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Thomas Jefferson's Carriage: *Arizona v. Gant's* Assault on the *Belton* Doctrine

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On April 21, 2009, in an important ruling for all criminal justice practitioners, the United States Supreme Court upended the long standing law regarding searches of the passenger compartments of automobiles incident to arrest of the occupants thereof. In *Arizona v. Gant*,[2] the Court took on the twenty-eight-year-old rule governing such searches established by its holding in *Belton v. New York*.[3] In doing so, the Court has created new standards that will inevitably lead to confusion and increased litigation over this issue for years to come.

To begin to understand the road the Court traveled from *Belton* to *Gant*, 21st century criminal justice practitioners need to close their eyes and imagine the following scenario: Thomas Jefferson, with the Declaration of Independence in hand, is racing through the streets of Philadelphia in his late 18th century-style horse-drawn carriage on his way to Independence Hall. Colonial law enforcement officers observe his violation of city speed limits, pull Jefferson's carriage to the side of the dirt road, and arrest him. In such a situation, what would Jefferson or his colleagues, who will go on to draft the Bill of Rights, consider a reasonable search? Would they object to the late 20th century Supreme Court's reading of the Fourth Amendment? Or would the Framers have no trouble with the search of the interior passenger compartment of Jefferson's carriage, as well as any wig boxes they may find therein?

This colonial criminal procedural issue matters to criminal practitioners today because it was the question on the mind of Justice Antonin Scalia during the oral arguments in the *Gant* case. In *Gant*, the Supreme Court was asked to revisit its holding in *Belton*; in *Belton*, the Court defined the constitutional scope of the exception to the Fourth Amendment's Warrant Clause for searches of vehicles incident to a lawful arrest of their occupants. At issue before the Court in *Gant* was the continuing viability of the *Belton* doctrine authorizing law enforcement officers to search the entire interior compartment of an automobile, as well as any containers therein, contemporaneously with the arrest of a recent occupant of that vehicle. The automobile arrest exception to the warrant requirement was intended to protect the physical safety of the arresting police officers and to prevent the destruction of evidence inside of the car. Police, prosecutors, and defense counsel should read the *Gant* decision carefully because the ruling creates a new, or at least modified, rule for how such searches may be constitutionally conducted. These changes will significantly alter how practitioners conduct litigation in this important area.

In an effort to decide the future of *Belton*, at least one Justice considered the Framers' original intent in writing the Fourth Amendment. Justice Scalia became frustrated with Arizona's reliance on law enforcement's use of procedures endorsed in *Belton* over the almost three decades since the issuance of that opinion.[4] As an originalist, Justice Scalia had a much longer timeline in mind and was anxious to hear about the Framers' experiences with the issue of searches incident to arrest in 18th century vehicles. "If you stopped Thomas Jefferson's carriage to arrest Thomas Jefferson," Justice Scalia asked of counsel for Arizona, "and you pulled him off to the side of the road, could you . . . then go up and search his carriage?"[5] Justice Scalia was disappointed by Arizona's slightly flummoxed counsel's inability to shed any light on the question of what kind of treatment the primary author of the Declaration of Independence would have expected from colonial law enforcement authorities.[6] The significance of Justice Scalia's question is that it revealed the degree to which he was willing to

reconsider the well-established precedent of *Belton*. Scalia was pleading with counsel to give him something "to hang [his] hat on" from the Framers' original understanding of what they may have viewed as a reasonable search under the "carriage exception" to the warrant requirement.[7]

This article will consider the state of the post-colonial law leading up to the Court's decision in *Belton*, the *Belton* case itself, and its progeny. Then, it will discuss the Arizona Supreme Court's holding and reasoning in *Gant*. It will analyze the positions on both sides and analyze the questions that each justice raised during oral arguments. It will propose grounds on which the Court could have decided *Gant* and assess what each would have meant for the criminal justice practitioner. Finally, it will discuss the significance of the Court's ruling in *Gant*.

Pre-*Belton*: *Chimel v. California* and Progeny[8]

In *Chimel v. California,*[9] the United States Supreme Court sought to explain the "search incident to arrest" exception to the Fourth Amendment's warrant requirement and limit its application to the extent supported by the rationale for the rule. Armed with a warrant for Chimel's arrest, three police officers went to Chimel's home to arrest him for the burglary of a coin shop. As he was being arrested, Chimel denied an officer's request for permission to search his home. Despite Chimel's refusal to give consent, the officers, citing their authority to conduct a search incident to the arrest, searched his home and seized evidence linking him to the burglary.[10]

The Supreme Court confronted the issue of whether the search of petitioner's whole house could be justified as incident to his lawful arrest therein.[11] The Court expressed its intent to clarify the scope of the search incident to arrest doctrine, noting that its own jurisprudence on the issue had been "far from consistent."[12] The Court began its analysis in *Chimel* by rejecting the twenty-eight-year-old standard it had announced in *United States v. Rabinowitz*[13] to govern the scope of a warrantless search incident to arrest. *Rabinowitz* permitted such a search to extend to the area in the "possession" or "under the control" of the arrestee.[14] Noting the broad sense in which the lower court applied the *Rabinowitz* standard to petitioner Chimel, the Court found it neither "historical nor rational."[15]

The *Chimel* Court walked through the various scenarios typically faced by police officers when making an arrest. It then analyzed the scope of a permissible search incident to arrest by reference to the rationale for that search. Thus, the Court found it reasonable for an officer to search the person of an arrestee in order to seize any weapons that he may use to threaten the officer's safety or "resist arrest or effect his escape."[16] The Court declared that it was also reasonable to search for or seize any evidence on the arrestee's person in order to "prevent its concealment or destruction."[17] The Court then limited the scope of a permissible search beyond the actual person of the arrestee only to that area to which these twin rationales apply.[18] The area to which these two rationales apply, the Court held, is that area "'within [the arrestee's] immediate control' . . . within which he might gain possession of a weapon or destructible evidence."[19] The Court thus modified the *Rabinowitz* standard by forbidding the warrantless search of any area within the arrestee's "possession" and narrowing it to that area not merely "under [his] control" but rather "within his *immediate* control."[20]

Setting up the choice as one between "a search of the person arrested and the area within his reach" on the one hand and "more extensive searches" on the other, the Court chose the former.[21] The search of Chimel's home beyond the area within his immediate control was unconstitutional if based solely on the search incident to arrest exception to the warrant clause.

Lower courts were left to apply *Chimel's* "within the arrestee's immediate control" doctrine on a case-by-case basis. Their efforts to define the permissible scope of a warrantless search incident to a lawful arrest proved difficult and inconsistent.[22] In response to the struggles of the lower courts, the Supreme Court began to adopt bright-line rules to determine the permissible scope of searches incident to arrest, at least as it applied to the timing of the search. In *United States v. Edwards*,[23] Justice Byron White, writing for the majority, stated that "searches and seizures that could be made on the spot at the time of the arrest may legally be conducted later when the accused arrives at the place of detention."[24] The Court justified extending the permissible search doctrine in *Edwards* because "the normal processes incident to arrest and custody had not yet been completed when Edwards was placed in his cell."[25] This is broadened from the scope of *Chimel* because at the time respondent was searched, there was neither a danger to the officer nor a risk of destruction of any evidence—the original *Chimel* rationales for the warrantless search.

In *United States v. Robinson*,[26] the Supreme Court drew another bright-line rule delineating the per-

missible scope of the search of the person of an arrestee incident to his arrest.[27] In that case, Robinson was legally arrested for driving an automobile after his operator's permit was revoked.[28] During a full custodial search of Robinson's person, the arresting officer discovered a crumpled up cigarette package containing packets of heroin in Robinson's breast pocket.[29] The evidence was admitted in his trial and led to his conviction for a narcotics offense.[30]

For purposes of its analysis, the Supreme Court divided the well-established exception to the warrant requirement for searches incident to arrest into two propositions: (1) "a search may be made of the *person* of the arrestee by virtue of the lawful arrest" alone and (2) "a search may be made of the area within the control of the arrestee."[31] The Court contrasted its decisions on these two propositions noting that the law regarding the search of the arrestee's person has been settled and consistently applied,[32] while the extent of the area which may be searched has been "subject to differing interpretations."[33]

The D.C. Circuit Court had reasoned that even a search of an arrestee's person incident to arrest is limited by the possible presence of weapons or evidence. It found that there was no reason to expect that evidence would be revealed by a full body search.[34] The Circuit Court also narrowed the scope of authority to search based upon a risk of concealment or destruction of evidence to such evidence that may relate to the offense for which the arrestee was being brought into custody.[35] In reversing the appellate court, the Supreme Court emphatically rejected a limitation of the search of Robinson's person to one only for weapons as well as the Circuit Court's "suggestion that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."[36]

The Court rejected a standard that would require a case-by-case, totality of the circumstances analysis to determine whether the arrestee may pose a threat to the safety of the officer or be in a position to conceal or destroy specifically relevant evidence. "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, *does not* depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would *in fact* be found upon the person of the suspect."[37] It is the lawful arrest itself that justifies the search of the arrestee's person, not the possibility under the circumstances of the case that weapons or evidence might be found.[38]

Thus, the Court drew a clear bright-line rule that allows the police, upon arrest of a person, to conduct a full search of that person, as well as any containers found on his person. Of course, the rationale underpinning the rule is the protection of the officer's safety and prevention of destruction of any evidence the arrestee may be carrying. The permissible scope of the search, however, is not "narrowly limited by [those] twin rationales."[39]

While the *Robinson* Court "established an automatic right to search everything found on a person who has been subjected to a custodial arrest,"[40] it was silent about whether that automatic power extended to containers or packages found within the arrestee's "immediate control."[41]

New York v. Belton's "Bright-Line" Rule

In 1981, the Supreme Court addressed the issue of the permissible scope of searches incident to arrests in automobiles in *New York v. Belton*.[42] On April 9, 1978, respondent Roger Belton was riding in an automobile that sped past State Trooper Douglas Nicot who was on routine patrol in an unmarked car on the New York Thruway.[43] Nicot chased down the car, ordered its driver to pull over to the side of the road, and found that the car was occupied by four men, including Belton.[44] After requesting the driver's license and the vehicle registration, Nicot discovered that none of the four men owned the car.[45]

While making these routine inquiries, Trooper Nicot was able to smell an odor he recognized to be that of burnt marijuana.[46] He saw an envelope on the floor of the car with the name of a brand of marijuana marked on it.[47] Trooper Nicot ordered all four men out of the car and placed each under arrest for unlawful possession of marijuana.[48] After patting down each arrestee, Nicot separated them so that they were unable to reach each other.[49] He then returned to the car and picked up the envelope in which he found marijuana.[50] Trooper Nicot then conducted a body search of each of the arrestees.[51] He next conducted a search of the entire passenger compartment of the car; Nicot found a black leather jacket belonging to Belton on the back seat of the vehicle.[52] Nicot searched the jacket, unzipped a closed pocket, and found what he suspected to be cocaine.[53] He seized the jacket and the envelope of marijuana and drove Belton and the other three arrestees to the closest police station.[54]

Belton was charged with, and found guilty of, criminal possession of a controlled substance.[55] His pretrial motion to suppress the cocaine that Trooper Nicot had found in his jacket was denied.[56] He appealed the denial of his motion to the New York Court of Appeals and the Court of Appeals reversed.[57] The appellate court held that the search of the jacket and the seizure of the cocaine were unconstitutional because "there was no longer any danger that the arrestee or a confederate might gain access to the article."[58] Thus, New York's highest court was interpreting the search incident to lawful arrest doctrine, as it applies to arrests involving automobiles, as being limited in scope to the extent necessary to support its underlying rationales of the arresting officer's safety or the integrity of any evidence of criminal activity. The same rationales would later be used by the Arizona Supreme Court to invalidate the search in *Gant*. It is beyond dispute, of course, that the search incident to arrest doctrine applies to arrests made of individuals who had been riding in automobiles as much as it does to those merely walking along the street. The issue the Supreme Court faced in *New York v. Belton*, as expressed by Justice Potter Stewart who authored the majority opinion, was "[w]hen the occupant of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible *scope* of a search incident to his arrest include the passenger compartment of the automobile in which he was riding?"[59] This expression of the issue, referring to the scope of arrests in automobiles, implies that there may be a distinction between the scope of searches permitted incident to automobile arrests and searches incident to other arrest scenarios not involving automobiles.

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The Supreme Court began its analysis in *Belton* by acknowledging the difficulty that courts were experiencing in applying the *Chimel* rule, especially as it related to arrests of the occupants of automobiles. *Chimel,* of course, defined the constitutionally permissible scope of a warrantless search incident to a lawful arrest as limited to the area within the immediate control of the arrestee.[60] The Court acknowledged, however, that "courts have found no workable definition of [this area] when that area arguably[61] includes the interior of an automobile and the arrestee is its recent occupant."[62] The Court, lamenting that difficulty, extolled the virtues of a clear set of rules for the Fourth Amendment that police, citizens, and courts can easily understand and consistently apply.[63] As applied to searches of the person, such a "straightforward rule, easily applied and predictably enforced" could be found in the Court's holding in *United States v. Robinson*.[64] The Court expressed its disappointment that no such rule has "emerged from the litigated cases" regarding the issue in *Belton*.[65]

The Court, determined to take the matter into its own hands, announced two bright-line rules in *Belton.* Both rules involved the constitutionally permissible scope of searches of the surrounding areas of arrestees who are recent occupants of automobiles.[66] The first rule dealt with the interior compartment of the vehicle and the second with packages or other containers inside that passenger compartment.

As for the first rule, the Court held that "[i]n order to establish the workable rule that this category of cases requires . . . we hold 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."[67] The Supreme Court rejected the argument that the court below found persuasive: that the search was unconstitutional because the four men were no longer within the reach of the passenger compartment of the automobile at the time of the search. The men had been separated and under the control of the officer early in the encounter.[68] Despite the fact that the officer was outnumbered four to one, there was no evidence in the record that the occupants posed a danger to his safety by virtue of a potential weapon in the car. Neither was there any evidence that any of the arrestees were in a position to destroy or conceal evidence in the car. Nevertheless, the Supreme Court upheld the search of the entire passenger compartment of the vehicle which the arrestees had recently occupied based on the arrest alone.

The second bright-line rule promulgated by *Belton* regarded containers in the automobile's passenger compartment. The Supreme Court went on to rule that "[i]t follows from [the conclusion that police officers may search the passenger compartment of a vehicle] that

the police may also examine the contents of any containers[69] found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach."[70]

The Court's imprecise language about the containers being as much within reach of the arrestee as the passenger compartment is unfortunate. It suggests wrongly that the search of the passenger compartment is predicated upon it being actually within the reach of the arrestee; a requirement it has clearly rejected. However, the Court assumed that the passenger compartment and the containers would actually be within reach in most cases.[71] Aside from the automobile arrest scenario, the entire search incident to arrest doctrine assumes the value of a clear line based upon the danger to the officer and of the destruction of evidence that is inherent in the nature of an arrest. Accordingly, a bright-line rule is needed for "predictability and ease of application."[72]

As has been recognized by commentators, the line can be drawn in any number of different places. The *Belton* Court explained that the reason for its placement of the line where it did was that, in reality, the accessibility of the passenger compartment and containers therein will be the case more often than not.[73] The majority is making the educated wager that they would more often be right than wrong; thus justifying those rare instances in which there are no opportunities for a suspect to access weapons or evidence. Whether this is empirically true, especially at present, is open to question. It may be true that the arrestee may more frequently be in handcuffs in the police car when the search of the automobile is conducted. That, of course, was the issue presented in *Gant* as will be discussed below.

Two places where the Court did not draw bright-line rules were the questions of whether arrestees were "recent occupants" of the vehicle and whether the search of the car incident to the arrests was "contemporaneous" with the arrests themselves. Fleshing out these two temporal requirements has led to considerable litigation and served to protect and justify the rationales of officer safety and protection of any evidence in the car. The temporal requirements go a long way to confirming the continued viability of the rationales while maintaining the bright-line rules regarding the scope of the search.[74]

An alternative to the bright-line rule would have been a holding that a search of an automobile's interior and any containers therein can be conducted only if the recent occupants pose an actual, provable threat to the safety of the police officer or to the integrity of any evidence of the suspected crime or otherwise. This standard, however, would have proven confusing and potentially dangerous for police to apply.[75] It would have required trial courts to undertake a case-by-case evaluation of when, during the course of each particular arrest situation, either a threat to the officer or to the integrity of the evidence existed. Any search of a car and containers therein would no longer be permissible once both of the twin dangers had subsided. Such a determination would involve factual hearings at which the court would have to make fine distinctions. Prosecutors, police, defense counsel, and judges would need to be prepared for additional litigation in most, if not all, car arrest cases.[76] In addition to these difficult factual determinations, there would still be a need for findings on the twin *Chimel* rationales.

The Supreme Court went on in several other cases to reaffirm its holding and rationale for the bright line rules it announced in *Belton*.[77] Almost every court that has considered the bright-line rules at both the federal and state levels has acknowledged and adopted the bright-line rules without regard to limitations imposed by the need to satisfy the underlying rationales.[78] Some state courts have declined to follow *Belton's* lead regarding the bright-line rules when they are interpreting their own state constitutions.[79] Some other courts, while accepting the constitutional ruling in *Belton*, have found it inapplicable for a variety of reasons.[80] Some expert commentary has defended the bright-line rules of *Belton*[81] while a considerable amount has been generally critical of the Court's approach.[82]

Thronton v. United States[83]

Twenty-three years after its opinion in *Belton*, and just four years before granting *certiorari* in *Gant*, the Supreme Court took up a case resembling the hypotheticals that Justice Brennan's dissent proffered in *Belton* and brightened the bright-line rule it drew in that case. The issue presented in *Thornton v. United States* was whether the rule in *Belton* "is limited to situations where the officer makes contact with the occupant while the occupant is inside the vehicle, or whether it applies as well when the officer first makes contact with the arrestee after the latter has stepped out of his vehicle."[84] The answer the Court provided to that question underscores the conclusion that a search incident to the arrest of a recent occupant of a vehicle does not depend on the arrestee's actual ability to reach weapons or evidence in the passenger compartment.

Norfolk, Virginia Police Officer Deion Nichols was in uniform driving an unmarked police car when he noticed petitioner Thornton driving a Lincoln Town Car.[85] Officer Nichols observed Thornton slow down and avoid driving directly next to Nichols' car, and suspected that Thornton recognized him to be a police officer and that he was trying to hide something from him.[86] Nichols pulled over, noted the license plate of Thornton's car, and found that they were registered to a different model car.[87]

Based on this information, Nichols prepared to pull Thornton over.[88] Before he was able to do so, Thornton pulled off the road into a parking lot and got out of the vehicle.[89] Officer Nichols parked behind Thornton, stopped him as he was walking away from his car, and asked for his license.[90] Nichols thought that Thornton appeared nervous—Thornton began speaking incoherently, sweating, and licking his lips.[91] Thinking Thornton could be armed and dangerous, Officer Nichols asked whether Thornton was carrying a weapon or drugs on his person or in his car.[92] Thornton denied possessing either and agreed to the officer's request to perform a frisk search.[93] During the search, Nichols felt a bulge in Thornton's left front pocket.[94] Nichols again asked Thornton if he was carrying any illegal drugs, and this time Thornton admitted that he was.[95] Nichols then removed two separate bags from Thornton's pocket: one contained a large amount of crack cocaine and the other contained three smaller bags of marijuana.[96] Thornton was handcuffed, placed under arrest, and put in the back seat of the police car.[97] Only then did Officer Nichols search Thornton's car, in which he found a gun under the driver's seat.[98]

Thornton was arrested and charged with possession of cocaine with the intent to distribute, possession of a firearm during a drug trafficking offense, and possession of a firearm by a convicted felon.[99] Thornton's motion to suppress the firearm and other evidence was denied, and he was convicted of all three counts.[100] On appeal, the United States Court of Appeals for the Second Circuit rejected Thornton's argument that *Belton* was limited to situations in which police first make contact with an arrestee while he is still in the car.[101]

In *Belton*, the officer made first contact with the arrestee while he was still in his vehicle, ordered him to get out of the car, and then placed him under arrest.[102] Thus, the fact that the arrest was made outside of the vehicle, as was the case in *Thornton*, did not preclude a search of the car incident to that arrest. The *Thornton* Court reasoned that the issue was not whether the arrest was made outside of the car—that scenario was settled by law.[103] The issue was whether there is a constitutional distinction over whether first contact between the officer and the suspect takes place after the suspect gets out of the car on his own initiative or at the officer's direction.[104]

The Court rightly and quickly dispensed with this issue in favor of the government.[105] It would be surprising for the Court to conclude that the legality of a search depends on whether the arrestee exited his car by choice or at the order of an officer, especially considering the search of an arrestee's car is legal even if arrested outside of the vehicle.

What is more significant about *Thornton*, for our purposes, is the issue of Thornton's proximity to the car and other circumstances at the time of his arrest and the search of the car. The important issue is not why Thornton got out of the car, but where he was at the time Nichols searched the car and whether the officer's safety or potential evidence was threatened by Thornton after being arrested, handcuffed, and placed in the patrol car. The circuit court correctly applied *Belton* below, and the Supreme Court did not directly address the question, assuming that this was not an issue. The Court interpreted *Thornton* on the much more narrow, and more easily decided, issue of whether the place of first contact is constitutionally significant for the validity of the search.[106]

In *Belton*, the Court "placed no reliance" on the fact that the officer had "ordered the occupants out of the vehicle, or initiated contact with them while they remained within it."[107] The *Thornton* Court stated that it did not "find such a factor persuasive in distinguishing the current situation, as it bears no logical relationship to *Belton's* rationale."[108] Pointing to the rationale of *Belton*, the Court concluded that, in determining the area within the arrestee's immediate control, it makes no difference "whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car."[109] The Court then analyzed the issue as such: identical concerns regarding officer safety and the destruction of evidence exist regardless of whether "the arrest [is of] a suspect who is next to a vehicle . . . [or] of one who is inside the vehicle."[110] While the Court posed the issue as whether the officer ordered respondent out of the car or whether he got out on his own, the Court based its analysis on whether the arrest was made outside or inside the car. Such an approach moves the issue closer to the question addressed in *Gant.*

The *Thornton* Court observed that the danger

sought to be addressed in *Belton* was "*the fact of the arrest*."[111] Given an arrest, the likelihood of getting a weapon or destroying evidence is the same whether or not the arrestee exited before the officer initiated contact and is "outside of, *but still in control of*" the vehicle.[112] The Constitution does not require officers to risk their safety or the destruction of evidence by a "contact initiation" rule.

Of course, the *Belton* requirement that the arrestee be a "recent occupant" of the automobile would remain viable. Whether an arrestee is a "'recent occupant' may turn on his temporal or spatial relationship to the car at the time of the arrest and search," the Court explained.[113] It then went on to imply that the temporal and spatial factors that may determine whether someone is a recent occupant need not exceed those of *Belton*, stating that "not all contraband in the passenger compartment is likely to be readily accessible to a 'recent occupant,'" and "[i]t [was] unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile."[114] The firearm and passenger compartment in general, however, were no more inaccessible than were the contraband and the passenger compartment in *Belton*. The need for a clear rule that would be readily understood by officers and would not be dependent on differing estimates of what items were within reach of an arrestee at any particular moment justifies the sort of generalization that *Belton* enunciated. Once officers determine that there is probable cause for an arrest, "it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment."[115]

The Thornton concurrence authored by Justice Scalia and joined by Justice Ginsburg offers an alternative standard and gives some insight into why the Court granted *certiorari* in the *Gant* case. The concurrence skips the issue the Court addresses regarding the when, where, and why of initial contact, and instead considers the circumstances at the time of the actual search. It begins with *Chimel*'s "immediate control" standard governing the scope of a search incident to a lawful arrest to find weapons or evidence.[116] *Thornton* notes the rationale as the need for covering that area into which an arrestee might reach, and explains that the *Belton* bright-line rule in automobile arrests is justified because the passenger compartment is "generally, even if not inevitably within the arrestee's immediate control."[117]

Scalia notes that Thornton was not in or near the car; instead, he was handcuffed and secured in the back of the police car at the time of the search.[118] The risk that Thornton could reach a weapon or evidence was "remote in the extreme" compared to the more dangerous location of the arrestees in *Belton*.[119] "The Court's effort to apply our current doctrine to this search stretches it beyond its breaking point," wrote Scalia.[120]

The concurrence identified and rejected three possible justifications for the *Thornton* search based on the two *Chimel* rationales:

1. The arrestee may escape and get a gun or evidence from the car. This feat, Scalia writes, would be consistent with Judge Goldberg's "mythical arrestee 'possessed of the skill of Houdini and the strength of Hercules.'"[121]

2. If the officer could have made the search at the time of the actual arrest near the car then he should be able to make it after he sensibly secures the arrestee. Scalia argues that the search is not an inevitable entitlement but rather an exception to a rule justified by the necessity of protecting the officer and the evidence, the absence of which would otherwise make the search unlawful.[122]

3. Although neither danger was present in this case, *Belton* searches are reasonable under the Fourth Amendment. It is better to have a bright-line rule even if some are not reasonable on their particular facts.[123]

It is no longer accurate to assume, as *Belton* did, that the arrestee will generally, if not always, have access to the passenger compartment and its containers for very long.

As a practical matter, it is very common to have the arrestee in handcuffs in the squad car precisely in order to neutralize him as a threat to the officer or to evidence. Scalia correctly noted that cases upholding such searches are multitudinous and that courts have upheld searches where the arrestee is driven away from the scene.[124] Today's police training makes this type of search routine.[125] It is no longer accurate to assume, as *Belton* did, that the arrestee will generally, if not always, have access to the passenger compartment and its containers for very long. The concurring justices correctly concluded that this is no longer the case in light of police adaptation to the *Belton* rule.

However, *Belton* may be justifiable, writes

Scalia, simply because the car may contain evidence of the crime for which the person was arrested.[126] Scalia's concurrence intimates that it is reasonable to search for evidence of a crime when and where the person is arrested for that crime. But the narrower *Chimel* rule, he notes, also has historical support.[127] Therefore, either the *Rabinowitz* or *Chimel* rules represent plausible means of analysis. Indicating his discomfort with *Belton,* Scalia writes that its historical support is based only on *stare decisis*.[128] Scalia further writes that *Belton* cannot be explained as an application of *Chimel*.[129] Rather, it is a return to broader pre-*Chimel* authority limited to automobiles because of a reduced expectation of privacy and heightened law enforcement needs. Returning to this "evidence of the crime" standard would help reconcile *Robinson* (police may search the person incident to arrest without regard to presence or absence of either *Chimel* rationale because the fact of the arrest alone is enough justification) and *Rabinowitz* (the arrest itself is not enough to justify the search but the search is justified based on a reasonable belief that evidence would be found).[130]

Scalia concludes by offering a new standard based on, but limiting, *Belton*: "[we] would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[131] Pursuant to an arrest for a drug offense it is entirely reasonable to believe that the car from which the arrestee emerged and was still close to could contain further contraband or other similar related evidence. This standard still leaves a number of questions unanswered and would require additional and extensive fact-finding hearings by the trial court as it considers the issue on a case-by-case basis.[132]

Justice Stevens' dissent, to which Justice Souter joined, emphasizes the fact that first contact occurred when Thornton was out of the car. Thornton was essentially an "arrested pedestrian."[133] The dissent argues that *Chimel* alone is enough to govern this situation because it is no longer an automobile arrest. The same protections should apply to a recent occupant of a vehicle as to a recent occupant of a house. The majority, Stevens writes, "[e]xtends *Belton's* reach without providing any guidance for the future application of its swollen rule."[134]

The opinions in *Thornton* reveal uneasiness with *Belton* by at least five justices: Scalia, Ginsburg, Stevens, Souter and O'Connor. In light of this, one can ask why the Court did not address the *Belton* issue in its 2004 *Thornton* opinion. Like Gant, Thornton was in handcuffs in the rear of the patrol car at the time of the search. Perhaps buyer's remorse after *Thornton* helps explain why the Court decided to grant *certiorari* in *Gant.*

Arizona v. Gant: The Case Below[135]

During the daylight hours of August 25, 1999, two uniformed officers of the Tucson police department knocked on the door of a house in response to a tip that activities involving illegal narcotics were taking place inside.[136] Rodney Gant answered the door.[137] The police officers asked to speak to the owner of the residence, and Gant responded by telling them that the owner was away and would return later in the afternoon.[138] Before returning that evening, the officers learned that there was an outstanding warrant for Gant's arrest for driving with a suspended license.[139] While the officers were in the process of making arrests outside the front of the residence, Gant drove up and parked his car in the driveway.[140] As Gant got out of the car, an officer immediately called him over, intending to place him under arrest based on the outstanding warrant.[141] Gant walked eight to twelve feet from the car toward the officer, and an officer handcuffed him and placed him under arrest.[142] Within moments, Gant was seated in the back seat of the patrol car under the supervision of an officer.[143] Two other officers, pursuant to their training in the permissible scope of a search incident to a lawful automobile arrest, searched the passenger compartment of the car that Gant had been driving just moments before.[144] In the course of that search, the officers found a small plastic bag of cocaine and a pistol.[145] Contemporaneously, two others had also been arrested and placed in the back seats of two other police vehicles.[146] In all, four officers were present at the scene, which was considered secure.[147]

The procedural history of the case is less simple. Based on the bag of drugs, Gant was charged with possession of a controlled substance and possession of drug paraphernalia.[148] The trial court denied Gant's motion to suppress both the drugs and the bag.[149] Consequently, Gant was convicted of both counts.[150] On appeal, the Arizona Court of Appeals reversed the denial of Gant's motion to suppress.[151] The Arizona Supreme Court denied review but the United States Supreme Court granted the State's petition for *certiorari*.[152] The Supreme Court vacated the opinion of the Court of Appeals and remanded for reconsideration in light of a relevant case that had been decided by the Arizona

Supreme Court in the interim.[153] That interim case, *State v. Dean*,[154] held that if an arrestee is not a recent occupant of the car from which he is arrested then *Belton* does not apply.[155] The Court of Appeals remanded Gant's case to the trial court for determination of whether Gant was a "recent occupant" under state and federal law. The trial court found that Gant was, in fact, a recent occupant and again upheld the search and admission of the evidence.[156] Gant again appealed to the Arizona Court of Appeals, which again reversed on grounds that the search was not "contemporaneous" with Gant's arrest and that the two rationales were not present for the automobile search incident to a lawful arrest exception to the warrant requirement of *Chimel*.[157] The State appealed to the Arizona Supreme Court, which affirmed,[158] and the United States Supreme Court granted the State's second petition for *certiorari*.[159]

The Arizona Supreme Court posed the issue in *Gant* as follows: does the search incident to arrest exception permit the warrantless search of an arrestee's car "when the scene is secure and the arrestee is handcuffed, seated in the back of a patrol car, and under the supervision of a police officer"?[160] The court held that under such circumstances such a search is not justified.[161] By framing the issue as it did, the Arizona Supreme Court distinguished *Belton* on its facts. More difficult was distinguishing *Thornton*, the facts of which are essentially identical to those in *Gant.* The Arizona Supreme Court unpersuasively argued that the only issue the petitioners raised in *Thornton* was the significance of when first contact occurs and that the *Thornton* Court could not and did not reach the issue presented in *Gant*.

Before the Arizona Supreme Court, the State argued Gant's case was an easy one because *Belton* and *Thornton* were controlling.[162] But unlike *Belton,* the court held that this case did not deal with the permissible *scope* of a search of an automobile incident to a contemporaneous arrest of a recent occupant but "with the threshold question whether the police may conduct a search incident to arrest *at all* when the scene is secure."[163] "Because *Belton* does not purport to answer this question," the Arizona Supreme Court claimed, "we must determine whether officer safety or the preservation of evidence, the rationales that excuse the warrant requirement for searches incident to arrest, justified the warrantless search of Gant's car."[164]

The Arizona Supreme Court read the record as showing that the scene was completely secure.[165] There was no reason to think anyone had access to the passenger compartment or that the safety of the officers or any evidence was at risk. The Arizona Supreme Court held that "absent either of these *Chimel* rationales, the search cannot be upheld as a lawful search incident to arrest."[166]

The Arizona Supreme Court claimed that *Gant* did not require it to "reconsider *Belton*" because the facts were very different.[167] It made no effort, therefore, to offer arguments for abandoning the rule of *stare decisis*. In *Belton*, the court emphasized that there was one officer and four unsecured suspects outside the car[168] thereby putting the safety of the officer and the integrity of the evidence at risk. Therefore, the *Chimel* reasons for a search of the passenger compartment incident to arrest were at hand in *Belton*, unlike in *Gant*.[169] The court read *Belton* as first requiring, as a threshold issue, the determination of one or both *Chimel* conditions to justify a search at all and then, if one condition applies, imposing a bright-line rule solely on the *scope* of the search.[170]

The State used the *Belton* rationale to argue that because the passenger compartment is usually within reach of an arrestee, it is unnecessary to analyze the exigency in each case. The court incorrectly held, however, that at least one exigency is necessary or it would be permissible to search the car an hour later, a result that was rejected in *Chimel*. The State further argued that under *Robinson*, the *Chimel* justifications are presumed to exist by virtue of the arrest itself and that the prosecution need not show actual danger in order to search a car.[171]

The Arizona Supreme Court rejected these arguments. It wrote that *Robinson* instead teaches that police can perform a search incident to arrest without proving in any particular case that they were concerned about safety or evidence because it is *presumed present in every arrest*.[172] But if those concerns "are no longer present," then the justifications are absent and a warrant is required.[173] According to the Arizona Supreme Court, potential danger to safety and evidence is a *presumption* that can be *rebutted* by the defense, even if it is a search of arrestee's person not involving a vehicle. The burden is then shifted to the government to prove that either a threat to the officer's safety or to the integrity potential evidence was indeed present in order to take advantage of the *Belton* warrant exception.[174]

The Arizona Supreme Court recognized that most other courts have found *Belton* and *Thornton* dispositive on similar facts,[175] but the court did not read them as abandoning the *Chimel* justifications for warrantless searches incident to lawful arrests in automobiles. The majority acknowledged the need for clear,

understandable rules in this area and noted the opposition of Arizona law enforcement to any changes in *Belton* search procedures.[176] The majority, however, rejected the warnings that law enforcement will "game" the rules and will not secure the arrestee until the search is done, and thus risk putting themselves in jeopardy.[177] No other theories were advanced or relied upon, such as the automobile or impoundment exceptions, to justify the warrantless search.

The *en banc* opinion of the Arizona Supreme Court in *Gant* was decided by a 3-2 vote. Justice W. Scott Bales authored the dissenting opinion and concluded that the majority's reasoning was inconsistent with *Belton*. There are "good reasons to reconsider *Belton*," he wrote, but "doing so is the sole prerogative of the United States Supreme Court."[178] The dissent rejected the majority's claim that *Belton* and *Thornton* do not control.[179] It did not read *Belton* as requiring a threshold finding of one of the *Chimel* factors to justify a *Belton* search.

The dissent persuasively surveyed the arguments against the majority's conclusions. According to the dissent, *Belton* was an extension of *Chimel* and *Robinson*. In *Robinson*, searches of a person incident to arrest are permissible regardless of whether, in a particular case, "there was present one of the reasons supporting the [exception to the warrant requirement]."[180] The lawful arrest *itself* justifies the search. "[T]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would . . . be found."[181]

The dissent writes that the Supreme Court defined the area of immediate control with the generalization that the passenger compartment and any containers therein may be searched contemporaneously to the arrest of a recent automobile occupant.[182] It was therefore permissible to search containers, including containers that could not hold weapons or evidence of the crime for which the arrest was made.[183]

According to the dissent, the majority erred in holding that the search was not incident to Gant's lawful arrest. It explained that the court was wrong because the validity of a *Belton* search does not depend on the presence of *Chimel* rationales in a particular case.[184] The New York State Court of Appeals in *Belton* made the same mistake and the Supreme Court corrected that error.[185] Brennan's dissent in *Belton* showed that he knew exactly what the majority was doing.[186] Brennan observed that "[t]he Court today substantially expands the permissible scope of a search incident to a lawful arrest by permitting police officers to search areas and containers the arrestee could not possibly reach at the time of arrest."[187]

The majority in *Gant* took issue with the *Belton* majority in the same way Brennan did in his dissent. Brennan unsuccessfully argued that "[w]hen the arrest has been consummated and the arrestee safely taken into custody, the justifications underlying *Chimel*'s limited exception to the warrant requirement cease to apply: at that point there is no possibility that the arrestee could reach weapons or contraband."[188] Based on Brennan's dissent in *Belton*, it is hard to understand how the *Gant* majority could adopt an interpretation that the *Belton* majority specifically rejected.

In *Belton*, the search did not take place until the officer had already removed the defendant from the car. The *Belton* Court did not then look to see if either of the *Chimel* rationales were present.

In his dissent in the Arizona Supreme Court, Bales wrote that "*Belton* is also inconsistent with the majority's focus on the *Chimel* rationales at the time of the search."[189] In *Belton*, the search did not take place until the officer had already removed the defendant from the car.[190] The *Belton* Court did not then look to see if either of the *Chimel* rationales was present at that point. It stated that the search was justified by the arrest itself. The Court in *Belton* held that the arrest was justified because of circumstances thought generally to exist during the arrest of a recent occupant, not on any particularized concerns for safety or evidence. Even the jacket in the passenger compartment was ruled to be within Belton's "immediate control" for the purpose of a search incident to arrest.[191]

Justice Brennan recognized that under the ruling in *Belton*, "the result would presumably be the same even if [the officer] had handcuffed Belton and his companions in the patrol car before placing them under arrest."[192] Nearly every appellate court that has since considered the issue has confirmed Brennan's point.[193]

This does not, as the majority claims, mean that police officers may conduct warrantless searches hours and miles removed from the arrest. *Belton* makes clear, and the *Gant* majority does not disagree, that the car searched must be that of a "recent occupant" and come "as a contemporaneous incident" of the arrest.[194] The arrestee need not be in the car nor must the search be simultaneous to the arrest as long as there is some temporal proximity.[195]

Bales recognized that the Arizona Supreme Court majority created a new test that ignored *Belton's* determination that searches in this context should be guided by a "straightforward rule" that does not depend on case-by-case adjudications. The Arizona Supreme Court majority says that a *Belton* search is not justified unless, "based on the totality of the circumstances," there is a reasonable risk to the officer's safety or preservation of evidence.[196] Such an inquiry can only be made on a case-by-case basis, first by police officers and then by the trial and reviewing courts.[197] This practical result is at odds with the core motivation of *Belton*: to develop a clear rule not dependent on differing estimates of what items were and were not within reach of an arrestee at any particular moment.[198] This imperative justifies the sort of generalization which *Belton* enunciated.

Belton already requires some case-by-case analysis of the totality of the circumstances itself through the twin requirements that the arrestee is a recent occupant and that the search is contemporaneous with the arrest.[199] These are threshold requirements that trigger the right to conduct a *Belton* search of a car, the scope of which is the passenger compartment and any containers. These determinations certainly do not mean that there must be case-specific findings of exigent circumstances at the time of the search. In fact, it suggests the contrary.

Justice Bales did add that the *Belton* bright-line rule "has long been criticized and probably merits reconsideration."[200] The bright-line rule, he wrote, created "a significant exception to the Fourth Amendment's warrant requirement by making a generalization about the exigencies of arrests involving automobiles and then allowing searches whether or not the concerns justifying the exception were present in any particular case."[201] Bales criticizes *Belton* as resting on a "shaky foundation" that has gotten more tenuous over time because police now routinely arrest and handcuff arrestees before conducting *Belton* searches.[202]

There are, however, alternative ways of dealing with *Belton's* weaknesses other than the majority's method. One such alternative, Bales suggested, would have been for the Arizona Supreme Court to ground its holding in the Arizona state constitution rather than the United States Constitution, as some other state courts have done.[203]

As will be discussed below, the *certiorari* petition and the oral argument revealed that the Court was interested in reassessing the twenty-eight-year-old holding in *Belton*, as well as the four-year-old holding in *Thornton*. That subsequent interest still does not explain, however, the Arizona Supreme Court's disregard of the established precedent in *Belton* and *Thornton*. The Arizona court's reinterpretation of the *Belton* doctrine was too clever by half and unjustified wishful thinking. It did not distinguish, in any meaningful way, the facts in *Gant* from *Belton* and especially from *Thornton*. In the case of *Thornton*, it tried to distinguish on the issue instead. In the case of *Belton*, the Arizona court chose to challenge its bright-line rule by arguing that the placement of the line may be logically inconsistent with the reason for the search in the first place. The court's decision represented a blow to the authority of the Supreme Court of the United States in determining the meaning of the Constitution of the United States. The Arizona Supreme Court could have based its holding on the Arizona state constitution and had its way on the streets of that state. The court chose, however, to flaunt its rejection of *Belton* and throw a gauntlet before the U.S. Supreme Court. The Supreme Court's subsequent willingness to revisit *Belton* is no excuse for the Arizona Supreme Court's judicial insubordination. It should have applied the law and let Gant seek *certiorari* in the Supreme Court.

The United States Supreme Court Considers *Gant*[204]

In its petition for a *writ of certiorari*, the State of Arizona argued, rightly in our view, that the Arizona Supreme Court's opinion in *Gant* not only conflicted with, but actually sought to overrule *Belton* and *Thornton*. By substituting a "factual assessment in every case [of] whether the justifications underlying the search incident to arrest actually exist,"[205] the *Gant* court "contradicts and effectively 'overrules'" *Belton*[206] and "directly contradicts [its] language and spirit."[207] The Supreme Court rejected this case-by-case analysis in *Belton,* a rejection reaffirmed in *Thornton* under nearly identical facts.[208] Arizona asked the Supreme Court to

take the case because the ruling "conflicts with the holdings of nearly every state and federal court that has applied *Belton* and *Thornton* to factual situations like Gant's."[209] It repeatedly argues that the *Gant* "case-specific assessment of actual risks to officers and evidence" is "unworkable for the very reasons that [the Supreme] Court has repeatedly cited in support of a bright-line rule."[210] The *Gant* decision "thwarts" the Court's efforts to impose a "straightforward rule, easily applied, and predictably enforced."[211]

In opposition to Arizona's request to hear the case, respondent Gant took a slightly different tack than did the Arizona Supreme Court. Gant's pleading relied more heavily on the claim that the search of his car was not a "contemporaneous incident" of the arrest as required in *Belton*.[212] By framing the issue as whether a *Belton* requirement of "contemporaneousness" was met, Gant gave the Court the opportunity to decide the case without challenging *Belton* directly. Gant agreed with the Arizona Supreme Court, however, that the opinion did not overrule or even contradict *Belton* and *Thornton* and that it was "consistent with the constitutional principles affirmed in *Chimel v. California*."[213] The pleading accused Arizona of "abandon[ing] Fourth Amendment protections by misapplying *Chimel* and *Belton*,"[214] describing its interpretation as "fundamentally flawed."[215] He quoted Justice O'Connor's concurrence in *Thornton*, saying that exigent circumstances attendant at arrests of recent automobile occupants "[did] not create an absolute and continuing right of law enforcement to conduct a search of the vehicle."[216]

Gant supported the Arizona Supreme Court's reasoning that a finding of at least one of the two *Chimel* rationales was a prerequisite for searching the car at all and that the *Belton* bright-line rule applied only to the scope of the subsequent search. Under Gant's interpretation of the *Belton* rule, there was no threat to the safety of the officers or the integrity of evidence in the vehicle.[217]

There are two possible reasons why the Supreme Court granted *certiorari* in the *Gant* case. One is that the Court planned to reaffirm the rulings in *Belton* and *Thornton* and noticeably correct the Arizona Supreme Court for its novel and unprecedented misapplication of *Belton*. The Court may have thought it necessary to send a message, both to the Arizona Supreme Court and other courts around the country that have strayed from its teaching, and to remind them that the bright-line rule imposed by *Belton* remained the law of the land. There have been few cases other than *Gant*, however, in which federal circuit courts or state courts of last resort have rejected or strayed from *Belton*.[218]

Another possible reason is that the Court was willing to reconsider, or at least reexamine, its holding in *Belton*, even after refusing to take such an opportunity just four years prior when it was arguably presented in *Thornton*. In light of each justice's previously expressed views on *Belton* and the concerns expressed in the oral arguments, it was clear that there was a genuine discomfort with *Belton*. But while a desire to reconsider its bright-line rule may have motivated its decision to grant *certiorari* in *Gant*, none of the factors that are usually present when the Supreme Court grants *certiorari* to reconsider a well-established case were present in *Gant*. There was no major split among courts considering the issue, there had been substantial reliance on *Belton*, *Belton* had not been ignored or proven unworkable, and there had been no subsequent Supreme Court cases undermining *Belton*.

In its brief on the merits, petitioner Arizona reiterated that *Belton* does not require a fact-bound assessment of either of the *Chimel* rationales. It went on to argue that "searches conducted under *Belton's* bright-line rule are reasonable" and that such a limited search "correctly balances the need for officer safety and evidence preservation with an arrestee's limited privacy interest in his automobile."[219] Arizona added the fanciful argument, however, that there is in fact a reasonable danger that Gant could have escaped from the police car and posed a threat to the officers or the evidence.[220] Arizona's brief went on to argue that *Belton* already answered the question presented in *Gant*, that *Thornton* recently reaffirmed this answer, and that principles of *stare decisis* favored affirming it once again.[221] The established rule should be affirmed because it has proven to be "workable," it "protects Fourth Amendment interests" and there is "no special justification . . . to overrule it."[222] Further, abandoning the *Belton* rule would pose a "special hardship" for police officers and departments which would be forced to develop and retrain new procedures in order to account for the ramifications of the *Gant* opinion.[223]

Gant's brief again argued that the Arizona Supreme Court did not contradict *Belton* or *Thornton* and asserted that "all searches incident to arrest must rest on *Chimel's* twin exigency rationales" under those cases.[224] Such searches include those of the arrestee's person as well as the area that is reasonable within reach. The bright-line rules of *Belton* and *Thornton* delineate the scope of the permissible search. Police may search

the entire passenger compartment of an automobile "when any part of the car is arguably within the immediate control of its recent occupant."[225] In this case no such argument can be made, Gant concludes. He points out factual determinations are still required in order to determine whether the arrestee is a "recent occupant" and whether the search is a "contemporaneous incident" of the arrest.[226] He argues in the alternative that if the Arizona Supreme Court opinion amounted to a contradiction of *Belton* and *Thornton*, the Court should indeed reconsider the holdings in those cases.[227] Gant therefore concluded by pointing out that searches of automobiles pursuant to arrest of a recent occupant are not *per se* reasonable.[228]

The oral arguments on October 7, 2008, were lively, with many justices who were critical of *Belton* showing some degree of willingness to reconsider it. The justices peppered the three attorneys (the United States appeared as an *amicus*) with questions. Nevertheless, the government counsel poorly handled the oral arguments. First, Arizona and the United States were not adequately prepared to argue the reasonableness of the *Belton* approach under the Fourth Amendment's Reasonableness Clause. Justice Scalia wanted information on the historic reasonableness of the practice and neither attorney was prepared to provide any.[229] Second, the two governments also wasted a lot of time and credibility on the notion that the *Chimel* rationales continue to apply even when arrestees are in cuffs in the police car.[230] They emphasized statistics showing that suspects occasionally escape from the back of squad cars despite being handcuffed and could, therefore, actually pose a danger to the officers or evidence.[231] Not only did this waste valuable argument time, but it was also inconsistent with the crux of their argument.[232] The Court was surprised by this strategy and did not buy the argument.[233] Lastly, the government argued for the application of *Belton* and *Thornton* when it should have been putting the burden on Gant to justify the Arizona court's rejection of those precedents. In doing so, the government failed to emphasize the importance of supporting *Belton* based on the doctrine of *stare decisis*. It could not provide the Court with the correct standard of special circumstances required to overturn established precedent.[234]

Nevertheless, if the justices stayed true to their voting records in the previous related cases there appeared to be a majority for reversal of the Arizona Supreme Court in *Gant*. Based on their history, Justices Kennedy, Breyer, and Thomas should have supported Arizona's view of the permissibility of the search on *stare decisis* grounds, if nothing else.[235] The two newest justices, Chief Justice Roberts and Justice Alito, had not had occasion to address the issue before *Gant*, but were expected to align themselves in the majority on the basis of *stare decisis*.[236]

Kennedy and Breyer's questions and statements, however, showed a willingness to revisit *Belton's* bright-line rule and its underlying rationales.[237] Two more justices, Scalia and Ginsburg, were expected to concur in a judgment to reverse, but on more narrow grounds than the government argued.[238] Thus, there were the seeds reworking the relationship between *Chimel* and *Belton* and an announcement of a new rationale for allowing *Belton*-style searches. There were two solid votes, Justice Stevens and Justice Souter, for the proposition that *Belton* requires, as a preliminary matter, a finding of danger to the officer or the evidence in order to conduct a search of the car and its containers once the arrestee is outside the car.[239]

Kennedy and Breyer's questions and statements, however, showed a willingness to revist *Belton's* bright-line rule and its underlying rationales.

The oral arguments provide further clues to the thinking of each justice. Although Chief Justice Roberts was not on the Court for any of the previous relevant cases, he, nevertheless, indicated his fealty to the *Belton* precedent through his questions. He stated that the purpose of a bright-line rule was that "you don't have to justify it in every particular case" and pointed out that by asking for a case-by-case inquiry, appellees "[a]re … giving up the bright-line rule."[240] "You don't look at the specific facts" in such cases, he argued, that's "[t]he whole point of a bright line rule."[241] He went on to explore the ramifications of eliminating the bright-line rule, posing hypothetical fact situations. He asked, "[w]hat if [the arrestee] is in the back of the car but not handcuffed?"[242] Roberts continued by stating that "you have exactly the same case-by-case inquiry that *Belton* said we are not going to do . . . . [I]n *Thornton* of course [the arrestee] was handcuffed in the back of the police car . . . . What is left of the *Belton* bright-line rule when you are done . . . ."[243] Then Roberts noted that Gant's argument "[a]ssum[ed *Belton*] was wrong . . ." and that Gant was

essentially arguing to overrule *Belton*'s bright-line rule when he said "in these circumstances *Belton* applies, and in these circumstances, it doesn't."[244]

Justice Samuel Alito was also new to the issue. His questioning focused on two themes: *stare decisis* and the difficulty of adopting a case-by-case approach. Assuming you have to overrule *Belton,* he asked Gant, "don't you have to show that there are special circumstances justifying the overruling of *Belton*" such as that it has been proven unworkable, that it has been undermined by subsequent cases, that lower courts have not relied upon it, or others?[245] Alito offered a few hypotheticals involving the requirements of "recent occupancy" of the car and "contemporaneousness" of the arrest to show that a case-by-case analysis could prove problematic.[246]

After exploring ways to abandon the *Belton* rule, while still permitting the search of the automobile on other grounds, through impoundment, the plain view doctrine, or pursuant to a warrant, Justice Breyer declared that he found the case "very, very difficult."[247] He was skeptical of the notion that overruling *Belton* would prompt the police to intentionally place themselves in danger in order to have the authority to search. He hinted that he would vote to uphold *Belton* on *stare decisis* grounds in the absence of any compelling reason to overturn it.[248] *Belton* is not very logical, he said, but it has been the law for almost thirty years and in the absence of a "disaster" or a "reason it is wrong" he would not overrule an earlier case.[249]

Justice Anthony Kennedy, as is often his practice, seemed to be looking for the middle ground. His questioning implied that he agreed with Gant, that the *Belton* bright-line rule requires the support of one of the *Chimel* rationales. He seemed at times to assume that there was no bright-line rule as of yet and that petitioners were asking for one.[250] Yet he was unpersuaded by Arizona's argument that there was still a danger to the officers and a risk of destruction of evidence despite the arrestee being handcuffed in the police car.[251] He admitted frustration that Arizona relied so heavily on this argument.[252] He struggled for an alternative rationale that he could use to justify a bright-line rule and pointed towards the car's mobility, that cars can be stolen or taken for joy rides, that there may be contraband or weapons in the car and that other people could get to them.[253]

No justice placed more significance on the original intent of the Framers than Justice Scalia. Justice Scalia was the most active member of the Court during the oral arguments in *Gant.*[254] Justice Scalia had already shown his discomfort with the *Belton* bright-line in his concurrence in *Thornton*, in which he argued the rule in *Rabinowitz* should apply to *Belton* searches. Justice Scalia was disappointed that none of the litigants was able to provide him with anything to "hang [his] hat on," by way of evidence that the Framers, or any court since that time, had found the searches allowed under *Belton* to be reasonable under the Fourth Amendment.[255] The government argued that police had come to rely on *Belton* over the nearly three decades since it was decided.[256] But Scalia was more interested in a longer time frame, going back to the Framers themselves. Using the example of Thomas Jefferson's carriage, he wondered whether the Framers would have considered the *Belton* rule to be reasonable under the Fourth Amendment.[257] If so, he asserted, that would be decisive for him in the *Gant* case. The litigants were unable to answer the question of the Framers' original intent in drafting the Fourth Amendment as it would relate to the reasonableness of *Belton* searches.[258]

If it is not a reasonable rule, Scalia said, then "it's just silly. It's . . . simply not the case . . . . I am going to say, you know, get rid of it."[259] Scalia observed that, realistically, the officer is not at risk if the arrestee is handcuffed in the police cruiser and the officer searches his car.[260] "[W]hat risk to the officer is being avoided?"[261] He further noted that if you remove the requirement to show a threat to officer safety, "why would you limit the search just to the passenger compartment of the vehicle? Why don't you let him search the trunk, too?"[262] It is illogical to "abandon the safety requirement" and then draw the line so that police cannot search the whole car.[263]

Scalia again emphasized that the scope of any search should be limited to evidence of the crime for which the suspect is being arrested.[264] If the arrest is for speeding, he wondered, what do the police think they will find by searching the car?[265] But, of course, many traffic arrests initially show no signs of other crimes until searches of the person and automobile take place.

Scalia's idea to link the arrest with the search for evidence that would support that arrest was laid out in his concurrence in *Thornton,* but neither attorney for the government seemed prepared to address Scalia's concurrence. The government should have prepared its standard as an alternative to its main argument.

Scalia foresaw that more widespread impoundment would constitute a threat to his standard and would, as a practical matter, be the police reaction to an

abandonment of the *Belton* rule.[266] But he questioned if impoundment could always be authorized.[267] Why, asked Scalia, must searches of vehicles, but not searches of the person, be tied to the two reasons?[268] Police can search Mother Teresa if they arrest her, even though there is little chance that she is carrying weapons.[269] Even if it is obvious that there is little to no chance of hostility in a given situation, there are still bright-line rules that govern the searches of persons.[270] Why not have a similar rule regarding autos as well?[271]

Justice Ginsburg joined Scalia's *Thornton* concurrence, approving of searches for evidence of the crime for which the suspect is being arrested. *Belton*, she observed, was concerned with weapons and "grab areas."[272] Also, she inquired about impoundment and subsequent inventory searches.[273] She relied on *Chambers* to draw the line at warrantless station-house impoundment searches as unreasonable and asked whether the facts in *Gant* were analogous to that situation.[274] "[W]hat happens to the car?" she asked.[275] Under what circumstances could the police impound and search the car? Here the car was on a private driveway.[276] Could police still have impounded and done an inventory search?[277] She astutely took issue with the Arizona Supreme Court's reasoning that it was not overruling *Belton*, but merely putting the bright-line rule in context.[278] Following such reasoning would lead to no bright-line rules.

Justice Stevens, as mentioned above, concurred in *Belton* but dissented in *Thornton*. During oral arguments, he seemed to argue that the traditional automobile exception to the warrant requirement could control these cases.[279] Under the exception, police are entitled to search an automobile when they have probable cause to believe it contains contraband, along with any containers reasonably expected to contain such evidence.[280] Why should other cases allow for more extensive searches on less than probable cause?

He reminded the litigants that in *Belton*, the suspects were not under the sort of control that they were in *Thornton* and in *Gant*.[281] Therefore, he reasoned, Arizona and the United States were actually asking for more than the Court gave in *Belton*—an "expanded *Belton*."[282] There is very little danger to the officers here; police just "want the ability to search the vehicle."[283]

Stevens hinted that he would not be inclined to join the Scalia-Ginsburg analysis allowing searches for evidence of the crime in question. Taking issue with the Scalia-Ginsburg rationale, he said the Scalia-Ginsburg analysis should only control when there is probable cause to believe there is some evidence in the vehicle.[284]

Justice Souter joined Justice Stevens by dissenting in *Thornton*. Like Justice Stevens, Justice Souter was a solid vote for Gant. He was sympathetic to Gant's view of *Belton* as being linked to the *Chimel* rule of an area within the suspect's "immediate control" and at least one of its rationales. The government's view, Souter stated, divorces the search completely from the *Chimel* rule and concluded that *Belton's* bright-line is dependent upon the presence of one of the two underlying rationales.[285] So either we declare it is no longer a *Chimel* rule or if we say it applies in a case like this, it is "nonsense."[286] The choice, he said, was between applying a new and different rule or applying *Chimel*.[287]

Responding to the government's main argument about the continued existence of the *Chimel* factors, Souter asked whether in escape cases an officer was ever injured.[288] Did the arrestee "make a beeline — for his own car?"[289] Are there any examples "where the arrestee went back to his own car and tried to get a gun to hurt a police officer?"[290] Was the arrestee handcuffed?[291] Could he still drive the car?[292] Souter assumed that no search of the car is permissible on an incident to arrest theory if the arrestee is in the station house.[293] "Why isn't it equally workable to say when the [arrestee] is handcuffed and put in the back of a cruiser, they can't do it?"[294]

Possible Holdings[295]

In our view, the U.S. Supreme Court had five possible options for its holding in *Gant*:

1. *Stare Decisis*: Reaffirm *Belton*'s Result and Rationale.

The Court could have maintained the bright-line rule that the police may search the entire passenger compartment of an automobile, including the glove compartment, as well as any container therein, contemporaneous to an arrest of a recent occupant of that vehicle. The trick would be how to reconcile the ruling with the obsolete *Belton* rationale that arrestees will, more often than not, have access to the compartment and thus endanger the safety of the officer and integrity of evidence. Instead, the importance of a bright-line rule and the maintenance of a widely used and easily applied standard must be emphasized.

The Court could have instructed the Arizona Supreme Court and other lower courts that the bright-

line rule of *Belton*, as would be reaffirmed in *Gant*, does not require specific factual findings of either actual risk that the police officer(s) may be in danger of harm or destruction or alteration of evidence as a threshold issue to conducting a search of the automobile. The bright line is drawn by virtue of the arrest itself, defining the scope of the permissible search as including the passenger compartment and any containers within it. Such a search is subject only to the limitations that the arrest must be of "recent occupants" of the car and "contemporaneous" to the search as defined by the applicable body of case law.

This option would have constituted no change in the way practitioners have dealt with these issues. The ability to search and the scope thereof would remain the same, as would the possibility of litigation regarding the recent occupancy of the vehicle and the contemporaneity of the search.

2. Redraw and Redefine the Bright Line.

Under this approach the Court would have specified the precise facts that would constitute the location of the line determining whether police can conduct a search. One example is in the facts of *Gant* itself: when the suspect is in handcuffs and in the patrol car. The line could be re-drawn in any number of other places and ways, considering factors such as: when the suspects are under arrest, when they are in the squad car, when they are handcuffed, or when they are removed from the car. The number of police officers present must also affect the rules.

The Court could have avoided overruling *Belton* by finding that police procedures developed in response to *Belton* undermined the Court's assumptions of the circumstances of these searches and now require fine-tuning of the placement of the line.

This option likely would have created the awkward situation of lines being drawn in different places under different circumstances. It would have changed how practitioners litigate the issues by requiring a finding of whether any of the new factors permitting a search were present in a given case.

3. A *Chimel*-based Standard.

Another approach could have been to develop a new standard based on the twin factors in *Chimel*. For example, the police may search the interior passenger compartment of an automobile, and any containers therein, *up until the moment that all recent occupants of an automobile are safely in custody and the automobile is secured.*

In other words, it could be lawful to search the interior compartment of an automobile and any containers therein, without a warrant, if the government can show that one or more recent occupants or other persons posed an actual danger to the officers' safety or to the integrity of any evidence. Evidence that the suspects were safely under arrest or within the control of the police, or that no one else had access to the car would undermine any ability to establish such dangers. Rebuttable presumptions could be imposed against either the defense or the government.

> The trick would be how to reconcile the ruling with the obsolete *Belton* rationale that arrestees will, more often than not, have access to the compartment and thus endanger the safety of the officer and integrity of evidence.

This standard would address the issue in *Gant* and accord with the underlying rationale that there is a special danger of harm and/or destruction of evidence from occupants of automobiles. This, of course, would have required additional litigation and fact-finding on the difficult issue of what circumstances present a danger to the officer or evidence. It is possible, but unlikely, that police would purposely manage the arrest scene to maintain threats to themselves or the evidence in order to justify a search of the car.

Certain basic fact situations would present, however, some compelling conclusions that may require a bright-line rule nonetheless. Would courts find, for example, that the existence of just one police officer creates a per se danger unless the arrestee or arrestees are handcuffed and secured in a police cruiser? In such a situation, an arrestee might run or attack the officer even if handcuffed. With this option, police may respond by developing procedures such that after the arrestee and the car are secured, they may search the car either through impoundment or pursuant to a search warrant.

It would be hard to imagine how the Court could have adopted this approach without overruling *Belton* by finding the special circumstances usually required

by a departure from *stare decisis*. This approach could also serve to undermine the "search incident to arrest of a person" doctrine under *Robinson* and perhaps require or lead to its modification as well. Rather than always allowing a full search of the person contemporaneous to an arrest, a new rule in *Gant* could presuppose that such searches require a showing that the suspect posed an actual risk of harm to the officer or destruction of evidence. In most cases, the warrantless search incident to a lawful arrest would be upheld but not before additional litigation of the facts of each arrest.

4. Evidence of the Crime.

Another possible approach is to adopt the novel Scalia-Ginsburg approach that a car search for evidence of the crime for which the arrest is being made would be reasonable under the Fourth Amendment. This would open a whole new area of litigation, fact-finding, and appellate case law as courts struggled with how to define the permissible scope of such searches. Some of the questions and issues the courts will face include: For what crimes is the suspect arrested? What happens when multiple suspects are arrested for different offenses? What sort of evidence is relevant to what sorts of crimes, for example: Is a gun evidence of the crime of drug possession and vice versa? Is marijuana evidence of driving under the influence? If the arrest is for a weapons offense, what is relevant evidence? Would any search ever be permissible pursuant to arrests for traffic offenses? If not, would that not potentially put officers in danger of weapons in the car, for example? Could more complete searches still be conducted if either of the *Chimel* rationales were present? Where in the car can be searched? Is the scope governed by the likelihood of relevant evidence being found? What about containers?

5. Other Means to the End: Warrants Based Upon Probable Cause or Other Exceptions

The final alternative would be to abolish any exception to the warrant clause beyond that involving the immediate area of control as determined by a *Chimel* analysis, and treat recent occupants of cars no differently than pedestrians or recent occupants of homes. Thus, in order to search the passenger compartment and any containers therein, the police would need to obtain a warrant based on probable cause as argued by Stevens and Souter. Police could also attempt to justify a search under some other exception to the warrant requirement. Impoundment would become a regular tactic utilized by the police and one that would, ironically, constitute a greater intrusion upon the owner and driver of the car than would a search at the scene.

It is well established that the Court is free to do as it pleases, as long as it has five votes. Given the options above and what occurred during the oral arguments, the Court could have found support for several outcomes. Chief Justice Roberts, along with Justices Alito, Thomas, and perhaps Breyer, could have found support for option number one, ruling that *stare decisis* reverses the Arizona Supreme Court decision. Also, there could have been two votes—Justices Stevens and Souter—for the warrant-based rule noted in option five.[296] Justices Scalia and Ginsburg would again propose their "related evidence" rule but might not attract any other votes, much less the three more required for a majority opinion. As they did in *Thornton*, however, these two justices would have likely concurred in the judgment of at least a *stare decisis* majority opinion.

As is so often the case, the most important justice might have been Justice Kennedy. Judging from his questions and comments during the oral argument, Kennedy may have based the validity of the search on grounds other than *Belton's* familiar bright-line rule. Justice Breyer confessed discomfort with *Belton* and indicated his preference for *stare decisis*.

The Supreme Court's Ruling

Two months before the end of its 2008–2009 term, the United States Supreme Court issued its opinion in the *Gant* case. In a 5-4 opinion penned by Justice Stevens, the Court affirmed the holding of the Arizona Supreme Court ruling that the evidence seized from respondent's car was inadmissible.[297] The Court held that the Constitution permitted police to search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might have access to the vehicle at the time of the search.[298] It also created, in a transparent effort to fashion a majority, a wholly new rule for application in such cases, holding that such a search may also constitutionally take place if there is reason to believe that the vehicle contains evidence of the offense of arrest.[299] Finding neither condition present in the facts of *Gant*, the Court held the search to be unreasonable.[300]

The Court shed light on its reasons for granting *certiorari* in this case citing a "chorus" of courts, scholars, and justices who questioned the clarity of *Belton* as well as its fidelity to the Fourth Amendment.[301] In doing

so, the Court turned a deaf ear to the much louder choir of consistent conformity to the plain rule in *Belton*.

Understandably in light of its ruling, the Court relied heavily on the holding in *Chimel* and was reminded that the exception to the Fourth Amendment's warrant requirement of a search incident to a lawful arrest applies only to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence."[302] If there is no possibility that an arrestee can reach into the area that the police seek to search, the two possible justifications for the exception are absent. This reasoning, the Court explained, assures that the scope of the search incident to the arrest is "commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense" that could be concealed or destroyed.[303]

Applying the *Chimel* exception to the automobile context, *Belton*, the Court continued, held that "when an officer lawfully arrests 'the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile' and any containers therein."[304] The justifications of the *Chimel* warrant exception, said the *Gant* Court, apply only when there is a reasonable possibility of the arrestee gaining access to a weapon or to evidence in the car.[305] The holding in *Belton* was based in large part, the Court said, on the assumption that articles inside the passenger compartment "are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach.'"[306]

Unabashedly seeking to avoid overruling *Belton*, the Court rejected the almost universal notion that it had established a bright-line rule in such cases. Accordingly, the Court refused to acknowledge that *Belton* directly required courts to admit evidence seized from the passenger compartment upon the arrest of recent occupants of vehicles.[307] Rather *Belton*, the Court claimed, has been widely, though exaggeratedly, read as allowing the search of the passenger compartment "even if there is no possibility the arrestee could gain access to the vehicle at the time of the search."[308] The Court attributed this reading to Justice Brennan's allegedly hyperbolic dissent in *Belton* warning that the majority's holding in that case rested on "the 'fiction . . . that the interior of a car is *always* within the immediate control of the arrestee'" and that the search would have been upheld "even if [the officer] had handcuffed Belton and his companions in the patrol car' before conducting the search."[309] The Court acknowledged that cases in which the searches have been upheld in "this precise factual scenario . . . are legion."[310] These cases, the Court admitted, include ones in which the handcuffed arrestee has already left the scene entirely.[311]

The *Gant* Court, disingenuously in our view, called this common application a "broad reading of *Belton*," one which would "untether the rule from the justifications underlying the *Chimel* exception."[312] The Court accordingly rejected this "broad reading" ostensibly without overruling that case. It held that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[313] A search of a vehicle incident to a recent occupant's arrest is unconstitutional, the Court held, if there was no possibility of the arrestee gaining access to the interior compartment of the vehicle at the time of the search.[314]

In an effort to distinguish, rather than overrule *Belton*, the Court relied heavily on the factual differences between *Belton* and *Gant*. In *Belton*, one police officer—presumably in possession of one pair of handcuffs—was confronted with four unsecured arrestees at the time of his search of the vehicle.[315] In *Gant*, however, a total of five police officers handcuffed and secured in a patrol car the lone arrestee, who had recently occupied the vehicle, and two other suspects.[316] The Court presumed that while Belton may have been able to access the passenger compartment, Gant, on the other hand, could not have gained access to his car at the time of the search.

By so ruling, the Court has left unscathed the result in *Belton* under the facts present in that case. The Court seemingly fails to realize that these two factual scenarios represent the polar extremes of a large spectrum of real world possibilities. Inexplicably, however, the Court concluded that it will be "the rare case" in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains.[317] The Court then foreshadows, without so acknowledging, the extensive litigation to come over the factual issue of whether arrestees have a possibility of access to the passenger compartment.[318] It also gives no weight to subsequent efforts by law enforcement to develop and employ strategies to permit searches of the passenger compartment by leaving a suspect or suspects arguably within reach of it.

Accordingly, the Court's ruling leaves many questions unanswered that criminal justice practitioners will have to address. Is the ruling in *Belton* essentially limited to its specific facts? Does *Gant* apply only to the

situation in which the arrestee is handcuffed and in a patrol car? What if the suspect is handcuffed but otherwise unsecured? What if no handcuffs have been applied but the suspects are placed up against the car or lying on the ground? What if one or more suspects are just steps away from the car? Must the suspects be as close as within arm's length of the car to invoke *Belton*? How do glove compartments fit in? The Court clearly fails to recognize the extent of the confusion and the subsequent litigation it has created by rejecting the bright-line rule of *Belton*.

Gant is also silent as to the treatment of containers within the passenger compartment. If suspects reasonably have access to the interior compartments of vehicles, do they automatically also have access to containers located within the compartment? The bright-line reading of *Belton* extended to any containers within the vehicle as well as to the passenger compartment itself. There were no containers involved in *Gant* and the ruling gives courts no guidance about how it should be applied in cases where contents of a container are at issue. Must the arrestee independently have reasonable access to the container? Does it matter where the container is within the car? Does the kind of container affect the result? Are containers that are more easily opened more likely to be accessible to the arrestee than other more difficult to open containers? Will the answers to these questions have to await yet another case?

Surprisingly and without justification in our view, the Court then goes on to carve out an additional exception to the limitations of *Chimel*. This part of the ruling is an audacious way to attract the vote of Justice Scalia and put together a majority of five votes. Adopting Justice Scalia's concurrence in *Thornton*,[319] the Court held that "circumstances unique to the vehicle justify a search incident to a lawful arrest when it is 'reasonable to believe [that] evidence relevant to the crime of arrest might be found in the vehicle.'"[320] The Court recognizes that this new rule "does not follow from *Chimel*."[321] Moreover, it does nothing to identify the "circumstances unique to the vehicle context" that justify the new exception.[322] It observes that in some cases there will be reason to believe that the passenger compartment may contain evidence of the arresting offense and in others it would not.[323] The Court, however, gives no guidance except that it holds that in *Gant* there is no reason to so believe—a conclusion with which we take exception—the car could contain evidence of the crime of driving with a suspended license. It is reasonable, however, to believe that the license itself, the car registration, or other evidence supporting the charge could have been found in the glove compartment or other parts of the vehicle's interior. Again, the Court fails to recognize the consequences of the creation of this new exception. In short, in the majority opinion rejects what was an understandable, easily applicable bright-line rule, replacing it with a two-part *Chimel*-centric analytical framework that will lead to extensive litigation.

The Court...holds that in *Gant* there is no reason to so beleive...[that] the car could contain evidence of the crime of suspended license. It is reasonable, however, to believe that the license itself, the car registration, or other evidence supporting the charge could have been found in the glove compartment.

Justice Scalia's concurring opinion is a fascinating exercise in judicial obfuscation in which he unabashedly announces that he is joining the Court's opinion despite his disagreement with half of it. He enthusiastically embraces that part of the majority opinion that establishes the "evidence of the crime" rationale for permitting vehicle searches. He does not, however, agree with the majority's endorsement of a revived, post-*Belton* application of *Chimel*. Scalia writes that Justice Stevens' opinion "would retain the application of *Chimel* in the car search context but would apply in the future what he believes our cases held in the past: that officers making a roadside stop may search the vehicle as long as the 'arrestee is within reaching distance of the passenger compartment at the time of the search.'"[324] He takes issue with this ruling, explaining that "this standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured . . . in order to conduct a vehicle search."[325] He would "simply abandon" what he calls "the *Belton-Thornton* charade" and overrule those cases outright and simply adopt his "evidence of

the crime" standard.[326]

Despite these views, he goes on to join the opinion of the Court. He acknowledges that no other Justice shares his view about abandoning the application of *Chimel* in these cases.[327] But he finds it "unacceptable" for the Court to issue a 4-1-4 opinion that would "leave[] the governing rule uncertain."[328] He then asserts that *Belton* and *Thornton* constituted a bright-line rule, albeit one that endorses cases he considers unconstitutional, and that the Court's opinion is an "artificial narrowing of those cases."[329] He joins the Court, not because he agrees with it, but because he considers allowing the bright-line rule to stand is the "greater evil."[330]

In his dissent, Justice Alito's shares our view that the Court, without so admitting, "effectively overrules [*Belton* and *Thornton*] even though respondent Gant has not asked [the Court] to do so."[331] Despite the majority's refusal "to acknowledge that it is overruling *Belton* and *Thornton*," Alito concludes, "there can be no doubt that it does so."[332] Alito believes that the majority's overruling of *Belton* departs from the usual rule of *stare decisis* without sufficient justification for doing so as required by that doctrine.[333] He argues that the case presents none of the "special justification[s]" necessary for the Court's departure from a constitutional precedent.[334] Justice Alito also takes issue with the "evidence of the crime" basis for the search by questioning the standard of "reason to believe."[335]

As expected, Chief Justice Roberts and Justices Kennedy and Breyer agree that *Belton* should be reaffirmed on *stare decisis* grounds. Justice Breyer writes in dissent that *Belton* did indeed create a bright-line rule; one which he believes sometimes leads to unconstitutional results.[336] Nevertheless, he says, there are no grounds upon which to abandon the well-established precedent that *Belton* represents.[337] Proponents of doing so have failed to meet their "heavy burden" for overturning a ruling on which there has been, as here, "considerable reliance."[338]

The Supreme Court's Ruling

So, what about Justice Scalia and the case of Thomas Jefferson's carriage? What would the Framers have expected in the future President's situation and how would that apply to the one in which Gant and the arresting officers found themselves?

In order to determine what is and is not "reasonable" under the Fourth Amendment, Justice Scalia always begins by looking to "the historical practices the Framers sought to preserve."[339] He must have been frustrated in this case because the Framers' practices failed to provide adequate guidance for how to rule. He could not determine, and the litigants could not help him, what James Madison, John Adams, and the other Framers would have believed to be reasonable. He was determined that because the "historical scope of officers' authority to search vehicles incident to arrest is uncertain, traditional standards of reasonableness govern."[340] Those standards, he concluded, do not justify the *Belton* bright-line rule.[341] As we saw, however, the Justices, all reasonable people, did not come to exactly the same conclusion on what the standard for such searches should be.

Of one thing we can be sure: by its ruling in *Arizona v. Gant*, the Supreme Court has completely reopened an area of constitutional criminal procedure that had been settled for nearly three decades. In doing so, it has released from Pandora's Box what will be a deluge of litigation as police, prosecutors, defense counsel, and trial and appellate courts—including the high court itself—are compelled to grapple with the new standards.

It is precisely cases like *Gant* that explain the allure of the doctrine of *stare decisis*. It makes one long, along with Justice Scalia, for the simplicity of the 18th century and the elusive wisdom of the case of Thomas Jefferson's carriage.

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[2] 129 S. Ct. 1710 (2009).

[3] 453 U.S. 454 (1981).

[4] *See* Transcript of Oral Argument at 7, Arizona v. Gant, 538 U.S. 976 (No. 07-542) (U.S. Oct. 7, 2008), 2008 WL 4527980 [hereinafter *Gant Transcript*].

[5] *Id.*

[6] *Belton*, 453 U.S. at 8.

[7] *See id.*

[8] The Fourth Amendment to the United States Constitution reads as follows:

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

U.S. Const. amend. IV.

In *Terry v. Ohio*, the United States Supreme Court emphasized the importance of this right by reiterating that "[n]o right is held more sacred . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by

clear and unquestionable authority of law." 392 U.S. 1, 9 (1968). As originally included in the Bill of Rights, the protections of the Fourth Amendment applied only to actions by the federal government. Pursuant to the Due Process clause of the Fourteenth Amendment, the Fourth Amendment was incorporated and applied to actions taken by state governments in 1961 in *Mapp v. Ohio*, 367 U.S. 643 (1961).

For most of its history, the Supreme Court read the Fourth Amendment to require a warrant supported by probable cause for all searches and seizures of places, persons and things. Its long held position had been that "searches conducted outside the judicial process, without prior approval by a judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." Katz v. United States, 389 U.S. 347, 357 (1967). The Court recognized "jealously guarded" exceptions to the Warrant Clause that it declared to be constitutionally permissible under the Reasonableness Clause. One of those exceptions is the constitutionally based "search incident to lawful arrest" doctrine. *See generally* Chimel v. California, 395 U.S. 752 (1969). The warrant requirement has eroded to the extent that many believe it has been virtually abandoned and Fourth Amendment analysis turned on its head. In *California v. Acevedo*, Justice Antonin Scalia points to the rise of the Reasonableness Clause in asserting that the warrant requirement has become so "riddled with exceptions that it [is] basically unrecognizable." 500 U.S. 565, 582 (1991) (Scalia, J., concurring). Reasonableness has become the "touchstone of the Fourth Amendment." United States v. Knights, 534 U.S. 112, 118 (2001).

[9] 395 U.S. 752 (1969).

[10] *Id.* at 754.

[11] *See id.* at 753–55.

[12] *Id.* at 755. *See, e.g.*, Weeks v. United States, 232 U.S. 383, 392 (1914) (affirming the right of law enforcement to confiscate any evidence on the person of an individual lawfully arrested); Carroll v. United States, 267 U.S. 132, 158 (1925) (holding that anything unlawful found upon lawful arrestee's person or in his control may be seized); Agnello v. United States, 269 U.S. 20, 30 (1925) (setting forth dictum expanding search incident to arrest notion to include the entire location where the arrest is made); Marron v. United States, 275 U.S. 192, 199 (1927) (holding that because officers made a lawful arrest, they had the right to contemporaneously search without a warrant any part of the arrestee's property used in the illegal activity); Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931) (distinguishing from the facts in *Marron* and holding instant search unlawful because the search was conducted in conjunction with an obviously invalid arrest); United States v. Leftkowitz, 285 U.S. 452, 461 (1932) (invalidating a search even though it had accompanied a lawful arrest because the search was general and exploratory rather than one targeted at evidence of and invited by the criminal activity for which the accused was arrested); Harris v. United States, 331 U.S. 145, 153 (1947) (sustaining a broad search of the home incident to arrest in order to uncover evidence of the crime for which the accused was arrested); Trupiano v. United States, 334 U.S. 699, 705, 708 (1948) (holding that search incident to lawful arrest is to be used sparingly and is justified by the necessities of the circumstances and that the instant search was invalid because agents had opportunity to obtain a search warrant prior to the search but failed to do so); United States v. Rabinowitz, 339 U.S. 56, 58, 59, 61 (1950) (rejecting *Trupiano* rule and upholding the warrantless search incident to lawful arrest for evidence of the type consistent with the crime for which the accused was arrested, not just items of evidence enumerated in the arrest warrant).

[13] *Rabinowitz,* 339 U.S. at 63, 64; *Chimel*, 395 U.S. at 760.

[14] *Rabinowitz*, 339 U.S. at 75, 78

[15] *Chimel*, 395 U.S. at 760.

[16] *Id.* at 763.

[17] *Id*. at 762–63.

[18] *See id.* at 763 (explaining that the scope of a search of an area "must, of course, be governed by a like rule").

[19] *Id.* at 763.

[20] *Id.* (emphasis added).

[21] *See id.* at 766–68.

[22] *See, e.g.*, United States v. Perea, 986 F.2d 633, 643 (2d Cir. 1993) (holding that a search of arrestee's duffle bag found in the trunk of the taxi cab in which arrestee was riding was not justified under the arrest power); Davis v. Robbs, 794 F.2d 1129, 1131 (6th Cir. 1986) (upholding seizure of a rifle that was in close proximity to the arrestee at the time of the arrest but not at the time of the seizure); United States v. Sanders, 631 F.2d 1309, 1313 (8th Cir. 1980) (finding that in the course of a search incident to arrest, police may retrieve evidence from the floorboard of an automobile after arrestees are no longer in it); United States v. Dixon, 558 F.2d 919, 922 (9th Cir. 1977) (upholding the seizure of a bag from the interior of a car and the contents within the bag after arrestee has been removed from the car); United States v. Frick, 490 F.2d 666, 669 (5th Cir. 1973) (affirming the seizure of an attaché case from the interior of a car after the arrestee has been removed because of exigent circumstances created by the mobile nature of the evidence, the possibility of an unknown accomplice or dangerous weapon, and the likelihood that the arrestee would soon be released from custody). *But see*, *e.g.*, United States v. Benson, 631 F.2d 1336, 1340 (8th Cir. 1980) (holding that a warrantless search of a tote bag was constitutionally invalid because there were no exigent circumstances that justified opening a bag already in police custody); United States v. Rigales, 630 F.2d 364, 367 (5th Cir. 1980) (stating that a warrantless search of the contents of a closed container seized in conjunction with a lawful automobile arrest was only justified by the presence of exigent circumstances); Hinkel v. Anchorage, 618 P.2d 1069, 1071 (Alaska 1980) (asserting that a warrantless search of a purse in arrestee's vehicle was lawful because the item was immediately associated with the person); Ulesky v. State, 379 So. 2d 121, 126 (Fla. App. 1979) (declaring that a search of purse was not justified as search incident to arrest because it was not located on arrestee's person or in the area within her immediate control at the time of the search).

The Supreme Court also revisited the issue several times. *See, e.g.*, Maryland v. Buie, 494 U.S. 325, 327 (1990) (holding a protective sweep may be justified by reasonable suspicion "that the area swept harbored an individual posing a danger to the officer or others"); Washington v. Chrisman, 455 U.S. 1, 6 (1982) (arguing that "the absence of an affirmative indication that an arrested person might have a weapon available or might attempt to escape does not diminish the arresting officer's authority to maintain custody over the arrested person" and conduct an automatic search within the grab area); Vale v. Louisiana, 399 U.S. 30, 35 (1970) (stating that the warrantless search violated the Fourth Amendment because the State did not meet its burden of showing exigent circumstances because the goods ultimately seized were not in the process of destruction); Chambers v. Maroney, 399 U.S. 42, 47 (1970) (finding that "once an accused is under arrest and in custody, then a search made at another place, without a warrant, is simply not incident to the arrest").

[23] 415 U.S. 800 (1974).

[24] *See id.* at 807–08 (holding that Edwards, who was arrested for attempted burglary and jailed at about midnight, could be legally searched incident to that arrest the next morning).

[25] *Id.* at 803–04.

[26] 414 U.S. 218 (1973).

[27] *See id.* at 236 (holding that the police officer had a right to search and seize heroin capsules discovered in the course of a lawful search as evidence of criminal conduct).
[28] *Id.* at 220.
[29] *Id*. at 223.
[30] *See id.* at 219, 236.
[31] *Id.* at 224 (emphasis in original).
[32] The cases make clear that the authority to search the arrestee's person is "affirmative" and "unqualified" making such searches not only an exception to the warrant requirement, but also reasonable under the Fourth Amendment. *Id.* at 225–226. Moreover, the authority to search the arrestee's person included authority to seize and search any packages or containers found on his person as an old cigarette package in Robinson's pocket was found to contain heroin capsules. *Id.* at 236.
[33] *Id.* at 224.
[34] *Id*. at 227.
[35] *See id.*
[36] *Id*. at 235.
[37] *Id.* (emphasis added).
[38] *Id.*
[39] *See id.* at 237 (Powell, J., concurring).
[40] Stephen A. Saltzburg & Daniel J. Capra, American Criminal Procedure 311 (8th ed. 2007).
[41] *See, e.g.*, United States v. Chadwick, 433 U.S. 1, 16 n.10 (1977) (distinguishing *Robinson*'s automatic search rule because "[u]nlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest"); United States v. Gorski, 852 F.2d 692 (2d Cir. 1988) (requiring that exigent circumstances are necessary to justify search of bag during arrest). *But see, e.g.*, United States v. Morales, 923 F.2d 621 (8th Cir. 1991) (upholding search of defendant's luggage as incident to arrest power because arrestee was holding bags when approached by officers, three feet away from bags when searched and not handcuffed; and distinguishing the search in *Chadwick* as occurring too long after arrest); United States v. Herrera, 810 F.2d 989 (10th Cir. 1987) (upholding search of arrestee's briefcase as incident to arrest). Whether the search precedes or follows the arrest does not affect the lawfulness of the search. Rawlings v. Kentucky, 448 U.S. 98 (1980). Police have the authority to order an arrestee to move about a considerable area while still permitting a *Chimel* search incident to arrest within all the areas so moved into, even without any fear of the safety of the officer or risk of destruction of evidence. Washington v. Chrisman, 455 U.S. 1 (1982). A "protective sweep" of a much larger area than *Chimel*'s area of immediate control is reasonable for the sake of the officer's safety. Maryland v. Buie, 494 U.S. 325 (1990). But police may not constitutionally search an impounded car on a search incident to arrest theory after both the car and the arrestee have been moved to the stationhouse. Chambers v. Maroney, 399 U.S. 42 (1970).
[42] *Belton*, 453 U.S at 454.
[43] *Id.* at 455.
[44] *Id.*
[45] *Id.* at 456.
[46] *Id.*
[47] *Belton*, 453 U.S at 456.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *Id.*
[52] *Belton*, 453 U.S at 456.
[53] *Id.*
[54] *Id.*
[55] *Id.*
[56] *Id.*
[57] *Id.*; *see also* People v. Belton, 407 N.E.2d 420, 421 (N.Y. 1980), *rev'd*, 453 U.S. 454 (1981).
[58] *Belton*, 453 U.S. at 456; *Belton*, 407 N.E.2d at 421.
[59] *Belton*, 453 U.S. at 455 (emphasis added).
[60] *Chimel*, 395 U.S. at 763.
[61] The choice of the word "arguably" suggests that the Court is not requiring that the interior of the automobile actually is, in fact, "within the immediate control" of the vehicle's recent occupant but only that it be "arguably" within his or her immediate control.
[62] *Belton*, 453 U.S. at 460.
[63] *See id.*
[64] *Id.* at 459.
[65] *Id.*
[66] Belton presented no issue of the legality of the search of respondent's person or those of the other three automobile occupants.
[67] *Belton*, 453 U.S. at 460. Footnote 3 of *Belton* emphasizes that its holding is limited to those special circumstances when an arrest is made "in this particular and problematic context" and does not change *Chimel's* fundamental principles regarding the scope of other searches incident to arrest. *Id.* at 460 n.3. This disclaimer provides further evidence of the Court's intention to carve out a bright-line rule for automobile arrests independent of the need for a showing of the rationales underpinning *Chimel*.
[68] *Id.* at 456.
[69] The Court defines "container" broadly as "any object capable of holding another object," *id.* at 461 n.4, and specifically authorizes the search of a container whether it is open or closed. *Id.* at 461. It went on to dismiss the notion, put forth by the D.C. Circuit in *Robinson*, that the extent of a search of a container must be defined by the likelihood of it holding a weapon or evidence of the crime for which the person is being taken into custody. *Id.* at 461. That provides further evidence that the Court is not limiting the scope of the searches to those specifically consistent with their underlying rationale. *See Robinson*, 414 U.S. at 235 (noting that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect.").
[70] *Belton*, 453 U.S. at 460.
[71] Justice Brennan's dissent in *Belton*, in which he was joined by Justice Marshall, reluctantly acknowledges that the rule established by the majority constitutes a "bright-line" but implies that it may fade under the brighter light of future cases. *Id*. at 463–64. He opines that the search of the car would have been allowed by the majority even in the situation in which the suspects had been handcuffed and safely placed in the patrol car before it was conducted. *See Id.* at 468. Despite that recognition, Brennan proceeds to list a number of possible factual scenarios which he claims are not encompassed by the new rule. His strongest arguments relate to the temporal proximity of the search to the arrest, although that issue may be controlled by *United States v. Edwards*, 415 U.S. 800, 807–08 (1974). Many of his other hypothetical facts indicate a less than careful reading of the majority opinion. For example, he poses the questions whether the interior includes locked glove compartments, whether there are special rules for hatchbacks, and whether only containers large enough to be "capable of holding another object" are covered by the holding. *Belton*, 453 U.S. at 470. Ironically, Brennan expresses his continued support of the *Chimel* standard and then rattles off an at least

equally complicated list of factors that he would use to determine the issue of the arrestee's area of "immediate control." These factors include: "relative number of police officers and arrestees, the manner of restraint placed on the arrestee, and the ability of the arrestee to gain access to a particular area or container." *Id.* at 471.

[72] Saltzburg & Capra, *supra* note 40, at 314.

[73] *Belton*, 453 U.S. at 460.

[74] For examples of cases interpreting "recent occupant," *see* United States v. Gordon, 264 F. App'x 274, 276 (4th Cir. 2008) (holding that arrestee, who was standing two or three feet from his vehicle after having just retrieved a letter from the vehicle that formed the basis for his arrest, was a "recent occupant"); United States v. Palmer, 206 F. App'x 357, 359 (5th Cir. 2006) (interpreting the "recent occupant" requirement put forth in Thornton v. United States, 541 U.S. 615 (2004), as not resting on where an officer makes contact with a person regardless of whether it was inside or outside a vehicle; the defendant parked his truck on the side of the road and the officers initiated contact with him while he and his companion exited the vehicle); United States v. Jones, 155 F. App'x 204, 208 (6th Cir. 2005) ("Although an arrestee's status as a 'recent occupant' may depend on 'his temporal or spatial relationship to the car at the time of the arrest and search,' it does not require that he be within reach of the automobile.") (citations omitted); United States v. Osife, 398 F.3d 1143, 1148 (9th Cir. 2005) (articulating that the Fourth Amendment permits police to search an automobile after arresting its recent occupant, even when evidence related to the crime is unlikely to be found; defendant was determined to be a recent occupant after he got out of his truck, urinated on the ground, walked into the store, walked back outside, and was standing next to the open driver's side door of his truck when the officers made contact with him. Also, defendant was handcuffed and inside the patrol car when the officer searched the truck); United States v. Bush, 404 F.3d 263, 275 (4th Cir. 2005) (applying the logic of *Thornton*, the court held that because the officers saw the arrestee exit the vehicle and arrested her when she was in the process of reentering her vehicle, the officers were permitted to search the vehicle incident to arrest); United States v. Herndon, 393 F.3d 665, 668 (6th Cir. 2005) (vacated on other grounds) (articulating that the defendant standing five feet away from the vehicle while the driver's door was open was a recent occupant); United States v. Sumrall, 115 F. App'x 22, 26–27 (10th Cir. 2004) (holding that the arrestee, who was followed by police for five or six blocks but met by police outside of the car after locking the driver's side door, was a "recent occupant"); United States v. Poggemiller, 375 F.3d 686, 688 (8th Cir. 2004) (arguing that the defendant was a recent occupant even though the police initiated contact when the defendant was standing 10 feet away from his vehicle); United States v. Deans, 549 F. Supp. 2d 1085, 1093 (D. Minn. 2008) (upholding the search under *Thornton* because where, as here, the law enforcement officials were engaged in an drug deal investigation and the suspected drug dealer drove his vehicle to the predetermined site of the transaction, it is reasonable to conclude the suspect might have further quantities of drugs left in the vehicle even though he left the vehicle to conduct the transaction elsewhere). *See also* United States v. Laughton, 437 F. Supp. 2d 665, 673 (E.D. Mich. 2006) (announcing that the search not justified as search incident to arrest of a "recent occupant" of a vehicle because there was no evidence the police officers saw the defendant in his car, and the arrest did not occur in the vicinity of the car); State v. Dean, 76 P.3d 429, 437 (Ariz. 2003) (following *Glasco*, the court held that defendant was not a "recent occupant" because he had not occupied the vehicle for some two and a half hours); People v. Savedra, 907 P.2d 596, 599 (Colo. 1995) (finding that temporal proximity between the police encounter and the defendant's presence in the vehicle are the most important factors in determining whether a defendant is a recent occupant of a vehicle for *Belton* purposes and stating that "*Belton* can include situations where the occupant of a vehicle anticipates police contact and exits the vehicle immediately before that contact occurs"); A.T.P. v. State, 973 So. 2d 650, 653 (Fla. Dist. Ct. App. 2008) (finding that the defendant was not a recent occupant because he was located thirty to sixty feet away from the vehicle, thirty-five minutes had elapsed since defendant exited the car, and defendant did not have the keys to the vehicle in his possession); State v. Clark, 986 So. 2d 625, 629 (Fla. Dist. Ct. App. 2008) (holding that the defendant, who was arrested after getting out of his truck, was a recent occupant); Black v. State, 810 N.E.2d 713, 716 (Ind. 2004) (declaring the arrestee a recent occupant even though he was inside mechanic shop and the vehicle was parked outside); Rainey v. Commonwealth, 197 S.W.3d 89, 94–95 (Ky. 2006), *cert. denied*, 549 U.S. 1117 (2007) (applying *Belton* where arrestee was 50 feet from vehicle); State v. Wanzek, 598 N.W.2d 811, 816 (N.D. 1999) (indicating that the defendant was a recent occupant even though not physically present in the vehicle when the officer made the arrest); Glasco v. Commonwealth, 513 S.E.2d 137, 142 (Va. 1999) (stating that a defendant is a recent occupant when he is arrested "in close proximity to the vehicle immediately after the [defendant] exits the automobile").

For examples of cases interpreting the "contemporaneousness" of the search to the arrest, *see* United States v. Hrasky, 453 F.3d 1099, 1102 (8th Cir. 2006), *cert. denied*, 127 S. Ct. 2098 (2007) (finding that the search was contemporaneous with the decision to place defendant under arrest and a culmination of a continuing series of events at the scene arising from the traffic stop, even though more than 60 minutes passed between initial detention and search); United States v. Smith, 389 F.3d 944, 951 (9th Cir. 2004) (stating that "a search need not be conducted immediately upon the heels of an arrest, but sometimes may be conducted well after the arrest, so long as it occurs during a continuous sequence of events," and that in determining whether a search is a contemporaneous incident of an arrest, the focus should be "not strictly on the timing of the search but its relationship to—and reasonableness in light of—the circumstances of arrest"); United States v. Doward, 41 F.3d 789, 793 (1st Cir. 1994) (emphasizing that the *Belton* Court chose the phrase "contemporaneous *incident* of that arrest' rather than the less expansive phrase 'contemporaneous *with* that arrest," which "plainly implies a greater temporal leeway between the custodial arrest and the search"); United States v. Lugo, 978 F.2d 631, 635 (10th Cir. 1992) (articulating that a search not contemporaneous incident of arrest when occupant was already en route to station); United States v. Vasey, 834 F.2d 782, 787–88 (9th Cir. 1987) (holding that a search conducted between thirty and forty-five minutes after defendant was arrested, handcuffed, and placed in rear of police vehicle was not contemporaneous incident of arrest); United States v. Scott, 428 F. Supp. 2d 1126, 1133 (E.D. Cal. 2006) (arguing that a fifty-three-minute delay between arrest and search was reasonable because of the need to get the vehicle upright and finish photographic scene); People v. Malloy, 178 P.3d 1283, 1287–88 (Colo. Ct. App. 2008) (finding that a half-hour delay in conducting search after defendant's arrest did not invalidate the search); State v. Badgett, 512 A.2d 160, 169 (Conn. 1986), *cert. denied*, 479 U.S. 940 (1986) (holding that the right to continue a *Belton* search "ceases the instant the arrestee departs the scene"); United States v. Harris, 617 A.2d 189, 193 (D.C. 1992) (agreeing with the federal courts that have held "a search of a vehicle, occurring shortly after the driver or an occupant has been placed under arrest and restrained, is contemporaneous"); State v. Homolka, 953 P.2d 612, 613 (Idaho 1998) (determining that whether search is contemporaneous with arrest is judged by a standard of reasonableness under the circumstances and that the search will generally be contemporaneous

when conducted on the scene with arrestee still present); State v. Giron, 943 P.2d 1114, 1120 (Utah Ct. App. 1997) (stating that contemporaneous requirement "requires only a routine, continuous sequence of events occurring during the same period of time as the arrest"); State v. Fry, 388 N.W.2d 565 (Wis. 1986), *cert. denied*, 479 U.S. 989 (1986); State v. Ullock, No. 93-1874-CR, 1994 WL 100324, at *2 (Wash. Ct. App. Mar. 30, 1994) (declaring that a forty-minute delay between arrest and search was not improper, as it was reasonable for the officer to not leave arrestee unsupervised).

[75] In response to *Belton*, police have developed simple and clear procedures for how to handle searches of automobiles incident to the arrest of a recent occupant. *See, e.g.*, Virginia Law Enforcement Professional Standards Commission, Search Incident to Arrest 2-5.4 (1999), *available at* http://www.dcjs.virginia.gov/cple/sampleDirectives/manual/pdf/2-5.pdf (finding that vehicles may be searched contemporaneous with the arrest of the occupant or driver and should be conducted as soon as practicable, even if the arrestee is not in the vehicle at the time of the search); Memphis Police Department, Policy and Procedures, Section 1: Search and Seizure Without a Warrant 4–5 (2006), *available at* https://kiosk.memphispolice.org/forms/Web%20Policy/CH03/Ch%20III%20Sec%2001%20Search%20and%20Seizure%20without%20a%20Warrant.doc (proclaiming that after a lawful arrest, and an "individual is placed in custody in or about a vehicle," the officer may search the passenger compartment of the vehicle); Alaska Department of Public Safety, Legal Bulletin Manual: Incident to Arrest E.3 (2007), *available at* http://www.dps.state.ak.us/APSC/docs/legalmanual/EINCIDENTTOARREST.pdf (citing case upholding search incident to arrest after arrestee handcuffed and in police car); Pine Bluff Police Department, Policy and Procedures Manual (2008), *available at* http://www.pbpd.org/Policies%20PDF/Chapter-III/Microsoft%20Word%20-%20POL-0352%20_Search%20Motor%20Vehicle_.pdf (arguing that whenever possible, search of a motor vehicle incident to arrest should be conducted at the location of the arrest, but search of the vehicle may be delayed when exigent circumstances are present); El Paso County Sheriff's Office, Policy and Procedure Manual, Search and Seizure/Arrests 8 (2005), http://shr.elpasoco.com/NR/rdonlyres/44D9EE1B-DBB4-4D71-B6F0-75C141A40E10/0/702_policy.pdf (finding that when occupant of a vehicle has been taken into custody, the officer may search the passenger compartment of the vehicle without a warrant).

[76] *See Belton*, 453 U.S. at 470 (Brennan, J., dissenting) (discussing the numerous questions and complexities that are raised because the majority abandoned the justifications for the bright-line rule of *Chimel* and did not give the police any bright-line rules as to how to interpret "recent occupant" or "contemporaneous to arrest").

[77] *See* Thornton v. United States, 541 U.S. 615, 623–24 (2004) (upholding under *Belton* a search of defendant's vehicle, of which defendant was a recent occupant, conducted after defendant was handcuffed and placed in the back seat of a patrol car); *see also* Atwater v. City of Lago Vista, 532 U.S. 318, 366 (2001); Knowles v. Iowa, 525 U.S. 113, 117–18 (1998); Ornelas v. United States, 517 U.S. 690, 697 (1996); California v. Acevedo, 500 U.S. 565 (1991); Colorado v. Bertine, 479 U.S. 367, 375 (1987); United States v. Hensley, 469 U.S. 221 (1984); Oliver v. United States, 466 U.S. 170 (1983); Michigan v. Long, 463 U.S. 1032 (1983); Illinois v. Andreas, 463 U.S. 765 (1983); Illinois v. Lafayette, 462 U.S. 640 (1983); Texas v. Brown, 460 U.S. 730 (1983). *But see Chambers*, 399 U.S. at 47 (declaring that police cannot constitutionally search an impounded car on a search incident to arrest theory after both the car and the defendant have been moved to the station house).

[78] For examples of when courts have held a search valid when arrestee was handcuffed and locked in the police car, *see* United States v. Weaver, 433 F.3d 1104, 1107 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 2053 (2006) (stating that *Belton* controls where the arrestee is handcuffed and locked in a patrol car), *cert. denied*, 126 S. Ct. 2053 (2006); United States v. Barnes, 374 F.3d 601, 605 (8th Cir. 2004) (holding that a vehicle search upheld as incident to arrest after arrestee was arrested, handcuffed, and placed in police patrol car); United States v. Doward, 41 F.3d 789, 794 (1st Cir. 1994) (finding that *Belton* is controlling where the police performed a contemporaneous search of a hatchback vehicle); United States v. Patterson, 993 F.2d 121, 123 (6th Cir. 1993) (6th Cir. 1993) (ruling that *Belton* controls, even when the vehicle was searched and impounded); United States v. Karlin, 852 F.2d 968, 972 (7th Cir. 1988) (finding that *Belton* controls "without determining whether the officer had rendered Karlin incapable of reaching into the van."); State v. Skaggs, 903 So. 2d 180, 182 (Ala. Crim. App. 2004) (holding that *Belton* is controlling where the police performed an automobile search incident to arrest just before the suspect's relative arrived to take the vehicle home); People v. Stoffle, 3 Cal. Rptr. 2d 257, 263 (Cal. Ct. App. 1991) (ruling that *Belton* permits vehicle searches incident to arrest where "the evidence discovered during the search had nothing to do with the crime for which the person was arrested, or where it was just as unlikely as in defendant's case that weapons would be found."); State v. Waller, 612 A.2d 1189, 1192 (Conn. 1992) ; State v. Hopkins, 293 S.E.2d 529, 531 (Ga. Ct. App. 1982) (holding that *Belton* controls when "articles in the passenger compartment are 'unaccessible' to the arrestee."); State v. Wheaton, 825 P.2d 501, 503 (Idaho 1992) (holding that under *Belton*, "[o]nce having made a lawful custodial arrest of an occupant of an automobile, there is no need for further justification in order to search the passenger compartment of an automobile); People v. Bailey, 639 N.E.2d 1278, 1282 (Ill. 1994) ("[V]alidity of a Belton search is not affected by the circumstance that defendant no longer had effective access to his vehicle when the search was conducted."); State v. Edgington, 487 N.W.2d 675, 677–78 (Iowa 1992) (holding that *Belton* permits contemporaneous searches of passenger compartments incident to arrest, but that searches of a vehicle's trunk must be justified on other grounds); State v. Press, 685 P.2d 887, 894 (Kan. 1984); State v. Jerome, 983 So.2d 214, 216 (La. Ct. App. 4th Cir. 2008); Hamel v. State, 943 A.2d 686, 696 (Md. Ct. Spec. App. 2008) (ruling that "[t]he fact that Hamel was secured and without access to his vehicle did not cause the search of the locked glove compartment to exceed the permissible scope of the search incident to his arrest."); Townsend v. State, 681 So.2d 497, 504 (Miss. 1996); State v. Scott, 200 S.W.3d 41, 44 (Mo. Ct. App. 2006) (noting that "the concern for officer safety is applicable even when the officer has already secured the suspect in handcuffs. . ."); State v. Gonzalez, 487 N.W.2d 567, 572 (Neb. 1992) (holding that "handcuffing the arrestee and placing the suspect away from the grabbable area of the vehicle does not prohibit a contemporaneous *Belton*-type search of the vehicle from which the arrestee recently came."); State v. Miskolczi, 465 A.2d 919, 921–22 (N.H. 1983); State v. Murrell, 764 N.E.2d 986, 992-93 (Ohio 2002); State v. Reed, 634 S.W.2d 665, 666 (Tenn. Crim. App. 1982) (holding that *Belton* controls even when the arrestee is handcuffed and in a non-responsive stupor); Pettigrew v. State, 908 S.W.2d 563, 570 (Tex. App. Fort Worth 2d Dist. 1995) ("A search under *Belton* is allowed even when the arrestee has been handcuffed and placed in a police car."); State v. Moreno, 910 P.2d 1245 (Utah Ct. App. 1996).

For examples of when courts have held a search valid when defendant arrested and placed in patrol car, see State v. Valdes, 423 So. 2d 944 (Fla. Dist. Ct. App. 1982) (finding that search was valid when the defendant arrested and placed in patrol car); State v. Cooper, 286 S.E.2d

102 (N.C. 1982); State v. Wanzek, 598 N.W.2d 811, 816 (N.D. 1999); *Glasco*, 513 S.E.2d at 140; State v. Fladebo, 720 P.2d 436, 440–41 (Wa. 1986).

Courts holding searches valid when arrestee handcuffed: *see e.g.*, United States v. Mapp, 476 F.3d 1012, 1019 (D.C. Cir. 2007) (upholding search of arrestee's car conducted after arrestee handcuffed and under police control); United States v. Currence, 446 F.3d 554, 559 (4th Cir. 2006) (stating that the search of vehicle after arrestee placed in handcuffs upheld as valid search incident to arrest); United States v. Cotton, 751 F.2d 1146 (10th Cir. 1985) (declaring that the search of defendant's vehicle after defendant was outside vehicle and handcuffed upheld); United States v. Collins, 668 F.2d 819, 821 (5th Cir. 1982); Stout v. State, 898 S.W.2d 457 (Ark. 1995) (holding that the search of vehicle after arrestee placed in handcuffs upheld); Black v. State, 810 N.E.2d 713, 716 (Ind. 2004); *Rainey*, 197 S.W.3d at 95 (articulating that the search of arrestee's car upheld even though conducted after he was handcuffed and "so far from his vehicle that it was unlikely he could have accessed it"); State v. Harvey, 648 S.W.2d 87, 90 (Mo. 1983) (upholding the search of vehicle when arrestee was handcuffed out of the car and presided over by two armed detectives).

Courts also recognize the nearly universal acceptance of *Belton* as a bright-line rule. *See, e.g.*, People v. Savedra, 907 P.2d at 598 n.1 (Colo. 1995) (citing federal courts of appeals cases, the court states that "the passenger compartment is within the Belton zone even where the arrestee is away from the vehicle and safely within police custody at the time of the search"); United States v. Mendez, 139 F. Supp.2d 273, 279 (D. Conn. 2001) (stating that a myriad of cases have concluded that the "search of an automobile is generally reasonable even if the occupant has exited the vehicle and is under the control of an officer"); Traylor v. State, 458 A.2d 1170, 1174 (Del. 1983) (noting that *Belton* is applicable to a search of a vehicle even though defendant arrested and in handcuffs); People v. Mungo, 747 N.W.2d 875, 882 (Mich. Ct. App. 2008) (stating that *Belton* rule has "been interpreted to permit a full search of the interior of an automobile even when the arrestee has been removed from the car, handcuffed, and placed in a secure area, thus alleviating concerns of officer safety and preservation of any evidence contained in the car"); State v. White, 489 N.W.2d 792, 796 (Minn. 1992) ("Thus, under *Belton*, an incidental search of the car is allowed even after the defendant is placed in the squad car."); State v. Rice, 327 N.W.2d 128, 131 (S.D. 1982) (accepting *Belton*'s reasoning and as a bright-line rule).

[79] *See, e.g.*, State v. Greenwald, 858 P.2d 36, 43 (Nev. 1993) (a search conducted of defendant's motorcycle after he was locked away in a police car was not a valid search incident to arrest); State v. Eckel, 888 A.2d 1266, 1277 (N.J. 2006) (rejecting bright-line application of *Belton* when defendant was arrested and placed in a patrol car under State constitution); State v. Rowell, 188 P.3d 95, 101 (N.M. 2008) (rejecting *Belton* bright-line rule in favor of a search incident to arrest exception "anchored in the specific circumstances facing an officer"); People v. Blasich, 541 N.E.2d 40, 43 (N.Y. 1989) (rejecting the *Belton* bright-line rule and interpreting the state constitution to limit warrantless searches of automobiles incident to arrest only to area from which arrestee might actually gain possession of weapon or destructible evidence); State v. Kirsch, 686 P.2d 446, 448 (Or. Ct. App. 1984) (finding that the state constitution allows search incident to arrest only if necessary to protect officer or preserve evidence or when the search is relevant to the crime for which the suspect was arrested); Commonwealth v. White, 669 A.2d 896, 902 (Pa. 1995) (arguing that a search incident to arrest is not justified when defendant was patted down, moved a short distance from the car, and under close police guard); State v. Bauder, 924 A.2d 38, 46 (Vt. 2007) (rejecting *Belton* under the state constitution); Holman v. State, 183 P.3d 368, 373, 377 (Wyo. 2008) (holding that under the totality of the circumstances, there were no articuable safety concerns to justify a search of the vehicle while the defendant was handcuffed and in a squad car); *see also* Commonwealth v. Toole, 448 N.E.2d 1264, 1268 (Mass. 1983) (stating that a search conducted while defendant was arrested, handcuffed, and in custody of two State troopers was invalidated under state law).

[80] S*ee, e.g.*, United States v. Lugo, 978 F.2d 631, 635 (10th Cir. 1992) (articulating that *Belton* does not control when an arrestee is no longer on the scene); United States v. Vasey, 834 F.2d 782, 787–88 (9th Cir. 1987) (finding that there was no exigency to justify a warrantless search conducted thirty to forty-five minutes after an arrest and while defendant was handcuffed and seated in the rear of a police car); State v. Badgett, 512 A.2d 160, 169 (Conn. 1986), *cert. denied*, 479 U.S. 940 (1986) (declaring that *Belton* only applies when arrestee remains at the scene); State v. Kunkel, 455 N.W.2d 208, 210 (N.D. 1990) (stating that a search incident to arrest exception does not apply when vehicle is searched at a location other than the scene of the arrest); *see also* Wayne R. LaFave, Search and Seizure: A Treatise on the Fourth Amendment § 7.1(c), at 518 n. 92 (4th ed. 2004)[hereinafter LaFave, Search and Seizure] (listing cases having an "on-the-scene requirement").

[81] *See Belton*, 453 U.S. at 458 (citing Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma*, 1974 Sup. Ct. Rev. 127, 142 [hereinafter LaFave, *The Robinson Dilemma*] (approving of bright-line rules as easier for police to apply)).

[82] *See, e.g.*, Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. Pitt. L. Rev. 227, 274 (1984) (stating that once occupants are removed from a vehicle, there is little chance they will be able to get a weapon or destroy evidence in the vehicle); Jeffrey A. Carter, *Fourth Amendment – of Cars, Containers and Confusion*, 72 J. Crim. L. & Criminology 1171, 1173, 1217–21 (1981) (stating that the *Belton* decision enhanced the confusion concerning Fourth Amendment requirements for automobile and container searches); Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith"*, 43 U. Pitt. L. Rev. 307, 325 (1981–1982) [hereinafter LaFave, *The Fourth Amendment*] (arguing that *Belton* does a disservice to the development of sound Fourth Amendment doctrine); Lawrence Gene Sager, *The Supreme Court, 1980 Term*, 95 Harv. L. Rev. 251, 260 (1981); Robert Stern, Robbins v. California *and* New York v. Belton: *The Supreme Court Opens Car Doors to Container Searches*, 31 Am. U. L. Rev. 291, 317 (1982) (arguing that *Belton* diminished the value in balancing the protection of privacy interests with the promotion of law enforcement activities in the area of automobile and container searches).

[83] 541 U.S. at 615 (2004).

[84] *Id.* at 617.

[85] *Id.*

[86] *Id.* at 617–18.

[87] *Id.* at 618.

[88] *Thornton*, 541 U.S. at 618.

[89] *Id.*

[90] *Id.*

[91] *Id.*

[92] *Id.*

[93] *Thornton*, 541 U.S. at 618.

[94] *Id.*

[95] *Id.*

[96] *Id.*

[97] *Id.*

[98] *Thornton*, 541 U.S. at 618.
[99] *Id.*
[100] *Id.* at 618–19.
[101] *Id.* at 619.
[102] *See Belton,* 453 U.S. at 455–56.
[103] *See Thornton*, 541 U.S. at 620–21 (noting that the Court's dicta in Michigan v. Long, 463 U.S. 1032 (1983), discussed the constitutionality of a search where officers initiated contact with and arrested a suspect after the suspect exited his vehicle).
[104] *Id.*
[105] *Id.* at 620.
[106] *Id.* at 617.
[107] *Id.* at 620.
[108] *Thornton*, 541 U.S. at 620.
[109] *Id.* at 620–21.
[110] *Id.* at 621.
[111] *Id.* (emphasis in original).
[112] *Id*. (emphasis added).
[113] *Thornton*, 541 U.S. at 615–16.
[114] *Id.* at 622.
[115] *Id.* at 623 (articulating that the search was contemporaneous to arrest).
[116] *Id.* at 625.
[117] *Id.* at 627.
[118] *Thornton*, 541 U.S, at 625 (Scalia, J., concurring).
[119] *Id.*
[120] *Id.*
[121] *Id.* at 625–26 (quoting United States v. Frick, 490 F.2d 666, 673 (5th Cir. 1973)).
[122] *Id.* at 627.
[123] *Thornton*, 541 U.S. at 627–28.
[124] *Id.* at 628; *see also supra* note 80.
[125] *See supra* note 75. *But see, e.g.*, Lubbock Independent School District, Criminal Investigations Manual Ch. 2, 7, *available at* http://www.lubbockisd.org/Police/Operations/Procedures-Ch2.pdf ("[W]henever an officer makes a custodial arrest of a person in a vehicle, the officer should search the person and his access area, for evidence and weapons . . . [but the] search should occur at the time and place of the arrest.").
[126] *Thornton*, 541 U.S. at 632 (Scalia, J., concurring) (citing *Rabinowitz*); *see Rabinowitz,* 339 U.S. at 62–63 (upholding the search of plaintiff's car because there was reasonable belief evidence would be found).
[127] *Thornton*, 541 U.S. at 630–31; *see* Entick v. Carrington, 19 How. St. Tr. 1029, 1031, 1063–1074 (C. P. 1765) (disapproving a search of private papers under a general warrant after an arrest).
[128] *Thornton*, 541 U.S. at 631.
[129] *Id.*
[130] *Id.* at 632 (Scalia, J., concurring)*; Rabinowitz*, 339 U.S. at 56.
[131] *Thornton*, 541 U.S. at 632 (Scalia, J., concurring).
[132] For example, would such a search ever be unreasonable or is it a bright-line rule of reasonableness? Must the arrest be of a recent occupant and the search contemporaneous to the arrest? If so, why? What is the scope of the permissible search? May police look only in those places likely to reveal such related evidence? What evidence is related to each particular crime and what is not? What about containers? Are legitimate searches limited to those containers reasonably likely to contain evidence of the arrest crime? Can't drug evidence be found anywhere? Is a gun related to marijuana possession? What if evidence unrelated to the arrest offense is found in the car in a place legitimately being searched? How will we determine the reasonableness of police decisions? Will the good faith exception apply?
[133] *Thornton*, 541 U.S. at 636 (Stevens, J., dissenting).
[134] *Id*. Justice O'Connor concurred, separately, writing that the majority's opinion in *Thornton* was "a logical extension of the holding in *New York v. Belton*, [but she wrote] separately to express [her] dissatisfaction with the state of the law in this area." *Id.* at 624 (O'Connor J., concurring) (citation omitted). The Court treated *Belton* searches as "entitlements" rather than as an "exception" of *Chimel,* she wrote, and "that erosion is a direct consequence of *Belton's* shaky foundation." *Id.* O'Connor also expressed her agreement with Justice Scalia's approach but did not want to adopt it in a case in which neither side has addressed the issue. *Id.* at 625.
[135] 162 P.3d 640 (Ariz. 2007), *aff'd* 129 S.Ct. 1710 (2009).
[136] *Id.* at 641.
[137] *Id.*
[138] *Id.*
[139] *Gant*, 162 P.3d at 641.
[140] *Id.*
[141] *See id.*
[142] *Id.*
[143] *Id.*
[144] *Gant*, 162 P.3d at 641.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Gant*, 162 P.3d at 641.
[150] *Id.*
[151] *Id.*
[152] *Id.*; Arizona v. Gant, 538 U.S. 976 (2003).
[153] Arizona v. Gant, 540 U.S. 963 (2003).
[154] 76 P.3d 429 (Ariz. 2003).
[155] *Id.* at 437.
[156] Gant, 162 P.3d at 641.
[157] *Id.*
[158] *Id.* at 646.
[159] Arizona v. Gant, 128 S. Ct. 1443, 1444 (2008).
[160] Gant, 162 P.3d at 641.
[161] *Id.*
[162] *Id.* at 643–44.
[163] *Id.* at 643 (emphasis added).
[164] *Id.*; *cf.* State v. Dean, 76 P.3d 429, 437 (Ariz. 2003) (indicating that the arrestee was not a recent occupant of the car).
[165] *Gant,* 162 P.3d at 643.
[166] *Id.* at 643, 643 n.2 (agreeing with Scalia that applying *Belton* to *Gant* facts "stretches [the doctrine] beyond its breaking point" (quoting *Thornton*, 541 U.S. at 625 (Scalia, J., concurring)).
[167] *Id.* at 643.
[168] *Id.*
[169] *Id.*
[170] *Id.* at 644, 646 n.5.
[171] *Gant*, 162 P.3d at 644.
[172] *Id.*
[173] *Id.*
[174] *Id.*
[175] For examples of such cases, see *id.* at 645.
[176] *Gant*, 162 P.3d at 649.
[177] *Id.* at 645.
[178] *Id.* at 646 (Bales, J., dissenting); *see also* United States v. Weaver, 433 F.3d 1104, 1107 (9th Cir. 2006), *cert. denied*, 126 S. Ct. 2053 (2006) (leaving question of whether *Belton* rule is flawed to the Supreme

Court).
[179] *Gant*, 162 P.3d at 646–50 (Bales, J. dissenting).
[180] *Id.* at 647 (quoting *Robinson*, 414 U.S. at 235).
[181] *Id.* (quoting Belton, 453 U.S. at 454, 455–56 (citation omitted)).
[182] *Id.*
[183] *Id.* (quoting *Belton*, 453 U.S. at 461).
[184] *Gant*, 162 P.3d at 647.
[185] *Id.*
[186] *Id.* at 647–48.
[187] *Belton*, 453 U.S. at 465–66 (Brennan, J., dissenting).
[188] *Id.*; *see Gant*, 162 P.3d at 648.
[189] *Gant*, 162 P.2d at 648.
[190] *Belton*, 453 U.S. at 456.
[191] *Id.* at 462–63.
[192] *Gant*, 162 P.2d at 648 (citing *Belton*, 453 U.S. at 468 (Brennan, J., dissenting)).
[193] *Id.*; *supra* note 78. *But see* State v. Ritte, 710 P.2d 1197, 1201 (Haw. 1985) (holding that the search was not within *Belton* because arrestee was taken from the area and vehicle was not within his immediate control); State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982) (articulating that *Belton*'s rule does not apply "after an arrestee has been handcuffed and removed from the scene, foreclosing even the slightest possibility that he could reach for an article within the vehicle"); Ferrell v. State, 649 So. 2d 831, 833 (Miss. 1995) (upholding that the search of arrestee's vehicle conducted after arrestee placed in patrol car was not within *Belton* because rationales underlying exception were absent); State v. Greenwald, 858 P.2d 36, 43 (Nev. 1993) (stating that a search of the defendant's motorcycle after he was locked away in a police car was not a valid search incident to arrest).
[194] *Belton*, 453 U.S. at 460.
[195] *See, e.g.*, *Gant*, 162 P.3d at 648–49 (Bales J., dissenting); United States v. Hrasky, 453 F.3d 1099, 1103 (finding that the search was contemporaneous with the decision to place the defendant under arrest and a culmination of a continuing series of events at the scene arising from the traffic stop, even though more than 60 minutes passed between the initial detention and search); United States v. Smith, 389 F.3d 944, 951 (9th Cir. 2004) (stating that a search does not need to occur immediately after the arrest but may be conducted well after the arrest as long as it is conducted in the course of a continuous sequence of events, and in determining whether a search is a contemporaneous incident of an arrest, the focus should be "not strictly on the timing of the search but its relationship to (and reasonableness in light of) the circumstances of arrest"); United States v. Doward, 41 F.3d 789, 793 (1st Cir. 1994) (emphasizing that the *Belton* Court chose the phrase "contemporaneous *incident* of that arrest" rather than the less expansive phrase "contemporaneous *with* that arrest" which "plainly implies a greater temporal leeway between the custodial arrest and the search . . ."); United States v. Lugo, 978 F.2d 631, 635 (holding that a search is not a contemporaneous incident of arrest when occupant was already en route to station); United States v. Harris, 617 A.2d 189, 193 (D.C. 1992) (agreeing with the federal courts that "a search of a vehicle, occurring shortly after the driver, or an occupant, has been placed under arrest and restrained, is contemporaneous"); United States v. Vasey, 834 F.2d 782, 787–88 (9th Cir. 1987) (asserting that a search conducted between thirty and forty-five minutes after defendant was arrested, handcuffed, and placed in rear of police vehicle was not contemporaneous incident of arrest); United States v. Scott, 428 F. Supp. 2d 1126, 1133 (E.D. Cal. 2006) (establishing that a fifty-three-minute delay between arrest and search was reasonable because of the need to get the vehicle upright and finish photographing the scene); People v. Malloy, 178 P.3d 1283, 1287–88 (Colo. App. 2008) (finding that a half-hour delay in conducting search after defendant's arrest did not invalidate the search); State v. Badgett, 512 A.2d 160, 169 (holding that the right to continue a *Belton* search "ceases the instant the arrestee departs the scene"); State v. Homolka, 953 P.2d 612, 613 (finding that the determination of whether search is contemporaneous with arrest is judged by a standard of reasonableness under the circumstances, and search will generally be contemporaneous when conducted on the scene with arrestee still present); State v. Giron, 943 P.2d 1114, 1120 (Utah Ct. App. 1997) (articulating that the contemporaneous requirement "requires only a routine, continuous sequence of events occurring during the same period of time as the arrest"); State v. Fry, 388 N.W.2d 565, 577 (Wis. 1986), *cert. denied*, 479 U.S. 989 (1986) (asserting that the right to a *Belton* search continues after arrestee leaves the scene).
[196] *Gant*, 162 P.3d at 649.
[197] *Id.*
[198] *Id.*
[199] *See* Belton, 453 U.S. at 469–71 (Brennan, J., dissenting).
[200] *Gant*, 162 P.3d at 649 (Bales, J., dissenting).
[201] *Id.*
[202] *Id.* (quoting *Thornton* at 624 (O'Connor, J., concurring in part)); *see supra* note 82.
[203] *Gant*, 162 P.3d at 649–50 (citing cases rejecting *Belton* under state constitution). *See, e.g.*, State v. Pierce, 642 A.2d 947, 958 (N.J. 1994) (rejecting *Belton* under the New Jersey state constitution); People v. Blasich, 541 N.E.2d 40 (articulating that New York rejects the *Belton* bright-line rule and interprets the state constitution to limit warrantless searches of automobiles incident to arrest only to areas from which arrestee might actually gain possession of weapon or destructible evidence); State v. Kirsch, 686 P.2d 446, 448 (finding that the state constitution allows a search incident to arrest only if it is necessary to protect officer or preserve evidence or when the search is relevant to the crime for which the suspect is arrested).
[204] There were no recorded dissenting opinions against the granting of *certiorari.* This case drew a number of amicus briefs on the merits from the United States, law enforcement groups such as National Association of Federal Defenders, National Association of Criminal Defense Lawyers, the Los Angeles County District Attorney on behalf of Los Angeles County, and The American Civil Liberties Union of Arizona and twenty-five states. The Supreme Court granted the United States time for oral argument.
[205] Petition for Writ of Certiorari at 10, Arizona v. Gant, 129 S. Ct. 1710 (2009) (No. 07-542), 2007 WL 3129919 [hereinafter *Petition for Writ of Certiorari*].
[206] *Id.* at 8.
[207] *Id.* at 11.
[208] *Id.* at 13.
[209] *Id.* at 8.
[210] *See* Petition for Writ of Certiorari, *supra* note 205, at 8.
[211] *Id.* at 9 (quoting *Belton*, 453 U.S. at 459).
[212] Brief in Opposition at 12, Arizona v. Gant, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 4527980 [hereinafter *Brief in Opposition]*.
[213] *Id.* at 9.
[214] *Id.* at 11.
[215] *Id.* at 15.
[216] *Id.* at 9.
[217] Brief in Opposition, 2008 WL 4527980 at 19.
[218] *See Gant*, 162 P.3d at 645 n.4 (noting cases which have applied *Belton* and *Thornton* to determine whether searches were conducted inci dent to arrest); *supra* notes 79-80.
[219] Brief for the Petitioner at 22–23, Arizona v. Gant, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 4527980[hereinafter Brief for the Petitioner].

[220] *Id.* at 24–25; *see also, e.g.*, Brief for the United States as Amicus Curiae Supporting Petitioner at 22–23, Arizona v. Gant, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 2149864.
[221] Petitioner's Brief on the Merits at 37, Arizona v. Grant, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 2066112.
[222] *Id.*
[223] *Id.* at 39.
[224] Brief of Respondent at 11, Arizona v. Gant, 129 S. Ct. 1710 (2009) (No. 07-542), 2008 WL 4527980.
[225] *Id.* at 15.
[226] *Id.* at 38–41.
[227] *Id.* at 32–34.
[228] *Id.* at 42–45.
[229] Gant Transcripts, *supra* note 4, at 7.
[230] *See generally id.* at 4-14, 14-31.
[231] *Id.* at 10, 23.
[232] *See generally id.* at 4-14, 14-31
[233] *See id.* at 9-12 (questioning the assertion that arrestees who are handcuffed and confined to a squad car pose an actual danger to police on scene).
[234] For examples articulating the special circumstances required to overturn established precedent, *see, e.g.*, Pearson v. Callahan, 129 S. Ct. 808, 816 (2009) ("Revisiting precedent is particularly appropriate where . . . a departure would not upset settled expectations."); United States v. Gaudin, 515 U.S. 506, 521 (1995) (articulating that "*stare decisis* cannot possibly be controlling when . . . the decision in question has been proved manifestly erroneous, and its underpinnings eroded, by subsequent decisions of this Court"; the role of *stare decisis* is reduced when the rule is procedural and rests on an interpretation of the Constitution); Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 857 (1992) (finding that where "development of constitutional law since the case was decided has implicitly or explicitly left [it] behind as a mere survivor of obsolete constitutional thinking" a case is properly overruled); Payne v. Tennessee, 501 U.S. 808, 828 (1991) (arguing that *stare decisis* is not an inexorable command particularly in constitutional cases because "correction through legislative action is practically impossible") (citation omitted); Arizona v. Rusmey, 467 U.S. 203, 212 (1984) ("[A]ny departure from the doctrine of *stare decisis* demands special justification."); Arizona v. California, 460 U.S. 605, 619 n. 8 (1983) (declaring that *stare decisis* does not apply when the Court is "convinced that [its prior decision] is clearly erroneous and would work a manifest injustice"); Smith v. Allwright, 321 U.S. 649, 665 (1944) (stating that when governing decisions are unworkable or badly reasoned, "this Court has never felt constrained to follow precedent"); Helvering v. Hallock, 309 U.S. 106, 119 (1940) (articulating that *stare decisis* "is a principle of policy and not a mechanical formula of adherence to the latest decision").
[235] *See Thornton*, 541 U.S. at 616 (joining the majority opinion were Justices Kennedy, Breyer, and Thomas).
[236] Justices Roberts and Alito were not members of the Court for the last decision regarding automobile searches incident to arrests. *See id.* at 616.
[237] *See* Gant Transcript, *supra* note 4, at 27-30 (questioning the underlying rationale that arrestees handcuffed and confined to a squad car are actual threats to officer safety or evidence).
[238] *See Thornton*, 541 U.S. at 625 (Scalia, J., joined by Ginsburg, J., concurring)
[239] *See id.* at 632 (Stevens, J., joined by Souter, J., dissenting).
[240] Gant Transcript, *supra* note 4, at 11.
[241] *Id.* at 39.
[242] *Id.* at 39–40.
[243] *Id.* at 40–43.
[244] *Id.* at 45–46.
[245] Gant Transcript, *supra* note 4, at 35–36, 41–42.
[246] *Id.* at 39.
[247] *Id.* at 37.
[248] *Id.*
[249] *Id.* at 37–38.
[250] Gant Transcript, *supra* note 4, at 6, 12, 18, 22–23.
[251] *Id.* at 22–23.
[252] *Id.* at 23.
[253] *Id.*
[254] *See generally id.* (Justice Scalia asking the most questions to both the government and Gant).
[255] Gant Transcript, *supra* note 4, at 8.
[256] *Id.* at 7.
[257] *Id.*
[258] *Id.* at 7–8.
[259] *Id.* at 9.
[260] Gant Transcript, *supra* note 4, at 9.
[261] *Id.*
[262] *Id.* at 16–17.
[263] *Id.* at 17.
[264] *Id.* at 22.
[265] *See* Gant Transcript, *supra* note 4, at 21–22.
[266] *See id.* at 25–26 (expressing uneasiness over the argument that police may impound and search a vehicle for reasons not limited to public safety or other similar rationales).
[267] *Id.* at 26.
[268] *Id.* at 32.
[269] Gant Transcript, *supra* note 4, at 32.
[270] *Id.*
[271] *Id.* at 33.
[272] *Id.* at 5.
[273] Gant Transcript, *supra* note 4, at 25.
[274] *Id.* at 4–5.
[275] *Id.* at 13.
[276] *Id.* at 24.
[277] *Id.* at 24–25.
[278] Gant Transcript, *supra* note 4, at 45.
[279] *Id.* at 20.
[280] Carroll v. United States, 267 U.S. 132, 158 (1925).
[281] Gant Transcript, *supra* note 4, at 8–9.
[282] *Id.* at 9.
[283] *Id.* at 20–21.
[284] *Id.* at 20.
[285] *Id.* at 6.
[286] Gant Transcript, *supra* note 4, at 6.
[287] *Id.*
[288] *Id.* at 10.
[289] *Id.* at 10.
[290] *Id.*
[291] Gant Transcript, *supra* note 4, at 10..
[292] *Id.*
[293] *Id.* at 19.
[294] *See id.* Justice Clarence Thomas asked no questions and made no statements from the bench during oral argument.
[295] *See Gant*, 162 P.3d at 649 (Ariz. 2007) (Bales, J., dissenting). Bales lists several alternative approaches to *Belton*, should the U.S. Supreme Court decides to reconsider its holding. One is to specifically take the approach adopted by the *Gant* majority. Second is to draw a new bright

line, possibly excluding searches when the arrestee is restrained by handcuffs and in the police car or away from his vehicle, but the potential for dispute of whether the facts of each case rise to this level are apparent. Third would be to limit the scope of the permissible search to the passenger compartment and exclude containers. Finally, fourth would be to allow searches of the car only when there are reasonable grounds to believe that it may contain evidence of the crime for which the suspect is being arrested. *See Thornton*, 541 U.S. at 632 (Scalia, J., joined by Ginsburg, J., concurring)).

[296] *See supra* Possible Holding 5, "Other Means to the End: Warrants Based Upon Probable Cause or Other Exceptions."

[297] *Gant*, 129 S. Ct. at 1724.

[298] *Id.* at 1723.

[299] *Id.*

[300] *Id.* at 1723–24.

[301] *Id.* at 1716.

[302] *Gant*, 129 S. Ct. at 1716 (quoting *Chimel*, 395 U.S. at 763).

[303] *Id.*

[304] *Id.* at 1717 (quoting *Belton,* 453 U.S. at 460).

[305] *Id.* at 1719.

[306] *Id*. at 1717 (quoting *Belton*, 453 U.S. at 460).

[307] *Gant*, 129 S. Ct. at 1720 (rejecting Arizona's argument that the search of Gant's vehicle was reasonable under the bright-line rule established under a broad reading of *Belton*).

[308] *Id.* at 1718.

[309] *Id.* (quoting *Belton*, 453 U.S. at 466, 468).

[310] *Id.* (quoting *Thornton*, 541 U.S. at 624).

[311] *Id.* (citing *Thornton*, 541 U.S. at 628).

[312] *Gant*, 129 S. Ct. at 1719.

[313] *Id.*

[314] *See id.* (holding that the search of Gant's car was unreasonable because police could not have reasonably believed that Gant could either access his car or the evidence contained within at the time of the search). The Court rejected the argument that law enforcement had been trained in and had come to consistently rely on the bright-line or "broad" reading of *Belton* for some three decades. The Court claimed the generalization underpinning the broad reading, that in most cases the arrestee would have access to the interior compartment, had proven to be unfounded. Adherence to its faulty assumption, the Court asserted, would lead to an unacceptable incident of unconstitutional searches. That argument, of course, begs the question whether or not the traditional reading of *Belton* is constitutional in the first place. With this declaration that there have been unconstitutional searches under current law, the Court is inviting subsequent litigation seeking to apply G*ant* retroactively under *Teague v. Lane* and its progeny.

[315] *Id.* at 1722; *see also Belton,* 453 U.S. at 455–56.

[316] *Gant*, 129 S. Ct. at 1715.

[317] *Id.* at 1730.

[318] *Id.*

[319] *See Thornton*, 541 U.S. at 632 (Scalia, J., concurring).

[320] *Gant*, 129 S. Ct. at 1719 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

[321] *Id.*

[322] *Id.*

[323] *Id.*

[324] *Id.* at 1724–25 (Scalia, J., concurring (quoting *Chimel*, 395 U.S. at 752).

[325] *Gant*, 129 S. Ct. at 1724-25 (Scalia, J., concurring).

[326] *Id.* at 1725.

[327] *Id.*

[328] *Id.*

[329] *Id.*

[330] *Gant*, 129 S. Ct. at 1725 (Scalia, J. concurring).

[331] *Id.* at 1726 (Alito, J., dissenting).

[332] *Id.*

[333] *Id.* at 1727–28.

[334] *Id.* at 1728.

[335] *Gant*, 129 S. Ct. at 1731.

[336] *Id.* at 1725 (Breyer, J., dissenting).

[337] *Id.* at 1726.

[338] *Id.*

[339] *Id.* at 1724 (Scalia, J., concurring).

[340] *Id.* (citation omitted).

[341] *Id.*

About the Authors

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