PENN STATE LAW REVIEW

Redefining Searches Incident to Arrest: *Gant*'s Effect on *Chimel*

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I. INTRODUCTION

One of the Supreme Court's "most important responsibilities is to offer clear guidance to lower courts," especially in matters of constitutional law.[1] For decades, the Supreme Court has held that warrantless search or seizure is "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions."[2] One such exception is a search incident to a lawful arrest.[3] When an officer makes an arrest,[4] the officer may search the arrestee's person and the area within the arrestee's immediate control.[5] The Supreme Court established two rationales behind the search incident to arrest in *Chimel v. California*:[6] (1) the police may remove any weapons the arrestee may use to resist arrest or to escape; and (2) the police may search for and seize any evidence to prevent its concealment or destruction.[7]

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1. Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. 1049, 1085-86 (2009).

2. Katz v. United States, 389 U.S. 347, 357 (1967) (citations omitted); *see also* U.S. CONST. amend. IV ("The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated, and no Warrants shall issue, but upon probable cause, support by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.").

3. *See* United States v. Robinson, 414 U.S. 218, 235 (1973); Chimel v. California, 395 U.S. 752, 763 (1969).

4. The search incident to arrest exception requires a lawful arrest. *See Robinson*, 414 U.S. at 235. If a warrantless arrest is invalid for lack of probable cause, the search incident to that arrest will be deemed invalid. *See* United States v. Ho, 94 F.3d 932, 935 (5th Cir. 1996). However, when an arrest is made based upon a warrant later deemed to be invalid, a search made incident to that arrest may still be upheld if the officers acted with the good faith belief that the warrant was valid. *See* Herring v. United States, 555 U.S. 135, *reh'g denied*, 129 S. Ct. 1692 (2009).

5. *Chimel*, 395 U.S. at 763.

6. *Id*. at 762-63.

7. *Id*.

Defining the area within the arrestee's immediate control has proven troublesome, especially in the context of arresting a vehicle occupant.[8] With respect to vehicle search, the Court in *New York v. Belton*[9] handled this issue by creating a bright-line rule that an officer making a lawful arrest of the occupant of a vehicle may search the passenger compartment of the vehicle and all containers therein.[10] Although the Court's rule appeared to be applicable only in the vehicle context, lower courts expanded the rule to searches incident to arrest outside of the vehicle context, and the Supreme Court did nothing to curb or encourage that expansion.[11] The Court recently limited the *Belton* rule in *Arizona v. Gant*,[12] where the Court held that police may search a vehicle incident to an arrest of the vehicle's occupant only when the arrestee is "unsecured and within reaching distance of the passenger compartment" at the time of the search.[13]

In the short time since *Gant* was decided, lower courts have split on whether the new rule announced in *Gant* applies to searches incident to arrest outside of the vehicle context.[14] The Third Circuit has applied the *Gant* rationale to a bag held by the arrestee at the time of arrest and dropped when the police placed him under arrest.[15] Noting that courts have used vehicle cases to justify searches in non-vehicle contexts for years,[16] the court used *Gant* to justify a search of the bag because the bag was accessible to the arrestee.[17] The District Court for the District of Nebraska also would have expanded *Gant*,[18] but the Eighth Circuit Court of Appeals invalidated the court's reasoning and limited *Gant* to vehicular searches incident to arrest.[19] Again, the Supreme Court has

8. *See* discussion *infra* Part III.C.2.

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

10. *Id.* at 462-63.

11. *See, e.g.*, State v. Roach, 452 N.W.2d 262 (Neb. 1990) (relying on *Belton* outside of the vehicular context and collecting federal cases relying similarly on *Belton*).

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

13. *Id.* at 1719, 1723-24.

14. *See, e.g.*, United States v. Perdoma, 621 F.3d 745, 751-52 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010) (finding that *Gant* does not apply to the search of a bag incident to arrest); United States v. Shakir, 616 F.3d 315, 319-20 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010) (applying *Gant* to a bag search).

15. *See Shakir*, 616 F.3d at 319-20.

16. *See id.* at 318.

17. *See id.* at 321.

18. *See* United States v. Perdoma, No. 8:08CR460, 2009 WL 1490595 (D. Neb. May 22, 2009), *aff'd on other grounds*, 621 F.3d 745 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010).

19. *See infra* notes 106-07, 109-10 and accompanying text.

remained silent on the issue of whether *Gant* is applicable outside of the vehicle context.[20]

When lower courts split on how to properly apply precedent, it is the Supreme Court that must step in to settle the dispute.[21] The Supreme Court has failed to mend the split of authority over the applicability of the vehicle cases to other searches incident to arrest.[22] This failure has caused the protections of the Fourth Amendment to vary by jurisdiction[23] and has wasted judicial resources.[24] If circuits misapply *Gant*, which is highly likely given that courts have already disagreed on *Gant*'s applicability,[25] *Gant* may result in the elimination of nearly all searches incident to arrest.[26] The Supreme Court needs to grant certiorari to review and settle the issue to guarantee equal protection of Fourth Amendment rights throughout our nation.

If the Supreme Court grants certiorari, two issues must be considered regarding the search incident to arrest exception. First, do vehicles continue to warrant specialized rules different from the general search incident to arrest exception?[27] Second, when does accessibility matter for searches incident to arrest outside of the vehicle context?[28]

This Comment will begin by delineating the history of the search incident to arrest exception generally and in the vehicular search context. This Comment will explain the current state of the law and review a selection of non-vehicle search incident to arrest cases where the courts have either utilized vehicular cases—namely *New York v. Belton* and *Arizona v. Gant*—to justify the scope of the search or considered and

20. *See* United States v. Shakir, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010) (denying certiorari).

21. *See* Milos Jekic, *Lowering the Jurisdictional Bar: A Call for an Equitable-Factors Analysis Under CERCLA's Timing-of-Review Provision*, 59 U. KAN. L. REV. 157, 177 (2010).

22. *See* United States v. Curtis, 653 F.3d 704, 713 (5th Cir. 2011) (noting the split between the circuits over whether *Gant* is applicable to only vehicle searches or whether *Gant* "generally limits the scope of the search-incident-to-arrest exception").

23. *See* discussion *infra* Part III.B.1. *Compare* United States v. Myers, 308 F.3d 251, 251 (3d Cir. 2002) (rejecting expansion of *Belton* beyond the vehicle context and invalidating a bag search based on *Chimel*), *with* United States v. Taylor, 656 F. Supp. 2d 988 (E.D. Mo. 2009) (applying *Gant* to invalidate a home search when the arrestee was secured in police car).

24. *See* discussion *infra* Part III.B.2.

25. *Cf.* United States v. Perdoma, 621 F.3d 745, 751-52 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010) (finding that *Gant* does not apply to the search of a bag incident to arrest); *Shakir*, 616 F.3d at 315 (applying *Gant* to a bag search incident to arrest).

26. *See* discussion *infra* Part III.B.3.

27. *See* discussion *infra* Part III.C.1.

28. *See* discussion *infra* Part III.C.2.

rejected extending the vehicular cases to other contexts. This Comment will then explain why the Supreme Court should mend the circuit split. Finally, this Comment also will consider points the Supreme Court should address in clarifying this area of law and will explain the course of action the Supreme Court should follow when deciding the future of the search incident to arrest exception.

II. HISTORY OF THE SEARCH INCIDENT TO ARREST EXCEPTION

A. The Early Cases

Despite a tortuous history, the search incident to lawful arrest exception has been accepted in American jurisprudence for nearly a century.[29] The exception first appeared as dictum in *Weeks v. United States*,[30] where the Supreme Court noted that American law always has recognized the right of the government to search the person of an arrestee.[31] The right of the government to search incident to arrest later extended beyond the arrestee's person.[32] The Court initially confirmed that a search of the premises incident to arrest was permissible in *Marron v. United States*[33] but limited searches of premises in *Go-Bart Importing Co. v. United States*.[34]

These limitations to the search incident to arrest exception were abandoned in *Harris v. United States*,[35] when the Court upheld a thorough, five-hour long search of a four-room apartment after the arrest took place in the living room.[36] In *United States v. Rabinowitz*,[37] the Supreme Court noted that *Harris* had not been overruled and provided sufficient authority to search the single-room office in which Rabinowitz had been arrested, including the desk, safe, and filing cabinets.[38]

B. Chimel v. California*: A Landmark Decision*

In 1969, the Supreme Court reconsidered the entire line of cases involving search incident to arrest.[39] In *Chimel v. California*, police

29. *See* Weeks v. United States, 232 U.S. 383, 392 (1914).
30. *Id*.
31. *Id*. Searches of an arrestee's person were firmly approved in the landmark case *United States v. Robinson*, 414 U.S. 218, 235 (1973).
32. *See* Agnello v. United States, 269 U.S. 20, 30 (1925).
33. *See* Marron v. United States, 275, U.S. 192, 198-99 (1927).
34. *See* Go-Bart Importing Co. v. United States, 282 U.S. 344, 358 (1931).
35. Harris v. United States, 331 U.S. 145, 148 (1947).
36. *See id.*
37. United States v. Rabinowitz, 339 U.S. 56 (1950).
38. *See id.* at 59, 63.
39. *See* Chimel v. California, 395 U.S. 752 (1969).

officers went to Chimel's home to execute a warrant for his arrest for the burglary of a coin shop and entered the home with the consent of Chimel's wife.[40] Chimel was arrested upon entering the house ten minutes later.[41] Despite Chimel's objections, the officers conducted a search incident to arrest of the entire house, including the outbuildings.[42] Although the police officers searched some rooms only briefly, in other rooms, they instructed Chimel's wife to open drawers and move the contents so that the officers could see if they contained items from the burglary.[43]

Chimel objected that the items removed from his house were unconstitutionally seized, but the items were admitted into evidence.[44] Chimel was convicted of two counts of burglary,[45] and his convictions were affirmed by the California Court of Appeal and the California Supreme Court.[46] The United States Supreme Court granted certiorari to determine whether the warrantless search of the entire house was constitutionally justified as incident to Chimel's arrest.[47]

After noting the inconsistency of the previous search incident to arrest cases, the Court held that a search incident to arrest could extend beyond the arrestee's person to the area "within his immediate control."[48] The Court found two rationales justifying search of an arrestee's person incident to arrest: officer safety and evidence preservation.[49] The Court justified a search for weapons on the basis that an arrestee carrying a weapon may use that weapon to resist arrest or to escape, endangering the officer.[50] The Court also determined that an officer's seizure of evidence to prevent its concealment or destruction is "entirely reasonable."[51] The Court concluded 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."[52]

The Court further held that rationales underlying a search incident to arrest cannot justify a search of any room other than that in which the

40. *Id.* at 753.
41. *Id.*
42. *Id.* at 753-54.
43. *Id.* at 754.
44. *Id.*
45. *Id.*
46. *See* People v. Chimel, 439 P.2d 333, 338 (Cal. 1968); People v. Chimel, 61 Cal. Rptr. 714, 721 (Cal. Ct. App. 1967).
47. *Chimel*, 395 U.S. at 755.
48. *Id.* at 763.
49. *See id.* at 762-63.
50. *Id.* at 763.
51. *Id.*
52. *Id.*

arrest occurs.[53] Even within the same room as the arrest, closed or concealed areas of the room may not be within the arrestee's control.[54] Additionally, a search that is remote in time from the arrest cannot be justified as incident to that arrest, because no danger of the arrestee obtaining a weapon exists and no destructible evidence remains.[55] The Court reversed Chimel's convictions because the search far exceeded the area within his immediate control.[56] Courts have been reluctant to embrace *Chimel*,[57] perhaps because *Chimel*'s application has not been as straightforward as the Court seemed to think it would be. This concern has been justified, as courts have had a difficult time applying *Chimel*, especially in the context of a vehicle search incident to arrest.[58]

C. The Vehicle Cases: New York v. Belton *and* Arizona v. Gant

In *New York v. Belton*, a lone officer stopped a speeding vehicle in which four men were traveling.[59] The officer smelled burnt marijuana and noticed an envelope marked "Supergold"[60] on the floor of the car.[61] The officer directed the men to get out of the car and arrested them for possession of marijuana.[62] Lacking sufficient means of securing all four men, the officer directed the men into four separate areas and proceeded to search the arrestees and the car.[63] On the back seat of the car, in a pocket of a jacket belonging to Belton, the officer found cocaine.[64]

Belton was convicted of possession of cocaine, but the New York Court of Appeals reversed Belton's conviction and held that the warrantless search of a zippered jacket pocket when the defendant could not have reached the pocket was not justified as a search incident to arrest.[65] The United States Supreme Court granted certiorari to determine whether the permissible scope of a search incident to arrest includes the passenger compartment of the vehicle in which an arrestee was riding.[66]

53. *See id.*
54. *Id.*
55. *Id.* at 764-65 (citing Preston v. United States, 376 U.S. 364, 367 (1964)).
56. *Id.* at 768.
57. *See* Wayne R. LaFave, SEARCH AND SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 6.3(c), 352 (4th ed. 2004).
58. New York v. Belton, 453 U.S. 454, 459-60 (1981).
59. *Id.* at 455.
60. "Supergold" is a name the officer associated with marijuana. *Id.* at 455-56.
61. *Id.*
62. *Id.* at 456.
63. *Id.* The officer also found marijuana in the envelope marked "Supergold." *Id.*
64. *Id.*
65. *Id.*
66. *Id.* at 455.

In validating the search, the Court initially tethered its ruling to *Chimel* and the rationale that the police must be able to search the arrestee's person and the area within the arrestee's immediate control for any weapons or destructible evidence.[67] The Court claimed that a "single, familiar standard" would best serve the Fourth Amendment protections at issue in a search incident to arrest.[68] In response to this need for a bright-line rule, the Court determined that items "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 item.'"[69] The Court held that an officer lawfully arresting an occupant of a vehicle may search the passenger compartment and all containers within the passenger compartment as a search incident to arrest.[70] The Court took special care to note that its holding did not "alte[r] the fundamental principles established in the *Chimel* case" but merely illuminated the application of *Chimel*'s principles in the "particular and problematic" vehicular context.[71] Because the jacket was within the passenger compartment of the car, it was within the reach of the arrestees, so the search incident to arrest was valid.[72] Belton's conviction was upheld.[73] Lower courts often read *Belton* as creating a police entitlement to search the passenger compartment of a vehicle any time an officer arrests the occupant of a vehicle instead of an exception to the rule justified by the "twin rationales in *Chimel v. California*."[74]

Twenty-eight years after *Belton*, the Supreme Court severely curbed the bright-line rule set out in that case.[75] In *Arizona v. Gant*, the police discovered that Gant had an outstanding warrant for his arrest for driving with a suspended driver's license.[76] Officers were making two drug-related arrests at a residence when Gant pulled his car into the driveway and exited his car.[77] A police officer hailed Gant and the two approached

67. *See id.* at 457.

68. *Id.* at 458 (citing Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

69. *Id.* at 460 (citing Chimel v. California, 395 U.S. 752, 763 (1969)).

70. *Id.* The Supreme Court later extended the *Belton* rule to apply to a "recent occupant" of a vehicle, including when the arrestee left the vehicle immediately prior to the police making contact with the arrestee. Thornton v. United States, 541 U.S. 615, 623-24 (2004).

71. *Belton*, 453 U.S. at 460 n.2.

72. *Id.* at 462-63.

73. *Id.*

74. *See Thornton*, 541 U.S. at 624 (O'Connor, J., concurring); *see also supra* notes 51-54 and accompanying text.

75. *See* Arizona v. Gant, 129 S. Ct. 1710, 1713 (2009).

76. *See id.* at 1715.

77. *See id.*

each other, meeting approximately ten feet from Gant's car.[78] The officer immediately arrested Gant on the outstanding warrant.[79] Gant and the two arrestees from the drug arrests were each handcuffed and secured in separate police cars.[80] One of the five police officers on the scene then searched Gant's car, finding a gun and cocaine.[81]

Gant moved to suppress the evidence because the warrantless search violated the Fourth Amendment.[82] At the suppression hearing, one officer testified that he searched the car "because the law says we can do it" and not because he had any fear or belief that Gant would access the vehicle.[83] The trial court denied the motion to suppress, and Gant was convicted.[84] The Arizona Supreme Court reversed the conviction because the "justifications underlying *Chimel* no longer exist [when] the scene is secure and the arrestee is handcuffed, secured in the back of a patrol car, and under the supervision of an officer."[85]

The United States Supreme Court adopted the Arizona Supreme Court's reasoning and rejected the broad reading of *Belton* that permits officers always to search a vehicle incident to the arrest of a recent occupant of that vehicle on the grounds that *Belton* had become "untether[ed]" from the rationales set forth in *Chimel*.[86] Although the Court claimed not to overrule *Belton*, the Court held that *Chimel* permits officers "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."[87] Some courts have expanded *Gant*'s holding beyond the vehicle context.[88]

78. *Id.*
79. *Id.*
80. *See id.*
81. *Id.*
82. *Id.*
83. *Id.*
84. *Id.*
85. State v. Gant, 162 P.3d 640, 644 (Ariz. 2007).
86. *Gant*, 129 S. Ct. at 1719. The Court was concerned that *Chimel*'s twin rationales no longer played any role in determining the scope of a vehicle search incident to arrest. *See id.*
87. *Id.* The Court also noted that when a search is authorized, *Belton* continues to permit a search of the passenger compartment and every container therein. *Id.* at 1720. The Court additionally noted in dictum 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.'" *Id.* at 1719 (citing Thornton v. United States, 541 U.S. 615,624 (2004) (Scalia, J., concurring)).
88. *See, e.g.*, United States v. Shakir, 616 F.3d 315, 318 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010); United States v. Jack, No. 1:09-cr-158, 2010 WL 2506709 (E.D. Tenn. May 25, 2010); United States v. Taylor, 656 F. Supp. 2d 988 (E.D. Mo. 2009).

III. ANALYSIS

A. The Lower Courts' Expansion of Belton *and* Gant

In deciding *Belton*, the Supreme Court carefully and repeatedly limited its holding to searches incident to the arrest of a vehicle occupant and denied that *Belton* in any way overruled *Chimel*.[89] The Court specifically noted that *Belton* was meant solely to determine the meaning of *Chimel* in the "*particular and problematic*" context of the arrest of a vehicle occupant.[90] The Court's framing of the issue unmistakably limited *Belton* to a particular situation: "when the occupant of an automobile is subjected to a lawful custodial arrest."[91]

Despite the limiting language in *Belton*, courts expanded *Belton* to cases involving searches incident to arrest outside of the vehicle context.[92] The *Belton* Court's discussion of "exclusive control" and accessibility led lower courts to believe that accessibility was not an issue in searches incident to arrest, so a search could happen even when the twin rationales of *Chimel* did not exist.[93] Over the next twenty years, circuit courts split on the issue of whether *Belton* applied outside the vehicle context.[94] Some circuits were unable to choose a position.[95]

89. *See* New York v. Belton, 453 U.S. 454, 455, 460 (1981). "Our holding . . . in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests." *Id.* at 460 n.3.

90. *Id.* (emphasis added).

91. *Id.* at 455.

92. *See, e.g.*, United States v. Fleming, 677 F.2d 602, 607 (7th Cir. 1982) (refusing to expand *Belton* beyond the automobile context); United States v. Brown, 671 F.2d 585, 587 (D.C. Cir. 1982) (interpreting *Belton* to extend beyond the vehicle context); United States v. Mefford, 658 F.2d 588, 592-93 (8th Cir. 1981) (applying *Belton* to searches not involving vehicles).

93. *See* discussion *infra* Part III.C.2.

94. *See, e.g.*, United States v. Myers, 308 F.3d 251 (3d Cir. 2002) (refusing to expand *Belton* beyond the automobile context); United States v. Johnson, 16 F.3d 69 (5th Cir. 1994) (noting that *Belton* is restricted to vehicle searches); United States v. Litman, 739 F.2d 137 (4th Cir. 1984) (expanding *Belton* to uphold the search of a bag); State v. Roach, 452 N.W.2d 262 (Neb. 1990) (relying on *Belton* and collecting federal cases relying similarly on *Belton*).

95. The Fifth and Seventh Circuits in particular had difficulty holding a position on whether *Belton* was limited to the vehicle context. In *United States v. Johnson*, the Fifth Circuit originally disposed of *Belton* in a footnote, but cited *Belton* as controlling upon rehearing. *See* United States v. Johnson, 846 F.2d 279 (5th Cir. 1988); United States v. Johnson, 834 F.2d 1191 (5th Cir. 1987), *withdrawn*, 846 F.2d 279 (1988). On rehearing, Judge Williams specially concurred to note that in writing the original opinion, he believed *Belton* had to be stretched far beyond itself to justify the search in *Johnson*, but that he had later concluded that *Belton* overruled *Chimel* and was, therefore, controlling. *Johnson*, 846 F.2d at 284 (Williams, J., specially concurring). Six years later, the Fifth Circuit found that "*Belton* makes clear that its holding is limited to its facts and merely

Nearly thirty years after deciding *Belton*, the Supreme Court severely restricted *Belton* by deciding *Gant*.[96] Because *Gant* is a relatively new opinion, circuit courts have had limited opportunities to consider the applicability of *Gant* outside of the vehicular context; however, the Third and Eighth Circuits have addressed the applicability of *Gant* with opposite results.[97] These two cases are just the most recent in a longstanding problem.[98]

In *United States v. Shakir*,[99] the Third Circuit Court of Appeals upheld a search of a bag incident to an arrest in a hotel lobby.[100] Because many courts expanded *Belton* beyond the vehicle context and *Gant* re-interpreted *Belton*, the Third Circuit determined that *Gant* must also be applicable outside of the vehicular context.[101] The Court found further justification for expansion in that, although *Belton* and *Gant* involved vehicles, those cases were explications of *Chimel*, which was not a vehicle case.[102] Although such reasoning might be expected of a court that had previously expanded *Belton* beyond the vehicle context, the Third Circuit had previously declined to do so.[103]

In contrast, the Eighth Circuit expanded *Belton* beyond the vehicle context but appeared to be unwilling to do the same with *Gant*.[104] On the face of its opinion in *United States v. Perdoma*,[105] the Eighth Circuit declined to rule on whether *Gant* is applicable because the defendant

serves as an explication of *Chimel* with respect to interior searches of an automobile." *Johnson*, 16 F.3d at 73.

In *United States v. Fleming*, the Seventh Circuit, noting that *Belton* did not apply to most *Chimel* searches, nonetheless applied *Belton* because the defendants' arguments were identical to those asserted by the defendant in *Belton*, where the search was upheld by the Supreme Court. *Fleming*, 677 F.2d at 607. The Seventh Circuit later expanded *Belton* more fully. *See* United States v. Queen, 847 F.2d 346 (7th Cir. 1988) (relying on *Belton* and *Chimel* to uphold search of a closet in which arrestee had been hiding).

96. *See* Arizona v. Gant, 129 S. Ct. 1710 (2009); *see also supra* notes 76, 86-88 and accompanying text.

97. *See* United States v. Perdoma, 621 F.3d 745 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010) (refusing to apply *Gant* to bag search); United States v. Shakir, 616 F.3d 315 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010) (applying *Gant* to bag search).

98. *See Perdoma*, 621 F.3d at 745; *Shakir*, 616 F.3d at 315; *see also* United States v. Mefford, 658 F.2d 588 (8th Cir. 1981).

99. *Shakir*, 616 F.3d at 315.

100. *See id.* at 321.

101. *Id.* at 318.

102. *Id.*

103. *See* United States v. Nigro, 218 F. App'x 153, 156 (3d Cir. 2007) (limiting its analysis to *Chimel* based upon the reasoning in *Myers*); United States v. Myers, 308 F.3d 251, 268-270 (3d Cir. 2002) (rejecting expanding *Belton* beyond the vehicle context).

104. *See* United States v. Perdoma, 621 F.3d 745, 751-52 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010); *see also id.* at 756 (Bye, J., dissenting).

105. *Id.* at 751-52.

failed to raise *Gant*, either on appeal or before the trial court.[106] However, not only did the defendant make the argument that *Gant* invalidated the search but the district court ordered supplemental briefs on the issue and ultimately agreed with the defendant on this point.[107] The Eighth Circuit noted that *Gant* may have applicability outside the vehicle context but then asserted that *Gant* does not apply to a bag search because *Gant* was a vehicle case and "must be understood in that limited context."[108] In support of its assertion, the Eighth Circuit relied on the fact that the Supreme Court focused "exclusively on how the rule will affect *vehicle* searches."[109]

The Court has failed to provide clear guidance on how its precedent should be applied, causing not only a circuit split as to the applicability of *Belton* and *Gant* outside of the vehicle context but also causing courts to be unable to choose and support a position consistently.[110] The Supreme Court has had ample opportunity to correct the circuit split.[111] Parties in seventeen different search incident to arrest cases have filed for certiorari; the Supreme Court has denied each petition.[112] Without the

106. *Id.*

107. United States v. Perdoma, No. 8:08CR460, 2009 WL 1490595, at *2 (D. Neb. May 22, 2009), *aff'd on other grounds*, 621 F.3d 745 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010); *see also Perdoma*, 621 F.3d at 754 (Bye, J., dissenting). The district court upheld the search on probable cause grounds that were later overturned by the Eighth Circuit. *Perdoma*, 2009 WL 1490595, at *2-3; *see also Perdoma*, 621 F.3d at 753.

108. *Perdoma*, 621 F.3d at 752.

109. *Id.* The dissent claims, correctly, that despite the majority's assertion that *Gant* was not argued before either court, the majority "goes to great lengths to limit *Gant* to vehicle searches." *Id.* at 756 (Bye, J., dissenting).

110. The Third Circuit, which refused to expand *Belton*, has expanded *Gant*. *See* United States v. Shakir, 616 F.3d 315 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010); United States v. Myers, 308 F.3d 251 (3d Cir. 2002). The Eighth Circuit expanded *Belton* but refused to apply *Gant* outside of the vehicle context in a very confused opinion. *See Perdoma*, 621 F.3d at 745; United States v. Palumbo, 735 F.2d 1095 (8th Cir. 1984). The Fifth Circuit completely changed its course regarding expansion of *Belton* between the hearing and rehearing of a single case and later reverted back to its original position. *See* United States v. Johnson, 16 F.3d 69 (5th Cir. 1994); United States v. Johnson, 846 F.2d 279 (5th Cir. 1988); United States v. Johnson, 834 F.2d 1191 (5th Cir. 1987), *withdrawn*, 846 F.2d 279 (1988).

111. *See, e.g.*, *Shakir*, 616 F.3d at 315; United States v. Jones, 218 F. App'x 916 (11th Cir.), *cert. denied*, 552 U.S. 947 (2007); United States v. Nelson, 102 F.3d 1344 (4th Cir. 1996), *cert. denied*, 520 U.S. 1203 (1997); United States v. Lucas, 898 F.2d 606 (8th Cir.), *cert. denied*, 498 U.S. 838 (1990); United States v. Porter, 738 F.2d 622 (4th Cir.), *cert. denied*, 469 U.S. 983 (1984).

112. *See, e.g.*, *Shakir*, 616 F.3d at 315; United States v. Nigro, 218 F. App'x 153 (3d Cir.), *cert. denied*, 550 U.S. 925 (2007); Northrop v. Trippett, 265 F.3d 372 (6th Cir. 2001), *cert. denied*, 535 U.S. 955 (2002); United States v. Han, 74 F.2d 537 (4th Cir.), *cert. denied*, 517 U.S. 1239 (1996); *Johnson*, 846 F.2d at 279, *cert. denied*, 488 U.S. 995

Court's guidance, the question of *Belton*'s and *Gant*'s applicability to searches incident to arrest will continue to trouble the circuit courts.

B. Why the Supreme Court's Failure to Decide the Applicability of Gant *Matters*

The Supreme Court should grant certiorari in order to authoritatively establish whether and to what extent *Belton* and *Gant* apply to searches incident to arrest outside of the vehicle context. Currently, the protections afforded by the Fourth and Fourteenth Amendments vary greatly depending on the jurisdiction in which the defendant is arrested and whether that jurisdiction expands *Gant* beyond vehicle searches.[113] Furthermore, the necessity of each circuit to consider, and reconsider, the issue until an authoritative interpretation is made will result in wasted judicial resources.[114] Not only is the general exception of searches incident to arrest affected, but the difference in law from circuit to circuit or misapplication of that law may dramatically change the protections of the Fourth Amendment.[115]

1. Different Circuits, Different Fourth Amendment Protections

The Fourth Amendment protections and search incident to arrest exception permit, or disallow, different searches depending on where the arrest occurs.[116] Some circuits have expanded *Belton* to the point that *Belton* is considered the authority for all searches incident to arrest;[117]

(1988); United States v. Mefford, 658 F.2d 588 (8th Cir. 1981), *cert. denied*, 455 U.S. 1003 (1982).

113. *Compare Myers*, 308 F.3d at 251 (rejecting expanding *Belton* beyond the vehicle context and invalidating a bag search based on *Chimel*), *with* United States v. Taylor, 656 F. Supp. 2d 988 (E.D. Mo. 2009) (applying *Gant* to invalidate a home search when the arrestee was secured in police car).

114. *See* Roger J. Miner, *Federal Court Reform Should Start at the Top*, 77 JUDICATURE 104, 106 (1993).

115. *See* Angad Singh, *Stepping Out of the Vehicle: The Potential of* Arizona v. Gant *to End Automatic Searches Incident to Arrest Beyond the Vehicle Context*, 59 AM. U.L. REV. 1759, 1782, 1796-97 (2010) (asserting that expansion of *Gant* will result in invalidation of nearly all searches incident to arrest).

116. *Compare Myers*, 308 F.3d at 251 (rejecting expanding *Belton* beyond the vehicle context and invalidating a bag search based on *Chimel*), *with Taylor*, 656 F. Supp. 2d at 988 (applying *Gant* to invalidate a home search when the arrestee was secured in police car).

117. *See, e.g.*, United States v. Christian, 190 F. App'x 720, 723 (10th Cir. 2006); United States v. Lewis, No. 95-5426, 1996 WL 193993, at *2 (4th Cir. April 23, 1996); United States v. Franklin, Nos. 89-6268, 89-6305, 1990 WL 124207, at *5 (6th Cir. Aug. 27, 1990).

courts are likely to come to a similar split with *Gant*.[118] However, because the Supreme Court overlooked the expansion of *Belton*,[119] it is possible the lower courts will see this as an indication that *Gant*'s refining of *Chimel* will be applicable to all searches incident to arrest.[120] A survey of recent cases demonstrates that the law regarding searches incident to arrest is in utter confusion.[121]

Although the Third and Eighth Circuits have addressed the applicability of *Gant* outside the vehicle context,[122] district courts are, for the most part, left to decide the issue themselves, leading to differing decisions even within the circuits.[123] This state of confusion bodes poorly for all involved: the police,[124] who must attempt to abide by the law in executing searches incident to arrest; the magistrates and district court judges, who have the responsibility in the first instance of determining the validity of such searches; and the defendants[125] and their counsel, who likely will have to appeal suppression rulings related to searches incident to arrest and re-litigate cases based on the appellate decisions. This type of confusion led the Court in *Belton* to note that "when a person cannot know how a court will apply a settled principle to

118. *See* United States v. Curtis, 653 F.3d 704, 713 (5th Cir. 2011) (noting the split between the circuits over whether *Gant* is applicable to only vehicle searches or whether *Gant* "generally limits the scope of the search-incident-to-arrest exception").

119. *See, e.g.*, United States v. Abdul-Saboor, 85 F.3d 664 (D.C. Cir. 1996); United States v. Queen, 847 F.2d 346 (7th Cir. 1988).

120. *See* United States v. Shakir, 616 F.3d 315 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010).

121. *See, e.g.*, *id.* (expanding *Gant*); United States v. Perdoma, 621 F.3d 745 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010) (limiting *Gant* to vehicle searches); United States v. Jack, No. 1:09-cr-158, 2010 WL 2506709 (E.D. Tenn. May 25, 2010) (applying *Gant* to the search of nearby riverbank); United States v. Harris, No. 09 CR 0028-2, 2009 WL 3055331 (N.D. Ill. Sept. 21, 2009) (declining to extend *Gant*).

122. *See Shakir*, 616 F.3d at 315; *Perdoma*, 621 F.3d at 745.

123. *See, e.g.*, United States v. Rodriguez-Salgado, No. 1:09-CR-454-5-CAP, 2010 WL 3035755 (N.D. Ga. July 30, 2010) (adopting as its opinion and order the magistrate's report in United States v. Salgado, No. 1:09-CR-454-CAP-ECS-5, 2010 WL 3062440 (N.D. Ga. June 12, 2010) (applying *Gant* to search of pants on arrestee's floor)); United States v. Bowman, No. 2:09-cr-182-MEF, 2010 WL 749908 (M.D. Ala. Mar. 4, 2010) (refusing to expand *Gant* beyond the vehicle context). District courts in the Third Circuit also had trouble before the Circuit Court of Appeals decided the issue. *Compare* United States v. Matthews, No. 09-612, 2010 WL 2671388 (E.D. Pa. July 1, 2010) (applying *Gant* to bag search), *with* United States v. Snard, No. 09-cr-00212, 2009 WL 3105271 (E.D. Pa. 2009) (refusing to apply *Gant* to search in motel room because facts are distinguishable).

124. *See* New York v. Belton, 453 U.S. 454, 459-60 (1981); United States v. Robinson, 414 U.S. 218, 235 (1973) (supporting the need for bright-line rules for Fourth Amendment protections and asserting that an officer's determination of the search area should not be subject to case-by-case adjudication).

125. *See Belton*, 453 U.S. at 459-60 (noting that lack of certainty in the law made it difficult for a person to know what he may or may not do).

a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority."[126] The police and the public may be uncertain because the judge does not know how to apply the law properly, especially when there are splits within a circuit and neither the Courts of Appeals nor the Supreme Court has considered the issue.[127]

Although litigation is important in creating case law, repeated litigation with inconsistent results throws our system into confusion.[128] As many, including Justice Ruth Bader Ginsburg, have suggested, the Court often waits for a deep split before deciding the issue.[129] Although there are few cases focusing on the applicability of *Gant*,[130] the split originated when courts needed to determine the applicability of *Belton*;[131] courts rely on *Belton* in determining *Gant*'s applicability.[132] The Court may be waiting for a "good vehicle," one that will permit the Court to craft a clear and decisive holding.[133] However, the Supreme Court has rejected nearly twenty cases on this issue.[134] How many more petitions for certiorari must be denied before the Court finds the right one? In *Shakir*, for instance, the Third Circuit applied *Gant* to validate a bag search.[135] *Shakir* would have provided a relatively easy means of clarifying the applicability of *Gant* outside of the vehicle context.

As Justice White often noted, "[o]ne of the Court's duties is to do its best to see that the federal law is not being applied differently in the various circuits around the country."[136] With regard to searches incident to arrest, the Court has failed.[137] The Supreme Court's consideration of

126. *Id.*

127. *See id.* at 459.

128. *See* discussion *infra* Part III.B.2.

129. *See* Ruth Bader Ginsburg, *Workways of the Supreme Court*, 25 T. JEFFERSON L. REV. 517, 517, 521-22 (2003).

130. *See, e.g.*, United States v. Perdoma, 621 F.3d 745, 751 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010); United States v. Shakir, 616 F.3d 315, 318 (3d Cir.), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010).

131. *See supra* notes 95-96 and accompanying text.

132. *See Perdoma*, 621 F.3d at 745; *Shakir*, 616 F.3d at 315.

133. *See* H.W. PERRY, JR., DECIDING TO DECIDE: AGENDA SETTING IN THE UNITED STATES SUPREME COURT 265, 281-82 (1991).

134. *See supra* notes 112-13 and accompanying text.

135. *See Shakir*, 616 F.3d at 315.

136. Taylor v. United States, 504 U.S. 991 (1992) (White, J., dissenting).

137. *See, e.g.*, United States v. Rodriguez-Salgado, No. 1:09-CR-454-5-CAP, 2010 WL 3035755 (N.D. Ga. July 30, 2010) (adopting as its opinion and order the magistrate's report in United States v. Salgado, No. 1:09-CR-454-CAP-ECS-5, 2010 WL 3062440 (N.D. Ga. June 12, 2010) (applying *Gant* to search of pants on arrestee's floor)); United States v. Bowman, No. 2:09-cr-182-MEF, 2010 WL 749908 (M.D. Ala. Mar. 4, 2010) (refusing to expand *Gant* beyond the vehicle context). District courts in the Third Circuit had a similar split before the Circuit Court of Appeals decided the issue. *Compare*

the applicability of *Belton* and *Gant* to searches incident to arrest outside of the vehicle context is the most certain way to eliminate the confusion and to ensure that Fourth Amendment protections are equal in all federal jurisdictions.

2. Lower Courts Waste Judicial Resources Reinventing the Wheel

"A judicial decision is a public act, created with societal resources for the purpose of resolving current disputes and providing guidance in future matters."[138] Because different courts have come to different conclusions and few circuits have addressed the issue,[139] these decisions foster confusion rather than provide guidance. Judge Miner, a Senior Judge in the Second Circuit Court of Appeals, notes that confusion of the law breeds litigation, and the constant re-litigation of the same issues wastes judicial resources.[140] Judges, at all levels, disagree on whether *Belton* and *Gant* apply outside of the vehicle context.[141] The discord gives the parties every reason to make an argument that the courts do not know how to answer.[142]

If the Supreme Court considered whether *Belton* and *Gant* were applicable outside of the vehicle context, not only could the judges spend less time considering the issue but they would spend less time retrying cases based on this issue.[143] Prosecutors and defense attorneys also spend a great deal of time on these issues, both in litigating the

United States v. Matthews, No. 09-612, 2010 WL 2671388 (E.D. Pa. July 1, 2010) (applying *Gant* to bag search), *with* United States v. Snard, No. 09-cr-00212, 2009 WL 3105271 (E.D. Pa. 2009) (refusing to apply *Gant* to search in motel room because facts are distinguishable).

138. Benavides v. Jackson Nat'l Life Ins. Co., 820 F. Supp. 1284, 1288 (D. Colo. 1993).

139. *See, e.g.*, United States v. Perdoma, 621 F.3d 745 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010); *Shakir*, 616 F.3d at 315. Other circuits have not yet squarely confronted the applicability of *Gant* outside of the vehicle context. The Sixth Circuit has addressed *Gant* only so far as to distinguish it from a case where the search was made pursuant to *Terry* rather than being incident to an arrest. *See* United States v. Walker, 615 F.3d 728 (6th Cir.), *cert. denied*, 131 S. Ct. 677 (2010).

140. *See* Miner, *supra* note 115, at 106-07.

141. *See* United States v. Curtis, 653 F.3d 704, 713 (5th Cir. 2011) (noting the split between the circuits over whether *Gant* is applicable to only vehicle searches or whether *Gant* "generally limits the scope of the search-incident-to-arrest exception").

142. *See* Miner, *supra* note 115, at 106-07.

143. *See id.* at 106 (noting that the Supreme Court is the only court that can settle uncertainty in the law); C. Steven Bradford, *Following Dead Precedent: The Supreme Court's Ill-Advised Rejection of Anticipatory Overruling*, 59 FORDHAM L. REV. 39, 80 (1990); Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987) ("[P]recedent allows less reconsideration of questions already considered.").

suppression motion in the first instance and in retrying the case if the trial court is reversed.[144] Additionally, the appeals process takes time.[145] The need to retry a case results in additional monetary and societal costs: the money spent on attorneys and expert witnesses, the time spent to retry the case, and the effort spent to locate and prepare witnesses for retrial.[146]

If the Supreme Court were to decide this issue, trial court judges could rule in the first instance with reasonable confidence that the decision would be upheld at the appellate level.[147] The number of retrials could be reduced and judicial resources could be used more efficiently.[148] To ensure that the protections of the Fourth Amendment are equally applied in various circuits and to avoid wasting judicial resources, the Supreme Court should grant certiorari to decide the issue of whether *Belton* and *Gant* are applicable outside the vehicle context.

3. Misapplication of *Gant* May Result in the Death of the Search Incident to Arrest

Although *Gant*'s immediate effect is to severely limit searches that are incident to arrest in the vehicle context, *Gant* has the possibility to strengthen *Chimel* by eliminating unnecessary and unwarranted searches incident to arrest.[149] Misapplication of *Gant*, however, has the potential to eliminate nearly all searches incident to arrest that are not justified by exigent circumstances.[150] Not only did *Gant* revive *Chimel*'s twin rationales in the search incident to arrest doctrine but *Gant* further defined the area of immediate control with the requirement of accessibility.[151] Like many precedents, *Gant* can be misread and

144. *See* Steven R. Harmon, Comment, *Unsettling Settlements: Should Stipulated Reversals Be Allowed to Trump Judgments' Collateral Estoppel Effects Under* Neary*?*, 85 CALIF. L. REV. 479, 484 (1997).

145. The average length of a criminal appeal, from notice of appeal to final disposition by the appellate court, was approximately one year in fiscal year 2009. James C. Duff, JUDICIAL BUSINESS OF THE UNITED STATES COURTS: 2009 ANNUAL REPORT OF THE DIRECTOR 104-05 (2009), *available at* http://www.uscourts.gov/uscourts/Statistics/JudicialBusiness/2009/appendices/B04ASep09.pdf.

146. *See* Emil J. Bove III, Note, *Preserving the Value of Unanimous Criminal Jury Verdicts in Anti-Deadlock Instructions*, 97 GEO. L.J. 251, 258-59 (2008).

147. *See* Miner, *supra* note 115, at 106 (noting that the Supreme Court is the only court that can settle uncertainty in the law).

148. *See* Harmon, *supra* note 145, at 484.

149. *See* Singh, *supra* note 116, at 1776.

150. *Cf. id.* at 1782, 1796-97 (concluding that the Court's reasoning in *Gant* essentially abrogates those cases that permit an automatic search incident to arrest, such as *Robinson*).

151. *See* discussion *infra* Part III.C.2.

misapplied.[152] One commentator has argued that if the courts expand *Gant*'s accessibility standard beyond the vehicle context, then searches long approved under *Chimel* will become invalid because the arrestee may not have had sufficient actual ability to access the searched area or container.[153] Although such treatment of *Gant* to disapprove those searches would be a misapplication,[154] it is possible for *Gant* to be read in just such a light.[155]

One commentator has noted that a search incident to arrest could be rendered invalid through a particular reading of *Gant*.[156] Singh applied *Gant* to the facts of *United States v. Robinson*,[157] where the police searched a crumpled cigarette package found in the defendant's pocket.[158] According to Singh, *Gant* will be interpreted such that when an arrestee's hands are secured behind his back, even items found on his person may no longer be subject to search because the twin rationales of *Chimel* no longer apply.[159] A properly secured arrestee will be unable to access a container, such as a crumpled cigarette pack or a bag, removed from his person and retained by the police; therefore, the police will have no reason to believe that the arrestee will access the container to either destroy evidence or attempt to harm police officers.[160] If the arrestee cannot destroy evidence or harm police, *Gant* holds that a search is not justified under *Chimel*.[161]

For support of his position, Singh relied on *United States v. Perdoma*, where the District Court for the District of Nebraska held that *Gant* could not justify a search of a bag incident to arrest when the search of the bag took place simultaneously with a search of the arrestee's person.[162] The court determined that, because one police officer was searching the arrestee, a second officer was watching the arrestee, and a third officer was searching and in possession of the bag, the arrestee did

152. *Cf.* Myron Moskovitz, *A Rule in Search of Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WIS. L. REV. 657 (2002) (asserting that *Chimel* and *Belton* are bad precedent and often misread).

153. Singh, *supra* note 116, at 1787, 1796-97.

154. *Gant* does indeed add an accessibility element to *Chimel*, but that element does not abrogate all searches incident to arrest. *See* discussion *infra* Part III.C.2.

155. *See* Singh, *supra* note 116, at 1780-82.

156. *See id.* at 1780-82.

157. United States v. Robinson, 414 U.S. 218, 235 (1973).

158. *See id.* at 221-23. The opinion is unclear as to whether Robinson was handcuffed at this time. *Id.*; *see also* Singh, *supra* note 116, at 1782.

159. *See* Singh, *supra* note 116, at 1780-82.

160. *See id.*

161. *See* Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).

162. *See* United States v. Perdoma, No. 8:08CR460, 2009 WL 1490595, at *2 (D. Neb. May 22, 2009), *aff'd on other grounds*, 621 F.3d 745 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010).

not have sufficient ability to access the bag to make it a valid search incident to arrest.[163] The Eighth Circuit refused to apply *Gant* to a bag search,[164] but other courts have expanded *Gant* to such searches and may apply *Gant* as the District of Nebraska did.[165]

Like the District of Nebraska, the Third Circuit expanded *Gant*;[166] however, the Third Circuit noted that only a "reasonable possibility" of access was necessary.[167] The court specifically noted that police initially had trouble securing Shakir due to his girth[168] and that even after Shakir was handcuffed behind his back, two officers continued to hold his arms.[169] The court held that because the bag was searched at Shakir's feet, he could have dropped to his knees and accessed the bag, and this possibility rendered the search valid under *Gant*.[170]

With little or no guidance, lower courts are likely to continue to make decisions similar to the district court decision in *United States v. Perdoma*.[171] Circuits that choose to expand *Gant* may be pushing the search incident to arrest closer to its demise, as Singh predicts,[172] not tethering the search incident to arrest doctrine to *Chimel*, as the Supreme Court has expressed a desire to do.[173] To encourage courts to remain consistent with Supreme Court precedent establishing the search incident to arrest exception, the Supreme Court needs to decide the applicability of *Gant* outside of the vehicle context. Doing so will not only prevent lower courts from underruling the Supreme Court[174] but the Court also will be able to ensure that Fourth Amendment protections are

163. *See id.*

164. *See* United States v. Perdoma, 621 F.3d 745, 751 (8th Cir. 2010), *reh'g and reh'g en banc denied*, (Nov. 9, 2010).

165. *See* United States v. Matthews, No. 09-612, 2010 WL 2671388 (E.D. Pa. July 1, 2010); United States v. Bennett, No. 08-535, 2010 WL 1427593 (E.D. Pa. April 8, 2010); United States v. Taylor, 656 F. Supp. 2d 988 (E.D. Mo. 2009).

166. *See* United States v. Shakir, 616 F.3d 315 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010).

167. *See id.* at 320-21.

168. *See id.* at 316.

169. *See id.*

170. *See id.* at 321.

171. *See, e.g.*, United States v. Matthews, No. 09-612, 2010 WL 2671388 (E.D. Pa. July 1, 2010); United States v. Taylor, 656 F. Supp. 2d 988 (E.D. Mo. 2009); United States v. Perdoma, No. 8:08CR460, 2009 WL 1490595 (D. Neb. May 22, 2009), *aff'd on other grounds*, 621 F.3d 745 (8th Cir. 2010), *reh'g and reh'g en banc denied* (Nov. 9, 2010).

172. *See* Singh, *supra* note 116, at 1796-97.

173. *See* Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).

174. *Contra* Singh, *supra* note 116, at 1783.

safeguarded equally throughout the nation[175] and to allow courts to make more efficient use of judicial resources.[176]

C. Points the Supreme Court Needs to Address When Deciding the Applicability of Gant

If the Supreme Court grants certiorari to address the applicability of *Gant* outside of the vehicle case, the Court should address two specific points to clarify the law regarding search incident to arrest. First, both *Belton* and *Gant* are cases involving vehicle searches,[177] but both cases have been expanded beyond the vehicle context by lower courts.[178] The Court should address whether this line of cases should continue as a separate line within the search incident to arrest doctrine or whether they should be abolished. On closer examination, the Court will be able to see that *Belton* and *Gant* were not founded on any concept specific only to vehicles but instead focused on factual distinctions, so the rationales behind those cases may be easily extended to searches outside of the vehicle context, as many lower courts have already done.[179] If *Gant*'s rationale may be extended beyond the vehicle context,[180] there will be no reason to have a vehicle-specific rule regarding searches incident to arrest, so the Court can abolish the distinction between vehicles and other searches incident to arrest.

If *Gant* is expanded beyond the vehicle context, it may conflict with how some lower courts have read *Chimel*.[181] Although certain circuits read *Chimel* as determining the area of immediate control at the time of arrest,[182] *Gant* focuses on the area the arrestee may have a reasonable possibility of accessing at the time of the search.[183] The difference between the two positions can greatly change the area to be searched and affect Fourth Amendment protections.[184] If the Court truly wishes to tether searches incident to arrest to *Chimel*'s justifications, the

175. *See* discussion *supra* Part III.B.1.
176. *See* discussion *supra* Part III.B.2.
177. *See Gant*, 129 S. Ct. at 1710; New York v. Belton, 453 U.S. 454 (1981).
178. *See, e.g.*, United States v. Shakir, 616 F.3d 315 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010); United States v. Tejada, 524 F.3d 809 (7th Cir. 2008); Northrop v. Trippett, 265 F.3d 372 (6th Cir. 2001).
179. *See, e.g.*, *Shakir*, 616 F.3d at 315; United States v. Litman, 739 F.2d 137 (4th Cir. 1984); United States v. Brown, 671 F.2d 585 (D.C. Cir. 1982).
180. *See Shakir*, 616 F.3d at 315.
181. *See* discussion *infra* Part III.C.2.
182. *See, e.g.*, *Northrop*, 265 F.3d at 379; United States v. Clemons, No. 95-5162, 1995 WL 729479 (4th Cir. Dec. 11, 1995); United States v. Queen, 847 F.2d 346, 353-54 (7th Cir. 1988).
183. *See* Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).
184. *See* Moskovitz, *supra* note 153, at 689-90.

Court should firmly establish *Gant*'s "time of search" test as the standard for defining the area of immediate control under *Chimel*.

1. Should Vehicles Have a Specialized Search Incident to Arrest Rule?

When the Supreme Court decided *Belton*, the majority of the Court appeared convinced that a specialized rule for searches incident to the arrest of a vehicle occupant was necessary.[185] Decades of precedent creating and applying rules particular to the vehicle context could have justified such a rule,[186] but the Court chose not to rely on this precedent in creating the *Belton* rule.[187] The vehicle-specific rule set forth in *Belton* and *Gant* should be abolished for two main reasons: (1) the rules are fact-bound and not grounded in the mobility or privacy interests which traditionally justify automobile-specific rules;[188] and (2) at least five justices of the Supreme Court believe that these rules have been or should be overruled, which leaves a question as to the controlling authority in search incident to arrest cases.[189]

Precedent establishing different rules for vehicles dates back to 1925 and *Carroll v. United States*.[190] The Court in *Carroll* determined that the most compelling reason for a rule particular to vehicles is the ready mobility of vehicles.[191] The inherent mobility of a vehicle may result in the arrestee using the vehicle to flee the police or to move evidence outside of the jurisdiction in which it is sought.[192]

Later, in *South Dakota v. Opperman*,[193] the Court announced another reason for the "automobile exception":[194] the lesser expectation of privacy that a person has in a vehicle.[195] Because vehicles on the road

185. *See* New York v. Belton, 453 U.S. 454 (1981).

186. *See* South Dakota v. Opperman, 428 U.S. 364, 367 (1976) (upholding a routine inventory search of lawfully impounded vehicle); Carroll v. United States, 267 U.S. 132 (1925) (upholding a warrantless vehicle search because of the inherent mobility of vehicles).

187. *See Belton*, 453 U.S. at 454.

188. *See Gant*, 129 S. Ct. at 1710; *Belton*, 453 U.S. at 454.

189. *See Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring); *id.* at 1726 (Alito, J., dissenting).

190. *Carroll*, 267 U.S. at 132.

191. *See id.* at 153; *see also* California v. Carney, 471 U.S. 386, 391 (1985) (upholding vehicle search because of inherent mobility of vehicles and reduced expectation of privacy in a vehicle); *Opperman*, 428 U.S. at 367.

192. *See Carney*, 471 U.S. at 391; *Carroll*, 267 U.S. at 153; *see also Opperman*, 428 U.S. at 367.

193. *Opperman*, 428 U.S. at 367.

194. *See id.* at 382 (Powell, J., concurring).

195. *See id.* at 367; *see Carney*, 471 U.S. at 391.

are heavily regulated,[196] individuals understand that the government has some interest in the vehicle,[197] the condition of a vehicle's driver,[198] and perhaps, the contents of the vehicle.[199] In addition to the higher level of regulation, most vehicles have multiple windows, through which the interior of the vehicle is open to inspection by any passerby.[200] Because a vehicle's interior is generally visible to the public through its windows, a vehicle is rarely the repository of private, personal items.[201] Vehicles also travel on public roadways, an act that is public in nature and in which police have certain safety and "community caretaking" interests.[202] The regulation of vehicles, the fact that vehicles and their contents are often in plain view, and the public nature of travel all contribute to the lesser sense of privacy that can be reasonably expected in vehicles.[203]

Not all Justices on the Supreme Court believe that separate rules for vehicles always are justified.[204] A divided Court noted in *Coolidge v. New Hampshire*[205] that "the word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears."[206] In *Arkansas v. Sanders*,[207] just two years before *Belton* was decided,[208] the Court further noted that the "Fourth Amendment applies evenly to all containers, within or without a car."[209] The Court's precedents from the 1970s indicated that automobiles may not always be entitled to special rules, especially with regard to searches and seizures.[210] Although *Belton* clearly articulated a rule applicable only in a vehicle context, some

196. *See Carney*, 471 U.S. at 392; *Opperman*, 428 U.S. at 368.
197. *See Carney*, 471 U.S. at 392-93; *Opperman*, 428 U.S. at 368-69.
198. For instance, every state has laws against driving under the influence of alcohol or a controlled substance. Tina Wescott Cafaro, *Slipping Through the Cracks: Why Can't We Stop Drugged Driving?*, 32 W. NEW ENG. L. REV. 33, 44 (2010). Sobriety checkpoints, which create a minor intrusion into a vehicle, have long been approved by the courts. *See* Michigan Dep't of State Police v. Sitz, 496 U.S. 444, 447, 455 (1990).
199. For example, vehicles carrying explosives, flammable liquids, or other hazardous materials are heavily regulated. *See* David M. Meezan, Meaghan G. Boyd, *Federal Regulation of Hazardous Materials Transportation*, 21 NAT. RESOURCES & ENV'T 22 (Fall 2006).
200. *See Carney*, 471 U.S. at 391; *Opperman*, 428 U.S. at 368.
201. *See* Cardwell v. Lewis, 417 U.S. 583, 590 (1974).
202. *Opperman*, 428 U.S. at 368-69.
203. *See Carney*, 471 U.S. at 391-93; *Opperman*, 428 U.S. at 368-69.
204. *See* Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979).
205. Coolidge v. New Hampshire, 403 U.S. 443 (1971).
206. *Id.* at 461 (plurality).
207. *Sanders*, 442 U.S. at 753.
208. *See* New York v. Belton, 453 U.S. 454 (1981); *Sanders*, 442 U.S. at 753.
209. United States v. Shah, No. 87-118, 1987 WL 4862, at *4 (E.D. La. May 4, 1987) (discussing *Sanders*, 442 U.S. at 764-65).
210. *See Sanders*, 442 U.S. at 764-65; *Coolidge*, 403 U.S. at 461 (plurality).

Justices continued to harbor doubts about specialized rules for vehicles.[211] Justice Stevens, for example, noted a few years after *Belton* that inherent mobility alone was insufficient to justify an automobile exception.[212]

Although all of the justifications for and reasons against vehicle-specific rules may have been in the Justices' minds when deciding *Belton*, the Court expressly declined to consider how the automobile exception would affect the case.[213] The Court disposed of the automobile exception in a footnote[214] and opted instead to create a new rule for the vehicle context.[215] Unlike in *Carroll* and *Opperman*,[216] the Court's opinion in *Belton* focused on the facts and not on the concept of a vehicle's mobility or the lesser privacy interest in a vehicle,[217] which resulted in a fact-bound contextual rule much different from the traditional type of automobile exception.[218]

The same type of fact-based context rule set forth in *Belton* was carried on in *Gant*.[219] The Court in *Arizona v. Gant* reinterpreted the *Chimel* decision, but like *Belton*, restricted its holdings to the vehicle context.[220] In justifying the limitations *Gant* set on the *Belton* rule, the Court relied, in part, on the factual distinctness of the cases[221] rather than any change in the perceived privacy interests which have been the basis

211. *See* California v. Carney, 471 U.S. 386, 395, 402 (1985) (Stevens, J., dissenting).

212. *See id.* However, Justice Stevens also noted that the "character" of the place searched "plays an important role in the Fourth Amendment analysis," so his view on this is less than clear. *Id.* at 395 (Stevens, J., dissenting).

213. *See Belton*, 453 U.S. at 462 n.6.

214. *See id.* Justice Stevens, however, notes in his concurrence that the automobile exception would sufficiently decide the case and that the new rule propounded by the Court is unnecessary and likely to create problems. *See id.* at 463 (Stevens, J., concurring) (concurring in the judgment for reasons stated in his dissent in *Robbins v. California*, 453 U.S. 420, 444 (1981) (Stevens, J., dissenting)).

215. *See id.* at 459-60.

216. *See* South Dakota v. Opperman, 428 U.S. 364, 367 (1976); Carroll v. United States, 267 U.S. 132, 153 (1925).

217. *See Belton*, 453 U.S. at 459-60, 462 (1981).

218. *Compare id.* (permitting search of vehicle incident to every arrest), *with Opperman*, 428 U.S. at 367 (upholding inventory search of vehicle when done routinely as a means of protecting officer safety); *Carroll*, 267 U.S. at 153 (upholding vehicle searched based on inherent mobility of vehicle); *see also* California v. Carney, 471 U.S. 386, 391 (1985) (upholding vehicle search based on inherent mobility of vehicle and reduced expectation of privacy in a vehicle).

219. *See* Arizona v. Gant, 129 S. Ct. 1710, 1722 (2009); *Belton*, 453 U.S. at 454; *see also* Myron Moskovitz, *The Road to Reason:* Arizona v. Gant *and the Search Incident to Arrest Doctrine*, 79 MISS. L.J. 181, 190 (2009).

220. *See Gant*, 129 S. Ct. at 1719; *Belton*, 453 U.S. at 460.

221. *See Gant*, 129 S. Ct. at 1722.

for most automobile-specific rules.[222] Neither the *Belton* Court nor *Gant* Court grounded its decision in the traditionally accepted reasons for separate rules for automobiles.[223] This alternative grounding for *Belton* and *Gant* is part of the reason for the confusion regarding whether these cases apply outside of the vehicle context.[224] A rule based on facts is subject to having its reasoning stretched, as lower courts have done with *Belton* and *Gant*,[225] whereas a rule based on mobility and lesser privacy interests could not reasonably be applied outside of the automobile context.[226] As one commentator has noted, "when lower courts believe they are bound by a rule that does not stand up to its own rationale, one can expect conflict and confusion."[227] The Supreme Court has admitted that *Belton* was based on a faulty assumption and does not stand up to its own reasoning.[228]

Because the justifications for a rule specific to the vehicle context have been fact-bound rather than based on privacy or mobility concerns,[229] the vehicle rules propounded in *Belton* and *Gant* are confusing and unnecessary. The Court claims that *Gant* merely re-tethers *Belton* to *Chimel*.[230] If this claim is true, there is no reason identifiable from the Court's opinion as to why the Court did not simply declare *Belton* overruled and *Chimel* controlling for all searches incident to arrest.[231] The majority expects that *Chimel* principles will govern vehicle searches incident to arrest, but it still declines to overrule the line of vehicle cases.[232] Instead, as Justice Scalia points out, the *Belton-Gant* line of cases has become no more than a charade.[233] Notably, five

222. *See Opperman*, 428 U.S. at 367; *Carroll*, 267 U.S. at 153; *see also Carney*, 471 U.S. at 391.

223. *Compare Gant*, 129 S. Ct. at 1719; *Belton*, 453 U.S. at 459-60, 462, *with Opperman*, 428 U.S. at 367; *Carroll*, 267 U.S. at 153; *see also Carney*, 471 U.S. at 391.

224. *See* Moskovitz, *supra* note 153, at 681.

225. *See, e.g.*, United States v. Shakir, 616 F.3d 315, 318 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010); United States v. Hudson, 100 F.3d 1409 (9th Cir. 1996); United States v. Brown, 671 F.2d 585, 587 (D.C. Cir. 1982); State v. Roach, 452 N.W.2d 262 (Neb. 1990) (expanding *Belton* and collecting other cases also expanding *Belton*).

226. *See* Arkansas v. Sanders, 442 U.S. 753, 764-65 (1979) (refusing to extend the automobile exception to suitcases seized from automobiles).

227. Moskovitz, *supra* note 153, at 681.

228. *See Gant*, 129 S. Ct. at 1722-23; *see also id.* at 1725 (Scalia, J., concurring).

229. *Compare id.* at 1719; New York v. Belton, 453 U.S. 454, 459-60, 462 (1981), *with* South Dakota v. Opperman, 428 U.S. 364, 367 (1976); Carroll v. United States, 267 U.S. 132, 153 (1925); *see also* California v. Carney, 471 U.S. 386, 391 (1985).

230. *See Gant*, 129 S. Ct. at 1719.

231. *See id.*

232. *See id.* at 1724 (Scalia, J., concurring).

233. *See id.* at 1725 (Scalia, J., concurring); *id.* at 1726 (Alito, J., dissenting).

Justices in *Gant* believe *Belton* either has been or should be overruled.[234] Because the vehicle-specific rule set forth in *Belton* and *Gant* is based on facts rather than sound reasoning[235] and because a majority of Justices believe the vehicle-specific rule set forth in *Belton* should be, or has been, overruled,[236] the *Belton* and *Gant* rule regarding vehicle searches incident to arrest should be abolished.

2. The Area Within the Arrestee's "Immediate Control":[237] When Does Accessibility Matter?

In *Gant*, the Supreme Court focused on whether the arrestee could access the passenger compartment of the vehicle at the time of the search.[238] Although the Court claimed that it was relying on *Chimel*,[239] *Chimel* never clarified when the area of immediate control was determined.[240] With courts expanding *Gant* to searches of homes and bags,[241] *Gant* has highlighted a long-standing circuit split about the basic application of *Chimel*: when accessibility matters.[242] In addressing the applicability of *Gant* outside of the vehicle context, the Court will need to consider when accessibility is important in defining the area to be searched incident to an arrest.

In *Chimel*, the Supreme Court created the immediate control standard, but the Court failed to discuss several key aspects of the standard, including whether the arrestee was handcuffed or otherwise secured.[243] The Court also neglected to mention whether the area within

234. *See id.* at 1725 (Scalia, J., concurring); *id.* at 1726 (Alito, J., dissenting).

235. *See id.* at 315; *Belton*, 453 U.S. at 454.

236. *See Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring); *id.* at 1726 (Alito, J., dissenting).

237. Chimel v. California, 395 U.S. 752, 763 (1969).

238. *See Gant*, 129 S. Ct. at 1718-19.

239. *See id.* at 1719.

240. *See Chimel*, 395 U.S. at 752. The Court in *Chimel* focused on the area within the arrestee's reach so accessibility was important, but the Court failed to clarify whether accessibility was measured at the time of arrest or the time of the search. *See id.*

241. *See* United States v. Shakir, 616 F.3d 315 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010); United States v. Taylor, 656 F. Supp. 2d 988 (E.D. Mo. 2009).

242. *See, e.g.*, Northrop v. Trippett, 265 F.3d 372, 379 (6th Cir. 2001) (noting that lack of accessibility at time of search does not invalidate search); United States v. Clemons, No. 95-5162, 1995 WL 729479 (4th Cir. 1995) (upholding search where arrestee was secured at time of arrest and could not access luggage); United States v. Lyons, 706 F.2d 321 (D.C. Cir. 1983) (adding accessibility element to *Chimel*); United States v. Mapp, 476 F.2d 67 (2d Cir. 1973) (adding accessibility element to *Chimel*).

243. *See Chimel*, 395 U.S. at 763. The Court also neglects to mention how many officers were present and whether the arrestee remained in the living room, where he was arrested, or whether he was removed to a police car. *See id.*

the arrestee's immediate control was determined at the time of arrest or the time of search.[244] Although the Court may have believed its instructions were clear, circuit courts often disagree on when to define the area of immediate control.[245]

After the Supreme Court decided *Belton*, courts used *Belton*'s "exclusive control" language to find that lack of accessibility at the time of the search did not invalidate a search.[246] Specifically, the *Belton* Court held that a search could not be declared invalid merely because an officer had gained "exclusive control" over an item.[247] The Court reasoned that this "fallacious theory" would effectively eliminate all searches incident to arrest.[248] Courts understood *Belton* to approve searches if the arrestee had access to the area searched at the time of arrest.[249] This position may have become popular because *Belton* purported to be an explication of *Chimel*,[250] causing many courts to apply *Belton* outside of the vehicle context.[251]

This "time of arrest" assessment permits police to fully secure an area, perhaps even removing the arrestee to another room, before conducting a search incident to arrest.[252] Some courts and commentators have noted that the limited search area must indicate that C*himel* intended a "time of arrest" method because an arrestee seldom has a "serious possibility" at the time of the search to reach anything beyond the arrestee's person because police almost invariably secure the arrestee first.[253] Those courts stretch *Chimel* beyond its limits.[254] If the area is

244. *See id.*; s*ee also* LaFave, *supra* note 59, at 352-53.

245. *See, e.g.*, United States v. Myers, 308 F.3d 251 (3d Cir. 2002) (invalidating search of bag when arrestee was handcuffed, lying face down, and guarded by two armed officers); *Northrop*, 265 F.3d at 379 (noting that lack of accessibility at time of search does not invalidate search); United States v. Johnson, 16 F.3d 69 (5th Cir. 1994) (invalidating briefcase search because numerous officers between arrestee and briefcase meant arrestee could not have accessed briefcase); United States v. Palumbo, 735 F.2d 1095, 1097 (8th Cir. 1984) (upholding search behind dresser drawer because arrestee may have accessed the area at the time of arrest).

246. *See, e.g.*, *Northrop*, 265 F.3d at 379; United States v. Clemons, No. 95-5162, 1995 WL 729479, at *2 (4th Cir. 1995); United States v. Queen, 847 F.2d 346, 353-54 (7th Cir. 1988); *see also* New York v. Belton, 453 U.S. 454, 461 n.5 (1981).

247. *See Belton*, 453 U.S. at 461 n.5.

248. *Id.*

249. *See, e.g.*, *Northrop*, 265 F.3d at 379; *Clemons*, 1995 WL 729479, at *2; *Queen*, 847 F.2d at 353-54.

250. *See Belton*, 453 U.S. at 460 n.3.

251. *See* discussion *supra* Part III.A.

252. *See* United States v. Turner, 926 F.2d 883 (9th Cir. 1991); *see also* Moskovitz, *supra* note 153, at 682.

253. Moskovitz, *supra* note 153, at 689-90; *see* United States v. Abdul-Saboor, 85 F.3d 664 (D.C. Cir. 1996) (determining access at time of arrest but requiring conceivable access at time of search); *Turner*, 926 F.2d at 883.

determined at the time of arrest, an unsecured arrestee likely will have greater freedom of movement and may be able to lunge across a small room to reach a weapon.[255] Therefore, the search area may cover a relatively large area.[256] The "time of arrest" assessment of the area to be searched permits a search incident to arrest even when police have removed an arrestee from the room, so the arrestee is no longer in a position to grab either a weapon or destructible evidence from the search area.[257] Therefore, using a "time of arrest" approach disconnects *Chimel* from its own rationale.[258] This disconnect led the Supreme Court to reject this broad reading of *Belton* in *Gant* and adopt the "time of search" approach with respect to vehicle searches.[259]

Several circuits have held that accessibility at the time of the search is a determinative factor in whether a search incident to arrest is valid.[260] The accessibility element is sometimes referred to as the "time of search" test because the courts determine whether the arrestee could have accessed the area at the time of the search rather than at the time of arrest.[261] These circuits have determined that the application of *Chimel* was "uneven" and led to inconsistent results.[262] These courts have adopted the presumption that an arrestee is "neither an acrobat nor a Houdini."[263] This position is consistent with the Supreme Court's recent

254. *See* Moskovitz, *supra* note 153, at 684-85.
255. *See* LaFave, *supra* note 59, at 355-56.
256. *See* Moskovitz, *supra* note 153, at 682.
257. *See* United States v. Myers, 308 F.3d 251, 273-74 (3d Cir. 2002).
258. *See* Moskovitz, *supra* note 153, at 684-85.
259. *See* Arizona v. Gant, 129 S. Ct. 1710, 1719 (2009).
260. *See, e.g.*, *Myers*, 308 F.3d at 251 (adding an accessibility element to *Chimel*); United States v. Lyons, 706 F.2d 321 (D.C. Cir. 1983) (requiring that arrestee could access area to be searched under *Chimel*); United States v. Mapp, 476 F.2d 67 (2d Cir. 1973); *see also* LaFave, *supra* note 59, at 355.
261. *See, e.g.*, Moskovitz, *supra* note 153, at 689.
262. *Myers*, 308 F.3d at 266; s*ee, e.g.*, Northrop v. Trippett, 265 F.3d 372, 379 (6th Cir. 2001) (noting that lack of accessibility at time of search does not invalidate search); United States v. Abdul-Saboor, 85 F.3d 664 (D.C. Cir. 1996) (requiring that arrestee could access area to be searched under *Chimel*); United States v. Johnson, 16 F.3d 69 (5th Cir. 1994) (invalidating briefcase search because numerous officers between arrestee and briefcase meant arrestee could not have accessed briefcase); United States v. Queen, 847 F.2d 346, 353-54 (7th Cir. 1988) (upholding search after arrestee was secured and removed from closet in which he had been hiding).
263. *Myers*, 308 F.3d at 267 (citing *Abdul-Saboor*, 85 F.3d at 669). The Third Circuit then held that an arrestee lying face down on the floor with his hands cuffed behind his back while being guarded by two armed police officers could not access a bag on the floor three feet from him and a search of the bag would be invalid. *Myers*, 308 F.3d at 267, 274.

explication of *Chimel* in *Gant*;[264] however, the circuits apply the "time of search" test to all searches incident to arrest, not just vehicle searches.[265]

If the area of immediate control is determined at the time of the search, the area will likely have shrunk significantly or have disappeared altogether as compared to the area at the time of the arrest.[266] The Third Circuit understood *Chimel* to approve a "time of search" approach because the *Chimel* court noted that an arrestee may use a weapon to "effect his escape," indicating that the arrestee has already been somewhat secured.[267] In *Gant*, the Supreme Court noted that a search was valid if a "*real* possibility" of the arrestee accessing the passenger compartment remained.[268] The *Gant* Court noted that the police officers could not "reasonably have believed" that the arrestee could access his car at the time of the search.[269] The reasonable belief standard is likely stricter than the "conceivable possibility" set forth in older circuit cases,[270] but the courts have not yet determined how realistic the possibility of access must be to justify a search.

The Third Circuit attempted to answer that question in *Shakir* and concluded that a "real possibility"[271] meant a "reasonable possibility."[272] The *Shakir* court noted that, although handcuffing or otherwise securing an arrestee can affect the reasonableness of the possibility of access, handcuffs may fail.[273] Therefore, when police believe they have secured an arrestee, a reasonable possibility of access may still remain.[274] The court held that although the standard is lenient, the possibility of access must be "more than the mere theoretical possibility."[275] The Third Circuit then held that when police have handcuffed an arrestee behind his back and have an officer holding each of the arrestee's arms, the arrestee may yet have a reasonable possibility of accessing a zipped bag at his feet.[276]

264. *See Gant*, 129 S. Ct. at 1710.
265. *See, e.g.*, *Myers*, 308 F.3d at 267, 274; *Abdul-Saboor*, 85 F.3d at 669.
266. *Cf.* LaFave, *supra* note 59, at 355.
267. United States v. Shakir, 616 F.3d 315, 320 (3d Cir. 2010), *cert. denied*, No. 10-7440, 2010 WL 4568540 (U.S. Dec. 13, 2010) (citing Chimel v. California, 395 U.S. 752, 763 (1969)).
268. *Gant*, 129 S. Ct. at 1719 n.4 (emphasis added).
269. *Id.* at 1719.
270. *See Abdul-Saboor*, 85 F.3d at 664 (requiring conceivable access at time of search).
271. *Gant*, 129 S. Ct. at 1719 n.4.
272. *Shakir*, 616 F.3d at 320.
273. *Id.* at 320-21.
274. *See id.* at 321.
275. *Id.*
276. *See id.*

The Court refined *Chimel*'s immediate control standard in *Gant*, but some courts have refused to apply the new standard because *Gant* was a vehicle case.[277] The result is that many courts are still approving searches not justified under *Chimel*'s twin rationales.[278] The Court should hold clearly that accessibility should be assessed at the time of the search.[279]

IV. CONCLUSION

The law regarding searches incident to arrest has not been clear or consistent.[280] Circuits have struggled with current Supreme Court precedent for over forty years, but courts still disagree.[281] The Supreme Court admitted in *Gant* that previous precedent, especially precedent creating a separate vehicle rule, was badly reasoned.[282] In *Gant*, the Court also refined *Chimel* without explicitly making *Gant* applicable outside of the vehicle context.[283] To clarify and equalize the law, the Supreme Court should act.[284] The Supreme Court should abolish any distinction between vehicle searches and home searches by making *Gant*'s explication of *Chimel* and the "area of immediate control" the controlling authority for all searches incident to arrest.

277. *Cf.* Moskovitz, *supra* note 220, at 199-200.

278. *See* Moskovitz, *supra* note 153, at 681-82.

279. *See* Moskovitz, *supra* note 153, at 689; Moskovitz, *supra* note 220, at 199-200. The Court should also define accessibility for clarity, although courts and scholars agree that certain factors should be considered in determining whether accessibility exists. *See* United States v. Palumbo, 735 F.2d 1095, 1099 (8th Cir. 1984) (McMillian, J., concurring); LaFave, *supra* note 59, at 355-58. These factors are (1) whether or not the arrestee has been handcuffed or restrained; (2) the position of the officer and arrestee in relation to the area searched; (3) the degree of difficulty, or lack thereof, of accessing the area or container searched; and (4) the number of officers in relation to the number of arrestees present. *Palumbo*, 735 F.2d at 1099 (McMillian, J., concurring); LaFave, *supra* note 59, at 355-58.

280. *See* discussion *supra* Part II.A.

281. *See* Moskovitz, *supra* note 153, at 657.

282. *See* Arizona v. Gant, 129 S. Ct. 1710, 1718 (2009).

283. *See id.* at 1719.

284. *See* discussion *supra* Part III.B.