Team P13

No. 4-422

In The

SUPREME COURT OF THE UNITED STATES

Chad David,

Petitioner,

v.

The United States of America,

Respondent.

On Writ of Certiorari to The
United States Court of Appeals for The Thirteenth Circuit

BRIEF FOR PETITIONER

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ISSUES PRESENTED

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

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

STATEMENT OF THE FACTS

Petitioner Chad David is a prominent and well-respected minister in Lakeshow, Staples, a community in which he has resided all of his life. R. at 2. Mr. David is well known for his engaging Sunday services at the Lakeshow Community Revivalist Church. *Id.* Officer James McNown is a patrol officer in the community who frequently attends Mr. David's church services and was scheduled to patrol Lakeshow after Mr. David's morning service on Sunday, January 15, 2017. *Id.*

When Officer McNown arrived at Mr. David's Sunday service that morning, he was surprised to find that Mr. David was not in attendance. R. at 2. Another church member, Julianna Alvarado, attempted to call Mr. David at home, but he did not answer. *Id.* Ms. Alvarado, being concerned for Mr. David's well-being, relayed this information to Officer McNown. *Id.* Another church attendee, Jacob Ferry, told Officer McNown that he thought he saw Mr. David at a bar the night before. *Id.* But Officer McNown knew Mr. David did not drink, nor frequent bars. *Id.* Thus, Officer McNown believed that Mr. David was likely just at home with an illness due to his old age. *Id.* To calm the two church attendees, Officer McNown told them he would check in on Mr. David during his patrol after the Sunday service. *Id.*

After the service, Officer McNown began his shift, stopping at a Starbucks to purchase hot tea for Mr. David. R. at 2. When Officer McNown pulled up to the gated community in which Mr. David resides, he was surprised to find out that Mr. David lived in such an affluent part of town. *Id.* Further, upon pulling in to the community, he saw a black Cadillac SUV leaving the area. *Id.* The vehicle had Golden State license plates. *Id.* Officer McNown knew, based on his experience, that those vehicles were typically driven by drug dealers. *Id.* Officer McNown also recognized that there had been a recent increase in Golden State drugs pouring

into Lakeshow. *Id.*

When Officer McNown approached Mr. David's house, he heard loud "scream-o" music being played from inside. Ex. A, pg. 4, line 16. This struck Officer McNown as very unusual. Ex. A, pg. 4, line 17. He then knocked and announced himself, waited two minutes, and peered inside the window adjacent to the front door. *Id.* At that moment, Officer McNown saw the R-rated movie, *The Wolf of Wall Street* playing on Mr. David's television, which struck him as incredibly odd given Mr. David's age and profession as a preacher. *Id.* At that moment, Officer McNown believed there was a possibility that "someone else might be in the home." Ex. A, pg. 5, lines 26-28.

Officer McNown attempted to open the front door, only to realize it was locked. *Id.* He nonetheless entered Mr. David's home through the unlocked back door. *Id.* Once inside, Officer McNown turned off the television and searched the ground floor before going to check on Mr. David. *Id*. During the search, he found a notebook full of incriminating information related to drug payments by church attendees. *Id.* Officer McNown then followed the loud music to a closed-door upstairs. *Id.* On the other side, Officer McNown found Mr. David handling cocaine. *Id.* He handcuffed Mr. David and called the local DEA because of the amount of drugs he observed. *Id.* The DEA had established a taskforce in the area as a result of the increase in narcotics. *Id.*

Once DEA Agent Colin Malaska arrived to the scene, Mr. David was read his Miranda rights. R. at 3. Agent Malaska then asked Mr. David from whom he had obtained the large quantity of drugs, to which Mr. David replied that he would not give up his suppliers for fear of physical violence towards him and his church. *Id.* Mr. David was subsequently held at a federal detainment facility, where he sought representation from Keegan Long, an alcoholic attorney

who frequented Mr. David's church services, and the only criminal defense attorney Mr. David knew. R. at 3-4.

Agent Malaska was interested in obtaining more information about Mr. David's drug suppliers, so he asked the prosecution to offer a favorable plea deal that could entice Mr. David to provide this information. R. at 4. Because Agent Malaska was aware of the drug kingpin traveling through Lakeshow, he asked the prosecution to hold off on filing any charges so that the kingpin would not be alerted to being investigated. *Id.* The prosecution agreed. They did not file any charges and instead, offered Mr. David a plea bargain of one year in prison in exchange for information about his suppliers. *Id.* The information Mr. David offered would have had to lead to an arrest and was only valid for 36 hours. R. at 4.

This offer was emailed to Mr. Long who received the message while at a bar. *Id*. He misread the email and thought the plea deal was valid for 36 days rather than 36 hours. Ex. B, pg. 2, lines 18-25. The next day, the prosecutor followed up with Mr. Long about the plea offer but received no response. R. at 4. The plea deal expired after 36 hours with Mr. David never being made aware of such an offer. *Id.* Mr. Long—who only found out about his mistake after the prosecutor contacted him a second time on January 18th, the day of Mr. David's indictment—communicated his mistake to Mr. David who subsequently fired him. *Id.*

Mr. David's new attorney, Michael Allen, attempted to renegotiate another plea deal with the prosecutor, who responded that at that point the plea deal was pointless to the government, because the drug kingpin was probably already aware of Mr. David's arrest. R. at 5. The prosecutor then stated that because the kingpin was tipped off at that point, there would be no benefit to the government to extend another plea offer. *Id.*

Mr. David filed two pretrial motions: (1) a motion to suppress evidence under the Fourth

Amendment, arguing that the evidence obtain by Officer McNown's initial search should be suppressed because he did not have a warrant to enter Mr. David's home; and (2) a motion to be re-offered the initial preindictment plea deal that was never timely communicated to him based on a Sixth Amendment ineffective assistance of counsel claim. R. at 5.

SUMMARY OF THE ARGUMENT

This Court should reverse the Court of Appeals' decision denying Mr. David's motion to suppress and his motion to be re-offered the plea deal. This Court has limited the community caretaking doctrine to searches of automobiles and expanding it to searches of the home is repugnant to the principles of the Fourth Amendment and undercuts the foundation of the doctrine itself. Further, even if this Court decides that the community caretaking doctrine *can* apply to the home, Officer McNown was not acting as a community caretaker, and his warrantless search of Mr. David's home was unreasonable.

Additionally, Mr. David's Sixth Amendment right to counsel should have attached during his brief, pre-indictment plea negotiations. Limiting the right to counsel to attach only once charges have been formally initiated cuts against the protections promised by the Sixth Amendment. Additionally, the constraints of the bright-line test as it is held today do not allow courts to address plea negotiations that may occur prior to the initiation of formal charges.

STANDARD OF REVIEW

The Court reviews the lower court's finding of fact for clear error, and its conclusions of law *de novo* in the context of a denial of a motion to dismiss. *See United States v. Gonzalez-Acosta*, 989 F.2d 384 (10th Cir. 1993). Additionally, the issue of whether the Sixth Amendment right to counsel extends to preindictment plea negotiations is a question of law and thus, should be reviewed *de novo*, as well. *See United States v. Moody*, 206 F.3d 609, 612 (2000).

ARGUMENT

I. THE COMMUNITY CARETAKING FUNCTION DOES NOT JUSTIFY THE WARRANTLESS SEARCH OF A HOME

The revered concept of security and the right to be free from unreasonable government intrusion in one's home was a paramount principle upon the formulation of American Constitutionalism. Prior to the American Revolution, the issuance of writs of assistance[1] exacerbated colonist hostility towards the Crown. Such hostility ultimately led to the American Revolution and became "the driving force behind the adoption of the Fourth Amendment." *Carpenter v United States,* 183 S.Ct. 2206, 2213 (2018). Indeed, John Adams had recognized the inherent danger of the writs and noted that unreasonable government intrusion "violated the fundamental principle of law [that] a man who is quiet, is as secure in his house, as a prince in his castle." *Id.* at 2239. Upon these historical foundations, the drafters of the Constitution provided assurance of protection from unreasonable government intrusion by drafting the Fourth Amendment.

The Fourth Amendment provides in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause…" U.S. Const. amend. IV. The ultimate standard set forth in the Fourth Amendment is reasonableness. *Cady v. Dombrowski,* 413 U.S. 433, 451 (1973). Unreasonable physical government intrusion into the home is the "chief evil against which the wording of the Fourth Amendment is directed." *Payton*

[1] *See Boyd v. United States*, 116. U.S. 616, 625 (1886) (stating "[t]he practice had obtained in the colonies of issuing writs of assistance to the revenue officers, empowering them, in their discretion, to search suspected places for smuggled goods which James Otis pronounced "the worst instrument of arbitrary power, the most destructive of English liberty, and the fundamental principles of law, that ever was found in an English law book.").

v. New York, 445 U.S. 573, 586 (1980). Thus, a warrantless search is presumed to be unreasonable, and therefore invalid under the Fourth Amendment. *Katz v. United States*, 389 U.S. 347, 357 (1967).

However, this Court has established a "few specifically [defined] and well-delineated exceptions" to the warrant requirement. *Dombrowski,* 413 U.S. at 451. Such exceptions to the warrant requirement include, "plain view, exigent circumstances, hot pursuit, search incident to a lawful arrest, consent, border search, and stop and frisk." R. at 18. The Thirteenth Circuit Court of Appeals, as well as a number of other lower courts assert that one exception is the "community caretaking exception." The community caretaking function was first recognized by this court in *Dombrowski*, 413 U.S. at 441. A police officer is acting as a community caretaker when, acting "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute[,]" she conducts a warrantless search motivated by concern for, or procedure to protect, the general public or personal property. *Id*. This Court, however, has never recognized the community caretaking functions as an exception to the warrant requirement, but rather, only as a *factor* within its' reasonableness analysis, and *never* outside the context of an automobile search. *Colorado v. Bertine*, 479 U.S. 367 (1987); *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Dombrowski*, 413 U.S. 433 (1973). Indeed, the Thirteenth Circuit agrees that the community caretaking doctrine is "not really an exception to the warrant requirement at all." R. at 15. Nonetheless, a number of lower courts have disagreed as to whether the community caretaking doctrine extends past automobiles and into the home. Ultimately, the Thirteenth Circuit has justified Officer McNown's warrantless entry into Mr. David's home through application of the community caretaking doctrine.

The community caretaking doctrine does not justify Officer McNown's warrantless entry into Mr. David's home for two reasons. First, *Cady* and its progeny limit the community caretaking doctrine to searches of automobiles and expanding it to searches of the home is repugnant to the principles of the Fourth Amendment and undercuts the foundation of the doctrine itself. Second, even if this court decides that the community caretaking doctrine *can* apply to the home, Officer McNown was not acting as a community caretaker, and his warrantless search of Mr. David's home was unreasonable.

A. ***Cady* and its progeny limit the community caretaking doctrine as a factor upon its reasonableness analysis pertaining to searches of automobiles.**

In *Cady*, an off-duty Chicago police officer wrecked his vehicle while driving in Wisconsin. *Dombrowski*, 413 U.S. at 434 (1973). The disabled vehicle was towed, and the off-duty Chicago police officer was brought to the hospital. *Id*. The local Wisconsin police officer believed that Chicago police officers were required to carry their firearms at all times, and when the firearm was not found in the Chicago officer's possession, the Wisconsin officer searched the towed vehicle pursuant to "standard procedure." *Id*. When the officer searched the vehicle for the firearm, he found items covered in blood which implicated the Chicago officer in a murder.

The search of the vehicle was upheld as constitutional under the Fourth Amendment. Indispensable to the Fourth Amendment reasonableness inquiry, and ultimately the establishment of the community caretaking doctrine, this Court emphasized the constitutional difference between vehicles and houses. *Dombrowski*, 413 U.S. at 439; *See also Preston v United States*, 376 U.S. 364, 367 (1964), (explaining "searches of cars that are constantly movable may make a search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home."). The Court further illustrated the constitutional differences between vehicles

and houses, explaining that the lesser level of protection afforded to vehicles stems from their "ambulatory character" and the fact that constant non-criminal contact with vehicles will often bring officers in "plain view" of evidence. *Dombrowski,* 413 U.S. at 445. Further, because of the transitory nature of vehicles, the regulation of vehicles, and the frequency with which vehicles break down, local law enforcement officers are frequently in contact with vehicles in a capacity described as "community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at. 441. Thus, with the foundation that a lesser level of protection is afforded to vehicles, the Court applied a calculus that, since the vehicle was towed and essentially in police custody, and the officer was acting within his community caretaking function to "protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands," the warrantless search was reasonable and the community caretaking doctrine was born. *Id.*

The community caretaking function has only been mentioned by this Court in two cases succeeding *Cady***.** In both *Opperman* and *Bertine*, the Court also applied the community caretaking function as a factor within its reasonableness analysis pertaining to an automobile search. In *Opperman*, the police searched an impounded vehicle after the officer noticed articles of clothing were left inside. *Opperman*, 428 U.S. at 366. Pursuant to standard procedure, the police officer collected the articles of clothing and conducted an inventory search which led to the discovery of marijuana. The Court, following *Cady*, premised the reasonableness inquiry upon the "lesser expectation of privacy in a motor vehicle." *Opperman*, 428 U.S. at 368 (citing *Cardwell v Lewis,* 417 U.S. 583, 589-590 (1974)). The Court determined that the inventory search of the vehicle, which was conducted to secure the personal belonging of the owner whilst in police custody, as well as to protect the police from possible claims over lost property, is

encompassed within the "community caretaking function[s]" of police. *Id*. Upon the foundation that "less rigorous requirements govern because the expectation of privacy with respect to one's automobile is significantly less than one's home," the Court concluded that the caretaking function of the police to perform an inventory search, compounded with the police custody of the vehicle, justified the reasonable warrantless search. In *Colorado v. Bertine*, the Court again premised its reasonableness analysis upon the lessened expectation of privacy afforded to automobiles and concluded that the inventory search of a towed vehicle justified the deference given to "police caretaking procedures designed to secure and protect vehicles and their content within police custody." *Bertine,* 428 U.S. 364 at 372.

Thus, this Court has only upheld warrantless searches conducted pursuant to an officer's community caretaking functions three times, and on very specific grounds. First, the court premised the searches upon the foundation of the lessened level of protection afforded to vehicles. Second, the community caretaking functions stemmed from the transparent and transitory nature of the automobiles, and the frequency with which local law enforcement come into contact with the vehicles in a non-investigatory capacity. Third, when the officers searched the vehicles, the search was pursuant to functions served for the protection of the general public, pursuant to standard procedure. The court compounded all the preceding factors upon consideration of the Fourth Amendment reasonableness analysis, and found that when present, warrantless searches of vehicles by an officer acting pursuant to his community caretaking functions are reasonable under the Fourth Amendment. Therefore, *Cady* and its progeny have limited the community caretaking doctrine to searches of automobiles, and because Officer McNown entered Mr. David's home, not his automobile, he was not justified in his warrantless search under the community caretaking doctrine.

B. Expanding the community caretaking doctrine to warrantless searches of the home would conflict with the core protections the Fourth Amendment extends to houses.

An intrusion of the home is "the chief evil against which the wording of the Fourth Amendment is directed." *Payton*, 445 U.S. at 587. Out of all the zones of privacy protected by the Fourth Amendment, "in none is the zone of privacy more clearly defined than when bounded by the unambiguous physical dimensions of an individual's home." *Id.* at 589. "[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines,* 569 U.S. 1, 6 (2013). "At the Amendments 'very core' stands the 'right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" *Id.* (discussing *Silverman v United States*, 365 U.S. 505, 511 (1961)). There is a well-defined and accepted constitutional difference between the heightened protections afforded to houses as compared to vehicles because, "[o]ne has a lesser expectation of privacy in a motor vehicle because its function is transportation and it seldom serves as one's residence." *Cardwell v. Lewis*, 417 U.S. at 590. Thus, Fourth Amendment jurisprudence has recognized a "firm line at the entrance into the home" for one to be free from unreasonable searches. *Payton*, 445 U.S. at 589-590. The sanctity of the home is so revered that the heightened level of protection extends to the curtilage of the home as well. *Collins v. Virginia*, 138 S.Ct. 1663, 1666 (2018).

In *Collins v. Virginia*, the Court attached a heightened level of protection afforded to the home to the vehicle parked in the driveway. *Id.* There, the officer had reason to believe that a parked motorcycle covered by a tarp in the defendant's driveway was stolen. *Id.* The officer approached the motorcycle parked in the driveway for inspection and concluded that the motorcycle was, in fact, stolen. *Id.* The Virginia State Supreme Court upheld the search as reasonable under the automobile exception. *Id.* This Court reversed the State Supreme Court

decision because the warrantless search of the vehicle in the driveway, which would have normally been justified under the "automobile exception," was found unreasonable because it was subject to the same protections afforded to the home. *Id.* at 1673. Notably, the development of the automobile exception stems from the *same principles* that the Court in *Cady* used to justify the creation of the community caretaking doctrine. In fact, the Court in *Collins* cited both *Cady* and *Opperman* to illuminate the principles of the automobile exception: the ready mobility of vehicles, the regulation of vehicles, the frequency officers come into contact with vehicles, and the *lessened expectation of privacy attached to vehicles. Id.* at 1670 (emphasis added). When confronted with a doctrine that was established upon the lessened expectation of privacy and protection afforded to vehicles—such as the automobile exception and the community caretaking doctrine—a situation that would normally justify a warrantless search under their applications cannot when faced with the heightened level of protection afforded to homes.

Therefore, expanding the community caretaking doctrine to the home, of which was founded upon the lessened level of protection afforded to vehicles just like the automobile exception, and allowing an officer to gain entry into the sanctity of one's home regardless of his intentions would "unmoor the exception from its justifications, render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage, and transform what was meant to be an exception into a tool with far broader application." *Id.* at 1673. Expanding the scope of the community caretaking doctrine in such a fashion would "both undervalue the core Fourth Amendment protection afforded to the home…and 'untether'…[the] exception from the justifications underlying it." *Id.* at 1672 (internal citations omitted).

C. Even if the community caretaking doctrine *can* extend to the home, Officer McNown's search of Mr. David's home was unreasonable.

1. Officer McNown was not acting as a community caretaker because his actions were not totally divorced from law enforcement functions.

Warrantless searches done by officers acting pursuant to community caretaking functions are those done "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Dombrowski*, 413 U.S. at 441. The standard used when determining when an officer is acting as a community caretaker is "reasonable belief." *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006). Therefore, the determination of Officer McNown's intent in entering Mr. David's home is of primary importance. However, an objective review of the facts and circumstance is considered during the assessment of whether the officer's primary intent was to enter the home serving as a community caretaker, or, whether the officer "entered under a 'pretext'…when in fact their actual intention was to perform a law enforcement function." *United States v. Rohrig*, 98 F.3d 1506, 1523 (6th Cir. 1996).

Officer McNown's entry was not totally divorced from an intention of performing law enforcement functions. Officer McNown's suspicions initially sparked when Mr. David did not show up to Church to conduct service in the morning. R. at 2. Officer McNown testified that it was unusual for Mr. David to not show up to work, and that Mr. David had a reputation for always being there, "rain or shine." Ex. A, pg. 2, line 28. A local attendee informed Officer McNown that he saw Mr. David at a bar the night before. R. at 2. This struck Officer McNown as odd considering Mr. David was not a drinker. *Id.* When Officer McNown received Mr. David's address in order to go check on him, he was surprised that Mr. David lived in such an affluent area. *Id.* Upon approaching the gated community, Officer McNown noticed a black Cadillac SUV with Golden State plates leaving the community. *Id.* Based on his experience, that type of car is popular among drug dealers. *Id.* In fact, Officer McNown knew there had been an

increase of drugs in Lakeshow coming from Golden State. *Id.* Prior to even approaching Mr. David's residence, Officer McNown had noticed a significant number of suspicious happenings.

When Officer McNown approached Mr. David's house he heard loud "scream-o" music and saw *The Wolf of Wall Street* playing on Mr. David's television. R. at 3. Both the music and the movie struck Officer McNown as very unusual considering Mr. David's age and his profession as a preacher. *Id*. In fact, at that moment, Officer McNown believed there was a possibility that "*someone else might be in the home.*" Ex. A, pg. 4, lines 26-28. (emphasis added)**.** In other words, Officer McNown was no longer totally divorced from any sort of investigative inquiries. Officer McNown even testified that he couldn't say he wasn't suspicious at that time because he wasn't sure "what [he] was thinking." Ex. A, pg. 5, lines 1-4. Thus, prior to entering Mr. David's home, Officer McNown was not acting as a community caretaker because his intentions were not "totally divorced" from criminal investigative purposes.

Officer McNown's investigative intentions are further illuminated by his actions once he entered the home. Although he could hear the music coming from upstairs, he continued to search around the first floor before attempting to locate Mr. David and the source of the music. Ex. A, pg. 5, lines 19-28. Had Officer McNown truly been acting without any investigative intentions, his first action would have been to go upstairs and check on Mr. David, not search around the ground floor where no occupants were present. *Compare with Michigan v. Clifford*, 464 U.S. 287, 297 (1984) (reasoning, because investigators had previously determined that a fire had originated in a home's basement, "the search of the upper portion of the house could only have been to gather evidence of arson requiring a criminal warrant."). Upon consideration of the facts leading up to Officer McNown's entry into the home and his subsequent investigative actions immediately following, Officer McNown was not acting as a community caretaker.

2. **Officer McNown's entry and search was not connected to serving the public interest.**

Community caretaking functions of police officers are non-traditional law enforcement functions that are taken out of concern for or on behalf of the general public or the protection of property. *See Dombrowski*, 413 U.S 433 (officers searched impounded car for a gun so that it wouldn't fall into untrained or malicious hands); *see also Opperman,* 428 U.S. 364 (inventory search conducted to preserve property and protect police from liability of lost or stolen items). This encompassment of the community caretaking function has been affirmed by lower courts across the circuit. In *Rohrig*, the officer entered the defendant's house in order to abate a nuisance in the early morning hours after receiving multiple complaints. *Rohrig,* 98 F.3d at 1509. In *United States v. Smith*, the police entered the house in order to conduct a well-being check on a halfway house after a report that an individual may be being held against her will inside the house by someone she had a non-contact order with. 820 F.3d 356, 358 (8th Cir. 2016). In *State v. Pinkard* the court found the police justified in entering the home after a report that the residence's door was wide open, and two occupants were sleeping next to a pile of drugs and money, suggesting that the two individuals may have been the victim of a crime or have overdosed. 327 Wis. 2d 346, 350 (2010).

In the cases where the community caretaking doctrine has been utilized, there has been a real and articulatable nexus between the entry of the home and some concern for the general public. That articulable nexus is absent in this case. In this case, Unlike *Rohrig*, multiple neighbors did not call the police because their right to private enjoyment was being infringed upon. *Rohrig,* 98 F.3d at 1509. Unlike *Smith*, there wasn't a belief that Mr. David was being held against his will. *Smith*, 820 F.3d at 358. Unlike *Pinkard*, there was no suggestion or belief that Mr. David may be

seriously injured or in dire need of assistance. *Pinkard,* 327 Wis. 2d at 350. Officer McNown decided to go to Mr. David's house to ease the fears of a very select few parishioners. He didn't even personally believe there was any cause for concern. Mr. David missed work, and Officer McNown decided to bring him tea. No facts suggest Mr. David was in need of any assistance, or that Officer McNown's entry into his home was to preserve property or grew out of concern for the general public. Two parishioner's concerns that an individual missed work cannot be sufficient to justify a warrantless entry into an individual's home as acting within the officer's community caretaking function. Therefore, Mr. David's Fourth Amendment interests outweigh the governmental interests motivating Officer McNown's search.

3. Chad David's Fourth Amendment interest outweighed the government's interest motivating the home intrusion and search.

When determining the reasonableness of a search within the meaning of the Fourth Amendment, "the governmental interest motivating the search must be balanced against the intrusion on the individual's Fourth Amendment interests." *United States v. Erickson*, 991 F.2d 529, 531 (9th Cir. 1993) (citing *Maryland v. Buie,* 494 U.S. 325, 331 (1990)). This general balancing test has been applied by courts across the circuits. *See Pinkard*, 327 Wis. 2d at 356 (explaining the balancing test as "whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised within the context of a home"); *See also Rohrig*, 98 F.3d at 1512 (explaining, "*Camara* and its progeny instruct us to balance the governmental interest being served against the individual's interest in remaining free from governmental intrusions"). Only if the government's interest motivating the search outweighs Mr. David's interest in maintaining the privacy of his home, was the community caretaking function reasonably exercised justifying the home intrusion.

Here, the governments interest motivating the search did not outweigh Mr. David's privacy interest. Officer McNown's motivation in entering Mr. David's home was to ease the fears of a few parishioners who were concerned because he missed work that morning. R. at 2. Officer McNown didn't think anything of his absence, instead, he thought Mr. David was only ill and decided to bring him tea. R. at 2. Arguably, there is not only a very weak governmental issue, but barely even a government interest involved at all. There was no attempt to protect or preserve property. *C.f. Bertine*, 479 U.S. 367; Opperman, 428 U.S. 364; *Dombrowski*, 413 U.S. 433. There was no attempt to provide a well-being check on an individual who may be in dire need of assistance. *C.f. Smith*, 820 F.3d 356; *Pinkard,* 327 Wis. 2d 346. Mr. David's decision to stay home was not infringing upon any rights enjoyed by the general public *C.f. Rohrig*, 98 F.3d 1506.

Further, Mr. David's interest in maintaining the privacy of his home is illuminated by the steps he took to ensure that he would remain left alone. Mr. David lives in a private gated community. R. at 2. Mr. David values his privacy to such an extent that he informs the gate operator of the community to not let anyone in that wishes to see him. Ex. C, pg. 2, lines 1-8. Mr. David never even lets *anyone* into his home. Ex. C, pg. 2, line 10. (*emphasis* added). Upon consideration of these facts, the asserted government interest to perform a well-being check on Mr. David who missed work that morning, does not outweigh his interest in maintaining privacy within the confines of his home. To allow for such a minute governmental interest to persevere in the balancing test, would be repugnant to the principles guiding the origins of the Fourth Amendment. To quote John Adams once more, "A man who is quiet, is as secure in his house, as a prince in his castle." *Carpenter,* 183 S.Ct. 2206, at 2239. Therefore, Officer McNown's search was not reasonable, and the decision of the Thirteenth Circuit denying Mr. David's motion to

suppress should be reversed.

II. THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTACHES DURING PLEA NEGOTATIONS PRIOR TO A FEDERAL INDICTMENT.

The second question before the Court is whether Mr. David has a Sixth Amendment right to counsel during his brief, pre-indictment plea negotiations. U.S. Const. amend. VI. ["[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense."). If this Court agrees with Mr. David's contention, then he would have a valid ineffective assistance of counsel claim under the *Strickland* test. *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (holding that for an ineffective assistance of counsel claim, the defendant needs to show that counsel's performance was deficient and show that the deficient performance prejudiced the defense). This Court has held that the right to counsel does not attach until formal adversarial proceedings have commenced. *Kirby v. Illinois*, 406 U.S. 682, 689 (1972). These formal proceedings include formal charges, arraignments, preliminary hearings, and indictments. *Id*. Since this decision, this Court, as well as the lower courts, have grappled with applying this formalistic principle to unique facts and scenarios.

In *United States v. Gouveia*, 467 U.S. 180, 188 (1984), this Court reinforced *Kirby*'s ruling that the right to counsel attaches once adversary judicial proceedings have been initiated. While addressing concerns about the effects of this ruling—such as delaying the appointment of counsel or the bringing of charges—this Court further stated that the possibility of prejudice to a defendant was not a "sufficient reason to wrench the Sixth Amendment from its proper context." *Id*. at 191 (quoting *United States v. Marion*, 404 U.S. 307, 321-22 (1971)). To be sure, in his concurrence, Justice Stevens stated *Kirby* did not "foreclose the possibility that the right to counsel might under some circumstances attach prior to the formal initiation of judicial

proceedings." *Gouveia*, 467 U.S. at 193.

The Circuit Courts have generally followed *Kirby*'s proposition, but not without some friction. In both *United States v. Moody*, 206 F.3d 609 (6th Cir. 2000), and *United States v. Hayes*, 231 F.3d 663 (9th Cir. 2000), the courts upheld *Kirby*'s rule, but did so with hesitation and dissatisfaction. *Moody*, 206 F.3d at 614 ("In light of the Supreme Court's stance on this issue, it is beyond our reach to modify this rule, even in this case where the facts so clearly demonstrate that the rights protected by the Sixth Amendment are endangered."); *Hayes*, 231 F.3d at 675 ("we are loath to engraft some new, pre-indictment proceeding onto the rule… [t]his said, we can't help being somewhat queasy because it looks like the government is trying to have its cake and eat it too.").

This Court has recognized the right to counsel at certain "critical" pretrial stages. *United States v. Wade*, 388 U.S. 218 (1967). In *Wade*, this Court acknowledged the importance of certain pretrial proceedings, stating "today's law enforcement machinery involves *critical* (emphasis added) confrontations of the accused by the prosecution at pretrial proceedings where results might settle the accused's fate." *Id.* at 224. For support, the court looked to the text of the Sixth amendment to emphasize the *right* to have counsel, and concluded that counsel was needed whenever necessary to ensure a meaningful "defen[s]e." *Id.* at 225. Furthermore, in *United States v. Ash*, 413 U.S. 300, 303 (1973), the defendant argued the right to counsel under the "critical stage" language. To be sure, the defendant was arguing that he had a right to counsel when the Government conducted a post-indictment photo-identification lineup, and the court ultimately held he had no right. *Id.* at 310. But within the opinion, this Court looked to the historical development of the right to trial to find that the central purpose of this right was to ensure "[a]ssistance" whenever the accused was "confronted with both the intricacies of the law and the

advocacy of the public prosecutor." *Id.* at 309.

More recently, this Court analyzed whether plea bargains fell under the "critical" stage protection. Previously, in an effort to further define this distinction, this Court has held that interrogation by the state is such a "critical" stage. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009). Although in *Montejo* the defendant had been formally charged, it nevertheless inched closer to a clearer definition of when the right to counsel attaches. In *Missouri v. Frye*, 566 U.S. 134, 143 (2012), this Court addressed whether plea negotiations fell under this definition, and found that plea bargaining was "so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process." To be sure, this Court has acknowledged that there is no right to be offered a plea. *Id.* at 148 (citing *Weatherford*, 429 U.S. 545, 561 (1977). But when a plea is offered, the right to counsel attaches to plea negotiations generally. *Lafler v. Cooper*, 566 U.S. 156, 162 (2012).

In *Moran v. Burbine*, 475 U.S. 412, 430 (1986), this Court also appeared to broaden the bright-line test when it stated that the right to counsel attached when the government's role shifted from investigation to accusation. This Court emphasized that the assistance by "one versed in the 'intricacies … of law' … is needed to assure that the prosecution's case encounters 'the crucible of meaningful adversarial testing.'" *Id.* at 430 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)).

When examining right to counsel inquiries, this Court has generally looked to whether the defendant requires assistance in dealing with legal problems or his adversary. *See Ash*, 413 U.S. at 313-20. This Court has also taken a more pragmatic approach and looked to how useful the presence of counsel would be at a particular proceeding, and more so, how dangerous it would be for the accused to proceed without counsel. *Patterson v. Illinois*, 487 U.S. 285, 298 (1988).

These inquiries tend to allow for more flexibility and consideration for fairness, especially in light of *Strickland*'s precedent discouraging "mechanical rules". *Nunes v. Mueller*, 350 F.3d 1045, 1054 (9th Cir. 2003) (citing *Strickland*, 466 U.S. at 695).

Over the years, the lower courts have demonstrated a genuine inquiry into whether the right to counsel was absolutely limited to the initiation of formal charges. *See U.S. ex rel. Hall v. Lane*, 804 F.2d 79, 82 (1986) (stating "[w]hat is not absolutely certain is whether these are the *only* events that can *ever* constitute the start of the "prosecution."); *see also Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995) ([w]e recognize the possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment."). In *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3rd Cir. 1999), the court held that the right to counsel could attach at earlier stages than any formal proceedings if the accused is confronted by an expert adversary, or the intricacies of criminal procedure.

A. Limiting the right to counsel to attach only once the defendant has been formally charged goes against the Sixth Amendment's purpose of providing assistance at critical stages of the legal process.

The central purpose of the right to counsel is to effectively assist the accused whenever they are confronted with the complexities of the law. *See Ash*, 413 U.S. at 309. In other words, the right to counsel attaches during critical stages of the accused's interactions with the criminal justice system. Plea negotiations are a critical stage in the criminal justice process; the defendant's fate is largely based on the discretion of the prosecutor and the defense attorney's ability to communicate. The criminal justice system guarantees the right to counsel "from the moment he 'finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.'" *Matteo*, 171 F.3d at 892. Mr. David was offered a favorable plea deal which was subsequently rescinded because of his

attorney's failure to communicate. R. at 4. This plea deal was not unlike most; Mr. David would serve one year in prison in exchange for information pertaining to his drug dealers. R. at 4. Without the plea deal, he was sentenced to ten years in prison. R. at 14.

Because of the growing practice of plea bargaining[2] in response to the higher volume of cases that come before the court, lower courts in recent decades have had to address the issue of whether the right to counsel attaches during pre-indictment plea bargaining. In *Chrisco v. Shafran*, 507 F. Supp. 1312, 1318-19 (D. Del. 1981), the court held the right to counsel attached to pre-indictment plea negotiations. That majority focused on the government's willingness to engage in plea bargaining as "proof that the government has made a commitment to prosecute and that the adverse positions of the government and the defendant have solidified in much the same manner as when formal charges are brought." *Id*. at 1319 (quoting Judge Wiseman's dissent in *United States v. Sikora*, 635 F.2d 1175, 1180 (6th Cir. 1980)); *see also United States v. Busse*, 814 F. Supp. 760, 764 (E.D. Wis. 1993) (holding that the defendant could assert an ineffective assistance of counsel claim as a result of the advice from the defendant's attorney to reject a pre-indictment plea offer). The *Chrisco* majority concluded that there could be "factual contexts" prior to any formal charges being made which would trigger the Sixth Amendment's right to counsel. 507 F. Supp. at 1319.

Plea bargaining is an important process for an efficient criminal justice system. *See Santobello v. New York*, 404 U.S. 257 (1971) (Douglas, J., concurring) ("'plea bargains' are important in the administration of justice both at the state and federal levels… they serve an important role in the disposition of today's heavy calendars") Its importance is demonstrated in

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[2] *See* Devers, *Plea and Charge Bargaining: Research Summary*, Bureau of Justice Assistance, U.S. Department of Justice (2011), available at https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf.

Turner v. United States, 885 F.3d 949, 951 (6th Cir. 2018), where a defendant was being charged in both state and federal courts. Turner hired an attorney who represented him in negotiations with state prosecutors. *Id*. This same attorney also relayed to Turner that the United States Attorney's Office was planning to bring federal charges against him, but that the Assistant United States Attorney had offered him a plea deal, which Turner allegedly rejected. *Id*. at 952. Turner then hired a new attorney, after he was federally indicted, who was able to negotiate a new plea deal. *Id.* In *Turner* the court ultimately followed precedent and applied the bright-line rule to find that the defendant did not have a right to counsel during plea negotiations. *Id.* at 953. But more importantly, it demonstrated the importance of having counsel during the plea negotiation process. Here, two skilled attorneys were able to negotiate two very different deals.

Turner's demise demonstrates the critical importance of the right of counsel during the plea negotiation process. As noted in *Frye*, defendants often receive longer sentences if they go to trial than if they enter into a plea bargain; the possibility of a longer sentence helps facilitate plea bargains. 566 U.S. at 144. Mr. David faced a much longer sentence for his drug possession charges. But because he was connected to a suspected drug kingpin, which federal agents were interested in investigating, he was offered a favorable deal. R. at 4. The lack of adequate counsel from Mr. Long caused Mr. David to miss the opportunity to negotiate a more favorable outcome. Had Mr. David obtained an effective attorney, he would have taken the plea deal he was being offered. Ex. C, pg. 3, lines 22-23. Respondent may argue that there is definitive proof that Mr. David would not have offered information about his suppliers by pointing to his statements made at arrest. R. at 3 (Mr. David asserting he would never give up his suppliers for fear that doing so would lead to physical damage to his church or possible death). Holding these initial statements against Mr. David would be wholly unfair given the fact that at that time, no plea deal was being

offered; there simply was no incentive for Mr. David to risk his life by sharing any pertinent information. As was evident in *Turner*, skilled attorneys are able to communicate and negotiate effectively, not simply with opposing counsel, but with their clients. A skilled attorney would have laid out all of the facts to Mr. David and opined on next steps using his legal expertise, which would have persuaded Mr. David to agree to the plea. This is quite clear in Mr. David's testimony during the Pretrial Evidentiary Hearing, during which he exclaimed he would have given information about his suppliers in exchange for the plea deal. Ex. C, pg. 3, lines 22-28.

This Court has recognized critical stages during which the Sixth Amendment right to counsel attaches. In *Wade*, this Court stated that the strategies of law enforcement involved *critical* confrontations of the accused during pretrial proceedings, and that such confrontations essentially sealed the fate of the accused. 388 U.S. at 224. For Mr. David, his confrontation occurred very quickly, before any charges could be filed, but it was nevertheless critical to his fate. Therefore, plea negotiations are a critical stage in the adjudication process, and the right to counsel should attach. *See Frye*, 566 U.S. at 143; *see also Lafler*, 566 U.S. at 162. A simple technical difference—i.e., the absence of formal charges—should not preclude a defendant from having the right to counsel. A plea negotiation is critical, pre- *and* post-indictment.

B. **The constraints of the formalistic bright-line test do not allow the courts to address the common practice of federal pre-indictment plea bargaining.**

Courts have been slowly broadening the technicalities of the bright-line test in order to address the common practice of plea bargaining, which is sometimes conducted prior to any formal charges. The reasonable next step would be to include plea negotiations—no matter the stage at which it is being offered—in the Sixth Amendment protection of the right to counsel. The time has come for this Court to look at preindictment plea negotiations, because the

implications of the bright-line test as applied now cut against notions of fairness and justice for defendants who are faced with plea negotiations before they are formally charged.

An expansion of the right to counsel is not uncommon. In *Ash*, this Court stated that it "has expanded the constitutional right to counsel only when new contexts appear presenting the same dangers that gave birth initially to the right itself." 413 U.S. at 311. Further, this Court recognized that the Sixth Amendment right to counsel has extended beyond trial as a result of "changing patterns of criminal procedure and investigation that have tended to generate pretrial events that might appropriately be considered to be parts of the trial itself." *Id.* at 310.

As has been demonstrated *supra*, this Court has reacted to the changing process of adjudication in order to protect individuals from the dangers of having no counsel at critical moments. This Court is well within its power to consider an expansion of the right to counsel—or alternatively, an elaboration—that makes clear that such a right attaches to preindictment plea negotiations. *Cf. Marbury v. Madison*, 5 U.S. 137, 170 (1803) (stating "[t]he province of the court is, solely, to decide on the rights of individuals, not to enquire how the executive, or executive officers, perform duties in which they have a discretion."). Thus, Respondent simply cannot make an argument against such an expansion on the basis of their supposedly missed opportunity: namely, that the suppliers had already been "tipped off", thereby rendering the original plea offer useless. *See* Ex. E.

At the time *Kirby* was decided, the thought of expanding the right to counsel beyond trial was a novel idea, hence the need for this Court to decide whether such a right attached at arraignments, indictments, and preliminary hearings. 406 U.S. at 689. And when *Gouveia* clarified the bright-line rule to mean that the right attaches during adversarial judicial proceedings, 467 U.S. at 188, this Court was once again reacted to the needs of society. Justice

Stevens was well aware of the possibility that the right to counsel would one day soon adjust in order to protect individuals prior to the initiation of formal charges. *E.g. Id.* at 193.

It is once again time for this Court to recognize the urgency to adapt to the needs of society. The lower courts have struggled to address preindictment plea negotiations given the bright-line test to which they are bound, in light of the endangerment of individual rights that these courts are witnessing. *See Moody*, 206 F.3d at 614; *see also Hayes*, 231 F.3d at 675; *see also supra*.

To be sure, Respondent was validly concerned with investigating the drug kingpin and tailoring a plea offer to address this urgency. However, the right to counsel is a protection for individual liberties, not the interests of the government. The existence of adequate counsel during Mr. David's brief plea negotiations would have been undeniably useful. This pragmatic approach has been used in determining the right to counsel. *See Patterson*, 487 U.S. at 298. At a fundamental level, the right to counsel during plea negotiations, an intricate process in criminal procedure, is simply fair. *See Nunes*, 350 F.3d at 1054. If the courts continue to be bound by the formalistic qualities of the bright-line test as it stands currently, then the rights of defendants who face preindictment plea negotiations would be endangered, thus rendering the adjudication process unfair. The Respondent's possible claim that an expansion of the bright-line rule would create confusion with the lower courts can be bypassed. This Court should simply hold that the right to counsel *also* attaches to preindictment plea negotiations.

CONCLUSION

For the foregoing reasons, the judgment of the Thirteenth Circuit Court of Appeals should be reversed.