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In the
Supreme Court of the United States

STATE OF MICHIGAN,

PETITIONER,

v.

LOREN TYLER and
ROBERT TOMPKINS,

RESPONDENTS,

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No. 76-1608

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Washington, D. C.
January 10, 1978

Pages 1 thru 36

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IN THE SUPREME COURT OF THE UNITED STATES

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STATE OF MICHIGAN, :
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 : Petitioner, :
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 : v. : No. 76-1608
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 : LOREN TYLER and :
 : ROBERT TOMPKINS, :
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 : Respondents. :
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Washington, D.C.

Tuesday, January 10, 1978

The above-entitled matter came on for argument
at 10:10 o'clock a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

JEFFREY BUTLER, Assistant Appellate Counsel, 1200
North Telegraph Road, Pontiac, Michigan 48053;
for the Petitioner, pro hac vice.

JESSE R. BACALIS, Esq., 1510 Ford Building, Detroit,
Michigan 48226; for the Respondents.

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments first this morning in Michigan against Tyler and Tompkins.

Mr. Butler, you may proceed whenever you are ready.

ORAL ARGUMENT OF JEFFREY BUTLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BUTLER: Mr. Chief Justice, and may it please the Court:

This arson case presents the questions of when and to what extent a warrant is to be required for post-fire and, by analogy, other post-disaster investigations and of which evidence is admissible against in particular arsonists who burn their own buildings.

The case arises out of facts which, for the most part, are typical of any arson for profit case, with two small exceptions which we plan to elaborate upon later in argument.

In relating the facts and in attempting to justify warrantless post-fire searches in general as well as the searches which occurred in particular in this case, we have four principal themes. The first is that the public interest in a post-disaster or post-fire search is significantly greater than the public interest in any inspection of the type touched upon or dealt with in Camara, See, and Secretary of State against Barlow.

The second theme is that the privacy interests at

issue, as well as the potential for abuse, are very minimal, primarily because of the extensive damage that has taken place, the extent of the already lawful intrusion, and because of the nature of the search for the cause or origin of the fire.

Third, we contend that a warrant in circumstances like these, whether administrative or criminal, will provide no protection in the great majority of cases, very little protection in a very limited class of cases.

Fourth--our fourth theme is that a fire investigation--there are certain costs in fire investigation and in public safety to require any kind of administrative search warrant.

The general interests in conducting a search of this type are several. The cause itself must be determined first as some type of exigent circumstance. This is a theme which the Michigan Supreme Court seemed not to acknowledge. Now, we grant that they did say if there are exigent circumstances, the possibility of danger, of evidence burning, of danger to the firemen conducting the investigation, danger of water damage to the evidence, that then that will excuse a search that takes place at that time. But we think they should have concluded that until the cause is determined, there should be a presumption that there is an exigent circumstance.

Q In the local law applicable here is every fire

subject to some investigation as to cause?

MR. BUTLER: There is a local statute which requires the local fire marshal to determine--to conduct a physical investigation to determine the cause or origin of the fire, and it states that he may enter without warrant any premises for making that determination.

Q The statute says--the state statute--says that the director or any officer is authorized to investigate and inquire. It does not direct him to investigate and inquire.

MR. BUTLER: If not that specific statute, it is clear that under the Fire Prevention Act, he does have the duty to determine the cause or origin of all fires that result in property damage or death.

Q And did you say in answer to the question of the Chief Justice that he does in fact investigate the cause or origin of every single fire, large and small?

MR. BUTLER: The statute reads where there is injury or death or damage to property. I mean, he would have to list any fire that is called to his attention, very small fires that he would never hear of, of course.

Q Because the statute is simply an authorizing statute. It is not a directory statute. But you say that in practice he is under a duty to do it?

MR. BUTLER: Yes, Your Honor.

Q And does do it?

MR. BUTLER: Yes, he does, Your Honor.

Q In every case where there is a loss of life or damage to property? There is always going to be some damage to property, is there not?

MR. BUTLER: That is brought to his attention. If it is a very small fire that--I mean, of course if it is not reported to any fire department, no, he does not do that.

Q I am assuming it has been reported to the fire department. And there is always damage to property in a fire, is there not?

MR. BUTLER: Not always to real property.

Q It does not say real property. It is pretty hard to damage real property in a fire.

MR. BUTLER: I am considering real property to be buildings as well, Your Honor. That is what I meant by that term.

Q Did the Michigan Court construe the state statutes?

MR. BUTLER: We believe that he construed the state statute to require a warrant only to make it constitutional under the Fourth Amendment. But they did read a warrant requirement into that statute. We claim that it makes very little sense to do that because the--it is certainly not the intent of the legislature because they surely should be presumed to know that any fire investigator can enter a

building with a warrant. So, by very clear implication, the statute on its face would seem to allow warrantless searches. That is, the Court said the statute did not speak to the question.

Q But are we not bound by the Michigan construction, to the extent that that is relevant to this case?

MR. BUTLER: I do not believe you would be bound by it if their construction depended upon an erroneous view only of the Fourth Amendment. If it depended upon any other view of Michigan law, then the Court would be bound by it.

Q Is not the only reason the case is here because they have construed the federal constitution?

MR. BUTLER: Yes, it is, Your Honor.

Q Mr. Butler, do I correctly understand your view is that the exigent circumstances exception should survive until the cause of the fire is determined?

MR. BUTLER: Precisely, Your Honor.

Q Even if that might take a year or two? Even if the building was reconstructed, would it still survive that long?

MR. BUTLER: Not if the owner or occupant had somehow retaken over the premises and moved something back in or in any other way indicated that he is either living in them or using it as an operational business.

Q What if he just locks the premises and secures

them against entry by third parties?

MR. BUTLER: A lot of that would depend upon precisely when he did that.

Q Would that ever terminate the exigency exception?

MR. BUTLER: Yes, it certainly would at some point. We contend--

Q Can we do that in this case?

MR. BUTLER: No. In this case the proprietor of the premises was out of state for about seven days after the fire, until about seven days after the fire.

Q But at the time of the search when they found the fuse and the glass or whatever it was, some 22 or 23 days later, the premises were locked then, were they not?

MR. BUTLER: They were locked and sealed by the fire department.

Q Why did that not terminate the exigency then?

MR. BUTLER: It clearly did. By the time of that search, the exigency was terminated.

Q Then under your view of the law, the search was improper, if I understand you.

MR. BUTLER: No, Your Honor. We believe there is an additional justification for that search. We are speaking now primarily of the search that occurred the morning following the fire.

Q Yes, but some of the evidence that was received over objection was found on January 22nd or whatever date it was, about three or four weeks later.

MR. BUTLER: Right, February--

Q Do you not have to sustain that search in order to sustain the conviction?

MR. BUTLER: We have to sustain that search, yes, Your Honor. But we do not believe we have to sustain it under the exigent circumstance exception to the warrant requirement.

Q Who put the lock on the door?

MR. BUTLER: The fire department, perhaps in conjunction with the police department.

Q It was sealed pending the completion of the investigation, as I read the records; is that correct? The building was sealed by a lock put on it by the fire marshal both to protect the property and--during the course of his investigation; is that correct?

MR. BUTLER: Yes, Your Honor. The fire was put out at approximately 4:00 a.m. on January 22nd, at which time the fire department boarded up all the windows and put their own locks and chains on all the doors and then re-entered at 8:00 o'clock the next morning and found what we agree is--was indeed the cause of the fire by that time.

The Michigan Supreme Court held that in the course of putting out the fire between midnight and approximately 4:00

a.m. on January 22nd, that the finding only of two plastic bottles, one partially filled with gasoline, was itself the cause of the fire, and that enabled them--that gave them enough probable cause to obtain a search warrant. We are contending--

Q Mr. Butler, I want to be sure. Are there not three pieces of evidence here? The first, what they picked up at the time of the fire, the plastic container and the like.

MR. BUTLER: Yes, Your Honor.

Q And there was no objection to its admission, as I recall.

MR. BUTLER: At least it was not challenged in the Court below nor here.

Q And the second piece was what was discovered at the daylight entry the very next day.

MR. BUTLER: Yes, Your Honor.

Q And that was admitted over objection and is at issue here.

MR. BUTLER: Yes, Your Honor.

Q And then the third one--am I correct--was two or three weeks later?

MR. BUTLER: About three or four weeks later there was a re-entry. The reason for the re-entry was that the photographs taken by an arson investigator were lost in the mail. He apparently re-entered to retake some more photographs and, while doing that, he found a piece of fuse and pieces of glass and

pieces of glass and debris, and those items were admitted over objection.

Q In any event, we have these three levels of evidence, two of which are under challenge at this point.

MR. BUTLER: That is correct, Your Honor.

However, in order to make this case retriable under the opinion of the Michigan Supreme Court, really there were other entries into the building. And the principals of the opinion below would not allow, for example, oral testimony by an arson investigator who went in four days after the fire. Had he taken photographs or found physical evidence, it is clear that they would have been challenged.

Q When you talk about a warrant requirement, as imposed by the Michigan Supreme Court, what inquiry would the magistrate make in order to justify the issuance of a warrant?

MR. BUTLER: The only possible inquiry which we can imagine is simply whether or not the fire occurred. It seems that if an administrative search warrant is to be allowed--is to be required to re-enter and determine the cause or origin of the fire, all that we should have to be able to show is that a fire occurred.

Q Could you not show that there were two cans of gasoline sitting there?

MR. BUTLER: He could show the fire occurred just by the condition of the building. I mean, that is what did say

that a fire occurred as opposed--

Q Could you not show that? I mean, you do not have gasoline sitting around for fumigation purposes, do you?

MR. BUTLER: I am not sure if Your Honor is suggesting that we need a criminal warrant. If that is the case, then there is a close question of whether those two bottles of gasoline are sufficient to prove that--

Q I am talking about any kind of warrant.

MR. BUTLER: If just an administrative warrant is required to determine the cause or origin of the fire, then the only--

Q You keep saying re-entry. Do you not mean search? Are you evading the word "search"?

MR. BUTLER: No, we are not. We use it repeatedly throughout the brief and--

Q Still you have been saying entry every time. You keep saying entry.

MR. BUTLER: The entry is one intrusion, and what they do inside is again something else.

Q But did they not search when they went in--

MR. BUTLER: Yes, they did, Your Honor.

Q --each time?

MR. BUTLER: Yes, they did. They searched for the cause or origin of the fire.

Q When you say entry, you mean search?

MR. BUTLER: Yes, Your Honor, entry and search.

Q Would you be satisfied with a rule that you could enter the building at any time you wanted to after a fire to hunt for evidence and the cause but that nothing you found could be admitted into evidence in the criminal prosecution unless you had a warrant?

MR. BUTLER: No, we would be very dissatisfied with a rule like that, Your Honor.

Q You really are gathering evidence, are you not? It is a criminal investigation, among other things.

MR. BUTLER: Among other things, exactly, Your Honor.

Q Why is this arson crime any different from any other crime in terms of your ability to enter property to find evidence?

MR. BUTLER: We think it is different because there is a legitimate need to enter the property anyway to make a valid civil inspection and search for the cause of the fire. Another respect in which it is different is that--

Q I know, but you could serve that end by agreeing not to use the evidence in a criminal prosecution unless you had a warrant.

MR. BUTLER: That would be the most perverse rule imaginable, Your Honor, because that would say that it is all right to make these searches because there is a public interest

for them. But we will make one exception and give a benefit only to arsonists and say that the evidence cannot be used--

Q No, but you are saying that only arsonists cannot object to entry to property without a warrant.

MR. BUTLER: We are saying that arsonists are in a special class in that they way they have treated their own property suggests that they have no protectable interest or no interest remaining protected by the Fourt Amendment by nearly any test except one which requires total abandonment of any property interests--

Q Like the man who shoots his children? He has done something pretty bad. But you cannot enter his house and search his property without a warrant just to find evidence of the crime.

MR. BUTLER: That is true, Your Honor. We are not contending that he somehow, as punishment for his crime, loses a right. We would make the same analysis if arson for profit were not a crime. Our point is that the way he treats his own property, the actions which make up the crime of arson, also speak to what expectation he has in his own premises, and they say that he has none.

Q So, to extend my Brother White's question, if a man shoots and kills four people in a place, you cannot come in and investigate that. But if he burns them up, you can.

MR. BUTLER: If the police hear gunshots in a building,

I think they can usually go in without a warrant just because--

Q No, this had a silencer, just to make it tougher.

MR. BUTLER: Just because a crime has been committed in a building does not waive any kind of privacy or protection one expects in that building.

Q Except arson.

MR. BUTLER: Except arson of your own building. We think that deliberate destruction of someone's own property is so inconsistent with any notion of how the law is supposed to protect private property that that in itself should be sufficient to waive at least temporarily any Fourth Amendment protection in the arsonist's own building.

Q Mr. Butler, I would like to go back to Mr. Justice Rehnquist's question. Just what does a magistrate do if you have to get a warrant? You go in and prove a fire took place and some damage was incurred, period. Is he not automatically going to issue the warrant?

MR. BUTLER: That is precisely our point, Your Honor. That needs no exercise of special--

Q That is only on the assumption that you need to show probable cause to believe that a crime has been committed. If you assume that, why you have assumed the case away.

MR. BUTLER: Okay, if we are speaking of administrative warrants, then you do not need probable cause to show that

a crime has occurred.

Q You are assuming the case away again.

Q When the marshal begins, is he looking for a crime or is he looking for a cause of a fire?

MR. BUTLER: He is looking for the cause of a fire which may--

Q Incidentally he may then come to the conclusion later that it was self-inflicted, that is, that it was arson. Does it become a criminal investigation right at the outset?

MR. BUTLER: Not at the outset. It can. The point is once there is evidence of arson discovered, it becomes-- arson is still a cause of a fire. And as far as using fire experience as a yardstick to test the success of fire codes, that says that this was not a breakdown in the fire prevention system; this was deliberately caused. But at the same time of course, it is evidence of a crime.

Q Can the medical examiner go into a house to find the cause of death?

MR. BUTLER: Yes, he can, immediately.

Q I know, but without a warrant five days later-- the door is locked. Can he break in and find evidence of what killed the person?

MR. BUTLER: I would think that in almost any circumstances, yes, Your Honor.

Q Without a warrant?

MR. BUTLER: It seems to me, speaking of an exigent circumstance, where a body is discovered that appears to have died of unnatural causes. Now, you cannot break into an occupied home--

Q Does he need a warrant or does he not?

MR. BUTLER: Your Honor, those statutes--

Q To enter a private house, private property?

MR. BUTLER: It would depend--

Q All he wants to find out is the cause of death. The only thing is that there may be very great evidence of a crime.

MR. BUTLER: It is very difficult to imagine circumstances that would arise where he would have noticed somehow that there is a dead body that has been dead for five days; yet it is in a completely locked house where someone is denying admission to the public or to the police.

Q No, there is no question about somebody has died. The body is in the morgue. But the medical examiner would like to get into somebody's house to find out what killed him.

MR. BUTLER: No, clearly not, Your Honor. I misunderstood the question. I thought the body was in the house.

Q Why can he not go in the house and find out the cause of death? That is all he wants to know. He is supposed to make out a death certificate. He does not know. So, he

would like to go find out.

MR. BUTLER: We are dealing with a fully occupied home or business that has all the traditional Fourth Amendment protection.

Q So, if this person, when this fire was put out, had put his own locks on his premises, would a warrant have to be obtained to get in?

MR. BUTLER: Under most circumstances, we would say yes. On the other hand--

Q How about this circumstance? If he had locked the door. The firemen had put the fire out and went away and instead of the fire department locking it up, he did.

MR. BUTLER: We still contend that if we are going to look at how he treats the property--that is, by putting a lock on it--we should also look at what he has done to the property to bring it into that condition. He has deliberately destroyed it. He has attempted to sell it back to the insurance company involuntarily, which indicates he does not want it anymore. He is--

Q I do not think he has done anything yet. He has not been indicted yet.

MR. BUTLER: Whenever the issue is raised in a suppression hearing or on appeal, the court will always have before it facts which indicate what he did. That is, his guilt will be established to some degree--

Q I am not talking about the hearing. I am talking about when he entered, broke in and entered.

MR. BUTLER: It is true that at the time they enter, they may not have evidence that the occupant burned it himself; that is true. We are saying--

Q But in this case they had evidence. They had the two cans of gasoline.

MR. BUTLER: That may be evidence of arson. I am not sure it is evidence that he did it himself. It could have been a malicious fire.

Q There was evidence of arson.

MR. BUTLER: We think that is very slim evidence of arson, and we doubt that a warrant would ever issue simply upon a statement that two plastic bottles of gasoline were found in a burned building. That seems equally as consistent with an innocent fire as with arson.

Q What was this building? Was it manufacturing place?

MR. BUTLER: No, Your Honor, it was a retail furniture store.

Q What would they use gasoline for?

MR. BUTLER: Cleaning. At the time--

Q Oh, I see.

MR. BUTLER: --they just seemed to know there was hydrocarbon or some kind of flammable liquid. They did smell

gasoline in the building. Those seemed to be the only facts which indicated that the fire was arson.

Q Mr. Butler, does the record tell us at the time of the search on February 16th--the building was locked, as I understand it--who had keys to the building at that time, just the fire people? Or did the--

MR. BUTLER: I believe it stated just the fire and/or the police officials had keys to the building. At that time the respondent Tyler had returned from out of state on, I believe, January 29th. That is when he visited the premises, and nothing in the record indicates that he had a key to it, at least nothing that I was able to find.

Q Do you distinguish at all between business premises and a home for purposes of your argument?

MR. BUTLER: We have not in the briefs. No, we do not, Your Honor. We would of course concede that if there had been any fire a home and the people are still living there or the damage was not extensive, that, yes, a warrant should be obtained there.

Q Did you hear the argument in the OSHA case yesterday in this Court?

MR. BUTLER: Yes, Your Honor.

Q Mr. Butler, let me add to your troubles, if I may. As you know, we take state law as construed by the court of the state. We have no other choice. My question is

suggested by an earlier question by my Brother Powell. In this case the Supreme Court of Michigan pointed out that the statute itself is silent as to a warrant requirement. It does not say one is required; it does not say one is not required. But it said, "As a state court we are now construing the law, the state law of Michigan, as requiring a warrant." Now, therefore, do we not have before us a state law, as construed by the highest court of your state, that in fact requires a warrant in this situation. And if that is true, is there any federal question before this Court?

MR. BUTLER: We contend that they construe it only to meet what they believe to be the requirements--

Q But they did construe their state law as requiring a warrant in these situations, the statute, and we take the combination of what was enacted by the legislature and the construction put on it by the Michigan courts. And the Michigan courts now tell us that the law of the State of Michigan, as a matter of state law, requires a warrant in this situation.

MR. BUTLER: But they are doing it only to do what they believe is necessary to conform to federal constitutional requirements.

Q Maybe they could not read. But however they did it, this is what they tell us the state law requires.

MR. BUTLER: We contend that construing a statute to

make it meet constitutional requirements is itself a federal question, not a state question. If their construction of the Fourth Amendment's requirements is mistaken, then presumably they would revise their judgment of what Michigan statute--

Q We had the Zucchini case late last term, which I think supports your position.

MR. BUTLER: I am not familiar with the case. I am sorry, Your Honor.

Q Mr. Butler, supposing the state legislature had expressly adopted a statute requiring a warrant and the legislative history showed that the legislature only did it because they thought the federal Constitution required it. They said, "We really do not want this requirement; we think the Supreme Court would impose it on us." Could we ignore that statute because we thought they acted under a misguided interpretation of the federal Constitution?

MR. BUTLER: No, we could not, Your Honor. They would be bound by that, of course. That would be a state law because it is a legislative act rather than a court decision or a court judgment that could be reviewed.

Q Here you are saying that even though the state supreme court is clear in what it tells us the statute means, we should change that because we think they may have acted on an incorrect premise?

MR. BUTLER: We are asking this Court to, if it agrees

with our position, state that the federal Constitution does not require this construction, does not require a warrant in these search--

Q If someone makes their decision exclusively on Michigan law, would you be here?

MR. BUTLER: No, we would not, Your Honor.

Q Under the Crivde case decided by this Court some years ago, whenever we have been in doubt about whether the state court acted on federal or state grounds, we have sent the case back to require the state supreme court or its highest court to state clearly whether they acted under federal or state law. But here they did base it on the Fourth Amendment, did they not?

MR. BUTLER: Yes, they did, Your Honor.

Q And that is why you claim your right to be here.

MR. BUTLER: Yes, it is.

Our contention is that there will be no protection afforded by an administrative warrant because it should issue simply on the fact that of a fire occurring. There seems to be no need for any exercise of independent judgment, no real individual review by a magistrate beforehand.

Q What is the basis for that?

MR. BUTLER: The only question is, Did a fire occur--

Q Is there some established law around that says

that you need not show probable cause to believe a crime has been committed?

MR. BUTLER: I believe the administrative warrant requirement which the Court below imposed did not have anything to do with whether a crime had occurred. It had simply to do with whether a fire had occurred and the officials need to re-enter the premises once they had left.

Q But you are talking about what the federal Constitution does or does not require. What authority is there for saying that under the Fourth Amendment you can investigate an arson by entering property without showing probable cause?

MR. BUTLER: We think Camara stands for the proposition you can have inspections without showing that necessarily a crime has occurred. You have to show their reasonableness by criteria which really do not apply to a post-disaster investigation. The length of time since a last inspection has occurred is irrelevant. The only thing that is relevant is the condition of the building.

Q Camara and See are your principal cases?

MR. BUTLER: We are contending that they do not require an administrative search warrant even though--

Q We do not have an investigation. We have a criminal investigation.

MR. BUTLER: We contend we have some kind of mixture of both, Your Honor. But to the extent--

Q What in the world reason do you have to go in there unless you want to find out whether or not a crime had been committed?

MR. BUTLER: You still want to confirm the cause of the fire. It was done in a very hasty manner in this case. If it is contended--

Q Hasty manner three weeks later?

MR. BUTLER: No, I am speaking of them leaving at 4:00 a.m. and being satisfied that they had determined the cause of the fire simply by finding two bottles of gasoline. Ordinarily that does not seem sufficient.

Q Then after they had all that time to think, they could think of getting a warrant.

MR. BUTLER: It seems the reason they left was simply because there was no more they could do until daylight, until smoke and steam had dissipated and they were able to visually--

Q And until they could have gotten a warrant. There could have been another reason.

MR. BUTLER: There were four hours, and that is the rough time that even an administrative warrant, which requires really no exercise of judgment, would take. So, an administrative warrant perhaps would have been obtained had there been the requirement at the time of the search.

Q Even if they had found nothing, even if they had not found these two cans of gasoline, might they not have

wanted to go back feeling that they had determined the cause of fire even though perhaps there was no arson involved?

MR. BUTLER: Yes, I believe they would have gone back to continue their investigation in daylight hours to do whatever they could not do at night while the building was filled with smoke and steam. In addition, they need to check the structural integrity of any building even before letting the occupants back in.

Q We are just suggesting, perhaps some of us, that you do not necessarily have a crime involved so far as investigation is concerned. Is it not the duty of the fire department under your system to find out the cause of a fire, among other things, to prevent its recurrence under similar circumstances? There may be no arson involved.

MR. BUTLER: Yes, it is, Your Honor--to determine the cause of the fire, to determine the extent of the damage, and to check the structural integrity of the building.

Q It strikes me you have something not dissimilar to an Internal Revenue Service investigation. They initially might be out just to determine that everything has been included, and that will develop into a full-fledged criminal investigation sometimes, depending on what they find.

MR. BUTLER: That is correct, Your Honor.

If there are no further questions and if the Court please, I would ask to reserve my remaining time for rebuttal.

MR. CHIEF JUSTICE BURGER: Very well.

Mr. Bacalis.

ORAL ARGUMENT OF JESSE R. BACALIS, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. BACALIS: Mr. Chief Justice, may it please the Court:

I think I would like to begin my remarks by clarifying the factual record a little bit. Allow me to say that the fire occurred at about 11:30 or just before 12:00 o'clock on January 21st.

Q At night?

MR. BACALIS: At night.

Q P.m.

MR. BACALIS: And while the fire department was there until 4:00 a.m. on January 22nd, a Lieutenant Larson on the fire department discovered gasoline on the premises, and he thereupon called the attention to Chief See, S-e-e, who was the fire chief. He came over and found the gasoline. At that point, Chief See then brought in detective Webb, and he too looked at the gasoline. And at that point they removed the gasoline from the premises and went to the police headquarters and poured the gasoline that they had removed from the premises into another container, which was marked for evidence purposes.

Q Do you say that that was a proper taking of possession of that gasoline at that point?

MR. BACALIS: I have to concede that the fire department had a right to be there to put out the fire; and whatever they found during the course of being there present for that occasion, they had a right to see--

Q They apparently did not have a right to permanently take whatever they found there, did they?

MR. BACALIS: No, but they have a right to at least identify it as being a cause or determining what the cause and origin of the fire was.

Q If for no other reason, they would remove the gasoline, if they thought it was gasoline, so that might not reignite between 4:00 in the morning and daylight, I suppose, would they not?

MR. BACALIS: I can only tell the Court what they did.

Q Does it not make sense? We are dealing with a clause that has the word "reasonable" in it--"unreasonable" as a matter of fact.

MR. BACALIS: I think we have to deal with the explosive nature and the danger of gasoline being present in the premises just because it vaporizes. From that context there is a danger present just because gasoline is vaporizing. I would have to concede, yes, there is a danger present. Whether that is the motive that prompted the police officer and the firemen to remove the gasoline from the premises, I cannot say. All I can tell you is what they did. My own private

opinion is they were gathering evidence because, as they indicated under cross-examination, they admitted that at that point in time, before they left the premises at 4:00 a.m., they had determined the cause and origin of the fire, and that the gasoline was the cause and the origin of the fire.

Q You said "they." Who is "they"?

MR. BACALIS: The persons I have identified, Chief See, S-e-e, who was the fire chief, and Detective Webb.

Q Is he an expert in finding the cause of fire?

MR. BACALIS: In my opinion, he is not an expert. But I am telling you what he determined.

Q You said they determined. How could they determine if they are not experts?

MR. BACALIS: If Your Honor please, the general practice is in fire extinguishment that somebody makes a determination of cause and origin. That is usually done by the fire department personnel. Whether or not they are experts and qualified to make that judgment--

Q The answer is that if they determined it, why did they have other investigation? They had other investigation because they had not determined it.

MR. BACALIS: I do not think so, Your Honor. My personnel opinion is once they determined that gasoline was involved--

Q Do they have a monitor there that is solely

responsible for determining fires, the cause of fire?

MR. BACALIS: In the state we do. We have a state fire marshal.

Q And that is his responsibility. I do not see how a chief of police or a chief of a fire department or anybody else can take over his responsibility. That is my problem.

MR. BACALIS: I cannot vouch for why they did--

Q But you say that they said that that was the cause.

MR. BACALIS: Oh, absolutely.

Q You said they found--

MR. BACALIS: They testified that they had determined that to be--

Q Testified, fine.

MR. BACALIS: They testified that they determined that gasoline--

Q They testified that in their opinion.

MR. BACALIS: That is right, correct.

Q They would be required certainly to take away any incendiary material. Suppose there were a couple of cases of bourbon or a couple of cases of shotgun shells. Would it make any sense for them to leave them in a fire that had not been totally and fully extinguished?

MR. BACALIS: In the State of Michigan the only one

who removes liquor from the premises is the department who administers alcohol licensing, the Michigan Liquor Control Commission. The liquor is destroyed under their direction.

Q I am not talking about destroying it.

MR. BACALIS: No, no, I am talking about removing it.

Q I am talking about something that would make a fire.

MR. BACALIS: I am talking about removing it also because that is what Your Honor asked me.

Q Would not the fire marshal, would not the fire department have the authority to remove inflammable material that might reignite the fire?

MR. BACALIS: I think one could well hypothecate he has a duty to protect further danger from developing, yes.

Q He would not be thought to have much sense if he did not remove it, would he?

MR. BACALIS: I cannot vouch for that, Your Honor, because all I can tell you is what they generally do. In Michigan they do not generally remove alcohol.

If Your Honor please, the important thing about the factual situation here is that after this conversation and identification of exhibits at police headquarters, the fire department personnel withdrew from the fire scene, leaving the premises unguarded and unlocked for four hours. Sometime later that day, January 22nd--I cannot tell you because the record

does not show at what time of day the premises were locked by the fire department. But they were locked and they were boarded up. And there is ample photographs in the record to show you exactly what that building looked like in its boarded up condition. And they were secure from outsiders coming in. It was done by Lieutenant Sommerville of the fire department.

Q I am just interested in what your view of the record might be. Perhaps it is not at issue here, but suppose the fire department or the investigators had gone to a magistrate and said, "We want authority to search the building," and they went there the morning immediately after the fire and said, "Here is what we found and here is what we want. We want authority to search, and we want authority to board up the building to avoid any destruction of evidence. Would there have been ample basis for a warrant to issue?

MR. BACALIS: For an administrative warrant?

Q No, for a judicial warrant.

MR. BACALIS: For a judicial warrant. From my own personal experience, any time you have gasoline present at a fire scene, suspected of being the accelerant, I believe that provides a reasonable cause to go in and search the premises.

Q So if they had gone to the magistrate, you think a warrant could have issued for searching the premises?

MR. BACALIS: I believe that under that state of facts, that a reasonable magistrate would have authorized the

warrant.

Q What if they had not found any gasoline but had simply felt that their investigation was incomplete because of the smokey conditions and so forth? What is your contention that a magistrate would have had to find if they had gone before him the next morning and asked for leave to continue the investigation?

MR. BACALIS: I believe that the fact that the fire personnel cannot determine the cause and origin of the fire would be a legitimate basis for granting an administrative warrant to enter the premises to determine with exactitude what the cause and origin is if it is possible to be done.

Q What if the magistrate were to conclude that diligent fire personnel could have concluded it at 4:00 in the morning? Would he be permitted under the federal Constitution to turn down a warrant at that point on that basis?

MR. BACALIS: Assuming the standard which you have given me to be factual, then I would have to say that there would be no necessity.

Q And only necessity would warrant the issuance of the type of administrative warrant that we have been discussing--

MR. BACALIS: I believe so because that is the only reason that it exists. I mean, the fire department is charged with a responsibility to keep track of the cause of the fire.

If they are unable to do that in a particular situation and the owner will not consent to enter the premises, then I believe it provides a legitimate basis to ask for an administrative search warrant, and it does not impose a serious hardship or difficulty upon the fire department. It does provide an additional safeguard in that a magistrate now sits between the fire department and/or the police department in their search for the cause and origin of the fire.

Q What do you call an administrative warrant if you are talking about a magistrate? That is a judicial warrant. It is not just a warrant issued by the executive branch or the administrative branch.

MR. BACALIS: Perhaps the Court is not aware that Michigan, in the same act which was cited in the briefs and petitions to justify the fire marshal's entering the premises, also had another section right following it which gives the fire marshal the right to investigate crime, if he thinks one is present, and part of that statute grants immunity if the witness is called to produce and give testimony against himself. And the procedure is there, and it is in the Fire Act to safeguard the right of the person who is being called upon to produce evidence to explain the cause and origin of the fire.

Q This gentleman was away for a week or eight days, was he not?

MR. BACALIS: Yes, he was, Your Honor.

Q Should they then stop all their inquiry into the fire cause until he got back?

MR. BACALIS: No. I think they had ample grounds and bases in this record to go to a magistrate and ask for a warrant for a criminal investigation, not just an administrative but a criminal, because they found gasoline.

Q What if at that time they did not think in terms of the criminal investigation? A lot of people leave gasoline in cans lying around.

MR. BACALIS: I think the record will reflect, Your Honor, because Chief See and Detective Webb both indicated in cross-examination, in their opinion, at that point in time they suspected foul play, and they believed that arson had been committed.

Q So that you are saying as soon as they begin to have suspicions, then they must get a judicial warrant.

MR. BACALIS: I am saying that as soon as there is a reasonable basis for those suspicions, yes, not just the mere fact that they had private suspicions but the fact that they had to go to a magistrate and lay those suspicions out and what they consist of. And if there is a reasonable basis for them and if that reasonable basis is the presence of gasoline, I say the magistrate should issue a warrant.

Q The Supreme Court of Michigan, I take it, in

construing the act that you referred to and the administrative warrant provision that I understood you to say was contained in it held that was inadequate under the federal Constitution; is that correct?

MR. BACALIS: No, I do not believe the Supreme Court of Michigan reviewed the fire marshal's act to determine whether or not it was adequate. All they have determined is that in this particular instance the search and seizure in this case was unreasonable and in violation of the constitutional rights.

Q Did they not say the statute did not speak to this point?

MR. BACALIS: Oh, yes. Oh, yes. In terms of requiring a warrant, that is correct, Your Honor. They make that comment in their opinion.

Q Mr. Bacalis, I have one problem perhaps you can help me with. The key to the premises retained by the public authority, either the fire marshal or the police department--

MR. BACALIS: That is correct.

Q --did the owner of the premises or the tenant have access at all or did he demand access at all? It is kind of a strange privacy interest--

MR. BACALIS: It is. It is. The last page of our appendix indicates the owner's statement. He could not get a thing out of that building. The fire department had in effect seized it and sealed it off.

Q Did he ask for it?

MR. BACALIS: Sir?

Q Did he ask to get in?

MR. BACALIS: No.

Q Is there anything in this record to convince any of us that he had not abandoned that building?

MR. BACALIS: There is no indication in the record that he did abandon the building, none whatsoever.

Q That was not my question.

MR. BACALIS: Sir?

Q Was there any evidence in the record that he had not abandoned the building? He locked up the building and went overseas.

MR. BACALIS: That is right.

Q And what did he do at all to get back into the building after that? Nothing.

MR. BACALIS: The record reflects that he went to the building and that there were various points in time when anyone may enter the building because vandals would frequently pull apart the boards which boarded up the windows and freely enter the building. And in this manner he had entered the building himself, I am sure. The record does not reflect that he did--

Q If you please, I want the record on this. Is there anything in the record that shows that he tried to get in the building?

MR. BACALIS: The record will reflect that--

Q And the next question is going to be, Is there anything he did to keep anybody out of the building?

MR. BACALIS: The only things that he did to keep people out of the building is the statements of what he did prior to the fire occurring.

Q I am talking about after the fire occurring.

MR. BACALIS: The record does not contain any evidence as to what he did to protect the building from invasion by anyone.

Q Anywhere?

MR. BACALIS: That is right. There is absolutely no disclosure in the record as to that.

Q He did not even put up a sign to say "Private Property"?

MR. BACALIS: No, sir, not in this record.

Q Did he make any effort to remove the contents of the building like the furniture that had not been soaked. Presumably something was not damaged. I do not know.

MR. BACALIS: So far as the furniture and the contents that were in the building were concerned, they were fairly well destroyed.

Q They were. I see.

MR. BACALIS: The things which were not destroyed of course were the business records. And there is evidence in the

record that the fire department and/or the police department-- no, I guess it was the state fire marshal--took a box of records, business records, to the fingerprint laboratory for purposes of having fingerprints taken off.

It seems to me it is a kind of a strange privacy interest where an owner does not even ask to get his records back or anything back and let somebody else have the key to the place for about a month.

MR. BACALIS: The record would reflect that Sergeant Hoffman, who is from the state fire marshal's office, told my client, Mr. Tyler, he was not to remove anything from the building. That is in the record.

In fact, when they went there together on January 29th, there is discussion between them and it is on the record to that effect.

Q Is there any statutory authority for a public official taking possession of premises like these?

MR. BACALIS: Not in my opinion.

Q Did you make any move in any court to get possession of the building?

MR. BACALIS: Like I said, Your Honor--

Q That is a very simple answer.

MR. BACALIS: No, we did not go into court because we did not need to.

Q But you did not have possession.

MR. BACALIS: No. If Your Honor please, what happened was the police and firemen locked up the building but vandals kept breaking it open. Anyone could and did, if they wanted, go into that building.

Q Was your client denied access to the building?

MR. BACALIS: He was denied the right to remove documents from--evidence from the building, according to Sergeant Hoffman.

Q Did you do anything to get him access to the building?

MR. BACALIS: I do not think I represented him at that time, Your Honor.

Q Did anybody do anything to get him access to the building?

MR. BACALIS: Not according to the record.

Q How can you tell me he had not abandoned it?

MR. BACALIS: Because he was still paying rent on the building, Your Honor, and that is in the record. Not only was he paying rent on the building, he had his records--what was remaining of his records--in the file. And Sergeant Hoffman told him he was not to take those from the building because he wanted to preserve them as evidence. My client, not knowing any better, yielded to his direction and order. I did not go to court and ask for an order to receive those records.

Q But you said you did not observe him there.

MR. BACALIS: I know. I understand that. Nor did anyone else, according to the record.

The thing that intrigues me about this case is the fact that the state supreme court has justifiably concluded from the testimony of the participants that this was in fact a criminal investigation from the early morning hours of January 22nd, beginning with Chief See's declaration as to what the cause and origin was, and I think that is significant when you view what was done here by the authorities, as the government's representatives, in literally sealing off this building and keeping the occupant from his records--that in effect we have not only a specific seizure but we have a total seizure of both business records and the so-called tools of the crime.

Unfortunately my brothers want to bootstrap the jury determination that there was an arson committed by my client to say that because of such a determination they have no expectation of privacy which this Court or the Constitution of Michigan or of the United States protects. And that to me is nothing more than saying that the end justifies the means. And I just cannot accept that kind of reasoning to say that there cannot be any expectation of privacy simply because there has been a determination that an arson has been committed. It also runs up against the presumption of innocence when this representative of the government is seeking evidence. If he forms an opinion, whether it be reasonable or not, that the

occupant has been guilty of the crime of arson, that should not by itself extinguish any expectation of privacy, nor should it give the government the right to intrude, as it did in this case totally by sealing off the premises, particularly under circumstances where we have the department, both the fire department and the police department, involved.

Q Does the sealing off of the premises add anything more to your argument that would not be present if the fire department had simply come in at these additional dates and taken the additional evidence?

MR. BACALIS: Only to the extent of the scope of the invasion, Your Honor, because I think they took more than they needed to take in terms of a reasonable search if they had a warrant in the first place.

Let us assume they had a warrant to search for criminal cause in the first place. I do not believe that that would give them the right to take possession of the premises.

Q You may well be right, but I get the impression from the record that your client was not overly concerned.

MR. BACALIS: Unfortunately we did not develop that in evidence, that is correct. There is nothing in the record to indicate one way or the other how my client felt about it.

Q Is it likely that he would have wanted a lot of cardboard furniture returned, do you think?

MR. BACALIS: I do not know about the cardboard

furniture, but I do know about his business records. I am sure that one would have a hard time convincing this Court that he would want his cardboard deposits in the fire scene to be returned. But of more significance are his private records, his business records. Now we are talking about possible Fifth Amendment implications.

Q Does the record indicate any condition of inherent dangerousness after the fire in the structure?

MR. BACALIS: There is absolutely nothing in the record to indicate there was any inherent danger present after the fire department left the scene.

Q Would you say that the fire department or that some public authority had an obligation to try to seal that building and lock it and protect it from vandalism until the owner could take over that responsibility himself?

MR. BACALIS: No, I did not say that, Your Honor.

Q No, I say would you say so?

MR. BACALIS: No, I do not think so.

Q Do you think they should just walk away and leave the doors open?

MR. BACALIS: I can guarantee you, Your Honor, they do it every day in Michigan--every day.

Q Mr. Bacalis, your emphasis on the business records--I cannot recall--were they admitted into evidence or not?

MR. BACALIS: No, Your Honor; but they were seized.

Q But they are not really before us.

MR. BACALIS: No, I only offer that as an extent of the scope of the intrusion, Your Honor.

Q But is not the constitutional question that we are supposed to decide here precisely the same as if there had never been any business record in the place at all?

MR. BACALIS: That part is true, Your Honor, but I think in looking at what took place, I thought it would be helpful to the Court to understand the scope of the invasion by the governmental authority.

Q But, for all we know on this record, they may have returned those papers and records to him as soon as he came and claimed them.

MR. BACALIS: There is nothing in the record one way or the other, Your Honor.

Q Suppose, Mr. Bacalis, that there had been no gasoline found in the course of putting out the fire, no evidence of the cause at that time, but the fire department has a duty to determine cause, whether there is a crime suspected or not. So, the fire department does or does not the next day get a so-called administrative warrant. But nevertheless it comes back either with or without a warrant and looks around the property and it determines cause right there on the spot, and it determines it from the fact that it finds some unimpeachable

evidence that there was arson and it finds the cause, and it takes it away. Is that admissible in evidence?

MR. BACALIS: I do not believe it is, Your Honor.

Q So that you think that without a warrant, without a probable cause warrant issued by a magistrate, the public authorities are entitled to determine cause, but if they find evidence of a crime, they cannot admit it? They cannot introduce it unless they have a warrant?

MR. BACALIS: Not unless they obtained that evidence through the means of a warrant; that is correct, Your Honor.

Q What if instead of taking something they merely took photographs of objective factors that would be evidence in support of arson? Would those photographs be admissible without warrant?

MR. BACALIS: I believe that they would be improper, Your Honor, because they represent a search. They do not represent a seizure, but at least they represent a search. The photograph is the next best substitute for giving a visual presentation to the trier.

Q Suppose in stead of taking pictures the fire marshal's man, who makes these investigations to determine cause of fire, merely looks at them, sees them, makes notes, and remembers them, and then they tender him as a witness. Would you say his testimony is excludable?

MR. BACALIS: I think so, Your Honor, on the theory

of the search being just what it is, a search. And without a warrant--I do not want to appear to not acknowledge that when the fire department is there for the purpose of putting out the fire, they have every right in the world to look and see what is there to be seen.

Q Then if they see some evidence of what caused the fire, even though it might indicate a crime, they can take it.

MR. BACALIS: At the time they are there for putting out the fire, yes, Your Honor.

Q All you are saying is that if they are legally on the premises, they can seize evidence of crime that is in plain sight.

MR. BACALIS: That is right.

Q What about the next day, if they are legally on the premises and they find some evidence?

MR. BACALIS: If they are legally on the premises--and I assume by that Your Honor means they have obtained a warrant.

Q No. Let us assume--suppose they have no evidence the night before that there has been any crime committed but they must determine cause. You are not suggesting that they need to show probable cause of some crime before they can go back on the premises to determine cause. They can at least get an administrative warrant and go back in.

MR. BACALIS: Yes, Your Honor.

Q Suppose they get the administrative warrant, as you call it, whatever that is, and they are legally on the premises. You would agree they are legally on the premises?

MR. BACALIS: Yes, under those circumstances.

Q And then they find some evidence.

MR. BACALIS: I think that is part of being on the premises and the lawful function--

Q Legally so they could then introduce the evidence that they legally find?

MR. BACALIS: Yes, sir. I believe so.

Q Who issues this administrative warrant that you speak of under Michigan law? How do you distinguish an administrative warrant from a judicial warrant, a traditional warrant?

MR. BACALIS: Unfortunately there is nothing spelled out in a statute in reference to a procedure as to what magistrate you would go before to obtain a warrant in an administrative area.

Q Is there then in Michigan law any such thing as an administrative warrant? That would be a creature of statute, would it not?

MR. BACALIS: I think the whole phraseology has come out of the Camara-See decisions in terms of recognizing a differentiation between an administrative search of the premises

and a criminal search. And from that distinction has now emerged a new language, "administrative warrant." Unfortunately, so far as I know, there is no legislative pronouncement as to how that is to be implemented, nor at this point are there any judicial decisions that spell out how it should be done.

Q Maybe all this Court had in mind in that conversation in the opinion was that the state could enact legislation creating an administrative warrant procedure. But if you do not have a statute of Michigan authorizing the administrative warrant, then I wonder why any discussion of an administrative warrant is relevant here.

MR. BACALIS: We do have a statute which has been alluded to already, Your Honor, which allows the fire marshal, if he suspects a crime, a procedure of testimony and subpoena by which he can require people to bring in records in evidence. And part of that statute also grants immunity to anybody who brings in such evidence.

That does not answer your question, but that is the only thing that I know of in Michigan law at this time that comes close to answering your question.

Q Mr. Bacalis, what did you want in this case before the second day when they went in? Where should they have gone and what should they have gotten?

MR. BACALIS: In my opinion, after they found gasoline

they had reasonable cause--if they wanted to pinpoint, as they appear to do--if they wanted to pinpoint with exact accuracy how the gasoline got triggered, caused the fire, then all they had to do was go to the local circuit court and ask for a criminal search warrant in the usual manner--

Q You want a judicial search warrant?

MR. BACALIS: That is right, Your Honor.

Q Mr. Bacalis, let me make Justice White's factual assumption a little stickier, because I am concerned about what they found the very next morning when daylight came. Assume that they found something that was not visible at night but was visible in the daytime. And further assume that instead of leaving at 4:00 a.m. the fire department just stayed there until the sun came out, and then they picked it up. Admissible in evidence or not?

MR. BACALIS: I think I would have to agree with you that it is admissible in evidence because the fire personnel, from your description, are still on the premises in this function of putting out the fire and determining the cause.

Q But the fire was out at 4:00 a.m. and they are just waiting now for the sun to rise so they can see a little more. And then it would be admissible. The fact they went home and came back makes it inadmissible?

MR. BACALIS: Not only the fact they went home, Your Honor. The fact that they went home and left the premises

unguarded for four hours--that I think is significant because that to me indicates an abandonment. They were through. Had they wished to do what Your Honor is suggesting and kept fire department personnel there--and they do do that, Your Honor--they do seal off premises for 24 and 48 hours. It is not unusual in Michigan. But in this case they did not. They went home for four hours.

Q The shift did not change.

MR. BACALIS: I cannot answer that, Your Honor. I can only tell you what the facts are in the record. That concludes my remarks unless you have some more questions.

MR. CHIEF JUSTICE BURGER: Do you have anything further, Mr. Butler?

REBUTTAL ARGUMENT OF JEFFREY BUTLER, ESQ.,

ON BEHALF OF THE PETITIONER

MR. BUTLER: Mr. Chief Justice, and may it please the Court:

A number of questions were asked about what an administrative search warrant is in Michigan. And there it is clear that an administrative search warrant is issued by a judge. It is just issued for a different purpose, for an administrative search rather than for a criminal investigation; and according to the opinion of the Court below there is a varying standard of probable cause under Camara. That is the lower court's understanding, and that is the practice in

Michigan. There is no one else to issue an administrative search warrant but a judge.

Q Has it ever been issued in connection with a fire situation, to your knowledge?

MR. BUTLER: Not to my knowledge, Your Honor, so far.

Q Mr. Butler, under your view of the case, who had possession of the premises on February 16th?

MR. BUTLER: On February 16th, the premises were sitting in exactly the condition they had been sitting in ever since the fire. As far as we know, respondent Tyler had been back there only once, at least until his return. I think the fire and police officials were responsible more as custodians or caretakers for the building.

Q Under your view of the fact situation, who had possession of the premises on February 16th?

MR. BUTLER: Respondent Tyler on February 16th.

Q But he did not have the key. I mean, not that it is involved in this case. But would it not have been better at some time to have said, "Here is the key to your building. We are through with it"?

MR. BUTLER: Tyler did not own the building. He leased it. He had actually nothing of value left in there. The evidence indicates--

Q He was still paying rent, according to--

MR. BUTLER: We believe the records indicate that he

did not pay his rent, according to the landlord. He did not pay it. There is one reference--and I do not have the cite to the record because I did not know it would be regarded as important--that he may have paid and the check did not clear the bank, something to that effect. But the cinderblock shell of the building was intact. The inside, with the exception of the northeast and northwest corners, were totally destroyed, and there was, as best we could tell, nothing of value.

Q Mr. Butler, until the decision of this case by the Michigan Supreme Court, what do you consider the law of Michigan to have been on this subject?

MR. BUTLER: There is a case from the 1920s which held merely the obvious, that firemen who went in were allowed to seize whatever they could find while they were putting out the fire. Since that time and before this case, there were four court of appeals cases; three of them upheld a warrantless search for the cause or origin of a fire.

Q Upheld?

MR. BUTLER: The validity of a warrantless search for the cause or origin of a fire.

Q Required a warrant?

MR. BUTLER: Pardon?

Q Required a warrant?

MR. BUTLER: Did not require a warrant.

Q Oh, did not require.

MR. BUTLER: Thank you.

Q And what did the fourth case hold?

MR. BUTLER: The fourth case was written or at least was joined in by one of the justices who wrote the opinion--it is under review now--when he was on the court of appeals and held that an administrative search warrant was required. That holding was expressly rejected by two later panels of the court of appeals and was never joined in by anyone other than that one panel.

Q What was that, the Danowitz case?

MR. BUTLER: Yes, Your Honor.

Q And in Michigan your courts of appeals are relatively relatively recent, dating back only to your new constitution.

MR. BUTLER: 1965.

Q Sixty-five. Your courts of appeals have territorial jurisdiction, do they not?

MR. BUTLER: They are elected from territorial districts. Their jurisdiction then is a complete mixture.

Q Statewide?

MR. BUTLER: Statewide.

Q So that it is not like the federal system where there could be a conflict between--

MR. BUTLER: Not at all. We do have conflicts that arise. But they simply apply to--

Q That are statewide?

MR. BUTLER: Right.

Q Did I understand you to say that the Danowitz case was subsequently overruled by two other decisions of the court of appeals?

MR. BUTLER: They do not really overrule.

Q But two panels took different--

MR. BUTLER: Two panels expressly considered it, found it not persuasive, and refused to follow it.

Q So that at the time of this fire, the authorities in Michigan, operating under decisions of your appellate court, had the authority to do what they did?

MR. BUTLER: Yes, they did, Your Honor. This was a pre-Danowitz fire and trial.

Q The Danowitz case was in 1972.

MR. BUTLER: Yes, Your Honor. This fire occurred in 1970. And the trial occurred in 1971. So, this search occurred prior to Danowitz.

Q So, they were acting in accordance with their understanding of the law at the time?

MR. BUTLER: Yes, Your Honor.

Q Of the four court of appeals decisions that you referred to, the Danowitz case was not the most recent?

MR. BUTLER: That is not the most recent. Following Danowitz is a case called People against Kulick, K-u-l-i-c-k;

and also this decision, People against Tyler.

Q Who wrote the Danowitz opinion ?

MR. BUTLER: I am not sure, Your Honor. Justice--

Q One of the members of the--

MR. BUTLER: Who is now Justice Levin was a judge in that panel. I do not believe he wrote it.

Q But even under the Danowitz case the 9:00 o'clock search, the second search, would have been perfectly valid, as I read that case. That said that at the time of the fire or promptly thereafter, there was authority to search without a warrant.

MR. BUTLER: It did. The question is, Does that mean that if they continue a search while there are exigent circumstances, the exigent circumstances dissipate and they continue the search? Maybe that would have been upheld. Whether Danowitz would have allowed a re-entry we doubt.

Q These court of appeals opinions that you have been discussing, were they placed on the Fourth Amendment of the federal Constitution or on the state constitution of Michigan?

MR. BUTLER: The Fourth Amendment primarily. One or two of them does mention, as state cases frequently do, that this case raises a question under the Fourth Amendment of the U.S. Constitution as well as Article I, Section 11 of the state constitution, and then proceed to discuss nothing but

federal cases. That is a frequent happening in state appellate courts.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[The case was submitted at 11:15 o'clock a.m.]

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