No. 4-442

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

Respondent, United States of America

Attorneys for the
Respondent, United States of America

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STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

Petitioner Chad David leads regular Sunday morning services in Lakeshow, Staples. R. at 2, lines 2-4. After missing one of his Sunday services, parishioners expressed concern over Mr. David's absence. Officer McNown, a parishioner and officer of 12 years, to ease the nerves of the concerned parishioners, decided to stop by Petitioner's Lakeshow residence and check on his well-being. *Id.* McNown believed Petitioner may have been sick and wanted to bring him tea. Ex. A, pg. 3, line 16.

As Officer McNown arrived in Petitioner's neighborhood, he noticed a black SUV with a Golden State license plate, which he found unusual, as it was a nice residential area. Ex. A. Lakeshow had been experiencing an influx of Golden State drugs and such a vehicle was typically driven by drug dealers. Ex A, pg. 4, line 6. After arriving at Petitioner's residence, McNown did not observe any signs of a break-in, and Petitioner's car was in the driveway. Ex. F. Assuming Petitioner was home, McNown knocked on the front door and rang the doorbell. *Id.* McNown attempted to open the front door, but it was locked. *Id*. While outside Petitioner's residence, McNown heard extremely loud music and saw a movie playing inside the residence—further confirming McNown's belief that an individual was inside the home. Ex. A, pg. 4, lines 27-28. At this point, McNown "was just eager to check the well-being of Chad and give him tea." Ex. A, pg. 5, lines 14-15

Believing he did not need a warrant as he was "just concerned about Chad's well-being[,]" McNown entered Petitioner's residence through the unlocked backdoor. *Id.* at pgs. 5, 7. Upon entering, McNown observed that Petitioner's house was "really messy" and found a notebook containing the words: "Julianne Alvardo," and "one ounce, paid." *Id.* McNown knew

Julianne Alvarado was a parishioner who went to Petitioner's Sunday services. R. at 2, lines 10-15.

With music playing within Petitioner's home, McNown followed the music in search of Petitioner and went upstairs to "check on" him. Ex. F. McNown opened the room's door where the music was coming from and witnessed Petitioner packaging cocaine into baggies. *Id.* Only after further observing the baggies did McNown notice they had a "Golden State Flag in the shape of a skull" label on them. *Id.* McNown then detained Petitioner and, following police department protocol, called a DEA agent to the residence. Ex A, pg. 6, lines 18-19. DEA Agent Colin Malaska arrived and investigated the scene. R. at 3.

After McNown advised Petitioner of his Miranda rights, agent Malaska asked Petitioner where he obtained the cocaine. Ex. F. Petitioner replied, "there is no way in hell I will tell you. They will kill me and burn my church down if I give you their names" Ex. F. After giving this statement, Petitioner was taken into custody at a federal detainment facility. Ex. F; R. at 3.

With Petitioner in custody, Agent Malaska contacted the prosecution regarding the possibility of obtaining information from Petitioner about a suspected drug kingpin operating in the Lakeshow area. R. at 4. Malaska convinced prosecutors to postpone the filing of charges in order to offer a time-limited plea deal to Petitioner so that he could provide the information without tipping off any potential suspects. R. at 4. The prosecution drafted a plea offer requiring Petitioner to: (1) plead guilty to one count of 21 U.S.C. § 841; (2) accept a sentence of one year in federal prison; (3) provide substantial information of known and suspected cocaine suppliers to the Department of Justice which leads to the arrest of one suspect; and (4) accept the plea before 10:00 PM on January 17, 2017. Ex. E.

At the federal detainment facility, Petitioner called and retained defense lawyer, Keegan Long. R. at 3. The prosecution emailed its plea offer to Mr. Long on January 16, 2017 at 8:00 AM, leaving Mr. Long thirty-six hours to convey the offer to Petitioner in order for him to accept or decline it. Ex. E. The prosecution did not file any charges against the Petitioner at this time.

Mr. Long admitted he was intoxicated throughout representation of Petitioner. Ex B, pg. 3, line 4. As a result, Mr. Long failed to convey the plea offer to Petitioner within the thirty-six-hour time-limit. Ex B, pg. 2, lines 25-26. After Mr. Long told Petitioner the plea offer had expired, Petitioner fired Mr. Long. Ex. B, pg. 4, line 2. At no time did Petitioner ever tell Mr. Long that he would have accepted the plea offer had it been conveyed to him. *Id.* at lines 15-17.

Following the expiration of the plea offer, the prosecution indicted Petitioner. R. at 4, line 20. Petitioner then retained a new defense attorney, Michael Allen. *Id.* at line 27. Mr. Allen emailed the case prosecutor to discuss the possibility of accepting the now-expired plea offer. Ex. D. The prosecutor replied that the offer could not be re-extended due to the fact that any of Petitioner's information "has no value by now." Ex. E. Mr. Allen sent a follow-up email and reiterated that Petitioner possessed valuable information. *Id.* The prosecutor ended the email exchange by affirming that the plea deal was off the table. *Id.*

II. SUMMARY OF THE PROCEEDINGS

On the January 18, 2017, federal prosecutors indicted Petitioner on one count of possessing a controlled substance with intent to distribute under 21 § U.S.C. 841. R. at 4, 14. After the government failed to re-offer an expired plea deal, Petitioner filed two pretrial motions in the Southern District Court of Staples. First, he filed a motion to suppress the evidence seized during the search of his home due to the lack of a search warrant. *Id.* The district court denied this motion, reasoning that Officer McNown's search of Petitioner's home fell under the community caretaker

search warrant exception. R. at 7-8. Second, Petitioner filed a motion ordering the government to re-offer the initial plea deal which his attorney failed to communicate to him. *Id.* The district court also denied this motion, finding that although the Sixth Amendment right to counsel attached during pre-indictment plea negotiations, no remedy can be granted because Petitioner did not suffer prejudice. R. at 11-12.

Claiming the District Court erred in denying both of his pretrial motions, Petitioner appealed to the Thirteenth Circuit Court of Appeals. R. at 14, line 3. The Thirteenth Circuit Court of Appeals affirmed Petitioner's conviction, upholding the District Court's denial of Petitioner's motion to suppress evidence and upholding in part the District Court's denial of Petitioner's motion to re-offer the plea deal. R. at 14, lines 7-9. With regard to the second motion, the Thirteenth Circuit Court of Appeals' reasoning departed from the District Court's as it found that the Sixth Amendment right to effective counsel does not attach in pre-indictment plea negotiations. *Id*. The Supreme Court granted a writ of certiorari to decide (1) whether warrantless searches conducted by law enforcement acting as community caretakers extend to the home under the Fourth Amendment; and (2) whether the Sixth Amendment right to effective counsel attaches during plea negotiations prior to a federal indictment.

SUMMARY OF THE ARGUMENT

This case involves allowing law enforcement officers to protect and serve their communities while also preserving consistency and clarity in the criminal justice system. This Court established exceptions to the warrant requirement, on the basis that the underlying touchstone of the Fourth Amendment is reasonableness. Because police officers have a duty to be public servants and to protect their communities, the "community caretaker" exception allows warrantless entries into homes by police officers, on the grounds that such entry and search was conducted for the sole purpose of performing a community caretaker function. The Thirteenth

Circuit properly extended this exception to the home and found that a warrantless entry and search of a home are valid under the community caretaker doctrine.

The Sixth Amendment's plain language dictates that only those accused in criminal prosecutions enjoy the right to counsel. Without a formal charge through an indictment, no criminal prosecution exists. Petitioner did not enjoy a right to effective counsel during initial plea negotiations because he faced no charges at the time. Therefore, Petitioner cannot raise an ineffective assistance of counsel claim through the Sixth Amendment. Even if this Court does find that the Sixth Amendment right to effective counsel attaches during critical pre-indictment proceedings, the Petitioner did not suffer the requisite prejudice to satisfy a *Strickland* ineffective assistance of counsel claim because he did not establish that he would have accepted the plea had he been offered it during the pre-indictment stage.

STANDARD OF REVIEW

Motions to suppress evidence are reviewed de novo. *United States v. Thomas*, 863 F.2d 622, 625 (9th Cir. 1988). Questions of law and fact are reviewed de novo. *United States v. McConney*, 728 F.2d 1195, 1201-03 (9th Cir. 1984). Whether the searches here are prohibited by the Fourth Amendment are questions of law and fact, so de novo review is appropriate.

ARGUMENT

I. THE THIRTEENTH CIRCUIT COURT OF APPEALS' DECISION SHOULD BE AFFIRMED BECAUSE THE WARRANTLESS ENTRY INTO PETITIONER'S HOME IS VALID UNDER THE FOURTH AMENDMENT.

The Fourth Amendment protects individuals against unreasonable searches and seizures. U.S. Const. amend. IV § 1. Although the Supreme Court recognizes that warrantless entries into a home are "presumptively unreasonable," a number of exceptions to the warrant requirement have been established. *See, e.g. Brigham City v. Stuart*, 547 U.S. 398 (2006); *Carroll v. United States*,

267 U.S. 132 (1925) (establishing the automobile exception to the warrant requirement). If a warrantless search is performed, the question of whether an individual's Fourth Amendment rights have been violated rests on whether an exception to the warrant requirement applies. See, *Katz v. United States*, 389 U.S. 347, 356-57 (1967).

At issue in the present case is the community caretaker doctrine and whether this doctrine justifies a warrantless entry into a home. The community caretaker doctrine refers to law enforcement functions, "entirely divorced" from criminal investigations, aimed at serving the public, and ensuring the safety of community members. *See Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). Because this Court has not directly addressed whether the exception can permit warrantless entries into the home, lower courts faced with answering this question are without much guidance in determining the answer. Here, the Thirteenth Circuit held that the community caretaker exception applied because the officer's entry was solely and reasonably performed as a community caretaking function. This Court should uphold the Thirteenth Circuit's decision and allow warrantless searches conducted by law enforcement acting as community caretakers to extend to the home.

A. Warrantless Searches Conducted by Law Enforcement Acting as Community Caretakers Should Extend to the Home under the Fourth Amendment.

The Thirteenth Circuit properly denied Petitioner's motion to suppress because the community caretaker doctrine should extend to the home under the Fourth Amendment. Warrantless entries into the home are per se unreasonable. Even so, the ultimate touchstone of the Fourth Amendment is 'reasonableness,'" and the warrant requirement is thus subject to certain exceptions. *Brigham City*, 547 U.S. at 403. Although limiting its scope to automobiles, this Court first established the community caretaker exception in *Cady v. Dombrowski*. *Dombrowski*, 413

U.S. at 441. It is distinguished from other exceptions to the Fourth Amendment's warrant requirement because it "requires a court to look at the *function* performed by a police officer" when engaging in a warrantless entry of a home. *Matalon v. Hynnes*, 806 F.3d 627, 634 (1st Cir. 2015) (quoting, *Hunsberger v. Wood* Cir. 2009). The community caretaker doctrine presumes "the police are not acting for any law enforcement purposes," and for this reason the inquiry of whether or not there was time to seek a warrant is immaterial. *Sutterfield v. City of Milwaukee*, 751 F.3d 542, 561 (7th Cir. 2014).

While the exceptions to the warrant requirement have been "jealously and carefully drawn," courts are split with regard to the "community caretaker" doctrine as an exception, specifically with its applicability to warrantless entries and searches of homes—showing that "no obvious answer as to whether it is appropriate to extend that doctrine beyond the automobile setting" exists. *Sutterfield*, 751 F.3d at 561. However, many Federal and State courts have established that a police officer's role as "community caretaker" justifies the warrantless entry into and search of a home, recognizing the performance of these caretaker functions is an essential part of an officer's job to protect and serve the community. *See, e.g. United States v. Quezada*, 448 F.3d 1005 (8th Cir. 2006); *United States v. Smith*, 820 F.3d 356 (8th Cir. 2016); *United States v. Rohrig*, 98 F.3d 1506 (6th Cir. 1996). The circuit courts have described the "community caretaker" doctrine as one that recognizes that "[i]n performing this community caretaker role, the police are 'expected to aid those in distress . . . prevent potential hazards from materializing and provide an infinite variety of services to preserve and protect public safety." *United States v. Coccia*, 446 F.3d 233, 238 (1st Cir. 2006).

The Eighth Circuit in *United States v. Smith* affirmed that a community caretaker function may justify "non-investigatory searches and seizures in limited situations." *Smith*, 820 F.3d at 360.

In *Smith*, the officers received a call from a concerned resident living in a halfway house regarding the well-being of another resident, Wallace. *Id*. at 361. The officers arrived and knocked on Smith's door and asked if Wallace was inside. *Id*. Smith responded that she was not. *Id*. After this interaction, one of the officers noticed a face in the back window. *Id*. at 361. After hours of Wallace being missing, the officers arrested Smith on outstanding warrants when he exited the home and proceeded to make a warrantless entry to confirm that Wallace was not in the home and check on her well-being if, in fact, she was being held against her will. *Id*. at 359. Once inside, in the process of finding Wallace to ensure she was safe, the officers found incriminating evidence that eventually led to Smith's arrest. *Id*.

Affirming the district court, the Eighth Circuit found that "the officers acted in their community caretaker function" when they entered the residence and therefore did not violate the Fourth Amendment. *Id*. at 361. Relying on its own precedent in *United States v. Quezada*, the court first noted that "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 360 (*citing Quezada*, 448 F.3d at 1005). This "reasonable belief" standard is "a less exacting standard" than probable cause: a search under the community caretaking function is reasonable "if the governmental interest in law enforcement's exercise of that function, based on specific articulable facts, outweighs the individual's interest in freedom from government intrusion." *Id*. Next, the court found that the officers, under the circumstances and based on specific articulable facts, "reasonably believed that an emergency situation existed that required their immediate attention" which had to be addressed by entering Smith's residence. *Id*. at 362. Further, the court found that the scope of the encounter was "carefully tailored to satisfy the [community caretaker] purpose." *Id*. It was in the process of ensuring Wallace's safety that the officers found the weapon

for which Smith is being charged. The government's interest in the officers' entry, saving victims in distress, then outweighed Smith's right to be free from government intrusion, making the entry and subsequent search reasonable. *Id*. at 361-62. Thus, the community caretaker exception applied. *Id*. at 361-62. Thus, the community caretaker exception applied.

In addition to the federal circuits, several state Supreme Courts have extended the community caretaker exception to the home. For example, in *People v. Ray*, the Supreme Court of California, relying on the community caretaker doctrine, established that "circumstances short of a perceived emergency may justify a warrantless entry." *Ray*, (1999) 21 Cal. 4th 464, 473. In *Ray*, police arrived at Respondent's home to investigate a report that a neighbor's apartment door had been open all day and it was a mess inside. *Id*. at 478. Concerned by the lack of response from the occupant and the conditions of the home, the police entered the apartment to check on the well-being of those inside and to secure the property, but found it empty and discovered a large quantity of suspected cocaine and money. *Id*. The court upheld the warrantless entry finding that it was reasonable under the community caretaker exception. The court relied on *Dombrowski* and its own longstanding recognition that "necessity often justifies an action that would otherwise constitute trespass . . . where the act is prompted by the motive of preserving life . . ." *Id*. (quoting, *People v. Roberts* (1956) 47 Cal. 2d 374).

The safety and well-being of vulnerable members of our community depends on officers performing their duties outside of law enforcement to protect and be public servants. Local police must be permitted to provide services unrelated to enforcing the law. In addition to courts, many commentators recognize law enforcement's role as public servants and community caretakers. Judge Debra Livingston, U.S. Circuit Judge for the Second Circuit, explained:

> Communities have always looked to local police to perform social services unrelated or at best partially related to enforcing criminal law. "Community

> caretaker" denotes a wide range of everyday police activities undertaken to aid those in danger of physical harm . . . or "to create and maintain a feeling of security in the community." It includes things like the mediation of noise disputes . . . and the provision of assistance to the ill or injured. Police must frequently care for those who cannot care for themselves: the destitute, the inebriated, the addicted . . . Community caretaker, then, is an essential part of the functioning of local police. It in fact occupies such a high proportion of police time that one can even question "the value of viewing the police primarily as a part of the criminal justice system."

Debra Livingston, "Police, Community Caretaker, and the Fourth Amendment," 1998 U Chi Legal F 261, 272 (1998).

The outcome of whether this exception extends to the home could be beneficial or detrimental to officers performing these functions. Due to the importance of facilitating police officer's execution of community caretaker functions, Respondent urges this court to adopt the Eighth Circuit's approach and standard, and hold that the community caretaker exception, under certain circumstances, may appropriately and constitutionally extend to warrantless entries of a home.

B. Officer McNown's actions were reasonable and fell within the scope of the community caretaker exception.

Officer McNown was performing a community caretaker function when he entered into Petitioner's home to check on his welfare, thus, his entry was reasonable under the Fourth Amendment. Mr. David's absence from Sunday services, coupled with his elderly age and the fact that he was not answering his phone, instilled concern in his parishioners. R. at 2. Upon their request, Officer McNown decided to check on Mr. David's welfare to ease their concerns. (R. at 2). Officer McNown assumed Mr. David was at home with an illness, and even considered the parishioners' concerns an "overreaction," supporting the assertion that he was merely performing a community caretaker duty. R. at 2.

While driving through Mr. David's neighborhood, Officer McNown noticed nothing unusual, with the exception of a black Cadillac SUV "typically driven by drug dealers." R. at 2. Despite this detail, Officer McNown was not suspicious of Mr. David, nor was he investigating Mr. David for any criminal activity. R. at 2. Once at the door, Officer McNown noticed details, such as the loud music playing from inside, indicating that someone might be in the house. R. at 3. After receiving no response to his knock, Officer McNown tried opening the front door, however it was locked. *Id.* To ensure Mr. David's safety, he entered the residence through an unlocked back door, and searched the home, in a carefully tailored manner, with the purpose of finding Mr. David. R. at 3. Officer McNown's entry was reasonable, and he would have failed to perform "an essential part of the functioning of local police" had he chosen to not check in on Mr. David's well-being.

Consistent with the Eighth Circuit's standard in *Smith* and this Court's limited guidance in *Cady*, Officer McNown was indeed performing a community caretaker function, and under the circumstances, based on specific articulable facts, he had a reasonable belief that an emergency existed which required him to enter the home. Further, he carefully tailored the scope of the subsequent search and focused on finding Mr. David. The entry under the community caretaker function was reasonable in this case because the interest in the officer's entry—Mr. David's well-being—outweighed Petitioner's right against an intrusion of his home.

The community caretaker doctrine is one that recognizes the importance of facilitating police officers' efforts to protect and serve the community. In order to effectively perform these functions, entering homes as "community caretakers" will, at times, outweigh an individual's right to be free from government intrusion. In another case, an individual's right to be free from government intrusion may very well outweigh this interest. But if this Court grants Mr. David'smotion to suppress the evidence in this case on the grounds that the community caretaker

exception does not extend to homes, this court will set a precedent that will hinder police officers from preserving life and performing a fundamental community caretaker function of checking on the well-being of members of the community in need of assistance. Therefore, this Court should affirm the 13th Circuit.

II. THE THIRTEENTH CIRCUIT COURT OF APPEALS DECISION SHOULD BE AFFIRMED BECAUSE PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL DID NOT ATTACH IN PRE-CHARGING PLEA NEGOTIATIONS.

The Sixth Amendment guarantees the right of effective counsel to the accused in all criminal prosecutions. U.S. Const. amend. VI. § 1; *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (holding that the right to counsel is the right to effective counsel). A criminal prosecution only begins when "adversary judicial proceedings have been initiated against" the accused. *United States v. Gouveia*, 467 U.S. 180, 187 (1984). An adversary judicial proceeding may only initiate either through a formal charging document such as indictment or an appearance before a judge. *Id*.; *Kirby v. Illinois*, 406 U.S. 682, 688 (1972). Under this bright-line rule, the Sixth Amendment right to counsel will not attach to plea negotiations where the defendant has not been charged. *Turner v. United States*, 884 F.3d 949, 953 (6th Cir. 2018). Here, Petitioner's Sixth Amendment right to effective counsel did not trigger when his initial counsel failed to convey a plea offer because Petitioner faced no formal charges. This Court should not depart from its well-considered bright-line rule as it reflects the plain meaning of the Sixth Amendment and provides clarity, consistency in the criminal justice system by firmly dividing the line between investigatory and adversarial proceedings.

A. The Bright-Line Rule Reflects the Core Purpose of the Sixth Amendment Right to Effective Counsel

By limiting the right to effective counsel to post-indictment proceedings, the bright-line rule accurately represents the Sixth Amendment protection as a trial right. The right to counsel's

purpose is to "assure assistance at *trial*, when the accused was confronted with both the intricacies of the law and the advocacy of the public prosecutor." *United States v. Ash*, 413 U.S. 300, 309 (1973) (emphasis added). Therefore, the right to counsel "has been accorded . . . because of the effect it has on the ability of the accused to receive a fair *trial*." *Mickens v. Taylor*, 535 U.S. 162, 165 (2002) (quotation omitted) (emphasis added). The Sixth Amendment right to effective counsel's purpose to preserve a trial's integrity.

Even when this Court expanded the Sixth Amendment's protections beyond trial itself, it repeatedly emphasized such expansions reflect the purpose of protecting the right to a fair trial. *United States v. Wade*, 388 U.S. 218 (1967); *Hamilton v. Alabama*, 368 U.S. 52, 53-54 (1961); *White v. Maryland*, 373 U.S. 59 (1963) (*per curiam*). Specifically, this Court noted,

> during perhaps the most critical period of the proceedings against the defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough-going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself.

Powell v. Alabama, 287 U.S. 45, 53 (1932).

While the Sixth Amendment's expanded application through the critical stage analysis will be detailed *infra*, this Court has affirmed the right's purpose as to protect a trial's legitimacy whenever discussing any possible claim of the Sixth Amendment right to counsel.

To expand the right to effective of counsel into pre-indictment contexts would contradict the Sixth Amendment's purpose. In the pre-indictment context, a trial is not guaranteed. At any time, new evidence, suspects, and other factual developments may dramatically alter charging decisions. In such a context, a trial is a possibility, but not an ultimatum. Whereas in the post-indictment stage, when formal charges require a defendant to eventually appear in a courtroom, the trial is the ultimatum, and pleas or dropping charges are possibilities. Having the Sixth

Amendment right to effective counsel attach in pre-indictment scenarios would divorce the Sixth Amendment from its very purpose as a trial right. The Sixth Amendment's plain language only further reflects this intended purpose.

B. The Plain Meaning of "Prosecution," and "Accused" Limits the Sixth Amendment Right to Counsel to when a Defendant has been Formally Charged.

This Court's bright-line rule limiting the Sixth Amendment right to effective counsel to post-indictment proceedings properly reflects the plain meaning of the Sixth Amendment's text. The Sixth Amendment reads, "[i]n all criminal *prosecutions*, the *accused* shall enjoy the right…to be informed of the nature and cause of the accusation…and to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. § 1. (emphasis added). The words "prosecution" and "accused" define the outer boundaries of the Sixth Amendment right to counsel to post-indictment proceedings. Here, the Court should not read beyond the plain meaning of the Sixth Amendment. To move beyond the plain meaning of the Sixth Amendment would run contrary to the drafter's intentions and severely limit law enforcement investigations and overburden the criminal justice system.

i. *"Prosecution" confines the Sixth Amendment right to effective counsel to adversarial judicial proceedings.*

The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." *Rothgery v. Gillespie Cty.*, 554 U.S. 191, 198 (2008) (quoting *McNeil v. Wisconsin*, 501 U.S. 171, 175 (1991)). Black's law dictionary defines prosecution as "a proceeding instituted and carried on by due course of law, before a competent tribunal, for the purpose of determining the guilt or innocence of a person *charged with crime*." Prosecution, *Black's Law Dictionary* (Online Edition) (emphasis added); *see also, e.g.*, *United States v. Reisinger*, 128 U.S. 398, 403 (1888); *Tennessee v. Davis*, 100 U.S. 257, 262 (1880); *Schulte v. Keokuk County*, 74 Iowa 292, 293, 37 N.W. 376

(1887); *Sigsbee v. State*, 43 Fla. 524, 529, 30 So. 816 (1901). The word "prosecution" should only encapsulate adversarial judicial proceedings as to protect the purpose behind the Sixth Amendment's right to effective counsel—to ensure a fair trial.

To extend the right to effective counsel into the spheres of investigation and pre-charging negotiations would blur the line of when a prosecution has begun. This would leave suspects confused as to whether they are charged with a crime. To preserve a clear understanding of a defendant's rights during adversarial judicial proceedings, the word prosecution should be interpreted narrowly. Thus, a prosecution will only commence when a suspect is formally accused through the filing of a criminal charge.

ii. *"Accused" only applies to defendants formally charged.*

A defendant belongs to the "accused" only when a formal charge is made against him or her. Black's law dictionary defines accusation as "[t]he formal charge that is made in court where a person is guilty of an offence that is punishable." Accusation, *Black's Law Dictionary* (Online Edition); s*ee also Turner*, 885 F.3d at 955 (Bush, J., concurring). Hence, the "accused" are not merely suspects, but defendants facing formal charges. Further, the word "charge" refers to the legal papers filed by the prosecutor that initiate judicial proceedings. *Moran v. Burbine*, 475 U.S. 412, 428-29 (1986). In federal prosecutions, the charging document usually takes the form of an indictment or information. Only through these documents does a suspect become a defendant charged with a crime. Accordingly, when a law enforcement officer/agent uses the word "charge" or "accused of" against an individual this does not mean the Sixth Amendment right to counsel has attached. *United States v. Boskic*, 545 F.3d 69, 82-83 (1st Cir. 2008).

Here, when arresting DEA Agent Malaska and Officer McNown investigated the crime scene and placed Petitioner in custody, no Sixth Amendment right to counsel attached. Only when

the Petitioner was formally charged through an indictment *after* the plea offer expire did the right to effective counsel attach. To say otherwise would directly contradict the plain meaning and purpose of the Sixth Amendment's right to effective counsel. Therefore, under the bright-line rule established by this Court in *Kirby* and *Gouveia*, Petitioner's Sixth Amendment right was not violated because such a right never attached.

C. The Critical Stage Analysis is Inapplicable Because No Criminal Proceeding was Initiated.

This Court recognizes the Sixth Amendment right to counsel will attach at critical stages of criminal proceedings, but because such analysis only applies only "at or after the time that adversary judicial proceedings have been initiated[,]" it does not apply here. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009); *Kirby*, 406 U.S. At 688. Even though the right to counsel "historically and rationally applicable only after the onset of formal prosecutorial proceedings[,]" it is recognized that pretrial criminal proceedings may be considered "parts of the trial itself." *Kirby*, 406 U.S. at 690; *Ash*, 413 U.S. at 310. Even so, the proceeding must be "critical" for the right to counsel to attach. *Wade*, 388 U.S. at 239.

Determining whether a pretrial criminal proceeding is "critical" depends on two questions: (1) whether there is a risk of substantial prejudice to accused's constitutional rights inherent in the confrontation; (2) and whether counsel may help to avoid such prejudice. *Id.* A critical stage invoking the right to effective counsel may include a post-indictment identification lineup that could inculpate the defendant, post-indictment plea negotiations that may determine a defendant's likely sentence, or a preliminary hearing where a defendant may uncover the weaknesses of the case against him. *Id*. at 219-20 (post-indictment identification); *Padilla v. Kentucky*, 559 U.S. 356 (2010) (post-charging plea negotiation); *Coleman v. Alabama*, 339 U.S. 1, 3 (1970) (preliminary hearing). In these stages, this Court recognized the need for effective counsel to protect a

defendant's guarantee to a fair trial. Notably, all of these stages occurred at or after an adversarial proceeding had been initiated against the defendant.

This Court has yet to depart from the bright-line rule and extend the Sixth Amendment right to counsel to a critical stage prior to the filing of formal charges. While several circuits have voiced their concern that a critical stage requiring the right to counsel may exist in a pre-charging scenario, all circuits have yielded to the bright-line rule. *Turner,* 885 F.3d at 953. ("no other circuit has definitively extended the Sixth Amendment right to counsel to preindictment plea negotiations"). This is because a distinction exists between the "critical stage question" and the "attachment question." *Id.* As stated before, the right to effective counsel will only attach when adversary judicial proceeding is initiated either through a formal charge or an appearance before a judge. Therefore, even if this Court is to find a critical stage did exist prior to the filing of charges, there is no Sixth Amendment violation because the Sixth Amendment right to effective counsel never attached.

Petitioner's situation is nearly identical to the recently decided Sixth Circuit *Turner* case, which held the right to counsel did not attach in pre-indictment plea negotiations. *Id.* In *Turner*, the prosecutor conveyed a plea offer to the defendant's defense attorney that would expire after defendant was indicted. *Id*. There was a dispute as to whether the plea offer was ever conveyed to the defendant. *Id.* Regardless, defendant did not accept the plea offer before he was indicted. *Id*. After being indicted, the defendant took a less favorable plea deal and received a significantly longer sentence than the one he likely would have received through the first plea deal. *Id.* Defendant claimed his right to effective counsel was violated because his original counsel never conveyed the plea deal. The court denied defendant's claim, holding the "Supreme Court's attachment rule is crystal clear." *Id.*

Like the *Turner* defendant, Petitioner was not indicted when his counsel failed to convey the plea offer. Therefore, Petitioner's Sixth Amendment right to effective counsel did not attach. The Thirteenth Circuit Court of Appeals correctly followed the "crystal clear" rule this Court has established. As the bright-line rule's clarity forms the distinguishing line between a suspect's rights in an investigation and a defendant's rights in a criminal prosecution, this Court should affirm the Thirteenth Circuit Court of Appeal's decision regarding the attachment of the right to effective counsel.

D. The Bright-Line Rule Serves the Criminal Justice System Because It Offers Clarity and Consistency.

This Court emphasized that the existing bright-line rule regarding the attachment of the Sixth Amendment right to effective counsel is not "mere formalism." *Kirby*, 406 U.S. at 689-90. The dividing line between investigation and prosecution must be clear and consistent. Such a line maintains the deterrence functions of respective Constitutional rights, preserves the viability of law enforcement investigations, and ensures the efficient operation of the criminal justice system. Therefore, discarding the bright-line rule regarding the attachment of the right to counsel would blur the line between investigation and prosecution, leaving negative ramifications for public safety and the criminal justice system.

i. *The bright-line rule maintains the deterrence functions of the Fifth and Fourteenth Amendments.*

Imposing a pre-indictment point of attachment for the Sixth Amendment right to effective counsel would not only lessen the independent significance of the Sixth Amendment, but also wade into the protective territory of due process rights. The Fifth and Fourteenth Amendments already protect a citizen's rights in the pre-charging stages by requiring due process. U.S. Const. amend. V. § 1; U.S. Const. amend. XIV. § 1; *Kirby*, 406 U.S. 682, 691. By confining the right to

effective counsel solely within post-indictment proceedings, the bright-line rule preserves the deterrence function of other valuable Constitutional rights while also reflecting the intention of the Sixth Amendment as a trial right. In a Maryland court's words,

> A sure sense of these differences is necessary in a case, such as this, where separate constitutional protections cover the same territory. Litigants too often confront us with a constitutional kaleidoscope, and constitutional overlap can quickly degenerate into constitutional chaos. It does not help to have a Sixth Amendment factor intruding into a Fifth Amendment analysis. It does not help to have a Fifth Amendment factor intruding into a Sixth Amendment analysis.
>
> *In re Darryl P.,* 211 Md. App. 112, 121, (2013).

This Court's jurisprudence has clearly distinguished the Fifth Amendment protection from the Sixth Amendment right to counsel. In *Moran* and *Miranda*, this Court affirmed that the Fifth Amendment privilege against self-incrimination exists outside of formal adversarial proceedings. *Moran,* 475 U.S at 429 (holding the Sixth Amendment only becomes applicable when the government's role changes from investigation to accusation); *Miranda v. Arizona*, 384 U.S. 436, 510 (1966) (holding the Sixth Amendment should have no bearing on a pre-indictment police interrogation). Thus, the right to counsel in pre-trial interrogations it not "to vindicate the constitutional right to counsel" during trial but to "guarantee full effectuation of the privilege against self-incrimination." *Kirby*, 406 U.S. at 689 (quoting *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966)). As stated *supra*, the Sixth Amendment right to counsel has been framed as protecting a trial's fairness—not to protect an individual's rights during pre-charging police confrontations. To allow the Sixth Amendment right to effective counsel in pre-charging contexts would create "constitutional chaos." *In re Darryl P.,* 211 Md. App. at 121.

If this Court abandons the bright-line rule, suspects could claim their Sixth Amendment at any point in an investigation deemed a "critical stage." Defense attorneys, judges, and prosecutors would need to conduct careful and time-intensive legal analysis to determine *what* constitutional

right may have been violated in an encounter. This will likely produce inconsistencies across courtrooms and cast a shadow over what rights are engaged by what encounters. Therefore, discarding the bright-line rule blurs a meaningful distinction and causes unnecessary headaches for not only prosecutors, but the defense bar.

ii. *The bright-line rule protects the integrity of meaningful law enforcement investigations.*

While the Sixth Amendment guarantees a right to counsel, it does not require the Court to undermine the work of law enforcement. An over-extended right to effective counsel would mean defendants gain a head-start on a potential prosecution before it has begun. This Court explicitly rejected this, stating, "[p]roviding a defendant with a preindictment private investigator is not a purpose of the right to counsel." *Gouveia*, 467 U.S. at 190-91. The bright-line protects this purpose by dividing the line between investigation and prosecution. The right to effective counsel will not attach during a criminal investigation of uncharged suspects, therefore law enforcement officers and agents are able to conduct investigations without the constant interference of lawyers. While the actions of law enforcement should be framed under a Constitutional microscope, there must be a logical starting point to maintain the integrity of law enforcement investigations. The bright-line rule sets this logical starting point.

Extending the right to effective counsel in pre-indictment stages will have defendants populating dockets with claims that their Sixth Amendment right was violated by not having a lawyer appointed during the time they were being investigated. This will slow down or potentially dismantle law enforcement investigations. Not only does this violate the very purpose of the Sixth Amendment but inject needless interference into investigations that protect public safety. Specifically, complicated investigations into sophisticated fraud schemes, which require years of investigation and significant resources, would face the constant risk of dismantlement through the

involvement of defense counsel. U.S. Gov't Accountability Office, GAO-06-320R, Information on False Claims Act Litigation 3 (2006) available at http://www.gao.gov/assets/100/93999.pdf ("[fraud] [c]ases in which DOJ intervened took a median of 38 months to conclude and ranged from 4 months to 187 months."). To avoid dismantling beneficial investigations, adversary criminal proceedings must be a necessary predicate to the attachment of the right to counsel.

iii. *The bright-line rule increases the criminal justice system's efficiency.*

Lastly, discarding the bright-line rule will shift the pace of the criminal justice system close to idle. In addition to forcing significant costs on governmental entities to pay defense counsel for indigent suspects not involved formal criminal proceedings, judges and their clerks will need to navigate often cumbersome and complex investigations to locate any possible "critical stages" where the right to counsel attached. One of the bright-line rule's core benefits is that it places a rational limit on when criminal litigation should start—only after the prosecution charges a defendant. Removing this rule would open floodgates for vexatious litigation, where every single encounter is meticulously examined to determine whether a "critical stage" that demands effective counsel exists.

Further, in a case where a defendant does end up being charged, it is likely that most law enforcement actions are critical in the sense they will eventually influence the outcome of a trial. Therefore, expanding the right to effective counsel to pre-indictment events would have suspects who do become defendants claiming they were guaranteed constant representation throughout the course they were being investigated. This is unworkable. The already-overburdened criminal justice system significantly benefits from the existing bright-line rule. It sets clear and predictable expectations of when a defendant is guaranteed counsel while also ensuring the criminal justice system does not overextend itself.

III. EVEN IF THIS COURT DOES FIND THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHED IN PRE-INDICTMENT PLEA NEGOTIATIONS, PETITIONER'S SIXTH AMENDMENT RIGHT TO COUNSEL WAS NOT VIOLATED.

Even if this Court departs from the well-established bright-line rule regarding the attachment of the Sixth Amendment right to counsel, Petitioner's right to counsel was not violated because Petitioner did not demonstrate a reasonable probability that he would have accepted the plea. To prove ineffective assistance of counsel in violation of the Sixth Amendment, a defendant must establish two prongs: (1) his/her counsel's performance was deficient; and (2) such performance prejudiced the defense to the degree that defendant was deprived of a fair trial. *Strickland*, 466 U.S. at 687. Here, it is clear Petitioner's counsel deficiently performed by not advising the Petitioner of the plea offer. However, Petitioner has not proven he suffered the requisite prejudice to satisfy the *Strickland* standard because Petitioner did not demonstrate he would have accepted the plea had his counsel advised him of it.

Prejudice requires, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694. A reasonable probability is a probability enough to undermine confidence in the outcome. *Id.* Further, a defendant must demonstrate that the error created an "actual and substantial disadvantage," not merely that the error created a "possibility of prejudice." *Satcher v. Pruett*, 126 F.3d 561, 572 (4th Cir. 1997) (quoting *Murray v. Carrier*, 477 U.S. 478, 494 (1986)); *Lafler v. Cooper*, 566 U.S. 156, 163 *(*1992). Accordingly, it is Petitioner's burden to prove that he suffered actual and substantive prejudice when his original defense counsel failed to convey the plea offer.

While there is a duty for defense counsel to convey plea offers to their clients, a violation of this duty only constitutes ineffective assistance of counsel when the defendant demonstrates a reasonable probability that (1) he/she would have accepted the plea offer if he/she had effective

assistance of counsel; (2) the plea would have been entered without the prosecution canceling the offer or the trial court's refusing to accept it; and (3) the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time *Missouri v. Frye*, 566 U.S. 134, 147-48 (2012). In other words, a defendant must prove, with a reasonable probability, that "the outcome of the plea process would have been different with competent advice." *Lafler*, 566 U.S. at 163.

When analyzing whether a defendant has proven with a reasonable probability that he or she would have been accepted a plea, any testimony or evidence offered by the defendant must be credible. *United States v. Giamo*, 153 F. Supp. 3d 744, 762 (E.D. Pa. 2015). Circuits have analyzed credibility differently. While the Sixth Circuit considers the disparity between the sentence offered and the sentence received, the Seventh Circuit requires "objective evidence" to establish a reasonable probability that a plea would have been accepted. *See*, *e.g., Smith v. United States*, 348 F.3d 545, 551-52 (6th Cir. 2012); *Toro v. Fairman*, 940 F.2d 1065, 1068 (7th Cir. 1991). This Court should adopt the Seventh Circuit's analysis and require a showing of objective evidence because it examines credibility even where there is no sentence disparity. Such objective evidence can include prior statements regarding details of a plea, trial options, or defendant's desires. *Giamo*, 153 F. Supp. 3d at 763 (considering prior statements made in a proffer session when analyzing testimony during an evidentiary hearing). A prior statement expressing a desire to go trial or refusing a plea deal's terms will show there is not a reasonable probability the plea would have been accepted. *King v. Davis*, 898 F.3d 600, 606 (5th Cir. 2018).

In *Giamo*, a defendant claimed ineffective assistance of counsel because his defense counsel did not accurately convey the sentencing parameters included in a plea deal's terms. *Giamo*, 153 F. Supp. 3d at 760. Similar to Petitioner's case, *Strickland*'s deficient performance

prong was clearly met. However, the defendant did not establish the prejudice prong because he could not show with a reasonable probability that the plea deal would have been reached. The question of prejudice turned on "whether there was a reasonable probability that Giamo would have made a satisfactory proffer leading to the proposed plea agreement[.]" *Id*. at 762. In an evidentiary hearing, Giamo told the court, "I was prepared to plead to anything that would get [me] under 20 years." *Id*. at 763. This statement proved inconsistent with Giamo's prior statements made in an affidavit and a proffer session, therefore the court found Giamo's "not credible or responsive." *Id.*

Here, like in *Giamo*, Petitioner has not demonstrated a reasonable probability that he would have accepted the plea because he made a prior statement directly contradicting his present desire to accept a plea. Specifically, the plea offer terms required Petitioner to "[p]rovide the Department of Justice with the names, and all relevant contact and identifying information, of known and suspected suppliers of cocaine." Ex. D. However, Petitioner told arresting agents, "there is no way in hell I will tell you [the names of his suppliers]. They will kill me and burn down my church if I give you their names." Ex. F. While Petitioner told the court during the pretrial evidentiary hearing that he would give up his suppliers "in a heartbeat" and accept the plea deal if offered, this directly contradicts his earlier statement. Ex C, pg. 3, line 25. Therefore, like in *Giamo*, this Court should find Petitioner's evidentiary hearing testimony not credible because it was not consistent with his statement given to arresting officers.

Accordingly, if this Court does discard its bright-line rule holding that the Sixth Amendment right to effective counsel only applies after indictment, Petitioner still has not met his burden of demonstrating prejudice as required under *Strickland*.

CONCLUSION

This Court should affirm the Thirteenth Circuit Court of Appeal's decision on the basis that the community caretaker exception to the warrant requirement applies to warrantless entries of a home under the Fourth Amendment. Additionally, this Court should affirm the Thirteenth Circuit Court of Appeals' denial of Petitioner's motion to re-offer the original plea deal on the basis of ineffective assistance of counsel because Petitioner's Sixth Amendment right to counsel did not attach in pre-indictment plea negotiations. Further, even if this Court does find Petitioner's right to counsel did attach in the pre-indictment plea negotiations, this Court should deny Petitioner's motion because Petitioner did not suffer prejudice.