SUPREME COURT OF THE UNITED STATES

No. 99–1132

ILLINOIS, PETITIONER *v.* CHARLES MCARTHUR

ON WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FOURTH DISTRICT

[February 20, 2001]

JUSTICE SOUTER, concurring.

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

for warrantless action here is the immediate risk, and the limit of reasonable response by the police is set by the scope of the risk. See *Terry* v. *Ohio*, 392 U. S. 1, 25–26 (1968).

Since, however, McArthur wished to go back in, why was it reasonable to keep him out when the police could perfectly well have let him do as he chose, and then enjoyed the ensuing opportunity to follow him and make a warrantless search justified by the renewed danger of destruction? The answer is not that the law officiously insists on safeguarding a suspect's privacy from search, in preference to respecting the suspect's liberty to enter his own dwelling. Instead, the legitimacy of the decision to impound the dwelling follows from the law's strong preference for warrants, which underlies the rule that a search with a warrant has a stronger claim to justification on later, judicial review than a search without one. See *United States* v. *Ventresca*, 380 U. S. 102, 106 (1965); see also 5 W. LaFave, Search and Seizure §11.2(b), p. 38 (3d ed. 1996) ("[M]ost states follow the rule which is utilized in the federal courts: if the search or seizure was pursuant to a warrant, the defendant has the burden of proof; but if the police acted without a warrant the burden of proof is on the prosecution"). The law can hardly raise incentives to obtain a warrant without giving the police a fair chance to take their probable cause to a magistrate and get one.