

The Burger Court Opinion Writing Database

Michigan v. Clifford

464 U.S. 287 (1984)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

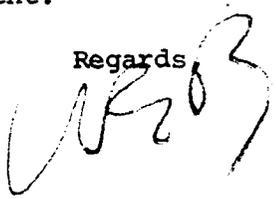
December 13, 1983

Re: 82-357 - Michigan v. Clifford

Dear Bill:

I join your dissent.

Regards



Justice Rehnquist

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

October 7, 1983

No. 82-357

Michigan v. Clifford

Dear Chief,

Lewis will undertake the opinion
for the Court in the above.

Sincerely,

The Chief Justice
Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 2, 1983

Re: Michigan v. Clifford, No. 82-357

Dear Lewis:

As I mentioned when we spoke yesterday, I agree with much of what you have said in the text of your opinion in the above and I will be happy to join. However, I do have some reservations about the language of certain footnotes, which seem to me to go beyond what is necessary either to decide the present case or to clarify the scope of Tyler.

1. In note 4 at page 6 you offer an explanation of several circumstances under which officials may, in the words of the Tyler opinion, "remain in a building for a reasonable time to investigate the causes of a blaze after it has been extinguished." 436 U.S. at 510. It strikes me that your explanation is perhaps too broad. May not it suggest to some readers that a considerable amount of time may elapse before the type of "post-fire search" that you describe is conducted? I would be happier with a formulation more along the lines of the one stated in Tyler itself, which suggested more directly that such searches must be conducted immediately after the fire has been extinguished: "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." 436 U.S. at 510. \

Substitute
this for
last
sentence
in our
n 5

2. In note 5 at page 6 you briefly recite the relevant standard for securing an administrative warrant. Here again, would not a more detailed explanation, such as that found in Tyler, be more helpful? E.g., "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. ... 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 all be relevant factors. Even though a fire victim's privacy must normally yield to the vital social objective of ascertaining the cause of the fire, the magistrate can perform the important

See
Tyler,
436 U.S.
at 510

Substitute
Add
3
words
- see
p 6
our
opinion

function of preventing harassment by keeping that invasion to a minimum." 436 U.S. at 507-508.

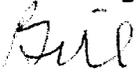
3. You also explain in note 6 at page 7 that firemen may, after removing rubble at the scene of a fire, seize evidence under the plain view doctrine, even though that evidence obviously was not literally in "plain view" at the time they initiated the search. The question whether the plain view doctrine permits fire officials to seize evidence without a warrant after sifting through the rubble of a fire or searching "other areas where the cause of fires are likely to be found" is not before us in this case and I would prefer not to reach out to decide this question without the benefit of specific facts and briefing that will help to focus our decision. More importantly, doesn't your assertion go considerably beyond the scope of Coolidge v. New Hampshire? The opinion of the Court in that case repeatedly stressed that when law enforcement officials "inadvertently come across evidence" that is in plain view they may lawfully seize it. 403 U.S. at 465-466 (emphasis added). In contrast, it seems to me that your footnote suggests that firefighters may intentionally search through rubble and unspecified "other areas" until they come across evidence of the cause of a fire; doesn't that statement go too far and, in any case, isn't it unnecessary to decide this case?

4. The last sentence of note 7 at page 9 seems, in my view, open to the reading that commercial warehouses will rarely if ever qualify for the protections of the Fourth Amendment. But as we said in Tyler, "the basic purpose of the Amendment is to safeguard the privacy and security of individuals against arbitrary invasions by government officials. . . . [This] privacy that is invaded may be sheltered by the walls of a warehouse or other commercial establishment not open to the public." 436 U.S. at 504-505. Perhaps your note could be recast to indicate that while commercial premises are certainly entitled to the protections of the Fourth Amendment, there may be circumstances in which such premises evidence reduced expectations of privacy.

5. Finally, I am worried that the last sentence of note 9 at page 10 ("Considerable latitude must be given to the compelling state interest in thorough investigations in the causes of recent fires") is perhaps too sweeping a statement that may be misread by lower courts.

I'll probably be able to go along even if you find no reason to make changes. But I'd really be more comfortable if these suggestions appealed to you.

Sincerely,


W.J.B., Jr.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

December 6, 1983

No. 82-357

Michigan v. Clifford

Dear Lewis,

I do appreciate your consideration of my suggestions and the changes you propose to meet. In all candor, I wish you could have gone further, but if you circulate with those changes I'll be content.

Sincerely,

Justice Powell

①

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE Wm. J. BRENNAN, JR.

RECEIVED
SUPREME COURT, U.S.
JUSTICE MARSHALL

December 8, 1983

'83 DEC -8 AIO:47

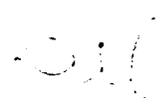
No. 82-357

Michigan v. Clifford

Dear Lewis,

I agree.

Sincerely,



Justice Powell

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

December 9, 1983

Re: 82-357 - Michigan v. Clifford

Dear Lewis,

Please join me.

Sincerely,



Justice Powell

Copies to the Conference

cpm

4

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

December 8, 1983

Re: No. 82-357 - Michigan v. Clifford

Dear Lewis:

Please join me.

Sincerely,

J.M.

T.M.

Justice Powell

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

December 12, 1983

Re: No. 82-357 - Michigan v. Clifford

Dear Bill:

Please join me in your dissent.

Sincerely,

A handwritten signature in cursive script, appearing to read "Harry", with a horizontal line underneath the name.

Justice Rehnquist

cc: The Conference

11/22

To: The Chief Justice

- Justice Brennan
- Justice White
- Justice Marshall ✓
- Justice Blackmun
- Justice Rehnquist
- Justice Stevens
- Justice O'Connor

From: **Justice Powell**

NOV 22 1983

Circulated: _____

Recirculated: _____

ZF

11/22
20/

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

MICHIGAN, PETITIONER *v.* RAYMOND CLIFFORD
AND EMMA JEAN CLIFFORD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF MICHIGAN

[November —, 1983]

JUSTICE POWELL delivered the opinion for the Court.

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.

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 Clifford's 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.

7

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

December 5, 1983

82-357 Michigan v. Clifford

Dear Bill:

Thank you for your letter of December 2 indicating your willingness to join my opinion, but identifying language in several footnotes that gives you some concern.

I have reviewed these notes with some care, and enclose a marked up copy of my opinion from which you will observe that I have made some changes in each of these notes. I believe the changes are completely faithful to Tyler and to Fourth Amendment doctrine. Fires do present unique situations.

We took this case to clarify Tyler. In that case there was no Court opinion. Only the Chief Justice and I joined Potter, and apparently the Chief and I now read Tyler differently as indicated by his vote and statements at Conference in this case. Also in Tyler there were separate opinions by Byron, Bill Rehnquist and John Stevens. I therefore think it is necessary to have these footnotes that endeavor to afford somewhat greater guidance than the Tyler opinion, which focuses primarily on the facts.

If my changes relieve your concerns - and I think they will - I will recirculate promptly. I appreciate the way you cooperate.

Sincerely,



Justice Brennan

lfp/ss

Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

Stylistic Changes Throughout.

Stylistic Changes at 6 + 9.

From: **Justice Powell**

Circulated: _____

Recirculated: **DEC 7 1983**

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

**MICHIGAN, PETITIONER v. RAYMOND CLIFFORD
AND EMMA JEAN CLIFFORD**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF MICHIGAN**

[December —, 1983]

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12/19

P-9

Justice Brennan
Justice White
Justice Marshall ✓
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: _____

DEC 20 1983

Recirculated: _____

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

MICHIGAN, PETITIONER *v.* RAYMOND CLIFFORD
AND EMMA JEAN CLIFFORD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF MICHIGAN

[December —, 1983]

JUSTICE POWELL delivered the opinion for the Court.

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01/05

TO: The Chief Justice

Page 1

- Justice Brennan
- Justice White
- Justice Marshall ✓
- Justice Blackmun
- Justice Rehnquist
- Justice Stevens
- Justice O'Connor

From: Justice Powell

Circulated: _____

Recirculated: _____

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

**MICHIGAN, PETITIONER v. RAYMOND CLIFFORD
AND EMMA JEAN CLIFFORD**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF MICHIGAN**

[January —, 1984]

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

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 Clifford's 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 eviden-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

TO: The Conference

FROM: Justice Powell

RE: Cases Held for Michigan v. Clifford, 82-357

Three cases were held for Michigan v. Clifford, No. 82-357, and will be discussed at the January 20, 1984 Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

November 23, 1983

Re: No. 82-357 Michigan v. Clifford

Dear Lewis:

In due course I will circulate a dissent.

Sincerely,



Justice Powell

cc: The Conference

To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: 12/6/83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

MICHIGAN, PETITIONER *v.* RAYMOND CLIFFORD
 AND EMMA JEAN CLIFFORD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF MICHIGAN

[December —, 1983]

JUSTICE REHNQUIST, 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 fire fighters and inspectors following a fire at a warehouse. 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 visits more than three weeks after the fire required an administrative warrant. *Id.*, at 511. These precepts of *Tyler* have not proved easy to apply, and we are told in the Court's opinion in this case that "we granted certiorari to clarify doubt that appears to exist as to the application of our decision in *Tyler*." Ante, at 2. 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.

Changes pp: 1, 3 & 4

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: DEC 15 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

MICHIGAN, PETITIONER *v.* RAYMOND CLIFFORD
AND EMMA JEAN CLIFFORD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF MICHIGAN

[January —, 1984]

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

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Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: Justice Rehnquist

Circulated: _____

Recirculated: DEC 19 _____

Pg 647

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

MICHIGAN, PETITIONER *v.* RAYMOND CLIFFORD
 AND EMMA JEAN CLIFFORD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF MICHIGAN

[January —, 1984]

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To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Stevens
 Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: JAN 4 1984

4th DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

MICHIGAN, PETITIONER *v.* RAYMOND CLIFFORD
 AND EMMA JEAN CLIFFORD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF MICHIGAN

[January —, 1984]

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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 fire fighters and inspectors following a fire at a warehouse. 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 visits more than three weeks after the fire required an administrative warrant. *Id.*, at 511. These precepts of *Tyler* have not proved easy to apply, and we are told in the Court's opinion in this case that "we granted certiorari to clarify doubt that appears to exist as to the application of our decision in *Tyler*." Ante, at 2. 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

Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

RECEIVED
 SUPREME COURT U.S.
 JUSTICE

'83 DEC 16 A11:15

From: **Justice Stevens**

Circulated: DEC 16 '83

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

MICHIGAN, PETITIONER *v.* RAYMOND CLIFFORD
 AND EMMA JEAN CLIFFORD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF MICHIGAN

[January —, 1984]

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 they 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

Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

pp. 6-7

From: Justice Stevens

Circulated: _____

Recirculated: DEC 27 1983

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

MICHIGAN, PETITIONER v. RAYMOND CLIFFORD
AND EMMA JEAN CLIFFORD

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
OF MICHIGAN

[January —, 1984]

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To: The Chief Justice
 Justice Brennan
 Justice White
 Justice Marshall
 Justice Blackmun
 Justice Powell
 Justice Rehnquist
 Justice O'Connor

From: **Justice Stevens**

Circulated: _____

Recirculated: JAN 5 '84

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 82-357

**MICHIGAN, PETITIONER v. RAYMOND CLIFFORD
 AND EMMA JEAN CLIFFORD**

**ON WRIT OF CERTIORARI TO THE COURT OF APPEALS
 OF MICHIGAN**

[January —, 1984]

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

November 23, 1983

No. 82-357 Michigan v. Clifford

Dear Lewis,

I will await further writing in
this case.

Sincerely,



Justice Powell

Copies to the Conference

D

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

REC'D
SUPREME COURT U.S.
JUSTICE O'CONNOR

December 7, 1983

'83 DEC -7 A11:18

Om...

Re: No. 82-357 Michigan v. Clifford

Dear Bill,

Please join me.

Sincerely,

Sandra

Justice Rehnquist

Copies to the Conference