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WHY AN ARTICLE ENTITLED "CHIMEL"?

Some cases have become household words: *Miranda* is an obvious example. There are other cases which, while they may not be commonplace in the sense that they are familiar to the general public, should be recognized standards for all lawyers and law enforcement officers. *Chimel v. California,*[1] is one of these cases. If *Chimel* is not devitalized as it evolves, its impact on criminal investigation could be more pronounced than any Supreme Court decision since the inaugurating of the Court's activist era with *Mapp*[2] which is another of those household words.

WHAT IS SO "PRONOUNCED" ABOUT CHIMEL?

Up to the *Chimel* decision there had been some fluctuation in delineating reasonableness of searches made incident to legal arrests. But *Chimel* overruled two cases which had been accepted by the lower courts as exemplifying "reasonableness:" *United States v. Rabinowitz,*[3] and *Harris v. United States.*[4] While *Trupiano v. United States,*[5] a decision which came down between *Rabinowitz* and *Harris,* seemed to conflict with these two cases, the most obvious distinguishing factor was that in *Trupiano* the arrest was made without a warrant, whereas in *Rabinowitz* and *Harris* valid arrest warrants had been issued. A further factual distinction, one of the place searched, could have been made by the Supreme Court in deciding *Chimel,* considering that *Rabinowitz* involved the search of an office while *Harris* and *Chimel* involved searches of living quarters. The Court rejected as "highly artificial" the area distinction (*Rabinowitz,* a single room; *Harris,* a four-room apartment; *Chimel,* an entire house). Also, in *Chimel* there was the matter of an invalid arrest warrant; despite

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1. Chimel v. California, 395 U.S. 752 (1969).
2. Mapp v. Ohio, 367 U.S. 643 (1961).
3. 339 U.S. 56 (1950).
4. 331 U.S. 145 (1947).
5. 334 U.S. 699 (1948).

this, the California Court found a lawful warrantless arrest and upheld the search as incident thereto. These distinctions the Supreme Court chose to ignore, specifically pointing out that although its decision in *Chimel* could be distinguished from *Rabinowitz* and *Harris* and thus so limited, the Court found the Fourth Amendment permits no rational distinction as to searches without search warrants, i. e., searches incident to arrest, which go beyond the "area from which the person arrested might obtain weapons or evidentiary items" with the clarification of "area" as being "within his reach."[6]

IS IT "UNREASONABLE" TO LIMIT SEARCHES INCIDENT TO ARREST TO AN AREA "WITHIN THE REACH" OF THE PERSON ARRESTED?

It could be. Actually, it is necessary to await *Chimel* application and construction by the lower courts. The fact is that while Supreme Court decisions are in fact "supreme" in every sense of the word, there is a collective watering down of a Supreme Court decision, which seems to come about when the general consensus of the lower courts, federal and state, is that a decision is unworkable if accepted literallly. The decision, naturally, has less force and effect and thus what might be *unreasonable* has a way of becoming *reasonable* as the lower courts go about fitting the standard to the everyday practicalities of life, such as the investigation of crime by law enforcement officers. Mr. Justice Harlan, for example, in concurring with the majority, finds it necessary to acknowledge a dilemma:

> We simply do not know the extent to which cities and towns across the Nation are prepared to administer the greatly expanded warrant system which will be required by today's decision; nor can we say with assurance that in each and every local situation, the warrant requirement plays an essential role in the protection of those fundamental liberties protected against state infringement by the Fourteenth Amendment.[7]

In dissent Mr. Justice White furnishes other explanations, which may require an unreasonable waste of effort upon the part of law enforcement officers who make an arrest where a search warrant could not be obtained because of the emergency situation and the lack of law enforcement personnel at the time of arrest to maintain the surveillance made necessary by the presence of others on the premises e.g., a wife who, although innocent, might nevertheless

6. 395 U.S. 752, 756 (1969).
7. *Id.* at 769.

require police surveillance until a warrant is issued. Such surveillance may well be necessary to prevent the destruction of evidence and may well interfere with the liberties of the wife, which in comparison would make a search without a warrant far less reprehensible. Also, it has been a recognized fact that the intricacies of obtaining a search warrant may preclude the obtaining of certain evidence due to the inability to "particularly describe" that which the officers seek to obtain as evidence. While this can be a reason for requiring a search warrant and is implied by *Chimel*, yet as a practical matter some searches may be required for undescribable evidence, such as written or pictorial evidence, hair, blood, paint scrapings, safe insulation, etc., which may be imperative for successful solution of a crime. In particular, where a valid arrest warrant has been issued, the privacy of the individual has already been invaded, so that the protections afforded by a search warrant may be no more than a means of hiding evidence.

CAN SEARCHES INCIDENT TO ARREST ONLY BE MADE IN AN AREA "WITHIN THE REACH" OF THE ARRESTEE?

The answer here unfortunately again is the question: is the Supreme Court to be taken literally? Even among strict constructionists of the Court's decisions, there is a limit to what "strictly" follow means. The Court seems to envision "exigent circumstances" arising which would be exceptions to the rule. The Court recognized the principle that allows the search of automobiles without a warrant upon probable cause[8] because of the mobility factor (citing *Carroll v. United States*,[9] another case worthy of first name familiarity). In describing the area of search of an arrestee, the Court refers to the justification for search of the area "within his immediate control" as meaning the "area from within which he might gain possession of a weapon or destructible evidence,"[10] and then goes on to note that there is no comparable justification for searching any room other than that in which the arrest occurs, nor for searching desk drawers or other closed and concealed areas in the room searches. It is only under a search warrant, "in the absence of well-recognized exceptions," that such searches may be conducted. The automobile is the only "well-recognized exception" listed. But the automobile search is based upon the "exigent circumstance" of mobility, and it is reasonable to assume that some of the arguments noted herein and by the dissent would involve "exigent circumstances" allowing a search beyond the room, i.e., where there is a danger of evidence being destroyed during the

8. *Id.* at 764 n. 9.
9. 267 U.S. 132 (1925).
10. Chimel v. California, 395 U.S. 752, 763 (1969).

time occupied in pursuit of a search warrant. However, any consideration of the automobile search issue nessitates an examination of the doctrine of *Preston v. United States*[11] (again a case of common-name import). In *Preston* the Court held that a delayed search of an automobile, after its removal to the police station, could not be considered incident to arrest. The reasoning is: the need for search had passed because no threat from concealed weapons or from the mobility of the vehicle existed (which prompts a right to search under the Carroll Doctrine, *supra*). But, with the decision in *Cooper v. California*,[12] the Preston Doctrine was shaken. As a matter of fact, the dissent in effect concluded that *Cooper* was a reversal of *Preston*, despite Mr. Justice Black's writing both the *Preston* and *Cooper* decisions. However, *Chimel* has regenerated *Preston* by citing it (although Mr. Justice Black dissented in *Chimel*) and limiting *Cooper*. Even where nonretroactivity is not considered, *Preston* has been found to be the basis for reversing automobile searches if there is a delay. E.g., see *Wood v. Crouse*.[13] "We believe that *Chimel* instructs us that the rule of *Preston*, decided prior to the trial here involved, is the law that controls in this case. Therefore, we need not consider whether *Chimel* is to be given retrospective effect."[14] Following the *Colosimo* reasoning is *Heffley v. Hocker*,[15] which did not consider *Chimel's* retroactivity but viewed *Chimel* as a revival of *Preston* and the demise of *Cooper*. At least as far limiting as *Preston*, is *Steel v. State*.[16] The *Steel* court points to the tenuous application of *Cooper* which had relied on *Rabinowitz*, now, of course, overturned by *Chimel*.

IS THERE EVIDENCE OF A TREND AMONG THE LOWER COURTS TO DILUTE CHIMEL?

Up to this time few cases have construed *Chimel*. Most courts have been content to find *Chimel* nonretroactive. (See discussion, *infra*.) However, there are examples, as follows, of *Chimel's* being distinguished. Over a confession of error by the district attorney, the court distinguished *Preston* by the continued occupancy of the vehicle and the unbroken surveillance, where the defendant-driver was removed but the other occupants remained therein. Although stating that *Chimel* is not retroactive, the court found the search of the automobile permissible under the Chimel Rule. *People v. Lewis*,[17] and *State v. Klingler*,[18] note the "exigent circumstances"

11. 376 U.S. 364 (1964).
12. 386 U.S. 58 (1967).
13. 417 F.2d 394 (10th Cir. 1969).
14. 415 F.2d 804, 806 (6th Cir. 1969).
15. 420 F.2d 881 (9th Cir. 1969).
16. ——Ark.——, 450 S.W.2d 545 (1970).
17. 306 N.Y.S.2d 197 (1969).
18. ——S.D.——, 173 N.W.2d 275 (1969).

permitting search: the officer was alone with the automobile when two occupants were removed, but a third person "might" have been close by. The search of a jewel box (containing marijuana and drugs) which was plainly visible and within reach of the defendant was held permissible in *State v. Tuck.*[19] *Chimel* would allow search of an entire motel room. The court distinguished *Chimel* as involving a search of an entire three-bedroom house, attic, garage and workshop in *Brewer v. State.*[20] It is reasonable for the police to accompany the defendant in a state of undress into his bedroom and under *Chimel* to seize evidence in "plain sight"; furthermore, knowing that the defendant had not acted alone, they could check out adjacent rooms for any potential accomplice and *Chimel* compliance would allow the seizure of evidence observed in "plain view."[21] The seizure of evidence (after arrest) observed in plain sight is valid even if Chimel is controlling.[22] Under *Cooper, supra,* the seizure of the automobile as an instrumentality of the robbery-murder would be allowed. Even assuming *Chimel* is retroactive, *Cooper* is not rejected.[23]

Most of the foregoing decisions are not radical departures from the Chimel Rule even under a fairly strict construction. Nonetheless, considering the short time there has been for the appellate courts to have ruled on cases which are not disposable on the basis of nonretroactivity, they are illustrative of the reasoning that might be applied. The exception key permitting search is "exigent circumstances," differing from the moderating courses the lower courts have followed in cases such as *Miranda* (accepting without question the police officer's testimony of warnings and waiver) and the *Wade-Gilbert-Stovall*[24] identification rules (applying "harmless error").

IS CHIMEL TO BE APPLIED RETROACTIVELY?

The Court expressly reserved the issue of retroactivity (or nonretroactivity) in the companion cases of *Von Cleef v. New Jersey,*[25] and *Shipley v. California.*[26] Mr. Justice White, dissenting in *Shipley,* objected to the majority's failing to reach such a determination.

To manage the "new" constitutional changes beginning with *Mapp,* the Court has evolved a series of "prospective rules"—name-

19. ——Ore.——, 462 P.2d 175 (1969).
20. ——Miss.——, 228 So.2d 582 (1969).
21. People v. Mann, 305 N.Y.S.2d 226 (1969).
22. United States ex rel. Williams v. LaVallee, 415 F.2d 643 (2nd Cir. 1969).
23. State v. Carter 54 N.J. 436, 255 A.2d 746 (1969).
24. United States v. Wade, 388 U.S. 218 (1967); Gilbert v. California, 388 U.S. 263 (1967); Stovall v. Denno, 388 U.S. 293 (1967).
25. 395 U.S. 814 (1969).
26. 395 U.S. 818 (1969).

ly, *Linkletter v. Walker*,[27] holding *Mapp* nonretroactive except as to cases "not yet final"; *Johnson v. New Jesey*,[28] holding *Miranda* and *Escobedo* applicable only to cases being tried after the dates of those decisions; *Stovall, supra*, holding *Wade* and *Gilbert* applicable only to lineups or other identification procedures occurring after those decisions. There are two reasons which would dictate *Chimel's* prospective application only to searches subsequent to its decision. First, this is one of the few instances where the Court has stated unequivocally that it reverses past decisions (specifically *Harris* and *Rabinowitz*); decisions upon which the lower courts as well as law enforcement officers relied and thus warranting all-out prospective application analogous to the identification cases. While *Miranda* analogy is also appropriate, it can be surmised that if the Supreme Court were to decide *Johnson* anew, it would choose to follow a *Stovall* type of nonretroactivity. *Johnson* at the time was revolutionary, but it is doubtful that a *Johnson* form of nonretroactivity will be applied in the future, except perhaps in some case(s) which involve trial situations as distinguished from changes in rules or standards that affect the police officer. Second, the pressure on the Court to prescribe a prospective application will be great, in that to do otherwise might be somewhat catastrophic by sheer volume of appellate decisions overwhelmingly limiting *Chimel* to searches occurring after its decision date (i. e., June 23, 1969).[29]

A few courts have leaned toward nonretroactivity but have not had the occasion to make this decision in that the searches were upheld in spite of *Chimel*.[30]

One court has applied a Linkletter form of "not yet final" nonretroactivity: *Chimel* is applicable to cases pending on direct review as of the date of its decision.[31]

No appellate court at this time has directly held *Chimel* retroactive, but there have been cases so applying *Chimel* without the issue of retroactivity being specifically considered, evidently because the issue was not brought to the attention of the court.[32]

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27. 381 U.S. 618 (1965).
28. 384 U.S. 719 (1966).
29. United States v. Bennett, 415 F.2d 1113 (2d Cir. 1969); United States v. Valdes, 417 F.2d 335 (2d Cir. 1969); Lyon v. United States, 416 F.2d 91 (5th Cir. 1969); Williams v. United States, 418 F.2d 159 (9th Cir. 1969); Whiteley v. Meacham, 416 F.2d 36 (10th Cir. 1969); United States v. Frazier, 304 F.Supp. 467 (D. Md. 1969); State v. Bustamante, ——Ariz.——, 462 P.2d 822 (1969); People v. Edwards, 80 Cal. Rptr. 633, 458 P.2d 713 (1969); Scott v. State, 7 Md. App. 505, 256 A.2d 384 (1969); People v. Herrera, 19 Mich. App. 216, 172 N.W.2d 529 (1969); Derouen v. Sheriff, Washoe County, ——Nev.——, 461 P.2d 865 (1969); People v. Lewis, 306 N.Y.S.2d 197 (1969).
30. *See* State v. Mitchell, ——Minn.——, 172 N.W.2d 66 (1969), inclined to find *Chimel* nonretroactive; State v. Carter, 54 N.J. 436, 255 A.2d 746 (1969) where retroactive application was also questioned.
31. Fresneda v. State, 458 P.2d 134 (1969).
32. *See* Steel v. State, ——Ark.——, 450 S.W.2d 545 (1970); Fields v. State, 463 P.2d 1000 (1970); Ashby v. State, 228 So.2d 400 (1969); State v. Rhodes, ——N.M.——, 460 P.2d 259 (1969).

However, there are some retroactive implications in the clarification made of *Preston*. (See discussion of preceding question.)

DOES CHIMEL SERVE A "PURPOSE"?

There are many decisions of the Supreme Court that, in my opinion, lack "realism." But if *Chimel*, and like decisions, can be considered the start of a standard, and if the Supreme Court itself can accept changes made by the majority of lower courts as they seek to work out the impracticalities to achieve a "workable rule," then such decisions can be beneficial for all.

In summary, (1) as now construed, *Chimel* has the tendency to make the arrest warrant superfluous. *Harris* and *Rabinowitz* involved arrest warrants. *Giordenello v. United States*[33] and *Jaben v. United States*[34] pointed out the need to specify the grounds for arrest in the complaint as clearly as is necessary for the affidavit used in obtaining a search warrant. In *Chimel* the arrest warrant being invalid, and the Court, without deciding the question, proceeded on the assumption that the California Court was correct in holding that the arrest was valid since reasonable grounds existed although not enumerated. The Court could have required arrest warrants in the same manner as search warrants, which would seem to be more desirable than strengthening the requirements for search warrants. There could be limitations on searches incident to arrests *made without warrants* (searches which are subject to more abuse). If a search warrant is to be issued, there will be a tendency to forget the arrest warrant altogether, because, in addition to the grounds for issuance of a search warrant which also may be sufficient to make the arrest, other evidence justifying an arrest may be discovered. (2) Also to be considered is the machinery needed to issue the warrant (as mentioned by Mr. Justice Harlan in concurring). The policing of the police has the limitations of the police themselves. They do act on the spur of the moment. What is "exigent circumstances" to them may not be to the Justices who have time to reflect. The Court's past statements that the law enforcement officer need not be a "legal technician" is no longer valid. We are not in a position to hold all police officers to the same standard; e.g., an FBI agent who generally is a handpicked college graduate and, more often than not, also a lawyer. And by limiting searches incident to arrest *Chimel* will unnecessarily expand the need for search warrants. (3) There are other means for measuring reasonableness of a search incident to arrest. *Kremen v. United States*[35] and *James v. Louisi-*

33. 357 U.S. 780 (1958).
34. 381 U.S. 214 (1965).
35. 353 U.S. 346 (1957).

ana[36] are examples of cases which noted the limits to which officers can go. *Preston* is another outstanding example, and although it was cited as a basis for *Chimel*, it should be noted that Mr. Justice Black dissented in *Chimel* while writing the *Preston* opinion. (4) It remains to be seen whether *Chimel* can inspire more care in police officers to obtain search warrants and prepare them properly under the rules already laid down in *Aguilar v. Texas*[37] and *Spinelli v. United States*[38] which rules undoubtedly were avoided to some extent by the incident to arrest route. It may well be that search warrants, with their affidavits being in writing, will bring out the best in police officers and thereby indirectly benefit both the public as well as the individual searched, striking a happy medium between what is "realistic" and what is "idealistic."

Even before the ink was dry on the above decisions of the lower courts in attempting to return **Preston** to what would seem to have been its proper place, the Supreme Court, in **Chambers v. Maroney**, ——U.S. —— (1970), modified the exigent circumstances of the automobile search, which must be taken as a new rule of what constitutes "mobility" of the automobile. In **Chambers** the Court considers it a reasonable decision to bring the automobile back to the police station for search (the time lag not being disclosed) because of the arrest of the occupants for robbery at night in a dark parking lot. **Chambers** is distinguished from **Preston** on the basis of the arrest, in the latter case for vagrancy and in the former for robbery. The robbery arrest in turn provided reasonable grounds to search the automobile, in that evidence of the robbery (the guns and fruits thereof) could reasonably be expected to be found in the automobile. This, of course, would not be so for vagrancy. The "mobility" provides the exigent circumstances for the search. But "mobility" nevertheless remains the unclarified factor in **Chambers**, in that all four occupants of the automobile were under arrest and there seemed, as in **Preston**, to be no urgency since there was no one to remove the automobile, and the police would undoubtedly be required to take protective measures for the automobile's safekeeping until its owner or someone designated by him was in a position to remove it. It can be readily understood that if someone should call for the automobile, the police would then have the exigent circumstance which would obviate the need for a warrant. If the Chambers Exception to Chimel is to be accepted at face value, **Preston** is very much modified when an arrest is made for a crime in which an automobile might be viewed as a depository of evidence (to be distinguished from vagrancy or traffic offense arrests), with the limitation that the search be made within a "reasonably" short interval of time after arrest and before "permanent" detention of the automobile takes places.

36. 382 U.S. 36 (1965).
37. 378 U.S. 108 (1964).
38. 393 U.S. 410 (1969).