Belton Dodges the Bullet: Entitlement Searches Survive Gant But it is Not Too Late to Set Things Straight

by

Edmund S. Luggen

Submitted in partial fulfillment of the requirements of the
King Scholar Program
Michigan State University College of Law
under the direction of
Professor Daniel Katz
Spring, 2012

Sometime in the early evening, a police officer pulls over a Chevrolet sedan for failing to properly signal a right-hand turn. Before approaching the vehicle, the officer checks the warrant database on his cruiser's computer and finds that the owner of the sedan has an outstanding arrest warrant. The officer approaches the car, identifies that the driver is the owner of the sedan, and places her under arrest. The officer then performs a brief pat-down and pocket search of the arrestee, finding nothing illicit. After locking the driver in the back of his patrol car, the officer searches the Chevy sedan and finds a small amount of cocaine under the seat. At a pretrial motion hearing, the driver tries to suppress the cocaine recovered from her car as obtained in violation of the Fourth Amendment to the Constitution.

The preceding story is a common one for the almost 40,000 people arrested in this country every day,[1] and has been for many decades. Whether the evidence will be suppressed, however, cannot be determined from the facts given. If the year were 1972, the search would almost certainly be held unconstitutional. In 1982, the answer is not so clear. In 1992 and 2002, the search would almost certainly be allowed. But now in 2012, the answer again is unclear. Whether the search is permissible now depends on factors such as where the arrest was made; the time of day; the allegations in the outstanding warrant; the make of the car being a Chevrolet (and not a Ford); whether the Chevy was an economy, mid-sized, or full-sized sedan; whether the driver left her cell phone visible in the car; and the officer's experience in handling similar stops.

This paper examines the current state of the "search incident to lawful arrest" ("SILA") exception to the warrant requirement three years after the Supreme Court's holding in *Arizona v.*

[1] U.S. DOJ, *Estimated Number of Arrests*, http://www2.fbi.gov/ucr/cius2009/data/table_29.html (last visited 4/17/2012).

Gant.[2] Specifically, it focuses on the divided interpretations of Justice Scalia's evidence-gathering addition to the Court's holding in that case. The article starts with a brief summary of the origins of the exception, tracking the iterations through the exception's formative period.[3] It then focuses on how the Supreme Court's most recent decision on the topic, *Arizona v. Gant*, changed interpretations and applications of the exception since April 2009.[4] After contrasting the various interpretations of the second prong of the *Gant* holding, which I have termed Scalia's rule, I will advocate the most proper interpretation of the *Gant* opinion language for lower courts going forward.[5]

I. HISTORY OF THE SILA DOCTRINE

The SILA exception to the warrant requirement is an ancient doctrine, long recognized at common law.[6] In its most primitive form, the SILA exception allowed an arresting police officer to search an arrestee for weapons that could be used against the officer or evidence that the suspect may destroy or conceal.[7] The rationale behind the exception, eloquently explained by Justice Cardozo, can be simply put: "[t]he peace officer empowered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed. The search being lawful, he retains what he finds if connected with the crime."[8] Grown from its early English and American roots, the SILA doctrine has expanded to encompass many new factual scenarios beyond a mere search of the person arrested.

Throughout its history, the SILA exception has been supported on two distinct, competing rationales: the exigency rationale and the evidence-gathering rationale. The Court has

[2] 556 U.S. 332 (2009).
[3] *See* History *infra* Part I.
[4] *See* Discussion *infra* Part II.
[5] *See* Analysis *infra* Part IV.
[6] *Weeks v. United States*, 232 U.S. 383, 392 (1914).
[7] *Id.*
[8] People v. Chiagles, 237 N.Y. 193, 197 (1923).

historically switched between those rationales, unable settle the logic behind the exception.[9] The first, the exigency rationale, rests on an interpretation of the Fourth Amendment which requires state actors to get a warrant whenever practicable, that is when exigent circumstances are not prohibitive.[10] The evidence-gathering rationale reads the Fourth Amendment to only prohibit unreasonable searches; applying courts conclude that warrantless searches can be reasonable if limited in scope and duration.[11]

The current rule in the automobile context has become a hybrid of sorts: contemporaneous to a lawful arrest of an automobile occupant, a government actor may search the arrested person and the area within reaching distance of the arrested person if it is reasonably likely that the arrestee may gain access to the place to be searched to procure a weapon or destroy evidence (exigency rationale) or if it is reasonable to believe that evidence of the crime for which the arrestee was arrested may be found therein (evidence-gathering rationale). The evolution of the modern exception is covered in the paragraphs that follow.

A. The Beginnings of the SILA Doctrine

In American jurisprudence, the SILA exception first received the Court's recognition in the 1914 opinion in *Weeks v. United States*.[12] In that case, the Court recognized in passing dicta that the right to search the person of an arrestee when legally arrested has been long recognized under both English and American Law.[13]

Eleven years later in *Carroll v. United States*, the Court noted "whatever is found upon [the arrestee's] person *or in his control* which it is unlawful for him to have and which may be

[9] *See* History *infra* Part I.A- B.
[10] *See* Chimel v. California, 395 U.S.752, 761 (1969).
[11] *See, e.g.,*United States v. Rabinowitz, 339 U.S. 56, 60 (1950).
[12] 232 U.S. 383.
[13] *Id.* at 392.

used to prove the offense may be seized."[14] Just weeks later in the in the *Agnello v. United States* opinion, the Court stated in dicta that the government's right to search persons lawfully arrested and "to search *the place where the arrest is made* to find and seize things connected with the crime as its fruits . . . is not to be doubted." [15] Though this language did not form part of the Court's holding, it still represented another significant expansion of the language in *Weeks* and *Carroll*.

The SILA doctrine, which had so far been mentioned only in dicta, took center stage as the basis for the Court's opinion two years later in *Marron v. United States*.[16] In that case, prohibition officers obtained a search warrant allowing the search and seizure of liquors and certain articles used in the alcohol manufacturing process.[17] During the search, the officers discovered and seized a ledger, an item not covered by the warrant.[18] The Court upheld the seizure, concluding the officers had a right to contemporaneously search the location and seize items used to carry out the enterprise incident to the lawful arrest of the suspects.[19] While the Court in *Carroll* hinted at reliance on the exigency rationale,[20] *Marron* focused on the police's interest in gathering evidence.[21]

Just three years after *Marron*, the Court swapped rationales in *Go-Bart Importing Co. v. United States*[22] and *United States v. Lefkowitz*.[23] In *Go-Bart*, agents "ransacked" the defendants'

---

[14] 267 U.S. 132, 158 (1925) (expanding the scope from just the person to the things within his "control.") (emphasis added).
[15] 269 U.S. 20, 30 (1925) (expanding the Carroll statements) (emphasis added).
[16] 275 U.S. 192 (1927).
[17] *Id.* at 194.
[18] *Id.*
[19] *Id.*
[20] 267 U.S. at 153 (recognizing a "difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.").
[21] *See* 275 U.S. at 199.
[22] 282 U.S. 344 (1930).
[23] 285 U.S. 452 (1932).

office, showing both false arrest and search warrants, and seized papers from the office, the desk, and the safe.[24] Because the agents effectuated an arrest and searched the premises pursuant to invalid warrants and in bad faith, the Court declined to extend SILA to permit a search in that situation.[25] The *Go-Bart* opinion was supported by the exigency rationale.[26]

In *Lefkowitz*, prohibition agents served an arrest warrant at an office where the occupants were suspected of conspiracy to distribute spirits.[27] When effectuating the search, the agents opened all the desk drawers and cabinets and took books, papers, and the contents of the waste bins, which they later pieced together to repair the documents.[28] The Court distinguished *Marron*: the *Marron* search involved officers who witnessed ongoing criminal activity (the search was of a distillery fully equipped with bar and bartender) and the ledger was part of the "outfit" used to commit the offense.[29] The search in *Lefkowitz* was exploratory in nature and unsupported by the warrant.[30]

The factual high-water mark for the evidence-gathering rationale came twelve years later in *Harris v. United States*.[31] In that case, FBI agents served an arrest warrant on the defendant in his apartment and agents performed an exploratory search.[32] The warrantless search lasted over five hours before the agents found an envelope labeled "personal papers."[33] The contents, selective service draft cards, supported the defendant's ultimate conviction.[34] The Court noted that a search incident to lawful arrest is not necessarily restricted to the room in which the

[24] 282 U.S. at 358.
[25] *See Id.*
[26] *Id.* (noting the agents' failure to obtain a warrant despite having the opportunity).
[27] 285 U.S. at 458.
[28] *Id.* at 458-59.
[29] *Id.* at 465.
[30] *Id.*
[31] 331 U.S. 145 (1947).
[32] *See Id.* at 148-49.
[33] *Id.* at 149.
[34] *Id.* (convicted for alteration of draft cards).

suspect was arrested.[35] The *Harris* Court upheld the search, concluding it was not "too intensive" in light of the elusive nature of the stolen checks, the lawful entry via the arrest warrants, and the inherently illegal nature of the items seized.[36] [37]

Only a year later, the Court reaffirmed the warrant requirement in the case of *Trupiano v. United States*.[38] In *Trupiano*, Internal Revenue agents set up an undercover operation in an illegal distillery.[39] Over the course of several weeks, the agents observed construction and operation of the still.[40] The agents eventually raided the still, seizing the operations, searching the building and nearby trucks, and arresting those found within.[41] No warrant was ever obtained[42] and the seizure was ruled invalid.[43] Concluding a warrant must be procured whenever reasonable, the agents' failure to obtain a warrant rendered the seizure unreasonable in light of the exigency rationale behind the SILA exception.[44]

The Court again reversed directions in *United States v. Rabinowitz*.[45] In *Rabinowitz*, government officials received word that a stamp dealer was ordering and dealing forged stamps in his one-room office.[46] The agents obtained an arrest warrant but did not apply for or obtain a search warrant.[47] After arresting the defendant, the officers searched the one-room office for an

---

[35] *Id.* at 152; n.16 ("Searches going beyond the room of arrest were upheld in the Agnello and Marron cases[]. The searches found to be invalid in the Go-Bart and Lefkowitz cases were so held for reasons other than the areas covered by the searches. It has not been the understanding of the lower federal courts that the search in every case must be so confined.").
[36] *Id.* at 154 ("Certainly this is not a case of search for or seizure of an individual's private papers.").
[37] *Id*. at 156 (Jackson, J. dissenting) (criticizing the majority opinion: "The Court now goes far beyond prior decisions in another direction -- it permits rummaging throughout a house without a search warrant on the ostensible ground of looking for the instruments of a crime for which an arrest, but only an arrest, has been authorized.").
[38] 334 U.S. 699 (1948).
[39] *Id.* at 701.
[40] *Id.* at 702.
[41] *Id.* at 703.
[42] *Id.*
[43] *Id.* at 710.
[44] *See id.* at 705-06 ("And so when the agents of the Alcohol Tax Unit decided to dispense with a search warrant and to take matters into their own hands, they did precisely what the Fourth Amendment was designed to outlaw.").
[45] 339 U.S. 56 (1950).
[46] *Id.* at 57-58.
[47] *Id.*

hour-and-a-half and uncovered almost 600 forged stamps.[48] The Court concluded that the search was permissible because it was not "exploratory" in nature, but was specific to the office and to illegally forged stamps.[49] The Court declined to adopt a rule requiring officers to acquire a warrant whenever practicable, [50] making *Rabinowitz* the most recent decision supported by the evidence-gathering rationale.

Closely related to the search-incident-to-arrest caseline is the 1968 decision in *Terry v. Ohio*.[51] That case answered the question of whether an officer can perform a less intrusive, pat-down search without an arrest, but during an investigation. The facts involved a police officer who noticed several youths engaged in suspicious behavior.[52] While questioning the individuals, the officer patted-down the outside of their clothing to check for weapons.[53] The Court concluded there "must be a narrowly drawn authority to permit a reasonable search for weapons for the protection of the police officer, where he has *reason to believe* that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime."[54]

Similarly relevant is the Court's 1980 decision in *Payton v. New York*. [55] There, the Court confronted the issue of whether a warrant was required to enter a home absent exigent circumstances. It concluded that a warrant, either arrest or search, was required to cross the threshold into the home.[56] At the end of the opinion, the *Payton* Court stated "an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in

[48] *Id.* at 58-59.
[49] *Id.* at 63.
[50] *Id.* at 64; *see also id.* at 60 ("It was recognized by the framers . . . that there were reasonable searches for which no warrant was required.").
[51] 392 U.S. 1 (1968).
[52] *Id.* at 6.
[53] *Id.* at 7.
[54] *Id.* at 27 (emphasis added).
[55] 445 U.S. 573 (1980).
[56] *Id.* at 589.

which the suspect lives when there is *reason to believe* the suspect is within."[57] It is the phrase "reason to believe" and its interpretations in the lower courts which is applicable to the present analysis.

B. The Modern SILA Exception

In *Chimel v. California*, the Court sought to settle the half-century of conflicting rationale behind the search-incident-to-lawful-arrest exception.[58] In that case, Police arrived at Chimel's house with a warrant for his arrest.[59] When the defendant arrived home, the officers arrested him and asked for permission to "look around."[60] Chimel objected, but the officers informed him that they would perform the search anyway incident to his arrest.[61] Over the next hour, the officers searched not only the entire house, but also the attic, garage, and workshop.[62] The officers ordered Chimel's wife to move contents in the drawers of the master bedroom where they found and seized incriminating objects.[63]

Chimel claimed the search was improper as incident to his arrest. The Court first examined the circumstances which prompted the Framers to enact the Fourth Amendment.[64] The *Chimel* Court then reaffirmed the importance of the warrant requirement: "[a]bsent some grave emergency, the Fourth Amendment has interposed a magistrate between the citizens and the police."[65] "The burden is on those seeking an exemption from the requirement to show the need

---

[57] *Id.* at 602 (emphasis added).
[58] 395 U.S. 752, 758 (1969).
[59] *Id.* at 753.
[60] *Id.*
[61] *Id.*
[62] *Id.* at 754.
[63] *Id.*
[64] *Id.* at 760-61 ("the Amendment's proscription of unreasonable searches and seizures must be read in light of the history that gave rise to the words -- a history of abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution. The Amendment was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence. In the scheme of the Amendment, therefore, the requirement that "no Warrants shall issue, but upon probable cause," plays a crucial part.") (internal quotations and citations omitted).
[65] *Id.* at 761(internal citations omitted).

for it."[66] "The scope of a search must be strictly tied to and justified by the circumstances which rendered its initiation permissible."[67]

The Court continued "it is entirely reasonable for the arresting officer to search for and seize any evidence . . . [in] the area into which an arrestee might reach in order to grab a weapon or evidentiary item."[68] "There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control.'"[69] The Court then concluded the "area of immediate control" was the "rational limitation" for the exigency-based SILA exception.[70]

Before holding the search of Chimel's house unconstitutional, the Court cited the words of Judge Learned Hand:

> After arresting a man in his house, to rummage at will among his papers in search of whatever will convict him, appears to us to be indistinguishable from what might be done under a general warrant; indeed, the warrant would give more protection, for presumably it must be issued by a magistrate. True, by hypothesis the power would not exist, if the supposed offender were not found on the premises; but it is small consolation to know that one's papers are safe only so long as one is not at home.[71]

The case which set the stage for *Arizona v. Gant* was the 1981 decision in *New York v. Belton*.[72] In that case, the Court addressed the issue of whether a legal arrest of an automobile occupant puts the passenger compartment of the automobile into the permissible scope of a search incident to arrest, *i.e.*, whether the interior of the vehicle is the "area within the arrestee's immediate control."[73]

---

[66] *Id.* at 762 (internal citations omitted).
[67] *Id.* (internal citations and quotations omitted).
[68] *Id.* at 763.
[69] *Id.* (emphasis added).
[70] *Id.* at 766 (citing Justice Jackson's dissent from *Harris*, who opined and cautioned against exactly the rule the Court was making: "once the search is allowed to go beyond the person arrested and the objects [(not area)] upon him or in his immediate physical control . . . that means no limit at all." 331 U.S. at 197).
[71] *Id.* at 767-68 (citing United States v. Kirschenblatt, 16 F.2d 202, 203 (2d Cir. 1926) (Hand, J.)).
[72] 453 U.S. 454 (1981).
[73] *Id.* at 455.

The facts of the case were not unusual: a police officer pulled over a vehicle for speeding.[74] When approaching the car, the officer smelled burnt marijuana and saw on the floor an envelope marked "Supergold," a name he associated with marijuana.[75] The officer searched the envelope and indeed found marijuana.[76] He proceeded to search the vehicle where he found a jacket belonging to Belton, which contained cocaine in the pocket.[77] The officer placed the four occupants under arrest.[78]

After reaffirming an officer's ability to search the surrounding area incident to lawful arrest, the Court noted the difficulty lower courts had defining the "area within the arrestee's immediate control."[79] The Court ruled, seeking to establish a workable standard and bright-line rule, that items inside the passenger compartment of an automobile are "generally" within reach of an arrestee.[80] Purporting to do no more than interpret *Chimel* in a "problematic context," the Court held "when a policeman has made a lawful arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[81] The rule explicitly allowed the police to examine the contents of any containers found within the passenger compartment, open or closed.[82]

Justice Brennan authored a dissent, criticizing the Court for "turn[ing] its back" on "*Chimel's* underlying policy concerns" and signaling a retreat from the settled search-incident-to-arrest

---

[74] *Id.*
[75] *Id.* at 455-56.
[76] *Id.* at 456.
[77] *Id.*
[78] *Id.*
[79] *Id.* at 458-59 (examining conflicting caselaw); *id*. at 460 ("when a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority").
[80] *Id.*
[81] *Id.* (claiming the holding "in no way alters the fundamental principles" of Chimel).
[82] *Id.* at 460-61 (citing United States v. Robinson, 414 U.S. 218 (1973)).

analysis.[83] Exceptions to the warrant requirement must be narrowly construed.[84] "[I]n determining whether to grant an exception to the warrant requirement, courts should carefully consider the facts . . . focusing on the reasons supporting the exception rather than on any bright-line rule . . . ."[85] Justice Brennan concluded his opinion noting how the Court's bright-line rule does not in fact apply bright-line standards, and would create far more problems than it solves.[86] "More important, because the Court's new rule abandons the justifications underlying *Chimel*, it offers no guidance to the police officer seeking to work out these answers for himself."[87]

C. The Gant Opinion

In 2009, the Court decided *Arizona v. Gant*.[88] Suspect Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car. [89] With Gant secured, the officers searched his car and his jacket, finding cocaine in a jacket pocket.[90]

The *Belton* opinion, over the previous 28 years, had been widely understood to allow a vehicle search incident-to-arrest as an entitlement search, allowable regardless of the suspect's current location.[91] The Court, seeking to clarify that interpretation, reaffirmed that a search incident to arrest may only include the arrestee's person and the area within his immediate control.[92] If during an arrest there is no possibility that the arrestee could access the area in

---

[83] *Id.* at 463-64.
[84] *Id.* (internal quotations omitted) (citing, *inter alia*, Katz v. United States, 389 U.S. 347, 457 (1967); Terry v. Ohio, 392 U.S. 1, 19 (1968)).
[85] *Id.* (internal citations omitted).
[86] *Id.* at 469-470 (noting no definition of "contemporaneous," no reasoning about why the rule is restricted to cars, and no definition of "interior").
[87] *Id.* at 470.
[88] 556 U.S. 332 (2009).
[89] *Id.* at 335.
[90] *Id.*
[91] *Id.* at 341; *see also Id.* at 342 (citing Thornton v. United States, 541 U.S. 615, 628 (2004) (Scalia, J. concurring in judgment) (noting that cases allowing a search when the suspect is already detained, in the police car, or even absent from the scene are "legion")).
[92] *Id.* at 339.

question, the *Chimel* justifications preclude a warrantless search incident to that arrest.[93] Allowing a vehicle search incident to every recent occupant's arrest would "untether the rule from the justifications underlying the *Chimel* exception."[94] "Construing *Belton* to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis."[95] Following the exigent circumstances rationale, the Court held that *Chimel* "authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[96]

The Court then created a second rule, the subject matter of this paper: "circumstances unique to the vehicle context justify a search incident to arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[97] The Court offered no analysis for the second prong of its holding, but instead cited Justice Scalia's concurrence in judgment from *Thornton*. In that opinion, Justice Scalia revisited older Court precedent which rested on the "evidence-gathering" rationale, defunct since *Rabinowitz*.[98] Justice Scalia, however, offered minimal reasoning without cited authority for his evidence-gathering rule. He wrote only that there is "nothing irrational about broader police authority to search for evidence when and where the perpetrator of the crime is lawfully arrested."[99] An arrest, Scalia reasoned, "distinguishes the arrestee from society at large, and distinguishes a search for evidence of his crime from general

[93] *Id.*
[94] *Id.* at 343.
[95] *Id.* at 347.
[96] *Id.*
[97] *Id.* (citing Thornton, 541 U.S. at 632) (Scalia, J. concurring in judgment)).
[98] Thornton, 541 U.S. at 629-30 (citing cases, primarily United States v. Rabinowitz, 339 U.S. 56, 94 (1950)).
[99] *Id.*

rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended."[100]

Justice Scalia authored a concurring opinion in *Gant*, sharing his belief that the "*Belton-Thornton* charade of officer safety" should be abandoned.[101] In support of his contention, Justice Scalia noted typical police conduct: when an arrest is made after a roadside stop, officers don't search the car for their safety, they detain the suspect in the back of the police car.[102] The risk, he reasoned, peaks at the initial confrontation and is "*not at all* reduced by allowing a search of the stopped vehicle after the driver has been arrested and placed in the squad car."[103] Scalia would rule that the only reasonable search incident to vehicular arrest would be when the search is for evidence of the crime for which the arrest was made.[104] Concluding that a majority would be better than a 4-1-4 opinion, Scalia joined the majority, [105] and it seems the majority accommodated him by adopting his evidence-gathering rule. [106]

Applying the *Chimel* rationales to the facts of *Gant*, the Court held the search unconstitutional because Gant was not within reaching distance of his car at the time of the search.[107] The Court also noted, referring to Scalia's rule, that Gant was arrested for driving with a suspended license, "an offense for which police could not expect to find evidence in the passenger compartment of Gant's car."[108] Lastly, in an effort to preempt the dissenting opinion

---

[100] *Id.*
[101] 556 U.S. at 351.
[102] *Id.* at 351-52.
[103] *Id.* at 352 (emphasis in original).
[104] *Id.* at 353.
[105] *Id.* at 354.
[106] For an excellent and extensive critique of the Scalia's contribution to the Gant opinion, *see* Jack Blum, *Arizona v. Gant: Missing an Opportunity to Banish Bright Lines from the Court's Vehicular Search Incident to Arrest Jurisprudence*, 70 MD. L. REV 826 (2011).
[107] 556 U.S. at 344.
[108] *Id.*

calling for *Stare Decisis*, the Court reviewed briefly the volatile and apparently still-unsettled history of the SILA exception. [109] [110]

In his dissent, Justice Alito criticized the second prong of the two-part holding, noting the rule was taken from *Thornton* "without any independent explanation of its origin or justification and is virtually certain to confuse law enforcement officers and judges."[111] The Court was overruling, not clarifying, the rules in *Belton* and *Thornton*,[112] and should adhere to those cases under *Stare Decisis*.[113] Lastly, Justice Alito noted the unintuitive nature of the evidence-gathering search: "the Court's new rule, which the Court takes uncritically from Justice Scalia's separate opinion in Thornton, raises doctrinal and practical problems that the Court makes no effort to address. Why, for example, is the standard for this type of evidence-gathering search 'reason to believe' rather than probable cause? And why is this type of search restricted to evidence of the offense of arrest?"[114]

II. THE CURRENT STATE OF SILA: "REASONABLE TO BELIEVE" AUTHORITY SPLITS

In the three years since *Gant*, the lower courts have had much difficulty interpreting the Supreme Court's decision. Both prongs of the holding, the return to the twin rationales of Chimel (part one)[115] and Justice Scalia's "reasonable to believe" standard (part two) have created

---

[109] *Id.* at 350.
[110] Strangely noting United States v. Rabinowitz, the case upon which Justice Scalia based his dissent in Thornton, which in turn was the basis for the second prong of the Court's holding in Gant, had been overruled by Chimel, the opinion resurrected by Gant.
[111] *Id.* at 356.
[112] *Id.*
[113] *Id.* at 358-63.
[114] *Id.* at 364 (further noting "it is not easy to see why an officer should not be able to search when the officer has reason to believe that the vehicle in question possesses evidence of a crime other than the crime of arrest.").
[115] *Compare* United States v. Brewer, 624 F.3d 900, 905-06 (8th Cir. 2010) (declining to apply Gant to a search of an arrestee's person) and United States v. Perdoma, 621 F.3d 745, 751-52 (8th Cir. 2010) (declining to apply Gant to a search of a bag recovered from an area within the arrestee's immediate control) *with* United States v. Shakir, 616 F.3d 315, 318 (3d Cir.) ("the Government contends that the rule of Gant applies only to vehicle searches. We do not read Gant so narrowly. The Gant Court itself expressly stated its desire to keep the rule of Belton tethered to the

splits among the federal and state courts. This section explores the divergent interpretations and the logic the adopting courts have followed interpreting part two, the portion of the *Gant* holding which has generated the widest range of divergence.

The relevant text in the *Gant* opinion reads "[a]lthough it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[116] This holding has been interpreted both to create a bright line rule similar to the abrogated holding from *Belton*, entitling the police to a full evidence-gathering search whenever it is "reasonable to believe" the crime is of the type which may yield physical evidence, and as an evidentiary standard. Two questions are presented: which interpretation is the correct one and, if an evidentiary standard is the proper construction, which standard the term "reasonable to believe" is meant to represent.

A. "Reasonable to Believe" is Not an Evidentiary Standard and Can be Satisfied by the Nature of the Charge

Some courts have interpreted the "reasonable to believe" requirement to be satisfied solely from the inference that evidence might be found at the place of arrest.[117] This rule, termed the "nature-of-the-offense" rule,[118] derives from the following language: "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence. But in others, including Belton and Thornton, *the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and*

---

justifications underlying the Chimel exception, and Chimel did not involve a car search.") (internal citation and quotation marks omitted).

[116] Arizona v. Gant, 556 U.S. 332, 343 (2009) (citing Thornton v. United States, 541 U.S. 615, 628 (2004) (Scalia, J. concurring in judgment)).

[117] *See*, *e.g.*, People v. Nottoli, 199 Cal. App. 4th 531, 554 (2011); State v. Cantrell, 149 Idaho 247, 248 (Ct. App. 2010); Brown v. State, 24 So.3d 671, 678 (Fla. Ct. App. 2009) (citing Thornton, 541 U.S. at 629 (Scalia, J., concurring)) (stating "not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended"); Cain v. Arkansas, 2010 Ark. App. 30 (2010).

[118] *See*, *e.g.*, People v. Chamberlain, 229 P.3d 1054, 1056-1057 (Colo. 2010).

any containers therein."[119] "Whereas Belton and Thornton were arrested for drug offenses, Gant was arrested for driving with a suspended license - an offense for which police could not expect to find evidence in the passenger compartment of Gant's car."[120]

The nature-of-the-offense rule contains within it two further potential interpretations. The applying courts have not fully explained the logic behind their decisions; they have not explained whether the "reasonable to believe" portion of the *Gant* holding applies to the type of the crime, *i.e.*, whether it must be reasonable to believe that the crime is of the type which may yield physical evidence; or whether the "reasonable to believe" language is superfluous and instead the phrase "the offense of arrest will supply a basis for searching the passenger compartment" supports the courts' rules. Both interpretations will be analyzed in the following section.

Courts applying this standard have, however, nearly identical rationale for adopting the nature-of-the-offense rule as opposed to other interpretations. In *State v. Cantrell*, the Idaho Court of Appeals applied the nature-of-the-offense interpretation to a DUI stop.[121] In that case, Cantrell, driving the wrong way down a one-way street, was pulled over for suspicion of driving under the influence of alcohol.[122] He admitted to consuming alcohol and was detained in the back of the police cruiser.[123] The officers then searched Cantrell's vehicle and discovered marijuana under the driver's seat.[124]

[119] Gant, 556 U.S. at 343-344 (internal citations omitted) (emphasis added).
[120] *Id.*
[121] Cantrell, 149 Idaho at 248.
[122] *Id.*
[123] *Id.*
[124] *Id.*

The *Cantrell* Court concluded first that "reasonable to believe" did not equate to probable cause.[125] The court also noted equating reasonable to believe with probable cause would render the automobile exception to the warrant requirement redundant.[126]

The *Cantrell* Court next dismissed the suggestion that reasonable to believe equated to a *Terry*-like standard that required some additional information suggesting evidence can be found in the vehicle.[127] Such a standard, the court reasoned, could not be proper because analysis would turn on the suspect's ability to hide evidence.[128]

The court decided the nature-of-the-offense interpretation was the correct one. "[T]he offense of arrest will supply a basis for the search. A search for this purpose is authorized irrespective of whether evidence is known to be located in the vehicle."[129] Because DUI is an offense for which evidence might potentially be found in the passenger compartment, the *Cantrell* Court concluded the search was reasonable and proper under *Gant*.[130]

B. Reasonable to Believe is an Evidentiary Standard Akin to the Terry "Reasonable Suspicion" Standard.

Some courts have applied the "reasonable to believe" language as a minimum evidentiary requirement to conduct a search – the arresting officers must have some particularized facts which indicate evidence of the crime of arrest will be found in the vehicle to be searched. Requiring a probability lower than probable cause, courts have adopted standards mirroring those standards developed in response to *Payton v. New York*[131] and *Terry v. Ohio*.[132] The courts

---

[125] *Id.* at 252 ("The . . . Supreme Court is certainly aware of the meaning attached to particular standards. Had the Court intended to adopt the probable cause standard, it would have done so.").
[126] *See Id.* (citing United States v. Ross, 456 U.S. 798, 820-21 (1982) (holding automobile exception allows a full search of a vehicle if the officers have probable cause to believe it contains evidence of criminal activity)).
[127] *Id.* at 253.
[128] *Id.* ("DUI evidence that is in plain view, or partially hidden . . . would supply a basis for the search, whereas evidence that is carefully hidden would not.").
[129] *Id.* (citing Gant, 556 U.S. at 342).
[130] *Id.* at 254-55.
[131] 445 U.S. 573 (1980).

interpreting *Payton* apply a standard lower than probable cause, but higher than the *Terry* standard.[133] [134] In the next section, I analyze arguments for this standard as both equivalent and not-equivalent to the *Terry* "reasonable suspicion" standard.

Relying on Sixth Circuit precedent interpreting *Payton*, the Court in *United States v. Reagan* equated the phrases "reasonable belief" and "reasonable to believe."[135] The argument that the *Gant* standard is equivalent to the *Payton* or *Terry* standards relies on the assumption those two phrases are equivalent.[136] "[R]easonable belief," the Sixth Circuit has held, "is established by looking at common sense factors and evaluating the totality of the circumstances."[137] In the *Payton* "reason to believe" context, the Sixth Circuit's interpretation is in accordance with the weight of federal authority.[138] The *Reagan* Court adopted that standard in its entirety and phrased the proper test as "reasonable to believe, based upon common sense factors and the totality of the circumstances, that evidence of the offense of the arrest is inside."[139]

The *Reagan* Court declined to adopt the *Cantrell* nature-of-the-offense rule for three reasons: First, that rule contemplates that all criminal charges be clearly divided into those that yield

---

[132] 392 U.S. 1 (1968).
[133] United States v. Reagan, 713 F. Supp. 2d 724, 728 (E.D. Tenn. 2010) (citing United States v. Pruitt, 458 F.3d 477, 482 (6th Cir. 2006) ("The Court of Appeals for the Sixth Circuit has not expressly decided what is meant by the phrase 'reasonable to believe' in Gant. But it has stated that a 'reasonable belief standard' is 'lesser' than a probable cause standard")).
[134] I have included within this rule section the "hybrid rule" which has surfaced in some courts. *See* People v. Evans, 200 Cal. App. 4th 735, 751 (2011) ("We conclude a reasonable belief to search for evidence of the offense of arrest exists when the nature of the offense, considered in conjunction with the particular facts of the case, gives rise to a degree of suspicion commensurate with that sufficient for limited intrusions such as investigatory stops."). That rule, considering the facts of the case specifically, is sufficiently analogous to the rules in this section to analyze them together.
[135] Reagan, 713 F. Supp at 728. ("This Court is unable to perceive any meaningful difference between the phrases 'reasonable belief' and 'reasonable to believe.'").
[136] Though the phrases are remarkably similar, there is indeed a semantic difference between the specific "[officers must possess] reasonable belief" and the general "it is reasonable to believe." This paper necessarily assumes the differences is immaterial to the outcome.
[137] Pruitt, 458 F.3d at 482.
[138] *See* United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995); United States v. Edmonds, 52 F.3d 1236, 1248 (3d. Cir. 1995); United States v. Route, 104 F.3d 59, 62-63 (5th Cir. 1997); United States v. Risse, 83 F.3d 212, 216-17 (8th Cir. 1996); Valdez v. McPheters, 172 F.3d 1220, 1225 (10th Cir. 1999); United States v. Magluta, 44 F.3d 1530, 1534 (11th Cir. 1995); United States v. Thomas, 429 F.3d 282, 286 (D.C. Cir. 2005).
[139] Reagan, 713 F. Supp. 2d at 728.

physical evidence or those that do not yield physical evidence.[140] While such distinctions may be simple when examining minor traffic offenses, the lines begin to blur when one considers charges such as telephone harassment.[141] "Reasonable people could disagree about exactly what can be considered 'physical evidence,' and about whether there 'might' be any physical evidence of telephone harassment."[142]

The second problem the *Reagan* Court raised against the nature-of-the-offense rule was the inevitable "piecemeal" decision making establishing those crimes for which it is "reasonable to believe" evidence may be found in the vehicle.[143] The many jurisdictions across the country applying their specific criminal law, which in many cases requires different elements or uses different terminology, would result in dramatic inconsistencies in case law.[144] At its worst, the nature-of-the-offense approach could yield results where one jurisdiction declares a specific crime might *per se* yield physical evidence, when another jurisdiction would declare the same crime *per se* incapable of yielding physical evidence.[145] The resulting uncertainty among law enforcement officers and citizens alike weighs against the nature-of-the-offense rule.[146]

Lastly and most significantly, according to the *Reagan* Court, would be the unintended or unreasonable results the *per se* nature-of-the-offense rule could create.[147] The court illustrated by means of example: if a police officer were to witness a bar patron consume several drinks at an establishment in a short period of time and then witness that patron get in his car and drive off, the officer would have probable cause to pull over and arrest that patron for driving while

[140] *Id.* at 732.
[141] *Id.*
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *See id.*
[147] *Id.*

intoxicated.[148] But by the very fact that the officer saw the patron in the bar, he would have specific facts and knowledge indicating that there was *no* evidence of DUI to be found in the vehicle.[149] That result would be contrary to *Gant*.[150] The officer would be entitled to search the patron's car because of a *per se* rule declaring DUI the type of crime for which it is reasonable to believe evidence may be found in the vehicle despite the specific facts indicating no such evidence exists.

C. Reasonable to Believe is Equivalent to Probable Cause

The Eastern District of Washington has held the standard "reasonable to believe" to the highest evidentiary requirement of any authority in the post-*Gant* automobile search context: probable cause. The court in *United States v. Grote*[151] examined Ninth Circuit precedent from *United States v. Gorman*,[152] which interpreted *Payton's* "reason to believe" standard as "the same standard of reasonableness inherent in probable cause."[153] The court in *Grote*, the like *Reagan* Court, had little difficulty drawing the correlation between the language in the *Payton* standard and the *Gant* standard.[154] The test under Ninth Circuit precedent is whether there is probable cause to believe that evidence relevant to the crime of arrest might be found in the particular vehicle to be searched.[155]

---

[148] *Id.*
[149] *Id.*
[150] *Id.* at 733 ("[The officer's] firsthand observation of the driver drinking several beers gives him a good reason to believe that no evidence of DUI is contained in the vehicle. This result seems completely contrary to Gant's statement that a warrantless search of a vehicle's passenger compartment incident to arrest is lawful when 'it is reasonable to believe the vehicle contains evidence of the offense of the arrest.' The Court therefore rejects Brown's interpretation of Gant.") (internal citations omitted).
[151] 629 F. Supp. 2d 1201 (E.D. Wash. 2009).
[152] 314 F.3d 1105 (9th Cir 2002).
[153] *Id.* at 1110-11 (internal quotations omitted).
[154] Grote, 639 F. Supp. at 1203. (equating "reasonable to believe" with "reason to believe").
[155] *Id.* at 1205.

Gorman based its conclusion on older case law from the Fifth Circuit, which also equated the probable cause standard to reasonable belief.[156] In *United States v. Woods*, the court reasoned that reasonable belief embodies the same standard as probable cause, but required a different description because the term "probable cause" had become a term of art.[157] Probable cause connotes a determination by a neutral and detached magistrate.[158] Reasonable belief, though embodying the same standard, allows an officer to make the probability determination himself without requiring another trip to the magistrate.[159] At the time of this paper, however, the Fifth Circuit has not extended its *Payton* reasonable belief standard to the post-*Gant* vehicular search context.

III. RIPENESS OF THE ISSUE – IS SUPREME COURT INTERVENTION NECESSARY?

When confronted with a pervasive authority split among lower courts, many legal observers contemplate whether resolution by the United States Supreme Court is necessary and, if so, how quickly that intervention must come. With a docket of only around 80 cases per year,[160] however, the Court can only grant or expedite *certiorari* to answer the most urgent questions. This section explores briefly the urgency of resolution by looking to some relevant common factors which lead to grants of *certiorari*: the depth and width of the split, frequency with which the issue arises, the need for constitutional uniformity, and the severity of the repercussions for a continued divide.[161] Based on these factors, I conclude Supreme Court intervention is

---

[156] United States v. Woods, 560 F.2d 660 (5th Cir. 1977); *see also* Vasquez v. Snow, 616 F.2d 217, 220 (5th Cir. 1980) ("For want of a better verbal formulation, we drew upon the jurisprudence of 'probable cause.'").
[157] *Id.* at 665.
[158] *Id.*
[159] *Id.*
[160] SUPREME COURT OF THE UNITED STATES, *Frequently Asked Questions*, http://www.supremecourt.gov/faq.aspx#faqgi9 ("the Court hears between 75 and 80 cases") (last visited 4/24/2012).
[161] *see* Nicholas J. Wagoner, *, 4 Reasons Why the Supreme Court Reviews Circuit Splits*; 4 *Reasons Why the FMLA is Ready for the Supreme Court's Review*, CIRCUIT SPLITS (March 15 and March 21, 2012), http://www.circuitsplits.com/supreme-court/.

unnecessary at this stage and instead urge the lower courts to adopt the appropriate rule going forward.

Three factors encourage intervention: (1) the frequency with which the issue arises, (2) the need for uniformity, and (3) severity of the repercussions of a continued divide. The first factor undeniably lends towards a definitive resolution. With over 200 million licensed drivers in the United States[162] and an average of near 40,000 arrests per day,[163] arrests and searches in an automobile context arise very frequently.

The need for uniformity also encourages resolution. The Constitution favors uniform application of laws as interpreted by the Supreme Court.[164] The American citizenry should not be exposed to inconsistent constitutional interpretations across jurisdictional boundaries, especially when a right as important as the freedom from unreasonable searches hangs in the balance. Lastly, uniformity lends to efficiency in government. When the judiciary is able to rely on similar decisions from other courts and police officers are allowed to share tactics and experience through manuals and other training, the judicial and executive branches function more efficiently as wholes.

The repercussions of allowing this ongoing split, though severe, are not as severe as they may initially appear. The nature-of-the-offense interpretation, as I conclude later,[165] is a functional continuation of the *Belton* entitlement search which the Court in *Gant* expressly ruled unconstitutional. Each automobile search in the jurisdictions which adopted that interpretation is potentially a violation of the Fourth Amendment for which the arrestee is left without redress.

---

[162] U.S. DOT, *Licensed Drivers by Age and Sex*, http://www.fhwa.dot.gov/ohim/onh00/onh2p4.htm (last visited 4/17/2012).
[163] U.S. DOJ, *Estimated Number of Arrests*, http://www2.fbi.gov/ucr/cius2009/data/table_29.html (last visited 4/17/2012).
[164] *See* Const. Art. III §1 ("The judicial power of the United States, shall be vested in one Supreme Court"); Const. Art. II("the laws of the United States . . . shall be the supreme law of the land."); *see also* Wagoner, *supra* note 161.
[165] *See supra* Part. IV.A-B.

Those jurisdictions, however, are not only few in number, but as of the time of this paper, the courts which have adopted the nature-of-the-offense rule are not courts of last resort; the problem can still be corrected by the respective state supreme courts. [166]

The remaining factor, the depth and width of the split weighs against immediate resolution by the Supreme Court. The divergence of authority here, though running fault-lines in at least three directions,[167] does not mandate *certiorari*. Few state supreme courts and only one federal circuit court have definitively spoken on the issue as of this writing.[168] Those jurisdictions which have strayed from the *Gant* holding are still able to correct their error.

While the numerical quantity of factors weighs in favor of swift resolution, the only factor itself which truly urges haste is the ongoing constitutional violations in the nature-of-the-offense jurisdictions. Because the jurisdictions which have adopted that interpretation are still able to correct the error, I conclude this matter is not sufficiently pressing to require resolution by the Supreme Court at this time.

IV. ANALYSIS – "REASOABLE TO BELIEVE:" IN SEARCH OF THE PROPER STANDARD

This section is dedicated to analyzing the interpretations of Scalia's "reasonable to believe" standard and determining which is the most appropriate. I conclude that the North Carolina approach, which holds "reasonable to believe" to be a standard parallel to *Terry*, is the correct standard.[169]

---

[166] *See supra* note 117.
[167] *See* Discussion s*upra* Part II.
[168] *See* State v. Mbacke, 721 S.E.2d 218, 222 (N.C. 2012); United States v. Vinton, 594 F.3d 14, 26 (D.C. Cir. 2010); *but see* Rose v. Commonwealth, 322 S.W.3d 76, 80 (Ky. 2010) (hinting that a Terry-like standard may be appropriate: "we are satisfied that [the officer] did not possess the requisite reasonable suspicion"); United States v. Williams, 616 F.3d 760, 765-766 (8th Cir. Mo. 2010) *(*hinting that probable cause may be the appropriate standard: "the police had probable cause to believe that evidence relevant to the drug crime would be found in the vehicle.").
[169] State v. Mbacke, 721 S.E.2d 218, 222 (N.C. 2012).

A. The Nature-of-the-Offense Rule

The nature-of-the-offense rule, as a brief reminder, is that the nature of the offense of arrest alone provides the basis for a vehicular search. The first of two possible interpretations is that the courts simply ignore the "reasonable to believe" language and instead rely solely on the "nature of the charge of arrest" language from *Gant*.[170] The second applies "reasonable to believe" to the type of crime; it must be reasonable to believe the crime serving as the basis for the arrest might yield physical evidence. Put differently, when different types of crimes blur the lines between those which might yield physical evidence and those that might not, the second interpretation permits officers to search when they reasonably believe the crime is of the type which might yield physical evidence.

1. "Reasonable to Believe" is Superfluous – the Strict Per Se Categories

This first interpretation of the nature-of-the-offense rule is the least appropriate of all interpretations because it ignores opinion language, adoption would result in almost a zero-net-change from the *Belton* rule, and it conflicts with the rest of the *Gant* opinion. If this interpretation were followed, the promise of any constitutional protection in an automobile search context turns illusory.

The most obvious argument against this interpretation is simply that, were it adopted, it would make the language in the *Gant* opinion superfluous. Surely Justice Stevens and Justice Scalia did not write extra words into their opinions without cause.[171] This argument carries with it more weight when the supposedly superfluous word is "reasonably." A former law professor of mine once taught his class "when you see the word 'reasonable' in an opinion, the odds are

[170] *See* Arizona v. Gant, 556 U.S. 332, 343-344 (2009) ("the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein.").
[171] *Id.* at 343; Thornton v. United States, 541 U.S. 615, 632 (2004).

pretty good you're looking at a legal standard."[172] I have found this statement to be remarkably accurate.[173] Omitting words expressly written into a holding does great violence to the opinion and weighs against using this interpretation.

The next argument is similarly powerful: the net result of adopting this interpretation would only be a slight dilution of *Belton*.[174] If the words "it is reasonable to believe that" are omitted from the *Gant* opinion as this interpretation requires, the holding is left reading "circumstances unique to the automobile context justify a search incident to arrest when [. . .] evidence of the offense of arrest might be found in the vehicle."[175] This interpretation hinges the ability to search the vehicle on the word "might." If the reasonableness language is not applied to the word "might," the rule becomes one where a search is allowed in any circumstances when it is within the realm of possibility that evidence of the crime of arrest might be found within the vehicle, without regard to probability. Searches conducted independent of the probability of actually finding evidence are entitlement searches and mark a return to *Belton*.

Several examples will better illustrate the point. In the DUI context, which is the underlying offense in many of the cases cited, an officer, having probable cause to arrest a driver for driving under the influence, would be allowed to search the driver's car each and every time he made an arrest for DUI because the officer *might* find empty beer cans in the car. In this example, it is within the realm of possibility that beer cans could be found in the car, despite no indication of

---

[172] Daniel M. Katz, Professor, Michigan State University College of Law., Criminal Procedure I (8/20/2011 – 12/9/2011).
[173] *See*, *e.g.*, Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 252 (1986) (beyond-a-reasonable-doubt); Strickland v. Washington, 466 U.S. 668, 687 (1984) ("the proper standard for attorney performance is that of reasonably effective assistance."); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 797 (1973) ("the Commission had failed to make a determination of reasonable cause"); Miranda v. Arizona, 384 U.S. 436, 474 (1966) (a reasonable period of time); Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 595 (1993) ("to be admitted only if the facts or data are 'of a type reasonably relied upon by experts in the particular field'").
[174] *See* People v. Chamberlain, 229 P.3d 1054, 1056-1057 (Colo. 2010).
[175] Gant, 556 U.S. at 335 (alterations mine).

probability. This logic was employed by the courts in *State v. Cantrell*[176] and *People v Nottoli*.[177]

While appearing initially like an allowable inference and a rule fit for adoption, the flaw in logic becomes apparent as the example becomes more extreme. Assume now that, serving a warrant issued with probable cause to arrest, a police officer pulls over and arrests a driver for the crime of soliciting a murder-for-hire. It is within the realm of possibility (that is, not *impossible*) that the officer may find a contract document bearing both the driver's and the murderer's signature that clearly illustrates the terms of the murder for hire including the target's name; time, place, and method of the killing; quantity of the payment; and the driver's motive for soliciting the assassination properly sealed by a notary public. That possibility, no matter how remote, would support a search of the arrestee's vehicle. The end result is a system functionally indistinguishable from *Belton*.

Lastly, an interpretation ignoring the reasonableness requirement would itself be at odds with the rest of the *Gant* opinion. *Gant*, based on Justice Scalia's reasoning in *Thornton*, draws a line between crimes for which evidence might be located in the vehicle and for those it might not.[178] This distinction, however, quickly evaporates when exposed to the "realm of possibility" argument. The *Gant* court cites an arrest for a traffic violation as one such crime for which no evidence might be found in the car.[179] But it is within the realm of possibility that the driver had an appointment slip inside the car, indicating a reason why a driver may be speeding, or a text on his phone to a friend that read "my driver's license is suspended, but I am going to drive over to

[176] 149 Idaho 247, 248 (Ct. App. 2010).
[177] 199 Cal. App. 4th 531, 554 (2011).
[178] Gant, 556 U.S. at 335.
[179] *Id.* at 343-44.

your house anyway." Because that evidence *might* be found in the car, a search would be allowable under those circumstances contrary to the express language of *Gant*.[180]

Ignoring the reasonableness language in the *Gant* opinion would be at odds with not only the remainder of the *Gant* opinion, but would ignore the tenets of construction by failing to give meaning to all the words. Furthermore, this rule would produce no net change in law from *Belton* aside from requiring our police officers to have a modicum of creativity to justify a search. For these reasons, I conclude this interpretation of the "reasonable to believe" standard is inappropriate.

2. "Reasonable to Believe" the Crime of Arrest Might Produce Physical Evidence

The alternative breed of nature-of-the-offense interpretation applies the reasonableness language to the crime itself, presenting the question of whether the officers might reasonably believe that the type of crime itself might produce physical evidence. This alternative is inappropriate for largely the same reasons as the strict *per se* variant: because the interpretation continues to result in entitlement searches, would likely result in conflicting interpretive case law, and threatens to devour the *Chimel* rationales the Court in *Gant* sought to reinstate.

Entitlement searches, as the *Gant* Court recognized, are "anathema to the Fourth Amendment."[181] *Belton*, as interpreted by many lower courts, allowed a search of an arrestee's vehicle absent the *Chimel* justifications, *i.e.*, when the arrestee could not gain access to a weapon or destructible evidence at the time of the search (or when the arrestee was no longer at the scene of the arrest when the search took place).[182] An interpretation of the "reasonable to believe"

[180] *See* Nottoli, 199 Cal. App. 4th at 557 (allowing search of driver's phone for evidence of driving under the influence).
[181] Gant, 556 U.S. at 347.
[182] *See*, *e.g.*, Rainey v. Commonwealth, 197 S. W. 3d 89, 94-95 (Ky. 2006) (applying Belton when the arrestee was apprehended 50 feet from the vehicle); Black v. State, 810 N.E.2d 713, 716 (Ind. 2004) (applying Belton when the arrestee was apprehended inside an auto repair shop and the vehicle was parked outside); United States v.

standard restricting only the types of offenses which allow an entitlement search does little to prevent further constitutional wrongs.

Applying the reasonableness standard to the types of crimes, *i.e.*, restricting those types which might yield physical evidence, without any requirement as to the probability of actually finding that physical evidence, would be nothing more than a slightly diluted version of *Belton's* entitlement searches. The resulting case law would (and already has) draw up *per se* rules allowing entitlement searches whenever the crime for arrest passed a court's test. The results could potentially be worse than the strict *per se* rule. If a court were to declare a type of crime *per se* a type that cannot yield physical evidence, officers may encounter scenarios where the facts *still*, in their judgment, make it reasonable to believe that evidence of the crime of arrest *might* be found in the car, allowing officers to sometimes circumvent court holdings. For example, telephone harassment may be declared a crime *per se* incapable of producing physical evidence.[183] But a police officer may solicit from the arrestee that the arrestee has a journal in which he records all of his daily activities somewhere in his car. The officer would have reason to believe that evidence of the crime of telephone harassment would be found in the car, expressly contrary to prior judicial rulings.

The holdings in *Cantrell* and *Nottoli* are examples of such *per se* line-drawing; both courts held that if the offense of arrest is DUI, then the officer is entitled to search the vehicle.[184] Many courts have already hinted that if possession of drugs or a firearm is the offense of arrest, then an officer may search.[185] Theft is on its way to becoming such a crime.[186]

McLaughlin, 170 F.3d 889, 890 (9th Cir. 1999) (upholding a search that commenced five minutes after the arrestee was removed from the scene); United States v. Snook, 88 F.3d 605, 608 (8th Cir. 1996) (same).

[183] *See* Reagan, 713 F. Supp. 2d at 732 (contemplating the uncertain nature of whether telephone harassment could produce physical evidence).

[184] Cantrell, 149 Idaho at 248; Nottoli, 199 Cal. App. 4th at 557.

[185] *See*, *e.g.*, Seth W. Stoughton, *Modern Police Practices: Arizona v. Gant's Illusory Restriction of Vehicle Searches Incident to Arrest*, 97 VA. L. REV. 1727 n151 (citing United States v. Shakur, 394 F. App'x 974, 976 (4th

Establishing nearly *per se* categories would have the effect of creating very narrow distinctions within those categories, lending further to unpredictability. It is not difficult to imagine a situation where theft of a standard bicycle is not a crime for which it is reasonable to believe the evidence, the bicycle, might be found in a compact car (it would not fit), but theft of a child's bicycle or a unicycle would be. It is also easy to imagine that the search for the very same stolen bicycle may be allowable if the driver was operating a car with best-in-class trunk space, but not a competing manufacturer's model. The resulting unpredictability is precisely the evil the *Reagan* Court sought to avoid.[187]

Creating *per se* rules allowing searches based only on the crime of arrest also presents issues of conflicting case law. Different jurisdictions, especially different states with unique wording and elements in criminal law statutes, would create discrepancies in types of crimes which allow a search. Jurisdictional inconsistencies would only be compounded by the inevitably narrow distinctions discussed above. Officers and citizens alike would have to endure the unpredictable nature of a case-by-case analysis in which the constitutionality of each search hinges on minute details, interpretations, or guesswork.

Applying the reasonableness language only to establish whether the offense of arrest is of the type which allows a search of an arrestee's vehicle would effectively amount to only a moderate dilution of the *Belton* entitlement search, which was clearly abrogated by the *Gant* Court. Allowing entitlement searches, only based on a different theory, would again threaten to devour the *Chimel* rationales. For of these reasons, I conclude that neither ignoring the reasonableness

---

Cir. 2010) (holding that a vehicle search incident to arrest for a drug offense was justified under Gant); United States v. Hayden, 389 F. App'x 544, 549 (7th Cir. 2010)).

[186] *See* Brown v. State, 24 So.3d 671 (Fla. Ct. App. 2009) (theft of wallets).

[187] United States v. Reagan, 713 F. Supp. 2d 724, 732 (E.D. Tenn. 2010) ("This piecemeal approach to classifying offenses could lead to jurisprudential inconsistencies.").

language nor applying it to the type of offense is the proper interpretation of the *Gant* Court's holding.

B. Reasonable to Believe – a Standard Less Than Probable Cause

The rules adopted by the courts in *United States v. Reagan*[188] and *State v. Mbacke*[189] apply the reasonableness standard as a required level of probability that evidence of the crime of arrest will be found inside the car to be searched. The *Reagan* Court required "a particularized and articulable reason to believe" that evidence is contained inside the car, but that reason to believe need not rise to the level of probable cause.[190] The *Mbacke* court equated the standard to the *Terry* "reasonable suspicion" standard.[191] An evidentiary-requirement interpretation of *Gant* is the most proper of the diverging interpretations because it allows for a minimum level of constitutional protection for the arrestee, maintains the rationale behind the motor vehicle exception to the warrant requirement, flows naturally from prior decisions interpreting the "reasonable to believe" standard, and does minimal violence to the wording of the *Gant* holding itself.

The most important benefit to adopting the "particularized and articulable reason" approach is the constitutional protection afforded the arrestee against general exploratory or rummaging searches, the central theme of Gant[192] and a requirement wholly lacking from the nature-of-the-offense approach. It is well settled in American law that the Fourth Amendment prohibits general rummaging and exploratory searches to find whatever there is to be found.[193] In *Gant* the

---

[188] *Id.* at 733.
[189] 721 S.E.2d 218, 222 (N.C. 2012).
[190] 713 F. Supp. 2d at 733.
[191] 721 S.E.2d at 222; *see* also People v. Chamberlain, 229 P.3d 1054, 1057 (Colo. 2010). ("The Court's use of phrases like "reasonable to believe" and "reasonable basis to believe" is a further indication that it intends some degree of articulable suspicion").
[192] Gant, 556 U.S. at 347.
[193] *See*, *e.g.*, Weeks v. United States, 232 U.S. 383 (1914).

Court expressly proscribed entitlement searches.[194] Requiring *some* specific information leading to the belief that evidence of the crime of arrest will be found in the vehicle comports with the rationale in Chimel and prevents those forbidden rummaging, entitlement searches.

While still affording the arrestee minimal constitutional protection, the "particularized and articulable" rule does not obliterate the automobile exception to the warrant requirement. Recognizing that cars are different from houses in that they are mobile, and thus more prone to disappear or be cleansed of incriminating evidence, the Court long ago in *Carroll v. United States*[195] held that officers may search a vehicle without first obtaining a warrant if they have probable cause to believe that evidence of a crime may be found therein. An evidentiary standard akin to, but distinct from, probable cause saves the automobile exception, while a standard mirroring probable cause would be superfluous entirely. Assuming true Justice Scalia's observation in *Thornton,* that evidence of the crime of arrest is more likely to be found in the suspect's location, [196] a lowered probability requirement for an evidentiary search is logically proper and makes useful all words in the *Gant* holding.

Left open still is the question of whether that standard is equivalent to the standard articulated in *Terry* or whether it is a separate standard altogether. The next subsections contemplate the answer.

1. "Reasonable to Believe" is Equivalent to the *Payton* "Reason to Believe"

There are at least two persuasive arguments indicating the "reasonable to believe" standard is distinct from the *Terry* standard: first, that same terminology has been long associated with the *Payton* standard and is in some sense inconsistent with the *Terry* standard. Second, there is

[194] Gant, 556 U.S. at 347.
[195] 267 U.S. 132, 154 (1925).
[196] Thornton v. United States, 541 U.S. 615, 630 (2004).

established case law applying the majority *Payton* standard. Holding "reasonable to believe" different in the *Gant* context than it is in the *Payton* context would be confusing.

The opinion in *Gant* phrases its holding "we also conclude that circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."[197] It stands to reason that if the Court intended to adopt the probable cause standard, it would have done so.[198] Similarly, it seems obvious that if the Court intended to adopt the reasonable suspicion standard from *Terry*, it would have done so. Thus the reasonable to believe standard could be an evidentiary standard distinct from either probable cause or reasonable suspicion.

An analysis of the language used in light of its dictionary definition lends to the same conclusion. Like the court in *Reagan*, I am unable to perceive any meaningful difference between the phrases "reasonable to believe" and "reasonable belief."[199] Similarly, the only difference I am able to perceive between the phrases "reasonable belief" and "reasonable suspicion" is the substitution of the word "belief" for the word "suspicion." The word "belief" is defined as "[a] state of mind which regards the existence of something as likely or relatively certain."[200] The word "suspicion" is defined as "[t]he apprehension or imagination of the existence of something wrong based only on inconclusive or slight evidence."[201] The term "belief" both connotes and denotes a stronger conviction of truth than does "suspicion." Thus the term "reasonable to believe" is most logically interpreted as a similar standard to *Terry's*

[197] Gant, 556 U.S. at 335.
[198] State v. Cantrell, 149 Idaho 247, 252 (Ct. App. 2010); *see also* United States v. Page, 679 F. Supp. 2d 648, 652 (E.D. Va. 2009) ("It is logical to assume that the Court's choice of words was carefully chosen and hence distinguishable from the more familiar standards of probable cause, articulable suspicion, or totality of the circumstances.").
[199] Reagan, 713 F. Supp. 2d at 728.
[200] BLACK'S LAW DICTIONARY 175 (9th ed. 2009).
[201] *Id.* at 1585.

"reasonable suspicion," though requiring a higher level of conviction or evidence than does reasonable suspicion to match the intensity of the word "belief."

There been significant interpretation of the "reason to believe" standard from *Payton* by the circuit courts. The weight of authority in prior decisions interpreting that standard advanced a common sense, totality of the circumstances analysis requiring an evidentiary standard lower than probable cause.[202] Following the *Reagan* Court's lead, a deciding court could equate with little imagination the "reasonable to believe" and "reasonable belief" terminology. [203] *Payton* was also decided in 1980; considering the wealth of case law available interpreting the *Payton* standard, both federal and state, adopting that standard in the *Gant* context appears a prudent choice.

2. "Reasonable to Believe" is Equivalent to *Terry* "Reasonable Suspicion"

There are at least three strong arguments which promote the interpretation of reasonable to believe as equivalent to reasonable suspicion: First, that the "reason to believe" language also appeared in *Terry v. Ohio*, in which the Court first outlined the reasonable suspicion test and appeared to equate the two.[204] Second, *Terry* also has been applied in remarkably similar situations as interpreted in *Michigan v. Long*.[205] Third, the reasonable suspicion based on articulable facts standard is one of the most prevalent and settled standards in all of criminal procedure.

---

[202] *See* United States v. Route, 104 F.3d 59, 62-3 (5th Cir. 1997); United States v. Risse, 83 F.3d 212, 216-17 (8th Cir. 1996); United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995); United States v. Edmonds, 52 F.3d 1236, 1248 (3d. Cir. 1995) United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir. Fla. 1995); United States v. Thomas, 368 U.S. App. D.C. 285, 429 F.3d 282, 286 (D.C. Cir. 2005); Valdez v. McPheters, 172 F.3d 1220, 1226 (10th Cir. Utah 1999).

[203] Reagan, 713 F. Supp 2d at 728.

[204] Terry v. Ohio, 392 U.S. 1, 30 (U.S. 1968) ("Officer McFadden had reasonable grounds to believe that petitioner was armed and dangerous.").

[205] 463 U.S. 1032 (1983).

The Court in *Terry v. Ohio* allowed police to perform a limited search of a person when the officer could point to "specific and articulable facts which, taken together with rational inferences from those facts, [which] reasonably warrant that intrusion."[206] The officer, the Court concluded, must have "*reason to believe* that he is dealing with an armed and dangerous individual."[207] This standard, structurally and phonetically, is remarkably similar to the Scalia standard which allows searches when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[208] Equating those two standards would not be a risky proposition.

Furthermore, in *Michigan v. Long*,[209] the Court applied the *Terry* standard to the search of the passenger compartment of an automobile (limited to those areas in which a weapon may be placed or hidden). Those searches are allowable if the police officer possesses "a *reasonable belief* based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons."[210] If officers are allowed to search a car for weapons when they possess a reasonable belief that the car contained weapons, it would make logical sense to allow the police also to search the same car if they possessed a reasonable belief that the car contains evidence of the crime of arrest. Holding the two searches to different standards when they use similar language and both tests allow warrantless searches in the vehicle context would make little sense.

---

[206] Terry, 392 U.S. at 21.
[207] *Id.* at 27.
[208] Gant, 556 U.S. at 343.
[209] 463 U.S. 1032, 1049-50 (1983).
[210] *Id.* (quotations omitted).

Terry v. Ohio, lastly, has become super-precedent in American jurisprudence. In the 43 years since the case was decided, the *Terry* standard been applied to many areas of law,[211] a substantial number of cases, and in a wide variety of factual scenarios.[212] The wealth of case law alone available to future courts in interpreting the Scalia search may justify its usage.[213] Because of the massive body of case law interpreting the *Terry* standard and the uncanny resemblance between the *Michigan v. Long* standard and the Scalia standard in *Gant*, I join the Supreme Court of North Carolina in concluding that the *Terry* interpretation of "reasonable to believe" is the correct one.[214]

C. Reasonable to Believe is Equivalent to Probable Cause

The Eastern District of Washington, in *United States v. Grote*,[215] following Ninth Circuit precedent from *Payton*, has been the only court to equate probable cause with the "reasonable to believe" language from *Gant*. The Ninth Circuit's adoption of that standard is one of semantics: adopting courts have drawn a line parallel to probable cause but have distinguished the terminology.[216] Supporting rationale for this position is sparse.

The court in *United States v. Woods* offered the reasoning that the "reason to believe" language mirrored the language embodied in the principal of probable cause.[217] Because of the similarity of the language used to describe the standards, the Fifth Circuit decided that the two standards were actually the same, but the term "probable cause" was inappropriate because that

---

[211] *See*, *e.g.*, New Jersey v. T.L.O., 469 U.S. 325 (1985) (searches in schools); O'Connor v. Ortega, 480 U.S. 709 (1987) (searches in government workplaces); Maryland v. Buie, 494 U.S. 325, 334 (1990) (protective sweeps through houses).
[212] *See* State v. Mbacke, 721 S.E.2d 218, 222 (N.C. 2012) ("In addition, law enforcement officers and courts have worked with the Terry standard for decades, making application of Gant's similar objective standard a straightforward matter.").
[213] See *Id.*
[214] *Id.*
[215] 629 F. Supp. 2d 1201, 1203 (E.D. Wash. 2009).
[216] *See*, *e.g.*, United States v. Woods, 560 F.2d 660 (5th Cir. 1977).
[217] *Id,* at 665 (internal citations omitted).

term connoted intervention of a judicial magistrate.[218] That phraseology also, however, mirrors the words used in *United States v. Terry* and its supporting case law.[219]

There is another consideration which, depending on the court's objective, could weigh very strongly for or very strongly against adoption of the probable cause standard. In *Carroll v. United States*,[220] the Court first recognized the automobile exception to the warrant requirement; if an officer has probable cause to believe that illegal material is contained in a car, he may search it without a warrant issued by judicial officer.[221] If a standard less than probable cause were used to determine when it is "reasonable to believe evidence relevant to the crime of arrest may be found in the vehicle," Scalia's rule would create an exception to the warrant requirement distinct from the automobile exception, which follows his logic in *Thornton*.[222] If, however, a standard equivalent to probable cause were adopted, then both exceptions would allow a vehicle search if the officer had probable cause to believe that the vehicle had contraband or evidence of a crime. The result then, of course, would be that the second prong of the *Gant* holding was meaningless, a mere recitation of the *Carroll* rule.

If the objective of the adopting court was to preserve Scalia's evidence-gathering rule, to make use of all of the Gant opinion language, or to give full respect to the majority's opinion, probable cause would be inappropriate. There have, however, been critics strongly opposed to the adoption of Scalia's rule, hinting even that its adoption may have been the result of extortion.[223] If a reviewing court sought to push the SILA doctrine towards simplicity and away from ill-fitting bright-line rules, there would be no better opportunity than to equate "reasonable

---

[218] *Id.*
[219] *See supra* Part III.B.2.
[220] 267 U.S. 132, 153 (1925).
[221] *Id.* at 154.
[222] Thornton v. United States, 541 U.S. 615, 630 (2004) ("There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested.").
[223] *See* Jack Blum, *Arizona v. Gant: Missing an Opportunity to Banish Bright Lines from the Court's Vehicular Search Incident to Arrest Jurisprudence*, 70 MD. L. REV 826, 866-67 (2011).

to believe" with probable cause. Boiling away Scalia's prong into the automobile exception would transform the *Gant* holding into a pure return to *Chimel*.

There are at least two more compelling arguments that lend against adoption of the probable cause standard. First, because the language of the opinion, when considered both textually and historically, does not support that interpretation. Second, because the majority of other federal circuits have rejected the Ninth's interpretation.

The Court is more than familiar with the probable cause standard. Indeed, the probable cause requirement and phraseology is as old as the Constitution itself.[224] As the court in *United States v. Pruitt*,[225] among others, noted, if the Court intended to adopt probable cause as the standard, it would have done so.[226] The ease with which the majority could have written "probable cause," but elected not to, weighs against adoption of that standard.

Lastly, the Federal Courts have largely rejected an equation with probable cause. As noted by the Sixth Circuit in *Pruitt*,[227] the majority of circuits which had ruled by the time *Pruitt* was decided adopted under *Payton* a common sense factor and totality of the circumstances test.[228] Such a predominant view surely weighs against the wisdom of adopting the probable cause standard for the term "reasonable to believe."

V. SUMMARY AND CONCLUSION

The Search Incident to Arrest exception to the warrant requirement has had a mixed history. The Court pitted two competing rationales against another, vying to support the SILA doctrine:

---

[224] U.S. Const. amend. IV; *see also*, *e.g.*, Carroll v. United States, 267 U.S. 132, 153 (1925).
[225] 458 F.3d 477, 484 (6th Cir. Ohio 2006).
[226] *See also* Cantrell, 149 Idaho at 248.
[227] 458 F.3d at 483.
[228] *See* United States v. Route, 104 F.3d 59, 62-3 (5th Cir. 1997); United States v. Risse, 83 F.3d 212, 216-17 (8th Cir. 1996); United States v. Lauter, 57 F.3d 212, 215 (2d Cir. 1995); United States v. Edmonds, 52 F.3d 1236, 1248 (3d. Cir. 1995) United States v. Magluta, 44 F.3d 1530, 1535 (11th Cir. Fla. 1995); United States v. Thomas, 368 U.S. App. D.C. 285, 429 F.3d 282, 286 (D.C. Cir. 2005); Valdez v. McPheters, 172 F.3d 1220, 1226 (10th Cir. Utah 1999).

the exigent circumstances rationale, which allows an officer to search the person of the arrestee and the immediately surrounding area for any weapons which may be used against the officer and for any evidence the suspect may destroy before the officer can stop him; and the evidence gathering rationale, which assumes that evidence of wrongdoing is more likely to be found in the spot where the criminal is arrested.

The question seemed settled in *Chimel v. California*, where the Court declared the exigent circumstances rationale to be the proper support for the search-incident-to-arrest exception. The 1981 decision in *New York v. Belton*, however, threw the SILA exception into a state of disarray. *Belton* was interpreted by many lower courts to allow an entitlement search by police officers every time a suspect was arrested in or near his automobile, allowing automobile searches well beyond the context described in *Chimel*.

In *Arizona v. Gant*, the Court sought to eliminate the "entitlement" searches and restore the search-incident-to-arrest doctrine to its *Chimel* underpinnings. The majority reaffirmed the exigency rationale and requirements that the automobile search be based on the need for officer protection or to prevent the destruction of evidence. The majority also, however, adopted the rule proposed first by Justice Scalia in *Thornton v. United States*, which allowed searches when "it is reasonable to believe that evidence of the crime of arrest might be found in the vehicle." Allowing the long-defunct evidence-gathering rationale to creep back into the picture, the Court adopted that standard without analysis and without explanation of what the standard actually required, if anything at all.

The Scalia rule has resulted in at least a three-way split among the lower courts searching for the correct interpretation. Some courts have applied the "reasonable to believe" language to the type of offense- that is reasonable to believe the type of offense is one which might produce

physical evidence, which in turn may be found in the vehicle. Other courts have equated the language "reasonable to believe" to the more venerable "reason to believe" standards from *Payton v. New York* and *Terry v. Ohio*, standards less than probable cause. The Ninth Circuit, using its own *Payton* precedent, has equated the "reason to believe" standard to probable cause, reasoning that "probable cause" is a term of art connoting involvement of a magistrate.

The nature-of-the-offense rule is the improper interpretation because of the potential for abuse and confusion. If police were entitled to search every time the arrest was of the type which might yield physical evidence, then the Court's purpose in *Gant* would be eviscerated. The nature-of-the-offense rule would be little more than a slightly-diluted version of *Belton*, allowing entitlement searches in all cases except for some minor traffic violations. The nature-of-the-offense rule would also cause confusion in the form of inconsistent results and indefinite line-drawing. The nature-of-the-offense rule is both unworkable and constitutionally violative in light of *Gant*.

The Ninth Circuit probable cause rule is similarly inappropriate. If "reasonable to believe" were equivalent to probable cause, then the Scalia rule would be empty text, assimilated into the pre-existing automobile exception to the search warrant requirement. Furthermore American jurisprudence is more than familiar with the probable cause standard and if the Court had intended to adopt probable cause as the standard, it would have done so.

The proper interpretation is for "reasonable to believe" to encompass a standard requiring some proof that evidence may be found in a vehicle, but not proof amounting to probable cause. The *Terry* "reasonable suspicion" standard is the proper one because of its widespread application and wealth of interpretive law. Courts in the past have equated language similar to

"reasonable to believe" to the *Terry* standard. Applying *Terry* to Scalia's evidentiary rule would both protect arrestee's constitutional rights and would create predictable results.

With a settled, uniform, and intuitive standard, the arrestee from the introductory paragraph would know her rights, as would the officer placing her under arrest. The admissibility of the evidence would not turn on disconnected factors like the size or make of the vehicle, but instead on the probability of finding evidence as the Constitution commands. And with all aspects of the automobile search-incident-to-arrest under the Fourth Amendment's protection, the era of *Belton* and the entitlement search can finally be laid to rest.