

Supreme Court of the United States

OCTOBER TERM 1970

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In the Matter of:

Docket No. 51

ARCHIE WILLIAM HILL, JR.,

Petitioners,

vs.

CALIFORNIA,

Respondent.

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C O N T E N T S

ARGUMENT OF

PAGE

Joseph Amato, Esq., on behalf of Petitioner	2
Ronald M. George, Esq., on behalf of the State of California	12
Joseph Amato, Esq., onbeh alf of Petitioner -- Rebuttal	34

1 IN THE SUPREME COURT OF THE UNITED STATES

2 OCTOBER TERM, 1970

3 - - - - - :
4 ARCHIE WILLIAM HILL, JR., :

5 Petitioners, :

6 vs. :

No. 51

7 CALIFORNIA, :

8 Respondent. :
9 - - - - - :

10 Washington, D. C.,

11 Wednesday, October 21, 1970.

12 The above-entitled matter came on for argument at
13 1:57 o'clock p.m.

14 BEFORE:

15 WARREN E. BURGER, Chief Justice
16 HUGO L. BLACK, Associate Justice
17 WILLIAM O. DOUGLAS, Associate Justice
18 JOHN M. HARLAN, Associate Justice
19 WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HENRY BLACKMUN, Associate Justice

20 APPEARANCES:

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24 Counsel for Petitioner

25 RONALD M. GEORGE, ESQ.,
Deputy Attorney General of the
State of California
Counsel for Respondent
- - -

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments in a few moments -- awaiting Justice Douglas -- in No. 51, Hill vs. California. But we will wait on Mr. Justice Douglas.

(Brief pause.)

MR. CHIEF JUSTICE BURGER: We will proceed, Mr. Amato. You may proceed whenever you are ready.

ARGUMENT OF JOSEPH AMATO, ESQ.,

ON BEHALF OF PETITIONERS

MR. AMATO: Mr. Chief, Justice, may it please the Court, I will be rather brief inasmuch as this is reargument and some of the factual arguments have been made by prior counsel today.

I would like to briefly, if I may, go over the facts of this particular case. You have a situation in this case where there was a robbery. Four individuals robbed a particular residence and then took some money, cameras and some other personal property.

The day after the robbery, which was June 4, the robbery being June 4, on July 5 two of the four accomplices to this particular robbery were captured in a narcotics situation and they were captured in the car of the petitioner, Archie Hill, along with other personal property that was recovered.

The two particular individuals that were captured

1 told the officers that Archie Hill was one of the four partici-
2 pants in this robbery. They implicated him to this particular
3 crime. The police then checked out the associations of peti-
4 tioner Archie Hill with the other two participants in the
5 police records that they had available. They got the descrip-
6 tion of Archie Hill, which was approximately five-feet-ten-
7 inches, 160 pounds. They had the address and so forth.

8 On the 6th of June they proceeded to the residence
9 of Archie Hill, petitioner. At that time the petitioner was
10 not in his apartment. We are talking about a four-room apart-
11 ment, one bedroom. There was a Mr. Miller in the apartment.
12 Officers came into the apartment and, upon noticing Mr. Miller,
13 made an immediate arrest, thereafter shoving Miller aside and
14 searching the other rooms and finding nothing.

15 At that time Mr. Miller indicated that he was Mr.
16 Miller. He showed the officers identification showing that he
17 was Mr. Miller. He further indicated that he was waiting for
18 Mr. Hill. The officers in this case did not ask permission to
19 search the premises. Thereafter they spent approximately two
20 hours making an extensive search of the particular apartment.

21 Now, the primary purpose of the search was to re-
22 cover the personal property, additional personal property and
23 weapons, which included two knives and two guns in the apart-
24 ment house.

25 Q Did most of the search take place before or

1 after Hill's arrest?

2 A The search took place after Mr. Miller was
3 arrested.

4 Q After Mr. Miller was arrested?

5 A That is correct.

6 Q And before Mr. Hill was arrested?

7 A Mr. Hill was not --

8 Q He never got to the point of being arrested?

9 A That is correct.

10 Q I am not sure you have made this case of
11 characters very clear, as to who the man in the room said he
12 was and who he really was and who the police thought he was.
13 I think it might help if you would go over that.

14 A Okay. Mr. Miller who, in fact, was Mr.
15 Miller, was he arrested. He stated that he was Mr. Miller.
16 The police said that the identification meant nothing to them,
17 that he fit the description of Mr. Hill exactly and, there-
18 fore, they felt that because criminals tend to in many in-
19 stances, to avoid arrest, they will falsify their identifica-
20 tion. So in this situation Mr. Miller was in fact Mr. Miller.
21 Mr. Hill was not in the apartment at all.

22 Now, the search was very extensive. They went all
23 over, and what they recovered, which was extremely damaging to
24 the petitioner in this action, was a personal diary in a
25 drawer in a dresser. And the reason why this particular

1 evidence is extremely damaging, even though they found other
2 evidence associated with the crime, is because Bader, who was
3 one of the four accomplices, lived with petitioner and he
4 stated that he was involved in the particular crime.

5 Q Now, could I interrupt you a second. Going
6 back to the Chief Justice's question, is there any contention
7 in this case that the police, in arresting Miller, who turned
8 out to be not Mr. Hill, were acting in bad faith when they
9 arrested him thinking he was Mr. Hill?

10 A Well, Your Honor, I think the court of appeal
11 that reversed this indicated that the police were acting in
12 good faith and did reverse the conviction.

13 Q Yes.

14 A There certainly is evidence in there that could
15 be argued that they were not exercising good faith, but the
16 court of appeals, in reversing, stated that the officers ap-
17 parently acted in good faith.

18 Q What about the trial court?

19 A The trial court --

20 Q What is the record of the trial court on that
21 score?

22 A The trial court in this situation, I think it
23 is important what the trial court said and what they were
24 thinking at the time. They took two days, after this matter
25 was submitted, to make a determination, and in the trial record

1 the court indicated that the officers were acting in good faith.
2 However, the court further indicated that -- you see, he
3 realized that he may be opening a Pandora's Box that
4 Rabinowitz and Harris was never intended to go this far.

5 Now, certainly we contend strongly right from the
6 outset that Rabinowitz and Harris are not applicable to this
7 particular case. Certainly, counsel in the prior cases have
8 already indicated this insofar as the factual details of
9 Rabinowitz and Harris, the location, the office in Rabinowitz,
10 the public matter and so forth, the fact that a continuing
11 crime was committed, and then when you compare it to a particu-
12 lar diary, something that the officers, even if they had the
13 knowledge of that diary, even if they had plenty of time,
14 could never have gotten a search warrant for that diary, and
15 yet --

16 Q Where was the diary found?

17 A The diary was found in a dresser drawer in the
18 bedroom?

19 Q Was it the entire diary or only some pages?

20 A Just a couple pages, but they were the damning
21 pages implicating the petitioner in this, and really --

22 Q What I am trying to get at, did the officers
23 take the couple of pages from a diary or were there just a
24 couple of pages in the drawer?

25 A That is not clear from the record, Your Honor,

1 but it was just a couple of pages.

2 Q Incidentally, I gather you didn't object on
3 Fifth Amendment grounds, did you, as to --

4 A No, I didn't handle this matter at the trial
5 level.

6 Q Yes.

7 A And the only reason I didn't object was the
8 same basis that I didn't object to the fact that he was found
9 guilty of kidnapping under, in effect, the little Lindberg law.
10 And clearly the facts that I have stated here do not indicate
11 any type of kidnap. Fortunately, the Superior Court in San
12 Francisco has reversed that through habeous corpus, and this
13 leads, I think, possibly to another matter here, where we are
14 talking about the second degree robbery.

15 Here is an individual serving the fifth year in the
16 state prison on an in effect one-year minimum prison sentence.
17 The Rabinowitz case and the Harris case, I think when you re-
18 view those cases very carefully, it is interesting to note
19 that they infer throughout the decision itself that it should
20 apply to those particular facts in Rabinowitz and Harris. But,
21 unfortunately, this Court did not see fit to expressly state
22 that and, as a result, the states across this country have
23 just murdered this decision, giving it unrealistic results as
24 far as this particular petitioner's contentions are concerned.

25 Certainly, the factual situations, when you put

1 Rabinowitz and Harris together, come up with a situation where
2 really you could almost fit nearly every factual situation to
3 the situation where you do not need a search warrant, and if
4 you get the search warrant you are better off without it be-
5 cause you can go further, like in this particular case. They
6 never could have gotten a search warrant for that diary, and
7 yet because they had gone beyond the scope, they are able to
8 bring in this extremely damaging evidence.

9 Q Why couldn't they get the diary under a search
10 warrant?

11 A Well, in this particular case -- in the first
12 place, they knew absolutely nothing about --

13 Q Well, I know that, but I mean is there anything
14 apart from that --

15 A Yes, Your Honor, then there would be a strong
16 Fifth Amendment objection, compelling the particular petitioner
17 to give evidence of this sort, which is self-incriminating if
18 in fact they knew this particular evidence --

19 Q Well, what about Warden vs. Hayden?

20 A Well, I think this is different than Warden vs.
21 Hayden in several --

22 Q This question was raised in Warden vs. Hayden,
23 wasn't it?

24 A I'm sorry, Your Honor.

25 Q This question was raised, wasn't it, in Warden

1 vs. Hayden?

2 A That's right, Your Honor, it was.

3 Q Yes.

4 A Now, insofar as retroactivity -- and I think
5 all the other points are spelled out in the brief, and since
6 this is reargument I will at least reserve until I hear the
7 Attorney General.

8 As far as retroactivity is concerned, I don't think
9 this Court has to go that far. I don't think -- of course,
10 the arguments I would espouse would be the same as that ex-
11 pressed in the Williams case, that here is a case that is on
12 direct appeal, that one of the differences, and big differences
13 that I think this Court should consider, when a case is on
14 direct appeal, and one that is being attacked collaterally from
15 the standpoint of retroactivity, is the fact that on direct
16 appeal certainly the government and the Attorney General and
17 all those prosecutors should be fully aware that there is al-
18 ways the possibility that the case will be reversed, and they
19 should keep their witnesses and keep their evidence and keep
20 all the things necessary to prosecute the case again in abey-
21 ance pending the possibility of a reversal.

22 Q How long do you think they should be obliged to
23 keep the case together?

24 A Well, Your Honor, I don't believe there can be
25 any time limit, but a direct appeal expressly on issues that

1 are involved -- now, I believe the government in the prior case
2 just mentioned that bringing up appeals on various other mat-
3 ters, while not relevant to the particular issues involved
4 here, and then they come in that way. There could be excep-
5 tions to that extent.

6 Q In California, if they went back for another
7 trial, may they use the recorded testimony of a missing wit-
8 ness who testified at the prior trial?

9 A Under certain exceptions, Your Honor, provid-
10 ing he is unavailable and --

11 Q That is what I mean, a missing witness.

12 A Yes, Your Honor.

13 Q In other words, there is no difference from the
14 federal --

15 A That is correct, Your Honor.

16 I think, in conclusion here at this time, I would
17 just like to indicate to the Court that this case, right from
18 the outset, was attacked on the Rabinowitz and Harris theory,
19 that really Chimel was not a criteria so far as taking this
20 case up, and that during the whole procedure up, it was a very
21 difficult question. And I think the reason it was difficult
22 was because of the expanded critical decisions of Rabinowitz
23 and Harris as we have gone along in time. And the trial court,
24 when they indicated they are opening a Pandora's door, was not
25 as the Attorney General indicates in this case, opening a

1 situation where every case is a person who is not in that par-
2 ticular apartment, then all of a sudden you open the door in
3 that area.

4 What they are talking about really was Rabinowitz
5 and Harris gave the government wide latitude in the search.
6 Now, we are going to go into a situation where the person
7 doesn't even have to be there; then all of a sudden you come
8 to the situation where really there just isn't going to be any
9 exceptions to amount to a material reason why they cannot
10 search once they have the arrest.

11 And I would submit, in the interest of justice,
12 particularly in this case, and I am arguing particularly in
13 this case, because of the situation where the equities should
14 come out where here an individual has served his fifth year on
15 a minimum one-year, has never been up for parole, because he
16 is convicted of a kidnapping charge that he clearly did not do
17 at the time, and the courts --

18 Q Did you say that conviction has been set aside--

19 A Yes, Your Honor.

20 Q -- in other proceedings on a habeas corpus --

21 A That was set aside.

22 Q And I presume that is the problem of the state
23 courts of California to deal with the length of this sentence.

24 A Yes, Your Honor.

25 Q Is that issue before us?

1 A It really is not. I am just indicating this
2 as an equitable situation when you are drawing a very close
3 line on this case, because the trial courts in California
4 knew about Rabinowitz, knew about Harris. The trial court
5 made that statement in the record at the time. The court of
6 appeals reversed 3-to-0 against, and it is just not that clear-
7 cut of a case, and I think sometimes in those types of cases
8 that information like that might be helpful.

9 Thank you very much.

10 MR. CHIEF JUSTICE BURGER: Thank you, Mr. Amato.

11 Mr. George, you may proceed whenever you are ready.

12 ARGUMENT OF RONALD M. GEORGE, ESQ.,

13 ON BEHALF OF THE STATE OF CALIFORNIA

14 MR. GEORGE: This is a reargument in a direct appeal
15 from a state conviction. The sole issues in this case involve
16 the search and seizure which occurred in petitioner's apartment
17 in 1966. And aside from the issue of the retroactivity of the
18 Chimel decision, there are two or three issues involving the
19 legality of the search under pre-Chimel law.

20 Before reaching these issues, however, I would like
21 to quickly dispose of the new element that petitioner has
22 injected into the case, namely this collateral proceeding in
23 the California courts whereby, I believe, within a month pre-
24 viously the kidnapping count was set aside, but that was on
25 a state law ground and that is not even a final judgment.

1 That is being appealed to the Court of Appeals.

2 Q You said a month previously. A month previous-
3 ly to --

4 A Sometime within the last month, I believe, it
5 was, and that is not even final yet and, frankly, I don't see
6 any bearing on it. The kidnapping count has gone but the
7 robbery count, which carries a maximum of life imprisonment,
8 remains. In fact, although petitioner's minimum is one year,
9 since that time, not applicable to him, the statute provides
10 for a fifteen-year minimum whereas here there is bodily injury
11 to the victim, so that is really --

12 Q Well, let's not spend any more time on that.

13 A So basically, getting to the search and seizure
14 issue, I would like to again outline the facts, although coun-
15 sel has, because they are a bit confusing and I don't think a
16 complete statement has been given.

17 On Saturday, June 4, 1966, a robbery was committed
18 involving a brutal assault and unnecessary assault by a gang of
19 four armed men, one of whom is petitioner, and this is part of
20 a series of robberies in the San Fernando Valley area of Los
21 Angeles.

22 Now, two days later the police acquire probable cause
23 to arrest petitioner, and petitioner, at page 10 of his opening
24 brief, really concedes that there is probable cause to arrest
25 him, so there is no need to dwell in detail on that.

1 What the police do is they proceed to petitioner's
2 apartment, they do not have a search warrant or an arrest
3 warrant, they go in order to seize the weapons and the stolen
4 property that is involved with the robbery in the present case.
5 And this is even arguably done with the consent of one of the
6 other robbery gang members who is in custody, but that is not
7 central to the case.

8 The police --

9 Q To whom are you referring when you say in cus-
10 today?

11 A That is Mr. Bader. He is one of the four men.
12 Baum and Bader were arrested --

13 Q He has told them about all of this?

14 A He has told them about this and they have inde-
15 pendent information in their files connecting petitioner with
16 these two men and with a series of robberies in that area.

17 So the police --

18 Q Bader was the petitioner's roommate, wasn't he?

19 A That's correct.

20 Q And it is not your submission, is it, or is it,
21 that Bader gave consent to this search?

22 A Well, I stated that arguably that he did, be-
23 cause he said, "You can go to the apartment and that is where
24 the loot is and the weapons are."

25 Q That wasn't the basis on which this was upheld

1 by the Supreme Court of California, was it?

2 A No, although I noted briefly in respondent's
3 brief that we don't think that is dispositive of the fact that
4 that was not the ground upheld by the appellate court. I just
5 injected that, that we seek to uphold the validity of the
6 search on other grounds.

7 Now, what the police do is they knock and they
8 identify themselves and they are confronted by a man who opened
9 the door and who looks exactly like petitioner Hill, and they
10 have descriptions of petitioner Hill from the victims, of which
11 there were three, although not all of them gave a full descrip-
12 tion. But they had general descriptions and they have a fourth
13 description from petitioner's roommate, and they have their own
14 information from their files involving previous arrests of
15 petitioner.

16 So they go there and there is a man who the record
17 later indicates is only ten pounds off in weight and two
18 inches in height, and these are discrepancies which would not
19 necessarily be apparent to the officers and could be accounted
20 for by any, let's say, ambiguity in the victims' description.

21 Q Two courts, the trial court has found as a
22 matter of fact there was no bad faith, and the court of appeals
23 has affirmed that, haven't they?

24 A That is correct, so --

25 Q I think the court of appeals reversed the

1 conviction, and then the state took it to the Supreme Court
2 where it was affirmed.

3 A That is correct, but the court of appeals did
4 affirm the validity of the arrest --

5 Q The good faith, yes.

6 A -- yes, and the arrest is such that they had a
7 rather curious approach to the legality of the search which
8 I mentioned in passing.

9 Q Yes.

10 A Now, what happens is, before the officers en-
11 tered the apartment, they see a gun with a loaded clip in plain
12 view from the threshold of the apartment, sitting on the coffee
13 table. They ask this man, "What do you know about guns being
14 on the premises?" He said, "I don't know anything about guns
15 being on the premises."

16 "Well, what about this one?" You know, this already
17 certainly alerts them as to evasive conduct by the person they
18 suspect as being a member of the robbery gang. So he is also
19 unable to give any satisfactory information for his presence
20 He is asked, "How did you get in here?" "Well, I don't know,
21 I just got in here." "Where is petitioner Hill?" "Oh, I
22 don't know where he is," you know, so then he says, "I am
23 Miller and I have got identification to prove it." But are
24 the officers supposed to believe that, when he doesn't know
25 anything about a gun in plain sight?

1 So they are entitled, as Justice Black stated in a
2 previous argument today, to assume that the person who opens
3 the door, especially when he matches the tenant's description,
4 is the person in control.

5 Now, this is where the divergence begins in the
6 treatment of the case between the court of appeal and the state
7 supreme court. The court of appeal adopted the approach sug-
8 gested by petitioner that somehow what is important in ascer-
9 taining the legality of a search is not the dominion and control
10 of the person over the premises in a physical sense, but it is
11 somehow his proprietary control that matters.

12 Well, this is a concept that, I believe, this Court
13 has rejected time and time again in the Jones case, the
14 Silverman case, and I think finally buried in the Katz case,
15 that the right to search incident to arrest, whatever its scope,
16 does not depend upon proprietary matters but, rather, upon the
17 physical dominion and control, because, after all, it is for
18 the officer's protection. And I think that Katz indicates
19 that clearly we are concerned with the ability of the person
20 to grab a weapon -- all of these cases indicate that this is
21 the consideration.

22 Now, the --

23 Q Is it your theory -- do you submit at all that
24 it was -- or suggest that Miller gave consent to this search?

25 A No, not Miller did. We have never made that

1 contention.

2 Q You suggest that Bader might have?

3 A Yes, that is the case.

4 Q Not that Miller?

5 A No, not that Miller. No, Miller did not.

6 Now, hearing the arguments in the White case, in-
7 volving electronic surveillance, it seemed to me that the Katz
8 decision, have as one of its facets of the protection of the
9 right to privacy, a concern really with assuming a risk of in-
10 vasion of privacy, and I think that is really the key to this
11 aspect of this case.

12 The risk that the public will have access to the
13 person's words or his property, if you leave that telephone
14 booth door open, it is a different matter; if you leave your
15 front door open or you invite people into your premises, that
16 is a different matter, and that is exactly what we think is
17 the case here. There is a certain assumption of the risk by
18 having visitors in your apartment. If you invite the visitor
19 in, let's say Hill had been there and they come to arrest
20 Miller, in Hill's place. I don't think that the fact that
21 Miller had no proprietary control over the premises would mean
22 that the officers would have to say, "We are not going to
23 search here because we are invading Hill's privacy." I think
24 that Miller could have grabbed a weapon out of the drawer
25 next to him, even under the Chimel scope, and injured the

1 officers.

2 Q Is there anything in the record as to how he
3 did happen to be there?

4 A I don't think --

5 Q It doesn't have much to do with this case, but
6 I was just interested.

7 A I am curious about it myself, and I have no
8 idea from the record or from any other source. All I know is
9 that he was asked for an explanation and was unable to give one
10 apparently.

11 Now, I think that the Stoner opinion itself recog-
12 nizes that apparent authority can provide a basis for searching
13 even when there is a mistake.

14 Now, I think what is important here is that if you
15 assume that Hill was there, the search that took place was
16 totally proper. It was a type of search that would have been
17 permissible under pre-Chimel law, and the fact that this mis-
18 take occurred in good faith should make no difference in the
19 treatment of it. Otherwise, certainly any felon could frus-
20 trate a search by claiming to be somebody other than the
21 petitioner, and unless the officer had personally seen him,
22 that would automatically preclude further search.

23 I think that Frazier vs. Cupp also speaks in terms
24 of assumption of the risk as far as the scope of permissible
25 search.

1 Now, one thing I would like to get into, after
2 concluding now that the scope of the search was unexceptional,
3 the items being found in the bedroom, is this question of the
4 diary. I think, other than that, there can't be any particu-
5 lar novelty to this case under pre-Chimel law.

6 Now, first of all, we would like to state strenu-
7 ously that we believe that issue is improperly raised before
8 this Court. It has been --

9 Q You raise no objection, you say?

10 A Not on this ground, no. In fact, perhaps the
11 making of an objection on other grounds is affirmatively in-
12 dicative of the waiver of an objection on this ground.

13 Q Well, the objection actually made was on Fourth
14 Amendment grounds?

15 A On Fourth Amendment grounds to all of the evi-
16 dence in general --

17 Q Well, what do you do with that statement in
18 Boyd, that where you are dealing with something like the diary,
19 incriminating statements, the Fourth and Fifth Amendments al-
20 most run into one another.

21 A Well, that language does appear, I think --

22 Q I mean for the purposes of the sufficiency of
23 the objection raised, in the Fifth Amendment and the Fourth
24 Amendment context.

25 A Well, I don't think that that can really be

1 dispositive of the issue or even that significant, because,
2 after all, if we look at the purpose of an objection, it is to
3 apprise opposing counsel and the trial court of the basis for
4 the objection --

5 Q Yes, but doesn't the objection on Fourth Amend-
6 ment grounds as to the diary only necessarily implicate the
7 Fifth Amendment consideration on the issue of reasonableness?

8 A I would say particularly not, in view of the
9 novel nature of this allegation, because I know of no cases
10 under California law or under federal law applicable to the
11 states where it has been held that because this is a document
12 that alone allows its admission in evidence, so --

13 Q Incidentally, are those pages anywhere in the
14 record, those diary pages?

15 A Yes, the diary can be found at --

16 Q What the diary says, on page 77 of the
17 Appendix, in a footnote to the opinion of the Supreme Court
18 of California --

19 A And on page 41 it is, as the Supreme Court of
20 California concludes, a damning account of petitioner's in-
21 volvement -- it is a rather unusual thing, it relates the fact
22 of the robbery and that the -- some of this is in criminal
23 jargon, but in effect "some of the members of the gang," in-
24 cluding petitioner, "went to TJ" -- that is Tijuana -- "and
25 scored seven keys" -- which means purchasing seven kilos of

1 marijuana.

2 Q Right.

3 A And then, when they came back, they went to
4 bed and a couple of them went out to get something to eat and
5 then "this turned out to be the mistake" --

6 Q Well, this is a detailed confession to the
7 commission of the crime, isn't it?

8 A That's correct, made under absolutely no com-
9 pulsion whatsoever, in view of the fact that criminals do not
10 customarily confess their crimes with the introductory phrase
11 "dear diary, yesterday I did so and so." This is something
12 that is totally volunteered, and that brings me really to the
13 merits of this claim of a Fifth Amendment basis.

14 Let me just state briefly, though, this was not
15 raised at the preliminary hearing, not at the trial court, not
16 the court of appeals, not the Supreme Court of California, not
17 even in the petition for writ of certiorari. So under the
18 Cardinale vs. Louisiana decision and rule 40 of this Court's
19 rules, I think that precludes it, but on the merits I think
20 that Gouled itself, whose mere evidence rule was at least to
21 very substantial degree rejected in Warden vs. Hayden, pre-
22 cludes the claim made here. I think --

23 Q I know, but wasn't this -- this very question
24 was reserved in Warden vs. Hayden.

25 A To a certain extent it was.

1 Q Not to a certain extent, it was.

2 A But this, I think, is dispositive of the fol-
3 lowing sentence, if I may note, from Gouled itself. There is
4 no special sanctity in papers as distinguished from other
5 forms of property to render them immune from search and
6 seizure if only they fall within the scope of the principles
7 of cases in which other property may be seized.

8 Q Yes, but at 302 and 303 of Warden vs. Hayden,
9 we are dealing there with clothing --

10 A Clothing.

11 Q -- and we said the items of clothing involved
12 in this case are not testimonial or communicative in nature
13 and their introduction therefore did not compel respondent
14 to become a witness against himself to violate the Fifth
15 Amendment. This case thus does not require that we consider
16 whether there are items of evidentiary value, whose very nature
17 precludes them from being the object of a reasonable search
18 procedure.

19 Doesn't that reserve this question?

20 A I think that that language, in conjunction
21 with whatever this Court would want to do in the future, cer-
22 tainly leaves the Court open to hold that documents are in a
23 special class. My only statement is that Gouled in effect
24 said there is a mere evidence rule and it is not because of
25 documents, documents and clothing, everything is the same way.

1 So once this Court in Warden dealt narrowly with the issue.
2 before it, namely non-documentary evidence, I think that by
3 the weight of that language, despite the reservation of the
4 question --

5 Q Well, I recognize there are documents and docu-
6 ments, but what we have here really is, as you concede, a de-
7 tailed confession of this very crime. That is what he wrote
8 down in his diary. A very peculiar thing, but that is what it
9 was.

10 A That is true, and if it is testimonial, how-
11 ever, it is not under any --

12 Q Well, I can't imagine a jury wouldn't have
13 found that very effective evidence upon which to convict,
14 wouldn't it, that confession?

15 A Yes, but I hardly view that as the test. I
16 think the test is, of course, whether this was given under any
17 compulsion, and --

18 Q Well, he certainly didn't make it expecting --
19 putting it in his dresser drawer, expecting some police
20 officer to find it, did he?

21 A Well, I don't think that the compulsion goes
22 to the manner in which the document was acquired by the police.
23 I think the compulsion goes to the making of the statement.
24 And, of course, when the statement was made, it bears all the
25 indicia of reliability. Here is a man in his own apartment

1 writing down his own thoughts of the events of the day, so I
2 think there is no compulsion whatsoever. It is not as if the
3 officer has said, "You are under arrest, now write down what
4 you have done in the last twenty-four hours."

5 Now, some question was raised at the previous argu-
6 ment about why the officers looked at this diary. Well, I
7 stated that hypothetically the police might have been concerned
8 with finding a weapon or some contraband there, and I think
9 that the events of the last day or two give some weight to my
10 hypothetical.

11 It was interesting to read in The Washington Post
12 yesterday about a man who attempted to escape from Death Row
13 in Chicago and had in a hollowed-out book of the Collected
14 Works of Edgar Allen Poe a pistol, and he succeeded, I believe,
15 in wounding some of the guards.

16 Q The point to the extent you claim the search
17 was valid based on consent of the absent owner or co-tenant,
18 that really doesn't make much difference where they were
19 looking, does it?

20 A No, to that extent it would not make any dif-
21 ference.

22 Q And the California Supreme Court recurred to
23 the consent issue and relied on it itself, didn't they?

24 A No, in all fairness, I must say they did not
25 uphold this on the consent issue --

1 Q What did they say?

2 A There was a footnote in their opinion, and
3 that can be found in the Appendix, on page 76, Footnote 2,
4 that the consent issue would not be decided by that court be-
5 cause the facts surrounding it, whether it was not a mere sub-
6 mission to authority not bound up with unlawful conduct were
7 never developed.

8 In other words, the Supreme Court of California
9 chose to uphold the search on grounds other than consent, but
10 they --

11 Q The court upheld it as a search incident to a
12 lawful arrest --

13 A Yes.

14 Q -- albeit a mistaken identify, did it not?

15 A Yes, that is correct.

16 Q And decided the case before this Court's deci-
17 sion in *Chimel* --

18 A *Chimel*.

19 Q -- however it is pronounced -- and the question
20 is whether the search was consistent with the Fourth Amendment
21 as construed in *Chimel* and, if not, whether or not *Chimel*
22 should be given retroactivity or retroactive application.

23 A Yes.

24 Q Is that about it?

25 A Yes, that is it, and --

1 Q And there are other complications in this case
2 stemming from the mistaken identity and from the fact that a
3 diary was among the things that were found and was used against
4 the person and the possibility of Bader's consent.

5 A Yes. From the diary I would like to add a
6 couple more comments. First of all, Schnirver itself shifts
7 the -- notes the shift in the Fourth Amendment view from
8 property to persons in their right to privacy.

9 Q Was the Fifth Amendment issue presented in the
10 California Supreme Court?

11 A No, not anywhere, not anywhere from the pre-
12 liminary hearing --

13 Q You don't have any state decision on this at
14 all?

15 A No, none whatsoever, not even in the petition
16 for writ of certiorari, for the very first time in the opening
17 brief.

18 I would like to note perhaps one thing a little bit
19 collaterally, but the enormous effect of any ruling by this
20 Court holding that papers are somehow sacrosanct was brought
21 home to me recently working on the preparation of the Sirhan
22 Sirhan case, involving the diary of a political assassin. I
23 think that if there somehow is going to be a special rule for
24 papers, that the court has to be fully aware of the ramifica-
25 tions of this, giving special treatment to that.

1 Now, I would like to cover one aspect of the search
2 before getting to the retroactivity question, namely the law-
3 fulness of the search under Chimel, because we do not in any
4 way feel that the retroactivity issue is dispositive of this
5 case. And I think it is important to note that Chimel and the
6 cases upon which it relies have held that the requirement for
7 the search warrant should not routinely be dispensed with, but
8 that where it is impracticable to obtain a search warrant,
9 that one need not be obtained. And this is precisely a case
10 that comes within the exigent circumstances exception to
11 Chimel.

12 In Chimel, of course, the officers had weeks to ob-
13 tain a search warrant. Here, let's look at the chronology
14 leading up to the search. The offense was committed late on
15 a Saturday night. Only after 5:30 p.m. on the following
16 Monday, two days later, did the officers acquire their probable
17 cause to arrest petitioner. This was after court hours. They
18 would have had to wait well over twelve hours to obtain a
19 search warrant and perhaps more. It occurred to me that the
20 first Tuesday in California, at least, is a court holiday in
21 the month of June in election years, so this really might be a
22 thirty-six hour wait instead of a twelve hour wait.

23 Now, was there any reason why they shouldn't wait
24 this day or two? Well, the officers knew that there was a
25 fourth member of the robbery gang at large. This gang was

1 armed and dangerous. They had committed several other robber-
2 ies in the area. The officers knew that the weapons and the
3 stolen property were at petitioner's apartment, thus time was
4 of the essence. The officers were confronted with what was
5 very close to a hot pursuit situation, and there were these
6 reasons for not delaying the search until a search warrant
7 could be obtained.

8 Petitioner and a fourth member of the gang, one
9 Baca, were at large and they could still be committing other
10 assaults and robberies. Secondly, the arrest of two members
11 of the gang just two and a half hours before the search here
12 might alert petitioner to flee from the apartment and perhaps
13 from the jurisdiction; and, thirdly, if petitioner were
14 arrested that evening and the search of the apartment delayed
15 another day or two, that fourth man, Baca, might have come
16 back, being alerted by petitioner's arrest or the arrest of
17 the two other men, Bader and Baum, and realized that the of-
18 ficers would have seen incriminating evidence when they
19 arrested petitioner and then might have removed it.

20 Q When was petitioner arrested?

21 A Petitioner?

22 Q Yes.

23 A He was arrested about Thursday or Friday of
24 that week, but that is not in the record.

25 Q Well, I mean there is all this emergency for

1 the hot pursuit and all, you didn't get him until Thursday.

2 A But they didn't know that --

3 Q May I ask did you have a warrant then?

4 A No --

5 Q On Thursday?

6 A I don't know if there was a warrant or not.

7 Q Well, don't you think it is of interest to some
8 people as to whether you had an arrest warrant or not?

9 A It is of great interest to me, too, but it is
10 nowhere in the record, not even in the local court's record.

11 Now, I think any --

12 MR. CHIEF JUSTICE BURGER: May I interrupt you a
13 moment. How much time will you want for rebuttal?

14 MR. AMATO: One minute, Your Honor.

15 MR. GEORGE: I think it is significant that the
16 officers knew that both guns in the robbery and all of the
17 remaining stolen property were on these premises and that
18 these were armed and dangerous men and they had to act
19 quickly.

20 Now, I won't go into it in detail, but the problem
21 of exigent circumstances is graphically demonstrated in the
22 amicus curiae brief filed by the Americans for Effective Law
23 Enforcement, Et Al. They demonstrate the practical necessities
24 for having a meaningful exigent circumstances exception to the
25 Chimel rule.

1 The brief that that organization has filed details
2 a couple of presently pending cases where the murder weapon
3 itself was disposed of during the time that the officers sought
4 to comply with Chimel and went out to try and get the search
5 warrant.

6 Now, one related problem, of course, is what can be
7 done to secure the premises, and that is one of the most seri-
8 ous problems, and in California our view is that the premises
9 cannot be secured to the extent that people who are not in-
10 volved in criminal conduct are restrained, their movements are
11 followed around the house, perhaps a matron has to come be-
12 cause the wife of the petitioner is there, she wants to use
13 the facilities, she could dispose of evidence. You would have
14 to have an armada of men and equipment there to follow every-
15 body around the house, so I think there is a serious problem
16 about that, and that is what has been most difficult to live
17 with under the Chimel decision.

18 Now, as far as retroactivity is concerned, we have
19 detailed our views in the brief, and I think it is important,
20 of course, to apply a fully prospective test to the Chimel de-
21 cision. The purpose of the decision, of course, is to deter
22 unlawful police conduct. That is not going to be deterred by
23 punishing police officers for what they did, relying on the
24 existing law as decided by this Court several years ago, and
25 after two or three years ago specifically at the time this

1 search was conducted. There certainly has been reliance and
2 the effect on the administration of justice of the retroactive
3 application of this Chimel decision would be, I submit, greater
4 than the effect of any decision of this Court on the administra-
5 tion of justice. Just thousands of prisoners would be sent
6 back for new trials and unquestionably could be retired.

7 And I would like to lodge with the Court an original
8 and ten copies of a memorandum which I provided petitioner
9 here, a man-hour cost study regarding the Chimel decision, and
10 that report is very significant in indicating that annually
11 the Chimel decision will cost the Los Angeles Police Depart-
12 ment alone an additional 86,000 man-hours, and the monetary
13 cost is close to half a million dollars, and that is just for
14 police officers, not the clerical help and the equipment that
15 this is --

16 Q Is there anything there about what the cost
17 would be to get search warrants in Los Angeles County?

18 A This is what I am referring to --

19 Q I thought you were talking about all of these
20 people you have to have in the building and all --

21 A To get search warrants. It is a very involved
22 process.

23 Q To prepare search warrants, that is what it is
24 limited to?

25 A To obtain search warrants. That is all that I

1 am talking about here, to draw up affidavits.

2 I see my time is up. Could I prevail upon the Court
3 for an additional minute.

4 And this is just the cost of police officers, not
5 clerical personnel. Now, this I believe averages out to about
6 thirty extra police officers for the City of Los Angeles a
7 year, because of this, and consequently one can imagine the
8 retroactive application of this.

9 What I would like to note, in conclusion, as far as
10 the impact of this decision, is that this strikes at the most
11 sensitive nature of police work, the type of property crime,
12 burglaries particularly, where the rate of recovery is lowest.
13 It might be of interest to Your Honors to note that less than
14 10 percent of stolen property is recovered.

15 Now, when the time it takes to obtain a search war-
16 rant in each case, which is several hours, is multiplied by
17 the hundreds of situations every day that occur necessitating
18 one under the Chimel decision, one can see the impact of this
19 decisions. One can easily point to one case or the other
20 case and say a warrant could have been obtained here, but if
21 one looks at the overall impact, it is quite apparent with
22 two million burglaries being committed annually in this
23 country, 265,000 of them in California, that there is indeed
24 a real problem of just not getting snowed under by police
25 work.

1 So for these reasons we would submit very, very
2 strongly that the date of prospectivity should be adopted
3 that all searches conducted previous to the date of Chimel not
4 be governed by the rule of that decision, and we urge that the
5 search and seizure in this case was lawful in all respects.

6 Thank you.

7 MR. CHIEF JUSTICE BURGER: Thank you. The document
8 you referred to will be considered as lodged with the Court,
9 and the Court will pass on it in due time.

10 Mr. Amato?

11 ARGUMENT OF JOSEPH AMATO, ESQ. -- REBUTTAL

12 MR. AMATO: Just briefly, Your Honor.

13 I would like to just hit on four points, Your Honor,
14 very briefly. The first one, insofar as the Fifth Amendment
15 was concerned, of course the problem there is interwoven with
16 the Fourth Amendment in many respects. The reason it wasn't
17 specifically brought out on appeal is because it wasn't ob-
18 jected to at the trial. I have nowhere indicated at any time
19 during the court of appeals, supreme court or petition that
20 this wasn't a consideration. It was only not mentioned because
21 the trial attorney at that time didn't object on those par-
22 ticular grounds.

23 Q Could it have been made? Is there a rule in
24 California that says you may not bring before the court some-
25 thing that wasn't raise in the court below?

1 A Well, that is correct, Your Honor, there is a
2 court ruling that you cannot. I could have brought it in on
3 ineffective counsel, however he, I didn't think --

4 Q Even to the extent that you did here, in the
5 California Supreme Court?

6 A Yes, Your Honor -- oh, as far as the brief?

7 Q Yes.

8 A No, Your Honor, I did not.

9 Q You did not brief it? You briefed Boyd here.

10 A That's correct.

11 Q But you did not in the California Supreme
12 Court?

13 A That is correct, I did not.

14 The second basis was Bader's consent. Now, insofar
15 as consent, the petitioner contends strongly that there was no
16 consent given. I think the words in the transcript are, and I
17 quote, that "he could go to petitioner's apartment," and I
18 think that is a far cry from giving consent to search into
19 drawers in the bedroom.

20 The third point that I would like to --

21 Q Well, on that question, what do you suppose
22 an officer would think he was being authorized to do if Mr.
23 Bader said "you may go to my apartment"?

24 A Well, I would think, Your Honor --

25 Q Just to look at the apartment?

1 A -- is to go see Mr. Hill and inquire of Mr.
2 Hill what the circumstances were. He doesn't say "you can
3 search my drawers and search my places." I would say he could
4 go to the apartment and meet Mr. Hill at that --

5 Q Suppose Mr. Hill or Mr. Miller or anybody else
6 being around, there was a cleaning lady there that day and he
7 said "Mr. Bader told us that we could come to the apartment,"
8 and she let them in?

9 A I would say still, Your Honor, that the same
10 thing applies. I think, on two counts: one is he wasn't
11 given express permission to search; and secondly, there is
12 another serious question as to whether another person can give
13 up the constitutional privacy of another party.

14 Now, insofar as the amicus curiae brief on behalf
15 of the Attorney General of California and the police chiefs
16 across the country, I too believe that this is a good case,
17 that guidelines could be set as to what the police can and
18 cannot do. But it still doesn't take even those examples
19 really to go back to this particular case. The examples there
20 are pretty extreme and yet -- that the Attorney General points
21 out in Colorado -- that in all those cases that he points out
22 those extreme examples which certainly there is a necessity
23 for guidelines.

24 The Attorney General was able to get convictions in
25 all those matters expressed, even though they had to go and

1 get the search warrants. In this case, I think it isn't that
2 close of an issue.

3 Now, insofar as retroactivity, and counsel has in-
4 dicated that thirty officers in Los Angeles will be required
5 if it is made retroactive, the Chimel decision --

6 Q I understood him to say thirty officers, addi-
7 tional officers in Los Angeles will be required just to carry
8 out the Chimel decision. I think that argument was made --

9 A That is correct, Your Honor. That is what I
10 was alluding to.

11 Q Yes.

12 A But improperly stated it. The point that I
13 would like to make is that we draw some happy medium and drop
14 it from maybe thirty officers to one officer on direct appeal.
15 Those cases certainly out-number, at least on a 30:1 basis.

16 Q Well, retroactivity wouldn't require any more
17 officers now. You can't un-ring a bell. You can't -- if this
18 was an unconstitutional search, there is no way to constitu-
19 tionalize it now. You can't go back and get a search warrant
20 and go and --

21 A Then I ask what is the purpose of the thirty
22 officer? What difference does that basically make? In other
23 words, the inference that I got -- although I didn't quite
24 understand it -- if you need thirty officers on something
25 that is already past, you don't need any officers. What

1 difference does it make?

2 I thought the point he was trying to bring out was
3 the fact that if you make it completely retroactive you are
4 going to accumulate a lot of this evidence based on past cases.
5 And now I am saying that if you have to get additional man-
6 power, that if you make it only on direct appeal, certainly a
7 30:1 ratio isn't unreasonable in light of all the years that
8 are involved prior to Chimel versus the cases on appeal.

9 And I would like to conclude with this last point,
10 that I was going to mention until counsel mentioned about the
11 numbers of crimes and so forth. I don't stand up here for
12 crime, and I hope no attorney or citizen does, but certainly
13 numbers can be misleading. And I think early in this case I
14 pointed that out, where the gravity of this crime was elevated
15 to kidnapping where, in fact, Carl Chessman died under this
16 same penal code section. And this Court knows the facts of
17 this case, and certainly he was subjected to the death penalty
18 also, and yet it would have been totally unreasonable in this
19 case, just as we indicated, it would have been totally un-
20 reasonable to go into the bedroom and to get that diary and
21 there is no indication that this particular diary was in a
22 book.

23 The only evidence -- and if it was in a book, it
24 should have been brought out by the prosecution -- the only
25 evidence is that there were two pages of a diary. No weapons

1 or supposedly no weapons could have been within those two
2 pages. There is no evidence to indicate there was anything
3 different than an ordinary two sheets of paper. I would sub-
4 mit strongly, Your Honors, in the interests really of justice
5 in this particular case, that this Court reverse the supreme
6 court and affirm the court of appeals.

7 Thank you.

8 MR. CHIEF JUSTICE BURGER: Thank you. The case is
9 submitted.

10 Counsel, you were appointed to act in this case and
11 acted at our request and our appointment?

12 MR. AMATO: Yes, sir.

13 MR. CHIEF JUSTICE BURGER: On behalf of the Court,
14 I want to thank you for your assistance not only to the
15 petitioner, your client, but your assistance to the Court.

16 MR. AMATO: Thank you, Mr. Chief Justice.

17 (Whereupon, at 2:55 o'clock p.m., argument in the
18 above-entitled matter was concluded.)

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