Team P6

No. 4-422

IN THE

SUPREME COURT OF THE UNITED STATES

FALL TERM 2018

Chad DAVID,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRTEENTH CIRCUIT

BRIEF FOR PETITIONER

October 21, 2018

COUNSEL FOR PETITIONER

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ISSUES PRESENTED

I. Does the community caretaking exception extend to the warrantless search of a home, notwithstanding the "constitutional difference" between searches of homes and automobiles?

II. Does the Sixth Amendment right to effective counsel attach to plea negotiations prior to federal indictment, where charges and sentences are bargained and determined and cases often settle?

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STATEMENT OF FACTS

A. The Warrantless Search of Mr. David's Home.

Petitioner Chad David ("Mr. David") was once the well-respected minister of Lakeshow Community Revivalist Church in the city of Lakeshow, Staples. R. at 2. On Sunday, January 15, 2017, Mr. David was unexpectedly absent from his usual morning service. R. at 2. Officer James McNown ("Officer McNown"), a local patrol officer and regular church attendee, noticed that the churchgoers were particularly agitated about Mr. David's absence: one patron told him that Mr. David was not answering his phone, and another informed him that he had seen Mr. David at a bar the night before. R. at 2. In an effort to assuage the "freaked out" church attendees, Officer

McNown decided to stop by Mr. David's home during his patrol route later that morning to determine if something was wrong. Ex. A, pg. 2-3, lines 28-15.

After the morning service, Officer McNown began his patrol of Lakeshow and stopped by Mr. David's gated community shortly thereafter. R. at 2. Officer McNown testified that, upon entry, he saw an out-of-place black Cadillac SUV with Golden State license plates leaving the community. R. at 2. Based on his experience, Officer McNown recognized the Golden State license plates as those affiliated with the recent influx of drugs into Lakeshow. R. at 2. When Officer McNown approached the front door of Mr. David's home, he heard loud music coming from inside the house. R. at 2-3. After knocking, Officer McNown waited two minutes before looking in the window, where he saw *The Wolf of Wall Street* playing on the television. R. at 3. At this point, Officer McNown proceeded to enter through the back door of the house. R. at 3.

Officer McNown heard the music coming through a closed door upstairs, and decided to seek out the source. R. at 3. When he opened the closed door, he found Mr. David packaging cocaine into Ziplock bags. R. at 3. Officer McNown then proceeded to handcuff Mr. David and call local Drug Enforcement Authority ("DEA") agents to come to the scene. R. at 3.

B. The Unconveyed Plea Offer and Subsequent Indictment.

After his warrantless search and detention, Mr. David called "one of the only defense lawyers he knew," a Mr. Keegan Long. R. at 3. Ever the faithful optimist, Mr. David hoped Mr. Long could sufficiently represent him, despite Mr. Long's alcoholism. R. at 4.

The Prosecution, acting partly under the advisement of DEA agents, sent Mr. Long a plea offer for him to convey to Mr. David. R. at 4. The offer, open only for 36 hours, was for one year in prison in exchange for Mr. David's suppliers. R. at 4. The offer was sent at 8:00 AM January 16, 2017, and set to expire at 10:00 PM January 17, 2017. R. at 4.

Unfortunately, Mr. Long was at a bar and intoxicated when he received the offer, misread it, and failed to convey the offer to Mr. David before it was set to expire. R. at 4. Mr. David was never informed of the potential bargain and the offer expired without further discussion. R. at 4. By the morning of January 18, 2017, Mr. David was immediately indicted for a single violation of 21 U.S.C. § 841, possession with intent to distribute, without having had the opportunity to accept an offer. R. at 4.

After the Prosecution attempted to discuss the plea with Mr. Long—though hours after the offer had expired—Mr. Long explained that, in his inebriated state, he thought the offer was open for 36 *days*, not hours. R. at 4. Once Mr. Long informed Mr. David of his critical error, Mr. David immediately fired him and sought out new counsel. R. at 4. Notwithstanding Mr. Long's failure as counsel and despite the request of Mr. David's new counsel, the Government refused to re-offer Mr. David the plea and proceeded with prosecution. R. at 5.

SUMMARY OF THE ARGUMENT

The privacy of the home is central to the Fourth Amendment's guarantees, and therefore homes receive the utmost protection from unreasonable government intrusion. By contrast, individuals inherently have a lesser expectation of privacy in automobiles because of their mobile nature. The extension of the community caretaking exception to the home ignores this constitutional distinction, and creates an avenue for police officers to circumvent the Fourth Amendment's staunch protection of the home. But even if this Court determines that the community caretaking exception extends to homes, the exception is inapplicable to the present case because Officer McNown's search of Mr. David's home was not "totally divorced" from the motive to investigate crime.

The Sixth Amendment right to counsel exists to ensure the sanctity of the criminal process. The existence of the right, though, is contingent on its judicial recognition. When courts, like the Thirteenth Circuit here, do not recognize that the right to counsel attaches to certain stages of the criminal process, criminal defendants are left defenseless. Here, the Thirteenth Circuit incorrectly applied a bright-line approach as to when the right attaches and declined to apply the more appropriate and applicable faded approach, and held that the right does not attach to plea negotiations prior to federal indictment. However, given the purpose of the Sixth Amendment and the critical function of counsel within that stage, the right does attach pre-indictment.

Finally, as the right to counsel should and does attach to pre-indictment plea negotiations and Mr. David suffered prejudice as a result of his ineffective counsel, he is entitled to a constitutional remedy. This Court should order the Prosecution to re-offer Mr. David his original plea deal. In the alternative, this Court should remand to the trial court to determine an appropriate remedy.

Accordingly, this Court should REVERSE the decision of the Thirteenth Circuit.

STANDARD OF REVIEW

The standard of review for questions of law is *de novo*. *Bose Corp. v. Consumers Union of U.S.*, Inc., 466 U.S. 485, 499 (1984).

ARGUMENT

I. THE COMMUNITY CARETAKING EXCEPTION SHOULD NOT EXTEND TO THE WARRANTLESS SEARCH OF A HOME, AND TO HOLD OTHERWISE ENDANGERS THE PROTECTION FROM UNREASONABLE SEARCHES AND SEIZURES GUARANTEED BY THE FOURTH AMENDMENT.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. An unreasonable Fourth Amendment search occurs when the government violates a subjective

expectation of privacy that society recognizes as reasonable. *Katz v. United States*, 389 U.S. 347, 361 (1967). A warrantless search of a home is presumptively unreasonable unless an exception to the Fourth Amendment's warrant requirement applies. *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971).

The warrant requirement safeguards an individual's reasonable expectation of privacy by interposing a neutral figure—an impartial magistrate—between the individual and the police officer "engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948). When a warrantless search occurs, the government bears the burden of showing that the search falls within one of the "specifically established and well-delineated exceptions." *Katz*, 389 U.S. at 357; *cf.* 68 Am. Jur. 2d *Searches and Seizures* § 114 (2018) (Exceptions to the warrant requirement include "exigent circumstances, searches incident to a valid arrest, inventory searches, plain-view searches, and *Terry* investigative stops.").

It is undisputed that Officer McNown searched Mr. David's home without a warrant. Ex. A, pg. 6, lines 25-26. The Government must therefore show that an exception to the warrant requirement applies to the search of Mr. David's home. *See Katz*, 389 U.S. at 356-57. Here, the Government relies completely upon the "community caretaking exception" established in *Cady v. Dombrowski*, 413 U.S. 433 (1973).[1] R. at 15. In *Cady*, this Court concluded that the community caretaking exception justifies the warrantless search of an automobile if it is undertaken to protect the public welfare, and is "totally divorced" from any motive to investigate suspected criminal activity. 413 U.S. at 441 ("Local police officers . . . frequently investigate vehicle accidents in which there is no claim of criminal liability."); *see also People v. Ray*, 21 Cal. 4th 464, 476 (1999)

[1] The Government concedes that Officer McNown did not enter Mr. David's home under an exigent circumstance. R. at 7.

(Police officers' community caretaking functions include "helping stranded motorists, returning lost children to anxious parents, assisting and protecting citizens in need."). Whether the community caretaking exception also extends to the warrantless search of a home is an issue of first impression for this Court.

A. Circuits Are Split on Whether *Cady*'s Community Caretaking Exception Extends to the Warrantless Search of a Home.

Circuit courts are divided on whether *Cady*'s community caretaking exception also extends to homes. Mark Goreczny, Note, *Taking Care while Doing Right by the Fourth Amendment: A Pragmatic Approach to the Community Caretaker Exception*, 14 Cardozo Pub. L. Pol'y & Ethics J. 229, 238 (2015). In *Cady*, the defendant, an off-duty Chicago police officer, became intoxicated and ran his automobile off the road in Wisconsin. 413 U.S. at 435-36. After towing the defendant's automobile to a nearby garage, police officers arrested him for drunk driving. *Id.* at 436. Operating under the impression that Chicago police officers were always required to carry their service revolver, and after not finding it on the defendant's person, an officer warrantlessly searched the automobile for the revolver. *Id.* at 436-37. During the search, the officer discovered evidence linking the defendant to a murder. *Id.* at 437-38. The *Cady* Court held that the search of the automobile was conducted in the officer's community caretaking capacity, and was therefore exempt from the warrant requirement. *Id.* at 447-48 ("[T]he search . . . was 'standard procedure . . .' to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands.").

The Third, Seventh, Ninth, and Tenth Circuits correctly refused to extend the community caretaking exception to warrantless searches of the home. *See Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994); *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993); *United States v. Pichany*, 687 F.2d 204, 209 (7th Cir.

1982). But like the Thirteenth Circuit in the decision below, the Sixth and Eighth Circuits incorrectly relied upon *Cady*'s community caretaking exception to uphold warrantless searches of homes. *See United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *United States v. Rohrig*, 98 F.3d 1506, 1521-23 (6th Cir. 1996). *See* R. at 16-17. The Thirteenth Circuit's decision ignored the "constitutional difference" between searches of homes and automobiles emphasized by this Court in *Cady*, and thus erroneously concluded that the community caretaking exception also extends to the home. *See* 413 U.S. at 439. This improper extension of the exception creates a "constitutional danger" which enables unscrupulous police officers to invoke the exception "when obtaining a search warrant proves futile." R. at 19 (O'Neal, J., dissenting). This Court should therefore reverse the decision of the Thirteenth Circuit.

B. This Court Should Not Extend the Community Caretaking Exception to the Home Because, in the Context of the Fourth Amendment, Homes Are Distinct from Automobiles and Are Afforded Greater Protection.

The sanctity of the home is central to the Fourth Amendment's guarantees, and thus the home receives the highest level of protection from unreasonable searches and seizures. Above all else, "the physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *Payton v. New York*, 445 U.S. 573, 585 (1980) (quoting *United States v. U.S. Dist. Ct.*, 407 U.S. 297, 313 (1972); *see also Hudson v. Michigan*, 547 U.S. 586, 603 (2006) (Kennedy, J., concurring) ("[P]rivacy and security in the home are central to the Fourth Amendment's guarantees."); *Silverman v. United States*, 365 U.S. 505, 511 (1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable government intrusion."). The Thirteenth Circuit's decision, however, ignores this constitutional distinction between the home and other effects, and enables police officers to circumvent the Fourth Amendment's protection of the home.

1. There is a constitutional difference between the search of a home and the search of an automobile.

Under the Fourth Amendment, the search of a home is constitutionally different than the search of an automobile. When fashioning the community caretaking exception, the *Cady* Court took extreme care to distinguish the constitutional implications between the search of a home and the search of an automobile. 413 U.S. at 439 (quoting *Chambers v. Maroney*, 399 U.S. 42, 52 (1970) ("Although vehicles are effects within the meaning of the Fourth Amendment . . . there is a constitutional difference between houses and cars.")). As this Court explained, an automobile's mobile nature may justify a warrantless search, "although the result might be the opposite in a search of a home." *Cady*, 413 U.S. at 440 (quoting *Cooper v. California*, 386 U.S. 58, 59 (1967)); *see also South Dakota v. Opperman*, 428 U.S. 364, 367 (1976) ("[T]he expectation of privacy with respect to one's automobile is significantly less than that relating to one's home.").

Unlike homes, automobiles travel on public roads and are extensively regulated. *Cady*, 413 U.S. at 441. They can also break down or become involved in accidents requiring interaction with police officers. *Id.* This frequent, "and often noncriminal contact with automobiles will bring local officials in 'plain view' of evidence, fruits, or instrumentalities of a crime, or contraband." *Id.* at 442. Accordingly, this Court concluded that a "caretaking 'search' [is] not unreasonable solely because a warrant [has] not been obtained." *Id.* at 447-48.

In refusing to extend the community caretaking exception to the home, the Third, Seventh, Ninth, and Tenth Circuits properly recognized this Court's intention to distinguish searches of homes from searches of automobiles. In *Pichany*, the Seventh Circuit refused to apply the community caretaking exception to the search of a warehouse, concluding that *Cady* was limited to warrantless searches of automobiles. 687 F.2d at 207-09 ("[T]he Supreme Court did not intend to create a broad exception to the Fourth Amendment warrant requirement to apply whenever the

police are acting in an 'investigative,' rather than a 'criminal' function."). Likewise, in *Erickson*, the Ninth Circuit held that *Cady* "clearly turned on the 'constitutional difference' between searching a house and searching an automobile." 991 F.2d at 533. In *Bute*, the Tenth Circuit similarly refused to apply the community caretaking exception to the search of a manufacturing plant, holding that "the community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches." 43 F.3d at 535. And most recently, in *Ray*, the Third Circuit determined that this Court's opinion in *Cady* was "expressly based on the distinction between automobiles and homes for Fourth Amendment purposes." 626 F.3d at 177.

The Thirteenth Circuit's extension of the community caretaking exception to the home ignores this crucial distinction between homes and automobiles under the Fourth Amendment. In the present case, Mr. David undoubtedly possessed a reasonable expectation of privacy within the confines of his gated community home. *See* R. at 2-3. Yet without a warrant or probable cause, Officer McNown entered the back door of Mr. David's home and violated his reasonable expectation of privacy. *See* R. at 3. The Thirteenth Circuit's extension of the community caretaking exception, however, pardons this egregious intrusion if Officer McNown acted as a community caretaker. But such a result leaves homes "secure only in the discretion of police officers," and therefore runs contrary to the Fourth Amendment's heightened protection of the home. *Coolidge*, 403 U.S. at 449.

2. The Sixth and Eighth Circuits improperly conflate the community caretaking exception with the exigent circumstance exception.

The Sixth and Eighth Circuits "do not simply rely on the community caretaking doctrine established in *Cady*," but instead "apply what appears to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaking role." *Ray*, 626 F.3d at 176. In *Mincey v. Arizona*, this Court held that the Fourth Amendment

permits warrantless entries and searches when a police officer "reasonably believe[s] that a person within is in need of immediate aid." 437 U.S. 385, 392 (1978). Such "exigent circumstances" justify otherwise unreasonable searches. *Id.* But this Court cautioned that "a warrantless search must be 'strictly circumscribed by the exigencies which justify its initiation.'" *Id.* at 393 (quoting *Terry v. Ohio*, 392 U.S. 1, 25-26 (1968)).

In *Mincey*, the defendant shot and killed an undercover police officer during a drug raid of his apartment. 437 U.S. at 387. Shortly after the raid, homicide detectives warrantlessly conducted an exhaustive search of the defendant's apartment that lasted four days. *Id.* at 389. This Court held that the warrantless search of the defendant's home was unreasonable because there were no exigent circumstances immediately "threatening life or limb" of anyone within the home, as all the suspects were arrested before the detectives arrived and the police could have timely obtained a search warrant. *Id.* at 393-95.

This Court made clear in *Mincey* that an exigent circumstance presents an imminent threat to life or limb. *See* 437 U.S. at 393-95. The Sixth and Eighth Circuits, however, muddle the distinction between exigent circumstances and the community caretaking functions discussed by this Court in *Cady*. *See Quezada*, 448 F.3d at 1007; *Rohrig*, 98 F.3d at 1521-23. In *Quezada*, for example, the Eighth Circuit held that the warrantless search of home was justified under the community caretaking exception if the police officer had a "reasonable belief that an emergency exists requiring his or her attention." 448 F.3d at 1007 (holding that a police officer's warrantless home entry was justified because the officer reasonably believed that an occupant required his immediate assistance). And in *Rohrig*, the Sixth Circuit recognized that police may sometimes address situations within their community caretaking functions that present a compelling governmental interest that rises to the level of an exigent circumstance. 98 F.3d at 1518-21

(concluding that the governmental interest in quieting a late-night noise disturbance was an exigent circumstance that justified police officers' warrantless entry into the defendant's home).

As seen in both *Quezada* and *Rohrig*, the Sixth and Eighth Circuits mistakenly characterized the police officers as community caretakers even though they were responding to exigent circumstances. *See Quezada*, 448 F.3d at 1007; *Rohrig*, 98 F.3d at 1518-21. And significantly, in neither case did the exigent circumstance threaten the immediate safety of members of the respective communities. *See Quezada*, 448 F.3d at 1007; *Rohrig*, 98 F.3d at 1518-21. The Sixth and Eighth Circuit's confusion of "community caretaking actions" with "exigent circumstances" conflicts with *Cady*'s effort to differentiate the two from each other. *See Cady*, 413 U.S. at 454 ("And certainly there were no exigent circumstances to justify the warrantless search."). This Court should therefore reject the Sixth and Eighth Circuit's misapplication of *Cady*'s community caretaking exception to the warrantless searches of homes.

3. This Court should not extend the community caretaking exception to homes because it would leave them vulnerable to pretextual caretaking searches.

The extension of the community caretaking exception to homes would empowers police officers to falsely invoke the exception to bypass the Fourth Amendment's warrant requirement. The Fourth Amendment mandates that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. This requirement is not intended "to shield criminals nor to make the home a safe haven for illegal activities," but rather "so that an objective mind might weigh the need to invade [an individual's] privacy in order to enforce the law." Megan Pauline Marinos, Comment, *Breaking and Entering or Community Caretaking? A Solution to the Overbroad Expansion of the Inventory Search*, 22 Geo. Mason. U. Civ. Rts. L.J. 249, 255-56 (2012). The community caretaking exception, however, "sets no boundaries" and gives police officers unbridled discretion in the exercise of their community caretaking functions. Jennifer Fink, Note, *People v. Ray: The*

Fourth Amendment and the Community Caretaking Exception, 35 U.S.F. L. Rev. 135, 155 (2000). It exempts police caretaking actions from the constraints of the warrant requirement, and thus is inherently susceptible to abuse. *Cf.* Mary Elisabeth Naumann, Note, *The Community Caretaker Doctrine: Yet Another Fourth Amendment Exception*, 26 Am. J. Crim. L. 325, 359 (1999) ("When, however, no independent justification exists for the search or arrest, pretext becomes crucial.").

In light of this Court's "emphasis on the importance of protecting the sanctity of the home," the community caretaking exception cannot "apply to private residences without severely diminishing the protections afforded the home." Marinos, *supra*, *Breaking and Entering*, at 280-81. As this Court articulated in *Johnson*,

> The point of the Fourth Amendment, which is often not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

333 U.S. at 13-14. Thus, the warrant requirement serves an essential function in preserving the Fourth Amendment's protections.

Although police officers' community caretaking functions serve a vital role in maintaining public safety, the inevitable abuse of the community caretaking exception juxtaposed with the Fourth Amendment's staunch protection of homes compels the conclusion that the exception should not extend to the home. Absent an exigent circumstance, police officers, like Officer McNown in the present case, should obtain a warrant from a neutral and detached magistrate before engaging in the search of a home. Accordingly, this Court should reverse the decision of the Thirteenth Circuit.

C. Even if This Court Extends the Community Caretaking Exception to Homes, Officer McNown Required a Warrant Because He Searched Mr. David's Home to Investigate Suspected Criminal Activity.

Even if this Court determines that the community caretaking exception applies to homes, Officer McNown's warrantless search of Mr. David's home was not, as required, "totally divorced" from his motive to investigate crime. *See Cady*, 413 U.S. at 441. It is the Government's burden to show that the community caretaking exception justified the search. *See Coolidge*, 403 U.S. at 455. Officer McNown must "point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry*, 392 U.S. at 21; *see also Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances.").

Moreover, this Court must judge those facts objectively, asking whether "the facts available to [Officer McNown] at the moment of . . . the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." *Terry*, 392 U.S. at 21-22. "And simple good faith on the part of [Officer McNown] is not enough," because "[i]f subjective good faith alone were the test, the protections of the Fourth Amendment would evaporate, and the people would be 'secure in their persons, house papers and effects,' only in the discretion of the police.'" *Id.* at 22 (quoting *Beck v. Ohio*, 379 U.S. 89, 97 (1964)).

Looking at the facts of the present case, "it is reasonable to believe that Officer McNown's motives prior to entering the home were surely influenced by a motive to investigate crime." R. at 20 (O'Neal, J., dissenting). As Judge O'Neal aptly expressed in his dissenting opinion below:

> First, [Officer McNown] noticed the unusual activity at his church when Mr. David did not show up. Second, he noticed the Cadillac SUV with Golden State license plates typically driven by drug dealers. Third, he heard loud music coming from the home at an early hour. Fourth, Mr. David did not answer the door after repeated knocks. Fifth, the television was playing a movie that Officer McNown had reason to know that Mr. David would not watch.

R. at 19-20 (O'Neal, J., dissenting).

When considering the totality of the circumstances in this case, it is more than likely that Officer McNown—just as any other reasonable police officer situated in the same or a similar situation—suspected that criminal activity was afoot before entering Mr. David's home. Consequently, Officer McNown should have obtained a warrant from a neutral and detached magistrate before entering the home, as mandated by the Fourth Amendment. *See Coolidge*, 403 U.S. at 454-55. The community caretaking exception cannot justify the search because it was not "totally divorced" from the desire to investigate criminal activity. *See Cady*, 413 U.S. at 441. This Court should therefore reverse the decision of the Thirteenth Circuit because the community caretaking exception is inapplicable to the warrantless search of Mr. David's home.

II. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL ATTACHES TO EACH AND EVERY CRITICAL STAGE OF A CRIMINAL PROCEEDING, INCLUDING PLEA NEGOTIATIONS PRIOR TO FEDERAL INDICTMENT.

There are no constitutional, court, or statutory protections that wholly guarantee a defendant's fair treatment in the American criminal justice system. The right to effective assistance of counsel, however, as guaranteed by the Sixth Amendment, comes pretty close.[2] U.S. Const. amend VI.

In all criminal prosecutions, criminal defendants "shall enjoy the right to have the assistance of counsel for [their] defense." U.S. Const. amend. VI. The right to counsel has long been recognized as the right to "effective assistance of competent counsel." *McMann v. Richardson*, 397 U.S. 759, 771 (1970); *see also Gideon v. Wainwright*, 372 U.S. 335, 345 (1963) (defendants have the right to effective assistance of counsel); *Reece v. Georgia*, 350 U.S. 85, 90

[2] This issue involves the Sixth Amendment, not the Fifth Amendment, right to counsel, and thus all references to the "right to counsel" refer to the Sixth Amendment, unless otherwise noted.

(1955); *Glasser v. United States*, 315 U.S. 60, 69-70 (1942); *Powell v. Alabama*, 287 U.S. 45, 57 (1932).

This right protects the "critical stages" of a criminal proceeding, including post-indictment hearings, pre-trial adjudications, plea negotiations, and trial. *United States v. Wade*, 388 U.S. 218, 224 (1967) (internal citations omitted); *see also Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). There exists, however, a temporal spectrum—and a circuit split—as to when exactly the right to counsel attaches to assist a criminal defendant in their defense.

The issue of first impression here is whether plea negotiations prior to federal indictment trigger the Sixth Amendment. It is well established that the right to counsel attaches to plea negotiations. *See Lafler v. Cooper*, 566 U.S. 156, 162 (2012); *Missouri v. Frye*, 566 U.S. 134, 144 (2012). However, plea negotiations are one of the few stages of a criminal proceeding that can occur pre- or post-indictment. Plea negotiations are also one of the few stages that fall prey to the bright-line rule as to when the right to counsel attaches that this Court established in *United States v. Gouveia*, 467 U.S. 180 (1984); *see also Kirby v. Illinois*, 406 U.S. 682 (1972). There, the Court held that the right to counsel attaches "after the initiation of criminal proceedings," thus excluding plea negotiations that take place before the traditional start of the adversarial process. *Gouveia*, 467 U.S. at 191-92.

However, circuits are split as to whether they should strictly adhere to the notion that the right to counsel attaches only after the traditional start of a proceeding, or if, in recognition of the purpose of the Sixth Amendment, they should take a more faded approach to the bright-line. *See Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) (holding that though the traditional initiation of criminal proceedings was "by way of . . . indictment," there is a "possibility that the right to counsel might conceivably attach . . . before an indictment").

The Thirteenth Circuit blindly followed the bright-line and incorrectly held that plea negotiations prior to federal indictment are not one of the stages of a criminal proceeding that triggers the right to counsel. However, the Thirteenth Circuit did not consider the full spectrum of Sixth Amendment cases nor its history and purpose.

Accordingly, this Court should reverse the Thirteenth Circuit and decline to mechanically apply the bright-line standard as to when the right to counsel attaches, given that the right seeks to protect the defendant from the very start of the criminal process. Regardless, even if this Court chooses to apply the bright-line approach, it should still recognize that pre-indictment plea negotiations are an adversarial process within the meaning of the bright-line rule. Finally, given that the right attaches to pre-indictment plea negotiations and Mr. David was undisputedly deprived of effective counsel during that stage and subsequently prejudiced, this Court should order the Prosecution to re-offer Mr. David his neglected plea deal.

A. Circuits Are Split as to When the Right to Counsel Is and Should Be Triggered.

This Court has only addressed plea negotiations in the context of post-indictment or arraignment negotiations. *See Lafler*, 566 U.S. 156; *Frye*, 566 U.S. 132. Thus, there remains debate as to when a stage triggers the Sixth Amendment.

Justice Kennedy framed the issue clearly when he wrote that "[d]efendants have a Sixth Amendment right to counsel, a right that extends to the plea-bargaining process." *Lafler*, 566 U.S. at 162 (citing *Frye*, 566 U.S. at 144; *Padilla v. Kentucky*, 559 U.S. 356 (2010); *Hill v. Lockhart*, 474 U.S. 52 (1985)) (internal emphasis omitted). In an effort to establish a bright-line rule for when the right attaches, this Court has held that the right to counsel does not attach until *after* the traditional initiation of adversarial proceedings. *See Gouveia*, 467 U.S. 180; *Kirby*, 406 U.S. 682. This established a "purely chronological distinction," and made it so that the right attaches "when a case becomes adverse." Brandon K. Breslow, *Signs of Life in the Supreme Court's Uncharted*

Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining, The Federal Lawyer (Oct/Nov. 2015), 35. In effect, adverse stages are those that take place post-indictment.

The *Kirby* bright-line rule has divided the courts below. 467 U.S. at 191-192 (holding that the right to counsel attaches "after the initiation of criminal proceedings"). The Fifth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuits adhere to the bright-line approach. *See Turner v. United States*, 885 F.3d 949 (6th Cir. 2018) (the right to counsel does not attach to pre-indictment negotiations).

On the other hand, the First, Third, Fourth, and Seventh Circuits have declined to strictly follow the bright-line approach and instead have blurred the stark chronological distinction in procedural stages. *See Roberts*, 48 F.3d at 1291; *United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992) (*cert. denied*) (The right to counsel may attach when "the government [has] crossed the constitutionally significant divide from fact-finder to adversary.") (internal citations omitted).[3]

Rather, those courts look to the underlying purposes of the Sixth Amendment protections and recognize, generally, that "[t]he right also may attach at earlier stages, when the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or both, in a situation where the results of the confrontation might well settle the accused's fate." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999). Both common sense, recent scholarship and case law acknowledge just how critical the plea negotiations stage can be. Not only, as in *Matteo*, are plea negotiations a time when the accused is confronted by his expert adversary and is potentially determinative, but they also represent a time when a minimum "ninety . . . percent of cases are resolved." R. at 20 (O'Neal, J., dissenting).

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[3] *See also United States v. Busse*, 814 F. Supp. 760, 763 (E.D. Wis. 1993) ("Under certain circumstances, the . . . right to counsel attaches prior to the time formal charges have been filed.").

B. This Court Should Decline to Mechanically Apply the Bright-Line Approach Regarding When the Right to Counsel Attaches.

The bright-line, time-focused approach ignores the reality of the criminal justice system and the purpose of the Sixth Amendment. The Sixth Amendment exists to protect criminal defendants from the life-altering experience of prosecution. *See Lafler*, 566 U.S. at 178 ("Because the right to effective assistance has as its purpose the assurance of a fair trial, the right is not infringed unless counsel's mistakes call into question the basic justice of a defendant's conviction or sentence.") A startling approximately ninety-seven percent of cases settle before trial, largely on the discussions had in the plea negotiation stage. *See Lafler*, 566 U.S. at 170 (*citing Frye*, 566 U.S. at 143-44). That is the stage where the defendant is very intimately opposed to the prosecution. Regardless of the stage the negotiations take place in, it is a scary, intimidating time and many defendants still plea to things they did not do because they are unsure of what the system has to offer them. Often, a would-be defendant is not even charged after plea negotiations. This Court cannot hang the outcome of a case on an arbitrary, chronological distinction for to do so risks making a mockery of the Sixth Amendment entirely.

The more faded approach to the bright-line rule recognizes the nuances in the criminal justice system. The *Kirby* start to a criminal proceeding and the moment the accused is faced with his adversary are not necessarily the same moment. As in *Roberts* and *Larkin*, there exist circumstances where, prior to the formal start of a proceeding, the accused meets intimately with the accuser. *See Roberts*, 48 F.3d at 1291; *Larkin* 978 F.2d at 969. Strict adherence to a bright-line standard that puts a time stamp on the right to counsel will deprive defendants in stages prior to indictment. Further, as the system becomes increasingly one of "pleas" and not one of trials, a holding that keeps up with the changing nature of the system will protect future defendants. *Lafler*, 566 U.S. at 170.

Here, the Government was far beyond investigation when it offered Mr. David the plea deal. *Cf. Larkin*, 978 F.2d at 969. Though Respondent was perhaps interested in pursuing other convictions, they were clearly still interested in prosecuting Mr. David, as they chose to charge him even given the relatively small amount of cocaine at issue. R. at 4. The Prosecution, then, had clearly crossed the line from investigator to adversary when it sent Mr. Long the initial offer. *See Larkin*, 978 F.2d at 969.

C. Even if This Court Applies the Bright-Line Approach, Pre-Indictment Plea Negotiations Are Nonetheless an Adversarial Stage that Triggers the Sixth Amendment.

Plea bargaining is not just part of the criminal justice system, it "*is* the criminal justice system." Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 Yale L.J. 1909, 1912 (1992). With its critical importance in mind, it is clear to see that even under the traditional bright-line approach, where the right to counsel does not attach until the official start of the criminal proceeding, plea bargaining marks that start. *See generally Kirby*, 406 U.S. at 682.

The two approaches are not so far off from each other. One sticks to the start of traditional adversarial proceedings, and one recognizes that that start can look a little different in every situation. *See Gouveia*, 467 U.S. at 191-92; *Larkin*, 978 F.2d at 964. Nonetheless, under either approach, Mr. David and other criminal defendants prevail because plea negotiations are so critical that even with a strict, bright-line approach to the start of the adversarial process, they demand the assistance of counsel. Because plea negotiations may sometimes dictate the end of a criminal proceeding, they necessarily mark the beginning. The average criminal defendant, nevertheless an elderly, scared defendant like Mr. David, is not equipped to handle alone the bargaining process inherent to plea negotiations. Ex. C, pg. 4, lines 3-4, 17.

D. Denial of the Effective Assistance of Counsel During Plea Negotiations Is Prejudice Under *Strickland*.

Assuming that the right to counsel does attach to plea negotiations prior to federal indictment, the next step is to determine if Mr. David suffered a constitutional violation and the appropriate remedy. The issue in this case as to plea negotiations prior to federal indictment is an issue of first impression for this Court, so the exact circumstances here and the appropriate test have yet to be decided. However, this Court's decisions in *Lafler* and *Frye* offer guiding analysis. *See Lafler*, 566 U.S. 165; *Frye*, 566 U.S 132.

"Claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland*." *Frye*, 566 U.S. at 140 (citing *Hill*, 474 U.S. at 52). To establish a claim for ineffective assistance under *Strickland v. Washington*, a defendant must show two things: that their "counsel's performance was deficient" and that the "deficient performance prejudiced the defense." 466 U.S. 668, 687 (1984). What exactly "prejudiced the defense" means varies depending on the circumstances of the claimed ineffective assistance.

The first prong—the performance prong—requires that the defendant's counsel's performance be deficient in some way. *Strickland*, 466 U.S. at 687. In the context of plea bargaining, this requires that counsel "breach[ed]" the duties required in the plea negotiation stage. *Frye*, 566 U.S. at 147. In *Frye*, "[w]hen defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." *Id*. at 145. Here, the parties here do not dispute that Mr. Long was ineffective when he completely failed to convey the Prosecution's offer to Mr. David. R. at "Stipulations and Assumptions;" Ex. B, pg. 2, lines 20-21.

What the parties do dispute, however, is whether Mr. David suffered prejudice under the second prong—the prejudice prong—of the *Strickland* analysis. Here, as in *Lafler*, the "question

for this Court is how to apply *Strickland*'s prejudice test where ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the ensuing trial." 566 U.S. at 163.

When determining prejudice under *Strickland* here, the appropriate inquiry is whether Mr. David would have accepted the original plea offer, not whether he would have gone to trial. *Frye*, 566 U.S. at 148. The inquiry is two-part. *Frye*, 566 U.S. at 147. Prejudice under these circumstances is where a defendant shows that there is "a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." *Id*. Prejudice can mean "[a]ny amount of [additional] jail time." *Glover v. United States*, 531 U.S. 198, 203 (2001).

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability that they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability that the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it, if they have the authority to exercise that discretion under state law.

Frye, 566 U.S. at 147. Thus, this is the appropriate standard to apply when the defendant was forced into rejecting a plea deal due to counsel's non-conveyance.

To show that a defendant would have accepted the deal if they had been offered it, this Court has considered, among other circumstances, factors such as what the defendant subsequently plead to and the strength of the prosecution's case. *Id*. at 150. In *Frye*, this Court declined to say specifically what a defendant might need to show in a situation with different facts than *Frye*, but did hold that the *Frye* defendant's "acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it." *Id*.

To show that the plea would have been entered without disruption from the court or counsel, this Court looks to the discretion afforded to the prosecution and to the trial court. *Frye*, 566 U.S. at 150. *Frye* dealt with state law, and the Court did not lay out the specific circumstances

in which a federal court or prosecutor would likely rescind or reject a plea offer. *Id*. at 150. The *Frye* Court stated, however, that "[i]t can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences," and in "most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstances" would "cause prosecutorial withdrawal or judicial nonapproval." *Id*. at 149; *see also* Fed. R. Crim. Pro. 11.

1. Mr. David would have accepted the plea deal and it would have been entered into the court, and thus Mr. David suffered remediable *Strickland* prejudice.

As in *Frye*, *Lafler*, and *Hill*, the Court's inquiry here is focused on the second, multi-tiered component of the *Strickland* prejudice analysis. In order to show prejudice under *Strickland* and be entitled to a remedy, Mr. David must show that there is a reasonable probability that the end result of his time in the criminal justice system would have been more favorable to him had his counsel not been deficient. *Frye*, 566 U.S. at 147. The Court should consider if Mr. David would have accepted the original, shorter plea offer if he had been offered it and if the Court would have accepted the more favorable offer when determining if Mr. David suffered prejudice. *Id*.

First, there are few clearer cut instances of prejudice at the hands of ineffective counsel than the prejudice Mr. David suffered here. Mr. David was essentially handed a life sentence in prison: ten years in prison when the plea deal he never knew about only required one. This is *beyond* a reasonable probability that the proceeding may have been different but for Mr. Long's errors. If Mr. David had been made aware of the proposed offer, he would have had an opportunity not only for a shorter time in prison, but an opportunity to avoid the taxing rigmarole of trial.

Second, Mr. David would have accepted the original plea offer. He explicitly testified to such, and there is nothing in the record that indicates otherwise. Ex. C, pg. 3, lines 18-23. Mr. David was never afforded the opportunity to accept his plea offer, and his misinformation resulted

in an inadvertent rejection. R. at 4. He has no reported criminal history, no prior contacts with the criminal justice system, and, for all intents and purposes, implied that he was hoping for the easiest resolution to this matter. Ex. C, pg. 3, lines 25-28.

Finally, there are no facts or circumstances in the record that indicate that neither the prosecution or the trial court would have prohibited Mr. David from entering the plea. Unlike *Frye*, where the Court considered the defendant's subsequent arrest, there are no circumstances here that suggest that any intervening facts would have disrupted the entrance of the plea. *See* 566 U.S. at 139.

Even if Respondent's goal was to *continue* searching for facts, it still gave Mr. David a window of opportunity to accept the offer and there is nothing in the record indicating he would not have done so. In fact, the opposite is true because just after the window expired and Mr. David learned of the unconveyed plea, he was so angry at the missed opportunity that he fired his counsel and his new counsel sought re-offer. R. at 4-5. Mr. David's actions show that he would have accepted the plea in the Prosecution's acceptable window.

E. Re-Offering the Original Plea Deal Is the Appropriate Constitutional Remedy When a Defendant Is Denied the Effective Assistance of Counsel During the Plea Negotiations Stage.

As this Court is aware, there is no definite precedent on an established remedy in the context of plea bargains. However, there is a "general rule that remedies [for Sixth Amendment violations] should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests." *United States v. Morrison*, 449 U.S. 361, 362 (1981). The remedy must also "'neutralize the taint' of a constitutional violation." *Lafler*, 566 U.S. at 170 (citing *Morrison*, 449 U.S. at 365).

This Court considered this question most directly in *Lafler*, 566 U.S. at 156. There, the Court determined that the "correct remedy" was to "order the State to reoffer the plea agreement."

Id. at 174. Then, "[p]resuming [the defendant] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence . . . pursuant to the plea agreement, to vacate only some of the convictions and resentence . . . , or to leave the convictions and sentence from trial undisturbed." *Id*. This option gives the sentencing court the most discretion and the most freedom without interference from a higher court. *Id*. at 175.

1. Mr. David is entitled to a constitutional remedy for the prejudice suffered, and should be re-offered the original plea deal.

Here, as established above, Mr. David does have standing to raise a claim for ineffective assistance of counsel because he has a right to counsel during plea negotiations and suffered an injury. *See generally Wainwright v. Torna*, 455 U.S. 586 (1982) (a defendant may not raise an ineffective assistance of counsel claim in a proceeding in which he had no constitutional right to counsel).

Mr. David deserves be re-offered the original plea deal in this matter. A sense of justice requires that Mr. David, already a victim of the criminal justice system, at least have an opportunity to have the outcome he could have had originally. The appropriate remedy is to order Respondent to re-offer the original deal so that Mr. David—though denied this opportunity by not only opposing counsel and the lower court, but also his own counsel—may attempt to seek justice and remedy the prejudice he has suffered.

2. In the alternative, this Court should remand to the trial court for a further determination as to the appropriate remedy.

In the alternative, should this Court determine that ordering the Government to re-offer Mr. David the plea deal is not an appropriate remedy for the injury suffered here, Mr. David should still be offered an opportunity to right the wrong he endured. Accordingly, this Court should still remand to the trial court for a further determination of an appropriate, case-specific remedy.

Mr. David's fate was decided for him. Not by the twelve jurors who convicted him, but by Mr. Long when he took that drink. He deprived Mr. David of a choice, of security, stability, and reliability, and certainly of the effective assistance of counsel. Having the effective assistance of counsel is akin to having good sneakers in basketball. No matter how skilled the player or how fair the trial, if the starting point is weak, then there risks broken ankles and unconstitutional prejudice. Mr. David's injury here demands a constitutional remedy for a claim of ineffective assistance of counsel. Accordingly, this Court should recognize that the Sixth Amendment right to counsel attaches to plea negotiations prior to federal indictment and, given the prejudice suffered here, order the Prosecution to re-offer Mr. David the original, favorable plea deal.

CONCLUSION

This Court should REVERSE the Thirteenth Circuit's determination that the community caretaking exception extends to warrantless searches of the homes. The Thirteenth Circuit's decision is inconsistent with the Fourth Amendment's adamant protection of homes, and leaves them susceptible to unreasonable police intrusion. This Court should also REVERSE the Thirteenth Circuit's decision that the Sixth Amendment right to counsel does not attach to pre-indictment plea negotiations. Such a holding deprives criminal defendants of the right to counsel during a critical stage of a criminal proceeding and risks a finding of prejudice due to ineffective assistance of counsel.

Dated: October 21, 2018

Respectfully Submitted,
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