No. 4-422

IN THE
UNITED STATES SUPREME COURT

Chad David,

Petitioner,

v.

The United States of America,

Respondent.

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

Petitioner's Brief
Team No. P9

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases, U.S. Supreme Court

Cases, U.S. Courts of Appeal

TABLE OF AUTHORITIES (CONT'D)

Cases, State Supreme Courts

Constitutional Provisions and Statutes

ISSUES PRESENTED

1. Do warrantless searches conducted by law enforcement acting as community caretakings extend to the home under the Fourth Amendment?
2. Does the Sixth Amendment right to effective counsel attach during plea negotiations prior to a federal indictment?

STATEMENT OF THE FACTS

Defendant, Chad David (hereafter, "Mr. David"), was a well-respected minister in Lakeshow, Staples, where gained a reputation in the community for holding energetic Sunday services at the Lakeshow Community Revivalist Church. On Sunday, January 15, 2017, Officer James McNown arrived at Mr. David's Sunday service just before 7:00 AM. Officer James McNown, a patrol officer in Lakeshow, frequently attended Mr. David's Sunday service and was scheduled to patrol Lakeshow shortly after 7:00 AM service that Sunday.

Mr. David regularly attended the 7:00 AM Sunday service, but was absent that morning so Julianne Alvarado, another church attendee, attempted to call Mr. David at his home to check if he was okay but no one answer. Ms. Alvarado told Officer McNown that Mr. David did not answer his phone and she was concerned about his well-being. Another church attendee, Jacob Ferry, told Officer McNown that he thought he saw Mr. David the prior night at a bar. At this time, Officer McNown was not concerned with Ms. Alvarado's and Mr. Ferry's statements because he thought it was all an overreaction and assumed that Mr. David was at home with an illness due to his elderly age of 72.

Officer McNown told Ms. Alvarado and Mr. Ferry that he would stop by Mr. David's house during his patrol route after work to bring him some hot tea. The Sunday service ended at approximately 8:50 AM and at 9:00 AM, Officer McNown began his patrolling shift, stopped at Starbucks, and purchased a hot tea to bring to Mr. David.

When Officer McNown pulled into Mr. David's gated community, he saw a black Cadillac SUV leaving the complex with Golden State license plates. Based on his experience, Officer McNown knew that drug dealers typically drove Black Cadillac SUVs and that there had been an increase in Golden State drugs coming into Lakeshow in recent years.

Mr. David's car was in the driveway and all the doors to the house were shut when Officer McNown arrived at Mr. David's residence at approximately 9:30 AM. When Officer McNown walked up to Mr. David's front door he heard loud music coming from inside the house. Officer McNown testified that he thought this was odd considering Mr. David's age and the time of day. Officer McNown knocked and announced his presence, waited approximately two minutes, and then peeked inside the window next to the front door. While looking through the window, Officer McNown saw that the movie *The Wolf of Wall Street* was playing on the TV, which surprised Officer McNown. Officer McNown testified that thought that someone else might be in the home. (Exhibit A, 4: 26-28). McNown also testified that he was "not sure" if he thought something suspicious was going on when he entered Mr. David's house, only that he was concerned about Mr. David's well-being. (Exhibit A, 5: 14-15).

Officer McNown tried opening the front door but it was locked, so instead he went around the house, through Mr. David's backyard, and entered the residence through the unlocked back door. After entering, Officer McNown walked towards the TV to turn it off and noticed a notebook containing the names of various church attendees along with information that appeared

to reflect transactions. Officer McNown heard the loud music coming from a closed-door upstairs and walked up the stairs to check if Mr. David was there. When Officer McNown opened the door he saw Mr. David packaging powder cocaine into ziplock bags.

Officer McNown detained Mr. David. (R, p. 33.) He called in local DEA agents to assist with seizing evidence because of the substantial amount of narcotics. (*Id*. at p. 3.) Officer McNown had "never seen that much cocaine in [his] life." (*Id*. at p. 33.) DEA Agent Colin Malaska (hereafter, "Agent Malaska"), arrived shortly after 10:00 a.m. to investigate. (*Id*. at p. 3.) Agent Malaska seized the cocaine, the notebook, Mirandized Mr. David, and began asking Mr. David questions. (*Ibid*.) Agent Malaska asked Mr. David where he obtained the substances and Mr. David willingly answered Agent Malaska's questions. (*Ibid*.) Notwithstanding, Mr. David replied that he would not give up his suppliers because he was concerned for his safety and his congregation. (*Ibid*.) Although Mr. David feared being stabbed in jail, he was later told by counsel if he remained quiet in detention he would be fine. (*Id*. at pp. 40, 45.)

Arriving at a federal detention facility on January 15, 2017, Mr. David called the only criminal defense lawyer he knew, Keegan Long (hereafter, "Mr. Long"), because Mr. Long attended his Sunday services. (R, pp. 3-4, 43.) Just arrested, Mr. David had not been charged or arraigned. (*Id*. at p. 38.) Mr. Long was well known to be an alcoholic. (*Id*. at p. 4.) Calling from detention, Mr. David told Mr. Long he had been arrested for "a little cocaine." (*Id*. at p. 37.) Drinking at the time, Mr. Long finished his beer and went to the detention facility to speak with Mr. David. (*Ibid*.) Mr. David believed that Mr. Long would adequately represent him. (*Id*. at p. 4.) At the facility, Mr. Long did not suggest they seek a plea bargain. (*Id*. at p. 44.) Neither did Mr. Long provide Mr. David with the deal of a plea bargain subsequently offered by Agent Malaska. (*Id*. at p. 4.) Believing that a suspected drug kingpin, Mr. David's supplier, was

traveling through Lakeshow at the time, Agent Malaska contacted the U.S. Attorney and asked them to hold off on filing charges and offer Mr. David a plea deal. (*Ibid*.) Assistant U.S. Attorney Kayla Marie (hereafter, "AUSA Marie"), offered Mr. David a deal where Mr. David would plead guilty to one count of violating 21 U.S.C. § 841, possession of a controlled substance with intent to distribute, and serve one year in federal prison, in exchange for giving up his suppliers. (*Id*. at pp. 4, 47.) The deal was set to expire in 36 hours. (*Ibid*.)

AUSA Marie emailed Mr. Long the plea offer on January 16, 2017, at 8:00 a.m., which was set to expire on January 17, 2017, at 10:00 p.m. (R, p. 4.) Mr. Long received the offer at 8:00 a.m. on January 16. (*Ibid*.) When he received the offer, Mr. Long was at a bar drinking. (*Id*. at pp. 4, 38.) Mr. Long was playing darts when he read AUSA Marie's email, had "had a little too much to drink and read the email wrong." (*Id*. at p. 38.) Mr. Long misread the information contained in the U.S. Attorney's plea offer, including AUSA Marie's 36-hour time limit. (*Id*. at p. 4.) In addition, AUSA Marie called Mr. Long's office during the day on Tuesday, January 17, when the offer was set to expire. (*Ibid*.) Mr. Long did not answer. (*Ibid*.) AUSA Marie left Mr. Long a voicemail, however Mr. Long did not then, and never communicated the plea offer to Mr. David during the 36-hour period that it was open. (*Ibid*.)

On January 18, 2017, AUSA Marie emailed Mr. Long and asked him why he did not accept the offer. (R, p. 4.) Mr. Long stated that he misread the deadline to be 36 days, not 36 hours. (*Ibid*.) Mr. Long checked the email offer he had received and verified he received the correct time limit of 36 hours. (*Ibid*.) Mr. David and Mr. Long did not discuss if Mr. David would have accepted the plea offer. (*Id*. at p. 40.) Calling Mr. David to explain his error, Mr. Long told Mr. David he "messed up," was fired immediately and replaced by current counsel. (*Id*. at pp. 4, 40, 44.) Mr. David would have taken the plea offer to avoid risking at least ten

years prison time at trial, even if it meant giving up his suppliers. (*Id*. at p. 44.) After being indicted, through new counsel, Mr. David informed AUSA Marie he had fired Mr. Long and that he asked for a new plea offer. (*Id*. at pp. 5, 54.) Mr. David's request was denied, citing the likelihood of Mr. David having already tipped off his suppliers. (*Id*. at pp. 5, 50.)

SUMMARY OF THE ARGUMENT

The Community Caretaking Function is not an exception to the warrant requirement to search a home because it only applies to searches of automobiles because automobiles have a lower expectation of privacy under the Fourth Amendment than homes. *See Cady*. The Doctrine Of Exigent Circumstances is the appropriate standard for warrantless entry into the home because it encompasses searches performed absent probable cause and while police are acting in a Community Caretaking Function. And, Officer McNown's warrantless entrance into Mr. David's home was unconstitutional because he was suspicious of criminal activity when he entered Mr. David's home. Furthermore, Mr. David was entitled to effective assistance of counsel under the 6th Amendment to the U.S. Constitution. Plea negotiations are an essential aspect of criminal litigation. As such, Mr. David's plea negotiations with the U.S. Attorney triggered his right to effective assistance. Counsel's deficient assistance prejudiced Mr. David because, to a reasonable probability, Mr. David would have accepted a plea bargain which carried a much lesser sentence had counsel communicated the offer in time.

STANDARD OF REVIEW

This Court applies a de novo standard of review to matters of law. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). Matters resolved by summary judgment at the trial court also receive de novo review. *United States v. Diebold, Inc.* (1962) 369 U.S. 654, 655. On review, this Court must assess "if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact . . . the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c).

ARGUMENT

I. OFFICER MCNOWN'S SEARCH OF MR. DAVID'S HOME VIOLATED THE FOURTH AMENDMENT BECAUSE THE COMMUNITY CARETAKER DOCTRINE DOES NOT EXTEND TO SEARCHES OF THE HOME

The Fourth Amendment to the United States Constitution guards "[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*. A warrantless search is presumed to be unreasonable, and therefore invalid under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 357 (1967). When a search is conducted without a warrant having first been issued by a neutral and detached magistrate, then it is the burden of the government to show that an exception to the general warrant requirement that makes the search reasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971).

Here, Respondent contends that the search of Mr. David's home did not require a warrant because Officer McNown was performing the search in his community caretaking function, completely divorced from any criminal investigation purposes. (R. 15). For the reasons set forth

below this Court should affirm the Thirteenth Circuit's decision finding the warrantless search of Mr. David's home violated the Fourth Amendment.

A. The Community Caretaking Function Is Not An Exception To The Warrant Requirement To Search A Home Because It Only Applies To Searches Of Automobiles Because Automobiles Have A Lower Expectation Of Privacy Under The Fourth Amendment Than Homes

In *Cady v. Dombrowski*, Wisconsin police officers arrested an off-duty Chicago policeman for drunk driving after he had crashed his vehicle. 413 U.S. 433, 436 (1973). The Wisconsin policemen believed that Chicago police officers were required by regulation to carry their service revolvers at all times. *Id*. The Officers searched the defendant and the vehicle at the time of arrest but were unable to locate the revolver. *Id*. After the wrecked vehicle was towed to a private garage out of concern for public safety, the officers performed a second search because it was "standard police procedure" to locate the revolver in order to protect the public from the possibility of the weapon falling into improper hands. *Id*. at 437. Incriminating evidence was uncovered in the second search, ultimately leading to Mr. Cady's conviction for murder. *Id*. at 438. At trial, Mr. Cady moved to suppress the evidence found during the second search on the grounds that it violated the Fourth Amendment. The Supreme Court found the second search of the vehicle reasonable under the Fourth Amendment. *Id*.

In its decision, the Court relied on the fact that the search was not performed pursuant to the police's law enforcement functions, but as part of the police's "community caretaking functions" because the search for the revolver was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441. The court emphasized two other facts in its decision. First, the police had exercised a form of

custody or control over the vehicle; and second, it was "standard procedure" in that particular police department to search an impounded vehicle for a missing firearm "to protect the public from the possibility that a [firearm] would fall into untrained or perhaps malicious hands." *Id*. at 442.

The Court also relied heavily on its prior decisions in *Cooper v. California* and *Harris v. United States,* holding that a warrantless search of a vehicle is not unreasonable under the Fourth Amendment while the vehicle is in valid control or custody of the police and performed to protect the police and public. *See Cooper v. California,* 386 U.S. 58 (1967*)*; *Harris v. United States,* 390 U.S. 234 (1968*)*. *Cady* simply restated what the Court had concluded in *Harris* and *Cooper,* a warrantless search of a vehicle in possession of the police may be reasonable because of the low expectation of privacy with a vehicle. The Court's decision in *Cady* is significant because, unlike *Cooper* and *Harris*, the vehicle was arguably not in police custody, so the Court relied heavily on that fact that automobiles have a lower expectation of privacy than a home because of their ambulatory nature and because police frequently come into contact with automobiles outside of their law enforcement functions. *Cady,* at 434. The Court found that individuals have a lower expectation of privacy with their automobiles because the extent of "police-citizen contact involving automobiles is substantially greater than police-citizen contact" involving the home and "because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways." *Cady*, at 441.

Cady does not stand for the proposition that <u>any</u> warrantless search performed while police are acting within their community caretaking function is reasonable under the Fourth Amendment. In fact, the Supreme Court has expressly limited its consideration of the police

officer's motivation to justify a warrantless search to searches of automobiles. *See United States v. Pichany,* 687 F.2d 204, 209 (7th Cir. 1982). The only other Supreme Court decisions that have mentioned the community caretaking function to justify a search were both limited to inventory searches of automobiles to be impounded. *See South Dakota v. Opperman* 428 U.S. 364, 369 (1976) (an inventory search revealing cannabis after the vehicle was impounded for parking citations did not violate the Fourth Amendment because vehicles are "subjected to pervasive and continuing governmental regulation and controls" and thus not entitled to the same protection under the Fourth Amendment as a home); *Colorado v. Bertine,* 479 U.S. 367, 381 (1987) (an inventory search conducted at the scene of the crime of an arrest for drunk driving, including a search of the locked trunk and contents of a backpack, was constitutional because it was performed pursuant to reasonable "standardized police procedures").

Respondent now mistakenly relies on the Supreme Court's consideration of the police officer's motivation for performing the search in *Cady* to justify the warrantless entrance into Mr. David's home. Respondent tries to overlook their glaringly obvious problem that *Cady's* consideration of the police's motivation for searching the vehicle to justify the warrantless search was expressly premised on the distinction between automobiles and homes in the context of searches. *See Ray v. Twp. of Warren*, 626 F.3d 170, 177 (3d Cir. 2010).

The Supreme Court explicitly intended to confine its consideration of the officer's intent to "the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses." *United States v. Pichany,* 687 F.2d 204, 209 (7th Cir. 1982). The Court did not intend for the community caretaking function to justify other searches where an individual has a higher expectation of privacy, evident by the clear distinction the court makes between searches of homes and automobiles in *Cady* and its progeny.

Unlike automobiles, homes are not subject to frequent contact with police while they are acting outside their law enforcement functions; homes are not normally lawfully possessed by the police; and, police do not search homes as part of any "standard police procedure" outside of their law enforcement functions. The home is the pinnacle of a person's expectation of privacy under the Fourth Amendment. *See Payton v. New York*, 445 U.S. 573, 596 (1980). Thus, a vehicle does not have the same expectation of privacy as a home, and thus a home is entitled to greater protection than a vehicle.

Moreover, facts of the instant case could not be more distinguishable from *Cady*. The police did not have regular contact with Mr. David's home completely divorced from criminal investigation, they did not have valid control or custody of Mr. David's home, and Officer McNown's search of Mr. David's home was anything but standard police procedure.

The protection afforded to the home under the Fourth Amendment is so great that even when police have probable cause to make an arrest they may not enter the home absent a warrant or exigent circumstances. *Id.* It is unimaginable then that the Fourth Amendment would allow for warrantless entry into the home solely because the police were acting with the intent to service and protect community safety. This Court should not justify warrantless entry into the home because the police were acting within their community caretaking function because the home holds a special sanctity "embedded in our tradition since the origins of the Republic." *Id.* at 601. The primary purpose of the Fourth Amendment is guarding against home entry. *United States v. United States District Court,* 407 U.S. 297, 313 (1972). Allowing police to search a home simply because they are acting within their community caretaking capacity is categorically unreasonable under American jurisprudence. And, there is no reason to create a new exception to the warrant requirement to enter a home because this Court already recognizes an exception to the warrant

requirement when police are acting within their community caretaking function under the doctrine of exigent circumstances.

B. The Doctrine Of Exigent Circumstances Is The Appropriate Standard For Warrantless Entry Into The Home Because It Encompasses Searches Performed Absent Probable Cause And While Police Are Acting In A Community Caretaking Function

There are already certain, well-recognized exceptions to the warrant requirement for entry into a home such as exigent circumstances "which may involve circumstances beyond those confronted by police in a criminal investigatory context." *See United States v. Coles*, 437 F.3d 361, 366 (3d Cir. 2006). The exigent circumstances exception permits warrantless entry into a home absent suspicions of criminal activity but only if the officer reasonably believes that "someone is in imminent danger." *Parkhurst v. Trapp*, 77 F.3d 707, 711 (3d Cir. 1996). The existence of exigent circumstances is the recognized justification for warrantless entry into a home, not the officer's intent when performing the search.

"Exigent circumstances exist if a reasonable law enforcement officer could believe that a person is in need of immediate aid." *United States v. Chipps*, 410 F.3d 438, 441 (8th Cir. 2005). Under the "emergency aid" doctrine "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." *Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). "To invoke this so-called 'emergency doctrine,' the person making entry must have had an objectively reasonable belief that an emergency existed that required immediate entry to render assistance or prevent harm to persons or property within." *United States v. Moss*, 963 F.2d 673, 678 (1992).

A law enforcement officer's subjective intent is irrelevant for purposes of determining if a warrantless entry is permissible under the Fourth Amendment. *See Brigham City v. Stuart*, 547 U.S. 398, 404 (2006). An action is "reasonable" under the Fourth Amendment, regardless of the individual officer's state of mind, "as long as the circumstances, viewed objectively, justify [the] action." *Scott v. United States*, 436 U.S. 128, 138 (1978).

Here, Officer McNown testified that he thought that someone else might be in the Mr. David's home. (Exhibit A, 4: 26-28). Officer McNown also testified that he was "not sure" if he thought something suspicious was going on when he entered Mr. David's house, only that he was concerned about Mr. David's well-being. (Exhibit A, 5: 14-15). Officer NcNown testified that he did not believe there was an emergency that needed his attention when he decided to enter Mr. David's home. (Exhibit A, p. 7). Respondent argues that the entry and seizure was legal because Officer McNown was acting as a community caretaker since he only intended to check on Mr. David's well-being, not investigate potential criminal conduct. (R. at 5). Respondent does not contend that this entry into Mr. David's home was valid under the doctrine of emergency aid. (R. 15).

Respondent's argument justifying McNown's warrantless entry into the home is entirely based on Officer McNown's intent. (R. at 7). Respondent's argument must be rejected because Officer McNown did not reasonably believe someone was in imminent danger and thus exigent circumstances were not present to justify his warrantless search.

Respondent has stipulated that Officer McNown's search was permissible because he was acting as community caretaker when he entered Mr. David's home, relying of Officer McNown's intent to justify the warrantless entrance, and thus has foregone any argument justifying the search on objective facts that show the existence of exigent circumstances. (R. 15).

The circuit courts that have found a warrantless entry into a home permissible under the Fourth Amendment because the police were acting within the community caretaking function have confused and conflated the community-caretaking-function consideration discussed in *Cady* with the emergency aid doctrine. They apply what appears to be a "modified exigent circumstances test, with perhaps a lower threshold for exigency if the officer is acting in a community caretaking role." *Ray v. Twp. of Warren,* 626 F.3d 170, 176 (3d Cir. 2010). For example, in *United States v. Quezada*, the court upheld a warrantless entry into a home when the mother of defendant's child called officers to the defendant's home because she was concerned about the safety of the child and the defendant was not responding to her phone calls. *United States v. Quezeda*, 448 F.3d 1005, 1007 (8th Cir. 2006). The Eighth Circuit held there is "a difference between the standards that apply when an officer makes a warrantless entry when acting as a so-called community caretaker and when he or she makes a warrantless entry to investigate a crime" and that the officer had to have a "reasonable belief that an emergency exists requiring his or her attention" for the community caretaking doctrine to apply to a warrantless search of a home. 448 F.3d at 1007. But, the Supreme Court has rejected the notion that a warrantless entry may be justified absent objective facts that support a reasonable belief that an emergency exists because someone is in imminent danger. *Quezada* suggests that the police officer's intent is the basis for the emergency aid exception. However, The Supreme Court has clearly held the emergency aid exception depends on the objective facts and circumstances. *See Brigham City v. Stuart*, 547 U.S. 398, 404 (2006).

In *United States v. Rohrig*, police officers were called to defendant's residence in the middle of the night in response to a complaint concerning loud music. 98 F.3d 1506 (6th Cir. 1996). The Sixth Circuit decision justified the warrantless entry into the home because "a late

night disturbance of the peace might well present exigent circumstances that would justify the [] officers' warrantless entry into Defendant's home" when also considering that the officers were "acting to protect the wellbeing of the immediate community." *See id.* at 1520. Again, these facts do not support a reasonable belief that an emergency exists requiring immediate police action.

Where these courts have gone astray is in their failure to recognize the Supreme Court has long rejected the view of the Fourth Amendment that the warrant requirement should not apply because the law enforcement officer was not trying to make a criminal case against defendant when they entered their home. *See United States v. Erickson,* 991 F.2d 529, 531 (9th Cir. 1993). Thus, the Court must reject the justification for Officer McNown's warrantless entrance on the basis of his motivation for conducting the search.

C. Officer McNown Warrantless Entrance Into Mr. David's Home Was Unconstitutional Because He Was Suspicious Of Criminal Activity When He Entered Mr. David's Home

Finally, even if the Court were to accept the proposition that the warrantless entry into a home may be lawful under the Fourth Amendment when the police are acting in their capacity as community caretakers, Officer McNown's entrance into Mr. David's home was not "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441.

If the community caretaking function as defined in *Cady* is to serve as the justification for the warrantless search of Mr. David's home, Officer McNown's motivation for entering must have been "totally divorced" from the detection of criminal activity. *Id*.

Here, Officer NcNown noticed Mr. David was unexpectedly absent from his regular church service. He also took notice of the Cadillac SUV with Golden State license plates near

Mr. David's home because he knew drug dealers typically drove them. Officer McNown heard loud music coming from the home at an early hour, the television was playing a movie that Officer McNown had reason to know Mr. David would not watch, and Mr. David did not answer the door after repeated knocks. Officer McNown testified that thought that someone else might be in the home. (Exhibit A, 4: 26-28). Individually, these facts may suggest that Officer McNown was totally divorced from criminal investigation, but when taken together, it is reasonable to believe that Officer McNown's motives for entering the home were not totally divorced from the detection of criminal activity. Thus, the Court should affirm the Thirteenth Circuit's finding that Officer McNown's search does not fall within the police's community caretaking function.

II. THE RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL ATTACHES DURING PLEA NEGOTIATIONS WHERE PLEADING DETERMINES MANY FINAL JUDGMENTS AND MISTAKES BY COUNSEL AFFECT WHETHER DEFENDANT ACCEPTS A PLEA

Mr. David was denied his right to effective assistance of counsel on the facts of this case. The Sixth Amendment to the U.S. Constitution provides, "In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense." U.S. Const. Amend. VI. The Sixth Amendment guarantees a right to counsel, i.e., the right attaches, at critical stages of a criminal proceeding. *Montejo v. La.*, 556 U.S. 778, 786 (2009). Counsel renders ineffective assistance of counsel where counsel's representation falls below the standards of a reasonably competent attorney of the profession and that representation prejudices defendant. *Strickland v. Wash.*, 466 U.S. 668, 695 (1984).

A. Mr. David's Sixth Amendment Right to Effective Assistance of Counsel Attached After He was Detained, Questioned, and the Prosecution Communicated a Plea Bargain.

Mr. David's Sixth Amendment right attached during plea negotiations which determined the sentencing terms of his final conviction. The Sixth Amendment guarantees criminal defendants the right to representation during critical stages of the proceedings. *Montejo v. La.*, 556 U.S. 778, 786 (2009); *United States v. Wade*, 388 U.S. 18, 227-228 (1967). Once police officers read Miranda warnings, defendant's Sixth Amendment right to counsel also attaches. *See Montejo*, 556 U.S. at 786 (holding that waiver of Miranda rights under the Fifth Amendment also waives right to counsel under the Sixth Amendment). Moreover, direct interrogation by the Government is a critical stage which triggers Sixth Amendment protection. *Massiah v. United States*, 377 U.S. 201, 204-205 (1964); *cf. United States v. Ocean* (1st Cir. 2018) 904 F.3d 25, 34-35 (holding no violation where Government does not direct witness to record jailhouse conversation); *United States v. Hayes*, 231 F.3d 663, 669 (9th Cir. 2000) (holding no violation where retained defendant's conversations were tape recorded prior to indictment).

Defense counsel's failure to communicate the terms of a plea bargain render representation deficient. *Missouri v. Frye*, 566 U.S. 134, 145 (2012); *United States v. Batamula*, 788 F.3d 166, 170 (5th Cir. 2015); *but see*, *e.g.*, *Turner v. United States*, 848 F.3d 767, 771-772 (6th Cir. 2017) (imposing bright-line test, even where plea bargaining has begun, for right to attach only after indictment). Even if no charges have been filed, plea bargaining should attach Sixth Amendment protection because it signals that the "government ha[s] crossed the constitutionally significant divide from fact-finder to adversary." *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995).

Implicitly, under *Frye*, counsel's failure to communicate the favorable terms of a plea deal means Mr. David's right to effective counsel attached. The Sixth Circuit Court of Appeals, to the contrary, imposes a bright-line rule that attachment does not occur during plea negotiations prior to indictment on federal charges. *Turner*, 848 F.3d at 771-772. In *Turner*, appellant was charged in state court and then federal court with interference with commerce by threats or violence through aggravated robbery under 18 U.S.C. § 1951. *Id*. at 768-769. Several months after retaining counsel, appellant successfully resolved plea negotiations with state authorities and received a plea offer from the U.S. Attorney. *Id*. at 769. Whereas appellant faced a mandatory minimum of 82 years, the U.S. Attorney offered him 15 years' prison time if appellant accepted before being indicted. *Ibid*. Counsel for appellant timely and accurately relayed this favorable offer to petitioner, but appellant declined. *Ibid*. This first offer lapsed, appellant fired his attorney, and a new U.S. Attorney offered appellant 25 years' prison time. *Ibid*. Appellant accepted and the trial court entered judgment. *Ibid*.

Appellant filed to vacate his guilty plea pursuant to 28 U.S.C. § 2255, alleging ineffective assistance of counsel. *Id*. at 769. The district court denied appellant's motion as a matter of law, finding his Sixth Amendment right to effective assistance had not attached pre-indictment and declining to reach the merits. *Ibid*. Recognizing this Court's precedent under *Frye*, nevertheless, the Sixth Circuit upheld its own precedent by declining to extend appellant's right to counsel to appellant's negotiations with prosecuting authorities pre-indictment. *Id*. at 770-771. The Sixth Circuit acknowledged *Frye*'s finding that plea bargains merit protection because they have "become so central to the administration of [the] criminal justice system." *Frye*, 566 U.S. at 143. Nevertheless, the Sixth Circuit upheld their own reluctant acceptance of a bright-line test, citing *United States v. Moody*, 206 F.3d 609 (6th Cir. 2000), where no right attached despite appellant

being subjected to six police interrogations, in a "triumph of the letter over the spirit of the law." *Turner*, 848 F.3d at 772-773. The Sixth Circuit considered that counsel effectively communicated petitioner's plea offer, but petitioner rejected it. *Id*. at 773.

This Court should provide guidance in upholding the spirit, rather than the letter, of the law. The indictment benchmark does not guarantee a criminal defendant's right to counsel at inherently adversarial stages of federal criminal proceedings. Unlike in *Turner*, here, Mr. David was immediately questioned by police upon their raiding his residence. R at 3. Agent Malaska arrived, Mirandized, and nevertheless began questioning Mr. David. *Ibid*. Mr. David did not waive Sixth Amendment protection by the mere fact that he began talking. *Ibid*. He instead said he would not talk. *Ibid*. Already, this tension between agents of the Government and as then unrepresented defendant initiated a guarantee of Sixth Amendment protection. *Ibid*. After they found large amounts of cocaine, it was plain the Government would seek criminal charges. *Ibid*. Despite Mr. David's affirmative representation, initially, that he would not give up his supplier as a term of a plea bargain, Agent Malaska called the U.S. Attorney to arrange one. *Ibid*. Unlike in *Turner*, all of this occurred in the late morning of January 15, 2017. *Ibid*.

Moreover, unlike in *Turner*, Mr. David's counsel was deficient in failing to communicate Mr. David's plea whatsoever. (R, 4-5, 40, 44.) Whereas appellant in *Turner* had several months after state charges were filed to consider a plea accurately communicated to him on favorable terms, and nevertheless rejected the plea, Mr. David's counsel simply did not communicate the plea deal. (*Ibid*.) Mr. David is not seeking to benefit from a plea he obstinately refused in hindsight. (*Ibid*.) Much to the contrary, Mr. David's detention, interrogation, and deadline to accept occurred rapidly within three days. (*Ibid*.) Whether or not Mr. David had been indicted, that rapid process indicates he was pitted against the Government in an adversarial and critical

juncture in determining the terms of Mr. David's final terms of conviction. (*Ibid*.) He never even learned of his plea deal and was never given the meaningful choice to accept or not. (Ibid.) This Court must ensure that defendants in similar circumstances receive the benefit of effective counsel which the Sixth Amendment guarantees.

Thus, Mr. David should be given the benefits the Sixth Amendment requires of counsel to render effective assistance during plea negotiations.

B. The Favorable Terms of a Plea Deal Indicate Defendant is Prejudiced in Not Accepting Them Owing to Deficient Assistance of Counsel.

Briefly, this Court should find that Mr. David was prejudiced by Mr. Long's representation. The second prong of the *Strickland* test asks if defendant was prejudiced in the outcome of proceedings, i.e., whether it is reasonably probable that confidence in the outcome is undermined by assistance of counsel. *Strickland v. Wash.*, 466 U.S. 668, 694 (1984). Deficient assistance which affects defendant's decision to accept a guilty plea gives rise to a constitutional violation and relief from the plea. *Hill v. Lockhart*, 474 U.S. 52, 56-60 (1985). Appellant seeking to withdraw a guilty plea must show that it was reasonably probable he would not have pleaded guilty. *Id*. at 58-59. Federal courts and state supreme courts broadly hold the converse situation also produces prejudice; where appellant challenges his decision not to accept a guilty plea, proper assistance which would have led appellant to accept the plea prejudices a judgment on higher sentencing terms at trial. *See In re Alvernaz*, 2 Cal.4th 924, 934-935 n.5 (1992) (indexing opinions).

Here, it was reasonably probable that Mr. David would have accepted the terms of a favorable plea bargain.

Mr. David's sentence would have been drastically reduced by plea bargain. AUSA Marie

offered Mr. David just one year in federal custody if he pleaded guilty to charges of violating 21 U.S.C. § 841, possession of a controlled substance with intent to distribute, and give up his suppliers. R, 4, 47. If Mr. David proceeds to trial, he faces hefty federal sentencing. Officer McNown and Agent Malaska found large quantities of cocaine, a controlled substance, at Mr. David's house. *Id*. at 4. In Officer McNown's experience as a peace officer, he had never seen so much cocaine. *Ibid*. Their discovery indicates that Mr. David will face severe penalties at trial, when AUSA Marie likely seeks the maximum penalty available under the U.S. Code. Mr. David testified at pretrial hearing that he will risk at least 10 years' prison time going to trial. *Id*. at 44. The statutory penalty for these circumstances, where no person suffers serious bodily injury in the process, but agents find over five kilograms of cocaine, could carry as much as a life-plus-ten year sentence. 21 U.S.C. § 841(b)(1)(A). Multiple corroborating testimony concerning the amount of cocaine Officer McNown first found, coming across Mr. David as he stuffed contraband labelled with a well-known brand into duffel bags, indicate his guilt under the statute. R, 3-4. Facing an effective death sentence of life in prison, only the occasional criminal defendant would turn down one year of prison time upon adequate advice of counsel.

Despite conflicting testimony whether Mr. David would have given up his supplier, AUSA Marie's offer gave him only one meaningful choice, to accept. Upon being confronted by Agent Malaska, Mr. David's first impression was that he would not give up his supplier. R, 4. However, Mr. David's offhand first assertion was not part of plea bargaining. *Ibid*. The agent simply asked him a question which no criminal defendant would affirmatively respond to. *Ibid*. Because he was in temporary federal detention for just three days, Mr. David was not under risk of being retaliated against if he simply did not talk about the predicaments of his case to

wandering ears. *Ibid*. Mr. David's only real choice was to accept the terms of the plea bargain had they been communicated to him.

To a near certainty, Mr. David would have accepted the terms of AUSA Marie's plea deal. Thus, counsel's assistance prejudiced the probable outcome of trial proceedings in Mr. Long's failure to communicate the offer.

Therefore, Mr. David's right to effective assistance merits this Court's remanding to reimpose the Government's plea offer.

CONCLUSION

Therefore, this Court should reverse the order of the Thirteenth Circuit and remand for consistent proceedings.