No. 4-422

# In the Supreme Court of the United States

**Chad David,**

*Petitioner*

v.

**United States of America,**

*Respondent*

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

## BRIEF FOR PETITIONER

Team #P7
*Counsel for Petitioner*

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## ISSUES PRESENTED FOR REVIEW

1. Identifying the constitutional distinction between cars and homes, this Court created the community caretaking function, a narrow exception to the Fourth Amendment in which searches of automobiles without a warrant are permissible so long as they are not investigative in nature or unreasonable. McNown, suspicious from numerous unusual events, entered David's home unannounced to check on David's well-being even though the entry was not time sensitive. Should the community caretaking function extend to homes, and if so, was McNown's search reasonable?

2. The Sixth Amendment right to effective counsel attaches once adversary judicial proceedings are initiated, in effect, when the government has committed itself to prosecute and the adverse positions of the government and the defendant have solidified. Prior to indictment or formal charge, but after the government decided to prosecute, the prosecutor offered a plea deal to David, intentionally delaying the filing of charges to secure information against David's drug supplier. Did the circuit court correctly find the Sixth Amendment does not protect defendants during pre-indictment plea negotiations because these plea negotiations do not count as adversary judicial proceedings?

## STATEMENT OF THE CASE

### Statement of the Facts

Chad David was the head minister of the Lakeshow Community Revivalist Church (the "Church"). Ex. A, pg. 1. Despite being seventy-two years old, Ex. C, pg. 4, David was known for his uplifting messages and high-energy. Ex. A, pg. 2. In fact, his messages were instrumental in helping his parishioners heal. *Id.* David had a reputation for showing up to every service, rain or shine. *Id.* Officer James McNown, a twelve-year veteran of the Lakeshow Police Department ("LPD"), *id.* at 1, was a member of the Church for approximately four months. *Id.* at 2. The Church, and in particular David's uplifting messages, helped heal McNown's depression following his favorite NBA team's struggles. *Id.*

On Sunday, January 15, 2017, McNown attended the 7:00 A.M. service at the Church. *Id.* At approximately 7:15 A.M., Julianne Alvarado called David, who had not shown up to the service, to see if he was okay. *Id.* After the call, McNown noticed that Alvarado was visibly nervous, sweating and shaking. *Id.* David was at home because he thought it was Saturday and he ignored the call, thinking it was unimportant. Ex. C, pg. 1. Jacob Ferry, another parishioner, swore that he saw David at a bar the night before. *Id.* Most people did not believe Ferry based on David's reputation as a non-drinker. Ex. A, pg. 3. McNown, however, believed David was home sick with the flu. *Id.*

With David absent, Draymond Blue, an aspiring minister, ended up leading the service. *Id.* The service ended around 8:50 A.M. and McNown, already in his uniform, decided to go check on David. *Id.* Before departing, McNown asked Alvarado for David's address. *Id.* McNown was surprised to learn that David lived in one of the nicest, most expensive gated communities in town. *Id.* As McNown approached David's neighborhood, he noticed a black

Cadillac SUV with Golden State license plates. *Id.* at 4. McNown knew these cars were popular among drug dealers and that there had been increased drug flow from Golden State to Lakeshow in recent months. *Id.* Because McNown was in uniform driving his police car, the security guard let him through the gate without any questions. *Id.* But David, preferring his privacy, had told his security guard not to allow visitors into the neighborhood and to tell them he was away. Ex. C, pg. 2. David never let anyone inside his house, especially police, whom he distrusts. *Id.*

When McNown arrived at David's house he noticed David's van in the driveway and assumed he was home. Ex. A, pg. 4. McNown approached the front door and heard "scream-o" music playing, which he found unusual. *Id.* He knocked a few times and when he did not get an answer he peered through the window and saw an empty room with an "R-rated" movie playing. *Id.* After trying to enter through the front door and thinking that someone might be home, *id.*, McNown walked around to the back door and entered without knocking even though he did not believe the situation constituted an emergency. *Id.* at 5, 7. McNown was unsure if David lived alone. *Id.* at 7. Although there were no signs of a break-in, Ex. F, McNown entered the house with unclear intentions[1] and without a search warrant even though he had ample time to get one. Ex. A, pg. 6. He was caught off guard to find the home very messy and looking like a frat house. *Id.* As McNown was shutting off the TV, *id.*, he found a small notebook with Alvarado's name on it and the words "one ounce, paid." Ex. F. At this point, believing something was wrong, McNown went upstairs to inspect where the music was coming from. Ex. A, pg. 5.

McNown opened a closed bedroom door and found David packing cocaine into Ziplock baggies with a Golden State flag on them in the shape of a skull. *Id.* at 6. McNown, following protocol, called the LPD for DEA support. *Id.* When the DEA agent, Colin Malaska, arrived,

[1] McNown says he was not sure whether he was suspicious at the time of entry, but he did want to check on David's well-being. Ex. A, pg. 5.

they measured the cocaine and determined it exceeded ten kilograms. Ex. F. McNown read David his Miranda rights and David indicated that he understood his rights. *Id.* Malaska then asked David to provide information about his supplier to which David replied, "[T]here is no way in hell I will tell you. They will kill me and burn my church down if I give you names." *Id.* David was then taken into custody and McNown retrieved the cocaine and notebook. *Id.*

While in custody, David called the only criminal defense attorney he knew. Ex. C, pg. 2. Although David knew Long had a drinking problem, David did not believe that problem would impact their professional relationship. *Id.* After Long received the call, he finished his beer then departed for the jail to talk with David in person. Ex. B, pg. 1. Having never been arrested, David asked questions about the general process of being arrested and what he could expect throughout the process.[2] Ex. C, pg. 3. During the initial conversation in the jail, Long collected facts from David about the events that day. Ex. B, pg. 2. They were unable to discuss any charges or the implications of trial because David had not yet been charged. *Id.* After the conversation, Long went to a bar and brainstormed the case, but he does not recall much after that. *Id.*

On January 16, 2017 at 8:00 A.M., prosecutor Kayla Marie sent a plea deal to Long that was valid for thirty-six hours. Ex. D. David was to plead guilty and provide information of known and suspected suppliers traveling through the area in return for a one-year sentence. *Id.* Although Long received the message on January 16, Ex. B, pg. 2, he did not inform David until January 18, after the deal expired. Ex. C, pg. 3. Long was at a bar playing darts when he received the message and believed that he had thirty-six days before the deal expired. Ex. B, pg.

[2] It is unclear whether David knew that Long had been drinking prior to the initial meeting. *See* Ex. B, pg. 1–2.

2. Although Long intended to inform David of the deal when he left the bar, like the birth of his only son, it slipped his mind. *Id.* at 3.

On Tuesday, January 17, Long received a call from the prosecutor's office inquiring on the status of the offer but ignored it because prosecutors are "always mean" to him. *Id.* Long checked the message but, believing that the prosecutor was just being bossy, failed to pass the plea deal on to David. *Id.* On January 18, Long received an email asking why David had not accepted the offer. *Id.* Realizing his mistake, Long told David who subsequently fired him. *Id.* at 3–4.. Ex. C, pg. 3. Long has since been disbarred for being drunk at trial. Ex. B, pg. 1.

Although David never indicated to Long that he would have accepted the plea, he did express a fear of being in jail, *id.* at 4, and later stated at a hearing that taking one year in prison instead of risking a minimum of ten years at trial was a "no brainer." Ex. C, pg. 3. David also stated he would give up the name of his supplier in a heartbeat. *Id*. On or about January 20, 2017 Michael Allen began representing David. Ex. E, pg. 1. Allen immediately informed Marie that his client had the information requested in the plea deal and would enthusiastically accept the offer. *Id.* Even though David was willing to offer the valuable information the prosecutor sought, Marie was unwilling to offer another deal. *Id*. At trial, David was sentenced to ten years in prison. R. at 14.

## Summary of the Proceedings

On July 15, 2017, the District Court denied Defendant's Motion to Suppress Evidence and Supplemental Motion regarding the plea offer. R. at 1. Then on November 28, 2017, the parties appealed to the Thirteenth Circuit. R. at 13. On May 10, 2018, the Thirteenth Circuit affirmed the District Court's denial of defendant's motions. R. at 13–14. David appealed the decision claiming McNown's search was unlawful under the Fourth Amendment and the

evidence should have been suppressed. R. at 14-15. He further argued his Sixth Amendment right to effective counsel was violated when his attorney failed to present him the plea offer. *Id*.

## SUMMARY OF THE ARGUMENT

**Issue 1**

Warrantless searches are presumptively unconstitutional unless they fall within a narrowly, well-defined class of exceptions. In *Cady v. Dombrowski*, this Court created one such narrow exception—the community caretaking function. The Court highlighted the constitutional distinction between homes and cars, explaining that an individual has a reduced expectation of privacy in cars because routine encounters between police officers and civilians occur frequently when driving around and because there are significant regulations of the auto industry. *Id.* When police act as community caretakers, their actions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute."

This Court has never expanded the narrow exception to homes. Lower courts that do not apply the community caretaking function to the home state that to do so would be against the express language and the clear reasoning this Court set forth. Extending the community caretaking function to home searches would significantly impact an individual's expectation and right of privacy. This Court should continue to follow its precedent and keep the community caretaking function narrow.

But even if this Court expands the community caretaking function to home searches, the evidence must still be suppressed because the search was not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." The facts make clear that McNown was suspicious when he got to David's home, and that suspicion continued to grow once inside David's home. Ex. A, pgs. 2–6. McNown believed something was awry which led to his entry and continued search of David's home. Moreover,

McNown's search fails a general standard of reasonableness. An individual's right to privacy does not depend on whether he is a law-abiding citizen or a suspected criminal. The relevant question is how the infringement on the individual's privacy compares against the public necessity. David moved into a gated community and does not allow people into his home because of his penchant for privacy. Ex. C, pgs. 1–2. If McNown's motives were as benign as he insists and the purpose of entry was really just to make sure that David was only mildly ill, then the public necessity of the check was low and outweighed by David's privacy right. Thus, the evidence must still be suppressed because the search was unreasonable.

**Issue 2**

This Court should find the Thirteenth Circuit incorrectly affirmed David's conviction and should find the Sixth Amendment right to effective counsel does extend to plea negotiations prior to an indictment. This Sixth Amendment right attaches at the initiation of adversary judicial proceedings. While these kinds of proceedings typically take the form of indictment, charge, information, or arraignment, the Supreme Court has not clearly stated that one of these proceedings must take place in order for the Sixth Amendment to attach. In effect, the key consideration is whether the government has committed itself to prosecute and has solidified the adverse relationship between the government and the defendant. The First, Third, and Seventh Circuits have found that where the government has crossed the line from fact-finder to adversary, the Sixth Amendment right to counsel attaches even if the defendant has not been formally charged or indicted. Other courts, like the Sixth Circuit, have maintained a bright line rule that unless one of the specified proceedings listed by the Supreme Court have commenced, the Sixth Amendment right to counsel does not attach.

The approach of the First, Third, and Seventh Circuits is most logical, especially regarding plea negotiations because they are a critical phase of criminal proceedings. Plea negotiations have become central to the American system of justice and if the right to counsel does not attach to that phase of government accusation, the defendant may give up his fundamental right to trial based on misinformation or misunderstandings. Drawing an arbitrary line between pre-indictment and post-indictment plea negotiations undermines the purpose of the Sixth Amendment right to effective counsel.

Once the Sixth Amendment right to effective counsel has attached, to overturn a conviction using an ineffective assistance of counsel claim, a defendant must meet the *Strickland* two-prong test. First, the defendant has to show counsel's performance was deficient. Second, he has to show the deficient performance prejudiced his defense. Prong one is met because the parties stipulated that David's counsel performed deficiently. Prong two is met because David's testimony—that he would have accepted the elapsed plea deal if his counsel had timely communicated it to him—was supported by the great disparity between the one-year sentence David would have received with the plea deal and the ten-year sentence he received at trial. Thus, but for his counsel failing to communicate the plea offer, there is a reasonable probability David would have accepted the offer. David was therefore prejudiced by counsel's ineffective assistance.

## STANDARD OF REVIEW

Appellate courts review questions of law de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Whether the community caretaking exception to the Fourth Amendment applies to homes and whether the Sixth Amendment right to counsel applies to pre-indictment plea negotiations are both questions of law. *See United States v. Moody*, 206 F.3d 609, 613 (6th Cir.

2000). Thus, this Court will review these two inquiries de novo. Furthermore, appellate courts also review the lawfulness of a search do novo. *See United States v. Erikson*, 991 F.2d 529, 530 (1993). Thus, this Court will apply de novo review in deciding the lawfulness of the search conducted in this case. Lastly, the Thirteenth Circuit did not examine whether David suffered prejudice under the *Strickland* test, so this Court will also review that issue de novo. R. at 18.

## ARGUMENT

### I. THIS COURT SHOULD REVERSE THE THIRTEENTH CIRCUIT'S HOLDING BECAUSE THE COMMUNITY CARETAKING FUNCTION DOES NOT EXTEND TO HOMES, AND EVEN IF IT DID, THE SEARCH WAS UNREASONABLE AND VIOLATED DAVID'S FOURTH AMENDMENT RIGHT TO PRIVACY.

The Fourth Amendment to the United States Constitution protects 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. This Court elaborated that "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 *Untied States v. U.S. Dist. Court for E. Dist. of Mich., S. Div.*, 407 U.S. 297, 313 (1972)). Searches and seizures "inside a home without a warrant are presumptively unreasonable," *Payton*, 445 U.S. at 587, with the exception of a "few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967).

This Court defined one such exception, the community caretaking function, in *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). While operating in this function, the police officer's actions are generally that of a public servant aimed at improving general welfare and "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* This Court has only applied the community caretaking function to searching cars, citing a "constitutional difference between houses and cars." *Id.* at 439 (citation

omitted). Additionally, the validity of any search is subject to a "general standard of 'unreasonableness.'" *See Cady*, 413 U.S. at 448. Opposing counsel asks this Court to expand the narrow community caretaking function to include homes despite the express language in *Cady*. *See United States v. Pichany*, 687 F.2d 204, 208 (7th Cir. 1982) (declining to extend the community caretaking function to house searches because of the express language of *Cady*). Further, the *Opperman* Court made clear in its reasoning that this exception applies to cars as effects under government control. *See South Dakota v. Opperman*, 428 U.S. 364, 367–70 (1976).

For a search to be reasonable under the community caretaking function, the police officer's acts must be devoid of investigative intent. *See Cady*, 413 U.S. at 441. McNown's search was unreasonable based on the specific circumstances under which he entered David's home. His search was investigative in nature following a number of incidents that led him to believe that something was awry. *See generally*, Ex. A (Alvarado nervously shaking when asking about David, surprise at the neighborhood David could afford to live in, suspected drug dealers leaving the neighborhood, etc.). Additionally, when McNown arrived at David's home he did not feel there was an emergency that required him to enter immediately and even acknowledged that he had time to get a warrant. Even if this is met the court still looks to a general reasonableness standard balancing the privacy interest of the individual against the public necessity. *See Camara v. Municipal Court of S.F.*, 387 U.S. 523, 529 (1967). David had a reasonable expectation of privacy in his home that McNown infringed on when he entered unannounced. Because the government failed to meet its burden of demonstrating that the search was reasonable, *see Coolige v. New Hampshire*, 403 U.S. 443, 455 (1971), the evidence must be suppressed.

### A. Through Express Language and Clear Reasoning, This Court Has Limited the Community Caretaking Function to Automobiles Because They Are Constitutionally Distinct from Homes.

This Court has made clear that searches without consent or a warrant are unreasonable, except in certain "carefully defined classes of cases." *Cady*, 413 U.S. at 439 (citation omitted). This Court created one such "class of cases" with the community caretaking function. *Id.* This Court has only applied the community caretaking function to cars based on the extensive regulation of vehicles and the frequency in which police encounter civilians in cars. *Id.* at 441. These factors lead to a decreased expectation of privacy in a car compared to a home. *Opperman*, 428 U.S. at 368.

In *United States v. Pichany*, the Seventh Circuit determined that the community caretaking function did not extend beyond searches of cars. 687 F.2d at 208–09. There, police officers were called to investigate a burglary that had occurred the night before. *Id.* at 205. The police, arriving before the property owner, began looking around the complex where the burglary had occurred. *Id.* at 206. They walked into a warehouse adjacent to the property, pulled back a tarp, and discovered two stolen tractors. *Id.* When asked to extend the community caretaking function to searches of warehouses, the Seventh Circuit refused to do so. *Id.* at 208–09. It reasoned that none of the factors the *Cady* Court considered were present in a warehouse search. *Id.* at 207. Unlike in *Cady*, the police had no control over the warehouse. *Id.* The police were also under no obligation to secure the warehouse or protect its contents, themselves, or the public from a danger. *Id.* Most importantly, the Seventh Circuit stated the express language of *Cady* made clear that the community caretaking function applied only to cars. *Id.* at 208.

Like in *Pichany*, none of the factors this Court used to determine whether the community caretaking function applied were present when McNown entered David's home. McNown had

no control over David's home. In *Cady*, the police took custody of the car making it reasonable for them to search it to protect themselves; however, nothing required McNown to be inside David's home. McNown could have left at any time to keep himself safe. Also like in *Pichany*, McNown was under no obligation to secure David's home or protect its contents. Instead, McNown was only there to check on David's well-being. Ex. F. Finally, McNown did not need to enter to protect himself, David, or the public. McNown stated that he went to check on David, bringing tea because he believed David had the flu. Ex. A, pg. 3. It can hardly be argued that McNown entered to protect David because he had the flu; nor was McNown protecting the public if his motives were as benign as he claims.

Most importantly, McNown entered the sanctity of David's home unannounced. *Id.* at 5. In *Cady*, this Court made clear the constitutional distinction between a car and a home. *Cady*, 413 U.S. at 439. While a car is often in view of the public and significantly regulated by the government, a home has a much higher degree of privacy. *Id.* David had a reasonable belief in being free from the government infringing on his privacy in his home. He lived in a gated community where he asked the security guard to turn guests away, and rarely if ever allowed people into his home. Ex. C, pg. 2. This Court's reasoning makes clear that the community caretaking function applies only to cars. *Cady*, 413 U.S. at 441.

Opposing counsel may cite *United States v. Smith*, 820 F.3d 356 (8th Cir. 2016) to support the idea that the caretaking function extends to homes. In *Smith*, police were asked to check on a person's well-being by a friend. *Id.* at 357. The police, based on a phone call, had reason to believe that the person was being held against her will by a dangerous person and was unresponsive to outside contact. *Id.* at 359. *Smith*, however, is distinguishable in facts and reasoning. Unlike in *Smith*, McNown was not fearing for David's safety when he went to visit

him. McNown only believed David had the flu, Ex. A, pg. 3; he never believed his failure to enter would impact David's safety. *Id.* at 7. Further, unlike in Smith, where the court found there was a potential emergency at the time the police entered, McNown admitted there was no emergency when he entered David's home.. *Smith*, 820 F.3d at 360. Thus, it is clear that *Smith* should not apply.

While McNown claims he was going to check on David's well-being, that does not give him the right to intrude on David's Fourth Amendment interests. *See United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993) (citation omitted). This interest extends to every law-abiding citizen, not just criminals. *See Camara*, 387 U.S. at 586. Even if an officer is performing a community caretaking function, he cannot justify his intrusion on someone's privacy right within the home. *Id.* This stems from the constitutional distinction between a home and a car. *Cady*, 413 U.S. at 441. To ignore this distinction would greatly infringe on Fourth Amendment rights.

This Court has never extended the community caretaking function to anything beyond cars. While some circuits have broadened the "carefully defined class," at least one has cautioned that it may have gone too far in doing so. *See Sutterfield v. City of Milwaukee*, 751 F.3d 542, 556 (7th Cir. 2014) (clarifying that the Third, Seventh, Ninth, and Tenth circuits do not apply the community caretaking exception to homes because it is inapposite to the *Cady* reasoning, but the Fifth, Sixth, and Eighth do); *cf. United States v. Williams*, 354 F.3d 497, 508 (6th Cir. 2003) (expressing doubt that the community caretaking function allows warrantless entry into homes). Therefore, this Court should continue to apply its precedent by restricting the community caretaking function to cars.

### B. Even If the Community Caretaking Function Applies to Homes, McNown Unreasonably Searched David's Home Because His Actions Were Investigative and Thus Infringed on David's Reasonable Expectation of Privacy.

Even if this Court decides to expand the narrow community caretaking function, the evidence should still be suppressed because the government has failed to show that the search was reasonable. Any search without a warrant is presumptively unconstitutional and the government bears the burden of demonstrating that its actions fall within a narrow exception. *Coolidge*, 403 U.S. at 455. To determine whether the Fourth Amendment's standard has been met, courts apply a "general standard of 'unreasonableness' as a guide." *Cady*, 413 U.S. at 448. For the community caretaking function to be met, the police officer's actions must be "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441.

McNown failed to completely divorce his acts from a detection or investigation. McNown had numerous indicators that he found "unusual" prior to entering David's home. McNown noticed Alvarado shaking with fear after calling David, Ex. A, pg. 2, then was shocked and surprised to learn where David lived. *Id.* at 3. Entering David's affluent neighborhood, McNown's suspicions were again raised when he saw what he believed to be a drug dealer car exiting the neighborhood. *Id.* at 4. Approaching David's house, McNown found the loud "scream-o" music and the "R-rated" movie playing to be "unusual." *Id.* While none of these facts alone would likely lead to an investigative intent, when taken in context, these facts highlight that McNown entered David's house with suspicion. Even if he did not begin his search with suspicion, when he saw the notebook in the living room with a possible drug transaction on it, McNown's actions turned investigative in nature. Looking at the totality of the situation, McNown failed to divorce his acts from an investigation.

Some courts have stated that the community caretaking function is not a search at all because the police officer is not intending to find anything and consequently is only acting to serve public interests. *See, e.g.*, R. at 15–16. This point of view, however, completely ignores the impact on the individual and only looks at one side of the search equation. This Court has long held that just because an officer is not trying to build a criminal case does not mean he is exempt from the warrant requirement. *See Erickson*, 991 F.2d at 532. Part of the purpose of the Fourth Amendment is to safeguard individual privacy. *Camara*, 387 U.S. at 528. This right extends to the law-abiding citizen as well as the citizen suspected of criminal behavior. *Id.* at 530–31. Courts misinterpret the Fourth Amendment's purpose when they state that the community caretaking function is not a search because the officer is not intending to find anything. The relevant question must be: what is the extent of infringement on the individual's privacy balanced against public necessity? *Id.* at 529; *see also Erickson*, 991 F.2d at 531.

David lived a private life outside the Church. David goes beyond not allowing people into his home, he asks his security guard to turn visitors away at the gate, not even them letting into his neighborhood. Ex. C, pg. 2. This is especially true when it comes to police officers—a group that he distrusts and has never allowed into his home. *Id.* These facts demonstrate that the burden on David's Fourth Amendment right to privacy is substantial. Just because McNown was allowed into the neighborhood by an unknowing security guard does not give him the right to infringe on David's privacy. Ex. A, pg. 4. On the other hand, there was little to no public necessity that required McNown infringing on David's rights. McNown believed he was stopping by for a routine check-up where there was no foul play or immediate harm likely. *See generally* Ex. A. When balancing these two factors, David's right of privacy outweighs public necessity.

To date, the framework that this Court has used to determine reasonableness under the community caretaking function is by determining whether the search is a routine inventory search related to a justified seizure. *Opperman*, 428 U.S. at 369. In *Opperman*, this Court determined that this was necessary to protect the owner's property, protect the police against claims of stolen property, or protect the police from potential danger. *Id.* (citations omitted). None of these reasons existed when McNown entered David's home. McNown did not have control over David's home and therefore none of these reasons could be met. McNown did not enter and search the house to protect David's property, nor can it be said that he was trying to protect himself or his department from claims of stolen property. In fact, by entering the house, he was likely creating liability. Finally, he was not protecting himself from any danger. McNown could have simply walked away and removed himself from any danger.

The *Opperman* Court offers one final alternative in which searches may be conducted—to determine if an effect was stolen. *Opperman*, 428 U.S. at 369. This again demonstrates that the purpose of the community caretaking function is to allow for vehicle searches, but assuming arguendo that the reasoning extends to checking homes to make sure personal property was not stolen, McNown did not intend to determine if anything in David's home had been stolen; his purpose was to check on David's well-being. Ex. F. As previously stated, it is likely that McNown was present in David's home with an investigative intent, but even if his motives were not investigative, he did not believe anything was stolen. *See* Ex. A, pg. 7 (stating that he did not believe anyone had unlawfully entered David's home). McNown had no intention of making sure that David's property was safe and therefore cannot meet this final purpose.

While determining reasonableness is generally done by applying a general standard, this Court has provided guidance both in terms of general reasonableness as well as reasonableness

under the community caretaking function. General reasonableness is determined by weighing the expectation of privacy of the individual against the public necessity. *Camara*, 387 U.S. at 529. McNown's search was unreasonable under this standard because David had a reasonable expectation of privacy within the sanctity of his home and the public necessity was very low based on both McNown's subjective beliefs and objective factors. Further, the search was unreasonable under the specific test set forth by this Court to determine whether the community caretaking function was met. Not only did McNown lack dominion and therefore have no reason to inventory anything within the home, but his motives were also investigative in nature based on the events preceding the search. Therefore, this Court should find that even if the community caretaking function does apply to homes, McNown's search was still unreasonable.

## II. THIS COURT SHOULD REVERSE THE THIRTEENTH CIRCUIT'S HOLDING BECAUSE THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL SHOULD ATTACH TO PRE-INDICTMENT PLEA NEGOTIATIONS AND DAVID WAS PREJUDICED BY THE INEFFECTIVE ASSISTANCE OF COUNSEL.

The Sixth Amendment states, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. This Court has held that the "right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against [the defendant]." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). Such proceedings typically include a "formal charge, preliminary hearing, indictment, information, or arraignment." *Id*. at 689. The initiation of adversary judicial proceedings is key because "it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified." *Id*. It is only when "a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law," that the Sixth Amendment right to counsel applies. *Id*. Furthermore, this Court's precedent highlights that "once the adversary

judicial process has been initiated, the Sixth Amendment guarantees a defendant the right to have counsel present at all 'critical' stages of the criminal proceedings." *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). These critical stages include pretrial proceedings because many pretrial proceedings "may settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Gouveia*, 467 U.S. 180, 189 (1984).

Under the *Strickland* test, once the Sixth Amendment right to counsel attaches, a "claim that counsel's assistance was so defective as to require reversal of a conviction . . . has two components." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense." *Id*. Here, the parties agreed the first prong was met because the facts were clear that David's counsel, Mr. Long, was ineffective and his performance was deficient. R. at 11. Thus, David only needs to prove prong two. Given the danger of having ineffective counsel at the critical phase of plea negotiations and the increase in David's prison sentence at trial, this Court should reverse the Thirteenth Circuit's holding and find the Sixth Amendment attaches to pre-indictment plea negotiations and that David's defense was prejudiced by his ineffective counsel.

### A. The Sixth Amendment Right to Effective Counsel Should Attach to Pre-Indictment Plea Negotiations In Order to Fulfill the Underlying Purpose of the Sixth Amendment.

The purpose of the Sixth Amendment right to effective counsel is to protect "the unaided layman at critical confrontations with his adversary," *Gouveia*, 467 U.S. at 189, as well as to provide "counsel's assistance whenever necessary to assure a meaningful [defense]." *Kirby*, 406

U.S. at 693 (Brennan, J., dissenting); *see also Patterson v. Illinois,* 487 U.S. 285, 298 (1988) (defining "the scope of the right to counsel by a pragmatic assessment of the usefulness of counsel to the accused at the particular proceeding, and the dangers to the accused of proceeding without counsel."). Pre-indictment plea negotiations meet this criteria and protecting the accused during these proceedings helps fulfill the purpose of the Sixth Amendment.

**1. The bright line rule adopted by some courts, which prevents application of the Sixth Amendment to any pre-indictment proceedings, undermines the principles of the Sixth Amendment.**

"Although the Supreme Court has not squarely addressed whether a suspect-defendant has the right to the effective assistance of counsel at a formal pre-indictment plea negotiation, [some] courts have recognized that the 'Sixth Amendment can apply when the government's conduct occurs pre-indictment.'" *United States v. Wilson*, 719 F. Supp. 2d 1260, 1266 (D. Or. 2010) (citation omitted); *see Matteo v. Superintendent, SCI Albion,* 171 F.3d 877, 892 (3d Cir. 1999); *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995); *United States v. Larkin,* 978 F.2d 964, 969 (7th Cir. 1992). Other courts continue to follow a bright line rule stating the Sixth Amendment does not apply to any pre-indictment proceedings. *See Turner v. United States,* 885 F.3d 949, 953 (6th Cir. 2018). This circuit split has undermined the purposes of the Sixth Amendment noted above and should be resolved in favor of attaching the Sixth Amendment to pre-indictment plea negotiations.

In *Roberts v. Maine*, the First Circuit stated, "the point at which the right to counsel attaches is when 'formal charges' have been initiated *or* when 'the government has committed itself to prosecute,'" recognizing the possibility that the Sixth Amendment may attach "before formal charges are made, or before an indictment or arraignment." 48 F.3d at 1290–91 (emphasis added) (citation omitted). The court furthered stated, "[the Sixth Amendment]

becomes applicable only when the government's role shifts from investigation to accusation." *Id*. at 1290. In that case, a police officer refused to let the defendant call his attorney when deciding whether to take a blood/alcohol test. *Id*. The court found the government had not shifted from investigation to accusation and therefore the Sixth Amendment had not attached because taking a blood/alcohol test is clearly part of the government's investigation procedure. *Id*. at 1291.

In *United States v. Larkin*, the Seventh Circuit noted "the right to counsel presumptively does not attach at pre-indictment lineups," but "[a] defendant may rebut this presumption by demonstrating that, despite the absence of formal adversary judicial proceedings, 'the government had crossed the constitutionally significant divide from fact-finder to adversary.'" 978 F.2d 964, 969 (7th Cir. 1992) (citation omitted); *see also Matteo*, 171 F.3d at 892 (citation omitted) ("The [Sixth Amendment] right also may attach at earlier stages [than formal charges, indictment, or arraignment], when 'the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality.'"). In *Larkin*, the court found the defendant had not shown that the government crossed the line from fact-finder to adversary; the pre-indictment line-up was part of the investigation to find the correct perpetrator as evidenced by the fact that the indictment occurred three months after the line-up. 978 F.2d at 969.

Unlike in *Roberts* and *Larkin* where the government had not crossed the line from investigation to accusation, here, the government did cross that line because the plea deal was not part of the officers' investigations. The prosecutors already intended to file charges, but purposefully delayed to minimize knowledge about David's arrest. R. at 4. This shows the investigation phase was over and the government had committed itself to prosecute. Because the

government crossed the line from fact-finding to adversary, the First, Third, and Seventh Circuits would likely find the Sixth Amendment attached when David was offered the plea deal.

In contrast, in *Turner v. United States*, the Sixth Circuit reaffirmed its reliance on the bright line rule that the Sixth Amendment does not attach to any pre-indictment proceedings. 885 F.3d at 953. The court stated that the Supreme Court has clearly held that a person's Sixth Amendment right to counsel only attaches after adversary judicial proceedings have been initiated against him. *Id*. Citing to its own precedent in *United States v. Moody,* 206 F.3d at 614, the Sixth Circuit in *Turner* held that the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations. *Id*.; *But cf. Wilson*, 719 F. Supp. 2d at 1266 (holding that the Sixth Amendment right to counsel does attach at pre-indictment plea negotiations because "the right to the effective assistance of counsel rests on the nature of the confrontation between the suspect-defendant and the government, rather than a 'mechanical' inquiry into whether the government has formally obtained an indictment.").

The conclusion in *Turner* is unsound for two reasons. First, the Sixth Circuit presumes without reason that plea negotiations prior to indictment do not count as adversary judicial proceedings. As mentioned above, plea negotiations are not simply part of the investigation process, they are part of the adverse relationship between a prosecutor and an accused. Second, Sixth Circuit precedent unequivocally disagrees with the bright line rule and advocates for a change. In *Moody*, the Sixth Circuit stated, "although logic, justice, and fundamental fairness favor" a different approach, "it is beyond our reach to modify [the bright line rule], even in this case where the facts so clearly demonstrate that the rights protected by the Sixth Amendment are endangered." 206 F.3d at 613–14. Here, the Thirteenth Circuit echoed this idea stating "[w]e acknowledge that Mr. David's situation is directly contrary to the underlying principles of the

Sixth Amendment," yet the Thirteenth Circuit still found the Sixth Amendment did not apply to David's case. R. at 18. Based on these statements, this Court should follow the First, Third, and Seventh Circuits' approach, not the Sixth Circuit's approach. Consequently, the Sixth Amendment right to counsel should apply to pre-indictment proceedings that make up critical stages of the criminal process and have the potential to endanger the defendant's Sixth Amendment rights.

**2. Plea Bargaining is a critical stage of criminal proceedings and should be protected by the Sixth Amendment right to counsel.**

This Court has held that plea negotiations in general are critical phases of criminal proceedings. *See Missouri v. Frye*, 566 U.S. 134, 140 (2012) (citations omitted) ("The 'Sixth Amendment guarantees a defendant the right to have counsel present at all "critical" stages of the criminal proceedings' . . . . Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea."). The Court in *Frye* emphasized the importance of plea bargaining, stating "plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires." *Id.* at 143; *see also United States v. Sikora,* 635 F.2d 1175, 1181 (6th Cir. 1980) (Wiseman, J., dissenting) (citation omitted) ("Plea bargaining is most emphatically a 'critical stage' of the prosecution, because a defendant who enters plea bargaining might well surrender the most fundamental right of all the right to trial itself. The accused 'requires the guiding hand of counsel,' to ensure that he does not lightly surrender that most basic protection of the Anglo-American system of justice.").

In most cases, plea negotiations occur after an accused is charged or indicted. Regardless, "[o]nce the government enters into plea bargaining, it is apparent that the adverse

positions of the parties have solidified, and the prospective defendant is plainly faced with the prosecutorial powers of the government." *Sikora,* 635 F.2d at 1181 (Wiseman, J., dissenting). Therefore, with unusual cases where the plea negotiations occur before formal charges or indictment, the Sixth Amendment right to counsel should still attach once the plea negotiations begin. *Id*. An arbitrary line drawn between pre-indictment and post-indictment plea negotiations undermines the purpose of the Sixth Amendment. *See Wilson*, 719 F. Supp. 2d at 1268 ("To conclude that [defendant] had no right to counsel in evaluating the government's plea offer simply because the government had not yet obtained a formal indictment would elevate form over substance, and undermine the reliability of the pre-indictment plea negotiation process."). Furthermore, without "the effective assistance of counsel at pre-indictment plea negotiation . . . [the consequences] may be more damaging than a denial of effective assistance at trial itself." *Id.* The fact that a prosecutor decides to delay formal charges or indictment, should not change the protections afforded defendants under the Sixth Amendment. Here, the prosecutor intentionally delayed filing charges in order to avoid tipping off the drug kingpin in the area. R. at 4. This strategic decision should not prevent Sixth Amendment rights from attaching when the proceeding is a critical stage in the criminal matter.

### B. The Ineffective Assistance of Counsel at the Plea Bargaining Phase Prejudiced David Because But for His Counsel's Deficient Performance the Outcome Would have been Different.

Under the second prong of *Strickland*, in order to show prejudice, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id*. This assessment must exclude the possibility of arbitrariness and whimsy. *Id*. at 695. In the context of a lapsed plea offer, a defendant "must demonstrate a reasonable probability [he] would have

accepted the earlier plea offer had [he] been afforded effective assistance of counsel." *Frye*, 566 U.S. at 147. In addition, the defendant must also show "a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law." *Id*. Establishing a reasonable probability that the end result would have been more favorable to the defendant because of "a plea to a lesser charge or a sentence of less prison time," helps establish prejudice against the defendant. *Id*. Lastly, the court in *Strickland* discouraged the use of "'mechanical rules' that distract from an inquiry into the fundamental fairness of the proceedings," and found that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury." *Nunes v. Mueller*, 350 F.3d 1045, 1054 n.6 (9th Cir. 2003) (citation omitted).

In *United States v. Busse*, the defendant was offered a plea deal that included the defendant pleading guilty to a misdemeanor and allowed him to ask the court for probation instead of incarceration. 814 F. Supp. 760, 761 (E.D. Wis. 1993). The defendant never received a copy of the offer and was given misinformation from his counsel regarding the potential sentence at trial. *Id*. at 762. The defendant testified that had he been fully informed, he would have accepted the plea deal. *Id*. The court found that had the defendant been fully informed, there was a reasonable probability he would have accepted the plea deal because without the benefit of the deal, the defendant faced at least four additional months in jail. *Id*. at 764. In misdemeanor cases, the maximum allowed jail time is one year, so an additional four months in jail in those cases is significant. *Id*.; *see also Frye*, 566 U.S. at 147 (quoting *Glover v. United States*, 531 U.S. 198, 203 (2001)) ("[A]ny amount of [additional] jail time has Sixth Amendment significance."). Based on this, the court found the counsel's deficiency prejudiced the outcome of defendant's case. *Id*.

In *United States v. Wilson*, the defendant's counsel did not provide "accurate advice regarding [defendant's] sentence, the strength of the government's case, and the improbability of obtaining immunity." 719 F. Supp. 2d at 1272–73. As a result, the 56-year-old defendant did not accept a plea deal for six years and was instead sentenced to twenty years at trial. *Id*. at 1273. The defendant testified that he would have accepted the plea deal if he knew he was facing a twenty year sentence at trial. *Id*. The court found the defendant's testimony credible because of defendant's age and the great disparity between the twenty-year sentence and the six years originally offered and found defendant was prejudiced under *Strickland*. *Id*. at 1273, 1275.

Like in *Busse* and *Wilson*, where there was great disparity between the plea offer and the sentence at trial, here, there was great disparity between the plea deal of one year in prison that David's counsel never communicated to him, and the ten-year sentence David received at trial. R. at 4. A nine-year sentencing difference provides substantial support in proving that had David's counsel communicated the deal to David, the outcome would have been different, especially given David's advanced age of 72 years old. R. at 2. David testified at the pre-trial evidentiary hearing that he would have taken the plea deal instead of risking at least ten years at trial. Ex. C, pg. 3. The district court noted that it was not clear David would have given up the names of his suppliers even if he had been informed of the plea deal and further concluded that because there had been no adverse conviction yet, there was no prejudice to David. R. at 11–12. But David testified that he would have given the information about his suppliers in a heartbeat had he known about the plea deal. Ex. C, pg. 3. Furthermore, once David learned about the elapsed plea deal, his new counsel responded to the prosecutor that in his discussions with David, David seemed "very enthusiastic about accepting that plea offer." Ex. E. In fact, David's new counsel wrote to the prosecutor saying, "[David] wanted me to tell you that he has the

information you are looking for and would like to be offered a new plea as soon as possible." *Id*. This, combined with the fact that David was subsequently convicted and sentenced to ten years, sufficiently demonstrates a reasonable probability that but for his counsel's ineffectiveness, the outcome of his case would have been different.

The courts in *Busse* and *Wilson* did not discuss the reasonable probability that the plea would have been entered without the prosecutor or trial court cancelling it, but still found the defendant had been prejudiced. As noted in *Frye*, these considerations must be taken into account if under state law, the prosecutor or trial judge have this discretion. 566 U.S. at 147. There are no facts in the record to show the prosecutor or trial judge have this discretion under state law. But based on David's testimony and the nine-year difference in sentencing, there is sufficient evidence to show David suffered prejudice even without the state law information. Thus, this Court should reverse the lower court's holding and find David suffered prejudice under the *Strickland* test.

## CONCLUSION

For the foregoing reasons, this Court should reverse the Thirteenth Circuit's holding and find that the community caretaking exception does not extend to the home under the Fourth Amendment and that the Sixth Amendment right to counsel does attach to pre-indictment plea negotiations.

Respectfully submitted,

Team P7

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