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

This Case is property of The University of
San Diego School of Law 30th Annual
Criminal Procedure Tournament November
16 – November 18, 2018
San Diego, CA

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CASE SPECIFIC RULES AND INFORMATION

(1) **This year's case is again a closed case.** When writing your briefs and arguments you may only cite cases and case law provided to you in this case packet. (Cases law TO BE ADDED BY SOON)

Permitted: The following sources may be referenced in oral argument:

- Any information in the case packet, including in the fact pattern, relevant legislation and case law.
- Any section of the Constitution, including its amendments.
- A direct quotation, rephrasing or summary of a court case not included in the case packet, as long as that quotation, rephrasing or summary appears in the case packet.
- "Common knowledge," defined as information that reasonably intelligent high school senior with no legal expertise would know."

Prohibited: Any other sources may not be referenced in oral argument. These include:

- An excerpt of any legislation or case included in the case packet, if that excerpt is not included in the case packet.
- A concurring or dissenting opinion of a case included in the case packet, if that opinion is not included in the case packet.
- A direct quotation, rephrasing or summary of a court case not included in the case packet, if that quotation, rephrasing or summary does not appear in the case packet.

(2) The attached case law (to be added soon) has been edited to only contain necessary content. Some Supreme Court Opinions are over 100 pages in length. The case reviewer did not find it necessary for you to print all of that content. However, in law school you will be tasked with reading and understanding full, unedited opinions.

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF STAPLES

UNITED STATES OF AMERICA,

Plaintiff,

v.

CHAD DAVID,

Defendant.

Case No.: 20-PKS09-20-RCN15

ORDER DENYING DEFENDANT'S MOTION TO SUPPRESS EVIDENCE AND SUPPLEMENTAL MOTION

DATE: July 15, 2017

On January 18, 2017, Chad David ("Defendant") was charged by indictment with one count of possession of a controlled substance with the intent to distribute in violation of 21 U.S.C. § 841. Specifically, the government alleges that Defendant possessed cocaine, a schedule II controlled substance, in excess of 10 kilograms with the specific intent of distributing the controlled substance. Mr. David has filed a motion to suppress the evidence that was collected on the date of his initial arrest in this case. Additionally, Mr. David has filed a motion to be re-offered the plea deal the government originally conveyed to his attorney. For the reasons explained below, the Court **DENIES** Mr. David's motions.

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I. STATEMENT OF FACTS

Defendant, Chad David, was a well-respected minister in Lakeshow, Staples, where he resided his whole life. Mr. David gained a reputation in the community for holding high energy Sunday services at the Lakeshow Community Revivalist Church. Officer James McNown, a patrol officer in Lakeshow, frequently attended Mr. David's Sunday service. Officer McNown was scheduled to patrol Lakeshow shortly after Mr. David's 7:00 AM Sunday service on January 15, 2017.

On Sunday, January 15, 2017, Officer McNown arrived at Mr. David's Sunday service just before 7:00 AM. However, Mr. David was absent from the service that morning. This was unusual because Mr. David regularly attended the Sunday service. Julianne Alvarado, another church attendee, attempted to call Mr. David at his home to check if he was okay; however, there was no answer. Ms. Alvarado, who appeared to be nervously shaking, told Officer McNown that Mr. David did not answer his phone and she was concerned about his well-being. Jacob Ferry, another church attendee, told Officer McNown that he thought he saw Mr. David the prior night at a bar. At this time, Officer McNown shrugged off the concerns from Ms. Alvarado and Mr. Ferry because Mr. David was not known to drink or go out to bars. Officer McNown thought this was all an overreaction and assumed that Mr. David was at home with an illness due to his elderly age of 72. To calm the service attendees, Officer McNown told them that he would stop by Mr. David's house during his patrol route after work and bring him some hot tea.

The Sunday service ended at approximately 8:50 AM after another churchgoer led the congregation. At 9:00 AM, Officer McNown began his shift patrolling Lakeshow. He first stopped at Starbucks and purchased a hot tea to bring to Mr. David. When Officer McNown arrived at Mr. David's residence at approximately 9:30 AM, he noticed nothing unusual as Mr. David's car was in the driveway and all the doors to the house were shut. However, Officer NcNown did testify that when pulling into Mr. David's gated community, he saw a black Cadillac SUV leaving the complex with Golden State license plates. Based on his experience, Officer McNown knew that these SUVs are typically driven by drug dealers. Additionally, there had been an increase in Golden State drugs coming into Lakeshow in recent years. Officer McNown walked up to Mr. David's front door. He

heard loud music coming from inside the house. He thought this was odd considering Mr. David's age and the time of day. Officer McNown knocked and announced his presence. After waiting approximately two minutes, Officer McNown peeked inside the window next to the front door. When looking through the window, Officer McNown noticed that the TV was on and playing the movie, *The Wolf of Wall Street.* This struck Officer McNown as unusual because he assumed that Mr. David would not watch R-rated movies given his profession. Officer McNown tried opening the front door, but it was locked.

In an effort to determine the status of Mr. David, Officer McNown entered the residence through the unlocked back door. Officer McNown assumed Mr. David couldn't hear the knocking over the loud music. Upon entry, Officer McNown approached the TV to turn it off and noticed a notebook. The notebook contained incriminating information including the names of various church attendees along with information about drug payments.

Officer McNown heard the loud music coming from a closed-door upstairs and walked up the stairs to check if Mr. David was there. Upon opening the door, Officer McNown found Mr. David packaging powder cocaine into ziplock bags. Officer McNown proceeded to handcuff Mr. David and call in local DEA agents to come to the scene, knowing that the mounds of cocaine were more than he was experienced in dealing with. According to Officer McNown, the Lakeshow Police Department policy is to obtain contact with the DEA upon a substantial finding of narcotics. The DEA had recently established a task-force in Lakeshow to combat the flow of narcotics from other states.

DEA Agent Colin Malaska arrived at Mr. David's house shortly after 10:00 AM and started investigating the scene. Officer McNown pointed Agent Malaska to the mounds of cocaine and the notebook he found in the living room. Agent Malaska read Mr. David his Miranda rights and asked Mr. David to tell him where he obtained the large quantity of drugs. Mr. David replied that there was no way he would give up his suppliers – indicating that doing so could lead to his death and his church being burnt down.

After Mr. David arrived at a federal detainment facility, he called one of the only criminal defense lawyers he knew, Keegan Long, who also happened to be an attendee of his Sunday

services. Mr. David knew, through confessions and public displays, that Mr. Long was an alcoholic. However, Mr. David believed that Mr. Long would adequately represent him.

After Mr. David was in custody, Agent Malaska contacted the prosecution to express the agency's desire to obtain information from Mr. David. Agent Malaska had credible information that a suspected drug kingpin was traveling through Lakeshow and believed that Mr. David could provide information leading to the kingpin's arrest. Agent Malaska encouraged the prosecution to offer a favorable plea deal before filing any charges so that there would be less public knowledge about the arrest, something Agent Malaska worried would tip-off the kingpin.

The prosecutors listened to Agent Malaska and held off on filing any charges. They came up with the plea bargain of one year in prison in exchange for the names of his suppliers, valid for only 36 hours. The prosecutors emailed this offer to Mr. David's attorney, Mr. Long, on Monday, January 16, 2017 at 8:00 AM. The offer was set to expire on January 17, 2017 at 10:00 PM. Mr. Long was at a bar, drinking, when he received the emailed offer. Mr. Long saw the email from the prosecutor but failed to accurately read the information regarding the time limit on the plea deal. On Tuesday, January 17, 2017, the prosecutor called Mr. Long's office to check the status of the plea offer. Mr. Long did not answer the phone and the prosecutor left a voice message inquiring about the status of the plea offer. After 36 hours, the plea offer expired without Mr. Long ever communicating the plea offer to Mr. David. It is undisputed that Mr. David was never communicated the plea offer during the 36 hour period it was valid. The federal prosecutors promptly indicted Mr. David, charging him with one count of 21 U.S.C. § 841 on the morning of January 18, 2017.

Kayla Marie, the prosecutor assigned to the case, contacted Mr. Long via email on the afternoon of the 18th and asked why Mr. David did not accept the plea offer. Mr. Long stated that he thought the offer was open for 36 days, not 36 hours. He then checked his email for the original plea offer and realized his mistake. He immediately contacted Mr. David and let him know his error. Mr. David fired Mr. Long as counsel during that same phone call. Mr. David subsequently hired a new criminal defense lawyer, Michael Allen, to represent him.

The following Friday, January 20, 2017, after the indictment, Mr. Allen emailed Ms. Marie to inquire about extending another plea offer to Mr. David. Ms. Marie told Mr. Allen that extending another plea offer would be pointless. Ms. Marie reasoned that the only purpose for offering the initial plea deal was to obtain the names of Mr. David's suppliers. She further explained that offering any more plea deals would be futile because the suppliers may be tipped off by now and the government would not receive any substantial benefit by extending another plea offer to Mr. David.

Defendant, Mr. David, concurrently filed two pretrial motions presently before this Court. The first is a motion to suppress evidence under the Fourth Amendment, claiming the evidence obtained from the initial search should be suppressed because Officer McNown did not have a warrant to enter his house. Second, is a motion seeking to be re-offered the initial plea deal that was not communicated to him, claiming that his counsel was ineffective under the Sixth Amendment.

II. ANALYSIS

This Court is tasked with deciding on the two motions raised pretrial by the Defendant, Chad David. First, whether the evidence seized during the search of Mr. David's home should be suppressed due to the lack of a warrant. Second, whether Mr. David should be re-offered the initial plea deal offered prior to indictment, which the attorney failed to communicate to him. We shall discuss each issue in turn.

A. Community Caretaking

Mr. David contends that the warrantless search of his home, in which incriminating evidence was seized, was an unconstitutional violation of his Fourth Amendment rights. The government argues that the entry and seizure was legal because Officer McNown was acting as a community caretaker, which does not require a warrant. This Court finds the government's argument compelling and DENIES Mr. David's motion to suppress evidence because Officer McNown was acting as a community caretaker.

The Fourth Amendment to the United States Constitution guards "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. 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). Accordingly, if a search is conducted without a warrant having first been issued by a neutral and detached magistrate, then it is the burden of the government to show that an exception to the general warrant requirement that makes the search reasonable. *Coolige v. New Hampshire*, 403 U.S. 443, 455 (1971).

This Court has no binding precedent to follow in the determination of this issue as neither the Supreme Court of the United States, the Thirteenth Circuit Court of Appeals, nor courts of this District have decided on this specific issue. The Supreme Court has yet to address whether the community caretaking exception extends to searches of the home. The Supreme Court has used the term "community caretaking" on only a limited number of occasions. Each of these have been in reference to searches of an automobile, never a home. This phrase was first realized by the Supreme Court in *Cady v. Dombrowski*, where the defendant was driving while impaired and wrecked his vehicle. *Cady v. Dombrowski*, 413 U.S. 433 (1973). Officers impounded and then searched the defendant's car, finding evidence that linked the defendant to a murder. The defendant argued that the warrantless seizure and search of his car violated the Fourth Amendment, but the Supreme Court disagreed, finding that no warrant was necessary. *Id*.

Here, we have a search of a home with no facts pertinent to inventory searches of automobiles. When looking to other courts across the nation for guidance on resolving this issue, there seems to be no resolution. "There is some confusion among the circuits as to whether the community caretaking exception set forth in *Cady* applies to warrantless searches of the home." *Ray v. Twp. of Warren*, 626 F.3d 170, 175 (3d Cir. 2010).

This "confusion," as referenced in *Ray*, points to a nationwide split among the circuits regarding the scope of warrantless searches of a home. When analyzing warrantless community caretaking home entries by officers, courts typically, and often incorrectly, interpret them as falling under the realm of exigent circumstances. While there is some overlap between the community caretaking and the "exigent circumstances" exceptions, "the community caretaking doctrine requires a court to look at the function performed by a police officer, while the emergency exception requires an analysis of the circumstances to determine whether an emergency requiring immediate action existed." *Hunsberger v. Wood*, 570 F.3d 546, 554 (4th Cir. 2009). In other

words, an exigent circumstance exception may apply in scenarios beyond those in which police are typically confronted with in a criminal investigation context. *Ray*, 626 F.3d at 177.

The language used in *Cady* is critical to understanding the scope of community caretaking. *Cady* specifically held that community caretaking searches are those done by officers "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady*, 413 U.S. at 441.

It is worth noting that some courts have concluded that the test for whether the search falls under a community caretaking exception is reasonableness. "In determining whether a search is reasonable 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). "Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause." *Id.* This rationale was also followed by the Eighth Circuit in *United States v. Quezada*, referring to these types of entries as "public servant" circumstances, in which police officers perform duties to help those in danger and to protect property, with an objective unrelated to the officer's duty to investigate and uncover criminal activity. *United States v. Quezada*, 448 F.3d 1005, 1007 (8th Cir. 2006). Here, the Government has conceded that Officer McNown's entry into Mr. David's home was not done under an exigent circumstance. Accordingly, we shall limit our inquiry to solely a community caretaking approach.

Here, the primary importance is determining Officer McNown's intent when entering Mr. David's home. As indicated in *Quezada*, there is a "concern that a police officer might use his or her caretaking responsibilities as a pretext for entering a residence." *Quezada*, 448 F.3d at 1007. If Officer McNown intended to enter Mr. David's home for purposes of conducting a criminal investigation, then the entry undoubtedly requires a warrant. Based upon the testimony of Officer McNown and supporting facts, this Court does not see any intent by Officer McNown to investigate criminal activity.

Officer McNown's entrance into Mr. David's home was totally divorced from any inquiry into criminal matters. It seems Officer McNown's primary intent was to ensure the well-being of Mr. David. There is no indication in the record that Officer McNown was suspicious of criminal activity in Mr. David's residence. Mr. David contends that Officer McNown acted under a pretext to enter the home after seeing an out-of-state registered Cadillac SUV leave the complex and after arriving to the sound of loud music with an R-rated movie on the television. However, none of these facts strongly indicate that Officer McNown had any intent other than to check on the well-being of Mr. David.

Preserving the "totally divorced" standard as held in *Cady*, we find that Officer McNown's search of Mr. David's residence was valid as a community caretaker. Thus, we DENY Mr. David's motion to suppress the evidence of the notebook and the 10 kilograms of cocaine seized during the search.

B. Sixth Amendment Right to Effective Counsel

On a pretrial motion, Mr. David seeks to be re-offered the original plea deal given to him by federal prosecutors, but never communicated to him by his first attorney. He claims that relief should be given because he did not enjoy his Sixth Amendment right to effective counsel. Conversely, the government argues that Mr. David is not entitled to this remedy because his Sixth Amendment rights do not attach prior to federal charges being filed against him and because he suffered no prejudice by the plea offer not being communicated. We agree with the government in part and Mr. David in part, finding that the Sixth Amendment does attach during pre-indictment plea negotiations, but no remedy should be given here because Mr. David is unable to show that he suffered prejudice under the *Strickland* test. *See Strickland v. Washington*, 466 U.S. 668, 695 (1984). Thus, Mr. David is not entitled to the remedy he seeks and shall stand trial.

The Sixth Amendment demands that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." U.S. Const. amend. VI. Further, the Sixth Amendment guarantees a right to counsel at critical stages of a criminal proceeding. *Montejo v. Louisiana*, 556 U.S. 778, 786 (2009).

However, this Court is again tasked with determining an unresolved issue. The Supreme Court has recently addressed the issue of effective counsel during plea negotiations. In *Missouri v. Frye*, the Court held *"*that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused." *Missouri v. Frye*, 566 U.S. 134, 145 (2012). Further, "when defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires." *Frye*, 566 U.S. at 145.

In *Frye*, a lawyer failed to inform his client of the prosecution's plea offers. After the offers expired, the defendant pled guilty, without a plea deal, and received a substantially longer sentence than the ones in the lapsed offers. Justice Kennedy's majority opinion framed the questions presented as "whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected" and, if so, "what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance." *Id*.

Importantly, the Court held that the Sixth Amendment right to effective counsel extended to plea negotiations. However, the Court did not squarely address whether this right extended to plea negotiations *prior to the filing of formal charges.* This Court finds it natural that the right to effective counsel under the Sixth Amendment applies during all "critical stages of a criminal proceeding" as held in *Montejo*, regardless of whether the Government has acted to prosecute a defendant via an indictment. *Montejo*, 556 U.S. at 786.

This finding is not unusual when looking to other courts outside our jurisdiction. The First Circuit "recognize[s] the possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment." *Roberts v. Maine*, 48 F.3d 1287, 1291 (1st Cir. 1995). The First Circuit further found that the circumstances include when the "government ha[s] crossed the constitutionally significant divide from fact-finder to adversary." *Id.* Here, the prosecution clearly had the intention of moving forward with criminal charges against Mr. David, only to be caught up in plea negotiations prior to doing so.

Finding that Mr. David did enjoy a Sixth Amendment right to effective counsel during plea negotiations prior to indictment, this Court now turns to whether Mr. David's suffered prejudice as required by *Strickland*. The Supreme Court requires the defendant to show two things to establish an ineffective assistance of counsel claim:

> First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

Strickland, 466 U.S. at 687.

From the facts here, it is clear that the first requirement has been met. Mr. David's counsel was deficient because he did not communicate the plea offer to Mr. David in a timely fashion and was apparently intoxicated for much of his short tenure as counsel. Neither Mr. David nor the government argues this first prong as the facts are clear.

Turning to the second prong, Mr. David did not suffer prejudice because of his counsel's actions and the nature of the plea bargain offered. Thus, this Court DENIES Mr. David's motion to be re-offered the plea deal.

As the Supreme Court reasoned in Frye, "[t]o show prejudice where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability both that they would have accepted the more favorable plea offer had they been afforded effective assistance of counsel and that the plea would have been entered without the prosecution's canceling it or the trial court's refusing to accept it." Frye, 566 U.S. at 135. Despite Mr. David's testimony, he has not shown a reasonable probability that he would have accepted the favorable plea.

When looking at the terms of the plea bargain, Mr. David would have to provide prosecutors with the names of his suppliers as a condition to acceptance. At the time of his arrest, Mr. David told Agent Malaska that if he gave the names of his suppliers then he would be killed and his church would be burnt down. This statement made by Mr. David shortly after arrest is substantial. Mr. David testified that after contemplation while in custody, he would undoubtedly give the names of his suppliers if he were offered the plea deal again. However, this Court is not convinced that this would be the case. The government argues that Mr. David missed his opportunity. Moreover, even if the government were to re-offer the plea deal to Mr. David, their actions would be futile because the suppliers have probably been tipped off about Mr. David's arrest, thus making a subsequent arrest unlikely. Though impossible to determine whether Mr. David would have given up names of his suppliers during the 36 hour period the plea offer was valid, this Court finds it more likely that he would not have. More importantly, however, is that fact that Mr. David has yet to go to trial. There is no prejudice suffered by Mr. David because there is no adverse conviction that this Court can weigh the outcomes to. Surely no prejudice will exist if Mr. David goes to trial and is found not guilty of the alleged crime. Mr. David has not demonstrated a showing of prejudice as required by Strickland. Consequently, an analysis of what remedy is appropriate is unnecessary here.

III. CONCLUSION & ORDER

This Court DENIES Mr. David's motion to suppress evidence, finding that Officer McNown did not need a warrant to search his house because he was acting as a community caretaker, which does extend to searches of the home. Additionally, this Court DENIES Mr. David's motion to be re-offered the plea deal, finding that although the Sixth Amendment right to effective counsel extends to criminal proceedings prior to indictment, no showing of prejudice by Mr. David has been found.

IT IS SO ORDERED

Kobe B. Bryant

KOBE BRYANT
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE THIRTEENTH CIRCUIT

CHAD DAVID, *Appellant*, v. UNITED STATES OF AMERICA, *Appellee*.	No.: 125-1-7-720 District Court No.: 20-PKS09-20-RCN15 **DATE:** May 10, 2018

Appeal from the United States
District Court for the Southern District of Staples
Kobe Bryant, District Judge, Presiding

Argued and Submitted
July 20, 2017
Lakeshow, Staples

Filed November 28, 2017
Before Judge Shaquille O'Neal, Judge Jerry West, and Judge Magic Johnson
Circuit Judges

MAJORITY OPINION

JOHNSON, M. Circuit Judge, (WEST, J. joining):

Appellant, Mr. Chad David, appeals his conviction for possession of a controlled substance with the intent to distribute. Appellant contends that the District Court erred in denying his motion to suppress evidence prior to trial. Additionally, Appellant contends that the District Court erred in denying his motion requiring the government re-offer the initial plea deal. For the reasons set forth below, we uphold the District Court's denial of Appellant's motion to suppress evidence. Additionally, we uphold the District Court's decision in part, finding that the Sixth Amendment right to effective counsel does not extend to plea negotiations prior to an indictment. Thereby AFFIRMING Mr. David's conviction at trial.

BACKGROUND

The District Court has already set forth the facts relevant to this case in detail. Because the facts of this case are not in dispute, this Court hereby adopts and incorporates by reference the facts from the opinion below. The District Court denied Appellant's motion to suppress evidence, finding that the community caretaking exception to the warrant requirement extends to the home, thus allowing the government to use the fruits of the search. Further, the District Court found that the Sixth Amendment right to counsel extends to plea negotiations pre-indictment, but found no prejudice suffered by Mr. David, thus barring any remedy. Based on the facts presented, Appellant was convicted on one charge and sentenced to 10 years in prison, the statutory minimum. Appellant now appeals his conviction and orders of the District Court.

I. ANALYSIS

Appellant now argues on appeal that his conviction should be reversed because the District Court admitted evidence at trial that was obtained in violation of his Fourth Amendment rights. Appellant also argues that the District Court erred in denying his motion to be re-offered the plea deal that was not conveyed to him by his initial counsel. First, Appellant claims that the search of his home violated the Fourth Amendment because the community caretaking doctrine does not extend to entries into the home. Second, Appellant argues that the Sixth Amendment right to counsel attaches during plea negotiations prior to a federal indictment and that Appellant

suffered prejudice, thus allowing a claim and remedy for ineffective assistance of counsel.

A. Community Caretaking

Appellant accurately explains that in order to conduct a search, a law enforcement officer must either have a search warrant or be prepared with a reason as to why the officer does not need one. A warrant will be only issued upon probable cause. U.S. Const. amend IV. The Fourth Amendment contains a "strong preference" for warrants. *Massachusetts v. Upton*, 466 U.S. 727, 734 (1984). Yet, the lack of a warrant is not dispositively fatal, as several exceptions to the warrant requirement have been established. *Katz v. United States*, 389 U.S. 347, 357 (1967). Where a search has been conducted without the benefit of a warrant, the government bears the burden of showing that it falls within one of these few "specifically established and well-delineated exceptions." *Id*. at 356–357. Because Officer McNown searched Appellant David's home without a warrant, it is incumbent upon the Appellee to show that the government did not need one. Here, Appellee relies completely on the community caretaking exception to the warrant requirement.

Overtime, the courts have developed various exceptions to the warrant requirement. Appellee solely contends that the search of Mr. David's residence did not require a warrant because Officer McNown was acting solely as a community caretaker, completely divorced from criminally investigative purposes.

The community caretaker exception is not really an exception to the warrant requirements of the Fourth Amendment at all. Rather, it is a description of what law enforcement officers do in acting to serve the public interests when they are not investigating a crime. It is true that the Supreme Court has not ruled on whether law enforcement may enter a home as a community caretaker and has limited the doctrine to vehicles. However, we find that entering a home as a community caretaker is a natural consequence of the role that law enforcement officers play in their everyday duties to protect and serve their communities. This concept of community caretaking allowing law enforcement to enter homes has been upheld across the nation in both federal and state courts.

For example, in Rohrig, the defendant moved to suppress evidence seized during a

warrantless search of his home. There, the police entered a home at the middle of the night to turn down loud music that was bothering neighbors. The Sixth Circuit upheld the warrantless search by referencing the community caretaker duties of officers established by the Supreme Court in *Cady*. The Court emphasized that the officers entered the residence without being involved in a criminal investigation. *United States v. Rohrig*, 98 F.3d 1506, 1513 (6th Cir. 1996).

Turning to the facts here, we find that Officer McNown did not deviate from any commonly recognized practices in exercising his right to search Mr. David's home as a community caretaker. Officer McNown was well informed that Mr. David was not attending his Sunday service, which he typically would attend. He then took it upon himself to act as a community caretaker, totally divorced from criminal investigation, to ensure the well-being of Mr. David. Upon arrival at the residence, Officer McNown knocked, to no answer, and entered the house through an unlocked back door. Only after Officer McNown was lawfully inside the home did his suspicions grow that criminal activity was afoot. Therefore, we AFFIRM the lower Court's decision to deny Mr. David's motion to suppress evidence. When an officer is acting as a community caretaker, totally divorced from criminal investigation, warrantless entry into a home is valid under the Fourth Amendment.

B. Sixth Amendment Right to Effective Counsel

Appellant argues that the District Court erred in finding that he did not suffer prejudice as required by *Strickland*. Appellee argues that the District Court erred in finding that the Sixth Amendment right to effective counsel attaches prior to indictment during plea negotiations. We find Appellee's arguments compelling and affirm the District Court's decision to DENY Mr. David's motion to be re-offered the plea deal because Mr. David did not enjoy the Sixth Amendment right to effective counsel prior to his indictment.

As recently articulated by the Sixth Circuit, "[i]t is 'firmly established' that a person's Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him."" *Turner v. United States*, 885 F.3d 949, 953 (6th Cir. 2018) (quoting *United States v. Gouveia*, 467 U.S. 180, 187 (1984)); *see also Kirby v. Illinois*, 406 U.S. 682, 688 (1972) (finding the Sixth Amendment right to counsel does not apply during pre-

indictment identification procedures). In Turner, the defendant raised the exact issue here, "whether the Sixth Amendment right to counsel extends to pre-indictment plea negotiations." Turner, 885 F.3d at 952. The Court held that "the Sixth Amendment right to counsel does not extend to pre-indictment plea negotiations." Id. at 953. We have no reason to deviate from the logical assessment of the issue the Sixth Circuit has provided. Further, we agree with the Sixth Circuit in finding that "[t]here is [. . .] no circuit split on this issue." Id. at 954.

This Court does not have the authority to directly hold against the bright-line rule established by the Supreme Court. We acknowledge that Mr. David's situation is directly contrary to the underlying principles of the Sixth Amendment. However, it is not our prerogative to disregard clear precedent set by the highest Court of the United States.

Because of this determination, we find that Mr. David is not entitled to be re-offered the plea deal and find it unnecessary to examine whether prejudice was suffered under the Strickland test and if a remedy is appropriate.

II. CONCLUSION

For the reasons above, the decision of the District Court is **AFFIRMED.**

DISSENT

O'NEAL, SHAQUILLE, Circuit Judge:

I. <u>Community Caretaking</u>

This Court's finding that the community caretaking exception extends to entries into a home is clearly erroneous. As such, the evidence seized against Mr. David, which stem from this illegal search, should be suppressed.

The facts of this case do not allow an argument from the government that the search was valid under an exigent circumstance. A governing principal under the Fourth Amendment is that only in a carefully defined class "of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Michigan v. Tyler*, 436 U.S. 499, 506 (1978). The Supreme Court, through the years, has crafted a number of exceptions to the warrant requirement of the Fourth Amendment. These include exceptions such as plain view, exigent circumstances, hot pursuit, search incident to a lawful arrest, consent, border search, and stop and frisk.

As the Supreme Court recognized in *Cady*, there is a "constitutional difference" in searching a home and searching an automobile. *Cady*, 413 U.S. at 439. As articulated by the Ninth Circuit, the community caretaking doctrine is restricted to searches of automobiles and does not extend to the searches of homes or offices. *United States v. Erickson*, 991 F.2d 529, 532 (9th Cir. 1993). This logic has been recognized by the Tenth Circuit as well in *Bute*, holding that "the community caretaking exception to the warrant requirement is applicable only in cases involving automobile searches." United States v. Bute, 43 F.3d 531, 535 (10th Cir. 1994).

Extending warrantless searches of homes to law enforcement under a community caretaking standard is a constitutional danger. Too often would this Court see law enforcement take advantage of this exception by claiming to enter homes as a caretaker when obtaining a search warrant proves futile. If law enforcement wishes to enter a home, they must either get consent, a warrant, or enter under a clearly established exception. Of course, law enforcement should continue to act as community caretakers to serve the public under their sworn duty, but allowing this exception to expand into searches of homes will only result in nefarious situations between those protected by the Fourth Amendment and law enforcement.

We know from the majority that if a search is conducted without a warrant issued by a neutral and detached magistrate, then it is the burden of the government to show that an exception to the general requirement of a warrant makes that search reasonable. *Coolige v. New Hampshire*, 403 U.S. 443, 455 (1971). Here, the Government has not met this burden of reasonableness.

Undoubtedly, Mr. David's Fourth Amendment rights were violated when Officer McNown searched his home, and his motion to suppress all evidence should have been granted at the District Court and this Court. Looking to the facts of this case, Officer McNown's intent when entering the home was not as sterile as the majority would like to think. When Officer McNown approached Mr. David's residence, we see that a suspicion grew that criminal activity was afoot. First, he noticed the unusual activity at his church when Mr. David did not show up. Second, he noticed the Cadillac SUV with Golden State license plates typically driven by drug dealers. Third, he heard loud music coming from the home at an early hour. Fourth, Mr. David did not answer the door after repeated knocks. Fifth, the television was playing a movie that Officer McNown had reason to

know Mr. David would not watch. Individually, these instances might show that Officer McNown was totally divorced from criminal investigation. Taken together, it is reasonable to believe that Officer McNown's motives prior to entering the home were surely influenced by a motive to investigate crime. Therefore, it is clear that the Majority erred in affirming the District Court's decision.

II. **Sixth Amendment Right to Effective Counsel**

The Majority has taken a very narrow approach in analyzing this issue by relying on only one Circuit's holding on the issue yet to be determined by the Supreme Court. This bright-line rule of when the Sixth Amendment right to counsel attaches stems from the language in *United States v. Gouveia* where the Supreme Court held that the right attaches only "after the initiation of criminal proceedings." *Gouveia*, 467 U.S. at 191–192. However, the language used by the Court and subsequent cases make it obvious that a strict adherence to the bright-line rule is not required. The Court's reasoning for drawing the bright-line rule where it is and the underlying constitutional purpose of the Sixth Amendment right to counsel support recognition of this right before any criminal proceedings have commenced. At a minimum, this right to effective counsel should be recognized during plea negotiations prior to indictment.

Scholars estimate that about ninety to ninety-five percent of cases are resolved through plea bargaining, regardless of whether charges have been filed. *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. Commonly, plea negotiations will take place prior to any charges being filed because the adverse parties work together to negotiate what charges will be filed. Plea bargaining yields many advantages to both the prosecution and defendant by conserving financial expenses of trial, allowing the defendant to admit their wrongdoing, and most importantly, allowing the defendant to accept a favorable, yet fair, sentence for their crimes. *See* Breslow, *Signs of Life in the Supreme Court's Uncharted Territory: Why the Right to Effective Assistance of Counsel Should Attach to Pre-Indictment Plea Bargaining*, Fed. Law. 34, 39 (2015). However, without Sixth Amendment protections, the average defendant does not have the capacity and intellect to fairly negotiate with the prosecutor, leading to

an unconstitutional imbalance. *Id*. Undoubtedly, there is a pressing need for the Supreme Court to expand the right to effective counsel to these critical stages of a criminal proceeding.

Prior to the Sixth Circuit's decision in *Turner*, the Circuit laid out compelling arguments for abandoning the bright-line rule in *United States v. Moody*. In this case regarding pre-indictment plea negotiations, the Court explained that the Supreme Court established a bright-line rule but made clear that the Supreme Court disagreed with such a rule. *United States v. Moody*, 206 F.3d 609, 614 (6th Cir. 2000). Ultimately, the Court held that it was beyond their power to modify the rule, even "where the facts so clearly demonstrate that the rights protected by the Sixth Amendment are endangered." *Id*. at 614. The majority also acknowledges this dichotomy but refuses to act.

Mistakenly agreed upon by the majority, there is a circuit split on this issue. The Fifth, Sixth, Ninth, Tenth, Eleventh, and D.C. Circuits have enforced this bright-line rule. The First, Third, Fourth, and Seventh Circuits have all either rejected this bright-line rule in direct holdings or in *dicta* along with several lower District Courts.

In *Matteo v. Superintendent, SCI Albion*, the Third Circuit held that a defendant's right to counsel attached after he was arrested and held in jail for more than a week but prior to the filing of any charges by the prosecution and before any arraignment. *Matteo v. Superintendent, SCI Albion*, 171 F.3d 877, 892 (3d Cir. 1999). In this holding, the court also relied on *Kirby* and *Gouveia*, but focused more on the underlying purposes of the Sixth Amendment protections rather than the expressed holding. The court there distinctly noted that "[t]he right also may attach at earlier stages, when "the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *Matteo*, 171 F.3d at 892 (quoting *Gouveia*, 467 U.S. at 189 (citations omitted)). Thus, the critically important stage of plea negotiations, regardless of whether charges have been filed, entitles the defendant to the protections of the Sixth Amendment.

Turning to the facts here, it is clear that Mr. David suffered due to a lack of effective counsel. Mr. David was convicted at trial and sentenced to ten years in prison, nine years longer than the offered plea deal. Solely due to the lack of effective counsel, Mr. David never had the opportunity to even consider this plea deal. We can debate whether Mr. David would have taken the plea deal, but we cannot arrive at this argument unless Mr. David was entitled to the Sixth Amendment right to counsel during plea negotiations. Had the prosecution immediately filed charges against Mr. David, then began plea negotiations, Mr. David would have an opportunity to remedy his counsel's deficiencies. The majority sets a dangerous precedent here. Prosecutors, knowing that the criminally accused will not have a remedy prior to the filing of formal charges under the Sixth Amendment, will simply postpone filing charges when making favorable plea offers. There is no loss sustained by the Government in these situations, only the criminally accused.

Assuming that the Sixth Amendment right to counsel does attach in this case, the District Court was wrong in holding Mr. David suffered no prejudice under *Strickland*. To show prejudice under *Strickland*, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). The facts here support a finding of reasonable probability. During pretrial testimony, Mr. David unambiguously stated that had he been communicated the plea deal from his initial attorney, he would have accepted it. This testimony was taken prior to trial where Mr. David was convicted. If Mr. David were truly gambling his fate, he would have brought up his Sixth Amendment claim after trial. Further, looking at the evidence clearly incriminating Mr. David, any prudent defense attorney would advise their client to take a one year deal as opposed to risking a minimum sentence of ten years at trial. Turning to the issue of naming his suppliers, there is no way of knowing whether Mr. David would have agreed to this term. However, had Mr. David received adequate counsel and been communicated the offer

promptly, perhaps the parties could engage in negotiating additional terms to the plea deal such as a witness protection program. Mr. David was unable to arrive at the negotiation table and discuss alternate possibilities solely due to his ineffective counsel. Undoubtedly, Mr. David suffered prejudice.

If the District Court went one step further in its analysis and found prejudice, the only question left would be what remedy is appropriate for Mr. David's situation. In *Frye*, the Court remanded the case back to a lower state court to avoid deciding the remedy issue. *Missouri v. Frye*, 566 U.S. 134, 151 (2012). Thus, there is no precedent in deciding how to remedy these situations.

III. Conclusion

Overall, Mr. David has surely suffered from the majority's holding today. Mr. David's motion to suppress evidence should have been granted because the community caretaking exception does not extend to warrantless searches of a home. Further, Mr. David should have been offered a remedy because he suffered prejudice under Strickland and the Sixth Amendment right to counsel should attach during plea negotiations prior to an indictment.

No. 4-422

IN THE

Supreme Court of the United States

Chad David,

Petitioner,

v.

The United States of America,

Respondent.

Petition for certiorari is granted. The Court grants certiorari limited to the following questions:

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?

Stipulations & Assumptions:

1. Both parties have stipulated that the focus of the first issue is community caretaking, not exigent circumstances.
2. Both parties have stipulated that Mr. Long was deficient when acting as Mr. David's counsel.
3. Both parties have stipulated that if Mr. David is granted relief on his Sixth Amendment claim, the Court should remand to the District Court to decide the proper remedy.
4. This is a closed problem.
5. Assume that the statement of facts and any additional case specific facts as stated by the District Court or Circuit Court are a complete record.
6. Assume that all issues addressed by the lower courts were properly raised and preserved for appellate review.
7. Assume that all motions, defenses, and appeals have been timely and properly filed.

SELECTED CASE LAW
ISSUE ONE: FOURTH AMENDMENT CASES

389 U.S. 347 (1967)

KATZ
v.
UNITED STATES.

No. 35.

Supreme Court of United States.

Argued October 17, 1967.
Decided December 18, 1967.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

Burton Marks and *Harvey A. Schneider* argued the cause and filed briefs for petitioner.

348 *348 *John S. Martin, Jr.,* argued the cause for the United States. With him on the brief were *Acting Solicitor General Spritzer, Assistant Attorney General Vinson* and *Beatrice Rosenberg.*

MR. JUSTICE STEWART delivered the opinion of the Court.

The petitioner was convicted in the District Court for the Southern District of California under an eight-count indictment charging him with transmitting wagering information by telephone from Los Angeles to Miami and Boston, in violation of a federal statute.[1] At trial the Government was permitted, over the petitioner's objection, to introduce evidence of the petitioner's end of telephone conversations, overheard by FBI agents who had attached an electronic listening and recording device to the outside of the public telephone booth from which he had placed his calls. In affirming his conviction, the Court of Appeals rejected the
349 contention that the recordings had been obtained in violation of the Fourth Amendment, *349 because "[t]here was no physical entrance into the area occupied by [the petitioner]."[2] We granted certiorari in order to consider the constitutional questions thus presented.[3]

The petitioner has phrased those questions as follows:

> "A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.
>
> 350 *350 "B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution."

We decline to adopt this formulation of the issues. In the first place, the correct solution of Fourth Amendment problems is not necessarily promoted by incantation of the phrase "constitutionally protected area." Secondly, the Fourth Amendment cannot be translated into a general constitutional "right to privacy." That Amendment protects individual privacy against certain kinds of governmental intrusion, but its protections go further, and often have nothing to do with privacy at all.[4] Other provisions of the Constitution protect personal privacy from other forms of governmental invasion.[5] But the protection of a

351 person's *general* right to privacy— his right to be let alone by other people[6]—is, like the *351 protection of his property and of his very life, left largely to the law of the individual States.[7]

Because of the misleading way the issues have been formulated, the parties have attached great significance to the characterization of the telephone booth from which the petitioner placed his calls. The petitioner has strenuously argued that the booth was a "constitutionally protected area." The Government has maintained with equal vigor that it was not.[8] But this effort to decide whether or not a given "area," viewed in the abstract, is "constitutionally protected" deflects attention from the problem presented by this case.[9] For the Fourth Amendment protects people, not places. What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection. See *Lewis* v. *United States,* 385 U. S. 206, 210; *United States* v. *Lee,* 274 U. S. 559, 563. But what he seeks to preserve
352 as private, even in an area accessible to the public, may be constitutionally protected. *352 See *Rios* v. *United States,* 364 U. S. 253; *Ex parte Jackson,* 96 U. S. 727, 733.

The Government stresses the fact that the telephone booth from which the petitioner made his calls was constructed partly of glass, so that he was as visible after he entered it as he would have been if he had remained outside. But what he sought to exclude when he entered the booth was not the intruding eye—it was the uninvited ear. He did not shed his right to do so simply because he made his calls from a place where he might be seen. No less than an individual in a business office,[10] in a friend's apartment,[11] or in a taxicab,[12] a person in a telephone booth may rely upon the protection of the Fourth Amendment. One who occupies it, shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication.

The Government contends, however, that the activities of its agents in this case should not be tested by Fourth Amendment requirements, for the surveillance technique they employed involved no physical penetration of the telephone booth from which the petitioner placed his calls. It is true that the absence of such penetration was at one time thought to foreclose further Fourth Amendment inquiry, *Olmstead* v. *United States,* 277 U. S. 438, 457, 464, 466; *Goldman* v. *United States,* 316 U. S. 129, 134-136, for that
353 Amendment was thought to limit only searches and seizures of tangible *353 property.[13] But "[t]he premise that property interests control the right of the Government to search and seize has been discredited." *Warden* v. *Hayden,* 387 U. S. 294, 304. Thus, although a closely divided Court supposed in *Olmstead* that surveillance without any trespass and without the seizure of any material object fell outside the ambit of the Constitution, we have since departed from the narrow view on which that decision rested. Indeed, we have expressly held that the Fourth Amendment governs not only the seizure of tangible items, but extends as well to the recording of oral statements, over-heard without any "technical trespass under . . . local property law." *Silverman* v. *United States,* 365 U. S. 505, 511. Once this much is acknowledged, and once it is recognized that the Fourth Amendment protects people— and not simply "areas"—against unreasonable searches and seizures, it becomes clear that the reach of that Amendment cannot turn upon the presence or absence of a physical intrusion into any given enclosure.

We conclude that the underpinnings of *Olmstead* and *Goldman* have been so eroded by our subsequent decisions that the "trespass" doctrine there enunciated can no longer be regarded as controlling. The Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a "search and seizure"

within the meaning of the Fourth Amendment. The fact that the electronic device employed to achieve that end did not happen to penetrate the wall of the booth can have no constitutional significance.

354 *354 The question remaining for decision, then, is whether the search and seizure conducted in this case complied with constitutional standards. In that regard, the Government's position is that its agents acted in an entirely defensible manner: They did not begin their electronic surveillance until investigation of the petitioner's activities had established a strong probability that he was using the telephone in question to transmit gambling information to persons in other States, in violation of federal law. Moreover, the surveillance was limited, both in scope and in duration, to the specific purpose of establishing the contents of the petitioner's unlawful telephonic communications. The agents confined their surveillance to the brief periods during which he used the telephone booth,[14] and they took great care to overhear only the conversations of the petitioner himself.[15]

Accepting this account of the Government's actions as accurate, it is clear that this surveillance was so narrowly circumscribed that a duly authorized magistrate, properly notified of the need for such investigation, specifically informed of the basis on which it was to proceed, and clearly apprised of the precise intrusion it would entail, could constitutionally have authorized, with appropriate safeguards, the very limited search and seizure that the Government asserts in fact took place. Only last Term we sustained
355 the validity of *355 such an authorization, holding that, under sufficiently "precise and discriminate circumstances," a federal court may empower government agents to employ a concealed electronic device "for the narrow and particularized purpose of ascertaining the truth of the . . . allegations" of a "detailed factual affidavit alleging the commission of a specific criminal offense." *Osborn* v. *United States,* 385 U. S. 323, 329-330. Discussing that holding, the Court in *Berger* v. *New York,* 388 U. S. 41, said that "the order authorizing the use of the electronic device" in *Osborn* "afforded similar protections to those . . . of conventional warrants authorizing the seizure of tangible evidence." Through those protections, "no greater invasion of privacy was permitted than was necessary under the circumstances." *Id.,* at 57.[16] Here, too, a
356 similar *356 judicial order could have accommodated "the legitimate needs of law enforcement"[17] by authorizing the carefully limited use of electronic surveillance.

The Government urges that, because its agents relied upon the decisions in *Olmstead* and *Goldman,* and because they did no more here than they might properly have done with prior judicial sanction, we should retroactively validate their conduct. That we cannot do. It is apparent that the agents in this case acted with restraint. Yet the inescapable fact is that this restraint was imposed by the agents themselves, not by a judicial officer. They were not required, before commencing the search, to present their estimate of probable cause for detached scrutiny by a neutral magistrate. They were not compelled, during the conduct of the search itself, to observe precise limits established in advance by a specific court order. Nor were they directed, after the search had been completed, to notify the authorizing magistrate in detail of all that had been seized. In the absence of such safeguards, this Court has never sustained a search upon the sole ground that officers reasonably expected to find evidence of a particular crime and voluntarily confined their
357 activities to the least intrusive *357 means consistent with that end. Searches conducted without warrants have been held unlawful "notwithstanding facts unquestionably showing probable cause," *Agnello* v. *United States,* 269 U. S. 20, 33, for the Constitution requires "that the deliberate, impartial judgment of a judicial officer . . . be interposed between the citizen and the police . . . ." *Wong Sun* v. *United States,* 371 U. S. 471, 481-482. "Over and again this Court has emphasized that the mandate of the [Fourth] Amendment requires adherence to judicial processes," *United States* v. *Jeffers,* 342 U. S. 48, 51, and that searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se*

unreasonable under the Fourth Amendment[18]—subject only to a few specifically established and well-delineated exceptions.[19]

It is difficult to imagine how any of those exceptions could ever apply to the sort of search and seizure involved in this case. Even electronic surveillance substantially contemporaneous with an individual's arrest
358 could hardly be deemed an "incident" of that arrest.[20] *358 Nor could the use of electronic surveillance without prior authorization be justified on grounds of "hot pursuit."[21] And, of course, the very nature of electronic surveillance precludes its use pursuant to the suspect's consent.[22]

The Government does not question these basic principles. Rather, it urges the creation of a new exception to cover this case.[23] It argues that surveillance of a telephone booth should be exempted from the usual requirement of advance authorization by a magistrate upon a showing of probable cause. We cannot agree. Omission of such authorization

> "bypasses the safeguards provided by an objective predetermination of probable cause, and substitutes instead the far less reliable procedure of an after-the-event justification for the . . . search, too likely to be subtly influenced by the familiar shortcomings of hindsight judgment." *Beck* v. *Ohio,* 379 U. S. 89, 96.

And bypassing a neutral predetermination of the *scope* of a search leaves individuals secure from Fourth
359 Amendment *359 violations "only in the discretion of the police." *Id.,* at 97.

These considerations do not vanish when the search in question is transferred from the setting of a home, an office, or a hotel room to that of a telephone booth. Wherever a man may be, he is entitled to know that he will remain free from unreasonable searches and seizures. The government agents here ignored "the procedure of antecedent justification . . . that is central to the Fourth Amendment,"[24] a procedure that we hold to be a constitutional precondition of the kind of electronic surveillance involved in this case. Because the surveillance here failed to meet that condition, and because it led to the petitioner's conviction, the judgment must be reversed.

It is so ordered.

[20] In *Agnello* v. *United States,* 269 U. S. 20, 30, the Court stated:

"The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody, is not to be doubted."

Whatever one's view of "the long-standing practice of searching for other proofs of guilt within the control of the accused found upon arrest," *United States* v. *Rabinowitz,* 339 U. S. 56, 61; cf. *id.,* at 71-79 (dissenting opinion of Mr. Justice Frankfurter), the concept of an "incidental" search cannot readily be extended to include surreptitious surveillance of an individual either immediately before, or immediately after, his arrest.

[21] Although "[t]he Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others," *Warden* v. *Hayden,* 387 U. S. 294, 298-299, there seems little likelihood that electronic surveillance would be a realistic possibility in a situation so fraught with urgency.

[22] A search to which an individual consents meets Fourth Amendment requirements, *Zap* v. *United States,* 328 U. S. 624, but of course "the usefulness of electronic surveillance depends on lack of notice to the suspect." *Lopez* v. *United States,* 373 U. S. 427, 463 (dissenting opinion of MR. JUSTICE BRENNAN).

[23] Whether safeguards other than prior authorization by a magistrate would satisfy the Fourth Amendment in a situation involving the national security is a question not presented by this case.

413 U.S. 433 (1973)

CADY, WARDEN
v.
DOMBROWSKI

No. 72-586.

Supreme Court of the United States.

Argued March 21, 1973.
Decided June 21, 1973.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

434 *434 *LeRoy L. Dalton,* Assistant Attorney General of Wisconsin, argued the cause for petitioner. With him on the briefs was *Robert W. Warren,* Attorney General.

William J. Mulligan, by appointment of the Court, 410 U. S. 952, argued the cause for respondent. With him on the brief was *David E. Leichtfuss.*[*]

Opinion of the Court by MR. JUSTICE REHNQUIST, announced by MR. JUSTICE BLACKMUN.

Respondent Chester J. Dombrowski, was convicted in a Wisconsin state court of first-degree murder of Herbert McKinney and sentenced to life imprisonment. The conviction was upheld on appeal, *State* v. *Dombrowski,* 44 Wis. 2d 486, 171 N. W. 2d 349 (1969), the Wisconsin Supreme Court rejecting respondent's contention that certain evidence admitted at the trial had been unconstitutionally seized. Respondent then filed a petition for a writ of habeas corpus in federal district court, asserting the same constitutional claim. The District Court denied the petition but the United States Court of Appeals for the Seventh Circuit reversed, holding that one of the searches was unconstitutional under *Preston* v. *United*
435 *States,* 376 U. S. 364 (1964), and the other unconstitutional *435 for unrelated reasons. 471 F. 2d 280 (1972). We granted certiorari, 409 U. S. 1059 (1972).

I

On September 9, 1969, respondent was a member of the Chicago, Illinois, police force and either owned or possessed a 1960 Dodge automobile. That day he drove from Chicago to West Bend, Wisconsin, the county seat of Washington County, located some hundred-odd miles northwest of Chicago. He was identified as having been in two taverns in the small town of Kewaskum, Wisconsin, seven miles north of West Bend, during the late evening of September 9 and the early morning of September 10. At some time before noon on the 10th, respondent's automobile became disabled, and he had it towed to a farm owned by his brother in Fond du Lac County, which adjoins Washington County on the north. He then drove back to Chicago early that afternoon with his brother in the latter's car.

Just before midnight of the same day, respondent rented a maroon 1967 Ford Thunderbird at O'Hare Field outside of Chicago, and apparently drove back to Wisconsin early the next morning. A tenant on his brother's farm saw a car answering the description of the rented car pull alongside the disabled 1960

Dodge at approximately 4 a. m. At approximately 9:30 a. m. on September 11, respondent purchased two towels, one light brown and the other blue, from a department store in Kewaskum.

From 7 to 10:15 p. m. of the 11th, respondent was in a steak house or tavern in West Bend. He ate dinner and also drank, apparently quite heavily. He left the tavern and drove the 1967 Thunderbird in a direction away from West Bend toward his brother's farm. On the way, respondent had an accident, with the
436 Thunderbird breaking through a guard rail and crashing into a *436 bridge abutment. A passing motorist drove him into Kewaskum, and, after being let off in Kewaskum, respondent telephoned the police. Two police officers picked him up at a tavern and drove to the scene of the accident. On the way, the officers noticed that respondent appeared to be drunk; he offered three conflicting versions of how the accident occurred.

At the scene, the police observed the 1967 Thunderbird and took various measurements relevant to the accident. Respondent was, in the opinion of the officers, drunk. He had informed them that he was a Chicago police officer. The Wisconsin policemen believed that Chicago police officers were required by regulation to carry their service revolvers at all times. After calling a towtruck to remove the disabled Thunderbird, and not finding the revolver on respondent's person, one of the officers looked into the front seat and glove compartment of that car for respondent's service revolver. No revolver was found. The wrecker arrived and the Thunderbird was towed to a privately owned garage in Kewaskum, approximately seven miles from the West Bend police station. It was left outside by the wrecker, and no police guard was posted. At 11:33 p. m. on the 11th respondent was taken directly to the West Bend police station from the accident scene, and, after being interviewed by an assistant district attorney, to whom respondent again stated he was a Chicago policeman, respondent was formally arrested for drunken driving. Respondent was "in a drunken condition" and "incoherent at times." Because of his injuries sustained in the accident, the same two officers took respondent to a local hospital. He lapsed into an unexplained coma, and a doctor, fearing the possibility of complications, had respondent hospitalized overnight for observation. One of the policemen remained at the hospital as a guard, and the other, Officer Weiss, drove at some time after
437 *437 2 a. m. on the 12th to the garage to which the 1967 Thunderbird had been towed after the accident.

The purpose of going to the Thunderbird, as developed on the motion to suppress, was to look for respondent's service revolver. Weiss testified that respondent did not have a revolver when he was arrested, and that the West Bend authorities were under the impression that Chicago police officers were required to carry their service revolvers at all times. He stated that the effort to find the revolver was "standard procedure in our department."

Weiss opened the door of the Thunderbird and found, on the floor of the car, a book of Chicago police regulations and, between the two front seats, a flashlight which appeared to have "a few spots of blood on it." He then opened the trunk of the car, which had been locked, and saw various items covered with what was later determined to be type 0 blood. These included a pair of police uniform trousers, a pair of gray trousers, a nightstick with the name "Dombrowski" stamped on it, a raincoat, a portion of a car floor mat, and a towel. The blood on the car mat was moist. The officer removed these items to the police station.

When, later that day, respondent was confronted with the condition of the items discovered in the trunk, he requested the presence of counsel before making any statement. After conferring with respondent, a lawyer told the police that respondent "authorized me to state he believed there was a body lying near the family picnic area at the north end of his brother's farm."

Fond du Lac County police went to the farm and found, in a dump, the body of a male, later identified as the decedent McKinney, clad only in a sportshirt. The deceased's head was bloody; a white sock was found near the body. In observing the area, one officer looked through the window of the disabled 1960 Dodge,
438 located *438 not far from where the body was found, and saw a pillowcase, backseat, and briefcase covered with blood. Police officials obtained, on the evening of the 12th, returnable within 48 hours, warrants to search the 1960 Dodge and the 1967 Thunderbird, as well as orders to impound both automobiles. The 1960 Dodge was examined at the farm on the 12th and then towed to the police garage where it was held as evidence. On the 13th, criminologists came from the Wisconsin Crime Laboratory in Madison and searched the Dodge; they seized the back and front seats, a white sock covered with blood, a part of a bloody rear floor mat, a briefcase, and a front floor mat. A return of the search warrant was filed in the county court on the 14th, but it did not recite that the sock and floor mat had been seized. At a hearing held on the 14th, the sheriff who executed the warrant did not specifically state that these two items had been seized.

At the trial, the State introduced testimony tending to establish that the deceased was first hit over the head and then shot with a .38-caliber gun, dying approximately an hour after the gunshot wound was inflicted; that death occurred at approximately 7 a. m. on the 11th, with a six-hour margin of error either way; that respondent owned two .38-caliber guns; that respondent had type A blood; that the deceased had type O blood and that the bloodstains found in the 1960 Dodge and on the items found in the two cars were type O.

The prosecution introduced the nightstick discovered in the 1967 Thunderbird, and testimony that it had traces of type O blood on it; the portion of the floor mat found in the 1967 car, with testimony that it matched the portion of the floor mat found in the 1960 Dodge; the bloody towel found in the 1967 car, with testimony that it was identical to one of the towels purchased by respondent on the 11th; the police uniform trousers;
439 and the sock *439 found in the 1960 Dodge, with testimony that it was identical in composition and stitching to that found near the body of the deceased.

The State's case was based wholly on circumstantial evidence. The Supreme Court of Wisconsin, in reviewing the conviction on direct appeal, stated that "even though the evidence that led to his conviction was circumstantial, we have seldom seen a stronger collection of such evidence assembled and presented by the prosecution." *State* v. *Dombrowski,* 44 Wis. 2d, at 507, 171 N. W. 2d, at 360.

II

The Fourth Amendment provides:

> "The 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."

The ultimate standard set forth in the Fourth Amendment is reasonableness. In construing this command, there has been general agreement that "except in certain carefully defined classes of cases, a search of private property without proper consent is `unreasonable' unless it has been authorized by a valid search warrant." *Camara* v. *Municipal Court,* 387 U. S. 523, 528-529 (1967). See *Coolidge* v. *New Hampshire,* 403 U. S. 443, 454-455 (1971). One class of cases which constitutes at least a partial exception to this general

rule is automobile searches. Although vehicles are "effects" within the meaning of the Fourth Amendment, "for the purposes of the Fourth Amendment there is a constitutional difference between houses and cars."
440 *Chambers* v. *Maroney,* 399 U. S. 42, 52 (1970). See *Carroll* v. *United States,* 267 U. S. 132, 153-154 (1925). In *Cooper* v. *California,* 386 U. S. 58, 59 (1967), the identical proposition was stated in different language:

> "We made it clear in *Preston* [v. *United States]* that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment depends upon the facts and circumstances of each case and pointed out, in particular, that searches of cars that are constantly movable may make the search of a car without a warrant a reasonable one although the result might be the opposite in a search of a home, a store, or other fixed piece of property. 376 U. S., at 366-367."

While these general principles are easily stated, the decisions of this Court dealing with the constitutionality of warrantless searches, especially when those searches are of vehicles, suggest that this branch of the law is something less than a seamless web.

Since this Court's decision in *Mapp* v. *Ohio,* 367 U. S. 643 (1961), which overruled *Wolf* v. *Colorado,* 338 U. S. 25 (1949), and held that the provisions of the Fourth Amendment were applicable to the States through the Due Process Clause of the Fourteenth Amendment, the application of Fourth Amendment standards, originally intended to restrict only the Federal Government, to the States presents some difficulty when searches of automobiles are involved. The contact with vehicles by federal law enforcement officers usually, if not always, involves the detection or investigation of crimes unrelated to the operation of a vehicle. Cases such as *Carroll* v. *United States, supra,* and *Brinegar* v. *United States,* 338 U. S. 160 (1949), illustrate the typical situations in which federal officials come into contact with and search vehicles. In both
441 cases, members of a special federal unit charged with enforcing a particular federal criminal statute stopped and searched a vehicle when they had probable cause to believe that the operator was violating that statute.

As a result of our federal system of government, however, state and local police officers, unlike federal officers, have much more contact with vehicles for reasons related to the operation of vehicles themselves. All States require vehicles to be registered and operators to be licensed. States and localities have enacted extensive and detailed codes regulating the condition and manner in which motor vehicles may be operated on public streets and highways.

Because of the extensive regulation of motor vehicles and traffic, and also because of the frequency with which a vehicle can become disabled or involved in an accident on public highways, the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office. Some such contacts will occur because the officer may believe the operator has violated a criminal statute, but many more will not be of that nature. Local police officers, unlike federal officers, frequently investigate vehicle accidents in which there is no claim of criminal liability and engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.

Although the original justification advanced for treating automobiles differently from houses, insofar as warrantless searches of automobiles by federal officers was concerned, was the vagrant and mobile nature of the former, *Carroll* v. *United States, supra; Brinegar* v. *United States, supra;* cf. *Coolidge* v. *New Hampshire, supra; Chambers* v. *Maroney, supra,* warrantless searches of vehicles by state officers have

442 been sustained in cases in which the possibilities of the vehicle's being removed *442 or evidence in it destroyed were remote, if not nonexistent. See *Harris* v. *United States,* 390 U. S. 234 (1968) (District of Columbia police); *Cooper* v. *California, supra*. The constitutional difference between searches of and seizures from houses and similar structures and from vehicles stems both from the ambulatory character of the latter and from the fact that extensive, and often noncriminal contact with automobiles will bring local officials in "plain view" of evidence, fruits, or instrumentalities of a crime, or contraband. Cf. *United States* v. *Biswell,* 406 U. S. 311 (1972).

Here we must decide whether a "search"[†] of the trunk of the 1967 Ford was unreasonable solely because the local officer had not previously obtained a warrant. And, if that be answered in the negative, we must then determine whether the warrantless search was unreasonable within the meaning of the Fourth and Fourteenth Amendments. In answering these questions, two factual considerations deserve emphasis.
443 First, the police had exercised *443 a form of custody or control over the 1967 Thunderbird. Respondent's vehicle was disabled as a result of the accident, and constituted a nuisance along the highway. Respondent, being intoxicated (and later comatose), could not make arrangements to have the vehicle towed and stored. At the direction of the police, and for elemental reasons of safety, the automobile was towed to a private garage. Second, both the state courts and the District Court found as a fact that the search of the trunk to retrieve the revolver was "standard procedure in [that police] department," to protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands. Although the trunk was locked, the car was left outside, in a lot seven miles from the police station to which respondent had been taken, and no guard was posted over it. For reasons not apparent from the opinion of the Court of Appeals, that court concluded that as "no further evidence was needed to sustain" the drunk-driving charge, "[t]he search must therefore have been for incriminating evidence of other offenses." 471 F. 2d, at 283. While that court was obligated to exercise its independent judgment on the underlying constitutional issue presented by the facts of this case, it was not free on this record to disregard these findings of fact. Particularly in nonmetropolitan jurisdictions such as those involved here, enforcement of the traffic laws and supervision of vehicle traffic may be a large part of a police officer's job. We believe that the Court of Appeals should have accepted, as did the state courts and the District Court, the findings with respect to Officer Weiss' specific motivation and the fact that the procedure he followed was "standard."

The Court of Appeals relied, and respondent now relies, primarily on *Preston* v. *United States,* 376 U. S.
444 364 *444 (1964), to conclude that the warrantless search was unconstitutional and the seized items inadmissible. In that case, the police received a telephone call at 3 a. m. from a caller who stated that "three suspicious men acting suspiciously" had been in a car in the business district of Newport, Kentucky, for five hours; four policemen investigated and, after receiving evasive explanations and learning that the suspects were unemployed and apparently indigent, arrested the three for vagrancy. The automobile was cursorily searched, then towed to a police station and ultimately to a garage, where it was searched after the three men had been booked. That search revealed two revolvers in the glove compartment; a subsequent search of the trunk resulted in the seizure of various items later admitted in a prosecution for conspiracy to rob a federally insured bank. In that case the respondent attempted to justify the warrantless search of the trunk and seizure of the items therein "as incidental to a lawful arrest." *Id.,* at 367. The Court rejected the asserted "search incident" justification for the warrantless search in the following terms:

> "But these justifications are absent where a search is remote in time or place from the arrest. Once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest." *Ibid.*

It would be possible to interpret *Preston* broadly, and to argue that it stands for the proposition that on those facts there could have been no constitutional justification advanced for the search. But we take the opinion as written, and hold that it stands only for the proposition that the search challenged there could not be justified as one incident to an arrest. See *Chambers* v. *Maroney, supra; Cooper* v. *California, supra.* We
445 believe that the instant case is controlled by principles *445 that may be extrapolated from *Harris* v. *United States, supra,* and *Cooper* v. *California, supra.*

In *Harris,* petitioner was arrested for robbery. As petitioner's car had been identified leaving the site of the robbery, it was impounded as evidence. A regulation of the District of Columbia Police Department required that an impounded vehicle be searched, that all valuables be removed, and that a tag detailing certain information be placed on the vehicle. In compliance with this regulation, and without a warrant, an officer searched the car and, while opening one of the doors, spotted an automobile registration card, belonging to the victim, lying face up on the metal door stripping. This item was introduced into evidence at petitioner's trial for robbery. In rejecting the contention that the evidence was inadmissible, the Court stated:

> "The admissibility of evidence found as a result of a search under the police regulation is not presented by this case. The precise and detailed findings of the District Court, accepted by the Court of Appeals, were to the effect that the discovery of the card was not the result of a search of the car, but of a measure taken to protect the car while it was in police custody. Nothing in the Fourth Amendment requires the police to obtain a warrant in these narrow circumstances.
>
> "Once the door had lawfully been opened, the registration card . . . was plainly visible. It has long been settled that objects falling in the plain view of an officer who has a right to be in the position to have that view are subject to seizure and may be introduced in evidence." 390 U. S., at 236.

In *Cooper,* the petitioner was arrested for selling heroin, and his car impounded pending forfeiture
446 proceedings. A week later, a police officer searched the car *446 and found, in the glove compartment, incriminating evidence subsequently admitted at petitioner's trial. This Court upheld the validity of the warrantless search and seizure with the following language:

> "This case is not *Preston,* nor is it controlled by it. Here the officers seized petitioner's car because they were required to do so by state law. They seized it because of the crime for which they arrested petitioner. They seized it to impound it and they had to keep it until forfeiture proceedings were concluded. Their subsequent search of the car—whether the State had `legal title' to it or not—was closely related to the reason petitioner was arrested, the reason his car had been impounded, and the reason it was being retained. The forfeiture of petitioner's car did not take place until over four months after it was lawfully seized. It would be unreasonable to hold that the police, having to retain the car in their custody for such a length of time, had no right, even for their own protection, to search it." 386 U. S., at 61-62.

These decisions, while not on all fours with the instant case, lead us to conclude that the intrusion into the trunk of the 1967 Thunderbird at the garage was not unreasonable within the meaning of the Fourth and Fourteenth Amendments solely because a warrant had not been obtained by Officer Weiss after he left the hospital. The police did not have actual, physical custody of the vehicle as in *Harris* and *Cooper,* but the vehicle had been towed there at the officers' directions. These officers in a rural area were simply reacting to the effect of an accident—one of the recurring practical situations that results from the operation of motor

vehicles and with which local police officers must deal every day. The Thunderbird was not parked adjacent
447 *447 to the dwelling place of the owner as in *Coolidge* v. *New Hampshire,* 403 U. S. 443 (1971), nor simply momentarily unoccupied on a street. Rather, like an obviously abandoned vehicle, it represented a nuisance, and there is no suggestion in the record that the officers' action in exercising control over it by having it towed away was unwarranted either in terms of state law or sound police procedure.

In *Harris* the justification for the initial intrusion into the vehicle was to safeguard the owner's property, and in *Cooper* it was to guarantee the safety of the custodians. Here the justification, while different, was as immediate and constitutionally reasonable as those in *Harris* and *Cooper:* concern for the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle. The record contains uncontradicted testimony to support the findings of the state courts and District Court. Furthermore, although there is no record basis for discrediting such testimony, it was corroborated by the circumstantial fact that at the time the search was conducted Officer Weiss was ignorant of the fact that a murder, or any other crime, had been committed. While perhaps in a metropolitan area the responsibility to the general public might have been discharged by the posting of a police guard during the night, what might be normal police procedure in such an area may be neither normal nor possible in Kewaskum, Wisconsin. The fact that the protection of the public might, in the abstract, have been accomplished by "less intrusive" means does not, by itself, render the search unreasonable. Cf. *Chambers* v. *Maroney, supra.*

The Court's previous recognition of the distinction between motor vehicles and dwelling places leads us to conclude that the type of caretaking "search" conducted here of a vehicle that was neither in the custody
448 nor on *448 the premises of its owner, and that had been placed where it was by virtue of lawful police action, was not unreasonable solely because a warrant had not been obtained. The Framers of the Fourth Amendment have given us only the general standard of "unreasonableness" as a guide in determining whether searches and seizures meet the standard of that Amendment in those cases where a warrant is not required. Very little that has been said in our previous decisions, see *Cooper* v. *California, supra, Harris* v. *United States, supra, Chambers* v. *Maroney, supra,* and very little that we might say here can usefully refine the language of the Amendment itself in order to evolve some detailed formula for judging cases such as this. Where, as here, the trunk of an automobile, which the officer reasonably believed to contain a gun, was vulnerable to intrusion by vandals, we hold that the search was not "unreasonable" within the meaning of the Fourth and Fourteenth Amendments.

. . . .

The judgment of the Court of Appeals is Reversed.

991 F.2d 529 (1993)

UNITED STATES of America, Plaintiff-Appellant,
v.
Ronald A. ERICKSON, Defendant-Appellee.

No. 92-30107.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted December 11, 1992.
Decided April 12, 1993.

Sean Connelly, U.S. Dept. of Justice, Washington, DC, for plaintiff-appellant.

Michael Filipovic, Asst. Federal Public Defender, Seattle, WA, for defendant-appellee.

530 *530 Before: WALLACE, Chief Judge, SKOPIL, and LEAVY, Circuit Judges.

WALLACE, Chief Judge:

The government appeals from the district court's order granting Erickson's pretrial motion to suppress evidence seized pursuant to a search of his residence. The sole issue on appeal is whether the probable cause and warrant requirement of the Fourth Amendment apply when a police officer pulls back a plastic sheet covering a window and looks inside a basement during a burglary investigation. The district court had jurisdiction pursuant to 18 U.S.C. § 3231. We have jurisdiction over this timely appeal pursuant to 18 U.S.C. § 3731. We affirm.

I

On the afternoon of December 13, 1990, Officer Justice of the Tacoma Police Department was dispatched to investigate a suspected burglary at 4012 North Orchard in Tacoma. Upon arrival, he and another officer conducted a perimeter search of the premises. The officers found no signs of forced entry. Officer Justice then spoke with two neighbors who told him they had seen two men dragging a large brown plastic bag which appeared to be full of heavy items across the backyard of 4018 North Orchard, the residence adjacent to 4012 North Orchard. The neighbors reported that the men left the bag to retrieve a car, then picked up the bag and drove away. From this conversation, Officer Justice erroneously concluded that the events described by the neighbors had occurred about a half-hour before he arrived. In fact, these events had occurred over an hour earlier.

Officer Justice walked into the backyard of 4018 North Orchard to investigate. While standing in the backyard, he looked into the house through a sliding glass door. The door and the rest of the residence seemed secure and no one appeared to be home. Officer Justice did not knock on the back door. Continuing his investigation, he came upon an open basement window. A fan occupied part of the open window, but enough space remained for someone to have gained entry. A black plastic sheet covered the open window.

Although Officer Justice did not see any signs of forced entry, he pulled back the plastic from the open window and looked inside the basement. Officer Justice testified that he did so in order to determine whether this residence had been burglarized. He saw numerous marijuana plants and smelled marijuana. Officer Justice immediately stopped looking in the window and contacted a supervisor to prepare an application for a search warrant. The police executed the warrant the same day and seized marijuana plants, cultivation equipment, and documentary evidence. The police also determined that the residence at 4018 North Orchard had in fact been burglarized and that numerous marijuana plants had been taken.

In a superseding indictment, the government charged Erickson with one count of conspiring to manufacture, distribute, and possess marijuana, three counts of possessing marijuana with intent to distribute, and three counts of financial structuring, in violation of 21 U.S.C. §§ 846 and 841(a)(1) and 18 U.S.C. § 1956(a)(1)(B)(i). Erickson moved to suppress the evidence obtained from his residence, arguing that Officer Justice's initial search violated the Fourth Amendment. In a written order clarifying an earlier oral decision, the district court concluded that exigent circumstances did not justify Officer Justice's warrantless search of Erickson's residence, and therefore granted the motion to suppress.

II

We review de novo the lawfulness of a search. *United States v. Chen,* 979 F.2d 714, 716 (9th Cir.1992).

It is common ground that the search pursuant to the warrant was impermissible unless the initial viewing was valid. *Nardone v. United States,* 308 U.S. 338, 341, 60 S.Ct. 266, 267-68, 84 L.Ed. 307 (1939). In addition, the government does not dispute the district court's finding that exigent circumstances did not
531 exist. Rather, *531 the government contends that the district court erred in applying its Fourth Amendment analysis. According to the government, Officer Justice was performing one of his "community caretaking functions" when he pulled back the plastic sheet and looked inside Erickson's basement. The government asserts that such a caretaking search, undertaken to protect the residents of 4018 North Orchard rather than make a criminal case against them, is permissible without a warrant or probable cause as long as the officer acted reasonably under the circumstances. The government contends that Officer Justice reasonably discharged his community caretaking responsibilities and that the district court thus erred in suppressing the evidence obtained from the warrantless search of Erickson's residence.

The Supreme Court used the phrase "community caretaking functions" in *Cady v. Dombrowski,* 413 U.S. 433, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973) (*Cady*). Cady, an off-duty Chicago policeman, became intoxicated and ran his car off the road near Kewaskum, Wisconsin. After towing the disabled car and leaving it outside a nearby garage, Kewaskum police officers arrested Cady for drunk driving. Based on the impression that Chicago police officers must carry their service revolvers with them at all times and pursuant to standard departmental procedures, one of the arresting officers searched Cady's car for the gun. The officer did not obtain a search warrant. During the search, the officer discovered evidence linking Cady to a recent homicide. Cady appealed his eventual conviction for first-degree murder and argued that the automobile search violated the Fourth Amendment. The Supreme Court recognized that, by necessity, local police officers often must "engage in what, for want of a better term, may be 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, 93 S.Ct. at 2528. The Court held that the search of Cady's car was incident to the caretaking function of the local police to protect "the safety of the general public who might be endangered if an intruder removed a revolver from the trunk of the vehicle." *Id.* at 447, 93 S.Ct. at 2531. Because the police had reasonably believed that Cady's car contained a gun, the Court upheld the

warrantless search of Cady's car. *Id.* at 447-48, 93 S.Ct. at 2531. The seizure of the incriminating evidence found during the search was therefore valid.

It cannot be gainsaid that the societal role played by local police officers extends well beyond their criminal enforcement activities. "[I]n addition to being an enforcer of the criminal law," a police officer "is a `jack-of-all-emergencies.'" *United States v. Rodriguez-Morales,* 929 F.2d 780, 784 (1st Cir.1991), *quoting* W. LaFave, *Search and Seizure* § 5.4(c), at 525 (2d ed. 1987), *cert. denied,* ___ U.S. ___, 112 S.Ct. 868, 116 L.Ed.2d 774 (1992). He is "expected to aid those in distress, combat actual hazards, prevent potential hazards from materializing, and provide an infinite variety of services to preserve and protect community safety." *Id.* at 784-85. Investigating reports of burglaries undoubtedly qualifies as one of these community caretaking functions.

The fact that a police officer is performing a community caretaking function, however, cannot itself justify a warrantless search of a private residence. In determining whether a search is reasonable 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. *Maryland v. Buie,* 494 U.S. 325, 331, 110 S.Ct. 1093, 1097, 108 L.Ed.2d 276 (1990). "Under this test, a search of the house or office is generally not reasonable without a warrant issued on probable cause." *Id.*

The government argues that the warrant requirement should not apply here because Officer Justice was not trying to make a criminal case against Erickson. But the Court has long rejected such a cramped view of the Fourth Amendment. The right to be free from unreasonable searches and seizures does not extend
532 only *532 to those who are suspected of criminal behavior. *See Camara v. Municipal Court,* 387 U.S. 523, 530, 87 S.Ct. 1727, 1731, 18 L.Ed.2d 930 (1967). On the contrary, "even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority." *Id.* at 530-31, 87 S.Ct. at 1732. The warrantless search of Erickson's residence was not justified by any of the established exceptions to the warrant requirement, such as consent or exigent circumstances. Thus, it was "presumptively unreasonable." *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980).

The cases relied on by the government do not cause us to view this case otherwise. Although it involved a community caretaking function, *Cady* clearly turned on the "`constitutional difference'" between searching a house and searching an automobile. 413 U.S. at 439, 93 S.Ct. at 2527, *quoting Chambers v. Maroney,* 399 U.S. 42, 52, 90 S.Ct. 1975, 1982, 26 L.Ed.2d 419 (1970). Because of the pervasive regulation of motor vehicles, which often calls on law enforcement officials to stop and examine cars, and because of the frequency with which cars break down or become involved in accidents on public roads, "the extent of police-citizen contact involving automobiles will be substantially greater than police-citizen contact in a home or office." *Id.* at 441, 93 S.Ct. at 2528. As a result of this frequent contact, "the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office." *South Dakota v. Opperman,* 428 U.S. 364, 367, 96 S.Ct. 3092, 3096, 49 L.Ed.2d 1000 (1976); *Cady,* 413 U.S. at 439, 442, 93 S.Ct. at 2527, 2528. In upholding the search of Cady's automobile, the Court expressly relied on its "previous recognition of the distinction between motor vehicles and dwelling places." 413 U.S. at 447-48, 93 S.Ct. at 2531. We agree with the conclusion of the Seventh Circuit that the Court in *Cady* "intended to confine the holding to the automobile exception and to foreclose an expansive construction of the decision allowing warrantless searches of private homes or businesses." *United States v. Pichany,* 687 F.2d 204, 209 (7th Cir.1982) (refusing to extend community caretaking exception to warrantless search of warehouse).

The government can point to only one case that discussed the police's community caretaking functions in a context other than a search of an automobile. *See* *United States v. Singer,* 687 F.2d 1135 (8th Cir.1982) (*Singer*), *adopted in relevant part,* 710 F.2d 431 (8th Cir.1983) (en banc). In that case, the Eighth Circuit properly pointed out that a police officer's community caretaking functions "include responding to notice of what appeared to be a burglary in progress." *Id.* at 1144. The court, however, expressly held that exigent circumstances justified the warrantless entry at issue. *Id.* Because exigent circumstances did not exist in this case, *Singer* is of no help to the government.

The warrantless search of a private residence strikes at the heart of the Fourth Amendment's protections. "The right of officers to thrust themselves into a home is ... a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). The government here contends that community safety demands that a police officer, without a warrant or probable cause, and in the absence of exigent circumstances, be allowed to conduct a search of a private home to determine if a crime has occurred. However, "[i]t is precisely this kind of judgmental assessment of the reasonableness and scope of a proposed search that the Fourth Amendment requires be made by a neutral and objective magistrate, not a police officer." *Mincey v. Arizona,* 437 U.S. 385, 395, 98 S.Ct. 2408, 2414-2415, 57 L.Ed.2d 290 (1978).

Quite unlike the automobile search performed in *Cady,* the warrantless search of Erickson's home constituted a severe invasion of privacy. The fact that Officer Justice may have been performing a community caretaking function at the time cannot alone justify this intrusion.

533 *533 Of course, to say that a police officer may not conduct a warrantless search of a residence merely because he is performing a community caretaking function does not mean that such a search may never be made. In a wide variety of contexts, this and other circuits have upheld warrantless searches conducted during burglary investigations under the rubric of exigent circumstances. In *United States v. Valles-Valencia,* 811 F.2d 1232 (9th Cir.), *amended,* 823 F.2d 381 (9th Cir.1987), for example, the police responded to a report that strangers were parked in front of a nearby house, the owners of which were on vacation. The strangers who were questioned by the police could not adequately explain their presence and a front window showed signs of being pried open. The police also smelled marijuana. Suspecting that a burglary was in progress, the police entered the house. They discovered a cache of controlled substances. We concluded that "[t]he circumstances known to the officers" suggested that a burglary was in progress and "supported probable cause to enter the building to learn what was happening." *Id.* at 1236. Because exigent circumstances justified the initial warrantless entry into the house, we upheld the search. *Id.; see also* *United States v. Dart,* 747 F.2d 263, 267 (4th Cir.1984) (upholding initial warrantless search of warehouse where locks sawed off and door forced open); *Singer,* 687 F.2d at 1144 (upholding warrantless entry of residence where circumstances indicated burglary in progress); *United States v. Estese,* 479 F.2d 1273, 1274 (6th Cir.1973) (upholding warrantless search where police observed signs that apartment door had been pried open).

The important responsibility of the police to investigate reported burglaries must be balanced against the serious invasions of privacy such searches entail. As the above cases demonstrate, the exigent circumstances exception to the warrant requirement adequately accommodates these competing interests. The government does not challenge on appeal the district court's finding that exigent circumstances did not exist in this case. We therefore do not pass upon that ruling.

AFFIRMED.

448 F.3d 1005 (2006)

UNITED STATES of America, Appellee,
v.
Christopher QUEZADA, Appellant.

No. 05-3254.

United States Court of Appeals, Eighth Circuit.

Submitted: February 15, 2006.
Filed: April 10, 2006.

1006 *1006 Jess E. Michaelsen, U.S. Attorney's Office, Kansas City, MO, for Appellee.

Stephen Carl Moss, Federal Public Defender's Office, Kansas City, MO, for Appellant.

Christopher Quezada, Osceola, MO, pro se.

Before WOLLMAN, FAGG, and ARNOLD, Circuit Judges.

ARNOLD, Circuit Judge.

After being found with a shotgun, Christopher Quezada was charged with being a felon in possession of a firearm, *see* 18 U.S.C. § 922(g)(1). He moved to suppress the admission of the shotgun into evidence, arguing that the deputy sheriff who discovered the gun had no lawful basis for entering the apartment in which he found it. The district court[1] denied the motion, concluding that the entry was permissible under the deputy's community caretaker function. Mr. Quezada appeals the denial of the suppression motion. We affirm.

I.

The Clay County, Missouri, Sheriff's Department often serves papers in civil proceedings. In this case, Deputy Danny Ruth went to Tiffany Giannone's apartment to serve her with a child protection order. The deputy had been to Ms. Giannone's apartment in the past and believed that she lived alone.

Deputy Ruth knocked on the apartment door. Although the door had been closed, the latch was not engaged; the door therefore yielded to the deputy's knock. Through the gap in the door, the deputy could see that the lights were on in the apartment and he heard a television playing. He shouted, "Deputy Sheriff, Sheriff's Department!," into the apartment several times, but received no response. Deputy Ruth then called his dispatcher and told him of the open door; the dispatcher in turn "held the air" (stopped all other radio traffic) so that fellow police officers could hear if the deputy needed assistance. With the radio silenced and his weapon drawn, Deputy Ruth opened the door further and went inside.

Soon after entering the apartment, Deputy Ruth looked down a hallway. There he saw a pair of legs on the ground sticking out from a bedroom. As he got closer, the deputy discovered that the legs belonged to a man lying on the ground with a shotgun protruding from beneath him. Deputy Ruth yelled but received no

reply. He kicked the man's feet to no avail. Only when the deputy took the shotgun from underneath the man did he begin to stir.

After being handcuffed and moved to the living room, the man said that his name was Carlos Pacheco and that he was staying in the apartment at Ms. Giannone's invitation. Further investigation revealed, however, that the man's true name was Christopher Quezada and that he had previously been convicted of felony
1007 theft. A *1007 grand jury indicted Mr. Quezada for being a felon in possession of a firearm in violation of § 922(g)(1). After the district court denied his motion to suppress, Mr. Quezada entered a conditional guilty plea, reserving the right to appeal the district court's ruling. *See* Fed.R.Crim.P. 11(a)(2).

II.

Mr. Quezada maintains that Deputy Ruth's entry into the apartment was unreasonable. Government officials may not conduct unreasonable searches or seizures without running afoul of the fourth amendment. Generally speaking, evidence gained from a fourth-amendment violation may not be used against a defendant at trial. *See* *Mapp v. Ohio,* 367 U.S. 643, 654-55, 81 S.Ct. 1684, 6 L.Ed.2d 1081 (1961); *Weeks v. United States,* 232 U.S. 383, 391-93, 398, 34 S.Ct. 341, 58 L.Ed. 652 (1914). We review the district court's denial of the motion to suppress *de novo.* *United States v. Williams,* 429 F.3d 767, 771 (8th Cir.2005).

We note at the outset that there is a difference between the standards that apply when an officer makes a warrantless entry when acting as a so-called community caretaker and when he or she makes a warrantless entry to investigate a crime. Police officers, unlike other public employees, tend to be "jacks of all trades," who often act in ways totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of criminal law. *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523, 37 L.Ed.2d 706 (1973). These activities, which are undertaken to help those in danger and to protect property, are part of the officer's "community caretaking functions." *Id.* They are unrelated to the officer's duty to investigate and uncover criminal activity. A police officer may enter a residence without a warrant as a community caretaker where the officer has a reasonable belief that an emergency exists requiring his or her attention. *Mincey v. Arizona,* 437 U.S. 385, 392-93, 98 S.Ct. 2408, 57 L.Ed.2d 290 (1978); *United States v. Nord,* 586 F.2d 1288, 1291 n. 5 (8th Cir.1978).

When acting to investigate and uncover crime, on the other hand, a police officer acts at the core of his or her duties; it is to these types of actions that the warrant clause of the fourth amendment is directed. *See* *Johnson v. United States,* 333 U.S. 10, 14, 68 S.Ct. 367, 92 L.Ed. 436 (1948). A warrantless entry in such circumstances must be justified by probable cause to believe that a crime has been or is being committed and the existence of what are called exigent circumstances. Examples of such circumstances are when an officer is in hot pursuit of a fleeing felon, and when an officer reasonably fears the imminent destruction of evidence or reasonably perceives a risk of danger to the police or others. *Minnesota v. Olson,* 495 U.S. 91, 100, 110 S.Ct. 1684, 109 L.Ed.2d 85 (1990).

The Supreme Court has held that reasonable belief, the standard used when determining whether an officer may enter as a community caretaker, *see* *Mincey,* 437 U.S. at 392-93, 98 S.Ct. 2408, is a less exacting standard than probable cause. *Maryland v. Buie,* 494 U.S. 325, 336-37, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990). This has led to some concern that a police officer might use his or her caretaking responsibilities as a pretext for entering a residence. The Ninth Circuit, therefore, has held that to justify an entry like the one in the present case an officer must have actually believed that an emergency existed and

the belief must have primarily motivated his or her actions. *See United States v. Cervantes,* 219 F.3d 882, 890 (9th Cir.2000), *cert. denied,* 532 U.S. 912, 121 S.Ct. 1242, 149 L.Ed.2d 150 (2001). This is contrary to
1008 the principle applicable when *1008 an entry is justified by probable cause to believe that a violation of law has occurred or is occurring; in those situations, the subjective intent of the officer is immaterial, *see Whren v. United States,* 517 U.S. 806, 813, 116 S.Ct. 1769, 135 L.Ed.2d 89 (1996).

But we do not have to decide the legal relevance, if any, that the subjective intent of the officer in the present case might have because the district court found on an ample record that Deputy Ruth entered the apartment to investigate a possible emergency situation. In fact, Mr. Quezada does not even assert that Deputy Ruth did not believe that an emergency existed or that he used this belief as a pretext to search for criminal wrongdoing. Deputy Ruth's entry into the apartment therefore violated the fourth amendment only if no reasonable officer could have believed that an emergency was at hand.

We agree with the district court that Deputy Ruth's belief was reasonable. Had the apartment been dark and quiet, it might have been reasonable to assume that Ms. Giannone had simply not closed the door securely on her way out. But when the door opened, Deputy Ruth saw that the lights were on and heard a television playing, making it more likely that someone was at home. When Deputy Ruth yelled into the apartment several times but received no answer, a reasonable officer in the deputy's position could conclude that someone was inside but was unable to respond for some reason. Because Deputy Ruth had a lawful basis for entering Ms. Giannone's apartment, the shotgun that he saw protruding from beneath Mr. Quezada is admissible under the plain-view doctrine. *See Arizona v. Hicks,* 480 U.S. 321, 326, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987); *see also Coolidge v. New Hampshire,* 403 U.S. 443, 465, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971) (plurality opinion).

III.

For the foregoing reasons, we affirm the district court's denial of Mr. Quezada's motion to suppress.

[1] The Honorable Ortrie D. Smith, United States District Judge for the Western District of Missouri.

895 F.2d 1026 (5th Cir. 1990)

UNITED STATES of America, Plaintiff-Appellee,

v.

Ellis Wayne YORK Defendant-Appellant.

United States Court of Appeals, Fifth Circuit
Feb 21, 1990

February 21, 1990. Rehearing and Rehearing En Banc Denied February 21, 1027 1990. *1027

Alexander Bunin, Edward A. Mallett, Houston, Tex., for defendant-appellant.

James L. Turner, Paula Offenhauser, Frances H. Stacy, Asst. U.S. Atty., Henry K. Oncken, U.S. Atty., Houston, Tex., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before CLARK, Chief Judge, POLITZ and WILLIAMS, Circuit Judges.

CLARK, Chief Judge:

I.

Ellis Wayne York appeals his conviction on one count of receipt of a firearm by a convicted felon and one count of possession of a firearm by a convicted felon in violation of 18 U.S.C. §§ 922(h)(1) and 924(a). York contends that the district court erred in refusing to suppress evidence gained on the authority of a search warrant issued on the basis of information gathered by police in violation of the fourth amendment. We affirm.

II.

On April 11, 1986, a deputy of the Harris County, Texas, Sheriff's Office responded to a disturbance call in Crosby, Texas. When the deputy reached the reported location, he found a man named Bill and his two minor sons waiting on the street. (Bill was never further identified. He did not participate in York's trial.) Upon their arrival, Bill told the officers that he and his family had been living as guests in York's home, located nearby. Bill complained that York had come home drunk that evening and had threatened Bill and his children. Bill had then departed with his two sons, leaving behind his daughter who was taking a bath at the time. Bill asked the deputy to accompany him to York's house so that he and his family could peacefully remove their belongings and leave permanently.

The responding deputy and two other deputies then took Bill and his
1028 sons to *1028 York's home two blocks away. The deputies radioed their dispatcher to telephone the daughter inside the home and ask her to step outside so that they could assess the situation. When this was done, the daughter came outside and met the deputies. She told them that she believed York was in his bedroom asleep. Bill and his family then led the deputies into the house, and the family began loading their belongings into Bill's truck and the daughter's car. The officers entered and stood inside the entrance foyer which opened into the living room of the house. From that point, they could see a glass-fronted gun cabinet located in the living room. Several guns inside the cabinet were visible. One appeared to be an Uzi machine gun and another a Thompson sub-machine gun. The deputies did not touch the gun cabinet or the guns.

While Bill and his family were removing their belongings, York came from the back of the house and ordered the officers to leave. He was belligerent and appeared intoxicated. After arguing with the deputies, York stated that he wanted to call his attorney, and he walked toward the back of the house. One of the deputies followed York into a bedroom where he observed York try in vain to contact his attorney by telephone. From his position in the bedroom, the deputy observed a pistol lying on York's nightstand and a sawed-off shotgun propped against the wall near the bed. As soon as Bill and his family finished loading their goods, the deputies escorted them to another residence.

Believing that it was illegal for a civilian to own some of the weapons he had observed in York's living-room gun case, one of the deputies later contacted the Federal Bureau of Alcohol, Tobacco and Firearms ("ATF") and reported seeing the guns. Upon investigation, ATF agents determined that York had been convicted of burglary in Arkansas in 1962 and 1963. The agents obtained a search warrant for York's home based on the deputy's report and seized the guns. York was later convicted of illegally receiving and possessing firearms. He was fined $15,000 and was sentenced to five years supervised probation for each count.

III.

On appeal York argues that the district court erred in refusing to suppress the evidence gained through the ATF search warrant. He contends that the deputies' warrantless entry into his home violated his rights under the fourth amendment to the Constitution and that the search warrant was therefore issued on the basis of information gained improperly.

The definition of "search" as that term is used in the fourth amendment is discussed in National Treasury Employees Union v. Von Raab, 816 F.2d 170 (5th Cir. 1987), a'd in part, vacated in part and remanded, ___ U.S. ___, 109 S.Ct. 1384, 103 L.Ed.2d 685 (1989). We stated:

> A search occurs when the government infringes "an expectation of privacy that society is prepared to consider reasonable" ... Not all invasions of privacy or interferences with liberty or property, then, are searches or seizures. Before the infringement can be labeled

> either "search" or "seizure," in the sense in which those words are used in the fourth amendment, the government action *must be unreasonable or constitute a meaningful interference.* These criteria are implied from the very use of the terms, "search" and "seizure." In addition, by its express text, the amendment prohibits only those searches and seizures that are unreasonable in the particular circumstances in which they are performed.

816 F.2d at 175 (*quoting United States v. Jacobsen,* 466 U.S. 109, 113, 104 S.Ct. 1652, 1656, 80 L.Ed.2d 85 (1984)) (emphasis in original). Thus, we established a two-step analysis for determining whether a governmental activity activates the fourth amendment. This court first considers whether the activity intrudes upon a reasonable expectation of privacy in such a significant way to make the activity a "search." Then, if we find a "search" has occurred, we determine whether the governmental intrusion was unreasonable given the particular
1029 facts of the case. *Id.; see also* *1029 *United States v. Johnson,* 431 F.2d 441 (5th Cir. 1970) (en banc).

IV.

The Supreme Court has often recognized that "[i]t is a `basic principle of Fourth Amendment law' that searches and seizures inside a home without a warrant are presumptively unreasonable." *Payton v. New York,* 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980). *See, e.g., Steagald v. United States,* 451 U.S. 204, 101 S.Ct. 1642, 68 L.Ed.2d 38 (1981); *Coolidge v. New Hampshire,* 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971). Indeed, the right to be free from unreasonable government intrusion into one's own home is a cornerstone of the liberties protected by the fourth amendment. *Payton,* 445 U.S. at 583-589, 100 S.Ct. at 1378-1382. Yet, although the right to privacy in the home is certainly a reasonable expectation, it has also been noted that this expectation can be reduced as a result of the activities of the home's occupants. *See United States v. Taborda,* 635 F.2d 131, 138-39 (2d Cir. 1980). For instance, occupants who leave window curtains or blinds open expose themselves to the public's scrutiny of activities within that part of the house that can be seen from outside the premises. The police may look into that opening from any point in a public thoroughfare or sidewalk without engaging in a fourth amendment search, *Taborda,* 635 F.2d at 138-39;

Cf. United States v. Burns, 624 F.2d 95 (10th Cir. 1980), *cert. denied,* 449 U.S. 954, 101 S.Ct. 361, 66 L.Ed.2d 219 (1980) (Overhearing a loud conversation in a hotel was not a search.); *United States v. Orozco,* 590 F.2d 789 (9th Cir.), *cert. denied,* 442 U.S. 920, 99 S.Ct. 2845, 61 L.Ed.2d 288 (1979) (Looking through a car window was not a search.), even though a "search" would have occurred if the same view had been obtained at a time when the curtains were closed. *See Katz v. United States,* 389 U.S. 347, 351, 88 S.Ct. 507, 511, 19 L.Ed.2d 576 (1967) ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection.")

Similarly, activities or circumstances within a dwelling may lessen the owner's reasonable expectation of privacy by creating a risk of intrusion which is "reasonably foreseeable." *See United States v. Bomengo,* 580 F.2d 173 (5th Cir. 1978), *cert. denied,* 439 U.S. 1117, 99 S.Ct. 1022, 59 L.Ed.2d 75 (1979). In Bomengo, the maintenance engineer of an apartment complex noticed water leaking from Bomengo's apartment. After trying unsuccessfully to locate Bomengo, the engineer entered the apartment to see if its occupants were sick or disabled and to inspect the severity of the water leak. While in the apartment, the engineer saw in plain view, through an open closet door, two pistols with attached silencers. The engineer notified the apartment complex security guard, who contacted the police. A police detective then entered the apartment with the engineer and viewed the guns. The detective then obtained a search warrant which led to Bomengo's arrest and conviction. We held that the warrantless entry of the detective into Bomengo's home was not a search for fourth amendment purposes because the detective had proceeded no farther in his investigation of the premises than the private citizens had already gone and because "the efforts of the apartment employees to deal with the leaking water were not illegal and were a *reasonably foreseeable intrusion of privacy."* 580 F.2d at 176 (emphasis supplied).

In the present case the actions of the Harris County deputies were made reasonably foreseeable when York became intoxicated and belligerent and threatened Bill and his children, whom he had allowed to occupy his home. Had Bill lacked this permitted nexus with the interior of York's home, Bill's reaction to York's abusive treatment probably would not have authorized the deputies to step inside York's home. But because Bill and his children

were guests, invited to live for a time in York's home, the threatening actions of York combined with this permitted occupancy to make it reasonable for Bill to enlist the aid of the police in removing from York's
1030 premises possessions that were incidents of his family's daily life. *1030 York's threats of violence to Bill and his children made it foreseeable that Bill would seek help in removing his possessions. The actions of the deputies, "for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski,* 413 U.S. 433, 441, 93 S.Ct. 2523, 2528, 37 L.Ed.2d 706 (1973) (Many police activities involving the custody of motor vehicles are within the caretaking function of the police, and this may work to make a vehicle inspection or search reasonable.); *see also United States v. Coleman,* 628 F.2d 961, 965 (6th Cir. 1980).

When York invited Bill and his family to share his residence, he necessarily invited the normal incidents of joint occupancy, including the introduction of property belonging to Bill which Bill retained the right to remove when his invitee status ended. Likewise, when York became intoxicated and belligerent, it was reasonable to expect that Bill might ask police officers to make a limited entry into the house to keep the peace while he removed his family and personal possessions. We need not decide whether Bill also had the authority to give valid consent for a search of the premises. The police initially entered only the first room of the dwelling. From that point, where they had a right to be as peacekeepers, they had a plain view of the guns which prompted the call to the ATF. This reasonable police action did not violate any privacy interest York had in his home in view of his invitation to Bill's family to occupy the house and York's actions earlier in the evening. No fourth amendment "search" took place.

V.

The judgment of the district court is AFFIRMED.

SELECTED CASE LAW
ISSUE TWO: SIXTH AMENDMENT CASES

466 U.S. 668 (1984)

STRICKLAND, SUPERINTENDENT, FLORIDA STATE PRISON, ET AL.
v.
WASHINGTON

No. 82-1554.

Supreme Court of United States.

Argued January 10, 1984
Decided May 14, 1984
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

670 *670 *Carolyn M. Snurkowski,* Assistant Attorney General of Florida, argued the cause for petitioners. On the briefs were *Jim Smith,* Attorney General, and *Calvin L. Fox,* Assistant Attorney General.

Richard E. Shapiro argued the cause for respondent. With him on the brief was *Joseph H. Rodriguez.*[*]

Richard J. Wilson, Charles S. Sims, and *Burt Neuborne* filed a brief for the National Legal Aid and Defender Association et al. as *amici curiae* urging affirmance.

671 *671 JUSTICE O'CONNOR delivered the opinion of the Court.

This case requires us to consider the proper standards for judging a criminal defendant's contention that the Constitution requires a conviction or death sentence to be set aside because counsel's assistance at the trial or sentencing was ineffective.

I

A

During a 10-day period in September 1976, respondent planned and committed three groups of crimes,
672 which included *672 three brutal stabbing murders, torture, kidnaping, severe assaults, attempted murders, attempted extortion, and theft. After his two accomplices were arrested, respondent surrendered to police and voluntarily gave a lengthy statement confessing to the third of the criminal episodes. The State of Florida indicted respondent for kidnaping and murder and appointed an experienced criminal lawyer to represent him.

Counsel actively pursued pretrial motions and discovery. He cut his efforts short, however, and he experienced a sense of hopelessness about the case, when he learned that, against his specific advice, respondent had also confessed to the first two murders. By the date set for trial, respondent was subject to indictment for three counts of first-degree murder and multiple counts of robbery, kidnaping for ransom, breaking and entering and assault, attempted murder, and conspiracy to commit robbery. Respondent waived his right to a jury trial, again acting against counsel's advice, and pleaded guilty to all charges, including the three capital murder charges.

In the plea colloquy, respondent told the trial judge that, although he had committed a string of burglaries, he had no significant prior criminal record and that at the time of his criminal spree he was under extreme stress caused by his inability to support his family. App. 50-53. He also stated, however, that he accepted responsibility for the crimes. *E. g., id.,* at 54, 57. The trial judge told respondent that he had "a great deal of respect for people who are willing to step forward and admit their responsibility" but that he was making no statement at all about his likely sentencing decision. *Id.,* at 62.

Counsel advised respondent to invoke his right under Florida law to an advisory jury at his capital sentencing hearing. Respondent rejected the advice and waived the right. He chose instead to be sentenced by the trial judge without a jury recommendation.

In preparing for the sentencing hearing, counsel spoke with respondent about his background. He also
673 spoke on *673 the telephone with respondent's wife and mother, though he did not follow up on the one unsuccessful effort to meet with them. He did not otherwise seek out character witnesses for respondent. App. to Pet. for Cert. A265. Nor did he request a psychiatric examination, since his conversations with his client gave no indication that respondent had psychological problems. *Id.,* at A266.

Counsel decided not to present and hence not to look further for evidence concerning respondent's character and emotional state. That decision reflected trial counsel's sense of hopelessness about overcoming the evidentiary effect of respondent's confessions to the gruesome crimes. See *id.,* at A282. It also reflected the judgment that it was advisable to rely on the plea colloquy for evidence about respondent's background and about his claim of emotional stress: the plea colloquy communicated sufficient information about these subjects, and by forgoing the opportunity to present new evidence on these subjects, counsel prevented the State from cross-examining respondent on his claim and from putting on psychiatric evidence of its own. *Id.,* at A223-A225.

Counsel also excluded from the sentencing hearing other evidence he thought was potentially damaging. He successfully moved to exclude respondent's "rap sheet." *Id.,* at A227; App. 311. Because he judged that a presentence report might prove more detrimental than helpful, as it would have included respondent's criminal history and thereby would have undermined the claim of no significant history of criminal activity, he did not request that one be prepared. App. to Pet. for Cert. A227-A228, A265-A266.

At the sentencing hearing, counsel's strategy was based primarily on the trial judge's remarks at the plea colloquy as well as on his reputation as a sentencing judge who thought it important for a convicted defendant to own up to his crime. Counsel argued that respondent's remorse and acceptance of responsibility justified sparing him from the death penalty. *Id.,* at A265-A266. Counsel also argued that
674 respondent had no history of criminal activity and that respondent committed *674 the crimes under extreme mental or emotional disturbance, thus coming within the statutory list of mitigating circumstances. He further argued that respondent should be spared death because he had surrendered, confessed, and offered to testify against a codefendant and because respondent was fundamentally a good person who had briefly gone badly wrong in extremely stressful circumstances. The State put on evidence and witnesses largely for the purpose of describing the details of the crimes. Counsel did not cross-examine the medical experts who testified about the manner of death of respondent's victims.

The trial judge found several aggravating circumstances with respect to each of the three murders. He found that all three murders were especially heinous, atrocious, and cruel, all involving repeated stabbings. All three murders were committed in the course of at least one other dangerous and violent felony, and since all involved robbery, the murders were for pecuniary gain. All three murders were committed to avoid

arrest for the accompanying crimes and to hinder law enforcement. In the course of one of the murders, respondent knowingly subjected numerous persons to a grave risk of death by deliberately stabbing and shooting the murder victim's sisters-in-law, who sustained severe — in one case, ultimately fatal — injuries.

With respect to mitigating circumstances, the trial judge made the same findings for all three capital murders. First, although there was no admitted evidence of prior convictions, respondent had stated that he had engaged in a course of stealing. In any case, even if respondent had no significant history of criminal activity, the aggravating circumstances "would still clearly far outweigh" that mitigating factor. Second, the judge found that, during all three crimes, respondent was not suffering from extreme mental or emotional disturbance and could appreciate the criminality of his acts. Third, none of the victims was a participant in, or consented to, respondent's conduct. Fourth, respondent's *675 participation in the crimes was neither minor nor the result of duress or domination by an accomplice. Finally, respondent's age (26) could not be considered a factor in mitigation, especially when viewed in light of respondent's planning of the crimes and disposition of the proceeds of the various accompanying thefts.

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In short, the trial judge found numerous aggravating circumstances and no (or a single comparatively insignificant) mitigating circumstance. With respect to each of the three convictions for capital murder, the trial judge concluded: "A careful consideration of all matters presented to the court impels the conclusion that there are insufficient mitigating circumstances. . . to outweigh the aggravating circumstances." See *Washington* v. *State,* 362 So. 2d 658, 663-664 (Fla. 1978) (quoting trial court findings), cert. denied, 441 U. S. 937 (1979). He therefore sentenced respondent to death on each of the three counts of murder and to prison terms for the other crimes. The Florida Supreme Court upheld the convictions and sentences on direct appeal.

. . . .

II

In a long line of cases that includes *Powell* v. *Alabama,* 287 U. S. 45 (1932), *Johnson* v. *Zerbst,* 304 U. S. 458 (1938), and *Gideon* v. *Wainwright,* 372 U. S. 335 (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial.
685 The Constitution guarantees a fair trial through *685 the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:

> "In 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 defence."

Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. *Adams* v. *United States ex rel. McCann,* 317 U. S. 269, 275, 276 (1942); see *Powell* v. *Alabama, supra,* at 68-69.

Because of the vital importance of counsel's assistance, this Court has held that, with certain exceptions, a person accused of a federal or state crime has the right to have counsel appointed if retained counsel cannot be obtained. See *Argersinger* v. *Hamlin,* 407 U. S. 25 (1972); *Gideon* v. *Wainwright, supra; Johnson* v. *Zerbst, supra.* That a person who happens to be a lawyer is present at trial alongside the accused, however, is not enough to satisfy the constitutional command. The Sixth Amendment recognizes the right to the assistance of counsel because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results. An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair.

686 *686 For that reason, the Court has recognized that "the right to counsel is the right to the effective assistance of counsel." *McMann* v. *Richardson,* 397 U. S. 759, 771, n. 14 (1970). Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See, *e. g., Geders* v. *United States,* 425 U. S. 80 (1976) (bar on attorney-client consultation during overnight recess); *Herring* v. *New York,* 422 U. S. 853 (1975) (bar on summation at bench trial); *Brooks* v. *Tennessee,* 406 U. S. 605, 612-613 (1972) (requirement that defendant be first defense witness); *Ferguson* v. *Georgia,* 365 U. S. 570, 593-596 (1961) (bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render "adequate legal assistance," *Cuyler* v. *Sullivan,* 446 U. S., at 344. *Id.,* at 345-350 (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective).

The Court has not elaborated on the meaning of the constitutional requirement of effective assistance in the latter class of cases — that is, those presenting claims of "actual ineffectiveness." In giving meaning to the requirement, however, we must take its purpose — to ensure a fair trial — as the guide. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result.

687 . . . .

III

A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable.

A

. . . . [Deficiency Prong Section Omitted]

B

An error by counsel, even if professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. Cf. *United States* v. *Morrison,* 449 U. S. 361, 364-365 (1981). The purpose of the Sixth Amendment guarantee of counsel is to ensure *692 that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding. Accordingly, any deficiencies in counsel's performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.

692 . . . .

693 *693 Conflict of interest claims aside, actual ineffectiveness claims alleging a deficiency in attorney performance are subject to a general requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and hence not able to prevent, attorney errors that will result in reversal of a conviction or sentence. Attorney errors come in an infinite variety and are as likely to be utterly harmless in a particular case as they are to be prejudicial. They cannot be classified according to likelihood of causing prejudice. Nor can they be defined with sufficient precision to inform defense attorneys correctly just what conduct to avoid. Representation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another. Even if a defendant shows that particular errors of counsel were unreasonable, therefore, the defendant must show that they actually had an adverse effect on the defense.

It is not enough for the defendant to show that the errors had some conceivable effect on the outcome of the proceeding. Virtually every act or omission of counsel would meet that test, cf. *United States* v. *Valenzuela-Bernal,* 458 U. S. 858, 866-867 (1982), and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding. Respondent suggests requiring a showing that the errors "impaired the presentation of the defense." Brief for Respondent 58. That standard, however, provides no workable principle. Since any error, if it is indeed an error, "impairs" the presentation of the defense, the proposed standard is inadequate because it provides no way of deciding what impairments are sufficiently serious to warrant setting aside the outcome of the proceeding.

On the other hand, we believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. This outcome-determinative standard has several strengths. It defines the relevant inquiry in a way familiar to courts, though the inquiry, as is inevitable, is anything but
694 precise. The standard also reflects the profound importance of finality in criminal proceedings. *694 Moreover, it comports with the widely used standard for assessing motions for new trial based on newly discovered evidence. See Brief for United States as *Amicus Curiae* 19-20, and nn. 10, 11. Nevertheless, the standard is not quite appropriate.

Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. *United States* v. *Johnson,* 327 U. S. 106, 112 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finality concerns are somewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding

can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome.

Accordingly, the appropriate test for prejudice finds its roots in the test for materiality of exculpatory information not disclosed to the defense by the prosecution, *United States* v. *Agurs,* 427 U. S., at 104, 112-113, and in the test for materiality of testimony made unavailable to the defense by Government deportation of a witness, *United States* v. *Valenzuela-Bernal, supra,* at 872-874. The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

In making the determination whether the specified errors resulted in the required prejudice, a court should presume, absent challenge to the judgment on grounds of evidentiary insufficiency, that the judge or jury
695 acted according to law. *695 An assessment of the likelihood of a result more favorable to the defendant must exclude the possibility of arbitrariness, whimsy, caprice, "nullification," and the like. A defendant has no entitlement to the luck of a lawless decisionmaker, even if a lawless decision cannot be reviewed. The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncracies of the particular decisionmaker, such as unusual propensities toward harshness or leniency. Although these factors may actually have entered into counsel's selection of strategies and, to that limited extent, may thus affect the performance inquiry, they are irrelevant to the prejudice inquiry. Thus, evidence about the actual process of decision, if not part of the record of the proceeding under review, and evidence about, for example, a particular judge's sentencing practices, should not be considered in the prejudice determination.

The governing legal standard plays a critical role in defining the question to be asked in assessing the prejudice from counsel's errors. When a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt. When a defendant challenges a death sentence such as the one at issue in this case, the question is whether there is a reasonable probability that, absent the errors, the sentencer — including an appellate court, to the extent it independently reweighs the evidence — would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.

In making this determination, a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a
696 pervasive effect on the inferences to *696 be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors on the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors.

IV

A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that

the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

. . . .

V

Having articulated general standards for judging ineffectiveness claims, we think it useful to apply those standards to the facts of this case in order to illustrate the meaning of the general principles. The record makes it possible to do so. There are no conflicts between the state and federal courts over findings of fact, and the principles we have articulated are sufficiently close to the principles applied both in the Florida courts and in the District Court that it is clear that the factfinding was not affected by erroneous legal principles. See *Pullman-Standard* v. *Swint,* 456 U. S. 273, 291-292 (1982).

Application of the governing principles is not difficult in this case. The facts as described above, see *supra,* at 671-678, make clear that the conduct of respondent's counsel at and before respondent's sentencing
699 proceeding cannot be found unreasonable. They also make clear that, even assuming the *699 challenged conduct of counsel was unreasonable, respondent suffered insufficient prejudice to warrant setting aside his death sentence.

. . . . .

With respect to the prejudice component, the lack of merit of respondent's claim is even more stark. The
700 evidence that respondent says his trial counsel should have offered at the *700 sentencing hearing would barely have altered the sentencing profile presented to the sentencing judge. As the state courts and District Court found, at most this evidence shows that numerous people who knew respondent thought he was generally a good person and that a psychiatrist and a psychologist believed he was under considerable emotional stress that did not rise to the level of extreme disturbance. Given the overwhelming aggravating factors, there is no reasonable probability that the omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence, the sentence imposed. Indeed, admission of the evidence respondent now offers might even have been harmful to his case: his "rap sheet" would probably have been admitted into evidence, and the psychological reports would have directly contradicted respondent's claim that the mitigating circumstance of extreme emotional disturbance applied to his case.

. . . .

Failure to make the required showing of either deficient performance or sufficient prejudice defeats the ineffectiveness claim. Here there is a double failure. More generally, respondent has made no showing that the justice of his sentence was rendered unreliable by a breakdown in the adversary process caused by deficiencies in counsel's assistance. Respondent's sentencing proceeding was not fundamentally unfair.

701A *701A We conclude, therefore, that the District Court properly declined to issue a writ of habeas corpus. The judgment of the Court of Appeals is accordingly

Reversed.

132 S.Ct. 1399 (2012)
566 U.S. 134

MISSOURI, Petitioner
v.
Galin E. FRYE.

No. 10-444.

Supreme Court of United States.

Argued October 31, 2011.
Decided March 21, 2012.

Chris Koster, Atty. Gen., State of Missouri, Jefferson City, MO, argued (James R. Layton, State Solicitor Gen., Shaun J. Mackelprang, Asst. Atty. Gen., on the brief), for petitioner.

Anthony A. Yang, Asst. to the U.S. Solicitor Gen., Washington, D.C., argued (Neal Kumar Katyal, Acting Solicitor Gen., Lanny A. Breuer, Asst. Atty. Gen., Michael R. Dreeben, Dep. Solicitor Gen., Deborah Watson, Atty., Dept. of Justice, on the brief), for United States as amicus curiae supporting petitioner.

1404 Emmett D. Queener, Asst. Public Defender, State of Missouri, Columbia, MO, *1404 argued (Craig A. Johnston, Asst. Public Defender, on the brief), for respondent.

1401 *1401

. . . .

KENNEDY, J., delivered the opinion of the Court, in which GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. SCALIA, J., filed a dissenting opinion, in which ROBERTS, C.J., and THOMAS and ALITO, JJ., joined, *post,* pp. 1412-1414.

Justice, KENNEDY delivered the opinion of the Court.

The Sixth Amendment, applicable to the States by the terms of the Fourteenth Amendment, provides that the accused shall have the assistance of counsel in all criminal prosecutions. The right to counsel is the right to effective assistance of counsel. See *Strickland v. Washington,* 466 U.S. 668, 686, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). This case arises in the context of claimed ineffective assistance that led to the lapse of a prosecution offer of a plea bargain, a proposal that offered terms more lenient than the terms of the guilty plea entered later. The initial question is whether the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. If there is a right to effective assistance with respect to those offers, a further question is what a defendant must demonstrate in order to show that prejudice resulted from counsel's deficient performance. Other questions relating to ineffective assistance with respect to plea offers, including the question of proper remedies, are considered in a second case decided today. See *Lafler v. Cooper,* 566 U.S. 156, 162-175, 132 S.Ct. 1376, 182 L.Ed.2d 398.

I

In August 2007, respondent Galin Frye was charged with driving with a revoked license. Frye had been convicted for that offense on three other occasions, so the State of Missouri charged him with a class D felony, which carries a maximum term of imprisonment of four years. See Mo. Rev.Stat. §§ 302.321.2, 558.011.1(4) (2011).

On November 15, the prosecutor sent a letter to Frye's counsel offering a choice of two plea bargains. App. 50. The prosecutor first offered to recommend a 3-year sentence if there was a guilty plea to the felony

charge, without a recommendation regarding probation but with a recommendation that Frye serve 10 days in jail as so-called "shock" time. The second offer was to reduce the charge to a misdemeanor and, if Frye pleaded guilty to it, to recommend a 90-day sentence. The misdemeanor charge of driving with a revoked license carries a maximum term of imprisonment of one year. 311 S.W.3d 350, 360 (Mo.App.2010). The letter stated both offers would expire on December 28. Frye's attorney did not advise Frye that the offers had been made. The offers expired. *Id.,* at 356.

Frye's preliminary hearing was scheduled for January 4, 2008. On December 30, 2007, less than a week before the hearing, Frye was again arrested for driving with a revoked license. App. 47-48, 311 S.W.3d, at 352-353. At the January 4 hearing, Frye waived his right to a preliminary hearing on the charge arising from the August 2007 arrest. He pleaded not guilty at a subsequent arraignment but then changed his plea to guilty. There was no underlying plea agreement. App. 5, 13, 16. The state trial court accepted Frye's guilty plea. *Id.,* at 21. The prosecutor recommended a 3-year sentence, made no recommendation regarding
1405 probation, and requested 10 days shock time in jail. *Id.,* at 22. The trial judge sentenced *1405 Frye to three years in prison. *Id.,* at 21, 23.

Frye filed for postconviction relief in state court. *Id.,* at 8, 25-29. He alleged his counsel's failure to inform him of the prosecution's plea offer denied him the effective assistance of counsel. At an evidentiary hearing, Frye testified he would have entered a guilty plea to the misdemeanor had he known about the offer. *Id.,* at 34.

A state court denied the postconviction motion, *id.,* at 52-57, but the Missouri Court of Appeals reversed, 311 S.W.3d 350. It determined that Frye met both of the requirements for showing a Sixth Amendment violation under *Strickland.* First, the court determined Frye's counsel's performance was deficient because the "record is void of any evidence of any effort by trial counsel to communicate the Offer to Frye during the Offer window." 311 S.W.3d, at 355, 356 (emphasis deleted). The court next concluded Frye had shown his counsel's deficient performance caused him prejudice because "Frye pled guilty to a felony instead of a misdemeanor and was subject to a maximum sentence of four years instead of one year." *Id.,* at 360.

To implement a remedy for the violation, the court deemed Frye's guilty plea withdrawn and remanded to allow Frye either to insist on a trial or to plead guilty to any offense the prosecutor deemed it appropriate to charge. This Court granted certiorari. 562 U.S. 1128, 131 S.Ct. 856, 178 L.Ed.2d 622 (2011).

II

A

It is well settled that the right to the effective assistance of counsel applies to certain steps before trial. The "Sixth Amendment guarantees a defendant the right to have counsel present at all `critical' stages of the criminal proceedings." *Montejo v. Louisiana,* 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009) (quoting *United States v. Wade,* 388 U.S. 218, 227-228, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967)). Critical stages include arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea. See *Hamilton v. Alabama,* 368 U.S. 52, 82 S.Ct. 157, 7 L.Ed.2d 114 (1961) (arraignment); *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (postindictment interrogation); *Wade, supra* (postindictment lineup); *Argersinger v. Hamlin,* 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972) (guilty plea).

With respect to the right to effective counsel in plea negotiations, a proper beginning point is to discuss two cases from this Court considering the role of counsel in advising a client about a plea offer and an ensuing guilty plea: *Hill v. Lockhart,* 474 U.S. 52, 106 S.Ct. 366, 88 L.Ed.2d 203 (1985); and *Padilla v. Kentucky,* 559 U.S. 356, 130 S.Ct. 1473, 176 L.Ed.2d 284 (2010).

Hill established that claims of ineffective assistance of counsel in the plea bargain context are governed by the two-part test set forth in *Strickland.* See *Hill, supra,* at 57, 106 S.Ct. 366. As noted above, in Frye's case, the Missouri Court of Appeals, applying the two part test of *Strickland,* determined first that defense counsel had been ineffective and second that there was resulting prejudice.

In *Hill,* the decision turned on the second part of the *Strickland* test. There, a defendant who had entered a guilty plea claimed his counsel had misinformed him of the amount of time he would have to serve before he became eligible for parole. But the defendant had not alleged that, even if adequate advice and
1406 assistance had *1406 been given, he would have elected to plead not guilty and proceed to trial. Thus, the Court found that no prejudice from the inadequate advice had been shown or alleged. *Hill, supra,* at 60, 106 S.Ct. 366.

In *Padilla,* the Court again discussed the duties of counsel in advising a client with respect to a plea offer that leads to a guilty plea. *Padilla* held that a guilty plea, based on a plea offer, should be set aside because counsel misinformed the defendant of the immigration consequences of the conviction. The Court made clear that "the negotiation of a plea bargain is a critical phase of litigation for purposes of the Sixth Amendment right to effective assistance of counsel." 559 U.S., at 373, 130 S.Ct., at 1486. It also rejected the argument made by petitioner in this case that a knowing and voluntary plea supersedes errors by defense counsel. Cf. Brief for Respondent in *Padilla v. Kentucky,* O.T. 2009, No. 08-651, p. 27 (arguing Sixth Amendment's assurance of effective assistance "does not extend to collateral aspects of the prosecution" because "knowledge of the consequences that are collateral to the guilty plea is not a prerequisite to the entry of a knowing and intelligent plea").

In the case now before the Court the State, as petitioner, points out that the legal question presented is different from that in *Hill* and *Padilla.* In those cases the claim was that the prisoner's plea of guilty was invalid because counsel had provided incorrect advice pertinent to the plea. In the instant case, by contrast, the guilty plea that was accepted, and the plea proceedings concerning it in court, were all based on accurate advice and information from counsel. The challenge is not to the advice pertaining to the plea that was accepted but rather to the course of legal representation that preceded it with respect to other potential pleas and plea offers.

To give further support to its contention that the instant case is in a category different from what the Court considered in *Hill* and *Padilla,* the State urges that there is no right to a plea offer or a plea bargain in any event. See *Weatherford v. Bursey,* 429 U.S. 545, 561, 97 S.Ct. 837, 51 L.Ed.2d 30 (1977). It claims Frye therefore was not deprived of any legal benefit to which he was entitled. Under this view, any wrongful or mistaken action of counsel with respect to earlier plea offers is beside the point.

The State is correct to point out that *Hill* and *Padilla* concerned whether there was ineffective assistance leading to acceptance of a plea offer, a process involving a formal court appearance with the defendant and all counsel present. Before a guilty plea is entered the defendant's understanding of the plea and its consequences can be established on the record. This affords the State substantial protection against later claims that the plea was the result of inadequate advice. At the plea entry proceedings the trial court and all counsel have the opportunity to establish on the record that the defendant understands the process that led

to any offer, the advantages and disadvantages of accepting it, and the sentencing consequences or possibilities that will ensue once a conviction is entered based upon the plea. See, *e.g.,* Fed. Rule Crim. Proc. 11; Mo. Sup.Ct. Rule 24.02 (2004). *Hill* and *Padilla* both illustrate that, nevertheless, there may be instances when claims of ineffective assistance can arise after the conviction is entered. Still, the State, and the trial court itself, have had a substantial opportunity to guard against this contingency by establishing at
1407 the plea entry proceeding that the defendant has been given proper advice or, if the advice received *1407 appears to have been inadequate, to remedy that deficiency before the plea is accepted and the conviction entered.

When a plea offer has lapsed or been rejected, however, no formal court proceedings are involved. This underscores that the plea-bargaining process is often in flux, with no clear standards or timelines and with no judicial supervision of the discussions between prosecution and defense. Indeed, discussions between client and defense counsel are privileged. So the prosecution has little or no notice if something may be amiss and perhaps no capacity to intervene in any event. And, as noted, the State insists there is no right to receive a plea offer. For all these reasons, the State contends, it is unfair to subject it to the consequences of defense counsel's inadequacies, especially when the opportunities for a full and fair trial, or, as here, for a later guilty plea albeit on less favorable terms, are preserved.

The State's contentions are neither illogical nor without some persuasive force, yet they do not suffice to overcome a simple reality. Ninety-seven percent of federal convictions and ninety-four percent of state convictions are the result of guilty pleas. See Dept. of Justice, Bureau of Justice Statistics, Sourcebook of Criminal Justice Statistics Online, Table 5.22.2009, http://www.albany.edu/sourcebook/pdf/t 5222009.pdf (all Internet materials as visited Mar. 1, 2012, and available in Clerk of Court's case file); Dept. of Justice, Bureau of Justice Statistics, S. Rosenmerkel, M. Durose, & D. Farole, Felony Sentences in State Courts, 2006-Statistical Tables, p. 1 (NCJ226846, rev. Nov. 2010), http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf; *Padilla,* 559 U.S., at 372, 130 S.Ct., at 1485-1486 (recognizing pleas account for nearly 95% of all criminal convictions). The reality is that plea bargains have become so central to the administration of the criminal justice system that defense counsel have responsibilities in the plea bargain process, responsibilities that must be met to render the adequate assistance of counsel that the Sixth Amendment requires in the criminal process at critical stages. Because ours "is for the most part a system of pleas, not a system of trials," *Lafler, post,* at 1388, 132 S.Ct. 1376, it is insufficient simply to point to the guarantee of a fair trial as a backstop that inoculates any errors in the pretrial process. "To a large extent ... horse trading [between prosecutor and defense counsel] determines who goes to jail and for how long. That is what plea bargaining is. It is not some adjunct to the criminal justice system; it *is* the criminal justice system." Scott & Stuntz, Plea Bargaining as Contract, 101 Yale L. J. 1909, 1912 (1992). See also Barkow, Separation of Powers and the Criminal Law, 58 Stan. L.Rev. 989, 1034 (2006) ("[Defendants] who do take their case to trial and lose receive longer sentences than even Congress or the prosecutor might think appropriate, because the longer sentences exist on the books largely for bargaining purposes. This often results in individuals who accept a plea bargain receiving shorter sentences than other individuals who are less morally culpable but take a chance and go to trial" (footnote omitted)). In today's criminal justice system, therefore, the negotiation of a plea bargain, rather than the unfolding of a trial, is almost always the critical point for a defendant.

To note the prevalence of plea bargaining is not to criticize it. The potential to conserve valuable prosecutorial resources and for defendants to admit their crimes and receive more favorable terms at sentencing means that a plea agreement can benefit both parties. In order that these benefits can be
1408 realized, however, criminal defendants require effective counsel *1408 during plea negotiations. "Anything

less ... might deny a defendant `effective representation by counsel at the only stage when legal aid and advice would help him.'" *Massiah,* 377 U.S., at 204, 84 S.Ct. 1199 (quoting *Spano v. New York,* 360 U.S. 315, 326, 79 S.Ct. 1202, 3 L.Ed.2d 1265 (1959) (Douglas, J., concurring)).

B

The inquiry then becomes how to define the duty and responsibilities of defense counsel in the plea bargain process. This is a difficult question. "The art of negotiation is at least as nuanced as the art of trial advocacy, and it presents questions further removed from immediate judicial supervision." *Premo v. Moore,* 562 U.S. 115, 125, 131 S.Ct. 733, 741, 178 L.Ed.2d 649 (2011). Bargaining is, by its nature, defined to a substantial degree by personal style. The alternative courses and tactics in negotiation are so individual that it may be neither prudent nor practicable to try to elaborate or define detailed standards for the proper discharge of defense counsel's participation in the process. Cf. *ibid.*

This case presents neither the necessity nor the occasion to define the duties of defense counsel in those respects, however. Here the question is whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both.

This Court now holds that, as a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

Though the standard for counsel's performance is not determined solely by reference to codified standards of professional practice, these standards can be important guides. The American Bar Association recommends defense counsel "promptly communicate and explain to the defendant all plea offers made by the prosecuting attorney," ABA Standards for Criminal Justice, Pleas of Guilty 14-3.2(a) (3d ed. 1999), and this standard has been adopted by numerous state and federal courts over the last 30 years. See, *e.g., Davie v. State,* 381 S.C. 601, 608-609, 675 S.E.2d 416, 420 (2009); *Cottle v. State,* 733 So.2d 963, 965-966 (Fla.1999); *(per curiam); Becton v. Hun,* 205 W.Va. 139, 144, 516 S.E.2d 762, 767 (1999); *Harris v. State,* 875 S.W.2d 662, 665 (Tenn.1994); *Lloyd v. State,* 258 Ga. 645, 648, 373 S.E.2d 1, 3 (1988); *United States v. Rodriguez Rodriguez,* 929 F.2d 747, 752 (C.A.1 1991) *(per curiam); Pham v. United States,* 317 F.3d 178, 182 (C.A.2 2003); *United States ex rel. Caruso v. Zelinsky,* 689 F.2d 435, 438 (C.A.3 1982); *Griffin v. United States,* 330 F.3d 733, 737 (C.A.6 2003); *Johnson v. Duckworth,* 793 F.2d 898, 902 (C.A.7 1986); *United States v. Blaylock,* 20 F.3d 1458, 1466 (C.A.9 1994); cf. *Diaz v. United States,* 930 F.2d 832, 834 (C.A.11 1991). The standard for prompt communication and consultation is also set out in state bar professional standards for attorneys. See, *e.g.,* Fla. Rule Regulating Bar 4-1.4 (2008); Ill. Rule Prof. Conduct 1.4 (2011); Kan. Rule Prof. Conduct 1.4 (2010); Ky. Sup.Ct. Rule 3.130, Rule Prof. Conduct 1.4 (2011); Mass. Rule Prof. Conduct 1.4 (2011-2012); Mich. Rule Prof. Conduct 1.4 (2011).

The prosecution and the trial courts may adopt some measures to help ensure against late, frivolous, or
1409 fabricated claims *1409 after a later, less advantageous plea offer has been accepted or after a trial leading to conviction with resulting harsh consequences. First, the fact of a formal offer means that its terms and its processing can be documented so that what took place in the negotiation process becomes more clear if some later inquiry turns on the conduct of earlier pretrial negotiations. Second, States may elect to follow

rules that all offers must be in writing, again to ensure against later misunderstandings or fabricated charges. See N.J. Ct. Rule 3:9-1(b) (2012) ("Any plea offer to be made by the prosecutor shall be in writing and forwarded to the defendant's attorney"). Third, formal offers can be made part of the record at any subsequent plea proceeding or before a trial on the merits, all to ensure that a defendant has been fully advised before those further proceedings commence. At least one State often follows a similar procedure before trial. See Brief for National Association of Criminal Defense Lawyers et al. as *Amici Curiae* 20 (discussing hearings in Arizona conducted pursuant to *State v. Donald,* 198 Ariz. 406, 10 P.3d 1193 (App.2000)); see also N.J. Ct. Rules 3:9-1(b), (c) (requiring the prosecutor and defense counsel to discuss the case prior to the arraignment/status conference including any plea offers and to report on these discussions in open court with the defendant present); *In re Alvernaz,* 2 Cal.4th 924, 938, n. 7, 8 Cal.Rptr.2d 713, 830 P.2d 747, 756, n. 7 (1992) (encouraging parties to "memorialize in some fashion prior to trial (1) the fact that a plea bargain offer was made, and (2) that the defendant was advised of the offer [and] its precise terms, ... and (3) the defendant's response to the plea bargain offer"); Brief for Center on the Administration of Criminal Law, New York University School of Law, as *Amicus Curiae* 25-27.

Here defense counsel did not communicate the formal offers to the defendant. As a result of that deficient performance, the offers lapsed. Under *Strickland,* the question then becomes what, if any, prejudice resulted from the breach of duty.

C

To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time. Cf. *Glover v. United States,* 531 U.S. 198, 203, 121 S.Ct. 696, 148 L.Ed.2d 604 (2001) ("[A]ny amount of [additional] jail time has Sixth Amendment significance").

This application of *Strickland* to the instances of an uncommunicated, lapsed plea does nothing to alter the standard laid out in *Hill.* In cases where a defendant complains that ineffective assistance led him to accept a plea offer as opposed to proceeding to trial, the defendant will have to show "a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." *Hill,* 474 U.S., at 59, 106 S.Ct. 366. *Hill* was correctly decided and applies in the context in which it arose.
1410 *Hill* does not, however, provide the sole means for demonstrating *1410 prejudice arising from the deficient performance of counsel during plea negotiations. Unlike the defendant in *Hill,* Frye argues that with effective assistance he would have accepted an earlier plea offer (limiting his sentence to one year in prison) as opposed to entering an open plea (exposing him to a maximum sentence of four years' imprisonment). In a case, such as this, where a defendant pleads guilty to less favorable terms and claims that ineffective assistance of counsel caused him to miss out on a more favorable earlier plea offer, *Strickland*'s inquiry into whether "the result of the proceeding would have been different," 466 U.S., at 694, 104 S.Ct. 2052, requires looking not at whether the defendant would have proceeded to trial absent

ineffective assistance but whether he would have accepted the offer to plead pursuant to the terms earlier proposed.

In order to complete a showing of *Strickland* prejudice, defendants who have shown a reasonable probability they would have accepted the earlier plea offer must also show that, if the prosecution had the discretion to cancel it or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither the prosecution nor the trial court would have prevented the offer from being accepted or implemented. This further showing is of particular importance because a defendant has no right to be offered a plea, see *Weatherford,* 429 U.S., at 561, 97 S.Ct. 837, nor a federal right that the judge accept it, *Santobello v. New York,* 404 U.S. 257, 262, 92 S.Ct. 495, 30 L.Ed.2d 427 (1971). In at least some States, including Missouri, it appears the prosecution has some discretion to cancel a plea agreement to which the defendant has agreed, see, *e.g.,* 311 S.W.3d, at 359 (case below); Ariz. Rule Crim. Proc. 17.4(b) (Supp.2011). The Federal Rules, some state rules including in Missouri, and this Court's precedents give trial courts some leeway to accept or reject plea agreements, see Fed. Rule Crim. Proc. 11(c)(3); see Mo. Sup.Ct. Rule 24.02(d)(4); *Boykin v. Alabama,* 395 U.S. 238, 243-244, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969). It can be assumed that in most jurisdictions prosecutors and judges are familiar with the boundaries of acceptable plea bargains and sentences. So in most instances it should not be difficult to make an objective assessment as to whether or not a particular fact or intervening circumstance would suffice, in the normal course, to cause prosecutorial withdrawal or judicial nonapproval of a plea bargain. The determination that there is or is not a reasonable probability that the outcome of the proceeding would have been different absent counsel's errors can be conducted within that framework.

III

These standards must be applied to the instant case. As regards the deficient performance prong of *Strickland,* the Court of Appeals found the "record is void of *any* evidence of *any* effort by trial counsel to communicate the [formal] Offer to Frye during the Offer window, let alone any evidence that Frye's conduct interfered with trial counsel's ability to do so." 311 S.W.3d, at 356. On this record, it is evident that Frye's attorney did not make a meaningful attempt to inform the defendant of a written plea offer before the offer expired. See *supra,* at 1404-1405. The Missouri Court of Appeals was correct that "counsel's representation fell below an objective standard of reasonableness." *Strickland, supra,* at 688, 104 S.Ct. 2052

The Court of Appeals erred, however, in articulating the precise standard for prejudice in this context. As
1411 noted, a defendant in Frye's position must show not only a reasonable probability that he *1411 would have accepted the lapsed plea but also a reasonable probability that the prosecution would have adhered to the agreement and that it would have been accepted by the trial court. Frye can show he would have accepted the offer, but there is strong reason to doubt the prosecution and the trial court would have permitted the plea bargain to become final.

There appears to be a reasonable probability Frye would have accepted the prosecutor's original offer of a plea bargain if the offer had been communicated to him, because he pleaded guilty to a more serious charge, with no promise of a sentencing recommendation from the prosecutor. It may be that in some cases defendants must show more than just a guilty plea to a charge or sentence harsher than the original offer. For example, revelations between plea offers about the strength of the prosecution's case may make a late decision to plead guilty insufficient to demonstrate, without further evidence, that the defendant would have pleaded guilty to an earlier, more generous plea offer if his counsel had reported it to him. Here,

however, that is not the case. The Court of Appeals did not err in finding Frye's acceptance of the less favorable plea offer indicated that he would have accepted the earlier (and more favorable) offer had he been apprised of it; and there is no need to address here the showings that might be required in other cases.

The Court of Appeals failed, however, to require Frye to show that the first plea offer, if accepted by Frye, would have been adhered to by the prosecution and accepted by the trial court. Whether the prosecution and trial court are required to do so is a matter of state law, and it is not the place of this Court to settle those matters. The Court has established the minimum requirements of the Sixth Amendment as interpreted in *Strickland,* and States have the discretion to add procedural protections under state law if they choose. A State may choose to preclude the prosecution from withdrawing a plea offer once it has been accepted or perhaps to preclude a trial court from rejecting a plea bargain. In Missouri, it appears "a plea offer once accepted by the defendant can be withdrawn without recourse" by the prosecution. 311 S.W.3d, at 359. The extent of the trial court's discretion in Missouri to reject a plea agreement appears to be in some doubt. Compare *id.,* at 360, with Mo. Sup.Ct. Rule 24.02(d)(4).

We remand for the Missouri Court of Appeals to consider these state-law questions, because they bear on the federal question of *Strickland* prejudice. If, as the Missouri court stated here, the prosecutor could have canceled the plea agreement, and if Frye fails to show a reasonable probability the prosecutor would have adhered to the agreement, there is no *Strickland* prejudice. Likewise, if the trial court could have refused to accept the plea agreement, and if Frye fails to show a reasonable probability the trial court would have accepted the plea, there is no *Strickland* prejudice. In this case, given Frye's new offense for driving without a license on December 30, 2007, there is reason to doubt that the prosecution would have adhered to the agreement or that the trial court would have accepted it at the January 4, 2008, hearing, unless they were required by state law to do so.

It is appropriate to allow the Missouri Court of Appeals to address this question in the first instance. The judgment of the Missouri Court of Appeals is vacated, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

406 U.S. 682 (1972)

KIRBY
v.
ILLINOIS.

No. 70-5061.

Supreme Court of United States.

Argued November 11, 1971.
Reargued March 20-21, 1972.
Decided June 7, 1972.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

683 *683 *Jerold S. Solovy* argued the cause for petitioner on the reargument and *Michael P. Seng* argued the cause on the original argument. *Messrs. Solovy* and *Seng* were on the briefs for petitioner.

James B. Zagel, Assistant Attorney General of Illinois, reargued the cause for respondent. With him on the brief were *William J. Scott,* Attorney General, *Joel M. Flaum,* First Assistant Attorney General, and *E. James Gildea,* Assistant Attorney General.

Ronald M. George, Deputy Attorney General, argued the cause on the reargument for the State of California as *amicus curiae* urging affirmance. With him on the brief were *Evelle J. Younger,* Attorney General, and *William E. James,* Assistant Attorney General.

MR. JUSTICE STEWART announced the judgment of the Court and an opinion in which THE CHIEF JUSTICE, MR. JUSTICE BLACKMUN, and MR. JUSTICE REHNQUIST join.

In *United States* v. *Wade,* 388 U. S. 218, and *Gilbert* v. *California,* 388 U. S. 263, this Court held "that a post-indictment pretrial lineup at which the accused is exhibited to identifying witnesses is a critical stage of the criminal prosecution; that police conduct of such a lineup without notice to and in the absence of his counsel denies the accused his Sixth [and Fourteenth] Amendment right to counsel and calls in question the admissibility at trial of the in-court identifications of the accused by witnesses who attended the lineup." *Gilbert* v. *California, supra,* at 272. Those cases further held that no "in-court identifications" are admissible in evidence if their "source" is a lineup conducted in violation of this constitutional standard. "Only a *per se*
684 exclusionary rule as to such testimony can be an effective sanction," the Court said, "to assure that law *684 enforcement authorities will respect the accused's constitutional right to the presence of his counsel at the critical lineup." *Id.,* at 273. In the present case we are asked to extend the *Wade-Gilbert per se* exclusionary rule to identification testimony based upon a police station showup that took place *before* the defendant had been indicted or otherwise formally charged with any criminal offense.

On February 21, 1968, a man named Willie Shard reported to the Chicago police that the previous day two men had robbed him on a Chicago street of a wallet containing, among other things, traveler's checks and a Social Security card. On February 22, two police officers stopped the petitioner and a companion, Ralph Bean, on West Madison Street in Chicago.[1] When asked for identification, the petitioner produced a wallet that contained three traveler's checks and a Social Security card, all bearing the name of Willie Shard. Papers with Shard's name on them were also found in Bean's possession. When asked to explain his

possession of Shard's property, the petitioner first said that the traveler's checks were "play money," and then told the officers that he had won them in a crap game. The officers then arrested the petitioner and Bean and took them to a police station.

Only after arriving at the police station, and checking the records there, did the arresting officers learn of the Shard robbery. A police car was then dispatched to Shard's place of employment, where it picked up Shard and brought him to the police station. Immediately upon entering the room in the police station where the
685 petitioner and Bean were seated at a table, Shard positively identified them as the men who had *685 robbed him two days earlier. No lawyer was present in the room, and neither the petitioner nor Bean had asked for legal assistance, or been advised of any right to the presence of counsel.

More than six weeks later, the petitioner and Bean were indicted for the robbery of Willie Shard. Upon arraignment, counsel was appointed to represent them, and they pleaded not guilty. A pretrial motion to suppress Shard's identification testimony was denied, and at the trial Shard testified as a witness for the prosecution. In his testimony he described his identification of the two men at the police station on February
686 22,[2] and identified them again in the courtroom as the men *686 who had robbed him on February 20.[3] He was cross-examined at length regarding the circumstances of his identification of the two defendants. Cf. *Pointer* v. *Texas,* 380 U. S. 400. The jury found both defendants guilty, and the petitioner's conviction was affirmed on appeal. *People* v. *Kirby* 121 Ill. App. 2d 323, 257 N. E. 2d 589.[4] The Illinois appellate court held that the admission of Shard's testimony was not error, relying upon an earlier decision of the Illinois Supreme Court, *People* v. *Palmer,* 41 Ill. 2d 571, 244 N. E. 2d 173, holding that the *Wade-Gilbert per*
687 *se* exclusionary rule is not applicable to pre-indictment confrontations. *687 We granted certiorari, limited to this question. 402 U. S. 995.[5]

I

We note at the outset that the constitutional privilege against compulsory self-incrimination is in no way implicated here. The Court emphatically rejected the claimed applicability of that constitutional guarantee in *Wade* itself:

> "Neither the lineup itself nor anything shown by this record that Wade was required to do in the lineup violated his privilege against self-incrimination. We have only recently reaffirmed that the privilege `protects an accused only from being compelled to testify against himself, or otherwise provide the State with evidence of a testimonial or communicative nature . . . .' *Schmerber* v. *California,* 384 U. S. 757, 761. . . ." 388 U. S., at 221.

.....

> "We have no doubt that compelling the accused merely to exhibit his person for observation by a prosecution witness prior to trial involves no compulsion of the accused to give evidence
688 having testimonial significance. It is compulsion of the accused *688 to exhibit his physical characteristics, not compulsion to disclose any knowledge he might have. . . ." *Id.,* at 222.

It follows that the doctrine of *Miranda* v. *Arizona,* 384 U. S. 436, has no applicability whatever to the issue before us; for the *Miranda* decision was based exclusively upon the Fifth and Fourteenth Amendment

privilege against compulsory self-incrimination, upon the theory that custodial *interrogation* is inherently coercive.

The *Wade-Gilbert* exclusionary rule, by contrast, stems from a quite different constitutional guarantee—the guarantee of the right to counsel contained in the Sixth and Fourteenth Amendments. Unless all semblance of principled constitutional adjudication is to be abandoned, therefore, it is to the decisions construing that guarantee that we must look in determining the present controversy.

In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell* v. *Alabama,* 287 U. S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama, supra; Johnson* v. *Zerbst,* 304 U. S. 458; *Hamilton* v. *Alabama,* 368 U. S. 52; *Gideon* v. *Wainwright,* 372 U. S. 335; *White* v. *Maryland,* 373 U. S. 59; *Massiah* v. *United States,* 377 U. S. 201; *United States* v. *Wade,* 388 U. S. 218; *Gilbert* v. *California,* 388 U. S. 263; *Coleman* v. *Alabama,* 399 U. S. 1.

This is not to say that a defendant in a criminal case has a constitutional right to counsel only at the trial
689 itself. The *Powell* case makes clear that the right attaches at the time of arraignment,[6] and the Court *689 has recently held that it exists also at the time of a preliminary hearing. *Coleman* v. *Alabama, supra.* But the point is that, while members of the Court have differed as to existence of the right to counsel in the contexts of some of the above cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.

The only seeming deviation from this long line of constitutional decisions was *Escobedo* v. *Illinois,* 378 U. S. 478. But *Escobedo* is not apposite here for two distinct reasons. First, the Court in retrospect perceived that the "prime purpose" of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda,* "to guarantee full effectuation of the privilege against self-incrimination . . . ." *Johnson* v. *New Jersey,* 384 U. S. 719, 729. Secondly, and perhaps even more important for purely practical purposes, the Court has limited the holding of *Escobedo* to its own facts, *Johnson* v. *New Jersey, supra,* at 733-734, and those facts are not remotely akin to the facts of the case before us.

The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the
690 intricacies of substantive and procedural criminal law. *690 It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable.[7] See *Powell* v. *Alabama,* 287 U. S., at 66-71; *Massiah* v. *United States,* 377 U. S. 201; *Spano* v. *New York,* 360 U. S. 315, 324 (DOUGLAS, J., concurring).

In this case we are asked to import into a routine police investigation an absolute constitutional guarantee historically and rationally applicable only after the onset of formal prosecutorial proceedings. We decline to do so. Less than a year after *Wade* and *Gilbert* were decided, the Court explained the rule of those decisions as follows: "The rationale of those cases was that an accused is entitled to counsel at any `critical stage of the *prosecution,*' and that a post-indictment lineup is such a `critical stage.' " (Emphasis supplied.) *Simmons* v. *United States,* 390 U. S. 377, 382-383. We decline to depart from that rationale today by

imposing a *per se* exclusionary rule upon testimony concerning an identification that took place long before the commencement of any prosecution whatever.

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The judgment is affirmed.

MR. CHIEF JUSTICE BURGER, concurring.

I agree that the right to counsel attaches as soon as criminal charges are formally made against an accused and he becomes the subject of a "criminal prosecution." Therefore, I join in the plurality opinion and in the judgment. Cf. *Coleman* v. *Alabama,* 399 U. S. 1, 21 (dissenting opinion).

MR. JUSTICE POWELL, concurring in the result.

As I would not extend the *Wade-Gilbert per se* exclusionary rule, I concur in the result reached by the Court.

MR. JUSTICE BRENNAN, with whom MR. JUSTICE DOUGLAS and MR. JUSTICE MARSHALL join, dissenting.

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MR. JUSTICE WHITE, dissenting.

United States v. Wade, 388 U. S. 218 (1967), and Gilbert v. California, 388 U. S. 263 (1967), govern this case and compel reversal of the judgment below.

467 U.S. 180 (1984)

UNITED STATES
v.
GOUVEIA ET AL.

No. 83-128.

Supreme Court of United States.

Argued March 20, 1984
Decided May 29, 1984
CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

181 *181 *Deputy Solicitor General Frey* argued the cause for the United States. With him on the briefs were *Solicitor General Lee, Assistant Attorney General Trott, Carolyn F. Corwin,* and *John F. De Pue.*

Charles P. Diamond, by appointment of the Court, 464 U. S. 1035, argued the cause for respondents Mills et al. With him on the brief were *M. Randall Oppenheimer* and *Edwin S. Saul. Joel Levine,* by appointment
182 of the Court, *182 464 U. S. 1035, argued the cause for respondents Gouveia et al. and filed a brief for respondent Segura. *Joseph F. Walsh,* by appointment of the Court, 464 U. S. 1035, filed a brief for respondent Ramirez. *Michael J. Treman,* by appointment of the Court, 464 U. S. 1035, filed a brief for respondent Gouveia. *Manuel U. A. Araujo* filed a brief for respondent Reynoso.[*]

JUSTICE REHNQUIST delivered the opinion of the Court.

Respondents William Gouveia, Robert Ramirez, Adolpho Reynoso, and Philip Segura were convicted of murdering a fellow inmate at a federal prison in Lompoc, Cal. Respondents Robert Mills and Richard Pierce were convicted of a later murder of another inmate at the same institution. Prison officials placed each respondent in administrative detention shortly after the murders, and they remained there for an extended period of time before they were eventually indicted on criminal charges. On appeal of respondents' convictions, the en banc Court of Appeals for the Ninth Circuit held by divided vote that they had a Sixth Amendment right to an attorney during the period in which they were held in administrative detention before the return of indictments against them, and that because they had been denied that right, their convictions had to be overturned and their indictments dismissed. 704 F. 2d 1116 (1983). We granted certiorari to review the Court of Appeals' novel application of our Sixth Amendment precedents, 464 U. S. 913 (1983), and we now reverse.

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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." As the Court of Appeals majority noted, our cases have long recognized that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant. In *Kirby* v. *Illinois, supra,* a plurality of the Court summarized our prior cases as follows:

> "In a line of constitutional cases in this Court stemming back to the Court's landmark opinion in *Powell* v. *Alabama,* 287 U. S. 45, it has been firmly established that a person's Sixth and Fourteenth Amendment right to counsel attaches only at or after the time that adversary judicial proceedings have been initiated against him. See *Powell* v. *Alabama, supra; Johnson*
188 v. *Zerbst,* *188 304 U. S. 458; *Hamilton* v. *Alabama,* 368 U. S. 52; *Gideon* v. *Wainwright,* 372 U. S. 335; *White* v. *Maryland,* 373 U. S. 59; *Massiah* v. *United States,* 377 U. S. 201; *United States* v. *Wade,* 388 U. S. 218; *Gilbert* v. *California,* 388 U. S. 263; *Coleman* v. *Alabama,* 399 U. S. 1.
>
> ". . . [W]hile members of the Court have differed as to the existence of the right to counsel in the contexts of some of the above cases, *all* of those cases have involved points of time at or after the initiation of adversary judicial criminal proceedings — whether by way of formal

> charge, preliminary hearing, indictment, information, or arraignment." *Id.,* at 688-689 (emphasis in original).

The view that the right to counsel does not attach until the initiation of adversary judicial proceedings has been confirmed by this Court in cases subsequent to *Kirby.* See *Estelle* v. *Smith,* 451 U. S. 454, 469-470 (1981); *Moore* v. *Illinois,* 434 U. S. 220, 226-227 (1977); *Brewer* v. *Williams,* 430 U. S. 387, 398-399 (1977); *United States* v. *Mandujano,* 425 U. S. 564, 581 (1976) (opinion of BURGER, C. J.).[5]

That interpretation of the Sixth Amendment right to counsel is consistent not only with the literal language of the Amendment, which requires the existence of both a "criminal prosecutio[n]" and an "accused," but also with the purposes which we have recognized that the right to counsel serves. We have recognized that
189 the "core purpose" of the counsel guarantee is to assure aid at trial, "when the accused [is] confronted *189 with both the intricacies of the law and the advocacy of the public prosecutor." *United States* v. *Ash,* 413 U. S. 300, 309 (1973). Indeed the right to counsel

> "embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." *Johnson* v. *Zerbst,* 304 U. S. 458, 462-463 (1938).

Although we have extended an accused's right to counsel to certain "critical" pretrial proceedings, *United States* v. *Wade,* 388 U. S. 218 (1967), we have done so recognizing that at those proceedings, "the accused [is] confronted, just as at trial, by the procedural system, or by his expert adversary, or by both," *United States* v. *Ash, supra,* at 310, in a situation where the results of the confrontation "might well settle the accused's fate and reduce the trial itself to a mere formality." *United States* v. *Wade, supra,* at 224.

Thus, given the plain language of the Amendment and its purpose of protecting the unaided layman at critical confrontations with his adversary, our conclusion that the right to counsel attaches at the initiation of adversary judicial criminal proceedings "is far from a mere formalism." *Kirby* v. *Illinois,* 406 U. S., at 689. It is only at that time "that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law." *Ibid.*

. . . .

193 We conclude that the Court of Appeals was wrong in holding that respondents were constitutionally entitled to the appointment of counsel while they were in administrative segregation and before any adversary judicial proceedings had been initiated against them. Accordingly, we reverse *193 the judgment of the Court of Appeals and remand for further proceedings consistent with this opinion.
It is so ordered.

48 F.3d 1287 (1995)

Alan D. ROBERTS, Plaintiff-Appellant,
v.
STATE OF MAINE, Defendant-Appellee.

No. 93-2392.

United States Court of Appeals, First Circuit.

Heard April 6, 1994.
Decided February 16, 1995.

1288 *1288 Robert E. Sandy, Jr., with whom Sherman, Sandy & Lee, Waterville, ME, was on brief, for appellant.

Donald W. Macomber, Asst. Atty. Gen., with whom Michael E. Carpenter, Atty. Gen., Charles K. Leadbetter and Wayne S. Moss, Asst. Attys. Gen., Augusta, ME, were on brief, for appellee.

Before TORRUELLA, CYR and STAHL, Circuit Judges.

TORRUELLA, Chief Judge.

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II. ANALYSIS

Roberts raises two related issues on appeal: (1) whether Officer Main's refusal to allow Roberts to call his attorney before deciding whether to take a blood/alcohol test denied Roberts of his Sixth Amendment right to counsel; and (2) whether Maine's "implied consent" form is misleading and inaccurate, in violation of Roberts' constitutional right to due process. Although Roberts' Sixth Amendment right to counsel is not implicated in this case, we do find a violation of Roberts' due process rights on the grounds that all of the circumstances of the case, including, but not limited to, the misleading information, deprived Roberts of fundamental fairness.

A. *Sixth Amendment Right to Counsel*

The Sixth Amendment to the United States Constitution guarantees that, "[i]n all criminal prosecutions, the accused shall enjoy the right to ... have the Assistance of Counsel for his defense." U.S. Const. amend. VI. It is axiomatic that the right to counsel attaches only upon "the initiation of adversary judicial criminal proceedings" against the defendant, and thereafter the right applies to all "critical stages" of the prosecution, before, during and after trial. *United States v. Gouveia,* 467 U.S. 180, 189, 104 S.Ct. 2292, 2298, 81 L.Ed.2d 146 (1984); *United States v. Ash,* 413 U.S. 300, 310-13, 93 S.Ct. 2568, 2574-75, 37 L.Ed.2d 619 (1973); *Kirby v. Illinois,* 406 U.S. 682, 688-90, 92 S.Ct. 1877, 1881-83, 32 L.Ed.2d 411 (1972); *United States v. Wade,* 388 U.S. 218, 225-27, 87 S.Ct. 1926, 1931-32, 18 L.Ed.2d 1149 (1967).

The initiation of adversary judicial proceedings is normally "by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby,* 406 U.S. at 689, 92 S.Ct. at 1882. In general terms, the point at which the right to counsel attaches is when "formal charges" have been initiated or when "the government has committed itself to prosecute." *Moran v. Burbine,* 475 U.S. 412, 430-32, 106 S.Ct. 1135, 1145-47, 89 L.Ed.2d 410 (1986); *Gouveia,* 467 U.S. at 189, 104 S.Ct. at 2298; *Kirby,* 406 U.S. at 689, 92 S.Ct. at 1882. "By its very terms, [the Sixth Amendment] becomes applicable only when the government's role shifts from investigation to accusation. For it is only then that the assistance of one versed in the `intricacies ... of law,' ... is needed to assure that the prosecution's case encounters `the crucible of meaningful adversarial testing.'" *Moran,* 475 U.S. at 430, 106 S.Ct. at 1146 (1986) (quoting *United States v. Cronic,* 466 U.S. 648, 656, 104 S.Ct. 2039, 2045, 80 L.Ed.2d 657 (1984)).

In the present case, state officials had not brought any formal charges against Roberts for drunk driving at the time Roberts refused to take the blood/alcohol test. The first state action that could conceivably resemble a formal charge, the filing of the criminal complaint against Roberts for OUI, did not occur until after Roberts refused to submit to the test. Thus, at the point when Roberts was denied his request to speak with his attorney, the government had not yet committed to prosecuting him for OUI, nor had the government shifted its role from that of investigation to accusation. We find, therefore, that Roberts' right to counsel had not attached at the time of the alleged violation of his Sixth Amendment rights. *See McVeigh v. Smith,* 872 F.2d 725 (6th Cir. 1989) (finding that the Supreme Court rejected the argument that a suspect's right to counsel attaches prior to taking a blood alcohol test in *Nyflot v. Minnesota Comm'r of Public Safety,*

1291 474 U.S. 1027, 106 S.Ct. 586, 88 L.Ed.2d 567 (1985), in which the Supreme *1291 Court dismissed an appeal raising the right to counsel argument for lack of substantial federal question); *Langelier v. Coleman,* 861 F.2d 1508, 1510 n. 3 (11th Cir.1988) (noting right to counsel had not yet attached when suspect was asked to take a blood/alcohol test).

We recognize the possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment, in circumstances where the "`government had crossed the constitutionally significant divide from fact-finder to adversary.'" *United States v. Larkin,* 978 F.2d 964, 969 (7th Cir.1992), *cert. denied,* ___ U.S. ___, 113 S.Ct. 1323, 122 L.Ed.2d 709 (1993) (quoting *United States Ex Rel. Hall v. Lane,* 804 F.2d 79, 82 (7th Cir.1986)). Such circumstances, however, must be extremely limited and, indeed, we are unable to cite many examples. *See Larkin,* 978 F.2d at 969 (citing *Bruce v. Duckworth,* 659 F.2d 776, 783 (7th Cir.1981), for the proposition that the government may not intentionally delay formal charges for the purpose of holding a lineup outside the presence of counsel). Overall, Supreme Court jurisprudence on the Sixth Amendment appears to allow for few exceptions to the bright-line rule that the right to counsel does not attach until the government initiates official proceedings by making a formal charge. *See United States v. Heinz,* 983 F.2d 609, 612-13 (5th Cir.1993) (interpreting *Gouveia,* 467 U.S. at 187-90, 104 S.Ct. at 2296-99, and other Supreme Court precedent as establishing a strictly formal test for determining the initiation of judicial proceedings as opposed to a more functional test based on whether the government had taken on an adversarial stance towards the defendant or whether the government had focussed its investigation on the defendant); *see also Moran,* 475 U.S. at 431, 106 S.Ct. at 1146 ("The clear implication of the holding [in *Maine v. Moulton,* 474 U.S. 159, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985)], and one that confirms the teaching of *Gouveia,* is that the Sixth Amendment right to counsel does not attach until after the initiation of *formal charges.*") (emphasis added).

Roberts asserts that the special circumstances of this case establish a Sixth Amendment right to counsel. According to Roberts, the mandatory sentencing consequences of refusing to take the blood/alcohol test, combined with the misleading information provided by Maine regarding the consequences that would arise from his refusal to take the test and the denial of Roberts' request to call his attorney to clear up the misunderstanding, somehow transformed the normally investigatory testing procedure into an adversarial, quasi-prosecutorial, sentencing proceeding. Appealing as this argument may be, we must reject it. Whatever limited circumstances may exist in which the right to counsel attaches prior to a formal charge, it cannot include the circumstances in the present case because the police were still waiting for the outcome of their investigation — either from the results of the blood/alcohol test or from the fact of defendant's refusal to submit to the test — before deciding whether or not to bring charges against the defendant. The government had not yet crossed the constitutional divide between investigator and accuser. As a threshold matter, the right to counsel had not yet attached when Robert's request for counsel was denied, and, therefore, we cannot reach the further, and admittedly close, question of whether or not Roberts decision to take the blood/alcohol test involved a "critical stage" of the prosecution at which the right to have the advice of counsel would otherwise be constitutionally required.

. . . .

885 F.3d 949 (2018)

John R. TURNER, Petitioner-Appellant,
v.
UNITED STATES of America, Respondent-Appellee.

No. 15-6060.

United States Court of Appeals, Sixth Circuit.

Argued: October 11, 2017.
Decided and Filed: March 23, 2018.

Appeal from the United States District Court for the Western District of Tennessee at Memphis. Nos. 2:12-cv-02266; 2:08-cr-20302-1—Samuel H. Mays, Jr., District Judge.

ARGUED EN BANC: Robert L. Hutton, Glankler Brown, PLLC, Memphis, Tennessee, for Appellant. Kevin G. Ritz, United States Attorney's Office, Memphis, Tennessee, for Appellee. ON SUPPLEMENTAL BRIEF: Robert L. Hutton, Glankler Brown, PLLC, Memphis, Tennessee, for Appellant. Kevin G. Ritz, Murrell G. Martindale, United States Attorney's Office, Memphis, Tennessee, for Appellee. Steven J. Mulroy, University of Memphis, Memphis, Tennessee, Stephen Ross Johnson, Ritchie, Dillard, Davies & Johnson, P.C., Knoxville, Tennessee, Adam Lamparello, Newport, Kentucky, for Amici Curiae.

Before: COLE, Chief Judge; BATCHELDER, MOORE, CLAY, GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, WHITE, STRANCH, DONALD, THAPAR, and BUSH, Circuit Judges. [*]

BATCHELDER, J., delivered the opinion of the court in which GIBBONS, ROGERS, SUTTON, COOK, McKEAGUE, GRIFFIN, KETHLEDGE, THAPAR, and BUSH, JJ., joined, and CLAY and WHITE, JJ., joined in the result. BUSH, J. (pp. 955-66), delivered a separate dubitante opinion in which KETHLEDGE, J., joined. CLAY, J. (pp. 966-76), delivered a separate concurrence in the judgment only in which WHITE, J., joined in Part I. WHITE, J. (pp. 976-77), delivered a separate concurrence in the judgment only. STRANCH, J. (pp. 977-84), delivered a separate dissent, in which COLE, C.J., and MOORE and DONALD, JJ., joined.

951 *951 ## OPINION

ALICE M. BATCHELDER, Circuit Judge.

Appellant John Turner asks us to overrule nearly four decades of circuit precedent holding that the Sixth Amendment right to counsel does not extend to preindictment plea negotiations. *See United States v. Moody,* 206 F.3d 609, 614-15 (6th Cir. 2000) (citing *United States v. Sikora,* 635 F.2d 1175 (6th Cir. 1980)). We decline to do so. Our rule — copied word for word from the Supreme Court's rule — is that the Sixth Amendment right to counsel attaches only "at or after the initiation of judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* at 614 (quoting *Kirby v. Illinois,* 406 U.S. 682, 689, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972) (plurality opinion)); *see also United States v. Gouveia,* 467 U.S. 180, 188, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984). The district court followed this rule, and we AFFIRM.

I.

In 2007, after appellant John Turner robbed four Memphis-area businesses at gunpoint, he was arrested by a Memphis police officer who was part of a joint federal-state "Safe Streets Task Force." Turner hired an attorney. A Tennessee grand jury indicted Turner on multiple counts of aggravated robbery, and Turner's attorney represented him in plea negotiations with state prosecutors.

952 During the state proceedings, the state prosecutor informed Turner's attorney *952 that the United States Attorney's Office planned to bring federal charges against Turner. Turner's attorney contacted the Assistant United States Attorney ("AUSA") responsible for Turner's case, who confirmed that the United States planned to bring federal robbery and firearms charges that could result in a mandatory minimum of eighty-two years' imprisonment for the firearms charges alone. The AUSA conveyed to Turner's attorney a plea offer of fifteen years' imprisonment which would expire if and when a federal grand jury indicted Turner.

Turner's attorney says that he correctly and timely relayed the federal plea offer to Turner, but that Turner refused it. Turner disputes this. In any event, Turner did not accept the federal plea offer before the federal grand jury in the United States District Court for the Western District of Tennessee indicted him in 2008. Turner hired a new attorney and negotiated a plea deal which resulted in twenty-five years' imprisonment. As part of Turner's plea agreement, he waived his right to file a direct appeal.

In 2012, Turner filed a 28 U.S.C. § 2255 motion alleging that his original attorney rendered constitutionally ineffective assistance during the federal plea negotiations. The district court, following Sixth Circuit and Supreme Court precedent, found that Turner's Sixth Amendment right to counsel had not yet attached during his preindictment federal plea negotiations and denied his motion.

A panel of this court affirmed the district court. *Turner v. United States,* 848 F.3d 767 (6th Cir. 2017). Turner then filed a petition for rehearing en banc, which this court granted. *Turner v. United States,* 865 F.3d 338 (6th Cir. 2017).

II.

Turner raises two issues: (1) whether the Sixth Amendment right to counsel extends to preindictment plea negotiations; and (2) whether an indictment in a state prosecution triggers a criminal defendant's Sixth Amendment right to counsel for the purposes of forthcoming federal charges based on the same underlying conduct. Both of these issues are questions of law that we review de novo. *See Moody,* 206 F.3d at 612.

A.

"In all criminal prosecutions, the accused shall enjoy the right ... to have the Assistance of Counsel for his defen[s]e." U.S. CONST. amend. VI. The Sixth Amendment right to counsel "does not attach until a prosecution is commenced." *Rothgery v. Gillespie Cty.,* 554 U.S. 191, 198, 128 S.Ct. 2578, 171 L.Ed.2d 366 (2008) (quoting *McNeil v. Wisconsin,* 501 U.S. 171, 175, 111 S.Ct. 2204, 115 L.Ed.2d 158 (1991)). A prosecution commences only at or after "the initiation of adversary judicial criminal proceedings — whether by way of formal charge, preliminary hearing, indictment, information, or arraignment." *Id.* (quoting *Gouveia,* 467 U.S. at 188, 104 S.Ct. 2292).

Once the Sixth Amendment right to counsel attaches, criminal defendants have a right to the assistance of counsel during "critical stages" of the prosecution. *Missouri v. Frye,* 566 U.S. 134, 140, 132 S.Ct. 1399, 182 L.Ed.2d 379 (2012); *Montejo v. Louisiana,* 556 U.S. 778, 786, 129 S.Ct. 2079, 173 L.Ed.2d 955 (2009). The "core purpose" of the Sixth Amendment right to counsel was to ensure that criminal defendants could receive assistance of counsel "at trial," *United States v. Ash,* 413 U.S. 300, 309, 93 S.Ct. 2568, 37 L.Ed.2d 619 (1973), but the Supreme Court has "expanded" the right to certain pretrial "trial-like confrontations" that present "the same dangers that gave birth initially to the right itself." *Id.* at 311-12, *953 93 S.Ct. 2568. These critical stages include "arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea." *Frye,* 566 U.S. at 140, 132 S.Ct. 1399.

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Six years ago, in *Missouri v. Frye,* 566 U.S. at 144, 132 S.Ct. 1399, and *Lafler v. Cooper,* 566 U.S. 156, 162, 132 S.Ct. 1376, 182 L.Ed.2d 398 (2012), the Supreme Court extended the Sixth Amendment right to counsel to a new critical stage: plea negotiations. It did so because plea negotiations have become "central to the administration of the criminal justice system" and because they frequently determine "who goes to jail and for how long," making them potentially "the only stage when legal aid and advice would help" many criminal defendants. *Frye,* 566 U.S. at 143-44, 132 S.Ct. 1399 (citations omitted). In both *Frye* and *Lafler,* however, the plea negotiations occurred after the criminal defendants had been formally charged. *See id.* at 138, 132 S.Ct. 1399; *Lafler,* 566 U.S. at 161, 132 S.Ct. 1376. Neither *Frye* nor *Lafler* specifically addresses attachment, but they are critical-stage cases which we have found "accept the rule that the right to counsel does not attach until the initiation of adversary judicial proceedings." *Kennedy v. United States,* 756 F.3d 492, 493 (6th Cir. 2014).

Turner argues that the Supreme Court's reasoning for holding that postindictment plea negotiations are critical stages applies equally to preindictment plea negotiations. But Turner makes the fundamental "mistake" of confusing the "critical stage question" with the "attachment question." *Rothgery,* 554 U.S. at 211, 128 S.Ct. 2578 (internal quotation marks omitted). These questions must be kept "distinct." *Id.* at 212, 128 S.Ct. 2578 (citation omitted). That is why the Supreme Court has repeatedly rejected attempts by criminal defendants to extend the Sixth Amendment right to counsel to preindictment proceedings, even where the same proceedings are critical stages when they occur postindictment. *Compare United States v. Wade,* 388 U.S. 218, 236-37, 87 S.Ct. 1926, 18 L.Ed.2d 1149 (1967) (Sixth Amendment right to counsel in postindictment lineups), *with Kirby,* 406 U.S. at 690, 92 S.Ct. 1877 (plurality opinion) (no Sixth Amendment right to counsel in preindictment lineups); *compare Massiah v. United States,* 377 U.S. 201, 205-06, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) (Sixth Amendment right to counsel in postindictment interrogations), *with Moran v. Burbine,* 475 U.S. 412, 431-32, 106 S.Ct. 1135, 89 L.Ed.2d 410 (1986) (no Sixth Amendment right to counsel in preindictment interrogations).

The Supreme Court's attachment rule is crystal clear. It is "firmly established" that a person's Sixth Amendment right to counsel "attaches only at or after the time that adversary judicial proceedings have been initiated against him." *Gouveia,* 467 U.S. at 187, 104 S.Ct. 2292. Because the Supreme Court has not extended the Sixth Amendment right to counsel to any point before the initiation of adversary judicial criminal proceedings, we may not do so. *See Moody,* 206 F.3d at 614. We therefore reaffirm our long-standing rule that the Sixth Amendment right to counsel does not extend to preindictment plea negotiations.

Turner argues that other circuits extend the Sixth Amendment right to counsel to preindictment "adversarial confrontations," but no other circuit has definitively extended the Sixth Amendment right to counsel to preindictment plea negotiations. Only one circuit has implied that the Sixth Amendment right to counsel extends to preindictment plea negotiations, but that opinion was non-precedential and the issue of when the Sixth Amendment right to counsel attaches was not before the court in that case. *See United States v.*

954 *Giamo,* *954 665 Fed.Appx. 154, 156-57 (3d Cir. 2016). A minority of circuits have also discussed the "possibility that the right to counsel might conceivably attach before any formal charges are made, or before an indictment or arraignment." *Roberts v. Maine,* 48 F.3d 1287, 1291 (1st Cir. 1995); *see Perry v. Kemna,* 356 F.3d 880, 895-96 (8th Cir. 2004) (Bye, J., concurring) (collecting cases). None of these circuits, however, has extended the Sixth Amendment right to counsel to preindictment plea negotiations. There is therefore no circuit split on this issue.

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C.

Turner's sole basis for relief in his 28 U.S.C. § 2255 motion was that his original attorney provided constitutionally ineffective assistance during Turner's preindictment federal plea negotiations. But Turner's Sixth Amendment right to counsel had not yet attached during those preindictment plea negotiations. There can be no constitutionally ineffective assistance of counsel where there is no Sixth Amendment right to counsel in the first place. Smith v. Ohio Dep't of Rehab. & Corr., 463 F.3d 426, 433 (6th Cir. 2006) (citing Coleman v. Thompson, 501 U.S. 722, 752, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991)).

III.

For the foregoing reasons, we AFFIRM the judgment of the district court.

171 F.3d 877 (1999)

Anthony N. MATTEO, Appellant

v.

SUPERINTENDENT, SCI ALBION; The District Attorney of The County of Chester; The Attorney General of The State of Pennsylvania

No. 96-2115.

United States Court of Appeals, Third Circuit.

Argued January 30, 1998.
Argued November 23, 1998.
Decided March 24, 1999.

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I. Background

A. Facts

In September 1988, Anthony Matteo was convicted of first degree murder, robbery, theft, and possession of marijuana and subsequently sentenced to life imprisonment on the murder conviction and twenty years' consecutive probation on the robbery conviction.

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III. Matteo's Sixth Amendment Claim

Matteo's sole argument on the merits is that the taping, and subsequent use in evidence, of his two telephone conversations with Lubking deprived him of his right to counsel as secured by the Sixth and Fourteenth Amendments to the United States Constitution. The Sixth Amendment provides in part 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. Relying on *Massiah v. United States,* 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and its progeny, Matteo claims the Pennsylvania Superior Court's rejection of his Sixth

Amendment argument was both "contrary to" and an "unreasonable application of" relevant Supreme Court precedent.

In *Massiah,* the Supreme Court held that deliberate elicitation of incriminating statements by a government agent, outside the presence of a charged defendant's attorney, violates the Sixth Amendment. Federal
892 agents had secured the cooperation of an informant who agreed to *892 let the agents place a radio transmitter underneath the seat of his car. An agent then overheard a conversation between Massiah and the informant, in which Massiah made several incriminating remarks about his drug importation activities. At trial, the agent was permitted to testify as to what he overheard on the radio transmitter, and Massiah was convicted. The Supreme Court overturned his conviction, holding that "the petitioner was denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206, 84 S.Ct. 1199. In a subsequent line of cases, the Court developed the *Massiah* doctrine governing the constitutionality of these so-called "secret interrogations." The cases establish three basic requirements for finding a Sixth Amendment violation: (1) the right to counsel must have attached at the time of the alleged infringement; (2) the informant must have been acting as a "government agent"; and (3) the informant must have engaged in "deliberate elicitation" of incriminating information from the defendant. *See, e.g., Maine v. Moulton,* 474 U.S. 159, 170-71, 106 S.Ct. 477, 88 L.Ed.2d 481 (1985); *United States v. Henry,* 447 U.S. 264, 269-270, 100 S.Ct. 2183, 65 L.Ed.2d 115 (1980). We will review each separately to determine whether the state court's conclusion withstands scrutiny under AEDPA.

A. *Attachment of the Right to Counsel*

The Pennsylvania Superior Court did not explicitly address whether Matteo's right to counsel had attached at the time in question. It did, however, analyze whether Lubking acted as a government agent and deliberately elicited information from Matteo. Because such an analysis would be unnecessary if Matteo's right to counsel had not attached, we believe the state court implicitly concluded that it had.

Generally, the Sixth Amendment right to counsel attaches "only at or after the initiation of adversary judicial proceedings against the defendant." *United States v. Gouveia,* 467 U.S. 180, 187, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984); *see also Estelle v. Smith,* 451 U.S. 454, 469-70, 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *Moore v. Illinois* 434 U.S. 220, 226, 98 S.Ct. 458, 54 L.Ed.2d 424 (1977); *Brewer v. Williams,* 430 U.S. 387, 398, 97 S.Ct. 1232, 51 L.Ed.2d 424 (1977); *Kirby v. Illinois,* 406 U.S. 682, 688, 92 S.Ct. 1877, 32 L.Ed.2d 411 (1972). Such proceedings include "formal charge, preliminary hearing, indictment, information, or arraignment." *Kirby,* 406 U.S. at 689, 92 S.Ct. 1877. The right also may attach at earlier stages, when "the accused is confronted, just as at trial, by the procedural system, or by his expert adversary, or by both, in a situation where the results of the confrontation might well settle the accused's fate and reduce the trial itself to a mere formality." *Gouveia,* 467 U.S. at 189, 104 S.Ct. 2292 (citations omitted). The crucial point is that the defendant is guaranteed the protection of 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." *Kirby,* 406 U.S. at 689.

At the time of Matteo's two telephone conversations, which took place on January 29-30, 1988, Matteo had been arrested and incarcerated for over a week. He had retained a lawyer, who ultimately represented him through the trial. Matteo's preliminary hearing took place on February 12, 1988; the district attorney filed an information on March 3, 1988; and the arraignment was held on March 4, 1988. Citing these facts, the

Magistrate Judge recommended denial of Matteo's petition on the grounds that his right to counsel had not yet attached. The District Court held otherwise, ruling that the right to counsel had attached but denying the
893 *893 petition on other grounds. *See Matteo,* at 3.

We hold that Matteo's right to counsel had attached at the time of the telephone conversations. By this time Matteo had undergone preliminary arraignment. Additionally, he "was in custody as a result of an arrest warrant charging him with the murder, and he was, in fact, represented by counsel from the day he surrendered." Id. at 2-3. Moreover, both before and after the telephone calls, Matteo was confronted with the organized resources of an ongoing police investigation by agents who were well aware of his legal representation. Under these circumstances, we believe Matteo's right to counsel had attached and he was entitled to the full protection of the Sixth Amendment.

. . . . [Determining no Sixth Amendment violation occurred] . . . .

Accordingly, the District Court correctly dismissed Matteo's habeas petition.
We will affirm the judgment of the District Court.