Criminal Procedure - The Role of the Search Warrant in Fire Investigations - Michigan v. Clifford

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Introduction

The United States Supreme Court recently addressed the applicability of the fourth amendment’s warrant clause to government officials who are attempting to determine the cause and origin of fires. The Court first addressed this issue in Michigan v. Tyler. In that case, the Court held that the fire itself was an “exigent circumstance” justifying a warrantless entry and that firemen could then remain on the premises for a reasonable time to investigate the cause of the fire.

In decisions subsequent to Tyler, lower courts have encountered difficulties in applying the precepts enunciated by the Supreme Court in that case. In Michigan v. Clifford, the Court granted certiorari to clarify doubt that appeared to exist as to the application of [its] decision in Tyler. This note will attempt to determine whether the Court was successful in clarifying the doubt concerning the application of the precepts stated in Tyler, or whether the Court may have sown new seeds of confusion in this area.

The Case

In the early morning hours of October 18, 1980, a fire began in Raymond and Emma Jean Clifford’s home while they were out of town. The Detroit Fire Department responded to the fire arriving on the scene at about 5:42 a.m. All fire officials and police left the premises at 7:04 a.m. after extinguishing the fire. At 8:00 a.m. on the morning of the fire, a fire investigator was informed that the fire department suspected arson, and he was instructed to investigate the Clifford fire. Due to other assignments, the investigator,

2. See e.g., Cleaver v. Superior Court of Alameda County, 29 Cal. 3d 297, 594 P.2d 984, 155 Cal. Rptr. 559 (1979); United States v. Miller, 589 F.2d 1117 (1st Cir. 1978); United States v. Kulcsar, 586 F.2d 1283 (8th Cir. 1978).
4. 104 S. Ct. at 645.
5. Id.
Lieutenant Beyer, did not arrive at the scene of the fire until about 1:00 p.m. that same day.

Upon arrival, the investigator and his partner found a work crew pumping water out of the basement and boarding up the Clifford residence. A neighbor, who had informed the Cliffs of the fire, advised the investigators that the Cliffs did not plan to return that day and that Clifford had instructed the neighbor to request the insurance company to send out a crew to secure the house. While waiting for the crew to pump water out of the basement, Lieutenant Beyer discovered a Coleman fuel can in the driveway. He seized the can and marked it as evidence.

At 1:30 p.m. Lieutenant Beyer and his partner entered the Clifford home and began their investigation into the cause of the fire. They had not obtained the Cliffs' consent or an administrative warrant. The investigators conducted an extensive search that began in the basement where they found two Coleman fuel cans and a crock pot attached to an electrical timer. The investigators determined that the fire had been set deliberately by use of the crock pot and timer. They then extended their search to the upper portions of the house where they found additional evidence of arson. All of this evidence was seized and marked.

Respondents, Raymond and Emma Jean Clifford, were arrested and charged with arson based upon the investigation of the scene and the evidence discovered during the search. At the probable cause hearing, the State introduced the physical evidence seized by Lieutenant Beyer and his partner during the October 18 search of the Clifford residence. The respondents moved to suppress the evidence on the ground that it was obtained through a warrantless and nonconsensual search of their home and therefore violated their rights under the fourth and fourteenth amendments to be free from unreasonable searches and seizures. The court denied the motion and bound the respondents over for trial. Prior to trial, the respondents again moved to suppress the evidence obtained during the October 18 search. The trial court denied the

6. Id. The firefighters initially on the scene had discovered the can in the basement and placed it in the driveway.

7. Id. These items were found in debris beneath the stairway. The timer was plugged into a nearby wall outlet. It was set to turn on at 3:45 a.m. and turn off at 9:00 a.m. The timer had stopped between 4:00 and 4:30 a.m.

8. Id. Upstairs the investigator found the drawers and closets full of old clothes. There were nails on the walls but no pictures. There were wires for a video tape machine but no machine.
motion on the ground that "exigent circumstances" justified the warrantless search. The Michigan Court of Appeals reversed and held that there were no "exigent circumstances" justifying the search.\(^9\) The United States Supreme Court granted certiorari to clarify doubt it felt existed as to the application of its decision in *Tyler*.\(^10\)

In its petition for certiorari, the State asked the Court to exempt all administrative investigations into the cause and origin of fires from the warrant requirement. The respondents argued that since the searches were to gather evidence of arson and were conducted without a warrant, consent, or exigent circumstances, they were *per se* unreasonable under the fourth and fourteenth amendments. In a five-four decision, the majority of the justices refused to sanction the search of the basement. The majority pointed out that while a fire creates an exigency that justifies a warrantless entry by firemen, once the fire has been extinguished and the firemen have left, the occupant has a reasonable expectation of privacy that requires a warrant before a further search may be made.\(^11\)

**Background**

The primary purpose of the fourth amendment\(^12\) is to safeguard the privacy of individuals against arbitrary and unreasonable searches and seizures by the government. There has been considerable confusion concerning the application of the fourth amendment to inspections made by administrative agencies. The confusion centers on when and under what circumstances a statute can legally authorize warrantless inspections.

Twenty-one years ago the Supreme Court first addressed the

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9. The Court of appeals found that the warrantless entry and search of the Clifford residence was conducted pursuant to a policy of the Detroit Fire Department. The department 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 that policy was inconsistent with *Michigan v. Tyler*, 436 U.S. 499 (1978), and therefore the nonconsensual, warrantless search violated the Cliffords' fourth and fourteenth amendment rights. *Id.* at 644, 645.

10. *Id.* at 645.

11. *Id.* at 646-47.

12. U.S. Const. amend. IV. "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."
constitutionality of warrantless administrative inspections in \textit{Frank v. Maryland}.\textsuperscript{13} The city health code involved in \textit{Frank} authorized inspections without requiring that the inspector obtain a warrant.\textsuperscript{14} The homeowner in \textit{Frank} refused to consent to an inspection of his home for possible violations of the city health code by an inspector who did not have a warrant.\textsuperscript{15}

A combination of four factors led the Court, in \textit{Frank}, to hold that certain warrantless administrative inspections were constitutionally proper.\textsuperscript{16} First, the Court felt that since the fourth amendment was adopted to restrain public officials in their search for criminal violations, its protection could not be invoked where the purpose of the inspection was merely to determine the existence of health code violations and not to gather evidence of criminal activity.\textsuperscript{17} Second, the health code's grant of the power of inspection was strictly limited and contained safeguards which eliminated all but the slightest restrictions on claims of privacy.\textsuperscript{18} Third, the Court felt there was a significant governmental interest in maintaining minimum health standards.\textsuperscript{19} Fourth, the Court felt the application of the warrant requirement in this situation would severely curtail proper enforcement of the health code.\textsuperscript{20}

Eight years later, in \textit{Camara v. Municipal Court},\textsuperscript{21} the Supreme Court overruled \textit{Frank} and held that under ordinary circumstances, searches by administrative agencies must be conducted pursuant to a search warrant. In the companion case of \textit{See v. Seattle},\textsuperscript{22} the Court held this fourth amendment protection applied to searches of commercial as well as residential property.

In \textit{Camara}, the Court abandoned three of the four factors it considered crucial to the decision in \textit{Frank}. The majority considered it irrelevant whether evidence of a criminal nature was sought

\begin{itemize}
\item \textsuperscript{13} 359 U.S. 360 (1959). The decision was overruled in \textit{Camara v. Municipal Court}, 387 U.S. 523 (1967).
\item \textsuperscript{14} 359 U.S. at 361.
\item \textsuperscript{15} \textit{Id.} The city health code authorized the imposition of fines for refusal to permit inspections.
\item \textsuperscript{16} \textit{Id.} at 373.
\item \textsuperscript{17} \textit{Id.} at 363-66.
\item \textsuperscript{18} \textit{Id.} at 367. For example, the Code prohibited forcible entries, allowed only daytime inspections, and required valid grounds for suspicion of the existence of a nuisance.
\item \textsuperscript{19} \textit{Id.} at 371-72.
\item \textsuperscript{20} \textit{Id.} at 372.
\item \textsuperscript{21} 387 U.S. 523 (1967).
\item \textsuperscript{22} 387 U.S. 541 (1967).
\end{itemize}
as opposed to evidence of violations of civil codes or local regulatory ordinances. The Court held that the broad statutory safeguards were no substitute for the individualized review provided by the magistrate in the warrant process. Also, the Court felt the emphasis placed on the government's interest was overblown in Frank. The Court held that the question was "whether the authority to search should be evidenced by a warrant," not whether the public interest justified the type of search in question. Whether the authority to search should be conducted pursuant to a warrant would partly depend upon whether the governmental purpose behind the search would be frustrated by the burden of obtaining a warrant. In See, the Court reserved for future determination the question of what other searches by administrative agencies could be conducted without warrants.

Three years later, in Colonnade Catering Corp. v. United States, the Court carved an exception in See's general rule requiring a warrant for administrative inspections of commercial premises. Noting the long history of governmental regulation of the liquor industry, in Colonnade, the Court held that the warrant requirement of See was not applicable. Just two years after Colonnade, the Court upheld the constitutionality of warrantless inspections in the firearms industry in United States v. Biswell. The Court in that case considered pivotal the fact that a warrant requirement could have easily frustrated enforcement of the regu-

23. 387 U.S. at 530. The Court agreed that inspections under local regulatory ordinances were less hostile than typical searches for evidence of criminal activity. But the Court felt it would be an anomaly to hold that an individual could receive the full protection of the fourth amendment only if the individual was suspected of criminal behavior.

24. Id. at 533.

25. Id.

26. Id.

27. 397 U.S. 72 (1970). The case involved a caterer licensed to serve alcoholic beverages who refused to allow Federal Internal Revenue Service agents to search his locked storeroom absent a warrant.

28. Id. at 77. The court in Colonnade stressed the broad authority of Congress to set standards of reasonableness for searches and seizures. The necessity of warrantless searches to insure effective enforcement of regulations was not mentioned, though the issue was considered determinative in the Camara decision. 387 U.S. at 533.

29. 406 U.S. 311 (1972). The case involved the attempt to suppress criminal evidence seized by a Federal Treasury agent during a warrantless search of the premises of a dealer federally licensed to sell firearms.
latory scheme.\textsuperscript{30}

In \textit{Marshall v. Barlow's Inc.},\textsuperscript{31} the Court held a provision of the Occupational Safety and Health Act of 1970 (OSHA),\textsuperscript{32} allowing warrantless inspections, unconstitutional. The Court stated the electrical and plumbing installation business was not so pervasively regulated as to qualify for the "pervasive regulation" exception stated in \textit{Biswell}.\textsuperscript{33} The Court held that the warrant requirement would not place a burden on the enforcement of OSHA and would protect the reasonable expectations of individual privacy.\textsuperscript{34}

In \textit{Michigan v. Tyler}\textsuperscript{35} the question of warrantless searches arose in another area, that of fire investigation. It is generally accepted that a governmental official will investigate the scene of a fire in order to determine the cause of the blaze. The official could be a member of the local fire or police department. The time and scope of these investigations may vary; they may occur at the time of the fire, shortly thereafter, or even days later depending on the department involved, its particular policy and its work load.\textsuperscript{36} Often a state statute or local ordinance will permit warrantless searches of a fire scene and allow on site inspections.\textsuperscript{37} The appellate decisions in this area have generally held that such inspections comply with fourth amendment requirements even though conducted without warrants and without probable cause to believe the fire was of criminal origin.\textsuperscript{38}

In \textit{Michigan v. Tyler},\textsuperscript{39} the Court upheld a Michigan Supreme Court reversal of an arson conviction based on evidence obtained by police and fire officials who visited the scene of the fire without a warrant. In \textit{Tyler}, fire officials discovered plastic containers of

\begin{thebibliography}{9}
\bibitem{30} \textit{Id.} at 317. \textit{Biswell} ignored the significance of the history of government regulation of the industry involved. Instead, the Court considered a combination of three factors in concluding the warrantless inspections were constitutionally permissible—the enforcement needs of the statute, the magnitude of the governmental interest, and the threats to privacy.
\bibitem{31} 436 U.S. 307 (1978).
\bibitem{32} 29 U.S.C. § 657(a) (1976).
\bibitem{33} 436 U.S. at 313.
\bibitem{34} \textit{Id.} at 324-25.
\bibitem{35} 436 U.S. 499 (1978).
\bibitem{36} 3 W. \textsc{LaFave, Search and Seizure} § 10.4 (1982).
\bibitem{39} 436 U.S. 499 (1978).
\end{thebibliography}
flammable liquid inside a fire-damaged furniture store shortly after the local fire department arrived. The detective was summoned to investigate the possibility of arson. The detective and fire officials arrived before the firefighters departed, but left the premises before completing the investigation because of smoke and steam in the building. Returning four hours after the fire was extinguished and after the firefighters had departed, the officials conducted a cursory examination, then left the scene. Joined by the detective, the fire officials returned approximately an hour later, reexamined the premises and removed pieces of evidence. The fire officials entered the fire-damaged store to seize evidence on at least three other occasions: once four days, once seven days, and once twenty-five days after the fire. The United States Supreme Court held that the evidence seized during the initial entry was proper. The Court held the re-entries on the morning of the fire were "continuations" of the initial entry, therefore the evidence seized during those searches was also properly admissible. The Court held the evidence seized in the re-entries occurring after the day of the fire inadmissible.

**Analysis**

The majority in *Clifford* stated that the issue involved was the extent of an arson investigator’s authority, in the absence of exigent circumstances, a warrant, or consent, to enter a private residence to investigate the cause of a recent fire. In the opinion authored by Justice Powell, the majority held “that a subsequent post-fire search must be conducted pursuant to a warrant, consent, or the identification of some new exigency.” An administrative warrant would be sufficient so long as the purpose of the search was to ascertain the cause of the fire. The majority restated its holding in *Tyler* that the nonconsensual entry and search of property is governed by the warrant requirement of the fourth and fifth amendments.

40. *Id.* at 501-02.
41. *Id.* at 502.
42. *Id.*
43. *Id.* at 503.
44. *Id.* at 511.
45. *Id.*
46. 104 S. Ct. at 644.
47. Justices Brennan, White, and Marshall joined the majority opinion.
48. 104 S. Ct. at 648-49.
49. *Id.* at 649.
fourteenth amendments except in a carefully defined class of cases. 50

The Court outlined three factors it felt were crucial to the analysis of cases in this area. First, "whether there are legitimate privacy interests in the fire-damaged property that are protected by the Fourth Amendment." Second, whether the governmental intrusion could be justified by exigent circumstances without regard to reasonable expectations of privacy. Last, whether the search is to gather evidence of criminal activity or is only to determine the cause of the fire. 51

The majority noted that the State did not claim that the post-fire searches were justified by exigent circumstances. 52 Without discussion, the majority rejected the State's argument that post-fire searches should be altogether exempt from the warrant requirement. 53 The majority then proceeded to distinguish the facts before it from those of Tyler and refused to modify Tyler to justify the search in this case. 54 First, the majority found the re-entry in Clifford was distinguishable from that in Tyler because of the interim efforts the Cliffords had taken to secure their home. The majority stated that those efforts served to separate the entry to extinguish the fire from the re-entry to investigate the cause of the fire. Second, the majority stated there were greater privacy interests associated with the private residence in Clifford than those interests involved in the commercial structure in Tyler. 55 Thus, after distinguishing Tyler, the majority affirmed that portion of the Michigan Court of Appeals decision which excluded the evidence. 56

Justice Stevens concurred in the judgment, but rendered a separate opinion. Justice Stevens stated that the Justices agreed on three general propositions regarding the protection the owner of fire damaged premises received from the fourth amendment. Justice Stevens felt there was no disagreement within the Court concerning the "right of the firefighters to make a forceful, unan-

51. 104 S. Ct. at 646.
52. Id.
53. Id.
54. Id. at 648-49.
55. Id. at 648.
56. Id. at 649-50. It should be noted that the can found in the driveway was still considered admissible evidence because it had been discovered in the "plain view" of firefighters who initially responded to the blaze.

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nounced, nonconsensual, warrantless entry into a burning building.\textsuperscript{57} The Court agreed on the firemen's right to remain on the premises to extinguish the fire, satisfy themselves that there was no danger of rekindling, and to investigate the origin of the fire.\textsuperscript{58} Justice Stevens stated there was also unanimity within the Court that after investigators determine the cause and origin of the fire, any further search of other portions of the premises may only be conducted pursuant to a warrant issued on probable cause.\textsuperscript{59}

Justice Stevens stated that the issues that divided the Court in \textit{Clifford} were whether the re-entry by Lieutenant Beyer should be regarded as a continuation of the earlier search and whether a warrantless, nonconsensual, post-fire investigation is constitutional.\textsuperscript{60} Presumably, Justice Stevens would hold that once the fire justifying the initial entry is extinguished and the firemen have left the premises, the emergency is over; therefore, re-entry must be made pursuant to a warrant.\textsuperscript{61} Justice Stevens stated that a warrantless search may have been constitutionally permissible if investigators had either given the owners sufficient advance notice to enable them or their agent to be present or had made a reasonable effort to do so.\textsuperscript{62} Justice Stevens concluded that the search in \textit{Clifford} violated the fourth amendment because the investigators failed to provide fair notice of the inspection to the owners of the premises.\textsuperscript{63} Justice Stevens' vote determined the outcome in \textit{Clifford}, and this presents an interesting point. If the investigators had attempted to notify the Cliffords of the search or if the Cliffords had been present, Justice Stevens may have found the search reasonable, and thus the outcome of the case would have been different.\textsuperscript{64}

The dissent by Justice Rehnquist\textsuperscript{65} argued that the re-entry by Lieutenant Beyer six hours later was an "actual continuation" of the original entry to extinguish the blaze and would have been a

\textsuperscript{57} Id. at 650.

\textsuperscript{58} Id.

\textsuperscript{59} Id.

\textsuperscript{60} Id.

\textsuperscript{61} Id. at 651.

\textsuperscript{62} Id. at 652.

\textsuperscript{63} Id. at 653.


\textsuperscript{65} 104 S. Ct. at 653 (Rehnquist, J., dissenting, joined by Chief Justice Burger, Justices Blackmun and O'Connor.).
valid search authorized by *Tyler*. Justice Rehnquist stated that because the justification for the search was the fire, an event which the investigators did not control, application of the warrant requirement would not serve a valid purpose, because its purpose is only to protect individuals from the unbridled discretion of government officials. 66

The grounds the majority relied on in distinguishing the facts in *Clifford* from those in *Tyler* were faulty. The majority stated that the Cliffords’ efforts to secure the privacy interests that remained in their residence served to separate the entry made to extinguish the blaze from the later entry to investigate the fire. 67 The Court stated in *Tyler* that “[l]ittle purpose would have been served by [the firemen] remaining in the building, except to remove any doubt about the legality of the warrantless search and seizure later that same morning.” 68 Such a statement suggested that such artificial acts would not be necessary if the search were made within a reasonable time. The constitutionality of subsequent post-fire searches should not depend on such artificial acts as an owner’s attempts to secure the remains of his fire-damaged premises. In his dissent, Justice Rehnquist aptly pointed out further failure of the majority’s logic. While the Cliffords’ interim efforts to secure their home “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. . . .” 69

The Court’s logic is also erroneous in holding that higher privacy interests exist in personal residences than in commercial premises. Justice Rehnquist pointed out in his dissent that “[i]t is also well-established that private commercial buildings in this context are as much protected by the Fourth Amendment as are private dwellings.” 70 Justice Rehnquist was correct when he pointed out that the majority distinguished *Clifford* from *Tyler* on “trivial and immaterial” differences. 71

Although *Clifford* reaffirmed the essential requirements concerning fire investigations as stated in *Tyler*, Justice Rehnquist is

66. *Id.* at 655.
67. *Id.* at 648.
68. 436 U.S. at 511.
69. 104 S. Ct. at 654.
70. *Id.*
71. *Id.* at 653.
well-founded in stating that Clifford has served to confuse rather than clarify the ambiguities of Tyler. In Clifford, the Court affirmed its holding in Tyler that once firefighters enter premises to extinguish a fire they may remain for a "reasonable time" to determine the origin and cause of the fire. The problem arises as to the determination of what constitutes a "reasonable time to investigate." What constitutes a reasonable time will have to be determined on a case-by-case basis taking numerous factors into account. In such an analysis, courts will need to consider such factors as: the different fires and the diverse policies of investigating departments; the fact that fires engulfing several buildings or large apartment complexes present more complexities than fires in single family dwellings; and, that the investigating officials may have more than one fire to investigate on the same day.

The determination of what constitutes a "reasonable time" as enunciated in Tyler has provided courts with some difficulty. For example, the Alaska Supreme Court, in Schultz v. State, upheld a fire inspector's warrantless search and seizure. In Schultz, the fire inspector arrived at the scene when the fire was under control but not yet extinguished. The investigator entered "solely for the purpose of ascertaining the cause of the fire" and remained on the premises for over an hour taking pictures and seizing items of evidence. In determining whether the inspector's search occurred within a reasonable time, the court relied on the balancing test enunciated in Tyler. Applying that test, the court found the defendant's argument without merit. The defendant argued that Tyler, which dealt primarily with firefighters remaining on the premises, was not distinguishable from Schultz where the inspectors entered the premises after the fire was under control. The court stated that the overriding concern in both cases was discovering the cause of the fire. Schultz reveals the difficulty of balancing the public interest of a speedy, unimpeded, arson investiga-

72. Id.
73. 104 S. Ct. at 646-47; 436 U.S. at 511.
74. 436 U.S. at 510 n. 6.
75. Id.
76. 104 S. Ct. at 655 n. 1.
77. 593 P.2d 640 (Alaska 1979).
78. Id. at 641.
79. Id. at 642.
80. Id. at 642-43.
81. Id. at 643.

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tion against the individual’s “reasonable expectations of privacy.”

Despite the difficulties encountered by lower courts in the application of the Tyler “reasonable time” test, the United States Supreme Court once again applied that vague test in Clifford. Such a vague test is of little help to the fire official in making his split second decision whether to obtain a warrant; because what was reasonable at the fire scene may not seem reasonable to the reviewing court which has the benefit of hindsight.

The holding by the Court, in Clifford, seems to indicate that in the future, any investigation made after the initial firefighting crew departs should be made pursuant to an administrative warrant. That rule should hold true unless the re-entry could be placed within that small category of circumstances where it could be considered a “continuation” of the initial exigency or if a new exigency had arisen. A possible exigency justifying a warrantless search was noted by the Court in Tyler. “Immediate investigation may also be necessary to preserve evidence from intentional or accidental destruction.” Although the State failed to argue the point, that exigency may have been present in Clifford. Arguably, the presence of the work crew in the basement presented the danger that possible evidence could have been destroyed. The Court failed to address that possible exigency in Clifford.

One commentator noted a question left unanswered by Tyler. The Court failed to address the extent to which an administrative search warrant can be used in cases where the suspicion of criminal activity does not rise to the level of probable cause. Clifford seems to provide only a partial answer. “[T]he object of the search determines the type of warrant required.”

82. United States v. Molt, 589 F.2d 1247, 1254 (3d Cir. 1978) (Stern, J., dissenting opinion).
83. Id. at 1255.
84. 436 U.S. at 510.
86. Id. at 223.
87. 104 S. Ct. at 647:
   If the primary object [of the search] is to determine the cause and origin of a recent fire, an administrative warrant will suffice . . . .
   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.”
tive warrant will suffice for investigations into the cause and origin of the fire. Under the "plain view" doctrine, evidence of criminal activity found during the course of an administrative search may be validly seized. Evidence seized during the course of the administrative search "may be used to establish probable cause to obtain a criminal search warrant." However, such evidence cannot be used to expand the scope of an administrative search. A criminal search warrant must first be obtained.

The Court's analysis in Clifford is incomplete. The Court failed to address what steps fire officials should take once evidence of a criminal nature is found during an administrative search. The Court also neglected to state any criteria as to the amount and scope of evidence needed to obtain a criminal warrant based on probable cause. Absent such guidelines, fire officials in the field are left to guess as to the sufficiency of their evidence, and as to what point in the investigation to obtain a criminal warrant.

In Clifford, the Court would have done well to have adopted the standard enunciated by the Michigan Supreme Court in Michigan v. Tyler. That court held that after the initial entry to extinguish a fire, all post-fire warrantless searches were unconstitutional and evidence obtained during such searches should be excluded. This would have provided a clear line of demarcation and an easier standard for fire officials to apply. The Court's failure to establish an understandable standard will increase the probability that evidence of arson will be excluded from trial. In the future, prudent investigators will do well to obtain an administrative warrant prior to any investigation conducted after the departure of the initial fire-fighting crew.

CONCLUSION

In Clifford, the United States Supreme Court attempted to clarify existing doubts regarding the application of the Tyler precepts concerning search warrants in fire investigations. Due to a fire investigation's potential dual nature—both administrative and criminal—the search warrant requirements needed clarification. Although Clifford reaffirmed the essential requirements concerning

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88. Id.
89. Id.
90. Id.
92. Id. at __, 250 N.W.2d at 477.
fire investigations as stated in *Tyler*, the Court has sown new seeds of confusion in the area.

In *Clifford*, the Court made it clear that the initial entry to fight a fire does not require a warrant and that officials may remain on the premises for a reasonable time to investigate the cause of the blaze. Any "subsequent post-fire search[es] must be conducted pursuant to a warrant, consent, or the identification of some new exigency." Post-fire re-entries will almost always require at least an administrative warrant, unless it fits within the *Tyler* circumstances where the re-entry is considered an "actual continuation" of the initial exigency. Evidence of criminal activity found in plain view during the course of an administrative search may be validly seized. Evidence seized during the course of the administrative search may be used to establish probable cause to obtain a criminal search warrant. Such evidence, however, cannot be used to expand the scope of an administrative search. A criminal warrant must first be obtained. The *Clifford* Court however, left unanswered the question of the amount and scope of evidence needed in order to obtain a criminal warrant based on probable cause and at what point in the investigation such a warrant should be obtained. Such a judicial omission makes it necessary for investigators to obtain at least an administrative warrant for any investigations conducted after the initial firefighting crew has departed, or run the risk that evidence found may be excluded from trial.

When fire officials re-enter premises without the owner's consent, or without a warrant, it is uncertain whether the re-entry is legal. The flexible standard of *Tyler*, allowing officials to perform their investigative duties within a "reasonable time," becomes even more difficult to apply in light of the decision in *Clifford*. The Court in *Clifford* should have held the re-entry by Lieutenant Beyer to be a "continuation" of the initial exigency. Instead, the Court chose to distinguish the re-entry in *Clifford* from that in *Tyler* only upon the basis of "trivial and immaterial grounds." Justice Rehnquist aptly summarized *Clifford*, stating that the "opinion, far from clarifying the doubtful aspects of *Tyler*, sows confusion broadside."

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93. 104 S. Ct. at 648-49.
94. Id. at 653.
95. Id.