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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 OF RESPONDENT, The United States of America

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ISSUES PRESENTED

I. The Court should affirm the lower court's denial of the Defendant's motion to suppress evidence because the community caretaking exception to the Fourth Amendment applies to an officer's warrantless entry into a home when they enter without any intention to investigate criminal activity.

II. The Court should affirm the lower court's denial to re-offer the plea deal because the Sixth Amendment right to effective counsel does not attach to pre-indictment proceedings. The *Strickland* test for ineffective counsel of whether the Defendant suffered deficient performance and if the Defendant suffered prejudice does not apply.

STATEMENT OF FACTS

The Defendant, Chad David, is a 72-year-old minister at Laksehow Community Revivalist Church in Lakeshow, Staples. R. at 2. Officer James McNown is a patrol officer in Lakeshow and frequently attends the Defendant's Sunday church services. R. at 2. On January 15, 2017, Officer McNown arrived at the Defendant's 7:00 AM services before beginning his shift patrolling Lakeshow at 9:00 AM. R. at 2. Officer McNown arrived at the service before 7:00 AM and noticed that the Defendant was absent. R. at 2. Officer McNown found the Defendant's absence unusual because the Defendant regularly attended the Sunday Service and another church member, Julianne Alvarado, stated that she was concerned about the Defendant's well-being because he did not answer his phone when she called. R. at 2. Jacob Ferry, another church member, mentioned that he believed he saw the Defendant at a bar the night before, but Officer McNown ignored this statement because he did not believe the Defendant would behave in this activity and instead believed the Defendant may be ill. R. at 2. To calm the church member's fears, Officer McNown agreed to stop by the Defendant's home during his patrol route to check on the Defendant's well-being and bring him some hot tea. R. at 2.

After the church service ended, Officer McNown began his 9:00 AM patrol and stopped at Starbucks to get a hot tea to bring to the Defendant. R. at 2. When entering the Defendant's gated community, Officer McNown noticed a black Cadillac SUV, which are usually associated with local drug dealers, leaving the community. R. at 2. Officer McNown, however, did not believe the Defendant was engaging in any criminal activity because he did not know where the vehicle was coming from. Ex. A. Officer McNown arrived at the Defendant's home at 9:30 AM and did not notice anything unusual because the Defendant's car was in the driveway and all of the doors to the Defendant's home were shut. R. at 2. Officer McNown walked up to the

Defendant's front door and heard loud music playing in the home, which was unusual given the Defendant's age and the time of day. R. at 3. Officer McNown knocked on the door and announced his presence but received no response after waiting two minutes. R. at 3. After receiving no response, Officer McNown peeked into the Defendant's home through a window and noticed the movie *The Wolf of Wall Street* was playing. R. at 3. Because of the Defendant's position as a minister, this movie also struck Officer McNown as an unusual choice for the Defendant because the movie revolved around the seven deadly sins. Ex. A. At this point, Officer McNown believed a guest was staying with the Defendant because there were no signs of a break in and he did not know if the Defendant lived alone. Ex. A.

Officer McNown attempted to enter through the front door, but the door was locked so he tried the door in the back of the home. R. at 3. Out of concern for the Defendant's well-being, Officer McNown entered through the back door of the home. R. at 3, Ex. A. Officer McNown did not knock on the back door before entering because he assumed that the Defendant was unable to hear the knocking over the loud music. R. at 3.

After entering the home, Officer McNown immediately went to turn off the TV and stumbled upon an open small notebook, which officers later learned contained incriminating evidence about drug payments from other church attendees. R. at 3. Instead of searching around on the first floor, Officer McNown decided to walk upstairs to find the source of the loud music. Ex. A. After finding the source of the music in an upstairs room, Officer McNown opened the door in hopes of finding the Defendant. Ex. A. When Officer McNown opened the door to the room, he found the Defendant packaging cocaine into Ziplock bags. R. at 3. Because of his police training and protocol, Officer McNown knew this substance was cocaine and immediately detained the Defendant and called the local DEA agents to process the scene. R. at 3.

DEA Agent Colin Malaska arrived on the scene and read the Defendant his Miranda rights. R. at 3. Agent Malaska asked the Defendant to tell him where he obtained the large quantity of drugs, but the Defendant replied that there was no way he would give up his suppliers. R. at 3. The Defendant indicated that if he did, it could lead to his death and result in the church burning down. R. at 3. The Defendant contacted a criminal defense attorney, Keegan Long, who attended Defendant's Sunday Services. R. at 4. The Defendant knew through confessions that Mr. Long was an alcoholic. Ex. C. However, the Defendant believed that Mr. Long would adequately represent him. R. at 4.

Because the prosecutors believed the Defendant could produce information on a suspected drug kingpin, they held off on any charges. R. at 4. The prosecutors emailed a plea offer to the Defendant's attorney, Mr. Long, on Monday, January 16, 2017 at 8:00 AM. R. at 4. The offer was for the Defendant to release the names, and all relevant contact and identifying information, of known and suspected suppliers of cocaine. Ex. D. The offer was set to expire on January 17, 2017 at 10:00 PM. Ex. D. Mr. Long was at a bar, drinking, when he received the emailed offer. R. at 4. Mr. Long saw the email from the prosecutor but failed to accurately read the information regarding the time limit on the plea deal. R. at 4. Mr. Long incorrectly read the plea offer and thought that it was valid for 36 days, but it was actually only valid for 36 hours. Ex. B.

Kayla Marie, the prosecutor, asked Mr. Long why he had not accepted the plea offer. R. at 4. Mr. Long checked his email again and saw he misinterpreted the offer. R. at 4. He then immediately called the Defendant and informed him of the offer and his mistake. R. at 4. The Defendant fired Mr. Long and hired a new criminal defense attorney, Michael Allen, to represent him. R. at 4.

On January 20, 2017, the Defendant asked the prosecutor for another plea deal. R. at 5. Ms. Marie said refused to offer another plea deal because the only purpose for offering the initial plea deal was to obtain the names of Mr. David's suppliers. R. at 5. She further explained that offering any more plea deals would be futile because the suppliers may be tipped off by now and the government would not receive any substantial benefit by extending another plea offer to Mr. David. R. at 5. The Defendant filed a motion to suppress the evidence found in his home and filed a motion seeking to be re-offered the initial plea deal that was not communicated to him, claiming that his counsel was ineffective under the Sixth Amendment. R. at 5.

SUMMARY OF THE ARGUMENT

The Appellate Court correctly held that the community caretaking exception to the Fourth Amendment applies to homes. The community caretaking exception of the Fourth Amendment permits officers warrantless entries into a residence when they are acting as a community caretaker with no intention of investigating criminal activity. Here, Officer McNown entered the Defendant's home as a community caretaker to check on his well-being but discovered incriminating evidence about the Defendant. Thus, the Circuit Court correctly concluded that the community caretaking exception to the Fourth Amendment applies to an officer's entry into a home when the officer is not acting in his investigative function.

The Appellate Court correctly found that the Defendant is not entitled to the plea deal. The Supreme Court should not deviate from the rule found in *Turner*, "the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations. *Turner*, 885 F.3d at 952. Additionally, even if it did, the Defendant is not entitled a claim for effective assistance of counsel because he did not meet the requirements under the *Strickland* test. The Defendant cannot show deficient performance because Mr. Long's performance did not fall below an

objective standard of reasonableness. *Strickland*, 466 U.S. at 690. Additionally, the Defendant did not suffer prejudice because we cannot tell whether Defendant would have accepted the plea offer. This depends on a prediction whether the evidence likely would have changed the outcome of a trial. *Hill v. Lockhart*, 474 U.S. 52 (1985). Because it is undetermined that Defendant would have accepted the plea offer, it is unlikely that it would have changed the outcome.

STANDARD OF REVIEW

When reviewing a motion to suppress on appeal, the Court reviews the lower court's ruling *de novo*. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). When reviewing Fourth Amendment issues regarding reasonable suspicion and probable cause, the Court reviews these issues *de novo* on appeal. *Id.*

ARGUMENT

I. The search of Mr. David's home did not violate the Fourth Amendment because Officer McNown was acting as a community caretaker and a warrant was not required.

The Court should deny Mr. David's motion to suppress evidence because the search of his home did not violate the Fourth Amendment. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. Const. amend. IV. The party seeking to utilize the exception to the Fourth Amendment has the burden to prove the search was reasonable. *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971). The circuits are split on whether or not the community caretaking doctrine applies to homes, but some circuit's decisions applied this exception to warrantless entries into a home.

Ray v. Twp. of Warren, 626 F.3d 170, 175-76 (3d Cir. 2010). The community caretaking exception applies to searches performed by officers who are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The Court uses a reasonable belief standard when deciding if an officer was acting as a community caretaker. *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006).

Officer McNown's search of the Mr. David's, hereinafter the Defendant, home was reasonable because he was acting as a community caretaker and Officer McNown's intention was not to investigate any criminal activity.

A. Officer McNown's search of the Defendant's home did not violate the Fourth Amendment because the community caretaker exception extends to homes.

First, Officer McNown's search of the Defendant's home was protected by the community caretaker exception to the Fourth Amendment. Law enforcement officers are permitted to perform warrantless entries into a residence when they are acting as community caretakers. *See United States v. Smith*, 820 F.3d 356, 360-61 (8th Cir. 2016); *see also United States v. Rohrig*, 98 F.3d 1506, 1523 (6th Cir. 1996). Officers can use their caretaking functions in situations involving either a vehicle or a home. *See State v. Pinkard*, 327 Wis. 2d 346, 363 (2010). The community caretaking doctrine cannot only apply to automobiles because officers need the ability to protect lives even in circumstances involving a home. *Id.* (quoting *State v. Deneui*, 775 N.W.2d 211, 239 (S.D. 2009)).

In *United States v. Smith,* officers responded to a report from a resident of a half-way house who was concerned about the safety of another resident, Alexis Wallace. *Smith*, 820 F.2d at 358. The informant stated that she feared Wallace was currently being held against her will by

the defendant who is known for having anger issues and carrying weapons. *Id*. Another officer was dispatched to the defendant's home because of a report of a male suspect shooting guns outside the home. *Id*. When officers arrived at the defendant's home, they believed the defendant was the same suspect shooting guns outside the home, but this belief was later disproved. *Id.* Officers then knocked on the door and the defendant answered but refused to allow officers to search for Wallace in the home. *Id.* After this failed attempt to enter the home, officers arrested the defendant for his outstanding warrants, and entered the home to check on Wallace's well-being. *Id.* at 359. While in the defendant's home, officers found Wallace in a bedroom and an AK-47, which they then seized. *Id.* The defendant filed a motion to suppress the evidence found in his home. *Id.* The court denied the defendant's motion to suppress this evidence and held that the community caretaker exception applied to the officers' warrantless entry into a residence. *See id.* at 361. The court reasoned that the officers entered lawfully because the officers were acting reasonably within their community caretaker function. *Id.* at 362.

Additionally, in *State v. Pinkard*, an officer received an anonymous tip regarding the location of a drug house. *Pinkard*, 327 Wis. 2d at 350. Because of the officer's concern for the safety of the occupants, the officer passed this information along to another available officer who was able to check on the situation. *Id.* at 350-51. After officers arrived on the scene, they knocked on the open door of the defendant's residence but received no response to the announcement of their presence. *Id.* at 351. Officers then entered the residence to check on the well-being of the residents. *Id.* After entering the residence, officers entered the defendant's bedroom in an attempt to wake the sleeping couple who again did not respond to the officers' announcement of their presence. *Id.* Officers seized various drugs, a scale, and a gun from the bedroom where the defendant was sleeping. *Id.* at 352. The court charged the defendant with

possession of a firearm by a felon, possession of cocaine with an intent to deliver as a second of subsequent offence and felony bail-jumping. *Id.* The defendant filed a motion to suppress all of the evidence the officers found at his residence, but the circuit court denied the motion to suppress the evidence of the drugs and scale but allowed the suppression of the seizure of the gun. *Id.* The defendant then appealed this decision to the Supreme Court of Wisconsin. *Id.* at 353. The court held that officers can use their community caretaking function when making a warrantless entry into a residence. *Id.* at 363. The court reasoned that there is no language in similar cases on this issue, including *Cady v. Dombrowski*, to suggest that the community caretaking exception only applies to automobiles. *Id.* at 357. The court went on to explain that the community caretaking doctrine should not be limited to automobiles because officers also need the ability to protect people in their homes. *Id.* at 363.

Here, Officer McNown exercised his community caretaking function when he entered the Defendant's home, so a warrant was not required. Similar to the situations the officers faced in *Smith* and *Pinkard*, Officer McNown went to the Defendant's home to check on his well-being. R. at 2. McNown testified that the Defendant had a reputation for always attending church services, which made his absence unusual. Ex. A. Officer McNown explained that he went to the Defendant's home "[a]s a concerned member of the church" and even stopped at Starbucks to get the Defendant some hot tea to help him if he was ill." Ex. A. The only reason Officer McNown went to the Defendant's home was to calm the fears of the other church attendees who were concerned about the Defendant's well-being. R. at 2. Thus, Officer McNown exercised his community caretaking function when he entered the Defendant's home and a warrant was not required.

B. When entering the Defendant's home, Officer McNown's only intention was to check on the Defendant's well-being and not to perform an investigatory search.

Second, Officer McNown had no intention of investigating criminal activity when he entered the Defendant's home. Warrantless entry into a home is lawful if the officer's intentions are purely motivated by their "'community caretaking' interests." *See Rohrig*, 98 F.3d at 1523. To exercise the community caretaking exception, an officer's intentions cannot be for investigatory purposes. *See Cady*, 413 U.S. at 441. When acting as a community caretaker, the scope of the search cannot exceed the caretaker role. *See Smith*, 820 F.3d at 362 (citing *United States v. Harris*, 747 F.3d 1013 (8th Cir. 2014)). The warrant requirement to the Fourth Amendment only appertains to officers who are acting within their capacity to investigate and undercover crime. *See Quezada*, 448 F.3d at 1007.

In *United States v. Rohrig*, officers received a noise complaint from a neighbor regarding the defendant's home. *Rohrig*, 98 F.3d at 1509. When officers arrived at the home, they walked around the premises while banging on windows and doors in an attempt to communicate with the resident. *Id.* After receiving no response from the residents, the officers announced their presence and entered the home through an unlocked screen door in the back of the house. *Id.* While walking through the home, the officers were forced to yell at one another in order to communicate and continued to announce their presence to the home owners but received no response. *Id.* The officers followed the light emanating from an open door that led into the basement of the home in the hopes of locating the home owner. *Id.* When the officers entered the basement, they found marijuana plants but were unable to find the home owner. *Id.* The officers then left the basement and continued to announce their presence while walking to the second floor of the home. *Id.* The officers found the defendant lying on the ground in one of the bedrooms and attempted to wake him and also turned down the stereo that was the source of the

loud music. *Id.* The court charged the defendant with possession of marijuana with intent to distribute and possession of an unregistered sawed-off shotgun. *Id.* at 1510. The defendant filed a motion to suppress the evidence that officers seized from his home and argued that this seizure violated his Fourth Amendment right. *Id.* The district court granted this motion, and the Government appealed. *Id.* The circuit court held that the officers did not violate the defendant's Fourth Amendment right because the officers' motivation to enter the home was not to investigate criminal activity, but instead was to act in their capacity as a community caretaker. *Id.* at 1523. The court reasoned that the officers did not enter the defendant's home in order to find a suspected criminal, but instead the officers entered to resolve a public disturbance issue. *Id.* at 1521.

Moreover, in *Cady v. Dombrowski*, officers arrested the defendant for drunk driving after the defendant called dispatch to report his single car accident. *Cady*, 413 U.S. at 436. Officers performed a warrantless search on a defendant's car after learning the defendant was a police officer and officers are known to travel with their service revolvers. *Id.* While the defendant was hospitalized after falling into a coma, an officer searched the vehicle to find the missing revolved, which is department procedure. *Id.* at 437. During this search of the vehicle, the officer found various items covered in blood and seized these items. *Id.* When officers confronted the defendant in relation to these items, the defendant gave his lawyer permission to disclose the location of a body on his brother's farm. *Id.* This evidence was used to convict the defendant of first-degree murder. *Id.* at 434. The court held that the caretaking exception applied in this instance, and the officers did not violate the defendant's Fourth Amendment right. *See id.* at 446-448. The court reasoned that the officer's motivation for searching the vehicle was because of the police department's standards and not to investigate any crime. *Id.* at 443.

Officer McNown entered the Defendant's home to check on his well-being and did not have any intention to investigate criminal activity. Similar to the officers' motivation in *Rohrig* and *Cady*, Officer McNown's motivation to enter the Defendant's was based solely on acting as a community caretaker and not to investigate criminal activity. Ex. A. Although Officer McNown stated that he saw two black SUVs leaving the Defendant's community and that these vehicles are commonly associated with drug dealers in the area, he did not believe there was any criminal activity involved. Ex. A. Officer McNown believed that someone else may be in the house because of the loud music and the vulgar movie playing, but he did not believe that a burglary was in progress. Ex. A. Like the officers in *Rohrig* who attempted to get the resident's attention but received no response due to the loud noise in the home, Officer McNown entered the home after receiving no response from the Defendant and he assumed this was because of the loud music playing in the home. R. at 3. Similar to the officers' actions in *Rohrig*, Officer McNown did not search the Defendant's home, he merely stumbled upon the evidence while attempting to locate the Defendant. Ex. A. Officer McNown did not attempt to search for additional evidence on the first floor of the home, but instead followed the source of the music in the hopes of finding the Defendant. Ex. A. Officer McNown testified that he did not believe a warrant was necessary because he was not attempting to investigate any crime, but he was just going to check on the Defendant. Ex. A. Thus, Officer McNown's interest when searching the Defendant's home was purely based on acting as a community caretaker and not to investigate any form of criminal activity.

The community caretaking exception to the Fourth Amendment applies to homes because officers need the ability to protect the public at all times. Thus, Officer McNown's warrantless entry into the Defendant's home was legal because the community caretaking exception applies

to homes. Additionally, Officer McNown went to the Defendant's home out of concern for the Defendant's welfare and not to investigate any criminal activity. Because Officer McNown was acting within his community caretaking function and not trying to investigate criminal activity, he did not exceed the scope of the community caretaking exception. Therefore, the Court should deny the Defendant's motion to suppress evidence because the search of his home did not violate the Fourth Amendment and Officer McNown's was acting as a community caretaker, which does not require a warrant.

II. The Government is not required to reoffer the Defendant a plea deal because the Sixth Amendment right to effective counsel does not attach prior to indictment during plea negotiations.

The lower court did not err in denying the Defendant's motion to be re-offered the plea deal that was not conveyed to him by his initial counsel and relief should not be given under the Sixth Amendment's right to effective counsel.

The Sixth Amendment states 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 Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney who plays the role necessary to ensure that the trial is fair. *Strickland v. Washington*, 466 U.S. 668 (1984).

In order for a defendant to show that he suffered prejudice under *Strickland*, the defendant must show that counsel's performance was deficient and that the deficient performance prejudiced the defense. *Id.* at 685. The Supreme Court concluded "the proper standard for attorney performance is that of reasonably effective assistance," *Id.* at 687, with the consequence that counsel's representation is constitutionally deficient if it falls "below an

objective standard of reasonableness." *Hill v. Lockhart*, 474 U.S. 52, 57 (1985); *Strickland*, 466 U.S. at 687. Reasonably effective assistance requires that counsel be more than a mere bystander and avoid making "errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." *Strickland*, 466 U.S. at 687.

The Defendant is not entitled to protections by the Sixth Amendment right to effective counsel because this protection does not attach to plea negotiations prior to an indictment. However, even if this Court finds the Sixth Amendment attaches prior to the filing of an indictment, the defendant fails under the *Strickland* test because the defendant is unable to show that counsel's performance was deficient, and the deficient performance prejudiced the defendant.

A. The Sixth Amendment right to counsel does not attach during plea negotiations prior to an indictment.

The Sixth Amendment right to counsel does not attach during plea negotiations prior to an indictment. An accused has the right to the effective assistance of counsel at the "critical stages" in the criminal justice process. *United States v. Wade*, 388 U.S. 218, 224 (1967). The Sixth Amendment right to counsel applies when the defendant's statements are "deliberately elicited from him after he had been indicted and in the absence of his counsel." *Massiah v. United States*, 377 U.S. 201, 204 (1964). The Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations. *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018). When an informed consideration can benefit defendants that also satisfy the interests of both parties, pre-indictment plea bargains may attach to the Sixth Amendment right to counsel. *Padilla v. Kentucky*, 559 U.S. 356, 358 (2010). When the government has not yet filed formal charges, the Sixth Amendment right to counsel does not apply to plea bargains. *United States v.*

Moody, 206 F.3d 609, 616 (6th Cir. 2000). It is firmly established that a person's Sixth Amendment right to counsel does not apply during pre-indictment identification procedures. *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). The government does not need to keep their end of the bargain even if a defendant agrees to the plea offer. *United States v. Gray*, 382 F. Supp. 2d 898, 908 (E.D. Mich. 2005).

In *United States v. Moody*, the court addressed the issue of whether the Sixth Amendment right to counsel applied to plea bargaining before the government filed formal charges. *Moody*, 206 F.3d at 611. Specifically, the suspect was offered a plea deal in which the U.S. Attorney and an FBI Special Agent told him it was a "good deal." *Id.* The defendant hired an attorney, but the attorney rejected the offer on Moody's behalf without inquiring into the interviews. *Id.* The government did not indict him until four months later. *Id.* The court concluded that Moody had no right to counsel in his decision to accept or deny the plea bargain because the government had not filed formal charges. *Id.*

In *United States v. Gouveia,* inmates suspected of committing murder were not given right to counsel because the actions took place before any adversary judicial proceedings had been initiated against them. *United States v. Gouveia*, 467 U.S. 180, 183 (1984). Here, they were in detention for nineteen months before their indictment. *Id.* The court concluded that because judicial proceedings had not been initiated against them, their Sixth Amendment right to counsel was not violated. *Id.* at 192.

Here, the Defendant is not entitled to Sixth Amendment rights to effective counsel because this right does not extend to pre-indictment plea bargains. Similar to the situation in *Moody*, where the government did not file formal charges until four months after the plea bargain was offered, the Defendant in the case at hand did not have formal charges against him at the

time the plea was offered. Ex. C. Similar to the inmates' situation in *Gouveia*, where the judicial proceedings had not been initiated against them, the court did not file any charges on the Defendant, so the pre-indictment plea bargain should not extend in this case. R. at 4. Additionally, Mr. Long did not talk with the Defendant about any implications on going to trial. Ex. B. Therefore, the Defendant was not entitled to effective counsel and his constitutional rights under the Sixth Amendment were not violated. Additionally, even if it did apply to pre-indictment proceedings, according to *Gray*, the government does not have to honor the offer and can take the plea bargain at any time.

B. Even if the Sixth Amendment did apply to pre-indictment proceedings, counsel's performance was not deficient, and the deficient performance did not prejudice the Defendant.

Even if this Court determines that the Sixth Amendment right to counsel does attach in this case, the Defendant did not suffer prejudice under the *Strickland* test. Under the *Strickland* test, the defendant must show that (1) counsel's performance was deficient and show that counsel made errors so serious that counsel was not functioning as the counsel guaranteed the defendant by the Sixth Amendment, *Strickland*, 466 U.S. at 687, (2) and the defendant must establish prejudice by showing a "reasonable probability" exists that, but for the deficiency, "the result of the proceeding would have been different." *Id.* at 694.

The Defendant's constitutional right was not violated because: (1) the Defendant did not show that his counsel was deficient, and (2) the Defendant did not suffer prejudice.

i. Counsel's performance was not deficient because Mr. Long's performance did not fall below an objective standard of reasonableness.

Counsel's performance was not deficient because Mr. Long's performance did not fall below an objective standard of reasonableness. The court must "indulge a strong presumption

that counsel's conduct falls within the range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. The petitioner may prove the deficiency prong by establishing that his attorney's conduct fell "outside the wide range of professionally competent assistance," *Id.* at 690, and establish prejudice by showing a "reasonable probability" exists that, but for the deficiency, "the result of the proceeding would have been different." *Id.* at 694. If a reasonable lawyer could conclude that a statement was so ambiguous to demonstrate bias against a defendant, the counsel is competent and is not indicative of deficient performance. *United States v. Powell*, 850 F.3d 145, 150 (4th Cir. 2017). Counsel performs in a "professionally unreasonable manner" only by failing to follow the defendant's express instructions with respect to an appeal. *Roe v. Flores-Ortega*, 528 U.S. 470 (2000). Inattentiveness during an insubstantial portion does not constitute deficient performance. *Muniz v. Smith*, 647 F.3d 619 (6th Cir. 2011).

In *Strickland v. Washington*, the court discussed the issue of whether counsel's failure to introduce mitigating evidence constituted deficient performance. The defendant alleged deficient performance because his attorney did not perform a psychological evaluation or present character evidence. *Strickland*, 466 U.S. at 690. The court concluded that failure to introduce mitigating evidence does not constitute deficient performance, because representation did not fall below an objective standard of reasonableness. *Id.* In *Powell,* the court addressed the issue of whether an attorney's knowledge of a biased statement of a juror constituted deficient performance. Specifically, the juror indicated that he wanted to give the defendant a "good kick in the butt." *Powell*, 850 F.3d at 147. The defendant alleged that this was ineffective counsel because if counsel would have brought that attention to the court, they would have replaced the juror. *Id.* at 150. The court held that this performance was not deficient because a reasonable lawyer could conclude that that statement was so ambiguous "that it could not be taken as indicating that the

juror was actually incapable or unwilling to base a verdict solely on the evidence presented at trial." *Id*. Additionally, the court reasoned that because the defendant and his father did not seem panicked or alarmed by the statement, a reasonable lawyer would conclude that this would have any effect on the verdict. *Id*.

In *Roe v. Flores-Oretga*, the court addressed the relevancy of the failure of consulting with their client regarding an appeal. Here, the defendant argued that his attorney's performance was deficient because he did not ask his client whether he wanted to appeal. *Roe*, 528 U.S. at 470. The question whether counsel has performed deficiently in such cases is best answered by first asking whether counsel in fact consulted with the defendant about an appeal. By "consult," the Court means advising the defendant about the advantages and disadvantages of taking an appeal and making a reasonable effort to discover the defendant's wishes. *Id.* at 471. The court considered whether the attorney knew or should have known that they would want to appeal. *Id.* In this case, the attorney had no recollection from discussing a possible appeal; however, the client was under the impression that the attorney was filing an appeal. *Id.* The court held that "counsel performs in a professionally unreasonable manner only by failing to follow the defendant's express instructions with respect to an appeal." *Id.* at 478. The court reasoned that because the defendant did not expressly wish to appeal, counsel's performance was not deficient. *Id.* at 479.

In *Muniz v. Smith*, the court discussed the relevancy of substantial versus insubstantial attentiveness during trial. *Muniz*, 647 F.3d at 624. Specifically, the attorney fell asleep for an undetermined portion of a single cross-examination. *Id.* The court held that this was not deficient performance, because the attorney did not sleep through a substantial portion of a single cross-

examination and objected near the end of questioning, the performance was not deficient. *Id.* at 626.

Here, when applying the objective standard of reasonableness, Mr. Long's performance was not deficient. A reasonable attorney would not typically check their emails while not in the office, especially in public, where attorneys protect the privacy of their client's information. Mr. Long was not incompetent by failing to fully read an email after hours in a public setting. Additionally, because there was no talk of negotiation with the prosecution prior to this email, it is reasonable that Mr. Long thought that he might have longer than a day to respond to the email, communicate the offer to his client, and finally accept the offer. Thus, Mr. Long's performance was not deficient.

Similar to the lawyer in *Roe*, Mr. Long never consulted with the Defendant regarding a plea offer prior to the offer being extended. Ex. B. He never discussed the advantages and disadvantages with him to where he would know his wishes. Ex. B. Mr. Long did not "know nor should have known" that he would have accepted the plea because he specifically said he refused to release the names. Ex. B. Because he did not know of the Defendant's wishes, his performance was not deficient.

Similar to the attorney's situation in *Muniz*, where the attorney was only asleep for an "undetermined" amount of time, it is also undetermined in the amount of time that Mr. Long was drinking, thus it is likely not deficient performance. Additionally, the Defendant knew that Mr. Long was known for being a drunk and he didn't seem panicked about it when he hired him. Ex. C. Similar to the defendant in *Powell*, who was not alarmed but the juror's statements, the Defendant was aware of Mr. Long's behaviors, but he was not panicked by his decision. Thus, Mr. Long's performance was not deficient.

ii. **The Defendant was not prejudiced by the performance because he is unable to show that he would have accepted the plea offer.**

The Defendant is not prejudiced by the counsel's performance because he is unable to show that he would have accepted the plea offer. The defendant must show that deficient performance prejudiced the defense. *Strickland*, 466 U.S. at 689. 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. *Id*. The determination whether the error "prejudiced" the defendant by causing him to plead guilty rather than go to trial will depend on the likelihood that discovery of the evidence would have led counsel to change his recommendation as to the plea. *Id.* This assessment, in turn, will depend in large part on a prediction whether the evidence likely would have changed the outcome of a trial or if the verdict would have been different. *See Hill v. Lockhart*, 474 U.S. 52 (1985); *See Kinney v. United States*, 268 F. Supp. 2d 186, 187 (E.D.N.Y. 2003).

In *Hill v. Lockart*, the defendant entered into a plea agreement, and two years later, he filed a federal habeas corpus petition claiming that his guilty plea was involuntary by reason of ineffective assistance of counsel because his attorney had misinformed him as to his parole eligibility. *Hill,* 474 U.S. at 54. The defendant could not show prejudice because he alleged no special circumstances that might support the conclusion that he placed particular emphasis on his parole eligibility in deciding whether or not to plead guilty. *Id.*

In *Kinney v. United States*, the court examined the relevancy of whether evidence introduced at trial would have changed the jury verdict, thus prejudicing the defendant. *Kinney*, 268 F. Supp. 2d at 188. Particularly, the defendant was convicted of soliciting funds and committed mail fraud. *Id.* He worked for a company that contracted with a non-profit that focuses on educating police officers. *Id.* At the end of the year, his company didn't publish the journals, and the evidence revealed the salesmen made misrepresentation to their identities as to

how they solicited funds will be used. *Id.* He was convicted and indicted for mail fraud. *Id.* The defendant argued ineffective counsel because they should have introduced evidence that a UPS receipt showed that Kinney mailed the package and he argued that counsel should have attempted to locate the log book. *Id.* The court concluded that the defendant did not suffer prejudice, reasoning that even if counsel located a UPS package receipt to show that Kinney mailed it, the receipt wouldn't indicate exactly what was in the package and we will never know what was in the package. *Id.* Additionally, even if they showed the log book, it may have indicated that the shipment was made, but we wouldn't know the contents of the shipment. Furthermore, the judge heard him testify that he mailed it, but refused to believe him, so it's unlikely that it would have changed the verdict. *Id.* at 192.

Here, the Defendant could not show prejudice because like in *Hill*, there were no special circumstances that would support the conclusion that he would accept the plea bargain. Specifically, the Defendant admitted that he would not release the names because he was worried that the church would burn down. R. at 3. Even though in his direct examination, Mr. David claimed that he would have accepted the plea, Ex. C., it is unlikely at the time that he would have accepted it, knowing that he would have had to release those names. R. at 3. At that time, he was not willing to release the names because he was afraid they would burn the church down. R. at 3. Because the plea bargain would have been known to him two days after, R. at 5., he likely was still in the same mindset about releasing the names.

Additionally, similar to *Kinney*, how no one would never know what was in the package, we also would never know if the Defendant would accept the plea bargain. Although the Defendant said in his direct examination that he would have accepted the plea offer, this statement was made at the trial in July of 2017, Ex. C., which is six months after the plea offer

was made. R. at 5. The day before the plea bargain was offered, Mr. David specifically said that he would not release the names. R. at 3. Therefore, at the time that he would have gotten word of the offer, it is likely that he would not have accepted the offer. Thus, it is likely that he would not have accepted the plea to release the names regardless, so therefore he would suffer no prejudice.

Because the Sixth Amendment right to counsel does not apply to pre-indictment plea bargains and Mr. David could not show that counsel's performance was deficient, and he is unable to show that the deficient performance prejudiced the defense, he is not entitled to the Sixth Amendment right to effective counsel. Therefore, the Defendant's constitutional right to effective assistance was not violated.

CONCLUSION AND PRAYER FOR RELIEF

For these reasons, the United States of America requests that this Court affirm the circuit court's denial of the Defendant's motion to suppress evidence. The Respondent specifically requests that this court find Officer McNown did not violate the Defendant's Fourth Amendment rights when he entered his home without a warrant because he was acting within his community caretaking function. Additionally, the Respondent requests that the Court affirm the lower court's denial to re-offer the plea deal because the Sixth Amendment right to effective counsel does not attach to pre-indictment proceedings