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

Team 27

Counsel for Respondent

The University of San Diego School of Law

30th Annual Criminal Procedure Tournament

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STATEMENT OF THE ISSUES

I. Does the community caretaker doctrine justify a police officer's warrantless entry of a house under the Fourth Amendment when the officer entered the house to check on the well-being of his church pastor?

II. Does the Sixth Amendment right to effective counsel attach during pre-indictment plea negotiations?

STATEMENT OF FACTS

Church

Officer McNown of Lakeshow Police Department attended church on a typical Sunday morning expecting to hear a sermon from respected preacher Chad David ("David"), but David never showed. R. at 2. David didn't answer one church attendee's phone call, and another thought he saw David at a bar the night before. R. at 2. To calm the others, and assuming David was ill, Officer McNown told them he would stop by David's house to make sure everything was okay. R. at 2. After church, Officer McNown picked up a hot tea and headed to David's house. R. at 2.

The Check-Up

Officer McNown saw a black Cadillac SUV leaving David's neighborhood, but instead of following, he continued on to David's. R. at 2. Although Officer McNown was trained to associate that vehicle with the type commonly driven by drug dealers, he had no reason to suspect any criminal activity in the area, much less at David's. R. at 2. Nothing was unusual at David's house as the car was in the driveway and the doors were shut. R. at 2. Officer McNown knocked on the door, but nobody answered. R. at 3. He heard loud scream-o metal music and saw *The Wolf of Wall Street* playing on the TV; strange choices for a church pastor. R. at 2-3. Officer McNown tried to open the front door, but it was locked. R. at 3.

Officer McNown entered the house through an unlocked back door. R. at 3. Once inside the house, he found a notebook containing information about drug payments and church attendees. R. at 3. He then followed the loud music upstairs, opened the upstairs door, and found David packaging powder cocaine into ziplock bags. R. at 3. Officer McNown handcuffed David and called local DEA Agents to the scene. R. at 3.

Officers seized 10 kilograms of cocaine from the scene. Ex. B, Pg. 2. After DEA Agent Malaska read David his Miranda Rights, he asked David where he obtained the cocaine. R. at 3. David refused to give up his suppliers because, as David said, "[t]hey will kill me and burn my church down if I give you their names." Ex. F.

The Plea Deal

At the federal detainment facility, David hired a criminal defense attorney, Keegan Long, whom David knew was an alcoholic. R. at 3-4. Agent Malaska encouraged prosecutors to offer a plea deal before filing charges so they could obtain information on the drug kingpin without tipping him off. R. at 4. The prosecutors offered a plea bargain for one year in prison in exchange for David's suppliers, valid for only thirty-six hours. R. at 4. Long received the plea offer in an email while he was drinking at a bar and misread when the plea offer expired. R. at 4.

The next day, prosecutors left a message after calling Long's office to check on the status of the plea offer. R. at 4. The plea offer expired before Long communicated the offer to David. R. at 4. The next morning, prosecutors indicted David. R. at 4. After receiving an email from Prosecutor Kayla Marie ("Marie") asking why David did not accept the offer, Long realized that the offer had already expired. R. at 4. David fired Long when Long called to tell him what happened. David then hired Michael Allen as his attorney. R. at 4. Allen sought a new plea deal for David, but Marie informed him that another offer would be pointless because the suppliers were likely tipped off and the government would no longer benefit from a plea deal. R. at 5.

District Court

Prosecutors indicted David for possession of cocaine in excess of 10 kilograms with intent to distribute under 21 U.S.C. § 841. R. at 1. David filed a motion to suppress claiming the evidence seized from the initial search violated the Fourth Amendment because Officer McNown did not

have a search warrant. R. at 5. David also filed a motion to be re-offered his original plea deal claiming ineffective assistance of counsel. R. at 5.

The District Court denied both motions. R. at 1. Denying the motion to suppress, the court found the search valid under the community caretaker doctrine because the entry was "totally divorced from any inquiry into criminal matters." R. at 8. It then denied the motion to be re-offered his original plea deal, finding the Sixth Amendment right to counsel "applies to criminal proceedings prior to indictment," but that David was not prejudiced by the actions of his attorney. R. at 12. It also stated that a new plea deal would be futile because "the suppliers have probably been tipped off[.]" R. at 11. David was subsequently convicted for possession of a controlled substance with intent to distribute. R. at 14.

Thirteenth Circuit

David appealed his conviction, claiming that the District Court erred in denying his pre-trial motions. R. at 14. He argued the District Court should have granted his motion to suppress because the community caretaker doctrine does not apply to homes. R. at 14. In his appeal of the motion to be re-offered his original deal, he contended the District Court correctly found the Sixth Amendment right to counsel's application to pre-indictment plea negotiations but argued that he was prejudiced by his attorney's failure to communicate the original offer. R. at 14-15.

The Thirteenth Circuit affirmed David's conviction. R. at 14. The court affirmed the denial of the motion to suppress finding that Officer McNown lawfully entered David's house because an officer may enter a home without a warrant when the "officer is acting as a community caretaker, totally divorced from criminal investigation." R. at 17. It then affirmed the denial of the motion to be re-offered finding that the Sixth Amendment does not attach to David's proceedings. R. at 17. David now appeals to the Supreme Court.

SUMMARY OF THE ARGUMENT

The Fourth Amendment is not a "guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures." *United States v. Sharpe*, 470 U.S. 675, 682 (1985). In this case, the District Court and Thirteenth Circuit correctly determined that Officer McNown's entry of David's home was constitutional under the community caretaker doctrine. The community caretaker doctrine is an exception to the warrant requirement when the officer's actions are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *United States v. Lewis*, 869 F.3d 460, 463 (6th Cir. 2017). The community caretaker doctrine is a catchall for the wide range of duties that officers fulfill apart from investigating crimes, such as aiding individuals in danger of physical harm, assisting individuals who cannot care for themselves, and providing particular emergency services. *Winter v. Adams*, 254 F.3d 758, 763 n.8 (8th Cir. 2001). The Supreme Court has yet to rule on whether the community caretaker doctrine applies to the entry of a home, but multiple federal and state appellate courts extend the doctrine to justify the search of a home when the officer acts totally divorced from criminal investigation.

First, extending the community caretaker doctrine to the entry of homes is a reasonable application of the law because it promotes positive and supportive police conduct while preventing pretextual enforcement and after-the-fact rationalization. The doctrine recognizes that officers "should and do regularly respond to the requests of friends and relatives and others for assistance when people are concerned about the health, safety or welfare of their friend, loved ones and others." *People v. Ray*, 981 P.2d 928, 934 (Cal. 1999). Second, the community caretaker doctrine does not fit within the warrant requirement or the emergency aid exception and this Court should not require a search warrant when police conduct is totally divorced from criminal investigation.

In community caretaking circumstances, a search warrant is likely unavailable or would unreasonably delay the officer's efforts. And third, the emergency aid exception does not cover community caretaking functions because there is frequently no emergency. Instead, the officer is simply trying to aid in circumstances less urgent than an emergency, but important nonetheless.

Applying the community caretaker doctrine to homes simply recognizes that the Fourth Amendment's primary consideration is reasonableness. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). This Court should follow the growing number of federal and state courts which appropriately extend the community caretaker doctrine to justify the search of a home when the officer acts totally divorced from police investigation. This Court is only faced with determining whether the entry was reasonable under the totality of the circumstances. *State v. Pinkard*, 785 N.W.2d 592, 598 (Wis. 2010). First, Officer McNown's community caretaking function was both reasonable and the sole justification for his entry. When Officer McNown arrived at David's home, he acted as a friend and church attendee, not a police officer. His concern for David's well-being was the sole justification for the entry. Second, the entry was totally divorced from criminal investigation. It is undisputed that Officer McNown's motivation to enter David's house was to appease concern for David's well-being. As such, the District Court and Thirteenth Circuit correctly determined that the community caretaking doctrine applies to the home and that Officer McNown's actions embodied those selfless principles, and this court should affirm the decision.

The Thirteenth Circuit also correctly determined that the Sixth Amendment right to counsel had not attached during David's pre-indictment plea negotiations with the United States. The Supreme Court established the bright-line rule that the Sixth Amendment attaches only when "the government has committed itself to prosecute," and "only then that the adverse positions of government and defendant have solidified." *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972). Judicial

criminal proceedings are initiated either by way "of formal charge, preliminary hearing, indictment, or arraignment." *Id.* The Supreme Court later reaffirmed the bright-line rule in *Gouveia*, finding that the Sixth Amendment "attaches only at or after the time that adversary judicial proceedings have been initiated against" a defendant. *United States v. Gouveia*, 467 U.S. 180, 187-88 (1984).

The Supreme Court has extended the Sixth Amendment right to counsel to a plea negotiation, but in a case where the criminal defendant at issue had already been formally charged. *Missouri v. Frye*, 566 U.S. 134, 144 (2012). The *Frye* Court stated that the Sixth Amendment right to counsel attaches only at "arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Id.* at 140. Thus, the Supreme Court has again made it clear that the right to counsel does not extend to plea negotiations during pre-indictment proceedings.

Three circuits concluded that the right to counsel may attach before the government files charges, but these opinions are too vague, unclear or inconsistent to follow. Further, "none of these circuits . . . extended the Sixth Amendment right to counsel to pre-indictment plea negotiations." *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018). The Second, Fifth, Ninth, Tenth, Eleventh and D.C. Circuit Court of Appeals follow the bright-line rule set forth in *Kirby* and *Gouveia*. From this consideration, a clear majority of circuits considering this issue relied on established Supreme Court precedent to find that the Sixth Amendment right to counsel does not attach to pre-indictment plea negotiations. In light of these arguments, this Court should affirm the Court of Appeal's findings. Specifically, this Court should find that Officer McNown's entry of David's home was constitutional under the community caretaker doctrine and that David's Sixth Amendment right to counsel had not attached during his pre-indictment plea negotiations with the United States.

STANDARD OF REVIEW

This Court reviews questions of law *de novo* and questions of fact for clear error. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011).

ARGUMENT

I. OFFICER MCNOWN'S ENTRY OF DAVID'S HOME WAS CONSTUTIONAL UNDER THE COMMUNITY CARETAKER DOCTRINE.

Police officers do much more than investigate crime. They care for others, help people in times of need, and serve the community. Officer McNown embodied those principles when he entered David's house to check on his friend and preacher. As it turned out, however, the preacher was doing more than planning his next sermon.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. The Fourth Amendment, however, is not a "guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures." *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (emphasis in original). While the Fourth Amendment typically prohibits warrantless searches of private residences, there are exceptions to the warrant requirement. *Michigan v. Fisher*, 558 U.S. 45, 47 (2009). The warrant requirement is subject to exceptions because "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

A. Extending the community caretaker doctrine to the entry of homes is a reasonable application of the law because it promotes positive and supportive police contribution in the community.

The community caretaker doctrine is an exception to the warrant requirement when the officer's actions are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *United States v. Lewis*, 869 F.3d 460, 463 (6th Cir.

2017) (quoting *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973)). The doctrine is a "catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities." *United States v. Rodriguez-Moralez*, 929 F.2d 780, 785 (1st Cir. 1991). These responsibilities include aiding individuals in danger of physical harm, assisting individuals who cannot care for themselves, and providing particular emergency services. *Winter v. Adams*, 254 F.3d 758, 763 n.8 (8th Cir. 2001). The community caretaker doctrine recognizes that officers "should and do regularly respond to the requests of friends and relatives and others for assistance when people are concerned about the health, safety or welfare of their friend, loved ones and others." *People v. Ray*, 981 P.2d 928, 934 (Cal. 1999). This Court previously stated that whether a search is reasonable "depends on the facts and circumstances of each case." *South Dakota v. Opperman*, 428 U.S. 364, 376 (1976). As such, this Court should recognize that there is no Fourth Amendment issue when an officer's decision to enter a home for a community caretaking purpose was "reasonably exercised under the totality of the circumstances." *State v. Pinkard*, 785 N.W.2d 592, 598 (Wis. 2010).

This Court has applied the community caretaker doctrine to justify warrantless searches of vehicles. *See South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976); *Cady*, 413 U.S. at 441. But it has yet to determine whether the doctrine can justify the search of a home. Multiple circuit courts have appropriately applied the community caretaker doctrine to justify the warrantless search of homes. *See, e.g., United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *United States v. Rohrig*, 98 F.3d 1506, 1521 (6th Cir. 1996); *United States v. York*, 895 F.2d 1026, 1028-30 (5th Cir. 1990); *see also United States v. Taylor*, 624 F.3d 626, 629 (4th Cir. 2010). Some circuits, however, inappropriately limit the scope of the community caretaker doctrine to only apply only to vehicles. *See, e.g., Ray v. Township of Warren*, 626 F.3d 177 (3d Cir. 2010); *United*

States v. Erickson, 991 F.2d 529 (9th Cir. 1993); *United States v. Pichany*, 687 F.2d 204 (7th Cir. 1982). Since originally limiting the scope of the doctrine, the Seventh Circuit has questioned its former decision and the Ninth Circuit used community caretaking principles to justify the warrantless search of a home. *See Sutterfield v. City of Milwaukee*, 751 F.3d 542, 561 (7th Cir. 2014); *Martin v. City of Oceanside*, 360 F.3d 1078, 1082-83 (9th Cir. 2004).

In this case, the District Court and Thirteenth Circuit correctly determined that Officer McNown's actions were totally divorced from criminal investigation and solely rooted in his community caretaking function to ensure the well-being of David. R. at 8, 17. David challenges these rulings on the basis that this Court has not yet applied the community caretaker doctrine to justify the warrantless entry of a home. R. at 14. While this Court has yet to determine whether the community caretaker doctrine applies to homes, it should follow the growing number of federal and state courts which appropriately extend the community caretaker doctrine to justify the entry of a home when the officer acts totally divorced from police investigation. As such, this Court should recognize Officer McNown's helpful and reasonable police conduct, justify the entry of David's home, and affirm the Thirteenth Circuit's decision.

1. A reasonable application of the community caretaker doctrine to the entry of homes balances public and private interests.

While David contends that the community caretaker doctrine does not apply to homes, no Supreme Court language limits the community caretaker doctrine's application to homes. *Pinkard*, 785 N.W.2d at 598. The Supreme Court's language in *Cady* "counsel[s] a cautious approach," but it does not prohibit a community caretaking officer from entering a home. *Id.* In *Cady*, this Court found the warrantless search of a disabled car reasonable because the officer acted "with concern for the safety of the general public." *Cady*, 413 U.S. at 447. Further, in *Opperman*, the Supreme

Court justified the warrantless search of a vehicle because the officer conducted the search as a caretaking function and not as "pretext concealing an investigatory police motive." *Opperman*, 428 U.S at 375-76. This court should likewise apply the community caretaker doctrine to the searches of homes because it is simply the most "practical and commonsense application of the law." *Taylor*, 624 F.3d at 635.

Applying the community caretaker doctrine to homes simply recognizes that the Fourth Amendment's primary consideration is reasonableness. *See Brigham City*, 547 U.S. at 403 ("[T]he Fourth Amendment's ultimate touchstone is 'reasonableness.'"). A reasonable application of the community caretaker doctrine to homes facilitates productive non-investigatory police functions while protecting private concerns. For instance, the South Dakota Supreme Court stated in *State v. Deneui* that the community caretaking doctrine justifies warrantless entry of a home if: 1) community caretaking is the sole justification for the intrusion; 2) the police action is apart from the detection, investigation, or acquisition of criminal evidence; and 3) and the officer is able to articulate specific facts that, taken with rational inferences, reasonably warrant the intrusion. 775 N.W.2d 221, 239 (S.D. 2009). Applying this rule actively promotes positive and supportive police contribution in the community. It also would alleviate private concerns that a police officer would rationalize the search after-the-fact or that "a police officer might use his or her caretaking responsibilities as a pretext for entering a residence." *Quezada*, 448 F.3d at 1007.

2. <u>The community caretaker doctrine does not fit within the warrant requirement or the emergency aid exception and this Court should not require a search warrant when police conduct is totally divorced from criminal investigation.</u>

The community caretaker doctrine does not fit within the traditional warrant requirement and this Court should not require police to obtain a search warrant when police conduct is "totally divorced" from criminal investigation. First, a search warrant might be completely unavailable. A

search warrant requires "probable cause to believe that someone is engaged in criminal mischief and/or that evidence of a crime will be found in a particular place." *Sutterfield*, 751 F.3d at 563. When officers act as community caretakers, however, there is "no suspicion of wrongdoing at the moment the police take action." *Id.* at 565. Thus, in circumstances where the officer operates totally divorced from the investigation and prosecution of crime, the facts would never provide sufficient probable cause for a warrant. Second, requiring a search warrant would delay the officer's efforts to assist a person in need. *Taylor*, 624 F.3d at 629 ("A detour to obtain a warrant would have delayed or frustrated the officer's pressing mission to safely reunite the young child with her parents or guardian.").

This Court should also extend the community caretaker doctrine to homes because officers' community caretaking functions are not sufficiently covered by the emergency aid exception to the warrant requirement. The emergency aid exception requires "an objectively reasonable basis for believing that a person within [the house] is in need of immediate aid." *Fisher*, 557 U.S. at 47 (internal quotation marks omitted); *see also Ray*, 981 P.2d at 472 (explaining that emergency aid requires "specific articulable facts indicating the need for swift action to prevent imminent danger to life or serious damage to property") (internal quotation marks omitted). In contrast, the community caretaker doctrine provides that "circumstances short of a perceived emergency may justify a warrantless entry[.]" *Ray*, 981 P.2d at 473.

Further, the emergency aid exception does not justify a search once the emergency ends and the initial "justification for the exception had ceased to exist." *Michigan v. Tyler*, N.W.2d 467, 474 (Mich. 1977) (*aff'd*, *Michigan v. Tyler*, 436 U.S. 499 (1978)). Instead, the community caretaking doctrine is "more akin to a health and safety check." *Deneui*, 775 N.W.2d at 239. This is an important distinction because "the emergency doctrine and emergency aid doctrine implicate,

as their titles denote, actual emergencies." *Id.* Thus, this Court should extend the community caretaker doctrine to justify police function entry of homes when the police conduct promotes the general welfare of citizens beyond the need for *immediate aid*.

3. Circuit and state court precedent support application of the community caretaker doctrine to the warrantless entry of homes.

Multiple circuits have expressly justified the warrantless entry of homes through the community caretaker doctrine. *See, e.g., United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006) ("A police officer may enter a residence without a warrant as a community caretaker when the officer has a reasonable belief that an emergency exists requiring his or her attention."); *United States v. Rohrig*, 98 F.3d 1506, 1521 (6th Cir. 1996) (finding that police officers acted within their community caretaker functions when they entered a home without a warrant "for the limited purpose of locating and abating a nuisance"); *United States v. York*, 895 F.2d 1026, 1028-30 (5th Cir. 1990) (allowing officers to enter a home to allow occupants to remove themselves and their possessions when a co-occupant was belligerent).

Without expressly ruling on the issue, the Fourth Circuit has implied that the community caretaker doctrine does or should extend to the home. *See, e.g., Taylor*, 624 F.3d at 629 ("Where police behavior falls outside the criminal justice rubric . . . warrants and the probable cause standard are inapposite."); *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009) (implying that community caretaker doctrine would justify search of home if officer was following a standard policy); *United States v. Gwinn*, 219 F.3d 326, 334 (4th Cir. 2000) (stating that *Cady*'s community caretaking rationale provides some support for justifying warrantless entry of home to retrieve clothes for arrestee).

Ninth Circuit precedent also supports an extension of the community caretaker doctrine to the home. The Ninth Circuit originally limited the doctrine's scope to vehicles. *See United States v. Erickson*, 991 F.2d 529 (9th Cir. 1993). Under the guise of emergency aid, however, the Ninth Circuit more recently used community caretaking principles to justify the warrantless entry of a home to respond to a father's request that police check on the welfare of his daughter. *See Martin v. City of Oceanside*, 360 F.3d 1078, 1082-83 (9th Cir. 2004). The *Martin* court applied a three-prong test requiring: 1) reasonable ground to believe that there is an immediate need for assistance, 2) the search was not motivated by intent to arrest or seizure evidence, and 3) a reasonable basis to associate the emergency with the place to be searched. *Id.* at 1081-82. The court ultimately found the search reasonable because it was motivated by the father's concern for the welfare of his daughter. *Id.* at 1081.

The Seventh Circuit originally limited the scope of the community caretaker doctrine to only vehicles. *See United States v. Pichany*, 687 F.2d 204 (7th Cir. 1982). Since *Pichany*, however, the Seventh Circuit has questioned that decision. *See Sutterfield v. City of Milwaukee*, 751 F.3d 542 (7th Cir. 2014) (stating that *Pichany* forecloses reliance on the community caretaking doctrine which "would potentially be the best fit for this case" when police entered a home to assist a possibly suicidal person). The Third Circuit failed to consider the value of police officer's community caretaking functions in maintaining the safety of the community and inappropriately declined to extend the community caretaker doctrine to justify an officer's entry of a home after receiving a call from a worried mother about the safety of her daughter. *See Ray v. Township of Warren*, 626 F.3d 177 (3d Cir. 2010).

Multiple state supreme courts also recognize the community caretaker doctrine's application to warrantless searches of homes. California expressly recognized the community

caretaking exception as a basis to enter a home without a search warrant. *See Ray*, 981 P.2d at 935. The California court concluded that "when officers act in their properly circumscribed caretaking capacity, we will not penalize the People by suppressing evidence of crime they discover in the process." *Id.* at 939. Wisconsin also expressly recognizes the exception. *See Pinkard*, 785 N.W. 2d at 608 (holding that officer's warrantless entry was undertaken in furtherance of a bona fide community caretaker function that was reasonably exercised). The Supreme Court of South Dakota recognizes the exception, reasoning that "homes cannot arbitrarily be isolated from the community caretaking equation" and "[t]he need to protect and preserve life or avoid serious injury cannot be limited to automobiles" *Deneui*, 775 N.W. 2d at 239.

B. Officer McNown's entry of David's home was reasonable and constitutional.

Officer McNown's entry of David's home was clearly reasonable and thereby constitutional. First, the community caretaking was the sole justification for the entry. When Officer McNown went to David's home to check on the well-being of his preacher, he acted as a friend and church attendee, not a police officer. The unusual nature of David's absence from the January 15th church service was reason enough to justify Officer McNown's actions, but Julianne Alvarado's ("Alvarado") concern and her statement that David did not answer his phone added to the reasonableness. Officer McNown even bought a hot tea for David as he assumed David was sick. Thus, Officer McNown's community caretaking function was both reasonable and the sole justification of the entry.

Second, the entry was totally divorced from the detection, investigation, or acquisition of criminal evidence. It is undisputed that Officer McNown's initial motivation for going to David's house was to appease both his own concern and the concern of other church attendees. Meanwhile, the argument that Officer McNown's intent was pretextual is without merit. Nothing in the record

suggests that investigative motives influenced Officer McNown's decision to go to David's house. When Officer McNown "saw a black Cadillac SUV" in David's community, he had already decided to go to David's house. This is undisputable because Officer McNown already purchased a hot tea for David before he saw the SUV, evincing Officer McNown's preexisting motive to ensure the well-being of his friend. The District Court was in the best position to evaluate the facts of this case and the court found ample evidence to support its conclusion that Officer McNown's entry was not pretextual, but in fact, totally divorced from criminal investigation.

Third, Officer McNown articulated specific facts that, taken with rational inferences, reasonably warranted the entry. Officer McNown articulated that his decision was based on David's unusual absence from the church service, Alvarado's concern for David's well-being, her statement that David did not answer his phone, and Jacob Ferry's statement that he thought he saw David the night before at a bar. Each are specific, articulable facts that demonstrate an initial need to check on David. Then, the loud music, failure to answer the door, and the secular movie on the television further justified the entry.

Officer McNown's lack of alternatives also supports the finding that the entry was reasonable. David could have consented, but as he was the subject of concern whose absence was the very reason for entering the house, consent was not a feasible alternative. A search warrant here would be unavailable because a search warrant's requirements were impossible to satisfy, since this had nothing to do with criminal investigation and probable cause was not at issue in this case. But even if a search warrant were available, the process of obtaining a warrant would unreasonably delay Officer McNown's efforts to check on the well-being of David.

Officer McNown's decision to enter David's home was unquestionably reasonable. Officer McNown went to check on David, not as a police officer, but as a friend. His only concern was

David's health. His motives were totally, completely, and undoubtedly divorced from the investigation of crime. As such, this entry satisfies the Fourth Amendment's pillar concern: reasonableness. The District Court and Thirteenth Circuit correctly determined that the community caretaking doctrine applies to the home and that Officer McNown embodied those selfless community caretaking principles, and this Court should affirm the Thirteenth Circuit's decision.

II. DAVID'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD NOT ATTACHED DURING HIS PRE-INDICTMENT PLEA NEGOTIATIONS WITH THE UNITED STATES.

The Sixth Amendment explicitly guarantees that in all criminal prosecutions, the accused shall have the right "to have the Assistance of Counsel" for their defense. U.S. CONST. amend. VI. The Sixth Amendment right to effective counsel is unquestionably one of the most important standards of the criminal justice system. A defendant cannot claim that his counsel's performance was deficient if the Sixth Amendment Right to Counsel has not attached to the situation at issue. *See Strickland v. Washington*, 466 U.S. 668 (1984). David contends that the Sixth Amendment right to counsel attaches to pre-indictment plea negotiations. The Supreme Court, however, has consistently held that the right to counsel attaches "only at or after the initiation of adversary judicial proceedings against the defendant," initiated either by way "of formal charge, preliminary hearing, indictment, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972). Therefore, this Court should find that the Sixth Amendment does not attach at pre-indictment plea negotiations and affirm the Thirteenth Circuit's decision.

A. This Court has clearly established a bright-line rule that the right to counsel does not attach before the initiation of adversarial criminal proceedings.

The Supreme Court has since reaffirmed the *Kirby* bright-line rule that the Sixth Amendment right to counsel attaches only at the initiation of adversarial judicial proceedings. *See*

United States v. Gouveia, 467 U.S. 180, 187-88 (1984). In *Gouveia*, the Supreme Court considered whether a federal inmate who was suspected of murder had the right to counsel during his almost two-year long detention before his federal indictment. *Id.* at 182. The decision supplemented the *Kirby* rule for Sixth Amendment right to counsel cases, such that the right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Id.* at 187-88; *see also Maine v. Moulton*, 474 U.S. 159, 180 (1985) (holding that the Sixth Amendment had not attached even when charges were pending against the defendant).

The Supreme Court in *Kirby* also emphasized that the initiation of judicial criminal proceedings "is far from a mere formalism," as it is the "starting point of our whole system of adversary criminal justice." *Kirby*, 406 U.S. at 689. Expounding on the initiation of judicial criminal proceedings, the Court also stated that it is where "the government has committed itself to prosecute," and "only then that the adverse positions of government and defendant have solidified." *Id*. "It is this point, therefore, that marks the commencement of 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable." *Id*. This ruling clearly stands for the bedrock principle that the Sixth Amendment right to counsel does not attach during plea negotiations before pre-indictment proceedings.

The Supreme Court again upheld the bright-line rule and expounded on its proper application. *Missouri v. Frye*, 566 U.S. 134, 144 (2012). The Supreme Court held that the Sixth Amendment right to counsel attaches only at "critical stages" of a criminal proceeding. *Id*. at 140. These critical stages include "arraignment, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Id.* While the Court here did extend the Sixth Amendment right to counsel to this particular plea negotiation, the defendant had already been formally charged. *Id*.

Thus, the Supreme Court has again made clear that the right to counsel does not extend to plea negotiations before pre-indictment proceedings.

Further, in *Missouri v. Frye*, the defendant's attorney failed to inform him about a plea offer, and Frye ultimately pleaded guilty without the opportunity or benefit of the plea deal. *Id*. at 134. The Court considered that because "a defendant has no right to be offered a plea," the defense counsel's mistake did not deprive the defendant of any substantive or procedural right. *Id*. at 148, 153. Instead, the defense counsel's mistake only deprived the defendant of the opportunity to accept a plea bargain to which he had no entitlement in the first place. *Id* at 149. The Court's decision in *Frye* stands for the proposition that even if David had known of and accepted the bargain, the prosecution would have been able to withdraw it right up to the point that his guilty plea was accepted. *Id*. at 152 "The plea-bargaining process is a subject worthy of regulation, since it is the means by which most criminal convictions are obtained." *Id*. But is it not "a subject covered by the Sixth Amendment. *Id.* The Sixth Amendment is not concerned "with the fairness of bargaining but with the fairness of conviction." *Id.*

B. The few circuits that find against the bright-line rule provide standards are too narrow or inconsistent.

While the Thirteenth Circuit found that there was no circuit split on the issue, Judge O'Neal's dissent asserted that there is a circuit split on this issue. R. at 21. While the First, Third, and Seventh Circuits concluded that the right to counsel may attach before the government files charges, these opinions are too vague, unclear or inconsistent to follow. Discussing the issue, the Sixth Circuit concluded that "[n]one of these circuits [] has extended the Sixth Amendment right to counsel to pre-indictment plea negotiations" and "[t]here is therefore no circuit split on this issue." *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018).

In *Matteo v. Superintendent, SCI Albion*, the Third Circuit considered whether the defendant's right to counsel attached prior to the filing of any charges by the prosecution and before any arraignment. 171 F.3d 877, 892 (3d Cir. 1999). The defendant had undergone preliminary arraignments and was in custody as a result of an arrest warrant charging him with murder. *Id*. Agents, well aware of the defendant's legal representation, confronted the defendant and taped conversations between the defendant and a police informant. *Id*. The Third Circuit found that "[t]he right also may attach at earlier stages, when the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *Id*. (quoting *Gouveia*, 467 U.S. at 189). Under this consideration, the Third Circuit ruled that the defendant's right to counsel had attached at the time of the taped conversations. *Id.*

In *Gouveia*, however, the Supreme Court purposely stated that the right "may" attach at earlier stages but refused to outright rule that the right "shall" attach at earlier stages. *Gouveia*, 467 U.S. at 189. The *Matteo* case clearly fits the narrow situation outlined in Gouveia because the defendant was absolutely faced with a situation wherein the "results of the confrontation would settle his fate and reduce the trial itself to a mere formality." *Matteo*, 171 F.3d at 892. Thus, this Court should find that the *Matteo* ruling is not applicable to this case because David was never faced with any sort of situation that resembles the confrontation mentioned in *Matteo* or *Guoveia*.

The Seventh Circuit uniquely ruled that there is a rebuttable presumption against attachment of the right in the absence of "an initiation of adversary criminal justice proceedings." *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992). The court found that a defendant could rebut the presumption by showing that the Government had crossed the line from "fact-finder to adversary." *Id*. Yet, the court still found that the defendant was unable to overcome this

presumption. *Id.* Essentially, *Larkin* stands for a hazy and unworkable solution to the already clear Supreme Court precedent of *Kirby*, *Missouri v. Frye* and *Gouveia*.

The First Circuit applies a rebuttable-presumption framework in which the defendant can only rebut the *Kirby* bright-line rule in "extremely limited" situations. *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995). As such, these decisions provide a very limited and narrow application of the Sixth Amendment right to counsel while the *Kirby* bright-line rule stands for efficiency and clarity. This Court should not set precedent that would veer so far from the established bright-line rule further disrupting and confusing the criminal justice framework.

C. The majority of circuits apply the bright-line rule in holding that the right to counsel does not apply to pre-indictment plea negotiations.

The Second, Fifth, Ninth, Tenth, Eleventh and D.C. Circuit Court of Appeals follow the bright-line rule set forth in *Kirby* and *Gouveia*. The Second Circuit analyzed whether the Sixth Amendment right to counsel was violated when federal officials arranged for a defendant in state custody to be placed in a holding cell with a cooperating witness. *United States v. Mapp*, 170 F.3d 328, 334 (2d Cir. 1999), cert. denied 528 U.S. 901 (1999). Yet, even in this fairly extreme situation, the Second Circuit found that the right to counsel had not yet attached as to the federal charges, because no indictment had been issued. *Id.*

The Tenth Circuit followed the bright-line rule in finding that the right to counsel had not attached with respect to evidence that was seized before the defendant's indictment. *United States v. Lin Lyn Trading, Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998). The Fifth Circuit and the D.C. Circuit have also followed the bright-line rule that the Sixth Amendment right to counsel does not attach until at or after the time formal adversary judicial proceedings have been initiated. *See United States v. Heinz*, 983 F.2d 609, 612, 613 (5th Cir. 1993); *United States v. Sutton*, 801 F.2d 1346 (D.C. Cir. 1986).

The Ninth Circuit cited *Gouveia* in ruling that the use of an incriminating tape recording of a defendant's conversation with a co-conspirator did not violate the defendant's right to counsel because no formal charge, preliminary hearing, indictment, information, or arraignment had occurred. *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000). The Eleventh Circuit ruled that a defendant who had been subpoenaed to testify before a grand jury prior to his indictment did not have a Sixth Amendment right to counsel. *United States v. Waldon*, 363 F.3d 1103, 1112 n.3 (11th Cir. 2004).

The Sixth Circuit held on three different occasions that the Sixth Amendment right to counsel does not attach during pre-indictment plea negotiations. In *United States v. Moody*, the Sixth Circuit held that Gouveia "forecloses the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial proceedings." 206 F.3d 609, 613 (6th Cir. 2000). In *Kennedy v. United States*, the Sixth Circuit reaffirmed Moody by holding that no subsequent Supreme Court case law had overruled or limited Gouveia's clear holding. 756 F.3d 492, 493-494 (6th Cir. 2014). Finally, in *Turner v. United States*, the Sixth Circuit again held that "the Supreme Court's attachment rule is crystal clear," as it is "firmly established" that a person's Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him." 885 F.3d 949 (6th Cir. 2018). The Sixth Circuit also stated that "because the Supreme Court has not extended the Sixth Amendment right to counsel to any point before the initiation of adversary judicial criminal proceedings, we may not do so." *Id.* at 953.

It is clear that the majority of circuits considering this issue have relied on established Supreme Court precedent to find that the Sixth Amendment right to counsel does not attach to pre-indictment plea negotiations. Thus, this Court should affirm the Thirteenth Circuit's ruling that the

Sixth Amendment right to counsel does not attach to pre-indictment plea negotiations and that it is irrelevant whether David was prejudiced under the *Strickland* test.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that the judgment of the United States Court of Appeals for the Thirteenth Circuit be affirmed.

Respectfully Submitted,

Team 27

Counsel for Respondent

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