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# Stranger Than Dictum: Why Arizona v. Gant Compels the Conclusion that Suspicionless Buie Searches Incident to Lawful Arrests Are Unconstitutional

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Stranger Than Dictum: Why *Arizona v. Gant* Compels the Conclusion that Suspicionless Buie Searches Incident to Lawful Arrests Are Unconstitutional

Colin Miller\*

I. INTRODUCTION

The opinion of the Court insists, however, that its major premise—that an arrest creates a right to search the place of arrest—finds support in decisions beginning with *Weeks v. United States*.... These decisions do not justify today’s decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated into a decision.<sup>1</sup>

Justice Frankfurter delivered this passage in his dissenting opinion in *United States v. Rabinowitz*, the Supreme Court’s 1950 opinion which set the high water mark for the search incident to a lawful arrest.<sup>2</sup> Nineteen years later, in *Chimel v. California*, the Court explicitly repudiated *Rabinowitz* and held that the proper scope of a search incident to a lawful arrest is merely “the arrestee’s person and the area ‘within his immediate control’—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”<sup>3</sup> Following *Chimel*’s contraction, however, the Court issued a few opinions of expansion.

In *Belton v. New York*, a majority of the Court created what was subsequently maligned as the *Belton* fiction: “that articles inside the...passenger compartment of an automobile are generally, if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m],’” meaning that officers lawfully arresting the occupant of a vehicle

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<sup>1</sup> *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting).

<sup>2</sup> See *infra* notes 83-90 and accompanying text.

<sup>3</sup> 395 U.S. 752, 763 (1969).

can automatically search the vehicle's passenger compartment.<sup>4</sup> It was Justice Brennan's reading of the majority opinion in his dissent, however, that subsequently "predominated."<sup>5</sup> According to Justice Brennan, while the majority found that a single arresting officer properly searched accessible portions of the passenger compartment of a vehicle while four arrestees were unsecured, "the result presumably would have been the same even if [the officer] 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."<sup>6</sup> In *Thornton v. United States*, the Court did not curtail this predominating reading and instead piled fiction upon (*Belton*) fiction, finding that *Belton* authorizes searches of passenger compartments of vehicles incident to the lawful arrests of even their recent occupants.<sup>7</sup>

In its 2009 opinion in *Arizona v. Gant*, the Court finally dismantled the *Belton* fiction, concluding that *Chimel* "continues to define the boundaries of the [search incident to a lawful arrest] exception" and that *Chimel* only authorizes the search of the passenger compartment of a vehicle "when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."<sup>8</sup> The effect of this opinion on *Belton* and *Thornton* was clear: *Gant* explicitly overruled the predominating reading of *Belton* and rebuked *Thornton* as an application of *Chimel*.<sup>9</sup> There was, however, a third post-*Chimel* Supreme Court opinion that also expanded the scope of searches incident to lawful arrests, and defendants and appellants should be able to raise *Arizona v. Gant* to invalidate an important part of that opinion as well.

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<sup>4</sup> 453 U.S. 454, 460 (1981) (quoting *Chimel*, 395 U.S. at 763 (1969)).

<sup>5</sup> *Arizona v. Gant*, 129 S.Ct. 1710, 1718 (2009).

<sup>6</sup> *Belton*, 453 U.S. at 468 (Brennan, J., dissenting).

<sup>7</sup> 541 U.S. 615, 622-23 (2004).

<sup>8</sup> *Gant*, 129 S.Ct. at 1719.

<sup>9</sup> *Id.*

In *Maryland v. Buie*, the Court held that as an incident to a lawful (home) arrest, officers can “as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”<sup>10</sup> This holding was actually dictum, with the controlling portion of the Court’s opinion being that reasonable suspicion is required for protective sweeps beyond these spaces, such as the search conducted in *Buie*.<sup>11</sup> Notwithstanding this fact, however, courts unequivocally have treated *Buie*’s dictum as gospel and universally found that it authorizes suspicionless searches of sufficiently large spaces not only in arrest rooms, but also in rooms immediately abutting arrest rooms and connected to arrest rooms by hallways.<sup>12</sup> This article argues that defendants and appellants should be able to raise both the *Arizona v. Gant* opinion and the reasoning within it to argue that the reaffirmation of *Chimel* and the destruction of the *Belton* fiction together invalidate the type of search authorized in *Buie*’s dictum. It also argues that, even without *Gant*, courts should have realized and should now conclude that they have grossly misconstrued the scope of suspicionless *Buie* searches.

Section II tracks the ebbs and flows in the Supreme Court’s treatment of the search incident to a lawful arrest, from its creation in dictum in *Weeks v. United States* to the Court’s most recent explanation of the exception in *Gant*. Section III sets forth precedent establishing the unduly broad construction which courts have given to suspicionless *Buie* searches. Finally, Section IV argues that, before *Gant*, courts had stretched the scope of suspicionless *Buie* searches beyond the breaking point, and, after *Gant*, courts should find that such searches are unconstitutional.

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<sup>10</sup> 494 U.S. 325, 334 (1990).

<sup>11</sup> *Id.*

<sup>12</sup> See *infra* notes 270-315 and accompanying text.

## II. THE CREATION AND DEVELOPMENT OF THE SEARCH INCIDENT TO A LAWFUL ARREST

### A. *Weeks, Carroll, and the Creation of the Search Incident to a Lawful Arrest Exception in Dicta*

It is well established that warrantless searches are “*per se* unreasonable subject only to a few specifically established exceptions.”<sup>13</sup> The Supreme Court’s 1914 opinion in *Weeks v. United States* is best known for birthing the main remedy for such unreasonable searches: the exclusionary rule.<sup>14</sup> Before christening this rule, however, the Court had to find that the search before it did not fall under a specifically established exception, and *Weeks* is actually a literal case of the exception proving the rule.<sup>15</sup> Before *Weeks*, the Supreme Court had never mentioned the search incident to a lawful arrest as an exception to the search warrant requirement,<sup>16</sup> but Justice Day’s opinion articulated such an exception solely to prove that it did not apply and that the exclusionary rule did. According to Day, the exclusionary rule applied to the case before the Court because the subject search did not involve the right “always recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crimes.”<sup>17</sup>

The Court’s next reference to the search incident to a lawful arrest also came in dictum in another opinion better known for something else. In its Prohibition-era opinion in *Carroll v. United States*, the Court addressed the constitutionality of a warrantless search of an Oldsmobile

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<sup>13</sup> *Katz v. United States*, 389 U.S. 347, 357 (1967).

<sup>14</sup> *See Weeks v. United States*, 232 U.S. 383, 398 (1914) (holding that the court’s admission of letters unconstitutionally seized from the defendant was prejudicial error).

<sup>15</sup> *See* Eugene Volokh, “The Exception Proves the Rule,” <http://www.volokh.com/posts/1241808692.shtml> (noting that the phrase “the exception proves the rule” means “seeing the exception, and recognizing that it is an exception, confirms for us that there is a rule”).

<sup>16</sup> *See Chimel v. California*, 395 U.S. 752, 755 (1969) (“Approval of a warrantless search incident to a lawful arrest seems first to have been articulated by the Court in 1914 in dictum in *Weeks v. United States*....”).

<sup>17</sup> *Weeks*, 232 U.S. at 392.

Roadster by federal prohibition agents which uncovered bonded whiskey and gin and which *preceded* the agents' arrest of the car's occupants.<sup>18</sup> The occupants claimed that the search was unconstitutional as it only could have been justified as an *incident*, and not as an *antecedent*, to a lawful arrest.<sup>19</sup> In his 1925 opinion, Chief Justice Taft agreed that the search could not be justified under the search incident to a lawful arrest exception laid out in *Weeks*, but in doing so, he expanded the proper scope of such a (still hypothetical) search beyond the person of the arrestee to objects within his control. According to his opinion, "[w]hen a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution."<sup>20</sup> But while the occupants won the battle, they lost the war. Justice Taft found that the agents had probable cause to believe that the Roadster contained intoxicating spirituous liquor and concluded that there is an exception to the search warrant requirement when an official has "reasonable cause...that the contents of [an] automobile offend against the law,"<sup>21</sup> *i.e.*, the automobile exception.

B. ***Agnello, Marron, and the Early, Uncertain Scope of Searches Incident to Lawful Arrests***

Later that same year year, the Court had its first opportunity to apply the search incident to a lawful arrest exception in a controlling portion of its opinion. In *Agnello v. United States*, agents were looking through the windows of Stephen Alba's house when they saw Frank

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<sup>18</sup> 267 U.S. 132, 158 (1925).

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

<sup>20</sup> *Id.* (citing *Weeks*, 232 U.S. at 392).

<sup>21</sup> *Id.* at 158-59.

Agnello apparently sell packages containing cocaine to an undercover agent.<sup>22</sup> Then, without a warrant, they rushed in and arrested Alba, Frank Agnello, and two other men allegedly involved in a conspiracy to sell cocaine.<sup>23</sup> The agents seized packages from the table where the sale took place and seized from Alba the money the undercover agent had given to him.<sup>24</sup> Subsequently, some of the agents and a city policeman proceeded to Agnello's house and uncovered a can containing cocaine in his bedroom.<sup>25</sup>

In upholding the searches at Alba's house but invalidating the search of Agnello's house, the Court again modified the proper scope of searches incident to lawful arrests. Justice Butler's opinion now explained that officers could "contemporaneously...search persons lawfully arrested while committing crime and...search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody..."<sup>26</sup> What was clear was that, as an incident to a lawful arrest, arresting officers could now search not only for the "fruits or evidences of crimes," but also for weapons or other instrumentalities that the arrestee could use to escape from custody.<sup>27</sup>

What was less clear was where those officers could search. While *Carroll* authorized a search of the arrestee and objects within his control,<sup>28</sup> *Agnello* approved a search of "the place where the arrest [wa]s made."<sup>29</sup> Was Justice Butler merely restating the proper scope of a valid search incident to a lawful arrest, or was he saying that officers arresting a suspect in the kitchen

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<sup>22</sup> 269 U.S. 28-29 (1925).

<sup>23</sup> *Id.* at 29.

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

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 30.

<sup>27</sup> *Id.*

<sup>28</sup> See *supra* note 20 and accompanying text.

<sup>29</sup> See *supra* note 26 and accompanying text.

of his house could search the entire kitchen, or, indeed, the entire house?<sup>30</sup> The Court did not have to answer these questions because the packages on the table and the money seized from Alba were both clearly within the arrestees' control and part of the place where the arrest was made, and the can at Agnello's house was neither.

The Court's opinion two years later in *Marron v. United States*,<sup>31</sup> which was also written by Justice Butler, was no more edifying on this issue. Like *Carroll*, *Marron* was a Prohibition-era case, and a prohibition agent properly procured a warrant authorizing a search for "intoxicating liquors and articles for their manufacture" at a saloon.<sup>32</sup> Upon executing the warrant, agents discovered patrons being furnished intoxicating liquors and placed the bartender, Birdsall, under arrest.<sup>33</sup> Subsequently, the agents combed the area next to the saloon's cash register and found a number of bills.<sup>34</sup> They also searched a closet in the saloon and seized not only large quantities of liquor, but also, *inter alia*, "a ledger showing inventories of liquors, receipts, [and] expenses, including gifts to police officers...."<sup>35</sup> The owner of the saloon thereafter moved for the return of the bills and the ledger, contending that their seizure was not authorized by the warrant.<sup>36</sup>

The Supreme Court agreed that that the seizure of the bills and the ledger was not authorized under the warrant but found that they were properly searched and seized as an incident to a lawful arrest.<sup>37</sup> According to Justice Butler, the agents properly arrested Birdsall

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<sup>30</sup> See James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1422 n.24 (2007) (noting that "[t]he Court did not specifically state how broadly 'the place where the arrest is made' should be interpreted").

<sup>31</sup> 275 U.S. 192 (1927).

<sup>32</sup> *Id.* at 193.

<sup>33</sup> *Id.* at 194.

<sup>34</sup> *Id.*

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

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 198-99.

and “had a right without a warrant contemporaneously to search the place in order to find and seize things used to carry on the criminal enterprise.”<sup>38</sup> In the next sentence of the opinion, Butler, speaking with regard to the ledger, found that “while it was not on Birdsall’s person at the time of his arrest, it was in his immediate possession and control,” seemingly implying that *Agnello* did not widen the scope of a search incident to a lawful arrest.<sup>39</sup> In the very next sentence, however, Butler noted that “[t]he authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts used for the unlawful purpose,” intimating that the search could have extended beyond the area of an arrestee’s literal possession and control.<sup>40</sup>

C. ***Go-Bart, Lefkowitz, and the Narrow Construction of the Proper Scope of Searches Incident to Lawful Arrests***

Just six years later, in *Go-Bart Importing Co. v. United States*,<sup>41</sup> Justice Butler opted for the more restrictive reading of *Marron*. *Go-Bart* was yet another Prohibition-era case, with prohibition agents executing an arrest warrant against defendants whom they believed were using a company to commit a nuisance against the United States by possessing, transporting, selling, and soliciting and receiving orders for intoxicating liquor in violation of the National Prohibition Act.<sup>42</sup> Upon executing the arrest warrant at the defendants’ office, the agents arrested Phillip Gowen and William Bartles, neither of whom were committing illegal acts at the time of arrest.<sup>43</sup> Despite not having a search warrant for the premises, the agents falsely informed the arrestees

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<sup>38</sup> *Id.* at 199.

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

<sup>40</sup> *Id.*

<sup>41</sup> 282 U.S. 344 (1931).

<sup>42</sup> *Id.* at 349.

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

that they had such a warrant, searched the men, and recovered papers from both.<sup>44</sup> By threat of force, the agents also compelled Gowen to open a desk and safe, from which they recovered, *inter alia*, other papers, account books, and cancelled checks.<sup>45</sup>

Gowen and Bartles subsequently moved for the suppression of the items seized after their arrests, and the prosecution countered that these items were properly searched and seized incident to their lawful arrests.<sup>46</sup> The Supreme Court unanimously agreed with Gowen and Bartles, concluding that “[p]lainly the case before [it w]as essentially different from *Marron*”<sup>47</sup> and “distinguish[ing] *Marron* in two narrowing respects.”<sup>48</sup> First, whereas the agents arrested Gowen and Bartles while they were not committing illegal acts, the officers in *Marron* arrested “Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon.”<sup>49</sup> Second, the Court noted that in *Marron*, agents “seized a ledger in a closet...and some bills beside the cash register” and concluded that these searches were proper because, unlike in *Go-Bart*, “[t]hese things were visible and accessible and in the offender’s immediate custody. There was no threat of force or general search or rummaging of the place.”<sup>50</sup>

The Court reached a similar conclusion in its final Prohibition-era search incident to a lawful arrest opinion the following year, *United States v. Lefkowitz*,<sup>51</sup> another unanimous opinion written by Justice Butler. In *Lefkowitz*, a deputy marshal and three other prohibition agents executed an arrest warrant at a one room apartment based upon probable cause that its occupants were conspiring “to sell, possess, transport, furnish, deliver, and take orders for intoxicating

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

<sup>45</sup> *Id.* at 349-50.

<sup>46</sup> *Id.* at 350.

<sup>47</sup> *Id.* at 358.

<sup>48</sup> Tomkovicz, *supra* note 30, at 1423.

<sup>49</sup> *Go-Bart*, 282 U.S. at 358.

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

<sup>51</sup> 285 U.S. 452 (1932).

liquor contrary to the National Prohibition Act.”<sup>52</sup> As in *Go-Bart*, the officials arrested two individuals, neither of whom was committing illegal acts at the time of arrest.<sup>53</sup> And, as in *Go-Bart*, despite not having a search warrant, the officials proceeded to search the place of arrest, this time recovering items from desks, a towel cabinet, and baskets.<sup>54</sup>

After the defendants moved to suppress these items, Butler again deemed the searches unconstitutional, drawing the same two distinctions between the case before him and *Marron*.<sup>55</sup> Butler again noted that the defendants in the present case were not committing illegal acts at the time of their arrests while *Marron* involved a search conducted after the arrest of “the bartender for crime openly being committed in their presence.”<sup>56</sup> And he again noted that the ledger and bills seized in *Marron* “being in plain view were picked up by officers as an incident of the arrest.”<sup>57</sup> Conversely, the items seized by the officials in *Lefkowitz* were not the fruits of a proper search incident to a lawful arrest because they were “concealed” and only uncovered as part of searches that “were exploratory and general....”<sup>58</sup>

D. **Post-Prohibition Precedent: The Expansion of the Scope of Searches Incident to Lawful Arrests in *Harris* and *Rabinowitz***

This restrictive reading of the proper scope of a valid search incident to a lawful arrest, however, died along with prohibition. The Supreme Court next addressed the scope of a valid search incident to a lawful arrest in 1947 in *Harris v. United States*,<sup>59</sup> but now with a completely different lineup of Justices. In *Harris*, officials procured two arrest warrants for George Harris,

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<sup>52</sup> *Id.* at 458.

<sup>53</sup> *Id.* at 458-60.

<sup>54</sup> *Id.*

<sup>55</sup> *Id.* at 465.

<sup>56</sup> *Id.*

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

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

<sup>59</sup> 331 U.S. 145 (1947).

who allegedly had violated both the Mail Fraud Statute and the National Stolen Property Act.<sup>60</sup> Five FBI agents then executed those warrants at Harris' four room apartment and arrested him in the living room while he was not committing any illegal acts.<sup>61</sup> Then, despite not having a search warrant, the agents conducted a search of the living room and each of the apartment's other three rooms for approximately five hours.<sup>62</sup> That search uncovered World War II draft cards, and Harris was eventually charged with "the unlawful possession, concealment and alteration of certain Notice of Classification Cards and Registration Certificates...."<sup>63</sup>

Harris thereafter moved to suppress the draft cards, but the Supreme Court, in a majority opinion penned by Chief Justice Vinson, found that the agents properly seized them as part of a valid search incident to a lawful arrest.<sup>64</sup> The Court noted that it was undisputed that a search incident to a lawful arrest can extend to the area under the arrestee's immediate control and then found no support "for the suggestion that [such a] search could not validly extend beyond the room in which the petitioner was arrested."<sup>65</sup>

In distinguishing the Court's two previous opinions, Justice Vinson concluded that "[t]he searches found to be invalid in the *Go-Bart* and *Lefkowitz* cases were so held for reasons other than the areas covered by the searches."<sup>66</sup> Instead, the majority construed those cases as ones "in which law enforcement officers ha[d] entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime."<sup>67</sup> Four Justices authored

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<sup>60</sup> *Id.* at 148.

<sup>61</sup> *Id.* at 148-49.

<sup>62</sup> *Id.* at 149.

<sup>63</sup> *Id.* at 146-47.

<sup>64</sup> *Id.* at 151-55.

<sup>65</sup> *Id.* at 152.

<sup>66</sup> *Id.* at 152 n.16.

<sup>67</sup> *Id.* at 153.

dissenting opinions disagreeing with this characterization of *Go-Bart* and *Lefkowitz*. Justice Frankfurter concluded that the majority was “throw[ing] to the winds the latest unanimous decisions of this Court on the allowable range of search without warrant incidental to lawful arrest.”<sup>68</sup> And Justice Jackson found that the problem with the majority’s opinion was “that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate control, I see no practical limit short of that set in the opinion of the Chief Justice-and that means to me no limit at all.”<sup>69</sup>

According to the majority opinion, however, the Court was not laying down a bright line rule that an arresting officer can always extend his search beyond the room in which a suspect is arrested. Instead, Chief Justice Vinson claimed that he was upholding the subject search because Harris had control over the entire apartment and the “instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment.”<sup>70</sup> He cautioned that “[o]ther situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive.”<sup>71</sup>

A mere year later, however, Chief Justice Vinson found himself on the wrong side of the Court’s next search incident to a lawful arrest opinion, which drastically, yet ultimately briefly, altered its application. In *Trupiano v. United States*, the Alcohol Tax Unit of the Bureau of Internal Revenue learned that the defendants sought to lease part of a farm and build and operate an illegal still on it.<sup>72</sup> The Unit continued to monitor the defendants’ activities for the next four

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<sup>68</sup> *Id.* at 168 (Frankfurter, J., dissenting).

<sup>69</sup> *Id.* at 197 (Jackson, J., dissenting).

<sup>70</sup> *Id.* at 152.

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

<sup>72</sup> 334 U.S. 699, 701 (1948).

months, with one agent gathering information while working undercover on the farm as a “dumb farm hand.”<sup>73</sup> Upon receiving a dispatch from the undercover agent that the defendants were about to ship alcohol, other agents conducted a warrantless raid of the farm.<sup>74</sup> After arresting one of the defendants, agents seized cans containing alcohol and distillery equipment such as large mash vats.<sup>75</sup>

The defendants subsequently moved to suppress this evidence, and the Supreme Court, in a majority opinion written by Justice Murphy, agreed, concluding that “there must be something more in the way of necessity than merely a lawful arrest” for officers to be able to conduct a warrantless search.<sup>76</sup> In other words, according to the Court, “there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant.”<sup>77</sup> The problem for the prosecution was that the majority found that in the case before it, “no reason whatever ha[d] been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant...”<sup>78</sup> Instead, “[t]he agents of the Alcohol Tax Unit knew every detail of the construction and operation of the illegal distillery long before the raid was made.”<sup>79</sup>

Justice Murphy found no need to reconcile his majority opinion with the majority opinion in *Harris* because he saw the case before him as “relat[ing] only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest.”<sup>80</sup> Conversely, he found among other things that this

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

<sup>74</sup> *Id.* at 702-03.

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

<sup>76</sup> *Id.* at 708.

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

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

<sup>79</sup> *Id.* at 706.

<sup>80</sup> *Id.* at 709.

“circumstance was wholly lacking in the *Harris* case, which was concerned with the permissible scope of a general search without a warrant as an incident to a lawful arrest.”<sup>81</sup>

Chief Justice Vinson filed a dissenting opinion, joined by three other Justices, in which he claimed that the majority opinion was inconsistent with the “long line of decisions in th[e] Court recognizing as consistent with the restrictions of the Fourth Amendment the power of law-enforcement officers to make reasonable searches and seizures as incidents to lawful arrests.”<sup>82</sup> While Vinson’s opinion did not take the day, *Trupiano* remained on the books for less than two years, and Vinson’s construction of the search incident to a lawful arrest would thereafter rule the Fourth Amendment roost for almost two decades.

This sea change came in the Court’s 1950 opinion in *United States v. Rabinowitz*.<sup>83</sup> In *Rabinowitz*, Government officers executed an arrest warrant at the office of Albert Rabinowitz, and, over his objection and without a search warrant, “searched the desk, safe, and file cabinets in the office for about an hour and a half.”<sup>84</sup> The searches uncovered, *inter alia*, stamps with forged overprints, and Rabinowitz was charged with selling, possessing, and concealing forged and altered obligations of the United States with intent to defraud.<sup>85</sup> Rabinowitz subsequently moved to suppress the stamps, claiming that pursuant to *Trupiano*, the officers had to procure a search warrant before searching for the stamps.<sup>86</sup>

The Supreme Court disagreed, finding that

A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But

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<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 714-15 (Vinson, J., dissenting).

<sup>83</sup> 339 U.S. 56 (1950).

<sup>84</sup> *Id.* at 58-59.

<sup>85</sup> *Id.* at 57, 59.

<sup>86</sup> *Id.* at 59.

we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of the search.<sup>87</sup>

Therefore, the Court held that “[t]o the extent that *Trupiano*...requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled.”<sup>88</sup>

This conclusion led the Court to deny Rabinowitz’s motion to suppress because it deemed the searches of the desk, safe, and file cabinets reasonable for the same reasons proffered in *Harris*: It found *Go-Bart* and *Lefkowitz* to be cases “that condemned generally exploratory searches, which cannot be undertaken by officers with or without a warrant.”<sup>89</sup> Thus, even though the stamps were not in plain view, they were reasonably seized because “[i]n the instant case the search was not general or exploratory....”<sup>90</sup>

In a dissenting opinion, Justice Frankfurter claimed that the decisions cited as support for the majority’s opinion, starting with *Weeks*, did “not justify today’s decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision.”<sup>91</sup> It would be nineteen years before Justice Frankfurter’s opinion and the logic of *Go-Bart* and *Lefkowitz* would command the endorsement of the majority of the Court.

E. **Return to Restrictive: *Chimel* and the Twin Rationales Test**

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<sup>87</sup> *Id.* at 65.

<sup>88</sup> *Id.* at 66.

<sup>89</sup> *Id.* at 62.

<sup>90</sup> *Id.*

<sup>91</sup> *Id.* at 75 (Frankfurter, J., dissenting).

In the interim, the Court nibbled around the edges of *Rabinowitz* without really taking a substantial bite.<sup>92</sup> Then, by reaching its landmark 1968 ruling in *Terry v. Ohio*,<sup>93</sup> the Supreme Court greased the wheels for the removal of *Rabinowitz* and *Harris* from Fourth Amendment doctrine. *Terry* reinforced the principle that “the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.”<sup>94</sup> Of course, the Court only laid out this principle to establish that “necessarily swift action predicated upon the on-the-spot observations of [police] officer[s] on the beat...historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”<sup>95</sup> The Court thus found that

where a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others' safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.<sup>96</sup>

Because of the nature and extent of the governmental interests and the intrusion on individual rights in this context, the Court found that such stops-and-frisks could be justified on something less than probable cause: “specific and articulable facts which, taken together with

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<sup>92</sup> See *United States v. Abel*, 362 U.S. 217, 235 (1960) (finding that the several cases on the search incident to a lawful arrest “cannot be satisfactorily reconciled,” but concluding that “[t]his is not the occasion to attempt to reconcile all the decisions, or to re-examine them”); *Preston v. United States*, 376 U.S. 364, 367 (1964) (finding that the search of an arrestee’s automobile long after his arrest “was too remote in time or place to have been made as incidental to the arrest”); *Stoner v. California*, 376 U.S. 483, 486 (1964) (finding that the search of an arrestee hotel room two days *before* his arrest was unconstitutional because “a search can be incidental to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest”); *James v. Louisiana*, 382 U.S. 36, 36-37 (1965) (relying upon *Stoner* to invalidate the search of an arrestee’s home, which was more than two blocks away from the site of the arrest); *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216 (1968) (invalidating an alleged search of a car incident to a lawful arrest that “did not take place until petitioners were in custody inside the courthouse and the car was parked on the street outside”).

<sup>93</sup> 392 U.S. 1 (1968).

<sup>94</sup> *Id.* at 20.

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

<sup>96</sup> *Id.* at 30.

rational inferences from those facts, reasonably warrant the intrusion,” *i.e.*, reasonable suspicion.<sup>97</sup> *Terry* laid the table for the Court’s opinion the following year in *Chimel v. California*.<sup>98</sup>

In *Chimel v. California*, three police officers went to Ted Chimel’s three bedroom house to execute an arrest warrant for the burglary of a coin shop and arrested him at the entrance to his house.<sup>99</sup> Then, without a search warrant and over Chimel’s objection, the officers searched the entire house over the next forty-five minutes to an hour.<sup>100</sup> During their search of the master bedroom and a sewing room, the officers directed Chimel’s wife to open drawers and “physically move contents of the drawers from side to side so that (they) might view any items that would have come from (the) burglary.”<sup>101</sup>

Chimel moved to suppress coins that the officers found during their search, but the California state courts denied his motion on the ground that the officers’ search of the entire house was a valid search incident to a lawful arrest in compliance with *Rabinowitz*.<sup>102</sup> The Supreme Court later granted *cert* and began by tracing the history of the search incident to a lawful arrest from *Weeks* to *Rabinowitz*.<sup>103</sup> In his majority opinion, Justice Stewart characterized *Harris* as throwing “[t]he limiting views expressed in *Go-Bart* and *Lefkowitz*...to the winds...”<sup>104</sup> Moreover, he found that the doctrine of *Rabinowitz*, that arresting officers can search any area within the possession or under the control of the arrestee, “at least in the broad

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<sup>97</sup> *Id.* at 21.

<sup>98</sup> See Thomas K. Clancy, *Protective Searches, Pat-Downs, or Frisks?: The Scope of Permissible Intrusion to Ascertain if a Detained Person is Armed*, 82 MARQ. L. REV. 491, 527 (1999) (“In so limiting the scope of a search incident to arrest, the *Chimel* Court explicitly relied on *Terry* for the proposition that ‘a search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.””).

<sup>99</sup> 395 U.S. 752, 753-54 (1969).

<sup>100</sup> *Id.* at 754.

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

<sup>102</sup> *Id.* at 754-55.

<sup>103</sup> *Id.* at 755-60.

<sup>104</sup> *Id.* at 757-58.

sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis.”<sup>105</sup> Instead, the Court concluded that *Rabinowitz* was “hardly founded on an unimpeachable line of authority” and endorsed Justice Frankfurter’s dictum dissent,<sup>106</sup> noting that “the approach taken in cases such as *Go-Bart*, *Lefkowitz*, and *Trupiano* was essentially disregarded by the *Rabinowitz* Court.”<sup>107</sup>

The Court then used *Terry* as the guiding light to redraw the lines of searches incident to lawful arrests. Justice Stewart noted that the Court had found in *Terry* that “the scope of a [warrantless] search must be strictly tied to and justified by the circumstances which rendered its initiation permissible.”<sup>108</sup> He then analogized *Terry* stops and frisks to the case before him, concluding that “[a] similar analysis underlies the ‘search incident to arrest’ principle, and marks its proper extent.”<sup>109</sup> According to the Court, there are twin rationales supporting searches incident to lawful arrests:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer’s safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee’s person in order to prevent its concealment or destruction.<sup>110</sup>

Based upon these twin rationales, the Court also found that “the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule.”<sup>111</sup> The Court reached this conclusion because “[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the

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<sup>105</sup> *Id.* at 760.

<sup>106</sup> *See supra* note 91 and accompanying text.

<sup>107</sup> *Chimel*, 395 U.S. at 760.

<sup>108</sup> *Id.* at 762 (*quoting Terry v. Ohio*, 392 U.S. 1, 19 (1969)).

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

<sup>110</sup> *Id.* at 762-63.

<sup>111</sup> *Id.* at 763.

clothing of the person arrested.”<sup>112</sup> Therefore, a search incident to a lawful arrest may only include “the arrestee’s person and the area ‘within his immediate control’-construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”<sup>113</sup> Conversely, the Court concluded that “[t]here is no comparable justification...for routinely searching any room other than that in which an arrest occurs-or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”<sup>114</sup> Instead, “[s]uch searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant.”<sup>115</sup>

Then, rather than distinguishing *Harris* and *Rabinowitz*, as the majority opinions in those cases had done with *Go-Bart* and *Lefkowitz*, Justice Stewart declared them no longer good law.<sup>116</sup> Justice Stewart noted that *Chimel* “correctly point[ed] out that one result of decisions such as *Rabinowitz* and *Harris* is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest the suspect at home rather than elsewhere.”<sup>117</sup> While not necessarily agreeing with *Chimel* that the police deliberately arrested him at home so that they could search his house, Justice Stewart concluded that “the fact remain[ed] that had [*Chimel*] been arrested earlier in the day, at his place of employment rather than at home, no search of his house could have been made without a search warrant.”<sup>118</sup>

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<sup>112</sup> *Id.*

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

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

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

<sup>116</sup> *See id.* at 768 (“It is time...to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have enforced today, [*Harris* and *Rabinowitz*] are no longer to be followed.”).

<sup>117</sup> *Id.* at 767

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

Justice Stewart did acknowledge that it would be possible to distinguish these two cases because “*Rabinowitz* involved a single room, and *Harris* a four-room apartment, while in the case before us an entire house was searched.”<sup>119</sup> He found, however, that “such a distinction would be highly artificial, agreeing with Justice Jackson’s dissenting opinion in *Harris* that “[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items.”<sup>120</sup> And while the *Harris* majority was not willing to lay down a bright line rule that an arresting officer can always extend his search beyond the room in which a suspect is arrested, the *Chimel* majority was willing to draw such a line in the opposite direction, deeming unconstitutional not only searches incident to lawful arrests that extend beyond the room of arrest but also searches within the arrest room but beyond the reach of the arrestee. According to the Court, “[t]he only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other.”<sup>121</sup>

#### F. **Robinson, Belton, and Bright Line Rules**

The Supreme Court’s next major search incident to a lawful arrest opinion, its 1973 opinion in *United States v. Robinson*, made clear that this bright line rule applied both ways. According to Justice Rehnquist’s majority opinion, while the *Chimel* twin rationales mark the proper scope of a search incident to a lawful arrest, neither of those rationales need be established in any particular case for the search of an arrestee to be deemed constitutional.<sup>122</sup> In *Robinson*, Officer Richard Jenks arrested Willie Robinson, Jr. for operating a motor vehicle after

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<sup>119</sup> *Id.* at 766.

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

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

<sup>122</sup> 414 U.S. 218, 236 (1973).

the revocation of his operator's permit, a crime not especially likely to involve evidentiary items or an armed and dangerous subject, *i.e.*, either of *Chimel's* rationales.<sup>123</sup> Nonetheless, Jenks proceeded to search Robinson, uncovering fourteen gelatin capsules containing heroin.<sup>124</sup>

Robinson moved to suppress the heroin, but the district court disagreed; however, the United States Court of Appeals for the District of Columbia reversed, "suggesti[ng] that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for the search of a person incident to a lawful arrest."<sup>125</sup> The Supreme Court then reversed the appellate court, rejecting "such a case-by-case adjudication."<sup>126</sup> Instead, it concluded that "[a] police officer's determination as to how to and where to search the person of a suspect whom he has arrested is necessarily a quick *ad hoc* judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search."<sup>127</sup>

Thus, the validity of a search incident to a lawful arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect."<sup>128</sup> Instead, when an arrest is lawful, "a search incident to the arrest requires no additional justification."<sup>129</sup> This is because "[i]t is the fact of the lawful arrest which establishes the authority to search..."<sup>130</sup> This principle continues to guide Supreme Court precedent, with the Supreme Court recently recognizing in its 1998 opinion in *Knowles v. Iowa* that *Robinson* does not authorize searches incident to the lawful

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<sup>123</sup> *Id.* at 227.

<sup>124</sup> *Id.* at 222-23.

<sup>125</sup> *Id.* at 236.

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

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

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

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

issuance of traffic citations,<sup>131</sup> thus “reaffirm[ing] its fealty to the *sine qua non* of arrest as a constitutional precondition to search incident authority.”<sup>132</sup>

While *Robinson* established the bright line rule that an officer may always search an arrestee as an incident to his lawful arrest, the Supreme Court’s 1981 opinion in *New York v. Belton*<sup>133</sup> established that an arresting officer may always search the passenger compartment of an arrestee’s automobile for similar reasons. In *Belton*, Trooper Douglas Nicot pulled over a speeding automobile on the New York Thruway, determined that none of the four occupants owned the vehicle or was related to its owner, smelled burned marijuana emanating from the car, and saw on the car’s floor an envelope marked “Supergold” that he associated with marijuana.<sup>134</sup> Nicot then arrested the four men, including Roger Belton, split them into four separate areas of the Thruway, picked up the envelope and found that it contained marijuana, and searched the vehicle’s passenger compartment, recovering from the back seat Belton’s black leather jacket, which had cocaine in one of its pockets.<sup>135</sup>

Belton thereafter moved to suppress the cocaine, but the Supreme Court found that the search was constitutional.<sup>136</sup> In Justice Stewart’s majority opinion, the Court began by citing to a law review article written in response to *Robinson*, which had concluded that “[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions...may be ‘literally impossible of application by the

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<sup>131</sup> 525 U.S. 113, 117-18 (1998).

<sup>132</sup> Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 399 (2001).

<sup>133</sup> 453 U.S. 454 (1981).

<sup>134</sup> *Id.* at 455-56.

<sup>135</sup> *Id.* at 456.

<sup>136</sup> *Id.* at 462-63.

officer in the field.”<sup>137</sup> According to Justice Stewart, this was why the Court in *Robinson* had “hewed to a straightforward rule, easily applied, and predictably enforced” for the search of an arrestee incident to his lawful arrest.<sup>138</sup> But the Court found that “no straightforward rule had emerged from litigated cases respecting...the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.”<sup>139</sup> Put another way, the Court concluded that “courts ha[d] found no workable definition of the ‘area within the immediate control of the arrestee’ when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.”<sup>140</sup>

Justice Stewart was, however, able to divine from these lower court opinions “the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are generally, if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’”<sup>141</sup> Therefore, “[i]n order to establish the workable rule this category of cases requires [the Court] read *Chimel*’s definition of the limits of the area that may be searched in light of that generalization.”<sup>142</sup> Justice Stewart thus concluded “that when a policeman has made a lawful arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”<sup>143</sup>

Moreover, Justice Stewart found that it followed “from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if

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<sup>137</sup> *Id.* at 458 (quoting Wayne R. LaFave, “Case –By-Case Adjudication” Versus “Standardized Procedures”: The *Robinson Dilemma*, 1974 S. CT. REV. 127, 141 (1974)).

<sup>138</sup> *Id.* at 459.

<sup>139</sup> *Id.*

<sup>140</sup> *Id.* 460.

<sup>141</sup> *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

<sup>142</sup> *Id.*

<sup>143</sup> *Id.*

the passenger compartment is within the reach of the arrestee, so also will containers in it be within his reach.”<sup>144</sup> This distinction allowed the Court to distinguish *Chimel*, which held that after an officer arrests a suspect at home, he may only search “drawers within the arrestee’s reach” and “could not search all the drawers in an arrestee’s house.”<sup>145</sup> In other words, according to the Court, the rest of the house, and even much of the room of arrest, is not within the reach of a suspect arrested at home, but the entire passenger compartment of a car is within the reach of an arrested occupant, even if an officer has already removed him from the car. Stewart claimed that the Court was merely “determin[ing] the meaning of *Chimel*’s principles” and “in no way alter[ing] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”<sup>146</sup>

Conversely, according to Justice Brennan’s dissenting opinion, the majority was making a mockery of *Chimel*. Justice Brennan began by disparaging the majority’s opinion as disregarding the twin *Chimel* rationales and “instead adopt[ing] a fiction—that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car.”<sup>147</sup> He then went on to note that the majority’s opinion in fact compelled something stranger than fiction. According to Justice Brennan, under the majority opinion, “the result presumably would have been 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.”<sup>148</sup> Although Justice Brennan’s reading of the majority’s opinion was done disparagingly, his reading soon

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 461.

<sup>146</sup> *Id.* at 460 n.3.

<sup>147</sup> *Id.* at 466.

<sup>148</sup> *Id.* at 468 (Brennan, J., dissenting).

“predominated,”<sup>149</sup> and it would be twenty-eight years before the Court finally decided to overrule this so-called *Belton* fiction.

G. **Michigan v. Long and the Automobile Frisk**

While, as noted, *Terry* led the Supreme Court to restrict the proper scope of searches incident to lawful arrests in *Chimel*, *Belton* was instrumental in the Court expanding the scope of a proper *Terry* frisk from the outer clothing of a suspect to the passenger compartment of a car in its 1983 opinion in *Michigan v. Long*.<sup>150</sup> In *Long*, Deputies Howell and Lewis observed a car traveling erratically and at an excessive speed before it swerved off into a shallow ditch.<sup>151</sup> The deputies approached the car, and Howell asked its driver, David Long, to produce his driver’s license, but Long did not respond until Howell repeated his request.<sup>152</sup> Howell then made two requests for Long’s registration, which merely led to Long (whom Howell thought appeared to be under the influence of something) turning from the deputies and walking toward the open door of his car.<sup>153</sup>

The deputies followed Long and observed a large hunting knife on the floorboard of the driver’s side of the car.<sup>154</sup> They then proceeded to conduct a fruitless *Terry* frisk of Long, followed by a search of the passenger compartment of the car, which uncovered marijuana.<sup>155</sup> Long moved to suppress the marijuana, with the Supreme Court of Michigan ultimately agreeing

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<sup>149</sup> *Arizona v. Gant*, 129 S.Ct. 1710, 1718 (2009).

<sup>150</sup> 463 U.S. 1032 (1983).

<sup>151</sup> *Id.* at 1035.

<sup>152</sup> *Id.* at 1036.

<sup>153</sup> *Id.*

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

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

with him because “*Terry* authorized only a limited patdown search of a *person* suspected of criminal activity’ rather than a search of an area.”<sup>156</sup>

The Supreme Court disagreed, noting that “[i]n two cases in which we applied *Terry* to specific factual situations, we recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers.”<sup>157</sup> One of those cases was *Pennsylvania v. Mimms*, where the Court adopted a bright line rule based on concerns about officer safety: “once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable seizures.”<sup>158</sup> The other was *Adams v. Williams*, in which the Court had cited to a study indicating that “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.”<sup>159</sup>

The Court then read *Mimms*, *Williams*, *Belton*, and *Terry* as indicating “that protection of police and others can justify protective searches when police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding the suspect.”<sup>160</sup> Extending the holdings of these opinions to the case before it, the Court concluded

that the search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible if the police officer possesses a reasonable belief based on ‘specific and articulable facts which, taken together with the

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<sup>156</sup> *Id.* at 1045 (quoting *People v. Long*, 320 N.W.2d 866, 869 (Mich. 1982)).

<sup>157</sup> *Id.* at 1047.

<sup>158</sup> 434 U.S. 106, 111 n.6 (1977).

<sup>159</sup> 407 U.S. 143, 148 n.3 (1972) (quoting Allen P. Brostow, *Police Officer Shootings-A Tactical Evaluation*, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 93, 93 (1963)).

<sup>160</sup> *Long*, 463 U.S. at 1049.

rational inferences from those facts, warrant' the officers in believing that the suspect is dangerous and the suspect may gain immediate control of weapons.<sup>161</sup>

#### H. **Buie, Protective Sweeps, and Suspicionless Searches**

Just as *Belton* begat the Court's extension of the scope of protective searches from a suspect's outer clothing to the passenger compartment of an automobile in *Michigan v. Long*, *Long* led to the Court expanding their scope still further and, in dictum, broadening the scope of searches incident to lawful arrests. In *Maryland v. Buie*, a man wearing a red running suit and another man robbed a Godfather's Pizza restaurant.<sup>162</sup> Police believed that the men were Jerome Buie and Lloyd Allen, and they obtained warrants for their arrests which six or seven officers executed at Buie's house.<sup>163</sup> Once inside Buie's house, the officers fanned throughout it, with Corporal James Rozar shouting into the basement, ordering anyone in it to come out.<sup>164</sup> Buie responded to Rozar and eventually emerged from the basement, with Rozar arresting him at the top of the staircase to the basement.<sup>165</sup> Detective Joseph Frolich then "entered the basement 'in case there was someone else' down there" and "noticed a red running suit lying in plain view on a stack of clothing and seized it."<sup>166</sup> Buie subsequently moved to suppress the red running suit, and while the lower Maryland courts denied his motion, the Court of Appeals of Maryland reversed, finding that to justify a protective sweep of a home after an arrest, such as the one that

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

<sup>162</sup> 494 U.S. 325, 328 (1990).

<sup>163</sup> *Id.*

<sup>164</sup> *Id.*

<sup>165</sup> *Id.*; See also *Buie v. State*, 580 A.2d 167, 171 (Md. 1990) ("Buie ascended the stairs at gunpoint and was immediately arrested.").

<sup>166</sup> *Buie*, 494 U.S. at 328.

Frolich conducted in the basement, arresting officers must have, and Detective Frolich did not have, probable cause to believe that a serious and demonstrable potentiality for danger exists.<sup>167</sup>

The Supreme Court, however, reversed the Court of Appeals of Maryland in a 1990 opinion by drawing a parallel between *Terry*, *Long*, and the case before it. In the introduction to its opinion, the Court began by defining a “protective sweep” as “a quick and limited search of premises, incident to an arrest and conducted to protect the safety of officers and others” which is “narrowly confined to a cursory visual inspection of those places in which a person might be hiding.”<sup>168</sup> It thereafter noted that “[i]n this case we must decide what level of justification is required...before police officers...may conduct a warrantless protective sweep of all or part of the premises.”<sup>169</sup> Then, before the Court got into the body of its opinion, it previewed its decision as follows:

We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer “[p]ossessed a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]’ the officers in believing,” *Michigan v. Long*...(quoting *Terry v. Ohio*...) that the area swept harbored an individual posing a danger to the officer or others.<sup>170</sup>

Thereafter, in the body of its opinion, the Court explained why it could and had to rely on *Terry* and *Long* to reach its conclusion. It noted that because the arresting officers had “an arrest warrant and probable cause to believe that Buie was home, the officers were entitled to enter and search anywhere in the house in which Buie might be found.”<sup>171</sup> The problem for the arresting officers, however, was that once they found Buie, “there was no longer that particular

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<sup>167</sup> *Id.* at 329.

<sup>168</sup> *Id.* at 327.

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

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

<sup>171</sup> *Id.* at 332-33.

justification for entering any rooms that had not yet been searched.”<sup>172</sup> This is where *Terry* and *Long* came into play.

According to the Court, the fact “[t]hat Buie had an expectation of privacy in those remaining areas of his house...d[id] not mean such rooms were immune from entry.”<sup>173</sup> The Court found that “[i]n *Terry* and *Long* we were concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons with whom they were dealing were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them.”<sup>174</sup> It then found that “[i]n the instant case, there is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.”<sup>175</sup>

The Court’s parallel then extended to the risks faced by officers as it concluded that “[t]he risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter.”<sup>176</sup> This is because, “unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary’s turf,” with “[a]n ambush in a confined setting of unknown configuration...more to be feared than it is in open, more familiar settings.”<sup>177</sup>

In reaching this conclusion, the Court likely relied upon similar arguments in the government’s brief and two *amicus curiae* briefs. In its brief, the government argued that protective sweeps are justified in part because “[a]n accomplice, lurking in another room, might

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<sup>172</sup> *Id.* at 333.

<sup>173</sup> *Id.*

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

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

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

<sup>177</sup> *Id.*

take someone hostage or attack the officers or the arrestee as they are leaving the premises.”<sup>178</sup> Meanwhile, both *amicus* briefs cited Wayne LaFave’s treatise on Search and Seizure for the proposition that “[i]t would make little sense to say that police may take protective measures against those known to be present, but that they may never stray beyond the room of the arrest to see if there are others present who, by virtue of their location, may be in an even more advantageous position to offer forcible resistance on behalf of the arrestee.”<sup>179</sup>

The Court did acknowledge “that entering rooms not examined prior to the arrest is [not] a *de minimis* intrusion that may be disregarded,” but it found that “arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, an arrest.”<sup>180</sup> These conclusions prompted the Court to issue a two-part holding. According to the Court,

as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets or other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.<sup>181</sup>

Immediately after this two-part holding, the Court added that “[t]his is no more and no less than was required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one.”<sup>182</sup> In the footnote accompanying this statement, the Court found that “[t]he State’s argument that no level of objective justification should be required because of ‘the danger that

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<sup>178</sup> Petitioner’s Brief at 15, *Maryland v. Buie*, 110 S. Ct. 1093 (No. 88-1369), 1989 WL 1127006.

<sup>179</sup> Brief of Amicus Curiae the Appellate Committee of the California District Attorneys Association at 8, *Maryland v. Buie*, 110 S. Ct. 1093 (No. 88-1369), 1989 WL 1127010; Brief of Amici Curiae of Americans for Effective Law Enforcement, Inc. at 8, *Maryland v. Buie*, 110 S. Ct. 1093 (No. 88-1369), 1989 WL 1127003.

<sup>180</sup> *Buie*, 494 U.S. at 333-34.

<sup>181</sup> *Id.* at 334.

<sup>182</sup> *Id.*

inheres in the in-home arrest for a violent crime...’ [wa]s rebutted by *Terry*...itself.”<sup>183</sup> The State’s *Belton*-esque argument was that “‘officers facing the life threatening situation of arresting a violent criminal in the home should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis.’”<sup>184</sup> The Court turned this argument aside, finding that “despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters.”<sup>185</sup> Instead, “[e]ven in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.”<sup>186</sup> The Court then pronounced that it was applying this same, reasonable suspicion “approach to the protective sweep of a house.”<sup>187</sup> According to the Court, the problem with requiring anything less is that, *inter alia*, “the existence of the arrest warrant implic[s] nothing about whether dangerous persons will be found in the arrestee’s home.”<sup>188</sup>

Thus, while the Court in *Buie* seemingly authorized two distinct types of post-arrest searches, it is clear that the Court’s recognition of the second type of search – the “protective sweep” – was its holding while its comments regarding the first type of search were merely dictum.<sup>189</sup> What courts have since referred to as the first type of *Buie* search<sup>190</sup> is the search of

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<sup>183</sup> *Id.* at 334 n.2.

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

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

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

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

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

<sup>189</sup> *See, e.g.,* United States v. McQuagge, 787 F.Supp. 637, 655 (E.D. Tex. 1991) (*quoting Buie*, 494 U.S. at 334 (“In *Buie*, the court noted, in dicta, that as an incident to an arrest, officers can ‘as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces from which an attack could be immediately launched.’”).

<sup>190</sup> *See, e.g.,* State v. Roberts, 957 S.W.2d 449, 454 (Mo.App. W.D. 1997) (noting that the first type of *Buie* search does not require reasonable suspicion).

“closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”<sup>191</sup> As the Court indicated, this type of search is “incident to the arrest” and thus a search incident to a lawful arrest.<sup>192</sup> And, as such, as the Court found with regard to the searches of arrestees in *Robinson*, such searches are automatically authorized by the arrest itself; the arresting officers need not have probable cause or even reasonable suspicion that an attack might be launched from the space to be searched.<sup>193</sup>

What courts have since referred to as the second type of *Buie* search is a “protective sweep” of areas beyond the spaces covered by the first type of *Buie* search which might “harbor[] an individual posing a danger to those on the arrest scene.”<sup>194</sup> And, as the Court made clear, this protective sweep is not an automatic search incident to a lawful arrest but instead similar to *Terry* frisks. The Court was quick to point out that a protective sweep is “not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found.”<sup>195</sup> As such, the sweep “must last no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.”<sup>196</sup> By limiting the protective sweep in these regards, the Court was able to compare it to a *Terry* frisk and find that “both are permissible on less than probable cause only because they are limited to that which is necessary to protect the safety of officers and others.”<sup>197</sup>

As noted, it is clear that the Court’s recognition of this second type of search – the “protective sweep” – was its holding. In the introduction to its opinion, the Court indicated that

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<sup>191</sup> *Buie*, 494 U.S. at 334.

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

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

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

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

<sup>196</sup> *Id.* at 335-36.

<sup>197</sup> *Id.* at 336.

the question before it was what level of justification is required before arresting officers conduct “the protective sweep undertaken here,” and the answer was reasonable suspicion.<sup>198</sup> In the body of its opinion leading up to its two-part holding, the Court analogized the reasonable suspicion searches in *Terry* and *Long* to the case before it, and immediately after this holding, it noted that it was applying their logic, requiring “reasonable, individualized suspicion,” and rejecting the State’s argument that Detective Frolich needed “no level of objective justification” before searching the basement.<sup>199</sup> Later, the Court held that the type of search which it was authorizing was “decidedly not ‘automati[c],’ but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.”<sup>200</sup> Finally, in its conclusion, the Court indicated that it was remanding to the Court of Appeals of Maryland so that it could determine whether Detective Frolich had the reasonable suspicion necessary to conduct the subject search.<sup>201</sup> There thus can be no doubt that the Court viewed Frolich’s search as a protective sweep, the second type of *Buie* search, and not the first type of *Buie* search, a fact confirmed by the Court of Appeals of Maryland subsequent opinion on remand.<sup>202</sup>

Indeed, the only reference that the Court made to the first type of *Buie* search was the first sentence in its two-part holding. The Court never explained why it was creating the first type of *Buie* search nor provided any grounds for its creation. Indeed, the brevity of the majority’s conclusory assertion of the existence of this first type of *Buie* search made the several

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<sup>198</sup> *Id.* at 327.

<sup>199</sup> *See supra* notes 183-88 and accompanying text.

<sup>200</sup> *Buie*, 494 U.S. at 336.

<sup>201</sup> *Id.* at 337.

<sup>202</sup> On remand, in *Buie v. State*, the Court of Appeals of Maryland did not make any reference to the first type of *Buie* search. 580 A.2d 167 (Md. 1990). It addressed the subject search as the second type of *Buie* search and found that there was reasonable suspicion to conduct the protective sweep of the basement. *See id.* at 168-72.

sentences Justice Brennan’s dissenting opinion devoted to it comprehensive by comparison. After Brennan attacked the second type of *Buie* search, he found the majority’s decision to “allow[] police officers without *any* requisite level of suspicion to look into ‘closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched’...equally disquieting.”<sup>203</sup> Brennan then noted the plausibility of *Chimel*’s twin rationales but found

much less plausible the Court’s implicit assumption today that arrestees are likely to sprinkle hidden allies throughout the rooms in which they might be arrested. Hence, there is no comparable justification for permitting arresting officers to presume as a matter of law that they are threatened by ambush from “immediately adjoining” spaces.<sup>204</sup>

I. **Thornton and Automobile Searches Incident to Lawful Arrests of Recent Occupants**

While *Buie* thus expanded the scope of home searches conducted in connection with arrests, the Court’s 2004 opinion in *United States v. Thornton* represented a further expansion upon the scope of automobile searches incident to lawful arrests that went beyond even *Belton*. In *Thornton*, Officer Deion Nichols observed Marcus Thornton driving a Lincoln Town Car in a suspicious manner and ran a check on the car’s license tags, which revealed that they were issued to a Chevy two-door.<sup>205</sup> Before Nichols could pull Thornton over, however, Thornton pulled into a parking lot and exited his car.<sup>206</sup> Nichols thus approached Thornton in the parking lot and eventually lawfully recovered drugs from Thornton, placed him under arrest, handcuffed him,

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<sup>203</sup> *Buie*, 494 U.S. at 342 n.6 (Brennan, J, dissenting).

<sup>204</sup> *Id.*

<sup>205</sup> 541 U.S. 615, 617-18 (2004).

<sup>206</sup> *Id.* at 618.

and secured him in the back seat of his patrol car.<sup>207</sup> Thereafter, Nichols searched the Lincoln Town Car and uncovered a BryCo 9-millimeter handgun from under the driver's seat.<sup>208</sup>

Thornton subsequently moved to suppress the handgun, claiming that *Belton* only applies “to situations where the officer initiated contact with an arrestee while he was still an occupant of the car.”<sup>209</sup> The Supreme Court, in a majority opinion by Chief Justice Rehnquist, disagreed, holding that “[i]n all relevant aspects, 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.”<sup>210</sup> According to Rehnquist, the stress faced by an arresting officer “is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle.”<sup>211</sup>

In finding that *Belton* applies to automobile searches incident to lawful arrests of even recent occupants, the majority both acknowledged and embraced *Belton*'s fiction. According to the Court,

To be sure, not all contraband in the passenger compartment is likely to be readily accessible to a “recent occupant.” It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*. The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within the reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.<sup>212</sup>

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

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

<sup>209</sup> *Id.* at 619.

<sup>210</sup> *Id.* at 621.

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

<sup>212</sup> *Id.* at 622-23.

Meanwhile, Justice Scalia, along with Justice Ginsburg, concurred in the judgment.<sup>213</sup> Justice Scalia noted that in *Chimel*, the Court had set forth the twin rationales of searches incident to lawful arrests: protecting officer safety and preventing the concealment or destruction of evidence.<sup>214</sup> According to Scalia, the majority stretched the scope of the search incident to a lawful arrest beyond its breaking point because the risk that Thornton, who was already handcuffed and in the patrol car, “would nevertheless ‘grab a weapon or evidentiary ite[m]’ from his car was remote in the extreme.”<sup>215</sup>

Scalia reached this conclusion by raising and rejecting “three reasons why the search might have been justified to protect officer safety or prevent concealment or destruction of evidence.”<sup>216</sup> The first defense of the search was that, “despite being handcuffed and secured in the back of a squad car, petitioner might have escaped and retrieved a weapon or evidence from his vehicle.”<sup>217</sup> Scalia disparaged this reason, claiming that it called to mind the “mythical arrestee ‘possessed of the skill of Houdini and the strength of Hercules’” because the government could cite no examples of such a feat.<sup>218</sup> The government did point to seven instances of handcuffed or formerly handcuffed arrestees attacking officers with weapons, but none of these instances involved an arrestee retrieving anything from his vehicle.<sup>219</sup> According to Scalia,

the Government need not document specific instances in order to justify measures that avoid obvious risks. But the risk here is far from obvious, and in a context as frequently recurring as roadside arrests, the Government’s inability to come up with even a single example of a handcuffed arrestee’s retrieval of arms or evidence from his vehicle undermines its claims. The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from

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<sup>213</sup> *Id.* at 625 (Scalia, J., concurring in the judgment).

<sup>214</sup> *Id.* at 625.

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

<sup>216</sup> *Id.*

<sup>217</sup> *Id.* at 625-26.

<sup>218</sup> *Id.* at 626 (*quoting* United States v. Frick, 490 F.2d 666, 673 (5<sup>th</sup> Cir. 1973)).

<sup>219</sup> *Id.*

his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel*.<sup>220</sup>

The second defense was that because “the officer could have conducted the search at the time of the arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first.”<sup>221</sup> Scalia found fault with this defense because it assumed that “the search must take place.”<sup>222</sup> He noted that searches incident to lawful arrests are exceptions (to the search warrant requirement) rather than the rule and that “[i]f ‘sensible police procedures’ require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search.”<sup>223</sup>

The third defense was the *Belton* fiction: “that, even though the arrestee posed no risk here, *Belton* searches in general are reasonable, and the benefits of a bright-line rule justify upholding that small minority of searches that, on their particular facts, are not reasonable.”<sup>224</sup> Scalia noted that “[t]he validity of this argument rests on the accuracy of *Belton*’s claim that the passenger compartment is ‘in fact generally, even if not inevitably,’ within the suspect’s immediate control.”<sup>225</sup> And he found that if this claim were ever true, “it certainly is not true today.”<sup>226</sup> Instead, Scalia pointed out that reported cases upholding vehicle searches after officers handcuffed and secured their occupants were “legion,” a point underscored by the government’s own admission that a finding that officers cannot search an arrestee’s vehicle after restraining

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<sup>220</sup> *Id.* at 626-27.

<sup>221</sup> *Id.* at 627.

<sup>222</sup> *Id.*

<sup>223</sup> *Id.*

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

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

<sup>226</sup> *Id.* at 628.

him would “largely render *Belton* a dead letter.”<sup>227</sup> The popularity of such searches made sense to Scalia because, “[i]f *Belton* entitles an officer to search a vehicle upon arresting the driver despite having taken measures that eliminate any danger, what rational officer would not take those measures?”<sup>228</sup> But the absence of danger in these searches made them indefensible to Scalia under *Chimel*.<sup>229</sup>

Instead, Scalia found that “[i]f *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.”<sup>230</sup> He then noted that “[t]his more general sort of evidence-gathering search is not without antecedent,” pulling *Rabinowitz* and *Harris* from the scrap heap.<sup>231</sup> Scalia found that the Court upheld the searches in those cases, not based upon either of the *Chimel* rationales, but instead based upon “a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.”<sup>232</sup> He proffered “[n]umerous earlier authorities” which supported the types of searches conducted in *Rabinowitz* and *Harris* and concluded that “[t]here is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested.”<sup>233</sup> Of course, Scalia also acknowledged that *Chimel* repudiated these two opinions and that its “narrower focus on concealment or destruction of evidence also has historical support.”<sup>234</sup>

As noted above, Scalia found that “*Belton* cannot reasonably be explained as a mere application of *Chimel*,” and he also found that *Rabinowitz* and *Harris* were not “so persuasive as

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<sup>227</sup> *Id.*

<sup>228</sup> *Id.*

<sup>229</sup> *Id.*

<sup>230</sup> *Id.* at 629.

<sup>231</sup> *Id.*

<sup>232</sup> *Id.*

<sup>233</sup> *Id.*

<sup>234</sup> *Id.* at 630.

to justify departing from settled law.”<sup>235</sup> For Scalia, then, the solution was neither to revive *Rabinowitz* and *Harris* generally as defining the proper scope of searches incident to lawful arrests nor to continue to pile fiction upon fiction; instead, the answer was honesty. According to Scalia, “if we are going to continue to allow *Belton* searches on *stare decisis* grounds, we should at least be honest about why we are doing so.”<sup>236</sup> And honesty for Scalia would be the Court acknowledging that *Belton* “is a return to the broader sort of search incident to arrest that we allowed before *Chimel*-limited, of course, to searches of motor vehicles, a category of ‘effects’ which give rise to a reduced expectation of privacy...and heightened law enforcement needs.”<sup>237</sup> Under this reading of *Belton*, officers can conduct searches of vehicles incident to lawful arrests if, and only if, “it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”<sup>238</sup>

#### J. **Back to Reality: *Arizona v. Gant* and the Dismantling of the *Belton* Fiction**

Five years later, the Court largely took Scalia up on his offer. In *Arizona v. Gant*, officers acted on an anonymous tip that a house was being used to sell drugs.<sup>239</sup> Upon arrival, they knocked at the front door and spoke with Rodney Gant, who told them that he expected the homeowner to return later.<sup>240</sup> The officers then left and conducted a records check, “which revealed that Gant’s driver’s license had been suspended and [that] there was an outstanding warrant for his arrest for driving with a suspended license.”<sup>241</sup> The officers then returned to the

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

<sup>236</sup> *Id.* at 631.

<sup>237</sup> *Id.*

<sup>238</sup> *Id.*

<sup>239</sup> 129 S. Ct. 1710, 1714 (2009).

<sup>240</sup> *Id.* at 1714-15.

<sup>241</sup> *Id.*

house and arrested a man near the back of the house for providing a false name and a woman parked in a car in front of the house for possessing drug paraphernalia.<sup>242</sup>

Subsequently, Gant returned the house in his car, and officers arrested him for driving with a suspended license, handcuffed him, locked him in a patrol car, and searched his car, uncovering cocaine in the pocket of a jacket on the backseat.<sup>243</sup> Gant later moved to suppress the drugs, and the Supreme Court, in a majority opinion by Justice Stevens, agreed, finding that the search was unconstitutional.<sup>244</sup> The Court began by noting that *Chimel* laid out the scope of a proper search incident to a lawful arrest: “the arrestee’s person and the area ‘within his immediate control’-construing that phrase to mean the area from which he might gain possession of a weapon or destructible evidence.”<sup>245</sup> Justice Stevens found that this limiting language, “*which continues to define the boundaries of the exception*, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.”<sup>246</sup> Conversely, “[i]f there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.”<sup>247</sup>

Justice Stevens found that the subject search fell into the latter category.<sup>248</sup> He noted that Justice Brennan’s disparaging reading of *Belton* had “predominated,” with courts construing it as an entitlement condoning officers’ searches of vehicles after they had arrested and secured their

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

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

<sup>244</sup> *Id.* at 1715-16.

<sup>245</sup> *Id.* at 1716

<sup>246</sup> *Id.* (emphasis added).

<sup>247</sup> *Id.*

<sup>248</sup> *Id.* at 1718.

occupants.<sup>249</sup> According to Stevens, applying *Belton* in this manner “untether[s] the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it ‘in no way alters the fundamental principles established in *Chimel*.’”<sup>250</sup> The Court thus “reject[ed] this reading of *Belton* and h[e]ld that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”<sup>251</sup>

After this sweeping statement, however, the Court immediately noted that these were not the only circumstances under which officers can search the passenger compartment of an arrestee’s vehicle incident to his lawful arrest. Relying upon Justice Scalia’s *Thornton* concurrence, the Court found that, “[a]lthough it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is ‘reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.’”<sup>252</sup> The Court quickly clarified that “[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence.”<sup>253</sup> Indeed, Justice Stevens found that the present case was such a case because it involved an arrest for driving with a suspended license, making the subject search unconstitutional because *Gant* was also secured and not within reaching distance of his car’s passenger compartment.<sup>254</sup>

In reaching this conclusion, the Court also rejected the State’s contention “that *Belton* searches are reasonable regardless of the possibility of access in a given case because that

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

<sup>250</sup> *Id.* at 1719.

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

<sup>252</sup> *Id.* (quoting *United States v. Thornton*, 541 U.S. 615, 632 (Scalia, J., concurring in the judgment)).

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

expansive rule correctly balances law enforcement interests...with an arrestee's limited privacy interest in his vehicle."<sup>255</sup> On the one hand, Stevens found that "the State seriously undervalue[d] the privacy interests at stake."<sup>256</sup> He noted that "[a]lthough we have recognized that a motorist's privacy interest in his vehicle is less substantial than in his home,...the former interest is nevertheless important and deserving of constitutional protection...."<sup>257</sup> Accordingly, the problem with the *Belton* fiction is that it gave "police the power to conduct...a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creat[ing] a serious and recurring threat to the privacy of countless individuals."<sup>258</sup>

On the other hand, Stevens concluded that, "[c]ontrary to the State's suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests."<sup>259</sup> The reason that he could reach this conclusion was because "[o]ther established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand."<sup>260</sup>

Specifically, Stevens noted that "*Michigan v. Long*...permits an officer to search a vehicle's passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is 'dangerous' and might access the vehicle to 'gain immediate control of weapons.'"<sup>261</sup> Moreover, he found that under the automobile exception, officers with probable cause to believe that a vehicle contains evidence of criminal activity can search "any area of the

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<sup>255</sup> *Id.* at 1720.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* at 1721.

<sup>260</sup> *Id.*

<sup>261</sup> *Id.*

vehicle in which the evidence might be found.”<sup>262</sup> Stevens also suggested that “there may still be other circumstances in which safety or evidentiary interests would justify a search,” with his support being a *cf.* citation to *Buie* and its holding that “incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding.”<sup>263</sup>

Ironically, while Justice Scalia’s *Thornton* concurrence was ostensibly the impetus for the majority opinion, Scalia begrudgingly concurred with the majority in *Gant* in an opinion that clearly showed his dissatisfaction with its central holding. Scalia of course agreed with the majority that officers should be able to search a vehicle’s passenger compartment incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.<sup>264</sup> But according to Scalia, this adopted *Rabinowitz-Harris* evidence-gathering rationale was the only support for such a search, and the Court “should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases.”<sup>265</sup>

Meanwhile, Justices Alito, Kennedy, Breyer, and Chief Justice Roberts were wholly unconvinced. In a dissenting opinion, they criticized many of the majority’s conclusions, including its assertion that a broad reading of *Belton* was unnecessary to protect law enforcement safety.<sup>266</sup> According to the dissenting Justices, the Court was insouciant to two situations where neither existing exceptions nor the Court’s construction of *Belton* would authorize a vehicle search despite safety concerns so demanding:

First, it is not uncommon for an officer to arrest some but not all of the occupants of a vehicle...Second, there may be situations in which an arresting officer has

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<sup>262</sup> *Id.*

<sup>263</sup> *Id.*

<sup>264</sup> *Id.* at 1724-25 (Scalia, J., concurring).

<sup>265</sup> *Id.*

<sup>266</sup> *Id.* at 1726-32 (Alito, J., dissenting).

cause to fear that persons who were not passengers in the car might attempt to retrieve a weapon or evidence from the car while the officer is still on the scene.<sup>267</sup>

### III. THE BROAD READING OF SUSPICIONLESS *BUIE* SEARCHES

As previously noted, in *Buie v. Maryland* the Court authorized two types of searches. First, the Court in *Buie* found that “as an incident to [an] arrest the officers c[an], as a precautionary matter and without probable cause or reasonable suspicion, look in closets or other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”<sup>268</sup> Second, *Buie* authorized “protective sweeps” beyond those spaces covered by the first type of search, but only when “there [are] articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene,”<sup>269</sup> *i.e.*, reasonable suspicion.

As noted, the Court’s creation of this second type of search was the controlling portion of its opinion while its reference to the first type of search was dictum. But while the Court merely made passing reference to this first type of search in dictum, as will be seen in the following paragraphs, federal and state courts across the country have treated it as gospel. Indeed, the fact that the first type of *Buie* search was dictum has only been mentioned in one opinion addressing the merits of *Buie*.<sup>270</sup> In *State v. Dawson*, an appellant claimed that the first type of *Buie* search, like the second type of *Buie* search, should require reasonable suspicion because the conclusion

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<sup>267</sup> *Id.* at 1731 n.2.

<sup>268</sup> 494 U.S. 325, 334 (1990).

<sup>269</sup> *Id.*

<sup>270</sup> In *United States v. McQuagge*, the United States District Court for the Eastern District of Texas did note that the Court’s recognition of the first type of search in *Buie* was dictum, but this holding was itself dictum as the court’s opinion addressed the constitutionality of the search of a van. 787 F.Supp. 637, 655 (E.D. Tex. 1991).

in *Buie* that the former search did not require such suspicion was dictum.<sup>271</sup> The Court of Appeals of Washington quickly disposed of this argument, concluding that “many federal and state cases cite *Buie* for both standards.”<sup>272</sup>

Indeed, courts nationwide have read *Buie* as well as *Michigan v. Summers* and its progeny as authorization cases, permitting officers at suspects’ homes (and sometimes other locations) to conduct warrantless searches and/or seizures under certain circumstances.<sup>273</sup> In *Michigan v. Summers*, the Court concluded that a search warrant *per se* carries with it the limited authority for officers to detain the occupants of the premises while a proper search is conducted.<sup>274</sup> Moreover, “[a]lthough *Summers* dealt with the execution of a search warrant, several courts have persuasively extended its application to the execution of arrest warrants, holding that the same law enforcement interests are applicable in both scenarios.”<sup>275</sup> In other words, under *Summers* and its progeny, officers can *per se* seize other occupants while executing search and/or arrest warrants. Meanwhile, under the first type of *Buie* search, arresting officers can automatically *search for* and seize other occupants. And as cases from across the country make clear, courts have construed this latter entitlement broadly.

First, courts universally have held that arresting officers can conduct the first type of *Buie* search without even reasonable suspicion of danger and that such searches need not be limited to the area from within which the arrestee might gain possession of a weapon or destructible

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<sup>271</sup> 2008 WL 4411539, No. 26360-6-III at \*3 (Wash.App. Div. 3, Sept. 30, 2008).

<sup>272</sup> *Id.* at \*4.

<sup>273</sup> Daniel L. Rotenberg, *An Essay on the Unexpected Person Factor in Searches and Seizures*, 39 ST. LOUIS U. L.J. 505, 510-12 (1995).

<sup>274</sup> 452 U.S. 692, 705 (1981).

<sup>275</sup> *United States v. Werra*, 2008 WL 4280035, No. 06-10414-DPW (D.Mass., Sept. 11, 2008).

evidence, *i.e.*, the boundary laid out in *Chimel*.<sup>276</sup> For instance, in *United States v. Charles*, Chief Brannon Decou received an anonymous tip that Bernard Charles was storing narcotics in a storage facility.<sup>277</sup> Decou then learned that Charles was the subject of several outstanding warrants, most for traffic violations, and proceeded with Sergeant Darryl Vernon and Chief Deputy Timothy Picard, but without a search warrant, to Charles' storage unit to conduct surveillance.<sup>278</sup> Charles eventually arrived, and just as he entered the storage unit, the officers identified themselves, prompting Charles to drop an envelope into an open convertible in the storage unit.<sup>279</sup> The officers then arrested Charles on his outstanding warrants "just at the entrance to the open storage unit, which measured approximately 10 feet wide and 25 feet deep."<sup>280</sup> Specifically, the arrest was conducted with Charles "being ordered out of the unit onto the ground, where he was arrested without incident."<sup>281</sup>

Then, "[a]s Charles was being read his *Miranda* rights and escorted to a police cruiser, Picard entered the unit and checked inside, under, and around the convertible to ensure that there were not other occupants in the unit."<sup>282</sup> In the convertible, Picard noticed that the "now open" envelope contained crack cocaine.<sup>283</sup> Picard also uncovered "a partially disassembled firearm on top of a cardboard box in the corner of the storage unit."<sup>284</sup> Charles thereafter moved to suppress this evidence, claiming that the officers "could have had no 'reasonable suspicion' that any other

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<sup>276</sup> Interestingly, in *McQuagge*, mentioned in *supra* note 270, the Eastern District of Texas found that the first type of *Buie* search only covers the arrest room and not any other room, but again, this was in dictum. *United States v. McQuagge*, 787 F.Supp. 637, 655 (E.D. Tex. 1991).

<sup>277</sup> 469 F.3d 402, 404 (5<sup>th</sup> Cir. 2006).

<sup>278</sup> *Id.*

<sup>279</sup> *Id.*

<sup>280</sup> *Id.* at 405.

<sup>281</sup> *Id.* at 404.

<sup>282</sup> *Id.*

<sup>283</sup> *Id.*

<sup>284</sup> *Id.*

individuals were present in the storage unit.”<sup>285</sup> The district court disagreed, and the United States Court of Appeals for the Fifth Circuit affirmed, concluding that “[u]nder *Buie*, Officer Picard’s cursory sweep of the unit immediately adjacent to the site of the arrest was permissible, even without probable cause or reasonable suspicion.”<sup>286</sup>

Furthermore, courts have not circumscribed the first type of *Buie* search to the arrest room. Instead, they universally have upheld searches of sufficiently large spaces in rooms immediately abutting arrest rooms and connected to arrest rooms by hallways.<sup>287</sup> As an example, in *State v. Roberts*, Matthew Roberts’ neighbor called 911 and informed authorities that Roberts had been beating his dog and that he thought Roberts had killed the dog.<sup>288</sup> Sergeant Schopfer and Officers Charles Iseman and Anthony Hunter arrived without a search warrant about three and a half hours later at Roberts’ duplex and arrested him in a rear bedroom, with Iseman handcuffing Roberts and Roberts admitting that his dog died while he was squeezing it.<sup>289</sup> Thereafter, while Schofer kept watch on Roberts, Iseman and Hunter searched a bathroom connected to the bedroom, a hallway closet, and a living room and kitchen that were about fifteen feet away from the bedroom and connected to it by a hallway.<sup>290</sup> These searches uncovered evidence connected to the death of the dog as well as a marijuana plant, and Roberts moved to suppress this evidence, claiming that it was unlawfully searched and seized without a search warrant.<sup>291</sup>

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<sup>285</sup> *Id.* at 405.

<sup>286</sup> *Id.* at 406.

<sup>287</sup> *See, e.g.*, *United States v. Brookshire*, 2009 WL 57530, No. 1:07-CR-92-TS at \*6 (N.D. Ind., Jan. 8, 2009) (collecting cases); *State v. Koziol*, 2005 WL 2502177, No. 23188-7III at \*4 (Wash.App. Div. 3, Oct. 11, 2005) (citing several cases for the proposition that “the immediately adjoining area may extend to a back bedroom in a small apartment, adjoining bedroom in a house, or mobile home bedroom).

<sup>288</sup> 957 S.W.2d 449, 450 (Mo.App. W.D. 1997).

<sup>289</sup> *Id.* at 450-51

<sup>290</sup> *Id.* at 451.

<sup>291</sup> *Id.* at 453.

The trial court denied Roberts’s motion, and, after he was convicted, he appealed to the Missouri Court of Appeals.<sup>292</sup> The court found that because the arresting officers did not have even reasonable suspicion that the areas they swept harbored an individual posing a danger to those on the arrest scene, the search could only be constitutional as a type one *Buie* search and, even then, only if the spaces they searched immediately adjoined the place of arrest.<sup>293</sup> In resolving this issue in favor of the government, the court noted that “[a]lthough the phrase ‘immediately adjoining the place of arrest from which an attack could be immediately launched’ is not defined in *Buie*, other courts have interpreted the phrase as including rooms directly adjacent to the place of arrest.”<sup>294</sup>

The court might have had two cases involving similar facts in mind. In *United States v. Lay*, Curtis Lay was arrested at the front door of his apartment, and the distance from the front door to his bedroom was fifteen feet, with the two being separated by the living room and a hallway.<sup>295</sup> The Fourth Circuit found that Lay’s bedroom constituted a space adjoining the place of arrest, rendering constitutional an officer’s warrantless entry into that bedroom and his suspicionless search of an internally partitioned locker, which uncovered crack cocaine and baggies.<sup>296</sup> In *United States v. Sanchez*, officers arrested and handcuffed Jaime Sanchez in his living room before searching “the adjoining kitchen, the three closets in the hallway off the living room, the bathroom, and the sole bedroom.”<sup>297</sup> In the last of the three closets, approximately fifteen feet from the place of arrest, an officer uncovered a shotgun which the United States District Court for the Southern District of New York refused to suppress,

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<sup>292</sup> *Id.* at 450.

<sup>293</sup> *Id.* at 453.

<sup>294</sup> *Id.* at 454.

<sup>295</sup> 1999 WL 436431, No. 98-4300 at \*2 (4<sup>th</sup> Cir., June 29, 1999).

<sup>296</sup> *Id.*

<sup>297</sup> 1999 WL 138924, No. 98 CR. 1480(DLC) at \*1 (S.D.N.Y., March 15, 1999).

concluding that even though the officers lacked reasonable suspicion or a warrant, they only searched areas immediately adjoining the place of arrest.<sup>298</sup> Of course, the court also could have had several other cases in mind, including cases authorizing searches of *locked* rooms connected to arrest rooms by hallways.<sup>299</sup>

Courts have even found that there is no problem with arresting officers searching the entirety of small houses or apartments as part of type one *Buie* searches. For instance, in *United States v. Thomas*, five Deputy U.S. Marshals executed an arrest warrant for Anthony Thomas at his apartment and arrested him in the living room at the entrance to the apartment.<sup>300</sup> The Deputy Marshals then proceeded to search the rest of the apartment's rooms: a kitchen, bedroom, and bathroom which were all connected to the living room by a hallway.<sup>301</sup> In the bedroom, which was fifteen feet from the entrance to the apartment, Deputy Marshal William Martin and a colleague searched an open closet and the space under a bed.<sup>302</sup> On the top shelf of the closet, atop a stack of clothes, they uncovered a handgun and shotgun shell, and, at the bottom of the closet, under a "big bulked up blanket or comforter" which was approximately three feet high and which Martin claimed "a person could easily have fit underneath," they uncovered an assault rifle and shotgun.<sup>303</sup> Thomas moved to suppress this evidence, claiming that the spaces immediately adjoining the place of arrest "included at most the living room, and the front hallway" because "[o]therwise, in a small apartment...the 'police would be entitled to sweep the entire premises without a showing of reasonable suspicion.'"<sup>304</sup> The United States Court of

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<sup>298</sup> *Id.* at \*1-\*2.

<sup>299</sup> *See, e.g.*, *United States v. Robinson*, 775 F.Supp. 231, 232, 235 (N.D. Ill. 1991).

<sup>300</sup> 429 F.3d 282, 284-85 (D.C. Cir. 2005).

<sup>301</sup> *Id.*

<sup>302</sup> *Id.* at 285.

<sup>303</sup> *Id.*

<sup>304</sup> *Id.* at 287.

Appeals for the District of Columbia disagreed, deciding that “[i]f an apartment is small enough that all of it ‘immediately adjoin[s] the place of arrest’ and all of it constitutes a space or spaces ‘from which an attack could be immediately launched,’ ...then the entire apartment is subject to a limited sweep of spaces where a person may be found.”<sup>305</sup> In reaching this conclusion, the court found that “Thomas’ concept of the place of arrest [wa]s unreasonably narrow” and that he could “point[] to no case where the place of arrest has been defined more narrowly than the entirety of the room in which the arrest occurred.”<sup>306</sup> Other courts also have found no problem with arresting officers searching entire houses or apartments during type one *Buie* searches.<sup>307</sup>

Indeed, litigants have been universally unable to point to precedent in which courts construed the “spaces immediately adjoining the place of arrest” as solely limited to spaces in the room where the arrest occurred. In *State v. Koziol*, Deputy Tom Manthei and Reserve Deputy Justin Brunson executed arrest warrants at the mobile home of Joseph Koziol, eventually arresting him in the living room.<sup>308</sup> Thereafter, Mathei walked down a hallway that was approximately thirty-five feet long and searched the master bedroom and adjoining bathroom before returning to the living room and walking down a second hallway that was approximately ten feet long and searching a second bedroom.<sup>309</sup> The searches uncovered a methamphetamine laboratory, and Koziol moved to suppress this evidence, claiming that the spaces immediately adjoining the place of arrest “should be limited to the room where the arrest occurred.”<sup>310</sup> The trial court denied that motion, and, on Koziol’s appeal, the Court of Appeals of Washington

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<sup>305</sup> *Id.*

<sup>306</sup> *Id.*

<sup>307</sup> *See, e.g.*, *United States v. Brookshire*, 2009 WL 57530, No. 1:07-CR-92-TS at \*6 (N.D. Ind., Jan. 8, 2009); *United States v. Williams*, 2008 WL 1712291 at \*5 (W.D. La. 2008); *State v. Hicks*, 3 So.3d 539, 546 (La.App. 5 Cir., Dec. 16, 2008).

<sup>308</sup> 2005 WL 2502177, No. 23188-7-III at \*1 (Wash.App. Div. 3, Oct. 11, 2005).

<sup>309</sup> *Id.*

<sup>310</sup> *Id.* at \*4.

affirmed, concluding that Koziol did “not provide any authority that support[ed] this position” and that “[t]he doctrine has not previously been applied this narrowly.”<sup>311</sup>

It is not surprising that Koziol was unable to point to any case that construed the “spaces immediately adjoining the place of arrest” as only those spaces in the room of arrest. This author was unable to locate a single case where a court has invalidated a search in rooms adjoining the arrest room, or connected to it by a hallway, as long as the officers only searched spaces from which an attack could be immediately launched.<sup>312</sup> Indeed, so well established is this broad construction of the first type of *Buie* search that many defendants and appellants have begun not even disputing the government’s ability to conduct them. For example, in *United States v. Mendoza*, four to five officers arrested Jose Mendoza in the living area of his home, and at least two of the officers then searched a bedroom in the adjoining hallway, in which they found an older couple sleeping, prompting them to conduct a protective sweep of the other bedrooms.<sup>313</sup> Mendoza filed a motion to suppress, but that motion only addressed the alleged unconstitutionality of the officers’ subsequent protective sweep of the other bedrooms; “Mendoza d[id] not argue that police were not entitled to enter the first [bed]room.”<sup>314</sup> Other defendants/appellants similarly have begun conceding that arresting officers can conduct suspicionless searches of rooms connected to arrest rooms by hallways.<sup>315</sup>

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<sup>311</sup> *Id.*

<sup>312</sup> In both *State v. Garrett*, 635 N.W.2d 615, 621 (Wis.App. 2001), and *State v. Kruse*, 499 N.W.2d 185, 189 (Wis.App. 1993), the Court of Appeals of Wisconsin deemed constitutional type one *Buie* searches in closets in rooms connected to arrest rooms by hallways and also “around the corner.” These, however, were not searches of rooms connected by hallways to arrest rooms, but searches of spaces adjoining rooms connected by two hallways to arrest rooms.

<sup>313</sup> 333 F.Supp.2d 1155, 1158-60 (D. Utah 2004).

<sup>314</sup> *Id.* at 1160.

<sup>315</sup> See, e.g., *United States v. Goree*, 365 F.3d 1086, 1090 (D.C. Cir. 2004) (noting that the appellant did not dispute that arresting officers properly searched rooms connected to the arrest room by hallways under the first type of *Buie* search).

Litigants do continue to contend that officers executing the first type of *Buie* search exceed the scope of such a search by exploring spaces from which an attack could not be immediately launched, but they have been largely unsuccessful as courts generally have defined such spaces broadly. As previously noted, in *United States v. Thomas*, the United States Court of Appeals for the District of Columbia saw no problem with a type one *Bue* search in which an arresting officer searched under a “big bulked up blanket or comforter” which was approximately three feet high.<sup>316</sup> As another example, in *United States v. McLemore*, Police Officers John Miltotzky and John McDermott as well as backup officers executed arrest warrants for Takiesha Haynes and Cartell McLemore at an apartment belonging to McLemore, eventually arresting and handcuffing Haynes in the living room.<sup>317</sup> Then, despite Miltotzky admittedly “not hear[ing] anything that would lead him to believe that someone else was in the apartment,” a backup officer, McDermott, and he searched each room in the apartment, including a southwest bedroom connected to the living room by a hallway that “was approximately seven or eight feet away from where Haynes was placed under arrest in the living room.”<sup>318</sup>

In one corner of the southwest bedroom, there was a bowl-shaped chair, and in another corner, there was a pile of laundry, which Miltotzky described as “approximately three feet high and two feet wide.”<sup>319</sup> Miltotzky searched the bedroom, including the pile of laundry and the area behind the chair, uncovering, *inter alia*, a firearm.<sup>320</sup> McLemore moved to suppress the evidence found during the search, and Miltotzky claimed that someone could have been hiding behind the

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<sup>316</sup> 429 F.3d 282, 285, 287 (D.C. Cir. 2005).

<sup>317</sup> 2006 WL 572353, No. 05-CR-266 at \*2 (E.D. Wis., March 7, 2006).

<sup>318</sup> *Id.* at \*6.

<sup>319</sup> *Id.* at \*3.

<sup>320</sup> *Id.* at \*3-\*4.

chair and that “it was possible for someone to conceal themselves with the pile of laundry.”<sup>321</sup> McLemore countered, *inter alia*, “that Milotzky’s testimony that a person could have concealed themselves behind the bowl-shaped chair, or under the pile of laundry [wa]s implausible.”<sup>322</sup> The United States District Court for the Eastern District of Wisconsin disagreed, with Magistrate Judge Callahan concluding,

I can not say that it was unreasonable for the officers to believe that a person might have been hiding behind the bowl-shaped chair or under the pile of laundry. Indeed, the defendant’s argument that the officers need not look behind the bowl-shaped chair or under the pile of laundry, or inside a closet does not comport with the underlying rationale for the protective sweep exception—that officers should be able to ensure their safety when lawfully entering a private dwelling.<sup>323</sup>

Other courts similarly have upheld *Buie* searches of relatively small spaces.<sup>324</sup>

Some courts have even held that both varieties of *Buie* searches “need not be incident to an arrest.”<sup>325</sup> In *Clark v. Webster*, drug enforcement agent Steven Webster suspected that Sara Clark was trafficking in marijuana and believed that his suspicion blossomed into probable cause when he went to Clark’s condominium and questioned her at its doorway.<sup>326</sup> Webster thereafter told Clark that he was securing the condo while he waited for a search warrant and gave her the option to stay outside or go inside with Officers Douglas Taft and Bernie King.<sup>327</sup> Clark chose the latter option and proceeded to the couch in her living room.<sup>328</sup> Thereafter, the officers searched not only the living room, but also the adjoining kitchen and the condo’s closet, bathroom, bedroom, and laundry room, which were “all connected to the living room by a short

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<sup>321</sup> *Id.* at \*3.

<sup>322</sup> *Id.* at \*8.

<sup>323</sup> *Id.*

<sup>324</sup> *See, e.g.*, *United States v. Lauter*, 57 F.3d 212, 214, 217 (upholding a *Buie* search of the three foot area between a mattress and a wall in a room that only contained the mattress and the nightstand).

<sup>325</sup> *Clark v. Webster*, 384 F.Supp.2d 371, 382 (D.Me. 2005).

<sup>326</sup> *Id.* at 374.

<sup>327</sup> *Id.* at 375.

<sup>328</sup> *Id.*

hallway.”<sup>329</sup> The United States District Court for the District of Maine found these searches constitutional, citing three federal appellate court opinions for the proposition that *Buie* searches are permissible when exigent circumstances prompt the entry of police, even in the absence of an arrest.<sup>330</sup>

#### IV. *ARIZONA v. GANT* INVALIDATES SUSPICIONLESS *BUIE* SEARCHES

##### A. **Introduction**

As previously noted, *Chimel* marked the end of the nearly two decade reign of *Harris*, *Rabinowitz*, and the broad construction of the search incident to a lawful arrest.<sup>331</sup> But, consistent with the inconsistent history of the exception, the Court soon began expanding the proper scope of searches incident to lawful arrests in its post-*Chimel* opinions in *Belton*, *Buie*, and *Thornton*.<sup>332</sup> In *Arizona v. Gant*, the Supreme Court reaffirmed *Chimel* as defining the proper scope of searches incident to lawful arrests and explicitly overruled the predominating reading of *Belton* and rebuked *Thornton* as an application of *Chimel*.<sup>333</sup> This section argues that defendants and appellants should be able to raise both the *Arizona v. Gant* opinion and the reasoning within it to argue that the reaffirmation of *Chimel* and the destruction of the *Belton* fiction together invalidate the first type of *Buie*'s search. This section also argues that, even without *Gant*, courts should have realized and should now conclude that they have grossly misconstrued the scope of the first type of *Buie* search.

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<sup>329</sup> *Id.* at 382-83.

<sup>330</sup> *Id.* at 382 (citing *United States v. Jimenez*, 419 F.3d 34 (1<sup>st</sup> Cir. 2005); *United States v. Martins*, 413 F.3d 139 (1<sup>st</sup> Cir. 2005); *United States v. Taylor*, 248 F.3d 506 (6<sup>th</sup> Cir. 2001)).

<sup>331</sup> *See supra* notes 99-121 and accompanying text.

<sup>332</sup> *See supra* notes 133-49 & 162-238 and accompanying text.

<sup>333</sup> *See supra* notes 239-63 and accompanying text.

## B. How Courts Erred in Construing the Scope of Suspicionless *Buie* Searches

As will be noted in *infra* Section IV.C.,<sup>334</sup> courts should read the Supreme Court’s opinion in *Arizona v. Gant* as invalidating the first type of *Buie* search. But, even if courts do not read *Gant* in this manner, it is clear even without *Gant* that courts have stretched the scope of this type of search incident to lawful arrest beyond its breaking point and need to correct their errors. As noted, the Court in *Maryland v. Buie* found that “as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets or other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”<sup>335</sup> This passage prompted at least three questions: (1) Is an arrest an absolute prerequisite for a *Buie* search; (2) from what spaces can an attack immediately be launched; and (3) what spaces immediately adjoin the place of arrest? Some courts have erred in answering the first two questions while all courts have erred in answering the third.

### 1. *Buie* Searches Cannot be Justified Unless Preceded by Lawful Arrests

In *Robinson*, the Court made clear that under the search incident to a lawful arrest exception, “[i]t is the fact of the lawful arrest which establishes the authority to search....”<sup>336</sup> This opinion in turn explained the Court’s subsequent conclusion in *Knowles v. Iowa* that a lawful arrest is, as the name of the exception makes clear, the *sine qua non* of a search incident to a lawful arrest.<sup>337</sup> Indeed, with one exception, courts have respected this Supreme Court

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<sup>334</sup> See *infra* Section IV.C.

<sup>335</sup> 494 U.S. 325, 334 (1990).

<sup>336</sup> *United States v. Robinson*, 414 U.S. 218, 236 (1973).

<sup>337</sup> 525 U.S. 113, 117-18 (1998).

precedent.<sup>338</sup> The one exception: courts' application of *Buie*. As noted, in *Clark v. Webster*, the United States District Court for the District of Maine relied on three federal appellate court opinions in deeming constitutional a type one *Buie* search that was conducted without an arrest.<sup>339</sup> Under *Robinson* and *Knowles*, these opinions are indefensible, and courts in the future should respect Supreme Court precedent and find that any searches conducted without lawful arrests cannot be justified under *Buie*.

2. Spaces From Which an Attack Could Immediately be Launched Only Include Spaces Large Enough to Conceal Persons

The Court made clear that type one *Buie* searches can only extend to “closets or other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”<sup>340</sup> Earlier in its opinion, it had defined these spaces as “those places in which a person might be hiding.”<sup>341</sup> It is difficult to reconcile the Court’s language in *Buie* with the broad way that many courts have defined these spaces.

In *United States v. Lauter*, Special ATF agents arrested Phillip Lauter in a basement apartment but did not have a search warrant covering that apartment.<sup>342</sup> Agents arrested Lauter in the front room of the apartment, and Agent Graham eventually entered the apartment’s small back room, which “contained only a night stand and a queen-sized mattress on a metal frame standing roughly three inches off the ground, with approximately three feet between the bed and

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<sup>338</sup> See, e.g., *Menotti v. City of Seattle*, 409 F.3d 1113, 1153 (9<sup>th</sup> Cir. 2005) (“We decline to extend the doctrine of ‘search incident to arrest’ to give protection for a warrantless search or seizure when no arrest is made.”).

<sup>339</sup> 384 F.Supp.2d 371, 382 (D. Maine 2005).

<sup>340</sup> 494 U.S. at 334.

<sup>341</sup> *Id.* at 327.

<sup>342</sup> 57 F.3d 212, 213-14 (1995).

the wall on either side of the bed.”<sup>343</sup> Graham looked in an open drawer in the night stand and seized from it a bag of ammunition.<sup>344</sup> He also looked to the left of the bed, saw the stock of a shotgun protruding from underneath the mattress, seized the shotgun, and “looked under the bed.”<sup>345</sup> Lauter moved to suppress the evidence that Graham found in the room, but the Second Circuit denied his motion, finding that “[a]side from looking in the drawer, the fruits of which search were not introduced into evidence, Graham’s conduct was well within the scope of a permissible” type one *Buie* search.<sup>346</sup>

This broad reading of *Buie* is consistent with some of the opinions already mentioned. As previously noted, in *United States v. McLemore*, the Eastern District of Wisconsin found no problem with a type one *Buie* search in which an officer searched, *inter alia*, under a pile of laundry which the officer himself described as “approximately three feet high and two feet wide.”<sup>347</sup> And three appears to be the magic number because, as noted, in *United States v. Thomas*, the United States Court of Appeals for the District of Columbia found no problem with a Deputy Marshal’s search under a “big bulked up blanket or comforter” which was approximately three feet high.<sup>348</sup> That court even implied that it might allow searches of smaller spaces when it found that “[i]f an apartment is small enough that all of it ‘immediately adjoin[s] the place of arrest’ and *all of it constitutes a space or spaces ‘from which an attack could be immediately launched,’* ...then the entire apartment is subject to a limited sweep of spaces where a person may be found.”<sup>349</sup>

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<sup>343</sup> *Id.*

<sup>344</sup> *Id.* at 214.

<sup>345</sup> *Id.*

<sup>346</sup> *Id.* at 217.

<sup>347</sup> 2006 WL 572353, No. 05-CR-266 at \*3 (E.D. Wis., March 7, 2006).

<sup>348</sup> 429 F.3d 282, 285 (D.C. Cir. 2005).

<sup>349</sup> *Id.* at 287 (emphasis added).

Even taking the officers in these cases at their words and giving these courts every benefit of the doubt, the idea that a two by three foot pile of laundry or the three inch space under a mattress might constitute spaces in which persons could be hiding and ready to launch an immediate attack is unpalatable. Moreover, the Court in *Buie* noted that the type of search it was authorizing was “narrowly confined to a *cursory visual inspection* of those places in which a person might be hiding.”<sup>350</sup> It is questionable that such a narrowly confined, cursory visual inspection would have uncovered the shotgun under the mattress in *Lauter*. Additionally, there appears to be no way that the courts in *McLemore* and *Thomas* could have concluded that the officers’ searches in those cases under the blanket and under the pile of laundry constituted narrowly confined, cursory visual inspections.

3. Rooms Connected to the Arrest Room by Hallways Do Not Immediately Adjoin the Place of Arrest

As previously noted, courts universally have construed the phrase “spaces immediately adjoining the place of arrest” as including sufficiently large spaces in rooms connected to arrest rooms by hallways.<sup>351</sup> This reading is problematic for two reasons. First, as noted, the Court in *Buie* found that Detective Frolich’s search of the basement was a protective sweep, the second type of *Buie* search, and not a type one *Buie* search.<sup>352</sup> Frolich conducted this search after Corporal Rozar arrested Buie at the top of the staircase to the basement, with Frolich spotting the incriminatory red running suit in plain view.<sup>353</sup> If a basement connected to the arrest room by a staircase does not constitute a space immediately adjoining the place of arrest, how can courts

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<sup>350</sup> 494 U.S. at 327 (emphasis added).

<sup>351</sup> See *supra* notes 276-324 and accompanying text.

<sup>352</sup> See *supra* notes 19-202 and accompanying text.

<sup>353</sup> See *supra* noted 165-67 and accompanying text.

construe rooms connected to arrest rooms by hallways as long as fifteen<sup>354</sup> or even thirty-five feet<sup>355</sup> as spaces immediately adjoining the place of arrest? Courts could potentially have good reasons for distinguishing hallways from staircases, but, as of yet, they have not articulated them.

Even if they could, however, the second problem with these readings of the phrase “immediately adjoining” is that they are inconsistent with the manner in which those same courts have construed the words “immediately adjoining” in other opinions. Courts most typically have construed the words “immediately adjoining” in opinions dealing with insurance policies. For instance, in *United States v. Great American Indemnity Co. of New York*, a customer fell in a building owned by the United States, which “required each individual tenant to secure insurance for the particular space occupied.”<sup>356</sup> The building was “divided into two separate parts by a solid brick wall.”<sup>357</sup> On the east side of the wall, on the ground floor, was a grocery store, and “in the west portion of the building on a mezzanine floor entirely separated from the stores occupying the street [wa]s a beauty shop....”<sup>358</sup> After patronizing the beauty shop, a customer went down a stairway to the ground floor, “left the building and fell on the sidewalk at a point two or three feet in front of the entrance to the mezzanine stairway,” “several feet west of the nearest corner of the grocery store,” and “35 feet west of the nearest entrance to the grocery store....”<sup>359</sup>

The customer sued and recovered a judgment against the United States, prompting it to seek indemnity from the beauty shop and grocery store.<sup>360</sup> The two businesses then brought

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<sup>354</sup> See *supra* notes 290, 295, 297, & 302 and accompanying text.

<sup>355</sup> See *supra* note 309 and accompanying text.

<sup>356</sup> 214 F.2d 17, 18 (9<sup>th</sup> Cir. 1954).

<sup>357</sup> *Id.*

<sup>358</sup> *Id.*

<sup>359</sup> *Id.* at 18-19.

<sup>360</sup> *Id.* at 18.

motions for summary judgment, claiming that their insurance policies did not cover the site of the accident, and the district court granted their motions, leading to an appeal to the United States Court of Appeals for the Ninth Circuit.<sup>361</sup> The beauty shop's insurance policy provided as follows: "Premises- The unqualified word 'premises' whenever used in this policy shall mean the premises designated in Item 4 of the declarations including buildings and structures thereon and ways immediately adjoining."<sup>362</sup> The grocery store's policy was similar and contained the same "immediately adjoining" language, and the Ninth Circuit found that the customer's "fall did not occur in any part of the premises occupied by the grocery store or the beauty shop."<sup>363</sup> Therefore, the court found that it had to resolve whether the customer fell "on a way 'immediately adjoining' either or both premises[.]"<sup>364</sup>

In answering this question, the Ninth Circuit found "no necessity to invoke the familiar rule that ambiguities in an insurance policy must be resolved against the insurer."<sup>365</sup> This was because

[t]he words 'immediately adjoining' are unequivocal and have a definite and certain meaning. 'Adjoining' used in its usual and ordinary sense means touching or contiguous, in contact with, as distinguished from lying near or adjacent. Webster's International Dictionary, Unabridged (2d Ed. 1936); Black's Law Dictionary (3d Ed. 1933); *Long v. London & Lancashire Indemnity Co. of America*, 6 Cir. 1941, 119 F.2d 628. The words 'adjacent' and 'adjoining' are sometimes incorrectly used interchangeably to mean lying close to or near. But when 'adjoining' is coupled with the word 'immediately', unquestionably the word is used, as here, in its most restrictive sense. *Charles Wolff Packing Co. v. Travelers' Insurance Co.*, 1915, 94 Kan. 630, 146 P. 1175.<sup>366</sup>

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<sup>361</sup> *Id.*

<sup>362</sup> *Id.*

<sup>363</sup> *Id.*

<sup>364</sup> *Id.*

<sup>365</sup> *Id.*

<sup>366</sup> *Id.* at 18-19.

This meant that the grocery store’s insurance policy was inapplicable because “[t]he restrictive words ‘ways immediately adjoining’ embrace[d] at most that portion of the sidewalk abutting or touching the grocery store.”<sup>367</sup> Thus, “[t]he place of the fall being several feet west of the nearest corner of the grocery store, it was not within the terms of the policy.”<sup>368</sup> It also meant that the beauty shop’s insurance policy was inapplicable. According to the court, “[w]hile the entryway and the hall immediately outside the beauty shop may well be included in the phrase ‘ways immediately adjoining’, it would be totally unreasonable to say that coverage extended down the stairway and out onto the sidewalk.”<sup>369</sup>

Similarly, in *Rodriguez v. American Restaurant Ventures, Inc.*, Posa Posa operated a restaurant in a mall, which had rules and regulations requiring that tenants “shall keep ‘[t]he outside areas immediately adjoining the premises...clean and free from snow, ice, dirt and rubbish...’”<sup>370</sup> After Louis and Nancy Rodriguez ate dinner at this restaurant, “they left the restaurant and crossed a brick sidewalk, which r[an] along the front of the mall’s stores, to two steps leading down to the mall’s parking lot.”<sup>371</sup> Louis slipped and fell on the steps, and the couple sued, *inter alia*, Posa Posa, which moved for summary judgment.<sup>372</sup> The United States District Court for the Southern District of New York granted that motion, finding that “[t]he steps in question do not immediately adjoin the restaurant; instead, they are separated from the restaurant’s premises by the brick sidewalk, which is approximately eight to ten feet wide.”<sup>373</sup> Other courts universally have read the phrase “immediately adjoining” in this narrow sense.<sup>374</sup>

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<sup>367</sup> *Id.* at 19.

<sup>368</sup> *Id.*

<sup>369</sup> *Id.*

<sup>370</sup> 923 F.Supp. 598, 600 (S.D.N.Y. 1996).

<sup>371</sup> *Id.*

<sup>372</sup> *Id.*

<sup>373</sup> *Id.* at 601.

<sup>374</sup> *See, e.g., Caribou Four Corners Inc. v. Truck Ins. Exchange*, 443 F.2d 796, 800 (9<sup>th</sup> Cir. 1971).

In other words, in construing insurance policies, courts universally have construed the words “immediately adjoining” as covering, at most, spaces touching or contiguous with the insured premises. According to these courts, even spaces “several feet west” from insured premises or separated from such premises by an eight to ten foot sidewalk do not immediately adjoin those premises.<sup>375</sup> Perhaps even more importantly, these courts have found these words to be unequivocal and unsusceptible to a broader reading.<sup>376</sup>

Amazingly, courts have read these exact same words in a directly antithetical manner in upholding type one *Buie* searches. Courts universally have upheld type one *Buie* searches even when they extend from the arrest room and down hallways as long as fifteen<sup>377</sup> or even thirty-five feet<sup>378</sup> into separate rooms by construing these rooms as spaces immediately adjoining the place of arrest. Indeed, on several occasions, courts have even upheld type one *Buie* searches when they extend from arrest rooms down hallways, into separate rooms, and into closets<sup>379</sup> and bathrooms<sup>380</sup> adjoining those separate rooms. These rulings make no sense given that the first type of *Buie* search authorized the search of “closets and other spaces immediately adjoining the place of arrest....”<sup>381</sup> Even if rooms connected to arrest rooms could be considered spaces immediately adjoining the place of arrest, closets or bathrooms connected to those rooms would be “spaces immediately adjoining spaces immediately adjoining” the place of arrest.

#### 4. Suspicionless *Buie* Searches Were Never Meant to Extend Beyond the Arrest Room

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<sup>375</sup> See *supra* notes 368 & 373 and accompanying text.

<sup>376</sup> See *supra* notes 366 & 373 and accompanying text.

<sup>377</sup> See *supra* notes 290, 295, 297, & 302 and accompanying text.

<sup>378</sup> See *supra* note 309 and accompanying text.

<sup>379</sup> See *supra* note 302 and accompanying text.

<sup>380</sup> See *supra* note 309 and accompanying text.

<sup>381</sup> 494 U.S. 325, 334 (1990).

Even if the words “immediately adjoining” by themselves did not unambiguously signal the invalidity of courts approving type one *Buie* searches extending down hallways and into other rooms, the *Buie* opinion itself clearly supports such a conclusion. Indeed, the *Buie* opinion makes clear that, contrary to what every court has since found, type one *Buie* searches cannot constitutionally extend beyond the arrest room and into any other room, whether it be a room connected to the arrest room by a hallway or a room that actually touches or is contiguous with the arrest room.

As previously noted, while the Court in *Buie* authorized two types of searches, its creation of the “protective sweep,” the second type of *Buie* search, was the controlling portion of its opinion.<sup>382</sup> To reiterate, the Court in *Maryland v. Buie* found that Detective Frolich’s post-arrest search of Buie’s basement was literally not warranted (under the arrest warrant) because once Buie “was found,...the search for him was over, and there was no longer that particular justification for entering *any rooms* that had not yet been searched.”<sup>383</sup> The Court then immediately noted, however, that the fact “[t]hat Buie had an expectation of privacy in those remaining *areas* of his house...d[id] not mean such *rooms* were immune from entry.”<sup>384</sup> Subsequently, the Court acknowledged “that entering *rooms* not examined prior to the arrest is [not] a *de minimis* intrusion that may be disregarded,” but it found that “arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, an arrest.”<sup>385</sup>

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<sup>382</sup> See *supra* notes 189-202 and accompanying text.

<sup>383</sup> 494 U.S. 325, 333 (1990) (emphasis added).

<sup>384</sup> *Id.* (emphasis added).

<sup>385</sup> *Id.* at 333-34 (emphasis added).

This analysis was followed by the Court’s two part holding. First, in dictum, the Court held “that as an incident to a lawful arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in *closets* and other *spaces* immediately adjoining the place of arrest from which an attack could be immediately launched.”<sup>386</sup> Second, in the controlling portion of its opinion, the Court found that “[b]eyond that,...there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the *area* swept harbors an individual posing a danger to those on the arrest scene.”<sup>387</sup> The Court immediately made clear the fact that this second type of *Buie* search was the controlling portion of its opinion (and that the first type of *Buie* search was not) in the accompanying footnote, which rejected the State’s contention that Detective Frolich’s search required “no level of objective justification” and applied *Terry*’s requirement of reasonable suspicion “to the protective sweep of a house.”<sup>388</sup>

The Court’s words compel the conclusion that the first type of *Buie* search can never extend beyond the arrest room and into any other room for a few reasons. First, the Court needed to create the second type of *Buie* search, the protective sweep, because, in the Court’s own words, after the arrest, Detective Frolich no longer had “particular justification for entering *any rooms* that had not yet been searched.”<sup>389</sup> Moreover, the Court rejected the government’s “no level of objective justification” argument and applied *Terry*’s reasonable suspicion requirement to protective sweeps based upon its acknowledgement “that entering *rooms* not examined prior to the arrest is [not] a *de minimis* intrusion that may be disregarded.”<sup>390</sup> Because protective

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<sup>386</sup> *Id.* at 334 (emphasis added).

<sup>387</sup> *Id.* (emphasis added).

<sup>388</sup> *Id.* at 334 n.2.

<sup>389</sup> *Id.* at 333.

<sup>390</sup> *Id.* at 333-34 (emphasis added).

sweeps cover those areas “[b]eyond” the scope of type one *Buie* searches, and because protective sweeps cover any rooms beyond the arrest room, it is clear that type one *Buie* searches can never extend beyond the arrest room.<sup>391</sup>

Second, the Court in *Buie* meant for the word “area” to be synonymous with the word “room.” As noted, the Court held that the fact “[t]hat Buie had an expectation of privacy in those *remaining areas* of his house...d[id] not mean *such rooms* were immune from entry.”<sup>392</sup> By juxtaposing the phrases “remaining areas” and “such rooms” in this sentence, the Court made clear that it meant for the two words to be interchangeable. Then, by later finding that arresting officers can conduct the second type of *Buie* search beyond the spaces covered by the first type of *Buie* search when they have reasonable suspicion “that the *area* swept harbors an individual posing a danger to those on the arrest scene,” the Court signaled that type one *Buie* searches cannot extend beyond the arrest room.<sup>393</sup> Moreover, by stating that type one *Buie* searches cover “spaces immediately adjoining the place of arrest” such as closets,<sup>394</sup> spaces within the arrest room, the Court at least implied that these searches are limited to the arrest room.

Third, it is clear from Justice Brennan’s dissenting opinion that he understood that the first type of *Buie* search could never extend beyond the arrest room. As noted, in his dissent, Justice Brennan challenged the Court’s creation of the first type of *Buie* search by deeming relatively “[im]plausible the majority’s assumption today that arrestees are likely to sprinkle hidden allies throughout the rooms in which they might be arrested.”<sup>395</sup> This criticism only

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<sup>391</sup> *Id.* at 334.

<sup>392</sup> *Id.* at 333 (emphasis added).

<sup>393</sup> *Id.* at 334.

<sup>394</sup> *Id.*

<sup>395</sup> *Id.* at 342 n.6 (Brennan, J., dissenting).

makes sense if Justice Brennan thought that type one *Buie* searches could never extend beyond the arrest room.

C. **Raising Arizona: Arizona v. Gant Compels the Conclusion that Suspicionless Buie Searches Incident to Lawful Arrests Are Unconstitutional**

The above analysis only remains relevant, however, if the first type of *Buie* search is still authorized after *Arizona v. Gant*. This section argues that it is not. There were three parts to *Arizona v. Gant*. First, the Court laid the *Belton* fiction to rest and reaffirmed that *Chimel v. California* generally “continues to define the boundaries of the [search incident to a lawful arrest] exception.”<sup>396</sup> Second, the Court adopted Justice Scalia’s *Thornton* concurrence and gave *Harris* and *Rabinowitz* renewed vitality based upon “circumstances unique to the automobile context...”<sup>397</sup> Third, the Court rejected the government’s argument that “*Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee’s limited privacy interest in his vehicle.”<sup>398</sup> Together, these conclusions similarly establish the invalidity of the first type of *Buie* search

1. **Suspicionless Buie Searches Cannot Be Defended Under Chimel**

As noted, in *Chimel v. California*, the Court laid out the twin rationales undergirding searches incident to lawful arrests – protecting officer safety and preventing the concealment or destruction of evidence – and found that that they defined the proper scope of such searches: “the arrestee’s person and the area ‘within his immediate control’-construing that phrase to mean the

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<sup>396</sup> *Arizona v. Gant*, 129 S.Ct. 1710, 1719 (2009).

<sup>397</sup> *Id.*

<sup>398</sup> *Id.*

area from within which he might gain possession of a weapon or destructible evidence.”<sup>399</sup> These rationales also defined its boundaries as they provided “no comparable justification...for routinely searching any room other than that in which an arrest occurs-or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”<sup>400</sup> In other words, *Chimel* deemed unconstitutional not only searches incident to lawful arrests that extend beyond the room of arrest but also searches within the arrest room but beyond the reach of the arrestee. According to the Court, “[t]he only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other.”<sup>401</sup>

Clearly, because *Gant* held that *Chimel* “continues to define the boundaries of the [search incident to a lawful arrest] exception,”<sup>402</sup> courts can no longer approve type one *Buie* searches that extend beyond the arrest room, and thus beyond the area within the arrestee’s reach, unless, as will be addressed *infra*,<sup>403</sup> some other justification applies. More importantly, however, the reaffirmation of *Chimel* as defining the boundaries of proper searches incident to lawful arrests means that type one *Buie* searches have been rendered obsolete in the absence of an alternate justification. As noted, on the one hand, under *Chimel*, courts cannot defend any type one *Buie* searches of spaces that are beyond the immediate control of an arrestee. On the other hand, assuming that there is a space in the arrest room and within the immediate control of the arrestee from which an attack could be immediately launched, that space would necessarily also be a

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<sup>399</sup> 395 U.S. 752, 763 (1969).

<sup>400</sup> *Id.*

<sup>401</sup> *Id.* at 766.

<sup>402</sup> *Gant*

<sup>403</sup> See *infra* notes 418-68 and accompanying text.

space from which the arrestee might gain possession of a weapon or destructible evidence, meaning that *Chimel* would authorize the search, and *Buie* would be unnecessary.<sup>404</sup>

## 2. *Harris and Rabinowitz* Now Only Apply To Automobile Arrests

Notwithstanding the Court's conclusion in *Gant* that *Chimel* generally "continues to define the boundaries of the [search incident to a lawful arrest] exception," the Court immediately thereafter relied upon Justice Scalia's *Harris* and *Rabinowitz*-reviving concurrence in *Thornton* to "conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"<sup>405</sup> As Justice Scalia noted in his *Thornton* concurrence, what makes the motor vehicle context unique is that automobiles are "a category of 'effects' which give rise to a reduced expectation of privacy...and heightened law enforcement needs...."<sup>406</sup> In other words, "the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation"<sup>407</sup> justifies this type of warrantless automobile search incident to a lawful arrest in the same way that it justifies the automobile exception.

Of course, a person does not have a reduced expectation of privacy in his home, meaning that this justification could not support a type one *Buie* search; instead, an individual's "expectation of privacy is at its highest" in his home.<sup>408</sup> Indeed, *Gant* reaffirmed *Chimel*, which declared that *Harris* and *Rabinowitz* no longer laid the boundaries of proper searches incident to

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<sup>404</sup> Clearly, a space in which a person might be hiding would also be large enough to conceal a weapon or other evidentiary item.

<sup>405</sup> *Arizona v. Gant*, 129 S.Ct. 1710, 1719 (2009).

<sup>406</sup> *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring in the judgment).

<sup>407</sup> *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

<sup>408</sup> *Polk v. District of Columbia*, 121 F.Supp.2d 56, 66 (D.D.C. 2000) (*construing* *Wilson v. Layne*, 526 U.S., 604, 610-12 (1999)).

lawful home arrests, and the Court made clear that it was only reviving these latter two opinions for automobile searches incident to lawful arrests based upon the uniqueness of the motor vehicle context.<sup>409</sup> Therefore, there is no logical or precedential ground for arguing that type one *Buie* searches can be justified under *Harris* and *Rabinowitz*.

3. Suspicionless *Buie* Searches Are Not Necessary to Protect Law Enforcement Safety and Evidentiary Interests

If type one *Buie* searches continue to be constitutionally valid, then, their justification can only lie in a rationale rejected by the Court in *Gant*: that the first type of *Buie* search is necessary “to protect law enforcement safety and evidentiary interests.”<sup>410</sup> In *Gant*, the Court found these interests insufficient to uphold the *Belton* fiction because it gave “police the power to conduct...a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creat[ing] a serious and recurring threat to the privacy of countless individuals.”<sup>411</sup> Accordingly, law enforcement safety and evidentiary interests can only be sufficient to support type one *Buie* searches if the analysis is significantly different in the home arrest context. There are three relevant points of comparison between the two contexts: the arrestee’s expectation of privacy, the law enforcement safety and evidentiary interests, and the extent to which established search warrant exceptions ensure that officers may search when safety or evidentiary concerns demand.<sup>412</sup>

a. An Individual’s Expectation of Privacy is at its Highest in His Home

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<sup>409</sup> *Chimel v. California*, 395 U.S. 752, 766-68 (1969).

<sup>410</sup> *Gant*, 129 S. Ct. at 1721.

<sup>411</sup> *Id.*

<sup>412</sup> *Gant*, 129 S. Ct. at 1720-21.

First, as previously noted, individuals have a “reduced expectation of privacy in an automobile, owing to its pervasive regulation.”<sup>413</sup> Conversely an individual’s “expectation of privacy is at its highest” in his home, leading to the obvious conclusion that “the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one’s home.”<sup>414</sup> This is not only “because the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office,” but also because of the mobility of automobiles.<sup>415</sup> These differences explain why “less rigorous warrant requirements govern automobile searches.”<sup>416</sup> Indeed, the Court in *Gant* recognized “that a motorist’s privacy interest in his vehicle is less substantial than in his home....”<sup>417</sup> Therefore, this factor weighs strongly against type one *Buie* searches being defensible while the *Belton* fiction was not.

b. Law Enforcement Interests During Automobile and Home Arrests are not Meaningfully Different

The Supreme Court has stated the law enforcement safety and evidentiary interests implicated by arrests of the occupants of automobiles on several occasions.<sup>418</sup> These interests are the interests of arresting officers in searching the passenger compartment of an arrestee’s automobile to ensure that the arrestee does not access that compartment to conceal or destroy evidence or remove a weapon to resist arrest or effect his escape.<sup>419</sup> In his *Thornton* concurrence, Justice Scalia called these interests into question in cases in which arresting officers had already handcuffed and secured arrestees in the back of squad cars, noting that the government could cite

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<sup>413</sup> See *supra* note 407 and accompanying text.

<sup>414</sup> *New York v. Class*, 475 U.S. 106, 114 (1986).

<sup>415</sup> *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

<sup>416</sup> *Id.*

<sup>417</sup> *Gant*, 129 S. Ct. at 1720.

<sup>418</sup> See *supra* notes 157-61 and accompanying text.

<sup>419</sup> *Id.*

no examples in which an arrestee had escaped and retrieved a weapon or evidence from his vehicle “despite being handcuffed and secured in the back of a squad car...”<sup>420</sup> According to Scalia,

the Government need not document specific instances in order to justify measures that avoid obvious risks. But the risk here is far from obvious, and in a context as frequently recurring as roadside arrests, the Government’s inability to come up with even a single example of a handcuffed arrestee’s retrieval of arms or evidence from his vehicle undermines its claims. The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel*.<sup>421</sup>

While Scalia’s reasoning did not carry the day in *Thornton*, the Court adopted it in *Gant* to dismantle the *Belton* fiction.<sup>422</sup> Because individuals have a significantly higher expectation of privacy in their homes than they enjoy in their vehicles, the law enforcement safety and evidentiary interests would need to be significantly higher in the home arrest context for type one *Buie* searches to be even potentially defensible.

The first problem in this regard is that the Court mentioned no evidentiary interests in *Buie*. Instead, the Court defined the type of search it was authorizing, the protective sweep, as “a quick and limited search of premises incident to an arrest and conducted to protect the safety of police officers or others.”<sup>423</sup> And while the Court did not explain the first type of *Buie* search in any detail, the fact that this type of search covers spaces “from which an attack could be immediately launched,” makes clear that such searches are defensible, if at all, solely based upon law enforcement safety interests and not based upon evidentiary interests.<sup>424</sup>

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<sup>420</sup> 541 U.S. 615, 625-26 (2004).

<sup>421</sup> *Id.* at 626-27.

<sup>422</sup> *Gant*, 129 S. Ct. at 1718-19.

<sup>423</sup> 494 U.S. 325, 327 (1990).

<sup>424</sup> *Id.* at 334.

With regard to the safety interests, the Court itself indicated in *Buie* that law enforcement safety interests do not justify suspicionless *Buie* searches any more than they justify suspicionless searches during on-the-street or roadside investigatory encounters. It is again important to keep in mind that the portion of the Court’s opinion in *Buie* creating the protective sweep was the controlling portion of its opinion while the portion creating the suspicionless, first type of *Buie* search was dictum.<sup>425</sup> The footnote immediately following the Court’s two-part holding proves both this point and that the Court did not view the law enforcement safety interests in the non-home arrest context and the home arrest context as meaningfully different.<sup>426</sup>

As noted, in that footnote, the Court rejected the State’s contention that Detective Frolich’s search required “no level of objective justification because of ‘the danger that inheres in the in-home arrest for a violent crime’” and applied *Terry*’s requirement of reasonable suspicion “to the protective sweep of a house.”<sup>427</sup> The Court did so because “despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters.”<sup>428</sup> Indeed, the Court noted that “[e]ven in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable suspicion before a frisk for weapons can be conducted.”<sup>429</sup> These findings compel the conclusion that the Court did not view the law enforcement safety interests in the non-home arrest context and the home arrest context as meaningfully different.

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<sup>425</sup> See *supra* notes 189-201 and accompanying text.

<sup>426</sup> *Belton*, 494 U.S. at 334 n.2.

<sup>427</sup> *Id.*

<sup>428</sup> *Id.*

<sup>429</sup> *Id.*

At another point in its *Buie* opinion, the Court did find that “[t]he risk of danger in the context of an arrest in the home is as great as, *if not greater than*, it is an on-the-street or roadside investigatory encounter.”<sup>430</sup> The above paragraph, however, establishes that this was merely idle speculation, with any difference in danger being insignificant.<sup>431</sup> More importantly, the Court’s speculation in this regard was directed solely at the potential dangers associated with type two *Buie* searches, not type one *Buie* searches. The reason that the Court found that the risk of danger might be greater in the context of home arrests was because, “unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary’s turf,” with “[a]n ambush in a confined setting of unknown configuration...more to be feared than it is in open, more familiar settings.”<sup>432</sup>

As noted, in reaching this conclusion, the Court likely relied upon the argument in the government’s brief that “[a]n accomplice, lurking in *another room*, might take someone hostage or attack the officers or the arrestee as they are leaving the premises”<sup>433</sup> and the argument in two *amicus* briefs that “[i]t would make little sense to say that police may take protective measures against those known to be present, but that they may never stray *beyond the room of the arrest* to see if there are others present who, by virtue of their location, may be in an even more advantageous position to offer forcible resistance on behalf of the arrestee.”<sup>434</sup> These arguments as well as the Court’s conclusion indicate that any increased risk of danger during home arrests is based upon the unknown configuration of the place of arrest and the possibility of accomplices

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<sup>430</sup> *Id.*

<sup>431</sup> See *supra* notes 427-29 and accompanying text.

<sup>432</sup> *Belton*, 494 U.S. at 334 n.2.

<sup>433</sup> See *supra* note 178 and accompanying text (emphasis added).

<sup>434</sup> See *supra* note 179 and accompanying text.

hiding in other rooms. Because, as noted, a type one *Buie* search can never extend beyond the arrest room,<sup>435</sup> this “home field advantage” argument has no relevance to this type of search.

Moreover, even if the Court were not idly speculating about increased risk, and even if this increased risk had relevance to type one *Buie* searches, the Court’s conclusion in this regard would be subject to the same challenges that undid the *Belton* fiction. *Gant*’s destruction of the *Belton* fiction was based upon Justice Scalia’s *Thornton* concurrence, which found that the problem with the *Belton* fiction was that the government could cite no examples in which an arrestee had escaped and retrieved a weapon or evidence from his vehicle “despite being handcuffed and secured in the back of a squad car....”<sup>436</sup> The same attack could be launched against the type one *Buie* search.

In his respondent’s brief, *Buie* argued that “[t]he State ha[d] cited no statistical or historical evidence that officers inside residences are especially susceptible to ambush.”<sup>437</sup> Moreover, *Buie* cited to a study which collected data on police in five south central states in the early 1970’s:

The assaults were classified according to type: general (unplanned attacks arising out of heated, emotional situations with much opportunity for interaction and communication between officer and assailant before the attack), robbery-related (attacks developed from sudden confrontations between police and offender in robbery situations), and ambush (sudden surprise attacks with no advance interaction between officer and assailant).<sup>438</sup>

The assaults were also “classified according to other variables including the location of assault,” and “of 264 assaults in private residences, 259 (98.1%) were general, 2 (0.7%) were

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<sup>435</sup> See *supra* notes 389-95 and accompanying text.

<sup>436</sup> *United States v. Thornton*, 541 U.S. 615, 625-26(2004) (Scalia, J., concurring in the judgment).

<sup>437</sup> Respondent’s Brief at 14, *Maryland v. Buie*, 110 S. Ct. 1093 (No. 88-1369), 1989 WL 1127011.

<sup>438</sup> *Id* at 14-15 (*construing Meyer et al., A Comparative Assessment of Assault Incidents: Robbery-Related, Ambush, and General Police Assaults*, 9 J. POLICE SCI. & ADMIN. 1 (1981)).

robbery-related, and 3 (1.1%) were ambushes.”<sup>439</sup> Buie noted that this data did “not show whether any of those three ambushes was a confederate’s surprise attack meant to foil an arrest.”<sup>440</sup> However, based upon the fact that only 1.1% of the attacks were ambushes, he was able to conclude “that if a police officer can expect to be assaulted in a private home, it is not likely to be by the kind of ambush that a protective sweep is intended to prevent.”<sup>441</sup> Instead, Buie claimed that “[t]here is simply no objective support for a heightened sense of danger in these situations.”<sup>442</sup> As support for this last claim, Buie noted that “[a] second premise on which the State’s position depends, that arrests for violent crimes necessarily carry a greater potential for danger, has already been rejected by the Court.”<sup>443</sup>

Indeed, the Court in *Buie* agreed with this argument, finding that “the existence of [an] arrest warrant implies nothing about whether dangerous third parties will be found in the arrestee’s house.”<sup>444</sup> The problem for Buie was that the Court reached this conclusion as part of its holding that a protective sweep can be justified, not solely based upon a lawful arrest, but based upon reasonable suspicion of danger in addition to a lawful arrest.<sup>445</sup> But the problem for the government should a defendant or appellant challenge a type one *Buie* search after *Gant* is that, in the words of Justice Scalia, the above language from *Buie* indicates that the risk of arresting officers being attacked by confederates during home arrests is “far from obvious.”<sup>446</sup>

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<sup>439</sup> *Id.* at 15.

<sup>440</sup> *Id.* at 15.

<sup>441</sup> *Id.* at 15.

<sup>442</sup> *Id.* at 15.

<sup>443</sup> *Id.* at 15 n.6.

<sup>444</sup> *Belton*, 494 U.S. at 334 n.2.

<sup>445</sup> *Id.*

<sup>446</sup> *United States v. Thornton*, 541 U.S. 615, 626 (Scalia, J., concurring in the judgment).

Therefore, just as “the Government’s inability to come up with even a single example of a handcuffed arrestee’s retrieval of arms or evidence from his vehicle”<sup>447</sup> proved fatal for the *Belton* fiction, the government’s inability (so far) to come up with even a single example of a confederate attacking an arresting officer from a space immediately adjoining the place of arrest<sup>448</sup> should prove fatal to the first type of *Buie* search. In fact, to defend type one *Buie* searches, the government would need to come up with (at the very least) an example of a confederate attacking an arresting officer from a space immediately adjoining the place of arrest when the officer lacked even reasonable suspicion of such an attack because the existing search warrant exception for protective sweeps authorizes a search for such confederates when there is reasonable suspicion.<sup>449</sup> This leads into the final point of comparison between the automobile and home arrest contexts.

c. Established Exceptions Authorize Home Searches When Safety or Evidentiary Concerns Demand

In *Gant*, the Court found that a broad reading of *Belton* was unnecessary to protect law enforcement safety and evidentiary interests because two established exceptions to the search warrant requirement “authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand.”<sup>450</sup> The first exception was the automobile exception, and the second exception was the *Michigan v. Long* automobile frisk.<sup>451</sup> The Court also included a *cf.*

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<sup>447</sup> *Id.*

<sup>448</sup> See *supra* notes 436-41 and accompanying text.

<sup>449</sup> *Belton*, 494 U.S. at 334.

<sup>450</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009).

<sup>451</sup> *Id.*

citation to the *Buie* protective sweep as support for the proposition that “there may be still other circumstances in which safety or evidentiary interests would justify a search.”<sup>452</sup>

As the *cf.* citation makes clear, *Buie* does not apply to automobile searches, but the *Buie* protective sweep *is* one example of an established exception to the search warrant requirement for home arrests that renders type one *Buie* searches unnecessary to protect law enforcement safety interests. As previously noted, the *Buie* protective sweep is the home counterpart to the *Michigan v. Long* protective sweep of an automobile.<sup>453</sup> In *Gant*, the Court held that “*Michigan v. Long*...permits an officer to search a vehicle’s passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is ‘dangerous’ and might access the vehicle to ‘gain immediate control of weapons.’”<sup>454</sup> Meanwhile, under the *Buie* protective sweep, arresting officers can search areas which they reasonably believe harbor individuals posing a danger to those on the arrest scene.<sup>455</sup> And, of course, *Chimel* still automatically authorizes arresting officers to search the area from within which arrestees might gain possession of weapons or destructible evidence.<sup>456</sup>

Together, these existing exceptions authorize home searches under additional circumstances when law enforcement safety and evidentiary interests demand at least to the same extent as *Michigan v. Long* authorizes automobile searches. Moreover, an additional exception provides *more* protection in the home arrest context. As noted, many courts have extended the reasoning of *Michigan v. Summers* to find that an arrest warrant *per se* carries with it the limited authority for officers to detain the occupants of the premises while a proper arrest is

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<sup>452</sup> *Id.*

<sup>453</sup> See *supra* notes 182-88 and accompanying text.

<sup>454</sup> *Gant*, 129 S. Ct. at 1721.

<sup>455</sup> *Maryland v. Buie*, 494 U.S. 325 (1990).

<sup>456</sup> *Chimel v. California*, 395 U.S. 753, 763 (1969).

conducted.<sup>457</sup> Combined with *Chimel* and the protective sweep portion of *Buie*, this means that, even without the type one *Buie* search, officers conducting a home arrest could still detain arrestees and search the area within their immediate control, automatically detain any other occupants, and search for other occupants if they have reasonable suspicion that they are present and pose a danger to those on the arrest scene. Without the type one *Buie* search, arresting officers simply could not *search* for other occupants without reasonable suspicion.

Arresting officers cannot so protect themselves during automobile arrests. Of course, officers conducting an automobile arrest can detain arrestees and search the area within their immediate control as well as search the passenger compartment when they have reasonable suspicion that an individual, whether or not the arrestee, is dangerous and might access the vehicle to gain immediate control of weapons. But arresting officers have no analogous authority to detain other occupants of the automobile or bystanders without reasonable suspicion. Extending the analysis from the aforementioned *Pennsylvania v. Mimms*,<sup>458</sup> the Court in *Maryland v. Wilson* found that “an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”<sup>459</sup> But the Court in *Wilson* also “express[ed] no opinion upon” the issue of whether an officer may forcibly *detain* a passenger for the entire duration of the stop.”<sup>460</sup> Since *Wilson*, only a few courts have authorized such detentions.<sup>461</sup> Conversely, even after *Wilson*, more courts have found that their state constitutions forbid arresting officers from even ordering non-arrestee passengers out of vehicles.<sup>462</sup>

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<sup>457</sup> See *supra* note 275 and accompanying text.

<sup>458</sup> 434 U.S. 106, 111 n.6 (1977).

<sup>459</sup> 519 U.S. 408, 415 (1997).

<sup>460</sup> *Id.* at 415 n.3 (emphasis added).

<sup>461</sup> See, e.g., *Williams v. Commonwealth*, 2001 WL 826525, No. 1827-00-3 at \*2 (Va.App., July 24, 2001) (noting that police officers can detain passengers until the completion of a traffic stop).

<sup>462</sup> See, e.g., *State v. Sprague*, 824 A.2d 539, 544 (Vt. 2003) (citing cases).

What this means is that, in the context of automobile arrests completed without reasonable suspicion of danger, no courts hold that arresting officers can detain bystanders, only a few courts hold that arresting officers can detain non-arrestee passengers, and a few (more) courts hold that arresting officers cannot even order non-arrestee occupants out of vehicles. What this also means is that officers completing an automobile arrest could be subject to unpreventable danger that is preventable during a home arrest. As Justice Alito noted in his dissent in *Gant*, the Court was insouciant to two situations where neither existing exceptions nor the Court's construction of *Belton* would authorize a vehicle search despite safety concerns so demanding:

First, it is not uncommon for an officer to arrest some but not all of the occupants of a vehicle...Second, there may be situations in which an arresting officer has cause to fear that persons who were not passengers in the car might attempt to retrieve a weapon or evidence from the car while the officer is still on the scene.<sup>463</sup>

For instance, in *Gant*, if *Gant* had a passenger, and the arresting officers did not have reasonable suspicion that the passenger was dangerous, they could not have detained him while they arrested *Gant*. And while the officers in *Gant* did arrest a man and a woman outside the house in front of which *Gant* was arrested, if the officers did not have probable cause to arrest them or reasonable suspicion that they were dangerous, they could not have detained them while they arrested *Gant*. Conversely, if the officers arrested *Gant* in the house and came across any of these people inside the house before arresting *Gant*, they could have detained them under the way that many courts have interpreted *Michigan v. Summers*, even in the absence of a type one *Buie* search.

The second existing exception mentioned by the Court in *Gant* was the automobile exception, which holds that “[i]f there is probable cause to believe that a vehicle contains

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<sup>463</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1731 n.2 (2009) (Alito, J., dissenting).

evidence of criminal activity,” officers can search “any area of the vehicle in which evidence might be found.”<sup>464</sup> Of course, the counterpart in the home arrest context is the search warrant. Indeed, while it was short lived, the Supreme Court’s opinion in *Trupiano v. United States* briefly held that arresting officers could not conduct a search incident to a lawful home arrest if it was practicable for those officers to procure a search warrant before completing the arrest.<sup>465</sup> While the Court’s opinion in *Rabinowitz* largely discredited *Trupiano*, its subsequent opinion in *Chimel* revitalized *Trupiano* in spirit, if not in holding.

The Court in *Chimel* repudiated *Rabinowitz* for a few reasons. One was that “the approach taken in cases such as *Go-Bart*, *Lefkowitz*, and *Trupiano* was essentially disregarded by the *Rabinowitz* Court.”<sup>466</sup> Another reason was that *Rabinowitz* (and *Harris*) “g[a]ve law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.”<sup>467</sup> Type one *Buie* searches give law enforcement officials the opportunity to engage in home searches not justified by probable cause or even reasonable suspicion, and they do so when officers could, as noted in *Chimel*, simply arrest suspects at some other location if they believe that a home arrest might be dangerous.<sup>468</sup> Therefore, the existing (search) warrant exceptions in the home arrest context, like the arrestee’s expectation of privacy, and the law enforcement evidentiary and safety interests, do not provide a basis for saving the type one *Buie* search from the fate that befell the *Buie* fiction.

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<sup>464</sup> *Id.* at 1721.

<sup>465</sup> 334 U.S. 699, 708 (1948).

<sup>466</sup> *Chimel v. California*, 395 U.S. 752, 760 (1969).

<sup>467</sup> *Id.* at 767.

<sup>468</sup> *Id.*

## V. CONCLUSION

In *United States v. Rabinowitz*, Justice Frankfurter dissented from the majority's opinion and its expansive reading of the search incident to a lawful arrest exception, concluding that the decisions supporting that opinion "merely prove[d] how a hint becomes a suggestion, is loosely turned into dictum and finally elevated into a decision."<sup>469</sup> His words finally commanded a majority of the Court in its landmark decision in *Chimel v. California*. But despite *Chimel*'s limiting twin rationales, the Court soon found itself creating what would become the *Belton* fiction and then piling fiction upon (*Belton*) fiction in *Thornton*, with the only difference between *Rabinowitz* and *Belton* being that, with the latter opinion, a dissent and not dictum was elevated into a decision. By reaffirming *Chimel* as defining the proper boundaries of searches incident to lawful arrests, the Court in *Gant* erased the *Belton* fiction and repudiated *Thornton* as an extension of *Chimel*.

While not mentioned in *Gant*, the first type of *Buie* search is actually a more perfect example of the problem identified by Justice Frankfurter. In an opinion single-mindedly focused on establishing the validity of protective sweeps supported by reasonable suspicion, the Court in *Buie* inserted a single line which suggested in dictum that arresting officers might be able to search spaces immediately adjoining the place of arrest without the requirement of probable cause or reasonable suspicion. From this dictum, courts have stretched the scope of these suspicionless searches down hallways, into separate rooms, and even into every room of small apartments and houses. These opinions clearly stretched the scope of type one *Buie* searches beyond the breaking point, meaning that courts should have concluded even before *Gant* that they grossly misconstrued the scope of the first type of *Buie* search. After *Gant*, this conclusion

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<sup>469</sup> *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting).

still holds, but courts should also use the same reasoning used to dismantle the *Belton* fiction to put to rest suspicionless *Buie* searches.