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Bailey v. United States: Drawing an Exception in the Context of Off-Premises Detentions Incident to Search Warrants

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Note

BAILEY v. UNITED STATES: DRAWING AN EXCEPTION IN THE CONTEXT OF OFF-PREMISES DETENTIONS INCIDENT TO SEARCH WARRANTS

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In *Bailey v. United States*,[1] the Supreme Court of the United States considered whether the detention of a recent occupant of a premises subject to a lawful search warrant one mile away from the premises violated the Fourth Amendment protection against unreasonable seizures,[2] or was a permissible extension of *Michigan v. Summers*.[3] The Court concluded that the off-premises detention did not serve the law enforcement interests underpinning the Court's decision in *Summers*.[4] The Court then articulated a spatial limit to *Summers*: officers cannot detain occupants beyond "the immediate vicinity of the premises to be searched."[5] The majority correctly crafted this line to ensure that police had adequate power to detain insofar as the detention served the underlying interest in the "safe and efficient execution of the search warrant."[6] Moreover, the majority communicated a flexible standard for lower courts to apply and adapt to the particular circumstances of a given case.[7] Justice Scalia, in concurrence, assisted the Court by clarifying the proper application and scope of a *Summers* detention in light of the conflicting interpretations of *Summers* among the

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1. 133 S. Ct. 1031 (2013).

2. U.S. CONST. amend. IV.

3. 452 U.S. 692 (1981). In *Michigan v. Summers*, the Court held that a valid search warrant "implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted." *Id.* at 705. *See infra* Part II.C.1.

4. *Bailey*, 133 S. Ct. at 1041. The three law enforcement interests are "officer safety, facilitating the completion of the search, and preventing flight." *Id.* at 1038.

5. *Id.* at 1042.

6. *Id. See infra* Part IV.A.

7. *See infra* Part IV.B.

federal courts of appeals.[8] By refusing to uphold Bailey's detention as reasonable, the Court confirmed that when it considers exceptions to traditional Fourth Amendment rules, the Court will maintain the scope of the exception narrowly and rigorously analyze any purported law enforcement interests involved to ensure the exception rests on appropriate justifications.[9]

I. THE CASE

On July 28, 2005, police obtained a warrant to search for a handgun in the basement apartment of a house located at 103 Lake Drive in Wyandanch, New York ("the residence").[10] While conducting presearch surveillance of the area, two police officers observed two men appear to depart from the residence, leave the gated area leading to the basement apartment, and enter a car parked in the driveway.[11] Both men matched the physical description a confidential informant had provided.[12] The officers decided not to detain the men out of concerns for safety and preserving any potential evidence.[13] Instead, the officers followed the vehicle and stopped the men about one mile from the residence.[14]

The officers ordered the men out of the car and checked them for weapons.[15] They found only keys and a wallet on the driver.[16] Upon questioning the men, the officers learned the driver's name was Chunon Bailey and that he lived at 103 Lake Drive.[17] When one of the officers inspected Bailey's license, however, he noticed the address was not 103 Lake Drive in Wyandanch, New York, but rather an address in Bay Shore, New York.[18] The officer recalled that their confidential informant had stated that the person living at 103 Lake Drive, from whom the informant

8. *See infra* Part IV.C.

9. *See infra* Part IV.D.

10. United States v. Bailey, 468 F. Supp. 2d 373, 376 (E.D.N.Y. 2006), *aff'd*, 652 F.3d 197 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013).

11. *Id.*

12. *Id.*

13. *See id.* ("[T]he detectives were concerned that, if any people who remained inside the residence saw that individuals leaving the residence were being stopped, they could arm themselves or destroy evidence prior to the search.").

14. *Id.*

15. *See id.* at 377 (noting that since the search warrant was for a handgun, the officers were "particularly concerned" that the men might have weapons).

16. *Id.*

17. *Id.*

18. *Id.*

had bought drugs, formerly lived in Bay Shore.[19] The officers then handcuffed Bailey and the passenger.[20] When Bailey questioned the reason for his arrest,[21] the officers informed him that he was being detained pursuant to the execution of a search warrant at his apartment.[22] Bailey then stated he was not cooperating, did not live at 103 Lake Drive, and anything found there did not belong to him.[23] The officers kept Bailey's keys, then called another officer to return the men to the residence.[24] Less than ten minutes passed from Bailey's initial stop to his return to the residence.[25] Both men were arrested after a search of the residence revealed drugs and a gun.[26]

Prior to trial in the United States District Court for the Eastern District of New York, Bailey moved to suppress the statements he made to the officers after being detained, as well as his key to the residence.[27] The district court denied Bailey's motion[28] and upheld the officers' actions under *Michigan v. Summers* and, alternatively, *Terry v. Ohio*.[29] The district court first reasoned that no binding authority prohibited police from detaining an occupant during a valid search of the premises "when the occupant is found and detained outside the residence."[30] The district court then explained that the officers acted in a manner consistent with "[a]t least two" of the three law enforcement interests that justified the detention upheld by the Supreme Court in *Summers*, namely, preventing the occupant from fleeing and protecting the officers from harm.[31] Ultimately, the district court found the officers detained Bailey "at the earliest practicable location that was consistent with the safety and security of the officers and

19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*
25. *Id.* at 377 n.3.
26. *Id.* at 377.
27. *Id.* at 375–76.
28. *Id.* at 378.
29. 392 U.S. 1 (1968); *see also Bailey*, 468 F. Supp. 2d at 382 ("Even if there was no authority for the detention under *Summers*, the Court finds that the stop of the defendant's car and brief detention during the search were supported by reasonable suspicion and were lawful under *Terry*."); *see also infra* Part II.A.
30. *Bailey*, 468 F. Supp. 2d at 379.
31. *See id.* (noting the officers' testimony that "they wanted to detain Bailey as he left the residence pending execution of the search, but did not do so immediately because of concerns about the effect that such a detention would have on officer safety, as well as the potential destruction of evidence").

the public";[32] if the officers were required to detain Bailey immediately outside the residence, the officers could have "jeopardize[d] the search or endanger[ed] [their] lives."[33] Bailey was subsequently convicted of three charges involving possession of drugs and a firearm.[34]

Bailey appealed his conviction to the United States Court of Appeals for the Second Circuit by arguing that the district court erred in denying his motion to suppress.[35] The Second Circuit affirmed the district court by reasoning that the three law enforcement interests "at stake" in *Summers* compelled a limited intrusion of Bailey, namely, the interests in protecting the officers, preserving the evidence, and completing the search.[36] The Second Circuit also explained that if it were to deny officers this power to detain, officers would be left with a "Hobson's choice," that is, the choice between detaining the individual but risking their own lives and the evidence, or declining to detain the individual only to obtain evidence that would give them sufficient cause to arrest after he had already departed.[37] Moreover, the Second Circuit found that "the officers acted as soon as reasonably practicable in detaining Bailey once he drove off the premises subject to search."[38] The Second Circuit explained that the holding in *Summers* contained both a physical and temporal limit: an officer can detain an occupant if the officer "identif[ies] [the] individual *in the process of leaving* the premises subject to search and detain[s] him *as soon as practicable* during the execution of the search."[39]

The Supreme Court of the United States granted certiorari to determine whether *Michigan v. Summers* justifies the detention of an occupant beyond the immediate vicinity of the premises subject to a search warrant.[40]

32. *Id.* at 380.

33. *Id.* at 379–80.

34. *See* United States v. Bailey, 652 F.3d 197, 199 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013) ("Bailey was convicted, following a jury trial, of possession with intent to distribute at least five grams of cocaine base in violation of 21 U.S.C. §§ 841(a)(1) and 841(b)(1)(B)(iii), possession of a firearm by a felon in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2), and possession of a firearm in furtherance of a drug trafficking crime in violation of 18 U.S.C. § 924(c)(1)(A)(i)."). Bailey moved to vacate his conviction under an ineffective assistance of counsel theory, but the district court denied this motion. United States v. Bailey, No. 06-CR-232, 2010 WL 277069, at *1 (E.D.N.Y. Jan. 19, 2010).

35. *Bailey*, 652 F.3d at 199. Bailey also appealed the denial of his motion to vacate his conviction. *Id.*

36. *Id.* at 205.

37. *Id.* at 205–06.

38. *Id.* at 207.

39. *Id.* at 206.

40. Bailey v. United States, 133 S. Ct. 1031, 1037 (2013).

II. LEGAL BACKGROUND

The Fourth Amendment provides that "[t]he right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . ."[41] Part II.A of this Note discusses the reasonableness inquiry that is central to the Court's analysis of searches and seizures under the Fourth Amendment. Part II.B explains how the Court has analyzed the reasonableness of searches incident to valid arrests. Part II.C examines the Court's reasonableness inquiry in the context of detentions incident to the execution of a lawful search warrant. While many federal courts of appeals approached the detention cases with a focus on reasonableness, several of these courts also incorporated other justifications that produced confusion; this confusion ultimately prompted the Supreme Court to grant certiorari in *Bailey v. United States* and to address whether police can detain occupants off the premises subject to a search warrant.[42]

A. The Reasonableness Inquiry

Until the Supreme Court decided *Terry v. Ohio* in 1968, it analyzed the reasonableness of a seizure only in cases involving an arrest; moreover, the Court applied a probable cause standard to determine reasonableness.[43] In *Terry*, however, the Court altered both of these positions. An arrest was not the only type of invasion that triggered the analysis of the reasonableness of a seizure;[44] moreover, in cases involving seizures less invasive than arrests, the Court substituted the probable cause standard to determine reasonableness for a balancing inquiry.[45]

The *Terry* Court recognized that certain types of intrusions do not fall under the "concept of 'arrest,'" and thus were not subject to the Fourth Amendment's probable cause requirement.[46] The action in *Terry* involved a stop-and-frisk of an individual by a police officer.[47] While a stop-and-frisk did not rise to the level of intrusiveness of an arrest, the Court explained that the officer's actions "must be tested by the Fourth

41. U.S. CONST. amend. IV. The Warrant Clause also states that the warrant must "particularly describ[e] the place to be searched, and the persons or things to be seized." *Id.*

42. *See infra* Part II.C.3.

43. *See* Dunaway v. New York, 442 U.S. 200, 207–08 (1979) (discussing the Court's pre-*Terry* Fourth Amendment jurisprudence).

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

45. *Id.* at 19.

46. *See Dunaway*, 442 U.S. at 209; *see Terry*, 392 U.S. at 26 ("An arrest is a wholly different kind of intrusion upon individual freedom from a limited search for weapons . . . .").

47. *Terry*, 392 U.S. at 6–7.

Amendment's general proscription against unreasonable searches and seizures."[48] The officer's action constituted "a serious intrusion upon the sanctity of the [individual]."[49]

The Court, however, refused to apply the probable cause standard to a stop-and-frisk because a stop-and-frisk was "a wholly different kind of intrusion upon individual freedom."[50] Instead, the Court assessed "the reasonableness [under] all [of] the circumstances of the particular governmental invasion of a citizen's personal security."[51] Reasonableness, the Court noted, was the "central inquiry under the Fourth Amendment."[52] The *Terry* Court balanced the law enforcement interests in officer safety and preventing crime against the petitioner's interest in personal security.[53] In other cases where the Court has engaged in this balancing inquiry, the Court addressed other law enforcement concerns, such as destruction of evidence,[54] and individual interests in property, privacy, and safety.[55] The Court has engaged in this inquiry in cases involving, among others, searches incident to arrests[56] and detentions incident to the execution of a search warrant.[57]

B. The Reasonableness Inquiry in Cases Involving Searches Incident to Arrests

An overview of the Supreme Court's reasoning in cases involving searches incident to arrests provides a useful context when considering the Court's analysis in *Bailey v. United States*. In *Chimel v. California*,[58] the Court recognized that an officer's interests in safety and in preserving

48. *Id.* at 20.

49. *Id.* at 17.

50. *Id.* at 26.

51. *Id.* at 19.

52. *Id.*

53. *Id.* at 22–27; *see also* Dunaway v. New York, 442 U.S. 200, 209 (1979) ("[T]he Court [in *Terry*] balanced the limited violation of individual privacy involved against the opposing interests in crime prevention and detection and in the police officer's safety.").

54. *See, e.g.*, Chimel v. California, 395 U.S. 752, 763 (1969) ("[I]t is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.").

55. *See, e.g.*, Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 652–53 (1995) ("[W]hether a particular search meets the reasonableness standard 'is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" The Court in *Acton* balanced the individual interest in privacy against the government's interest in "[d]eterring drug use." *Id.* at 658–61.

56. *See infra* Part II.B.

57. *See infra* Part II.C.

58. 395 U.S. 752 (1969).

evidence only justified a warrantless search of an arrestee incident to a valid arrest as well as of the area in the arrestee's home within the arrestee's immediate control.[59] Relying on its reasoning in *Chimel* and the need for a workable rule, the Court in *New York v. Belton*[60] held that officers could similarly conduct a warrantless search of the area in a vehicle within the arrestee's immediate control after validly arresting the vehicle's occupant.[61] While the Court in *Thornton v. United States*[62] accepted, as it did in *Belton*, that officers needed a workable rule, and that the interests in safety and in preserving evidence supported a warrantless search even though the arrestee was no longer in his own car, the Court did not critique the relevance of the officer's interests as rigorously as Justice Scalia did in his concurrence.[63] In *Arizona v. Gant*,[64] however, the Court tightened its reasonableness inquiry and found that the circumstances surrounding the officer's search did not in fact trigger the justifications underlying the rule in *Chimel*.[65]

1. Chimel v. California

In *Chimel v. California*, three police officers obtained an arrest warrant for Chimel's arrest for burglarizing a coin shop.[66] The officers served Chimel with the arrest warrant at his home, asked for his permission to "look around," then, over his objection, searched his home for evidence of the crime.[67] They searched the entire house and ultimately obtained many items, including coins and metals.[68] Both state appellate courts rejected Chimel's claim to suppress the evidence and found that police had searched Chimel's house incident to a valid arrest.[69]

The Supreme Court reversed the decision of the California Supreme Court.[70] While the Court recognized the officers' interests in safety and obtaining and preserving evidence of Chimel's crime, the Court found these interests justified only a search of Chimel's person and the area "within his immediate control."[71] The Court defined this term as "the area from within

59. *See infra* Part II.B.1.
60. 453 U.S. 454 (1981).
61. *See infra* Part II.B.2.
62. 541 U.S. 615 (2004).
63. *See infra* Part II.B.3.
64. 556 U.S. 332 (2009).
65. *See infra* Part II.B.4.
66. 395 U.S. 752, 753 (1969).
67. *Id.* at 753–54.
68. *Id.* at 754.
69. *Id.* at 754–55.
70. *Id.* at 768.
71. *Id.* at 763.

which [an arrestee] might gain possession of a weapon or destructible evidence."[72] The Court ultimately rejected the argument that the search of Chimel's entire home was reasonable.[73] This argument, the Court explained, could "evaporat[e]" Fourth Amendment protections of the individual and allow officers to defend a search based on "subjective view[s] regarding the acceptability of certain sorts of police conduct" without clear limits.[74] Thus, the Court held that the search was unreasonable.[75]

2. New York v. Belton

In *New York v. Belton*, a police officer pulled over a speeding vehicle and suspected that the occupants possessed marijuana.[76] The officer then ordered the four occupants "out of the car, and placed them under arrest for the unlawful possession of mari[j]uana."[77] After he searched the arrestees, the officer searched the car's passenger compartment and found a jacket that contained cocaine in one of the pockets.[78] Belton, the arrestee to whom the jacket belonged, was later charged with criminal possession of a controlled substance.[79] The trial court denied Belton's motion to suppress the evidence, but the New York Court of Appeals reversed and held that the warrantless search of the jacket could not be upheld as a "search incident to a lawful arrest" where there was no risk that any of the arrestees could gain access to the jacket.[80]

The Supreme Court reversed the decision of the New York Court of Appeals.[81] The Court acknowledged that, without a "straightforward rule," individuals cannot know the extent of their protection under the law nor can officers grasp the extent of their authority.[82] Though the search incident to arrest in *Chimel* took place in a home, the *Belton* Court looked to *Chimel* because there was no "workable definition" of *Chimel*'s central term—

72. *Id.*
73. *Id.* at 764–65.
74. *Id.*
75. *Id.* at 768.
76. *See* 453 U.S. 454, 455–56 (1981) ("[T]he policeman had smelled burnt marihuana and had seen on the floor of the car an envelope marked 'Supergold' that he associated with marihuana.").
77. *Id.* at 456.
78. *Id.*
79. *Id.*
80. *Id.*
81. *Id.* at 462–63.
82. *Id.* at 459–60.

"within the [arrestee's] immediate control"—for searches of a vehicle.[83] The *Belton* Court recognized that the *Chimel* Court had taken into account law enforcement interests in officer safety and evidence preservation when making its determination that the warrantless search of the area "within [an arrestee's] immediate control" was reasonable.[84] The *Belton* Court ultimately found that the search of Belton's car invoked the same law enforcement interests as the search in *Chimel*, and that a passenger compartment constituted an area within the arrestee's immediate control.[85] Accordingly, the Court held that the officer's search of Belton's jacket, located in the passenger compartment of the car, amounted to a reasonable search incident to a lawful arrest and thus did not violate the Fourth Amendment.[86]

3. Thornton v. United States

In *Thornton v. United States*, Thornton aroused an officer's suspicions when he tried to avoid driving next to the officer's unmarked police car.[87] Upon running a check on Thornton's license plate number, the officer learned the number was issued to a different car from the one Thornton was driving.[88] Thornton had already turned into a parking lot, parked, and left his car by the time the officer caught up to him.[89] When the officer approached Thornton and questioned him about his car, he "[a]ppeared nervous. . . . [and] began rambling and licking his lips . . . [and] was sweating."[90] Thornton agreed to the officer's request to pat him down, at which point the officer found drugs on him.[91] After the officer handcuffed Thornton, informed him he was under arrest, and placed him in the police car, he searched Thornton's car and found a handgun.[92] The trial and appellate courts rejected Thornton's attempt to suppress the handgun and

83. *Id.* at 460.

84. *See id.* at 457 ("Such searches have long been considered valid because of the need 'to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape' and the need to prevent the concealment or destruction of evidence." (quoting Chimel v. California, 395 U.S. 752, 763 (1969))).

85. *See id.* at 460 ("Our reading of the cases suggests the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" (quoting Chimel v. California, 395 U.S. 752, 763 (1969))).

86. *Id.* at 462–63.

87. 541 U.S. 615, 617 (2004).

88. *Id.* at 618.

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.*

distinguish *Belton* by arguing that he was not in his vehicle when the officer approached him.[93]

The Supreme Court affirmed.[94] The Court found that the *Belton* Court accorded no weight to the fact that the officer had met the occupants while they were inside the vehicle.[95] The Court noted that an officer possesses "identical concerns" about safety and the preservation of evidence whether the suspect is inside, or next to, the vehicle.[96] As in *Belton*, the *Thornton* Court affirmed the need to lay down a "clear rule" for officers to apply.[97] Thornton's proposed rule, however, would place officers in the "impracticable" position of making "highly fact specific . . . ad hoc determinations" each time they approached an occupant.[98] Thus, the Court held that the search of a vehicle incident to the arrest of its occupant is reasonable under *Belton*—"even when an officer does not make contact until the person arrested has left the vehicle"[99]—so long as the arrestee is a "recent occupant" of the vehicle.[100]

Concurring in the judgment, Justice Scalia reasoned that the justifications underpinning *Chimel*—safety and evidentiary concerns—could not support the search of Thornton's vehicle for three reasons: (1) Thornton, handcuffed and secured in the officer's car, could not escape to destroy evidence or secure a firearm;[101] (2) the officer did not have a government right to secure Thornton, even if it was sensible to do so;[102] and (3) the key premise in *Belton* was not true anymore (if it ever was), namely, that the passenger compartment was within the area of immediate control of the arrestee.[103] Justice Scalia would have limited *Belton* searches to situations where the officer reasonably believed that "evidence relevant to the crime of arrest might be found in the vehicle."[104] Because the officer could have reasonably believed that Thornton—arrested for a drug

93. *Id.* at 618–19.
94. *Id.* at 624.
95. *Id.* at 619–20.
96. *Id.* at 621.
97. *Id.* at 623.
98. *Id.*
99. *Id.* at 617.
100. *Id.* at 623–24.
101. *See id.* at 625–27 ("The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel* . . . .").
102. *Id.*
103. *Id.* at 627–28.
104. *Id.* at 632.

offense—had evidence of that crime in his car, Justice Scalia concluded that the officer's search was reasonable.[105]

4. Arizona v. Gant

In *Arizona v. Gant*, officers received an anonymous tip that drugs were being sold at a particular house.[106] Upon the officers' arrival at the house, Gant answered the door and told the officers the owner was not present.[107] The officers left and then ran a records check on Gant, upon which they learned of his outstanding arrest warrant for "driving with a suspended license."[108] Shortly after the officers returned to the house that evening, they recognized Gant as he pulled up to the driveway, then summoned him from his car and immediately arrested him.[109] After the officers secured Gant in a police car, they searched his car and found cocaine and a gun.[110] Gant was ultimately charged with two drug offenses.[111] The trial court dismissed Gant's motion to suppress the evidence found during the search of his car,[112] but the Arizona Supreme Court reversed and held that the search was unreasonable.[113] The Arizona Supreme Court explained that the "'justifications underlying *Chimel*'"—officer safety and evidence preservation—disappeared once the officers secured the scene, handcuffed Gant, and locked him in a police car.[114]

The Supreme Court affirmed.[115] The Court reasoned that courts of appeals had read *Belton* so broadly that officers could search a vehicle incident to the arrest of a recent occupant even when, "in most cases," the arrestee could not reach the passenger compartment.[116] To avoid adopting an interpretation of *Belton* that would "untether the rule from the justifications underlying the *Chimel* exception," the *Gant* Court explained that officers could search a vehicle incident to the arrest of a recent

105. *Id.*
106. 556 U.S. 332, 335 (2009).
107. *Id.* at 335–36.
108. *Id.* at 336.
109. *Id.*
110. *Id.*
111. *Id.*
112. *See id.* ("Among other things, Gant argued that *Belton* did not 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.").
113. *Id.* at 337.
114. *Id.* at 337–38.
115. *Id.* at 351.
116. *Id.* at 342–43.

occupant only "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[117] Adopting the argument Justice Scalia set forth in his concurrence in *Thornton*, the *Gant* Court explained that an officer could also search a vehicle if the officer reasonably believed that the search would produce evidence "'relevant to the crime of arrest.'"[118] The Court ultimately held that the search of Gant's car was unreasonable because the officers lacked a reasonable belief that Gant could access his car "at the time of the search" or that they could find therein "evidence of the offense for which he was arrested"—driving with a suspended license.[119]

Concurring, Justice Scalia argued that only one justification could make reasonable a search of a vehicle incident to the arrest of its occupant: if the officer is searching for "evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."[120] Justice Scalia reasoned that limiting the justifications for automobile searches incident to arrests in this manner would "tether[] the scope and rationale of the doctrine to the triggering event."[121]

While the Court in *Chimel*, *Belton*, and *Thornton* articulated a sphere of power for officers to conduct a warrantless search incident to a valid arrest, the Court most recently demonstrated in *Gant* that it is determined to scrutinize whether the circumstances surrounding the officer's actions actually trigger law enforcement interests such as safety and evidence preservation.[122] When these law enforcement interests are not at stake, as in *Gant*, the Court has demonstrated that it will circumscribe police power as is necessary to respect the ultimate touchstone of the Fourth Amendment—reasonableness.[123]

C. The Reasonableness Inquiry in Cases Involving Detentions Incident to the Execution of a Search Warrant

1. Michigan v. Summers

In *Michigan v. Summers*, police were about to execute a search warrant at a residence when they "encountered [Summers] descending the front

117. *Id.* at 343.
118. *Id.* (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).
119. *Id.* at 344.
120. *Id.* at 353 (Scalia, J., concurring).
121. *Id.*
122. *See supra* text accompanying notes 116–119.
123. *See supra* text accompanying notes 116–119.

steps."[124] The officers detained Summers for the duration of the search.[125] Once the officers discovered drugs in the basement and identified Summers as the owner of the home, they arrested him.[126] A search of his person revealed heroin in his coat pocket.[127] Summers was "charged with possession of the heroin found on his person," but the trial court granted his motion to suppress the evidence as "the product of an illegal search in violation of the Fourth Amendment."[128] The state appellate courts affirmed the trial court's ruling, but the Supreme Court reversed.[129]

The Court found the detention, arrest, and search of Summers reasonable.[130] First, the Court explained that certain cases, like *Terry*, demonstrate that some seizures "constitute such limited intrusions . . . and are justified by such substantial law enforcement interests that they may be made on less than probable cause."[131] Second, the Court articulated three law enforcement interests that justified Summers's detention: (1) preventing flight, (2) protecting the officers, and (3) completing the search.[132] The Court stressed that a valid search warrant, signed by a neutral magistrate, constitutes "an objective justification" for an officer to believe occupants of the premises to be searched are engaged in criminal activity.[133] Relying on these factors, the Court held that police officers have "limited authority to detain the occupants of the premises while a proper search is conducted" if they have "a warrant to search for contraband founded on probable cause."[134] The Court noted that its decision would not burden officers with evaluating on a case-by-case basis whether the detention of an occupant incident to a lawful search of a premises was reasonable under the Fourth Amendment.[135]

124. 452 U.S. 692, 693 (1981).

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.* at 694.

129. *Id.*

130. *Id.* at 705.

131. *Id.* at 699.

132. *Id.* at 702–03.

133. *See id.* at 703–04 ("The connection of an occupant to that home [where a neutral magistrate has determined there is probable cause to believe a crime is taking place] gives the police officer an easily identifiable and certain basis for determining that suspicion of criminal activity justifies a detention of that occupant.").

134. *Id.* at 705.

135. *See id.* at 705 n.19 ("The rule we adopt today does not depend upon . . . ad hoc determination[s], because the officer is not required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.").

2. Muehler v. Mena

In *Muehler v. Mena*,[136] a Special Weapons and Tactics ("SWAT") team and police officers executed a search warrant for "deadly weapons and other evidence of gang membership" at a house thought to be associated with a violent gang.[137] Upon entering the house, the officers handcuffed at gunpoint Mena and three other individuals, then detained them in the garage for the duration of the search.[138] The officers released the detainees several hours later.[139] Mena sued the officers under the theory that "she was detained for an unreasonable time and in an unreasonable manner in violation of the Fourth Amendment."[140] A jury found the officers' actions unreasonable, and the Ninth Circuit affirmed.[141]

The Supreme Court vacated the decision of the lower courts and remanded.[142] According to the Court, "Mena's detention was, under *Summers*, plainly permissible" because "[a]n officer's authority to detain incident to a search is categorical . . . ."[143] The Court reasoned that two elements made the detention reasonable for the duration of the search: the existence of a search warrant, and the identification of Mena as an occupant of the premises subject to the search warrant at the time it was executed.[144] The *Muehler* Court explained that *Summers* authorizes officers to use "reasonable force" in detaining an occupant during a search.[145] The officers' use of handcuffs, however, was "undoubtedly a separate intrusion in addition to" Mena's detention in the garage.[146] The Court then balanced the extent of the intrusions against the interests of the officers at the scene.[147] Although the Court recognized that Mena's detention was "more intrusive" than the detention in *Summers*, the Court reasoned that "the governmental interests outweigh[ed] the marginal intrusion."[148] In particular, the Court stressed that the search for weapons and a "wanted gang member" constituted an "inherently dangerous situation[]" that triggered the law enforcement interest in "minimizing the risk of harm to

136. 544 U.S. 93 (2005).
137. *Id.* at 95–96.
138. *Id.* at 96.
139. *See id.* at 100 (noting the detainees' "2– to 3–hour detention").
140. *Id.* at 96.
141. *Id.* at 97.
142. *Id.*
143. *Id.* at 98.
144. *Id.*
145. *Id.* at 98–99.
146. *Id.* at 99.
147. *Id.* at 99–100.
148. *Id.* at 99.

both officers and occupants."[149] While the *Muehler* Court expanded the scope of a *Summers* detention, the Court endeavored to balance competing safety interests of the officers and the occupants in light of the intrusive nature of the detention.[150]

3. *Federal Courts of Appeals Consider* Summers *in Cases Involving Off-Premises Detentions*[151]

a. *Interpretations of* Summers *Before* Muehler *by Federal Courts of Appeals*

Before *Muehler* was decided in 2005, several federal courts of appeals applied *Summers* differently when confronted with an off-premises detention of an occupant during the execution of a valid search warrant. In *United States v. Cochran*,[152] for example, the Sixth Circuit held that *Summers* imposed no geographic limit on police authority to detain an occupant during a valid search of a premises.[153] As officers prepared to execute a search warrant, they observed Cochran exit the premises by car.[154] They decided to detain him to facilitate the search but did not do so until he had "travelled a short distance" from the premises.[155] In upholding Cochran's eventual conviction, the Sixth Circuit explained that "*Summers* does not impose upon police a duty based on geographic proximity . . . rather, the focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence."[156]

Similarly, the Fifth Circuit upheld an off-premises detention in *United States v. Cavazos*.[157] Officers were surveying a premises before executing a search warrant when they observed Cavazos leave the premises in his

149. *Id.* at 100.

150. *Id.* at 98–100.

151. This Section considers federal cases since the Supreme Court granted certiorari in *Bailey* to resolve the conflicting interpretations of *Summers* among the federal courts of appeals. Several state courts have also split in their interpretations of *Summers*. *Compare* Whitaker v. Commonwealth, 553 S.E.2d 539 (Va. Ct. App. 2001) (refusing to recognize a spatial limit in *Summers*), *and* Fromm v. State, 624 A.2d 1296, 96 Md. App. 249 (Md. Ct. Spec. App. 1993) (same), *with* Commonwealth v. Charros, 824 N.E.2d 809 (Mass. 2005) (recognizing an off-premises detention as unduly intrusive), *and* Commonwealth v. Graziano-Constantino, 718 A.2d 746 (Pa. 1998) (same).

152. 939 F.2d 337 (6th Cir. 1991).

153. *Id.* at 339.

154. *Id.* at 338.

155. *Id.*

156. *Id.* at 339.

157. 288 F.3d 706, 711–12 (5th Cir. 2002).

truck.[158] The truck pulled up next to the officers' vehicle and "its occupants peered at the officers inside."[159] When the officers pursued Cavazos, he turned his truck around and confronted them, as if the vehicles were in a "stand off."[160] The officers then exited their vehicle and detained Cavazos in the street, about two blocks away from the premises.[161] Like the Sixth Circuit, the Fifth Circuit explained that *Summers* did not hinge on a spatial relationship between the location of the detention and the premises subject to the search warrant.[162] The Fifth Circuit, however, analyzed the circumstances of Cavazos's detention more rigorously by drawing the interest-balancing approach from the *Summers* Court and weighing "'the character of the official intrusion and its justification.'"[163] The court reasoned that Cavazos's actions, particularly his surveillance of the officers and his aggressive driving, had triggered all three of the *Summers* governmental interests: the elimination of flight, the completion of the search, and the protection of the officers.[164]

In contrast, the Eighth Circuit held in *United States v. Sherrill*[165] that an off-premises detention was too intrusive for the court to uphold under *Summers*.[166] While officers prepared to execute a search warrant at Sherrill's residence, they observed Sherrill leave the premises in his vehicle.[167] The officers pulled Sherrill's car over "one block away from his home," detained him, and returned him to the premises, where he assisted the officers in completing the search.[168] The Eighth Circuit explained that *Summers* did not justify Sherrill's detention for two reasons.[169] First, the court reasoned that the off-premises detention was much more intrusive than in *Summers* "because Sherrill had already exited the premises."[170] In support of its contention, the Eighth Circuit cited a similar case in which the court had declined to extend *Summers* to the detention of an occupant "three

158. *Id.* at 708.

159. *Id.*

160. *Id.*

161. *Id.* at 708, 711.

162. *See id.* at 712 ("The proximity between an occupant of a residence and the residence itself may be relevant in deciding whether to apply *Summers*, but it is by no means controlling.").

163. *Id.* at 711 (quoting Michigan v. Summers, 452 U.S. 692, 700 (1981)).

164. *See id.* ("[His] conduct warranted the belief that Cavazos would have fled or alerted the other occupants of the residence about the agents nearby if he were released immediately after the stop and frisk.").

165. 27 F.3d 344 (8th Cir. 1994).

166. *Id.* at 346.

167. *Id.* at 345.

168. *Id.* at 345–46.

169. *Id.* at 346.

170. *Id.*

to five miles away" from the premises subject to a search warrant.[171] Second, the court reasoned that the circumstances of the detention did not satisfy two of the *Summers* interests: completing the search or preventing flight.[172] Thus, the court found that the intrusiveness of the detention greatly outweighed the law enforcement interests.[173]

Similarly, the Tenth Circuit declined to extend *Summers* in *United States v. Edwards*.[174] In *Edwards*, officers prepared to execute a search warrant at a "suspected 'drug house.'"[175] The officers watched Edwards, a "frequent visitor," drive away from the premises before they executed the search.[176] The officers then pulled Edwards over and detained him "at streetside for forty five minutes" until other officers completed the search of the premises.[177] The Tenth Circuit acknowledged a seeming "parallel" with *Summers*, in that "if an 'occupant' *on* the premises may be so detained, it might appear that Edwards—who had just left the premises—could be similarly detained."[178] The court ultimately rejected this parallel, however, by reasoning that Edwards's detention failed to fulfill two of the *Summers* law enforcement interests—preserving the evidence and protecting the officers—"in any way," and that the third interest—preventing the occupant's flight—"was far more attenuated than in *Summers*."[179] While these federal courts of appeals generally adopted the *Summers* Court's reasonableness inquiry of analyzing "the character of the official intrusion

171. *Id.* (citing United States v. Hogan, 25 F.3d 690, 693 (8th Cir. 1994)). In *Hogan*, the Eighth Circuit found that:

> *Summers* [was] not applicable . . . [because] the police officers encountered the defendant descending the front steps as they were about to execute a warrant to search his house for narcotics. . . . Here, Hogan was not on his front steps or even near his home. He was stopped three to five miles away, handcuffed, and taken back to his house.

Hogan, 25 F.3d at 693.

172. *See Sherrill*, 27 F.3d at 346 ("[T]he officers had no interest in preventing flight or minimizing the search's risk [by detaining Sherrill] because Sherrill had left the area of the search and was unaware of the warrant."). Sherrill did, however, "help the officers conduct the search." *Id.*

173. *Id.*

174. 103 F.3d 90, 93–94 (10th Cir. 1996).

175. *Id.* at 91.

176. *Id.*

177. *Id.* at 91–92.

178. *Id.* at 93.

179. *Id.* at 93–94.

and its justification," they nevertheless varied in their application of *Summers* to off-premises detentions.[180]

b. Interpretations of Summers *After* Muehler *by Federal Courts of Appeals*

After *Muehler* was decided in 2005, federal courts of appeals consistently justified off-premises detentions but did so by alternately focusing on the officers' actions and balancing the three law enforcement interests raised in *Summers*. In *United States v. Castro-Portillo*,[181] for example, the Tenth Circuit recognized the significance of *Muehler* in expanding the authority underlying *Summers*.[182] Officers detained and handcuffed Castro-Portillo two blocks from the house he exited before they executed a search warrant there and found drugs.[183] In concluding that Castro-Portillo's detention was permissible pursuant to the execution of the search warrant, the Tenth Circuit reasoned that the *Muehler* Court "extended" the *Summers* rule and provided officers with "'categorical'" power to detain Castro-Portillo.[184] Moreover, the Tenth Circuit found that the officers acted "as soon as reasonably practicable" in detaining Castro-Portillo.[185] Even though the Tenth Circuit previously declined to extend *Summers* to the off-premises detention in *Edwards*, it explained in *Castro-Portillo* that *Edwards* "preceded" *Muehler* and that Castro-Portillo's detention was distinguishable.[186]

In *United States v. Montieth*,[187] the Fourth Circuit similarly recognized *Muehler* as strengthening police authority to detain incident to the

180. Michigan v. Summers, 452 U.S. 692, 701 (1981). *But see* United States v. Cochran, 939 F.2d 337, 338–40 (6th Cir. 1991) (failing to refer to any of the three governmental interests in *Summers* in reaching its decision).

181. 211 F.App'x 715 (10th Cir. 2007).

182. *Id.* at 720–24.

183. *Id.* at 717.

184. *Id.* at 720. The Tenth Circuit explained:

> The fact [Castro-Portillo] was not observed committing a crime at the time of the stop, drove away from the house moments before the execution of the search warrant, and did not know about the search warrant did not prevent authorities from having the requisite suspicion to stop him. . . . The search warrant alone provided reasonable suspicion to stop Mr. Castro-Portillo, and the fact he did not know about the search warrant does not diminish the risk he may have posed.

Id. at 721.

185. *Id.*

186. *See id.* at 721–22 (noting, for example, that, whereas Edwards was held at gunpoint and for thirty minutes longer than necessary, Castro-Portillo was not held at gunpoint and for a period as short as possible).

187. 662 F.3d 660 (4th Cir. 2011).

execution of a search warrant.[188] Officers detained Montieth nearly eight-tenths of a mile from his home, which was subject to a search warrant, and acquired his consent to execute the search.[189] Drawing upon *Muehler*, the Fourth Circuit explained that the officers' authority to detain Montieth was "categorical" and did not depend on any "'quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.'"[190] The Fourth Circuit found the officers' actions were justified because the detention served the *Summers* law enforcement interests in officer safety and the completion of the search.[191] The court concluded that the officers assumed "the most practicable means" of executing the search by not forcibly entering Montieth's home where his wife and children resided and instead obtaining Montieth's consent before undertaking the search.[192]

Both the Fourth and Tenth Circuits interpreted *Muehler* as strengthening police power to detain an occupant incident to a search under *Summers*.[193] Moreover, they analyzed the detention using the term first pronounced by the Sixth Circuit in *Cochran*: "whether the police detained defendant as soon as practicable after departing from his residence."[194] The Seventh Circuit and the Second Circuit also adopted this language from *Cochran* in upholding off-premises detentions in *United States v. Bullock*[195] and *United States v. Bailey*,[196] respectively. The Seventh, Second, and Fourth Circuits turned to the traditional reasonableness inquiry and examined the circumstances of the detention in light of the three law

188. *Id.* at 666.

189. *Id.* at 663.

190. *Id.* at 666.

191. *Id.*

192. *Id.* at 667. The Fourth Circuit stressed that its holding "should not be over-read" and it "do[es] not suggest that any detention away from the home to be searched is invariably a reasonable one." *Id.* The court noted that "in some circumstances the distance from the home may combine with other factors surrounding the search to present an objectively unreasonable plan of warrant execution." *Id.* But here, according to the court, this was not the case. *Id.*

193. *See supra* notes 184, 190 and accompanying text.

194. *See supra* notes 185, 192 and accompanying text; *see also* United States v. Cochran, 939 F.2d 337, 339 (6th Cir. 1991).

195. *See* 632 F.3d 1004, 1020 (7th Cir. 2011) ("[T]here is nothing to suggest that the vehicle was not pulled over *as soon as practicable*." (emphasis added)).

196. *See* 652 F.3d 197, 206 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013) ("[P]olice must identify an individual *in the process of leaving* the premises subject to search and detain him *as soon as practicable* during the execution of the search."); *see also* United States v. Sears, 139 F.App'x 162, 166 (11th Cir. 2005) (per curiam) ("That the stop does not occur on the premises to be searched is irrelevant so long as the officers detain the individual *as soon as practicable* after his departure." (emphasis added)). While the *Sears* Court decided this case nearly three months after the Supreme Court decided *Muehler*, it is unclear if it took the *Muehler* decision into account. The *Sears* Court did not mention *Muehler*.

enforcement interests articulated in *Summers*.[197] Thus, while federal courts of appeals consistently upheld off-premises detentions after *Muehler*, these courts relied on several justifications to underpin their conclusions. Due to the inconsistent use of justifications regarding reasonableness in these types of cases, the Supreme Court considered the Second Circuit's opinion in *United States v. Bailey* alongside these various cases.[198]

III. THE COURT'S REASONING

In *Bailey v. United States*, the Supreme Court reversed the judgment of the Second Circuit and held that the detention of an occupant nearly one mile from the premises subject to a valid search warrant was unreasonable under the Fourth Amendment.[199] Justice Kennedy, writing for the majority, explained that the rule in *Michigan v. Summers* could not apply to detentions beyond the immediate vicinity of the premises because such a detention did not further the three law enforcement interests articulated in *Summers*; rather, the detention would pose too severe an intrusion upon the individual.[200] Tracing the Court's exceptions to the Fourth Amendment requirement "prohibiting detention absent probable cause,"[201] the majority reasoned that any exception had to adhere closely to the Fourth Amendment's "purpose and rationale."[202] Thus, in determining whether to uphold Bailey's detention as an extension of *Summers*, the Court acknowledged it would have to consider whether Bailey's detention aligned with the reasoning underlying *Summers*.[203]

As the Court set out to analyze the three law enforcement interests underpinning the *Summers* rule—officer safety, effective completion of the search, and preventing flight—the Court expressed concern over the extent of police authority to detain incident to a search as a result of *Muehler v. Mena*.[204] Recognizing that *Muehler* provided police with broad power to detain "at the scene of the search," the *Bailey* Court reasoned that police

197. *See Bullock*, 632 F.3d at 1019 ("[T]he officers' interests in detaining [Bullock] during the search were not outweighed by this rather limited intrusion on his freedom."); *supra* text accompanying notes 36, 191.

198. *See* Bailey v. United States, 133 S. Ct. 1031, 1037 (2013) (explaining that the "Federal Courts of Appeals have reached differing conclusions as to whether *Michigan v. Summers* justifies the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant").

199. *Id.* at 1042–43.

200. *Id.*

201. *Id.* at 1038.

202. *Id.*

203. *Id.*

204. *Id.* at 1038–39.

would have too much authority if officers were permitted to detain occupants away from the scene of the search as well.[205]

In analyzing the facts of Bailey's detention, the Court reasoned that none of the law enforcement interests articulated in *Summers* applied "with the same or similar force."[206] For the first interest—officer safety—the Court explained that officers did not minimize a risk of harm to themselves by detaining Bailey because he had already left the premises before the execution of the search.[207] The Court also rejected the Second Circuit's concern that if officers were deprived of the authority to detain off-premises, they would have to make a difficult choice between detaining an occupant on the premises, which might alert occupants inside of the residence of the impending search, or letting the individual get away.[208] According to the Court, such a concern rested on the "false premise" that officers were required to detain Bailey in the first place.[209] Instead, the Court suggested that officers could elect not to detain immediately but pursue the suspect and, if appropriate, stop him later under *Terry*.[210] For the next law enforcement interest—effective completion of the search—the Court explained that Bailey could not frustrate the officers' attempt to complete the search because he was not at the scene when they executed the warrant.[211] The Court redefined the last interest—preventing flight—as a branch of the second interest, which the Court already determined was not advanced by Bailey's detention.[212]

In analyzing the intrusion on Bailey, the Court considered Bailey's detention more like "a full-fledged arrest" than the minor invasion in *Summers* because he was publicly handcuffed and transported back to his residence in a police car.[213] According to the Court, "[t]hese facts illustrate that detention away from a premises where police are already present often will be more intrusive than detentions at the scene."[214] After balancing the

205. *Id.* at 1039.

206. *Id.* at 1038–41.

207. *See id.* at 1039 ("Bailey had left the premises, apparently without knowledge of the search. He posed little risk to the officers at the scene.").

208. *Id.*

209. *Id.*

210. *See id.* ("[W]here there are grounds to believe the departing occupant is dangerous, or involved in criminal activity, police will generally not need *Summers* to detain him at least for brief questioning, as they can rely instead on *Terry*.").

211. *See id.* at 1040 ("[A]fter Bailey drove away from the Lake Drive apartment, he was not a threat to the proper execution of the search.").

212. *Id.* at 1041.

213. *Id.*

214. *Id.*

law enforcement interests at stake against the interest to Bailey, the Court found Bailey's detention unreasonable.[215]

The Court did not go so far as to conclude its analysis by declaring that any detention away from the premises to be searched is incompatible with *Summers*.[216] Rather, it confined an officer's power to detain occupants under *Summers* to "the immediate vicinity of the premises to be searched."[217] According to the Court, drawing this line ensured that a detention under *Summers* would not depart from its "underlying justification," that is, "the safe and efficient execution of a search warrant."[218] The Court, however, declined to define its geographic demarcation—the immediate vicinity of the premises—because the Court concluded that Bailey clearly was not detained in that area.[219] Instead, the Court identified several factors lower courts could use to evaluate whether the officers in a particular situation had conformed to this new spatial line, such as "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors."[220] The Court did not address the application of *Terry* to the detention but left this question for the Second Circuit to consider on remand.[221]

Justice Scalia agreed with the majority's decision but wrote a concurring opinion to critique the Second Circuit's "interest-balancing approach."[222] According to Justice Scalia, when a court considers whether *Summers* applies, it need not engage in "any balancing . . . because the *Summers* exception, within its scope, is 'categorical.'"[223] Justice Scalia explained that the proper inquiry was binary: did the officers detain an occupant, someone "within 'the immediate vicinity of the premises to be searched,'" or not?[224] According to Justice Scalia, Bailey—"seized a mile away"—was not an occupant; thus, *Summers* did not apply.[225] Furthermore,

215. *Id.* at 1042.

216. *Id.* at 1041–43.

217. *Id.* at 1042.

218. *Id.*

219. *See id.* ("[P]etitioner was detained at a point beyond any reasonable understanding of the immediate vicinity of the premises in question; and so this case presents neither the necessity nor the occasion to further define the meaning of immediate vicinity.").

220. *Id.*

221. *See id.* at 1043 ("[T]he District Court, as an alternative ruling, held that stopping petitioner was lawful under *Terry*. This opinion expresses no view on that issue. It will be open, on remand, for the Court of Appeals to address the matter . . . .").

222. *Id.* (Scalia, J., concurring).

223. *Id.* (quoting Muehler v. Mena, 544 U.S. 93, 98 (2005)).

224. *Id.* (citing *Bailey*, 133 S. Ct. at 1041 (majority opinion)).

225. *Id.*

Justice Scalia criticized the Second Circuit's finding that *Summers* permitted detentions if accomplished "'as soon as practicable.'"[226] Justice Scalia asserted that "a *Summers* seizure . . . 'is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the [seizure] unlawful.'"[227] Justice Scalia concluded by critiquing the *Summers* Court for identifying overly broad law enforcement interests in its decision.[228] According to Justice Scalia, the only justification for the detention in *Summers* was "law enforcement's interest in carrying out the search unimpeded by violence or other disruptions."[229]

Justice Breyer stated in dissent that the Second Circuit did not err because Bailey's detention satisfied each of the law enforcement interests in *Summers*.[230] Moreover, Justice Breyer asserted that drawing the line at "as soon as reasonably practicable" was more appropriate than drawing the line at "immediate vicinity" because the latter was too ambiguous for courts to apply.[231] Consequently, Justice Breyer said, the majority's rule did not "offer[] [an] easily administered bright line"; rather, it "invite[d] case-by-case litigation" yet "offer[ed] no clear case-by-case guidance."[232] Justice Breyer also reasoned that when the majority crafted its rule, it should have taken into greater consideration the three law enforcement interests in *Summers*, which he regarded as pillars of reasonableness.[233] Justice Breyer concluded that adopting the Second Circuit's "as soon as reasonably practicable" standard would have more accurately addressed Fourth Amendment concerns.[234]

IV. ANALYSIS

In *Bailey v. United States*, the Supreme Court held that a detention made beyond the immediate vicinity of the premises subject to a search warrant was not reasonable under the Fourth Amendment.[235] The Court drew a spatial line to ensure that police power to detain comported with the

226. *Id.* at 1044 (quoting United States v. Bailey, 652 F.3d 197, 206 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013)).

227. *Id.* (quoting Thornton v. United States, 541 U.S. 615, 627 (2004) (Scalia, J., concurring)).

228. *See id.* ("Regrettably, this Court's opinion in *Summers* facilitated the Court of Appeals' error here by setting forth a smorgasbord of law-enforcement interests assertedly justifying its holding. . . . We should not have been so expansive.").

229. *Id.*

230. *Id.* at 1045 (Breyer, J., dissenting).

231. *Id.* at 1047.

232. *Id.*

233. *Id.* at 1048.

234. *Id.* at 1046, 1049.

235. *Id.* at 1042–43 (majority opinion).

underlying law enforcement interest in "the safe and efficient execution" of the search.[236] This law enforcement interest was an appropriate, succinct modification of the three law enforcement interests articulated in *Summers*—protecting the officers, completing the search, and preventing flight.[237] The Court also communicated its holding clearly to lower courts.[238] Whereas the *Summers* Court did not clarify the scope of the term "occupant" for lower courts,[239] the *Bailey* Court provided factors to incorporate in assessing the term "immediate vicinity," as well as the flexibility to analyze this term on a case-by-case basis.[240] Moreover, in his concurrence, Justice Scalia clarified the application and scope of *Summers* by addressing the various justifications underlining the Second Circuit's decision.[241] Like the *Gant* Court in the search-incident-to-arrest context, the *Bailey* Court stressed that exceptions to Fourth Amendment rules have a narrow scope and performed a rigorous analysis of the purported justifications of the officer's actions.[242] Through its holding, the *Bailey* Court struck a proper balance to ensure law enforcement interests do not unreasonably intrude upon individual liberty interests.

A. The Bailey *Court Succinctly Modified the Three Law Enforcement Interests Articulated in* Summers *to Ensure That Police Power to Detain Occupants Within the Immediate Vicinity of the Premises to be Searched Is Reasonable*

The *Bailey* Court explained that its spatial line—immediate vicinity of the premises to be searched—would cover "the area in which an occupant poses a real threat to the safe and efficient execution of a search warrant."[243] The Court indicated that the "underlying justification" for its spatial line was not as broad as the series of law enforcement interests in *Summers*.[244] Admittedly, the interests do overlap. For example, the *Bailey* Court recognized the *Summers* interests in minimizing the risk of harm to officers

236. *Id.* at 1042.

237. *See infra* Part IV.A.

238. *See infra* Part IV.B.

239. *See, e.g.*, United States v. Bailey, 652 F.3d 197, 204 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013) ("This question has divided the Courts of Appeals. Of the five courts to consider it, three have extended *Summers* on facts similar to those of this case. . . . Two circuits have declined to extend *Summers* to permit detention of occupants who have been seen leaving a residence subject to a search warrant.").

240. *See infra* Part IV.B.

241. *See infra* Part IV.C.

242. *See infra* Part IV.D.

243. Bailey v. United States, 133 S. Ct. 1031, 1042 (2013).

244. *Id.*

and in completing the search by emphasizing the interest in "the safe and efficient execution" of the search.[245] The *Bailey* Court explained, though, that "[t]he concern over flight is not because of the danger of flight itself"; rather, the concern over flight is only relevant insofar as it undermines "the integrity of the search."[246] By modifying the justifications for *Summers* detentions, the *Bailey* Court succeeded in tethering its holding to law enforcement interests that underpin an officer's power to detain an occupant incident to the execution of a search warrant.

While the dissent argued that the concern over flight "will be present in all *Summers* detentions," the dissent did not tether its illustration to the facts of Bailey's detention or the overarching concern for the search.[247] Justice Breyer explained that "any occupant departing a residence containing contraband will have incentive to flee once he encounters police."[248] Bailey, however, did not flee once he encountered the police.[249] While other suspects or detainees might act differently if confronted on the premises, it is unlikely Bailey's flight could have threatened the search of his residence. He was a mile away.[250]

Justice Scalia criticized the *Summers* Court for justifying its decision on law enforcement interests that were too "expansive."[251] He construed the proper justifications for a *Summers* detention more narrowly than Justice Kennedy. "The *Summers* exception," Justice Scalia explained, "is appropriately predicated *only* on law enforcement's interest in carrying out the search unimpeded by violence or other disruptions."[252] Like Justice Kennedy, Justice Scalia would not have permitted the detention of occupants under the theory that doing so eliminated the risk of flight of the occupant.[253] Justice Scalia, however, implicitly disagreed with Justice Kennedy that the "efficient execution" of the search constituted a valid

245. *Id.*

246. *Id.* at 1041.

247. *Id.* at 1047 (Breyer, J., dissenting).

248. *Id.*

249. *See id.* at 1036 (majority opinion) ("[The officers] tailed Bailey's car for about a mile—and for about five minutes—before pulling the vehicle over . . . . They ordered Bailey and Middleton out of the car and did a patdown search of both men.").

250. *Id.*

251. *Id.* at 1044 (Scalia, J., concurring); *see supra* note 228 and accompanying text.

252. *Bailey*, 133 S. Ct. at 1044.

253. *See id.* (explaining that the *Summers* Court laid out a series of law enforcement interests that were too "expansive," including "'preventing flight in the event that incriminating evidence is found.'" (quoting Michigan v. Summers, 452 U.S. 692, 702 (1981))).

justification for the detention.[254] The interest in efficiency appeared to Justice Scalia to depart from "'[t]he common denominator,'" which the Court has used to uphold "seizures based on less than probable cause" as reasonable under the Fourth Amendment: a "governmental interest independent of the ordinary interest in investigating crime and apprehending suspects."[255] Whereas Justice Breyer in dissent endorsed the three law enforcement interests articulated by the *Summers* Court, Justice Scalia in concurrence sought to confine the underlying justification for a detention under *Summers* to just one interest.

B. The Bailey *Court Communicated Clearly How Lower Courts Were to Interpret "Immediate Vicinity" and Provided Them Flexibility to Apply This Term on a Case-by-Case Basis*

The *Bailey* Court stated that lower courts could "consider a number of factors" to determine whether an officer had detained an occupant within the immediate vicinity of the premises subject to a search warrant.[256] Those factors included, but were not limited to, the following: "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, [and] the ease of reentry from the occupant's location . . . ."[257]

In dissent, Justice Breyer stated that "[t]he majority's line invites case-by-case litigation."[258] Even if Justice Breyer is correct, however, the *Bailey* Court neither needed to nor arguably should have tried to draw a bright spatial line. First, the *Bailey* Court did not need to draw a bright line with a restrictive definition of "immediate vicinity" because the officers had detained Bailey nearly a mile from the premises, "a point beyond any reasonable understanding of the immediate vicinity" of his residence.[259] The Court granted certiorari to address a particular question and issued a holding on that particular question.[260]

254. *See id.* (labeling the law enforcement interest in "obtaining residents' assistance in 'open[ing] locked doors or locked containers'" as too "expansive" (quoting *Summers*, 452 U.S. at 703)).

255. *Id.* (quoting *Summers*, 452 U.S. at 707 (Stewart, J., dissenting)). According to Justice Scalia, "[p]reventing flight is not a special governmental interest—it is indistinguishable from the ordinary interest in apprehending suspects. Similarly, the interest in inducing residents to open locked doors or containers is nothing more than the ordinary interest in investigating crime." *Id.* at 1045.

256. *Id.* at 1042 (majority opinion).

257. *Id.* The *Bailey* Court also stated that courts could take into account "other relevant factors." *Id.*

258. *Id.* at 1047 (Breyer, J., dissenting).

259. *Id.* at 1042 (majority opinion).

260. *See id.* at 1037 ("The Federal Courts of Appeals have reached differing conclusions as to whether *Michigan v. Summers* justifies the detention of occupants beyond the immediate vicinity

Second, it is plausible the *Bailey* Court recognized an indomitable challenge in defining a term that officers and courts would inevitably interpret in a variety of ways. "[T]he limitations of language," Professor Albert Alschuler noted, "make extremely difficult the articulation of general principles that will yield justice in almost every situation that they address."[261] There are many types of houses, apartments, and other premises an officer might prepare to search; to try to explain fully the immediate vicinity of each would require a list of factors larger than anything the *Bailey* Court could hope to catalog. Moreover, Fourth Amendment cases often hinge on "particulars" as opposed to "blanket" statements and rules.[262] The *Bailey* Court was right to communicate to courts examples of relevant factors the courts could use to analyze the particular facts of a given case rather than confine the meaning of the term "immediate vicinity" to an exclusive list. Moreover, if the *Bailey* Court had drawn a rigid spatial line, lawyers—"'trained to attack 'bright lines' the way hounds attack foxes'"[263]—would likely have feasted on it.

Third, the scope of the *Bailey* line does not unnecessarily constrain officers or lower courts. The majority and concurrence both stressed the importance of confining the scope of the detention to the underlying justification.[264] The *Bailey* rule, indeed, is an exception and ought not permit expansive interpretations or outcomes.[265] The Court, in fact, expressed concern regarding outcomes yielding expansive police power in its discussion of *Muehler v. Mena*; it recognized *Muehler* as a sign of the "far-reaching authority the police have when the detention is made at the scene of the search."[266] When coupled with Justice Scalia's critique of the *Summers* Court's reasoning—"[w]e should not have been so expansive"[267]—the majority's analysis of *Muehler* indicates that the *Bailey*

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of the premises covered by a search warrant. This Court granted certiorari to address the question.").

261. Albert W. Alschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 227 (1984).

262. *See* United States v. Montieth, 662 F.3d 660, 667 (4th Cir. 2011) ("Fourth Amendment cases tend to turn on particulars and are often neither blanket authorizations nor blanket prohibitions.").

263. Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing "Bright Lines" and "Good Faith,"* 43 U. PITT. L. REV. 307, 333 (1982) (quoting Robbins v. California, 453 U.S. 420, 443 (1981) (Rehnquist, J., dissenting)).

264. *See supra* notes 202–203, 227–229 and accompanying text.

265. *See Bailey*, 133 S. Ct. at 1038 ("An exception to the Fourth Amendment rule prohibiting detention absent probable cause must not diverge from its purpose and rationale.").

266. *Id.* at 1039.

267. *Id.* at 1044 (Scalia, J., concurring).

line will mark the Court's concerted effort to maintain more narrowly the contours of detentions of occupants without probable cause.

One could counter that the *Bailey* Court has placed courts and officers in a position that will hinder police in executing their duties. As Justice Scalia noted, however, a search warrant does not "*entitle*[] the Government to a concomitant *Summers* detention."[268] A *Summers* detention "'is an exception—justified by necessity—to a rule that would otherwise render the [seizure] unlawful.'"[269] Officers do not have to seize an occupant on the immediate vicinity of the premises,[270] and lower courts ought not analyze future cases with the contrary premise in mind. A *Summers* detention is not the only means by which to stop a suspect.[271]

C. Justice Scalia Correctly Clarified the Application and Scope of Summers *When He Addressed the Interest-Balancing Approach of the Second Circuit*

Several courts confronted cases involving off-premises detentions incident to the execution of a search warrant.[272] Because those courts did not read *Summers* to state definitively whether the power to detain extended beyond the premises, however, they generally conducted the traditional reasonableness inquiry of weighing the intrusion of the individual against the law enforcement interests at stake.[273] The Second Circuit employed this "interest-balancing approach" in *United States v. Bailey* as well.[274] In his concurrence, Justice Scalia criticized the Second Circuit for misinterpreting the application of *Summers*.[275] He clarified that the *Summers* Court did not impose "'an ad hoc determination'" on officers, nor did it require them "'to evaluate . . . the quantum of proof justifying detention.'"[276] Justice Scalia recognized that after the *Muehler* Court revisited *Summers*, the *Summers*

268. *Id.*

269. *Id.* (quoting Thornton v. United States, 541 U.S. 615, 627 (2004) (Scalia, J., concurring)).

270. *See id.* at 1039 (majority opinion) ("If the officers find that it would be dangerous to detain a departing individual in front of a residence, they are not required to stop him.").

271. *See id.* (noting that "where there are grounds to believe the departing occupant is dangerous, or involved in criminal activity, police will generally not need *Summers* to detain him at least for brief questioning, as they can rely instead on *Terry*").

272. *See supra* Part II.C.3.

273. *See supra* Part II.C.3.

274. *See* United States v. Bailey, 652 F.3d 197, 205 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013) ("The guiding principle behind the requirement of reasonableness for detention in such circumstances is the *de minimis* intrusion characterized by a brief detention in order to protect the interests of law enforcement in the safety of the officers and the preservation of evidence.").

275. *Bailey*, 133 S. Ct. at 1043 (Scalia, J., concurring).

276. *Id.* (quoting Michigan v. Summers, 452 U.S. 692, 705 n.19 (1981)).

exception was categorical "within its scope."[277] The application of *Summers*, therefore, was a binary, not balancing, inquiry.[278] A court only had to determine whether the detainee was an occupant of the premises subject to a search warrant.[279] If so, then *Summers* applied.[280]

One could argue that Justice Scalia obviated the question of how or if the *Summers* Court defined "occupant." Because lower courts, including the Second Circuit, did not have a workable definition to apply to cases involving off-premises detentions, they opted to assess the reasonableness of the detention by weighing competing interests.[281] Justice Scalia provided an answer as to the scope of *Summers* by applying the majority's geographic line to explain the meaning of occupant.[282] Thus, the majority seemed to supply an answer to the question that had been plaguing the circuits—whether *Summers* "impose[d] upon police a duty based on geographic proximity."[283] The majority and Justice Scalia in concurrence informed officers through *Bailey* that the "immediate vicinity of the premises to be searched" marked the scope of that duty.[284]

Justice Scalia also criticized the Second Circuit's consideration of whether the officers had detained Bailey "as soon as practicable."[285] While Justice Scalia recognized the "appeal" of this inquiry, he explained that it was ultimately fallacious.[286] Justice Scalia reasoned that the issuance of a search warrant does not *per se* entitle officers to detain under *Summers*.[287] Rather, a *Summers* detention is the *exception* to the rule, "'justified by necessity.'"[288] For Justice Scalia, that necessity arises out of the law enforcement interest in "carrying out the search unimpeded by violence or other disruptions."[289] Furthermore, the necessity arises only in the event that occupants are present "during the execution of a search warrant."[290]

277. *Id.*; *see also* Muehler v. Mena, 544 U.S. 93, 98 (2005) ("An officer's authority to detain incident to a search is categorical.").

278. *Bailey*, 133 S. Ct. at 1043.

279. *Id.*

280. *Id.*

281. *See supra* Part II.C.3.

282. *Bailey*, 133 S. Ct. at 1043.

283. United States v. Cochran, 939 F.2d 337, 339 (6th Cir. 1991).

284. *Bailey*, 133 S. Ct. at 1042 (majority opinion).

285. *Id.* at 1044 (Scalia, J., concurring) (quoting United States v. Bailey, 652 F.3d 197, 206 (2d Cir. 2011), *rev'd*, 133 S. Ct. 1031 (2013)).

286. *Id.*

287. *Id.*

288. *Id.* (quoting Thornton v. United States, 541 U.S. 615, 627 (2004) (Scalia, J., concurring)).

289. *Id.*

290. *Id.*

The *Cochran* Court initiated the pervasive inquiry among the federal courts of appeals as to whether officers had acted "as soon as practicable."[291] No balancing inquiry of competing interests, however, takes into account police performance in this manner. The *Summers* Court certainly never recognized this term.[292] With respect to the officers, reasonableness hinges on the interests at stake in the line of duty—protecting themselves and preserving evidence.[293] Justice Scalia appropriately framed a *Summers* detention as a limited exception justified by a narrow interest, not an automatic right available to well-behaved police officers.

D. The Bailey *Court Adopted an Approach Consistent with the* Gant *Court—A Concerted Focus on Maintaining an Exception to the Fourth Amendment Narrowly and Probing the Relevance of Its Underlying Justifications*

The *Bailey* Court modified and reduced the three law enforcement interests at stake in *Summers*—minimizing the risk of harm to the officers, completing the search, and preventing flight—to the following: "the safe and efficient execution of [the] search."[294] Justice Scalia went further in his concurrence to emphasize that officers have an interest not in executing an efficient search but in "carrying out the search unimpeded by violence or other disruptions."[295] In both opinions, the Justices stressed that detentions under *Summers* were exceptions to be narrowly tailored.[296] This emphasis is not an aberration. By considering *Bailey* in light of *Gant*, one can perceive a concerted effort by the Court not to tolerate existing exceptions, or grant new ones, if legitimate law enforcement interests do not support them and the facts do not trigger those law enforcement interests.

The Court in *Belton* held that officers could search "the passenger compartment" of a vehicle when they make "a lawful custodial arrest of the occupant" of the vehicle.[297] The *Belton* Court looked to the justifications for a search incident to arrest in *Chimel*—safety and evidentiary concerns—

291. *See* United States v. Cochran, 939 F.2d 337, 339 (6th Cir. 1991) ("[T]he focus is upon police performance, that is, whether the police detained defendant as soon as practicable after departing from his residence.").

292. *See generally* Michigan v. Summers, 452 U.S. 692 (1981).

293. *See, e.g.*, Chimel v. California, 395 U.S. 752, 766 (1969) ("No consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items.").

294. *Bailey*, 133 S. Ct. at 1042 (majority opinion).

295. *Id.* at 1044 (Scalia, J., concurring).

296. *See supra* notes 202–203, 227–229 and accompanying text.

297. New York v. Belton, 453 U.S. 454, 460 (1981).

in reaching this determination.[298] The *Gant* Court, however, was concerned that many courts had construed the *Belton* rule broadly to permit searches "even if there [was] no possibility the arrestee could gain access to the vehicle at the time of the search."[299] If the arrestee could not legitimately gain access to the vehicle, then the justifications of officer safety and evidence preservation were not triggered.[300] Consequently, the *Gant* Court restricted the scope of a *Belton* search to "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[301]

The *Gant* Court probed the competing interests and concluded that the broad reading of *Belton* undermined the individual's privacy concerns while not critically protecting or serving officer safety and evidentiary concerns.[302] The Court also concluded that adopting a broad reading of *Belton* would inappropriately transform an exception into "a police entitlement," which the Court considered an "anathema to the Fourth Amendment."[303] Finally, Justice Scalia, in concurrence, would have eliminated the safety concern and confined the scope of reasonable searches under *Belton* to only those animated by a search for "evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred."[304]

Similarly, the *Bailey* Court was concerned that upholding Bailey's detention could cause the *Summers* exception to "diverge from its purpose and rationale."[305] Like the *Gant* Court, the *Bailey* Court sensed that police had already achieved "far-reaching authority" in detaining occupants under *Summers* and *Muehler*.[306] Moreover, the *Bailey* Court found that the justifications under *Summers* were not triggered by the circumstances of Bailey's detention.[307] Thus, the Court similarly decided to impose a condition on officers for the detention to be reasonable—they would have to detain the occupant within the immediate vicinity of the premises.[308] Justice Scalia agreed with the condition the majority imposed, but would

298. *Id.* at 457–58.
299. Arizona v. Gant, 556 U.S. 332, 341 (2009).
300. *See id.* at 343 (articulating the broad reading of *Belton* that the Court sought to reject).
301. *Id.*
302. *Id.* at 344–48.
303. *Id.* at 347.
304. *Id.* at 353 (Scalia, J., concurring).
305. Bailey v. United States, 133 S. Ct. 1031, 1038 (2013).
306. *Id.* at 1039.
307. *Id.* at 1041.
308. *Id.* at 1042.

have circumscribed the holding further.[309] Like the *Gant* Court, Justice Scalia stressed in *Bailey* that officers were not entitled to the authority in question and only could use it in very narrow circumstances.[310]

One may ask how the Court will approach the next case involving a detention incident to the execution of a search warrant. Justice Breyer argued in dissent that the *Bailey* Court's line of reasoning could promote uncertainty among the lower courts,[311] uncertainty that could likely trigger a case before the Court on the meaning of "immediate vicinity." Or perhaps the Court will first face another controversy over the manner or duration of a detention under *Summers* and *Muehler*. However *Bailey* arises in a future case before the Supreme Court, the *Bailey* opinion provides valuable insight into how the Court treats Fourth Amendment issues, rules, and exceptions. The Court has demonstrated that it is willing to chisel away at the justifications underlying its exceptions, is attentive in appraising the facts of the case alongside the purported justifications, and is insistent that officers not undertake their roles with the assumption that a search or a detention is a government right. In *Bailey*, the Court was careful to maintain control of an exception to traditional Fourth Amendment rules.

V. CONCLUSION

In *Bailey v. United States*, the Court concluded that a detention under *Summers* could not occur beyond "the immediate vicinity of the premises to be searched" without violating the Fourth Amendment standard of reasonableness.[312] This spatial line nevertheless supplies police with adequate power to detain, power underpinned by a more appropriate justification than that in *Summers*.[313] The Court also communicated this line to lower courts with enough flexibility to ensure that it would not collapse under the particulars of a given case.[314] Justice Scalia assisted lower courts by articulating the proper application and scope of *Summers* to ensure courts do not permit a theory that officers possess a government right to detain incident to the execution of a search warrant; rather, this power to detain is an exceptional grant of narrow authority.[315] The Court in *Bailey*, as it had in *Gant*, focused on ensuring that an exception granting

309. *Id.* at 1043–44 (Scalia, J., concurring).
310. *Id.* at 1044; *see supra* text accompanying note 303.
311. *Bailey*, 133 S. Ct. at 1047 (Breyer, J., dissenting).
312. *Id.* at 1042–43 (majority opinion).
313. *See supra* Part IV.A.
314. *See supra* Part IV.B.
315. *See supra* Part IV.C.

police power was narrow and justified by relevant law enforcement interests.[316]

316. *See supra* Part IV.D.