No. 4-422

IN THE

Supreme Court of the United States

CHAD DAVID,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

BRIEF FOR PETITIONER

On Writ of Certiorari to the

United States Court of Appeals

for the Thirteenth Circuit

TEAM #P3
Counsel for Petitioner

QUESTIONS PRESENTED

I. Whether warrantless searches conducted by law enforcement acting as community caretakers extend to Petitioner's home under the Fourth Amendment;

II. Whether Petitioner's Sixth Amendment right to effective counsel attached during plea negotiations prior to a federal indictment?

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STATEMENT OF CASE

A. Statement of Facts

Every Sunday, the Lakeshow Community Revivalist Church in Staples, holds a Sunday service led by Minister Chad David, (hereinafter "Mr. David"). Mr. David, a 72-year-old well-respected minister, had acquired notoriety in the community for his high-energy Sunday services. R. at 2. However, on Sunday, January 15, 2017, Mr. David unexpectedly missed the regularly scheduled 7:00 AM service due to mistakenly believing that the day was Saturday. Ex. C, pg. 1. Officer James McNown (hereinafter "Officer McNown"), a fully uniformed patrol officer, was in attendance for the morning service. R. at 2. Officer McNown had only recently become a member of the church after struggling with suicidal thoughts brought on when his favorite NBA team failed to make the playoffs four months prior. Ex. A, pg. 1 Other members in attendance were Julianne Alvarado (hereinafter "Ms. Alvarado") and Jacob Ferry (hereinafter "Mr. Ferry"). R. at 2.

At approximately 7:30 AM, Ms. Alvarado attempted to call Mr. David at his home to inquire about his absence, but was unsuccessful. *Id*. She subsequently approached Officer McNown and informed him that Mr. David was not answering his phone and that she was concerned "about his well-being." *Id*. In light of the recent outbreak of the "bandwagon flu," Officer McNown disregarded the concerns and "assumed Mr. David was at home with an illness due to his elderly age." Ex. A, pg. 3. To calm the congregation, Mr. Ferry stated that he believed that he saw Mr. David at the bar the night prior; however, most individuals disregarded these remarks because Mr. David was not known to "drink or go out to bars." R. at 2. Despite Officer McNown's

belief that this was "all an overreaction", he assured the congregation that he would stop by the minister's house and "bring him some tea." *Id*.

After the service concluded, Officer McNown started his 9:00 AM patrol shift. *Id*. Shortly after starting his shift, Officer McNown stopped at a Starbucks to purchase some tea for Mr. David and texted Ms. Alvarado requesting that she provide him with the minister's home address. Ex. A, pg. 3. When Officer McNown arrived at the community in which David resided, he was surprised to find that the minister lived in the "nicest gated community in town." *Id*. When he approached the gated community in a marked patrol car, the security guard waved him through without first questioning him. *Id.* at 4. Had the security known who Officer McNown was coming to visit, they would have turned him away on Mr. David's instructions. Ex. C, pg. 2. While approaching Mr. David's home, Officer McNown noted a black SUV with Golden State license plates, which based on his knowledge, training, and experience belonged to a drug dealer. Ex. A, pg. 3-4.

Upon arriving at Mr. David's home, Officer McNown initially noted "nothing unusual," as Mr. David's car was parked in the driveway. *Id*. However, upon approaching the home, McNown heard loud scream-o music playing inside. *Id*. After knocking at the door with no response for 2 minutes, he looked through the front window and observed an R-rated movie, *The Wolf of Wall Street*, playing on the living room television. *Id*. Because Officer McNown believed the music selection and movie choice was inappropriate for a minister, he grew suspicious that "someone else might be in the home." *Id.* at 4-5. Due to the front door being locked, Officer McNown was forced to enter the

home through an unlocked back door. *Id* at 5. Officer McNown claimed that he only entered Mr. David's house to "bring him some tea" and to check on his "well-being." *Id*.

However, upon entering the home, Officer McNown approached the television to turn it off and in doing so located a small notebook. Ex. A, pg. 5. While examining the notebook further, Officer McNown noticed the words "ounce" and "paid" next to Ms. Alvarado's name. *Id*. It was at this point that Officer McNown's concerns were confirmed that "something was wrong." *Id*. Hearing the loud music emanating from an upstairs room, McNown decided to "check it out." *Id*. Upstairs behind a closed bedroom door, Officer McNown discovered Mr. David packaging drugs into Ziploc baggies. *Id.* at 6. Officer McNown immediately arrested Mr. David and contacted DEA agent Colin Malaska (hereinafter "Agent Malaska") for assistance. R. at 3.

Agent Malaska, armed with information that a drug kingpin was in the area, was eager to get Mr. David to give up his suppliers. R. at 4. Upon Agent Malaska's encouragement, the prosecutor offered Mr. David a favorable plea deal, prior to filing formal charges, in exchange for the information. *Id*. The prosecutor agreed to hold off filing formal charges for 36 hours and extended a plea bargain for a one-year prison sentence in exchange for the names of Mr. David suppliers. *Id*.

Meanwhile, immediately upon arriving at a federal detainment facility, Mr. David contacted the only criminal defense attorney he knew, Keegan Long (hereinafter "Mr. Long") and retained his services. *Id*. The prosecutor communicated the bargain to Mr. Long with a reminder that it would be valid for only 36 hours. *Id*. Mr. Long, a notorious alcoholic, was at the bar drinking when he received the offer by email and misread the time limitation. *Id*. The prosecution attempted to contact long via phone call to check on

the status of the offer prior to the expiration. Mr. Long failed to answer or return the call and the offer subsequently expired without ever being communicated to Mr. David. *Id*. Had the offer been communicated to Mr. David, he would have accepted it. Ex. C, pg. 3. Immediately upon the expiration of the offer, the prosecutor indicted Mr. David, charging him with one count of 21 USC §841, possession of a controlled substance with the intent to sell or distribute to wit cocaine in the amount in excess of 10 kilograms, which carries a mandatory minimum 10-year prison sentence. R. at 4.

B. Procedural History

On January 18, 2017, Respondent indicted Mr. David with one count of 21 U.S.C. §841, possession of a controlled substance with the intent to sell or distribute, to wit cocaine in the amount in excess of 10 kilograms. R. at 1. Petitioner subsequently filed two motions. R. at 5. First was a motion to suppress evidence which was improperly denied when the lower court erroneously applied the community caretaker exception to the Fourth Amendment to the search of Mr. David's home. *Id*. Second was a motion to compel the Respondent to reoffer a plea due to ineffective assistance of counsel which was improperly denied when the lower courts determined that the Sixth Amendment right to effective counsel did not attach to pre-indictment proceedings. *Id*.

On appeal, the Thirteenth Circuit erroneously affirmed the District Court's holding. R. at 14-15. Petitioner's writ of certiorari to the United States Supreme Court was granted. R. at 25.

STANDARD OF REVIEW

This Court should, in reviewing the judgement of the Thirteenth Circuit on the motion to suppress the evidence, review the findings as a mixed question of law and fact.

"Mixed questions of law and fact [are] questions in which the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard." *Pullman-Standard v. Swint*, 456 U.S. 273, 290 (1982). "Mixed questions of fact and law are reviewed de novo." *Darensburg v. Metro. Transp. Comm'n*, 636 F.3d 511, 519 (9th Cir. 2011). Therefore, in reviewing the judgement entered below, this court should review the application of law to facts *de novo* and reverse the findings of the law of the district court and the Thirteenth circuit because there is clear error.

Additionally, this Court should, in reviewing the judgement entered by the United States Court of Appeals for the Thirteenth Circuit on the motion to compel the Respondent to reoffer a plea due to ineffective assistance of counsel, review the findings of law *de novo* because a "ineffective assistance of counsel claims are mixed questions of law and fact which we review de novo." *Rhoades v. Henry*, 638 F.3d 1027, 1034 (9th Cir. 2011). Therefore, in reviewing the judgement entered below, this court should review the application of law to facts *de novo* and reverse the findings of the law of the district court and the Thirteenth circuit because the Sixth Amendment right to counsel attaches in pre-indictment plea negotiations.

SUMMARY OF ARGUMENT

Warrantless entry into the home is not covered by the community caretaking exception because the home receives the highest protection that the Fourth Amendment has to offer. In creating the community caretaker exception, this Court limited the exception to vehicles due to the lower expectation of privacy they receive as compared to the heightened expectation of privacy that protects the home. Additionally, the intrusion in this case fails to comply with requirement that searches not executed under a warrant

be, limited, reasonable, and totally divorced from any criminal investigation, detection, or acquisition of evidence.

The Thirteenth Circuit incorrectly held that the Sixth Amendment right to effective counsel does not extend to plea negotiations before the filing of formal charges. The Supreme Court has limited the Sixth Amendment right until after the filing of formal charges against a defendant. However, the Supreme Court has also recognized that the Sixth Amendment right to effective counsel extends to the criminally accused during all critical stages of a prosecution. In 2012, the Supreme Court recognized plea negotiations as a critical stage in a prosecution that warrant Sixth Amendment safeguards. Lower Courts agree that plea negotiations, especially pre-indictment negotiations, should be covered by the Sixth Amendment. Several of the lower courts reject the strict adherence to the bright line rule (which indicates that the right to counsel attaches only after formal charges); and recognize the Sixth Amendment may attach prior to the filing of formal charges. Because pre-indictment plea negotiations are a critical stage in a prosecution that warrant Sixth Amendment safeguards, the Thirteenth Circuit was in error in denying the motion to compel the Respondent to reoffer a plea due to ineffective assistance of counsel.

ARGUMENT

I. THE COMMUNITY CARETAKER EXCEPTION TO THE FOURTH AMENDMENT DOES NOT PERMIT A WARRANTLESS SEARCH OF THE HOME

A. The Community Caretaker Exception Is Limited To Warrantless Searches Of Automobiles

The Fourth Amendment guarantees that, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. The Supreme Court, in reviewing this

language has determined that the Fourth Amendment "protects people, not places" because it applies to anything an individual "seeks to preserve as private, even in an area accessible to the public." *Katz v. United States*, 389 U.S. 347, 351 (1967). In applying the holding of *Katz*, the Supreme Court preserved the principle that homes enjoy the highest expectation of privacy when it held that "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. U.S. District Court*, 407 U.S. 297, 313 (1972). However, the Supreme Court has recognized exigent circumstances, emergency aid, and the community caretaker exception as exceptions to the Fourth Amendment. Because Respondent has waived exigent circumstances, and emergency aid, the only exception at issue is the community caretaker exception. R. at 7 and 15.

When creating the community caretaker exception in *Cady*, the Supreme Court preserved the heightened protection afforded to homes and offices by limiting the exception to automobiles. The Supreme Court did so by recognizing "[t]he constitutional difference between searches of, and seizures from houses and similar structures and from vehicles." *Cady v. Dombrowski*, 413 U.S. 433, 442 (1973). In reviewing the community caretaker exception as applied in *South Dakota v. Opperman*, the Supreme Court, in holding that "less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office," reaffirmed the automobile limitation to the community caretaker exception. *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). Lower courts have, in recognizing the limitation of the community caretaking exception, held that "[The Supreme Court] intended to confine the holding to the automobile exception and to

foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses." *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993); *United States v. Pichany*, 687 F.2d 204, 209 (7th Cir. 1982); and *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994).

Because "warrantless searches of automobiles have been upheld in circumstances in which a search of a home or office would not," Officer McNown's search may have been covered under the community caretaker exception had he been searching a vehicle. *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976). However, in the case at bar, Officer McNown's search was of Mr. David's home, not his automobile. Therefore, the community caretaker exception did not extend to Officer McNown's intrusion in this case.

B. The Community Caretaker Exception Only Applies If The Search Was Reasonable, Limited, and Divorced From Any Criminal Investigation

When addressing a warrantless search by law enforcement, the government bears the burden to establish the exception. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). Lower courts have, in complying with Supreme Court holdings, identified a number of factors that must be proven for a Fourth Amendment exception to apply. The New Mexico Supreme Court, in the case *State v. Nemeth*, articulated a 3-part test to establish the community caretaker exception. Under the *Nemeth* test, the state bears the burden to show: 1) the search was objectively reasonable, 2) the search was limited as necessary to achieve the purpose of the intrusion, and 3) the search was not part of a criminal investigation. *State v. Nemeth*, 23 P.3d 936 (N.M. 2001), *overruled on other grounds by State v. Ryon*, 108 P.3d 1032 (N.M. 2005).

1. The community caretaker exception only applies if the search was reasonable

a. A search is only reasonable if it is supported by specific, objective, and articulable facts

Any intrusion against the Fourth Amendment requires sufficient specific and articulable facts to reasonably justify an intrusion when reviewed objectively. *Terry v. Ohio*, 392 U.S. 1, 22 (1968). The Supreme Court recognized this requirement because "anything less would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Id*. Therefore, in determining if an intrusion is in violation or not, the court may objectively review the specific and articulable facts, and any rational inferences that can be made from those facts to determine if the situation reasonably warranted the intrusion. *Id.* at 20. The Supreme Court also requires that the facts be reviewed objectively because "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.'" *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

In order for Officer McNown's intrusion to be exempt from the Fourth Amendment, it must have been reasonable based of the information he had prior to intruding. In this case, Officer McNown knew that David missed church that day and that he was not answering his phone. R. at 2. Officer McNown also knew that Lakeshow was suffering an outbreak of Bandwagon Flu. Ex. A, pg. 3. With the assistance of Julianne Alvarado, Officer McNown came to know that David lived in the "nicest gated community in town." *Id*. Officer McNown knew that a black Cadillac SUV with Golden State license plates was in the area. R. at 2. Based off his knowledge, training, and

experience Officer McNown believed the SUV was a drug dealers' vehicle. *Id*. Officer McNown assumed David was home because the church van was parked in the driveway of his residence. Ex A, pg. 4. Officer McNown heard loud scream-o music coming from inside the residence and could see "*The Wolf of Wall Street*" playing on the TV. *Id*. Officer McNown believed it was unusual for a minister to listen to music with profane language or watch an R-rated movie. *Id*. Finally, no one answered the door despite Officer McNown knocking for 2 minutes. *Id.* at 4-5. Reviewing the facts as a totality, they do not justify Officer McNown's intrusion because they do not show the requisite need, societal interest, or exigency that would justify an intrusion without a warrant.

b. A search is only reasonable if the facts would give rise to a good faith reason to intrude

The Supreme Court has recognized that only reasonable police action administered in good faith will satisfy the Fourth Amendment in the absence of a warrant. *Colorado v. Bertine*, 479 U.S. 367, 374 (1987). In *Bertine*, the Supreme Court recognized that warrant exceptions such as inventory searches, the border search exception recognized under *United States v. Martinez-Fuerte*, and the community caretaking exception recognized under *Cady v. Dombrowski*, require that the search be conducted in good faith. *Id*. The Supreme Court articulated in *Florida v. Wells* that a search is not in good faith if it was used as "a purposeful and general means of discovering evidence of crime." *Florida v. Wells*, 495 U.S. 1, 4 (1990).

In the case at bar, the record clearly indicates that Officer McNown was suspicious of criminal wrongdoing prior to his entrance into David's home. Ex A, pg. 5. In light of Officer McNown being "definitely concerned something was wrong," the appropriate course of action would have been to seek a warrant rather than conduct a

search of Mr. David's home. The Court in reviewing the facts articulated above, can clearly determine that there is no objectively reasonably good faith reason to intrude. The Thirteenth Circuit improperly compared the case at bar to *United States v. Rohrig*, *United States v. Smith*, and *State v. Pinkard*. This case is unlike *United States v. Rohrig,* in which the court recognized the public's interest in music volumes during the nighttime hours based on the interest in the health and wellbeing of the community, because the public interest was identified by a statute. *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996).

Additionally, unlike *Smith* which involved a welfare check on a resident of a halfway house who had suicidal tendencies, David, aside from being 72 years old, does not suffer any condition that may give rise to a concern for his health or safety. *United States v. Smith*, 820 F.3d 356, 361 (8th Cir. 2016). The intrusion in *State v. Pinkard*, was supported by a third-party statement that individuals were unconscious in a room full of drugs, which differs from this case because there was no evidence or statements of any kind to indicate that David was in any life-threatening or dangerous condition. 327 Wis. 2d 346, 350 (2010). Therefore, because there were not sufficient facts to support a good faith reason to intrude, the intrusion by Officer McNown was unreasonable.

c. A search is only reasonable if the basis for the search would outweigh the need for the Fourth Amendment right to privacy

The Supreme Court has recognized that "in determining reasonableness, [courts] have balanced the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests. *Maryland v. Buie*, 494 U.S. 325, 331 (1990). To date, the Supreme Court has only recognized a limited number of exceptions to the Fourth Amendment that would overcome the expectation of privacy in the home.

Those exceptions are 1) consent to the search, 2) the plain view doctrine recognized in *Arizona v. Hicks*, 3) the emergency aid doctrine recognized in *Brigham City v. Stuart*, and 4) exigent circumstances.

In this case, the Respondent has expressly waived the exigent circumstances exception as well as emergency aid doctrine. R. at 7 and 15. In reviewing the record, none of the pre-intrusion facts known by Officer McNown would support an intrusion under the plain view doctrine because there was nothing with an immediately apparent illicit character. Only after intruding into David's home did officer McNown discover any evidence of criminal activity. Further, the record clearly indicates that David did not consent to the search evidenced by the steps he took to ensure that he did not receive visitors. Ex C, pg. 2. It therefore follows that the Respondent is seeking the Supreme Court to recognize a new exception to the expectation of privacy. This new exception in the context of the home is based on the public's interest in the welfare of the citizens. Such an exception would directly contradict the intent of the Fourth Amendment because even the slightest concern about an individual's health would expose their home to an unreasonable intrusion by law enforcement. Courts have recognized that the government has an interest in the health, safety, and wellbeing of the citizens. However, that interest has been sufficiently protected by the emergency aid doctrine so long as the government can provide some facts to indicate that there is an immediate danger to the life of the person. Therefore, Officer McNown's concern for David's health does not outweigh David's expectation of privacy within his home.

2. The community caretaker exception requires that the search be limited to the conditions that gave rise to the intrusion

The purpose of warrants arises from the court's abhorrence to exploratory searches. In *Coolidge v. New Hampshire*, the Supreme Court held that "those searches deemed necessary should be as limited as possible." *Coolidge v. New Hampshire*, 403 U.S. 443, 467 (1971). The Supreme Court, in expanding on the meaning of limited as possible, held that "the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." *Terry v. Ohio*, 392 U.S. 1, 19 (1968). This requires that an officer, when engaging in warrantless intrusions, limit their search to only what is absolutely necessary.

In the case at bar, Officer McNown's search involved looking through journals, quickly searching the first floor, interacting with the television, and locating the source of the music. R. at 3. Assuming, *arguendo*, that Officer McNown had a valid justification for intruding into the privacy of Mr. David's home, his conduct is closer to an exploratory search rather than a limited search that is "strictly tied" to whatever justification Officer McNown had for being in the home. If Officer McNown was present in the home to check on David, he had no place looking through the journals and messing with the television set. In contrast, if his purpose was to stop a potential burglary or determine if a crime had occurred, he should have taken additional safety steps as Deputy Ruth did in *United States v. Quezada*.

In Quezada, Deputy Ruth, upon finding an open front door to an apartment with lights on and evidence of a person being inside, placed a call for backup and entered the apartment with his gun drawn while loudly declaring his law enforcement affiliation. *United States v. Quezada*, 448 F.3d 1005, 1006 (8th Cir. 2006). In contrast, Officer

McNown walked around without a drawn firearm or backup inbound. Therefore, because Officer McNown's search was exploratory in nature, it was not sufficiently limited to achieve the purpose of his intrusion as required by the Fourth Amendment.

3. The Community Caretaker Exception Requires That The Intrusion Be Completely Divorced From A Criminal Investigation

The final prong of the *Nemeth* test requires the government to prove that the intrusion was totally divorced from a criminal investigation. In deciding *Cady v. Dombrowski*, The Supreme Court articulated that "[the] community caretaking functions [are] totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The underlying reasoning, as stated by the Eighth Circuit, is that "a police officer might use his or her caretaking responsibilities as a pretext for entering a residence." *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006).

In the case at bar, the record clearly indicates that Officer McNown's intrusion into David's residence was motivated by suspicions of crime. Officer McNown indicated that several observations he made leading up to the intrusion into Mr. David's bedroom, were unusual and that he was suspicious of some wrongdoing. First, he noted how unusual it was that David resided in one of the nicest gated communities in Lakeshow despite being a minister. Ex A, pg. 3. He believed that an SUV belonging to a drug dealer had been in the area. *Id.* at 3-4. Officer McNown heard scream-o music coming from inside Mr. David's residence and observed the *Wolf of Wall Street* playing on the downstairs television. *Id*. David failed to answer his front door despite Officer McNown knocking and ringing the doorbell for 2 minutes. *Id.* at 5. Because Officer McNown

believed all of the surrounding circumstances to be unusual, he willfully violated David's privacy by entering his home through the rear door. *Id*.

If the intrusion was purely for the purpose of locating Mr. David to ensure his health and safety, there was no reason for Officer McNown to interact with the television or read any of the notebooks. *Id*. In reviewing the totality of the circumstances, the facts available to Officer McNown prior to his intrusion combined with his conduct after intruding, make it apparent that Officer McNown's entrance into Mr. David's home was motivated by the need to determine if a crime was afoot within the residence. Therefore, Officer McNown's conduct is the type of conduct that *Cady* explicitly exempted from falling under the community caretaker exception.

II. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL ATTACHES TO PREINDICTMENT PLEA NEGOTIATIONS AS A MATTER OF LAW

A. The Right to Effective Counsel Attaches to Pre-Indictment Plea Negotiations Because It Represents the Beginning of Adversarial Proceedings

1. The application of the right to effective counsel to pre-indictment pleas is supported by the language and purpose of the Sixth Amendment

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The right to counsel is the right to effective assistance of counsel." *Missouri v. Frye*, 566 U.S. 134, 138 (2012). In *Kirby v. Illinois*, the Supreme Court held that "a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." 406 U.S. 682, 688 (1972). That Court noted that this may happen "by way of formal charge, preliminary

hearing, indictment, information, or arraignment." *Id*. at 689. Some courts have described this as the "bright line rule." See *Turner v. United States*, 885 F.3d 949 (2018). This Court has held that once the right to effective assistance of counsel attaches, it applies to all critical stages of a prosecution. "[T]he initiation of adversary judicial criminal proceedings against the defendant, and thereafter the right applies to all "critical stages" of the prosecution, before, during and after trial." *United States v. Gouveia,* 467 U.S. 180, 189 (1984).

In 2012, this Court held that plea negotiations are a critical stage in a prosecution that warrant Sixth Amendment safeguards. *See Missouri v. Frye*, 566 U.S. 134 (2012). The Court however, never discussed whether the right to effective counsel extended to pre-indictment plea negotiations. Because this Court never expressly held that the Sixth Amendment applied to pre-indictment plea negotiations, a divide among the lower courts has resulted. Several of the lower courts strictly apply the bright line rule, reasoning that the Sixth Amendment right to counsel cannot attach prior to the filing of formal charges. Alternatively, several of the lower courts reject the strict application of the bright line rule and recognize the right may attach prior to the filing of formal charges in limited circumstances. The Supreme Court should recognize that there is ample support in its own Sixth Amendment jurisprudence, and holdings by lower courts to extend the right to effective assistance of counsel to pre-indictment plea negotiations.

2. The Supreme Court does not require a strict mechanical application of the bright line rule

The Sixth Amendment right to effective counsel was originally thought to only protect the criminally accused during trial. However, over the years, this Court has gradually extended the right to counsel beyond trial itself to encompass certain pretrial

proceedings. This Court has stated that the Sixth Amendment right to counsel over time has evolved to meet the challenges presented by a changing legal paradigm. *See United States v. Ash*, 413 U.S. 300, 310 (1973). In extending the right, the Supreme Court has instructed courts to "scrutinize any pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial." *United States v. Wade*, 388 U.S. 218, 227 (1967). The *Kirby* Court set out the elements that define a proceeding for attachment purposes:

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.

406 U.S. 682, 689-90 (1972).

The Supreme Court has never rigidly applied a mechanical, indictment-based rule in its attachment cases. In balancing the nature of the relationship between the government and the accused, the Supreme Court has scrutinized the confrontation and the implications thereof. *Kirby* is an example of how this Court has put these principles into practice. In *Kirby*, police officers arrested the petitioner and his accomplice after finding stolen traveler's checks in their possession. 406 U.S. 682, 684 (1972). The police brought the owner of the checks to the station where he identified the petitioner and his friend as the people who stole his property. *Id*. at 684–85. The petitioner claimed that the Sixth Amendment gave him the right to counsel during an identification. The *Kirby* Court

emphasized that the identification occurred during "a routine police investigation . . . that took place long before the commencement of any prosecution whatsoever." *Id*. at 690.

The Court reasoned that there were other constitutional protections in place during the investigatory stage and discussed the "constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest in society in the prompt and purposeful investigation of an unsolved crime. *Id.* at 691. Notably, the Courts finding that the Sixth Amendment right to effective counsel did not attach, was based on more than the absence of an indictment. The Court analyzed the confrontation between the government and the suspect before it determined the right did not apply. *Id.* at 689–91.

The evaluation of what an adversary judicial proceeding is, is the essential link in the Supreme Court's attachment jurisprudence. For example, the Supreme Court held in *Moran v. Burbine*, that the Sixth Amendment "[b]y its very terms, it becomes applicable only when the government's role shifts from investigation to accusation. It is only then that the assistance of one versed in the "intricacies of law is needed to assure that the prosecution's case encounters "the crucible of meaningful adversarial testing." 475 U.S. 412, 430 (1986) (Citations omitted). In general terms, the point at which the right to counsel attaches is when formal charges have been initiated or when the government has committed itself to prosecute. *See also Gouveia*, 467 U.S. at 189. "Attachment occurs when the government has used the judicial machinery to signal a commitment to prosecute . . ." *Rothgery v. Gillespie County*, *Texas*, 554 U.S. 191, 211 (2008).

The Supreme Court has never rigidly applied a mechanical, indictment-based rule in its attachment cases. There is strong evidence to recognize an exception to the bright line rule in the context of pre-indictment plea negotiations. First, prosecutors do not make

formal offers to every suspect. Generally, prosecutors only make offers to suspects with impending charges. According to the *United States Department of Justice, U.S. Attorneys Manual*, there may be potential ethical violations for a federal prosecutor to make a formal plea offer if he did not intend to file charges or if he lacked factual or legal basis to sustain a conviction. § 9-27.430 (2018). Therefore, when a prosecutor extends a formal plea offer, it is at that point that "the adverse positions of government and defendant have solidified" the prosecutor becomes the accused's adversary and has committed himself to prosecute. *Kirby*, 406 U.S. at 689.

In this case, based on the above principles, it's clear that the government's role had shifted from "investigation to accusation." Before the filing of formal charges, the government communicated a plea offer to Mr. David's attorney. R. at 4. Mr. David never had the opportunity to accept the offer; however, if he had, it would have rendered the trial a mere formality. The prosecution offered Mr. David a reduced sentence in prison in exchange for information leading to the arrest of his suppliers. Ex. D. When the government extended a formal offer, it was at that moment the government shifted their role from "investigation to accusation." The prosecutor clearly became Mr. David's adversary, he gave him 36 hours to accept one year in prison or be exposed to a minimum of ten years in prison at trial. *Id*. Therefore, because Mr. David was met with the "prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law," he was entitled to the full protection of the Sixth Amendment. *Kirby*, 406 U.S. at 689-90. Thus, the Supreme Court should formally recognize the exception to the bright line rule for pre-indictment plea negotiations.

3. There is support among the lower courts for the Supreme Court to extend the right to effective assistance of counsel prior to the filing of formal charges

The Thirteenth Circuit was in error when it held that there was no circuit split regarding this issue. The Fifth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits have all enforced the bright line rule. The First, Third, Fourth, and Seventh Circuits have all either rejected the bright line rule in direct holdings or in *dicta* with other lower courts. There is a great deal of support among the lower courts for the Supreme Court to expressly extend the Sixth Amendment to pre-indictment plea negotiations.

"To conclude that petitioner had no right to counsel in evaluating the government's plea offer simply because the government had not yet obtained a formal indictment would elevate form over substance, and undermine the reliability of the pre-indictment plea negotiation process." *United States v. Wilson*, 719 F.Supp.2d 1260, 1268 (D. Or. 2010); *see also Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir.1995) ("We recognize the possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment, in circumstances where the government had crossed the constitutionally significant divide from fact-finder to adversary.") (citations omitted); *United States ex rel. Hall v. Lane*, 804 F.2d 79, 82 (7th Cir.1986 (recognizing that the Sixth Amendment right to counsel may attach "prior to the initiation of formal adversary proceedings.")

The Thirteenth Circuit specifically adopted the holding of the Sixth Circuit, when it held that the right to effective counsel does not attach to pre-indictment plea negotiations. However, the Sixth Circuit has expressly denounced the bright line rule, only using its application because it believes the Supreme Court compels it to do so.

> We do not favor this bright line approach because it requires that we disregard the cold reality that faces a suspect in pre-indictment plea negotiations. There is no question in our minds that at formal plea negotiations, where a specific sentence is offered to an offender for a specific offense, the adverse positions of the government and the suspect have solidified. Indeed, it seems a triumph of the letter over the spirit of the law to hold that Moody had no right to counsel in his decision to accept or deny the offered plea bargain only because the government had not yet filed formal charges.

United States v. Moody, 206 F.3d 609, 615-616 (6th Cir. 2000). Thus, for the foregoing reasons mentioned above the Supreme Court should extend the right to effective assistance of counsel to pre-indictment plea negotiations.

B. Chad David's Sixth Amendment Right to Effective Counsel was Violated When his Defense Attorney failed to communicate a favorable plea offer during a Critical Stage of the Prosecution

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The "core purpose" of the Sixth Amendment right to counsel is to guarantee effective assistance at trial. *United States v. Ash*, 413 U.S. 300, 309 (1973). The Sixth Amendment, however, guarantees more than simply a right to a fair trial. *United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir.1994). It "serves to protect the reliability of the entire trial process." *Nunes v. Mueller*, 350 F.3d 1045, 1052 (9th Cir. 2003). For this reason, the right to effective counsel has been extended to certain pretrial proceedings that "might appropriately be considered parts of the trial itself," such as where the defendant is "confronted, just as at trial, by the procedural system, or by his expert adversary, or by both." *Ash*, 413 U.S. at 310.

There are often "critical confrontations of the accused by the prosecution at pretrial proceedings where the results might well settle the accused's fate and reduce the

trial itself to a mere formality." *United States v. Wade*, 388 U.S. 218, 224 (1967). Accordingly, the right to the effective assistance of counsel extends to "all critical stages of the criminal process." Nunes, 350 F.3d at 1052.

A "critical stage" is any "trial-like confrontation, in which potential substantial prejudice to the defendant's rights inheres and in which counsel may help avoid that prejudice." *United States v. Leonti*, 326 F.3d 1111, 1117 (9th Cir. 2003). It includes all circumstances in which "certain rights might be sacrificed or lost," or where "[a]vailable defenses may be irretrievably lost." *Wade*, 388 U.S. at 225. The essence of a critical stage is "not its formal resemblance to a trial but the adversary nature of the proceeding, combined with the possibility that a defendant will be prejudiced in some significant way by the absence of counsel." *Leonti*, 326 F.3d at 1117.

The Respondent argues that because the right to effective counsel does not attach prior to the filing of formal charges, plea indictment plea agreements are not critical stages of the prosecution. However, plea negotiations are a critical stage of a criminal proceeding, and the Sixth Amendment right extends to the consideration of plea offers that have lapsed or been rejected. *Missouri v. Frye*, 566 U.S. 134, 141-143 (2012). In *Frye*, the respondent was charged with driving with a revoked license. He had been convicted for the same offense three times before. The prosecutor contacted counsel for Frye and communicated two favorable plea deals. The offers indicated that they would expire on a specified date. The offers expired, and the attorney never communicated the plea offers to his client. The respondent pled guilty and received a longer sentence than if he had accepted one of the offers. On a motion for post-conviction the respondent claimed his Sixth Amendment rights were violated, because he would have accepted the

first plea offer if it was communicated to him. This Court determined, "plea negotiations, which often take place *absent formal court proceedings and without judicial involvement, are a critical stage*." *Id*. at 140, 143–44.

The Court reasoned, "Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas." *Id*. The Court noted, ". . . plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea-bargaining process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages." *Id*. This Court was persuaded that plea agreements have effectively replaced trials, and therefore constitute a critical stage of a prosecution. *Id*. at 144. The *Frye* Court reasoned, "The failure to extend the right to plea agreements might deny a defendant effective representation by counsel at the only stage when legal aid and advice would help him." *Id*.

The Court held that, "as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Id*. at 145. "Any exceptions to that rule need not be explored here, for *the offer was a formal one with a fixed expiration date*. When defense counsel allowed the offer to expire without allowing the defendant to first consider it, they did not render the effective assistance the Constitution requires." *Id*.

Like *Frye*, Mr. David: retained counsel after arrest, was given a formal plea offer with an expiration date, his counsel failed to communicate the plea offers, and he received much longer sentences then he would have if he had taken the plea. *See* R. at 4. The only difference between the two cases is that in *Frye*, the government filed formal

charges against the respondent before making a formal plea offer. The Respondent argues that pre-indictment plea agreements are not critical stages of the prosecution. However, the filing of charges against Mr. David was imminent. The only reason charges were not immediately filed in this case was because the DEA wanted to prevent Mr. David's drug suppliers from learning of his arrest. R. at 4.

The reasoning used by the Supreme Court in *Frye*, logically supports the application of critical stage protection to the pre-indictment plea offer context with great force. "When plea negotiations take place before an indictment, they may be an accused's only adversarial confrontation." *Turner v. United States*, 885 F.3d 949, 982 (6th Cir. 2018) (Stranch J. dissenting opinion). If a defendant accepts the plea offer prior to the filing of charges, his fate becomes sealed. If a defendants only adversarial confrontation happens pre-indictment, the Sixth Amendment is the only safeguard to ensure the fairness of the entire process. "Denying an accused the right to counsel during preindictment plea negotiations therefore all but ensures that his window of exposure to the criminal justice system will open with the prosecutor and close in the prison system." *Id*. The interaction between the criminally accused and a professional prosecutor requires the guidance of legal counsel just as much before an indictment as after an indictment.

This Court should hold that pre-indictment plea negotiations are a "critical stage" of a prosecution. The bright line rule, that separates post-indictment plea offers from pre-indictment plea offers is an arbitrary line. The bright line rule creates an unworkable paradigm because the dangers that present themselves to a criminally accused post-indictment, are the same dangers present pre-indictment. Accordingly, the logic and

reasoning of the Supreme Court in *Frye* recognizes pre-indictment plea negotiations as both a critical stage and the point at which the right to effective counsel attaches.

Therefore, because pre-indictment plea negotiations are a critical stage in a prosecution, and the right to effective counsel attaches, Mr. David's defense counsel had the duty to communicate the formal offer from the prosecution. The failure of Mr. Long to inform his client of the offer resulted in the violation of Chad David's Sixth Amendment right to effective counsel.

CONCLUSION

The Thirteenth Circuit Court improperly affirmed the denial of Petitioner's motions. The motion to suppress evidence was improperly denied when the lower court erroneously applied the community caretaker exception to the Fourth Amendment to the search of Mr. David's home. The motion to compel the Respondent to reoffer a plea due to ineffective assistance of counsel was improperly denied when the Thirteenth Circuit determined that the Sixth Amendment right to effective counsel did not attach to pre-indictment proceedings. For the foregoing reasons, the Supreme Court should reverse the Thirteenth Circuit Court of Appeals.

Dated, October 21, 2018

Respectfully Submitted,

TEAM #P3
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