R40

No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 2018

_____

CHAD DAVID,

Petitioner,

v.

THE UNITED STATES OF AMERICA,

Respondent.

_____

On Writ of Certiorari to the

United States Court of Appeals

for the Thirteenth Circuit

_____

BRIEF FOR RESPONDENT

_____

ATTORNEYS FOR RESPONDENT

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

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?

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

On Sunday, January 15, 2017, Officer McNown arrived at Sunday service just before 7:00 AM. R. at 2. Expecting to see Respondent Minister Chad David, Officer McNown was instead met with several church members who expressed deep concern for the missing minster. R. at 2. The members stated that they had tried to contact Mr. David to ensure that he was okay but none reached the reverend. R. at 2. Another member expressed greater concern when he disclosed that he thought he had seen Mr. David at a bar the previous night. R . at 2. Though Officer McNown suspected the elderly David to have been at home with the flu, Officer McNown assured the church community he would check on their minster after their service. R. at 2. After another church attendee filled in for the missing minister, Officer McNown began his shift of patrolling Lakeshow. R. at 2.

After picking up some hot tea for the presumed ill minister, Officer McNown drove to Mr. David's residence. R. at 2. While in the gated neighborhood, McNown's police suspicions arose when he spotted a black Cadillac SUV with Golden State license plates, which based on his experience, were typically driven by drug dealers. R. at 2. These reservations were corroborated by the knowledge there had been an increase of drugs coming into the Lakeshow community from the Golden State area. R. at 2. After the suspicious encounter, Officer McNown arrived at Mr. David's house to find the front door locked and the church van parked outside. R. at 2.

While knocking on the front door, Officer McNown heard loud music playing with noticeably inappropriate language in it. Ex. A. Alarmed by the profanity and noise coming from the 72-year-old minister's home on a Sunday morning, Officer McNown inspected the windows. R. at 3. Upon looking around the home, Officer McNown noticed the TV was playing the movie,

The Wolf of Wall Street. R. at 3. Concerned with the debaucheries easily observed outside the elderly minster's home, Officer McNown suspected someone else to be inside the residence. Ex. A. Now determined to check on Mr. David's status, Officer McNown checked the homes backdoor, which was unlocked, and went inside. Ex. A. Upon entering the premises, Officer McNown noticed the disheveled manner of the first floor, reflecting the nature of a frat house rather than an elderly minister's home. Ex. A. As McNown went to turn off the profanity-screaming movie, he noticed a notebook with church attendee's names written next to words such as "ounce" and "paid." Ex. A. After obtaining the drug payment information, Officer McNown heard loud music blaring from upstairs. R. at 3.

Upon going upstairs to check if Mr. David was there, Officer McNown opened the door to find Mr. David acting in a rage packaging cocaine into tiny zip-lock baggies with a Golden State flag sticker in the shape of a skull. Ex. A. Witnessing the minister bagging more cocaine than Officer McNown had ever seen in his life, he quickly detained Mr. David and called the department for a DEA agent. Ex. A. DEA Agent Colin Malaska arrived to Mr. David's house and began searching the house for drugs and paraphilia evidence. R. at 3. To combat the flow of narcotics from other states, Agent Malaska read Mr. David his Miranda rights and asked Mr. David to tell him where he obtained the large quantity of drugs. R. at 3. Mr. David replied there was no way he would give up his suppliers. R. at 3. After arriving to the prison, Respondent obtained Mr. Keegan Long as his attorney, although he personally knew through confessions and public displays that Mr. Long was an alcoholic. R. at 3–4.

With credible information that a suspected drug kingpin was traveling through Lakeshow, Agent Malaska encouraged the prosecution to offer a favorable plea deal before filing any charges to obtain information, which could lead to the kingpin's arrest. R. at 4. Agent Malaska

wished to keep any information of Mr. David's involvement away from the public so the kingpin would not be tipped-off and evade arrest. R. at 4. To keep with the wishes of Agent Malaska and help the narcotics investigation, the prosecutors offered Mr. David a plea bargain of one year in prison in exchange for the names of his suppliers. R. at 4. This offer was emailed to Mr. Long on Monday, January 16, 2017 with an express provision that the plea deal was only valid for 36 hours. R. at 4. The offer was set to expire on January 17, 2017 at 10:00 PM. R. at 4.

Mr. Long while drinking at a bar, received the emailed plea offer and failed to accurately read the information regarding the time limit. R. at 4. Mr. Long never disclosed the plea deal to Mr. David, nor did he answer the prosecutor's voicemail inquiring about the plea offer status. R. at 4. After 36 hours, the plea offer expired. R. at 4. Federal prosecutors indicted Mr. David, charging him with one count of 21 U.S.C. § 841 on the morning of January 18, 2017. R. at 4.

When Mr. David was informed of Mr. Long's mistake, he fired Mr. Long and obtained a new lawyer, Mr. Allen. R. at 4. At this point, however, the minister's drug suppliers would have likely been tipped off and another plea deal was not offered. R. at 5.

II. PROCEDURAL HISTORY

Mr. David filed two motions, a motion to suppress evidence under the Fourth Amendment and a motion seeking to be re-offered the initial plea deal. R. at 5. The district court denied the motion to suppress evidence, finding Officer McNown acted as a community caretaker, which extended to the search of a home. R. at 12. Additionally, the court denied the motion for Mr. David to be reoffered the plea deal, deciding no showing of prejudice could be found. R. at 12. The Thirteenth Circuit Court of Appeals affirmed the decision of the district court. R. at 18.

SUMMARY OF THE ARGUMENT

The community caretaker exception should be applied to warrantless entries into a home or residence. The interest of the public will be best served by this exception because law enforcement officers are responsible for a wide variety of task distinct from criminal investigation. If the exception was prohibited, harm could occur to persons or property where a warrant is not available as a legitimate option. Further, the extension of this doctrine to the home best serves the general needs of an expecting public.

Here, Officer's McNown's actions show his intentions when entering Mr. David's home were divorced from investigating criminal conduct. His actions reflect a desire to aid or comfort a sickly Mr. David. Officer McNown had a reasonable belief that his entry was necessary due to the unusual circumstances at the scene. The loud music, profanity laced movie, and disheveled home suggested that something was amiss and required immediate attention. The need of the government to act as caretakers exceeds the infringement on the right of privacy in the strange circumstances presented here. Because the entry should be considered lawful, the apparent illegality of the evidence in plain view will support an affirmation of the denial to suppress by this Court.

It has long been recognized that the Sixth Amendment right to counsel attaches only at or after initiating adversary judicial proceedings against the defendant. By applying the *Kirby* bright-line standard to when the right to counsel attaches, the court will follow years of case precedent, as well as allow an appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interests of society in the prompt and purposeful investigation of an unsolved crime. Although a minority of Circuit Courts question the bright-line standard, this Court has never wavered in its bright-line test. In applying the *Kirby*

test to Mr. David, his Sixth Amendment right to counsel had not attached when prosecutors extended him a plea bargain. Because Mr. David's right to counsel never attached, this Court should deny Mr. David's motion to be re-offered the expired plea deal.

STANDARD OF REVIEW

This Court reviews decisions of the district court to deny a motion to suppress evidence by not disturbing factual findings unless they are clearly erroneous. *United States v. Rohrig*, 98 F.3d 1506, 1511 (6th Cir. 1996). However, this Court reviews de novo any conclusions of law reached by the lower courts. *Id.* Whether the Sixth Amendment right to counsel attaches in pre-indictment plea negotiations is a question of law that is reviewed de novo. *United States v. Latouf*, 132 F.3d 320, 330 (6th Cir. 1997); *United States v. Doherty*, 126 F.3d 769, 777–78 (6th Cir. 1997).

ARGUMENT AND AUTHORITIES

I. THE COMMUNITY CARETAKER EXCEPTION TO A WARRANT REQUIREMENT VALIDATES THE DISCOVERY OF THE COCAINE AT CHAD DAVID'S RESIDENCE.

The Fourth Amendment to the Constitution provides "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. A warrantless search is presumed to be invalid. *Katz v. United States*, 389 U.S. 347, 357 (1967). Several exceptions to the warrant requirement have been expanded by court decisions over the years. *See United States v. Hromada*, 49 F.3d 685, 690 (11th Cir. 1995) (execution of arrest warrant); *Mincey v. Arizona*, 437 U.S. 385, 392 (1978)

(exigent circumstances); *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973) (community caretaking functions).

This Court has not determined whether the community caretaker functions of police officers should support a warrantless entry into a home or residence where evidence of a crime is found during the entry. The community caretaking functions of police are things that officers do when assisting members of a community totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *United States v. York*, 895 F.2d 1026, 1030 (5th Cir. 1990). The phrase "community caretaking" is a catchall for the wide-ranging duties that police officers must discharge aside from their criminal enforcement obligations. *United States v. Rodriguez-Morales,* 929 F.2d 780, 785 (1st Cir. 1991). In performing this caretaking role, police are expected to help those in distress, combat actual hazards, prevent potential hazards from coming into existence, and provide an infinite variety of services to preserve and protect public safety. *United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006).

The community caretaking doctrine originates from this Court's ruling in *Cady v. Dombrowski,* where this Court upheld the warrantless search of a car. 413 U.S. 433. The police reasonably believed that the incapacitated driver, a police officer, had his service revolver that might be subject to theft if left in the vehicle. *Id.* at 446–48. This Court recognized that officers engage in functions other than those of enforcing criminal laws. *Id.* at 441. One result of *Cady* is the authorization of routine, warrantless inventory searches. *See South Dakota v. Opperman*, 428 U.S. 364 (1976).

Well-accepted community caretaking functions include not just investigating accidents and protecting property, but also assisting those who cannot care for themselves, mediating disputes,

preserving civil order, and providing other services on an emergency basis. *Winters v. Adams*, 254 F.3d 758, 763 n.8 (8th Cir. 2001). Police are the "jack-of-all-emergencies," expected to provide "an infinite variety of services to preserve and protect community safety." *Rodriguez-Morales*, 929 F.2d at 784–85.

Several circuits have addressed whether the community caretaking functions of police officers extends to entries of homes. These undertakings by the circuit courts have led to a disagreement on whether the exception does so extend. The Fifth, Sixth, and Eighth Circuits have upheld such searches under this doctrine. *See United States v. Quezada*, 448 F.3d 1005, 1007–08 (8th Cir. 2006) (officer entered apartment after finding door unlatched and lights and television on inside but receiving no response to his shouted inquiries); *Rohrig*, 98 F.3d at 1521–25 (officer entered home to abate loud and disruptive noise in a residential neighborhood); *York*, 895 F.2d at 1029–30 (officers entered to keep the peace inside a residence while a guest removed his family and possessions).

A. The Community Caretaker Exception Should Be Applied to a Home or Residence.

This Court should find that the community caretaker exception extends to houses and residences when the questioned conduct is divorced from the purpose of criminal investigation. If the exception is denied, the public interest will not be served because police may be unable to obtain a warrant to provide services expected by society. Recognizing that community caretaking can apply to searches of a house simply acknowledges that the Fourth Amendment standard regarding searches is reasonableness. *Kentucky v. King*, 563 U.S. 452, 459 (2011). That reasonableness determination ultimately "depends upon the facts and circumstances of each case." *Opperman*, 428 U.S. at 364.

The community caretaking doctrine strikes the proper balance between the public and private interest involved in residential searches. It is incorrect to contend that community caretaking interests are always insignificant and could never justify a warrantless entry into a home. *Rohrig*, 98 F.3d at 1522. A rule that the doctrine could never apply to homes would overlook not only the weight of public interest, but the fact that an intrusion into the home might be minimal, such as stepping through a door to shout hello. The homeowner is unlikely to be harmed because often, the entry is for his or her benefit, to check on welfare or protect property from damage, theft, or loss.

The community caretaking doctrine is necessary, not only because police may lack time to obtain a warrant, but because a warrant may not be available for police to obtain. Properly, community caretaking functions are unrelated to the enforcement of criminal laws, yet traditional warrants are only options in the criminal context. For community caretaking functions, there may be no appropriate warrant that police can even seek. *See Sutterfield v. City of Milwaukee*, 751 F.3d 542, 563–66 (7th Cir. 2014). Without the doctrine of community caretaking, what is best for protecting pubic interests may be unavailable. *Rohrig*, 98 F.3d at 1522–23 & n.9.

In the years since the decision in *Cady* establishing the doctrine of community caretaking, federal and state supreme courts have expanded the doctrine to allow warrantless searches of homes. *See id.* at 1509; *State v. Alexander*, 721 A.2d 275, 286–87 (Md. Ct. Spec. App. 1988). In *Rohrig*, police officers were investigating a noise complaint at the home of Donald Rohrig. 98 F.3d at 1509. The officers entered the home through an unlocked door after receiving no answer when they knocked and tapped on the first-floor windows. *Id.* During their efforts to locate the homeowner they discovered a marijuana growing operation. *Id.* Rohrig attempted to suppress the evidence, asserting a violation of his Fourth Amendment rights. *Id.* at 1510. The Sixth Circuit

held that the warrantless entry was justified under the community caretaking exception. *Id.* at 1523. The court was "simply unable to identify any unreasonable conduct on the part of the officers." *Id.* at 1524. The court concluded that the government's interest in quieting the music justified the entry into Rohrig's home. *Id.* at 1522.

Similarly in *United States v. Smith*, officers responded to a call for a welfare check of an individual at her boyfriend Cody Smith's house. 820 F.3d 356, 358 (8th Cir. 2016). The officers approached the front door and announced their presence. *Id.* at 359. Before entering the residence, the police called out for the individual, but she did not respond. *Id.* When they located the individual in a bedroom, the officers observed an AK-47, and Smith was indicted for possession of a firearm by a prohibited person. *Id.* The court upheld the lower court's refusal to suppress the evidence. *Id.* at 362. The court found that the incident required their immediate attention in entering Smith's residence. *Id.* The evidence was admissible because the firearm was lying on the bed in plain view. *Id.* This Court has "long held that 'under certain circumstances the police may seize evidence in plain view without a warrant,' including situations '[w]here the initial intrusion that brings the police within plain view of such [evidence] is supported . . . by one of the recognized exceptions to the warrant requirement.'" *Id.* (citing *Arizona v. Hicks*, 480 U.S. 321, 326 (1987)).

Additionally, in *United States v. Nord*, the Eighth Circuit found that police were lawfully in the defendant's residence under their community caretaking function when they were called to the defendant's apartment by a concerned neighbor who feared the defendant was inside his apartment intoxicated. 586 F.2d 1288, 1289 (8th Cir. 1978). Once inside the residence, the police observed firearms in plain view, and the defendant was later charged. *Id.* The community caretaking function includes rendering aid to those who may need it. *See United States v.*

Holloway, 290 F.3d 1331, 1340 (11th Cir. 2002) (recognizing that police may seize evidence in plain view during their community caretaking or emergency situation).

Some circuits emphasize *Cady*'s distinction between cars and homes, but community caretaking functions extend far beyond just protecting the contents of automobiles. *Cf. Ray v. Township of Warren*, 626 F.3d 170, 177 (3d Cir. 2010). Even the few circuits that have rejected the application of the community caretaking doctrine to the home have expanded it to include the seizure of persons. *See Vargas v. City of Philadelphia*, 783 F.3d 962, 972–74 (3d Cir. 2015). The important privacy interests in the home can be protected not only by weighing the severity of the intrusion against legitimate governmental interests, but also by requiring, under *Cady*, that the police action be "totally divorced" from any criminal investigation. *See Hawkins v. United States*, 113 A.3d 216 (D.C. 2015). Further protections could be afforded by determining if alternatives existed to a warrantless entry and whether the search ceased once the community caretaking interests were satisfied. *Id.*

This Court should recognize the community caretaking doctrine's applicability to residential searches. Community caretaking interests should not be arbitrarily precluded as justification for a warrantless residential search.

B. Officer McNown Was Acting as a Community Caretaker When He Discovered the Cocaine During the Search for Mr. David.

Officer McNown acted as a community caretaker, and the evidence seized from his entry into Mr. David's residence should not be suppressed. For an exception to the warrant requirement based on community caretaking to be effective, the government must show: (1) the search was divorced from criminal investigation, (2) the officer reasonably believed entry was necessary, (3) the government has a sufficient interest, and (4) the evidence was lawfully seized.

Here, Officer McNown was concerned for the health of Mr. David, believed he needed to enter, had an obligation to ensure the public's safety, and the drugs were in plain view.

1. The search was totally divorced from criminal investigation.

Police officers regularly perform community caretaking activities to help people in danger, to preserve property, or to create and maintain security in the community. Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 272. Community caretaking functions are not an exception to the warrant requirement on their own, but can be converted to an exception when the officer must perform a search to complete the caretaking activity. *Id.* The exception as initially conceived by this Court is supposed to be divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute. *Cady*, 413 U.S. at 441.

Here, the facts show that Officer McNown was not participating in any form of a criminal investigation. Ms. Alvarado expressed concern that Mr. David was not at church on the morning of the questioned actions. R. at 2. To ease Ms. Alvarado's concerns, Officer McNown told her he would stop by Mr. David's home to check on his well-being. R. at 2. Officer McNown assumed Mr. David was sick and stated he would bring him hot tea, and the record reflects that he purchased the hot tea from Starbucks on the way to Mr. David's residence. R. at 2. Upon arriving at Mr. David's house, Officer McNown noticed the unusual scene, but the record reflects Officer McNown's concern was determining the status of Mr. David. R. at 3. After discovering Mr. David with the mounds of cocaine, the officer placed him under arrest and notified the Drug Enforcement Agency. R. at 3. The scope of his search properly ended with the discovery of Mr. David. R. at 3.

2. The officer had a reasonable belief entry was necessary.

Lower courts have noted the distinction between the standards that apply when an officer makes a warrantless entry when acting as a so-called community caretaker and when he or she makes a warrantless entry to investigate a crime. *Quezada*, 448 F.3d 1007. The community caretaker functions are unrelated to the officer's duty to investigate and uncover criminal activity. *Id.* "A police officer may enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists requiring his or her attention." *Id.*

In *Quezada* a sheriff's deputy was attempting to serve papers when he entered an apartment without a warrant. *Id.* at 1006. The deputy knocked on the door, which because it was unlatched, opened slightly. *Id.* Through the opening the deputy could see a light shining and heard a television. *Id.* He announced his presence and received no answer. *Id.* He drew his weapon upon entry and observed a pair of legs on the floor protruding from a bedroom. *Id.* The legs belonged to the defendant sleeping on top of a shotgun. *Id.* at 1006–07. Quezada was arrested for being a felon in possession of a firearm. *Id.* The court allowed the entry because the officer had a reasonable belief an emergency existed inside the residence. *Id.*

State courts have also applied the exception when the officer has a reasonable belief entry was necessary. *See Wood v. Commonwealth*, 484 S.E.2d 627, 630 (Va. Ct. App. 1997), *rev'd en banc*, 497 S.E.2d 484 (Va. Ct. App. 1998) ("Simply put, the evidence in this case proves that the search was not "totally divorced from" a criminal investigation."). The Virginia court noted that there is little difference between the emergency doctrine and community caretaking exceptions. *Id.* at 630–31. The court treated the exceptions differently, and it did not limit community caretaking to emergency situations, only those where the officer maintains a reasonable

suspicion that such action is necessary. *Id.*; *see also State v. Pinkard*, 785 N.W.2d 592 (Wis. 2011) ("The community caretaking exception does not require the circumstances to rise to the level of an emergency to qualify as an exception to the Fourth Amendment's warrant requirement.").

Here, whether this Court requires an emergency to legitimize the community caretaker exception or just proof Officer McNown was exercising a rational community caretaking function, the actions by Officer McNown are reasonable. The actions leading to the arrest of Mr. David were highly unusual and out of character from what Mr. David's parishioners would expect of him. Mr. David was not known to miss scheduled church services without informing someone of his impending absence. R. at 2. When the officer arrived at Mr. David's house he heard loud music coming from inside, again irregular for a seventy-two-year-old minister. R. at 3. The officer observed a movie playing on the television in Mr. David's residence, which would not likely be watched by a member of the clergy. R. at 3. Easily, Officer McNown could have concluded that Mr. David was in some physical or medical distress requiring immediate assistance. This Court should find that Officer McNown could have possessed a reasonable belief that Mr. David was in distress to support an entry into Mr. David's home.

3. The government interest outweighs Mr. David's privacy concern.

"It goes without saying that the Fourth Amendment bars only unreasonable searches and seizures." *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602 (1989). This Courts cases show that to determine the reasonableness of a search, the intrusion on the individual's Fourth Amendment interest must be balanced against the promotion of legitimate governmental interest. *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983); *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). Under that balancing test, a search of a house is generally not reasonable

without a warrant; however, there are contexts when the public interest is such that neither a warrant nor probable cause is required. *Skinner*, 489 U.S. at 619–20.

The right to be free from unreasonable government intrusion in one's own home is a cornerstone of the liberties protected by the Fourth Amendment. *Payton v. New York*, 445 U.S. 573, 586 (1980). Yet, expectations of a right to privacy in the home can be reduced because of activities of the home's occupants. *United States v. Taborda*, 635 F.2d 131, 138–39 (2d Cir. 1980).

In *Smith*, the Eighth Circuit found the government's interest justified entry when searching for the missing individual. 820 F.3d at 361. The court found that the person could have been incapacitated or otherwise unable to respond. *Id.* The lack of response to any calls or messages further supported that contention. *Id.* The court concluded, the justification for the officers' entry arises from their obligation to help those in danger and ensure the safety of the public. *Id.* at 361–62. Here, Mr. David did not answer the call of Ms. Alvarado or the knocking of Officer McNown. R. at 2–3. Further, the situation presented that day would suggest to Officer McNown that Mr. David was either incapacitated or otherwise unable to respond. The obligation of Officer McNown to ensure the safety of the public should outweigh Mr. David's right to privacy in the circumstances before this Court.

4. The notebook and cocaine were in plain view.

The plain view doctrine establishes that an officer may seize evidence in plain view despite failing to obtain a warrant if two elements are established: (1) lawful access to the object seized and (2) the incriminating nature of the object seized is immediately present. *Hromada*, 49 F.3d at 690 n.11.

Upon entry, Officer McNown discovered the cocaine and notebook in plain view. First, Officer McNown had lawful access to Mr. David's home under the community caretaking exception. Second, the incriminating nature of the notebook and cocaine that Mr. David was packaging was immediately apparent. R. at 3. Based on these observations, Officer McNown had probable cause to seize the cocaine and notebook at that time, or, elect as he did, to notify the Drug Enforcement Agency. R. at 3.

II. MR. DAVID'S SIXTH AMENDMENT RIGHT TO COUNSEL HAD NOT ATTACHED WHEN THE PROSECUTOR OFFERED A PLEA DEAL BECAUSE THIS COURT HAS ARTICULATED A BRIGHT-LINE RULE THAT THE RIGHT TO COUNSEL DOES NOT ATTACH BEFORE THE "INITIATION OF ADVERSARY CRIMINAL JUDICIAL PROCEEDINGS" BY WAY OF "FORMAL CHARGE, PRELIMINARY HEARING, INFORMATION, OR ARRAIGNMENT."

The role that lawyers play has always been an important fixture in the American justice system. For example, the Sixth Amendment guarantees that "in all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. This Court highlighted that the "core purpose of the counsel guarantee was to assure 'Assistance' at trial, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309–10 (1973). It furthered state that the assistance of council would be "less than meaningful if it were limited to the formal trial itself." *Id.* But if the Sixth Amendment right-to-counsel guarantee did not start and end with the formal trial itself, then when would it attach?

A. This Court Established the *Kirby* Bright-Line Sixth Amendment Rule.

This Court has "long recognized that the Sixth Amendment right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." *United States v. Gouveia*, 467 U.S. 180, 187–88 (1984). This precedent was upheld and solidified in *Kirby v. Illinois* when the court found no Sixth Amendment violation when a victim of a robbery testified

in-court against the defendants about a police station identification. 406 U.S. 682, 683 (1972). At the time of the identification, no lawyer was present, the defendant had not asked for legal assistance, and the defendant had not been advised of any right to counsel. *Id.* Although the Sixth Amendment right to counsel existed at a post-indictment pretrial lineup, the court refused to extend the right to an identification that took place before the commencement of any prosecution. *Id.*

The court looked to past cases in determining when exactly the Sixth Amendment right to counsel attached. *Powell v. Alabama*, 287 U.S. 45, 72 (1932); *Johnson v. Zerbst*, 304 U.S. 458, 467–68 (1938); *Gideon v. Wainwright*, 372 U.S. 335, 345 (1963); *United States v. Wade*, 388 U.S. 218, 236–38 (1967); *Coleman v. Alabama*, 399 U.S. 1, 9 (1970). While members of the court differed on the existence of the right in the contexts of those cases, the Court highlighted that "*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." *Kirby*, 406 U.S. at 689. The Court stressed that the judicial criminal proceedings was the "starting point of our whole system of adversary criminal justice" and "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." *Id.*

Honing in on the literal language of past cases, the Court emphasized that the right to counsel only attached to a "critical stage of the prosecution," noting that any interactions before initiating adversary judicial proceedings against the defendant could be adequately addressed by the Due Process Clauses of the Fifth and Fourteenth Amendments. *Id.* at 690–91. Holding these measures strike "the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful

investigation of an unsolved crime," the Court plainly refused to create a per se exclusionary rule into events taking place before initiating any formal prosecutorial conduct. *Id.*

This case should be decided by applying the bright-line rule of when the Sixth Amendment right to counsel attaches, established in *Kirby*. Here, the prosecutor, at the request of DEA Agent Malaska, offered Mr. David a plea bargain of one year in prison in exchange for the names of his suppliers, before any charges were filed against Mr. David. R. at 4. In applying the *Kirby* right-to-counsel rule to these facts, Mr. David's Sixth Amendment right to counsel had not yet attached. 406 U.S. at 689. Mr. David had not been involved in any critical stage of the prosecution. *Id.* There was never an initiation of any adversary judicial criminal proceedings including: formal charge, preliminary hearing, indictment, or arraignment. *Id.* While there was evidence established against Mr. David for selling and dealing cocaine, the government was still well within the investigatory stage. The prosecution had never committed itself to prosecute, therefore never holding an adverse position to Mr. David formally. *Id.* By applying the bright-line rule of when the right to counsel attaches, Mr. David was never in an adverse position against the government, and therefore, cannot have had his Sixth Amendment right to counsel violated by in effective counsel.

After this Court created the bright-line rule in *Kirby* specifying when the Sixth Amendment right to counsel attaches, it reaffirmed the test in later cases. In *United States v. Gouveia*, this Court reversed a Ninth Circuit case in which the Sixth Amendment right to counsel was extended to inmates kept in administrative detention for an extended period before they were eventually indicted on murder charges. 467 U.S. at 183. The inmates argued that confinement without counsel for that period violated their Sixth Amendment right to counsel. *Id.* The Ninth Circuit agreed, finding that while the bright-line Sixth Amendment right-to-counsel rule *Kirby*

stated the right did not attach until charges are brought against the defendant, this rule did not apply in the same way to prison cases. *Id.* at 185.

In that holding, the Ninth Circuit analogized the right to counsel with the Sixth Amendment speedy trial cases, where it was held that the Sixth Amendment speedy trial right was triggered when an individual is arrested and held to answer criminal charges. *Id.* at 185–86. The Ninth Circuit reasoned that the prisoners would either need to be afforded counsel after 90 days, or else be released back into the prison population to ensure that their lawyer could take pre-indictment investigatory steps to preserve their defense at trial. *Id.* The court suggested that applying the Sixth Amendment right to counsel should have been extended due to the time the investigation took, and the fact that the defendants were already convicted inmates. *Id.*

While this Court acknowledged the Ninth Circuit's legitimate concerns over the inmates' rights, they refused to extend the Sixth Amendment right to counsel further and instead reaffirmed the *Kirby* bright-line rule that adversary judicial proceedings must be initiated before the right to counsel attaches. *Id.* at 191. It found that the "Court of Appeals departed from our consistent interpretation of the Sixth Amendment in these cases, and in so doing, fundamentally misconceived the nature of the right to counsel guarantee." *Id.* at 189. While the Court agreed in speedy trial cases the "Sixth Amendment right may attach before an indictment and as early as the time of arrest and holding to answer a criminal charge," they had "never held that the right to counsel attaches at the time of arrest." *Id.* at 190. This Court cautioned the lower court in applying a rule of law to fit a fact situation in which the Sixth Amendment right to counsel was not created to protect. *Id.* at 189.

Years later, this Court extended the Sixth Amendment right to counsel to a new critical stage: plea negotiations. *Missouri v. Frye*, 566 U.S. 134, 144 (2012); *Lafler v. Cooper*, 566 U.S.

156, 162 (2012). In these cases, the court stated that plea negotiations had become "central to the administration of the criminal justice system" and because they frequently determine "who goes to jail and for how long," it could be the only state in where the "legal aid and advice would help." *Frye*, 566 U.S. at 143–44. In both *Frye* and *Lafler*, however, the plea negotiations occurred after the criminal defendants had been formally charged and neither specifically addressed when the right to counsel attached. *Id.* at 138; *Lafler*, 566 U.S. at 161.

By looking to precedent after *Kirby*, the Sixth Amendment bright-line rule still applies. *Gouveia*, 467 U.S. at 191. This Court not only reaffirmed that the Sixth Amendment right to counsel only attaches at or after initiating adversary judicial proceedings against the defendant in *Gouveia*, it also warned lower courts not to expand its meaning into other contexts. *Id.* at 189–91. Further, when this Court extended the Sixth Amendment right to counsel to another critical stage of plea negotiations, it never readjusted the attachment bright-line rule to include plea negotiations taking place prior to any criminal charges being filed. It would seem unlikely that a court that has been so clear as when the Sixth Amendment right to counsel attaches and in exactly what context to use the rule would not address the attachment in a new critical stage. Although the Court added a new critical stage to the Sixth Amendment, it did not change the bright-line rule of when it would attach. *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018).

When the bright-line test is applied literally, Mr. David's Sixth Amendment right to counsel did not attach because he was never formally charged with any crime. *Id.* Although his plea negotiations fell within a critical stage within the Sixth Amendment right to counsel, the right itself did not attach to Mr. David yet because he was never formally charged. *Id.* Again, Mr. David was never in an adverse position against the government, and therefore, cannot have had

his Sixth Amendment right to counsel violated by Mr. Long's involvement with the plea bargain. *Kirby*, 406 U.S. at 689.

B. Circuit Courts Have Followed the *Kirby* Bright-Line Rule.

The Second, Fifth, Eighth, Ninth, Tenth, Eleventh, and D.C. circuits have all strictly followed *Kirby*'s bright-line rule regarding initiating judicial criminal proceedings. *United States v. Medunjanin*, 752 F.3d 576, 585 (2d Cir. 2014); *United States v. Heinz*, 983 F.2d 609, 612–13 (5th Cir. 1993); *United States v. Morriss*, 531 F.3d 591, 594 (8th Cir. 2008); *United States v. Hayes*, 231 F.3d 663, 675 (9th Cir. 2000); *United States v. Lin Lyn Trading Ltd.*, 149 F.3d 1112, 1117 (10th Cir. 1998); *Philmore v. McNeil*, 575 F.3d 1251, 1257 (11th Cir. 2009); *United States v. Sutton*, 801 F.2d 1346, 1365 (D.C. Cir. 1986). The cases above all cite to the *Kirby* bright-line rule as clearly established law and correctly applied the right to counsel to attach only after initiation of adversary judicial proceedings against the defendant have taken place. Although this Court cautioned the lower courts in misapplying the Sixth Amendment right to counsel in *Gouveia*, a minority of circuit courts proceeded to liberally extend the meaning of the bright-line rule to counsel. 467 U.S. at 189.

The First Circuit has seemed to question the bright-line test in *Roberts v. Maine*, where a driver suspected of driving under the influence was denied his request to call his attorney regarding a implied consent form for a blood test. 48 F.3d 1287, 1288–89 (1st Cir. 1995). Although there was no initiation of adversary judicial proceedings against the driver when he wanted to call his lawyer, the First Circuit explored "*the possibility* that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment, in circumstances where the government had crossed the constitutionally significant divide from fact finder to adversary." *Id.* at 1291. Ultimately, however, the court did not apply

the right-to-counsel dictum it considered and found that the Sixth Amendment right to counsel had not attached. *Id.*

The Third, Fourth, and Seventh Circuits similarly questioned the bright-line rule when it looked to creating its own authority, rather than applying this Court's precedent. The Seventh Circuit, for example, stated this Court "has not spoken with one voice in defining which events constitute the starting points in the prosecution and proceeded to create a rebuttable presumption out of the bright-line rule held in *Kirby*, finding that the right to counsel should attach when proven that the government had crossed the constitutionally significant divide from fact-finder to adversary." *United States ex rel. Hall v. Lane*, 804 F.2d 79, 82 (7th Cir. 1986).

Finally, while ultimately adhering to the bright-line rule for when the Sixth Amendment right to counsel attaches, the Sixth Circuit has expressed direct opposition to the rule. In *United States v. Moody*, the defendant was offered a plea deal when he approached the FBI and offered to cooperate in a drug ring. 206 F.3d 609, 611 (6th Cir. 2000). During his interviews with the FBI agents, Moody made several self-incriminating statements, leading the government attorneys to offer him a deal that would limit his sentence to a maximum of five years' incarceration if he agreed to plead guilty to a conspiracy charge and continued to cooperate with the government. *Id.* This plea was offered before Moody had obtained an attorney. *Id.* Moody eventually sought the advice of an attorney, who later contacted the government a month after he was retained to reject the plea offer. *Id.* Moody was later indicted on more serious charges, and the same attorney advised him to plead guilty. *Id.* Because Moody was sentenced to double the maximum sentence he would have faced if he had accepted the plea deal, Moody argued ineffective assistance of counsel and requested the original plea offer be reinstated. *Id.* at 612.

The Sixth Circuit reversed the district court's decision with the reluctance and stated that although plea bargaining was a critical stage at which the right to counsel would normally attach, this Court narrowed the attachment of the right to the bright-line test, and therefore it did not have the power to grant relief to Moody on his ineffective assistance of counsel claim. *Id.* at 613–14. It stated that it did not favor the bright-line rule and that "we are faced with the ponderable realization that this is an occasion when justice must of necessity yield to the rule of law." *Id.* at 616.

Although the lower Circuit Courts have expressed questions and even disapproval of the bright-line rule to when the Sixth Amendment right to counsel attaches, they cannot deny that the rule is precedent they must follow. *Id.* Some argue that the rule should attach once the prosecution has committed itself to prosecute, or when the intent of the prosecution has turned adversarial. This interpretation, however, reflects a fundamental misreading of *Kirby* and *Gouveia*, which, if applied, would produce an unclear, ambiguous standard for attachment of the Sixth Amendment right to counsel. *Kirby*, 406 U.S. at 689. Not only would it become more difficult for judges to apply this counsel attachment standard to cases, it would create a state of confusion within the investigatory stage of any case. During the crucial period of when an officer or prosecutor should be focusing on preventing or all together stopping the criminal activity from furthering into their community, the investigatory team would be confronted with questions of Sixth Amendment violations before they had even committed themselves to prosecuting the case. This relaxation in the standard would cause a judge to objectively try and decide whether the prosecution or officer had committed itself to prosecute, by ultimately assessing the situation through a subjective lens. This is an unworkable standard, which was recognized by this Court when it created the *Kirby* bright-line rule. *Id.* at 689–90.

In Mr. David's case, adhering to the *Kirby* bright-line rule is the only pragmatic way in determining whether the Sixth Amendment right to counsel had attached when he was offered the plea bargain. Not only does finding the right does not attach because there was never an initiation of adversary judicial proceedings against him lay well within case precedent, it allows the courts a bright-line way to confirm or deny whether the right had been violated. It allows all parties involved to understand exactly when the Sixth Amendment right attaches and helps strike "the appropriate constitutional balance between the right of a suspect to be protected from prejudicial procedures and the interest of society in the prompt and purposeful investigation of an unsolved crime." *Id.* at 691.

CONCLUSION

Respondent respectfully requests this Court affirm the judgment below denying Defendant's motion to suppress the evidence seized and refusing to reinstate the expired plea deal, and asks this Court to remand to the district court with instructions to proceed to trial.

Respectfully submitted,

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ATTORNEYS FOR RESPONDENT