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 THE PETITIONER

TABLE OF CONTENTS

TABLE OF AUTHORITES

United States Supreme Court Cases:

Federal Circuit Court Cases:

Federal District Court Cases:

State Court Cases:

United States Constitution:

Secondary Sources:

STATEMENT OF ISSUES

1. Under the Fourth Amendment, may a police officer acting as a community caretaker enter a private residence without a warrant and seize evidence therein without an objectively reasonable belief that an emergency existed?

2. Under the Sixth Amendment, does a defendant have a valid claim and remedy for ineffective assistance of counsel when a federal prosecutor extends a favorable pre-indictment plea deal to the defendant's attorney, but the attorney fails to communicate the offer to his client before it expires, resulting in the defendant's later conviction at trial?

STATEMENT OF FACTS

A. Relevant Facts

Petitioner, Chad David, was a well-respected minister at Lakeshow Community Revivalist Church in Lakeshow, Staples. R. at 2. Despite being seventy-two years of age, David enthralled his congregation with spirited, high-energy sermons. R. at 2. On Sunday, January 15, 2017, David was scheduled to lead a 7:00 AM sunrise service, but he never made it to the church that morning. R. at 2.

By 7:15 AM, some parishioners—including Julianne Alvarado and Officer James McNown—noticed David's absence. R. at 2. Alvarado called David at his home to check if he was okay, but there was no answer. R. at 2. Visibly nervous, Alvarado expressed concern to Officer McNown about the minister's well-being. *Id.* After obtaining David's address from Alvarado, Officer McNown told his fellow parishioners that he would stop by David's house with some hot tea during his 9:00 AM patrol shift. R. at 2.

At approximately 9:30 AM, Officer McNown pulled into David's gated community, passing a black Cadillac SUV with Golden State license plates leaving the complex. R. at 2. Officer McNown knew that drug dealers typically drive these SUVs and that there had been a recent uptick in Golden State drugs flowing into Lakeshow. R. at 2. As Office McNown approached David's home, nothing seemed out of the ordinary. R. at 2. He observed that all the doors were shut to the house and recognized David's car in the driveway. R. at 2. Officer McNown exited his car and heard loud, profanity-laden music coming from inside the house. R. at 2–3. Officer McNown knocked and announced his presence, but there was no response. R. at 3. After waiting two minutes, he looked inside a front window. R. at 3. He saw that the TV was

playing the movie *The Wolf of Wall Street*. R. at 3. He then tried to open the front door, but the door was locked. R. at 3.

Officer McNown walked to the backyard and, without knocking, entered the house through an unlocked backdoor. R. at 3. When he approached the TV to turn off the movie, he noticed an open notebook with the name "Julianne Alvarado" written next to the words "ounce" and "paid." R. at 3. Officer McNown then noticed music playing from a room upstairs. R. at 3. He walked up the stairs, opened the door without knocking, and found David packaging powder cocaine into ziplock bags. R. at 3. Officer McNown handcuffed David and, per Lakeshow Police Department policy, reported the incident to local DEA agents. R. at 3. The DEA had recently established a joint state and federal taskforce to combat the flow of narcotics from neighboring states into Staples. R. at 3. As part of his training, Officer McNown learned that Golden State cocaine is packaged in bags labeled "Curry Coke" and stamped with the state flag in the shape of a skull. Ex. A.

DEA Agent Colin Malaska arrived at David's house shortly after 10:00 AM. R. at 3. After seeing the mounds of cocaine and the incriminating notebook, Agent Malaska read David his Miranda rights and asked him to tell her the name of his supplier. R. at 3. David refused, fearing that talking to federal agents could get him killed and his church burnt down. R. at 3.

After arriving at a federal detainment facility, David called Keegan Long, the only criminal defense attorney he knew. R. at 3–4. Long had previously confided to David through confessions that he struggled with alcohol dependency, but David believed Long would adequately represent him. R. at 3–4.

Agent Malaska contacted the federal prosecutor to express the DEA's desire to gain information from David regarding a suspected drug kingpin traveling through Lakeshow. R. at

4. Agent Malaska encouraged the prosecutor to offer David a favorable plea deal before filing any formal charges, concerned that public charges would tip-off the intended target. R. at 4.

Kayla Marie, the Assistant United States Attorney (AUSA) assigned to David's case, complied with the DEA's request and offered David a plea deal before filing any criminal charges. R. at 4. The offer, which Marie emailed to Long on Monday, January 16, at 8:00 AM, stipulated that if David provided the names of his suppliers, he could plead guilty to one count of possession of a controlled substance with the intent to distribute (21 U.S.C. § 841) and only serve one year in prison. Ex. D. Marie specified that in order for David to enjoy the benefit of the deal, the information "must lead to the arrest of one suspect." Ex. D. The deal was set to expire the next day, Tuesday, January 17, at 10:00 PM. R. at 4.

Long was drinking at a bar when he received the emailed offer. R. at 4. Due to his intoxicated state, Long misread the message and believed that the plea deal was valid for another thirty-six days. R. at 4. The plea offer expired at 10:00 PM on Tuesday, January 17, without Long—or anyone else—ever communicating the offer to David. R. at 4. On Wednesday, January 18, the federal prosecutor indicted David, charging him with one count of possession with the intent to distribute under 21 U.S.C. § 841. R. at 4.

Eventually Long realized his error and explained the situation to David. R. at 4. David promptly terminated Long and hired a new criminal defense attorney, Michael Allen, to represent him. R. at 4. On Friday, January 20, Allen emailed AUSA Marie, asking her to extend another plea deal with the same terms; Marie refused. R. at 5. She told Allen that it was likely that David's suppliers had already been tipped off and the original plea offer would no longer benefit the government. R. at 5.

B. Procedural History

David filed two pretrial motions with the United States District Court for the Southern District of Staples: (1) a motion to suppress evidence under the Fourth Amendment, claiming the drug evidence was seized during an unconstitutional search of his home; and (2) a motion seeking to be re-offered the initial plea deal, claiming that his attorney's failure to communicate the formal plea offer violated his Sixth Amendment right to effective counsel. R. at 5. The district court denied both motions, holding that (1) the warrantless search of David's home was valid under the community caretaker exception to the warrant requirement; and (2) David did not suffer prejudice due to his defense counsel's ineffective representation. R. at 12. At trial, David was convicted for possession of a controlled substance with the intent to distribute and sentenced to ten years in prison, the statutory minimum. R. at 14.

David appealed his conviction to the United States Court of Appeals for the Thirteenth Circuit. R. at 13. The Thirteenth Circuit affirmed David's conviction, holding that (1) the community caretaking exception to the warrant requirement extends to homes; and (2) the Sixth Amendment right to effective counsel only attaches after the prosecution files formal charges against a defendant. R. at 17–18.

David subsequently petitioned this Court for writ of certiorari, which was granted.

SUMMARY OF THE ARGUMENT

Petitioner, Chad David, is requesting that this Court reverse the appellate court's decision and vacate his conviction. The drug evidence should have been suppressed because Officer McNown had no authority under the community caretaking exception to conduct a warrantless search of David's home. In the alternative, David requests that this Court compel the

government to re-offer its initial plea deal because David suffered prejudice due to his ineffective representation during the pre-charge plea negotiations.

The Court of Appeals erred in affirming the District Court's ruling on David's motion to suppress evidence obtained during the warrantless search of David's home. Under the Fourth Amendment, a warrantless search of a private residence is presumptively unreasonable, unless the search was conducted pursuant to one of the exceptions to the warrant requirement. The community caretaking exception permits warrantless searches of vehicles in light of their ready mobility and operation in a public space. This Court has never extended the community caretaking exception to permit searches of homes, but rather has narrowly confined the doctrine to vehicles. In light of this Court's unwavering insistence upon the sanctity of the home, an individual's privacy interests in her home outweigh the government's interests in carrying out a well-being check without any articulable exigent circumstances. The Thirteenth Circuit's contrary holding risks extending police officers license to conduct warrantless searches of homes as a routine police practice, rather than a narrow exception to the warrant requirement.

However, even if the court extends the community caretaking exception to apply outside the vehicle context, Officer McNown's conduct does not fall within the scope of the exception. First, Officer McNown did not act in a manner that was totally divorced from a criminal investigation when he spotted a black Cadillac SUV with Golden States license plates leaving David's gated community. Second, if Officer McNown's intent was pure when he began his shift, the need to continue the alleged well-being check ended when Officer McNown arrived at David's home and saw that his lights were on and his car was in the driveway. Finally, Officer McNown acted in an investigative role when he heard loud music coming from David's home and assumed that he could enter the home without knocking through an unlocked backdoor.

Accordingly, Officer McNown's warrantless entry clearly violated David's Fourth Amendment rights, and any evidence seized as a result of that unlawful entry should have been suppressed below.

Even if the drug evidence was properly seized, the government should re-offer its initial plea deal because David's representation during plea negotiations was constitutionally deficient. Under the Sixth Amendment, criminal defendants are entitled to effective assistance of counsel during all critical stages of the government's prosecution. Historically, the government initiated criminal proceedings by filing formal charges, but in current criminal practice, defendants face the prosecutorial forces of organized society long before stepping foot in a courtroom. When a federal prosecutor extends a formal plea offer to a defendant before filing charges—an increasingly common tactic under the Federal Sentencing Guidelines regime—the government has shifted from investigator to accuser, and the Sixth Amendment right to effective counsel attaches.

The Thirteenth Circuit's bright-line rule, which holds that no criminal defendant has a right to counsel pre-indictment, undermines the purpose of the Sixth Amendment. First, if the right to counsel only attaches post-indictment, indigent defendants would be forced to negotiate pre-charge plea deals without the guide of a public defender. Second, prosecutors could game the system, delaying charges in order to deprive defendants of post-conviction relief under the Sixth Amendment. Finally, the rise of joint taskforces, in which state and federal prosecutors work together to negotiate plea deals for separate state and federal crimes, makes the bright-line rule constitutionally untenable.

Assuming David's right to counsel attached when the federal prosecutor emailed Long the plea offer, this Court should find that David was prejudiced by Long's deficient

representation. Had David been properly advised, he would have accepted the deal and received a sentence of one year rather than the ten years he is currently serving. Before the trial started, David expressed interest in accepting the deal on its original terms. This indicates that he was willing to give-up the names of his suppliers to avoid risking a long stint in prison.

In order to remedy David's constitutional injustice, the government should re-offer the one-year plea deal. The terms of the offer are contingent upon David's information leading to an arrest, so the government still stands to gain the same benefits the deal originally conferred.

STANDARD OF REVIEW

The review of a motion to suppress evidence, like determinations of probable cause and reasonable suspicion, presents a mixed question of law and fact. *Ornelas v. United States*, 517 U.S. 690, 697 (1996); *United States v. Lopez*, 474 F.3d 1208, 1212 (9th Cir. 2007). Mixed questions of law and fact are reviewed *de novo*. *Ornelas*, 517 U.S. at 699.

Whether the Sixth Amendment right to counsel attaches during a particular pre-trial criminal proceeding is a question of law that courts review *de novo*. *United States v. Moody*, 206 F.3d 609, 612 (6th Cir. 2000); *see also Moran v. Burbine*, 475 U.S. 412, 428–29 (1986).

ARGUMENT

I. The Court of Appeals Erred When It Admitted Evidence Obtained by Officer McNown Through the Warrantless Search of David's Home.

A. Warrantless Searches of the Home Conducted Pursuant to the Community Caretaker Exception Violate the Fourth Amendment Absent Probable Cause or Exigent Circumstances.

The Fourth Amendment safeguards "[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 (emphasis added). Any warrantless search—including the search of a private residence—is "presumptively unreasonable." *Payton v. New York*, 445 U.S. 573, 586 (1980)

(quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 454–55 (1971)). To be sure, "when it comes to the Fourth Amendment, the home is the first among equals. At the Amendment's very core stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Collins v. Virginia*, 138 S. Ct. 1663, 1670, 1672 (2018) (quoting *Florida v. Jardines*, 569 U.S. 1, 6 (2013) (internal citation and quotation marks omitted)).

"Because the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006), the few exceptions to the warrant requirement are carefully circumscribed and well-defined. *See Coolidge*, 403 U.S. at 454–55; *see, e.g.*, *Kentucky v. King*, 563 U.S. 452, 462 (2011) (imminent destruction of evidence); *Brigham City*, 547 U.S. at 401 (emergency aid); *Minnesota v. Olson*, 495 U.S. 91, 99 (1990) (hot pursuit); *Arizona v. Hicks*, 480 U.S. 321, 327 (1987) (plain view); *California v. Carney*, 471 U.S. 386, 392 (1985) (automobile exception). These exceptions balance law enforcement's interest in their ability to "protect and serve" the public good, and society's interest in protecting citizens against warrantless searches not based on probable cause. No such exception exists that permits law enforcement to enter a private residence without a warrant when acting as a community caretaker.

Circumstances that may render an officer's warrantless home entry reasonable under the Fourth Amendment arise when it is critical that officers not wait another moment before intervening. For instance, entry during a well-being check is appropriate when an officer confronts other factors signaling immediate danger or risk of injury, such as smelling possible decomposition, observing broken windows, seeing signs of a struggle, or responding to a neighbor's complaints regarding a pattern of disruptive or concerning behavior. Courts extending the community caretaking exception in these circumstances are in fact "applying what

appears to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaker role." *Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010); *see United States v. Smith*, 820 F.3d 356, 361 (8th Cir. 2016); *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996). Absent an urgent need to protect the public, an officer acting as a community caretaker cannot force entry into a private residence.

Respondent concedes that no exigent circumstances necessitated Officer McNown's warrantless entry, so David's motion to suppress the evidence obtained during the unconstitutional search of his home should have been granted. As such, this Court should overturn David's conviction.

1. *The Community Caretaking Exception Is Justified by Law Enforcement's Interest in Protecting Itself and the Public from Danger, Risk of Injury, and Claims of Misconduct.*

The community caretaking exception derives from this Court's decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973). Dombrowski, an off-duty police officer, was in a DUI accident and taken into custody by police officers. *Id.* at 346. The officers took Dombrowski to the hospital and had his car impounded. *Id.* They believed that Dombrowski may have left his service weapon in the vehicle, but Dombrowski had fallen into a coma. An officer therefore searched the car to prevent the gun from falling into "untrained or perhaps malicious hands." *Id.* at 443. Finding nothing in the main cabin, the officer unlocked the truck, where he discovered bloodied clothing, a nightstick, and moist blood on a car mat. *Id.* at 437. This Court held evidence from the trunk was admissible because the search was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441.

This Court in *Cady* preserved the distinction between warrantless searches of vehicles and warrantless searches of private residences. *Id.* The community caretaking exception allows officers to bypass the warrant and probable cause requirements when searching a vehicle that may contain stolen, dangerous, or expensive personal property. *Id.* at 447–48. This Court has never wavered in its approach—every subsequent case in which it cites the community caretaking function has involved searches of vehicles. *See, e.g.*, *Colorado v. Bertine*, 479 U.S. 367, 372 (1987) (inventory search of vehicle upheld under community caretaking exception); *South Dakota v. Opperman*, 428 U.S. 364, 370 (1976) (same); *see also* 3 Wayne F. LaFave, *Search & Seizure: A Treatise on the Fourth Amendment* § 6.6 n.4 (5th ed. 2018) (citing *State v. Vargas*, 63 A.3d 175 (N.J. 2013) ("[W]hile the Supreme Court in Cady recognized law enforcement's community caretaking functions, it never suggested that community-caretaking responsibilities constituted a wholly new exception to the warrant requirement that would justify the warrantless search of a home.") (internal quotation marks omitted)).

In those cases, the searches—conducted by officers according to standardized, routine police procedures—fell under the community caretaking exception because they protected officers against claims of vandalism, theft, or negligence, and they protected the public from potential danger or nuisance. *Bertine*, 479 U.S. at 368–69, 372–73; *Opperman*, 428 U.S. at 366, 370. But any leeway afforded to officers conducting a warrantless vehicle search under the exception is confined to conduct that is expressly defined by the police procedures authorizing the search. *Bertine*, 479 U.S. at 376; *see id.* at 377 (Blackmun, J., concurring) ("[P]olice officers are not vested with discretion to determine the scope of the inventory search."). The limiting principles justifying the warrantless search of a vehicle disappear in the context of a warrantless

search of a private residence. The Constitution simply does not permit routine, inventory searches of homes.

This Court's most recent citation to *Cady* similarly limited its holding to vehicles. *See Collins*, 138 S. Ct. at 1669–70 (quoting *Cady*, 413 U.S. at 441) (explaining that the rationale behind *Cady* "applie[s] only to automobiles and not to houses, and therefore support[s] 'treating automobiles differently from houses' as a constitutional matter") (internal quotation marks omitted). Given the rationale underlying this Court's decision in *Cady*, such a steadfast approach is unsurprising. Vehicles—unlike private residences—are operated on public roadways, movable, highly regulated, and are thus afforded a lesser expectation of privacy. *See Carney*, 471 U.S. at 391–92; *Bertine*, 479 U.S. at 372; *Opperman*, 428 U.S. at 367–69.

The community caretaking exception should remain narrowly confined to vehicles. The Ninth Circuit in *United States v. Erickson* held that "the fact that [an officer] may have been performing a community caretaking function at the time" cannot alone justify warrantless searches of a residence or office. 991 F.2d 529, 531 (9th Cir. 1993). The "governmental interest motivating the search must be balanced against the intrusion on the individual's Fourth Amendment interests." *Id.* Indeed, "a basic principle of Fourth Amendment law," *Brigham City*, 547 U.S. at 403, is a citizen's privacy interest in the sanctity of his or her home. *See Collins*, 138 S. Ct. at 1673. Intrusions into the home, therefore, pose a much more serious affront to an individual's Fourth Amendment interests than do warrantless searches of vehicles.

Other circuit courts have recognized as much in holding that privacy interests outweigh any government interests furthered by warrantless entry that are not already addressed by other exceptions to the warrant requirement. *Ray*, 626 F.3d at 177; *Erickson*, 991 F.2d at 532; *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994); *United States v. Pichany*, 687 F.2d 204, 209

(7th Cir. 1982). Thus, just as the Court in *Collins* declined the government's "invitation to extend the automobile exception to permit a warrantless intrusion on a home or its curtilage," so too should this Court decline Respondent's "invitation to extend the [community caretaking] exception to permit a warrantless intrusion on a home." *Collins*, 138 S. Ct. at 1673.

2. *Courts Expanding the Community Caretaking Exception to Homes Are Applying a Modified Version of the Exigent Circumstances Exception.*

Courts extending the community caretaking exception to the warrantless entry of private residences are in fact "applying what appears to be a modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaker role." *Ray*, 626 F.3d at 177. For its part, Respondent will argue that police officers may—and indeed, should—respond to situations in which an occupant of private property is seriously in need of assistance, is injured, or is at risk of imminent injury. *See Brigham City*, 547 U.S. at 400. But Respondent would be hard-pressed to point to a case where officers, acting as community caretakers, confronted such a situation that did not also present some exigency.

For example, in *United States v. Rohrig*, the Sixth Circuit allowed a warrantless search of a home conducted in response to ongoing noise complaints by neighbors of loud music playing in the middle of the right. 98 F.3d at 1513. After attempts to contact the defendant proved unsuccessful, the officers entered the home to turn off the music so as not to "subject the community to a continuing and noxious disturbance." *Id.* at 1522. In other words, although the officers were acting in a community caretaking role, exigent circumstances were in fact what led the court to conclude that the warrantless entry was reasonable. *Id.*

The Eighth Circuit likewise relied on a modified version of the exigency exception in permitting the warrantless search of the defendant's home in *United States v. Smith*, 820 F.3d at 361–62. In that case, officers responding to a call from a member of the community regarding a

possible hostage situation entered a halfway house without a warrant when the potential hostage did not respond to any calls or messages on her cell phone. *Id.* The court concluded that the officers' actions were justified because their "entry ar[ose] from their obligation to help those in danger and ensure safety of the public." *Id.* at 361–62; *see also United States v. Quezada*, 448 F.3d 1005, 1008 (8th Cir. 2006) (holding that police officer's entry into a home was reasonable because the officer entered "to investigate a possible *emergency* situation") (emphasis added); *State v. Menz*, 880 P.2d 48, 49–50 (Wash. Ct App. 1994) (sustaining warrantless entry into a home because officers believed they needed to render immediate emergency aid).

The Thirteenth Circuit erred in holding that "entering a home as a community caretaker is a natural consequence of the role that law enforcement officers play in their everyday duties to protect and serve their communities." R. at 16. As aptly stated by Judge O'Neal in his dissent, "[e]xtending warrantless searches of homes to law enforcement under a community caretaking standard is a constitutional danger" because of the risk that the caretaking justification merely serves as *post hoc* rationalization for entry when a "search warrant proves futile." R. at 19. Accordingly, this Court should reverse the Thirteenth Circuit and vacate David's conviction.

B. Even If the Court Extends the Community Caretaker Exception to Homes, Officer McNown's Conduct Does Not Fall Within the Scope of the Exception.

This Court should hold that the community caretaker exception to the warrant requirement does not extend to the search of private residences. But even under the Fifth, Sixth, Eighth, and Thirteenth Circuits' contrary holdings, Officer McNown's conduct fares no better. When he entered David's home and searched his residence, Officer McNown was not acting in the capacity of a community caretaker, he was investigating criminal activity. *See Cady*, 413 U.S. at 441.

1. *Officer McNown Was Alerted to the Possibility of Criminal Activity Upon Seeing a Black Cadillac SUV with Golden State Plates Leaving David's Gated Community.*

The Thirteenth Circuit centered its inquiry on whether Officer McNown "deviate[d] from any commonly recognized practices" in searching David's private residence. R. at 17. In order to conclude that Office McNown "act[ed] solely as a community caretaker, completely divorced from criminally investigative purposes," the Court of Appeals had to find "no indication in the record" that Officer McNown was alerted to the possibility of criminal activity in David's residence. R. at 15. That conclusion is clearly erroneous.

If Officer McNown's intentions were pure when he began his shift, they became muddied upon seeing a black Cadillac SUV with Golden State plates leave David's gated community. R. at 2; Ex. A. Though Officer McNown did not know exactly where the car was coming from, he knew "based on [his] experience" that black Cadillac SUVs with Golden State plates are "popular among drug dealers." Ex. A. In fact, Officer McNown was fully aware that Lakeshow was experiencing an increase in "the flow of drugs from Golden State" in recent months. Ex. A. To be sure, in a recent training, Officer McNown had seen the Golden State flag on a sticker used on bags of "Curry Coke"—a type of cocaine that Officer McNown knew was "getting popular across the country." Ex. A. No doubt, upon seeing that black Cadillac SUV with Golden State plates, Officer McNown was alerted to the fact that this prominent drug dealer had left from somewhere within the gated community he had just entered. Ex. A.

2. *Officer McNown's Well-Being Check Should Have Ended Upon His Arrival at David's Residence Because No Reasonable Officer Would Have Believed That David Was In Danger By Virtue of his Playing Loud Music and Watching a Profane Movie.*

Assuming, as Respondent argues, that Officer McNown's search can still be characterized as a wellness check after seeing the black Cadillac SUV with Golden State plates,

that surely ended when Officer McNown approached David's private residence. Upon seeing his car in his driveway and his TV turned to *The Wolf of Wall Street*, a reasonable officer would not believe that David was in any danger. Ex. A. The more plausible explanation for Officer McNown's entry is that after hearing "loud scream-o metal music" and observing an R-rated movie on the TV, he suspected criminal activity was afoot. Ex. A. At the very least, any pretense of a well-being check vanished the moment Officer McNown spotted an open notebook with annotations consistent with a drug deal, including the name Alvarado, a parishioner whom he had just observed exhibiting suspicious behavior. Ex. A. When Officer McNown walked up the steps and opened that bedroom door, he was not doing so to provide aid—he was investigating a crime. Ex. A.

Even if the community caretaking doctrine could theoretically apply to homes, this is not that case. Officer McNown's warrantless search of David's private residence was at least partially motivated by his desire to thwart crime. Accordingly, the search exceeded the scope of the community caretaking exception, and any evidence seized therefrom should have been suppressed at trial.

II. The Court of Appeals Erred When It Held That the Sixth Amendment Right to Counsel Does Not Attach When a Prosecutor Conducts Plea Negotiations Prior to Filing a Formal Charge.

A. The Sixth Amendment Right to Effective Counsel Attaches When the Government Commits to Prosecution—A Moment That Often Occurs Before the Prosecutor Files Formal Charges.

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defen[s]e." U.S. Const. amend. VI. Although the "core purpose" of the Sixth Amendment is to assure that criminal defendants have adequate representation at trial, this Court has extended the right to effective counsel to critical pre-trial proceedings. *See United States v.*

Ash, 413 U.S. 300, 309–10 (1973). This right is limited though, attaching only when the government commences a "criminal prosecution" against an "accused" defendant. U.S. Const. amend. VI; *see also McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991).

Over the past fifty years, this Court has described the prosecution trigger in two different ways. First, like the Thirteenth Circuit below, this Court has stated that the Sixth Amendment right to counsel attaches only "after the first formal charging proceeding." *Moran*, 475 U.S. at 428. Under this iteration, the moment of attachment occurs at "the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby v. Illinois*, 406 U.S. 682, 689 (1972) (plurality opinion). However, in these very same cases, this Court has also pegged attachment to the moment "when the government's role shifts from investigation to accusation." *Moran*, 475 U.S. at 430. Historically, these two definitions were not at odds. When this Court decided *Kirby v. Illinois* in 1972, formally filing criminal charges marked the moment that the government stopped being a neutral fact-finder and "committed itself to prosecute." *Kirby*, 496 U.S. at 689. But with the proliferation of pre-indictment plea negotiations, many defendants now face the full force of government prosecution before they are ever charged with a crime.

In this case, the Thirteenth Circuit misapplied this Court's Sixth Amendment jurisprudence and established an erroneous "bright-line" rule. R. at 18. Relying on the Sixth Circuit's recent decision in *Turner v. United States*, 885 F.3d 949 (6th Cir. 2018), the lower court pronounced that no criminal defendant "enjoy[s] the Sixth Amendment right to effective counsel prior to his indictment." R. at 17. In *Turner*, the Sixth Circuit reasoned that a bright-line rule was necessary—even though such a rule defies "logic, justice, and fundamental fairness," *Moody*, 206 F.3d at 613—because of this Court's "mandate" that the right to counsel only

attaches after the prosecution files formal charges. *Turner*, 885 F.3d at 967 (Clay, J., concurring).

No such mandate exists. In every Sixth Amendment case, this Court has insisted that strict adherence to "mere formalism" should not determine whether the defendant's right to effective counsel has attached. *Moran*, 475 U.S. at 431. Instead, courts must apply a fact-sensitive analysis to determine "the point at which . . . the adverse positions of government and defendant have solidified, and the accused finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive procedural criminal law." *Rothgery v. Gillespie Cty. Tex.*, 554 U.S. 191, 198 (2008) (internal quotation marks omitted).

Other circuit courts have rejected the Thirteenth Circuit's rigid indictment-based standard, holding that the requisite formal adversary judicial proceedings begin when the government effectively shifts from fact-finder to accuser. *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). Instead of implementing a mechanical bright-line rule, courts must look to the nature of the relationship between the government and the defendant to determine whether the accused was confronted "by the procedural system, or by his expert adversary, or by both." *Ash*, 413 U.S. at 310.

This functional approach—based on classifying the government's actions as either those of an investigator or those of a prosecutor—is consistent with this Court's prior Sixth Amendment cases. In *Kirby*, this Court held that defendants do not have the right to counsel at pre-indictment lineups. *Kirby*, 406 U.S. at 690; *see also United States v. Gouveia*, 467 U.S. 180, 189 (1984) (right to counsel does not attach at moment of arrest); *Ash*, 413 U.S. at 321 (police may conduct a post-indictment photo array outside the presence of counsel). These cases

establish that law enforcement officers may follow routine investigatory procedures meant to gather evidence without infringing on a suspect's Sixth Amendment rights. *See United States v. Wade*, 388 U.S. 218, 227 (1967) (explaining that preparatory steps in the government's investigation, "such as systematized or scientific analyzing of the accused's fingerprints, blood sample, clothing, hair, and the like," do not trigger the right to counsel). When the government "cross[es] the constitutionally significant divide from fact-finder to adversary," however, the investigation is over and the prosecution has begun. *Larkin*, 978 F.2d at 969 (quoting *Hall v. Lane*, 804 F.2d 79, 82 (7th Cir. 1986) (internal quotation marks omitted)).

This Court should reject the Thirteenth Circuit's bright-line test in favor of a circumstance-specific inquiry. *See* Steven J. Mulroy, *The Bright Line's Dark Side: Pre-Charge Attachment of the Sixth Amendment Right to Counsel*, 92 Wash. L. Rev. 213, 241 (2017) (arguing that the right to counsel should attach when "a prosecutor has contact with a suspect about the substance of the case (other than as a witness), either directly or through counsel"). The Sixth Amendment right to effective counsel attaches at the start of prosecution—even if the government starts to prosecute before it files charges.

B. Pre-Charge Plea Negotiations Are a Critical Phase in Judicial Proceedings For Which Defendants Require the Guidance of Effective Counsel.

Plea bargaining dominates our current criminal justice system. *See Lafler v. Cooper*, 566 U.S. 156, 174 (2012) ("Criminal justice today is for the most part a system of pleas, not a system of trials."). The vast majority of criminal defendants plead guilty before ever arguing their case in front of a judge or jury. *See Missouri v. Frye*, 566 U.S. 134, 143 (2012) ("Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas."). Accordingly, this Court has concluded that post-indictment plea negotiating "is a critical phase of litigation for the purposes of the Sixth Amendment . . . ." *Padilla v. Kentucky*,

559 U.S. 356, 373 (2010). The same reasoning applies just as forcefully to pre-charge plea negotiations—a tactic prosecutors are employing with increasing regularity in the era of Federal Sentencing Guidelines. *See* David N. Yellen, *Two Cheers for a Tale of Three Cities*, 66 S. Cal. L. Rev. 567, 569–70 (1992) (explaining that pre-indictment plea bargaining allows prosecutors greater sentencing discretion because they can avoid filing certain charges which prompt higher sentencing levels under the Guidelines).

Pre-charge plea bargaining marks the advent of adversary judicial criminal proceedings, thus triggering the protections of the Sixth Amendment. The right to effective counsel attaches at this point for three main reasons: (1) the government has shifted from fact-finder to adversary, (2) the government has committed itself to prosecution, and (3) the defendant is suddenly immersed in the intricacies of procedural criminal law. *See Rothgery*, 554 U.S. at 198.

First, when a prosecutor extends a formal plea offer, she approaches the defendant as a clear adversary. Unlike the law enforcement officers in *Kirby* and *Ash* who were conducting neutral investigatory procedures, a prosecutor is pursuing ends squarely opposed to those of the accused.

Second, if the government offers a plea deal, it intends to prosecute. *See Chrisco v. Shafran*, 507 F. Supp. 1312, 1319 (D. Del. 1981) ("[T]he fact that the government is willing to engage in plea bargaining is proof that . . . the adverse positions of the government and the defendant have solidified in much the same manner as when formal charges are brought."). Plea bargaining works because defendants implicitly understand that if they reject a plea, the prosecution will pursue a more severe charge carrying a longer prison sentence.

Finally, the accused needs access to a defense attorney during pre-charge plea negotiations because plea bargaining is complicated. *See Turner*, 885 F.3d at 976 (noting that

plea bargaining requires that a defendant "navigate the complex web of federal sentencing guidelines, computations that confound even those who work with them often") (internal citations omitted). For this reason, the American Bar Association encourages prosecutors to negotiate plea deals through the defendant's attorney. *See* ABA Standards for Criminal Justice Pleas of Guilty Standard 14-1.3(a) (3d ed. 1999) ("A defendant should not be called upon to plead until an opportunity to retain counsel has been afforded . . . .").

Denying defendants the right to an attorney during pre-charge plea negotiations undermines the purpose of the Sixth Amendment and creates perverse incentives for prosecutors. If this Court affirms the lower court's all-or-nothing holding, indigent defendant will likely plead guilty without ever being appointed representation. In other words, suspending attachment until after the filing of charges will leave indigent defendants to negotiate pre-indictment guilty pleas on their own. The system becomes rigged against the people most in need of legal aid. *See Turner*, 885 F.3d at 982 (Stranch, J., dissenting) (arguing that denying the accused the right to an attorney during pre-indictment plea negotiations "all but ensures that his window of exposure to the criminal justice system will open with the prosecutor and close in the prison system").

Even counseled defendants are at risk of losing the guidance of an attorney. Under the Thirteenth Circuit's bright-line approach to attachment, a prosecutor could bypass a defendant's lawyer and negotiate directly with the accused. If the prosecutor delays filing charges and then manipulates the accused into accepting an unfavorable deal, the defendant would have no constitutional redress under the Sixth Amendment. An equally unjust outcome played out in the case at bar. David would have been better situated if he never acquired representation at all—at least then, the prosecutor would have communicated the plea offer to him directly. This Court should not endorse a rule that punishes a suspect-defendant for hiring an attorney.

Moreover, joint federal-state taskforces—like the narcotics taskforce at issue in this case—compound the already troubling constitutional problem. Often federal and state prosecutors work together to prosecute a drug offender. *See Heath v. Alabama*, 474 U.S. 82, 88 (1985) ("When a defendant in a single act violates the peace and dignity of two sovereigns by breaking the laws of each, he has committed two distinct offenses.") (internal citations omitted). If a suspected drug dealer is sitting in jail, having been charged with a state crime but not yet a federal crime, he is in the precarious situation of having a right to counsel only for his state court proceedings. When the joint state and federal prosecution team initiates plea negotiations regarding federal charges, the defendant will have no Sixth Amendment protection. Such a distinction "seems a triumph of the letter over the spirit of the law." *Moody*, 206 F.3d at 616.

A legal system that facilitates knowledgeable plea bargaining benefits defendants, prosecutors, and courts. With guilty pleas, criminal proceedings can be adjudicated quickly, cheaply, and to the mutual benefit of all parties. *See generally, Brady v. United States*, 397 U.S. 742, 752 (1970). But plea bargaining—whether it begins before or after the prosecutor files charges—is only constitutionally palatable if defendants are represented by effective counsel.

C. Under the *Strickland* Analysis, David Received Deficient Representation That Prejudiced his Defense, and the Only Appropriate Remedy Is for the Court to Instruct the Government to Re-Offer the Initial Plea.

Once this Court determines that David's Sixth Amendment right to counsel attached when AUSA Marie emailed a formal plea offer to Long, David's attorney, this Court should find that Long's representation failed to meet constitutionally acceptable standards.

In *Strickland v. Washington*, this Court established a two-step inquiry to determine whether a convicted defendant is entitled to a remedy due to ineffective assistance of counsel. 466 U.S. 668, 687 (1984). First, the defendant must establish that defense counsel's

representation was deficient. *Id*. Second, the defendant must prove the deficient representation prejudiced him. *Id*. To establish 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." *Id*. at 694.

Long's representation of David was deficient, and David suffered prejudice as a result; thus, David is entitled to relief under the Sixth Amendment.

1. *An Attorney Has an Affirmative Obligation to Present All Formal Plea Deals to his Client.*

A defense attorney must communicate all formal plea offers to his client, and when he fails to do so, his representation is constitutionally ineffective under *Strickland*. *See Frye*, 566 U.S. at 145 ("When 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.").

Long's representation fell substantially below constitutionally acceptable standards. Marie, the federal prosecutor, offered David a generous plea deal—one year in prison in exchange for the names of his suppliers—but Long, misreading the email due to his drunkenness, never communicated the offer to his client. R. at 4. By the time Long realized his mistake, the offer had expired. *Id*. Under *Frye*, Long's failure violated David's Sixth Amendment right to effective counsel.

2. *Petitioner Suffered Prejudice Because, Had He Been Properly Advised, David Would Have Accepted the Offer and Been Sentenced to Only One Year in Prison Instead of Ten.*

To establish prejudice, a convicted defendant must show that, but for counsel's error, the criminal proceeding would have ended differently. *Frye*, 566 U.S. at 694. To establish prejudice due to defense counsel's failure to communicate a plea offer, a defendant must demonstrate the

following by a reasonable probability: (1) that the defendant would have accepted the earlier plea offer, and (2) that the prosecution would have entered the plea without the trial court refusing to accept it. *Id*. at 147.

David can satisfy both criteria. First, David testified under oath that he would have accepted the deal if Long presented it to him. Ex. C ("Of course I would have taken [the deal]. One year in prison compared to risking at least ten at trial. It's a no brainer."). The prosecution had substantial evidence against David, including the fact that Officer McNown caught David red-handed, packaging a mound of Golden State cocaine. Ex. A. At the time AUSA Marie offered the one-year deal, David's chances at trial were bleak. Additionally, David's new defense attorney, Michael Allen, emailed the prosecutor to seek a new plea on the same terms two days after the offer expired. R. at 5. Allen sent this email before trial, so David remained in the same position he occupied when the government made the original offer. David did initially express concerns to a DEA agent about giving up his suppliers, fearing that doing so could get him killed or his church destroyed, but it is reasonable to believe that a formal plea deal with favorable terms—plus a night in jail to reflect—changed his mind. R. at 3. Even if David truly feared for his safety, a competent defense attorney could have bargained for witness protection. R. at 22–23. Judge O'Neal captured the point succinctly in his dissent: "any prudent defense attorney would advise their client to take a one year deal." R. at 22.

Second, there is a reasonable probability that the prosecutor would have honored the original deal, and that the trial court would have accepted David's guilty plea. Although the offer was generous, the government had a lot to gain by getting David to cooperate. A notorious drug boss was travelling through Lakeshow, and David was the government's best chance to

apprehend him. R. at 4. There is no reason to believe the trial judge would have rejected a mutually beneficial plea deal.

If David had competent counsel, he would have accepted the plea offer and served one year in prison; instead, he was convicted at trial and sentenced to ten years. R. at 14. Clearly the end result would have been more favorable for David had he enjoyed the assistance of counsel the Sixth Amendment requires.

3. *The Only Meaningful Remedy for Defense Counsel's Grossly Ineffective Assistance Is the Specific Performance of the Government's One-Year Offer.*

Assuming that David suffered prejudice due to his defense attorney's deficient representation, he is entitled to judicial remedy. In this particular case, the only fair remedy is for this Court to compel the government to re-offer the initial plea.

To remedy a counsel's ineffective assistance, the court "should put the defendant back in the position he would have been in if the Sixth Amendment violation had not occurred." *United States v. Baylock*, 20 F.3d 1458, 1468 (9th Cir. 1994). The Sixth Amendment further requires that the government "bear the risk of constitutionally deficient assistance of counsel." *Kimmelman v. Morrison*, 477 U.S. 365, 379 (1986). Courts should consider the competing interests of the government, but, ultimately, "remedies should be tailored to the injury suffered." *United States v. Morrison*, 449 U.S. 361, 365 (1981).

David suffered profound injuries due to the constitutional violation, and the only appropriate remedy is for the government to re-offer the plea. In his dissent, Judge O'Neal argues that the government offered the plea to entice David to testify against his suppliers; "[t]hus, the government would not derive any benefit from Mr. David accepting the original plea offer this late in the proceedings." R. at 23. This argument fails to account for the actual terms

of the plea bargain. David's plea was contingent on his information leading to an arrest. Ex. D. If David cannot provide any meaningful information—a possibility now that so much time has passed—the deal is void. The government has nothing to lose by re-offering the plea. In fact, David's cooperation may bring down an elusive drug kingpin.

The only meaningful remedy for defense counsel's grossly ineffective assistance is the specific performance of the government's one-year offer. Anything less would "impermissibly shift the risk of ineffective assistance of counsel from the government to petitioner." *United States v. Wilson*, 719 F. Supp. 2d 1260, 1276 (D. Or. 2010).

CONCLUSION

The Lakeshow Police Department violated David's Fourth Amendment rights when Officer McNown conducted a warrantless search of his home without any probable cause. As such, David respectfully requests that this Court reverse the Thirteenth Circuit below, and vacate his conviction.

In the alternative, David requests that this Court reverse the Thirteenth Circuit on Sixth Amendment grounds and compel the government to re-offer the initial one-year plea deal.