IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 2018

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

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ISSUES PRESENTED

Whether the community caretaker exception to warrantless searches extends to the searches of homes.

Whether the right to effective assistance of counsel as guaranteed by the Sixth Amendment attaches to plea negotiations that occur prior to indictment.

STATEMENT OF FACTS

I. Facts

On January 15, 2017, the Petitioner was arrested for possessing with the intent to distribute large quantities of a controlled substance, namely cocaine. R. at 1. Petitioner was not under investigation prior to his arrest. R. at 8. The morning of Sunday, January 15, 2017, the Petitioner failed to appear at a regularly schedule church service. R. at 2. Officer James McNown, a regular attendee of the Petitioner's church, arrived at the service at 7:00 a.m. R. at 2. The Petitioner, however, was not there. R. at 2. Several of the other parishioners were concerned that something was wrong with the Petitioner as he very rarely missed church service. R. at 2. The parishioners explained that they were worried because the Petitioner had not answered his phone and someone had reported seeing the Petitioner at a bar the night before, which would have been out of character for the Petitioner. R. at 2. Officer McNown offered to stop by the Petitioner's home after church when his shift as a Lakeshow patrol officer started. R. at 2. Officer McNown was simply concerned that the Petitioner had fallen ill due to the Petitioner's advanced age. R. at 2.

After the church service ended, Officer McNown began his shift. R. at 2. Officer McNown decided to stop at Starbucks to get a hot tea to take to the Petitioner. R. at 2. Officer McNown arrived at the Petitioner's residential neighborhood around 9:30 a.m. R. at 2. Besides a black Cadillac SUV leaving the neighborhood, Officer McNown did not observe anything suspicious. R. at 2. While Officer McNown potentially saw a connection between the Cadillac and drug dealing, he did not suspect that the Petitioner was involved. *See* R. at 2. At that point, Officer McNown had only known the Petitioner as an energetic minister for the Lakeshow Community Revivalist Church. Ex. A. The presence of the black Cadillac SUV in the neighborhood did not lead Officer McNown to believe that the Petitioner was involved in any criminal activity. R. at 4.

Officer McNown did not see anything unusual when he arrived at Petitioner's home. R. at 2. The Petitioner's vehicle was in the driveway, which simply led Officer McNown to believe that the Petitioner was at home. R. at 2. As Officer McNown approached the Petitioner's house, Officer McNown heard loud music coming from inside. R. at 3. This was not indicative of criminal activity to Officer McNown, but it did seem odd, considering the Petitioner's age and that it was a Sunday morning. R. at 3. After Officer McNown knocked on the front door and announced his presence, he waited about two minutes and then looked inside the window next to the front door. R. at 3. Inside, Officer McNown saw that *The Wolf of Wall Street*, an R-rated movie, was playing on the TV. R. at 3. This was also seen as a mere oddity to Officer McNown given the Petitioner's age and profession. R. at 3.

After trying the front door and not receiving any answer, Officer McNown walked around to the rear of the residence. R. at 3. The rear door was unlocked and Officer McNown entered. R. at 3. At the time of entry Officer McNown did not have any suspicion of criminal activity, but was rather "eager to check the well-being of [the Petitioner] at that point and give him his tea." Ex. A. Officer McNown went to turn off the TV and noticed a notebook with names, weights, and payments written in it. R. at 3. With the TV turned off, Officer McNown was able to determine that the music was coming from upstairs. R. at 3. Officer McNown went upstairs to check out the source of the loud music. R. at 3. He did not search the first floor. R. at 3.

Once upstairs, Officer McNown opened the door to the room he believed the loud music to be coming from. R. at 3. The Petitioner sat amongst a scale, baggies, and a large amount of cocaine. R. at 3. Officer McNown quickly handcuffed the Petitioner and called the DEA per agency protocol. R. at 3. DEA Agent Colin Malaska arrived and, in a properly Mirandized interview, asked

the Petitioner about his supplier. R. at 3. The Petitioner indicated that if he gave up his suppliers his church would be burned down and he would be killed. *Id.*

At the federal detainment facility, the Petitioner called and retained the services of criminal defense lawyer, Keegan Long, despite that the Petitioner knew him to be an alcoholic. R. at 3–4. The Petitioner believed that Mr. Long would be able to provide competent representation despite of his alcoholism. R. at 4. While the Petitioner was in custody, Agent Malaska contacted the prosecution in order to get a plea agreement for the Petitioner before he was formally indicted in order to avoid tipping off the Petitioner's suppliers. R. at 4. One of the terms of the agreement would be that the Petitioner give the names of his suppliers to the DEA. R. at 4. The prosecutors sent the plea agreement to Mr. Long, the Petitioner's retained legal counsel, with a clear expiration of the offer in thirty-six hours. R. at 4. Mr. Long, apparently drunk when he received the email, misread it as expiring within thirty-six days. R. at 4. The offer was never communicated to the Petitioner during the thirty-six-hour period it was valid. R. at 4. After the offer expired, the Petitioner was indicted on one count of violating 21 U.S.C. § 841. R. at 1.

Once the Petitioner learned of the offer and that it was expired, he fired Mr. Long and hired Mr. Michael Allen to represent him. R. at 4. Mr. Allen subsequently emailed the prosecutor to ask the prosecutor to reissue the offer. R. at 5. AUSA Kayla Marie responded that the information about the suppliers would be of little use to the Government due to the risk of the Petitioner alerting his suppliers to an imminent search and declined to reissue the offer. Ex. E.

II. Procedural Posture

The Petitioner filed a motion to suppress the evidence found in his home as well as a motion to be re-offered the plea deal. R. at 1. The United States District Court for the Southern District of Staples denied the Petitioner's motion to suppress evidence because it found that Officer

McNown's entry and search of the Petitioner's home was valid under the community caretaker doctrine. R. at 8. Additionally, the district court denied the Petitioner's motion to be re-offered the plea because it found that he was not prejudiced by the ineffective assistance of counsel due to the fact that he had yet to be found guilty or tried. R. at 12.

The Petitioner was subsequently tried and convicted for possession of a controlled substance with intent to distribute. R. at 14. The Petitioner was sentenced to the statutory minimum of ten years in prison. R. at 14. The Petitioner filed a timely appeal to the Thirteenth Circuit. R. at 13. The Thirteenth Circuit affirmed the district court, R. at 14, over the objections of Judge O'Neal in dissent, R. at 18–24. The court of appeals affirmed the district court's decision to deny the Petitioner's motion to suppress evidence because the search was valid under the community caretaker doctrine. R. at 17. Additionally, the circuit court affirmed the district court's denial of the Petitioner's motion to be re-offered the plea deal because the Petitioner did not have a Sixth Amendment right to effective assistance of counsel prior to the initiation of adversary judicial proceedings against him. R. at 17.

SUMMARY OF THE ARGUMENT

The touchstone of the Fourth Amendment is reasonableness. *Brigham City v. Stuart*, 547 U.S. 398 (2006). As a result, several exceptions to the Fourth Amendment's warrant requirement have developed that recognize the practical realities of the work performed by police on a regular basis. The exception at issue in the present case is the community caretaker exception, which has been recognized by this Court. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The district court and the circuit court were correct when they found that Officer McNown was acting as a community caretaker as he entered the Petitioner's home. R. at 8, 17. As both courts noted, the standard provided in *Cady* is whether the entry is "totally divorced from criminal investigation." *Id.* The purpose of the exception is to recognize certain functions performed by police and those functions are not location specific.

Officer McNown's entry into the Petitioner's home were out of a concern for the Petitioner's health safety, not in furtherance of a criminal investigation. Therefore, the entry was totally divorced from criminal investigation and the community caretaker exception should apply. Because the community caretaker exception applies in this case, Officer McNown had a lawful purpose to be in the Petitioner's home. The plain view doctrine only requires that the objects be readily visible in a location that the officer had a right to be in, and that is what happened here. *See Harris v. United States*, 390 U.S. 234, 236 (1968). Because the plain view doctrine applies, the district court properly admitted the cocaine as evidence.

The Sixth Amendment guarantees the right of assistance of counsel for the accused in all criminal prosecutions. U.S. Const. Amend. VI. This Court has extended that right to the effective assistance of counsel in all critical stages of a criminal prosecution. The Sixth Amendment requires both a criminal prosecution and an accused before it attaches. *United States v. Gouveia*, 467 U.S.

180, 188 (1984). There is a clear bright line rule that the right to competent counsel only attaches after the initiation of adversary judicial proceedings. This Court has wisely declined to extend that right to any pre-indictment proceedings. While the right to effective assistance of counsel has unambiguously been extended to post-indictment plea bargaining, it does not attach to pre-indictment plea bargaining. Extending the right to competent counsel prior to the initiation of adversary judicial proceedings would only invite confusion on exactly how far that right extends.

Because the right to effective assistance of counsel does not apply until a criminal prosecution has been initiated, the Petitioner cannot have been denied effective assistance of counsel during pre-indictment plea negotiations. Additionally, even if the Petitioner were entitled to competent counsel at that time, he is not entitled to have the plea agreement re-offered to him because he cannot show a reasonable probability that he would have accepted the offer and the court would have accepted the agreement without the prosecution cancelling the agreement. Both the district and circuit courts below correctly held, respectively, that the Petitioner's Sixth Amendment right was not violated because the Petitioner was not prejudiced by his counsel's deficient performance, R. at 12, and that the Petitioner did not have a Sixth Amendment right that could have been violated prior to indictment, R. at 18. The Government should not have to suffer the Petitioner's poor choice of counsel while the Petitioner reaps the rewards of his hindsight. Therefore, the Petitioner is not entitled to relief.

STANDARD OF REVIEW

The issue of whether the community caretaker exception applies to warrantless searches of the home is an issue of law that this Court reviews de novo. *Pierce v. Underwood*, 487 U.S. 552, 558 (1988).

There is no dispute as to the facts underlying Petitioner's ineffective assistance of counsel claim. The issue presented before the Court is purely a question of law. Therefore, it should be reviewed de novo. *See Id.*

ARGUMENT

I. THE COMMUNITY CARETAKER EXCEPTION APPLIES TO THE COCAINE FOUND IN THE PETITIONER'S HOME WHEN OFFICER MCNOWN WAS LOOKING FOR THE PETITIONER OUT OF CONCERN FOR THE PETITIONER'S HEALTH AND SAFETY.

This Court should affirm the Thirteenth Circuit's decision and hold that the community caretaker function applies to activities in the home and, therefore, the Petitioner is not entitled to any relief. The community caretaker functions performed by police include all those tasks that police routinely perform that are not related to investigating crime. The function performed is the basis of the exception, not the location. The circuit court found "that entering a home as a community caretaker is a natural consequence of the role that law enforcement officers play in their everyday duties to protect and serve communities." R. at 16. Therefore, the purpose of the exception can only be fulfilled if it applies to both automobiles and homes.

A. The Community Caretaker Exception to the Fourth Amendment Should Not be Limited to Automobiles Because the Purpose of the Exception is About the Function Performed, Not the Location.

The Fourth Amendment provides that "[t]he right of the people to be secure in their . . . houses . . . against unreasonable searches and seizures, shall not be violated." U.S. Const. Amend. IV. "[B]ecause the ultimate touchstone of the Fourth Amendment's is 'reasonableness,' the warrant requirement is subject to certain exceptions." *Brigham City v. Stuart*, 547 U.S. 398, 403 (2006). One exception is when police are acting as a community caretaker. *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). The community caretaker function is best described as those parts of a police officer's job that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute," and has nothing to do with the location that is ultimately searched. *Id.*

The community caretaker function was first recognized by this Court in *Cady* in the context of an automobile search. *Id.* In *Cady*, the defendant was involved in a car accident. *Id.* at 435–36. After the accident, the defendant's vehicle was searched for the weapon out of a concern that it might fall into untrained or malicious hands. *Id.* at 443. Police did not find the revolver in the car, but they discovered evidence relating to a murder not yet reported. *Id.* at 437, 447. The Court ultimately held that the search was not unreasonable within the meaning of the Fourth Amendment because it fell within the community caretaker function. *Id.* at 448. The Court noted that the search was conducted out of a concern for the safety of the public and without knowledge that any crime had been committed. *Id.* at 447. The fact that less intrusive methods may have accomplished the same result did not make the search unreasonable. *Id.*

While It may be tempting to limit the community caretaker function to searches of an automobile based on *Cady*, this Court should not do so. The *Cady* Court noted that there is a constitutional difference between a house and a car and "that searches of cars that are constantly moveable *may* make the search of a car without a warrant a reasonable one although the result *might* be the opposite in a search of a home . . . ." *Id.* at 439–40 (emphasis added). This Court has never decided the issue, R. at 16, although, several circuits have held that the community caretaker exception does not apply to the home by pointing to this portion of the opinion in *Cady*. *See Ray v. Twp. Of Warren*, 626F.3d 170, 177 (3d Cir. 2010); *United States v. Bute*, 43 F.3d 531, 535 (10th Cir. 1994) (quoting *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993)); *Erickson*, 991 F.2d at 533 ("*Cady* clearly turned on the 'constitutional difference' between searching a house and searching an automobile."); *United States v. Pichany*, 687 F.2d 204, 208–09 (7th Cir. 1982) (refusing to extend the community caretaker exception to a warehouse). However, when the Thirteenth Circuit held that the exception applies to the home, R. at 17, it joined other federal and

state courts that have also applied the community caretaker exception to the home, *see United States v. Smith*, 820 F.3d 356, 359 (8th Cir. 2016); *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006); *United States v. Rohrig*, 98 F.3d 1506, 1510 (6th Cir. 1996); *State v. Pinkard*, 2010 WI 81, ¶ 20, 327 Wis. 2d 346, 349, 785 N.W.2d 592, 594.

For example, the Sixth Circuit held that entering a home to locate an unresponsive occupant while responding to a noise complaint falls within the community caretaking functions that police routinely provide as part of their jobs. *Rohrig*, 98 F.3d at 1510. In *Rohrig*, officers responded to a noise complaint in the middle of the night. *Id.* at 1509. Officers first tried to contact the occupants at the front door, and then by tapping windows as they walked around the home to find a rear entrance. *Id.* The officers found a back door and again knocked and shouted to make their presence known. *Id.* When they still did not get a response, they entered the home through the unlocked screen door and announced their presence each time they entered a different room. *Id.* When they entered the basement, instead of finding an occupant, they found a marijuana growing operation with 150 plants, including a system of lights, fans, and running water. *Id.* Ultimately, the Sixth Circuit determined that the officers' entry into the home was motivated by their role as community caretakers and "that their failure to obtain a warrant [did] not render that entry unlawful." *Id.* at 1523.

Another example is when the Eighth Circuit found that entering an apartment after attempting to serve papers to an unresponsive occupant is also part of the community caretaking function. *Quezada*, 448 F.3d at 1007. In *Quezada*, a deputy sheriff went to the defendant's apartment to serve a child protective order. *Id.* at 1006. When the deputy knocked on the apartment door, it swung open enough for him to see that the lights were on and to hear that the television was playing. *Id.* The deputy shouted to announce his presence several times but got no response.

Id. In an effort to find the occupant, the deputy entered the apartment and looked down the hallway where he saw a pair of legs on the ground sticking out from a bedroom door. *Id.* The deputy again shouted and got no response. *Id.* As he moved closer, he even kicked the defendant's feet and got no response. *Id.* It was only after the deputy took the shotgun from beneath the defendant that the man began to stir. *Id.* The court held the entry was justified because a police officer may enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists requiring his or her attention. *Id.* at 1007 (citing *Mincey v. Arizona*, 437 U.S. 385, 392–93 (1978)). Here, the Eighth Circuit found the deputy's belief to be reasonable. *Id.* at 1008. The court noted that it might have been different had the apartment been dark and quiet but that under these circumstances, it was reasonable to believe "that someone was inside but was unable to respond for some reason." *Id.*

Further, the Eighth Circuit has found that a wellness check is also within the community caretaking function performed by law enforcement. *Smith*, 820 F.3d at 359. In *Smith*, police conducted a wellness check after someone expressed concern that the defendant might be holding his ex-girlfriend against her will. *Id.* at 358. When police knocked on the door at the defendant's apartment, the defendant answered, denied the women's presence, and refused to consent to a search of the apartment. *Id.* After discussing the situation and learning of warrants for the defendant's arrest, police arrested him as he took out the trash. *Id.* at 359. As police prepared to enter the home based on an obligation to make sure the ex-girlfriend was safe, an officer noticed someone looking out a window from the home. *Id.* Police entered the home where they found the ex-girlfriend and an AK-47, which the defendant was not allowed to possess because he was a felon. *Id.* The Eighth Circuit ultimately concluded that the entry was done as part of the officers'

community caretaking function because there was good reason to believe the ex-girlfriend was in danger and in this location. *Id.*

The Supreme Court of Wisconsin has found the community caretaker exception applies to the home when an officer enters to ensure the health and safety of the occupants. *Pinkard*, 785 N.W.2d at 594. In *Pinkard*, officers received an anonymous tip that the defendants were sleeping near drugs and money in a home where the door was standing open. *Id.* at 594–95. Upon arrival, the officers announced their presence and waited for roughly thirty to forty-five seconds with no response. *Id.* at 595. They then entered the home out of concern for the welfare of the defendants and to "safeguard any life or property in the residence." *Id.* In finding that the community caretaker exception applied, the Supreme Court of Wisconsin noted there is no language in *Cady* that would limit the exception to incidents involving vehicles. *Id.* at 598. The court read *Cady* as "counsel[ing] a cautious approach when the exception is invoked to justify law enforcement intrusion into a home," not as a prohibition. *Id.* (first quoting *South Dakota v. Deneui*, 2009 SD 99, 775 N.W.2d 221, 239; then citing *United States v. Gillespie*, 332 F. Supp. 2d 923, 929 (W.D. Va. 2004)).

While factually *Cady* involved a vehicle, the concern that prompted the officers to act as community caretakers had very little to do with the vehicle. *See Cady*, 413 U.S. at 437. The concern was with the safety of the community. *Id.* at 447. Concerns for safety of the community can be equally great when they involve a home. As the cases above illustrate, officers routinely deal with safety concerns in the home that are distinct from criminal investigations. While a person's home and car are treated differently for Fourth Amendment purposes, the purpose of the community caretaker function is present in both. Therefore, the community caretaker exception should apply to the home.

Officer McNown went to the Petitioner's home as a community caretaker, not as a criminal investigator. Officer McNown went to the Petitioner's home after the Petitioner unexpectedly missed the Sunday morning service and failed to respond to phone calls from members of the congregation. R. at 2. Further supporting this purpose for visiting the Petitioner is the fact that Officer McNown stopped to buy hot tea at Starbucks on his way to the home. R. at 2. While it is true that Officer McNown saw a Cadillac that might have a connection to drug dealing, nothing in the record indicates a suspicion that the Petitioner was involved. As an attendee of the church where the Petitioner worked, Officer McNown knew the Petitioner well. Officer McNown knew him as someone that was not involved with drugs or the bar scene. This is evident because earlier that morning when another member of the church mentioned that the Petitioner was at a bar the night before, Officer McNown dismissed it. R. at 2. He had no reason to suspect the Petitioner.

On arrival at the Petitioner's home, Officer McNown heard loud music coming from the home and despite knocking on the front door and announcing his presence, no one answered the door. R. at 3. Much like the officers in *Rohrig*, Officer McNown worked his way around the home and tried to enter in a back door. R. at 3. Just like the officers in *Quezada*, Officer McNown was concerned that someone was not answering the door despite the fact that it appeared as though someone was home. R. at 3. Officer McNown entered the Petitioner's home and proceeded room by room to find the Petitioner out of a concern for the Petitioner's health and safety, just as the officers did in all the cases illustrated above. R. at 3. While it is true that prior to finding the Petitioner Officer McNown found a notebook containing incriminating information, the search continued out of a desire to locate Petitioner. R. at 3. The same thing happened in *Rohrig*, where the officers continued to search the residence after finding the marijuana plants in the hope of locating one of the occupants. *Rohrig*, 98 F.3d at 1509.

Community caretaking functions exercised by law enforcement officers are essential for the health and safety of members in our society. Making clear that this exception applies to the home will ensure that those who violate the law do not get a windfall when law enforcement acts in the interest of the health and safety of our society. This Court should hold that the community caretaker exception applies to the home.

B. The Plain View Doctrine Applies to the Cocaine Found by Officer McNown Because Officer McNown Had a Lawful Basis for Entry into the Petitioner's Home.

Because the community caretaker exception applies, Officer McNown's discovery of cocaine in the Petitioner's home is not in violation of the Fourth Amendment. "It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." *Harris v. United States*, 390 U.S. 234, 236 (1968).

In the present case, the community caretaker function served as a lawful basis for Officer McNown's entry into the home. Officer McNown did not actively search for cocaine. Officer McNown entered the home to find the Petitioner, R. at 3, because he had not come to church that morning, R. at 2. Officer McNown did not search through boxes, drawers, or cabinets. Rather, he went to the television to turn it off and went upstairs to find the source of loud music. R. at 3. He didn't search all the rooms. He simply opened the door to the room the music was coming from to search for the Petitioner. R. at 3. Officer McNown found the drugs when he found the Petitioner. R. at 3. The cocaine was observable because the Petitioner was packaging it; he did not have to open drawers, look under furniture, or ask questions to find it. R. at 3. Therefore, the drugs were in plain view. Because the plain view doctrine is an exception to the warrant requirement,

application of the exclusionary rule is not appropriate, and the cocaine was properly admitted as evidence. *See Davis v. United States*, 564 U.S. 229, 231–32 (2011).

Officer McNown, as the Thirteenth Circuit concluded, was acting as a community caretaker when he entered the Petitioner's home because Officer McNown was concerned about the health and safety of the Petitioner, not conducting a criminal investigation. Because the community caretaker exception applies, Officer McNown had a lawful purpose to be in the home and the plain view doctrine applies to the cocaine found in the Petitioner's home. Therefore, this Court should affirm the holding of the Thirteenth Circuit.

II. THE PETITIONER IS NOT ENTITLED TO RELIEF BECAUSE HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL WAS NOT VIOLATED.

This Court should affirm the Thirteenth Circuit's decision and hold that the Petitioner's Sixth Amendment right to counsel was not violated and, therefore, he is not entitled to any relief. First, there is a clear bright-line rule that the Sixth Amendment right to counsel does not attach until after adversary judicial proceedings have been initiated. Because the Petitioner was not denied effective assistance of counsel after he was indicted, his Sixth Amendment rights are not implicated. Second, even if the Petitioner had competent counsel, he cannot demonstrate a reasonable probability that he would have accepted the plea offer extended by the Government. Therefore, even if the Sixth Amendment right to counsel extends to pre-indictment plea negotiations, the Petitioner is not entitled to be re-offered the original plea deal.

A. The Sixth Amendment Right to Counsel Does Not Attach to Pre-Indictment Plea Negotiations Because Criminal Judicial Proceedings Have Not yet Begun.

The Sixth Amendment to the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the [a]ssistance of [c]ounsel for his defen[s]e." U.S. Const. amend. VI. The language of the Sixth Amendment requires (1) a criminal

prosecution, and (2) an accused. *Id.*; *United States v. Gouveia*, 467 U.S. 180, 188 (1984). Therefore, no individual has the Sixth Amendment right to effective assistance of counsel prior to the initiation of criminal judicial proceedings. *See Brewer v. Williams*, 430 U.S. 387, 398 (1977). "[T]he right to counsel granted by the Sixth . . . Amendment[] means that at least a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him . . . ." *Id.* The initiation of adversary judicial criminal proceedings is generally recognized "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Estelle v. Smith*, 451 U.S. 454, 469–70 (1981) (quoting *Kirby v. Illinois*, 406 U.S. 682, 688–89 (1972) (plurality opinion)). Once adversary judicial criminal proceedings have been initiated, a defendant is entitled to the Sixth Amendment protection of effective assistance of counsel at all critical stages. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). The negotiation of a plea bargain is considered a "critical stage" for Sixth Amendment right to counsel purposes. *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). The right to counsel for plea bargaining, however, does not extend to plea bargaining that occurs prior to the initiation of adversary judicial proceedings. *See Gouveia*, 467 U.S. at 188 (citing *Estelle*, 451 U.S. at 469–70; *Moore v. Illinois*, 434 U.S. 220, 226–27 (1977); *Brewer*, 430 U.S. at 398–99; *United States v. Mandujano*, 425 U.S. 564, 581 (1976)).

Where inmates at a federal prison were held in the Administrative Detention Unit (ADU) for nineteen months and not appointed counsel prior to being arraigned in federal court, this Court held that the Sixth Amendment right to counsel was not violated. *Gouveia*, 467 U.S. at 182. In *Gouveia*, several inmates were suspected of killing another inmate. *Id.* at 183. The suspects were placed in ADU and segregated from the general prison population while the prison administration investigated the death. *Id.* During the nineteen months that the suspects were in ADU, none of

them were appointed counsel. *Id.* Each were then arraigned in federal court on murder charges and appointed counsel at the arraignment. *Id.* The defendants moved the trial court to dismiss their indictments. *Id.* They argued, *inter alia*, that their right to counsel was violated when they were held without appointed counsel. *Id.* This Court held that, because the right to counsel does not attach prior to the initiation of adversary judicial proceedings, their Sixth Amendment right to counsel could not have been violated. *Id.* at 190. This Court reasoned that "the mere 'possibility of prejudice [to a defendant resulting from the passage of time] . . . is not itself sufficient reason to wrench the Sixth Amendment from its proper context.'" *Id.* at 191 (quoting *United States v. Marion*, 404 U.S. 307, 321–22 (1971)) (alterations in original).

The law is clear. The Sixth Amendment right to competent counsel does not attach until adversary judicial proceedings have been initiated. *See Brewer*, 430 U.S. at 398. Therefore, the Petitioner's claim that he was denied effective assistance of counsel has no merit. It is not disputed that Petitioner's initial choice of counsel was deficient in his performance. However, because the Petitioner had not yet been charged or had adversary judicial proceedings commenced against him, the constitutional right to effective assistance of counsel had not yet attached. Much like the defendants in *Gouveia*, therefore, the Petitioner's right to counsel could not have been violated. The proper context of the Sixth Amendment right to counsel is after adversary judicial proceedings have commenced, either by formal charge, preliminary hearing, indictment, information, or arraignment. *See Gouveia*, 467 U.S. at 321–22; *Estelle*, 451 U.S. at 469–70. The Sixth Amendment right to competent counsel has never extended to pre-indictment proceedings. Extending the right to competent counsel to pre-indictment proceedings would make the line impossible to draw and would require fact-intensive review to determine whether the right should have applied. Furthermore, the Fifth Amendment right to counsel in a custodial interrogation provides protection

prior to indictment. Therefore, this Court should not wrench the Sixth Amendment right to competent counsel from its proper context.

B. Even if the Sixth Amendment Right to Counsel Applies, the Petitioner Is Not Entitled to Relief Because He Cannot Meet the Two-Part *Strickland* Test.

In the stages where the Sixth Amendment right to counsel applies, "defendants are 'entitled to effective assistance of competent counsel.'" *Lafler v. Cooper*, 566 U.S. 156, 162 (2012) (quoting *McMann v. Richardson*, 397 U.S. 759, 771 (1970)). Counsel is ineffective if the conduct was so below the professional standard that it undermined any faith that the adversarial process produced a fair result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984). In order for a defendant to be successful in a claim that there was ineffective assistance of counsel, the defendant must show two things. *Id.* at 687. First, the defendant must show that the counsel was, in fact, ineffective. *Id.* Second, the defendant must show that the ineffective assistance of counsel prejudiced the defendant. *Id.* "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.* This right to competent counsel has been extended to plea negotiations. *Lafler*, 566 U.S. at 162. In order to show ineffective assistance of counsel in the context of plea negotiations, the defendant "must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel." *Missouri v. Frye*, 566 U.S. 134, 147 (2012). The defendant must also show that the prosecutor would not have withdrawn the offer and that the court would have accepted the agreement. *Id.*

If a defendant cannot satisfy the prejudice prong of the *Strickland* test as applied to plea negotiations, the defendant is not entitled to be re-offered the plea agreement. *Id.* at 150–51. In *Frye*, the defendant was charged with a felony. *Id.* at 138. The prosecutor sent a written offer with two options to the defendant's attorney. *Id.* Both offers were sent with an expiration date. *Id.* at

139. The defendant's attorney, however, never communicated the offers to the defendant. *Id.* After the offers expired, the defendant plead guilty to the felony offense and was sentenced by the trial judge. *Id.* The defendant filed for post-conviction relief, alleging that his attorney provided ineffective assistance of counsel. *Id.* This Court held that the defendant's counsel certainly provided ineffective assistance of counsel by failing to communicate the prosecution's plea offers to the defendant. *Id.* at 149. At the evidentiary hearing on the defendant's post-conviction motion, he testified that he would have taken one of the offered pleas, but for his attorney's failure to communicate the offer to him. *Id.* at 139. This Court, however, held that the defendant did not satisfy the requisite prejudice showing. *Id.* at 150. The defendant could not show that the prosecutor would not have withdrawn the offer and that the trial court would have accepted the plea. *Id.* Therefore, the defendant was not entitled to be re-offered the plea. *Id.*

In the present case, the Petitioner cannot prove that he was prejudiced from his attorney's ineffective assistance. In order to prove prejudice, the Petitioner must show a reasonable probability (1) that he would have accepted the plea but for his attorney's ineffective assistance, (2) that the Assistant U.S. Attorney (AUSA) would not have rescinded the offer, and (3) that the trial court would have accepted the agreement. The Petitioner cannot do so. First, the Petitioner cannot show a reasonable probability that he would have accepted the offer with its conditions. The AUSA offered the Petitioner a guilty plea for a recommendation of one year in prison if the Petitioner provided the names of his suppliers. R. at 4. When interviewed after arrest, the Petitioner indicated that he would never reveal his suppliers. R. at 3. The Petitioner told DEA agents that if he provided the names of his suppliers, he would be killed and his church would be burned down. R. at 3. After the offer had expired and the Petitioner was staring down the barrel at a minimum ten-year prison sentence with a maximum of life in prison, 21 U.S.C. § 841(b)(1)(A)(ii)(II) (2012),

the Petitioner testified at the pretrial evidentiary hearing that he would have given up his suppliers "in a heartbeat" and that he would "do anything to avoid the risk of trial," Ex. C. The Petitioner must show a reasonable possibility that he would have accepted the offer when it was extended to his initial counsel. The Petitioner could only say that if he were offered the agreement at the evidentiary hearing he would accept it. Ex. C. Because the offer expired within thirty-six hours and the Petitioner was adamant about the dire consequence of revealing his suppliers only a day before the offer was extended, the Petitioner cannot claim with any reasonable certainty that he would have accepted the plea agreement.

Additionally, the Petitioner cannot demonstrate with any degree of reasonable probability that the prosecutor would not have rescinded the offer. The plea agreement was contingent on the Petitioner providing the names of his cocaine suppliers. R. at 4. Regardless of how much the Petitioner would have wanted to accept the plea and only serve one year in prison, the prosecution would not have accepted the Petitioner's plea for the recommended sentence if the conditions were not complied with. The record does not demonstrate anywhere that the Petitioner knew the real names of his suppliers. Additionally, the purpose of the plea agreement was to obtain information that would lead to the arrest of the "kingpin." R. at 4. Therefore, as the trial court found, it is more likely than not that the Petitioner would not have provided the names of his suppliers within the thirty-six-hour period. R. at 11. Without that information, the prosecutor would have revoked the offer and it never would have been submitted to the trial court for acceptance. Finally, there is nothing in the record that indicates whether the trial court would have accepted the offer.

C. The Remedy that the Petitioner Seeks Is Not Available Because He Fails the *Strickland* Test and it Would Not Be Tailored to the Violation.

Even if there is a violation of an individual's Sixth Amendment right to effective assistance of counsel, the violation "may be disregarded as harmless error." *United States v. Morrison*, 449

U.S. 361, 365 (1981). However, where a remedy is required, that remedy should be appropriately tailored to the violation. *Id.* at 364. Any remedy granted should not unnecessarily infringe on any relevant competing interests. *Id.* Therefore, the remedy for a violation of the Sixth Amendment's counsel guarantee must neutralize the taint of the constitutional violation without "grant[ing] a windfall to the defendant or needlessly squander[ing] the considerable resources the State properly invested in the criminal prosecution." *Lafler*, 566 U.S. at 170.

If the injury that the defendant suffered was such that a plea bargain that consisted of pleading to the charged offense for a reduced sentencing recommendation was rejected, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." *Id.* at 171. The defendant in *Lafler* was provided ineffective assistance of counsel that led him to reject a plea that would have imposed a greatly reduced sentence. *Id.* at 160. The defendant sought the plea offer to be re-extended as a remedy for the ineffective assistance of counsel. *Id.* at 162. The Court acknowledged that, as a practical matter it is nearly impossible to restore the defendant and the prosecutor to the same positions they occupied prior to the rejection of the plea bargain. *Id.* at 172. The Court held that, because the defendant had satisfied both prongs of the *Strickland* test, the prosecution must re-offer the plea agreement. *Id.* at 174. In order to decide how to or whether to resentence the defendant, a court may consider the "defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions," as well as "any information concerning the crime that was discovered after the plea offer was made." *Id.* at 171–72.

Here, because the Petitioner does not pass both prongs of the *Strickland* test for ineffective assistance of counsel, the remedy he seeks is unavailable. The Court in *Lafler* held that the

defendant in that case was only entitled to be re-offered the plea agreement because the defendant had suffered prejudice. 566 U.S. at 174. If the Petitioner were to be re-offered the original plea agreement, it would essentially grant a windfall to the Petitioner while squandering the resources that the Government invested into the prosecution of the Petitioner. The purpose of the plea agreement was to gain information about and apprehend the Petitioner's cocaine suppliers. R. at 4. The reason the offer was extended to the Petitioner through counsel prior to the Petitioner being indicted was to avoid tipping off the suppliers. R. at 4. Any information that the Petitioner supplies at this point would be virtually useless to the Government. The suppliers have long been tipped off about the Petitioner's arrest and prosecution. There is little to no chance that information provided by the Petitioner would lead to any arrests of the suppliers. Therefore, the Government should not be compelled to re-extend the plea offer because the explicit purpose of the offer has been frustrated.

CONCLUSION

For the forgoing reasons, this Court should affirm the decision of the United States Court of Appeals for the Thirteenth Circuit and hold that the community caretaker doctrine extends to warrantless entry into homes and that the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations.