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THE EVOLUTION OF THE SEARCH INCIDENT TO ARREST DOCTRINE: *ARIZONA V. GANT (2009) 129 S.Ct. 1710*

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Note: This article includes a thorough discussion of the justices' reasoning in the three *Arizona v. Gant* opinions (majority, concurrence, dissent), as well as a discussion of the Supreme Court's prior rulings on search incident to arrest. If you prefer to read a brief analysis of *Gant*'s holding, the decision's likely impact, the questions still to be addressed, and post-Gant cases, read only sections I, VI, VII, VIII, and IX.

I. Summary: What Does Gant Hold?

Arizona v. Gant was decided by the United States Supreme Court on April 21, 2009. It was a 5-4 opinion. Justice Stevens wrote the majority opinion, and Justices Scalia, Souter, Thomas and Ginsberg joined. Justice Scalia filed a separate concurring opinion. Justice Alito authored the dissent, joined by Chief Justice Roberts, and Justices Kennedy and Breyer, in part. Justice Breyer wrote a separate dissenting opinion.

Twenty-eight years ago, the Supreme Court decided *New York v. Belton* (1981) 453 U.S. 454, holding that the police could search the entire passenger compartment of a vehicle incident to the custodial arrest of a vehicle occupant. In *Gant*, the Court redefined the circumstances that justify a *Belton* search, in light of the rationales for a "search incident to arrest" set forth by the Court in *Chimel v. California* (1969) 395 U.S. 752.

In *Chimel*, the Court defined the scope of a search conducted by the police when they make a custodial arrest. In order to protect the police and prevent the destruction of evidence, an officer may search the person arrested to remove any weapons or evidence. An officer may also search the area within the arrestee's immediate control – the space into which he might reach to grab a weapon or evidence. (*Chimel, supra*., 395 U.S. at 763-764.) In *Belton*, the Court considered the parameters of the "area within the arrestee's immediate control" when the arrestee has recently occupied a vehicle. Preferring a straightforward rule to guide police practice, the Court deemed the vehicle's entire passenger compartment to be an area into which the arrested occupant might reach to access a weapon or evidence. Consequently, upon arresting a vehicle occupant, officers may search the passenger compartment and any containers found therein. (*Belton, supra*., 453 U.S. at 460.)

In *Arizona v. Gant,* the Supreme Court re-examined the *Belton* rule. Commensurate with the purposes of a search incident to arrest – to protect the arresting officers and safeguard evidence– the Court held that "*Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle". Henceforth, the police may only search the passenger compartment, following the arrest of a recent occupant: 1)when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search; or 2)when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. (*Gant, supra*., 129 S.Ct. at 1714.)

Applying this rule to the facts of Gant's arrest, the Court held that the search of his vehicle was unreasonable. Police officers learned that Gant was the subject of an arrest warrant for driving with a suspended license. After observing Gant driving, parking and alighting from a vehicle, an officer arrested him as he stood 10 to 12 feet away from his car. After Gant was handcuffed and secured in the police car, two officers searched the car he'd been driving. They found a gun and a bag of cocaine in a jacket on the backseat.

The United States Supreme Court agreed with the Arizona Supreme Court that the weapon and drugs found in the vehicle should be suppressed. At the time of the search, Gant was not within reaching distance of the car's interior. Thus, the search of the passenger compartment was not necessary to prevent him from accessing a weapon or destructible evidence. Also, Mr. Gant was arrested for driving with a suspended license. Officers could not reasonably expect to find evidence of that crime inside his vehicle. (*Gant, supra*., at 1714-1716, 1718.)

II. The Background of the Search Incident to Arrest Rules: Chimel, Belton and Thornton

_____It has long been established that when an individual is lawfully arrested, the police may search the arrestee and seize items found upon his person. (See *Weeks v. United States* (1914) 232 U.S. 383, 392; *Carroll v. United States* (1925) 267 U.S. 132, 158.) But could the police search the place of arrest without a warrant, and if so, to what extent? Over the years, the Supreme Court issued several contradictory opinions regarding police authority to search the site of the arrest when the defendant was taken into custody at his home or business. (See, e.g. *Marron v. United States* (1927) 275 U.S. 192, [police may search the place of arrest for items used to carry on the defendant's criminal enterprise]; *Go-Bart Importing Co. v. United States* (1931) 282 U.S. 344 [unlawfully searched the arrestee's office and desk after arresting him inside of his office]; *Harris v. United States* (1947) 331 U.S. 145 [after arresting the defendant in his living room, police legally

searched his entire four-room apartment without a warrant]; *United States v. Rabinowitz* (1950) 339 U.S. 56 [after arresting the defendant in his one-room office, police were permitted to search his desk, safe and file cabinets]. To resolve this discrepancy, the Supreme Court granted certiorari in *Chimel v. California* (1969) 395 U.S. 752.

A. Chimel v. California (1969) 395 U.S. 752

In *Chimel*, the police obtained a warrant authorizing the defendant's arrest for burglarizing a coin shop. The officers executed the warrant and arrested the defendant inside his residence. The police then searched the entire three-bedroom house, including the attic, the garage and a small workshop. In several rooms, they rummaged through drawers, looking for coins and other items taken during the burglary.

The Court held that the search of the defendant's entire home, incident to his lawful arrest, was unconstitutional. Exigent circumstances are necessary to dispense with the Fourth Amendment's warrant requirement, and that the scope of a warrantless search must be strictly tied to its justification. (*Chimel, supra*., at 761-762.) **When they make an arrest, police officers are permitted to search for weapons that the arrestee might use to resist or escape, and to seize evidence to prevent its concealment or destruction. Consequently, the police may contemporaneously search the arrestee and the area into which he might reach to grab a weapon or evidence. (*Chimel, supra*., at 763.) "There is no constitutional justification, in the absence of a search warrant, for extending the search beyond that area." (*Chimel, supra*., at 768.)** The officers can't search beyond the arrestee's reach; they cannot search the whole house or the entire room in which the suspect has been arrested. (*Chimel, supra*., at 763-764.)

The *Chimel* rule is relatively easy to apply when a suspect is arrested in his home or office. But what are the parameters of a search incident to arrest when the arrestee is a vehicle occupant? Courts considering this question found no workable definition of "the area within the immediate control of the arrestee" when that area arguably included the interior of a vehicle that the arrestee had recently occupied. (See *New York v. Belton* (1981) 453 U.S. 454, 459-460.)

B. New York v. Belton (1981) 453 U.S. 454

Twelve years after *Chimel*, the Supreme Court sought to define the permissible scope of a search incident to arrest when the police arrest a vehicle occupant. (*Belton*, supra., at 455.) Defendant Belton was a vehicle passenger – one of four men in an automobile stopped by the police for speeding. Upon contacting the driver, the officer smelled the odor of burnt marijuana emanating from the car. On the vehicle's floor, he

saw an envelope marked "Supergold", a term associated with marijuana. The defendant and the other occupants were removed from the car and arrested for marijuana possession. After searching the four men, the officer searched the passenger compartment of the car. On the back seat, the officer found a jacket that belonged to the defendant, and in the jacket's pocket, he found cocaine. (*Belton, supra*., at 455-456.)

The Supreme Court declared that the searches of the vehicle's passenger compartment and the defendant's jacket were lawful. The Court expressed its preference for applying a clear rule to a recurring factual situation, so that citizens may know the scope of their constitutional protection and law enforcement officers may know the extent of their authority. The Court generalized 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 evidence'". (*Belton, supra*., at 460, citing *Chimel, supra*., 395 U.S. at 763.)

According to *Belton*, upon arresting a vehicle occupant, an officer may search the passenger compartment and examine the contents of any containers found within. Officers do not have to decide on a case-by-case basis whether the occupant could have actually reached every corner of the passenger compartment or the container searched when he was in or near the car. (*Belton, supra*., at 460-461.)

In *Belton*, the Supreme Court's ostensible purpose was to provide a straightforward rule to guide the police when they arrested a vehicle occupant. However, as police officers sought to apply the *Belton* rule and as the courts sought to enforce it, they faced many unanswered questions. For example, does *Belton* sanction a search of the passenger compartment when the defendant exits the car before the police initiate contact, so that he is outside of the vehicle at the time of contact and arrest? Second, may the police conduct a *Belton* search when the arrestee is secured some distance away from the vehicle at the time of the search, so the threat that he might grab a weapon or destructible evidence from the passenger compartment has been eradicated? The first of these questions was answered by the Supreme Court five years ago in *Thornton v. United States* (2004) 541 U.S. 615, whereas the second question was not resolved until this year's decision in *Arizona v. Gant*.

C. Thornton v. United States (2004) 541 U.S. 615

In *Thornton*, an officer spotted the defendant's car, ran a check on the license tags and discovered that they had been issued to a different vehicle. Before the officer could stop the defendant, he parked and left his car. The officer exited from his patrol car, contacted the defendant, and discovered narcotics in his pockets during a consensual pat-search. The officer then arrested the defendant for drug possession, placed him in the back of the patrol car, and searched the passenger compartment of his vehicle, finding a handgun under the driver's seat. (*Thornton, supra*., at 618.)

In *Belton*, the defendant was in the passenger seat of the vehicle when the police initiated contact, although he was removed from the car prior to his arrest. In *Thornton*, the police did not contact the defendant until after he had voluntarily left his vehicle. The Supreme Court held that this distinction made no difference; after arresting Defendant Thornton, the police were entitled to conduct a *Belton* search of the passenger compartment and open any containers found therein. (*Thornton, supra*., 541 U.S. at 617.)

The defense had asserted that officers could not conduct a *Belton* search unless the suspect was inside the vehicle when the police made contact, even if he was removed from the vehicle by the time of the arrest and search. The Court rejected this rule, holding that "the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle". In either case, the officer faces a stressful and volatile situation. Thus, a *Belton* search is authorized when the arrestee is in the vehicle or has recently occupied the vehicle at the time of police contact. (*Thornton*, *supra*, at 623-624.)

As noted by concurring Justice Scalia, *Thornton* left an important question unresolved. Does it matter that by the time of the car search, Defendant Thornton "was neither in, nor anywhere near, the passenger compartment of his vehicle? Rather, he was handcuffed and secured in the back of the officer's squad car." The risk that he could actually grab a weapon or evidentiary item from the car was extremely remote, if not non-existent. (*Thornton, supra*., at 625 [conc. opn. of Scalia, J.].) Scalia suggested that by allowing a *Belton* search under these circumstances, the Court had allowed the rule to become unmoored from its justification (to protect officer safety and prevent evidence destruction). Scalia proposed an alternative rationale for a vehicle search following an arrest – to search for evidence of the crime of arrest that the officer reasonably believes might be located in the passenger compartment. (*Thornton, supra*., at 625-632.) It would take an additional five years, until the Court would address Scalia's concerns and his suggested alternative rule.

III. The Majority Opinion in Arizona v. Gant (2009) 129 S.Ct. 1710

The majority opinion in *Gant* was written by Justice Stevens – the only Supreme Court Justice who was on the Court when *Belton* was decided. Stevens was joined by Justices Souter, Thomas, Ginsberg, and Scalia (who filed a concurring opinion explaining his reluctant support for the majority position).

The question presented in *Gant* was whether *Belton* authorized a vehicle search incident to a recent occupant's arrest when the arrestee cannot access the vehicle's passenger compartment at the time of the search – e.g. he is handcuffed and secured in the back seat of a locked patrol car.

The Court held that a search of the vehicle's passenger compartment and containers therein, incident to arrest, is justified in only two situations: 1)when the arrestee is unsecured and actually within reaching distance of the passenger compartment at the time of the search; or 2)when it is reasonable to believe that the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the arrestee's vehicle will be unreasonable unless the police obtain a warrant or demonstrate that another exception to the warrant requirement applies. (*Gant, supra*., at 1714.)

A. The Scope of a Search Incident to Arrest Must Be Consistent With It's Justification as Set Forth in Chimel

The majority reiterated that a search incident to arrest is an exception to the Fourth Amendment's warrant requirement. The scope of this exception must be commensurate with the purposes set forth in *Chimel* – to prevent the arrestee from reaching for a weapon or destructible evidence. (*Gant, supra*., at 1716.)

In *Belton*, the Court held that after arresting a vehicle occupant, the officer could search the entire passenger compartment. According to *Gant*, that holding was based on: 1)the actual facts of *Belton* (a lone officer arrested four suspects who stood just outside the vehicle at the time of the search); and 2)the presumption that articles inside the passenger compartment are usually if not always within the reach of an arrestee who is inside or near the vehicle. Thus, "*when* the passenger compartment is within the arrestee's reaching distance, *Belton* supplies the generalization that the entire compartment and any containers therein may be reached." (*Gant, supra*., at 1718.)

B. Rejecting the Lower Courts' Broad Reading of Belton

According to *Gant,*, *Belton* left open the question of whether the arrestee must be within reaching distance of the vehicle to justify the search of the passenger compartment. Over the next 28 years, lower courts divided on this question, but most understood *Belton* as permitting a vehicle search every time the police arrest a recent vehicle occupant regardless of the arrestee's actual location at the time of the search – "even if there [was] no possibility that the arrestee could gain access to the vehicle at the time of the search." Relying on *Belton*, courts have validated vehicle searches "incident to arrest" when the arrestee has been handcuffed, secured in the back of the patrol car and even removed from the scene by the time the police enter the passenger compartment. (*Gant, supra*., at 1718-1719.) As Justice O'Connor observed in her *Thornton* concurrence, "lower court decisions seem to treat the ability to search a vehicle incident to arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." (*Thornton, supra*., 541 U.S. at 624 [conc. opn. of O'Connor, J.].)

In *Gant*, the Court rejected the "broad reading of *Belton*" which had improperly authorized a vehicle search even when the vehicle's passenger compartment was no longer within the arrestee's reaching distance. This expansive interpretation of the *Belton* rule no longer served the justifications underlying the "search incident to arrest" exception defined in *Chimel*.

Moreover, this broad reading of Belton undervalued the privacy interests at stake. "Although we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home, [citation omitted], the former interest is nevertheless important and deserving of constitutional protection. The privacy interest is particularly significant because "*Belton* authorizes police officers to search not just the passenger compartment but every purse, briefcase, or other container within that space." This practice "implicates the central concern underlying the Fourth Amendment – the concern about giving police officers unbridled discretion to rummage at will among a person's private effects". (*Gant, supra*., at 1720.)

C. Comments on Stare Decisis

The *Gant* majority addressed the dissenting justices' insistence that *stare decisis* required adherence to the broad reading of Belton – authorizing a vehicle search incident to arrest in every case regardless of the arrestee's location at the time of the search. First, the majority stated that it was not overruling *Belton* and *Thornton*, as those cases are distinguishable on their facts. Neither expressly permitted a search of the vehicle's passenger compartment when the arrestee was secured in the patrol car and the officers

lacked a reasonable belief that evidence of the crime of arrest could be found in the car.[1] (*Gant, supra*., at 1722.)

Second, reliance on *stare decisis* cannot "justify the continuance of an unconstitutional police practice" or application of a rule untethered from its rationale:

> "The experience of 28 years since we decided *Belton* has shown that the generalization underpinning the broad reading of that opinion is unfounded. We know that articles inside the passenger compartment are rarely 'within the area into which an arrestee might reach', and blind adherence to *Belton*'s faulty assumption would authorize myriad unconstitutional searches." (*Gant, supra*.,at 1723.)

Third, The fact that law enforcement officers relied on the broad interpretation of *Belton* in conducting vehicle searches for 28 years does not require a different outcome:

> "Countless individuals guilty of nothing more serious than a traffic violation have had their constitutional right to the security of their private effects violated as a result. The fact that the law enforcement community may view the State's version of the *Belton* rule as an entitlement does not establish the sort of reliance interest that could outweigh the countervailing interest that all individuals share in having their constitutional rights fully protected."
> (*Gant, supra*., at 1722-1723.)

D. Adopting Justice Scalia's Proposed Rule Permitting a Belton Evidentiary Search

Acknowledging that it did not follow from *Chimel*, the *Gant* majority held that the search of the vehicle's passenger compartment, incident to a recent occupant's arrest, would also be allowed when officers reasonably believe that evidence relevant to the crime of arrest might be found in the vehicle. (*Gant, supra*., at 1719.) This novel rule was advocated by Justice Scalia in his concurring opinion in *Thornton*, as well as in his

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[1] In *Thornton*, the defendant was handcuffed and seated in the police car by the time of the search, but officers could have reasonably believed that evidence of his drug dealing offense would be found in the vehicle.

concurrence in the present case.

Under this "Scalia rule", authority to search the passenger compartment depends on the crime for which the suspect has been arrested. If he is arrested for a drug offense (as were the defendants in *Belton* and *Thornton*), the police can search the vehicle for evidence of this crime. If he is arrested for a traffic violation (as was the defendant in *Gant*), the officers cannot search as it would be unreasonable to believe that relevant evidence would be found in the passenger compartment. (*Gant, supra*., at 1719.)

The Court reconciled this new justification for a vehicle search with its previous ruling in *United States v. Ross* (1982) 456 U.S. 798. In *Ross,* the Court held that officers could search a vehicle if they had probable cause to believe that it contained contraband or evidence of crime, and they could search any and every part of the vehicle and its contents that might conceal the object of the search. (*Ross, supra*., at 799-800, 825.) The search permitted by the new rule adopted in *Gant* requires only reasonable suspicion, while the *Ross* rule requires probable cause. In *Ross*, probable cause to believe the vehicle contains evidence of any crime triggers the right to search, whereas *Gant* requires reasonable suspicion that evidence of the crime of arrest will be found in the vehicle. Under *Ross*, the officers can search the entire car, including the trunk, whereas, *Gant* only authorizes a search of the passenger compartment and containers found therein. (*Gant, supra*., at 1721.)

IV. Justice Scalia's Concurring Opinion in Gant

Justice Scalia reluctantly joined the majority opinion authored by Justice Stevens, viewing it – as compared to Justice Alito's dissent – as the lesser of two evils. (*Gant, supra*., 129 S.Ct. At 1725 [conc. opn. of Scalia, J.].) According to Scalia, the "*Belton-Thornton*" rule should be abandoned and replaced with a rule permitting a vehicle search incident to arrest "only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer had probable cause to believe had occurred." (*Gant, supra*., at 1725.)

Scalia stated that the dissent's endorsement of the broad interpretation of the *Belton-Thornton* rule, which permitted a search of the vehicle for hidden weapons every time a recent occupant was arrested, was both unreasonable and unnecessary. When an arrest is made in connection with a vehicle stop, the police have less intrusive and more effective means of ensuring their safety by denying the arrestee access to any weapons left in the vehicle. The officers can order the arrestee away from the vehicle, pat him down for weapons, handcuff him and place him in the squad car. (*Gant, supra*., at 1724.)

Scalia also expressed reservations about Justice Stevens' proposed narrowing of this rule – allowing a passenger compartment search only when the arrestee is within reaching distance of the vehicle at the time of the search. "This standard fails to provide the needed guidance to arresting officers and also leaves much room for manipulation, inviting officers to leave the scene unsecured (at least when dangerous suspects are not involved) in order to conduct a vehicle search." (*Gant, supra*., at 1724-1725.)

Noting that it would be "unacceptable" for the Court to set forth a "4-to-1-to-4 opinion that leaves the governing rule uncertain", Justice Scalia elected to join the somewhat imperfect majority opinion rather than sanction "plainly unconstitutional searches – which is the greater evil". (*Gant, supra*., at 1725.)

V. The Dissent in Gant

The dissenting opinion, authored by Justice Alito, was joined by Chief Justice Roberts, Justice Kennedy and Justice Breyer, in part.[2] The principle objection (stated in both Justice Alito's and Justice Breyer's dissents) is that the majority opinion departed from the rule of stare decisis and overruled *Belton* and *Thornton* without stating good reason for doing so.

According to Justice Alito, the holding of *Belton* "could not be clearer"; whenever a police officer "has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile". (*Belton, supra*., 453 U.S. at 460, quoted in *Gant, supra*., 129 S.Ct. At 1727 [dis. opn. Of Alito, J.].) The *Belton* ruling was not limited to situations when the passenger compartment was within the arrestee's reaching distance at the time of the search. In fact, *Belton* acknowledged that articles in the passenger compartment are not always within an arrestee's reach. However, the Court wanted a workable rule, "a single familiar standard" to guide officers who make roadside arrests. Then, in *Thornton* – a case with facts not materially different from those of *Gant* – the Court recognized that *Belton* allowed a passenger compartment search in every case when a vehicle occupant or recent occupant was arrested.

The *Gant* majority overruled *Belton* and *Thornton* without good reason; the factors that may justify a departure from the rule of stare decisis do not apply. The *Belton-Thornton* rule had not proved to be unworkable or badly reasoned. *Belton* had not been

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[2] Justice Breyer filed a separate dissenting opinion, joining all but the last part of Justice Alito's dissent.

undermined by subsequent decisions; rather, it had been re-affirmed by *Thornton* just five years ago. There had been no important changes in the outside world which caused a re-assessment of the rule. Moreover, law enforcement officers had relied on the validity of the Belton rule for 28 years. (*Gant, supra*., at 1727-1731.)

Belton had provided a workable rule. It was easy for police officers and judges to apply. In contrast, the first part of the majority's new rule –"which permits the search of a vehicle's passenger compartment if it is within an arrestee's reach at the time of the search – reintroduces the same sort of case-by-case, fact-specific decision making that the *Belton* rule was adopted to avoid." (*Gant, supra*., at 1729.)

Alito's dissent defended *Belton*'s reasoning, and argued that it closely followed *Chimel*.[3] *Chimel* did not specify whether the area from within which the arrestee might grab a weapon or evidence was to be measured at the time of arrest or the time of the search. According to the dissent, "the Court [in *Chimel*] must have intended for this area to be measured at the time of arrest". The Court could "hardly have failed to appreciate" that an arresting officer would usually handcuff an arrestee and remove him to a secure place before conducting a search incident to arrest. Thus, if the arrestee's reaching distance was measured at the time of the search, "the *Chimel* rule would rarely come into play". (*Gant, supra*., at 1729-1731.)The assumption underlying *Belton* was that articles within the passenger compartment are generally, if not inevitably, within an arrestee's reach. "This is undoubtedly true at the time of the arrest of a person who is seated in the car but plainly not true when the person has been removed from the car and placed in handcuffs. Accordingly, the *Belton* Court must have proceeded on the assumption that the *Chimel* rule was to be applied at the time of arrest." (*Gant*, *supra*., at 1730-1731.)

VI. The Impact of the Gant Ruling

Following *Belton* and *Thornton*, police officers believed that they were automatically entitled to search a vehicle's passenger compartment, and examine the contents of any containers found therein, after arresting an occupant or recent occupant. Most courts endorsed that view. The majority opinion did not expressly overrule *Belton* or *Thornton*, as neither case specifically addressed the question at issue in *Gant* – whether the arrestee must be unsecured and near the car at the time of the search to authorize a search incident to arrest. However, given the facts of *Thornton* (the defendant was handcuffed and in the back of the patrol car by the time the officer searched his vehicle), the Court had implicitly endorsed the right to conduct a *Belton* search under those

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[3] This is the portion of Alito's dissent that Justice Breyer did not join.

circumstances. *Gant* represents a significant turnaround, just five years later and at a time when the Supreme Court has not generally been inclined to limit police authority.

Did *Gant* reduce police authority to conduct post-arrest searches? Will fewer searches be conducted and validated? That remains to be seen, as *Gant* yielded a mixed result, both restricting and expanding the officers' right to search.

On one hand, the police can no longer search the passenger compartment every time they arrest a suspect who has recently occupied a vehicle; they can do so only if the arrestee is unsecured and within reaching distance of the vehicle's interior at the time of the search. On the other hand, *Gant* set forth a new rule permitting a post-arrest search of the passenger compartment when the officers reasonably believe that evidence of the crime of arrest will be found therein.

In most cases, officers concerned with police and public safety will handcuff and secure the suspect immediately following the arrest; thus, they will not be able to search the passenger compartment unless they reasonably believe it contains evidence of the crime of arrest. This should reduce the number of lawful searches, at least when the suspect is arrested for a traffic offense. However, when an officer arrests a driver or passenger for a Vehicle Code violation (presumably a non-serious and non-violent crime), he may be less likely to secure the arrestee prior to searching the vehicle. There is even the possibility that, after arresting a driver for a minor traffic offense, the *Gant* rule could encourage the police to search the car first and then put the arrestee in the patrol car.

Of course, Justice Scalia only joined the *Gant* majority because the other four justices endorsed his proposed new rule allowing officers to search the passenger compartment for evidence of the crime of arrest – an exception to the Fourth Amendment's warrant and probable cause requirements that does not serve the justifications for a post-arrest search set forth in *Chimel* and expands police authority to search vehicles.

What will be the impact of this new rule? If officers arrest the suspect for a drug, theft, or weapons possession offense, they should be able to search the passenger compartment for evidence and examine the contents of any containers found therein, even if the arrestee is locked in the back of the patrol car and on his way to the police station at the time of the search.. Thus, police authority to conduct a *Belton* search may ultimately depend on the nature of the crime of arrest.

If officers arrest a driver for a traffic offense, it may be more difficult for the state to prove a reasonable suspicion that evidence of that crime would be found in the vehicle.

This is significant as police officers may make a custodial arrest, without violating the Fourth Amendment, when they have probable cause to believe that a vehicle occupant has committed a traffic offense – including a minor fine-only infraction. (See *Atwater v. City of Lago Vista* (2001) 532 U.S. 318 [seatbelt violation]; *Arkansas v. Sullivan* (2001 532 U.S. 769 [speeding]; *People v. McKay* (2002) 27 Cal. 4th 601, 605 [riding bicycle the wrong way on a residential street].)[4] After *Gant*, although officers may arrest a vehicle occupant for any traffic offense and take him into custody, their authority to search the passenger compartment would likely depend on whether the arrestee is unsecured and within reaching distance of the vehicle at the time of the search.

Several passages of the *Gant* majority's analysis may have ramifications beyond the factual context and specific issue of this case. First, the Court re-affirmed that a driver has a protected privacy interest in his vehicle and in the personal effects (e.g. purses and briefcases) that he keeps in that space. (*Gant, supra*.,129 S.Ct. at 1720.)

Second, the Court reiterated and applied the cardinal Fourth Amendment principles that exceptions to the warrant requirement must be narrowly defined, and that the scope of any warrantless search must be circumscribed by its justification.

Third, the Court showed its willingness to disregard or re-interpret past decisions when adherence to stare decisis would sanction the continuation of unconstitutional police practices or the perpetuation of poor reasoning: "The doctrine of stare decisis is of

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[4] In *Atwater*, the Supreme Court upheld the constitutionality of the custodial arrest of a Texas woman who had committed a seatbelt violation, punishable by only a monetary fine. Under Texas law, officers had the option of arresting the driver or issuing a citation for her failure to secure her passengers in seatbelts. The Court held that Atwater's arrest did not violate the Constitution's proscription on unreasonable searches and seizures: "If an officer has probable cause to believe that an individual has committed even a minor criminal offense in his presence, he may, without violating the Fourth Amendment, arrest the offender." (*Atwater, supra*., 532 U.S. at 354.) Unlike Texas, California statutes do not authorize a custodial arrest for a seatbelt violation or other minor Vehicle Code offenses (including the fine-only infraction of driving a bicycle on the wrong side of the roadway). Nevertheless, in *People v. McKay*, the California Supreme Court held that a custodial arrest for a minor traffic offense does not violate the Fourth Amendment, even though it is illegal under California law. Thus, if an officer effects a custodial arrest of an individual for a minor Vehicle Code offense, in violation of state statutory procedures, and then searches his vehicle incident to arrest, any evidence seized is not subject to suppression. (*McKay, supra*., 27 Cal. 4th at 607-619.)

course ‘essential to the respect accorded to the judgments of the Court and to the stability of the law’, but it does not compel us to follow a past precedent when its rationale no longer withstands ‘careful analysis’. (*Gant, supra*., at 1722, quoting *Lawrence v. Texas* (2003) 539 U.S. 558, 577.)

VII. Questions to Answer in the Aftermath of Gant

Applying the *Gant* rule to vehicle searches, courts will have to decide on a case-by-case basis whether the arrestee was “unsecured and within reaching distance of the passenger compartment at the time of the search”. In *Gant* itself, the defendant had been handcuffed and placed in the backseat of the locked patrol car by the time the officers began searching the vehicle.

What if the arrestee was handcuffed but still standing outside of the car?

What if the arrestee was not handcuffed but was nevertheless located so far from the vehicle that he has no realistic possibility of accessing the passenger compartment?

What if the arrestee was secured and restrained, but other vehicle occupants were within reaching distance of the vehicle’s interior?

Also, the courts will have to assess whether the circumstances supported a reasonable belief that evidence of the crime of arrest might be found in the vehicle?

What types of crimes give rise to such a reasonable belief?

Are the officers permitted to open and examine any container found in the passenger compartment that might contain evidence of the crime of arrest, and does this include cell phones and laptop computers?

VIII. Post-Gant Appellate Cases

After *Gant* was decided, on April 21, 2009, the appellant courts considered cases in which the search of the defendant’s vehicle, following arrest, was conducted prior to *Gant*. Some of these cases expressly addressed the question of whether the *Gant* rules apply retroactively to these pre-*Gant* searches. Answering this question, the courts have split. A few cases held that *Gant* should apply retroactively to determine the constitutionality of searches conducted prior to April 21, 2009, and that evidence seized in violation of *Gant* should be excluded. (See, e.g. *United States v. Gonzalez* (9th Cir.

2009) 578 F.3d 1130; *People v. McCarty* (2010) 229 P.3d 1041 [the Colorado Supreme Court holds that *Gant* applies retroactively].) Other courts held that regardless of whether the *Gant* rules apply retroactively, the good faith exception to the exclusionary rule would preclude suppression of the evidence when officers searched a vehicle, post-arrest, in reasonable reliance on established pre-*Gant* precedent which interpreted *Belton* as permitting vehicle searches incident to arrest regardless of the arrestee's location. (See e.g. *United States v. McCane* (10th Cir. 2009) 573 F.3d 1037; *United States v. Davis* (11th Cir. 2010) 598 F.3d 1259; *People v. Branner* (2010) 180 Cal. App. 4th 308.)

This split of authority will soon be resolved, as the United States Supreme Court granted the defendant's petition for writ of certiorari in *United States v. Davis*, on June 8, 2010 (Supreme Court Docket No. 08-16654), three months after the California Supreme Court had granted the defendant's petition for review in *People v. Branner*, on March 10, 2010. (Cal. Supreme Court Case No. S179730) Presumably, the United States Supreme Court will have the first say on this issue as oral argument in *Davis* is calendared for March 21, 2011, whereas briefing in *Branner* was just completed on November 10, 2010.

Other appellant court cases, considering the constitutionality of pre-*Gant* searches conducted incident to arrest, have simply applied the *Gant* rules to the facts without expressly addressing the retroactivity question.

A. Cases Expressly Discussing the Retroactivity of the Gant Rules

1. United States v. Gonzalez (9th Cir. 2009) 578 F.3d 1130: Gant rules apply retroactively to assess the validity of vehicle searches in cases in which convictions not final by April 21, 2009

In June 2006 (almost three years before *Gant*), the defendant was a passenger in a car stopped for a traffic violation. The police arrested another passenger for outstanding warrants and then searched the car, finding a gun inside the glove box. By the time of the search, the defendant was handcuffed and secured in the officers' patrol car. After his motion to suppress was denied, the defendant was convicted of firearm possession.

Following the Supreme Court's *Gant* decision, the defendant argued on appeal that the car search was unconstitutional. The government conceded that the search incident to arrest was illegal, but only if the *Gant* rules applied to this case. The government asserted that the June 2006 search of the vehicle's glove box was conducted in good faith under the "then prevailing interpretation of *Belton*". Consequently, the exclusionary rule should not be applied. The government relied on the Supreme Court's recent decision in *Herring v. United States* (2009) 129 S.Ct. 695, which had applied the good faith exception to an

arrest and search conducted by police officers in reliance on incorrect computerized data that had been negligently entered by another law enforcement official.

The Ninth Circuit declined to apply *Herring's* extension of the good faith exception to this situation. The court noted that *Herring* and the other cases relied on by the government involved application of the good faith exception to searches conducted in reliance on a warrant subsequently found invalid or a statute subsequently found unconstitutional. As the court stated:

> "Neither the Supreme Court nor our court, however, has applied the good faith exception to the scenario we face: a search conducted under a then-prevailing interpretation of a Supreme Court ruling, but rendered unconstitutional by a subsequent Supreme Court ruling announced while the defendant's conviction was on direct review".
> (*Gonzalez, supra*., 578 F.3d at 1132.)

The Ninth Circuit concluded that this case presented a retroactivity issue that was controlled by long-standing precedent governing the applicability of a new rule of law announced by the Supreme Court while a case is on direct review. "A decision of [the Supreme Court] construing the Fourth Amendment is to be applied retroactively to all convictions that were not yet final at the time the decision was rendered". (*Gonzalez, supra*., at 1132, citing *United States v. Johnson* (1982) 457 U.S. 537, 562; *Griffith v. Kentucky* (1987) 479 U.S. 314, 328.)

According to the Ninth Circuit, the *Gant* rules apply to all post-arrest vehicle searches conducted in cases in which the defendant's conviction was not final by April 21, 2009. Evidence discovered a result of those searches must be excluded.

2. United States v. McCane (10th Cir. 2009) 573 F.3d 1037: April 2007 search invalid under Gant, but evidence not excluded as the officers reasonably relied in good faith on pre-Gant Tenth Circuit precedents

Faced with a similar factual situation – a vehicle search incident to arrest conducted before *Gant* that would clearly be illegal after *Gant* – the Tenth Circuit reached a result opposite to the conclusion reached by the Ninth Circuit in *Gonzalez*.

In April 2007 (two years before *Gant*), the defendant was stopped by a police officer for a traffic violation, During the ensuing detention, the officer learned that the defendant was driving with a suspended license. The officer arrested the defendant,

handcuffed him, and placed him in the back seat of the patrol car. The officer then searched the car's passenger compartment and discovered a firearm concealed in the pocket of the driver's side door. The district court denied the defendant's motion to suppress the firearm and other incriminating evidence. The trial court relied on pre-*Gant* Tenth Circuit precedents which had allowed officers to conduct a vehicle search, incident to the arrest of a recent occupant, under these circumstances.

While Defendant McCane's case was pending on appeal before the Tenth Circuit, the Supreme Court issued its decision in *Gant*. The parties agreed that if the *Gant* rules applied, the search of Defendant McCane's car was illegal; he was arrested for a traffic violation and then handcuffed and secured in the patrol car at the time of the search. The prosecution asserted, however, that the district's court's ruling denying the motion to suppress should be affirmed based on the good faith exception to the exclusionary rule; at the time of the search, the officer had reasonably relied in good faith on settled precedents which permitted the vehicle search incident to the defendant's arrest.

The Tenth Circuit agreed, noting that – as the Supreme Court acknowledged in *Gant – Belton* had been "widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search". (*McCane, supra*., at 1041, quoting *Gant, supra*., 129 S. Ct. at 1718.) Precedents from the Tenth Circuit Court of Appeal had adopted this interpretation of *Belton*, approving vehicle searches even when the arrestee was secured in the officer's patrol car by the time of the search.

The Court of Appeal analyzed Supreme Court precedents defining the good faith exception to the exclusionary rule. These cases had allowed the admission of evidence seized in violation of the Fourth Amendment when officers conducted searches or seizures in reasonable reliance on: 1) a warrant subsequently declared invalid (*United States v. Leon* (1984) 468 U.S. 897); 2) a statute later declared unconstitutional (*Illinois v. Krull* (1987) 480 U.S. 340); 3) incorrect information in a court's data base mistakenly entered by court employees (*Arizona v. Evans* (1995) 514 U.S. 1); and 4) incorrect information in a police database negligently entered by another law enforcement employee. (*Herring v. United States* (2009) 129 S.Ct. 695.)

The Tenth Circuit emphasized that in each of these cases, the Supreme Court had declined to apply the exclusionary rule, because suppression of the evidence would not serve the rule's primary purpose – to deter police misconduct. The exclusionary rule should only be applied to deter objectively unreasonable police misconduct – a search or seizure that the officer knows or should know violates the Fourth Amendment.

Applying these principles to Defendant McCane's case, the Tenth Circuit emphasized that the officer who searched the defendant's car, following his arrest, reasonably relied in good faith on settled law of the Tenth Circuit Court of Appeals, interpreting *Belton*, which was subsequently repudiated by *Gant*. In April 2007, the officer did not know – nor should he have known – that he could not search the car's passenger compartment while the arrestee was secured in the patrol car.

The Tenth Circuit rejected application of the retroactivity rule set forth in *Griffith v. Kentucky* (1987) 479 U.S. 314 (the rule that the Ninth Circuit applied in *United States v. Gonzalez* (9th Cir. 2009) 578 F.3d 1130). The Tenth Circuit stated: "The issue before us, however, is not whether the Court's ruling in *Gant* applies [retroactively] to this case, it is instead a question of the proper remedy upon application of *Gant* to this case." (*McCane, supra*., at 1044, fn. 5) Although the search of the defendant's car was unconstitutional under *Gant*, the evidence discovered in the car need not be excluded.

3. United States v. Davis (11th Cir. 2010) 598 F.3d 1259: Agreeing with McCane that although the 2007 vehicle search would be invalid under Gant, the seized evidence need not be excluded as the police reasonably relied on the Eleventh Circuit's interpretation of Belton
[United States Supreme Court granted the defendant's petition for writ of certiorari on June 8, 2010, Supreme Court Docket No. 08-16654)]

As in *McCane*, the search in this case occurred in 2007. The defendant was a passenger in a stopped car. The driver was arrested for driving while intoxicated, and the defendant was arrested for giving a false name. Both the driver and the passenger were handcuffed and placed in separate patrol cars. The officer then searched the vehicle that they'd recently occupied and found a revolver in the pocket of the defendant's jacket, which he had left in the car. The trial court denied the defendant's motion to suppress, finding that the firearm was discovered during a lawful search incident to arrest. The court relied on established Eleventh Circuit precedent which, "like most other courts, read *Belton* to mean that police could search a vehicle incident to a recent occupant's arrest regardless of the occupant's actual control over the passenger compartment --even if there was no possibility that the arrestee could gain access to the vehicle at the time of the search." (*Davis, supra*., 598 F.3d at 1261-1262.)

While the case was pending on appeal, the Supreme Court decided *Gant*, which rejected this "prevailing reading of *Belton*". (*Id.*, at 1262.) The Eleventh Circuit held: 1)that under the Supreme Court's retroactivity doctrine, the rule announced in *Gant* applied to the defendant's case; and 2)that the vehicle search violated the defendant's Fourth Amendment rights. Both recent occupants, the defendant and the driver, were

handcuffed and secured in separate patrol cars before the officer searched the vehicle. Moreover, the defendant was arrested for giving a false name. The police could not reasonably expect to find evidence of that crime in the car. (*Id.*, at 1263.)

However, the appellate court still needed to determine whether the exclusionary rule should apply to the evidence seized during the unconstitutional search. Citing the Ninth Circuit's decision in *Gonzalez* and the Tenth Circuit's decision in *McCane*, the Eleventh Circuit noted that the circuits had split on this issue. The court entered the fray by holding that "the exclusionary rule does not apply when the police conduct a search in objectively reasonable reliance on our well-settled precedent, even if that precedent is subsequently overruled." (*Id.*, at 1263-1264.) Because the police officer who searched the vehicle reasonably relied on clear, well-settled and unequivocal precedent which permitted the intrusion, the good-faith exception to the exclusionary rule applied. "Relying on a court of appeals' well-settled and unequivocal precedent is analogous to relying on a statute, or a facially valid warrant." (*Id.*, at 1267-1268, citing *Illinois v. Krull* (1987) 480 U.S. 340, *United States v. Leon* (1984) 468 U.S. 897.)

4. People v. Branner (2010) 180 Cal. App. 4th 308: Gant rules apply retroactively, but under the exclusionary rule, evidence seized by the police in reasonable reliance on law applicable at the time of the search was not subject to exclusion [California Supreme Court granted the defendant's petition for review on March 10, 2010, Case No. S179730. Two of the three issues on review are: 1)Is the defendant entitled to retroactive application of Arizona v. Gant (2009)[citation omitted], in which the high court limited vehicle searches incident to the arrest of a recent occupant after the arrestee has been secured and cannot access the interior of the vehicle. 2)If so, did the Court of Appeal err by applying the good faith exception to the exclusionary rule?][5]

During a traffic stop, based on information learned from a records check, an officer arrested the defendant for violating his drug registration requirements. The officer put the defendant in the back of a patrol car and then searched the passenger compartment of the defendant's vehicle, finding a gun and cocaine base. This stop, arrest and search occurred in December 2004, more than four years before *Gant*.

The Third District rejected the defendant's contention that the Supreme Court's recent *Gant* decision compelled suppression of the gun and drugs seized during the post-arrest search of the defendant's vehicle, while the defendant was secured in the officer's patrol car. In *Gant*, the Court revisited its prior ruling in *Belton*, which the Court

[5] This published decision may no longer be cited while review is pending.

acknowledged had "been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search". (*Branner, supra*, 180 Cal. App. 4th at 317, citing *Gant, supra*, 129 S.Ct. at 1716.) *Gant* changed the law so that police could only search the arrestee's vehicle if the arrestee was within reaching distance of the passenger compartment at the time of the search, or the officer reasonably believed that the vehicle contained evidence of the offense of arrest.

The Court of Appeal, in *Branner*, agreed with the defendant that *Gant* applies retroactively because his case was still pending on direct review. Thus, the search of the defendant's vehicle while he was secured in the back seat of the patrol car violated the Fourth Amendment unless if was reasonable for the officer to believe that evidence of the crime of arrest (violation of drug registration requirements) would be found in the vehicle. However, the court declined to decide that question. Instead, it upheld the search and seizure by applying the good faith exception to the exclusionary rule.

The officer who searched the defendant's vehicle after arresting him and placing him in the patrol car reasonably relied on the then prevailing view of *Belton*, which permitted a search of the passenger compartment, incident to the arrest of a recent occupant, even if the arrestee could no longer reach the compartment at the time of the search. This understanding of Belton, was commonly accepted by federal and state appellate courts and taught to law enforcement officers in police academies for 28 years.

The Third District continued with a discussion of the exclusionary rule's deterrent purpose and the consequent evolution of the good faith exception, which applied when suppression of the evidence would not effectively advance that purpose. The court concluded that the reasoning of the good faith cases "must be extended to the officer's search in this case". "Just as the officers in *Leon, Krull* and *Evans* could not be faulted for relying on judges decisions or [false] information provided by a court clerk, surely the officers here cannot be faulted for acting in conformity with the United States Supreme Court's decision in *Belton*, which for more than a quarter century, had been understood and applied by other courts to allow officers to conduct a vehicle search incident to arrest even though the defendant was in the back of the patrol car.". (*Branner, supra*, at 322.) Because the officer who searched the defendant's car reasonably relied on established precedent, interpreting *Belton*, excluding the seized evidence would have no deterrent effect. Officers should not be expected to question the judgment of the Supreme Court.

B. Cases Applying the Gant Rules to Pre-Gant Searches Without Expressly Addressing Retroactivity

1. People v. Osborne (2009) 175 Cal. App. 4th 1052 [First District, Division Four; Petition for Review denied on 10/28/09]: Vehicle search incident to arrest justified by reasonable belief that evidence of the crime of arrest (firearm possession) would be found in the passenger compartment

The Court of Appeal held that the search of the interior of the defendant's car was justified as a search incident to arrest. Although the arrest and search in this case occurred in December 2006, almost two and one-half years before *Gant*, the court applied the *Gant* rules without expressly addressing either retroactivity or the good faith exception to the exclusionary rule.

In this case, two officers observed the defendant standing next to the open trunk of a Lexus vehicle. He appeared to be handling exposed wires in the trunk. The defendant looked at the officers' patrol car as it passed; he then shut the trunk and walked away, appearing "real nervous". The officers ordered the defendant to sit down in the driver's seat of the Lexus. Believing that the defendant was a parolee, the officers walked over to the Lexus and looked inside. They observed that parts of the interior were stripped and that there were screwdrivers, pliers and other possible "burglary tools" strewn across the front passenger area. Suspecting that the defendant might be burglarizing the vehicle, the officers ordered him out of the Lexus, and prepared to pat-search him. Because he seemed very nervous, the officers handcuffed the defendant and asked him if he had a gun. He admitted that he did, and the officers seized a loaded handgun from his pants pocket. One officer then entered the Lexus and removed a backpack from the passenger compartment. Inside the backpack, the officers found drugs.

The trial court denied the defendant's motion to suppress the firearm and the drugs. The Court of Appeal found that the officers' reasonable suspicion that appellant might be burglarizing the Lexus justified his detention. The suspicion of burglary, the observation of the burglary tools and the defendant's nervous demeanor and evasive actions justified the use of handcuffs and the pat-search. Once the officers discovered the firearm in the defendant's possession and the defendant admitted that he'd been recently released from parole, the officers had probable cause to arrest him.

The Court of Appeal applied the *Gant* rules to uphold the vehicle search incident to arrest. It was clear from the record that the defendant was handcuffed at the time of the vehicle search, but it was not evident that he was secured in the back of the patrol car. Nevertheless, the appellate court validated the search because it was reasonable for the

officers to believe that evidence of the crime of arrest – firearm possession – might be found in the passenger compartment of the Lexus.

2. United States v. Davis (8th Cir. 2009) 569 F. 3d 813: Vehicle search justified under Gant, even though the defendant-driver was in the patrol car at the time of the search, because three unsecured and intoxicated passengers were still standing around the vehicle

Without an express discussion of retroactivity, the Eighth Circuit applied the Gant rules to the pre-*Gant* vehicle search conducted in May 2007. The facts were as follows: Two officers stopped the defendant's car for speeding. As he approached, one officer smelled the odor of marijuana emanating from the car. He asked the driver to exit from the vehicle and pat-searched him. During the pat search , the officer felt a plastic bag in the defendant's pocket. The defendant admitted that it was a bag of marijuana. He was arrested for possession of marijuana and placed in the back of the officer's patrol vehicle. The officers then ordered the three passengers out of the car. The passengers appeared to have been drinking but they were not placed in handcuffs. One officer then searched the car and found a loaded handgun in the center console. He also observed open beer bottles in the vehicle. The trial court denied the motion to suppress the handgun and other incriminating evidence, finding that the car search was justified incident to the defendant's arrest.

While the case was pending on appeal, the Supreme Court published *Gant*, and the Eighth Circuit applied the *Gant* rules to the facts of this case. By the time of the car search, the defendant had been arrested and secured in the back of the patrol vehicle. Nevertheless, "[t]he odor of marijuana was wafting from the car. Empty beer bottles law strewn in the back seat. Three passengers, all of whom had been drinking, were not in secure custody and outnumbered the two officers at the scene." (*Davis, supra*., at 817.) Given these circumstances, a vehicle search incident to arrest was justified as the unsecured and intoxicated passengers could have reached inside the car to grab evidence or weapons. The court distinguished *Gant*, in which five officers had arrested, handcuffed and secured the three recent vehicle occupants by the time of the search. The court found this situation was more like *Belton*, in which a single officer had been confronted with four unsecured arrestees.

The Eighth Circuit also noted that officers could have reasonably believed that evidence of the defendant's crime of arrest – possession of marijuana – might be found in the vehicle. However, they did not decide the case on this basis as "the evidence-of-arresting-offense rule had not been established until after the filing of this appeal." (*Davis, supra*., at 817, fn. 5.)

3. United States v. Goodwin-Bey (8th Cir. 2009) 584 F.3d 1117: Vehicle search incident to arrest of passenger justified when all four occupants standing unsecured outside of vehicle at the time of the search

In this second post-*Gant* Eighth Circuit appeal, the search occurred in April 2007, but the *Gant* rules were applied. Defendant Goodwin-Bey was the driver of a vehicle stopped for running a red light. There were three passengers in the car. While the officer was attempting to identify all four occupants, he received a report of an earlier incident in which occupants of a similar car had displayed a firearm. During the traffic stop, the officer learned that one passenger had an outstanding arrest warrant. This passenger was arrested and handcuffed. The defendant and the other passengers were pat-searched, but not handcuffed. All four occupants, including the arrested passenger, were standing around the car when officers searched the vehicle incident to the passenger's arrest. An officer unlocked the glove box and found a handgun inside.

The Eighth Circuit affirmed the district court's denial of the motion to suppress evidence, applying *Gant* and analogizing to the court's prior opinion in *United States v. Davis, supra.*, 569 F.3d at 813. The Court of Appeal held that the officers' reasonable concern that the recent vehicle occupants could grab a weapon from the car justified the search, because the defendant and the other passengers were not restrained. The court rejected the defendant's argument that the scene was, in fact, secure, because the occupants had been patted down and found not to possess weapons.

4. United States v. Ruckes (9th Cir. 2009) 586 F.3d 713: Vehicle search not justified as a search incident to arrest under Gant, but incriminating evidence would have been inevitably discovered during a lawful inventory search

The Ninth Circuit applied the *Gant* rules even though the search occurred in September 2006, and the Supreme Court decided *Gant* after this appeal was submitted for decision. A Washington State trooper stopped the defendant's vehicle for speeding. The defendant was unable to provide car registration, a driver's license or any other form of identification. While requesting these items, the officer noticed that the car's open center console contained loose money and a prescription bottle with the label removed. The trooper asked the defendant to exit from the car and frisked him for weapons before placing him in the patrol car. A computer check revealed that the defendant's license had been suspended. When the defendant questioned the trooper's asserted authority to search his car, the officer explained that the suspended license warranted the defendant's arrest as well as inspection of the vehicle, and that he could impound and inventory the car. The officer then searched the vehicle's passenger compartment, finding drugs and a firearm.

The Ninth Circuit held that, following *Gant*, the car search was not justified as a search incident to arrest. The defendant "was secured in the backseat of the patrol car - clearly beyond lunging distance of the handgun - at the time Trooper Wiley conducted the automobile search. Additionally, there was no likelihood that Trooper Wiley would have discovered evidence of [the defendant's] driving offense within the vehicle." (*Ruckus, supra*., 586 F.3d at 718.)

Nevertheless, the Ninth Circuit affirmed the district court's denial of the defendant's motion to suppress on the second of two justifications advanced by the government, finding that the evidence would have been inevitably discovered during a lawful inventory search. Under Washington state law, the trooper had the authority to impound the vehicle and inventory it's contents because the defendant was driving on a suspended license. Moreover, the trooper had testified that he would have impounded the car because no one was available to remove it from the scene of the traffic stop and "an inventory search would have necessarily followed". (*Ruckes, supra*., 586 F.3d at 718-719.)

Consequently, the drugs and firearm found in the car were "properly admitted under the inevitable discover exception to the exclusionary rule" notwithstanding the trooper's invalid search incident to arrest. (*Id.*, at 719.) "[T]he deterrent rationale for the exclusionary rule is not applicable where the evidence would have ultimately been discovered during a police inventory of the contents of [the defendant's] car." (*Ibid*.)

5. United States v. Maddox (9th Cir. 2010) 614 F.3d 1046: Post-arrest searches of two containers removed from the defendant's vehicle, after he was secured in the patrol car, not justified as searches incident to arrest or as inventory searches

In this government appeal from the grant of a motion to suppress evidence, it's not clear whether the arrest and searches occurred before or after *Gant* was decided. Moreover, the Ninth Circuit affirmed the district court's holding that the searches of containers removed from the defendant's vehicle after his arrest, were unconstitutional without mentioning either *Belton* or *Gant*.

The police officer stopped the defendant for reckless driving. The defendant was unable to produce a driver's license and a computer check revealed that he was driving on a suspended license. When the defendant ignored the officer's request to exit from his truck, the officer took away the defendant's cell phone and key chain, which he was apparently holding in his hands, and tossed them on the front seat of the vehicle. The officer then arrested the defendant, handcuffed him and searched his person, finding a substantial amount of cash. The defendant was secured in the back of the officer's patrol car. The officer then entered the truck and retrieved the key chain, which had an attached

metal vial with a screw top. Upon removing the top, the officer discovered methamphetamine inside the vial. The officer also removed a closed computer case from the defendant's vehicle. He opened the case and found a handgun and more methamphetamine.

The Ninth Circuit found that the search of the key chain vial was not justified as incident to the defendant's arrest because the defendant could not access the item by the time of the search. According to the dissent, the defendant was holding the key chain, with the attached vial, right before he was arrested. "Just before handcuffing Maddox, [the officer] removed a cell phone and key-chain from Maddox's hands and set them on the driver's seat." (*Maddox, supra*., 614 F.3d at 1052 [diss. opn. of Smith, J.].) Then after the defendant was secured in the patrol car, the officer retrieved the key chain from the car and opened the attached vial. The Court of Appeal did not analyze the search of the key chain vial as a search of the defendant's person or an item intimately associated with his person at the time of arrest. (See *Maddox, supra*., at 1048, fn. 2 [distinguishing *United States v. Robinson* (1973) 414 U.S. 218.) Instead, the court treated the key chain search as a *Chimel* search of the area within the arrestee's reaching distance.[6]

To determine the validity of this slightly delayed post- arrest search of the area within the arrestee's reaching distance and items found therein, the court employed the two-fold inquiry commonly employed in the Ninth Circuit: "(1)was the searched item within the arrestee's immediate control when he was arrested; (2)did events occurring after the arrest but before the search make the search unreasonable". (*Maddox, supra*., 614 F.3d at 1048, citing *United States v. Turner* (9th Cir. 1991) 926 F.2d 883, 887.) While the key chain was within the defendant's immediate control when he was arrested, subsequent events – i.e. the officer handcuffed the defendant and secured him in the back of the patrol car – rendered the search unreasonable. Once the defendant was handcuffed in the patrol car, he could not access the key chain to destroy evidence. (*Id.,* at 1048-1049.)[7]

Moreover, relying on language from *United States v. Chadwick* (1977) 433 U.S. 1, the Ninth Circuit emphasized that the key chain, with its attached vial, was within the officer's exclusive control, no longer accessible to the defendant, when the officer opened

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[6] The dissenting justice would have approved the search of the key chain vial, taken from the defendant's hand right before his arrest, as valid under the authority of *Robinson* [upholding the examination of the contents of a cigarette pack that was seized from the defendant's pocket during a search of his person incident to arrest].

[7] Note that under the *Gant* analysis, the court would have reached the same conclusion.

the vial and examined its contents. Therefore, the warrantless search could not be justified as incident to the defendant's arrest: "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest". (*Maddox, supra*., at 1049, quoting *Chadwick*, 433 U.S. at 15.) Arguably, this limitation could apply even if the defendant was not secured in the patrol car. Finally, the court did not analyze the search of the key chain vial as a container found in the passenger compartment during a vehicle search incident to arrest, presumably because it was the officer who took the key chain from the defendant and placed it in the defendant's car.

Apparently, the government had not tried to justify the search of the computer case found in the vehicle as a search incident to arrest. Rather, they asserted that it was a valid inventory search. The Ninth Circuit did not accept this rationale because the officers did not have a legal right to impound the vehicle under state law.

IX. The Sixth Districts Two Opinions in People v. Leal (Pre-Gant and Post-Gant): Officers may not conduct a search of the arrestee's reaching distance after he has been removed and secured in the patrol car – decision based on Chimel and not on Gant

Here are the facts underlying the two *Leal* decisions: Police officers ventured to the defendant's home to arrest him on two outstanding misdemeanor warrants. They demanded that the defendant emerge from his house. After many minutes, he did so. As soon as the defendant opened the front door, the officers arrested him, handcuffed him and led him away from the residence. The officers confined the defendant in a police car parked in the driveway, about 30 to 38 feet from the site of arrest. Then, without a search warrant, the officers entered the "very small residence" to make sure nobody else was inside. They found no one. Two to three minutes later, with the scene secure, the officers searched the area immediately adjacent to the threshold of the front door where the defendant had been arrested. There was a chair about one foot from the spot where the defendant had been standing. An officer lifted a sweatshirt from this chair and found a loaded pistol underneath.

Based on these facts and relying on federal circuit decisions, the trial court denied the defendant's motion to suppress the firearm. The court found that the officers lawfully searched the chair within minutes after the defendant's arrest. Items on the chair had been within the defendant's reaching distance at the time of arrest. It did not matter that by the time of the search, the defendant could not have accessed the firearm.

A. Leal I: People v. Leal (2008) 160 Cal. App. 4th 701

Fourteen months before *Gant*, the Sixth District of the California Court of Appeal had decided *People v. Leal* (2008) 160 Cal. App. 4th 701. The court noted that the police searched the area that had been within the arrestee's reaching distance at the time of his in-home arrest. However, by the time of the search, the arrestee was secured in the patrol car many feet away from the arrest site. Under these circumstances, the search was not justified by *Chimel* as a search incident to Defendant Leal's arrest.

The Sixth District reviewed the *Chimel* rule and its rationale; officers are permitted to search the area within the arrestee's immediate control in order to remove weapons and destructible evidence. In *Leal*, the handgun was found in an area that was not within the defendant's immediate control at the time of the search when he was confined in a patrol car, in handcuffs, far away from the premises. Consequently, the search of the chair was not justified by the *Chimel* rationale. (*Leal, supra*., at 861.)

The court disapproved of federal cases that had validated officers who removed and secured the suspect and then returned to the arrest site to conduct a "search incident to arrest". The police act properly, in the interests of officer safety, when they immediately handcuff and secure an arrestee.. And by doing so, they do not relinquish any "right" to conduct a warrantless search. "The fundamental flaw in the analysis contained in theses cases....is that it assumes that, one way or another, the search must take place. But conducting a *Chimel* search is not the Government's right. It is an exception – justified by necessity – to a rule that would otherwise render the search unlawful." (*Leal, supra*., at 862, quoting *Thornton, supra*., 541 U.S. at 672 [conc. opn. Of Scalia, J.].)

The Sixth District acknowledged that "a different rule of reasonableness" applies when the police have a degree of control over the suspect but do not have control over the entire situation – i.e. when third parties are nearby but unaccounted for, or when the arrestee is not fully secured. Under these circumstances, the police could search the immediate area of the suspect's arrest even after the suspect had been handcuffed or removed. *(*See, e.g., *People v. Summers* (1999) 73 Cal. App. 4th 288.)

B. Leal II: People v. Leal (2009) 178 Cal. App. 4th 1051

The Sixth District published its initial *Leal* opinion on February 28, 2008, three days before the United States Supreme Court granted certiorari in *Gant*. In June 2008, the California Supreme Court granted the prosecution's Petition for Review in *Leal,* but deferred briefing pending the high court's decision in *Gant*. The United States Supreme Court decided *Gant* on April 21, 2009. Thereafter, the California Supreme Court

transferred *Leal* to the Sixth District Court of Appeal with directions to vacate its decision and reconsider the case in light of *Gant*. The parties then submitted supplemental letter briefs addressing *Gant's* applicability to the facts of *Leal*.

On October 29, 2009, six months after *Gant*, the Sixth District issued its second opinion in *People v. Leal.* As it had in the pre-*Gant* opinion (*Leal I*), the Court held that the delayed post-arrest search of the area of the home within the defendant's reaching distance at the time of the arrest was unconstitutional. The court suppressed the evidence and reversed the judgment. The court's decision was based on its reading of *Chimel* and not on *Gant*. (*People v. Leal* (2009) 178 Cal. App 4th 1051.)

In *Leal I*, the Sixth District had based its ruling on a careful reading of the United States Supreme Court's decision in *Chimel*. In *Leal II*, the appellate court stated that the high court's recent decision in *Gant* had not affected its prior ruling:

> "Nothing in *Gant* derogates from our prior reasoning; rather, it reinforces it. In the main, *Gant* deals with an obliquely different area of Fourth Amendment law than does this case. *Gant* clarified the scope of the permissibility of police searches of vehicles following an arrest and the safe confining of the arrestee to a nearby police car. The case has little bearing on this one, except that *Gant's* reaffirmation of Chimel [citation] is congruent with our interpretation of *Chimel*."
> (*Leal, supra*., at 1064.)

In their post-*Gant* supplemental briefing, the prosecution acknowledged that the search in Defendant's Leal's case would have violated the Fourth Amendment if it had taken place after *Gant*, and that post-*Gant*, the defendant would have been entitled to have the firearm suppressed. (*Leal, supra*., 1064-65.) Nevertheless, the prosecution asserted, because the search of the defendant's home preceded *Gant*, it was valid under the "broad authority" that the law previously conferred on police actions under those circumstances. The Sixth District disagreed, finding that the search in *Leal* was illegal under *Chimel* even before the Supreme Court decided *Gant*. (*Ibid*.)

Next, the prosecution argued that even if the search was illegal, the defendant was not entitled to exclusion of the evidence, under the Supreme Court's decision in *Herring v. United States* (2009) 129 S.Ct. 695. The government asserted that the officer's conduct in searching a portion of Defendant' Leal's home was not deliberate, reckless or grossly negligent, as the state of the pre-*Gant* law governing searches incident to arrest was "muddled". Thus, the officers acted in good faith under then-prevailing law when they

searched the home after the defendant had been secured in the patrol car.

Again, the Sixth District disagreed, finding that the state of the law governing warrantless residential searches was not"muddled" when the officers searched the defendant's home following his arrest. *Chimel* clearly defined a narrow exception to the warrant and probable cause requirements. The residential search conducted in Defendant's Leal's case "was entirely at odds with *Chimel* and with basic Fourth Amendment principles". Moreover, "the violation was serious enough to warrant giving substance to the Fourth Amendment's promise of protection from state intrusion by suppressing the firearm evidence against [the] defendant". (*Leal, supra*., at 1066.)