



**TOURO UNIVERSITY**  
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## Touro Law Review

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Volume 27  
Number 3 *Annual New York State Constitutional Issue*

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Article 7

October 2011

### Supreme Court of New York, New York County: People v. Derrell

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#### Recommended Citation

LaBrie, Maurice M. (2011) "Supreme Court of New York, New York County: People v. Derrell," *Touro Law Review*: Vol. 27: No. 3, Article 7.

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**SUPREME COURT OF NEW YORK  
NEW YORK COUNTY**

**People v. Derrell<sup>1</sup>**  
(decided December 3, 2009)

Niven Derrell was charged with third degree criminal possession of a weapon for possession of a gravity knife,<sup>2</sup> and fifth degree criminal possession of a controlled substance<sup>3</sup> for cocaine possession.<sup>4</sup> Derrell was initially stopped by the New York City Police Department (“NYPD”) on suspicion of driving a vehicle with illegally tinted windows.<sup>5</sup> The Supreme Court of New York County conducted a hearing to determine whether there was probable cause to arrest Derrell and whether the gravity knife and cocaine recovered from Derrell’s automobile were admissible at trial.<sup>6</sup> Derrell argued that the search of his vehicle and subsequent seizure of property were illegal because the search and seizure violated the Fourth Amendment to the United States Constitution, and article I, section 12 of the New York State Constitution.<sup>7</sup> The court determined probable cause

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<sup>1</sup> 889 N.Y.S.2d 905 (Sup. Ct. 2009).

<sup>2</sup> See N.Y. PENAL LAW § 265(5) (McKinney 2010) (defining a gravity knife as “any knife which has a blade which is released from the handle or sheath thereof by the force of gravity or the application of centrifugal force which, when released, is locked in place by means of a button, spring, lever or other device.”).

<sup>3</sup> See N.Y. PENAL LAW § 220.06(5) (McKinney 2010) (stating “[a] person is guilty of criminal possession of a controlled substance in the fifth degree when he knowingly and unlawfully possesses: (5.) cocaine and said cocaine weighs five hundred milligrams or more.”).

<sup>4</sup> *Derrell*, 889 N.Y.S.2d at 909.

<sup>5</sup> *Id.* See N.Y. VEH. & TRAF. LAW § 375(12-a)(b)(1-4) (McKinney 2010) *amended by* 2010 N.Y. SESS. LAWS Ch. 465 (McKinney) (effective August 31, 2010) (amending non-pertinent areas of traffic code relating to emergency vehicles).

<sup>6</sup> *Derrell*, 889 N.Y.S.2d at 909.

<sup>7</sup> The Fourth Amendment to the United States Constitution states in pertinent part: “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . . .” Article I, section 12 of the New York State Constitution states in pertinent part: “The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no warrants shall issue but upon probable cause . . . .”

existed that Derrell violated the Vehicle and Traffic Law by driving with excessively tinted windows, and therefore the initial stop was lawful.<sup>8</sup> The court denied Derrell's motion to suppress the recovered narcotics, but granted Derrell's motion to suppress the admission of the gravity knife,<sup>9</sup> holding the search of Derrell's automobile to be illegal as violative of the Fourth Amendment to the United States Constitution, and the knife inadmissible as the fruits of an illegal search.<sup>10</sup> However, the court remained uncertain whether the search violated article I, section 12 of the New York State Constitution.<sup>11</sup>

Police Officers Edgardo Cortes and Franklin Salinas observed a four-door sedan driven by Derrell with apparently illegal tinted windows on June 1, 2008, at approximately 2:00 a.m.<sup>12</sup> After pulling the vehicle over the officers confirmed via instruments that Derrell's vehicle was unlawfully tinted.<sup>13</sup> The officers ran a record check on Derrell, and learned that Derrell's driving privileges had been suspended.<sup>14</sup> During the records check, the officers observed Derrell making furtive gestures, but were unable to see clearly into the vehicle due to the excessive tint.<sup>15</sup> Police Officers Cortes and Salinas contacted Officer Zabala and his partner, Officer Rodriguez, to effect the arrest of Derrell.<sup>16</sup> Derrell was handcuffed and escorted to Officers Zabala's and Rodriguez's patrol car which was parked approximately fifty-feet from Derrell's vehicle.<sup>17</sup> A female passenger with Derrell at the time of this incident was released and not charged.<sup>18</sup> While being placed into the patrol car, Officer Cortes observed Derrell reach towards his pocket or waist, and observed an item fall to

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<sup>8</sup> *Derrell*, 889 N.Y.S.2d at 913.

<sup>9</sup> *Id.* at 909; *id.* at 914 (holding that because defendant denied a possessory interest in the cocaine bags, he lacked standing to suppress cocaine evidence because he had no reasonable expectation of privacy).

<sup>10</sup> *Id.* at 917, 921.

<sup>11</sup> *Id.* at 917, 919-21.

<sup>12</sup> *Derrell*, 889 N.Y.S.2d at 909.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 910-11 (quoting Officer Salinas' testimony: "I saw him moving a lot inside the vehicle.").

<sup>16</sup> *Id.* at 909-10, 912 (stating that Officers Cortes and Salinas, due to time constraints, were unable to making the actual arrest; decisions regarding arrests or summons for violating the tinted window regulations are discretionary, and Derrell could not drive once the Officers discovered his driving privileges were suspended).

<sup>17</sup> *Derrell*, 889 N.Y.S.2d at 910.

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

the ground next to Derrell; however, the officer did not see Derrell actually throw or drop any item.<sup>19</sup> The fallen items were subsequently found to be eleven small clear bags of cocaine; Derrell denied the drugs were his.<sup>20</sup> Contemporaneously, Officer Salinas conducted a search of Derrell's vehicle.<sup>21</sup> There is no evidence in the record that Officer Salinas detected or suspected cocaine was present prior to beginning his initial search.<sup>22</sup> Officer Salinas "searched the front and rear seats, the middle console and the doors."<sup>23</sup> During the initial search of the vehicle, Officer Salinas discovered a gravity knife.<sup>24</sup> Officer Salinas testified that he searched the vehicle because it was incidental to a lawful arrest and because of Derrell's furtive movements.<sup>25</sup> It is clear from the record that the female passenger never posed a threat to the arresting officers;<sup>26</sup> during the entire incident she was standing on the sidewalk ten feet from the passenger side and was never placed in handcuffs.<sup>27</sup>

Because the officers observed Derrell apparently driving with excessively tinted windows, the trial court found probable cause existed to stop the vehicle for suspicion of violating the Vehicle and Traffic Law.<sup>28</sup> The court determined that Derrell lacked standing to challenge the seizure of the cocaine.<sup>29</sup>

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

<sup>20</sup> *Id.* at 912 (stating the Officer knew the items were cocaine based on his training and experience with narcotics).

<sup>21</sup> *Id.* at 911 (stating that Officer Salinas began the initial search of Derrell's automobile when Derrell was handcuffed and in the back of Officer Zabala's patrol car with Officers Zabala and Cortes).

<sup>22</sup> *Derrell*, 889 N.Y.S.2d at 913 (stating there is no indication in the record that Officer Salinas was aware of the cocaine when beginning his search, and possible cocaine in the vehicle formed no part of Salinas' motivation in performing the search).

<sup>23</sup> *Id.* at 911.

<sup>24</sup> *Id.* (stating a second search was conducted by the Officers, where nothing was found).

<sup>25</sup> *Id.* at 910-11. Officer Salinas testified that he searched "all reachable, lungible areas . . . to where the motorist was seated" incident to arrest in order "[t]o make sure that there wasn't anything in the car, anything that could harm us." *Id.* at 911.

<sup>26</sup> *Derrell*, 889 N.Y.S.2d at 919.

<sup>27</sup> *Id.* at 911.

<sup>28</sup> *Id.* at 913 (citing *People v. Robinson*, 767 N.E.2d 638, 641 (N.Y. 2001) (holding that police do not require a warrant to stop a vehicle if probable cause exists)). See *People v. Cuevas*, 203 A.D.2d 88, 88 (App. Div. 1st Dep't 1994) (stating that observing a vehicle with excessive tint justifies a stop of a vehicle) *appeal denied*, 637 N.E.2d 282 (N.Y. 1994); see also N.Y. VEH. & TRAF. LAW § 375(12-a)(b)(1-4).

<sup>29</sup> *Derrell*, 889 N.Y.S.2d at 914 (holding Derrell had no subjective expectation of privacy regarding narcotics found on the ground because he denied having a possessory interest in

The *Derrell* court then analyzed the vehicle search subsequent to the arrest under the United States and New York State Constitutions.<sup>30</sup>

The Fourth Amendment to the United States Constitution guarantees, as a fundamental principle, that the government may not conduct a search of a citizen unless a search warrant is obtained from a neutral magistrate showing probable cause exists to allow the search.<sup>31</sup> However, the Supreme Court has long held that “the exigencies of the situation” make exemption from obtaining a warrant at times “imperative.”<sup>32</sup> Therefore, selected scenarios involving searches conducted incidental to lawful arrests have become clearly accepted as exceptions to the warrant requirement,<sup>33</sup> while other sce-

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the drug bags, and thus lacked standing to challenge the seizure by the police).

<sup>30</sup> U.S. CONST. amend. IV; N.Y. CONST. art. I, § 12.

<sup>31</sup> *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009) (“[S]earches conducted outside the judicial process, without prior approval by judges or magistrates, are *per se* unreasonable under the Fourth Amendment—subject to only a few specifically established and well-delineated exceptions.” (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967))). See *New York v. Belton*, 453 U.S. 454, 457 (1981); see also *People v. Belton*, 407 N.E.2d 420, 421-22 (N.Y. 1980) (“The privacy interest of our citizens is far too cherished a right to be entrusted to the discretion of the officer in the field.”), *rev’d*, 453 U.S. at 462-63.

<sup>32</sup> *Belton*, 453 U.S. at 457 (quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948)).

<sup>33</sup> See *Chimel v. California*, 395 U.S. 752, 762-63 (1969) (stating searches performed incidental to arrest are legal where there is a need to seize weapons and other items which may harm the public or the arresting officers, may affect an escape by the defendant, or to prevent the destruction of evidence of the crime); see *id.* at 755-56 (stating searches performed directly on the person and their worn clothing incidental to a lawful arrest has been held valid without a warrant) (“‘When a man is legally arrested . . . whatever is found upon his person or in his control . . . may be seized and held as evidence . . .’” (quoting *Carroll v. United States*, 267 U.S. 132, 158 (1925))); *United States v. Robinson*, 414 U.S. 218, 226 (1973) (holding that discovery of narcotics during a pat down frisk performed during arrest of defendant for driving with a revoked license, was a valid warrantless search under the search incident doctrine (quoting *Chimel*, 395 U.S. at 762-63)); see also *Gustafson v. Florida*, 414 U.S. 260, 261 (1973) (holding a warrantless search of a cigarette box found to contain marijuana discovered in defendants coat pocket during an arrest frisk legal when defendant was placed under arrest for driving without a license). The Supreme Court has held that if the search could have legally been performed at the time of the arrest, the search could be legally performed many hours later after the defendant is placed in detention. See *United States v. Edwards*, 415 U.S. 800, 803 (1974) (holding because a search could have legally been initially performed, the later performed search ten hours after arrest was still incidental to the arrest because the fact of the arrest made the search permissible). A warrantless search of vehicles where probable cause existed is legal where securing a warrant is not practical because the vehicle may be quickly moved out of the local area or jurisdiction. See *Chimel*, 395 U.S. at 764 (citing *Carroll*, 267 U.S. at 153). But compare with *id.* at 768 (holding that police search of defendant’s entire apartment far removed from the person or the area where he conceivably might obtain a weapon or alter evidence against him, was “unreasonable”

narios of warrantless searches of homes and vehicles incidental to a lawful arrest have a lengthy and conflicting history, marked by contradictory and at times confusing rulings by the United States Supreme Court and the lower federal courts.<sup>34</sup>

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under the Fourth Amendment and thus illegal), and *United States v. Chadwick*, 433 U.S. 1, 11 (1977) (holding the warrantless search of a locked footlocker performed incidental to a lawful arrest was illegal, because a locked footlocker has a greater expectation of privacy than a person who is arrested has), *overruled by* *California v. Acevedo*, 500 U.S. 565, 579 (1991).

<sup>34</sup> See *Weeks v. United States*, 232 U.S. 383, 392 (1914) (stating in dictum that warrantless searches, incidental to a lawful arrest, is an exception to the Fourth Amendment, “always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidence of crimes.”); *Carroll*, 267 U.S. at 158 (“When a man is legally arrested . . . whatever is found upon his person or in his control . . . may be seized and held as evidence. . . .” (emphasis added)). Compare *Agnello v. United States*, 269 U.S. 20, 30 (1925) (stating in dictum “[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.” (emphasis added)), and *Marron v. United States*, 275 U.S. 192, 198-99 (1927) (holding federal agents who secured a warrant to seize illegal liquor, upon discovering persons selling and drinking liquor, arrested the person in charge, and then executed the warrant; in searching the premises agents discovered and seized an incriminating ledger not covered by the warrant; the Court upheld the seizure because a lawful arrest was made and “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 enterprise.”), with *Go-Bart Imp., Co. v. United States*, 282 U.S. 344, 357-58 (1931) (holding a warrantless search of an arrested person’s desk, safe, and parts of his office “unreasonable” and thus illegal because defendant committed no crime in the presence of the agents; distinguishing *Go-Bart* from *Marron*, where defendant was engaged in criminal activity in the presence of agents), and *United States v. Lefkowitz*, 285 U.S. 452, 465 (1932) (concurring with *Go-Bart* and holding unlawful a search of a desk and office cabinet despite being incidental to a lawful arrest, because the searches were “exploratory and general”); compare also *Harris v. United States*, 331 U.S. 145, 149, 151-52 (1947) (holding search of defendant’s entire four-room apartment incidental to arrest for defendant’s alleged involvement with cashing and interstate transportation of forged checks, was lawful; defendant convicted of violating Selective Training and Service Act when agents found in a desk drawer a sealed envelope marked “George Harris, personal papers,” which contained forged selective service documents. The Court relied on *Angello* to allow a search of the entire premises), *overruled by* *Chimel*, 395 U.S. at 768, with *Trupiano v. United States*, 334 U.S. 699, 705, 708 (1948) (holding seizure of illicit distillery contemporaneously to arrest of person in raid of illicit distillery site was illegal because the agents easily could have obtained a valid warrant prior to the raid; the Court stated “[a] search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest. The mere fact that there is a valid arrest does not ipso facto legalize a search or seizure without a warrant . . . [o]therwise the exception swallows the general principle, making a search warrant completely unnecessary wherever there is a lawful arrest. And so there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself

*Chimel v. California*<sup>35</sup> articulated the basis for all modern adjudication of automobile searches incidental to lawful arrest cases.<sup>36</sup> “Under *Chimel*, police may search incident to arrest only the space within an arrestee’s ‘immediate control,’ meaning ‘the area from within which he might gain possession of a weapon or destructible evidence.’ ”<sup>37</sup> Federal and state courts have discovered that the apparently simple principle limiting searches incident to lawful arrests in *Chimel* was difficult to apply to specific cases.<sup>38</sup> Such confusion ultimately weakens the Fourth Amendment’s intended privacy protections when the government and citizens are unable to clearly and

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with a search warrant.”), *overruled by* United States v. Rabinowitz, 339 U.S. 56, 65-66 (1950) (holding officers seizure of stamps with forged overprints in defendants office desk, obtained via a search of over an hour and a half after defendant’s arrest based on a valid arrest warrant, was valid based on *Harris*; the Court rejected the *Trupiano* test of whether it is reasonable to obtain a search warrant, but rather the test is whether the search itself was reasonable), *overruled by Chimel*, 395 U.S. 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’ under the Fourth and Fourteenth Amendments.”).

<sup>35</sup> 395 U.S. 752 (1969).

<sup>36</sup> See *Chimel*, 395 U.S. at 763, 768 (holding a search incidental to arrest may only include “the arrestee’s person and the area ‘within his immediate control’ – construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”); *Belton*, 453 U.S. at 457-58 (“[T]he Court in *Chimel* found ‘ample justification’ for a search of ‘the area from within which [an arrestee] might gain possession of a weapon or destructible evidence, . . . no comparable justification . . . for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.’ ” (quoting *Chimel*, 395 U.S. at 763)); see also *Gant*, 129 S. Ct. at 1714; *Thornton*, 541 U.S. at 619-20.

<sup>37</sup> *Gant*, 129 S. Ct. at 1714 (quoting *Chimel*, 395 U.S. at 763).

<sup>38</sup> See *Belton* 453 U.S. at 458, 460 (stating that although *Chimel* established that a search incidental to arrest could not go beyond the “area within the immediate control of the arrestee,” courts have not found a workable definition of what this area is exactly defined as); see also *People v. Smith*, 452 N.Y.S.2d 886, 887 (App. Div. 1st Dep’t 1982) (explaining that Fourth Amendment jurisprudence’s “underlying difficulty has its genesis in the formulation of the governing rule by the United States Supreme Court in *Chimel v. California*,” specifically, the *Chimel* Court’s language “[t]here 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.” (quoting *Chimel* 395 U.S. at 763)). *Smith* continues, “[T]wo questions which have given rise to a variety of judicial approaches. One involved the question . . . the term ‘within his immediate control’ or ‘grabbable’ area, as it has come to be called. The second was whether the right to search within the defined area was limited by the stated reasons and whether the right survived even where no practical possibility existed that the arrested person could secure a weapon or destroy evidence.” *Smith*, 452 N.Y.S.2d at 887.

easily know what the Fourth and Fourteenth Amendments protects.<sup>39</sup>

The Supreme Court in *New York v. Belton* applied *Chimel* to warrantless vehicle searches incidental to a lawful arrest.<sup>40</sup> *Belton* involved a New York State Trooper who stopped an automobile for driving at an excessive speed.<sup>41</sup> While conducting a check of the driver's license and registration, the officer smelled burnt marijuana and observed an envelope he associated with marijuana.<sup>42</sup> The officer ordered the occupants from the car, placed them under arrest, separated and secured the four occupants roadside, and then searched the passenger compartment of the car.<sup>43</sup> The officer found a leather jacket on the backseat of the car which contained cocaine in a zippered pocket.<sup>44</sup> Defendants moved to suppress the admission of the cocaine as the fruits of an illegal search.<sup>45</sup> The trial court denied the motion, and the Appellate Division affirmed.<sup>46</sup> The New York Court of Appeals reversed, holding there was no longer any danger to the officer or any possibility of loss of evidence because the jacket was inaccessible to the defendants,<sup>47</sup> and therefore the search was an illegal warrantless search.<sup>48</sup>

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<sup>39</sup> *Belton*, 453 U.S. at 458 (“Fourth Amendment doctrine, given force and effect by the exclusionary rule, is primarily intended to regulate the police in their day-to-day activities and thus ought to be expressed in terms that are readily applicable by the police in the context of the law enforcement activities in which they are necessarily engaged. A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be ‘literally impossible of application by the officer in the field.’” (quoting Wayne R. LaFave, “Case-by-Case Adjudication” versus “Standardized Procedures”: *The Robinson Dilemma*, 1974 SUP. CT. REV. 127, 141 (1974) [hereinafter *The Robinson Dilemma*])).

<sup>40</sup> *See id.* at 460 (holding that when police make a lawful arrest of an occupant of an automobile, the officer “may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”). *Chimel*’s facts were in the context of police executing an arrest warrant at defendant’s home, and the subsequent search by the police of the entire home. *See Chimel*, 395 U.S. at 753-54.

<sup>41</sup> *Belton*, 453 U.S. at 455.

<sup>42</sup> *Id.* at 455-56.

<sup>43</sup> *Id.* at 456.

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

<sup>45</sup> *Id.*

<sup>46</sup> *Belton*, 453 U.S. at 456.

<sup>47</sup> *Id.* (“‘A warrantless search of the zippered pockets of an inaccessible jacket may not be upheld as a search incident to a lawful arrest where there is no longer any danger that the arrestee or a confederate might gain access to the article.’” (quoting *Belton*, 407 N.E. 2d at 421)).

<sup>48</sup> *See id.*



The *Belton* Supreme Court reversed, and established a bright-line rule based on *Chimel* stating:

In order to establish the workable rule this category of cases requires, we read *Chimel's* definition of the limits of the area that may be searched in light of that generalization. Accordingly, we hold that when 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. Our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.<sup>49</sup>

*Belton's* bright-line rule was fashioned after the bright-line rule in *United States v. Robinson*,<sup>50</sup> a case which dealt with searches of the actual person.<sup>51</sup> In *Robinson*, the defendant was arrested for driving with a revoked license, and during the arrest pat down police discovered narcotics on the defendant without first obtaining a warrant for the search.<sup>52</sup> Both the warrantless searches of the person in *Robinson*, and the vehicle search incidental to arrest in *Belton*, are allowed based on the need to protect police or protect evidence from destruction.<sup>53</sup> Thus, just as in *Robinson* the allowable search of the person could even be of containers or areas on the person which physically could not contain a weapon or evidence, *Belton* followed this concept and did not limit vehicle searches incidental to lawful arrest to only situations where the defendant was physically inside the

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<sup>49</sup> *Id.* at 460; *id.* at 460, n.3.

<sup>50</sup> *Robinson*, 414 U.S. at 225-26, 236 (holding that discovery of narcotics during a pat down frisk performed during arrest of defendant for driving with a revoked license was a valid warrantless search under the search incident doctrine in *Chimel*).

<sup>51</sup> See *Belton*, 453 U.S. at 459-60 (referring to *Robinson* as “a straightforward rule, easily applied, and predictably enforced[;]” while describing the *Belton* holding as “[i]n order to establish the workable rule this category of cases requires, we read *Chimel's* definition of the limits of the area that may be searched in light of that generalization . . . we hold that when a policeman has made a lawful custodial arrest . . . he may, as a contemporaneous incident of that arrest, search the passenger compartment. . . .”).

<sup>52</sup> *Robinson*, 414 U.S. at 220-23.

<sup>53</sup> *Belton*, 453 U.S. at 460, 462-63; *Robinson*, 414 U.S. at 226, 236.

stopped vehicle, but extended it to situations where the defendant was removed from the stopped vehicle by some undefined point of physical distance contemporaneous and connected to the arrest.<sup>54</sup>

The core reasoning of Justice Stewart, writing the *Belton* plurality opinion, was not agreed upon by a majority of the Justices. The core holding of *Belton* was that the interior of a vehicle could be considered “the area within the immediate control of the arrestee,” and where he “might reach in order to grab a weapon or destroy evidentiary item” as required by *Chimel*, even when the arrestee is outside of the vehicle.<sup>55</sup> The *Belton* majority only reached its judgment by relying on two concurring opinions which did not share Justice Stewart’s reasoning.<sup>56</sup>

The *Belton* dissent strongly argued that *Belton* was in reality overruling *Chimel*.<sup>57</sup> Furthermore, the dissent argued that the decision created a legal fiction that the interior of a car is always in the immediate control of the arrestee,<sup>58</sup> and ultimately argued that *Belton* failed to create its stated objective of providing police officers with a clear, workable standard because it leaves too many vague determinations for police and citizens.<sup>59</sup> The *Belton* majority denied that the

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<sup>54</sup> See *Belton*, 453 U.S. at 461 (“The authority to search . . . while based on the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect. 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.” (quoting *Robinson* 414 U.S. at 235)).

<sup>55</sup> See *Belton*, 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763).

<sup>56</sup> See *id.* at 454-55 (the opinion of the Court written by Justice Stewart, joined by Chief Justice Burger and Justice Blackmun). Cf. *id.* at 463 (Rehnquist, J., concurring) (joining the reversal of the Court, but preferring that the case should have been decided by overruling *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961) (holding that the Fourth Amendment exclusionary rules were applicable to the States through the Fourteenth Amendment), or in the alternative Justice Rehnquist would apply the “automobile exception” he argued for in dissent in *Robbins v. California*, 453 U.S. 420, 439-40 (1981) (Blackmun, J., dissenting) (joining with Justice Blackmun in dissent, Justice Rehnquist argued that automobiles should be a general exception to the Fourth Amendment, and are constitutionally different than homes)).

<sup>57</sup> *Id.* at 463-64 (Brennan, J., dissenting) (arguing that *Belton* abandoned *Chimel*’s principles because *Chimel* was predicated on the safety of the arresting officers and preservation of concealed or destructible evidence, only allowing substantially contemporaneous and in the immediate vicinity of an arrest; these concerns did not exist when the defendants, such as in *Belton*, were separated and unable to reach the jacket. Absent these concerns, *Chimel* does not allow exceptions to the warrant requirement).

<sup>58</sup> *Id.* at 466.

<sup>59</sup> *Belton*, 453 U.S. at 466, 469-71 (stating the Court’s decision leaves too many unanswered questions for the police to be a useful bright-line rule, among them: how long after an

decision overruled *Chimel*.<sup>60</sup>

The Supreme Court's next major revisit of an automobile search incidental to lawful arrest case was in *Thornton v. United States*.<sup>61</sup> *Thornton* involved a police officer who observed an automobile driven by the defendant with license tags issued to another vehicle.<sup>62</sup> Before the officer was able to pull over the vehicle, the defendant drove into a parking lot, parked, and left the vehicle.<sup>63</sup> The officer approached the defendant who was now on foot, found marijuana and crack cocaine in the defendant's pocket, and subsequently arrested him.<sup>64</sup> The officer searched the vehicle incidental to the arrest, and found a handgun under the driver's seat.<sup>65</sup> Defendant was charged with federal drug and gun charges.<sup>66</sup> The Federal District Court held the search valid under *Belton*, and the United States Court of Appeals for the Fourth Circuit affirmed.<sup>67</sup> Arguably, *Thornton*<sup>68</sup> extended *Belton*,<sup>69</sup> because the contact with defendant in *Thornton* did not occur until after the defendant was removed from the vehicle, and there is less connection between the defendant's arrest and the vehicle.<sup>70</sup> *Thornton*, like *Belton*, failed to reach a majority on the underlying reasoning of the case,<sup>71</sup> and required two concurring opi-

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arrest may a *Belton* search be performed; five minutes, thirty minutes, three hours; does it matter how close the defendant is to the vehicle; does it include locked glove compartments, under floor boards, or interiors of door panels?).

<sup>60</sup> *Id.* at 462-63 (majority opinion).

<sup>61</sup> 541 U.S. 615 (2004).

<sup>62</sup> *Id.* at 617-18.

<sup>63</sup> *Id.* at 618.

<sup>64</sup> *Id.*

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

<sup>66</sup> *Thornton*, 541 U.S. at 618.

<sup>67</sup> *Id.* at 619.

<sup>68</sup> *See id.* at 617 (holding *Belton* allowed a search of a defendant who was a recent occupant of a vehicle where the defendant was stopped by police, accosted, frisked, and found to possess marijuana and cocaine. Incidental to the arrest the vehicle was searched without a warrant and a handgun was found).

<sup>69</sup> *See id.* at 617, 619-21 (holding that *Belton* applies "even when an officer does not make contact until the person arrested has left the vehicle." Yet, stating that *Belton* "placed no reliance on the fact" that the defendants were ordered out of the car, or when the officer initiated the contact; *Belton's* logic of creating a bright-line rule should not logically create such distinctions).

<sup>70</sup> *See id.* at 619 (rejecting defendant's argument that *Belton* is limited to cases where the officer initiated contact with the defendant while still an occupant of the vehicle).

<sup>71</sup> *See Thornton*, 541 U.S. at 616-17 (*Thornton* reached a majority in judgment, affirming the lower court; Rehnquist, C.J., delivered the opinion of the Court, joined by Kennedy, Thomas, and Breyer, JJ.); *id.* at 624-25 (O'Connor & Scalia, JJ., concurring).

nions to reach a judgment.<sup>72</sup> The plurality opinion in *Thornton* continued the same application of *Chimel* to *Thornton*'s facts as was held in *Belton*; namely, allowing a warrantless search even though the arrestee was secured and removed from the searched vehicle.<sup>73</sup> Justice Scalia concurred in judgment in *Thornton* only because the officers had a reasonable belief that evidence related to the arresting crime was in the vehicle.<sup>74</sup> Justice Scalia argued for discarding altogether *Belton*'s application of *Chimel* to vehicle searches incidental to lawful arrests,<sup>75</sup> because the doctrine of viewing the inside of a vehicle to be within the immediate control of an arrestee who is physically removed from the vehicle and secured stretches the doctrine "beyond its breaking point."<sup>76</sup> Justice Scalia would only allow a search incidental to lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.<sup>77</sup> This approach narrows the exception to the Fourth Amendment,<sup>78</sup> and Justice Scalia argued searches based on seeking evidence of the crime committed have a long judicial history in English and American law.<sup>79</sup>

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<sup>72</sup> *Id.* at 624-25 (O'Connor, J., concurring) (stating that although *Thornton* is a logical extension of *Belton*, she is dissatisfied with the state of the law in searches of vehicles incidental to arrest, because *Belton* is on a "shaky foundation," and quoting Justice Scalia's concurrence "lower courts decisions seem now to treat the ability to search a vehicle incident to the arrest . . . as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*. . . ."); *id.* at 625, 628-29, 632 (Scalia, J., concurring) (rejecting the accepted rationale of *Belton* to an approach that allows the search simply because the vehicle may contain evidence relevant to the crime for which the defendant was arrested for. In the facts of *Thornton*, this analysis produces his concurrence affirming the lower court, but on other grounds).

<sup>73</sup> *Id.* at 617, 620-21 (majority opinion).

<sup>74</sup> *Thornton*, 541 U.S. at 632 (Scalia, J., concurring) ("In this case, as in *Belton*, petitioner was lawfully arrested for a drug offense. It was reasonable . . . to believe that further contraband or similar evidence relevant to the crime for which he had been arrested might be found in the vehicle from which he had just alighted and which was still within his vicinity at the time of arrest. I would affirm the decision below on that ground.").

<sup>75</sup> *Id.* at 629 (majority opinion) ("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.").

<sup>76</sup> *Id.* at 625.

<sup>77</sup> *Id.* at 632.

<sup>78</sup> *Id.* at 630 ("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.").

<sup>79</sup> *Thornton*, 541 U.S. at 629 ("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.").

Justice Scalia's concurrence is noteworthy for a number of reasons. First, Justice Scalia articulated an opinion that echoed Justice Brennan's dissent in *Belton* regarding whether the *Belton* holding can actually be reconciled with *Chimel*, stating:

[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*—limited, of course, to searches of motor vehicles, a category of 'effects' which give rise to a reduced expectation of privacy.<sup>80</sup>

While Justice Brennan stated in *Belton*, that the decision "carves out a dangerous precedent that is not justified by the concerns underlying *Chimel*."<sup>81</sup> Second, Justice Scalia illuminated the inherent difficulties in the application of *Chimel* to vehicle searches incidental to lawful arrest over the last four decades.<sup>82</sup> Third, the opinion

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<sup>80</sup> See *id.* at 631.

<sup>81</sup> See *Belton*, 453 U.S. at 463, 468 (Brennan, J., dissenting). Justice Brennan did not reach Justice Scalia's conclusion in *Thornton*, because Justice Brennan narrowly applied *Chimel*, only allowing searches that have one or both of the *Chimel* factors of protecting the police or evidence. *Id.* at 464-66. On the other hand, Justice Scalia categorically allowed any search incidental to arrest if the search is related to evidence of the crime alleged, regardless if there is a safety or possible evidence destruction potential. *Thornton*, 541 U.S. at 631-32 (Scalia, J., concurring).

<sup>82</sup> *Thornton*, 541 U.S. at 625-29. Justice Scalia discussed and rejected three possible reasons the search in *Thornton* might have been justified to protect police officers or prevent evidence destruction. First, although handcuffed and in the back of the patrol car, defendant theoretically might escape and retrieve a weapon or evidence from his vehicle. Justice Scalia rejected this, quoting Judge Goldberg who called such a proposition a reference to the mythical arrestee "possessed of the skill of Houdini and the strength of Hercules." *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973). Justice Scalia pointed out that the United States in their brief pointed to seven instances over thirteen years where state or federal officers were attacked with weapons by handcuffed arrestees. He asserted that this does not create a safety concern in reality. Three of the cases involved weapons that remained concealed on the person, three more involved weapons seized from the arresting officers, while only one case involved an arrestee who escaped a patrol car and ran through a forest to a house where he struck an officer while still handcuffed with a fireplace poker. Justice Scalia pointed out that it can hardly be a danger justifying searches if there is no documented case of a handcuffed arrestee retrieving weapons from his former car, even though arresting people in this context is fairly common. Second, since the officer could have searched the vehicle when the defendant was in the car, the officer should not be penalized for taking the

presented a new understanding of *Belton*<sup>83</sup> which provided much of the doctrinal underpinnings of the Supreme Court's future ruling altering searches of automobiles incidental to arrests in *Arizona v. Gant*.<sup>84</sup> Justice O'Connor in her separate *Thornton* concurrence expressed support for Justice Scalia's views, and stated they were on "firmer ground" than *Belton*, but she was hesitant to adopt Justice Scalia's views without the government or petitioner having had an opportunity to argue the case on the merits.<sup>85</sup>

The Supreme Court in *Arizona v. Gant*<sup>86</sup> embraced a new,

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prudent precaution of safely securing the defendant before searching the vehicle. Justice Scalia rejected this logic, pointing out that the search allowed under *Chimel* is an *exception*, only allowed by circumstances, to conduct normally unlawful searches. It is not a Governmental right. Third, while true that no danger existed to the police or evidence, *Belton* argued for a bright-line rule which would justify cases that normally would be unreasonable. Justice Scalia pointed out that such an argument is only valid if it is accurate, as *Belton* claims, "that the passenger compartment is 'in fact generally, even if not inevitably,' within the suspect's immediate control." *Thornton*, 591 U.S. at 627. Reality is far from this premise. Justice Scalia pointed out that near universal police practice is to secure a defendant in handcuffs and to place an arrestee into the squad car before performing a search. In reality, the passenger compartment is *never* within the arrestee's control. *See id.* at 625-29.

<sup>83</sup> *Id.* at 629, 631-32 (stating that *Belton* should be recast to allow searches of cars because the car may contain evidence relevant to the crime for which the defendant was arrested). This view of *Belton* would align *Belton* to *Robinson* which abandoned the two *Chimel* factors in searches incident to arrest of the actual person.

<sup>84</sup> *Gant*, 129 S. Ct. at 1714, 1723-24 (holding even if *Chimel*'s factors are inapplicable to allow a warrantless search because the arrestee is removed from the vehicle and physically secured, when it is reasonable to believe evidence of the arresting crime is in the vehicle a warrantless search may still be performed).

<sup>85</sup> *Thornton*, 541 U.S. at 624-25 (O'Connor, J., concurring).

<sup>86</sup> 129 S. Ct. 1710 (2009). The facts of *Gant* involved police initially responding to an anonymous tip that a residence was being used to sell drugs. Upon arriving at the home, the police knocked on the door. *Gant* answered, identified himself and stated the owner of the home was expected later. The police conducted a records check and discovered *Gant* had an open warrant for his arrest for driving with a suspended license. Returning later that evening, the police found a man near the back of the home, and a woman in a parked car. The man was arrested for giving a false name, and the woman for drug paraphernalia possession. Both were handcuffed and placed in a patrol car. *Gant* then arrived driving his vehicle. *Gant* parked his car, got out, and shut the door. An officer about thirty feet from *Gant* called to him, and the officer and *Gant* met approximately ten-twelve feet from *Gant*'s car. *Gant* was immediately arrested and handcuffed, and placed in a patrol car. After being placed in the patrol car, *Gant*'s car was searched. The officers discovered a gun, and a bag of cocaine in the pocket of a jacket which was on the backseat. The trial court held police had no probable cause to search the vehicle, but because the officers saw *Gant* commit the crime of driving without a license, the search incident to this lawful arrest was permissible. The Arizona Supreme Court reversed, holding the search unreasonable under the Fourth Amendment to the United States Constitution. The majority and dissent focused on whether *Belton* would or would not allow a search in this fact pattern. *Id.* at 1714-1716.

narrow view of *Belton* tied to *Chimel*; holding *Chimel*'s safety and evidence protections are strictly determinative of *Belton*'s scope.<sup>87</sup> *Gant* interpreted that *Belton* should not allow a search of an automobile incidental to lawful arrest when the occupant is no longer in the stopped vehicle, is secured, and unable to access the interior of the vehicle.<sup>88</sup> *Gant* steadfastly denied it was overturning *Belton*, while simultaneously acknowledging that most authorities did not read *Belton* to be in concert with its new *Gant* interpretation.<sup>89</sup> The holding in *Gant* simultaneously holds a vehicle search incidental to a lawful arrest where the occupant is no longer in the vehicle, is secured, and unable to access the interior of the vehicle is illegal,<sup>90</sup> but also holds of an expansive vehicle exception not tethered at all to *Chimel*,<sup>91</sup> specifically, allowing the police to search a vehicle incident to a lawful arrest when it is reasonable for the arresting officer to believe that evidence of the arresting crime may be found in the vehicle, regardless of the lack of ability by the arrestee to harm officers or destroy evidence.<sup>92</sup>

Prior to *Gant* the United States Circuit Courts of Appeals had varied opinions whether the inside of the vehicle must actually be within the defendant's reach to allow a warrantless search incidental to lawful arrest.<sup>93</sup> However, post-*Gant* current federal law under the

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<sup>87</sup> *Id.* at 1714.

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

<sup>89</sup> *Id.* at 1718-22. The *Gant* dissent strongly disagreed with this characterization, insisting the *Gant* majority actually overturned established precedent under *Chimel* and *Belton*. See *Gant*, 129 S. Ct. at 1726 (Breyer, J., dissenting) ("Principles of *stare decisis* must apply, and those who wish this Court to change a well-established legal precedent . . . bear a heavy burden."); *id.* (Alito, J., dissenting) (describing the majority holding as effectively overruling *Belton*, and stating "[a]lthough the Court refuses to acknowledge that it is overruling *Belton* and *Thornton*, there can be no doubt that it does so").

<sup>90</sup> *Id.* at 1714.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* (following *Thornton* and Justice Scalia's suggestion in his *Thornton* concurrence, the context of an automobile allows a search incident to lawful arrest of a vehicle when it is reasonable for the arresting officers to believe evidence of the arresting offense might be found in the vehicle).

<sup>93</sup> Compare *Gant*, 129 S. Ct. at 1718-19 n.2 (comparing *United States v. Green*, 324 F.3d 375, 379 (5th Cir. 2003) (holding that *Belton* did not authorize a search of an arrestee's vehicle when he was handcuffed and lying face down on the ground surrounded by four police officers 6-to-10 feet from the vehicle); *United States v. Edwards*, 242 F.3d 928, 938-39 (10th Cir. 2001) (finding a vehicle search conducted while the arrestee was handcuffed in the back of a patrol car illegal); *United States v. Vasey*, 834 F.2d 782, 787 (9th Cir. 1987) (finding a vehicle search conducted thirty to forty-five minutes after an arrest and after the arrestee had

Fourth Amendment does not allow a warrantless search of a vehicle incidental to the occupant's arrest if the arrestee is secured and no longer able to access the interior of the vehicle.<sup>94</sup> If however, a reasonable possibility exists that there is evidence in the vehicle directly relating to the crime for which the defendant was lawfully arrested, a separate non-*Chimel* search of the vehicle is justified based solely on searching for relevant evidence reasonably related to the arresting crime.<sup>95</sup>

Because *Gant* is current law, *Derrell* correctly held that the search conducted by the police violated Derrell's Fourth Amendment rights because the police searched his automobile without a warrant.<sup>96</sup> *Derrell* left the exact parameters of New York Constitutional law to a theoretical question, because under *Gant* any interpretation of New York law would be unconstitutional.<sup>97</sup>

The language of the New York State Constitution protecting citizens against unlawful searches and seizures is identical to the Fourth Amendment to the United State Constitution.<sup>98</sup> However,

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been handcuffed and secured in the back of a police car illegal), *with* United States v. Hrasky, 453 F.3d 1099, 1102 (8th Cir. 2006) (upholding a search conducted an hour after the arrestee was apprehended and after he had been handcuffed and placed in the back of a patrol car), *overruled by Gant*, 129 S. Ct. at 1719; United States v. Weaver, 433 F.3d 1104, 1106-07 (9th Cir. 2006) (upholding a search conducted ten to fifteen minutes after an arrest and after the arrestee had been handcuffed and secured in the back of a patrol car), *overruled by Gant*, 129 S. Ct. at 1719; *and* United States v. White, 871 F.2d 41, 44 (6th Cir. 1989) (upholding a search conducted after the arrestee had been handcuffed and secured in the back of a police cruiser), *overruled by Gant*, 129 S. Ct. at 1719).

<sup>94</sup> *Gant*, 129 S. Ct. at 1714, 1716 (holding that the "safety and evidentiary justifications underlying *Chimel's* reaching-distance rule determine *Belton's* scope." "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply.").

<sup>95</sup> *Id.* at 1714 (citing *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)). It is not at all clear where the *Gant* Court found *Thornton* to endorse Justice Scalia's opinion that the automobile justifies a search incident to arrest even if outside of *Chimel* to find further evidence of the arresting crime. *Thornton* appears clearly to reject this view. See *Thornton*, 541 U.S. at 624 n.4 (stating that although Justice Scalia's view may have merits, *Thornton* is "the wrong case in which to address them" to decide based on Justice Scalia's views).

<sup>96</sup> *Derrell*, 889 N.Y.S.2d at 909, 917-18, 921-22. *Derrell's* facts do support a warrantless search for evidence related to the arresting crime of driving with tinted windows and a suspended license.

<sup>97</sup> *Id.* at 916-17.

<sup>98</sup> The Fourth Amendment to the United States Constitution states, in pertinent part: "The right of the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause . . ." Article I, section 12 of the New York State Constitution states, in pertinent part: "The right of



currently and historically,<sup>99</sup> the New York State Constitution is evaluated differently than the United States Constitution.<sup>100</sup> The differences, if any, between federal law and New York State law may hinge to a large degree on how *Belton* is understood.

Prior to *Gant*, as stated in *Derrell*, New York case law apparently protected the privacy interests of a party more than the *Belton* era bright-line rule,<sup>101</sup> because New York law required a case-by-case inquiry to determine at the time of arrest whether the officers were at potential risk from the defendant, or if a potential for destruction of evidence existed.<sup>102</sup> Under the predominant pre-*Gant* understanding of *Belton*, no case-by case inquiry was required under federal law, and *any* search of a vehicle incidental to a lawful arrest was allowed regardless if the arrestee could access the stopped vehicle at the time

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the people to be secure in their persons . . . against unreasonable searches and seizures, shall not be violated; and no warrants can issue but upon probable cause . . . ." See *People v. Smith*, 452 N.E.2d 1224, 1226 (N.Y. 1983) ("[B]oth [the] Federal and State warrant requirements derive from the common law." (citing *Robinson*, 414 U.S. 218, 230 (1973))).

<sup>99</sup> *Smith*, 452 N.E.2d at 1226 (stating the United States Supreme Court understands the Fourth Amendment to the United States Constitution to require drawing a bright line "for reasons of efficiency between permissible searches and impermissible searches, even though the result is occasionally to forbid a reasonable search or permit an unreasonable one" (citing *Robinson*, 414 U.S. at 235)). The New York State Constitution requires that the reasonableness of each search must be determined on the basis of the facts and circumstances of each case. *Id.* at 1226-27 (citing *People v. DeBour*, 352 N.E.2d 562, 571 (N.Y. 1976)); *id.* at 1227 (noting under *Belton* the Federal Constitution allows the search of a closed container taken from the person or in the " 'grabbable area' accessible to the person arrested, even though the police have no reason to fear for their safety," while the New York State Constitution is not so broad; exigent circumstance of possible destruction of evidence or police safety must exist). However, the state allows searches based on the circumstances which exist at the time of the arrest even though the arrestee is subdued and the object searched is under exclusive police control. *Id.* (citing *Belton*, 407 N.E.2d at 423 n.2). The search must not be " 'significantly divorced in time or place from the arrest.' " *Id.* (quoting *People v. De Santis*, 385 N.E.2d 577, 580 (1978), *overruled by Belton*, 407 N.E.2d at 422 n.1 ("To the extent that these cases may be read to suggest otherwise, they are disapproved.")).

<sup>100</sup> *Derrell*, 889 N.Y.S.2d at 917 (stating that "under the law in effect in New York prior to *Gant*, in contrast to the *Gant* decision, the question was not whether, at the time a search was conducted, a defendant, in reality, could jeopardize the safety of an officer or the preservation of evidence. The inquiry considered whether such circumstances existed before the search was made, so long as the relevant criteria existed at the time of the arrest and the arrest and search were sufficiently close in space and time. In this respect the Federal Constitution now arguably imposes more restrictions on an officer's exercise of the right to search incidental to an arrest (at least in the vehicle context) than the State Constitution imposed prior to *Gant*.").

<sup>101</sup> See *id.*

<sup>102</sup> *Id.*

of the search.<sup>103</sup> This predominate reading of *Belton*, embraced both by the majority in *Gant* as the pre-*Gant* reading of *Belton*<sup>104</sup> and in *Derrell*, resulted in New York law being more protective of Fourth Amendment privacy interests. First, New York law required an individual inquiry into each case and rejected applying a *Belton* type bright-line rule.<sup>105</sup> Second, New York remained more faithful to a literal reading of *Chimel* by requiring the actual existence of a risk to police or real potential destruction of evidence at the time of the arrest; this effectively is more limiting on police in their ability to search without a warrant.<sup>106</sup>

According to this predominate reading of *Belton*, the Supreme Court's ruling in *Gant* significantly changed the landscape of both federal and New York State law by switching to a requirement that a search of a vehicle incidental to lawful arrest required a strict adherence to *Chimel*'s twin dictates of an *actual* risk to the officers, or *actual* potential loss of evidence relating to the arresting crime, not at the time of arrest, but at the *time of the search*.<sup>107</sup> According to the new view held in *Gant*, when an arrestee is secured in the patrol car, no lawful search would be allowed because at the time of the search no risk to officers or evidence destruction exists. As stated in *Derrell*, New York law accordingly would be unconstitutional because New York case law previously allowed a determination of potential risk to the officers, or evidence destruction determined at the time of the *arrest*, not the time of the search; *Gant* held a search predicated on the time of arrest unconstitutional under the Fourth Amendment to the United States Constitution; the risk to officers, or potential evidence loss must exist at the time of the actual search for the warrantless search to be constitutional.<sup>108</sup>

It is analytically relevant to examine the various opinions in *Gant* itself to understand how *Derrell* concluded that New York law is more lenient than post-*Gant* and thus unconstitutional. Approaching the issues from one of the alternative views expressed in *Gant* may result in conclusions different than those reached by *Derrell*.

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<sup>103</sup> *Id.* at 915-16.

<sup>104</sup> *See Gant*, 129 S. Ct. at 1718.

<sup>105</sup> *Smith*, 457 N.E.2d at 1226-27; *Derrell*, 889 N.Y.S.2d at 917.

<sup>106</sup> *See Smith*, 457 N.E.2d at 1227.

<sup>107</sup> *See Gant*, 129 S. Ct. at 1719, 1723-24; *Derrell*, 889 N.Y.S.2d at 915-17.

<sup>108</sup> *See Derrell*, 889 N.Y.S.2d at 917.

Two divergent views are expressed in the *Gant* dissent.<sup>109</sup> Justice Breyer doctrinally agreed with the majority, but principles of *stare decisis* compelled him to dissent.<sup>110</sup> Justice Alito joined by Chief Justice Roberts and Justice Kennedy, fundamentally disagree with the majority on how to understand *Belton*<sup>111</sup> and *Chimel*.<sup>112</sup> Importantly, according to Justice Alito's view of *Belton*, the determination of the area of possession and control of the defendant required by *Chimel* to allow a warrantless search incidental to arrest is based on the *time of arrest*, not the time of the search; a markedly different view than the traditional understanding of *Belton*.<sup>113</sup> According to

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<sup>109</sup> *Gant*, 129 S. Ct. at 1725-26 (Breyer, J., dissenting); *id.* at 1726-27 (Alito, J., dissenting).

<sup>110</sup> *Id.* at 1725-26 (Breyer, J., dissenting) (stating that he simultaneously agrees that Justice Alito's reading of *Belton* establishing a clear bright-line rule is the "best read" of *Belton*, while agreeing with Justice Stevens' majority holding in *Gant* that the accepted reading of *Belton* produces rulings inconsistent with its underlying Fourth Amendment justifications. In the abstract, he would look for a better rule than *Belton*, but the issue before the Court is not of first impression, rather an issue with a long judicial history and established precedents. For reasons of *stare decisis*, he dissented).

<sup>111</sup> *Id.* at 1727 (Alito, J., dissenting) (stating that *Belton* itself expressly acknowledged that articles in vehicles may not always be within the reach of the arrestee, "but '[i]n order to establish the workable rule this category of cases requires,' the Court adopted a rule that categorically permits the search of car's passenger compartment incident to the lawful arrest of an occupant"). Justice Alito further stated that "[t]he precise holding in *Belton* could not be clearer," and "[c]ontrary to the Court's suggestion, however, Justice Brennan's *Belton* dissent did not mischaracterize . . . or cause the holding to be misinterpreted. As noted, the *Belton* Court explicitly stated precisely what it held." *Id.*

<sup>112</sup> *Gant*, 129 S. Ct. at 1730 (stating that *Chimel*'s holding confining searches to the area of "the arrestee's person" and "the area from which he might gain possession of a weapon or destructible evidence" "did not explicitly state if this meant accessible to arrestee at the time of the arrest or at the time of the search. Justice Alito argued it must be the latter). Justice Alito's conclusion is premised on the fact that even at the time *Chimel* was decided, officers making an arrest were able to first handcuff and secure the arrestee; importantly, this is the safer practice that logically is the prevalent practice. "Thus, if the arrestee's place was defined by the time of search, rather time of arrest, the rule would rarely, if ever come into play." *Id.* at 1730. Additionally, Justice Alito points out that handcuffs were available in 1969 as they are today. *Chimel* understood as applying to time of the search, would create a perverse incentive to the police to *not* properly secure the arrestee, to allow them greater latitude to gather important evidence which once handcuffed and secured would be unavailable to them, "if this is the law, 'the law would truly be, as Mr. Bumble said, 'a[sic] ass.'" *Id.* at 1730 (quoting *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996)). Based on these arguments, Justice Alito concludes that *Chimel* must have meant articles in the reach of the arrestee at the time of his or her arrest, irrespective of being within the reach of the arrestee at the actual time of the search. *Id.*

<sup>113</sup> See *id.* at 1730-31. Cf. *id.* at 1714, 1716-19, 1721 n.8 (majority opinion) (holding of the broader view of *Belton* which requires all pertinent *Chimel* determinations to be based on the actual time of the search, not the arrest).

this view, *Belton* did not expand *Chimel*, but simply eliminated the pre-*Belton* requirement deciding on a case-by-case basis whether the arrestee was or was not able to reach the item when seated in the car at the time of arrest.<sup>114</sup> Under Justice Alito's view of *Belton*, if an arrestee was secured in the patrol car at the time of the search, the warrantless search would be permitted as long as at the time of arrest a risk to the arresting officers or loss of evidence existed, even though at the moment of the search, no such concerns exist.<sup>115</sup> According to this understanding of *Belton*, federal and New York State law are nearly identical; as both federal and New York State law require an inquiry focusing on the existence of *Chimel*'s factors at time of the arrest. The only differences between federal and New York law under Justice Alito's understanding of *Belton*, would be the Supreme Court's application of a bright-line rule in *Belton* determining that everything within a vehicle is within the reachable area of an arres-

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<sup>114</sup> *Gant*, 129 S. Ct. at 1730-31 (Alito, J., dissenting) (stating that according to his reading of *Chimel* and *Belton*, if the Court decides to reexamine *Belton*, it must actually reexamine *Chimel* upon which *Belton* is securely based). Additionally, Justice Alito argued that regardless of how *Belton* and *Chimel* are understood, principles of *stare decisis* require allowing vehicle searches incidental to a lawful arrest even when the arrestee is handcuffed and secured from the scene. *See id.* at 1727-28. Acknowledging that "*stare decisis* is not an 'inexorable command,' " Justice Alito discussed at length why in *Gant* principles of *stare decisis* should hold; specifically, because no "special justifications" warrant abandoning the present state of the law, and five factors which are weighed in deciding whether to invoke or reject *stare decisis*. *Id.* at 1727-28 (quoting *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). Specifically, reliance, changed circumstances, workability, consistency with later cases, and bad reasoning, all point to maintaining *stare decisis* of the prevalent traditional view of *Belton* and allowing searches incident to arrest even when the arrestee is secured. *See id.* at 1728-31 (arguing because *Belton* has been taught for twenty-eight years in police academies, there is significant reliance on the previous ruling; the circumstances of arrests today are not changed since *Belton* was decided twenty-eight years ago, and the unlikely return of a handcuffed arrestee to the vehicle to retrieve a weapon or destroy evidence is identical now as when *Belton* decided; the *Belton* rule has not proven to be unworkable; *Belton* has not been undermined by later cases, rather it was reaffirmed in 2004 by *Thornton*; and *Belton* was not based on bad reasoning. Based on Justice Alito's view that *Belton*'s determination of threat to the officers or potential evidence destruction meant at the time of the arrest, *Belton* was a modest step post *Chimel*, simply avoiding a case-by-case determination of the arrestees reach at the time of arrest). Although *Belton* is not always perfectly clear, according to Justice Alito it is clearer than the new two-part rule articulated by the *Gant* Court; first, requiring a determination whether or not the arrestee is or is not within reach of the interior at the time of the search. This is a case-by-case determination; second, requiring officers in the field to determine whether the vehicle reasonably contains evidence specifically connected to the crime an arrestee was detained for. Neither step is clear independently, certainly not when both are required. *Gant*, 129 S. Ct. at 1729.

<sup>115</sup> *See id.* at 1730-31.

tee,<sup>116</sup> while New York would require an individual determination based on each case's facts and circumstances to determine the reasonableness of each individual search.<sup>117</sup>

Justice Scalia in concurrence<sup>118</sup> with *Gant* strikes out a third

<sup>116</sup> *Smith*, 452 N.E.2d at 1226 (stating for "reasons of efficiency" a bright-line is allowed under the Federal Constitution (citing *Robinson*, 414 U.S. at 235)).

<sup>117</sup> *Id.* at 1226-27. *Derrell* pointed out that beyond the core ruling of *Gant*, New York law is essentially identical to federal law in regards to other possible issues involved with warrantless searches of vehicles incidental to lawful arrest. *Derrell*, 889 N.Y.S.2d at 919-20. For instance, regarding whether vehicle searches are justified by the 'vehicle exception' rule. *Id.* at 919 (stating that under New York law, when "an arrest is made and there is 'reason to believe that the vehicle . . . may be related to the crime for which the arrest is being made[.]'" a warrantless search may be conducted under the "vehicle exception" rule) (quoting *People v. Belton*, 432 N.E.2d 745, 748 (1982), *rev'd* 407 N.E.2d 420, *rev'd by*, 453 U.S. 454). *Derrell* noted that the "automobile exception" rule under New York State law overlaps, and is essentially the same as the second prong of *Gant* which allowed a special category of searches for vehicles where there is reason to believe there is evidence of the arresting crime in the vehicle. *Id.* New York and federal law post-*Gant* are identical as far as allowing a vehicle search regardless of the existence of potential officer safety or evidence destruction factors, where the police have a reasonable basis to believe that evidence for the crime that the arrestee was arrested for may be present in the vehicle. *See id.* at 918-19. The presence of a passenger in a defendant's vehicle who was not arrested, but posed a reasonable suspicion of danger or a threat, was held to allow a warrantless search in *Michigan v. Long*, 463 U.S. 1032, 1049-50 (1983); New York State law is identical. *See Derrell*, 889 N.Y.S.2d at 919. *Derrell* continued by exploring the 'inevitable discovery doctrine,' which holds that evidence obtained from an illegal search which would have been discovered in the normal course of an investigation or inventory, is admissible. Under New York State law, the "inevitable evidence doctrine" has limitations, which depends upon whether it is applied to "primary evidence" or "secondary evidence." "Primary evidence," which is subject to exclusion, is evidence "illegally obtained during or as the immediate consequences of the challenged police conduct." "Secondary evidence," which is evidence "obtained indirectly as a result of leads or information gained from that primary evidence," is admissible under the "inevitable discovery doctrine." *See id.* at 920. Under federal law, the "inevitable discovery doctrine" allows searches forbidden under *Gant*, when the government proves that the evidence would have inevitably been discovered and the government can "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *United States v. Morillo*, No. 08 CR 676, 2009 U.S. Dist. LEXIS 94396, \*25-26 (E.D.N.Y. October 9, 2009) (quoting *Nix v. Williams*, 467 U.S. 431, 444 (1984)). However, the court must find "with a high level of confidence, that each of the contingencies necessary to the legal discovery of the contested evidence would be resolved in the government's favor." It is not enough that there is a "reasonable probability that the contested evidence would have been discovered by lawful means in the absence of police misconduct." *See United States v. Heath*, 455 F.3d 52, 60 (2d Cir. 2006). Thus, differences exist between New York and Federal law regarding searches incident to lawful arrests involving vehicles, when the issue involves the "inevitable discovery doctrine."

<sup>118</sup> *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring) (describing his view of abandoning *Chimel* and *Belton* as not shared by any other Justice, and faced "with a 4-to-1-to-4 opinion that leaves the governing rule uncertain," Justice Scalia chose between the 'two evils' and for the sake of higher degree of certainty for police officers, sided with the majority, as the

position.<sup>119</sup> According to Justice Scalia, the Court should overrule both *Belton* and *Thornton*, and hold that vehicle searches incidental to lawful arrests are allowed as long as the object searched is evidence of the crime arrested for, or of another crime that the arresting officer has reasonable cause to believe occurred.<sup>120</sup> Justice Scalia pointed out that *Gant* attempted to continue to apply *Chimel* to vehicle searches, and would only allow officers to search vehicles incident to arrest “so long as the ‘arrestee is within reaching distance of the passenger compartment at the time of the search.’ ”<sup>121</sup> Justice Scalia posited that this *Gant* standard lacks clear guidance for the arresting officers, and potentially would allow manipulation by officers purposely leaving a non-violent arrest scene unsecured solely to allow a warrantless vehicle search.<sup>122</sup> Justice Scalia further argued that the continued adherence to *Belton*’s and *Thornton*’s officer safety requirement is a “charade,” because the normal sequence of an arrest dictates that the person being arrested is first secured and removed, and then a search is contemplated.<sup>123</sup>

*Derrell* clearly does not embrace Justice Alito’s or Justice Scalia’s view of *Belton* or what *Gant* accomplished, because following either justice’s view would have led the *Derrell* court to different

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dissent approach “is the greater evil.”).

<sup>119</sup> *Id.* at 1724-25.

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

<sup>121</sup> *Id.* at 1724.

<sup>122</sup> *Id.* at 1724-25 (stating the concern of manipulation would exist in cases where dangerous suspects are not involved, specifically, because the *Gant* holding creates a disincentive for police to secure the scene; once the scene is secure, *Chimel* blocks any further warrantless searches).

<sup>123</sup> See *Gant*, 129 S. Ct. at 1724-25 (pointing out that the risk to officers in vehicle stops is at its height at the time of the initial officer-citizen confrontation, and is never reduced by allowing a search of the vehicle *after* the driver is arrested and secured in a patrol car). Justice Scalia pointed out that the government has failed to provide a single incidence of a secured arrestee escape, which then retrieved a weapon from their formerly driven vehicle. *Thornton*, 541 U.S. at 625-27 (Scalia, J., concurring). Additionally, Justice Scalia countered Justice Alito’s numerous arguments based on *stare decisis*; specifically, regarding his arguments concerning no reason to limit searches to cases where evidence of the crime exists, and in the difficulty for officers in administering the standard. See *Gant*, 129 S. Ct. at 1725 (rejecting *stare decisis* instantly, because *Belton* was “badly reasoned” and produced unconstitutional results that were based on “fanciful reliance upon officer safety”; further arguing that searches based on reasonably finding evidence of the arresting crime ties the arresting triggering event to the scope of the search, while *Belton*, based on exigency concepts, allows searches at the time when the concept is least applicable, i.e. after arrest, and the defendant is secured from the scene).

conclusions.<sup>124</sup>

However, as stated in *Derrell*,<sup>125</sup> post the holding in *Gant* the discussion of what New York law held is largely irrelevant, because according to *Gant* New York's time of arrest determination of the *Chimel* factors violates the Fourth Amendment to the United States Constitution,<sup>126</sup> because New York case law as stated in *Derrell* is more lenient towards the police, allowing more invasion of privacy than the Supreme Court would allow in *Gant* in violation of the Fourth Amendment.<sup>127</sup>

It is clear that prior to *Gant* vehicle searches incidental to lawful arrest had become erroneously perceived as a police right, and not the exception to the Fourth Amendment which they truly are.<sup>128</sup> Such a perception is fundamentally troubling, and a very dangerous proposition. Troubling because vehicle searches incidental to lawful arrests were not tied to the Fourth Amendment, and essentially were a government invasion of its citizens outside of the law. A government operating outside of the laws inevitably leads to further egregious government abuses. Additionally, the underlying legal legitimacy allowing vehicle searches incident to lawful arrest; *Chimel's* twin factors, pre-*Gant* had become a "charade."<sup>129</sup>

*Gant* in this sense re-tethered vehicle searches incidental to lawful arrests to *Chimel* and Fourth Amendment jurisprudence.<sup>130</sup> However, post *Gant* a major problem which has persisted since the inception of *Belton* remains; the fact that police officers in the field, who are under stressful and rapidly changing circumstances,<sup>131</sup> are still expected to make subtle, abstract determinations of possible

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<sup>124</sup> Compare *supra* p. 621 and notes 107-08, with *supra* pp. 621-25 and accompanying notes.

<sup>125</sup> See *Derrell*, 889 N.Y.S.2d at 917.

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

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

<sup>128</sup> *Gant*, 129 S. Ct. at 1718 (majority opinion) (" '[L]ower 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*.' " (quoting *Thornton*, 541 U.S. at 624 (O'Connor, J., concurring)); *id.* at 1718-19 (quoting *Thornton*, 541 U.S. at 628-29 (Scalia, J., concurring) (stating Justice Scalia's similar observation, and some courts have allowed searches under *Belton* even after the arrestee has left the scene).

<sup>129</sup> See *id.* at 1725 (Scalia, J., concurring).

<sup>130</sup> See *id.* at 1719 (majority opinion).

<sup>131</sup> See *Belton*, 453 U.S. at 458 (quoting *The Robinson Dilemma*, *supra* note 39, at 141).

threats to their safety or possible evidence destruction.<sup>132</sup> This is both impractical and seemingly absurd. Moreover, such a state of the law leaves room for possible police abuses through purposeful police manipulations to leave arrestees and crime scenes unsecured to gain further evidence without a warrant.<sup>133</sup> Pre-*Gant* New York law as expressed in *Derrell* was even more difficult and impractical than federal law, because New York law required a field determination by police whether at the time of arrest the area police seek to search is or is not within the immediate area under the control and reach of the arrestee,<sup>134</sup> and then a determination by the courts in each case whether this was a correct decision.<sup>135</sup> Logically, this should simply be too difficult to expect police officers to make such field determinations. On a more fundamental level this is most problematic, because it causes police and citizens to lack clarity whether a warrant is or is not required, thus diluting the protections of the Fourth Amendment and weakening fundamental freedoms.<sup>136</sup>

Accepting this logical premise and observation, arguably New York law pre-*Gant* as expressed by *Derrell* was actually not more protective of privacy rights, but actually contributed to less Fourth Amendment protection because of the confusion and lack of clarity the New York rule apparently created for police and citizens.<sup>137</sup>

The only approach which simultaneously is firmly tethered to Fourth Amendment jurisprudence and creates the clearest, definable exception to the Fourth Amendment, which facilitates the greatest police and citizen certainty of what and where a warrantless search is permissible, is Justice Scalia's *Gant* concurrence.<sup>138</sup> Justice Scalia's opinion removes the entire murky area of "within the reach" of the arrestee issue, as well as removing the "charade" of *Belton* creating a fantasy exception for safety and evidence concerns; a concern which in reality does not exist because arrestees are almost always secured and removed from the vehicle prior to a search being conducted.<sup>139</sup>

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<sup>132</sup> See *The Robinson Dilemma*, *supra* note 39, at 141.

<sup>133</sup> *Gant*, 129 S. Ct. at 1724-25 (Scalia, J., concurring).

<sup>134</sup> *Derrell*, 889 N.Y.S2d at 916-17.

<sup>135</sup> *Smith*, 452 N.E.2d at 1226-27.

<sup>136</sup> *Belton*, 453 U.S. at 458.

<sup>137</sup> See *The Robinson Dilemma*, *supra* note 39, at 141.

<sup>138</sup> See *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring).

<sup>139</sup> See *id.* at 1724 (stating police almost always will secure an arrestee first to secure the scene).



By no longer applying *Chimel* to the vehicle search context, ample protections exist limiting the search exception to only cases where there is an arrest, and only to searches reasonably connected to the arresting crime.<sup>140</sup> Searches with no reasonable connection to the arresting crime, would be illegal.<sup>141</sup> Only warrantless vehicle searches incidental to a lawful arrest with a reasonable connection between the search and the reason officers are arresting the defendant are permitted.<sup>142</sup> This approach is simpler because the same thought process allowing the officer to arrest for probable cause continues to be the officer's guide whether a search can or cannot be conducted.<sup>143</sup> Because the factor of a defendant being secured is irrelevant, police manipulation is not an issue under this approach, and no complicated spatial and temporal decisions need to be contemplated by the arresting officers.<sup>144</sup> Police and citizens both would have a clear understanding of the Fourth Amendment; warrants are required, except when a person is lawfully arrested, and the police have a reasonable belief that evidence relating to the arresting crime may be found in the vehicle. Such a search is allowed solely, and only because it is incidental to a lawful arrest. Moreover, the *Gant* majority opinion itself accepted Justice Scalia's exception allowing warrantless searches for evidence reasonably related to the arresting crime.<sup>145</sup> Apparently, the *Gant* Court was trying to have all positions simultaneously; keep *Chimel* applicable to vehicles, and allow evidence relating to the arresting crime regardless of *Chimel*.<sup>146</sup> For the sake of police and citizen clarity, and ultimately greater privacy protection under the Fourth Amendment, requires a revisit of the entire application of *Chimel* to

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<sup>140</sup> See *id.* at 1724-25; *Thornton*, 541 U.S. at 629-30 (Scalia, J., concurring).

<sup>141</sup> See *Gant*, 129 S. Ct. at 1724-25; *Thornton*, 541 U.S. at 629-30.

<sup>142</sup> *Gant*, 129 S. Ct. at 1724-25.

<sup>143</sup> See *id.*

<sup>144</sup> See *id.* at 1724-25.

<sup>145</sup> See *id.* at 1714 (majority opinion) (following *Thornton* and Justice Scalia's suggestion in his *Thornton* concurrence, holding the context of an automobile allows a search incidental to lawful arrest, when it is reasonable for the arresting officers to believe evidence of the arresting offense might be found in the vehicle).

<sup>146</sup> See *id.* at 1714 (holding that *Chimel*'s safety and evidence protections are determinative of *Belton*'s scope; therefore *Belton* does not allow a search incident to lawful arrest of an occupant who is no longer in the vehicle and is secured and is unable to access the interior of the vehicle); *Gant*, 129 S. Ct. at 1714 (following *Thornton* and Justice Scalia's suggestion in his *Thornton* concurrence, the context of an automobile allow a search incident to lawful arrest of a vehicle, when it is reasonable for the arresting officers to believe evidence of the arresting offense might be found in the vehicle).

vehicles as advocated by Justice Scalia and endorsed by Justice O'Connor.<sup>147</sup>

Under this proposal of solely using Justice Scalia's concurrence in *Gant*, New York law would revert to being more protective of privacy interests than the United States Constitution, as New York law would continue to adhere to the *Chimel* requirements of potential officer risk or evidence destruction as determined at the time of arrest, and a case-by case determination of overall reasonableness as stated by in *Derrell*.<sup>148</sup>

It would remain arguable whether this assumption of New York being more protective of Fourth Amendment privacy rights than the United States Constitution is accurate.<sup>149</sup> While a case-by-case determination approach according to *Derrell* makes New York more protective of privacy rights, the uncertainty inherent in such a New York approach has a net-loss in Fourth Amendment privacy protection, because police and citizens would not know in simple terms what is or is not protected. Moreover, the New York pre-*Gant* approach would appear to be judicially unworkable. Requiring already overwhelmed New York courts to conduct case-by-case determinations of facts and circumstances would be the height of judicial inefficiency. Moreover, requiring the police to contend with two constitutional standards would logically cause police uncertainty and handcuff officials in performing their jobs. Ultimately, the police will likely err on the side of caution, potentially missing or losing important evidence relating to the crimes a person was arrested for.

A remaining problem according to both Justice Scalia and the *Gant* opinion is how to exactly understand the parameters of the allowable search of the vehicle for evidence related to the arresting crime. Is this a probable cause concept? Justice Scalia apparently alluded to this when he stated that the criterion for arrest, which is probable cause, continues to be the consistent determinative factor in

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<sup>147</sup> See *Thornton*, 541 U.S. at 624-25 (O'Connor, J., concurring) (stating that although *Thornton* is a logical extension of *Belton*, she is dissatisfied with the state of the law in search incident to arrest of automobiles, because *Belton* is on a "shaky foundation," and quoting Justice Scalia's concurrence "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest . . . as a police entitlement rather than as an exception justified by the twin rationales of *Chimel* . . .").

<sup>148</sup> See *supra* text accompanying notes 128-133.

<sup>149</sup> See *supra* text accompanying notes 136-37.

allowing a warrantless subsequent search.<sup>150</sup> Or, as alluded to by Justice Stevens in *Gant*,<sup>151</sup> and Justice Scalia in *Thornton*,<sup>152</sup> a seemingly lower standard than probable cause, the concept of a reasonable probability of evidence of the arresting crime?

While the aforementioned discussions are theoretical alternatives to the outcome stated in *Derrell*, presently it is not the law. *Derrell* correctly stated the view held by the majority in *Gant*, as well as the predominant view pre-*Gant* how to understand *Belton*.<sup>153</sup> It remains arguable whether the pre-*Gant* law in New York was or was not more or less protective of the Fourth Amendment rights; but as *Derrell* correctly stated, this is purely theoretical under post-*Gant* law.

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<sup>150</sup> See *Gant*, 129 S. Ct. at 1725 (Scalia, J., concurring).

<sup>151</sup> See *id.* at 1714, 1723 (majority opinion).

<sup>152</sup> See *Thornton*, 541 U.S. at 632 (Scalia, J., concurring). Cf. *Robbins*, 453 U.S. at 444 (Stevens, J., dissenting) (describing the “automobile exception” being allowed using both terms in the same paragraph, “probable cause to believe the vehicles contained contraband,” and at the end of the same paragraph “any containers in vehicle that might reasonably contain the contraband”).

<sup>153</sup> *Derrell*, 889 N.Y.S.2d at 915-17.

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