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Counsel for Respondent
October 21, 2018

Docket No. 4-422

IN THE

Supreme Court of the United States

October Term, 2018

CHAD DAVID,
Petitioner,

v.

THE UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR RESPONDENT

QUESTIONS PRESENTED

I. Whether the Thirteenth Circuit Court of Appeals properly found that when a law enforcement officer is acting as a community caretaker, warrantless entry into a home is valid under the Fourth Amendment?

II. Whether the Thirteenth Circuit Court of Appeals correctly held that the Sixth Amendment to counsel does not attach to plea negotiations prior to a federal indictment?

TABLE OF CONTENTS

QUESTIONS PRESENTED ii

TABLE OF AUTHORITIES v

OPINIONS BELOW x

STATEMENT OF JURISDICTION x

CONSTITUTIONAL PROVISIONS INVOLVED x

STANDARD OF REVIEW xi

STATEMENT OF THE CASE 1

SUMARY OF THE ARGUMENT 3

ARGUMENT 5

I. THE THIRTEENTH COURT OF APPEALS CORRECTLY DENIED MR. DAVID'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE COMMUNITY CARETAKING DOCTRINED EXEMPTED OFFICER MCNOWN'S SEARCH OF MR. DAVID'S HOME FROM THE FOURTH AMENDMENT'S GENERAL WARRANT REQUIREMENT. 5

A. The Fourth Amendment Touchstone of "Reasonableness" Governs Exceptions to the General Warrant Requirement, Including the Community Caretaking Doctrine. 6

B. This Court Should Resolve the Circuit Split By Using a Hybrid Test Based in This Court's Own Jurisprudence. 7

C. Officer McNown's Search Was Reasonable Under the Community Caretaking Doctrine. 10

D. Officer McNown Lawfully Obtained Evidence Upon Entering Mr. David's Home Under the Plain View Doctrine. 15

II. THE THIRTEENTH COURT OF APPEALS CORRECTLY DENIED MR. DAVID'S MOTION ON INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL DID NOT ATTACH PRIOR TO MR. DAVID'S FEDERAL INDICTMENT. 16

A. Mr. David's Sixth Amendment Right to Counsel Did Not Attach During the Plea Negotiations Because the State Had Not Used the Judicial Machinery to Signal Commitment to Prosecute. 17

B. Even if the Sixth Amendment Right to Counsel Had Attached, Mr. David's Motion On Effective Assistance Of Counsel Should Be Denied Because Mr. David Has Failed to Show Prejudice, as Required Under the Strickland Test. 21

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Arizona v. Hicks,
480 U.S. 321 (1987)……………………………………………………………7, 15

Brewer v. Williams,
430 U.S. 387 (1977)…………………………………………………………...17

Brigham City, Utah v. Stuart,
547 U.S. 398 (2006)……………………………………………………………7

Cady v. Dombrowski,
413 U.S. 433 (1973)…………………………………………………………Passim

Chad David v. United States,
2018 WL 1234567 (13th Cir. 2018)……………………………………….........x

Coleman v. Thompson,
501 U.S. 722 (1991) ………………………………………………………......21

Colorado v. Bertine,
479 U.S. 367 (1987)……………………………………………………………7

Coolidge v. New Hampshire,
403 U.S. 443 (1971)…………………………………………………………...15

Corrigan v. D.C.,
841 F.3d 1022 (D.C. Cir. 2016)………………………………………………..14

Estelle v. Smith,
451 U.S. 454 (1981)…………………………………………………………...17

Gideon v. Wainwright,
372 U.S. 335 (1963)…………………………………………………………...17

Hawkins v. United States,
113 A.3d 216 (D.C. 2015)……………………………………………………..10

Hunsberger v. Wood,
570 F.3d 546 (4th Cir. 2009) ………………………………………………..8, 14

Illinois v. Gates,
462 U.S. 216 (1983)……………………………………………………………xi

Johnson v. Zerbst,
304 U.S. 458 (1938) 17, 20

Kimmelman v. Morrison,
477 U.S. 365 (1986)....................xi

Kirby v. Illinois,
406 U.S. 682 (1972) 17, 18, 20, 21

Kyllo v. United States,
533 U.S. 27 (2001) 6

Lockhard-Bembery v. Sauro,
498 S.W.3d 170 (1st Cir. 2007) 8

Maryland v. Bui,
494 U.S. 325 (1990) 9

McNeil v. Wisconsin,
501 U.S. 171 (1991) 16, 17

Moore v. Illinois,
434 U.S. 220 (1977) 17

Ornelas v. US,
517 U.S. 690 (1996) xi

Payton v. New York,
445 U.S. 573 (1980) 6, 12

People v. Slaymaker,
2015 IL App (2d) 130528, 27 N.E.3d 642 (App. Ct. 2d Dist. 2015) 10

Powell v. Alabama,
55 S. Ct. 55 (1932) 17, 18

Simmons v. United States,
390 U.S. 377 (1968) 17

State v. Edmonds,
211 N.J. 117, 47 A.3d 737 (2012) 10

State v. Kern,
831 N.W.2d 149 (Iowa 2013) 10

Strickland v. Washington,
466 U.S. 668 (1984) ……………………………………………………..xi, 21, 22, 23

South Dakota v. Opperman,
428 U.S. 364 (1976) ………………………………………………………………7

Sutterfield v. City of Milwaukee,
751 F.3d 542 (7th Cir. 2014) ………………………………………………………12

Tennessee v. Garner,
471 U.S. 1 (1985) ……………………………………………………………...11

United States v. Bradley,
321 F.3d 1212 (9th Cir. 2003) ………………………………………………………9

United States v. Chad David,
No.: 20-PKS09-20-RCN15, 2017 WL 1234567
(S.D. Stap. July 15, 2017)…………………………………………………………….x

United States v. Derose,
74 F. 3d 1177 (11th Cir. 1996) ……………………………………………………...19

United States v. Erickson,
991 F.2d 529 (9th Cir. 1993) ………………………………………………………19

United States v. Gilmore,
776 F.3d 765 (10th Cir. 2015) ………………………………………………………9

United States v. Gouveia,
467 U.S. 180 (1984) ………………………………………………………17, 18, 19, 20

United States v. Hayes,
231 F. 3d 663 (9th Cir. 2000) (en banc???) ………………………………………19

United States v. Heinz,
983 F. 2d 609 (5th Cir. 1993) ………………………………………………………19

United States v. Holloway,
290 F.3d 1331 (11th Cir. 2002) ………………………………………………………8

United States v. Karo,
468 U.S. 704 (1984) ……………………………………………………………...10

United States v. King,
990 F.2d 1552 (10th Cir. 1993) ……………………………………………………..10

United States v. Lin Lyn Trading,
149 F.3d 1112 (10th Cir. 1998)…………………………………………………………...19

United States v. Mandujano,
425 U.S. 564 (1976) …………………………………………………………………...17

United States v. Marion,
404 U.S. 307 (1971) …………………………………………………………………...20

United States v. Markland,
635 F.2d 174 (2nd Cir. 1980) …………………………………………………………...8

United States v. Morrison,
449 U.S. 361 (1981) …………………………………………………………………..ix, 22

United States v. New York,
895 F.2d 1026 (5th Cir. 1990) ……………………………………………………………8, 15

United States v. Pichany,
687 F.2d 204 (7th Cir. 1982) ………………………………………………………………9

United States v. Quezada,
448 F.3d 1005 (8th Cir. 2006) ……………………………………………………………8, 15

United States v. Rohrig,
98 F.3d 1506 (6th Cir. 1996) ………………………………………………………8, 10, 15

United States v. Smith,
820 F.3d 356 (8th Cir. 2016) ……………………………………………………………10, 15

United States v. Sutton,
801 F.2d 1346 (D.C. Cir. 1986)………………………………………………………….19

Welsh v. Wisconsin,
466 U.S. 740 (1984) …………………………………………………………………...10

White v. Maryland,
373 U.S. 59 (1963) ………………………………………………………………………17

CONSTITUTIONS AND STATUTES

U.S. Const. amend. IV………………………………………………………………......x, 6

U.S. Const. amend. VI ……………………………………………………………..xi, 16

OTHER AUTHORITIES

David Fox, *The Community Caretaking Exception: How the Courts Can Allow the Police to Keep Us Safe Without Opening the Floodgates to Abuse*,
63 Wayne L. Rev. 407, 415 (2018) 11

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103 (2009) 11

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Respondent, the United States of America, the plaintiff in the United States District Court for the Southern District of Staples and the appellees in the United States Court of Appeals for the Thirteenth Circuit, respectfully submit this brief-on-the-merits in support of its request that this Court affirm the judgement of the court of appeals.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Staples appears in the record on pages 1-12 and is reported at *United States v. Chad David*, No.: 20-PKS09-20-RCN15, 2017 WL 1234567 (S.D. Stap. July 15, 2017). The opinion of the United States Court of Appeals for the Thirteenth Circuit appears in the record on pages 13-24 and is reported at *Chad David v. United States*, 2018 WL 1234567 (13th Cir. 2018).

STATEMENT OF JURISDICTION

A Formal Statement of Jurisdiction has been omitted in accordance with Rule 8(c) of the University of San Diego School of Law National Criminal Procedure Tournament.

CONSTITUTIONAL PROVISIONS INVOLVED

The text of the Fourth Amendment to the United States Constitution: "*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 (emphasis added).

The text of the Sixth Amendment to the United States Constitution: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been

previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, *and to have the Assistance of Counsel for his defence*." U.S. Const. amend. VI (emphasis added).

STANDARD OF REVIEW

This Court has not articulated a standard of review for determinations of reasonableness under the community caretaking doctrine. However, this Court's "strong preference for searches conducted pursuant to a warrant," *Illinois v. Gates*, 462 U.S. 216, 236 (1983), has resulted in *de novo* review of determinations of reasonable suspicion and probable cause as to warrantless searches. *Ornelas v. US*, 517 U.S. 690, 689-99 (1996). Therefore, this Court should apply a *de novo* standard of review to the issue of warrantless searches in this case.

This Court applies a "highly deferential" standard of review in evaluating the reasonableness of counsel's performance under the *Strickland* test. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (citing *Strickland v. Washington*, 466 U.S. 668, 689 (1984)). However, the Thirteenth Circuit Court of Appeals did not rely on *Strickland* and therefore this Court should apply a *de novo* standard of review to the issue of ineffective assistance of counsel in this case.

STATEMENT OF THE CASE

***Mr. David's Conspicuous Absence*:** The criminal defendant, Chad David ("Mr. David"), was a minister in Lakeshow, Staples, at the Lakeshow Revivalist Church. R. at 2, lines 2-4. Before his arrest, Mr. David attended Sunday service almost every Sunday, despite his old age of 72. *Id*., lines 9-10. Of the few time Mr. David could remember ever being absent from his church services, he was either sick or away for travel. Ex. C, pg. 4, lines 12-15.

Officer James McNown ("Officer McNown") is a 12 year patrol officer in Lakeshow. R. at 2, lines 5-6; Ex. A, pg. 1, lines 10-11. Officer McNown was also a frequent attendee of Mr. David's church and active member of the congregation. R. at 2. However, Officer McNown's last day as a member of the Lakeshow Revivalist Church was the same day on which the events giving rise to the case occurred.

On the morning of Sunday, January 15, 2017, Officer McNown attended the sunrise church service at Mr. David's church, expecting to find the elderly pastor leading the service. R. at 2-3. However, Mr. David never arrived and another congregation member had to lead the service. *Id*. Officer McNown and two other congregation members expressed concern for Mr. David's wellbeing. Julianne Alvarado, one service attendee, attempted to call Mr. David at his home to check on his safety and expressed grave concern when Mr. David did not answer. *Id* at 2. Jacob Ferry, a second service attendee expressed concern over having seen Mr. David drinking at a bar the previous evening. *Id*.

Officer McNown also expressed his concern at Mr. David's absence, worrying that the 72 year old may be sick with the Bandwagon Flu, of which a particularly nasty strain was spreading around Lakeshow at the time. *Id*.; Ex. A, pg. 3, lines 15-16. After the church service ended, Officer McNown went to check on Mr. David at his home. R. at 2-3. Once at Officer McNown's home, he heard loud "scream-o" music emanating from Mr. David's home and could see playing on the

television the film *The Wolf of Wall Street*, which is MPAA R-rated for "sequences of strong sexual content, graphic nudity, drug use, and language throughout, and for some violence."[1] R. at 3. Officer McNown knocked at Mr. David's front door and announced his presence, but after waiting two minutes there was no answer. *Id*. Finding the front door locked, Officer McNown checked Mr. David's backdoor, which was unlocked. *Id*. Officer McNown entered Mr. David's residence through the unlocked back door in order to check on Mr. David. *Id.*

Once inside, Officer McNown found the first floor to be like "his frat house," which was unusual but did not trigger any search of the first floor. *Id*. Because the film playing on the television was very loud and was spewing expletives, Officer McNown turned the television off. *Id*. Officer McNown could hear that the loud music was coming from upstairs, so he walked upstairs and opened the room from which the loud music was emanating. *Id*. There Officer McNown found Mr. David working in a "rage" to package mounds of cocaine into small ziplock bags. *Id*.; Ex. F. Seeing the naked criminal activity before him, Officer McNown detailed Mr. David and called local DEA agents to come to the scene. *Id*. Ultimately, 10 kilograms of cocaine were seized from Mr. David's home. R. at 8.

***Mr. David's Rejection of the Plea Deal*:** As defense counsel, Mr. David hired Keegan Long. R. at 3-4. On behalf of Mr. David, Mr. Long received a favorable plea bargain from federal prosecutors, which was valid for only 36 hours. *Id*. at 4. Prosecutors called Mr. Long on the day when the plea deal was set to expire but Mr. Long was not in his office and the plea deal expired after 36 hours with federal prosecutors not hearing from Mr. Long. *Id*. Upon the plea deal's

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[1] *See the Motion Picture Association of America's film rating statement online*, https://www.imdb.com/title/tt0993846/parentalguide.

expiration, prosecutors promptly indicted Mr. David with one count of unlawful possession with intent to distribute or dispense a controlled substance. *Id*.

***Summary of Proceedings*:** Following communications between Mr. David's defense counsel and federal prosecutors regarding a second plea deal, Mr. David filed two pretrial motions. R. at 5. The first motion was to suppress evidence under the Fourth Amendment and the second motion was seeking to be re-offered the initial plea deal claiming ineffective assistance of counsel under the Sixth Amendment. *Id*. The District Court for the Southern District of Staples ("Southern District Court") properly denied both of Mr. David's motions, finding first that Officer McNown did not need a warrant to search Mr. David's house because he was acting as a community caretaker and second that there was no showing of prejudice on Mr. David's Sixth Amendment claim. R. at 12.

Subsequently, Mr. David appealed the district court's decision in the United States Court of Appeals for the Thirteenth Circuit ("The Thirteenth Circuit"). *Id*. at 13-14. The Thirteenth Circuit properly affirmed the Southern District Court's decision to deny Mr. David's pretrial motion to suppress evidence and properly affirmed the Southern District Court's decision to deny Mr. David's pretrial motion on ineffective assistance of counsel. *Id*. at 18.

SUMMARY OF THE ARGUMENT

This case presents the ideal opportunity for this Court to review the constitutionality of two important issues: (1) warrantless searches of private homes under the Fourth Amendment's community caretaking doctrine and (2) the Sixth Amendment right to counsel prior to indictment. These issues often impact criminal defendants but they also impact the State, whose interests in protecting the community and ensuring the constitutional rights of criminal defendants are currently frustrated by confusion among the circuit courts. Because of the uncertainty surrounding these issues, this Court should clarify these issues to the benefit of citizens and the State alike.

Fourth Amendment Suppression of Evidence Claim**:** The Thirteenth Circuit correctly affirmed the Southern District Court's denial of Mr. David's motion to suppress evidence because the search of Mr. David's home was exempted from the Fourth Amendment's general warrant requirement by the community caretaking doctrine. This Court recognized that local police officers routinely engage in "community caretaking functions" in their role of offering assistance to the public, outside of investigating crimes. This Court has found that the community caretaking doctrine exempts police from the general warrant requirement in certain circumstances and many circuit courts interpret the doctrine apply to the warrantless search of homes. This Court balances the "competing governmental and individual interests" regarding warrantless entry into private homes using a Fourth Amendment analysis focused on the "reasonableness" of the search.

The entry in this case was objectively reasonable under the community caretaking doctrine. The absence of an elderly pastor from his own church service and his failure to respond to phone calls or knocks at his front door justified the officer's minor intrusion of a private home to perform a wellbeing check. The State and the public alike want officers to fully engage in community caretaking functions without fear of violating the Fourth Amendment. Because the officer acted reasonably in this case and the State's interest in community caretaking outweighed the defendant's right to privacy in his home, this Court should affirm the decision of the Thirteenth Circuit.

Sixth Amendment Ineffective Assistance of Counsel Claim: The United States Supreme Court maintains a bright-line rule that the Sixth Amendment right to counsel does not attach until the State has used the judicial machinery to signal a commitment to prosecute. Under Decades of Supreme Court jurisprudence, endorsed in a majority of circuit courts, Mr. David's effective counsel rights did not attach during pre-indictment negotiations.

This Court should uphold its interpretation of the Sixth Amendment consistent with the literal language, purpose, and proper use of the Sixth Amendment in this case by affirming the Thirteenth Court of Appeals in denying Mr. David's pretrial motion.

ARGUMENT

The State's interest before the Court stretch far beyond the singular outcome of this particular case. There is need for clarity from this Court and therefore a request for a deferential affirmation of the lower court's holding will not suffice. The issues implicated in this case – the Fourth Amendment's community caretaking doctrine and the Sixth Amendment's right to effective counsel – stand to substantially impact the State's ability to protect American communities and to effectively prosecute criminals. Local police must know how to train officers to engage in their community caretaking functions and criminal prosecutors must know when their discretionary functions end and constitutional protections begin. For those reasons, the State respectfully asks this Court to affirm the Thirteenth Court of Appeals and adopt the affirmative positions described herein.

I. THE THIRTEENTH COURT OF APPEALS CORRECTLY DENIED MR. DAVID'S MOTION TO SUPPRESS EVIDENCE BECAUSE THE COMMUNITY CARETAKING DOCTRINED EXEMPTED OFFICER MCNOWN'S SEARCH OF MR. DAVID'S HOME FROM THE FOURTH AMENDMENT'S GENERAL WARRANT REQUIREMENT.

The community caretaking doctrine originated in 1973 with this Court's decision *Cady v. Dombrowski*. There, this Court held that police officers routinely engage in "community caretaking functions," which are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). That case exempted police from the Fourth Amendment's general warrant requirement when conducting a warrantless search of an automobile and a majority of circuit courts have either

extended the community caretaking doctrine to warrantless searches of the home or refused to limit the doctrine merely to automobiles.

The Supreme Court has remained silent on whether the community caretaking doctrine applies to private homes, thus allowing different circuits to afford varying levels of protection in the context of the home. This presents problems both for citizens and for law enforcement officers, who must engage in community caretaking functions on a regular, if not daily, basis. This Court should affirm the lower district and appellate courts by holding that the community caretaking doctrine exempted Officer McNown's warrantless search of Mr. David's home for three reasons. First, the fundamental question for a community caretaking analysis is the Fourth Amendment's touchstone of "reasonableness." Second, a hybrid test for reasonableness resolves the circuit split and extends the community caretaking doctrine to homes using principles created by this Court. Third, Officer McNown's search was reasonable under the hybrid test.

A. The Fourth Amendment Touchstone of "Reasonableness" Governs Exceptions to the General Warrant Requirement, Including the Community Caretaking Doctrine.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. This Court has held that the sanctity of the home is especially important because it stands at the "very core of the Fourth Amendment." *Kyllo v. United States*, 533 U.S. 27, 31 (2001). Warrantless searches of the home are presumed unreasonable with very few exceptions. *Id*. (citing *Payton v. New York*, 445 U.S. 573, 586 (1980) (holding that "searches and seizures *inside a home* without a warrant are presumptively unreasonable.").

Nevertheless, this Court recognizes several well-established exceptions, only two of which are raised in this case. First, the "community caretaking doctrine" provides an exception for

officers acting in their role as community caretakers. *See Cady*, 413 U.S. at 433. Second, officers may seize evidence in their plain view under the appropriately named "plain view doctrine." *Arizona v. Hicks*, 480 U.S. 321, 321-22 (1987). These exemptions spring from the inherent balancing taking place at the heart of the Fourth Amendment: the interests of the State in having police officers perform their duties to protect the community must balance with the "sanctity of the home" under the Fourth Amendment. To achieve the right balance, this Court appeals to the touchstone of the Fourth Amendment, which is "reasonableness." *Brigham City, Utah v. Stuart*, 547 U.S. 398, 398 (2006) ("the Fourth Amendment's ultimate touchstone is reasonableness").

The fundamental question in *Cady* was whether the warrantless search of the automobile was "reasonable." *Cady*, 413 U.S. at 443. The Court held that it was reasonable as to automobiles but the Court neither extended nor restricted the application of the community caretaking doctrine to private homes. *Id.* Two subsequent decisions involving the community caretaking doctrine were also silent on expanding the doctrine to private homes. *South Dakota v. Opperman*, 428 U.S. 364, 369 (1976) (justifying inventory searches); *Colorado v. Bertine*, 479 U.S. 367, 381 (1987) (reaffirming that "community caretaking" functions are "totally divorced from the detection, investigation, or acquisition of evidence…"). Because this Court's touchstone for Fourth Amendment jurisprudence is reasonableness, it is in that frame that this Court should evaluate the issue of extending the community caretaking function to homes.

B. This Court Should Resolve the Circuit Split By Using a Hybrid Test Based in this Court's Own Jurisprudence.

The Supreme Court should establish clear principles of law, consistent with the Constitution, that subsequent courts can apply as the facts of any particular case dictate. As stated above, the Court did not prohibit courts from extending the doctrine in *Cady* and many circuit

courts have applied this Court's jurisprudence to the facts of subsequent cases, extending the community caretaking doctrine to the warrantless search of private homes. The few courts that have created unjustified boundaries to the community caretaking doctrine have thusly created a circuit split. The analysis provided below shows that a hybrid test, focused on reasonableness and balancing of interests, is the test that this Court should use in analyzing community caretaking cases both in this case and going forward.

The majority of circuit courts have not limited the community caretaker doctrine and the few courts that have done so incorrectly interpret this Court's decision in Cady.

So far, the Fifth, Sixth, and Eighth Circuit Courts of Appeals have extended the doctrine to homes. Warrantless searches were permitted in calls to domestic violence, to turn down loud music late at night, when officers had reasonable belief that an emergency existed. *United States v. New York*, 895 F.2d 1026 (5th Cir. 1990) (upholding warrantless entry into a home under the community caretaking doctrine in response to a domestic violence call); *United States v. Rohrig*, 98 F.3d 1506, 1516 (6th Cir. 1996) (upholding warrantless entry into a home under the community caretaking doctrine to turn down loud music late at night); *United States v. Quezada*, 448 F.3d 1005 (8th Cir. 2006) (upholding warrantless into a home under the community caretaking doctrine where officers have a "reasonable belief that an emergency exists requiring his or her attention"). Additionally, the First, Second, Fourth, Eleventh, and DC Circuit Courts of Appeals have refused to limit the doctrine to exclude homes. *See generally Lockhard-Bembery v. Sauro,* 498 S.W.3d 170 (1st Cir. 2007) (standard is whether the officer acted "within the realm of reason"); *United States v. Markland,* 635 F.2d 174 (2nd Cir. 1980); *Hunsberger v. Wood*, 570 F.3d 546 (4th Cir. 2009); *United States v. Holloway*, 290 F.3d 1331 (11th Cir. 2002).

Only the Third, Seventh, Ninth, and Tenth Circuit Courts of Appeals have limited the doctrine to exclude homes, misinterpreting the *Cady* decision. *United States v. Erickson*, 991 F.2d 529, 531-32 (9th Cir. 1993) ("*Cady* clearly turned on the 'constitutional difference' between searching a house and searching an automobile."); *but see United States v. Bradley*, 321 F.3d 1212, 1214-15 (9th Cir. 2003) (upholding officer's warrantless entry into a home under the emergency doctrine, as an extension of the community caretaking doctrine); *United States v. Pichany*, 687 F.2s 204 (7th Cir. 1982); *United States v. Gilmore*, 776 F.3d 765, 769 (10th Cir. 2015) (inexplicably wringing a probable cause requirement from *Cady*). Contrary to the interpretations of these circuits, the Supreme Court based its decision on the lodestar of Fourth Amendment jurisprudence, reasonableness. As the Court stated in the introduction to the *Cady* decision, "the ultimate standard set forth in the Fourth Amendment is reasonableness." *Cady*, 413 U.S. at 439. The Court also stated that the officer in *Cady* reasonably believed the automobile contained a gun, holding that "the search was not "unreasonable." *Id*. at 448. Although the Court said, "For the Fourth Amendment there is a constitutional difference between houses and cars," the Court did not hold warrantless entries of the home *per se* unreasonable under the community caretaking doctrine. *Id*.

This Court should affirmatively extend the community caretaking doctrine to homes and use a hybrid test to assess the reasonableness of a warrantless search of a private home.

As the circuit split discussed above shows, whether the community caretaking doctrine applies to residential searches is an open question before the Supreme Court. This Court should address this open question and hold that the community caretaking doctrine does apply to homes. Although most courts approach the community caretaking doctrine differently, this Court should first return to the fundamental Fourth Amendment principle of "reasonableness" and then "balance

the intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests." *Maryland v. Bui*, 494 U.S. 325, 331 (1990).

Therefore, Respondent urges this Court to adopt a hybrid of the reasonableness and balancing tests, in light of the totality of the circumstances, to assess whether an officer's community caretaking conduct is valid under the Fourth Amendment. Courts contemplating this hybrid test have looked to four factors based in the law, focusing on the central question of reasonableness. First, specific and articulable facts show that the search was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Hawkins*, 113 A.3d at 222 (citing *Cady*, 413 U.S. at 441). Second, there were no reasonable alternatives. *Id*. Third, the officer's action ended when the citizen or community was no longer in need of assistance. *Id*.[2] Fourth, the State's interests outweigh the citizen's interest in being free from minor government interference. *United States v. Smith*, 820 F.3d 356, 361 (8th Cir. 2016); *Rohrig*, 98 F.3d at 1516 (citing *Welsh v. Wisconsin*, 466 U.S. 740, 750 (1984)); *see also United States v. King*, 990 F.2d 1552, 1560 (10th Cir. 1993); *United States v. Karo*, 468 U.S. 704, 714 (1984). Under this hybrid test, looking at this Court's own core principles for a Fourth Amendment analysis, Officer McNown's search was reasonable under the community caretaking doctrine.

C. Officer McNown's Search Was Reasonable Under the Community Caretaking Doctrine.

Before applying the four factors of the hybrid test to this case, there are two preliminary matters. First, this Court should examine the reasonableness of Officer McNown's search by

[2] Several state courts have pioneered this factor as well. *See People v. Slaymaker*, 2015 IL App (2d) 130528, 27 N.E.3d 642 (App. Ct. 2d Dist. 2015); *State v. Kern*, 831 N.W.2d 149 (Iowa 2013); *State v. Edmonds*, 211 N.J. 117, 47 A.3d 737 (2012).

considering the facts known to Officer McNown at the time he made the decision to enter Mr. David's home. Although the Southern District Court correctly denied Mr. David's motion to suppress evidence, that court's reasoning belies confusion over the standard of intent for officers in the community caretaking analysis. *See* R. at 7-8 (analyzing Mr. David's intent). This Court has held that Fourth Amendment claims examine reasonableness from the perspective of a "reasonable officer on the scene." *Tennessee v. Garner*, 471 U.S. 1, 8-9 (1985). Therefore, the subjective intent of officers is not relevant in the community caretaking analysis and this Court should only assess the objective reasonableness of the search in this case.

Second, Officer McNown was acting in a community caretaking function at the time he entered Mr. David's home. There are three broadly recognized community caretaking functions, one of which is the "public servant function," which includes police action like checking on the homes of the elderly and infirm. David Fox, *The Community Caretaking Exception: How the Courts Can Allow the Police to Keep Us Safe Without Opening the Floodgates to Abuse*, 63 Wayne L. Rev. 407, 415 (2018) (citing Thomas N. Mcinnis, *The Evolution of the Fourth Amendment*, 103 (2009)). As the facts cited below demonstrate, Officer McNown was acting in his public servant function by checking on the elderly Mr. David in his home.

Applying the four factors of the proposed hybrid test, Officer McNown's warrantless search of Mr. David's home was reasonable and therefore comported with the Fourth Amendment.

Factor 1: Officer McNown's search was totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

First, specific and articulable facts showed that Officer McNown's search of Mr. David's home was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 436. Officer McNown entered Mr. David's home out of concern for the septuagenarian who was conspicuously absent from the church

service, which he routinely led, on the morning of the search. R. at 2. As he stated in his deposition, Officer McNown was "just eager to check the well-being of [Mr. David]." Ex. A, pg. 5. As the record shows, Officer McNown did not enter Mr. David's home to detect, investigate, or acquire evidence. In fact, Officer McNown stated on cross-examination that the search was not part of an investigation. *Id.*, pg. 7.

Although Petitioner argues that the record shows repeated instances in which Officer McNown expressed concern that something was wrong at Mr. David's house, Officer McNown never changed his role to an investigatory one. For example, Office McNown saw an unusual black Cadillac, which was popular among drug dealers, but he did not know where the car had come from and did not make a connection between the Cadillac and Mr. David's house. *Id.*, pg. 4. In another example, Officer McNown found Mr. David's house to be "really messy" and he found a notebook containing concerning notes, however he never deviated from his search of Mr. David. *Id.*, pg. 5. The fact that Officer McNown found evidence of cocaine distribution has no bearing on the community caretaking rationale for his search of Mr. David's home. Therefore, Officer McNown's search of Mr. David's home was totally divorced from the investigation of any criminal act.

Factor 2: Officer McNown had no reasonable alternatives to entering Mr. David's home to check on the elderly Mr. David.

Second, Officer McNown lacked any reasonable alternative to entering Mr. David's home. Not only could Officer McNown not have obtained a standard warrant in this case, Officer McNown did everything else practically available to him before resorting to entering Mr. David's home. As a matter of course, standard search warrants require probable cause as the basis of the warrant. *Payton*, 445 U.S. at 584. However, the availability of a traditional warrant should be immaterial to the community caretaking analysis. *Sutterfield v. City of Milwaukee*, 751 F.3d 542,

561 (7th Cir. 2014). As *Cady* requires, officers engaged in community caretaking must be divorced from the investigation of crime, which makes the acquisition of probable cause impossible. The only probable cause that Officer McNown could have had in this case was that a burglary had taken place in Mr. David's house. However, Officer McNown stated that he did not think someone might have unlawfully entered Mr. David's home. Ex. A, pg. 7.

Furthermore, Officer McNown explored virtually all alternatives to entering Mr. David's home before finally entering. Before even visiting Mr. David's house, Officer McNown worked with other concerned individuals to call Mr. David by phone, but to no avail. *Id*., pg. 2. Officer McNown knocked on the front door at least once, he peered through Mr. David's front window, and he went to his back yard before finally entering Mr. David's unlocked back door. *Id*., pg. 4-7. In other words, Officer McNown had no reasonable alternatives available besides entering Mr. David's house to check on the elderly pastor.

Factor 3: Officer McNown ended his search when he found Mr. David.

Third, Officer McNown searched Mr. David's home only until he found Mr. David, which was the purpose of his search. It is a common sense requirement that warrantless searches of the home must end upon the satisfaction of the condition giving rise to the search. In this case, the satisfaction of the cause of the search was Officer McNown finding Mr. David. As Officer McNown stated both in his deposition and his police report, he moved through Mr. David's house, eventually upstairs, in order to find Mr. David. Ex. F. There is no dispute that Officer McNown discovered Mr. David surrounded by powder cocaine, which Mr. David was packaging into baggies. Despite the circumstances, Officer McNown did not continue his search after he found Mr. David. Ex. A, pg.6.

This Court could reasonably come to a different conclusion as to this factor if Officer McNown had found Mr. David to be well but had continued his search through Mr. David's home nonetheless. For example, the D.C. Circuit heard a case involving a second search looking for unspecified materials. *Corrigan v. D.C.*, 841 F.3d 1022, 1036 (D.C. Cir. 2016). There, the court held that the search was not within the community caretaking exception. *Id*. However, the facts in this case are much more similar to those the Fourth Circuit faced in *Hunsberger*. In that case, an officer ended his search after finding the family to be well and the officer left the house. *Hunsberger*, 570 F.3d at 556. This Court should find, as the Fourth Circuit did in *Hunsberger*, that Officer McNown's search ended upon the satisfaction of the cause of the search and is therefore covered by the community caretaking doctrine.

Factor 4: The State's interests outweigh Mr. David's interest in being free from this minor interference.

Fourth, the State's community caretaking interests outweighed Mr. David's interest in the privacy of his home. Entry into a home under the community caretaking doctrine is never taken lightly, but the balancing of interests in this case show why Officer McNown's search was reasonable. As discussed above, the community caretaking function in which Officer McNown was operating in this case was as a public servant, ostensibly checking in on Mr. David as a concerned member of his congregation and officer of the peace. *See supra* p. 11. Here, Officer McNown's intrusion was slight and his search was limited. Upon entry, Officer McNown observed the first floor of Mr. David's house as being messy "like [his] frat house," but Officer McNown did not expand the scope of his search to include the rest of the first floor. Ex. A, pg. 5. Upon hearing music coming from upstairs, Officer McNown went up to the room from which the music was emanating and opened the door, Officer McNown did not search anywhere else on the second floor. *Id*., pg. 6. Officer McNown's intrusion into Mr. David's house was minor, going in only to

find Mr. David. The fact that Mr. David was engaged in illicit activity and was surrounded by 10 kilograms of cocaine does not elevate his privacy interest above those of the State in this case.

Courts facing facts like these consistently hold that community caretaking interests outweigh privacy rights. In the Eighth Circuit, the court held that the State's interests outweighed the homeowner's privacy interests when officers entered to ensure the safety of those inside the home who were nonresponsive. *Smith*, 820 F.3d at 361; *see also Quezada*, 448 F.3d at 1006 (holding permissible an officer's entry in fear of an occupant's safety). The Sixth Circuit held in *Rohrig* that officers' entry was permissible when entering to respond to a call about loud music. *Rohrig*, 98 F.3d at 1527. Although no case is a perfect fit for a fact specific analysis such as this, the totality of circumstances urge this Court to hold that the State's role in community caretaking is too important to be outweighed in this case by a minor intrusion.

D. Officer McNown Lawfully Obtained Evidence Upon Entering Mr. David's Home Under the Plain View Doctrine.

This Court has long held that "under certain circumstances the police may seize evidence *in plain view* without a warrant," including situations where "the initial intrusion that brings the police within plain view of such [evidence] is supported…by one of the recognized exceptions to the warrant requirement." *Hicks*, 480 U.S. at 326 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971)). In fact, courts have applied the plain view doctrine to evidence obtained where the initial intrusion is under the community caretaking doctrine. *Quezada*, 448 F.3d at 1008 (holding that a protruding from beneath a man lying down on the ground was admissible under the plain view doctrine); *Smith*, 820 F.3d at 362 (holding that a firearm laying on a bed in the room where an endangered citizen was found was admissible under the plain view doctrine); *New York*, 895 F.2d at 1030 (holding that when officers had lawful entry into one room of a home, guns

visible in another room were admissible under the plain view doctrine); *Rohrig*, 98 F.3d at 1525-26 (holding that marijuana visible upon entry to defendant's home was admissible under the plain view doctrine).

In this case, the evidence obtained was cocaine, which Mr. David appeared to be packaging for sale or distribution. R. at 3. It is undisputed that the cocaine obtained was in Officer McNown's plain view. Because Officer McNown had a right to be in Mr. David's room as part of his search of Mr. David's home under the community caretaking doctrine, the cocaine obtained is admissible under the plain view doctrine.

Furthermore, to the extent that Justice O'Neal's dissenting opinion in the Thirteenth Court of Appeals involves the plain view doctrine, applying the plain view doctrine in this case presents no constitutional danger. In fact, applying the plain view doctrine to the evidence in this case makes an important statement that police officers cannot feign blindness after seeing illegal narcotics presented in their view. Here, Officer McNown saw a large amount of cocaine in his plain view and had Mr. David's home not contained this illicit substance, the issue would not even be before the Court today. Ex. F. For these reasons, Mr. David's motion to suppress evidence is an inappropriate remedy and the lower courts' dismissal should be affirmed.

II. THE THIRTEENTH COURT OF APPEALS CORRECTLY DENIED MR. DAVID'S MOTION ON INEFFECTIVE ASSISTANCE OF COUNSEL BECAUSE THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL DID NOT ATTACH PRIOR TO MR. DAVID'S FEDERAL INDICTMENT.

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense. U.S. Const. amend. VI. This Court has stated that the Sixth Amendment right to counsel "does not attach until a prosecution is commenced, that is, at or after the initiation of adversary criminal proceedings – whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *See McNeil v.*

Wisconsin, 501 U.S. 171, 175 (1991). The rationale behind this Court's bright-line rule is that an accused is entitled to counsel at any 'critical stage of the prosecution.' As the Court in *Simmons v. United States* explained, post-indictment stages are critical but pre-indictment stages, before any prosecution has occurred, are not critical stages. *See Simmons v. United* States, 390 U.S. 377, 382-83 (1968); *see also Kirby v. Illinois*, 406 U.S. at 690. Because Mr. David's prosecution was in the pre-indictment stage, his Sixth Amendment right to effective counsel had not attached.

A. Mr. David's Sixth Amendment Right to Counsel Did Not Attach During the Plea Negotiations Because the State Had Not Used the Judicial Machinery to Signal Commitment to Prosecute.

This Court should affirm the Thirteenth Court of Appeal's denial of Mr. David's motion to be re-offered the plea deal for three reasons. First, the decades of Supreme Court jurisprudence upholding a bright-line rule that the Sixth Amendment does not attach prior to adversarial judicial criminal proceedings. Second, the majority of the circuits follow the binding Supreme Court precedent that applies this bright-line rule. Third, upholding the bright-line rule that the Sixth Amendment does not attach until after an indictment is consistent with the literal language, the purpose, and proper use of the Sixth Amendment.

Decades of Supreme Court binding precedent supports affirming the Thirteenth Court of Appeal's holding that the Sixth Amendment does not attach in pre-indictment plea negotiation contexts.

Since the landmark 1932 opinion *Powell v. Alabama*, this Court has consistently reiterated that a person's Sixth Amendment right to counsel attaches only at or after the time that adversarial judicial proceedings have been initiated. *See United States v. Gouveia*, 467 U.S. 180, 187-88 (1984) (citing *Kirby*, 406 U.S. at 688); *Estelle v. Smith*, 451 U.S. 454, 469-70 (1981); *Moore v. Illinois*, 434 U.S. 220, 226-27 (1977); *Brewer v. Williams*, 430 U.S. 387, 398-99 (1977); *United States v. Mandujano*, 425 U.S. 564, 581 (1976); Gideon *v. Wainwright*, 372 U.S. 335 (1963); *White*

v. Maryland, 373 U.S. 59 (1963); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Powell v. Alabama*, 55 S. Ct. 55 (1932). The starting point of our whole system of adversarial criminal justice is the moment at which the State formally commits itself to prosecute. *Kirby*, 406 U.S. at 689-90. Only when the State has committed itself to prosecute, and only when the defendant is faced with the prosecutorial forces of the State, are the guarantees of the Sixth Amendment applicable. *Id.* at 689 (citing *Powell v. Alabama,* 287 U.S. at 66-71).

In *United States v. Gouveia*, this Court reversed the Ninth Court of Appeals, which had departed from the Court's consistent interpretation of the Sixth Amendment in pre-indictment contexts. *Gouveia*, 467 U.S. at 189. The Court explained that the Ninth Court of Appeals had "fundamentally misconceived the nature of the right to counsel guarantee." *Id*. Writing for the majority, Justice Rehnquist explained that the Ninth Circuit erred in finding a violation of the defendant's Sixth Amendment right to counsel when the defendant was held in administrative detention during a pre-indictment investigatory phase. *Id*. at 185-87.

Furthermore, the Sixth Amendment right to counsel does not attach to pre-indictment plea proceedings. Mr. David's plea negotiations and ineffective assistance of counsel occurred between Monday, January 16, 2017 at 8:00 AM and January 17,2017 at 10:00 PM. R. at 4. However, Mr. David was not indicted until the morning of January 18, 2017. *Id.* Before the January 18, 2017 indictment, there were no federal charges against Mr. David for which the Sixth Amendment right to counsel could attach. Therefore, Mr. David has no basis to complain about the effectiveness of his counsel in the pre-indictment plea proceedings in this case.

The majority of circuit courts have upheld the Supreme Court's binding precedent by finding that the Sixth Amendment does not attach to pre-indictment plea negotiations.

The Fifth, Sixth, Ninth, Tenth, Eleventh, D.C., and Thirteen Circuits have followed binding Supreme Court precedent to hold that the Sixth Amendment right to counsel does not attach to

pre-indictment plea negotiations. *See United States v. Heinz*, 983 F.2d 609, 612 (5th Cir. 1993) (holding current law teaches that the Sixth Amendment right to counsel does not attach until or after the time formal adversary judicial proceedings have been initiated); *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018) (holding Turner's Sixth Amendment right to counsel had not yet attached during those pre-indictment plea negotiations); *United States v. Hayes,* 231 F.3d 663, 669-71 (9th Cir. 2000) (*en banc*) (held Sixth Amendment right did not attach pre-indictment); *United States v. Lin Lyn Trading*, 149 F.3d 1112, 1117 (10th Cir. 1998) (held Sixth Amendment right did not attach pre-indictment); *United States v. Derose*, 74 F.3d 1177, 1185 (11th Cir. 1996) (held the Sixth Amendment does not attach before a defendant is accused or arrested); *United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986) (held Sixth Amendment right did not attach pre-indictment); *David v. United States*, No. 125-1-7-720 (13th Cir. 2018) (held the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations). This court should uphold its bright-line rule precedent that the Sixth Amendment does not attach pre-indictment.

The plain language, purpose, and proper use of the Sixth Amendment support the finding that the Sixth Amendment does not attach in pre-indictment plea negotiations.

The interpretation of the Sixth Amendment right to counsel attaching only at or after the adversary judicial criminal proceedings begins is consistent with both the literal language and purpose of the Sixth Amendment. *See Gouveia*, 467 U.S. at 188-89. Justice Stevens explains that the literal language of the Sixth Amendment requires the existence of both a "criminal prosecution" and an "accused" in order for the right to counsel to attach. *See Id*. at 188. At the time of the plea negotiations from January 16, 2018 to January 17, 2018, there did not exist a "criminal prosecution" against Petitioner and he was not an "accused" because the criminal prosecution and accusation did not occur until Petitioner was indicted on January 18, 2018. R. at 4.

Furthermore, finding the Sixth Amendment does not attach to Mr. David's pre-indictment plea negotiations is consistent with the core purpose of the right to counsel, which is to "assure aid at trial" and "protect [the Petitioner] when brought before a tribunal with power to take his life or liberty." *See Gouveia*, 467 U.S. at 188-89 (citing *Johnson*, 304 U.S. at 462-63). Here, Mr. David has neither yet been to trial nor has he been brought before a tribunal. Therefore, Mr. David is not guaranteed the right to counsel during his plea negotiations, which took place before his indictment.

Finally, even though the Sixth Amendment does not attach to plea negotiations prior to an indictment, there are safeguards in place such as the general scrutiny of criminal prosecutions under the Due Process Clause of the Fifth and Fourteenth Amendments. *See Kirby*, 406 U.S. at 690-91. This Court cautioned against confusing the purpose of the right to counsel with the purposes that are served by the Fifth Amendment's Due Process guarantee. *Gouveia*, 467 U.S. at 191. While there exist legitimate concerns of the possibility of prosecutors abusing their power, this possibility "is not itself insufficient reason to wrench the Sixth Amendment from its proper context." *See United States v. Marion*, 404 U.S. 307, 321-22 (1971).

This court should find that the Sixth Amendment right to counsel does not attach to pre-indictment plea negotiations because such a holding strikes the appropriate constitutional balance between the interest of prompt and purposeful investigation of an unsolved crime and the right of a suspect to be protected from prejudicial procedures. *See Kirby*, 406 U.S. at 691. In conclusion, as this court stated, "there can be no constitutionally ineffective assistance of counsel where there is no Sixth Amendment right to counsel in the first place." *See Coleman v. Thompson*, 501 U.S. 722, 752 (1991).

B. Even if the Sixth Amendment Right to Counsel Had Attached, Mr. David's Motion On Effective Assistance Of Counsel Should Be Denied Because Mr. David Has Failed to Show Prejudice, as Required Under The Strickland Test.

Under this Court's *Strickland* Test, Mr. David is required to show two components to establish ineffective assistance of counsel. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984). First, Mr. David must show that his counsel's performance was deficient by proving that his attorney did not functioning as the "counsel" guaranteed under the Sixth Amendment. *Id*. Second, Mr. David must show that his counsel's deficient performance prejudiced his defense by proving that his counsel's errors deprived him of a fair trial with a reliable result. *Id*. Mr. David's failure to prove both components of the *Strickland* Test result in no remedy under an ineffective assistance of counsel claim. *Id*.

In this case, both parties have stipulated that Mr. David's first lawyer, Mr. Long was ineffective when acting as Mr. David's counsel. R. at 8-9. Therefore, the State concedes the first prong of the *Strickland* Test. However, the remaining second prong of the *Strickland* Test, requiring that Mr. David demonstrate prejudice as a result of the ineffective assistance of counsel, is addressed below. The Sixth Amendment guarantees that Mr. David had the assistance necessary to justify reliance on the outcome of any criminal proceedings against him; however, an error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. *See Strickland,* 466 U.S. at 691-92.

There is a high standard for setting aside a judgment because counsel's error might not have any effect on the court's judgment. *Id*. Accordingly, as this Court explained in *Strickland* that in order to require a remedy, a petitioner must affirmatively prove that the ineffective assistance of counsel had an actual adverse effect on his defense. *See Strickland*, 466 U.S. at 671, 692-93. Mr. David has failed to demonstrate any prejudice as the result of his counsel providing ineffective

representation in the plea negotiation phase for two reasons. First, Mr. David has not gone to trial. Second, Mr. David has not shown a reasonable probability that he would have accepted the favorable plea.

First, Mr. David cannot meet the second prong of the Strickland Test because he has not gone to trial, does not have an adverse conviction, and will not suffer prejudice if he is found not guilty of the alleged crime.

When analyzing the second prong of the *Strickland* test, this Court looks to an ineffective counsel's errors undermining the reliability of Mr. David's criminal proceeding. *Id*. at 693. However, "it is not enough for the [Petitioner] to show that the [ineffective counsel's] errors had some conceivable effect on the outcome of the proceeding." *Id*. A reasonable probability is a probability sufficient to undermine the confidence in the outcome of Mr. David's trial and prove prejudice caused by the ineffective assistance of counsel. *Id*. at 694. As in *Morrison*, there is no effect of a constitutional dimension which needs to be purged to make certain that Mr. David has been effectively represented especially because Mr. David has not been tried or convicted for the charge. *See United States v. Morrison*, 449 U.S. 361, 366 (1981). Therefore, even if Mr. David's the Sixth Amendment had been violated, he fails the second prong of the *Strickland* test because he cannot prove prejudice. Absent a showing of prejudice, there is no basis to justify interfering with the State's criminal prosecution of Mr. David.

Second, Mr. David cannot meet the required second prong of the Strickland Test because he has failed to show a reasonable probability that the result of the proceeding would have been different because there has not yet been a proceeding or a result.

For Sixth Amendment ineffective assistance of counsel claims, dismissal of the indictment is plainly inappropriate absent demonstrable prejudice. *Id*. at 365 (applying the test for ineffective assistance of counsel under *Strickland*, 466 U.S. at 668). In *Strickland*, the Court explained that the Petitioner must show there is a reasonable probability that, but for his counsel's unprofessional

errors, the result of the proceeding would have been different. *See Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the criminal proceeding's outcome. *Id*. Because Mr. David has not been in a proceeding or received a result, he is unable to prove with any probability, much less a reasonable probability, that either the proceeding or the result would have been different but for the ineffective assistance of counsel he received from Mr. Long. Therefore, Mr. David has not met his burden of fulfilling the second prong of the *Strickland* Test and therefore cannot raise a claim for ineffective assistance of counsel under the Sixth Amendment.

CONCLUSION

For the foregoing reasons, Respondent respectfully requests that this Honorable Court AFFIRM the Court of Appeals for the Thirteenth Circuit and UPHOLD the judgment from the United States District Court for the Southern District of Staples denying Mr. David's two motions to suppress evidence and to be re-offered his plea deal.

Respectfully Submitted,

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Team R35

Counsel for Respondent