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Arizona v. Gant: The Good, the Bad, and the Meaning of Reasonable Belief

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Reasonable belief. The Supreme Court's ambiguous use of this term in Arizona v. Gant *transformed what could have been a clear logical holding into a source of potential uncertainty. Consequently, lower courts have struggled to interpret the reasonableness of police automobile searches subsequent to the arrest of a vehicle occupant. By endorsing an entirely new automobile search authority—one that is triggered by reasonable belief that evidence related to the offense of arrest may be found in the automobile—police search authority will in many cases be expanded. Reasonable belief that evidence related to the arrest may be in the automobile operates as a procedural tether, linking the probable cause of the arrest to the search for that specific evidence. Interpreting reasonable belief as a synonym for reasonable suspicion is inconsistent with the most fundamental principle in search law: pure evidentiary searches may only be reasonable when based on probable cause.* Gant*'s articulation of reasonable belief presents a new source of search authority, distinct from both the traditional authority granted by a search incident to a lawful arrest and the authority granted by probable cause. Viewing the Court's decision in* Gant *as a procedural tether—albeit one with necessary substantive overtones—is, despite first impression, neither a hindrance to police procedure nor a detriment to the public good.*

ARTICLE CONTENTS

Arizona v. Gant: The Good, the Bad, and the Meaning of "Reasonable Belief"

GEOFFREY S. CORN*

I. INTRODUCTION

Reasonable belief. Use of this phrase by the Supreme Court in *Arizona v. Gant*[1] transformed what could have been a clear and logical holding into a source of potential uncertainty. This uncertainty has forced lower courts to struggle when determining the reasonableness of police automobile searches subsequent to the arrest of a vehicle occupant—a manifestation of how *Gant* blurred what was among the brightest lines in Fourth Amendment jurisprudence. Furthermore, on the surface *Gant*'s constriction of authority to search an automobile incident to lawful arrest may seem to enhance the protection of privacy, but this is a tenuous conclusion. Instead, police search authority will in many cases actually be expanded by endorsing a wholly new automobile search authority that is triggered by reasonable belief that evidence related to the offense of arrest may be found in the car.

This Article highlights why "reasonable belief" that evidence related to the arrest may be in the automobile operates as a procedural tether linking the probable cause for the arrest to the search for that evidence. In support of this interpretation, the Article explains why treating reasonable belief as a synonym for reasonable suspicion is palpably hostile to the most fundamental principle of search law: pure evidentiary searches may only be reasonable when based on probable cause. Accordingly, reasonable belief within the meaning of *Gant* is a wholly new source of search authority, distinct both from the traditional authority granted by a search incident to a lawful arrest ("SITLA") and the authority granted by probable cause. Finally, the Article explains why viewing the Court's decision in *Gant* as a procedural tether—albeit one with necessary substantive overtones—is, despite first impression, neither a hindrance to police procedure nor a detriment to the public good.

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[1] 556 U.S. 332, 343 (2009) ("[C]ircumstances 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.'" (quoting Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring))).

II. BACKGROUND

Gant's core holding constricts the authority to search an automobile incident to lawful arrest, an authority established by the Court almost thirty years earlier in *New York v. Belton*.[2] In so holding, the Court reasoned that once the arrestee is secure, a subsequent search of the vehicle is only justified if there is "reasonable belief" that evidence of the offense of arrest might be found in the vehicle.[3] The Court concluded that *Belton* had evolved to a point that could no longer be justified by the underlying exigency rationale for SITLA,[4] creating an automatic and unrestricted search authority whenever the police arrested an occupant or recent occupant of an automobile.[5] Accordingly, the Court concluded that *Belton*'s SITLA authority must be restricted to only those situations involving a genuine risk that the arrestee could gain access to the passenger compartment of the automobile immediately after arrest,[6] with that authority expiring once the arrestee is secured in a manner that deprives her of any meaningful access to the automobile.[7]

Had the Court's analysis been limited to defining the constriction of *Belton*'s SITLA authority, little uncertainty would have resulted: once an arrestee was effectively secured, an alternative exception to the warrant and probable cause requirements of the Fourth Amendment would then govern the reasonableness of all other intrusions into the arrestee's automobile.[8] The Court, however, did not limit its analysis to this continuum. Writing for the majority, Justice Stevens introduced an apparently new standard—inspired by Justice Scalia's concurrence in

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[2] 453 U.S. 454, 462–63 (1981).

[3] *Gant*, 556 U.S at 335.

[4] *See id.* at 343 ("To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception . . . .").

[5] *See, e.g., id.* at 345–46 (2009) ("Courts that have read *Belton* expansively are at odds regarding how close in time to the arrest and how proximate to the arrestee's vehicle an officer's first contact with the arrestee must be to bring the encounter within *Belton*'s purview and whether a search is reasonable when it commences or continues after the arrestee has been removed from the scene. The rule has thus generated a great deal of uncertainty, particularly for a rule touted as providing a 'bright line.'" (citing 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 7.1(c), 514–18 (4th ed. 2004) ("Thus, under *Belton* a search of the vehicle is allowed even after the defendant was removed from it . . . . But because *Belton* abandoned the presumably difficult-to-apply 'immediate control' test of *Chimel* in favor of a 'bright line,' it is most certainly arguable that an on-the-scene requirement is appropriate as the nearest available 'bright line.'"))).

[6] *Id.* at 343.

[7] *See, e.g., id.* ("[T]he *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." (emphasis added)).

[8] *See id.* at 335 (concluding, in addition to clarifying *Belton*, that "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle").

Thornton v. United States[9]—to justify a search of an automobile: "We also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[10] Until *Gant*, no such reasonable belief test for assessing a reasonable search existed in Fourth Amendment jurisprudence.[11] Instead, a two-prong equation had become settled law: (1) a full evidentiary search is reasonable only when supported by probable cause; and (2) a cursory protective inspection is reasonable based on a lower quantum of reasonable suspicion.[12]

This reasonable belief justification must be distinct from the authority to conduct a SITLA. This is because the reasonableness of a SITLA has never depended on the presence of probable cause or reasonable suspicion of discovering evidence. Instead, SITLA is justified by the exigency created by the lawful predicate arrest.[13] Indeed, the core holding of *Gant* reflected this by excluding the search for evidence in Gant's car from the reasonable scope of a SITLA.[14] Accordingly, *Gant* introduced an apparently new test into the existing continuum of reasonableness analysis, a test that has and will continue to produce uncertainty. This uncertainty has forced lower courts to struggle to identify the meaning and scope of

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[9] 541 U.S. 615, 632 (2004) (Scalia, J., concurring) ("I would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."). *But see id.* at 623–24 (majority opinion) (holding that a warrantless search conducted under the SITLA exception did not violate the Fourth Amendment, even though the suspect had exited the vehicle prior to being stopped by police, because the suspect was still found to have been a "recent occupant" of the vehicle, such that the SITLA fell within the *Belton* exception).

[10] *Gant*, 556 U.S. at 335. *But see Thornton*, 541 U.S. at 624 n.4 ("Whatever the merits of Justice Scalia's opinion concurring in the judgment, this is the wrong case in which to address them. Petitioner has never argued that *Belton* should be limited 'to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle,' nor did any court below consider Justice Scalia's reasoning." (citation omitted)).

[11] *See Gant*, 556 U.S. at 363–64 (Alito, J., dissenting) (criticizing the second part of the Court's two-part test, which the Court borrowed from Justice Scalia's opinion in *Thornton*).

[12] *See* Memorandum from Charles Doyle, Senior Specialist, Am. L. Div., Cong. Res. Serv. to Mike Davidson, Senate Select Comm. on Intelligence, Probable Cause, Reasonable Suspicion, and Reasonableness Standards in the Context of the Fourth Amendment and the Foreign Intelligence Surveillance Act 3 (Jan. 30, 2006) ("The reasonable suspicion standard is of relatively recent origins. . . . [U]nder certain exigencies of time and place police officers may conduct a limited seizure and search with less than probable cause . . . ." (citing Terry v. Ohio, 392 U.S. 1, 30–31 (1968))), *available at* http://www.fas.org/sgp/crs/intel/m013006.pdf) (last visited June 19, 2012).

[13] *See, e.g.*, *Gant*, 556 U.S. at 337–38 (reasoning that, based on *Chimel*, the SITLA exception to the warrant requirement is justified by interests in officer safety and evidence preservation).

[14] *See id.* at 335 ("Rodney Gant was arrested for driving with a suspended license, handcuffed and locked in the back of a patrol car . . . . Accordingly, we hold that *Belton* does not authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle.").

reasonable belief.[15] Indeed, lower court decisions have begun to evince several possible interpretations.

First, "reasonable belief" may be interpreted as a synonym for reasonable suspicion[16]—a rational interpretation based on the similarity of the two terms. However, this interpretation renders a full search of an automobile reasonable based on a quantum of proof lower than probable cause, a result clearly in conflict with longstanding Fourth Amendment jurisprudence.[17] Second, "reasonable belief" could be interpreted as a synonym for probable cause.[18] This interpretation would certainly reconcile the decision with prior Fourth Amendment jurisprudence. However, such a reading ignores the Court's use of a term distinct from traditional probable cause terminology, as well as the Court's recitation of pre-existing search authority (including probable cause search authority). Thus, it is simply impossible to reconcile *Gant* with the pre-existing probable cause–reasonable suspicion continuum. Accordingly, there is a compelling argument in support of recognition of a new test for a limited category of reasonable automobile searches.

The *Gant* Court's reliance on Justice Scalia's concurring opinion in *Thornton*[19] is critical to properly understand the meaning of this new test. In *Thornton,* Justice Scalia asserted that the search of a recently arrested defendant's vehicle was not based on a necessity to protect evidence from destruction.[20] Instead, the search was justified based on the relationship between the evidence and the nature of the offense for which the defendant was arrested.[21] If this justification holds, "reasonable belief" could in fact mean probable cause. This, however, is a dubious interpretation. There is

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[15] *See, e.g.*, People v. Coates, 266 P.3d 397, 399 (Colo. 2011) (creating and using the term "reasonable articulable suspicion" in the wake of *Gant* to describe the necessary quantum of proof needed by police to conduct a SITLA for evidence related to the crime of arrest).

[16] *See* Kit Kinports, *Veteran Police Officers and Three-Dollar Steaks: The Subjective/Objective Dimensions of Probable Cause and Reasonable Suspicion*, 12 U. PA. J. CONST. L. 751, 772 (2010) ("[R]easonable suspicion . . . [requires] that 'the searching officer *possesses* a *reasonable belief* based on specific and articulable facts that the area to be swept harbors an individual posing a danger.'" (second emphasis added) (quoting Maryland v. Buie, 494 U.S. 325, 337 (1990))).

[17] *See* Terry v. Ohio, 392 U.S. 1, 8–9 (1968) (explaining that the Fourteenth Amendment protects against unreasonable searches and seizures "wherever an individual may harbor a reasonable 'expectation of privacy'").

[18] *See, e.g.*, Maryland v. Pringle, 540 U.S. 366, 371 (2003) ("[T]he substance of all the definitions of probable cause is a *reasonable ground for belief* of guilt, and that the belief of guilt must be particularized with respect to the person to be searched or seized." (emphasis added)).

[19] 541 U.S. 615, 625–32 (2004) (Scalia, J., concurring).

[20] *Id.* at 625.

[21] *See id*. at 629–30 (arguing that "it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended," thus "[t]he fact of prior lawful arrest distinguishes . . . a search for evidence of *his* crime from general rummaging").

no question that probable cause must exist to justify the arrest.[22] According to Justice Scalia, when that probable cause relates to an offense for which related evidence may be found at the scene of the arrest, it is the arrest itself that justifies the subsequent search of that scene; the probable cause for the arrest effectively provides concurrent justification for the search.[23] Based on this reasoning, this Article asserts that "reasonable belief" does not indicate a new substantive causal standard justifying a search of an automobile, but instead introduces a link—or procedural tether—connecting probable cause for an arrest with a subsequent search of a recently occupied automobile for offense-related evidence.

Part III of this Article will trace the evolution of the *Belton* SITLA authority from its origin in *Belton* to the *Gant* backlash. Part IV will address the uncertainty triggered by *Gant*'s "reasonable belief" language through analysis of several illustrative post-*Gant* decisions. Part V will analyze the lineage of the "reasonable belief" concept adopted by the *Gant* Court, and how that lineage supports the conclusion that "reasonable belief" creates a procedural tether to the probable cause for arrest. Part VI then assesses *Gant*'s impact on the interests of law enforcement and the individual citizen. Part VII concludes that interpreting "reasonable belief" within the meaning of *Gant* as a distinct concept from both traditional SITLA authority and the authority granted by probable cause is the only interpretation consistent with existing Fourth Amendment jurisprudence, and that interpreting "reasonable belief" as a procedural tether—albeit one with necessary substantive overtones—is neither a hindrance to police procedure nor a detriment to the public good despite first appearances.

III. FROM *BELTON* TO *GANT*

The uncertainty created by the Court's use of "reasonable belief" in *Gant* was a reaction, in part, to the legal fiction in *Belton* that had expanded what constitutes "an area within a suspect's immediate control."[24] Based on this legal fiction, in 1981, the Supreme Court extended the longstanding authority for police to conduct a full search incident to lawful arrest to the interior compartment of an automobile following the arrest of its occupants.[25]

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[22] U.S. CONST. amend. IV; *see also* Virginia v. Moore, 553 U.S. 164, 177 (2008) (equating lawful arrest with probable cause); Michigan v. Summers, 452 U.S. 692, 700 (1981) ("[E]very arrest . . . is unreasonable unless it is supported by probable cause."); United States v. Robinson, 414 U.S. 218, 235 (1973) (explaining that a custodial arrest based on probable cause is reasonable under the Fourth Amendment).

[23] Arizona v. Gant, 556 U.S. 332, 351 (2009).

[24] *See supra* note 5 and accompanying text.

[25] New York v. Belton, 453 U.S. 454, 460 (1981).

A. *Setting the Conditions:* Belton, *SITLA, and the* Gant *Backlash*

In *New York v. Belton*,[26] a New York State Police Officer stopped a car traveling on the New York State Thruway for erratic driving.[27] When the officer approached the vehicle, he detected an odor of marijuana coming from the passenger compartment.[28] He also observed a brown paper bag on the floor in front of the passenger seat with "Supergold" written on it.[29] Based on this information, the officer ordered the four vehicle passengers to exit, placed them under arrest, and had them sit on the side of the road.[30] No other officers were present at the scene.[31] Without seeking consent, the officer proceeded to search the interior of the automobile, where he found a jacket belonging to the passenger Belton.[32] He then searched the pockets of the jacket, in which he found cocaine.[33] Belton was subsequently prosecuted for possession of cocaine.[34]

Belton sought to suppress the cocaine as the fruit of an unreasonable search in violation of the Fourth Amendment (as applied to the state via the Fourteenth Amendment).[35] Belton argued, and the New York Court of Appeals agreed, that the officer exceeded the scope of the SITLA authority triggered by the arrest of the vehicle occupants because the interior of the vehicle and the jacket were beyond the wingspan of the arrestees at the time of the search.[36] This argument relied on *Chimel v. California*,[37] in which the Court held that it was reasonable to search within an arrestee's "immediate control" in order both to preserve evidence by protecting it from possible destruction by the arrestee and to discover weapons that might be used to harm the police and/or facilitate the arrestee's escape.[38] In *Chimel*, the Court held that extending the SITLA beyond the arrestee's

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[26] 453 U.S. 454 (1981).

[27] *Id*. at 455.

[28] *Id*.

[29] *Id.* at 455–56.

[30] *Id.* at 456.

[31] *Id.* at 457.

[32] *Id.* at 456.

[33] *Id*.

[34] *Id*.

[35] *Id.*

[36] *Id.*

[37] 395 U.S. 752 (1969).

[38] *Id.* at 762–63 ("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. . . . And 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. 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 clothing of the person arrested. There is ample justification, therefore, for a search of 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."). As noted throughout this Article, this has become known as the "wingspan" rule.

wingspan exceeded the scope justified by the recent arrest and was therefore unreasonable absent an alternative justification.[39]

In *Belton*, the Court rejected the *Chimel* argument that the search of the automobile interior, and containers therein, was unreasonable because it exceeded the wingspan of the arrestees.[40] In an effort to establish a universally applicable reasonableness standard in the automobile context, the Court created what was really a fiction: that the interior of the automobile remained within the "lunging distance" of the arrestees.[41] Of course, *Belton* was the ideal case for extending the wingspan rule: outnumbered four to one, with the suspects seated near the vehicle, the arresting officer was at a distinct disadvantage.[42] Nonetheless, there was no indication that a sense of exigency motivated his search, nor did the Court qualify the extension of the SITLA authority in any way that required proof of such a tactical disadvantage for the arresting officer. Instead, the decision seemed to grant police the automatic authority to conduct a general search of the interior of an automobile, and any containers found therein, following the arrest of its occupants.[43]

In *Belton*, the officer was arguably searching for narcotics—evidence related to the offense for which he had just arrested the suspects.[44] However, SITLA has never been limited in scope to fruits related to the offense that triggers the search. From the inception of SITLA as a basis to establish the reasonableness of a police search, the immediate search of the area within the arrestee's wingspan was deemed reasonable by the exigency of the arrestee's ability to access evidence or weapons.[45] Accordingly, SITLA has always stood as an exception not only to the

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[39] *See id.* at 768 ("The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area. The scope of the search was, therefore, 'unreasonable' . . . .").

[40] *See Belton*, 453 U.S. at 461 ("A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.").

[41] *See id*. at 460 (suggesting that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m]'" (quoting *Chimel*, 395 U.S. at 763)); *infra* notes 137 and 138 and accompanying text.

[42] *See Belton*, 453 U.S. at 455–56 (describing the circumstances surrounding the arrest of the four car occupants by a single policeman).

[43] *See id.* at 460 ("[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.").

[44] *Id.* at 456.

[45] *See* Chimel v. California, 395 U.S. 752, 762–63 (1969) (asserting that it is reasonable for the arresting officer to search the arrestee in order to remove concealed weapons and prevent the destruction or concealment of evidence, and 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").

warrant requirement of the Fourth Amendment, but also to the probable cause requirement of the Fourth Amendment.[46] Because police are authorized to search for *any* evidence or contraband, there has never been a link between the scope of the SITLA and evidence related to the arrested offense.[47] Indeed, any requirement to establish such a link was categorically rejected by the Court in *United States v. Robinson*,[48] where the Court held that "[t]he standards traditionally governing a search incident to lawful arrest are not, therefore, commuted to the stricter *Terry* standards by the absence of probable fruits or further evidence of the particular crime for which the arrest is made."[49] The Court further noted that:

> A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification. It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a "reasonable" search under that Amendment.[50]

So much has been apparent in the Court's pre-*Gant* SITLA jurisprudence. Exigency, and not the discovery of evidence, became the predominant interest that the exception advanced. Accordingly, the Court extended the SITLA exception to cover not only the arrested automobile occupant but also the recent occupant of an automobile arrested shortly after exiting the vehicle.[51] In *Thornton v. United States*,[52] the Court held reasonable the search of the suspect's automobile following his arrest after he exited the vehicle.[53] According to the Court, extending SITLA to such

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[46] *See* Weeks v. United States, 232 U.S. 383, 393 (1914) (arguing that seizure of private documents from the accused's home, in his absence and without a warrant, runs afoul of the protections afforded by the Fourth Amendment), *overruled by* Mapp v. Ohio, 367 U.S. 643 (1961).

[47] *See id.* at 392 (explaining that the Government's right "to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crime . . . has been uniformly maintained in many cases").

[48] 414 U.S. 218 (1973).

[49] *Id.* at 234.

[50] *Id.* at 235.

[51] *See* Thornton v. United States, 541 U.S. 615, 622 (2004) ("*Belton* allows police to search the passenger compartment of a vehicle incident to a lawful custodial arrest of both 'occupant[s]' and 'recent occupant[s].'").

[52] 541 U.S. 615 (2004).

[53] *See id.* at 620 ("[W]hen a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." (quoting New York v. Belton, 453 U.S. 454, 460 (1981)) (internal quotation marks omitted)).

situations was consistent with its underlying exigency and police safety justifications: it was simply untenable to force an officer into the "Hobson's choice"[54] of either approaching a vehicle in which the suspect might be armed in order to preserve the authority to search the vehicle upon arrest, or sacrificing that search authority by allowing the suspect to exit the vehicle into full view before initiating the arrest.[55]

Following *Thornton*, the only lingering uncertainty surrounding automobile SITLA authority was how proximate the exiting driver must be to the vehicle before the authority dissipated.[56] Accordingly, the admissibility of evidence seized from the interior compartment of an automobile, or a container therein, following the lawful arrest of a driver or occupant became a genuine article of faith. Lawful arrest was the *sine qua non* for admissibility. Other factors relating to the arrest were simply irrelevant, including: the nature of the offense; whether the offense was one traditionally associated with violence; the relative probability or improbability that evidence related to the offense might be in the vehicle; the ability of the suspect to gain access to the vehicle at the time of the search; the number of officers at the scene; the number of suspects; or the location of the vehicle. In short, an arrest for a minor traffic infraction of the proverbial eighty-year-old grandmother triggered the authority to search the entire interior compartment of her automobile, even if she was secured in the back of the arresting officer's police cruiser with numerous other officers on the scene.

B. Arizona v. Gant *and the End of the Blank Check*

The Court's *Gant* decision thus rested on the background of the apparently unlimited search authority triggered by the arrest of an automobile occupant or recent occupant.[57] In many ways, *Gant* provided as compelling a set of facts as *Belton* to revisit the automobile exception that *Belton* established in the first instance. Unlike the *Belton* situation of an outnumbered officer who discovered evidence somewhat related to the arresting offense, *Gant* involved a situation where neither the search for evidence nor officer safety seemed to justify the subsequent automobile search.[58]

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[54] A "Hobson's choice" is a "take it or leave it" option in which a party is offered the free choice of only one option. According to the Court, "a Hobson's choice is not a choice, whatever the reason for being Hobsonian." Zelman v. Simmons-Harris, 536 U.S. 639, 707 (2002).

[55] *Thornton*, 541 U.S. at 622.

[56] *See* United States v. Dorsey, 418 F.3d 1038, 1038–41 (9th Cir. 2005) (upholding automobile search conducted after the arrestee had been handcuffed and placed in a patrol car); United States v. Barnes, 374 F.3d 601, 602–03 (8th Cir. 2004) (same).

[57] *See* Arizona v. Gant, 556 U.S. 332, 340–41 (2009).

[58] *See id.* at 344 ("Neither the possibility of access nor the likelihood of discovering offense-related evidence authorized the search in this case.").

In *Gant*, police arrested the suspect for driving with a suspended license.[59] Following his arrest, Gant was secured in the back seat of a locked police cruiser.[60] Several other police cruisers and officers were present at the scene.[61] Nonetheless, the police proceeded to search the interior of Gant's automobile. In Gant's automobile, police discovered and seized evidence unrelated to the offense of driving with a suspended license.[62] Prior to his trial on charges of possession of a weapon and possession of drug paraphernalia, Gant moved to suppress the evidence discovered in his car.[63] At the outset, the trial court rejected the state's assertion that the police acted upon probable cause that evidence related to the arresting offense would be found in the car so as to trigger the automobile exception to the warrant requirement.[64] This was a critical conclusion, for it eliminated the only plausible alternative justification for a warrantless search of the car. However, the trial court then applied the *Belton*/*Thornton* rule and concluded that the search was reasonable because Gant had been lawfully arrested immediately after exiting his vehicle.[65]

Gant appealed the issue to the Arizona Supreme Court, which ultimately rejected the trial court's application of the SITLA exception and reversed Gant's conviction.[66] The U.S. Supreme Court summarized the Arizona Supreme Court's rationale as follows:

> [T]he Arizona Supreme Court concluded that the search of Gant's car was unreasonable within the meaning of the Fourth Amendment. The court's opinion discussed at length our decision in *Belton*, which held that police may search the passenger compartment of a vehicle and any containers therein as a contemporaneous incident of an arrest of the vehicle's recent occupant. The court distinguished *Belton* as a case concerning the permissible scope of a vehicle search incident to arrest and concluded that it did not answer "the threshold question whether the police may conduct a search incident to arrest at all once the scene is secure." Relying on our earlier decision in *Chimel*, the court observed that the search-incident-to-arrest exception to the warrant requirement is justified by interests in officer safety and

[59] *Id.* at 332.
[60] *Id.*
[61] *Id.* at 344.
[62] *Id.* at 336.
[63] *Id.*
[64] *Id.*
[65] *Id.* at 337.
[66] *Id.*

> evidence preservation. When "the justifications underlying *Chimel* no longer exist because the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer," the court concluded, a "warrantless search of the arrestee's car cannot be justified as necessary to protect the officers at the scene or prevent the destruction of evidence." Accordingly, the court held that the search of Gant's car was unreasonable.[67]

The Supreme Court then noted that the Arizona Supreme Court's dissenting justices rejected the majority's consideration of any *actual Chimel* justification as the basis for the reversal.[68] For the dissent, such consideration of actual exigency was inconsistent with the *Belton*/*Thornton* SITLA rule.[69] In essence, the dissent understood SITLA as an automatic exception to the warrant and probable cause requirements, regardless of how attenuated from the original *Chimel* SITLA rationale a particular application might be.[70] However, the dissent also acknowledged that the bright line *Belton* rule had become difficult to justify in cases like Gant's, and therefore joined in the call for reconsideration by the U.S. Supreme Court.[71] That request landed on a receptive Court, which noted in its opinion: "The chorus that has called for us to revisit *Belton* includes courts, scholars, and Members of this Court who have questioned that decision's clarity and its fidelity to Fourth Amendment principles. We therefore granted the State's petition for certiorari."[72]

In a 5–4 majority opinion authored by Justice Stevens, the U.S. Supreme Court affirmed the decision of its Arizona counterpart, in large measure adopting the rationale of the state supreme court.[73] Focusing on the original exigency justification upon which *Belton* was built, the Court rejected a broad reading of *Belton*.[74] Instead, it limited the application of *Belton*'s SITLA authority to those situations in which a recent arrestee could legitimately gain access to the interior of the automobile: "Accordingly, we reject this reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[75]

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[67] *Id.* at 337–38 (citations omitted).

[68] *Id.* at 338 (quoting State v. Gant, 162 P.3d 640, 647 (Ariz. 2007) (Bales, J., dissenting), *aff'd*, 556 U.S. 332 (2009)).

[69] *Id.*

[70] *See id.*

[71] *Id.* at 338.

[72] *Id.*

[73] *Id.* at 351.

[74] *Id.* at 343.

[75] *Id.*

Had the Court stopped there, *Gant* would have been nothing more than a clarification on the applicability of the *Belton* rule. However, in a separate concurring opinion, Justice Scalia interjected a somewhat perplexing new element into the meaning of the decision. Drawing on his concurring opinion in *Thornton*, Justice Scalia added a new dimension to the trigger for a *Belton* SITLA, a dimension that migrated to the holding of *Gant*, reasoning: "Although 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.'"[76]

Thus, *Gant* qualified *Belton*, and then ostensibly modified its own qualifier. The decision qualified *Belton* by limiting its applicability to situations where an arrestee retains genuine access to the automobile—ostensibly irrespective of the nature of the offense for which the suspect was arrested.[77] However, Justice Scalia's *Thornton* opinion provided the foundation for an exception to this qualifier: even when access to the vehicle has been eliminated by police control, a search is still reasonable whenever the police have a "reasonable belief" that evidence related to the crime might be in the vehicle.[78]

This reasonable belief modifier would have been relatively unremarkable had Justice Scalia utilized slightly different language. Probable cause would have been the easiest terminology to reconcile with existing jurisprudence. Pursuant to the longstanding automobile exception to the warrant requirement, a warrantless search of an automobile based on probable cause is reasonable.[79] This exception operates independently of the *Belton* SITLA.[80] Accordingly, even if the recent occupant is secured in a manner that eliminates access to the automobile, police with probable cause that evidence related to the offense for which the occupant was arrested will be found in the automobile may search for that evidence anywhere in the automobile where its presence is supported by probable

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[76] *Id.* at 343 (quoting Thornton v. United States, 541 U.S. 615, 624 (Scalia, J., concurring)).

[77] *Id.* ("[T]he *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.").

[78] *Id.* (citing *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

[79] *See* United States v. Ross, 456 U.S. 798, 799–800 (1982) (holding that police officer can search a vehicle without a warrant); Carroll v. United States, 267 U.S. 132, 162 (1925) (holding that police can conduct a warrantless search of a vehicle if there is probable cause to believe there is contraband in the car).

[80] New York v. Belton, 453 U.S. 454, 462 & n.6 (1981) (finding that where a defendant's "jacket was located inside the passenger compartment of the car in which the [defendant] had been a passenger just before he was arrested . . . [t]he jacket was thus within the area which we have concluded was 'within the arrestee's immediate control' within the meaning of the *Chimel* case . . . [and therefore] there is no need here to consider whether the search and seizure were permissible under the so-called 'automobile exception'").

cause.[81]

Albeit less understandable, reasonable suspicion would have at least been a term well established in Fourth Amendment jurisprudence and practice.[82] Reasonable suspicion has never justified a full evidentiary search.[83] Instead, pursuant to the landmark decision in *Terry v. Ohio*,[84] reasonable suspicion justifies a "cursory" search for the limited purpose of ensuring that the suspect is not armed and dangerous.[85] This *Terry* "pat down" was extended to the interior of an automobile in *Michigan v. Long*,[86] where the Court held that a cursory search of the interior of an automobile is reasonable whenever a police officer has reasonable suspicion that there may be a weapon within ready access of a passenger allowed to re-enter the vehicle.[87] However, because Justice Scalia used the term "reasonable belief" as the litmus test for an authorized warrantless search for evidence related to the arresting offense, it is difficult to reconcile that term with the more limited protective scope of *Terry* and *Michigan*. Nonetheless, had the Court substituted "suspicion" for "belief," it would have at least invoked an already established quantum of proof.

The Court explicitly acknowledged that the automobile exception to the warrant requirement, coupled with the *Terry* search exception, justified a search for evidence or for the protection of officer safety.[88] The Court also concluded that these alternative search justifications "together ensure that officers may search a vehicle when genuine safety or evidentiary concerns encountered during the arrest of a vehicle's recent occupant justify a search."[89]

Thus, as articulated, the holding of the case suggests that these are the exclusive justifications for searching the automobile of a recently arrested

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[81] *See Ross*, 456 U.S. at 799–800 (holding that police officers who have probable cause that there is contraband in a container in a vehicle may search the containers where such contraband may be, even if it is not in plain view, and rejecting the prior rule that if the police know that the contraband is in a container in the vehicle (as opposed to just somewhere in the vehicle), they must obtain a warrant to open the container). In other words, *Ross* held that once a container is placed in a vehicle, it is indistinguishable from the vehicle itself for purposes of the warrant exception.

[82] *See* Terry v. Ohio, 392 U.S. 1, 30–31 (1968) (authorizing limited cursory searches where police harbored reasonable suspicion—rather than probable cause—of the presence of weapons).

[83] *See id.* at 25–26 ("A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically be characterized as something less than a 'full' search, even though it remains a serious intrusion." (citing Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring))).

[84] 392 U.S. 1 (1968).

[85] *Id.* at 30–31.

[86] 463 U.S. 1032, 1036 (1983).

[87] *Id*. at 1036, 1050.

[88] Arizona v. Gant, 556 U.S. 332, 346–47 (2009).

[89] *Id.* at 347.

occupant: "Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest."[90] However, drawing from Justice Scalia's concurring opinion in *Thornton* the Court elaborated on the justification to search the car of an arrested recent occupant, which applies even when the suspect is secure and when *Belton*'s SITLA authority has terminated:

> [F]ollowing the suggestion in Justice Scalia's opinion concurring in the judgment in that case, we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle.[91]

The Court did not, however, explain what it meant by the term "reasonable belief," a term it adopted from Justice Scalia's *Thornton* concurrence. It therefore would be tempting to conclude that this term was merely a synonym for probable cause—that the Court merely highlighted the alternative existing "unique" automobile search justification pursuant to the *Ross* automobile exception to the warrant requirement. However, Justice Scalia's concurring opinion in *Gant* exacerbates the uncertainty related to the meaning of "reasonable belief," the relevant portion of which provides:

> I would hold that a vehicle search incident to arrest is *ipso facto* "reasonable" only when the object of the search is evidence of the crime for which the arrest was made, or of another crime that the officer has probable cause to believe occurred.[92]

There are two meanings that can be attributed to this explanation of automobile search authority. Consistent with the existing range of exceptions to the warrant requirement, the reference to probable cause could qualify the two distinct search objectives that Justice Scalia addresses: (1) search for evidence related to the arrested crime; or (2) search for any other evidence in the automobile based on probable cause. However, it is also plausible to read this portion of Justice Scalia's opinion as distinguishing between these two search objectives, indicating that probable cause is required only when the object of the search is evidence unrelated to the crime for which the suspect was arrested. This latter

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[90] *Id.* at 351.
[91] *Id.* at 335 (citing Thornton v. United States, 541 U.S. 615, 632 (Scalia, J., concurring)).
[92] *Id.* at 353 (Scalia, J., concurring).

interpretation underscores the majority's reliance on Justice Scalia's *Thornton* concurrence in concluding that a search for evidence related to the crime of arrest is justified when the police have a "reasonable belief" that the evidence will be found in the automobile.[93]

One conclusion seems indisputable: had the Court intended to emphasize the existing *Ross* automobile exception search authority, the opinion's use of the term "reasonable belief" instead of probable cause becomes illogical. It is also illogical to assume the Court intended reasonable belief to be a synonym for reasonable suspicion. First, as already noted, reasonable suspicion had never before been understood as a substantive authority justifying an *evidentiary* search, which is exactly what the *Gant* reasonable belief standard permits. Second, where the Court had previously extended the concept of reasonable suspicion to another context, it utilized that exact term and not some synonym. In *Richards v. Wisconsin*,[94] for example, the Court addressed the question of when it was reasonable for police to execute a warrant without first knocking and announcing their presence.[95] The Supreme Court of Wisconsin had affirmed a trial court's *per se* exception to the knock-and-announce requirement for felony drug warrant execution.[96] In overruling the decision, Justice Stevens wrote for the majority:

> In order to justify a "no-knock" entry, the police must have a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. This standard—as opposed to a probable-cause requirement—strikes the appropriate balance between the legitimate law enforcement concerns at issue in the execution of search warrants and the individual privacy interests affected by no-knock entries.[97]

The Court went on to state that although the reasonable suspicion threshold was not a high burden to meet, it was nonetheless necessary to justify the reasonableness of a no-knock entry.[98] This extension of the reasonable suspicion quantum of cause to a context beyond the *Terry* investigatory stop situation suggests that where the Court intends to endorse such an extension, it will use the precise terminology of reasonable

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[93] *See id.* at 343 (majority opinion).
[94] 520 U.S. 385 (1997).
[95] *Id.* at 394.
[96] *Id.* at 389–90.
[97] *Id.* at 394.
[98] *Id.* at 394–95.

suspicion. This, in turn, supports the alternate inference: that the Court's use of the term "reasonable belief" was deliberate, and not a veiled invocation of the reasonable suspicion quantum.[99]

IV. LOWER COURT UNCERTAINTY: REASONABLE SUSPICION, PROBABLE CAUSE, OR SOMETHING NEW?

"Reasonable belief" has become a "nebulous standard" in continuing Fourth Amendment jurisprudence.[100] As Justice Alito correctly predicted in his *Gant* dissent, this new standard is "virtually certain to confuse law enforcement officers and judges for some time to come."[101] Not surprisingly, lower courts wrestling with the ultimate meaning of "reasonable belief" have come to myriad conclusions. Some courts have determined that, outside of traffic violations, once a person is arrested and outside the vehicle, *Gant* allows the police to search the vehicle for further evidence of the crime for which he was arrested.[102] Others see *Gant* as providing a *per se* test for "reasonable belief" based on the nature of the offense for which a suspect is arrested.[103] In *Reagan v. United States*, the court found that "reasonable belief" requires a court to determine, based on common sense and the totality of the circumstances, whether the police had cause to believe there would be evidence of the offense of the arrest in the vehicle.[104] In *United States v. Page*,[105] the Fourth Circuit made a similar determination, relying, however, on the presence of other evidence to justify the search.[106] As the *Page* court observed:

> [I]t would appear that the majority in *Gant* distinguishes between offenses for which it is unlikely that the arrestee's vehicle contains relevant evidence, i.e., traffic violations, and offenses for which the recovery of such evidence is likely. The Court in *Gant* specifically cited drug offenses as illustrative of the exception to the rule announced. Accordingly, under the rationale in *Gant*, the seizure of a quantity of marijuana from the defendant, standing alone,

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[99] *See id.* at 385.

[100] United States v. Page, 679 F. Supp. 2d 648, 652 (E.D. Va. 2009).

[101] Arizona v. Gant, 556 U.S. at 356 (Alito, J., dissenting).

[102] *E.g.*, Brown v. State, 24 So. 3d 671, 677–79 (Fla. Dist. Ct. App. 2009); People v. Osborne, 96 Cal. Rptr. 3d 696, 705 (Cal. Ct. App. 2009).

[103] *E.g.*, United States v. Reagan, 713 F. Supp. 2d 724, 728 (E.D. Tenn. 2010).

[104] *Id.*

[105] 679 F. Supp. 2d 648 (E.D. Va. 2009).

[106] *See id.* at 654 (finding that seizure of drugs from the person of the defendant after he was stopped in the vehicle justified search of vehicle for drugs); *see also* Hill v. State, 303 S.W.3d 863, 875–76 (Tex. App. 2009) (holding that drugs in plain view in the vehicle justified search); State v. Snapp, 219 P.3d 971, 976–77 (Wash. Ct. App. 2009) (holding that drugs in plain view and defendant's movements to hide something in car gave police reasonable belief to search for drugs in vehicle), *rev'd*, 275 P.3d 289 (Wash. 2012).

> justified the search of the passenger compartment of his vehicle.[107]

This position seems both logical and in accordance with the Court's annunciation in *Gant*.[108]

Perhaps "reasonable belief" is a twin sibling of the lower evidentiary standard of "reasonable suspicion," as espoused by the Colorado courts. Some courts have "concluded that by using language like 'reasonable to believe' and 'reasonable basis to believe,' the Supreme Court intended a degree of articulable suspicion commensurate with that sufficient for limited intrusions like investigatory stops."[109] In *Perez v. People*,[110] the Colorado Supreme Court found a direct link between "reasonable belief" and the type of reasonable suspicion found in *Terry v. Ohio*[111]: "a reasonable belief to conduct such a search exists when there is a 'degree of articulable suspicion commensurate with that sufficient for limited intrusions like investigatory stops.'"[112] To support the assumption, it is noteworthy to observe that *Terry*, which gave life to "reasonable suspicion," seemed to suggest in its opinion that the two were indeed part and parcel of the same concept:

> [T]here must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has *reason to believe* that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime . . . .

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[107] *Page*, 679 F. Supp. 2d at 654. *Compare* United States v. Joy, 336 F. App'x 337, 343 (4th Cir. 2009) (holding that it may be reasonable to believe evidence relating to the drug offenses may be located in the vehicle), *and* United States v. Oliva, 2009 U.S. Dist. LEXIS 57293 (S.D. Tex. July 1, 2009) (holding that police could reasonably believe that evidence of defendant's arrest for DWI could be found in the vehicle), *with* United States v. Megginson, 340 F. App'x 856, 857 (4th Cir. 2009) (holding that arrest for domestic abuse did not justify search), *and* United States v. Majette, 326 F. App'x 211, 213 (4th Cir. 2009) (holding that arrest for suspended operator's license did not warrant search).

[108] *See* Arizona v. Gant, 556 U.S. 332, 343–44 (2009) ("In 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. But in others, including *Belton* and *Thornton*, *the offense of arrest* will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." (emphasis added) (internal citations omitted)); *see also* United States v. Matias-Maestres, 738 F. Supp. 2d 281, 293–96 (D.P.R. 2010) (holding that police could not have reasonable belief that evidence of driver's DUI would be found on passenger).

[109] People v. McCarty, 229 P.3d 1041, 1046 (Colo. 2010); *see also* People v. Chamberlain, 229 P.3d 1054, 1058 (Colo. 2010) (finding search incident to arrest for false reporting unreasonable where defendant was handcuffed and in backseat of police vehicle, police possessed defendant's driver's license listing her former address, her registration, and her proof of insurance, and it was not reasonable to believe that defendant's vehicle might contain evidence relevant to false reporting).

[110] 231 P.3d 957 (Colo. 2010).

[111] 392 U.S. 1 (1968).

[112] *Perez*, 231 P.3d at 961 (quoting *McCarty*, 229 P.3d at 1046).

> [T]he issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger.[113]

This rationale has repeatedly fallen on a receptive audience in the Colorado courts, which are much more in tune with the notion that "reasonable belief" equates to "reasonable suspicion."

The Court's use of phrases like "reasonable to believe" and "reasonable basis to believe" is a further indication that it intends some degree of articulable suspicion, a standard which it has previously acknowledged as meriting lawful intrusion in its Fourth Amendment jurisprudence. While this particular language is often used synonymously with probable cause, in light of the automobile exception—which already provides authority for a warrantless evidentiary search where police have probable cause to believe an automobile contains evidence of a crime—a requirement of probable cause in this context would render the entire second prong of the *Gant* SITLA exception superfluous. The Colorado Supreme Court stated: "For this reason, and because the majority at several points requires only a reasonable belief that evidence 'might' be found, it seems more likely that the Court intended a lesser degree of suspicion commensurate with that sufficient for limited intrusions, like investigatory stops."[114]

While determining the meaning of "reasonable belief" in the *Gant* decision has been met with uncertainty and a lack of clarity, determining what "reasonable belief" *is not* has been less difficult. The idea that *Gant*'s reasonable belief justification (the "evidentiary justification") under an automobile-related SITLA is somehow synonymous with the probable cause requirement of the automobile exception to the warrant requirement has been dismissed by a number of lower court decisions, and to Justice Alito it was a key defect of the *Gant* majority opinion.[115] In fact, as observed by the First Circuit, "every circuit that has considered the issue to date has either concluded or assumed that the auto exception survived under *Gant* . . . [and] the auto exception requires probable cause. But the *Gant* evidentiary justification only requires a 'reasonable basis.' These distinctions make a difference."[116]

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[113] *Terry*, 392 U.S. at 27 (emphasis added); *see also* Adams v. Williams, 407 U.S. 143, 146 (1972) ("So long as the officer is entitled to make a forcible stop, and has *reason to believe* that the suspect is armed and dangerous, he may conduct a weapons search limited in scope to this protective purpose." (emphasis added)).

[114] *Chamberlain*, 229 P.3d at 1057. *But see* State v. Baker, 229 P.3d 650, 665 (Utah 2010) ("[A]n objectively reasonable belief that the suspect is armed and dangerous . . . does not create automatic authorization for officers to conduct a [*Terry*] frisk.").

[115] Arizona v. Gant, 556 U.S. 332, 364 (Alito, J., dissenting) ("Why . . . is the standard for this type of evidence-gathering search 'reason to believe' rather than probable cause?").

[116] United States v. Polanco, 634 F. 3d 39, 42–43 (1st Cir. 2011) (citing United States v. Arriaza, 401 F. App'x 810 (4th Cir. 2010); United States v. Aguilera, 625 F.3d 482, 485–86 (8th Cir. 2010);

When coupled with Justice Scalia's less than clear discussion of the range of automobile search justifications, understanding this new term that has been injected into the automobile search equation requires analysis that drills deeper than the opinion itself to its apparent origin: *United States v. Rabinowitz*[117] and the Court's early clarification of the SITLA exception.

V. *THORNTON* AND THE BIRTH OF "REASONABLE BELIEF"

As the *Gant* majority notes, Justice Scalia's concurring opinion in *Thornton v. United States*[118] first introduced the concept of "reasonable belief" into the automobile SITLA equation.[119] In *Thornton*, a police officer observed suspicious behavior by the driver (Thornton) of an automobile.[120] The officer followed the suspect to a parking lot. Unlike in *Belton*, the police officer did not immediately approach the vehicle. Instead, he waited for the suspect to exit the vehicle. The officer then approached Thornton and asked him several investigatory questions. His suspicion was aroused that Thornton might be armed and dangerous, so the officer performed a *Terry* search of Thornton, which led to the discovery of narcotics on Thornton's person. At that point, Thornton was placed under arrest, and the officer searched the interior compartment of Thornton's vehicle, in which he found a firearm.[121]

Thornton sought to suppress the firearm as fruit of an unreasonable search.[122] The government responded that the search was justified pursuant to *Belton*'s SITLA exception.[123] The evidence was admitted and Thornton was convicted.[124] The case reached the Supreme Court on the question of whether a *Belton* SITLA applied when the police arrest an automobile occupant *after* the occupant exits the vehicle.[125] The Court concluded that requiring the police to approach the suspect while still in the vehicle created an unnecessary risk to law enforcement officers.[126]

United States v. Hinojosa, 392 F. App'x 260 (5th Cir. 2010); United States v. Vinton, 594 F.3d 14, 25 (D.C. Cir. 2010); United States v. Stotler, 591 F.3d 935, 940 (7th Cir. 2010)).

[117] 339 U.S. 56 (1950).

[118] 541 U.S. 615 (2004).

[119] *See id.* at 632 (Scalia, J., concurring) ("I would . . . limit *Belton* searches to cases where it is *reasonable to believe* evidence relevant to the crime of arrest might be found in the vehicle." (emphasis added)).

[120] *Id.* at 617 (majority opinion) ("Officer Deion Nichols of the Norfolk, Virginia, Police Department, who was in uniform but driving an unmarked police car, first noticed petitioner Marcus Thornton when petitioner slowed down so as to avoid driving next to him.").

[121] *Id.* at 618.

[122] *Id.*

[123] *Id.* at 618–19.

[124] *Id.* at 619.

[125] *Id.*

[126] *Id.* at 621–22 ("[U]nder the strictures of petitioner's proposed 'contact initiation' rule, officers who do so would be unable to search the car's passenger compartment in the event of a custodial arrest,

Accordingly, it held that *Belton* applied not only when the suspect was arrested in the automobile, but also to the arrest of recent automobile occupants.[127]

Concurring in the judgment, Justice Scalia expressed his overall dissatisfaction with the automobile SITLA exception.[128] Essentially laying the groundwork for *Gant*, he emphasized that *Belton* had become a blank check, allowing the police to search automobiles after the arrest of an occupant—and now even a recent occupant—irrespective of the presence of factors related to the original rationale for the SITLA exception, such as the risk that evidence will be destroyed or that the suspect will be able to access a weapon to endanger the police.[129] For Justice Scalia, the issue was not whether the suspect was arrested in the automobile or after having exited the automobile; the issue was whether the facts supported any plausible exigency justifying application of the SITLA exception.[130] In short, Justice Scalia rejected the "bright line" *Belton* rule that the presence of the automobile in the equation *ipso facto* created an exigency justifying a SITLA, no matter how minor the offense of arrest, or how secure the arrestee.[131]

Justice Scalia then articulated his alternative vision for the proper tailoring of the *Belton* automobile SITLA exception. Unsurprisingly, this focused on the original SITLA exception and the exigencies that justified dispensing with the warrant and probable cause requirements for conducting a search following arrest.[132] As it originally did in *Chimel v. California*,[133] the Court endorsed the SITLA based on the historic practice of police conducting a search of a suspect's person in order to seize any evidence in the suspect's possession—thereby protecting it from destruction—and to ensure the suspect did not have a secreted weapon that could endanger the police.[134] In *Chimel*, the Court concluded that any intrusion resulting from the SITLA was incidental to the already more

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potentially compromising their safety and placing incriminating evidence at risk of concealment or destruction. The Fourth Amendment does not require such a gamble.").

[127] *Id.* at 622.

[128] *See id.* at 628 (Scalia, J., concurring) ("[The consequence of *Belton*'s bright line rule is that] we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a car to see what they might find." (quoting United States v. McLaughlin, 170 F.3d 889, 894 (9th Cir. 1999) (Trott, J., concurring))).

[129] *See id.* at 631 ("*Belton* cannot reasonably be explained as a mere application of *Chimel*. Rather, it 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." (internal citation omitted)).

[130] *Id.* at 625–28.

[131] *See id.* at 625.

[132] *Id.* at 632.

[133] 395 U.S. 752 (1969).

[134] *Id.* at 763.

substantial intrusion of arrest.[135] Accordingly, so long as the arrest was lawful, the search incident to the arrest produced no further offense to the interests protected by the Fourth Amendment.

Chimel was, however, a double-edged sword. In *Chimel*, following the arrest, the police searched Chimel's person, the drawers and closets in the bedroom where he was arrested, and other areas of the house wherein he was arrested.[136] The Court held that the search of Chimel and the area within his immediate control, or "wingspan," was reasonable, for that was the area from which Chimel might be able to gain access to a weapon or evidence.[137] However, the Court also held that the police exceeded the reasonable scope of the SITLA when they searched areas outside the room in which he was arrested because there was simply no exigency to justify such an expansive scope.[138]

Justice Scalia's criticism of the *Belton* automobile variant of the SITLA focused on the exigency foundation. More specifically, Justice Scalia attacked the most troubling aspect of the *Belton* decision: the Court's holding that application of the SITLA exception to an automobile would not depend on a case-by-case assessment of the presence of the *Chimel* exigency considerations, but instead would be applied as a "bright line" rule.[139] In short, Justice Scalia took issue with the fact that *Belton* had created an automatic search authority for automobiles that applied even in the absence of the slightest exigency to justify the search; this was a concern also highlighted by Justice O'Connor in *Thornton* when she noted in her concurrence 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*."[140]

Justice Scalia first noted the obvious: that the bright line authority to conduct an automobile SITLA established in *Belton* had become totally untethered from the original *Chimel* justifications:

> As one judge has put it: "[I]n our search for clarity, we have now abandoned our constitutional moorings and floated to a place where the law approves of purely exploratory searches of vehicles during which officers with no definite objective or reason for the search are allowed to rummage around in a

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[135] *See id*. at 776 (White, J., dissenting) ("[T]he invasion and disruption of a man's life and privacy which stem from his arrest are ordinarily far greater than the relatively minor intrusions attending a search of his premises.").

[136] *Id.* at 754 (majority opinion).

[137] *Id.* at 768.

[138] *Id.*

[139] Thornton v. United States, 541 U.S. 615, 627 (2004) (Scalia, J., concurring).

[140] *Id.* at 624 (O'Connor, J., concurring in part).

> car to see what they might find." I agree entirely with that assessment.[141]

Instead of an outright rejection of this expansive application of *Belton*, Justice Scalia took a different tack: he offered an alternative justification for the scope of the *Belton* search authority. He reasoned: "If *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."[142] This one sentence opened a new front in the automobile search battle that would evolve and culminate with the *Gant* decision. It also sowed the seed for the "reasonable belief" justification adopted by the *Gant* majority.

Justice Scalia's explanation of this alternative theory of *Belton*'s automobile search authority is essential to understanding the meaning of "reasonable belief" adopted by the *Gant* majority. According to his *Thornton* concurrence, courts had historically endorsed the search for evidence related to the crime of arrest, indicating that such searches had always been considered reasonable: "Numerous earlier authorities support this approach, referring to the general interest in gathering evidence related to the crime of arrest with no mention of the more specific interest in preventing its concealment or destruction."[143] Furthermore, endorsement of these searches had nothing to do with concerns over the safety of police officers or the risk that the evidence might be destroyed—the two foundational pillars of the *Chimel* SITLA. It is therefore clear that Justice Scalia regarded the search for evidence related to the crime of arrest as justified on a wholly independent basis from the SITLA that *Belton* extended to automobiles. Because this search justification is not contingent on the SITLA exigency concerns, it is both automatic and broader in scope than Justice Scalia's conception of a legitimate SITLA, a fact he had no difficulty endorsing:

> There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.[144]

This was not intended to suggest that *Chimel*'s SITLA authority was

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[141] *Id.* at 628–29 (Scalia, J., concurring) (alteration in original) (citation omitted).
[142] *Id.* at 629.
[143] *Id.*
[144] *Id.* at 630.

invalid. Indeed, Justice Scalia emphasized that "*Chimel*'s [automobile SITLA exception which focuses on] concealment or destruction of evidence also has historical support."[145] Instead, his discussion of evidentiary searches related to the crime of arrest seemed clearly intended to offer a more logical rationale for the expansive application of *Chimel* to the automobile context. Again, from his opinion:

> [I]f 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. *Belton* cannot reasonably be explained as a mere application of *Chimel*. Rather, it is a return to the broader sort of search incident to arrest that we allowed before *Chimel* . . . .[146]

In using the term "reasonable belief," the *Gant* Court ultimately embraced the honesty Justice Scalia demanded. Accordingly, "reasonable belief" can only be understood in the broader context of the type of evidentiary search Justice Scalia invoked in support of the continued validity of *Belton*—not a variant of a *Chimel* search, but instead an evidentiary search rendered reasonable by some alternative justification.

This analysis hearkens back to the Supreme Court's decision in *United States v. Rabinowitz*.[147] In *Rabinowitz*, police officers suspected the defendant of unlawfully selling forged postage stamps.[148] Based on his sale of stamps to an undercover officer, the police obtained a warrant for his arrest.[149] However, they did not obtain a search warrant.[150] Rabinowitz was subsequently arrested at his place of business: an office.[151] Immediately following his arrest, police searched Rabinowitz and his office—including his desk, safe, and file cabinets—and seized 573 forged stamps. He was indicted for possessing and concealing the stamps so seized and for selling the four that had been purchased. The seized stamps were admitted in evidence over his objection, and he was convicted on both counts.[152] The court of appeals reversed, concluding that the search was unreasonable solely because the police had a prior opportunity to obtain a search warrant—a basis subsequently rejected by the Supreme Court, but outside of the scope of this discussion.[153]

The Supreme Court determined that the search conducted

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[145] *Id.*
[146] *Id.* at 631.
[147] 339 U.S. 56 (1950).
[148] *Id.* at 57.
[149] *Id.* at 57–58.
[150] *Id.* at 59.
[151] *Id.* at 58.
[152] *Id.* at 59.
[153] *Id.*

contemporaneously with Rabinowitz's arrest was reasonable and accordingly reversed the court of appeals' decision.[154] The Court emphasized, however, that "[w]hat is a reasonable search is not to be determined by any fixed formula. . . . The recurring questions of the reasonableness of searches must find resolution in the facts and circumstances of each case."[155] Although it decided *Rabinowitz* prior to its seminal SITLA decision in *Chimel v. California*,[156] the Court nonetheless focused on the area within the arrestee's immediate control.[157] The Court concluded that the nature of the business office justified the conclusion that the entire room was within Rabinowitz's immediate control, and therefore held that the entire search fell within the SITLA exception.[158]

While the search of Rabinowitz himself certainly met the notion of an area within his immediate control,[159] the search of his file cabinet (where the stamps were found) is almost impossible to square with this limitation. The Court seemed unconcerned with the distinction, indicating that its conception of "immediate control" was more expansive than that which would be endorsed by *Chimel* decades later.[160] Indeed, the ability to gain ready access to the file cabinet seemed far less significant in *Rabinowitz* than did the assumption that evidence of a crime is often found in the area within the possession of the arrested suspect.

Despite invoking the SITLA doctrine to justify the search in *Rabinowitz*, it seems relatively clear that the Court viewed the scope of that authority quite differently than did the Court in the subsequent *Chimel* decision. In *Rabinowitz*, the Court was obviously willing to endorse a scope that included the entire office.[161] The rationale for this expansive

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[154] *Id.* at 63–64, 66. In reaching its conclusion, the Court relied on a series of cases, including *Weeks v. United States*, 232 U.S. 383, 392 (1914) and *Agnello v. United States*, 269 U.S. 20, 30 (1925). *See Rabinowitz*, 339 U.S. at 61 (citing *Weeks* and *Agnello* for the propositions that it is reasonable "to 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," *Weeks*, 232 U.S. at 392, and "[t]he right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to 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, is not to be doubted," *Agnello*, 269 U.S. at 30).

[155] *Rabinowitz*, 339 U.S. at 63.

[156] 395 U.S. 752 (1969).

[157] *Rabinowitz*, 339 U.S. at 63–64.

[158] *Id.* at 64.

[159] *Id.* at 60 ("[N]o one questions the right, without a search warrant, to search the person after a valid arrest. The right to search the person incident to arrest always has been recognized in this country and in England. Where one had been placed in the custody of the law by valid action of officers, it was not unreasonable to search him." (citing *Weeks*, 232 U.S. at 392)).

[160] *Chimel* only authorizes such contemporaneous searches in order to seize weapons or other evidence that may be used to effect an escape, or to prevent the destruction of evidence. *See* Chimel v. California, 395 U.S. 752, 764 (1969).

[161] *Id.*

scope was clearly based not on the type of exigency presumptively associated with arrest, but instead on the mere fact that the offense was committed in the location of arrest such that it was likely that evidence of the offense could be found in that location. Indeed, the Court noted that the authority for the search was based on both denial of the means to effect escape and the traditionally accepted goal of discovering evidence of the offense:

> The right "to 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" seems to have stemmed not only from the acknowledged authority to search the person, but also from the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest. It became accepted that the premises where the arrest was made, which premises were under the control of the person arrested and where the crime was being committed, were subject to search without a search warrant. Such a search was not "unreasonable."[162]

Including the "premises where the arrest was made" within the scope of SITLA was therefore based on a reasonable linkage between the nature of the offense and the type of evidence searched for and seized.[163] The Court cited another example to emphasize this point:

> In *Marron v. United States*, the officers had a warrant to search for liquor, but the warrant did not describe a certain ledger and invoices pertaining to the operation of the business. The latter were seized during the search of the place of business but were not returned on the search warrant, as they were not described therein. The offense of maintaining a nuisance under the National Prohibition Act was being committed in the room by the arrested bartender in the officers' presence. The search warrant was held not to cover the articles seized, but the arrest for the offense being committed in the presence of the officers was held to authorize the search for and seizure of the ledger and invoices, this Court saying: "The officers were authorized to arrest for crime being committed in their presence, and they lawfully arrested Birdsall. They had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal

[162] *Rabinowitz*, 339 U.S. at 61 (citations omitted) (internal quotation marks omitted).
[163] *Id.*

> enterprise. . . . The closet in which liquor and the ledger were found was used as a part of the saloon. And, if the ledger was not as essential to the maintenance of the establishment as were bottles, liquors and glasses, it was nonetheless a part of the outfit or equipment actually used to commit the offense. And, while it was not on Birdsall's person at the time of his arrest, it was in his immediate possession and control. The authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose."[164]

The *Rabinowitz* Court then noted that, as long as the object of the search was rationally related to the offense of arrest, it was sufficiently distinguishable from an unreasonable general search:

> [Prior] cases condemned general exploratory searches, which cannot be undertaken by officers with or without a warrant. In the instant case the search was not general or exploratory for whatever might be turned up. Specificity was the mark of the search and seizure here. There was probable cause to believe that respondent was conducting his business illegally. The search was for stamps overprinted illegally, which were thought upon the most reliable information to be in the possession of and concealed by respondent in the very room where he was arrested, over which room he had immediate control and in which he had been selling such stamps unlawfully.[165]

In further support of its assessment of reasonable scope, the Court cited *Harris v. United States*,[166] a case that involved a SITLA that extended throughout the arrestee's apartment and lasted for five hours.[167] In concluding that the search was reasonable, the Court emphasized the relationship between the nature of the offense and the objects of the search:

> Nor can support be found for the suggestion that the search could not validly extend beyond the room in which petitioner was arrested. Petitioner was in exclusive possession of a four room apartment. His control extended quite as much to the bedroom in which the draft cards were found as to the living room in which he was arrested. The canceled checks and

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[164] *Rabinowitz* 339 U.S. at 61–62 (citations omitted) (quoting Marron v. United States, 275 U.S. 192, 198–99 (1927)).

[165] *Id.* at 62–63.

[166] 331 U.S. 145 (1947).

[167] *Id.* at 149.

> other instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment. . . . [T]he area which reasonably may be subjected to search is not to be determined by the fortuitous circumstance that the arrest took place in the living room, as contrasted to some other room of the apartment.[168]

While even here the Court invoked the "immediate control" rationale of SITLA,[169] it seems to reflect a fiction; few would consider the entire apartment of an arrestee to be within his "immediate control" *after* he is placed in custody. Nonetheless, by characterizing the location of the arrest as a "fortuitous" factor,[170] the Court appeared more interested in authorizing the search for evidence related to the offense at the location of the arrest than in any exigency related to the arrestee's ability to access (and potentially destroy) such evidence, a theory obviously central to the *Rabinowitz* holding.[171]

Justice Scalia's "reasonable belief" concept—a concept ultimately adopted by the *Gant* majority—can only be understood in light of this line of decisions. Unlike the earlier decisions he invoked, Justice Scalia confronted a barrier against merely including within the scope of a SITLA the entire area in which a suspect was arrested: *Chimel* viewed the "area of immediate control" as more limited than the area considered within that scope in these earlier decisions. As noted above, by the time *Thornton* was decided (long after *Chimel*), immediate control had become synonymous with lunging distance, or wingspan, of the arrestee. Accordingly, Justice Scalia was apparently compelled to develop an alternative theory to resurrect the type of evidentiary search justified by the much broader scope of the SITLA applied in *Rabinowitz* and its progeny.

VI. THE *GANT* BALANCE SHEET

There is no question that on the surface, *Gant* appears to severely curtail the authority of police to conduct an automobile SITLA following arrest of a vehicle occupant or recent occupant.[172] While *Gant* did not

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[168] *Id.* at 152.

[169] *See id.* (upholding SITLA despite it having spanned an entire apartment).

[170] *Id.*

[171] *See id.* at 152–53 ("The same meticulous investigation which would be appropriate in a search for two small canceled checks could not be considered reasonable where agents are seeking a stolen automobile or an illegal still. We do not believe that the search in this case went beyond that which the situation reasonably demanded."); *Rabinowitz*, 339 U.S. at 63 ("*Harris* . . . is ample authority for the more limited search here considered." (citation omitted)).

[172] *See* Arizona v. Gant, 556 U.S. 332, 343 (2009) ("[T]he *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.").

overrule *Belton*, a footnote in the majority opinion indicates that, although still breathing, *Belton* is on life support:

> Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains. But in such a case a search incident to arrest is reasonable under the Fourth Amendment.[173]

The message is clear: it will be a rare case where the situation results in the type of genuine access to the automobile necessary to justify application of *Belton*.

This, however, does not mean a search contemporaneous with the arrest of a vehicle occupant or recent occupant will now almost invariably be considered unreasonable.[174] In fact, quite the opposite is true. First, the pre-existing search justifications resulting from probable cause (for a full evidence search) or reasonable suspicion that the vehicle contains a weapon (for a cursory *Terry* interior sweep) are totally unaffected by *Gant*.[175] In fact, the opinion emphasizes the continuing validity of these well-established theories of reasonableness.[176] However, it is the inclusion of Justice Scalia's "reasonable belief" concept that will significantly impact future automobile searches.

Assuming the police arrest a suspect after approaching her in a vehicle or soon after she exits the vehicle, *Gant* essentially presumes that the apprehension will result in restraint sufficient to eliminate any SITLA justification.[177] Unless someone else will be permitted to return to the

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[173] *Id.* at 343 n.4 (citation omitted).

[174] *See id.* at 346 (stating that a broad reading of *Belton* is unnecessary to protect officers in light of the many other exceptions to the warrant requirement).

[175] *Id.* at 346–47.

[176] *See id.* ("Other established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand. For instance, *Michigan v. Long*, 463 U.S. 1032 (1983), 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. If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820–21 (1982), authorizes a search of any area of the vehicle in which the evidence might be found. . . . Finally, there may be still other circumstances in which safety or evidentiary interests would justify a search. *Cf.* Maryland v. Buie, 494 U.S. 325, 334 (1990) (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)" (citations omitted) (internal quotation marks omitted)).

[177] *Id.* at 351 ("Police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies.").

vehicle to drive it away from the scene (such as a passenger who was not arrested), the police will have no basis to conduct an interior sweep for weapons pursuant to *Michigan v. Long*.[178] If the police have probable cause to believe that evidence is in the vehicle, then the *Belton*/*Gant* line of authority becomes essentially irrelevant because of the alternate authority to conduct a probable cause search of the vehicle without first obtaining a warrant.[179] However, what happens if none of these authorities are triggered?

At this point, a "reasonable . . . [belief] the vehicle contains evidence of the offense of arrest" becomes decisive.[180] That belief justifies a full search of the vehicle for that evidence.[181] Reasonable belief therefore cannot be analogous to probable cause (because the *Gant* Court recognized that probable cause provides an independent basis for the evidentiary search),[182] or reasonable suspicion (because reasonable suspicion has never justified a full evidentiary search).[183] Instead, reasonable belief is best understood as a tether—both historical and practical. Historically, it represents a tether back to the originally broad scope of SITLA central to *Harris* and *Rabinowitz*, but subsequently narrowed by *Chimel*. Practically, it is a tether that connects the probable cause for the arrest to the search for the evidence—a tether because it presupposes the absence of independent probable cause to conduct the search (which would obviate the need for the "reasonable belief" justification).

Accordingly, "reasonable belief" is best understood as a hybrid between a procedural and substantive justification for reasonable government action. The link it establishes between the justification for the arrest and the justification for the subsequent vehicle search reflects the procedural nature of the concept—in effect extending the justification for the arrest to the search for evidence of the arrest. However, the concept includes a modest yet important substantive aspect: the requirement that the linkage between the arrest and the evidence searched for be reasonable.

This substantive element does not, however, seem analogous to either reasonable suspicion or probable cause for one critical reason: there is no requirement that the belief be based on any articulable fact that evidence is

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[178] 463 U.S. 1032, 1052–53 (1983) (extending the concept of a *Terry* frisk to the interior of a vehicle when the police have reasonable suspicion that someone can rapidly access a weapon inside the vehicle).

[179] *See*, United States v. Ross, 456 U.S. 798, 825 (1982) (authorizing a warrantless probable cause search of any area of a vehicle in which evidence of criminal activity might be found).

[180] *Gant*, 556 U.S. at 346.

[181] *Id.* at 343.

[182] *See id.* at 347 ("If there is probable cause to believe a vehicle contains evidence of criminal activity, *United States v. Ross*, 456 U.S. 798, 820–21 (1982), authorizes a search of any area of the vehicle in which the evidence might be found.").

[183] *See* Terry v. Ohio, 392 U.S. 1 (1969).

in the automobile. Instead, the mere nature of the offense of arrest is what ostensibly renders the belief reasonable.[184] That it is the nature of the arrested offense and not any individualized articulable fact that establishes reasonable belief seems almost indisputable after considering the genesis of the concept. By reaching back to *Harris* and *Rabinowitz*, Justice Scalia almost unquestionably resurrected the aspect of those decisions later overruled by *Chimel*[185]: that the mere nature of the offense, and not the risk of evidence destruction, danger to the police, or articulable facts establishing probable cause is what justifies the broader scope of the search associated with the arrest.[186]

Notably, *Gant*'s holding limits the "reasonable belief" standard to automobile searches, demonstrating the minimal nature of the substantive aspect of reasonable belief. In its endorsement of Justice Scalia's *Thornton* concept, the Court emphasized that limitation.[187] It is a well-established aspect of Fourth Amendment jurisprudence that automobiles are afforded a reduced expectation of privacy.[188] This reduced expectation lies at the core of the automobile exception to the warrant requirement, as well as the extension of that exception to containers contained within an automobile.[189] Accordingly, it seems significant that the Court limited the scope of a "reasonable belief" search to the automobile, and did not extend it to any area within the arrestee's possession (which would have been more consistent with Justice Scalia's *Thornton* reliance on *Harris* and

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[184] *See Gant*, 556 U.S. at 343–44 ("In 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. But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." (citations omitted)).

[185] *See* Jack Blum, Note, Arizona v. Gant*: Missing an Opportunity to Banish Bright Lines from the Court's Vehicular Search Incident to Arrest Jurisprudence*, 70 MD. L. REV. 826, 826 (claiming that the *Gant* Court should have restored an exigency-based standard similar to that in *Chimel* when it deviated from the previous bright-line standard set forth in *Belton* and that the Court's failure to do so created an unacceptably vague precedent).

[186] Thornton v. United States, 541 U.S. 615, 629 (2004) (Scalia, J., concurring). I use "associated" because *Chimel* precludes characterizing this expanded scope as an aspect of a SITLA.

[187] *See Gant*, 556 U.S. at 332–33 ("Although it does not follow from *Chimel*, *circumstances unique to the automobile context* also 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.'" (emphasis added) (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

[188] *See* California v. Carney, 471 U.S. 386, 392–93 (1985) ("When a vehicle is being used on the highways, or if it is readily capable of such use and is found stationary in a place not regularly used for residential purposes—temporary or otherwise—the two justifications for the vehicle exception come into play. First, the vehicle is obviously readily mobile by the turn of an ignition key, if not actually moving. Second, there is a reduced expectation of privacy stemming from its use as a licensed motor vehicle subject to a range of police regulation inapplicable to a fixed dwelling." (footnote omitted)).

[189] *See* Arkansas v. Sanders, 442 U.S. 753, 763–64 (1979) (discussing privacy levels with respect to suitcases in automobiles).

Rabinowitz).[190] While the Court is obviously willing to tolerate an expanded search authority in relation to a recent arrestee's automobile, the opinion does not (at least explicitly) indicate an analogous tolerance for other areas within an arrestee's possession, such as her home.

Ultimately, revealing the full extent of *Gant*'s "reasonable belief" search authority will depend on further jurisprudence.[191] Is a reasonable belief established solely by the nature of the crime of arrest, or is some additional quantum of proof required? If based solely on the offense, what offenses create such reasonable belief? What is the scope of the automobile search authority triggered by reasonable belief? Is it, like the *Belton* SITLA, restricted to the interior compartment of the automobile? Or does it extend to any part of the automobile where evidence may be found (like the trunk)? Will a reasonable belief justify a post-arrest search of other areas within an arrestee's possession, such as a home or office? Does the authority extend to all containers in the automobile?[192] If, as proposed herein, reasonable belief is indeed a new search justification, these questions of scope and substance become unavoidable. At this point, one thing seems clear: *Gant* is a genuine double-edged sword in the realm of search justification.

A. *The Good (for Police)*

By qualifying the constriction of *Belton*'s SITLA authority with the concept of reasonable belief,[193] the Supreme Court did not, as many assumed, inflict a mortal blow to post-arrest vehicle searches; *Gant*'s impact was anything but such a blow. First, as noted by the Court, existing exceptions to the warrant and/or probable cause requirements continue to provide police with substantial vehicle search authority.[194] However, police now also have search authority derived from the nature of the offense for which the suspect is arrested. Looking to the pre-*Chimel* jurisprudence that Justice Scalia relies on as the foundation for his

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[190] *See Thornton*, 541 U.S. at 629 (Scalia, J., concurring) (relying on the general interest in gathering relevant evidence). Neither *Rabinowitz* nor *Harris* involved a search of a suspect's vehicle. *Rabinowitz* involved the search of a one-room office for counterfeit stamps, while *Harris* involved the search of an apartment and its contents for stolen checks.

[191] *See* George M. Dery III, *A Case of Doubtful Certainty: The Court Relapses into Search Incident to Arrest Confusion in* Arizona v. Gant, 44 IND. L. REV. 395, 396 (2011) (discussing how the Court's decision in *Gant* offered very little guidance in terms of proximity, limits, and applicability and left the many unclear aspects of the *Gant* decision for future courts to interpret, thereby undermining the legitimacy of law enforcement activities).

[192] Considering that both the *Belton* SITLA and the automobile exception to the warrant requirement permit the search of containers in the vehicle, it is almost inconceivable that this question will be answered in the negative.

[193] *See* Arizona v. Gant, 556 U.S. 332, 343 (2009) (describing the concept of reasonable belief under *Belton*).

[194] *Id.* at 346.

"reasonable belief" concept, the range of offenses that will trigger this search authority appears to be quite broad.[195]

A vehicle search based on "reasonable belief" that evidence is located in the vehicle will unquestionably provide police lawful access to the vehicle's interior. As a result, when linked to the plain view doctrine,[196] this aspect of *Gant*'s vehicle search authority provides an additional benefit for police. So long as the extent of the vehicle search is proper in its scope, any evidence or contraband discovered may be seized, irrespective of whether it is evidence of the crime of arrest. Nor is there any reason to assume that "reasonable belief" search authority does not extend to the trunk of the automobile. Because the foundation of this search authority differs from the protective search foundation of SITLA, restricting the scope to the interior compartment (like SITLA) would be illogical. So long as evidence related to the crime of arrest might be in the trunk, the trunk would be within proper scope. The same logic would apply to containers inside the automobile, so long as evidence of the crime of arrest might be found in those containers.

The net result of all of these considerations is that contrary to the restrictive tone of *Gant*, the "reasonable belief" prong of the decision will in fact often expand police search authority. Furthermore, because lawful vantage point and access to seize contraband then triggers the plain view doctrine,[197] associated seizure authority will not be limited to evidence of the crime of arrest, but will extend to any contraband or evidence discovered in plain view while searching for evidence of the crime of arrest. However, there is one context where *Gant* will modify police authority to conduct post-arrest vehicle searches. Ironically, this modification will effectively nullify an authority not even addressed in the *Gant* opinion: the pretextual arrest.

B. *The Good (for the Public)*

If the range of offenses triggering a "reasonable belief" that evidence

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[195] *See Thornton*, 541 U.S. at 631–32 (Scalia, J., concurring) ("Rather, it 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." (citations omitted)).

[196] The plain view doctrine permits a warrantless seizure of evidence and contraband discovered in plain view during a lawful observation. *See* Coolidge v. New Hampshire, 403 U.S. 443, 465 (1971) ("It is well established that under certain circumstances the police may seize evidence in plain view without a warrant."); *see also* Arizona v. Hicks, 480 U.S. 321, 326 (1987) (citing *Coolidge*, 403 U.S. at 465); Horton v. California, 496 U.S. 128, 131 (1990) (discussing *Coolidge*, 403 U.S. at 465).

[197] *See Horton*, 496 U.S. at 136–37 (1990) (requiring a police officer seizing evidence in plain view (i) to be lawfully present at the place where the evidence can be plainly viewed; (ii) to have a lawful right of access to the object; and (iii) that the incriminating character of the object is immediately apparent).

related to the offense will be in the automobile is quite broad, the value of restricting the *Belton* SITLA might appear questionable. However, there is one type of situation where *Gant* will significantly curtail police search authority: what the Court previously characterized as a pretextual arrest. In limiting police search authority, *Gant* provides some protection for an individual's limited expectation of privacy in his vehicle. In *United States v. Robinson*,[198] the Supreme Court held that any lawful arrest triggers the authority to conduct a SITLA, irrespective of the subjective motive of the arresting officer.[199] In that case, the defendant argued that his arrest for a minor traffic infraction was in fact motivated by the arresting officer's desire to conduct a SITLA, and therefore was pretextual.[200] Because a reasonable officer would rarely arrest an individual for such a minor offense, the defendant argued that the subsequent SITLA was unreasonable.[201]

Rejecting this argument, the Court established a bright line trigger for the SITLA: lawful arrest.[202] Motive for arrest is simply irrelevant, as long as the arrest was authorized by law and was conducted pursuant to valid probable cause.[203] The defendant (and the dissent) argued that this ruling would effectively provide police with a blank check for searching vehicles because existing statutes allow for arrest for such a wide variety of traffic violations.[204] The Court, however, was unpersuaded that this reality justified a case-by-case assessment of the propriety of the arrest or the necessity for the SITLA.[205] The Court prohibited lower courts from probing any possible pretext for the arrest. Reasoning that the police would be concerned that their justification for the arrest would be subjected to subsequent judicial scrutiny, the Court rejected a rule that would place police at risk by causing them to hesitate in conducting SITLAs.[206] The term "pretextual arrest," therefore, while a factual reality

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[198] 414 U.S. 218 (1973).

[199] *Id.* at 235.

[200] *See id.* at 221 n.1 ("Respondent argued below that Jenks may have used the subsequent traffic violation arrest as a mere pretext for a narcotics search which would not have been allowed by a neutral magistrate had Jenks sought a warrant.").

[201] *Id.*

[202] *See id.* at 235 ("It is the fact of the lawful arrest which establishes the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment.").

[203] *See id.* at 226 ("Thus, the broadly stated rule, and the reasons for it, have been repeatedly affirmed in the decisions of this Court since *Weeks v. United States*, *supra*, nearly 60 years ago. Since the statements in the cases speak not simply in terms of an exception to the warrant requirement, but in terms of an affirmative authority to search, they clearly imply that such searches also meet the Fourth Amendment's requirement of reasonableness.").

[204] *Id.* at 235.

[205] *Id.*

[206] *Id.*

in the view of many, is a legal oxymoron.

Gant, however, has substantially altered this conclusion. It is clear that the decision in no way modified *Robinson*'s holding that the subjective motive of an arresting officer is irrelevant to assessing the propriety of a SITLA. However, *Gant*'s impact on the ability to use an arrest for traffic infractions as the trigger for a SITLA is profound. Because evidence related to a traffic offense will rarely, if ever, be in the vehicle itself, SITLA authority will terminate once the arrested driver or passenger is under effective police control—a situation the *Gant* Court indicated would rarely not be the case. This control will eliminate any legitimate need to search the vehicle in order to secure any weapons within the arrestee's lunging distance. The only other justification for a vehicle search following *Gant* would be reasonable belief that evidence related to the offense will be in the vehicle, which will rarely be the case in relation to traffic offenses. Indeed, *Gant* is an example of how traffic related offenses *do not* trigger such reasonable belief. Accordingly, whether as a pretext to gain the opportunity to search a suspect's vehicle, or as a legitimate exercise of police authority, traffic related arrests will no longer justify a search of the arrestee's vehicle absent some alternative exception to the warrant and/or probable cause requirements.

Traffic offense arrests are precisely the type of offenses that previously offered police a pretext to conduct an exploratory search of an automobile without probable cause. Limiting post-arrest search authority in relation to such offenses is, as the Court emphasized in *Gant*, an important step forward in reconnecting the automobile SITLA with the reasonableness touchstone of the Fourth Amendment.[207] Thus, although the Court in no way addressed the continued validity of *Robinson*, the effect of its decision will in large measure achieve the relief that was sought but denied in *Robinson*. Like Gant himself, future suspects arrested for traffic infractions will be protected from reliance on those offenses as a justification for a general search of their automobiles.

VII. CONCLUSION

Reconnecting the automobile SITLA with the underpinnings of the original SITLA exception—denying a recently arrested suspect access to evidence and/or weapons—was the primary focus of the *Gant* decision. This aspect of the decision nullified a troubling legal fiction that enabled police to transform any arrest of a vehicle occupant or recent occupant to a general search of the vehicle, unsupported by any individualized suspicion. While *Belton*'s automobile SITLA authority was not eliminated, as the Court noted, the likelihood that most arrested vehicle occupants would

[207] Arizona v. Gant, 556 U.S. 332, 344–47 (2009).

rarely retain the type of genuine access to the automobile to trigger *Belton* indicates that the true automobile SITLA will now be a rare occurrence.[208]

Had the *Gant* majority limited the decision to this constriction of the *Belton* automobile SITLA, a clear range of automobile search options would have emerged, all of which would have been based on well-established Fourth Amendment jurisprudence. In the rare situations where an arrested vehicle occupant retained genuine access to the vehicle interior, police would be authorized to search the vehicle interior pursuant to *Belton*. In most situations, where the control over the arrestee deprives him of such access, probable cause that evidence is in the vehicle would trigger the automobile exception to the warrant requirement and thereby allow police to search the vehicle for such evidence, subject to the limitations imposed based on the nature of the evidence. Even without probable cause to search for evidence or genuine concern that the arrestee or another individual will gain access to the vehicle interior, reasonable suspicion that another individual will gain ready access to a weapon once the vehicle is released will allow police to conduct a cursory "sweep" of the vehicle interior to ensure their safety. Finally, if the vehicle is impounded as an incident to the arrest, it will almost always result in an inventory search.[209] Any evidence discovered during any of these searches may be seized pursuant to the plain view doctrine.

This range of search options would have provided police with a powerful investigatory arsenal. However, the majority added a new weapon to that arsenal: the authority to search the vehicle for evidence related to the crime of arrest whenever police have "reason[] to believe" that such evidence may be in the vehicle.[210] While the Court emphasized that traffic violations like the one leading to *Gant*'s arrest would rarely produce such reasonable belief,[211] it unfortunately did not define what that term required. As noted in this Article, it may be tempting to equate reasonable belief with reasonable suspicion. However, doing so is inconsistent with the fundamental limitations on the authority derived from reasonable suspicion: reasonable suspicion has simply never been a sufficient quantum of cause to justify an evidentiary search.[212] Because,

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[208] *Id.* at 343 n.4 ("Because officers have many means of ensuring the safe arrest of vehicle occupants, it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains.").

[209] *See* South Dakota v. Opperman, 428 U.S. 364, 369 (1976) ("When vehicles are impounded, local police departments generally follow a routine practice of securing and inventorying the automobile's contents.").

[210] *Gant*, 556 U.S. at 351.

[211] *Id.* at 343.

[212] *See* Terry v. Ohio, 392 U.S. 1, 25–26 (1968) ("A search for weapons in the absence of probable cause to arrest, however, must, like any other search, be strictly circumscribed by the exigencies which justify its initiation. Thus it must be limited to that which is necessary for the discovery of weapons which might be used to harm the officer or others nearby, and may realistically

according to *Gant*, a reasonable belief creates just such a justification, it is illogical to conclude that the Court intended the term to be a synonym for reasonable suspicion. This conclusion is bolstered by the Court's decision in *Richards v. Wisconsin*,[213] which illustrates that where the Court intends to extend the concept of reasonable suspicion to other contexts (in *Richards* the justification for dispensing with the knock and announce requirement), it uses that term rather than some cryptic synonym.[214] It is even more illogical to conclude that reasonable belief was intended to be a synonym for probable cause. First, the terminology is markedly different from probable cause. More importantly, treating reasonable belief as such a synonym would render the term superfluous; the existence of probable cause alone provides an independent and well-established justification to search for evidence in the automobile at the scene of arrest without a warrant.[215]

Tracing the roots of *Gant*'s reasonable belief concept back to its origins reveals the most logical meaning of the term: a procedural tether between the probable cause for the arrest and the search for evidence in the automobile. A review of Justice Scalia's concurring opinion in *Thornton v. United States*, the opinion on which the *Gant* majority relies for the reasonable belief concept, indicates that it was never conceived as a substantive causal justification.[216] Instead, it was intended to be a modern day variant of the "area within the arrestee's possession" concept that defined the legitimate scope of a SITLA prior to *Chimel*'s narrowing of that scope to the arrestee's "lunging distance." However, *Chimel* did in fact narrow the scope of the SITLA from the *Harris*/*Rabinowitz* "area in possession" to the arrestee's "lunging distance." As a result, it was impossible to assert that a search of the automobile of a recent arrestee for evidence related to the offense is justified because the automobile was in his "possession" at the time of the arrest. Nonetheless, the logic of that aspect of *Harris* and *Rabinowitz* could be resurrected on one condition: the nature of the offense of arrest leads to a reasonable belief that evidence associated with such offense is normally found in the area within the arrestee's possession. Ultimately, this logic led the *Gant* majority to allow the search for such evidence in an automobile based solely on the nature of the offense, with no other articulable basis to justify the search. This indicates two unavoidable conclusions. First, the "reasonable belief"

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be characterized as something less than a 'full' search, even though it remains a serious intrusion." (citing Warden v. Hayden, 387 U.S. 294, 310 (1967) (Fortas, J., concurring))).

[213] 520 U.S. 385 (1997).

[214] *Id.* at 394–96.

[215] *See* United States v. Ross, 456 U.S. 798, 817 (1982) (providing an example of a legitimate warrantless search).

[216] 541 U.S. 615, 625 (2004) (Scalia, J., concurring).

search authority of *Gant* is entirely distinct from SITLA authority, indicating that the scope limitations of the automobile SITLA are inapplicable. Second, reasonable belief is not synonymous with reasonable suspicion because of the lack of an individualized articulable fact requirement to establish the belief. It is the nature of the offense of arrest alone, and no specific indicator of the presence of evidence in the automobile, that renders the belief reasonable.

The net result of *Gant*, therefore, is not as debilitating to police as it may first appear. In fact, police retain all of the pre-existing vehicle search justifications (a point emphasized by the *Gant* majority). While SITLA authority will normally be terminated once the arrestee is restrained, this will not always prohibit a suspicion-less search of the automobile. If the offense of arrest is one that normally involves the possession of associated evidence, police will be authorized to search the vehicle. Furthermore, unlike the SITLA search, these "reasonable belief" searches will not be confined to the interior compartment of the automobile. As long as it is the type of evidence that may be concealed on other parts of the vehicle, those parts (most importantly the trunk) should fall within the scope of the justification.

Gant does, however, substantially alter one particularly troubling type of post-arrest vehicle search: those based on arrest for a traffic infraction. These SITLA's have always seemed troubling because of the perception that police use the arrest as a pretext in order to trigger SITLA authority. It is clear that the Court has foreclosed the ability to challenge the subjective motivation for an arrest, and that nothing in *Gant* altered that aspect of SITLA. However, because the arrestee will rarely, if ever, have evidence related to a traffic arrest in the automobile, *Gant* effectively nullifies the efficacy of the SITLA triggered by a traffic arrest. The arrest will presumptively result in restraint of the arrestee, terminating the SITLA authority. This fact, when coupled with the inability to assert a reasonable belief that evidence related to the offense will be found in the vehicle, will place any vehicle search based on the arrest outside the bounds of reasonableness defined by *Gant*.