R36

No. 4-422

IN THE

Supreme Court of the United States

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

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1. Is a warrantless search conducted by law enforcement acting as community caretakers in a non-investigatory role consistent with the Fourth Amendment when it takes place in a home?
2. Does the Sixth Amendment right to effective counsel attach during plea negotiations prior to an indictment or any other formal judicial proceeding?

STATEMENT OF THE FACTS

This is a case about the government's ability to ensure the welfare of the community it serves. On January 15, 2017, Officer James McNown, a patrol officer in Lakeshow, Staples attended his regular 7:00 AM Sunday service at the Lakeshow Community Revivalist Church. R. at 2. Officer McNown had been a police officer for 12 years in the City of Lakeshow. Ex. A, pg. 1, lines 8-11. He had been attending services at Lakeshow Community Revivalist Church for about four months. Ex. A at pg. 2, line 2. Petitioner Chad David ("Petitioner") led the congregation each week at the church for the 7:00 AM service. Ex. C, pg. 1, line 13.

On the morning of January 15, however, Petitioner was conspicuously absent which was unusual because he regularly attended the service. R. at 2. Julianne Alvarado, a regular churchgoer, tried calling Petitioner at his home to check on him but he did not answer. R. at 2. She was nervously shaking and expressed concern to Officer McNown for Petitioner's well-being as this was unlike him. R. at 2. Another church attendee, Jacob Ferry, told Officer McNown that he thought he saw Petitioner at a local bar the night before. R. at 2. Officer McNown told the worried churchgoers that he would check on Petitioner after the service, since his patrol route began at 9:00 AM. R. at 2.

At 8:50, the service concluded. R. at 2. At 9:00, Officer McNown began his shift and made an initial stop at Starbucks to pick up a hot tea to bring to Petitioner. R. at 2. After that, he drove immediately to Petitioner's neighborhood. R. at 2. Upon arriving at the gated community, he noticed a black Cadillac SUV with Golden State plates leaving the complex. This struck Officer McNown as noteworthy since, in Officer McNown's 12 years of experience, these SUVs typically were driven by drug dealers and there had been an influx of Golden State drugs coming into Lakeshow in recent years. R. at 2.

Officer McNown arrived at Petitioner's home at 9:30 AM and walked to the front door. R. at 2. Petitioner's car was in the driveway and every door appeared to be shut. R. at 2. Right away, he noticed loud, scream-o music, with a lot of cursing in the lyrics, emanating from inside the house. Ex. A, pg. 4, lines 15-17. At the front door, Officer McNown knocked and announced his presence. R. at 3. After waiting two minutes, there had been no answer. R. at 3. Officer McNown proceeded to peer through the window next to the front door, where he saw *The Wolf of Wall Street*, an R-rated movie playing on the television with nobody watching it inside. R. at 3. Officer McNown found both the music and the film that was playing to be odd based on his knowledge of Petitioner's age and profession. R. at 3. Officer McNown tried to open the front door but it was locked. R. at 3. Out of concern for Petitioner's well-being and to deliver the hot tea, Officer McNown went around to the rear of the house and, assuming that Petitioner would not be able to hear the knocking, entered through an unlocked back door. R. at 3; Ex. A, pg. 5, lines 11-12.

Upon entering the home, Officer McNown noticed that the first floor was extremely messy with items strewn everywhere and nobody around. Ex. A, pg. 5, lines 19-21. He approached the loud television to turn it off and make it easier to hear. R. at 3. While there, he found a small notebook with the name "Julianne Alvarado" written on it and the words "ounce" and "paid". Ex. A, pg. 5, lines 22-23. Having not abated his concern for Petitioner's safety, Officer McNown proceeded upstairs, where he could hear the loud music playing. R. at 3. He arrived at a closed door which seemed to be the source of the music and opened it in order to check to see if Petitioner was in there. R. at 3. When he opened the door, Officer McNown saw Petitioner, in a fit of rage, packaging powdered cocaine into tiny ziplock bags. R. at 3; Ex. A, pg. 6, lines 6-7. At this point, Officer McNown detained Petitioner in handcuffs and, as per LPD protocol when dealing with

such a large amount of narcotics, called the department to have a DEA agent dispatched to the address. R. at 3.

DEA Agent Colin Malaska arrived at Petitioner's house within approximately 30 minutes and started investigating the scene. R. at 3. Agent Malaska read Petitioner his Miranda rights and began to question him about the drugs. R. at 3. During this conversation, Petitioner indicated that he would give up his suppliers because he was afraid for his safety and for the safety of his church. R. at 3.

Once Petitioner was transported to a federal detainment facility, he called Keegan Long, a defense lawyer and attendee of his church. R. at 3–4. Petitioner was aware that Mr. Long was an alcoholic when he asked Mr. Long to represent him. R. at 4.

Agent Malaska later contacted the prosecution to express the agency's desire to obtain information about a suspected drug kingpin from Petitioner. R. at 4. Agent Malaska encouraged the prosecution to offer a favorable plea deal before filing any charges so that there would be less public knowledge about the arrest, which Agent Malaska worried would tip-off the kingpin. R. at 4.

The prosecutors decided to hold off on filing charges and offered a plea bargain of one year in prison in exchange for the names of Petitioner's suppliers. R. at 4. The offer was valid for 36 hours. R. at 4. The prosecutors emailed this offer to Petitioner's attorney, Mr. Keegan Long, on Monday, January 16, 2017 at 8:00 AM. R. at 4. The offer was set to expire on January 17, 2017 at 10:00 PM. Mr. Long was at a bar, drinking, when he received the emailed offer. R. at 4. Mr. Long saw the email from the prosecutor but failed to accurately read the information regarding the time limit on the plea deal. R. at 4.

When the prosecutor called Mr. Long's office to check the status of the plea offer, Mr.

Long did not answer his phone. R. at 4. The prosecutor left a voice message inquiring about the status of the plea offer, but Mr. Long did not return this call. R. at 4. The offer expired before Mr. Long communicated the plea offer to Petitioner or responded to the prosecutor. R. at 4.

Petitioner was subsequently indicted on one count of violating 21 U.S.C. § 841. R. at 4. When contacted by Ms. Kayla Marie, the prosecutor assigned to Petitioner's case, Mr. Long stated that he had failed to communicate the plea offer to Petitioner. R. at 4. Mr. Long then contacted Petitioner and informed him of this error. R. at 4. Petitioner fired Mr. Long as counsel and subsequently hired a new criminal defense lawyer, Michael Allen, to represent him. R. at 4. Both parties have stipulated that Mr. Long was ineffective in his representation of Petitioner.

After Petitioner was indicted, Mr. Allen inquired about the possibility of another plea offer for Petitioner. R. at 5. Ms. Marie declined Mr. Allen's request because the purpose for offering the initial plea deal had elapsed and the government would not receive any substantial benefit by extending another plea offer to Petitioner. R. at 5.

Petitioner concurrently filed two pretrial motions in the United States District Court for the Southern District of Staples. R. at 1. The first was a motion to suppress the evidence obtained on the date of his arrest under the Fourth Amendment. The second was a motion to be re-offered the plea deal that the government originally conveyed to his attorney. The District Court denied both motions and held that (1) Officer McNown did not need a warrant to search Petitioner's house because he was acting as a community caretaker, which does extend to searches of the home, and (2) although the Sixth Amendment right to effective counsel extends to criminal proceedings prior to indictment, Petitioner did not suffer prejudice. R. at 12.

On appeal, the United States Court of Appeals for the Thirteenth Circuit upheld the District Court's decision in part. R. at 14. The court upheld the denial of Petitioner's motion to

suppress evidence and found that the Sixth Amendment right to effective counsel does not extend to plea negotiations prior to an indictment. R. at 14. The decision of the District Court upholding Petitioner's conviction was affirmed. R. at 18.

Petitioner appealed from his conviction, and this Court granted Petitioner's petition for certiorari, limited to the two issues presented above.

SUMMARY OF THE ARGUMENT

I. Community Caretaking Exception to the Warrant Requirement

The Fourth Amendment of the United States Constitution affirms the right of the people to be free from unreasonable searches. Warrantless searches are presumed to be unreasonable, although several well-established exceptions to this presumption exist. Reasonability is at the core of the Fourth Amendment and determines when an exception withstands government scrutiny. The warrantless search here falls squarely within an established exception to the warrant requirement and this Court should thus affirm the Court of Appeals for the Thirteenth Circuit in denying Petitioner's motion to suppress.

One such exception to the warrant requirement is the community caretaker exception, first recognized by the Supreme Court in *Cady*. Under the exception, a search is valid if it is conducted pursuant to community caretaking functions that are totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. Though *Cady* concerned a search of a vehicle, this Court has never presided over a community caretaking search of a home. Circuit courts have split on whether the searches can extend to the home, with the Fifth, Sixth, and Eighth Circuits finding that under some circumstances, the search of a home as a community caretaker is reasonable.

State courts have primarily governed the determination of the reasonableness of a home search conducted under the community caretaking doctrine. Generally, objective reasonableness of an officer is the standard by which the exception is triggered. Where there is an objectively reasonable belief that an individual is in harm's way or may need assistance, the community caretaker exception can be exercised. Additionally, the government would need to show that under the circumstances, the government's interest in entering one's home outweighed the individual's right to be free from intrusion. Finally, the officer must contain the scope of the search to the precise community caretaking purpose that granted the search.

A welfare check of an elderly person, as occurred here, was objectively reasonable under the facts known to the officer at the time, went toward a significant government interest in keeping its citizens safe from harm, and the search was carefully tailored to its purpose of ensuring the safety and wellbeing of individuals. In such a situation, the community caretaking doctrine is not only reasonable, it is preferable. Where community caretaking is reasonably shown, the Court should explicitly hold that a search that is limited to such a purpose can take place in an individual's home.

II. Pre-Indictment Right to Counsel

The Sixth Amendment right to effective counsel does not attach during pre-indictment plea negotiations.

The Sixth Amendment right to counsel only attaches after a judicial proceeding in which a defendant is formally accused and prosecution is formally initiated. Adversary judicial proceedings that cause attachment include formal charges, preliminary hearings, indictments, informations, and arraignments. Plea negotiations do not animate the right to counsel.

Prosecutorial awareness or involvement is irrelevant to the attachment analysis. Without a formal proceeding, the right to counsel cannot attach.

The right to counsel is only applicable at critical stages of prosecution. The critical stage question is separate and distinct from the attachment question. Proceedings that occur prior to a formal judicial proceeding, such as an indictment, are not critical proceedings. This is true even when the same proceeding would be a critical stage after a formal proceeding. This Court has explicitly held that interrogations and identifications that occur prior to an indictment do not animate the Sixth Amendment right to counsel.

The Court has not recognized any exceptions to this rule, even in the context of plea negotiations. Manufacturing such an exception would be contrary to the text of the Sixth Amendment and to the prior decisions of this Court.

Only one circuit has actually decided the question of whether the right to counsel attaches during pre-indictment plea negotiations. That circuit held that the right to counsel does not attach prior to an indictment or other formal proceeding.

STANDARD OF REVIEW

Where there is a constitutional challenge to a warrantless search, this Court reviews *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Findings of fact should be reviewed for clear error and due weight given to the inferences drawn from trial judges. *Id.*

ARGUMENT

Here, the Court of Appeals for the Thirteenth Circuit properly upheld the District Court's denial of Petitioner's Motion to Suppress and affirmed Petitioner's conviction under the Fourth and Sixth Amendments of the Constitution. First, the search of petitioner's home was permissible under the community caretaker exception to the Fourth Amendment. Second, the Sixth

Amendment right to counsel does not attach during plea negotiations prior to an indictment. Therefore, the decision of the Thirteenth Circuit must be affirmed.

I. THE SEARCH OF PETITIONER'S HOME WAS PERMISSIBLE UNDER THE COMMUNITY CARETAKING EXCEPTION TO THE FOURTH AMENDMENT.

The community caretaking doctrine of the Fourth Amendment recognizes that police officers often "take actions not for any criminal law enforcement purpose but rather to protect members of the public." *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 553-54 (7th Cir. 2014). "It is a basic principle of Fourth Amendment law that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980). Nevertheless, because the ultimate touchstone of the Fourth Amendment is "reasonableness," the warrant requirement is subject to certain exceptions. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006); *Katz v. United States*, 389 U.S. 347, 357 (1967).

Federal courts have long recognized that police officers often engage in what the Supreme Court calls "community caretaking functions, 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); *see also Terry v. Ohio*, 392 U.S. 1, 13 (1968) ("Encounters are initiated by the police for a wide variety of purposes, some of which are wholly unrelated to a desire to prosecute for crime."). The community caretaking doctrine is thus used to "justify noninvestigatory searches and seizures in certain limited situations," when they are objectively reasonable. *United States v. Harris*, 747 F.3d 1013, 1017 (8th Cir. 2014).

The question of whether the doctrine can be used to justify the entry into a home where an officer has a reasonable belief that someone is in danger has been answered in the affirmative by multiple federal circuit courts. *See United States v. Quezada*, 448 F.3d 1005, 1007-08 (8th Cir. 2006); *United States v. Rohrig*, 98 F.3d 1506, 1521-25 (6th Cir. 1996); *United States v. York*, 895

F.2d 1026, 1029-30 (5th Cir. 1990). Additionally, many state courts have extended the community caretaker doctrine into the home, understanding the natural byproduct of a police officer's full day-to-day duties. However, this Court has not decided the question.

Here, there was an objectively reasonable belief that Petitioner was in danger. Second, the government's interest in entering the home far outweighed Petitioner's right to be free from government intrusion. Lastly, the scope of the search was carefully tailored to the community caretaking purpose.

A. The search of the home was a justifiable exercise of Officer McNown's community caretaking function because he had an objectively reasonable belief that Petitioner was in danger.

The search of Petitioner's home was permissible under the Fourth Amendment because Officer McNown had a reasonable belief that a person was in danger. *United States v. Smith,* 820 F.3d 356, 360 (8th Cir. 2016). Courts have typically measured this reasonableness based on the facts known to the officers at the time of entry. *Id.* State courts have been instrumental in crafting how exactly to determine whether the community caretaking exception is justifiable. While no general consensus exists, each test that states have implemented requires that officers act with objective reasonableness when acting in their role as community caretakers, either as part of a larger balancing test or a pure reasonableness test. *See State v. Gracia*, 826 N.W.2d 87, 94 (Wis. 2013) (applying three-part balancing test)*; see also People v. Ray*, 981 P.2d 928, 937 (Cal. 1999) (applying a pure reasonableness test – "given the known facts, would a prudent and reasonable officer have perceived a need to act in the proper discharge of his or her community caretaking functions?).

There are two primary assessments courts must make in determining if objective reasonableness is present. As the D.C. Court of Appeals held, using a hybrid of the two tests, the

government must show by specific and articulable facts that the government's conduct was totally divorced form the detection, investigation, or acquisition of evidence related to a criminal statute. *Hawkins v. United States*, 113 A.3d 216, 222 (D.C. 2015). First, the presence of specific and articulable facts is required which reasonably warrant the community caretaking intrusion. *State v. Lovegren*, 51 P.3d 471, 475 (Mont. 2002); *see also State v. Kleven*, 887 N.W.2d 740, 743 (S.D. 2016). Second, in accordance with the Supreme Court's requirement in *Cady*, the search must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." 413 U.S. at 441. This requires an objectively reasonable basis. *State v. Kramer,* 759 N.W.2d 598, 608 (Wis. 2009).

The first assessment of objective reasonableness requires that there be specific and articulable facts reasonably warranting the action, *United States v. Garner*, 416 F.3d 1208, 1213 (10th Cir. 2005). These facts must point to the direct need to act in a community caretaker role, such that the facts point to a citizen in need of help or someone in peril. *Lovegren*, 51 P.3d at 475-76. The specific and articulable facts known to Officer McNown at the time were directly in line with this purpose.

He was aware that Petitioner, a well-respected minister of a local church had failed to attend the Sunday service he typically led. This was at a church community and a minister with whom Officer McNown was familiar, though he had never been to Petitioner's house. He also knew that Petitioner was 72 years old. Because of how rare his absence was, Officer McNown was aware that a parishioner called Petitioner that morning and there was no answer. He was also aware that another parishioner claimed that he saw Petitioner at a local bar the night before. Upon arriving at Petitioner's house, Officer McNown was aware that the car Petitioner typically drove was in the driveway. There were no signs of a break-in but he could hear loud scream-o music coming from

somewhere in the house. Through the window, he knew that an R-rated movie was showing on the television but nobody in the living room was watching. He observed no movement in the house at all. He also knew nobody was responding to his knocking. Finally, when he entered, the first floor appeared very messy, as if it had been ransacked.

Officer McNown's decision to enter as a community caretaker was not just some tenuous hunch or a wild guess. Based on the facts he knew, he made a reasonable inference that a senior citizen who, with absolutely no notice, failed to preside over his weekly religious service, was in need of aid. Officer McNown was not acting as a police officer, investigating whether Petitioner was engaged in criminal wrongdoing; he was a neighbor, checking in on the welfare of an acquaintance. Though it turned out that Petitioner did not require any assistance, "[o]nly when an apparent threat has become an actual harm can officers rule out innocuous explanations for ominous circumstances." *Michigan v. Fisher*, 558 U.S. 45, 49 (2009). At that point though, it could have been too late.

The second assessment is whether there was an objectively reasonable basis to conclude that the officer's actions were totally divorced from the investigation of crime. State courts have generally concluded that rather than a strict bifurcation between criminal investigation and community caretaking, the question is whether there is an objectively reasonable basis that this was an exercise of the community caretaking function. *State v. Kramer*, 759 N.W.2d 598, 608 (Wis. 2009); *see also State v. Smathers,* 753 S.E.2d 380, 386 (N.C. Ct. App. 2014).

The court in *Kramer* drew similarities with *Whren v. United States*, where the Supreme Court held that where an objectively reasonable basis for probable cause exists, an officer's subjective motivations do not negate the probable cause determination. 517 U.S. 806, 813 (1996).

Similarly, the court noted that where an objectively reasonable basis for employing the community caretaker function exists, subjective intent is not a factor. *Kramer*, 759 N.W.2d at 606.

It makes practical sense to not require rigid categories for police actions since "the nature of a police officer's work is multifaceted." *Id.* at 608. While on patrol and going about regular duties, "an officer cannot always ascertain which hat the officer will wear—his law enforcement hat or her community caretaker hat." *Id.* These hats can blend or shift from one to the other in a matter of seconds. Adopting an objective reasonableness standard alleviates the difficulty that would come with demarcating where one role ends and the other begins.

In *State v. Pinkard*, officers received a reliable anonymous tip that the rear door of Pinkard's home was standing open and two occupants inside appeared to be sleeping near drugs and drug paraphernalia. 785 N.W.2d 592, 594 (Wis. 2010). The officers responded to the home out of concern for their "health and safety," fearing that they may have been victims of a crime or had overdosed on drugs. *Id.* They corroborated the tip by observing that the rear door was indeed ajar. *Id*. at 595. After repeatedly knocking and announcing their presence with no response of any type from Pinkard or his companion, officers entered the home. *Id.* They awoke the two individuals and seized the drugs and a gun which were in plain view. *Id.*

Unlike in *Pinkard*, there was no indication here that a crime had even been committed. Though a law enforcement concern, at least where there is an objectively reasonable basis for performing a community caretaker function, would not discredit the utilization of the doctrine, there was not one here. The only investigation that Officer McNown conducted was investigating the health and well-being of a citizen for whom the community was concerned. Rather than arming himself with his weapon, all he had was a hot tea to bring to a senior citizen he intended to check in on.

Here, based on the facts known to Officer McNown, there was an objectively reasonable basis to conclude that he was serving a community caretaking function. Reasonability is the bedrock principle for answering this question and it is a principle that undergirds all Fourth Amendment jurisprudence.

Furthermore, even if subjective motivations did matter, Officer McNown clearly acted with the intent of a community caretaker. After Sunday service, he promised other community members and friends who were concerned about Petitioner that he would stop by his home. On the way there, he stopped for a Starbucks hot tea, much more of a sign of somebody checking in on one's health than an officer investigating criminal activity at a home.

B. The government's interest in entering the home as a community caretaker outweighed Petitioner's right to be free from government intrusion.

The search was also justified because the government's interest in entering the home outweighed Petitioner's right to be free from intrusion. Balancing tests conducted by state courts have often broken this inquiry down into several relevant considerations—the degree of public interest and exigency of the situation; the attendant circumstances surrounding the search, including time, location, and degree of overt authority and force displayed; and the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished. *State v. Gracia*, 826 N.W.2d 87, 94 (Wis. 2013).

First, the degree of public interest in an officer's limited entry as a community caretaker must be mindful that the police engage in a "myriad of activities that ensure the safety and welfare of . . . citizens." *Commonwealth v. Livingstone*, 174 A.3d 609, 629 (Pa. 2017). "The modern police officer is a jack-of-all-emergencies, with complex and multiple tasks to perform in addition to identifying and apprehending persons committing serious criminal offenses." *Williams v. State*, 962 A.2d 210, 216-17 (Del. 2008). This view of policing is meant to encapsulate the full panoply

of duties that officers may undertake on a daily basis – such as giving directions, rendering aid, assisting those who cannot assist themselves, searching for lost children, and providing emergency services. 3 WAYNE R. LEFAVE, SEARCH AND SEIZURE § 5.4(c) (4th ed. 2004).

While implementing limits is not just constitutionally sound but preferential to avoid exploitation, requiring police to only engage in criminal investigation and prevention takes a stunted view of the aspirational officer and risks an undesirable scenario by which police feel forced to "stand outside an apartment, despite legitimate concerns about the welfare of the occupant, unless they can hear screams." *United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995).

Second, the attendant circumstances of the entry point towards the minimized intrusion on Petitioner's privacy. Officer McNown's entry was conducted on a Sunday morning at 9:30 AM, while it was light out but still early enough that loud music emanating from a home was out of the ordinary. At no point did Officer McNown draw his weapon or even threaten to use it. The only thing he had in his hand was a cup of tea to give to Petitioner if he was found unharmed.

Lastly, the availability and feasibility of alternatives also favors the exercise of the community caretaker function. More reasonable alternatives do not exist based on the specific and articulable facts which would lead an objectively reasonable officer to believe that Petitioner needed assistance. For instance, waiting around and scoping out the home risks wasting precious minutes for somebody who is hurt or in danger. It also fails to abate the nuisance of loud noise in a residential neighborhood, which the Sixth Circuit has determined is "sufficiently compelling to justify warrantless intrusions under some circumstances." *United States v. Rohrig*, 98 F.3d 1506, 1522 (6th Cir. 1996).

Though there is a difference between vehicles and homes, the community caretaking function itself is not confined to any one medium. Community caretaking takes on a broad nature, one in which the government interest is ever magnified where lives are in danger. *State v. Coffman*, 914 N.W.2d 240, 264 (Iowa 2018).

C. The scope of the search was carefully tailored to satisfy Officer McNown's community caretaking purpose.

The search is also justifiable because it was carefully tailored to address the precise community caretaking purpose at hand. As noted earlier, the doctrine requires that a search be totally divorced from criminal investigation, meaning that there is an objectively reasonable basis that officers were acting in their community caretaker duties. When officer actions stray from this non-investigatory function, safeguards must be in place to assure the protection of one's privacy. To avoid constitutional concerns related to extending warrant exceptions, "the level of intrusion must be commensurate with the perceived need for assistance." *Commonwealth v. Livingstone,* 174 A.3d at 637*; see also State v. McCormick,* 494 S.W.3d 673, 687 (Tenn. 2016) (scope of the intrusion must be "reasonably restrained and tailored to the community caretaking need."). As soon as the officer has assured that an individual is no longer in danger or the peril has been mitigated, "any actions beyond that constitute a seizure implicating . . . the protections provided by the Fourth Amendment." *State v. Lovegren*, 51 P.3d 471, 475 (Mont. 2002). The officer's scope to search is constitutionally limited. Indeed, the community caretaker doctrine does not provide carte blanche to search without a warrant; rather, there is a carefully confined scope. In such cases, fear of exploitation of the exception is overblown.

In the case at issue, Officer McNown did not snoop around the entire downstairs looking for Petitioner. Each step he took was confined to determining Petitioner's safety and ascertaining whether aid was necessary. He approached the television and turned it off to help him to hear if

anybody was calling out for help. He then went up the stairs to locate the source of the loud music, which led him to a door, behind which he happened to find a seemingly healthy Petitioner. At this point, the community caretaker doctrine could no longer justify a search since the perceived danger was no longer present. Officer McNown made no further searches of the home and upon seizing Petitioner and the contraband, made a call to the Drug Enforcement Agency as per department protocol.

However, because Officer McNown's intrusion was "supported . . . by one of the recognized exceptions to the warrant requirement," the community caretaking doctrine, his seizure of cocaine and the ledger is legally justified since they were in plain view. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987). What Officer McNown is quite different than what happened in *State v. Kaltner*, wherein the New Jersey Supreme Court held that officers' initial entry into a home to abate loud noise was within their role as community caretaker, but a "full-blown search of the house," revealing drugs in an upstairs bedroom, was not reasonably related to the circumstances that brought police to the home. 22 A.3d 77, 89 (N.J. Super. Ct. App. Div. 2011), aff'd 41 A.3d 736 (2012). That was held to be an unconstitutional seizure. *Id*.

Officer McNown's entry and carefully tailored search was confined by his objectively reasonable purpose—to ensure Petitioner was not in need of necessary assistance. The officer's route to Petitioner's bedroom was not a rigorous combing of evidence but a thoroughfare towards a quick and efficient welfare check. In *United States v. Smith*, officers entered Mr. Smith's apartment in order to locate and check on the well-being of Ms. Wallace, his former girlfriend. 820 F.3d 356, 358 (8th Cir. 2016). They had received a call that Wallace had not returned to the half-way house where she was staying and another resident feared that Smith was holding her against her will. *Id.* Officers arrived at his home based on these facts. *Id.* When they saw Smith

exit the building to take out trash, he was arrested on outstanding warrants. *Id.* at 359. Though Smith denied that anybody else was in the home, officers saw a face peer out of the apartment's window. *Id.* Upon entering the apartment, they heard Wallace call out from the bedroom. *Id.* Officers then approached and entered the bedroom, where they saw an AK-47 on the bed. *Id.*

Officer McNown, like the officers in *Smith*, responded immediately to the source of noise, in accordance with the community caretaking purpose. Thus, through his lawful presence, the plain view doctrine applies. *Id.* at 362; *see also United States v. Quezada*, 448 F.3d at 1008 (holding that a shotgun protruding out from under a man on the ground was admissible under the plain view doctrine).

II. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL DOES NOT ATTACH DURING PLEA NEGOTIATIONS PRIOR TO A FEDERAL INDICTMENT.

The Sixth Amendment to the United States Constitution, made applicable to the States through the Fourteenth Amendment, provides that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. The right to counsel protected by the Sixth Amendment is the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984).

The Sixth Amendment right to counsel only attaches once a defendant has been formally accused and prosecution has been formally initiated. *See Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)). Attachment cannot occur without a formal judicial proceeding in which the status of the defendant as the accused is solidified. *See id.* at 207. Further, in the absence of an indictment or other formal commitment to prosecute, no prosecution has commenced and the Sixth Amendment right is not animated.

The Sixth Amendment right to counsel does not extend to pre-indictment proceedings, even if the proceeding is considered a critical stage post-indictment. Only one circuit has actually decided the question of whether the right to counsel attaches during pre-indictment plea negotiations. *See Turner v. United States*, 885 F.3d 949 (6th Cir. 2018). That circuit held that the right to counsel did not attach. *See id.* at 953. This Court has not yet decided this question.

The Sixth Amendment right to effective counsel does not attach during plea negotiations prior to a federal indictment. First, a pre-indictment plea negotiation is not an adversary judicial proceeding to which the Sixth Amendment right to counsel attaches. Second, plea negotiations are not an exception to the Sixth Amendment's internal limitations on attachment.

A. A pre-indictment plea negotiation is not an adversary judicial proceeding to which the right to effective counsel attaches.

Plea negotiations, in the absence of an indictment or other judicial proceeding, are insufficient to animate Sixth Amendment protections. The Sixth Amendment right to counsel does not attach prior to the commencement of adversary judicial proceedings. *See Rothgery*, 554 U.S. at 198. The language of the Sixth Amendment imposes several internal restrictions on the right to counsel. U.S. CONST. amend. VI. The right is limited to the accused in a criminal prosecution. *See id* (emphasis added). Unless a defendant has been formally accused and prosecution has formally commenced, the Sixth Amendment right cannot attach. *See Rothgery*, 554 U.S. at 198 (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)).

In order to trigger attachment of the Sixth Amendment right to counsel, the government must make a formal accusation against the defendant and signal a formal commitment to prosecute. *See Rothgery,* 554 U.S. at 211. This accusation must prompt "arraignment and restrictions on the accused's liberty to facilitate the prosecution." *Id.* at 207. This Court has recognized several ways

in which adversary judicial criminal proceedings can be initiated: formal charges, preliminary hearings, indictments, informations, and arraignments. *See id.* at 198. The right to counsel does not attach prior to the first formal proceeding. *Id.* at 203.

Attachment of the Sixth Amendment right to counsel does not turn on prosecutorial awareness or involvement. *See id.* at 206 ("[A]n attachment rule that turned on determining the moment of a prosecutor's first involvement would be 'wholly unworkable and impossible to administer.'") Instead, attachment turns on the position of the defendant. Once the defendant is "faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law," he becomes accused within the meaning of the Sixth Amendment. *See Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion); *see also Rothgery*, 554 U.S. at 207 ("By that point, it is too late to wonder whether he is 'accused' within the meaning of the Sixth Amendment, and it makes no practical sense to deny it.")

In order to be accused in a criminal prosecution, a prosecution must exist. The text of the Sixth Amendment explicitly protects the accused during a criminal prosecution, not during the entirety of a criminal investigation. Attachment occurs at the point when an investigation formally becomes a prosecution. The right to counsel is animated when threats to liberty solidify and become actual restrictions on liberty. *See Rothgery*, 554 U.S. at 202 ("[B]y the time a defendant is brought before a judicial officer, is informed of a formally lodged accusation, and has restrictions imposed on his liberty in aid of the prosecution, the State's relationship with the defendant has become solidly adversarial.")

Plea negotiations prior to an indictment do not cause the Sixth Amendment right to counsel to attach. Plea offers are neither formal accusations nor formal commitments to prosecute. A prosecutor is not bound to prosecute someone after making a pre-indictment plea offer. Further,

informal negotiations that have not escalated to formal proceedings before a court do not amount to a prosecution. At the pre-indictment stage, prosecution and deprivations of liberty are threats, not realities. The Sixth Amendment right to counsel is only animated by the existence of a formal adversary, not merely the threat of one.

The rule that the right to counsel only attaches after adversary judicial proceedings have been initiated, while formal, is "fundamental to the proper application of the Sixth Amendment right to counsel." *Moran v. Burbine*, 475 U.S. 412, 431 (1986).

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

Kirby, 406 U.S. at 689–90 (plurality opinion). A clear attachment point allows prosecutors, defendants, and defense attorneys to set expectations and conform conduct.

A variable or unclear attachment point would create practical problems and generate disparity between indigent and non-indigent defendants. Once the right to counsel attaches, a defendant must retain counsel, have counsel appointed, or waive the right to counsel. Appointment of counsel is a judicial process. Without a judicial proceeding before a court, an attorney for an indigent defendant cannot be appointed. Because the appointment process can be lengthy, indigent defendants who wish to safeguard their right to counsel could not benefit from time-sensitive plea

offers or otherwise engage in pre-indictment plea negotiations. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 (AM. BAR ASS'N 2018) (prohibiting lawyers from communicating with persons represented by counsel). Unlike defendants who could afford to retain private counsel, indigent defendants would be unable to try and prevent or mitigate criminal charges until after they had been formally initiated.

The formal judicial proceeding requirement for attachment comports with the text of the Sixth Amendment right to counsel, adheres to precedent, facilitates de-escalated negotiations, and safeguards pre-indictment parity among defendants.

B. Pre-indictment plea negotiation is not an exception to the Sixth Amendment's internal limitations on attachment.

This Court has not articulated an exception to the constitutional limitations of the right to counsel in the context of pre-indictment plea negotiations. Such a departure would be contrary to both the Sixth Amendment and the prior decisions of this Court.

The question of whether formal judicial proceedings have begun and the Sixth Amendment right to counsel has attached is distinct from the critical stage question. *See Rothgery*, 554 U.S. at 211 (finding that "merging the attachment question (whether formal judicial proceedings have begun) with the distinct 'critical stage' question (whether counsel must be present at a postattachment proceeding unless the right to assistance is validly waived) is a mistake). The Sixth Amendment only guarantees right to counsel at critical stages of criminal proceedings once the adversary judicial process is initiated. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). Because the adversary judicial process is not initiated during pre-indictment plea negotiations, pre-indictment plea negotiation is not a critical stage of a criminal proceeding under the Sixth Amendment.

Plea negotiations that occur post-indictment are a critical stage of prosecution. *See Missouri v. Frye*, 566 U.S. 134, 144 (2012); *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). These holdings were based in part on the predominance of plea-bargaining in the criminal justice system. *See, e.g., Missouri v. Frye*, 566 U.S. at 143 ("The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages.") Post-indictment, a defense attorney can provide ineffective assistance of counsel by allowing a plea offer to expire. *See id.* at 145 (emphasis added).

This Court has repeatedly held that the Sixth Amendment right to counsel does not extend to pre-indictment proceedings, even if the proceeding is considered a critical stage post-indictment. The timing of an indictment is dispositive in the context of both lineups and interrogations. *Compare United States v. Wade*, 388 U.S. 218, 236-37 (1967) (finding that the Sixth Amendment right to counsel in post-indictment lineups) *with Massiah v. United States*, 377 U.S. 201, 205-06 (1964) (finding that the Sixth Amendment right to counsel was violated during a post-indictment interrogation); *Kirby v. Illinois*, 406 U.S. 682, 690 (1972) (plurality opinion) (finding that there is no Sixth Amendment right to counsel during pre-indictment lineups) *with Moran v. Burbine*, 475 U.S. 412, 431-32 (1986) (finding that there is no Sixth Amendment right to counsel in pre-indictment interrogations). Plea negotiations are not sufficiently distinct from interrogations and identifications to justify a significant departure from well-established law.

The Sixth Circuit is the only circuit that has decided the question of whether the Sixth Amendment right to counsel extends to pre-indictment plea negotiations. *See Turner v. United States*, 885 F.3d 949 (6th Cir. 2018). The Sixth Circuit held that the right does not attach, finding

that "[t]he Supreme Court's attachment rule is crystal clear." *Id.* at 953. A few circuits have opined that the right to counsel might attach prior to an indictment. *See*, *e.g.*, *Goodman v. United States (In re Grand Jury Proceedings)*, 33 F.3d 1060, 1062 (9th Cir. 1994) ("The Sixth Amendment can apply when the government's conduct occurs pre-indictment"); *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) ("We recognize the possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment"). However, none of those circuits actually decided the attachment question in the context of pre-indictment plea negotiations. Further, these cases were decided prior to this Court's decisions in *Rothgery* (2008), *Missouri v. Frye* (2012), and *Laffler v. Cooper* (2012) and are contrary to this Court's holdings in those cases.

Plea negotiations that occur pre-indictment are not a critical stage of prosecution. This Court has not previously carved out an exception to the Sixth Amendment attachment rule for plea negotiations. Manufacturing an exception here would be contrary to the Sixth Amendment itself and to the prior decisions of this court, and such a holding would erroneously conflate the distinct attachment question and the critical stage question.

CONCLUSION

For the foregoing reasons, the Government respectfully requests that the judgement of the Thirteenth Circuit Court of Appeals be affirmed.

Date: October 21, 2018

Respectfully submitted,

/s/ Team R36
Team R36
Counsel for Respondent