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 JUDICIAL CIRCUIT

BRIEF FOR RESPONDENT

TEAM NO. 39
COUNSEL FOR RESPONDENT

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1. Whether the community caretaker exception to the Fourth Amendment may be extended to the home when the totality of the circumstances show an officer acted reasonably.
2. Whether the Sixth Amendment right to counsel for criminal prosecutions attaches when a plea offer is made prior to the initiation of formal judicial proceeding

STATEMENT OF THE FACTS

Officer James McNown's desire to serve others is embedded in his character. Growing up in Lakeshow, James was known as the child who would stop to tend to stray animals or help the other children change the tire on their bike. For twelve years, Officer McNown grew within this attribute as he dutifully served the community of Lakeview. Ex. A. In many ways, the series of events that brings this case before the Court are a result of Officer McNown's love for his community and desire to help others.

In August of 2016, James McNown began to experience emotional turmoil. Ex. A, pg. 2. Officer McNown is a lifelong, and unfortunately a long suffering, NBA fan. He was struggling after years of his favorite team missing the playoffs. Ex. A, pg. 2. In September, McNown saw an advertisement for Lakeshow Community Revivalist Church, pastored by Chad David. Officer McNown began to attend the church regularly and he felt an immediate reduction in his ailments. Ex, A pg. 2. He began attending services regularly and deepened his connections to the church leadership and members.

Though Officer McNown would attend church in his capacity as a private citizen, he often wore his police uniform if his shift started after service. This was the case on January 15, 2017. Ex. A, pg. 3. Officer McNown went about his day like any other Sunday, arriving early for sunrise service. The service would usually begin around 7:00 a.m. with Pastor David, the elderly, energetic, senior pastor. R. at 2. However, on this Sunday, Pastor David was nowhere to be found. R. at 2. Naturally, members of the congregation were concerned. R. at 2. The seventy-two-year-old pastor was not known to miss service, especially unannounced. R. at 2. Members of the church frantically attempted to call Pastor David, and others speculated about his whereabouts. R. at 2.

After multiple unsuccessful attempts to contact Pastor David, the congregation members pleaded with Officer McNown to check on the elderly man. R. at 2. Recognizing this as an opportunity to fulfill his duty to serve his community, Officer McNown agreed. R. at 2. Members of the congregation provided Officer McNown with Pastor David's address and on his way there, Officer McNown picked up a cup of hot tea for his pastor. R. at 2.

Officer McNown drove through the wide streets of the large, gated community. Officer McNown was relieved as he pulled up to the pastor's residence, recognizing the church van the pastor used as his personal car. R. at 2. However, the feeling quickly faded when he realized the car meant Pastor David was most likely home yet uncharacteristically unresponsive. Officer McNown parked in the driveway and hurried out of his car. He heard "loud, scream-o metal music" as he approached the front door. Ex. A, pg. 4. Officer McNown began to anxiously knock on the door and announce his presence when he also noticed loud, explicit entertainment playing on the living room television. R. at 2–3. While he noted it was odd considering Pastor David's occupation, it only reaffirmed Officer McNown's assumption the pastor was home. R. at 3.

Officer McNown's concerns grew as he began to knock louder on the door hoping his pastor would respond. Fearing the worst, Officer McNown decided to take further action in order to ensure the well-being of his pastor. R. at 3. He walked to the back of house, where he found an unlocked door. R. at 3. Officer McNown followed the source of the music and headed up the stairs. R. at 3. Thankfully, Officer McNown was able to locate his pastor. R. at 3.

Unfortunately, that is not where the story ends. McNown stumbled upon Mr. David furiously packaging large amounts of cocaine into individual bags for distribution. R. at 3. When the initial shock of what he had witnessed wore off, McNown placed Mr. David under arrest and reported what he had uncovered. R. at 3. Lakeshow Police Department policy requires officers to

notify the DEA when large quantities of drugs are involved in an arrest. Ex. A, pg 6. Agent Colin Malaska was dispatched to the scene where he read Mr. David his Miranda rights. R. at 3.

Mr. David contacted an attorney, Keegan Long after arriving at the station. R. at 3. Mr. Long was also a member of Lakeshow Community Revivalist Church. R. at 3–4. By virtue of serving as Mr. Long's spiritual advisor, Mr. David was aware Mr. Long struggled with alcohol abuse. Ex. B; Ex. C. Despite knowing Long was "a complete drunk," Mr. David did not believe it would impair Long's ability to act as his attorney. Ex. C. On January 15, Long and Mr. David held their initial meeting where Long agreed to represent Mr. David. Ex. B.

Meanwhile, Agent Malaska contacted Kayla Marie, the Assistant U.S. Attorney assigned to Mr. David's case. R. at 4. Despite Mr. David's prior refusal to provide information, Malaska requested Marie extend a plea bargain prior to filing formal charges. R. at 3–4. The agency hoped to avoid tipping off Mr. David's suppliers by postponing the charges and keeping Mr. David's arrest from becoming public knowledge. R. at 4; Ex. B. Marie agreed and emailed Long with a plea offer on the morning of January 16. R. at 4; Ex. B. The plea bargain offered to reduce Mr. David's sentence to one-year in exchange for the names and information and explicitly stated it would expire in thirty-six hours. R. at 4.

However, Long neglgected to present the plea offer to Mr. David. R. at 4. Long testified he misread the email and understood it to mean the offer would remain open for thirty-six days rather than hours. R. at 4; Ex. B, pg. 2. He further testified he did not realize the mistake until after the offer expired. R. at 4; Ex. B, pg. 3. Mr. David immediately fired Mr. Long when he learned of the lapsed offer. Ex. B, pg. 4; Ex. C, pg. 3.

Mr. David then hired attorney Michael Allen to represent him. R. at 4; Ex. E. On January 20, Allen contacted Marie, explaining why the plea offer was never communicated directly to Mr. David and requesting the offer be reopened. Ex. E. Marie informed Allen of the futility of reopening the offer because any information Mr. David had was now irrelevant. Ex. E.

STATEMENT OF THE CASE

David filed two motions in the United States District Court for the Southern District of Staples contesting the constitutionality of his case. R. at 1. The district court issued an order denying Mr. David's motion to suppress evidence and motion to have the original plea deal re-offered. R. at 1.

In his motion to suppress, Mr. David argued the warrantless search of his home was an unconstitutional violation of his Fourth Amendment rights. R. at 5. The District Court denied his motion, upholding the search under the community caretaker exception. R. at 6–8. In his motion to be re-offered the plea deal, Mr. David argued for reinstatement of the offer because Long violated his Sixth Amendment right to effective counsel. R. at 8. The court denied his motion and found the right to effective counsel did attach, but Mr. David did not show the requisite prejudice to satisfy the *Strickland* test. R. 8–12.

On July 20, Mr. David was convicted and sentenced to ten years. R. at 14. Mr. David appealed to the United States Court of Appeals for the Thirteenth Circuit. R. at 14. The Thirteenth Circuit issued an opinion, affirming the district court's denial of Mr. David's motion to suppress. R. at 14. On the issue of Mr. David's Sixth Amendment right to effective counsel, the Thirteenth Circuit only upheld the district court's decision in part and reversed in part. R. at 14. The court found the right to effective counsel does not extend to pre-indictment plea negotiations. R. at 14.

With those findings, the Thirteenth Circuit affirmed Mr. David's conviction at trial. R. at 14. This Court then granted Mr. David's petition for certiorari.

SUMMARY OF THE ARGUMENT

Officer James McNown and millions of other first responders across this nation take great pride in the same thing: community. Our society is better because so many police officers, fire fighters, and emergency medical technicians do more than punch a clock and take home a paycheck. The fact that communities rely upon officers in situations well beyond traditional law enforcement is as baked into the spirit of Americana as apple pie and Norman Rockwell.

It was Officer McNown's service to his community as a caretaker that brought him to the Petitioner's house on January 15, 2017. When Pastor David was unaccounted for at his Sunday service, Officer McNown and other members of the community were justifiably concerned. Officer McNown's decision to check on Mr. David's well-being was not only reasonable, it was admirable.

This Court has long understood the core requirement of the Fourth Amendment is reasonableness, and recognized exceptions to the warrant requirement when officers act reasonably within the totality of the circumstances. We urge this Court to apply that same reasonability analysis to this case and find the evidence seized at Petitioner's home is admissible under the Community Caretaker exception to the Fourth Amendment warrant requirement.

As to the second issue in this case, this Court should remain committed to the decades of clear and concrete precedent finding the Sixth Amendment right to counsel does not attach until the initiation of formal judicial proceedings. In an overwhelming number of cases, this Court has

affirmed and reaffirmed this understanding based on the literal text of the Sixth Amendment and the realities in which criminal prosecutions occur.

This Court has made clear the Sixth Amendment right to counsel may only attach at or after the initiation of formal judicial proceedings. After attachment, the Sixth Amendment right to counsel will arise during critical stages of prosecution. These inquiries are distinct and separate. The threshold question of attachment only at or after the initiation of formal judicial proceedings must be answered first. Here, no Sixth Amendment right to counsel had attached, therefore no violation could have occurred.

STANDARD OF REVIEW

In cases involving a claim of denial of rights under the Federal Constitution, this Court will independently review to the evidentiary basis on which those conclusions are founded. *Bose Corp. v. Consumers Union*, 466 U.S. 485, 509–10 (1984). Because both issues in this case involve rights granted by the Constitution, a de novo standard of review is appropriate.

ARUGMENT

I. THE COMMUNITY CARETAKER EXCEPTION IS PROPERLY EXTENDED TO RESIDENCES UNDER THE FOURTH AMENDMENT

The question before this Court is whether the "community caretaker exception" is confined to the context of automobiles. Petitioner contradicts the historical precedent of analyzing Fourth Amendment exceptions under the standard of reasonableness. The Respondent urges this Court to reject confining the exception to only automobiles and instead analyze individual cases under the standard of reasonableness required by the Constitution. By applying this standard, Officer McNown's entry into Mr. David's home was constitutional under the community caretaker Exception to the Fourth Amendment warrant requirement.

A. The Community Caretaker Exception to the Warrant Requirement Applies When a Search is Reasonably Performed.

The Fourth Amendment provides:

> 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 . . . describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV. Since the enactment of our Fourth Amendment, this Court has championed one standard above all others: reasonableness. *See Cady v. Dombrowski*, 413 U.S. 433, 439 (1973); *see also Maryland v. Wilson*, 519 U.S. 408, 411 (1997); *Delaware v. Prouse*, 440 U.S. 648, 653–54 (1979); *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 312 (1978); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977); *Camara v. Mun. Court*, 387 U.S. 523, 528 (1967). Examining the reasonableness of an officer's action is crucial to protect the individual's interests as well as society's. *Terry v. Ohio*, 392 U.S. 1, 19 (1968).

Courts prefer the government obtain a warrant prior to performing a search. *See Minnesota v. Dickerson*, 508 U.S. 366, 372 (1993); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971); *Katz v. United States*, 389 U.S. 347, 357 (1967). However, there are several well-established exceptions to the warrant requirement, each determined by the universal standard of reasonableness. "

The Fourth Amendment consistently provides officers leeway in performing their duties because officers are often confronted with ambiguous situations. *Brinegar v. United States*, 338 U.S. 160, 176 (1949). Officers must be allowed to make mistakes, but these mistakes must be those of "reasonable men acting on facts leading sensibly to their conclusions of probability." *Id.* The

reasonableness standard encompasses the heart of the Fourth Amendment and its exceptions; there is no basis to exclude community caretaking.

The Community Caretaker Exception was first recognized in *Cady v. Dombrowski*, 413 U.S. at 442–43. Officers responded to a call regarding a disabled vehicle. *Id.* at 436. When the officers arrived, they found an intoxicated individual (Dombrowski) that had stopped his car in the middle of a highway. *Id*. Dombrowski was taken to the hospital, and the vehicle was towed to a safe, but publicly accessible location. *Id*. While at the hospital, Dombrowski fell into an unexplained coma. *Id*. The responding officers had learned Dombrowski was an officer in Chicago and did not have his firearm on him. *Id.* The officers decided to return to the vehicle to retrieve the firearm and prevent someone from breaking into the vehicle and stealing it. *Id*. While searching the disabled vehicle, the officers discovered clothes and other items covered in blood. *Id* at 437. After confronting Dombrowski with the items discovered in the trunk, police were told there may be a body located on the farm owned by Dombrowski's brother. *Id*. Police soon discovered a body, and Dombrowski was charged with murder. *Id* at 438. At trial and at every level on appeal, Dombrowski argued the search of the trunk violated the Fourth Amendment and the evidence gathered should be inadmissible. *Id*. at 434.

After reviewing the case, this Court concluded Dombrowski's Fourth Amendment rights were not violated by the search. *Id.* The Court analyzed the responding officer's actions under the reasonableness standard and held the search was lawful under the community caretaker exception. *Id* at 439, 450. Crucial to the decision was the fact that the police officers who searched the trunk were unaware any crime, not to mention a murder, had occurred. *Id*. at 447. The only purpose the police had for searching the trunk was to protect the community and Mr. Dombrowski's property. *Id*. at 447–50.

The Court recognized officers are often called upon to serve the community in functions "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id* at 441. This Court concluded the officers acted reasonably in a manner meant to protect the community from harm and no violation of the Fourth Amendment occurred. *Id* at 447–50. Thus, when an officer conducts a reasonable search out of service to his community and independent of criminal investigation, inadvertently discovered evidence is admissible under the community caretaker exception. *Id.*

1. In Cady, this Court intended for the reasonableness standard to apply to the community caretaker exception.

In *Cady,* the Court again applied the reasonableness standard to the community caretaker exception. Following precedent, the Court applied the reasonableness standard when officers fulfill their duties as public servants and caretakers. *Id.* at 442–43.

The Court was determined to enable officers to perform their necessary job functions as community members. The Court emphasized the responding officers' fulfillment of an essential-job function and motive "to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443.The setting, in *Cady*, however was not ideal: the officers intentionally invaded the vehicle to search for a specific item. By recognizing the exception in *Cady*, the Court ran the risk of opening Pandora's box of a widely construed Fourth Amendment exception allowing officers to conduct warrantless searches. Thus, the Court carefully balanced the circumstances in order to craft an opinion tailored to prevent this result. The Court distinguishes the caretaking search in *Cady* from other searches rather than creating a bright-line restriction.

Lower courts have essentially created a limitation to the community caretaker exception. These courts have construed *Cady*'s analysis of the specific circumstances presented in the case as a limitation to the exception. *See Ray v. Warren*, 626 F.3d 170, 177 (3d Cir. 2010); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994); *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993); *United States v. Pichany*, 687 F.2d 204, 209 (7th Cir. 1982). The consequence of this interpretation is a failure to acknowledge the public interest purpose of the exception.

At a foundational level, *Cady* recognizes the societal concern for the general public's welfare. *Cady*, 413 U.S. at 447. Community caretaking is grounded in the idea that an officer is responding to circumstances which may require him to provide immediate aid to the community. *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009). These circumstances do not arise only in the context of automobiles. Thus, it is counterintuitive to presume a remedy to these circumstances should be limited to automobiles. Officers have the duty to provide assistance to members of the community, wherever they are found. To fulfill this duty, officers need to be able to act when they are presented with reasonable concerns about a citizen's well-being, unconnected with the suspicion of criminal activity.

Officer McNown was placed in a position where he was reasonably and justifiably concerned with Mr. David's well-being. He knew if the worst had occurred, detrimental repercussions accompanied inaction. However, through reasonable action Officer McNown could aid a member of his community and fulfill his duty to serve.

2. The Court Should Consider the Totality of the Circumstances When Analyzing the Reasonableness Standard.

The Court intended for the community caretaker exception to be a narrowly tailored exception that is determined by the totality of the circumstances. Courts often determine the

reasonableness of officers' actions in "the totality of the circumstances and view those facts objectively through the eyes of a reasonable officer with the knowledge, training, and experience of the investigating officer." *Wood v. Commonwealth*, 497 S.E.2d 484, 491 (1998) (*citing Murphy v. Commonwealth*, 384 S.E.2d 125, 128 (1989)). The reasonableness analysis in *Cady* is clearly evidenced in *United States v. Gillespie*, 332 F. Supp. 2d 923 (W.D. Va. 2004) where the court held officers' warrantless entry was not within the exception's scope because of the officers' motive of criminal investigation.

The court began the analysis by distinguishing the holding in *Wood*, a case denying the extension of the community caretaker exception to residences, from *Phillips* and *Rohrig*, two cases extending the exception to residence. *Gillesipie* 323 F. Supp. 2d at 930–31; *see also Phillips v. Peddle*, 7 F. App'x 175, 178 (4th Cir. 2001) (where the court upheld the extension of the community caretaker exception because officers entered with the belief a witness was in danger); *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996) (where the court upheld the extensions of the community caretaker exception because officers did not enter the home with an investigative purpose); *Wood*, 497 S.E.2d 484 (where the court denied extension of the community caretaker exception to residence because of officers' underlying intent to undertake a criminal investigation). The court determined the decisions were not rooted in the search location, but rather, the criminal investigative animus motivating the officers. *Id*. "As in *Wood* and unlike *Phillips* and *Rohrig* cases, the officers in this case were involved in a criminal investigative capacity when they entered Ms. Gillespie's home." *Id.* at 930. The *Gillespie* court embodies the reasonability precedent, set by this Court in *Cady* by properly inquiring into the totality of the circumstances. *Id.* at 930–31. To ensure the Court's intended application, the community caretaker exception reasonableness standard should continue to apply a totality inquiry to determine if the officers' entry was reasonable.

B. The Community Caretaker Exception Applies Because Officer McNown Acted Reasonably Under the Circumstances.

Officers are consistently faced with circumstances demanding split-second decisions to act. Societal expectations and job duties require officers to quickly evaluate the situation, address the potential for danger, and act accordingly. Given this wide latitude, every law enforcement decision will not necessarily be characterized as reasonable. Therefore, a careful inquiry into the totality of the circumstances provides insight as to why the decision was made and if it was reasonable.

Community caretaking is a function of law enforcement "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady,* 412 U.S. at 441. The application of the community caretaker exception is deemed reasonable under the circumstances when the search is: 1) based on specific, articulable facts which outweigh a defendant's interest in freedom from government intrusion; and 2) carefully tailored to satisfy the purpose of the intrusion. *United States v. Harris*, 747 F.3d 1013, 1017 (8th Cir. 2014) (citations omitted). Similar to the officers in *Cady*, the circumstances surrounding Officer McNown's entry show the reasonableness of his actions.

1. The circumstances surrounding Officer McNown's entry reasonably necessitated immediate action, outweighing Mr. David's interest in freedom from government intrusion.

Officer McNown's entry to Mr. David's residence was reasonable based on the surrounding facts and circumstances. The first step to determining if an action is reasonableness under the Fourth Amendment is an objective inquiry into the surrounding circumstances and if they necessitated the action. *Brigham City, Utah v. Stuart*, 547 U.S. 398, 404 (1978) (*citing Scott v. United States*, 436 U.S. 128, 138 (1978)); (*see also, Graham v. Connor,* 490 U.S. 386, 396 (1989) (holding an action's reasonableness must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight).

Officer McNown acted as a reasonable officer would be expected to act when deciding to perform the welfare check on Mr. David and executing the check. Welfare checks are typically requested by when a family member, friend, or neighbor when they are unable to communicate with or locate a loved one. In *United States v. Smith*, 820 F.3d 356, 360–61 (8th Cir. 2016), officers responded to a call from an individual who feared her friend was being held against her will by her abusive significant other. Despite seeing an individual inside the home, the officers received no response when they arrived at the residence. *Id.* In order to ensure the friend's safety, the officers entered the home. *Id.* The court held the entry as lawful under the community caretaker exception because of the welfare request and the development of facts while the officers were on scene. *Id.*

Officer McNown was placed in a position analogous to the officers in *Smith.* Upon arriving at church on January 15, 2017, Officer McNown encountered a distraught congregation, anxiously was awaiting the arrival of their devoted pastor. R. at 2. Officer McNown is active member of the church community and regularly attends the seventy-two-year-old pastor's 7:00 a.m. service. R. at 2. It was out of character for the elderly pastor to be absent without notice, and the church congregation's concern heightened as time passed and their pastor remained missing. R. at 2. One member of the congregation began calling Mr. David. R. at 2. When none of the phone calls were answered, the terrified congregation pleaded with Officer McNown to check on their senior pastor. R. at 2. After the church community requested a welfare check, Officer McNown acted as a reasonable officer in determining to perform a welfare check requested by the church based upon abnormality of Mr. David's absence coupled with his seniority.

While performing the welfare check, Officer McNown acted as a reasonable officer would under the circumstances, by entering Mr. David's residence. The overlapping facts between this

case and *Rohrig* illustrate this reasonable conclusion. In *Rohrig,* officers responded to a noise complaint with and unresponsive homeowner. *Rohrig,* 98 F.3d at 1509. Arriving at the residence, officers continually announced their presence and "banged repeatedly on the front door . . . [and] received no response." *Id.* The court held the officers' entry was reasonable in light of the circumstances to keep the community at peace. *Id.* at 1522.

Officer McNown was alerted of Mr. David's presence from his vehicle in the driveway and the running entertainment systems. R. at 2–3. Similar to the officers in *Rohrig,* Officer McNown made multiple attempts to communicate his presence to Mr. David. Officer McNown was aware Mr. David's age increased his risk of injury or illness. Mr. David would likely be unresponsive if he was injured or ill. Faced with the very real possibility Mr. David could be in grave danger, Officer McNown did what society would expect of any reasonable officer in his position: act.

In order to determine reasonability, a court must balance the public interest or need that furthered Officer McNown's conduct against the degree and nature of the intrusion on Mr. David's constitutional interest. *State v. Kramer,* 759 N.W.2d 598, 611 (2008). "The stronger the public need and the more minimal the intrusion upon an individual's liberty, the more likely the police conduct will be held to be reasonable." *Id.*

An individual's home is "accorded the full range of Fourth Amendment protections." *Lewis v. United States,* 385 U.S. 206, 211 (1966). However, courts have also held, "homes cannot be arbitrarily isolated from the community caretaking equation," and "the need to protect and preserve life or avoid serious injury cannot be limited to automobiles." *State v. Deneui,* 775 N.W.2d. 221, 227 (2009) (holding warrantless entry reasonable to ensure the safety of the homeowners when officers smelled the odor of ammonia); *see also United States v. Pinkard,* 327 N.W. 2d. 594 (2010). Officer McNown's entry was based on the cumulative circumstances of Mr. David's age,

reputation, and unresponsiveness, which reasonably suggested his well-being might be in jeopardy.

Petitioner desperately attempts to assert the entry was predicated by suspicions of criminal activity, citing the SUV Officer McNown witnessed in the gated community and the obscure entertainment at the residence. This assertion lacks merit in light of Mr. David's reputation, occupation, and circumstances on scene.

Mr. David was a well-respected, senior citizen pastor whose attendance to church was so reliable that an unannounced absence led congregation members to fear the worst. Officer McNown concedes the automobile he saw entering Mr. David's gated community may have belonged to a drug trafficker. However, it is illogical to suggest Officer McNown abandoned all prior held characterizations of Mr. David and attributed the van to the pastor's participation in drug trafficking. There is nothing to indicate Officer McNown volunteered to check on Mr. David as a veiled attempt to seek evidence of a crime, and even less to suggest Officer McNown suspected Mr. David of committing a crime inside his home. Officer McNown acted as a reasonable officer in would in performing the welfare check and entering the residence upon the circumstantial development.

2. Officer McNown's search was carefully tailored to satisfy the purpose of intrusion.

Law enforcement actions must be carefully tailored to satisfy the purpose of the intrusion. *Harris*, 747 F.3d at 1017. The court in *Pickard* held the officers' search was carefully tailored because the entry was minimally intrusive and the purpose was to confirm of the occupants' health and safety. *Pickard*, 785 N.W. 2d at 607. Officers responded to a report of residents passed out next to drugs and paraphernalia. *Id.* at 594–95. The officers arrived at the location and repeatedly

announced their presence. *Id.* at 595. After the efforts proved futile, the officers decided to enter the residence. *Id.* The court upheld the community caretaker exception and emphasized the entry was limited to the officers' purpose of ensuring the occupants' safety. *Id.*

Similarly, Officer McNown had no reasonable alternative to ascertain Mr. David's well-being. Every action employed was done with the sole purpose of confirming Mr. David's safety. Furthermore, Officer McNown's search was limited. Officer McNown only continued to extend his entry upon the continued unresponsiveness of Mr. David. Under the two-prong test applied in *Harris*, Officer McNown's entry under the community caretaker exception was reasonable.

II. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL ATTACHES AT OR AFTER THE INITIATION OF FORMAL JUDICIAL PROCEEDINGS.

The question of when the Sixth Amendment's right to effective counsel attaches in criminal proceedings is answered by the plain text of the Amendment and has been confirmed in numerous rulings from this Court. The concrete rule recognizing the right to counsel attaches *only* at or after the initiation of formal adversarial judicial proceedings against the accused was first articulated in *Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (plurality opinion) (citations omitted).[1]

The bright-line rule that the right to counsel attaches only at or after the initiation of formal adversarial judicial proceedings against the accused was not considered lightly. In *Kirby*, the defendant was arrested after he was unable to explain the reason he was in possession of a wallet, travelers checks, and social security card belonging to and a man named Willie Shard. *Id.* at 684.

[1]Though citations were omitted for readability, it is important to recognize how many cases this Court cited in support of the holding from *Kirby*. *Powell v. Alabama*, 287 U.S. 45 (1932); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Hamilton v. Alabama*, 368 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *White v. Maryland*, 373 U.S. 59 (1963); *Massiah v. United States*, 377 U.S. 201 (1964); *United States v. Wade*, 388 U.S. 218 (1967); *Gilbert v. California*, 388 U.S. 263 (1967); *Coleman v. Alabama*, 399 U.S. 1 (1970).

Mr. Shard had been robbed the day before, but he did not report the items stolen until the following day. The officers who arrested Kirby were not aware of Mr. Shard's report at the time of arrest. *Id.* The police learned of Mr. Shard's report after arriving at the station and sent a unit to pick up Mr. Shard and bring him to the station. *Id*. Mr. Shard entered the room where the defendant was sitting and immediately identified the defendant as the person who robbed him the day before. *Id*. at 684–85. No lawyer was present, nor had one been requested. *Id*. at 684.

Kirby argued the identification violated his Sixth Amendment right to counsel because he did not have a lawyer present when he was identified by Mr. Shard, and the identification should be inadmissible. *Id*. at 685–86. Kirby relied upon earlier rulings from this Court that held a post-indictment pretrial lineup where the accused is exhibited to identifying witnesses was a critical point in the prosecution giving rise to the Sixth Amendment right to counsel. *Id*. (citing *Gilbert*, 388 U.S. 263, and *Wade*, 388 U.S. 218). Kirby argued the post-indictment right to counsel recognized in *Wade* and *Gilbert* should be extended to pre-indictment identifications like the one that occurred in his case.

When considering Kirby's argument, the Court rightfully started with the text of the Sixth Amendment. Noting the Sixth Amendment guaranteed the right to counsel only in criminal prosecutions, the Court concluded the initiation of the adversary judicial proceedings is the earliest point in which the Sixth Amendment's right to counsel may attach. *Id*. at 689–90 & n.7. The Court supported this conclusion by reviewing its jurisprudence on the issue where it found:

> [W]hile members of the Court have differed as to existence of the right to counsel in the contexts of some cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings -- whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

Id. at 689 (emphasis in original).

While rejecting Kirby's argument, the Court distinguished the facts of Kirby's case from its earlier rulings in *Gilbert* and *Wade* because each of those cases involved *post-indictment* activities. *See id*. at 689–90. In Kirby's case, he had not been charged with any crime when he was identified by Mr. Shard. *Id*. at 690. Thus, the criminal prosecution against Kirby had not begun, and no Sixth Amendment right to counsel could have attached. *Id*.

The plurality in *Kirby* carefully and thoughtfully explained the rationale for this bright-line rule, stating:

> 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.

Id. The rule recognized in *Kirby* was adopted and affirmed by a majority of this Court in *every* subsequent case mentioning the attachment of the Sixth Amendment right to counsel. *See Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008); *Fellers v. United States*, 540 U.S. 519, 523 (2004); *Texas v. Cobb*, 532 U.S. 162, 168 (2001); *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991); *Patterson v. Illinois*, 487 U.S. 285, 290–91 (1988); *Satterwhite v. Texas*, 486 U.S. 249, 254–55 (1988); *Michigan v. Jackson*, 475 U.S. 625, 631–32 (1986), *overruled on other grounds by Montejo v. Louisiana*, 556 U.S. 778, 797 (2009); *Moran v. Burbine*, 475 U.S. 412, 428 (1986); *United States v. Gouveia*, 467 U.S. 180, 185 (1984); *Estelle v. Smith*, 451 U.S. 454, 470 (1981); *Moore v. Illinois*, 434 U.S. 220, 226–27 (1977); *Michigan v. Tucker*, 417 U.S. 433, 438 (1974).

A. The Determination of When the Sixth Amendment Right to Counsel Attaches is Separate from the Determination of Which Stages of Prosecution are Considered Critical.

Since this Court's decision in *Kirby*, the understanding of when an individual's right to counsel may arise has been further developed. In later cases, this Court explained that the Sixth Amendment right to counsel would attach at the initiation of judicial proceedings, but that right would only arise during "critical stages" in the prosecution. *Compare Michigan v. Jackson*, 475 U.S. 625, 630 (1986) (finding a defendant had a right to counsel during a postarraignment custodial interrogation because it was a critical stage of prosecution), *and Brewer v. Williams*, 430 U.S. 387, 399–400 (1977) (same), *with Gerstein v. Pugh*, 420 U.S. 103, 122 (1975) ("Because of its limited function and its nonadversary character, the probable cause determination is not a 'critical stage' in the prosecution that would require appointed counsel.").

This Court reiterated the important distinction between "attachment" and "critical stages" in the most recent case dealing with the attachment of the Sixth Amendment right to counsel. In *Rothgery v. Gillespie County*, William Rothgery was arrested for being a felon in possession of a firearm after a criminal background erroneously disclosed Rothgery had been convicted of a felony. 554 U.S. 191, 195 (2008). Rothgery was brought before a magistrate where he was informed of the charges and bail was set. *Id*. at 196. Rothgery was unable to afford an attorney and made multiple requests that an attorney be assigned to his case, all of which were denied. *Id*. Rothgery was released after posting a surety bond but was rearrested six months later when a grand jury formally indicted. *Id*. After the second arrest, bail was increased beyond what Rothgery could afford and he spent three weeks in jail. *Id*. At that time Rothgery was assigned an attorney who promptly obtained a bail reduction and assembled the necessary paperwork to prove Rothgery was

never convicted of a felony. *Id*. at 196–97. The district attorney then filed a motion to dismiss the charges. *Id*. at 197.

Rothgery then brought a 42 U.S.C. § 1983 action against Gillespie County arguing the denial of counsel after the initial hearing before the magistrate was a violation of his Sixth Amendment right to counsel. *Id*. The County argued no right to counsel existed in the *Rothgery* case as it had in *Brewer* and *Jackson* because the prosecutor did not participate in the initial hearing before the magistrate. *Id*. at 210. This, the county argued, meant the initial appearance before the magistrate could not be a critical stage of the prosecution giving rise to the Sixth Amendment right to counsel. *Id*. at 210–11.

The majority in *Rothgery* was quick to point out the mistake the County's argument made in "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)." *Id*. at 211. After highlighting the fact that there was no dispute regarding attachment of the Sixth Amendment right to counsel in *Brewer* or *Jackson*, this Court stated:

> Attachment occurs when the government has used the judicial machinery to signal a commitment to prosecute as spelled out in *Brewer* and *Jackson*. Once attachment occurs, the accused at least is entitled to the presence of appointed counsel during any "critical stage" of the postattachment proceedings; what makes a stage critical is what shows the need for counsel's presence.

Id. at 211–12. This Court found the initial appearance before the magistrate judge, where Rothgery was informed of the charges and his liberty was threatened, signaled the beginning of formal judicial proceedings even though a formal indictment had not been issued. *Id*. at 213. Thus, the denial of counsel after the initial appearance before the magistrate constituted a violation of Rothgery's Sixth Amendment right to counsel. *Id*. It was the total denial of Rothgery's right to

counsel that was a violation, not the exclusion of counsel at the initial hearing before the magistrate. *Id*.

The facts the Court relied upon in *Rothgery* to conclude a Sixth Amendment right to counsel had attached are notably absent in the current case. Mr. David never made an initial appearance before any judge or judicial officer. Mr. David was not assigned a public defender and could not have had one assigned because the formal judicial process had not commenced as it did in *Rothgery*. Certainly Petitioner had, and exercised, his right to hire counsel and assert his rights against self-incrimination under the Fifth Amendment. But as this Court has stated, the Fifth Amendment right to counsel is different and distinct from the Sixth Amendment right to counsel. *See McNeil*, 501 U.S. at 177. Mr. David was not entitled to the protections found in the Sixth Amendment because no formal judicial proceedings were undertaken to that point.

B. A Pre-Indictment Plea Offer is Not the Beginning of Formal Judicial Proceedings.

Every action taken by the police and AUSA Marie were part of the investigation that only began when the drugs were found in Petitioner's possession. This investigation was particularly focused on identifying Mr. David's drug suppliers, at least one of whom was believed to be a "kingpin." R. at 4.

Because of the time sensitive nature of the situation, a plea offer was the logical option to achieve this ultimate objective. Plea offers are a useful tool for the judicial system, "[b]ut there is no constitutional right to plea bargain." *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). A valid plea agreement is virtually certain to result in a waiver of constitutional rights, such as the right to a trial by jury. In contrast, a rejected, lapsed, or even unknown plea offer waives no constitutional rights. *See Lafler v. Cooper*, 566 U.S. 156, 181 (2012) (5-4 decision) (Scalia, J., dissenting).

Anyone who faces prosecution after failed plea offer, no matter the reason for the failure, maintains the full bounty of rights and protections granted in our constitution. *See id*.

C. Petitioner's Right to Counsel Could Not Attach Because No Formal Judicial Proceedings Had Begun.

Applying the rule from *Kirby* and later cases to the present case renders an easy conclusion: Adversarial judicial proceedings against Petitioner had not begun, therefore Petitioner's Sixth Amendment right to counsel could not attach. Neither the arrest or interrogation of a target in an investigation is sufficient alone to give rise to a Sixth Amendment right to counsel. *See Lucas v. Johnson*, 132 F.3d 1069, 1080 (5th Cir. 1998); *Caver v. Alabama*, 577 F.2d 1188, 1195 (5th Cir. 1978) ("An arrest on probable cause without a warrant, even though that arrest is for the crime with which the defendant is eventually charged, does not initiate adversary judicial criminal proceedings, and therefore Caver had no constitutional right to counsel . . . .").

This Court addressed the limits of the bright-line attachment rule directly in *Gouveia* which involved inmates suspected of murdering another prisoner. *Gouveia*, 467 U.S. at 183–85. The suspects were held in administrative detention for nineteen-months while the investigation was ongoing before formal charges were filed. *Id*. at 183. The suspects' repeated requests for appointed counsel were rejected. *Id*. at 183. Before trial the suspects filed a motion to dismiss their indictments, arguing the nineteen-month detainment in administrative detention without appointment of counsel violated their Sixth Amendment right to counsel. *Id*. The trial court denied the motion and the suspects were convicted at trial. *Id*. The Court of Appeals for the Ninth Circuit overturned the convictions finding the defendant's right to counsel had been violated. *Id.* This Court wasted little time voicing its disapproval, ending the first paragraph of the opinion with the phrase: "We granted certiorari to review the Court of Appeals' novel application of our Sixth Amendment precedents, and we now reverse." *Id*. (citation omitted).

This majority opinion from *Gouveia* necessarily goes into great depth on the issue of when an individual's Sixth Amendment right to counsel attaches. Returning to the text of the Sixth Amendment, the Court reaffirmed the Sixth Amendment protections require the existence of both a criminal prosecution and an accused. *Id*. at 188. The Court acknowledged the bright-line rule that the right to counsel does not attach until the initiation of judicial proceedings is consistent with the literal text and the core purpose of the amendment – to assure aid at trial. *Id*. For "[i]t is only at that time 'that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified.'" *Id*. at 189 (quoting *Kirby*, 406 U.S., at 689). Thus, the Court concluded the suspect's right to counsel did not attach until the formal charges were filed despite the nineteen-months in administrative detention. *Id*. at 192.

Turning to the facts of the present case, Mr. David was formally charged on January 18, 2017. R. at 4. The plea offer at issue was given on the morning of January 16, and by its terms expired in the evening of January 17. R. at 4. When the bright-line rule for attachment of the Sixth Amendment right to counsel is applied to this case, Mr. David's Sixth Amendment rights were not violated when his attorney failed to convey the plea offer because the right counsel had not attached.

The Court of Appeals for the Sixth Circuit was recently faced with a similar set of circumstances, and the court reached a decision with the exact same understanding and result. *See Turner v. United States*, 885 F.3d 949, 951 (6th Cir. 2018) (en banc), *petition for cert. filed*, 2018 WL 3572624 (U.S. July 20, 2018) (No. 15-6060). There, a state grand jury indicted Turner on multiple counts of aggravated robbery. *Id*. While the state proceedings were ongoing, the prosecutor informed Turner's attorney that Turner would likely face federal charges as well. *Id*. at 951–52. Turner's attorney contacted the Assistant U.S. Attorney assigned to the case to confirm

charges would be brought. *Id*. at 952. A plea offer covering the federal charges Turner might face was extended to Turner through his attorney but was not accepted. *Id*. Turner later filed a 28 U.S.C. § 2255 motion asserting the plea offer was never communicated by his attorney in violation of his Sixth Amendment right to counsel. *Id*. The district court denied the motion and Turner appealed. *Id*. The en banc panel at the Court of Appeals for the Sixth Circuit was unwilling to "overrule nearly four decades of circuit precedent holding that the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations." *Id*. at 951 (citing *United States v. Moody*, 206 F.3d 609, 614–15 (6th Cir. 2000). Citing favorably to *Kirby* and *Gouveia*, the court affirmed the denial of Turner's motion.

Just as the Court of Appeals for the Sixth Circuit did, this Court should decline the opportunity to overturn decades of precedent and guidance in search of a vague or unworkable standard. The text of the Sixth Amendment and this Court's meticulous analysis of the right to counsel provide a concrete bright-line rule prosecutors and defendants can rely upon. Recalling the words of Abraham Lincoln who advised, "[b]e sure you put your feet in the right place, then stand firm," we ask this Court to recognize the existing rule is correct and urge you to stand firm.

CONCLUSION

This case presents a unique opportunity for this Court to clarify important aspects of constitutional jurisprudence. Respondent respectfully asks this Court to find the actions taken leading up to the discovery of evidence by Officer McNown were reasonable and, as such, did not violate the Fourth Amendment. We further request this Court reaffirm once again the bright-line rule for attachment of the Sixth Amendment right to counsel found in the literal text of the Amendment and articulated throughout this Court's jurisprudence on the matter.