No. 4-422

IN THE

Supreme Court of the United States

CHAD DAVID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

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

BRIEF FOR RESPONDENT

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether local law enforcement officers violate the Fourth Amendment when they enter a home on a reasonable basis to protect property or aid those in need of assistance as part of their community caretaking function?

II. Whether the Court should reject the long-standing bright-line rule against pre-indictment attachment of the Sixth Amendment right to counsel.

III. Whether counsel's failure to inform Petitioner of an informal offer to negotiate a plea bargain prejudiced Petitioner pursuant to the Strickland test.

OPINIONS BELOW

The decision of the United States District Court for the Southern District of Staples is an order denying defendant's motion to suppress evidence and supplement motion. United States v. David, Case No. 20-PKS09-20-RCN15 (S. D. Staples Jul. 15, 2017). The decision of the United States Court of Appeals for the Thirteenth Circuit AFFIRMED the District Court order. David v. United States, No. 125-1-7-720 (13th Cir. 2017). The decisions appear at pages 1 through 24 in the Transcript of Record ("R.").

STATEMENT OF FACTS

On Sunday January 15, 2017, Officer James McNown of the Lakeshow Police Department ("Officer McNown") attended morning services at the Lakeshow Community Revival Church ("the Church"). R. at 2. Petitioner Chad David ("Petitioner") was the minister of the Church and was known for his consistent attendance and lively sermons each Sunday. R. at 2. Petitioner was absent from the 7:00 AM service to the surprise of several attendees, Officer McNown included. R. at 2. Attendee Julianne Alvarado approached Officer McNown to share her concern for the Petitioner's well-being. R. at 2. Another service attendee, Jacob Ferry, informed Officer McNown that he saw the Petitioner stumbling at a bar the previous night. R. at 2. Officer McNown was skeptical based on his knowledge of Petitioner, but was concerned that the 72-year-old minister might have fallen ill. R. at 2. Officer McNown assured his fellow churchgoers that he would check in on Petitioner during his patrol shift after church services. R. at 2.

After services concluded, Officer McNown stopped at Starbucks and purchased a hot tea to bring to Petitioner. R. at 2. Upon arrival at the residence he noticed Petitioner's car in the

driveway and assumed that he was home. R. at 2. Walking up to the house at approximately 9:30 AM, Officer McNown heard loud "scream-o metal" music emanating from the house, which he described as "unusual" for the older, unmarried minister. Ex. A. Officer McNown knocked loudly on the front door several times with no answer. Ex. A. Officer McNown noticed the film *The Wolf of Wall Street* playing on the television inside, which he also found uncharacteristic of Petitioner. Ex. A. Officer McNown proceeded to the back door, which he found unlocked, and entered the residence to check on Petitioner's well-being. Ex. A.

Once inside, Officer McNown turned off the television, but the loud music continued from an upstairs room. Ex. A. Officer McNown did not open any cupboards or drawers while on the first floor, but did observe an open notebook next to the television. Ex. A. Still concerned for the Petitioner's well-being, Officer McNown went upstairs to check on Petitioner. Ex. A. He entered the room where the loud music originated and found the Petitioner packaging powdered cocaine into ziplock bags with skull faces printed on them Ex. A. Based on Officer McNown's training and experience, he recognized the substance and packaging to be cocaine and handcuffed the Petitioner. Ex. A.

Officer McNown contacted local DEA agents pursuant to Lakeshow Police policy. R. at 3. DEA Agent Colin Malaska ("Agent Malaska") arrived at the Petitioner's residence shortly after 10:00 AM and read Petitioner his Miranda rights before he began his investigation. R. at. 3. The amount of cocaine found in Petitioner's residence exceeded 10 kilograms. Ex. F. Agent Malaska asked Petitioner where he obtained the drugs, but Petitioner answered that there was "no way" he would give up his suppliers out of fear that he would be killed and his church would be burned down. R. at 3.

Petitioner was held in a federal detainment facility where he contacted attorney Keegan Long ("Mr. Long"). R. at 3. Petitioner sought Mr. Long's representation despite knowing that he was an alcoholic. R. at 4. Mr. Long agreed to represent Petitioner. R. at 4. During their conversation, they did not discuss seeking a plea bargain. Ex. B.

While Petitioner was detained, Agent Malaska encouraged prosecutors to offer Petitioner a favorable plea deal in exchange for information about his suppliers. R. at 4. Agent Malaska hoped to arrest a suspected drug dealer he believed was traveling through the area. R. at 4.

On January 16, 2017 at 8:00 AM, Assistant United States Attorney Kayla Marie ("Ms. Marie") communicated a tentative offer to negotiate a plea deal to Mr. Long via email, which included a draft of potential terms. Ex. D. The terms would have required Mr. Long to provide the "names, and all relevant contact and identifying information, of known and suspected suppliers of cocaine" to the Department of Justice. Ex. D. Additionally, under the proposed terms Petitioner's information "must lead to the arrest of one suspect." Ex. D. In exchange, Petitioner would plead guilty to one count of 21 U.S.C. § 841 and accept a sentence of one year in prison. Ex. D. Ms. Marie wrote in the email that "if everything looks good, we can negotiate in a formal setting." Ex. D. The offer to negotiate was valid until January 17, 2017 at 10:00 PM. Ex. D.

Mr. Long did not communicate Ms. Marie's offer to negotiate a plea deal to Petitioner within the allotted time. R. at 4. Accordingly, the offer lapsed. R. at 4. On January 18, Petitioner was indicted on one count of 21 U.S.C. § 841. R. at 4. On cross-examination, Petitioner stated that he would have accepted the plea offer had he known about it. Ex. C.

SUMMARY OF THE ARGUMENT

I. This Court should uphold the Circuit Court's decision to deny Petitioner's motion to suppress a search because: (1) The community caretaking exception applies to the home as well as vehicles when officers are acting on a reasonable basis to protect property or aid those in need of assistance; (2) Officer McNown's search of Petitioner's home was undertaken for a bona fide community caretaking function: aiding those in need of help, and; (3) Officer's McNown's search was limited in scope to the basis of his community caretaking function.

II. The Circuit Court's order affirming the decision of the District Court should be upheld because: (1) Petitioner's right to counsel did not attach during pre-indictment plea negotiations and; (2) Petitioner failed to assert prejudice under the Strickland test.

STANDARD OF REVIEW

I. Motions to suppress a search are reviewed de novo. See United States v. Zapien, 861 F.3d 971, 974 (9th Cir. 2017).

II. Whether a defendant's Sixth Amendment right to counsel was improperly denied is a question of law reviewed de novo. See United States v. Hantzis, 625 F.3d 575, 582 (9th Cir. 2010).

ARGUMENT

I. THIS COURT SHOULD AFFIRM THE THIRTEENTH CIRCUIT COURT'S DECISION AS OFFICER MCNOWN ACTED REASONABLY IN ENTERING PETITIONER'S HOME UNDER THE COMMUNITY CARETAKING EXCEPTION TO THE FOURTH AMENDMENT.

A. This Court should adopt a general reasonableness standard to warrantless searches of homes under the community caretaker exception as the principles in Cady v. Dombrowski are applicable to the home, in addition to vehicles, as it allows for the protection of property and aiding those in need.

The Fourth Amendment of the United States Constitution provides for:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Among several exception to the warrant requirement that has evolved in Fourth Amendment jurisprudence is the community caretaker exception, first described by this Court in Cady v. Dombrowski. 413 U.S. 433 (1973). In Cady, a police officer had a vehicle towed because the driver was incapacitated and it presented a safety hazard on the roadside. Id. at 436. The responding officer believed the driver, an off duty police officer, was required to keep a firearm on him at all times and searched the vehicle to find the revolver before it was towed. Id. This search revealed bloodied garments linked to a homicide. Id. at 437. In analyzing the text of the Fourth Amendment, the court found that the ultimate standard is reasonableness. Id. at 439. The court found the search did not violate the Fourth Amendment because the officer's actions were a part of a "community caretaking [function], totally divorced from the detection, investigation, or acquisition of evidence relation to the violation of a criminal statute". Id. at 441. The

officer's actions were judged to be "constitutionally reasonable" in light of their intended goal: "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." Id. at 447.

While the facts in Cady did not involve a warrantless search of a home, the court did mention it in dicta: "Although vehicles are 'effects' within the meaning of the Fourth Amendment, for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars." Id. at 439 (internal citation omitted). This language has caused a circuit split with several circuits adopting a bright-line rule against the community caretaker exception for searches of a home or fixed structure. See United States v. Bute, 43 F.3d 531, 535 (10th Cir. 1994) United States v. Erickson, 991 F.2d 529, 532 (9th Cir. 1993); United States v. Pichany, 687 F.2d 204, 208 (7th Cir. 1982). However, this categorical ban is not based on the text of the Fourth Amendment or the reasoning used in Cady itself, which in fact cautions that "very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this." Cady, 413 U.S. at 447. The Court in Cady did not use a bright-line rule, but instead employed a totality of the circumstances test to determine the reasonableness of the officer's conduct. Id. The court even mused about whether the officer's actions might be deemed unreasonable in an urban policing environment. Id. ("While perhaps in a metropolitan area the responsibility to the general public might have been discharged by the posting of a police guard during the night, what might be normal procedure in such an area may be neither normal nor possible in Kewaskum, Wisconsin."). The overall context of Officer McNown's search is what this Court should examine. See New Jersey v. T.L.O., 469 U.S. 325, 327 ("Although the underlying command of the Fourth Amendment is

always that searches and seizures be reasonable, what is reasonable depends on the context within which a search takes place." The distinction between vehicles and homes may be a factor in the test for reasonableness, but in no opinion of this Court has it ruled that entry into a home as part of a community caretaking function is per se unreasonable. The United States urges the Court to extend the general reasonableness standard used in vehicle searches under the community caretaking exception to searches of the home as well.

Warrantless searches of homes under the community caretaking exception have been found to be constitutional by a number of courts that have evaluated the reasonableness of law enforcement officers in attempts to safeguard property and provide assistance to those in need. See State v. Pinkard, 327 Wis. 2d 346 (2010); People v. Ray, 21 Cal. 4th 464 (1999); State v. Alexander, 124 Md. App. 258 (1998). In People v. Ray, officers responded to a report of an open door at a residence. Upon arrival, the officers were able to see inside and observed the residence in shambles, and "looked like someone had gone through the house." Ray, 21 Cal. 4th at 468. The officers entered in order to conduct a welfare check to "see if anyone inside might be injured, disabled, or unable to obtain help" and to ascertain if a burglary was recently committed. Id. The California Supreme Court found that while the observations of the officers did not meet that of exigent circumstances, "[u]nder the community caretaker exception, circumstances short of a perceived emergency may justify a warrantless entry, including protection of property". Id. at 473.

Similarly, in State v. Pinkard, police officers in Milwaukee responded to an anonymous call about two individuals sleeping in an apartment next to drugs and paraphernalia with the main door of the residence open. 327 Wis. 2d 346, 349. The responding officers knocked on the ajar

door and attempted to yell inside to awaken anyone possibly sleeping. Id. at 351. The officers then entered the residence out of a concern for the occupants well-being. Id. Specifically, the officer testified that they entered "to make sure the occupants that the caller had referred us were not the victims of any type of crime; that they weren't injured; that they weren't the victims of like a home invasion robbery; that they were okay, and to safeguard any life or property in the residence." Id. The officers entered and could see two sleeping bodies in an adjoining room who did not respond to further calls. Id. Upon entering the room, drugs were found in plain view. Id. at 351-2. The Supreme Court of Wisconsin looked to whether the "community caretaker function was reasonably exercised under the totality of the circumstances of the incident under review." Id. at 358. The court found the police officers' actions to be reason given several factors taken in totality: (1) the police received a reliable tip about individuals sleeping near drugs; (2) the officers responded because they were concerned for the health and safety of the occupants; (3) the officers corroborated the tip when they found the door to the residence open; (4) the officers knocked repeatedly and announced their presence before entering. Id. at 366-67. Based on these circumstances, the court found that an officer could be reasonably concerned that the occupants may have overdosed on drugs. Id. at 368.

While the court in Ray emphasized protection of property in supporting the officer's actions, the court in Pinkard stressed the second aspect of the community caretaker function performed by police: "when the officer discovers a member of the public who is in need of assistance." Id. at 356. Both protection of property and giving aid to those in need of assistance are well recognized as aims of the community caretaker exception. See United States v. Quezada, 448 F.3d 1005, 1007 (8th Cir. 2006) ("These activities, which are undertaken to help those in danger

and to protect property, are part of the officer's 'community caretaking functions.'"); State v. Vargas, 213 N.J. 301, 324 (2013) ("[P]olice officers or first responders, in carrying out their community-caretaking responsibilities, may not have time to secure a warrant when emergent circumstances arise and an immediate search is required to preserve life or property."); Ray, 21 Cal. 4th at 473 ("Although the case law attaches slightly greater weight to the protection of persons from harm than to the protection of property from theft, many of the cases involving possible burglaries or breakings stress the dual community caretaking purpose of protecting both.").

The use of the community caretaker exception for warrantless searches of the home has been upheld by the Sixth, Eighth, and now Thirteenth Circuit Court of Appeals. See David v. United States, No. 125-1-7-720 (13th Cir. 2017); United States v. Smith, 820 F.3d 356 (8th Cir. 2016); United States v. Quezada, 448 F.3d 1005 (8th Cir. 2006); United States v. Rohrig, 98 F.3d 1506 (6th Cir. 1996). The confusion caused by the bright-line distinction between vehicles and homes drawn by the Third, Seventh, Ninth, and Tenth Circuit Courts needs to be resolved by this court. See Ray v. Twp. of Warren, 626 F.3d 170 (3d Cir. 2010) United States v. Bute, 43 F.3d 531, 535 (10th Cir. 1994) United States v. Erickson, 991 F.2d 529, 532 (9th Cir. 1993); United States v. Pichany, 687 F.2d 204, 208 (7th Cir. 1982). The First Circuit complained of the lack of clarity on the issue in MacDonald v. Town of Eastham. 745 F.3d 8, 14 (1st Cir. 2014) ("Manifestly, there is no directly controlling authority. The question thus reduces to whether a consensus of persuasive judicial decisions exists. We think not."). In MacDonald, police officers responded to a report of an open door, and in circumstances similar to People v. Ray, entered the house to check on its occupant. Id. at 10-11. The warrantless entry was challenged in a civil suit by the

resident. Id. at 11. Judge Selya found that "because there is no clearly established law that would deter reasonable police officers from effecting such an entry, the individual defendants are entitled to qualified immunity." Id. at 10. The government urges this court to clarify and affirm the principles manifest in Cady v. Dombrowski: that local police fulfill important community caretaking roles and their actions should be judged by their "reasonableness" under the Fourth Amendment, not by arbitrary judicial formulas. See Cady v. Dombrowski, 413 U.S. at 447.

B. Officer McNown's search of Petitioner's home was reasonable because he entered to check on the welfare of the Petitioner, not to investigate a crime.

Understanding that the community caretaker exception applies to the home, next this Court must evaluate whether Officer McNown's actions were reasonable under the circumstances. This court recognizes the exceptional nature of law enforcement work in judging reasonableness: "The clarity of hindsight cannot provide the standard for judging the reasonableness of police decisions made in uncertain and often dangerous circumstances." Tennessee v. Garner, 471 U.S. 1, 26 (1985). Officer McNown's actions were reasonable because he entered Petitioner's home for a bona fide community caretaker function, not as pretext for a criminal investigation. Further, his search of the home was limited to the goal of his community caretaker function, checking on the well-being of the Petitioner, and did not exceed that scope.

Cady makes clear that the community caretaking function applies when local police officers engage in work "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. Cady, 413 U.S. at 441. Officer McNown did not stop by the Petitioner's home after church in order to conduct a drug raid. Ex. A at 5 ("I guess I was just eager to check the well-being of [Petitioner] at that point and give him his tea."). In fact, he went at the urging of community members concerned for the well-being of the Petitioner.

R. at 2 ("To calm the service attendees, Officer McNown told them that he would stop by [Petitioner's] house during his patrol route after work and bring him some hot tea."). There is no indication that Officer McNown's decision to stop by his minister's home, who was absent from services that very morning, was part of a larger, coordinated criminal investigation. See Alexander, 124 Md. App. at 261–62 ("When the police initially entered the home of the appellees, the appellees were not the target of any police investigation nor were they believed to be harboring fugitives or concealing evidence of crime. There was, moreover, no remote hint of subterfuge; no narcotics officers were waiting, opportunistically, for an excuse to reconnoiter an otherwise protected asylum.").

Wisconsin courts have held that "if the court concludes that the officer has articulated an objectively reasonable basis under the totality of the circumstances for the community caretaker function, he has met the standard of acting as a bona fide community caretaker, whose community caretaker function is totally divorced from law enforcement functions." Pinkard, 327 Wis. 2d at 366 (quoting State v. Kramer, 315 Wis. 2d 414, 435 (2009)). Officer McNown had a reasonable basis to engage in the community caretaking function when he went to check on the well-being of the Petitioner. The Petitioner was known for his consistent attendance at Sunday church services of which he was an integral part. Ex. A. Officer McNown was aware of "a nasty strain of the Bandwagon Flu going around." Id. Another churchgoer told Officer McNown that the Petitioner was seen stumbling at a bar the night before. Id. The Petitioner was 72 years old and known by Officer McNown to be unmarried. R.; Ex. A. Upon arrival at the Petitioner's residence, Officer McNown observed several things that seemed out of place given his knowledge of the Petitioner and the time of day: loud "scream-o metal" music emanating

from the home; *The Wolf of Wall Street* playing on a television inside; and no response to his knocking or attempts to announce himself despite seeing the Petitioner's car in the driveway. Ex. A. Given the totality of the circumstances, Officer McNown had a reasonable basis to believe that the Petitioner was in need of assistance. See State v. Vargas, 213 N.J. at 336 ("A police officer responding to a report of a missing person must consider a spectrum of possibilities, from an innocuous absence for personal or business reasons to an accident, illness or crime in the home that has left the resident unable to summon assistance. Despite diligent inquiries, the officer may be unable to determine whether there is an objectively reasonable emergency unless he or she enters the residence.").

Officer McNown's search of the Petitioner's home to check on his well-being was "strictly circumscribed by the exigencies which justify its initiation." See Terry v. Ohio, 392 U.S. 1, 25-26. Officer McNown entered the first floor, looked for signs of the Petitioner, and turned off the television which was playing loudly. R.; Ex. A. While he did observe a notebook, it was open and in plain view next to the television. Id. Not finding the Petitioner on the first floor, Officer McNown went to the second floor and opened the door to a room where loud music was originating. Id. It was here he found the Petitioner with large quantities of cocaine in plain view. Id. Officer McNown did not open any cupboards or drawers, nor enter any rooms other than to ascertain the location and well-being of the Petitioner. Id.

Officer McNown had a reasonable basis to believe that the Petitioner, an elderly bachelor and the minister at Officer's McNown's church, was in need of assistance. Officer McNown's search of the home was for the sole purpose of checking in on the Petitioner and was not pretext for a drug raid. The search undertaken was strictly limited to finding the Petitioner and did not

involve searching his personal effects. For these reasons, the United States asks this Court to find Officer McNown's actions reasonable in view of the community caretaking exception to the Fourth Amendment.

II. THE CIRCUIT COURT'S ORDER AFFIRMING THE DISTRICT COURT'S DECISION SHOULD BE UPHELD BECAUSE IT CORRECTLY APPLIES THE BRIGHT-LINE RULE OF THE SIXTH AMENDMENT ESTABLISHED BY THE SUPREME COURT.

The Sixth Amendment guarantees that, "In all criminal prosecutions, the accused shall enjoy the right…to have assistance of counsel for his defense." U.S. Const. amend. VI. The Supreme Court has recognized that the Sixth Amendment's right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated" against individuals. U.S. v. Gouveia, 467 U.S. 180, 187 (1984). Furthermore, the Supreme Court has delineated the specific proceedings that trigger attachment - "formal charge, preliminary hearing, indictment, information, or arraignment." Kirby v. Illinois, 406 U.S. 682, 689 (1972). The Kirby Court counseled that:

> The initiation of judicial criminal proceedings is far from a mere formalism...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 this point, therefore, that marks the commencement of the 'criminal prosecutions' to which alone the explicit guarantees of the Sixth Amendment are applicable.

Id. at 689-90 (citations omitted).

Supreme Court precedent establishes a bright-line rule that the Sixth Amendment does not attach until a formal prosecution commences. U.S. v. Moody, 206 F.3d 609, 613 (6th Cir. 2000). If an individual has yet to be indicted and has not appeared in court before a judge or a

magistrate on a given matter, his Sixth Amendment right to counsel has not attached. See Kirby, 406 U.S. at 689.

In the present case, Petitioner contends that he is entitled to relief under the Sixth Amendment for Mr. Long's ineffective assistance prior to Petitioner's indictment. Specifically, Petitioner claims that his attorney's failure to communicate an offer to negotiate a plea deal was a violation of the right to counsel. In sum, Petitioner urges the Court to accept that the Sixth Amendment's right to counsel attaches during pre-indictment plea negotiations.

The Petitioner's argument should be rejected for two main reasons. First, it is inconsistent with Supreme Court precedent. See Kirby, 406 U.S. at 689. As noted above, the Supreme Court has fashioned an easily applicable bright-line test to determine if the right to counsel has attached. Attaching the right to counsel in pre-indictment plea negotiations would unmoor the Sixth Amendment from its foundation as a right guaranteed to criminal *defendants*. This principle is reflected in the plain text of the Sixth Amendment, which guarantees the right to counsel at all critical stages of "criminal *prosecutions*." U.S. Const. amend. VI. (emphasis added). Here, since a formal prosecution had not been initiated against Petitioner, he cannot seek relief pursuant to the Sixth Amendment.

Second, Petitioner contends that pre-indictment plea negotiations are a critical stage of plea negotiations. While the Supreme Court has recognized that the right to counsel applies in the "critical stages" of criminal proceedings, such stages only occur after the commencement of a formal prosecution. See Missouri v. Frye, 566 U.S. 134 (2012); Lafler v. Cooper, 566 U.S. 156 (2012); Montejo v. Louisiana, 556 U.S. 778 (2009). Recognizing a pre-indictment procedure as a critical stage would contradict binding Supreme Court precedent.

A. The bright-line rule prohibits attaching the Sixth Amendment right to counsel prior to the initiation of formal criminal proceedings.

The bright-line rule governing attachment of Sixth Amendment rights is articulated clearly in Kirby v. Illinois. See 406 U.S. at 689-90 (explaining that the Sixth Amendment right to counsel did not attach during an uncounseled identification of the defendant conducted in police custody prior to indictment). A plurality of the Court held that the right to counsel attaches "at the initiation of criminal judicial proceedings." Id. (citing Powell v. Alabama, 287 U.S. 45, 66-71 (1932); Massiah v. United States, 377 U.S. 201 (1964); Spano v. New York, 360 U.S. 315, 324 (1959) (Douglas, J., concurring)).

Subsequent decisions from this Court illustrate the rigid, bright-line attachment test. See Gouveia, 467 U.S. at 192 (holding that the Sixth Amendment right to counsel did *not* attach during the 19-month pre-indictment administrative segregation of two inmates later convicted of murdering a fellow inmate); Moore v. Illinois, 434 U.S. 220 (1977) (Sixth Amendment right to counsel attached at a preliminary hearing following defendant's arrest where the alleged victim identified the defendant in court).

Gouveia and Moore apply the rule stated in Kirby consistently to determine when attachment occurs. They each correctly identify the initiation of judicial proceedings - whether by "formal charge, preliminary hearing, indictment, information, or arraignment" - as the point at which the Sixth Amendment attaches. Kirby, 406 U.S. at 689. In both cases, the right to counsel attached at the respective defendants' first hearings - in Moore, the preliminary hearing took place one day

following the defendant's arrest, while in Gouveia, the defendants waited 19 months for their arraignment.[1]

Additional cases demonstrate strict adherence to the bright-line rule. Rothgery v. Gillespie, 554 U.S. 191, 203 (2008) (holding that "the first formal proceeding is the point of attachment"); Moran v. Burbine, 475 U.S. 412, 430 (1986) (holding that the Sixth Amendment, "by its very terms, [becomes] applicable only when the government's role shifts from investigation to accusation"); Brewer v. Williams, 430 U.S. 387, 399 (1977) (attachment occurred after defendant had been arraigned on the charged offense before a judge).

B. No circuit court has attached the right to counsel under the Sixth Amendment during pre-indictment plea negotiations.

The majority of circuit courts have explicitly adopted the bright-line rule against pre-indictment attachment. See Turner v. United States, 885 F.3d 949, 953 (6th Cir. 2018) *petition for cert. filed*, (Jul. 20, 2018) (No. 18-106); U.S. v. Morriss, 531 F.3d 591, 594 (8th Cir. 2008); U.S. v. Waldon, 363 F.3d 1103, 1112 (11th Cir. 2004); U.S. v. Hylton, 349 F.3d 781, 787 (4th Cir. 2003); U.S. v. Hayes, 231 F.3d 663, 675 (9th Cir. 2000); U.S. v. Mapp, 170 F.3d 328, 334 (2d. Cir. 1999); U.S. v. Lin Lyn Trading, Ltd., 149 F.3d 1112, 1117 (10th Cir. 1998); U.S. v. Heinz, 983 F.2d 609, 612-13 (5th Cir. 1993); U.S. v. Sutton, 801 F.2d 1346, 1356-66 (D.C. Cir. 1986).

The Sixth Circuit recently faced a nearly identical issue to the present case. The defendant in Turner alleged that his attorney failed to communicate a plea deal offered prior to indictment. The Sixth Circuit upheld the "long-standing rule that the Sixth Amendment right to counsel does

[1] The Gouveia court squarely addressed the issue of the right to counsel under the Sixth Amendment. The majority recognized that the length of the inmates' detention might have implicated the Sixth Amendment speedy trial right, but the issue had not been raised below. Gouveia, 467 U.S. at 190.

not extend to pre-indictment plea negotiations." Turner, 885 F.3d at 953. The Sixth Circuit also correctly observed that "no other circuit has definitively extended the Sixth Amendment right to counsel to pre-indictment plea negotiations." Id.

Indeed, several of the circuits have applied the bright-line test in cases where the defendant is arguably closer to the "prosecutorial forces of organized society" than the Petitioner was here. Kirby, 406 U.S. at 689. See Morriss 531 F.3d at 594 (no attachment despite defendant's employment records being subpoenaed, a warrant issued to collect his DNA, and the government's initiation of plea negotiations prior to indictment); Hylton, 349 F.3d at 787 (defendant's arraignment on a felony charge in district court was not a "formal" proceeding sufficient to trigger attachment because the district court lacked jurisdiction to prosecute the felony charge); Hayes, 231 F.3d at 675 (no attachment where defendant received a target letter from the prosecution, was subpoenaed to testify before a grand jury, and conducted a deposition prior to indictment). The Ninth Circuit strongly endorsed the bright-line test in Hayes, writing, "We are loath to engraft some new, pre-indictment proceeding onto the rule, thereby making it no longer clean and clear—and outside the clear boundaries the Supreme Court has established." 231 F.3d at 675.

Here, the defendant had merely been arrested. R. at 3. The government was actively investigating a drug ring in which Petitioner was thought to be involved. R. at 4. On these facts, the government's role had certainly not shifted from "investigation to accusation" under the Sixth Amendment. See Moran, 475 U.S. at 412.

While the few remaining circuits have not explicitly adopted the bright-line test, their decisions are either distinguishable from the present case or too vague to meaningfully support

attachment during pre-indictment plea negotiations. See Matteo v. Superintendent, SCI Albion, 171 F.3d 877, 892 (3rd Cir. 1999) (right to counsel attached during telephone calls defendant made while in police custody); Roberts v. Maine, 48 F.3d 1287, 1291 (1st Cir. 1995); United States v. Larkin, 978 F.2d 964, 969 (7th Cir. 1992).

In Larkin, the Seventh Circuit held that a defendant may rebut the presumption against pre-indictment attachment by showing that the government "crossed the...divide from factfinder to adversary." Larkin, 978 F.2d at 969 (quoting U.S. ex rel. Hall v. Lane, 804 F.2d 79, 82 (7th Cir. 1982). Without elaborating on how one could do so specifically, the Court found that the defendants in Larkin had *not* made such a showing, despite their seizure by federal authorities and appearance before a grand jury prior to indictment. Id. at 967.

Roberts alludes to a similar test. 48 F.3d at 1291 ("We recognize the possibility that the right to counsel might conceivably attach...in circumstances where the 'government had crossed the constitutionally significant divide from factfinder to adversary.'" quoting Larkin, 978 F.2d at 969). The First Circuit clarifies, "Such circumstances...*must be extremely limited* and, indeed, we are unable to cite many examples," hardly a ringing endorsement for attaching Sixth Amendment protections to all pre-indictment plea negotiations. See Roberts, 48 F.3d at 1291 (emphasis added).

C. The Sixth Amendment right to counsel does not attach unless the government has crossed the threshold of formal prosecution, regardless of whether or not plea negotiations are considered a "critical stage" of criminal proceedings.

While the bright-line test establishes a threshold for attachment, it is not the "be-all and end-all" of Sixth Amendment right to counsel jurisprudence. In its decisions, the Court has consistently applied a two-step attachment inquiry. First, the Court examines "when the

government's role shifts from investigation to accusation" by applying the bright-line test. See Moran, 475 U.S. at 430. If the bright-line test has not been not satisfied, then the right to counsel cannot attach.

Second, the Court considers whether uncounseled defendants have been confronted with "the intricacies of substantive and procedural criminal law." Kirby, 406 U.S. at 689. The Court refers to these confrontations as the "critical stages" of criminal proceedings. Id. at 690.

This two-step approach has its roots in Powell, which describes the period from "arraignment until the beginning of [the] trial" as "perhaps the most critical period" for defendants to have representation, implicitly recognizing that formal charging is indeed a predicate to attachment. See 287 U.S. at 59.

The Court explicitly endorsed this two-step approach in Rothgery. 554 U.S. 191 (attachment and critical stage analyses are "distinct" from one another and "once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any 'critical stage' of the post-attachment proceedings."). Several critical stages - such as "formal charge, preliminary hearing, indictment, information, and arraignment" - can only occur once a formal prosecution has commenced. See Kirby, 406 U.S. at 689.

For procedures that can occur both before and after the initiation of a prosecution – such as a custodial interrogation - the Court applies the same two-step approach. Compare Massiah, 377 U.S. at 206 (right to counsel applied during federal agents' post-indictment interrogation of defendant) with Moran, 475 U.S. at 428 ("Because...the events that led to the inculpatory statements preceded the formal initiation of adversary judicial proceedings, we reject the contention that the conduct of the police violated his rights under the Sixth Amendment."). The

right to counsel did not attach in Moran because the defendant was an unindicted suspect at the time of the interrogation. Id. In other words, the threshold from investigation to accusation had not been crossed. Pre-indictment proceedings are by nature less critical than those occurring between arraignment and indictment. See Powell, 287 U.S. at 59.

Turning to the present case, the right to counsel did not attach during Petitioner's pre-indictment plea negotiations. Though the Supreme Court has recognized that post-indictment plea negotiations are a critical stage protected under the Sixth Amendment, the Court evidently reached this conclusion using the two-step approach. See Frye, 566 U.S. at 143.

Throughout the majority opinion in Frye, the Court repeatedly discusses the right to counsel in plea negotiations as a right given to "criminal *defendants*." Id. at 143-44 (emphasis added). This word choice suggests that the right to counsel attaches strictly for those who have already passed the threshold - "whether by formal charge, preliminary hearing, indictment, information, and arraignment" - from suspect to accused. See Kirby, 406 U.S. at 689.

Others have nonetheless suggested that the right to counsel might attach in all plea negotiations. Moody, 206 F.3d at 613 (reasoning that attachment should occur at proceedings "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." quoting U.S. v. Wade, 388 U.S. 218, 224 (1967)). Such reasoning simply goes against the grain of Sixth Amendment jurisprudence. Pre-indictment plea negotiations do not settle one's fate any more so than uncounseled interrogations that yield admissions of guilt.[2] Cf. Moran, 475 U.S. at 428. Petitioner apparently contends that the Sixth Amendment protects the former, but not the latter.

[2] Assuming *arguendo* that the individual waived his *Miranda* rights.

Furthermore, a plea agreement must be presented in open court for judicial approval. Fed. R. Crim. P. § 11(c)(2). The Sixth Amendment would unambiguously attach in this context given its formality and the presence of a judge overseeing the proceedings. See Gouveia, 467 U.S. at 188-89. In such a circumstance, counsel would have the opportunity to guide unwitting defendants away from unfavorable plea deals and toward favorable ones.

As for defendants such as Petitioner who claim prejudice from counsel's failure to communicate an offered plea deal, their position is simply not one that the Sixth Amendment is equipped to remedy. As the Court counsels in Moran, "The possibility that [an] encounter may have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel." 475 U.S. at 432.

In sum, the Court should not extend the right to counsel to pre-indictment plea negotiations. Rejecting pre-indictment attachment accords with well-founded Sixth Amendment principles and upholds Supreme Court precedent.

III. THE PLEA DEAL SHOULD NOT BE RE-OFFERED BECAUSE PETITIONER FAILED TO ASSERT A REASONABLE PROBABILITY THAT HE WOULD HAVE ACCEPTED THE INITIAL OFFER AND THAT THE INITIAL OFFER WOULD HAVE FORMALLY ENTERED.

Assuming *arguendo* that the right to counsel attached during the pre-indictment plea negotiations, Petitioner still must show that he suffered prejudice under the Strickland test.[3] Strickland v. Washington, 466 U.S. 668, 687 (1984) (defendant must show that counsel's performance was deficient and that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable."). Given that Mr. Long's ineffectiveness has been

[3] The United States is not conceding that the right to counsel attached. The United States contends that Petitioner is not entitled to relief under the Sixth Amendment. The issue of prejudice is relevant only if the Court holds that the right to counsel attached during the pre-indictment negotiation phase.

stipulated, this analysis will focus solely on whether counsel's errors deprived Petitioner of a fair, reliable trial.

The Frye Court announced the standard for prejudice when a formal plea offer has lapsed due to ineffective assistance of counsel. 566 U.S. at 147.

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law.

Id.

Here, Petitioner's attorney received an offer to negotiate a formal plea deal containing preliminary terms communicated via email. Ex. D. Petitioner did *not* receive a formal plea offer. Ex. D. Furthermore, Petitioner did not establish a reasonable probability that he would have accepted the terms included in the offer to negotiate, nor did he establish a reasonable probability that the agreement would have entered without the prosecution canceling it or the trial court refusing it. Accordingly, Petitioner has not established prejudice under Strickland and is not entitled to any remedy.

A. The January 16 email was not a formal plea agreement offer.

Frye holds that "defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." 566 U.S. at 145. The Frye court did not impose a fixed standard for what constitutes a formal plea offer, but does suggest that there should be a documented negotiation process, a finalized agreement in writing, and that such materials should appear in the record. See id. at 146.

Some circuit courts have encountered offers that were considered informal following the Frye ruling. Ramirez v. U.S., 751 F.3d 604, 606-08 (8th Cir. 2014) (proffer letter sent to defendant's attorney was not a formal plea offer); Merzbacher v. Shearin, 706 F.3d 356, 369 (4th Cir. 2013) (letter containing undefined terms that required "substantial negotiation and compromise" was not a formal plea offer).

In the present case, Ms. Marie's email on January 16 was evidently an informal offer to negotiate. Ex. D. Ms. Marie's email concludes with a conditional offer to "negotiate a *final deal in a formal setting*." Ex. D (emphasis added). If Ms. Marie intended to communicate a finalized, formal plea offer, she would not have left the matter open to negotiation. See Ramirez, 751 F.3d at 608. Furthermore, while the email does contain proposed terms of agreement, it contains a key undefined term. Ex. D. Under the proposed terms of agreement, Petitioner's information "must lead to the arrest of one suspect," yet Ms. Marie did not specify a timeframe in which the arrest must take place. Ex. D. Undefined terms such as this one require "substantial negotiation and compromise" and would not be found in a formal plea offer. See Merzbacher, 706 F.3d at 369.

B. Petitioner did not establish reasonable probability that he would have accepted a formal plea deal had he reached that stage with the government.

"Defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." Frye, 566 U.S. at 147. In Frye, the defendant satisfied this burden by showing that he later pleaded guilty to a more serious charge without the promise of a lenient sentencing recommendation. Id. at 151 (the Court importantly recognized that a later guilty plea is not always dispositive of a defendant's likelihood of accepting an earlier plea deal).

Here, the evidence shows that Petitioner was unequivocally opposed to giving up information about his suppliers after his arrest. When Agent Malaska asked him to provide information about his suppliers, Petitioner said there was "no way" he would do so out of fear of death and the destruction of his church. R. at 3. While Petitioner later testified that he would have accepted a plea deal from the government, that testimony came *after* he was indicted and was given with the benefit of hindsight. Ex. C. The record reflects that at the only time Petitioner could have accepted a plea deal, there was "no way" he would have agreed to give up the necessary information. R. at 3. Furthermore, unlike in Frye, the record here is bereft of a later guilty plea entered by Petitioner. Cf. Frye, 566 U.S. at 151 (reasoning that a later guilty plea sometimes suggests that a defendant would have pleaded guilty earlier on more favorable terms).

Given Petitioner's vehement refusal to cooperate prior to indictment, there is no reasonable probability that he would have agreed to any pre-indictment plea offer requiring him to provide information about his suppliers.

C. Petitioner did not establish a reasonable probability that a plea agreement would have entered without being canceled or refused.

"Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it." Frye, 566 U.S. at 147.

Here, the preliminary terms of Ms. Marie's offer to negotiate require that Petitioner's information yield at least one arrest. Ex. D. The record reflects Agent Malaska's "belief" that Petitioner could provide information leading to the arrest of a suspect, but this evidence is insufficient to establish a reasonable probability that a formal offer would have entered. R. at 4.

As noted above, before his indictment Petitioner said there was "no way" he would give information about his suppliers. R. at 3.

Furthermore, Agent Malaska's purported belief in the likelihood of an arrest on its own should be insufficient to establish a reasonable probability that an arrest would have actually occurred. The record does not include any evidence independently corroborating Agent Malaska's belief, such as documented whereabouts of suspects on the date in question. Nor does the record contain testimony from Agent Malaska explaining *why* he believed an arrest could have been made on Petitioner's information.

In sum, Petitioner has not asserted prejudice under Strickland given the standard set in Frye. The January 16 email from Ms. Marie was not a formal plea offer. Ex. D. Ms. Marie acknowledged as such she invited Mr. Long to "negotiate a final deal in a formal setting" in the email itself. Ex. D. Furthermore, even if Petitioner had received a formal plea offer, Petitioner's stated fear of violence to himself and his church would have precluded him from accepting one. R. at 3.

CONCLUSION

For the reasons set forth above, the judgment of the Thirteenth Circuit Court of Appeals should be affirmed.