No. 4-422 TEAM NO. R30

In The

# Supreme Court of the United States

CHAD DAVID,

*Petitioner,*

v.

UNITED STATES OF AMERICA

*Respondent.*

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRTEENTH CIRCUIT**

## BRIEF FOR RESPONDENT

*COUNSEL FOR RESPONDENT*

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## ISSUES PRESENTED

I. Is it lawful for law enforcement officers acting as community caretakers to search one's residence absent a warrant under the Fourth Amendment?

II. Does the failure of an attorney to communicate a plea agreement give rise to an unfair prejudice, such that it deprives the client of his Sixth Amendment right to counsel?

## STATEMENT OF THE FACTS

***Petitioner's Absence from Sunday Service***

Chad David (hereinafter "Petitioner") was a well-respected pastor in Lakeshow, Staples. R. at 2, line 2. Petitioner resided in Lakeshow his entire life, gaining a reputation in the community for performing lively Sunday services at the Lakeshow Community Revivalist Church (hereinafter "LCRC"). R. at 2, line 4. According to those in the LCRC, Petitioner never missed a service, no matter the weather. Ex. A. However, on January 15, 2017, Petitioner was absent from his Sunday service. R. at 2, line 9. Officer McNown (hereinafter "McNown"), a patrol officer in Lakeshow, frequently attended Petitioner's Sunday services. R. at 2, line 5. Before starting his patrol, McNown arrived at the LCRC's Sunday service on January 15, 2017. R. at 2, lines 6–9. However, when Petitioner failed to show, some churchgoers noticed his absence. R. at 2, line 9.

Among them was Julianne Alvarado (hereinafter "Alvarado"), a regular at Petitioner's services. R. at 10. Alvarado tried to call Petitioner to check up on him, to no avail. R. at 2, lines 11–12. Nervously shaking and sweating, Alvarado informed McNown of Petitioner's failure to answer her phone call. R. at 2, lines 12–13. Further, Alvarado told McNown that she was concerned for Petitioner's well-being. R. at 2, line 13. McNown, aware of Petitioner's elderly age of 72, assumed Petitioner was at home with an illness. R. at 2, line 17. McNown made this assumption due to a nasty strain of "Bandwagon Flu" going around the community. Ex. A.

***McNown's Visit to Petitioner's Residence***

To calm the service attendees, McNown told them he would visit Petitioner's residence and bring him a cup of hot tea. R. at 2, line 19. After beginning his patrol shift, McNown purchased the tea from Starbucks and arrived at Petitioner's community. R. at 2, line 22. When McNown pulled into Petitioner's community, he noticed a black Cadillac SUV with Golden State license

plates leaving the complex. R. at 2, lines 25–26. Based on McNown's knowledge, drug dealers typically drove this type of vehicle, but he was unaware of the car's exact origin. R. at 2, line 27 and Ex. A. Upon arrival, McNown noticed nothing unusual; Petitioner's car was in the driveway, and all the home doors were shut. R. at 2, lines 23–24. McNown heard loud metal music blaring from inside the house. R. at 3, line 1. Concerned, McNown knocked on the front door and announced his presence, but no one responded. R. at 3, line 2 and Ex. A.

***McNown's Entrance of Petitioner's Residence***

After waiting approximately two minutes, McNown peered through a window next to the front door and saw a TV playing *The Wolf of Wall Street*. R. at 3, lines 3–5. McNown attempted to open the front door, but it was locked. R. at 3, lines 6–7. Concerned over Petitioner's status, McNown entered the residence through an unlocked back door. R. at 3, lines 8–10. Upon entry, McNown approached the TV to turn it off and noticed a notebook. R. at 3, lines 10–11. The notebook listed various church attendees, along with drug payment information. R. at 3, lines 11–12. The discovery of this notebook concerned McNown, but he ultimately followed the loud music and walked upstairs to a closed room where the music played. R. at 3, lines 13–14 and Ex. A. McNown opened the door and witnessed Petitioner packaging powdered cocaine into zip-lock bags and proceeded to handcuff him. R. at 3, lines 14–16.

***Post-Arrest Plea Negotiations***

Agent Colin Malaska (hereinafter "Malaska") read Petitioner his Miranda rights and asked him to disclose where he obtained the large quantity of drugs. R. at 3, lines 23–24. Petitioner expressed his strong apprehension to give up his suppliers and indicated that doing so could lead to his death and his church being burnt down. R. at 3, lines 24–26. After Petitioner arrived at the federal detainment facility, he called Keegan Long (hereinafter "Long"), a criminal defense

lawyer. R. at 3, lines 27–28. Although Petitioner knew that Long was a known alcoholic, Petitioner still hired him, believing Long would adequately represent him. R. at 4, line 2.

Realizing that Petitioner may have information on a suspected drug-kingpin traveling through Lakeshow, Malaska encouraged the prosecution to offer a favorable plea deal to Petitioner. R. at 4, lines 4–6. Malaska also suggested the prosecution hold off on filing formal charges. R. at 4, lines 6–7. Malaska feared the kingpin would be tipped off if the information about Petitioner's arrest came out. R. at 4, line 8. The Prosecutor Kayla Marie (hereinafter "Prosecutor") listened to Malaska and held off on filing charges. R. at 4, line 9. The plea bargain offered Petitioner a one-year prison sentence, in exchange for the names of his suppliers. R. at 4, line 10 and Ex. D. Additionally, this deal hinged on the successful arrest of at least one drug suspect. Ex. D. In the interest of time, the deal was only valid for 36 hours, with the hope of locating the suspected drug kingpin. R. at 4, line 11.

***Long's Failed Communication of the Plea Offer to Petitioner***

The Prosecutor emailed Long the plea offer, but he was drinking at a bar and incorrectly read the offer's details. R. at 4, lines 12–14. Long mistakenly believed the offer was valid for 36 days, rather than 36 hours. R. at 4, line 14. The day the offer expired, the Prosecutor called Long's office to touch base, but he did not answer. R. at 4, lines 15–16. As such, the plea offer expired. R. at 4, lines 17–18. The parties stipulate that Petitioner was never informed of the plea offer and that Long was ineffective when acting as Petitioner's counsel. R. at 4, lines 18–19. Accordingly, Petitioner was charged with one count of 21 U.S.C. § 841. R. at 4, line 20.

Subsequently, Petitioner fired Long as his counsel and hired a new criminal defense lawyer to represent him. R. at 4, lines 26–28. Petitioner's new counsel, Michael Allen, inquired into extending the plea offer to Petitioner after the indictment. R. at 5, lines 1–2. The Prosecutor

informed Mr. Allen that extending the offer would be pointless, since the only purpose of the initial plea deal was to obtain the names of Petitioner's suppliers. R. at 5, lines 2–4. She further emphasized that if the government were to offer any additional plea deals, the drug suppliers may be tipped off, thus making it futile. R. at 5, lines 5–7. The Prosecutor underscored that the government would not receive any substantial benefit by extending another plea offer to Petitioner. R. at 5, lines 6–7.

***Procedural History***

Petitioner has filed two pretrial motions presently before this Court on *Writ of Certiorari* to consider the underlying issues of this case. R. at 5, line 8. The first is a motion to suppress evidence based on an alleged violation of the Fourth Amendment due to a warrantless search. R. at 5, lines 9–10. The second is a motion seeking to be re-offered the initial plea deal that was not communicated, claiming ineffective assistance of counsel. R. at 5, lines 11–12.

## SUMMARY OF THE ARGUMENT

This Court should affirm the Thirteenth Circuit Court of Appeal's decision, thereby denying Petitioner's motion to suppress the evidence found in his home, as McNown's warrantless entrance was reasonable, and ultimately lawful under the community caretaker exception of the Fourth Amendment.

McNown's actions fell within his community caretaker duties, as his objective of entering Petitioner's residence was completely divorced from any investigative purpose. McNown sought to alleviate the community's anxieties by affirming the well-being of Petitioner. In doing so, McNown's primary motivations for the search were unrelated to an investigation into, or acquisition of, evidence related to the violation of a criminal statute.

Furthermore, McNown's search was justified, for his objective of confirming Petitioner's welfare outweighed Petitioner's right to privacy. In this case, McNown had no realistic alternative to verify Petitioner's status without entering the premises. Inferring that Petitioner could have been severely ill with influenza, McNown decided to search the residence, instead of wasting precious time securing a warrant.

Additionally, McNown's search was reasonable, as he restricted the scope of his search to locating Petitioner's whereabouts. Despite finding a concerning notebook within the residence, McNown never expanded his search beyond the necessary means of finding Petitioner. By limiting his search to confirming Petitioner's status, McNown used the least-intrusive means possible. Thus, this Court should find McNown's actions reasonable, and therefore lawful under the community caretaker exception of the Fourth Amendment.

Further, the Thirteenth Circuit Court of Appeal correctly ruled that Petitioner did not enjoy his Sixth Amendment right to effective counsel prior to his indictment. Petitioner claims his Sixth Amendment right was violated when his counsel failed to communicate a plea bargain to him. Importantly, this Court's precedent imposes a high burden of proof on Petitioner to establish ineffective assistance of counsel. Further, for his Sixth Amendment right to become implicated, Petitioner must be faced with the prosecutorial forces of organized society by way of adversarial judicial proceedings. In this case, Petitioner was neither interrogated, arraigned, indicted, or participated in a line up. These trial-like confrontations are the trademarks of adversarial judicial proceedings. Therefore, Petitioner's case had not yet reached a critical stage born out of trial-like confrontation sufficient to trigger his Sixth Amendment right to effective assistance of counsel.

Moreover, Petitioner did not prove he suffered a prejudice pursuant to the *Strickland* analysis, due to the nature of the plea bargain offered. Petitioner's plea offer was dependent on

him providing the names of his drug suppliers as well as the successful arrest of at least one drug suspect. This provided a narrow circumstance by which Petitioner's plea would be granted. Further, Petitioner failed to establish a reasonable probability that he would have met the plea's requisite conditions, had it been timely communicated. Accordingly, Petitioner did not suffer a prejudice.

Finally, there is no appropriate remedy available because re-offering the plea is no longer suitable. Vacating Petitioner's sentence is likewise unreasonable because it would infringe on the competing interests between the government and Petitioner. Therefore, Petitioner has not met his burden of proof in establishing that his Sixth Amendment right to effective assistance of counsel attached during pre-indictment negotiations.

## STANDARD OF REVIEW

A mixed question of fact and law applies to the denial of a motion to suppress evidence. *United States v. Williams*, 777 F.3d 1013, 1015 (8th Cir. 2015). Whether a warrantless search implicates the Fourth Amendment is a question of law reviewed *de novo,* with the district court's findings of fact reviewed for clear error. *Id*. The Sixth Amendment guarantees a right to counsel at critical stages of criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). The question of whether the Sixth Amendment right to counsel attaches during pre-indictment plea negotiations is a question of law reviewed *de novo*. *United States v. Moody*, 206 F.3d 609, 612 (6th Cir. 2000). *Mickens v. Taylor*, 535 U.S. 162, 177 (2002). The Court's role is to defer to the district court's findings of fact unless it can conclude that they are clearly erroneous. *Id.*

## ARGUMENT

### I. MCNOWN'S WARRENTLESS ENTRANCE INTO PETITIONER'S RESIDENCE WAS REASONABLE AND THEREFORE LAWFUL UNDER THE COMMUNITY CARETAKER EXCEPTION OF THE FOURTH AMENDMENT.

McNown's entrance into Petitioner's residence was lawful under the community caretaker exception, as it was divorced from an investigatory purpose and reasonable based on the circumstances. The Fourth Amendment of the United States Constitution protects citizens from warrantless searches and seizures by the federal and state governments. U.S. CONST. amend. IV. Although it is a basic principle of Fourth Amendment law that warrantless searches of a home are presumptively unreasonable, this Court specifically stated that the Fourth Amendment "protects *people*, not places." *Katz v. United States*, 389 U.S. 347, 351 (1967) (emphasis added); *Payton v. New York*, 445 U.S. 573, 586 (1980).

Nonetheless, there are several exceptions to the warrant requirement. *Brigham Cty., Utah v. Stuart*, 547 U.S. 398, 403 (2006). Once an exception is established, and an officer retains a lawful right of access, any incriminating items found within view can be seized. *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971). One exception to the warrant requirement, articulated by this Court in *Cady v. Dombrowski*, is the community caretaker exception. 413 U.S. 433, 441 (1973).

For the community caretaker exception to apply, an officer's actions must be separate from the acquisition of, or investigation into, evidence related to the violation of a criminal statute. *Id*. Additionally, the officer's actions must be reasonable, based on the specific and articulable facts known at the time. *Dakota v. Opperman*, 428 U.S. 364, 373 (1976) (quoting *Coolidge*, 403 U.S. at 509–10). McNown's search of Petitioner's residence was unrelated to a criminal investigation, as he was alleviating community anxieties, while simultaneously checking up on the welfare of

Petitioner. Furthermore, McNown's search of Petitioner's home was reasonable, as his actions were justified and limited in scope.

Therefore, McNown's actions were appropriate under the community caretaker exception, and this Court should affirm the Thirteenth Circuit Court of Appeal's decision, denying Petitioner's motion to suppress the evidence found in Petitioner's residence.

### A. McNown's search of Petitioner's residence was completely divorced from an investigatory purpose.

According to *Cady,* the community caretaker exception potentially applies when an officer's actions are divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *Cady*, 413 U.S. at 441. This Court recognized that police officers have multiple roles in our society, some of which fall outside the scope of investigating crimes. *Id.* Officers have unique positions; they are expected to aid those in need, respond to potential hazards, and provide an infinite array of services to protect and preserve the community. *United States v. Rodriguez-Morales,* 929 F.2d 780, 784 (1st Cir. 1991).

In *Cady*, police officers searched the defendant's car to locate a gun, as the defendant claimed to be a Chicago officer, of whom were required to carry a revolver. *Cady*, 413 U.S. at 436. The officer's search was procedural; it existed (in part) to protect the community from weaponry potentially falling into the wrong hands. *Id.* at 441. Relying on the procedural, policy-driven purpose of the search, this Court found the officers' actions separate from a criminal investigation. *Id*. This Court reaffirmed its stance on the community caretaker exception in *Opperman,* relying on the absence of an investigative motive by the officers conducting the search. *Opperman,* 428 U.S. at 383.

Here, McNown simply sought to alleviate the community's anxiety. R. at 2, line 19. In the LCRC, Petitioner had a reputation of never missing his Sunday morning services, no matter the

circumstances. Ex. A. Petitioner's absence, paired with his failure to answer Alvarado's phone call, struck fear into at least one of the churchgoers. R. at 2, line 12. McNown witnessed Alvarado in an extremely anxious state over Petitioner's absence. *Id*. He attempted to quell such worries by visiting Petitioner's home. *Id.* McNown's secondary motivation for visiting Petitioner's home was to check up on Petitioner's welfare. R. at 2, line 17. Aware of the "nasty" Bandwagon Flu going around the community, McNown concluded that the 72-year-old Petitioner was sick. R. at 2, line 19 and Ex. A. This was his justification for going to Starbucks for tea. *Id.*

Petitioner will likely point to several instances where McNown grew suspicious of criminal activity. Firstly, McNown viewed a black Cadillac SUV with Golden State license plates leave Petitioner's community. R. at 2, lines 25–26. According to McNown, these vehicles are typically driven by drug dealers. R. at 2, lines 26–27. However, based off his testimony, McNown never connected that specific vehicle to Petitioner. Ex. A.

Secondly, Petitioner may suggest that McNown grew suspicious when he heard the loud metal music and viewed the explicit movie playing inside Petitioner's home. Ex. A. Accordingly, Petitioner will argue that McNown began to investigate a potential crime, as he found these activities abnormal for a pastor. Ex. A. Despite McNown's apparent skepticisms over these happenings, he never inferred that criminal activity was afoot. Furthermore, even upon discovery of the notebook, McNown never acted upon his suspicion to actively investigate criminal activity. On these facts, McNown displayed no investigatory purpose in his search of Petitioner's home.

**B. McNown's search of Petitioner's residence was reasonable, based on the totality of the circumstances.**

This Court has stated that searches within a home are the chief evil to which the Fourth Amendment addresses, and thus, are presumptively unreasonable. *Brigham*, 547 U.S. at 403. However, when dealing with potential exceptions to the Fourth Amendment warrant requirement,

reasonableness is the proper standard. *Id*. at 403 (citing *Flippo v. West Virginia*, 528 U.S. 11, 13 (1999) (per curiam)); *Katz*, 389 U.S. at 357.

While the community caretaker exception overlaps with the emergency aid doctrine in relation to an officer's vast array of duties, one Circuit claims there is an inherent difference between the two. *Burke v. Sullivan*, 677 F.3d 367, 371 (8th Cir. 2012). In *Burke*, the Eighth Circuit defined the emergency aid exception as a situation where law enforcement officers "may enter a residence without a warrant when they have 'an objectively reasonable basis for believing that an occupant is…imminently threatened with [serious injury].'" *Id*. (citing *Ryburn v. Huff*, 565 U.S. 987, 990 (2012) (quoting *Brigham*, 547 U.S. at 400).

In contrast, the court in *Burke* defined the community caretaker exception as a situation where the officer has a reasonable belief that an emergency exists requiring his or her attention. *Burke*, 677 F.3d at 371 (quoting *United States v. Quezada*, 448 F.3d 1005, 1007 (2006)). This Court has held that reasonable belief is a less exacting standard than probable cause. *See Maryland v. Buie*, 494 U.S. 325, 336–37 (1990). In determining reasonableness, this Court recognized that justification for, and the ultimate scope of a search, are major factors to consider. *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985) (quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1967).

*United States v. Harris* lays out a simple framework for determining reasonableness when an officer utilizes his community caretaker duties in a search. 747 F.3d 1013, 1018–19 (8th Cir. 2014). First, as addressed in the above section, an officer's actions must be divorced from acquiring or investigating evidence of a crime. *Id.* at 1018. Next, the court must weigh the government's interest against the defendant's right to be free from governmental intrusion. *Id.* Finally, the court must determine whether the officer's actions were narrowly tailored to addressing a potential emergency. *Id*. at 1019.

The following subsections address (1) the government's interest in confirming Petitioner's welfare against that of Petitioner's right of privacy; and (2) whether the scope of McNown's search was limited.

**1. The government's interest in confirming Petitioner's welfare outweighed Petitioner's right to be free from governmental intrusion into his residence.**

In *Quezada*, the court determined that an officer's entrance into the defendant's apartment was reasonable. 448 F.3d at 1008. In that case, the officer was attempting to serve a subpoena. *Id*. at 1006. Upon arrival, the officer noticed an open door, lights on, and the television playing. *Id*. The officer shouted his presence several times, but nobody responded. *Id*. After waiting for a brief period, the officer entered and found the defendant, a felon, in possession of a firearm. *Id*. The court concluded that the officer had a reasonable belief that an emergency existed, therefore making his entrance into the apartment reasonable. *Id*. at 1008.

Additionally, in *United States v. Rohrig*, an officer responded to a neighborhood noise complaint. 98 F.3d 1506, 1509 (6th Cir. 1996). Neighbors called in the authorities, reporting loud music blasting from the defendant's home in the early morning hours. *Id*. Upon arrival, the officer banged on the front door, but received no response. *Id.* After walking around the perimeter, the officer entered through an unlocked door. *Id.* Upon entrance, the officer continued to announce his presence, but was drowned out by the music. *Id*. Searching for an occupant to turn the music down, the officer discovered a basement filled with marijuana plants. *Rohrig*, 98 F.3d at 1509.

*Rohrig* concluded that the governmental interest of "keeping the peace" sufficiently justified the home search. *Id*. at 1522. The court relied on the crucial premise that important governmental interests may be at stake, even in the absence of fatal circumstances. *Id*.; *see United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995) ("We do not think that the police must stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they

can hear screams."). Further, the court viewed the warrant requirement unnecessary, as a magistrate would have provided little assessment. *Id*. at 1523.

In *Macdonald v. Town of Eastham,* police officers entered a home without a warrant. 745 F.3d 8, 11 (1st Cir. 2014). In that case, a concerned neighbor noticed that plaintiff's home door was wide open and no one was home. *Id*. at 10. The neighbor called the police, who arrived and announced their presence. *Id*. After receiving no reply, the officers entered the home to make sure nothing was missing. *Id*. at 11. Upon entrance, the officers came upon a marijuana growing operation. *Id*. The First Circuit found the officer's actions reasonable, given the "parade of horribles (sic) that could easily be imagined had the officers simply turned tail." *Macdonald,* 745 F.3d at 14. While avoiding the formation of a bright-line rule for the community caretaker exception, the court extended the exception to the home for this circumstance. *Id*.

Petitioner will likely claim that the government's interest in checking up on his welfare did not outweigh his right to privacy. However, as stated in *Rohrig*, the government's interest does not falter in the absence of fatal circumstances. *Rohrig,* 98 F.3d at 1522. Additionally, the court in *Macdonald* articulated the danger of having officers turn a blind eye to potentially hazardous situations. *Macdonald*, 745 F.3d at 14. In both those cases, officers dealt with non-fatal situations, all of which could have produced noxious results if left unchecked.

Here, McNown dealt with a potentially pernicious situation; arriving at Petitioner's home, he heard music blasting, the television playing, and the back door unlocked. R. at 3. Then, McNown knocked on Petitioner's door, with no answer. R. at 3, line 2. On these facts, McNown logically concluded that someone was in the household. R. at 3, lines 1–6. Thus, knowing Petitioner's elderly age, along with the current flu epidemic plaguing the local community, McNown wanted to ensure Petitioner's safety.

Petitioner will likely distinguish his case from *Cady*, as that case specifically dealt with the search of an automobile. *Cady*, 413 U.S. at 433. He will further rely on *Cady's* language, which has yet to be expanded to the home. *Opperman*, 428 U.S. at 382. However, *Opperman* stated there is no general "automobile exception" to the warrant requirement. *Id.* Due to this, Circuits are split as to whether the community caretaker exception should be limited to vehicles or expanded to homes. It is important to note that this Court has yet to specifically address the potential expansion of the community caretaker exception.

A few Circuits explicitly deny the exception's use in conjunction with a home search, due to inherent discrepancies between automobiles and homes. *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir.1993) (citing *Cady*, 413 U.S. at 439, quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970)). According to *Erickson*, citizens have a lesser expectation of privacy in their automobiles, due to a dramatic increase in police-citizen interaction. *Id*.

While this argument is persuasive, it is entirely restrictive of how officers respond to a multitude of situations. Barring officers from addressing a potentially dangerous situation, simply because their actions do not conform to a nuanced categorical exception, is exceptionally inefficient. Officers should respond proactively and without hesitation. By forcing officers to obtain an unnecessary warrant in similar situations, we are ignoring other instances where people truly need assistance. As a society, we cannot anticipate our officers to be soothsayers, of whom can predict when a true emergency exists.

Thus, even though Petitioner was in good health, McNown had no realistic way of confirming Petitioner's status without intervening onto the premises. According to the Centers for Disease Control and Prevention, there is an increased likelihood of fatal complications with influenza-infected elders. CENTERS FOR DISEASE CONTROL AND PREVENTION, https://www.

cdc.gov/flu/about/disease/65over.htm (last visited Sep. 4, 2018). Between 70 and 85 percent of seasonal flu-related deaths have occurred in people 65 years and older. *Id*. Further, between 54 and 70 percent of seasonal flu-related hospitalizations occur within this same age group. *Id*. Inferring that Petitioner had the flu, rather than waste precious time obtaining a warrant, McNown acted proactively to ensure Petitioner's welfare. Therefore, in this specific instance, McNown's interest in ensuring Petitioner's safety outweighed Petitioner's right to privacy.

**2. McNown carefully tailored his search towards the objective of affirming Petitioner's well-being.**

Stated previously, the community caretaker exception must be completely unrelated to a criminal investigation and reasonable in nature. *Harris,* 747 F.3d at 1018. For the government's actions to be considered reasonable, the scope of the disputed search must be narrowly tailored to the officer's goal at the time. *Phillips v. Peddle*, 7 F. App'x 175, 180 (4th Cir. 2001).

In *Phillips,* a detective and an officer visited Phillip's home to serve a subpoena. *Phillips,* 7 F. App'x at 177. The detective repeatedly knocked on the door, yelled "Police!" and called him on the telephone, with no response. *Id*. Phillip's front door was open, the police entered and shouted "Police! We're coming in." *Id*. Upon entrance, the detective served Phillips with the subpoena and left the home after approximately 60 seconds. *Id*. The Fourth Circuit determined that the detective and officer's actions fell under the community caretaker exception, as their actions were divorced from a criminal investigation, but also due to their limited actions while in Phillip's home. *Id*. at 180. The court viewed the detective and officer's actions as limited in scope, due to their constricted time within the home. *Phillips*, 7 F. App'x at 177.

*United States v. Johnson* reiterated the restrictive scope approach in relation to the community caretaker exception. 410 F.3d 137, 146 (4th Cir. 2005). Although *Johnson* involved an automobile search, the reasoning parallels *Peddle*. *Id*. (citing *United States v. Moss,* 963 F.2d

673, 678 (4th Cir. 1992)); *see* also *United States v. Presler,* 610 F.2d 1206, 1211 (4th Cir. 1979) (finding that although the officer who entered the apartment without a warrant to address a medical emergency could have seized evidence in plain view, he did not have "an unlimited right extending 'to the interiors of every discrete enclosed space capable of search within the area'"). However, the court in *Johnson* relied on *Cady,* stating that a search does not fail the reasonableness standard simply because less-intrusive means existed. *Johnson,* 410 F.3d at 146 (quoting *Cady,* 413 U.S. 433 at 447).

Here, McNown limited his search to ensuring Petitioner's safety. R. at 2, line 19. Upon entrance, McNown went to turn off the TV, likely for the objective of clearing out any unnecessary noise. R. at 3, line 10. Then, upon approaching the TV, McNown noticed a small notebook in plain view, containing the name "Julianne Alvarado" and the words "ounce" and "paid." R. at 3, line 1 and Ex. A. Although McNown admitted the notebook was concerning, he did not expand his search. Ex. A. Instead of searching the entirety of the first floor, McNown followed the loud music coming from upstairs, opened the door and found Petitioner packaging cocaine. R. at 3, lines 13–14.

McNown's actions were logically consistent with locating Petitioner. When he saw the notebook, McNown could have altered his motivations for the search. Relying on the notebook's contents, he could have rummaged through every aspect of the first floor. Instead, McNown directed his search towards the source of the music, paralleling his objective of finding Petitioner. R. at 3, line 14. Therefore, McNown's search was not overly-expansive in nature and ultimately lawful under the community caretaker exception. Thus, this Court should affirm the Thirteenth Circuit Court of Appeal's decision, denying Petitioner's motion to suppress the evidence found in his residence.

## II. THE THIRTEENTH CIRCUIT COURT OF APPEAL CORRECTLY AFFIRMED THE DENIAL OF PETITIONER'S MOTION TO BE RE-OFFERED THE PLEA AGREEMENT BECAUSE HIS SIXTH AMENDMENT RIGHT DID NOT ATTACH PRIOR TO INDICTMENT.

The Sixth Amendment of the United States Constitution requires that defendants receive effective assistance of counsel. U.S. CONST. Amend VI. When a defendant complains of ineffective assistance of counsel, the defendant must show that counsel's representation fell below the objective standard of reasonableness. *Mickens*, 535 U.S. at 177. However, "[j]udicial scrutiny of counsel's performance must be highly deferential, and a fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). There is a strong presumption that a counselor's conduct may fall within the wide range of reasonable professional assistance. *Id.* Nonetheless, the defendant bears the burden of proof. *Strickland*, 446 U.S. at 713 (Marshall, J., dissenting).

### A. Petitioner did not enjoy a Sixth Amendment right to effective counsel before formal charges were entered.

The Sixth Amendment right to the effective assistance of counsel guarantee attaches only "at or after the initiation of judicial criminal proceedings." *Turner v. United States*, 885 F.3d 949, 951(6th Cir. 2018) (quoting *Kirby v.* Illinois, 406 U.S. 682, 289 (1972)). Once the Sixth Amendment right to counsel attaches, criminal defendants have a right to the assistance of counsel during "critical stages" of the prosecution. *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Montejo*, 556 U.S. at 786. In fact, "the 'core purpose' of the Sixth Amendment right to counsel was to ensure that criminal defendants could receive assistance of counsel 'at trial.'" *United States v. Ash*, 413 U.S. 300, 309 (1973).

However, this Court expanded the right to certain pretrial "trial-like" confrontations that present "the same dangers that gave birth initially to the right itself." *Id*. at 311–12. These "trial-like" confrontations define the critical stage in which potential substantial prejudice to the

defendant's rights occur. *United States v. Wilson*, 719 F. Supp. 2d 1260, 1266 (D. Or. 2010). These critical stages occur by way of formal charge, arraignment, post-indictment interrogations, lineups, and the entry of a guilty plea. *Frye*, 566 U.S. at 140. In *Frye* and *Lafler*, this Court recognized that plea negotiations have become "central to the administration of the justice system." *Frye*, 56 U.S. at 143–44; *Lafler v. Cooper*, 566 U.S. 156 (2012). However, it is important to note that neither *Frye* nor *Lafler* concerned plea negotiations which occurred *before* the criminal defendant had been formally charged. *See id*. at 138; *Lafler*, 566 U.S. at 161.

Moreover, these cases did not specifically address attachment, but are critical stage cases. *Kennedy v. United States*, 756 F.3d 492, 493 (6th Cir. 2014). They have accepted the rule that one's right to counsel does not attach until the initiation of adversarial judicial proceedings. *Id.* Accordingly, the "critical stage question" and "attachment question" must be kept distinct. *Turner*, 885 F.3d 949 at 953; *Rothgery v. Gillepsie Cty.*, 554 U.S 191, 198 (2008).

**1. Petitioner's case had not reached a "critical stage" born out of a trial-like confrontation, sufficient to trigger his Sixth Amendment right to effective counsel.**

In *United States v. Gouveia*, this Court stated that the "core purpose" of the Sixth Amendment right to counsel is "assuring aid at trial and at 'critical' pretrial proceedings *when the accused is confronted with the intricacies of criminal law or with the expert advocacy of the public prosecutor*, or both." Mulroy, Steven J., *The Bright Line's Dark Zone: Pre-Charge Attachment of the 6th Amendment Right to Counsel*, 92 WASH L. REV. 213, 222 (2017) (citing *United States v. Gouveia*, 467 U.S. 179, 189 (1984) (emphasis added)). Crucially, this Court has reasoned that the right to counsel "exists to protect the accused during trial-type confrontations with the prosecutor." *Id*. at 190. It is only at that time, "that the government has committed itself to prosecute, and only then the adverse positions of government and defendant have solidified." *Kirby*, 406 U.S. at 689.

That is when "the defendant finds himself faced with the prosecutorial forces of organized society," and immersed in the intricacies of substantive and procedural law. *Id.*

However, there are some circuits which "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 has crossed the constitutionally significant divide from fact-finder to adversary." *United States ex rel. Hall v. Lane*, 804 F.2d 79, 82 (7th Cir. 1986) (emphasis added).

This reasoning is inapplicable, as the case against Petitioner had not reached the 'critical' moment when the accused is confronted with the prosecutor. In fact, Petitioner had *zero* communications with the Prosecutor when the initial plea discussions took place. R. at 4. Rather, Malaska expressed the DEA's desire to obtain information from Petitioner. *Id.* Moreover, Petitioner was not informed of any plea offers until his counsel contacted him in jail on January 18, 2017. Ex. C. This fortifies the premise that the government had not crossed the constitutionally significant divide from fact-finder to adversary. Therefore, Petitioner was not "confronted with the prosecutor" at any moment while he remained in jail.

Further, the prosecution had not yet "committed itself" to prosecuting Petitioner. When Malaska contacted the prosecutor and encouraged her to offer a plea deal, Petitioner had not been interrogated, arraigned, or confessed to any crimes. In fact, the only significant evidence against Petitioner was the testimony of McNown, who found Petitioner packaging cocaine. R. at 3. Therefore, the adverse positions of government and defendant had not yet solidified, and Petitioner's case had not reached a critical stage.

### 2. Since no critical stage existed, Petitioner's Sixth Amendment right to effective counsel had not yet attached.

The right to certain pretrial "trial-like" confrontations define the critical stage in which potential substantial prejudice to a defendant's rights may occur. *Ash*, 413 U.S. at 311–12; *Wilson*, 719 F. Supp. 2d at 1266. Critical stages include arraignments, post-indictment interrogations, lineups, and the entry of a guilty plea. *Frye*, 566 U.S. at 140. Therefore, a defendant's right to counsel may attach only at or after the initiation of such judicial criminal proceedings. *Turner*, 885 F.3d at 951.

In *Gouveia*, four respondents were placed in administrative detention for suspicion of murder. 467 U.S. at 181. While under investigation, they remained in confinement for *nineteen* months prior to their indictment or arraignment. *Id.* During that time, the respondents were neither interrogated nor arraigned. *Id*. After their indictment, the respondents brought a motion to dismiss based on a violation of their Sixth Amendment right to counsel. *Id.* This Court found that no adversarial judicial proceedings had been initiated. *Id*. Therefore, their Sixth Amendment right to counsel did not attach. *Gouveia*, 467 U.S. at 181.

In the instant case, Petitioner was only held for three days, far less than the nineteen months the *Gouveia* respondents spent in custody. Just as this Court held in *Gouveia* that no adversarial judicial proceedings were initiated, here too, this Court should find similarly. Petitioner's right to counsel *would* have attached had he been formally charged, arraigned, interrogated, or participated in a lineup; like in *Gouveia*, neither of these instances occurred. Petitioner was finally indicted on Wednesday, January 18, 2017—after he spent nearly four days in custody. R. at 4.

Petitioner may argue his indictment was withheld and kept out of the public eye to secure the arrest of his supplier. However, this is just one avenue by which Petitioner's Sixth Amendment right may have attached. Regardless of the Prosecutor's reasoning for withholding formal charges,

Petitioner did not participate in any lineups nor did he plead guilty. Therefore, Petitioner's case was not at a "critical stage" as required for the Sixth Amendment to attach. Petitioner cannot argue that he did not enjoy a right which had not yet been implicated.

### B. Petitioner did not establish ineffective assistance of counsel pursuant to a *Strickland* analysis, and thus, has not demonstrated a denial of his Sixth Amendment right.

A prisoner may seek relief under 28 U.S.C. § 2255 based on a denial of his or her Sixth Amendment right to the effective assistance of counsel. *Strickland*, 446 U.S. at 686. The purpose of the effective assistance guarantee is not to improve the quality of legal representation, but rather to ensure that criminal defendants receive a fair trial. *Id*. at 689. "[T]he right to counsel means the right to effective assistance of counsel." *Id*. at 686. In fact, the right to effective assistance of counsel is recognized, not for its own sake, but because of its effect on the ability of the accused to receive a fair trial. *United States v. Cronic*, 466 U.S. 648, 658 (1984). *Strickland* places the "ultimate focus of inquiry" on the fundamental fairness of the proceeding whose result is being challenged. *Strickland*, 466 U.S. at 696.

This Court, in *Hill v. A.L. Lockhart*, established that claims of ineffective assistance of counsel in the plea-bargaining context be governed by the *Strickland* test. 474 U.S. 52, 57 (1985). *Strickland* requires the defendant to show two things to establish an ineffective assistance of counsel claim. *See Strickland*, 466 U.S. at 690. "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Id*. at 687. Second, the defendant must show that the deficient performance prejudiced the petitioner. *Id*. at 687–690. Both prongs must be met under the *Strickland* analysis.

### 1. Petitioner failed to show that his counsel's deficient representation prejudiced his defense.

Both parties stipulate that Petitioner's counsel was ineffective. The issue now turns on whether Petitioner showed a reasonable probability that, but for his counsel's unprofessional errors, the result of the proceeding would have been different. This proves prejudice.

Under the second prong of the strict two-part test established in *Strickland*, this Court examined the application of the second prong and explained, "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct." *Strickland,* 446 U.S. at 690. Moreover, "[a]n error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment." *Id*. However, even when a defendant proves actual errors in his counsel's representation, the defendant still has the burden of proving that the errors undermined or prejudiced the outcome. *See Strickland,* at 690.

Here, Petitioner bases his challenge on Long's failure to communicate a plea offer to him and seeks it be re-offered. R. at 8. However, there is no way to know that Petitioner would have met the plea offer's requisite conditions, had it been timely communicated to him. Therefore, it could have been withdrawn at any time.

Thus, Petitioner has failed to establish that his constitutional right to effective counsel has been violated because he has not affirmatively "proved prejudice" as required by this Court. *Strickland,* at 690. This Court should hold resolute in precedent established in *Strickland* and affirm the lower court's opinion denying Petitioner's claim of ineffective assistance of counsel.

### C. Petitioner cannot show he suffered prejudice as required by *Strickland* and therefore a remedy is unnecessary at this juncture as no appropriate remedy is available.

Petitioner cannot prove that he suffered a prejudice due to his counsel's ineffective assistance. Therefore, a remedy is not necessary at this stage. A "remedy for counsel's ineffective assistance should put the defendant back in the position he would have been if the Sixth Amendment violation would not have occurred." *United States v. Blayock*, 20 F.3d 1458, 1468 (9th Cir. 1994). Moreover, when ineffective assistance of counsel has deprived a defendant of a plea offer, a court *may* choose to vacate the conviction and return the parties to the plea-bargaining stage. *Riggs v. Fairman*, 399 F.3d 1179, 1184 (9th Cir. 2005).

Alternatively, a court may decide to order the government to reinstate its original plea offer to the defendant. *Id*. Nonetheless, in choosing a proper remedy, the court must consider the unique facts and circumstances of the particular case. *Id*. In cases involving Sixth Amendment violations, there is a "general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not necessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 362 (1981).

In *Lafler*, the state argued that since the defendant was found guilty after a fair trial, vacating his conviction served no purpose to remedy the alleged constitutional violation. 566 U.S. at 174. Justice Kennedy held that the correct remedy in these circumstances is to order the state to re-offer the plea agreement. *Id.* However, he qualified this premise, since it would allow the trial court to exercise their own discretion in all circumstances of the case. *Id*. Moreover in *Frye*, the lower court—rather than this esteemed Court—decided the remedy issue, leaving no binding precedent on how to remedy these situations. *Frye*, 566 U.S. at 151.

Like in *Lafler*, Petitioner was found guilty after a fair trial. R. at 14. If the Court was to vacate his conviction and return the parties to the plea-bargaining stage, this would serve no

purpose to remedy the alleged constitutional violation. Alternatively, if the Court were to reinstate the original plea offer, the government would suffer an immense prejudice as this infringes on competing interests. Justice O'Neal's dissenting opinion from the lower court's ruling poignantly effectuates the literal quagmire befalling the government. The guiding force behind Petitioner's plea offer was to arrest suspected drug kingpins who supplied Petitioner with cocaine. R. at 4. However, once Petitioner was charged, and the facts of the case exposed to the general public, the government lost its upper hand. R. at 23. It is unreasonable to believe a remedy so one-sided and based on speculation is well tailored to the injury presented here.

Additionally, there is no way to predict if Petitioner would have met all the conditions of the plea offer, even if timely communicated and accepted. The plea arrangement rested on the successful arrest of suspects related to the influx of drugs into Lakeshow. *See* Ex. D. Nevertheless, had Petitioner accepted the plea, there is a strong possibility that his information would not have led to the successful arrest of suspects. However, if the Court were to find that Petitioner proved prejudice, then the only appropriate remedy available is no remedy at all.

## CONCLUSION

For the foregoing reasons, this Court should affirm the Thirteenth Circuit Court of Appeal's decision to dismiss Petitioner's Fourth Amendment and Sixth Amendment challenges, finding the warrantless search of Petitioner's home lawful under the Fourth Amendment, and holding Petitioner's plea negotiations did not trigger the constitutional protections of effective assistance of counsel under the Sixth Amendment.