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 THE RESPONDENT, THE UNITED STATES OF AMERICA

TEAM R38
COUNSEL FOR RESPONDENT
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I. This Court recognized a community caretaker doctrine to allow warrantless searches of vehicles in Fourth Amendment claims. Some lower courts extended this exception to include homes, if the officer had specific reasonable beliefs. Officer McNown conducted a welfare check and entered Mr. David's residence after receiving no answer on the telephone and no response at the door. Should this Court extend the community caretaker doctrine to allow warrantless searches of homes in limited circumstances?

II. This Court requires defendants to prove they were prejudiced by their attorneys' ineffective assistance in Sixth Amendment claims. Furthermore, the right to effective counsel only attaches after a criminal indictment. Mr. David's attorney provided ineffective assistance prior to his indictment, and Mr. David was not prejudiced because he cannot prove the court and prosecution would have finalized the plea deal. Were Mr. David's Sixth Amendment rights violated prior to his criminal indictment?

STATEMENT OF FACTS

Chad David, a seventy-two-year-old man, was a minster in Lakeshow, Staples where he held services every Sunday at the Lakeshow Community Revivalist Church ("the Church"). R. at 2. Officer James McNown, a patrol officer for Lakeshow Police, was a member of the Church. R. at 2. On January 15, 2017, Mr. David was absent from his Sunday service. R. at 2. Members of the Church found this behavior unusual. R. at 2. Julianne Alvarado, a member of the Church, called Mr. David, but Mr. David did not answer. R. at 2. Jacob Ferry, another church attendee, told Officer McNown he witnessed Mr. David at a bar the previous night. R. at 2. Officer McNown told concerned church members he would stop by Mr. David's home to check his welfare. R. at 2.

When Officer McNown arrived at Mr. David's community, the gate keeper allowed him through because he was on duty and in his patrol vehicle. Ex. A at 4. When Officer McNown arrived at Mr. David's home, he saw Mr. David's car in the driveway. R. at 2. He went to the front door and knocked, announcing his presence. R. at 2-3. Officer McNown heard loud music playing somewhere in the house. R. at 2, 3. After no one answered, Officer McNown looked through the window and saw the movie *The Wolf of Wall Street* playing. R. at 3. Officer McNown found this concerning and tried to open the front door. R. at 3. The front door was locked, but Officer McNown entered the home through the back door. R. at 3. Upon entering, Officer McNown noticed the home was in disarray. R. at 3. Officer McNown turned the television off and noticed a notebook with names of church attendees and the words "ounce" and "paid." R. at 3; Ex. A at 5.

Officer McNown then followed the sound of the loud music upstairs, to find its source, and hoped to find Mr. David as well. R. at 3; Ex. A at 4. He opened a bedroom door and found Mr. David frantically packaging powder cocaine into ziplock bags. R. at 3. Officer McNown

handcuffed Mr. David and called the department for instructions on how to proceed. R. at 3; Ex. A at 6.

Soon thereafter, DEA Agent Colin Malaska arrived and commenced his investigation. R. at 3. Agent Malaska advised Mr. David of his Miranda rights and asked where he got the drugs from. R. at 3. Mr. David was unwilling to cooperate and would not reveal his source and claimed he feared that doing so would lead to his death or subject his church to arson. R. at 3.

Mr. David was transported to a federal detainment facility and he called a criminal defense attorney who was a member of the Church, Keegan Long. R. at 3. Mr. David knew that Mr. Long was an alcoholic but did not think this would affect Mr. Long's ability to competently represent him. R. at 4. After Mr. David was in custody, Agent Malaska told the prosecution the importance of discovering the identity of Mr. David's suppliers. R. at 4. The prosecutor waited to indict Mr. David and offered Mr. David a plea deal of one year in prison if he revealed his suppliers. R. at 4. The prosecutor explained this offer was only valid for thirty-six hours. R. at 4. The prosecutor emailed the offer to Mr. Long on January 16, 2017, at 8:00 AM, and the offer was set to expire on January 17, 2017, and 10:00 PM. R. at 4. Mr. Long received the email while he was drinking at a bar and failed to read the information accurately. R. at 4. When the prosecutor called Mr. Long on January 17, 2017, for an update on the offer, Mr. Long did not answer the phone. R. at 4. The prosecutor left a message that Mr. Long did not listen to until after the offer expired. R. at 4. Further, the offer expired before Mr. Long informed Mr. David about it. R. at 4. The prosecutor emailed Mr. Long again after the offer expired. R. at 4. When asked why he did not communicate the offer to his client, Mr. Long stated that he believed the offer was valid for thirty-six days rather than thirty-six hours. R. at 4. Mr. Long immediately contacted Mr. David and informed Mr. David

of the error. R. at 4. Mr. David immediately fired Mr. Long and hired a new attorney, Michael Allen. R. at 4.

I. STATEMENT OF JURISDICTION

Chad David was charged with one count of possession of a controlled substance with the intent to distribute in violation of 21 U.S.C. § 841 on January 18, 2017. R. at 1. The United States District Court for the Southern District of Staples denied Mr. David's motion to suppress evidence and supplemental motion on July 15, 2017. *Id*. On July 20, 2017, Mr. David was found guilty following a jury trial. R. at 13. The United States Court of Appeals for the Thirteenth Circuit properly upheld the district court's ruling on May 10, 2018. *Id*. Mr. David filed a petition for writ of certiorari, which was granted by this Court. R. at 25.

SUMMARY OF ARGUMENT

I. Officer McNown's entry into Mr. David's residence, in an attempt to check Mr. David's welfare, did not violate the Fourth Amendment. The community caretaking exception allows officers to enter a residence if the entry is unconnected with the detection or search for criminal activity, as long as the officer's actions are reasonable. Here, Officer McNown knew that several members of Mr. David's congregation were concerned about Mr. David's welfare. Additionally, Officer McNown knocked and announced his presence to alert occupants of his arrival. The loud music and movie playing indicated someone was inside the home. Nobody responded to Officer McNown's knocks. Therefore, Officer McNown was reasonable in entering the residence to check Mr. David's welfare, believing he might need assistance.

II. Mr. David does not have a Sixth Amendment claim because he was not indicted and was not prejudiced by his attorney's ineffective assistance. The Sixth Amendment right to counsel does not attach prior to an indictment because it is only guaranteed during adversary judicial proceedings. Furthermore, Mr. David does not have a valid Sixth Amendment claim because he did not suffer prejudice as a result of Mr. Long's ineffective assistance. Mr. David made clear that he would not have accepted the plea offer because the offer required him to provide the names of his suppliers, but his prior statements demonstrated he was unwilling to cooperate. Moreover, Mr. David failed to show the plea offer would become finalized without the prosecution canceling the deal or the trial court refusing to accept it. Therefore, Mr. David does not have a valid Sixth Amendment claim.

STANDARD OF REVIEW

I. This Court reviews appeals of motions to suppress in two ways: factual findings are reviewed for clear error, while legal determinations are reviewed *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). The factual findings from the lower court are uncontested, therefore this Court reviews the first issue *de novo*.

II. Constitutional questions are questions of law. *I.N.S. v. St. Cyr*, 533 U.S. 289, 290 (2001). Questions of law are subject to *de novo* review and no deference is given to the lower court. *Pierce v. Underwood*, 487 U.S. 552, 558-59 (1988).

ARGUMENT

I. THE COMMUNITY CARETAKING EXCEPTION TO THE WARRANT REQUIREMENT SHOULD BE EXTENDED TO INCLUDE RESIDENCES BECAUSE IT IS A SPECIAL NEED OF LAW ENFORCEMENT

The Fourth Amendment states that people have a right "to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures...[and that] no Warrants shall issue, but upon probable cause[.]" U.S. Const. amend. IV. This Court has held that both innocent and guilty individuals are guaranteed protection against unreasonable searches and seizures. *McDonald v. United States*, 335 U.S. 451, 453 (1948). With no evidence of an ongoing emergency, officers must have compelling reasons to justify a warrantless search. *Id*. at 454. However, courts have allowed many exceptions to the warrant requirement. *See Warrantless Searches and Seizures*, 40 Geo. L.J. Ann. Rev. Crim. Proc. 44, 44-45 (2011) (The exceptions include investigatory stops, investigatory detentions of property, warrantless arrests, searches incident to valid arrests, seizures of items in plain view, searches and seizures justified by exigent circumstances, consensual searches, searches of vehicles, searches of containers, inventory searches, border searches, searches at sea, administrative searches, and searches relating to the special needs of law enforcement). Typically, the question of whether a special needs search is permissible is heavily case- and fact-specific. *Id*. at 135-136.

A. The Community Caretaking Exception Applies Because Welfare Checks are a Special need of law Enforcement

Community caretaking is a catchall phrase for the variety of duties and responsibilities police officers attend to, apart from duties related to criminal investigations. *MacDonald v. Town of Eastham*, 745 F.3d 8, 12 (1st Cir. 2014). This Court first recognized the phrase "community caretaking" when police searched a car to protect public safety. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973).

In analyzing a new exception to the Fourth Amendment's warrant requirement, this Court first considered whether the officer's actions were reasonable in *Cady*. *Id*. at 439. There, an off-duty Chicago police officer drove under the influence of alcohol in Wisconsin and crashed his vehicle. *Id*. at 436. After leaving the scene to call local police, responding officers drove the defendant back to the scene of the accident. *Id.* During the drive, the defendant identified himself as an off-duty Chicago police officer. *Id*. Based on the defendant's actions, the officers arrested the defendant for driving under the influence. *Id*. The local officers believed Chicago officers were required to carry a weapon at all times, even off-duty. *Id*. Officers did not locate the gun on the defendant, in the front seat, or in the glove box of his car. *Id*. The defendant was interviewed at the station before he was transported to the hospital, where he lapsed into an unexplained coma. *Id*. The local officers still believed the defendant's gun was missing and knew the his car would be unattended for some period of time due to defendant's unknown health and pending arrest. *Id*. at 437. Officers returned to the vehicle to try and locate the gun, to protect the community. *Id*. Officers opened the trunk to locate the revolver and found evidence of a murder. *Id*.

This Court found that the local officers in *Cady* were operating in a community caretaking function, "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id*. at 441. The officers' motivation for the search was to ensure the defendant's weapon did not come into the wrong hands if left in the vehicle. *Id*. at 447. This Court emphasized that "[t]he Framers of the Fourth Amendment have given us only the general standard of '**unreasonableness**' as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required." *Id*. at 448 (emphasis added).

This Court has never addressed whether the community caretaking exception extends to homes, and has only recognized a distinction between homes and vehicles. *Ray v. Twp. Of Warren*, 626 F.3d 170, 175 (3d Cir. 2010). The court in *Ray* explained the circuit split on the expansion of the community caretaking exception. *Id*. *See United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993) (the distinction between homes and vehicles in *Cady* barred extension of the community caretaking doctrine to homes); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (community caretaking only applies to automobiles). *But see United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006) (community caretaking allows entry if officers reasonably believe an emergency exists); *United States v. Rohrig*, 98 F.3d 1506, 1521 (6th Cir. 1996) (community caretakers can enter homes to abate noise nuisance). However, lower courts have extended the community caretaker exception in different ways to include or exclude homes. *See United States v. Brown*, 64 F.3d 1083, 1086 (7th Cir. 1995) (Police do not have to wait for screams to enter an apartment, if legitimate concerns about the occupant's safety exist).

The Sixth Circuit expanded the community caretaker exception to homes when officers responding to noise complaints in the middle of the night were unable to get a response by banging on the door. *Rohrig*, 98 F.3d at 1509. Officers entered through an unlocked back door, knocking and announcing their presence before entering and as they walked through the home. *Id*. After encountering angry neighbors, officers hoped to locate a resident to turn down the music. *Id*. Inside the home, officers observed a light coming from the basement, entered the basement, and discovered large quantities of marijuana. *Id*. The court observed that the officers' actions had to undergo Fourth Amendment scrutiny, even though they had not entered the house to search for evidence of a crime. *Id*. at 1512. Ultimately, the court evaluated a multi-part "exigent circumstances" test: (1) whether there was a need for immediate action; (2) whether specific

governmental interests are served by the entry; (3) whether the governmental interests outweigh the defendant's privacy interests; and (4) whether the defendant's conduct diminished the normal reasonable expectation of privacy. *Id*. at 1518. The court explained that it was open to establishing a new exception to the warrant requirement, allowing entry into the defendant's home. *Id*. at 1519. The court relied on previous decisions where officers conducted warrantless entries in the interest of community wellbeing. *Id*. at 1520. In analyzing the multi-part test, the court acknowledged the need for immediate action, based on the upset neighbors. *Id*. at 1521. The court also noted the compelling governmental interest in a limited entry to locate and abate the noise, because the officers were only attempting to restore neighborhood peace. *Id*. Furthermore, the court recognized restoration of neighborhood peace as a "community caretaking function." *Id*. at 1521. Finally, the court explained that the interest in preserving peace outweighed the defendant's substantially weakened privacy interest. *Id*. at 1522.

The Eighth Circuit similarly expanded the community caretaking exception to a home when the defendant denied police entry, but police reasonably believed an occupant was in danger. *United States v. Smith*, 820 F.3d 356, 361 (8th Cir. 2016). Officers received calls that the defendant's ex-girlfriend might be in danger at the defendant's home. *Id*. at 358. When officers arrived, the defendant came out of the house and denied consent, claiming nobody was inside. *Id*. When the defendant took the trash outside, officers arrested the defendant and informed him they were entering the residence over his objections. *Id*. at 359. Officers found the defendant's ex-girlfriend in a bedroom with an AK-47 on the bed. *Id.* She stated the defendant prevented her from leaving. *Id*. The court explained that the officers lawfully entered the defendant's residence under the community caretaking exception. *Id*. The court reasoned "a search or seizure under the community caretaking function is **reasonable** if the governmental interest in law enforcement's

exercise of that function, based on specific and articulable facts, outweighs the individual's interest in freedom from government intrusion." *Id*. at 360 (emphasis added). Because the officers were genuinely concerned for the ex-girlfriend's safety, and reasonably believed she was at the defendant's residence, the warrantless entry did not violate the Fourth Amendment. *Id*. at 361.

The First Circuit only recently extended community caretaking to include home searches. *MacDonald*, 745 F.3d at 15. Officers responded to a call from a citizen concerned about her neighbor's open front door. *Id*. at 10. When officers received no response after knocking and announcing their presence, they entered the house to see if anyone needed assistance. *Id*. at 11. Officers found no evidence of a burglary or any other exigent circumstances prior to entry, but merely conducted a check of the house based on the open front door. *Id*. The court explained that while the community caretaking exception to the warrant requirement was clearly established in vehicle searches, its application to homes was poorly defined. *Id*. at 13. However, the court found that the officers' actions were "at least arguably within the scope of the officers' community caretaking responsibilities—and given the parade of horribles that could easily be imagined had the officers simply turned tail, a plausible argument can be made that the officers' actions were reasonable under the circumstances." *Id*. at 14.

Here, Officer McNown was acting as a community caretaker when he entered Mr. David's house. Like the officers in *Cady*, who only searched the automobile to ensure public safety, here, Officer McNown's entry into Mr. David's house was only to ensure Mr. David's safety. *See* 413 U.S. at 441; R. at 8.

Officer McNown only entered Mr. David's residence as a community caretaker to check on his wellbeing. Similar to *Rohrig*, where officers heard loud music and believed someone was inside and unable to respond, here, Officer McNown heard loud music and believed Mr. David

might be unable to respond. *See* 98 F.3d at 1509; R. at 1-2. Further, members of the church were unsuccessful in reaching Mr. David by telephone. R. at 2. Like the officers in *MacDonald*, who received no response when they knocked and announced their presence, here, Officer McNown received no response when he knocked and announced his presence. *See* 745 F.3d at 11; R. at 3. Additionally, like the officers in *Smith*, whose concern for an occupant's safety outweighed the defendant's privacy interests, here, Officer McNown had specific facts that increased his concern for Mr. David, thereby outweighing Mr. David's privacy interests. *See* 820 F.3d at 360; R at 8.

Therefore, given the "parade of horribles" that Mr. David could have endured had Officer McNown not entered his residence, the community caretaking exception to the warrant requirement should include residential searches.

B. Officer McNown Reasonably Believed Mr. David Might need Assistance Because his Whereabouts were Unknown

This Court has allowed a police officer to use his training and experience, along with the facts of a particular case, to develop a reasonable belief about a suspect. *Terry v. Ohio*, 392 U.S. 1, 27 (1968). In *Terry*, this Court held that an officer does not have to establish probable cause before patting down a suspect, but a lesser "reasonable suspicion" standard is sufficient. *Id.* This standard is based on what a reasonably prudent officer, in the same circumstances, with the same training and experience as the investigating officer would believe. *Id.* This Court further explained that a reasonable suspicion is established based on a totality of the circumstances. *United States v. Sokolow*, 490 U.S. 1, 7-8 (1989); *see also United States v. Cortez*, 449 U.S. 411, 417-18 (1981) (holding that the totality of the circumstances is based upon the whole picture, and requires that "officers must have a particularized and objective basis for suspecting the particular person" committed criminal activity).

The Eighth Circuit found that an officer reasonably believed someone might be home and unable to respond when he saw lights, heard a television, and knocked, but nobody came to the door. *Quezada*, 448 F.3d at 1006. There, an officer attempted to serve a notice on a woman at her apartment. *Id*. When the officer knocked on the door, the latch was not engaged and the door opened. *Id*. When the officer entered, he found the defendant unresponsive on the floor, with a shotgun beneath his body. *Id*. The court noted the difference between officers making a warrantless entry as a community caretaker and a warrantless entry to investigate a crime. *Id*. at 1007. The court extended the community caretaking exception to residences and required the officer to have a reasonable belief an occupant was inside. *Id*. Because the officer saw lights and heard a television, the court opined that the deputy was reasonable in believing an occupant was inside and unable to respond, therefore in need of assistance. *Id*. at 1008.

Another instance in which officers had reasonable belief that occupants needed assistance occurred when a strong smell of ammonia emanated from a residence. *State v. Deneui*, 775 N.W.2d 221, 231 (S.D. 2009). Police officers responded to a call from the natural gas company and found the smell of ammonia strong enough to abandon their attempts to conduct a welfare check. *Id*. at 228. The court considered how other courts applied the community caretaking exception to homes. *Id*. at 236. The court explained the variety of tests, from Wisconsin's "three-part test, with a four-part subtest" to California's question of whether "given the known facts . . . a prudent and reasonable officer [would] have perceived a need to act[.]" *Id*. at 237. (Internal citations omitted). The *Deneui* court specifically found the *Quezada* court's analysis of the community caretaking exception helpful. *Id*. at 238. Ultimately, the court explained that "the constitutional difference between homes and automobiles counsels a cautious approach when the exception is invoked to justify law enforcement intrusion into a home," but that intrusion was reasonable in this case. *Id*.

at 239. The court did not want to arbitrarily exclude homes from the community caretaking exception, because a police officer's need to protect and preserve life or health could not stop at the front doors of residences. *Id*.

Here, the totality of the circumstances gave Officer McNown reasonable belief Mr. David might need assistance. Officer McNown was familiar with Mr. David and found it unusual that he was not available to lead the Sunday service. R. at 2. Further, he knew other members of the congregation appeared "shaken" when they were unable to reach Mr. David. R. at 2; Ex. A at 2. Given the fact that Mr. David was in his seventies combined with other circumstances, Officer McNown was reasonably concerned about his welfare. R. at 2; Ex. A at 2. Like the officers in *Quezada*, who believed someone was present and needed assistance based on the lights and a television playing, here, Officer McNown heard music and a television, therefore, he had reason to believe there might be someone inside in need of assistance. *See* 448 F.3d at 1006; Ex. A at 5. Additionally, like the officer in *Quezada* who knocked prior to entry, here, Officer McNown also announced his presence by knocking and received no response, furthering his reasonable belief Mr. David might need assistance. *See* 448 F.3d at 1006; Ex. A at 5.

As the *Deneui* court noted, when applying the community caretaking exception to home, courts should take a cautious approach. *See* 775 N.W.2d at 239. Similar to the officers in *Deneui*, who were alarmed when a strong odor of ammonia emanated from a house, here, Officer McNown was concerned with the state of Mr. David's home and the inability to reach him by telephone. *See* 775 N.W.2d at 228; Ex. A at 4, 5.

Considering the totality of circumstances on Sunday, Officer McNown reasonably believed Mr. David was inside the house but unable to respond, thereby giving Officer McNown a reasonable belief to enter without a warrant.

II. MR. DAVID DID NOT HAVE A SIXTH AMENDMENT RIGHT BECAUSE HE WAS NOT INDICTED AND WAS NOT PREJUDICED BY HIS ATTORNEY'S INEFFECTIVE ASSISTANCE

The purpose of the Sixth Amendment is to protect a defendant's right to a fair trial. *Strickland v. Washington*, 466 U.S. 668, 684 (1984). The Sixth Amendment guarantees effective assistance of counsel to defendants in all criminal prosecutions. U.S. Const. amend. VI. More specifically, the Sixth Amendment guarantees a right to counsel at **critical stages** in a criminal proceeding. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009) (emphasis added). As a rule, defense attorneys must inform their clients about formal plea offers with favorable terms. *Missouri v. Frye*, 566 U.S. 134, 145 (2012). This Court has recognized that plea bargain negotiations are a critical phase in criminal proceedings, therefore requiring effective assistance of counsel. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). Because of the complex nature of plea bargain negotiations, a defendant requires the "guiding hand of counsel" during every step. *Powell v. Alabama*, 287 U.S. 45, 53 (1932). When a defense attorney allows a plea offer to expire before telling the defendant about the offer, the attorney fails to render the type of effective assistance described in the Constitution. *Frye*, 566 U.S. at 145. Defendants have a right to counsel at critical stages in a criminal proceeding, which begins when the prosecution files charges. *Montejo*, 556 U.S. at 786.

A. The Right to Effective Counsel Attaches After a Federal Indictment Because it is only Guaranteed During Adversary Judicial Proceedings

This Court has consistently held the Sixth Amendment right to effective counsel "attaches only **at or after the initiation of adversary judicial proceedings** against the defendant." *United States v. Gouveia*, 467 U.S. 180, 187-88 (1984) (emphasis added) (citing *Kirby v. Illinois*, 406 U.S. 682, 688-89 (1972) (plurality opinion) (holding the defendant's Sixth Amendment right to counsel did not attach after defendant's arrest because criminal prosecution was not initiated)); *see also Moran v. Burbine*, 475 U.S. 412, 430 (1986) (holding the Sixth Amendment right to counsel

applies only after the government shifts from investigation to accusation); *McNeil v. Wisconsin*, 501 U.S. 171, 175-76 (1991) (holding a defendant did not have a Sixth Amendment right to counsel for uncharged offenses but gained this right at the first formal proceeding against him).

This Court later confirmed the Sixth Amendment right to counsel does not attach until the government uses the judicial process to demonstrate a commitment to prosecute the defendant. *Rothgery v. Gillespie County*, 554 U.S. 191, 211 (2008). The system of adversary criminal justice, which is more than a mere formalism, begins after there is a commitment to prosecute. *Kirby*, 406 U.S. at 689. After the adversary criminal justice system begins, the critical stages of a criminal proceeding begin, where a defendant gains the Sixth Amendment right to counsel. *Frye*, 566 U.S. at 140. The critical stages of a criminal proceeding include "arraignments, **postindictment** interrogations, **postindictment** lineups, and the entry of a guilty plea." *Id*. (emphasis added). Furthermore, there must be a formal prosecution and an accused defendant before the critical stages of a judicial proceeding commence. *Rothgery*, 554 U.S. at 198. This Court made clear that the Sixth Amendment identifies who may enjoy this Constitutional right ("the accused") and when he may assert it (after a "criminal prosecution" commences). *Id*. at 214 (Alito, J., concurring).

The Sixth Amendment right to counsel begins after criminal prosecution begins. *Kirby*, 406 U.S. at 690. For example, this Court held that a defendant did not have a Sixth Amendment right to counsel when he was merely seized by police. *Id*. at 688-89. There, the police officers transported a defendant suspected of robbery to the station where the victim spontaneously identified him as the robber. *Id*. at 684-85. At that time, the defendant was not Mirandized. *Id*. at 685. After the identification, the defendant was subsequently indicted and arrested. *Id*. This Court refused to extend Sixth Amendment protection to the identification because the identification occurred before formal charges were filed. *Id*. at 690.

This Court further affirmed the bright-line rule that the Sixth Amendment right to counsel only attaches after indictment. *Gouveia*, 467 U.S. at 187-89. There, an inmate suspected of murdering another inmate was placed in administrative detention for nineteen months without counsel. *Id*. at 182. This Court held that the defendant did not have a Sixth Amendment right to counsel during the investigation because the defendant was not yet indicted. *Id*. at 183-85. This Court reasoned that the Sixth Amendment requires a criminal prosecution and an accused defendant. *Id*. at 187-89. Until adversary judicial proceedings have begun, defendants do not have a Sixth Amendment right to counsel. *Id*.

Here, Mr. David did not have a Sixth Amendment right to counsel prior to his indictment. Similar to *Kirby*, where a police seizure was insufficient to invoke the Sixth Amendment, here, Mr. David could not invoke the Sixth Amendment when Officer McNown seized him, or when officers transported him to the police station. *See* 406 U.S. at 688-89; R. at 3. Like the defendant in *Kirby*, who was not Mirandized, here, Mr. David was not Mirandized when Officer McNown handcuffed and detained him. *See* 406 U.S. at 685; R. at 3. This Court in *Kirby* held that the defendant did not have a Sixth Amendment right to counsel before prosecution commenced, therefore, Mr. David did not have a Sixth Amendment right to counsel before prosecution commenced against him. *See* 406 U.S. at 690.

Mr. David did not have a Sixth Amendment when the police investigated him. Similar to *Gouveia*, where the inmate was held in a detention center without a right to counsel, here, Mr. David did not have a right to counsel when he held in a federal detainment facility. *See* 467 U.S. at 182; R. at 3. This Court in *Gouveia* held that there must be both a criminal prosecution underway and an accused defendant for the defendant to have a Sixth Amendment right to counsel. *See* 467

U.S. at 187-89. Although Mr. David was an accused defendant, no criminal prosecution was underway; therefore, he did not have a Sixth Amendment right. R. at 3, 5.

There is no reason to deviate from the bright-line rule that this Court has repeatedly affirmed. The Sixth Amendment right to effective counsel does not attach prior to indictment, therefore, Mr. David did not have a Sixth Amendment right to counsel before he was indicted.

B. Mr. David does not have a Valid Sixth Amendment Claim Because he did not Suffer Prejudice as a Result of Mr. Long's Ineffective Assistance

Even if Mr. David had a Sixth Amendment right to effective assistance of counsel prior to his indictment, to obtain a legal remedy, Mr. David must prove Mr. Long's ineffective assistance prejudiced him. To succeed in a Sixth Amendment claim, a defendant must show: 1) the counsel's performance was deficient; and 2) a reasonable probability that, but for counsel's deficient performance, the defendant would not have suffered prejudiced. *Strickland*, 466 U.S. at 687 (1984). For a defendant to suffer prejudiced, he must show that the outcome of the proceeding would have been different. *Id*. Unless a defendant can satisfy both prongs of this test, he will not succeed in a Sixth Amendment claim. *Id*.

Here, the question of whether Mr. David can satisfy the first prong of the *Strickland* test is unchallenged. This Court has recognized that a defense attorney has a duty to inform a defendant of the advantages and disadvantages of a plea agreement. *Libretti v. United States*, 516 U.S. 29 (1995). Here, Mr. Long failed to inform Mr. David about the plea agreement altogether, and in doing so, his performance as an attorney was deficient.

The second prong of the Strickland test requires a defendant to show: 1) a reasonable probability that he would have accepted the plea offer if he had effective assistance of counsel;

and 2) that the deal would have become finalized without the prosecution canceling the deal or the trial court refusing to accept it. *Frye*, 566 U.S. at 147.

i. Mr. David failed to show he would have accepted the plea offer if he had effective assistance of counsel

Attorneys have a duty to communicate favorable plea offers to their client. *Id*. at 145. The Sixth Amendment right to effective counsel extends to plea offers that lapse or are rejected if the defendant was indicted. *Montejo*, 566 U.S. at 786. To satisfy the first subsection of the second prong of the *Strickland* test, the defendant must show a reasonable probability that he would have accepted the plea offer. *Frye*, 566 U.S. at 147.

In *Frye*, the prosecution charged a defendant with a class D felony and he faced a maximum sentence of ten years imprisonment. *Id*. at 138. There, an attorney allowed two plea offers with favorable terms lapse without informing the defendant about the offers. *Id*. at 138-39. Both of the plea offers' terms provided a lesser sentence than a guilty verdict's maximum sentence. *Id*. At a subsequent evidentiary hearing, the defendant stated he would have accepted the plea offer if he had known about it. *Id*. at 139. The Court reasoned that there was a fair probability the defendant would have accepted the more favorable plea offer if he had known about it because he already pleaded guilty to a more serious charge. *Id*. at 150. The Court further reasoned that merely pleading guilty to a harsher sentence is not always sufficient to show that a defendant would have accepted the plea offer. *Id*.

This Court has decided another case surrounding the second prong of the *Strickland* test when a defendant entered a guilty plea after his counsel misinformed him about his parole eligibility. *Hill v. Lockhart*, 474 U.S. 52, 53 (1985). There, the defense attorney informed the defendant he would become eligible for parole after serving a third of his sentence, however, he would not be eligible for parole until he served half of his sentence. *Id*. at 55. While this Court

acknowledged the attorney's misrepresentation about the defendant's parole eligibility date, the defendant failed to allege, but for his attorney's error, he would have plead not guilty and proceeded to trial. *Id*. at 60. Therefore, this Court held that the defendant was not prejudiced by his counsel because the defendant was unable to satisfy the second prong of the *Strickland* test. *Id*.

Similarly, this Court recently affirmed the holding from *Hill* when a defendant's attorney misinformed the defendant about the consequence of a guilty plea on his immigration status. *Padilla*, 559 U.S. at 359. The defendant plead guilty to a drug distribution charge and faced deportation as a consequence. *Id*. This Court held that while the attorney should have informed the defendant about his immigration consequences, the defendant was not prejudiced by his counsel. *Id*. at 387. The defendant was unable to show that he would have plead not guilty and proceeded to trial, but for his attorney's failure to inform him of the immigration consequences. *Id*.

Here, Mr. David's actions demonstrate he would not have accepted the plea offer even if he had known about it. Like the attorney in *Frye*, who allowed a plea offer to lapse before informing his client, here, Mr. Long allowed a plea offer to lapse before telling Mr. David about it. *See* 566 U.S. at 138-39; R. at 4. Unlike *Frye*, where the defendant could demonstrate a reasonable probability that he would have accepted the plea offer had he known about it, here, Mr. David could not demonstrate a reasonable probability that he would have accepted the plea offer had he known about it. *See* 566 U.S. at 150; R. at 3. Mr. David told Agent Malaska that he would never give up his suppliers because doing so would result in his death or subject his church to arson. R. at 3. This statement indicated he would not have accepted the plea offer even if he had known about it.

Similar to *Hill* and *Padilla*, where the defendants were unable to prove they would have accepted the plea offer, here, Mr. David is unable to show that he would have accepted the plea

offer. Mr. David stated that he was not willing to give up his suppliers, therefore, the plea offer would not have benefitted him in any way because he could not satisfy the terms of the offer. R. at 4. Even though *Hill* and *Padilla* concerned attorneys misinforming their clients about the plea offer rather than allowing the offer to lapse, the rule from *Hill* is applicable here. An attorney's ineffective assistance is not sufficient to provide the defendant with a valid Sixth Amendment claim because the defendant must prove he was prejudiced by the ineffective assistance. *See* 474 U.S at 60. Unlike the defendants in *Hill* and *Padilla*, here, Mr. David has been unable to demonstrate a reasonable probability he would have accepted the plea offer because upon arrest he refused to give up his suppliers. R. at 4.

Therefore, even though Mr. Long provided ineffective assistance of counsel to Mr. David, Mr. David cannot claim that Mr. Long's ineffective assistance prejudiced him because he is unable to show that he would have accepted the plea offer had he known about it.

ii. Mr. David failed to show a plea offer would be accepted by the court without the prosecution canceling the deal

To satisfy the second subsection of the second prong of the *Strickland* test, the defendant must show that the plea would become final without opposition from the prosecution or the court. *Frye*, 566 U.S. at 147. A defendant has no universal right to a plea offer. *Weatherford v. Bursey*, 429 U.S. 545, 561 (1977). Furthermore, a defendant does not have a right that ensures a judge honor a plea deal. *Santobello v. New York*, 404 U.S. 257, 262 (1971). The Federal Rules additionally give trial courts deference to accept or reject plea agreements. Fed. R. Crim. P. 11(c)(3).

In *Frye*, the defendant could demonstrate that he would have accepted a more favorable plea if he was aware of it. 566 U.S. at 150. He could not, however, prove that the prosecution and the court would have accepted the plea and allowed it to become final. *Id*. at 151. Because the

defendant was unable to prove this latter requirement, this Court reasoned that the defendant was not prejudiced by his ineffective assistance of counsel. *Id*. The defendant was convicted of the same offense numerous times, therefore, there was reason to believe that either the prosecution or the trial court would not have allowed the plea offer to become final. *Id*. The Court stated that numerous states have given the prosecution deference to cancel plea offers that the defendant has already accepted. *Id*. at 149.

This Court has held that until a court accepts a plea offer, the defendant is not deprived of any constitutional right if that offer is not finalized. *Mabry v. Johnson*, 467 U.S. 504, 507 (1984). There, the prosecution offered the defendant a deal to serve his new sentence concurrently with sentences the defendant was already serving for other crimes. *Id*. at 506. The defendant accepted the offer, but the prosecutor later withdrew the offer due to a mistake. The prosecutor offered a second plea deal requiring the defendant to serve the new sentence consecutively with his other sentences. *Id*. The defendant rejected this second offer and proceeded to trial. *Id*. The defendant asserted he was entitled to the terms of the first offer because his acceptance complied with the terms of the offer. *Id*. This Court rejected the defendant's assertion and held that he was not entitled to enforce the first plea offer because plea offers do not carry constitutional significance. *Id*. at 507.

Here, Mr. David was unable to show that the prosecution or the court would have allowed the plea offer to become final. Similar to *Frye*, where the defendant was convicted of the same offense numerous times, here, the evidence demonstrates Mr. David has sold drugs for an extended period of time. *See* 566 U.S. at 151; R. at 3. This is evidenced by the payment information in his notebook as well as the large quantity of cocaine Officer McNown discovered. R. at 3. Therefore,

even if Mr. David accepted the guilty plea, there is reason to believe either the prosecution or the court would have rejected the plea offer because of these extenuating factors.

Furthermore, Mr. David cannot prove he was entitled to the plea deal offered by the prosecution. Similar to *Mabry*, where the prosecution had discretion to withdraw a plea offer after it was accepted, here, the prosecutor could have withdrawn the plea offer even after Mr. David accepted it. *See* 467 U.S. at 506; R. at 4. The plea deal was only valid if the information Mr. David provided led to an arrest. Ex. D. Even if the information Mr. David claims he was willing to provide did lead to an arrest, the prosecution could have withdrawn the plea offer. Therefore, Mr. David cannot prove he had a right to take advantage of the plea offer made by the prosecution.

Because Mr. David is unable to prove that his plea would become final without opposition from the prosecution or the court, he does not have a valid claim for prejudice stemming from ineffective assistance of counsel.

Mr. David could neither show that he would have accepted the plea offer had he known about it, nor that the plea would become final without opposition from the prosecution or the court. Therefore, Mr. David cannot claim that, but for his attorney's ineffective assistance, the outcome of his conviction would be different, because he failed to prove Mr. Long's ineffective assistance prejudiced him.

CONCLUSION

Officer McNown was acting as a community caretaker when he entered Mr. David's home and did not violate the Fourth Amendment by entering the residence. Based on the totality of the circumstances, Officer McNown reasonably believed that Mr. David might need assistance. Furthermore, while Mr. David had ineffective assistance of counsel, his Sixth Amendment right to counsel did not attach prior to his indictment and Mr. David was unable to prove prejudice based on his attorney's ineffective assistance. For these reasons, this Court should affirm the decision and order of the Thirteenth Circuit Court of Appeals, denying Mr. David's motions to suppress and motion to have the plea deal re-offered.

Dated: October 21, 2018

Respectfully Submitted,

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Team R38
Counsel for Respondent