

# ***State v. Tyson: Rendering Rule 13.2(c)(iii) of the Arkansas Rules of Criminal Procedure Ineffective at Guarding the Privacy Interests It Historically Protected\****

## I. INTRODUCTION

The following facts from *United States v. Randle* reflect a tempered example of police executing a nighttime-search warrant.<sup>1</sup> Police received authorization from a magistrate judge to execute a nighttime-search warrant based upon a confidential informant's tip that the defendant was selling crack cocaine from his home.<sup>2</sup> The police arrived at 10:30 p.m. and knocked on the door, announcing their presence.<sup>3</sup> The defendant tried to escape by fleeing through the back door, but the police caught him and served him with a copy of the search warrant.<sup>4</sup> A search of the home revealed cocaine, marijuana, scales, and several firearms, which corroborated the informant's assertion that the defendant sold illegal drugs from his home.<sup>5</sup> No injuries occurred, and no property was damaged during the execution of the warrant.<sup>6</sup>

Now consider the shocking facts from *Rush v. City of Mansfield*, which also illustrate the execution of a nighttime-

---

\* The author first thanks Professor Brian R. Gallini, Associate Professor of Law, University of Arkansas School of Law, for his invaluable direction and deliberation in helping prepare this note. Second, the author thanks her Note & Comment Editor, Jervonne Newsome, for her perceptive and candid advice on prior drafts. Third, the author thanks her family, especially her parents and grandparents, for their unwavering support and genuine enthusiasm throughout the drafting process and in all of her scholastic endeavors. Last, but far from least, the author thanks her husband for his patience and encouragement.

1. See 196 F. App'x 676, 677 (10th Cir. 2006) (upholding the district court's denial of the defendant-homeowner's motion to suppress by finding that probable cause supported the execution of the nighttime-search warrant).

2. *Id.* at 677.

3. *Id.*

4. *Id.*

5. *Id.* at 677-78.

6. *Randle*, 196 F. App'x at 677-78.

search warrant.<sup>7</sup> Immediately prior to his death at 11:00 p.m., a homeowner was sleeping in his bedroom when a flash grenade detonated outside his home.<sup>8</sup> ASORT<sup>9</sup> officers began banging on the door and started yelling unintelligibly from the surrounding yard.<sup>10</sup> Bright lights impaired the homeowner's vision as he attempted to identify the voices.<sup>11</sup> Panicked, he ran to the kitchen with a shotgun in hand.<sup>12</sup> He turned on the kitchen light, and a police officer opened fire.<sup>13</sup> The homeowner returned fire, but the officers berated him with bullets from their assault rifles.<sup>14</sup> Hit and bleeding, he slumped onto the kitchen floor still holding his shotgun.<sup>15</sup> Police rushed into the kitchen.<sup>16</sup> An officer saw the homeowner's bloody face and fired a shot that instantly killed him.<sup>17</sup> The law-enforcement officers had been executing a nighttime search pursuant to a lawfully issued search warrant.<sup>18</sup>

The *Mansfield* and *Randle* cases contrast the dangers posed by nighttime searches—escaping suspects and the sparking of unnecessary violence. Dramatic flair aside, on March 8, 2012, the Arkansas Supreme Court, in *State v. Tyson*, expanded the language of Rule 13.2(c)(iii) of the Arkansas Rules of Criminal Procedure,<sup>19</sup> which allows the execution of nighttime searches.<sup>20</sup> Rule 13.2(c) states:

---

7. 771 F. Supp. 2d 827, 850 (N.D. Ohio 2011).

8. *Id.*

9. The "Allied Special Response Team" (ASORT) consists of volunteer police officers, comprising a "SWAT-type team." *Id.* at 831 n.1, 838, 841.

10. *Id.* at 850.

11. *Id.*

12. *Mansfield*, 771 F. Supp. 2d at 850.

13. *Id.*

14. *Id.*

15. *See id.*

16. *Id.*

17. *Mansfield*, 771 F. Supp. 2d at 850.

18. *Id.* The victim's family did not challenge the nighttime-search warrant; instead, they brought a civil suit alleging that police used excessive force to execute the warrant. *Id.* at 853-55. Therefore, whether the warrant was reasonable was not an issue on appeal. However, the court's opinion provided in dicta that the judge who issued the warrant approved the nighttime execution knowing that three adults living in the home possessed firearms and kept two dogs outside the home. *Id.* at 847-48. Ultimately, the court concluded a reasonable jury could find that the use of ASORT to execute the nighttime-search warrant was unreasonable. *Id.* at 859.

19. *See* 2012 Ark. 107, at 10-11, 388 S.W.3d 1, 7-8.

20. ARK. R. CRIM. P. 13.2(c)(iii).

(c) Except as hereafter provided, the search warrant shall provide that it be executed between the hours of six a.m. and eight p.m., and within a reasonable time, not to exceed sixty (60) days. Upon a finding by the issuing judicial officer of reasonable cause to believe that:

(i) the place to be searched is difficult of speedy access; or

(ii) the objects to be seized are in danger of imminent removal; or

(iii) the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy; the issuing judicial officer may, by appropriate provision in the warrant, authorize its execution at any time, day or night, and within a reasonable time not to exceed sixty (60) days from the date of issuance.<sup>21</sup>

*Tyson* held that a nighttime-search warrant was improper because the affidavit did not cite sufficient facts showing that the home's occupants would only be safe if officers executed the warrant at night according to Rule 13.2(c)(iii).<sup>22</sup> Nevertheless, the court found that the officers acted within the *Leon* good-faith exception; therefore, the court did not suppress evidence obtained during the nighttime search.<sup>23</sup> Importantly, the court noted that Rule 13.2(c)(iii) may consider general-safety concerns if an affidavit alleges sufficient facts supporting that people other than officers will only be safe if officers execute the warrant at night.<sup>24</sup> By doing so, the Arkansas Supreme Court

---

21. ARK. R. CRIM. P. 13.2(c)(iii).

22. *Tyson*, 2012 Ark. 107, at 8, 388 S.W.3d. at 6.

23. *Id.* at 11, 388 S.W.3d at 7-8; *see also* United States v. Leon, 468 U.S. 897, 923 (1984) (outlining the parameters of the good-faith exception); Judge John N. Fogleman & N. Chase Teeple, *The Forgotten Rule: Rule 16.2(e) of the Arkansas Rules of Criminal Procedure*, 66 ARK. L. REV. 661, 688 (2013) (“[T]he Arkansas Supreme Court has only approved nighttime searches that violate Rule 13.2 by applying the *Leon* good-faith exception. *State v. Tyson* is such a case.” (footnote omitted)).

24. *Tyson*, 2012 Ark. 107, at 7-8, 388 S.W.3d at 6. The court stated:

Rule 13.2(c)(iii) of the Arkansas Rules of Criminal Procedure does not expressly limit the safety concern to the safety of police officers. . . . The problem with the affidavit in the instant case is that there were not facts to support a finding that the children, or anyone else, would only be safe during the execution of the warrant if the execution took place in the cover of darkness that nighttime affords.

expanded its caselaw, which had only applied the Rule's safety concerns to officer safety,<sup>25</sup> and eroded the original purpose of Rule 13.2(c)(iii), which was to protect the privacy interests of the public.<sup>26</sup>

This case note argues that Rule 13.2(c)(iii) should exclusively allow for nighttime searches predicated on law-enforcement officers' concerns for their own safety. Further, it asserts that allowing nighttime searches premised upon a concern for public safety is a dangerous mechanism, providing law enforcement with a ready-made key to access citizens' homes at night. Part II discusses the facts, rationale, and reasoning of *State v. Tyson*. Part III provides the historical framework in Arkansas for lawfully executing searches. Part IV then analyzes the implications of *Tyson* on the issuance of warrants—especially how the case erodes the intended purpose of Rule 13.2(c)(iii) by allowing nighttime searches based on general public-safety concerns. Part V concludes.

## II. STATE V. TYSON

On the night of September 4, 2010, law-enforcement officers monitored a mobile home in Jacksonville, Arkansas, due to complaints of narcotic activity.<sup>27</sup> The property manager told officers he did not know the names of the adults living in the trailer, but he claimed he knew that three small children lived there.<sup>28</sup> At approximately 8:30 p.m., officers observed a male carrying several bags of trash to a nearby dumpster, which the officers later recovered.<sup>29</sup> Inside, officers found items related to methamphetamine production and, therefore, believed the occupants were manufacturing methamphetamine.<sup>30</sup> The officers also found

---

*Id.*

25. *Id.* at 6-7, 388 S.W.3d at 5 (citing *Tate v. State*, 357 Ark. 369, 380, 167 S.W.3d 655, 662 (2004); *Owens v. State*, 325 Ark. 110, 926 S.W.2d 650 (1990)).

26. *Kelley v. State*, 371 Ark. 599, 603-04, 269 S.W.3d 326, 329-30 (2007) (“In addition to the constitutional protections and general rules requiring probable cause to obtain a search warrant, Ark. R. Crim. P. 13.2(c), which was adopted by [the Arkansas Supreme Court] in 1976, expressly provides further protection against unjustified nighttime searches of our citizens’ homes.”).

27. *Tyson*, 2012 Ark. 107, at 1, 388 S.W.3d at 3.

28. *Id.* at 1-2, 388 S.W.3d at 3.

29. *Id.* at 1, 388 S.W.3d at 3.

30. *Id.* at 2, 388 S.W.3d at 3.

baby diapers in the trash bags and toys surrounding the trailer.<sup>31</sup> Officers immediately filed an application for a nighttime-search warrant, which included the following justification:

THE CONTENTS OF THE TRASH BAGS REVEALED SEVERAL BABY DIAPERS. OFFICER [ ] WAS ADVISED BY THE TRAILER PARK MANAGER THAT THERE ARE THREE SMALL CHILDREN BETWEEN THE AGES OF 3 AND 8 YEARS OF AGE LIVING IN TRAILER NUMBER 23. THE MANAGER WAS UNCERTAIN OF THE NAMES OF THE ADULTS WITHOUT GOING TO THE OFFICE TO PULL THE LEASE AGREEMENTS. IT IS BELIEVED BECAUSE OF THE LACK OF THE ACTUAL LAB COMPONENTS IN THE TRASH THAT THEY MAY BE IN THE ACTUAL PROCESS OF COOKING THE METHAMPHETAMINE AT THIS TIME.<sup>32</sup>

A judge signed the search warrant at 9:42 p.m.,<sup>33</sup> and officers executed it immediately.<sup>34</sup> Upon entering the trailer, officers discovered the ongoing manufacture of methamphetamine and three sleeping children.<sup>35</sup> Tyson, the defendant, was present during the search and moved to suppress all evidence found inside the trailer, arguing that the judge did not have probable cause to issue the nighttime-search warrant because it failed to comply with Rule 13.2(c)(iii).<sup>36</sup>

Prior to trial, the circuit court granted Tyson's motion to suppress the evidence discovered during the nighttime search, holding that the search violated Rule 13.2(c)(iii).<sup>37</sup> The State appealed directly to the Arkansas Supreme Court.<sup>38</sup> The issue on appeal was whether the conditions for granting a nighttime-search warrant under Rule 13.2(c)(iii)

---

31. *Id.*

32. *Tyson*, 2012 Ark. 107, at 2-3, 388 S.W.3d at 3.

33. *Id.* at 3, 388 S.W.3d at 3; *see also* ARK. R. CRIM. P. 13.2(c)(iii) (defining a search after 8:00 p.m. as a nighttime search).

34. *Tyson*, 2012 Ark. 107, at 3, 388 S.W.3d at 3.

35. *Id.* at 2-3, 388 S.W.3d at 3.

36. *Id.* at 3, 388 S.W.3d at 3.

37. *Id.* at 3, 388 S.W.3d at 4.

38. *Id.*

account only for officer safety.<sup>39</sup> The court acknowledged that the caselaw focusing on safety as provided in Rule 13.2(c)(iii) “has overwhelmingly been in the context of officer safety”; nonetheless, it found the Rule “does not expressly limit the safety concern to the safety of police officers.”<sup>40</sup> Ultimately, the court held that Rule 13.2(c)(iii) could support a nighttime-search warrant premised upon facts showing probable cause of a risk of physical harm to persons on the premises or to officers executing the warrant.<sup>41</sup> While the *Tyson* court found the affidavit was insufficient to indicate the presence of general-safety concerns, the court acknowledged that general-safety concerns may support the execution of a nighttime search under Rule 13.2(c)(iii).<sup>42</sup> The court specifically intended the decision to help law-enforcement officers.<sup>43</sup> The court concluded: “[T]his appeal does present an issue involving the interpretation of our criminal rules and is one that will have widespread ramifications in that it will provide guidance to our law enforcement officers and our courts.”<sup>44</sup>

In contrast, Chief Justice Hannah’s dissent accused the majority of “ignor[ing] stare decisis and the predictability and stability of the law it is intended to protect.”<sup>45</sup> The dissent reasoned:

[T]he plain language of Arkansas Rule of Criminal Procedure 13.2(c)(iii) precludes the majority’s interpretation. The use of the word “safely,” in permitting execution at night where the warrant “can only be safely or successfully executed at nighttime,” refers solely to the safety of law enforcement officers who are executing the warrant. Rule 13.2(c)(iii) grants permission to execute at night where that is the only safe time for the officers to do so or where postponing will negate the likelihood the evidence to be seized will still be there. Safety of the occupants of a premise to be

---

39. *Tyson*, 2012 Ark. 107, at 4-5, 388 S.W.3d at 4.

40. *Id.* at 6, 8, 388 S.W.3d at 5-6.

41. *Id.* at 8, 388 S.W.3d at 6.

42. *See id.*

43. *Id.* at 5, 388 S.W.3d at 4.

44. *Tyson*, 2012 Ark. 107, at 5, 388 S.W.3d at 4.

45. *Id.* at 12, 388 S.W.3d at 8 (Hannah, C.J., dissenting).

searched is simply not contemplated or addressed by Rule 13.2.<sup>46</sup>

Critically, the Chief Justice noted that Rule 13.2 was designed to safeguard citizens' privacy at night and that the majority decision improperly and unnecessarily altered the rule.<sup>47</sup>

### III. HISTORICAL FRAMEWORK

This Part discusses the historical framework surrounding search-warrant executions. Section A discusses constitutional rulings from the United States Supreme Court and the Arkansas Supreme Court for executing searches. Section B then analyzes the Federal and Arkansas Rules of Criminal Procedure for executing searches. Finally, section C evaluates search procedures in other states for a comparative analysis of the development of nighttime-search procedures.

#### A. Constitutional Search Limitations

This section provides the framework for search procedures under federal and Arkansas law. It considers search requirements established by the Fourth Amendment to the U.S. Constitution and article 2, section 15 of the Arkansas Constitution. Furthermore, this discussion covers the Arkansas Supreme Court's interpretation of article 2, section 15 of the Arkansas Constitution to underscore the increased privacy interests it provides.

The Fourth Amendment to the U.S. Constitution guards citizens' privacy by prohibiting unreasonable searches and seizures by law-enforcement officers.<sup>48</sup> The Fourth Amendment provides:

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,

---

46. *Id.* at 11-12, 388 S.W.3d at 8.

47. *Id.* at 12, 388 S.W.3d at 8 (“[T]his court [has] stated that ‘[g]ood cause must exist and be found by the issuing judicial officer to exist to authorize entry into a citizen’s privacy in the night time. This is a safeguard justified by centuries of abuse.’” (quoting *Harris v. State*, 264 Ark. 391, 393, 572 S.W.2d 389, 393 (1978))).

48. U.S. CONST. amend. IV.

supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>49</sup>

Accordingly, a search without a warrant is presumptively unreasonable.<sup>50</sup> The presence of exigent circumstances, however, creates three categories of searches that weaken Fourth Amendment protections: (1) unannounced searches; (2) warrantless searches of places; and (3) warrantless searches of individuals.<sup>51</sup> These searches ensure the safety of law-enforcement officers executing a search and prevent the destruction of evidence.<sup>52</sup>

Although the Arkansas Supreme Court has concluded that the Fourth Amendment to the U.S. Constitution adequately protects against unlawful police action,<sup>53</sup> the court construes the Arkansas Constitution to provide even more protections to its citizens.<sup>54</sup> Article 2, section 15 of Arkansas Constitution provides:

The right of the people of this State to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be

---

49. U.S. CONST. amend. IV.

50. See, e.g., *Katz v. United States*, 389 U.S. 347, 356-58 (1967); see also Brian Gallini, *Step Out of the Car: License, Registration, and DNA Please*, 62 ARK. L. REV. 475, 489-90 (2009) (“The Supreme Court’s early Fourth Amendment jurisprudence unequivocally suggested that searches conducted without a warrant were presumptively ‘unreasonable.’”).

51. Paul Morris, Note, *Fouse v. State: The Arkansas Nighttime Search Rule – Helping Make Arkansas the Country’s Number One Producer of Methamphetamine*, 53 ARK. L. REV. 965, 965 (2000).

52. See Catherine A. Fiske, Comment, *Clean Sweeps: Protecting Officer Safety and Preventing the Imminent Destruction of Evidence*, 55 U. CHI. L. REV. 684, 692, 698-701 (1988); Jeffrey R. Gittins, Comment, *Excluding the Exclusionary Rule: Extending the Rational of Hudson v. Michigan to Evidence Seized During Unauthorized Nighttime Searches*, 2007 BYU L. REV. 451, 474.

53. *Rikard v. State*, 354 Ark. 345, 353, 123 S.W.3d 114, 118-19 (2003) (“[T]here are occasions and contexts in which federal Fourth Amendment interpretation provides adequate protections against unreasonable law enforcement conduct; however, there are also occasions when this court will provide more protection under the Arkansas Constitution than that provided by the federal courts.” (quoting *State v. Sullivan*, 348 Ark. 647, 652, 74 S.W.3d 215, 218 (2002))); *Griffin v. State*, 347 Ark. 788, 792, 67 S.W.3d 582, 584 (2002) (“[W]e do have the authority to impose greater restrictions on police activities in our state based upon our own state law than those the Supreme Court holds to be necessary based upon federal constitutional standards.”).

54. E.g., *Rikard*, 354 Ark. at 353, 123 S.W.3d at 118; *Griffin*, 347 Ark. at 792, 67 S.W.3d at 584.



violated, and no warrant shall issue, except upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the person or thing to be seized.<sup>55</sup>

The court has noted the similarity of the language in the Fourth Amendment to that provided in article 2, section 15.<sup>56</sup> Although the Arkansas Supreme Court cannot extend the Fourth Amendment beyond the protections provided by the United States Supreme Court,<sup>57</sup> it can impose greater restrictions on Arkansas law-enforcement activity based upon state law.<sup>58</sup> In many cases, the court has “harmonized” the protections afforded by the Fourth Amendment with the protections provided in article 2, section 15 of the Arkansas Constitution.<sup>59</sup>

## B. Search Limitations Based on Rules of Procedure

This section discusses the search protections provided by the Federal and Arkansas Rules of Criminal Procedure. The first subsection considers the protections against warrantless searches provided by the Federal rules. The second subsection then analyzes search protections provided by the Arkansas rules and critically examines Rule 13.2(c)(iii), which covers nighttime searches and seizures.<sup>60</sup>

### 1. Rule 41 of the Federal Rules of Criminal Procedure

At present, the Fourth Amendment does not require officers to execute a warrant during specific hours for searches to be reasonable.<sup>61</sup> The only showing the Supreme Court requires for nighttime-search executions is that

---

55. ARK. CONST. art. 2, § 15.

56. *State v. Harris*, 372 Ark. 492, 500, 277 S.W.3d 568, 575 (2008).

57. *Griffin*, 347 Ark. at 792, 67 S.W.3d at 584.

58. *Id.* (citing *Arkansas v. Sullivan*, 532 U.S. 769 (2001)).

59. *Id.* at 791, 67 S.W.3d at 584.

60. ARK. R. CRIM. P. 13.2(c).

61. *Cf. Gooding v. United States*, 416 U.S. 430, 458 (1974) (holding that a federal statute—21 U.S.C. § 879—“requires no special showing for a nighttime search”). As the dissent in *Gooding* noted, the majority’s holding may imply that the Fourth Amendment also does not require a special showing. *See id.* at 461-62 (Marshall, J., dissenting).

contraband is likely to be on the property or person to be searched at the time officers conduct a search.<sup>62</sup>

Rule 41 of the Federal Rules of Criminal Procedure, which provides federal search and seizure procedure,<sup>63</sup> is no broader than the Fourth Amendment and, in fact, conforms to constitutional standards.<sup>64</sup> The constitutional standards restrict search executions and protect “against official invasion of privacy and the security of property.”<sup>65</sup> Subsection (e)(2)(A)(ii) requires law enforcement to “execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time.”<sup>66</sup> Subsection (a)(2)(B) defines “[d]aytime” as “the hours between 6:00 a.m. and 10:00 p.m. according to local time.”<sup>67</sup>

Federal courts have interpreted Rule 41 to allow nighttime searches when facts show officers were concerned for their own safety.<sup>68</sup> First, an affidavit for the nighttime-search warrant must allege specific facts justifying probable cause.<sup>69</sup> Courts may uphold nighttime searches even when a warrant does not specifically authorize a nighttime search if law-enforcement officers’ safety concerns reasonably justified the search.<sup>70</sup>

## 2. Rule 13.2(c) of the Arkansas Rules of Criminal Procedure

Rule 13.2(c) of the Arkansas Rules of Criminal Procedure provides Arkansas citizens with more safeguards against unreasonable nighttime searches and seizures than

---

62. *Id.*

63. FED. R. CRIM. P. 41.

64. *See* Jones v. United States, 362 U.S. 257, 261 (1960) (noting that Rule 41 was designed to make effective the privacy interests protected by the Fourth Amendment); *see also* Alderman v. United States 394 U.S. 165, 173 n.6 (1969) (“Jones . . . makes clear that Rule 41(e) conforms to the general standard and is no broader than the constitutional rule.”).

65. Jones, 362 U.S. at 261.

66. FED. R. CRIM. P. 41(e)(2)(A)(ii).

67. FED. R. CRIM. P. 41(a)(2)(B).

68. *E.g.*, United States v. Buis, 678 F. Supp. 2d 665, 674 (E.D. Tenn. 2009).

69. United States v. Searp, 586 F.2d 1117, 1122 (6th Cir. 1978); United States v. Curry, 530 F.2d 636, 637 (5th Cir. 1976).

70. *See, e.g.*, Buis, 678 F. Supp. 2d at 674.

the protections found in the U.S. Constitution and Rule 41.<sup>71</sup> In accordance with Rule 13.2(c), a judicial officer may issue a warrant to be executed between the hours of 8:00 p.m. and 6:00 a.m. in only three situations:

- (i) the place to be searched is difficult of speedy access;  
or
- (ii) the objects to be seized are in danger of imminent removal; or
- (iii) the warrant can only be safely and successfully executed at nighttime.<sup>72</sup>

The Arkansas Supreme Court adopted the Arkansas Rules of Criminal Procedure in 1976.<sup>73</sup> Since that time, the court has consistently interpreted and applied the Rules as written originally or as amended periodically, with the latest amendments made in November 2013.<sup>74</sup> In 1977, the Arkansas Supreme Court began developing a test for determining the reasonableness of nighttime searches and seizures.<sup>75</sup> In one of its first nighttime-search cases, *Harris v. State*, the court analyzed both Rule 13.2(c) and article 2, section 15 of the Arkansas Constitution.<sup>76</sup> The *Harris* court upheld a magistrate's finding that a nighttime-search warrant complied with Rule 13.2(c) by showing reasonable cause that the suspects could easily dispose of guns used in an armed robbery.<sup>77</sup>

Following *Harris*, the court developed a strict standard for determining whether an affidavit for a nighttime-search warrant was reasonable based upon the threat of "imminent

---

71. Compare FED. R. CRIM. P. 41(e)(2)(A)(ii) ("The warrant must command the officer to . . . execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time . . ."), and *Curry*, 530 F.2d at 637 ("[P]robable cause must be shown for the issuance of the [nighttime-search] warrant, but beyond that the only requirement is that there be cause for carrying on the unusual nighttime arrest or search that, upon showing made, convinces the magistrate that it is reasonable."), with ARK. R. CRIM. P. 13.2(c) (limiting nighttime searches to only three expressly prescribed instances).

72. ARK. R. CRIM. P. 13.2(c).

73. *In re Ark. Criminal Code Revision Comm'n*, 259 Ark. 863, 864, 530 S.W.2d 672, 673 (1975) (citing January 7, 1976, as the effective date).

74. ARK. R. CRIM. P. REFS. & ANN.

75. See *Harris v. State*, 262 Ark. 506, 509-10, 558 S.W.2d 143, 145 (1977).

76. *Id.* at 509, 558 S.W.2d at 145.

77. *Id.* at 509, 558 S.W.2d at 144-45.

removal” of evidence.<sup>78</sup> When defendants challenge nighttime-search warrants, courts uphold the warrants based upon the threat of removal of evidence only if facts supported a reasonable belief that items were likely to be removed or destroyed.<sup>79</sup>

Rule 13.2(c)(iii) outlines an exception to the normal requirement of daytime-search executions by allowing nighttime searches when a warrant “can only be safely or successfully executed at nighttime.”<sup>80</sup> The Arkansas Supreme Court originally enforced the application of this Rule in matters dealing with the safety of the officers executing the warrant.<sup>81</sup>

In 1992, the Arkansas Supreme Court decided *Coleman v. State*, holding a nighttime-search warrant was based on sufficient facts that showed law-enforcement officers reasonably feared for their safety according to Rule 13.2(c)(iii).<sup>82</sup> The officers had been concerned for their safety because the subject house was on a cul-de-sac with only one entrance and the defendant regularly watched for cars and owned a gun; thus, the officers could only approach

---

78. See *Kelley v. State*, 371 Ark. 599, 608, 269 S.W.3d 326, 333 (2007) (holding a nighttime search unreasonable when “the affidavit lacked all indicia of reasonable cause to justify a nighttime search”); *Richardson v. State*, 314 Ark. 512, 519, 863 S.W.2d 572, 576 (1993) (holding that a nighttime-search warrant was unreasonable under Rule 13.2(c) when officers provided conclusory statements, not actual facts, in the affidavit for a nighttime-search warrant); *State v. Martinez*, 306 Ark. 353, 355-56, 811 S.W.2d 319, 320-21 (1991) (holding that the affidavit in support of a nighttime-search warrant did not contain facts sufficient to support any of the three applicable exceptions under Rule 13.2(c)); *Hall v. State*, 302 Ark. 341, 343-44, 789 S.W.2d 456, 458 (1990) (holding that a nighttime search was unreasonable where the warrant authorizing the search under Rule 13.2(c) was not supported by any facts amounting to reasonable cause to believe the items to be seized would be disposed of before morning); *State v. Broadway*, 269 Ark. 215, 216-17, 224, 599 S.W.2d 721, 722-23 (1980) (“There are only three exceptions to [Rule 13.2(c)’s time] restriction. The pertinent one here is that ‘the objects to be seized are in danger of eminent removal.’”).

79. See, e.g., *Cummings v. State*, 353 Ark. 618, 631, 635-36, 110 S.W.3d 272, 280, 282 (2003) (holding that a nighttime search based upon danger of removal was reasonable when the affidavit included facts that the defendant, later convicted of producing child pornography, knew he was under investigation and that some of the pictures on his computer were “too revealing”).

80. ARK. R. CRIM. P. 13.2(c)(iii).

81. See *Coleman v. State*, 308 Ark. 631, 632, 826 S.W.2d 273, 274-75 (1992).

82. *Id.* at 633-34, 826 S.W.2d at 275 (noting sufficient facts supported fear of imminent removal of evidence).

the house safely in the dark.<sup>83</sup> Likewise, in *Owens v. State*, the Arkansas Supreme Court upheld a nighttime-search warrant that indicated occupants of a residence could observe arriving vehicles, that the occupants had been using meth for six months and feared law enforcement, and that automatic weapons were possibly in the residence.<sup>84</sup> The court noted that the difficult access, possibility of destroyed evidence, and officer safety justified the nighttime-search warrant; but the court did not explicitly mention occupant safety as justifying the nighttime-search warrant—even though the affidavit asserted that both officer and occupant safety were in danger.<sup>85</sup> The court never exclusively considered the safety of occupants to be a compelling justification for a nighttime search.<sup>86</sup>

Further, in the 1998 decision *Langford v. State*, the court found that when an armed and dangerous defendant had previously threatened use of a semi-automatic pistol, the “element of surprise inherent with a nighttime search [was] essential for the safety of the officers executing the warrant.”<sup>87</sup> The court held that exigent circumstances warranted the nighttime search in accordance with Rule 13.2(c)(iii) and affirmed the trial court’s denial of the defendant’s motion to suppress.<sup>88</sup>

In the 1999 decision *Fouse v. State*, the court ignored the general-safety concerns that officers had used to justify a nighttime search, holding that the warrant’s affidavit was not supported by sufficient facts.<sup>89</sup> The affidavit asserted that “the chemicals used to manufacture methamphetamine are volatile and subject to explode or at the least cause a fire and

---

83. *Id.* at 633, 826 S.W.2d at 275 (noting that although the affidavit contained only form language indicating the house “was so situated that the approach of the officers serving this warrant can be readily detected,” the officers knew of articulable facts supporting the need for a nighttime search).

84. *Owens v. State*, 325 Ark. 110, 117, 926 S.W.2d 650, 654 (1996).

85. *Id.* (“Speedy access is necessary both for the protection and safety of approaching officers as well as occupants of the residence . . .”).

86. *See id.* at 118-19, 926 S.W.2d at 655.

87. *Langford v. State*, 332 Ark. 54, 63-64, 962 S.W.2d 358, 363-64 (1998) (noting speedy access was impossible and the drugs were packaged in a manner that would make their destruction easy).

88. *Id.* at 63-64, 962 S.W.2d at 364.

89. *See* 337 Ark. 13, 21-23, 989 S.W.2d 146, 149-51 (1999) (remanding the case back to the trial court for entry of an order consistent with the finding that the affidavit was insufficient to support the nighttime-search warrant).

can be a danger to surrounding houses in a residential setting.”<sup>90</sup> Importantly, the court noted that “[t]he privacy of citizens in their homes, secure from nighttime intrusions, is a right of vast importance as attested not only by our Rules, but also by our state and federal constitutions.”<sup>91</sup> In a second case from 1999, the Arkansas Court of Appeals affirmed a trial court’s denial of a defendant’s motion to suppress, finding a nighttime search reasonable under Rule 13.2(c)(iii) because firearms and aggressive dogs at the home to be searched presented dangers to officers.<sup>92</sup>

In the 2004 decision *Tate v. State*, the court continued to assess officer safety for determining the reasonableness of a nighttime search.<sup>93</sup> The *Tate* court found that a nighttime search was reasonable in accordance with Rule 13.2(c)(iii) because security cameras surrounding the home created fear for officer safety and because executing the warrant “under the cover of darkness w[ould] greatly diminish the danger to the approaching officers.”<sup>94</sup>

In sum, procedural rules permitting nighttime searches at the federal level and in Arkansas have historically focused on officer-safety concerns to justify the issuance of nighttime-search warrants. Although the Arkansas rule specifies that a nighttime-search warrant requires more justification than does the federal rule, Arkansas courts had not explicitly interpreted Rule 13.2(c) as applying to general public-safety concerns until *Tyson v. State*.

### C. Other States

This section illustrates other states’ constitutional and procedural mechanisms for searches, demonstrating differences among states in what they consider reasonable searches and highlighting the enhanced protections provided in Arkansas. Moreover, this section argues that Arkansas intentionally enhanced its protections by enacting its Rules of Criminal Procedure, distinguishing Arkansas’s rules from

---

90. *Id.* at 20, 989 S.W.2d at 149.

91. *Id.* at 23, 989 S.W.2d at 150-51 (quoting *Garner v. State*, 307 Ark. 353, 358-59, 820 S.W.2d 446, 449-50 (1991)).

92. *Townsend v. State*, 68 Ark. App. 269, 275-76, 6 S.W.3d. 133, 136-37 (1999).

93. *See Tate v. State*, 357 Ark. 369, 379, 167 S.W.3d 655, 661 (2004).

94. *Id.* at 379-80, 167 S.W.3d at 661-62.

other states' rules that allow nighttime searches based on public safety.

Like Arkansas, many states grant their citizens more protections against unreasonable searches and seizures than does the U.S. Constitution.<sup>95</sup> Several state constitutions—like those of Arkansas's neighboring states—include search and seizure protections for citizens.<sup>96</sup> Particularly, some states, like Arkansas, guard against unreasonable searches to protect the privacy interests of the public beyond the protections provided by the Fourth Amendment.<sup>97</sup> Though the rules vary, state procedural rules take three distinct approaches in governing nighttime searches.

One group of states does not specifically mention nighttime searches in their rules of procedure; instead, these states find that affidavits with facts supporting probable cause for search warrants justify executing searches without regard for the time of their execution.<sup>98</sup> Several states do not require a special showing for nighttime-search warrants.<sup>99</sup>

---

95. *See, e.g.*, *State v. Dean*, 639 So. 2d 1009, 1011-12 (Fla. Dist. Ct. App. 1994) (noting that the state constitution provides more privacy protections than the Federal Constitution); *People v. Cabellas*, 851 N.E.2d 26, 45 (Ill. 2006) (“[S]tate courts are free to independently construe their state constitutions to provide more protection than the federal constitution.”); *Commonwealth v. Johnston*, 530 A.2d 74, 79 (Pa. 1987) (holding that although a dog sniff was not a search for Fourth Amendment purposes, it violated state law).

96. LA. CONST. art. I, § 5; MISS. CONST. art. III, § 23; MO. CONST. art. I, § 15; OKLA. CONST. art. II, § 30; TENN. CONST. art. I, § 7; TEX. CONST. art. I, § 9. Other states also specifically provide for search and seizure protections. ALA. CONST. art. I, § 5; ALASKA CONST. art. I, § 14; ARIZ. CONST. art. II, § 8; CAL. CONST. art. I, § 13; COLO. CONST. art. II, § 7; CONN. CONST. art. 1, § 7; HAW. CONST. art. 1, § 7; KAN. CONST. Bill of Rights, § 15; MONT. CONST. art. II, § 10; NEB. CONST. art. I, § 7; N.H. CONST. pt. I, art. 19; OR. CONST. art. I, § 9; PA. CONST. art. I, § 8; VT. CONST. ch. 1, art. 11; WASH. CONST. art. 1, § 7; WYO. CONST. art. I, § 4.

97. *See State v. Ault*, 724 P.2d 545, 549 (Ariz. 1986) (“The Arizona Constitution is even more explicit than its federal counterpart in safeguarding the fundamental liberty of Arizona citizens.”); *State v. Bobic*, 996 P.2d 610, 615-16 (Wash. 2000) (“Washington’s ‘private affairs inquiry’ is broader than the Fourth Amendment’s ‘reasonable expectation of privacy inquiry.’” (quoting *State v. Goucher*, 881 P.2d 210, 212 (Wash. 1994))).

98. *E.g.*, KAN. STAT. ANN. § 22-2510 (West 2013); TENN. CODE ANN. § 40-6-107 (West 2013).

99. *See, e.g.*, FLA. STAT. ANN. § 933.10 (West 2014) (stating that a search warrant may, if expressly authorized by the judge, be executed during the day or night, as required by the exigencies of the occasion); TENN. CODE ANN. § 40-6-107; *United States v. Larabee*, No. 05-40070-01-RDR, 2006 WL 839451, at \*1 (D. Kan. Mar. 28, 2006) (noting that, under Kansas law, officers may execute a warrant at any time of day or night in accordance with the standard of reasonableness); *State v. Sargent*, No.

For example, Tennessee allows law enforcement to execute search warrants in either the daytime or nighttime and does not procedurally differentiate between the two.<sup>100</sup>

A second group of states requires affidavits for nighttime-search warrants to contain facts supporting the execution of a nighttime search. Such states provide minimal criteria for nighttime searches.<sup>101</sup> Generally, these states require that articulable facts support a reasonable suspicion that law enforcement must conduct a nighttime search to prevent the destruction of evidence.<sup>102</sup> This approach is similar to Rule 41 of the Federal Rules of Criminal Procedure.<sup>103</sup>

Other states, such as Arkansas and Oklahoma, enumerate specific circumstances that justify executing nighttime searches.<sup>104</sup> Oklahoma provides three exceptions that allow for nighttime searches, none of which mention public-safety concerns.<sup>105</sup> Other states, unlike Arkansas, give courts the responsibility of determining justifications for nighttime-search warrants when rules of criminal procedure

---

CR-03-127, 2004 WL 396311, at \*6 (Me. Super. Ct. Feb. 13, 2004) (finding that reasonable cause justified the issuance of a nighttime-search warrant), *aff'd*, 875 A.2d 125 (Me. 2005); *State v. Barron*, 623 A.2d 216, 217 (N.H. 1993) (“The current warrant statute does not set forth any specific requirement for procuring a nighttime search warrant.”); *State v. Garcia*, 45 P.3d 900, 906 (N.M. Ct. App. 2002) (holding that reasonable cause is required for a nighttime search warrant and noting that this determination is a common-sense reading of the affidavit and does not impose “technical requirements” or “elaborate specificity” (quoting *In re Shon Daniel K.*, 959 P.2d 553, 557 (N.M. Ct. App. 1998))).

100. TENN. CODE ANN. § 40-6-107(b).

101. *See, e.g.*, MINN. STAT. ANN. § 626.14 (West 2013); PA. R. CRIM. P. 206(7); VT. R. CRIM. P. 41(c).

102. *See, e.g.*, *State v. Bourke*, 718 N.W.2d 922, 926-27 (Minn. 2006) (holding law enforcement must have a reasonable suspicion that a nighttime search is essential to preserve evidence or to protect officers or the public); *Commonwealth v. Johnson*, 462 A.2d 743, 746 (Pa. Super. Ct. 1983) (noting the affidavit supported a reasonable belief that evidence was in danger of disposal); *State v. Weiss*, 587 A.2d 73, 76 (Vt. 1990) (noting a nighttime search is valid when the affidavit supports a reasonable belief that evidence will be destroyed).

103. *See* FED. R. CRIM. P. 41(e)(2)(A)(ii) (“The warrant must command the officer to . . . execute the warrant during the daytime, unless the judge for good cause expressly authorizes execution at another time . . .”); *supra* Part III.B.1.

104. *E.g.*, ARK. R. CRIM. P. 13.2(c); OKLA. STAT. ANN. tit. 22, § 1230 (West 2013); *see also* N.Y. CRIM. PROC. LAW § 690.35(4)(a) (McKinney 2013) (listing circumstances that may allow a search-warrant application to request a nighttime search).

105. OKLA. STAT. ANN. tit. 22, § 1230.



do not define such circumstances.<sup>106</sup> In conclusion, the mechanisms for allowing nighttime-search warrants differ among states. Arkansas is one of a few states whose rules of criminal procedure provide such a mechanism, which does not explicitly allow nighttime-search warrants premised on general-safety concerns for the public.

#### IV. THE FAULTY GROUND OF *STATE V. TYSON*

This Part argues that the Arkansas Supreme Court wrongly decided *State v. Tyson*. Section A contends that the *Tyson* court strayed from the historical development of Arkansas caselaw interpreting Rule 13.2(c)(iii). Section B asserts that the court ignored the privacy interests of the public, which the Rule was designed to protect. Furthermore, section C argues that the court failed to provide any guidelines for nighttime-search warrants after creating the new exigency for public safety. Finally, section D contends that Rule 13.2(c) intentionally provides greater protections to Arkansas citizens than other states' rules, but that *Tyson* eviscerated these protections and created an unworkable rule.

##### A. *State v. Tyson*: Straying from Precedent

The *Tyson* decision faced criticism not only from Chief Justice Hannah's dissent but also from the public.<sup>107</sup> The Arkansas Supreme Court consistently interpreted Rule 13.2(c)(iii) in cases involving officer safety until the 2012

---

106. See OR. REV. STAT. ANN. § 133.565 (West 2013) (“[T]he search warrant shall be executed between the hours of 7 a.m. and 10 p.m. . . . The judge issuing the warrant may, however, . . . authorize its execution at any time of the day or night . . . .”); OHIO R. CRIM. P. 41 (“The warrant shall be served in the daytime, unless the issuing court . . . authorizes its execution at times other than daytime.”).

107. See *State v. Tyson*, 2012 Ark. 107, at 11, 388 S.W.3d 1, 8 (Hannah, C.J., dissenting); Max Brantley, *Supreme Court Open Doors Wide to Nighttime Searches*, ARK. TIMES (Mar. 8, 2012, 10:01 AM), <http://www.arktimes.com/ArkansasBlog/archives/2012/03/08/supreme-court-open-doors-wide-to-nighttime-searches> (writing that the Arkansas Supreme Court “blew a big hole in limits on issuance of warrants for nighttime searches” and arguing that the decision contravened the Arkansas Rules of Criminal Procedure); Rob Moritz, *Arkansas Supreme Court Says Nighttime Search for Safety OK*, SWTIMES.COM (Mar. 9, 2012, 8:59 AM), <http://swtimes.com/sections/news/state-news/arkansas-supreme-court-says-nighttime-search-safety-ok.html> (emphasizing that the “dissenting justices warned [the majority opinion] would arbitrarily broaden use of a police tactic meant to be used only in narrow circumstances”).

*Tyson* decision.<sup>108</sup> Thus, prior Arkansas court decisions over the past two decades reliably applied Rule 13.2(c)(iii)'s language—"can only be safely or successfully executed at nighttime"<sup>109</sup>—to officer-safety concerns.<sup>110</sup> Moreover, when the Arkansas Supreme Court has been faced with affidavits and warrants expressing concern for public safety, it has twice previously ignored such concerns.<sup>111</sup>

The *Tyson* court wrote that the ordinary meaning of Rule 13.2(c)(iii)'s language does not expressly limit safety concerns to officer safety.<sup>112</sup> The court reasoned that its interpretation of the language and intent behind Rule 13.2(c)(iii) supported its conclusion that public-safety concerns may justify a nighttime search.<sup>113</sup> The Rule states that the judicial officer must have reasonable cause for

---

108. *Tyson*, 2012 Ark. 107, at 6, 388 S.W.3d at 5 (majority opinion) (noting that prior Arkansas caselaw focusing "on the safety factor in Rule 13.2(c) has overwhelmingly been in the context of officer safety").

109. ARK. R. CRIM. P. 13.2(c)(iii).

110. *Tate v. State*, 357 Ark. 369, 379, 167 S.W.3d 655, 661 (2004) (noting that officer safety was in danger due to the home's surveillance system); *Fouse v. State*, 337 Ark. 13, 20-21, 989 S.W.2d 146, 149 (1999) (finding that affidavit's conclusory statements, which indicated danger to the public, was insufficient to support nighttime-search warrant); *Langford v. State*, 332 Ark. 54, 64, 962 S.W.2d 358, 364 (1998) (noting the element of surprise was essential to officer safety and justified a nighttime search); *Owens v. State*, 325 Ark. 110, 118-19, 926 S.W.2d 650, 655 (1996) (holding danger to officers justified nighttime-search warrant and failing to address if occupant safety could also serve as justification); *Coleman v. State*, 308 Ark. 631, 632, 826 S.W.2d 273, 274-75 (1992) (finding portion of nighttime-search warrant that merely replicated a memory bank's statements about officers being detected was insufficient to justify, by itself, issuing the warrant); *Townsend v. State*, 68 Ark. App. 269, 275, 6 S.W.3d 133, 137 (1999) (finding a nighttime search was reasonable due to the dangers presented to officers).

111. *See Fouse*, 337 Ark. at 20-21, 989 S.W.2d at 149 (holding search warrant deficient under Rule 13.2(c) despite affidavit's assertion of potential danger to surrounding homes); *see also Owens*, 325 Ark. at 117-19, 926 S.W.2d at 654-55 (upholding nighttime-search warrant for showing dangers to officer safety while not mentioning affidavits' explicit concern for public safety).

112. *Tyson*, 2012 Ark. 107, at 7-8, 388 S.W.3d at 6 ("Rule 13.2(c)(iii) of the Arkansas Rules of Criminal Procedure does not expressly limit the safety concern to the safety of police officers. . . . Nothing in that language suggests that the only safety concern in executing the warrant is the officers' safety."). The court also noted that it "construe[s] court rules using the same means and canons of construction used to interpret statutes." *Id.* (citing *Jackson v. Sparks Reg'l Med. Ctr.*, 375 Ark. 533, 537-38, 294 S.W.3d 1, 3 (2009)); *see also Jonesboro Healthcare Ctr., LLC v. Eaton-Moery Env'tl. Servs., Inc.*, 2011 Ark. 501, at 3, 385 S.W.3d 797, 799 ("The basic rule . . . to which all other interpretive guides defer is to give effect to the intent of the drafting body.").

113. *Tyson*, 2012 Ark. 107, at 7-8, 388 S.W.3d at 6.

believing “the warrant can only be safely or successfully executed at nighttime.”<sup>114</sup> By all accounts, the court looked neither to the plain language of the Rule—wherein the term “safely” exclusively modifies “executed”—nor did it look to its own thirty-year history illustrating the Rule’s intent.<sup>115</sup> Essentially, the court ignored its prior decisions by broadening the scope of the Rule, even though the court has never amended the Rule.<sup>116</sup> Therefore, the Arkansas Supreme Court’s expanded interpretation is not based upon the Rule’s language or the intent behind its creation.

### B. Privacy Unprotected

The implications of *State v. Tyson* are far-reaching. If general-safety concerns justify nighttime searches, then Rule 13.2(c)(iii)’s language allowing a nighttime search if “the warrant can only be safely or successfully executed at nighttime”<sup>117</sup> is unnecessary because the Rule will no longer guard the privacy interests that it was created to protect. Moreover, the Rule will risk allowing a nighttime search premised upon almost anything. In *Tyson*, the officers’ general-safety concern was the potential harm to children living in a home alongside suspected methamphetamine production.<sup>118</sup> Although the *Tyson* court held the affidavit did not provide facts showing that executing the warrant at night would better protect the children’s safety,<sup>119</sup> the court maintained that such public-safety concerns could justify a nighttime search where facts show it would be safer for children than a daytime search would be. Some argue that methamphetamines create an exigent circumstance due to

---

114. ARK. R. CRIM. P. 13.2(c)(iii).

115. *See Tyson*, 2012 Ark. 107, at 11-12, 388 S.W.3d at 8 (Hannah, C.J., dissenting). Chief Justice Hannah’s dissent notes:

[T]he plain language of Arkansas Rule of Criminal Procedure 13.2(c)(iii) precludes the majority’s interpretation. The use of the word “safely,” in permitting execution at night where the warrant “can only be safely or successfully executed at nighttime,” refers solely to the safety of law enforcement officers who are executing the warrant.

*Id.*

116. *See* ARK. R. CRIM. P. 13.2(c).

117. ARK. R. CRIM. P. 13.2(c)(iii).

118. *Tyson*, 2012 Ark. 107, at 2-3, 388 S.W.3d at 3 (majority opinion).

119. *Id.* at 8, 388 S.W.3d at 6.

the volatility of the chemical compounds used to create the illegal substance.<sup>120</sup> However, other drugs are equally dangerous to children<sup>121</sup> and to public safety.<sup>122</sup> Allowing nighttime searches premised merely on the safety of any occupant or the public provides officers with a ready-made key to citizens' homes, ultimately permitting them to intrude on citizens' lives at any time during the night. Such an allowance is risky and, as illustrated by the introductory cases, dangerous.<sup>123</sup>

The public has a right to be free from unreasonable searches and seizures;<sup>124</sup> yet, the new public-safety exigency the court created may allow nighttime searches based upon any circumstance that could be considered dangerous.<sup>125</sup> This broad reading opens the door so wide as to allow any possible danger to create an exigency. For example, consider *Rush v. City of Mansfield*, where the theft of a DVD player from Wal-Mart resulted in a deadly nighttime search.<sup>126</sup> When fear of public safety creates an exigency justifying nighttime searches, little remains of Rule 13.2(c) that would limit nighttime-search executions. Thus, *Tyson* renders Rule 13.2(c)(iii) wholly useless in protecting the people against unreasonable nighttime searches and seizures.

In *Tyson*, Chief Justice Hannah noted in his dissent:

[T]his court stated that “[g]ood cause must exist and be found by the issuing judicial officer to exist to authorize entry into a citizen’s privacy in the night time. This is a safeguard justified by centuries of abuse.” I believe that the majority is making alterations to Rule 13.2 and the

---

120. See *Morris*, *supra* note 51, at 980-81 (2000) (arguing that the court wrongly decided *Fouse v. State* when it found that the danger and volatility inherent with all methamphetamine labs did not justify a nighttime-search warrant).

121. See 21 U.S.C. § 812 (2012) (“Schedule of controlled substances”).

122. See NILA NATARAJAN ET AL., JUSTICE POLICY INST., SUBSTANCE ABUSE TREATMENT AND PUBLIC POLICY 9 (2008), available at [http://www.justicepolicy.org/images/upload/08\\_01\\_REP\\_DrugTx\\_AC-PS.pdf](http://www.justicepolicy.org/images/upload/08_01_REP_DrugTx_AC-PS.pdf).

123. See *supra* text accompanying notes 1-18.

124. ARK. CONST. art. 2, § 15.

125. Cf. *Coleman v. State*, 308 Ark. 631, 635, 826 S.W.2d 273, 276-77 (1992) (Newbern, J., dissenting) (arguing that the majority’s decision upholding a nighttime-search warrant because of the risk of destruction of evidence would allow future officers to justify nighttime searches by finding merely that suspects would have an easier time disposing evidence at night).

126. 771 F. Supp. 2d 827, 847, 850 (N.D. Ohio 2011); see *supra* notes 7-18 and accompanying text.

law on search warrants that are improper and unnecessary.<sup>127</sup>

Despite the Arkansas Supreme Court's attempt to protect public safety,<sup>128</sup> its finding that general-safety concerns justify nighttime searches unreasonably betrays the public's privacy interests by eviscerating Rule 13.2(c)(iii), which was specifically designed to protect privacy.<sup>129</sup>

### C. New Guidelines?

The Arkansas Supreme Court intended *Tyson* to serve as a guide for law enforcement and courts in interpreting Rule 13.2(c)(iii).<sup>130</sup> Though the court found that the Rule supported the creation of an exigency premised upon general-safety concerns, it held that the facts in *Tyson* were insufficient to create such a concern.<sup>131</sup> The affidavit alleged that officers could find baby diapers and methamphetamines in a trailer, thereby asserting that babies were living alongside methamphetamine production.<sup>132</sup> The court offered the following explanation for why the situation in *Tyson* did not justify a general-safety exigency:

The problem with the affidavit in the instant case is that there were not facts to support a finding that the children, or anyone else, would only be safe during the execution of the warrant if the execution took place in the cover of darkness that nighttime affords. Rather, it appears that the officers included facts to support a

---

127. *State v. Tyson*, 2012 Ark. 107, at 12, 388 S.W.3d 1, 8 (Hannah, C.J., dissenting) (citation omitted) (quoting *Harris v. State*, 264 Ark. 391, 394, 572 S.W.2d 389, 390 (1978)).

128. *See id.* at 8, 388 S.W.3d at 6 (majority opinion).

129. *See Fouse v. State*, 337 Ark. 13, 23, 989 S.W.2d 146, 150-51 (1999) (“The privacy of the citizens in their homes, secure from nighttime intrusions, is a right of vast importance as attested not only by our Rules but also by our state and federal constitutions.” (quoting *Garner v. State*, 307 Ark. 353, 358-59, 820 S.W.2d 446, 449-50 (1991))).

130. *Tyson*, 2012 Ark. 107, at 5, 388 S.W.3d at 4. The *Tyson* court wrote:

[T]his appeal does present an issue involving the interpretation of our criminal rules and is one that will have widespread ramifications in that it will provide guidance to our law enforcement officers and our courts as to the law in our state when faced with similar circumstances in the future.

*Id.*

131. *Id.* at 8, 388 S.W.3d at 6.

132. *Id.* at 9-10, 388 S.W.3d at 7.

finding that, in order to keep the children on the premises safe, who might have been at risk of serious bodily injury, they had probable cause to go in immediately, which happened to be nighttime.<sup>133</sup>

Thus, the guidelines the court seemingly suggests are: (1) that general safety is a sufficient concern; and (2) that facts must link the need for safety with the necessity of a nighttime execution rather than with immediate action.<sup>134</sup> Although the *Tyson* court specifically noted its intent to provide guidance, mere suggestions do not accomplish this goal. *Tyson* provides no guidance as to what facts could justify the general-safety exigency; instead, the court merely explained what is insufficient, thereby leaving the door open.<sup>135</sup> Redress through Arkansas courts will now be necessary to clarify what amounts to a general-safety concern. However, in the interim, citizens could endure privacy intrusions—the type Rule 13.2 was enacted to prevent.<sup>136</sup>

#### D. Arkansas's Protections Exceed Those of Other States

The Arkansas Supreme Court first enacted Rule 13.2(c)(iii) to provide more protection against unreasonable searches than the U.S. Constitution and the rules of criminal procedure in other states.<sup>137</sup> Arkansas's neighbors—Louisiana and Missouri—do not provide any additional requirements for nighttime searches in their constitutions<sup>138</sup> or criminal-procedure rules.<sup>139</sup> Both of those states enacted

---

133. *Id.* at 8, 388 S.W.3d at 6.

134. *See Tyson*, 2012 Ark. 107, at 8, 388 S.W.3d at 6 (noting that officers discovered the facts at 8:30 p.m. and that the warrant application alleged methamphetamine was “cooking . . . at this time” at 9:42 p.m.).

135. *See id.* at 8, 388 S.W.3d at 6.

136. *See Harris v. State*, 264 Ark. 391, 392, 572 S.W.2d 389, 390 (1978) (“Good cause must exist and be found by the issuing judicial officer to exist to authorize entry into a citizen’s privacy in the night time. This is a safeguard justified by centuries of abuse.”).

137. *See Kelley v. State*, 371 Ark. 599, 604, 269 S.W.3d 326, 329-30 (2007) (“In addition to the constitutional protections and general rules requiring probable cause to obtain a search warrant, Ark. R. Crim. P. 13.2(c), which was adopted by this court in 1976, expressly provides further protection against unjustified nighttime searches of our citizens’ homes.”).

138. *See* LA. CONST. art. I, § 5; MO. CONST. art. I, § 15.

139. MO. ANN. STAT. § 542.291 (West 2013) (originally enacted in 1974); LA. CODE CRIM. P. art. 162 (originally enacted in 1966).

their rules of criminal procedure prior to Arkansas,<sup>140</sup> perhaps indicating that Arkansas sought to provide more protections to its citizens than did its sister states. Arkansas has not amended Rule 13.2(c)(iii) since its enactment.<sup>141</sup> The court could have interpreted Rule 13.2(c)(iii) as applying to public-safety concerns after the Rule's enactment, but it did not do so until now—decades after the adoption of the Rule and the development of relevant caselaw.

Although other states provide specific requirements for executing nighttime-search warrants,<sup>142</sup> the Arkansas Supreme Court failed to do so when it created a new exigency in *Tyson* without explaining what facts will support that exigency.<sup>143</sup> Thus, the parameters of the new exigency are undefined. Oklahoma's statute specifically provides for exigency-based searches where methamphetamines or dangerous substances exist, and it is generally much broader than Arkansas's Rule.<sup>144</sup> Instead of creating a new exigency for broad safety concerns in *Tyson*, the Arkansas Supreme Court should have proposed an amendment to Rule 13.2(c) to reflect its new purpose. As noted by the dissenters in *Tyson*: “[T]his court should not change the rules without notice and referring the proposed change to the proper supreme court committee.”<sup>145</sup>

The *Tyson* court's interpretation of Rule 13.2(c)(iii) defeated the purpose of enacting the Rule and lacks the guidance that other states have provided as to the circumstances allowing nighttime searches.<sup>146</sup> Although some states follow procedural rules enumerating

---

140. MO. ANN. STAT. § 542.291 (West 2013); LA. CODE CRIM. P. art. 162.

141. ARK. R. CRIM. P. 13.2(c)(iii).

142. See CAL. PENAL CODE § 1533 (West 2013); OKLA. STAT. ANN. tit. 22, § 1230; N.Y. CRIM. PROC. LAW § 690.35(4)(a) (McKinney 2013).

143. See *State v. Tyson*, 2012 Ark 107, at 5, 388 S.W.3d 1, 4-5.

144. Compare OKLA. STAT. ANN. tit. 22, § 1230 (West 2013) (providing that a nighttime search may occur if evidence is only located on property at night, if the search is a crime-scene search, if the subject evidence is likely to be destroyed, or if the subject evidence relates to methamphetamine), with ARK. R. CRIM. P. 13.2(c)(iii) (providing that a nighttime search may occur when the place is difficult to access speedily, “the objects to be seized are in danger of imminent removal,” or when “the warrant can only be safely or successfully executed at nighttime or under circumstances the occurrence of which is difficult to predict with accuracy”).

145. *Tyson*, 2012 Ark. 107, at 12, 388 S.W.3d at 8.

146. See CAL. PENAL CODE § 1533; OKLA. STAT. ANN. tit. 22, § 1230; N.Y. CRIM. PROC. LAW § 690.35(4)(a).

circumstances justifying a nighttime-search warrant, others have developed caselaw providing enumerated exceptions to the warrant requirement.<sup>147</sup> The Arkansas Supreme Court seems to be attempting both methods not only by enforcing the enumerated exceptions in Rule 13.2(c)(iii) but also by re-interpreting the Rule to create a new exception.

## V. CONCLUSION

The Arkansas Supreme Court wrongly decided *State v. Tyson*. The decision ignores the plain meaning of Rule 13.2(c)(iii) and expands decades of Arkansas Supreme Court precedent interpreting the Rule. The danger of this new, unfounded interpretation of Rule 13.2(c)(iii) is that: (1) courts can now allow nighttime searches based upon general-safety concerns; and (2) the Arkansas Supreme Court changed Rule 13.2(c)(iii) without providing proper notice to law-enforcement officers or to the public, and without referring the change to the proper supreme-court committee.

The court's decision in *Tyson* nullifies the existing Rule without providing effective guidance for the future. Arkansas should return to the pre-*Tyson* procedure for nighttime searches, which applied Rule 13.2(c)(iii) only in cases concerning officer safety. Even an amendment to the Rule supporting the *Tyson* decision would fail to guard the privacy interests of the public by allowing any "danger" to justify nighttime entries into citizens' homes.

LINDA K. BIRD

---

147. *State v. Glass*, 458 N.E.2d 1302, 1304 (Ohio 1983) (noting that concern about officer and public safety was reasonable when determining whether to allow a nighttime search); *State v. Brock*, 653 P.2d 543, 546 (Or. 1982) (noting "[n]ighttime searches would also be permissible in circumstances where the safety of the executing officers, occupants of premises or possessors of property would not be affected").