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THE IMPACT OF ARIZONA V. GANT ON SEARCH AND SEIZURE LAW AS APPLIED TO VEHICLE SEARCHES

Michael C. Gizzi¹ and R. Craig Curtis^{2,3}

I. INTRODUCTION

On April 21, 2009, the United States Supreme Court handed down a decision that sent shock waves through the law enforcement community. *Arizona v. Gant*⁴ significantly modified the Supreme Court's rules for vehicle searches incident to arrest—rules that had been in place since the 1981 decision in *New York v. Belton*.⁵ The decision in *Gant* placed limits on the ability of the police to conduct searches of a vehicle's passenger compartment after making a warrantless arrest. The *Belton* bright-line rule had been extensively used by police, and its demise was of great concern to the law enforcement community.

Police have used *Belton* searches in conjunction with arrests for minor traffic offenses as a key strategy in ferreting out drugs.⁶ Officers observe a vehicle that they suspect might be involved in drugs.⁷ They might have a hunch, or they may be relying on intelligence about the vehicle.⁸ They follow the vehicle and then establish a pretext for pulling it over, often relying on minor traffic violations.⁹ When officers pull over a vehicle, they speak with the driver, use their senses to look for any criminal evidence in plain view, and ask the driver for his license, registration, and proof of insurance.¹⁰ If the driver is unable to produce any of these three things, an officer may place him under arrest and may search the vehicle's passenger compartment.¹¹

Although difficult to quantify, law enforcement agents find evidence supporting drug arrests through this process often enough to create a general perception among officers that

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⁴ 129 S. Ct. 1710 (2009).

⁵ 453 U.S. 454 (1981).

⁶ See Markus D. Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY 829 (2001); Michael C. Gizzi, *Pretextual Stops, Vehicle Searches, and Crime Control: An Examination of Strategies Used on the Frontline of the War on Drugs*, in 24 CRIMINAL JUSTICE STUDIES: A CRITICAL JOURNAL OF CRIME, LAW, AND SOCIETY (forthcoming 2011); MILTON HEUMANN & LANCE CASSAK, GOOD COP, BAD COP: RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE 70-74 (2003); Walter R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

⁷ HEUMANN & CASSAK, *supra* note 6, at 73.

⁸ *Id.*

⁹ *Id.* at 71.

¹⁰ *Id.* at 71-72.

¹¹ *Id.* at 72.

this is a highly effective tactic for drug interdiction.¹² However, the United States Supreme Court's decision in *Gant* places limits on law enforcement's ability to conduct these searches.

This study examines the issues raised by *Arizona v. Gant* and provides a context for understanding the importance of the *Gant* decision. The article provides an overview of the use of vehicle searches incident to arrest in the war on drugs and examines the rationale underlying the *Gant* decision, considering the implications the case raises for vehicle searches. This information provides a background for an examination of lower court decisions in the year after *Gant* was decided. A content analysis of 125 decisions by federal courts and 117 decisions by state courts has been conducted to consider the initial impact the decision is having on vehicle searches.¹³

A. VEHICLE SEARCHES INCIDENT TO ARREST

In 1969, the Supreme Court decided *Chimel v. California* and defined the scope of warrantless searches of individuals that occur incident to arrest.¹⁴ An officer is permitted to search the arrestee's person and the area within the "immediate control" of the person, defined as the distance the individual could reach, in order to discover weapons or to identify evidence and prevent its concealment or destruction.¹⁵ This rule was expanded by the Court's decision in *United States v. Robinson*, which ruled that after a lawful custodial arrest, a full search of the person incident to arrest was reasonable under the Fourth Amendment.¹⁶ Unlike the "stop and frisk" search authorized by *Terry v. Ohio*,¹⁷ the search incident to arrest is a far more invasive search.¹⁸ The search incident to arrest is not limited in the scope of evidence that may be seized nor in the purpose of the search.¹⁹ The only limitation is the "immediate control" standard set out in *Chimel*, which means that the entire person of the arrestee is subject to search.²⁰ While *Chimel*'s reaching distance rule seemed simple enough, it left some confusion about the permissible scope of searches incident to legal arrest when the suspect was arrested in a vehicle.²¹ Could the search extend to the entire passenger compartment, or was it limited to the arrestee's reaching distance? In *New York v. Belton*, the Court set aside the limitations that *Chimel* placed on searches incident to arrest by establishing a bright-line rule: when an individual is arrested in a vehicle, it is reasonable for the officer to search the entire passenger compartment, including any opened or closed containers.²²

¹² See, e.g., Charles Crawford, *Race and Pretextual Stops: Noise Enforcement in Midwest City*, 6 Soc. PATHOLOGY 213 (2000); Ilya Lichtenberg, *Driving While Black (DWB): Examining Race as a Tool in the War on Drugs*, 7 POLICE PRAC. AND RES. 49 (2006); Alberto Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, 90 KY. L.J. 75 (2001).

¹³ These cases were selected using *Shepard's Citations for Arizona v. Gant*, 129 S. Ct. 1710 (2009).

"Followed" cases were selected for analysis. In addition, seventy-two federal cases listed in *Shepard's* as "Distinguished" were examined. See *infra* Part IV for a detailed examination of the methodology used.

¹⁴ 395 U.S. 752 (1969).

¹⁵ *Id.* at 763.

¹⁶ 414 U.S. 218, 236 (1973).

¹⁷ 392 U.S. 1, 30 (1968).

¹⁸ *Robinson*, 414 U.S. at 228, 234-35.

¹⁹ *Id.* at 234.

²⁰ *Id.* at 235.

²¹ A widely cited analysis of the search incident to arrest rule was highly critical of the rationale in *Chimel*: *Chimel's* justification for a search of that area appears to be based on two assumptions: (1) that the arrestee *might be inclined* to reach into that area for a weapon or evidence, and (2) that the arrestee *would be able* to reach into that area. The first assumption might be correct, but the second assumption is *not* correct. Because it is incorrect, a whole body of subsequent law has been built on a false foundation.

Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of Chimel and Belton*, 2002 Wis. L. REV. 657, 661 (2002).

²² 453 U.S. 454, 460-61 (1981).

The "automobile exception" to the warrant requirement was first stated in the case of *Carroll v. United States* in 1925.²³ Under that doctrine, a warrantless search of a motor vehicle was justified when there was probable cause to suspect the presence of contraband in that vehicle.²⁴ The rationale was that the mobile nature of an automobile made requiring a warrant impractical.²⁵ The bright-line rule established in *Belton* enabled an arresting officer to conduct a search of the passenger compartment of a vehicle for any arrest made in a vehicle. In many ways, it transformed the automobile exception into a mere probable cause exception: as long as the officer had probable cause for an arrest, he or she could search the entire passenger compartment.²⁶

In 2001, the Court ruled in *Atwater v. City of Lago Vista* that officers could impose full custodial arrest for any offense, including minor non-jailable offenses,²⁷ thus expanding the potential reach of *Belton* searches and increasing the ability of the police to use traffic enforcement as a pretext for drug enforcement efforts. In *Thornton v. United States*, the Court extended the *Belton* rule to hold that an arrestee need not even be at the vehicle at the time of the arrest; the fact that he or she was the "recent occupant" of the vehicle was sufficient to justify a search of the automobile in question.²⁸ The fact that Thornton was handcuffed and in the patrol car at the time of the vehicle search would prove to be significant given the facts and ultimate ruling in *Gant*.²⁹

B. PRETEXTUAL TRAFFIC STOPS AND THE WAR ON DRUGS

New York v. Belton changed the landscape for criminal investigations involving vehicles. When an officer makes an arrest – any arrest – he can execute a full search of the passenger compartment of the vehicle.³⁰ The development of search incident to arrest law was particularly valuable for the "war on drugs."³¹ In the 1968 case *Terry v. Ohio*, the Supreme Court sanctioned the use of warrantless "stop-and-frisk" searches based only on an officer's "reasonable articulable suspicion."³² In response, the federal government began to use criminal profiling strategies in which profiles of likely drug dealers were developed, and *Terry* stops were used to investigate potential drug couriers in the nation's airports and in train and bus stations.³³ These efforts were generally viewed favorably by the Supreme Court.³⁴ While using a *Terry* stop was easy enough when observing suspects disembarking airplanes or buses, it was much more difficult to develop the required reasonable suspicion when following a vehicle going sixty-five

²³ 267 U.S. 132, 149 (1925); see also Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 390, n.49 (2001) (discussing *Carroll* and opining that the ongoing efforts to prohibit the sale of alcohol in the 1920s is somewhat similar to the war on drugs that has resulted in broader powers of search and seizure today).

²⁴ *Carroll*, 267 U.S. at 149.

²⁵ *Id.* at 153.

²⁶ See Yale Kamisar, *Confessions, Search and Seizure, and the Rehnquist Court*, in THE REHNQUIST COURT: A RETROSPECTIVE 80, 100 (Martin H. Belsky ed., 2002).

²⁷ 532 U.S. 318, 354 (2001). The offense in this case was for violation of a mandatory safety belt use law.

²⁸ 541 U.S. 615, 622-24 (2004).

²⁹ Commentators have been clear in pointing out flaws of the *Thornton* ruling. See, e.g., Note, *Leading Case: B. Criminal Law and Procedure*, 118 HARV. L. REV. 268, 270-71 (2004), and Jason Hermele, Comment, *Arizona v. Gant: Rethinking the Evidence*, 87 DENV. U. L. REV. 175, 178-79 (2009), both of which make prominent favorable mention of Scalia's criticism of Rehnquist's rationale in *Thornton*.

³⁰ *New York v. Belton*, 453 U.S. 454, 460-61 (1981).

³¹ SAMUEL WALKER, SENSE AND NON-SENSE ABOUT CRIME, DRUGS, AND COMMUNITIES 301-31 (7th ed. 2011)

³² 392 U.S. 1, 30 (1968).

³³ See Phillip S. Greene & Brian W. Wice, *The D.E.A. Drug Courier Profile: History and Analysis*, 22 S. TEX. L.J. 261, 265-74 (1982).

³⁴ See, e.g., *United States v. Sokolow*, 490 U.S. 1, 10 (1989); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985); *United States v. Mendenhall*, 446 U.S. 544, 547 (1980).

miles per hour down the highway.³⁵ Thus, in 1984, the federal Drug Enforcement Agency (DEA) came up with a strategy to get around this problem.³⁶ Under Operation Pipeline, as the DEA's effort is known, police are encouraged to employ any applicable traffic laws, and if they identify any traffic infractions, no matter how minor, the officers have probable cause to stop a vehicle.³⁷ Once the vehicle is stopped, they can observe the driver and passenger using their senses, request a driver's license and proof of insurance, and determine if any active warrants have been issued for the vehicle occupants.³⁸ If an officer has probable cause that the driver has engaged in any illegal activities, he can place the driver in custody and execute a complete search of the vehicle's passenger compartment as incident to arrest.³⁹ This has proved to be a valuable set of tools, and in the past thirty years, the DEA has trained more than 27,000 officers in effectively using these techniques.⁴⁰

The key to Operation Pipeline is the use of pretextual traffic stops to conduct a drug-related criminal investigation.⁴¹ Officers observe a traffic violation, which they use as the pretext for a broader investigation.⁴² Officers can follow a vehicle until they identify a reason to stop the vehicle, and the reason may be minor.⁴³ Even if the stop is not originally a pretextual stop, the stop may escalate if the officer becomes suspicious during his interactions with the occupants of the vehicle.⁴⁴

Numerous studies have shown that police officers are more likely to stop and search minority drivers,⁴⁵ raising concerns about discrimination through racial profiling.⁴⁶ However, in 1996, the Supreme Court ruled in *Whren v. United States* that while a traffic stop is a seizure under the Fourth Amendment, "as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred."⁴⁷ *Whren* provided law enforcement with a definitive statement that the traffic code could be used as the pretext for criminal investigations as long as the officer had probable cause for the stop.⁴⁸ The *Whren* decision raised questions of racial profiling in the use of vehicle stops, but the Court swept those questions aside as irrelevant under a Fourth Amendment analysis.⁴⁹

³⁵ See HEUMANN & CASSAK, *supra* note 6.

³⁶ See *Operations Pipeline and Convoy*, UNITED STATES DRUG ENFORCEMENT ADMINISTRATION, <http://www.usdoj.gov/dea/programs/pipecon.htm> (last visited Jan. 26, 2011); DAVID HARRIS, PROFILES IN INJUSTICE: WHY RACIAL PROFILING CANNOT WORK (2001).

³⁷ See Dubber, *supra* note 6.

³⁸ LaFave, *supra* note 6, at 1853, 1868.

³⁹ *Id.* at 1857.

⁴⁰ VIKAS GUMBHIR, BUT IS IT RACIAL PROFILING: POLICING, PRETEXT STOPS, AND THE COLOR OF SUSPICION 13 (2007).

⁴¹ *Id.* at 14.

⁴² *Id.* at 13-14.

⁴³ *Id.* at 14.

⁴⁴ *Id.*

⁴⁵ See HEUMANN & CASSACK, *supra* note 6; Craig Curtis, *Car Stereos and the Criminal Sanction: The Dangers of Too Much Social Control*, 31 NEW POL. SCI. 273, 285 (2009) (reporting significant racial disparities in impoundment provisions of vehicle noise ordinances where young male minority drivers were far more likely to have their vehicles impounded than their prevalence among drivers would suggest); Angela Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425, 432 (1997). See generally Robin Engel & Jennifer Calnon, *Examining the Influence of Drivers' Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUST. Q. 49 (2004); Robin Engel, *A Critique of the "Outcome Test" in Racial Profiling Research*, 25 JUST. Q. 1 (2008).

⁴⁶ See, e.g., David Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, 87 J. CRIM. L. & CRIMINOLOGY 544 (1997); Lopez, *supra* note 12.

⁴⁷ 517 U.S. 806, 810 (1996).

⁴⁸ *Id.*

⁴⁹ Justice Scalia rejected *Whren's* argument that the use of "ulterior motives" would invalidate an otherwise legal traffic stop. *Id.* at 811. After citing a series of precedents, he was emphatic in proclaiming, "[w]e think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved." *Id.* at 813 (citing *United States v. Robinson*, 414 U.S.

C. AN EARLY HINT OF THE VULNERABILITY OF BELTON

In the 1998 case of *Knowles v. Iowa*, the Court ruled that when an officer chooses not to arrest an individual who commits a minor offense and instead chooses to issue a citation, the officer does not have the right to conduct a search of the individual.⁵⁰ The "search incident to arrest" doctrine does not apply because there is no custodial arrest. In *Knowles*, the police stopped a driver for speeding and issued him a citation.⁵¹ The officer then proceeded to search the vehicle's passenger compartment, where he found marijuana and drug paraphernalia.⁵² Iowa law permitted either an arrest or a citation for a traffic violation,⁵³ and the state argued that this allowed law enforcement to conduct a search incident to issuing a citation.⁵⁴ Chief Justice Rehnquist disagreed. Writing for a unanimous Court, Rehnquist reasoned that when a search incident to arrest is performed, it has two purposes: a search for weapons and a search for further evidence of the crime.⁵⁵ If the law permits an arrest for a citable offense and the officer chooses not to make the arrest, then there is no rationale for a search beyond officer safety.⁵⁶ Even if officer safety concerns were present, the search would be limited to the individual's reachable area.⁵⁷

The second rationale underlying search incident to arrest is the search for more evidence related to the crime. The Court stated,

Once *Knowles* was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car.⁵⁸

There was no justification for a search to preserve evidence, as all of the evidence needed for the arrest was already complete; a search incident to arrest in this instance is merely an attempt to "stumble onto evidence wholly unrelated to the speeding offense."⁵⁹

Rehnquist's reasoning in *Knowles* might suggest that the Court would be willing to reconsider how the search incident to arrest had been contorted by *Belton* into something that barely resembled the rationale put forth in *United States v. Robinson*.⁶⁰ The application of a bright line rule as laid out in *Belton* could easily result in the police engaging in full blown searches of cars stopped for a wide range of minor traffic violations. Often, the Court issues significant rulings when extreme factual situations emerge from the application of existing doctrines. For example, it was only three years later that the Court decided *Atwater*, permitting full custodial arrests for any offense, including those misdemeanors and petty offenses that were

218 (1973); *Scott v. United States*, 436 U.S. 128 (1978); *United States v. Villamonte Marquez*, 462 U.S. 579 (1983)). While he acknowledged that the Constitution prohibits "selective enforcement of the law based on considerations such as race," he asserted, "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Id.* at 814 nn.6-7.

⁵⁰ 525 U.S. 113, 117-19 (1998).

⁵¹ *Id.* at 114.

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 115.

⁵⁵ *Id.* at 116 (citing *United States v. Robinson*, 414 U.S. 218, 234 (1973)).

⁵⁶ *Id.* at 118.

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ See *United States v. Robinson*, 414 U.S. 218 (1973).

not punishable by jail.⁶¹ This further widened the ability of police to use vehicle searches to wage the war on drugs but also exposed the extremes to which police misconduct could be justified by existing search and seizure rules. Indeed, one of the telling features of the *Gant* decision is the total lack of any sense that the law places any restraints on them by the police at the scene.

II. ARIZONA V. GANT: AN UNEXPECTED SHIFT IN SEARCH INCIDENT TO ARREST LAW

The facts in the case of *Arizona v. Gant* are not complex. The police in Tucson, Arizona received an anonymous tip that a residence was involved in the illegal drug trade.⁶² Knowing that an anonymous tip alone is insufficient to detain a suspect,⁶³ the police focused their investigation on the residence.⁶⁴ They knocked on the door and spoke to Rodney Gant, who answered the door and identified himself, but claimed that he was not a resident of the house.⁶⁵ The officers withdrew, ran a background check on Gant, discovered that he had a suspended driver's license, and returned to the residence.⁶⁶ Gant was not there, but he drove back to the residence while the officers were present.⁶⁷ Having observed Gant driving and knowing that he had a suspended driver's license, the officers placed him under arrest, handcuffed him, and placed him in the back of a police cruiser.⁶⁸ An officer then proceeded to search Gant's car, finding a gun and cocaine.⁶⁹

At trial, Gant moved to suppress the evidence of the gun and the cocaine on the basis that the police had no probable cause to search for evidence of drug trafficking and that a search of the car incident to arrest was not proper since he was completely and securely isolated from the car at the time of his arrest.⁷⁰ The trial court ruled for the state⁷¹ but was reversed by the Arizona Court of Appeals,⁷² which determined that the search incident to arrest was not permissible under *Belton* because "the record before us does not support a finding that the police were attempting to initiate contact with Gant while he was in the vehicle."⁷³ After the Arizona Supreme Court declined to hear the case, the State sought *certiorari* from the United States Supreme Court, which was granted in 2003.⁷⁴ The Supreme Court did not reach the merits, however, and remanded the case⁷⁵ back to the state courts for reconsideration in light of a 2003 Arizona Supreme Court case, *State v. Dean*.⁷⁶ The trial court refused to suppress the evidence as an unreasonable search and seizure, and Gant appealed to the Court of Appeals, which again reversed the decision.⁷⁷ The Court of Appeals held that the suppression was appropriate because Gant had no means of gaining access to the car at the time of the search and noted that since Gant was in handcuffs, neither of the rationales for search incident to

⁶¹ *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001).

⁶² *Arizona v. Gant*, 129 S. Ct. 1710, 1714 (2009).

⁶³ See *Alabama v. White*, 496 U.S. 325 (1990); *Florida v. J.L.*, 529 U.S. 266 (2000).

⁶⁴ *Gant*, 129 S. Ct. at 1714.

⁶⁵ *Id.* at 1714-15.

⁶⁶ *Id.* at 1715.

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Def's. Mot. to Supp., *State v. Gant*, No. CR-2000-0042, 2000 WL 34566317 (Ariz. Super. Ct. Apr. 26, 2000).

⁷² *State v. Gant*, 43 P.3d 188, 192 (Ariz. Ct. App. 2002).

⁷³ *Id.* at 194.

⁷⁴ *Arizona v. Gant*, 538 U.S. 976 (2003).

⁷⁵ *Arizona v. Gant*, 540 U.S. 963 (2003).

⁷⁶ 76 P.3d 429, 436-37 (Ariz. 2003) (holding that a search incident to arrest was invalid where the arrestee was not the "recent occupant" of a vehicle, and criticizing the earlier ruling in *State v. Gant*, 43 P.3d 188).

⁷⁷ *State v. Gant*, No. CR-230000042, 2004 WL 5588539, at *1 (Ariz. Super. Ct. Dec. 7, 2004).

arrest was present.⁷⁸ The Arizona Supreme Court affirmed.⁷⁹ Once again, the case made its way to the Supreme Court, which granted *certiorari* in February 2008 on the question:

[whether the Fourth Amendment requires] law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured.⁸⁰

Arizona v. Gant was argued on October 7, 2008.⁸¹ Oral argument largely turned on the question of whether the two-pronged justification for search incident to arrest could support the bright-line rule established twenty-seven years earlier in *New York v. Belton*.⁸² Thirty-three states submitted *amicus* briefs in support of the state,⁸³ and several Justices, including Scalia, Stevens, Ginsberg, and Souter, expressed disbelief that the officer safety rationale made sense as the justification for *Belton*, particularly given the facts involved in *Gant*.⁸⁴ Justices Breyer, Alito, and Chief Justice Roberts were the only justices to actively engage the respondent and make the case for continuing *Belton*'s bright-line rule.⁸⁵

The decision that the Court handed down in April 2009 reflected the Justices' positions revealed during oral argument. Justice Stevens wrote the opinion of the Court and was joined in a 5-4 decision by Justices Souter, Ginsberg, and Thomas,⁸⁶ with Justice Scalia writing a separate concurrence.⁸⁷ Justice Breyer wrote a dissent,⁸⁸ and Justice Alito wrote a dissent in which Justice Kennedy and Chief Justice Roberts joined, and Justice Breyer joined in part.⁸⁹

Justice Stevens was the only justice remaining from the Court that decided *New York v. Belton*, and his opinion in *Gant* is hinted at in his dissent in *Thornton v. United States*, in which he questioned the rationale of *Belton*.⁹⁰ Stevens viewed *Belton* as being "swollen" beyond its original intent when it was used to allow an officer to search the passenger compartment of a vehicle in which the arrestee had been merely a "recent occupant."⁹¹ He accepted the use of the automobile exception if there was probable cause to search, but was troubled by the way that *Belton* had been contorted into a generally applicable tool for police to search a vehicle's passenger compartment without consideration for the legal basis for that search.⁹²

⁷⁸ *State v. Gant*, 143 P.3d 379, 382-83 (Ariz. Ct. App. 2006).

⁷⁹ *State v. Gant*, 162 P.3d 640, 646 (Ariz. 2007).

⁸⁰ *Arizona v. Gant*, 552 U.S. 1230, 1230 (2008).

⁸¹ Transcript of Oral Argument, *Arizona v. Gant*, 129 S. Ct. 1710 (2009) (No. 07-542), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-542.pdf.

⁸² *Id.*

⁸³ Brief for State of Florida et al. as Amici Curiae Supporting Petitioner, *Arizona v. Gant*, 129 S. Ct. 1710 (2003) (No. 02-1019), 2003 WL 21648701; Brief for State of Florida et al. as Amici Curiae Supporting Petitioner, *Arizona v. Gant*, 129 S. Ct. 1710 (2003) (No. 07-542), 2008 WL 2151707.

⁸⁴ Transcript of Oral Argument, *Arizona v. Gant*, 129 S. Ct. 1710 (No. 07-542).

⁸⁵ *Id.* at 39-45.

⁸⁶ *Arizona v. Gant*, 129 S. Ct. 1710, 1710 (2009).

⁸⁷ *Id.* at 1724-25 (Scalia, J., concurring).

⁸⁸ *Id.* at 1725-26 (Breyer, J., dissenting).

⁸⁹ *Id.* at 1726-32 (Alito, J., dissenting).

⁹⁰ *Thornton v. United States*, 541 U.S. 615, 633-36 (2004) (Stevens, J., dissenting).

⁹¹ *Id.* at 636.

⁹² *Id.*; see also, e.g., *California v. Acevedo*, 500 U.S. 565, 599 (1991) (Stevens, J., dissenting) ("Even accepting *Belton*'s application to a case like this one, however, the Court's logic extends its holding to a container placed in the trunk of a vehicle, rather than in the passenger compartment. And the Court makes this extension without any justification whatsoever other than convenience to law enforcement."); *Wyoming v. Houghton*, 526 U.S. 295, 313 (2001) (Stevens, J., dissenting) ("Instead of applying ordinary Fourth Amendment principles to this case, the majority extends the automobile warrant exception to allow searches of passenger belongings based on the driver's misconduct. Thankfully, the Court's automobile-centered analysis limits the scope of its holding. But it does not justify the outcome in this case.").

Stevens began the Court's decision in *Gant* by confronting the shortcomings of returning to the original rationales for search incident to arrest. He argued that the primary purpose of the search was for officer safety and to ensure that the arrestee could not gain access to weapons.⁹³ The "reaching-distance" rule of *Chimel* as applied to vehicles did not support the search of *Gant*'s vehicle after he had been handcuffed and placed in the back seat of the patrol car.⁹⁴ Moreover, the second rationale for searches incident to arrest also did not apply, as a search for evidence related to the crime could only be used when it was reasonable to assume that evidence supporting the arrest might be found in the vehicle.⁹⁵ Given that *Gant* was arrested for driving under a suspended license, this was not reasonable.⁹⁶

Belton had been expanded in such a way that it was disconnected from its original rationale. Stevens quoted Justice O'Connor's concurrence in *Thornton*, in which she stated, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*."⁹⁷ Even the officer who searched *Gant*'s vehicle noted that he conducted the search "because the law says we can do it."⁹⁸ The bright-line rule in *Belton* was designed to provide officers with maximum efficiency in conducting their work, yet it did so by disregarding the constitutional rationale for the search in the first place.⁹⁹ Stevens challenged the *Thornton* holding that allowed police to search the vehicle recently occupied by an arrestee, even though "most of the time the vehicle would not be within the arrestee's reach at the time of the search."¹⁰⁰ He rejected the broad reading of *Belton*, and held that *Chimel v. California* provides the proper standard for vehicle searches incident to arrest.¹⁰¹ 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."¹⁰²

In order to gain the crucial fifth vote for a majority, Stevens acceded to Justice Scalia's desire to allow a search of a vehicle under the circumstances when "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."¹⁰³ This would not permit a search in cases like *Gant*'s where the arrest was for a minor traffic violation, but it would have supported the searches in *Belton* and in *Thornton* where the initial arrests were drug-related; thus, it would be reasonable for officers to conclude that further evidence of that crime might be found in the passenger compartment.

In his concurring opinion, Justice Scalia rejected Stevens' reliance on *Chimel* and argued that the only rationale for a vehicle search incident to arrest is where it is reasonable to believe evidence related to the crime of arrest would be found.¹⁰⁴ Scalia believed that the officer safety rule left too much room for manipulation by officers.¹⁰⁵ Yet, because no other member of the Court shared his view about *Chimel*, Scalia chose to join the majority in order to avoid what he

⁹³ *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009).

⁹⁴ *Id.* at 1719.

⁹⁵ *Id.*

⁹⁶ *Id.* ("Whereas *Belton* and *Thornton* were arrested for drug offenses, *Gant* was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of *Gant*'s car.").

⁹⁷ *Gant*, 129 S. Ct. at 1718 (quoting *Thornton v. United States*, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part)).

⁹⁸ *Id.* at 1715.

⁹⁹ *Id.* at 1723 (citing *Mincey v. Arizona*, 437 U.S. 385, 393 (1978)).

¹⁰⁰ *Id.* at 1719.

¹⁰¹ *Id.*

¹⁰² *Id.*

¹⁰³ *Id.* (citing *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).

¹⁰⁴ *Id.* at 1724-25 (Scalia, J., concurring).

¹⁰⁵ *Id.*

viewed as "plainly unconstitutional searches" under the *Belton* standard.¹⁰⁶ While the two pronged ruling that emerged – permitting searches of the defendant's "reaching distance" when not secured or full passenger compartment searches when it is reasonable to believe that the search will yield further evidence of the crime of arrest – is more accommodating to police than Stevens' sole opinion would have been, the Stevens/Scalia rationale places significant limits on the police to conduct vehicle searches incident to a legal arrest.

Writing in dissent, Justice Alito argued that the majority had in fact overruled *Belton* even though it claimed only to be modifying it.¹⁰⁷ Alito challenged the majority for abandoning *stare decisis* in an area of the law in which there has been substantial reliance by law enforcement on the rule set forth in *Belton*, stating, "[t]he *Belton* rule has been taught to police officers for more than a quarter century."¹⁰⁸ This was also the stated rationale for Justice Breyer's dissent, in which he acknowledged Stevens' concerns about the problems of unconstitutional searches but believed that great weight had to be given to the *Belton* precedent that had been recently reaffirmed in *Thornton* and had been relied on for the past twenty-eight years.¹⁰⁹

Alito further argued that *Belton* has been a workable rule, and there have been no circumstances that have occurred which would bring the decision's rationale into question.¹¹⁰ He challenged the Court's claim that the reasoning in *Belton* was flawed, arguing that the reliance on *Chimel* is flawed, and that the *Belton* Court could not have assumed that the search would occur before the arrestee was placed in custody.¹¹¹ It was enough for Alito that at the time of the arrest the suspect was near their vehicle, the suspect would then be secured, and the search could proceed safely.¹¹² Alito also questioned Justice Scalia's "reasonable to believe" standard, wondering why a "reasonableness" standard would be used, rather than a probable cause standard.¹¹³

III. THE IMPLICATIONS OF *GANT* FOR THE FUTURE OF VEHICLE SEARCHES

Arizona v. Gant could fundamentally reshape the law of search incident to arrest. The bright-line rule from *New York v. Belton* seems to have been abandoned. Officers may no longer search the passenger compartment of a vehicle incident to arrest unless they have reason to believe that the arrestee will be able to gain access to the vehicle at the time of the search.¹¹⁴ In that instance, the "reachable-distance" rule of *Chimel v. California* determines the scope of a permissible search.¹¹⁵ A search can also be conducted if the officer has reasonable belief that the vehicle contains further evidence of the crime for which the suspect was arrested.¹¹⁶ For arrests stemming from minor traffic violations, this precludes a vehicle search.¹¹⁷ The reaction from the law enforcement community, at least as evidenced by such publications as the *FBI Law Enforcement Bulletin*¹¹⁸ and *Police Chief*,¹¹⁹ suggests that *Gant* is perceived as a significant ruling for day-to-day law enforcement operations.

¹⁰⁶ *Id.* at 1725.

¹⁰⁷ *Id.* at 1726 (Alito, J., dissenting).

¹⁰⁸ *Id.* at 1728 (Alito, J., dissenting).

¹⁰⁹ *Id.* at 1725-26 (Breyer, J., dissenting).

¹¹⁰ *Id.* at 1729 (Alito, J., dissenting).

¹¹¹ *Id.* at 1730-31.

¹¹² *Id.*

¹¹³ *Id.* at 1731.

¹¹⁴ *Id.* at 1723-24.

¹¹⁵ *Id.* at 1723.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 1719.

¹¹⁸ Richard G. Schott, *The Supreme Court Reexamines Search Incident to Lawful Arrest*, 78 *FBI Law Enforcement Bulletin* 22 (2009).

¹¹⁹ Lisa A. Judge, *Bye-Bye Belton? Supreme Court Decision Shifts Authority for Vehicle Searches from Automatic to Manual*, *POLICE CHIEF MAG.*, June 6, 2009, available at

For twenty-eight years, the bright-line rule from *Belton* governed searches incident to arrest occurring in the context of a traffic stop. In many ways, Justice O'Connor's comments in *Thornton* were accurate in that police have viewed the tool of search incident to arrest as an entitlement. Pretextual stops were an essential tool in the war on drugs and in many other types of criminal investigations. Police officers knew that all they had to do was to establish probable cause for an illegal act based on whatever information they had. They could then stop a suspect's vehicle on the pretext of a minor traffic offense, place the driver under arrest, and proceed to conduct a complete search of the passenger compartment. Thus, the decision in *Gant* represents what could be a paradigm shift for law enforcement, at least with regard to automobile searches.

A few months after the *Gant* decision, both the *FBI Law Enforcement Bulletin*¹²⁰ and *Police Chief*¹²¹ had articles focusing on the implications of the decision. The Federal Law Enforcement Training Center issued a ten-page report on the decision to educate law enforcement officers on how the decision changed protocol in the context of investigatory traffic stops.¹²² Perhaps more importantly, the article provided a list of five vehicle search exceptions that officers can use in specific circumstances and still comply with the strictures of the Fourth Amendment.¹²³ First, if there is reasonable suspicion that a passenger or recent occupant is dangerous and might be able to gain access to the vehicle, the officer can "frisk the passenger compartment for weapons."¹²⁴ This suggests that the search would be permissible even if the driver is secured and under arrest if other recent occupants are not under the control of the officer. Second, an officer may search a vehicle if he has reasonable belief that "the vehicle contains evidence of criminal activity."¹²⁵ Such a search is implied by Justice Scalia's reasonable belief standard of finding evidence of criminal activity related to the arresting offense. Third, an officer can conduct a protective sweep of a vehicle if he or she has reasonable suspicion that a dangerous person is hiding therein.¹²⁶ This search would be limited to looking in places where such a person might be hiding, but it would not allow a full search of all containers in the vehicle.¹²⁷ Fourth, the officer can search the vehicle if he or she gains consent to do so.¹²⁸ Finally, if the officer chooses to lawfully impound the vehicle after an arrest, this would enable an inventory search for administrative purposes; if performed legally, an inventory search would permit any contraband to be seized.¹²⁹ These same "tips" were reproduced in the June 2009 issue of *Police Chief*.¹³⁰

Of these exceptions, consent and inventory searches are particularly important. Many police officers believe they can convince almost anyone to consent to a search; thus, it is a logical implication of *Gant* that officers will seek to obtain consent to search in cases in which they could previously conduct a search incident to arrest. As long as consent is given voluntarily, the Court has held that a consent search is legal.¹³¹ Consent for a search does not require the officer to arrest the individual.¹³² For example, when someone is issued a summons for failure to

http://policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=1811&issue_id=6 2009.

¹²⁰ Schott, *supra* note 118.

¹²¹ Judge, *supra* note 119.

¹²² Jennifer G. Solari, *The United States Supreme Court's Ruling in Arizona v. Gant: Implications for Law Enforcement Officers*, FED. LAW ENFORCEMENT INFORMER, May 2009, at 3, 3-8.

¹²³ *Id.* at 8.

¹²⁴ *Id.*

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ See Judge, *supra* note 119.

¹³¹ *Schneckloth v. Bustamonte*, 412 U.S. 218, 248 (1973).

¹³² *Id.* at 277.

show proof of insurance, the police officer could simply ask the driver to consent to a search of the vehicle. However, if for the same offense the officer placed the driver under arrest and then asked the arrestee to search the vehicle as a condition of releasing him, a court would likely interpret this behavior as coercive, thus invalidating the voluntariness of consent.

The last search exception discussed in the Federal Law Enforcement Training Center report is the inventory search.¹³³ An inventory search is an administrative search conducted when a vehicle has been lawfully impounded.¹³⁴ The purpose of this type of search is to inventory the contents of a vehicle and protect the police from claims that valuable items in the vehicle were stolen when it was in the impound system.¹³⁵ If in the course of inventorying a vehicle, the police discover illegal contraband or evidence of a crime, that evidence is admissible in court.¹³⁶ As the report suggests, if the law permits the use of impoundment, this may be a way to accomplish a full vehicle search.¹³⁷ It is unclear how the Court would respond to this back-door method to circumvent *Gant*'s restrictions, but the Court has been willing to limit the scope of inventory searches in the past.¹³⁸ As Chief Justice Rehnquist said in his majority opinion affirming the suppression of evidence in *Florida v. Wells*, "[o]ur view that *standardized criteria* . . . must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."¹³⁹ Thus, if an agency has a standing policy to impound any vehicle where an arrest occurs on the street, then it is likely that this exception would be acceptable. But if an agency rarely or never impounds vehicles as a matter of practice, then the shift to impoundment in light of *Gant* might be viewed as an attempt to violate the spirit of the decision.

IV. THE JUDICIAL IMPACT OF ARIZONA V. GANT

The impact of the *Gant* decision on law enforcement search practices will only become clear once time has passed for lower courts to flesh out their interpretations of the decision. Additionally, it will take time for law enforcement to adapt their practices to the new rules. While any examination of the impact of *Arizona v. Gant* after one year is by its very nature preliminary, there are important indicators present that suggest that the Court's decision is significant.

A. RESEARCH METHOD

In order to consider the impact of the *Gant* decision, every lower federal court decision citing *Gant* in *Shepard's Citations* from April 22, 2009, through September 30, 2010, was read and analyzed. The decisions were read and coded to present a quantitative picture of the issues that have been raised in the year following the ruling and to examine the substantive impact of the decision in terms of the resolution of cases. *Shepard's* was used as the primary means of identifying lower court decisions responding to the *Gant* decision because it is the most comprehensive data source available to identify court decision citations to pre-existing cases.¹⁴⁰

¹³³ Solari, *supra* note 122, at 8.

¹³⁴ See *Florida v. Wells*, 495 U.S. 1, 4-5 (1990); *Colorado v. Bertine*, 479 U.S. 367, 372 (1988); *South Dakota v. Opperman*, 428 U.S. 364, 369-70 (1976).

¹³⁵ *Bertine*, 479 U.S. at 372; *Opperman*, 428 U.S. at 369.

¹³⁶ *Opperman*, 428 U.S. at 371-73.

¹³⁷ Solari, *supra* note 122, at 8.

¹³⁸ See *Wells*, 495 U.S. at 4.

¹³⁹ *Id.* (emphasis added).

¹⁴⁰ THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* 45-50 (Princeton Univ. Press 2008) (2006) (finding that *LEXIS Shepard's Citations* is a reliable and valid tool for judicial impact studies).

For the analysis conducted here, all cases that were listed by Shepard's as "followed by" federal courts or state courts were examined. In addition, the seventy-two Federal cases that were listed as "distinguished by" in *Shepard's* were examined separately. Cases that only cited *Gant*, and provided no analysis, were excluded. Tables 1 and 2 provide a detailed breakdown for the courts that rendered these decisions.

Content analysis was conducted after reading each decision. Cases were coded for whether the state or defendant won in the ruling, the presence of inventory searches, consent searches, the reason for the arrest, and the rationale for the decision. For the reason for the arrest, cases were coded as either minor traffic violation, driving with suspended license, drug arrest, warrant, possession of firearm, and other. The rationale for the decision was coded under the two prongs of the *Gant* ruling, including cases in which there was no justification for a search (e.g., minor traffic offenses, driving under a suspended/revoked license, warrants for failure to appear for minor offenses) and cases where a search was justified by a reasonable search for further evidence of the crime for which the arrest was made. These included drug arrests, officer safety claims based on the presence of firearms or weapons, and other reasons where courts believed it reasonable for further evidence to be found through a search. In addition, cases were coded if they were justified by the automobile exception, valid consent search, or a good faith exception to *Gant*.

B. RESULTS

Shepard's Citations reports that in the eighteen months since *Gant* was decided, the case has been cited by 814 lower federal and state courts. The number of cases making reference to *Gant* has increased by approximately forty cases each month. Of the cases in which Shepard's indicated there was "analysis", 242 cases have followed the decision, 138 have distinguished it, and three have criticized it.¹⁴¹ The sheer number of citations to *Gant* in such a short time period is significant. A separate analysis of citations to Supreme Court search and seizure cases since 1953 shows that *Gant* is ranked forty-second among all search and seizure cases in terms of the number of citations by lower courts.¹⁴²

¹⁴¹ *Arizona v. Gant*, 129 S. Ct. 1710 (available at LEXIS, *Shepardize*, original search and *shepardization* of cases citing completed Oct. 22, 2010).

¹⁴² The author *shepardized* all 298 search and seizure opinions found in the Supreme Court database and ranked these decisions by total number of lower court citations. As of Sept. 2010, *Gant* ranks among the top fifteen percent of all search and seizure cases decided since 1953. Michael C. Gizzi, William R. Wilkerson, and R. Craig Curtis, *What Makes a Landmark Case or Major Opinion? Examining Citation Patterns in Search and Seizure Cases* (Apr. 2011) (unpublished manuscript, presented at the annual meeting of the Midwest Political Science Association) (on file with author).

**Table 1. Followed and Distinguished Cases in Federal Court
April 22, 2009 – September 30, 2010¹⁴³**

| Circuit | Followed Cases | | Distinguished Cases | |
|----------------|-------------------------|-----------------------|----------------------------|-----------------------|
| | <u>Court of Appeals</u> | <u>District Court</u> | <u>Court of Appeals</u> | <u>District Court</u> |
| 1 | 0 | 1 | 0 | 0 |
| 2 | 0 | 7 | 0 | 2 |
| 3 | 2 | 9 | 0 | 3 |
| 4 | 4 | 8 | 3 | 12 |
| 5 | 0 | 5 | 2 | 4 |
| 6 | 4 | 21 | 2 | 9 |
| 7 | 0 | 8 | 2 | 5 |
| 8 | 6 | 18 | 0 | 8 |
| 9 | 9 | 10 | 1 | 9 |
| 10 | 1 | 3 | 0 | 3 |
| 11 | 1 | 6 | 1 | 6 |
| DC | 2 | 0 | 0 | 0 |
| Total | 29 | 96 | 11 | 61 |

¹⁴³ SOURCE: *Shepard's Citations*, compiled by the authors.

**Table 2. Followed Decisions in State Courts
April 22, 2009 – September 30, 2010¹⁴⁴**

| State | <u>Lower Court</u> | <u>Supreme Court</u> | <u>Total</u> |
|-------------------------|------------------------|--------------------------|--------------|
| California | 1 | 0 | 1 |
| Colorado | 1 | 2 | 3 |
| District of Columbia | 2 | 0 | 2 |
| Florida | 4 | 0 | 4 |
| Georgia | 3 | 0 | 3 |
| Idaho | 2 | 1 | 3 |
| Illinois | 3 | 1 | 4 |
| Indiana | 3 | 0 | 3 |
| Kansas | 5 | 1 | 6 |
| Kentucky | 3 | 2 | 5 |
| Louisiana | 3 | 1 | 4 |
| Maryland | 1 | 0 | 1 |
| Michigan | 2 | 0 | 2 |
| Missouri | 3 | 0 | 3 |
| North Carolina | 3 | 0 | 3 |
| New York | 3 | 0 | 3 |
| Ohio | 12 | 0 | 12 |
| Oklahoma | 1 | 0 | 1 |
| South Carolina | 1 | 0 | 1 |
| Tennessee | 1 | 0 | 1 |
| Texas | 11 | 0 | 11 |
| Utah | 2 | 1 | 3 |
| Virginia | 5 | 0 | 5 |
| Washington | 25 | 4 | 29 |
| Wisconsin | 3 | 1 | 4 |
| Total | 103 | 14 | 117 |

¹⁴⁴ SOURCE: *Shepard's Citations*, compiled by the authors.

1. Federal Court Decisions

Of the 125 "followed by" cases in Federal Court, the defendant had a positive result (defined as either having a search suppressed or a ruling favorable to their position) in 29.6 percent of the cases (n=37). Seventeen cases involved instances where the defendant was arrested for driving without a license or with a suspended license. For example, in one Fourth Circuit case,

[the defendant] was handcuffed and secured in the patrol car when Officer Czernicki searched the Cadillac and found the drugs. Thus, the Cadillac's passenger compartment was not "within [the defendant's] reach at the time of the search." Moreover, the officer would not have had a reasonable basis to believe he would find evidence of [the defendant's] license suspension – the offense of arrest – within the Cadillac's passenger compartment.¹⁴⁵

One case had evidence suppressed because the initial arrest was for reckless driving.¹⁴⁶ There were another six cases where the court found no reasonable basis for a search for evidence of the crime of arrest, including a minor warrant,¹⁴⁷ and one case where the suspect was arrested on a warrant for domestic abuse.¹⁴⁸

One search was invalidated because the arrest was for resisting arrest and battery upon a peace officer.¹⁴⁹ The court argued that,

[i]n this case, neither the officer safety nor the evidentiary preservation justifications for a search incident to arrest supports the search of [the defendant's] car. At the time of the search, [the] defendant . . . had fled from the car, eluded police officers, and jumped over a fence. He was nowhere near the car after he fled the scene and jumped the fence [E]ven if [the defendant] had returned to the vicinity of the car, he would not have had access to the backpack or the gun as it was under [another person's] 'dominion and control.' Moreover, akin to traffic-related offenses, it is generally unlikely that an officer could reasonably expect to find evidence of the crimes of battery upon an officer or resisting arrest within a car.¹⁵⁰

In two cases, the defendant won because courts found that an invalid inventory search was conducted by officers, who failed to follow the Supreme Court's requirements that agencies employing inventory searches have standardized procedures.¹⁵¹ For example, in one case it was argued,

[i]t was never established that the Spink County training of its law enforcement officers suggested or required that their standard practice should be to open any closed containers as a part of an inventory search. There was no standardized procedure in this regard in Spink County and the written policy does not state that closed containers should be opened during the inventory search.¹⁵²

¹⁴⁵ United States v. Majette, 326 F. App'x 211, 212-13 (4th Cir. 2009).

¹⁴⁶ United States v. Lopez, 567 F.3d 755, 756 (6th Cir. 2009).

¹⁴⁷ United States v. Westerman, No. 1:09-cr-8-WSD, 2009 U.S. Dist. LEXIS 123601, at *3-5 (N.D. Ga. Oct. 1, 2009) (finding no basis for a search incident to arrest when the defendant was stopped for a minor traffic infraction and was subsequently arrested based on an outstanding warrant for probation violation).

¹⁴⁸ United States v. Megginson, 340 Fed. App'x 856, 857 (4th Cir. 2009).

¹⁴⁹ United States v. Chavez, No. 2:09-cr-0033, 2009 U.S. Dist. LEXIS 116924, at *13-14 (E.D. Cal. Nov. 24, 2009).

¹⁵⁰ *Id.*

¹⁵¹ United States v. Jackson, No. 1:07-CR-016, 2010 U.S. Dist. LEXIS 1699, at *9 (S.D. Ohio Jan. 11, 2010); United States v. Sullivan, No. CR 09-40043, 2009 U.S. Dist. LEXIS 59934, at *1-3 (D.S.D. July 13, 2009).

¹⁵² *Sullivan*, 2009 U.S. Dist. LEXIS 59934, at *1.

In one case, questioning done as part of an inventory search was ruled to be a violation of the defendant's *Miranda* rights:

Although a question concerning the possession of "valuables" may have been proper for inventory purposes, the trooper should have known that inquiring about a "large amount of U.S. currency and/or guns" was reasonably likely to elicit an incriminating response from a suspect¹⁵³

Finally, in two cases, courts allowed plea agreements that were made prior to the *Gant* decision to be revoked so questions of invalid searches could be considered.¹⁵⁴

The government won in eighty-three cases where *Gant* was followed. Here there were several interesting findings. Almost half of the cases involved arrests for drug offenses. In twenty cases, the defendant was arrested for drug-related offenses, and vehicle searches were justified by the "reasonable evidence of the crime" prong under *Gant*. For example, in the case of *United States v. Bell*, the court found,

[t]he police could reasonably believe that evidence of Bell's drug offense was in the car. Bell had apparently sold the drugs inside the car, and had driven the car to and from the sale site. Under *Gant*'s second prong, the authority to search extends to containers in the passenger compartment if the police reasonably believe that evidence of the suspected crime may be found therein.¹⁵⁵

Two cases involved drug paraphernalia or illegal weapons found during the search of the person incident to arrest, which justified the search of the vehicle.¹⁵⁶ Eight cases were won by the state where the officer obtained consent for a search, and the courts ruled that consent was properly obtained.¹⁵⁷

Eighteen cases involved application of the automobile exception due to the existence of probable cause that contraband was in the car.¹⁵⁸ For example, in a case where the suspect was arrested for possession of illegal firearms, the district court ruled that "because the officers had probable cause to believe that [the defendant's] car contained evidence of crimes, the well-recognized automobile exception to the warrant requirement alleviates any Fourth Amendment concerns."¹⁵⁹ In another automobile exception case, the district court used the automobile exception to make the argument,

[c]onsidering the totality of the circumstances, including the officers' prior knowledge of Defendant, the presence of numerous air fresheners, Defendant's unusual behavior, and [the drug dog's] positive alert, the Court concludes that probable cause existed to search Defendant's vehicle for evidence of narcotics possession and/or trafficking.¹⁶⁰

In this case, the defendant was arrested on an outstanding warrant for a traffic violation.¹⁶¹

¹⁵³ *United States v. Vega*, No. C-09-064, 2009 U.S. Dist. LEXIS 49614, at *13 (S.D. Tex. June 11, 2009).

¹⁵⁴ *United States v. Amos*, No. 3:08-CR-145, 2010 U.S. Dist. LEXIS 515, at *21 (E.D. Tenn. Jan. 5, 2010); *United States v. Avendano*, 373 Fed. App'x 683 (9th Cir. Apr. 1, 2010).

¹⁵⁵ 343 Fed. App'x 72, 74 (6th Cir. 2009).

¹⁵⁶ See *United States v. Hunter*, 333 Fed. App'x 920, 925-26 (6th Cir. 2009); *United States v. Garibay*, 334 Fed. App'x 91, 93 (9th Cir. 2009).

¹⁵⁷ See *id.*

¹⁵⁸ Another 12 automobile exception cases were included among the 72 federal cases that Shepard's identified as "distinguishing."

¹⁵⁹ *United States v. Cowart*, No. 1:08-cr-10119, 2009 U.S. Dist. LEXIS 49366, at *38 (W.D. Tenn. June 5, 2009).

¹⁶⁰ *United States v. Toliver*, No. 09-20503, 2010 U.S. Dist. LEXIS 6442, at *11-12 (E.D. Mich. Jan. 27, 2010).

¹⁶¹ *Id.* at *2.

Two circuits established a "good faith" exception for cases in which the searches occurred before the decision in *Gant* was handed down. In *United States v. McCane*,¹⁶² the Tenth Circuit used the precedent of *United States v. Leon*¹⁶³ to establish a good faith exception for *Belton* searches conducted before the ruling in *Gant*. The Eleventh Circuit established a good faith exception in March 2010 in *United States v. Mitchell*.¹⁶⁴ In the months immediately following the *Gant* decision, the Eighth Circuit refused to consider a good faith exception,¹⁶⁵ but in December 2009, an Eighth Circuit District Court in Nebraska used the good faith exception to uphold a search.¹⁶⁶ The Tenth Circuit decision in *McCane* has created a circuit conflict with the Ninth Circuit, which rejected a good faith exception claim in *United States v. Gonzalez*.¹⁶⁷ In *United States v. Casper*, the Fifth Circuit remanded a case to the District Court for an evidentiary hearing on inevitable discovery, but did not rule on the government's claim of a good faith exception.¹⁶⁸ One District Court in the Fourth Circuit used a good faith exception to invalidate a pro-defendant ruling.¹⁶⁹ The Supreme Court has recently granted certiorari on the issue of good faith exceptions to the exclusionary rule in cases where searches were authorized by precedent at the time of the search, but later invalidated.¹⁷⁰

Finally, there were twenty-five cases the government won that raised issues involving inventory searches. There were two cases where courts ruled that inventory searches were invalid for failure of the agency to demonstrate routine practice or policy.¹⁷¹ There were an additional three cases where an invalid inventory search was not viewed as sufficient to suppress evidence, due to outside factors including exigent circumstances involving concerns for officer safety during transportation of property, the use of the automobile exception, and consent provided for a search.¹⁷² In examining inventory search cases, the record only indicated one case where a magistrate-judge actually reviewed department policies to make the determination of whether officers were entitled to impound vehicles and conduct inventory searches.¹⁷³ There were also cases where it was unclear from the record whether an inventory search occurred, but where the court accepted an "inevitable discovery" argument. For example, the Seventh Circuit stated,

[O]bviously, the arresting officers would not have allowed the truck to just sit on the street after [the driver] was carted away. What they would have done, in all likelihood, was impound the truck and have it towed away. An inventory search would have naturally followed; the evidence would have been inevitably discovered.¹⁷⁴

2. STATE COURT DECISIONS

¹⁶² 573 F.3d 1037, 1042 (2009).

¹⁶³ 468 U.S. 897, 922-23 (1984).

¹⁶⁴ 374 Fed. App'x 859, 867 (11th Cir. 2010).

¹⁶⁵ *United States v. Hrasky*, 567 F.3d 367, 369 (11th Cir. 2009).

¹⁶⁶ *United States v. Gray*, No. 4:09CR3089, 2009 U.S. Dist. LEXIS 113436, at *15-16 (D. Neb. Dec. 7, 2009).

¹⁶⁷ 578 F.3d 1130, 1133 (9th Cir.2009).

¹⁶⁸ 332 Fed. App'x 222, 223 (5th Cir. 2009).

¹⁶⁹ *United States v. Southerland*, No. 7:09-CR-68-1FL, 2009 U.S. Dist. LEXIS 119851, at *10 (E.D.N.C. Nov. 13, 2009).

¹⁷⁰ *Davis v. United States*, 131 S. Ct. 502 (2010) (oral argument scheduled for March 21, 2011).

¹⁷¹ *United States v. Jackson*, No. 1:07-CR-016, 2010 U.S. Dist. LEXIS 1699, at *7, 11 (S.D. Ohio Jan. 11, 2010); *United States v. Sullivan*, No. CR 09-40043, 2009 U.S. Dist. LEXIS 59934, at *1-2 (D.S.D. July 13, 2009).

¹⁷² *United States v. Morillo*, No. 08 CR 676 (NGG), 2009 U.S. Dist. LEXIS 94396, at *21-23 (E.D.N.Y. Oct. 9, 2009); *United States v. Mitan*, No. 08-760-1/08-760-2, 2009 U.S. Dist. LEXIS 63890, at *39-40 (E.D. Pa. July 23, 2009); *United States v. Scott*, No. 09 CR 331 (HB), 2009 U.S. Dist. LEXIS 52431, at *28-34 (S.D.N.Y. June 8, 2009).

¹⁷³ *United States v. Sprecht*, No. 8:09CR101, 2009 U.S. Dist. LEXIS 99759, at *3 (D. Neb. Oct. 26, 2009).

¹⁷⁴ *United States v. Stotler*, 591 F.3d 935, 940 (7th Cir. 2010).

There have been 117 cases in which *Gant* was followed by state courts. Nine state supreme courts have handed down fourteen decisions that involved *Gant* issues in the past year. There were 103 lower court decisions in twenty-five state courts. Unlike federal court, where defendants won in 29 percent of cases, in state courts, defendants won in 56.4 percent ($n = 66$) of all cases.¹⁷⁵ While cases have been decided in twenty-five states, almost 40 percent of existing decisions were from three states: Washington ($n=29$), Ohio ($n=12$), and Texas ($n=11$). The defendant won in 21 of 29 (72.4 percent) cases in Washington, 50 percent in Ohio, and 36 percent of cases in Texas. Yet, even with those cases removed from the database, the defendant won in 51 percent of all other state court decisions.

State supreme court rulings in nine states ruled for the defendant in 11 of 14 cases (78.5 percent). Perhaps the most interesting of the decisions by state supreme courts is *State v. Henning*, in which the Kansas Supreme Court ruled that the state's search incident to arrest law was unconstitutional under *Gant*.¹⁷⁶ Two state supreme courts have considered good faith exceptions for *Gant* cases. The Colorado Supreme Court rejected a good faith exception.¹⁷⁷ The Utah Supreme Court established a good faith exception in *State v. Baker*, but excluded evidence of the vehicle search for other reasons.¹⁷⁸ The Court ruled that a vehicle search that would be unconstitutional under *Gant* was protected by good faith exception of *Leon*, but because the officers lacked "reasonable articulable suspicion that the passengers posed a threat to their safety at the time they conducted the pat-down search," the evidence was suppressed.¹⁷⁹ The District of Columbia Court of Appeals also considered a good faith exception for *Gant* cases, but rejected it.¹⁸⁰ The Illinois and Washington Supreme Courts handed down decisions favorable to the defendant under *Gant*.¹⁸¹ The Delaware and Kentucky Supreme Courts have decided *Gant* cases favorable to the state: Delaware used the automobile exception to justify a search,¹⁸² while Kentucky used the "reasonable evidence" prong.¹⁸³

When examining state court decisions involving *Gant*, there are several interesting findings. First, there were more cases where the arrest began with a minor traffic offense than in Federal Court. Fifteen cases involved arrests for offenses where it was not reasonable to believe further evidence of the crime would be found in a search. These included seventeen arrests for driving under a suspended license, two active warrants, and one for violation of a protective order. Two searches were suppressed for invalid inventory searches, where there were no standard operating procedures in place. Two cases involved frisks that were ruled unreasonable searches, and two courts ruled that there was no plain view of evidence of a crime. Four cases were ruled to be unreasonable seizures, where there was no articulable suspicion for the initial detention. Another four cases were remanded to lower courts for hearings consistent with *Gant*.

In the forty-eight lower state court cases where searches were upheld, the majority were for instances in which it was reasonable to believe that a search would reveal further evidence of the crime. These included fourteen cases where drugs or drug paraphernalia were in plain view, or where the defendant admitted to drug use. Two cases involved arrests for DUI,¹⁸⁴ and there were four additional cases that fell under the second prong of *Gant*, including cases where weapons were found and where stolen items were in plain view.¹⁸⁵ Four appeals were

¹⁷⁵ A full comparison of the differences between federal and state courts is the subject of on-going research by the authors, but is beyond the scope of this paper.

¹⁷⁶ 209 P.3d 711, 720 (Kan. 2009).

¹⁷⁷ *Perez v. People*, 231 P.3d 957, 962 (Colo. 2010).

¹⁷⁸ 229 P.3d 650, 663 (Utah 2010).

¹⁷⁹ *Id.* at 668.

¹⁸⁰ *United States v. Debruhl*, 993 A.2d 571, 573 (D.C. 2010).

¹⁸¹ *People v. Bridgewater*, 918 N.E.2d 553, 557-58 (Ill. 2009); *State v. Patton*, 219 P.3d 651, 658 (Wash. 2009).

¹⁸² *Hall v. State*, 981 A.2d 1106, 1112-13 (Del. 2009).

¹⁸³ *Owens v. Commonwealth*, 291 S.W.3d 704, 708 (Ky. 2009).

¹⁸⁴ *State v. Cantrell*, 233 P.3d 178 (Idaho Ct. App. 2010); *People v. Mason*, 935 N.E.2d 130 (2010).

¹⁸⁵ See, e.g., *Bishop v. State*, 308 S.W.3d 14 (Tex. App. 2009).

rejected as improvidently granted, due to the defendant not raising a suppression motion in the original action. Courts in five states issued rulings establishing a good faith exception, although one has been overruled by the state supreme court.¹⁸⁶ While one court in Washington established a good faith exception,¹⁸⁷ other Washington state courts ruled on *Gant* issues in another twenty-one cases.

V. CONCLUSION

The review of lower court decisions involving *Gant* issues in the year following the decision provide evidence that the case is having an impact on police vehicle search practice. Out of 125 federal cases where *Gant* was the controlling factor, almost 30 percent resulted in rulings favorable to defendants. Defendants fared even better in state court decisions, where courts ruled in their favor 56 percent of the time. While it is difficult to compare the number of cases in which a defendant won prior to *Gant*, given that the *New York v. Belton* "bright line rule" permitted vehicle searches after all arrests made in a vehicle, it is highly unlikely that defendants would have evidence suppressed after a vehicle search, and even less likely that they would prevail, since the success rate currently sits between 30 and 50 percent. As Justice O'Connor pointed out in *Thornton*,¹⁸⁸ police viewed *Belton* as an entitlement, and there is ample evidence to demonstrate that law enforcement agents routinely use pretextual traffic stops as a means to execute a vehicle search after making a minor arrest. For these cases, where individuals are arrested for driving under a suspended license, driving without proof of insurance, and a host of other offenses where there is no reasonable basis for arguments of officer safety or the need to find additional evidence of the crime, it is likely that police will be forced to find other methods.

Gant leaves officers with several alternatives in these types of cases. First, they can try to obtain consent to conduct a search. If they can demonstrate that consent is obtained voluntarily and there is no evidence of coercion, it is likely to pass constitutional muster. Yet, even here, officers need to be careful in how they proceed. Out of nine consent cases included in this study, two searches were ruled improper by lower courts. Second, the automobile exception remains a viable search option where officers can demonstrate probable cause of evidence of criminal activity.¹⁸⁹ That can be obtained under the plain view doctrine (e.g., smelling alcohol or marijuana, viewing open bottles in the back seat) or through use of a K-9 unit to conduct a dog sniff.¹⁹⁰

As the review of decisions demonstrates, the automobile exception (present in seven federal and one state decision) is still a viable option for officers. Third, when officers can legitimately make officer safety claims or demonstrate reasonable suspicion of the presence of weapons, officers may be able to search the vehicle to do a protective sweep. While only three cases in this review involved such facts, it is by no means prohibited.

When departments have written policies or established routine practices, they can impound vehicles and then conduct an inventory search. Of the available options, this is perhaps the most suspect because the purpose of an inventory search should not be a fishing expedition to find criminal activity. Adding further support to the idea that suspect motives may be behind inventory searches, the author of the *FBI Bulletin's* advice regarding inventory searches stated that the purpose behind the advice was to find a way "around" *Gant*.¹⁹¹ Yet, as the review of cases here suggests, courts may be unwilling to invalidate the use of inventory

¹⁸⁶ *People v. Chamberlain*, 229 P.3d 1054, 1058 (Colo. 2010).

¹⁸⁷ *State v. Riley*, 225 P.3d 462 (Wash. Ct. App. 2010).

¹⁸⁸ *Thornton v. United States*, 541 U.S. 615, 624 (O'Connor, J., concurring in part).

¹⁸⁹ See *United States v. Ross*, 456 U.S. 798 (1982).

¹⁹⁰ In most states, suspicionless dog searches are permitted at any traffic stop. See generally *Illinois v. Caballes*, 543 U.S. 405 (2005) (holding such a search does not violate the Fourth Amendment).

¹⁹¹ Schott, *supra* note 118.

searches except in rare circumstances. And while the issue of inventory searches viewed in light of *Gant* may ultimately make it to the Supreme Court, it is uncertain how the Court would rule. It is possible that the Supreme Court would reject the strategy of using inventory searches if it is clear that the impoundment is merely a pretext for a search without probable cause. Yet, as long as police are careful to make sure that there is an "innocent" explanation of their behavior, the chances are that the Court will allow it. The future use of inventory searches by police is deserving of further research.

A. DOES GANT REPRESENT A FUNDAMENTAL SHIFT IN CRIMINAL PROCEDURE?

Arizona v. Gant certainly sent shock waves through law enforcement in the first few months after it was handed down. The case undid almost thirty years of police practice, and it has the potential to force law enforcement to find new ways to conduct criminal investigations. Only time will tell how great the change may be. Yet, what *Gant* does not appear to be is a fundamental shift in the Court's overall crime control jurisprudence. While *Gant* places limits on police practice, there are few signs within the decision that the case truly represents a paradigm shift. Much of the criticism of *Belton* in the opinions of Justices Stevens and Scalia focus more on the logical flaws in the argument underlying *Belton's* bright-line rule. The Court did not focus on the rights of the accused in the same way as many dissents by Justices Marshall and Brennan in earlier crime control decisions.¹⁹²

Gant also stands alone in recent search and seizure cases. In recent years, most of the Court's criminal procedure decisions have been squarely on the side of crime control. For example, in *Virginia v. Moore*, the Court unanimously ruled that the Fourth Amendment was not violated when police arrested someone for an offense for which state law only permitted a summons, and refused to suppress the evidence of drugs found in the subsequent search incident to arrest.¹⁹³ In *Arizona v. Johnson*, the Court reaffirmed the holdings of *Terry v. Ohio*¹⁹⁴ and *Brendlin v. California*,¹⁹⁵ and further held that an officer's questioning about matters unrelated to the original stop does not change the encounter into something other than a lawful seizure.¹⁹⁶ In another 2009 decision, the Court held in *Herring v. United States* that the good-faith exception to the exclusionary rule applied when an officer made an arrest based on an outstanding warrant in another jurisdiction, even though that warrant was invalid.¹⁹⁷ Indeed, with the exception of *Gant*, there have been few criminal procedure decisions in recent years that would indicate a shift in the Court's general approach to the Fourth Amendment. More recently, that trend has continued in the Court's decision in *Berghuis v. Thompkins*, which narrowed the

¹⁹² See, e.g., Justice Brennan's dissent in *Belton v. New York*, 453 U.S. 454, 468 (1981), overruled by *Arizona v. Gant*, 129 S. Ct. 1710 (2008):

Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car.

See also Marshall's dissents in *South Dakota v. Opperman*, 428 U.S. 364, 384-96 (1976), and *United States v. Peltier*, 422 U.S. 531, 544-62 (1975). In *Peltier*, Marshall bitterly states,

If a majority of my colleagues are determined to discard the exclusionary rule in *Fourth Amendment* cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule, with no opportunity afforded parties most concerned to be heard, would be indefensible in any circumstances.

Peltier, 422 U.S. at 561-62.

¹⁹³ 553 U.S. 164 (2008).

¹⁹⁴ 392 U.S. 1 (1968).

¹⁹⁵ 551 U.S. 249, 256-57 (2007) (holding that the driver and all passengers of a vehicle are considered seized for the duration of a lawful traffic stop).

¹⁹⁶ *Arizona v. Johnson*, 129 S. Ct. 781, 788 (2009).

¹⁹⁷ 555 U.S. 135; 129 S. Ct. 695, 701 (2009).

applicability of *Miranda* advisements by requiring defendants to explicitly invoke their right to remain silent.¹⁹⁸

It is also unclear how the Court will decide similar cases in the future. *Gant* was a 5-4 decision, and two members of the majority, Justices Souter and Stevens, have since left the court. While it is not likely that Justice Sotomayor would join with the dissenters to overrule *Gant*, any predictions about how she will vote are certainly premature. Further, while Justice Sotomayor represents a question mark on the Court, the appointment of Elena Kagan to replace Justice Stevens raises even more questions due to her virtually non-existent record on criminal procedure issues.

Regardless of what *Gant* means for the long term future of the meaning of the Fourth Amendment, in the short term, police officers will need to adapt to the decision. Anecdotal evidence certainly indicates that officers and prosecuting attorneys are taking this matter seriously and that it will have an impact on the ability of police to use pretextual stops as a tool in the ongoing effort to limit traffic in illegal drugs. As new cases come to the Court, the extent to which *Gant* marks a sea change will become more apparent. The decision has had an immediate impact on law enforcement, and further research of the decision's reach on police practice and the use of vehicle searches is merited.

¹⁹⁸ 130 S. Ct. 2250 (2010), *reh'g denied*, *Berghuis v. Thompkins*, 131 S. Ct. 33 (2010).