Summer 1972

Warrantless Searches Incident to Arrest

Joseph G. Cook

WARRANTLESS SEARCHES INCIDENT TO ARREST*

*Joseph G. Cook***

I. INTRODUCTION

The determination of probable cause to search is a judicial question, and, therefore, the Supreme Court has consistently manifested a strong preference for the use of warrants in order that the justification for a search may be pre-evaluated by a magistrate.[1] Nevertheless, the fourth amendment condemns only searches which are unreasonable, and its manipulative language has led to the judicial creation of numerous exceptions to the warrant requirement,[2] the most frequently employed of which has been the search incident to an arrest, with or without an arrest warrant.[3]

The justification for this exception to the warrant requirement, where expansively employed, has never been entirely clear. One court has opined that "[t]he searched person's privacy has already been partially invaded by the arrest; therefore, the search does not have the personal impact that it otherwise might have."[4] However, unlike the other generally recognized exceptions to the warrant requirement, the search incident to an arrest could until recently be of a highly explora-

---

** Professor of Law, University of Tennessee College of Law. A.B., 1961, J.D., 1964, University of Alabama; LL.M., 1965, Yale University.

1. *See, e.g.*, Terry v. Ohio, 392 U.S. 1, 20 (1967) ("[t]he police must, whenever practicable, obtain advanced judicial approval of searches and seizures through the warrant procedure . . . .").

2. *See* notes 145-51 *infra* and accompanying text.

3. *Compare* Vale v. Louisiana, 399 U.S. 30 (1970); Chimel v. California, 395 U.S. 752 (1969); Preston v. United States, 376 U.S. 364 (1964); Agnello v. United States, 269 U.S. 20 (1925), *with* Warden v. Hayden, 387 U.S. 294 (1967); United States v. Rabinowitz, 339 U.S. 56 (1950) (overruled by *Chimel v. California*); Marron v. United States, 275 U.S. 192 (1927).

See Annots., 19 A.L.R.3d 727 (1968), 82 A.L.R. 782 (1933), 74 A.L.R. 1387 (1931); 51 A.L.R. 424 (1927), 32 A.L.R. 680 (1924); Annot. 4 L. Ed. 2d 1982 (1960).

Miranda warnings [Miranda v. Arizona, 384 U.S. 436 (1966)], or the equivalent, are not a prerequisite to such a search. Moll v. United States, 413 F.2d 1233 (5th Cir. 1969); People v. Walker, 27 Mich. App. 609, 183 N.W.2d 871 (1971); Alaniz v. State, 458 S.W.2d 813 (Tex. Crim. App. 1970); Brown v. State, 443 S.W.2d 261 (Tex. Crim. App. 1969).

4. State v. Cloman, 254 Ore. 1, ____, 456 P.2d 67, 74 (1969).

tory nature, and no less a personage than Judge Learned Hand expressed a serious apprehension about the exercise of this authority.[5]

The scope of such searches, progressively expanded over the past 25 years, was severely restricted by the decision of *Chimel v. California*.[6] This article will examine the burgeoning dimensions of the warrantless search incident to arrest and the impact of *Chimel* on this investigative tool.

II. PRE-*Chimel* STANDARDS

A. Spatial and Temporal Proximity

The very notion of a search *incident* to an arrest connotes spatial contiguity and temporal proximity. To hold otherwise would eliminate all pretense of a rational nexus between the search and the arrest and would be tantamount to saying that an individual legally arrested thereby forfeits all protection under the fourth amendment. The *Chimel* decision has now made this point emphatically clear.[7] Several prior decisions, however, had established limitations on the permissible dimensions of a search incident to arrest.

1. Spatial Contiguity.—Spatial contiguity was first raised as a central issue in *Agnello v. United States*.[8] The defendant was properly arrested in the home of another for a federal narcotics offense. Following the arrest, officers went to the defendant's own residence and seized a can of cocaine which was introduced as evidence at his trial. Noting that the search was conducted several blocks from the scene of the arrest, the Court concluded that it could not be sustained as incident

---

5. After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable to what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home. Such constitutional limitations arise from grievances, real or fancied, which their makers have suffered, and should go pari passu with the supposed evil. They withstand the winds of logic by the depth and toughness of their roots in the past. Nor should we forget that what seems fair enough against a squalid huckster of bad liquor may take on a very different face, if used by a government determined to suppress political opposition under the guise of sedition.

United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926).

6. 395 U.S. 752 (1969).

7. *See* notes 72-77 *infra* and accompanying text.

8. 269 U.S. 20 (1925).

thereto.[9] *Agnello* has frequently been cited to preclude justification of a warrantless search as incident to arrest when the two events are some distance apart.[10] It was hardly surprising that *Agnello* was followed in *Stoner v. California*,[11] where the arrest occurred in Nevada and the search in California.

Further tightening the range of potential warrantless searches, *Shipley v. California*[12] and *Vale v. Louisiana*[13] both held that an arrest made in front of the residence of the defendant would not justify entering and searching the premises.[14] Conversely, in *Coolidge v. New Hampshire*[15] an arrest made within a house would not support the search of an automobile in the driveway.[16] The problem of physical distance cannot be avoided by taking the arrestee to the premises which the officers wish to search. In *James v. Louisiana*,[17] officers arrested the petitioner at a street intersection when he alighted from an automobile, whereupon they drove him to his home some two blocks away and there carried out an intensive search which uncovered narcotics paraphernа-

9. *Id.* at 34-35.

10. *See, e.g.*, United States *ex rel.* Linkletter v. Walker, 323 F.2d 11 (5th Cir. 1963), *aff'd*, 381 U.S. 618 (1965); People v. Shelton, 60 Cal. 2d 698, 388 P.2d 665, 36 Cal. Rptr. 433 (1964); *cf.* Kelley v. United States, 61 F.2d 843, 847 (8th Cir. 1932) wherein the court stated:

> It would seem rather an affront to common sense to say that were officers on the outside of a building where a murder was being committed, heard shots and screams from within, observed a person running from the door with a smoking revolver in his hands and they pursued him and arrested him within a hundred feet of the building where the crime was committed and from which he had fled, that they could not search the building, but must be content with looking over the spot where the arrest actually took place. The word "place" as used by the Supreme Court in the Agnello Case certainly should be given no such narrow meaning . . . .

11. 376 U.S. 483 (1964).

12. 395 U.S. 818 (1969).

13. 399 U.S. 30 (1970).

14. *Shipley* was decided the same day as *Chimel*; *Vale* was decided thereafter. Both dealt with pre-*Chimel* searches, and the attitude of the Court in each instance was that it was simply applying pre-*Chimel* standards. Numerous lower court decisions had previously reached the same result on analagous facts. *See, e.g.*, United States v. Baca, 417 F.2d 103 (10th Cir. 1969); Page v. United States, 282 F.2d 807 (8th Cir. 1960); United States v. Zarra, 258 F. Supp. 713 (M.D. Pa. 1966).

See also United States v. Marti, 421 F.2d 1263 (2d Cir. 1970), *cert. denied*, 92 S. Ct. 287 (1971); United States v. Goad, 426 F.2d 86 (10th Cir. 1970); United States v. Holsey, 414 F.2d 458 (10th Cir. 1969); *cf.* People v. Woods, 239 Cal. App. 2d 697, 49 Cal. Rptr. 266 (2d Dist. Ct. App. 1966).

15. 403 U.S. 443 (1971) (four Justices concurred in this portion of the opinion).

16. Again applying pre-*Chimel* standards.

17. 382 U.S. 36 (1965).

lia. The Court held that the search was not incident to the arrest.[18]

The limitations imposed by these several decisions might be evaded by merely delaying the arrest of the suspect until he reaches an area which officers would like to search. Inferential support for this gambit was supplied by *Hoffa v. United States*,[19] where the petitioner contended that the officers had deliberately elected not to arrest him at an earlier time, even though they had probable cause, so that he could not claim a deprivation of the right to counsel while inculpatory statements were being obtained by an undercover agent.[20] The Court summarily rejected the argument with the observation, "There is no constitutional right to be arrested."[21] In *Chimel*, one of the arguments put forward by the petitioner was that the officers had carefully selected the scene of the arrest to provide the most attractive opportunity to search.[22] Because of its resolution of the case,[23] the Court found it unnecessary to consider the point.[24] Nevertheless, a number of lower court decisions have held incident searches illegal where it was evident that the officers had waited until the suspect reached a particular location.[25]

2. *Temporal Proximity.*—The requirement of temporal proxim-

18. "A search 'can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.' " *Id.* at 37 (quoting Stoner v. California, 376 U.S. 483, 486 (1964)). *See also* United States v. Reincke, 229 F. Supp. 132 (D. Conn. 1964); United States v. Scott, 149 F. Supp. 837 (D.D.C. 1957); United States v. Fowler, 17 F.R.D. 499 (S.D. Cal. 1955).

19. 385 U.S. 293 (1966).

20. Petitioner cited Massiah v. United States, 377 U.S. 201 (1964), and Escobedo v. Illinois, 378 U.S. 478 (1964). 385 U.S. at 309.

21. 385 U.S. at 310. "The police are not required to guess at their peril the precise moment at which they have probable cause to arrest a suspect, risking a violation of the Fourth Amendment if they act too soon, and violation of the Sixth Amendment if they wait too long." *Id.*

22. 395 U.S. at 767.

23. *See* notes 72-77 *infra* and accompanying text.

24. This, however, is not to say that the *Chimel* holding renders the question moot. The productiveness of a limited *Chimel* search may still be a function of the situs of the arrest.

25. *See, e.g.*, Gilbert v. United States, 291 F.2d 586 (9th Cir. 1961), *vacated and remanded on other grounds*, 370 U.S. 650 (1962); Lott v. United States, 218 F.2d 675 (5th Cir. 1955), *cert. denied*, 351 U.S. 953 (1956); United States v. Ortiz, 331 F. Supp. 514 (D.P.R. 1971); People v. Haven, 59 Cal. 2d 713, 381 P.2d 927, 31 Cal. Rptr. 47 (1963); O'Neil v. State, 194 So. 2d 40 (Fla. App. 1967); *cf.* United States v. Frazier, 304 F. Supp. 467, 473 (D. Md. 1969), *cert. denied*, 402 U.S. 986 (1971). Following arrest, defendant requested that he be permitted to return to his bedroom to get dressed. Officers went with him and searched the room. Apparently, officers intended to search the room in any event. "[W]here there is a dual purpose and the primary one is valid while the secondary one is not, the latter does not invalidate the lawfulness of a search conducted pursuant to such valid purpose." *See also* notes 122-23 *infra* and accompanying text.

ity was at issue in *Preston v. United States*[26] and *Stoner v. California*,[27] both of which were decided on the same day. In *Preston*, the petitioner and his companion were arrested while seated in an automobile. While they were taken to the police station, the vehicle was taken to a garage. A short time later, the automobile was searched and various robbery paraphernalia were seized. The Court held that although a search of the vehicle at the time the officers first came on the scene might have been reasonable, the search actually carried out was too "remote in time or place"[28] and was therefore illegal. In *Stoner*, officers thoroughly searched the petitioner's hotel room, but did not arrest him until 2 days later in a different state. The lower court, in upholding the search as incident to the arrest, had reasoned that since the officers had probable cause to arrest at the time they entered the hotel room, the search and seizure were "part of the same transaction."[29] The Supreme Court reversed, finding the search "completely unrelated to the arrest, both as to time and as to place."[30] Thus, a search too long after the arrest will not be considered incident,[31] and a search preceding an arrest by an extended time period likewise will be condemned.[32]

Particular facts may on occasion extend the time period deemed reasonable. For example, in *Mulligan v. United States*,[33] while officers were conducting a search incident to arrest, the arrestee threw something behind a stove. The officers thereupon had the stove disconnected and retrieved what turned out to be a package of money. The entire process, which took about 2 hours, was found to be reasonable.[34] More

---

26. 376 U.S. 364 (1964).

27. 376 U.S. 483 (1964).

28. 376 U.S. at 367.

29. People v. Stoner, 205 Cal. App. 2d 108, 113, 22 Cal. Rptr. 718, 722 (2d Dist. Ct. App. 1962).

30. 376 U.S. at 487.

31. *See, e.g.*, Creasy v. Leake, 422 F.2d 69 (4th Cir. 1970); United States v. Broadhead, 413 F.2d 1351 (7th Cir. 1969); United States *ex rel.* Clark v. Maroney, 539 F.2d 710 (3d Cir. 1965); State v. McMillan, 206 Kan. 3, 476 P.2d 612 (1970); Coston v. State, 252 Miss. 257, 172 So. 2d 764 (1965); Alvey v. State, ___ Tenn. App. ___, 443 S.W.2d 518 (1969); *cf.* Lara v. State, 469 S.W.2d 177 (Tex. Crim. App. 1971), where the defendant was first arrested on one charge and shortly thereafter arrested on another charge. A second search following the second arrest was sustained.

32. *See* United States *ex rel.* Mancini v. Rundle, 337 F.2d 268 (3d Cir. 1964); People v. Drumright, ___ Colo. ___, 475 P.2d 329 (1970).

33. 358 F.2d 604 (8th Cir. 1966).

34. *Id.* at 607. *See also, e.g.*, Kirkpatrick v. Cox, 321 F. Supp. 284 (W.D. Va. 1971): What is important in this case is that the search was continued immediately after the petitioner was taken from the premises and not at some time distant from the arrest. Clearly

questionable is the result in a recent Vermont decision, *State v. Oakes*.[35] Officers were summoned to the house of the defendant around 11 P.M. and were told by him that he had shot his wife, whose body was lying on the floor. About 2 hours later the investigation was temporarily interrupted, and the defendant was taken to the police station. Officers returned to the scene, without a warrant, at 6 A.M. They returned again at 11 A.M., this time with a search warrant. The court held that given the legality of the initial presence of the police on the scene at the request of the defendant, the search some 5 hours later could properly be considered a continuation of the earlier search. Indeed, the court found the warrant obtained prior to the 11 o'clock search a "gratuitous precaution"[36] unnecessary to sustain that search. Influencing factors were the seriousness of the offense[37] and the fact that the crime occurred in a small village.[38]

In no event should *Stoner* be understood as categorically precluding a search which precedes an arrest from being viewed as incident thereto. A prior search will more often than not be found unreasonable, because it is problematical whether the officer in such a case has had probable cause to arrest, but for the newly discovered evidence. Thus, the arrest may in truth be incident to the search.[39] For this reason,

---

the search would have been permissible if the officers had compelled Kirkpatrick to sit in a chair while they completed their looking, and it is difficult to see that the petitioner's removal from the room would make the search illegal.

Id. at 285; State v. Downey, 104 Ariz. 375, 455 P.2d 521 (1969) (A search was begun at the time of arrest, discontinued for 20 minutes, then continued by another officer. The court found the procedure reasonable.); Middletown v. State, 10 Md. App. 18, ____, 267 A.2d 759, 765 (1970) ("*Vale* would appear to allow some leeway, *albeit* slight, for a post-arrest warrantless search of the arrestee's dwelling where based on truly exigent or emergency circumstances."). *But see* United States v. Davis, 423 F.2d 974, 979 (5th Cir.), *cert. denied*, 400 U.S. 836 (1970). "[T]he ability of a third party to destroy evidence does not temporally expand the authority of arresting officers to conduct a search incident to a lawful arrest. The search must be substantially contemporaneous with the arrest."

35. ____ Vt. ____, 276 A.2d 18 (1970), *cert. denied*, 404 U.S. 965 (1972).

36. *Id.* at 25.

37. The defendant was convicted of murder in the first degree.

38. The small manpower of the local force must, of necessity, be supplemented by the personnel and the expertise the state police can furnish, once they arrive. Likewise, the prosecutor must usually be called to the scene from some other part of the county. Delay, or interruption of police presence at the premises, on this account, does not undercut the right of the police to complete, within a reasonable time, their investigative work, or require a renewed authority to enter.

276 A.2d at 25.

39. "It is axiomatic that an incident search may not precede an arrest and serve as part of its justification." Sibron v. New York, 392 U.S. 41, 63 (1968). *See also* Commonwealth v. Friel, 211 Pa. Super. 11, 234 A.2d 22 (1967).

courts are quick to hold a search illegal where it appears that the arrest was a mere pretext for carrying out a warrantless search, even where probable cause to arrest was already present.[40] But all *Stoner* held was that "a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest."[41] Within the scope of this rule, it is still conceivable that a search could legitimately precede an arrest.

The issue arose again in *Warden v. Hayden*.[42] Having probable cause to believe that the petitioner had committed armed robbery and was now in his residence, the officers entered the house without a warrant, spread out, and searched for him and weapons. The petitioner was found in a bed on the second floor. Meanwhile, another officer found a shotgun and pistol hidden in a toilet, and another found some of the clothing worn during the robbery in a washing machine. Other items were found in the bedroom. The temporal sequence of these various discoveries was not clear, but in the mind of the Court, it made no difference. First, the entry to the residence without a warrant was reasonable under the circumstances.[43] Second, "[t]he permissible scope of the search" was "as broad as may reasonably be necessary to prevent

40. *See, e.g.*, Harris v. United States, 331 U.S. 145 (1947); Williams v. United States, 418 F.2d 159 (9th Cir. 1969), *aff'd*, 401 U.S. 646 (1971); United States v. Harris, 321 F.2d 739 (6th Cir. 1963); Carlo v. United States, 286 F.2d 844, 846 (2d Cir. 1961) ("The mere fact that the arrest was not unlawful does not give law enforcement officers carte blanche to rummage about at will in any home or other place where an arrest is made and then seek to justify their conduct by a blanket statement that the 'search' made by them was incidental to an arrest."); Drayton v. United States, 205 F.2d 35 (5th Cir. 1953); State v. Anonymous, 29 Conn. Supp. 153, 276 A.2d 448 (Super. Ct. 1971); State v. Roach, 256 La. 408, 236 So. 2d 782 (1970); Coston v. State, 252 Miss. 257, 172 So. 2d 764 (1965) (authority to check driver's license cannot be used as a subterfuge to search). *But see* State v. Sedecca, 252 Md. 207, 221-22, 249 A.2d 456, 465 (1969). Officers had received a tip that the defendant was transporting untaxed cigarettes. They followed him until he broke a traffic law, whereupon they arrested him and in the course of checking the automobile serial number were able to observe some cigarettes and arrested him for this offense as well. While acknowledging the general principle that the arrest could not be used as a pretext for a search, the court held, "The trooper who checked the serial number on the door had *two motives*, one to make a bona fide and routine check of the serial number, the other to ascertain if possible in the usual and normal course of that check of the serial number, what was contained in the rear portion of the vehicle."

41. 376 U.S. at 486.

42. 387 U.S. 294 (1967).

43. The Fourth Amendment does not require police officers to delay in the course of an investigation, if to do so would greatly endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons that could be used against them or to effect an escape.

Id. at 298-99.

the dangers that the suspect at large in the house may resist or escape."[44] Third, as to the order of events, "the seizures occurred prior to or immediately contemporaneous with Hayden's arrest, as part of an effort to find a suspected felon, armed, within the house to which he had run only minutes before the police arrived."[45] The seizures were thus reasonable. The Court was not impressed by the argument made by the petitioner that looking in a washing machine could not be justified as an effort to locate the suspect or weapons. Even assuming that the only legitimate objects of search were the suspect and weapons, and not clothing,[46] it could not be said that the officer was not looking for weapons in the washing machine.[47]

In the *Hayden* case, then, the Supreme Court held for the first time, without elaboration, that a search may under appropriate circumstances precede an arrest and still be seen as reasonably incident thereto. Indeed, the holding leaves open the possibility that the seizures would have been legal even if the petitioner had not been on the premises and, thus, no arrest had been immediately made.[48] For such a result it may be assumed that the exigent circumstances—the reasonable belief that the perpetrator of a violent crime is presently within the premises—become critical. Numerous decisions by lower courts indicate that a search preceding an arrest is permissible if the two events are substantially contemporaneous and if it is clear that the officer had probable cause to arrest prior to the search.[49]

---

44. *Id.* at 299.

45. *Id.*

46. The Court left open the possibility that such was not the limits of permissible search. *Id.*

47. In this respect, *Hayden* would appear to be overruled by *Chimel.*

48. Similarly, a search may be justified as incident to an arrest, even though an arrest is *not* made but *could* have been made. *See* People v. Gavin, 21 Cal. App. 3d 408, 98 Cal. Rptr. 518 (2d Dist. Ct. App. 1971).

49. This matter, at least as regards a search of the person of the arrestee, was quite sensibly explained by Justice Harlan, concurring in Sibron v. New York, 392 U.S. 40, 77 (1968):

> Of course, the fruits of the search may not be used to justify an arrest to which it is incident, but this means only that probable cause to arrest must precede the search. If the prosecution shows probable cause to arrest prior to the search of a man's person, it has met its total burden. There is *no* case in which a defendant may validly say, "Although the officer had a right to arrest me at the moment when he seized me and searched my person, the search is invalid because he did not in fact arrest me until afterwards."

See, e.g., United States v. Collins, 439 F.2d 610 (D.C. Cir. 1971); United States v. Maynard, 439 F.2d 1086 (9th Cir. 1971); United States v. Skinner 412 F.2d 98 (8th Cir.), *cert. denied*, 396 U.S. 967 (1969); Henderson v. United States, 405 F.2d 874 (5th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969); United States v. Lucas, 360 F.2d 937 (6th Cir.), *cert. denied*, 385 U.S. 875 (1966); Holt v. Simpson, 340 F.2d 853 (7th Cir. 1965); United States v. Devenere, 332 F.2d 160 (2d Cir. 1964);

The *Stoner* and *Hayden* cases, reaching opposite conclusions, provide comparative standards by which police conduct may be evaluated. Each involved a dramatic fact situation in which a reasonable conclusion was reached. When the arrest is not made immediately following the search, these decisions are normally employed to determine reasonableness. If, as in *Hayden*, the officers could be said to be in "hot pursuit,"[50] then the incidental discovery of incriminating evidence would probably be sustained.[51] But when officers enter the residence of a defendant, purportedly for the purpose of arresting him, and, not finding him there, carry out a search, and then patiently await his return, at which point they arrest him, a number of courts have held the search not supportable as incident to the arrest even though both the arrest and search would have been valid if the officers had found the defendant present upon their initial entry.[52] A particularly interesting case, because it shares characteristics of both *Stoner* and *Hayden*, is *People v. Olszowy*.[53] In that case officers held a warrant for the arrest of the defendants on a charge of rape. Receiving no response at the defendants' apartment, they forced their way in and searched all areas in which a person might be hidden. The complainant, who claimed she had bled profusely during the attack, was brought into the apartment where she indicated the bed where the assault had occurred. Although the linens

---

Jones v. State, 246 Ark. 1048, 441 S.W.2d 458 (1969); People v. King, 5 Cal. 3d 458, 487 P.2d 1032, 96 Cal. Rptr. 464 (1971); State v. Harding, 184 Neb. 159, 165 N.W.2d 723 (1969); Warden v. State, 214 Tenn. 314, 379 S.W.2d 788 (1964); Brown v. State, 443 S.W.2d 261 (Tex. Crim. App. 1969).

50. *See* 387 U.S. at 297-98.

51. *See* United States v. DeBose, 410 F.2d 1273 (6th Cir. 1969), *cert. denied*, 401 U.S. 920 (1971) (facts analagous to *Hayden*); State v. Jemison, 14 Ohio St. 2d 47, 236 N.E.2d 538 (1968) (Officers with an arrest warrant were searching for the defendant at his residence when they came upon a body.).

52. *See, e.g.*, Mosco v. United States, 301 F.2d 180 (9th Cir.), *cert. denied*, 371 U.S. 842 (1962) (arrest about 30 minutes after the search); People v. Bussie, 41 Ill. 2d 323, 243 N.E.2d 196 (1968), *cert. denied*, 396 U.S. 819 (1969); State v. Smith, ___ Iowa ___, 178 N.W.2d 329 (1970) (facts analagous to *Stoner*); Gross v. State, 235 Md. 429, 201 A.2d 808 (1964) (facts analogous to *Stoner*). *See also* People v. O'Neil, 11 N.Y.2d 148, 153, 182 N.E.2d 95, 98, 227 N.Y.S.2d 416, 419 (1962) ("The search cannot be justified as incident to a lawful arrest, for it was commenced several hours before defendant, who was at all times present, was arrested."); Commonwealth v. Smyser, 205 Pa. Super. 599, 211 A.2d 59 (1965); *cf.* the dubious pronouncement in People v. Evans, 3 Mich. App. 1, 4, 141 N.W.2d 668, 669 (1966) that "[i]n Michigan, the validity of a search and seizure without a warrant is not dependent upon a prior valid arrest." Here officers had confronted the defendant under suspicious circumstances in an alley in the early morning, and seized a number of bottles of liquor on his person and in a sack he was carrying. He was taken into custody but not charged with larceny until 2 days later. The search was upheld.

53. 47 Misc. 2d 859, 263 N.Y.S.2d 221 (Erie County Ct. 1965).

were clean, a further search of the premises revealed the soiled sheets in a clothes hamper and a pill, which complainant said had been in her pocket, on the floor. One defendant was arrested 3 hours later at a tavern, and the other surrendered sometime thereafter. Even though the warrant under which the officers were acting when they entered the apartment was an arrest warrant and not a search warrant, the court held the search reasonable.[54]

B. Intensity

Prior to *Chimel*, the Supreme Court had recognized that an otherwise valid search might be illegal because of its unreasonable intensity. The extreme case was *Kremen v. United States*,[55] in which, incident to an arrest, officers apparently seized the entire contents of a cabin.[56] The Court held the search to be unreasonable.[57] A similar result was reached in *Von Cleef v. New Jersey*[58] where, incident to an arrest for maintaining a building for the purpose of lewdness, "several policemen proceeded to search the entire house for a period of about three hours,"[59] and seized several thousand articles. Condemnation of undue intensity may also be found in decisions of lower courts.[60]

The reasonableness of the intensity of a search is partially a function of the offense for which an arrest is made. For example, in *United States v. Cally*,[61] the court found a search carried out by five officers unreasonable where the defendant was a 68-year-old man arrested for tax evasion allegedly having occurred some 5 or 6 years prior to the arrest. And in *People v. Alexander*,[62] the court found that ripping up

54. *Id.* at 860, 263 N.Y.S.2d at 223.

55. 353 U.S. 346 (1957).

56. An itemization of the property seized occupies 11 pages of fine print in the official report. *Id.* at 349-59.

57. *Id.* at 347. *See also* Terry v. Ohio, 392 U.S. 1, 17-18 (1968): "This court has held in the past that a search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." (citing Kremen v. United States, 353 U.S. 346 (1957)).

58. 395 U.S. 814 (1969).

59. *Id.* at 815.

60. In addition to the cases cited notes 61-63, 66-68, 70 *infra*, *see* United States v. Masiello, 434 F.2d 33 (2d Cir. 1970); People v. Magel, 4 Cal. App. 3d 458, 84 Cal. Rptr. 353 (4th Dist. Ct. App. 1970); Willett v. Superior Court, 2 Cal. App. 3d 555, 83 Cal. Rptr. 22 (4th Dist. Ct. App. 1969); People v. Bowen, 29 Ill. 2d 349, 194 N.E.2d 316 (1963); State v. Chinn, 231 Ore. 259, 373 P.2d 392 (1962) (dicta).

61. 259 F. Supp. 539 (S.D.N.Y. 1966).

62. 21 Ill. 2d 347, 172 N.E. 2d 785 (1961).

the linoleum in the defendant's apartment incident to her arrest for a narcotics offense was a bit extreme.[63]

Two decisions which authorized a very expansive power of search incident to arrest—*Harris v. United States*[64] and *United States v. Rabinowitz*[65]—were both overruled by *Chimel*. In *Harris* the defendant was arrested in the living room of his apartment pursuant to two warrants involving charges of fraud. He was handcuffed and the entire apartment was searched, ostensibly to find two cancelled checks and any other evidence relevant to the charge. During a 5-hour search, a sealed envelope was found marked "George Harris, personal papers," within which the officers found eight selective service classification cards. This evidence, which bore no relation to the reason for the arrest, was used in the present prosecution. While acknowledging the *Agnello* standard of reasonableness, the Court held that the search in the instant case need not be limited to the very room in which the arrest was consummated. Rather, the defendant was in "exclusive possession" of a "four-room apartment," and the search of the entire premises was therefore reasonable. *Harris* was a popular decision in the lower courts, frequently employed to uphold searches of a far-reaching nature;[66] however, there

---

63. *See also* Matthews v. United States, 407 F.2d 1371 (5th Cir. 1969). Distinguishing *Kremen*, the court said:

> Significant here is the ease with which certain quantities of marijuana can be concealed, the clandestine nature and places of possible concealment, the difficulty in finding it under these circumstances, the wide ranging nature of the conspiracy, and the breadth of evidentiary data relevant thereto.

Id. at 1382; Neal v. State, ___ Ala. App. ___, 250 So. 2d 605 (Crim. App. 1971); State v. Dodd, 28 Wis. 2d 643, 648, 137 N.W.2d 465, 468 (1965) ("A search which might be reasonable as incidental to an arrest for one crime may be entirely unreasonable as an incident to an arrest for another crime.").

64. 331 U.S. 145 (1947).

65. 339 U.S. 56 (1950).

66. *See* Porter v. Ashmore, 421 F.2d 1186 (4th Cir. 1970), *cert. denied*, 402 U.S. 981 (1971); United States v. Valdes, 417 F.2d 335 (2d Cir. 1969); Williams v. United States, 418 F.2d 159 (9th Cir. 1969), *aff'd*, 401 U.S. 646 (1971); United States v. Smith, 393 F.2d 687 (6th Cir.), *cert. denied*, 393 U.S. 885 (1968); Haas v. United States, 344 F.2d 56 (8th Cir. 1965); Bartlett v. United States, 232 F.2d 135 (5th Cir. 1956); James v. United States, 191 F.2d 472 (D.C. Cir. 1951), *cert. denied*, 342 U.S. 948 (1952); United States v. Braggs, 189 F.2d 367 (10th Cir. 1951); United States v. Spadafora, 181 F.2d 957 (7th Cir.), *cert. denied*, 340 U.S. 897 (1950).

In United States v. Riso, 405 F.2d 134 (7th Cir. 1968), *cert. denied*, 394 U.S. 959 (1969), defendant was arrested without a warrant, for being in possession of a stolen painting. When the officer called defendant by name and told him he was under arrest, defendant dropped his package [the painting] into the trunk of his car and slammed it shut. The officer used defendant's key to open the trunk and seized the package. The search was held reasonable per *Harris*. "[S]ince the arresting agent saw the package before the trunk of the auto was slammed shut, he did not violate defendant's Fourth Amendment rights by opening the trunk to retrieve the package." *Id.* at 137.

are cases in which even the authority of *Harris* was found to have been exceeded.[67]

Beyond the issue of the range of the search, the *Harris* Court also directed its attention to the intensity level of the search resulting in a discovery of the selective service cards. The Court noted that the reasonableness of the method of search depends upon the items being sought. Here the officers were looking for items which by their very nature would likely be in a secluded location, and therefore a search of this intensity was justifiable. "The same meticulous investigation which would be appropriate in a search for two small cancelled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still."[68]

Finally, the fact that the evidence uncovered was not related to the crimes for which the defendant was arrested was inconsequential. Once it was established that the search itself was legal, the officers were

---

67. *See* Drayton v. United States, 205 F.2d 35 (5th Cir. 1953):

> The search here involved transcends even the doctrine of the Harris case, which appears to be the apogee of the Supreme Court decisions on search of a dwelling without a warrant. . . . Here, room No. 5, in which the contraband was found, was wholly unconnected with the room in which the arrest was made. It was on another floor, and in another part of the building. To reach it from the room where the arrest was made, it was necessary for the officers to go through the downstairs hall, up the stairway to the second floor, and down that hall until room No. 5 was reached. It was then necessary to unlock No. 5 with the key which the officers had demanded that the defendant produce, and which the defendant yielded involuntarily. To sanction this search, even as an incident to a lawful arrest, would extend the doctrine of the Harris case too far.

Id. at 37; Gilbert v. United States, 291 F.2d 586 (9th Cir. 1961), *vacated and remanded on other grounds*, 370 U.S. 650 (1962) (court acknowledged that incident to an arrest the search is not limited to the room in which the arrest occured but held the case distinguishable from *Harris*, because (1) the government already had the evidence on which the arrest warrant was based and, therefore, the search was unnecessary and (2) there was some indication that the arresting officers waited until the defendant was on the premises to make the arrest so that the search would be possible); People v. Gonzalez, 33 App. Div. 2d 762, 305 N.Y.S.2d 927 (1969) (search of storeroom separate from and having no direct access to restaurant in which the defendant was arrested, was unreasonable and constitutionally unjustified; challenged evidence suppressed).

68. 331 U.S. at 152. *See also* United States v. Thomson, 113 F.2d 643 (7th Cir. 1940):

> [N]either the length of the search at the time of the arrest, nor the volume of the evidence seized has anything to do with the validity of the search. One single bit of evidence, no larger than a half-carat diamond, may be all that is seized in one case. Thirteen truck loads of liquor, still apparatus, etc., may be taken in another case. The smuggled diamond may be so skillfully concealed that much time is required for the searching officers to locate it, whereas the defendant may be sitting in his still house surrounded by vats of liquor, in the second search, and no time at all required to complete the search. In other words, the reasonableness of the search depends upon the facts in each case, and this applies to the length of the search and the quantity seized.

Id. at 645; *cf.* Caver v. Kropp, 306 F. Supp. 1329, 1331 (E.D. Mich. 1969). Defendant was arrested

authorized to take any items discovered which were subject to seizure.[69]

In *Rabinowitz* the defendant was arrested for offenses related to forged postage stamps. Incident to the arrest the officers "searched the desk, safe, and file cabinets in the office for about an hour and a half,"[70] and seized 573 stamps with forged overprints. Again, the Court found the search reasonable.[71]

III. THE *Chimel* CASE

The facts in *Chimel v. California*[72] were as follows: Officers went to the home of the petitioner to arrest him pursuant to a warrant for burglary. The petitioner's wife met them at the door and allowed them to enter and await the petitioner's return from work some 10 or 15 minutes later. He was thereupon arrested, and the officers asserted their authority, over the petitioner's objection, to search the house. For the next 45 minutes to an hour, they proceeded to search the entire three-bedroom house, including the attic, garage, and workshop. Numerous items believed to be fruits of the burglary were seized. Gratuitously observing that in regard to warrantless searches incident to an arrest "[t]he decisions of this Court bearing upon that question have been far from consistent,"[73] the Court reviewed the history of the doctrine and concluded that the judicial preference accorded warrant searches compelled it to retreat from the broad authorization of recent decisions.[74]

---

for attempted rape. The court felt that "[t]here [was] no reasonable connection between the charges which form the basis for the arrest and the possible contents of the small envelopes."

69. 331 U.S. at 154-55. The Court acknowledged that the limits imposed by the *Gouled* rule, Gouled v. United States, 255 U.S. 298, 309 (1921), were no longer applicable. *See* Warden v. Hayden, 387 U.S. 294 (1967).

70. 339 U.S. at 59.

71. As a basis for its opinion, the Court gave weight to the following factors: (1) The search and seizure were incident to a valid arrest; (2) the place of the search was a business room to which the public, including the officers, were invited; (3) the room was small and under the immediate and complete control of respondent; (4) the search did not extend beyond the room used for unlawful purposes; (5) the possession of the forged and altered stamps was a crime, just as it is a crime to possess burglars' tools, lottery tickets or counterfeit money. *Id.* at 64.

72. 395 U.S. 752 (1969).

73. *Id.* at 755; *see* Abel v. United States, 362 U.S. 217, 235 (1960), where the Court noted, "The several cases on this subject . . . cannot be satisfactorily reconciled." *See also* United States v. Cally, 259 F. Supp. 539 (S.D.N.Y. 1966).

74. The Court particularly noted language in Terry v. Ohio, 392 U.S. 1 (1968), that "the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure," *id.* at 20, and that "[t]he scope of the search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible," *id.* at 19. 395 U.S. at 762.

The holding concluded that incident to an arrest an officer could, first, search the person arrested[75] to remove any weapons that might be employed in resisting arrest or escaping and any evidence which might be subject to concealment or destruction. Second, the officer could search "the area into which an arrestee might reach in order to grab a weapon or evidentiary items . . . ."[76] Any search extending beyond these limits would be deemed unreasonable. It followed that *Harris* and *Rabinowitz* were overruled.[77]

IV. POST-*Chimel* STANDARDS

A. The Person of the Arrestee

In regard to the first aspect of the *Chimel* standard, the authority of an officer to make a complete search of the arrestee has never been seriously questioned.[78] A number of decisions indicate that a search of the person of the suspect may be delayed from the time of the arrest until he is taken to the police station and still be reasonable.[79] This is particularly true when the suspect is to be jailed, whereupon a complete inventory and seizure of his personal possessions is acknowledged as

75. 395 U.S. at 763. The authority following an *arrest* is to *search*, not merely *frisk*; *cf.* Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk).

See LaFave, *Street Encounters: and the Constitution: Terry, Sibron, Peters and Beyond*, 67 MICH. L. REV. 40, 91 (1968).

76. 395 U.S. at 763.

77. "*Rabinowitz* and *Harris* have been the subject of critical commentary for many years, and have been relied upon less and less in our own decisions. It is time, for the reasons we have stated, to hold on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, they are no longer to be followed." *Id.* at 768.

78. *See, e.g.*, United States v. Di Re, 332 U.S. 581 (1948); United States *ex rel.* Walls v. Mancusi, 406 F.2d 505 (2d Cir.), *cert. denied*, 395 U.S. 958 (1969); Drayton v. United States, 205 F.2d 35 (5th Cir. 1953); People v. Maltz, 14 Cal. App. 3d 381, 92 Cal. Rptr. 216 (4th Dist. Ct. App. 1971); Brown v. State, 230 So. 2d 177 (Fla. App. 1970); Thacker v. State, 226 Ga. 170, 173 S.E.2d 186 (1970); Campbell v. State, ___ Tenn. App. ___, 447 S.W.2d 877 (1969). *See also* Hurst v. United States, 425 F.2d 177 (9th Cir.), *cert. denied*, 400 U.S. 843 (1970): "A warrant had been issued for the arrest of one of the men, Bobby Roy Bush. Officers apprehended the car and, as they did not know which man was Bush, they arrested both Bush and his companion, the appellant . . . and, finding a pistol and ammunition arrested him for carrying a concealed weapon." 425 F.2d at 178 (arrest and search were upheld); Johnson v. State, ___ Miss. ___, 145 So. 2d 156 (1962), *appeal dismissed and cert. denied*, 372 U.S. 702 (1963). Appellant conceded that search of her companion's car was properly incident to his arrest, which was lawful, but asserted that her arrest at that time was illegal because without probable cause or warrant. However, the searching officers did not know at the time of the search that the bag in question belonged to her. This fact did not invalidate an otherwise lawful search of the contents of the car. The officers had authority to search everything in the car unless they were forewarned that the bag belonged to someone else. *Cf.* Gustafson v. State, 243 So. 2d 615 (Fla. App. 1971).

79. *See, e.g.*, United States v. James, 432 F.2d 303 (5th Cir. 1970), *cert. denied*, 403 U.S.

reasonable.[80] Presumably, these decisions have not been repudiated by *Chimel*.[81]

B. The Area Within Reach

1. The Basic Ambiguity.—By permitting a search to encompass "the area into which an arrestee might reach in order to grab a weapon or evidentiary items,"[82] the Court postulated an ambiguity which has contributed substantially to the inconsistencies appearing in lower court decisions. The essence of the problem is this: Is the standard properly understood to define an *area* of specified radius with the arrestee at its center, or is this a *purposive* definition with each case to be evaluated in terms of the capability of the arrestee to reach a weapon or evidentiary item?

The *area* test has much to be said in its favor in terms of establishing a reasonably objective standard which would be more understandable to the law enforcement officer. It helps to eliminate hopeless factual disputes over what the officer thought the arrestee might be "going for"

---

906 (1971); Bailey v. United States, 404 F.2d 1291 (D.C. Cir. 1968) (suspect thwarted original efforts to search him); United States v. Caruso, 358 F.2d 184, 185-86 (2d Cir.), *cert. denied*, 385 U.S. 862 (1966) ("The appellant's contention means that the seizure of his clothing could have been made constitutionally only if, immediately on his arrest, he had been stripped to the buff on the public highway. Even though that April 13th may have been a very pleasant spring day, we are of the opinion that the argument is somewhat extreme."); United States v. Margeson, 246 F. Supp. 219 (D. Me. 1965), *aff'd*, 361 F.2d 327 (1st Cir. 1966), *cert. denied*, 385 U.S. 830 (1966) (Officer examined suspect's shoes, stating that he was seizing them, then gave them back to him to wear until they reached the station. The court found the seizure reasonable, as incident to the arrest.); People v. Shaw, 237 Cal. App. 2d 606, 47 Cal. Rptr. 96 (1st Dist. Ct. App. 1965) (seizure of suspect's underwear in rape case after arrival in police station was reasonable); United States v. Dyson, 277 A.2d 658 (D.C. Ct. App. 1971) (transporting officer can search for weapon); State v. Aiken, 228 So. 2d 442 (Fla. App. 1969). *But see* Mayfield v. United States, 276 A.2d 123 (D.C. Ct. App. 1971).

Similarly, a search delayed only long enough for the arresting officer to summon assistance is not unreasonable. Kirby v. Cox, 435 F.2d 684 (4th Cir. 1970), *cert. denied*, 92 S. Ct. 118 (1971).

80. *See, e.g.*, United States v. Taggert, 334 F. Supp. 206 (D. Del. 1971); People v. Glaubman, ___ Colo. ___, 485 P.2d 711 (1971); Farrie v. State, ___ Ind. ___, 266 N.E.2d 212 (1971); Wright v. State, ___ Miss. ___, 236 So. 2d 408 (1970). *See also* United States v. Blackburn, 389 F.2d 93, 95 (6th Cir. 1968) (police sending to motel or hotel for arrestee's personal effects for itemizing and storing approved).

81. *See* United States v. Deleo, 422 F.2d 487 (1st Cir.), *cert. denied*, 397 U.S. 1037 (1970); McCoy v. State, 491 P.2d 127 (Alaska 1971); Wright v. State, ___ Miss. ___, 236 So. 2d 408 (1970), *dismissed*, 401 U.S. 929 (1971).

82. 395 U.S. at 763.

when he reacted in a furtive manner.[83] Indeed, since this approach is based on spatial considerations, if the point of arrest could be accurately determined, in many instances a return to the scene at a later time would permit an after-the-fact evaluation of the reasonableness of a particular search.

On the other hand, it may well be argued that such a standard sacrifices the policy basis of *Chimel* for the practical expedience of a narrowly defined rule. The area standard differs only in degree from *Rabinowitz* and *Harris*; the arresting officers still have a license for an exploratory search, albeit one of substantially delimited parameters. The intent of the *Chimel* Court was to make a change in *purpose*, not mere degree. The warrantless search incident to arrest is justified because the safety of the officer may be jeopardized, the potential for escape by the arrestee should be minimized, and the possibility of evidentiary destruction should be eliminated. Insofar as a search is supportable for one of these purposes, it is sanctioned by *Chimel*; if no real threat of this nature is presented, then the spatial relationship of arrestee and object is immaterial.

The operational distinction between these approaches can be observed. In *People v. Perry*[84] the defendant was arrested in a room, handcuffed, and taken into the corridor. A subsequent search of an open dresser drawer and a purse in the room was sustained, "since it was within the area from which defendant could have obtained a weapon or something that could have been used as evidence against him."[85] Conversely, in *People v. Floyd*[86] the New York Court of Appeals held that nothing is within "grabbing distance" once the arrestee has been handcuffed.[87] The inconsistency between these two decisions is a product of the courts' fundamental misunderstanding of the *Chimel* holding. While the source of disagreement has apparently not been recognized by any

83. *See* Carrington, *Chimel v. California—A Police Response*, 45 NOTRE DAME LAW. 559, 568 (1970):

> It is submitted that the majority opinion in that case [*Chimel*] is so overbroad that: (1) the most conscientious policeman, desiring to act properly, in many cases simply *cannot know* whether his conduct is proper or not; and (2) any judge applying *Chimel* to a given case has such latitude for interpretation that almost any arrest-based search could be held to be a *Chimel* violation if the sitting judge saw fit to do so. This second result is of tremendous importance to the working policeman in his decision making process, for he must consider that certain judges will interpret his conduct strictly against him, no matter what the facts of the case.

84. 47 Ill. 2d 402, 266 N.E.2d 330 (1971).

85. *Id.* at 408, 266 N.E.2d at 333. *See also* State v. Johnson, 463 S.W.2d 785 (Mo. 1971).

86. 26 N.Y.2d 558, 260 N.E.2d 815, 312 N.Y.S.2d 193 (1970).

87. *Id.* at 563, 260 N.E.2d at 817, 312 N.Y.S.2d at 195.

court, its realization does much to explain the otherwise inexplicable conflict evident in a substantial portion of the search incident to arrest cases.

2. Search Subsequent to Seizure.—A principal manifestation of this dichotomy of decisions is found in those instances where an item is seized at the time of arrest but not searched until later. For example, in *Malone v. Crouse*[88] officers seized a suitcase which was within the immediate control of the defendant at the time of his arrest. A search at the police station an hour or so later in the presence of the defendant was found reasonable.[89] Similarly, in *Evalt v. United States*,[90] at the time of the defendant's arrest the sheriff legally searched a packsack in the possession of the defendant and discovered what he believed to be stolen money. The defendant and the packsack were then taken into custody. Sometime later, an FBI agent was allowed to go through the packsack to compare the serial numbers on the currency with those reportedly stolen from a bank. The court held that since the initial seizure of the packsack was valid, it was legally in the custody of the sheriff, and allowing the federal agent to examine it was not unreasonable.[91] Post-*Chimel* decisions have continued to sustain such searches. In *United States v. Mehciz*[92] the defendant was arrested and handcuffed, after which the suitcase he was carrying was searched. The court found the procedure unobjectionable. *United States v. Lipscomb*[93] also upheld a delayed search under similar circumstances.[94] Not mentioned in *Lipscomb*, however, was an earlier decision by the same court, *Brett v. United States*,[95] which had held that when the police have custody of a

88. 380 F.2d 741 (10th Cir. 1967), *cert. denied*, 390 U.S. 968 (1968).

89. *Id.* at 744. A comparable result on analagous facts was reached in United States v. Robbins, 424 F.2d 57 (6th Cir. 1970), *cert. denied*, 402 U.S. 985 (1971). *But see* dissent: "The proposition that this subsequent search can be considered a continuation of the first search completely ignores the Supreme Court's express limitation that 'a search can be incident to an arrest *only* if it is *substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest.*'" (citing Stoner v. California, 376 U.S. 483, 486 (1964)) (emphasis added). *Id.* at 60.

90. 382 F.2d 424 (9th Cir. 1967).

91. *Id.* at 427. *See also* People v. Robertson, 240 Cal. App. 2d 99, 49 Cal. Rptr. 345 (4th Dist. Ct. App. 1966), where the defendant refused to allow the officers to search his zippered and locked bag at the time of his arrest.

92. 437 F.2d 145 (9th Cir.), *cert. denied*, 402 U.S. 974 (1971).

93. 435 F.2d 795 (5th Cir. 1970), *cert. denied*, 401 U.S. 980 (1971).

94. "Although the situation may indeed arise in which the police, rather than follow the strict requirements of *Chimel* for warrantless searches incident to an arrest, simply seize personal property and attempt to search it later under the guise of a station-house inventory, that case is not now before us." 435 F.2d at 801.

95. 412 F.2d 401 (5th Cir. 1969).

prisoner's property merely for its protection while he is incarcerated, the fourth amendment protection of privacy as interpreted in *Katz v. United States*[96] precludes a search of his belongings without a warrant.[97]

More questionable is the case where, as a result of a valid search incident to arrest, a baggage check is found on the person of the arrestee, and subsequently the officers present the check to the bailee, thereby gaining possession of the defendant's property. A variant situation involves the discovery of a key to a locker at the time of the arrest and a subsequent search of the locker. Pre-*Chimel* decisions have sanctioned such seizures.[98] However, the decisions are not unanimous,[99] and the continued vitality of such holdings in light of *Chimel* would seem dubious.[100]

3. Expanding the Parameters of "Reach."—The *Chimel* limitation restricting the search beyond the arrestee to the area within his reach is acknowledged as severely narrowing the authority to search,[101] and its effect is widely reflected in the decisions of lower courts. For example, in *People v. Machroli*[102] an officer responded to a call and arrested the defendant for battery in conjunction with a domestic disturbance. The officer handed him some clothing and observed him remove a small white box from his trousers pocket and place it on the dresser. The officer thereupon picked up the box and found within it some unidentifiable tablets which were seized and later determined to be illegally possessed narcotics. The court cited *Chimel* in holding the search unreasonable. Again, in *State v. Rhodes*[103] officers went to the defendant's home with an arrest warrant for a drug offense. While making the arrest the officer observed a dark spot "in the bowl of the light fixture in the living room,"[104] whereupon he removed the bowl and found some marijuana cigarettes. The court found the search outside the

96. 389 U.S. 347 (1967).

97. "We are not prepared to say that an accused whose effects are held by the police for safekeeping has, by the single fact alone of the police custody of the property, surrendered his expectations of the privacy of these effects." 412 F.2d at 406.

98. *See* United States v. Blassick, 422 F.2d 652 (7th Cir. 1970), *cert. denied*, 402 U.S. 985 (1971); Kanick v. United States, 242 F.2d 818 (8th Cir. 1957); United States v. Wilson, 163 F. 338 (S.D.N.Y. 1908).

99. *See* McArthur v. Pennington, 253 F. Supp. 420 (E.D. Tenn. 1963) (key to automobile trunk); People v. Perez, 219 Cal. App. 2d 760, 33 Cal. Rptr. 398 (1st Dist. Ct. App. 1963).

100. *But see* State v. Mejia, ___ La. ___, 242 So. 2d (1971).

101. *See, e.g.*, State v. O'Steen, 238 So. 2d 434, 437 (Fla. App. 1970).

102. 44 Ill. 2d 222, 254 N.E.2d 450 (1969).

103. 80 N.M. 729, 460 P.2d 259 (1969).

104. *Id.* at ___, 460 P.2d at 259 (quoting officer's testimony).

"area of defendant's immediate control" per *Chimel*.[105]

Nevertheless, there appears to be a clear tendency on the part of many courts to stretch the limits of *Chimel* in an effort to legitimize searches. The crux of the problem usually involves determining the scope of the phrase "immediate control" of the arrestee.[106] An occasional decision, notwithstanding *Chimel*, has permitted a complete search of the room in which the arrest occurred,[107] and at least two courts have allowed the search of an entire apartment.[108] The validity of such results is highly questionable.[109]

Of greater interest are those cases which take more seriously the requirement of immediacy and demand a precise factual analysis. It has been held in such cases that where the defendant is arrested while lying

---

105. *Id.* at ___, 460 P.2d at 260 (citing Chimel v. California, 395 U.S. 752, 762-63 (1968)). *See also* United States v. Colbert, 454 F.2d 801 (1972); United States v. Jiminez-Badilla, 434 F.2d 170 (9th Cir. 1970); United States v. Armpriester, 416 F.2d 28 (4th Cir. 1969), *cert. denied*, 397 U.S. 1046 (1970).

106. 395 U.S. at 763. In Berlin v. State, 19 Md. App. 48, 57, 277 A.2d 468, 473 (1971), a Maryland court said: "The area of immediate control cannot be measured in feet or by an arm's length, but is to be measured reasonably with respect to the accessibility of the articles and their nature." *See also* People v. Vigil, ___ Colo. ___, 489 P.2d 593 (1971).

107. Perkins v. State, 228 So. 2d 382 (Fla. 1969); People v. Perry, 47 Ill. 2d 402, 266 N.E.2d 330 (1971); Murphy v. State, ___ Miss. ___, 239 So. 2d 162 (1970); Brewer v. State, ___ Miss. ___, 228 So. 2d 582 (1969).

108. Hernandez v. Superior Court, 16 Cal. App. 3d 169, 173-74, 93 Cal. Rptr. 816, 818-19 (1st Dist. Ct. App. 1971): "*Chimel* . . . was not meant, we are convinced, to protect persons in possession of contraband or the contraband within a house when evidence of its presence is shown at the moment of the arrest." In Thornton v. State, 451 S.W.2d 898 (Tex. Crim. App. 1970), officers went to one bedroom apartment to make arrest for armed robbery. In the apartment, they found eight men and one woman. A search incident to the arrest disclosed (1) a driver's license and social security card of the victim in the toilet, (2) a revolver and a large amount of change in some trousers in a closet, (3) a pistol and watch in a dresser drawer, and (4) another pistol under the mattress. "*Chimel* is distinguishable. There, the officers were searching for stolen coins and property taken in the burglary. In the present case officers under this record were justified after their entry in searching the apartment for the pistols for their own protection." *Id.* at 901.

109. *See generally* People v. Valasquez, 3 Cal. App. 3d 776, 83 Cal. Rptr. 916 (5th Dist. Ct. App. 1970), involving the search of a bar, where *Chimel* was distinguished to obliteration:

> The distinctions between the two cases are numerous and include, among others: (1) The . . . search was limited to the specific locations where the officers had observed appellant dig and reach for what they had every reason to believe was narcotics; (2) unlike our case, neither Chimel nor his wife did anything in the presence or observation of the officers to indicate that they were committing a felony or attempting to hide or dispose of the evidence of a felony which either had committed; and (3) in *Chimel*, where the alleged burglary had been committed sometime prior to the day of arrest, it would have been no more difficult for the officers to have obtained a search warrant than it was to obtain the warrant of arrest and to have served both warrants simultaneously. In our case, the felony was being committed in the presence of the officers.

Id. at 784-85, 83 Cal. Rptr. at 921.

on a bed, a wallet partially exposed beneath a pillow,[110] a duffel bag or box at the foot of the bed,[111] and even items beneath the bed[112] are seizable. Courts have also upheld the search of a coat hanging at an unspecified distance from the arrestee,[113] and a pair of pants draped over a chair 6 feet away.[114] Finally, the Court of Special Appeals of Maryland has construed "within reach" to mean "within lunge."[115]

4. Floating Areas.—Particular circumstances may legitimize a search covering a far greater area than *Chimel* would appear to permit. It may be assumed that *Warden v. Hayden*[116] remains good authority for the principle that officers with probable cause to arrest may, if necessary, forcibly enter premises in which they have reason to believe the potential arrestee is hiding; and any seizable evidence they reasonably discover in the process of looking for him may be taken. Thus, if the arrestee were found in the first room, any exploratory search beyond this point would not be tolerated; if he were found in the last room, a survey of the entire premises would be legitimate. Courts may be expected to look with a wary eye, however, upon any procedures appearing to delay the discovery of the arrestee as long as possible. So instead of viewing the search as incident to an arrest, as the *Hayden* Court did, firmer reliance may be placed on the "plain view" exception: officers legitimately on the premises for the purpose of making an arrest need

---

110. United States v. Russell, 315 F. Supp. 65 (W.D. Pa. 1970).

111. People v. Spencer, 22 Cal. App. 3d 786, 99 Cal. Rptr. 681 (2d Dist. Ct. App. 1972); People v. Arvizu, 12 Cal. App. 3d 726, 90 Cal. Rptr. 895 (5th Dist. Ct. App. 1970).

112. People v. King, 5 Cal. 3d 458, 487 P.2d 1032, 96 Cal. Rptr. 464 (1971); People v. Doss, 44 Ill. 2d 541, 256 N.E.2d 753 (1970).

113. People v. Keelen, ___ Ill. App. 2d ___, 264 N.E.2d 753 (1970); State v. Fulford, ___ Minn. ___, 187 N.W.2d 270 (1971).

114. Simberg v. State, 288 Minn. 175, 179 N.W.2d 141 (1970). *See also* People v. Belvin, 275 Cal. App. 2d 955, 958-59, 80 Cal. Rptr. 382, 384 (2d Dist. Ct. App. 1969).

115. Scott v. State, 7 Md. App. 505, 513, 256 A.2d 384, 389 (1969):

> But as the search is tested by its reasonableness and its scope is justified by the need to protect the arresting officer and to prevent the destruction of evidence, we cannot construe *Chimel* to mean that the area is confined to that precise spot which is at arm length from the arrestee at the moment of his arrest. He may well lunge forward or move backward or to the side and thus into an area in which he *might* grab a weapon or evidentiary items then within his reach before the officer could, by the exercise of reasonable diligence, restrain him. We think that *Chimel* requires that the State show that the search was conducted and items were seized in an area "within the reach" of the arrestee in this concept, as for example, by evidence as to the location of the items with respect to the whereabouts of the arrestee, the accessibility of the items and their nature.

See also Grimes v. State, 244 So. 2d 130, 133 (Fla. 1971), where a gun could have been reached "with a couple of good steps."

116. 387 U.S. 294 (1967). *See* notes 42-49 *supra* and accompanying text.

not ignore seizable evidence coming within plain view. The preferability of this approach over the incident to arrest rationale is apparent if one considers the possibility that in the *Hayden* case the officers might not have found the suspect *at all*. If there was probable cause to believe Hayden was on the premises, but the officers were simply mistaken, there still would have been every reason to sustain the seizure of the evidence, since the presence of probable cause is not determined by a retrospective evaluation of whether the officers were right.[117] On the other hand, obviously a search cannot be sustained as incident to an arrest if there is no arrest. The plain view doctrine was used to avoid such an impasse in *People v. Eddington*,[118] where officers entered the apartment of the defendant with probable cause to arrest him and "a reasonable belief that defendant was home."[119] Although he was not at home, the seizure of a shoe which matched a print left at the scene of the crime was sustained.

When the arrestee is at home and is located with little or no effort, a walk through the remainder of the premises may be legitimate when the officers reasonably believe confederates might be hidden. Again, in the process of making such a check, seizable evidence fortuitously appearing may be taken.[120] Courts have also held that the area around potential accomplices who are found at the scene of an arrest, yet not arrested themselves at the time, can properly be subjected to a *Chimel* search.[121]

In several cases a suspect has been arrested in the front room of a dwelling and allowed to go to another room in order to don appropriate clothing for the trip to the station house. The act of an officer in following the arrestee into the other portion of the premises has been uniformly sustained, and evidence so discovered has been ruled admissi-

117. *See* Hill v. California, 401 U.S. 797 (1971), where the legality of an arrest was sustained even though the police arrested the wrong man, for whose arrest they had no probable cause at all.

118. 23 Mich. App. 210, 178 N.W.2d 686 (1970).

119. *Id.* at 221, 178 N.W.2d at 691.

120. *See, e.g.*, United States v. Briddle, 436 F.2d 4 (8th Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); Guevara v. Superior Court, 7 Cal. App. 3d 531, 86 Cal. Rptr. 657 (2d Dist. Ct. App. 1970); State v. Toliver, 5 Wash. App. 321, 487 P.2d 264 (1971).

121. United States v. Patterson, 447 F.2d 424 (10th Cir. 1971), *cert. denied*, 92 S. Ct. 748 (1972); United States v. Manarite, 314 F. Supp. 607 (S.D.N.Y. 1970), *aff'd*, 448 F.2d 553 (2d Cir.), *cert. denied*, 404 U.S. 947 (1971). But a lawful arrest "cannot legalize a personal search of a companion for evidence against her simply because she was there." United States v. Berryhill, 445 F.2d 1189, 1193 (9th Cir. 1971).

ble.[122] Likewise, courts have not hesitated to sustain the reasonableness of searching articles of clothing the arrestee is about to put on.[123] And if the arrestee requests the officer to get an object from a drawer, he may not complain of the seizure of evidence fortuitously discovered in so doing.[124]

What result should be reached if when the arrest is being made for a crime of violence, the arresting officer were to say, "Where's the gun?" or words to that effect? Should a responsive answer permit the officer to get the weapon from the indicated location, even if it is beyond the bounds of the *Chimel* authorization? This problem is a particularly complex one since the separate analytical thrusts of *Terry v. Ohio*,[125] *Miranda v. Arizona*,[126] and *Chimel* seem to converge on a single incident. Three jurisdictions have grappled with the problem.

In *State v. Lane*[127] four officers forcibly entered the defendant's apartment with drawn guns.[128] The defendant was advised that he was under arrest, handcuffed, and was being given the *Miranda* warnings when another officer interrupted, asking, "Do you have the gun?" The defendant responded, "I don't have the gun. I wouldn't be dumb enough to have it here."[129] As the weapon was not located at this time, the controversy concerned the admissibility of the defendant's statement. The court found no violation of *Miranda* in the sequence of events, since

---

122. *See, e.g.*, Johnson v. State, 252 So. 2d 371 (Fla. App. 1971) (motel room); People v. Pearson, 126 Ill. 2d 166, 261 N.E.2d 519 (1970); People v. Mann, 61 Misc. 2d 107, 305 N.Y.S.2d 226 (Bronx Ct. 1969); Goodner v. State, ___ Tenn. App. ___, 464 S.W.2d 389 (1970). *See also* Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971), *cert. denied*, 92 S. Ct. 960 (1972); United States v. Kee Ming Hsu, 424 F.2d 1286 (2d Cir. 1970), *cert. denied*, 402 U.S. 982 (1971). *Chimel* was found inapplicable in each, but the indication was that it would have led to the same result. And in Parker v. Swenson, 332 F. Supp. 1225 (E.D. Mo. 1971), the district court determined:

> It may be that under this rationale, police had no authority to search petitioner's locker when they first arrested him. However, when petitioner was given permission to collect his personal effects, then opened the door and removed the paper bag, the contents of that bag clearly came within the area subject to his control. There arose a substantial possibility that in picking up the bag, petitioner was in the process of obtaining a weapon or acquiring destructible evidence.

Id. at 1232-33. *Cf.* United States v. Broomfield, 336 F. Supp. 179 (E.D. Mich. 1972).

123. *See, e.g.*, United States *ex rel.* Falconer v. Pate, 319 F. Supp. 206 (N.D. Ill. 1970); Rennow v. State, ___ Ala. App. ___, 255 So. 2d 602 (Crim. App. 1971); Grimes v. State, 244 So. 2d 130 (Fla. 1971).

124. Neam v. State, 14 Md. App. 180, 286 A.2d 540 (1972).

125. 392 U.S. 1 (1968).

126. 384 U.S. 436 (1966).

127. 77 Wash. 2d 860, 467 P.2d 304 (1970).

128. The facts are quite similar to those in Orozco v. Texas, 394 U.S. 324 (1969), a comparison which the court draws.

129. 77 Wash. 2d at ___, 467 P.2d at 305.

the question was not designed to elicit incriminating information. The question was viewed instead as the verbal equivalent of a frisk and, as such, was quite proper.[130] If the defendant had told the officers where he had hidden the weapon, that statement clearly could have been used against him, either as evidence of guilt or as a basis for probable cause to obtain a search warrant. It is not clear, however, whether the weapon could have been seized immediately, without a warrant, if it had been found in another area of the house.[131]

In *People v. Brown*[132] officers entered the residence of the defendant to arrest him on a homicide charge and observed cartridges on the dresser. When they asked the defendant where he had put the weapon, he indicated the dresser drawer. While again suggesting that the question, rather than raising a *Miranda* issue, might be viewed as a protective frisk, the court held that in any event the search of the dresser drawer was reasonable under the *Chimel* standard.[133]

Finally, the issue was squarely presented in *State v. Michael.*[134] Defendant was arrested in his home for fatally shooting his wife and, as he was leaving the premises, an officer asked him, "Where is the gun?"[135] The defendant responded, "It's over there,"[136] pointing in the

130. *Id.* at ____, 467 P.2d at 306. Obviously the court is drawing an exceedingly thin line in making this distinction. Whether the question is *designed* to elicit an incriminating response, it can hardly be doubted that given the coercive circumstances any response made by the arrestee will likely be incriminating. Furthermore, even thinner lines can be drawn if one pursues the analytical ideal. The defendant was being arrested for armed robbery and the question asked was, "Do you have *the* gun?" not "Do you have *a* gun?" *i.e.*, the inquiry was as to a particular evidentiary item. Certainly if the question asked was, "Do you have *the* money?" the response would be inadmissible per *Miranda*, and if the contraband was thereby located it would probably be inadmissible as a fruit of the poisonous tree. *See* Wong Sun v. United States, 371 U.S. 471 (1963).

131. One might speculate that the seizure would likely be sustained on a theory analagous to that postulated in Chambers v. Maroney, 399 U.S. 42 (1970), sustaining the search with probable cause of a seized vehicle without obtaining a warrant: whatever reasonable expectation of privacy the defendant has in his residence has been legitimately intruded upon by the entry to make the arrest. At this point, the question becomes, would it be a greater intrusion of privacy to walk into the other room and seize the weapon now, or to proceed to a magistrate, obtain a warrant, and return to seize it? From the defendant's viewpoint, the choice seems *de minimis*; as to others who might also reside on the premises, their privacy is likely compromised more by a second intrusion at a later time.

132. ____ Ill. App. ____, 266 N.E.2d 131 (1970).

133. [I]t is clear that the police would have found the gun without having to ask the defendant where it was . . . . The dresser drawer was within the area of defendant's immediate control and it is possible that he could have gained possession of the weapon. The dresser was thus a proper object of a search pursuant to arrest . . . .

Id. at ____, 266 N.E.2d at 135.

134. 107 Ariz. 126, 483 P.2d 541 (1971).

135. *Id.* at ____, 483 P.2d at 543.

136. *Id.*

direction of the bedroom he had left. The defendant's son then opened a desk drawer in the bedroom and said to the officers, "Here it is."[137] After looking in the drawer and observing two weapons, the officer closed the drawer. Later, the weapons were seized. The court held the seizure reasonable, distinguishing *Chimel* on the theory that here the defendant had effectively consented to the search.[138]

V. Conclusion

The impact of the *Chimel* decision should not be underestimated. Perhaps no holding since *Miranda v. Arizona*[139] has had a comparable effect on the procedures used to investigate crime.[140] Indeed, *Chimel* is likely to be of greater significance, because the introduction of evidence seized incident to an arrest is far more common than the introduction of a confession. Unquestionably, the *Harris* decision had so extended the authority to search incident to an arrest that arresting officers were constitutionally vested with a general exploratory searching power. With the official discarding of the "mere evidence" rule,[141] the simple assertion of the possibility of the presence of evidence relevant to the subject of the arrest, verified by the results, would justify the minute search of an entire house or comparable area. Such power dangerously approaches the use of "general warrants" to carry out indiscriminate searches, the paramount evil at which the fourth amendment was directed.[142]

A constitutional retreat by the Court was therefore inevitable. What was not expected, perhaps, was the severity of the limitations set out in *Chimel*. They do more than merely force the officer to procure a search warrant, for in many if not most productive searches incident to an arrest prior to *Chimel*, the officer did not have probable cause to believe that specifically describable items were in a designated location

---

137. *Id.*

138. *Id.* at ____, 483 P.2d at 545. *Cf.* United States v. Marotta, 326 F. Supp. 377 (S.D.N.Y. 1971).

139. 384 U.S. 436 (1966).

140. In Williams v. United States, 401 U.S. 646 (1971), *Chimel* was held to be applicable prospectively only.

141. Warden v. Hayden, 387 U.S. 294 (1967).

142. *See, e.g.*, Stanford v. Texas, 379 U.S. 476 (1965); Henry v. United States, 361 U.S. 98 (1959); Go-Bart Importing Co. v. United States, 282 U.S. 344 (1931); Olmstead v. United States, 277 U.S. 438 (1928); Boyd v. United States, 116 U.S. 616 (1886). *See generally* Barrett, *Personal Rights, Property Rights and the Fourth Amendment*, 1960 Sup. Ct. Rev. 46.

at a particular time;[143] discovery was often wholly fortuitous. Thus, rather than simply delaying the search, the effect of *Chimel* may be that there can be no search at all.[144]

To say this, of course, is not to say that *Chimel* is necessarily incorrect or undesirable. In fact, what has happened is that the preference given to searches made pursuant to search warrants has been revitalized, and the search incident to an arrest has been reduced to an exception no longer threatening to virtually swallow the rule. Searches incident to arrest, as with the other acknowledged exceptions requiring no warrant—frisking,[145] items in plain view,[146] abandoned property,[147] vehicle searches,[148] effective consent,[149] exigent circumstances,[150] and customs searches at international borders[151]—exemplify the fourth amendment's flexibility in continuing to preserve the constitutional bulwark against unwarranted governmental intrusion.

---

143. The fourth amendment requires that the warrant particularly describe "the place to be searched, and the persons or things to be seized."

144. Thus arises the fallacy in Justice Black's reasoning in Preston v. United States, 376 U.S. 364 (1964), to the effect that the officers should have obtained a warrant before searching the trunk of the vehicle. From aught that appears, the police had no reason to suspect that instrumentalities of crime were to be found in the trunk.

145. Terry v. Ohio, 392 U.S. 1 (1968).

146. Harris v. United States, 390 U.S. 234 (1968).

147. Abel v. United States, 362 U.S. 217 (1960); Hester v. United States, 265 U.S. 57 (1924).

148. Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925).

149. *See* Bumper v. North Carolina, 391 U.S. 543 (1968); Johnson v. United States, 333 U.S. 10 (1948); Amos v. United States, 255 U.S. 313 (1921), all recognizing the exception but finding consent ineffective under the facts.

150. Warden v. Hayden, 387 U.S. 294 (1967).

151. *See* Carroll v. United States, 267 U.S. 132 (1925) (exception recognized in dictum).

Alabama Law Review

Volume 24, Number 3, Summer 1972