No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES OF AMERICA

Chad David
Petitioner

v.

United States of America
Respondent

On Writ of Certiorari
From the United States Court of Appeals
For the Thirteenth Circuit

BRIEF FOR RESPONDENT

Team No. 31

TABLE OF CONTENTS

TABLE OF AUTHORITIES

UNITED STATES SUPREME COURT CASES

UNITED STATES COURT OF APPEALS CASES

UNITED STATES DISTRICT COURT CASES

STATE COURT CASES

CONSTITUTIONAL PROVISIONS

SECONDARY SOURCES

STATEMENT OF THE ISSUES

I. Whether warrantless searches conducted by law enforcement acting as community caretakers extend to homes under the Fourth Amendment.

II. Whether the Sixth Amendment right to effective counsel attaches during plea negotiations prior to a federal indictment.

STATEMENT OF THE FACTS

I. Facts Pertaining to the Fourth Amendment Community Caretaking Exception

Chad David ("Defendant") is a well-respected minister at Lakeshow Community Revivalist Church in Lakeshow, Staples. R. at 2. Defendant, now 72, has lived in Lakeshow his entire life and was known in the community for regularly holding Sunday services at his church. *Id.* Defendant had a reputation of never missing a Sunday service. Ex. A, pg. 2. Along with many other devoted, regular attendees, James McNown ("Officer McNown"), a local patrol officer of twelve years, attended Defendant's Sunday church services frequently. Ex. A, pg. 2.

On Sunday, January 15, 2017, Officer McNown arrived at Defendant's Sunday service just before 7:00 AM. R. at 2. In an unusual occurrence, Defendant was absent from this Sunday service, and many of his regular attendees were concerned for his well-being. *Id.* After waiting fifteen minutes, service members attempted calling Defendant, but Defendant did not answer. Ex A, pg. 2. Some members were visibly upset with Defendant's absence, but the congregation decided not to wait for the Defendant any longer, and another churchgoer proceeded to lead the congregation. R. at 2.

After the service, to alleviate the concerns of the visibly-worried churchgoers, Officer McNown told them that he would stop by Defendant's house and bring him some hot tea. *Id.* Officer McNown saw the congregation was overly distraught, but he simply assumed Defendant was at home with an illness because a flu bug had been going around. Ex. A, pg. 3. Immediately following the church service, Officer McNown went to Starbucks to purchase a hot tea for Defendant, and his patrol shift began. R. at 2. He then arrived at Defendant's home. *Id.* He did not immediately observe anything unusual as he approached Defendant's home. *Id.* Defendant's vehicle was in the driveway, so Officer McNown assumed Defendant was at home. *Id.*

After exiting his patrol car, Officer McNown heard loud "scream-o metal music" coming from inside Defendant's home. Ex. A, pg. 4. He thought it was odd that "scream-o metal music" was projecting from Defendant's home because Defendant was a 72-year-old minister, and it was early in the morning. *Id.* Officer McNown then attempted knocking and announcing his presence to no avail. R. at 3. He proceeded to look through the front window and observed an R-rated movie playing on the television. *Id.* Officer McNown also thought it was unusual for Defendant to be playing that movie provided his profession and age. *Id.* After approximately two minutes, Officer McNown attempted opening the front door, but it was locked. Ex. A, pg. 4.

After seeing the television on, hearing music playing, and observing Defendant's vehicle in the driveway, Officer McNown continued his efforts to determine the status of Defendant through the unlocked back door. Ex. A, pg. 5. Officer McNown entered on the assumption that, like his encounter with the front door, Defendant would not be able to hear the knocking over the loud music and television. *Id.* Upon entry, Officer McNown approached the television in an attempt to turn it off to alleviate the noise barrier. *Id.* There, Officer McNown encountered a notebook that contained names of church attendees and financial information next to their names. *Id.* Officer McNown did not touch or search any other area in the room and proceeded to follow the loud music. R. at 3. Upon opening the upstairs door of the source of the loud music, Officer McNown immediately saw Defendant packaging cocaine. *Id.* Officer McNown proceeded to handcuff Defendant and followed standard protocol by contacting local DEA agents. *Id.*

II. Facts Pertaining to the Sixth Amendment Attachment Question

DEA Agent Colin Malaska ("Agent Malaska") arrived at Defendant's house and investigated the scene. R. at 3. Agent Malaska read Defendant his Miranda rights and asked where he obtained the large quantity of drugs. *Id.* Defendant replied he would not give up his suppliers, indicating that doing so could lead to his death and his church being burnt down. *Id.* Agent Malaska

obtained credible information that the suspected drug kingpin was traveling through Lakeshow. R. at 4.

Defendant arrived at the detainment facility and called a criminal defense lawyer, Keegan Long ("Mr. Long"), who Defendant knew was an alcoholic. *Id.* Agent Malaska contacted prosecution and encouraged them to offer a favorable plea deal before filing charges to avoid tipping off the kingpin. *Id.* The prosecutors listened to Agent Malaska and emailed Defendant's attorney with a plea bargain, valid for only 36 hours, for one year in prison in exchange for his suppliers. *Id.* The prosecutors emailed this offer to Defendant's attorney on Monday, January 16, 2017 at 8:00 AM, and the offer was set to expire on Tuesday, January 17, 2017 at 10:00 PM. *Id.*

Mr. Long was drinking at a bar on Monday at 8:00 AM when he received the offer. *Id.* He saw the email but failed to accurately read it. *Id.* On Tuesday, the prosecutor called Mr. Long's office to check the status of the plea offer. *Id.* When Mr. Long did not answer, the prosecutor left a voice message inquiring about the status of the offer. *Id.* After 36 hours, the plea offer expired, and the federal prosecutors promptly indicted Defendant, charging him with one count of 21 U.S.C. § 841 on the morning of January 18, 2017. *Id.* Kayla Marie ("Ms. Marie"), the assigned prosecutor to the case, called Mr. Long on the afternoon of the 18th to ask why Defendant had not accepted the plea offer. *Id.* After receiving Ms. Marie's call, Mr. Long told Defendant of the error. *Id.* Defendant fired him and hired a new attorney, Michael Allen ("Mr. Allen"), to represent him. *Id.*

On Friday, January 20, 2017, after the indictment, Mr. Allen emailed Ms. Marie to inquire about extending another plea offer to Defendant. R. at 5. Ms. Marie told Mr. Allen that offering any more plea deals would be futile because the suppliers were likely tipped off of Defendant's arrest by now. *Id.*

SUMMARY OF ARGUMENT

Criminal investigations are a fraction of a local police officer's duties on a daily basis. Police officers provide a variety of assistance, the majority of which fall into community caretaking responsibilities. From noise complaints to well-being checks, officers engage in an expansive amount of non-investigatory duties. Since this Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973), courts have been divided on the applicability of the community caretaking exception to circumstances outside the context of automobiles. While some courts consider it an extension of the exigent circumstances exception, others analyze an officer's actions on a case-by-base basis applying a reasonableness standard. Many courts have held that police who conduct non-investigatory warrantless entries into homes in response to relatively minor concerns are acting reasonably.

Here, Officer McNown approached Defendant's home to conduct a well-being check, acting in a community caretaking capacity. The purpose for entry into Defendant's house was to ascertain Defendant's location to ensure that he was alive and well. The Fourth Amendment requirement to describe a particular thing or person to be seized for warrants to be issued is not practical in this situation; Officer McNown was not entering with a purpose to seize a particular thing or person. A warrantless entry is not unreasonable when officers act in a community caretaking capacity where no criminal investigation has occurred.

This Court has made substantial efforts to create a bright-lined rule—not to serve as a mechanical formulism, but to serve as a recognition of the core purpose according to the plain language of the Sixth Amendment. Indeed, it has been firmly established that an individual's Sixth Amendment right to effective counsel attaches only at or after the time adversary judicial proceedings have be initiated against him. Thus, courts often look for an indictment to determine

if the Sixth Amendment right has attached, and this Court pegged the attachment of the right to effective counsel to the initiation of adversary judicial criminal proceedings whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Finally, this Court reaffirmed that a criminal defendant's initial appearance before a judicial officer marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel. Because none of the enumerated criminal proceedings were brought before Defendant, his right to effective counsel had not attached prior to his indictment.

The Defendant cannot rebut this presumption of the bright-line rule because the adversary judicial process has to be initiated to guarantee the right to counsel at all critical stages of the criminal proceedings. Any such suggestion by Defendant that the government crossed the constitutional line to adversary is belied by the fact that the indictments followed. Moreover, even if Defendant could get beyond this bright-lined rule, the government did not cross a constitutional line to adversary when it tried several times to contact Defendant's attorney but received no response. Thus, Defendant's counsel did not relay the plea offer, and this was not due to any intention from the prosecution to take advantage of Defendant.

STANDARD OF REVIEW

Whether the officer's entry into Defendant's home falls under the Community Caretaking exception to the Fourth Amendment's warrant requirement is a question of law, which should be reviewed *de novo*. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

"Because ineffective assistance of counsel is a mixed question of law and fact, the state court's determination that [Defendant] received effective assistance of counsel is reviewed de novo." *Barnes v. Elo*, 231 F.3d 1025, 1028 (6th Cir. 2000). Whether Defendant's Sixth

Amendment right to counsel attaches in pre-indictment plea negotiations is a question of law that courts review *de novo. United States v. Moody,* 206 F.3d 609, 612 (6th Cir. 2000).

ARGUMENT

I. OFFICER MCNOWN'S WARRANTLESS ENTRY INTO DEFENDANT'S HOME WAS NOT UNREASONABLE UNDER THE FOURTH AMENDMENT BECAUSE OFFICER MCNOWN WAS ACTING IN A COMMUNITY CARETAKER CAPACITY.

The Fourth Amendment does not protect individuals from all searches and seizures, but only against unreasonable searches and seizures. *United States v. Sharpe*, 470 U.S. 675, 682 (1985). Warrantless searches are not always unreasonable, and this Court has recognized "specifically established and well-delineated exceptions" to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967).

A categorical exclusion that has not been so neatly delineated is the community caretaking exception. *See Cady v. Dombrowski*, 413 U.S. 433 (1973). While the circumstances in *Cady* involved an automobile, this Court did not specifically articulate whether or not the same principles justifying a warrantless search of an automobile also apply to an individual's home. *Id.* The Fourth Amendment protects against unreasonable searches and seizures, and when an officer is acting as a community caretaker, he is neither looking to search nor seize in an investigative capacity. Therefore, the evils which the Fourth Amendment seeks to eradicate are not present, and, thus, this Court should find that the community caretaking exception also extends to homes.

A. Acting as a Community Caretaker, Officer McNown's Actions Were Completely Divorced from the Detention, Investigation, or Acquisition of Evidence Relating to the Violation of a Criminal Statute.

Safeguarding property and life are reasonable concerns that justify warrantless searches in certain instances. *Cady*, 413 U.S. at 447 (citing *Harris v. United States*, 390 U.S. 234 (1968); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971)); *South Dakota v. Opperman*, 428 U.S.

364 (1976). While the facts in *Cady* surrounded a warrantless search of an automobile, the same reasonable concerns are present when officers act as community caretakers in a context outside of automobiles. This Court found that when officers engage in "community caretaking functions, totally divorced from the detention, investigation, or acquisition of evidence relating to the violation of a criminal statute[,]" an intrusion of Fourth Amendment protections is not unreasonable. *Cady,* 413 U.S. at 441.

In *Cady*, the officers responded to a traffic accident and were not necessarily seeking to implicate the defendant in a crime. *Id.* at 436. The responding officers discovered the defendant was a Chicago police officer and knew it was standard procedure for officers to possess their revolvers even when off-duty. *Id.* Nevertheless, responding officers found it prudent to search the vehicle for the defendant's service revolver after the defendant was brought to the hospital. *Id.* Because the vehicle was towed to an unsecured location, the officers were concerned that a vandal could break into it and find the revolver. *Id.* at 437. Ultimately, the warrantless search of the locked trunk was permissible under the Fourth Amendment because the "officer reasonably believed" that a gun could fall into the hands of vandals unless immediate action was taken. *Id.* at 438. Thus, this Court upheld a warrantless entry into a locked trunk to search for a revolver, which the officers were not positive even existed, on the grounds that a vandal could *potentially* break in and find it. *Id.*

Similarly, Officer McNown approached Defendant's home with a purpose completely detached from any investigatory intent. Officer McNown sought to ease the concerns of church attendees, who were physically distraught due to the uncertainty of Defendant's whereabouts and well-being. R. at 2. Therefore, Officer McNown's actions were so far removed from typical investigatory police duties when he brought a hot tea to Defendant's home, assuming that

Defendant merely missed the church service because of an illness and his elderly age. *Id.* Acting as a community caretaker, Officer McNown's actions demonstrate that he was "totally divorced from the detention, investigation, or acquisition of evidence" thereby rendering the warrantless entry permissible under this Court's precedent. *Cady*, 413 U.S. at 441.

i. Officer McNown entered Defendant's home with a non-investigatory purpose.

Satisfying the Fourth Amendment's reasonableness standard, this Court in *Cady* viewed the initial encounter with the defendant as a response with a non-investigatory purpose. *Id.* By doing so, the reasoning in *Cady* effectively distinguished the functions of police into two categories: investigatory and non-investigatory. *Id.* Community caretaking functions, or non-investigatory functions, include a vast array of everyday police activities varying from responding to noise complaints to assisting the ill or injured. *See ABA Standards for Criminal Justice* § 1-2.2 at 1.31-32 (ABA Criminal Justice Standards Committee 2d ed. 1980) (discussing complex and varying functions of police); *See also Robert Trojanowicz and Bonnie Bucqueroux, Community Policing 15* (Anderson Publishing Co 1990) (noting that the majority of calls received by police "have nothing to do with a crime in progress," but involve problems like loud parties, abandoned cars, uncollected garbage, rowdy teens, and drunk individuals). Because police functions differ from non-investigatory to investigatory, the Fourth Amendment protections should likewise differ.

Several courts have held that police who conduct non-investigatory warrantless entries into homes in response to relatively minor concerns are acting reasonably. *See U.S. v. Boyd*, 407 F.Supp 693, 694 (S.D.N.Y. 1976)(responding to call regarding leaking water from ceiling in apartment complex and holding the warrantless entry permissible); *Bies v. State*, 251 N.W.2d 461, 468 (Wis. 1977) (holding early morning entry into garage in response to a noise complaint to be reasonable exercise of "community caretaker" function); *United States v. Miller*, 589 F.2d 1117,

1125 (1st Cir. 1978) (holding warrantless intrusion on a boat to check on safety of owner and mariners permissible).

For instance, in *United States v. Rohrig*, police responded to complaints of excessive noise coming from the defendant's home. *United States v. Rohrig*, 98 F.3d 1506, 1509 (6th Cir. 1996). After arriving at the house, the officers banged on the front door and windows repeatedly to no avail. *Id*. Upon multiple failed attempts to draw attention to the knocking on the doors and windows, officers entered the home through an unlocked back door. *Id.* Attempts to announce their presence also were not successful in arousing the resident's attention. *Id.* Upon entry of a lit room, officers discovered a room of marijuana plants. *Id.* Still unable to locate a resident of the home, officers continued to follow the source of the music and located a man lying on the floor of a bedroom in the room which the music was coming from. *Id.* The Sixth Circuit reasoned that "[h]aving found that an important 'community caretaking' interest [abating a nuisance] motivated the officers' entry in this case," and furthermore, "that their failure to obtain a warrant does not render that entry unlawful." *Id.* at 1523. Using a reasonableness standard, the Sixth Circuit held that the officers were not acting *predominantly* to enforce the law and that the Fourth Amendment's concerns in a criminal context are not implicated when police officers act to perform community caretaking functions. *Id.* at 1521.

Like in *Rohrig*, Officer McNown approached the home without an investigative purpose, but rather a community caretaking purpose. After making reasonable attempts of knocking on the door to no avail, Officer McNown entered the house through the back door with the purpose to find the Defendant, not to seize evidence or conduct a criminal investigation. R. at 3. Procedurally, Officer McNown took the same exact steps as the officers in *Rohrig* in first trying to locate the individual within the home before turning to the entry of the home. *Id.* Examining the facts

through the lense of the officer's purpose for the entry, Officer McNown was acting in the same reasonable capacity as the officers were in *Rohrig*.

Additionally, the actions of Officer McNown are even more separated from criminal activity than in *Rohrig*. The purpose of the officers' visit to the defendant's home in *Rohrig* pertained to a noise complaint which resulted in a citation issued in violation of Ohio statute. *Rohrig*, 98 F.3d at 1509. Even police responding to complaint of a violation of a criminal statute was considered detached enough from a criminal investigation to permit a warrantless entry after exhaustion of alternative approaches first. Here, Officer McNown did not approach the home due to any sort of criminal behavior or complaint of violation of a statute. He approached the home strictly for the purpose of checking on the well-being of the Defendant. In comparison, a well-being check is even further removed from a criminal investigation than a noise complaint. Thus, the actions of Officer McNown did not violate the Fourth Amendment because he conducted a reasonable, non-investigatory search that falls within the community caretaking exception.

ii. Even if Officer McNown had a mixed purpose for entry of the home, he was predominantly acting as a community caretaker.

When police respond to a situation in their community caretaking capacity many times circumstances change that evolve into a criminal investigation. *See Rohrig*, 98 F.3d 1506, 1521 (reasoning that when officers are *predominantly* acting in a community caretaking capacity that any circumstance then leading to a criminal investigation is still permissible under the community caretaking exception). A prime example of mixed purpose is when officers respond to a burglary alarm. *See Debra Livingston, Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 261–62 (1998). If officers respond to the alarm, they are acting in the capacity of community caretakers. *Id.* Upon finding a broken window, they may enter the building not only to apprehend a burglar, but also to ensure that no one inside the building is injured or

harmed within. *Id.* Such situations are not immediately rendered unreasonable simply because officers observed circumstances that are intertwined with both community caretaking and criminal investigation purposes. *Id.*

The Eighth Circuit examined an intertwined situation in *United States v. Quezada*. 448 F.3d 1005 (8th Cir. 2006). There, an officer approached the defendant's home with the purpose of serving the resident with a child protection order. *Id.* at 1006. The officer knocked on the door; as a result of the door not being fully latched, it cracked open revealing a fully lit home with a television on. *Id.* The officer announced his presence multiple times assuming that someone was inside the house due to the lights and television being turned on. *Id.* When he did not get a response to his shouts, he became concerned that someone was inside and unable to respond. *Id.* at 1008. The Eighth Circuit found this belief to be reasonable, and although no exigent circumstances were present nor was his initial purpose of approaching the home a well-being check, the intertwined purpose of approaching and subsequently entering the home was reasonable because the officer was *predominantly* acting in a community caretaking capacity. *Id.*

Similarly, Officer McNown approached Defendant's home to conduct a well-being check, predominantly acting in a community caretaking capacity. Because Defendant was a well-known pastor, Officer McNown's observation of an R-rated movie and loud scream-o-type music was unusual. R. at 3. Furthermore, Defendant was a pastor who conducted church service only once a week on Sundays. R. at 2. Defendant did not attend service that day, and multiple church attendees were concerned with his well-being. *Id.* Additionally, no one was able to reach Defendant through phone calls. *Id.* When examined together, the circumstances would cause a reasonable individual to worry for Defendant's well-being. Like in *Quezada*, Officer McNown approached the home without an intent to investigate criminal activity. Instead, observed unusual

circumstances led Officer McNown to believe that something was not right within the home and, like in *Quezada*, his intertwined purposes for entering the home do not merit the entry unreasonable.

B. Officer McNown's Entry Was Justified at Its Inception, and His Subsequent Actions Were Reasonably Related in the Scope of Locating the Defendant.

Because the Fourth Amendment protects against unreasonable searches and seizures, this Court's well-established precedent provides the avenue to determine whether an intrusion of privacy is unreasonable per Fourth Amendment standards. The reasonableness analysis requires a two-fold inquiry into whether an intrusion on privacy is justified at its inception and thereafter is "reasonably related in scope to the circumstances which justified the interference in the first place." *New Jersey v. T.L.O.*, 469 U.S. 325, 341 (1985)(quoting *Terry v. Ohio*, 392 U.S. 1, 20 (1968)). A court should first examine all of the circumstances and determine if the officers were justified in the initial entry of a home. *Id.* If the intrusion is found to be appropriate and constitutionally tolerable, officers must still act in a manner consistent with the factors supporting the initial legitimate entry.

An illustrative case of officers *not* acting in a manner consistent with factors supporting the initial legitimate entry is *State v. Bridewell.* 306 Or. 231 (Or. 1988). In *Bridewell*, police were called to the residence of a man whose neighbor had not seen him in a few days. *Id.* at 233. When she went to check on him, she observed unusual circumstances including missing vehicles, an open front door to the home with the condition of the home in disarray, and an empty pistol holder on his couch. *Id.* Police responded and observed the same conditions as described to them. *Id.* at 234. Upon finding the defendant in his shop, officers continued to search the home and subsequently discovered a large number of marijuana plants. *Id.* Because the officers continued

searching the home after finding the defendant safe and well, they exceeded the scope of their authority. *Id.*

Unlike the officers in *Bridewell*, Officer McNown did not exceed the scope of his authority because after locating the Defendant, he ceased searching the home and followed standard protocol and called local DEA agents to come to the scene. Officer McNown was both reasonable in his legitimate entry into the home as well as his scope of the search of the home.

i. Officer McNown did not conduct an unreasonable search or seizure because the evidence was discovered in plain view.

While both federal and state courts have exercised a more lenient approach to Fourth Amendment protections concerning *entry* of a home without a warrant, that does not then extend unfettered search and seizure powers immediately upon entry. As discussed previously, officers must enter the home for the exact purpose in which they entered.

Here, all seized evidence was found in plain view; therefore, the seizure was not unreasonable per this Court's precedent. *See Arizona v. Hicks*, 480 U.S. 321, 326 (1987); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971) (plurality opinion). Officer McNown acted reasonably even after entry into Defendant's home. Because both the television and music were loud and likely disrupting Defendant's ability to hear, Officer McNown entered the living room with the purpose of shutting the television off so as to help eliminate the noise. R. at 3. When he entered the living room, he discovered the ledger book containing names, open and in plain view. *Id.* Like the officers in *Rohrig*, Officer McNown proceeded to move through the house in the direction of the music. *Id.* Again, after locating the source of the music and the Defendant, the cocaine was also in plain view. *Id.* Because Officer McNown acted within his non-investigatory scope while in the house and did not search beyond what was in plain view, the evidence seized falls within the plain view exception to warrantless seizures.

II. DEFENDANT'S RIGHT TO EFFECTIVE COUNSEL HAD NOT ATTACHED PRIOR TO HIS INDICTMENT ACCORDING TO THE BRIGHT-LINED RULE, WHICH UPHOLDS THE PLAIN LANGUAGE AND CORE PURPOSE OF THE SIXTH AMENDMENT.

The Sixth Amendment right to effective counsel demands 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. Under this Court's precedent, once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all critical stages of the criminal proceedings. *United States v. Wade*, 388 U.S. 218, 227–28 (1967); *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

This Court has made substantial efforts to create a bright-lined rule—not to serve as a mechanical formulism, but to serve as a recognition of the core purpose according to the plain language of the Sixth Amendment. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The core purpose ensures that the accused will have the right to effective counsel when he is confronted in trial proceedings "with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309 (1973). This recognizes the "obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal." *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

The Defendant's Sixth Amendment right to effective counsel had not attached because Defendant was not brought before a judicial officer nor were any adversary judicial proceedings brought against him prior to his indictment. Moreover, Defendant cannot raise the rebuttable presumption because it wrenches the Sixth Amendment right to effective counsel from its proper context. Therefore, this Court should affirm the decision of the Thirteenth Circuit, which upheld the bright-lined rule and denied Defendant's motion to be re-offered the plea deal.

A. For Decades This Court Firmly Established the Bright-Lined Rule, Holding a Person's Sixth Amendment Right to Counsel Only Attaches After Enumerated Formal Proceedings Are Brought Against Him.

The United States Court of Appeals for the Thirteenth Circuit cited *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018), *United States v. Gouveia*, 467 U.S. 180, 187 (1984), and *Kirby*, 406 U.S. at 688 to hold defendant's Sixth Amendment right to Counsel had not attached before his indictment. *See* R. at 17. Indeed, this Court has "firmly established" that an individual's Sixth Amendment right to effective counsel attaches "only at or after the time that adversary judicial proceedings have be initiated against him." *Kirby*, 406 U.S. at 689; *Gouveia*, 467 U.S. at 180; *Estelle v. Smith*, 451 U.S. 454, 469–70 (1981); *Moore v. Illinois*, 434 U.S. 220, 226–27 (1977); *Brewer v. Williams*, 430 U.S. 387, 398–99 (1977). More specifically, the right attaches only after the initiation of criminal proceedings, *Gouveia*, 467 U.S. at 191–92, and this Court has defined such proceedings. *Kirby*, 406 U.S. at 689.

This Court has often looked for an indictment to determine if the Sixth Amendment right has attached. *See Powell*, 287 U.S. at 69 (holding preindictment administrative confinement had not violated defendants' Sixth Amendment right to counsel); *Massiah v. United States*, 377 U.S. 201, 210-12 (1964) (holding the government could not elicit incriminating statements outside of defendant's presence of counsel according to the Sixth Amendment when he had been indicted).

However, this Court has expanded the right's attachment to "certain pretrial 'trial-like' confrontations that present 'the same dangers that gave birth initially to the right itself.'" *Ash*, 413 U.S. at 311-12. Therefore, this Court pegged the attachment of the right to effective counsel to the initiation of adversary judicial criminal proceedings "whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Gouveia*, 467 U.S. at 187 (citations omitted).

B. Further Substantiating the Bright-Lined Rule, This Court Recognizes a Person's Sixth Amendment Right Attaches When He is Brought Before a Judicial Officer.

Moreover, recently this Court reaffirmed "what [it has] held before and what an overwhelming majority of American jurisdictions understand in practice" that "a criminal defendant's initial appearance before a judicial officer, where he learns the charge against him and his liberty is subject to restriction, marks the start of adversary judicial proceedings that trigger attachment of the Sixth Amendment right to counsel." *Rothgery v. Gillespie County, Tex.*, 554 U.S. 191, 219 (2008) (7-2 decision). As this Court has established the bright-lined rule, the Thirteenth Circuit correctly held it does not have the authority to directly hold against it. R. at 18.

i. Defendant was not brought in front of a judicial officer nor did prosecutors initiate any enumerated adversary judicial proceedings.

This Court has continued to uphold that the right to counsel attaches at or after the initiation of adversary judicial criminal proceedings, and a criminal defendant's initial appearance before a judicial officer marks the attachment of the Sixth Amendment right to effective counsel. *Rothgery*, 554 U.S. at 219.

Here, Defendant was not brought before a judicial officer, and prosecution brought no adversary judicial proceedings by way of formal charge, preliminary hearing, indictment, information, or arraignment. Agent Malaska read Defendant his Miranda rights, and Defendant arrived at a federal detainment facility. R. at 3-4. He then contacted his attorney, Mr. Long, and soon after the prosecution sent a plea deal to Mr. Long. R. at 4. As this Court has never held that the right to counsel attaches at the time of arrest, Defendant cannot show his Sixth Amendment right to effective counsel attached prior to his indictment. *See Kirby*, 406 U.S. at 698.

Despite this Court's case law defining the bright-lined rule, some circuit courts have misinterpreted the critical stage question into an attachment question, erroneously holding that preindictment plea negotiations mark the attachment of the Sixth Amendment right to counsel.

C. In Accordance to the Bright-Lined Rule, The Critical Stage Question is Distinct from the Attachment Question.

Once the adversary judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (citing *United States v. Wade*, 388 U.S. 218, 227–28 (1967)). These critical stages include "arraignments, post indictment interrogations, post indictment lineups, and the entry of a guilty plea." *Missouri v. Frye*, 566 U.S. 134, 140 (2012).

This Court listed plea negotiations as a new critical stage because plea negotiations have become "central to the administration of the criminal justice system." *Id.* at 143-44 (citations omitted). Also, because plea negotiations may determine "who goes to jail and for how long," they are potentially a stage when legal aid and advice would help many criminal defendants. *Id.* at 144.

However, in both *Frye* and *Lafler*, the plea negotiations occurred after the criminal defendants had been formally charged. *Id.* at 138; *Lafler v. Cooper*, 566 U.S. 156, 161 (2012). Neither *Frye* nor *Lafler* specifically address attachment, but they are critical stage cases. *Id.* Thus, *Frye* and *Lafler* still appear to accept the rule that the right to counsel does not attach until the initiation of adversary judicial proceedings. *Kennedy*, 756 F.3d at 493.

Moreover, this Court remained silent whether plea negotiations were an attachment question. *Frye.* at 138; *Lafler*, 566 U.S. at 161. This provides guidance that the attachment question is distinct from the critical stage question because "[h]ad the Supreme Court erased the line between preindictment and postindictment proceedings for plea negotiations, it surely would have said so given its careful attention to the distinction for interrogations and lineups." *Kennedy v. U.S*, 756 F.3d 492, 494 (6th Cir. 2014) (citations omitted). Therefore, circuit courts, such as the United States Court of Appeals for the Sixth Circuit, have upheld the legal principle by firmly rejecting

an expansion of the Sixth Amendment right to effective counsel to critical stages. *Kennedy*, 756 F.3d at 493.

i. Defendant's preindictment plea negotiations are only a critical stage question, where the Sixth Amendment right to effective counsel had not attached.

Because plea negotiations are a critically important stage for defendants but are not enumerated under the attachment question, Defendant cannot claim his counsel was ineffective under the Sixth Amendment without first showing his Sixth Amendment rights to effective counsel had attached. *Kennedy*, 756 F.3d at 493.

Even if Defendant retains his claim that the Sixth Amendment had attached, his case is unlike the defendants in *Frye* and *Lafler*. In *Frye* and *Lafler*, the defendants were involved in post-indictment plea negotiations. *Frye*, 566 U.S. at 138; *Lafler*, 566 U.S. at 161. Thus, the defendants' Sixth Amendment right to effective counsel had attached, resulting in this Court's application of the two-part *Strickland* test that determines whether defendants were prejudiced. *Frye*, 566 U.S. at 139; *Lafler*, 566 U.S. at 161. Here, Defendant's present case is more like the defendant's in *Turner* because neither were involved in preindictment plea negotiations. *Turner,* 885 F.3d at 951. Therefore, like in *Turner*, Defendant's cannot show his Sixth Amendment right had attached during preindictment plea negotiations. *Id.*

However, this is not the first time circuit courts have attempted to broaden the Sixth Amendment right to counsel. They have also analyzed the nature of confrontations, allowing defendants an opportunity to rebut the presumption the Sixth Amendment had not attached. S*ee United States Ex Rel. Hall v. Lane*, 804 F.2d 79, 82 (7th Cir. 1986). Therefore, this Court's rejection of the rebuttable presumption provides further guidance.

D. The Rebuttable Presumption Broadens the Sixth Amendment Right to Effective Counsel and Wrenches It From Its Proper Context.

Despite this Court's articulation of when the Sixth Amendment right to effective counsel attaches, *Rothgery*, 554 U.S. at 219, some circuit courts have held they are not absolutely certain whether other events mark the start of prosecution. *Lane*, 804 F.2d at 82 (noting the language this Court used, "whatever else it may mean" (quoting *Maine v. Moulton*, 474 U.S. 159, 160 (1985)). Thus, some circuit courts have turned to the rebuttable presumption. *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992).

The rebuttable presumption allows the defendant to rebut the bright-lined rule by showing "the government had crossed the constitutionally significant divide from fact-finder to adversary." *Id.* at 969. The rebuttable presumption misinterpreted this Court's legal principles in *Wade* and *Kirby*, reasoning the right to effective counsel under the Sixth Amendment may attach prior to enumerated formal proceedings when "the state [becomes] aligned against the accused," *Wade*, 388 U.S. at 235, and when the government has "committed itself to prosecute." *Kirby*, 406 U.S. at 691. Conversely, this Court has held "[t]he Sixth Amendment guarantees the accused, *at least after the initiation of formal charges*, the right to rely on counsel as a 'medium' between him and the State," *Moulton*, 474 U.S. at 176 (emphasis added), and it does not require prosecutorial awareness. *Rothgery*, 554 U.S. at 206. Thus, this Court has only affirmed the bright-lined rule.

Additionally, some circuit courts hold the defendant may rebut the bright-lined rule by showing the government intentionally delayed formal chargers for the purpose of holding a pre-trial event outside of presence of defense counsel—or to gain advantages over the defendant. *Bruce v. Duckworth*, 659 F.2d 776, 783 (7th Cir. 1981). However, even if this Court was willing to broadly view the right to counsel "as a generalized protection of the adversary process," it held it

is unwilling to go so far as "to extend the right to a portion of the prosecutor's trial-preparation." *Ash*, 413 U.S. at 317. Although this Court finds it necessary to scrutinize pretrial confrontations, *Wade*, 388 U.S., at 227, the Due Process Clause of the Fifth and Fourteenth Amendments can provide pretrial protections where there is no trial-like confrontation. *See Kirby*, 406 U.S. at 689.

This Court further distinguished the speedy trial right from the effective counsel right because the mere "possibility of prejudice [to a defendant resulting from the passage of time] . . . is not itself sufficient reason to wrench the Sixth Amendment from its proper context." *Gouveia*, 467 U.S. at 191 (quoting *United States v. Marion*, 404 U.S. 307, 321-22 (1971)). The right to counsel is distinct from the speedy trial right, which exists primarily to protect an individual's liberty interest. *Id.* Thus, Defendant cannot rebut the bright-lined rule the appellate court properly upheld. However, even if Defendant could raise the rebuttable presumption, Defendant cannot show the government crossed the constitutionally significant divide to adversary or attempted to gain an advantage over him.

i. The government did not cross the constitutional line to adversary when it tried several times to contact Defendant's attorney in an attempt to offer a generous plea deal.

This Court has stated it will not consider a prosecutor's trial-preparation as an adversary judicial proceeding under the attachment question, *Ash*, 413 U.S. at 317, nor will it accept the prosecutorial awareness standard under the attachment question, *Rothgery*, 554 U.S. at 206, but even if Defendant could ignore this Court's precedent, caselaw such as *Larkin* is still not applicable to Defendant's case.

In *Larkin*, the United States Court of Appeals for the Seventh Circuit applied the rebuttable presumption when the government did not follow traditional procedures to compel defendants' appearance before a grand jury and in a lineup. *Larkin*, 978 F.2d at 967. The manner in which the government applied for the writ was irregular. *Id.* The government stated in its writ application

that "it sought the writ for the purpose of producing [the defendants] for a scheduled lineup." *Id.* The court reasoned this was "improper" because at the time the government submitted the application, the grand jury had not yet ordered the defendants to participate in a lineup. *Id.* The line-up occurred prior to the defendants' indictment, but the court allowed defendants an opportunity to rebut the bright-lined rule if they could show the government crossed the constitutionally significant divide from fact-finder to adversary. *Id.* at 969. Despite the court's reasoning that the government "from all indications, planned first to bring the defendants before the grand jury, and then to ask the jury to compel them to participate in the lineup already scheduled for later in the day," it still concluded defendants could not rebut the bright-lined rule. *Id.* at 968-69. The court held that the defendants made "no showing that the government crossed that line here—indeed, any such suggestion is belied by the fact that the indictments followed the lineup by three months." *Id.* at 969.

Here, like in *Larkin*, the government's actions do not cross the line to adversary—and any such suggestion by Defendant is belied by the fact that the indictments followed. *Id.* at 969. The government did not circumvent Defendant from contacting an attorney, Mr. Long. R. at 3. Immediately, the government sent the plea deal to Mr. Long on Monday the 16th. R. at 4. The government called Mr. Long again only a day later on Tuesday the 17th to ask about the status of the plea offer. *Id.* When the government could not get ahold of Defendant's attorney, they left a voicemail. *Id.* After these repeated attempts with no response and no apparent interest, the offer expired. *Id.* Federal prosecutors *promptly* indicted Defendant, charging him on the morning of January 18, 2017. *Id.* (emphasis added). Concerned, the government sent another email to Mr. Long on the 18th soon after time had lapsed asking why Defendant hadn't accepted the plea offer—and this is the only reason Mr. Long realized his mistake. *See Id.* In sum, Defendant's counsel did

not relay the plea offer, and this was not due to any intention from the prosecution to take advantage of Defendant.

Further, no other purposeful attempts to gain an advantage over Defendant took place. The government offered a plea deal that would be advantageous for both parties. *See Id.* Agent Malaska had credible information that a suspected drug kingpin was traveling through Lakeshow. R. at 3. When Agent Malaska asked Defendant where he obtained the large quantity of drugs, Defendant replied that there was no way he would give up his suppliers, indicating it would lead to his death and his church being burnt down. *Id.* With this information, Agent Malaska was worried news of Defendant's arrest would tip-off the kingpin, so he encouraged the prosecution to offer a favorable plea deal before filing any charges. R. at 4. Thus, this explains why the prosecutors quickly offered a generous plea bargain of one year in prison in exchange for the names of Defendant's suppliers.

CONCLUSION

Because Officer McNown acted within a community caretaking capacity when he entered the home and Defendant's right to effective counsel did not attach prior to his indictment, Respondent respectively requests this Court affirm the decision of the United States Court of Appeals for the Thirteenth Circuit.

Respectfully Submitted,

_____

Attorneys for Respondent
R31