No. 4-422

IN THE
SUPREME COURT OF THE UNITED STATES

Chad David,

Petitioner,

v.

United States of America,

Respondent,

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR RESPONDENT

Team No. R21
Counsels for the Respondent

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ISSUES PRESENTED

I. Do warrantless searches conducted by law enforcement acting as community caretakers extend to the home under the Fourth Amendment?

II. Does the Sixth Amendment right to effective counsel attach during plea negotiations prior to a federal indictment?

STATEMENT OF FACTS

Defendant David ("Defendant"), a well-known minister in Lakeshow, Staples regularly held high-energy Sunday services at the Lakeshow Community Revivalist Church. R. at 2. On the morning of Sunday, January 15, 2017, at 7:00 am, Officer McNown ("McNown"), an officer for twelve years and a frequent service attendee, arrived at Defendant's Sunday service and learned the Defendant was absent. R. at 2. An attendee, Julianne Alvarado, attempted to call the Defendant to check on his well-being, but the Defendant did not answer. R. at 2. Ms. Alvarado frantically expressed her concern for the Defendant's well-being to McNown. R. at 2. The Defendant's absence from service that morning, the concern for the Defendents's well-being by other church members coupled with the Defendant's reputation for showing up at every service, no matter the circumstance, made McNown believe the Defendant was likely home with an illness and assured other church members that he would check up on the Defendant after the Sunday service. R. at 2. At 9:00 AM, McNown began his shift. R. at 2. After, McNown stopped at Starbucks to buy tea for the Defendant and drove to Defendant's known address. R. at 2.

Once McNown arrived at the Defendant's residence, he saw that the defendant's car was in the driveway and the doors to his house were shut. R. at 2. When McNown walked up to the front door, he heard loud music playing and saw the TV on through the window. R. at 2-3. McNown knocked and announced his presence and waited two minutes for a to response, but without any response McNown tried opening the front door. R. at 3. Thinking that the Defendant couldn't hear him knocking over the loud music, and determined to check on the Defendant's well-being, McNown entered the Defendant's home through an unlocked back door. R. at 3. Upon entering the Defendant's home and approaching the TV to turn it off, McNown saw a notebook open, in plain view, containing names associated with information about drug

payments. R. at 3. McNown followed the source of the loud music to a room upstairs to see if the Defendant was there. R. at 3. When McNown opened the bedroom door, he found the Defendant surrounded by mounds of powder cocaine packaging it into ziplock bags. R. at 3. Following policy, McNown handcuffed the Defendant and contacted the DEA. R. at 3. DEA Agent Malaska ("Malaska") responded to McNown's call and arrived at the Defendant's residence to investigate. R. at 3. Malaska read the Defendant his Miranda rights and ask him where he obtained the large quantity of cocaine. R. at 3. The Defendant responded that he would not give up his suppliers because they would have him killed and burn down his church. R. at 3.

After his arrest, Defendant called Keegan Long ("Mr. Long"), the only defense attorney who he knew from church. R. at 4. Mr. Long was a known alcoholic. R. at 4. With credible information that a Drug Kingpin was traveling through Lakeshow and believing that the Defendant could assist in the Kingpin's arrest, Malaska persuaded the prosecutor into offering the Defendant a plea deal for one-year imprisonment in exchange for his cooperation and providing the names of his suppliers. R. at 4. This offer was emailed by prosecution to Mr. Long at 8:00 am on January 16, 2017 and was set to expire in for 36 hours, 10:00 pm on January 17, 2017. Once the offer expired the prosecutions office promptly indicted the Defendant on January 18, 2017. R. at 4. Mr. Long informed the Defendant of his failure to communicate the plea offer and the Defendant fired Mr. Long and hired Michael Allen ("Mr. Allen") to represent him. R. at 4. On January 20, 2017, Mr. Allen requested that the plea agreement be extended to David once again. R. at 5. The prosecutor refused, because it would be futile since the Defendant's suppliers would likely be tipped-off and the government would not receive any benefit. R. at 5.

The Defendant filed two pre-trial motions: a motion to suppress evidence of the notebook and cocaine asserting that because McNown entered the Defendant's residence without a warrant

violating the Fourth Amendment, and a motion to re-offer the initial plea deal asserting that Mr. Long's failure to communicate constituted ineffective counsel violating the Sixth Amendment. R. at 5. The District Court denied both motions, asserting that McNown's warrantless entrance was consistent with the "community caretaking" exception, and that the Defendant failed to meet his burden under Strickland to show ineffective counsel in plea bargaining. R. at 12. The Thirteenth Circuit affirmed the District Court's denial the motion to suppress in whole and affirmed the denial the motion to re-offer the plea deal in part, by holding that the defendant was not entitled to Sixth Amendment protections in pre-indictment plea negotiations, thus there could be no violation of the Sixth Amendment. R. at 18.

SUMMARY OF ARGUMENT

As to the Defendants motion to suppress the evidence, the Court's expansion of the community caretaking doctrine to the home would be appropriate and in consistent with the decision in *Cady v. Dombrowski* because Officer McNown, in entering Defendant's home was motivated by a concern for Defendant's well-being, and not by an alternative motive related to the investigation of a crime, or acquisition of evidence related to the crime. Since the circumstances that took McNown to Defendant's home was the mere fact that Defendant was absent from church that Sunday morning and he was wholly unresponsive to calls made to him. Additionally, at the time McNown arrived at Defendant's home, all he knew for certain was that someone was in Defendant's home. He believed that the Defendant was home because his car was in the drive-way, there were no additional assumptions about the existence of a crime.

Moreover, the high Court has recognized time and time again that an individual's expectation of privacy in the home is not absolute and not every search or seizure will constitute a search within the meaning of the Fourth Amendment. By this Court's holdings, we must apply

the test set forth in determining the reasonableness of one's expectation of privacy. When applying the two-prong test, the Court will find that although Defendant manifested and expectation of privacy within his home, the circumstances surrounding his manifested expectation is not one in which society is willing to recognize as reasonable. In this case, the expansion of the community caretaking doctrine would not constitute a search within the meaning of the Fourth Amendment because the search would not be unreasonable.

Even if the Court were to find that the circumstances are such that society is willing to recognize as reasonable, Defendant's expectation of privacy was reduced by his conduct and actions within the home such that an entry would be reasonably foreseeable. Defendant's TV and music were audible from the street and he was unresponsive to knocks at his door and calls to his telephone; his actions gave rise to an ongoing nuisance that needed to be abated to maintain peace in the community. As a result, Officer McNown's entry into Defendant's home was not unreasonable under the Fourth Amendment and the community caretaking doctrine could be extended to allow for such an entry by an officer.

Lastly, the circumstances presented in the case at hand require this Court to extend the community caretaking doctrine to the home because a failure to do so would require officers to obtain a warrant in order to undertake their policing duties and attend to the care of individuals in their homes. However, the probable cause prerequisite to obtaining a warrant directly contradicts this Court's standard of the community caretaker exception, where the community caretaker is applicable only where officers are undertaking a function that is "totally divorced" from the investigation or acquisition of evidence of a crime. Thus, it would not only be unreasonable to require officers to obtain a warrant but also vitiate their roles as officers in serving their communities and undertaking their policing, protecting, and mediating functions in society.

As to the motion to re-offer the plea deal, there is a line of constitutional cases by the Supreme Court that has firmly established that the bright-line Sixth Amendment attachment rule is applicable only at or after the time that adversary judicial proceedings have been initiated against a defendant. Adversary judicial proceedings are initiated by the occurrence of one of the following events: formal charges, preliminary hearing, indictment, information or arraignment. Here, the Defendant was arrested on January 15, 2017 at 10:00 am. Within Twenty-four hours the government extending a plea offers to the Defendant. The plea offer was emailed by the government to the Defendants attorney on January 16, 2017 at 8:00 am, and the plea offer was set to expire in thirty-six hours at 10:00 pm on January 17, 2017. At the time the plea offer was extended to the Defendant, there had been no indictment or any formal judicial proceeding. Following the Supreme Court bright line rule, the Sixth Amendment rights of the Defendant had not triggered because there were no adversarial criminal proceedings.

The core purpose of the Sixth Amendment right to counsel, and the court's reasoning behind the bright line rule, is to ensure that criminal defendants could "receive effective assistance of counsel 'at trial. The Court reasons that with these triggering events, the defendant finds himself faced with the prosecutorial forces of organized society and is immersed in the intricacies of substantive and procedural criminal law. Following this reasoning, here the Defendant is not entitled to Sixth Amendment protections. At the time of plea negotiations there was no indictment and the prosecution was not committed to the criminal prosecution of the Defendant. Rather, the plea agreement was offered to assist the DEA in the arrest of a more serious criminal, the Drug Kingpin. Therefore, there was no need for the protection of the Sixth Amendment.

The Supreme Court has repeatedly rejected attempts by criminal defendants to extend the Sixth Amendment to pre-indictment proceedings, even where the same proceedings are critical stages when they occur post-indictment. Guarantying a Sixth Amendment protections to pre-indictment plea negotiations is constitutionally and practically unsound. Here, allowing more time to pass before getting the necessary information from the Defendant makes it the more likely that the Drug Kingpin would then be tipped-off of the investigation their lower level drug deal and any information from the Defendant would no longer be useful.

Even if the court finds the Sixth Amendment did attached, the defendant has failed to meet his burden of proving the two prong Strickland test. The Defendant cannot prove that he would have accepted the plea had he had effective counsel. In fact, the evidence shows that he would not have accepted by stating, "no way I would give up my supplier." Indicated that if the defendant were to reveal information about his supplier, they would have the Defendant murdered and would burn his church. Lastly, the defendant cannot prove that the court would have accepted the unjust plea agreement of one year when the crime is punishable by ten years.

STANDARD OF REVIEW

The denial of the Defendants motions to (1) suppress the evidence of the notebook and cocaine, and (2) motion to re-offer the plea agreement "presents a mixed question of fact and law." *In re Resendiz,*19 P.3d 1171 (Cal.4th 2001). This court should review the district and appellate courts' findings of fact for clear error and the denial of the motion to suppress *de novo*. *Id.*; *United States v. Orozco*, 700 F.3d 1176, 1178 (8th Cir. 2012).

ARGUMENT

I. THE COMMUNITY CARETAKING DOCTRINE, AN EXCEPTION TO THE FOURTH AMENDMENT WARRANT REQUIREMENT, EXTENDS TO THE HOME.

Since the Supreme Court first created the community caretaker doctrine in *Cady v. Dombrowski* in 1973, the Court has only sparingly written about it in two proceeding cases: *South Dakota v. Opperman* (1976) and *Colorado v. Bertine* (1987). In its decisions, the Court only addressed the doctrine only with respect to automobiles due to the nature of the cases presented to it but has not explicitly limited its holdings to automobiles. What has resulted is a circuit disarray over the interpretation and application of this doctrinal exception. 99 A.B.A.J. 18. (2013). The case at hand presents the best factual scenario that will allow the Court to extend the community caretaking doctrine to the home without placing an unreasonable circumvention of the warrant requirement of the Fourth Amendment.

This Court's decision will not only resolve the circuit split in the application and interpretation of the community caretaker doctrine but will also clarify the standards it set out in its earlier decision in *Cady v. Dombrowski*.

A. The Warrantless Entry And Search Conducted By An Officer Acting As Community Caretaker Extends To The Home Under The Fourth Amendment When The Officer's Intent Is Not In Pursuant To Some Investigative Objective.

The Fourth Amendment precludes officers from conducting unreasonable searches of a person or their home unless a valid warrant is issued based on probable cause. *U.S. Const. amend. IV*. However, the community caretaker doctrine creates an exception where officers' actions and intentions in conducting a search are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973). In addressing the community caretaker doctrine, courts

have added that the warrantless entry and search is valid if, in conducting the search, the officer had a reasonable belief that an emergency existed requiring their attention. *U.S. v. Quezada*, 448 F.3d 1005, 1008 (8th Cir. 2006). The Supreme Court thereafter defined the reasonable belief standard, holding that a reasonable belief determination is a less exacting standard than probable cause. *Maryland v Buie*, 494 U.S. 325, 336-37 (1990). In creating this exception, courts have acknowledged the possibility of abuse of this doctrinal exception; in order to protect against such abuse, the government has the burden to show that the officer actually believed that an emergency existed, and that emergency was the primary motivation for his/her actions. *U.S. v. Cervantes*, 219 F.3d 882, 890 (9th Cir. 2000).

In *Cady v. Dombrowski*, the Supreme Court allowed the admission of evidence of a murder found in officer defendant's vehicle because in searching defendant's vehicle, officers were acting in a manner to prevent public access to the gun they reasonably knew officer defendant carried as required by department procedures. The Court reasoned that their actions in conducting a search was "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." 413 U.S. 433 at 441. Here, officer McNown's actions were "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute" because he was acting in a manner to ensure the well-being of Defendant; because Defendant failed to attend the Sunday service, which he was scheduled to lead, and failed to respond to calls from concerned friends, Officer McNown was essentially responding to a welfare call. Additionally, Officer McNown picked up tea for defendant prior to his visit, illustrating officer's non-investigative intent.

In *U.S. v. Quezada* a deputy sheriff entered the home at which defendant was a guest after knocking and announcing her presence, when no one responded. Because the door was

cracked open and the TV and lights were on, the court held that it was reasonable for the deputy officer to conclude that someone was inside but was unable to respond. 448 F.3d 1005 at 108. Here, because the TV and music were on and Defendant's car was in the driveway, and because no one was responding to the knocks at the door or to the telephone calls, it was reasonable for Officer McNown to conclude that Defendant was inside but unable to respond, for whatever reason.

As a result, because Officer McNown's actions in entering Defendant's home was totally divorced from the investigation of a crime, he can carry his burden in showing that he reasonably believed than an emergency existed since Defendant was wholly unresponsive and his actions were motivated by the emergency because when he arrived at Defendant's home, he reasonably concluded that Defendant was home but unable to respond, which was his sole motivation.

B. **Extending The Caretaking Doctrine To The Home Would Not Be Unreasonable Where One's Expectation Of Privacy Is Not One In Which Society Is Willing To Recognize As Reasonable And Where The Expectation Is Reduced Such That An Intrusion Would Be Reasonably Foreseeable.**

The Supreme Court has recognized that a core principle of the Fourth Amendment is that warrantless searches of a home are presumptively unreasonable due to one's expectation of privacy in their home. Referring to the home as one's "castle" and coining terms such as "castle doctrine" granting individuals protections and immunities for actions taken within their homes, the courts. However, the protection granted to the home is not impregnable; and not every entry or search will constitute a search within the Fourth Amendment.

The Supreme Court held in *California v. Ciraolo,* that an intrusion is a search within the Fourth Amendment only if "the individual manifested a subjective expectation of privacy" and "society [is] willing to recognize the expectation as reasonable" 476 U.S. 207, 211 (1967). While

it can be argued that there is a presumption that individuals who remain in their homes with their doors closed manifest a subjective expectation of privacy, the same cannot be argued about society's willingness to recognize the expectation as reasonable. The Sixth Circuit addressed the reasonableness of an entry and search of a home in an effort to abate an ongoing nuisance in *United States v.* Rohrig, 98 F.3d 1506 (6th Cir. 1996). In its holding, the court extended the caretaker doctrine to the home where police officers responded to noise complaint calls regarding loud music playing from the Defendant's home. Officers repeatedly knocked and announced their presence, and eventually entered the defendant's home through an unlocked back door. Hoping to find the home's occupant, they searched the home, in their search, finding "wall-to-wall marijuana plants" and the defendant asleep in a bedroom upstairs. *Id*. at1509. The Court held that abating an ongoing nuisance caused by the defendant sufficiently justified the entry and search of the defendant's home. It cannot be said that neighbors who report incidents of nuisances caused by the occupants of a home such as loud music would be willing to recognize that occupant's expectation of privacy as reasonable.

Here, David was similarly playing loud music that was audible from the street outside his home, creating a public nuisance to his community. He additionally failed to attend the Sunday service without notice to any attendees and was unresponsive to telephone calls and knocks at his door. Society would not be willing to recognize his subjective manifestation of privacy as reasonable; in fact, society would mandate an intrusion upon his privacy insofar as to ensure his safety, since society encourages the type of caretaking that call the communities to action; when individuals are unresponsive and their whereabouts are unknown, society encourages community members to search for them, and part of that entails seeking out the help of officers.

Similarly, courts have recognized that one's "expectation of privacy can be reduced as a result of the activities of the home's occupants." *United States v. Taborda*, 635 F.2d 131, 138 (2d Cir. 1980). The United States Supreme Court further denied cert where the court held that "activities of circumstances within a dwelling may lessen the owner's reasonable expectation of privacy by creating a risk of intrusion which is reasonably foreseeable." *United States v. York*, 895 F.2d 1026, 1029 (5th Cir. 1990) (citing *United States v. Bomengo*, 580 F.2d 173, 176 (5th Cir. 1978)).

In *York*, the defendant's guest called upon the help of police officers when the defendant, homeowner returned to the home intoxicated and threatened his guest. In support of its holding, the court in *York* held that "when York became intoxicated and belligerent, it was reasonable to expect that Bill might ask police officers to make a limited entry into the house to keep peace while he removed his family and personal possessions." 895 F.2d 1026 at 1030. Here, when David didn't show up to the Sunday service as expected and was unresponsive to telephone calls and when he had the volumes of his music and TV on so high to be heard outside his home, it was reasonable to expect that a neighbor or concerned friend or church attendee might ask police officers to make a limited entry into the house to assess his physical well-being.

C. **The Community Caretaking Doctrine Should Extend To The Home Since Officers Undertake Duties That Extend Beyond Crime Investigation, And Limiting The Caretaking Doctrine Or Requiring Officers To Obtain A Warrant Would Hinder Their Efforts In Undertaking Those Duties.**

A cornerstone of the Fourth Amendment protection is the warrant requirement, without which, and exceptions aside, a search of a person or place is per se unreasonable. Since its inception, the Supreme Court has recognized that under certain circumstances obtaining a warrant is not feasible or is simply moot, hence creating the doctrinal exceptions of exigent

circumstances *Kentucky v. King*, *563,* U.S. 452 (2011), plain view *Coolidge v. New Hampshire,* 403 U.S. 443 (1971), search incident to an arrest *Chimel v. California*, 395 U.S. 752 (1969), hot pursuit *Kentucky v. King,* 563 U.S. 452 (2011), and more.

In creating the aforementioned doctrinal exceptions, the Court has recognized a variety of needs that comport with public policy concerns. One such need that supports the extension of the community caretaking doctrine is the need to allow officers to engage in their policing, protecting, and counseling functions in society without being dissuaded by the procedural standards and limitations of a criminal investigation.

In the aforementioned cases, the Supreme Court recognized the role of police officers in society and balanced that interest against the individual's privacy interest. The Court can apply the same standard in extending the community caretaker doctrine to the home. Police officers are a pillar of the core order and functionality of the communities they serve; their responsibilities "expand beyond attempting to control criminal activity – to preventing crime, promoting order, resolving disputes, and providing emergency assistance in social crises." Edwin Meese III., *Community Policing and the Police Officer*. Their roles as police officers requires them to analyze, plan, negotiate, counsel, organize, and take initiative and lead in the community. *Id*. Community policing, specifically empowers officers to "take independent action to solve problems, work with community leaders, and improve the social environment of the neighborhoods they serve." *Id*.

Incorporated in the policing function, is responding to reports of concerned friends, family, and community members. As such was the case here, where concerned community members expressed concern for the unforeseen absence of their minister on a Sunday morning. Here, the public interest involved was the congregation's need to ensure the safety and welfare of

their minister in conjunction with Officer McNown's duty to police and protect community members. In opposition is the private interest of David to be free from an unreasonable search.

When weighing the private and public interests involved, the Court can apply a balancing test, and would consequently find that the "need to protect and preserve life or avoid serious injury" is great and their caretaking role of "checking on the health and safety of citizens" cannot be limited to automobiles. *State v. Deneui*, 775 N.W. 2d 221, 239 (S.D. 2009). Even when faced against the private interest of an individual to remain free from an intrusion within his home. As a result, when balancing the interests of society against the individual interest, the Court can aptly extend the community caretaking doctrine to the home, finding that the officer's role as a caretaker is not only tolerable, but mandated.

As a matter of public policy, there should be a consideration of the ramifications of limiting the caretaking doctrine to automobiles. Considering the Fourth Amendment once again, the second clause mandates "no [w]arrants shall issue, but upon probable cause, supported by [o]ath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." *U.S. Const. amend. IV*. The Supreme Court defined 'probable cause' in *Brinegar v. United States* holding that probable cause exists "where the facts and circumstances within the officers' knowledge, and of which they have reasonably trustworthy information, are sufficient in themselves to warrant a belief by a man of reasonable caution that a *crime is being committed*." 338 U.S. 160, 175-76 (1949). (emphasis added).

However, the very essence of the community caretaker doctrine is engaging in a function that is totally "divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady,* 413 U.S. 433 at 441. Requiring an officer to obtain a warrant would, by the default rules expressed by the Supreme Court, require him to have

probable cause of a pending crime; which is in direct contradiction to the doctrinal exception at issue. An officer who responds to the concerns of multiple community members of the absence of their minister on a Sunday morning, with concern of his health and well-being cannot legitimately show probable cause that evidence of a crime will be found when all he supposes is that the individual is ill.

As a result, requiring officers to obtain a warrant to engage in their caretaking functions beyond public streets and automobiles would place them in a procedural straightjacket, and vitiate their roles and responsibilities to the communities they serve.

II. THE SIXTH AMENDMENT RIGHT TO EFFECTIVE COUNSEL DOES NOT ATTACH IN PRE-INDICTMENT PLEA DEALS.

The United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense," *U.S. Con. St. amend. VI*. It is "firmly established" that a person's Sixth Amendment right to counsel attaches "only at or after the time that adversarial proceedings have been initiated against the defendant." *United States v. Gouvia*, 467 U.S. 180, 187 (1984).

A. The Supreme Court Bright Line Rule Is That The Sixth Amendment Right To Effective Counsel Does Not Attach Until Criminal Proceedings Have Been Initiated Against A Defendant.

There is a line of constitutional cases by the Supreme Court of the United States stemming from its landmark decision in *Powell v. Alabama*, 287 U.S. 45, that have firmly established that "a person's Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against a defendant." *Kirby v. Illinois*, 406 U.S. 682, 689 (1877); *Johnson v. Zerbst*, 304 U.S. 458 (1938); *Hamilton v. Alabama*, 388 U.S. 52 (1961); *Gideon v. Wainwright*, 372 U.S. 335 (1963); *White v. Maryland*, 373 U.S. 59 (1963); *Massiah v. United States*, 377 U.S. 201 (1964). The bright-line attachment rule for the Sixth

Amendment is when there is an initiation of criminal proceedings by the occurrence of one of the following events: formal charges, preliminary hearing, indictment, information or arraignment. *Kirby*, 406 U.S. at 689 (1877); *Gouveia,* 467 U.S. at 122 (1984). For it is "only then that the government has committed itself to prosecute" the defendant, and "only then that the adverse positions of government and defendant have solidified." *Kirby*, 406 U.S. at 682 (1877). At those triggering events, the defendant finds himself faced with the prosecutorial forces of organized society and is immersed in the intricacies of substantive and procedural criminal law. *Id*. Therefore, only that point the commencement of "criminal prosecutions" is the Sixth Amendment triggered. *See Powell*, 287 U.S. 45, 66-71 (1932); *Massiah*, 377 U.S. at 201; *See Also, Spano v. New York*, 360 U.S. 315, 324.

The core purpose of the Sixth Amendment right to counsel is to ensure that criminal defendants could "receive effective assistance of counsel 'at trial.'" *Missouri v. Frye*, 566 U.S. 134, 140 (2012). The Supreme Court has ensured that criminal defendants could also receive assistance at "trial-like confrontations" that present the same dangers as trial itself, these trial-like confrontations are called "critical stages of a proceeding". *Frye*, 566 U.S. at 140 (2012); *Turner v. United States*, 885 F.3d 949, 952 (6th Cir. 2018). The critical stage of a proceeding is often confused with the point that the Sixth Amendment attached. *Turner*, 885 F.3d at 953. *Quoting Rothgery v. Gillespie Cty.*, 554 U.S. 191, 211 (2018). However, the point at which the Sixth Amendment right attaches and a critical stage of a proceedings, are distinctly different. A "critical stage" of the proceeding occurs after the initiation of the criminal proceedings and before trial in situations where "the accused is confronted, just as at trial, by the prosecutorial system or by his expert adversary, in a situation where the results might well settle the accused's fate." *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999). The Supreme

Court has repeatedly rejected attempts by criminal defendants to extend the Sixth Amendment to pre-indictment proceedings, "even where the same proceedings are critical stages when they occur post-indictment." *Turner*, 885 F.3d at 953; *Rothgery*, 554 U.S. at 211.

The court in *Turner* compares the Supreme Court's holdings on the Sixth Amendment's attachment during different critical stages at both pre-indictment and post-indictment. *Turner*, 885 F.3d at 953. First, *United States v. Wade*, 388 U.S. 218, 266-37 (1967), holding that defendant had a Sixth Amendment right to counsel in post indictment lineups, is compared with *Kirby v. Illinois*, 406 U.S. 682, 689 (1877) which held that a defendant does not have a Sixth Amendment right to counsel in pre-indictment lineups. Secondly, *Massiah v. United States*, 377 U.S. 201, 205-06 (1964), holding that a defendant has a Sixth Amendment right to counsel in post indictment interrogations, is compared with *Moran v. Burbine*, 475 U.S. 412, at 431-32 (1964), which held that there is no Sixth Amendment right to counsel in pre-indictment interrogations. The high court found that line-ups and police interrogations are "critical stages of a proceeding". *Wade*, 388 U.S. at 266-67; *Massiah*, 377 U.S. at 203-06. However, if the critical stages take place prior to an indictment than a defendant is not entitled to the Sixth Amendment rights. *Wade*, 388 U.S. at 266-67; *See, Massiah*, 377 U.S. at 203-06. This reasoning follows that even though plea negotiation is a critical stage, if negotiations are prior to indictment the Sixth Amendment has not been triggered.

In the case at bar, the Defendant was arrested on January 15, 2017 at 10:00 am. Within Twenty-four hours the government extending a plea offers to the Defendant. The plea offer was emailed by the government to the Defendants attorney on January 16, 2017 at 8:00 am, and the plea offer was set to expire in thirty-six hours at 10:00 pm on January 17, 2017. At the time the plea offer was extended, there had been no indictment, arraignment, preliminary hearing, or any

formal judicial proceeding in the Defendant's case. Because the Supreme Court has held that the Sixth Amendment rights are not triggered until "adversarial criminal proceedings " are brought upon the defendant by way of indictment, preliminary hearing, or arraignment, the Defendant was not entitled to Sixth Amendment protections. Therefore, the Defendant is not entitled for any remedy to a right he did not possess and the motion to re-offer the plea must be denied.

B. **Holding That There Is No Sixth Amendment Rights In Pre-Indictment Plea Bargaining, Is In Line With The Reasoning And Purpose of the Sixth Amendment Attachment**.

In *Kirby v. Illinois*, 406 U.S. 682 (1877), the Supreme Court stated: "[I]n this case we are asked to import, into a routine police investigation, an absolute constitutional guarantee historically and rationally applicable *only after* the onset of formal prosecutorial proceedings. We decline to do so." (Emphasis added). The Court reasoned that there is a necessity for the police to conduct a line-up for investigative purpose in order to effectively investigate criminal activity and protect society. *Id*. at 686-89. To "impose an absolute constitutional guarantee would unreasonably hinder the police" in the investigation of crimes as a practical matter. *Id*. at 989. Also, it is impractical for the police to wait to conduct a line-up until prosecution indicted the defendant to conduct and investigatory line-up because the evidence is less reliable as time fades. The Court held that there is no Sixth Amendment right during a pre-indictment line-up because it was neither legally nor practically sound. *Id*. at 686-989.

Similarly, in *Moran v. Burbine*, 475 U.S. 412, 430 (1964), the Court held that as a practical matter, it "makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation." *Kirby*, 406 U.S. at 686-89 (1877). The Sixth Amendment, as written, becomes "applicable only when the government's role shifts from

investigation to accusation." because it is "only then that the assistance of one versed in the intricacies . . . of law," is needed. United States v. Croinic, 466 U.S. 648, 656 (1984).

When applying the Supreme Court's holding and reasoning in *Kirby* and *Moran* to the case at hand, there is no Sixth Amendment right to defendants in pre-indictment plea negotiations. Here, the reason for offering the plea deal so quickly without indicting the Defendant was due to law enforcement's immediate necessity to get pertinent information from the Defendant for investigative purposes. The officers believed that the Defendant could give them information which would lead to the arrest of the Drug Kingpin, but only if they got the information immediately before the news of Defendant's arrest had spread.

Kirby held that it was not practical to force law enforcement to wait until the defendant was indicted by prosecution to take this necessary investigative procedure because it would unreasonably hinder the police in criminal investigations of Drug Kingpins. Just as the evidence obtained by line-ups are not reliable as time goes on, here the information given by the Defendant, after a longer period of time, is not likely to lead to an arrest of the Drug Kingpin. The more time passes, the more likely the Drug Kingpin would be tipped off about the investigation of their lower level drug deal. Once tipped off they would take actions avoiding arrest based on the arrestee's ability to share information. Based on the Supreme Court's reasoning in a line of Sixth Amendment cases, it would neither be legally nor practically sound to guarantee a Sixth Amendment Right to defendants in pre-indictment plea negotiations. In addition, it would unreasonably interfere with society's interest in criminal investigations.

Additionally, in *Moran v. Burbine*, 475 U.S. 412, 431 (1964), it was argued that custodial interrogations require an exception to the Sixth Amendment attached rule, because confessions elicited during police questioning often "seal a suspect's fate." The Court recognized that "a

lawyer's presence could be of value to the suspect; and [the Court] readily agrees that if a suspect confesses, his attorney's case at trial will be that much more difficult." *Id*. at 432. However, the Court found that interrogation is no more or less "critical" than other pre-indictment or pre-trial event, and the mere possibility that the interrogation "may" have important consequences at trial, standing alone, is insufficient to trigger the Sixth Amendment right to counsel. *Id*. The high court rejected the defendant's argument and held that there is no exception for pre-indictment interrogation. *Id*. The Court reaffirmed that the Sixth Amendment attached when adversarial criminal proceedings are initiated. *Id.*

Similarly, it is recognized that plea- negotiation may seal the fate of a defendant if he agrees. However, plea negotiations are no more or less important to the fate of the defendant than being picked out of a line up or interrogated by officers. The mere fact that plea negotiations *may* seal the defendant's fate is not enough to trigger the Sixth Amendment prior to indictment. The government had not committed itself to prosecution and the adverse position of the government was not solidified, the plea deal was merely offered to see in hopes that the Defendant would assist the police in the investigation and arrest of a Drug Kingpin. Therefore, holding that the Defendant was not entitled to Sixth Amendment protections at the time of the pre-indictment plea negotiation is in line with the Supreme Court's bright line rule and reasoning. The motion to re-offer original plea deal must be denied.

C. **There Is No Government Misconduct In The Present Case, And The Bright-Line Sixth Amendment Attachment Rule Applies.**

Six of the thirteen Circuit Courts have enforced the bright-line attachment of the Sixth Amendment rule, including the Fifth, Sixth, Ninth, Tenth, Eleventh and D.C. Circuit Courts. The argument has been raised that other circuits extend the Sixth Amendment right to counsel to pre-indictment "adversarial confrontations." *Turner v, United States*, 885 F.3d 949, 953 (6th Cir.

2018). However, no other circuit "has definitively extended the Sixth Amendment right to counsel to pre-indictment plea negotiations." *Turner,* 885 F3d at 953. Instead, there are only three circuits that have implied that the Sixth Amendment might be extended to pre-indictment plea negotiations in extreme circumstances show the governments misconduct. *See Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999); *See also, United States v. Larkin*, 978 F.2d 964, 969 (7th Cir. 1992). The Supreme Court held in *Kirby*, that "[w]hat has been said, [as to the attachment rule,] is not to suggest that there may not be occasions during. . . a criminal investigation when the police do abuse identification procedures. Such abuses are not beyond the reach of the Constitution. *Kirby*, 406 U.S. at 689; *United States v. Wade*, 388 U.S. 218, 266-67 (1967). Therefore, it is implied that the only when the government has abused the pre-indictment procedure that a defendant may seek a remedy under the Sixth Amendment.

In such cases, the courts have remedied defendants who have proved the government abused the pre-indictment procedure and showed the governments conduct goes beyond "factfinder to adversary," causing the defendant to need such protection prior to indictment. *See Larkin*, 978 F.2d at 964-69. For example, in the case of *Matte*, the prosecution took an unnecessary amount of time, over a week, before charging the defendant. In addition, the prosecutor and a law enforcement agent personally interviewing the defendant, attempting to persuade him into a plea deal while delaying the indictment. *Matte*, 171 F.3d at 880-892. In these interviews, the statements made by the prosecutor and agent made it clear that the prosecution intended on filing charges. *Id.* The Court found that it was clear the government had already decided to bring criminal proceedings against the defendant, but intentionally delayed indictment to improperly bargain with the defendant. *Id.* The government's misconduct amounted to

"adversary judicial proceedings" requiring Sixth Amendment protection based on the core purpose of the Sixth Amendment. *Id.*

Here, DEA Agent Colin Malaska took it upon himself to informed prosecution of the case immediately after the arrest of the defendant on January 15, 2017. Like *Kirby* and *Moran*, the governments plea offer was extended solely because of the urgency of law enforcement's interest in information that would lead to the arrest of a serious criminal, here, Drug Kingpin. It is reasonable to believe that it would take longer than twenty-four hours to go through the procedure of processing all the evidence, write a full and complete report, and submit all the agent's findings to the prosecution's office. But here, from sometime after 10:00 am on January 15, 2017 and sometime around 5:00 pm – 6:00 pm, the end of the work day, the prosecution was persuaded to offer a plea as Agent Malaska suggested. In the regular course of business, a prosecution would not be able to indict the defendant in six to ten hours from their arrest. The speed of the events shows that prosecution was not committed to criminal prosecution of the Defendant, rather prosecution was trying to aid law enforcement in the arrest of Drug Kingpin.

Similar to *Kirby* and *Moran*, immediate action prior to indictment was necessary because allowing more time to pass or waiting until the defendant was formally charged would cause the potential evidence to be unreliable or useless, which hinders the criminal investigation. Here, allowing more time to pass or waiting until formal indictment of the defendant made it highly likely that the Drug Kingpin would be tipped-off by Defendant's arrest. Law enforcement knew from experience that, when a Drug Kingpin is aware that a lower level dealer is arrested, the arrestee might give the police information to aid in his arrest. The Drug Kingpin will then avoid arrest by altering his actions based on the arrestee's knowledge, since there is a possibility the arrestee might act as an informant. Offering plea deals in exchange for information leading to the

arrest of other more serious criminals is a normal practice of law enforcement and prosecution in order to further the public's interest in preventing crime.

Unlike the prosecutors in *Larkin* and *Matteo,* the prosecutor never spoke with the Defendant directly or attempted in any way to use his expertise in the law against the Defendant. The prosecution conveyed the plea offer through email to the Defendants attorney at that time, Mr. Long. Once the plea offer expired on January 17, 2017 at 10:00 pm, the prosecutor promptly indicted the Defendant first thing on January 18, 2017, within 3 days of the Defendants arrest. Since the prosecution did not unnecessarily delay indicting the defendant to unfairly negotiate a plea with defendant personally, there was no misconduct by the prosecution.

In conclusion, there was no misconduct by the government who extended the plea offer to assist in the arrest of a more serious criminal. The Defendant's Sixth Amendment rights were not triggered and the motion to re-offer the plea must be denied.

III. EVEN IF THE COURT FINDS THE SIXTH AMENDMENT DID ATTACH, THE DEFENDANT HAS FAILED TO MEET HIS BURDEN OF PROVING THE TWO PRONG STICKLAND TEST.

In *Strickland v. Washington*, 466 U.S. 668 at 686 (1984), the Supreme Court established that defendants carry the burden to show they meet the two-pronged "*Stickland* test" to determine whether there was a violation of the Sixth Amendment right to effective counsel in plea-bargaining. Here, the Defendant failed to meet his burden to prove the prejudice prong of the *Strickland* test. The *Strickland* test requires the defendant to affirmatively establish: (1) Their counsel's representations fell below an objective standard of reasonableness; and (2) that the deficiency prejudiced the outcome of the case. 466 U.S. at 686. The defendant can meet the second element, the "prejudice prong," by showing there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Id*.

First Prong – Below Objective Standard of Reasonableness

Most states require attorneys to abide by certain rules and duties. One of the duties is that an attorney must communicate all plea offers to their client in a timely manner. The parties have stipulated that Mr. Long, the defendant's attorney at the time of the plea negotiations, was ineffective when he failed to communicate the plea offer prior to its expiration. However, the first prog alone is not enough for the court to find there was a violation of the Sixth Amendment right to effective counsel, the defendant must also prove that they were prejudiced by the ineffectiveness of their counsel.

Second Prong- Prejudice to the Defendant.

The court in *Nunes v. Mueller* explains that it must be "objectively reasonable for the state court to conclude that [with] the record before it, that no reasonable factfinder could believe that [the defendant] had been prejudiced." 350 F.3d 1045, at 1055 (9th Cir. 2003). To find that there was prejudice, the defendant must show two events would have occurred. First, the evidence must show that there is a reasonable probability that the defendant would have taken the plea offer. Second, that the court would have accepted the plea agreement. *Nunes*, 350 F.3d at 1055. First, there must be enough evidence for a reasonable fact finder to conclude there was a "reasonable probability" the defendant would have accepted the plea deal, and the finding "cannot be based on the defendant's own self-serving statements alone." *United States v. Buss*, 814 F.Supp. 760 at 764 (1993); *In re Alvernaz*, 830 P.2d 747, 756 (Cal. 1992).

The Defendant did not submit any evidence other than his own self-serving statement that he would have accepted the plea at the time is was offered had he been afforded effective counsel. The Defendant testified that after being incarcerated, he changed his mind about his

previous statements and would give the officers the supplier's name for a plea deal. It is the prosecution's position that his testimony is not true and shown by the facts and evidence. This is shown by his own statements to the agent at arrest that the Defendant was truly scared of the Drug Kingpin's threats and would not have accepted the offer because he could not give the name of his supplier. He said, "no way I would give up my supplier" and indicated to the officers that if he gave them information about his supplier, the Drug Kingpin would have the Defendant murdered and would burn his church, where he preached, to ashes. With no other evidence but the Defendant's self-serving and contradictory statements, it is objectively reasonable that a state court could find that no reasonable fact finder would conclude with reasonable probability that the defendant would have accepted the plea offer. This alone, shows that the Defendant failed their burden to prove the prejudice prong of the *Strickland* test.

Secondly, the defendant also must establish that the plea agreement would have been approved by the trial court. *Missouri v. Frye,* 406 U.S. 682. Such a requirement is "indispensable to a showing of prejudice" because judicial approval is an essential condition precedent to any plea bargain negotiated by the prosecution and defense, and plea bargain is ineffective unless and until it is approved by the court. *In re Alvernaz*, 830 P.2d at 756 (Cal. 1992); See *People v. Orin* (1975) 13 Cal 3d 935 at 942-943.

The Court in *In re Alvernaz* explains that "we cannot just assume that a court would have granted the plea deal" and we have to "recognize that the court has discretion to approve or reject proposed plea bargains because the courts are charged with the protection and promotion of the public's interest in vigorous prosecution of the accused, imposition of appropriate punishment, and protection of victims of crimes." 830 P.2d at 758; See *People v. Cardoza,* 161 Cal.App.3d 40, 43. A trial court's approval of a plea agreement must represent an "informed decision in

furtherance of the interest of society as recognized by both the legislature and the judiciary, the trial court may not arbitrarily abdicate that responsibility." *In re Alvernaz*, 830 P.2d at 756.

Here, the defendant is a well-respected minister who was found bagging mounds of cocaine with the intent to distribute shown by his drug sale ledger. This defendant is in a position of trust in the community and the court would likely hold him to a higher standard and refuse the unjust punishment of one year for a crime that is rightfully punishable by ten years. The defendant has put forth no evidence showing otherwise. It is not probable that the court would have accepted the plea. Further, because now the information that would be exchanged for the plea is useless to law enforcement, it is highly unlikely the court would allow such injustice. Thus, this is yet another issue that, standing alone, causes the defendant to fail in proving prejudice. In conclusion, the defendant failed to meet his burden under *Strickland* that he would have accepted the plea and that the court would have granted such an unjust punishment. Thus, there was no violation of the Sixth Amendment right to effective counsel.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests this Court affirm the lower court's ruling to deny Defendant's motion to suppress the evidence found from the officer's entry into his home because the community care taker exception extended to the home. Additionally, Respondent requests the Court to affirm the lower court's denial of the Defendant's motion to re-offer the plea deal because his Sixth Amendment rights had not yet attached, and even if they had the defendant failed to meet the balancing test.