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is particularly significant because it is a matter over which control may be exercised.

Despite the questions left unanswered by the court in *Ladehoff*, it seems clear that rights under section 93 of the Texas Probate Code are to be strictly construed. Accordingly, citizens of Texas, and especially attorneys of Texas, are now on notice that probate judgments may be subject to attack until the last interested minor has passed his majority by two years.

Ellen K. Solender

The Scope of Search When Incident to a Lawful Arrest

Chimel was arrested at his home by three officers pursuant to an arrest warrant. The officers did not have a search warrant, and asked for permission to look around the house. When permission was refused they announced that they would exercise their prerogative of conducting a search incident to a lawful arrest. Accompanied by Chimel's wife, they conducted a forty-five minute search of the house, attic, garage, and workshop. Items were seized which were later admitted into evidence at Chimel's trial for burglary. Chimel maintained that these items were obtained in violation of his fourth amendment right to be free from unreasonable searches and seizures.¹ The California supreme court rejected the claim and upheld the search.² The United States Supreme Court granted certiorari.³ *Held, reversed*: A warrantless search which goes beyond the person and the area from which he might obtain a weapon or destructible evidence is unreasonable under the fourth and fourteenth amendments. *Chimel v. California*, 395 U.S. 752 (1969).

I. THE FOURTH AMENDMENT AND ITS DEVELOPMENT IN CRIMINAL PROCEDURE

In *Weeks v. United States*⁴ the Supreme Court recognized that the fourth amendment does not bar the search of a person legally arrested for the purpose of discovering and seizing fruits or evidence of crime.⁵ *Weeks* was the first case to delineate a specific exception to strict fourth amendment limitations on search.⁶ The *Weeks* doctrine was extended in

¹ "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized." U.S. CONST. amend. IV.

² 68 Cal. 2d 436, 439 P.2d 333, 67 Cal. Rptr. 421 (1968).

³ 393 U.S. 958 (1968).

⁴ 232 U.S. 383 (1914).

⁵ *Id.* at 392. This was set out in the form of judicial dicta to a decision which held that it was a violation of the fourth amendment to break into a person's house and search through his effects without a search warrant.

⁶ The predicate for this was laid in *Robertson v. Baldwin*, 165 U.S. 275 (1897), where the Court held there were "well-recognized exceptions arising from the necessities of the case." *Id.* at 281. For a more thorough study of the fourth amendment limitations, see N. LASSON, *THE HISTORY AND DEVELOPMENT OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION* (1937).

Carroll v. United States.⁷ In *Carroll* the Supreme Court held that, "[W]hen a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."⁸ The meaning of "in the control" was clarified two years later in *Marron v. United States*.⁹ There, federal agents with a search warrant went to the premises of the defendant to look for liquor and articles used in its manufacture. They searched the room and the closets, where they found and seized a ledger dealing with illicit liquor transactions. The Court held that although seizure of the ledger was not authorized by the warrant it was admissible because the officers had the right to search incident to a lawful arrest and the seizure could be viewed as a product of that search. Thus, in a matter of three years the Court extended the spatial limitations of a search from the person to all parts of the premises where the arrest is effected.

Contemporaneous with this development was the issue of the thoroughness and geographical boundaries of a search. In *United States v. Kirschenblatt*¹⁰ the argument was advanced that enforcement officials had the right to conduct general searches incident to a lawful arrest.¹¹ The standard of "reasonableness" in conducting a search was developed in answer to this argument;¹² "reasonableness" was to be determined by the facts and circumstances of each case.¹³ One application of this newly determined standard was in *United States v. Lefkowitz*.¹⁴ In *Lefkowitz* the defendant was arrested in a room where he was allegedly carrying on an illegal liquor business. The room where the arrest took place was ten feet long, twenty feet wide, and divided by a partition. The defendant was arrested in the outer portion of the room, but both parts were searched intensively, and books and papers were seized from both. The Court found that these items were improperly admitted at the trial, holding that the authority to search contemporaneous with an arrest is not greater than that conferred by a search warrant specifically describing the things to be seized. Moreover, the Court held that an arrest cannot be used as a pretext to search for evidence.¹⁵ Thus, the apparent criterion for a search incident to a law-

⁷ 267 U.S. 132 (1925).

⁸ *Id.* at 158. The primary issue in *Carroll* was the validity of the arrest, but once this was established the stated search rule was held to apply.

⁹ 275 U.S. 192 (1927). See also *Agnello v. United States*, 269 U.S. 20 (1925), which firmly established the right to search the place of the arrest.

¹⁰ 16 F.2d 202 (2d Cir. 1926).

¹¹ In *Kirschenblatt* the defendant's offices were searched by federal agents. The agents had a search warrant, but the prosecution admitted that the search and subsequent seizure was not authorized by the warrant alone. It was argued that the lawful arrest justified a search for and seizure of, incriminating papers related to the defendant's illicit purchase of liquor. The court found that the evidence in question was improperly seized because it was unrelated to the crime. *Id.* at 204.

¹² *Go-Bart Co. v. United States*, 282 U.S. 344 (1931).

¹³ *Id.* at 357. *Go-Bart* also reaffirmed the decision in *Gould v. United States*, 255 U.S. 298 (1921), by saying that in looking at these factors the amendment should be liberally construed.

¹⁴ 285 U.S. 452 (1932).

¹⁵ *Id.* at 467. In so stating, the Court leaves somewhat of an ambiguity when comparison is made to *Marron* (see text accompanying notes 9-10 *supra*). Since *Marron* was not overruled the implication is that the items were of a kind that could have been seized had the search been reasonable under the circumstances.

ful arrest was that it could extend to all parts of the premises where the arrest was effected if it was reasonable under the circumstances and for something specific.

The beginning of the modern era in this area of law began in 1947 with *Harris v. United States*.¹⁶ In *Harris* FBI agents had a warrant to arrest the defendant for interstate transportation of forged checks. After the arrest was effected in the living room of Harris' four-room apartment, a five-hour search of the premises took place, the object being the recovery of the checks. In the course of the search, a sealed envelope containing altered selective service cards was found and opened. The cards were admitted into evidence to convict Harris of violating the Selective Service and Training Act of 1940.¹⁷ The Court upheld the search, finding that it was no more extensive than necessary, and that it was insignificant that the draft cards were unrelated to the crime for which the accused was arrested.¹⁸ The Court further stated that if the entry was authorized and the search valid, there is nothing in the fourth amendment which prohibits the seizure of property, possession of which is a crime, even though the officers were initially unaware that such property was on the premises. Apparently the Court did not find the search in *Harris* to be a general one because the officers began the search looking for something specific. However, Mr. Justice Frankfurter dissented, proposing that "reasonableness" should not be judged with reference to a particular search but by the historic experience of the fourth amendment.¹⁹

The Court did modify its position somewhat in *Trupiano v. United States*²⁰ when it held that "in seizing goods and articles, law enforcement agents must secure and use search warrants whenever practicable."²¹ This view prevailed for barely two years before it was rejected by the Court in *United States v. Rabinowitz*.²² There, an arrest warrant was issued for selling forged stamps. The defendant was arrested in his small one-room office, and his desk, safe, and file cabinet were intensively searched as an incident to the arrest. A number of forged stamps were seized and later admitted in evidence. In upholding the search the Court rejected the reasoning it used in *Trupiano* and said that "such searches turn upon the reasonableness under all the circumstances and not upon the practicability of procuring a search warrant, for the warrant is not required."²³ Once again

¹⁶ 331 U.S. 145 (1947).

¹⁷ Selective Training & Service Act of 1940, ch. 720, 54 Stat. 885, § 311 (expired 1947).

¹⁸ 33 U.S. at 154. It should be noted that the previous cases such as *Carroll* and *Marron* (see text accompanying notes 7-10 *supra*) dealt with the right to seize things that could be used to prove the crime. The inference being that this meant the crime for which the person was being arrested. However, the question of the propriety of seizing items that could be used to prove a crime was not dealt with.

¹⁹ *Id.* at 162. Justice Frankfurter would prefer the Court to set a more specific guideline based on constitutional interpretation, rather than to formulate a standard which would fluctuate from case to case. This is opposed to the Court's decision in *Go-Bart* (see text accompanying notes 12-13 *supra*) and the idea that the Court should not formulate a rule of constitutional law broader than is required by the precise facts of the case. *Garner v. Louisiana*, 368 U.S. 157, 163 (1961).

²⁰ 334 U.S. 699 (1948).

²¹ *Id.* at 705. However, no guidelines were set down by the Court to determine when it would be "practicable."

²² 339 U.S. 56 (1950).

²³ *Id.* at 65, 66.

Justice Frankfurter dissented, stating that if the police had time to obtain a search warrant and the need for it was apparent before the arrest, the search should not be allowed.²⁴ *Harris* and *Rabinowitz* represented the state of the law until 1969.

II. CHIMEL V. CALIFORNIA: A NEW STANDARD

Speaking for the majority in *Chimel*, Mr. Justice Stewart held that a search incident to a lawful arrest cannot go beyond the area within the immediate control of the person arrested.²⁵ The Court defined this area as that "from within which a person might gain possession of a weapon or destructible evidence."²⁶ A distinction should be drawn between the "area within the *immediate* control of the person" that was spoken of in *Chimel*, and the area "in the control of the person" as defined in *Marron*.²⁷ Under *Marron*, an entire room, including closets and desks even if thirty feet away, were considered to be "in the control" of the accused by virtue of the fact that he was the occupant of the premises. *Chimel* narrowed the permissible area of search to one which would be within the reach of the accused before he could be apprehended by the police. While it is difficult to define this area in precise spatial terms, the Court's decision in *Chimel* certainly precludes the search of a closet which is closed and some distance removed from the accused. The reasoning of the Court in establishing the "immediate control" standard was that once the search is allowed to go beyond this area there is no way rationally to limit its extent. Consequently, the Court overruled *Harris* by finding that there is no justification for searching rooms other than that in which the arrest occurs.²⁸

The Court in *Chimel* also rejected the idea that because a court would have issued a search warrant the fact that one was not obtained is unimportant. Merely because courts have granted search warrants in similar situations²⁹ does not mean that it is justifiable to forego this safeguard in future cases. Nor did the Court accept the idea that a warrantless search may be justified because of the impracticality of obtaining a warrant. This is a direct departure from the Court's decision two years earlier in *Camara v. Municipal Court*.³⁰ There the Court found that peculiar circumstances making the obtaining of a search warrant highly impractical are a significant consideration in evaluating a search under the reasonable-

²⁴ *Id.* at 85. Is there an inconsistency in Justice Frankfurter's dissents in *Harris* and *Rabinowitz*? In *Harris* he does not think the facts of the particular case should be looked at, but here he is willing to look at them to determine that the police might have had time to obtain a search warrant.

²⁵ 395 U.S. at 763. See *Scott v. State*, 256 A.2d 384 (1969), where the Maryland court found *Chimel* to be non-retroactive. It was stated there that the exclusion of evidence seized before *Chimel* would increase the burden on the administration of justice, would overturn convictions based on fair reliance upon pre-*Chimel* decisions, and would not serve to deter similar searches and seizures in the future. *Id.* at 392.

²⁶ *Id.* at 759.

²⁷ See text accompanying notes 9-10 *supra*.

²⁸ 395 U.S. at 763.

²⁹ See *People v. Alvarado*, 255 Cal. App. 2d 285, 62 Cal. Rptr. 891 (Ct. App. 1967), where there was no *direct* evidence that items sought were at home but warrant was issued.

³⁰ 387 U.S. 523 (1967).

ness standard. These last two points are especially significant. In holding as it did, the Court in *Chimel* took a definite turn away from the past practice of looking at the "total atmosphere"³¹ of the case and deciding that if a search warrant probably would have been issued the search may be upheld.³² In *Chimel* the Court tried to redirect enforcement procedures back to the use of the search warrant rather than to justify its non-use, an approach which previous decisions had engendered.³³

Chimel restricts a warrantless search incident to a lawful arrest to three situations.³⁴ First, an arresting officer may search the person arrested in order to remove any weapons he might seek to use in order to resist arrest or effect escape. Second, it is permissible to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. Finally, a search may go beyond the person arrested, but not beyond the area into which an arrestee might reach in order to grab a weapon or evidentiary items.

III. CONCLUSION

The decision in *Chimel* is an attempt to set a workable guideline for the scope of a search incident to a lawful arrest. It seems clear that the concept of such a search has a rather nebulous base. This was recognized by Justice Frankfurter's dissenting opinion in *Rabinowitz* which said that "the right to search the place of arrest is an innovation based on confusion, without historic foundation, and made in the teeth of a historic protection against it."³⁵ The fact that courts have encountered difficulty in establishing what that right consists of is amply shown by the wide variety of decisions attempting to follow the guideline of reasonableness.³⁶

The basic difficulty is the conflict between the right of an individual to be free from intrusion, and the right of society to maintain effective law enforcement. The dilemma which this conflict causes was recognized by Justice Harlan in his concurring opinion in *Chimel*. He said that he did not know to what extent cities and towns across the nation are prepared to administer the greatly expanded warrant system required by the decision, but that he could not vote to perpetuate "bad fourth amendment law."³⁷ Whether this decision requires an expanded warrant system and

³¹ *United States v. Rabinowitz*, 339 U.S. 56 (1950).

³² See *Aguilar v. Texas*, 378 U.S. 108, 111 (1964), where the Court justified its holding by saying that as much was required to support a search without a warrant as required for the issuance of a warrant.

³³ In his dissent in *Chimel* Justice White raises the question of whether a search warrant will provide any more protection than the law does presently, and whether it is reasonable to request an officer to leave the place of the arrest to go and get a search warrant, knowing that the evidence present might be destroyed by another party. 395 U.S. at 774, 781.

³⁴ *Id.* at 763.

³⁵ *United States v. Rabinowitz*, 339 U.S. 56, 78 (1950).

³⁶ In *People v. Braden*, 34 Ill. 2d 516, 216 N.E.2d 808 (1966), the police arrested defendant in his apartment and the search of a refrigerator and closet outside the apartment was upheld. In *Commonwealth v. Cockfield*, 411 Pa. 71, 190 A.2d 898, *cert. denied*, 375 U.S. 920 (1963), the police searched defendant's car 57 hours after his arrest and this was held to be incidental to the arrest. The California court of appeals, in *People v. Rodriguez*, 238 Cal. App. 2d 682, 48 Cal. Rptr. 117, *cert. denied*, 385 U.S. 951 (1966), held that an arrest on the outside of the house could lend itself to a search of the inside.

³⁷ 395 U.S. at 769.