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Searches Incident to Arrest and the Aftermath of Arizona v. Gant – A Circuit Split as to Gant's Applicability to Non-Vehicular Searches

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SEARCHES INCIDENT TO ARREST AND THE AFTERMATH OF *ARIZONA V. GANT* – A CIRCUIT SPLIT AS TO *GANT*'S APPLICABILITY TO NON-VEHICULAR SEARCHES

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I. Introduction

The nation's struggle to balance individual rights of privacy and legitimate law enforcement efforts continues without any clear resolution in sight. The Fourth Amendment of the United States Constitution guarantees citizens the right to be free from unreasonable searches and seizures, stating that search warrants shall be issued only with a showing of probable cause, a description of the place to be searched, and the persons or things to be seized.[1] Complementing the warrant requirement is the principal that searches done without a warrant are per se unreasonable.[2] The Supreme Court, however, has recognized exceptions to the warrant requirement under certain situations, based on various legal theories and factual scenarios.[3] This article will discuss only

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1. U.S. CONST. amend. IV.

2. Katz v. United States, 389 U.S. 347, 357 (1967).

3. *E.g.,* Warden v. Hayden, 387 U.S. 294 (1967) (exigent circumstances exception); Chambers v. Maroney, 399 U.S. 42 (1970) (automobile exception); South Dakota v. Opperman, 428 U.S. 364 (1976) (inventory exception); Bumper v. North Carolina, 391 U.S. 543 (1968) (consent); Arizona v. Hicks, 480 U.S. 321 (1987) (plain view doctrine); Terry v. Ohio, 392 U.S. 1 (1968) (stop and frisk). Additionally, the Court has found various special needs exceptions for searches. *E.g.*, Camara v. Mun. Court of S.F., 387 U.S. 523 (1967); Skinner v. Ry. Labor Exec. Ass'n, 489 U.S. 602 (1989); City of Indianapolis v. Edmond, 531 U.S. 32 (2000); New Jersey v. T.L.O., 469 U.S. 325 (1985)). This paper will treat another exception, known as searches incident to an arrest.

one of these exceptions, searches incident to arrest. The evolving standards and rules for these searches, their significance, how and when they apply, and recent changes in the scope of these searches will be the main focus of this article. In addition, a circuit split regarding this issue will be discussed and analyzed.

II. Background

A. *Before* Chimel v. California

The basic concept of a search incident to arrest has changed throughout the years. In 1950, *United States v. Rabinowitz* was decided by the Supreme Court on the subject of searches incident to arrest.[4] Albert Rabinowitz, a stamp dealer, was arrested and a search incident to arrest took place.[5] He was arrested in his place of business, a one-room office.[6] Upon being arrested, the officers searched the defendant's desk, safe, and file cabinets for an hour and a half.[7] They seized a large amount of incriminating evidence consisting of 573 forged stamps, and used it against the defendant at trial.[8] The Court held this search was valid, even though the purpose was to procure incriminating evidence from the defendant, due to the "longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest."[9] The Court noted that the reasonableness of the search was the crucial analysis, not whether or not the officers could have procured a search warrant to search all that they had searched.[10] The Court held that this search, under the

4. 339 U.S. 56 (1950), *overruled by* Chimel v. California, 395 U.S. 752 (1969).

5. *Id.* at 58-59.

6. *Id.* at 58.

7. *Id.* at 58-59.

8. *Id.* at 59.

9. *Id.* at 61 (citing Weeks v. United States, 232 U.S. 383, 392 (1914)).

10. *Id.* at 65-66. The Court explained that there is no fixed formula used to determine the reasonableness of a search, and "unreasonable" is not defined in the Constitution. *Id.* at 63 (citing Go-Bart Importing Co. v. United States, 282 U.S. 344, 357 (1931). The Court went on to say that reasonableness needs to be determined from the facts and circumstances of

circumstances, was reasonable, and that the evidence obtained from the lengthy search of the office would not be suppressed.[11]

B. Chimel v. California

The decision in *Rabinowitz* stood until 1969, when the Supreme Court decided the groundbreaking case of *Chimel v. California*.[12] In *Chimel*, the defendant was arrested when he walked into his house, where the police were waiting with the defendant's wife who had let them in, and a search "incident to arrest" took place thereafter.[13] The officers searched the entire three-bedroom home, along with the attic, the garage, and a small workshop, accompanied by the defendant's wife.[14] In the master bedroom and the sewing room, at the officer's direction, the defendant's wife opened drawers and moved the contents around, so the officers could see if there was any incriminating evidence in the drawers.[15] They found incriminating evidence, seized it, and used it against the defendant later at trial.[16] The search took about forty-five to sixty minutes.[17]

each case. *Id*. In this case, the United States Supreme Court agreed with the District Court that the search was reasonable because the search and seizure was incident to a valid arrest. The location of the search was a business room where the public, including the police officers, were invited, the room was small and under the immediate control of the defendant, the search did not extend beyond the room, and the possession of fraudulent and altered stamps was a crime. *Id*. at 63-64.

11. *Id*. at 66.

12. 395 U.S. 752 (1969). This reversal of longstanding precedent could arguably be attributable to the liberal nature of the famous "Warren Court" in the 1950s and 1960s. *See* Joan Rapczynski, *The Legacy of the Warren Court*, YALE-NEW HAVEN TEACHERS INSTITUTE, http://www.yale.edu/ynhti/curriculum/units/2004/1/04.01.07.x.html (last visited Oct. 23, 2012).

13. *Chimel*, 395 U.S. at 753.

14. *Id.* at 754.

15. *Id.*

16. *Id.* The evidence seized consisted of coins, medals, tokens, and other objects, which the police officers believed were stolen. *Id*. The defendant was later charged with burglary and the evidence was received at trial, over the defendant's objection. *Id.* The United States Supreme Court reversed the conviction and suppressed the evidence. *Id*. at 768.

17. *Id.* at 754.

The Supreme Court, in *Chimel*, overturned *Rabinowitz* and stated that the search was not a valid search incident to arrest.[18] The court noted that there were two justifications for searches incident to arrest.[19] The first justification was officer's safety.[20] When the officer makes an arrest, he needs to be able to remove any weapons the arrestee might possess.[21] The second justification was to prevent the destruction of evidence.[22] Both of these justifications apply not only to the arrestee's person, but also to any area where the arrestee is able to grab, reach, or lunge in order to gain access to a weapon or attempt to destroy evidence.[23] The court labeled this the arrestee's area of "immediate control."[24]

Because of these rationales for searches incident to arrest, the search in *Chimel* was deemed unreasonable.[25] The scope of the search went far beyond that which would be reasonable to protect the officer's safety or the destruction of evidence on the arrestee's person or within the area of the arrestee's immediate control.[26] The dissent argued that the "exigent circumstances" doctrine should apply since the defendant's wife was present at the scene and might have destroyed the evidence when the police left.[27] The main thrust of *Chimel* is that a search incident to an arrest must be within the area of the arrestee's

18. *Id.* at 768.

19. *Id.* at 763. These justifications were not new, and were stated in *Rabinowitz*. United States v. Rabinowitz, 339 U.S. 56, 72-73 (1950), *overruled by* Chimel v. California, 395 U.S. 752 (1969). In fact, these justifications can be found in court opinions dating back to the 19th century. *See, e.g.*, Closson v. Morrison, 47 N.H. 482, 484-85 (1867); Holker v. Hennessey, 42 S.W. 1090, 1092-93 (Mo. 1897).

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

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.*

25. *Id* at 768.

26. *Id*. at 768.

27. *Id*. at 773-75 (White & Black, JJ., dissenting). The exigent circumstances doctrine applies when there is an emergency situation, making it impracticable to obtain a search or arrest warrant. *Id.* For example, if an officer is chasing a person who has just committed an armed robbery, and that person runs into his home before the officer arrests him, due to the emergency at hand, the officer may enter the person's home to make the arrest.

"immediate control," which greatly narrowed the scope of these searches.

C. *The Aftermath of* Chimel

Although the holding in *Chimel* was clear on its face, questions remained as to certain circumstances in which searches incident to an arrest had occurred.[28] For example, in *United States v. Patterson*, the United States Court of Appeals for the Tenth Circuit held that police were justified in entering the defendant's kitchen to remove weapons, because the defendant's wife was between the kitchen and living room when the defendant was arrested.[29] The resulting search and seizure of a partially hidden folder on a cabinet shelf in the kitchen was lawful as a search incident to the husband's arrest.[30] Thus, many different situations can arise in which the *Chimel* rule must be interpreted.

Other questions also remained after *Chimel* was decided; it remained unclear how long after an arrest a search incident to arrest can be made.[31] In *United States v. Chadwick*, this issue arose, as the Court held that a search incident to an arrest cannot be justified as incident to that arrest if the search was remote in time.[32] In *Chadwick*, a footlocker was searched over an hour after it was seized, and therefore this search could not be justified as a search incident to arrest.[33] *United States v. Edwards*, however, provided an exception.[34] In *Edwards*, a search incident to arrest of the defendant's person was allowed ten hours after he was arrested since it was deemed improper to strip the defendant of his clothing at the time of the arrest and leave him naked in his jail cell simply so a search of the

28. *See, e.g.*, United States v. Patterson, 447 F.2d 424, 427 (10th Cir. 1971) (discussing the extent of the arrestee's area of immediate control).

29. *Id.*

30. *Id.* at 425.

31. *See* United States v. Chadwick, 433 U.S. 1 (1977), *abrogated on other grounds by* California v. Acevedo, 500 U.S. 565 (1991).

32. *Chadwick*, 433 U.S. at 15; *see also* Preston v. U.S., 376 U.S. 364 (1964).

33. *Chadwick*, 433 U.S. at 15.

34. 415 U.S. 800 (1974).

clothing could be justified as incident to arrest.[35] It was late at night when the defendant was arrested and no substitute clothing could be provided until the next morning.[36] *Edwards* was therefore a narrow exception to the normal requirement of immediacy when dealing with searches incident to arrest.[37]

Yet another crucial question remained after *Chimel*. The cases of *Chimel*, *Patterson*, and many others[38] dealt with defendants who were arrested in their homes and apartments, and searches incident to arrest had to be analyzed in these similar environments. This paper will discuss the decisions of several important cases, which answered the question of whether searches incident to arrest could apply to arrests outside of the home, particularly whether an arrest could justify a search of a defendant's vehicle if he is arrested after he is pulled over, and, if so, what the permissible scope of the search is.

D. *Vehicular Searches Incident to an Arrest: From 1981 to 2009*

The first major case with respect to searches incident to arrest in the automobile context was *New York v. Belton*, which reached the Supreme Court and was decided in 1981.[39] *Belton* established a bright line rule that lasted for twenty-eight years with respect to searches incident to arrest in the automobile context.[40] In *Belton*, the defendant was pulled over for speeding.[41] As the officer was trying to determine who owned the car, he smelled burnt marijuana and saw an envelope he

35. *Id.* at 805.

36. *Id.*

37. *Id.* at 807.

38. *See, e.g.*, Chimel v. California, 395 U.S. 752 (1969); United States v. Patterson, 447 F.2d 424 (10th Cir. 1972); State v. Roberts, 623 N.W.2d 298 (Neb. 2001).

39. 453 U.S. 454 (1981), *abrogated by* Arizona v. Gant, 556 U.S. 332 (2009).

40. *See Gant*, 556 U.S. at 335 (holding that the doctrine of stare decisis did not require the United States Supreme Court to adhere to the broad reading of its prior decision in *Belton*).

41. *Belton*, 453 U.S. at 455.

suspected to contain marijuana in plain view.[42] He ordered all of the occupants out of the car and arrested them for drug possession.[43] After searching the occupants, he searched the passenger compartment of the car, finding a jacket belonging to one of the occupants.[44] He unzipped one of the pockets and discovered cocaine.[45]

The Supreme Court held that this was a lawful search incident to arrest.[46] The Court held that the scope of the search in such a situation can include a search of the passenger compartment, as well as any open or closed containers found in those compartments.[47] While the Court used the rationale that the jacket was in the arrestee's immediate control, it also stated that there was no workable definition of the area within the immediate control of the arrestee, when that area included the interior of an automobile and when the arrestee was a recent occupant.[48] The Court then went on to say, without mentioning the immediate control test, that when an officer had 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."[49] Therefore, this Court implied that, in such a situation, the *Chimel* "immediate control" test need not be used, and a search of the arrestee's automobile will always be reasonable as a search incident to arrest.[50] This rule survived for nearly three decades, but the recent 2009 United States Supreme Court of *Arizona v. Gant* decision changed the *Belton* rule.[51]

42. *Id.* at 455-56.
43. *Id.* at 456.
44. *Id.*
45. *Id.*
46. *Id*. at 462.
47. *Id.* at 460-61.
48. *Id.* at 460, 462-63.
49. *Id.* at 460 (footnote omitted).
50. *Id.*
51. 556 U.S. 332 (2009).

E. Arizona v. Gant

In 2009, the Supreme Court decided *Arizona v. Gant*, which made it clear that *Belton* was no longer the rule for searches incident to arrest with respect to automobiles.[52] *Gant* established a standard for evaluating such searches based on *Chimel*-like factors.[53] Gant was pulled over by the police, arrested for driving with a suspended license, handcuffed, and locked in a patrol car.[54] The police officers then went back to the defendant's automobile, searched his car, and found cocaine in a jacket pocket.[55] The Supreme Court used the *Chimel* rule of "immediate control" to decide this case.[56] The Court stated that police may search the passenger compartment of a vehicle incident to a recent occupant's arrest only if it is reasonable to believe that the arrestee might access the vehicle at the time of the search.[57] Since the two justifications for searches incident to an arrest are to prevent the destruction of evidence and that of officer safety, this rule seems logical.[58] In so holding, the Court rejected a broad reading of *Belton*, which permitted a search of a vehicle incident to an arrest even if there was no possibility that the arrestee could gain access to the automobile at the time of the search.[59] In *Gant*, since the arrestee had already been handcuffed and placed inside a police car about thirty feet away from his own vehicle, there was no possibility that Gant could gain access to his own vehicle.[60]

52. *Id*. at 348-51.

53. *Id*. at 335.

54. *Id.* at 336.

55. *Id.*

56. *Id.* at 339.

57. *Id.* at 335, 337. The Court stated that a valid search incident to an arrest may *also* be justified if there was reason to believe the vehicle contained evidence of the crime the person was arrested for. *Id.* at 343. This "second prong" of the *Gant* test will be discussed later in this paper. *See infra* Part III.D.

58. *Gant*, 556 U.S. at 338.

59. *Id*. at 339, 341.

60. *Id.* at 336.

In a dissenting opinion, Justice Alito predicted some important unintended consequences to the Court's ruling.[61] Justice Alito explained that this "immediate control" rule with respect to vehicles would require a case-by-case, fact intensive analysis, which was exactly what *Belton* was trying to avoid, since it is often unclear whether or not an arrestee could gain access to a weapon or evidence in the passenger compartment of a car.[62] Also, as Justice Alito pointed out, this new rule would place a premium on when an officer decides to take the arrestee away from the vehicle and place him in a secure police car.[63] In attempting to make the search a lawful search incident to an arrest, this rule would "'create a perverse incentive for an arresting officer to prolong the period during which the arrestee is kept in an area where he could pose a danger to the officer.'"[64] Although Justice Alito's concerns were valid, the majority was not persuaded that these concerns should affect its decision.

The *Gant* rule created more restraints on police officers with regard to searches of automobiles incident to an arrest. If the arrestee was secured and there was no possibility that he could gain access to his vehicle, any search of his vehicle thereafter could not be justified as a search incident to his arrest.[65] Although this rule seems clear, circuit courts have struggled with interpreting and applying the rule, especially in the context of non-vehicular searches.[66]

61. *Id*. at 359-61 (Alito, J., dissenting).

62. *Id.* at 360.

63. *Id.* at 362.

64. *Id.* (quoting United States v. Abdul-Saboor, 85 F.3d 664, 669 (D.C. Cir. 1996)).

65. *Id.* at 337-38 (majority opinion); Davis v. United States, 131 S. Ct. 2419 (2011). The facts of *Davis* are analogous to the facts of *Gant*, as an arrestee was removed from his vehicle, handcuffed, and placed in a police car before the subsequent search of his vehicle occurred. *Id*. at 2425. In this case, the search would have been invalidated, but was held to be valid for other reasons, namely, the good faith exception to the exclusionary rule, which is beyond the scope of this paper.

66. *See* discussion *infra* Part III.A.

III. The Aftermath of *Gant*: Applicability to Non-Vehicular Searches

A. *Circuit Split*

While the ruling in *Gant* clearly applies to automobile searches incident to an arrest, the question remains whether *Gant* should apply to non-vehicular searches incident to an arrest. Recent circuit court decisions have differed on the answer to this question. A circuit split was recognized in the Fifth Circuit's March 2011 decision *United States v. Curtis*.[67] The *Curtis* court analyzed the *Gant* decision and explained that other circuit courts were divided over whether *Gant* applied only to vehicular searches incident to arrest or whether it applied to all searches incident to arrest.[68] Although *Curtis* dealt with a situation which appeared to require interpretation of the scope of *Gant* relating to non-vehicular searches, the court denied the motion to suppress based on the exclusionary rule's good faith exception, and thus did not decide if *Gant* was applicable.[69]

The Eighth Circuit and the Third Circuit are split on the issue of the applicability of *Gant* to non-vehicular searches.[70] The Eighth Circuit case *United States v. Perdoma* is an important case in this discussion, because the Eighth Circuit interpreted *Gant* as not applicable to non-vehicular searches.[71] In *Perdoma*, the defendant was arrested on drug charges in the middle of a bus terminal.[72] The officers handcuffed him and brought him to an area at the rear of the terminal.[73] One officer searched Perdoma and found marijuana, while another officer searched Perdoma's bag and found methamphetamine.[74]

67. 635 F.3d 704, 713 (5th Cir. 2011). In *Curtis*, the defendant was arrested in his car, and the arresting officer took his cell phone, looked through it, and continued to do so long after the arrest was finished. *Id.* at 711.

68. *Id.* at 713.

69. *Id.*

70. *Id.* n.22; United States v. Perdoma, 621 F.3d 745 (8th Cir. 2010).

71. *Perdoma*, 621 F.3d at 751.

72. *Id.* at 748.

73. *Id.*

74. *Id.*

Perdoma argued that he was "secured" like the defendant in *Gant*, so the subsequent search of his duffle bag should not have been allowed.[75] The court stated that, while the explanation of *Gant* of the rationale for searches incident to an arrest may be instructive regarding outside of vehicle searches, the court declined to adopt *Gant* in this situation.[76] The court reasoned that, even though Perdoma was "secured," the bag was in close proximity to him, and the police did not know how strong he was.[77] Thus, the search was upheld as valid, and the Court did not interpret *Gant* as applicable to non-vehicular searches.[78]

The Third Circuit case, *United States v. Shakir*, came to a different conclusion in determining whether *Gant* applies to non-vehicular searches.[79] In *Shakir*, an arrest warrant for the defendant had been issued.[80] An arrest team was supposed to arrest the defendant at the Trump Plaza Hotel and Casino.[81] Soon after the defendant entered the lobby of the hotel, the arresting officer spotted the defendant standing at the end of a check-in-line about twenty-five feet away.[82] As the officer got closer, somebody yelled out "shit!," and the defendant turned and made eye contact with the man who had yelled.[83] Two security guards, who were accompanying the arresting officer, detained the man who yelled and the arresting officer hurried over to Shakir and arrested him as well.[84] Shakir did not resist, and dropped the bag he was carrying on the floor at his feet.[85] Shakir was immediately patted down and was cooperative

75. *Id.* at 751. The defendant in *Gant* was better "secured" than the defendant in *Perdoma* and was completely removed from the area being searched before the search was conducted. *Id.* In *Gant*, the defendant was handcuffed and locked in a patrol car before the officers searched his car. Arizona v. Gant, 556 U.S. 332, 335 (2009).

76. *Perdoma*, 621 F.3d at 751.

77. *Id.* at 750-51.

78. *Id.* at 751.

79. 616 F.3d 315, 321 (3d Cir. 2010).

80. *Id.* at 316.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

throughout the arrest.[86] Within five minutes, two more officers arrived with handcuffs.[87] While the other officers held Shakir's arms, the arresting officer bent down to investigate the contents of Shakir's bag, which was still by his feet, and found a large amount of cash.[88]

With respect to *Gant*, the Third Circuit stated that "the Government contends that the rule of *Gant* applies only to vehicle searches. We do not read *Gant* so narrowly."[89] The court went on to say that, in *Gant*, the Supreme Court "'h[e]ld that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.'"[90] The court stated that an aggressive reading of *Gant* would prohibit the search of the bag in this case, unless Shakir was both unsecured and within reaching distance of the bag.[91] The court declined to adopt such an aggressive reading, even though they applied *Gant*.[92]

The court also noted that there was no definition of what "secured" meant in *Gant*.[93] The court stated that handcuffs are not fail-safe, and it is not impossible for a handcuffed person to obtain and use a weapon concealed on his person or within his reach.[94] Therefore, the court applied *Gant*, but the court took a middle ground approach in doing so.[95] It implied that, if the

86. *Id.*

87. *Id.* at 316-17.

88. *Id.* at 317. It was later determined that some of the cash was stolen during an armed robbery, and, at trial, Shakir moved to suppress the cash found in his bag during the search. *Id.*

89. *Id.* at 318.

90. *Id*. at 319-20 (quoting Arizona v. Gant, 556 U.S. 332, 343 (2009)).

91. *Id.* at 320.

92. *Id*.

93. *Id*. In *Gant*, the defendant was handcuffed and secured in a police car at the time of the search. Arizona v. Gant, 556 U.S. 332, 335 (2009).

94. *Shakir*, 616 F.3d at 320-21 (citing United States v. Sanders, 994 F.2d 200, 209 (5th Cir. 1993)).

95. *Id*. at 321. The circuit split regarding *Gant* was mentioned in the district court case *United States v. Cartwright*, No. 10-CR-104-CVE, 2010 WL 3931102, at *1 (N.D. Okla. Oct. 5, 2010). There the court stated that the Tenth Circuit had not yet ruled on the issue of whether *Gant* should apply to non-vehicular searches. *Id*. at *9. The court concluded that, post-*Gant*, the standard remains lenient in determining whether an arrestee can reasonably access an area or item being searched incident to the arrest, and the inquiry

defendant was truly secured like the defendant in *Gant*, the search of the bag would have been invalid.[96] The court held that since the bag was still at his feet, the defendant could have still accessed his bag.[97] The court concluded that the totality of circumstances, including the defendant's arrest for an armed bank robbery and the possibility of a confederate in the hotel lobby at the time of his arrest, made the search of his bag valid incident to arrest.[98] Thus, the Third Circuit ruled that *Gant* applied to non-vehicular searches, contrary to the pronouncements of the Eighth Circuit in *Perdoma*.[99]

B. *Courts Applying* Gant *or Indicating that* Gant *Would Apply to Non-Vehicular Searches Incident to Arrest*

The issue of whether the Supreme Court's decision in *Gant* should apply to non-vehicular searches remains an open question. There are a number of district court decisions and some appellate court decisions which answer this question in the affirmative.[100] In *United States v. Bennett*, the police suspected the defendant had committed an attempted robbery.[101] A police officer saw the defendant running down a street and the defendant was soon tackled by two police officers.[102] Upon being tackled, the backpack that the

cannot stop simply because an arrestee is handcuffed or secured. *Id*. The court also seemed to apply *Gant's* justifications of officer safety and evidence preservation, and, in doing so, appeared to be applying and interpreting *Gant* as was done by the Third Circuit in *Shakir*. *Id*.; *see also Shakir*, 616 F.3d at 320.

96. *Shakir*, 616 F.3d at 320.

97. *Id*. at 321.

98. *Id*.

99. *Id.* at 318; *see* United States v. Perdoma, 621 F.3d 745, 751 (8th Cir. 2010).

100. *See, e.g.*, United States v. Bennett, No. 08-535, 2010 WL 1427593 (E.D. Pa. Apr. 8, 2010); United States v. Scott, No. 09 CR 331(HB), 2009 WL 4975269 (S.D.N.Y. June 8, 2009); United States v. Snard, No. 09-cr-00212, 2009 WL 3105271 (E.D. Pa. Sept. 27, 2009); United States v. McGhee, No. 8:09CR31, 2009 WL 2424104 (D. Neb. July 21, 2009); People v. Brown, No. B213110, 2009 WL 3193993 (Cal. Ct. App. Oct. 7, 2009); State v. Lussier, 770 N.W.2d 581(Minn. Ct. App. 2009).

101. *Bennett*, 2010 WL 1427593, at *1.

102. *Id.* at *2-3.

defendant was carrying fell off of his shoulder.[103] After tackling him, and with the defendant on the ground, one officer pointed his gun at the defendant and the other officer pinned the defendant down, frisked him, arrested him, and handcuffed him.[104] Subsequently, one officer picked up the backpack, noticed it was heavy, and searched the backpack, in which he discovered a gun.[105] The defendant moved to suppress the evidence, arguing that the backpack was not searched incident to his arrest.[106] The court, in deciding whether the backpack was within the arrestee's immediate control, looked to *United States v. Myers*.[107] In *Myers*, police officers searched the defendant's bag while the defendant was lying face down on the floor, handcuffed, and had two armed police officers hovering over him.[108] The *Myers* court found that the bag was not searched incident to an arrest since the bag was not within the defendant's immediate control due to the defendant being secured.[109] The same rationale applied in the *Bennett* case, and the same conclusion was reached. The *Bennett* court, applying *Gant*, stated that, when determining whether an object is accessible to an arrestee, a court should assume that "[the arrestee] was neither an acrobat [nor] a Houdini."[110] This is another way of saying that, once an arrestee is lying faced down and handcuffed, there is no conceivable way that the arrestee could access any bag or container, even if it was within his reach, and no search incident to the arrest would be justified in those circumstances. Therefore, because the court applied *Gant* and found that the defendant was secured and did not have access to the backpack, the search was invalidated.[111] Other cases with similar facts have come to the same conclusion.[112]

103. *Id.* at *3.
104. *Id.*
105. *Id.*
106. *Id.* at *1.
107. 308 F.3d 251 (3d Cir. 2002).
108. *Id.* at 267.
109. *Id.*
110. *Bennett*, 2010 WL 1427593, at *5 (quoting *Myers*, 308 F.3d at 267).
111. *Id.* at *5-6.
112. United States v. Scott, No. 09 CR 331(HB), 2009 WL 4975269, at *1 (S.D.N.Y. June 8, 2009); *see also* United States v. Morillo, No. 08 CR

United States v. Scott, for example, also held that when a defendant is secured and does not have access to his belongings, the search will be invalidated.[113] In *Scott*, the defendant was arrested and the bag he was carrying was brought to the police station without being searched.[114] Later, when the defendant was being interrogated, the police officers brought the bag into the interrogation room and searched it, claiming it was incident to the defendant's arrest.[115] Applying *Gant* to this non-vehicular search, the court held that the search was invalid.[116] The court stated that once the bag was taken from the defendant at the scene of the arrest, a later search of the bag could not be justified as a search incident to arrest since the worries of officer safety and preservation of evidence were no longer present.[117] Also, the officers were "not allowed to simulate circumstances warranting application of the incident-to-arrest exception merely by bringing the item they wish to search into the area near where the person was arrested, or vice versa."[118] Therefore, applying *Gant* to this situation, the search of the bag was not valid as a search incident to arrest.

In *United States v. Snard*, the court applied *Gant* as well, but the search was still found to be valid as a search incident to arrest.[119] In *Snard*, the police, with a warrant, went to the defendant's apartment to arrest him for drug possession, and

676(NGG), 2009 WL 3254431, at *1 (E.D.N.Y. Oct. 9, 2009). In *Morillo*, the defendant, wearing a backpack, fled an attempted arrest on his bicycle while police were pursuing him. *Id.* at *1. The defendant crashed his bicycle in a pothole and continued fleeing on foot. *Id.* Police officers eventually tackled him and his backpack fell off of his shoulder. *Id.* He was then handcuffed and brought to the back of a police car with his backpack. *Id.* The backpack was then searched. *Id*. The court disallowed the search, because there was no possibility that the defendant could have gained access to the backpack during the time of the search. *Id*. at *2.

113. No. 09 CR 331(HB), 2009 WL 4975269, at *1, *7 (S.D.N.Y. June 8, 2009).

114. *Id.* at *1.

115. *Id.* at *2.

116. *Id.* at *7.

117. *Id.*

118. *Id.* (quoting United States v. Perea, 986 F.2d 633, 643 (2d Cir. 1993)).

119. No. 09-cr-00212, 2009 WL 3105271, at *1 (E.D. Pa. Sept. 27, 2009).

they were warned that the defendant might be armed.[120] The police knocked and Snard finally answered the door after telling the police, "just a minute."[121] Thereafter, while still in the defendant's apartment, the police arrested and handcuffed the defendant.[122] The defendant then said, "Can I get my clothes?" and quickly walked to his bed and sat down.[123] The officers followed him and told him to stand up and walk back to the doorway.[124] One officer noticed drugs in the room and decided that a protective sweep should be done to make sure that nobody else was in the apartment.[125] The police officer lifted the mattress to look under the bed.[126] He did not want to stick his foot under the bed, nor did he want to get down on all fours to check for additional persons in the room, as it would have placed him in a vulnerable position.[127] Upon lifting the mattress, a gun was exposed.[128] Applying *Gant* to this non-vehicular situation, the court nonetheless validated the search incident to the defendant's arrest.[129] Due to the defendant's long delay in answering the door, his walking quickly to the bed after being handcuffed, the drugs in plain view, and the warning that he might he armed, the search of the bed was valid to protect the officers' safety.[130] This case shows that even if a court applies *Gant* to non-vehicular searches, the search can still be validated as incident to an arrest, even if the defendant is handcuffed, as he was in this case.[131]

A different situation arose in *United States v. McGhee*, in which the district court applied *Gant*.[132] In *McGhee*, the defendant was arrested and the police searched his person

120. *Id.* at *2-3.
121. *Id.* at *3.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.* at *4.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.* at *11.
130. *Id.* at *6-7.
131. *Id.* at *10.
132. No. 8:09CR31, 2009 WL 2424104, at *1 (D. Neb. July 21, 2009).

incident to the arrest, and found a cell phone in his pocket.[133] The police then searched the phone and copied the saved contact list in the phone.[134] The court concluded that this was not a valid search incident to the defendant's arrest.[135] Although the search of his person was justified, the additional search of the numbers and contacts in the phone was not.[136] The court applied *Gant*, and noted that "'[i]f 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.'"[137] The court stated that, although the cell phone was within the defendant's immediate control at the time the defendant was searched, once the officer seized the phone, there was no evidence that the cell phone contained any destructible evidence or that the cell phone presented any risk of harm to the officers.[138] Therefore, since the justifications for searches incident to an arrest were not present during the search of the cell phone, the search was not a valid search incident to the defendant's arrest.[139]

In the case of *People v. Brown*, the *Gant* analysis was applied to a different set of facts.[140] In *Brown*, the defendant was arrested in his motel room after police officers smelled and observed large amounts of smoke, which they determined to be marijuana.[141] The motel room was then searched and evidence of the crime was discovered.[142] The defendant moved to suppress the evidence, claiming that the search was not valid incident to his arrest.[143] Although the evidence was admitted for other reasons, the court determined that this search was not a valid search incident to the defendant's arrest.[144] The

133. *Id.*
134. *Id.* at *2.
135. *Id.* at *3.
136. *Id.*
137. *Id.* (quoting Arizona v. Gant, 556 U.S. 332, 339 (2009)).
138. *Id.* at *3.
139. *Id.*
140. No. B213110, 2009 WL 3193993, at *1 (Cal. Ct. App. Oct. 7, 2009).
141. *Id.*
142. *Id.*
143. *Id.* at *3.
144. *Id.* at *4.

court applied *Gant* to this non-vehicular case.[145] The court stated the immediate control test, commented on the issue of a secured defendant as discussed in *Gant*, and noted the justifications of officer safety and evidence preservation.[146] In its analysis, the court concluded that the search of the motel room was not a valid search incident to the defendant's arrest.[147] After the defendant was arrested, he was taken outside of his motel room.[148] Once the defendant was outside, the officers searched the motel room.[149] At that point, with the defendant standing outside, there was no reason to believe that the defendant had access to or could reach anything in the motel room or that he would be able to destroy any evidence in the motel room.[150] Therefore, under *Gant*, the court concluded that the search was invalid as a search incident to arrest since there were no circumstances that would justify such a search.[151]

In a unique set of circumstances, a Minnesota appellate court applied *Gant* to a non-vehicular search in *State v. Lussier*.[152] In this case, the defendant was arrested on probable cause that he had recently committed a rape.[153] After he was arrested, the defendant was placed in the back of a police car and was driven to a hospital to undergo a Severe Acute Respiratory Syndrome ("SARS") exam.[154] At the hospital, the defendant's clothes and underwear were collected as evidence, and at 5:00 A.M., his pubic hair was combed, pubic hair samples were collected, and his cheek, hands, and penis were swabbed.[155] Defendant claimed that this exam was not a lawful

145. *Id.*
146. *Id.* at *3-4.
147. *Id.* at *4.
148. *Id.*
149. *Id.* at *1.
150. *Id.* at *4.
151. *Id.*; *see also* People v. Leal, 100 Cal. Rptr. 3d 856 (Ct. App. 2009) (holding, under similar circumstances, that the search of an area in the defendant's home where he was arrested was invalid under *Gant* because the defendant had already been secured and removed from the scene when the search took place).
152. 770 N.W.2d 581(Minn. Ct. App. 2009).
153. *Id.* at 583-84.
154. *Id.* at 584-85.
155. *Id.* at 585.

search incident to his arrest, and the court agreed.[156] The officers argued that this was a lawful search incident to arrest because of the danger of DNA evidence easily being destroyed by washing the area but the court disagreed.[157] The court first noted that this case was distinguishable from *State v. Riley*, wherein a close visual inspection of the defendant's penis was conducted the day following his arrest.[158] In this case, a much more intrusive search was done, as opposed to simply a visual inspection.[159] The court also applied *Gant* to this analysis, stating that the defendant's genitals could not be accessed in this situation, since he was handcuffed and was under constant police observation.[160] Officer safety and the preservation of evidence, justifications of a search incident to arrest, were not present.[161] Thus, an incident to arrest rationale could not be used to justify the search.[162]

These are just some examples of cases in the lower courts that have applied the *Gant* rule to non-vehicular searches. These cases have not reached the Supreme Court of the United States, but the holdings and rationale used by these courts are clear. Other lower courts, however, have decided not to apply *Gant* to non-vehicular cases, and have adopted a less broad application of *Gant*, limiting its scope to cases regarding vehicular searches.[163]

156. *Id.* at 585-86, 590.

157. *Id.* at 587-88.

158. *Id.* at 589 (citing State v. Riley, 226 N.W.2d 907, 908-09 (Minn. 1975)).

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.*; *see also* United States v. Townsend, 151 F. Supp. 378, 384 (D.D.C. 1957) (affirming that an examination of the defendant's penis and testing for blood evidence following an arrest for sexual assault requires "the most scrupulous observation of propriety and decency"); State v. Fontenot, 383 So. 2d 365, 367 (La. 1980) (holding that the retrieval of a container from the defendant's vagina after she was arrested was not a lawful search incident to her arrest since a warrant could have been obtained in one to two hours and because the arrestee was heavily guarded by police, therefore no destruction of evidence would have been possible).

163. *See, e.g.*, United States v. Bowman, No. 2:09-cr-182-MEF, 2010 WL 749908 (M.D. Ala. Mar. 4, 2010); United States v. Briones, No. H-09-491, 2009 WL 5208835 (S.D. Tex. Dec. 24, 2009); United States v. Patterson, No. 09-cr-503, 2009 WL 3578955 (N.D. Ill. Oct. 26, 2009); Sanders v. City of

C. *Courts Declining to Apply* Gant *to Non-Vehicular Searches Incident to Arrest*

Although some courts have decided to apply *Gant* to non-vehicular searches, many lower courts have not chosen to do so. These cases are important to show that the scope of *Gant* is not clear, and that courts in different jurisdictions are interpreting *Gant* as they see fit, since no specific guidelines have been given as to whether *Gant* should apply to non-vehicular searches. *United States v. Patterson* is a case in which *Gant* was not applied. In *Patterson*, police officers arrested the defendant in his two-bedroom apartment pursuant to an arrest warrant.[164] The defendant was arrested, handcuffed, and removed from the apartment.[165] The police asked the defendant's girlfriend if there were any weapons in the apartment, and upon receiving a vague answer, searched a closet in the apartment.[166] They found an AK-47 rifle in the closet.[167] The defendant claimed that *Gant* should apply to this case because he was secured and removed from the apartment before the search of the closet commenced.[168] The court, however, declined to apply *Gant* in this situation.[169] The court explained that *Gant* should be limited to searches incident to arrest involving vehicle searches, and should not be extended to searches outside of the vehicle context.[170] The court therefore denied the defendant's motion to suppress the weapon.[171] The importance of the scope of *Gant*, as seen in this case, is crucial. If *Gant* was applied to this case, the evidence would have most likely been suppressed since the defendant was secured and removed from the apartment before the search of the closet. In

Bakersfield, No. CIV-F 04-5541 AWI BAK, 2009 WL 3300253 (E.D. Cal. Oct. 14, 2009); State v. McKay, 154 Wn. App. 1010; No. 38816-2-II, 2010 Wash. App. LEXIS 114 (Jan. 12, 2010); State v. Sero, 153 Wn. App. 1001; No. 35617-1-II, 2009 Wash. App. LEXIS 2956 (Nov. 10, 2009).

164. No. 09-cr-503, 2009 WL 3578955, at *1 (N.D. Ill. Oct. 26, 2009).

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at *2.

170. *Id.*

171. *Id.* at *3.

not applying *Gant*, however, the court found that the Fourth Amendment was not violated, and the evidence was admissible.[172]

United States v. Briones is another case in which the court declined to apply *Gant*.[173] In this case, the defendant was arrested in his home pursuant to an arrest warrant.[174] He was handcuffed and removed from the premises.[175] The defendant then asked the officers for a shirt and shoes, and told them they were located near his bed in his room.[176] The officers went to his room to get these items, and saw a pistol, a rifle, ammunition, and an armored vest.[177] The items were seized and offered into evidence at trial, to which the defendant objected.[178] The defendant argued that *Gant* should apply, and contended that searches of premises incident to an arrest are only allowed if the defendant is unsecured and within reaching distance of the searched area at the time of the search.[179] The court, however, declined to read *Gant* as "an indication of a new trend by the Supreme Court to limit the scope of reasonable searches in connection with arrests," and was not persuaded by any such argument.[180] This case exemplifies the importance of the scope of *Gant*, because if *Gant* was applied, crucial evidence of weapons, ammunition, and a bulletproof vest would have likely been suppressed, and the outcome of the case might have been affected.

172. *Id*. In another case decided by the same court, *United States v. Harris*, a defendant was arrested and secured as he was coming out of his bedroom, and there was a subsequent search of the mattress in the bedroom. No. 09 CR 0028-2, 2009 WL 3055331, at *1, *2 (N.D. Ill. Sept. 21, 2009). At the time of the arrest, the mattress was within the defendant's grabbing radius, but before the search took place, the defendant was removed from the bedroom (the mattress was therefore not accessible at the time of the search). *Id*. The court nevertheless declined to apply *Gant* in this non-vehicular context. *Id*. at *4. The court read *Gant* to apply strictly to vehicular searches. *Id*.

173. No. H-09-491, 2009 WL 5208835, at *1 (S.D. Tex. Dec. 24, 2009).

174. *Id.*

175. *Id.*

176. *Id.*

177. *Id*.

178. *Id.*

179. *Id.* at *3.

180. *Id*.

The court in *Sanders v. Bakersfield* also declined to apply *Gant*. In *Sanders*, the plaintiffs were handcuffed and arrested in their apartment.[181] The officers subsequently searched the premises and found cocaine in a shoe within a bedroom closet.[182] The plaintiffs claimed that this search exceeded any justifiable search incident to their arrest, and urged that *Gant* be applied in this situation.[183] The court, however, decided that *Gant* should not apply to non-vehicular searches.[184] The court stressed that a *Gant* situation involving a vehicular search is very different than a non-*Gant* situation.[185] The court noted that the nature of space within a car, as in *Gant*, is much smaller than in other circumstances.[186] For example, an officer can usually tell right away if there is another person sitting in the arrestee's car who might pose a threat of danger to the officers.[187] In a *Sanders* situation, however, this is not the case.[188] In *Sanders*, the officers were allowed to do a "protective sweep" of the premises as part of their search incident to the arrest for the purpose of officer safety to make sure no one else was hiding in the apartment who might pose an additional danger to the police officers, a circumstance not present in *Gant*.[189] For this primary reason, the court noted, *Gant* should not apply to non-vehicular searches because the surrounding circumstances are different.[190] This case shows an important reason why some courts might choose not to apply *Gant* to non-vehicular searches.

The case of *United States v. Bowman* reached a similar result.[191] In *Bowman*, the police entered a mobile home

181. No. CIV-F 04-5541 AWI BAK, 2009 WL 3300253, at *1 (E.D. Cal. Oct. 14, 2009). Plaintiffs in this case filed suit, claiming that their Fourth Amendment rights had been violated. *Id.*

182. *Id.*

183. *Id.* at *1-2.

184. *Id.* at *3.

185. *Id.*

186. *Id.*

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.*

191. No. 2:09-cr-182-MEF, 2010 WL 749908, at *1 (M.D. Ala. Mar. 4, 2010).

pursuant to an arrest warrant for the defendant.[192] The defendant and a young woman were lying on a couch in the living room when the officers arrived.[193] The officers rolled Bowman off the couch and onto the floor, about four or five feet away from the couch.[194] The woman was also placed on the floor, about three to four feet away from the couch.[195] After Bowman was handcuffed, one officer lifted up a couch cushion and searched the couch.[196] He found a .25 caliber pistol and seized the weapon.[197] The defendant urged that *Gant* should apply to this case.[198] He argued that, since he was handcuffed and was five feet away from the couch, he had no access to the couch at the time of the search, and a search of the couch incident to his arrest should therefore be invalid.[199] The court was not persuaded by this argument and refused to apply *Gant* to this non-vehicular search.[200] The motion to suppress was accordingly denied.[201] This case differs from *Sanders* because the defendant in this case was not removed from the area when the search was conducted, which was not the case in *Sanders*. However, this did not seem to matter because the court's narrow reading of *Gant* would limit *Gant's* scope strictly to vehicular searches. Similar to other cases in which courts did not apply *Gant* to non-vehicular searches incident to arrest, if *Gant* was applied here, the evidence would have most likely been suppressed, since the defendant was "secured," lying face down on the floor five feet away from the couch, and therefore did not have access to the couch under a *Gant* analysis.[202] Thus, the significance of the scope of *Gant* and how far it should extend is apparent.

192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.* at *3.
199. *Id.* at *4.
200. *Id.*
201. *Id.*
202. *See generally* United States v. Bowman, No. 2:09-cr-182-MEF, 2010 WL 749908, at *1 (M.D. Ala. Mar. 4, 2010).

Two other cases decided by the Washington Court of Appeals are worthy of comment. In the first case, *State* v. *McKay*, the defendant was arrested and placed in the back of a police patrol car.[203] The bag he was carrying was subsequently searched by one of the arresting police officers.[204] The court stated that the bag was in McKay's immediate control at the time of the search and declined to apply *Gant* since this was a non-vehicular search.[205] In the second case, *State v. Sero*, the defendant was arrested in her motel room.[206] The police found her hiding inside a couch in the motel room.[207] The officers arrested her, removed her from the room, went back inside the motel room, searched the couch, and found incriminating evidence.[208] This court also declined to apply *Gant* to this non-vehicular search incident to the defendant's arrest since the search occurred in a motel room, not a vehicle.[209]

It is evident after reading and analyzing these lower court decisions that the question of whether *Gant* should apply to non-vehicular searches incident to an arrest is still unclear. If lower courts interpret *Gant* broadly, they would likely apply *Gant* to non-vehicular searches incident to an arrest, but if they read the decision more narrowly, they would likely not apply it to non-vehicular searches incident to arrest.

D. *Cases Distinguishing Prongs of* Gant

In *Arizona v. Gant*, the Court described two separate prongs in which a search could be justified in the automobile context incident to a defendant's arrest.[210] First, the Court stated that an officer may search the passenger compartment of a vehicle incident to an arrest if it is reasonable to believe

203. 154 Wn. App. 1010; No. 38816-2-II, 2010 Wash. App. LEXIS 114, *1 (Jan. 12, 2010).

204. *Id.*

205. *Id.* at *2.

206. 153 Wn. App. 1001; No. 35617-1-II, 2009 Wash. App. LEXIS 2956, *1 (Nov. 10, 2009).

207. *Id.*

208. *Id.*

209. *Id.* at *2.

210. 556 U.S. 332, 339-41 (2009).

that the arrestee might access the vehicle at the time of the search.[211] Second, the Court stated that such a search may also be justified if there was reason to believe the automobile contained evidence of the crime the defendant was arrested for.[212] The following cases discuss the meaning and interplay of these prongs. The cases also answer the interesting question of whether both prongs must be applied if the court determines that *Gant* is applicable to the situation.

In *People v. Matthews*, the defendant was arrested in his motel room.[213] He was then taken out of the motel room and placed in a police squad car.[214] His girlfriend, who was staying with the defendant, was also arrested.[215] She was handcuffed and seated on the bed in the motel room.[216] After the arrests, one officer saw a knit cap on the floor a few feet from where the defendant's girlfriend was sitting.[217] He picked it up and, when he looked inside, found drug paraphernalia.[218] The question before the court was whether this was a reasonable search incident to the defendant's arrest, or the defendant's girlfriend's arrest.[219] The court applied *Gant* to this non-vehicular search and, in doing so, the search was found to be invalid.[220] The search could not be justified as incident to the defendant's arrest because he was secured in a patrol car when the search took place.[221] The search also could not be justified as incident to the defendant's girlfriend's arrest, even though the knit cap was only several feet away from her.[222] This was so because she was handcuffed and two armed officers were standing beside her, leaving her no opportunity to access the knit cap.[223]

211. *Id.*
212. *Id.*
213. No. H033568, 2010 WL 468105, at *1 (Cal. Ct. App. Feb. 11, 2010).
214. *Id.*
215. *Id.*
216. *Id.*
217. *Id.*
218. *Id.*
219. *Id.*
220. *Id.* at *4-6.
221. *Id.*
222. *Id.* at *6.
223. *Id.*

The prosecution made an additional argument in this case, urging that, even if *Gant* was applied to this case, the search should be valid because there was reason to believe that evidence relevant to the crime would be found at the scene.[224] In *Gant*, the court stated that a valid search can be conducted if it is done incident to the defendant's arrest *or* if there is reason to believe that the car contained evidence of the crime for which the defendant was arrested.[225] However, in *Matthews*, the court refused to apply this second prong of *Gant*.[226] The court seemed to say that there was a difference between a reasonable belief that the premises contains evidence of a crime and preventing the destruction of evidence, the latter being one of the justifications for searches incident to an arrest.[227] The court also noted that, even though they were applying the first prong of *Gant* to this case, the second prong, concerning reason to believe that evidence of a crime is located on the premises, should not be applied.[228] The court stated that, if the defendant's girlfriend had been arrested in her car for a drug related offense, the police could have searched the car for drug evidence without a warrant, even after she was arrested, handcuffed, and placed in a patrol car.[229] The court made it clear, however, that this rule only applied to automobile searches.[230]

Although not stated in the decision, this is what is known as the "automobile exception."[231] The justification for this exception to the warrant requirement is the inherent mobility of automobiles, which makes the danger of the destruction of evidence much higher than in other circumstances.[232] The Supreme Court, in *Chambers*, stated that the mobility of a car may make the warrantless search of it reasonable, "'although the result might be the opposite in a search of a home, a store,

224. *Id.* at *7.
225. Arizona v. Gant, 556 U.S. 332, 351 (2009).
226. *Matthews*, 2010 WL 468105, at *6.
227. *See id.*
228. *Id.*
229. *Id.* at *8.
230. *Id.*
231. *See* Chambers v. Maroney, 399 U.S. 42, 62 (1970).
232. *Id.* at 50.

or other fixed piece of property.'"[233] This relates back to *Matthews*, because a motel room is not inherently mobile; the court thus declined to apply this prong of *Gant*.[234] The court's application of *Gant* was therefore very unique, in that it chose to apply *Gant* because the defendant's girlfriend was secured and had no access to the knit cap (search incident to arrest therefore not allowed), but declined to apply *Gant* with respect to the second prong as to the reasonable belief that the premises contained evidence of a crime.[235] The confusing questions of applicability along with the scope of *Gant* are therefore highlighted in this case. Although somewhat confusing, this court's analysis and partial application of *Gant* does make sense for the reasons stated above.

Another case where the court applied the first prong of *Gant* but declined to apply the second prong of *Gant* was *United States v. Taylor*.[236] In *Taylor*, the defendant was arrested in his attic, where he was found hiding from the arresting officers.[237] The defendant was then handcuffed and taken to the police squad car outside the home.[238] Subsequently, one officer went back inside the defendant's house to look for contraband and weapons, which he found.[239] The court decided to apply the first prong of *Gant* to this situation,[240] stating that, since the defendant no longer had access to anything in his home, the subsequent search of the house was not a valid search incident to the defendant's arrest.[241] The court reasoned that *Gant* did not specifically state that it should only apply to vehicular searches, and thus decided to apply it in the non-vehicular context as well.[242] The government then argued, as in *Matthews*, that, if *Gant* is applied, the second prong regarding reasonable belief that the

233. *Id.* (quoting Cooper v. California, 386 U.S. 58, 59 (1967)).

234. People v. Matthews, No. H033568, 2010 WL 468105, at *6 (Cal. Ct. App. Feb. 11, 2010).

235. *Id.*

236. 656 F. Supp. 2d 998 (E.D. Mo. 2009).

237. *Id.* at 1000.

238. *Id.* at 1001.

239. *Id.*

240. *Id.* at 1001-02.

241. *Id.* at 1002.

242. *Id.* at 1001-02.

premises contained evidence of the crime also should be applied.[243] Otherwise, the government argued, *Gant* is being read two different ways and is not being applied consistently.[244] The court disagreed with this argument, and, like the court in *Matthews*, applied the first prong but declined to apply the second prong.[245] The court followed the recommendation of the Magistrate Judge, who stated that the second prong, although applicable in the automobile context, should not be applied in other situations such as this one, due to a heightened expectation of privacy in one's home.[246] Whether one agrees that the first prong of *Gant* should apply to non-vehicular searches, it seems logical to apply the second prong strictly in the automobile context, due to an automobile's inherent mobility and a greater expectation of privacy in a person's home as opposed to a person's automobile.

E. *The Effect of* Gant *on Police Practices*

The rule that was crafted in *Gant* has major implications as to whether evidence obtained will be suppressed or admitted at trial. With respect to automobiles, under the old *Belton* rule, any search of the arrestee's automobile after he or she was arrested was allowed, regardless of whether the arrestee had been secured.[247] After *Gant*, such a search would not be allowed if the arrestee was secured and did not have access to the vehicle, unless the officers had reason to believe the vehicle contained evidence of the offense for which the arrest had been made.[248] The question remains whether this change will have an effect on how police officers act in these situations.

Any time an individual is being arrested, a dangerous situation has been created: the arrestee might try to flee, or might even attempt to harm the arresting officer if the arrestee is in a state of desperation and wants to avoid detention. Placing handcuffs on these individuals and securing them so

243. *Id.*
244. *Id.*
245. *Id.* at 1002-03.
246. *Id.* at 1007.
247. New York v. Belton, 453 U.S. 454, 463 (1981).
248. Arizona v. Gant, 556 U.S. 332, 349-50 (2009).

that they will pose no threat to the arresting officer is important for officer safety. However, after the *Gant* decision, with respect to automobile searches incident to an arrest, officers will be punished for securing these individuals before searching their vehicles incident to their arrest.[249] If they first secure the individual, the subsequent search of the car will be invalidated if the arrestee no longer has "access" to the vehicle.[250] However, if they wait to secure him, and search the vehicle first in an attempt to obtain more evidence, the arrestee is still unsecured and poses a threat to the arresting officers.[251] The actual effect of *Gant* thus appears contradictory. If the officers are more concerned about their safety, they should first secure the individual, which would not allow them to subsequently search the arrestee's vehicle incident to the arrest.[252] However, if the officers want to gather as much evidence as possible, they should wait to secure him and search the vehicle first. Due to this contradiction, officers will have to make spur of the moment decisions about when to secure the arrestee and when to search his or her vehicle incident to arrest.

If *Gant* was to apply to non-vehicular searches, the effect is arguably even more dramatic. For example, if an officer arrests an individual in that individual's bedroom, questions will arise in an officer's mind as to what he can search incident to the arrest. An arrestee could have a weapon hidden in any part of the bedroom, and could attempt to gain access to it at any time. If *Gant* is applied to non-vehicular searches, and the arrestee is secured, the scope of the search will be extremely limited. If *Gant* is not applied to non-vehicular searches, the "immediate

249. *Id*. at 351.

250. *Id.* at 335.

251. *Id*. at 351.

252. Some argue that the effect of *Gant* with respect to vehicular searches is not terribly significant since other exceptions could validate a search of the automobile even after the arrestee has been secured. *See* Katz v. United States, 389 U.S. 347, 357 (1967); Brian S. Batterton, *What Exactly Can We Do In Light of Gant?*, PUBLIC AGENCY TRAINING COUNCIL, http://www.llrmi.com/articles/legal_update/az_v_gant_guidelines.shtml (last visited Oct. 23, 2012); Albert L. Wysocki, *Searches Following Arrest: The Implications of Arizona v. Gant*, 24-7 PRESS RELEASE (June 11, 2009), http://www.24-7pressrelease.com/press-release/searches-following-arrest-the-implications-of-arizona-v-gant-103577.php.

control" test from *Chimel v. California* would govern, and anything in the arrestee's immediate control or lunging distance could be searched, regardless of whether he or she was secured.[253] The Court, in *Chimel*, stated, "[a] gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested."[254] This seems to be the rule regardless of whether the arrestee is handcuffed or secured, since handcuffs are not failsafe and a handcuffed arrestee can still be dangerous.[255] In this non-vehicular context, however, if *Gant* was applied, the search of a nightstand a few feet away from a secured arrestee would not be allowed, since it would not be reasonable to think he could gain access to the nightstand.[256] The importance of whether *Gant* applies to non-vehicular searches is therefore apparent, as the effect would be to greatly limit searches incident to an arrest and place officers in a quandary about what can be searched and what cannot be searched.[257] This is quite contrary to the bright-line rule of *Chimel* that existed before the *Gant* decision.[258] Officers should not have to analyze these difficult questions during these dangerous situations, but rather should have clear rules to follow. The bright-line rule of *Chimel* therefore would be more appropriate with regard to non-vehicular searches.

IV. Conclusion

The seminal case of *Arizona v. Gant* has completely revamped the rules applicable to searches incident to arrests in the automobile context, and has created more fact sensitive issues than existed before under the law set forth in *New York v. Belton*.[259] Thus, when important issues as to the validity of

253. 395 U.S. 752, 763 (1969).

254. *Id.*

255. United States v. Shakir, 616 F.3d 315, 320-21 (3d Cir. 2010) (citing United States v. Sanders, 994 F.2d 200, 209 (5th Cir. 1993)).

256. Arizona v. Gant 556 U.S. 332, 351 (2009).

257. *Id.*

258. 395 U.S. 752, 768 (1969).

259. *Gant*, 556 U.S. at 351; New York v. Belton, 453 U.S. 454, 462-63 (1981).

searches hinge on variable factual issues, uncertainty is the result, especially for law enforcement as to what exactly the rules are. In addition, since *Gant* involved an automobile search, uncertainty has also arisen as to its application to searches incident to arrests which do not involve automobiles. Lower courts, including two circuit courts, have come to different conclusions as to *Gant's* applicability for non-vehicular searches incident to arrests.[260] It remains to be seen if the circuits will ultimately resolve this disparate treatment of the *Gant* ruling, or whether the Supreme Court will settle this issue at some future point in time.

260. United States v. Perdoma, 621 F.3d 745 (8th Cir. 2010); United States v. Shakir, 616 F.3d 315 (3d Cir. 2010); *see supra* Part III.