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NOTE

DEFINING 'REASONABLE': THE IMPLICATIONS OF STATE V. MBACKE ON FOURTH AMENDMENT PROTECTIONS

DAVID B. MCKAIG^{a1}

I. INTRODUCTION

Under what circumstances and to what extent can police conduct a warrantless search of a person's vehicle following a lawful arrest? Courts have long attempted to balance the protections of the Fourth Amendment with the interests of law enforcement.¹ Despite repeated attempts to establish precedent that protects the rights of individuals while providing guidance to police officers, courts are still interpreting this question today.

The North Carolina Supreme Court recently addressed this issue in *State v. Mbacke*.² The court upheld a conviction based on evidence obtained during a warrantless search of the defendant's vehicle.³ The search took place after the defendant was arrested, handcuffed and confined to the back seat of a patrol car under a charge of carrying a concealed weapon.⁴ The court distinguished the facts of this case from those of United States Supreme Court case *Arizona v. Gant*⁵ and held that the officers had reason to believe that additional evidence of the offense of arrest could be found inside the car.⁶ The *Mbacke* decision leaves a great deal of discretion in the hands of police officers, and fails to clear the muddy waters and define the circumstances that justify this type of search.

a1 B.A., North Carolina State University, History, 2006; J.D. Candidate, North Carolina Central University School of Law, 2014. I'd like to thank Scott and Ryan McKaig for three decades of front porch debates and Joe Johnson for providing me with a floor to sleep on while writing this note.

1. *See generally* *Chimel v. California*, 395 U.S. 752 (1969) (opinion begins by outlining the inconsistency of the precedent, citing a dozen U.S. Supreme Court cases dealing with this issue between 1914 and 1968).

2. *State v. Mbacke*, ___ N.C. ___, 721 S.E.2d 218 (2012).

3. *Id.*

4. *Id.* at ___, 721 S.E.2d at 219.

5. *Arizona v. Gant*, 556 U.S. 332 (2009).

6. *Mbacke*, ___ N.C. at ___, 721 S.E.2d at 222.

This casenote will examine the rationale of the majority opinion in *Mbacke* and the case law that the court relied on in reaching its decision. This note will also explore the historical evolution of the law with regard to searches incident to lawful arrest and discuss the effects of the *Mbacke* decision on the protection provided under the Fourth Amendment. The note will explain how the *Mbacke* decision lessens the protection North Carolinians enjoy under the Fourth Amendment. Finally, this note will advocate a change in the law and abandonment of the search incident to arrest exception to the warrant requirement for the benefit of the courts, the police, and the citizens of North Carolina.

II. THE CASE

Mbacke arises from the arrest of Omar Sidy Mbacke on September 5, 2007.⁷ Officers responded after a 911 caller reported that an armed man in a yellow shirt was sitting in his driveway in a red Ford Escape.⁸ The caller also stated that the man had “shot up” his house the previous night.⁹ Police arrived as the Ford Escape was pulling out of the driveway.¹⁰ Two officers drew their weapons and instructed the driver to stop the vehicle and put his hands up while a third officer blocked the driveway with a patrol car.¹¹ The driver, Mbacke, initially left his hands on the wheel and then momentarily lowered them toward his waist, bringing about more forceful demands from the officers.¹² After that brief hesitation, Mbacke put his hands up and exited the vehicle as instructed and kicked the driver’s side door closed.¹³ Mbacke laid on the ground as instructed and was handcuffed.¹⁴ In response to a question from one of the officers, Mbacke disclosed that he had a handgun in his waistband.¹⁵ After retrieving the gun and rendering it safe, the officers placed Mbacke under arrest for carrying a concealed weapon and secured him in the back seat of a patrol car.¹⁶ After securing Mbacke in the back seat of the car, the officers opened the driver’s side door and discovered a white brick wrapped in green

7. *State v. Mbacke*, ___ N.C. App. ___, ___, 703 S.E.2d 823, 825 (2011).

8. *Mbacke*, ___ N.C. at ___, 721 S.E.2d at 219.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*

13. *State v. Mbacke*, ___ N.C. App. ___, ___, 703 S.E.2d 823, 825 (2011).

14. *Mbacke*, ___ N.C. at ___, 721 S.E.2d at 219.

15. *Id.*

16. *Id.*

plastic protruding from under the driver's seat.¹⁷ Subsequent tests determined that the brick contained 993.8 grams of cocaine.¹⁸

Mbacke was indicted for carrying a concealed weapon and traffick- ing in cocaine by transportation.¹⁹ The trial court denied a pretrial motion to suppress all evidence from the stop.²⁰ The motion was re- newed during the trial with respect to the drug evidence on the same morning the U.S. Supreme Court issued its ruling in *Arizona v. Gant*.²¹ After speaking with the trial judge, Mbacke's council agreed to continue the trial and pursue the issues raised by *Gant* via a motion for appropriate relief after the trial.²² Mbacke was convicted on all counts and sentenced to 175 to 219 months in prison.²³

On the subsequent motion for appropriate relief, the trial court held that the U.S. Supreme Court's decision in *Gant* was applicable, but that the search was not a Fourth Amendment violation because the officers had reason to believe that evidence of the charge of carrying a concealed weapon, which Mbacke had been arrested for, as well as evidence relevant to the investigation into the 911 call, would be lo- cated inside the vehicle.²⁴ The court included "other firearms, gun boxes, holsters, ammunition, spent shell casings and other indicia of ownership of the firearm that was seized" as potential relevant evi- dence that could have been found inside the car.²⁵ The trial court de- nied the motion for appropriate relief and Mbacke appealed, arguing that "there was no reason to further investigate the offense of carrying a concealed weapon with a search of Defendant's vehicle because no further relevant evidence could be found as the concealed handgun at issue had already been discovered on Defendant's person."²⁶

In a 2-to-1 decision, the Court of Appeals reversed the denial of the motion for appropriate relief, holding that officers did not have rea- sonable grounds to believe that additional evidence of the carrying of a concealed weapon would be found in the car.²⁷ The dissenting judge argued that the hypothetical evidence of ownership, intent, and use were relevant, and that the search was reasonable under the circum- stances.²⁸ Finally, the North Carolina Supreme Court reversed the de-

17. *Id.*

18. *Id.*

19. *State v. Mbacke*, ___ N.C.App. ___, ___, 703 S.E.2d 823, 824 (2011).

20. *Id.* at ___, 703 S.E.2d at 825.

21. *State v. Mbacke*, ___ N.C. ___, ___, 721 S.E.2d 218, 219-20 (2012).

22. *Id.* at ___, 721 S.E.2d at 220.

23. *Id.*

24. *Mbacke*, ___ N.C.App. at ___, 703 S.E.2d at 827.

25. *Id.*

26. *Id.*

27. *Id.* at ___, 703 S.E.2d at 830.

28. *Id.* at ___, 703 S.E.2d at 831 (Stroud, J., dissenting).

cision of the Court of Appeals and reinstated the denial of the defendant's motion for appropriate relief, holding that the officers had reason to believe that additional evidence of the carrying of a concealed gun would be found inside the car.²⁹

III. BACKGROUND

Because this case deals with an exception to the warrant requirement, we start with the requirement itself. The Fourth Amendment provides that:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.³⁰

The Fourth Amendment protects against the types of random searches and seizures seen in colonial America under general warrants and writs of assistance.³¹ “[T]he Amendment’s proscription of ‘unreasonable searches and seizures’ must be read in light of ‘the history that gave rise to the words’—a history of ‘abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution’”³² This historical context provides insight into the types of intrusions the Fourth Amendment is intended to prevent.

As a general rule, “‘searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.’”³³ A search conducted as a contemporaneous incident to a lawful custodial arrest is one of the established exceptions to the warrant requirement.³⁴ Under the controlling case law, “[p]olice may search a vehicle incident to a recent occupant’s arrest only [one] if the arrestee is within reaching distance of the passenger compartment at the time of the search or [two] it is *reasonable to believe the vehicle contains evidence of the offense of arrest.*”³⁵ *Mbacke* hinges on whether it was reasonable for the arresting officers to believe that the Ford Escape contained additional evidence of the crime of carrying a concealed weapon.³⁶

29. *State v. Mbacke*, ___ N.C. ___, ___, 721 S.E.2d 218, 223 (2012).

30. U.S. CONST. amend. IV.

31. See *Chimel v. California*, 395 U.S. 752, 761 (1969).

32. *Id.* at 760-61 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950) (Frankfurter, J., dissenting)).

33. *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

34. *Id.*

35. *Id.* at 351 (emphasis added).

36. See *State v. Mbacke*, ___ N.C. ___, ___, 721 S.E.2d 218, 219 (2012).

The majority in *Mbacke* likened the “reasonable to believe” requirement of *Gant* to the “reasonable articulable suspicion” test established in *Terry v. Ohio*.³⁷ Decided in June of 1968, *Terry* established that police officers are entitled to “conduct a carefully limited search of the outer clothing” of a person when “a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous.”³⁸ By upholding the constitutionality of a reasonable “stop and frisk” search, *Terry* allows for the limited search and seizure of a person who is not under arrest, absent a warrant or probable cause.³⁹ The Court notes, however, that even a simple pat down “is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly.”⁴⁰ This exception to the warrant requirement attempts to balance the Fourth Amendment rights of the individual against the public policy interests of effective law enforcement and public safety.⁴¹ To determine whether a search is reasonable under the Fourth Amendment, *Terry* establishes a two-pronged test: “whether the officer’s action was justified at its inception, and whether it was reasonably related in scope to the circumstances which justified the interference in the first place.”⁴² This rationale was extended in later cases to justify and define the scope of searches performed contemporaneously with a lawful arrest.⁴³

The U.S. Supreme Court applied the officer safety rationale in an attempt to solidify the permissible scope of a search incident to arrest in 1969 with *Chimel v. California*.⁴⁴ The Court ruled that there is “no constitutional justification, in the absence of a search warrant,” for police to search the home of a lawfully arrested defendant “beyond

37. *Id.* at ___, 721 S.E.2d at 222.

38. *Terry v. Ohio*, 392 U.S. 1, 30 (1968) (holding that a brief seizure and pat down of suspect, without probable cause, when officer has observed behavior leading him to believe that suspect is armed and presents a danger to the officer or to the public at large, is not unreasonable under the Fourth Amendment).

39. *Id.*

40. *Id.* at 17.

41. *See id.* at 24 (“When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm.”).

42. *Id.* at 19-20.

43. *See, e.g., Chimel v. California*, 395 U.S. 752 (1969); *New York v. Belton*, 453 U.S. 454 (1981); *Thornton v. United States*, 541 U.S. 615 (2004); *Arizona v. Gant*, 556 U.S. 332 (2009).

44. *See Chimel*, 395 U.S. 752 (1969) (holding that a search performed as a contemporaneous incident to a lawful arrest should be limited to the person of the arrestee and the area from within which he might be able to retrieve a weapon or evidence that could be used against him).

the [arrestee's] person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him."⁴⁵ Quoting *Terry*, the Court held that "'(t)he scope of (a) search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible.'"⁴⁶ As in *Terry*, the Court looked at both the justification for the search itself and the permissible scope of such a search in holding:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.⁴⁷

Under *Chimel*, the police are required to obtain a warrant to search beyond the reach of the arrestee unless there is some "grave emergency" which makes such a search immediately necessary.⁴⁸

In 1981, the Court addressed the search of an automobile following the arrest of the passengers for marijuana possession in *New York v. Belton*.⁴⁹ The Court held that "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile" and any containers found therein.⁵⁰ The Court justified this by reasoning that items inside the passenger compartment "are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'"⁵¹ The arresting officer in the *Belton* case found cocaine in the zippered pocket of the defendant's jacket which was lying on the back seat of a car in which the defendant was a passenger.⁵² The four occupants of the car were under arrest at the time of the search but were not handcuffed or restrained.⁵³ The court purported to adhere to the officer safety rationale as a justification for the search

45. *Id.* at 768.

46. *Id.* at 762 (quoting *Terry*, 392 U.S. at 19).

47. *Id.* at 762-63.

48. *See id.* at 761 ("Absent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizen and the police. This was done not to shield criminals nor to make the home a safe haven for illegal activities. It was done so that an objective mind might weigh the need to invade that privacy in order to enforce the law.")

49. *New York v. Belton*, 453 U.S. 454 (1981).

50. *Id.* at 460.

51. *Id.* (quoting *Chimel*, 395 U.S. at 763).

52. *Id.* at 456.

53. *Id.*

itself, but noted the difficulty of defining *Chimel's* "area within the immediate control of the arrestee" and sought to establish a bright line test to clearly establish the rights of citizens and officers.⁵⁴ "When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."⁵⁵ Taking the arrestee's wingspan out of the equation and defining the entire passenger compartment as within the control of the arrestee would provide a clear rule which is easy for both officers and the public at large to understand. Accordingly, this decision has been interpreted by many courts, law enforcement agencies, and five current justices of the U.S. Supreme Court to establish that police are always entitled to search the passenger compartment of a vehicle incident to the lawful arrest of an occupant.⁵⁶ Police officers, including the Winston-Salem police officers in *Mbacke*, have conducted such searches as standard procedure in reliance on *Belton* for more than twenty years.⁵⁷ This interpretation of *Belton* succeeds in establishing clarity but allows warrantless searches in situations where the officer safety and evidence preservation rationales underlying *Terry* and *Chimel* are absent.⁵⁸

This presumed entitlement was expanded in 2004 by *Thornton v. United States* in which the U.S. Supreme Court held that the search of a vehicle was justified even when the officer's first contact with the suspect occurred after the suspect had exited the vehicle, extending *Belton* to cover recent occupants.⁵⁹ Justice Scalia disagreed with the rationale of the majority in *Thornton*, noting that the officer safety and evidence preservation rationales underlying *Chimel* are virtually never present in *Belton* searches because modern police procedure is to handcuff and secure the defendant before conducting the search.⁶⁰ He advocated abandoning the officer safety and evidence preservation rationale of *Chimel* and allowing vehicle searches only when

54. *See id.* at 458-60.

55. *Id.* at 459-60.

56. *Arizona v. Gant*, 556 U.S. 332, 357 (2009) (Alito, J., dissenting).

57. *See State v. Mbacke*, ___ N.C. App. ___, 703 S.E.2d 823 (2011) (standard Winston Salem PD procedure to search defendant's car after arrest relying on *Belton*); *Gant*, 556 U.S. at 359 (Alito, J., dissenting) ("The *Belton* rule has been taught to police officers for more than a quarter century. Many searches—almost certainly including more than a few that figure in cases now on appeal—were conducted in scrupulous reliance on that precedent").

58. *Gant*, 556 U.S. at 343 ("To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception").

59. *Thornton v. U.S.*, 541 U.S. 615 (2004).

60. *Id.* at 625-27 (Scalia, J., concurring).

there is reason to believe that evidence of the crime of arrest will be found within the vehicle.⁶¹

The case on which Mbacke's motion for appropriate relief was based was the U.S. Supreme Court's 2009 decision in *Gant*.⁶² In *Gant*, the Court criticized the broad interpretation of *Belton* and *Thornton* and held that the search of a vehicle after the driver's arrest for driving while under a license revocation was a violation of the Fourth Amendment.⁶³ It sets out a two prong test to establish the limits of these vehicle searches, specifically:

Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.⁶⁴

The first prong of the test established by *Gant* mirrors the officer safety and evidence preservation rationale of *Chimel*.⁶⁵ For the second prong of the test, the Court carved out a new exception based on Justice Scalia's concurring opinion in *Thornton*.⁶⁶ This second prong allows searches of vehicles, absent probable cause, after the defendant has been handcuffed and secured when the search can no longer be justified under the officer safety or evidence preservation justifications relied on in *Chimel*. The Court noted that the *Belton* and *Thornton* cases themselves satisfied this new test.⁶⁷ The suspects in *Belton*, while under arrest, had not been handcuffed or otherwise restrained at the time of the search and could have reached or lunged for a weapon inside the vehicle; under these circumstances the *Belton* case meets the first prong of the *Gant* test.⁶⁸ The court notes that in both *Belton* and *Thornton* it was reasonable for the officers to believe that evidence of the crime of arrest (drug possession) would be found inside the vehicles, satisfying the second prong of the test.⁶⁹

A parade of cases followed the *Gant* decision challenging the constitutionality of vehicle searches in which the defendants were secured in patrol cars and argued that the officers had no reasonable basis to suspect that their vehicle would contain evidence of the crime of ar-

61. *Id.* at 629 (Scalia, J., concurring).

62. *State v. Mbacke*, ___ N.C. ___, ___, 721 S.E.2d 218, 220 (2012).

63. *Gant*, 556 U.S. 332.

64. *Id.* at 351.

65. *Id.* at 339.

66. *Id.* at 343 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

67. *Id.* at 344.

68. *Id.*

69. *Id.*

rest.⁷⁰ As noted by the majority in *Mbacke*, most of these cases have held that an arrest for a weapons offense gives rise to a reasonable suspicion that additional evidence of the crime of arrest will be found during a vehicle search.⁷¹ Other courts confronted with similar facts, including the North Carolina Court of Appeals in *Mbacke*, have held that possession of a concealed weapon does not give rise to a reason to believe that additional evidence of the crime of arrest will be found in the defendant's vehicle.⁷²

The most recent development in this area is the U.S. Supreme Court's 2011 ruling in *United States v. Davis*.⁷³ Justice Alito's majority opinion confirms that *Gant* applies retroactively to cases that were not yet finalized at the time of the decision, but also creates a good faith exception which limits the availability of the exclusionary rule as a remedy to an unconstitutional search.⁷⁴ "Evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule."⁷⁵ Critics argue that this leaves defendants with no remedy in cases where their constitutional rights were violated and as a result, will stunt the development of Fourth Amendment law by discouraging defendants from seeking appellate review.⁷⁶

IV. ANALYSIS

In deciding *Mbacke*, the North Carolina Supreme Court set out to define the "reasonable to believe" standard required under part two of the *Gant* test.⁷⁷ The court held that "reasonable to believe" is a lower standard than that of probable cause and reasoned that "the underlying concept of a reasonable articulable suspicion discussed in *Terry*, is readily adaptable to a scenario in which a search of a vehicle is contemplated after the occupants have been arrested and detained."⁷⁸ In doing so, the majority used *Terry*, which authorized a limited pat down of the outside of a person's clothing as part of an

70. *State v. Mbacke*, ___ N.C. ___, ___, 721 S.E.2d 218, 222-23 (citing *U.S. v. Rochelle*, 422 F. App'x. 275, 277 (4th Cir. 2011); *U.S. v. Vinton*, 594 F.3d 14, 25-26 (D.C. Cir. 2010); *U.S. v. Leak*, No. 3:09-cr-81-W, 2010 WL 1418227, at *5 (W.D.N.C. Apr. 5, 2010); *U.S. v. Wade*, No. 09-462, 2010 WL 1254263, at *2-3, *5 (E.D. Pa. Mar. 29, 2010); *People v. Osborne*, 96 Cal.Rptr.3d 696, 698 (Cal. Ct. App. 2009); *U.S. v. Brunick*, 374 F. App'x. 714, 716 (9th Cir. 2010) (unpublished)).

71. *Mbacke*, ___ N.C. at ___, 721 S.E.2d at 222-23.

72. *State v. Mbacke*, ___ N.C. App. ___, 703 S.E.2d 823 (2011).

73. *Davis v. U. S.*, 131 S.Ct. 2419 (2011).

74. *Id.* at 2431.

75. *Id.* at 2429.

76. *Id.* at 2437-38 (Breyer, J., dissenting).

77. *State v. Mbacke*, ___ N.C. ___, ___, 721 S.E.2d 218, 222 (2012).

78. *Id.* (internal citations omitted).

investigation,⁷⁹ to justify a much more thorough search of the passenger area of an automobile and any containers found therein after the arrestee had been secured and the officer or public safety concerns underlying *Terry* were no longer present.⁸⁰ The court also cited *United States v. Place* to establish that “reason to believe” equates to a lower standard than that of probable cause.⁸¹

The dissent in *Mbacke* noted the glaring difference in the scope of the search authorized under *Place* and the one conducted by the Winston Salem police in this case and disagreed with its application to a search incident to arrest.⁸² Like *Terry*, *Place* authorized a very specific limited seizure for a less invasive, investigative search rather than the much broader *Belton* search.⁸³ The court purports to render a decision consistent with the aims of *Terry*, *Chimel*, and *Gant* while failing to heed the mandate established by *Terry* and later quoted in *Chimel*: “[t]he scope of [a] search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.”⁸⁴

Even the carefully limited scope of a *Terry* stop has been criticized for weakening Fourth Amendment protections by granting the police authority to search in situations where a judge would not have the authority to authorize one.⁸⁵ “To give police greater power than a magistrate is to take a long step down the totalitarian path.”⁸⁶ The *Mbacke* Court’s interpretation of “reasonable” authorizes searches without warrants or probable cause and it does so without the justifications offered by *Terry*.⁸⁷

Even with a standard lower than that of probable cause, the search in *Mbacke* pushes the limits of reason. Each piece of evidence the state hypothesized could be found within the car was either altogether irrelevant or was evidence of a separate offense.⁸⁸ Gun boxes, receipts and other evidence of ownership would lend no support to the concealed weapon charge because ownership of the gun is not an element of the offense.⁸⁹ Spent shell casings, while relevant to an investigation

79. See *Terry v. Ohio*, 392 U.S.1, 21-22 (1968).

80. *Mbacke*, ___ N.C. at ___, 721 S.E.2d at 224 (Timmons-Goodson, J., dissenting).

81. *Id.* at ___, 721 S.E.2d at 222 (majority opinion).

82. *Id.* at ___, 721 S.E.2d at 225 (Timmons-Goodson, J., dissenting) (noting that the search authorized by *Place* was limited to a brief detention of luggage to allow trained drug dogs to sniff the unopened bags for contraband).

83. *U. S. v. Place*, 462 U.S. 696 (1983).

84. *Chimel v. California*, 395 U.S. 752, 762 (1969) (quoting *Terry*, 392 U.S. at 19).

85. See *Terry*, 392 U.S. at 35-39 (1968) (Douglas, J., dissenting) (advocating strict adherence to the requirement for probable cause unless and until a constitutional amendment adjusts the probable cause requirement).

86. *Id.* at 38

87. See *Terry*, 392 U.S. at 22.

88. *State v. Mbacke*, ___ N.C. App. ___, ___, 703 S.E.2d 823, 830 (2011).

89. *Id.*

into the alleged shooting the night before the arrest, would lend no support to the charge of carrying a concealed weapon when the weapon in question has already been surrendered to and secured by law enforcement.⁹⁰

The majority decision of the North Carolina Supreme Court cited a half dozen decisions from other jurisdictions finding it reasonable for an officer to believe that a vehicle could contain evidence of the crime of carrying a concealed weapon after the weapon in question had been secured by police.⁹¹ After stating that weapons charges will almost always give rise to a reasonable belief,⁹² the opinion notes:

We stress that we are not holding that an arrest for carrying a concealed weapon is *ipso facto* an occasion that justifies the search of a vehicle. We believe that the “reasonable to believe” standard required by *Gant* will not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine the propriety of any vehicular searches conducted incident to an arrest.⁹³

This case-by-case approach leaves great uncertainty as to when and to what extent these searches are justified. As the majority noted in *Belton*, “[a] single familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.”⁹⁴ While the Court’s choice in *Belton*, to promote consistency by limiting a constitutional protection⁹⁵, was regrettable, there are advantages to adopting a clear and simple standard which is easily understood by the police and the public at large.

A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be ‘literally impossible of application by the officer in the field.’⁹⁶

The court notes that “[o]ther circumstances. . . such as the report of defendant’s actions the night before and defendant’s furtive behavior when confronted by officers, support a finding that it was reasonable to believe additional evidence of the offense of arrest would be found in defendant’s vehicle.”⁹⁷ Allowing a warrantless vehicle search based

90. *Id.*

91. *See* State v. Mbacke, ___ N.C. ___, ___, 721 S.E.2d 218, 222-23.

92. State v. Mbacke, ___ N.C. ___, ___, 721 S.E.2d 218, 222 (2012).

93. *Id.* at ___, S.E.2d at 223.

94. New York v. Belton, 453 U.S., 454, 458 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)).

95. *Id.* at 466 (Brennan, J., dissenting).

96. *Id.* at 458 (majority opinion) (quoting Wayne R. LaFare, *Case-By-Case Adjudication Versus Standardized Procedures: The Robinson Dilemma*, 1974 Sup.Ct.Rev. 127, 142 (1974)).

97. *Mbacke*, ___ N.C. at ___, 721 S.E.2d at 222.

on a report of a totally separate offense and unspecified “furtive” behavior provides shockingly little in the way of guidance for officers in the field. The dissent further states that if the act of closing the car door upon exiting constitutes “furtive behavior” sufficient to justify reasonable suspicion, the majority opinion “dangerously undermines the right to privacy” by penalizing drivers for attempting to protect their Fourth Amendment rights.⁹⁸

Despite the numerous problems with the *Mbacke* decision, the holding of the majority is not unreasonable or inconsistent with precedent. Justices Scalia, Alito, Breyer, Kennedy and Chief Justice Roberts all felt that the decision in *Gant* amounted to a reversal rather than a clarification of *Belton* and *Thornton*.⁹⁹ Justice Scalia concurred in the judgment only to avoid 4-to-1-to-4 decision, which would have left *Belton* and *Thornton* unchecked.¹⁰⁰ By expressing the decision in *Gant* as a clarification of *Belton* and *Thornton* and allowing searches after the defendant has been arrested and secured, the Court leaves the door open for police departments and lower courts to continue operating essentially as they have under *Belton* as long as they can think of some hypothetical piece of evidence that could be used to support the charge. Police officers are given a fishing license which allows them to rummage through vehicles for evidence of any crime as long as they can think of some theoretical piece of evidence that could be found to support the crime of arrest. In his opinion concurring in result with *Gant*, Justice Scalia expressed his opinion that many of the searches allowed under *Belton* were unconstitutional, but agreed with the majority that officers should be allowed to search when they have reason to believe that evidence of the crime of arrest will be found within the vehicle.¹⁰¹ He disagreed with the “within reaching distance” portion of the test established by *Gant* and advocated abandoning the “charade of officer safety,” arguing that the continued use of this rationale encourages officers to leave suspects unsecured in the interests of conducting a more expansive search.¹⁰² “[P]olice virtually always have a less intrusive and more effective means of ensuring their safety—and a means that is virtually always employed: ordering the arrestee away from the vehicle, patting him down in the open, hand-

98. *Id.* at 224 (Timmons-Goodson, J., dissenting) (“On the one hand, if defendant closes the vehicle door when complying with an officer’s order to exit the vehicle, then law enforcement, under today’s opinion, can search the car. On the other hand, if defendant leaves the door open, officers can conduct a broader plain view search of the passenger compartment.”).

99. See *Arizona v. Gant*, 556 U.S. 332, 351 (2009) (Scalia, J., concurring); *Id.* at 354 (Breyer, J., dissenting); *Id.* at 355 (Alito, J., dissenting).

100. *Id.* at 354 (Scalia, J., concurring).

101. *Id.* at 353 (Scalia J., concurring).

102. *Id.* at 352-53.

cuffing him, and placing him in the squad car.”¹⁰³ Under Justice Scalia’s reasoning, police officers cannot be trusted not to place themselves in danger in order to justify a more intensive search, but they can be trusted to make a legal determination as to whether or not there is reason to believe evidence of the crime of arrest will be found during a vehicle search. Justice Scalia did not offer a justification for upholding a vehicle search on a standard lower than probable cause absent the officer safety justification.

There are other exceptions to the warrant requirement of the Fourth Amendment which can justify a vehicle search without a warrant. Consent, plain view, exigent circumstances, the automobile exception, and even an inventory search, can provide justification for the search of an automobile without a warrant¹⁰⁴. However, these exceptions each require the existence of circumstances which make the warrantless search reasonable and result in fewer instances of the pretextual and unconstitutional searches allowed under *Belton*, *Thornton* and *Gant*.

“To provide the necessary security against unreasonable intrusions upon the private lives of individuals, the framers of the Fourth Amendment required adherence to judicial process wherever possible.”¹⁰⁵ “We cannot be true to that constitutional requirement and excuse the absence of a search warrant without a showing by those who seek exemption from the constitutional mandate that the exigencies of the situation made that course imperative.”¹⁰⁶ In deciding *Terry*, the U.S. Supreme Court was careful to note “we do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.”¹⁰⁷

The officers who conducted the search of Mbacke had ample opportunity to obtain a warrant yet conducted a warrantless search justified only by the pretense that the officers were looking for evidence of a crime for which they had already collected and secured all relevant evidence.¹⁰⁸ Allowing these types of warrantless searches of a vehicle, after its occupants have been removed and confined, based on any standard lower than that of probable cause, allows officers more discretion than judges in determining when a search is appropriate and

103. *Id.* at 351-52.

104. See *Davis v. U.S.*, 328 U.S. 582 (1946) (consent); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971) (plain view); *Warden v. Hayden*, 387 U.S. 294 (1967) (safety of officers and the public); *Carroll v. U.S.*, 267 U.S. 132 (1925) (automobile exception); *South Dakota v. Opperman*, 428 U.S. 364 (1976) (inventory).

105. *Chimel v. California*, 395 U.S. 752, 758-59 (1969).

106. *Id.* at 761 (quoting *McDonald v. United States*, 335 U.S. 451, 455-56 (1948)).

107. *Terry v. Ohio*, 392 U.S. 1, 20 (1968).

108. See *State v. Mbacke*, ___ N.C. App. ___, ___, 703 S.E.2d 823, 830-31 (2011).

inevitably yields unconstitutional results. The *Mbacke* decision weakens Fourth Amendment protections by granting officers a broader power to search than the Constitution allows. This is especially frightening in the light of *Davis v. United States* under which Defendants who are convicted based on evidence obtained in unconstitutional searches may have no available remedy if the unconstitutional search was conducted in good faith reliance on precedent.¹⁰⁹

In limiting *Belton* and *Thornton*, the U.S. Supreme Court attempted to reduce the incidents of unconstitutional searches, but by using reasonable belief rather than probable cause as the test to justify a vehicle search, the Court left the door open for state courts to justify bad searches on a case-by-case basis. *Mbacke* is a prime example of just such a result. A search incident to a lawful arrest “is an exception justified by necessity to a rule that would otherwise render the search unlawful.”¹¹⁰ Other exceptions to the warrant requirement provide the police with the necessary power to investigate and respond to emergency situations without giving them license to go fishing through people’s possessions looking for evidence of other crimes. This line of cases, beginning with *Chimel*, should be revisited and either the “reasonable to believe” standard should be replaced with that of probable cause or the search incident to arrest exception to the warrant requirement should be abandoned. Requiring probable cause for the search of a vehicle and abandoning both the officer safety and evidence preservation reasoning of *Chimel* and the “reasonable belief” test expressed in *Gant*, would establish a clear standard, which would be easily understood by both police officers and the public. Such a rule would protect the Fourth Amendment rights of citizens, have little or no impact on officer safety, and take us a step away from the “totalitarian path” that Justice Douglas warned of in his dissent in *Terry*.¹¹¹ “Only that line (probable cause) draws a meaningful distinction between an officer’s mere inkling and the presence of facts within the officer’s personal knowledge which would convince a reasonable man that the person seized has committed, is committing, or is about to commit a particular crime.”¹¹²

V. CONCLUSION

Mbacke presented the North Carolina Supreme Court with the opportunity to protect citizens from unconstitutional searches performed

109. See *Davis v. U. S.*, 131 S.Ct. 2419 (2011).

110. *Thornton v. U.S.*, 541 U.S. 615, 627 (2004) (Scalia, J., concurring).

111. *Terry*, 392 U.S. at 38 (Douglas, J., dissenting) (“To give police greater power than a magistrate is to take a long step down the totalitarian path.”).

112. *Id.*

in reliance on *Belton*. The court chose instead to sanction a pretextual search and leave the door open for police officers to continue the practice of conducting vehicle searches absent a warrant or probable cause. This grants law enforcement officers a broader authority to conduct searches than that granted to judges to authorize such searches and leaves all citizens at the mercy of police, who may intentionally, or as a result of inadequate knowledge, violate their rights.

The immediate effect of the *Mbacke* decision, keeping Omar Mbacke in prison, is likely to be the popular choice. It is easy to side with the police officers over the cocaine dealer and bend the rules to bring about a desired result, but the legality of a search should not hinge on the character of the defendant or the evidence obtained. In limiting the rights of Omar Mbacke, we pay too heavy a price to uphold one conviction. The court has made the popular choice at the expense of the law and has weakened the constitutional protections that all North Carolinians enjoy.

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