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Constitutional Law - Faded Lines: Another Attempt to Delineate Reasonableness in Automobile Searches Incident to Arrest; Arizona v. Gant, 129 S. Ct. 1710 (2009)

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CASE NOTE

CONSTITUTIONAL LAW—Faded Lines: Another Attempt to Delineate Reasonableness in Automobile Searches Incident to Arrest; *Arizona v. Gant*, 129 S. Ct. 1710 (2009)

*Devon M. Stiles**

Introduction

On August 25, 1999, Tucson police dispatched two officers to investigate a residence implicated by an anonymous tip as the site of a drug-dealing operation.[1] Upon answering the door, the respondent Rodney Gant identified himself and informed the officers he expected the owner of the household to return later.[2] The officers left and checked Gant's background, discovering he had a suspended driver's license.[3] The officers returned to the residence later and arrested two individuals: one for providing a false name and the other for possession of drug paraphernalia.[4]

Shortly thereafter, another man arrived in a car; the officers recognized the car as belonging to Gant.[5] After Gant exited his vehicle, the police arrested him for driving on a suspended license.[6] After handcuffing Gant, the police placed him in the backseat of a patrol car and called for additional officers to assist at the crime scene.[7] After the additional officers arrived on the scene, the police searched Gant's car.[8] The officers found Gant's jacket on the backseat of his car, searched the pockets of the jacket, found a bag of cocaine, and charged him with possession of a narcotic drug for sale and possession of drug paraphernalia.[9] After Gant's failed attempt to suppress the evidence at trial, his subsequent conviction and numerous appeals, the United States Supreme Court granted Gant's petition for certiorari.[10]

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[1] Arizona v. Gant, 129 S. Ct. 1710, 1714–15 (2009).

[2] *Id.* at 1715.

[3] *Id.*

[4] *Id.*

[5] *Id.*

[6] *Id.*

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Id.*

In a 5 to 4 decision, the *Gant* majority issued two holdings reinterpreting the existing federal cases guiding police practices in automobile searches made incident to arrest, thus creating a new bright-line rule.[11] The first holding served to reinterpret and limit the boundaries set by the seminal case *New York v. Belton*.[12] The second holding adopted Justice Scalia's concurring opinion in *Thornton v. United States* and established a new standard of suspicion to initiate automobile searches incident to arrest.[13]

The two *Gant* holdings represent a radical departure from the past two decades of Fourth Amendment automobile jurisprudence.[14] This case note critiques the two *Gant* holdings as lacking clarity and providing scant guidance to law enforcement.[15] The background section of this note details the history of warrantless searches incident to arrest, focusing on three seminal United States Supreme Court cases involving automobile searches incident to arrest: *Chimel v. California*, *New York v. Belton*, and *Thornton v. United States.*[16] Further, this note outlines the automobile exception to the Fourth Amendment warrant requirement, established in *United States v. Carroll*, *United States v. Ross*, *California v. Acevedo*, and *Wyoming v. Houghton*.[17] Finally, after critiquing the two holdings in *Gant*, this note advocates for a return to the probable cause standard and the adoption of the automobile exception as an alternative to *Gant*'s unclear bright-line rule.[18]

BACKGROUND

The Fourth Amendment to the United States Constitution protects individuals from "unreasonable searches and seizures" and invokes probable cause

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[11] *Id.* at 1716–24.

[12] *See infra* notes 87–90 and accompanying text (outlining the first *Gant* holding).

[13] *See infra* notes 91–93 and accompanying text (outlining the second *Gant* holding).

[14] *See infra* notes 24–59, 105–36 and accompanying text (discussing the history of automobile searches incident to arrest and the effects of the *Gant* ruling).

[15] *See infra* notes 105–36 and accompanying text (discussing the lack of clarity in the two *Gant* holdings).

[16] *See infra* notes 24–59 and accompanying text (outlining the federal bright-line approach to Fourth Amendment challenges involving automobile searches incident to arrest which commence without probable cause).

[17] *See infra* notes 60–73 and accompanying text (explaining the automobile exception to the Fourth Amendment warrant requirement which defines the boundaries of reasonableness in automobile searches commencing with probable cause).

[18] *See infra* notes 114–33 and accompanying text (arguing *Gant*'s lack of clarity provides scant guidance to law enforcement); *infra* notes 137–54 and accompanying text (contending the probable cause automobile exception solves the problems in *Gant* by simultaneously providing broad search authority to police and limiting when law enforcement may commence searches).

as the baseline standard for determining reasonableness.[19] Whether a search is reasonable, however, requires a detailed factual analysis which balances a suspect's privacy interests with the government's need to conduct a search.[20]

The United States Constitution proscribes warrantless searches as per se unreasonable, subject to certain limited exceptions.[21] Searches conducted by police incident to the arrest of a suspect are reasonable under the Fourth Amendment if the searches adhere to a series of bright-line rules.[22] The United States Supreme Court originally created these rules to govern all warrantless searches occurring incident to the arrest of a suspect, then later established a separate set of rules governing searches incident to arrest if the searches specifically targeted the vehicles of suspects.[23]

Searches Incident to Arrest

Nearly a century of jurisprudence defines the boundaries of reasonableness in searches incident to arrest.[24] In the first half of the twentieth century, the Supreme Court defined reasonableness on a case-by-case basis, with no specific rule or test

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[19] *See*, *e.g.*, James J. Tomkovicz, California v. Acevedo: *The Walls Close in on the Warrant Requirement*, 29 AM. CRIM. L. REV. 1103, 1130–31 (1992) (discussing how the framers intended the Fourth Amendment to protect Americans from writs of assistance and general warrants issued in colonial times, which helped push the country toward the American Revolution).

[20] Terry v. Ohio, 392 U.S. 1, 21 (1968) (quoting Camara v. Mun. Court, 387 U.S. 523, 534–37 (1967)).

[21] *Gant*, 129 S. Ct. at 1716 (quoting Katz v. United States, 389 U.S. 347, 357 (1967) ("Searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.")). The Court has adopted numerous exceptions to the warrant requirement: investigative stops; frisks for weapons; stops of cars to check drivers' licenses and registration; customs searches of vehicles and persons at borders; luggage detention; mail detention; special needs searches which make the warrant and probable cause requirements impossible; public school searches; government workplace searches; searches of parolees; searches of businesses in heavily regulated industries; searches of property in government safekeeping; drug testing; hot pursuit; searches incident to arrest; and searches of vehicles with probable cause (the automobile exception). *See* Russell W. Galloway, Jr., *Basic Fourth Amendment Analysis*, 32 SANTA CLARA L. REV. 737, 753–65 (1992).

[22] *See* 3 WAYNE R. LAFAVE, SEARCH AND SEIZURE § 7.1 (4th ed. 2008) (discussing the history of searches incident to arrest).

[23] *Id.*; *see also* Rachel Moran, *Motorists Are People Too: Recalculating the Vehicular Search Incident to Arrest Exception by Prohibiting Searches Incident to Arrest for Nonevidentiary Offenses*, 44 NO. 4 CRIM. L. BULL. ART. 3 (2008) (outlining the history of the search incident to arrest doctrine as applied to vehicles).

[24] *See* 3 LAFAVE, *supra* note 22, § 6.3 (discussing the history of the search incident to arrest exception to the Fourth Amendment); Cecil J. Jones, Jr., Thornton v. United States: *Expanding the Scope of Search Incident to Arrest on America's Roadways*, 30 AM. J. TRIAL ADVOC. 627, 631–38 (2007) (providing an overview of the search incident to arrest exception).

providing guidance.[25] This trend ceased in 1950 with *United States v. Rabinowitz*, which allowed police to search the entire premises surrounding a suspect if the search commenced incident to the suspect's arrest.[26] In 1969, the Court overruled *Rabinowitz* and established the first bright-line rule governing searches incident to arrest in *Chimel v. California*.[27] Under *Chimel*, a search is unreasonable if the police search outside the area in the suspect's "immediate control," defined as the area where the suspect could obtain a weapon or destroy evidence.[28] Whether *Chimel* permitted police to search the interior of a suspect's vehicle incident to an arrest remained unsettled.[29]

The Problem of Vehicles

The Court considered the challenge of defining reasonableness in warrantless automobile searches incident to arrest in *New York v. Belton*.[30] In *Belton*, an officer stopped the defendant's vehicle for a speeding violation.[31] After approaching

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[25] 3 LAFAVE, *supra* note 22, § 6.3; *see also* Stephen A. Saltzburg, *The Fourth Amendment: Internal Revenue Code or Body of Principles?*, 74 GEO. WASH. L. REV. 956, 960–75, 977–83, 988–1001 (2006) (detailing the history of Fourth Amendment jurisprudence).

[26] 3 LAFAVE, *supra* note 22, § 6.3 n.25 (citing Smith v. United States, 254 F.2d 751, 755 (1958)). In *Smith*, police officers searched for drugs upstairs shortly after arresting the defendant downstairs. *Smith*, 254 F.2d at 753. Since the police arrested the defendant downstairs, he could never have gained access to the drugs upstairs or hindered the evidence-gathering process. *Id.* However, in response to the defendant's evidentiary challenge, the court quoted the majority in United States v. Rabinowitz, 339 U.S. 56, 65 (1950):

> [W]e cannot agree that [the requirement of procuring a warrant prior to a search] should be crystallized into a *sine qua non* to the reasonableness of a search. It is fallacious to judge events retrospectively and thus to determine, considering the time element alone, that there was time to procure a search warrant.

Smith, 254 F.2d at 755. The court in *Smith* interpreted this as a rule preventing judges from retrospectively judging the reasonableness of a search incident to arrest. *Id.* at 753–55.

[27] *See* 3 LAFAVE, *supra* note 22, § 6.3 (summarizing Chimel v. California, 395 U.S. 752 (1969)).

[28] *Chimel*, 395 U.S. at 768. The *Chimel* opinion addressed the increasing expansion of the range in which the police could conduct a reasonable search incident to the arrest of a suspect. *Id.* The majority argued once the boundary of reasonableness expands outside the immediate control of the suspect, the distinction essentially becomes an artifice attempting to maintain some semblance of the *Rabinowitz* rationale. *Id.* at 759, 762–66. The Court could thus think of no rational reason for police to search beyond an area where the suspect presented a danger to evidence or officers. *Id.* at 766. After police secured a suspect, they faced little risk in taking the time to obtain a warrant to search the suspect's premises since the suspect no longer presented a threat. *Id.* at 754–56, 763–68.

[29] *See* 3 LAFAVE, *supra* note 22, § 7.1(a) (describing how lower courts would often overlook the immediate control test in *Chimel* if the disputed search involved a vehicle).

[30] New York v. Belton, 453 U.S. 454, 460–61 (1981); *see also* Carol A. Chase, *Cars, Cops, and Crooks: A Reexamination of* Belton *and* Carroll *With an Eye Toward Restoring Fourth Amendment Privacy Protection to Automobiles*, 85 OR. L. REV. 913, 913–18 (2006) (analyzing each opinion in *Belton*).

[31] *Belton*, 453 U.S. at 455.

the car and requesting the driver's license and registration, the officer smelled burnt marijuana emanating from within the car and saw a bag on the floor of the car labeled "Supergold," which the officer associated with marijuana.[32] These circumstances provided the officer with probable cause to believe the occupants of the vehicle illegally possessed marijuana.[33] The officer subsequently arrested the defendant and the other individuals in the defendant's car for possession of marijuana.[34] The officer searched the vehicle after detaining the suspects and discovered the defendant's jacket in the back seat of the car.[35] The officer discovered cocaine in the jacket pocket.[36]

The defendant challenged the constitutionality of the search of his jacket, alleging it commenced without probable cause and thus violated the Fourth Amendment.[37] In its holding, the United States Supreme Court found the search reasonable, extending the *Chimel* immediate control rule to include passenger compartments into which a "recent occupant" of the vehicle had access.[38] *Belton* thus expanded the reasonableness of a search incident to arrest to include the entire car rather than merely the area where a suspect could destroy evidence or harm officers.[39]

In *Thornton v. United States*, the Court expanded the definition of "recent occupant" to include *any* individuals, including passengers, who exited a vehicle prior to detainment by officers.[40] The defendant in *Thornton* cautiously passed an officer while driving a Lincoln Town Car.[41] The officer subsequently checked the car's tags and found they were registered to a different make and model than the defendant's car.[42] The officer pursued, but the defendant parked the car and

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[32] *Id.* at 455–56.

[33] *Id.* at 456.

[34] *Id.*

[35] *Id.*

[36] *Id.*

[37] *Id.*

[38] *Id.* at 460 ("The police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within reach of the arrestee, so also will containers in it be within his reach.").

[39] *See* Barry Kamins, *Automobile Searches: Supreme Court Confesses Error*, N.Y. L.J., Sept. 17, 2009, at 3 (col. 1); Carson Emmons, Comment, Arizona v. Gant*: An Argument for Tossing* Belton *and All Its Bastard Kin*, 36 ARIZ. ST. L.J. 1067, 1078–80 (2004) (discussing *Belton*).

[40] Thornton v. United States, 541 U.S. 615, 623–24 (2004); *see also* George Dery & Michael J. Hernandez, *Turning a Government Search Into a Permanent Power:* Thornton v. United States *and the "Progressive Distortion" of Search Incident to Arrest*, 14 WM. & MARY BILL RTS. J. 677, 689–701 (2005) (discussing and critiquing the Court's opinion in *Thornton*).

[41] *Thornton*, 541 U.S. at 617–18.

[42] *Id.* at 618.

exited the vehicle before the officer stopped him.[43] The defendant appeared nervous and incoherent when the officer confronted him in the parking lot.[44] Upon consenting to a pat down search, which revealed a bulge in his pants, he admitted to possessing narcotics.[45] He then revealed two containers to the officer: one containing three bags of marijuana, and another containing a large amount of crack cocaine.[46] The officer handcuffed the defendant, placed him in the patrol car, and initiated a search of the defendant's car.[47] During the search, the officer discovered a handgun.[48] The jury convicted Thornton of several crimes, including possession of a firearm after having been previously convicted of a felony.[49]

In its ruling, the *Thornton* Court expanded the scope of reasonableness in a search incident to arrest beyond the boundaries defined in *Belton*.[50] Similar to *Belton*, this expansion allowed officers to search anywhere in a vehicle the suspect could have hidden evidence or weapons.[51] However, the rule in *Belton* only addressed searches that commenced incident to the arrest and forcible removal of the defendant from the vehicle.[52] In contrast, the *Thornton* Court expressly rejected an analysis of whether the officer made the arrest outside the vehicle or forcibly removed the suspect from the vehicle prior to initiating the search.[53] This rendered irrelevant the temporal or spatial proximity of the suspect to the vehicle at the time of the search, allowing police to expand the scope of a search incident to arrest to include the suspect's entire vehicle.[54]

Justice Scalia wrote a concurring opinion in *Thornton*, joined by Justice Ginsburg.[55] Justice Scalia believed the *Belton* rule did not require an inquiry into the *Chimel* dual interests of officer safety and the preservation of evidence.[56]

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[43] *Id.*

[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*

[48] *Id.*

[49] *Id.*

[50] *Id.* at 620–21.

[51] *See* Carson, *supra* note 39, at 1069–70 (describing how *Belton* expands the search incident to arrest exception beyond the area of immediate control).

[52] *Belton*, 453 U.S. at 456.

[53] *Thornton*, 541 U.S. at 620–21 ("There is simply no basis to conclude that the span of the area generally within the arrestee's immediate control is determined by whether the arrestee exited the vehicle at the officer's direction, or whether the officer initiated contact with him while he remained in the car.").

[54] *Id.*

[55] *Id.* at 625–32 (Scalia, J., concurring).

[56] *Id.* at 626–28.

Instead, he reasoned the *Belton* rule allowed the type of broad, sweeping searches authorized by *Rabinowitz*.[57] He supported both the *Rabinowitz* and *Chimel* interpretations of the search incident to arrest exception as constitutionally valid, but found the *Thornton* majority's attempts to tether *Belton* to *Chimel* functionally disingenuous, since he found no examples of a defendant who successfully escaped and gained access to a vehicle after detainment.[58] He thus argued a reasonable search incident to arrest commences when officers have reason to believe evidence of the crime of arrest exists in the vehicle at the time of the search.[59]

The Automobile Exception

The Fourth Amendment to the United States Constitution mentions probable cause as a standard of suspicion limiting when courts may issue warrants.[60] Over time, courts have interpreted the language of the Fourth Amendment to render probable cause the baseline standard of suspicion required for reasonableness in warrantless searches.[61] *Belton–Thornton* addressed the scope of reasonableness in a search incident to a suspect's arrest when the searches commenced without probable cause or a warrant.[62] When officers—absent a warrant—have probable cause to believe evidence of a crime exists in a suspect's vehicle, a different set of case law applies, allowing officers to search the entire vehicle and the contents of passenger belongings for evidence of wrongdoing.[63]

The United States Supreme Court in the seminal case *United States v. Carroll* first established the "automobile exception" to the Fourth Amendment warrant requirement allowing warrantless searches of a vehicle when law enforcement

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[57] *Id.* at 629; *see supra* note 26 and accompanying text (discussing *Rabinowitz*).

[58] *Thornton*, 541 U.S. at 625–26 (Scalia, J., concurring).

[59] *Id.* at 630.

[60] U.S. CONST. amend. IV. The Fourth Amendment provides:

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

Id.

[61] *See* United States v. Ross, 456 U.S. 798, 806–09 (1982) (describing the history of the probable cause standard); *see also* Ricardo J. Bascuas, *Property and Probable Cause: The Fourth Amendment's Principled Protection of Privacy*, 60 RUTGERS L. REV. 575, 637–45 (2008) (discussing probable cause as a presumptive standard for searches and seizures).

[62] *See supra* notes 30–59 and accompanying text (discussing the history of the *Belton–Thornton* bright-line approach).

[63] *See infra* notes 64–73 and accompanying text (discussing the cases underpinning the automobile exception).

officers possess probable cause to search sufficient to obtain a warrant.[64] In *United States v. Ross*, the Court expanded the automobile exception to allow searches of the passenger compartments of vehicles.[65] The Court affirmed this expansion in *California v. Acevedo*, holding that a search of a closed container in a vehicle is reasonable when law enforcement officers have probable cause to believe it contains evidence or contraband.[66]

The Court fully expanded the automobile exception in *Wyoming v. Houghton*.[67] In *Houghton*, an officer pulled over a vehicle with a faulty brake light and noticed a hypodermic needle in the driver's front pocket.[68] After leaving the vehicle at the demand of the officer, the driver admitted he used the needle to take drugs.[69] The officer then ordered the two passengers, including Houghton, out of the vehicle.[70] The officer proceeded to search the vehicle and discovered Houghton's purse, in which he discovered a brown pouch containing methamphetamine.[71] The officer also noticed hypodermic needle marks on Houghton's arms and subsequently arrested her for felony possession of methamphetamine.[72] The Court held that when an officer has probable cause to search a suspect's car for contraband, the automobile exception allows the officer to reasonably search any *passenger's* belongings found in the car at the time of the search.[73]

Wyoming's Alternative Approach

When confronted with the dilemma of determining the reasonableness of automobile searches incident to arrest, several states—including Wyoming—have

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[64] United States v. Carroll, 267 U.S. 132, 147, 155–57, 162 (1924) (holding when police possess probable cause to believe evidence of a crime exists in a vehicle, sufficient to procure a warrant, the police may search the vehicle without first obtaining a warrant); *see also* Alex Chan, *No, You May Not Search My Car! Extending* Georgia v. Randolph *to Vehicle Searches*, 82 WASH. L. REV. 377, 384–88 (2007) (outlining the automobile exception to the Fourth Amendment warrant requirement).

[65] *Ross*, 456 U.S. at 825 (holding the automobile exception allows police to search compartments in a vehicle, including the trunk, if the officers have probable cause to believe evidence or contraband is hidden somewhere in the vehicle, since a warrant issued by a court would allow a full search of passenger compartments).

[66] California v. Acevedo, 500 U.S. 565, 579–80 (1991) (determining a warrantless search commencing with probable cause may extend to closed containers capable of concealing evidence or contraband).

[67] *Houghton*, 526 U.S. at 298.

[68] *Id.*

[69] *Id.*

[70] *Id.*

[71] *Id.*

[72] *Id.*

[73] *Id.* at 307.

chosen to adopt approaches different from the *Belton–Thornton* rule.[74] Article 1, § 4 of the Wyoming Constitution contains a provision similar to the Fourth Amendment which protects citizens from unreasonable searches and seizures.[75] In Wyoming, defendants often challenge the reasonableness of automobile searches incident to arrest under both Article 1, § 4 of the Wyoming Constitution and the Fourth Amendment to the United States Constitution.[76] Challenges made under the Wyoming Constitution adhere to a factor-based "reasonable under all the circumstances" approach created in a series of Wyoming Supreme Court cases.[77] However, any challenges made under the Fourth Amendment must now adhere to *Gant* rather than *Belton*.[78]

PRINCIPAL CASE

After leaving the alleged drug house, police officers discovered Gant's suspended license after a check of police records.[79] When they returned later, Gant arrived in his car, after which the police arrested him for driving on a suspended license.[80] After handcuffing and securing him in a police car, the officers searched his vehicle incident to his arrest.[81] The officers found Gant's jacket on the back seat and discovered cocaine in the jacket pocket.[82] The state charged Gant

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[74] *Gant*, 129 S. Ct. at 1718 n.8 (referencing all relevant case law from the states which decided to repudiate *Belton–Thornton* in favor of alternative approaches).

[75] WYO. CONST. art. 1, § 4. The Wyoming Constitution provides:

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

Id.

[76] *See, e.g.,* Holman v. State, 183 P.3d 368, 371–72, 380–82 (Wyo. 2008); Pierce v. State, 171 P.3d 525, 529, 531–32 (Wyo. 2007); Vasquez v. State, 990 P.2d 476, 481–83 (Wyo. 1999) (challenging the reasonableness of searches under both Article 1, § 4 of the Wyoming Constitution and the Fourth Amendment to the United States Constitution).

[77] *See* Kenneth Decock & Erin Mercer, Comment, *Balancing the Scales of Justice: How Will* Vasquez v. State *Affect Vehicle Searches Incident to Arrest in Wyoming*, 1 WYO. L. REV. 139 (2001) (investigating how *Vasquez* rejected the federal bright-line approach in favor of a factor-based "reasonable under all of the circumstances" analysis); Maryt L. Fredrickson, Note, *Recent Developments in Wyoming's Reasonableness Requirement Applied to the Search Incident to Arrest Exception*, 9 WYO. L. REV. 195 (2009) (analyzing how several cases have shaped the Wyoming definition of reasonableness); Mervin Mecklenberg, Comment, *Fixing* O'Boyle v. State*—Traffic Detentions under Wyoming's Emerging Search-and-Seizure Standard*, 7 WYO. L. REV. 69 (2007) (examining one of the earliest decisions applying Wyoming's "reasonable under all the circumstances" approach); .

[78] *See infra* notes 87–93 and accompanying text (outlining the separate holdings of *Gant*).

[79] Arizona v. Gant, 129 S. Ct. 1710, 1714–15 (2009).

[80] *Id.*

[81] *Id.*

[82] *Id.*

with two offenses: possession of a narcotic drug for sale and possession of drug paraphernalia.[83] Gant moved to suppress the evidence.[84] The trial judge denied Gant's motion, and the jury convicted Gant of both offenses.[85] After a lengthy set of appeals, the United States Supreme Court granted certiorari.[86]

Majority Opinion

Justice Stevens wrote the majority opinion, joined by Justices Ginsburg, Souter, Thomas, and Scalia.[87] Justice Scalia issued a separate concurring opinion critiquing the majority's reasoning, but joined the majority to avoid creating a plurality opinion.[88] In its first holding, the majority rejected broad State readings of *Belton* as unconstitutionally expanding the search incident to arrest exception to establish an automatic authorization of all searches of a suspect's vehicle.[89] Accordingly, the Court retethered *Belton* to the *Chimel* doctrine, rendering a warrantless automobile search incident to arrest reasonable when the suspect is

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[83] *Id.*; ARIZ. REV. STAT. ANN. § 13-3408 (2009) (possession of a narcotic drug for sale); ARIZ. REV. STAT. ANN § 13-3415(A) (2009) (possession of drug paraphernalia).

[84] *See* Defendant's Motion to Suppress at 1, State v. Gant, No. CR-20000042 (Ariz. Super. Ct. Apr. 26, 2000), 2000 WL 34566317 (arguing the police conducted an unreasonable search incident to arrest pursuant to *Chimel* since police had secured Gant in a police car prior to commencing the search); Response to Defendant's Motion to Suppress at 1, State v. Gant, No. CR-20000042 (Ariz. Super. Ct. May 18, 2000), 2000 WL 34566316 (contending *Belton* authorized the search automatically since it commenced incident to Gant's arrest).

[85] *Gant*, 129 S. Ct. at 1715; *see also* Minute Entry at 1, State v. Gant, No. CR-20000042 (Ariz. Super. Ct. June 5, 2000), 2000 WL 35630010 (denying Gant's motion to suppress).

[86] *See*, *e.g.*, State v. Gant (*Gant I*), 43 P.3d 188, 194 (Ariz. Ct. App. 2002) (determining police unreasonably searched Gant's vehicle because he presented no threat to either the police or to the evidence in the vehicle, and the police should thus have obtained a warrant prior to initiating the search); State v. Gant (*Gant II*), 162 P.3d 640, 642 (Ariz. 2007) (holding the police search unreasonable under the Fourth Amendment).

[87] *Gant*, 129 S. Ct. at 1713–14.

[88] *Id.* at 1724–25 (Scalia, J., concurring). Although Justice Scalia did not agree with the majority's reasoning, he chose to join with the majority opinion to prevent the confusion of a 4 to 1 to 4 split decision:

> It seems to me unacceptable for the Court to come forth with a 4-to-1-to-4 opinion that leaves the governing rule uncertain. I am therefore confronted with the choice of either leaving the current understanding of *Belton* and *Thornton* in effect, or acceding to what seems to me the artificial narrowing of those cases adopted by Justice Stevens. The latter, as I have said, does not provide the degree of certainty I think desirable in this field; but the former opens the field to what I think are plainly unconstitutional searches—which is the greater evil. I therefore join the opinion of the Court.

Id. at 1725; s*ee also infra* notes 94–97 and accompanying text (discussing Justice Scalia's concurring opinion in *Gant*).

[89] *Gant*, 129 S. Ct. at 1719–20.

"unsecured" and could gain access to the passenger compartment of the vehicle and destroy evidence or brandish a weapon.[90]

In its second holding, the majority extended *Gant* beyond the *Chimel* doctrine by adopting Justice Scalia's concurrence in *Thornton*.[91] In addition to the dual interests of protecting officers and the integrity of evidence articulated in *Chimel*, a reasonable search incident to arrest includes a warrantless search commenced when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[92] The Court thus held the search of Gant's car unreasonable not only because Gant could not have destroyed evidence or wielded a weapon, but also because the police could not have reasonably believed evidence related to Gant's crime of arrest—driving on a suspended license—was located in the car at the time of the search.[93]

Justice Scalia's Concurring Opinion

Justice Scalia wrote a concurring opinion in which he agreed with the judgment but critiqued the majority's reasoning.[94] He argued the majority maintained needless ties to *Belton* by retethering *Belton* to *Chimel*, thus requiring a suspect to present a risk to evidence or officers to invoke the rule.[95] As an alternative to *Belton–Thornton*, Justice Scalia proposed a partial return to probable cause, which renders the *Chimel* analysis of a suspect's spatial proximity to the vehicle or potential threat to evidence or officers moot.[96] Under Justice Scalia's proposed alternative, while officers could still commence a warrantless search of the suspect's vehicle for evidence of the crime of arrest, they would need probable cause to search for evidence of other crimes.[97]

Justice Alito's Dissenting Opinion

Justice Alito wrote for the dissent, joined by Justice Kennedy and Chief Justice Roberts, with Justice Breyer joining in part.[98] Justice Alito criticized the majority on multiple points, focusing on the majority's critique of *Belton*.[99] He argued

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[90] *Id.*

[91] *Id.*

[92] *Id.* (quoting *Thornton*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

[93] *Id.* ("Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case.").

[94] *Id.* at 1724–25 (Scalia, J., concurring).

[95] *Id.*

[96] *Id.*

[97] *Id.* at 1725.

[98] *Id.* at 1726–32 (Alito, J., dissenting).

[99] *Id.* at 1727.

the majority in *Belton* meant solely to establish a bright-line rule allowing police to search the passenger compartments of a suspect's vehicle after every arrest.[100] Moreover, Justice Alito contended the majority's adoption of Justice Scalia's concurring opinion in *Thornton* with little explanation will result in confusion as to what constitutes reasonableness.[101]

Justice Breyer's Dissenting Opinion

Justice Breyer wrote a separate dissenting opinion.[102] According to Justice Breyer, Gant failed to reach the burden necessary to overcome the presumption of stare decisis and persuade the Court to overrule *Belton*.[103] His opinion, however, separated him from Justice Alito's critique with respect to whether the *Gant* majority's reasoning was flawed; he chose instead not to address the *Gant* majority's reasoning.[104]

ANALYSIS

The rule in *Arizona v. Gant* is another in a long line of attempts to delineate reasonableness in automobile searches incident to arrest through the use of bright-line rules.[105] With each iteration of a bright-line rule, however, the particular circumstances surrounding each disputed search have required the Court to stretch each bright-line rule to accommodate factually complicated challenges.[106] The Court in *Thornton* ultimately stretched the bright-line approach to the point where law enforcement gained an entitlement allowing broad searches of vehicles with neither probable cause nor a warrant.[107] The Court in *Gant* attempted to preserve the bright-line approach while addressing unconstitutionally broad

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[100] *Id.*

[101] *Id.*

[102] *Id.* at 1725–26 (Breyer, J., dissenting).

[103] *Id.*

[104] *Id.*

[105] 129 S. Ct. 1710, 1718–20 (2009); *see also supra* notes 20–59, 79–104 and accompanying text (describing the history of the bright-line approach from its inception to the current ruling in *Gant*).

[106] New York v. Belton, 453 U.S. 454, 460–61 (1981); *see also supra* notes 30–59 and accompanying text (discussing the expansion of the bright-line rule).

[107] Thornton v. United States, 541 U.S. 615, 620–21, 623–24 (2004); *see also* Carol S. Steiker, *Second Thoughts About First Principles*, 107 HARV. L. REV. 820, 825 (1994) (acknowledging the widely fluctuating level of Fourth Amendment protection offered by the United States Supreme Court).

readings of *Belton–Thornton*, but instead created a two-part rule that frustrated the purposes for which *Belton–Thornton* was originally adopted: clarity and guidance for law enforcement.[108]

Applying *Gant* in practice will present numerous problems.[109] In the first holding, the majority retethered *Belton* to the *Chimel* dual interests of protecting officer safety and the integrity of evidence.[110] Lower courts never fully defined *Chimel* as applied to vehicles, and now courts must face the same issue.[111] In the second holding, recognizing the diminished expectation of privacy in vehicles, the Court imposed the "reason to believe" standard.[112] The Court has never fully defined reason to believe: some courts have defined it as probable cause, and other courts have defined it as some lesser standard than probable cause.[113]

Neither Holding Provides Clarity

In its first holding, the *Gant* majority retethered the *Belton* rule to the *Chimel* immediate control test by limiting searches of vehicles incident to arrest to areas within which a defendant could reach to access a weapon or destroy evidence.[114] The majority modified *Belton*, however, without first clarifying the required level of spatial proximity between a defendant and a vehicle necessary to trigger the rule.[115] Instead, the holding stated a suspect must be "unsecured" and capable of

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[108] *See infra* notes 114–33 and accompanying text (arguing the Court in *Gant* established a new bright-line test which lacks clarity and does not guide law enforcement as to the boundaries of reasonableness in automobile searches incident to arrest).

[109] *See infra* notes 110–13 and accompanying text (asserting *Gant* will prove difficult for practitioners to apply).

[110] *Gant*, 129 S. Ct. at 1719–20.

[111] *See* Wayne R. LaFave, *The Fourth Amendment in an Imperfect World: On Drawing 'Bright Lines' and 'Good Faith*,*'* 43 U. PITT. L. REV. 307, 330 (1982) (discussing the *Belton* majority's assertion that the bright-line approach arose from a lack of a clear definition of *Chimel* as applied to vehicles); *infra* notes 114–18 and accompanying text (contending the first *Gant* holding remains unclear until further litigation resolves the *Chimel* definition of "immediate control" as applied to automobiles).

[112] *Gant*, 129 S. Ct. at 1719–20.

[113] *See The Supreme Court 2008 Term—Leading Cases*, 123 HARV. L. REV. 172, 181–82 (2009) (noting neither Justice Scalia in *Thornton* nor the *Gant* majority defined the reason to believe standard); *infra* notes 124–28 and accompanying text (critiquing the reason to believe standard and outlining numerous cases utilizing different definitions of reason to believe).

[114] *Gant*, 129 S. Ct. at 1719 ("Accordingly, we reject [the State's] reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."); *see also* Chimel v. California, 395 U.S. 752, 768 (1969).

[115] *See* Carson, *supra* note 39, at 1087–88 (describing the lack of a clear definition of the required level of temporal or spatial proximity to trigger the *Belton–Thornton* rule); *infra* notes 116–18 and accompanying text (describing the lack of clarity in the first *Gant* holding).

physically reaching into the vehicle to destroy evidence or brandish a weapon.[116] Courts have never fully defined the level of spatial proximity necessary to satisfy the immediate control test.[117] Though *Gant* may serve to constrict readings of *Belton* that allowed law enforcement complete access to a vehicle incident to an arrest, the lack of a precise definition of necessary spatial proximity provides little guidance to law enforcement.[118]

When the *Gant* majority adopted Justice Scalia's concurring opinion in *Thornton* as the second *Gant* holding, it did so without sufficiently explaining its potential effects on evidentiary offenses.[119] The concurring opinion in *Thornton* addressed the admissibility of evidence obtained by a warrantless search incident to arrest which commenced after the discovery of evidence in a separate, lawful search of the defendant's clothing.[120] In contrast, the police arrested Gant for a non-evidentiary offense, which Justice Scalia's concurring opinion in *Thornton* did not specifically discuss.[121] Rather than address evidentiary concerns, the *Gant* majority applied the *Thornton* concurring opinion by concluding officers did not have reason to believe they could find evidence of Gant's crime in his car, as the crime—driving on a suspended license—required no further evidence

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

[117] *See* Myron Moskowitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WIS. L. REV. 657, 657–58, 661, 667–78 (2002) (concluding the *Chimel* bright-line rule fails to recognize the complex factual realities of searches, and as such is difficult to clarify).

[118] *See* Albert W. Aschuler, *Bright Line Fever and the Fourth Amendment*, 45 U. PITT. L. REV. 227, 274 (1984) (noting the *Belton* bright-line rule arose because the United States Supreme Court believed lower courts never resolved how to apply the *Chimel* immediate control test to vehicles); Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia's Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law,* 82 TUL. L. REV. 77, 96–97 (2007) (discussing how *Belton* arose from the lack of a clear definition of *Chimel* as applied to vehicles).

[119] *Gant*, 129 S. Ct. at 1719; *see also* Brief Amicus Curiae of the ACLU and the ACLU of Arizona in Support of Respondent at 21-22, *Gant*, 129 S. Ct. 1710 (No. 07-542) (arguing against the adoption of an evidentiary rule to resolve the issues presented by Gant's non-evidentiary offense); Mark M. Neil, *The Impact of* Arizona v. Gant*: Limiting the Scope of Automobile Searches?*, PROSECUTOR, June 2009, at 38 (opining about the potential situations in which the *Gant* rule may or may not limit automobile searches); *infra* notes 120–28 and accompanying text (discussing the lack of clarity in the second *Gant* holding).

[120] *Gant*, 129 S. Ct. at 1718–19.

[121] *Id.* at 1712. The police arrested Gant for driving on a suspended license, which is a non-evidentiary offense because it only requires evidence of a suspect driving a vehicle while possessing a suspended license. *See* ARIZ. REV. STAT. ANN. § 28-3473 (2008); State v. Brown, 986 P.2d 239, 241 (Ariz. Ct. App. 1999) (describing the elements of driving on a suspended license). The police could not have discovered any further evidence of driving on a suspended license in Gant's car, since evidence of the suspended license existed intangibly in police records, wholly apart from Gant's car. *Gant*, 129 S. Ct. at 1718–19. In contrast, the police arrested Thornton for felony possession of cocaine, which is an evidentiary offense because it requires tangible evidence of cocaine in the

to prove its commission.[122] The *Gant* majority's application of Justice Scalia's concurring opinion in *Thornton* to Gant's case failed to address the finer nuances of evidentiary arrests, such as how officers may demonstrate the reason to believe standard based on the evidence discovered through a prior lawful search.[123]

Furthermore, the *Gant* majority adopted the unclear reason to believe standard from Justice Scalia's concurring opinion in *Thornton* without providing sufficient clarification.[124] Justice Scalia's concurring opinion in *Thornton* allows officers to conduct a warrantless search of the suspect's vehicle incident to arrest of the suspect when they have reason to believe the suspect's car contains evidence of the crime of arrest.[125] Justice Scalia in *Thornton* did not define reason to believe.[126] Since the *Gant* majority also failed to define the meaning of reason to believe, the standard remains unclear: some courts have defined reason to believe as probable cause, and some courts have defined it as some lesser standard.[127] Clarifying the precise definition of the reason to believe standard will thus require further litigation.[128]

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defendant's possession. *Thornton*, 541 U.S. at 631–32; *see also* 21 U.S.C. § 841(a)(1) (2006); United States v. Cordoba-Murgas, 422 F.3d 65, 68–69 (2d Cir. 2005) (discussing how the quantity of drugs possessed is an important element of the offense of felony possession of cocaine, which thus requires evidence of the possession of the cocaine to demonstrate).

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

[123] Brief of the ACLU, *supra* note 119, at 25; *infra* notes 124–28 and accompanying text (discussing the lack of clarity in the reason to believe standard).

[124] *See infra* notes 125–28 and accompanying text (discussing the reason to believe standard).

[125] *Thornton*, 541 U.S. at 630–32; *see also* David S. Rudstein, Belton *Redux: Reevaluating* Belton*'s Per Se Rule Governing the Search of an Automobile Incident to an Arrest*, 40 WAKE FOREST L. REV. 1287, 1344–45 (2005). Professor Rudstein reads the reason to believe standard in Justice Scalia's concurring opinion in *Thornton* as a "less-than-probable-cause" standard. *Id. But see infra* notes 127–28 and accompanying text (discussing conflicting definitions of reason to believe).

[126] *Thornton*, 541 U.S. at 630–32. Justice Scalia did not explicitly define reason to believe, but quoted a criminal procedure treatise published in 1872 which described reason to believe as a justification for officers to search an arrestee. *Id.* at 630 (quoting 1 J. BISHOP, CRIMINAL PROCEDURE § 211, at 127 (2d ed. 1872)).

[127] *Gant*, 129 S. Ct. at 1720 (adopting Justice Scalia's concurring opinion in *Thornton* without defining reason to believe); *see*, *e.g.*, Maryland v. Pringle, 540 U.S. 366, 371 (2003) (referring to probable cause as a "reasonable ground for belief"); Illinois v. Gates, 462 U.S. 213, 233 n.7 (1983) (citing Ker v. California, 374 U.S. 23, 36 (1963) (finding probable cause to search based on a reasonable belief Ker was in possession of marijuana)); Matthew A. Edwards, *Posner's Pragmatism and* Payton *Home Arrests*, 77 WASH. L. REV. 299, 362 (2002) (explaining how some commentators, model procedural codes and legal institutes equate "reasonable cause to believe" and probable cause). *But see*, *e.g.*, California v. Carney, 471 U.S. 386, 391–92, 394–95 (1982) (discussing how the presence of probable cause to search vehicles would trigger the automobile exception); United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995) (applying "reasonable belief" as a lesser standard than probable cause); United States v. Route, 104 F.3d 59, 62 (N.D. Tex. 1997) (interpreting both standards as separate and distinct).

[128] *See Gant*, 129 S. Ct. at 1719; *Thornton*, 541 U.S. at 631–32 (describing a suspect's reduced privacy interest in his vehicle, and thus the lower degree of suspicion required to initiate a search); *see also*, *e.g.*, United States v. Kellam, 568 F.3d 125, 136 n.15 (4th Cir. 2009) (referencing an

In addition, the *Gant* rule fails to protect privacy interests.[129] The majority in *Gant* held the "circumstances unique to the vehicle context" justified the adoption of Justice Scalia's concurring opinion in *Thornton*, which likely refers to the lesser privacy interest afforded to vehicles due to their mobile and public nature.[130] However, searches of suspects' vehicles must adhere to the constitutional protection of even reduced expectations of privacy.[131] The *Belton–Thornton* bright-line approach resulted in no protection of privacy interests.[132] *Gant* lacks a precise, clear definition; it therefore provides scant guidance to law enforcement and will prove incapable of protecting privacy rights until further litigation defines the unclear terms in both holdings.[133]

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officer's probable cause to search to distinguish the *Gant* reason to believe standard); People v. Osborne, 96 Cal. Rptr. 3d 696, 705 (Cal. Ct. App. 2009) (applying the *Gant* reason to believe standard by referring to a separate search of the defendant's clothing). *But see*, *e.g.*, James J. Franklin, Payton*'s Probable Cause: Why Probable Cause and "Reason to Believe" Represent and Should Represent the Same Reasonableness Standard,* 70 U. PITT. L. REV 487, 489–98 (2009) (arguing probable cause and reason to believe function as the same standard); Michael A. Rabasa, Comment, Payton v. New York*: Is "Reason to Believe" Probable Cause or a Lesser Standard?*, 5 SETON HALL CIR. REV. 437, 441–50 (2009) (discussing conflicting definitions of reason to believe as applied to Fourth Amendment analyses of arrests); *supra* note 127 and accompanying text (describing the lack of clarity in the definition of reason to believe).

[129] *See infra* notes 130–33 and accompanying text (contending the *Gant* rule will not adequately protect privacy interests in automobiles).

[130] *Thornton*, 541 U.S. at 631–32; *see also* Wyoming v. Houghton, 526 U.S. 295, 298–99 (1999) (determining passengers in vehicles have reduced privacy interests while in vehicles); *Carney*, 471 U.S. at 391–92 (referencing the public nature of vehicles and the heavy regulation of vehicular travel as justifications for a reduced expectation of privacy in vehicles); Gerald A. Ashdown, *The Blueing of America: The Bridge Between the War on Drugs and the War on Terrorism*, 67 U. PITT. L. REV. 753, 766–68 (2006) (discussing the lesser privacy interests afforded to defendants in vehicles).

[131] *See Gant*, 129 S. Ct. at 1720 (stating searches of vehicles must respect even reduced privacy interests); Knowles v. Iowa, 525 U.S. 113, 117, 119 (1998) (finding circumstances surrounding a search of a vehicle incident to arrest must fall into well-defined exceptions to justify invading a defendant's implicit privacy interests).

[132] *See* Peter W. Fenton, *Search & Seizure Commentary*, CHAMPION, July 2009, at 51 (drawing a parallel between the *Belton–Thornton* bright-line approach and older British general warrants which allowed for broad, sweeping invasions of privacy).

[133] *See Gant*, 129 S. Ct. at 1716, 1719 (adopting the *Chimel* immediate control test and Justice Scalia's concurring opinion in *Thornton*); Aschuler, *supra* note 118, at 274 (discussing how the Court has never fully defined the *Chimel* immediate control test); Kit Kinports, *Diminishing Probable Cause and Minimalist Searches*, 6 OH. ST. J. CRIM. L. 649, 651 (2009) (criticizing Justice Scalia's concurring opinion in *Thornton*); Dale Anderson & Hon. Dave Cole, *Search & Seizure After* Arizona v. Gant, ARIZ. ATT'Y, Oct. 2009, at 15–18 (pontificating about numerous issues which parties must litigate to clarify both *Gant* holdings); *supra* notes 114–33 and accompanying text (outlining the lack of clarity in both *Gant* holdings and the need for further litigation to define ambiguous terms).

The two *Gant* holdings rely on unclear reasoning.[134] By retethering *Belton* to the *Chimel* dual interests of officer safety and evidence preservation, the first holding resurrected the immediate control test, which courts have never fully defined in the context of automobiles.[135] In the second holding, the majority arbitrarily adopted the reason to believe standard of suspicion without explaining the definition of the standard or how it applies.[136]

Probable Cause Solves the Issues

For decades, courts addressed searches of vehicles with two separate standards, depending upon whether officers arrested suspects prior to initiating searches or officers possessed probable cause to search.[137] The automobile search incident to arrest doctrine began as a doctrine meant to simplify the application of *Chimel* to vehicles, but has now resulted in *Gant*—a confusing two-part rule requiring further litigation to clarify.[138] Courts must instead cease the use of two separate standards and adopt probable cause—thereby triggering the automobile exception—as the sole standard for automobile searches in all situations.[139]

Probable cause operates as a simple, straightforward standard, defined by decades of case law.[140] With few exceptions, probable cause governs all searches,

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[134] *See supra* notes 114–33 and accompanying text (critiquing the two *Gant* holdings).

[135] *See* LaFave, *supra* note 111, at 330 (discussing how the United States Supreme Court decided *Belton* based on a belief that lower courts never defined *Chimel* as applied to vehicles); *supra* notes 114–18 and accompanying text (discussing how courts have never fully defined the immediate control test).

[136] *See*, *e.g.*, Kinports, *supra* note 133, at 651 (arguing Justice Scalia's concurring opinion in *Thornton* lacks clarity); Rudstein, *supra* note 125, at 1344–45 (critiquing Justice Scalia's concurring opinion in *Thornton*); *supra* notes 114–33 and accompanying text (arguing both *Gant* holdings provide scant guidance to law enforcement).

[137] *Compare Gant*, 129 S. Ct. at 1720–22 (limiting *Belton* solely to areas in which an unsecured suspect could grab weapons or destroy evidence, as well as allowing searches of vehicles incident to arrest when officers have reason to believe evidence of the crime of the arrest exists in the vehicle) *and Thornton*, 541 U.S. at 620–21 (expanding *Belton* to allow searches of entire vehicles regardless of the suspect's proximity to the vehicle) *and Belton*, 453 U.S. at 460–61 (creating the first bright-line rule allowing searches of areas into which a "recent occupant" of a vehicle could reach) *with Houghton*, 526 U.S. at 298 (allowing officers who have probable cause to believe evidence exists in the vehicle to search the entire vehicle—including the belongings of all passengers—without further restrictions on where in the vehicle they may search).

[138] *See supra* notes 60–77 and accompanying text (outlining the history of the automobile search incident to arrest doctrine); *supra* notes 114–36 and accompanying text (critiquing both holdings in *Gant*).

[139] *See infra* notes 140–54 and accompanying text (advocating for the adoption of probable cause and the automobile exception as the alternative to *Gant*).

[140] *See infra* notes 141–47 and accompanying text (arguing probable cause operates as a straightforward standard, as opposed to the search incident to arrest doctrine, which remains vague).

regardless of whether the search targets a person, home, or vehicle.[141] It serves as the definitive standard when balancing a suspect's expectation of privacy and the interests of law enforcement.[142] An extensive number of cases fully inform law enforcement of the nature of probable cause and its application to automobile searches.[143] When law enforcement officers possess probable cause to search a vehicle, they satisfy the traditional constitutional standard to initiate searches, and can thus commence a presumably reasonable search.[144] Courts determine probable cause by analyzing the totality of the circumstances surrounding a search from the objective position of a reasonable law enforcement official at the time of the arrest.[145] This test is flexible because courts must analyze each challenge separately based on the facts of each individual search.[146] In contrast, the federal bright-line approach has proven incapable of addressing the factual intricacies of Fourth Amendment challenges, leading courts to adopt unconstitutionally broad or vague standards entitling law enforcement to search vehicles with little to no required level of suspicion.[147]

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[141] Arizona v. Hicks, 480 U.S. 321, 329 (1987) (referring to probable cause as the "textual and traditional standard" for searches); Brief of the ACLU, *supra* note 119, at 25.

[142] *See* Chambers v. Maroney, 399 U.S. 42, 51 (1970) (referring to probable cause as the "minimum requirement" for a constitutional, reasonable search); 68 AM. JUR. 2D *Searches and Seizures* § 11 (2009) (detailing probable cause).

[143] *See, e.g.*, *Houghton*, 526 U.S. at 306–07 (holding when law enforcement has probable cause to search a suspect's vehicle for evidence, they may reasonably search all compartments and the contents of passenger belongings in the vehicle); United States v. Ross, 456 U.S. 798, 825 (1982) (expanding the automobile exception to the Fourth Amendment warrant requirement to allow searches of vehicles and vehicular compartments without a warrant if officers have probable cause sufficient to obtain a warrant at the time of the search); *see also* 2 LAFAVE, *supra* note 22, § 3.2 (outlining numerous cases which define probable cause historically and practically, as well as how to demonstrate probable cause existed at the time of a search).

[144] *See* Whren v. United States, 517 U.S. 806, 818–19 (1996) (holding searches and seizures are presumed reasonable when police have probable cause); *see also, e.g.*, United States v. Coleman, 458 F.3d 453, 458 (6th Cir. 2006) (holding a search reasonable under *Whren* since the officers had probable cause to search); United States v. Tovar-Valdivia, 193 F.3d 1025, 1028 (8th Cir. 1999) (referring to *Whren* when determining an officer did not have probable cause and thus did not commence a reasonable seizure).

[145] *See Gates*, 462 U.S. at 233 (determining probable cause operates as a "totality of the circumstances" inquiry); Lawrence Rosenthal, *Probability, Probable Cause, and the Law of Unintended Consequences*, 87 TEX. L. REV. SEE ALSO 63, 63–66 (2009), http://www.texaslrev.com/sites/default/files/seealso/vol87/pdf/87TexasLRevSeeAlso63.pdf (discussing the probable cause standard).

[146] *See Gates*, 462 U.S. at 233 (establishing the fact-based "totality of the circumstances" approach to determining probable cause); Brinegar v. United States, 338 U.S. 170, 175 (1949) ("In dealing with probable cause, however, as the very name implies, we deal with probabilities. These are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act."); *The Warrant Requirement*, 38 GEO. L.J. ANN. REV. CRIM. PROC. 21, 23 n.59 (2009) (discussing the *Gates* "totality of the circumstances" approach to probable cause).

[147] *See Thornton*, 541 U.S. at 620–21 (expanding the *Belton* "recent occupant" test to allow searches to commence after suspects exited vehicles of their own volition, resulting in carte blanche access to search the suspect's entire vehicle incident to arrest); *Belton*, 453 U.S. at 460–61 (expanding the *Chimel* immediate control test to include passenger areas into which "recent occupants" of a

Adopting the automobile exception as the alternative to *Gant* simultaneously protects privacy interests while enabling law enforcement total access to vehicles, without the need for further litigation.[148] When searches of vehicles commence with probable cause, numerous cases define the boundaries of reasonableness.[149] The probable cause automobile exception explicated in *Ross–Acevedo–Houghton* addresses the problems in *Gant* by allowing thorough searches of vehicles while simultaneously recognizing and protecting a suspect's privacy interests.[150] After circumstances surrounding the search give rise to probable cause, *Houghton* allows law enforcement to search the suspect's entire vehicle, including closed compartments and the contents of passenger belongings.[151] Since *Houghton* allows officers possessing probable cause total access to a vehicle under the automobile exception, law enforcement requires no further litigation to understand the boundaries of reasonableness after commencing the search.[152] *Gant* cannot currently protect privacy interests, however, since the two holdings remain unclear and require further litigation to clarify.[153] Adopting probable cause through the automobile exception as the sole standard for automobile searches thus simultaneously protects the privacy interests of suspects while enabling law enforcement to thoroughly search for evidence.[154]

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vehicle could reach); *Chimel*, 395 U.S. at 768 (limiting the area of a search incident to arrest to the area solely within the immediate control of the suspect in order to protect officers from hidden weapons and prevent the destruction of evidence).

[148] *See infra* notes 149–54 and accompanying text (contending courts must adopt the automobile exception to protect privacy interests).

[149] *See supra* notes 140–46 and accompanying text (explaining probable cause).

[150] *See* Brief of the ACLU, *supra* note 119, at 19–20 (arguing the Fourth Amendment requires the government to have probable cause to justifiably infringe on a suspect's privacy interests); Donald A. Dripps, *The Fourth Amendment and the Fallacy of Composition: Determinacy Versus Legitimacy in a Regime of Bright-Line Rules*, 74 MISS. L.J. 341, 381–84, 406–07 (2004) (discussing the high degree of suspicion required to search under the automobile exception, and how the search incident to arrest exception erodes the privacy protections offered by probable cause); *infra* notes 151–54 and accompanying text (discussing the thorough searches allowed under *Houghton*).

[151] *See Houghton*, 526 U.S. at 298 (holding the automobile exception allows law enforcement to search the belongings of passengers); California v. Acevedo, 500 U.S. 565, 579–80 (1991) (expanding the automobile exception to include closed passenger compartments capable of concealing contraband); *Ross*, 456 U.S. at 825 (holding the automobile exception allows officers who possess sufficient probable cause to obtain a warrant may search an entire vehicle including the trunk since a warrant would authorize the search of those areas).

[152] *See* Michele M. Jochner, *Recent U.S. Supreme Court Fourth Amendment Rulings Expand Police Discretion*, 88 ILL. B.J. 576, 580–81 (2000) (noting *Houghton* expands police discretion to search passenger belongings, but remains limited by probable cause); Walter M. Hudson, *A Few New Developments in the Fourth Amendment*, ARMY LAW., Apr. 1999, at 39 (discussing how *Houghton* authorizes meticulous searches while still remaining restricted by probable cause).

[153] *See supra* notes 114–33 and accompanying text (discussing the lack of clarity in the *Chimel* immediate control test and the unclear definition of the reason to believe standard in Justice Scalia's concurring opinion in *Thornton*).

[154] *See* United States v. Carroll, 267 U.S. 132, 147, 155–57, 162 (1924) (establishing the automobile exception to the Fourth Amendment warrant requirement, but maintaining probable

CONCLUSION

In the first *Gant* holding, the majority retethered *Belton* to the *Chimel* dual interests of officer safety and evidence preservation.[155] In the second *Gant* holding, the majority extended the rule beyond *Chimel* by allowing searches to commence if officers have reason to believe evidence of the crime of the arrest exists in the vehicle at the time of the search.[156] The Court has never fully defined *Chimel* as applied to vehicles.[157] The Court also adopted the reason to believe standard without explaining its precise definition.[158] By doing so, the *Gant* ruling fails to protect privacy interests since clarifying both holdings requires further litigation.[159] As an alternative, the automobile exception explicated in *Ross–Acevedo–Houghton* solves the problems in *Gant* by protecting privacy interests while simultaneously providing total guidance to law enforcement.[160] When officers possess probable cause that evidence exists in a suspect's vehicle, they may search the entire vehicle, including all compartments and the contents of passenger belongings.[161] While the automobile exception allows for thorough searches, it remains limited by probable cause, which properly balances privacy interests with the government's need to search.[162] Since *Gant* fails to protect privacy interests, courts must protect these interests by adopting the automobile exception as the sole standard for automobile searches.[163]

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cause as the required level of suspicion); Davis A. Harris, *Car Wars: The Fourth Amendment's Death on the Highway*, 66 GEO. WASH. L. REV. 556, 565–70 (1998) (discussing the automobile exception, which commences with probable cause sufficient to obtain a warrant, and the search incident to arrest exception, which offers little to no protection of privacy); Thomas B. McAffee, John P. Lukens & Thaddeus J. Yurek III, *The Automobile Exception in Nevada: A Critique of the* Harnisch *Cases*, 8 NEV. L.J. 622, 646 (2008) (observing the automobile exception provides greater privacy protection to suspects than the search incident to arrest exception).

[155] *See supra* notes 87–90 and accompanying text (discussing the first *Gant* holding).

[156] *See supra* notes 91–93 and accompanying text (discussing the second *Gant* holding).

[157] *See supra* notes 114–18 and accompanying text (contending courts have never defined the *Chimel* immediate control test).

[158] *See supra* notes 119–28 and accompanying text (arguing neither Justice Stevens in *Gant* nor Justice Scalia in *Thornton* defined reason to believe).

[159] S*ee supra* notes 129–33 and accompanying text (contending *Gant* cannot protect privacy rights since both holdings are unclear).

[160] *See supra* notes 148–54 and accompanying text (advocating for the adoption of probable cause and the automobile exception as the sole standard for automobile searches).

[161] *See supra* notes 148–50 and accompanying text (explaining the boundaries of reasonableness defined in *Houghton*).

[162] *See supra* notes 137–47 and accompanying text (arguing probable cause protects privacy interests while enabling law enforcement to thoroughly search the vehicles of suspects).

[163] *See supra* notes 148–54 and accompanying text (concluding the automobile exception should operate as the sole standard for vehicle searches).