. Here Officer McNown was acting as a community caretaker when he entered Petitioner's home and saw over ten kilograms of cocaine in plain view.

The community caretaker exception to the warrant requirement was created by this Court in *Cady v. Dombrowski*, 413 U.S. 433, 447 (1973) and allows for warrantless searches when police are not investigating crime. Since *Cady* involved the search of a vehicle, some courts have wrongly held that the exception applies only to vehicles without conducting an accurate Fourth Amendment balancing of interests. Courts that have balanced the government's interest in the community caretaker function with the private interest in homes have concluded that the community caretaker exception applies to homes as well as vehicles.

McNown's community caretaking entry into Petitioner's home was valid because it was divorced from the investigation of crime, objectively reasonable and based on specific articulable facts and carefully limited in scope. The evidence seized in plain view is not subject to the exclusionary rule because McNown's conduct was objectively reasonable and based on his training, therefore there is no police misconduct to deter.

The Sixth Amendment right to effective counsel at issue in this case is the subject of a long-held bright line rule established by the Supreme Court in *United States v. Gouveia,* 467 U.S. 180 (1984). This rule creates a clear, objective standard that the right to counsel does not attach to a defendant until he or she is formally charged. As a result, the ineffective assistance of counsel Petitioner experienced was not actionable on appeal in these proceedings.

However, if this court chooses to overturn its long-held precedent where Sixth Amendment rights attach upon indictment, Petitioner's ineffective assistance of counsel should be evaluated using the factors laid out in *Strickland v. Washington*, 466 U.S. 668 (1984). While counsel's assistance was certainly ineffective, the second prong of this test requires Petitioner to show a reasonable probability of prejudice.

The facts demonstrate that Petitioner's plea offer requiring him to provide information leading to the arrest of a supplier would not likely have changed the outcome of the case despite its favorable terms. Since Petitioner repeatedly expressed concerns about retaliation from suppliers, it is not likely he would have accepted the plea. Even if he had, there is little evidence that he had actual knowledge that would benefit the government, so the prosecution likely would never enter the plea. Because of this, re-offering the plea deal would be an inequitable solution to this case.

For these reasons, the Supreme Court should affirm the 13th circuit's ruling and find that there was neither a Fourth Amendment nor a Sixth Amendment violation in this case.

STANDARD OF REVIEW

Both issues presented are reviewable de novo. *See Ornelas v. United States*, 517 U.S. 690, 696 (1996). Fourth Amendment and Sixth Amendment standing present mixed questions of law and facts; legal conclusions are reviewable de novo, and underlying facts are reviewable for clear error. *See Ammex, Inc. v. United States,* 367 F.3d 530, 533 (6th Cir. 2004); *United States v. Singleton*, 987 F.2d 1444, 1447 (9th Cir. 1993). Here, the underlying facts are not in dispute, and the court should give deference to the district court's findings. Therefore, the applicable standard of review is de novo.

ARGUMENT

I. THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT APPLIES TO HOMES WHEN OBJECTIVELY REASONABLE, AND EVIDENCE SEIZED IN PLAIN VIEW DURING SUCH AN ENTRY SHOULD NOT BE SUPPRESSED.

A. The Community Caretaking Exception to the Warrant Requirement is Necessary to Protect the Safety and Well-being of the Public.

1. The Fourth Amendment Warrant Requirement

The Fourth Amendment protects people's right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" and requires that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. The Fourth Amendment was made applicable to the states by the Fourteenth Amendment. U.S. Const. amend. XIV; *Camara v. Mun. Court of City & Cty. of San Francisco*, 387 U.S. 523, 528 (1967). The Fourth Amendment only bars unreasonable searches and seizures. *Maryland v. Buie*, 494 U.S. 325, 331 (1990); *Skinner v. Railway Labor Executives' Assn.,* 489 U.S. 602, 619 (1989). Reasonableness, the touchstone of American Fourth Amendment jurisprudence, "depends on all of the circumstances surrounding the search or seizure and the nature of the search or seizure itself." *Skinner,* 489 U.S. at 619.

Searches conducted without a warrant are per se unreasonable subject to a few specifically established exceptions. *Katz v. United States*, 389 U.S. 347, 357 (1967). One exception, the community caretaker exception, at issue in this case, involves police acting as community caretakers outside their criminal investigation role. *Cady v. Dombrowski,* 413 U.S. 433, 441(1973).

2. Cady and the Creation of the Community Caretaking Exception

In *Cady*, this Court first recognized the community caretaking exception to the warrant requirement, Chicago Police officer, Chester Dombrowski (Dombrowski), was in a single-vehicle accident while intoxicated. 413 U.S. at 435–36, 447. At the scene, officers searched Dombrowski and the interior of his vehicle for Dombrowski's service weapon, but were unable to locate it. *Id.*

at 436. The officers had the disabled car towed to a private garage and arrested Dombrowski for driving under the influence. *Id.* Unable to learn the location of the gun from Dombrowski, one officer went to the garage and without a warrant searched Dombrowski's vehicle for the weapon again. *Id.* at 436-37. When the officer opened the trunk, he found and seized several bloody items. *Id.* at 437. These items were used to convict Dombrowski of first-degree murder. *Id.* at 434.

In determining the warrantless search of Dombrowski's vehicle was valid under the community caretaker exception to the warrant requirement, the *Cady* court emphasized "The ultimate standard set forth in the Fourth Amendment is reasonableness." *Id.* at 439. The court noted that law enforcement officers frequently investigate disabled vehicles and accidents with no criminal liability claims and "engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441. The court also highlighted that the officer's search for the gun was standard procedure in the department "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443. The *Cady* court found the police concern for the safety of the general public to be "immediately and constitutionally reasonable" and held the search was reasonable. *Id.* at 447-48.

3. The Community Caretaking Exception Applies to Homes as Well as Vehicles

i. Nothing in Cady Evidences an Intent to Restrict the Exception to Vehicles

No language in *Cady* limited community caretaking to automobiles. The *Cady* court addressed vehicles' partial exception to the warrant requirement because "there is a constitutional difference between houses and cars." *Id.* at 439–40. Further, what is reasonable under the Fourth Amendment "depends upon the facts and circumstances of each case" and what may be reasonable for a car may not be for a home. *Id*. at 440. Several courts have relied on *this* discussion to find

that the community caretaker exception applies to vehicles only. *See Ray v. Twp. of Warren*, 626 F.3d 170, 175 (3d Cir. 2010) (relying on Cady's statements distinguishing between cars and homes to hold the community caretaker exception applies to vehicles only); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (same); *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993) (same); *United States v. Pichany*, 687 F.2d 204, 208 (7th Cir. 1982) (same).

However, the *Cady* decision clearly stated that reasonableness "depends upon the facts and circumstances of each case." *Cady*, 413 U.S. at 440. Considering results might differ if circumstances differ did not foreclose the application of the exception to homes, it merely acknowledged the need to balance. The courts relying on this language to hold that *Cady* restricted the exception to vehicles only over simplified the substance and rationale of *Cady*. Further these same courts failed to balance the "facts and circumstances" and the Fourth Amendment interests at issue in applying the community caretaker exception to homes. *Cady*, 413 U.S. at 440.

ii. Courts Holding the Community Caretaker Exception Applies to Vehicles Only Have Failed to Adequately Balance Government and Private Interests

This Court consistently determines what is reasonable under the Fourth Amendment by balancing the government's interest against the individuals. *See e.g., Buie*, 494 U.S. at 331 ("Our cases show that in determining reasonableness, we have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.").

It is vital to notice that the Circuits' holdings restricting the community caretaker exception to vehicles failed to conduct adequate balancing tests weighing government and individual interest. The Seventh Circuit quoted *Cady's* statement "there is a constitutional difference between houses and cars" and stated "we have found-no cases extending *Cady* or the "community caretaking" exception beyond the automobile search context" without conducting any balancing test before holding the community caretaking exception applied only to vehicles. *Pichany*, 687 F.2d at 208-

09 (quoting *Cady,* 413 U.S. at 439). The Third and Tenth Circuits similarly failed to conduct any balancing in determining if the community caretaker exception applied beyond vehicles. *See Ray,* 626 F.3d at 175-77 (reviewing cases and concluding the community caretaker exception applies only to vehicles without conducting any balancing of interests); *Bute*, 43 F.3d at 534–35 (same).

The Ninth Circuit conducted a balancing test in *Erickson*, but wrongly concluded the private interest outweighed the government interests in ensuring occupant safety and investigating burglary. *Erickson*, 991 F.2d at 531–32. Here, an objectively reasonable citizen would want the police to investigate the home burglary. *Id*. at 530.

iii. Courts that Have Balanced Government and Private Interests Held that the Community Caretaker Exception Applies to Homes

As one court explained "homes cannot be arbitrarily isolated from the community caretaking equation. The need to protect and preserve life or avoid serious injury cannot be limited to automobiles." *State v. Deneui*, 775 N.W.2d 221, 239 (S.D. 2009). Courts that have balanced the government's interest in protecting and preserving life with an individual's interest have held the community caretaker exception applies to homes. The Eight Circuit, for example, articulated a balancing test and holds that a community caretaking search or seizure in a home is "reasonable if the governmental interest in the police officer's exercise of [the officer's] community caretaking function, based on specific articulable facts, outweighs the individual's interest in being free from arbitrary government interference." *United States v. Harris*, 747 F.3d 1013, 1017 (8th Cir. 2014).

Another court did not believe the community caretaking interest of "preserving our communities … is so insignificant that it can never serve as justification for a warrantless entry into a home. To the contrary, *Camara* and its progeny recognize that important governmental interests may be at stake even in the absence of life-or-death circumstances." *United States v. Rohrig*, 98 F.3d 1506, 1509, 1521 (6th Cir. 1996) (citing *Camara v.*, 387 U.S. 523) (holding a

community caretaker home entry in response to complaints of late-night loud music was valid).

B. Community Caretaking Entries are Valid When Objectively Reasonable

This Court has repeatedly used an objective standard to review Fourth Amendment actions. *See e.g.*, *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) ("An action is 'reasonable' under the Fourth Amendment, regardless of the individual officer's state of mind, as long as the circumstances, viewed *objectively,* justify [the] action.") (emphasis in original). Yet, there is a lack of uniformity among lower courts in evaluating community caretaking entries. *See Deneui*, 775 N.W.2d at 236–38 (discussing standards of review and tests developed by circuit and state courts).

Here, the reasoning of *Terry v. Ohio*, 392 U.S. 1, 20–21 (1968) is instructive for evaluating community caretaking home entries. *Terry*, 392 U.S. at 20–21. *Terry* provides a dual reasonableness inquiry: "whether the officer's action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place." *Id*. at 19–20. To determine if an officer's actions were justified at the outset "there is 'no ready test for determining reasonableness other than by balancing the need to search (or seize) against the invasion which the search (or seizure) entails" and in order to justify the intrusion the officer "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id*. at 20-21. If the search was reasonable, the court must also determine if the scope was reasonable. The scope of a search "must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* at 19 (internal quotations omitted).

This Court and others have followed *Terry* to evaluate other warrantless searches and seizures. In *Buie* this Court stated *Terry* was instructive in evaluating warrantless protective sweeps. *Buie*, 494 U.S. at 331–32. The *Buie* court held the Fourth Amendment permits warrantless protective sweeps "if the searching officer possessed a reasonable belief based on specific and

articulable facts which, taken together with the rational inferences from those facts, reasonably warranted the officer in believing that the area swept harbored an individual posing a danger to the officer or others." *Buie*, 494 U.S. at 327 (relying on *Terry v. Ohio,* 392 U.S. 1, 21 (1968)).

In short, for a warrantless community caretaking entry into a home to be reasonable under the Fourth Amendment the police must act as community caretakers, not investigators; have a reasonable belief the entry is justified based on specific and articulable facts; and the scope of the entry must not exceed the circumstances that justify it. *See*, *Terry*, 392 U.S. at 1921;. *Buie*, 494 U.S. at 327; 393; *Cady*, 413 U.S. at 448.

C. Officer McNown's Entry and Search Were Objectively Reasonable

1. Officer McNown was Acting as a Community Caretaker not Investigating Crime

Cady requires community caretaker actions to be "totally divorced" from criminal investigation. *Cady*, 413 U.S. at 441. When reviewing community caretaker action, courts examine "the *function* performed by a police officer." *Hunsberger v. Wood*, 570 F.3d 546, 553–54 (4th Cir. 2009). McNown was not investigating crime or acquiring evidence, but rather was acting entirely as a community caretaker: after his minister did not attend church, he believed his minister was sick, and decided to check on his well-being and bring tea. Ex. A at 3:5-8, 3:15-16, 5:14-15.

2. Officer McNown Reasonably Believed Petitioner was Ill or in Need of Medical Attention

As discussed above, in order for McNown's warrantless entry to be reasonable he must have objectively reasonably believed it was warranted. *Terry*, 392 U.S. at 21–22. For this inquiry, *United States v. Smith*, 820 F.3d 356, 358 (8th Cir. 2016) is particularly instructive. In *Smith*, the police were looking for a missing woman, Wallace, and believed her ex-boyfriend, Smith, was holding her against her will. *Smith*, 820 F.3d at 358. Smith told the officers he was alone and refused them entry without a search warrant. *Id*. When Smith left home, they arrested him on an

outstanding arrest warrant. *Id*. at 359. The Officers noticed a face through a window so they knocked, announced, and, when no one answered, went in calling for Wallace. *Id*. Wallace was in a bedroom with an AK-47 and stated Smith prevented her from leaving. *Id*. The officers seized the weapon and Smith was convicted as a felon in possession of a firearm. *Id*. The *Smith* court found the warrantless entry was valid because the officers were acting in their community caretaker capacity while searching for a missing community member and a reasonable officer could believe that someone was inside and required their assistance. *Id* at 359-60.

McNown reasonably believed his minister was unwell based on specific, articulable facts. Petitioner was elderly and though known for never missing service, did not show up, he was not answering his phone, bandwagon flu was going around, his car was in his driveway, and music was playing Ex. A at 2:16, 2:19-23-27, 3:5-8, 4:14-16) As in *Smith*, under the circumstances, a reasonable officer could believe that Petitioner was home and too ill to answer the phone or door. When he entered, McNown did not suspect Petitioner was involved in a crime. *Id*. at 4:5-6, 5:14-15, 7:26-8:1. Per his LPD training, McNown did not believe he needed a warrant to check on Petitioner's well-being since he was not investigating a crime. Ex. A at 7:1-2, 7:26-8:1.

3. The Government's Caretaking Interest Outweighs Petitioner's Privacy Interest

The next step in determining the reasonableness of McNown's entry is to balance the need to search against the invasion the search entails. *Camara*, 387 U.S. at 536–37. The government acknowledges that Petitioner's high privacy interest in his home. *See Kyllo v. United States*, 533 U.S. 27, 46 (2001) (stating the chief evil the Fourth Amendment guards against is physical entry of the home). However, the government's interest in ensuring the well-being of community members outweighs Petitioner's interest.

Police-community relations are an important government interest as society increasingly relies on the police to be jacks-of-all-emergencies and assist the public in a variety of situations.

Wilson v. State, 975 A.2d 877, 889–90 (Md. 2009); *People v. Ray*, 981 P.2d 928, 934 (Cal. 1999). It is in society's best interest for the police to respond to community members' concerns about the health, safety, and welfare of others. *Ray,* 981 P.2d at 934. Prohibiting objectively reasonable community caretaking entries into homes would preclude police from responding to concerned relatives and friends. *Id*. at 939. It would have left Wallace to be held against her will by Smith. *Smith*, 820 F.3d at 359. "An officer less willing to discharge community caretaking functions implicates seriously undesirable consequences for society at large." *Ray*, 981 P.2d at 939.

The government's interest in the well-being of the community is so compelling, courts have held the government's community caretaking interest outweighs an individual's interest even when there is a government interest other than safety. For example, in *Rohrig* despite no concerns for the occupants' well-being the officer's warrantless entry was reasonable as part of their community caretaking function to abate an ongoing noise nuisance. *Rohrig*, 98 F.3d at 1521.

Here, McNown, already in his uniform, offered to assuage the concerns of his fellow church-goers by checking on Petitioner. R. at 2:18-19. Because Petitioner was a pillar of the community and McNown visibly represented the government, its interest in responding to protect Petitioner was even higher than typical. Here, as in *Smith*, the government's interest in assisting a community member who may be incapacitated outweighs Petitioner's individual privacy interest; McNown's entry was a valid exercise of community caretaking duties. *Smith*, 820 F.3d at 361-62.

4. The Scope of McNown's Entry and Search Was Reasonable

Lastly the scope of McNown's entry was reasonable. A reasonable search must not exceed the circumstances that justified its inception. *Terry*, 392 U.S. at 19; *see also Ray*, 981 P.2d at 937 (stating caretaking entries are limited "to achieving the objective which justified the entry"). In *Smith* the scope of the entry was carefully tailored to the caretaking purpose when officers entered

to search for Wallace, called out, and, when she responded, went directly to her. 820 F.3d at 362.

Importantly, reasonable police need not exhaust all possible alternatives before entering. As stated in *Cady*, "[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, by itself, render the search unreasonable." 413 U.S. at 447. Requiring police to exhaust all possible alternatives before entry "would require us to ignore the day-to-day and minute-to-minute demands upon police officers, and to instead evaluate their conduct under a standard established with the benefit of hindsight." *Rohrig*, 98 F.3d at 1524.

Here, the scope of McNown's entry was reasonable. McNown knocked and announced and waited about two minutes before looking into the adjacent window. R. at 3:2-3. McNown did not draw a weapon or use force. Ex. A. McNown turned off the blaring TV and then followed the music coming from the second floor; he "didn't search around much on the first floor" but kept searching for Petitioner. Ex. A at 5:26-27. McNown didn't open drawers or closets but confined his search to the places Petitioner might be, in the TV room and then upstairs where music was playing. McNown's search for Petitioner was narrowly tailored to find Petitioner and deliver him tea; the search did not exceed the circumstances that justified its initiation and so was reasonable.

D. Petitioner's Cocaine and Notebook Were Validly Seized Under the Plain View Doctrine

The plain view exception to the warrant requirement allows seizure of evidence when the evidentiary nature of the item is immediately apparent to the police. *Coolidge v. New Hampshire*, 403 U.S. 443, 466 (1971). The plain view doctrine is applicable when the police have justification for the initial intrusion, including when the intrusion is supported by an exception to the warrant requirement, and when "a police officer is not searching for evidence against the accused, but nonetheless inadvertently comes across an incriminating object." *Coolidge*, 403 U.S. at 465-66.

Since McNown's notebook and cocaine discovery occurred during a justified community caretaking entry, they are admissible under the plain view doctrine. *Coolidge*, 403 U.S. at 466. *See*

also Buie, 494 U.S. at 330 (holding warrantless seizure of defendant's clothing lawful because detective's entry into defendant's basement was lawful and detective had probable cause to believe the clothing was evidence of a crime); *Smith*, 820 F.3d at 362 ("officers had a lawful basis for entering Smith's apartment under their function as community caretakers, the firearm laying on the bed in the room in which Wallace was found is admissible under the plain view doctrine.").

Petitioner may argue that McNown exceeded the scope of his community caretaker entry by reading the notebook. However, even if McNown's reading of the notebook exceeded the scope of his valid entry, the DEA would have discovered it in their search of Petitioner's home for additional cocaine, so the notebook is admissible under the inevitable discovery doctrine. *Nix v. Williams*, 467 U.S. 431, 448 (1984) (holding evidence that would have been inevitably discovered by law enforcement is admissible).

E. Even If There Had Been a Fourth Amendment Violation, Suppression is Not the Proper Remedy Because There Is No Police Misconduct to Deter

Even if the community caretaking exception fails, excluding the notebook and cocaine is not the proper remedy. Evidence seized in violation of the Fourth Amendment may be excluded under the exclusionary rule, which is neither a per se rule nor an automatic consequence of the violation. *Herring v. United States*, 555 U.S. 135, 137 (2009); *United States v. Leon*, 468 U.S. 897, 910–11 (1984). The sole purpose of the exclusionary rule is to deter law enforcement misconduct. *Davis v. United States*, 564 U.S. 229, 246 (2011). Application of the rule is determined by "an assessment of the flagrancy of the police misconduct" and the likelihood that exclusion will deter wrongful police conduct. *Leon*, 468 U.S. at 911, 918-20. "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system... [T]he exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct." *Herring*, 555 U.S. at 144.

The exclusionary rule has a "substantial social cost" when police have acted in "good faith" or their "transgressions have been minor," and guilty defendants receive the "enormous" benefit of exclusion. *Leon*, 468 U.S. at 907–08. Such would be the case if the rule were applied here. McNown did not engage in any flagrant misconduct. He was trained by his department that a warrant is unnecessary if the entry "is not part of an investigation." Ex. A. at 7:1-2. McNown relied in good faith on his training. As such, there is little to no potential to deter future misconduct. Further he had an objectively reasonable belief his minister might be ill and need assistance. When an officer's conduct is objectively reasonable "[e]xcluding the evidence can in no way affect his future conduct unless it is to make him less willing to do his duty." *Ray*, 981 P.2d at 939 (quoting *Stone v. Powell,* 428 U.S. 465, 539–540 (1976)). Deterring police from actively caring for their communities and ensuring the safety and well-being of community members is not in anybody's best interests. Given the extraordinary social cost of letting a guilty drug dealer, particularly one in a position to exert powerful influence over the community, go free and the very low potential of deterring future police misconduct the notebook and cocaine should not be excluded.

II. PETITIONER'S LACK OF EFFECTIVE COUNSEL DURING PRE-INDICTMENT PLEA-BARGAINING DID NOT VIOLATE HIS SIXTH AMENDMENT RIGHTS; ACCORDINGLY, THE GOVERNMENT SHOULD NOT RE-OFFER THE ORIGINAL PLEA DEAL.

A. The Sixth Amendment Right to Effective Counsel Only Attaches During Critical Stages, Which Does Not Include Pre-Indictment Plea Bargaining.

The Sixth Amendment guarantees a Constitutional right to a fair trial, and provides for the accused to have the assistance of counsel. U.S. Const. amend. XI. The Supreme Court has recognized the fundamental role of counsel: "access to counsel's skill and knowledge is necessary to accord defendants the ample opportunity to meet the case of the prosecution to which they are entitled." *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (internal quotations omitted). In *Strickland*, the court explained "the benchmark for judging any claim of ineffectiveness must be

whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." 466 U.S. at 686.

The right to effective counsel applies in "critical stages of a criminal proceeding." *Montejo v. Louisiana*, 556 U.S. 786 (2009). In assessing whether pre-indictment plea negotiation is a sufficiently critical stage to trigger this right, the Supreme Court examined its precedent and settled on a bright line rule that Sixth Amendment rights do not attach prior to indictment or arraignment. *See generally US v. Gouveia,* 467 U.S. 180 (1984); *Moran v. Burbine*, 475 U.S. 412 (1986).

1. Post-Indictment Plea Bargaining is Considered a Critical Stage.

This Court has recognized post-indictment plea bargaining as a critical stage requiring effective assistance of counsel. *See generally Missouri v. Frye*, 566 U.S. 134 (2012); *Lafler v. Cooper*, 566 U.S. 156 (2012). These cases, released on the same day, extensively addressed the policy implications of their rulings, noting that 95-97% of federal convictions arise from pleas. *Missouri v. Frye*, 566 U.S. 134, 143 (2012) (citing *Padilla v. Kentucky*, 559 U.S. 359, 372 (2010)). However, they also recognized a defendant does not have the right to be offered a plea, and a judge need not accept it. *Lafler*, 566 U.S. at 168; *Frye*, 566 U.S. at 148-49.

Both *Frye* and *Lafler* involved defendants who, like Petitioner, did not accept plea offers, but the *Frye* case is most similar to the facts here. In *Frye*, the prosecution made two offers contingent on a guilty plea, but Frye's attorney did not inform him of the offers, and they both expired. *Frye*, 566 U.S. at 138-39. Before his preliminary hearing, Frye was arrested for the same offense, and, after pleading guilty without a plea deal, was convicted and sentenced to 3 years in prison. *Id.* The court a post-indictment plea offer is a critical stage. *Id.* at 140-41. The court also recognized a right to effective counsel in *Lafler*, where the defendant rejected three favorable plea offers after initially expressing interest due to counsel's erroneous advice and was later sentenced over three times

longer at trial. *Lafler*, 566 U.S. at 161. Citing *Frye* and *Padilla,* the court drew the matter-of-fact conclusion that the right to counsel applies to post-indictment plea bargaining. *See Id.* at 162-63.

2. The Sixth Amendment Only Attaches After Formal Proceedings Have Begun.

The Supreme Court first distinguished between a pre-indictment and post-indictment right to counsel in *Kirby v. Illinois,* 406 U.S. 682, 684 (1972). The *Kirby* defendant was seeking to extend the Wade-Gilbert per se exclusionary rule from post-indictment lineups to pre-indictment lineups without counsel present. *Kirby,* 406 U.S. at 684. The *Kirby* court drew a bright line rule for right to counsel at lineups at the "initiation of adversary judicial proceedings-whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689.

After *Strickland*, the Supreme Court extended the *Kirby* bright line rule for lineups to all Sixth Amendment right to counsel cases in *Gouveia*. *Gouveia,* 467 U.S. at 182. In *Gouevia*, the court assessed if prisoners suspected of murder had the right to counsel prior to proceedings regarding their alleged crimes. *Id.* at 183. The court cited over a dozen of its previous decisions to highlight a clear precedent holding the right to counsel "does not attach until the initiation of adversary judicial proceedings." *Id.* at 188. This rule, which requires a formal indictment by the prosecution or an appearance before a judge, is the basis for the bright-line rule against the attachment of Sixth Amendment rights pre-indictment. *Id.* The court acknowledged the 9th Circuit majority's concern regarding deliberate delay of charges, but pointed out that applicable statutes of limitations and the Fifth Amendment protect against deliberate delay. *Id.* at 192 (" Fifth Amendment requires the dismissal of an indictment, even if it is brought within the statute of limitations, if the defendant can prove that the Government's delay in bringing the indictment was a deliberate device to gain an advantage over him and it cause him actual prejudice in presenting his defense").

Cementing the *Gouveia* bright line rule, the court again addressed the need for formal

proceedings before a Sixth Amendment right attaches in *Moran. Moran*, 475 U.S. at 428. The defendant in *Moran* did not request an attorney after being read his *Miranda* rights, and although his sister called an attorney for him who called demanding that questioning be postponed until the next day, the defendant confessed. *Id.* at 415. While the primary issue of third party assertion of *Miranda* rights is not at issue in the current matter, the court's assessment of pre-arraignment protections in the context of the Sixth amendment is highly relevant. *See Id.* at 428-32. The court clarified that the *Gouveia* rule covers all pre-indictment encounters, and since the statements at issue were prior to formal proceedings, Sixth Amendment protection did not attach. *See Id.* at 432.

3. Circuit Split Regarding the Application of the Pre-Indictment Bright Line Rule

Since *Strickland* and *Gouveia*, nearly every circuit has opined on the pre-indictment bright line rule. Though most circuits have correctly held that this is a true bright line rule, some have interpreted *Gouveia* as a rebuttable presumption that rights attach only after indictment.

Most circuits have adopted the bright line rule. The D.C. Circuit ruled that the right to counsel under the Sixth Amendment does not apply until the defendant is formally accused. *United States v. Sutton,* 801 F.2d 1346, 1365-66 (D.C. Cir. 1986) (finding taped conversations of a defendant represented by counsel without counsel present were admissible). In a similar case of misconduct, the Fifth Circuit appropriately acknowledged that although government contact with a represented suspect outside the presence of counsel may be an ethics violation, if formal proceedings have not begun, it is not a Sixth Amendment violation. *See United States v. Heinz*, 983 F.2d 609, 611-12 (5th Cir. 1993). Several circuit courts cite the bright line rule as a foregone conclusion. *See U.S. v. Ayala,* 601 F.3d 256, 272 (4th Cir. 2010) ("easily dismissing" a Sixth Amendment claim because the right had not attached to an unindicted subject of an investigation); *see also United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000) (ruling, in the context of a grand jury target, the right to counsel did not attach pre-indictment).

Additionally, the bright line rule is indoctrinated through the nature of the offense-specific right granted under the dual-sovereignty doctrine. *See McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991). The right is offense specific, so indictment triggers its attachment *See e.g. U.S. v. Burgest*, 519 F.3d 1307 (11th Cir. 2008) (dismissing Sixth Amendment claim in federal court despite formal proceedings in state court); *U.S. v. Coker*, 433 F.3d 39 (1st Cir. 2005) (denying motion to suppress in federal proceeding despite clear attachment of Sixth Amendment rights in state court). These cases demonstrate that the defining feature of the separate offenses is based on indictment status.

The Seventh Circuit declined to follow the bright line rule but held that a rebuttable presumption instead applies. *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992). In *Larkin* and subsequent rulings the First Circuit suggests that the pre-indictment right is a narrow one. *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (finding a possibility of pre-indictment rights in "extremely limited" scenarios). The Third Circuit also appears to hold a narrow opening for a pre-indictment right to counsel in *Matteo*, but upon closer review of the facts, the defendant had undergone "preliminary arraignment," which could be considered formal proceedings under the bright line rule, and would certainly lean in favor of counsel under the narrow opening suggested by the other non-compliant cases. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892-93 (3d Cir. 1999) (en banc). Accordingly, even if the court chooses to overturn the bright line rule, only a narrow exception assessing the equities of a given pre-indictment scenario should apply. A plea offer like that in Petitioner's would not likely fall into this narrow exception.

The most recent case on this issue addressed the status of pre-indictment plea bargaining directly. *See generally Turner v. United States,* 885 F.3d 949 (6th Cir. 2018). After the appellate panel held that Sixth Amendment rights do not attach pre-indictment, the Sixth Circuit reviewed this issue en banc. *Id.* at 951. The Sixth Circuit expressly re-affirmed their long-standing reliance

on the Supreme Court bright line rule that the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Id.* at 953 (quoting *Gouveia*, 467 U.S. at 187). Turner argued that pre-indictment plea bargaining is an identical critical stage to post-indictment plea bargaining, but the court correctly identifies that the proceeding must begin in order to have critical stages. *Id.* (distinguishing the inquiries of "attachment" and "critical stage") (citing *Rothgery v. Gillespie County, Tex.,* 554 U.S. 191, 211 (2008)). The court further cements their ruling calling the Supreme Court's bright line rule "crystal clear." *Id.*

Turner's argument gets to the crux of the circuit split: the misplaced reliance on the critical stage language of "critical stages of a criminal proceeding." *See generally Montejo*, 556 U.S. 786. The requirement of counsel in "critical stages" refers to the likelihood that assistance counsel will be necessary in order to protect the lay defendant's interests. However, at issue in the pre-indictment bright line rule is whether or not a "criminal proceeding" has begun. Regardless of how helpful a suspect's lawyer may be in a situation, it is cannot be a critical stage of a criminal proceeding if there is not yet a criminal proceeding. The initiation of the proceeding causes the attachment, and then once the right has attached, then a court must assess whether the stage was critical. The circuits who resist the bright line rule, improperly fuse these inquiries.

The moment Sixth Amendment rights attach is best determined by the Supreme Court's current bright line rule that plea-bargaining prior to indictment is not covered by the Sixth Amendment right to counsel, and under this rule, Petitioner's right to counsel had not yet attached.

B. Even if the Right to Effective Counsel Attaches to Pre-Indictment Plea-Bargaining, Petitioner Suffered no Prejudice Because There Was Not a Reasonable Probability that Receiving the Plea Offer Would Alter the Outcome.

1. The Strickland Test to Evaluate Ineffective Assistance of Counsel Requires that the Defendant Suffered Prejudice.

Even if the court finds that Sixth Amendment rights attach to pre-indictment plea

negotiations, Petitioner did not suffer sufficient prejudice. The Supreme Court established a benchmark for evaluating ineffective assistance of counsel in *Strickland v. Washington*. *Strickland*, 466 U.S. at 695. The two factors the court considered in *Strickland* to determine whether to ineffective assistance warranted retrial or resentencing were (1) counsel was so ineffective he was no longer functioning as counsel as required by the Sixth Amendment and (2) counsel's error prejudiced the defendant so that he did not receive a fair trial. *Id.* at 687.

Respondent concedes Petitioner's counsel was ineffective, so the only factor the court must consider is whether Petitioner was actually prejudiced. In *Strickland*, the court explained that when counsel is found to be ineffective, a defendant must affirmatively prove prejudice. *Id.* at 693. The prejudice requirement in *Strickland* centers around the importance of whether there was "fundamental fairness" to the challenged proceeding. *Id.* at 696. Since trust in the reliability of the judicial system is an important interest, the court looks to whether the prejudice causes a "breakdown in the adversarial process that our system counts on to produce just results." *Id.*

The consequences of accepting a plea deal without understanding the consequences can reach the prejudice threshold. *See Padilla v. Kentucky*, 559 U.S. 356, 374 (2010) (holding defendant was prejudiced by counsel's failure to advise him on immigration consequences of his post-indictment plea, leading to deportation proceedings). However, when a defendant cannot demonstrate a reasonable probability they would have rejected the plea but for the ineffective counsel, they fail the *Strickland* test. *See generally Hill v. Lockhart*, 474 U.S. 52, 60 (1985) (finding counsel's incorrect advice regarding defendant's eligibility for parole did not prejudice him when he accepted a plea he otherwise would have rejected). Accordingly, when examining prejudice when a defendant is unaware of a plea deal, the defendant must affirmatively demonstrate a reasonable probability they would have accepted the plea but for ineffective counsel.

2. *Petitioner has not demonstrated a reasonable probability that the proceeding's outcome would have been different had he known about the plea deal.*

The discussion in *Strickland* centers around prejudice in the determination of guilt or death penalty sentencing, but the Supreme Court has further interpreted this standard in the cases

discussed above. *See Strickland,* 466 U.S. at 695-96. In *Frye*, the court addressed the requirements a defendant must meet to demonstrate prejudice when counsel failed to notify a defendant of a plea offer. *See Frye,* 566 U.S. at 147-49. The *Frye* court outlined defendants' burden to show a reasonable probability that 1) they would have accepted that plea offer, 2) the plea would have been entered without interference from the prosecution or judge and 3) there would have been a more favorable outcome due to a lesser charge or less prison time. *Id.* at 147. The reasonable probability of these occurrences is consistent with the requirement in *Strickland* whether "the result of the proceeding would have been different" *Id.* at 148 (citing *Strickland*, 466 U.S., at 694).

Respondent disputes the first two elements, but Petitioner meets the third element as Judge O'Neal's dissent points out. *See* R. at 22. If the Petitioner had successfully accepted and entered the offer, it would have been favorable due to the reduced jail time. *See* Ex. D. However, the dissent failed to consider the first two elements. Petitioner did not demonstrate a reasonable probability that the outcome of the proceeding would have changed but for his ineffective counsel. Accordingly, Petitioner's claim of ineffective assistance of counsel fails due to lack of prejudice.

i. Petitioner likely would not have accepted the plea bargain.

In *Frye*, Frye testified that he would have taken the plea originally offered, he eventually plead guilty in court rather than go to trial and the trier of fact concluded that there was a reasonable probability he would have accepted a plea. *Frye*, 566 U.S. at 139-40. Unlike Frye, Petitioner went to trial and, distinctively, his plea offer involved having to provide information in return. *See* Ex. D. Although Petitioner testified he would have accepted the plea offer had he known of it, his hypothetical hindsight is not the only evidence regarding his likelihood to take a plea. *See* Ex. C 3:18-28. Though Petitioner admitted to a fear of being stabbed while incarcerated, this does not increase his likelihood of taking the deal as the plea would have guaranteed jail time even if it

were less. Ex. C 4:3-6; Ex. B. More persuasively, upon arrest, Petitioner responded when questioned about his suppliers, "there is no way in hell I will tell you. They will kill me and burn my church down if I give you their names." Ex. F. Each of these statements strongly indicate that despite his stated interest in accepting a plea deal, he feared that doing so may affect his safety. Due to these factors, there is not a reasonable probability Petitioner would have accepted the plea.

ii. Even if he had accepted the plea bargain, Petitioner likely would not have been able to provide information that fulfilled the arrest requirement.

Unlike the offer in *Frye*, Petitioner's offer included a condition that the information he provided must lead to an arrest in order for the plea to be entered. Ex. D. Even if Petitioner were willing to provide the information required, there is no evidence to assess the likelihood his information would lead to an arrest. In fact, Petitioner's outburst suggested that these suppliers had threatened him and his subsequent testimony offering to give them up "in a heartbeat" strongly points to a lack of a loyal relationship between Petitioner and his supplier. *See* Ex. F; Ex. C 3:18-28. Petitioner provides no evidence he was close enough to his suppliers to be privy to useful information, and, further, the DEA described their target kingpin as "passing through," which implies Petitioner likely did not know his location and the kingpin would not have stayed in the same location for long. R. at 4. Without evaluating the quality of Petitioner's information, it is impossible to know if the prosecution would have received what they bargained for and entered the plea. Finally, the trier of fact, the district court in the motion suppress hearing, found that it was more likely that the information would not have led to an arrest. R. at 11. As addressed in the standard of review, this finding should only be revisited if there is clear error, and here there is not. As such, there is no reasonable probability that the plea would have been entered.

3. Even if Petitioner were prejudiced, reoffering the plea deal is not an equitable remedy.

The only lower court judge who agreed that the Petitioner suffered sufficient prejudice, Judge

O'Neal, found that the proper remedy would likely not be a re-offer of the original plea. *See* R. at 23. Like Judge O'Neal, this court has emphasized the need to evaluate "competing interests" when assessing a remedy, which, here, were the prosecutor's interest in arresting the kingpin. *United States v. Morrison*, 449 U.S. 361, 362 (1981). The purpose of a plea offer contingent on cooperation is to provide a lesser sentence in exchange for information, and the government would be at a loss in this case. R. at 4, 23; Ex. D. The suppliers the government wanted to arrest are likely far from Lakeshow, Staples now, that information is no longer useful. *See* Ex. E. The competing interests are no longer relevant, so if remanded, the court should consider an alternate remedy. More critical to Petitioner, if the actual plea deal were re-offered and accepted, his information would need to lead to an arrest. *See* Ex. D. As that is highly unlikely at this point, Petitioner would be unable to fulfill the terms of the deal and remain stuck with his original sentence despite this proceeding. Because of this, the relief requested by Petitioner is unequitable and unrealistic.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the Supreme Court of the United States affirm the judgment of the Thirteenth Court of Appeals.

Dated: October 21, 2018

Respectfully submitted,

By: /s/ R23
Respondent #23
Attorney for Respondent,
THE UNITED STATES