No. 4-422

In The Supreme Court of the United States

CHAD DAVID,
Petitioner,
v.

THE UNITED STATES OF AMERICA,
Respondent.

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

BRIEF FOR RESPONDENT

Counsel for Respondent

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STATEMENT OF THE ISSUES

I. Whether under the Fourth Amendment, the community caretaking doctrine applies to the home, and if so, whether Officer McNown was performing a community caretaking function when he entered defendant's home to check on defendant's well-being.

II. Whether Sixth Amendment rights attach to plea negotiations that occur prior to any formal indictment.

III. Whether defendant can establish prejudice under *Strickland* where he received the minimum sentence, after a fair trial conducted under the supervision of effective counsel.

STATEMENT OF THE FACTS

I. Search of defendant's home

Officer James McNown ("McNown") has been a member of the Lakeshow police department ("LPD") for 12 years, having joined after college. Ex. A, pg. 1, lines 8-11. Until recently, McNown was a member of the Lakeshow Community Revivalist Church ("the church") *Id*. at line 18. The defendant Chad David ("defendant") was the head minister during McNown's tenure as a congregant. *Id*. at line 22. McNown attended Sunday services that were led by the defendant. Ex. A, pg. 2, line 4.

On Sunday, January 15, 2017, McNown attended the Sunday sunrise service at 7 AM as per usual. *Id*. at line 21. McNown noticed that at 7:15 AM, defendant had yet to show up for the service. *Id*. at line 22. McNown thought this was unusual because defendant had a reputation for showing up at "every service, rain or shine." *Id*. at lines 26-28. Another congregant Julianna Alvarado ("Alvarado") approached McNown expressing her concern for defendant. R.at 2. Another congregant, Jacob Ferry ("Mr. Ferry"), approached McNown and told him that he thought he saw defendant at a bar the night prior. *Id.* However, McNown laughed off Mr. Ferry's concerns because he knew defendant was not a drinker. Ex. A, pg. 3, lines 4-7. Instead, McNown believed that defendant was home sick because he knew there was a nasty strain of the Bandwagon flu going around Lakeshow. *Id*. at lines 7-8.

After the service, McNown's patrol began, and he decided to go check on defendant at his home. *Id.* at lines 15-17. McNown picked up a hot tea for defendant to make him feel better. *Id.* at lines 15-18. McNown did not have defendant's address, so Alvarado provided it to him. *Id.* at lines 22-23. Upon entering the gated community that defendant lived in, McNown noticed an SUV

leaving with Golden State license plates. Ex. A, pg. 4, lines 1-5. He knew these SUV's were popular among drug dealers, but, "didn't know where the car was coming from." *Id*. at line 6.

Upon arriving at defendant's home, McNown noticed that the former's car was in the driveway. *Id*. at lines 14-16. McNown thought it was unusual that as he approached the front door, he heard loud scream-o music playing. *Id*. at lines 15-17. Because of the type of music and the cursing in the song, McNown thought there was something unusual going. *Id.* McNown didn't think anyone could have heard his knocking or the doorbell ringing because of the loud music. Ex. A, pg. 4, lines 19-20. After waiting two minutes for a response, McNown peered through the window; he did not see anyone but did see the TV was on. *Id*. at line 21. McNown worried that someone else was in the home because the movie playing did not seem like one defendant would watch. *Id.* at lines 25-28. Because of the concern for both defendant's safety, McNown entered the house through the backdoor. Ex. A, pg. 5, lines 8-11. While not suspicious of anything specific yet, McNown was eager to, "check the well-being of Chad . . and give him his tea." *Id*. at lines 13-15.

McNown turned the TV off because it was loud, and while doing so, found a small notebook with the name "Julianna Alvarado" on it. *Id*. at lines 20-23. McNown could still hear the loud music emanating from the second floor. Ex. A, pg. 5, at lines 26-28. Still concerned for defendant, McNown then decided to go upstairs. *Id.* On the second floor, McNown went to the room where the music was playing. Ex. A, pg. 6, line 2. When he opened the door, he saw defendant packaging cocaine into small zip lock bags. *Id*. at 6-7. McNown then arrested defendant and called his department for assistance. *Id*. at 17-19. Due to the amount of cocaine, 10 kilograms, and the seriousness of the offense, a Drug Enforcement Agency ("DEA") agent was sent. R. at 3, lines 15-17.

II. Plea-bargain

When DEA Agent Colin Malaska ("Malaska") arrived on the scene, he read defendant Miranda rights. R. at 3, lines 23-24. Malaska then asked defendant where he obtained the large amount of cocaine, but defendant replied that, "there was no way he would give up his suppliers." *Id.* at lines 25-26. Upon arriving at a federal detainment facility, he called a criminal defense attorney, Keegan Long ("Mr. Long"). Defendant knew that Mr. Long was an alcoholic. R. at 4, lines 1-2. In fact, defendant once caught Mr. Long stealing a bottle of wine from the church's storage closet. Ex. B, pg. 2, lines 1-3. Defendant admitted in his deposition that he knew Mr. Long was a "complete drunk" but disregarded Mr. Long's alcoholism, thinking it would not impact him. Ex. C, pg. 2, at lines 23-26.

Malaska believed that defendant could provide useful information leading to the kingpin's arrest. *Id.* He encouraged the prosecutors to offer defendant a deal *before* any charges would be filed so there would be less public knowledge about the arrest. *Id.* at lines 6-9. Malaska knew that once the arrest got out, the kingpin would be tipped-off and might flee. *Id.*

Without charging defendant, the prosecutors decided to offer a plea of one year in prison in exchange for the name of defendant's suppliers. R. at 4, lines 10-11. A condition of the plea was that the information must lead to at least one arrest. R. at 4, lines 10-11. Because the purpose was to arrest the kingpin, the deal was valid for only 36 hours. *Id.* The offer was emailed to Mr. Long on Monday, January 16, 2017 at 8:00 AM. *Id.* at 11-12. The offer was set to expire on January 17, 2017 at 10:00 PM. *Id.* Mr. Long saw the email but misread the time limit, instead thinking the offer was valid for 36 days. *Id*. at lines 23-24. The 36-hour period expired without Mr. Long having communicated the offer to defendant. R. at 4, lines 18-19. Once the period expired, prosecutors indicted defendant, charging him with one count of 21 U.S.C. § 841 on the morning of January 18,

2017. *Id.* at lines 20-21. Mr. Long realized his mistake on January 18, 2017, when prosecutor Kayla Marie ("Ms. Marie") asked Mr. Long why defendant did not accept the plea. *Id.* at lines 22-23. Mr. Long then promptly informed defendant of the offer and the subsequent mistake. *Id.* at line 26. Defendant fired Mr. Long as counsel. *Id*. Defendant then hired Michael Allen ("Mr. Allen") to represent him. *Id.* at line 27.

SUMMARY OF THE ARGUMENTS

I. The motion to suppress was properly denied because defendant's Fourth Amendment rights were not violated. The community caretaking doctrine extends to the home because police officers' functions are not limited to that of law enforcement. To best balance privacy interests against that of the public need, this Court should adapt the test applied by the court in *State v. Pinkard*. 327 Wis.2d 346 (2010). The test has three parts: "(1) a search occurred within the meaning of the Fourth Amendment, (2) police conduct was a bona fide community caretaking function, and (3) that the public need and interest outweigh the intrusion upon the privacy of the individual." *Id.* at 348. Here, Officer McNown was acting in his capacity as a community caretaker when he entered defendant's home.

II. Defendant's Sixth Amendment rights were not violated because the rights do not attach to pre-indictment plea negotiations. This court has yet to extend Sixth Amendment rights to any scenario where a defendant has not been formally charged. Here defendant has failed to make any novel or compelling allegation which would induce this court to hold contrary to the bright-line rule that it has long established and upheld.

III. Even if it was determined that attachment had occurred, defendant would still be unable to establish prejudice under the second prong of the *Strickland* test. Defendant has not proved that he (1) would have accepted the plea offer had he been aware of its existence, (2) that

the prosecutor would have adhered to the plea offer, and (3) that the court would have approved a plea that was an 85-month deviation from the acceptable sentencing guidelines. *Strickland v. Washington*, 466 U.S. 668, 687 (1984).

STANDARD OF REVIEW

The reasonableness of searches under the Fourth Amendment is a question that this Court reviews de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Whether a defendant's Sixth Amendment rights were violated is a question that this Court reviews de novo. *People v. Lockridge*, 870 N.W.2d 502, 511 (Mich. 2015).

ARGUMENT

I. THE MOTION TO SUPPRESS WAS PROPERLY DENIED BECAUSE THE COMMUNITY CARETAKING DOCTRINE EXTENDS TO THE HOME AND OFFICER MCNOWN WAS PERFORMING A COMMUNITY CARETAKING FUNCTION WHEN HE ENTERED DEFENDANT'S HOUSE

The Fourth Amendment does not guard "against all searches and seizures, but only against *unreasonable* searches and seizures." *United States v. Sharpe*, 470 U.S. 675, 682 (1985); *see* U.S. Const. amend IV. Though a warrantless search of a home is presumptively unreasonable, that presumption can be overcome. *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006).

While not an exception per se, the community caretaking doctrine was first introduced by this Court in 1973. *Cady v. Dombrowski*, 413 U.S. 433 (1973). The doctrine "requires a court to look at the function performed by police officers." *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009). Searches are reasonable where they are conducted under the scope of community caretaking "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441.

A. COMMUNITY CARETAKING IS AN ESSENTIAL FUNCTION OF LOCAL POLICE, DENOTING THE WIDE RANGE OF POLICE ACTIVITIES UNDERTAKEN TO SECURE THE COMMUNITY

Police officers have multiple responsibilities, only one of which is the enforcement of criminal law. *See* Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. Chi. Legal F. 261, 272 (1998). While local officers investigate crimes and arrest suspected criminals, the totality of their responsibilities is extraordinarily broad. For example, their duties include helping parents find lost children and checking on the well-being of elderly citizens. *Id.* It is estimated that two-thirds of all police calls are for order maintenance and peacekeeping activities. SAMUEL WALKER, THE POLICE IN AMERICA 112 (McGraw Hill 2nd ed. 1992). The New York City Police Department, for example, describes their mission to be, in part, "preserv[ing] peace…and maintain[ing] order." N.Y.C. Police Dep't, Patrol Guide Procedure No. 200-02

(2016), https://www1.nyc.gov. Limiting the job description of local officers to that of criminal justice discounts the intricacies of their work. *See* Livingston, *supra* at 272.

This Court created the term "community caretaking functions" to describe those tasks unrelated to crime-fighting. *See Cady*, 413 U.S. at 441. In *Cady*, an off-duty Chicago officer was involved in a car accident; his car was towed and left outside of an unguarded private garage. *Id.* at 437. The searching officer was concerned that the officer's weapon was still in the car, and upon searching, found evidence of the defendant's crime. *Id.* This Court found that the officer's search of the car fell within the scope of his duty to protect the community. *Id*. at 443. In holding that the officer was working within the scope of his duty to protect the public, this Court highlighted the important role local officers play in securing the safety of the community. Their duties as local officers are not limited to stopping and solving crime, but to prevent crime as well. *Id*.

Since *Cady*, courts across the nation have recognized the community caretaking doctrine. *See United States v. Harris*, 747 F.3d 1013, 1017 (8th Cir. 2014) (recognizing that a "community caretaker" classification may justify non-investigatory searches in certain limited situations). Local police officers often respond to calls of noise complaints, stray animals, or tend to the injured. *See United States v. Rohring*, 98 F.3d 1506, 1509 (6th Cir. 1996) (holding officer entry into a home to provide peace to the community was appropriate when neighbors complained about loud music from a home). Additionally, the Eighth and Fourth Circuits, as well as an increasing number of state courts, have all agreed with this Court that local officers serve important community caretaking functions totally divorced from criminal detection and investigation. *See Hunsberger*, 570 F.3d 546 (4th Cir. 2009); *see also United States v. Quezada*, 448, F.3d 1005, 1007 (8th Cir. 2006); *United States v. Smith*, 820 F.3d 356, 361 (8th Cir. 2016).

B. THE COMMUNITY CARETAKING DOCTRINE MUST BE EXPANDED TO THE HOME BECAUSE THE NEED TO PROTECT AND PRESERVE LIVES IS NOT LIMITED TO AUTOMOBILES

There is no language in the *Cady* decision that "limits an officer's community caretaking functions to incidents involving automobiles." *State v. Pinkard*, 785 N.W.2d 592, 598 (Wis. 2010). Rather, *Cady* proposes a "cautious approach when the exception is invoked to justify law enforcement intrusion into a home." *South Dakota v. Deneui*, 775 N.W.2d 221, 239 (S.D. 2009); *see United States v. Gillespie*, 332 F.Supp.2d 923, 929 (W.D.Va. 2004). Even though the *Cady* decision was in part justified by the lower expectation of privacy in cars, the function of local police officers outside of the criminal context applies to homes as well. "Homes cannot be arbitrarily isolated from the community caretaking equation." *See Deneui*, 775 N.W.2d at 239. If "securing a car and its contents" is a legitimate community caretaking function, then surely checking on the elderly or ill in their homes is one. *See South Dakota v. Opperman*, 428 U.S. 364, 373 (1976). To limit the doctrine would undermine local police's ability to perform said caretaking functions. As noted by the Thirteenth Circuit's majority, "entering a home is a natural consequence of the role that law enforcement local officers play in their everyday duties to protect and serve their communities." R at 16, line 3-4.

For example, local police routinely respond to calls from citizens expressing their concern about a friend, co-worker, neighbor, or loved one. Often times, "callers are . . . fearful that the missing person may be ill or even dead." *See* JONATHAN RUBINSTEIN, CITY POLICE 92-3 (1973). In *Bridewell*, police were confronted with that very issue when an individual was concerned about her neighbor; the latter had not returned any of the person's phone calls. *See United States v. Bridewell*, 759 P.2d 1054 (Ore. 1988). An officer was dispatched to the scene to make sure the missing neighbor was okay. Upon arrival, they found the neighbor alive and well, along with 354 marijuana plants. There, the Oregon Supreme Court found that the entry could not be established

under any exceptions to the warrant requirement. *See Id.* at 1057-58. At the same time, the court also found that "police lacked probable cause to obtain a warrant." *See Id*. Thus, even though the officer entered the home to check on the neighbor, his entry was deemed improper. *Bridewell* illustrates the need for the doctrine to be expanded to the home. There, the concerned citizen who contacted police was genuinely worried for the safety of her neighbor. How are local police expected to check on those who might need aid if they aren't permitted to enter the home for the *purpose* of providing said aid?

In *State v. Pinkard*, this issue was addressed by the Supreme Court of Wisconsin. 327 Wis. 2d at 346. There, officers entered a home after receiving an anonymous tip that two people appeared to be sleeping, and on drugs, near the rear door of their house. *Id.* While providing aid to the occupants, the officers saw, in plain view, drugs and paraphernalia. *Id.* The court extended the doctrine because it found that limiting it to just automobiles would have long lasting harms. If police cannot enter the home without a warrant, but cannot obtain a warrant, "the police are powerless." *Id.*

The community caretaking doctrine is necessarily separate from other exceptions to the Fourth Amendment because it encompasses important categories that would not otherwise justify warrantless entry into someone's home. One need not look any further than the instant matter. Officer McNown entered the home because he was concerned about the welfare of defendant. R. at 3, lines 8-9. There is nothing in the record which would have supported entry into the home under exigent circumstances or the emergency aid doctrine. Rather, Officer McNown, was concerned about the welfare and safety of defendant and entered the home to see if defendant was okay. R. at 3, lines 8-9. The fact that Officer McNown found evidence of a crime in the home does not negate his non-investigative reason for entry. Without the community caretaking doctrine, had

defendant been sick and in need of assistance, McNown would not have been able to either lawfully enter the home to provide aid or obtain a warrant.

In addition to the *need* for the doctrine's expansion, this Court's decision in *Cady* did not limit the doctrine to the searches of cars. This Court has subsequently heard two cases pertaining to the community caretaking doctrine, and chose not to restrict the doctrine to automobiles. *See Opperman*, 428 U.S. at 369; *see also Colorado v. Bertine*, 479 U.S. 367, 381 (1987) ("Inventory searches are not subject to the warrant requirement because they are conducted by the government as part of a 'community caretaking' function, 'totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.") (quoting *Cady*, 413 U.S. at 441).

C. THE STANDARD GOVERNING THE COMMUNITY CARETAKING DOCTRINE THAT THIS COURT SHOULD ADOPT IS ARTICULATED IN *PINKARD*

The sanctity of the home results in the need for the highest constitutional protections. However, "a balance must be maintained between the recognition of the liberty of a citizen to be free from unreasonable searches and seizures and the recognition of the common-sense performance of law enforcement activities." *People v. Ray*, 981 P.2d 928, 939 (Cal. 1999). While reasonableness and the "totally divorced" standard are necessary in considering whether the doctrine applies, this Court should adopt a more in-depth test. In *Pinkard,* the Supreme Court of Wisconsin applied a three-part test:

> (1) [whether] a search occurred within the meaning of the Fourth Amendment, (2) [whether] police conduct was a bona fide community caretaking function, and (3) [whether] the public need and interest outweigh the intrusion upon the privacy of the individual.

347 Wis. 2d at 348. This test will provide guidance in determining the reasonableness of such entries by establishing clear considerations as to whether the police are truly performing a duty to

the community, and whether that duty outweighs the privacy interests of the victim of the search. There is no dispute that McNown's entry into defendant's home was a search under the Fourth Amendment for the purpose of applying the community caretaking doctrine. Thus, the applicability of the doctrine in the present case, turns on the second and third prongs.

i. Officer McNown's conduct was a bona fide community caretaking function because it was totally divorced from any criminal investigation or detection

The lower courts correctly held that Officer McNown's entry into defendant's home was permissible under the Fourth Amendment because he was acting in his capacity as a community caretaker. The standard from *Cady* requires that for an officer's conduct to be considered a community caretaking function, it must be "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 conduct is found to have been totally divorced, then it is a bona fide community caretaking function. *Pinkard*, 347 Wis. 2d at 366.

Here, the lower courts correctly looked to the several circuits that have upheld the community caretaking doctrine in cases analogous to the one at bar. R. at 16 (finding that the concept of community caretaking has been expanded to homes across the nation in both federal and state courts). While not binding on this Court, these cases shed a light on what qualifies as "totally divorced." As in *Deneui*, where officers entered a home because they smelled ammonia, here, the health and well-being of defendant was the originating concern that prompted McNown to check on him. Ex. A, pg. 3, lines 8-10; 15-17; *see Deneui*, 775 N.W. 2d 221 (S.D. 2009). McNown stated in his report and on direct examination, that he was concerned because: (1) defendant missed the service he leads, a first by McNown's observations, Ex. A, pg. 3, at lines 26-28; (2) two other congregants had expressed their concern, R. at 2, lines 18-19; and (3) McNown understood that the Bandwagon Flu was going around, which can pose a serious threat for a 72-

year-old, Ex. A, pg. 2, lines 7-8. *See* Ex. F. As previously discussed, checking on somebody who might be unwell or in need of assistance falls within the community caretaking functions.

Upon arriving at defendant's home, McNown's concern grew when he heard the loud music blasting from the house. Ex. A, pg. 4, lines 15-17. After knocking on the door and waiting a couple of minutes, McNown finally entered. Ex. A, pg. 5, lines 8-11. Even if the initial concern about the defendant's welfare was not sufficient, as in *Rohring*, McNown's entry would be lawful because keeping the peace is a legitimate community caretaking function. *See Rohring*, 98 F.3d 1506 (6th Cir. 1996). The music was loud enough that McNown believed his knocking could not be heard inside the home and he grew worried that defendant could be in harm because somebody else might have been in the house. *Id.*

Defendant maintains that McNown's conduct was not "totally divorced"; that there was suspicion that criminal activity was afoot. However, just as the officer in *Cady* did not suspect he would find evidence of a crime in the car, neither did McNown. First, McNown testified that he did not know where the SUV that he observed came from. Ex. A, pg. 4, lines 1-5. The area was a gated community and thus the car could have come from any house. Just because it had license plates that were popular among drug dealers has no bearing on what McNown believed he would find at defendant's home. McNown had no suspicion that defendant was somehow involved in drug activity, or that he would find evidence of such activity in the home. For this Court to find otherwise not only discredits McNown's testimony, but relies on speculation as well.

With respect to defendant's absence from church, defendant was correct in stating that McNown had a suspicion, but McNown's only suspicion was that defendant might have the flu. *Id.* at lines 7-8. McNown decided to check on defendant because he was concerned about the latter's health and well-being. *Id.* at lines 15-17. There is nothing in the record to suggest that

McNown could have in any way known that defendant was involved in drug activities. McNown's purpose was check on the man that had helped him through tough times. It would be unreasonable for this Court to find that defendant's absence caused McNown to have suspicion of criminal activity. Finally, the music and movie playing in the house only increased McNown's already established concern for defendant. McNown was not suspicious of any criminal activity, rather he was eager to "check the well-being of Chad." Ex. A, pg. 5, at lines 13-15. Therefore, McNown's conduct was a bona fide community caretaking function.

ii. Public need and interest outweighs privacy concerns because the absence of law enforcement motive mitigates any harm to the individual

In determining whether the bona fide conduct of the local officer was reasonable, we balance the "public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen" *State v. Kramer*, 315 Wis. 2d 414, 438 (Wis. 2009). The stronger the public need, and minimal the intrusion, the more likely the police conduct was reasonable. *Id.* Such balancing entails consideration of the following factors: (1) the degree of public interest and exigency of the situation; (2) the attendant circumstances surrounding the search including time, place, and use of force; (3) whether an automobile is involved; and (4) the availability and effectiveness of alternatives to the type of intrusion actually accomplished. *Id.*

To start, it is important to note that entries for community caretaking functions are unlike traditional searches and seizures in several ways. First, when local officers enter the home to render aid or check on one's welfare, they seek "neither evidence nor suspects." Livingston, *supra* at 272. Second, the "absence of law enforcement motive often mitigates the harms associated with intrusions on privacy for the purpose of criminal investigation." *Id.* As in the instant case, when a local officer enters the home to ensure that the individual is not injured or in need of aid, it does

not "damage reputation or manifest official suspicion." *Id*. Thus, searches that are conducted under the doctrine are not as intrusive as those done for investigatory purposes, because they are not looking for any evidence of a crime.

As no automobile was involved, and as previously discussed, no exigent circumstance was present, this prong rests on the second and fourth factors. The search occurred immediately after McNown noticed defendant's absence from the service. There was no force used and McNown never felt he had to draw his weapon. *See Pinkard*, 347 Wis. 2d at 374 (noting that the second factor weighs in favor of the state, in part, because the none of the officers drew their weapons). Before entering, McNown knocked on the door and rang the bell. Ex. A, pg. 4, lines 15-17. McNown waited for a couple of minutes but there was no response. *Id.* at line 21. Because the music was so loud, McNown doubted anybody could hear, and thus decided to enter through the backdoor. Ex. A, pg. 5, lines 8-11. In *Pinkard*, the court held that because the officer believed someone was in danger, it was "not unreasonable for them to wait 30-45 seconds prior to entering." *Pinkard*, 347 Wis. 2d at 374. Therefore, the factor weighs in favor of finding that McNown's exercise of the community caretaking function was reasonable.

As to the fourth factor, the court in *Pinkard* declared that the question to ask in analyzing this factor is whether "the officers would have been derelict in their duty had they acted otherwise." *Id.* at 376. This is not based on the knowledge we now have, but rather what was known at the time of the entry. *See Id*. at 376 (stating that it must be emphasized that the fact that no one was injured in the end is of no consequence). Here, a 72-year-old prominent minister known around the community for his inspiring sermons was missing. Two congregants approached McNown at the service expressing their concerns and asking McNown to check on him. R. at 2. Had McNown ignored their pleas, and defendant was in danger or in need of aid, he would have been derelict in

his duty. Accordingly, McNown's conduct was a legitimate community caretaking function, and therefore the entry and search of defendant's home was lawful.

II. DEFENDANT'S SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL WAS NOT VIOLATED BECAUSE THE RIGHT DOES NOT ATTACH PRIOR TO INDICTMENT OR ANY OTHER FORMAL FILING OF CHARGES

The Sixth Amendment of the Constitution provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. The plain language of the text indicates that the Sixth Amendment is applicable where an individual is being prosecuted for a particular crime and requires a defense. Here, defendant had not yet been charged with any crime at the time the plea was made or expired. In fact, the prosecution made a specifically calculated decision, pursuant to the request of DEA Agent Malaska, not to prosecute defendant prior to offering the plea. R. at 4, lines 6-8. The prosecution could have, as in *Missouri v. Frye* and *Lafler v. Cooper*, proceeded with indicting defendant prior to offering the plea. *See Missouri v. Frye*, 566 U.S. 134, 144 (2012); *see also Lafler v. Cooper*, 566 U.S. 156, 162 (2012). Because the prosecution made active efforts not to charge defendant, his right to effective assistance of counsel had not yet attached at the time the plea was offered. Defendant cannot assert a valid claim that his Sixth Amendment rights were violated simply because he was not reoffered a plea which he was not entitled to receive.

"[I]t has been firmly established that a person's Sixth . . . Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Kirby v. Illinois*, 406 U.S. 682, 688 (1972); *see Powell v. Alabama*, 287 U.S. 45 (1932); *United States v. Howard*, 752 F.2d 220 (6th Cir. 1985); *United States v. Alvarez*, 142 F.3d 1243 (10th Cir. 1998); *United States v. Moody*, 206 F.3d 609 (6th Cir. 2000); *Turner v. United States*, 885 F. 3d 949 (6th Cir. 2018). This standard was initially developed by this court in *Powell* and

has been fervently followed since. *Kirby*, 406 U.S. at 688; *see Powell v. Alabama*, 287 U.S. 45 (1932)). The Sixth Circuit notes that, in addition to this Court, all circuits "have held that the sixth amendment right to counsel does not attach until adversary judicial proceedings have commenced." *Howard*, 752 F.2d at 226.

> This Court, in *Kirby*, made clear that this standard serves a substantial purpose:
>
> > The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of the government and defendant have solidified.

Kirby, 406 U.S. at 689. This notion was furthered by this Court in *McNeil v. Wisconsin*, where it is explained that "[t]he purpose of the Sixth Amendment counsel guarantee – and hence the purpose of invoking it – is to 'protec[t] the unaided layman at critical confrontations' with his 'expert adversary,' the government, *after* 'the adverse positions of government and defendant have solidified.'" *McNeil v. Wisconsin*, 501 U.S. 171, 177-78 (1991) (quoting *United States v. Gouveia*, 467 U.S. 180, 189 (1984)). Here, absent indictment, there was no need to provide defendant with legal expertise to protect him from the intricacies of the legal field. As discussed, the purpose of obtaining counsel, particularly in criminal proceedings such as this, is to ensure that "the accused shall not be left to his own devices in facing the 'prosecutorial forces of organized society.'" *Moran v. Burbine*, 475 U.S. 412, 430 (1986) (quoting *Maine v. Moulton*, 474 U.S. 159, 170 (1985)); *see Kirby*, 406 U.S. at 689. Courts have consistently held that the purpose of the Sixth Amendment and its attachment, "is to guarantee assistance at trial, 'when the accused [is] confronted with both the intricacies of the law and the advocacy of the public prosecutor.'" *Moody*, 206 F.3d at 613 (quoting *United States v. Ash*, 413 U.S. 300, 309 (1973)). The attachment of Sixth Amendment rights are "'most critical…from the time of their arraignment until the beginning of their trial, when consultation, through-going investigation and preparation were vitally important'" *Brewer*

v. Williams, 430 U.S. 387, 396 (1977) (quoting *Powell*, 287 U.S. at 57.) In this case, prior to being charged, defendant did not require the expert legal advice of an attorney; there were no legal decisions to be made or adverse positions to defend against.

Courts have long held that once the Sixth Amendment rights have attached, "criminal defendants have a right to the assistance of counsel during 'critical stages' of the prosecution." *Turner*, 885 F.3d at 953 (citing *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009)). Traditionally, these critical stages have only been extended to include "'arraignments, *post indictment* interrogations, *post indictment* lineups, and the entry of a guilty plea.'" *Turner*, 885 F.3d at 969 (quoting *Frye*, 566 U.S. at 140). Even though this Court, in *Frye* and *Lafler*, held that plea negotiations are considered a critical stage of prosecution, those cases involved plea negotiations that occurred *after* the defendants had been formally charged with crimes. *Turner,* 885 F.3d at 953. The plea negotiations here occurred *before* defendant was formally indicted. Since then, this Court, as well as all but one of the circuit courts, have declined to extend Sixth Amendment rights to pre-indictment plea negotiations. *Turner*, 885 F.3d at 954 ("Only one circuit has implied that the Sixth Amendment right to counsel extends to pre-indictment plea negotiations, but that opinion was non-precedential and the issue of when the Sixth Amendment right to counsel attaches was not at issue before the court in that case.") (citing *United States v. Giamo*, 665 Fed.Appx. 154, 156-57 (3rd Cir. 2016)). The Sixth Circuit in *Moody* made clear that this Court has established a bright line rule regarding Sixth Amendment attachment. 206 F.3d at 614; *see Turner*, 885 F.3d at 953 ("Because the Supreme Court has not extended the Sixth Amendment right to counsel to any point before the initiation of adversary judicial criminal proceedings, we may not do so.")

In *Rothgery v. Gillespie County, Tx.*, the concurring Justices used "strands of authority" to "interpret the Sixth Amendment to require the appointment of counsel only after the defendant's

prosecution has begun, and then only as necessary to guarantee the defendant effective assistance at trial." 554 U.S. 191, 217 (2008) (Roberts, J., concurring) (citing *McNeil*, 501 U.S. at 177-178). As the long line of case law suggests, this Court has consistently held that the Sixth Amendment right to counsel only attaches once formal charges have been made, and not a moment before. Defendant asserts that the right had already attached when Mr. Long failed to communicate that a plea had been offered, but his assertions are unsupported by any binding or precedential court. This Court should not only follow its own precedent, but should hold similarly to the Sixth Circuit in *Turner* and *Moody* and decline to extend the Sixth Amendment right to counsel to pre-indictment plea offers. *See Turner*, 885 F.3d 949 (6th Cir. 2018); *see also Moody*, 206 F.3d 609 (6th Cir. 2000).

III. EVEN IF DEFENDANT'S RIGHT TO COUNSEL HAD ATTACHED, HE IS NOT ENTITLED TO A REMEDY AS DEFENDANT IS UNABLE TO ESTABLISH THAT HE SUFFERED PREJUDICE UNDER THE *STRICKLAND* TEST

The test developed by this Court in *Strickland* is the standard by which a defendant can establish a claim of ineffective assistance of counsel. To successfully make a claim, defendant bears the sole burden of making two showings:

> First, defendant must show that counsel's performance was deficient. This requires a 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. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland v. Washington, 466 U.S. 668, 687 (1984). As stipulated by the parties, and held by the lower court, defendant has satisfied the first prong under *Strickland*. However, defendant has failed to meet his burden of establishing that he was prejudiced due to counsel's failure.

A. DEFENDANT IS PRECLUDED FROM BEING REOFFERED THE INITIAL PLEA BECAUSE HE CANNOT ESTABLISH PREJUDICE

At the outset, it is of paramount importance to note that defendant is asserting that he was prejudiced by his inability to benefit from the plea; a benefit which he has absolutely no constitutional right to. As Justice Scalia outlines in *Frye*, where counsel failed to communicate a plea offer, "[c]ounsel's mistake did not deprive [the defendant] of any substantive or procedural right; only of the opportunity to accept a plea bargain to which he had no entitlement in the first place." *Frye*, 566 U.S. at 152 (Scalia, J., dissenting); *see Lafler*, 566 U.S. at 180 ("'[T]here is no constitutional right to plea bargain; the prosecutor need not do so if he prefers to go to trial.'") (quoting *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)).

This Court held that "[e]ven if a defendant shows that particular errors of counsel were unreasonable . . . the defendant must show that they actually had an adverse effect on the defense." *Strickland*, 466 U.S. at 93. Furthermore, holding that "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would be different." Here, as was the case in *Lee v. United States*, defendant is required to "convince the court that a decision to reject the plea bargain would have been rational under the circumstance." Brief for Respondent at 8, *Lee v. United States*, 137 S.Ct. 1958 (2017) (No. 16-327). Further noting that "'it is often quite difficult for petitioners who have acknowledged their guilt to satisfy *Strickland's* prejudice prong.'" *Id.* (quoting *Roe v. Flores-Ortega*, 528 U.S. 470, 486 (2000)). This Court provides that a showing of prejudice under *Strickland* is to be evaluated in three ways: "whether he would have accepted the . . . plea bargain . . . whether the prosecution would have withdrawn the plea offer. And finally, . . . whether the trial court would have approved the plea agreement." *Frye*, 566 U.S. at 154.

Here, defendant, post-conviction, asserts that had Mr. Long offered him the plea deal, he would have accepted the offer without hesitation. Defendant states, "[o]f course I would have taken it. One year in prison compared to risking at least ten at trial. It's a no brainer." Ex. C, pg. 3, lines 22-23. Defendant, however, made a directly contradictory statement to Agent Malaska upon his arrest on Sunday, January 15, 2017. Agent Malaska inquired where defendant was obtaining the cocaine and defendant responded that "there was no way he would give up his suppliers – indicating that doing so could lead to his death and his church being burnt down." R. at 3, lines 25-26. This unwillingness to reveal information was again noted in Officer McNown's Incident Report indicating that when prompted to reveal his sources defendant replied, "there is no way in hell I will tell you. They will kill me and burn my church down if I give you their names." Ex. F. Because defendant expressed to two law enforcement officers that he would not proffer that specific information, it is clear that he would *not* have accepted the plea deal had it been offered to him by Mr. Long. R. at 3, lines 23-26. Defendant's assertion that he would have accepted the plea is a self-serving attempt to establish prejudice after he received a sentence that he found dissatisfactory. The plea deal constructed by the prosecution reduced defendant's sentence to one year, *only* if he revealed the names of his suppliers and *only* if such information lead to one arrest. R. at 4, lines 10-11. As noted in the District Court's opinion, given that these were the conditions of the plea, it seems highly unlikely that defendant would have, within the 36 hours, decided to reveal information which might lead to not only his death, but that of innocent churchgoers as well. R. at 11, lines 26-28. Due in part to the inconsistency of defendant's statements, and in part to a logical review of the circumstances, defendant has failed to sufficiently establish that there is a reasonable probability that he would have accepted the plea offer had he been aware of its existence.

Next, to make a showing of prejudice, defendant must prove that the prosecutor would not have withdrawn the plea offer before he was able to accept it. It is the general rule, that a prosecutor can withdraw a plea deal "at any time prior to, but not after, the entry of a guilty plea or other action constituting detrimental reliance on the defendant's part." *Frye*, 566 U.S. at 154; *see, e.g., United States v. Kuchinski*, 469 F.3d 853, 857-858 (9th Cir. 2006). Here, even if defendant had been made aware of the plea deal, the prosecution could still have revoked the offer because they maintain broad discretion to pull a plea at any point, for any reason, up until the court accepts the offer. It is only then that the Government and the court are bound to comply with the terms of the offer. As such, defendant could have accepted the offer, provided the information as requested, and the prosecution could have chosen to withdraw the plea and proceed to trial. It is difficult to definitively rule, retroactively, what the prosecution would have done. There remains the understanding that the prosecution retained the ability to retract the plea at nearly any point and that the court is the final arbiter in determining if a plea will be accepted or denied. This Court in *Frye* indicated that whether the prosecution and the court could or should accept a plea "is a matter of state law, and it is not the place of this court to settle those matters." *Frye*, 566 U.S. at 150. Here, because the record does not provide guidance as to the regulation of accepting or rejecting plea deals in the State of Staples, and because defendant faced federal charges, we turn to federal regulations on this matter.

In reviewing federal sentences, trial courts follow a three-step procedure, that was set out by this court in *Gall v. United States*, and explained further in the Departure and Variance Primer.

> First, the court must properly determine the guideline range. Second, the court must determine whether to apply any of the guidelines' departure policy statements to adjust the guideline range. Third, the court must consider all the factors set forth in 18 U.S.C 3553(a) as a whole, including whether a variance – a sentence outside the advisory guideline system – is warranted.

Primer on Departures and Variances II(A) (U.S. Sentencing Comm'n 2018); *see Gall v. United States*, 552 U.S. 38, 51 (2007). Applying this standard to the case at bar begins with the Federal Sentencing Guidelines, which provide insight as to the applicable sentencing range for specific crimes. Here, defendant was charged with one count of 21 U.S.C. §841, for the possession of 10 kilograms of cocaine with specific intent to distribute. R. at 1, lines 13-14. This particular crime is defined in the Federal Sentencing Guidelines Manual as a base level 30 crime. U.S. Sentencing Guidelines Manual § 2D(c)(5) (U.S. Sentencing Comm'n 2016). Defendants who have no criminal history face a minimum sentence of between 97 and 121 months in prison. *Id.* When evaluating a plea offer, the court retains broad discretion to either accept or reject a plea. Rule 11(c)(3)(A), Fed. R. Crim. P. According to Chapter 6 of the Federal Sentencing Guidelines Manual, "[i]n the case of a plea agreement that includes a specific sentence…the court may accept the agreement if the court is satisfied . . . that: (2)(A) the agreed sentence is outside the applicable range for justifiable reasons…" U.S. Sentencing Guidelines Manual § 6B1.2(c) (U.S. Sentencing Comm'n 2016). Here, the sentence offered in the plea is certainly outside the applicable sentence guideline range.

The Office of General Counsel of the U.S. Sentencing Commission produced a Departure and Variance Primer in 2018 that provides guidance on when and for what reasons departure from suggested sentencing minimums should be permitted. Primer on Departures and Variances III(3)(B) (U.S. Sentencing Comm'n 2016). Departures from standard sentencing are designed to "help provide courts with a way to impose an appropriate sentence in exceptional circumstances." *Id.* Circumstances sufficient to warrant departure, either by increasing or decreasing a sentence, include inadequacy of criminal history, substantial assistance to authorities, as well as other grounds for departures. In terms of criminal history, §4A1.3(b)(1)(A) prohibits any "departure

below the lower limit of the applicable guideline range for Criminal History Category I." U.S. Sentencing Guidelines Manuel § 4A1.3(b)(1)(A) (U.S. Sentencing Comm'n 2016).

The Ninth circuit applied this standard and held that a defendant's first-time offender status did not warrant any downward departure because the sentencing guidelines *already* account for a defendant's criminal history. *United States v. Atondo-Santos*, 385 F.3d 1199 (9th Cir. 2004). Defendant, here, is not noted to have any prior criminal record, thus placing him within the lowest category of criminal history. The plea offered directly violates §4A1.3(b)(1)(A) by offering a term of imprisonment that is 85 months below the lowest range of acceptable sentencing for the specified crime and defendant's criminal history. U.S. Sentencing Guidelines Manual § 4A1.3(b)(1)(A) (U.S. Sentencing Comm'n 2016). Accounting for defendant's criminal history *twice* to result in the approval of a plea that deviates so significantly from standard sentencing is unjust. This proposition lends itself to the idea that the Federal Government values a defendant's prior ability to abide by the law significantly more than their present violation of the law.

The second circumstance in which departure from sentencing guidelines may be acceptable is one where a defendant provides substantial assistance to authorities. Primer on Departures and Variances III(3)(B) (U.S. Sentencing Comm'n 2018); *see* U.S. Sentencing Guidelines Manual (U.S. Sentencing Comm'n 2016). § 5K1.1(a) details the considerations that a court may use to determine how much a sentence will be reduced for assistance to authorities. These considerations include, for example, the significance and usefulness of the assistance and the truthfulness, completeness, and reliability of the information provided. Primer of Departures and Variances III(3)(B) (U.S. Sentencing Comm'n 2018); *see* U.S. Sentencing Guidelines Manual § 5K1.1(a) (U.S. Sentencing Comm'n 2016). Here, although the prosecution believed the information they sought warranted a sentence of just one year, this Court is not bound by that valuation. "[S]erious

consideration needs be given the government's recommendation, but that is certainly not controlling." *United States v. Pizano*, 403 F.3d 991, 996 (8th Cir. 2005). Given that defendant would not have provided prosecutors with the information they sought, it is unlikely that a court would find such a departure to be reasonable based on substantial assistance to authorities.

Turning to 18 U.S.C. §3553(a), it appears similarly unlikely that an evaluation of the considerations set forth would result in a departure from sentencing norms. §3553 indicates that in determining the sentence to impose, a court shall consider seven factors, including, most notably "the applicable category of the offense committed by the applicable category of defendant as set forth in the guidelines issued by the sentencing commission", "any pertinent policy statement issued by the Sentencing Commission," and "the need to avoid unwarranted sentence disparities among defendants with similar records who have been found guilty of similar conduct." 18 U.S.C. §3553(a). These factors revert to the Sentencing Commission guidelines, which as discussed above, would lead this Court to find that a departure of this magnitude is unreasonable given the circumstances.

With respect to the trial, defendant was given a fair and speedy trial as guaranteed by the Sixth Amendment of the Constitution. Additionally, defendant does not allege that his subsequent counsel, Mr. Allen, was defective in any fashion, thereby continually satisfying his Sixth Amendment right. Not only were defendant's Sixth Amendment rights supremely satisfied throughout his trial, the court closely adhered to the federal sentencing guidelines, sentencing defendant to a sentence a mere month over the lightest sentence for the crime. 18 U.S.C §841. This sentence range is furthered by the federal guidelines, which call for a sentence of between 97 and 121 months for first-time offenders. Although Mr. Long failed to inform defendant that a plea had been offered, his failure did not amount to the level of prejudice that, but for counsel's errors, "'the

result of the proceeding would have been different.'" *Lafler*, 566 U.S. at 163 (quoting *Strickland*, 466 U.S. at 694). Because defendant cannot establish: (1) that he would have accepted the plea; (2) that the prosecutor would not have revoked the plea; (3) that the court was likely to have approved it; or (4) that Mr. Long's actions had any subsequent effect on the fairness of his trial, defendant has not established prejudice sufficient to satisfy the second prong of *Strickland*.

CONCLUSION

For the foregoing reasons, this Court should affirm the United States Court of Appeals for the Thirteenth Circuit's denial of defendant's motion to suppress. Further, this Court should hold that the Sixth Amendment right to effective assistance of counsel does not attach prior to indictment and that defendant was not prejudiced and, therefore, not entitled to a reoffer of the plea.