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2013

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## Recommended Citation

Messmer, Patrick D., "Circuit Confusion: The Growing Divide on Whether Gant Applies to Non-Vehicular Searches Incident to Arrest" (2013). *Law School Student Scholarship*. 66.  
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Circuit Confusion: The Growing Divide on Whether *Gant* Applies to Non-Vehicular Searches Incident to Arrest

*Patrick D. Messmer*\*

I. INTRODUCTION

The search incident to arrest exception to the Fourth Amendment's warrant requirement has had a tumultuous history to say the least.<sup>1</sup> In 2009, the Supreme Court waded once more into the fray with its decision in *Arizona v. Gant*<sup>2</sup>, which marked yet another change in Fourth Amendment jurisprudence.<sup>3</sup> While not quite overruling the landmark case, *New York v. Belton*<sup>4</sup>, *Gant* was a new return to old principles, namely ones that *Belton* had replaced.<sup>5</sup>

Specifically, the *Gant* Court sought to return the search incident to arrest exception, as it applied to vehicular searches, to the concerns of officer safety and preservation of evidence.<sup>6</sup> The Court was concerned that the *Belton* holding was being interpreted in ways that were no longer primarily concerned with those two overarching principals of this particular exception to the warrant requirement. As with any change in standard, the Court considered the implications of the change, and one of the implications that is still being considered is whether or not the test for the reasonableness of a vehicular search incident to arrest delineated by the *Gant* majority should also be applied outside of the vehicle context.<sup>7</sup>

This Comment seeks to examine and answer that question. As it stands, the circuits are split as to whether or not *Gant* should be extended outside of the motor vehicle context.<sup>8</sup> Due to

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<sup>1</sup> See *infra* Parts II.A–II.B.

<sup>2</sup> *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

<sup>3</sup> See *infra* Part III.

<sup>4</sup> *New York v. Belton*, 453 U.S. 454 (1981).

<sup>5</sup> See *infra* Part III.

<sup>6</sup> See *infra* Part III.B.

<sup>7</sup> See *infra* Part IV.

<sup>8</sup> See *infra* Part IV.

the developing circuit split, and the prolificacy of Fourth Amendment litigation, the U.S. Supreme Court can be expected to address this issue sooner rather than later. When the Court eventually addresses the issue, it should extend the *Gant* holding to searches incident to arrest even outside of the motor vehicle context.

Part II will briefly examine the history and evolution of the search incident to arrest exception to the warrant requirement of the Fourth Amendment. After some general background, it will pay particular attention to the application of the exception to motor vehicles. Part III will discuss the implications of the *Gant* decision and how it affected the existing standards for searches incident to lawful arrests. Part IV will demonstrate and analyze the confusion that *Gant* has caused among the Courts of Appeals by referencing relevant examples from three Circuits. Part V will make an argument for the correct interpretation of *Gant*, namely that a broad reading of when *Gant* should be applied, and will make reference to several examples that show the applicability of a broad interpretation. Finally, the argued-for standard will be applied to the cases discussed in Part IV as a way of clarifying any remaining uncertainties.

## II. BRIEF HISTORY OF THE SEARCH INCIDENT TO ARREST EXCEPTION TO THE WARRANT REQUIREMENT

### A. *The Search Incident to Arrest Exception and Its Murky Years*

Historically, courts have been charged with safeguarding the guarantees found in the Fourth Amendment. These protections—“[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . .,”<sup>9</sup>—are only lawfully absent when certain circumstances exist. As Justice John Paul Stevens put it, “[s]earches

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<sup>9</sup> U.S. CONST. amend. IV.

conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment, subject to only a few specifically established and well-delineated exceptions.”<sup>10</sup> One such exception is the search incident to lawful arrest.<sup>11</sup>

This exception is grounded in concerns for officer safety and the preservation of evidence; courts are willing to overlook the lack of a warrant if the search is to protect officers from a reasonable threat or to prevent the arrestee from destroying potentially incriminating evidence prior to the execution of the warrant.<sup>12</sup> The Supreme Court itself admits that the development of this exception has historically been far from consistent, and indeed, has had a rather tumultuous evolution.<sup>13</sup>

The search incident to arrest exception first appeared in *Weeks v. United States*, in which the Court stated in dictum that the right to “search the person of the accused . . . to discover and seize the fruits of evidences of crime,” has always been understood as a right of the government in American law, so long as the search is incident to a lawful arrest.<sup>14</sup> The Court took a step in that direction of including areas surrounding where an arrest is made in the exception when it decided *Carroll v. United States*, which broadened the phrase used in *Weeks* to include “whatever is found upon his person or in his control . . . ”<sup>15</sup> The phrase, “in his control,” clearly expands the available application of the exception beyond merely the arrestee’s person. Just a

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<sup>10</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)).

<sup>11</sup> *See Weeks v. United States*, 232 U.S. 383, 392 (1914) (“ . . . to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crime.”).

<sup>12</sup> *United States v. Robinson*, 414 U.S. 218, 229 (1973) (“[T]he incident search was obviously justified ‘by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime.’” (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964))).

<sup>13</sup> *Chimel v. California*, 395 U.S. 752, 755 (1969).

<sup>14</sup> *Weeks*, 232 U.S. at 392.

<sup>15</sup> *Carroll v. United States*, 267 U.S. 132, 158 (1925).

few months after *Carroll*, the Court decided *Agnello v. United States*, stating that the ability to search the place where an arrest is made is “not to be doubted.”<sup>16</sup>

Up to and including *Agnello*, the Court seemed relatively consistent in piecemeal expansions of the search incident to arrest exception to the warrant requirement. This ended after *Agnello*, however, as the Court’s Fourth Amendment rulings became much murkier between 1932 and 1950.

The first of these cases is *United States v. Lefkowitz*, which sought to limit the growth and application of the exception.<sup>17</sup> *Lefkowitz* involved a man accused of importing, selling and distributing “intoxicating liquor” during the Prohibition Era.<sup>18</sup> He was arrested in his office, a room that was approximately 10 feet by 20 feet.<sup>19</sup> Upon his arrest, the prohibition agents searched all of the drawers of his desk, which were unlocked, seizing contents therein.<sup>20</sup> The agents did not have a search warrant, only a warrant for Lefkowitz’s arrest.<sup>21</sup> The Court held that the search of the drawers was unreasonable because there was no crime being openly committed in the presence of the arresting agents at the time of the defendant’s detention.<sup>22</sup> Despite what seems to be strong language applauding a liberal interpretation of the Fourth Amendment, the *Lefkowitz* opinion was undone fifteen years later, in *Harris v. United States*.<sup>23</sup>

A warrant was issued and executed for Mr. Harris after he was thought to have stolen two checks and to have used them to assist in his forgery efforts.<sup>24</sup> The apartment where he lived consisted of four rooms, each of which was thoroughly searched for “any means that might be

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<sup>16</sup> *Agnello v. United States*, 269 U.S. 20, 30 (1925).

<sup>17</sup> 285 U.S. 452 (1932).

<sup>18</sup> *Lefkowitz*, 285 U.S. at 459.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 460.

<sup>22</sup> *Id.* at 465.

<sup>23</sup> 331 U.S. 145 (1947).

<sup>24</sup> *Id.* at 148.

used to commit” the crimes Mr. Harris was accused of.<sup>25</sup> The Court held that the search was permissible because Mr. Harris was in exclusive possession of the apartment and, therefore, the search could reasonably extend beyond the room in which he was arrested.<sup>26</sup> In response to the dissenters’ charge that this was in effect a validation of a general warrant, the majority asserted that the search, while intensive, was aimed at finding very specific “means and instrumentalities by which the crimes charged had been committed.”<sup>27</sup>

Despite the frustration of the dissenting Justices, they were all vindicated little more than a year later when the Court decided *Trupiano v. United States*.<sup>28</sup> Justices Frankfurter, Murphy, and Jackson joined with three of their colleagues to attempt to limit the expansion of the search incident to arrest exception rendered by *Harris*.<sup>29</sup> Mr. Trupiano and his fellow defendants were accused of operating an illegal still for the production of whiskey.<sup>30</sup> A raid on the property they were renting was conducted at night, leading to the arrest of a few of Mr. Trupiano’s compatriots.<sup>31</sup> Because one of the men was observed committing a felony, a lawful arrest was made and a search of the entire premises ensued.<sup>32</sup> The Court later invalidated this search and the subsequent seizures made as a result of it.<sup>33</sup> The majority reasoned that the search incident to arrest exception is supposed to be a strictly limited one in application and, therefore, police need more than merely a valid arrest to justify a subsequent search.<sup>34</sup> There must also be some level of necessity.<sup>35</sup>

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<sup>25</sup> *Id.* at 148–49.

<sup>26</sup> *Id.* at 152.

<sup>27</sup> *Harris*, 331 U.S. at 153.

<sup>28</sup> 334 U.S. 699 (1948).

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 703.

<sup>31</sup> *Id.* at 704.

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 705.

<sup>34</sup> *Trupiano*, 334 U.S. at 708.

<sup>35</sup> *Id.*

Less than two years later, in 1950, the pendulum again swung back toward the preferences of the *Harris* majority when the Court decided *United States v. Rabinowitz*.<sup>36</sup> Mr. Rabinowitz was accused, and later convicted, of possessing postage stamps with forged “overprints.”<sup>37</sup> After the police obtained a valid warrant for his arrest, Rabinowitz was apprehended at his place of business, a one room office open to the public, out of which he sold his stamps.<sup>38</sup> Over Mr. Rabinowitz’s objection, and without a search warrant, agents searched his desk, safe, and filing cabinet, and thereafter seized over 500 stamps with forged overprints.<sup>39</sup> Relying on *Agnello* and *Harris*, and discounting *Go-Bart* and *Lefkowitz* as only proscribing general exploratory searches, the Court upheld the legitimacy of the search.<sup>40</sup>

### C. *Chimel v. California: The Court Attempts to Inject Some Clarity*

After a much-needed nineteen year respite from any more major changes regarding the search incident to arrest exception, the Court decided *Chimel*.<sup>41</sup> In so doing, the Court lamented the confused development and inconsistent application of the exception, and then sought to establish a definitive standard that courts can apply in a way that removes its unpredictable nature.<sup>42</sup> Three police officers went to the defendant’s home with a warrant for his arrest.<sup>43</sup> Upon arresting the defendant, the officers asked to “look around” but the defendant objected.<sup>44</sup> The police informed him that regardless of his objection, they would conduct a search of the premises

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<sup>36</sup> 339 U.S. 56 (1950).

<sup>37</sup> *Id.* at 57.

<sup>38</sup> *Id.* at 58.

<sup>39</sup> *Id.* at 59.

<sup>40</sup> *Id.* at 61–63.

<sup>41</sup> *Chimel v. California*, 395 U.S. 752, 752 (1969).

<sup>42</sup> *Id.* at 755.

<sup>43</sup> *Id.* at 753

<sup>44</sup> *Id.*

“on the basis of the lawful arrest.”<sup>45</sup> No search warrant had been issued.<sup>46</sup> The Court ruled that it was unreasonable for the police to search the defendant’s entire house incident to his arrest, because the search extended beyond his person and “the area from which he might have obtained either a weapon or something that could have been used as evidence against him.”<sup>47</sup>

Despite holding that the search was invalid, the Court made it very clear that a police officer may search an arrestee for weapons that could be used to escape or injure the officer, as well as for evidence on the arrestee’s person that could be concealed or destroyed.<sup>48</sup> The Court felt that these two concerns should receive the utmost consideration.<sup>49</sup> As the Court pointed out, such a rule as would allow a police officer to search an arrestee’s person for weapons or evidence would only make sense if the officer could also search the area under the arrestee’s immediate control.<sup>50</sup> Such weapons and evidence within the arrestee’s area of immediate control pose just as much of a threat to an officer’s safety and are equally subject to concealment or destruction, as weapons and evidence on an arrestee’s person.<sup>51</sup> The Court defined the area within an arrestee’s “immediate control” as the area “from within which he might gain possession of a weapon or destructible evidence.”<sup>52</sup> Unlike some of the majorities before it, this Court expressly limited the scope of the search incident to arrest exception, saying “[t]here is no . . . justification . . . for routinely searching any room other than that in which an arrest occurs— or for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”<sup>53</sup>

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<sup>45</sup> *Id.* at 754.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.* at 762–63.

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> *Id.* at 763.

<sup>51</sup> *Id.*

<sup>52</sup> *Chimel*, 395 U.S. at 763.

<sup>53</sup> *Id.*



One of the *Chimel* majority's greatest concerns was the same as that of Justice Jackson when he dissented in *Harris*, namely that there would be no logical way to limit the area that could be searched once the area was allowed to extend beyond the arrestee's person and area of immediate control.<sup>54</sup> For added measure, the majority also asserts that the standards set forth in *Harris* and *Rabinowitz* would allow police officers to institute searches of an arrestee's home not otherwise justified by probable cause so long as the police timed the arrest to coincide with moments that the arrestee is in his home.<sup>55</sup> The *Chimel* Court agreed with Judge Learned Hand that in theory, the power to search without probable cause would not exist if the arrestee were not at home, but "it is small consolation to know that one's papers are safe only so long as one is not at home."<sup>56</sup> Thus the Court endeavored to narrow the exception, which thereafter remained significantly unchanged until twelve years later, when the Court decided *New York v. Belton*.<sup>57</sup>

#### *D. The Search Incident to Arrest Exception Applied to Motor Vehicles*

The exception as applied to motor vehicles has had a much less confusing and unstable history than the exception as a whole. In *Preston v. United States*, the police were contacted about three suspicious men sitting in an automobile.<sup>58</sup> The officers arrested the men and took them back to the police station.<sup>59</sup> One of the officers drove the vehicle that the men were found in back to the station, after which it was towed to a garage.<sup>60</sup> The officers later searched the

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<sup>54</sup> *Chimel*, 395 U.S. at 766; *Harris v. United States*, 331 U.S. 145, 197 (1947) (Jackson, J., dissenting).

<sup>55</sup> *Chimel*, 395 U.S. at 767.

<sup>56</sup> *United States v. Kirschenblatt*, 16 F.2d 202, 203 (2d Cir. 1926).

<sup>57</sup> *New York v. Belton*, 453 U.S. 454 (1981).

<sup>58</sup> *Preston v. United States*, 376 U.S. 364, 365 (1964). For a historical discussion and justification of applying a different standard to automobiles and other moveable vessels, see generally *Carroll v. United States*, 267 U.S. 132 (1925).

<sup>59</sup> *Id.*

<sup>60</sup> *Id.*

vehicle, after the men had been booked.<sup>61</sup> The police found numerous pieces of evidence during the search, and after being confronted with this evidence, one of the men confessed to plans to rob a bank.<sup>62</sup>

Despite searching a vehicle incident to arrest being reasonable in some scenarios, the Court stressed that it would not be reasonable in every scenario and, indeed, felt that it was not in the fact pattern before them.<sup>63</sup> The Court saw an important distinction in the fact that the men had not only been arrested, but were at the police station and the car was in police custody.<sup>64</sup> Essentially, this means that neither of the traditional justifications for a search incident to arrest—officer safety and evidence preservation—were present in *Preston*.<sup>65</sup> The Court therefore concluded that, under these facts, the search was unreasonable for being “too remote in time or place to have been made as incidental to the arrest . . . .”<sup>66</sup>

Arguably one of the most significant Supreme Court decisions regarding the Fourth Amendment, *New York v. Belton* attempted to draw a rare bright-line rule for the search incident to arrest exception.<sup>67</sup> *Belton* resulted from an incident on the New York Thruway: a state trooper pulled over an automobile that was traveling at excessive speeds.<sup>68</sup> In the car were four men, none of whom, as the officer discovered, owned the car or were related to the owner of the car.<sup>69</sup> The trooper also smelled marijuana, at which time he directed the occupants of the vehicle to get out of the vehicle, and then arrested them for illegal possession of marijuana.<sup>70</sup> After patting

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<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.*

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *New York v. Belton*, 453 U.S. 454 (1981); Jeffrey R. Beck, Note, *Arizona v. Gant: Heightening a Person’s Expectation of Privacy in a Motor Vehicle Following Searches Incident to Arrest*, 55 S.D. L. REV. 299, 301 (2010).

<sup>68</sup> *Belton*, 453 U.S. at 455.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 456.

them down and separating them, the officer picked up an envelope that contained marijuana off of the floor of the car.<sup>71</sup> The trooper gave each of them their *Miranda* warnings and searched each of their persons.<sup>72</sup> The trooper then searched the passenger compartment of the vehicle and found a leather jacket that belonged to Mr. Belton in the back seat.<sup>73</sup> After unzipping one of the jacket's pockets, the trooper discovered cocaine.<sup>74</sup> Mr. Belton objected to the use of the cocaine as evidence at trial, contending that the search was unlawful.<sup>75</sup>

The New York Court of Appeals agreed with Mr. Belton, holding that “a warrantless search of the zippered pockets of an inaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.”<sup>76</sup> In so holding, New York's highest court believed that it was following the principles espoused in *Chimel*, namely, that once arresting officers and potentially incriminating evidence are unlikely to be harmed or destroyed, then the search incident to arrest exception to the warrant requirement no longer applies.<sup>77</sup> Specifically, the Court of Appeals stated that “[t]he privacy interest of the arrestee in an object remains intact once he is effectively neutralized or the object is within the exclusive control of the police.”<sup>78</sup> The Court of Appeals felt that with all of the former occupants of the vehicle already under arrest, separated, and away from the vehicle they had been in, they were effectively neutralized for purposes of the search incident to arrest exception.<sup>79</sup> The Court of Appeals also claimed that the leather jacket, and

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<sup>71</sup> *Id.*

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Belton*, 453 U.S. at 456.

<sup>75</sup> *Id.*

<sup>76</sup> *People v. Belton*, 407 N.E.2d 420, 421 (N.Y. 1980).

<sup>77</sup> *Id.* at 421.

<sup>78</sup> *Id.* at 422.

<sup>79</sup> *Id.*

indeed the vehicle as a whole, was under the exclusive control of the police, and thus the search was unreasonable.<sup>80</sup>

Upon review, the Supreme Court disagreed, reading *Chimel* to allow a broader exception than the New York high court recognized.<sup>81</sup> The Court felt the need to establish a bright-line rule to permanently answer “the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.”<sup>82</sup> The Court acknowledged that *Chimel* had established a standard for a search incident to arrest, in that such a search may not extend beyond the area within the immediate control of the arrestee, but the Court then voiced concern over the general inability for courts as a whole to adequately define “area within the immediate control of the arrestee.”<sup>83</sup> Specifically, the *Belton* Court felt that the definition was particularly troublesome when the facts involved the interior of a car and the arrestee was an occupant thereof.<sup>84</sup> The Court went on to hold that when the occupant of a vehicle is lawfully arrested, the police officer may, as a contemporaneous incident of the arrest, search the passenger compartment of the vehicle.<sup>85</sup> The Court further held that the permissibility of searching the passenger compartment includes any containers found therein, regardless of whether they are closed or otherwise.<sup>86</sup> A container was defined as “any object capable of holding another object.”<sup>87</sup>

This holding is significant for several reasons. First, the Court signaled its desire to establish a bright-line rule by creating a rule that is based on the general assumption that *all* areas of the passenger compartment are *always* within the immediate control of an occupant of the

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<sup>80</sup> *Id.*

<sup>81</sup> *Belton*, 453 U.S. at 453.

<sup>82</sup> *Id.* at 459.

<sup>83</sup> *Id.* at 460.

<sup>84</sup> *Id.*

<sup>85</sup> *Id.*

<sup>86</sup> *Belton*, 453 U.S. at 461.

<sup>87</sup> *Id.* at 461 n.4.

vehicle. Second, the Court, despite its apparent willingness to broaden the scope of the incident to arrest exception, still placed a temporal restraint on it, i.e. “contemporaneous.”<sup>88</sup> As the dissent points out, this might actually lead to more questions than it answers.<sup>89</sup>

The dissent is a fervent one, taking aim at the majority’s reasoning, goal, and resulting opinion.<sup>90</sup> Justice Brennan chides the Court for ignoring the underlying principles in *Chimel*.<sup>91</sup> In his view, a bright-line rule is inappropriate for this type of case, in which he believes that courts should “carefully consider the facts and circumstances of each search and seizure, focusing on the reasons supporting the exception.”<sup>92</sup> Justice Brennan thought not only that the majority got the wrong answer, but that it in fact was asking the wrong question: “the crucial question under *Chimel* is not whether the arrestee could *ever* have reached the area that was searched, but whether he could have reached it at the time of the arrest and search.”<sup>93</sup>

*Thornton v. United States* gave the Court a chance to reexamine its *Belton* ruling in 2004.<sup>94</sup> A police officer was driving an unmarked car when he noticed another car slow down, so as not to pull up along side of the officer’s vehicle.<sup>95</sup> The officer pulled over so that the car had to pass him. After getting back onto the street, the officer checked the plates of the suspicious vehicle and discovered that while they were on a Lincoln Town Car, they had been issued to a Chevy two-door.<sup>96</sup> Before the officer could pull over the car, the petitioner pulled

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<sup>88</sup> *Id.* at 460.

<sup>89</sup> *Id.* at 470 (Brennan, J., dissenting).

<sup>90</sup> *See Belton*, 453 U.S. at 463 (Brennan, J., dissenting).

<sup>91</sup> *Id.* at 463.

<sup>92</sup> *Id.* at 464; *see also* *Warden v. Hayden*, 387 U.S. 294, 310 (1967) (indicating that for a search to be valid under the Fourth Amendment, it must be “strictly tied to and justified by the circumstances which rendered its initiation permissible”).

<sup>93</sup> *Id.* at 469 (Brennan, J., dissenting).

<sup>94</sup> *Thornton v. United States*, 541 U.S. 615 (2004).

<sup>95</sup> *Id.* at 617.

<sup>96</sup> *Id.* at 618.

into a parking lot and got out of the vehicle.<sup>97</sup> When the officer pulled up and approached him, the man seemed nervous.<sup>98</sup> The officer asked to pat him down, to which the man agreed, and then the officer felt a large bulge in the man’s front pocket.<sup>99</sup> When asked about it, the man admitted that he had illegal drugs on his person.<sup>100</sup> The officer arrested the man and placed him in the back seat of the patrol car.<sup>101</sup> After the man had been handcuffed and put into the police car, the officer searched the man’s vehicle.<sup>102</sup> The petitioner sought to suppress the evidence obtained, arguing that he in fact was not an occupant of the vehicle at the time he was arrested and that, therefore, *Belton* did not control and the search was illegal.<sup>103</sup>

The Court was faced with a new question—whether *Belton* controls even when an officer does not make contact until the suspect has left the vehicle.<sup>104</sup> The Court concluded that it does.<sup>105</sup> The Court believed that the petitioner was close enough to his vehicle, “both temporally and spatially,” so as to place the vehicle in his immediate control, even though he was technically no longer an occupant of same.<sup>106</sup> In its analysis, the Court explained that there is no logical reason to decide that the area generally within the arrestee’s immediate control is determined by whether the arrestee got out of the car because an officer told him to or whether the officer initiated contact while the arrestee was still in the car.<sup>107</sup> The Court asserted that the same concerns for officer safety and evidence preservation still exist when the arrestee is next to

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<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Thornton*, 541 U.S. at 618.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.*

<sup>103</sup> *Id.* at 615.

<sup>104</sup> *Id.* at 617.

<sup>105</sup> *Id.* at 617.

<sup>106</sup> *Thornton*, 541 U.S. at 617.

<sup>107</sup> *Id.* at 620–21.

the vehicle as when he is inside it.<sup>108</sup> The Court pointed out that two different rules for what is essentially the same situation would merely lend itself to confusion and difficult application.<sup>109</sup> The Court admitted that not all contraband in the passenger compartment is likely to be readily accessible to a recent occupant, especially one who has exited the vehicle.<sup>110</sup> Nonetheless, said the Court, the passenger compartment *in general* is accessible.<sup>111</sup>

The dissent took issue with the majority equating a “recent occupant” with an “occupant,” arguing that the *Chimel* rule should afford recent occupants of vehicles the same protections as a recent occupant of a house.<sup>112</sup> The dissent is similar to Justice Brennan’s dissent in *Belton*, in that it accuses the majority of attempting to extend a bright-line rule, but actually doing nothing more than causing more questions.<sup>113</sup> In this case, obvious questions surround the term “recent occupant.”<sup>114</sup> Justice Stevens was also concerned that, without some limiting principal, *Thornton* would serve to broaden the automobile exception to the detriment of citizens’ Fourth Amendment rights.<sup>115</sup>

The search incident to arrest exception to the warrant requirement of the Fourth Amendment is well established. Chaotically winding its way through Supreme Court holdings, the exception eventually began to resemble its current form after the Court tried to clarify things in *Chimel*. Motor vehicles have historically been treated differently than an arrestee’s home or person, and the search incident to arrest exception is no different. In *Belton*, later affirmed by *Thornton*, the Court extends its broad interpretation of *Chimel*’s area of immediate control

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<sup>108</sup> *Id.* at 621

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 622.

<sup>111</sup> *Id.*

<sup>112</sup> *Thornton*, at 636 (Stevens, J., dissenting).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

analysis to automobiles. The *Gant* Court sought to rectify some of the confusion over the search incident to arrest exception as it pertains to motor vehicles.

### III. ARIZONA V. GANT'S PLACE IN FOURTH AMENDMENT JURISPRUDENCE

In 2009, the Supreme Court decided *Gant* and introduced more changes to the Fourth Amendment analysis.<sup>116</sup> The eventual effects of the decision on the warrant exception to the Fourth Amendment have not yet been made entirely clear.

#### A. Factual Background

The police were called to a house where, according to a report by an anonymous tipster, drugs were being sold.<sup>117</sup> When police knocked on the door, Rodney Gant answered.<sup>118</sup> The police ascertained his identity, and then left the residence after Mr. Gant told them that the owner of the home would be back later that day.<sup>119</sup> After leaving, the police officers checked their records and discovered that Mr. Gant had an outstanding arrest warrant for driving with a suspended license.<sup>120</sup> The police returned to the residence later that day and arrested two individuals, one for providing a false name and one for possession of drug paraphernalia that they found near the house.<sup>121</sup> Each of these individuals was arrested, handcuffed, and detained in a separate police car by the time Mr. Gant returned to the residence.<sup>122</sup> After he pulled into the driveway, Mr. Gant exited his vehicle, closed the door, and then walked toward one of the

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<sup>116</sup> See *infra* Part III.B.2.

<sup>117</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 1714–15.

<sup>120</sup> *Id.* at 1715.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*



officers, who had just called to him.<sup>123</sup> The officer immediately arrested Mr. Gant, who at that time was approximately ten to twelve feet from his vehicle.<sup>124</sup>

Two more police officers arrived on the scene, bringing the total to five officers and three arrestees.<sup>125</sup> Upon arrival by the additional officers, Mr. Gant was placed in one of the empty patrol cars.<sup>126</sup> After securing Mr. Gant in the back of a police vehicle, two of the officers proceeded to search his car, eventually finding a gun and a bag of cocaine in the pocket of a jacket on the backseat.<sup>127</sup> Mr. Gant moved to suppress the gun and bag of cocaine as evidence, on the grounds that he believed them to be the products of an illegal and unreasonable search and seizure.<sup>128</sup> According to Mr. Gant, *Belton* did not in fact authorize the search of his vehicle because he “posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle.”<sup>129</sup>

#### *B. Arizona Supreme Court v. United State Supreme Court: One Holding, Different Reasons*

##### 1. The Arizona Supreme Court

The Arizona Supreme Court ruled in favor of Mr. Gant, holding that the warrantless search of his vehicle was outside the proper scope of the search incident to arrest exception to the Fourth Amendment’s warrant requirement.<sup>130</sup> The state’s high court read *Belton* as not answering the “threshold question whether the police may conduct a search incident to arrest at all once the scene is secure.”<sup>131</sup> Therefore, in the court’s view, *Belton* merely detailed the

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<sup>123</sup> *Gant*, 129 S. Ct. at 1715.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

<sup>128</sup> *Id.*

<sup>129</sup> *Gant*, 129 S. Ct. at 1715.

<sup>130</sup> *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007).

<sup>131</sup> *Id.* at 643.

acceptable scope of a search of a vehicle incident to an arrest.<sup>132</sup> With such a reading of *Belton*, the court concluded that the police could not search Mr. Gant's vehicle because neither of the two primary *Chimel* justifications existed once he had been handcuffed and secured in the back of a patrol car.<sup>133</sup> That is, once an arrestee is safely secured and "under the supervision of an officer, the warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence."<sup>134</sup>

## 2. The Supreme Court of the United States

Despite arriving at the same conclusion as the Arizona high court, the Supreme Court disagreed with its reasoning.<sup>135</sup> The Court acknowledged that there was both textual and evidentiary support for the Arizona court's interpretation of *Belton*, but went on to note that most lower courts have interpreted the ruling to allow a vehicle search incident to arrest of a recent occupant regardless of whether the recent occupant is no longer a potential threat.<sup>136</sup> "Under this broad reading of *Belton*, a vehicle search would be authorized incident to every arrest of a recent occupant notwithstanding that in most cases the vehicle's passenger compartment will not be within the arrestee's reach at the time of the search."<sup>137</sup> Indeed, as Justice Scalia's concurrence pointed out in *Thornton*, some courts have held searches valid under the *Belton* rule "even when . . . the handcuffed arrestee has already left the scene."<sup>138</sup>

The Court flatly rejected this broad interpretation of *Belton*, asserting that such a reading would "thus untether the rule from the justifications underlying the *Chimel* exception."<sup>139</sup> Such a result would be particularly unpalatable for the Court, since the majority in *Belton* stated that its

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<sup>132</sup> *Gant*, 129 S. Ct. at 1715 (discussing *State v. Gant*, 162 P.3d at 643).

<sup>133</sup> *Gant*, 162 P.3d at 644.

<sup>134</sup> *Id.*

<sup>135</sup> Compare *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007), with *Arizona v. Gant*, 129 S. Ct. 1710 (2009).

<sup>136</sup> *Gant*, 129 S. Ct. at 1718.

<sup>137</sup> *Id.* at 1719.

<sup>138</sup> *Thornton v. United States*, 541 U.S. 615, 628 (Scalia, J., concurring in judgment).

<sup>139</sup> *Gant*, 129 S. Ct. at 1719.

ruling “in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”<sup>140</sup> To this end, the Court held that police were authorized 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.<sup>141</sup> However, not wishing to overrule *Belton* outright, the Court also held that circumstances unique to the vehicle context justify a search incident to lawful arrest when it is “reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”<sup>142</sup>

The Court did not affirmatively define “reaching distance,” instead attempting to define what it is not.<sup>143</sup> It seems plausible that this may even have been the point, as the Court did not want to positively define something because such definitions often lead to general bright-line rules that are applied to all circumstances. Such an overbroad ruling is precisely what the Court was doing away with by limiting *Belton*. However, the Court did list three factors which it deemed relevant to the discussion of whether or not an arrestee was within “reaching distance”: (1) the number of officers compared to the number of arrestees; (2) whether or not the arrestee is in handcuffs; (3) whether or not the arrestee is placed into a patrol car.<sup>144</sup>

In presenting its case, the State of Arizona argued for keeping the *Belton* rule in place, calling for fewer restraints on the scope of searches incident to arrest.<sup>145</sup> The State’s argument centers on the premise that *Belton* correctly “balances law enforcement interests, including the

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<sup>140</sup> *Id.* (quoting *New York v. Belton*, 453 U.S. 454, 460 n.3 (1981)).

<sup>141</sup> *Id.* at 1719.

<sup>142</sup> *Id.* (quoting *Thornton*, 541 U.S. at 632).

<sup>143</sup> George M. Dery, III, *A Case of Doubtful Certainty: The Court Relapses into Search Incident to Arrest Confusion in Arizona v. Gant*, 44 IND. L. REV. 395, 415 (2011).

<sup>144</sup> As a result of *Gant*, at least one court, the Eighth Circuit in *United States v. Perdoma* (discussed below), has considered whether having an object or container under the exclusive control of the police per se takes it out of the area into which the arrestee might reach. As will be shown below, the *Perdoma* court relies on a very literal reading of the word “might” and rules in such a way as to make it seem very difficult for anything to ever be out of the area into which an arrestee *might* reach.

<sup>145</sup> *Gant*, 129 S. Ct., at 1720.

interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle."<sup>146</sup> The Court dispatched the State's arguments quickly.<sup>147</sup> First, the majority informs the State that it undervalues the privacy interest an individual has in his vehicle, which, while less than the one he possesses in his home, is substantial nonetheless.<sup>148</sup> The Court stressed that this interest is especially important given that the container rule espoused by *Belton* allows law enforcement to search every container within a vehicle once the initial search of the vehicle is valid.<sup>149</sup> Second, according to the Court, the bright-line rule in *Belton* is more ambiguous in practice than the State would have the Court believe. To wit, courts are not entirely in agreement as to how close in time to the arrest or how near to an arrestee's vehicle a given encounter must take place to be within the *Belton* rule.<sup>150</sup> The Court was particularly critical of the last of Arizona's arguments, that without *Belton* in place, police officer safety and evidence safeguarding would both suffer tremendously. As the Court demonstrated, even if the *Gant* opinion did not explicitly indicate that the principles of officer safety and evidence preservation as outlined by *Chimel* were to be considered in all determinations of the reasonableness of searches incident to arrest, there is still ample precedent besides *Belton* to protect those interests.<sup>151</sup>

The majority then turns its attention to two of the counterarguments that the dissenters present: (1) that the doctrine of *stare decisis* mandates faithfulness to the then-current interpretation of the *Belton* rule, and (2) that consideration of police reliance on prior precedent

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<sup>146</sup> *Id.*

<sup>147</sup> *Id.* at 1714.

<sup>148</sup> *Id.* at 1720.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Gant*, 129 S. Ct. at 1721 (“For instance, *Michigan v. Long*, 463 U.S. 1032, 103 S. Ct. 3469, 77 L.Ed.2d 1201 (1983), permits an officer to search a vehicle’s passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is ‘dangerous’ and might access the vehicle to ‘gain immediate control of weapons.’ . . . If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820–821, . . . authorizes a search of any area of the vehicle in which the evidence might be found,” including “searches for evidence relevant to offenses other than the offense of arrest . . .”).

warrants not overturning said precedent.<sup>152</sup> The majority rejected the *stare decisis* argument on the grounds that there is no obligation to “follow a past decision when its rationale no longer withstands ‘careful analysis.’”<sup>153</sup> Additionally, the Court asserted that it has never allowed *stare decisis* to excuse the continuation of an unconstitutional law enforcement policy.<sup>154</sup> Finally, the Court noted that the respective facts of *Belton* and *Gant* can be distinguished from one another with relative ease: in *Belton*, one police officer was attempting to deal with “four unsecured arrestees suspected of committing a drug offense,” whereas in *Gant*, there were several officers and only one arrestee, who was securely detained in the back of a patrol car.<sup>155</sup> In response to Justice Alito’s argument that the good faith reliance on the *Belton* standard by police officers merits some consideration when deciding whether or not to overrule the standard,<sup>156</sup> the majority declared that the reliance of police officers does not trump the “countervailing interest” that all citizens have in seeing their constitution fully protect their rights.<sup>157</sup>

Justice Scalia, while not exactly enthused by the majority’s holding, decided that he had an obligation to vote for the lesser of two evils, in this case the majority (the other being the dissent’s wish to reaffirm the *Belton* standard).<sup>158</sup> Scalia felt that the Court should have gone further in its holding and overruled *Belton* outright.<sup>159</sup> He felt that the proper standard was that a “vehicle search incident to arrest is *ipso facto* ‘reasonable’ only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.”<sup>160</sup> Conspicuously, Scalia favored removing considerations

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<sup>152</sup> *Gant*, 129 S. Ct. at 1722.

<sup>153</sup> *Id.* (quoting *Lawrence v. Texas*, 539 U.S. 558, 577 (2003)).

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

<sup>156</sup> *Id.* at 1728 (Alito, J., dissenting).

<sup>157</sup> *Id.*

<sup>158</sup> *Gant*, 129 S. Ct. 1722, 1725 (2009) (Scalia, J., concurring).

<sup>159</sup> *Id.*

<sup>160</sup> *Id.*

of officer safety from determinations of reasonableness in regards to searches incident to arrests.<sup>161</sup> His opinion was that officer safety was effectively a straw man argument, in that police face the greatest risk of harm prior to an arrest being made, and to allow the police to search a vehicle *after* they have already successfully arrested the suspect does nothing to curtail the risk of harm inherent in the act of arresting a suspect.<sup>162</sup> To drive his point home, Scalia gave an open invitation to the government to provide evidence of “a single instance in which a formerly restrained arrestee escaped to retrieve a weapon from his own vehicle.”<sup>163</sup>

#### IV. DIFFERING INTERPRETATIONS OF THE APPLICABILITY OF *GANT* TO NON-VEHICULAR SEARCHES INCIDENT TO ARREST

Since the Court handed down the *Gant* decision, the courts of appeals have not uniformly interpreted and applied its holding.<sup>164</sup> Some circuits are open to the idea of broadening *Gant*'s reach when the right case comes before the court, but others see little to no reason to extend *Gant*'s principles beyond the vehicular context.<sup>165</sup> There are a number of cases that have addressed this issue thus far, which have illustrated the different approaches that the circuit courts have taken.

##### A. *The Third Circuit*

###### 1. *United States v. Shakir*<sup>166</sup>

Naim Nafis Shakir was suspected of robbing a bank in Pennsylvania.<sup>167</sup> A magistrate judge issued a warrant for his arrest, and eventually investigators found Shakir in Atlantic City,

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<sup>161</sup> *Id.*

<sup>162</sup> *Id.*

<sup>163</sup> *Id.* (Scalia, J., concurring); *Thornton*, 541 U.S. at 626 (Scalia, J., concurring in judgment).

<sup>164</sup> Compare *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010), with *United States v. Brewer*, 624 F.3d 900 (8th Cir. 2010), and *United States v. Perdoma*, 621 F.3d 745 (8th Cir. 2010).

<sup>165</sup> See, e.g., *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010), *United States v. Brewer*, 624 F.3d 900 (8th Cir. 2010), *United States v. Perdoma*, 621 F.3d 745 (8th Cir. 2010).

<sup>166</sup> *United States v. Shakir*, 616 F.3d 315 (3d Cir. 2010).

where Mr. Shakir was believed to have “gambling ties.”<sup>168</sup> When detectives arrived at a hotel that Mr. Shakir was believed to have stayed at recently, they discovered that Mr. Shakir was expected to check-in later that day.<sup>169</sup>

That afternoon, Detective Smith spotted Mr. Shakir standing in line, waiting to check in.<sup>170</sup> Smith approached Mr. Shakir, arrested him and immediately patted him down for weapons, finding none.<sup>171</sup> Mr. Shakir was compliant and polite and dropped his bag at his feet at Detective Smith’s request.<sup>172</sup> Due to Mr. Shakir’s girth, Smith was unable to handcuff the man until two more policemen arrived five minutes later with additional handcuffs.<sup>173</sup>

After Mr. Shakir was safely detained, Detective Smith searched the bag that Mr. Shakir had been carrying.<sup>174</sup> He found clothing and large amounts of cash, but no weapons.<sup>175</sup> The police discovered that the cash was stolen and Mr. Shakir was indicted for armed robbery.<sup>176</sup> He moved to have the cash suppressed because, as he argued, he was already handcuffed when the search took place and, therefore, had no access to any weapon or evidence that could have been in the bag.<sup>177</sup> In response to Mr. Shakir’s argument, the Government cited several cases that allowed a search incident to arrest despite the arrestee already being in handcuffs. However, all of the cases that the Government cited predated the *Gant* ruling.<sup>178</sup>

The Government dismissed *Gant* as not controlling because the facts of the case involved a vehicular search incident to arrest and because the holding was essentially an elucidation of

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<sup>167</sup> *Id.* at 316.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.*

<sup>170</sup> *Id.*

<sup>171</sup> *Id.*

<sup>172</sup> *Shakir*, 616 F.3d at 316.

<sup>173</sup> *Id.* at 316–17.

<sup>174</sup> *Id.* at 317.

<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> *Shakir*, 616 F.3d at 317.

<sup>178</sup> *Id.* at 318.

how to properly interpret the *Belton* ruling, which also dealt with a vehicular search incident to arrest.<sup>179</sup> However, the Third Circuit was not as prepared to disregard *Gant* entirely.<sup>180</sup> As the court pointed out, “[t]he *Gant* Court itself expressly stated its desire to keep the rule of *Belton* tethered to ‘the justifications underlying the *Chimel* exception.’”<sup>181</sup>

The Third Circuit stated that many judicial opinions had looked at *Belton* as having relaxed the rule for searches incident to arrest in all contexts.<sup>182</sup> By the court’s reasoning, if courts of appeals were so willing to broadly apply *Belton*, then a case that issued a limitation on *Belton* should also be duly applied.<sup>183</sup> The court believed that *Gant* should apply to any “situation where the item is removed from the suspect’s control between the time of the arrest and the time of the search.”<sup>184</sup> The court went on to hold that a “search is permissible incident to a suspect’s arrest when, under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched.”<sup>185</sup>

The court also noted that despite the restrictions placed on *Belton*, the standard remained a lenient one.<sup>186</sup> This is true for, as the court saw, three reasons. First, the Supreme Court chose not to adopt a strict two-prong test that would allow a search incident to arrest only if the arrestee was both unsecured and within reaching distance of the container or vehicle to be searched.<sup>187</sup> Instead, the Court did not mention the arrestee’s secured or unsecured status in the summation of its holding, relying instead, as the Third Circuit saw it, on the single factor of whether or not a

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<sup>179</sup> *Id.*

<sup>180</sup> *Id.*

<sup>181</sup> *Id.* (quoting *Gant*, 129 S. Ct. at 1719).

<sup>182</sup> *Id.* (citing *United States v. Tejada*, 524 F.3d 809 (7th Cir. 2009) (applying *Belton* to search of a cabinet in a home); *United States v. Abdul-Saboor*, 85 F.3d 664 (D.C. Cir. 1996) (applying *Belton* to an apartment search)).

<sup>183</sup> *Shakir*, 616 F.3d at 318.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.* at 321.

<sup>186</sup> *Id.*

<sup>187</sup> *Id.* at 320.



suspect can reasonably access a location or container.<sup>188</sup> Second, the Supreme Court did not intend to prohibit all searches of containers once an arrestee has been restrained.<sup>189</sup> And third, to prohibit a search incident to arrest whenever an arrestee is handcuffed would expose police to an unreasonable risk of harm, which would run counter to the *Chimel* principles that the Supreme Court was trying to uphold.<sup>190</sup>

## B. The Eighth Circuit

### 1. *United States v. Brewer*<sup>191</sup>

Agent Meggers of the Iowa Division of Narcotics Enforcement arranged to purchase crack cocaine from Mr. Brewer.<sup>192</sup> The two met, and while under surveillance, completed a sale of 13.2 grams of crack cocaine for \$800.<sup>193</sup> The team monitoring the sale previously knew that Mr. Brewers had a suspended license and arranged to have him pulled over as he left the parking lot.<sup>194</sup> He was arrested for driving with a suspended license and the police recovered the \$800 was recovered during the arrest.<sup>195</sup> For several more weeks Mr. Brewer sold crack cocaine to Agent Meggers, until he was eventually arrested for unlawful distribution of a controlled substance.<sup>196</sup>

At trial, Mr. Brewer moved to suppress the \$800 as evidence illegally obtained from an unlawful search.<sup>197</sup> It was his contention that the *Gant* ruling prohibited the search of his van because he had already been removed and detained and, therefore, the police could not have

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<sup>188</sup> *Id.*

<sup>189</sup> *Shakir*, 616 F.3d at 320.

<sup>190</sup> *Id.* at 321.

<sup>191</sup> *United States v. Brewer*, 624 F.3d 900 (8th Cir. 2010).

<sup>192</sup> *Id.* at 903.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.*

<sup>195</sup> *Id.*

<sup>196</sup> *Brewer*, 624 F.3d at 904.

<sup>197</sup> *Id.*

reasonably believed that he was able to access its interior.<sup>198</sup> The court noted that at trial Mr. Brewer claimed that the money had been found on his person, but now claims that it had been taken from the van.<sup>199</sup> The court looked to other testimony and made a factual determination that the money had been found on Mr. Brewer’s person.<sup>200</sup>

Once the court determined that the cash was seized from Mr. Brewer’s person rather than his van, it seemed to breathe a little easier, and dismissed the application of *Gant* out of hand.<sup>201</sup> The court stated, in pertinent part, that *Gant* was merely concerned with “when the police may search the passenger compartment of a vehicle incident to arrest.”<sup>202</sup> The Court eventually upheld the search, but for the purposes of this Comment, only the Court’s dismissal of the possibility of *expanding Gant* to non-vehicular searches incident to arrest is relevant.<sup>203</sup>

## 2. *United States v. Perdoma*<sup>204</sup>

An investigator for the Nebraska State Patrol, Alan Eberle, was on plain clothes duty in a Greyhound bus terminal when he noticed a man, Jesus Perdoma, get out of a black SUV with a small bag.<sup>205</sup> Eberle followed the man to the ticket window and observed him while he ordered a one-way ticket to Des Moines, Iowa.<sup>206</sup> After noticing that Perdoma’s hands were shaking and that he appeared nervous, Eberle decided to approach Perdoma.<sup>207</sup> He identified himself as a

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<sup>198</sup> *Id.* at 905.

<sup>199</sup> *Id.* at 906 (the court here notes that *Gant* had been decided between Mr. Brewer’s first trial and his subsequent appeal, thus insinuating that Mr. Brewer changed his story so as to try and gain an advantage in his motion to suppress).

<sup>200</sup> *Id.* at 906.

<sup>201</sup> *Id.*

<sup>202</sup> *Brewer*, 624 F.3d at 906.

<sup>203</sup> Since the money was on Mr. Brewer’s person—and not, for example, in a bag next to Mr. Brewer—the Court did not in fact have to reach the question of whether to extend *Gant* to non-vehicular searches, but the easy language with which the Court dismissed even the possibility of *Gant* being extended to non-vehicular searches incident to arrest is probably indicative of the way this Court would have decided that issue.

<sup>204</sup> *United States v. Perdoma*, 621 F.3d 745 (8th Cir. 2010).

<sup>205</sup> *Id.* at 747.

<sup>206</sup> *Id.*

<sup>207</sup> *Id.*

police officer and, after assuring Perdoma that he was not under arrest, asked if he would mind answering some questions.<sup>208</sup>

During the course of the questioning, Perdoma lied to Eberle about how he had arrived at the bus terminal and about not having any identification on him, which Eberle had seen when Perdoma paid for the bus ticket he purchased.<sup>209</sup> Having smelled marijuana coming from Perdoma, Eberle asked to see his wallet.<sup>210</sup> Rather than produce his wallet, which had his identification in it, Perdoma turned and ran.<sup>211</sup> With the help of another Nebraska State Patrol officer, Investigator Scott, Eberle was able to wrestle Perdoma to the ground.<sup>212</sup> Eberle and Scott then placed Perdoma under arrest, handcuffed him, and led him to an area in the rear of the terminal.<sup>213</sup> Eberle searched Perdoma's person and discovered four ounces of marijuana in the pocket of Perdoma's pants.<sup>214</sup> Meanwhile, Scott searched the bag that Perdoma had come in with and found approximately one pound of methamphetamine.<sup>215</sup> Perdoma moved to suppress the evidence.<sup>216</sup>

The district court applied part two of *Gant*'s holding and determined that the search was a valid one because in light of the marijuana, it was reasonable for the arresting officers to believe that the defendant's bag contained evidence of a drug crime.<sup>217</sup> The court of appeals saw it differently, and felt that *Gant* was inapplicable in the factual circumstances of the case.<sup>218</sup> The

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<sup>208</sup> *Id.* at 747.

<sup>209</sup> *Id.* at 747–48.

<sup>210</sup> *Perdoma*, 621 F.3d at 748.

<sup>211</sup> *Id.*

<sup>212</sup> *Id.*

<sup>213</sup> *Id.*

<sup>214</sup> *Id.*

<sup>215</sup> *Id.*

<sup>216</sup> *Perdoma*, 621 F.3d at 748.

<sup>217</sup> *Id.*

<sup>218</sup> *Id.* at 751 (“Perdoma has not meaningfully argued, on appeal or before the district court, how the circumstances of his arrest in a public bus terminal rendered him ‘secured’ and out of reaching distance of his bag in a manner analogous to the circumstances in *Gant*. Therefore, we need not contemplate here to what extent *Gant* has application beyond the context of vehicle searches.”).

court left open the possibility of using the *Gant* ruling in some way in a non-vehicular search, but determined that this was not the case in which to do that.<sup>219</sup>

Perdoma's argument centered around the proposition that the bag could not have been searched incident to his arrest because, by being handcuffed and escorted by two police officers, he was necessarily "secured" within the meaning of *Gant* and, therefore, the bag was per se outside of the area of his immediate control.<sup>220</sup> The court of appeals rejected this argument: "Whether an officer has exclusive control of a seized item does not, however, necessarily determine whether the item remains in the area from within which the arrestee might gain possession of a weapon or destructible evidence."<sup>221</sup> Looking at factors such as where the arrest occurred, that Perdoma had already run from the police, and that the police might not know how strong he was, the court felt that the record suggested that the bag was still within "the area into which the arrestee might reach."<sup>222</sup>

In addition to emphatically disagreeing with the majority that Perdoma should have done more to preserve the issue of whether the search was unreasonable, the dissent takes issue with the majority's handling of the *Gant* ruling.<sup>223</sup> The dissent looks at the record of the case very differently than the majority, noting that Eberle testified at trial that the bag was searched "in the presence of three officers *after* Perdoma had been apprehended, placed in handcuffs, and removed from the public terminal."<sup>224</sup> The dissent's reading of the *Gant* opinion is even more broad than the Third Circuit's in *Shakir*, arguing that *Gant* did in fact set out a two-prong test

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<sup>219</sup> *Id.* ("While the explanation in *Gant* of the rationale for searches incident to arrest may prove to be instructive outside the vehicle-search context in some cases, we agree with the Government that this is not such a case.")

<sup>220</sup> *Id.* at 750.

<sup>221</sup> *Id.* (citing *Chimel v. California*, 395 U.S. 752, 763 (1969)) (internal quotation marks and emphasis omitted).

<sup>222</sup> *Perdoma*, 621 F.3d at 751 (quoting *Chimel*, 395 U.S. at 763).

<sup>223</sup> *Id.* at 753 (Bye, J., dissenting).

<sup>224</sup> *Id.* at 754.

that requires the arrestee to be unsecured *and* in reaching distance of the passenger compartment of the vehicle for the search incident to arrest exception to apply.<sup>225</sup>

The dissent then lists three reasons why the majority's efforts to discount *Gant* outside of vehicular searches are unpersuasive: (1) all *Gant* sought to do is return the analysis to that of *Chimel*, which did not itself deal with a vehicular search; (2) the *Gant* Court obviously contemplated its applicability outside the vehicular context because it added part two of the holding, which it expressly limited to vehicular searches; and (3) *Belton* has been consistently cited and applied outside of the vehicular context, even though it dealt with a vehicle search.<sup>226</sup>

#### V. THE CORRECT INTERPRETATION OF *GANT*

In light of what appears to be an emerging split among the circuits, one that will inevitably become more pronounced as more and more courts get briefs arguing that *Gant* also applies to non-vehicular contexts, the Supreme Court will inevitably have to address this issue. Indeed, only a year after the Supreme Court decided *Gant*, there were already at least three different opinions out of two circuits, each of which answered the question in a manner distinct from the others. It is therefore only a matter of time before the Court has before it a case that will ask it to either limit or expand the principles that it set forth in *Gant*. The Court should expand the protections found in *Gant* to searches incident to arrest that take place outside and independent of the vehicular context. To demonstrate the viability of such expansion of the *Gant* protections, this Comment will apply the argued-for broader standard will be applied to some of the cases discussed above in Part IV—as well as a case, *United States v. Curtis*, 635 F.3d 705 (5th Cir. 2011), that fits the factual criteria but in which the court declined the opportunity to

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<sup>225</sup> *Id.* at 756.

<sup>226</sup> *Id.* (Bye, J., dissenting).

answer the question of whether or not *Gant* applied because it had another, much easier way to resolve the contest before it.

#### *A. Broader is Better*

The Supreme Court should interpret and apply *Gant* broadly, not just in the context of vehicular searches incident to arrest, but also to non-vehicular searches incident to arrest. As there is currently no consensus among the circuits that have considered the issue, the Court has a great amount of flexibility in the rule it crafts. The best interpretation of the *Gant* rule is that of the Third Circuit. The majority in *Shakir* held that a *Gant* search incident to arrest is permissible when, under all the circumstances, there remains a reasonable possibility that the arrestee could access the container or area being searched, regardless of whether or not the area to be searched happened to be inside a vehicle.<sup>227</sup> Factors for this “reasonable possibility” could include: (1) the number of law enforcement officers at the scene compared to the number of arrestee’s; (2) whether or not the arrestees were securely detained; and (3) whether or not there is a risk of evidence of the crime of arrest being destroyed. This test would be easy to apply, allow for clear and consistent rulings, and would protect citizens' Fourth Amendment rights of citizens.

There are several reasons why the *Gant* test should not be limited to vehicular searches incident to arrest. First, as the Third Circuit pointed out in *Shakir*, as well as the dissent in *Perdoma*, the courts of appeals have applied the *Belton* standard numerous times to cases outside the vehicular context. Indeed, in 1981, the very year that the Supreme Court decided *Belton*, the Eighth Circuit applied it to a non-vehicular search incident to arrest in *United States v. Mefford*.<sup>228</sup> Three years later, the Eighth Circuit again applied *Belton* outside of the motor

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<sup>227</sup> *United States v. Shakir*, 616 F.3d 315, 321 (3d Cir. 2010).

<sup>228</sup> *United States v. Mefford*, 658 F.2d 588, 591–93 (8th Cir. 1981) (applying *Belton* to an arrestee’s sack).

vehicle context in *United States v. Palumbo*.<sup>229</sup> The Seventh Circuit and D.C. Circuit have also applied *Belton* to non-vehicular searches incident to arrest.<sup>230</sup> In *United States v. Abdul-Saboor*, the D.C. Circuit extended *Belton* to cover the search of an apartment,<sup>231</sup> and in *United States v. Tejada*, the Seventh Circuit applied *Belton* to the search of a cabinet inside a home.<sup>232</sup>

The dissent felt that it would be hard pressed to determine a logical rationale for not applying *Gant* outside of a vehicular context when it modified the *Belton* ruling, which merely applied the non-vehicular search incident to arrest principals found in the *Chimel* ruling to a vehicle search. Indeed, Justice Alito lamented the fact that “there is no logical reason why the same rule should not apply to all arrestees.”<sup>233</sup> However, the situation is not as dire as Justice Alito imagined it. The expansion of *Gant* to cases other than those involving vehicular searches would mean fewer standards for police to worry about, which in turn could lead to less confusion over whether a given search is appropriate.

However, one can imagine an argument against applying *Gant* outside of the vehicular context. While at least one Court of Appeals applied *Belton* outside of the vehicle context, it seems that the Supreme Court never explicitly did. Therefore, it could be argued that the lower court was simply misreading the *Belton* ruling and that it never was meant to apply beyond automobiles. If this is the case, then the argument that *Gant* should apply in such circumstances because it modified *Belton* would have no weight in determining whether *Gant* applied beyond vehicles. This is a valid, but ultimately unsound argument. The Court in *Belton* felt that it was merely applying the *Chimel* search incident to arrest analysis to the particularly difficult factual

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<sup>229</sup> *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir. 1984) (applying *Belton* to a search of the area behind an arrestee’s dresser drawer).

<sup>230</sup> See *United States v. Abdul-Saboor*, 85 F.3d 664 (D.C. Cir. 1996); *United States v. Tejada*, 524 F.3d 809, 812 (7th Cir. 2008).

<sup>231</sup> *Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996).

<sup>232</sup> *Tejada*, 524 F.3d 809, 812 (7th Cir. 2008).

<sup>233</sup> *Gant*, 129 S. Ct. at 1731 (Alito, J., dissenting).

circumstances surrounding arrests made when the arrestee was driving a motor vehicle.<sup>234</sup>

Because the Court felt that it was creating a holding specific to the application of *Chimel* to the vehicle context, it felt more comfortable creating a bright-line rule. There is no other self-contained enclosure like an automobile that would allow for the exact same bright-line rule delineated in *Belton*, namely that the police may, so long as an occupant of a vehicle is lawfully arrested, contemporaneously search the passenger compartment of the vehicle, including any containers therein.<sup>235</sup> This type of bright-line rule could not be applied readily to a non-vehicular search.

There are important differences between that holding and the *Gant* holding that make the latter more flexible in how it is applied. As discussed above, the Court in *Gant* held that police can only search the passenger compartment incident to arrest when an arrestee is unsecured and within reaching distance of same.<sup>236</sup> This rule no longer depends on the mere presence of an arrestee in a passenger compartment, but rather sets out factual and spatial restrictions, i.e. whether the arrestee is unsecured and within reaching distance, in order to determine if a warrantless search is unreasonable. Because of the Court's obvious change of a vehicle-exclusive bright-line rule, it should be apparent that regardless of the application of *Belton* to non-vehicular circumstances, *Gant* can be applied more broadly.

The second reason that *Gant* should extend to situations outside the vehicular context is historical consistency. Throughout Fourth Amendment jurisprudence, one's vehicle has never been afforded as much protection as one's home or person.<sup>237</sup> It would be bizarre for the Court

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<sup>234</sup> *New York v. Belton*, 453 U.S. 454, 460 n.3 (1981) ("Our holding today does no more than determine the meaning of *Chimel*'s principles in this particular and problematic content. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.").

<sup>235</sup> *Id.* at 460.

<sup>236</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1719 (2009).

<sup>237</sup> *See supra* Part II.D.



to suddenly make it more difficult for police officers to search a vehicle than a home by furnishing extra protections on the former but not the latter. The opinion does not overtly make any such change, and it would be very peculiar for any court of appeals to infer one.

The third reason that *Gant* should also apply to non-vehicular searches is that one of the Court's self-declared goals for the *Gant* holding was to bring the analysis back to the principles elucidated in *Chimel*.<sup>238</sup> This is significant because the search in *Chimel* involved an arrestee's house, not his car.<sup>239</sup> If the Court wanted to go back to the principles that it considered central to a ruling that had nothing to do with vehicular searches, then it must have contemplated *Gant*'s applicability to non-vehicular searches.

The fourth reason that the Court should formally extend *Gant* protections to non-vehicular searches is that the very language of the *Gant* holding indicates that the Court intended the test to apply broadly. Part one of the holding—that police may search a vehicle incident to the arrest of a recent occupant only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search—should be read to apply in non-vehicular search situations because part two of the holding is expressly limited to the “circumstances unique to the vehicle context.”<sup>240</sup> The Court consciously chose to insert the limiting language only in part two of the holding. If the Court also wished for part one of the holding to only apply in the narrow circumstance of vehicular searches, then presumably the limiting language would also have appeared in part one, or otherwise inserted in such a way as to make it clear that the *Gant* holding was to be applied only in the vehicular context.

### *B. The Broader Standard Applied*

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<sup>238</sup> *Gant*, 129 S. Ct. at 1719.

<sup>239</sup> *Chimel v. California*, 395 U.S. 752, 753 (1969).

<sup>240</sup> *Gant*, 129 S. Ct. at 1719 (citing *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in judgment)).

As a means of demonstrating the workability and appropriateness of the *Gant* standard to non-vehicular searches, this Comment will now apply the test to cases discussed in Part IV of this Comment, as well as another case that could have addressed the question had the court of appeals not relied on the good faith exception to uphold the search without ever reaching the underlying question of whether or not *Gant* could apply to a cell phone retrieved from a vehicle.

1. *U.S. v. Curtis*<sup>241</sup>

While trying to buy a high-end vehicle, Curtis made a false statement on his credit application, using the Social Security Number of a seven year old girl.<sup>242</sup> An internal investigator for the dealership caught this and reported the fraud to a member of the anti-fraud task force.<sup>243</sup> Agent Edwards, a member of the Secret Service and anti-fraud task force, investigated the matter and subpoenaed Curtis's bank records.<sup>244</sup> A close examination led Edwards to believe that Curtis was masterminding a complex mortgage loan fraud scheme (which he was in fact involved in).<sup>245</sup>

Edwards obtained an arrest warrant for the charge of making a false statement to obtain credit, a charge unrelated to the mortgage scheme.<sup>246</sup> The warrant was executed while Curtis was driving.<sup>247</sup> Prior to being pulled from the car, Curtis placed the cell phone he had been using on top of the center console within the passenger compartment of the vehicle.<sup>248</sup> Edwards grabbed the phone while Curtis was being arrested and began looking through his text messages, which he again did later while Curtis was going through prisoner processing.<sup>249</sup> While Curtis

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<sup>241</sup> *United States v. Curtis*, 635 F.3d 705 (5th Cir. 2011).

<sup>242</sup> *Id.* at 711.

<sup>243</sup> *Id.*

<sup>244</sup> *Id.*

<sup>245</sup> *Id.*

<sup>246</sup> *Id.*

<sup>247</sup> *Curtis*, 635 F.3d at 711.

<sup>248</sup> *Id.*

<sup>249</sup> *Id.*

was going through prisoner processing, Edwards discovered incriminating messages about the mortgage fraud scheme.<sup>250</sup> The court in this case never reached the question of whether *Gant* applied because it relied on the good faith exception.<sup>251</sup> Since the court declined the opportunity to address the applicability of *Gant*, this Comment will do so. For the sake of discussion, his Comment will assume that the good faith exception does not apply.

The search would most likely be invalidated under the first holding of *Gant*: there is no way to reasonably say that the phone was within Curtis's area of immediate control while he was going through prisoner processing. Thus, neither of the primary concerns of officer safety or evidence preservation could justify such a warrantless search, especially given that the test, as outlined by the Court, calls for the test to be applied at the time of the *search*, and since the search took place later while Mr. Curtis was going through prisoner processing. Perhaps it could be successfully argued that the first preliminary search of the phone's messages at the scene was acceptable, but there is no reasonable excuse not to have obtained a warrant for the subsequent searches of the phone. At that point there was no danger of the evidence being lost, there was no concern regarding officer safety, and the unique circumstances surrounding automobiles were no longer present. Under such facts, the search incident to arrest exception would not apply, especially under a *Gant* analysis.

Whether or not the search is valid becomes decidedly less clear under the second part of the *Gant* holding. It might be possible for Edwards to argue that he reasonably believed that evidence of the crime of arrest, making a false statement to obtain credit, was on the phone. It is potentially plausible that Curtis kept an email or text message telling someone of his plan. This still seems to be a stretch, however, given that there does not seem to be much evidence needed

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<sup>250</sup> *Id.*

<sup>251</sup> *Id.* at 713.

aside from the fraudulent paperwork. Additionally, a court would be less likely to stretch an exception in a case such as this, where no one is really in danger and there are no real consequences to simply waiting and obtaining a warrant to search the phone.

### 2. *U.S. v. Brewer*

As outlined in Part IV.B.1 above, *Brewer* involved an attempted suppression of \$800 seized after an undercover crack cocaine sale.<sup>252</sup> Under the appropriate reading of *Gant*, the search should be upheld. An initial pat-down and search of an arrestee's person is nearly always valid, and that was not changed or diminished by *Gant* in the least. Indeed, The Court used *Gant* to reaffirm the principles underlying *Chimel*, i.e. officer safety and evidence preservation. Pat-downs and searches of an arrestee's person are considered essential to those goals. There is nothing in the *Gant* holding to suggest that it could ever be applied to the arrestee's person.

### 3. *U.S. v. Perdoma*

As stated in Part IV.B.2 above, *Perdoma* dealt with an attempted suppression of evidence obtained from a suspect's luggage at a train station.<sup>253</sup> If *Gant* is applied, then the search is almost certainly invalidated in this case. The majority is mistaken in its contention that the record supports a finding that the bag was still within the arrestee's area of immediate control. The arrestee had been tackled by two officers, and was under the supervision of an additional officer, while the other two searched his person and his bag. Furthermore, one of the arresting officers testified to the fact that they had moved the arrestee away from the public, to a different area of the bus terminal. Once the police securely detained, the risk of harm to police presumably falls sharply. Since that cannot then be the determining factor, the court must look to evidence preservation as the only remaining *Chimel* justification. If the police searched the

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<sup>252</sup> See supra Part IV.B.1.

<sup>253</sup> See supra Part IV.B.2.

arrestee's person and had him supervised by an additional police officer, then chances are good that the arrestee will be hard pressed to destroy any evidence. These facts are perfect for applying the factors that should be used to determine whether or not a "reasonable possibility" exists. The arrestee in *Perdoma* is out-manned by at least three to one, is securely detained and supervised by another police officer, and has no reasonable way to even attempt to destroy evidence, let alone to succeed at it. It is highly unlikely that a court applying *Gant* to this scenario will determine that a "reasonable possibility" exists.

## VI. CONCLUSION

The holding in *Gant* should apply beyond the motor vehicle context. The *Gant* Court had ample opportunity to make it clear that part one of the holding should only be applied in the vehicular context, but the majority made no such assertion. In addition, since *Gant* modified *Belton*, which itself was applied to non-vehicular searches incident to arrest, it is appropriate that *Gant* too be extended in other arenas. One of the self-stated goals of the *Gant* Court was to return Fourth Amendment jurisprudence to the principles found in *Chimel*, a case that involved a non-vehicular search incident to arrest. Finally, it would be very strange for motor vehicles to receive additional protections that the home does not, since traditionally the home is afforded a much greater amount of privacy.