2019 Captain – Fire Marshal Process

Case Laws

Michigan v. Clifford, 46 U.S. 287, 104 S. Ct.641 (1984)

Michigan v Tyler, 436 U.S. 499, 98 S. Ct. 1942 (1978)

United States v. Arvizu, 534 U.S. 266, 122 S. Ct. 744 (2002)

Murdock v. Stout, 54 F.3d 1437 (9th Cir. 1995)

Illinois v. McArthur, 531 U.S. 326 121 S. Ct. 946 (2001)

United States v. Warner, 843 F.2d 401 (9th Cir. 1988)

Harris v. Alabama 115 S. Ct. 1031 (United States Supreme Court 1995)

McLaughlin v. Commonwealth of Virginia, No.1187-14-1. (November 17, 2015)

Goodwin v. Commonwealth of Virginia, No.0190-14-3, (February 03, 2015)

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464 U.S. 287 (1984)

MICHIGAN
v.
CLIFFORD ET AL.

No. 82-357.

Supreme Court of United States.

Argued October 5, 1983
Decided January 11, 1984

CERTIORARI TO THE COURT OF APPEALS OF MICHIGAN

288 *288 *Janice M. Joyce Bartee* argued the cause *pro hac vice* for petitioner. With her on the brief were *William L. Cahalan*, *Edward Reilly Wilson*, and *Timony A. Baughman*.

K. Preston Oade, Jr., argued the cause and filed a brief for respondents.

JUSTICE POWELL announced the judgment of the Court and delivered an opinion, in which JUSTICE BRENNAN, JUSTICE WHITE, and JUSTICE MARSHALL joined.

This case presents questions as to the authority of arson investigators, in the absence of exigent circumstances or consent, to enter a private residence without a warrant to investigate the cause of a recent fire.

289 *289 I

Respondents, Raymond and Emma Jean Clifford, were arrested and charged with arson in connection with a fire at their private residence. At the preliminary examination held to establish probable cause for the alleged offense, the State introduced various pieces of physical evidence, most of which was obtained through a warrantless and nonconsensual search of the Cliffords' fire-damaged home. Respondents moved to suppress this evidence on the ground that it was obtained in violation of their rights under the Fourth and Fourteenth Amendments. That motion was denied and respondents were bound over for trial. Before trial, they again moved to suppress the evidence obtained during the search. The trial court conducted an evidentiary hearing and denied the motion on the ground that exigent circumstances justified the search. The court certified its evidentiary ruling for interlocutory appeal and the Michigan Court of Appeals reversed.

That court held that there were no exigent circumstances justifying the search. Instead, it found that the warrantless entry and search of the Clifford residence were conducted pursuant to a policy of the Arson Division of the Detroit Fire Department that sanctioned such searches as long as the owner was not present, the premises were open to trespass, and the search occurred within a reasonable time of the fire. The Court of Appeals held that this policy was inconsistent with *Michigan v. Tyler*, 436 U. S. 499 (1978), and that the warrantless nonconsensual search of the Cliffords' residence violated their rights under the Fourth and Fourteenth Amendments. We granted certiorari to clarify doubt that appears to exist as to the application of our decision in *Tyler*. 459 U. S. 1168 (1983).

II

In the early morning hours of October 18, 1980, a fire erupted at the Clifford home. The Cliffords were out of town on a
290 camping trip at the time. The fire was reported to the Detroit Fire Department, and fire units arrived on the *290 scene about 5:40 a. m. The fire was extinguished and all fire officials and police left the premises at 7:04 a. m.

At 8 o'clock on the morning of the fire, Lieutenant Beyer, a fire investigator with the arson section of the Detroit Fire Department, received instructions to investigate the Clifford fire. He was informed that the Fire Department suspected arson. Because he had other assignments, Lieutenant Beyer did not proceed immediately to the Clifford residence. He and his partner finally arrived at the scene of the fire about 1 p. m. on October 18.

When they arrived, they found a work crew on the scene. The crew was boarding up the house and pumping some six inches of water out of the basement. A neighbor told the investigators that he had called Mr. Clifford and had been instructed to request the Cliffords' insurance agent to send a boarding crew out to secure the house. The neighbor also advised that the Cliffords did not plan to return that day. While the investigators waited for the water to be pumped out, they found a Coleman fuel can in the driveway that was seized and marked as evidence.[1]

By 1:30 p. m., the water had been pumped out of the basement and Lieutenant Beyer and his partner, without obtaining consent or an administrative warrant, entered the Clifford residence and began their investigation into the cause of the fire. Their search began in the basement and they quickly confirmed that the fire had originated there beneath the basement stairway. They detected a strong odor of fuel throughout the basement, and found two more Coleman fuel cans beneath the stairway. As they dug through the debris, the investigators also found a crock pot with attached wires
291 leading to an electrical timer that was plugged into an outlet *291 a few feet away. The timer was set to turn on at approximately 3:45 a. m. and to turn back off at approximately 9 a. m. It had stopped somewhere between 4 and 4:30 a. m. All of this evidence was seized and marked.

After determining that the fire had originated in the basement, Lieutenant Beyer and his partner searched the remainder of the house. The warrantless search that followed was extensive and thorough. The investigators called in a photographer to take pictures throughout the house. They searched through drawers and closets and found them full of old clothes. They inspected the rooms and noted that there were nails on the walls but no pictures. They found wiring and cassettes for a video tape machine but no machine.

Respondents moved to exclude all exhibits and testimony based on the basement and upstairs searches on the ground that they were searches to gather evidence of arson, that they were conducted without a warrant, consent, or exigent circumstances, and that they therefore were *per se* unreasonable under the Fourth and Fourteenth Amendments. Petitioner, on the other hand, argues that the entire search was reasonable and should be exempt from the warrant requirement.

III

In its petition for certiorari, the State does not challenge the state court's finding that there were no exigent circumstances justifying the search of the Clifford home. Instead, it asks us to exempt from the warrant requirement all administrative investigations into the cause and origin of a fire. We decline to do so.

In *Tyler*, we restated the Court's position that administrative searches generally require warrants. 436 U. S., at 504-508. See *Marshall v. Barlow's, Inc.*, 436 U. S. 307 (1978); *Camara v. Municipal Court*, 387 U. S. 523 (1967); *See v. City of*
292 *Seattle*, 387 U. S. 541 (1967). We reaffirm that view again today. Except in certain carefully defined *292 classes of cases,[2] the nonconsensual entry and search of property are governed by the warrant requirement of the Fourth and Fourteenth Amendments. The constitutionality of warrantless and nonconsensual entries onto fire-damaged premises, therefore, normally turns on several factors: whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth Amendment; whether exigent circumstances justify the government intrusion regardless of any reasonable expectations of privacy; and, whether the object of the search is to determine the cause of fire or to gather evidence of criminal activity.

A

We observed in *Tyler* that reasonable privacy expectations may remain in fire-damaged premises. "People may go on

living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises." *Tyler*, 436 U. S., at 505. Privacy expectations will vary with the type of property, the amount of fire damage, the prior and continued use of the premises, and in some cases the owner's efforts to secure it against intruders. Some fires may be so devastating that no reasonable privacy interests remain in the ash and ruins, regardless of the owner's subjective expectations. The test essentially is an objective one: whether "the expectation [is] one that society is prepared to recognize as `reasonable.'" *Katz v. United States*, 389 U. S. 347, 361 (1967) (Harlan, J., 293 concurring). See also *Smith v. Maryland*, 442 U. S. 735, 739-741 (1979). If reasonable privacy interests remain in *293 the fire-damaged property, the warrant requirement applies, and any official entry must be made pursuant to a warrant in the absence of consent or exigent circumstances.

B

A burning building of course creates an exigency that justifies a warrantless entry by fire officials to fight the blaze. Moreover, in *Tyler* we held that once in the building, officials need no warrant to *remain*[3] for "a reasonable time to investigate the cause of a blaze after it has been extinguished." 436 U. S., at 510. Where, however, reasonable expectations of privacy remain in the fire-damaged property, additional investigations begun after the fire has been extinguished and fire and police officials have left the scene, generally must be made pursuant to a warrant or the identification of some new exigency.

The aftermath of a fire often presents exigencies that will not tolerate the delay necessary to obtain a warrant or to secure the owner's consent to inspect fire-damaged premises.[4] Because determining the cause and origin of a fire serves a compelling public interest, the warrant requirement does not apply in such cases.

294 *294 **C**

If a warrant is necessary, the object of the search determines the type of warrant required. If the primary object is to determine the cause and origin of a recent fire, an administrative warrant will suffice.[5] To obtain such a warrant, fire officials need show only that a fire of undetermined origin has occurred on the premises, that the scope of the proposed search is reasonable and will not intrude unnecessarily on the fire victim's privacy, and that the search will be executed at a reasonable and convenient time.

If the primary object of the search is to gather evidence of criminal activity, a criminal search warrant may be obtained only on a showing of probable cause to believe that relevant evidence will be found in the place to be searched. If evidence of criminal activity is discovered during the course of a valid administrative search, it may be seized under the "plain view" doctrine. *Coolidge v. New Hampshire*, 403 U. S. 443, 465-466 (1971). This evidence then may be used to establish probable cause to obtain a criminal search warrant. Fire officials may not, however, rely on this evidence to expand the scope of their administrative search without first making a successful showing of probable cause to an independent judicial officer.

The object of the search is important even if exigent circumstances exist. Circumstances that justify a warrantless search for the cause of a fire may not justify a search to gather evidence of criminal activity once that cause has been determined. If, for example, the administrative search is justified by the immediate need to ensure against rekindling, 295 the scope of the search may be no broader than reasonably *295 necessary to achieve its end. A search to gather evidence of criminal activity not in plain view must be made pursuant to a criminal warrant upon a traditional showing of probable cause.[6]

The searches of the Clifford home, at least arguably, can be viewed as two separate ones: the delayed search of the basement area, followed by the extensive search of the residential portion of the house. We now apply the principles outlined above to each of these searches.

IV

The Clifford home was a two-and-one-half story brick and frame residence. Although there was extensive damage to the lower interior structure, the exterior of the house and some of the upstairs rooms were largely undamaged by the fire, although there was some smoke damage. The firemen had broken out one of the doors and most of the windows in fighting the blaze. At the time Lieutenant Beyer and his partner arrived, the home was uninhabitable. But personal belongings remained, and the Cliffords had arranged to have the house secured against intrusion in their absence. Under these circumstances, and in light of the strong expectations of privacy associated with a home, we hold that the Cliffords retained reasonable privacy interests in their fire-damaged residence and that the postfire investigations were subject to the warrant requirement. Thus, the warrantless and nonconsensual searches of both the basement and the upstairs areas of the house would have been valid only if exigent circumstances had justified the object and the scope of each.

296 *296 **A**

As noted, the State does not claim that exigent circumstances justified its postfire searches. It argues that we either should exempt postfire searches from the warrant requirement or modify *Tyler* to justify the warrantless searches in this case. We have rejected the State's first argument and turn now to its second.

In *Tyler* we upheld a warrantless postfire search of a furniture store, despite the absence of exigent circumstances, on the ground that it was a continuation of a valid search begun immediately after the fire. The investigation was begun as the last flames were being doused, but could not be completed because of smoke and darkness. The search was resumed promptly after the smoke cleared and daylight dawned. Because the postfire search was interrupted for reasons that were evident, we held that the early morning search was "no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence." 436 U. S., at 511.

As the State conceded at oral argument, this case is distinguishable for several reasons. First, the challenged search was not a continuation of an earlier search. Between the time the firefighters had extinguished the blaze and left the scene and the arson investigators first arrived about 1 p. m. to begin their investigation, the Cliffords had taken steps to secure the privacy interests that remained in their residence against further intrusion. These efforts separate the entry made to extinguish the blaze from that made later by different officers to investigate its origin. Second, the privacy interests in the residence — particularly after the Cliffords had acted — were significantly greater than those in the fire-damaged furniture store, making the delay between the fire and the midday search unreasonable absent a warrant, consent, or exigent circumstances. We frequently have noted that privacy interests are especially strong in a private
297 residence.[7] *297 These facts — the interim efforts to secure the burned-out premises and the heightened privacy interests in the home — distinguish this case from *Tyler*. At least where a homeowner has made a reasonable effort to secure his fire-damaged home after the blaze has been extinguished and the fire and police units have left the scene, we hold that a subsequent postfire search must be conducted pursuant to a warrant, consent, or the identification of some new exigency.[8] So long as the primary purpose is to ascertain the cause of the fire, an administrative warrant will suffice.

B

Because the cause of the fire was then known, the search of the upper portions of the house, described above, could only have been a search to gather evidence of the crime of arson. Absent exigent circumstances, such a search requires a criminal warrant.

Even if the midday basement search had been a valid administrative search, it would not have justified the upstairs search. The scope of such a search is limited to that reasonably necessary to determine the cause and origin of a fire and to ensure against rekindling. As soon as the investigators determined that the fire had originated in the basement

298 and had been caused by the crock pot and timer found beneath *298 the basement stairs, the scope of their search was limited to the basement area. Although the investigators could have used whatever evidence they discovered in the basement to establish probable cause to search the remainder of the house, they could not lawfully undertake that search without a prior judicial determination that a successful showing of probable cause had been made. Because there were no exigent circumstances justifying the upstairs search, and it was undertaken without a prior showing of probable cause before an independent judicial officer, we hold that this search of a home was unreasonable under the Fourth and Fourteenth Amendments, regardless of the validity of the basement search.[9]

The warrantless intrusion into the upstairs regions of the Clifford house presents a telling illustration of the importance of prior judicial review of proposed administrative searches. If an administrative warrant had been obtained in this case, it presumably would have limited the scope of the proposed investigation and would have prevented the warrantless intrusion into the upper rooms of the Clifford home. An administrative search into the cause of a recent fire does not give fire officials license to roam freely through the fire victim's private residence.

V

The only pieces of physical evidence that have been challenged on this interlocutory appeal are the three empty fuel
299 *299 cans, the electric crock pot, and the timer and attached cord. Respondents also have challenged the testimony of the investigators concerning the warrantless search of both the basement and the upstairs portions of the Clifford home. The discovery of two of the fuel cans, the crock pot, the timer and cord — as well as the investigators' related testimony — were the product of the unconstitutional postfire search of the Cliffords' residence. Thus, we affirm that portion of the judgment of the Michigan Court of Appeals that excluded that evidence. One of the fuel cans was discovered in plain view in the Cliffords' driveway. This can was seen in plain view during the initial investigation by the firefighters. It would have been admissible whether it had been seized in the basement by the firefighters or in the driveway by the arson investigators. Exclusion of this evidence should be reversed.

It is so ordered.

JUSTICE STEVENS, concurring in the judgment.

Because I continue to hold the views expressed in my separate opinions in *Michigan* v. *Tyler*, 436 U. S. 499, 512 (1978), *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307, 325 (1978), *Zurcher* v. *Stanford Daily*, 436 U. S. 547, 577-578, 583 (1978), and *Donovan* v. *Dewey*, 452 U. S. 594, 606-608 (1981), I am unable to join JUSTICE POWELL's opinion. I do agree with him, however, that the holding in *Tyler* supports the judgment commanded by his opinion.

There is unanimity within the Court on three general propositions regarding the scope of Fourth Amendment protection afforded to the owner of a fire-damaged building. No one questions the right of the firefighters to make a forceful, unannounced, nonconsensual, warrantless entry into a burning building. The reasonableness of such an entry is too plain to require explanation. Nor is there any disagreement concerning the firemen's right to remain on the premises, not only until the fire has been extinguished and they are satisfied that there is no danger of rekindling, but also while
300 they *300 continue to investigate the cause of the fire. We are also unanimous in our opinion that after investigators have determined the cause of the fire and located the place it originated, a search of other portions of the premises may be conducted only pursuant to a warrant, issued upon probable cause that a crime has been committed, and specifically describing the places to be searched and the items to be seized. The issues that divide us in this case are (1) whether the entry by Lieutenant Beyer and his partner at 1:30 p. m. should be regarded as a continuation of the original entry or a separate postfire search, and (2) whether a warrantless entry to make a postfire investigation into the cause of a fire without the owner's consent is constitutional.

I

I agree with JUSTICE POWELL's conclusion that Lieutenant Beyer's entry at 1:30 p. m. was a postfire search rather than

merely a continuation of an earlier valid entry, *ante*, at 296, and disagree with JUSTICE REHNQUIST's position that our decision in *Tyler* is indistinguishable in this regard, *post*, at 306-307. In *Tyler* the Court was willing to treat early morning reentries by the same officers who had been on the premises a few hours earlier[1] as a "continuation" of their earlier valid investigation into the cause of the fire. 436 U. S., at 511. The attempt to ascertain the cause of the fire was temporarily suspended in *Tyler* because visibility was severely hindered by darkness, steam, and smoke. Under these circumstances, the return of the same[2] investigators shortly after daybreak to ascertain the cause of the fire was
301 indeed "no more than an actual continuation" of their earlier *301 valid search. *Ibid.* Unlike *Tyler*, in this case the challenged entry was made by officers who had not been on the premises at the time of an earlier valid search. Moreover, in contrast to *Tyler*, an investigation of the fire's origin was not temporarily suspended on account of the conditions at the scene and resumed at the first opportunity when the conditions hampering the investigation subsided. While the investigators in this case waited for the work crew on the scene to pump water out of the basement before making their entry, the delay in their arrival at the scene apparently had nothing to do with the fact that water had collected in the basement. While that fact might have justified a temporary suspension of an investigative effort commenced by investigators at the scene before the premises were abandoned by fire officials, in this case it amounts to a *post hoc* justification without apparent basis in reality. In general, unless at least some of the same personnel are involved in a return to the premises and the temporary departure was justifiably and actually occasioned by the conditions at the premises, I would apply the test expressed by JUSTICE WHITE for measuring the scope of the emergency that justified the initial entry and search: "[O]nce the fire has been extinguished and the firemen have left the premises, the emergency is over." *Id.*, at 516. I would only add that the departure of the firemen should also establish a presumption that the fire has been extinguished and that any danger of rekindling is thereafter too slight to provide an independent justification for a second entry, a presumption that could only be rebutted by additional information demonstrating a previously unknown or unrecognized danger of rekindling.

II

Presumably most postfire searches are made with the consent of the property owner. Once consent is established, such searches, of course, raise no Fourth Amendment issues. We therefore are concerned with the fire investigator's
302 right to make an entry without the owner's consent, by force if *302 necessary. The problem, then, is to identify the constraints imposed by the Fourth Amendment on an officer's authority to make such an entry.

In this context, the Amendment might be construed in at least four different ways. First, the Court might hold that no warrantless search of premises in the aftermath of a fire is reasonable and that no warrant may issue unless supported by probable cause that a crime has been committed. Such a holding could be supported by reference to the text of the two Clauses of the Fourth Amendment.[3] No Member of the Court, however, places such a strict construction on the Amendment.

Second, the Court might hold that no warrantless search is reasonable but allow postfire searches conducted pursuant to a warrant issued without a showing of probable cause. Following *Marshall v. Barlow's Inc., supra*, JUSTICE POWELL takes this position. In my judgment that position is at odds with the text of the Fourth Amendment and defeats the purpose of the Warrant Clause, enabling a magistrate's rubber stamp to make an otherwise unreasonable search reasonable.

Third, the Court might hold that no warrant is ever required for a postfire search. If the search is conducted promptly and if its scope is limited to a determination of the cause of the fire, it is reasonable with or without probable cause to
303 suspect arson. JUSTICE REHNQUIST has persuasively outlined the basis for that position,[4] and has noted that *303 in certain cases there may be some justification for requiring the inspectors to notify the building's owners of the inspection. *Post*, at 311, n. 4.

A fourth position — the one I believe the two Clauses of the Fourth Amendment command — would require the fire investigator to obtain a traditional criminal search warrant in order to make an unannounced entry, but would characterize a warrantless entry as reasonable whenever the inspector either had given the owner sufficient advance

notice to enable him or an agent to be present, or had made a reasonable effort to do so.[5]

Unless fire investigators have probable cause to believe the crime of arson has been committed, I believe that the homeowner is entitled to reasonable advance notice that officers are going to enter his premises for the purpose of ascertaining the cause of the fire. Such notice would give the owner a fair opportunity to be present while the investigation is conducted, virtually eliminating the need for a potentially confrontational forcible entry. Advance notice of the search is the best safeguard of the owner's legitimate interests in the privacy of his premises, allowing him to place certain possessions he would legitimately prefer strangers not to see out of sight, and permitting him to be present
304 during the search *304 to assure that it does not exceed reasonable bounds. Moreover, the risk of unexplained harm or loss to the owner's personal effects would be minimized, and the owner would have an opportunity to respond to questions about the premises or to volunteer relevant information that might assist the investigators. It is true, of course, that advance notice would increase somewhat the likelihood that a guilty owner would conceal or destroy relevant evidence, but it seems fair to assume that the criminal will diligently attempt to cover his traces in all events. In any event, if probable cause to believe that the owner committed arson is lacking, and if the justifications for a general policy of unannounced spot inspections that obtain in some regulatory contexts are also lacking, a mere suspicion that an individual has engaged in criminal activity is insufficient to justify the intrusion on an individual's privacy that an unannounced, potentially forceful entry entails.

Since there was no attempt to give any kind of notice to respondents, this case does not provide a proper occasion for defining the character of the notice that must be given. I am convinced, however, that a nonexigent, forceful, warrantless entry cannot be reasonable unless the investigator has made some effort to give the owner sufficient notice to be present while the investigation is made. Naturally, if the owner is given reasonable notice and then attempts to interfere with the legitimate performance of the fire investigators' duties, appropriate sanctions would be permissible.

If there is probable cause to believe that a crime has been committed, the issuance of a valid warrant by a neutral magistrate will enable the entry and subsequent search to be conducted in the same manner as any other investigation of suspected criminal conduct, without advance notice to the property owner. In such a case, the intrusive nature of the potentially forceful entry without prior notice is justified by the demonstrated reasonable likelihood that the owner of the
305 property will conceal or destroy the object of the search if *305 prior notice is provided. Zurcher v. Stanford Daily, 436 U. S., at 582 (STEVENS, J., dissenting).

In this case, as JUSTICE REHNQUIST has pointed out, *post*, at 310, n. 3, an argument may be made that the notice requirement is inapplicable because the owners were out of town. But no attempt whatever was made to provide them with notice, or even to prove that it would have been futile to do so. The record does not foreclose the possibility that an effort to advise them, possibly through the same party that notified the representatives of the insurance company to board up the building, might well have resulted in a request that a friend or neighbor be present in the house while the search was carried out and thus might have avoided the plainly improper search of the entire premises after the cause of the fire had already been identified.

I therefore conclude that the search in this case was unreasonable in contravention of the Fourth Amendment because the investigators made no effort to provide fair notice of the inspection to the owners of the premises. Accordingly, I concur in the Court's judgment.

JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE, JUSTICE BLACKMUN, and JUSTICE O'CONNOR join, dissenting.

Six Terms ago in Michigan v. Tyler, 436 U. S. 499 (1978), we first addressed the applicability of the Fourth Amendment's Warrant Clause to the activities of firefighters and inspectors following a fire at a furniture store. A divided Court held that the fire itself was an "exigent circumstance" which allowed entry to extinguish the fire and authorized investigators to remain for a reasonable time to investigate the cause of the blaze. *Id.*, at 509-510. We also held that a "re-entry" a few hours after these officials had departed was an "actual continuation" of the earlier investigation, but that subsequent
306 visits more than three weeks after the fire required an administrative warrant. *Id.*, at 511. These precepts *306 of *Tyler* have not proved easy to apply, and we are told in the plurality opinion in this case that "[w]e granted certiorari to clarify

doubt that appears to exist as to the application of our decision in *Tyler*." *Ante*, at 289. But that same opinion demonstrates beyond peradventure that if that was our purpose, we have totally failed to accomplish it; today's opinion, far from clarifying the doubtful aspects of *Tyler*, sows confusion broadside. I would hold that the "exigent circumstances" doctrine enunciated in *Tyler* authorized the search of the basement of the Clifford home, although the remaining parts of the house could not have been searched without the issuance of a warrant issued upon probable cause.

I

Judging simply by comparison of these facts to those in *Tyler*, I believe that the basement inspection conducted by Lieutenant Beyer about 1:30 p. m. on October 18th — some six hours after the fire was extinguished and the fire officials and police had left the Clifford premises — was an "actual continuation" of the original entry to fight the fire, as that term is used in *Tyler*. The firefighters who fought the blaze at the Clifford house had removed a can containing Coleman lantern fuel and placed it in the driveway of the home, where it was later seized and marked as evidence by the inspectors who arrived about 1 p. m. Thus here, as in *Tyler*, the investigation into the cause of the fire went on contemporaneously with the efforts to fight it, before the firefighters first left the premises in the early morning. I see no reason to treat the 6-hour delay between the departure of the firefighters and the arrival of the investigators in this case any differently than the Court treated the 5-hour delay between the departure of the investigators at 4 a. m. from the Tyler store and their return to the same premises at 9 a. m.

The plurality seeks to distinguish the two situations on the basis of differences which seem to me both trivial and
307 immaterial. *307 It says that in that interim in our case, the Cliffords "had taken steps to secure their privacy interests that remained in their residence against further intrusion." *Ante*, at 296. While this may go to the question of whether or not there was an invasion of a privacy interest amounting to a search, it has no bearing on the question of whether there were exigent circumstances which constitute an exception to the warrant requirement for what is concededly a search. The plurality also intimates that the "firefighters" did nothing but fight the fire, and that the arson investigation did not begin until the arson investigators arrived at 1 o'clock in the afternoon. *Ibid.* But firefighting and fire investigation are obviously not this neatly compartmentalized, as is shown by the fact that the firefighters themselves were alert to signs of the cause of the fire and had removed the Coleman lantern fuel can for inspection by the later team of arson investigators.

The plurality also purports to distinguish the facts in *Tyler* by the statement that "the privacy interests in the residence — particularly after the Cliffords had acted — were significantly greater than those in the fire-damaged furniture store . . . ." *Ante*, at 296. But if the furniture store in *Tyler* is to be characterized as "fire-damaged," surely the Cliffords' residence deserves the same characterization; it too was "fire-damaged." It is also well established that private commercial buildings in this context are as much protected by the Fourth Amendment as are private dwellings. See *See v. City of Seattle*, 387 U. S. 541, 542-543 (1967) (citing cases). And certainly the public interest in determining the cause and origin of a fire in a commercial establishment applies with equal, if not greater, force to the necessity of determining the cause and origin of a fire in a home.

On the authority of *Tyler*, therefore, I would uphold the search of the Clifford basement and allow use of the evidence resulting from that search in the arson trial.

308 *308 II

In *Camara v. Municipal Court*, 387 U. S. 523 (1967), and *See v. City of Seattle, supra*, this Court imposed a warrant requirement on city housing and fire inspectors requiring them to obtain an administrative search warrant prior to entering a building to inspect for possible health or fire code violations. To protect the privacy interests of building owners from the unbridled discretion of municipal inspectors, the Court held that administrative searches had to be conducted pursuant to a warrant obtained from an independent magistrate. *Camara, supra*, at 534. But in light of the important public interest in abating public health hazards, the relatively limited invasion of privacy inhering in

administrative searches, and the essentially noncriminal focus of the inspection, a different kind of warrant was established, a warrant described by the dissent in that case as "newfangled." *See, supra,* at 547 (Clark, J., dissenting). Probable cause to issue this kind of warrant did not sound in terms of suspicion of criminal activity, but in terms of reasonable legislative or administrative standards governing the decision to search a particular building. *Camara, supra,* at 538.

One may concede the correctness of the *Camara-See* line of cases without agreeing that those cases should be applied to a prompt postfire inspection conducted to determine the cause and origin of a fire. The practice of investigating the cause and origin of fires has longstanding and widespread acceptance. The public interest in conducting a prompt and careful investigation of the cause and origin of all fires is also undeniably strong. An investigation can reveal whether there is a danger of the fire rekindling and assess the effectiveness of local building codes in preventing and limiting the spread of fire. It may bring to light facts suggesting the crime of arson. Entry is also necessary because the causes of a fire may also not be observable from outside a building or by an uninformed
309 occupant. See *United States* v. *Green,* 474 F. 2d *309 1385, 1388-89 (CA5 1973). Certainly these reasons justify a search to determine the cause and origin of a fire.

The concerns regarding administrative searches expressed in *Camara* and *See* to justify the imposition of a warrant requirement simply do not apply to a postfire investigation conducted within a reasonable time after a fire.[1] Under the emergency doctrine, it is beyond dispute that firefighters may enter a building in order to extinguish the flames. *Michigan* v. *Tyler,* 436 U. S., at 509. In their efforts to control the blaze firefighters may knock in doors and windows, chop holes in roofs and walls, and generally take full control of a structure to extinguish a fire. In the aftermath of a fire an individual is unlikely to have much concern over the limited intrusion of a fire inspector coming into his premises to learn why there had been a fire. Fire victims, unlike occupants at ordinary times, generally expect and welcome the intrusions of fire, police, and medical officials in the period following a fire. Likewise, as here, relative strangers such as insurance agents will frequently have authority to enter the structure. In these circumstances, the intrusion of the fire inspector is hardly a new or substantially different intrusion from that which occurred when the firefighters first arrived to extinguish the flames. Instead, it is analogous to intrusions of medical officials and insurance investigators who may arrive at the scene of the fire shortly after its origin.

Ample justification exists for a State or municipality to authorize a fire inspection program that would permit fire inspectors to enter premises to determine the cause and origin of the fire. But in no real sense can the investigation of
310 *310 the Cliffords' home be considered the result of the unbridled discretion of the city fire investigators who came to the Cliffords' home.[2] No justification existed to inspect the Cliffords' home until there was a fire. The fire investigators were not authorized to enter the Cliffords' home until the happening of some fortuitous or exigent event over which they had no control. Thus, if the warrant requirement exists to prevent individuals from being subjected to an unfettered power of government officials to initiate a search, a warrant is simply not required in these circumstances to limit the authority of a fire investigator, so long as his authority to inspect is contingent upon the happening of an event over which he has no control.[3]

In my view, the utility of requiring a magistrate to evaluate the grounds for a search following a fire is so limited that the incidental protection of an individual's privacy interests simply does not justify imposing a warrant requirement. Here the
311 inspection was conducted within a short time of ********8 *311 extinguishing of the flames, while the owners were away from the premises, and before the premises had been fully secured from trespass. In these circumstances the search of the basement to determine the cause and origin of the fire was reasonable.[4]

[1] The can had been found in the basement by the fire officials who had fought the blaze. The firemen removed the can and put it by the side door where Lieutenant Beyer discovered it on his arrival.

[2] See, e. g., *Donovan* v. *Dewey,* 452 U. S. 594 (1981) (heavily regulated business); *United States* v. *Biswell,* 406 U. S. 311 (1972) (same); *Colonnade Corp.* v. *United States,* 397 U. S. 72 (1970) (same). The exceptions to the warrant requirement recognized in these cases are not applicable to the warrantless search in this case.

[3] We do not suggest that firemen fighting a fire normally remain within a building. The circumstances, of course, vary. In many

situations actual entry may be too hazardous until the fire has been w holly extinguished, and even then the danger of collapsing w alls may exist. Thus, the effort to ascertain the cause of a fire may extend over a period of time w ith entry and reentry. The critical inquiry is w hether reasonable expectations of privacy exist in the fire-damaged premises at a particular time, and if so, w hether exigencies justify the reentries.

[4] For example, an immediate threat that the blaze might rekindle presents an exigency that w ould justify a w arrantless and nonconsensual postfire investigation. "Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction." See *Michigan* v. *Tyler*, 436 U. S. 499, 510 (1978).

[5] Probable cause to issue an administrative w arrant exists if reasonable legislative, administrative, or judicially prescribed standards for conducting an inspection are satisfied w ith respect to a particular dw elling. See particularly *Tyler, supra;* see also *Camara* v. *Municipal Court*, 387 U. S. 523, 538 (1967).

[6] The plain-view doctrine must be applied in light of the special circumstances that frequently accompany fire damage. In searching solely to ascertain the cause, firemen customarily must remove rubble or search other areas w here the cause of fires is likely to be found. An object that comes into view during such a search may be preserved w ithout a w arrant.

[7] See, *e. g.*, *Payton* v. *New York*, 445 U. S. 573, 589-590 (1980); *United States* v. *United States District Court*, 407 U. S. 297, 313 (1972). Reasonable expectations of privacy in fire-damaged premises w ill vary depending particularly on the type and use of the building involved. Expectations of privacy are particularly strong in private residences and offices. There may be, depending upon the circumstances, diminished privacy expectations in commercial premises.

[8] This is not to suggest that individual expectations of privacy may prevail over interests of public safety. For example, w hen fire breaks out in an apartment unit of an apartment complex, the exigency exception may allow w arrantless postfire investigations w here necessary to ensure against any immediate danger of future fire hazard.

[9] In many cases, there w ill be no bright line separating the firefighters' investigation into the cause of a fire from a search for evidence of arson. The distinction w ill vary w ith the circumstances of the particular fire and generally w ill involve more than the lapse of time or the number of entries and reentries. For example, once the cause of a fire in a single-family dw elling is determined, the administrative search should end, and any broader investigation should be made pursuant to a criminal w arrant. A fire in an apartment, on the other hand, may present complexities that make it necessary for officials to conduct more expansive searches, to remain on the premises for longer periods of time, and to make repeated entries and reentries into the building. See *Tyler*, 436 U. S., at 510, n. 6.

[1] Fire Chief See entered w ith Assistant Chief Somerville at 8 a. m. and Detective Webb accompanied Somerville at 9 a. m. See had been on the scene at 2 a. m. and Webb had arrived at 3:30 a. m. See 436 U. S., at 501-502.

[2] It is true that in *Tyler* Assistant Chief Somerville first arrived on the scene at 8 a. m., but presumably he did not observe anything that w as not also seen by Chief See or Detective Webb, both of w hom had been on the scene earlier.

[3] As I noted in *Marshall* v. *Barlow's, Inc.*, 436 U. S. 307 (1978):

"The first Clause states that the right to be free from unreasonable searches 'shall not be violated';[1] the second unequivocally prohibits the issuance of w arrants except 'upon probable cause.'[2]" *Id.*, at 326.

"[1] 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated.. . .' " *Id.*, at 326, n. 1.

"[2] '[A]nd no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.' " *Id.*, at 326, n. 2.

[4] To the extent, how ever, that he relies on the danger of rekindling, I believe his analysis is flaw ed. I w ould suppose that JUSTICE POWELL w ould also dispense w ith a w arrant requirement if that danger w ere present. Surely I w ould. For analytical purposes, I believe w e must assume that the postfire investigation cannot be supported on an emergency rationale but rather is justified by the general regulatory interest in preventing similar fires, including those set by arsonists.

[5] By prohibiting the issuance of any w arrant to make an unannounced, nonconsensual entry into the home, unless there is probable cause to believe a crime has been committed, my reading of the Fourth Amendment carries out the express purpose of the Warrant Clause. JUSTICE POWELL's view that a so-called administrative w arrant w ill suffice does not, I submit, provide the protection contemplated by that Clause. On the other hand, because I am persuaded that a postfire investigatory search is reasonable — even w ithout either suspicion or probable cause — w hen advance notice is given to the homeow ner, the purpose of the Reasonableness Clause can be satisfied w ithout obtaining an administrative w arrant that is nothing more than a rubber stamp.

[1] What constitutes a reasonable time would have been determined on a case-by-case basis. Fire investigators may have more than one fire to investigate on any given day. In addition, fire investigators are entitled to wait until the embers and gasses of the fire have cooled, or as here, until the water pumped into the structure by the firefighters is pumped out.

[2] This is made abundantly clear by the Detroit Fire Department's policy regulating postfire investigations. That policy encourages investigators to conduct an investigation as promptly as possible. If the property is occupied or is a place of business trying to conduct business, inspectors are instructed to obtain consent or an administrative warrant. If the premises are occupied by children, inspectors must obtain consent from an adult before entry. To inspect premises secured from trespass, investigators must obtain consent or an administrative warrant. Only if the owners are away and the building open to trespass may fire investigators enter without consent or a warrant. App. 9a, 12a, 19a (testimony of Lt. Beyer and Capt. Monroe).

[3] The *Tyler* majority stated that a *major* function of the warrant requirement was to provide a property owner with sufficient information to reassure him of the legality of the entry. *Michigan* v. *Tyler*, 436 U. S. 499, 508 (1978). The relationship of this informational function and the privacy interest protected by the Fourth Amendment is not clear. Proper identification or some attempt at notifying the owners could allay any reasonable fears that the inspectors are impostors or lack authority to inspect for the origin and cause of the fire.

[4] As noted in n. 3, *supra*, there may be some justification for requiring the inspectors to contact or attempt to contact the building's owners as to the inspection. But where, as here, the owners were out of town, it does not appear unreasonable to have conducted the inspection without prior notice to the owners. Notice simply informs the building owners that the building will be entered by persons possessing authority to enter the building. Yet the failure to notify the Cliffords prior to entry fails to advance in any significant way the purposes of the exclusionary rule. In point of fact, the fire investigators were told the Cliffords were unavailable, that they had gone fishing. App. 16a. Thus, in these circumstances the failure to notify the Cliffords seems reasonable. The Cliffords can also be deemed to have received constructive notice, because their agents were on the scene, and a neighbor apparently ascertained the legitimacy of the inspectors' visit.

436 U.S. 499 (1978)

MICHIGAN
v.
TYLER ET AL.

No. 76-1608.

Supreme Court of the United States.

Argued January 10, 1978.
Decided May 31, 1978.

CERTIORARI TO THE SUPREME COURT OF MICHIGAN.

501 *501 *Jeffrey Butler* argued the cause *pro hac vice* for petitioner. With him on the brief was *L. Brooks Patterson*.

Jesse R. Bacalis argued the cause and filed a brief for respondents.

MR. JUSTICE STEWART delivered the opinion of the Court.

The respondents, Loren Tyler and Robert Tompkins, were convicted in a Michigan trial court of conspiracy to burn real property in violation of Mich. Comp. Laws § 750.157a (1970).[1] Various pieces of physical evidence and testimony based on personal observation, all obtained through unconsented and warrantless entries by police and fire officials onto the burned premises, were admitted into evidence at the respondents' trial. On appeal, the Michigan Supreme Court reversed the convictions, holding that "the warrantless searches were unconstitutional and that the evidence obtained was therefore inadmissible." 399 Mich. 564, 584, 250 N. W. 2d 467, 477 (1977). We granted certiorari to consider the applicability of the Fourth and Fourteenth Amendments to official entries onto fire-damaged premises. 434 U. S. 814.

I

Shortly before midnight on January 21, 1970, a fire broke out at Tyler's Auction, a furniture store in Oakland County, Mich. The building was leased to respondent Loren Tyler, who conducted the business in association with respondent Robert Tompkins. According to the trial testimony of various witnesses, the fire department responded to the fire and was "just watering down smoldering embers" when Fire Chief See arrived on the scene around 2 a. m. It was Chief See's responsibility "to determine the cause and make out all reports." Chief See was met by Lt. Lawson, who informed
502 him that two *502 plastic containers of flammable liquid had been found in the building. Using portable lights, they entered the gutted store, which was filled with smoke and steam, to examine the containers. Concluding that the fire "could possibly have been an arson," Chief See called Police Detective Webb, who arrived around 3:30 a. m. Detective Webb took several pictures of the containers and of the interior of the store, but finally abandoned his efforts because of the smoke and steam. Chief See briefly "[l]ooked throughout the rest of the building to see if there was any further evidence, to determine what the cause of the fire was." By 4 a. m. the fire had been extinguished and the firefighters departed. See and Webb took the two containers to the fire station, where they were turned over to Webb for safekeeping. There was neither consent nor a warrant for any of these entries into the building, nor for the removal of the containers. The respondents challenged the introduction of these containers at trial, but abandoned their objection in the State Supreme Court. 399 Mich., at 570, 250 N. W. 2d, at 470.

Four hours after he had left Tyler's Auction, Chief See returned with Assistant Chief Somerville, whose job was to determine the "origin of all fires that occur within the Township." The fire had been extinguished and the building was empty. After a cursory examination they left, and Somerville returned with Detective Webb around 9 a. m. In Webb's words, they discovered suspicious "burn marks in the carpet, which [Webb] could not see earlier that morning, because

of the heat, steam, and the darkness." They also found "pieces of tape, with burn marks, on the stairway." After leaving the building to obtain tools, they returned and removed pieces of the carpet and sections of the stairs to preserve these bits of evidence suggestive of a fuse trail. Somerville also searched through the rubble "looking for any other signs or evidence that showed how this fire was caused." Again, there was neither consent nor a warrant for these entries and
503 seizures. *503 Both at trial and on appeal, the respondents objected to the introduction of evidence thereby obtained.

On February 16 Sergeant Hoffman of the Michigan State Police Arson Section returned to Tyler's Auction to take photographs.[2] During this visit or during another at about the same time, he checked the circuit breakers, had someone inspect the furnace, and had a television repairman examine the remains of several television sets found in the ashes. He also found a piece of fuse. Over the course of his several visits, Hoffman secured physical evidence and formed opinions that played a substantial role at trial in establishing arson as the cause of the fire and in refuting the respondents' testimony about what furniture had been lost. His entries into the building were without warrants or Tyler's consent, and were for the sole purpose "of making an investigation and seizing evidence." At the trial, respondents' attorney objected to the admission of physical evidence obtained during these visits, and also moved to strike all of Hoffman's testimony "because it was got in an illegal manner."[3]

The Michigan Supreme Court held that with only a few exceptions, any entry onto fire-damaged private property by fire or police officials is subject to the warrant requirements of the Fourth and Fourteenth Amendments. "[Once] the blaze [has been] extinguished and the firefighters have left the premises, a warrant is required to reenter and search the premises,
504 unless there is consent or the premises have been abandoned." 399 Mich., at 583, 250 N. W. 2d, at 477. Applying *504 this principle, the court ruled that the series of warrantless entries that began after the blaze had been extinguished at 4 a. m. on January 22 violated the Fourth and Fourteenth Amendments.[4] It found that the "record does not factually support a conclusion that Tyler had abandoned the fire-damaged premises" and accepted the lower court's finding that "'[c]onsent for the numerous searches was never obtained from defendant Tyler.'" *Id.*, at 583, 570-571, 250 N. W. 2d, at 476, 470. Accordingly, the court reversed the respondents' convictions and ordered a new trial.

II

The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in *Camara v. Municipal Court*, 387 U. S. 523, 528, the "basic purpose of this Amendment . . . is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials." The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a
505 routine periodic inspection. The privacy that is invaded may be *505 sheltered by the walls of a warehouse or other commercial establishment not open to the public. *See v. Seattle*, 387 U. S. 541; *Marshall* v. *Barlow's, Inc.*, *ante*, at 311-313. These deviations from the typical police search are thus clearly within the protection of the Fourth Amendment.

The petitioner argues, however, that an entry to investigate the cause of a recent fire is outside that protection because no individual privacy interests are threatened. If the occupant of the premises set the blaze, then, in the words of the petitioner's brief, his "actions show that he has no expectation of privacy" because "he has abandoned those premises within the meaning of the Fourth Amendment." And if the fire had other causes, "the occupants of the premises are treated as victims by police and fire officials." In the petitioner's view, "[t]he likelihood that they will be aggrieved by a possible intrusion into what little remains of their privacy in badly burned premises is negligible."

This argument is not persuasive. For even if the petitioner's contention that arson establishes abandonment be accepted, its second proposition—that innocent fire victims inevitably have no protectible expectations of privacy in whatever remains of their property—is contrary to common experience. People may go on living in their homes or working in their offices after a fire. Even when that is impossible, private effects often remain on the fire-damaged premises. The petitioner may be correct in the view that most innocent fire victims are treated courteously and welcome inspections of their property to ascertain the origin of the blaze, but "even if true, [this contention] is irrelevant to the question whether the . . . inspection is reasonable within the meaning of the Fourth Amendment." *Camara, supra*, at

536. Once it is recognized that innocent fire victims retain the protection of the Fourth Amendment, the rest of the petitioner's argument unravels. For it is, of course, impossible to justify a warrantless search on the ground of
506 abandonment by arson *506 when that arson has not yet been proved, and a conviction cannot be used *ex post facto* to validate the introduction of evidence used to secure that same conviction.

Thus, there is no diminution in a person's reasonable expectation of privacy nor in the protection of the Fourth Amendment simply because the official conducting the search wears the uniform of a firefighter rather than a policeman, or because his purpose is to ascertain the cause of a fire rather than to look for evidence of a crime, or because the fire might have been started deliberately. Searches for administrative purposes, like searches for evidence of crime, are encompassed by the Fourth Amendment. And under that Amendment, "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is 'unreasonable' unless it has been authorized by a valid search warrant." *Camara, supra*, at 528-529. The showing of probable cause necessary to secure a warrant may vary with the object and intrusiveness of the search,[5] but the necessity for the warrant persists.

The petitioner argues that no purpose would be served by requiring warrants to investigate the cause of a fire. This argument is grounded on the premise that the only fact that need be shown to justify an investigatory search is that a fire
507 of undetermined origin has occurred on those premises. The *507 petitioner contends that this consideration distinguishes this case from *Camara*, which concerned the necessity for warrants to conduct routine building inspections. Whereas the occupant of premises subjected to an unexpected building inspection may have no way of knowing the purpose or lawfulness of the entry, it is argued that the occupant of burned premises can hardly question the factual basis for fire officials' wanting access to his property. And whereas a magistrate performs the significant function of assuring that an agency's decision to conduct a routine inspection of a particular dwelling conforms with reasonable legislative or administrative standards, he can do little more than rubberstamp an application to search fire-damaged premises for the cause of the blaze. In short, where the justification for the search is as simple and as obvious to everyone as the fact of a recent fire, a magistrate's review would be a time-consuming formality of negligible protection to the occupant.

The petitioner's argument fails primarily because it is built on a faulty premise. To secure a warrant to investigate the cause of a fire, an official must show more than the bare fact that a fire has occurred. The magistrate's duty is to assure that the proposed search will be reasonable, a determination that requires inquiry into the need for the intrusion on the one hand, and the threat of disruption to the occupant on the other. For routine building inspections, a reasonable balance between these competing concerns is usually achieved by broad legislative or administrative guidelines specifying the purpose, frequency, scope, and manner of conducting the inspections. In the context of investigatory fire searches, which are not programmatic but are responsive to individual events, a more particularized inquiry may be necessary. The number of prior entries, the scope of the search, the time of day when it is proposed to be made, the lapse of time since the fire, the continued use of the building, and the owner's efforts to secure it against intruders might
508 all be relevant factors. Even though a fire victim's privacy must normally yield to the vital *508 social objective of ascertaining the cause of the fire, the magistrate can perform the important function of preventing harassment by keeping that invasion to a minimum. See *See v. Seattle*, 387 U. S., at 544-545; *United States v. Chadwick*, 433 U. S. 1, 9; *Marshall* v. *Barlow's, Inc.*, *ante*, at 323.

In addition, even if fire victims can be deemed aware of the factual justification for investigatory searches, it does not follow that they will also recognize the legal authority for such searches. As the Court stated in *Camara*, "when the inspector demands entry [without a warrant], the occupant has no way of knowing whether enforcement of the municipal code involved requires inspection of his premises, no way of knowing the lawful limits of the inspector's power to search, and no way of knowing whether the inspector himself is acting under proper authorization." 387 U. S., at 532. Thus, a major function of the warrant is to provide the property owner with sufficient information to reassure him of the entry's legality. See *United States v. Chadwick, supra*, at 9.

In short, the warrant requirement provides significant protection for fire victims in this context, just as it does for property owners faced with routine building inspections. As a general matter, then, official entries to investigate the cause of a

fire must adhere to the warrant procedures of the Fourth Amendment. In the words of the Michigan Supreme Court: "Where the cause [of the fire] is undetermined, and the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring, a . . . search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards; if evidence of wrongdoing is discovered, it may, of course, be used to establish probable cause for the issuance of a criminal investigative search warrant or in prosecution." But "[I]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply." 399 Mich., at 584, 250 N. W. 2d, at
509 477. Since all *509 the entries in this case were "without proper consent" and were not "authorized by a valid search warrant," each one is illegal unless it falls within one of the "certain carefully defined classes of cases" for which warrants are not mandatory. *Camara*, 387 U. S., at 528-529.

III

Our decisions have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action and no time to secure a warrant. *Warden v. Hayden*, 387 U. S. 294 (warrantless entry of house by police in hot pursuit of armed robber); *Ker v. California*, 374 U. S. 23 (warrantless and unannounced entry of dwelling by police to prevent imminent destruction of evidence). Similarly, in the regulatory field, our cases have recognized the importance of "prompt inspections, even without a warrant, ... in emergency situations." *Camara, supra*, at 539, citing *North American Cold Storage Co. v. Chicago*, 211 U. S. 306 (seizure of unwholesome food); *Jacobson v. Massachusetts*, 197 U. S. 11 (compulsory smallpox vaccination); *Compagnie Francaise v. Board of Health*, 186 U. S. 380 (health quarantine).

A burning building clearly presents an exigency of sufficient proportions to render a warrantless entry "reasonable." Indeed, it would defy reason to suppose that firemen must secure a warrant or consent before entering a burning structure to put out the blaze. And once in a building for this purpose, firefighters may seize evidence of arson that is in plain view. *Coolidge v. New Hampshire*, 403 U. S. 443, 465-466. Thus, the Fourth and Fourteenth Amendments were not violated by the entry of the firemen to extinguish the fire at Tyler's Auction, nor by Chief See's removal of the two plastic containers of flammable liquid found on the floor of one of the showrooms.

Although the Michigan Supreme Court appears to have accepted this principle, its opinion may be read as holding that
510 *510 the exigency justifying a warrantless entry to fight a fire ends, and the need to get a warrant begins, with the dousing of the last flame. 399 Mich., at 579, 250 N. W. 2d, at 475. We think this view of the firefighting function is unrealistically narrow, however. Fire officials are charged not only with extinguishing fires, but with finding their causes. Prompt determination of the fire's origin may be necessary to prevent its recurrence, as through the detection of continuing dangers such as faulty wiring or a defective furnace. Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction. And, of course, the sooner the officials complete their duties, the less will be their subsequent interference with the privacy and the recovery efforts of the victims. For these reasons, officials need no warrant to remain in a building for a reasonable time to investigate the cause of a blaze after it has been extinguished.[6] And if the warrantless entry to put out the fire and determine its cause is constitutional, the warrantless seizure of evidence while inspecting the premises for these purposes also is constitutional.

IV

A

The respondents argue, however, that the Michigan Supreme Court was correct in holding that the departure by the fire
511 *511 officials from Tyler's Auction at 4 a. m. ended any license they might have had to conduct a warrantless search. Hence, they say that even if the firemen might have been entitled to remain in the building without a warrant to investigate the cause of the fire, their re-entry four hours after their departure required a warrant.

On the facts of this case, we do not believe that a warrant was necessary for the early morning re-entries on January 22. As the fire was being extinguished, Chief See and his assistants began their investigation, but visibility was severely hindered by darkness, steam, and smoke. Thus they departed at 4 a. m. and returned shortly after daylight to continue their investigation. Little purpose would have been served by their remaining in the building, except to remove any doubt about the legality of the warrantless search and seizure later that same morning. Under these circumstances, we find that the morning entries were no more than an actual continuation of the first, and the lack of a warrant thus did not invalidate the resulting seizure of evidence.

B

The entries occurring after January 22, however, were clearly detached from the initial exigency and warrantless entry. Since all of these searches were conducted without valid warrants and without consent, they were invalid under the Fourth and Fourteenth Amendments, and any evidence obtained as a result of those entries must, therefore, be excluded at the respondents' retrial.

V

In summation, we hold that an entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the cause of the fire must be made pursuant to the warrant procedures governing administrative searches. See *Camara*, 387 U. S., at 534-539; *See v. Seattle*, 387 U. S., at 544-545; *Marshall* v. 512 *Barlow's, Inc., ante*, at 320-321. Evidence of arson discovered in the course of such investigations is admissible at trial, but if the investigating officials find probable cause to believe that arson has occurred and require further access to gather evidence for a possible prosecution, they may obtain a warrant only upon a traditional showing of probable cause applicable to searches for evidence of crime. *United States v. Ventresca*, 380 U. S. 102.

These principles require that we affirm the judgment of the Michigan Supreme Court ordering a new trial.[7]

Affirmed.

MR. JUSTICE BLACKMUN joins the judgment of the Court and Parts I, III, and IV-A of its opinion.

MR. JUSTICE BRENNAN took no part in the consideration or decision of this case.

MR. JUSTICE STEVENS, concurring in part and concurring in the judgment.

Because Part II of the Court's opinion in this case, like the opinion in *Camara v. Municipal Court*, 387 U. S. 523, seems to 513 assume that an official search must either be conducted pursuant to a warrant or not take place at all, I cannot join its reasoning.

In particular, I cannot agree with the Court's suggestion that, if no showing of probable cause could be made, "the warrant procedures governing administrative searches," *ante*, at 511, would have complied with the Fourth Amendment. In my opinion, an "administrative search warrant" does not satisfy the requirements of the Warrant Clause.[1] See *Marshall* v. *Barlow's, Inc., ante*, p. 325 (STEVENS, J., dissenting). Nor does such a warrant make an otherwise unreasonable search reasonable.

A warrant provides authority for an unannounced, immediate entry and search. No notice is given when an application for a warrant is made and no notice precedes its execution; when issued, it authorizes entry by force.[2] In my view, when there is no probable cause to believe a crime has been committed and when there is no special enforcement need to justify an unannounced entry,[3] the Fourth Amendment neither requires nor sanctions an abrupt and peremptory confrontation 514 *514 between sovereign and citizen.[4] In such a case, to comply with the constitutional

requirement of reasonableness, I believe the sovereign must provide fair notice of an inspection.[5]

The Fourth Amendment interests involved in this case could have been protected in either of two ways—by a warrant, if probable cause existed; or by fair notice, if neither probable cause nor a special law enforcement need existed. Since the entry on February 16 was not authorized by a warrant and not preceded by advance notice, I concur in the Court's judgment and in Parts I, III, and IV of its opinion.

MR. JUSTICE WHITE, with whom MR. JUSTICE MARSHALL joins, concurring in part and dissenting in part.

I join in all but Part IV-A of the opinion, from which I dissent. I agree with the Court that:

> "[A]n entry to fight a fire requires no warrant, and that once in the building, officials may remain there for a reasonable time to investigate the cause of the blaze. Thereafter, additional entries to investigate the
515 cause of *515 the fire must be made pursuant to the warrant procedures governing administrative searches." *Ante*, at 511.

The Michigan Supreme Court found that the warrantless searches, at 8 and 9 a. m. were not, in fact, continuations of the earlier entry under exigent circumstances[*] and therefore ruled inadmissible all evidence derived from those searches. The Court offers no sound basis for overturning this conclusion of the state court that the subsequent re-entries were distinct from the original entry. Even if, under the Court's "reasonable time" criterion, the firemen might have stayed in the building for an additional four hours—a proposition which is by no means clear—the fact remains that the firemen did not choose to remain and continue their search, but instead locked the door and departed from the premises entirely. The fact that the firemen were willing to leave demonstrates that the exigent circumstances justifying their original warrantless entry were no longer present. The situation is thus analogous to that in *G. M. Leasing Corp. v. United States*, 429 U. S. 338, 358-359 (1977):

> "The agents' own action . . . In their delay for two days following their first entry, and for more than one day following the observation of materials being moved from the office, before they made the entry during which they seized the records, is sufficient to support the District Court's implicit finding that there were no exigent circumstances. . . ."

516 To hold that some subsequent re-entries are "continuations" *516 of earlier ones will not aid firemen, but confuse them, for it will be difficult to predict in advance how a court might view a re-entry. In the end, valuable evidence may be excluded for failure to seek a warrant that might have easily been obtained.

Those investigating fires and their causes deserve a clear demarcation of the constitutional limits of their authority. Today's opinion recognizes the need for speed and focuses attention on fighting an ongoing blaze. The firetruck need not stop at the courthouse in rushing to the flames. But once the fire has been extinguished and the firemen have left the premises, the emergency is over. Further intrusion on private property can and should be accompanied by a warrant indicating the authority under which the firemen presume to enter and search.

There is another reason for holding that re-entry after the initial departure required a proper warrant. The state courts found that at the time of the first re-entry a criminal investigation was under way and that the purpose of the officers in re-entering was to gather evidence of crime. Unless we are to ignore these findings, a warrant was necessary. *Camara v. Municipal Court*, 387 U. S. 523 (1967), and *See v. Seattle*, 387 U. S. 541 (1967), did not differ with *Frank v. Maryland*, 359 U. S. 360 (1959), that searches for criminal evidence are of special significance under the Fourth Amendment.

MR. JUSTICE REHNQUIST, dissenting.

I agree with my Brother STEVENS, for the reasons expressed in his dissenting opinion in *Marshall v. Barlow's, Inc.*, *ante*, at 328, that the "Warrant Clause has no application to routine, regulatory inspections of commercial premises." Since in my opinion the searches involved in this case fall within that category, I think the only appropriate inquiry is whether they were reasonable. The Court does not dispute that the entries which occurred at the time of the fire and the next morning
517 were entirely justified, and I see nothing to indicate that the *517 subsequent searches were not also eminently

reasonable in light of all the circumstances.

In evaluating the reasonableness of the later searches, their most obvious feature is that they occurred after a fire which had done substantial damage to the premises, including the destruction of most of the interior. Thereafter the premises were not being used and very likely could not have been used for business purposes, at least until substantial repairs had taken place. Indeed, there is no indication in the record that after the fire Tyler ever made any attempt to secure the premises. As a result, the fire department was forced to lock up the building to prevent curious bystanders from entering and suffering injury. And as far as the record reveals, Tyler never objected to this procedure or attempted to reclaim the premises for himself.

Thus, regardless of whether the premises were technically "abandoned" within the meaning of the Fourth Amendment, cf. *Abel v. United States*, 362 U. S. 217, 241 (1960); *Hester v. United States*, 265 U. S. 57 (1924), it is clear to me that no purpose would have been served by giving Tyler notice of the intended search or by requiring that the search take place during the hours which in other situations might be considered the only "reasonable" hours to conduct a regulatory search. In fact, as I read the record, it appears that Tyler not only had notice that the investigators were occasionally entering the premises for the purpose of determining the cause of the fire, but he never voiced the slightest objection to these searches and actually accompanied the investigators on at least one occasion. App. 54-57. In fact, while accompanying the investigators during one of these searches, Tyler himself suggested that the fire very well may have been caused by arson. *Id.*, at 56. This observation, coupled with all the other circumstances, including Tyler's knowledge of, and apparent acquiescence in, the searches, would have been taken by any sensible person as an
518 indication that Tyler thought the *518 searches ought to continue until the culprit was discovered; at the very least they indicated that he had no objection to these searches. Thus, regardless of what sources may serve to inform one's sense of what is reasonable, in the circumstances of this case I see nothing to indicate that these searches were in any way unreasonable for purposes of the Fourth Amendment.

Since the later searches were just as reasonable as the search the morning immediately after the fire in light of all these circumstances, the admission of evidence derived therefrom did not, in my opinion, violate respondents' Fourth and Fourteenth Amendment rights. I would accordingly reverse the judgment of the Supreme Court of Michigan which held to the contrary.

[1] In addition, Tyler was convicted of the substantive offenses of burning real property, Mich. Comp. Laws § 750.73 (1970), and burning insured property with intent to defraud, Mich. Comp. Laws § 750.75 (1970).

[2] Sergeant Hoffman had entered the premises with other officials at least twice before, on January 26 and 29. No physical evidence was obtained as a result of these warrantless entries.

[3] The State's case was substantially buttressed by the testimony of Oscar Frisch, a former employee of the respondents. He described helping Tyler and Tompkins move valuable items from the store and old furniture into the store a few days before the fire. He also related that the respondents had told him there would be a fire on January 21, and had instructed him to place mattresses on top of other objects so that they would burn better.

[4] Having concluded that warrants should have been secured for the postfire searches, the court explained that different standards of probable cause governed searches to determine the cause of a fire and searches to gather evidence of crime. It then described what standard of probable cause should govern all the searches in this case:

"While it may be no easy task under some circumstances to distinguish as a factual matter between an administrative inspection and a criminal investigation, in the instant case the Court is not faced with that task. Having lawfully discovered the plastic containers of flammable liquid and other evidence of arson before the fire was extinguished, Fire Chief See focused his attention on assembling proof of arson and began a criminal investigation. At that point there was probable cause for issuance of a criminal investigative search warrant." 399 Mich., at 577, 250 N. W. 2d, at 474 (citations omitted).

[5] For administrative searches conducted to enforce local building, health, or fire codes, "'probable cause' to issue a warrant to inspect . . . exist[s] if reasonable legislative or administrative standards for conducting an area inspection are satisfied with respect to a particular dwelling. Such standards, which will vary with the municipal program being enforced, may be based upon the passage of time, the nature of the building (*e. g.*, a multi-family apartment house), or the condition of the entire area, but they will not necessarily depend upon specific knowledge of the condition of the particular dwelling." *Camara*, 387 U. S., at 538; *Marshall* v. *Barlow's, Inc.*,

ante, at 320-321. See LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 Sup. Ct. Rev. 1, 18-20.

[6] The circumstances of particular fires and the role of firemen and investigating officials will vary widely. A fire in a single-family dwelling that clearly is extinguished at some identifiable time presents fewer complexities than those likely to attend a fire that spreads through a large apartment complex or that engulfs numerous buildings. In the latter situations, it may be necessary for officials—pursuing their duty both to extinguish the fire and to ascertain its origin—to remain on the scene for an extended period of time repeatedly entering or re-entering the building or buildings, or portions thereof. In determining what constitutes a "reasonable time to investigate," appropriate recognition must be given to the exigencies that confront officials serving under these conditions, as well as to individuals' reasonable expectations of privacy.

[7] The petitioner alleges that respondent Tompkins lacks standing to object to the unconstitutional searches and seizures. The Michigan Supreme Court refused to consider the State's argument, however, because the prosecutor failed to raise the issue in the trial court or in the Michigan Court of Appeals. 399 Mich., at 571, 250 N. W. 2d, at 470-471. We read the state court's opinion to mean that in the absence of a timely objection by the State, a defendant will be presumed to have standing. Failure to present a federal question in conformance with state procedure constitutes an adequate and independent ground of decision barring review in this Court, so long as the State has a legitimate interest in enforcing its procedural rule. *Henry* v. *Mississippi*, 379 U. S. 443, 447. See *Safeway Stores* v. *Oklahoma Grocers*, 360 U. S. 334, 342 n. 7; *Cardinale* v. *Louisiana*, 394 U. S. 437, 438. The petitioner does not claim that Michigan's procedural rule serves no legitimate purpose. Accordingly, we do not entertain the petitioner's standing claim which the state court refused to consider because of procedural default.

[1] The Warrant Clause of the Fourth Amendment provides that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

[2] See *Wyman* v. *James*, 400 U. S. 309, 323-324. As the Court observed in *Wyman*, a warrant is not simply a device providing procedural protections for the citizen; it also grants the government increased authority to invade the citizen's privacy. See *Miller* v. *United States*, 357 U. S. 301, 307-308.

[3] In this case, there obviously was a special enforcement need justifying the initial entry to extinguish the fire, and I agree that the search on the morning after the fire was a continuation of that entirely legal entry. A special enforcement need can, of course, be established on more than a case-by-case basis, especially if there is a relevant legislative determination of need. See *Marshall* v. *Barlow's, Inc.*, *ante*, p. 325 (STEVENS, J., dissenting).

[4] The Fourth Amendment ensures "[t]he right of the people to be *secure* in their persons, houses, papers, and effects, against unreasonable searches and seizures." (Emphasis added.) Surely this broad protection encompasses the expectation that the government cannot demand immediate entry when it has neither probable cause to suspect illegality nor any other pressing enforcement concern. Yet under the rationale in Part II of the Court's opinion, the less reason an officer has to suspect illegality, the less justification he need give the magistrate in order to conduct an unannounced search. Under this rationale, the police will have no incentive—indeed they have a disincentive—to establish probable cause before obtaining authority to conduct an unannounced search.

[5] See LaFave, Administrative Searches and the Fourth Amendment: The Camara and See Cases, 1967 Sup. Ct. Rev. 1. The requirement of giving notice before conducting a routine administrative search is hardly unprecedented. It closely parallels existing procedures for administrative subpoenas, see, e. g., 15 U. S. C. § 1312 (1976 ed.), and is, as Professor LaFave points out, embodied in English law and practice. See LaFave, *supra*, at 31-32.

[*] The Michigan Supreme Court recognized that "[i]f there are exigent circumstances, such as reason to believe that the destruction of evidence is imminent or that a further entry of the premises is necessary to prevent the recurrence of the fire, no warrant is required and evidence discovered is admissible." 399 Mich. 564, 578, 250 N. W. 2d 467, 474 (1977). It found, however, that "[i]n the instant case there were no exigent circumstances justifying the searches made hours, days or weeks after the fire was extinguished." *Id.*, at 579, 250 N. W. 2d, at 475.

534 U.S. 266 (2002)

UNITED STATES
v.
ARVIZU

No. 00-1519.

United States Supreme Court.

Argued November 27, 2001.
Decided January 15, 2002.

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

268 *268 Rehnquist, C. J., delivered the opinion for a unanimous Court. Scalia, J., filed a concurring opinion, *post*, p. 278.

Austin C. Schlick argued the cause for the United States. With him on the briefs were *Solicitor General Olson*, *Assistant Attorney General Chertoff*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.

Victoria A. Brambl argued the cause for respondent. With her on the brief was *Fredric F. Kay*.[*]

268 *268 Chief Justice Rehnquist delivered the opinion of the Court.

Respondent Ralph Arvizu was stopped by a border patrol agent while driving on an unpaved road in a remote area of southeastern Arizona. A search of his vehicle turned up more than 100 pounds of marijuana. The District Court for the District of Arizona denied respondent's motion to suppress, but the Court of Appeals for the Ninth Circuit reversed. In the course of its opinion, it categorized certain factors relied upon by the District Court as simply out of bounds in deciding whether there was "reasonable suspicion" for the stop. We hold that the Court of Appeals' methodology was contrary to our prior decisions and that it reached the wrong result in this case.

On an afternoon in January 1998, Agent Clinton Stoddard was working at a border patrol checkpoint along U. S. Highway 191 approximately 30 miles north of Douglas, Arizona. App. 22, 24. See Appendix, *infra* (containing a map of the area noting the location of the checkpoint and other points important to this case). Douglas has a population of about 13,000 and is situated on the United States-Mexico border in the southeastern part of the State. Only two highways lead north from Douglas. See App. 157. Highway 191 leads north to Interstate 10, which passes through Tucson and Phoenix. State Highway 80 heads northeast through less populated areas toward New Mexico, skirting south and east of the portion of the Coronado National Forest that lies approximately 20 miles northeast of Douglas.[1]

The checkpoint is located at the intersection of 191 and Rucker Canyon Road, an unpaved east-west road that connects 191 and the Coronado National Forest. When the checkpoint is operational, border patrol agents stop the
269 traffic *269 on 191 as part of a coordinated effort to stem the flow of illegal immigration and smuggling across the International border. See *id.*, at 20-21. Agents use roving patrols to apprehend smugglers trying to circumvent the checkpoint by taking the backroads, including those roads through the sparsely populated area between Douglas and the national forest. *Id.*, at 21-22, 26, 80. Magnetic sensors, or "intrusion devices," facilitate agents' efforts in patrolling these areas. See *id.*, at 25. Directionally sensitive, the sensors signal the passage of traffic that would be consistent with smuggling activities. *Ibid.*; Tr. of Oral Arg. 23-24.

Sensors are located along the only other northbound road from Douglas besides Highways 191 and 80: Leslie Canyon Road. Leslie Canyon Road runs roughly parallel to 191, about halfway between 191 and the border of the Coronado National Forest, and ends when it intersects Rucker Canyon Road. It is unpaved beyond the 10-mile stretch leading out of Douglas and is very rarely traveled except for use by local ranchers and forest service personnel. App. 26. Smugglers commonly try to avoid the 191 checkpoint by heading west on Rucker Canyon Road from Leslie Canyon

Road and thence to Kuykendall Cutoff Road, a primitive dirt road that leads north approximately 12 miles east of 191. *Id.*, at 29-30. From there, they can gain access to Tucson and Phoenix. *Id.*, at 30.

Around 2:15 p.m., Stoddard received a report via Douglas radio that a Leslie Canyon Road sensor had been triggered. *Id.*, at 24. This was significant to Stoddard for two reasons. First, it suggested to him that a vehicle might be trying to circumvent the checkpoint. *Id.*, at 27. Second, the timing coincided with the point when agents begin heading back to the checkpoint for a shift change, which leaves the area unpatrolled. *Id.*, at 26, 47. Stoddard knew that alien smugglers did extensive scouting and seemed to be most active when agents were en route back to the checkpoint. Another
270 border patrol agent told Stoddard that the same *270 sensor had gone off several weeks before and that he had apprehended a minivan using the same route and witnessed the occupants throwing bundles of marijuana out the door. *Id.*, at 27.

Stoddard drove eastbound on Rucker Canyon Road to investigate. As he did so, he received another radio report of sensor activity. *Id.*, at 29. It indicated that the vehicle that had triggered the first sensor was heading westbound on Rucker Canyon Road. He continued east, passing Kuykendall Cutoff Road. He saw the dust trail of an approaching vehicle about a half mile away. *Id.*, at 31. Stoddard had not seen any other vehicles and, based on the timing, believed that this was the one that had tripped the sensors. *Id.*, at 31-32. He pulled off to the side of the road at a slight slant so he could get a good look at the oncoming vehicle as it passed by. *Id.*, at 32.

It was a minivan, a type of automobile that Stoddard knew smugglers used. *Id.*, at 33. As it approached, it slowed dramatically, from about 50-55 to 25-30 miles per hour. *Id.*, at 32, 57. He saw five occupants inside. An adult man was driving, an adult woman sat in the front passenger seat, and three children were in the back. *Id.*, at 33-34. The driver appeared stiff and his posture very rigid. He did not look at Stoddard and seemed to be trying to pretend that Stoddard was not there. *Id.*, at 33. Stoddard thought this suspicious because in his experience on patrol most persons look over and see what is going on, and in that area most drivers give border patrol agents a friendly wave. *Id.*, at 59. Stoddard noticed that the knees of the two children sitting in the very back seat were unusually high, as if their feet were propped up on some cargo on the floor. *Id.*, at 34.

At that point, Stoddard decided to get a closer look, so he began to follow the vehicle as it continued westbound on
271 Rucker Canyon Road toward Kuykendall Cutoff Road. *Id.*, at 34-35. Shortly thereafter, all of the children, though *271 still facing forward, put their hands up at the same time and began to wave at Stoddard in an abnormal pattern. *Id.*, at 35, 61. It looked to Stoddard as if the children were being instructed. Their odd waving continued on and off for about four to five minutes. *Id.*, at 35, 73.

Several hundred feet before the Kuykendall Cutoff Road intersection, the driver signaled that he would turn. *Id.*, at 36. At one point, the driver turned the signal off, but just as he approached the intersection he put it back on and abruptly turned north onto Kuykendall. The turn was significant to Stoddard because it was made at the last place that would have allowed the minivan to avoid the checkpoint. *Id.*, at 37. Also, Kuykendall, though passable by a sedan or van, is rougher than either Rucker Canyon or Leslie Canyon Roads, and the normal traffic is four-wheel-drive vehicles. *Id.*, at 36, 63-64. Stoddard did not recognize the minivan as part of the local traffic agents encounter on patrol, *id.*, at 37, and he did not think it likely that the minivan was going to or coming from a picnic outing. He was not aware of any picnic grounds on Turkey Creek, which could be reached by following Kuykendall Cutoff all the way up. *Id.*, at 54. He knew of picnic grounds and a Boy Scout camp east of the intersection of Rucker Canyon and Leslie Canyon Roads, *id.*, at 31, 53, 54, but the minivan had turned west at that intersection. And he had never seen anyone picnicking or sightseeing near where the first sensor went off. *Id.*, at 53, 75.

Stoddard radioed for a registration check and learned that the minivan was registered to an address in Douglas that was four blocks north of the border in an area notorious for alien and narcotics smuggling. *Id.*, at 37-38, 66-67. After receiving the information, Stoddard decided to make a vehicle stop. *Id.*, at 38. He approached the driver and learned
272 that his name was Ralph Arvizu. Stoddard asked if respondent would mind if he looked inside and searched *272 the vehicle. *Id.*, at 43. Respondent agreed, and Stoddard discovered marijuana in a black duffel bag under the feet of the

two children in the back seat. *Id.*, at 45-46. Another bag containing marijuana was behind the rear seat. *Id.*, at 46. In all, the van contained 128.85 pounds of marijuana, worth an estimated $99,080. Brief for United States 8.

Respondent was charged with possession with intent to distribute marijuana in violation of 21 U. S. C. § 841(a)(1) (1994 ed.). He moved to suppress the marijuana, arguing among other things that Stoddard did not have reasonable suspicion to stop the vehicle as required by the Fourth Amendment. After holding a hearing where Stoddard and respondent testified, the District Court for the District of Arizona ruled otherwise. App. to Pet. for Cert. 21a. It pointed to a number of the facts described above and noted particularly that any recreational areas north of Rucker Canyon would have been accessible from Douglas via 191 and another paved road, making it unnecessary to take a 40-to50-mile trip on dirt roads. *Id.*, at 22a.

The Court of Appeals for the Ninth Circuit reversed. 232 F. 3d 1241 (2000). In its view, fact-specific weighing of circumstances or other multifactor tests introduced "a troubling degree of uncertainty and unpredictability" into the Fourth Amendment analysis. *Id.*, at 1248 (internal quotation marks omitted). It therefore "attempt[ed] . . . to describe and clearly delimit the extent to which certain factors may be considered by law enforcement officers in making stops such as the stop involv[ing]" respondent. *Ibid.* After characterizing the District Court's analysis as relying on a list of 10 factors, the Court of Appeals proceeded to examine each in turn. It held that seven of the factors, including respondent's slowing down, his failure to acknowledge Stoddard, the raised position of the children's knees, and their
273 odd waving carried little or no weight in the reasonable-suspicion calculus. The remaining factors—the *273 road's use by smugglers, the temporal proximity between respondent's trip and the agents' shift change, and the use of minivans by smugglers—were not enough to render the stop permissible. *Id.*, at 1251. We granted certiorari to review the decision of the Court of Appeals because of its importance to the enforcement of federal drug and immigration laws. 532 U. S. 1065 (2001).

The Fourth Amendment prohibits "unreasonable searches and seizures" by the Government, and its protections extend to brief investigatory stops of persons or vehicles that fall short of traditional arrest. *Terry* v. *Ohio*, 392 U. S. 1, 9 (1968); *United States* v. *Cortez*, 449 U. S. 411, 417 (1981). Because the "balance between the public interest and the individual's right to personal security," *United States* v. *Brignoni-Ponce*, 422 U. S. 873, 878 (1975), tilts in favor of a standard less than probable cause in such cases, the Fourth Amendment is satisfied if the officer's action is supported by reasonable suspicion to believe that criminal activity "'may be afoot,' " *United States* v. *Sokolow*, 490 U. S. 1, 7 (1989) (quoting *Terry*, *supra*, at 30). See also *Cortez*, 449 U. S., at 417 ("An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity").

When discussing how reviewing courts should make reasonable-suspicion determinations, we have said repeatedly that they must look at the "totality of the circumstances" of each case to see whether the detaining officer has a "particularized and objective basis" for suspecting legal wrongdoing. See, *e. g.*, *id.*, at 417-418. This process allows officers to draw on their own experience and specialized training to make inferences from and deductions about the cumulative information available to them that "might well elude an untrained person." *Id.*, at 418. See also *Ornelas* v. *United States*, 517 U. S. 690, 699 (1996) (reviewing court must give "due weight" to factual inferences drawn by
274 resident *274 judges and local law enforcement officers). Although an officer's reliance on a mere "'hunch' " is insufficient to justify a stop, *Terry*, *supra*, at 27, the likelihood of criminal activity need not rise to the level required for probable cause, and it falls considerably short of satisfying a preponderance of the evidence standard, *Sokolow*, *supra*, at 7.

Our cases have recognized that the concept of reasonable suspicion is somewhat abstract. *Ornelas*, *supra*, at 696 (principle of reasonable suspicion is not a "'finely-tuned standar[d]' "); *Cortez*, *supra*, at 417 (the cause "sufficient to authorize police to stop a person" is an "elusive concept"). But we have deliberately avoided reducing it to "'a neat set of legal rules,' " *Ornelas*, *supra*, at 695-696 (quoting *Illinois* v. *Gates*, 462 U. S. 213, 232 (1983)). In *Sokolow*, for example, we rejected a holding by the Court of Appeals that distinguished between evidence of ongoing criminal behavior and probabilistic evidence because it "create[d] unnecessary difficulty in dealing with one of the relatively simple concepts embodied in the Fourth Amendment." 490 U. S., at 7-8.

We think that the approach taken by the Court of Appeals here departs sharply from the teachings of these cases. The court's evaluation and rejection of seven of the listed factors in isolation from each other does not take into account the "totality of the circumstances," as our cases have understood that phrase. The court appeared to believe that each observation by Stoddard that was by itself readily susceptible to an innocent explanation was entitled to "no weight." See 232 F. 3d, at 1249-1251. *Terry*, however, precludes this sort of divide-and-conquer analysis. The officer in *Terry* observed the petitioner and his companions repeatedly walk back and forth, look into a store window, and confer with one another. Although each of the series of acts was "perhaps innocent in itself," we held that, taken together, they "warranted further investigation." 392 U. S., at 22. See also *Sokolow, supra*, at 9 (holding that factors which by
275 themselves *275 were "quite consistent with innocent travel" collectively amounted to reasonable suspicion).

The Court of Appeals' view that it was necessary to "clearly delimit" an officer's consideration of certain factors to reduce "troubling . . . uncertainty," 232 F. 3d, at 1248, also runs counter to our cases and underestimates the usefulness of the reasonable-suspicion standard in guiding officers in the field. In *Ornelas v. United States*, we held that the standard for appellate review of reasonablesuspicion determinations should be *de novo*, rather than for "abuse of discretion." 517 U. S., at 691. There, we reasoned that *de novo* review would prevent the affirmance of opposite decisions on identical facts from different judicial districts in the same circuit, which would have been possible under the latter standard, and would allow appellate courts to clarify the legal principles. *Id.*, at 697. Other benefits of the approach, we said, were its tendency to unify precedent and greater capacity to provide law enforcement officers with the tools to reach correct determinations beforehand: Even if in many instances the factual "mosaic" analyzed for a reasonable-suspicion determination would preclude one case from squarely controlling another, "two decisions when viewed together may usefully add to the body of law on the subject." *Id.*, at 697-698.

But the Court of Appeals' approach would go considerably beyond the reasoning of *Ornelas* and seriously undercut the "totality of the circumstances" principle which governs the existence *vel non* of "reasonable suspicion." Take, for example, the court's positions that respondent's deceleration could not be considered because "slowing down after spotting a law enforcement vehicle is an entirely normal response that is in no way indicative of criminal activity" and that his failure to acknowledge Stoddard's presence provided no support because there were "no 'special circumstances' rendering 'innocent avoidance . . . improbable.' " 232 F. 3d, at 1248-1249. We think it quite reasonable
276 that a driver's *276 slowing down, stiffening of posture, and failure to acknowledge a sighted law enforcement officer might well be unremarkable in one instance (such as a busy San Francisco highway) while quite unusual in another (such as a remote portion of rural southeastern Arizona). Stoddard was entitled to make an assessment of the situation in light of his specialized training and familiarity with the customs of the area's inhabitants. See *Ornelas, supra*, at 699. To the extent that a totality of the circumstances approach may render appellate review less circumscribed by precedent than otherwise, it is the nature of the totality rule.

In another instance, the Court of Appeals chose to dismiss entirely the children's waving on grounds that odd conduct by children was all too common to be probative in a particular case. See 232 F. 3d, at 1249 ("If every odd act engaged in by one's children . . . could contribute to a finding of reasonable suspicion, the vast majority of American parents might be stopped regularly within a block of their homes"). Yet this case did not involve simply any odd act by children. At the suppression hearing, Stoddard testified about the children's waving several times, and the record suggests that he physically demonstrated it as well.[2] The District Court Judge, who saw and heard Stoddard, then characterized the waving as "methodical," "mechanical," "abnormal," and "certainly . . . a fact that is odd and would lead a reasonable officer to wonder why they are doing this." App. to Pet. for Cert. 25a. Though the issue of this case does not turn on the children's idiosyncratic actions, the Court of Appeals should not have casually rejected this factor in light of the District Court's superior access to the evidence and the well-recognized inability of reviewing courts to reconstruct what happened in the courtroom.

277 *277 Having considered the totality of the circumstances and given due weight to the factual inferences drawn by the law enforcement officer and District Court Judge, we hold that Stoddard had reasonable suspicion to believe that respondent was engaged in illegal activity. It was reasonable for Stoddard to infer from his observations, his registration check, and his experience as a border patrol agent that respondent had set out from Douglas along a little-

traveled route used by smugglers to avoid the 191 checkpoint. Stoddard's knowledge further supported a commonsense inference that respondent intended to pass through the area at a time when officers would be leaving their backroads patrols to change shifts. The likelihood that respondent and his family were on a picnic outing was diminished by the fact that the minivan had turned away from the known recreational areas accessible to the east on Rucker Canyon Road. Corroborating this inference was the fact that recreational areas farther to the north would have been easier to reach by taking 191, as opposed to the 40-to-50-mile trip on unpaved and primitive roads. The children's elevated knees suggested the existence of concealed cargo in the passenger compartment. Finally, for the reasons we have given, Stoddard's assessment of respondent's reactions upon seeing him and the children's mechanical-like waving, which continued for a full four to five minutes, were entitled to some weight.

Respondent argues that we must rule in his favor because the facts suggested a family in a minivan on a holiday outing. A determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct. See *Illinois v. Wardlow*, 528 U. S. 119, 125 (2000) (that flight from police is not necessarily indicative of ongoing criminal activity does not establish Fourth Amendment violation). Undoubtedly, each of these factors alone is susceptible of innocent explanation, and some factors are more probative than others. Taken together, we believe they
278 sufficed to form a particularized and objective basis for Stoddard's *278 stopping the vehicle, making the stop reasonable within the meaning of the Fourth Amendment.

The judgment of the Court of Appeals is therefore reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

[Appendix to opinion of the Court follows this page.]

Justice Scalia, concurring.

I join the opinion of the Court, because I believe it accords with our opinion in *Ornelas v. United States*, 517 U. S. 690, 699 (1996), requiring *de novo* review which nonetheless gives "due weight to inferences drawn from [the] facts by resident judges . . . ." As I said in my dissent in *Ornelas*, however, I do not see how deferring to the District Court's factual inferences (as opposed to its findings of fact) is compatible with *de novo* review. *Id.*, at 705.

The Court today says that "due weight" should have been given to the District Court's determinations that the children's waving was "`methodical,' `mechanical,' `abnormal,' and `certainly . . . a fact that is odd and would lead a reasonable officer to wonder why they are doing this.' " *Ante*, at 276. "Methodical," "mechanical," and perhaps even "abnormal" and "odd," are findings of fact that deserve respect. But the inference that this "would lead a reasonable officer to wonder why they are doing this," amounts to the conclusion that their action was suspicious, which I would have thought (if *de novo* review is the standard) is the prerogative of the Court of Appeals. So we have here a peculiar sort of *de novo* review.

I may add that, even holding the Ninth Circuit to no more than the traditional methodology of *de novo* review, its judgment here would have to be reversed.

[*] Briefs of *amici curiae* urging affirmance were filed for the DKT Liberty Project by *Julia M. Carpenter*; and for the National Association of Criminal Defense Lawyers et al. by *Lawrence S. Lustberg* and *Risa E. Kaufman*.

[1] Coronado National Forest consists of 12 widely scattered sections of land covering 1,780,000 acres in southeastern Arizona and southwestern New Mexico. The section of the forest near Douglas includes the Chiricahua, Dragoon, and Peloncillo Mountain Ranges.

[2] At one point during the hearing, Stoddard testified that "[the children's waving] wasn't in a normal pattern. It looked like they were instructed to do so. They kind of stuck their hands up and began waving to me like this." App. 35.

MURDOCK V. STOUT•54 F.3d 1437, 1447 (9th Cir. 1995)

United States Court of Appeals, Ninth Circuit.

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54 F.3d 1437 (9th Cir. 1995)

MURDOCK V. STOUT

CLYDE MURDOCK; LINDA MURDOCK; JEFFREY MURDOCK, PLAINTIFFS-APPELLANTS, v. ED STOUT; CITY OF FONTANA; JACOBSON, POLICE OFFICER # 193; WALBY, POLICE OFFICER # 222; AND ROBINS, POLICE OFFICER # 307, DEFENDANTS-APPELLEES.

Nos. 93-56248, 93-56643.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted February 8, 1995.

Decided April 26, 1995. *14381438

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Appeal from the United States District Court for the Central District of California. *14391439

Before: BEEZER and NOONAN, Circuit Judges, and EZRA, District Judge._

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The Honorable David Alan Ezra, United States District Judge for the District of Hawaii, sitting by designation.

Opinion by Judge BEEZER; dissent by Judge NOONAN.

BEEZER, Circuit Judge:

We consider whether exigent circumstances justified the warrantless entry and search of a house along with the brief seizure of an occupant by police officers investigating a suspected burglary.

Clyde Murdock, Linda Murdock, and Jeffrey Murdock (collectively "Murdock") appeal the district court's grant of summary judgment in favor of Ed Stout, the City of Fontana, California, and Fontana Police Officers Mark Jacobson, Dave Walby and Darren Robins (collectively "Fontana") in Murdock's 42 U.S.C. § 1983 action alleging a violation of his rights under theFourth Amendment. The district court concluded that the police officers acted reasonably when they entered Murdock's house without a warrant and briefly detained him while investigating a possible burglary. We have jurisdiction, 28 U.S.C. § 1291, and we affirm.

I

The facts are undisputed. On March 23, 1992, Robert Keck called the Fontana Police Department to report what he believed was suspicious activity in his neighborhood. Keck informed the Fontana police dispatcher that a passerby had told him that he saw a young person run from a neighbor's house across the street, enter an automobile and drive away. The house, identified by Keck as 13767 Lighthouse Court, was, according to the passerby, dark. The dispatcher, believing that a "possible burglary or other crime had occurred" contacted three police officers by radio.1

1.

The "Defendant's Contentions Regarding Facts," which Murdock accepts as undisputed, include an unfortunate use of the passive voice at a critical place. After detailing the information that Keck told the dispatcher, the statement of facts continues, "[b]ecause the house was dark, it was believed that a possible burglary or other crime had occurred." (emphasis added). We would have been delighted had the statement of facts indicated who believed that a burglary had occurred. Nevertheless, in our judgment, the only fair reading of this inartful sentence is that both Keck and the dispatcher believed that a burglary or other crime had occurred. This reading provides the only explanation of why the dispatcher called three police officers to investigate. This interpretation is also supported by transcripts of the conversations between Keck and the dispatcher and between the dispatcher and the police officers.

Fontana Police Officers Jacobson, Walby, and Robins arrived at the house to investigate shortly before 8:30 p.m. The officers observed that the windows were secure and the garage door was closed. Officers Jacobson and Robins proceeded to the rear of the house, where they noticed a sliding door open approximately 8 to 10 inches. Inside, a television was on "at a low setting" and the lights were "dim." Officer Jacobson twice announced his presence by shouting, "Fontana Police. Anybody home?" The announcement was sufficiently loud for Officer Walby to hear it across the street. No one responded. The telephone then rang several times. No one answered, and an answering machine was activated.

At this point, Officers Jacobson and Robins entered the house through the open door. Using their flashlights, and with their guns drawn, they searched the living room and kitchen. The officers discovered several cans of beer on a table near the television. The officers then entered the bedroom. They observed a man, later identified as Clyde Murdock, lying on the bed partially covered by some type of blanket. Officer Jacobson announced that he was a police officer. Because the man's hands were hidden under the blanket, Officer Jacobson immediately demanded that the man show his hands. Murdock began yelling at the officers. Officer Jacobson eventually removed the blanket, discovering that Murdock was fully clothed and was wearing shoes.

Officer Robins then let Officer Walby in the house. As Murdock had yet to be identified, Walby and Robins continued to search the house for "possible suspects or other persons." They found nothing. While this additional search was being performed, *14401440 Murdock refused to answer Officer Jacobson's questions regarding his name and address.

When Walby and Robins returned to the bedroom, the officers conducted a pat down search of Murdock.2 Murdock was then identified by his driver's license. He continued to act belligerently toward the officers and demanded their badge numbers. The officers provided Murdock with their badge numbers and left the Murdock residence, stopping at Keck's house to inform him that no burglary or other crime had occurred.

2.

Although Murdock states in his brief that "impermissible force" was used against him by the Fontana police officers and that the Fontana Police Department has a policy or practice of taking similar action, he does not cite to any evidence in the record supporting these allegations, nor does he offer any cases or argument in support of the claims. We decline to consider them.

Murdock later called Fontana Police Headquarters to complain about the incident. A police sergeant explained the reason for the intrusion. Murdock did not request an investigation.

Murdock filed a section 1983 action seeking money damages of 20 million dollars. Both parties moved for summary judgment. The district court granted Fontana's motion, concluding that the officers acted reasonably when they conducted a warrantless search of the house and briefly seized Murdock. Murdock appeals.

Murdock later sought sanctions pursuant to Federal Rule of Civil Procedure 11 against Fontana because it initially included a claim for photocopying expenses in its bill of costs. Fontana withdrew its request after Murdock objected to the claim. The district court declined to impose sanctions. Murdock also appeals this decision.

II

We review de novo a district court's determination of the validity of a warrantless entry into a residence. United States v. Lai, 944 F.2d 1434, 1441 (9th Cir. 1991), cert. denied, 502 U.S. 1062, 112 S.Ct. 947, 117 L.Ed.2d 116 (1992). We also review de novo a grant of summary judgment. Jesinger v. Nevada Fed. Credit Union, 24 F.3d 1127, 1130 (9th Cir. 1994).

The Fourth Amendment to the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." A warrantless search or seizure carried out in a private residence is presumptively unreasonable. Welsh v. Wisconsin, 466 U.S. 740, 748-49, 104 S.Ct. 2091, 2096-97, 80 L.Ed.2d 732 (1984); Coolidge v. New Hampshire, 403 U.S. 443, 474-75,91 S.Ct. 2022, 2042-43, 29 L.Ed.2d 564 (1971). Indeed, the protection of individuals from unreasonable government intrusion into their houses remains at the very core of theFourth Amendment. Payton v. New York, 445 U.S. 573, 589-90,100 S.Ct. 1371, 1381-82, 63 L.Ed.2d 639 (1980); see also United States v. United States Dist. Court, 407 U.S. 297, 313, 92 S.Ct. 2125,2134, 32 L.Ed.2d 752 (1972) (physical entry of the home is "chief evil against which the wording of the Fourth Amendment is directed").

Police entry into a house without a warrant is not, however, always unreasonable. Instead, a number of purportedly "well-delineated" exceptions permit law enforcement officers to conduct constitutionally reasonable searches and seizures without a warrant. Katz v. United States, 389 U.S. 347, 357,88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). Because a warrantless search is presumed to be unreasonable, Fontana bears the burden of establishing the applicability of any exception.

Here, Fontana invokes the "exigent circumstances exception" to the search warrant requirement. The exigency exception, unlike other more discrete counterparts such as consent searches or searches incident to arrest, is in fact more of a residual group of factual situations that do not fit into other established exceptions. See Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment

§§ 6.5-6.6 (2d ed. 1987). The critical commonality shared by exigency cases is the need for quick action in an emergency situation. United States v. Warner, 843 F.2d 401,403 (9th Cir. 1988) (noting that presence of exigent circumstances necessarily *14411441 implies insufficient time to obtain a warrant).

We have defined exigent circumstances as:

"those circumstances that would cause a reasonable person to believe that entry . . . was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts."

Lai, 944 F.2d at 1442 (quoting United States v. McConney, 728 F.2d 1195, 1199 (9th Cir.) (en banc), cert. denied, 469 U.S. 824,105 S.Ct. 101, 83 L.Ed.2d 46 (1984)). We evaluate the reasonableness of a warrantless entry in view of the totality of the circumstances from the perspective of the police officers at the time of the entry. United States v. Lindsey, 877 F.2d 777,781 (9th Cir. 1989).

Although exigent circumstances relieve the police officer of the obligation of obtaining a warrant, they do not relieve an officer of the need to have probable cause to enter the house. Lai, 944 F.2d at 1441; United States v. Valles-Valencia, 811 F.2d 1232, 1236 (9th Cir.), amended, 823 F.2d 381 (1987). One commentator has noted, however, that an analysis of probable cause in exigency cases "must be applied by reference to the circumstances then confronting the officer, including the need for prompt assessment of sometimes ambiguous information concerning potentially serious consequences." LaFave § 6.6(a), at 698.3

3.

Some courts have recognized an exception, distinct from exigent circumstances, where there is an emergency involving imminent danger to life or property such as where an officer observes a fire in a house or hears a scream from a house. These scenarios invoke the so-called "emergency doctrine." LaFave § 6.6(a), at 699; see New York v. Mitchell, 39 N.Y.2d 173,383 N YS.2d 246, 347 N.E.2d 607, cert. denied, 426 U.S. 953,96 S.Ct. 3178, 49 L.Ed.2d 1191 (1976). In Mitchell, the New York Court of Appeals created a three part test to analyze emergency cases: (1) the police must have reasonable grounds to believe there is an emergency at hand and an immediate need for their assistance for the protection of life or property; (2) the search must not be primarily motivated by intent to arrest and seize evidence; and (3) there must be some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched. Id., 39 N.Y.2d at 177-78,383 N YS.2d 246, 347 N.E.2d 607; see Michigan v. Davis, 442 Mich. 1,497 N.W.2d 910, 918 (noting that police need not have probable cause but rather a "reasonable belief" that a person is in need of immediate aid in order to enter a dwelling in an emergency), cert. denied, ___ U.S. ___, 113 S.Ct. 2432, 124 L.Ed.2d 652 (1993); Mincey v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408,2413, 57 L.Ed.2d 290 (1978) (officer can make warrantless entry when he or she "reasonably believe[s] that a person within is in need of immediate aid"). We have yet to consider whether this approach, or something comparable, should be adopted in a case such as this one where police officers are investigating a possible crime at the same time they might be rendering aid to a person in danger. Because we believe that probable cause and exigent circumstances were present here to justify an exigent circumstances search, we need not address whether this case, or a similar one, could qualify under an "emergency doctrine."

To determine if the officers had probable cause to enter Murdock's house, we examine the totality of the circumstances known to the officers at the time they entered. Lai, 944 F.2d at 1441 (citing Illinois v. Gates, 462 U.S. 213, 238,103 S.Ct. 2317, 2332, 76 L.Ed.2d 527 (1983)). Probable cause requires only a fair probability or substantial chance of criminal activity, not an actual showing that such activity occurred. Gates, 462 U.S. at 244, 103 S.Ct. at 2335.

When the three Fontana police officers arrived at the house, they knew that there had been a report of suspicious activity indicating a possible burglary or other crime had been or was being committed. Upon moving to the rear of the house, the officers discovered an open door. Based on these facts, we doubt that there would be sufficient probable cause to support entry. We have upheld, as have other courts, exigent circumstance searches based on officers finding physical evidence of a burglary, such as a broken window or forced lock. See Valles-Valencia, 811 F.2d at 1236 (officers observed signs that front window was pried open); United States v. Johnson, 9 F.3d 506,509-10 (6th Cir. 1993) (officers discovered broken window and people inside house who had no identification or keys), cert. denied, ___ U.S. ___, 114 S.Ct. 2690, 129 L.Ed.2d 821 (1994); *14421442 United States v. Dart, 747 F.2d 263, 267 (4th Cir. 1984) (officers observed locks sawed off and door forced open); United States v. Estese, 479 F.2d 1273, 1274 (6th Cir. 1973) (officers observed signs that apartment door had been pried open). In our judgment, the open door at Murdock's house was itself not sufficient to satisfy the standards in these cases where physical signs of burglary were evident.

The police officers did not, however, enter the house based only on the open door and the neighbor's report. They observed several indications that a resident was or should have been at the residence. The lights were on and a television was on, in addition to the door being open. The officers prudently attempted to make contact with the resident, no doubt to make sure the resident was safe in light of the officers' concern that a burglary or other crime might have occurred. Officer Jacobson shouted twice, but received no answer, nor did any resident answer the telephone. These additional pieces of information, indicating that a resident should have been home, but was not responding, combined with the earlier report of suspicious activity and the presence of the open door tip the scales to supply the officers with probable cause to believe that some criminal activity had occurred or was occurring or that a resident in the house might have been in danger or injured.4

4.

The cases cited by Murdock, United States v. Del Vizo, 918 F.2d 821, 825 (9th Cir. 1990) and Hutchinson v. Grant, 796 F.2d 288, 290 (9th Cir. 1986), are inapposite. They involve probable cause to arrest a suspect, which is not at issue here. The Fontana police officers did not seek to make any arrests.

Given the presence of probable cause, we have little difficulty in concluding that exigent circumstances justified the immediate warrantless entry. The police officers had a reasonable belief that they had insufficient time to obtain a warrant. Lai, 944 F.2d at 1442. We agree with the Seventh Circuit that when police are responding to a possible crime, police judgments should be afforded an "extra degree of deference." Reardon v. Wroan, 811 F.2d 1025, 1029 (7th Cir. 1987); see also Johnson, 9 F.3d at 510.

Furthermore, only a mild exigency need be shown where entry can be accomplished, as here, without physical destruction of property. Lai, 944 F.2d at 1442; McConney, 728 F.2d at 1206. The facts known to the police officers indicated that a resident was not responding when the circumstances inside the house strongly suggested that a resident should have been present. This gave the officers reason to

enter immediately without a warrant. Indeed, we are convinced that citizens in the community would have understandably viewed the officers' actions as poor police work if they had left the scene or failed to investigate further at once.

Once the officers were inside the house they conducted a brief search of the house in order to locate any occupant. After they found Murdock, fully-clothed, wearing shoes, lying on a bed with his hands covered by a blanket, they tried to ascertain his identity. Murdock was uncooperative. The officers acted reasonably in briefly seizing Murdock and conducting a pat down search to look for weapons. See Terry v. Ohio, 392 U.S. 1,21-22, 88 S.Ct. 1868, 1879-81, 20 L.Ed.2d 889 (1968); cf. Maryland v. Buie, 494 U.S. 325, 333, 110 S.Ct. 1093, 1097,108 L.Ed.2d 276 (1990) (extending Terry principles, under certain circumstances, to police-citizen confrontations in houses; in Buie, the context was a protective sweep while carrying out an arrest warrant); Michigan v. Summers, 452 U.S. 692, 702 n. 17, 705, 101 S.Ct. 2587, 2594 n. 17, 2595, 69 L.Ed.2d 340 (1981) (permitting brief seizure of occupant of premises while conducting search pursuant to a warrant, while leaving open possibility that exigent circumstances could justify comparable police conduct absent a warrant). After Murdock was identified, the officers immediately left the premises. The officers' conduct never exceeded the scope of the exigency. See Mincey v. Arizona, 437 U.S. 385, 393, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978) (warrantless search must be strictly circumscribed by the exigency that justified the initial entry).

We must also observe that there was no indication here that the officers were using their burglary investigation as a pretext for *14431443 conducting a search for evidence in Murdock's house. We would be more reluctant to accept officers' claims of exigency if we found persuasive pretext evidence. See LaFave § 6.6(b), at 708 ("courts must be especially vigilant in guarding against subterfuge, that is, a false reliance upon the property protection rationale when the real purpose was to seek out evidence of a crime."). Absent any evidence of pretext, we are more inclined to give deference to the judgments of police officers doing their job in the field.

Under different circumstances, the details judged to be suspicious by the officers would be innocuous, such as an open door, a dimly lit house, a television turned on, and an unanswered telephone. We, however, must examine the circumstances as they appeared to the police officers in light of their situation at the time. On the evening of March 23, 1992, these circumstances gave the officers probable cause to believe that a crime might be ongoing or might have taken place and that someone might be in need of their help. We do not believe that theFourth Amendment's crucial protections of the sanctity of a person's house are jeopardized by the police officers' entering a house without a warrant under the limited and compelling circumstances of this case.

At oral argument, Murdock contended that our decision in United States v. Erickson, 991 F.2d 529 (9th Cir. 1993), controls the outcome of this case in his favor. For several reasons, we disagree.

In Erickson, a police officer dispatched to investigate a suspected burglary arrived at a house in the afternoon and spoke to neighbors who had seen two men dragging a bag across the backyard. The officer walked into the backyard. He observed that no one appeared to be home, but did not knock on the door or make any other effort to contact a resident. The officer noticed an open basement window with a "black plastic sheet" covering the opening. The officer pulled back the sheet and spotted marijuana plants. The district court suppressed the evidence at a subsequent trial.

On appeal, the government did not argue that the search was justified by exigent circumstances. Instead, it argued that a police officer investigating a suspected burglary was performing a "community caretaking function" and was not subject to the probable cause requirement of the Fourth Amendment. The government argued, rather, that the officer need only act "reasonably under the circumstances." Id. at 531. We rejected that argument, holding that the need for police officers to enter houses without a warrant while investigating suspected burglaries was adequately protected by "the exigent circumstances exception to the warrant requirement." Id. at 533.

We specifically stated that "[t]he government does not challenge on appeal the district court's finding that exigent circumstances did not exist in this case. We therefore do not pass upon that ruling." Id. Thus, while we indicated that police officers must have probable cause and exigent circumstances to conduct a warrantless search, we did not state whether the facts in that case would have satisfied either of those requirements.

In any case, the facts in Erickson are distinguishable. In that case, arriving in mid-afternoon, the police officer observed only an open window. The officer made no effort to contact a resident. He did not knock on the door. He did not observe any signs that a resident should have been inside. Here, the Fontana officers, while investigating a suspected burglary in the evening, noticed an open door and evidence that a resident should have been at home. The officers made the further step of trying to make contact with a resident. Only after their efforts failed did they enter the house. Clearly, the equation for the police officer in Erickson was much different than for the officers here. The police officers here had a fair probability that something was amiss inside the house and that a resident might be in need of assistance. The burglary report, the open door, and the disturbing lack of response from a resident when the situation in the house indicated the presence of a resident were far different than the facts known to the officer in Erickson.

In conclusion, the three Fontana police officers had probable cause and exigent *14441444 circumstances sufficient to justify their warrantless entry into Murdock's house to investigate what might have been the scene of a burglary or other crime. The officers acted reasonably inside the house by looking for a possible victim or perpetrator, and securing the unknown fully-dressed occupant until his identity could be established. The fact that the officers' suspicions were wrong does not alter our view that the circumstances known to them outside the house justified all of their actions.5

5.

Because we believe the officers' conduct was reasonable, and thus affirm summary judgment, we need not address whether the officers had qualified immunity.

III

Murdock also argues that the district court erred in issuing a standing jury instruction order. The standing order required that the parties meet and confer at least 14 days before trial to address proposed jury instructions. We decline to address this issue as it is not yet ripe for review, and alternatively because Murdock has no standing to raise it. See St. Clair v. City of Chico, 880 F.2d 199, 201 (9th Cir.), cert. denied, 493 U.S. 993,110 S.Ct. 541, 107 L.Ed.2d 539 (1989) (court should not review a claim that lacks ripeness); Lujan v. Defenders of Wildlife, 504 U.S. 555, 559-63, 112 S.Ct. 2130, 2136-37,119 L.Ed.2d 351 (1992) (plaintiff must demonstrate actual injury). Because the district court granted

summary judgment in favor of Fontana, a trial was never held and Murdock was never required to comply with the standing order. Cf. Fikes v. Cleghorn, 47 F.3d 1011,1015 (9th Cir. 1995) (declining, on mootness grounds, to address whether standing order violated Fed.R.Civ.P. 83 because order was never enforced).

IV

Murdock argues that the district court erred in denying his motion to impose sanctions on Fontana's counsel. He contends that Fontana submitted a bill of costs that included photocopying costs in the amount of $803.50, which Murdock argues are not recoverable. Murdock alleges that because Fontana knew the costs were not recoverable, it violated Federal Rule of Civil Procedure11 by signing the bill of costs. We disagree.

Federal Rule of Civil Procedure 11 provides for sanctions if a party signs a pleading, motion, or other document that contains claims not "warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law. . . ." A district court's decision to deny sanctions under Rule 11 is reviewed for abuse of discretion. Larez v. Holcomb, 16 F.3d 1513, 1521 (9th Cir. 1994).

Murdock cites no authority demonstrating that the requested photocopying costs are not recoverable. Absent this showing, there is no evidence that Fontana's request was improper. Indeed,28 U.S.C. § 1920(3) and (4) indicate that expenses for some printing and photocopying are recoverable costs. See Dohmen-Ramirez v. Commodity Futures Trading Comm'n, 846 F.2d 1200,1202 n. 1 (9th Cir. 1988). In any case, when Murdock filed an objection to the photocopying costs, Fontana chose not to contest them based on its determination that the time needed to obtain documentary support for these costs exceeded the potential recovery. This decision is not unreasonable and certainly not sanctionable. We conclude that the district court did not abuse its discretion in denying sanctions.

AFFIRMED.

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[37] NOONAN, Circuit Judge, dissenting:

In United States v. Erickson, 991 F.2d 529 (9th Cir. 1993), police officers were informed of a suspected burglary, arrived at the scene and spoke to two neighbors who told them they had seen two men dragging a large brown plastic bag, apparently full of heavy items, across the backyard of the residence adjacent to the scene of the suspected burglary. One of the officers found an open basement window at the scene of the suspected crime and pulled back a plastic sheet to investigate the basement. On doing so, the officer saw numerous marijuana plants and smelled marijuana. This court upheld the order of the district court suppressing the *14451445 evidence that was obtained by the policeman's look. In the hearing before the district court the government had maintained that the police had acted in exigent circumstances. When District Court Judge Robert Bryan found there were no such circumstances, the government abandoned this ground on appeal and sought to justify the search in terms of the community caretaking functions of the police — a justification that we treated as equally unavailing. In other words, even where two neighbors, interviewed by the police, had seen strong indication that a burglary had taken place, not even the prosecutors were willing to argue on appeal that the police were acting in exigent circumstances when they peeked into the house. The attempt by the majority to distinguish Erickson from this case rings hollow.

At a time when the use of the exclusionary rule is being relaxed judicially and when further relaxations are contemplated by Congress, it is particularly necessary to maintain the vitality of the Fourth Amendment in assuring the sanctity of the homes of law-abiding citizens. It would be not much less than a constitutional catastrophe if this court were willing to relax its vigilance. Here is what happened in this case. Clyde Murdock was confronted in his bedroom, as he lay asleep in his bed, by an armed police officer, who with his gun drawn, told him to show his hands. This unexpected request woke Murdock up. From his prone position, he saw a gunman holding a gun at his head. He asked the gunman: "Who are you? What are you doing in my house? Why are you here?" He received no answer to these questions (the majority opinion stigmatizes him as "uncooperative"). Instead, the gunman continued to shout at him to show his hands and finally yanked the blanket from his bed. Murdock was then kept covered by the gun while two other police officers searched his house. After the search of the house had been completed, the police then conducted a pat-down search. Murdock asked the gun-holding officer "to get the gun out of his face." There was no response. When the pat-down was completed, the police looked at his driver's license and identified him as the owner of the house. The majority opinion is pleased to describe this astounding series of events as a Terry stop. It is, however, difficult to know or even imagine what the basis for a Terry stop of a man asleep in his own bed might be. I trust that it is not that he had gone to sleep in his clothes that made him the object of the police belief that they confronted a criminal. The Terry rule was designed to cover "street encounters" between citizens and the police on the beat. See Terry v. Ohio, 392 U.S. 1, 13, 88 S.Ct. 1868, 1875, 20 L.Ed.2d 889 (1968). It was originally applied on behalf of a police officer with "reason to believe that he was dealing with an armed and dangerous individual." Id. at 27, 88 S.Ct. at 1883. It does not protect police action taken in good faith based on "inarticulate hunches." Id. at 22, 88 S.Ct. at 1880. Nor does it protect decisions that are a "product of a volatile or inventive imagination." Id. at 28, 88 S.Ct. at 1883.

The majority opinion relies on Maryland v. Buie, 494 U.S. 325,333, 110 S.Ct. 1093, 1097, 108 L.Ed.2d 276 (1990) and Michigan v. Summers, 452 U.S. 692, 702, n. 17, 705,101 S.Ct. 2587, 2594, n. 17, 2595, 69 L.Ed.2d 340 (1981), for the majority's extension of Terry. Examination of those cases shows them far from the case at hand. Buie involved a "protective sweep" of a dwelling in connection with the arrest within it of an individual for whom the officers had a warrant. Terry was invoked by way of analogy only, to show that application of theFourth Amendment requires balancing to determine reasonableness. Buie, 494 U.S. at 332-33, 110 S.Ct. at 1097-98. There was no suggestion that Terry was itself extended to stops effected within in a home. Buie itself contains the warning that for a protective sweep within a home "there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene." Id. at 334, 110 S.Ct. at 1098. What articulable facts of this character justified the police sweep here after finding the television on, Buds near the screen, and a man asleep in bed? *14461446

Michigan v. Summers, 452 U.S. 692, 101 S.Ct. 2587,69 L.Ed.2d 340 (1981) involved the execution of a warrant, in this case a search warrant of a house. Incident to its execution, the police stopped a man on the front steps leaving the house and detained him during the search; the stop was held lawful. In Summers, the Court notes that it is not deciding what might by justified be exigent circumstances, absent a warrant. Id. at 702, n. 17,101 S.Ct. at 2594, n. 17. Instead, the Court declared: "forFourth Amendment purposes, we hold that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain the occupants of the premises while a proper

search is conducted." Id. at 705,101 S.Ct. at 2595. The Court's careful delineation of the limits on police action with a warrant stands in startling contrast to what the majority opinion in this case approves in a warrantless police action without probable cause. Terry is here extended to an almost unimaginable degree. Sound asleep in your own bed you can be nabbed by police whose chief ground for the "stop" is that a blanket covers your hands and clothes.

It may be that, deep in the memory of the three policemen who carried out this operation, there was the story of Goldilocks and the Three Bears. Like the Three Bears, the three policemen at first encountered a scene where one or more persons had been enjoying themselves — in this case by drinking Budweiser. They then opened a closed bedroom door and found a person they did not know asleep, clothed, in a bed. If they were the Three Bears, they could have identified this sleeping figure as an alien in their home and could have at least effected a Goldilocks stop if not a Terry stop. However, the analogy falters. The three bears were in their own home and so could recognize a stranger in it when they saw one. The three policemen were in Clyde Murdock's home and had no reason to suppose that the sleeping man who had drunk some beer was now committing or had just committed a crime.

In some way that is not fully articulated the majority opinion attempts to link this use of armed force in a man's bedroom to the events that occurred in the mind of the police shortly before their entry. A little after 8:00 p.m. that spring evening a neighbor of Murdock's had encountered an unidentified person who is described simply as "a passing person." The passing person told the neighbor that a boy, 16 to 22 years of age, had run from a house at the end of the cul de sac and had driven off in a black Chevy. On the basis of this tip the neighbor called the Fontana Police Department. The defendants' statement of facts continues: "Because the house was dark, it was believed that a possible burglary or other crime had occurred." The majority opinion shows some embarrassment as there is no identification of who believed that a possible burglary or other crime had occurred. Was it the passing person, the neighbor or the police dispatcher? What was the basis for this belief? The Murdocks had children; it was scarcely surprising that a Murdock child or a friend should run out of the house and enter a car. There was no report of anyone carrying loot from the Murdock house. There was no sign of forced entry. Compared with the facts in Erickson, these facts do not even amount to a suspicion that a burglary had occurred. Unlike Erickson, where the informants who had seen the two men moving the heavy bag were interviewed by the investigating police, in this case the police had no idea who the passing person was who made the comment that triggered their response. The police did not interview the neighbor who had called the police. A farfetched guess might have been that a boy had entered the house and had run out again, although even that speculation would have had almost no basis. The basis for believing that a burglary was actually in progress was nil.

Despite this shadowy bit of information, the police dispatcher sent three cruisers to the Murdock house. The police did a bang-up job of covering the house front and back with their guns drawn. They examined the house and garage and found everything locked, except a sliding door at the rear which was eight to ten inches open — an open door on a spring evening in southern California is scarcely surprising, let alone suspicious. At this point the majority opinion concedes that the police had no basis for entering Murdock's home, no basis for believing that there were exigent circumstances. *14471447

The police could hear a television set on and see some lights. That no doubt warranted the belief that somebody was at home. When they called "police" and no one answered and when a telephone answering device answered a random telephone call, the police jumped to the conclusion that there was

someone at home who was being prevented from answering them, and made the further assumption that this person was being criminally restrained rather than being in the shower, the toilet, or his or her bed. Thereupon they made their bold entry that led them to see and seize Clyde Murdock in his bed. Their imaginations had been active, volatile and inventive.

The defense claim of exigent circumstances here comes down to the claim that when a homeowner is asleep and does not answer his phone or a police call, the police have reason to think that a crime is probably in progress. On the basis of that doctrine, there must be a good many homes in California that may be entered by roving policemen.

The majority opinion tries to suggest that the earlier anonymous and entirely mistaken report of a "possible burglary or other crime" that "had occurred" can somehow be put together with the homeowner's silence to create exigent circumstances. Zeroes do not add up. No scrap of information pointed to a burglary in the present. At the very most the police had suspicion that a possible crime had taken place. There was absolutely no reason to believe a crime was occurring at the time the police arrived. The defendants do not assert any basis for such a supposition. There was no reason to think that when the television was on and an answering machine was in operation that mere non-response to a police call indicated a criminal emergency occurring within the house.

The majority opinion recites words that courts up until now have taken seriously. An entry into a person's home without a warrant is "presumptively unreasonable." Payton v. New York, 445 U.S. 573, 586, 100 S.Ct. 1371, 1380, 63 L.Ed.2d 639 (1980). To have police officers thrust themselves into a home is "a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance." Johnson v. United States, 333 U.S. 10, 14,68 S.Ct. 367, 369, 92 L.Ed. 436 (1948). As we have put it: "The warrantless search of a private residence strikes at the heart of the Fourth Amendment protections." Erickson, 991 F.2d at 532.

Instead of applying Fourth Amendment law as set out on behalf of a person accused of a crime in Erickson, the majority opinion flouts Erickson to deny protection to a law-abiding homeowner. Instead of preserving the limits on arrest with a warrant and search with a warrant, so carefully set out in Buie and Summers, the majority opinion approves an expansive doctrine of police freedom to act on hunch without warrant or even articulable facts. In a case which is of first impression in this circuit, Terry stop authority is given an enormous extension. Instead of being treated as presumptively unreasonable, the break-in by the police and the seizure of Clyde Murdock are rationalized by speculation. Instead of their actions being treated as a grave concern not only to Clyde Murdock but to all of us, the police officers that committed the outrage are shielded from liability. Instead of protecting the heart of theFourth Amendment, the majority opinion strikes at it.

I would reverse the district court.

531 U.S. 326 (2001)

ILLINOIS
v.
McARTHUR

No. 99-1132.

United States Supreme Court.

Argued November 1, 2000.
Decided February 20, 2001.

CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

328 *328 Breyer, J., delivered the opinion of the Court, in which Rehnquist, C. J., and O'Connor, Scalia, Kennedy, Souter, Thomas, and Ginsburg, JJ., joined. Souter, J., filed a concurring opinion, *post*, p. 337. Stevens, J., filed a dissenting opinion, *post*, p. 338.

Joel D. Bertocchi, Solicitor General of Illinois, argued the cause for petitioner. With him on the briefs were *James E. Ryan*, Attorney General, and *William L. Browers* and *Colleen M. Griffin*, Assistant Attorneys General.

Matthew D. Roberts argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Waxman*, *Assistant Attorney General Robinson*, *Deputy Solicitor General Dreeben*, and *Deborah Watson*.

328 *328 *Deanne Fortna Jones* argued the cause for respondent. With her on the brief was *Jeff Justice*.[1]

Justice Breyer, delivered the opinion of the Court.

Police officers, with probable cause to believe that a man had hidden marijuana in his home, prevented that man from entering the home for about two hours while they obtained a search warrant. We must decide whether those officers violated the Fourth Amendment. We conclude that the officers acted reasonably. They did not violate the Amendment's requirements. And we reverse an Illinois court's holding to the contrary.

I

A

On April 2, 1997, Tera McArthur asked two police officers to accompany her to the trailer where she lived with her husband, Charles, so that they could keep the peace while she removed her belongings. The two officers, Assistant
329 Chief John Love and Officer Richard Skidis, arrived with *329 Tera at the trailer at about 3:15 p.m. Tera went inside, where Charles was present. The officers remained outside.

When Tera emerged after collecting her possessions, she spoke to Chief Love, who was then on the porch. She suggested he check the trailer because "Chuck had dope in there." App. 15. She added (in Love's words) that she had seen Chuck "slid[e] some dope underneath the couch." *Id.*, at 19.

Love knocked on the trailer door, told Charles what Tera had said, and asked for permission to search the trailer, which Charles denied. Love then sent Officer Skidis with Tera to get a search warrant.

Love told Charles, who by this time was also on the porch, that he could not reenter the trailer unless a police officer accompanied him. Charles subsequently reentered the trailer two or three times (to get cigarettes and to make phone calls), and each time Love stood just inside the door to observe what Charles did.

Officer Skidis obtained the warrant by about 5 p.m. He returned to the trailer and, along with other officers, searched it. The officers found under the sofa a marijuana pipe, a box for marijuana (called a "one-hitter" box), and a small amount of marijuana. They then arrested Charles.

B

Illinois subsequently charged Charles McArthur with unlawfully possessing drug paraphernalia and marijuana (less than 2.5 grams), both misdemeanors. See Ill. Comp. Stat., ch. 720, §§ 550/4(a), 600/3.5(a) (1998). McArthur moved to suppress the pipe, box, and marijuana on the ground that they were the "fruit" of an unlawful police seizure, namely, the refusal to let him reenter the trailer unaccompanied, which would have permitted him, he said, to "have destroyed the marijuana." App. 27.

330 The trial court granted McArthur's suppression motion. The Appellate Court of Illinois affirmed, 304 Ill. App. 3d *330 395, 713 N. E. 2d 93 (1999), and the Illinois Supreme Court denied the State's petition for leave to appeal, 185 Ill. 2d 651, 720 N. E. 2d 1101 (1999). We granted certiorari to determine whether the Fourth Amendment prohibits the kind of temporary seizure at issue here.

II

A

The Fourth Amendment says that the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U. S. Const., Amdt. 4. Its "central requirement" is one of reasonableness. See *Texas* v. *Brown*, 460 U. S. 730, 739 (1983). In order to enforce that requirement, this Court has interpreted the Amendment as establishing rules and presumptions designed to control conduct of law enforcement officers that may significantly intrude upon privacy interests. Sometimes those rules require warrants. We have said, for example, that in "the ordinary case," seizures of personal property are "unreasonable within the meaning of the Fourth Amendment," without more, "unless . . . accomplished pursuant to a judicial warrant," issued by a neutral magistrate after finding probable cause. *United States* v. *Place*, 462 U. S. 696, 701 (1983).

We nonetheless have made it clear that there are exceptions to the warrant requirement. When faced with special law enforcement needs, diminished expectations of privacy, minimal intrusions, or the like, the Court has found that certain general, or individual, circumstances may render a warrantless search or seizure reasonable. See, *e. g.*, *Pennsylvania* v. *Labron*, 518 U. S. 938, 940-941 (1996) *(per curiam)* (search of automobile supported by probable cause); *Michigan Dept. of State Police* v. *Sitz*, 496 U. S. 444, 455 (1990) (suspicionless stops at drunk driver checkpoint); *United States*
331 v. *Place*, *supra*, at 706 (temporary seizure of luggage based on reasonable suspicion); *Michigan* v. *Summers*, *452 U. S. 692, 702-705 (1981)* (temporary detention of suspect without arrest warrant to prevent flight and protect officers while executing search warrant); *Terry* v. *Ohio*, 392 U. S. 1, 27 (1968) (temporary stop and limited search for weapons based on reasonable suspicion).

In the circumstances of the case before us, we cannot say that the warrantless seizure was *per se* unreasonable. It involves a plausible claim of specially pressing or urgent law enforcement need, *i. e.*, "exigent circumstances." Cf., *e. g.*, *United States* v. *Place*, *supra*, at 701 ("[T]he exigencies of the circumstances" may permit temporary seizure without warrant); *Warden, Md. Penitentiary* v. *Hayden*, 387 U. S. 294, 298-299 (1967) (warrantless search for suspect and weapons reasonable where delay posed grave danger); *Schmerber* v. *California*, 384 U. S. 757, 770-771 (1966) (warrantless blood test for alcohol reasonable where delay would have led to loss of evidence). Moreover, the restraint

at issue was tailored to that need, being limited in time and scope, cf. *Terry v. Ohio, supra*, at 29-30, and avoiding significant intrusion into the home itself, cf. *Payton v. New York*, 445 U. S. 573, 585 (1980) ("'[T]he chief evil against which the . . . Fourth Amendment is directed' " is warrantless entry and search of home) (quoting *United States v. United States Dist. Court for Eastern Dist. of Mich.*, 407 U. S. 297, 313 (1972)). Consequently, rather than employing a *per se* rule of unreasonableness, we balance the privacy-related and law enforcement-related concerns to determine if the intrusion was reasonable. Cf. *Delaware v. Prouse*, 440 U. S. 648, 654 (1979) (determining lawfulness by balancing privacy and law enforcement interests); *United States v. BrignoniPonce*, 422 U. S. 873, 878 (1975) (same).

We conclude that the restriction at issue was reasonable, and hence lawful, in light of the following circumstances, which we consider in combination. First, the police had probable cause to believe that McArthur's trailer home
332 contained evidence of a crime and contraband, namely, unlawful *332 drugs. The police had had an opportunity to speak with Tera McArthur and make at least a very rough assessment of her reliability. They knew she had had a firsthand opportunity to observe her husband's behavior, in particular with respect to the drugs at issue. And they thought, with good reason, that her report to them reflected that opportunity. Cf. *Massachusetts v. Upton*, 466 U. S. 727, 732-734 (1984) *(per curiam)* (upholding search warrant issued in similar circumstances).

Second, the police had good reason to fear that, unless restrained, McArthur would destroy the drugs before they could return with a warrant. They reasonably might have thought that McArthur realized that his wife knew about his marijuana stash; observed that she was angry or frightened enough to ask the police to accompany her; saw that after leaving the trailer she had spoken with the police; and noticed that she had walked off with one policeman while leaving the other outside to observe the trailer. They reasonably could have concluded that McArthur, consequently suspecting an imminent search, would, if given the chance, get rid of the drugs fast.

Third, the police made reasonable efforts to reconcile their law enforcement needs with the demands of personal privacy. They neither searched the trailer nor arrested McArthur before obtaining a warrant. Rather, they imposed a significantly less restrictive restraint, preventing McArthur only from entering the trailer unaccompanied. They left his home and his belongings intact—until a neutral Magistrate, finding probable cause, issued a warrant.

Fourth, the police imposed the restraint for a limited period of time, namely, two hours. Cf. *Terry v. Ohio, supra*, at 28 (manner in which police act is "vital . .. part of . . . inquiry"). As far as the record reveals, this time period was no longer
333 than reasonably necessary for the police, acting with diligence, to obtain the warrant. Compare *United**333 *States v. Place*, 462 U. S., at 709-710 (holding 90-minute detention of luggage unreasonable based on nature of interference with person's travels and lack of diligence of police), with *United States v. Van Leeuwen*, 397 U. S. 249, 253 (1970) (holding 29-hour detention of mailed package reasonable given unavoidable delay in obtaining warrant and minimal nature of intrusion). Given the nature of the intrusion and the law enforcement interest at stake, this brief seizure of the premises was permissible.

B

Our conclusion that the restriction was lawful finds significant support in this Court's case law. In *Segura v. United States*, 468 U. S. 796 (1984), the Court considered the admissibility of drugs which the police had found in a lawful, warrant-based search of an apartment, but only after unlawfully entering the apartment and occupying it for 19 hours. The majority held that the drugs were admissible because, had the police acted lawfully throughout, they could have discovered and seized the drugs pursuant to the validly issued warrant. See *id.*, at 799, 814-815 (citing *Silverthorne Lumber Co. v. United States*, 251 U. S. 385 (1920)). The minority disagreed. However, when describing alternative lawful search and seizure methods, both majority and minority assumed, at least for argument's sake, that the police, armed with reliable information that the apartment contained drugs, might lawfully have sealed the apartment from the outside, restricting entry into the apartment while waiting for the warrant. Compare *Segura v. United States*, 468 U. S., at 814 ("Had police never entered the apartment, but instead conducted a perimeter stake out to prevent anyone from entering . . . and destroying evidence, the contraband . . .would have been . . .seized precisely as it was here"), with
334 *id.*, at 824, n. 15 (Stevens, J., dissenting) ("I assume impoundment would be permissible *334 even absent exigent

circumstances when it occurs 'from the outside'—when the authorities merely seal off premises pending the issuance of a warrant but do not enter"); see also *Mincey* v. *Arizona*, 437 U. S. 385, 394 (1978) (exigent circumstances do not justify search where police guard at door could prevent loss of evidence); *United States* v. *Jeffers*, 342 U. S. 48, 52 (1951) (same).

In various other circumstances, this Court has upheld temporary restraints where needed to preserve evidence until police could obtain a warrant. See, *e. g.*, *United States* v. *Place*, *supra*, at 706 (reasonable suspicion justifies brief detention of luggage pending further investigation); *United States* v. *Van Leeuwen*, *supra*, at 253 (reasonable suspicion justifies detaining package delivered for mailing). Cf. *Richards* v. *Wisconsin*, 520 U. S. 385, 395 (1997) (no need to "knock and announce" when executing a search warrant where officers reasonably suspect that evidence might be destroyed); *Carroll* v. *United States*, 267 U. S. 132, 153 (1925) (warrantless search of automobile constitutionally permissible).

We have found no case in which this Court has held unlawful a temporary seizure that was supported by probable cause and was designed to prevent the loss of evidence while the police diligently obtained a warrant in a reasonable period of time. But cf. *Welsh* v. *Wisconsin*, 466 U. S. 740, 754 (1984) (holding warrantless entry into and arrest in home unreasonable despite possibility that evidence of noncriminal offense would be lost while warrant was being obtained).

C

Nor are we persuaded by the countervailing considerations that the parties or lower courts have raised. McArthur argues that the police proceeded without probable cause. But McArthur has waived this argument. See 304 Ill. App. 3d, at 397, 713 N. E. 2d, at 95 (stating that McArthur *335 does not contest existence of probable cause); Brief in Opposition 7 (acknowledging probable cause). And, in any event, it is without merit. See *supra*, at 331-332.

The Appellate Court of Illinois concluded that the police could not order McArthur to stay outside his home because McArthur's porch, where he stood at the time, was part of his home; hence the order "amounted to a constructive eviction" of McArthur from his residence. 304 Ill. App. 3d, at 402, 713 N. E. 2d, at 98. This Court has held, however, that a person standing in the doorway of a house is "in a 'public' place," and hence subject to arrest without a warrant permitting entry of the home. *United States* v. *Santana*, 427 U. S. 38, 42 (1976). Regardless, we do not believe the difference to which the Appellate Court points—porch versus, *e. g.*, front walk—could make a significant difference here as to the reasonableness of the police restraint; and that, from the Fourth Amendment's perspective, is what matters.

The Appellate Court also found negatively significant the fact that Chief Love, with McArthur's consent, stepped inside the trailer's doorway to observe McArthur when McArthur reentered the trailer on two or three occasions. 304 Ill. App. 3d, at 402-403, 713 N. E. 2d, at 98. McArthur, however, reentered simply for his own convenience, to make phone calls and to obtain cigarettes. Under these circumstances, the reasonableness of the greater restriction (preventing reentry) implies the reasonableness of the lesser (permitting reentry conditioned on observation).

Finally, McArthur points to a case (and we believe it is the only case) that he believes offers direct support, namely, *Welsh* v. *Wisconsin*, *supra*. In *Welsh*, this Court held that police could not enter a home without a warrant in order to prevent the loss of evidence (namely, the defendant's blood alcohol level) of the "nonjailable traffic offense" of driving while intoxicated. 466 U. S., at 742, 754. McArthur notes *336 that his two convictions are for misdemeanors, which, he says, are as minor, and he adds that the restraint, keeping him out of his home, was nearly as serious.

We nonetheless find significant distinctions. The evidence at issue here was of crimes that were "jailable," not "nonjailable." See Ill. Comp. Stat., ch. 720, § 550/4(a) (1998); ch. 730, § 5/5-8—3(3) (possession of less than 2.5 grams of marijuana punishable by up to 30 days in jail); ch. 720, § 600/ 3.5; ch. 730, § 5/5-8—3(1) (possession of drug paraphernalia punishable by up to one year in jail). In *Welsh*, we noted that, "[g]iven that the classification of state crimes differs widely among the States, the penalty that may attach to any particular offense seems to provide the

clearest and most consistent indication of the State's interest in arresting individuals suspected of committing that offense." 466 U. S., at 754, n. 14. The same reasoning applies here, where class C misdemeanors include such widely diverse offenses as drag racing, drinking alcohol in a railroad car or on a railroad platform, bribery by a candidate for public office, and assault. See, *e. g.*, Ill. Comp. Stat., ch. 65, § 5/4-8—2 (1998); ch. 610, § 90/1; ch. 625, § 5/11-504; ch. 720, § 5/12-1.

And the restriction at issue here is less serious. Temporarily keeping a person from entering his home, a consequence whenever police stop a person on the street, is considerably less intrusive than police entry into the home itself in order to make a warrantless arrest or conduct a search. Cf. *Payton v. New York*, 445 U. S., at 585 (the Fourth Amendment's central concern is the warrantless entry and search of the home).

We have explained above why we believe that the need to preserve evidence of a "jailable" offense was sufficiently urgent or pressing to justify the restriction upon entry that the police imposed. We need not decide whether the circumstances before us would have justified a greater restriction for this type of offense or the same restriction were only a "nonjailable" offense at issue.

337 *337 III

In sum, the police officers in this case had probable cause to believe that a home contained contraband, which was evidence of a crime. They reasonably believed that the home's resident, if left free of any restraint, would destroy that evidence. And they imposed a restraint that was both limited and tailored reasonably to secure law enforcement needs while protecting privacy interests. In our view, the restraint met the Fourth Amendment's demands.

The judgment of the Illinois Appellate Court is reversed, and the case is remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

Justice Souter, concurring.

I join the Court's opinion subject to this afterword on two points: the constitutionality of a greater intrusion than the one here and the permissibility of choosing impoundment over immediate search. Respondent McArthur's location made the difference between the exigency that justified temporarily barring him from his own dwelling and circumstances that would have supported a greater interference with his privacy and property. As long as he was inside his trailer, the police had probable cause to believe that he had illegal drugs stashed as his wife had reported and that with any sense he would flush them down the drain before the police could get a warrant to enter and search. This probability of destruction in anticipation of a warrant exemplifies the kind of present risk that undergirds the accepted exigent circumstances exception to the general warrant requirement. *Schmerber v. California*, 384 U. S. 757, 770-771 (1966). That risk would have justified the police in entering McArthur's trailer promptly to make a lawful, warrantless search. *United States v. Santana*, 427 U. S. 38, 42-43 (1976); *Warden, Md. Penitentiary v. Hayden*, 387 U. S. 294, 298-299
338 (1967). When McArthur stepped *338 outside and left the trailer uninhabited, the risk abated and so did the reasonableness of entry by the police for as long as he was outside. This is so because the only justification claimed for warrantless action here is the immediate risk, and the limit of reasonable response by the police is set by the scope of the risk. See *Terry v. Ohio*, 392 U. S. 1, 25-26 (1968).

Since, however, McArthur wished to go back in, why was it reasonable to keep him out when the police could perfectly well have let him do as he chose, and then enjoyed the ensuing opportunity to follow him and make a warrantless search justified by the renewed danger of destruction? The answer is not that the law officiously insists on safeguarding a suspect's privacy from search, in preference to respecting the suspect's liberty to enter his own dwelling. Instead, the legitimacy of the decision to impound the dwelling follows from the law's strong preference for warrants, which underlies the rule that a search with a warrant has a stronger claim to justification on later, judicial review than a search without one. See *United States v. Ventresca*, 380 U. S. 102, 106 (1965); see also 5 W. LaFave,

Search and Seizure § 11.2(b), p. 38 (3d ed. 1996) ("[M]ost states follow the rule which is utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution"). The law can hardly raise incentives to obtain a warrant without giving the police a fair chance to take their probable cause to a magistrate and get one.

Justice Stevens, dissenting.

The Illinois General Assembly has decided that the possession of less than 2.5 grams of marijuana is a class C misdemeanor. See Ill. Comp. Stat., ch. 720, § 550/4(a) (1998). In so classifying the offense, the legislature made a
339 concerted policy judgment that the possession of small amounts of *339 marijuana for personal use does not constitute a particularly significant public policy concern. While it is true that this offense—like feeding livestock on a public highway or offering a movie for rent without clearly displaying its rating[1]— may warrant a jail sentence of up to 30 days, the detection and prosecution of possessors of small quantities of this substance is by no means a law enforcement priority in the State of Illinois.[2]

Because the governmental interest implicated by the particular criminal prohibition at issue in this case is so slight, this is a poor vehicle for probing the boundaries of the government's power to limit an individual's possessory interest in his or her home pending the arrival of a search warrant. Cf. Segura v. United States, 468 U. S. 796 (1984) (seven Justices decline to address this issue because case does not require its resolution). Given my preference, I would, therefore, dismiss the writ of certiorari as improvidently granted.

Compelled by the vote of my colleagues to reach the merits, I would affirm. As the majority explains, the essential
340 inquiry in this case involves a balancing of the "privacyrelated *340 and law enforcement-related concerns to determine if the intrusion was reasonable." *Ante*, at 331. Under the specific facts of this case, I believe the majority gets the balance wrong. Each of the Illinois jurists who participated in the decision of this case placed a higher value on the sanctity of the ordinary citizen's home than on the prosecution of this petty offense. They correctly viewed that interest—whether the home be a humble cottage, a secondhand trailer, or a stately mansion—as one meriting the most serious constitutional protection.[3] Following their analysis and the reasoning in our decision in Welsh v. Wisconsin, 466 U. S. 740 (1984) (holding that some offenses may be so minor as to make it unreasonable for police to undertake searches that would be constitutionally permissible if graver offenses were suspected), I would affirm.

[*] A brief of *amici curiae* urging reversal was filed for the State of Ohio et al. by *Betty D. Montgomery*, Attorney General of Ohio, *Edward B. Foley*, State Solicitor, and *Robert C. Maier* and *Matthew D. Miko*, Assistant Solicitors, and by the Attorneys General for their respective States as follows: *Bruce M. Botelho* of Alaska, *Janet Napolitano* of Arizona, *M. Jane Brady* of Delaware, *Alan G. Lance* of Idaho, *Thomas J. Miller* of Iowa, *Andrew Ketterer* of Maine, *J. Joseph Curran, Jr.*, of Maryland, *Mike Hatch* of Minnesota, *Joseph P. Mazurek* of Montana, *Philip McLaughlin* of New Hampshire, *John J. Farmer, Jr.*, of New Jersey, *Don Stenberg* of Nebraska, *Frankie Sue Del Papa* of Nevada, *W. A. Drew Edmondson* of Oklahoma, *Charles M. Condon* of South Carolina, *Mark Barnett* of South Dakota, *Jan Graham* of Utah, *William H. Sorrell* of Vermont, *Christine O. Gregoire* of Washington, *Thomas F. Reilly* of Massachusetts, *D. Michael Fisher* of Pennsylvania, and *Mark L. Earley* of Virginia.

Briefs of *amici curiae* urging affirmance were filed for the National Association of Criminal Defense Lawyers by *Lisa B. Kemler*; and for the Rutherford Institute by *John W. Whitehead* and *Steven H. Aden*.

[1] See Ill. Comp. Stat., ch. 605, § 5/9-124.1 (1998) (making feeding livestock on a public highway a class C misdemeanor); ch. 720, §§ 395/3-395/4 (making it a class C misdemeanor to sell or rent a video that does not display the official rating of the motion picture from which it is copied). Other examples of offenses classified as class C misdemeanors in Illinois include camping on the side of a public highway, ch. 605, § 5/9-124, interfering with the "lawful taking of wild animals," ch. 720, § 125/2, and tattooing the body of a person under 21 years of age, ch. 720, § 5/12-10.

[2] Nor in many other States. Under the laws of many other States, the maximum penalty McArthur would have faced for possession of 2.3 grams of marijuana would have been less than what he faced in Illinois. See, e. g., Cal. Health & Safety Code Ann. § 11357(b) (West 1991) ($100 fine); Colo. Rev. Stat. § 18-18-406(1) (1999) ($100 fine); Minn. Stat. § 152.027(4) (2000) ($200 fine and drug education); Miss. Code Ann. § 41-29-139(c)(2)(A) (Supp. 1999) ($100—$250 fine); Neb. Rev. Stat. § 28-416(13) (1995) ($100 fine and drug education); N. M. Stat. Ann. § 30-31-23(B) (1997) ($50—$100 fine and 15 days in jail); N. Y. Penal Law § 221.05 (McKinney 2000) ($100 fine); Ore. Rev. Stat. § 475.992(4)(f) (Supp. 1998) ($100 fine).

[3] Principled respect for the sanctity of the home has long animated this Court's Fourth Amendment jurisprudence. See, *e. g.*, *Wilson v. Layne*, 526 U. S. 603, 610 (1999) ("The Fourth Amendment embodies this centuries-old principle of respect for the privacy of the home"); *Payton v. New York*, 445 U. S. 573, 601 (1980) (emphasizing "the overriding respect for the sanctity of the home that has been embedded in our traditions since the origins of the Republic"); *Mincey v. Arizona*, 437 U. S. 385, 393 (1978) ("[T]he Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law").

843 F. 2d 401 - United States v. Warner

843 F2d 401 United States v. Warner

843 F.2d 401

56 USLW 2646

UNITED STATES of America, Plaintiff-Appellant,
v.
Avery Jay WARNER, Defendant-Appellee.

No. 87-1084.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 10, 1987.
Decided April 5, 1988.
As Amended June 16, 1988.

David F. Levi, U.S. Atty., Sacramento, Cal., for plaintiff-appellant.

Robert M. Holley, Asst. Federal Defender, Sacramento, Cal., for defendant-appellee.

Appeal from the United States District Court for the Eastern District of California.

Before SCHROEDER, PREGERSON and BRUNETTI, Circuit Judges.

SCHROEDER, Circuit Judge:

1

The Government appeals from an order granting the defendant's motion to suppress evidence in this prosecution for possessing a controlled substance used to manufacture methamphetamine. The evidence suppressed was obtained through a warrantless search of a garage leased to the defendant. The Government's principal justifications for the search were (1) that the landlord had provided requisite consent, or (2) that there were exigent circumstances. Based upon its careful findings of fact, the district court concluded that the landlord could not have provided requisite consent because he lacked joint access to the garage, and the information available to the officer at the time did not present exigent circumstances. We have jurisdiction pursuant to 18 U.S.C. Sec. 3731, and we affirm.

2

The underlying facts as found by the district court are not materially disputed. The defendant rented the residence and garage in Sacramento in June, 1986. At that time, it was agreed that the landlord had permission to enter the premises in the defendant's absence to make certain repairs and mow the lawn.

3

On June 17, the landlord went to the residence to make repairs and entered the garage seeking a power source for his electric drill. In the garage he observed numerous boxes of chemicals. He compiled a list and took them to a chemist friend who told him the chemicals posed no hazard. The list included P2P, ether, formaldehyde, acetic anhydride and methlamine. At the beginning of July, the defendant told the landlord that he planned to move out by the end of the month because he had lost his job, and that in the meantime he was seeking work in Washington State.

4

The landlord went to the property to mow the lawn on July 12. He noticed a pungent chemical smell and became concerned about a possible hazard because it was a hot day. He returned home to call the police. He asked that someone from the appropriate agency come to check out the condition of the garage and its contents, but told the police that the situation was not an emergency.

5

A police officer arrived at the landlord's house approximately two hours later, and the two together went to the property rented by the defendant. When there was no answer to their knock on the front door, they started down the driveway and the landlord showed the officer the list of chemicals he had made a few weeks earlier. The officer testified that he recalled that formaldehyde and ether were among the chemicals listed, and that he was aware that such chemicals are used in manufacturing illicit drugs. He also testified that he knew that these chemicals can pose a risk of explosion. However, the officer testified that he could not smell the odors described by the landlord, possibly because he suffered from hay fever.

6

The officer asked the landlord to use his key to open the garage. When they entered, they observed boxes of chemicals partially covered by tarps. The officer then called the fire department and an investigator from the narcotics section of the police department.

7

The police seized the suppressed items from both the garage and the house. No warrant was ever obtained. It is not disputed that all of the items suppressed were the product of the original warrantless entry by the officer with the landlord's key. The issue before us is thus whether that entry comes within any of the exceptions to the warrant requirement of the fourth amendment.

8

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment--subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357, 88 S.Ct. 507, 514, 19 L.Ed.2d 576 (1967). This court will "uphold the district court's findings offact at a suppression hearing unless they are clearly erroneous (citation omitted). The ultimate issue of whether exigent circumstances justify a warrantless entry and/or search is resolved under the de novo standard." United States v. Echegoyen, 799 F.2d 1271, 1277-78 (9th Cir.1986).

9

The officer stated that he did not obtain a warrant because he believed that no warrant was necessary if the landlord consented to the entry. Landlords, however, do not have authority to waive the fourth amendment's warrant requirement by consenting to a search of premises inhabited by a tenant who is not at home at the time of a police call. The security of tenants' residences is not dependent solely upon the discretion of landlords. See Chapman v. United States, 365 U.S. 610, 81 S.Ct. 776, 5 L.Ed.2d 828 (1961) ("to uphold such an entry, search and seizure 'without a warrant would reduce the [Fourth] Amendment to a nullity ...' ") (citation omitted).

10

We have permitted the police to rely on a landlord's consent for admission to an abandoned apartment when the abandonment was apparent. United States v. Sledge, 650 F.2d 1075 (9th Cir.1981). Here, however, the defendant had not abandoned the premises. The rent was paid and he had told the landlord he would move out at the end of the month. Nothing at the scene indicated to the officer that the premises were abandoned.

11

We have looked to three factors in determining when a third party may effectively consent to a search of another's property. The factors are: (1) whether the third party has an equal right of access to the premises searched; (2) whether the suspect is present at the time the third party consent is obtained; and (3) if so, whether the suspect actively opposes the search. United States v. Impink, 728 F.2d 1228, 1232-33 (9th Cir.1984). We drew our factors from United States v. Matlock, 415 U.S. 164, 94 S.Ct. 988, 39 L.Ed.2d 242 (1974). Here the latter two factors are not implicated because of the suspect's absence. Thus, the issue of consent turns upon whether the landlord had an equal right of access to the premises.

12

The landlord in this case did not have any right of access for most purposes. As noted by the district court, "at best, the landlord had permission to enter the property for the limited purpose

of making specified repairs and occasionally mowing the lawn." Here, as in Impink, the landlord "had reserved only [a] limited right to enter the garage.... The agreement that permitted the [landlord] to re-enter the garage was oral. Even if ... a right to re-enter existed, we need not interpret an informal oral agreement as conveying an unlimited right of access." Impink, 728 F.2d at 1233. The landlord therefore could not give effective consent for the search of Warner's property.

13

We therefore must determine whether the warrantless entry was justified upon some basis other than the one on which the police officer relied. The Government urges us to hold that exigent circumstances provided adequate justification for the entry.

14

We have defined exigent circumstances as "those circumstances that would cause a reasonable person to believe that entry (or other relevant prompt action) was necessary to prevent physical harm to the officers or other persons, the destruction of relevant evidence, the escape of the suspect, or some other consequence improperly frustrating legitimate law enforcement efforts." United States v. McConney, 728 F.2d 1195, 1199 (9th Cir.) (en banc), cert. denied, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984). Exigent circumstances include the need to protect or preserve life or avoid serious injury. See Echegoyen, 799 F.2d at 1278; see also United States v. Martin, 781 F.2d 671, 674-75 (9th Cir.1985). "Exigent circumstances necessarily imply that there is insufficient time to get a warrant." Echegoyen, 799 F.2d at 1279 n. 5; see also United States v. Good, 780 F.2d 773, 775 (9th Cir.), cert. denied, 475 U.S. 1111, 106 S.Ct. 1523, 89 L.Ed.2d 920 (1986).

15

Exigencies must be viewed from the totality of the circumstances known to the officer at the time of the warrantless intrusion. United States v. Licata, 761 F.2d 537, 543 (9th Cir.1985). The reason behind assessing exigency from the circumstances known to the officer at the time of the search lies in the purposes underlying the fourth amendment. As the United States Supreme Court articulated in Arkansas v. Sanders, 442 U.S. 753, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979):

16

a search of private property must be both reasonable and pursuant to a properly issued search warrant. The mere reasonableness of a search, assessed in the light of the surrounding circumstances, is not a substitute for the judicial warrant required under the Fourth Amendment.... [B]ecause each exception to the warrant requirement invariably impinges to some extent on the protective purpose of the Fourth Amendment, the few situations in which a search may be conducted in the absence of a warrant have been carefully delineated and "the burden is on those seeking the exemption to show the need for it."

17

442 U.S. at 758-60, 99 S.Ct. at 2590-91. The Supreme Court then went on to state that exigency "must be assessed at the point immediately before the search." 442 U.S. at 763, 99 S.Ct. at 2593. The fourth amendment does not permit an officer to conduct a search and seek its justification later. As we have previously stated, "[t]he propriety of a search ... is unrelated to the results it later yields. To hold otherwise would legitimize any search as long as it ultimately revealed evidence of illegality." Impink, 728 F.2d at 1231-32; see also Blefare v. United States, 362 F.2d 870, 881 (9th Cir.1966) (dissenting opinion).

18

Here there was no basis for believing that any illicit activity was actually taking place on the premises; no occupants were present. There was similarly no basis for believing that suspects or evidence might disappear. As the district court observed, in this case the only potential exigency was the inherent volatility of the chemicals known to be in the garage.

19

Two cases in this circuit help delineate the kinds of circumstances that constitute exigency with respect to threatened fire or explosion. In Echegoyen, officers arrived at 12:30 a.m. in response to a call about a chemical odor. They recognized the smell as ether, determined where the odor was coming from, and called the fire department. Upon being advised by the firefighter that immediate action was necessary, the officers entered the residence, arrested the occupants, and attempted to eliminate the fire hazard by turning off the gas burners and opening the windows. We upheld the warrantless entry, stressing the "deputies' testimony as to chemical smell, the activity in the cabin, the early-morning hour, the remoteness of the ... area, and the limited availability of firefighting resources." 799 F.2d at 1278-79. None of these factors exists in this case. By contrast, in Impink, we declined to hold that a warrantless entry was justified when the police entry was based upon the observation through a garage window of evidence of drug manufacturing.

20

In urging that the circumstances in this case constitute an exigency justifying immediate entry, the Government relies heavily upon expert evidence at the suppression hearing that because of the summer heat, these chemicals in fact possessed a higher potential for explosion than either the landlord or the police officer had perceived. This, however, is not something that falls within the ambit of circumstances known to the officer at the time and as we have seen, it is those circumstances that are controlling. See, e.g., Arkansas v. Sanders, 442 U.S. at 763, 99 S.Ct. at 2593.

21

The totality of the circumstances known to the officer at the time of the intrusion consisted of the landlord's perception of the chemical fumes and the landlord's lack of perception that an immediate emergency existed; the list of chemicals the landlord had made and the officer's limited knowledge of their possible explosive potential; knowledge that Warner was not home;

and knowledge that the chemicals had been in the garage in the summer heat for at least two weeks. Although the officer may have been well-intentioned, the circumstances did not present an exigency justifying a warrantless entry.

22

We must also reject the Government's argument that, although the entry violated the fourth amendment, we should extend to warrantless searches the "good faith exception" to the exclusionary rule established in United States v. Leon, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984). We previously rejected that position in United States v. Whiting, 781 F.2d 692, 698 (9th Cir.1986), pointing out that the Leon exception "is clearly limited to warrants invalidated for lack of probable cause and does not create the broad 'good faith' exception the government suggests."

23

The good faith exception to the warrant requirement of the fourth amendment developed in Leon arose in the context of reasonable reliance by a police officer on a warrant determined by a magistrate, albeit incorrectly, to rest on probable cause. Leon, 468 U.S. at 904, 104 S.Ct. at 3410. In its recent decision in Illinois v. Krull, --- U.S. ----, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987), the Court extended the good faith exception announced in Leon to situations in which police officers conduct a warrantless search pursuant to a regulatory scheme authorizing the search, even though that statute later is invalidated on constitutional grounds. Id. at ---, 107 S.Ct. at 1167. In both Leon and Krull, the touchstone of the Court's decision was the police officer's objectively reasonable reliance on the determination of a magistrate or a legislature that the challenged search in fact met the standards required by the fourth amendment.

24

In the present case, in contrast, the Government would have us conclude that the good faith exception rests on the police officer's belief that he or she is acting reasonably. We reject this suggestion. Doubtless, a police officer who conducts a search may subjectively believe he or she is acting reasonably. Mere reliance on the officer's own judgment, however, does not rise to the level of reasonable reliance required by the Constitution.

25

Finally, the Government urges us to apply a "balancing test" to these circumstances, balancing the defendant's fourth amendment rights against the public interest. However, the home and its traditional curtilage is given the highest protection against warrantless searches and seizures. "[P]hysical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed...." United States v. United States District Court, 407 U.S. 297, 313, 92 S.Ct. 2125, 2134, 32 L.Ed.2d 752 (1972). The Supreme Court has noted that searches "carried out on a suspect's premises without a warrant [are] per se unreasonable, unless the police can show that it falls within one of a carefully defined set of exceptions based on the presence of 'exigent circumstances.' " Coolidge v. New Hampshire, 403 U.S. 443, 474-75, 91 S.Ct. 2022,

2042, 29 L.Ed.2d 564 (1971). Thus, the "balancing test" urged here by the Government is already encompassed by the exception to the warrant requirement for exigent circumstances.

26

AFFIRMED.

BRUNETTI, Circuit Judge, dissenting:

27

I respectfully dissent from the majority's conclusion that exigent circumstances did not justify the officer's warrantless entry into Warner's leased premises. We review the ultimate issue of whether exigent circumstances justified the officer's warrantless entry under the de novo standard, United States v. Echegoyen, 799 F.2d 1271, 1277-78 (9th Cir.1986). The totality of circumstances in this case demonstrate a "need to protect or preserve life or avoid serious injury." Id. at 1278, citing Mincey v. Arizona, 437 U.S. 385, 392, 98 S.Ct. 2408, 2413, 57 L.Ed.2d 290 (1978). On that basis, I would reverse the district court's order granting the defendant's motion to suppress.

28

Determining the existence of exigent circumstances requires use of an objective test. "[A]lmost without exception in evaluating alleged violations of the Fourth Amendment the Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances then known to him ... would the facts available to the officer at the moment of seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate"? Scott v. United States, 436 U.S. 128, 137, 98 S.Ct. 1717, 1723, 56 L.Ed.2d 168 (1978) (citations omitted).

29

At the moment when the officer entered Warner's leased premises, he knew all of the following information: that Warner's landlord had smelled chemical fumes on two occasions, most recently on that very day; that Warner's landlord had observed boxes of formaldehyde and ether in Warner's premises; that these boxes of chemicals had been in the summer heat for at least two weeks; that these chemicals were associated with illicit drug manufacturing; that these chemicals posed a risk of explosion; and that it was a very hot day. The majority correctly points out that the officer could not, himself, smell the odors described by the landlord. However, even without the benefit of his olfactory sense, all of the above information warrants a man of reasonable caution in the belief that an immediate entry is not only appropriate, but necessary to protect life and avoid serious injury.

30

The facts of this case parallel those in Echegoyen, infra. In Echegoyen, this Court upheld a warrantless entry because the officers suspected the residence was the scene of illicit narcotics activity, the officers smelled ether and thought it might pose a fire hazard, the residence was in a remote location, the area had limited firefighting resources, and they were notified early in the morning. Although the entry in our case occurred in the mid-afternoon, rather than early in the morning, and took place in a densely populated area, rather than in a remote area, a man of reasonable caution could have readily concluded that the threat to a greater number of people posed an even greater exigency than that in Echegoyen.

31

Additionally, the conclusion that a bona fide emergency existed was "buttressed by the behavior of the officer[ ] upon entering the dwelling." Echegoyen, 799 F.2d at 1279. As in Echegoyen, upon entering the dwelling, the officer proceeded to reduce the hazards of fire and explosion by phoning the fire department, while the landlord ventilated the area.

32

Considering the totality of the circumstances known to the officer at time of his entry into Warner's leased premises, sufficient exigent circumstances existed to uphold the belief of a man of reasonable caution that immediate entry into the premises was necessary to protect life and avoid serious injury. Therefore, I respectfully dissent form the majority's decision to affirm the district court's order granting the defendant's motion to suppress.

Court of Criminal Appeals of Alabama.

Timothy Lee HARRIS v. STATE of Alabama.

CR-04-0274.

Decided: February 03, 2006

Richard R. Klemm, Dothan, for appellant. Troy King, atty. gen., and Nancy M. Kirby, deputy atty. gen., for appellee.

Timothy Lee Harris was convicted of trafficking in marijuana, a violation of § 13A-12-231(1), Ala.Code 1975. He was sentenced, as a habitual felony offender, to life imprisonment.

On appeal, Harris contends that the trial court erred in denying his motion to suppress the marijuana evidence found as a result of a warrantless search of his automobile because, he says, the search did not fall within the automobile exception to the warrant requirement. Specifically, he argues (1) that there was no probable cause to search his vehicle, and (2) that his vehicle was parked on private property at the time of the search and the automobile exception, even if there was probable cause to search, does not apply to vehicles parked on private property.

The evidence adduced at the suppression hearing and at trial indicated the following.[1] Carlton Ott, a corporal with the Dothan Police Department assigned to the vice-intelligence division, testified that on August 19, 1999, he received information from a confidential informant, who had provided reliable information in the past, that Harris was in possession of a large amount of marijuana at his residence at 2401 Brown Street. The informant said that he had seen Harris in possession of the marijuana within the last few hours; that the marijuana was located in Harris's white Plymouth Laser automobile, which was parked outside the residence; and that a second automobile, a white Mazda 929, was also parked outside the residence. That evening, approximately six hours after receiving the information from the informant, Cpl. Ott and Mark Nelms, a sergeant in the vice-intelligence division of the Dothan Police Department, set up surveillance at Harris's residence, a mobile home, to corroborate the information received from the informant. They saw both vehicles described by the informant parked in the front yard of the mobile home.

Cpl. Ott testified that at approximately 10:10 p.m. they saw Harris leave the mobile home and get in the Plymouth Laser. According to Cpl. Ott, Harris sat in the vehicle for a few minutes until a black female drove up in a maroon Hyundai Sonata automobile and parked on the street in front of the residence. At that point, Cpl. Ott

said, Harris got out of the Plymouth Laser and got into the Hyundai Sonata; Harris and the driver of the Sonata sat in the vehicle for a few minutes and then drove away. Cpl. Ott then radioed two backup officers and told them to stop the Sonata. Cpl. Ott said that he saw no bulges in Harris's clothing when he got out of the Laser and into the Sonata; that he had no information on the driver of the Sonata; and that no arrests were made during the stop. According to Cpl. Ott, no more than three minutes after the stop was completed, the Sonata returned to Harris's residence, Harris got out of the Sonata and got in the Laser, and then drove the Laser toward the back of the mobile home. At that point, Cpl. Ott said, they decided to "move in" because "[i]t was obvious . that criminal activity was taking place." (R. 28.)

Cpl. Ott and Sgt. Nelms, as well as the officers who had stopped the Sonata, entered the premises and met Harris as he was walking around from the back to the front of the mobile home. They detained Harris and conducted a Terry[2] patdown of his person. Cpl. Ott testified that Harris told him that his mother was inside the residence, and Cpl. Ott then knocked on the front door. According to Cpl. Ott, he informed Harris's mother that he had information that Harris was in possession of marijuana, and Harris's mother gave him permission to search her mobile home. Cpl. Ott testified that Harris did not appear nervous about the search of the mobile home. However, shortly after detaining Harris, Cpl. Ott called for a K-9 unit to come to the residence so that a drug-sniffing dog could sniff the Laser. When Harris heard that Cpl. Ott had called for a K-9 unit, Cpl. Ott said, Harris became nervous and began calling for his mother. Cpl. Ott then asked Harris for the key to the Laser, and Harris handed him a key. However, Cpl. Ott recognized that the key Harris gave him was not a Chrysler-product key and he then asked Harris if he was sure this was the key to the Laser. According to Cpl. Ott, Harris told him that the key fit the Mazda 929 and that he did not have a key to the Laser. Cpl. Ott testified that the officer who had conducted the patdown of Harris told him that Harris had another key ring in the pocket of his shorts and Cpl. Ott then reached in Harris's pocket and retrieved the key to the Laser.

Shortly after Cpl. Ott retrieved the key, the K-9 unit arrived, and the K-9 officer walked his dog around the Laser; the dog alerted to the presence of narcotics at the rear of the vehicle. At that point, Cpl. Ott used the key to open the vehicle and discovered in the rear hatchback portion of the vehicle three one-gallon Ziploc brand plastic bags that were later determined to contain 2.92 pounds of marijuana. In addition, a large amount of currency was found in the center console, various papers with Harris's name on them were found in the glove compartment, and the registration indicated that the vehicle was registered to "Tim or Patricia Harris." (R. 74.)

Standard of Review

"When an appellate court reviews the findings and holdings of a trial court resulting from a hearing on a motion to suppress evidence, if the evidence before the trial court was undisputed, the 'ore tenus rule,' pursuant to which the trial court's conclusions on issues of fact are presumed correct, is inapplicable, and the reviewing court will sit in judgment on the evidence de novo, indulging no presumption in favor of the trial court's application of the law to those facts."

Ex parte Kelley, 870 So.2d 711, 714 (Ala.2003). Here, the evidence was undisputed; the only issue is whether the trial court properly applied the law regarding probable cause and the automobile exception to the warrant requirement to the undisputed facts. Therefore, we review de novo the trial court's denial of Harris's motion to suppress.

Probable Cause

"A warrantless search of a vehicle is justified where there is probable cause to believe the vehicle contains contraband." Lykes v. State, 709 So.2d 1335, 1337 (Ala.Crim.App.1997).

" 'Probable cause exists where all the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been or is being committed and that contraband would be found in the place to be searched.' Sheridan v. State, 591 So.2d 129, 130 (Ala.Cr.App.1991). 'The requisite probable cause is present "if a reasonably prudent person, based on the facts and circumstances which the officer knows, would be justified in concluding that the items sought are connected with criminal activity and that they will be found in the place to be searched. Illinois v. Gates, 462 U.S. 213 [103 S.Ct. 2317, 76 L.Ed.2d 527] . (1983)." ' Day v. State, 539 So.2d 410, 413-14 (Ala.Cr.App.1988). ' "The test for probable cause is 'whether the facts available to the officer at the moment of the seizure or search, would warrant a man of reasonable caution to believe that the action taken was appropriate.' " ' Ivey v. State, 698 So.2d 179, 185-86 (Ala.Cr.App.1995), aff'd, 698 So.2d 187 (Ala.1997) (quoting Riley v. State, 583 So.2d 1353, 1355 (Ala.Cr.App.1991))."

Johnson v. State, 719 So.2d 272, 273 (Ala.Crim.App.1998). "Probable cause to search a vehicle exists when all the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has been or is being committed and the vehicle contains contraband." State v. Odom, 872 So.2d 887, 891 (Ala.Crim.App.2003). See also State v. Ivey, 709 So.2d 502, 505 (Ala.Crim.App.1997) ("Probable cause to believe a vehicle contains contraband exists where all the facts and circumstances within the officer's knowledge are sufficient to warrant a person of reasonable caution to conclude that an offense has

been or is being committed and that a search of the vehicle would produce contraband.").

" 'Probable cause is concerned with "probabilities," that "are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians act." ' " Chevere v. State, 607 So.2d 361, 368 (Ala.Crim.App.1992), quoting Carter v. State, 435 So.2d 137, 139 (Ala.Crim.App.1982), quoting in turn Brinegar v. United States, 338 U.S. 160, 175, 69 S.Ct. 1302, 93 L.Ed. 1879 (1949).

" 'Probable cause does not require an officer to compile an airtight case against a suspect.' Williams v. State, 440 So.2d 1139, 1145 (Ala.Cr.App.1983). 'It merely requires that the facts available to the officer would "warrant a man of reasonable caution in the belief" that certain items may be contraband . it does not demand any showing that such a belief be correct or more likely true than false. A "practical, nontechnical" probability that incriminating evidence is involved is all that is required.' Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983) (citations omitted)."

Mewbourn v. State, 570 So.2d 805, 808-09 (Ala.Crim.App.1990). " ' "[P]robable cause does not require certainty of criminal activity, but only probability. First-hand observations of criminal activity by a reliable informant in conjunction with police corroboration of factual details provides just this probability." ' " Harrelson v. State, 897 So.2d 1237, 1241 (Ala.Crim.App.2004), quoting McBride v. State, 492 So.2d 654, 658 (Ala.Crim.App.1986), quoting in turn United States v. Thompson, 751 F.2d 300, 302 (8th Cir.1985).

Initially, we note that on appeal Harris confines his probable-cause argument to those circumstances that occurred before the officers' entry onto his premises. However, he does not challenge on appeal the officers' entry onto his premises, the Terry patdown of his person, the search of his pocket to obtain the key to the Laser, or the use of the drug-sniffing dog.[3] Therefore, he has waived any inquiry into the propriety of those actions, and this Court, in determining whether probable cause existed, can and will consider all of the circumstances within the officers' knowledge at the time of the search, including those circumstances that occurred after the officers' entry onto Harris's premises.

Considering the totality of the circumstances, we conclude that there clearly was probable cause to search Harris's vehicle. Within a few hours of receiving information from a reliable confidential informant that Harris was in possession of a large amount of marijuana, which was located in his white Plymouth Laser

automobile at his residence, Cpl. Ott and Sgt. Nelms conducted surveillance at Harris's residence and confirmed that both vehicles the informant had described as being at the residence were, in fact, parked in front of the residence. During their surveillance, Cpl. Ott and Sgt. Nelms saw Harris come out of his residence, sit in the Laser for a few minutes, and then leave in a Hyundai Sonata that had arrived at the residence. Although a stop of the Sonata did not result in any arrests, within three minutes after the stop, Harris returned and pulled the Laser around the back of his residence. When the officers first approached Harris on his premises and obtained consent from his mother to search the residence, Harris did not appear nervous; however, when Harris discovered that a K-9 unit had been called to sniff the Laser, he became nervous and began calling for his mother. In addition, when asked for the key to the Laser, Harris gave the officers the key to the other vehicle parked at the residence and claimed that he did not have a key to the Laser. Harris, however, had just driven the Laser from the front to the back of the mobile home and the key to the Laser was discovered in Harris's pocket. Finally, when the drug-sniffing dog arrived at the scene and circled the vehicle, it alerted near the rear of the vehicle. These circumstances would warrant a person of reasonable caution to conclude that the Laser contained contraband. Therefore, there was probable cause to search the vehicle.

Automobile Exception

In California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), the United States Supreme Court explained the automobile exception to the warrant requirement as follows:

"The Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.' This fundamental right is preserved by a requirement that searches be conducted pursuant to a warrant issued by an independent judicial officer. There are, of course, exceptions to the general rule that a warrant must be secured before a search is undertaken; one is the so-called 'automobile exception' at issue in this case. This exception to the warrant requirement was first set forth by the Court 60 years ago in Carroll v. United States, 267 U.S. 132 (1925). There, the Court recognized that the privacy interests in an automobile are constitutionally protected; however, it held that the ready mobility of the automobile justifies a lesser degree of protection of those interests. The Court rested this exception on a long-recognized distinction between stationary structures and vehicles:

" '[T]he guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of Government, as recognizing a necessary difference between a search of a store, dwelling house or

other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.' Id., at 153 (emphasis added).

"The capacity to be 'quickly moved' was clearly the basis of the holding in Carroll, and our cases have consistently recognized ready mobility as one of the principal bases of the automobile exception. See, e.g., Cooper v. California, 386 U.S. 58, 59 (1967); Chambers v. Maroney, 399 U.S. 42, 52 (1970); Cady v. Dombrowski, 413 U.S. 433, 442 (1973); Cardwell v. Lewis, 417 U.S. 583, 588 (1974); South Dakota v. Opperman, 428 U.S. 364, 367 (1976). In Chambers, for example, commenting on the rationale for the vehicle exception, we noted that 'the opportunity to search is fleeting since a car is readily movable.' 399 U.S., at 51. More recently, in United States v. Ross, 456 U.S. 798, 806 (1982), we once again emphasized that 'an immediate intrusion is necessary' because of 'the nature of an automobile in transit.' The mobility of automobiles, we have observed, 'creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.' South Dakota v. Opperman, supra, at 367.

"However, although ready mobility alone was perhaps the original justification for the vehicle exception, our later cases have made clear that ready mobility is not the only basis for the exception. The reasons for the vehicle exception, we have said, are twofold. 428 U.S., at 367. 'Besides the element of mobility, less rigorous warrant requirements govern because the expectation of privacy with respect to one's automobile is significantly less than that relating to one's home or office.' Ibid.

"Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception. See, e.g., Cady v. Dombrowski, supra. In some cases, the configuration of the vehicle contributed to the lower expectations of privacy; for example, we held in Cardwell v. Lewis, supra, at 590, that, because the passenger compartment of a standard automobile is relatively open to plain view, there are lesser expectations of privacy. But even when enclosed 'repository' areas have been involved, we have concluded that the lesser expectations of privacy warrant application of the exception. We have applied the exception in the context of a locked car trunk, Cady v. Dombrowski, supra, a sealed package in a car trunk, Ross, supra, a closed compartment under the dashboard, Chambers v. Maroney, supra, the interior of a vehicle's upholstery, Carroll, supra, or sealed packages inside a covered pickup truck, United States v. Johns, 469 U.S. 478 (1985).

"These reduced expectations of privacy derive not from the fact that the area to be searched is in plain view, but from the pervasive regulation of vehicles capable of traveling on the public highways. Cady v. Dombrowski, supra, at 440-441. As we explained in South Dakota v. Opperman, an inventory search case:

" 'Automobiles, unlike homes, are subjected to pervasive and continuing governmental regulation and controls, including periodic inspection and licensing requirements. As an everyday occurrence, police stop and examine vehicles when license plates or inspection stickers have expired, or if other violations, such as exhaust fumes or excessive noise, are noted, or if headlights or other safety equipment are not in proper working order.' 428 U.S., at 368.

"The public is fully aware that it is accorded less privacy in its automobiles because of this compelling governmental need for regulation. Historically, 'individuals always [have] been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.' Ross, supra, at 806, n. 8. In short, the pervasive schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.

"When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes-temporary or otherwise-the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling. At least in these circumstances, the overriding societal interests in effective law enforcement justify an immediate search before the vehicle and its occupants become unavailable."

471 U.S. at 390-93, 105 S.Ct. 2066 (footnote omitted). No additional exigent circumstances are required for the warrantless search of a vehicle; probable cause alone is sufficient to bring a search within the automobile exception. See Pennsylvania v. Labron, 518 U.S. 938, 940, 116 S.Ct. 2485, 135 L.Ed.2d 1031 (1996), wherein the United States Supreme Court upheld the warrantless search of a vehicle parked in the driveway of a farmhouse, and stated that "[i]f a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more." See also Maryland v. Dyson, 527 U.S. 465, 466-67, 119 S.Ct. 2013, 144 L.Ed.2d 442 (1999), wherein the United States Supreme Court, reaffirming its holding in Labron, stated:

"The Fourth Amendment generally requires police to secure a warrant before conducting a search. California v. Carney, 471 U.S. 386, 390-391 (1985). As we recognized nearly 75 years ago in Carroll v. United States, 267 U.S. 132, 153 (1925), there is an exception to this requirement for searches of vehicles. And under our established precedent, the 'automobile exception' has no separate exigency requirement. We made this clear in United States v. Ross, 456 U.S. 798, 809 (1982), when we said that in cases where there was probable cause to search a vehicle 'a search is not unreasonable if based on facts that would justify the issuance of a warrant, even though a warrant has not been actually obtained.' (Emphasis added.) In a case with virtually identical facts to this one (even down to the bag of cocaine in the trunk of the car), Pennsylvania v. Labron, 518 U.S. 938 (1996) (per curiam), we repeated that the automobile exception does not have a separate exigency requirement: 'If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . permits police to search the vehicle without more.' Id., at 940.

"In this case, the Court of Special Appeals found that there was 'abundant probable cause' that the car contained contraband. This finding alone satisfies the automobile exception to the Fourth Amendment's warrant requirement, a conclusion correctly reached by the trial court when it denied respondent's motion to suppress. The holding of the Court of Special Appeals that the 'automobile exception' requires a separate finding of exigency in addition to a finding of probable cause is squarely contrary to our holdings in Ross and Labron. We therefore grant the petition for writ of certiorari and reverse the judgment of the Court of Special Appeals."

In arguing that the automobile exception to the warrant requirement does not apply to a vehicle parked on private property, Harris principally relies on the last paragraph in Carney quoted above, specifically, the following statement: "When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes-temporary or otherwise-the two justifications for the vehicle exception come into play." 471 U.S. at 392-93, 105 S.Ct. 2066 (footnote omitted; emphasis added). However, Harris's reliance on this single sentence is misplaced.

As the South Carolina Supreme Court explained in State v. Cox, 290 S.C. 489, 351 S.E.2d 570 (1986):

"In a plurality opinion the Court [of Appeals of South Carolina] held the 'automobile exception' to the warrant requirement was not applicable because Cox's car was found at his residence. The Court, relying upon California v. Carney, 471 U.S. 386, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), concluded that 'an automobile found parked at a

person's home is protected from warrantless searches.' 287 S.C. [260,] 264, 335 S.E.2d [809,] 811 [(Ct.App.1985)].

"We disagree.

"The automobile exception was first articulated in Carroll v. United States, 267 U.S. 132, 45 S.Ct. 280, 69 L.Ed. 543 (1925). Since Carroll, the doctrine has been applied on a case-by-case basis to various sets of facts. See generally cases cited in Annot., 66 L.Ed.2d 882, Validity of Warrantless Search of Motor Vehicles.

"The two bases for the exception are: (1) the ready mobility of automobiles and the potential that evidence may be lost before a warrant is obtained; and (2) the lessened expectation of privacy in motor vehicles which are subject to governmental regulation.

"The source of the Court of Appeals' ruling is the following language from Carney:

" 'When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes-temporary or otherwise-the two justifications for the vehicle exception come into play.' [Emphasis supplied].

"471 U.S. at 392, 105 S.Ct. at 2070, 85 L.Ed.2d at 414.

"The plurality interpreted this to mean that the automobile exception does not apply to any vehicle parked at a residence. However, Carney dealt with a motor home, or camper vehicle. Even though the language cited above may appear to apply to all motor vehicles, a close reading, in context, makes it clear that the Court was addressing only the inapplicability of the exception as to motor homes set up on a site and used as a residence. In the same paragraph from which the above sentence is cited, the Carney Court states 'there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulations inapplicable to a fixed dwelling.' [Emphasis supplied]. 471 U.S. at 393, 105 S.Ct. at 2070, 85 L.Ed.2d at 414. The emphasized pronoun 'its' in this sentence clearly refers to a motor home.

"No prior Supreme Court cases have recognized a distinction between vehicles parked in public and private places. Indeed, such a distinction would not harmonize with the Court's reasoning in automobile search cases.

"The Carney Court makes clear that under the automobile exception, probable cause alone is sufficient to justify a warrantless search. As the Court stated, 'the pervasive

schemes of regulation, which necessarily lead to reduced expectations of privacy, and the exigencies attendant to ready mobility justify searches [of vehicles] without prior recourse to the authority of a magistrate so long as the overriding standard of probable cause is met.' [Emphasis supplied]. 471 U.S. at 392, 105 S.Ct. at 2070, 85 L.Ed.2d at 414. That is, the inherent mobility of automobiles provides the requisite exigency."

290 S.C. at 491-92, 351 S.E.2d at 571-72. We agree. Carney involved the warrantless search of a motor home, readily capable of use either as a home or as a vehicle. In upholding the warrantless search under the automobile exception to the warrant requirement, the United States Supreme Court relied in part on the location of the motor home-in a parking lot in downtown San Diego-in concluding that the motor home was "so situated that an objective observer would conclude that it was being used not as a residence, but as a vehicle." Carney, 471 U.S. at 393, 105 S.Ct. 2066. Indeed, the Court pointed out that it "need not pass on the application of the vehicle exception to a motor home that is situated in a way or place that objectively indicates that it is being used as a residence." 471 U.S. at 394 n. 3, 105 S.Ct. 2066. Thus, the Court's statement in Carney that the automobile exception applies when a vehicle is found "in a place not regularly used for residential purposes," 471 U.S. at 392, 105 S.Ct. 2066, was a reference to the limitation of the automobile exception to motor homes (or other objects that are equally capable of use as either a home or a vehicle) that are situated in such a place and in such a manner as to indicate their use as vehicles rather than homes.

Other courts have similarly construed this language in Carney. In United States v. Brookins, 345 F.3d 231 (4th Cir.2003), the United States Court of Appeals for the Fourth Circuit stated:

"On appeal, Brookins proposes an interpretation of the 'automobile exception,' which he grounds largely in Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971).[4] In Coolidge, the Supreme Court, by the opinion of a four-justice plurality, declined to apply Carroll [v. United States, 267 U.S. 132 (1925),] under circumstances evincing no exigency whatsoever. Specifically, the defendant's automobile was parked in his own driveway and contained no contraband. Additionally, the police had developed probable cause well in advance of the warrantless search. Brookins maintains that Coolidge represents the sole Supreme Court decision to address 'head-on' the warrantless search of an automobile at a private residence. Based upon the facts of Coolidge, Brookins would posit a bright-line rule, whereby the automobile exception may never apply when a vehicle is stationed on private, residential property.8

"Brookins seeks additional support for this theory in California v. Carney, 471 U.S. 386, 390, 105 S.Ct. 2066, 85 L.Ed.2d 406 (1985), where the Supreme Court held that a mobile home, on the facts presented, was more characteristic of an automobile than a fixed residence. The Court did look to the nature of the location where the vehicle was discovered, but only to ascertain whether the vehicle itself was, in an ontological sense, in use as a 'movable vessel' or as a fixed residence. Hence, the Court's reference to a 'place not regularly used for residential purposes,' Carney, 471 U.S. at 392, 105 S.Ct. 2066-from which the police would be less likely to infer that the object was residential in nature-served as a guidepost to determine, ab initio, whether the object encountered was a vehicle or a residence. After considering these circumstances, the Court concluded that the warrantless search of the mobile home was covered by the 'automobile exception.' Id. at 394, 105 S.Ct. 2066. Brookins' invocation of Carney to buttress his reading of Coolidge as generating a bright-line approach to the application of the 'automobile exception' is therefore flawed. The Supreme Court has expressly held that the 'automobile exception' is applicable '[i]f a car is readily mobile and probable cause exists to believe it contains contraband.' [Maryland v.] Dyson, 527 U.S. [465,] 466, 119 S.Ct. 2013 [(1999)] (internal quotation and citation omitted).

"In light of the Supreme Court's holding in Dyson, we find the 'automobile exception' applicable to the case before us. First, the motor vehicle at issue was clearly operational and therefore 'readily movable.' Second, as discussed in greater detail above, the police officers had probable cause to conclude that there was contraband in the vehicle, as the party responsible for the vehicle's flight, Brookins' wife, was present on the scene at her mother's home. Given these facts, the warrantless search of Brookins' vehicle by law enforcement officers did not violate his Fourth Amendment rights.

"

"8We decline to adopt this construction of Coolidge. Nor do we find it necessary to determine the contours of the expectation of privacy in and around one's private property. Although heightened privacy interests may be triggered when a vehicle is encountered on private property, the Coolidge plurality opinion cannot be fairly read to create a bright-line rule precluding warrantless searches on private property under all circumstances."

345 F.3d at 237-38. Similarly, in State v. Marquardt, 247 Wis.2d 765, 635 N.W.2d 188 (Ct.App.2001), the Wisconsin Court of Appeals noted:

"Despite the 'public place' language that appears in [various Wisconsin] cases, we conclude that the automobile exception is nonetheless applicable to Marquardt. The

genesis of the language was [California v.] Carney, [471 U.S. 386 (1985),] which involved the search of a fully mobile motor home located in a public place. See Carney, 471 U.S. at 387, 105 S.Ct. 2066. United States Supreme Court cases subsequent to Carney have not recognized a public place requirement for the automobile exception. See, e.g., [Maryland v.] Dyson, 527 U.S. [465,] 467, 119 S.Ct. 2013 [(1999)]. Thus, to the extent that Carney ever intended to impose a public place requirement, it is no longer applicable."

247 Wis.2d at 790, 635 N.W.2d at 200. See also United States v. Fladten, 230 F.3d 1083 (8th Cir.2000); United States v. Markham, 844 F.2d 366 (6th Cir.1988); United States v. Moscatiello, 771 F.2d 589 (1st Cir.1985), vacated on other grounds sub nom. Carter v. United States, 476 U.S. 1138, 106 S.Ct. 2241, 90 L.Ed.2d 688 (1986); United States v. Hamilton, 792 F.2d 837 (9th Cir.1986); People v. Garvin, 235 Mich.App. 90, 597 N.W.2d 194 (1999); and Commonwealth v. A Juvenile (No. 2), 411 Mass. 157, 580 N.E.2d 1014 (1991) (all upholding warrantless searches of vehicles parked on private property).

There appears to be a consensus among other jurisdictions that the language in Carney does not indicate a per se rule precluding application of the automobile exception to vehicles parked on private property, but there also appears to be a split among jurisdictions as to whether Carney requires the presence of exigent circumstances, beyond the ready mobility of vehicles, before the automobile exception is applicable to a vehicle parked on private property. See, e.g., United States v. Shepherd, 714 F.2d 316, 319-20 (4th Cir.1983) ("[T]he danger posed by the inherent mobility of an automobile must outweigh whatever enhanced privacy interest exists when the car is parked at home if it appears the car is about to take flight."); State v. Lejeune, 276 Ga. 179, 183, 576 S.E.2d 888, 893 (2003) (holding "that the automobile exception does not apply where . the suspect's car was legally parked in his residential parking space [and] the suspect and his only alleged cohort were not in the vehicle or near it and did not have access to it"), and State v. Roaden, 98 Ohio App.3d 500, 504, 648 N.E.2d 916, 919 (1994) ("[A]bsent exigent circumstances, the automobile exception does not apply to the warrantless search or seizure of an automobile from the driveway of a private residence.").[5] In United States v. Reis, 906 F.2d 284 (7th Cir.1990), the United States Court of Appeals for the Seventh Circuit explained:

"The automobile exception allows vehicles that are being used on the highway or are readily capable of such use to be searched without a warrant 'so long as the overriding standard of probable cause is met.' California v. Carney, 471 U.S. 386, 392, 105 S.Ct. 2066, 2070, 85 L.Ed.2d 406, 414 (1985). The reasons underlying the exception are twofold: The reduced expectation of privacy an individual has in a car, and the 'exigencies attendant to ready mobility' of the vehicle combine to create a situation

justifying a search without taking the time to obtain the prior approval of a magistrate. Id., 471 U.S. at 392-93, 105 S.Ct. at [2070], 85 L.Ed.2d at 414; United States v. Rivera, 825 F.2d 152, 158 (7th Cir.), cert. denied, 484 U.S. 979, 108 S.Ct. 494, 98 L.Ed.2d 492 (1987).

"Reis, however, points out that the Supreme Court stated in Carney that the automobile exception is applicable '[w]hen a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes.' California v. Carney, 471 U.S. at 392, 105 S.Ct. at 2070, 85 L.Ed.2d at 414 (emphasis added). Reis argues that because his car was in a place that is regularly used for residential purposes [parked in the street in front of his residence], the above-quoted language from Carney renders the automobile exception inapplicable, unless exigent circumstances can be shown to exist.

"Reis misconstrues the meaning of Carney. In that case, the Supreme Court was faced with the issue of whether a mobile home comes within the automobile exception, and the Court looked to the location where the vehicle was parked solely for the purpose of determining whether the mobile home was being used more like an automobile (so that it would come within the exception) or more like a residence (so that a heightened expectation of privacy would exist, necessitating either a warrant or the existence of exigent circumstances before a search properly could be carried out). Carney does not establish a requirement that additional exigent circumstances be present merely because an automobile is parked at a residence.

"Indeed, this circuit and others have, either expressly or implicitly, construed Carney as recognizing that the inherent mobility of automobiles by itself provides the only exigent circumstance needed, so that as long as probable cause exists to search an automobile, that automobile may be searched without a warrant. See e.g., United States v. Paulino, 850 F.2d 93, 96 (2d Cir.1988), cert. denied, [490] U.S. [1052], 109 S.Ct. 1967, 104 L.Ed.2d 435 (1989); United States v. Markham, 844 F.2d 366, 369 (6th Cir.1988); United States v. Rivera, 825 F.2d [152,] 158 [(7th Cir.1987)]; Autoworld [Specialty] Cars, Inc. v. United States, 815 F.2d 385, 389 (6th Cir.1987); United States v. Bagley, 772 F.2d 482, 490-91 (9th Cir.1985), cert. denied, 475 U.S. 1023, 106 S.Ct. 1215, 89 L.Ed.2d 326 (1986). Even in circuits which construe Carney as imposing a requirement that additional exigent circumstances be demonstrated before the automobile exception is applicable, see, e.g., United States v. Alexander, 835 F.2d 1406, 1409-10 (11th Cir.1988); United States v. Hepperle, 810 F.2d 836, 840 (8th Cir.), cert. denied, 483 U.S. 1025, 107 S.Ct. 3274, 97 L.Ed.2d 772 (1987), circumstances such as those found in this case-the car parked outside the arrestee's residence, with the possibility of either the registered owner or family members of the arrestee removing the car or destroying evidence in the car before a warrant could be obtained-have been found to constitute exigent circumstances

sufficient to activate the automobile exception. See, e.g., United States v. Alexander, 835 F.2d at 1410. Furthermore, the fact that the detectives could have obtained a warrant in the hours between the initial encounter on the freeway and the arrest, but did not, does not change this analysis. 'Clearly, the Carney majority . did not contemplate that an agent's inability to obtain a search warrant be a prerequisite to the application to the automobile exception.' United States v. Markham, 844 F.2d at 369."

906 F.2d at 290-91.

We have found no cases by either this Court or the Alabama Supreme Court squarely addressing this issue; however, this Court has touched on the issue in two cases. In Robinette v. State, 531 So.2d 682 (Ala.Crim.App.1987), rev'd on other grounds, 531 So.2d 697 (Ala.1988), this Court upheld the search of a vehicle parked in the yard of a residence at which law-enforcement officers had executed a search warrant. This Court held that the search was within the scope of the warrant, but, in the alternative, stated that the search also fell within the automobile exception to the warrant requirement. In analyzing the automobile exception, this Court noted:

"Most of the cited cases deal with vehicles located on public highways and in parking lots. In the instant case, the vehicle in question was parked on private property; it was parked within the curtilage of the Hatcher residence. The courts have recognized that a car traveling on a public highway is afforded less privacy than the home, but that one's expectation of privacy in a vehicle is enhanced when the car is nestled in the driveway. Coolidge v. New Hampshire, [403 U.S. 443 (1971)]; Cardwell v. Lewis, 417 U.S. 583, 94 S.Ct. 2464, 41 L.Ed.2d 325 (1974); United States v. Shepherd, 714 F.2d 316 (4th Cir.1983), cert. denied, 466 U.S. 938, 104 S.Ct. 1914, 80 L.Ed.2d 462 (1984). We find in 3 W. LaFave, [Search and Seizure] § 7.2(b) (2d ed.1987), the following:

" 'To the extent that the vehicle search cases continue to emphasize the existence of such [exigent] circumstances, they may have somewhat greater legitimacy. It is well to stress once again, however, that these cases generally utilize a very loose and uncritical type of exigent circumstances inquiry, quite different from that which would be employed if the warrantless search were of premises. In this sense, then, these decisions are unquestionably relying also upon the notion that vehicles carry with them a lesser expectation of privacy. (This means that genuine exigent circumstances must exist when the car can be searched only by first intruding inside private premises to gain access to the vehicle, for the lesser expectation of privacy does not also extend to premises housing a vehicle.)' (Footnote omitted, emphasis added [in Robinette].)

"Accordingly, out of abundance of caution, we have reviewed the circumstances of the instant search for the existence of exigent circumstances and conclude that the search of Robinette's vehicle, following his activities in the house leading to his arrest, was based on probable cause and exigent circumstances and, thus, did not violate the Fourth Amendment guarantees against unreasonable searches."

531 So.2d at 692-93. This Court did not specifically hold in Robinette that additional exigent circumstances were required before the automobile exception could be applied to vehicles parked on private property, but merely noted "out of [an] abundance of caution" that there were exigent circumstances present. 531 So.2d at 693.

In Stanfield v. State, 529 So.2d 1053 (Ala.Crim.App.1988), this Court upheld the search of a vehicle parked in a public parking space at an apartment complex where law-enforcement officers had executed a search warrant for one of the apartments. After concluding that the search was valid under the automobile exception to the warrant requirement absent any additional exigent circumstances, we noted:

"Upon this authority, we hold, generally, a vehicle may be searched on probable cause without a warrant and without a demonstration of any exigent circumstances other than its own inherent or ready mobility. The exception to this general rule applies when the vehicle is located on premises where the defendant has a legitimate expectation of privacy, see Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971); Robinette v. State, [531 So.2d 682 (Ala.Crim.App.1987), rev'd on other grounds, 531 So.2d 697 (Ala.1988)]."

529 So.2d at 1060. This statement, however, was merely dicta because the vehicle in that case was not on private property.

We agree with those jurisdictions cited above that have held that the automobile exception applies to vehicles located on private property without any additional exigency requirement. This view appears to be more in line with the underlying rationales for the automobile exception-the ready mobility and pervasive regulation of vehicles-and with the more recent pronouncements on the exception by the United States Supreme Court. The location of the vehicle does not change the inherent mobility and regulation of a vehicle. And in Labron, supra, the United States Supreme Court reversed the Pennsylvania Supreme Court's holding that the warrantless search of a vehicle parked in the driveway of a farmhouse was invalid under the automobile exception to the warrant requirement absent additional exigent circumstances on the ground that the holding "rest[ed] on an incorrect reading of the automobile exception to the Fourth Amendment's warrant requirement." 518 U.S. at 939, 116 S.Ct. 2485. Although the location of the vehicle does not appear to have

been a specific issue in the case, it is nevertheless instructive that the Supreme Court held that the search was valid based on probable cause alone and absent any additional exigent circumstances. Therefore, to the extent that Robinette and Stanfield imply that the automobile exception to the warrant requirement does not apply to vehicles parked on private property without any additional exigent circumstances, they are hereby overruled.

Conclusion

In this case, there was probable cause to search Harris's vehicle, and the search of the vehicle was valid under the automobile exception to the warrant requirement without more. Therefore, the trial court properly denied Harris's motion to suppress.

Based on the foregoing, the judgment of the trial court is affirmed.

AFFIRMED.

FOOTNOTES

1. This Court may consider both the evidence at the suppression hearing and at trial in determining whether the denial of a motion to suppress was proper. See, e.g., Ex parte Price, 725 So.2d 1063 (Ala.1998).

2. Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

3. In his brief, Harris makes the following statement: "When Harris returned to his home [after the traffic stop of the Hyundai Sonata], the officers intruded without probable cause upon Harris's premises. [The] officers intruded not with knowledge of a crime in progress, but upon a suspicion, to simply determine if a resident engaged in a crime." (Harris's brief at p. 15.) To the extent that Harris intended this single sentence to be a challenge to the officers' entry onto his premises, it fails to comply with Rule 28(a)(10), Ala.R.App.P., and, thus, is deemed to be waived.

4. Although not cited in his brief on appeal, Harris relied in large part on Coolidge v. New Hampshire, 403 U.S. 443, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971), in arguing his motion to suppress in the trial court.

5. We note that, except for the Georgia case, these cases were decided before the United States Supreme Court's specific disavowance of any separate exigency requirement for the automobile exception in Dyson and Labron, supra. Therefore, it is unclear whether those courts would continue to hold that additional exigent circumstances are necessary when a vehicle is parked on private property.

SHAW, Judge.

McMILLAN, P.J., and COBB, BASCHAB, and WISE, JJ., concur.

PUBLISHED

COURT OF APPEALS OF VIRGINIA

Present: Judges Beales, Chafin and O'Brien
Argued at Norfolk, Virginia

ROBERT LEE McLAUGHLIN, JR.

v. Record No. 1187-14-1

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE RANDOLPH A. BEALES
NOVEMBER 17, 2015

FROM THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH
Leslie L. Lilley, Judge[1]

Aleasa D. Leonard, Senior Assistant Public Defender, for appellant.

Steven A. Witmer, Senior Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Robert L. McLaughlin, Jr. (appellant) was convicted of one count of felony possession of a firearm by a convicted felon in violation of Code § 18.2-308.2. Appellant argues on appeal that the trial court erred when it denied appellant's motion to suppress the evidence because the probation officer had no authority to enter appellant's house or bedroom – and was otherwise not in a position to lawfully see the gun. For the reasons below, we affirm the ruling of the trial court.

I. BACKGROUND

We consider the evidence on appeal "'in the light most favorable to the Commonwealth as we must since it was the prevailing party'" in the trial court. Beasley v. Commonwealth, 60 Va. App. 381, 391, 728 S.E.2d 499, 504 (2012) (quoting Riner v. Commonwealth, 268 Va. 296, 330, 601 S.E.2d 555, 574 (2004)). On October 22, 2013, prior to his trial for possession of a

[1] The Honorable H. Thomas Padrick, Jr. presided over and ruled on appellant's suppression motion that is the subject of appellant's assignment of error.

firearm by a convicted felon, appellant moved to suppress evidence obtained pursuant to a probation transfer investigation conducted by his probation officer.

In April 2012, appellant was put on supervised probation in Virginia Beach – soon after his release from incarceration for a previous offense. Appellant executed a document with the Virginia Beach Adult Probation intake workers, which in relevant part states, "I will permit the Probation and Parole Officer to visit my home and place of employment." The probation officer testified that it was office procedure to provide this document to a new probationer – and for someone in the office to review the document with the probationer. At some point during his probationary term, appellant moved to Norfolk, and his supervision was transferred to Norfolk Adult Probation. Appellant's Norfolk probation officer went to visit appellant's reported location, and found that it was an invalid address. Appellant called his Norfolk probation officer on October 31, 2012 and told her that he and his sister were living in a trailer located in Virginia Beach. Appellant's supervision was then transferred back to Virginia Beach Adult Probation.

On November 8, 2012, a Virginia Beach probation officer, Tiffany Franklin (Officer Franklin),[2] accompanied by a surveillance officer, went to appellant's reported address in Virginia Beach to conduct a transfer investigation. Prior to conducting this visit, Officer Franklin had never met appellant. She described the transfer investigation in the following manner:

> We go out to the home, view the home. If we can, speak with the person or speak with someone who is at the residence to verify that that person does, in fact, reside there. Usually it entails going in, viewing the home, making sure that they are really there, not just receiving mail like a lot of folks. . . . I had one where it was an empty lot that I went out to; so that's why I'm asking.

[2] The Commonwealth stipulated at the suppression hearing that Officer Franklin was acting as a law enforcement officer during the home visit ("We concede that Ms. Franklin was acting as an agent of the Commonwealth as a probation officer that day.").

When Officer Franklin arrived, an adult female, Alicia Young-Sanchez (Young), answered the door and confirmed to Officer Franklin that appellant lived there, but stated that he was at work at the time. Young allowed the probation officer inside the trailer, identifying herself as Alicia. Officer Franklin noted that Young had two guests visiting inside the trailer with her—another woman and a child. Officer Franklin noticed that the two women were "kind of hanging out," chatting, and having a drink. Officer Franklin did not observe any luggage belonging to Young, or any other indicators that she was only an overnight guest. Instead, Officer Franklin said, "To my understanding I have written in my notes that [Young] was the homeowner . . . ." Appellant's landlord testified at the suppression hearing that Young was not on the official lease although this information was not available to Officer Franklin at the time she conducted her transfer investigation. Appellant put on no other evidence to rebut the assertion that Young lived at the residence. The trial court found that Young lived in the trailer, could enter and leave as she pleased, and could have guests over.

Before Officer Franklin went through the front door into the home's main room, she asked Young if she could view appellant's bedroom and stated that Young assented. As Officer Franklin testified, "I asked to view his bedroom. She [Young] said that was fine." Young went across the room and opened the door to the bedroom. Upon opening the door and going into the bedroom, Young reacted in surprise. Officer Franklin came up and looked past her into the bedroom, and saw someone she later identified as appellant asleep in the bed. Young then went over and awakened appellant. Officer Franklin testified that, as appellant awakened, he glanced at the stand beside his bed, which caught her attention. She then looked as well, and saw an open beer, a pistol handgun, a pair of jeans, and a baseball cap lying on the stand. At no point did appellant or Young tell Officer Franklin to leave the room. Appellant told Officer Franklin that

the beer, jeans, and the hat were his and that his prints might be on the gun, but that the gun was not his.

On December 18, 2013, after allowing both parties time to brief the issue, the trial court found:

> The court, weighing the evidence that was presented, indicated that Ms. Snachez[sic] Young lived in the trailer, that she could enter and leave as she pleased, she could have guests over, and that she had the authority to enter the defendant's room. From the evidence, it appears, and the court finds, that it was reasonable for Ms. Franklin to believe that she had authority to consent to the search.

II. ANALYSIS

Standard of Review

"Since the constitutionality of a search and seizure under the Fourth Amendment involves questions of law and fact, we give deference to the factual findings of the trial court but independently decide whether, under the applicable law, the manner in which the challenged evidence was obtained satisfies constitutional requirements." Jackson v. Commonwealth, 267 Va. 666, 672-73, 594 S.E.2d 595, 598 (2004) (citing McCain v. Commonwealth, 261 Va. 483, 490, 545 S.E.2d 541, 545 (2001)).

General Fourth Amendment Principles

The Fourth Amendment protects individuals from unreasonable searches and seizures in their home. "[A] search and seizure conducted without a warrant issued upon probable cause is *per se* unreasonable." Crosby v. Commonwealth, 6 Va. App. 193, 197, 367 S.E.2d 730, 733 (1988). However, it will not be unreasonable when law enforcement officers perform a search based on consent. Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973). In fact, the Supreme Court has stated,

> In a society based on law, the concept of agreement and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding.

United States v. Drayton, 536 U.S. 194, 207 (2002).

Consent may be obtained either from the individual whose property is being searched or from a third party with common authority over the premises. Jones v. Commonwealth, 16 Va. App. 725, 727, 432 S.E.2d 517, 518-19 (1990). The standard for determining whether a third party has actual authority to consent is the following:

> The authority which justifies the third-party consent . . . rests . . . on mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the co-inhabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched.

United States v. Matlock, 415 U.S. 164, 171 n.7 (1974).

"[E]ven if that party does not have actual authority to consent, apparent authority may be sufficient [to justify a search without a warrant] if the facts surrounding the situation would have led a reasonable officer to conclude that the person providing consent had the requisite authority." Jones, 16 Va. App. at 727-28, 432 S.E.2d at 519 (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)). Said another way, "[w]hether apparent authority exists is an objective, totality-of-the-circumstances inquiry into whether the facts available to the officers at the time they commenced the search would lead a reasonable officer to believe the third party had authority to consent to the search." Glenn v. Commonwealth, 275 Va. 123, 132-33, 654 S.E.2d 910, 914-15 (2008) (quoting United States v. Andrus, 483 F.3d 711, 716-17 (10th Cir. 2007)).

Young's Apparent Authority to Consent to Entry Into the House

Courts have long since recognized that "'[i]nherent in the very nature of probation is that probationers "do not enjoy the absolute liberty to which every citizen is entitled,"' 'but only . . . conditional liberty properly dependent on observance of special [probation conditions].'" Murry v. Commonwealth, 288 Va. 117, 123-24, 762 S.E.2d 573, 577 (2014) (first quoting United States v. Knights, 534 U.S. 112, 119 (2001); and then quoting Morrissey v. Brewer, 408 U.S. 471, 480 (1972)) (bracketed phrase in original quote). In this case, appellant signed a probation condition allowing probation officers to engage in "home visits." Officer Franklin had already received this signed condition when she went to visit appellant. While the Supreme Court of Virginia has not articulated exactly what a "home visit" does encompass, it has found that a home visit without more specificity does not operate as a full Fourth Amendment waiver. Megel v. Commonwealth, 262 Va. 531, 536, 551 S.E.2d 638, 641 (2001). Thus, when Officer Franklin arrived at appellant's residence, the following evidence was available to her: (1) appellant provided a home address in Virginia Beach to his probation officer and told his Norfolk officer that he and his sister were living at that address; (2) appellant signed a provision allowing probation officers to visit;[3] (3) when Officer Franklin went to that residence, Young was an adult female who answered the door; (4) Young had guests visiting her; (5) Young appeared to be living there; and (6) Young allowed Officer Franklin into the house. All this evidence is such that a reasonable officer in Officer Franklin's position would have thought that Young had actual authority to allow her into the house. As such, we find that Young had apparent authority to allow Officer Franklin into the house.

[3] This provision seems to grant the probation officer actual authority to visit and at least enter the home.

Young's Apparent Authority to Consent to Entry Into the Bedroom

In Glenn v. Commonwealth, the Supreme Court of Virginia found that a grandfather had apparent authority to consent to search a backpack within a bedroom in the grandfather's home, despite the fact that his grandson had been using the bedroom. Glenn, 275 Va. 123, 654 S.E.2d 910. The issue for the Court to consider was the following: "As the search of the fixed premises, the home, was proper, the issue before us is narrowed to whether there was a constitutionally valid consent for the search of a closed container within that house . . . ." Id. at 131, 654 S.E.2d at 914. In Glenn, the grandfather (who owned the home) allowed the police into his house and allowed the police to search it. Id. at 128, 654 S.E.2d at 912. Two bedrooms in the home were searched, and, in the second bedroom, the police found and searched a closed, unmarked backpack. Id. Appellant argued on appeal that the police did not have apparent authority to search the backpack as a matter of law, because the police did not know whether the backpack belonged to appellant or the grandfather, but they did know that the bedroom was where appellant had been staying. Id. at 132, 654 S.E.2d at 914. Appellant was present during the police search, and did not make any objections at the time of the search. Id. at 128, 654 S.E.2d at 912.

Ultimately, the Supreme Court of Virginia held, "The facts available to the officers at the time of the search of [the grandfather's] house were sufficient to lead an objectively reasonable police officer to believe that [the grandfather] had authority to consent to a search of the backpack." Id. at 137-38, 654 S.E.2d at 917. Thus, in Glenn, the Court did not question the grandfather's actual authority to consent to a search. The Court, in evaluating whether the grandfather had authority over a room in which he was not sleeping, looked to the grandfather's assertion that the home belonged to him as a way of showing a sufficient connection to the bedroom, even though the grandfather himself was not sleeping in that bedroom. Similarly here,

the trial court found that Young lived in the house, and she could have guests over as well as come and go as she pleased.

Appellant contends that, because Young was not on the lease, Young did not have actual or apparent authority over the premises. However, as the United States Supreme Court has noted, "The authority which justifies the third-party consent does not rest upon the law of property, . . . but rests rather on mutual use of the property by persons generally having joint access or control for most purposes . . . ." Matlock, 415 U.S. at 172; see also Georgia v. Randolph, 547 U.S. 103 (2006). Considering this principle in conjunction with the decision in Glenn, it is clear that ownership is not dispositive. An individual can have control and access to the premises without having a property interest in the house. As a practical matter, a probation officer cannot always be required to determine who is on a lease in every probation transfer investigation, as appellant's counsel acknowledged at oral argument. Nor can a probation officer cross-examine every individual she comes across in a transfer investigation to ensure that appearances mirror reality.

Therefore, based on the trial court's findings of fact that Young could come and go as she pleased, "that she had the authority to enter the defendant's bedroom,"[4] and could have guests over to the home – findings supported by the evidence in the record, we conclude that Young had a sufficient relationship to the premises to justify a reasonable person in Officer Franklin's position in forming the opinion that Young had authority to take her into appellant's bedroom.

[4] The trial court found, "[Young] had the authority to enter the defendant's room." This statement was not a legal conclusion, but, based on the context in which the trial court said it, a factual finding regarding Young's use of the premises.

The Gun's Position in Plain View in the Bedroom

Once in the bedroom, Officer Franklin saw the gun sitting out on top of a bedside table.[5]

> The rationale of the plain-view doctrine is that if contraband is left in open view and is observed by a police officer from a lawful vantage point, there has been no invasion of a legitimate expectation of privacy and thus no "search" within the meaning of the Fourth Amendment – or at least no search independent of the initial intrusion that gave the officers their vantage point.

Minnesota v. Dickerson, 508 U.S. 366, 375 (1993). "An officer may seize an item in plain view if the officer is lawfully in a position to see the item and it is 'immediately apparent that the item may be evidence of a crime.'" Commonwealth v. Ramey, 19 Va. App. 300, 303, 450 S.E.2d 775, 777 (1994) (quoting Carson v. Commonwealth, 12 Va. App. 497, 501, 404 S.E.2d 919, 921 (1991)). Thus, because a person with apparent authority admitted the probation officer to the house and the bedroom, the probation officer was lawfully in a position to observe the gun.[6] Because the gun was in plain view in the bedroom, it was immediately apparent that the gun could be evidence of possession of a firearm by a convicted felon. Therefore, the trial court was correct in denying the motion to suppress.

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[5] Appellant has not argued in the trial court or on appeal that there was ever revocation of consent.

[6] This Court notes that there are three separate grounds for denying appellant the suppression remedy he seeks: (1) The trial court found that Young lived in the trailer, could enter and leave as she pleased, and could have guests over. Consent may be obtained either from the individual whose property is being searched or from a third party with common authority over the premises. Jones, 16 Va. App. at 727, 432 S.E.2d at 518-19. (2) "Apparent authority may be sufficient [to justify a search without a warrant] if the facts surrounding the situation would have led a reasonable officer to conclude that the person providing consent had the requisite authority." Id. at 727-28, 432 S.E.2d at 519 (citing Illinois v. Rodriguez, 497 U.S. 177, 181 (1990)). (3) As the United States Supreme Court has repeatedly emphasized, suppression of the evidence is a "last resort." Hudson v. Michigan, 547 U.S. 586, 591 (2006). See also Davis v. United States, 131 S. Ct. 2419 (2011); Herring v. United States, 555 U.S. 135 (2009). Thus, even if this evidence had been gathered in violation of the Fourth Amendment, it would not be suppressed here because the trial court below made a factual finding that the probation officer's actions were "for lack of a better term, innocent." Suppressing the evidence here would not serve the larger purpose of deterring unlawful police conduct in the future. Id.

III. CONCLUSION

Applying the trial court's factual findings to Fourth Amendment principles, this Court holds that the trial court did not err in finding that Officer Franklin had apparent authority to enter the house and to go into the bedroom with Young, where the officer saw the gun in plain view. Accordingly, we affirm appellant's conviction for possession of a firearm by a convicted felon in violation of Code § 18.2-308.2.

Affirmed.

Court of Appeals of Virginia.

Morgan Sinclair GOODWIN v. COMMONWEALTH of Virginia.

Record No. 0190–14–3.

Decided: February 03, 2015

Present: PETTY, BEALES and DECKER, JJ.Duane Barron, Deputy Public Defender, for appellant. Virginia B. Theisen, Senior Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Morgan Sinclair Goodwin appeals his three convictions for uttering a public record, in violation of Code § 18.2–168. He argues that the Commonwealth failed to present sufficient evidence to prove that he did anything other than sign three summonses with a false name. The appellant suggests that his actions did not constitute utterings under Virginia law because the evidence failed to prove that he acted with the "purpose of obtaining the [object] mentioned" in the summonses. We hold that the evidence was sufficient to prove that the appellant uttered public records. Specifically, the record supports the conclusion that the appellant, through his actions, asserted that his false signatures on the summonses were good and valid. These actions were sufficient to prove uttering. Therefore, we affirm the convictions.

I. BACKGROUND

On appeal of a challenge to the sufficiency of the evidence, this Court views the record in the light most favorable to the Commonwealth, the prevailing party at trial. Stevenson v. Commonwealth, 258 Va. 485, 488, 522 S.E.2d 368, 368 (1999); Henry v. Commonwealth, 63 Va.App. 30, 35, 753 S.E.2d 868, 870 (2014). To do so, we " 'discard all evidence of the accused that conflicts with that of the Commonwealth.' " Henry, 63 Va.App. at 37, 753 S.E.2d at 871 (quoting Holcomb v. Commonwealth, 58 Va.App. 339, 346, 709 S.E.2d 711, 714 (2011)). The Court also accepts as true all the credible evidence favorable to the prosecution as well as all fair inferences in support of the conviction that may be drawn from the record. Id. Viewed under this standard, the evidence is as follows.

On November 8, 2012, Deputy Scott Craig of the Augusta County Sheriff's Department stopped the appellant's vehicle for a speeding violation. Before Deputy Craig approached the automobile, the appellant, who was driving, got out of the car. The appellant turned, placed his hands behind his back, and announced that he did not have a driver's license.

The deputy assured him that driving without a license did not necessarily warrant an arrest. The appellant identified himself as Christopher Venable, stated that he was from New York, and provided Deputy Craig with a date of birth and social security number. Due to technical difficulties with equipment, Craig was unable to verify the out of state information with dispatch.

The deputy issued three summonses to the appellant in the name of Christopher Venable for speeding, driving without an operator's license, and failure to wear a seatbelt. The appellant signed the summonses as "Christopher Venable" and returned them to Deputy Craig. He signed each document below two pre-printed sentences: "I promise to appear at the time and place shown above, signing this summons is not an admission of guilt. I certify that my current mailing address is as shown below." Two of the documents included "checked" boxes informing the recipient that he could avoid going to court if he followed the accompanying instructions.

Over a month later, Deputy Craig learned the appellant's true identity. The appellant had represented himself as Christopher Venable during a separate encounter with Officer Robert Dean of the Waynesboro Police Department. When Dean saw the name Christopher Venable on a recent record, he contacted Deputy Craig and provided the deputy with the appellant's actual name.

At the completion of the Commonwealth's case, the appellant moved to strike the uttering charges, alleging that the evidence was insufficient to support them. He argued that the Commonwealth failed to prove that he sought to obtain an "object mentioned in the [forged] writing." The court denied the motion. During closing arguments, the appellant renewed the motion. The trial court again denied the motion, holding that the forgeries were "the signature[s] of Christopher Venable." The court further explained that the appellant "intended to have the officer believe that" he was Christopher Venable "and handed [them] back with that false impression" and "that was the object of his uttering."

The court convicted the appellant of three counts of uttering a public record, in violation of Code § 18.2–168.[1] He was sentenced to a total of nine years in prison for these offenses, with eight years suspended.

II. ANALYSIS

The appellant argues that the evidence was insufficient to prove uttering.[2] Relying on Bennett v. Commonwealth, 48 Va.App. 354, 357, 631 S.E.2d 332, 333 (2006), he suggests that an uttering occurs only when the act was "made in the prosecution of the purpose of obtaining the [object] mentioned in the said writing." The Commonwealth

responds that "uttering," as used in the statute at issue, is complete upon proof of "an assertion by word or action that a writing known to be forged is good and valid."

The relevant facts are not in dispute. Rather, the question in this appeal is whether the facts of this case meet the definition of "uttering" under Code § 18.2–168. In order to resolve this issue, we must determine the applicable definition of "uttering," and then review the relevant evidence supporting the appellant's convictions to ascertain whether it was sufficient to prove that he uttered the forged summonses.[3]

A. Meaning of Uttering for Purposes of the Statute

The interpretation of a statute is a question of law which this Court reviews de novo on appeal. Baker v. Commonwealth, 278 Va. 656, 660, 685 S.E.2d 661, 663 (2009); Belew v. Commonwealth, 62 Va.App. 55, 62, 741 S.E.2d 800, 803 (2013). Generally, an undefined statutory term " 'must be given its ordinary meaning, given the context in which it is used.' " Lawlor v. Commonwealth, 285 Va. 187, 237, 738 S.E.2d 847, 875 (2013) (quoting Meeks v. Commonwealth, 274 Va. 798, 802, 651 S.E.2d 637, 639 (2007)).

Code § 18.2–168, in pertinent part, forbids "any person [from] forg[ing] a public record . or [from] utter[ing], or attempt[ing] to employ as true, such forged record . knowing the same to be forged." The code section prohibits two distinct offenses: forging a public record and uttering, or attempting to employ as true, the forged record.[4] Bennett, 48 Va.App. at 357, 631 S.E.2d at 333; see also Bateman v. Commonwealth, 205 Va. 595, 599, 139 S.E.2d 102, 105 (1964) (holding that Code § 18.1–96 (1960), the precursor to Code § 18.2–172, "list[ed] two offenses in the disjunctive: one, forgery, and the other, uttering or attempting to employ as true a forged writing").

The Supreme Court of Virginia considered the definition of "uttering" in Bateman, 205 Va. 595, 139 S.E.2d 102. The Court referenced Black's Law Dictionary 's entry on uttering, " '[t]o put or send [as a forged check] into circulation[;] . to utter and publish.' " Id. at 599–600, 139 S.E.2d at 106 (first and second alterations in original) (quoting Black's Law Dictionary 1716 (4th ed.1957)). See generally Elliott v. Commonwealth, 277 Va. 457, 463, 75 S.E.2d 178, 182 (2009) ("When the language of a statute is unambiguous, courts are bound by the plain meaning of that language and may not assign a construction that amounts to holding that the General Assembly did not mean what it actually has stated."). The Court ultimately defined an uttering as "an assertion by word or action that a writing known to be forged is good and valid." Bateman, 205 Va. at 600, 139 S.E.2d at 106.

In Bennett, this Court applied the definition of uttering provided in Bateman in the context of Code § 18.2–168. Bennett, 48 Va.App. at 357, 631 S.E.2d at 333. Bennett had submitted an application for a driver's license under an alias. Id . During the application process, he signed a false name on "a computer screen bearing his digitalized image." Id. On appeal, Bennett argued that the single act of signing the false name could not constitute both a forgery and an uttering of a public record, because he did not "put the forged document into circulation." Id. at 358, 631 S.E.2d at 333. This Court rejected that notion and explained that the forged document " 'is uttered when it is offered to another as genuine, without regard to whether it is so accepted.' " Id. (quoting 4 Charles E. Torcia, Wharton's Criminal Law § 496 (15th ed.1996)). The Court further made clear that there was "no requirement that a forged instrument be negotiated." Id. at 358, 631 S.E.2d at 334. The opinion adopted the definition of uttering provided in Bateman, " 'an assertion by word or action that a writing known to be forged is good and valid.' " Id. at 357, 631 S.E.2d at 333 (quoting Bateman, 205 Va. at 600, 139 S.E.2d at 106). The Court reasoned that the act of signing was an assertion to the Department of Motor Vehicles agent that the false name was "good and valid." Id. at 358, 631 S.E.2d at 334. The signing triggered the production of the fraudulent license and, therefore, simultaneously constituted a forgery and an uttering. Id. Thus, both the definition applied in Bennett and its ultimate holding are consistent with Bateman.

The appellant cites specific language in Bennett as controlling. The Bennett opinion does, as the appellant suggests, include language that an uttering is comprised of an assertion that a forged writing is true if the assertion " 'was made in the prosecution of the purpose of obtaining the [object] mentioned in the said writing.' " 48 Va.App. at 357, 631 S.E.2d at 333 (alteration in original) (quoting Sands v. Commonwealth, 61 Va. (20 Gratt.) 800, 823–24 (1871)).[5] The appellant contends that this language signifies that in order for an action to constitute an uttering, it not only must be an assertion that a forged writing is good and valid, the action must also be done in pursuit of a goal specifically mentioned in the forged document. A full reading of the opinion, however, demonstrates that the actual analysis did not consider the purpose stated in the writing to which the defendant affixed his false signature.

The reference to the purpose mentioned in the writing was "not essential to the Court's judgment" in Bennett and, as such, "is unbinding dicta." Sarafin v. Commonwealth, ––– Va. ———, ———, 764 S.E.2d 71, 77 (2014). In other words, the language relied upon by the appellant does not bind this Court. See, e.g., Cooper v. Commonwealth, 54 Va.App. 558, 571, 680 S.E.2d 361, 367–68 (2009) (explaining that dicta can be persuasive but is not controlling). Consequently, while the Bennett holding is instructive and consistent with the common definition of uttering, it compels a result contrary to the appellant's argument. We decline to hold, as the appellant suggests,

that an uttering occurs only when the action is done in pursuit of a purpose specifically mentioned in the forged writing.

Our conclusion that Bennett did not place an additional requirement on the general statutory meaning of "uttering" and, instead, applied the common definition, is supported by Bateman and the many Virginia appellate opinions that reviewed uttering convictions without discussing the "purpose of obtaining the object mentioned" in the forged writing. See, e.g., Oliver v. Commonwealth, 35 Va.App. 286, 295–96, 544 S.E.2d 870, 874–75 (2001) (affirming uttering conviction under Code § 18.2–172); Dillard v. Commonwealth, 32 Va.App. 515, 519, 529 S.E.2d 325, 327 (2000) (analyzing sufficiency of the evidence to support convictions for forging and uttering a check); Ramsey v. Commonwealth, 2 Va.App. 265, 269–70, 343 S.E.2d 465, 468–69 (1986) (affirming conviction for uttering a forged check); see also Va. Model Jury Inst.-Crim. Inst. No. G30.300. Based upon this Court's de novo review of the statute, we hold that in order to sustain the convictions for uttering under Code § 18.2–168, the Commonwealth was required to prove that the appellant knew that the writings were forged, yet asserted that they were "good and valid." We next review whether the evidence supporting the uttering convictions was sufficient to prove that the appellant's actions met this definition.

B. Sufficiency of the Evidence

When considering a challenge to the sufficiency of the evidence, we must affirm the decision below unless the trial court's decision was plainly wrong or lacked evidence to support it. See, e.g., Allison v. Commonwealth, 207 Va. 810, 811, 153 S.E.2d 201, 202 (1967); Henry, 63 Va.App. at 37, 753 S.E.2d at 871. In our review of the record, we accord the trial court's factual determinations "great deference." See, e.g., Towler v. Commonwealth, 59 Va.App. 284, 297, 718 S.E.2d 463, 470 (2011).

During a routine traffic stop, the appellant identified himself as Christopher Venable to Deputy Craig. The appellant told the deputy that he was from New York and provided him with a date of birth and social security number. Based on the appellant's representations, the deputy issued three summonses to the appellant under the name of Christopher Venable. The appellant signed the summonses as "Christopher Venable" and returned them to Deputy Craig. The trial court found that the appellant uttered the forged summonses when he handed them back to Deputy Craig with the intent to convey that the false signatures were true. Viewing the evidence in the light most favorable to the Commonwealth, the record supports the reasonable conclusion that, through his actions, the appellant asserted that his forged name was true and that the forged summonses were good and valid. Thus, the trial court's finding was not plainly wrong, and the convictions were supported by the evidence.

III. CONCLUSION

We hold that the definition of uttering is "an assertion by word or action that a writing known to be forged is good and valid." Bateman, 205 Va. at 600, 139 S.E.2d at 106. Under this definition, the evidence was sufficient for the trial court to conclude that the appellant uttered the summonses. Therefore, we affirm the convictions for uttering a public record.

Affirmed.

FOOTNOTES

1. The appellant's convictions for forging public records are not challenged in this appeal.

2. The appellant does not contest that the traffic summonses are public records. See Rodriquez v. Commonwealth, 50 Va.App. 667, 671, 653 S.E.2d 296, 298 (2007) (holding that the summonses issued to the defendant were "public records" under Code § 18.2–168).

3. We do not consider the Commonwealth's contention that under Rule 5A:18, the appellant procedurally defaulted any argument that the evidence was insufficient to prove that he made the requisite assertion because Deputy Craig took the documents from him. See Rule 5A:18 ("No ruling of the trial court . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling."). Although the Commonwealth's point that the appellant did not raise this issue below is well founded, the appellant acknowledged at oral argument that he did not intend to raise that argument on brief. (Oral Argument Audio at 22:52).

4. A separate statute, Code § 18.2–172, prohibits the forgery and uttering of instruments other than public records and currency. See, e.g., Beiler v. Commonwealth, 243 Va. 291, 415 S.E.2d 849 (1992) (affirming convictions under Code § 18.2–172 for forging and uttering two checks).

5. In Sands, the case from which the Bennett language cited by the appellant originated, the Supreme Court of Virginia reviewed convictions for forging and uttering a written document. The language from Sands that the jury should have been instructed that an assertion "is an uttering . provided that [it] was made in the prosecution of the purpose of obtaining the money mentioned in said writing" has no application here because the case dealt with a jury instruction specific to the Commonwealth's theory of guilt charged in the indictment. Sands, 61 Va. (20 Gratt.) at 823–24; see also Cooper v. Commonwealth, 2 Va.App. 497, 500, 345 S.E.2d 775,

777 (1986) (noting that jury instructions should inform the jury " 'as to the law of the case applicable to the facts' " (quoting 75 Am.Jur.2d Trial § 573 (1974))); cf. Shaikh v. Johnson, 276 Va. 537, 546, 666 S.E.2d 325, 329 (2008) (cautioning against using language from an appellate opinion in jury instructions). Further, Sands involved an uttering of a private financial document, not a public record. Sands, 61 Va. (20 Gratt.) at 823–24. Applying Sands to Code § 18.2–168 would be at odds with the statutory language because that language specifically encompasses the forgery and uttering of "public documents." The statute is written to include all public documents, not exclusively documents with writing pertaining to money. Indeed, Bateman, which also involved money and was decided ninety-three years after Sands, did not even cite the Sands case or the expanded language relied upon by the appellant. Bateman, 205 Va. 599–600, 139 S.E.2d at 105–06 (reviewing convictions for uttering forged checks).

DECKER, Judge.