Supreme Court of the United States

OCTOBER TERM 1970

In the Matter of:

JOSEPH ELKANICH,

Petitioner,

vs.

UNITED STATE,

Respondent.

Docket No. 82

Place Washington, D. C.

Date October 21, 1970

ALDERSON REPORTING COMPANY, INC.

300 Seventh Street, S. W.

Washington, D. C.

NA 8-2345

C O N T E N T S

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

JOSEPH ELKANICH, Petitioner,	:	
vs.	:	No. 82
UNITED STATES, Respondent.	:	

Washington, D. C.,

Wednesday, October 21, 1970.

The above-entitled matter came on for argument at 11:12 o'clock a.m.

BEFORE:

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

APPEARANCES:

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Counsel for Petitioner

JAMES van R. SPRINGER, ESQ.,
Office of Solicitor General,
Department of Justice

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PROCEEDINGS

MR. CHIEF JUSTICE BURGER: We will hear argument in No. 82, Elkanich vs. United States.

Mr. Miller, you may proceed whenever you are ready.

ARGUMENT OF CHARLES A. MILLER, ESQ.,

ON BEHALF OF PETITIONER

MR. MILLER: Mr. Chief Justice, may it please the Court, this case and the two that follow present the question of the extent of retroactive application of the decision in Chimel vs. California, decided in the 1968 Term.

Chimel dealt with the permissible scope of a search without a warrant, but pursuant to a lawful arrest. The Fourth Amendment has long been understood to permit a search without warrant as incident to a valid arrest. The question in Chimel was how far can a search go and still be deemed incident to a valid arrest.

In that case the Court held that to be incident to an arrest, a search must be confined to the person arrested or to the immediate vicinity from which he might reach weapons or destructible evidence. Any search beyond the immediate person or the immediate vicinity without a validly issued search warrant would violate the Fourth Amendment.

Q Does it encompass anything that he can see?

A Pardon?

Q Does it encompass anything which he can see in

the place where he is making the search?

A He is the defendant?

Q What?

A He is the defendant.

Q The searcher.

A The searcher. I think that there is other doctrine, not necessarily emanating from Chimel, that holds that if the officer is legally on the premises he may seize any contraband or other fruits of crime that are visible to him.

Q A pistol, for example?

A Yes. I think a postol, yes.

Now, in Chimel, the rule of that casewas applied to invalidate a search of an entire house in which the defendant was arrested. In present case, the petitioner was convicted on the basis of evidence seized at the time of his arrest when the arresting officers had no warrant. He was arrested in his apartment; after entry into the apartment and arrest of petitioner, the arresting officers proceeded to search throughout the apartment.

In the course of their search, they uncovered hidden in the closets and in the kitchen certain evidence that was material to petitioner's conviction.

Now, conceivably, the search without warrant in this case went far beyond the petitioner's person or the immediate vicinity of his arrest, and the government makes no claim now

in this case that the search was incident to the arrest within the meaning of that term as defined in Chimel. The government does urge, however, that the search here ought not be deemed a violation of the standard announced in Chimel because there were exigent circumstances that justified a broader search without warrant than would otherwise be permitted under the Chimel doctrine.

We treat this point in our reply brief and it warrants just a few words this morning. The exigent circumstances alleged here by the government were that the petitioner's wife was present in the apartment at the time of his arrest and that she might dispose of incriminating evidence if a search and seizure were not immediately undertaken.

This explanation for the warrantless search is virtually identical to the justification for a similar warrantless search ofa dwelling in last year's case of Vail vs. Louisiana. The argument was rejected in that case. There the court held that the requirement for a warrant for search of a dwelling was subject only to a few well recognized exceptions, and that the asserted justification advanced there, which is identical to the one advanced here, did not fall within one of those exceptions.

Now, the government contends that the present case is different because the officers here were concerned that petitioner might be forewarned of his imminent arrest and flee,

and that this justified the officers in making the arrest and the search without first securing the warrant. Now, the basis of this claim is that an alleged middleman in the narcotics dealings, of which petitioner was accused, was in custody and that he knew, he the middleman, knew that the officials were seeking his supplier and that he might therefore forewas his supplier by telephone.

We think this claim to be insufficient on the facts. The alleged middleman here had been in custody for two days prior to the arrest of petitioner. Had he been disposed and able to forewarn his supplier, he would have done so long before petitioner was arrested. Moreover, it does not seem likely to us that the middleman's captors would have allowed him unrestricted access to a telephone for the purpose of forewarning accomplices of impending arrest.

Q Well, what led to government's point that his common law wife could very well destroy it after he was arrested?

A Well, Your Honor, that was -- that is the precise point made in Vail by the arresting officers in that case, and the Court that is insufficient grounds for not securing a warrant before making the search, and that is exactly the point we make here.

Q This isn't here on direct review, is it?

A No, Your Honor, this is here on collateral

attack. This is collateral review. This conviction became final -- it was denied I think in 1967, I believe -- 1964, I am correct.

Q Yes.

A In short, on this aspect of the case, which I will leave, the government we don't believe has shown that the arresting officers in this case were justified in searching petitioner's apartment without first securing a warrant. We think it is beyond serious dispute that the search and seizure in this case cannot pass muster under the standards for searches incident to arrest that were announced in the Chimel case.

And so we come to the question of whether Chimel should be applied retroactively in this case which, as I said, Mr. Justice Harlan, arises on collateral review of petitioner's conviction.

We begin with the basic rule of Weeks vs. United States and its progeny that a physical search of the person or his dwelling must be pursuant to a valid search warrant issued by a magistrate upon a showing of probable cause. Now, there are exceptions to this principle, one of which is that a search warrant may be conducted as -- excuse me, a search may be conducted as an incident to a lawful arrest.

This Court typically decides federal cases each year that explicate the basic Weeks rule or its generally recognized exceptions. No one would reasonably suggest that each of these

decisions in each term of this Court be given only prospective effect, and we know of no such contention. Indeed the government here concedes that this result of automatic prospectivity might result in an intolerable burden of sorting out the effective date of each nuance of the basic rule.

Even more intolerable, we submit, would be a regime whereby this Court considered separately in each of these many Fourth Amendment cases whether to apply the case retroactively or prospectively. And yet we recognize that the Court in recent years has limited application of some of its criminal procedure decisions, including some decisions arising under the Fourth Amendment search and seizure provision. And the question as we see it is therefore in what kind of case, in what class of case should the Court make a determination as to whether to apply a criminal procedure decision retroactively effectively.

Linkletter vs. Walker --

Q May I ask you -- perhaps it is in the brief, but I missed it -- who is the author of the Appendix to your brief, the memorandum?

A It was prepared in my office, sir, as stated. I think we stated --

Q It probably is. I just missed it. It is not a --

A It is at the outset of the argument there.

Q It is not a published --

A No, no, sir, it is part of our argument.

Q Right.

A As we indicated here, the Court had not indicated prior to this time, at the time we filed our brief, a disposition to review the entire question of retroactivity.

Q Yes.

A And so we didn't feel that an extended argument on the point was warranted, but --

Q That is the reason you state that.

A -- that is the reason the Appendix seems to be appropriate.

Q I understand.

A It also helped to sort out some of the cases in the argument that I am going to make this morning. I do think that Linkletter vs. Walker, which is the root case in this area, does not answer the question that is now before this Court in this case, which is when do you make the determination of retroactivity.

Linkletter vs. Walker sets out standards for deciding the question when the question is presented to the Court. It doesn't deal with it when that question is appropriately raised. However, we think that upon reviewing some of the retroactivity decisions, including those set forth in the Appendix, Mr. Justice Stewart, that there emerges from those cases an appropriate test as to when the question of

retroactivity ought to be raised.

There are seven instances in which constitutional decisions have not been given fully retroactive effect. Each of these decisions involve the extension of a constitutional provision to a wholly new area of activity where it had not been thought previously to apply. For example, in the Katz case, which was given retroactive -- I mean prospective only effect in Desist.

The protection of the Fourth Amendment was extended for the first time to electronics eavesdropping or non-treaspassory invasion of privacy. Now, in Miranda and Escobedo, whose backward reach was limited in Johnson vs. New Jersey, the right to counsel in police interrogations before as well as after indictment was established for the first time. And in the Wade-Gilbert case, which was given prospective only effect in Stovall, the right to counsel at lineups was announced for the first time. Similarly, in Mapp vs. Ohio, given limited retroactive effect, as Linkletter, was an extension of the exclusionary rule to the states for the first time. In jury cases, Bloom vs. Illinois and Duncan vs. Louisiana, which were given prospective only effect in DeStefano.

Those cases extended the right to trial by jury in all state cases for the first time. Finally, the Griffin case, which was given prospective only effect in Tehan, extended the Fifth Amendment self-incrimination provision to comments by

the judge for the first time.

All of these cases involve the extension of a constitutional provision to a new area of activity where it had not previously been felt to apply. However, the Chimel decision, which is before us today, is of a very different nature from those cases that I have just canvassed.

Chimel does not extend the Fourth Amendment to an area of activity where it had not been thought previously to apply. From the beginning, it has been clear that physical searches must meet Fourth Amendment standards; even where being incident to a valid arrest, so that a warrant is not mandated, a physical search is still within the ambit of the Fourth Amendment.

Chimel, like many other cases, simply added refinement to the principle of law that searches incident to a valid arrest may be conducted without a warrant. Chimel dealt with the dividing line between searches incident to arrest, which needn't be accompanied by a warrant, and those that meet the Fourth Amendment reasonableness standard because -- I think I said that wrong.

Chimel, in effect, dealt with the dividing line between searches for which a warrant is required and those for which a warrant is not required but which otherwise meet the Fourth Amendment reasonableness standard.

As a result of Chimel, that dividing line was moved

somewhat and so the incident to arrest doctrine has been constricted.

Q What would you say about the pre-Rabinowitz law? Would you think Chimel went beyond that?

A Well, Mr. Justice, the rationale with Chimel was that it was a return to pre-Rabinowitz law.

Q That is what I thought.

A And I would, without having a thorough review of the facts of each case prior to Rabinowitz, it is hard to say whether the precise -- whether the term was precisely on all fours to what the law was before or just to the general area of where the law was before.

Q But on your retroactivity suggestion, your retroactivity formula, this is not a hundred percent clear case that the court is making a brand new constitutional rule, is it?

A I think it is clear in the context which I have used it this morning, that Chimel did not represent --

Q Did not, yes.

A -- a distinction of the Constitution to a new area of activity.

Q All right.

A Even where an arrest was incident -- even where a search was an appropriate incident to arrest, whether by the Rabinowitz standard or by the pre-Rabinowitz standard or by

Chimel standard, it was still within the ambit of the Fourth Amendment. It still had to meet the reasonableness standard. No one has ever suggested that a physical search was wholly unrelated to the Fourth Amendment.

Actually, we think that Chimel does not really differ at all from other decisions of this Court, recent decisions, in which retroactive application has been assumed, and the car-search cases are good examples. They also happen to deal with the incident to arrest doctrine.

In the Preston case, in 376 U.S., the Court ruled that a search of a car in police custody after the driver had been removed and placed in jail was too remote to be considered incident to a lawful arrest, consequently a warrant was required.

But last term, in Chambers vs. Maroney, the Court held in almost identical factual circumstances that the car search there was incident to arrest. Now, I don't believe it is contended by anyone seriously that the Chambers case should not be given retroactive effect and that the stricter Preston rule --

Q You don't agree with everything in Chambers, do you?

A I understand -- and I am going to point out later -- that the Court, in dealing with Preston and Chambers sought to distinguish Preston, and I want to come to that in

a moment, Mr. Justice White. It is -- distinguishing cases is one way of limiting their application, just as overruling is another way.

But another illustration of the point I now make is Warden vs. Hayden, in 387 U.S. I think this is perhaps an even more appropriate example. Here is a case where the prevailing doctrine that seizure of mere evidence of crime was not permitted under the Fourth Amendment was rejected. There had been a doctrine that the police could search and seize instrumentalities and the fruits of crime but not "mere evidence." Well, this Court rejected that distinction in the Warden vs. Hayden case. Yet, I know of no suggestion that Warden vs. Hayden should be applied only prospectively with the earlier mere evidence rule left on the books to apply to cases that antedated Warden.

Now, these examples and others, I think, illustrate an ebb and flow that is characteristic of decisions interpreting the Fourth Amendment, and Chimel is like those cases. It can't be distinguished from them and unless there are to be limits on the applicability of every Fourth Amendment decision, an approach that I think would admittedly wreak havoc with the administration of justice, there can be no reasonable basis for limiting the application of Chimel.

It may be suggested that Chimel is different because it expressly overruled prior precedent, the Rabinowitz and

Harris cases, and this, I think, comes to the point that Mr. Justice White touched on.

I respectfully suggest that this would not be a meaningful distinction of the Chimel decision from the other myriad of Fourth Amendment decisions announced every year by this Court. Many of the Court decisions have the effect of dissipating earlier precedence. Sometimes it is done by an express overruling, sometimes by distinguishing a case out of existence or distinguishing it in a way that narrowly limits its ambit. Sometimes cases are discarded without mention at all, and Chambers is a good example, because there the Court did not purport to overrule Preston but it cannot be denied that the Chambers decision narrows the reach of Preston. There can't be too much left of Preston after Chambers.

Indeed, the Vail decisions of last term, which I mentioned earlier, provides a different illustration of this point. Vail refused to permit a search without warrant of a dweeling as an incident to an arrest of the man standing on the front steps of the dwelling.

Q There was a little dispute over where he was standing, wasn't there?

A Well, yes, it was --

Q The facts weren't very clear.

A It was somewhere outside the front door of his house. He may have been as far as all the way to the street,

and he may have been one step from the front door. He was on the threshold or close to it.

Q Certainly on the figurative threshold of going into his house --

A Yes, sir.

Q -- and not on the physical threshold?

A That is correct. Now, the principle of that case is that it cannot be consistent with the underpinnings of Rabinowitz and Harris, which were that you can, incident to arrest, search any place within the control of the person arrested. Certainly, in that situation, his house was within his control.

Had Chimel not intervened to overrule Rabinowitz or put it aside, it clearly would have been said that Vail eroded most if notall of the basis of Rabinowitz. Yet there is no indication that Vail could be applied prospectively only. It is simply another in the continuum of cases that add judicial interpretation to the meaning of the basic rule that physical searches must be made pursuant to warrant except where incident to a lawful arrest.

Yet, it would be quite anomalous to hold that Chimel, which involved a search without warrant after arrest just inside the door, is not to be given retroactive effect if Vail, which involved a search without warrant after arrest just outside the door, is to be given retroactive effect.

The point is that there is nothing unique about the express overruling of a prior precedent that would warrant limiting the effect of a particular new decision. And we think the Gideon case and Jackson vs. Denno, both of which expressly overruled prior precedents, yet both of which enjoy full retroactive application, further indicate that there is no necessary requirement that a decision which overrules past precedent be given only prospective effect.

Now, the government in its brief has asserted a different test for determining when to consider limiting the application of new procedural due process rulings, and the government's test is whether the new decision is a landmark decision, and if it is landmark the Court then may consider giving it prospective only effect. That is the government's position at page 45.

With all respect, we submit that this distinction affords no real standard. The term "landmark" is not an objective standard and provides no basis for distinguishing cases. It cannot be said, for example, that Chamber, which altered the prevailing law on the appropriateness of the search of a car incident to arrest, is more or less a landmark decision than Chimel, which altered the prevailing law on the appropriateness of the search of a house as incident to an arrest.

The rubric landmark does not answer the question at issue, which is to what class of cases should the Court

consider giving prospective only application. We submit that the only objective distinction that can be drawn, and that has in effect been drawn in the cases to date, is between rulings extending the Fourth Amendment and other constitutional decisions to new areas of activity where they were previously not applied on the one hand, and on the other hand rulings that merely explicate the meaning of a constitutional provision without extending it to a new area of activity.

The office of the Linkletter-Desist line of cases ought to be limited to those constitutional decisions where the Constitution has been extended to new areas of activity. For these other cases, the traditional rule of full retroactive application should be observed for any other rule for these cases that ultimately lead to chaos and disruption in the administration of the criminal law.

Q One factor in a Fourth Amendment cases is different, it seems to me, when considering a question of retroactivity from what it might be in right to counsel cases or something else, and that is because the Fourth Amendment talks about unreasonable searches and seizures, and then the question becomes is it an unreasonable search or seizure if a law enforcement officer makes a search or seizure relying on the settled law as of the time he makes the search and seizure.

In other words, is it even a constitutional violation for a law enforcement officer to make an arrest and then

an incident search and seizure in reliance on the settled law then on the books, i.e. Harris and Rabinowitz, is that even a constitutional violation, because is it an unreasonable search and seizure?

It adds a little complication to the simple question of retroactivity in a Fourth Amendment case, does it not, just simply because of the wording in the Fourth Amendment?

A Well, I can see, Mr. Justice Stewart, that what your question suggests is that what may reasonable in 1950 may on the same facts be unreasonable in 1960.

Q Well, it is certainly difficult to say that a law enforcement officer is acting unreasonably when he is acting in accord with the then decisional law of this Court under the Fourth Amendment, is it not?

A Well, that may be so but if that were the case, then how can one explain the Chimel decision, where the officer was acting reasonably by the standard that you have just suggested, because the Court, acting in accordance with the Rabinowitz case, which was on the books as of the time of the first search in Chimel?

I realize that you may say, well, we have to decide cases and that is one of the prices we pay for deciding cases. But I suggest that that is not a complete answer. I suggest indeed that that answer carries the seeds of a broader answer to your question. Chimel happened to be convenient in that it

involved a past precedent which was expressly overruled. In the whole range of Fourth Amendment cases, there are many cases that do not present on all four facts that have previously been before this Court. Infinite gradations of reasonableness are presented in every case.

If an officer could, by some hindsight justification, point to some earlier decision of the courts from which it could be interpreted that his action was reasonable under the suggestion you just made, that would automatically result in affirmance. I think, with all respect, Mr. Justice, that the reasonableness term is not quite that elastic in the Fourth Amendment area.

Q Well, what interest do you think should be given to the finality interests in determining upon a retroactivity rule?

A Mr. Justice, I haven't attempted in our brief to go into an extended discussion of that obviously pertinent point of finality because it has been canvassed so thoroughly by this Court in recent decisions, such as Kaufman and others. And there are differences of opinion on them, as you are well aware.

Kaufman, I think, establishes the proposition that whatever else may be said, notions of finality underlay earlier decisions of this Court are not to be given the same effect, the same exalted position as they once were. Finality

is an important matter, but this cuts across all cases involving retroactivity questions; as against finalty is the interest in maintaining in prison or in custody one who has been convicted in ways which we now determine are contrary to the Constitution, and I think that question is not unique to Chimel, that it arises in every case in which retroactivity questions arise.

Q Mr. Miller, I am sure you would agree that if we had an amendment to the Constitution in the formal conventional way -- you can make constitutional amendments, like the recent one -- there would be no question about retroactivity of that amendment unless by its terms, it was done -- which isn't very often likely -- is that right?

A I am sure that is correct, Mr. Chief Justice.

Q Well, when the Court makes a marked change in the thrust and scope of the Constitution, why should the rule be any different, having in mind Justice Stewart's suggestion about official reliance?

A I think I would agree with you. I think indeed that is the point I have tried to assert this morning. When there is a distinction that is marked, a landmark or whatever word you want to --

Q I didn't want to use landmark. That is a news media word and not a legal word.

A What I am suggesting is, Mr. Chief Justice,

that a mere adjective like marked, landmark and important or other --

Q I said marked change, not marked opinion, a marked change in the thrust and scope of an existing provision of the Constitution.

A Well --

Q Then shouldn't it fall under the same rule of prospectivity as formal and official amendments to the Constitution?

A I would say no, Your Honor, not -- if the result is to extend the constitutional provision to a new area, where it had not previously been applied, then I would say yes. But a change that simply -- a change such as in Chimel, which may or may not be a marked change, but it is conceivably a change -- I would say no, because once you agree that a change in the law gives rise to prospectivity or the possibility of it, you inevitably are led to the regime where every case must be reviewed for prospective or retroactive applications, because this Court, by definition, practically every case changes the law to some extent. This Court doesn't sit on typical cases. It sits on cases at the edge of the law. It extends or contracts it.

Q Over the years, hasn't it been the dominant rationale of all the exclusion doctrines to deter official governmental conduct which is in violation of the Constitution

or statute, the deterrence concept? Isn't that the most constant thread through all the exclusion cases?

A I would say certainly in the Fourth Amendment cases, I would agree with you.

Q Well, how does the deterrence concept come in, again picking up Justice Stewart's point, how does the deterrence concept come into play when the action, as taken by the officer at the time, under Rabinowitz and prior interpretations, was perfectly proper?

A I would like to answer that in two ways, if I may. First, I think there may be some tendency to exalt the notion of official reliance on the decisions of this Court, and especially that is true in an area like the incident to arrest area, where it is typified by decisions like Rabinowitz which say that each case turns on its own facts. I think the circumstances must govern in every case, and we can make no real hard and fast rule.

We have quoted the language from Rabinowitz in our brief which seems to me to suggest that we can carry it at least to some reasonable extreme, the notion that officers were relying on Supreme Court decisions every time they take an action in this area; but beyond that it seems to me that the question that you have just raised is typical of the questions that are asked when one is applying the Linkletter vs. Walker standards. That is one of the questions that is

discussed in every case.

We suggest that Linkletter vs. Walker standards, a Linkletter vs. Walker analysis need not and ought not be made in every criminal decision of this Court because of the disruptive effects that it would have -- that would ensue. And so what I am suggesting is that the Linkletter vs. Walker type of analysis ought to be limited to a certain class of cases, and I have tried this morning to set out that class of cases in which I think it has heretofore been limited and which it ought to be limited in the future.

I see my time is up. Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Miller.

Mr. Springer, you may proceed whenever you are ready.

ARGUMENT OF JAMES VAN R. SPRINGER, ESQ.,

ON BEHALF OF THE UNITED STATES

MR. SPRINGER: Mr. Chief Justice, may it please the Court, without anticipating here the argument in the next case, which I will also be doing for the government, the Williams case, it may be helpful to take a minute at the outset to outline the issues that are in this pair of related cases and the government's position and presentation in each of them.

The present case, the Elkanich case, can, we think, be affirmed on either of two grounds, and I think Mr. Miller

has acknowledged that, at least to the former matter, first that the search, which happened long before Chimel, was valid under pre-Chimel standards and Chimel should not be applied retroactively here on court review; and, second, that even apart from that, even assuming that Chimel did apply, the search in this case would be consistent with the principles of Chimel in view of the conglomeration of special circumstances that I will discuss in a couple of minutes.

In the next case, the Williams case, it is similarly argued that the search was valid under the pre-Chimel standards. Of course, when the search was made, though Williams contests that proposition, as I think it is fair to say, and Elkanich does not, but we do not argue that the Williams search would be valid if it had taken place after Chimel. Accordingly, we urge the Court to affirm the Williams judgment on the sole ground of non-retroactivity of Chimel.

Now, on this retroactivity issue that is common to the two cases, they differ in that, as I have indicated, Elkanich comes here on collateral review, whereas Williams is here on direct review of the conviction and was in fact pending in the Court of Appeals when Chimel was decided.

For reasons that I will go into in my next case, we think that makes no difference since the crucial dividing point for retroactivity purposes should be the base of the search, as the Court held in Desist.

My argument on retroactivity in the present case will be a simple one, in order to prevail on that issue, I think, Elkanich would have to convince the Court that Chimel should be fully retroactive without regard to more delicate questions of providing -- but before I go into the retroactivity question in this case, I would like to turn first to our proposition that the search of Elkanich's apartment was under all the circumstances one that would be valid even if it were carried on today. This is a very important proposition for the government and we assert it just as strenuously here as we do the non-retroactivity point, even though it may not be necessary to reach it, depending on how the Court decides the case.

On the search question, we start with the premise, which is not contested, that this was a search made pursuant to a valid arrest without a warrant. In fact, the validity of the arrest was the question that was litigated on direct review in 1963 and 1964. The Court of Appeals held that there was ample probable cause to arrest Elkanich in his apartment. This court denied certiorari and, as I think I indicated, there is no issue as to the validity of the arrest here on collateral review.

We acknowledge, however, that the search of the apartment, of Elkanich's apartment, was more extensive that what Chimel indicated would routinely be appropriate as an

incident to an arrest without a search warrant in the future. It was not simply a search of Elkanich himself and the area within his immediate control where he could obtain weapons or destructible evidence. We acknowledge, this was a search by several narcotics agents, and in at least two of the three rooms of Elkanich's small apartment, and that it went on for some time.

Q How long? An hour would you say?

A That is a little unclear. The agents were there roughly an hour. The record suggests that they spent a good deal of time trying to persuade Elkanich to cooperate with them and reveal his sources. So it is hard to reestablish exactly how many agents spent how long search through things. We do admit, though, that it was a search of some scope and time.

The products of the search which were introduced in evidence were really two things, marked currency, which was found in a kitchen closet, and a plastic bag which was found in the living room closet and which was similar to the plastic bag that had been used in some of the sales of narcotics, sales of heroin that were involved in the trial.

But, as I indicated, we believe the combination of special circumstances here did make this search reasonable without -- and that the search therefore should not be judged solely by the standards established in Chimel as to

routine searches pursuant to arrest. This we say was not a routine search.

We think that there were really three exceptional factors here: First, we think the record shows that there was probable cause for the relatively narrowly focused search in terms of what the agents apparently were looking for and what they found, what actually occurred here.

Second, there was a real danger, we think the record shows, that if agents did not search the apartment when they did, when they went there to arrest Elkanich, the evidence they reasonably expected to find in the apartment would be removed or destroyed.

And third, and I think most important in distinguishing this case from some of the others that have been mentioned, the circumstances leading up to the arrest had brought the agents to the apartment with such genuine urgency that it was not reasonably practicable for them to obtain a search warrant, even though we think they could have if they had had time.

Q Mr. Miller pointed out that the Court, this Court, in Vail last year appears to have at least rejected the idea that the practical considerations are of no concern to the Court.

A I think --

Q At least that is what I take his argument to

be.

A I think, on examination of the opinion in Vail, the Court, the majority went to some pains to point out that that was not a case where it was impracticable to get a search warrant. So on this third point, which I emphasize because I think it is a more unique point, I think Vail does not by any means foreclose that. In Vail, the Court pointed out that there was time. I think there was an arrest warrant there, that there was time to get a search warrant. Now, there may have been some factual dispute, as I guess Vail was characterized by a good deal of factual dispute, but those were the terms at least which the majority cited in that case.

Q What was the reason in this case, I am still waiting, was it late at night?

A Well, I --

Q Oh, you are going to get to it.

A I will get to the facts which I think --

Q No rush.

A -- I hope to do before the lunch break.

Q No rush.

A Of course, as I indicated, we are not rearguing Chimel here, even though the dissenters in that case believe that the first two of the factors, probable cause and danger of loss of evidence, were present there. Again, I think this case is different from that because of the third

factor and, in fact, the Chimel rule, the statement of the rule in the majority opinion does not really focus on the two factors of probable cause and danger of loss of evidence, the dissenters pointed out. So I think Chimel has to be read as stating the rule for a routine search pursuant to an arrest.

This brings me, then, to the circumstances that we think make it impracable to obtain a warrant, and this will require me to state the facts of the case in considerably more detail than the petitioner did.

This case involved three sales of heroin by a man named Rios to an undercover agent, totalling about 60 grams, and these three sales were over the period of a week in the summer of 1962. The first sale was July 13, and then there were two more on July 18 and 19.

Each time the intermediary, Rios, was given marked currency by the undercover agent. He went away and came back with the heroin, which suggests, of course, that he was obtaining it from a then unknown third party. Rios was arrested on the afternoon, very shortly after the last of the sales, on July 19. On his person he had two keys and an address book. When questioned that afternoon about his source of supply, he would say only that it was a Chinese seaman named "Charlie." We were unable to get any more information than this from Rios. The undercover agent, Mr. Lang, testified that he spent the evening of July 19 testing the keys he had found in an

apartment house where apparently he had some reason to suspect that the keys might belong. That was unsuccessful.

The case began to break on the afternoon of July 20, the next day, when Rios became a bit more talkative, maintaining his story about the Chinese seaman named "Charlie," but admitting that the keys were to Room 30 of a place called the Marlow Hotel. This, in fact, was a place where Lang had seen Rios go from across the street, apparently to obtain the heroin he bought from him at the first sale on July 16, so that the Marlow Hotel rang a bell in Lang's mind, based on his own observation of that sale.

Almost immediately Lang, still the same afternoon -- in fact, all the events of this case through the search take place over the period of perhaps three or four hours, between sometime in the afternoon, which isn't clear from the record, and about 6:00 p.m. when the search took place.

Lang, as I say, went promptly to the hotel to check out what Rios had told him about the keys. He found out from the manager of the hotel that on July 13, which was the night when presumably Room 30 had been used in connection with this sale, Room 30 had been rented not to any Chinese but to a person who signed his name as Joseph Elkanich, the petitioner in this case. The manager described him in considerable detail and said that he had been a little suspicious because the evidence indicated the next morning that he hadn't slept

in the room.

Lang then went right back to the Narcotics Headquarters, which I presume -- I gather all of these locations are in fairly close proximity to each other, since the events seem to have moved quite quickly -- there he looked up the files on Elkanich, found that he had been involved in smuggling of heroin in the Orient in the past. He had some other matters to attend to in court that afternoon, but as soon as he could he obtained pictures of Elkanich from the San Francisco police who he discovered had had arrested him and he had served some time on a local robbery, I believe, conviction. But he obtained pictures from them. Then he went back to the hotel and verified with the hotel clerk that these pictures looked like the man who had rented Room 30 on July 13, the night of the first sale.

I think it is fair to say that at this point, and probably at this point for the first time, probable cause to go after Elkanich had emerged. Elkanich was tied quite clearly to the place where apparently the narcotics had been obtained from, and it was perhaps reasonable to suspect that Elkanich had also been the source for the two other sales within a very short period of a few days that Rios had made to the agent.

Having suddenly discovered that Elkanich seemed to be the man, it was a matter of considerable urgency to the police, to the narcotics agents, to go after him. Rios had

obviously made efforts to conceal his source of supply. He had, the police discovered then, had access, as Mr. Miller mentioned, to a telephone at the county jail where he was being held. I don't suppose that the urgency depends on what he might have done after that point. He might well already have tipped off Elkanich and Elkanich might be packing to leave town or whatever, so it seemed to them that it was quite urgent to pursue Elkanich as promptly as they could and, in addition, assuming that there had been substantial dealings with Elkanich and Rios, Elkanich might without regard to any telephone call have suddenly discovered that his intermediary was missing.

So, in any event, the police, the agents felt, and I think in good faith and with substantial justification that they should find this man as soon as they could, and they proceeded very promptly to do so.

They checked with the telephone company by subpoena and discovered that he had an unlisted telephone, having listed an apartment at the address -- in fact, the apartment where he was, where they went to find him and arrested him and searched.

In addition, they found in the notebook which Rios had had on his person when he was arrested a notation of a telephone number for a man referred to as "Joe," and his telephone number was the telephone number that they had found

on the telephone.

MR. CHIEF JUSTICE BURGER: We will recess until 1:00 o'clock.

(Whereupon, at 12:00 o'clock meridian, the argument in the above-entitled matter was in recess, to reconvene at 1:00 o'clock p.m., the same day.)

AFTERNOON SESSION

1:00 p.m.

MR. CHIEF JUSTICE BURGER: Mr. Springer, I think you have the podium. You may continue whenever you are ready.

ARGUMENT OF JAMES VAN R. SPRINGER, ESQ.,

ON BEHALF OF THE UNITED STATES -- Resumed

MR. SPRINGER: Thank you, Mr. Chief Justice.

At the lunch hour, we left off at the verge of the trip by the agents to Elkanich's apartment where they arrested and searched. At that point it was about 5:45 on the same afternoon that the leads that led to the focus on Elkanich first came to the agents' attention and, as I indicated, the agents had reasonable grounds to believe that they should pursue Elkanich with as much urgency as they could.

At this time, at 5:45 in the afternoon, Agent Lang, who was handling the matter principally did try to reach the United States Commissioner. He any unable to do so. In any event, I think under the circumstances it might have been imprudent even if the Commissioner was right on hand perhaps to take the time for the mechanical and secretarial work of preparing papers looking toward a search warrant, but in any event they were unable to find the Commissioner and accordingly Lang and two other agents proceeded immediately to Elkanich's apartment where they arrested him and made the search.

Q What is your hypothesis, Mr. Springer, as to

what officers would do if, having arrived there as was the case in Vail vs. Louisiana last year, and then undertook to try to freeze the status quo while they sent one or more men off to get a warrant?

A Well, that --

Q What did the officers do to prevent the destruction of evidence, to prevent the flight or whatever?

A Well, that really leads me into another of the factors. Under these circumstances, it is fair to say there was nothing reasonable they could do to freeze the status in the apartment, pending efforts to get a search warrant.

Q Mr. Springer, what difference is there with this case and the average narcotics case?

A Well, I think, for example, we concede in the next case, in the Williams case, there is a good deal of difference. There there was an arrest warrant, the arrest was made on the basis of a sale of narcotics some three weeks before the arrest. I think that kind of case is probably also quite typical of narcotics cases, where sale is made but the agents hold off making an arrest for a certain period of time, which of course can't go too far while they try to find the sources of supply and so forth.

Q I am not at this point questioning the arrest. I am questioning the search. And do I understand your position to be that wherever a person charged with a narcotics

violation is arrested without a warrant automatically you have the right to search his whole dwelling without a warrant?

A No, certainly not.

Q Well, what is the difference in this case?

A The difference in this case, as I have tried to show in the facts I stated, is that the case broke very quickly under circumstances where there were good grounds to believe that they wouldn't be able to find the man they were looking for unless they went for him promptly, and then --

Q Well, I understand that you found him through the telephone company. That is no ingenuity.

A But they didn't know they were looking for him until -- I don't know how -- until a relatively few minutes before they could get the information from the telephone company and then go on to his apartment.

Q Well, they --

A They didn't know the identity of the man they were looking for until that same afternoon.

Q If he was engaged in interstate theft, would you have had a right to search his apartment, with the same facts as this case?

A I think so, though there is an additional fact, when we get into the danger of loss of evidence, if he were an interstate theft of television sets --

Q You see, I am interested in not destroying the

Fourth Amendment and putting an amendment to the Fourth Amendment that this doesn't apply to narcotics cases. That is my point.

A Of course, there are additional factors here. There is this exigency, the impracticability of getting a search warrant. There is also the fact that we submit that there was probable cause to look for the specific items they were looking for and there were circumstances where there was a serious danger that the evidence would disappear and it was impracticable for them, unreasonable in fact, for them to seal off the area where the evidence might be until they could get a search warrant. This was because the apartment had another occupant, who has been described as Elkanich's common law wife, in any event she lived there. She had certain rights on the premises. Since it was narcotics, heroin, that was in question, which was, of course, a very small item, the only way that the agents could have guarded against the risk that the evidence would disappear or be flushed down the toilet or something like that, would have been to supervise and watch this Miss Egan's activities very closely, I think under circumstances where she would in practical terms would have been virtually under arrest until they could get a search warrant. Of course, they had no basis for restricting her freedom in that way. Or they could have excluded her from the apartment but, again, that was --

Q What did she tell them when they went in?

A I don't think the record shows anything. I think --

Q Did she tell them what her relationship was to the man in the house?

A I think not, as far as the record shows. I am not sure where the information comes from that she was a common law wife, in any event she was living there at the apartment and she was present.

Q She was there at that time?

A She was present in the apartment, in fact she opened the door to let the agents in.

Q I suppose it would be reasonable for a man to assume that if somebody opened the door and let them in the house that they had something to do with the control of that house.

A Yes, I certainly think so, Mr. Justice Black, and I think it was entirely proper for the agents to have considerable concern for her freedom and her rights to go on living in her apartment, so that under the circumstances I think the search, considering the rights of both of the parties, was considerably less of an intrusion than an attempt to freeze the situation pending efforts to get a warrant.

I might also just review the circumstances that we think made for the additional factor that there was probable

cause for the search. In other words, there could have been a warrant had there been time.

Q Do you mean there was reasonable ground for this act, as the amendment calls for?

A Yes, I think there was.

Q Yes.

A And as I indicated, there had been a reasonable identification of Elkanich as the source of the narcotics that the agent had bought from the intermediary Rios.

Q I assume you are not arguing this on the basis that we or any other institution has the right to change the amendment, take out of it the word "unreasonable" and that unreasonable is always the test, that there are no rigid rules announced in the amendment?

A That is certainly so, Mr. Justice Black.

Q Or as the circumstances --

A Of course, over the years there have developed different focusing aspects of the reasonableness --

Q Almost making some rules rigid, but nevertheless there remains in the amendment the words "unreasonable searches," doesn't it?

A Yes, and we would submit, of course, that under special circumstances, such as we have here, it should be open despite Chimel --

Q That is why you have given us all the facts?

A Yes, that is exactly why, and we think that Chimel cannot be read as an absolute rigid rule as to the only thing that can be done by way of search at the time of arrest and accordingly with these additional factors here which I have put forth.

Q Mr. Springer, I think you -- at least I understood you to agree with Justice Marshall's suggestion, at least by inference, that there can't be a difference in terms of amendment, in terms of the Constitution on the aspect of the dangerousness of drugs, but in terms of evaluating the reasonableness, you did suggest television sets which couldn't be disposed of very easily, but take the extreme now.

Would the requirements of getting a warrant perhaps not be more stringent if a man was accused of stealing trailer trucks as distinguished from gambling slips, counterfeit money or narcotics, all of which can be destroyed in a matter of minutes? Does that enter into the equation of reasonableness?

A I think it certainly does, though when you talk about trailer trucks you may get into the vehicle search kind of situation, which perhaps is a different category.

Q Well, the police could always lie down in front of the trailer truck until his colleagues got there with a warrant, whereas he couldn't freeze the situation on narcotics or counterfeit money.

A Without, as I indicate, very serious intrusions upon the other occupant of the apartment. I think a futher factor, in addition to the three, the exigency, the probable cause and the danger of losing the evidence, I think it is pertinent to bear in mind that this is a search at the time of arrest.

The fact that there is an arrest does mean that the defendant will quite shortly be brought before a magistrate and quite shortly have a lawyer appointed to protect him. So I think the context in which this occurrs is somewhat different from the context where there might not be the imminent safeguards that arise out of the arrest situation.

I would suggest that there is some analogy, though I don't want to press it too far, between the decision last term in Chambers vs. Maroney, where in connection with a vehicle search the two factors of probable cause and danger of loss of the evidence were regarded as enough, without either an arrest or perhaps at least so clearly the notion of the impracticability of getting a warrant.

I would like to move on to the retroactivity questions that have been raised by the petitioner here. As I indicated, what I have said so far has assumed what we argue not to be the case, that Chimel governs this case. I would emphasize again that this case, Elkanich, is a collateral review case, since the search took place in 1962 and the

conviction became final in 1964, so that in order to prevail the petitioner would have to convince the Court that the Chimel rule should be fully retroactive.

His principal point, of course, is that, I guess, he argues that we don't have a retroactivity case here because Chimel was not the kind of change in the interpretation of the Constitution which invokes a retroactivity problem. But I think it is implicit, at least, in what Mr. Miller has said, that he believes that if we do have a retroactivity problem here the principles of Desist, in fact all of the Court's cases since Linkletter in 1965, indicate that this case should not be governed by Chimel.

I think the first place to look in determining whether Chimel is the kind of change in the law that creates a retroactivity problem is the Chimel opinion itself, where the Court discussed the prior law at some length and said clearly that the Rabinowitz case -- and I am quoting now -- "has come to stand for the proposition that a warrantless search incident to a lawful arrest may generally extend to the area that is considered to be in the possession or under the control of the person arrested."

And then, on another point, the Court says: "The rationality that allowed the searches and seizures in Rabinowitz and Harris would allow the searches and seizures in this case." Chimel involved the search of an entire

three-bedroom house by three officers that went on for the good part of an hour. Rabinowitz involved a meticulous search of all of the drawers and cabinets of an office that went on for an hour and a half, and Harris was a five-hour search of a four-room apartment. All of these searches, I think, were considerably more laborate than the search in this case, and so I think the contemporary standards in effect at the time of the search, as expressed explicitly by this Court in its decisions, continue to be good law.

Petitioner suggests that any policeman worthy of the name -- to use his phrase -- should have noticed some years before Chimel that this Court had lost enthusiasm for the Rabinowitz rule and therefore should have ceased relying on it as a guide for their investigatory work. I think that is unrealistic.

In 1962, as a matter of fact, though as petitioners suggest without enthusiasm, this Court relied on the Rabinowitz case and the Abel case, considering that we are dealing here with rules of primary behavior by police officers who I think have to be able to carry on their work with some degree of certainty and simplicity as to rules. I think it is simply unrealistic to say that the police were not entitled to rely upon the Rabinowitz rule in 1962, or for that matter in 1964 when the conviction became final here.

Thank you.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Springer.

Your time is exhausted, Mr. Miller, but let me say, you acted by appointment of the Court and at the request of the court --

MR. MILLER: Yes, sir.

MR. CHIEF JUSTICE BURGER: -- in tradition with the concept of being an officer of the Court, and we thank you for your assistance to the defendant and the Court.

MR. MILLER: Thank you, Mr. Chief Justice.

MR. CHIEF JUSTICE BURGER: The case is submitted.

(Whereupon, at 1:17 o'clock p.m., argument in the above-entitled matter was concluded.)

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