Team R34

No. 4-422

IN THE

Supreme Court of the United States

Chad David,

Petitioner,

v.

The United States of America,

Respondent.

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

Brief for the Respondent – The United States of America

Team R34
Counsel for the Respondent
October 21, 2018

QUESTIONS PRESENTED

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

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

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The opinion of the United States Court of Appeals for the Thirteenth Circuit is unreported but may be found at pages 13-24 of the Record, respectively. The decision of the United States District Court for the Southern District of Staples is unreported but may be found at pages 1-12 of the Record, respectively.

STATEMENT OF JURISDICTION

The statement of jurisdiction has been omitted in accordance with the rules of the University of San Diego School of Law Criminal Procedure Tournament.

STATEMENT OF THE CASE

A. Statement Of The Facts

On January 15th, 2017 Mr. Chad David, the 72 year old minister at Lakeshow Community Revivalist Church did not appear as expected to lead Sunday services. R. at 2. Parishioner Julianne Alvarado appeared to be nervously shaking as she voiced her concern for Mr. David's wellbeing to another parishioner, Officer James McNown. *Id.* Mr. David failed to answer Ms. Alvarado's telephone calls, and it was unusual for the minister to fail to appear for services. *Id.* and Ex. A at 2. A second parishioner, Mr. Jacob Ferry, said to Officer McNown that he thought he had observed the minister at a bar the night before. *Id.* Officer McNown offered to stop by to bring Mr. David some tea during his patrol route scheduled to begin after service that morning. This was to calm the service attendees and assuage the concerns for his safety. *Id.* Another parishioner was able to stand in and lead the services which ended around 8:50am *Id.*

Officer McNown began his patrol shift once services had ended. He acquired a hot tea as a gesture of concern for Mr. David, and arrived at Mr. David's home at approximately 9:30am. R. at 2. Officer McNown noted nothing unusual with the home. Mr. David's car was in the driveway and all the doors were shut. He noticed a black Cadillac SUV with Golden State license plates leaving the gated complex as he entered, but did not attribute such to Mr. David. *Id.* and Ex. A at 4. This style of vehicle is known to Officer McNown as typically driven by drug dealers which drew his interest, as there had been an increase in drugs from Golden State recently. *Id.* Officer McNown knocked and announced his presence at the front door. R. at 3. After two minutes of waiting, no one had come to the door to answer. *Id.* Hearing loud music, Officer McNown peeked into the front window and saw the TV on with

The Wolf of Wall Street playing, a movie Officer McNown felt was out of character given Mr David's profession and reputation. *Id.* Officer McNown assumed Mr. David could not hear the knocking given the loud music. *Id.* He then attempted to open the front door. *Id.*

Finding the front door locked, Officer McNown proceeded around to the back of the home and entered an unlocked back door. *Id.* Officer McNown approached the TV to turn it off and noticed a notebook while he did so. *Id.* The notebook was open and had the name "Julianne Alvarado" and the words "ounce" and "paid" on it. Ex. A at 5. Officer McNown proceeded upstairs toward the music and opened the door to the room where the music was coming from. R. at 3 and Ex. A at 6. Mr. David was inside packaging what appeared to be large amounts of powdered cocaine into plastic bags. *Id.*

Drug Enforcement Agent Colin Malaska arrived at Mr. David's house around 10:00am and began to investigate the scene. *Id.* After being shown the mounds of cocaine and the notebook found in the house, Agent Malaska read Mr. David his Miranda rights. *Id.* When Agent Malaska asked Mr. David where he obtained the large quantity of drugs, he replied that there was "no way he would give up his suppliers" - indicating that sharing could potentially lead to his death and his church being burnt down. *Id.*

After Mr. David arrived at the federal detainment facility, he called one of the only criminal defense lawyers he knew, Keegan Long. R. at 4. Mr. Long was an attendee of Mr. David's Sunday services. *Id.* Though Mr. David was personally aware that Mr. Long was an alcoholic, he believed that he would adequately represent him. R. at 4 and Ex. C at 4.

Per a request from Agent Malaksa, the prosecutors held off on filing any charges. *Id.* He encouraged them to offer a favorable plea deal, as he had credible information that a suspected drug kingpin was traveling through Lakeshow and believed that Mr. David could

provide information that would lead to an arrest. *Id.* The prosecutors came up with a plea bargain of one year in prison in exchange for the name of his suppliers, valid for only 36 hours. *Id.* The offer was emailed to Mr. Long on January 16, 2017 at 8:00am and was set to expire on January 17, 2017 at 10:00pm. R. at 4 and Ex. D.

Mr. Long was drinking at a bar when he received the emailed plea offer and failed to accurately read the 36-hour time limit on the plea deal. *Id.* He also failed to answer a call from the prosecutor inquiring about the status of the plea deal. *Id.* It is undisputed that after 36 hours, the offer expired without Mr. Long ever communicating the plea offer to Mr. David. *Id.* On January 18, 2017, federal prosecutors indicted Mr. David, charging him with one count of 21 United States Code Section 841. *Id.* After Mr. David was made aware of Mr. Long's mistake, he fired Mr. Long as counsel. *Id.* Subsequently, he hired a new criminal defense lawyer, Michael Allen. *Id.* After the indictment, Mr. Allen emailed Ms. Marie, the prosecutor, inquiring about extending another plea offer to Mr. David. R. at 5 and Ex. E at 1. She made it clear that they would not be extending another plea offer because the government would not receive any substantial benefit as the suppliers may have been tipped off. R. at 5 and Ex. E at 2.

B. Procedural History

On January 18, 2017, Chad David ("Petitioner") was charged by indictment with one count of possession of controlled substance with intent to distribute in violation of 21 United States Code Section 841. R. at 1. Case number 20-PKS09-20-RCN15 was assigned and trial proceedings were initiated. *Id.* A motion to suppress evidence and supplemental motion was denied by Judge Kobe Bryant on July 15, 2017. *Id.* A timely appeal was made to the United States Court of Appeals for the Thirteenth Circuit. Judge Shaquille O'Neal, Judge Jerry West,

and Judge Magic Johnson issued their decision on May 10, 2018 upholding the lower court's decision and affirming Mr. David's conviction at trial. This Court of the United States granted Writ of Certiorari, briefs to be filed by October 21, 2018 and oral argument to be presented on November 16, 2018.

STANDARD OF REVIEW

Despite some variance between appellate jurisdictions on the interpretation of the level of deference required for the lower court's determinations, the current appropriate standard of review for a Fourth Amendment and Sixth Amendment analysis is de novo. Ornelas v. United States, 517 U.S. 690, 697, 116 S. Ct. 1657, 1662, 134 L. Ed. 2d 911 (1996.) Such review commonly contains mixed questions of law and fact. De novo review does not supplant the lower court entirely, it simply opens the door for the appellate court to review such facts and determine who is in the best position to determine which are convincing. "[O]ne judicial actor is better positioned than another to decide the issue in question." Miller v. Fenton, 474 U.S. 104, 114, 106 S. Ct. 445, 451, 88 L. Ed. 2d 405 (1985.) If the lower court was in a better position to evaluate the factual aspects of the case, such determinations should stand. If not, or if there is an appearance of bias, the appellate review must provide a new synthesis using the facts supplied in the record. In both circumstances, the overarching principal that overturning a lower court decision should not be done lightly, still holds.

SUMMARY OF THE ARGUMENT

The Fourth Amendment protects the People from search and seizure by the government without probable cause. Warrants are a means to validate that probable cause exists and therefore entry is reasonable, but are not the sole means to validate an entry. Courts have long recognized exceptions to the warrant requirement, including many aspects rightfully classified as community

caretaking. With the interpretive shift to a reasonableness standard, the more conservative Trespass Doctrine has been relaxed but not completely supplanted. However, the home remains one of the most sensitive areas and requires clear protection from pretextural or overzealous policing. However, the framework for non-investigative activity is afforded a different standard than required for an intentional search. Entry to the home is allowable within reason for non-emergency, non-exigency purposes. When the facts, such as in the instant case, make it clear that there was no investigative intent on behalf of the officer in question, general community caretaking should also fall within such allowance. Any evidence observed while properly conducting oneself in pursuit of such legal aims may be rightfully seized, and all evidence observed while on a community caretaking call should therefore be admissible. In addition, the same absence of intent precludes the application of the exclusionary rule as it is a remedy strictly reserved as a deterrent for willful, negligent, or intentional search violations of the Fourth Amendment protections, for which public interest activities do not fall.

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall have the right to the assistance of counsel for his defense. In determining when the right may be asserted, this Court has recognized that once the adverse position of the government and the defendant has been established, the right attaches. After the right has attached, the accused has the right to the assistance of counsel during any critical stage of the post attachment proceedings. Attachment alone does not require the occurrence of a critical stage. Critical stages include arraignments, postindictment interrogations, postindictment lineups, postindictment plea negotiations, and the entry of a guilty plea. This Court has continued to reject attempts by criminal defendants to extend the Sixth Amendment right to counsel to preindictment

proceedings, even when the same proceedings are considered a critical stage when they occur postindictment.

However, if it is found that the right to counsel does attach to preindictment plea negotiations, it is necessary to analyze whether counsel's representation was effective. In *Strickland*, this Court adopted a two-part standard for evaluating claims of ineffective assistance of counsel. First, the defendant must show that counsel's performance was deficient. Next, the defendant must show that the deficient performance prejudiced the defense. There is no argument that Mr. Long's performance was deficient. Though counsel's performance was deficient, Mr. David is unable to show that the deficient performance prejudiced his defense, defeating his ineffectiveness claim.

ARGUMENT

I. THE FOURTH AMMENDMENT DOES NOT BAR WARRANTLESS ENTRY PURSUANT TO A COMMUNITY CARETAKING PURPOSE

A. The Trespass Doctrine as Updated by Katz v. United States

The Fourth Amendment protects the People, specifically in their persons, houses, papers, and effects, against unreasonable searches and seizures by the government. U.S. Const. amend. IV. This has never been interpreted as a general right of privacy, nor a blanket requirement for a warrant to search, but solely prohibits unreasonable governmental intrusion to particular sensitive areas of our lives. Interpretation of the amendment, specifically what government purposes defeat the presumption of unreasonableness, and what acts constitute a search has evolved over time. Initially protection was constrained to property law trespass to one of the above enumerated protected areas, but has since developed into a more modern interpretation. Now a sphere of protection, objectively defined by society, travels with the individual. Olmstead

v. United States, 277 U.S. 438, 464, 48 S. Ct. 564, 568, 72 L. Ed. 944 (1928) *compared to* Katz v. United States, 389 U.S. 347, 350, 88 S. Ct. 507, 510, 19 L. Ed. 2d 576 (1967.) Although now no longer affixed to the above enumerated areas, the sphere of protection is not unyielding, as it may be pierced when measured reasonable by examining the totality of the circumstances. Ohio v. Robinette, 519 U.S. 33, 39 (1996.)

Post *Katz*, decisions were focused on the expansion of Fourth Amendment protection beyond the traditional Trespass Doctrine which led to confusion in lower courts. Some concluding that the Trespass Doctrine no longer held. In *United States v. Jones*, this Court clarified that "Katz did not erode the principle "that, when the Government does engage in physical intrusion of a constitutionally protected area in order to obtain information, that intrusion may constitute a violation of the Fourth Amendment." 460 U.S., at 286, 103 S.Ct. 1081 (opinion concurring in judgment). We have embodied that preservation." United States v. Jones, 565 U.S. 400, 407, 132 S. Ct. 945, 951, 181 L. Ed. 2d 911 (2012.) Justice Kennedy placed an extremely significant clause in his description of the surviving aspects of the Trespass Doctrine; the clause "in order to obtain information." *Id.* This clause highlights that the Fourth Amendment requires the actions of the government to be *for the purpose of investigation* for it to be considered a violation. Intent and purpose behind the act continue to play a pivotal role even when a home is the area of potential violation.

More specifically, when evaluating entry into a home, this Court has also specifically discussed that the Trespass Doctrine is not a blanket ban, but still subject to the reasonableness balancing standard envisioned in *Katz*. "In determining whether a particular inspection is reasonable …the need for the inspection must be weighed in terms of these reasonable goals of code enforcement" Camara v. Mun. Court of City & Cty. of San Francisco, 387 U.S. 523, 535,

87 S. Ct. 1727, 1734, 18 L. Ed. 2d 930 (1967.) Although this Court found insufficient factual support for entry, the method employed in the decision validates that under different factual circumstances, it could be reasonable to enter the home without probable cause of criminality, similar to the recognized authority to enter a vehicle to conduct an inventory discussed below.

As it is still unclear how all this applies to the home, several jurisdictions have retained the strict trespass standard while others shifted the standard to incorporate a balancing component. As an example, the Ninth Circuit has more recently become amenable to a modified standard. Murdock v. Stout, 54 F.3d 1437, 1443 (9th Cir. 1995.) In that case, the court opined that entry into the house without a warrant was not a violation unless it was intended as a search or found to be unreasonable on other grounds. Those factual determinations require an analysis of the specific nature of, and intent behind the entry to properly determine if a violation of a Constitutional right has occurred. Hence, the Trespass Doctrine places a high bar to entry for the purpose of criminal investigation, but is relaxed for alternate government purpose. The appropriate standard for home entry for non-criminal purposes has therefore evolved from a highly restrictive approach to a more balanced one.

B. Community Caretaking Stems From Intentions Other than the Enforcement of Law

Once a balancing approach is employed, it becomes a challenge to evaluate when there is *no* law enforcement purpose to balance against; it becomes even more so when there is no direct government purpose to the entry *at all*. In evaluating inventory searches of vehicles, this Court highlighted the common understanding that "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." Cady v. Dombrowski, 413 U.S. 433, 441, 93 S. Ct. 2523, 2528, 37 L. Ed. 2d 706 (1973); *see also* S. Dakota v. Opperman, 428 U.S. 364, 368, 96 S. Ct. 3092, 3096, 49 L. Ed. 2d 1000 (1976.) As the Fourth Amendment specifically precludes unreasonable searches and seizures, one logical inference from these decisions is that such behavior is essentially so devoid of investigative intent that they do not run afoul of the Fourth Amendment. These cases still have a government administrative purpose, whereas many community caretaking activities are humanistic and do not.

A significant part of the problem with this area is the frequency of overlap in classification, or more appropriately misclassification, between the topics of emergency, exigency, and community caretaking. Exigency encompasses a law enforcement purpose where the actual intent to search is present, insufficient evidence is apparent to make a finding of probable cause, but specific, defined, and reasonable conditions exist to surmount the *per se* illegality of said warrantless search. Commonly conflated, emergency is more appropriately classified to the non-enforcement role our community caretakers perform. "[P]olice officers function in one of two roles: (1) apprehension of criminals (investigative function); and (2) protecting the public and rescuing those in distress (caretaking function)." State v. Boggess, 115 Wis.2d 443, 340 N.W.2d 516, 521 (1983.) Immediate aid and a search for additional victims have historically been afforded exceptions from the *per se* unreasonable standard, even when the Trespass Doctrine was the sole criterion for determining if a Fourth Amendment violation occurred. "[T]he emergency-aid exception is justified because the motivation for the intrusion is to preserve life rather than to search for evidence to be used in a criminal investigation." Duquette v. Godbout, 471 A.2d 1359, 1362 (R.I.1984.) Traditionalists that hold to the highest bar to entry have argued that absent direct exigency such emergency aid activities fall more so

under the rubric of implied consent rather than some alternate exception to the Trespass Doctrine. How does one then rectify the Court's allowance for non-emergency or exigent caretaker activities such as taking a vehicle inventory, a compliance check, or "in a variety of factual situations, including entry of a dwelling to seek an occupant reported as missing?" State v. Carlson, 548 N.W.2d 138, 141 (Iowa 1996.) One simply cannot and one must therefore abandon the strict construction and unify under a balancing approach.

The Fourth Circuit elegantly addresses this concern by repurposing the logic applied in *Cady v. Dombrowski*. Their approach addresses that emergency and community caretaking are similar in nature and distinct from exigency. They apply a framework where a procedural standard is used when the government is acting pursuant to a non-investigative purpose, but becomes an objective fact-based standard when acting outside delineated bounds, such as when an emergency exists.

> "The doctrines overlap conceptually. For example, although fire officials investigate arson, the main function they serve is the protection of persons and property, not the detection of crime; thus … could be justified under a community caretaking rationale, as well as under the exigent circumstances doctrine. …the two exceptions are not the same. 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. Thus, as the district court noted, the doctrines have different "intellectual underpinning[s]." Hunsberger, 564 F.Supp.2d at 567. …the best reading of the relationship between the two exceptions is that when analyzing a search made as the result of a routine police procedure, such as the policy of locating weapons in towed cars in Dombrowski, the court should examine the programmatic purpose of the policy—whether it was animated by community caretaking considerations or by law enforcement concerns. But when the search in question was performed by a law enforcement officer responding to an emergency, and not as part of a standardized procedure, the exigent circumstances analysis and its accompanying objective standard

should apply." Hunsberger v. Wood, 570 F.3d 546, 554 (4th Cir. 2009.)

C. Officer McNown was Acting Pursuant to Community Caretaking

There is no compelling factual matter the instant case that places Mr. David directly in question. The actions of Officer McNown should therefore be evaluated as those of a community caretaker. Officer McNown was a member of the church and was himself present at the service where Mr. David failed to appear without notice. R. at 2. Mr. David is of advanced age and not known to miss services. R. at 2. The initiation of the contact was not pursuant to a criminal investigation or an emergency but from humanistic intent to determine if assistance is needed for a beloved and potentially ailing individual. Officer McNown waited until after services and stopped to acquire a tea before going to the home, a common gesture of goodwill to someone ailing. R. at 2. Officer McNown observed Mr. David's car in the driveway, indicating he was likely home. R. at 2. Officer McNown then rang the bell and waited for approximately two minutes R. at 3. All of these facts are consistent with a community caretaking action.

Although Officer McNown thought the observed departing vehicle, and the volume and type of movie were unusual, it is irrelevant to his entry and does not preclude continuation as a community caretaker. His original purpose was not fulfilled or altered and Mr. David was too engrossed in his activities to hear or attend the knock, leaving the question as to the condition of Mr. David still uncertain. No criminally suspicious activity directly related to Mr. David was detected prior to the point of entry. Officer McNown proceeded to the unlocked back door, and entered. R. at 3. A welfare check requires an officer to make reasonable effort to evaluate if a party is in need, and falls outside the scope of a search or arrest warrant which would require probable cause.

Mr. David was not present inside, requiring further entry to the second floor, a likely place for an individual to be present when apparently home but not visible on the first floor. Without contact with Mr. David, reasonable information that Mr. David was safe, or a search of all relevant places, Officer McNown was still beholden to continue his action. The volume of the music was such that knocking on the main door was insufficient. R. at 2. This would also reasonably apply to any knocking on the upstairs door; therefore Officer McNown opened the door reasonably. R. at 3. Upon entry to the room, Officer McNown immediately observed sufficient evidence of cocaine trafficking (mounds of product and packaging supplies in current use by the petitioner) to afford a probable cause determination. R. at 3. Discussed further below, once incriminating nature of the evidence is immediately apparent, Officer McNown is clear to seize the evidence and detain the suspect without violation of the Fourth Amendment. *see* U.S. v. Terry, 400 F.3d 575 (8th Cir. 2005); U.S. v. Hastings, 685 F.3d 724 (8th Cir. 2012.) None of the facts in the unfolding of the incident in question are inconsistent with his actions as a community caretaker.

Officer McNown may not have been acting under the color of law at all. He was member of the congregation and Mr. David was his pastor. R. at 2. Although Officer McNown has only attended the Church for four months, a congregant - pastor relationship is one of the most personal relationships that human beings have. A search for a friend, neighbor, or pastor on behalf of the concerned congregation is not an act of the government but is one of a private citizen. Similar to 1983 actions, some activities of government agents are so devoid of government nexus that the Constitution does not apply. Officer McNown had split motives, personal and based upon community concern, but the entry was not pursuant to intent to investigate crime or government purpose.

II. EVIDENCE FOUND PURSUANT TO COMMUNITY CARETAKING IS ADMISSABLE

A. Plain View Seizure is Valid When Entry is Pursuant to Community Caretaking

The notebook and cocaine were discovered in an act consistent with plain view; the notebook was open and both were observed in an area of authorized presence. Ex. F at 1. Once properly observed, "the police may seize any evidence that is in plain view." Mincey v. Arizona, 437 U.S. 385, 392–93, 98 S. Ct. 2408, 2413, 57 L. Ed. 2d 290 (1978.) This doctrine is broadly applied, including for community caretaking: "The ... reasons for which police or other public officials might enter private premises are so varied that generalization is virtually impossible. ... Where police had [a] right to be on premises as part of routine community caretaking functions which included responding to calls to assist persons … search and seizure was proper" (*Internal citations omitted*) Duck v. State, 518 So. 2d 857, 859–60 (Ala. Crim. App. 1987.)

The argument that discovery of the notebook converted an otherwise valid community caretaking entry to a police investigation requiring immediate cessation and acquisition of a search warrant is irreconcilable with the facts of the case. A trained officer, Officer McNown did not perceive such as sufficient evidence to stop and procure a warrant. He did not put down the tea and draw his service weapon, but instead continued to look for Mr. David. Even so, if one assumes arguendo that the notebook discovery is sufficient evidence to convert the community caretaking act into a search, proper procedure would be to secure the residence and apply for a warrant. The discovery of the cocaine and Mr. David's presence in the residence is therefore inevitable. Such evidence would be admissible under the Inevitable Discovery Doctrine. Brewer v. Williams, 430 U.S. 387, 393, 97 S. Ct. 1232, 1236, 51 L. Ed. 2d 424 (1977.) Either way the court chooses to interpret the facts, the discovery of the notebook is therefore irrelevant to the

admissibility of the cocaine, and a bar to admissibility is the sole remedy for a Fourth Amendment violation.

In addition, a mixed motivation does not taint a valid entry. This Court has made clear that the use of minor violations as pretext for entry is unreasonable without acquiring a warrant. Welsh v. Wisconsin, 466 U.S. 740, 754, 104 S. Ct. 2091, 2100, 80 L. Ed. 2d 732 (1984.) However, the decision in that case is a result of the balancing of a minor violation coupled with deliberate motivation for entry rather than some blanket pretextural ban. The Court has "been unwilling to entertain Fourth Amendment challenges based on the actual motivations of individual officers, petitioners disavow any intention to make the individual officer's subjective good faith the touchstone of "reasonableness." Whren v. United States, 517 U.S. 806, 813, 116 S. Ct. 1769, 1774, 135 L. Ed. 2d 89 (1996.) Therefore, mixed motivation and/or Pretext is not a *per se* violation of the Fourth Amendment. The presence of such instead requires greater weight to be found reasonable given the potential for abuse. In the instant case, Officer McNown has only observed tangentially incriminating evidence when he effectuates the entry. Any potential finding of mixed motivation should therefore not preclude entry when the vast majority of the evidence supports a finding that his motivation was purely as a community caretaker.

B. Application of Exclusion is Not Punitive, But a Judicially Derived Deterrent

This Court has made it clear exclusion is a remedy designed to deter intentional police violations of the Fourth Amendment. United States v. Leon, 468 U.S. 897, 918, 104 S. Ct. 3405, 3418, 82 L. Ed. 2d 677 (1984.) The Good Faith Exception derives from this concept; an officer who acts in reliance on an apparently valid, but deficient warrant has no intent to violate the constitution and therefore exclusion would not offer any deterrent effect. *Id.* at 921. Magistrate negligence is similarly outside the scope of such deterrence and exclusion is not the appropriate

remedy. In a similar vein, a community caretaking purpose is by nature devoid of intent to violate the rights of the citizenry. Absent such intent or knowledge, application of the exclusionary rule to plain view evidence discovered while performing a community caretaking duty would as stated in *Leon* "not further the ends of the exclusionary rule in any appreciable way." *Id*. at 920. It therefore must also follow that as a matter of public policy that community caretaking is reasonably outside the scope of the rule to preclude application of exclusion. Without the exclusionary remedy, any finding of a Fourth Amendment violation would be moot.

III. DOES THE SIXTH AMENDMENT RIGHT TO COUNSEL ATTATCH DURING PREINDICTMENT PLEA NEGOTIATIONS?

A. Sixth Amendment

The Sixth Amendment provides that in all criminal prosecutions, the accused shall enjoy certain rights. These rights include the right to a speedy and public trial, the right to be informed of the nature and cause of the accusation, the right to be confronted with the witnesses against him, the right to have compulsory processes for obtaining witnesses in his favor, and the right to have the assistance of counsel for his defense. U.S. Const. amend. VI. These rights are designed to make criminal prosecutions more accurate, fair, and legitimate.

B. Right to Counsel – Attachment & Critical Stages

The Sixth Amendment guarantees that in all criminal prosecutions, the accused shall have the assistance of counsel for his defense. The Sixth Amendment defines the scope of counsel in three separate ways: who may assert the right, when the right may be asserted, and what the right guarantees. Rothgery v. Gillespie Cty., Tex., 554 U.S. 191, 214 (2008.) There is no question that the accused may assert the right and that the right guarantees assistance of counsel for his defense, but there is much debate as to when the right may be asserted. In determining when the

right may be asserted, this Court has recognized that the right to counsel does not attach until a prosecution is commenced.

This Court has firmly established that a prosecution commences only at or after the time that adversary judicial proceedings have been initiated – whether it is by way of formal charge, preliminary hearing, indictment, information, or arraignment. Brewer, 430 U.S. at 398. The reasoning behind why the right attaches at this time is simple. The court recognizes that once the judicial proceedings have been initiated, the adverse position of the government and the defendant has been established. This adverse position triggers the right to the assistance of counsel. Once the right has attached, the accused has the right to the assistance of counsel during any critical stage of the post attachment proceedings. A critical stage in a criminal proceeding is one in which the defendant cannot be presumed to make critical decisions without the advice of counsel. Lafler v. Cooper, 566 U.S. 156, 165 (2012.) For this reason, counsel must be appointed within a reasonable time after attachment to allow for adequate representation at any critical stage before trial, as well as at trial itself. Rothgery, 554 U.S. at 214.

Originally, critical stages included arraignments, postindictment interrogations, postindictment lineups, and the entry of a guilty plea. Turner v. United States, 885 F.3d 949, 953 (6th Cir. 2018.) In both *Missouri v. Frye* and *Lalfer v. Cooper*, this Court extended the Sixth Amendment right to counsel to postindictment plea negotiations, creating a new critical stage. In *Frye,* the court reasoned 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." Missouri v. Frye, 566 U.S. 134, 143 (2012.)

The *Lalfer* and *Frye* decisions make it clear that the right to counsel applies to postindictment plea negotiations, even if the negotiations have no effect on the fairness of the conviction. It is important to note that in both *Lalfer* and *Frye,* plea negotiations occurred postindictment, after the criminal defendants had been formally charged. At this time, the adverse position of the government and the defendants had already been established, and the right to assistance of counsel had already attached. Neither decision questions nor abrogates the issue of attachment; instead they create a new postindictment critical stage. "Had this Court erased the line between preindictment and post indictment proceedings for plea negotiations, it surely would have said so." Kennedy v. United States, 756 F.3d 492, 494 (6th Cir. 2014.) *Lalfer* and *Frye* both accept the long-standing rule that the Sixth Amendment right to counsel does not extend to preindictment plea negotiations.

In order to properly understand and apply the Sixth Amendment right to counsel, it is essential to separate 'attachment' from 'critical stage'. It is an analytical mistake to assume that attachment requires the occurrence or imminence of a critical stage. Turner, 885 F.3d at 953. There are a myriad of situations where, irrelevant of attachment, counsel's presence may not be critical. As this Court has said that "[t]he question whether arraignment signals the initiation of adversary judicial proceedings ... is distinct from the question whether the arraignment itself is a critical stage requiring the presence of counsel." Rothgery, 554 U.S. at 212.

The Sixth Amendment right to counsel attaches only after a criminal defendant's initial appearance before a judicial officer. Once his right has attached, the accused has the right to assistance of counsel during any critical stage of the post attachment proceedings. Though plea negotiations are now recognized as a critical stage, it is necessary to understand that they only fall under the critical stage category after judicial proceedings have been initiated against the

defendant. This Court has continued to reject attempts by criminal defendants to extend the Sixth Amendment right to counsel to preindictment proceedings, even when the same proceedings fall under the critical stage category when they occur postindictment. Turner, 885 F.3d at 953.

Some circuits have extended the Sixth Amendment right to preindictment adversarial confrontations. A minority of circuits have discussed the possibility that the right to counsel might attach before any formal charges are made, or before indictment or arraignment where the government has "crossed the constitutionally significant divide from fact-finder to adversary." Roberts v. State of Me., 48 F.3d 1287, 1291 (1st Cir. 1995.) However, none of these circuits have extended the Sixth Amendment right to counsel to preindictment plea negotiations. Turner, 885 F.3d at 954. Therefore, there is no circuit split on the issue.

Because the Six Amendment right to counsel does not attach during preindictment plea negotiations, Mr. David is not entitled to be re-offered the plea deal. However, if it is found that his right to counsel has attached, his ineffective assistance of counsel claim will fail as he cannot meet the two-part standard laid out in *Strickland.*

IV. STRICKLAND TWO-PRONGED TEST

A. Transition from 'Assistance of Counsel' to 'Effective Assistance of Counsel'

The Sixth Amendment refers specifically to 'counsel' and makes no mention of specifying particular requirements of effective assistance. Over the course of history, the Sixth Amendment right to counsel has become a crucial part of the adversarial system. Counsel's skill and knowledge are integral pieces that allow the defendant to meet the case of the prosecution. In *McMann v. Richardson,* this Court recognized that the right to counsel is the right to the effective assistance of counsel. McMann v. Richardson, 397 U.S. 759, 771 (1970.) The purpose of the requirement of effective assistance of counsel is to ensure a fair trial. "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." Strickland v. Washington, 466 U.S. 668, 686 (1984.)

The right to effective assistance of counsel may be violated by the government or the attorney. The government violates the right to effective assistance of counsel when it interferes with the ability of counsel to make independent decisions regarding how to conduct the defense. An attorney can deprive the defendant the right to effective assistance of counsel if he fails to render adequate legal assistance. With this, we must rely on the legal profession's standards to "justify the law's presumption that counsel will fulfill the role in the adversary process that the Amendment envisions." *Id.*

In *Strickland v. Washington* this Court adopted a two-part standard for evaluating claims of ineffective assistance of counsel. Citing *McMann,* the court reiterated that:

> "When a convicted defendant complains of the ineffectiveness of counsel's assistance, the defendant must show that counsel's representation fell below an objective standard of reasonableness. We also held, however, that 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. This additional "prejudice" requirement was based on our conclusion that 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." Hill v. Lockhart, 474 U.S. 52, 57 (1985.)

The same two-part standard is applicable to ineffective assistance of counsel claims that arise out the plea process.

B. Strickland Test - Prong One: Defendant Must Show That Counsel's Performance Was Deficient

When a convicted defendant makes an ineffectiveness claim, he must identify the acts or omissions of the attorney that are alleged to not have been the result of reasonable professional judgment. In making a determination, the court looks at the identified acts or omissions and decides whether they were outside the wide range of professionally competent assistance. They judge the reasonableness of counsel's challenged conduct on the facts of the case. Strickland, 466 U.S. at 690.

According to the facts, Mr. Long was apparently intoxicated for much of his time as Mr. David's counsel. Due to his intoxication, he incorrectly read the plea offer and did not communicate it to Mr. David within the 36-hour time frame. Ex. B at 3.

Based on the identified acts and omissions by Mr. Long, both the government and Mr. David agree that Mr. Long's actions were far outside the wide range of professionally competent assistance. His actions were unreasonable and it is clear that his performance was deficient. Part one of the Strickland two-pronged test has been satisfied.

C. Strickland Test – Prong Two: Defendant Must Show That the Deficient Performance Prejudiced the Defense

The prejudice requirement is based on the conclusion that an error by counsel, even if determined to be professionally unreasonable, does not warrant setting aside the judgment of a criminal proceeding if the error had no effect on the judgment. U. S. v. Morrison, 449 U.S. 361, 363 (1981.) Actual ineffectiveness claims that allege a deficiency in attorney performance are subject to the requirement that the defendant affirmatively prove prejudice. The government is not responsible for, and cannot prevent, attorney errors that will result in reversal of a conviction

or sentence. *Id*. Even when a defendant shows that particular errors were unreasonable, he must also show that they 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, and not every error that conceivably could have influenced the outcome undermines the reliability of the result of the proceeding." Strickland, 466 U.S. at 691–693. 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.

Prejudice requires a two-part showing. To show prejudice from ineffective assistance of counsel where a plea offer has lapsed because of counsel's deficient performance, the defendant must show with reasonable probability that he would have accepted the earlier plea offer, had counsel been effective. Additionally, the defendant must also show that the plea would have been entered without the prosecution cancelling it or the trial court refusing to accept it. To establish prejudice in this instance, they must show with reasonable probability, that the "end result would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time." Frye, 566 U.S. at 147–148.

First, Mr. David must show with reasonable probability that he would have accepted the original plea offer. A reasonable probability is a probability sufficient to undermine confidence in the outcome. The plea offer required Mr. David to plead guilty, accept a one year sentence in federal prison, and required him to release the names and relevant contact information of known and suspected suppliers of cocaine. The information given was required to lead the prosecution to at least one arrest. Ex. D at 1. Based on the facts, Mr. David cannot show with reasonable probability that he would have accepted the original plea offer. After arresting Mr. David, Agent

Malaska asked him where he obtained such a 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 to his church being burnt down. R. at 3. His response to Agent Malaksa is substantial. The statement made by Mr. David shows that he had no intention of sharing information about his suppliers, protecting himself and in turn, protecting their identity. Therefore, part one of *Strickland* prejudice cannot be shown.

Second, Mr. David must also show that if the prosecution had the discretion to cancel the plea offer or if the trial court had the discretion to refuse to accept it, there is a reasonable probability neither would have prevented the offer from being accepted. This showing is essential because a defendant has no right to be offered a plea, nor a federal right that a judge accept it. Whether the prosecution or the trial court are required to accept a plea offer is a matter of state law. States have the discretion to add procedural protections under state law, should they so 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." *Id.* at 151. Because the prosecution's plea offer to Mr. David expired after 36 hours, they cannot be compelled re-offer the plea deal. Re-offering the plea deal would be unwise because the suppliers had likely been tipped off about the arrest, making a subsequent arrest unlikely. A plea agreement is neither binding nor enforceable until it is accepted in court. More importantly, Mr. David has yet to go to trial. There is a chance that he will go to trial and will not be found guilty of the alleged crime. For this reason, he cannot have suffered prejudice as there is no adverse conviction to compare to. Therefore, the second part of *Strickland* prejudice cannot be shown.

Failure to make the required showing of deficient performance or sufficient prejudice defeats an ineffectiveness claim. Though Mr. David can make a showing that his counsel was deficient, he cannot show that the deficient performance prejudiced his defense.

CONCLUSION

This Court has clearly excised reasonable activities and circumstances from a Fourth Amendment claim. Community Caretaking has rightfully been recognized as part of that canon. This case is ripe to further refine and clarify the dicta of this Court that the home is not excluded from such exception when proper factual matter makes it reasonable. Any evidence found pursuant to such an entry would also be admissible as exclusion is a deterrent reserved for where incentives exist to willfully overstep those reasonable bounds.

Mr. David contends that he should be re-offered the plea deal, as he was not afforded effective assistance of counsel for his defense. This Court continues to reject attempts by criminal defendants to extend the Sixth Amendment right to counsel to preindictment proceedings. As the ineffectiveness claim occurred preindictment, he is not afforded the protections of the Sixth Amendment.

Therefore this Court should affirm the decisions of both the District and Circuit Courts that there is no violation of the Fourth or Sixth Amendment in this case.

CERTIFICATION OF ADHERENCE TO COMPETITION RULES

All team members understand the Rules of the Competition and have adhered to all rules in writing this brief. We have not received any assistance in writing this brief.

Respectfully Submitted,

Team R34

October 21, 2018