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The Permissible Scope of a Premises Search Incident to Arrest under Chimel v. California: Divergent Definitions of Immediate Control Plague the Lower Courts

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THE PERMISSIBLE SCOPE OF A PREMISES SEARCH INCIDENT TO ARREST UNDER CHIMEL v. CALIFORNIA: DIVERGENT DEFINITIONS OF "IMMEDIATE CONTROL" PLAGUE THE LOWER COURTS

I. INTRODUCTION

In Chimel v. California\(^1\) the United States Supreme Court reiterated its position that "in the absence of well recognized exceptions\(^2\) a warrantless search is per se unreasonable\(^3\) and hence violative of fourth amendment\(^4\) protections. The more controversial aspect\(^5\) of the Court's

2. Id. at 763. Among the recognized exceptions to the search warrant requirement are: searches incident to arrest (see note 6 infra); items falling into "plain view" (Coolidge v. New Hampshire, 403 U.S. 443 (1971); see Comment, "Plain View"—Anything But Plain: Coolidge Divides the Lower Courts, 7 Loy. L.A.L. Rev. 489 (1974)); searches made in "hot pursuit" of a felon (Warden v. Hayden, 387 U.S. 294 (1967)); searches of automobiles and other vehicles (Chambers v. Maroney, 399 U.S. 42 (1970); see note 16 infra); and searches necessitated by exigent circumstances (Vale v. Louisiana, 399 U.S. 30, 34 (1970); United States v. Basurto, 497 F.2d 781 (9th Cir. 1974)). There is some authority in federal courts of appeals cases which suggests the development of what may be termed a "second-glance" exception to the warrant requirement. That is, once an item has been exposed to government view under unobjectionable circumstances and no further intrusion is involved, it cannot be argued that a subsequent seizure of the same item is unconstitutional since any expectation of privacy has been dissipated. See United States v. Grill, 484 F.2d 990 (5th Cir. 1973), cert. denied, 416 U.S. 958 (1974); United States v. Allende, 486 F.2d 1351, 1352-53 (9th Cir. 1973), cert. denied, 416 U.S. 958 (1974). But cf. 17 U.C.L.A.L. Rev. 626, 634 (1970). The Katz formulation has been subsequently affirmed by the Supreme Court. See Cardwell v. Lewis, 417 U.S. 583, 589 (1974); Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971).
4. U.S. Const. amend. IV provides:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants
opinion was its analysis and limitation of the area surrounding an arrestee which lawfully may be searched pursuant to the search incident to arrest exception to the warrant requirement. The Court ex-

shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

5. See, e.g., Carrington, Chimel v. California—A Police Response, 45 Notre Dame Law. 559 (1970), wherein the author states:

It is submitted that the majority opinion in [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.

Id. at 568.

6. The search incident to arrest exception was first recognized in dictum in Weeks v. United States, 232 U.S. 383 (1914). There the Court stated:

What then is the present case? Before answering that inquiry specifically, it may be well by a process of exclusion to state what it is not. It is not an assertion of the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime.

Id. at 392. The doctrine was again recognized in Carroll v. United States, 267 U.S. 132, 158 (1925), and was stated to extend to a search of the area in the arrestee's control. Finally, in Marron v. United States, 275 U.S. 192, 199 (1927), the dictum was adopted as a rule of law to sustain the warrantless search of the defendant's premises. Since that time the validity of the exception has been well recognized, and the conflict has centered on the permissible scope of searches incident to arrests. See Chimel v. California, 395 U.S. 752, 755-63 (1969).

There are two requisites to the search incident to arrest exception. First, the arrest must be lawful under the authority of the officer to arrest. United States v. Di Re, 332 U.S. 581 (1948). Second, the arrest must be based on probable cause. Sibron v. New York, 392 U.S. 40 (1968); Brinegar v. United States, 338 U.S. 160 (1949). Probable cause exists if the facts and circumstances known by the officer warrant a prudent and reasonable person to believe an offense has been committed, and the arrestee has committed it. Henry v. United States, 361 U.S. 98, 102 (1959); Le Roux v. State, 207 N.W.2d 589, 596 (Wis. 1973). The Chimel Court assumed that the arrest of the petitioner was valid. 395 U.S. at 755.

If probable cause for the arrest exists, it is immaterial that the search is conducted subsequent to or prior to the formal arrest. E.g., United States v. Jenkins, 496 F.2d 57 (2d Cir. 1974), cert. denied, 420 U.S. 925 (1975); United States v. Riggs, 474 F.2d 699 (2d Cir.), cert. denied, 414 U.S. 820 (1973); United States v. Woods, 468 F.2d 1024 (9th Cir.), cert. denied, 409 U.S. 1045 (1972); Bailey v. United States, 389 F.2d 305 (D.C. Cir. 1967); Pendergraft v. Cook, 323 F. Supp. 967 (S.D. Miss.), modified, 446 F.2d 1222 (5th Cir. 1971), cert. denied, 409 U.S. 886 (1972); People v. Sirak, 2 Cal. App. 3d 608, 82 Cal. Rptr. 716 (1969). If, however, the arrest is made prior to establishing probable cause the evidence may not be used, even if probable cause is subsequently established. See, e.g., United States v. Gonzalez, 362 F. Supp. 415 (S.D.N.Y. 1973); United States v. Lopez, 328 F. Supp. 1077 (E.D.N.Y. 1971). Moreover, the officer is prohibited from delaying the arrest merely so it will occur on premises which the officer desires to search; such an arrest is considered a pretext to search. United States v. Martinez, 434 F.2d 190 (9th Cir. 1970); cf. State v. Baker, 271 A.2d 435 (N.J. Super. Ct., App. Div. 1970). Compare Elsman v. Superior Court, 21 Cal. App. 3d 342, 98 Cal. Rptr. 342 (1971).
pressly overruled United States v. Rabinowitz and Harris v. United States, which held that incident to an arrest an officer could search the entire premises where the arrest occurred—the area deemed to be in the "possession" or under the "control" of the arrestee. In sustaining the petitioner's contention that the search of his entire house incident to his arrest was unconstitutional, the Court held:

There is ample justification, therefore, for a search of the arrestee's person and the area "within his immediate control"—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.

7. 395 U.S. at 768.
10. 395 U.S. at 760.
11. A warrant had been issued for the arrest of the petitioner. Three officers went to his house and arrested him when he arrived. The officers had no search warrant, but after being denied permission to look around they proceeded to search the premises. The search of the petitioner's home lasted some forty-five minutes and extended throughout the entire three-bedroom house including the attic, garage, and workshop. In some rooms the petitioner's wife, who accompanied the officers throughout the house, was directed to open drawers and move the contents about. At the end of the search the officers seized several items of evidence related to the burglary of a coin shop for which the petitioner was arrested. Id. at 754.

At the state trial of the petitioner the objects were admitted into evidence over objection. The petitioner was convicted, and his conviction was affirmed by the California Supreme Court (People v. Chimel, 68 Cal. 2d 436, 439 P.2d 333, 67 Cal. Rptr. 421 (1968)) on the ground that despite the lack of a search warrant the arrest of the petitioner had been valid and the search of the house was justified as incident thereto.

Compare the search in Chimel with the search upheld by the Court in Harris v. United States, 331 U.S. 145 (1947). In Harris the petitioner was arrested in the living room of his apartment pursuant to an arrest warrant. The officers conducted a search of the entire apartment to find two cancelled checks involved in the charges of cashing and transporting interstate forged checks. An envelope marked "personal papers" was found and opened. Altered Selective Service documents found inside were used as evidence against Harris in the subsequent trial for violation of the Selective Service Act of 1940. Id. at 148-49.

Based on the fact that Harris involved the search of a four-room apartment (id. at 148), some courts have reasoned that Chimel was not so much a rejection of the Harris principles as a matter of judicial line-drawing. See notes 47-62 infra and accompanying text.

12. 395 U.S. at 763 (emphasis added). Note the earlier statement of the Court in Preston v. United States, 376 U.S. 364 (1964), in summarizing the search incident to arrest exception:

Unquestionably, when a person is lawfully arrested, the police have the right, without a search warrant, to make a contemporaneous search of the person of the accused for weapons or for the fruits of or implements used to commit the crime. This right to search and seize without a search warrant extends to things under the accused's immediate control, and, to an extent depending on the circumstances of the case, to the place where he is arrested.

Id. at 367 (citations omitted).
Undeniably, the decision in Chimel placed limitations on the scope of a permissible search incident to an arrest. While some searches are clearly violative of fourth amendment protections under either the Harris-Rabinowitz or Chimel standards, in most cases the determination of the constitutional validity of an area search will depend upon an interpretation of the operative language of Chimel. This Comment

13. See United States v. De La Cruz Bellinger, 422 F.2d 723 (9th Cir.), cert. denied, 398 U.S. 942 (1970) (search of a dresser in hallway adjoining the living room where the arrest took place held valid under the Rabinowitz standards; while Chimel was not applicable, the court indicated that had it applied the area would not have been within his immediate control); United States v. Harris, 435 F.2d 74 (D.C. Cir. 1970), cert. denied, 402 U.S. 986 (1971) (search of a bedroom adjoining a room where the arrest took place held valid since Chimel not to be given retroactive application). Compare United States v. Holland, 438 F.2d 887 (6th Cir. 1971) (applying pre-Chimel standards, the search of four rooms of a dwelling without a search warrant held violative of Chimel standards) and State v. Gumins, 469 P.2d 833 (Ariz. 1970) (defendant arrested in hallway between the living room and the kitchen, the latter room was searched and marijuana was found and seized; search held valid since Chimel not retroactive). But see notes 111-12 infra and accompanying text. One perplexed court has been moved to comment:

We are inclined to the opinion that with a change in the composition of that court and the attitude toward crime prevention, that the pendulum will again swing toward the holding enunciated in Harris v. United States ... and United States v. Rabinowitz ... which basically held that a search of the premises was proper as incident to a lawful arrest in or on the premises. We do not find fault with a reasonable interpretation of the Fourth Amendment to the United States Constitution, but to limit a search incident to a lawful arrest to items of weapons or destroyable evidence in the immediate vicinity or reach of the arrested person, must be a real windfall for criminals.


14. See, e.g., Vale v. Louisiana, 399 U.S. 30 (1970) (without application of Chimel, held that for a search of a house to be incident to arrest the arrest must occur inside the house); United States v. Bell, 457 F.2d 1231 (5th Cir. 1972) (applying pre-Chimel standards, search of a backyard of a home held invalid when defendant was arrested at the front door of the house and removed from the scene); United States v. Hooper, 306 F. Supp. 715 (E.D. Tenn. 1969) (defendant arrested on back porch of home and removed from the scene; search of an outbuilding, an automobile parked in the driveway, and a junked automobile on the premises violated fourth amendment standards); State v. Roach, 236 So. 2d 782 (La. 1970) (search of entire house invalid under either Chimel or pre-Chimel standards); People v. Spinelli, 358 N.Y.S.2d 743 (Cl. App. 1974) (defendant arrested in front of building, after searching the arrestee the officers went to the rear of the lot to look at serial numbers of vehicles believed to be hijacked; search held invalid).

15. One commentator has noted the importance of the lower courts' decisions in this regard:

Since police practices are affected to a greater extent by the lower courts' interpretation of the new standards than by the standards themselves, an unexplained or incorrect interpretation of the standards hinders the police in obtaining the information necessary to rectify the police practices the Supreme Court thought questionable.

focuses on the attempts of the lower courts to define the area surrounding the arrestee which is deemed to be "within his immediate control" in the context of searches of premises incident to arrest. It will also

16. This Comment limits itself to an examination of the immediate control rule as it has been applied to searches of dwellings, homes, or other premises incident to arrest. This focus, however, should not be presumed to indicate that searches of other areas incident to arrest present no problems. The application of Chimel to searches of automobiles and other vehicles incident to arrest presents some particularly thorny problems.

When a search of a vehicle is made without a warrant and in conjunction with an arrest, both the mobility exception to the warrant requirement and the search incident to arrest exception to the warrant requirement come into play. But the justification for these two exceptions must be distinguished. The mobility exception allows a warrantless search of an automobile or other vehicle when there is probable cause to believe that the vehicle contains contraband or evidence of a crime and exigent circumstances are present. Chambers v. Maroney, 399 U.S. 42 (1970); Carroll v. United States, 267 U.S. 132 (1925). The focus of the two exceptions is, in part, the same: the possible removal or destruction of evidence. See Chimel v. California, 395 U.S. 752, 763 (1969); Carroll, supra at 153. Consequently they are often argued as alternative justifications for the dispensation of a search warrant. See, e.g., United States v. Connolly, 479 F.2d 930 (9th Cir.), petition for cert. dismissed, 414 U.S. 897 (1973); United States v. Free, 437 F.2d 631 (D.C. Cir. 1970); People v. Babie, 287 N.E.2d 24 (Ill. Ct. App. 1972); People v. Ricketson, 264 N.E.2d 220 (Ill. Ct. App. 1970); State v. Brewer, 212 N.W.2d 90 (Neb. 1973). It is also possible for both exceptions to apply in a single transaction. A valid search of an automobile incident to arrest, confined to the proper area, may give rise to the necessary probable cause to justify a search of the entire automobile under the Carroll doctrine. See, e.g., State v. Heald, 314 A.2d 820 (Me. 1973).

The similarity and the common grounds of the two exceptions, however, should not be allowed to blur the fact that each proceeds from a wholly different theory. The Supreme Court noted in Carroll:

The right to search and the validity of the seizure are not dependent on the right to arrest. They are dependent on the reasonable cause the seizing officer has for belief that the contents of the automobile offend against the law.

267 U.S. at 158-59 (emphasis added). Recognition of this distinction is crucial to a proper analysis of the requisites for the two exceptions and leads to the conclusion that when a search of a vehicle is incident to arrest neither exigent circumstances nor probable cause to search must be independently established, but are considered to be inherent in the arrest situation. E.g., State v. Ponce, 491 P.2d 845 (Ariz. Ct. App. 1971); State v. Hollingshead, 191 N.W.2d 680 (Iowa 1971). On the other hand, absence of either of those elements in a search alleged to come within the ambit of the mobility exception would be fatal to the claim. Chambers v. Maroney, 399 U.S. 42 (1970); United States v. Payne, 429 F.2d 169 (9th Cir. 1970) (failure to establish threat of removal of automobile from jurisdiction); United States v. McIntyre, 304 F. Supp. 1244 (E.D. La. 1969) (no threat that evidence would be removed); Steel v. State, 450 S.W.2d 545 (Ark. 1970) (no proof of mobility). See Comment, Back on the Road Again—The Mobility Exception in the 70's, 7 Loy. L.A.L. Rev. 550 (1974).

The determination of whether or not a warrantless search of an automobile falls within the mobility exception as opposed to the search incident to arrest exception is of profound significance in view of the scope limitations of Chimel. The Chimel Court stated:

Our holding today is of course entirely consistent with the recognized principle that, assuming the existence of probable cause, automobiles and other vehicles may
examine the alternative justifications developed by the courts to expand the permissible scope of such searches. Finally, it will review the impact of recent Supreme Court decisions on Chimel.

II. DEFINING THE PERMISSIBLE SCOPE

The Supreme Court has offered little guidance to the lower courts since enunciating the “immediate control” rule in 1969. Decisions from

be searched without warrants “where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.” Carroll v. United States . . . .

395 U.S. at 764 n.9. This language is clear in one respect: warrantless searches of automobiles based on the mobility exception need not be confined to the area within the arrestee’s immediate control. United States v. Gibbs, 435 F.2d 621 (9th Cir. 1970), cert. denied, 401 U.S. 994 (1972); State v. Garcia, 504 P.2d 172 (Kan. 1972).

Despite this distinction, Chimel has created several problems with regard to the mobility exception. For example, in Daygee v. State, 514 P.2d 1159 (Alas. 1973), the court upheld the admission into evidence of items seized from an automobile from which the passengers had been removed and placed in custody in a police patrol car. The court rejected the appellant’s argument that Chimel must be read to prevent any search of an automobile once the owner or passengers are in custody since the exigencies justifying the dispensation of the warrant no longer exist. Id. at 1164-66; accord, United States v. Ragsdale, 470 F.2d 24 (5th Cir. 1972); United States v. Mehciz, 437 F.2d 145 (9th Cir.), cert. denied, 402 U.S. 974 (1971); United States v. Free, 437 F.2d 631 (D. C. Cir. 1970); United States v. Gerlach, 350 F. Supp. 180 (E.D. Mich. 1972); Harris v. State, 486 S.W.2d 88 (Tex. Ct. Crim. App. 1972); see note 50 infra. Contra, Ramon v. Cupp, 423 F.2d 248 (9th Cir. 1970).

Another question which must be dealt with is whether or not the scope limitations of Chimel apply to searches of automobiles incident to arrest. In United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971), the defendant was stopped while driving his car and arrested pursuant to a valid arrest warrant. After the defendant was removed from his car, frisked, and placed in the police patrol car, the officers returned to the defendant’s automobile and searched it. The court rejected appellant’s contention that the search could not be held valid as incident to his arrest, declined to discuss whether the area searched could be construed as being within the defendant’s immediate control, and distinguished Chimel by holding that it applied only to the search of a home, apartment, or other dwelling in conjunction with the arrest of the suspect therein. The court concluded:

The High Court, so far as we are advised, has not to this date engaged in any nice distinctions regarding the scope of the vehicular search. . . . If the justification for the search is that it is incident to a lawful arrest, the limitation is that it must be contemporaneous with the arrest. . . .

Id. at 1192-93. For other comments related to the immediate control rule and automobile searches see notes 50, 60 infra.

17. Since its decision in Chimel, the Supreme Court has only considered three cases dealing specifically with Chimel and the scope restrictions it set forth. In Von Cleef v. New Jersey, 395 U.S. 814 (1969), and Shipley v. California, 395 U.S. 818 (1969), both decided on the same day as Chimel, the Court reversed and remanded since the searches involved were violative of even the pre-Chimel standards. The Court therefore left open the question of retroactivity of the decision. This question was resolved in Williams v. United States, 401 U.S. 646 (1971), when the Court declined to accord retroactive effect to Chimel.
these courts are therefore unclear and often contradictory. Moreover, the failure of the courts to make detailed explications of the factual settings makes it impossible to ascertain whether other circumstances are truly analogous. A more fundamental flaw in the opinions is that they usually fail to expound on the particular court's understanding of the Chimel decision. Unfortunately, the determinative factor in a court's decision as to whether or not a search incident to arrest falls within permissible bounds is that court's interpretation of the "immediate control" rule. The operational definition of the area of immediate control is inextricably intertwined with this often unarticulated understanding of the rationale of Chimel. One commentator has succinctly stated the problem:

By permitting a search to encompass "the area into which an arrestee might reach in order to grab a weapon or evidentiary items," 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 items?1

Because of this inherent vagueness in the language used by the Chimel Court, the lower courts have developed two tests by which to determine the validity of a search of a premises incident to arrest. The first, which may be termed the physical proximity test, focuses on the arrestee's hypothetical ability to reach the area searched. It does not

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18. The problem is further compounded by the confusion that exists as to which party has the burden of proving that the search extended beyond the area prescribed by Chimel. It is established that in cases of warrantless searches the prosecution must show that a warrant was unnecessary because the search fell within a recognized exception. Chimel v. California, 395 U.S. 752, 762 (1969), citing United States v. Jeffers, 342 U.S. 48, 51 (1951). However, the Court has not decided the prosecutorial burden in demonstrating that the search did not exceed the permissible bounds of such a search, or, conversely, whether the burden is on the defendant to establish that the search did exceed permissible bounds. The lower courts are split. See, e.g., United States v. Burrus, 306 F. Supp. 915 (E.D. Pa. 1969) (government's burden to show item was within the immediate control of the arrestee); People v. Shepherd, 33 Cal. App. 3d 865, 109 Cal. Rptr. 388 (1973) (item seized from closet; without other evidence the court will assume the door was open); State v. Green, 282 So. 2d 461 (La. 1973), cert. denied, 415 U.S. 985 (1974) (defendant failed to plead facts in brief that would substantiate his Chimel claim); State v. Funk, 490 S.W.2d 354 (Mo. Ct. App. 1973) (defendant did not establish that the seized items were not within his immediate control); Nicholas v. State, 502 S.W.2d 169 (Tex. Ct. Crim. App. 1973) (prosecution failed to show defendant's proximity to the items seized); cf. Howell v. State, 318 A.2d 189 (Md. Ct. App. 1974) (state failed to bring a warrantless search of an automobile within Chimel limitations).

consider physical limitations placed on the arrestee by the arresting officer. The second, which may be termed the factual analysis test, focuses on the actual ability of the arrestee to reach a particular item as established by the facts of the case.

A. The Physical Proximity Test

The limits of a valid search incident to arrest under the Harris-Rabinowitz decisions were based upon property law concepts of possession and control. If it can be said that Chimel did not repudiate the underlying proprietary analysis of these decisions, then it can be argued that Chimel only represents a judicial limitation on the extent of the area under the arrestee's control, conceptually measured by the arrestee's hypothetical ability to reach a particular item. Several courts have evinced such an understanding of Chimel.

The New York Court of Appeals speculated in People v. Floyd:

It suffices that it is not at all clear that the "grabbing distance" authorization in the Chimel case is conditioned upon the arrested person's continued capacity to "grab." Since the petitioner's arrest in that case was invalid, the statement was dictum. Subsequent New York cases, however, have followed the lead of the court.

In People v. Gonzalez, while the defendant was incarcerated on other charges, several undercover officers went to his home. After gaining admittance, one of the officers purchased heroin from the defendant's girlfriend. The officer then arrested her and took her to a bedroom where he arrested another occupant. He then escorted them both to the front door and admitted two more officers. The two arrestees were handcuffed together and placed in a back bedroom while the officers searched the apartment and waited for the defendant to return after being released from custody. When the defendant re-

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22. Id. at 817.
23. Id.
25. Id. at 337.
26. Id.
27. Id.
28. Id.
turned, he was placed under arrest for possession of drugs. At his subsequent trial, drugs which had been found in the bedroom, the kitchen, and a suitcase in a closet were admitted into evidence against him. The New York Supreme Court, Appellate Division, affirmed the conviction in a memorandum decision. A dissenting justice argued that the only justification for this warrantless search was that it was incidental to arrest and once the arrestees were handcuffed and taken to the front door, the justification ended.

The New York Court of Appeals later indicated in People v. Fitzpatrick that such results were not contrary to its interpretation of Chimel. In Fitzpatrick the defendant was arrested while hiding in a closet and was removed, frisked, and handcuffed. He argued that a subsequent search of the closet was invalid as the area was no longer within his "grabbing distance." The court cited its language in People v. Floyd and reasoned that the fact that the defendant was handcuffed had no bearing on the outcome. More importantly, the court stated its understanding of the Chimel decision:

Nothing in Chimel requires so narrow a reading of the Fourth Amendment [that the arrestee must have the continuing ability to grab]. The Court did not disapprove of a search of the "room" or area where the "arrest occurs"; it condemned only a search "remote in time or place from the arrest." The immediate search of the very closet where the defendant was arrested is far different from the proscribed search of "closed or concealed areas," even in the room where a defendant is arrested. There was here no quality of "rummaging at will" among the defendant's effects at which the Fourth Amendment is aimed.

29. Id.
30. Id. at 339 (Murphy, J., dissenting).
31. Id. at 338-39 (Murphy, J., dissenting).
33. Id. at 140.
34. Id. at 143.
35. Id.; see text accompanying note 22 supra.
36. 300 N.E.2d at 143.
37. Id. (emphasis added). Note the analysis of the New York Court of Appeals regarding the search incident to arrest of the person of the arrestee:

The reason searches of a person and his immediate effects at a place of detention are permissible is not in the fiction that they are incident to arrest but because of the maximum intrusion already effected by an arrest and detention pending arraignment . . .

Given the nature of the gross intrusion by detention of the person it is reasonable to conduct a less intrusive search of his person and the possessions he carried with him.

People v. Perel, 315 N.E.2d 452, 456 (N.Y. 1974) (citations omitted). The dissent in Chimel had postulated such a theory to justify a search of the entire premises incident to
While it is true that the Chimel Court did not expressly "disapprove of a search of the 'room' or area where the 'arrest occurs,'" any conclusion that the converse is true can only be made by juxtaposing out of order several key phrases in the decision. The majority in Chimel, after setting forth the justification for the search incident to arrest exception and enunciating the immediate control rule, did state that "[t]here is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs . . . ." While this might support the interpretation of the Fitzpatrick court, the statement was qualified when the court continued that neither is there any justification "for searching through all the desk drawers or other closed or concealed areas in that room itself." Therefore, it would seem that the fact that the Chimel Court reiterated its position that "a search . . . remote in time or place from the arrest" is unconstitutional does not detract from the further limitations it established. In fact, the Chimel Court's statement to that effect was by way of a quotation from Preston v. United States, and was cited as support for the Court's reasoning that a search without a warrant must be tied to the justifications which initially authorize it.

The dissent in Gonzales correctly argued that once the occupants of the apartment had been taken "[into] custody and removed from the immediate area under their control at arrest, a warrant was required to search the apartment." That this is the correct interpretation of Chimel is supported by the fact that, prior to announcing the immediate control rule, the Chimel court cited Terry v. Ohio and its statement arrest provided that there is probable cause to search the premises. The majority responded to the contention:

> [W]e can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require.

Id. at 766 n.12. 38. 395 U.S. at 763 (emphasis added). 39. Id. 40. 376 U.S. 364 (1964). 41. 395 U.S. at 764. Of course, the Fitzpatrick decision can find some tangential support in Chimel. The rummaging at will concept included in the Fitzpatrick opinion (see text at note 37 supra) came from a statement by Judge Learned Hand in United States v. Kirschenblatt, 16 F.2d 202, 203 (1926), which was quoted by the majority in Chimel in its conclusion. 395 U.S. at 767-68. It appears that the citation was made as a philosophical statement of the protection accorded an individual by the warrant requirement, and not as a statement of the controlling rule of law. It is also significant that this quotation was set forth immediately prior to the Court's express overruling of Rabinowitz and Harris.

42. 331 N.Y.S.2d at 337, 338 (Murphy, J., dissenting). 43. 392 U.S. 1 (1968).
therein that "'[t]he scope of [a] search must be “strictly tied to and justified by” the circumstances which rendered its initiation permissible.'" 44 Since Chimel set forth the initial justifications for the search incident to arrest exception as the need to protect the officer and to prevent destruction of evidence,45 the search must end once these dangers are mitigated either by the removal of the defendant from the area or by other means. Thus, the immediate control limitation only makes sense if it is supported by a rationale resting on danger to the police or evidence destruction. If a search could be conducted after the apprehended person can no longer reach any evidence or weapon, the definition of the allowable search area as, in effect, the "grabbing area" becomes completely arbitrary and without any underlying justification.46

The New York court, however, is not alone in positing that Chimel authorizes a search of the entire room where the arrest occurs, regardless of the restraints placed upon the arrestee. The supreme courts of Mississippi and Minnesota have apparently adopted approaches similar to that of New York. In Brewer v. State,47 the defendant was arrested at the door to his motel room; nevertheless, the police entered and searched the room.48 The Mississippi Supreme Court, relying on the fact that the evidence seized was "found in [the defendant's] motel room, which was under his control," upheld the search.49 The court distinguished Chimel in that it was a search of a three bedroom home while the instant situation encompassed a search confined to a "single motel room rented and actually occupied by the [arrestee]."50 Consequently the court concluded it was reasonable under all the facts.

44. 395 U.S. at 762, quoting Terry v. Ohio, 392 U.S. 1, 19 (1968).
45. Id. at 763.
47. 228 So. 2d 582 (Miss. 1969).
48. Id. at 584.
49. Id.
50. Id. The search in Brewer occurred prior to the decision in Chimel, and the court's distinction need not have been made. However, the impact of the statement of the court cannot be underestimated. In addition to distinguishing Chimel, the court cited a Fifth Circuit Court of Appeals pre-Chimel case (Albright v. United States, 402 F.2d 862 (5th Cir. 1968)) for support of its position that the search and seizure was lawful. Thus, the court did not appear to perceive any shift in the basis underlying Chimel from Harris-Rabinowitz and still interpreted Chimel in light of property law concepts of control.

The Mississippi court has been more articulate in dealing with the search of an automobile incident to arrest. In Hall v. State, 288 So. 2d 850 (Miss. 1974), the
In a later case, the Mississippi court expanded the permissible scope of a search incident to arrest to include not only the room where the arrest occurred but also the rooms where the officers knew an instrumentality of the crime for which the person was being arrested was secreted. The defendant in Murphy v. State\(^5\) was charged with possession of whiskey for resale without a license. Evidence introduced at trial was seized from the defendant's premises in conjunction with the arrest of another person on the premises. The arrest was executed in one room and the officer immediately proceeded to another room and seized the whiskey from an open closet.\(^5\) The court again distinguished Chimel as encompassing a search of many rooms whereas the search involved in this case was "limited to the very room that [the arrestee] was actually seen to enter empty-handed [and return] with a bottle of whiskey in his hand which he sold to [the arresting officer]."\(^5\)

Similarly, in State v. Cox,\(^5\) the Minnesota Supreme Court acknowledged the validity of a search of the entire room where the arrest took place as a search incident to arrest. There the defendant was arrested in his bedroom by seven officers who seated him on a chair in the room.\(^5\) While the specific item alleged by the defendant to have been illegally seized was under the cushion of a settee within five to eight

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51. 239 So. 2d 162 (Miss. 1970).
52. Id. at 163.
53. Id. at 164.
54. 200 N.W.2d 305 (Minn. 1972).
55. Id. at 308.
feet of the defendant, the court held that the search was valid to the extent the officers stayed in the bedroom—the area deemed to be in the control of the defendant. That the court was relying not on the actual ability of the defendant to reach the area searched is clear. The court stated:

The fact that defendant may have been handcuffed at the time the police searched that limited area is not alone a sufficient factor to distinguish this case from other cases in which we have approved the search involved as being limited to the area within the arrestee's immediate control.

It should be noted that the two cases which the Minnesota court found indistinguishable were both decided on pre-Chimel standards—a factor which it apparently did not consider. Furthermore, the court failed to take cognizance of the fact that six officers completely surrounded the arrestee. This superficial analysis suggests that the court was opting for the easy expedient of a mechanical rule allowing a search of the entire room where the arrest occurs.

These courts' approaches suffer from the same infirmity as does the New York courts' analysis: they find no support in the language of Chimel. More significantly, they fail to recognize the Chimel Court's implicit rejection of such an approach. In fact, the Supreme Court

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56. Id. at 309.
57. Id.
58. Id.
59. The cases cited were: State v. Fulford, 187 N.W.2d 270 (Minn. 1971) (upholding the seizure of a knife from the defendant's coat which was on a chair a few feet away from the defendant), and Simberg v. State, 179 N.W.2d 141 (Minn. 1970) (upholding a search of the defendant's trousers draped over a chair a few feet from him). It should be noted that in both these cases the items were found in clothing belonging to the defendant which in all likelihood would accompany the defendant and would thus eventually have to be put in the control of the arrestee. See notes 130-48 infra and accompanying text. The item in Cox, however, was hidden in a stationary non-apparel item.
60. The Arizona courts seem to be in accord with the Minnesota courts in some respects. In State v. Hays, 496 P.2d 628 (Ariz. 1972), the defendant was sitting in the living room and a search was made of a nearby bookcase. The court stated:

[We do not] believe a different result is mandated because there was an officer stationed between the bookcase and defendant. The guidelines set forth in Chimel are meant to limit the area of a search and are not dependent upon the location of an officer in respect to the person being searched.

Id. at 630. Cf. State v. Gerry, 489 P.2d 288 (Ariz. 1971) (defendant arrested outside of car, drugs found in glove compartment held to be admissible since whole car was in defendant's immediate control); State v. Kelly, 480 P.2d 658 (Ariz.), cert. denied, 404 U.S. 866 (1971) (defendant arrested while driving car, removed and placed in back seat of patrol car; subsequent search of defendant's car held to be incident to arrest).
discussed the possibility of drawing a line between the searches held valid in *Rabinowitz* and *Harris* and the search under consideration in *Chimel*, noting:

[S]uch a distinction would be highly artificial. The rationale that allowed the searches and seizures in *Rabinowitz* and *Harris* would allow the searches and seizures in this case. No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items.\(^6\)

The Court further cited Justice Jackson's dissent in *Harris* where he stated "that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit [other than] no limit at all."\(^6^2\) Clearly the Court rejected any judicial line-drawing that would allow searches beyond the area of the arrestee, as measured by either the real or hypothetical ability of the arrestee to gain access to an item of evidence or a weapon. Since those courts which allow a search to extend throughout the room where the arrest occurs do so without regard to whether the room is in the arrestee's control, they are in conflict with *Chimel*.

Other courts have avoided the necessity of conducting a detailed examination of the factual surroundings by adopting a standard that allows a search to extend to all areas and certain items categorically deemed to be under the control of the arrestee at the moment of the arrest, irrespective of the arrestee's actual abilities. In dicta in several cases the California courts have approved of such an approach. For example, in *People v. Belvin*\(^6^3\) the defendant was arrested at her home and was permitted to go into a bedroom where two other persons were present; as she sat on the bed, her purse was on the floor beside her.\(^6^4\) The defendant and the others present were then taken to the living room. The officers returned to the bedroom and searched the purse.\(^6^5\) Though the search was subject only to pre-*Chimel* standards, the court nevertheless discussed the case in light of *Chimel*. In upholding the search, the California Court of Appeal stated:

> It is apparent from *Chimel* that a search of an arrested person is limited to the person of the arrestee and the area under that person's im-

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61. 395 U.S. at 766 (footnote omitted).
64. *Id.* at 957, 80 Cal. Rptr. at 383.
65. *Id.*
mediate control . . . But it is equally evident that normal extensions of the person remain subject to search and that articles customarily carried by an arrested person fall within the area of his immediate control. In the category of such articles we include a woman's purse, a man's wallet, a jacket, a hat, an overcoat, and a brief case in use at the time of the arrest, even though these articles may not be on the immediate person of the arrestee at the moment of arrest. . . . We conclude that the defendant's purse, apparently in use by her at the time of her arrest, legally amounted to an extension of her person and could be searched on her arrest. Whether the search of the purse took place before or after defendant's physical removal to another room we consider wholly fortuitous.66

Subsequently, in People v. Arvizu,67 the California Court of Appeal cited Belvin as indistinguishable in sustaining the search of a duffel bag at the foot of a bed upon which the defendant was lying when arrested. While Chimel was not controlling due to its prospective application,68 the court indicated the arrest and search would be proper under Chimel.69 It did so without any discussion of the particular facts of the case in light of the Chimel rationale. In a similar case, People v. King,70 the California Supreme Court indicated in dictum that a search of the area under the bed where the arrestee was lying when arrested was proper. The case did not indicate the number of officers present, whether the arrestee was handcuffed or restrained in any manner, and the actual accessibility of the defendant to the area searched.71 As dissenting Justice Peters noted:

The record reveals nothing about the size of the bed or the location of the paper bag beneath it. Unless the bag was within the defendant's reach, the requirements of Chimel are not satisfied. I do not believe that this court should rush in and declare that items under beds, without more, are lawful objects of a search under Chimel.72

The dicta set forth in these cases has been adopted in the California courts, which seem to be moving towards an application of a rule that items within a predefined radius at the time of the arrest, notwithstanding the ability or inability of the arrestee to reach them, are within the

66. Id. at 958-59, 80 Cal. Rptr. at 384 (emphasis added).
68. Id. at 729, 90 Cal. Rptr. at 897.
69. Id.
70. 5 Cal. 3d 458, 487 P.2d 1032, 96 Cal. Rptr. 464 (1971).
71. Id. at 463, 487 P.2d at 1035, 96 Cal. Rptr. at 467.
72. Id. at 468, 487 P.2d at 1038, 96 Cal. Rptr. at 470 (Peters, J., dissenting).
Some California courts have gone so far as to find that the mere fact that a searched item is one of those set forth in Belvin as customarily carried by the arrestee is sufficient, in and of itself, to justify the conclusion that the item was under the control of the defendant at the time of the arrest. Still other California courts have extended the rationale of Belvin to movable items not specifically enumerated therein. For example, in People v. Spencer the California Court of Appeal relied on King and Arvizu to uphold the search of a box at the foot of a bed on which the arrestee was lying when apprehended. The court upheld the search as the "obviously reasonable course," even though it noted that contemporaneously with the search one officer had "subdued and handcuffed the resisting suspect." The only factor mentioned by the court that would indicate that the defendant could have obtained access to the box was the fact that the arrest occurred in "the close confines of an auto trailer."
As the foregoing discussion has demonstrated, it is difficult to reconcile the decisions of the courts utilizing the physical proximity test with the underpinnings of the *Chimel* decision. Most courts which follow the physical proximity test, or some variant thereof, rely upon the characterization of the police conduct as the reasonable course under the circumstances. However, while the talisman of reasonableness may provide the semblance of a legal basis for these approaches, the Court in *Chimel* expressly rejected the criteria of reasonableness as the means to limit the scope of searches of premises incident to arrest. Such an abstract standard, the Court noted,

is founded on little more than a subjective view regarding the acceptability of certain sorts of police conduct, and not on considerations relevant to Fourth Amendment interests. Under such an unconfined analysis, Fourth Amendment protection in the area would approach the evaporation point.

The majority’s rejection of a reasonableness standard is underscored by the dissenting opinion of Justice White, joined by Justice Black. After noting that the fourth amendment does not prohibit warrantless, but only unreasonable searches, Justice White chastised the majority for not adhering to that standard. He posited that while the justifications which make reasonable the search of the arrestee and the area within his or her immediate control “do not apply to the search of areas to which the accused does not have ready physical access [t]his is not, however, enough to prove such searches unconstitutional.” Justice White then argued that, if there is probable cause to search, a warrantless search of the premises upon which an arrest occurs is reasonable because it is unreasonable to require the police to leave the scene in order to obtain a search warrant when they are already legally there to make a valid arrest, and when there must almost always be a strong possibility that confederates of the arrested man will in the meanwhile remove the items for which the police have probable cause to search.

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79. See, e.g., text accompanying notes 37, 77 supra.
80. 395 U.S. at 764-65.
81. *Id.* at 770.
82. *Id.* at 773 (emphasis added).
83. *Id.* at 774. The fact that there is a “strong possibility” that others may destroy evidence at the scene of the arrest and that, in effect, the arrest inherently creates exigent circumstances is not a valid reason to abrogate the rule announced by the majority in *Chimel*. First, it is arguable whether such circumstances exist in all cases of searches of premises incident to arrest. And it is questionable whether the protection accorded by the fourth amendment should be dissipated upon the basis of “strong probabilities.” Second, if the circumstances set forth by the dissent actually exist in a given situation, it is possible to resolve the conflict between the fourth amendment
Thus it was the dissent and not the majority which argued that the reasonableness of the police conduct should determine the scope of a search incident to arrest. The incantation of the legal axiom of reasonableness cannot support the argument that the physical proximity test is the correct interpretation of the immediate control rule.

B. The Factual Analysis Test

In addition to rejecting a reasonableness standard, a substantial portion of the majority opinion is directed to examining the justifications for the search incident to arrest exception. The Court suggested that a similarity exists between the "stop and frisk" and the search incident to arrest situations and concluded:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested.

The Court's opinion is not free from ambiguity, but this passage indicates that the Court was abandoning fictionalized concepts of control, requiring instead that the search extend only to those areas over which the arrestee may have actual control. Otherwise, how is the search to be limited to and justified by the initial circumstances authorizing it? If this is the rationale behind Chimel, then courts would have to engage in a detailed factual examination of the setting where the arrest took place and the desire to aid police enforcement without doing away with the immediate control rule. If there are confederates of an arrestee who realistically pose a threat to the preservation of evidence, law enforcement officers may argue that the facts give rise to a situation wherein the "exigent circumstances" exception to the search warrant should apply. See note 2 supra. Another approach would be to recognize such situations as an exception to the general limitations of Chimel, and a legitimate justification for the extension of the search to areas not directly under the immediate control of the defendant. Several courts have recognized such an exception to Chimel on several different theories. See notes 121-29, 150-75 infra and accompanying text.

84. See 395 U.S. at 762-64.
85. Id. at 762-63.
86. See note 20 supra and accompanying text.
—examining the number of officers present, the position of the officers in relation to the arrestee, the physical restraints placed on the arrestee, and the capabilities of the arrestee.

The Sixth Circuit Court of Appeals adopted such a factual analysis test in *United States v. Shye.87* In that case six or seven officers arrested four defendants in an apartment for armed robbery. The arrestees were lined up against a wall in the apartment “spread-eagle” by one officer, and other officers then seized a sack of money discovered behind a water heater by an adjoining wall about four feet from the nearest suspect.88 Between the suspect and the water heater was a hallway, and the water heater was set in a closet-like recess.89 Emphasizing that the search incident to arrest exception can be invoked only when there is danger to the officers or the possibility of destruction of evidence and agreeing with the district court that “’the officers had the situation completely under control,’”90 the court rejected the prosecution’s argument that the item was lawfully seized incident to arrest. The court noted that an officer had been stationed between the water heater and the nearest suspect and therefore the item could not be under the suspect’s immediate control as defined in *Chimel.*91

Subsequently, this same circuit court conducted an examination of a similar situation but, because of factual variations, reached a contrary conclusion. In *United States v. Becker*92 the defendant was arrested but had not been handcuffed or bound, and an officer opened a desk drawer three to five feet from the defendant.93 The officer stated that his purpose in doing so was to search for weapons and to secure the desk from the defendant’s control.94 Relying on the officer’s testimony and the fact that the defendant was resisting arrest and attempting to move in directions other than those prescribed by the officer, the court held the search to be within the permissible scope of a search incident to arrest.95 The court also distinguished *Shye* since there was no officer

87. 473 F.2d 1061 (6th Cir. 1973).
88. Id. at 1063.
89. Id.
90. Id. at 1066.
91. Id.
93. Id. at 53.
94. Id.
95. Id. at 55. It should be noted that a test which calls for an analysis of the facts surrounding the search can lead to diverse conclusions based on the same facts. Compare United States v. Becker, 485 F.2d 51, 51-55 (6th Cir. 1973) (majority opinion) with id. at 58-59 (McCree, J., dissenting). Judge McCree relied heavily on portions of the officer’s testimony that indicated the defendant was under control at the time of the 
between the arrestee and the desk drawer until the officer moved to look for weapons.\textsuperscript{96} The Sixth Circuit thus made it clear that the application of \textit{Chimel} in its estimation requires an examination of at least the position of any officers in relation to the defendant and the area searched, and the existence of any effective restraints placed upon the arrestee.\textsuperscript{97}

Other circuit courts of appeals appear to be in substantial accord with the Sixth Circuit: both the Second and the Tenth Circuits have adopted an approach centering on the actual ability of the defendant to control the particular area searched.\textsuperscript{98} In \textit{United States v. Mapp},\textsuperscript{99} a Second arrest and that there was no apprehension of danger on the officer's part when he searched the desk. The dissent also noted that at the time of the search the officers present had put their weapons away. According to the officer's testimony, quoted by the dissent, the search occurred after the defendant was subdued, \textit{i.e.,} "he was no longer in a violent nature or position to pull a gun or anything." \textit{Id.} at 59. Judge McCree was the author of the majority opinion in \textit{United States v. Shye}, 473 F.2d 1061 (6th Cir. 1973). See notes 87-91 \textit{supra} and accompanying text.

\textsuperscript{96} 485 F.2d at 55.

\textsuperscript{97} The Sixth Circuit Court of Appeals has not been uniform in its application of a requirement that an examination be made of the factual circumstances surrounding a search, apparently applying a different test when the search involves a suitcase or briefcase. \textit{See United States v. Kaye}, 492 F.2d 744 (6th Cir. 1974); \textit{United States v. Burch}, 471 F.2d 1314 (6th Cir. 1973); \textit{United States v. Robbins}, 424 F.2d 57 (6th Cir. 1970), \textit{cert. denied}, 402 U.S. 985 (1971). \textit{See note 186 infra}.

\textsuperscript{98} In addition to the Second and Tenth Circuits, the Fifth Circuit is apparently in accord with the Sixth Circuit. In \textit{United States v. Jones}, 475 F.2d 723 (5th Cir.), \textit{cert. denied}, 414 U.S. 841 (1973), the court refused to uphold the warrantless search of a suitcase located one and one-half feet from the head of the bed where the arrestee was when arrested. The court noted that the defendant was handcuffed either in front of himself or behind his back. Furthermore, the record did not establish the arrestee's presence in relation to the suitcase. The court stated:

\begin{quote}
Both of these facts are relevant to a determination of access to weapons or destructible evidence which is the crucial factor in the \textit{Chimel} analysis.

For example, if defendant's hands were cuffed in front and he were in close proximity to the suitcase, then the search here could probably be justified under \textit{Chimel}. Even with the presence of numerous FBI agents in the room, we cannot say that it would be unreasonable to believe that Jones might attempt to lay his hands on a weapon located inside the suitcase. But if defendant's hands were cuffed behind him in such a manner that he was denied access to the suitcase, then the search could not be upheld under \textit{Chimel} because the suitcase would not be within his immediate control or within an area from which he might gain possession of a weapon or destructible evidence.

It might seem anomalous for the validity of a search to depend on the position of a defendant's hands. Nonetheless, the \textit{Chimel} analysis requires just this sort of an examination of the facts. In essence, the approach to a claim that a search was incident to an arrest is for the court to examine the facts and make an objective determination of a rather subjective question: could the law enforcement officials on the scene reasonably expect the arrested person to gain hold of a weapon or evidence in the area searched?
\end{quote}

\textit{Id.} at 727-28 (footnote omitted). The search, however, was upheld on other grounds. \textit{Id.} at 725. The case represents a significant shift from the court's earlier approach to \textit{Chimel} problems. \textit{See United States v. Harrison}, 461 F.2d 1127 (5th Cir.), \textit{cert. denied},
Circuit case, six agents broke into an apartment after announcing their authority. After arresting one individual on the premises, they asked another occupant to disclose the location of a package of heroin that they believed the defendant had delivered to the premises. The individual indicated that the heroin was located in a closet.

409 U.S. 884 (1972); United States v. Wysocki, 457 F.2d 1155 (5th Cir.), cert. denied, 409 U.S. 859 (1972). And the approach has not been subsequently applied since the searches in later cases have involved automobile searches incident to arrest. See Strader v. Estelle, 491 F.2d 969 (5th Cir.), cert. denied, 419 U.S. 994 (1974); United States v. Frick, 490 F.2d 666 (5th Cir. 1973), cert. denied, 419 U.S. 831 (1974).

The Third Circuit Court of Appeals is unclear as to the approach it has adopted in applying the Chimel immediate control rule. In United States v. Ciotti, 469 F.2d 1204 (3d Cir. 1972), vacated and remanded, 414 U.S. 1151 (1974), the court upheld the search of a briefcase even though the defendant was handcuffed. The court reasoned that the handcuffs would not prevent the arrestee from opening the briefcase or using a gun if one were available. Id. at 1207. The court also noted that prior to making the arrest the officers heard what they believed to be the cocking of a gun and therefore they could have believed that a gun was present. Id. While the court may thus appear to be applying a factual analysis approach to the immediate control rule, the superficiality of the examination may indicate a contrary position. On the other hand, in view of the court's citation of United States v. Robbins, 424 F.2d 57 (6th Cir. 1970), cert. denied, 402 U.S. 985 (1971), it may have been simply recognizing an exception to the general application of a factual analysis rule. See note 97 supra; note 186 infra. But see United States v. Schartner, 426 F.2d 470 (3d Cir. 1970) (upholding under pre-Chimel standards a search of a suitcase found in a one-room cabin where the arrest took place, but acknowledging that Chimel might prohibit searches into closed areas of the room).

The Ninth Circuit Court of Appeals arguably has rejected an approach requiring an analysis of the facts surrounding a search. See United States v. Ponce, 449 F.2d 1299 (9th Cir. 1971) (per curiam) (upheld search as being within Chimel scope since item seized was in a "nearby" dresser drawer). Other circuits have not expressed their position on the question, nor can one be gleaned from the cases. The Eighth Circuit, however, has held that the range of permissible search under Chimel is not limited to the arm's length, but the leaping distance of the arrestee. In re Kiser, 419 F.2d 1134, 1137 (8th Cir. 1969).

99. 476 F.2d 67 (2d Cir. 1973).

100. Id. at 75. The facts of Mapp underscore some of the various problems that may be confronted when a search is alleged to come within the search incident to arrest exception to the warrant requirement. As noted earlier, for a search incident to arrest to be valid the underlying arrest must be legal and proper under all governing rules. See note 6 supra. In Mapp the defendant attacked the underlying arrest on several grounds. As summarized by the court, the defendant asserted that

the Task Force agents did not have probable cause to arrest the occupants of the apartment where the search occurred; that even if there was probable cause to arrest, the agents were required to secure a warrant before effecting a nighttime arrest in a dwelling; that even if the warrantless entry was otherwise legal, it became unlawful as a result of the failure of the officers to announce both their identity and purpose prior to entry. . . .

476 F.2d at 71. The court disposed of all the claims against the defendant. Id.

101. 476 F.2d at 70.

102. Id.
court rejected the government's claim of consent to search and disposed of the claim that the seizure was incident to arrest by noting that there were six armed officers present in a one-bedroom apartment and that one of the officers was between the closet and the co-occupant. The court reasoned:

Unless [the defendant's accomplice] were either an acrobat or a Houdini... we cannot conceive how the closet could have fallen within the area of her immediate control. To say that the closet was an area into which she was able to reach, despite the fact that an armed officer stood between her and it, would, in effect, be to hold that a search of all the enclosed places in [the] bedroom would have been consistent with the Fourth Amendment—a result explicitly foreclosed by Chimel.

The court apparently left open the possibility, however, that in a particular factual setting such a search could be reasonable and within the bounds of Chimel when it stated:

[T]he officers here involved [did not] point to any articulable reasons leading them to believe that [the defendant's accomplice] was an especially dangerous person against whom extraordinary protective measures may have been required...

While the Second Circuit considers the position of the officers in relation to both the arrestee and the place searched to be critical to the outcome of its analysis, the Tenth Circuit focuses on the effectiveness of the restraints placed upon the arrestee. In United States v. Patterson, five officers went to the defendant's house to arrest the defendant's spouse; she was arrested in the living room. The defendant was also arrested and was frisked to determine if he had any weapons upon his person; none were found. One officer went into the kitchen and saw a partially hidden envelope on a shelf in a cabinet and seized it. The court upheld the seizure of the envelope since the defendant's spouse at the time of the seizure had voluntarily moved to within four to six feet of the cabinet and it was accessible to her merely by turning around.

103. Id. at 76-79.
104. Id. at 80.
105. Id.
106. Id.
108. Id. at 425.
109. Id. The court also noted that the officer who seized the items testified that he was searching for a pistol since one was taken in a burglary of an apartment for which the defendant's spouse was suspected. Id. at 426.
110. Id. at 426-27. The defendant argued that the search was invalid because his wife was neither in nor facing the kitchen, the room in which the evidence seized was found. The court found that these facts did not negate the ease of access to the area which the
The court distinguished an earlier case where it had held a similar search invalid because the defendant had been handcuffed. The restraints in the present case, including the presence of an officer between the defendant and the cabinet searched, the court reasoned, were not as effective. The conclusion of the Patterson court may be debatable, and, in fact, it gives rise to the question of whether the factual analysis test provides an arrestee with any greater fourth amendment protection than does the physical proximity test. It would appear quite easy for any court to hypothesize that a particular fact, or facts, could be interpreted as presenting one of the dangers against which the search incident to arrest is directed. Nonetheless, to argue that the factual analysis test should be abandoned because of possible misapplication is unjustifiable, especially in light of the principles underlying the Chimel decision.

Several state courts have also adopted a factual analysis interpretation of the immediate control rule. Based upon a review of the federal court-arrestee enjoyed, stating that "surely [the defendant] would not argue before this court that a weapon concealed on a table or in a drawer just beyond a doorway is any less dangerous than a weapon in the room being occupied." Id. at 426 (footnote omitted). The court cited as support for this proposition the Eighth Circuit case of In re Kiser, 419 F.2d 1134 (8th Cir. 1969), which held that the immediate control extended to the "leaping range" of the arrestee. Of course it is questionable whether the arrestee in Patterson even could have leaped close enough to the cabinet to have gained access to the evidence, as an officer was stationed between her and the cabinet. Id. at 427. The court found this not to be an effective restraint. Id.; see note 111 infra.

111. United States v. Baca, 417 F.2d 103 (10th Cir. 1969), cert. denied, 404 U.S. 979 (1971). Baca was decided on the basis of pre-Chimel standards, and it is therefore interesting that as compared to Patterson, which was decided under Chimel, it reached a decision that is more restrictive vis-à-vis permissible police conduct. Cf. note 13 supra. However, the Baca court cited the controlling test as that set forth in Preston (see note 12 supra) and thus it was applying a standard almost identical to Chimel.

112. 447 F.2d at 427. The distinction made by the court is not extremely persuasive. In Baca the defendant was arrested in the doorway of a bedroom of his apartment. At the time of the arrest the officers saw in plain view some narcotics paraphernalia and two vials which contained what appeared to be narcotic substances. 417 F.2d at 104. While Baca was handcuffed, the officers then proceeded to search the apartment, apparently searching areas within the bedroom and elsewhere. As to the search of areas within the bedroom, the court stated:

[It] can hardly be said or found that the closet . . . was under Baca's immediate control when he was physically confined to a limited area within the 9 X 12 bedroom . . . . Moreover, it cannot be said that the inside of his bureau drawers, night stand, under the bed or any similar area was under any type of control by Baca inasmuch as he was handcuffed with his hands behind his back . . . .

Id. at 105. Thus it would appear that the court was relying on the fact that the defendant was handcuffed only as to the search of areas within the room where the defendant was confined, and, as to areas outside the room, the critical fact was that the defendant was confined to one room.
decisions, the Supreme Court of Illinois ruled that the determination of the permissible scope of a search under Chimel requires the court to look to the actual capability of the arrestee to gain control of the specific area searched. In People v. Williams,113 the court stated:

[T]here can be no hard and fast rule defining the permissible scope of a warrantless search incident to an arrest. Certainly an arbitrary limitation to a certain number of feet would be unsatisfactory. Whether the search is reasonable must depend on the particular facts of the case.114

Applying that standard to the case before it, the court found the search of a bag seven to ten feet from the defendant resulting in the seizure of a gun to be reasonable.115 The court relied upon the facts that the arrestee was known to be armed, that there was present another person who might attempt to assist the defendant, and that the defendant would have to be taken past the shelf as he was escorted from the room. Therefore, the court reasoned, he would have easy access to the shelf.116 A decision such as this is perhaps the most desirable. It is both consistent with Chimel and articulates the particular facts that law enforcement officers and courts must look to in determining the limits of the immediate control rule.117

114. Id. at 685.
115. Id.
116. Id. at 684, 685.
117. Such a decision also goes far in responding to objections made by some that a factual analysis approach, or the immediate control rule in the abstract, is so vague as to be unmanageable. See note 5 supra. It clearly gives the lower courts and police officials more guidance as to the bounds of a permissible search than do the opinions which, without setting forth the underlying interpretation of Chimel or the specific facts of the case, simply state that an item is or is not within the permissible bounds of a search incident to arrest. See, e.g., cases cited at note 73 supra.

In fact, the decision in Williams has cleared up some confusion that previously plagued the Illinois courts. The Supreme Court of Illinois had indicated in People v. Perry, 266 N.E.2d 330 (Ill. 1971), that a warrantless search of an arrestee's hotel room while the arrestee was handcuffed and removed from the room was permissible even under Chimel standards. The court stated that the search was permissible since the officers had seen the defendant take something out of or put something into a partially open dresser drawer. Id. at 333. The decision appeared to ignore the actual ability of the defendant to have access to the area searched and the motive of the officers in searching. Thus, it was in conflict with the court's earlier holding in People v. Machroli, 254 N.E.2d 450 (Ill. 1969). The defendant in that case was arrested at home clad only in shorts and a tee shirt. Another person who also resided in the defendant's apartment gave the officer some clothes belonging to the defendant which he in turn gave to the defendant. Id. at 451. The officer checked the pockets of the defendant's jacket, but not his trousers. After donning the trousers, the defendant removed a box from one of the pockets and placed it on a dresser. Id. After the defendant left the room, the officer seized the box
Other courts have adopted a more stringent factual analysis standard which requires that the officer articulate some sense of danger, as evidenced by the officer’s actions in the situation, or that the crime be one for which there is tangible evidence. The reasoning of these courts is that without such circumstances the initial justification for the search is non-existent. Other courts require only that the possibility exist that the arrestee be able to reach the area, and do not consider the beliefs of the officer or the existence of evidence of the specific crime as determinative.

While it is difficult, if not impossible, to determine whether the physical proximity or factual analysis test is the more accepted interpretation of the immediate control rule, there is no question that the latter better comports with the rationale of Chimel. Furthermore, those who argue that the physical proximity test should be followed because of

and found some pills inside. The pills were later found to be narcotic substances and the defendant was charged with possession of narcotics. The court sustained the defendant's fourth amendment claim stating:

If we accept the officer's testimony that he did not search the defendant's trousers before handing them to him, it is clear that he was not concerned about the necessity of protecting himself from attack or that he feared an attempt to escape . . . .

[We see no justification other than curiosity for the officer's conduct in entering the bedroom after the defendant had left it and taking possession of the box.

Id. at 452. Thus, Williams represents an adoption of a standard similar to that imposed in Machroli, one which is reasonably related to the underlying rationale of Chimel. But see People v. Doss, 256 N.E.2d 753 (Ill. 1970) (search of a nearby bed upheld with the court stating simply that it was clearly within the bounds of Chimel).

The lower courts have followed the lead of the Supreme Court of Illinois. Compare People v. Holmes, 313 N.E.2d 297 (Ill. App. Ct. 1974) (search under a mattress five feet from the arrestee held valid since no officer was positioned between the bed and the arrestee) with People v. Hines, 267 N.E.2d 696 (Ill. App. Ct. 1971) (pre-Chimel search of a room while the defendant stood in the hallway held valid).

118. See Neal v. State, 250 So. 2d 605 (Ala. Ct. Crim. App. 1971) (pre-Chimel search not incident to arrest since the officers were not searching for weapons which might endanger them or be used in an escape and there was no evidence of the crime for which the defendant was arrested).


120. Indeed, some courts have had little opportunity to express an opinion as to the correct interpretation of Chimel. See Harris v. Commonwealth, 469 S.W.2d 68 (Ky. 1971); Lugar v. Commonwealth, 202 S.E.2d 894 (Va. 1974).
its ease of application and the possible "windfall" that criminal defendants may enjoy under the factual analysis test do not realize that the flexibility of the factual analysis test more readily admits to exceptions to the general rule without violating the underpinnings of the search incident to arrest exception. Thus, it can accommodate legitimate police conduct within specific constitutional limits.

III. EXPANDING THE PERMISSIBLE SCOPE

Given the restrictions that Chimel placed upon the area which may be searched incident to arrest, courts have been quick to formulate theories by which to expand the permissible scope. One method of enlarging the permissible scope is to redefine the area of the arrestee's immediate control in certain situations. This is not only consistent with, but also mandated by the underlying considerations of the Chimel immediate control rule: preservation of evidence and protection of the arresting officers. A second method of expanding the allowable scope is to permit searches beyond the immediate control of the arrestee, however defined. Technically an "exception" to the immediate control rule, this second method is based on the protection of police officers, which, even when taken alone, is deemed to make reasonable an extended search in specified circumstances.

A. Extensions of the Arrestee's Control

The presence of known third parties in close proximity to the area searched has been held to extend the permissible area of a search incident to arrest on the basis that such third parties represent an extension of the defendant's control. In United States v. Manarite\textsuperscript{121} the Second Circuit Court of Appeals upheld as being within the bounds of Chimel the seizure of items from an end table near which several unidentified persons were standing at the time of the defendant's arrest.\textsuperscript{122} While the items were not within the actual physical control of the defendant at the time of the arrest, the court reasoned that

\[\text{[f]he F.B.I. agents were justified in assuming that these persons might be accomplices of those arrested and hence might attempt to destroy evidence or procure a weapon on behalf of the appellants.}\textsuperscript{123}\\

\textsuperscript{121} 448 F.2d 583 (2d Cir.), cert. denied, 404 U.S. 947 (1971). \textsuperscript{122} Id. at 593. \textsuperscript{123} Id.
In a subsequent opinion this same court, which generally has used a factual analysis test, implied that the Manarite holding was to be limited to the particular fact pattern involved therein.

*State v. Mayer* represents a more confined application by the Vermont court of the "possible accomplices" rationale to extend the scope of searches. In *Mayer* a gun was seized from an area near an accomplice of the defendant for whom the police also had an arrest warrant. It is unclear whether the court, in upholding the search, was relying on the arrest of the accomplice, or the mere fact of her presence in the room with the defendant. Although the Vermont court has not addressed the issue since that time, it appears that so long as the factual situation does in fact indicate that there is a person present who may attempt to assist the arrestee, then the extension of the scope of the search would not violate the *Chimel* limitations. In such instances

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124. See notes 99-106 *supra* and accompanying text.
125. United States v. Mapp, 476 F.2d 67, 81 n.15 (2d Cir. 1973). In *Mapp* the court distinguished the facts therein (see notes 95-99 *supra*) from *Manarite* by concluding that the possible accomplices theory set forth in *Manarite*

is wholly inapplicable to the facts in this case where no unidentified, suspected accomplices were found standing in [the occupant's] room or near her bedroom closet. 476 F.2d at 81 n.15.

In *Manarite*, the court of appeals stated that it completely agreed with the denial of the motion to suppress evidence by the judge in the district court. 448 F.2d at 593. The lower court gave much more attention to detail. United States v. Manarite, 314 F. Supp. 607, 615-16 (S.D.N.Y. 1970), aff'd, 448 F.2d 583 (2d Cir. 1971). Among the facts set forth in the district court opinion were the facts that the officers, prior to searching the area near two persons, had found a gun on the premises; that the two persons were not restrained in any manner; and that no one was between the persons and the area searched. *Id.* at 615. The court then stated that

[j]both men had apparently been sleeping in the . . . apartment and were likely relatives or intimate friends of the [defendant]. Since they were both in full view of [the defendant], who had already been placed under arrest, it would be reasonable for the agents to assume that if [the defendant] had signalled the two unidentified men, they would have been able to reach over and draw a weapon out of the end tables. *Id.*

The emphasis by the court upon the inferences that could be drawn from the facts known to the officers and leading to the conclusion that the persons were accomplices, indicates that the basis for the assumption that the other persons represented an extension of the arrestee's control is the "connection in crime" between the two.

126. 283 A.2d 863 (Vt. 1971).
127. *Id.* at 864.
128. It cannot be discerned from the opinion whether the accomplice was in fact arrested. Thus the basis for the court's opinion becomes even less clear. It may be argued that more than mere presence is required. But United States v. Berryhill, 445 F.2d 1189 (9th Cir. 1971), suggests that under *Terry v. Ohio*, 392 U.S. 1 (1968), the fact that a person is with an arrestee would give a law enforcement officer the authority to conduct a patdown search of that person. 445 F.2d at 1193.
the search would be limited to the reasons which make it justifiable to search without a warrant in the first place.129

The most widely used and recognized method of expanding the definition of the arrestee's control is to include those areas that will be or would have been under the control of the defendant. This theory usually is applied when the arrestee must change his or her clothing or obtain a jacket or some other item of clothing before being removed from the premises where the arrest occurred.130 In such cases the extension of the arrestee's control is consonant with both the fourth amendment and Chimel. This is particularly true where the arrestee requests permission to obtain an item or to be allowed access to a particular area.131 The arresting officers are faced with the alternatives of denying the request, obtaining the item themselves, or searching the area before the arrestee retrieves the item or is otherwise permitted access to the area. Courts have held that either of the two latter courses are permissible.132

129. The possible accomplices exception which allows a search based on the theory that another person present represents an extension of the arrestee's control should be distinguished from the "protective sweep" exception to the Chimel limitation. This latter exception allows the officer to extend the scope of the search to other rooms in order to determine if confederates of the arrestee, who may assist the arrestee in resisting arrest or destroying evidence, are present. See notes 150-75 infra and accompanying text. Of course, the two exceptions may arise in the same situation.


131. In such situations there is a basis for finding an implied consent to the extended search. See W. Ringel, Searches & seizures, arrests and confessions § 231, at 290 (1972); note 148 infra.

132. See, e.g., United States v. DeMarsh, 360 F. Supp. 132, 137 n.4 (E.D. Wis. 1973) (search of bathroom permissible before allowing arrestee to use as requested); Parker v. Swenson, 332 F. Supp. 1225, 1232-33 (E.D. Mo. 1971), aff'd, 459 F.2d 164 (8th Cir. 1972), cert. denied, 404 U.S. 947 (1971) (where agent obtained clothing for the arrestee he could properly search it; if he had let the arrestee obtain the clothing he could search closet from which clothing was taken); Neam v. Superior Court, 7 Cal. App. 3d 836, 849-50, 852-53 (1970) (evidence seen in plain view validly seized); Commonwealth v. Davenport, 308 A.2d 85, 89 (Pa. 1973) (evidence seen in plain view while retrieving arrestee's clothing from closet validly seized).
In those cases where there is no clear necessity for the arrestee to go to the area searched, the enlargement may not be clearly within the Chimel rationale. In such cases the courts will often rely upon a combined theory of consent, vis-à-vis the arrestee's request, and plain view. Consequently, when the arrestee's removal to an area is bottomed on a police request or suggestion the consent fiction is weakened and the courts scrutinize the reasonableness and purpose of the request. For example, in Walker v. United States agents went to the defendant's home at six a.m. to execute an arrest warrant issued for the defendant for armed robbery. According to the officers' estimations, the defendant was not properly dressed. They asked the defendant where he kept his clothes. After the defendant stated his willingness to go to the police station as attired, the officers went to the room indicated by the defendant, looked into a closet, and found evidence of the robbery for which he was arrested. The court held that the search was proper since the closet was an area within the control of the arrestee at the time he was directed to obtain additional clothing. The courts generally are in harmony as to the acceptability of an extension of the arrestee's control based on his or her need to don proper attire.

Problems arise, however, when the arresting officers ask the arrestee to reveal the location of evidence. In United States v. Kee Ming Hsu, set forth the rationale of the extension of the scope of the search in dictum:

"The" rationale [of Chimel] compels the conclusion that the police may constitutionally conduct a warrantless search of any item that necessarily must be placed on the arrestee's person or within his immediate control in order to remove him from the place of arrest and take him into custody, notwithstanding that such item at the initial time of arrest may have been beyond the permissible search area under Chimel.

Id. at 213 (emphasis added).

134. The mere fact that an arresting officer has asked a question regarding the location of an evidentiary item will not by itself invalidate a search. See People v. Brown, 266 N.E.2d 131, 135 (Ill. Ct. App. 1970).
136. Id. at 290-91.
137. Id. at 291.
138. Id.
139. See, e.g., United States v. Mulligan, 488 F.2d 732 (9th Cir. 1973), cert. denied, 417 U.S. 930 (1974); Giacalone v. Lucas, 445 F.2d 1238 (6th Cir. 1971), cert. denied, 405 U.S. 922 (1972). Cf. United States v. Rothberg, 460 F.2d 223 (2d Cir. 1972) (officer asked location of arrestee's wallet in order to determine his identity; arrestee did not have it on his person and officer, therefore, could go into another room to retrieve it).
the defendant was arrested pursuant to an arrest warrant at the entrance to his apartment. One of the arresting agents asked him where he kept a pistol that was known to have been used in connection with the fraudulent scheme for which he was arrested. The defendant then led the agent to a cupboard some thirty feet away and as the defendant reached into it the agent stopped him and then removed a pistol. By the time the agent had the pistol in his possession, the defendant had begun to back into a room four to five feet away, and, as the officer unloaded the weapon, both he and the defendant found themselves in a bedroom that was subsequently searched. The court held that the search was valid under Chimel since the items seized in the bedroom were within the area from which the defendant could have obtained a weapon. The court further stated:

Although the arrest was at the entrance door to the apartment, it would be unreasonable to restrict the search to the area immediately adjacent to the entrance door in view of the fact that the request for Hsu's weapon lead to the cupboard and to the combined bedroom and office [where the items were seized].

On its face, Kee Ming Hsu gives considerable latitude to officers to expand the permissible scope of the search. Wisely, the case has not led to broad acceptance of the propriety of officers asking the arrestee where evidentiary items are located in order to enlarge the permissible area of the search. If not construed in a limited manner, the case could be taken as authority to allow the officers to move the arrestee from room to room in order to conduct an area search of each room.

141. The defendant was engaged in a rather intricate fraud scheme. He claimed that he had been sent to the United States from Free China by Chiang Kai Shek to collect contributions to a fund to organize resistance to a possible coup being organized by Madame Chiang Kai Shek and the Red Chinese. The defendant displayed pictures of himself with the Generalissimo to prospective contributors. He also showed these persons a gun which he claimed he was forced to carry at all times since he was in continual danger of death. Id. at 1288. This was the gun referred to by the arresting officer.

142. Id.
143. Id.
144. Id. at 1289.
145. Id.

146. See, e.g., United States v. Marotta, 326 F. Supp. 377 (S.D.N.Y. 1971), aff'd mem., 456 F.2d 1336 (2d Cir. 1972) (in an arrest for illegal sale of firearms the officer's request to show him where guns were located was not motivated by regard for his own safety; search held invalid).

To allow an officer to expand the scope of a search by purposely extending the area within the arrestee's control would be to directly circumvent the guarantees of the fourth amendment as interpreted by Chimel. However, police conduct in such situations is not without limitation. A proper analysis of the consent and plain view issues should be sufficient to invalidate the more objectionable police practices. Thus, a limited and controlled relaxation of the Chimel limitations is legitimate.

B. Extensions of Scope Based on Protective Purposes

The Chimel Court stated that the considerations which allow a search of the person of the arrestee and the area within the arrestee's immediate control do not justify a search of other rooms. But the language was couched in terms of a prohibition against "routinely searching any room other than that in which an arrest occurs." The Court seemingly left open the possibility that if the search was not routine and was motivated by some articulable reason which related to either the safety of the

148. The Supreme Court in Johnson v. Zerbst, 304 U.S. 458 (1938), stated in regard to waivers of constitutional rights that
"courts indulge every reasonable presumption against waiver" of fundamental constitutional rights and that we "do not presume acquiescence in the loss of fundamental rights." A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege.

Id. at 464, citing Aetna Ins. Co. v. Kennedy, 301 U.S. 389, 393 (1937); Ohio Bell Tel. Co. v. PUC, 301 U.S. 292, 307 (1937); Hodges v. Easton, 106 U.S. 408, 412 (1882). See Green v. United States, 355 U.S. 184, 191 (1957). In the specific context of consent to searches and seizures, the Supreme Court has stated:

When a prosecutor seeks to rely upon consent to justify the lawfulness of a search, he has the burden of proving that the consent was, in fact, freely and voluntarily given. This burden cannot be discharged by showing no more than acquiescence to a claim of lawful authority.

Bumper v. North Carolina, 391 U.S. 543, 548-49 (1968). In Bumper the Supreme Court found no consent to a search when the party merely allowed the officers into the home when presented with a search warrant that later was found to be deficient. Id. at 546. Thus, when the request by a law enforcement officer presents such coercion that the arrestee cannot be said to have voluntarily consented to the request, the search would be overturned. See Hoover v. Beto, 467 F.2d 516 (5th Cir. 1972), rev'd 439 F.2d 913 (5th Cir. 1971), cert. denied, 409 U.S. 1086 (1972); Leavitt v. Howard, 462 F.2d 992 (1st Cir.), cert. denied, 409 U.S. 884 (1972) (rejecting claim that a defendant would never voluntarily consent to a search where he or she knew it would lead to incriminating evidence).

The limitations set forth by the Court on the plain view exception to the warrant requirement would impose additional limitations to the officer's authority and ability to search areas outside the scope limitations of Chimel. See Note, "Plain View" Anything But Plain: Coolidge Divides the Lower Courts, 7 Loy. L.A.L. Rev. 489 (1974).

149. 395 U.S. at 763.
arresting officer or the protection of evidence, the search extending beyond the actual range of the arrestee’s control would be permissible. Federal courts were quick to develop the perimeters of such an exception to the immediate control rule of Chimel.

In United States v. Briddle\textsuperscript{150} the defendant was arrested at his home pursuant to an arrest warrant. The agents also had a search warrant that proved to be defective; nonetheless, at the moment of the defendant’s arrest in the entry hall the officers “fanned out” to determine if there were others present who would hinder their operations.\textsuperscript{161} The court upheld the seizure of an item found in plain view while the agent was exercising his “right to conduct a quick and cursory viewing of the apartment area for the presence of other persons who might present a security risk.”\textsuperscript{162} The opinion did not require that the officers testify as to any specific facts leading them to believe that such a search was necessary. In view of this, the opinion could be read as establishing an unconditional right to search; however, the right of the officers to make a protective sweep was not in issue in the case as the court noted that the right to do so was a “conceded right.”\textsuperscript{163}

While other federal courts have also allowed the “protective sweep” argument of Briddle, they have demanded that there be some existing condition that leads the officer to conclude reasonably that the sweep is necessary.\textsuperscript{164} In United States v. Basurto\textsuperscript{155} the defendant was arrested on the front lawn of his home for conspiracy to import marijuana.

\textsuperscript{151} Id. at 6.
\textsuperscript{152} Id. at 7.
\textsuperscript{153} Id.
\textsuperscript{154} See United States v. Basurto, 497 F.2d 781 (9th Cir. 1974); United States v. Samuels, 374 F. Supp. 684 (E.D. Pa. 1974); United States v. Broomfield, 336 F. Supp. 179 (E.D. Mich. 1972). The Fifth Circuit is the only court to adopt the exception as set out in Briddle. See United States v. Looney, 481 F.2d 31 (5th Cir.), \textit{cert. denied}, 414 U.S. 1070 (1973), wherein the court harmonized the exception with Chimel as follows:

\textsuperscript{155} 497 F.2d 781 (9th Cir. 1974).
When arrested he yelled, "It's the police!"\textsuperscript{156} The arresting agents ran to the house to see if anyone was inside and, if so, whether anyone present was armed.\textsuperscript{157} While the court concluded that because the arrest took place outside the house the search could not possibly be upheld as incident to an arrest,\textsuperscript{158} its analysis clarifies the basis upon which the protective sweep extension is justified. In its proper context it is not so much an exception to the immediate control rule as it is a factual circumstance falling outside any of the limitations of the search incident to an arrest.

The \textit{Basurto} court correctly analyzed the protective sweep justification for a warrantless search as a combination of exigent circumstances and plain view.\textsuperscript{159} Under the rubric of exigent circumstances officers are allowed to search without a warrant when, under the facts of the case, to do otherwise could endanger police safety and subvert lawful and legitimate police apprehension of criminals.\textsuperscript{160} As summarized by the court in \textit{Basurto}:

The circumstances considered "exigent" were stated \cite{Vale v. Louisiana} to include responding to an emergency; the hot pursuit of a fleeing felon; the ongoing destruction of the goods ultimately seized; and the removal of those goods from the jurisdiction.\textsuperscript{161} The conditioning of the protective sweep upon the existence of exigent circumstances makes it more easily reconcilable with \textit{Chimel} and the fourth amendment. If there is no requirement of at least a good faith belief on the officer's part that the further intrusion is necessary, then the protective sweep takes on characteristics of a routine search of rooms other than that in which the arrest occurs, notwithstanding the fact that the items seized may only be those in plain view. The Seventh Circuit has rejected the protective sweep argument, perhaps partially for these reasons.

In \textit{United States v. Gamble}\textsuperscript{162} the officers executed an arrest warrant at 12:30 a.m. After announcing their purpose and authority, they heard some noises inside and broke in with guns drawn. They then

\begin{footnotes}
\footnotetext{156. Id. at 787.}
\footnotetext{157. Id. The agent who entered the home testified that he had known at the time of the entry that the defendant had earlier been in possession of a weapon. Id.}
\footnotetext{158. Id. at 788.}
\footnotetext{159. Id. at 788-90.}
\footnotetext{160. See Vale v. Louisiana, 399 U.S. 30 (1970); Warden v. Hayden, 387 U.S. 294 (1967); note 2 supra.}
\footnotetext{161. 497 F.2d at 789.}
\footnotetext{162. 473 F.2d 1274 (7th Cir. 1973).}
\end{footnotes}
placed the defendant under arrest in the kitchen, and looked throughout the entire apartment.\textsuperscript{163} Notwithstanding the fact that a number of other persons were present, the court rejected the government's claim that it could make a protective sweep of the premises. Casting the issue in light of the proper scope of a search incident to arrest, the court found that since the defendant had been placed against a wall and frisked and that since the area was within his immediate control had been secured, the search was not incident to arrest under \textit{Chimel}.\textsuperscript{164} Additionally, the court found that the factors set forth\textsuperscript{165} did not constitute exigent circumstances. Moreover, the court viewed the protective sweep not just as an exception to the \textit{Chimel} immediate control rule, but as an independent exception to the warrant requirement. Consequently, it could not classify the protective sweep as one of the well-recognized exceptions referred to in \textit{Chimel},\textsuperscript{166} and it also refused to create a new exception to the warrant requirement.\textsuperscript{167}

Several state courts have adopted the protective sweep approach used in the federal courts.\textsuperscript{168} California, however, has adopted what appears

\begin{itemize}
\item The government, according to the court, did not rely upon the “feared presence of dangerous criminal suspects other than [the defendant].” \textit{Id.} at 1277. Rather, the government listed a series of factors which it believed amounted to exigent circumstances. Three of the factors set forth related to information that the police had prior to effecting the arrest and which the court concluded could have been presented to a magistrate. \textit{Id.} The government also contended that the officers had heard rustling noises in the house after announcing their purpose and authority. The court concluded that as to this factor police officers will almost always be confronted with “rustling” noises when they knock on the door of an occupied home late at night; the party inside must awake, prepare himself to answer, and walk to the door. We think that arresting police must show considerably more than this to justify a search beyond \textit{Chimel} limits

\textit{Id.} Finally, the government pointed to factors indicating that the defendant was a violent person. The court reasoned that this type of characteristic was considered by the Court in \textit{Chimel} and justified only a search of the area within the immediate control of the arrestee. \textit{Id.}

\item \textit{Id.} at 1276.

\item The Seventh Circuit again rejected the protective sweep claim of the government in United States v. Cooks, 493 F.2d 668 (7th Cir. 1974), \textit{cert. denied}, 420 U.S. 996 (1975).

\item \textit{See}, e.g., State v. Miller, 316 A.2d 16 (N.J. Super. Ct. App. Div. 1974) (search of an attic based on noises heard therein after arrest lawful if motivated by the belief that someone was secreted there); People v. Sturgis, 352 N.Y.S.2d 942 (Sup. Ct. N.Y. Co., Spec. Narc. Ct. 1973) (search of entire apartment and suitcase found therein valid since there had been a twenty to thirty minute gun fight prior to the arrest with an undetermined number of persons); State v. Jennings, 192 S.E.2d 46 (N.C. Ct. App. 1972) (valid for police to search after a gun battle with an undetermined number of
\end{itemize}
to be a more limited application of the exception. In *People v. Block*\(^{109}\) officers went to an address where they believed there was a narcotics suspect. After being admitted to the home, they saw six or seven persons on the downstairs level whom they believed had been using marijuana.\(^{170}\) Additionally, they found a smoldering marijuana "roach" and two pipes lying in plain view.\(^{171}\) Based on these facts, the court concluded that the officers reasonably could deduce that a marijuana party was indeed in progress and that there were an undetermined number of participants.\(^{172}\) Therefore the court held that the officer was entitled to proceed to the upstairs portion of the home to determine if any accomplices were present.\(^{173}\) It also held that any evidence seen in plain view while looking for accomplices was properly seized and admitted into evidence.\(^{174}\)

The California court subsequently made it clear that for such a search to be constitutionally permissible and within the *Chimel* limitations, the officers would have to be able to conclude, and in fact have concluded, from the facts within their knowledge that accomplices possibly were present in the home.\(^{175}\) This application of the protective sweep exception seems to be more narrowly limited to the protection of officers and the preservation of evidence than are other courts' approaches. It does not indulge in a presumption that there are others present who would


\(^{169}\) 6 Cal. 3d 239, 499 P.2d 961, 103 Cal. Rptr. 281 (1971).

\(^{170}\) Id. at 242, 499 P.2d at 962, 103 Cal. Rptr. at 282.

\(^{171}\) Id.

\(^{172}\) Id. at 245, 499 P.2d at 964, 103 Cal. Rptr. at 284.

\(^{173}\) Id. at 246, 499 P.2d at 965, 103 Cal. Rptr. at 285. The decision in *Block* accepted the prior decision of the court of appeal in Guevara v. Superior Court, 7 Cal. App. 3d 531, 86 Cal. Rptr. 657 (1970), wherein the court held that the search of a room other than the room of the arrest could be justified if the officer had a reasonable fear that someone therein might attack. In that case the officer had the additional information that evidence of the very crime for which the defendant was arrested would be located in the room he entered subsequent to the arrest.

\(^{174}\) 6 Cal. 3d at 246, 499 P.2d at 965, 103 Cal. Rptr. at 285.

\(^{175}\) *Dillon v. Superior Court*, 7 Cal. 3d 305, 497 P.2d 505, 102 Cal. Rptr. 161 (1972). In that case the court found that there was insufficient evidence from which the officers could conclude that accomplices were present. The defendant had been arrested outside of her home for cultivating marijuana plants. The court said the mere fact that others were known to live there and that they had been seen working with the plants in the backyard did not provide a sufficient justification for entry into the home. *Id.* at 314, 497 P.2d at 511, 102 Cal. Rptr. at 167.
aid the arrestee. Thus, it is more appropriately considered an exception to the scope limitations rather than as an independent exception to the warrant requirement.

It cannot be denied that there are certain situations which call for an abrogation of the immediate control limitations of Chimel. However, in allowing for such exceptions or expansions, it should be recognized that the factual analysis approach more readily accommodates itself to these expansions. The exceptions to the immediate control rule are all tied to the original justifications for the allowance of a warrantless search. Because the physical proximity test, in initially defining the permissible scope of a search incident to arrest, ignores the rationale of this exception to the warrant requirement, it results in a confusing duality approach. Searches within a predefined radius are per se reasonable, regardless of the abilities of the arrestee, while expansions beyond that radius must be related to the destruction of evidence or protection of officers. On the other hand, because the factual analysis test defines the initial scope and any expansions with reference to the abilities of the arrestee, it allows the courts to adopt a single uniform interpretation and application of Chimel.

IV. IMPLICATIONS OF RECENT SUPREME COURT DECISIONS

While the Supreme Court has not addressed the issue of the correct interpretation of the immediate control rule as it relates to searches of premises incident to arrest, it has recently considered the permissible scope of the search of a person incident to arrest. In *United States v. Robinson* and *Gustafson v. Florida* the Supreme Court validated, as consonant with the Constitution, a full person search of a custodial arrestee, regardless of the facts that there was no evidence of the crime for which the person was arrested and that the arresting officers did not express any fear for their safety. In part, the Court's decision was based upon its statement in *Robinson* that

[The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not

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176. See note 17 supra.
179. Both *Robinson* and *Gustafson* involved the question of the permissible limits of a search of the person incident to a full-custody arrest for a traffic offense. In identical language in *Robinson* and *Gustafson* the Court explicitly stated that "it is of no moment that [the arresting officer] did not indicate any subjective fear of the [arrestee] or that he did not himself suspect that the [arrestee] was armed." *United States v. Robinson*, 414 U.S. 218, 236 (1973); *Gustafson v. Florida*, 414 U.S. 260, 266 (1973).
depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.\textsuperscript{180}

Based upon this language, several courts have indicated their belief that even though the justifications for the initiation of a warrantless search are dissipated, the search may nonetheless continue. In \textit{United States v. Kaye}\textsuperscript{181} the defendant's suitcase had been seized when he was arrested at an airport. The court upheld the search of the suitcase made after the defendant was in custody, based on the fact that it was within his immediate control "\textit{at the time of the arrest}."\textsuperscript{182} The court reached this result by bootstrapping the above language from \textit{Robinson} into the immediate control rule, reasoning that

\[\text{if it is true, as Appellant contends, that Appellant had been subdued and presented no danger to the police at the time the suitcase was opened. Nor was there the possibility that the evidence in the suitcase would be destroyed as the suitcase was under the control of the police. However, the authority to conduct a search incident to an arrest, once established, still exists even after the need to disarm and prevent the destruction of evidence have [sic] been dispelled.}\textsuperscript{183}

While \textit{Kaye} did not involve the search of a premises incident to arrest, the reasoning has been applied to such searches of premises. In \textit{United States v. Bradley}\textsuperscript{184} the defendant threw a bag he was holding at the time of the arrest into an adjoining room.\textsuperscript{186} In finding that the item was properly seized incident to arrest, the court relied on the fact that the item was within the defendant's immediate control at the instant of the arrest and remained in plain view thereafter. The court concluded that \textit{Chimel} "did not erect impenetrable barriers at

\textsuperscript{180} 414 U.S. at 235. Justice Powell, concurring, was even clearer. He stated: 
\textit{No reason ... exists to frustrate law enforcement by requiring some independent justification for a search incident to a lawful custodial arrest. This seems to me the reason that a valid arrest justifies a \textit{full search} of the person, even if that search is not narrowly limited by the twin rationales of seizing evidence and disarming the arrestee.}

\textit{Id.} at 237 (emphasis added) (footnote omitted).

\textsuperscript{181} 492 F.2d 744 (6th Cir. 1974) (per curiam).

\textsuperscript{182} Id. at 746 (emphasis added).

\textsuperscript{183} Id. The decision in \textit{Kaye} is consistent with earlier cases decided by the Sixth Circuit court which did not set forth its reasoning. \textit{See United States v. Burch}, 471 F.2d 1314 (6th Cir. 1973); \textit{United States v. Robbins}, 424 F.2d 57 (6th Cir. 1970). See the criticism of the court's approach in the dissenting opinion of Judge McCree in \textit{Robbins}, raising a question as to whether a suitcase could ever be within the immediate control of the arrestee. \textit{Id.} at 59.

\textsuperscript{184} 455 F.2d 1181 (1st Cir. 1972), \textit{aff'd}, 410 U.S. 605 (1973).

\textsuperscript{185} Id. at 1187.
Thus, by construing a search to be one of the person of the arrestee rather than of the premises, the courts have allowed searches to extend beyond the scope limitations of Chimel.

The more significant implication of the post-Chimel Supreme Court decisions is the support that may be found therein for the physical proximity test. In addition to Robinson and Gustafson, the Supreme Court has addressed the issue of a search of the person incident to arrest in United States v. Edwards. In that case the defendant was arrested for attempting to break into a post office and was taken into custody late at night. The next morning, believing that some paint chips, which would be evidence of the crime for which he was arrested, could be found in the clothing, the police gave Edwards some new clothing and took his clothing as evidence. An examination of the clothing revealed paint chips which matched the paint on the building that he was suspected of attempting to break into. In denying that the defendant's fourth amendment rights had been violated by the introduction into evidence of the paint chips, the Court stated that the seizure

186. Id. State v. Boyd, 492 S.W.2d 787 (Mo.), cert. denied, 414 U.S. 1069 (1973), applied the same reasoning in upholding the search of an attache case seized from the defendant at the time of the arrest and searched at a security office 150 feet away. The court went further than either Kaye or Bradley, and limited the applicability of Chimel to exclude such situations. Id. at 791.

The Ninth Circuit Court of Appeals apparently relies on an approach based on the immediate control at the time of the arrest. See United States v. Rothman, 492 F.2d 1260 (9th Cir. 1973). However, an alternative theory was developed by that court for the warrantless searches of suitcases in United States v. Mehciz, 437 F.2d 145 (9th Cir. 1971). In Mehciz the defendant was arrested and handcuffed before a suitcase in his possession was taken from him and searched. The court rejected the appellant's claim that incident to the arrest the officers could lawfully only hold the suitcase until they obtained a warrant for a search. Over a strong dissent by Judge Ely, the court reasoned that the suitcase was like an automobile in its potential for mobility and hence if probable cause existed the suitcase could be searched without a warrant pursuant to the mobility exception formulated in Carroll and Chambers. Id. at 147. The decision has been the subject of controversy and has begun a debate concerning the applicability of the mobility exception to suitcases and other moveable containers. See Note, Mobility Reconsidered: Extending the Carroll Doctrine to Movable Items, 58 IOWA L. REV. 1134 (1973); 9 HOUSTON L. REV. 140 (1971). Nonetheless, several courts have adopted the reasoning. See, e.g., United States v. Johnson, 467 F.2d 630 (2d Cir.), cert. denied, 413 U.S. 920 (1972); Waugh v. State, 318 A.2d 204 (Md. Ct. Spec. App. 1974), rev'd, 338 A.2d 268 (1975); Commonwealth v. Duran, 293 N.E.2d 285 (Mass. 1973). See the dissent of Justices White, Douglas, and Brennan to denial of certiorari in Nugent v. United States, 409 U.S. 1065 (1972).

188. Id. at 801.
189. Id. at 801-02.
190. Id. at 802.
was and is a normal incident of a custodial arrest, and reasonable delay in effectuating it does not change the fact that Edwards was no more imposed upon than he could have been at the time and place of the arrest or immediately upon arrival at the place of detention.\textsuperscript{191}

The purport of the Court's reasoning is clear when Robinson, Gustafson, and Edwards are taken together. The language of these cases\textsuperscript{192} appears to support the proposition that the justifications which exist to conduct a warrantless search at the moment of arrest are not dissipated by a reasonable delay in effecting the search. If this reasoning can be applied to the determination of the \textit{scope} of the search incident to arrest, it would appear to support the physical proximity test. That is, if at the moment of arrest an area is within the immediate control of the arrestee, then, notwithstanding the fact that the arrestee subsequently may be restrained or removed from the area, a search of the area would be valid.\textsuperscript{193}

\textit{Edwards} also supports the physical proximity test on another basis. As noted earlier, some courts which rely on the physical proximity test do so because it takes into consideration the reasonableness of the police conduct.\textsuperscript{194} This position, rejected by the majority in \textit{Chimel} and finding support only in the dissent,\textsuperscript{195} appears to have been resurrected by the majority in \textit{Edwards}. The majority in \textit{Edwards} stated that the test was "not whether it was reasonable to procure a search warrant, but whether the search itself was reasonable . . . ."\textsuperscript{196} Thus, as the dissent pointed out, the Court was departing from its earlier position that warrantless searches are per se unreasonable unless they fall "within one of the 'jealously and carefully drawn' exceptions to the warrant requirement."\textsuperscript{197} Additionally, the \textit{Edwards} Court relied upon the fact that the procedures therein were in accord with police practices in the area and noted that while "[a] rule of practice must not be allowed . . . to prevail over a constitutional right,' little doubt has ever been expressed about the validity or reasonableness of such searches incident to incarceration."\textsuperscript{198} To the extent the Court may have been relying on the practicalities of the situation as justification for

\begin{footnotes}
\item 191. \textit{Id.} at 805.
\item 192. See text accompanying notes 180, 191 \textit{supra}.
\item 193. That some courts have adopted this line of reasoning is clear. \textit{See} text accompanying note 66 \textit{supra}; notes 63-75 \textit{supra} and accompanying text.
\item 194. See notes 77, 79 \textit{supra} and accompanying text.
\item 195. See notes 80-83 \textit{supra} and accompanying text.
\item 196. 415 U.S. at 807.
\item 197. \textit{Id.} at 809 (footnote omitted).
\item 198. \textit{Id.} at 804-05 n.6 (citation omitted).
\end{footnotes}
the search, it is indeed a shift in the Court’s policy regarding the fourth amendment.

Notwithstanding portions of Robinson, Gustafson, and Edwards which may support the physical proximity test interpretation of the immediate control rule of Chimel, there are significant distinctions between the search of a person incident to arrest considered in those cases and the search of a premises incident to arrest. In fact, the Court in both Robinson and Gustafson gave particular recognition to the distinction that exists between the search of the person and the search of a premises incident to arrest. Likewise, in Edwards there


It is well settled that a search incident to a lawful arrest is a traditional exception to the warrant requirement of the Fourth Amendment. This general exception has historically been formulated into two distinct propositions. The first is that a search may be made of the person of the arrestee by virtue of the fact of the lawful arrest. The second is that a search may be made of the area within the immediate control of the arrestee.

Examination of this Court's decisions show that these two propositions have been treated quite differently. The validity of the search of the person incident to a lawful arrest has been regarded as settled since its first enunciation, and has remained virtually unchallenged until the present case. The validity of the second proposition, while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched.

The Court then discussed the petitioner's authority for the assertion that a search of a person incident to arrest must be limited in scope to the need to preserve evidence and protect officers. Interestingly, and correctly, the petitioner relied not on Chimel, but on Sibron v. New York, 392 U.S. 40 (1968). In Sibron the Court dealt specifically with the search of a person incident to arrest, holding that an officer had the right to search an arrestee because he had probable cause to arrest him. The Court stated that at the time of the arrest the arresting officer had the authority to search [petitioner] Peters, and the incident search was obviously justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." Preston v. United States, 376 U.S. 364, 367 (1964). Moreover, it was reasonably limited in scope by these purposes. [The arresting officer] did not engage in an unrestrained and thorough-going examination of Peters and his personal effects.

392 U.S. at 67; see note 12 supra.

The Robinson Court, stated in regard to this passage that "[it is, of course, possible to read the second sentence from this quotation as imposing a novel limitation on the established doctrine set forth in the first sentence." 414 U.S. at 229. The Court then went on to state that while Chimel quoted the above language with approval, it was preceded "by a full exposition of the traditional and unqualified authority of the arresting officer to search the arrestee's person." Id. (citation omitted). The Court concluded that it "did not believe that the Court in Peters [sic] intended in one unexplained and unelaborated sentence to impose a novel and far-reaching limitation on the authority to search the person of an arrestee incident to his lawful arrest." Id. Thus, the Court also recognized that a different standard can be applied to the search of a person incident to arrest as opposed to the search of a premises incident to arrest. The distinction drawn, and the Court's acknowledgment that Chimel established a more restrictive stand-
was no need to discuss the search of a premises as the facts and the Court's language clearly established that the Court was dealing only with the search of a person. Despite the fact that these cases may foreshadow a less restrictive interpretation of the immediate control rule, vis-à-vis the right of the officers to search a larger area, they are distinguishable authority upon which to base a conclusion that the physical proximity test is the correct application of the immediate control rule. As noted earlier the factual analysis test best comports with the rationale underlying Chimel. Until such time as that rationale is reconsidered and repudiated in the specific context of a search of a premises incident to arrest, the lower courts should apply the immediate control rule with regard to the actual abilities of the arrestee.

V. CONCLUSION

Chimel v. California placed definite limitations upon the area of a premises search incident to arrest. However, the language used by the Court to define the permissible scope of such searches—the area within the immediate control of the arrestee—has been variously interpreted by the lower courts. On the one hand are those courts which believe that the area of immediate control is to be measured by the hypothetical ability of the arrestee to reach the area searched. Under this physical proximity test, a predefined area is always deemed to be within the arrestee's immediate control. On the other hand are those courts

ard to be applied to searches of premises, signifies that the Court was not dealing with the rationale and limitation of the area of a search of a premises incident to arrest. Robinson therefore should not be binding authority in the interpretation of the immediate control rule.

200. The evidence seized from the petitioner in Edwards was paint chips found in his clothing. The issue in the case was whether a search incident to arrest could lawfully be conducted once the administrative mechanics of the arrest had been completed. 415 U.S. at 802. Holding that the search could constitutionally be made after the arrest mechanics had halted, the Court concluded by agreeing with the First Circuit Court of Appeals that

"[w]hile the legal arrest of a person should not destroy the privacy of his premises, it does—for at least a reasonable time and to a reasonable extent—take his own privacy out of the realm of protection from police interest in weapons, means of escape, and evidence."

Id. at 809, quoting United States v. DeLeo, 422 F.2d 487, 493 (1970) (footnote omitted). This recognition of the differing interest involved in the search of a person incident to arrest and the search of a premises incident to arrest again indicates that the Court could recognize that a different standard applies to each search situation.

201. See notes 79-120 supra and accompanying text.


203. See notes 20-78 supra and accompanying text,
which look to the actual ability of the arrestee to determine if the area is within the immediate control. This approach, the factual analysis test, generally calls for an examination of the facts surrounding the search, including the number of officers present, the distance between the arrestee and the area searched, and any restraints placed upon the arrestee.204 Under both of these tests, courts have recognized certain situations which will allow a search to extend beyond the immediate control of the arrestee.205 These "exceptions" are based upon the reasons which initially allow a warrantless search incident to arrest: preservation of evidence206 and protection of the arresting officer.207

While neither the physical proximity test nor the factual analysis test has become the prevailing test, there is some authority in post-Chimel Supreme Court decisions which indicates that the Court would favor the physical proximity test.208 However, since those cases dealt with the scope of a search of a person incident to arrest and not the search of a premises, they are weak authority upon which to determine that the physical proximity test should be utilized in construing the immediate control rule of Chimel.209 In view of the fact that the factual analysis test is more in accord with the underpinnings of Chimel,210 courts should utilize it in examining searches of premises incident to arrest, at least until such time as the Court may expressly reconsider its holding in Chimel.

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