Identification Number: R32

IN THE

SUPREME COURT OF THE UNITED STATES

Chad David,
Petitioner,

v.

The United States of America,
Respondents.

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

BRIEF FOR THE RESPONDENT

Counsel for Respondent

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ISSUES PRESENTED

1. Do warrantless searches conducted by law enforcement acting as community caretakers extend to the home under the Fourth Amendment?
2. Does the Sixth Amendment right to effective counsel attach during plea negotiations prior to a federal indictment?

STATEMENT OF FACTS

Petitioner Chad David was an elderly minister in Lakeshow, Staples. R. at 2. He was well respected among his community and had a reputation for holding high energy Sunday services at the Lakeshow Community Revivalist Church. *Id*. Unfortunately, Petitioner used his minister role as a guise. Petitioner was actually a drug dealer who packaged and distributed large quantities of cocaine, and there is reason to believe he distributed the same to some of his congregation. *Id*.

On Sunday, January 15, 2017, Petitioner did not attend church or hold his morning service. *Id.* at 2. It was unusual for Petitioner to be absent from service. *Id*. Officer James McNown was an avid churchgoer and frequently attended Petitioner's Sunday service. *Id*. When Officer McNown attended church that morning, two other church attendees, Julianne Alvarado and Jacob Ferry, expressed concerns to Officer McNown regarding Petitioner's absence. *Id.* Ms. Alvarado told officer McNown that she was worried about Petitioner's well-being because she called him and he did not answer. *Id.* Ms. Alvarado was nervously shaking as she spoke to Officer McNown. *Id*. Mr. Ferry told Officer McNown that he thought he saw Petitioner the previous night at a bar. *Id*. Officer McNown did not pay too mention attention to their concerns because Petitioner was not known as a person who drinks or visits bars. *Id*. Officer McNown speculated that Petitioner stayed home due to illness and old age. *Id*. To give them peace of mind, Officer McNown offered to check on Petitioner at his home and take him some hot tea. *Id*.

Officer McNown stayed at Sunday service until it ended at approximately 8:50 AM. *Id.* After Officer McNown started his patrol shift, at 9:00 AM, he stopped by Starbucks and purchased hot tea for the Petitioner. *Id.* Then, Officer McNown drove to Petitioner's home. *Id*. Upon arriving at the gated community where Petitioner lived, Officer McNown observed a black Cadillac SUV with Golden State license plates leaving the complex. *Id*. Officer McNown knew

these types of SUVs were frequently driven by out-of-state drug dealers and that the quantity of drugs smuggled into Lakeshow had recently increased. *Id*.

Officer McNown arrived at Petitioner's home at approximately 9:30 AM. *Id*. He saw Petitioner's car parked in the driveway and noticed the doors to Petitioner's home were closed. *Id*. As Officer McNown approached the front door, he heard loud music playing inside Plaintiff's home. *Id*. Officer McNown thought it was unusual for an elderly man such as Petitioner to have loud music playing during that time of day. *Id*. He also thought it was unusual for Petitioner to be listening to scream-o-metal music because it contains a lot of curse words. *Id.* at 31 (Exhibit A, p.4).

Officer McNown knocked on the front door, announced his presence, and waited approximately two minutes before looking inside a window next to the door. *Id.* at 2. He was able to see inside and saw the T.V. screening *The Wolf of Wall Street*. *Id*. This concerned Officer McNown because he doubted a minister would watch an R rated movie containing a lot of sexual content, nudity, and drug use. *Id*. At this point, Officer McNown attempted to open the front door to go inside and check on Petitioner's well-being. *Id*. The front door was locked, but Officer McNown was able to go enter the home through an unlocked back door. *Id*.

Once inside Petitioner's home, Officer McNown walked towards the T.V to turn it off. *Id.* at 2. He noticed a notebook containing the names of church attendees and information about drug payments. *Id*. He then walked upstairs where he heard the loud music emanating from a closed-door room. *Id*. He wanted to check if petitioner was inside the room, so he opened the door and found petitioner packing cocaine into zip lock bags. *Id*. He immediately handcuffed petitioner and due to the large quantity of cocaine discovered and department protocol, he called the local DEA, who sent Agent Malaska to assist. *Id*.

Once the Petitioner was transported to a federal detainment facility, he hired an attorney, Mr. Keegan Long, who was a member of his congregation and a known alcoholic. *Id.* at 3-4. Agent Malaska asked the prosecution to refrain from filing criminal charges against the Petitioner. *Id.* Agent Malaska encouraged the prosecutors to offer Petitioner a "favorable" plea deal before any charges were filed so that they could obtain information about his suppliers. *Id.* Agent Malaska believed that this information would lead to the arrest of a suspected drug kingpin. *Id.* The prosecutor, Ms. Kayla Marie, agreed, and sent Mr. Long a plea offer via email on January 16, 2017, at 8:00 AM. *Id.* Based on the sensitive nature of the information and concerns that the kingpin would soon learn of the Petitioner's detainment, the offer had a very short window. *Id.* The offer was set to expire after 36 hours, on January 17, 2017, at 10:00 PM. *Id.* Unfortunately, Mr. Long was at a bar, drinking, when he received the offer. *Id.* Mr. Long acknowledges he misread the email, and believed his client had 36 days to respond to the offer instead of 36 hours. *Id.* On January 17, 2017, Ms. Marie called Mr. Long's office to check on the status of the offer, however she was not able to reach Mr. Long so left a message. *Id.* Mr. Long did not inform his client about the terms of the offer until after the offer expired, and the offer expired without a response. *Id.* The next morning, on January 18, 2017, the Government filed an indictment against the Petitioner, charging him with one count of 21 U.S.C. § 841 (2018) (possession of narcotics with the intent to distribute). *Id.* It is stipulated that Mr. Long was ineffective counsel for the brief period of time he represented the Petitioner. *Id.* at 54 (Stipulation 2).

On January 18, 2017, when Mr. Long called Petitioner to inform him of his mistake, Petitioner immediately fired Mr. Long. R. at 4. Shortly thereafter, Petitioner hired new counsel, Mr. Michael Allen. *Id.* On January 20, 2017, Mr. Allen called Ms. Marie to ask if the prosecution would be willing to extend another plea. *Id.* The Government declined to offer another plea, as

they were concerned any information obtained at that point would be useless because the suppliers were likely tipped off by the indictment. *Id.*

Petitioner was indicted for possession of a controlled substance with the intent to distribute in violation of 21 U.S.C. § 841. *Id*. at 1. Petitioner filed two motions. *Id*. He moved to suppress the evidence found in his home and filed a motion to be re-offered a plea deal based on ineffective assistance by counsel, Mr. Long. *Id*. Petitioner alleged that the evidence against him was obtained without a warrant and in violation of his Fourth Amendment rights. *Id*. at 5. Petitioner further alleged ineffective assistance of counsel under the Sixth Amendment. *Id*. Petitioner requested that the original plea deal be re-offered because his counsel did not communicate the plea to him before the offer expired. *Id*.

The United States District Court Southern District of Staples denied Petitioner's motions. *Id.* at 1. After a full trial on the merits, Petitioner was convicted of possession of a controlled substance with the intent to distribute and sentenced to the statutory maximum, 10 years in prison. *Id*. at 14. Petitioner timely appealed his conviction and the denial of the two motions. *Id*. The United States Court of Appeals for the Thirteen Circuit upheld the conviction and the district court's denial of the two motions. *Id*. Petitioner timely filed a Petition of Certiorari to the United States Supreme Court, which was granted. *Id.* at 25.

SUMMARY OF THE ARGUMENTS

I. Community Caretaking Exception

The Supreme Court has recognized various exceptions to the warrant requirement. These exceptions apply to warrantless searches of vehicles and homes. When granting the exception, the Court looks at whether the actions of the officers were objectively reasonable and whether or not there is a significant government interest at stake. In *Cady*, the Supreme Court found that an officer may exercise his community caretaking functions and conduct a warrantless search of a vehicle. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The Court found that it is objectively reasonable for a police officer to search the trunk of a vehicle without a warrant when the officer had reasonable belief it contained a firearm. *Id*. at 448. Also, the government had a compelling interest to preserve public safety and removing a deadly weapon from a vehicle parked in a public garage furthered that objective. *Id*. at 447.

The community caretaking exception should apply to a warrantless search of a home because there is a compelling government interest that is furthered, and the standard of reasonableness is satisfied. The government has a compelling interest to ensure the health and well-being of elderly people in the community. The government's interest is furthered when an officer goes inside a home to check on the well-being and safety of an elderly person. Also, when officers check on the safety and well-being of elderly people, their actions are completely divorced from the acquisition and detection of criminal activity. The officers are performing their community caretaking functions to keep members of the public safe. Under these circumstances, it is objectively reasonable for an officer to conduct a warrantless search of a home when the officer has reason to believe an elderly man is need of assistance. Thus, applying the community

caretaking exception to a warrantless search of a home furthers an important government interest and does not erode the touchstone of the Fourth Amendment,, the standard reasonableness.

Here, the Thirteenth Circuit properly upheld the district court's denial of the motion to suppress because the community caretaking exception applied to the warrantless search of Petitioner's home. The community caretaking exception applies because the officer entered the home to exercise his community caretaking functions. He entered the home to check on the health and well-being of Petitioner and did not enter his home to investigate any criminal conduct. Therefore, the community caretaking exception applies to the warrantless search of Petitioner's home and the motion to suppress the evidence was properly denied.

II. Sixth Amendment Right to Effective Assistance by Counsel

The Sixth Amendment right to effective assistance by counsel is limited by its terms to "criminal prosecutions." U.S. CONST. amend. XI. In cases where a defendant claims ineffective assistance by counsel, the district court must first decide whether the defendant's Sixth Amendment rights attached and then whether the alleged ineffective assistance was at a critical point in the prosecution. *Rothgery v. Gillespie County*, 554 U.S. 191, 211-12 (2008). If the defendant's Sixth Amendment right attached and the alleged ineffective assistance by counsel was at a critical point in the prosecution, then the district court must determine if the defendant was prejudiced. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). Only if the defendant can affirmatively show all three that their Sixth Amendment right had attached, the ineffective assistance by counsel was at a critical point, and they were prejudiced by the ineffective assistance are they entitled to relief. *Id.* This appeal specifically addresses when the Sixth Amendment right attaches.

The Sixth Amendment right attaches "only at or after the initiation of adversary judicial proceedings against the defendant." *United States v. Gouveia*, 467 U.S. 180, 187 (1984). Judicial proceedings formally begin when a defendant first appears before a judicial officer, is told of the formal accusations against him, and restrictions on his liberty are imposed. *Rothgery*, 554 U.S. at 194. In this case, both sides have stipulated that the Petitioner's first counsel, Mr. Long, was ineffective. R. at 54 (Stipulation 2). This Court must decide whether the Petitioner's Sixth Amendment rights attached when Mr. Long failed to inform Petitioner of a plea offer while it was available. *Id.* at 4. No charges were filed until after the plea offer expired. *Id.* at 4-5. This Court should affirm the Thirteenth Circuit Court of Appeals decision for two reasons. First, the Sixth Amendment protections only attach to a criminal defendant after prosecution is commenced, which it had not at the time of the offending event in this case. And second, contrary to the District Court's decision in this case, the critical stages, including plea offers, are only subject to the Sixth Amendment protection after the right attaches by formal judicial proceedings.

STANDARD OF REVIEW

This Court reviews the ultimate question of reasonableness for a warrantless search *de novo*. *Ornelas v. United States*, 517 U.S. 690, 691 (1996).

With respect to attachment of the Sixth Amendment, that is a question of law which this Court reviews de novo. *Strickland v. Washington*, 466 U.S. 668, 698 (1984). However, if this Court finds the Sixth Amendment attached during the pre-indictment plea deal, this Court reviews the District Court's findings of fact that there was no prejudice to the Petitioner subject to the clearly erroneous standard of Federal Rule of Civil Procedure 52(a). *Id.* at 698 ("[B]oth the performance and prejudice components of the ineffectiveness inquiry are mixed questions of law and fact.").

ARGUMENT

I. Community Caretaking

The Fourth Amendment to the United States Constitution protects people from unreasonable searches and seizures. U.S. Const. amend. IV; *Katz v. United States*, 389 U.S. 347, 353 (1967). One of the well-established principles of the Fourth Amendment is that searches and seizures inside a home without a warrant are presumptively unreasonable. *Payton v. New York*, 445 U.S. 573, 586 (1980); *Brigham City, Utah v. Stuart*, 547 U.S. 398, 403 (2006) (citing *Groh v. Ramirez*, 540 U.S. 551, 559 (2004) (quoting *Payton*, v. 445 U.S. at 586)). However, because the ultimate touchstone of the Fourth Amendment is reasonableness, that presumption can be overcome. *Michigan v. Fisher*, 558 U.S. 45, 47 (2009). Since the presumption of unreasonableness can be rebutted, the warrant requirement is subject to exceptions. *Brigham City*, 547 U.S.at 403. The community caretaking doctrine is one such exception. *Cady v. Dombrowski*, 413 U.S. 433 (1973).

Initially, the community caretaking exception only applied to warrantless searches of vehicles, however circuit courts and state courts have expanded the exception to include homes. The exception can apply to a home as well because the touchstone of the Fourth Amendment is reasonableness. *Brigham City*, 547 U.S. at 403; *Illinois v. McArthur*, 531 U.S. 326, 330 (2001) (the Fourth Amendment's central requirement is one of reasonableness). When the community caretaking exception is applied to a warrantless search of a home, the reasonableness standard is still preserved and is not undermined. A warrantless search of a home is reasonable when the officer is acting as a community caretaker, not a law enforcement agent, and the officer's actions are reasonable under the totality of the circumstances.

A. The community caretaking exception applies to a warrantless search of a home so long as the officer's conduct is objectively reasonable under the totality of the circumstances and the government has a compelling government interest.

Exceptions to the warrant requirement are upheld when there is a sufficient showing of reasonableness necessary to satisfy the requirements of the Fourth Amendment. This Court recognizing the community caretaking exception, however has only extended it to searches involving vehicles. *Cady*, 413 U.S. 433 (1973); *S. Dakota v. Opperman*, 428 U.S. 364 (1976); *Colorado v. Bertine*, 479 U.S. 367 (1987). In *Cady v. Dombrowski*, this Court held that a warrantless search of a vehicle's locked trunk was reasonable within the meaning of the Fourth Amendment. *Cady*, 413 U.S.at 448. The search was reasonable because the officer reasonably believed the vehicle contained a firearm, the vehicle was parked in a public garage, and was subject to intrusion by vandals. *Id*. This type of community caretaking search is totally divorced from the detection, investigation, and acquisition of evidence relating to criminal activity. *Id*. at 441. The type of search serves to protect the public's safety. *Opperman*, 428 U.S. at 374. In essence, an officer's warrantless community caretaking search of a vehicle is reasonable under the Fourth Amendment.

Although this Court has not addressed whether the community caretaker exception applies to the home, this Court has recognized other exceptions that allow officers to enter the home. Once such exception is the emergency aid exception. For the emergency aid exception, the courts apply a reasonableness standard. *Brigham City*, 547 U.S. at 403. Warrants are generally required to search a person's home unless the exigencies of the situation make the need so compelling that the warrantless search is objectively reasonable. *Id*. An exigency justifying a warrantless search is the urgent need to help someone seriously injured or threatened with such injury. *Id*. Under these circumstances, police officers may enter a home without a warrant to render emergency assistance.

Id. The officer's action will not be found violative of the Fourth Amendment so long as the circumstances objectively justify the action. *Id*. at 404. Thus, the emergency aid doctrine applies to a warrantless search of a home when there is an urgent need to provide emergency aid and the officer's actions are objectively reasonable.

Additionally, several federal circuits courts have extended the community caretaker exception to the home. Using a standard similar to the emergency aid exception, Circuit courts have applied the community caretaking exception to warrantless searches of a home when an officer's actions are objectively reasonable. In *United States v. Rohrig*, two officers arrived at defendant's home past midnight to respond to a noise complaint. *United States v. Rohrig*, 98 F.3d 1506, 1509 (6th Cir. 1996). The music emanating from defendant's home was so loud, that it could be heard a block away. *Id*. One of the officers entered the home after repeated attempts to reach the defendant and found incriminating evidence. *Id*. The court held that the officer's warrantless entry into the home was reasonable because it was motivated by community caretaking functions. *Id*. at 1523. The officer was carrying out his community caretaking functions to abate a nuisance. *Id*. at 1523.

In *Hunsberger v. Wood*, the Fourth Circuit Court of Appeal applied the caretaking exception to a home and held that a warrantless search was reasonable under the circumstances. *Hunsberger v. Wood*, 570 F.3d 546, 557 (4th Cir. 2009). The facts in the case gave rise to an objectively reasonable belief that a home was being vandalized and that a missing girl was likely in the home. *Id*. at 555. The officer received notice that a concerned neighbor called 911 to report suspicious activity inside the Hunsberger's home who she believed were out of town. *Id*. When officers arrived to check the home, the lights were immediately turned off and the garage door was first closed and then subsequently opened. *Id*. The missing girl's father reported that he did not

know why his daughter's car was parked outside of the Hunsberger's home. *Id*. The father was concerned for her safety, especially since she did not answer his phone calls. *Id*. The court held that considering these facts, exigent circumstances existed to justify a warrantless search for the presence of vandalism and for the search of the missing girl. *Id*.

In *United States v.* Quezada, the Eighth Circuit also applied the community caretaking exception to warrantless searches of a home. *United States v. Quezada*, 448 F.3d 1005 (8th Cir. 2006) (finding that a warrantless search of a home was reasonable where the officer had reason to believe that someone inside a home was unable to respond); *United States v. Smith*, 820 F.3d 356, 360–61 (8th Cir. 2016) (finding that a warrantless search of a home was reasonable where the officer had reason to believe the defendant's girlfriend was being held against her will). The Eight Circuit noted that police officers tend to be the "jacks of all trades" who often act in ways totally divorced from the investigation criminal conduct. *Quezada*, 448 F.3d at 1007 (citing *Cady*, 413 U.S.at 441). The Eight Circuit further noted that an officer, when acting as community caretaker, may enter a home without a warrant if the officer has a reasonable belief that emergency existed inside the home. *Id*.

The circuit courts appropriately applied the community caretaking exception to warrantless searches of the home. All the cases cited above rely on the reasonableness prong of the Fourth Amendment. The Circuit Courts applied the community caretaking exception to the warrant requirement when an officer's conduct was objectively reasonable. There is an abundance of Supreme Court cases where exceptions to the warrant requirement have been upheld when there is a sufficient showing of reasonableness. For example, police officers may enter a home in hot pursuit of a suspected felon. *Warden, Md. Penitentiary v. Hayden*, 387 U.S. 294, 298–99 (1967) (finding that the officers acted reasonably when they entered a home without a warrant to search

for a suspected robber). Police officers may conduct a warrantless entry into a home to prevent the destruction of evidence. *Kentucky v. King*, 563 U.S. 452, 462 (2011) (finding that a warrantless entry into a home to prevent the destruction of evidence is reasonable under the Fourth Amendment).

A warrantless entry into a home to conduct a community caretaking search is also reasonable under the Fourth Amendment. To be reasonable, the officer must show he was acting as a bona fide community caretaker. *State v. Pinkard*, 785 N.W.2d 592, 602–03 (Wis. 2010). The officer can show this by articulating an objectively reasonable basis under the totality of the circumstances that he was carrying out his community caretaking functions. *Id.* Community caretaking functions must be totally divorced of law enforcement functions and must be conducted for the purposes of public safety. *Cady*, 413 U.S. at 448. The burden is on the government to make this showing and prove the exception applies. *Rohrig*, 98 F.3dat 1522.

Furthermore, the community caretaking exception should apply to a warrantless search of a home because the government's interest in ensuring public safety outweighs an individual's interest. A person has a significant interest in the right to be free from governmental intrusions. *Silverman v. United States*, 365 U.S. 505, 511–12 (1961). However, some government interests are so compelling, that they outweigh an individual's interest. In *Cady v. Dombrowski*, the court found that the government's interest in preserving public safety outweighed the defendant's interest in being free from a warrantless search of his vehicle. *Cady*, 413 U.S.at 442. This governments interest in preserving public safety unquestionably applies to homes. Police officers have an obligation to preserve the safety of the public and help those in need. *S. Dakota*, 428 U.S. at 367–68; *Smith*, 820 F.3d at 361-62. Police officers should be allowed to conduct a warrantless search of a home when they are acting as community caretakers and working to preserve the public

safety. Because the government has a compelling interest in preserving public safety, the community caretaker exception should apply to the context of a home.

.Here, the government interest in ensuring the well-being of elderly people outweighs the right to be free from government intrusion. Elderly people are vulnerable members of the community. The government has a compelling interest to ensure their health and well-being. The Petitioner is a 70-year-old man who consistently attended church every Sunday. R. at 2-3. Officer McNown was concerned about Petitioner's safety due to his age and the signs of unusual activity at or near his home. *Id.* For these reasons, the Government's compelling interest in this case justified Officer McNown entering the Petitioner's home.

The standard of reasonableness required for the Fourth Amendment does not dissipate when the community caretaking exception is applied to the home. The community caretaking exception applies to a warrantless search of home only where there is a sufficient showing of reasonableness and when there is a significant government interest. The government must show that the officer was acting as a bonified community caretaker and that his actions were objectively reasonable under the totality of the circumstances. The government must show that there was also a significant government interest at stake, which is the need to preserve public safety. In the case before the court, both requirements were met.

B. This Court should adopt the analysis conducted by the Illinois Supreme Court when determining whether the community caretaking exception applies and was properly exercised.

The Illinois Supreme Court developed a three-step analysis for determining whether the community caretaking exception applies to a warrantless search of a home. When assessing whether or not the community caretaking exception applies, a court must determine the following:

> (1) Whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community

> caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home.

Pinkard, 785 N.W.2dat 601.

The first step of the analysis is to determine whether a not a search occurred. Unconsented police entry into a residential unit constitutes a search within the meaning of *Katz v. United States*, 389 U.S. 347. Wayne R. LaFave, *§ 2.3(b) Entry of residence, 1 Search & Seizure § 2.3(b)* (5th ed. 2018) (5th ed.). Petitioner was in the upstairs bedroom when Officer McNown arrived at his home. R. at 3. All the doors to Petitioner's house were shut and his front door was locked. *Id*. at 2-3. Officer McNown entered into Petitioner's home through an unlocked backdoor. *Id*. at 3. He did not receive Petitioner's consent before entering and did not have a warrant. *Id*. Thus, Officer McNown's warrantless entry into Petitioner's home without Petitioner's consent undoubtedly constituted a search.

Second, a court must determine whether Officer McNown was exercising a bona fide community caretaker function. Community caretaking functions involve efforts to preserve public safety. *S. Dakota*, 428 U.S. at 374. They are completely divorced from law enforcement functions. *Cady*, 413 U.S. at 441. An officer must be able to articulate an objectively reasonable basis under the totally of the circumstances that he was acting as a community caretaker. *Pinkard*, 785 N.W.2dat 365–66.

Officer McNown went to Petitioner's home to check on him because he was worried about his well-being. R. at 30 (Exhibit A, p.3). Officer McNown was a member of Lakeshow Community Revivalist Church where Petitioner was a minister. *Id*. at 28 (Exhibit A, p.1). He attended Petitioner's Sunday morning church service for roughly four months before the incident leading to Petitioner's arrest, which was Sunday, January 15, 2017. *Id*. at 29 (Exhibit A, p.2). He

became concerned about Petitioner's well-being after Petitioner did not attend church on Sunday, January 15, 2017. *Id*. at 2. Petitioner had a reputation of showing up to church every Sunday, rain or shine. *Id*. at 30 (Exhibit A, p.3). Another member of the church, Ms. Alvarado, expressed deep concerns about Petitioner's absence. *Id*. at 29 (Exhibit A, p.2). She was shaking and sweating while she informed Officer McNown that she called Petitioner and he did not answer her call. *Id*. Officer McNown thought it would be a good idea to stop by Petitioner's home to check on him. *Id*. at 2.

Officer McNown's concerns grew after he arrived at Petitioner's home on January 15, 2017. First, Petitioner's car was parked outside of his home, but Petitioner did not respond to Officer's repeated attempts to reach him. *Id*. at 3. Officer McNown knocked and announced his presence and Petitioner did not respond. *Id*. Second, there was unusually loud music emanating from Petitioner's home. *Id*. The music was scream-o metal music, which is a type of music that contains a lot of curse words. *Id*. at 31 (Exhibit A, p.4). Third, the *Wolf of Wall Street*, a movie with high rated R content, was screening on Petitioner's television. *Id*. at 3. Officer McNown thought it was unusual for Petitioner, an elderly minister, to listen to music with a lot of profanity and watch a rated R movie. *Id*. at 31 (Exhibit A, p.4). These series of events led him to believe someone might be in the home. *Id*.

After waiting two minutes for petitioner to respond, Officer McNown went to the backdoor to try to reach Petitioner. *Id*. at 3. The music coming from the house was so loud that he thought it was futile to knock. *Id*. Officer McNown walked into the house through the unlocked backdoor and eventually made his way upstairs where the music was coming from. *Id*. at 3. He opened the upstairs bedroom to check if Petitioner was there and found Petitioner packing drugs into zip lock bags. *Id*.

Officer McNown had no reason to believe or even suspect that he would find Petitioner doing anything illegal. Petitioner was an elderly, well-respected minister in the community. *Id*. at 2. Officer McNown did not go to Petitioner's house to investigate any crime. He went to Petitioner's home to check on his well-being. Petitioner had an objectively reasonable belief that Petitioner needed assistance. Therefore, Officer McNown was reasonably acting as a bona fide community caretaker under the totality of the circumstances.

Third, the court must determine whether the public interest outweighs the intrusion upon the privacy of the individual. In other words, whether the officer's exercise of a bona fide community caretaker function was reasonable. *Pinkard*, 785 N.W.2d at 605.

The public has a substantial interest in ensuring that officers check up on elderly people who unexpectedly go missing. This interest substantial interest is greater when community members express concerns that the person might be in need of assistance. In *People v. Slaymaker*, the court noted that responding to calls about missing persons or sick neighbors falls under community caretaking functions. *People v. Slaymaker*, 27 N.E.3d 642, 646 (Ill. 2015). Since the public has a substantial interest in police ensuring the well-being and safety of elderly citizens, the officer's community caretaking function was reasonably exercised.

Since the police officer in this case was exercise a bona fide community caretaking function and the public's interest in ensuring the health and safety of elderly people outweighs individual privacy interest, the community caretaking exception properly applies to the warrantless search of Petitioner's home.

II. Sixth Amendment Right to Effective Counsel

Effective assistance of counsel is imperative to preserve the Petitioner's constitutionally protected right to a fair trial, however, that right does not attach until "after [a] formal charge,

preliminary hearing, indictment, information, or arraignment." *United States v. Gouveia*, 467 U.S. 180, 188 (1984). To hold otherwise would cause confusion in the lower courts and allow any number of defendants to allege inefficient assistance of counsel no matter how removed the offending event was from the actual criminal prosecution. The rights of the accused to assistance by counsel is limited by its terms to after a "prosecution is commenced." *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *see also* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to . . . have the [a]ssistance of counsel for his defense.").

This Court has already found that the Sixth Amendment right to counsel attaches when a defendant first appears before a judicial officer, is told of the formal accusations against him, and restrictions on his liberty are imposed. *Rothgery v. Gillespie County*, 554 U.S. 191, 194 (2008). The Thirteenth Circuit was correct to find the Petitioner's Sixth Amendment right had not attached when the plea at issue in the case was offered, and that the District Court had committed harmless error in finding that it had. First, the Sixth Amendment protections only attach to a criminal defendant after prosecution is commenced, which it had not at the time of the offending event in this case. And second, contrary to the District Court's decision in this case, the critical stages, including plea offers, are only subject to the Sixth Amendment protections after the right attaches by formal judicial proceedings. Therefore, this Court should affirm the Thirteenth Circuit Court of Appeals decision.

A. Petitioner's Sixth Amendment Right to Effective Assistance by Counsel Attaches After the Initial Judicial Proceedings.

The Sixth Amendment right to counsel attaches "only at or after the initiation of adversary judicial proceedings against the defendant." *United States v. Gouveia*, 467 U.S. 180, 187 (1984); *see also Estelle v. Smith*, 451 U.S. 454, 469–70 (1981); *Moore v. Illinois*, 434 U.S. 220, 226 (1977); *Brewer v. Williams*, 430 U.S. 387, 398 (1977); *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). Such

proceedings include a "formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby*, 406 U.S. at 689. The right may attach at earlier stages, such as when "the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *Gouveia*, 467 U.S. at 189. However, the crucial point is that the defendant is guaranteed the protection of counsel from the moment he "finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Kirby*, 406 U.S. at 689. The distinction identified in *Kirby v. Illinois*, clarifies the importance of formal proceedings to identify the start of a criminal prosecution;

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

Kirby v. Illinois, 406 U.S. at 689–90 (1972) (citing *Powell v. Alabama*, 287 U.S. at 66-71; *Massiah v. United States*, 377 U.S. 201; *Spano v. New York*, 360 U.S. 315, 324 (Douglas, J., concurring)) (emphasis added).

An early string of Supreme Court decisions demonstrate that this Court has long recognized that the Sixth Amendment attaches with formal prosecution, in the form of judicial proceedings; compare *Kirby*, 406 U.S. at 682 (no Sixth Amendment right to counsel in a pre-indictment line-up); and *Hoffa v. United States*, 385 U.S. 293, 308 (1966) (no Sixth Amendment right to counsel attaches for statements made post-indictment about a separate uncharged offense); with *United*

States v. Wade, 388 U.S. 218, 226-27 (1967) (Sixth Amendment right to counsel attaches to post-indictment line-up); and *Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (Sixth Amendment right to counsel attaches to post-indictment statements about offense with which defendant is charged). Through these cases a bright line rule emerged explicitly stated in *Rothgery* that the Sixth Amendment right to effective assistance by counsel only attaches after the Government has started formal prosecution involving the judiciary. To hold otherwise, as the Petitioner requests in this case, would be break with years of jurisprudence.

In 2008, this Court revisited this issue in *Rothgery v. Gillespie County*, and made it very clear the point of attachment begins when formal *judicial* proceedings have begun. *Rothgery*, 554 U.S. at 211-12. In *Rothgery*, the defendant had a criminal proceeding in front of a magistrate judge, who heard the allegations, set bail, and refused to appoint an attorney for the defendant. *Id.* at 195-96. The defendant was indicted later. *Id.* This Court addressed the issue of whether this preliminary hearing was sufficient to attach Sixth Amendment rights to a defendant. This Court found "no need for lengthy disquisitions on the significance of the initial appearance, . . . because it found the attachment issue an easy one. . . . The Court's conclusions were not vague; *Brewer* expressed "no doubt" that the right to counsel attached at the initial appearance," citing *Brewer v. Williams*, 430 U.S. 387, 399, and "Jackson said that the opposite result would be 'untenable.'" *Id.* (citing *Michigan v. Jackson*, 475 U.S. 625, 629 (1986), *overruled by Montejo v. Louisiana*, 556 U.S. 778 (2009), *on other grounds*). In his concurrence, Justice Roberts spelled out that attachment "signifies nothing more than the beginning of the defendant's prosecution . . . [and] does not mark the beginning of a substantive entitlement to the assistance of counsel." *Id.* at 213-14 (Roberts, J., concurring). The Sixth Amendment requires the appointment of counsel only after criminal

prosecution has begun, and then only as necessary to guarantee the defendant effective assistance at trial. *See id.* at 217 (Roberts, J., concurring).

In this case, when the Petitioner's first counsel, Mr. Long, failed to inform the Petitioner of the plea deal at issue on this appeal, no formal judicial proceedings against the Petitioner had commenced. The police stumbled across the Petitioner's possession of drugs with intent to distribute when Officer McNown entered the Petitioner's home to check on him acting as a community caretaker, as discussed at length in section one of this argument. When the Petitioner was first arrested, DEA Agent Malaska was primarily interested in gathering information about the drug King Pin who was supplying the Petitioner. R. at 4. The Government was more concerned about a recent flow of drugs into the state from out-of-state drug traffickers. *See Id*. at 2. Officer McNown saw cars with out-of-state license plates leave the Petitioners gated community shortly before the drugs were found in Petitioner's home, and the police had reason to believe timely information would allow them to make an arrest before those individuals fled the state. *Id*. at 2. Despite Petitioner's initial refusal to provide information on the drug suppliers, the Government was still in an information gathering stage and reached out to Petitioner's counsel of record, Mr. Long, to see if Petitioner was willing to negotiate a plea in exchange for that information. *Id*. at 3-4. The Government was concerned filing charges against the Petitioner would alert the suppliers and eliminate the element of surprise. *Id.* Therefore, no formal judicial proceedings were initiated against the Petitioner while the plea deal was on the table.

While it is unfortunate that Petitioner's first counsel, Mr. Long, was too intoxicated to relay the message to his client. *Id*. at 4. But the unfortunate circumstances of this case do not change the fact that no criminal charges were filed and the Petitioner had not appeared before any judiciary on this matter until after the plea had lapsed. *Id*. at 4. Once the time to accept the plea deal lapsed,

and no counter offer had been made, the Government believed they were unlikely to catch the suppliers and the value of the information requested declined. *Id*. at 4. It was at that time that the Government initiated a formal criminal prosecution against the Petitioner shifting from investigation mode to prosecution by filing an indictment against him. *Id.* That same day, January 18, 2017, as soon as Mr. Long told Petitioner about his mistake, Petitioner relieved Mr. Long as his counsel and retained Mr. Allen. It is stipulated that Mr. Long was ineffective counsel. *Id*. at 54 (Stipulation 2). However, Mr. Long was not Petitioner's counsel during any critical stage after the Government formally began criminal prosecution of the Petitioner. For these reasons, the Petitioner did not have a Sixth Amendment right to effective assistance by counsel when the pre-indictment plea at issue on appeal was offered, and lapsed.

B. Contrary to the District Courts Decision in This Case, the Critical Stages Analysis Only Applies After the Sixth Amendment Attaches.

After the initiation of adversary criminal proceedings, "'the government has committed itself to prosecute, and . . . the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Gouveia*, 467 U.S. at 189 (quoting *Kirby v. Illinois*, 406 U.S. at 689). In *Rothgery*, this Court found courts only reach the "critical stage" question, to determine whether there has been ineffective assistance by counsel, with respect to post-attachment proceedings. *Rothgery*, 554 U.S. at 211-12. This Court said its prior decisions should be taken "at face value," then the lower courts "would have avoided the mistake of merging the attachment question (whether formal judicial proceedings have begun) with the distinct 'critical stage' question (whether counsel must be present at a post-attachment proceeding unless the right to assistance is validly waived)." *Id.* In this case, the District Court found that Petitioner's Sixth Amendment right attached when he was offered the plea at issue on

appeal. R. at 10. The District Court then determined the Petitioner was not prejudiced by the ineffective assistance of counsel under the *Strickland* test. *Id.* at 11-12. The Thirteenth Circuit found the District Court erred in deciding the Sixth Amendment right had attached, but that the error was harmless because the District Court did not grant Petitioner's motion to reinstate the plea. *Id.* at 17-18. This Court should decide that the Thirteenth Circuit was correct, and the Petitioner's Sixth Amendment right had not attached when the plea was offered.

This Court has recognized that the assistance of counsel cannot be limited to participation in a trial; to deprive a person of counsel during the period prior to trial may be more damaging than denial of counsel during the trial itself. Recognizing that "the right to the assistance of counsel is shaped by the need for the assistance of counsel," this Court found that the right attaches at earlier, "critical" stages in the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade*, 388 U.S. 218, 224 (1967); *see also United States v. Gouveia*, 467 U.S. 180, 189 (1984)); *Coleman v. Alabama*, 399 U.S. 1 (1970); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *White v. Maryland*, 373 U.S. 59 (1963); *Escobedo v. Illinois*, 378 U.S. 478 (1964); *Kirby v. Illinois*, 406 U.S. 682 (1972). "Whatever else it may mean, the right to counsel granted by the Sixth and Fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Brewer v. Williams*, 430 U.S. 387, 398 (1977).

Here, the District Court conflates the "critical stage" issue with the "attachment" issue, finding that plea negotiations are "critical stages" therefore the right to effective assistance by counsel attached before indictment. R. at 9. The District Court mistakenly relied on this Court's jurisprudence in *Missouri v. Frye*, 566 U.S. 134 (2012) and *Montejo v. Louisiana*, 556 U.S. 778 (2009), which both held plea negotiations are a critical stage in proceedings. However, both cases

involved defendants who were offered plea deals post-indictment, after those defendants' Sixth Amendment rights had clearly attached. Neither case overruled this Courts earlier jurisprudence discussed above, that criminal prosecution commences when formal judicial proceedings begin. The only pertinent question this Court faced in those cases was whether the plea negotiations were a critical stage in the defendant's criminal proceedings. The Government does not dispute that plea negotiations are a critical stage, once the Sixth Amendment attaches. However, the Sixth Amendment does not attach until after judicial proceedings are initiated against a defendant.

To confound the problem, the District Court mistakenly relied on dicta to create a circuit court split that doesn't exist. The majority of circuits have explicitly found that defendants' Sixth Amendment rights do not attach until after formal judicial proceedings are initiated against the defendant. United States v. Ayala, 601 F.3d 256, 272 (4th Cir. 2010); United States v. Heinz, 983 F.2d 609, 612 (5th Cir. 1993); United States v. Morriss, 531 F.3d 591, 593-94 (8th Cir. 2008); United States v. Hayes, 231 F.3d 663, 673 (9th Cir. 2000) (en banc); United States v. Calhoun, 796 F.3d 1251, 1254-55 (10th Cir. 2015); United States v. Waldon, 363 F.3d 1103, 1112 n.3 (11th Cir. 2004); United States v. Sutton, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986). Even the circuit courts that found defendants *may* have a right to counsel pre-indictment only discussed that possibility in dicta. *See Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (right to counsel did not attach when asked to participate in alcohol test because officers were still in investigative stage); *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892-93 (3d Cir. 1999) (en banc) (Defendant had undergone preliminary arraignment when phone calls were tapped so Sixth Amendment attached); *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992) (finding rebuttable presumption that right to counsel did not attach until charges were filed). Therefore, in this case, the District Court misapplied the law, misrepresented the circuit split, and conflated the

attachment issue with the critical stages issue to determine when Petitioner's right to effective assistance by counsel attached.

However, that misstatement of the law was harmless error as the District Court went on to find that even if the right attached and Petitioner's counsel was ineffective, there was no prejudice to Petitioner under this Court's *Strickland* test. R. at 12. The Thirteenth Circuit correctly applied the law, found the Sixth Amendment did not attach at the time the plea was offered, and affirmed the District Courts holding. R. at 18; *see also Strickland v. Washington*¸ 466 U.S. 668, 695 (1984). .Therefore, this Court should affirm the Thirteenth Circuit Court's decision, that the Sixth Amendment right to counsel only attaches after formal *judicial* criminal proceedings are initiated against a defendant.

CONCLUSION

Therefore, for the foregoing reasons, the Government respectfully requests this Court affirm the Thirteenth Circuit Court of Appeals decision in its entirety. Specifically, the Government asks that this Court find Officer McNown's entry into Petitioner's home was protected by the community caretaker exception, and that the right to effective assistance by counsel, guaranteed by the Sixth Amendment, did not attach until after formal prosecution, in the form of judicial proceedings and in this case the indictment commenced against the Petitioner.

However, even if this Court finds that the right to counsel attached to Petitioner before the indictment, the Government asks that this Court not remand for further proceedings as the District Court properly found the Petitioner was not prejudiced by ineffective assistance from counsel under the *Strickland* test. R. at 12.