GRANTED

No. 99-1132

In the

Supreme Court of the United States

PEOPLE OF THE STATE OF ILLINOIS,

Petitioner,

v.

CHARLES McARTHUR,

Respondent.

On Writ of Certiorari to the Appellate Court of Illinois

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Is it reasonable under the Fourth Amendment for police officers who have probable cause to believe that a residence contains evidence that could readily be destroyed to secure the residence by preventing its occupant and others from entering unaccompanied while the officers seek a search warrant?

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The oral ruling of the Circuit Court for the Sixth Judicial Circuit, Moultrie County, Illinois, granting Respondent's motion to suppress evidence was transcribed at the conclusion of that court's suppression hearing. It is reprinted in the Joint Appendix, Jt. App. 39-41. The Appellate Court of Illinois, Fourth District, issued its opinion affirming that ruling on May 7, 1999. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999). That decision is reprinted in the appendix to the Petition for Writ of Certiorari, Pet. App. 1-14. The October 6, 1999, order of the Supreme Court of Illinois, denying Petitioner's Petition for Leave to Appeal to that court, is also reprinted in the appendix to the Petition for Writ of Certiorari, Pet. App. 15.

JURISDICTION

The Appellate Court of Illinois, Fourth District, entered its judgment on May 7, 1999, and the Supreme Court of Illinois denied Petitioner's Petition for Leave to Appeal to that court on October 6, 1999. The Petition for Writ of Certiorari was timely filed on January 4, 2000 and this Court granted that Petition on May 1, 2000. Petitioner invokes this Court's jurisdiction under 28 U.S.C. §1257(a) because Respondent has claimed a violation of his rights under the United States Constitution.

CONSTITUTIONAL PROVISION INVOLVED

This case puts in issue the Fourth Amendment to the United States Constitution, which provides as follows:

> 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.

U.S. Const., amend. IV (hereinafter "the Fourth Amendment").

STATEMENT OF THE CASE

Respondent Charles McArthur was arrested and charged with misdemeanor violations of Illinois' drug and paraphernalia possession laws after a search of his residence, conducted pursuant to a warrant, disclosed approximately 2.3 grams of marijuana and paraphernalia, including a smoking pipe, hidden under a sofa. The trial court, after an evidentiary hearing, granted Respondent's motion to suppress those items, finding that police officers had violated his rights under the Fourth Amendment when they secured his residence for approximately two hours while obtaining the search warrant. Illinois' intermediate appellate court affirmed that ruling, and the Supreme Court of Illinois denied leave to appeal. The People of the State of Illinois respectfully request that this Court reverse those rulings.

On the afternoon of April 2, 1997, two officers of the Sullivan, Illinois, police department went to the home of

Respondent and his wife, Tera McArthur ("Tera"). The home was a trailer located in a trailer park. Tera had asked them to accompany her to the trailer to "keep the peace" while she moved her belongings out. Jt. App. 15, 20. After Tera removed her possessions from the trailer, she told the officers that her husband (Respondent) had "dope" in the trailer. The senior officer, Assistant Police Chief John Love, asked Tera to describe what she had seen. Tera said she had seen Respondent hide "pot" under the couch in the trailer. Jt. App. 15-16, 19.

Officer Love knocked on the door of the trailer, and Respondent answered. Officer Love told Respondent that his wife had informed the officers that he had marijuana in the trailer. Respondent denied the accusation. Officer Love asked Respondent if he could enter the trailer and search it, but Respondent declined to permit the officer to search without a warrant. Jt. App. 16, 26, 29. When this conversation concluded, Respondent was outside the trailer. Jt. App. 16, 26.[1]

Officer Love asked Tera whether she would be willing to tell a judge what she had seen, and she agreed to do so. Officer Love's partner then left with Tera to go to the local prosecutor's office for the purpose of seeking a

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[1] The record does not make clear exactly when or how Respondent came to be outside the trailer, although he was outside at the time he refused to consent to a warrantless search. Jt. App. 16, 17, 26. Respondent did not testify that he was asked or otherwise compelled to step out of the trailer, and Officer Love testified that he did not recall whether he asked Respondent to come outside or Respondent did so on his own (Jt. App. 17).

search warrant for the trailer. Jt. App. 16-17, 26. Officer Love remained behind with Respondent. He did not arrest Respondent or tell Respondent that he was not free to leave. Jt. App. 22, 29. When Respondent asked Officer Love if he could go back inside the trailer to wait for the warrant, however, Officer Love told him that, until the warrant was or was not obtained, Respondent would not be allowed to reenter the trailer unless accompanied by the officer. Jt. App. 17, 27.

Respondent and Officer Love waited outside the trailer for about two hours before other officers returned with a search warrant for the trailer.[2] Jt. App. 3-10, 18, 27. During that period Respondent asked Officer Love if he could go back into the trailer, and was told that he could do so only if the officer accompanied him. At least twice Respondent entered the trailer to get cigarettes and call family members; each time, Officer Love stood in the doorway of the trailer and observed Respondent as he did so, but made no further entry into and no search of the trailer. Jt. App. 17, 18, 22-23, 27, 30. At the suppression hearing, Respondent admitted that his purpose in asking to go back into the trailer was to destroy the evidence concealed there and that he would have done so had he

[2] The trial judge concluded that approximately two hours elapsed between the officers' arrival at the trailer and the issuance of the warrant. Jt. App. 40. Officer Love testified that he arrived at the trailer at approximately 3:15 p.m. (Jt. App. 25), and the warrant states on its face that it was issued at 5:05 p.m. (Jt. App. 4). Nevertheless, Tera McArthur, in her affidavit submitted in support of the warrant, stated that she saw the marijuana in the trailer at approximately 3:40 p.m., Jt. App. 9, suggesting that the actual time may have been shorter.

been permitted to enter alone, although he did not announce that purpose to Officer Love. Jt. App. 27, 29. At some point during this period Respondent's mother came to the trailer. She was also told by Officer Love that she could not enter unaccompanied. Jt. App. 17-18. When other officers returned with the warrant, Respondent showed the officers where a small quantity of marijuana and paraphernalia were hidden. He was then arrested. Jt. App. 18, 23, 29-30.

Respondent was charged with two counts of unlawful possession of drug paraphernalia and one count of unlawful possession of less than 2.5 grams of marijuana, all misdemeanor violations. 720 ILCS 600/3.5(a) and 550/4(a).[3] He filed a motion to suppress the items found at his residence, arguing that barring him from entering the trailer while the search warrant was sought had amounted to an illegal arrest, and that the marijuana and paraphernalia recovered when the warrant was executed were the products of that arrest because, had he not been kept outside, he would have destroyed them.

After an evidentiary hearing at which Respondent and Officer Love testified, the trial court granted Respondent's motion to suppress. Jt. App. 39-41. The State appealed, and the Appellate Court of Illinois, Fourth District, affirmed. *People v. McArthur*, 304 Ill. App. 3d 395, 713 N.E.2d 93 (4th Dist. 1999); Pet. App. 1-14. The court

[3] Under Illinois law, possession of not more than 2.5 grams of marijuana is a Class C misdemeanor punishable by not more than 30 days of imprisonment, while paraphernalia possession is a Class A misdemeanor punishable by less than one year of imprisonment. 730 ILCS 5/5-8-3(a)(1) and (3).

conceded that the police officers had "probable cause to secure the residence." Pet. App. 12. The court nonetheless held that barring Respondent from reentering his home unaccompanied amounted to his "constructive eviction" therefrom, *id.*, although the court later observed that it was "unclear whether the police effected a seizure of [Respondent's] person when they secured his residence and, if so, whether the seizure was reasonable," Pet. App. 13-14. The court distinguished the instant case, wherein Respondent was on the premises at the time the home was seized, from one in which the police secure premises and bar entry by anyone thereafter arriving. Pet. App. 12. Similarly, the court distinguished that portion of the opinion in *Segura v. United States*, 468 U.S. 796, 813 (1984) (Opinion of Burger, C.J., joined by O'Connor, J.), that had declared that the seizure of a residence presents a lesser interference with the occupant's possessory interest if the occupant is then in custody, noting that Respondent herein was present and not under arrest at the time he was barred from entering his trailer. Pet. App. 7. The court also concluded that Officer Love conducted both a search and a seizure "from the inside" when he stood in the doorway of the trailer to observe Respondent as he made phone calls and retrieved his cigarettes. Pet. App. 12-13.

The State filed a timely Petition for Leave to Appeal to the Supreme Court of Illinois. On October 6, 1999, that court denied the petition. The State's Petition for a Writ of Certiorari was filed in this Court on January 4, 2000 and granted on May 1, 2000.

SUMMARY OF ARGUMENT

This case presents the question whether, as an alternative to either the loss of evidence or a warrantless search to recover it, a police officer may "maintain the status quo"[4] by prohibiting entry to a residence by its unarrested occupant while a fellow officer seeks and obtains a search warrant. By securing the residence from the outside, the officers in this case honored Respondent's privacy rights while assuring the preservation of evidence that, but for their action, would certainly have been destroyed.

The Fourth Amendment's requirement that searches and seizures be reasonable prescribes a balancing of the intrusion upon an individual's interests in privacy and possession against the State's interest in detecting and prosecuting crimes. The officers in this case visibly executed that balance, assuring that evidence was preserved while leaving Respondent's right to the privacy of his home, as well as his own liberty, virtually intact. The balance of interests required by the Fourth Amendment demonstrates that the actions of the police officers in this case were reasonable. The infringement upon Respondent's rights was deliberately minimal. The securing of Respondent's trailer was a seizure, not a search, and thus effected only his possessory interests. These interests are of less concern under the Fourth Amendment than the privacy interests that would have been implicated by an entry and search. Respondent lost posses-

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[4] Erwin N. Griswold, *Criminal Procedure 1969 - Is It a Means or an End?*, 29 Md. L. Rev. 307, 317 (1969).

sion of his home for only the brief and reasonable period required to obtain a judicial warrant. Moreover, contrary to the view of the Appellate Court, Respondent himself was not in any significant way seized as a result of this procedure, as he remained free to go anywhere in any manner except unescorted into his home.

The State's interest in carrying out this procedure was substantial. The officers had firsthand, current information constituting probable cause to believe that evidence of a crime was inside the trailer. The State has a strong interest in assuring that such evidence is not destroyed while it seeks to invoke judicial process in order to gain access to it. In this case, of course, the officers' concern for the security of that evidence was well-founded; the evidence ultimately seized under the warrant certainly would have been lost had the officers not barred Respondent's entry.

The police officers were not required to obtain a separate warrant before temporarily seizing Respondent's trailer while a search warrant was sought. Probable cause was sufficient to permit the officers to secure the residence provisionally pending the issuance of a warrant to search. This Court has endorsed temporary seizures of property or persons pending further investigation based on probable cause. That power is no less appropriately exercised where the warrantless seizure of a home is at issue, particularly when the seizure is carried out as an alternative to the intrusion of a warrantless search. Endorsement of the practice of securing from the outside, when appropriate and effective, will encourage the use of search warrants, as it did in this case, by allaying the

fears of officers that evidence will be lost. It will correspondingly discourage, or at least confine, warrantless searches intended to quell those fears.

Finally, the Appellate Court below was wrong in finding that Officer Love secured Respondent's home "from the inside" (Pet. App. 12) by standing in the doorway and observing Respondent as he made telephone calls and got cigarettes. Those brief entries yielded nothing incriminating, and the court never linked them in any way to the discovery of the evidence later obtained by warrant. Because the officer was entitled to bar Respondent's entry for the limited period required to obtain the warrant, Respondent must be deemed to have consented to those entries. In fact, they militate in favor of a finding of reasonableness, as they manifest Officer Love's endeavor to minimize the intrusion imposed by the temporary securing of Respondent's home.

ARGUMENT

THE FOURTH AMENDMENT PERMITS OFFICERS WHO HAVE PROBABLE CAUSE TO SEIZE AND SECURE A RESIDENCE FROM THE OUTSIDE FOR A REASONABLE PERIOD OF TIME WHILE SEEKING A SEARCH WARRANT.

The police officers in this case effected a temporary warrantless seizure of Respondent's residence in order to preserve the existence of incriminating evidence while they sought and obtained a search warrant. This brief infringement upon Respondent's possessory interest in his home allowed the officers to preserve evidence contained inside from certain destruction without resort to

the primary affront against which the Fourth Amendment stands: a warrantless entry into a home. This procedure thus answers a need that has been noted by distinguished constitutional commentators, both on and off the bench.[5] It represents a reasonable accommodation of interests that deserves this Court's endorsement.

A. The State's Interest in Securing Evidence Against Destruction Outweighs the Lesser Fourth Amendment Interests Implicated by the Temporary Seizure of Respondent's Residence.

The Fourth Amendment to the United States Constitution restricts only searches or seizures that are "unreasonable." This "key principle" calls for "the balancing of competing interests." *Dunaway v. New York*, 442 U.S. 200, 219 (1979) (White, J., concurring). In each instance the reviewing court must balance the intrusion upon an individual's personal Fourth Amendment rights against "the public interest" underlying the State's execution of a particular procedure. *United States v. Brignoni-Ponce*,

[5] *See Vale v. Louisiana*, 399 U.S. 30, 41 (1970) (Black, J. dissenting) ("This case raises most graphically the question how does a policeman protect evidence necessary to the State if he must leave the premises to get a warrant, allowing the evidence he seeks to be destroyed."); Griswold, *supra* n. 4, at 317 ("Does the police officer have any power to maintain the status quo while he, or a colleague of his, is taking the time necessary to draw up a sufficient affidavit to support an application for a search warrant, and then finding a magistrate, submitting the application to him, obtaining the search warrant if it is issued, and then bringing it to the place where the arrest was made[?]").

422 U.S. 873, 878 (1975); *see also United States v. Place*, 462 U.S. 696, 703 (1983) ("We must balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the importance of the governmental interests alleged to justify the intrusion."); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). In this case the balance falls in favor of the State's interest at the cost of a limited Fourth Amendment intrusion.

By barring Respondent from entering his home while his fellow officer sought a search warrant, Officer Love selected a course of action deliberately designed to mitigate the nature and extent of the intrusion on the Fourth Amendment rights of Respondent. The procedure effected a seizure, and thus implicated interests that figure differently in Fourth Amendment analysis than those implicated by a search. A seizure affects a person's possessory interest in the property seized, while a search affects the maintenance of personal privacy. *United States v. Jacobsen*, 466 U.S. 109, 113 (1984). And although both interests are protected by the Fourth Amendment, the physical entry to an individual's home is considered "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 (1972); *see also United States v. Chadwick*, 433 U.S. 1, 13 and n. 8 (1977).

The infringement upon Respondent's possessory interests imposed by the seizure of his home was mitigated in significant respects. First, the seizure was provisional; it was undertaken only to allow officers to obtain a search

warrant, and was in effect only as long as it took to obtain one. Second, the approximately two-hour period was reasonable; the record would support no suggestion that this time period was excessive or that the officers were not diligent in seeking the warrant or returning to conduct the search. During those two hours Officer Love's partner was able to return to the local police station with Respondent's wife in tow, draft and type (or have typed) a warrant, complaint for warrant, and two affidavits (Jt. App. 3-10), locate a judge and submit them for his review, obtain his approval and return to Respondent's home. Two hours is an eminently reasonable time within which to accomplish these tasks. Certainly it did not approach the 19-hour period this Court commented on in *Segura v. United States*, 468 U.S. 796, 812-13 (1984) (opinion of Burger, C.J., joined by O'Connor, J.).

In addition, Officer Love effectively tempered the effects of the seizure by permitting Respondent to enter the trailer, albeit only under his observation. As discussed *infra* p. 22-24, these instances did not compromise Respondent's privacy rights. They did permit Respondent to exercise some possessory interest in his home by using the telephone and obtaining cigarettes from inside. While the seizure of the home was, so long as it lasted, substantially complete, some aspects of Respondent's possessory right to make use of it were thus extended to him.

The Appellate Court below may have believed that the impoundment of Respondent's trailer also implicated his interest in avoiding an unreasonable seizure of his person. In the operative portion of its decision the court observed that, while the police officers had sufficient

cause to secure Respondent's residence, doing so while Respondent was actually present "amounted to a constructive eviction of [Respondent] from his residence." Pet. App. 12; *see also* Pet. App. 13-14 ("unclear" whether police seized Respondent's person). The court found this case to be different from one in which an occupant arrives after the residence was secured, but did not explain the reason behind that distinction. Pet. App. 12. For purposes of preserving evidence, there should be no distinction between one who is on the scene and one who arrives later, after the premises is already secured; either individual, given the improper motive and opportunity, poses an equal threat to the evidence inside. In this case, Respondent's desire and admitted intention to destroy the evidence if given the chance would not have been diminished had he arrived after Officer Love had secured his trailer from entry.

To the extent the court felt that Respondent was personally seized when he was barred from reentering his trailer, that conclusion is simply wrong. As the court itself acknowledged, Respondent was not told he was under arrest, was not physically restrained, and was "free to go anywhere in the world except back into his trailer by himself." Pet. App. 14; *see also* Jt. App. 22, 29. Absent such restraint, Respondent himself was not seized at all. *See United States v. Mendenhall*, 446 U.S. 544, 553-54 (1980) (opinion of Stewart, J.). The restriction on a person's personal liberty imposed by the warrantless securing of his residence is "not remarkable," 3 Wayne R. LaFave, *Search and Seizure* §6.5(c), at 366 (3rd Ed. 1996), especially considering that the probable cause that supported that action would also have justi-

fied his warrantless arrest. *United States v. Watson*, 423 U.S. 411 (1976); *cf. Michigan v. Summers*, 452 U.S. 692, 703-04 (1981) (probable cause for search warrant provides connection with occupant justifying detention during warrant's execution).[6]

For these reasons, the impoundment procedure carried out by Officer Love resulted in an infringement of Respondent's Fourth Amendment rights that was substantially mitigated and considerably less extensive than would have been occasioned by a search. By contrast, the State's interest in this case was considerable. This Court has accorded substantial weight to the need of investigating authorities to prevent the destruction, alteration or concealment of evidence of crimes. *Schmerber v. California*, 384 U.S. 757, 770-71 (1966); *Preston v. United States*, 376 U.S. 364, 367 (1964); *Jeffers v. United States*, 342 U.S. 48, 52 (1951). Officer Love's decision to secure the premises was made based on his desire to prevent anyone from "disturb[ing] evidence", and specifically his concern that Respondent "could dispose [of] or destroy the evidence." Jt. App. 21. The presence of Respondent at the scene and unrestricted by arrest made that concern acute. Respondent's own intentions elevated that concern beyond the level of speculation. Had Officer Love not prevented him from doing so, Respondent would, by his

[6] Under Illinois law, an officer may make an arrest without a warrant whenever "[h]e has reasonable grounds to believe that the person is committing or has committed an offense." 725 ILCS 5/107-2(c). The term "offense" includes "a violation of any penal statute of this State," 725 ILCS 5/102-15, which would encompass a misdemeanor.

own admission, have destroyed the evidence hidden in the trailer. Jt. App. 27, 29. In this case, then, the officer's concern amounted to a sure thing.

The balance of competing interests tilts in favor of approving the impoundment procedure. The State's interest in preserving the marijuana and paraphernalia hidden in Respondent's home was meaningful, even compelling, in this case. The presence of Respondent, the person with the strongest motive to destroy the items, made such destruction a strong possibility; Respondent's admitted intentions made it a certainty. On the other side of the scale, while Respondent did suffer some loss of the use of his home, this deprivation was confined to a reasonable period directly related to its purpose, namely the securing of a warrant. More critically, the impoundment procedure provided a method by which the more grave intrusion of entry to preserve evidence could be avoided. Where it may appropriately be used, impoundment thus serves the Fourth Amendment's policies not simply by providing a model of restrained police conduct, but also by lessening or eliminating the need or motive for greater intrusion.

B. The Constitution Does Not Require That Police Obtain a Seizure Warrant Before Temporarily Seizing a Residence While Awaiting a Search Warrant.

In securing Respondent's residence and barring his entry, Officer Love acted without a warrant. Indeed, the very purpose of his actions was to freeze the circumstances in place while a search warrant was sought. It is not disputed that Officer Love had probable cause to

believe that marijuana was secreted within Respondent's trailer. Respondent's wife had told him it was there; she had seen it herself. And, when Officer Love asked her specifically where it was, she told him where it was hidden. Because he had probable cause, and because his seizure of Respondent's home did not involve entry and lasted only long enough to allow officers to obtain a judicial search warrant, the seizure of Respondent's trailer required no warrant or showing of particularized exigent circumstances.

The officer's decision to secure the premises in this case accords with this Court's precedent, and in fact with its prescriptions, for preserving the status quo pending the issuance of a search warrant. This Court has stated, on a number of occasions, that police may seize property that they have probable cause to believe contains contraband for the limited period required to obtain a warrant. In *Arkansas v. Sanders*, 442 U.S. 753 (1979), the Court condemned the warrantless *search* of a suitcase found in a car, but observed that the police had acted "commendably" in seizing the suitcase. The proper course of action, in the Court's view, would have been to hold on to the suitcase, unopened, until a warrant could be obtained. 442 U.S. at 761, 766; *see also Chadwick*, 433 U.S. at 13 (locked footlocker); *Chambers v. Maroney*, 399 U.S. 42, 51-52 (1970) (automobile). The Court's understanding that these warrantless seizures were reasonable has stemmed from its "preference for a magistrate's judgement," 399 U.S. at 51, and its recognition that a search represents "a far greater intrusion into Fourth Amendment values than [an] impoundment . . .," *Chadwick*, 433 U.S. at 13 n. 8.

These principles should apply with equal force to a residence, so long as privacy interests are not compromised. This Court has directly addressed the seizure of a residence pending issuance of a search warrant only once, without conclusively resolving the issue. In *Segura v. United States*, 468 U.S. 796 (1984), the Court considered a more invasive impoundment procedure; the officers in that case entered an apartment and remained inside for some 19 hours before a search warrant was issued. 468 U.S. at 801. The Court upheld the admissibility of the evidence seized under that warrant, but the portion of the opinion that addressed the constitutionality of the warrantless securing of the apartment garnered only two votes. 468 U.S. at 797 n. †; *id.* at 805-813 (Opinion of Burger, C.J., joined by O'Connor, J.).

Although the instant case is factually distinct from *Segura*, and in particular involves less of an intrusion, the precedential value of that case for this one is clear. Indeed, while the Court was sharply divided on whether a residence could be secured in the more intrusive manner employed in *Segura*, it appears that the entire Court—all nine Justices—agreed that the drug enforcement agents could have secured the apartment without entering in the absence of either a warrant or exigent circumstances. The Chief Justice, joined by Justice O'Connor, felt that "secur[ing] the premises from the outside by a 'stakeout' once the security check revealed that no one . . . [was] in the apartment" would have been "arguably, the wiser course." 468 U.S. at 811. Moreover, the full majority of five Justices joined that portion of the opinion that addressed the connection between the agents' entry and the warrant, in which the Court ob-

served that, "[h]ad the police never entered the apartment, but instead conducted a perimeter stakeout to prevent anyone from entering the apartment and destroying evidence, the contraband now challenged would have been discovered and seized precisely as it was here." 468 U.S. at 814. The four dissenting Justices, while critical of the agents' warrantless entry of and extended presence in the apartment, "assume[d] impoundment would be permissible even absent exigent circumstances when it occurs 'from the outside'—when authorities merely seal off the premises pending the issuance of a warrant but do not enter." 468 U.S. at 824 n. 15 (Stevens, J. dissenting). *See also* LaFave, *supra* §6.5(c), at 366 ("All members of the Court appear to agree that the mere seizure of the premises and contents . . . is permissible on probable cause even absent exigent circumstances.").[7]

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[7] Lower courts have also interpreted *Segura* as authorizing impoundment that is either entirely external or involves only a limited entry for purposes of securing the premises. *United States v. Riley*, 968 F.2d 422, 425 n. 5 (5th Cir.), *cert. denied*, 506 U.S. 990 (1992); *United States v. Scheets*, 188 F.3d 829, 840 (7th Cir. 1999), *cert. denied*, ___ U.S. ___, 120 S.Ct. 837 (2000); *United States v. Roby*, 122 F.3d 1120, 1125 (8th Cir. 1997); *United States v. Crespo De Lano*, 838 F.2d 1006, 1016 (9th Cir. 1987); *United States v. Morales*, 868 F.2d 1562, 1575 n. 8 (11th Cir. 1989); *United States v. Hall*, 50 M.J. 247, 250-51 (C.M.A. 1999); *People v. Griffin*, 727 P.2d 55, 59 (Colo. 1986); *State v. Hull*, 210 Conn. 481, 497, 556 A.2d 154, 163 (1989); *Jones v. State*, 648 So. 2d 669, 676 (Fla. 1994), *cert. denied*, 515 U.S. 1147 (1995); *Commonwealth v. Blake*, 604 Mass. 823, 829-30, 604 N.E.2d 1289, 1294 (1992); *State v. Alayon*, 459 N.W.2d 325, 329-30 (Minn. 1990), *cert. denied*, 498 U.S. 1049 (1991); *State v. DeLane*, 207 N.J. Super. 45, 50, 503 A.2d 903, 905 (App. Div.

(continued...)

The assumptions made in *Segura* are consistent with those made in other cases in which the Court, while criticizing warrantless entries made to preserve evidence, has commented favorably on the power of police officers to take the lesser step of seizing pending the securing of a warrant. In *Mincey v. Arizona*, 437 U.S. 385 (1978), the Court struck down the warrantless search of a murder suspect's apartment. In rejecting a claim of exigent circumstances amounting to the possible loss, destruction or removal of evidence, the Court found that possibility effectively "minimized" by "the police guard at the apartment." 437 U.S. at 394. The Court rejected a similar exigency argument in *Vale v. Louisiana*, 399 U.S. 30 (1970), in part because "the arresting officers [had] satisfied themselves that no one else was in the house." 399 U.S. at 34. That conclusion suggests that, once the officers had made that determination, they had the power to maintain that state of affairs while seeking the warrant that they needed. *See also Jeffers*, 342 U.S. at 52 ("In fact, the officers admit they could have easily prevented any such destruction or removal by merely guarding the door."); *Trupiano v. United States*, 334 U.S. 699, 706 (1948). In the instant case, Officer Love was the very "police guard" at the door that the Court has contemplated.

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[7] (...continued)
1986); *State v. Knight*, 340 N.C. 531, 548-49, 459 S.E.2d 481, 492 (1995); *State v. Smith*, 458 N.W.2d 779, 782 (S.D. 1990); *State v. Kin Ng*, 104 Wash. 2d 763, 770-71, 713 P.2d 63, 67 (1985).

While the Court has distinguished between property and places where warrantless *searches* are concerned, *Chambers*, 399 U.S. at 48, such a distinction is misplaced where only the *seizure* of a place, without entry, is at issue. When they can do so without invading a privacy interest, police officers are entitled to secure a place in order to prevent the destruction or other loss of evidence. The non-intrusive nature of a seizure, as compared to a search, excuses the requirement of a warrant so long as that seizure is confined to a reasonable period necessary for securing one. *See Segura*, 468 U.S. at 809-10 (Opinion of Burger, C.J., joined by O'Connor, J.). As Dean Griswold noted, "[u]nless there is some kind of a power to prevent removal of material from the premises, or destruction of material during this time, the search warrant will almost inevitably be fruitless." Griswold, *supra* n. 4, at 317. Indeed, cases like *Mincey*, *Jeffers* and even *Vale* demonstrate that, where privacy interests are at stake, securing a residence from the outside is the preferable alternative to a search. Impoundment addresses legitimate (and in this case decisive) concerns regarding loss of evidence without the need for intrusion.

By securing Respondent's home from the outside and sending his partner off to seek a search warrant, Officer Love was able to vindicate the State's interest in preventing Respondent from destroying the evidence hidden there without invading the sanctity of his home and thus perpetrating what has been considered the greater evil.[8]

[8] Officer Love's brief entries to observe Respondent as he made telephone calls and retrieved his cigarettes do not alter this analysis, as will be discussed *infra* p. 22-24.

Indeed, to prohibit this procedure would limit officers who have "every reason to believe that someone in the house [is] likely to destroy the contraband if the search were postponed," *Vale*, 399 U.S. at 41 (Black, J. dissenting), to choosing between conducting a warrantless search and standing by while evidence is altered or destroyed. One likely result of rejecting impoundment would therefore be the creation of additional incentives for warrantless searches; "a rule intended to maximize security of premises may have the opposite effect upon security of the person." LaFave, *supra* §6.5(c), at 361; *see also People v. Bennett*, 17 Cal. 4th 373, 387-88, 949 P.2d 947, 956-57 (1998). In the appropriate case, external impoundment provides a middle ground that accommodates a policeman's investigative interest at a lesser cost to the rights of the individual.[9]

[9] This Court should resist the suggestion of several commentators that an officer contributes to the need to secure a place by seeking Respondent's consent to search it. *See, e.g.*, Barbara C. Salken, *Balancing Exigency and Privacy in Warrantless Searches to Prevent Destruction of Evidence: The Need for a Rule*, 39 Hastings L.J. 283, 330-31 (1988); Note, *The Securing of the Premises Exception: A Search for the Proper Balance*, 38 Vand. L. Rev. 1589, 1616 (1985). It is not likely that Officer Love's knock on Respondent's door actually informed Respondent of his presence; the officers would not have made useful "peace-keepers" unless Respondent knew of their presence as soon as they arrived. In any event, immediate warrantless action can be justified by the need to prevent destruction of evidence even when that need is brought on by the seeking of consent to obtain it. *Cupp v. Murphy*, 412 U.S. 291 (1973). Once the suspect in that case had been "alerted to the desire of the police" to obtain consent, "there was no way to preserve the

(continued...)

C. Because Officer Love Was Entitled to Bar Respondent from Entering His Trailer Unless Escorted, the Officer's Observation of Respondent Inside the Trailer Was a Consensual Acceptance of That Condition.

On at least two occasions while they waited for the warrant, Officer Love permitted Respondent to enter the trailer while under his observation. Each time Officer Love stood in the doorway of the trailer and watched Respondent, but made no further entry or search. Jt. App. 17, 18, 22-23, 27, 30. The Appellate Court below determined that, by these entries, Officer Love had also "secured the dwelling from the inside," and concluded therefrom that the officer had executed a warrantless,

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[9] (...continued)
status quo while a warrant was sought, and there was good reason to believe that Murphy might attempt to alter the status quo unless he were prevented from doing so." 412 U.S. at 298 (Marshall, J., concurring).

The officers' ability to impound the trailer should not be lost because they first sought consent to search. Officer Love did not seek consent as a pretext to create the need to impound. Absent such a concern, this Court should not discourage the seeking of consent by requiring the police to risk their ability to preserve evidence if it is refused. While warrant searches are generally preferable to those conducted without a warrant, searches by voluntary and knowing consent are better still; they take less time and do not consume judicial resources. *Cf. Schneckloth v. Bustamante*, 412 U.S. 218, 228, 243 (1973). Informal investigative procedures are necessarily widely used and can be more effective and efficient than the invocation of judicial process. They may also be preferred by individuals who would rather abide an immediate and informal search than await a court order.

and therefore illegal, search of the trailer. The court distinguished *Segura* on the ground that Respondent in this case was not under arrest during the time his trailer was secured, and therefore was present and in a position to exercise some dominion over the trailer. Pet. App. 12-13.

As noted *supra* p. 12, the real consequence of these brief and cabined entries was to lessen the intrusion upon Respondent's Fourth Amendment interests by actually *permitting* him to continue to exercise some possessory rights in his residence. Because Officer Love was entitled to secure the residence as he did in order to prevent the destruction of evidence, as discussed above, he was entitled to bar Respondent's entry. Respondent's decision to accept Officer Love's conditions was therefore voluntary on his part, and the officer's presence in the doorway was consensual. In fact, Officer Love's terms essentially empowered both the officer and Respondent. Officer Love was entitled to keep Respondent out of the trailer entirely; similarly, had Respondent desired to prevent Officer Love from entering, he could have done so by simply staying outside himself.

The Appellate Court's reasoning, if followed to its logical conclusion, suggests that arresting Respondent would have lessened his possessory interest by making him unavailable to exercise it. *See also Segura*, 486 U.S. at 813 (Opinion of Burger, C.J., joined by O'Connor, J.); *but see id.* at 826-27 (Stevens, J. dissenting). It is difficult to understand how the additional personal infringement attendant to an arrest would have reduced Respondent's possessory interest. In any event, it is unlikely that Respondent would have preferred that alternative. In addition, Officer Love observed nothing of any conse-

quence, and certainly nothing inculpatory, as a result of these looks inside; these entries, even if illegal, cannot therefore be said to have "contribute[d] in any way to discovery of the evidence seized under the warrant." *Segura*, 468 U.S. at 815.

CONCLUSION

The judgment of the Appellate Court of Illinois should be reversed.

Respectfully submitted,

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