

Supreme Court of the United States

Supreme Court, U. S.

OCTOBER TERM, 1969

1970

FEB 3 1970

In the Matter of:

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 ARCHIE WILLIAM HILL, JR., :
 :
 Petitioner, :
 :
 vs. :
 :
 STATE OF CALIFORNIA, :
 :
 Respondent, :
 :
 ----- X

Docket No. 750
51

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ORAL ARGUMENTS:

P A G E

Joseph Amato, Esq., on behalf of Petitioner.

1

Ronald M. George, Esq., on behalf of Respondent.

12

REBUTTAL ARGUMENT:

P A G E

Joseph Amato, Esq., on behalf of Petitioner.

35

* * * * *

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1969

-----x

ARCHIE WILLIAM HILL, JR., :
 Petitioner, :
 vs. : No. 730
 STATE OF CALIFORNIA, :
 Respondent. :

-----x

Washington, D. C.
January 19, 1970

The above-entitled matter came on for argument at
12:55 p.m.

BEFORE:

WARREN BURGER, Chief Justice
 HUGO L. BLACK, Associate Justice
 WILLIAM O. DOUGLAS, Associate Justice
 JOHN M. HARLAN, Associate Justice
 WILLIAM J. BRENNAN, Jr., Associate Justice
 POTTER STEWART, Associate Justice
 BYRON R. WHITE, Associate Justice
 THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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 Counsel for Respondent

P R O C E E D I N G S

1
2 MR. CHIEF JUSTICE BURGER: Case No. 730, Hill against
3 the State of California.

4 Mr. Amato, you may proceed whenever you are ready.

5 ARGUMENT OF JOSEPH AMATO, ESQ.

6 ON BEHALF OF PETITIONER

7 MR. AMATO: Honorable Chief Justice, Mr. Associate
8 Justices, this is another case that we have here in a long
9 history of cases that the United States Supreme Court has
10 decided in the past regarding the Fourth Amendment to the
11 United States Constitution.

12 That amendment reads as follows, "The right of the
13 people to be secure in their persons, houses, papers, and
14 effects, against unreasonable searches and seizures, shall not
15 be violated, and no Warrants shall issue, but upon probable
16 cause, supported by Oath or affirmation, and particularly de-
17 scribing the place to be searched, and the persons or things
18 to be seized."

19 Certainly this Court has treated the rights of the pri-
20 vate citizen in the past with great emphasis. Weeks vs.
21 United States has held that a search based upon reasonable cause
22 is allowed incidental to arrest providing that that search is
23 reasonable.

24 Before we go into a long facts situation of this parti-
25 cular case, I think it should be pointed out that the petitioner

1 in this case is alleging that his particular arrest, which was
2 an invalid arrest, and then subsequently the police went on with
3 an unreasonable search, that this was a violation to his Fourth
4 Amendment rights even prior to this Court's decision last year
5 in People v. Chimel.

6 Certainly in this particular case the Petitioner
7 appealed and opposed all information and all evidence regarding
8 that particular case, at the trial level, the court of appeal,
9 at the supreme court and now here before the United States
10 Supreme Court.

11 The particular trial court at the time they were rul-
12 ing on the evidence, particularly the diary which is really
13 the relevant issue in this particular case because without the
14 diary the evidence is insufficient to convict the particular
15 petitioner. That at the time the trial judge ruled upon the
16 admissibility of the particular evidence and the diary that
17 the trial judge made a statement that a ruling to the prosecu-
18 tion would open Pandora's box to the particular evidence that
19 was included in this particular case.

20 What the trial court meant at that time was not that
21 this factual situation would open the court but this would open
22 such a vast exception to what this Court has ruled in the past
23 it would in effect allow an arrest, an arrest that was not a
24 valid arrest, it was the arrest of a mistaken person and then
25 to go from that arrest on to search the premises, to search

1 for things that are not necessarily connected with the crime or
2 the fruits of the particular crime that the police were search-
3 ing for.

4 The court of appeal after taking it under ---

5 Q Supposing Chimel is carried backwards, does that
6 end this case? Does this satisfy Chimel?

7 A Yes, Your Honor, I believe without question
8 that this comes within the rule of Chimel that ---

9 Q You mean it is invalid under Chimel?

10 A Invalid under Chimel, yes, Your Honor.

11 I don't believe that this is the big issue in this
12 particular case although I am sure the Court has granted certior-
13 ari on the basis of Chimel and the decision on whether to make
14 it retroactive or not.

15 The Petitioner in this particular case had this go on
16 the court of appeal. The Court of Appeal of California reversed
17 based upon the law of Rabinowitz and Harris, and then the Supreme
18 Court of California affirmed the conviction using those same
19 two cases as guidelines.

20 It would seem, based on the factual situation in this
21 case, that what we have here is the Petitioner absent from his
22 residence. The police finding information out from co-companions--
23 this case as the Court is aware of involved four individuals
24 robbing a particular house and then two of those individuals
25 shortly thereafter, a day or two thereafter, was captured by

1 the police on an unrelated crime, the possession of marihuana.

2 The police at that time had information from those
3 particular police officers and the victims of the robbery it-
4 self, also a bystander.

5 So, it is not the petitioner's contention that there was
6 not reasonable cause to arrest Hill, clearly there was, but it
7 is the petitioner's contention that the rights of privacy that
8 this Court has constantly held is the rights of privacy of the
9 house and not the fact that reasonable cause allowed a mistaken
10 arrest to then give effect an authority to an unreasonable
11 search.

12 First of all, the arrest itself was made, the petitioner
13 contends, in debatably good faith. There were four officers in
14 this case, two of them carrying shotguns enter into the office
15 of Hill, I should say the apartment of Hill. Miller was there.
16 Miller answered the particular door and immediately thereafter
17 the officers arrested Miller.

18 Miller stated that he was not Miller nor gave identifi-
19 cation showing that he was not Miller and then when the officers
20 asked whether or not Miller knew where Hill was Miller replied
21 "No, that he did not know where Hill was."

22 Q I am not sure of the significance of his dis-
23 avowal or his claim that he was Miller and not Hill. That is
24 not unusual for people engaged in this kind of business to
25 carry false identity cards and a lot of other things, is that

1 not so?

2 A That is correct, Your Honor, but I think from
3 the standpoint when you take all of these factors, the fact
4 that there was a couple of inches in discrepancy in the height,
5 10 pounds in the weight, the fact that he said that he was
6 Miller and that he was in Hill's apartment that at this parti-
7 cular point in time he showed identification that he was Miller.
8 There is no information that the officers had prior to going to
9 the residence of Hill that there was another person and there
10 was no indication that Miller knew that the officers were coming
11 in there, or Hill.

12 So the officers, and I think the case cited in the
13 Friend of the Court Brief shows that the officers are required
14 to use diligence and prudence when they arrest a particular
15 person.

16 Most of these cases hold that when a person or an
17 officer does not use diligence that it in fact is a bad-faith
18 arrest. In one particular case cited by the Friend of the Court
19 Brief, it even held that particular officer liable in damages
20 for the amount of \$1,500, and in that particular dissenting
21 opinion, and I am referring to Walton v. Will, 66 Cal. App. 2d
22 509, the dissenting opinion stated that in all respects the
23 description of the accused was either identical with or closely
24 approximated that of respondent.

25 That was a particular "same name" case. In this

1 situation the names were not the same at all, Archie ----

2 Q We do have express findings by the state courts
3 that the officers though mistaken in their identification acted
4 in good faith, don't we?

5 A Yes, Your Honor.

6 Q So you have to start from that premise, your
7 argument has to start from that premise, doesn't it?

8 A Well, I think it starts from that premise.

9 Q You are not asking us to upset those findings?

10 A That is correct, Your Honor, but I think in all
11 these particular search and seizure cases all the facts are
12 important.

13 This initial arrest should also be considered in light
14 of the total search itself which petitioner contends is un-
15 reasonable.

16 Then we go on to the search itself. The search was
17 directed toward the bedroom, the material search, where it
18 disclosed a particular diary and some other fruits of the search.

19 The diary is the area petitioner contends is totally
20 unreasonable as far as the search is concerned and that it is
21 totally inconsistent with Rabinowitz, with Harris or any other
22 cases that this particular Court has decided.

23 First of all, the officers had no way of getting a
24 search warrant based upon the information they had regarding the
25 diary. The fact that they were able to search that particular

1 residence and assuming they are allowed to search the drawers
2 and rummage through the particular dresser drawers, this Court
3 has always stated in the past that because you have a lawful
4 search doesn't necessarily mean that you have a right to seize.

5 In the Respondent's Brief, there is indicated that
6 they came across this particular diary in the search for their
7 other items, and we are talking about cameras, we are talking
8 about clothes of certain types that the particular suspects wore
9 during the commission of the robbery.

10 Even in People v. Harris, which is probably the most
11 liberal decision allowing the police to search, this Court held
12 that not in all cases will they allow such an extensive search.

13 Certainly in Harris they were looking for checks, two-
14 \$10,000 checks. And by the nature of the search, the nature of
15 the things that they were looking for, it would require looking
16 into a particular drawer or books or personal belongings, but
17 what information the officers had in this particular case did
18 not require that type of search.

19 If in fact they did, and it is concluded by this Court
20 that they made a reasonable search, then it is submitted by the
21 petitioner that there was an unlawful seizure.

22 In Boyd v. United States, it is held that an unlawful
23 search or an unlawful seizure are not dependent upon each other.

24 So certainly the petitioner is strongly contending
25 for that one item alone that it was an unreasonable search and
seizure.

1 Q And that is proceeding on the premise that there
2 was probable cause to make an arrest?

3 A Your Honor, we assume ---

4 Q Of Hill.

5 A Yes, Your Honor.

6 I don't believe that there is any question. We have
7 not raised issues that we do not think are extremely material
8 and relevant or straw issues, so to speak.

9 We have raised issues relative to the arrest itself
10 and the seizure itself, and certainly we wanted the arrest it-
11 self, the fact that it wasn't the person that the officers were
12 there to make sure that all of the circumstances of the case
13 were before the Court.

14 Certainly it doesn't need dwelling on that Rabino-
15 witz and Harris, which the California Supreme Court relied on
16 to affirm the conviction of the petitioner, is totally different
17 from the facts situation in this case.

18 I have indicated this in my particular brief and I
19 don't believe it needs elaboration on at this time, but we are
20 emphasising at this time that there is really no degree of con-
21 sistency with the fact situation and the application of the
22 Fourth Amendment in that case as compared to the case at Bar.

23 I would like to go to the second point and that is to
24 the determination of whether or not this Court will make Chimel
25 -- People v. Chimel retroactive or not.

1 In this particular case, I think it directly comes
2 into play, another part, another exception, another error on the
3 part of the prosecution to press their case. I think it is
4 another area that this Court could reverse in addition to
5 the very initial contention that Petitioner has made.

6 That is the fact that Chimel, People v. Chimel, decid-
7 ed last year, clearly limits the police to search a particular
8 residence. While many questions have been raised as to how far
9 the police are allowed to search, certainly in this instance
10 where the particular arrest was made in the living room, al-
11 though this Court has decided that that is not a material
12 fact, then the search was made beyond the immediate scope of
13 the particular Petitioner that, and I quote Petitioner because
14 in fact he was not even present that the arrest could not, or
15 search could not pursue into the living room, into drawers and
16 in fact a general and exploratory search to find evidence of the
17 crime.

18 Q How big was this apartment?

19 A The apartment was a one-bedroom, kitchen and
20 small living room apartment, a four-room apartment.

21 Q Four-room apartment including the kitchen and
22 Miller was in the living room, was he, when the police came in?

23 A Yes, Your Honor, Miller was lying on the couch
24 when the four policemen came he went to the door and was immedi-
25 ately arrested at that point.

1 Q And the diary was found in the drawer of a desk or
2 of a closet or of a bureau of something in what room?

3 A It was found in the bedroom in a small drawer.

4 Q In the bedroom.

5 Q Now, insofar as retroactivity on this particular
6 case, certainly this Court has decided that it depends on a
7 case-case basis depending on the law, the actual effect it will
8 have on the administration of justice and whether or not it
9 will serve to a good effect on the past conduct of the Courts.

10 Now, it is contended that the administration of jus-
11 tice will be strongly effected as a result of making Chimel
12 retroactive. The Petitioner contends that this will not, in
13 fact, be the case, that the Courts are extremely flexible that in
14 the past time and time again the courts on major counties have
15 been able to take some of their civil judges and utilize them
16 for criminal matters.

17 This happens on occasion even if -- when there is no
18 strong decision from this Court changing the particular law.

19 The Petitioner strongly contends that making Chimel
20 retroactive will not have that great of an effect on the particu-
21 lar administration of justice from the standpoint of having a
22 lot of criminals who have been unconstitutionally convicted of
23 being released.

24 Petitioner has contended in his Reply Brief that surely
25 the appeals that are pending now could easily effect the law as

1 Court has enunciated it in People v. Chimel.

2 It seems appropriate that when you review the cases
3 regarding this particular problem in Alaska's Supreme Court,
4 the Court of Appeals of New Mexico that these cases have applied
5 Chimel on direct appeals only, and then when you review the
6 cases, you also see that they apply to these particular cases
7 without opinion.

8 When the cases are not utilizing Chimel on direct
9 appeal, they seem to state what this Court has stated in
10 Stoval v. California and the Desist case setting forth the
11 free criteria that this Court strongly considers in their
12 determination of whether or not a case in criminal law should
13 be made retroactive or not.

14 The Courts, in fact, have just come to a conclusion
15 that when there is a constitutional finding before them that
16 they review the facts of the law as it is in that pending appeal.

17 It doesn't have to be satisfied with the law of
18 opinion or justification, but that, in fact, it seems reasonable
19 to those particular judges that this case should be made as the
20 law is stated by this Court and not set some date back when a
21 particular case and arrest was made two to three years ago and
22 have all those particular arrests then based upon whether or not
23 it was constitutional or not constitutional.

24 It is immaterial because the date of the arrest of
25 Chimel, the date of the seizure -- search and seizure is not the

1 same date as specified in the pending appeal.

2 This particular case was close to Chimel. The petition-
3 er contended at the time at the Court of Appeal that this was
4 not a case where the law of Rabinowitz and Harris, and I am re-
5 ferring back to the first issue, if I may, was not constitution-
6 ally sanctioned search even at that time.

7 So certainly insofar as Chimel is concerned, which
8 far limits the courts -- far limits the courts in affirming the
9 rights of the police officers to search.

10 It would be submitted by this petitioner that Chimel
11 should be made retroactive at least if the case is on direct
12 appeal.

13 CHIEF JUSTICE BURGER: Thank you, Mr. Amato.

14 Mr. George?

15 ARGUMENT OF RONALD M. GEORGE, ESQ.

16 ON BEHALF OF RESPONDENT

17 MR. GEORGE: The sole issues in this case are whether
18 the search of petitioner's one-bedroom apartment was lawful
19 under then existing law, and secondly if the search was not
20 lawful under present law as defined by this Court's decision
21 seven months ago in Chimel v. California, whether Chimel is to
22 be applied retroactively.

23 The factual setting in which the lawfulness of this
24 search arises is a rather unusual one, and I would, therefore,
25 chronicle it briefly.

1 On June 4, 1966, a robbery involving a brutal assault
2 was committed by a gang of four armed men one of whom was
3 petitioner.

4 As part of a series of robberies committed by this
5 gang, or we can say which this gang was suspected, in a parti-
6 cular district in Los Angeles.

7 Two days later after this robbery in the evening the
8 police acquired probable cause to arrest petitioner. This is
9 conceded by petitioner in this Court. I won't dwell upon the
10 probable cause to arrest petitioner, that is clear and, as I
11 said, conceded.

12 The police then proceed to petitioner's apartment in
13 order to arrest petitioner and to retrieve the weapons used
14 in the assault and robberies and in order to retrieve the dis-
15 guises and stolen property.

16 In fact, this is done with the consent of one Bader,
17 who is one of the members of the gang. Bader and one other man,
18 Baum, have been placed in custody and Bader is petitioner's
19 roommate.

20 The police knock and identify themselves and they are
21 confronted by somebody who later turns out to be Mr. Miller.
22 Now Miller is the sole occupant of the apartment at this time.
23 He opens the door. He looks almost identical to the petitioner.
24 In fact, the discrepancies are almost negligible, brown hair,
25 brown yees, almost the same height and weight. In fact,

1 petitioner was two inches shorter, 5'10" instead of 6', and he
2 was 10 pounds lighter as well, but that is a negligible dis-
3 crepancy and one that certainly isn't necessarily apparent to
4 the officers or one that need not be apparent.

5 Q That issue is foreclosed unless we are going to
6 review the findings of fact, isn't it?

7 A I would think so, yes, because the trial court
8 and the court of appeal and the State Supreme Court all found
9 that the officers did act with good faith. I know this Court
10 has stated that good faith is not a substitute for probable
11 cause, but, of course, there is no substitution here. There is
12 ample probable cause.

13 Q By good faith in this context you mean -- you
14 submit that there was a finding by both of the courts in the
15 all three of the courts in the state that the officers
16 genuinely believed that Miller was Hill.

17 A Yes.

18 Q Do I understand you correctly?

19 A That is correct, yes.

20 There are many things that support this. This person
21 in addition to his almost identical physical description he
22 suspiciously and evasively denied having seen any guns in the
23 apartment.

24 Yet, when the officers are standing outside the
25 apartment after the door has been opened, they see an automatic

1 and a loaded clip right on the coffee table in plain view.

2 The person denies being petitioner but he is unable
3 to give any satisfactory explanation for his presence in the
4 apartment. He says he has some kind of identification showing
5 his name to be Miller, but this doesn't mean much to the arrest-
6 ing officer.

7 As the Chief Justice noted, it is commonly known and
8 the trial court took judicial notice of the fact that many
9 criminals, at least in California, do carry false identification.
10 It is an easy thing to come by, and why should the officers
11 believe this identification when he had just lied about the gun,
12 not knowing there was a gun in plain view.

13 The small apartment was then searched incident to this
14 valid but mistaken arrest of Miller and ---

15 Q What were they searching for?

16 A They were searching for the weapons which they
17 had been told would be at the apartment, the weapons used in
18 this crime and disguises which they had heard were there and
19 presumably some of the stolen property as well which they had
20 reason to believe were there.

21 Q The diary was just a windfall.

22 A That is correct. They had no idea, and it is not
23 even suggested that anybody had any idea there was such a diary,
24 I don't think it is something that we would assume a person would
25 write, "Dear Diary, Yesterday I committed a crime."

1 Q If you by any chance had gone for a search warrant,
2 you wouldn't have been able to mention the diary, would you?

3 A Well, what would have happened, we would submit---

4 Q Would you?

5 A Well, I will answer that. I think that one could
6 have obtained this diary with a search warrant in the following
7 way, by searching for weapons, for looking for weapons in a
8 place where weapons might logically be, a bedroom, a dresser
9 drawer, opening up the drawer, seeing the diary open to that
10 current page and then going to use that information lawfully
11 acquired to go get a search warrant.

12 Q What about the constitutional requirement to
13 specify what you are searching for and where you search?

14 A Yes.

15 Q Is that gone?

16 A That is not gone. The officers would have acquired
17 information lawfully by being where they had a right to be in
18 a place where they might find weapons.

19 Q You still will agree, will you not, that you would
20 be a little better off if you had a search warrant, just a little
21 bit better off?

22 A We would be better off, but, of course, that was
23 not the law at the time, and we have an alternate argument that,
24 even under current law, there were exigent circumstances here
25 which would have not required the officers to obtain a search

1 warrant.

2 Q What were the exigent circumstances?

3 A The exigent circumstances were as follows, the
4 officers had two suspects of the four robbery gang members in
5 custody. They knew that there was a series of robberies being
6 committed. They had just found out that petitioner was one of
7 the men, and this was after court hours. There was a great
8 liklihood that other assaults ---

9 Q Well, let's get our dates straight now.

10 A All right.

11 Q You got this information on June 4th, right?

12 A No. I will give the chronicle, if Your Honor
13 pleases.

14 On June 4th, the robbery was committed at 10:30 p.m.
15 that is a Saturday night. On June 6th, Monday, at 5:30 p.m.,
16 the officers commenced their talk with Baum and Bader who are
17 in custody. That talk finishes some time thereafter, we don't know
18 exactly when. At 8:15 that same evening, they go to the apart-
19 ment.

20 Q The same evening?

21 A The same evening.

22 Now, there were two members of the gang at large. We
23 submit that the officers did not have to wait and worry about
24 these fellows committing other crimes. Also, there was a distinct
25 possibility that petitioner would learn of the fact that two

1 of the members of the gang had been taken into custody and would
2 remove these weapons from the apartment.

3 Finally, one could say, well, why didn't they go ahead
4 and seize petitioner, arrest him, and then the next day go back
5 with a search warrant.

6 Well, we have this fourth member of the gang, Baca,
7 who was still at large, and he might be alerted by the fact
8 that these three members were placed in custody and might re-
9 move the property before a search warrant could be obtained.

10 This is not the type of situation that Chimel criti-
11 cizes where the officers routinely, as a matter of course,
12 dispensed with the requirement of a search warrant. Chimel,
13 itself, is replete with language recognizing that there are
14 situations where a search without a search warrant is justifi-
15 able. We would submit strongly that this is one of those
16 situations.

17 Now this is an alternate argument because we urge
18 very strongly that Chimel is not retroactive. In turn, I feel
19 that the search passes muster under either Chimel or pre-Chimel
20 law.

21 Q Suppose it were retroactive, why do you say the
22 search was reasonable?

23 A Because the officers were confronted with a
24 situation where time was of the essence, this gang was going
25 around assaulting and robbing people, the evidence might be

1 removed from the apartment if the other members of the gang at
2 large were apprised of the fact that some of their members had
3 been arrested.

4 It is pretty clear that they all had access to this
5 apartment. We are ---

6 Q Mr. George, directing your attention to page
7 76 which appears to be the opinion of the Supreme Court, it
8 says that they were arrested on June 5th and the information
9 was obtained on June 5th, and again on June 6th, am I reading
10 it right?

11 A And again on June --- You know I read that
12 over last night, and I thought I had been missing something.
13 I combed through that record. Baum and Bader only spoke once
14 to the arresting officer. There was no telling him and then
15 telling him again.

16 Q Well how in the world did the Supreme Court of
17 California make this mistake?

18 A Well, as this Court has found previously, they
19 are not infallible, and I submit that this is a mistake on
20 their part.

21 Q Occasionally this Court makes factual errors in
22 its opinions, too.

23 A Yes. But I just last night looked over this and
24 I read the entire record carefully including the state court
25 record, and it is clear that this officer spoke only once to
Bader and Baum and that was the only information he had from

1 them that he acquired at 5:30 on June the 6th.

2 I think these state findings are entitled to great
3 weight where they are supported by the evidence especially re-
4 garding the good faith of the officers here.

5 I think, too, the fact of judicial notice where the
6 Court can consider as evidence these facts of common knowledge
7 that false identification is being carried and that although the
8 man was booked under this different name that in California you
9 are booked under the name you give. So clearly the officers did
10 consider Miller to be Hill.

11 Now, I think, we get to the heart of the case here.
12 We have a valid arrest. We assume it is a valid arrest. A
13 search incident to arrest, of course, is permissible. The scope
14 varying with the time we submit that the search occurred, pre-
15 Chimel or post-Chimel.

16 The question is, what is the effect of this mistake?
17 First of all, we would like to note that it is highly unlikely
18 that upholding this search would open up a Pandora's box. The
19 parties' diligent research has not disclosed this factual situa-
20 tion arising in any other state or Federal case. It is a highly
21 unusual situation, and the Fourth Amendment bars only unreasonable
22 searches.

23 What is there unreasonable in conducting the same type
24 of search which would have been permissible had the arrestee in
25 fact been petitioner and the officers not had made this reasonable

1 mistake.

2 Q What did you expect to find? Was the diary a
3 book?

4 A It is not clear. All that was introduced are
5 two pieces of paper. We don't know if they were in notebook
6 form or what.

7 Q What did you expect to find in a book? If you
8 are searching for weapons or disguises, do you expect to find
9 something in -- the book may have been in plain sight in those
10 places where you were entitled, if you were, to look for some
11 other things, but all you could see was the book. What entitles
12 you to look inside of it?

13 A We don't know that they did look inside of it.
14 We don't know that there was a book. It might have been open
15 like that if there were a book. Since that was the current
16 period of the diary ---

17 Q Well why would you read it?

18 A You might just see it. You might open up a
19 drawer and there it is.

20 Q I know but then you see some pages but you just
21 don't automatically know what those words say unless you take
22 the trouble to read them. What right did you have to read those
23 materials, anyway?

24 A The second ---

25 Q I take it that this is just a Fourth Amendment

1 argument. Is the Fifth Amendment argument here? Or, was that
2 raised in the court below?

3 A The Fifth Amendment point is made somewhat
4 inappropriately by petitioner in this Court because it was not
5 all raised in either of the four courts in the state proceedings
6 and it was not raised in the Petition for Certiorari. So, in
7 effect it is what Justice Jackson called in the Irvine case
8 smuggling in an issue. He is ---

9 Q So you think it is just a Fourth Amendment
10 question?

A Yes.

11 Q Do you think you could have looked -- assuming
12 the search you were making was valid, could you have looked in
13 a sealed envelope?

14 A In a sealed envelope? I think it would depend on
15 the envelope. Maybe there would be a knife in between the pages
16 of a book. Remember there were two knives used ---

17 Q It is a little, narrow sealed envelope.

18 A I don't think that the officers could look in-
19 side that kind of envelope, no, not in light of the present
20 day law, anyway, and ---

21 Q Or even pre-Chimel law.

22 A Well, under pre-Chimel law, I think that they
23 could really because the scope was not restricted and they can
24 look for evidence. They can look for stolen property, and they
25 can look for pretty much what is a legitimate matter of concern

1 and I don't think there is any basic limitation on that. I
2 think the mere evidence rule being rejected in Warden v. Hayden
3 eliminates these distinctions where we worry about one piece of
4 paper which in one case may be a so-called instrumentality by
5 the Court reaching strained application of that doctrine to
6 save it from a mere evidence rule.

7 I think you can certainly look inside envelopes under
8 pre-Chimel law. I don't think there is any problem, but, again,
9 that is not our situation here. The officers are looking only
10 in places where a weapon could reasonably be.

11 Now, basically what the petitioner is relying on here
12 in his attempt to persuade us that the search is unreasonable
13 is an outmoded and totally inappropriate concept of property
14 law.

15 He is saying, well, fine, the arrest is all right, and
16 this defendant here he had the control over the premises in the
17 sense of physical control. He could go and grab a weapon. He
18 could go run over to evidence, but he didn't have control in
19 a proprietary sense. That is a totally inappropriate standard.

20 I think that Katz has effectively buried these dis-
21 tinctions, and I think what the Silverman opinion says is very
22 appropriate here. It cautions that the scope of the Fourth
23 Amendment cannot be ascertained by resort to the ancient niceties
24 of tort or real property law. In the Jones case, the opinion by
25 Justice Frankfurter says the same thing.

1 I think the principles involved in this case are
2 graphically illustrated by considering the following hypotheti-
3 cal situation.

4 Let's assume that Miller was arrested in petitioner's
5 apartment but that petitioner was right there and the police
6 wanted to arrest Miller, that they knew he was visiting there.
7 Certainly even under Chimel the police could search the area
8 within the reach of the visitor. The officer need not decide
9 well this is really Hill's apartment here and I have to risk
10 being shot by Miller, who might grab a weapon. He has the
11 right to, to a certain extent, invade the privacy of the pro-
12 prietor of these premises.

13 Now, the question is, why? Well, I think that there is a
14 certain assumption of risk on the part of the defendant. Here
15 the petitioner talks about the risk, that the invasion of
16 petitioner's privacy. Well, one takes a risk in inviting a
17 visitor on the premises, just as one may risk tort liability if
18 he falls over the carpet.

19 I think if you give ---

20 Q Is this risk being that your visitor, your
21 social guest, may be somebody whom the police are pursuing or
22 want to arrest for some reason or another and therefore are go-
23 ing to enter your house, and in the restricted search of your
24 guests they are going, to an extent, invade the privacy of your
25 house, is that the point?

1 A Yes, exactly. I think similarly if one gives
2 a key to ones apartment to somebody else or leaves the door un-
3 locked, one assumes certain risks. Maybe a thief will enter.
4 Maybe a pursued felon will enter, and that is the situation here.

5 Q How did Miller get into this house?

6 A We don't know, and he gave a very strange ex-
7 planation apparently. He just didn't come right out and say
8 I got in this way or so. He fudged around a bit.

9 In Fraser v. Kup, the recent opinion of this Court
10 stated with reference to the search of a duffle bag there, well,
11 so and so's roommate didn't have authority to give consent. The
12 Court said, look, and I believe it was Justice Marshall's opinion,
13 you left that bag there in his custody and you sort of assumed
14 the risk that he would say, well, look through the bag. I
15 think that is what we have here.

16 Q Is there anything in the record to show that Hill
17 left Miller in the custody of the apartment?

18 A No, there is nothing to show that, but he obvious-
19 ly got in somehow.

20 Q That is different from the duffle bag.

21 A I think what is interesting is that absolutely
22 no defense was offered at the preliminary hearing or at the
23 trial, not one word of evidence to come forward and indicate
24 that this apartment had been locked or whatever, nothing at all.

25 Q You mean that there was no claim that he was a

1 a trespasser.

2 A Pardon me.

3 Q There is no claim by Hill that Miller was a tres-
4 passer?

5 A There is no claim whatsoever.

6 Similarly I think that if Miller had been arrested
7 in his own apartment, in Miller's apartment, and this had all
8 been a mistake, what would happen if the officers found marihuana
9 in Miller's pocket, let's say, or in the drawer. I think it
10 would be clearly admissible against Miller despite the invasion
11 of his privacy, if it was a reasonable mistake to arrest Miller
12 and search his premises.

13 Q You mean that if the word comes out that a 6',
14 200-pound blond man committed a crime that the police have the
15 right to go into anybody's apartment that fits that description?
16 Certainly you don't mean that.

17 A No, and I didn't mean to imply that.

18 Q I thought so.

19 A But there is much more evidence here. It would
20 have to be a reasonable mistake, and that is always going to
21 be a case-by-case basis.

22 Let's say somebody says it is that 6', 200 pound blond
23 who lives in Apartment 6 at 1931 so and so Drive.

24 Q But you said anyone, I thought.

25 A Well I didn't mean to imply it would be that

1 broad.

2 Q And you understand Chimel to say that if you
3 arrest a man in the living room that you can search every room
4 in the apartment that he is able to walk into?

5 A When there are exigent circumstances that dis-
6 pense ---

7 Q That would go to a three-story house?

8 A No, not necessarily.

9 Q Well, what is the limit?

10 A I wouldn't want to say what it is. In Warden v.
11 Hayden it ---

12 Q I thought Chimel said what was within where he
13 could reach.

14 A It said that is the normal rule and that to dis-
15 pense with that you would have to have exceptional circumstances,
16 and normally you ---

17 Q And what is the exceptional circumstance here?

18 A I attempted to outline ---

19 Q That he will go in and get a gun and shoot some-
20 body?

21 A No, that there were other robbers in this gang
22 at large and that when they heard that petitioner's confederates
23 were arrested or that petitioner was that then they would come
24 and remove these weapons from the premises.

25 Q Well, couldn't they stay there until somebody got

1 a warrant?

2 A It is an interesting question. I'm fairly rather
3 pessimistic under California law. Officers have asked me that.
4 I don't know under California law what would give them the right
5 to camp out in the apartment ---

6 Q The same right that would give them the right to
7 tear the door down. The same right, I would assume. If they
8 have one, they have the other.

9 A There was no tearing down of any door here. This
10 was a perfectly legitimate search. They knocked and identified
11 themselves. They followed all the proper rules.

12 Q They identified themselves and this man says,
13 come on in, fine, I just happen to have a loaded revolver
14 laying on the table here which you can see that I'm a criminal.

15 A No, he says, I don't have a loaded revolver, and
16 it is right there. That is quite a different situation.

17 Q That is what I meant.

18 A And, there is a lot of other circumstances. In
19 other words, ---

20 Q When he entered the room, counsel, could the
21 officer at that time, or the officers, see whether there was
22 more than one person, one occupant of the apartment at once?

23 A No, they couldn't. They had to, of course, look
24 into areas where a person could be secreted, but we are not
25 going to claim the extreme position that they could look inside

1 because obviously a person can't be secreted there. So, we
2 are justifying it on this other basis.

3 Q That they could look in every opening from that
4 main room in which someone might be able to conduct an ambush
5 of the officers?

6 A Certainly. Let's say under a bed or in a closet
7 or in another room. They certainly have the right to do that
8 we would submit.

9 I think that if the Court would conclude otherwise,
10 you know, any felon could frustrate an arrest and search. All
11 he would have to do is say, I'm not the defendant, I'm not the
12 man you are looking for and especially if he has a phone I.D.

13 Then what does the officer have to do. Then he would
14 be estopped as a matter of law from continuing. He would have
15 to go away and find some 100 percent proof that this, in fact,
16 was the criminal, and then perhaps the evidence would be re-
17 moved.

18 This would give the criminal a veto power over every
19 search. He would just have to claim, I'm not the man. Now,
20 go prove it.

21 I won't discuss this purported issue under the Fifth
22 Amendment. We have pointed out that it was deliberately waived,
23 I think, all along the way.

24 Q Assume for the moment that it isn't.

25 A All right.

1 Q It isn't waived, do you think he has got a good
2 Fifth Amendment claim through the introduction of the diary?

3 A No. I certainly don't. I think that Gouled,
4 itself, -- I think it is noteworthy that Gouled said, "There
5 is no special sanctity in papers, as distinguished from other
6 forms of property, to render them immune from search and seizure,
7 if only they fall within the scope of the principles of the cases
8 in which other property may be seized."

9 So then we have Warden v. Hayden dispensing with this
10 mere evidence rule. Now, we allow confessions from a man's lips,
11 we allow blood to be taken from his veins without a warrant under
12 Schmerber. Is paper more sacred than this? I don't see how it
13 can be.

14 Q It is testimonial, isn't it?

15 A I don't think it is testimonial in a ---

16 Q It is a confession, suppose it is an outright
17 confession, it is not testimonial?

18 A It is not testimonial in a compulsive sense. I
19 think that is what is essential. The Fifth Amendment is a safe-
20 guard against compulsory self-incrimination.

21 Q Isn't the blood testimonial, if it has got some
22 alcohol showing in it?

23 A That I think is equally testimonial. It is
24 probably a lot more compulsory ---

25 Q I thought you said it wasn't testimonial.

1 A To the extent that one would assume it to be
2 testimonial, blood is certainly as much so, I would think, but
3 this Court has ruled ---

4 Q Would you want us to overrule Schmerber?

5 A No.

6 Q I didn't think you would.

7 Q Well, what about ---

8 A I can't see a distinction, though, if we uphold
9 it in Schmerber, I think we have to uphold it here, and I think
10 it is like a spy's paper. Will we say that spies' papers in
11 Abel, those are instrumentalities, but the same papers are mere
12 evidence or a political assassin's notebooks. Are those instru-
13 mentalities or are they mere evidence? I think we could get
14 into an awful lot of problems in this situation.

15 Finally, I have only about three or four more minutes.
16 I would like to note our views on the retroactivity issue.

17 I think it is significant. First of all, under Chimel
18 I have tried to indicate the exigent circumstances, and that it
19 was after court hours, and that time was of the essence.

20 We would submit that Chimel should not be applied
21 retroactively. And, first of all, I would like to ask leave
22 of the Court to file a letter listing recent decisions on the
23 question of retroactivity, if I might do that.

24 Q As a supplemental memorandum?

25 A Yes, it is giving citations and I have them here.

1 Q You may file it, but furnish your friend with
2 a copy of it, of course.

3 A Yes, I did this morning.

4 Q It would help me out, since you are from
5 California, do you pronounce this Chimel, not Shimel?

6 A Well, I have it from the horse's mouth that
7 it is Chimel.

8 Q Chimel?

9 A Yes. Although, there have been five or six
10 variants on that pronunciation.

11 Q Yes, we have had them among us, too, but Chimel
12 is the official, correct pronunciation.

13 A According to Mr. Chimel, yes.

14 Q Well, he would know.

15 A There are three Federal circuits in five states
16 that have held that Chimel is fully prospective and
17 applies only to searches conducted after the date of that deci-
18 sion, and Alaska and New Mexico are the only jurisdictions that
19 have decided to the contrary.

20 We submit that Desist is the governable standard here.
21 Desist set forth the function of the three considerations, the
22 purpose to be served, the extent of reliance and the effect on
23 the administration of justice.

24 Chimel stresses in footnote 12 that the Fourth Amend-
25 ment's purpose is to prevent not simply to redress unlawful

1 Police action. I don't see how it would help deter illegal
2 police conduct to punish, in effect, police and prosecutors who
3 had justifiably relied on this Court's decision of many years'
4 standing and conducted searches in total compliance with those
5 standards.

6 We are not talking about unreliable or false evidence.
7 It is only a procedural question not effecting the issue of
8 guilt or innocence. So, in effect, and certainly the extent
9 of reliance by law enforcement is clear, this Court two years
10 before Chimel and one year after the present search in the
11 Cooper case quoted that statement in Rabinowitz that has since
12 been disapproved.

13 I think it is significant that within three weeks of
14 the decision in Chimel 70 percent of the states joined respon-
15 dent in petitioning for rehearing, and this shows the impact of
16 this decision. It has been evident to me in going around ex-
17 plaining this decision to police officers.

18 They regard this as a greater impact than Miranda on them
19 and they regard this as the greatest impact on their day-to-day
20 enforcement techniques of any decision that has come down in
21 the criminal field in recent years.

22 The memorandum which is attached to this letter of the
23 Los Angeles Municipal Court shows how that court has had to
24 completely revise its procedures and place judges on call nights
25 and weekends to issue search warrants because of Chimel.

1 We would submit that there would be an enormous impact
2 on the courts in requiring them to retry a multitude of cases
3 decided in reliance on Chimel, and if there is any case in which
4 this Court still believes that a new rule of constitutional
5 law should be applied prospectively, this is certainly the case
6 under the standards which this Court has set forth.

7 Q Of course, an argument could be made which it
8 was suggested as I remember in Desist that at the time this
9 happened this was not any Federal violation of the constitution
10 even in the retrospective wisdom of Chimel because the consti-
11 tution itself prohibits only unreasonable searches and seizures.

12 A I know. I believe it was Your Honor in that
13 footnote 12 in Desist who noted it can't be unreasonable if that
14 was the law.

15 Q And agents who rely on the decisions of the courts
16 can hardly said to be acting unreasonably.

17 A Yes. We certainly concur with that.

18 Q I say that is kind of a circular argument, but
19 it is not lacking in realism either.

20 'A I think not in view of the particular wording
21 of the Fourth Amendment that searches are to be judged in lack
22 of their reasonableness, and that certainly must imply what the
23 law is at the time the searches are conducted.

24 I see my time is up, and that is all we have unless
25 there are any questions.

1 CHIEF JUSTICE BURGER: Thank you.

2 Do you have something further, counsel? You have
3 10 minutes left.

4 Thank you, Your Honor.

5 REBUTTAL ARGUMENT OF JOSEPH AMATO, ESQ.

6 MR. AMATO: In answering the last question first,
7 Your Honor, as far as the reasonableness of the search in this
8 particular case, each case certainly is decided by its own
9 facts.

10 Now, Justice Frankfurter in his dissent in Harris indi-
11 cated, what is the criteria that the officers have when they make
12 the particular search, how far can it go?

13 Really the decisions aren't that clear. You can't
14 determine what is reasonable and what is unreasonable as far as
15 the extent of the search. How far can you go? Can you go up-
16 stairs? Can you go to the third floor? Can you to the fourth
17 floor?

18 Q We don't have to worry about that here, do we?

19 A I believe you do, Your Honor, because ---

20 Q We have to decide this case which is all on one
21 floor in a moderate to small apartment.

22 A That part is true, Your Honor, but as far as
23 now to the extent of the search, now, how could you make a search
24 in a particular apartment of a diary when in fact even before
25 they went to that particular apartment they couldn't have gotten

1 a search warrant.

2 They didn't know enough information with enough
3 particularity to get a magistrate to sign a search warrant
4 specifying that particular diary. The information that they
5 had available did not include that information. They could have
6 gotten a search warrant for the particular information that
7 they knew about from the co-defendants in this particular
8 case.

9 Q What if the warrant application recited and
10 the warrant in turn recited any books, papers and records re-
11 lating to the alleged crime?

12 A I think that is so general in nature, Your Honor,
13 that they would have to specify what type of books, what general
14 -- you are talking about maybe an accounting situation but this
15 ---

16 Q What in the constitution would require you to
17 particularize more than that?

18 A Well, Your Honor, I think the Fourth Amendment
19 states in itself that you have to be more specific than just
20 be so general. That is why the general warrant has been out-
21 lawed in the past.

22 Q Well, but it says describing the particularity
23 or substantially that. If you said any books, papers and re-
24 cords relating to the crime, isn't that particular ---

25 A Your Honor, I say that is insufficient to justify

1 a search warrant, and I don't think that it could stand.

2 Q Would the search warrant be invalid then in your
3 view?

4 A Not the total search warrant. I think it would
5 be justified from the standpoint of the parts that they set forth
6 for clarity and would extend to the diary which would be illegal.
7 In other words, if they brought in the diary, it would be in-
8 sufficient.

9 As far as the other evidence, it would be all
10 right as far as the Court is concerned.

11 Counsel brought out the fact that Bader who was in
12 custody consented to the officers to go to the petitioner's
13 apartment. I think the California court, and it is stated
14 in my Reply Brief, that Bader who was held in custody does not
15 have the authority to strip the petitioner of all of his
16 constitutional rights.

17 Certainly because Bader said that he could go to that
18 particular apartment doesn't mean that he can go ahead, the
19 officer can go ahead and search it and as far as the petitioner
20 contends an unreasonable search.

21 Now, this point about this Baca, B-A-C-C-A, Bacca
22 was the third person who was not in custody, meaning two of
23 the defendants were in custody, but petitioner was not avail-
24 able.

25 So, the respondent says there is a very big emergency

1 here, we can't go back and get a search warrant.

2 Well, what is the emergency here? What we are talking
3 about is four individuals. Police officers, two with shotguns,
4 who have already arrested Miller. Now, we have, in fact, if they
5 thought it was Miller, then they have three of the four. The
6 fourth man is not in custody. The fourth man has access to this
7 particular place.

8 So, it would seem to me that if they wanted to get and
9 protect the particular goods that were in that apartment, to
10 search it more in detail at a later time, that the proper and
11 reasonable police procedure would be to have the officers stay
12 at the apartment to survey it, and if that fourth suspect comes
13 back, then they can make an arrest at that time.

14 It would see that it would be an asset to not search
15 the apartment rather than have to search it right away and be
16 fearful that this particular Bacca would come back and take the
17 goods from that particular apartment.

18 Insofar as this diary, and this is what the petitioner
19 is contending at this time, is completely unreasonable. The
20 other items that were searched the petitioner contends it is
21 possible under Rabinowitz and Harris that these items may have
22 been able to have been searched and properly seized by the
23 officers.

24 Insofar as that particular diary is concerned, I think
25 it is the burden upon the prosecution when they are attempting

1 to make exceptions to the Fourth Amendment that the particular
2 officers show enough authority and enough diligence and prudence
3 to justify that particular search and to show it into evidence
4 and not have the petitioner show that he has the rights afforded
5 by the Fourth Amendment but rather have the prosecution show
6 the exceptions to the Fourth.

7 Q Do you concede that everything about the search
8 was valid except the taking of the diary?

9 A No, Your Honor, I concede only that it may have
10 possibly been. Certainly this case regarding the diary to me
11 seems so clear in reviewing the case decisions in Rabinowitz
12 and Harris and all the other decisions Weeks and Lefkowitz and
13 Gobard Company, and reviewing in light of Chimel, all these
14 cases make it so crystal to myself that the particular search
15 and seizure of the diary was improper.

16 The most you can get, I think, is the search was valid.
17 The seizure is difficult to comprehend in light of the Court's
18 decisions in the past.

19 Q Do you claim that the thing siezed was not
20 relevant?in the case?

21 A Yes, Your Honor, I think that they were making
22 a general, exploratory search.

23 Q I am not talking about the search. You do not
24 assert, do you, that a diary which contains a confession that
25 a man was guilty of a crime is not relevant evidence against

1 him?

2 A Oh, Your Honor, that is relevant and material,
3 no question about it.

4 Q And material. And if an officer sees it, you
5 say, though, that he couldn't get it.

6 A Without a search warrant, Your Honor, that is
7 correct.

8 Q Without a search warrant, even though he sees
9 it. Suppose he saw a weapon exactly of the description which
10 was used to shoot a man, would you say they couldn't get that?

11 A I would say, Your Honor, I think it depends on
12 the circumstances. In the first instance, if the officers knew
13 or had reason or any evidence or any probable cause as this
14 Court has ---

15 Q Suppose they didn't have evidence but when they
16 looked at it they saw it was highly relevant.

17 A Well, Your Honor, I say that they cannot seize
18 that particular evidence without a search warrant.

19 I have no further questions, Your Honor. Thank you.

20 CHIEF JUSTICE BURGER: Thank you, Mr. Amato. Thank
21 you for your submissions, gentlemen, the case is submitted.

22 Counsel, Mr. Amato, you were appointed by this Court?

23 A Yes, Your Honor.

24 CHIEF JUSTICE BURGER: Excuse me for overlooking that.
25 We thank you for your assistance to the Court and, of course,

1 the assistance to your client that we placed you in charge of.

2 MR. AMATO: Thank you very much, Your Honor.

3 (Whereupon, at 12:55 p.m. the argument in the above-
4 entitled matter was concluded.)
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