Team P42

No. 4-422

IN THE

Supreme Court of the United States

Chad David,

Petitioner,

v.

The United States of America

Respondent.

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

BRIEF FOR PETITIONER

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ISSUES PRESENTED

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

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

STATEMENT OF FACTS

Minister Chad David is a seventy-two-year-old lifelong resident of Lakeshow, Staples and well-respected religious leader. R. at 2. Minister David typically preached Sunday services at the Lakeshow Community Revivalist Church ("the Church"). *Id*. On Sunday, January 15, 2017, Officer James McNown, a patrol officer in Lakeshow, arrived at the Church just before 7:00 a.m. to attend a service. *Id*. Officer McNown observed that Minister David was not present. *Id*. One church attendee swore to Officer McNown that he saw Minister David "stumbling around" at a bar the previous night. Ex. A, pg. 3. Officer McNown doubted the validity of these concerns and "shrugged [them] off," deeming them an "overreaction." R. at 2. Officer McNown assumed that Minister David was sick at home with the flu. Ex. A, pg. 3.

Officer McNown began his patrol of Lakeshow at 9:00 a.m., shortly after the Church service concluded. R. at 2. After receiving Minister David's address from a fellow church attendee, he drove to Minister David's home to deliver hot tea to him. *Id*; Ex. A, pg. 3. After being waived through the gate of Minister David's gated community, Officer McNown saw a black Cadillac sport utility vehicle with a Golden State license plate exiting the community. R. at 2. He knew from his experience as an officer that drug dealers typically drove these types of vehicles, and that there had been an influx of Golden State drugs coming into Lakeshow. *Id*. Officer McNown arrived at Minister David's residence at approximately 9:30 a.m. and walked up to the front door of Minister David's home without his permission. *See id*. Officer McNown heard music coming from the home and knocked on the door to no answer. *Id*. at 2-3. Officer McNown did not attempt to call Minister David nor did he contact his police department or obtain a warrant. *See* Ex. A, pgs. 1-6. Officer McNown tried to enter through the front door but

found it was locked so he went to the back door of Minister David's home and, without knocking, entered through an unlocked back door. *Id.* at 4-5.

When Officer McNown entered the home, he saw a notebook with "Julianne Alvarado"—a church member known to Officer McNown—and the words "one ounce, paid" written on it. *Id.* at 5; Ex. F. Officer McNown later testified that he "was definitely concerned something was wrong at this point." Ex. A, pg. 5. Officer McNown went upstairs, following the loud music. *Id*. Once upstairs, Officer McNown opened a bedroom door and observed Minister David packaging what he suspected to be cocaine. *Id.* at 6. Officer McNown detained Minister David and contacted the United States ("U.S.") Drug Enforcement Agency (DEA). *Id.*

DEA Agent Malaska later arrived at the home shortly after 10:00 a.m. to investigate. R. at 3. After reading Minister David his Miranda rights, Agent Malaska asked him where he obtained the narcotics. *Id*. Minister David replied that he would not divulge that information because he feared that if he did, he would be killed and his church would be burned down. *Id.*

After Minister David was transported to a federal detainment facility, he hired counsel—attorney Keegan Long, who Minister David knew was a confessed alcoholic. *Id.* at 3-4. While Minister David was in custody, Agent Malaska contacted federal prosecutors and asked them to hold off on filing charges against Minister David. *Id*. at 4. Agent Malaska believed that Minister David could provide information leading to the arrest of a suspected narcotics supplier, and he did not want to file charges, lest he tip the supplier off. *Id*. The prosecutors agreed. *Id*.

On January 16, 2017, at 8:00 a.m., the prosecutors sent Mr. Long a plea offer via email intended for Minister David's consideration. *Id*. The terms of the offer required Minister David to plead guilty to one count of 21 U.S.C. § 841for possession of a controlled substance with the intent to distribute; accept a sentence of one year in federal prison; and to provide the

government with information related to suspected narcotics suppliers that led to an arrest. Ex. D. The offer was valid for thirty-six hours, however, Mr. Long misread the plea offer, thinking it was valid for thirty-six days. *R.* at 4. The time period passed, and Mr. Long never communicated the plea deal to Minister David. *Id*. The offer then became invalid. *See id*. Minister David subsequently fired Mr. Long and hired attorney Michael Allen to represent him. *Id*. Minister David later testified at a pre-trial evidentiary hearing that he would have accepted the plea offer had Mr. Long communicated it to him. Ex. C, pg. 3. The prosecutor declined to extend Minister David another plea offer. R. at 5.

On January 18, 2017, Minister David was indicted and charged with one count of 21 U.S.C. § 841. R. at 1. Minister David subsequently filed two pre-trial motions: a motion to suppress the evidence collected on January 15, 2017, the day of his arrest; and a motion to be re-offered the original plea deal offered on January 16, 2017. *Id.* On July 15, 2017, the United States District Court for the Southern District of Staples denied both his pre-trial motions. *Id.* at 12. On July 20, 2017, Minister David was convicted at trial. *Id.* at 13. He was sentenced to ten years in prison, the mandatory minimum sentence for that offense. R. at 14. On May 10, 2018, the United States Court of Appeals for the Thirteenth Circuit affirmed the District Court's denial of both motions. *Id.* at 13-14.

SUMMARY OF THE ARGUMENT

Warrantless searches of the home are *per se* unreasonable and may only be conducted pursuant to a limited class of exceptions, none of which apply in this case. Due to the lesser protection afforded to vehicles under the Fourth Amendment, *Cady v. Dombrowski* instructs that law enforcement officers may conduct warrantless searches of vehicles if they are exercising a

community caretaker function, *i.e.*, a function that is not motivated by criminal investigative concerns. The exception announced in *Cady* applies only to searches of vehicles and cannot be extended to the home without upending well-established Fourth Amendment doctrine and disturbing our society's expectation of privacy in the home. Officer McNown's warrantless search of Minister David's home thus violated his Fourth Amendment rights.

Even if there is some small class of situations where the community caretaker doctrine may be extended to homes, an extension would be inappropriate under the facts of this case because Officer McNown was not exercising community caretaker functions as he searched Minister David's home. Officer McNown arrived at Minister David's home as a concerned friend and, after entering without consent or a warrant, decided to go upstairs to investigate.

The right to counsel attached at pre-indictment plea negotiations because adversary judicial proceedings had begun and it was a critical stage of the criminal proceedings. This Court determines whether the right to counsel attaches by scrutinizing any pre-trial confrontation involving the accused, for the presence of these two factors. So, the right could attach before indictment and did in this case.

Adversary judicial proceedings had begun because three conditions were present. First, the government committed to prosecute Minister David when it made a formal plea offer because the prosecutor intended to bring charges or had a sufficient factual basis to do so. Second, adverse positions of the government and Minister David had solidified because the two parties had opposing interests—the government could only reduce its caseload if the accused waived his constitutional rights to a trial by jury and right against self-incrimination. Third, Minister David was faced with prosecutorial forces of organized society and immersed in the intricacies of

substantive and procedural law. He faced a prosecutor who was armed with expert knowledge of the law and government resources that could be used to investigate, try, and incarcerate him.

Additionally, the pre-indictment plea negotiation is a "critical stage" of criminal proceedings because when the accused negotiates or agrees to a plea agreement without counsel, he risks unknowingly waiving his rights preserving due process and a fair trial. The presence of counsel reduces these risks by providing the accused with legal advice and leveling the playing field against an expert prosecutor skilled in the law.

STANDARD OF REVIEW

This Court reviews *de novo* the denial of Minister David's motion to suppress evidence and motion seeking to be reoffered the initial plea offer. *United States v. Holloway*, 290 F.3d 1331, 1334 (2002); *United States v. Moody*, 206 F.3d 609, 611 (6th Cir. 2000). The District Court's factual findings, however, are reviewed by the clearly erroneous standard. *Holloway*, 290 F.3d at 1334.

ARGUMENT

Minister David's Fourth Amendment rights were violated when Officer McNown entered his home without a warrant and in the absence of exigent circumstances. The community caretaker doctrine cannot cure Officer McNown's warrantless entry because it does not extend to the home. Also, the Sixth Amendment right to counsel attached during Minister David's pre-indictment plea negotiation because adversary judicial proceedings had begun and it was a critical stage of the criminal proceedings where counsel would have helped him avoid making an unknowing waiver of his legal rights and defenses necessary to preserve a fair trial.

I. THE COMMUNITY CARETAKER DOCTRINE DOES NOT EXTEND TO OFFICER MCNOWN'S WARRANTLESS SEARCH OF MINISTER DAVID'S HOME.

The Fourth Amendment provides that the "right of all people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend. IV. The Fourth Amendment is enforceable against the states because it is incorporated by the Fourteenth Amendment's Due Process Clause. *Mapp v. Ohio*, 367 U.S. 643, 660 (1961). This Court has recognized two forms of searches. First in *Katz*, this Court held that a violation of a reasonable expectation of privacy constituted a search under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347 (1967). Later, in *Jones*, this Court held that a government intrusion on a constitutionally protected area is a search under the Fourth Amendment. *United States v. Jones*, 565 U.S. 400, 407 (2012).

The scope of the right to privacy does not extend equally to all private property. Rather, this Court has consistently recognized that society's expectation of privacy is at its zenith in the home. "[A] man's house is his castle," and so "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. Payton*, 445 U.S. 573, 585, 598 (1980).

The cornerstone of the Fourth Amendment is reasonableness which generally requires the government to obtain a valid warrant prior to a search of private property. *Camara v. Mun. Court*, 387 U.S. 523, 528-29 (1967) ("except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant."); *Cady v. Dombrowski*, 413 U.S. 433, 439 (1973) (quoting *Camara*, 387 U.S. 523, 528-29). Therefore, a search of private property without a valid warrant is presumed to be *per se* unreasonable. *Georgia v. Randolph*, 547 U.S. 103, 109 (2006) (discussing

the "Fourth Amendment rule ordinarily prohibiting the warrantless entry of a person's house as unreasonable *per se*"). This Court has recognized exceptions to that general rule, however, which in "the narrowest of circumstances" permit the government to search private property without a valid warrant. The narrow circumstances that do not require a warrant include instances where voluntary consent to search is obtained or exigent circumstances are present. *Illinois v. Rodriguez*, 497 U.S. 177, 186 (1990). As Respondent acknowledges, Officer McNown did not have Minister David's consent to enter his residence nor were exigent circumstances present. R. at 7; Ex. A, pg. 5. Respondent instead contends that the community caretaker doctrine announced in *Cady v. Dombrowski* should be extended to the home, R. at 5, despite long-standing Fourth Amendment precedent holding otherwise.

Cady's community caretaker doctrine is inapplicable in this case because it does not extend to searches of a home. The Fourth Amendment forecloses the possibility of allowing warrantless searches of a home outside of this Court's carefully articulated exceptions. Moreover, even if a new exception were to be created, the doctrine is nonetheless inapplicable in this case because Officer McNown was not exercising a community caretaker function when he searched Minister David's home.

A. *Cady* limited the community caretaker doctrine to non-investigative searches of vehicles.

In *Cady*, this Court upheld a warrantless "caretaking 'search' conducted [] of a *vehicle* that was neither in the custody *nor on the premises of its owner.*" *Cady*, 413 U.S. at 447-48 (emphasis added). *Cady* involved a Chicago police officer named Dombrowski who crashed his vehicle in Wisconsin and subsequently alerted the police. *Id.* at 435. Two local police officers responded to the scene and noticed Dombrowski appeared intoxicated. *Id.* at 436. Dombrowski

informed the officers that he was a Chicago police officer so the officers searched Dombrowski's person and then his vehicle's front seat and glove box for his service revolver. *Id.* The Wisconsin police could not find Dombrowski's revolver, so they transported Dombrowski to the hospital while his vehicle was towed away. *Id.* An officer later went to Dombrowski's vehicle to search for his revolver, acting under their department's policy of locating weapons "to protect the public." *Id.* at 436-37, 443. Upon opening the vehicle's trunk, the officers found evidence linking Dombrowski to a murder unrelated to the traffic incident. *Id.* at 437. Dombrowski challenged the search as a violation of his Fourth Amendment rights because the officers never obtained a warrant to search the vehicle. *Id.* at 434.

This Court held that the search was reasonable and recognized that when police search a vehicle to perform a "community caretaker" function pursuant to an established policy, they do not need a warrant. *Id.* at 447-48. The Court rested its holding on three factors. First, the search involved a vehicle, a "class of cases which constitutes at least a partial exception" to the general warrant requirement. *Id.* at 439. This exception reflects this Court's recognition that "there is a constitutional difference between houses and cars." *Id.* Indeed, as recently as this past term, this Court reiterated that "[w]hen it comes to the Fourth Amendment, the home is first among equals." *Collins v. Virginia*, 138 S. Ct. 1663, 1670 (2018). This is because the physical entry into the home is the "chief evil" the Fourth Amendment was enacted to protect against and it is an evil that affects not only the individual homeowner but also concerns the greater "society which chooses to dwell in reasonable security and freedom from surveillance." *United States v. Payton*, 445 U.S. 573, 585-86, n.24 (1980) (quoting *Johnson v. United States*, 333 U.S. 10, 14 (1948)). The home is thus at the "very core" of the Fourth Amendment whereas vehicles are afforded lesser protection due to their mobile nature and pervasive regulation. *Collins*, 138 S. Ct. at 1670-

71. Indeed, a home is given such heightened protection under the Fourth Amendment that this Court in *Cady* emphasized that not only was the search at issue of a vehicle, but additionally the vehicle was not "on the premises of its owner." *Cady*, 413 U.S. at 447-48.

The second factor the Court recognized in *Cady* was the non-investigative nature of the search of Dombrowski's vehicle. *Id.* at 441. The Court characterized the officer's search for Dombrowski's gun as a "community caretaker" function "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" because the purpose of the search was to locate the gun for reasons of public safety. *Id.* Third, the Court emphasized the officers in *Cady* were acting pursuant to an established police department procedure. *Id.* at 443.

A majority of Courts of Appeals have identified the first factor as the crux of the Court's decision in *Cady* and agree that the community caretaker doctrine is inapplicable in the home. *See e.g.*, *United States v. Pichany*, 687 F.2d 204, 209 (7th Cir. 1982) ("The Court intended to confine the holding [of Cady] to the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses."); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) ("the community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches"); *Ray v. Township of Warren*, 626 F.3d 170, 174-77 (3d Cir. 2010); *but see United States v. Rohrig*, 98 F.3d 1506, 1523-24 (1996) (upholding the warrantless entry of a home to abate a "late-night, ongoing nuisance to the community"). As the Third Circuit succinctly put it: "The community caretaking doctrine cannot be used to justify warrantless searches of a home." *Ray*, 626 F.3d at 177.

In contrast to *Cady*, Officer McNown searched Minister David's *home*. Even assuming, *arguendo*, that Officer McNown did not enter Minister David's home for a criminal investigative purpose, the purpose of Officer McNown's entry, to deliver tea to an ill friend, Ex. A, pg. 3, is a far cry from the heightened purpose in *Cady* of protecting the public by securing a weapon. Moreover, Officer McNown's entry was not conducted pursuant to an established police department procedure. For these reasons, Officer's McNown's search was outside the community caretaker doctrine and as such cannot be used to justify his warrantless search of Minister David's home.

B. The Fourth Amendment prevents the community caretaker doctrine from being extended to the home because it would be an objectively unreasonable search and inapposite to the reasoning in *Cady*.

Officer McNown admittedly failed to obtain a warrant in the absence of exigent circumstances. R. at 7. His search of Minister David's home was therefore unreasonable and violated Minister David's Fourth Amendment rights.

Extending the community caretaker doctrine to the home is not only inapposite to the rationale in *Cady*, it is also objectively unreasonable under Fourth Amendment standards. As this Court has observed: "the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant." *Payton*, 445 U.S. at 590. Despite this clear command, Officer McNown crossed the threshold of Minister David's home without a warrant when he snuck into his home through an unlocked back door. Ex. A, pg. 5. At that moment, Minister David's right to privacy was at its apex. To allow his significant privacy interest to be overcome by one officer's desire to "check [on his] well-being" and deliver tea, *id.*, even if well-intentioned, would undermine the Fourth Amendment and upend society's expectations of peace and privacy in the home.

1. Individuals have a significant privacy interest in their home regardless of whether they are suspected of criminal activity.

Community caretaker functions are, as *Cady* instructs, divorced from concerns of criminal activity. *Cady*, 413 U.S. at 441. The absence of an officer's concerns of criminality, however, does not affect an individual's significant privacy interests in his home. *See Camara*, 387 U.S. at 530-31 ("even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanction is a serious threat to personal and family security."). Even when a government official seeks to enter a home for non-criminal investigative reasons, a warrant or consent is generally required. *See id.* In *Camara*, this Court reconsidered its exception for warrantless entry to conduct routine inspections of residences, a practice which, like community caretaker functions, is a "less hostile intrusion than the typical policeman's search for the fruits and instrumentalities of crime." *Id.* at 530. In reversing its prior holding that administrative inspections of homes may be conducted without a warrant, the Court emphasized that "[i]t is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior." *Id. Camara* instructs that government officials seeking to execute administrative functions by entering a home must first obtain a warrant, unless consent is obtained or emergency circumstances are present. *Id.* at 534.

2. Since the emergency aid doctrine sufficiently protects the safety of individuals and the community, expanding the community caretaker doctrine to homes is not necessary.

If Officer McNown had reasonably believed Minister David was in serious danger, he could have lawfully entered Minister David's home pursuant to the well-established emergency

aid doctrine. *See Brigham City v. Stuart*, 547 U.S. 398 (2006). Under the emergency aid doctrine, if there is a valid and imminent need to enter the home to provide assistance or dispel concerns about a tenant's safety, an officer may enter without delay and without a warrant. *Id.* at 403. The protection of the public is of imminent concern yet this Court has held that the Constitution compels a high threshold for what constitutes an emergency—the preservation of life or avoidance of serious injury—due to the significant privacy rights at stake, particularly in a home. *Id.* ("The need to protect or preserve life or avoid serious injury is justification for what would be otherwise illegal absent an exigency or emergency.")

As Respondent concedes, Minister David's suspected case of the flu does not rise to the level of necessitating emergency aid. R. at 5. There are cases, however, where officers legitimately have grave concerns about the well-being of a resident; in these scenarios, the emergency aid doctrine suffices to protect individuals. *See Brigham*, 547 U.S. at 403. Extending the community caretaker doctrine to the home would provide no benefit to public safety and only serve to detract from constitutionally protected privacy interests.

C. Even if officers may enter homes without a warrant to perform community caretaker functions, the search of Minister David's home does not fall within the community caretaker doctrine.

Even if this Court decides that there are some circumstances in which an officer may enter a home without a warrant to perform a community caretaker function, the situation at-hand should not provide the basis for this new exception. Officer McNown was not acting pursuant to standard police procedures and was not at Minister David's home pursuant to his official duties. Moreover, by the time Officer McNown went upstairs and entered Minister David's bedroom,

any benign motives he had for entering the home had been displaced by suspicions of criminality. *See generally* Ex. A, pgs. 1-8.

1. Officer McNown's search was unreasonable because he was not acting pursuant to standard police procedures.

If an officer is permitted to breach the sanctity of one's home without a warrant to perform community caretaker functions, an officer may only do so pursuant to standard police procedures. *See South Dakota v. Opperman*, 428 U.S. 364, 375-76 (1976); *Cady*, 413 U.S. at 443. In the absence of an emergency, a warrantless search may only be conducted pursuant to standard police procedures to ensure "intrusion[s are] limited in scope to the extent necessary to carry out the caretaking function." *See Opperman*, 428 U.S. at 374-75. Unlike in *Cady*, where the officers searched the vehicle for the missing weapon at the scene and later in the location where it had been towed pursuant to an established department policy, *Cady*, 413 U.S. at 443, in the present case, the record does not indicate the Lakeshow Police Department had a standard procedure in place for conducting welfare checks. Further, even if such a policy existed, there is little indication that Officer McNown was acting in accordance with such a policy. Officer McNown initially testified that he "didn't really think [he] needed" a warrant because it was his understanding and the way he was trained that a warrant was unnecessary. Ex. A, pg. 7. But, when asked on cross-examination why he believed he could enter Minister David's home without a warrant, Officer McNown did not mention any department policy. Ex. A, pgs. 7-8. In contrast, when discussing his decision to contact the DEA agents, Officer McNown referred explicitly to Lakeshow Police Department protocols and policies. *Id.* at 6. Additionally, even if Officer McNown had been informed in his training that a warrant is unnecessary to enter homes for non-investigative purposes, his testimony indicates there is a blanket rule in place. *Id.* at 7-8.

A one-time verbal instruction is far from the requisite standard procedure necessary to make a search of the home that the Fourth Amendment requires.

2. Officer McNown was not exercising a community caretaker function when he went to the second floor of Minister David's home.

As an initial matter, Officer McNown appears to have visited Minister David's home in his personal capacity. Officer McNown testified that he believed Minister David was "sick at home" and wanted to check on him "[a]s a concerned member of the church." Ex. A, pg. 3. As a concerned church member, Officer McNown purchased a tea for Minister David then went to deliver it at his home. *Id.* He received Minister David's address from a fellow church attendee, *id.*, not by calling his precinct or looking it up in a Lakeshow Police Department directory, and then was waived into Minister David's neighborhood by virtue of his police vehicle, *id.* at pg. 4,—not because he showed a badge or affirmatively indicated he was there on official police business.

The only facts that indicate that Officer McNown was there in his professional capacity are that he went to Minister David's home during his work hours, in uniform, and while driving his work vehicle. *See id.* at pgs. 3-4. If this Court deems these facts are enough to justify the warrantless entry into Minister David's home, then any uniformed officer arriving in a work vehicle during his shift may enter an individual's home without a warrant if the officer believes the resident is feeling ill. With such a low standard, officers could loiter at a doctor's office until they have reason to believe an individual is sick, follow that individual home, and then enter without a warrant if they receive no response at the door. Such a standard would reduce the force of the Fourth Amendment.

Even if Officer McNown did visit Minister David in his capacity as an officer, the record indicates that he entered the second floor of the home for criminal investigative purposes. *See generally* Ex. A, pgs. 1-8. The record indicates that Officer McNown's decision to search the second floor of Minister David's home and enter the bedroom was both objectively and subjectively motivated by criminal investigative concerns. When Officer McNown decided to go upstairs and enter the bedroom, he was aware of the following facts: there had been an increase in the flow of drugs into the community in recent months; Minister David was not present at his job that morning which was uncharacteristic of him; a fellow church attendee "swore" he saw Minister David "stumbling around" at a bar the night before; Minister David appeared to be living in an area above his means; a vehicle commonly associated with drug dealers was seen exiting Minister David's community; "[t]here were no signs of a break in"; the front door was locked; there was a notepad containing a name and "one ounce, paid" written on it; and the bedroom door was shut. Ex. A, pgs. 1-8; Ex. F. Any trained and experienced police officer aware of these facts, especially the note with "one ounce, paid" on it, would reasonably and objectively believe that criminal activity was afoot. When Officer McNown went upstairs, he did so as a law enforcement officer investigating criminal activity. Though Officer McNown found what he was looking for, he did so at the expense of Minister David's Fourth Amendment right to privacy in his own home.

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES AT PRE-INDICTMENT PLEA NEGOTIATIONS BECAUSE ADVERSARY JUDICIAL PROCEEDINGS HAVE BEGUN AND PRE-INDICTMENT PLEA NEGOTIATIONS ARE CRITICAL STAGES OF THE CRIMINAL PROCEEDINGS.

The right to counsel must attach at pre-indictment plea negotiations because adversary judicial proceedings have begun, and it is a critical stage of the criminal proceedings where the accused risks waiving rights and defenses that preserve due process and a fair trial. A layman like Minister David has little or no knowledge of his rights or defenses under the law. Yet in a pre-indictment plea negotiation, he opposes a legal-expert prosecutor whose objective is to get him to waive his right against self-incrimination and the right to trial by jury in a plea agreement. The right to counsel must attach during pre-indictment plea negotiations to aid the accused during the confrontation that often determines the fairness and outcome of the trial.

The Sixth Amendment provides that, "[i]n all criminal prosecutions,[1] the accused shall . . . enjoy the right to the assistance of counsel for his defence." U.S. Const. amend. VI. The Due Process Clause of the Fourteenth Amendment incorporates the right to counsel and makes it enforceable against the states. *See Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963). This Court has recognized the dual purposes of the Sixth Amendment are to guarantee effective assistance of counsel at trial, *United States v. Ash*, 413 U.S. 300, 309 (1973), and to protect the unaided layman in critical confrontations with his expert adversary in trial-like contexts where he risks losing his life or liberty. *See United States v. Gouveia*, 467 U.S. 180, 189 (1984); *United States v. Wade*, 388 U.S. 218 (1967). Thus, the assistance of counsel guaranteed by the Sixth Amendment must be "effective" *see Strickland v. Washington*, 466 U.S. 668, 686 (1984) meaning it satisfies "minimum standards of professional competence." *Alaniz v. United States*,

[1] The language "in all criminal prosecutions," does not foreclose applying the Sixth Amendment before formal charges have been filed. Blackstone and other Eighteenth Century legal texts from the time of the Amendment's ratification reference private parties bringing "prosecutions" in civil suits—altogether unrelated to an indictment. *See Powell v. Alabama*, 287 U.S. 45, 61 (1932) (citing 4 Blackstone 355); Pamela R. Metzger, *Beyond the Bright Line: A Contemporary Right-To-Counsel Doctrine*, 97 Nw. U.L. Re. 1635, 1638 (2003).

351 F.3d 365, 367-68 (8th Cir. 2003) (*citing Strickland*, 466 U.S. at 690).[2] Three of this Court's landmark decisions govern the purpose, scope, and attachment of the Sixth Amendment right to counsel: *Powell v. Alabama*, *Kirby v. Illinois*, and *United States v. Wade*.

Powell affirmed that the Sixth Amendment's guarantee of counsel is rooted in due process. *See Powell v. Alabama*, 287 U.S. 45, 68 (1932). In *Powell*, this Court held that a trial court's same-day appointment of counsel for nine African-American boys facing capital murder charges violated the Due Process Clause of the Fourteenth Amendment. Though decided on Fourteenth Amendment Due Process grounds, *Powell* contains two important observations about the interplay between the Sixth Amendment right to counsel and due process. First, counsel ensures a fair trial by providing parity between the legal knowledge of the government and the accused. *Id*. at 69. As this Court noted, the layperson has little or no knowledge of the law or rules of evidence and so requires the "guiding hand of counsel" before trial to prepare an adequate defense and to be on an even playing field with his expert adversary prosecutor. *Id*. Second, the right to counsel *before trial* preserves two elements of due process—a fair trial and the opportunity to be heard. *See id*. at 67-70. This Court observed that it would be "vain" to give the accused a trial without a meaningful opportunity to prepare for it. *Id*. at 59.

Kirby v. Illinois articulates this Court's standard for when the Sixth Amendment attaches and leaves open the possibility that it might attach before indictment. *See Kirby*, 406 U.S. 682, 689 (1972). This Court stated that the Sixth Amendment attaches once "adversary judicial proceedings have been initiated." *Kirby*, 406 U.S. at 688. Adversary judicial proceedings have begun when the government has "committed itself to prosecute," "adverse positions of the

[2] The government concedes that Mr. Long was ineffective when acting as Minister David's counsel. Therefore, the sole question before this Court is whether the Sixth Amendment attaches at pre-indictment plea negotiations.

government and [accused] have solidified," and "the accused is faced with the prosecutorial forces of organized society and must be immersed in the intricacies of substantive and procedural criminal law." *Id*. at 689. The initiation of adversary judicial proceedings is "far from a mere formalism," but rather it "start[s] . . . our whole system of adversary criminal justice," *id*., when the counsel becomes necessary to ensure a fair trial and a meaningful opportunity to be heard.

Wade held that the right to counsel only applies at "critical stages" of the criminal proceedings, *Wade*, 388 U.S. at 227-28, which encompasses pre-indictment plea negotiations. In *Wade*, this Court observed that in the "realities of modern criminal prosecution," confrontations with expert prosecutors or law enforcement may occur before trial to "settle the fate of the accused and reduce the trial itself to a mere formality." *Id*. at 224. During these "critical" pre-trial confrontations, "certain rights might be sacrificed or lost," and "defenses may be irretrievably lost, if not then and there asserted." *Id*. at 225. This Court recognized that these "critical" pre-trial confrontations can reduce the right to counsel at the actual trial to "a very hollow thing" because for all practical purposes the conviction would be assured by the pre-trial interaction. *Id*. at 226. Whether a confrontation is a "critical stage" is determined by inquiring if the accused faces "substantial prejudice" and requires "the ability of counsel to help avoid that prejudice." *Id*.

To determine whether the right to counsel attaches, this Court "scrutinize[s] any pretrial confrontation of the accused." *Id*. *See Rothergy v. Gillespie Cty.*, 554 U.S. 191, 198-213 (2008) (scrutinizing whether an initial appearance hearing marked the beginning of adversary judicial proceedings). Upon scrutiny of the plea negotiations between Minister David and the government, the Sixth Amendment right to counsel attached because "adversary judicial proceedings ha[d] been initiated," and it was a "critical stage" of the criminal proceedings. *See*

Kirby, 406 U.S. at 688, 690. Minister David required effective counsel at the pre-indictment plea negotiation to preserve his right to a fair trial and to prevent him from making an unknowing waiver of crucial rights or defenses.

A. Adversary judicial proceedings had begun by the pre-indictment plea negotiation stage.

"[A]dversary judicial proceedings ha[d] begun" during the plea negotiation between the government and Minister David according to *Kirby*'s three factors. *See Kirby*, 406 U.S. at 688-89. First, the government's offer of a plea agreement was sufficient evidence that the government "committed itself to prosecute." *Id.* Second, "adverse positions of the government [and Minister David] ha[d] solidified," *id*., because the government could only gain benefits from the plea offer if Minister David waived crucial rights. Third, Minister David was "faced with the prosecutorial forces of organized society," *id*., because he faced the combined power and resources of the state and federal governments, and was "immersed in the intricacies of substantive and procedural criminal law," *id*., since he needed to navigate complex state and federal criminal laws and mandatory minimum sentencing statutes.

1. <u>The prosecutor's plea offer evidences that the government committed itself to prosecute.</u>

The government committed to prosecute Minister David when the prosecutors made a formal plea offer to him. *See United States v. Sikora*, 635 F.2d 1175, 1181 (6th Cir. 1980) (Wiseman, J., concurring). The American Bar Association and the Office of the U.S. Attorneys make it sanctionable for a prosecutor to make a formal plea offer without the intent to bring charges, or a factual or legal basis to do so. *See* Am. Bar Ass'n, Crim. Just. Standards for the

Prosecution Function, Standard 3-5.6(g) (4th ed. 2015); U.S. Dep't of Just., U.S. Attorneys' Manual § 9-27.430 (2017). Therefore, when the government makes a plea offer, it either intends to bring charges, or has compiled enough information to support charges.

The federal prosecutors intended to bring charges against Minister David. They simply "*held off* on filing any charges" until Minister David accepted or rejected the plea offer because they did not want to tip off the narcotics supplier that the DEA was pursuing. R. at 4. (emphasis added). It was not a question of "if" prosecutors would file charges, but "when." As in *Escobedo v. Illinois*, where this Court also considered a pre-indictment confrontation between the suspect and the police, bringing formal charges against Minister David was a foregone conclusion. *Escobedo v. Illinois*, 378 U.S. 478, 479 (1964). It would "exalt form over substance" to make the Sixth Amendment guarantee "depend on whether . . . authorities had secured a formal indictment." *Id*. at 486. Like the suspect in *Escobedo*, here Minister David had "for all practical purposes, already been charged." *Id*.

To be sure, this Court has held the right to counsel attaches in instances where adversary judicial proceedings began by way of formal charge, preliminary hearing, indictment, information, or arraignment. *Kirby*, 406 U.S. at 689. But, this Court "has never applied a mechanical, indictment-based rule" to determine when adversary judicial proceedings begin. *Turner v. United States*, 885 F.3d 949, 980 (6th Cir. 2018) (Stranch, J., dissenting). Rather, the Sixth Amendment's guarantee depends "on the nature of the confrontation between the authorities and the citizen." *United States v. Gouveia*, 467 U.S. 180, 195 (1984) (Stevens, J., concurring).

Several Courts of Appeals have adhered to this Court's approach to scrutinize each confrontation for due process concerns and recognized "the right to counsel might conceivably

attach before any formal charges are made." *Roberts v. Maine*, 48 F.3d 1278, 1291 (1st Cir. 1995); *see Matteo v. SCI Albion*, 171 F.3d 877, 893 (3d Cir. 1999); *United States v. Larkin*, 978 F.2d 964 (7th Cir. 1992).

While Sixth Circuit applies a bright-line indictment-based rule to attachment, that court has rejected the contention that the right could never attach before indictment in dicta. *See Turner*, 885 F.3d at 955-66 (6th Cir. 2018) (Bush J., concurring dubitante); *Id*. at 966-69 (Clay, J., concurring). Several Courts of Appeals interpret *Kirby* to establish a "bright line" rule that forecloses the attachment of the right to counsel before indictment. *See United States v. Medunjanin*, 742 F.2d 576, 589-90 (2d Cir. 2014); *Philmore v. McNeil*, 575 F.3d 1251, 1257 (11th Cir. 2009); *United States v. Morriss*, 531 F.3d 591, 594 (8th Cir. 2000); *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); *United States v. Heinz*, 983 F.2d 609, 612-13 (5th Cir. 1993); *United States v. Sutton*, 801 F.2d 1346, 1365-66 (D.C. Cir. 1986). However, those courts either disregard or undervalue the weight of this Court's countervailing language in *Powell*, *Wade*, *Kirby*, and *Gouveia* recognizing that the right to counsel may attach before indictment where an accused requires counsel to preserve his right to a fair trial and due process. *See Powell*, 287 U.S. at 67-70; *Wade*, 388 U.S. at 227; *Kirby*, 406 U.S. at 682-89; *Gouveia*, 467 U.S. at 193 (Stevens J., concurring).

2. Adverse positions of the government and defendant have solidified.

The government and Minister David stood at adverse positions because the government could only benefit from the plea agreement if Minister David forfeited his rights against self-incrimination and trial by jury. The plea offer required Minister David to plead guilty to one count of 21 U.S.C. § 841 and receive a one year prison term in exchange for information about

narcotics suppliers that led to an arrest. R. at 4; Ex. D. The government would benefit from this agreement because it would free judicial resources, reduce prosecutors' caseloads, and curtail the courts' dockets. *See generally* William Stuntz, *Plea Bargaining and Crim. Law's Disappearing Shadow*, 117 Harv. L. Rev. 2254, 2254-56 (2008). The government could only secure those benefits if Minister David agreed to the plea offer which required him to admit guilt in court and waive his Fifth Amendment right against self-incrimination and Sixth Amendment right to trial by jury. *See* U.S. Const. amend. V, VI; Leanna Minix, *Examining Rule 11(b)(1)(n) Error: Guilty Pleas, App. Waiver, and Dominguez Benetiz,* 74 Wash. & Lee L. Rev. 551, 553 (2017) (a defendant who enters a guilty plea surrenders the right to trial by jury).

3. The accused is faced with prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural law.

Minister David was faced with prosecutorial forces of organized society and immersed in the intricacies of substantive and procedural law because the government brought expert knowledge and vast resources with it to the bargaining table that it used to mount a case against him. At the plea negotiation, Minister David faced the combined "forces" of three government agencies in "organized society:" the Lakeshow Police Department through Officer McNown, the DEA task force charged with taking down the narcotics supplier, and the U.S. Attorney's Office through the federal prosecutors, R. at 2-4.

These three government agencies had a substantial amount of resources, expert knowledge, and authority. They could utilize the federal and state governments' time, money, and personnel to investigate and gather evidence against Minister David. The government was also armed with an expert knowledge of the state criminal code and federal criminal code, as well as substantive and procedural legal doctrines and defenses. Whereas the government knew

how many years Minister David could be sentenced for that amount of narcotics, Minister David likely did not know. What is more, the U.S. Attorney's Office could impanel a grand jury to indict Minister David and a jury to try him. Most importantly, the federal government had the power to deprive Minister David of his liberty and incarcerate him for at least ten years.

B. The pre-indictment plea negotiation is a "critical stage" of the criminal proceedings.

The same reasoning that this Court applied to find that a post-indictment plea negotiation is a "critical stage" applies co-extensively to a pre-indictment plea negotiation. *See Missouri v. Frye*, 566 U.S. 134, 140-46 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010) (post-indictment plea negotiations are critical stages). This Court held in *Padilla* that "the negotiation of a plea bargain is a critical phase of litigation." *Padilla*, 559 U.S. at 373. This Court later explained the post-indictment plea negotiation is a "critical stage" because the risk of the accused making an unintelligent or unknowing decision in the negotiation process can "determine[] who goes to jail and for how long." Frye, 566 U.S. at 144. Indeed, pleas account for nearly ninety-five percent of all criminal convictions. *Id*. at 143. Also, the presence of effective counsel at plea negotiations "reduce[s] the chance" of an unintelligent or unknowing waiver, because counsel can guide the accused with competent legal advice. *Padilla*, 559 U.S. at 387. Both the post-indictment plea negotiation and the pre-indictment plea negotiation are critical stages because an accused faces substantial prejudice to rights ensuring a fair trial and the presence of counsel would avoid the prejudice.

1. <u>Minister David faced substantial prejudice to his rights that would ensure a fair trial.</u>

Minister David's right to a fair trial faced "substantial prejudice" in the negotiation against the expert prosecutors because by negotiating or agreeing to a plea offer, he would forfeit

many rights designed to ensure a fair trial and prepare a defense. If Minister David had accepted the plea offer, prosecutors likely would have required him to make an incriminating evidence proffer detailing the information he could provide about the narcotics supplier. *See* Graham Hughes, *Agreements for Cooperation in Crim. Cases*, 45 Vand. L. Rev. 1, 41 (1992); R. at 4. Prosecutors likely could have admitted the incriminating statements that Minister David made in his home to Agent Malaska notwithstanding Federal Rule of Evidence 410 because he made them outside the presence of the prosecutor, *see United States v. Moody*, 206 F.3d 609, 611 (6th Cir. 2000), and during the government's "investigation," R. at 3, before plea negotiations began. *See Sikora*, 635 F.2d at 1177 (Wiseman, J., concurring). Also, if prosecutors determined that Minister David did not perform under the terms of the plea agreement (e.g., his information did not lead to an arrest, Ex. D) prosecutors could use his statements against him in a subsequent prosecution, and he could not withdraw his guilty plea. Pamela Metzger, *Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine*, 97 Nw. U. L. Rev. 1635, 1662 (2003). Most importantly, accepting the plea agreement would require Minister David to waive his right to a trial by jury. *See* U.S. Const. amend. VI; *Sikora*, 635 F.2d at 1181 (Wiseman, J., dissenting).

2. <u>The presence of effective counsel at pre-indictment plea negotiations would have helped Minister David avoid the prejudice that inured to his right to a fair trial.</u>

The presence of counsel would "help avoid th[e] prejudice" that inured to Minister David's rights guaranteeing a fair trial, *Wade*, 388 U.S. at 227, because the legal expertise of effective counsel would help him make an informed decision about whether to negotiate and whether to accept the offer. The Sixth Amendment's guarantee of effective counsel required Minister David's attorney to communicate the plea offer to him so that he could make a knowing and intelligent decision to accept or reject it. *See Frye*, 566 U.S. at 145. Effective counsel would

have advised Minister David that he risked waiving certain rights by even negotiating and would add nine years to his sentence if he rejected the offer. A person like Minister David who is unskilled in the law "cannot be presumed to make critical decisions without [effective] counsel's advice." *Lafler v. Cooper*, 566 U.S. 156, 165 (2012). Effective counsel would have guided Minister David through the negotiation by reserving vital rights during the process. For example, effective counsel would know to seek a cooperation agreement limiting the way that the government could use information volunteered by the accused as part of his cooperation. *See* Practice Under the Federal Sentencing Guidelines at 7-15, 7-17 (Phylis Skloot Bamberger et al. eds. 5th ed. 2000).

The pre-indictment plea negotiation between the government and Minister David was fundamentally unfair and undermined his right to a fair trial. The right to counsel attaches here just as it would at trial because plea negotiations determine the outcome and fairness of a trial and "might be appropriately be considered to be parts of the trial itself." *Ash*, 413 U.S. at 310.

CONCLUSION

This Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

Team P42

Counsel of Record

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