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 PETITIONER

Attorneys for Petitioner

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STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Mr. Chad David ("Petitioner" or "Mr. David") is a 72-year-old minister in his home town of Lakeshow, Staples. R. at 2. He was a well-respected member of his community and had a reputation for his uplifting and energizing sermons at the Lakeshow Community Revivalist Church, all until his arrest on Sunday January 15, 2017. R. at 2. On that Sunday, Lakeshow patrol officer James McNown entered Mr. David's residence without announcing himself and without a warrant. R. at 3. In the months preceding Mr. David's arrest, the Lakeshow police and Officer McNown knew of an increase in Golden State drugs entering Lakeshow and sought to crack down on such activity. R. at 2. The issue was so prevalent that the DEA had established a task force in Lakeshow to assist local law enforcement in combating the flow of narcotics into Lakeshow. R. at 3.

Before arresting Mr. David, Officer McNown had been attending church services at Lakeshow Community where Mr. David regularly performed ministry services. Ex. A. On Sunday January 15, 2017, Mr. David was noticeably absent from church services, and Officer McNown was approached by church member Julianne Alvarado who informed him she was worried about Mr. David and had attempted to contact him that morning but received no answer. R. at 2. Another church member, Jacob Ferry, informed Officer McNown he saw Mr. David at a bar the night before. *Id.* To placate church members, Officer McNown stated he would go by Mr. David's house to check in on him. *Id.*

Church services ended around 8:50 AM and Officer McNown began his patrol of Lakeshow at 9:00 AM. *Id.* He first stopped at a Starbucks and ordered Mr. David a hot tea before heading to Mr. David's residence. *Id.* Officer McNown entered Mr. David's gated community

without addressing the gate security guard; Officer McNown stated that at this point he was curious about how Mr. David could live in such a nice residential community and simply work as a minister. *Id.* Upon entering, Officer McNown noticed a black SUV exiting the gated community and, based on his experience knew that this same type of SUV was one typically driven by drug dealers. *Id.*

Officer McNown arrived at Mr. David's home at 9:30 AM and first saw that Mr. David's van was parked in the driveway. *Id.* Officer McNown heard loud music coming from inside Mr. David's home and thought it was odd that Mr. David would be listening to such music given his age and the early morning hours. R. at 3. Officer McNown knocked and announced his presence, waited approximately two minutes, and peaked through the windows of Mr. David's home. *Id.* He observed the television and noticed that Mr. David's TV was playing *The Wolf of Wall Street*. *Id.* Again, Officer McNown thought something was odd because he assumed Mr. David would not watch such R-rated films given he is a minister. *Id.* At that point Officer McNown attempted to open the front door without Mr. David's permission, but it was locked. *Id.*

In a purported effort to determine the status of Mr. David, Officer McNown went around the house to the back door and found it unlocked. *Id.* Officer McNown assumed Mr. David could not hear his knocking over the loud music and entered Mr. David's home without his permission or awareness. *Id.* Officer McNown did not announce himself when he entered through the unlocked backdoor. *Id.* McNown first walked over to the television and turned it off; there he discovered a notebook containing "incriminating information." *Id.* Officer McNown then directed his attention toward the source of the loud music; he determined the music to be coming from behind a closed-door upstairs. *Id.* Again, without announcing himself, McNown opened a closed door to find Mr. David packaging powder cocaine into zip-lock bags. *Id.*

Officer McNown immediately handcuffed Mr. David and called in the local DEA agents for assistance. R. at 3. DEA Agent Colin Malaska arrived at Mr. David's residence shortly after 10:00 AM and began his investigation. *Id.* After Officer McNown directed Malaska to the notebook and cocaine, Malaska Mirandized Mr. David and asked him where he obtained the drugs. *Id.* Mr. David refused to answer, indicating that informing the agents would put Mr. David's church and his own life in danger. *Id.*

After arriving at a federal detainment facility, Mr. David called the only criminal defense attorney he knew, Keegan Long. *Id.* Long was a member of Mr. David's church and, as Mr. David was aware, struggled with alcoholism. R. at 3–4. But Mr. David trusted Mr. Long to be effective and retained him as his attorney. *Id.*

After Mr. David expressed his fear of reprisal from his "suppliers" and was taken into custody, Agent Malaska contacted federal prosecutors to express the DEA's desire to obtain information from Mr. David. *Id.* Malaska had credible information that a suspected drug kingpin was travelling through Lakeshow and believed that Mr. David could provide information leading to the kingpin's arrest. *Id.* Mr. David did in fact have such information. Ex. E. Malaska encouraged the prosecution to offer a favorable plea deal before filing any formal charges to prevent tipping off the kingpin that Mr. David was in custody. R. at 4.

The prosecutors agreed with Agent Malaska and did not file formal charges against Mr. David. *Id.* They offered Mr. David a plea bargain of one year in prison in exchange for the names of his suppliers, valid for 36 hours only. *Id.* The prosecutors emailed the offer to Mr. David's attorney, Mr. Long, on January 16, 2017 at 8:00 AM indicating the expiration of the offer on January 17, 2017 at 10:00 PM. *Id.* Long received and read the email from the prosecutor, but he failed to accurately read the information regarding the time limit on the offer.

Id. After 36 hours, the offer expired having never been communicated to Mr. David. *Id.* It is undisputed by either party that the plea was not communicated to Mr. David during the 36-hour time period it could have been accepted. *Id.* After the expiration of the plea bargain, the prosecutors promptly indicted Mr. David, charging him with one count of violating 21 U.S.C. § 841 on the morning of January 18, 2017. *Id.*

Kayla Marie, the prosecutor assigned to Mr. David's case, contacted Mr. Long to ask why Mr. David did not accept the plea offer. *Id.* Only then did Mr. Long realize his error and immediately contacted Mr. David to inform him of the lapsed offer. *Id.* Mr. David fired Mr. Long as his attorney and then hired Michael Allen as his new criminal defense lawyer. *Id.*

On Friday, January 20, 2017, after Mr. David was indicted, his new attorney Mr. Allen contacted Ms. Marie via email to inquire about extending another plea offer to Mr. David. R. at 5. Ms. Marie responded by stating she had contacted the DEA and the information they were seeking from Mr. David was most likely of no value. Ex. E. Mr. Allen responded to Ms. Marie and informed her that Mr. David gave his assurances that the information he could provide was still of value and Mr. David would accept a deal contingent upon the arrest of a suspect. *Id.* Ms. Marie was unwavering and responded to Mr. Allen that Mr. David "should have taken the plea deal when he could." *Id.*

II. NATURE OF PROCEEDINGS

On Sunday, January 15, 2017, Mr. David was detained and mirandized by DEA Agent Malaska in his home on Sunday, January 15, 2017. R. at 2. After spending the next three days in custody, Mr. David was finally indicted and charged with possession of a controlled substance with the intent to distribute in violation of 21 U.S.C. § 841. *Id.* Mr. David filed a pretrial motion to suppress evidence collected on the date of his arrest because the search was conducted without

a warrant and a supplemental motion to be re-offered a plea deal never communicated to him by his ineffective counsel. *Id.* The district court denied both of Mr. David's motions. On July 15, 2017 Mr. David's motion to suppress and supplemental motions were denied. R. at 13. On July 20, 2017 Mr. David was tried and found guilty; then he received a mandatory 10-year minimum sentence. *Id.* The Thirteenth Circuit Court of Appeals affirmed his conviction, upholding the denial of Mr. David's motion to suppress evidence and supplemental motion. R. at 14.

SUMMARY OF THE ARGUMENT

I.

The Thirteenth Circuit Court of Appeals incorrectly held that the government's search of Mr. David's home was constitutional under the Fourth Amendment. Although warrantless searches are presumed to be unreasonable, and therefore unconstitutional, the government argues that the community caretaking exception to the Fourth Amendment's warrant requirement applies. But the community caretaking exception has yet to be extended by this Court to apply to houses. Instead, this Court's jurisprudence regarding the community caretaking exception has been solely applied to cars. Because of the intrusive nature of a search performed on an individual's home, the community caretaking exception should not be extended to the home.

To satisfy the community caretaking exception established in *Cady*, the government must show that (1) the officer was not engaged in an investigation and (2) the search was done to protect the safety of the general public. The government can satisfy neither. Officer McNown suspected both Mr. David and activity taking place outside of Mr. David's home. To investigate this suspicion, Officer McNown searched Mr. David's home without securing a warrant as required by the Fourth Amendment.

Nor did Office McNown search Mr. David's home to protect the safety of the general public. McNown had no reason to believe that the contents resulting from a search of Mr. David's home would protect the public's safety. Because Officer McNown was performing an investigation and had no reason to believe that the search was necessary to protect the public's safety, the community caretaking exception does not apply.

II.

The Sixth Amendment is the recognition there must be experienced and learned counsel standing between the government and the object of its prosecution. Today, the majority of individuals whose liberty has been taken by the government entered into that fate voluntarily through plea agreements. In the decades since the Sixth Amendment's adoption, trial by a jury of peers has become a rarity; the fate of accused individuals now rests in the hands of prosecutors offering plea deals. This Court has recognized this reality and held that plea negotiations are a critical stage where the prosecution has initiated adversary judicial proceedings against the accused. Here, in Mr. David's case, the question then is when does one become an accused?

The government's position is that even though Mr. David was offered a plea deal, that if taken would seal his fate and forever label him a felon, he could not be an "accused' because he had not yet been indicted. Mere hours after the expiration of Mr. David's plea deal he was indicted, further evidence that cemented the government's position that Mr. David had committed a violation of federal law, but just because indictment cements the government's position as an adversary of a defendant does not mean that the individual was never accused before the mere formality of indictment.

This Court jurisprudence requires the lower court to analyze the circumstances of Mr. David's relationship to the prosecution and determine on that basis whether he was an accused

facing adversary judicial proceedings. The lower court instead relied on a so-called bright-line rule and incorrectly held that the right to counsel can never attach pre-indictment. This contradicts the decades of this Court's cases that intensely analyzed the defendants' circumstances and most recently held that plea-negotiations are a critical stage of judicial proceedings requiring attachment. Here, Mr. David was an accused facing adversarial judicial proceedings of plea-bargaining and therefore his Sixth Amendment right to counsel effectively attached when the plea offer was made pre-indictment.

STANDARD OF REVIEW

Mr. David is appealing from the denial of his motion to suppress evidence discovered in violation of the Fourth and Sixth Amendments. A district court's denial of a motion to suppress is reviewed de novo. *United States v. Quezada*, 448 F.3d 1006, 1007 (8th Cir. 2006) (Fourth Amendment violations); *United States v. Latouf*, 132 F.3d 320, 330 (6th Cir. 1997) (Sixth Amendment violations).

ARGUMENT AND AUTHORITIES

I. OFFICER MCNOWN'S SEARCH OF MR. DAVID'S HOME VIOLATED THE FOURTH AMENDMENT'S WARRANT REQUIREMENT.

The Fourth Amendment to the United States Constitution ensures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. When America's Founding Fathers drafted the Bill of Rights, the "physical entry of the home [was] the chief evil against which the wording of the Fourth Amendment [was] directed." *United States v. U.S. Dist. Court*, 407 U.S. 297, 313 (1972). The chief evil which the drafters sought to prevent, an unreasonable entry into the home of another, is the impetus of the case before this Court today.

Officer McNown entered and searched Chad David's home without a warrant. R. at 3. Any warrantless search performed by a government agent is presumed to be unreasonable. *Katz v. United States*, 389 U.S. 347, 357 (1967). To overcome the presumption of unreasonableness, the government must prove that an exception to the warrant requirement exists. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The government cannot meet their burden, however, because this Court has chosen not to extend the community caretaking exception to homes. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *accord South Dakota v. Opperman*, 428 U.S. 364, 365 (1976); *Colorado v. Bertine*, 479 U.S. 367, 368 (1987).

The Thirteenth Circuit Court of Appeals wrongly held that Officer McNown's search was reasonable. Under the community caretaking exception first established by the *Cady* Court, an officer's search must meet two requirements to pass constitutional muster. 413 U.S. at 441–43. First, the government must show that the officer was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a crim[e]." *Id.* at 441. Second, the government must show that the officer's actions were taken in order "to protect the

public." *Id.* at 443. Even if this Court extends the community caretaking exception to the search of private homes, Officer McNown's search of Mr. David's home does not satisfy either of the exception's requirements. This Court should suppress all evidence found because of the government's illegal search of Mr. David's home.

A. The Community Caretaking Exception Does Not Extend to Homes.

The main constitutional difference between the search of a house and the search of a vehicle is "from the ambulatory character of the latter" and from the fact that police "often [have] noncriminal contact with automobiles" *Id.* at 442. This distinction lies at the very heart of the community caretaking exception because the government is "frequently investigat[ing] vehicle accidents in which there is no claim of criminal liability." *Id.* at 441; *United States v. Smith*, 522 F.3d 305, 313 (3d Cir. 2008) ("In performing this community caretaking role, police are 'expected to aid' those in distress, combat actual hazards, prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety."); *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993) ("Because of the pervasive regulation of motor vehicles, which often calls on law enforcement officials to stop and examine cars, and because of the frequency with which cars break down or become involved in accidents on public roads, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home.")

The characteristics of a home differ significantly from those of a vehicle for the community caretaking exception. Police investigate at the homes of individual citizens every day. Unlike the investigation of an automobile accident, however, the investigation of a home is typically criminal in nature. Houses do not call for the same "regulation" or "examination" that vehicles do. *Id.* An individual's "expectation of privacy with respect to one's automobile is significantly

less than that relating to one's home or office." *Opperman*, 428 U.S. at 365. Because of these drastic differences, the community caretaking exception must be "confined . . . to the automobile exception . . . to foreclose an expansive construction of the decision allowing warrantless searches of private homes." *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994).

B. The Community Caretaking Exception Does Not Apply Because Officer McNown Was Conducting an Investigation.

If police officers are not prevented from asserting the exception to search the homes of individual citizens, the caretaking exception will become nothing more than a "subterfuge to look for and seize evidence in plain view." David Fox, *The Community Caretaking Exception: How the Courts Can Allow the Police to Keep Us Safe Without Opening the Floodgates to Abuse*, 63 Wayne L. Rev. 407, 424 (2018). Officer McNown's search of Mr. David's home is a prime example of the dangers presented when the community caretaking exception is extended to the home. Despite the lower court's holding that the community caretaker exception applies, Officer McNown's actions amount to a full-blown investigation.

When an officer searches a private home to ascertain whether a crime has occurred, he is investigating—a fact that makes the caretaking exception unavailable. *Erickson*, 991 F.2d at 532. In *Erickson*, the police were dispatched to investigate a suspected burglary of a habitation. *Id.* at 530. During the investigation of the burglary, the police were informed that a neighbor witnessed "two men dragging a large brown plastic bag" across the backyard of a nearby house. *Id.* The responding officer walked into the backyard and looked through a glass door to the inside of the house. *Id.* The officer then knocked on the back door; however, no one responded. *Id.* Noticing a nearby basement window with enough space "for someone to have gained entry," the officer pulled back plastic covering the window and peered into the basement. *Id.* While looking inside, the officer could smell a strong odor of marijuana and saw numerous marijuana plants. *Id.*

After the trial court suppressed the marijuana plants, the government appealed arguing that the officer was performing one of his community caretaking functions while searching the house. *Id.* at 531. The United States Court of Appeals for the Ninth Circuit held that the officer's search did not meet the community caretaking exception. *Id.* at 532. The court reasoned that the officer's decision to investigate whether a crime had occurred was "precisely th[e] kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amendment requires be made by a neutral and objective magistrate, not a police officer." *Id.*

Likewise, Officer McNown's search of Mr. David's home amounted to a full-blown investigation. Although McNown was not responding to an ongoing crime, the moment he arrived at Mr. David's community, his suspicion of criminal activity grew. McNown arrived already curious of how a minister such as Mr. David could afford to "live in such an expensive area." R. at 3. Just as the *Erickson* police arrived on scene with the belief that a burglary was in progress, McNown arrived at the community of Mr. David's home and immediately observed a black SUV with Golden State license plates which Officer McNown knew to be "popular among drug dealers" and linked to "an increase in the flow of drugs" into the Lakeshow area. R. at 4. Just as the *Erickson* police went to the defendant's backyard to get access to the house, McNown went to Mr. David's backyard to get to an unlocked back door. R. at 5. Unlike *Erickson* where the officers did not enter into the home, however, McNown took it upon himself to enter into the home of Mr. David in order to further his search.

Just as the Court of Appeals for the Ninth Circuit concluded that the *Erickson* officer's actions amounted to an investigation, falling outside of the community caretaking exception, here, the Court should find that officer McNown's actions constitute an investigation and do not satisfy the caretaking exception. Holding otherwise would allow officers to assert the caretaking

exception to make "judgmental assessment[s]" that the Fourth Amendment demands be made by a neutral and detached magistrate. *Erickson*, 991 F.2d at 532. This case is pivotal to Fourth Amendment jurisprudence because "[t]he right of officers to thrust themselves into a home is . . . a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

C. The Community Caretaking Exception Does Not Apply Because the Search Was Unrelated to the Safety of the General Public.

Under the community caretaking exception, the government may search the vehicle of a defendant when there is a "concern for the safety of the general public." *Cady,* 413 U.S. at 447. Where a search is performed unrelated to "reasons of safety," the government's search falls outside of the community caretaking exception. *Id.* at 443. Searches claimed to fall under the community caretaking exception "must be balanced against the intrusion on the individual's Fourth Amendment interests." *Erickson*, 991 F.2d at 531; *Maryland v. Buie,* 494 U.S. 325, 331 (1990). The intrusion is substantial as Officer McNown searched through the home of Mr. David. Officer McNown had no reason to believe that searching Mr. David's home was necessary for the safety of the general public, which necessarily takes the search outside of the community caretaking exception.

In *Cady*, the search of the defendant's vehicle was necessary, given the government's "concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the [defendant's] vehicle." 413 U.S. at 447. The defendant in *Cady* was a police officer who the government believed to be in the possession of a revolver as required by his department's procedures. *Id.* at 437. After Cady was arrested, the government searched his vehicle for the revolver without getting a warrant to do so. *Id.* at 440. In holding that the search of Cady's vehicle fell under the community caretaking exception, the Court reasoned

that the search was necessary to "protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443.

Circuit courts applying the *Cady* test for the community caretaking exception have applied the same safety standard. In *Bute*, two officers were patrolling a local neighborhood when they observed an open garage at a commercial building. 43 F.3d at 532. Because neither officer had ever seen anyone around this building, the officers became suspicious of why the garage door was open. *Id.* at 533. The officers entered into the building through the garage door to search for vandalization or evidence of a burglary as the officer suspected. *Id.* Despite the officers' observation there was "no indication that anyone was in or around the . . . building, and no sign of forced entry," they continued to search around the building without a warrant. *Id.* In their search, the officers came across a meth lab. *Id.* After the defendant was charged with intent to distribute meth, the defendant moved to suppress the evidence, arguing that the officers' warrantless search violated his Fourth Amendment rights. *Id.* In response, the government argued that the community caretaking exception applied, and therefore, they did not have to obtain a warrant. The *Bute* court rejected this argument, holding that the caretaking exception did not apply. *Id.* In concluding this, the court reasoned that the search of the building was unnecessary to "protect the safety of the general public." *Id.* at 535 (internal citations omitted).

Officer McNown had no reason to believe that searching the home of Mr. David was necessary to protect the public's safety. Unlike *Cady*, where the police were under the assumption that the defendant possessed a weapon, here, McNown did not believe that Mr. David had any weapons in his home that might be a threat to the public. 413 U.S. at 437. Nor did McNown claim he believed Mr. David to have a firearm. Unlike *Cady*, which found there was a

concern for the public safety, here there is no concern for the public safety and no caretaking exception. *Id.*

Similar to the officers in *Bute* who went to the defendant's building suspicious of criminal activity, when McNown went to Mr. David's home he was doing so while acting on a suspicion of criminal activity. There was "no sign of forced entry" at Mr. David's home. 43 F.3d at 533. Just as the officers in *Bute* were found to have no sufficient reason for searching the building of the defendant, this Court should rule the same and find that McNown had no reason to believe that searching Mr. David's home was necessary to protect the public's safety. *Id.*

II. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL ATTACHES TO PRE-INDICTMENT PLEA NEGOTIATION.

The Thirteenth Circuit Court of Appeals incorrectly declared itself bound by precedent when it held that the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations. Whether the Sixth Amendment right to counsel attaches in pre-indictment plea negotiations is a question of law that is reviewed de novo. *Latouf*, 132 F.3d at 330. "In all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense." U.S. Const. amend. VI. The Sixth Amendment right to effective counsel has been described as "a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson v. Zerbst*, 304 U.S. 458, 462–63 (1938).

In the decades since *Johnson*, this Court has incrementally extended the right to effective counsel beyond a defendant's presence before a tribunal to encompass certain pretrial proceedings. *See United States v. Wade*, 388 U.S. 218, 227 (1967) (applying the right to effective counsel to post-indictment lineups); *see also United States v. Ash*, 413 U.S. 300, 313 (1973)

(reviewing the history and expansion of the Sixth Amendment right to effective counsel to demonstrate the test used by the Court calls for examination of the event causing the Sixth Amendment claim to determine whether the accused required assistance in meeting the prosecution). This Court explained in *Ash* that the extension of the right to effective counsel during pre-trial events resulted from changing patterns of criminal procedure and investigation that generate pretrial events that may be considered parts of a trial itself. 413 U.S. at 310.

A. The Lower Court Misapplied the *Kirby* Rule.

The question before the Court is whether the Sixth Amendment right to effective counsel "attaches" during pre-indictment plea negotiations. This Court first spoke of "attachment" in *Kirby v. Illinois* when it held the right to effective counsel "attaches" at or after the time that adversarial judicial proceedings have been initiated against the accused. 406 U.S. 682, 688–89 (1972). Cases preceding *Kirby* "involved points of time at or after the initiation of adversary judicial proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 689. The lower court, and the Sixth Circuit in *Turner v. United States*, relied heavily on the language "by way of formal charge, preliminary hearing, indictment, information, or arraignment" in concluding that the right to effective counsel was precluded by this Court. R. at 17; *Turner v. United States,* 885 F.3d 949, 953 (6th Cir. 2018). But independent analysis of the language of *Kirby* does not preclude a holding that the right to effective counsel attaches during pre-indictment negotiation. Where any adversary judicial proceedings have been initiated, the right to effective counsel attaches.

1. The lower court did not take an in-depth look at the circumstances surrounding Mr. David's case.

The question then must be, whether the prosecution's offer of a one-year plea deal to Mr. David qualifies under *Kirby* as an adversary judicial proceeding. The answer is yes. The lower

court relied on the language from *Kirby* to claim that formal proceedings must be initiated for the effective counsel right to attach but failed to apply the same reasoning. There, the petitioner and a companion were arrested when police officers found stolen traveler's checks in their possession. 406 U.S. at 684. Notably, the *Kirby* Court did not limit its analysis to the lack of an indictment, but rather engaged in a practical evaluation of the facts and circumstances. *Id.* at 689–91.

This binds attachment jurisprudence. For example, this Court emphasized in *Moran v. Burbine* that when the government's role shifts from investigation to accusation is when the assistance of counsel is needed to assure that the prosecution's case "encounters the crucible of meaningful adversarial testing." 475 U.S. 412, 430 (1986) (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)) (finding that the right had not attached during a pre-arraignment interrogation, even though the defendant's sister had retained counsel on his behalf). In *United States v. Gouveia*, the Court began its analysis by clarifying the type of pretrial proceeding at issue when prison inmates were held in administrative detention without counsel for months after they were indicted. 467 U.S. 180, 185 (1984). The Court clarified those types of pretrial proceedings that invoke Sixth Amendment concerns as those that include confrontations with the "procedural system" or an "expert adversary" which "might well settle the accused's fate." *Id.* at 189. Here, Mr. David was offered a plea deal by the U.S. prosecutor Ms. Marie, clearly understood by *Gouveia* as an "expert adversary." The government offered Mr. David a plea bargain before he was indicted hoping he would provide them information and plead guilty in exchange for one year of incarceration. This plea would have settled Mr. David's fate as a free man and subjected him to prison time and lifelong status as a felon.

2. This Court's recent cases reject a bright-line rule analyzing a defendant's relationship with the prosecution.

More recently, this Court considered whether the right to effective counsel attached during pre-indictment probable cause hearing in *Rothgery v. Gillespie County*. There, the county did not require prosecutors' involvement in probable cause hearing and so, the county argued, the government had not yet committed to prosecution; therefore, the Sixth Amendment right to counsel had not attached. 554 U.S. 191, 209–10 (2008). This Court agreed that the Sixth Amendment had not yet attached but found that prosecutor involvement is unnecessary for attachment. *Id.* at 210. The Court explained that the right to effective counsel applies whether the accused is "headed for trial" and needs to get a lawyer working to either "attempt to avoid trial or to be ready with a defense" for trial. *Id.*; *see also id.* at 208 (holding that the attachment question is not driven by whom, but by *when* the machinery of prosecution is turned on). The Court further rejected the government's attempt to characterize Sixth Amendment jurisprudence as establishing a "general rule" that attachment occurs only when formal charges are filed. *Id.* at 211 ("[A]ccording to the County, our cases . . . actually establish a 'general rule that the right to counsel attaches at the point that . . . formal charges are filed.' . . . We think the County is wrong both about the clarity of our cases and the substance we find clear."). Here, the lower court applied the same mechanical logic as the government in *Rothgery*, but this Court has repeatedly scrutinized the relationship between the government and the accused and the potential consequences for the accused. In applying the principle in *Kirby*, and repeatedly applied by the this Court since, we must scrutinize the formal plea made by the prosecutor and determine whether adversary judicial proceedings were initiated.

Here, it should be clear that an individual who receives a formal plea offer has become an accused under the Sixth Amendment. Nonetheless, the government contends that an individual is

not an accused until formally indicted. The investigation of Mr. David was completed, and no plans to investigate further existed when the prosecution made their plea offer. It would be an ethical violation if the prosecutor made a formal plea offer if she did not intend to file charges or have the factual or legal basis to do so. *Cf.* Am. Bar Ass'n, *Criminal Justice Stands for the Prosecution Function*, Standard 3-5.6(g) (4th ed. 2015); U.S. Dep't of Justice, *U.S. Attorney's Manual* § 9-27.430 (2017). Therefore, when a prosecutor extends a formal plea offer with specific charges, she has cemented her position as an adversary of the defendant. Formal pleas, whether before or after a defendant is indicted, expose the individual to the intricacies of substantive and procedural law. Confronted with these plea bargains, an inexperienced defendant who lacks legal skill risks waiving his right to life and liberty without the protections the Sixth Amendment anticipated he would need.

Mr. David's case illustrates this point. When the prosecution communicated the one-year plea offer to Mr. Long, the prosecution had committed to prosecute Mr. David; immediately following the lapse of the offer, the government indicted Mr. David. Mr. David was exposed to the risk of being sentenced to a ten-year minimum or take the plea offer of one year. With or without his attorney's ineffective counsel, Mr. David was confronted by the prosecution in a situation undoubtedly the initiation of adversary judicial proceedings. To evaluate the plea deal, Mr. David had to understand the charges he faced, the punishments prescribed by law, the defenses, or lack thereof, he could claim, and the strength of the prosecution's case against him. Mr. David's Sixth Amendment right to effective counsel attached when the prosecution cemented its position as an adversary when it communicated a plea offer to Mr. Long, initiating adversary judicial proceedings under *Kirby*.

B. This Court's Decisions in *Frye* and *Lafler* Support Attachment of the Sixth Amendment's Right to Counsel in Pre-Indictment Plea Negotiations.

This Court's analysis in post-indictment plea negotiations further support that Mr. David's Sixth Amendment right to effective counsel attached when the prosecution offered Mr. David the one-year plea deal. Both *Missouri v. Frye* and *Lafler v. Cooper* hold that because plea negotiations might resolve a defendant's fate entirely, they are critical stages encompassed by the Sixth Amendment's right to effective counsel. The same reasoning should apply regardless of the mere formalism of indictment. In *Frye*, an attorney failed to communicate a plea offer to an individual indicted on felony charges. *Missouri v. Frye*, 566 U.S. 134, 138–39 (2012). The individual plead guilty later without the benefit of a plea bargain and received a harsher sentence. *Id.* at 139. The Court considered whether post-indictment plea negotiations, which often take place outside of formal court proceedings, are a critical stage. *Id.* at 140. The Court cited statistics regarding the overwhelming percentage of criminal cases resolved through plea bargaining and seemed persuaded that plea negotiations have essentially replaced trials, making plea negotiations a critical stage of prosecution. *Id.* at 143–44. Denying "counsel during plea negotiations might deny a defendant effective representation by counsel at the *only* stage when legal aid and advice would help him." *Id.* at 145 (noting the offer made by the prosecution to the accused was formal and fixed).

In *Lafler*, a companion case to *Frye*, the Court emphasized that plea negotiations are critical stage in which an individual rejected two plea offers and was convicted by a jury. *Lafler v. Cooper*, 566 U.S. 156, 161 (2012). Reiterating *Frye*, the Court focused on the underlying principle of the Sixth Amendment and applied those protections to pretrial stages of a criminal proceeding "in which defendants cannot be presumed to make critical decisions without

counsel's advice." *Id.* at 165 (clarifying the right to effective counsel is not just to protect during trial, as evidenced by the right to effective counsel on appeal).

The reasoning applied by the Court in *Frye* and *Lafler* logically apply to this case, and other pre-indictment cases, perhaps more so, because in situations like Mr. David's had the offer been communicated to him, that may be his *only* adversarial confrontation with the prosecution. Denying the accused the right to effective counsel during pre-indictment plea negotiation ensures that his exposure to the criminal justice system will open with the prosecutor and end with the gates of the prison closing behind him. This is what the Sixth Amendment was adopted to protect people like Mr. David from. The creation and deliverance of a formal plea offer reflects deliberate state action against the accused, and, therefore, requires the guidance of legal counsel just as much before an indictment is passed down as to after in *Frye* and *Lafler*.

In addition, the lower court's adherence to a rule that attachment occurs only at indictment raises the possibility of prosecutorial manipulation. In *Turner v. United States*, Turner was offered a plea deal that exploded on indictment, betraying an effort to bypass the traditional criminal process entirely. In essentially the same manner, the prosecution in Mr. David's case sought to keep his arrest from public knowledge and so made the plea offer before he was indicted. If the right to counsel does not attach before indictment, prosecutors can simply delay indicting individuals to extract unfavorable and uncounseled plea agreements. The lower court's decision exposes the vast majority of criminal defendants to navigating the criminal justice system during adversarial and critical stage plea bargaining without legal representation. This directly conflicts with the principles of the Sixth Amendment right to counsel, which seeks to protect individuals from government abuse.

CONCLUSION

This Court should reverse the judgment of the Thirteenth Circuit Court of Appeals and hold that Mr. David's Fourth and Sixth Amendment rights were violated.

Respectfully submitted,

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ATTORNEYS FOR PETITIONER