No. 4-422

IN THE SUPREME COURT OF THE UNITED STATES

CHAD DAVID,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to
the United States Court of Appeals
for the Thirteenth Circuit

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

I. Do warrantless searches conducted by law enforcement acting as community caretakers extend to the home under the Fourth Amendment?

II. Does the Sixth Amendment right to effective counsel attach during plea negotiations prior to a federal indictment?

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The United States District Court for the Southern District of Staples denied both of petitioner's motions. R. at 1. The district court denied petitioner's motion to suppress evidence under the Fourth Amendment after determining that Officer McNown entered David's home as a community caretaker. *Id.* at 8. Even after finding that David's Sixth Amendment right to effective counsel attached during the pre-indictment plea negotiations, the district court also dismissed petitioner's motion to be re-offered his initial plea deal because his attorney's deficiency did not prejudice him. *Id.* at 10, 12. The United States Court of Appeals for the Thirteenth Circuit affirmed on both issues, but held that the Sixth Amendment right to effective counsel does not attach prior to an indictment. *Id.* at 14, 17-18. Both opinions are reproduced in Appendix B.

JURISDICTION

This case was properly brought before the United States District Court for the Southern District of Staples under 18 U.S.C. § 3231 (2012). The Thirteenth Circuit had proper appellate jurisdiction over the district court's judgment under 28 U.S.C. § 1291 (2012). Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1) (2012).

STATUTES INVOLVED

The relevant federal laws in this case are the Fourth and Sixth Amendments of the United States Constitution. U.S. Const. amend. IV; U.S. Const. amend. VI. The Amendments are attached as Appendix A.

STATEMENT OF THE CASE

I. Facts

On Sunday, January 15, 2017, Chad David ("David"), the minister of Lakeshow Community Revivalist Church, failed to appear at the 7:00 a.m. church service. Ex. A at 2; Ex. C at 1. Upon

his absence, Julianne Alvarado ("Alvarado"), a church attendee, called David. Ex. A at 2; Ex. C at 1. When David did not pick up the phone, Officer James McNown ("McNown"), a church attendee and Lakeshow police officer, noticed Alvarado was nervously sweating and shaking. Ex. A at 2. Even after learning David had been seen at a bar the night before, McNown "assumed" David was sick with the flu due to his elderly age of 72. *Id.* at 3. McNown volunteered to go check on David after his patrol shift started at 9:00 a.m. *Id.* McNown sat through the nearly two-hour long Church service and stopped at Starbucks to get David tea before heading to David's home. *Id.*

David lived in a gated community because he liked his privacy. Ex. C at 2. Upon arriving at the gated community, McNown noticed a black Cadillac SUV with Golden State tags that were common among drug dealers. Ex. A at 4. Recently, there had been an increase in drug traffic into Lakeshow from Golden State. *Id.* David was not expecting McNown because he did not typically have visitors. Ex. C at 2. Upon arriving at David's home, McNown saw David's van in the driveway and heard loud music playing from inside the home. Ex. A at 4. Uncertain as to whether David was home, McNown knocked on David's front door, rang the doorbell, and waited "a little" before trying to open the locked door. *Id.* at 5. David did not hear the knock or the doorbell because the music was too loud and the doorbell was broken. Ex. C at 2. When he looked through the window next to the front door, Officer McNown noticed a movie playing on the TV. Ex. A at 4. McNown then entered the backyard, opened the unlocked back door, and entered without a warrant. *Id.* at 5. Typically, McNown only entered a home without a warrant in order to pursue a fleeing suspect. *Id.* at 7. Upon entering the home, Officer McNown noticed an open notebook that contained information linking Alvardo to drug purchases. *Id.* at 5. McNown then went upstairs, opened a closed door, and saw David bagging cocaine into packages bearing a Golden State flag in the shape of a skull. *Id.* at 6. McNown, recognizing the substance as

cocaine due to his twelve years of police experience, called the Drug Enforcement Administration (DEA) as per protocol. *Id.* at 1, 6. David was never in need of emergency assistance, Ex. C at 2, and Officer McNown never saw any evidence of an emergency or break-in. Ex. A at 7.

DEA Agent Malaska ("Malaska") arrived David's home around 10:00 a.m., at which point he read David his *Miranda* rights and asked him for the identity of his suppliers. R at 3. At that moment, David refused to name his suppliers because he was afraid that it could lead to his death and the destruction of his church. *Id.* Despite David refusing to name his suppliers, Malaska contacted the prosecution once David was in custody and encouraged them to offer David a favorable plea deal in exchange for information on his suppliers. *Id.* at 4. Malaska wanted the prosecution to offer the plea deal before they filed charges so as not to alert the drug kingpin he suspected was in Lakeshow. *Id.*

Upon arriving at a federal detainment facility, David called the only attorney he knew, Keegan Long ("Long"), who attended his Church. *Id.* at 3-4; Ex. C at 2. Even though David suspected Long was an alcoholic, he did not think it would affect his case and was desperate for representation. R. at 3-4; *see also* Ex. C. The prosecution deferred to Malaska and emailed Long a formal plea deal, valid for only 36 hours, offering David one year in prison in exchange for a guilty plea to 21 U.S. Code § 841 and the names of his suppliers, on the condition that his confession led to a suspect's arrest. R at 4; *see also* Ex. D. The prosecution emailed the offer to Long on Monday, January 16, 2017 at 8:00 a.m., and it was set to expire on January 17, 2017 at 10:00 p.m. R at 4. Long was drunk when he received the offer and failed to read the deadline. Ex. B at 2. When a prosecutor called Long's office on January 17th to check the status of the plea deal, Long refused to answer the phone. *Id.* at 3. The offer expired without Long ever

communicating the plea offer to David. R at 4. On January 18, 2017, just two days after the initial plea offer, the prosecution promptly indicted David, charging him with one count of 21 U.S.C. § 841. *Id.*

Long immediately contacted David on January 18, 2017 when he realized his mistake and confessed his error. Ex. B at 3. David promptly hired a new attorney, Michael Allen ("Allen"). R at 4. Allen contacted prosecutor Kayla Marie ("Marie") on January 20, 2017 to inform her that David wanted to reveal his suppliers' identities in exchange for another plea deal. Ex. E. David thought taking the deal was a "no brainer," said that he would have given up his suppliers' names "in a heartbeat," and would take the plea deal if re-offered "without a doubt." Ex. C at 3. Even though less than a week had passed since the initial plea deal, Marie refused to extend another plea deal. R at 5.

David subsequently filed two pretrial motions. *Id.* He filed a motion to suppress the evidence obtained as a result of McNown's warrantless entry into his home under the Fourth Amendment. *Id.* He also filed a motion requesting to be re-offered the initial plea deal that Long failed to communicate to him under the Sixth Amendment. *Id.* At trial, David was convicted under 21 U.S.C. § 841 for possessing cocaine with the intent to distribute and was sentenced to ten years in prison. *Id.* at 22.

II. Procedural History

In January 2017, the United States charged David by indictment with one count of possession of a controlled substance with the intent to distribute in violation of 21 U.S.C. § 841. *Id.* at 1. The district court denied David's motion to suppress the evidence collected during the warrantless search of his home. *Id.* at 8. After extending the community caretaking exception to the Fourth Amendment's warrant requirement to home searches, the court held that McNown's warrantless

search of David's home was valid because he was acting as a community caretaker. *Id.* The district court also denied David's motion to be re-offered the prosecution's plea, reasoning that, while the Sixth Amendment right to effective counsel applies during pre-indictment plea negotiations, David was not sufficiently prejudiced by his attorney's failure to communicate the plea offer. *Id.* at 10-12. David appealed the district court's judgment, and the Thirteenth Circuit affirmed on both issues, but held that the Sixth Amendment right to effective counsel does not attach prior to formal charges being brought against an accused. *Id*. at 14, 17-18. David appealed the Thirteenth Circuit's judgment and this Court granted the his petition for writ of certiorari.

SUMMARY OF THE ARGUMENT

The Thirteenth Circuit erred in denying David's motion to suppress evidence found during a warrantless police search of his home. This Court has indicated that an exception to the Fourth Amendment warrant requirement exists when police officers acting solely as community caretakers conduct a warrantless search of an automobile. Because there is a heightened expectation of privacy in the home that makes it different from an automobile, this Court must not extend the community caretaking exception to warrantless home searches. Even if the exception does extend to the home, the exception does not apply here for two reasons. First, the evidence suggests that McNown entered David's home for an investigative purpose. Second, the factors that courts have cited for applying the exception are not present in this case. Therefore, this Court must not extend the community caretaking exception to warrantless search of David's home.

The Thirteenth Circuit also erred in holding the Sixth Amendment right to effective counsel did not attach during David's pre-indictment plea negotiations. This Court has indicated that Sixth Amendment attachment is required when the government's intent to prosecute is present and when the pretrial event in question can determine a defendant's case outcome. Because both these

characteristics are present during pre-indictment plea negotiations, this Court must extend the right to counsel to David's case. To do otherwise would undermine judicial precedent and diminish the underlying purpose of the Sixth Amendment without serving a legitimate governmental interest.

STANDARD OF REVIEW

Cases regarding an individual's Fourth and Sixth Amendment rights involve mixed questions of fact and law, which this Court reviews *de novo*. *See Ornelas v. United States*, 517 U.S. 690, 697 (1996); *Johnson v. Williams*, 568 U.S. 289, 297 (2013).

ARGUMENT

I. THE THIRTEENTH CIRCUIT ERRED IN DENYING DAVID'S MOTION TO SUPPRESS EVIDENCE FOUND DURING THE WARRANTLESS SEARCH BECAUSE THE *CADY* COMMUNITY CARETAKER EXCEPTION DOES NOT EXTEND TO THE HOME.

The Fourth Amendment guarantees citizens the right "to be secure in their . . . houses . . . against unreasonable searches and seizures" conducted by the government. U.S. CONST. amend. IV. Generally, searches of homes conducted without consent or a warrant are presumably unreasonable, with some specific exceptions. *See Camara v. S.F. Mun. Ct.*, 387 U.S. 523, 528-29 (1966); *see also Katz v. United States*, 389 U.S. 347, 357 (1967). In *Cady v. Dombrowski*, the Supreme Court held that one exception to the warrant requirement exists when police officers conduct warrantless searches while acting in a community caretaking function, "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).

The primary issue before this Court is whether *Cady* extends beyond automobile searches to homes searches. The circuits are currently split on this issue. *See Ray v. Twp. Of Warren*, 626 F.3d 170, 175-66 (3d. Cir. 2010). Three Circuits, including the Thirteenth, have extended *Cady* beyond the context of automobile searches. The Third, Seventh, Ninth, and Tenth Circuits, on the other

hand, have explicitly declined extend *Cady* to home searches. This Court should neither extend *Cady* to the home nor apply *Cady* to the facts of this case. First, the increased expectation of privacy in the home constitutionally distinguishes it from automobiles. Second, even if this Court extends *Cady* to home searches, the exception does not apply in this case because the evidence indicates McNown entered David's home for investigative purposes, and the factors utilized in determining whether the community caretaking exception applies are not present in this case.

A. The *Cady* community caretaking exception does not extend to home searches due to a heightened expectation of privacy in the home.

The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed . . . ." *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972). The Fourth Amendment, therefore, acknowledges that citizens have a "tangible interest" in protecting the "sanctity" of their homes from "the possibility of criminal entry under the guise of official sanction." *Camara*, 387 U.S. at 530-31. This Court has recognized that the threat of invasion by police officers is "a grave concern" to society as a whole. *Johnson v. United States*, 333 U.S. 10, 14 (1948). Consequently, warrantless home searches are presumed to be unreasonable. *See Payton v. New York*, 445 U.S. 573, 586 (1980); *see also Coolidge v. New Hampshire*, 403 U.S. 443, 474 (1971).

By contrast, this Court has recognized that "for the purposes of the Fourth Amendment there is a 'constitutional difference' between houses and vehicles." *Chambers v. Maroney*, 399 U.S. 42, 52 (1970). Specifically, this Court has noted that warrantless searches of automobiles may be reasonable when they would not otherwise be for houses because automobiles are "constantly movable." *Cooper v. California*, 386 U.S. 58, 59 (1967). In addition, the "ambulatory" nature of automobiles gives officers "extensive . . . noncriminal contact" with them that can bring officers within "plain view" of evidence of a crime or contraband. *Cady*, 413 U.S. at 442. That is why

Cady allows for warrantless automobile searches when officers are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441. A majority of Circuits have held that this Court intended to confine its *Cady* holding to vehicles and "did not intend to create a broad exception to the Fourth Amendment warrant requirement . . . ." *See e.g., United States v. Pichany*, 687 F.2d 204, 208-09 (7th Cir. 1982); *see also United States v. Bute*, 43 F.3d 53, 535 (10th Cir. 1994) (holding that the community caretaking exception only applies to automobile searches). These courts have emphasized that the governmental interest motivating a warrantless search must be balanced against the intrusion on the individual's Fourth Amendment interests. *See e.g., United States v. Erickson*, 992 F.2d 529, 531 (9th Cir. 1993) (citing *Maryland v. Buie*, 494 U.S. 325, 331 (1990)). Under this balancing test, warrantless searches of homes by officers, even when acting as community caretakers, are generally not reasonable. *See e.g., Erickson*, 992 F.2d at 531 (citing *Buie*, 494 U.S. at 331).

For example, the fact that an officer is performing a community caretaking function at the time of a warrantless search cannot alone justify the intrusion on an individual's privacy. *Erickson*, 992 F.2d at 532. In *Erickson*, an officer responding to the suspected burglary of an adjacent property, after noticing that the back door was locked, pulled back the black plastic sheet that was covering a basement window and saw marijuana plants inside the home. *Id.* at 530. In recognizing that there is a lesser expectation of privacy in an automobile than a home due to the "pervasive regulation" and frequent accidents and break downs of automobiles, the court held that "the warrantless search of Erickson's home constituted a severe invasion of privacy." *Id.* at 532-33 (citing *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976)). The heightened expectation of privacy in the home led the court to hold that a judge should be the one to

determine whether it is reasonable to enter a home in the absence of exigent circumstances. *Erickson*, 991 F.2d at 532 (citing *Mincey v. Arizona*, 437 U.S. 385, 395 (1978)).

When balancing the government's interest motivating the warrantless search of David's home against the intrusion to David's interest, McNown's search, like the search in *Erickson*, constituted a severe invasion of David's privacy. David said it himself: "I like my privacy. That's why I live in a gated community." Ex. C at 2. David indicated that he never allowed people inside of his house and would not have let Officer McNown enter on January 15, 2017. *Id.* David's statements are corroborated by the fact that his front door was locked, and by the fact that he did not answer the door when McNown knocked on it and rang the doorbell. Ex. A at 5.

Although some circuits have extended *Cady* to homes, their reasoning should not be adopted here because they "appl[ied] what appears to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaking role." *Ray*, 626 F.3d at 176. In extending *Cady* beyond the context of automobile searches, the Sixth Circuit emphasized the "compelling government interest" in entering a home when obtaining a warrant would not serve "any apparent purpose." *United States v. Rohrig*, 98 F.3d 1506, 1522 (6th Cir. 1996). The court noted that the government's interest is not limited to its interest in carrying out local ordinances, but exists in "exigent circumstances" that deal with "the importance of preserving [the] communit[y] . . . ." *Id.* at 1521-22. Unlike *Rohrig*, the Government here conceded that McNown did not enter David's home under any exigent circumstances. R at 7. The Sixth Circuit later questioned whether *Cady* created an exception to the warrant requirement for homes, holding that it "doubt[s] that community caretaking will generally justify warrantless entries into private homes.") *United States v. Williams*, 354 F.3d 497, 508 (6th Cir. 2003).

The Eighth Circuit has only extended *Cady* to homes when the officer conducting the search had a "reasonable belief that an emergency exist[ed] requiring his or her attention." *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006). That is because officers have an "obligation to help those in danger and ensure the safety of the public." *United States v. Smith*, 820 F.3d 356, 361-62 (8th Cir. 2016). Unlike the Eighth Circuit cases, the Government here has never contended that McNown's entry in David's home was "valid under the guise of emergency aid." R at 15.

The government undoubtedly has a strong interest in searching automobiles due to their mobility and frequent contact with police. In the absence of a warrant or exigent circumstances, however, the government's interest in entering a home must yield to the homeowner's interest in protecting himself and his belongings from government invasion. If not, then any citizen suspected of having a common cold could be subject to police intrusion. Because this result is not acceptable, this Court should not extend the *Cady* community caretaker exception to warrantless home searches.

B. Even if *Cady* does extend to home searches, it does not apply to McNown's search of David's home.

Even if this Court determines that *Cady* extends to the home, it should not apply *Cady* to this case for two reasons. First, this Court held that the community caretaker exception is only applicable when an officer enters a home with a non-investigatory purpose. Because the evidence indicates McNown entered David's home with an investigatory purpose, an application of *Cady* would contradict this Court's own precedent. Second, courts, including this Court, have relied on various factors when determining whether an officer was acting as a community caretaker. Because these factors do not apply to this case, McNown was not acting as a community caretaker when he entered David's home.

i. The facts indicate that McNown entered David's home with investigative purpose.

This Court held that the community caretaking exception only applies when an officer acts "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441. Courts should focus on the officer's purpose at the time of the search as opposed to the urgency of the officer's action. *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 561 (7th Cir. 2014). In determining the officer's purpose, courts must view the facts and circumstances objectively, as "[t]he officer's subjective motivation is irrelevant." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006) (quoting *Scott v. United States*, 436 U.S. 128, 138 (1978)).

A police officer's motives are not "totally divorced" from "investigation" when the circumstances show a significant suspicion of criminal activity. *Williams*, 354 F.3d at 508. In *Williams*, DEA agents responded to a landlord's call about plant materials and an odd smell coming from one of her residences. *Id.*at 500. The court held that the officers' entry into the apartment were not solely related to their community caretaking function. *Id.* at 508. The court recognized that "although the officers ostensibly entered the home to assist [the landlord]," their experience, combined with the landlord's description, made them "suspicious, if not convinced, that drug-related activity was taking place inside the residence before they entered without a warrant." *Id.*

The facts of this case, when viewed objectively, suggest that McNown went to David's house for investigative purposes. McNown began attending David's Church around the same time that there had been an increase in the flow of drugs into Lakeshow from Golden State. Ex. A at 4. McNown, a police officer of twelve years, had enough experience to know that Alvardo's reactions indicated that she was trying to hide something. *Id.* at 1,6. McNown claims that he

went to check on David because he "assumed" that he had the flu. *Id.* at 3. This is not an objectively reasonable basis for entering someone's home. As Judge O'Neal indicated in his dissent, extending *Cady* to warrantless home searches on the basis of officers suspecting flu outbreaks would give officers the ability to abuse their discretion and enter nearly any home for pretextual reasons. *See* R at 19 (O'Neal J., dissent). Officers who do this will not be on notice that their conduct is a clear violation of the law and will have qualified immunity in many jurisdictions because this Court has not yet explicitly declined to extend *Cady* to homes. *See Ray*, 626 F.3d at 177, 179.

Like *Williams*, an objective analysis of the facts in the case indicates that McNown entered David's home with a significant suspicion of criminal activity. McNown's suspicions of criminal activity only heightened upon approaching David's home. Upon arrival at David's gated community, McNown noticed a black Cadillac SUV with Golden State plates, which he knew were popular among drug dealers, leaving David's gated community. Ex. A at 4. When he pulled up to David's, he noticed David's van in the driveway and loud music playing inside. *Id.* After knocking on the door, ringing the doorbell, and waiting for someone to answer, he realized the front door was locked. *Id.* Even though he admitted there were no signs of a break-in or other exigent circumstances, McNown entered the back door without knocking. *Id.* at 5,7. Therefore, like *Williams*, the facts indicate that McNown was not acting solely within his community caretaking function when he entered David's home.

ii. Additionally, the community caretaking factors do not apply to McNown's search of David's home.

Community caretaking serves as "a catchall for the wide range of responsibilities that police officers must discharge aside from their criminal enforcement activities." *United States v. Rodriguez-Morales*, 929 F.2d 780, 785 (1st Cir. 1991). Courts should look at the totality of the

circumstances to determine if the officer had an objectively reasonable basis to exercise his community caretaker function. *State v. Kramer*, 315 Wis.2d 414, 432, 434 (Wis. 2009). Courts have, however, emphasized three main factors when undertaking their analysis: (1) custody and control, (2) standard or routine procedure, and (3) immediate aid.

Cady emphasized custody and control of the defendant's car, which had been impounded by the police. *Cady*, 413 U.S. at 443. It is clear that, in this case, David's house was not in the custody and control of McNown at the time of the search. *Cady* also emphasized the standard police procedure of searching for a known gun in an impounded car in order to protect public safety. *Cady*, 413 U.S. at 443. The Fourth Circuit extended this analysis to residential searches when the police conduct a search pursuant to routine procedure and not for purposes of criminal evidence-gathering. *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009). In that case, courts "should examine the programmatic purpose of the policy—whether it was animated by community caretaking considerations or by law enforcement" but should use an exigent circumstances analysis when an officer enters a home in response to an emergency. *Id.* In this case, however, the Government does not contend that police entering homes under suspicion that someone inside has the flu is standard, routine Lakeshow police procedure. Therefore, the exigent circumstances analysis is appropriate. The Government, however, has conceded that there were no exigent circumstances in this case. R at 7.

Courts also consider whether an officer was "responding to calls to assist persons in need of immediate aid." *United States v. Nord*, 586 F.2d 1288, 1290 (8th Cir. 1978). Police acting in their community caretaking role are "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety." *Rodriguez-Morales*, 929 F.2d at 784-85). Consequently, the

community caretaking doctrine exempts searches that take place "not for any criminal law enforcement purpose but rather to protect members of the public." *Sutterfield*, 751 F.3d at 553-54. The "immediate aid" aspect of community caretaking, however, is not to be confused with the emergency aid exception, as the former looks to the function of the officer, while the latter looks to whether the circumstances indicated the existence of an emergency requiring immediate action. *Hunsberger*, 570 F.3d at 554.

In this case, the facts do not indicate that McNown entered David's home because he believed David was in need of immediate aid. Although McNown contends that he entered David's home because he was concerned that David had the flu, Ex. A at 3, the evidence indicates that McNown did not believe David was at risk of injuring himself or the public at the time of the entry. *Cf. Quezada*, 448 F.3d at 1008 (holding that because the door was unlocked, because the lights and tv were on, and because no one answered when the officer called out, "a reasonable officer in the deputy's position could conclude that someone was inside but was unable to respond for some reason.") In this case, McNown was not sure if David was home. Ex. A at 7. The only indication that he might have been home was the fact that his van was in the driveway, the TV was on, and loud music was playing, which could easily have prevented David from hearing McNown's knocks and doorbell rings. *Id.* at 4,5, 7. *Cf. Rohrig*, 98 F.3d at 1521-22 (holding that an officer *responding to a noise complaint*, which is not present here, was justified in entering the home without a warrant to turn down the music, as it was a part of his community caretaking function prevent a public nuisance).

Additionally, even if McNown truly believed that David was at home with the flu when he entered his home, his argument that David was in need of immediate aid is not persuasive. Before leaving to check on David, McNown sat through a nearly two-hour long service and then

stopped at Starbucks before heading to David's house sometime after 9:00 a.m. Ex. A at 3. If McNown truly believed that David was in need of immediate aid, he would have skipped the Church service and gone to David's house immediately. He likely would have called an ambulance to meet him at David's home or taken David medication rather than stopping at Starbucks to pick up tea. *Id.* In addition, no one asked McNown, or the police, to check on David. After David did not answer Alvardo's phone call, McNown decided on his own, while he was in his civilian capacity, that he would go check on David. *Id.* It was McNown's decision to wait until he was on duty to check on David. Because McNown did not have custody and control over David's home, did not enter David's home under Lakeshow police procedure, and did not have any reason to believe that David was in need of immediate aid, the community caretaking exception cannot apply to McNown's search of David's home.

II. THE THIRTEENTH CIRCUIT ERRED IN DENYING DAVID'S MOTION TO HAVE THE PLEA DEAL RE-OFFERED BECAUSE PRECEDENT SUPPORTS SIXTH AMENDMENT ATTACHMENT DURING PRE-INDICTMENT PLEA BARGAINING.

The Sixth Amendment declares that "in all criminal prosecutions, the accused shall enjoy the right to . . . the Assistance of Counsel for his defense." U.S. Const. amend.VI. The right to counsel recognizes the average defendant's inability to protect himself" against an "experienced and learned" prosecution. *Johnson v. Zerbst*, 304 U.S. 458, 462-463 (1938). Accordingly, the Sixth Amendment awards defendants a right to reasonably competent legal counsel after "the initiation of adversary judicial criminal proceedings" and in all "critical stages" of a judicial criminal action. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972); *Missouri v. Frye*, 566 U.S. 134, 140 (2012).

Although the original "core purpose" of the right to counsel was to ensure effective representation at trial, the Supreme Court has gradually expanded the right to certain pretrial

proceedings. *United States v. Ash*, 413 U.S. 300, 309 (1973). In *Kirby v. Illinois*, Justice Stewart, writing for the plurality, stated that the right to counsel is triggered by either (1) a formal charge by the prosecutor in the form of an indictment or information; or (2) an appearance before the judge, as in arraignment or a first hearing. *Kirby*, 406 U.S. at 689. Accordingly, it is only "at or after the initiation of adversary judicial criminal proceedings" that the need for effective counsel becomes necessary. *United States v. Gouveia*, 467 U.S. 180, 187 (1984).

Recently, the Court has recognized that the changing landscape of the criminal justice system warrants even greater Sixth Amendment protection during pretrial stages. *See e.g.*, *Frye*, 566 U.S. 134 at 140; *Lafler v. Cooper*, 566 U.S. 156, 162 (2012). In *Frye*, the Court noted that plea deals between prosecutors and defendants have nearly functionally replaced trials. *See Frye*, 566 U.S. 134 at 144. Accordingly, this Court extended the Sixth Amendment right to a new critical stage: plea negotiations. *Id.* at 143-144. Because both *Frye* and its companion case, *Lafler*, involve post-indictment plea negotiations, this Court has not addressed whether the right to counsel extends to plea negotiations occurring *prior* to indictment.

The primary issues in this case, therefore, is whether the right to counsel attaches in pre-indictment plea negotiations. Several circuits, including the Thirteenth, have reduced the right to counsel to a "bright line" rule foreclosing attachment during all pretrial stages that occur before indictment or an initial appearance. *See e.g.*, *David v. U.S.*, No. 125-1-7-720, 20-PKS09-20-RCN15 (11th Cir. 2018). These circuits generally hold that a bright line rule is warranted by this Court's statement that the "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated." *See e.g.*, *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018) (quoting *Gouveia*, 467 U.S. at 187). However, as many bright line circuits have noted, the adoption of such a strict, mechanical rule disregards the "cold reality" of the current

criminal justice system – namely that there is a great need for effective counsel in plea negotiations regardless of whether they take place before or after indictment. *United States v. Moody*, 206 F.3d 609, 616 (6th Cir. 2000).

Although bright line circuits correctly recognize the danger of the bright line rule, they are wrong to interpret this Court's precedent to require such a holding. A more thorough analysis of Supreme Court attachment jurisprudence reveals that the right to counsel is defined by (1) the government's solidified commitment to prosecute, and (2) a defendant's need for effective counsel. *See, e.g.*, *Kirby*, 406 U.S. 682 at 689; *Frye*, 566 U.S. 134 at 143. Because these two characteristics manifest in pre-indictment plea bargaining with equal or greater force than post-indictment plea bargaining, this Court must find that the Sixth Amendment right to counsel attaches during pre-indictment plea negotiations. Assuming attachment exists in this case, David's Sixth Amendment claim for ineffective counsel must be granted because he suffered prejudice due to his ineffective counsel.

A. Sixth Amendment attachment is required in pre-indictment plea bargaining because prosecutors commit to their adversarial position when engaged in formal pre-indictment plea negotiations.

In *Kirby*, this Court was confronted with the issue of whether the right to counsel attaches during a post-arrest police line-up conducted prior to the initiation of formal charges. *See generally Kirby*, 406 U.S. 682. Although the Court ultimately found the right to effective counsel did not attach in the defendant's case, it did not limit its analysis to the indictment. *Id.* at 688-690. Rather, the Court cautioned against engaging in "mere formalism" and came to its conclusion only after engaging in a thorough analysis of the circumstances. *Id.* at 689. Justice Stewart indicated that Sixth Amendment attachment is necessary when the government transitions from a neutral investigatory stance to an adversarial one. *Id.* The Court reasoned that

when the "adverse positions of government and defendant" are "solidified," the defendant is faced with both the "prosecutorial forces of organized society" and the "intricacies of substantive and procedural criminal law." *Id.* At that point, the defendant must have access to effective counsel in order to even the judicial playing field. *Id.* In withholding attachment, the Court emphasized that the identification at issue took place during a "routine police investigation" that occurred "long before" the prosecution began its case. *Id.* at 690. The Court also withheld attachment in order to protect the public's interest in ensuring "prompt and purposeful" criminal investigations. *Id.* at 690.

In *United States v. Gouveia*, the Supreme Court reinforced its finding that Sixth Amendment attachment analysis must be based on the presence, or lack thereof, of the government's commitment to prosecute. *See Gouveia*, 467 U.S. at 189 (quoting *Kirby*, 406 U.S., at 689). In *Gouveia*, the police transferred several prison inmates suspected of murder into administrative segregation for interrogation without defense counsel present. Id. at 183. When the inmates later asserted Sixth Amendment violations, the Court again withheld attachment. *Id.* at 187. Even though the Court's previous ruling in *Kirby* gave Justice Rehnquist, writing for the plurality, room to base his opinion on a bright line attachment rule, this Court chose again to conduct a thorough analysis of the interests and circumstances at play. *Id.* at 187-190. By focusing on the "core purpose" of the right to counsel as well as the other constitutional protections available for the defendant, this Court avoided the "mere formalism" cautioned against by Justice Stewart. *Id.* at 188-190 (quoting *Kirby*, 406 U.S. at 689).

Unlike the police investigations in the prior court decisions, a prosecutor's formal plea offer clearly manifests the government's commitment to prosecution. As Judge Stranch stated in her dissent from the Sixth Circuit's *en banc* decision, it is an ethical violation for prosecutors to

make a formal plea offer when they do not intend to bring charges. *See Turner*, 885 F.3d at 981 (Stranch J., dissenting). Therefore, by offering a formal plea deal for specific charges, prosecutors communicate that indictment is impending. *Id.* As the facts of this case indicate, the government's commitment to prosecute is no less solidified when a prosecutor presents a plea offer before, as opposed to after, indictment. When federal prosecutors extended a plea offer to David, they presented a formalized offer for a specific term of imprisonment in exchange for David's cooperation. R. at 4. Given that law enforcement witnessed David engaging in illegal activity, it can be assumed that the prosecution was certain of David's guilt at the initiation of plea negotiations. *Id.* at 3. The prosecution delayed indictment strategically in response to law enforcement's express wishes, and prosecutors promptly brought formal charges within two days of initiating negotiations. *Id.* at 4. Whereas each of the Court's prior cases involved investigative action undertaken by police officers, David was confronted by an expert prosecutorial adversary.

Additionally, recognizing a right to counsel in pre-indictment plea bargaining cases does not implicate any of the public safety concerns present in *Frye*. Recognizing a right to counsel will not hinder law enforcement or the government's ability to prosecute. The government has nothing to gain by denying defendants the right to counsel during pre-indictment plea negotiations, aside from the opportunity to exploit defendants' ignorance. David's case exemplifies the difficulties defendants face in evaluating pre-indictment plea offers. In order for David to meaningfully evaluate the plea offer presented in this case, he would need to be fluent in criminal procedural and substantive law and capable of understanding the strength of the prosecution's case. Clearly, David, an elderly minister with no prior arrests or legal training, lacked the ability to defend himself against a savvy federal prosecutor. Ex. C at 3. Given both the

practical setbacks of the bright line rule and its inability to serve a significant governmental interest, this Court has no reason to deny attachment during pre-indictment negotiations.

Furthermore, the Thirteenth Circuit's finding that "there is no circuit split on this issue" is misguided. *See* R. at 18. As the District Court noted, the lower courts are divided on the issue of Sixth Amendment attachment during pre-indictment plea bargaining. *See id.* at 9-10. Four circuits, including the Third, First, Fourth, and Seventh Circuit, have deemed attachment possible during pre-indictment circumstances. *See*, *e.g.*, *Matteo v. Superintendent*, 171 F.3d 877, 892 (3d Cir. 1999) (holding that the right to counsel "may attach at earlier stages [before an indictment or the defendant's first court appearance]").

Although the Second, Fifth, Tenth, Eleventh, Sixth, and D.C. Circuits have adopted the bright line rule, these cases are not persuasive for two reasons. First, many bright line cases involve government investigations, such as line-ups or police interrogations analogous to the investigations in *Frye* and *Lafler*. *See, e.g.*, *United States v. Mapp*, 170 F.3d 328, 334 (2d Cir. 1999) (withholding attachment during pre-indictment conversations between defendants and law enforcement); *United States v. Langley*, 848 F.2d 152, 152 (11th Cir. 1988) (withholding attachment during a pre-indictment line-up conducted by the police). Because law enforcement investigation cases differ from pre-indictment plea bargaining cases due to the lack of evidence indicating the government's commitment to prosecute, these cases are not relevant to the facts at issue.

Second, the vast majority of Circuits that have adopted the bright line rule have done so without engaging in the thorough, fact-intensive analysis propagated by this Court. *See, e.g*, *United States v. Heinz*, 983 F.2d 609, 612 (5th Cir. 1993) (limiting its attachment analysis to the statement that the Sixth Amendment right "does not attach" despite earlier Supreme Court cases

implying "a more functional" attachment test); *Langley*, 848 F.2d 152, 152 (stating simply that "the mere filing of a complaint and the issuance of a warrant for the defendant's arrest…does not meet [the] *Wade/Kirby* test.") Rather than asking whether the government's commitment to prosecute is evident, bright line circuits tend to elevate the general language found in *Kirby* to a strict rule without any discussion of the underlying issues. Such "wooden adherence" to an "attachment only indictment rule" violates Justice Stewart's warning against engaging in "mere formalism," and renders the underlying holdings unpersuasive. *See Turner*, 885 F.3d at 983 (Stranch J., dissenting).

Although the Sixth Circuit provides a meaningful analysis of pre-indictment plea negotiation cases, as exemplified by *Turner v. United States*, the court misreads *Kirby* and *Gouveia* by failing to consider the government's commitment to prosecute and the practical implications of the bright line rule during its evaluation. *See generally*, *Turner*, 885 F.3d 949. Moreover, the Sixth Circuit's adoption of the bright line rule is hardly whole-hearted. The majority opinion in *Turner* was offset by a passionate concurrence and dissent urging the Sixth Circuit to reconsider the bright line rule. *See generally Turner*, 885 F.3d 955-984. Additionally, as noted by Judge O'Neal in his dissent, prior to *Turner*, the Sixth Circuit "laid out a compelling argument for abandoning the bright-line rule in [*Moody*]." *See* R. at 21. Although the Sixth Circuit in *Moody* held that it was beyond the court's power to modify the rule, it stated in no uncertain terms that the bright line rule "exalt[s] form over substance." *See United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000). However, because the underlying rationale in *Kirby* and *Gouveia* supports attachment during pre-indictment negotiations, it is within the power of this Court to both vindicate the purpose of the Sixth Amendment and remain true to judicial precedent.

B. Sixth Amendment attachment is required in pre-indictment plea bargaining because pre-indictment plea negotiations carry long term implications for defendants' case outcomes.

The Sixth Amendment right to counsel has evolved to meet the challenges that result from "changing patterns of criminal procedure and investigation . . . ." *Ash*, 413 U.S. 300 at 310. As this Court's precedent has recognized, the criminal justice system has changed so that defendants now face critical stages of their prosecution prior to indictment. *See e.g.*, *Frye*, 566 U.S. 134 at 140; *Lafler*, 566 U.S. 156 at 162. Recently, this Court recognized that plea negotiations play nearly as significant a role within the criminal justice system as trials do. *See Frye*, 566 U.S. 134 at 143. Accordingly, the Supreme Court deemed plea negotiations a "critical stage" of an adversarial proceeding triggering Sixth amendment attachment. *Id*. at 140. Because the impact of a plea negotiation is not lessened when it occurs before, as opposed to after, indictment, basic principles of common sense and fairness demand that this Court extend attachment to pre-indictment plea negotiations.

In *Frye* and *Lafler*, this Court held that plea negotiations are critical stages encompassing a Sixth Amendment right due to the long-lasting impact that plea negotiations have on a defendant. *See Frye*, 566 U.S. 134 at 140-144; *Lafler*, 566 U.S. 156 at 162. In both cases, defendants were unable to take advantage of favorable plea offers due to the incompetency of their legal counsel. *See Frye*, 566 U.S. 134 at 139; *Lafler*, 566 U.S. 156 at 161. In conducting its Sixth Amendment analysis, this Court acknowledged that plea negotiations comprise "97 percent of federal convictions and 94 percent of state convictions . . . ." *See Frye*, 566 U.S. 134 at 143. Accordingly, Justice Kennedy, writing for the majority in *Frye*, stated that plea bargaining can no longer be considered "adjunct to the criminal justice system; it *is* the criminal justice system." *Id.* Because plea bargaining has functionally replaced trials in both presence and impact, it

logically follows that both trials and plea bargaining implicate Sixth Amendment rights. *Id.* To rule otherwise would frustrate the intent of the Sixth Amendment as many defendants would be denied legal guidance at "the only stage when legal aid and advice would help . . . ." *Id.* at 144.

Although the Court did not have the opportunity to consider pre-indictment plea bargaining in either *Frye* or *Lafler*, the Court's justification applies to pre-indictment plea bargaining with the same or greater force than post-indictment plea bargaining. As David's case illustrates, pre-indictment plea bargaining clearly carries long-lasting consequences for defendants. There is no dispute that David's initial legal counsel, Long, met the standard for ineffective legal counsel. Had David been capable of participating in the pre-indictment plea bargaining process, his prison sentence may have been reduced by nine years. Solely due to his defense counsel's incompetency, he was unable to even consider this plea deal. In addition, there does not appear to be any dispute that the government delayed indictment by two days only in response to law enforcement's explicit encouragement. R at 4. But for law enforcement's intervention, David clearly would be entitled to the effective assistance of counsel. Under the bright line test, however, none of these factors are given any consideration. A reasonable and fair interpretation of the Sixth Amendment cannot be squared away with such an arbitrary and unjust result.

Moreover, as Judge Stranch noted in her Sixth Circuit dissent, the justifications for providing defendants with a right to counsel during pre-indictment plea negotiations are arguably stronger than in post-indictment cases. *See Turner*, 885 F.3d at 982 (Stranch J., dissenting). In some cases, pre-indictment plea negotiations may be the accused's only "adversarial confrontation." *Id.* If these defendants are denied the right to effective counsel, it is "all but [ensured] that his window of exposure to the criminal justice system will open with the prosecutor and close in the

prison system." *Id.* Thus, failure to extend attachment to pre-indictment plea negotiations leaves "whole hosts of defendants" unprotected. *Id.*

However, adoption of the bright line rule has other troubling consequences. Mechanical adherence to an "attachment on indictment rule" also "raises the specter of prosecutorial manipulation." *Id.* at 983. The bright line rule incentivizes prosecutors to purposely delay indictment in order to "extract unfavorable and uncounseled plea agreements . . . ." *Id.* Accordingly, this Court's acceptance of the bright line rule will likely condemn vast numbers of defendants to "navigate the confines of an adversarial and critical plea bargaining process without legal representation." *Id.*

C. Assuming the Sixth Amendment right to effective counsel attaches, David should prevail on his ineffective assistance of counsel claim and be given an appropriate remedy.

To prevail on an ineffective assistance of counsel claim, the "defendant must affirmatively establish" that (1) the constitutional deficiency of his counsel (2) prejudiced the outcome of his case. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Both parties in this case have stipulated that Long was constitutionally deficient as David's counsel. Accordingly, in evaluating David's Sixth Amendment, this Court must only determine whether David suffered prejudice, and, if so, what remedy should be awarded.

In order to show prejudice, a defendant "must demonstrate a reasonable probability" that he (1) would have accepted the more favorable plea offer had he been afforded effective assistance of counsel and (2) that "the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it." *Frye,* 566 U.S. at 135. Courts should tailor remedies to the Sixth Amendment injury suffered. *United States v. Morrison*, 449 U.S. 361, 362 (1981). In

this case, there are two possible remedies: 1) forcing the prosecution to re-offer the initial plea or 2) authorizing the lower court to determine the appropriate remedy. *Lafler*, 566 U.S. at 174.

"[T]he facts here support a finding of reasonable probability" of prejudice. R. at 22 (O'Neal J., dissent). Less than a week after the prosecution initiated the plea deal, David indicated his willingness to exchange information capable of leading to a suspect's arrest in exchange for the same plea deal. R. at 5; Ex. C at 3; Ex. E. The timing and certainty of this offer support a "reasonable probability" that David, the prosecution, and the trial court would have accepted the plea deal had it been communicated to David in a timely fashion. Given the seriousness of Long's incompetency, as well as the clear prejudice suffered by David, this Court should direct the prosecution to re-offer its initial plea deal. However, if this Court finds that the prosecution would no longer derive any benefit from re-offering the plea deal, the trial court should be allowed to determine the issue.

CONCLUSION

The Fourteenth Circuit improperly denied David's motion to suppress the evidence obtained during a warrantless search of his home because the community caretaking exception to the Fourth Amendment's warrant requirement does not extend to searches of the home or the facts of this case. Likewise, the court incorrectly denied David's motion to be re-offered the government's plea because the Sixth Amendment's right to effective counsel attaches to pre-indictment plea negotiations. Thus, the decision of the Thirteenth Circuit should be denied.

APPENDIX A

U.S. CONST. amend. IV:

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

U.S. CONST. amend. VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.