

**ORIGINAL**

# OFFICIAL TRANSCRIPT PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

**DKT/CASE NO.** 82-357

**TITLE** MICHIGAN, Petitioner v. RAYMOND CLIFFORD AND EMMA  
JEAN CLIFFORD

**PLACE** Washington, D. C.

**DATE** October 5, 1983

**PAGES** 1 thru 55



ALDERSON REPORTING

(202) 628-9300  
440 FIRST STREET, N.W.  
WASHINGTON, D.C. 20001

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

IN THE SUPREME COURT OF THE UNITED STATES

MICHIGAN,

Petitioner

v.

RAYMOND CLIFFORD AND EMMA JEAN  
CLIFFORD

No. 82-357

Washington, D.C.

Wednesday, October 5, 1983

The above-entitled matter came on for oral  
argument before the Supreme Court of the United  
States at 11:59 p.m.

APPEARANCES:

JANICE M. JOYCE BARTEE, Assistant Prosecuting  
Attorney, Detroit Michigan; on behalf of  
Petitioner.

K. PRESTON OADE, Jr., Southfield, Michigan;  
on behalf of the Respondents.

- - -

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

C O N T E N T S

ORAL ARGUMENT OF

PAGE

JANICE M. JOYCE BARTEE, ESQ.  
on behalf of the Petitioner  
  
K. PRESTON OADE, JR., ESQ.  
on behalf of the Respondents

3  
  
  
29

1                                    P R O C E E D I N G S

2                    CHIEF JUSTICE BURGER:   Mrs. Bartee, you may  
3   proceed whenever you are ready.

4                    ORAL ARGUMENT OF JANICE M. JOYCE BARTEE  
5                    ON BEHALF OF THE PETITIONER

6                    MRS. BARTEE:   Mr. Chief Justice, and may it  
7   please the Court:

8                    Fifteen years ago this Court decided the  
9   landmark case of Terry versus Ohio.   It looked to the  
10   language of the Fourth Amendment to articulate a promise  
11   previously unrecognized; that is although all seizures  
12   of persons, while withint he Fourth Amendment, not every  
13   seizure requires probable cause to arrest to be reason-  
14   able under the first clause of the Amendment.

15                   Today we ask this Court to again focus its  
16   attention upon the language of the Fourth Amendment  
17   and recognize that it contains two separate, distinct,  
18   and coequal clauses, the reasonableness clause and the  
19   warrant clause, and to hold that administrative  
20   inspection oriented searches fall without the warrant  
21   and within the reasonsonableness clause.

22                   More specifically, with regard to this case,  
23   we are urging this Court to hold if there is a fire  
24   and firefighters must enter the premises to distinguish  
25   the fire, fire investigators may also enter the premises



1 within reasonable time after the flames have been ex-  
2 tinguished to conduct an investigation of reasonable  
3 scope and intensity to determine the cause and origin  
4 of the fire.

5           We contend this initial unconsented, unwarranted  
6 investigative intrusion, with or without probable cause,  
7 is justified by the mere fact that a fire has occurred.

8           The bare language of the Fourth Amendment  
9 requires only that searches and seizures be reasonable  
10 and that if and when a warrant shall issue it must be  
11 based upon probable cause to believe seizable items  
12 will be found in the premises, supported by a sworn  
13 affidavit and particularly describing the place to be  
14 searched and the items to be seized.

15           Two views have emerged from this Court regard-  
16 ing the Fourth Amendment requirements. The prevailing  
17 view to date holds that a search warrant is always required  
18 except when the facts and circumstances fit within a  
19 few carefully defined exceptions. This view focuses  
20 upon whether the failure to obtain a warrant is reasonable.

21           The second view recognizes that this Court,  
22 starting with *Camara*, has forced administrative searches  
23 unnaturally into the warrant clause and that this causes  
24 serious problems. In applying the warrant preference  
25 indiscriminately to all searches, rather than simply

1 applying them to the seizure-oriented searches as  
2 intended, this Court has been forced to distort the  
3 concept of probable cause.

4           It is our contention, as is maintained by  
5 the second view, that the Fourth Amendment guarantees  
6 searches will not be unreasonable and that neither the  
7 absence of a warrant nor the practicability of not  
8 obtaining a warrant is dispositive of whether the Fourth  
9 Amendment has been violated.

10           QUESTION: Mrs. Bartee, I suppose you could  
11 also prevail if the Court were to say that the facts  
12 of this case fitted within the exigent circumstances  
13 exception to the warrant requirement, could you not?

14           MRS. BARTEE: The precise holding by this  
15 Court in Michigan v. Tyler dealt with a subse-  
16 quent entry which was made after initial entry was made  
17 while the flames were smoldering. The precise issue  
18 before this Court nows deals with an initial entry which  
19 was made six hours after the flames had been distinguished.

20           QUESTION: Unless, Mrs. Bartee, the entry  
21 of the investigating arson squad is part and parcel  
22 of the initial entry of the firefighters. In that  
23 connection, I would like to know whether, in the juris-  
24 diction in question, the arson squad would have visited  
25 the Cliffords' home even without a report that the fire

1 was of suspicious origin. Is it a routine thing? Do  
2 they always go?

3 MRS. BARTEE: Fire investigators investigate  
4 approximately 130 to 160 fires a day. Well, I am sorry,  
5 there are approximately 130 to 160 fires a day. They  
6 investigate approximately 20 of them and they do that  
7 in a priority order which starts off -- If there is  
8 a major explosion or a homicide on the scene, they leave  
9 wherever they are -- If they are in the middle of an  
10 investigation, they leave and go to that site. They  
11 then go down and determine what is priority from there  
12 on.

13 QUESTION: What determines whether the arson  
14 squad would go to a fire scene?

15 MRS. BARTEE: I think it is a matter -- There  
16 are many arsons which are never investigated. It depends  
17 upon the degree of damage. And, in this case -- This  
18 case was determined to be a priority case because a  
19 police officer was involved and they always investigate  
20 a police officer's house if they possibly can.

21 QUESTION: Do you mean because the owner of  
22 the premises was a police officer?

23 MRS. BARTEE: That is correct.

24 QUESTION: I see. So, what you are saying  
25 to me is that the arson squad would have gone in any

1 even to this fire?

2 MRS. BARTEE: That is correct.

3 QUESTION: But, that might be suspected that  
4 somebody is after a policeman.

5 MRS. BARTEE: That is correct. There are  
6 several --

7 QUESTION: So, there is always some thread  
8 of suspicious circumstances present in the cases that  
9 the arson squad investigates.

10 MRS. BARTEE: Well, there may be. Arson  
11 investigators have several purposes which makes this  
12 case a particularly tough case in that it is not purely  
13 an administrative search. It may have --

14 QUESTION: I want to pursue Justice O'Connor's  
15 question. How do you -- Let's put it this way. What  
16 are the cases they do not investigate, those that have  
17 no suspicious circumstances at all?

18 MRS. BARTEE: Those that have no suspicious  
19 circumstances, those for which there is not a high like-  
20 lihood of rekindling, those for which the cause and  
21 origin is determined definitely, those that they can  
22 get to. Many times they just have to cut --

23 QUESTION: What about the case where they  
24 think it has been definitely determined that it is arson?  
25 Won't the arson squad go and --



1 MRS. BARTEE: What the firefighters do themselves  
2 in the City of Detroit is they make a preliminary deter-  
3 mination without further investigation. And, that is  
4 what we have in this case, a preliminary determination,  
5 and they leave it to the fire investigators to follow  
6 up that determination and find out for sure.

7 QUESTION: When the investigator arrived there,  
8 there were still some of the post-arson, post-fire activity  
9 going on, was there not?

10 MRS. BARTEE: Yes, there was.

11 QUESTION: They were still boarding up the  
12 windows and pumping water out of the basesment and clean-  
13 ing up debris?

14 MRS. BARTEE: That is correct.

15 QUESTION: Following through on the other  
16 questions, wasn't there a formal report to the arson  
17 squad in this case?

18 MRS. BARTEE: I believe there was some indication  
19 of that in the record, but that was not accurate. A  
20 formal report is drawn up, but the fire investigators  
21 do not receive that report until two or three days later  
22 and that as the firefighters go back to their office,  
23 compile a formal report and sent it over the fire  
24 investigators when they are completed.

25 QUESTION: Now, does the record show that?

1 MRS. BARTEE: No, it does not.

2 QUESTION: How are we to accept it then?

3 MRS. BARTEE: I believe that the record indi-  
4 cates -- It does not indicate anything specifically.  
5 It indicates both views. While the fire investigator  
6 was being cross-examined, he said, no, we do not receive  
7 a written report, yet the compiled facts indicate a  
8 written report and that was sort of a slip-up and which  
9 I checked out the question myself, because I think it  
10 does make a difference. Well, it does make a difference  
11 to some extent, depending on what this Court's holding  
12 is, but it would be our contention, even if these fire  
13 investigators entered the premises with probable cause  
14 to believe that the cause and origin was arson, and  
15 with probably cause to believe that seizable evidence  
16 of arson could be found on the premises, that the fire  
17 presents and independent justification aside from that  
18 to enter those premises.

19 Let me give you an analogy just so we can see  
20 that this would be correct. If, for example, a border  
21 inspector has probable cause to believe that "X" will  
22 be crossing the border with a suitcase full of cocaine,  
23 even though he has probable cause to believe seizable  
24 evidence of a crime will be found in that suitcase,  
25 and even though it may be practicable to obtain a warrant,

1 no warrant is required, because a border search, which  
2 is made to portect the sovereignty of our country, requires  
3 no cause of warrant.

4 QUESTION: But, you can't extend a border  
5 search to an arson investigation, can you?

6 MRS. BARTEE: I would like to analogize the  
7 border situation to the fire situation in that there  
8 is no greater threat to the lives --

9 QUESTION: Well, the border one is limited  
10 to a border.

11 MRS. BARTEE: The fire situation would be  
12 limited to those instances where a fire occurs.

13 QUESTION: Well, one is oranges and one is  
14 apples or stones.

15 MRS. BARTEE: My only analogy would go to  
16 the extent that if probable cause does exist for the  
17 border situation, the independent justification for  
18 the search, which is the border search, requires no  
19 warrant. Similarly, in a fire -- If this Court accepts  
20 that a fire presents a situation which would allow the  
21 fire investigators to enter and determine what was the  
22 cause for this fire, then the fact that probable cause  
23 exists cannot defeat that independent justification  
24 for entering the premises.

25 QUESTION: I take it from the position you

1 have suggested that if the men who were working to pump  
2 out the excess water out of the basement found some  
3 incriminating evidence, that that would be admissible  
4 as part of the whole process of extinguishing the fire  
5 and restoring safe conditions.

6 MRS. BARTREE: The people that were on the  
7 premises were not government officials, but I believe  
8 if that was -- Those were insurance people, I believe,  
9 and if that evidence -- Once that evidence was left  
10 there in the basement, I believe that should be admis-  
11 sible evidence as part of that first initial investigative  
12 entry.

13 It is --

14 QUESTION: May I ask you another question  
15 as long as you are interrupted? Suppose that after  
16 the fire, the firefighters as they put it out or as  
17 they were pumping out the water, discovered in the base-  
18 ment what appeared to be to them an illicit drug  
19 laboratory. Could the police then have entered six  
20 hours later without a warrant to investigate that like  
21 the arson squad did?

22 MRS. BARTREE: Absolutely not, because I think  
23 what I would have to have is that the person who finds  
24 this evidence is validly on the premises.

25 We are urging this Court to hold that a valid



1 purpose for entering those premises, once a fire has  
2 occurred, would be to investigate the cause of an origin  
3 of that fire and to prevent rekindling if it is possible,  
4 or if a fire is rekindled, to put that rekindled fire  
5 out and to assure that a dangerous and volitile situation  
6 still does not exist.

7 QUESTION: Mrs. Bartee, when you advance those  
8 justification, does it really differ much, your theory,  
9 from the question posed to you by Justice O'Connor that  
10 it could come within the exigent circumstances, etc.  
11 in Clifford?

12 MRS. BARTEE: Well, we would urge this Court  
13 to first reach the constitutional question and that  
14 is does a fire investigation require a warrant? If  
15 this Court follows my analysis, as is urged, then this  
16 Court would find a fire investigation falls within the  
17 reasonableness clause and we would never reach the Tyler  
18 question and it would never have to determine an exigency.

19 QUESTION: But, you must realize you have  
20 a fairly strong laboring ore to bear with the Court  
21 having decided the Clifford case.

22 Now, your petition for certiorari was granted,  
23 but that doesn't necessarily indicate, I think, that  
24 the Court wants to have a brand new ball game in this  
25 area after having decided Clifford.

1 QUESTION: Tyler.

2 QUESTION: I am sorry, Tyler.

3 MRS. BARTEE: I believe that the Clifford --

4 QUESTION: I am sorry to have confused you.

5 MRS. BARTEE: I believe that the Tyler case --

6 I can understand Justice O'Connor's position, but I

7 believe that the Tyler case itself dealt with the initial

8 investigative entry by the investigators and I think

9 there has to be a distinction between the firefighters

10 entering, because I think no matter how you view that

11 entry, it has got to be justified. The tougher question

12 comes with that initial investigative entry.

13 And, that initial investigative entry in Tyler

14 occurred while the flames were still smoldering. And,

15 Tyler precisely dealt with additional entries. In my

16 case, the initial investigative entry occurred six hours

17 after the flames were extinguished.

18 QUESTION: Which way does that cut?

19 MRS. BARTEE: Well, that cuts that this Court

20 would either have to modify Tyler or this Court would

21 have to go with the more prominent issue which would

22 be that the fire investigation falls within the reason-

23 ableness clause of the Fourth Amendment.

24 QUESTION: And, hence -- What would that do

25 to Tyler?

1 MRS. BARTEE: It would cause this Court to  
2 overrule Tyler.

3 QUESTION: Yes. Well, in addition to the  
4 exigent circumstances possibility, we have never said  
5 that every administrative search needs a warrant. There  
6 are certain kinds of administrative searches that fall  
7 within a unique context and no warrant is required.  
8 The investigators can just enter. And, I would suppose  
9 your position subsumes that I would think.

10 MRS. BARTEE: Our position is that the present  
11 day warrant exceptions are in actuality reasonable  
12 searches under the reasonableness clause. Those which  
13 do not focus on seizure-oriented probable cause, such  
14 as the heavily regulated business, search incident  
15 arrest, inventory search, are reasonable in light of  
16 the high governmental interest involved.

17 QUESTION: Suppose your investigators that  
18 you are saying were legally on the property, what if  
19 they had found the illegal drug apparatus?

20 MRS. BARTEE: I believe that would have been  
21 in plain view.

22 QUESTION: So that would have been seizable  
23 because they were legally where they were?

24 MRS. BARTEE: Because they validly invaded  
25 that privacy interest already.

1               QUESTION: But, they couldn't tell the police  
2 and the police couldn't come in?

3               MRS. BARTEE: That is correct.

4               QUESTION: May I ask one question? Your  
5 exception that you seek, you want us to establish, is  
6 for fire investigation. I am curious to know what you  
7 mean by a fire investigation. Is it an investigation  
8 to determine the cause of the fire or is it an investi-  
9 gation to determine whether there was arson?

10              MRS. BARTEE: A fire investigation is an  
11 investigation to determine the cause and origin of the  
12 fire. But, as I have indicated, there may be multiple  
13 purposes and one of the purposes might be the seizure  
14 of criminal evidence.

15              QUESTION: To prove arson?

16              MRS. BARTEE: If evidence of arson happens  
17 to be on the premises, yes, that is correct.

18              QUESTION: Or to put it another way, the Fourth  
19 Amendment doesn't apply to arson.

20              MRS. BARTEE: The Fourth Amendment would apply  
21 to a fire inspection in the same manner which this Court  
22 allows border inspections or seizure of the person and  
23 this Court could set out demarcation of categories --

24              QUESTION: Are you aware that there are statutes  
25 on the border --



1           QUESTION: Are you aware that there are federal  
2 statutes involving border searches?

3           MRS. BARTEE: I believe that --

4           QUESTION: And you don't have a federal statute  
5 involving state arson, do you?

6           MRS. BARTEE: Correct.

7           QUESTION: Isn't that a difference?

8           MRS. BARTEE: There is a difference between  
9 the two, but not to the extent that each one may present  
10 an independent justification for entering the premises.

11           I believe that if this Court were to require  
12 a neutral magistrate to determine that for a fire  
13 investigator to go onto the premises to determine the  
14 cause and origin of a fire, all that fire investigator  
15 need say to that neutral magistrate would be there is  
16 a fire on those premises and we don't know what the cause  
17 and origin of that fire is.

18           QUESTION: Well, Mrs. Bartee, supposing that  
19 Al Capone had lived in Detroit rather than Chicago and  
20 the government had wanted to search his house for a  
21 long while but could never find grounds for a warrant.  
22 Then all of a sudden one day the police found out that  
23 his house had burned. Now, do you think they could  
24 call the Detroit arson squad and say, go over and search  
25 Al Capone's house and see if you can't find some evidence

1 of income tax violation?

2 MRS. BARTEE: I believe that the purpose of  
3 the fire itself would determine the appropriate scope  
4 and intensity which would be they could not look in  
5 desk drawers to determine the cause and origin of a  
6 fire.

7 I am not here to --

8 QUESTION: Is that what the inquiry is direct  
9 at, to the cause and origin of a fire, and not to just  
10 any sort of miscellaneous criminal conduct that the  
11 person might have otherwise engaged in?

12 MRS. BARTEE: I think the primary focus is  
13 for the cause and origin of the fire and if a search  
14 of inappropriate scope and intensity occurs, this court  
15 has always recognized that that would be a reason to  
16 exclude the evidence.

17 We believe, which may be helpful, that a  
18 four-prong analysis should be undertaken whenever the  
19 government contemplates invading a person's privacy.

20 First, the reasonableness clause would require  
21 a balancing of the government's interest in achieving  
22 the search against the individual's interest in privacy  
23 to determine whether the type or class of search is  
24 reasonable and permissible.

25 For example, a search of a private dwelling

1 for criminal evidence is a permissible class of search  
2 once the balancing is applied.

3 A search of a private dwelling to see how  
4 firearms are on the premises or to see what I can find  
5 about a crime is not a permissible class of search and  
6 may never take place.

7 The second question then, once we have a per-  
8 missible class of search, would be is the sole purpose  
9 of this search seizure oriented? If the sole purpose  
10 is not seizure oriented, then the third question simply  
11 is what quantum of information is required to justify  
12 this particular search.

13 For example, an administrative search might  
14 be justified by a legislative scheme which authorizes  
15 periodic inspections.

16 The fourth question then is, once the quantum  
17 of information is met and once the search is deemed  
18 permissible, the fourth question would be what safe-  
19 guards does the reasonableness clause require in order  
20 to insure that the execution of this search is reasonable.

21 Once again, in the administrative arena, the  
22 reasonableness clause might require prior notice and  
23 no inconvenient time of execution.

24 Now, if, on the other hand, the answer to the  
25 second question is that the search is -- the sole

1 purpose of the search is to seize items, then the answer  
2 to the third question, as to the quantum of information,  
3 is always probable cause. And, the fourth question  
4 would still apply in that the search must be executed  
5 in a reasonable manner.

6           This Court has recognized that a warranted  
7 search which exceeds appropriate scope and intensity  
8 is unreasonable. And, I submit it violates the reason-  
9 ableness clause and that the reasonableness clause requires  
10 that all governmental intrusions be done in a reasonable  
11 fashion.

12           It is our contention that Camara and its  
13 progeny recognize that administrative searches are  
14 justified, but felt compelled to apply the warrant  
15 preference, and were, thus, presented with a dilemma  
16 of defining the quantum of information necessary in  
17 terms of probable cause in a situation where probable  
18 cause was never intended to apply, and, thus, it resulted  
19 in the distortion of the concept of probable cause and  
20 the creation of a new type of warrant.

21           Those who advocate the primacy of the warrant  
22 have delineated out two separate and distinct types  
23 of warrants based upon the warrant language of the Fourth  
24 Amendment.

25           First, the seizure-oriented warrant which



1 authorizes a government official to go on to designated  
2 premises and seize evidence of a crime or property to  
3 which the government has a superior claim of possession  
4 must be based upon probably cause; that is facts and  
5 circumstances which lead a reasonably prudent person  
6 to believe that this seizable evidence of a crime or  
7 or property to which the government has a superior claim  
8 of possession will be found in the premises.

9           Secondly, the inspection-oriented warrant,  
10 which is applicable in the administrative arena, authorizes  
11 a government official to go on to designated premises  
12 and inspect the condition of those premises and deter-  
13 mine whether that condition violates a regulatory code.  
14 This inspection-oriented warrant is necessarily based  
15 upon something less than probable cause and may even  
16 be based upon the legislative scheme with neutral  
17 criterion.

18           It is our position that as stated by the  
19 Fourth Amendment a warrant may not issue but upon  
20 probably cause to believe that seizable items --

21           QUESTION: You have got your eye not only  
22 on Tyler, but Camara and See and that whole string of  
23 administrative --

24           MRS. BARTTEE: In all due deference, I believe  
25 I do.

1 QUESTION: You certainly do.

2 QUESTION: The Court has changed its mind  
3 on previous occasions, hasn't it?

4 MRS. BARTEE: That is correct. And, I believe  
5 this Court changed its mind before Camara and See and  
6 its progeny came and that Frank versus Maryland existed.

7 And, I believe that the goals of this Court  
8 would allow this Court once again to look at this  
9 analysis and determine whether the Constitution does  
10 require a warrant in the administrative arena.

11 QUESTION: Mrs. Bartee, as a matter of curiosity,  
12 I never know the Michigan practice, on page 83A of your  
13 Joint Appendix is something called "Statement of Facts  
14 and Proceedings." Is that a stipulation?

15 MRS. BARTEE: That was a stipulation in the  
16 lower court, but I believe -- And, that is where there  
17 is the incorrect statement as to whether a written report  
18 was received, was found. However, I don't believe this  
19 Court is limited to that stipulation of facts as the  
20 whole record is before it.

21 QUESTION: Well, in other words, in Michigan  
22 you call a stipulation a statement?

23 MRS. BARTEE: Statement of facts, that is  
24 correct.

25 QUESTION: And, I was going to ask you whether

1 we can accept the facts therein stated as true and correct  
2 and I take it you are saying for the most part, but  
3 not entirely so.

4 MRS. BARTEE: That is correct.

5 QUESTION: Just a matter of curiosity, has  
6 the insurance company ever paid off?

7 MRS. BARTEE: They are still calling me.

8 QUESTION: They are still what?

9 MRS. BARTEE: They are calling me to find  
10 out the decision which this Court is going to hold.

11 QUESTION: So, I take it your answer to me  
12 is no.

13 MRS. BARTEE: That is correct.

14 QUESTION: May I ask a question about your  
15 reasonableness theory? As I read your brief, you seem  
16 to agree with something I had written that there ought  
17 to be notice if they go in without a warrant and yet  
18 there was no notice here. So, I was just wondering  
19 if you didn't concede yourself out of court.

20 MRS. BARTEE: No, I did not. I believe that  
21 a fire investigative search, the initial entry, does  
22 not require a warrant or notice or no inconvenient time  
23 and that is to some extent because of the exigency which  
24 this Court has recognized in Michigan versus Tyler.

25 Take, for example, if --

1           QUESTION: In Tyler, the point was to remain,  
2 not to enter.

3           MRS. BARTEE: That is correct. That is why  
4 this Court would have to modify Tyler.

5           QUESTION: Well, that is different.

6           MRS. BARTEE: That is correct.

7           Let me give this Court an example. If, for  
8 example, a gas station develops a leak in its underground  
9 tank and gas seeps through the soil and into the basement  
10 of this house and flames ignite in that house, the extinguish-  
11 ing of those flames in that basement does not extinguish  
12 the potentially dangerous and volatile situation that  
13 might be life threatening and, therefore, a fire may  
14 rekindle in that basement, a fire may rekindle somewhere  
15 else.

16           It is our position that the local government  
17 spent a great deal of money and risked lives putting  
18 out fires. There is no greater threat to the property  
19 and residence than fires. That they have the right  
20 to determine the cause and origin of the fire and they  
21 have the right to determine why that fire existed in  
22 the first place and to ensure that a dangerous situation  
23 does not still exist.

24           QUESTION: Let's not talk about rights. Do  
25 they have a duty to determine it?



1 MRS. BARTEE: I believe to some extent they  
2 do and as the fire marshal is given the duty of inspect-  
3 ing every fire which occurs in the City of Detroit and  
4 these fire investigators fall within the fire marshal.

5 QUESTION: Now, your example about the leak,  
6 wouldn't that give you a whim in that case under Tyler  
7 itself? I guess I am repeating Justice O'Connor's  
8 inquiry. Why do you have to cut back on Tyler to win  
9 this case?

10 MRS. BARTEE: Because I believe in Tyler this  
11 Court was looking at the investigative entries and that  
12 the investigators arrived while the flames were still  
13 smoldering. They were not looking at when did the fire-  
14 fighters arrive.

15 I believe this case looks at it too, the first  
16 initial investigative entry and this initial investigative  
17 entry occurred while the -- six hours after the flames  
18 were extinguished.

19 QUESTION: Had they stayed there for those  
20 six hours, would the case be here?

21 MRS. BARTEE: Absolutely. Had they arrived  
22 when the flames were smoldering, no.

23 I think it is a matter of when does the first  
24 investigative entry occur. I believe that there would  
25 be little modification --

1 QUESTION: I can frankly say --

2 MRS. BARTEE: There would be little modification

3 to the --

4 QUESTION: Will you let me speak, please.

5 I do not understand your negative answer to my inquiry.

6 I said, had they stayed there the entire six hours,

7 would not the case be different?

8 MRS. BARTEE: That is correct, I am sorry.

9 I was thinking if they stayed after the six hours.

10 That is correct.

11 QUESTION: And, had they stayed there for

12 six hours, they still couldn't investigate because of

13 six inches of water in the basement, isn't that correct?

14 MRS. BARTEE: That is correct.

15 QUESTION: Then why do you have to go outside

16 Tyler?

17 MRS. BARTEE: Because they did not arrive

18 to stay there the six hours. So, it would require modi-

19 fication of Tyler. Then a new question --

20 QUESTION: So, even if they had arrived and

21 could do nothing, the case is different?

22 MRS. BARTEE: Because they didn't know they

23 couldn't do anything until they did arrive.

24 QUESTION: How could the understanding of

25 the officers make any possible difference? It is very

1 hard to understand your argument frankly.

2 MRS. BARTEE: Well, because my argument would  
3 be had they arrived six hours after the flames were  
4 extinguished and they could have gone right on to the  
5 premises. That that was a reasonable time for which  
6 to enter the premises and that the investigation could  
7 have occurred without a warrant if the investigation  
8 is seen as falling within the reasonableness clause  
9 of the Fourth Amendment and that they couldn't possibly --  
10 Well, a fire presents an independent justification for  
11 entering those premises.

12 Let me apply --

13 QUESTION: Aren't you, Mrs. Bartee, trying  
14 to pass up a first down for a touchdown, you know, by  
15 trying to suggest some distinctions from Tyler which  
16 some of my colleagues have suggested are by no means  
17 self evident?

18 MRS. BARTEE: I believe if you limit Tyler  
19 to its holding, and that is that there may be investi-  
20 gative entries which can be deemed a continuous entry,  
21 a continuum of the initial entry. If you limit Tyler  
22 to its holding, we do not fit exactly under the facts.

23 However, if you want to say that reasonably  
24 that Tyler should be held to say that fire investigatos  
25 may enter within a reasonable time after the flames

1 have been extinguished, then I believe you are correct.

2 Let me just shortly apply my four-prong test  
3 to the fire situation.

4 QUESTION: Before you do, I am still not sure  
5 you have cleared up my concern about the lack of notice  
6 here. You gave me hypothetical example of where we  
7 would not have needed notice. But, why, on the facts  
8 of this case, wasn't it perfectly simply to give notice?  
9 As I understand it, the insurance -- everybody else  
10 gave the owner notice.

11 MRS. BARTEE: The question is not is it practicable  
12 to give notice. It is notice required and I believe --

13 QUESTION: You seem to concede it was required  
14 on the facts of Tyler as I understand it.

15 MRS. BARTEE: I will concede for additional  
16 entries it would be required unless notice would defeat  
17 the purpose. And, in an arson situation, it is conceivable  
18 that notice might defeat the purpose of the search.

19 But, for the initial investigative entry,  
20 I believe just the exigency of the fire itself and the  
21 local governments, they have expended money and risked  
22 lives, they have an interest and a right to determine  
23 the cause and origin and to make that initial entry  
24 without a warrant.

25 QUESTION: You would say the same thing even



1 if the initial entry were three days later?

2 MRS. BARTEE: Absolutely not. I would have  
3 to say reasonable time. The entry -- The quantum of  
4 information required, that is my third prong, would  
5 be reasonable time and reasonable time is not subject  
6 to a precise definition.

7 QUESTION: Well, let's say it was two hours  
8 after the water had been cleaned up in the basement  
9 instead of they had to wait. Could they have gone in?

10 MRS. BARTEE: I believe so.

11 QUESTION: I see.

12 MRS. BARTEE: I believe that reasonable time,  
13 to follow up your answer -- The starting point for reason-  
14 able time would be that time within which the fire may  
15 rekindle, but it could not end within time within which  
16 a fire may rekindle because there may also be factors  
17 beyond the control of the investigators which precludes  
18 or hinders their initial investigation.

19 For example, in Tyler the steam and darkness  
20 hindered the investigation. It may be unsafe to make  
21 that initial investigation. A bulldozer may be required  
22 to remove some debris to make that initial investigation  
23 or, as in the instant case, water may have to be pumped  
24 out of the basement to make that initial investigation.

25 So, reasonable time would require several

1 factors. Some of these factors were discussed by this  
2 Court in Tyler such as the attempt to secure the premises,  
3 the continued use of the premises.

4 QUESTION: If you are responding to the question,  
5 you may complete, but then you have used up all your  
6 time.

7 MRS. BARTEE: Thank you.

8 CHIEF JUSTICE BURGER: Mr. Oade?

9 ORAL ARGUMENT OF K. PRESTON OADE, JR., ESQ.

10 ON BEHALF OF THE RESPONDENTS

11 MR. OADE: Mr. Chief Justice, and may it please  
12 the Court:

13 As the Court is well aware petitioner in this  
14 case is, in effect, asking this Court to overrule Camara  
15 versus Municipal Court of City and County of San Francisco,  
16 a 1967 case, dealing with warrantless searches of the  
17 physical condition of premises by building inspectors;  
18 asking the Court to overrule See versus City of Seattle,  
19 a fire inspection case, 1967; asking the Court to over-  
20 rule Marshall v. Barlows, Inc., a warrantless search  
21 under the occupational health and safety provisions;  
22 and they are asking the Court to overrule Michigan v.  
23 Tyler.

24 The reason that petition perceives it necessary  
25 to ask this Court to overrule those cases is because

1 whether this search is viewed in the context of an  
2 administrative search or whether it is viewed in the  
3 context of a criminal search, it is clear a warrant  
4 was required under any case.

5 I submit to this Court that the Court need  
6 not reach the question of whether these cases should  
7 be overruled. And, the reason it need not reach those  
8 questions is because clearly a police officer has no  
9 right to enter a private home, which this Court through  
10 the years has protected and drawn the line that the  
11 threshold of the home which the police officers or not  
12 officials may enter, absent compelling cause, exigent  
13 circumstances for a warrant.

14 QUESTION: Now, some of the questions, Mr.  
15 Oade -- We are getting back to fundamentals about the  
16 Fourth Amendment. What is the purpose of the Fourth  
17 Amendment protection, the warrant protection?

18 MR. OADE: I think this case illustrates very  
19 well, Mr. Chief Justice, the purpose of the Fourth Amendment.

20 QUESTION: Well, without the merits of this  
21 case, what is the broad purpose? To protect privacy,  
22 is it not?

23 MR. OADE: That is correct.

24 QUESTION: Now, in this place they had anywhere  
25 from six to a dozen firemen filing around the place

1 for many, many hours, and carpenters and whoever the  
2 people wer manning the water pumps. There had been  
3 quite an interference with privacy by that time, hadn't  
4 there?

5 MR. OADE: Mr. Chief Justice, the firefighters  
6 had a duty to fight that fire and they had a duty to  
7 extinguish that fire and they had a duty to ensure that  
8 that fire was put out. Thereafter, when the firefighters  
9 had left the scene of those premises, the Cliffords  
10 had their insurance agent boarding those premises up.

11 The purpose of the Fourth Amendment is so  
12 a police officer will not enter someone's private bedroom,  
13 go through that person's closets, go through the drawers  
14 of their dresser drawers to see if there is any evidence  
15 in there that they can convict them of a crime.

16 QUESTION: What if the firefighters had discovered,  
17 in the process of their work while the fire was still  
18 going on, bales of marijuane or kegs of heroin and  
19 that sort of thing? Is it admissible?

20 MR. OADE: Mr. Chief Justice, I think that  
21 I can fairly concede that that is within plain view.  
22 And, in fact, in this case we have a plain view situation  
23 and the plain view is because the origin of the fire  
24 here was very easily determined as being in the basement --  
25 There was an odor of flammable liquid, there was a definite



1 burn pattern emerging from the stairwell of the basement  
2 stairwell and there was a can of Coleman fuel found  
3 in that basement next to the point of origin. The  
4 firefighters found that can of fuel and they took that  
5 can of fuel and seized it because it was in plain view  
6 and they put it outside and then they gave a report  
7 to the arson squad of probable arson. This fire is  
8 probable arson, started in the basement.

9 Now, at that point, it is our contention that  
10 it turned into a criminal investigation and if it was  
11 not criminal at that point it was certainly criminal  
12 by the time Lieutenant Beyer, who, by the way, I would  
13 like the Court to know is a police officer. Lieutenant  
14 Beyer is a member of the Detroit Police/Fire Arson Squad.  
15 His function is to investigate criminality and prosecute  
16 it as evidenced by the fact he was a witness in this  
17 case, he performed their exam, as evidenced by the fact  
18 he has powers of arrest, as evidenced by the fact that  
19 he went out there not to find cause and origin, because  
20 he found cause and origin in the basement. He then  
21 went through this entire home for three hours, Mr. Chief  
22 Justice.

23 QUESTION: Is that different than the officers  
24 in Tyler?

25 MR. OADE: I think it is very different in

1 this sense. The officers in Tyler was the Fire Chief,  
2 I believe Chief See. They went there while the fire  
3 was still smoldering. When the fire was extinguished,  
4 they were sure what the cause and origin was. In fact,  
5 they couldn't even see any.

6 QUESTION: I meant as to their official duties  
7 and the powers and so forth. You made something to  
8 the effect that this was a police officer, he had the  
9 power to arrest. Did the officers in Tyler not have  
10 the power to arrest?

11 MR. OADE: I am not sure, Justice Rehnquist,  
12 whether they had the power to arrest or not, but I think  
13 that this Court has distinguished between administrative  
14 and criminal searches based on the objects and intrusive-  
15 ness of the search.

16 So, I submit to the Court, that, number one,  
17 the object of the search was, what, criminal evidence?  
18 Look what was seized. What was seized here was old  
19 clothes. Old clothes were seized from the Cliffords'  
20 bedroom and that was viewed as evidence of arson, to  
21 wit, somebody that is going to burn their house down  
22 takes all their new clothes and expensive things out  
23 of their home.

24 QUESTION: Was all of that in evidence?

25 MR. OADE: This is part of the evidence that

1 we are seeking to suppress.

2 So, they have -- They didn't confine their  
3 activities to cause and origin. This was a three-hour  
4 search of this home.

5 The Court has the investigator's report, which  
6 is a five-page report -- it is not in the Appendix,  
7 but I know it has been submitted to the Court -- that  
8 describes the scope of this search. They started in  
9 the basement and they found clearly a crock pot and  
10 a wire.

11 QUESTION: Is that report in evidence?

12 MR. OADE: Yes, I believe it is.

13 QUESTION: Because it certainly is not in  
14 the Joint Appendix.

15 MR. OADE: It is not in the Joint Appendix  
16 and we had some confusion in putting the Joint Appendix  
17 together as far as counsel contacting me and asking  
18 me what we wanted in there. It should be in the Joint  
19 Appendix and I did get a request from the Clerk of the  
20 Court. I have sent the Court copies of the investi-  
21 gator's report.

22 QUESTION: Are you representing that it was  
23 received in evidence in the case?

24 MR. OADE: This investigator's report?

25 QUESTION: Yes.

1           MR. OADE: No. It was not marked. It was,  
2 in fact, referred to by Lieutenant Beyer throughout  
3 his testimony. He used it in his testimony. The trans-  
4 script reflects that. He would say I have to refer  
5 to my report.

6           QUESTION: Mr. -- Go ahead.

7           QUESTION: It is not in the record?

8           MR. OADE: It is not.

9           QUESTION: Or it is not before us.

10          MR. OADE: It has not been marked as an exhibit  
11 and put in for identification. Certainly there is no  
12 question on the authenticity of it. The prosecution  
13 has a copy of it. We obtained it from the state. I  
14 believe it certainly is pertinent and I have cited it  
15 in my brief without objection from the petitioner.

16          QUESTION: Mr. Oade, to get back for a moment  
17 to the similarities or dissimilarities between the  
18 officers in your case and in Tyler, reading from page  
19 502 of 436 US, the Court's opinion in Tyler, the first  
20 person to arrive was Chief See, who I take it was the  
21 Fire Chief, and then at 3:30 A.M. he called Police  
22 Detective Webb. So, there was a police detective on  
23 the premises at all times after 3:30 in Tyler.

24          So, I would think that your argument that  
25 these were police officers rather than fire officers



1 is pretty well foreclosed by Tyler.

2 MR. OADE: Well, I don't believe it is entirely  
3 foreclosed, Mr. Justice Rehnquist.

4 QUESTION: Why not?

5 MR. OADE: And, the reason I don't is because  
6 of the scope of the search itself in this case. In  
7 the Tyler case I think it was limited to a reasonable  
8 search into cause and origin.

9 QUESTION: But, you are talking -- It may  
10 be differentiated on the scope of the search. I  
11 certainly am not saying it isn't. But, I thought you  
12 were trying to distinguish on the basis of the type  
13 of officer who came.

14 MR. OADE: I wanted to make it clear to the  
15 Court, because I am maintaining that this is a criminal  
16 investigation.

17 QUESTION: But, if Detective Webb was involved  
18 in Tyler, there is certainly every presumption there  
19 was a criminal investigation in Tyler too.

20 MR. OADE: I think there was certainly a criminal  
21 investigator present. I would certainly concede that,  
22 but I will not concede that the focus and object of  
23 the search in Tyler was solely to gather fruits and  
24 instrumentalities of crime.

25 And, I think it is clear in this case that

1 the scope of the search and what was seized was fruits  
2 and instrumentalities of the crime. I think the case  
3 illustrates why --

4 QUESTION: Mr. Oade, every time you discover  
5 evidence of arson, it becomes the fruits of a crime,  
6 doesn't it?

7 MR. OADE: It does, but --

8 QUESTION: So you would just say there can  
9 never be an arson investigation under any circumstances,  
10 that the exigent circumstances would never allow that,  
11 is that your position?

12 MR. OADE: No, that is not my position. My  
13 position --

14 QUESTION: Well, if the officers were there  
15 at the time the firefighters were there, would you think  
16 they could have conducted this same search?

17 MR. OADE: No, they could not. And, I would  
18 like to illustrate my point as follows:

19 Let's suppose they would have gotten an  
20 administrative warrant to search for cause and origin.  
21 I submit to the Court that one of the purposes of a  
22 warrant is to limit the scope of a search. And, I be-  
23 lieve that a proper administrative warrant would have  
24 instructed, whether they be police officers or fire-  
25 fighters, would have instructed them to search for

1 cause and origin. Cause and origin of the fire was  
2 in the basement.

3 QUESTION: But, don't you concede under Tyler,  
4 if they had been there when the firefighters were there,  
5 that that much would have authorized them to make the  
6 search they did?

7 MR. OADE: It would not have authorized --

8 QUESTION: You are asking us to overrule Tyler  
9 in another way then.

10 QUESTION: Yes.

11 MR. OADE: No, I am not. No, I am not. Maybe  
12 I am not making myself clear.

13 Let's suppose that the firefighters in this  
14 case had stayed at the scene and let's suppose that  
15 they had stayed there for six hours and the water was  
16 pumped out and they are trying to determine cause and  
17 origin. If that happened, and it didn't happen, but  
18 if it did happen, and under Tyler they had a right to  
19 remain there to search --

20 QUESTION: And, under Tyler they would have  
21 had a right to call a police detective too.

22 MR. OADE: They would have had a right to  
23 call a police detective. They would have had the right  
24 to go down in the basement where the cause and origin  
25 of the fire was. They would have had a right to search

1 through the fire debris and they would have had a right  
2 to seize evidence at the cause and origin, but they  
3 would not have a right, Justice Rehnquist, to go in  
4 the man's living room, to rummage through his personal  
5 effects. They would not have a right --

6 QUESTION: Would you say the evidence of only  
7 old clothes in the closet is not probative of arson?

8 MR. OADE: I find the fact that is probative  
9 of arson irrelevant. The fact is they took it upon  
10 themselves to go up in this man's bedroom, to search  
11 their closets, to search their dresser drawers, and  
12 I find that to be an extreme evasion of privacy that  
13 far exceeds the scope of the search.

14 The cause and origin of the fire had nothing  
15 to do with --

16 QUESTION: What if the fire had originated  
17 in the bedroom?

18 MR. OADE: Pardon me?

19 QUESTION: What if the fire had originated  
20 in the bedroom?

21 MR. OADE: Well, at least they would have  
22 an arguable case that they were confining their search  
23 to the less intrusive means.

24 QUESTION: Well, you suggest it is only arguable  
25 that they could go into the bedroom if the fire had



1 originated there?

2 MR. OADE: I am saying that it is clear to  
3 me, Justice Rehnquist, that the cause and origin of  
4 the fire had no relationship to whatever personal effects  
5 might have been present in my clients' bedroom.

6 QUESTION: But, I asked you what if the cause  
7 of the fire had been found in the bedroom and you say,  
8 I believe that it is only arguable that the fire people  
9 could have gone into the bedroom, even though the cause  
10 of the fire was there.

11 MR. OADE: I will concede if the origin of  
12 the fire was in the bedroom they had a right to be  
13 present in the bedroom. I don't think they had a right  
14 to go through somebody's diary or open their dresser  
15 drawers and see what is in there. I don't think they  
16 had a right to do that. That has nothing to do with  
17 cause and origin and that is why you need a warrant  
18 so that people will know, so police officers will know,  
19 so arson investigators will know what is the limit of  
20 their authority.

21 QUESTION: You mean in this case you wouldn't  
22 be here if they had limited their search to the basement?

23 MR. OADE: If they had gotten an administrative  
24 warrant and limited the search to the basement.

25 QUESTION: So you would be here if all they

1 did was they entered without a warrant and went down  
2 the basement to verify the cause and origin of the fire.  
3 And, if they found some evidence in that search, you  
4 would still be here, even if they stayed a hundred miles  
5 from the bedroom.

6 MR. OADE: Justice White, I think perhaps --

7 QUESTION: Can't -- Yes, you would be here,  
8 you just wouldn't have as much to argue about?

9 MR. OADE: That is true. I wouldn't have  
10 as many strings in my bow, but I would like to say,  
11 Justice White, that in Michigan v. Tyler the Michigan  
12 Supreme Court -- In People v. Tyler, the Michigan  
13 Supreme Court set forth a clear rule for arson investi-  
14 gators to follow. The Michigan Sumpreme Court said  
15 when the fire has been extinguished, there is no danger  
16 of its recurrence, and you have left the scene, your  
17 duties are over. If you want to go back in to determine  
18 cause and origin, get a warrant.

19 This Court said in Tyler, well, that took  
20 an unrealistic and narrow view of the firefighting  
21 function.

22 The Court viewed the re-entry by Chief See  
23 four hours later as a continuation of the original entry.

24 And, Justice White, I think you said in Tyler, in  
25 your concurring opinion, that that line of demarcation,

1 the continuation, will not aid firefighters, it will  
2 confuse them. In other words, you predicted that there  
3 are going to be situations, because of this continuation  
4 theory, where firefighters or arson investigators could  
5 have easily have gotten a warrant and they are not going  
6 to do so because of this continuation theory in Michigan  
7 v. Tyler.

8 I submit to the Court that if you create an  
9 exception to the warrant requirement, and I think the  
10 Court has in effect created an exception in Michigan  
11 v. Tyler called the continuation exception. The  
12 exception will be expanded. The police and the fire-  
13 fighters will take it to the limits. And, that is why,  
14 I think, we are before this Court. If this Court in  
15 Michigan v. Tyler had set down a clear rule and said  
16 once you leave the premises, once the fire is out, and  
17 you want to come back, then have an administrative warrant  
18 or have a probable cause warrant or, as Justice Stevens  
19 says, fair notice.

20 QUESTION: Mr. Oade, you have referred to  
21 administrative warrants several times. Does Michigan  
22 have an administrative warrant procedure for determining  
23 the cause and origin of the fire?

24 MR. OADE: I am not aware of any particular  
25 legislative standards, and in the absence of those

1 standards, I think that it is incumbent --

2 QUESTION: So at the time of this incident,  
3 there wasn't such an animal that these people could  
4 have tried to get?

5 MR. OADE: Oh, I believe they could have.  
6 In fact, Lieutenant Beyer conceded that he knew how  
7 to get an administrative warrant. He said it could  
8 have taken him an hour. So, there was apparently a  
9 mechanism where local magistrates will allow adminis-  
10 trative searches based on showing of need to enter and  
11 a reasonable scope and search.

12 QUESTION: Just a showing that there had been  
13 a fire, is that all they need?

14 MR. OADE: I think a showing that there has  
15 been a fire and it is of suspicious origin, that is  
16 correct.

17 But, Justice Stevens, they had much more in  
18 this case. They had --

19 QUESTION: I know they had more, but there  
20 is no finding of probable cause here so I think we have  
21 to decide the case as though it presents a question  
22 that might arise when there is no probable cause.

23 MR. OADE: I think that is true. I think  
24 you should decide the case that way, even though I take  
25 the view, and we take the view, that this was a criminal



1 search. They had probable cause. They knew the fuel  
2 was there. When they went out to the house, Lieutenant  
3 Beyer talked to the neighbors, gathered information  
4 that there had been a prior fire there reported by  
5 arson.

6 QUESTION: I understand that. But, if you  
7 had a case in which there was suspicion of arson, say,  
8 rather than probable cause to believe it, and an uncertain  
9 origin of fire, your view of the Constitution is that  
10 they could not enter at all or without an administrative  
11 warrant?

12 MR. OADE: I think they would have to -- I  
13 think they should, according to Tyler, they would have  
14 to get an administrative warrant and the reason for  
15 that is --

16 QUESTION: Tyler doesn't talk about an admin-  
17 istrative warrant, does it? Maybe my recollection is  
18 poor about it. I thought that talked about the old  
19 fashioned kind of warrant.

20 MR. OADE: Probable cause type of warrant.

21 QUESTION: I don't think Tyler even mentions  
22 administrative warrant.

23 MR. OADE: Well, you might be correct. I  
24 have been so brainwashed by this administrative search  
25 idea that perhaps you are correct.

1               Clearly, in any event, they could have gotten  
2 a warrant in this case and I maintained in my brief  
3 that they could have gotten a probable cause warrant  
4 and should have gotten a probable cause warrant because  
5 they knew before they went into the house that it was  
6 arson and they not only knew it was arson, they sus-  
7 pected and had probable cause to believe who had committed  
8 the arson.

9               QUESTION: Do you concede that a magistrate  
10 would have issued a warrant?

11              MR. OADE: I think in all likelihood a magis-  
12 trate would have issued a probable cause warrant in  
13 this case. I can't speculate on what the magistrate  
14 would have done, but I think certainly under the tests  
15 set forth by this Court in Illinois v. Gates, I think  
16 that there was probable cause that there was evidence  
17 of arson inside that home.

18              And, of course, I think given that fact, there  
19 is a compelling reason to require resort to the warrant.

20              QUESTION: I suppose it would be a rare case  
21 where, in a suspected arson case, a probable cause  
22 warrant wouldn't arise, wouldn't issue.

23              MR. OADE: I think that may be true, Justice  
24 Blackmun.

25              QUESTION: This is totally irrelevant, but

1 I am curious. I have done a lot of camping in my day.  
2 How did it happen the Cliffords were so conveniently  
3 available by telephone on a camping trip?

4 MR. OADE: I am not aware of that, Justice  
5 Blackmun. I think they had told their neighborhood --  
6 There was a Boy Scout troop. They were going up north  
7 with a Boy Scout troop, so I believe it is because the  
8 parents wanted to know where their kids were and wanted  
9 to know how to get ahold of the Cliffords and their  
10 children up north. So, I think Mr. Mott knew how to  
11 get ahold of Mr. Clifford.

12 QUESTION: So, there were other youngsters  
13 than the Cliffords' children?

14 MR. OADE: That is correct. That is correct.

15 But, I think the main purpose for a warrant  
16 is, number one, to limit the scope of a search to a  
17 reasonable degree and it is our position that in this  
18 case this was an intrusive search. It went far beyond  
19 a determination of mere cause and origin.

20 QUESTION: Well, if a magistrate had issued  
21 a warrant, as you seem to concede he would have or any  
22 judicial officer would have, arson being the subject  
23 of the inquiry, how do you think the search could be  
24 limited? Would it not be to inquire into everything  
25 that would bear upon the arson?

1           MR. OADE: I would agree with that, Mr. Chief  
2 Justice, and the fact is they did not get a warrant.  
3 They should have.

4           QUESTION: Let's just stay with the warrant  
5 would not be limited. Had they had that warrant they  
6 could have gone into the closets to determine what they  
7 did find, in fact, and into every part of the house  
8 where they might find something that would bear on the  
9 arson, is that true?

10          MR. OADE: I am not sure that is correct,  
11 Mr. Chief Justice. I think it would depend on the type  
12 of probable cause that was submitted to the magistrate  
13 and the type of search that the magistrate would have  
14 authorized. Perhaps the magistrate would have authorized  
15 to search the basement area and then when they found  
16 more evidence of arson, they could have come back and  
17 gotten another warrant to further enlarge the scope  
18 of their search.

19          QUESTION: Do Michigan magistrates and judicial  
20 officers issue warrants seriatim?

21          MR. OADE: Oh, I think absolutely.

22          QUESTION: Is that common practice?

23          MR. OADE: A magistrate has a duty to --

24          QUESTION: Well, is that a common practice  
25 in Michigan?



1               MR. OADE: It certainly happens, Mr. Chief  
2 Justice. It does happen where you have probable cause  
3 to search a certain area or a certain building or a  
4 certain apartment and then you make you search and based  
5 on what you find that gives you probable cause to search  
6 somewhere else. It certainly happens there and it  
7 happens in the wire tapping area where you authorize  
8 a search and you find something out and on the basis  
9 of that search you go back and you get further authori-  
10 zation.

11               I would like to turn now to the question that  
12 Justice O'Connor raised earlier about exigent circum-  
13 stances. I would like to emphasize that, in fact, this  
14 started as an exigent circumstance case. That is the  
15 only ground upon which the petitioner defended the search  
16 in the trial court. It is the only ground upon which  
17 the petitioner defended the search in the Court of Appeals  
18 and the Michigan Court of Appeals specifically found  
19 as fact that there were no exigent circumstances. That,  
20 in fact, the firefighters had completely left the scene.  
21 They were in no hurry to go back. Lieutenant Beyer  
22 had processed a prisoner, investigated another fire,  
23 stopped for lunch, and he and his partner came to the  
24 Clifford home.

25               Then they had to wait around an additional

1 half an hour to wait for the water to go down. So,  
2 they had ample time, ample opportunity to obtain a  
3 warrant.

4 QUESTION: Is that the justification for getting  
5 a warrant, that there is time to get one?

6 MR. OADE: I think that exigent circumstances  
7 certainly in Michigan is a need for an immediate search.  
8 If there is a need for an immediate search -- If you  
9 don't search now, the car is going to be gone, or if  
10 you don't search now, they are going to flush the dope  
11 down the toilet, then maybe that is an exigent circum-  
12 stance. But, there was no reason for an immediate  
13 search. There were two of them there. They could have  
14 waited. They could have posted a guard and gone and  
15 gotten a warrant and came back. They could have probably  
16 have gotten a warrant while the water was being pumped  
17 out.

18 There was absolutely no reason for an immediate  
19 search. The firefighters left. This rekindling thing  
20 is a red herring. There is no rekindling. The fire-  
21 fighters had gone. The fire was out. If there was  
22 any danger of rekindling, why did they go to lunch and  
23 process another prisoner and take their sweet time in  
24 getting out there? This wasn't an exigent circumstance.

25 QUESTION: Maybe it was because there was

1 six inches of water in the basement.

2 MR. OADE: Well, they didn't know that, but  
3 even if they did, I don't see what significance that  
4 has to exigent circumstances. The Michigan Court of  
5 Appeals viewed the water as merely increasing the time  
6 for them to go and get a warrant.

7 QUESTION: Wasn't the Michigan Court basing  
8 its ruling on this Court's holding in Michigan versus  
9 Tyler?

10 MR. OADE: Well, I don't agree with that,  
11 Justice O'Connor, and I would like to --

12 QUESTION: At least that is what it said it  
13 was doing.

14 MR. OADE: It said that, but I would like  
15 to also take this opportunity to correct a misstatement  
16 in the reply brief of the petitioners where they say  
17 that we, in the lower court, did not raise any Michigan  
18 constitutional grounds. In the motion to suppress,  
19 which I hope you have in the file, we said the search  
20 violates the Fourth Amendment and the Michigan Constitution.

21 When we went to the Court of Appeals, we said  
22 the search violates the Fourth Amendment and the Michigan  
23 Constitution. In our brief in the Court of Appeals,  
24 we cited I believe a total of seven cases and most of  
25 those cases were state cases and they were state cases

1 on exigent circumstances.

2 QUESTION: Suppose the people, the firemen  
3 come into a burning house and they put out the fire.  
4 Now, I take it from what you say that you agree they  
5 could search around immediately for the cause.

6 MR. OADE: I agree with that.

7 QUESTION: Even if it wasn't in plain sight.

8 MR. OADE: I agree with that also.

9 QUESTION: Suppose though as soon as the fire  
10 is out they get an emergency -- the chief gets an  
11 emergency call from another terrific blaze down the  
12 street. They go put it out. And, they want to now  
13 go back in that building and just search. They haven't  
14 any reason to think that it is arson. You seem to agree  
15 if they were there in the first place, even if they  
16 had no suspicion at all of arson, they could look around  
17 to see if there was arson right on the spot.

18 MR. OADE: I think that is correct.

19 QUESTION: Yes. Well, the only thing is they  
20 couldn't do it right then because they had an emergency  
21 somewhere else. An hour later they come back. The  
22 fire is out and they are going to do precisely then  
23 what they were going to do before except they had to  
24 go somewhere else.

25 MR. OADE: I think that would be an exigent



1 circumstance. Some emergency compelled them to leave  
2 the scene and come back. I don't think that any court  
3 would say --

4 QUESTION: Well, the justification for the  
5 search without a warrant or even just a search for  
6 evidence, even without any suspicion, the exigent cir-  
7 cumstance is what? It is the public interest in knowing  
8 what causes fires, isn't it?

9 MR. OADE: I don't view, Justice White, that  
10 the exigent --

11 QUESTION: Well, you tell me what the exigent  
12 circumstance is. When the fireman is there, he puts  
13 out the fire. He has no idea whether it is arson or  
14 not. But, you tell me that he may look around in places  
15 that are not in plain sight for evidence of the cause  
16 of the fire.

17 MR. OADE: I think that is --

18 QUESTION: What is the exigent circumstance?

19 MR. OADE: There is no exigent circumstance.

20 QUESTION: Well, why may he search around?

21 MR. OADE: The exigent circumstance was the  
22 fact that there was a fire in the first place.

23 QUESTION: All right. So, you tell me why  
24 may he look around? It is just the public interest  
25 in knowing what causes fires.

1           MR. OADE: And, the firefighter has the duty  
2 to determine that.

3           QUESTION: Why does he have a duty? Because  
4 it is in the public interest for him to have it.

5           MR. OADE: It is in the public interest.

6           QUESTION: And for him to discharge that duty  
7 without a warrant.

8           MR. OADE: I think this Court said that in  
9 Tyler. That is what this Court said in Tyler, but this  
10 Court also said in Tyler --

11          QUESTION: Yes, but you just agreed with me  
12 that to discharge that duty he doesn't have to stay  
13 on the premises.

14          MR. OADE: You posited a situation where some  
15 exigent circumstance called him away.

16          QUESTION: Well, there may be a lot of others.

17          MR. OADE: And, one of those others was in  
18 Tyler where there was smoke and steam and the firefighters  
19 could not perform that public duty and because --

20          QUESTION: And here there was water in the  
21 basement.

22          MR. OADE: But that had nothing to do with  
23 the fact of an exigent circumstance, because who came  
24 back were not firefighters and that gets to my earlier  
25 point. These weren't firefighters. The firefighters

1 had ceased to be involved in this. They had extinguished  
2 the fire. The exigent circumstance was over. And,  
3 now they turn it over to an arson squad to investigate  
4 it and the arson squad comes out there, could have gotten  
5 a warrant, and took it upon themselves to search this  
6 entire house. And, I hope this Court will agree with  
7 me that firefighters or arson investigators do not have  
8 a right to rummage at will among people's personal effects  
9 in search of whatever may convict them without having  
10 a warrant.

11           Firefighters do have a duty to investigate  
12 fires, but that doesn't given them a license to rummage  
13 through people's personal effects. The Fourth Amendment  
14 struck the balance on that situation in favor of the  
15 individual.

16           QUESTION: If the arson squad investigators  
17 had just happened to show up during the fire and entered --  
18 And the fire was out and they entered the building just  
19 when the fire was going out. You would say the arson  
20 squad could make a search, a limited area.

21           MR. OADE: I would say a limited search.  
22 The fire here was clearly in the basement. Let them  
23 go in the basement. Let them determine what caused  
24 the fire, but keep them out of the bedroom, keep them  
25 out of the dresser drawers, keep them out of going through

1 and searching this man's badge and uniform cap and  
2 everything else.

3 Thank you.

4 CHIEF JUSTICE BURGER: Thank you, counsel.

5 The case is submitted.

6 We will hear arguments next in Welsh against  
7 Wisconsin.

8 (Whereupon, at 2:01 p.m., the case in the  
9 above-entitled matter was submitted.)

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25



# CERTIFICATION

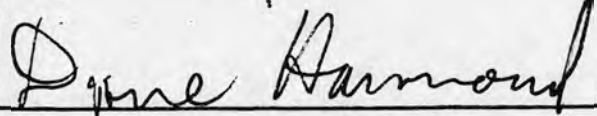
Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

MICHIGAN, Petitioner v. RAYMOND CLIFFORD AND EMMA JEAN CLIFFORD  
# 82-357

---

and that these attached pages constitute the original transcript of the proceedings for the records of the court.

BY



(REPORTER)

RECEIVED  
SUPREME COURT, U.S.  
MARSHAL'S OFFICE

'83 OCT 12 AM0:58