Docket 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

Supreme Court of the United States

BRIEF FOR PETITIONER

QUESTIONS PRESENTED

I. In accordance with the community caretaking exception to the Fourth Amendment's warrant requirement, may law enforcement enter a home when he believes the resident is home, but the music is loud, and the television is playing a suspicious movie?

II. May the Sixth Amendment right to effective counsel attach during plea negotiations prior to a federal indictment when the petitioner was never made aware of the Government's plea offer?

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CONSTITUTIONAL PROVISIONS

The citations to the relevant Constitutional provisions are U.S. Const. amend. IV and U.S. Const. amend. VI. The provisions provide the following:

> [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, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized;

U.S. Const. amend. IV.

> [i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. amend. VI.

STATEMENT OF THE FACTS

II. Mr. David is absent from Sunday Morning Service.

On Sunday, January 15, 2017, Mr. Chad David ("Mr. David"); a 72-year-old, well-respected minister in the community; thought it was a Saturday and failed to show up to his 7 AM service at Lake Show Community Revivalist Church. His church members were concerned about his absence and called him to see if he was ok. Unable to get in contact with Mr. David, the church proceeded with service. One member, Officer James McNown ("Officer McNown), was particularly concerned about Mr. David. Officer McNown was a veteran police officer who started attending the church only four months earlier. He didn't know much about Mr. David, but he really liked him and enjoyed the church. Officer McNown decided he would check on Mr. David after church service and after he started his patrolling shift.

Around 9 AM Officer McNown left church, started his shift, and went to pick up Mr. David a Starbucks tea. Unaware of where Mr. David lived, he called a church member who in turn provided Officer McNown with Mr. David's address.

III. Officer McNown conducted a warrantless search on Mr. David's home.

Around 9:30 AM, Officer McNown pulled up to Mr. David's gated community and was surprised that he lived in such an upscale area. Upon entering the gate, he immediately became suspicious of a black SUV with a Golden State license plate. He was suspicious of this SUV because they are "popular among drug dealers." Unable to get more information regarding the SUV, Officer McNown proceeded to Mr. David's home.

Once at Mr. David's home, Officer McNown did not notice anything unusual. He identified Mr. David's twelve passenger van in the driveway and assumed he was home. As he

approached the home, he heard loud vulgar music that he judged as “unusual for a minister.” At the door, he knocked and rang the doorbell. No one answered so Officer McNown attempted to open the front door—it was locked.

Eager to see Mr. Davis, Officer McNown peered into the window but did not see anyone. Instead, he noticed the T.V. was on and playing *The Wolf of Wall Street*; a movie he thought was too sinful for a minster to watch. The loud, vulgar music coupled with the sinful movie made Officer McNown believe someone else had to be in the home with Mr. David. This concern prompted Officer McNown to enter Mr. David’s home by any means necessary. He attempted to open the front door again—it was still locked. He proceeded to the backdoor and without knocking or announcing himself he entered Mr. David’s home.

Inside Mr. David’s home, Officer McNown looked around the first floor. He turned off the T.V. and found a small notebook with a church members name along with the words “ounce” and “paid.” After looking around Mr. David’s first floor he headed upstairs to search where the loud, vulgar music was coming from. He followed the noise and without knocking or announcing himself he opened the door and found Mr. David packaging small Ziplock bags of cocaine with Golden State labels into a suitcase.

IV. Mr. David is arrested.

Once Officer McNown remembered his standard protocol, he called the local DEA and requested them to come to the scene. Shortly after 10 AM Agent Malaska arrived at the house. He investigated the scene and placed Mr. Davis under arrest.

Following Mr. David’s arrest, he contacted the only attorney he knew—Mr. Long. He knew Mr. Long enjoyed drinking a lot, but he didn’t think his drinking would impact him or his work. Mr. Long received Mr. David’s call while he was in the bar drinking. Drunk, he finished

his beer and left the bar to meet with Mr. David. Mr. David was unaware that Mr. Long was drunk, and Mr. Long failed to tell Mr. David. Mr. Long also failed to counsel Mr. David or speak with any specificity about the potential charges the prosecution could charge. He did not discuss the implications of Mr. David going to trial or ask any questions about Mr. David's arrest. Admittedly, Mr. Long simply spoke with Mr. David about the process of his arrest. Mr. David shared with Mr. Long his fear of being stabbed while in jail and Mr. Long simply advised him to be quite and keep to himself.

V. The prosecution extends a plea offer to Mr. David and Mr. David's attorney does not relay details of the offer to Mr. David.

After his meeting with Mr. David, Mr. Long went back to the bar to drink and did not work on Mr. David's case. The following morning, January 16, 2017, Mr. Long received an email from AUSA Kayla Marie ("Ms. Marie"). Ms. Marie extended a plea deal to Mr. David. The plea deal allowed, if accepted, Mr. David to serve a one-year prison sentence in exchange for information on his alleged suppliers. The email further stated that the offer would only be valid for thirty-six hours and Mr. David would need to express his interest by January 17, 2017 at 10:00 PM. Mr. Long received the email the same day, while he was drinking at a bar and playing darts with his friends. He misread the email and thought he had thirty-six days and not thirty-six hours to respond to Ms. Marie.

Despite his misinterpretation of the email, Mr. Long failed inform Mr. David that he had received an offer from the prosecution. Additionally, Mr. Long received a voicemail from Ms. Marie reminding him about the plea deal, and yet, Mr. Long still failed to share this information with Mr. David.

On January 18, 2017, after the deal expired, Ms. Marie sent another email to inquire why Mr. David did not accept the deal. Mr. Long realized his error after he received Ms. Marie's email. On the same day, Mr. David was charged with one count of possession of a controlled substance with the intent to distribute in violation of 21 U.S.C § 841. After Mr. David was charged, Mr. Long told Mr. David about his mistake. Furious that Mr. Long made such an egregious error, Mr. David fired Mr. Long.

In hopes that he could still accept the prosecutions deal, Mr. David hired another attorney, Mr. Michael Allen ("Mr. Allen"). Mr. Allen reached out to Ms. Marie and requested an extension on the plea deal. Ms. Marie stated it was too late and the government would no longer receive any substantial benefit from the information Mr. David had to offer.

SUMMARY OF THE ARGUMENT

Fourth Amendment

The rationales of the Community Caretaking Exception. In 1973, this Court decided *Cady v. Drombroski,* and stated that warrantless searches when acting for the community's general welfare do not violate the Fourth Amendment—a rule known as the community caretaking exception. As originally articulated the rationale for the community caretaking exception was the inherent mobility of automobiles, the frequent takings of automobiles into police custody, and the protection of the general welfare. This Court determined that law enforcement officers should not be expected to secure a warrant prior to the search of an automobile when they are acting to secure the community from potential harm. In *South Dakota v. Opperman*, this Court further justified the community caretaking exception, reasoning that law enforcements constantly engages automobiles—such as removing them off the roadways—in caretaking and traffic control activates solely to protect the community's safety. The rationales for the community caretaking exemption focused solely on the search and seizure of automobiles and nothing more. In fact, this Court distinguished the search of an automobile with the search of a home in *Cady* stating that there is a "constitutional difference from houses and similar structures and from vehicles." Accordingly, the automobile exception should solely extend to the search and seizure of automobiles and not houses.

The requirement of the community caretaking exception. Applying the community caretaking exception in accordance with this Court's holdings, a warrantless search of a house is invalid because it is not inherently mobile. In other words, because this court has never extended the Fourth Amendment to the search of a house, it should not do so today. However, if this Court should decide to extend the community caretaking exception to the house it should do so when law enforcement reasonably believes there is an impending threat or harm to the community. Officer McNown entered Mr. David's home with no reasonable belief that the community was in danger. On the contrary, Officer McNown entered Mr. David's home because of his

preconceived notion that ministers do not watch R-rated movies or listen to loud, vulgar music; therefore, someone else must be inside Mr. David's home. This notion that someone else was inside Mr. David's home wasn't reasonable and was not potentially threatening or harmful to the community's safety. Thus, the community caretaking exception should not extend to Officer McNown's search of Mr. David's home.

Sixth Amendment

The Sixth Amendment attaches pre-indictment. When defendants choose to retain counsel, they do so with an expectation that counsel will effectively defend their rights and advise them from that moment forward. This Court reasoned in *U.S. v. Wade* that because defendants now face critical stages of litigation prior to indictment, assistance from counsel is necessary to ensure a meaningful defense. Echoing the same logic from wade, this Court further reasoned in *Turner v. U.S.* that the Sixth Amendment attaches to or after the initiation of judicial criminal proceedings. The initiation of Mr. David's criminal proceedings began with his arrest. Once Mr. David was arrested his Sixth Amendment right engaged and granted him access to effective assistance of counsel. Undisputedly, Mr. David did not enjoy the benefits of effective counsel pre-indictment—once criminal proceedings began—therefore he should receive a remedy.

The Strickland Test. In 1984 this Court analyzed the ineffective assistance of counsel utilizing a two-prong test known as the Strickland Test. To succeed on a claim of ineffective assistance of counsel a defendant must prove first, that the attorney's representation was deficient, and, second, that deficient representation prejudiced the defendant. It is an undisputed fact that Mr. Keegan Long ("Mr. Long") was ineffective as counsel. Thus Mr. David must only show Mr. Long's ineffective counsel prejudiced him. Mr. David failed to receive the plea offer because Mr. Long—while in a drunken stupor—misread the time he had to accept the deal. Because Mr. David was not given an opportunity to accept the offer, he faced more jail time instead of receiving a one-year sentence. Mr. David meets both requirements under the Strickland Test. Thus, this Court should allow Mr. David to be re-offered the original plea deal.

STANDARD OF REVIEW

The legal standard for reviewing constitutional questions is de novo. *Ornelas v. United States*, 517 U.S. 690, 699 (1996). Claims of ineffective assistance of counsel are constitutional questions; therefore, are reviewed de novo. *United States v. Shepherd*, 880 F.3d 734, 740 (5th Cir. 2018). In reviewing a motion to suppress on appeal, "determinations of reasonable suspicions and probable cause" are reviewed de novo. *Ornelas,* 517 U.S. 690, 699 (1996). In addition, this Court reviews findings of fact for clear error. *Id.* Therefore, the standard of review for both issues presented is de novo.

ARGUMENT

I. Warrantless searches conducted by law enforcement acting as a community caretaker does not and should not extend to the home under the Fourth Amendment.

The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures." U.S. Const. amend. IV. In fact, the very essence of the Fourth Amendment is to protect that right through the warrant requirement. *Id.* A warrantless search and seizure inside a home is presumptively unreasonable, and this Court acknowledges few exceptions where this is permitted; including, the community caretaker exception. *Hunsberger v. Wood*, 570 F.3d 546, 553 (4th Cir. 2009) (quoting *Payton v. New York*, 445 U.S. 573, 586 (1980). The United States Supreme Court first recognized the community caretaker exception in Cady v. Dombrowski more than forty years ago. *Cady v. Dombrowski*, 413 U.S. 433 (1973). The community caretaker exception is only applicable when law enforcement is acting for the general welfare of the community—not in an investigative capacity. *Cady*, 413 U.S. at 447.

This Court explicitly held that a warrantless search— when conducted by an officer acting for the general welfare of the community— was not "unreasonable" within the meaning of the Fourth Amendment. *Cady*, 413 U.S. at 448. However, the underlying facts of *Cady* involved the warrantless search of an automobile, not a home. *Id.* at 436.

A. Warrantless searches of the home are presumptively unreasonable under the Fourth Amendment unless the officer is acting for the general welfare of the community or has a reasonable belief an emergency exists

The community caretaking exception is notable from other exceptions because it requires the court to assess the "function performed by a 'police officer' when the officer engages in a warrantless search or seizure." *Matalon v. Hynnes*, 806 F.3d 627, 634 (1st Cir. 2015). This function

must involve activities that are "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* (quoting *Cady*, 413 U.S at 441).

The analysis to determine if the community caretaker exception applies requires two inquiries. First, were the law enforcement's actions for the general welfare? If not, did the law enforcement's officer believe his/her actions were reasonable under the circumstances? If neither of these questions can be answered in the affirmative, the community caretaker exception must not apply.

1. Officer James McNown was not acting for the general welfare; instead, he was acting in an investigative capacity.

This Court established that when there is concern for the safety of the general community; law enforcement can search without a warrant. *Cady*, 413 U.S. at 447. In Cady, an off-duty Chicago police officer became intoxicated, crashed his car and then left it disabled on the road. *Id.* at 435. The local policemen called a tow truck to tow the car because it was a hazard to other drivers. *Id.* at 436. The local policemen believed the Chicago Police Department required officers to carry their service revolvers at all time, so they searched the off-duty officer as well as the front seat and glove compartment of the car to find the gun. *Id.* The revolver was not found and the car was towed to a privately owned garage where it was left outside with no police guard. *Id.* The local policemen went to the garage to look for the service revolver. *Id.* at 437. The local policemen were concerned—believing that there was a revolver inside— with the vehicle being placed outside the garage with no police guard. *Id.* at 443. During the search of the vehicle, the local policemen found several bloody garments that were eventually linked to a recent homicide. *Id.* at 437. Prior to the search the local policemen were unaware of the any link the Chicago police officer might have with a homicide. *Id.* at 438.

Accordingly, this Court determined that because the local policemen were not investigating a crime or attempting to acquire evidence, that the search fell under the community caretaking exception. *Id.* at 447. The local policemen were attempting to prevent an intruder from breaking into the car and finding the gun. *Id.* The justification for the initial intrusion into the car was "concern for the safety of the general public" who might be endangered. *Id.*

Mr. David agrees with the Government that Officer McNown's intent is most important when determining if the community caretaking exception applies. However, it is not simply his intent, but whether—according to this Court—his intent was motivated to protect the public's general welfare. In this case Officer McNown's entrance into Mr. David's home was not totally divorced from his investigative duties as an officer. Unlike the policemen in Cady, who searched the car to protect the broader community from danger, here, Officer McNown searched Mr. David's home concerned only for Mr. David's "personal welfare". According to Officer McNown, his concerns for Mr. David were due in part because of Mr. David's absence at church, the loud music playing in Mr. David's home; the R-rated movie on his television. These concerns, while honorable, do not pose any immediate danger to the general public; unlike, the danger of a revolver in *Cady*.

Officer McNown was a member of Lakeshow Community Revivalist Church for only four short months. By his own testimony, this period of time was "not very long." Being a new member to the church, Officer McNown could not have understood Mr. David's routine well enough to allow Mr. David's one absence and the opinions of other members trigger his official duties. Additionally, Officer McNown testified that he assumed that Mr. David was simply home sick because there was a flu going around. Furthermore, as a new member to the church, Officer McNown did not personally know Mr. David well enough to know what kind of music or movies Mr. David enjoyed. In *Cady*, the local policemen, based on their experience, believed that Chicago

policemen were required to carry their service revolvers at all times. Here, Officer McNown had no foundation to base his irrational concerns.

This Court should distinguish this case from Cady, and not extend the community caretaking exception to Officer McNown's actions because he does not satisfy the requirement—acting for the public's general welfare. Officer McNown was not acting to protect the community from danger. Officer McNown's concern was the personal welfare of Mr. David and concerns for the personal welfare of an individual do not satisfy the burden created by the Community caretaker exception in *Cady*. *Cady v. Dombrowski*, 413 U.S. 433 (1973).

2. Officer James McNown's actions were not reasonable and therefore entering Mr. David's home was a severe invasion of privacy.

Even if this Court determines that Officer McNown was acting in the interest of the public's general welfare when he searched Mr. David's home—which he was not—his actions to enter the home were not reasonable. This Court determined that the reasonableness of a search is determined by "comparing the degree to which it intrudes upon an individual's privacy," coupled with "the degree to which it is needed for the promotion of legitimate governmental interests." *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999). To justify a warrantless search, the governmental interest must outweigh the individual's interest in freedom from government intrusion. *United States v. Harris*, 747 F.3d 1013, 1017 (8th Cir 2014); *see also United States v. Parks*, 902 F.3d 805, 813 (8th Cir. 2018).

In this case, Officer McNown's interest in Mr. David health does not outweigh Mr. David's fundamental right to his privacy. It is unreasonable for law enforcement to search a home, absent consent, in an investigative capacity. *U.S. v. Bute*, 43 F.3d 531, 535 (1994); *see generally Cady v. Dombrowski*, 413 U.S. 433 (1973). In Bute, officers noticed an open garage door at the Bute

building on their way home. *Bute*, 43 F.3d at 532. The officers suspected the building might have been vandalized and decided to enter the building and search for any indication of a burglary. *Id.* at 533. Once they searched the building, they found a lab which was used to manufacture methamphetamines. *Id.* However, the court held that the community caretaking exception must only be extended to automobiles and that "a warrantless entry is only permitted when an officer has objectively reasonable belief that an emergency exists[.]" *Id.* at 540.

Officer McNown did not have an objectively reasonable belief that an emergency existed in Mr. David's home. His search of Mr. David's home was unreasonable similar to the officer's search of the building in Bute. Like in Bute, where the officer's noticed something unusual—an open garage—here, Officer McNown noticed some things "unusual" about Mr. David's home—the R-rated movie on his television and the loud music playing. The unusual open garage prompted the officers in Bute, in an investigative function, to enter and search the building like the R-rated movie and loud music prompted Officer McNown, in an investigative function, to enter Mr. David's home. Furthermore, Officer McNown admits that he searched around some on the first floor before heading upstairs to find Mr. David. If Officer McNown was legitimately concerned about the wellbeing of Mr. David, his first concern would have been to locate Mr. David, not to aimlessly search his home.

This Court should follow the reasoning in Bute. The court in Bute reasoned that because an open garage did not pose an eminent harm or threat to the safety of others and no emergency existed then the warrantless search of the building was unreasonable. Here, An R-rated movie and loud music pose even less eminent harm or threat to the safety of others and no emergency existed; therefore, a warrantless search of Mr. David's home is also not reasonable.

C. If this Court chooses to extend the community-caretaker exception to the home—which it should not—the rule should be based on clear and convincing evidence that law enforcement was acting for the public's general welfare or under the reasonable belief that there was an emergent circumstance.

For decades this Court has expressed the importance of limiting the warrant requirement to few exceptions. *Cady v. Dombrowski*, 413 U.S. 433 (1973). These exceptions rarely extend to the privacy of a home. This Court notes the biggest difference between the home and an automobile is the mobility and continual interaction with law enforcement. *Id.* at 441. Unlike an automobile, a man's house is his castle and there he should be shielded by the highest level of the Fourth Amendment. *Matalon v. Hynnes*, 806 F.3d 627, 633 (1st Cir. 2015). The community caretaking exception begins with law enforcements reasonable believe that they are acting for the public's general welfare. *Cady*, 413 U.S. at 447. If this Court chooses to extend the community caretaking exception to the home, this Court has the opportunity to further clarify this exception and provide a bright line rule for law enforcement. This bright line rule should likely follow the narrow ruling of the Eighth Circuit in U.S. v. Quezada—a case distinguishable from the instant case. *U.S. v. Quezada*, 448 F.3d 1005 (8th Cir. 2006).

In *Quezada*, the court, with great scrutiny of this Court's holding in *Cady*, extended the community caretaking exception to the home. *Id.* at 1008. In that case an officer went to an apartment to serve papers in a civil proceeding. *Id.* at 1006. The officer knocked on the door and noticed that the door was not locked or closed all the way. *Id.* Through the crack in the door the officer could see the lights were on in the apartment and hear the television playing. *Id.* The officer announced his presence several times. *Id.* When he received no answer, he entered the apartment and looked down the hallway. *Id.* Down the hallway he saw a pair of legs lying on the ground with a shotgun. *Id.* The officer got closer and took the shotgun from the man; this caused the man to

wake up. *Id.* Further investigation revealed that the man had a previous felony conviction and was not allowed to possess a gun. *Id.*

The court in *Quezada* defined the community caretaking exception as activities that are undertaken to help those in danger and to protect the property. *Id.* at 1007. That court determined that because the apartment door was unlocked and open, the lights and television were on, and when the officer announced himself no one responded, it was reasonable for the officer to conclude someone inside could be in danger. *Id.* at 1008

The facts of this case are distinguishable from *Quezada*. While it is true, that some facts are similar to *Quezada* such as the lights and television being on, and the unlocked back door. The differences between the two cases are much more profound. Unlike in *Quezada* where the officer approached the door, knocked and notice the door ajar, here, Officer McNown, approached the door, knocked and the door was closed and locked. Unlike the officer in *Quezada* who announced himself before he entered the unlocked front door, here Officer McNown did not announce himself before he entered the unlocked back door—a different door than the door he originally approached. Furthermore, the officer in *Quezada* was looking for the owner of the apartment when he entered and was not concerned about turning off the television or doing a preliminary search. Conversely, here, Officer McNown claimed he was looking for Mr. David when he entered but he was concerned about turning off the television and doing a preliminary search.

An objectively reasonable officer in the same situation as *Quezada*—lights and television on in an apartment with the door opened—could believe an individual was in danger. In Contrast, an objectively reasonable officer in the same situation—R-rated movie on the television, loud music, with the doors locked—would not believe that Mr. David was in danger. Officer McNown testified that he saw Mr. David's car parked outside of his home. A reasonable officer in the same situation

would not have assumed Mr. David was in danger if his car is home, his doors are locked, and there is music and the television playing. Unlike in *Quezada* where there was cause for concern because the door was unlocked.

Therefore, this Court should distinguish *Quezada* from this case. Yet, if this Court should decide to extend the community caretaking exception to the home a narrow application as set forth in *Quezada* should be applied. The bright line rule this Court should establish is to only allow law enforcement to enter the home when an objectively reasonable officer believes there is eminent threat or harm to the individual or the general public. *U.S. v. Quezada*, 448 F.3d 1005 (8th Cir. 2006).

II. Mr. David's Sixth Amendment right to effective counsel attaches during plea negotiations prior to a federal indictment.

The Sixth Amendment lays the foundation for the right to assistance of counsel which provides that "in all criminal prosecutions, the accused shall enjoy the right…to have the assistance of counsel for his defence." U.S. CONST. AMEND VI. This Court noted that this right "cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political intuitions.'" *Powell v. Alabama*, 287 U.S. 45,6 (1963) (quoting *Hebert v. Louisiana*, 272 U.S. 312, 316 (1926)). This Court recently determined that the Sixth Amendment attaches at or after the initiation of adversary judicial criminal proceedings. *Turner v. United States*, 885 F.3d 949, 952 (2018). Furthermore, this Court expressed the fundamental right of criminal defendants to have assistance of counsel at critical stages of the litigation. *Missouri v. Frye*, 566 U.S. 134, 140 (2012). In other words, the negotiation of a plea bargain is a critical phase of litigation for the purposes of the Sixth Amendment. *Missouri v. Frye*, 566 U.S. 134, 140 (2012); *Padilla v. Kentucky*, 559 U.S. 356, 373 (2010). The presence of counsel at the critical stages is to

ensure the accused's interest is consistently protected. *U.S. v. Wade*, 388 U.S. 218, 227 (1967). This Court consistently recognized the right of defendants to have their counsel inform them of pela offers and provide information about the consequences of accepting those offers. Padilla, 559 U.S. 35 (2010).

VI. **Plea negotiations are a critical stage of negotiations, notwithstanding if they occur prior to a federal indictment.**

Negotiation plea bargains are a critical phase of the litigation that guarantees defendants the right to effective assistance of counsel. *Missouri*, 566 U.S. at 140. In *Missouri*, the defendant was charged with driving with a revoked license. The prosecutor sent a letter to the defendant's attorney offering a choice between two plea bargains. The attorney did not advise the defendant about the offers which resulted in the offer's expiration. *Id*. The court reasoned that the Sixth Amendment guarantees the right to have counsel present at all critical stages of litigation. *Id*. The court further reasoned that because plea bargains have become such a central part of our criminal justice system, defense counsel has the duty to communicate plea offers with their clients. *Id.* The court held that the defense counsel did not render the effective assistance the Sixth Amendment requires. *Id*. Because, the defense counsel allowed the offer to expire without advising the defendant. *Id.*

The instant case is similar to the facts in *Missouri*. Here, Mr. David's counsel did not render him the effective assistance the Sixth Amendment requires. As a defense attorney, Mr. David's counsel had a duty to communicate the plea bargain with Mr. David and allow him the opportunity to consider the offer. Similar to the attorney in *Missouri*, Mr. David's counsel not only failed to advise him about the plea offer, he also allowed the offer to expire, thus denying Mr. David the right to effective counsel at a critical phase of the litigation. Plea bargains have commonly become the only avenue used to determine the length of time criminal defendants go to jail. This common

practice makes plea bargains the most crucial stage of litigation and arguably, the stage where legal aid is most needed.

The presence of counsel at all critical stages of the litigation ensures the protection of the accused. *U.S. v. Wade*, 388 U.S. 218, 227 (1967). In *Wade*, the defendant was arrested and was required to participate in a lineup with five other prisoners for witness verification. *Id* at 220. The defendant's attorney was not contacted regarding the lineup and did not participate in ensuring his client's interest was protected. *Id*. The court reasoned that the assistance of counsel at the lineup was "indispensable" to protect the defendant's rights as a criminal defendant. *Id* at 242. The court further reasoned that the evolution of the criminal justice system has provided for earlier pretrial confrontation of the accused. *Id*. How these confrontations are handled could settle the accused's fate and reduce the trial to a mere formality. *Id*. The court held that the Sixth Amendment guarantee applies to all critical stages whenever necessary to assure a meaningful defense is provided to the defendant.

Here, like in *Wade,* this case presents a critical confrontation at pretrial that could settle Mr. David's fate and reduce the trial to a mere formality. The prosecution sought a plea deal because they believed that Mr. David could assist them with locating his supplier. Once the prosecution was aware that the plea deal was not properly delivered to Mr. David, they still refused to discuss further plea arrangements. Their refusal stemmed from a belief that Mr. David could no longer provide them with credible information.. Because the prosecution took an adversarial position, Mr. David was entitled to have someone to advise him of his legal rights and provide him with a meaningful defense. Like in *Wade,* the assistance of counsel at this critical point in the litigation would have been "indispensable" to protect Mr. David's rights. Refusing to discuss further plea negotiations despite the defense counsel's conduct, reduced the trial to a mere formality. Mr. David

was deprived of his Constitutional rights in order to aid the prosecution in convicting him. And, this deprivation is what the Sixth Amendment seeks to protect.

VII. The Government's reliance on Kirby and Gouveia is misplaced because adversary judicial proceedings had been initiated in this case.

In coming to a contrary conclusion, the Government argues that Sixth Amendment protection does not attach prior to indictment. R. at 8. The Sixth Amendment guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defence." U.S. CONST. AMEND VI. This Court in *Gouveia,* noted that the language of the Sixth Amendment requires both a "criminal prosecution[n]" and an "accused." *United States v. Gouveia,* 467 U.S. 180, 188 (1984). This Court in *Kirby* further reasoned that the "Sixth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against the accused. *Kirby v. Illinois,* 406 U.S. 682, 689 (1972). For It is only at that time that the government has committed itself to prosecute, and only then that the adverse positions of the government and defendant have solidified." *Id.*

In this case, adversary judicial proceedings had been initiated against Mr. David. When the plea deal was offered to Mr. David, it was conditioned upon the arrest of a subject. Ex. D. The prosecution expressed that they were interested in gathering information on Mr. David's supplier. *Id*. At this point, the government took an adverse position against Mr. David. The government committed itself to prosecute, in the event that Mr. David's information did not come through. Furthermore, when Mr. David's new attorney attempted to renegotiate a plea deal, the government further expressed their adverse intention to prosecute the case. Ex. E. At the time Mr. David was entitled to Sixth Amendment protection, the government had already initiated adversary judicial proceedings.

Moreover, this Court has also recognized that an accused has a right to counsel during critical pretrial proceedings, where the accused is confronted in a situation where the results of the situation "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States v. Wade*, 388 U.S. 218, (1967). Here, Mr. David was confronted with a situation that did settle his fate and reduce the trial to a mere formality. The government was acting with a greater purpose—securing information leading to the arrest of Mr. David's supplier. Ex. D. In the initial plea offer Mr. David was offered a smaller sentence assuming he could provide that information. *Id.* This decision (to provide the information to his supplier) would ultimately determine Mr. David's fate. This decision would determine how much time he would serve in federal prison.

The expiration of the plea offer reduced Mr. David's trial to a mere formality. The government had already committed itself to prosecute Mr. David when the plea deal was offered. When Mr. David's counsel allowed the offer to expire, the prosecution was simply fulfilling the formalities of litigation by continuing the case to trial. While it is true that this Court has not explicitly extended the Sixth Amendment protections to preindictment plea negotiations, it is also true that under the precedent that this Court has established, Sixth Amendment protections can be afforded to an accused prior to indictment. Adversary judicial proceedings had been initiated against Mr. David; therefore, he was entitled to effective assistance of counsel.

VIII. Mr. David meets the two-pronged test as defined in Strickland.

To meet the first prong of the *Strickland* test, the defendant must show that counsel's performance was deficient. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show deficient performance, the defendant must show that counsel made errors so serious that counsel was not function as the "counsel" guaranteed to the defendant under the Sixth Amendment. *Id*. Second, the defendant must show that the deficient performance prejudiced the defense. *Id.* This

requires a showing that the counsel's actions were so serious that it deprived the defendant of a fair trial. *Id*.

It is an undisputed fact that Mr. Long was ineffective as counsel for Mr. David. However, this Court must determine if Mr. Long's deficiency resulted in Mr. David's prejudice. Consequently, an analysis of Mr. David's prejudice follows below.

1. **Counsel's actions prejudiced Mr. David's defense.**

To show prejudice, the defendant must show that there is a reasonable probability that but for counsel's performance, the result of the trial would have been different. *Id*. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." *Id.* Mr. David undoubtedly suffered prejudice due to his counsel's representation. Here, Mr. David was sentenced to ten years in prison— nine years more than he was offered in the plea deal. Ex. D. During pretrial testimony, when asked if Mr. David would have taken the plea deal if offered to him, Mr. David stated that it was a "no brainer." Ex. C. Mr. David further stated that he would have given up the suppliers in "a heartbeat" and that he would have done anything to avoid the risk of trial. *Id.*

But for counsel's failure to disclose the details of the plea deal, by Mr. David's own testimony, he would have taken the prosecutions offer, resulting in a different outcome. Consequently, due to Mr. David's counsel, Mr. David was denied the opportunity to accept a better outcome than the one he received at trial.

While it is true that Mr. David told the DEA agents that he would not give up his suppliers, this alone does not overcome the reasonable probability that counsel's actions prejudiced Mr. David's defense. Mr. David was asked in the heat of the moment to disclose

potentially harmful information. At this time, he refused to answer the officer's questions, but this refusal does not undermine his defense. Mr. David was initially fearful for his safety and the safety of his church members. Had he been given the opportunity to consult with his attorney regarding the plea offer Mr. David could have learned about the consequences of giving into his fears. He would have learned about the amount of time in prison he was facing if he did not accept the terms of the plea deal. He would have had the opportunity to weigh these options, and by his own testimony, he would have decided to accept the plea deal. Despite his initial hesitation, Mr. David was willing to fully cooperate with the prosecution, but was denied that opportunity by his counsel. Therefore, Mr. David's suffered prejudice because there is a reasonable probability that but for the actions of Mr. David's counsel, the results of the trial would have been different.

CONCLUSION

This Court established a bright-line rule in Cady, that set forth the standard for the community caretaking exception. A warrantless search of a vehicle is valid when law enforcement is reasonably acting in the interest of the individual or the general welfare. Officer McNown did not search Mr. McNown's vehicle—he searched his home. Furthermore, he did not reasonably act in the interest of Mr. David or the community. For these reasons the community caretaking exception should not be extended to his actions.

Regarding the second issue before this Court, the Sixth Amendment requires that a defendant receive effective use of counsel in all critical stages of the litigation. This Court is clear that a pre-indictment offer is a critical stage of the litigation. Mr. David received a pre-indictment offer that was not communicated to him because of his ineffective counsel. In

addition, the failure to communicate this offer prejudiced him. Therefore, for these reasons Mr. David should be re-offered his original plea deal.

CERTIFICATE OF SERVICE

We certify that a copy of Petitioner's brief was served upon Respondent, The United States of America, through the counsel of record by certified U.S. mail return receipt requested, on this, 21st day of October, 2018.

/s/_____

Attorneys for Petitioner