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# Arizona v. Gant and its Impact on Search and Seizure Law and Vehicle Searches

Michael C Gizzi, Ph.D., *Illinois State University*

R Craig Curtis, Ph.D, J.D., *Bradley University*



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Michael Gizzi\*  
Associate Professor  
Illinois State University  
Department of Criminal Justice  
Normal, Illinois 61790-5250  
(309) 438-5001

R. Craig Curtis\*\*  
Associate Professor  
Bradley University  
Department of Political Science  
Peoria, Illinois 61625  
(309) 677-2492

## **Acknowledgments**

\* Associate Professor of Criminal Justice, Illinois State University. ; Ph.D., The University at Albany, SUNY (political science).. A.B., Saint Michael's College, VT

\*\* Associate Professor of Political Science, Bradley University. Ph.D., Washington State University (political science); J.D., University of the Pacific, McGeorge School of Law; A.B., Millsaps College.

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# ***Arizona v. Gant* and its impact on Search and Seizure Law and Vehicle Searches**

## **Abstract**

The decision in *Arizona v. Gant*, handed down in April of 2009, was a surprise for law enforcement and Supreme Court observers alike. For law enforcement, it took away their unfettered discretion to search a car anytime they engaged in a routine traffic stop, which was a commonly used tool for drug interdiction and combating gangs. For Court observers, it not only was a rare decision to suppress evidence in a Fourth Amendment case but it also presented an unusual line up of justices. This study considers the implications of *Gant* both for law enforcement and for observers of the Court. A content analysis of 314 federal and state lower court decisions that have followed the *Gant* decision in the year following the decision is used to examine the impact that case is having on police and the lower courts. The content analysis illustrates the ways the decision is forcing changes in police practice, and provides insight into the ways that lower courts are responding to the *Gant* precedent.

## Contents

I.	Introduction .....	1
A.	Vehicles Searches Incident to Arrest .....	2
B.	Pretextual Traffic Stops and the War on Drugs .....	4
C.	A Hint of the Weakness in <i>Belton</i> .....	7
II.	<i>Arizona v. Gant</i> : an Unexpected Shift in Search Incident to Arrest Law .....	8
III.	The Implications of <i>Gant</i> for the Future of Vehicle Searches .....	15
IV.	The Judicial Impact of <i>Arizona v. Gant</i> .....	19
A.	Federal Court Decisions .....	24
B.	State Court Decisions .....	29
V.	Conclusion .....	31
A.	Does <i>Gant</i> Represent a Fundamental Shift in Criminal Procedure? .....	33

## I. Introduction

On April 21, 2009, the United States Supreme Court handed down a decision that sent shock-waves through the law enforcement community. *Arizona v. Gant*<sup>1</sup> significantly modified the Supreme Court's rules for vehicle searches incident to arrest—rules that had been in place since the 1981 decision in *New York v. Belton*.<sup>2</sup> The decision in *Gant* placed limits on the ability of the police to conduct searches of a vehicle's passenger compartment after making a warrantless arrest. The *Belton* bright-line rule had been extensively used by police, and its demise was of great concern to the law enforcement community.

Police have used *Belton* searches in conjunction with arrests for minor traffic offenses as a key strategy in ferreting out drugs. Officers observe a vehicle that they suspect might be involved in drugs. They might have a hunch, or they may be relying on intelligence about the vehicle. They follow the vehicle, and then establish a pretext for pulling it over – often relying on the most minor of traffic violations.<sup>3</sup> When an officer pulls a vehicle over they speak with the driver, use their senses to look for plain view of any criminal evidence, and ask for driver's license, registration, and proof of insurance. If the driver is unable to produce any of these three things, the officer places him or her under arrest, and proceeds to search the vehicle's passenger

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<sup>1</sup> 129 S.Ct. 1710 (2009).

<sup>2</sup> 453 U.S. 454 (1981).

<sup>3</sup> See, i.e., Markus D. Dubber, *Policing Possession: The War on Crime and the End of Criminal Law*, 91 J. CRIM. L. & CRIMINOLOGY, 829 (2001).; MICHAEL C. GIZZI AND JENNIFER SHEETZ, *Pretexts, Traffic Stops, and Methamphetamine Arrests: 'Its Like Fishing in a Stocked Pond'* (Paper Presented at the Annual Meeting of the Midwest Political Science Association 2009); MILTON HEUMANN & LANCE CASSAK, *GOOD COP, BAD COP : RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE* (P. Lang. 2003); Walter R. LaFave, *The "Routine Traffic Stop" from Start to Finish: Too Much "Routine," Not Enough Fourth Amendment*, 102 MICH. L. REV. 1843 (2004).

compartment. Often enough to create a general perception among officers that this is a highly effective tactic for drug interdiction,<sup>4</sup> they find evidence supporting an arrest for drugs. *Arizona v. Gant* places limits on the ability to conduct these searches.

This study examines the issues raised by *Arizona v. Gant*. The paper provides a context for understanding the importance of the *Gant* decision, by first providing an overview of the use of vehicle searches incident to arrest in the war on drugs. The paper examines the rationale underlying the *Gant* decision, and considers the implications it raises for vehicle searches. This provides the background for an examination of lower court decisions in the year since *Gant* was handed down. A content analysis of 125 lower court decisions by Federal Courts and 117 decisions by state courts has been conducted, to consider the initial impact the decision is having on vehicle searches.<sup>5</sup>

## A. Vehicles Searches Incident to Arrest

*Chimel v. California*<sup>6</sup> defined the scope of a warrantless search of a person incident to arrest. An officer is permitted to search the arrestee's person and the area within the immediate control of the person arrested (the reachable area or reachable-distance) to discover weapons and

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<sup>4</sup> See, e.g., Crawford, Charles, *Race and Pretextual Stops: Noise Enforcement in a Midwest City*, 6 SOCIAL PATHOLOGY 213-227 (2000); Lichtenberg, Illya, *Driving While Black (DWB): Examining Race as a Tool in the War on Drugs*, 7 POLICE PRACTICE AND RESEARCH 49-60 (2006); Lopez, Alberto, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, 90 KENTUCKY LAW JOURNAL 75-122 (2001).

<sup>5</sup> These cases were selected through using Shepard's Citations for *Arizona v. Gant*, 129 S.Ct. 1710. "Followed" cases were selected for analysis. In addition, 72 Federal cases which were listed in *Shepard's* as "Distinguished" were also examined. See, *infra*, page... for a detailed examination of the methodology utilized.

<sup>6</sup> 395 U. S. 752 (1969).

to seize evidence to prevent its concealment or destruction. This was expanded by the decision in *United States v. Robinson*,<sup>7</sup> which ruled that after a lawful custodial arrest, a full search of the person incident to arrest was “reasonable” under the 4<sup>th</sup> Amendment. This search is not limited to the outer clothing and removal of weapons, as permitted by the pat-down or frisk rule of *Terry v. Ohio*.<sup>8</sup>

While the reaching distance rule seemed simple enough, it left some confusion about what the scope of a search incident to legal arrest was when the suspect was arrested in a vehicle.<sup>9</sup> Did it extend to the entire passenger compartment or was it limited to the arrestee’s reaching distance? In *New York v. Belton*<sup>10</sup> the Court set aside the limitations that *Chimel* placed on searches incident to arrest, by establishing a bright-line rule that when an individual was arrested in a vehicle, it was reasonable for the officer to search the entire passenger compartment, including any opened or closed containers. While the automobile exception<sup>11</sup> already permitted a warrantless vehicle search when there was probable cause of the presence of contraband in a vehicle, the bright-line rule in *Belton* enabled the officer to conduct a search of

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<sup>7</sup> 414 U. S. 218 (1973)

<sup>8</sup> 392 U. S. 1 (1968).

<sup>9</sup> A widely cited analysis of the search incident to arrest rule was highly critical of the rationale in *Chimel*, “*Chimel's* justification for a search of that area appears to be based on two assumptions: (1) that the arrestee *might be inclined* to reach into that area for a weapon or evidence, and (2) that the arrestee *would be able* to reach into that area. The first assumption might be correct, but the second assumption is *not* correct. Because it is incorrect, a whole body of subsequent law has been built on a false foundation.” Moskowitz, Myron, “A Rule in Search of a Reason: An Empirical Reexamination of *Chimel and Belton*,” 2002 *Wisconsin Law Review* 657, 661(2002). See, also, Logan, Wayne A. “An Exception Swallows a Rule: Police Authority to Search Incident to Arrest,” 19 *Yale Law and Policy Review* 381, 391-394 (2001).

<sup>10</sup> Note 2, *supra*.

<sup>11</sup> *Carroll v. United States*. 267 U. S. 132 (1925). In discussing *Carroll*, Logan, *supra*, note 7, at 390, no 49, opines that the ongoing efforts to prohibit the sale of alcohol in the 1920’s is somewhat similar to the war on drugs that has resulted in broader powers of search and seizure today.

the passenger compartment of a vehicle for any arrest made in a vehicle. In many ways it transformed the automobile exception into simply a probable cause exception. As long as the officer had probable cause for an arrest, he or she could search the entire passenger compartment.<sup>12</sup> In 2001, the Court ruled in *Atwater v. City of Lago Vista*<sup>13</sup> that officers could arrest for any offense, including the most minor non-jailable offenses like driving without a seat-belt. In *Thornton v. United States*<sup>14</sup> the Court extended the *Belton* rule to hold that an arrestee need not even be at the vehicle at the time of the arrest; it was enough that he or she was the “recent occupant” of the vehicle. This was even more ironic given that Thornton was handcuffed and in the patrol car at the time of the vehicle search.

## B. Pretextual Traffic Stops and the War on Drugs

*New York v. Belton* changed the landscape for criminal investigations. When an officer makes an arrest – any arrest – he or she can do a full search of the passenger compartment of the vehicle incident to arrest. The development of search incident to arrest law was particularly valuable for the war on drugs. In the years after *Terry v. Ohio* established the warrantless standard of stop and frisk based on reasonable articulable suspicion, the federal government began to develop criminal profiling strategies, where profiles of likely drug dealers were established, and based on these lists of characteristics *Terry* stops were initiated to investigate potential drug couriers in the nation’s airports, train, and bus stations.<sup>15</sup> These efforts were

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<sup>12</sup> See Yale Kamisar, *Confessions, Search and Seizure, and the Rehnquist Court*, in Martin Belsky, *The Rehnquist Court: A Retrospective*, 100 New York: Oxford University Press (2002).

<sup>13</sup> 532 US 318 (2001).

<sup>14</sup> 541 U.S. 615 (2004).

<sup>15</sup> See Philip S. Greene, P. and Brian W. Wice, *The D.E.A. Drug Courier Profile: History and Analysis*. S. TEX. L. J. 22: 261- 285 (1981).

generally viewed favorably by the Supreme Court.<sup>16</sup> While using a *Terry* stop was easy enough when observing questionable suspects coming off of airplanes or buses, it was much more difficult to develop the required reasonable suspicion when following a vehicle going 65 miles per hour down the highway.<sup>17</sup> In 1984, the Drug Enforcement Agency came up with a strategy to get around this problem.<sup>18</sup> All police had to do was use the traffic code, and if they identified any one of a hundred minor traffic infractions, they would have probable cause to stop a vehicle.<sup>19</sup> Once the vehicle is stopped, they can observe the driver and passenger using their plain view, check for license, proof of insurance, and determine if there are any active warrants. If the driver is guilty of any offenses that they could make an arrest for, they can place the driver in custody, and then do a complete search of the vehicle's passenger compartment incident to arrest. This would prove to be a valuable set of tools, and in the next thirty years, the DEA would train more than 27,000 officers in how to use these techniques.<sup>20</sup>

The key to Operation Pipeline, as this effort became known, was the use of pretextual traffic stops for conducting a criminal investigation. The officers observe a traffic violation which they use as the pretext to conduct a broader investigation. Officers will follow a vehicle until they find the reason to pull someone over – and that reason can be extremely minor. Even if the stop was not originally a pretextual stop, if the officer becomes suspicious during his or her

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<sup>16</sup> See *U. S. v. Sokolow.*, 490 U.S. 1 (1989).; *Florida v. Bostick.*, 501 US 429 (1991).

<sup>17</sup> See MILTON HEUMANN & LANCE CASSAK, *GOOD COP, BAD COP : RACIAL PROFILING AND COMPETING VIEWS OF JUSTICE* (P. Lang. 2003).

<sup>18</sup> United States Drug Enforcement Administration, *Operations Pipeline and Convoy*, (2009), <http://www.usdoj.gov/dea/programs/pipecon.htm>.; DAVID HARRIS, *PROFILES IN INJUSTICE* (New York, NY: New Press.) (2001).

<sup>19</sup> See Dubber, *supra* note 3.

<sup>20</sup> See VIKAS GUMBHIR, *BUT IS IT RACIAL PROFILING: POLICING, PRETEXT STOPS, AND THE COLOR OF SUSPICION* (El Paso, TX: LFB Scholarly Publishing.) (2007); Wayne LaFave, *Routine Traffic Stop From Start to Finish: Too Much "Routine" Not Enough Fourth Amendment*, 102 U. MICH L. REV. 1843 – 1905 (2004).

interactions with the occupants of the vehicle, the stop can be escalated into a full blown investigation, given the range of tools available to the officer. As numerous studies have shown, police officers are more likely to stop and search minority drivers,<sup>21</sup> raising concerns about discrimination through racial profiling.<sup>22</sup> Yet, in 1996, the Supreme Court ruled in *Whren v. United States*<sup>23</sup> that while a traffic stop is a seizure under the Fourth Amendment, “as a general matter, the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred.”<sup>24</sup> *Whren* provided law enforcement with a definitive statement that the traffic code could be used as the pretext for criminal investigations, as long as the officer had probable cause for the traffic stop. The *Whren* decision raised questions of racial profiling in the use of vehicle stops, but the Court swept those questions aside as not applicable under the Fourth Amendment.<sup>25</sup>

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<sup>21</sup> See Curtis, Craig, *Car Stereos and the Criminal Sanction: The Danger of Too Much Social Control*. 31 NEW POLITICAL SCIENCE 273-289 (2009). Curtis’s analysis of vehicle noise ordinances reported significant racial disparities in the application of the impoundment provisions of those laws. Young, male, minority drivers are far more likely to have their vehicle impounded than their prevalence among drivers would suggest.; Angela Davis, *Race, Cops, and Traffic Stops*, 51 U. MIAMI L. REV. 425-443 (1997); Robin Engel & Jennifer Calnon, *Examining the Influence of Drivers’ Characteristics During Traffic Stops with Police: Results from a National Survey*, 21 JUSTICE QUARTERLY 49-90 (2009); Robin Engel, *A Critique of the ‘Outcome Test’ in Racial Profiling Research*, 25 JUSTICE QUARTERLY 1-36 (2008).

<sup>22</sup> See, i.e., David Harris, *Driving While Black and All Other Traffic Offenses: The Supreme Court and Pretextual Traffic Stops*, Journal of Criminal Law and Criminology 82(January): 544-582 (1997); Heumann and Cassack, *supra* note 3; Alberto Lopez, *Racial Profiling and Whren: Searching for Objective Evidence of the Fourth Amendment on the Nation's Roads*, Kentucky Law Journal, 90: 75-122 (2001).

<sup>23</sup> 517 U. S. 806 (1996).

<sup>24</sup> *Id.*, at 810.

<sup>25</sup> Justice Scalia rejected *Whren*’s argument that the use of “ulterior motives” would invalidate an otherwise legal traffic stop. After citing a series of precedents (*United States v. Robinson*, 414 U.S. 218 (1973); *Scott v. United States*, 436 U.S. 128 (1978); *United States v. Villamonte Marquez*, 462 U.S. 579 (1983)), he was emphatic in proclaiming, “[w]e think these cases foreclose any argument that the constitutional reasonableness of traffic stops depends on the actual motivations of the individual officers involved.” While he acknowledged that the

### C. A Hint of the Weakness in *Belton*

In 1998, in *Knowles v. Iowa*,<sup>26</sup> the Court ruled that when an officer chooses not to arrest an individual who commits a minor offense, and instead issues a citation, the officer does not have the right to conduct a search incident to citation. In that case, the police stopped a driver for speeding, and issued her a citation. The officer then proceeded to search the vehicle's passenger compartment, where he found marijuana and drug paraphernalia. Iowa law permitted either an arrest or a citation for a traffic violation. The state argued that this permitted a search incident to arrest. Chief Justice Rehnquist disagreed in a decision that raised arguments which would ultimately be used in *Gant*. Writing for a unanimous Court, Rehnquist argued that when a search incident to arrest is done, it has two purposes: a search for weapons and a search for further evidence of the crime.<sup>27</sup> If the law permits an arrest for a citable offense, and the officer chooses not to make the arrest, then there is no rationale for a search beyond officer safety. Even if that concern were present, it would be limited to the defendant's reachable area. The second rationale underlying search incident to arrest is the search for more evidence related to the crime. "Once Knowles was stopped for speeding and issued a citation, all the evidence necessary to prosecute that offense had been obtained. No further evidence of excessive speed was going to be found either on the person of the offender or in the passenger compartment of the car."<sup>28</sup> There is no justification for a search to preserve evidence, as all of the evidence needed for the arrest is already complete; she was caught in the act. A search incident to arrest in this instance is merely

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Constitution prohibits "selective enforcement of the law based on factors such as race . . . the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." *Whren*, note 20, *supra*, at 813.

<sup>26</sup> 525 U.S. 113 (1998).

<sup>27</sup> *Id.* at 116.

<sup>28</sup> *Id.* at 118.

an attempt to “stumble onto evidence wholly unrelated to the speeding offense.”<sup>29</sup> Rehnquist’s argument in *Knowles* might suggest that the Court would be willing to reconsider how the search incident to arrest had been contorted by *Belton* into something that barely resembled the rationale put forth in *United States v. Robinson*.<sup>30</sup> Of course, the *Atwater*<sup>31</sup> decision, permitting arrests for any offense, occurred a mere three years later.

## II. *Arizona v. Gant*: an Unexpected Shift in Search Incident to Arrest Law

The facts in the case of *Arizona v. Gant* are not terribly complex. The police in Tucson, Arizona, received an anonymous tip that a particular residence was involved in the illegal drug trade. Knowing that an anonymous tip is not sufficient without more evidence to justify detaining the subject,<sup>32</sup> the Tucson Police then decided to focus their attention on the residence. They knocked on the door and spoke to Rodney Gant, who answered the door and identified himself, but claimed that he was not a resident of the house. The officer withdrew and ran a background check on Mr. Gant and discovered that he had a suspended driver’s license. They returned to the residence and found two other people, who were arrested. Mr. Gant was not there, but came back to the residence driving a car while the officers were present. Having observed Gant driving and knowing that he had a suspended driver’s license, the officers placed him under

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<sup>29</sup> *Id.* at 118.

<sup>30</sup> *Robinson*, *supra* note.6.

<sup>31</sup> *Atwater v. City of Lago Vista*, note 13, *supra*.

<sup>32</sup> *See Alabama v. White*, 496 U. S. 325 (1990); *Florida v. J. L.*, 529 U.S. 266 (2000).

arrest for driving on a suspended license, handcuffed him, and placed him in the back of a police cruiser. An officer then proceeded to search Mr. Gant's car, finding both a gun and cocaine.<sup>33</sup>

At trial, Gant moved to suppress the evidence of the gun and the cocaine on the basis that the police had no probable cause to search for evidence of drug trafficking and that a search of the car incident to arrest was not proper since he was completely and securely isolated from the car – locked in the back of a police cruiser and in handcuffs. The trial court ruled for the state,<sup>34</sup> but was reversed by the Arizona Court of Appeals,<sup>35</sup> which argued that the search incident to arrest was not permissible under *Belton* because, “the record before us does not support a finding that the police were attempting to initiate contact with Gant while he was in the vehicle either by confronting him or by signaling an intent to confront him, notwithstanding the officer's shining the flashlight.”<sup>36</sup> After the Arizona Supreme Court declined to hear the case, the State sought *certiorari* from the United States Supreme Court, which was granted in 2003.<sup>37</sup> The Supreme Court never reached a decision on the merits however, as it vacated the judgment and remanded it back to the state courts in light of a 2003 Arizona Supreme Court case (*State v. Dean*),<sup>38</sup> which argued that a search incident to arrest was not valid for someone who was not the “recent occupant” of a vehicle, and which criticized the earlier ruling in *State v. Gant*.<sup>39</sup> The case then

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<sup>33</sup> *Gant*, *supra* note 1, at 1714.

<sup>34</sup> Defendant's Motion to Suppress, *State v. Gant*, No. CR-2000-0042 (Ariz. Super. Ct., April 26, 2000) 2000 WL 34566317

<sup>35</sup> *State v. Gant*, 43 P.3d 188, 190 (Ariz. Ct. App. 2002).

<sup>36</sup> *Id.* at 15.

<sup>37</sup> *Arizona v. Gant*, 539 U.S. 974 (2003).

<sup>38</sup> *State v. Dean*, 206 Ariz. 158; 76 P.3d 429 (2003).

<sup>39</sup> This issue was addressed by the United States Supreme Court in *Thornton v. United States*, 541 U.S. 615 (2004), which ruled that a search incident to arrest also extended to those individuals who had been the recent occupant of a vehicle, even though the arrest did not occur at the vehicle. Chief Justice Rehnquist, writing for the majority stated, “In any event, while an arrestee's status as a “recent occupant” may turn on his temporal or spatial relationship to the car

returned to the trial court which in 2004 refused to suppress the evidence as an unreasonable search and seizure. Gant appealed to the Court of Appeals, which, once again, reversed the decision in 2006.<sup>40</sup> The Court of Appeals argued that the suppression was appropriate because Gant had no means of gaining access to the car at the time of the search, and since he was in hand-cuffs, neither of the rationales for search incident to arrest were present.<sup>41</sup> The Arizona Supreme Court affirmed the decision.<sup>42</sup> Once again, the case made its way to the Supreme Court, which granted *certiorari* in February 2008 on the question of whether the Fourth Amendment requires “law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle’s recent occupants have been arrested and secured.”<sup>43</sup>

*Arizona v. Gant* was argued on October 7, 2008.<sup>44</sup> Oral argument largely turned on the question of whether the two-pronged justification for search incident to arrest could support the bright-line rule established 27 years earlier in *New York v. Belton*. The case’s argument included participation of the Department of Justice, representing the United States as *amicus curiae*. More than 25 states submitted *amicus* briefs in support of the state. Several justices – including Scalia, Stevens, Ginsberg and Souter – expressed disbelief that the officer safety rationale made sense as the justification for *Belton* particularly given the facts present in *Gant*. Justices Breyer, Alito, and

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at the time of the arrest and search, it certainly does not turn on whether he was inside or outside the car at the moment that the officer first initiated contact with him,” 541 U.S. at 622 [footnote omitted].

<sup>40</sup> *State v. Gant*, 213 Ariz. 446, 143 P.3d 379, 2006 Ariz. App. LEXIS 112,

<sup>41</sup> *Id.* at 449-450.

<sup>42</sup> *State v. Gant*, 216 Ariz. 1, 162 P.3d 640, 2007 Ariz. LEXIS 73.

<sup>43</sup> *Arizona v. Gant*, 552 U.S. 1230 (2008).

<sup>44</sup> *Arizona v. Gant*, Docket 07-542, Oral Argument transcript, retrieved from [http://www.supremecourt.gov/oral\\_arguments/argument\\_transcripts/07-542.pdf](http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-542.pdf).

Chief Justice Roberts were the only justices to actively engage the respondent and make the case for continuing the bright-line rule.<sup>45</sup>

The decision that the Court handed down in April 2009<sup>46</sup> reflected the breakdown of justice positions staked out in oral argument. Justice Stevens wrote the opinion of the Court in a 5-4 decision joined by Justice Souter, Ginsberg, and Thomas, with Justice Scalia writing a concurrence. Justice Breyer dissented in part, and Justice Alito wrote a dissent in which Justice Kennedy and Chief Justice Roberts joined. Justice Stevens was the only justice remaining from the Court that decided *New York v. Belton*. In *Belton*, Stevens wrote a concurring opinion in which he relied on his dissent in *Robbins v. California*.<sup>47</sup> Stevens accepted the search of the vehicle incident to arrest, but believed that the search had to be based on probable cause. He argued that in both cases “the automobiles had been lawfully stopped on the highway, the occupants had been lawfully arrested, and the officers had probable cause to believe that the vehicles contained contraband.” Thus, the “automobile exception” to the warrant requirement was met and it “provided each officer the authority to make a thorough search of the vehicle – including the glove compartment, the trunk, and any containers in the vehicle that might reasonably contain the contraband.”<sup>48</sup> Stevens believed that there was no need to take an “extraordinarily dangerous detour to reach the same result by adopting an admittedly new rationale applicable to every ‘lawful custodial arrest’ of the occupant of an automobile.”<sup>49</sup> Stevens agreed with the outcome of *Belton* but was opposed to the broad-based rule that was developed to accomplish it.

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<sup>45</sup> *Id.* at 39-45.

<sup>46</sup> *Gant, supra*, note 1.

<sup>47</sup> 453 U.S. 420.

<sup>48</sup> *Id.* at 444 (Stevens, J. concur).

<sup>49</sup> *Id.* at 449-450.

Steven's decision in *Gant* was hinted at in his dissent in *Thornton v. United States*,<sup>50</sup> where he questioned the rationale of *Belton*, which he saw as being "swollen" beyond its original intent when used to allow an officer to search the passenger compartment of a vehicle in which the arrestee had been the "recent occupant." He accepted the use of the automobile exception if there was probable cause to search, but was troubled by the way that *Belton* had been contorted into a generally applicable tool for police to search a vehicle's passenger compartment without consideration of the legal basis for that search.<sup>51</sup>

Stevens began his decision in *Gant* by confronting the shortcomings of returning to the original rationales for search incident to arrest. He argued that the primary purpose of the search was for officer safety and to ensure that the arrestee could not gain access to weapons.<sup>52</sup> The "reaching-distance" rule of *Chimel* as applied to vehicles did not support the search of *Gant*'s vehicle after he had been handcuffed and placed in the back-seat of the patrol car. Moreover, the second prong of search incident to arrest also did not apply, as a search for evidence related to the crime could only be used when it was reasonable to assume that evidence of the arrest might

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<sup>50</sup> *Thornton*, *supra* note 12.

<sup>51</sup> See, e.g., Steven's dissent in *California v. Acevedo*, 500 U.S. 565, 599 (1991), "Even accepting *Belton's* application to a case like this one, however, the Court's logic extends its holding to a container placed in the trunk of a vehicle, rather than in the passenger compartment. And the Court makes this extension without any justification whatsoever other than convenience to law enforcement." See, also, Steven's dissent in *Wyoming v. Houghton*, 526 U.S. 295, 313 (2001), "Instead of applying ordinary Fourth Amendment principles to this case, the majority extends the automobile warrant exception to allow searches of passenger belongings based on the driver's misconduct. Thankfully, the Court's automobile-centered analysis limits the scope of its holding. But it does not justify the outcome in this case."

<sup>52</sup> *Gant*, *supra* note 1, at 1714.

be found in the vehicle. Given that Gant was arrested for driving under a suspended license, this was not reasonable.<sup>53</sup>

*New York v. Belton*<sup>54</sup> had been expanded in such a way that it was disconnected from its original rationale. Steven’s quoted Justice O’Connor’s concurrence in *Thornton v. United States*, where she said that “lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*.”<sup>55</sup> Even the officer who conducted the search of Gant’s vehicle noted that he conducted the search “because the law says we can do it.”<sup>56</sup> The bright-line rule in *Belton* was designed to provide officers with maximum efficiency in conducting their work, yet it did so by disregarding the constitutional rationale for the search in the first place. Stevens challenged the *Thornton* decision’s holding allowing police to search the vehicle of every recent occupant, even though “most of the time the vehicle would not be within the arrestee’s reach at the time of the search.”<sup>57</sup> He rejected the broad reading of *Belton*, and held that *Chimel v. California* is the proper standard. 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>58</sup>

In order to gain the crucial fifth vote for a majority, Stevens acceded to Justice Scalia’s desire to allow a search of a vehicle under the circumstances when, “it is reasonable to believe

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<sup>53</sup>*Gant, supra*, note 1, at 1719; “Whereas *Belton* and *Thornton* were arrested for drug offenses, Gant was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of Gant’s car.”

<sup>54</sup> *Belton, supra*, note 51.

<sup>55</sup> O’Connor, *Thornton, supra*, note 14 at 624 (O’Connor, J. concurring in part).

<sup>56</sup> *Gant, supra*, note 1 at 1715.

<sup>57</sup> *Id.* at 1719.

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

evidence relevant to the crime of arrest might be found in the vehicle.”<sup>59</sup> This would not permit a search in cases like *Gant*’s where the arrest was for a minor traffic violation; but it would have supported the search in *Belton* and in *Thornton* where the initial arrest was for a drug charge, and thus it is reasonable to conclude that further evidence of that crime might be found in the passenger compartment. In his concurring opinion, Justice Scalia rejected Stevens’ reliance on *Chimel* and argued that the only rationale for a vehicle search incident to arrest is where it is reasonable to believe evidence related to the crime of arrest would be found. Scalia believed that the officer safety rule left too much room for manipulation by officers. Yet, because no other member of the Court shared his view about *Chimel*, Scalia chose to join the majority, in order to avoid what he viewed as “plainly unconstitutional searches” under the *Belton* standard.<sup>60</sup> While the two pronged ruling that emerged – permitting searches of the defendant’s “reaching distance” when not secured, or vehicle passenger compartment searches when it is reasonable to believe that they search will yield further evidence of the crime of arrest – is more accommodating to police than that which Stevens’ opinion would have been, the Stevens/Scalia rationale places significant limits on the police to conduct vehicle searches incident to a legal arrest.

Writing in dissent, Justice Alito argued that the majority has in fact overruled *Belton* even though it claims to only be modifying it. Alito challenged the majority for abandoning *stare decisis* in an area of the law in which there has been substantial reliance by law enforcement on the rule set forth in *Belton*. “The *Belton* rule has been taught to police officers for more than a quarter century,”<sup>61</sup> This was also the stated reason for Justice Breyer’s dissent. Breyer acknowledged Stevens’ concerns about the problems of unconstitutional searches, but believed

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<sup>59</sup> *Id.* (citing Scalia, J, concurring) in *Thornton*, *supra* note 12, at 632.

<sup>60</sup> *Id.* at 1725.

<sup>61</sup> *Id.* at 1728 (Alito, J., dissenting).

that great weight had to be given to the *Belton* precedent which had been recently reaffirmed in *Thornton* and has been relied on by numerous courts in the 28 years since it was established.<sup>62</sup>

Alito further argued that *Belton* has been a workable rule, and there have been no circumstances that have occurred which would bring the decision's rationale into question. He also challenged the Court's claim that the reasoning in *Belton* was flawed. It is his argument that the reliance on *Chimel* is flawed, and that the Court that decided *Belton* could not have assumed that the search would occur before the arrestee was placed in custody. It was enough that at the time of the arrest they were at their vehicle. The arrestee would be secured, and then the search could safely proceed. Alito also questioned Justice Scalia's "reasonable to believe" standard, wondering why a "reasonableness" standard would be used, rather than a probable cause standard.<sup>63</sup>

### III. The Implications of *Gant* for the Future of Vehicle Searches

*Arizona v. Gant* could fundamentally reshape the law of search incident to arrest. The bright-line rule from *New York v. Belton* seems to have been abandoned. Officers may no longer search the passenger compartment of a vehicle incident to arrest unless they have reason to believe that the arrestee will be able to gain access to the vehicle at the time of the search. In that instance, the "reachable-distance" rule of *Chimel v. California*<sup>64</sup> determines the scope of the search. A search can also be conducted if the officer has reasonable belief that the vehicle contains further evidence of the crime for which the suspect was arrested. For arrests based on

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<sup>62</sup> *Id.* at 1725.

<sup>63</sup> *Id.*

<sup>64</sup> *Chimel, supra*, note 5.

minor traffic violation this precludes the vehicle search. The reaction from the law enforcement community, at least as evidenced by the quick issuance of analysis from such publications as the *FBI Law Enforcement Bulletin*<sup>65</sup> and *Police Chief*,<sup>66</sup> would indicate that this is not an insignificant ruling from their point of view. Anecdotal evidence gained by the authors from contacts in the law enforcement community certainly support the argument that this is perceived as a significant ruling.

For twenty eight years the bright-line ruling in *New York v. Belton* governed searches incident to arrests occurring in the context of a traffic stop. In many ways Justice O'Connor's comments in *Thornton v. United States* were accurate in that police have viewed the tool of search incident to arrest as an entitlement. Pretextual stops had become an essential tool in the war on drugs. Police officers knew all they had to do was to decide, based on whatever information, rumors, or tips they had, that a particular person was a drug dealer. They could then stop the suspected drug dealer's vehicle on the pretext of a minor traffic offense. If the individual is driving without a proper license, or cannot show proof of insurance, the officer places the driver under arrest and proceeds to conduct a complete search of the passenger compartment incident to arrest. This frequently leads to a felony arrest for drugs.<sup>67</sup> The decision in *Arizona v.*

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<sup>65</sup> Richard Schott, *The Supreme Court Reexamines Search Incident to Lawful Arrest*. 78 *FBI Law Enforcement Bulletin* 22-31 (2009).

<sup>66</sup> Lisa Judge, *Bye-bye Belton? Chief's Counsel: Supreme Court Decision Shifts Authority for Vehicle Searches from Automatic to Manual*, *Police Chief* (2009).

<sup>67</sup> See Michael Gizzi and J. Sheetz, *Pretexts, Traffic Stops, and Methamphetamine Arrests: 'It's Like Fishing in a Stocked Pond*. Paper presented at the annual meeting of the Midwest Political Science Association (2009); Michael Gizzi, *Pretextual Traffic Stops, the Automobile, and Crime Control: An Examination of Strategies Used on the Frontline of the War on Drugs*, (Unpublished manuscript, Illinois State University);, Harris, *supra*, note 16.

*Gant* represents what could be a paradigm shift for law enforcement, at least with regard to automobile searches.

A few months after the *Gant* decision, both the *FBI Law Enforcement Bulletin*<sup>68</sup> and *Police Chief*<sup>69</sup> had articles focusing on the implications of the decision. The Federal Law Enforcement Training Center issued a ten-page report on the decision, trying to educate law enforcement officers on how the decision changes what they can and cannot do in the context of traffic stops.<sup>70</sup> Perhaps more importantly, the article provides a list of five vehicle search exceptions that officers can use in specific circumstances.<sup>71</sup> First, if there is reasonable suspicion that a passenger or recent occupant is dangerous and might be able to gain access to the vehicle, the officer can “frisk the passenger compartment for weapons.”<sup>72</sup> This suggests that the search would be permissible even if the driver is secured and under arrest. Second, the automobile exception still applies if the officer has probable cause that “the vehicle contains evidence of criminal activity.”<sup>73</sup> Such a search is implied by Justice Scalia’s reasonable evidence standard of criminal activity related to the arresting offense. Third, an officer can conduct a protective sweep of the vehicle if he or she has reasonable suspicion that a dangerous person is hiding in a nearby vehicle. This search would be limited to looking in places where such a person might be hiding; but would not allow a full search of all containers in the vehicle.<sup>74</sup> Fourth, the officer can search the vehicle if he or she gains consent to do so. Finally, if the officer chooses to lawfully impound

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<sup>68</sup> Schott, *supra*, note 65

<sup>69</sup> Judge, *supra*, note 66.

<sup>70</sup> J. Solari, *The United States Supreme Court’s Ruling in Arizona v. Gant: Implications for Law Enforcement Officers* 2-12 The Federal Law Enforcement Informer.

<sup>71</sup> *Id.*, p. 8.

<sup>72</sup> *Id.*.

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

<sup>74</sup> *Id.*

the vehicle after an arrest, this would enable an inventory search for administrative purposes, and if performed legally, would permit any contraband to be seized.<sup>75</sup> These same “tips” were reproduced in the June 2009 issue of *Police Chief*.<sup>76</sup>

Of these exceptions, consent and inventory searches are particularly important. Most police officers believe they can convince almost anyone to give them consent to a search; thus, it is a logical implication of *Gant* that officers will seek to gain consent to search in many cases where they could previously conduct a search incident to arrest. As long as consent is given voluntarily, and the officer does not coerce the arrestee in giving consent to a search, the Court has held that it is legal.<sup>77</sup> Consent for a search does not require the officer to have first arrested the individual. For example, when someone is issued a summons for failure to show proof of insurance, the police officer could simply ask if the driver would mind if he searched the vehicle. It would be a different scenario, however, if for the same offense, the officer placed the driver under arrest, and then asked the arrestee to search the vehicle as a condition of releasing him or her on a summons. This would likely be an instance of coercion, where the officer is offering a *quid pro quo*.

The last search exception that is discussed in the Federal Law Enforcement Training Center report is the inventory search.<sup>78</sup> An inventory search is an administrative search conducted when a vehicle has been lawfully impounded.<sup>79</sup> The purpose of this type of search is to “inventory” the contents of a vehicle, to protect the police from claims that valuable items in

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

<sup>76</sup> See Judge, *supra* note 65.

<sup>77</sup> *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973).

<sup>78</sup> Solari, *supra*, note 70 at 6.

<sup>79</sup> *South Dakota v. Opperman*, 428 U.S. 364 (1976); *Colorado v. Bertine*, 479 U.S. 367 (1988); *Florida v. Wells*, 495 U.S. 1 (1990).

the vehicle were stolen when it was on the impound lot. If in the course of inventorying a vehicle, the police discover illegal contraband or evidence of a crime, that evidence is admissible in court. As the report suggests, if an agency's policies permit the use of impoundment, this may be a way to accomplish that goal. It is unclear how the Court would respond to this back-door method to circumvent *Gant*'s restrictions, but the Court has been willing to limit the scope of inventory searches in the past. As Chief Justice Rehnquist said in his majority opinion affirming the suppression of evidence in *Florida v. Wells*, "Our view that standardized criteria . . . must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence"<sup>80</sup> If an agency has a standing policy to impound any vehicle where an arrest occurs on the street, then it is likely that this exception would be acceptable. But if an agency rarely or never impounds vehicles as a matter of practice, then the shift to impoundment in light of *Gant* might be viewed as an attempt to violate the spirit of the decision.

#### **IV. The Judicial Impact of Arizona v. Gant**

The impact of the *Gant* decision on law enforcement search practices will only become clear once considerable time has passed for lower courts to flesh out interpretation of the decision, and for law enforcement to adapt their practice to the new rules. While any examination of the impact of *Arizona v. Gant* after one year is by its very nature preliminary, there are important indicators present that suggest that the Court's decision is not insignificant. In order to consider the impact of the *Gant* decision, every federal lower court decision citing

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<sup>80</sup> Rehnquist, in *Wells, supra*, note 79, at 4.

*Gant* in *Shepard's Citations* from April 22, 2009 through September 30, 2010 was read and content analyzed. This included decisions of all federal courts of appeals and any United States district court that cited *Gant*. The decisions were read and coded to present a quantitative picture of the issues that have been raised in the year following the ruling, and to examine the substantive impact of the decision in terms of the resolution of cases.

*Shepard's Citations* reports that in the eighteen months since *Arizona v. Gant* was decided, the case has been cited by 814 lower federal and state courts. The number of cases making reference to *Gant* has increased by approximately 40 cases each month. 500 cases have cited *Gant*, 242 have followed it, 138 have distinguished it, and 3 have criticized it.<sup>81</sup> The sheer number of citations to *Arizona v. Gant* in such a short time period is significant. A separate analysis of citations to Supreme Court search and seizure cases since 1953 shows that *Arizona v. Gant* is ranked 42<sup>nd</sup> among all search and seizure cases in terms of the number of citations by lower courts.<sup>82</sup> *Shepard's* has been used as the primary means of identifying lower court decisions responding to the *Gant* decision because it is the most comprehensive data source available on identifying citation practices.<sup>83</sup> For the analysis conducted here, all cases that were followed by Federal Courts or State Courts were examined. In addition, the 72 Federal cases that were “distinguished” by *Shepard's* were examined separately. Cases that only cited, but

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<sup>81</sup> LexisNexis Academic, *Shepard's Citations*, search on 129 S.Ct. 1710, search done on October 22, 2010.

<sup>82</sup> The author shepardized all 298 search and seizure opinions found in the Supreme Court Database, and ranked decisions by total number of lower court citations. As of September 2010, *Gant* is in the top fifteen percent of all search and seizure cases decided since 1953.

<sup>83</sup> Thomas Hansford and James Spriggs have conducted a study on the validity using *Shepard's Citations*, and they found that it is extremely reliable and has validity as a tool for judicial impact studies. See THOMAS G. HANSFORD AND JAMES F. SPRIGGS, II, *THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT* (Princeton, NJ: Princeton University Press), p. 45 – 50 (2008).

provided no analysis of *Gant* were excluded. Table 1 and 2 provides a detailed breakdown for the courts that rendered these decisions.

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

**Table 1. Followed and Distinguished Cases in Federal Court,  
April 22, 2009 – September 30, 2010**

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

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

**Table 2. Followed Decisions in State Courts, April 22, 2009 – September 30, 2010**

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

\* Or equivalent court.

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

## A. Federal Court Decisions

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

..was handcuffed and secured in the patrol car when Officer Czernicki searched the Cadillac and found the drugs. Thus, the Cadillac's passenger compartment was not "within [Majette's] reach at the time of the search.” Moreover, the officer would not have had a reasonable basis to believe he would find evidence of Majette's license suspension - - the offense of arrest -- within the Cadillac's passenger compartment.<sup>84</sup>

One case had evidence suppressed because the initial arrest was for reckless driving. There were another six cases where the court found no reasonable basis for a search for evidence of the crime of arrest, including a minor warrant,<sup>85</sup> a case where the defendant was arrested for child abuse, and a case where the suspect was arrested for a warrant for domestic abuse.

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

In this case, neither the officer safety nor the evidentiary preservation justifications for a search incident to arrest supports the search of Chavez's car. At the time of the search, defendant Chavez had fled from the car, eluded police offices, and jumped over a fence. He was nowhere near the car after he fled the scene and jumped the fence...

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<sup>84</sup> *United States v. Majette*, 326 Fed. Appx. 211; (2009).

<sup>85</sup> In *United States v Westerman*, 2009 U.S. Dist. LEXIS 123601, the defendant was arrested for an outstanding warrant for a probation violation after a minor traffic violation, coming to an abrupt stop at a red light and crossing over the white stop line (p. 2). After arresting Westerman, his vehicle was searched incident to arrest, and two containers with methamphetamine was found behind the front passenger seat (p. 5).

even if Chavez had returned to the vicinity of the car, he would not have had access to the backpack or the gun as it was under Martinez's 'dominion and control.' Moreover, akin to traffic-related offenses, it is generally unlikely that an officer could reasonably expect to find evidence of the crimes of battery upon an officer or resisting arrest within a car.”<sup>86</sup>

In three cases, the defendant won because courts found that an invalid inventory search was conducted by officers, who failed to follow the Supreme Court’s requirements that agencies employing inventory searches have standardized procedures. For example, in one case, it was argued that “It was never established that the Spink County training of its law enforcement officers suggested or required that their standard practice should be to open any closed containers as a part of an inventory search. There was no standardized procedure in this regard in Spink County and the written policy does not state that closed containers should be opened during the inventory search.”<sup>87</sup> In one case, questioning done as part of an inventory search was ruled to be a violation of the defendant’s *Miranda* rights, “Although a question concerning the possession of ‘valuables’ may have been proper for inventory purposes, the trooper should have known that inquiring about a ‘large amount of U.S. currency and/or guns’ was reasonably likely to elicit an incriminating response from a suspect.”<sup>88</sup> Finally, in two cases, courts allowed plea agreements that were made prior to the *Gant* decision to be revoked so questions of invalid searches could be considered.

The state won in 83 cases where *Gant* was followed. Here there were several interesting findings. Almost half of the cases involved arrests for drug offenses. In 20 cases, the defendant was arrested for a drug charges, and vehicle searches were justified by the “reasonable evidence

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<sup>86</sup> *United States v. Chavez*, Eastern District-California, 2009 U.S. Dist. LEXIS 116924

<sup>87</sup> *United States v Sullivan*, U.S. Dist. LEXIS 125207 (W.D. Ky. Nov. 5, 2009).

<sup>88</sup> *United States v. Vega*, 2009 U.S. Dist. LEXIS 49614, at 13.

of the crime arrested for” prong under *Gant*. For example, in the case of *United States v. Bell*, the court found that “the police could reasonably believe that evidence of Bell’s drug offense was in the car. Bell had apparently sold the drugs inside the car, and had driven the car to and from the sale site. Under *Gant*’s second prong, the authority to search extends to containers in the passenger compartment if the police reasonably believe that evidence of the suspected crime may be found therein.”<sup>89</sup> Two cases involved drug paraphernalia and illegal weapons found during the search of the person incident to arrest, which justified the search of the vehicle incident to arrest.<sup>90</sup> Eight cases were won by the state where the officer obtained consent for a search, and courts ruled the consent was properly obtained.<sup>91</sup>

Eighteen cases involved application of the automobile exception due to there being probable cause of contraband in the car.<sup>92</sup> For example, in a case where the suspect was arrested for possession of illegal firearms, the district court ruled that “Because the officers had probable cause to believe that Cowart’s car contained evidence of crimes, the well-recognized automobile exception to the warrant requirement alleviates any Fourth Amendment concerns.”<sup>93</sup> In another automobile exception case, the district court used the automobile exception to make the argument that “considering the totality of the circumstances, including the officers’ prior knowledge of Defendant, the presence of numerous air fresheners, Defendant’s unusual behavior, and the drug dog’s positive alert, the Court concludes that probable cause existed to search

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<sup>89</sup> *United States v. Bell*, U.S. App. LEXIS 18745, 6th Cir. Ky. 2009).

<sup>90</sup> *United States v. Hunter*, 2009 U.S. App. LEXIS 11684, (6th Cir. Tenn. 2009); *United States v. Garibay*, 2009 U.S. App. LEXIS 15626 (9th Cir. Ariz. July 15, 2009).

<sup>91</sup> See, i.e.,

<sup>92</sup> Another 12 automobile exception cases were included among the 72 Federal cases that Shepard’s identified as “distinguishing” *Gant*.

<sup>93</sup> *United States v. Cowart*, 2009 U.S. Dist. LEXIS 49366 (W.D. Tenn. June 5, 2009).

Defendant's vehicle for evidence of narcotics possession and/or trafficking.”<sup>94</sup> In this case, the defendant was arrested on an outstanding warrant for a traffic violation.

Two circuits established a “good faith” exception for cases in which the searches occurred before the decision in *Gant* was handed down. In *United States v. McCane*,<sup>95</sup> the Tenth Circuit used the precedent of *United States v. Leon*<sup>96</sup> to establish a good faith exception for *Belton* searches conducted before the ruling in *Gant*. The Eleventh Circuit established a good faith exception in March 2010 in *United States v. Mitchell*.<sup>97</sup> In the months immediately following the *Gant* decision, the Eighth Circuit refused to consider a good faith exception<sup>98</sup> but in December 2009 an Eighth Circuit District Court in Nebraska used the good faith exception to uphold a search.<sup>99</sup> The Tenth Circuit decision in *McCane* has created an inter-circuit conflict with the Ninth Circuit, which rejected a good faith exception claim in *United States v. Gonzalez*.<sup>100</sup> In *United States v. Casper*,<sup>101</sup> the Fifth Circuit remanded a case to the District Court for an evidentiary hearing on inevitable discovery, but did not rule on the government's claim of a good faith exception. Three District Courts in the Fourth Circuit have used good faith exception arguments to invalidate pro-defendant rulings in *Gant* cases.<sup>102</sup> While there are clear

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<sup>94</sup> *United States v. Tolliver*, 2010 U.S. Dist. LEXIS 6442 ( E.D. Mich. Jan. 27, 2010).

<sup>95</sup> *United States v. McCane*, F, 3d 1037; 2009 U.S. App. LEXIS 16557 (10th Cir. Okla. 2009).

<sup>96</sup> 468 U.S. 897 (1984).

<sup>97</sup> 2010 U.S. App. LEXIS 5247, at 24.

<sup>98</sup> *United States v Hrasky*, 567 F.3d 367; 2009 U.S. App. LEXIS 12396

<sup>99</sup> *United States v. Gray*, 2009 U.S. Dist. LEXIS 102577.

<sup>100</sup> U.S. App. LEXIS 18958 (9th Cir. Aug. 24, 2009)

<sup>101</sup> 2009 U.S. App. LEXIS 20526 (5th Cir. Tex. Sept. 14, 2009).

<sup>102</sup> *Torres v United States*, 2010 U.S. Dist. LEXIS 63457 (W.D.N.C. June 5, 2010); *United States v. Southerland*, 2009 U.S. Dist. LEXIS 119851 (E.D.N.C. Nov. 13, 2009); and *United States v*

differences among the circuits in terms of whether to apply a good faith exception to *Gant* cases, it is probably not an issue that will result in further review by the Supreme Court, since within a year or two, almost all cases will have occurred after the *Gant* decision was handed down in April, 2009.

Finally, there were twenty five cases where the government won that raised issues involving inventory searches. There were three cases where courts ruled that inventory searches were invalid for failure of the agency to demonstrate routine practice or policy.<sup>103</sup> There were other an additional three cases where an invalid inventory search was not viewed as sufficient to suppress evidence, due to outside factors including exigent circumstances due to concerns for officer safety during transportation of property, the use of the automobile exception, and consent provided for a search.<sup>104</sup> In examining inventory search cases, the record only indicated one case where a magistrate-judge actually reviewed department policies to make the determination of whether officers were entitled to impound vehicles and conduct inventory searches.<sup>105</sup> There were also cases where it was unclear from the record whether an inventory search occurred, but where the court accepted an “inevitable discovery” argument. For example, the Seventh Circuit made the claim that that “As obviously the arresting officers would not have allowed the truck to just sit on the street after Stotler was carted away. What they would have done, in all likelihood,

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*Monroe*, 2009 U.S. Dist. LEXIS 51389 (S.D. W. Va. June 18, 2009) were each decided on grounds of good faith.

<sup>103</sup> *United States v. Jackson*, 2010 U.S. Dist. LEXIS 1699; *United States v. Sullivan*, 2009 U.S. Dist. LEXIS 59934

<sup>104</sup> *See, i.e., United States v. Mitan*, 2009 U.S. Dist. LEXIS 63890 (E.D. Pa. July 23, 2009); *United States v. Morillo*, 2009 U.S. Dist. LEXIS 94396; *United States v. Scott*, 2009 U.S. Dist. LEXIS 52431

<sup>105</sup> *United States v Sprecht*, 2009 U.S. Dist. LEXIS 99759 (D. Neb. Oct. 26, 2009).

was impound the truck and have it towed away. An inventory search would have naturally followed; the evidence would have been inevitably discovered.”<sup>106</sup>

## B. State Court Decisions

There have been 117 cases in which *Gant* was followed by state courts. Nine state supreme courts have handed down 14 decisions that involved *Gant* issues in the past year. There were 103 lower court decisions in 25 state courts. Unlike federal court, where defendants won in 29 percent of cases, in state courts, defendants won in 56.4 percent (n = 66) of all cases.<sup>107</sup> While cases have been decided in twenty five states, almost forty-percent of those decisions were from three states: Washington (n=29), Ohio (n=12), and Texas (n=11). The defendant won in 21 of 29 (72.4 percent) cases in Washington, 50 percent in Ohio, and 36 percent of cases in Texas. Yet, even if those cases were removed from the database, the defendant won in 51 percent of all other state court decisions.

State Supreme Court rulings in nine states ruled for the defendant in 11 of 14 cases (78.5 percent). Perhaps most interesting of the decisions by state supreme courts is that of *State v. Henning*,<sup>108</sup> where the Kansas Supreme Court ruled that the State’s search incident to arrest law was unconstitutional under *Gant*. Two state Supreme Courts have considered good faith exceptions for *Gant* cases. The Colorado Supreme Court rejected a good faith exception.<sup>109</sup> The Utah Supreme Court established a good faith exception in *State v. Baker*,<sup>110</sup> but overturned a

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<sup>106</sup> *United States v. Stotler*, 591 F.3d 935, 2010 U.S. App. LEXIS 878 (7th Cir. Ill. 2010).

<sup>107</sup> A full comparison of the differences between federal and state courts is the subject of on-going research by the authors, but is beyond the scope of this paper.

<sup>108</sup> 209 P.3d 711; 2009 Kan. LEXIS 174 (Kan. 2009).

<sup>109</sup> *Perez v. People*, 2010 Colo. LEXIS 364 (Colo. May 10, 2010).

<sup>110</sup> UT 18; 651 Utah Adv. Rep. 25; 2010 Utah LEXIS 17).

vehicle search for other reasons. The Court ruled that a vehicle search that would be unconstitutional under *Gant* was protected by good faith exception of *Leon*; but because the officers lacked “reasonable articulable suspicion that the passengers posed a threat to their safety at the time they conducted the pat-down search,” the evidence was suppressed.<sup>111</sup> The District of Columbia Court of Appeals also considered a good faith exception for *Gant* cases, but rejected it.<sup>112</sup> The Illinois and Washington Supreme Courts handed down decisions favorable to the defendant under *Gant*.<sup>113</sup> The Delaware and Kentucky Supreme Court have decided *Gant* cases favorable to the state. Delaware used the automobile exception to justify a search,<sup>114</sup> and Kentucky used the “reasonable evidence” prong to justify a search.<sup>115</sup>

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

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<sup>111</sup> *Id.* at 58.

<sup>112</sup> *United States v. Debruhl*, D.C. App. LEXIS 208 (D.C. Apr. 22, 2010).

<sup>113</sup> *People v. Bridge-water*, 235 Ill. 2d 85; 918 N.E.2d 553; 2009 Ill. LEXIS 1928; 335 Ill. Dec. 208.; *State v. Patton*, 167 Wn.2d 379; 219 P.3d 651; 2009 Wash. LEXIS 975.

<sup>114</sup> *Hall v. State*, 981 A.2d 1106; 2009 Del. LEXIS 529 (2009)

<sup>115</sup> *Owens v. Commonwealth*, 291 S.W.3d 704; 2009 Ky. LEXIS 258 (2009)

In the 48 lower state court cases where searches were upheld, the majority were for instances where there it was reasonable to believe that a search would reveal further evidence of the crime. These included 14 cases where there was plain view<sup>116</sup> of drugs or drug paraphernalia or where the defendant admitted to drug use. Two cases involved arrests for DUI; and there were four additional cases where courts accepted that fell under the second prong of *Gant*, including cases where weapons were found and where stolen items were in plain view. Four appeals were rejected as improvidently granted, due to the defendant not raising a suppression motion in the original action. Courts in five states issued rulings establishing a good faith exception, although one (Colorado), has been over-ruled by the State Supreme Court.<sup>117</sup> While one court in Washington established a good faith exception, other Washington state courts ruled on *Gant* issues in twenty-one cases.

## V. Conclusion

The review of lower court decisions involving *Gant* issues in the year following the decision provide evidence that the case is having an impact on police vehicle search practice. Out of 125 federal cases where *Gant* was the controlling factor, almost 30 percent resulted in rulings favorable to defendants. Defendants fared even better in state court decisions, where courts ruled in their favor 56 percent of the time. While it is difficult to compare the number of cases in which a defendant won prior to *Gant*, given that the *New York v. Belton* “bright line rule” permitted vehicle searches after all arrests made in a vehicle, it is highly unlikely that

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<sup>116</sup> See, e.g., *Arizona v. Hicks*, 480 U. S. 321 (1987) and *California v. Horton*, 496 U. S. 128 (2000)

<sup>117</sup> *People v. Chamberlain*, 229 P.3d 1054; 2010 Colo. LEXIS 360 (2010).

defendants would have evidence suppressed after a vehicle search – and even less likely that they would prevail at a rate between thirty and fifty percent. As Justice O’Connor pointed out in *Thornton*,<sup>118</sup> police viewed *Belton* as a police entitlement, and there is ample evidence to demonstrate that law enforcement routinely use pretextual traffic stops as a means to the end of being able to do a vehicle search after making a minor arrest. For these cases, where individuals are arrested for driving under a suspended license, driving without proof of insurance, minor warrants for failure to appear, and a host of other offenses where there is no reasonable basis for arguments of officer safety or the need to find additional evidence of the crime, it is likely that police will be forced to find other methods.

*Arizona v. Gant* leaves officers with several alternatives in these types of cases. First, they can try to obtain consent to conduct a search. If they can demonstrate that consent is obtained voluntarily, and there is no evidence of coercion, it is likely to pass constitutional muster. Yet, even here, officers need to be careful in how they proceed. Out of nine consent cases included in this study, two were ruled improper by lower courts. Second, the automobile exception remains a viable search option where officers can demonstrate probable cause of evidence of criminal activity.<sup>119</sup> That can be obtained by plain view (i.e., smelling alcohol or marijuana, viewing open bottles in the back seat), or through use of a K-9 unit to conduct a dog sniff.<sup>120</sup> As the review of decisions demonstrates, the automobile exception (present in 7 federal and 1 state decision), is still a viable option for officers. Third, when officers can legitimately make officer safety claims or demonstrate reasonable suspicion of the presence of weapons,

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<sup>118</sup> *Thornton v. United States*, note 14, *supra*, at 624, (O’Connor concurring in part.)

<sup>119</sup> See *United States v. Ross*, 456 U.S. 798 (1982).

<sup>120</sup> In most states, suspicion-less dog searches are permitted at any traffic stop. See *Illinois v. Caballes*, 543 U.S. 405 (2005).

officers may be able to search the vehicle to do a protective sweep. While only three cases in this review involved such facts, it is in no means prohibited.

When departments have written policies or established routine practices, they can impound vehicles and then conduct an inventory search. Of the available options, this is perhaps the most suspect, in that the purpose of an inventory search is not supposed to be a general rummaging of a vehicle for the sole purpose of a criminal investigation. Indeed, the *FBI Bulletin*'s advice to make use of inventory searches is somewhat ingenuous as the author's stated rationale was to find a way "around" *Gant*. Yet, as the review of cases here suggests, courts may be unwilling to invalidate the use of inventory searches except in rare circumstances. And while the issue of inventory searches viewed in light of *Gant* may ultimately make it to the Supreme Court, it is uncertain how the Court would rule. It is possible that the Supreme Court would reject the strategy of using inventory searches if it is clear that the impoundment is merely a pretext for a search without probable cause. Yet, as long as police are careful to make sure that there is an "innocent" explanation of their behavior, the chances are that the Court will allow it. The future use of inventory searches by police is deserving of further research.

#### **A. Does *Gant* Represent a Fundamental Shift in Criminal Procedure?**

*Arizona v. Gant* has certainly sent shock-waves through law enforcement in the few months since it was handed down. The case undid almost thirty years of police practice, and has the potential to force law enforcement to find new ways to conduct criminal investigations. Only time will tell how great the change is. Yet, what *Gant* does not appear to be is a fundamental shift in the Court's overall crime control jurisprudence. While *Gant* places limits on police practice, there are few signs within the decision that the case truly represents a paradigm shift.

Much of the criticism of *Belton* in Justice Stevens and Scalia's opinions focused more on the logical flaws in the argument underlying *Belton's* bright-line rule. The Court did not focus on the rights of the accused in the same way that many of Justice Marshall and Brennan's dissents did in earlier crime control decisions.<sup>121</sup>

*Gant* also stands alone in recent search and seizure cases. In recent years most of the Court's criminal procedure decisions have been squarely on the side of crime control. For example, in *Virginia v. Moore*,<sup>122</sup> the Court unanimously ruled that the Fourth Amendment was not violated when police arrested someone for an offense which state law only permitted a summons, and refused to suppress the evidence of drugs found in the subsequent search incident to arrest. In *Arizona v. Johnson*<sup>123</sup> the Court reaffirmed the holding of *Terry v. Ohio*, and held that the driver and passenger of a vehicle remain seized for the duration of a valid traffic stop. More importantly, an officer's questioning about matters unrelated to the original stop do not change the encounter into something other than a lawful seizure. In another 2009 decision, the Court held in *Herring v. United States*<sup>124</sup> that the good-faith exception to the exclusionary rule applied when an officer made an arrest based on an outstanding warrant in another jurisdiction, even though that warrant was invalid. Indeed, with the exception of *Gant*, there have been few

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<sup>121</sup> See, i.e., Justice Brennan's dissent in *Belton*, "Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car" (453 U.S. at 468). See, also, Marshall's dissent in *South Dakota v. Opperman* (1976) and his dissent in *U. S. v. Peltier* (1975, 422 U.S. at 561-562) where he bitterly says, "If a majority of my colleagues are determined to discard the exclusionary rule in Fourth Amendment cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule, with no opportunity afforded parties most concerned to be heard, would be indefensible in any circumstances."

<sup>122</sup> See *Virginia v. Moore*, 553 U.S. \_\_\_\_ ; 128 S.Ct. 1598 (2008).

<sup>123</sup> 555 U.S. \_\_\_\_, 129 S. Ct. 781 (2009).

<sup>124</sup> *Herring v. United States*, 555 U.S. \_\_; 129 S.Ct. 1692 (2009).

criminal procedure decisions in recent years that would indicate a shift in the Court's general approach to the Fourth Amendment. More recently, that trend has continued in the Court's decision in *Berghuis v. Thompkins*<sup>125</sup> narrowed the applicability of *Miranda* advisements by requiring defendants to explicitly claim their right to remain silent.

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

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

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<sup>125</sup> *Berghuis v. Thompkins*, 130 S. Ct. 1499 (2010).