

**STRANGER THAN DICTUM: WHY ARIZONA V. GANT COMPELS THE
CONCLUSION THAT SUSPICIONLESS *BUIE* SEARCHES INCIDENT TO
LAWFUL ARRESTS ARE UNCONSTITUTIONAL**

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I. INTRODUCTION

The opinion of the Court insists, however, that its major premise—that an arrest creates a right to search the place of arrest—finds support in decisions beginning with *Weeks v. United States*. These decisions do not justify today’s decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally

elevated to a decision.¹

Justice Frankfurter delivered this passage in his dissenting opinion in *United States v. Rabinowitz*, the Supreme Court's 1950 opinion that set the high water mark for the search incident to a lawful arrest.² Nineteen years later, in *Chimel v. California*, the Court explicitly repudiated *Rabinowitz* and held that the proper scope of a search incident to a lawful arrest is merely "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."³ Following *Chimel*'s contraction, however, the Court issued a few opinions of expansion.⁴

In *New York v. Belton*, a majority of the Court created what was subsequently maligned as the *Belton* fiction: "that articles inside . . . the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m],''" meaning that officers lawfully arresting the occupant of a vehicle can automatically search the vehicle's passenger compartment.⁵ It was Justice Brennan's reading of the majority opinion in his dissent, however, that subsequently "predominated."⁶ According to Justice Brennan, while the majority found that a single arresting officer properly searched accessible portions of the passenger compartment of a vehicle while four arrestees were unsecured, "the result would presumably would have be the same even if [the officer] had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car."⁷ In *Thornton v. United States*, the Court did not curtail this predominating reading and instead piled fiction upon (*Belton*) fiction, finding that *Belton* authorizes

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¹United States v. Rabinowitz, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting) (citation omitted).

²See *infra* notes 95–105 and accompanying text.

³395 U.S. 752, 760, 763 (1969).

⁴See generally *Thornton v. United States*, 541 U.S. 615 (2004); *Maryland v. Buie*, 494 U.S. 325 (1990); *Belton v. New York*, 453 U.S. 454 (1981).

⁵*Belton*, 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763).

⁶*Arizona v. Gant*, 129 S. Ct. 1710, 1718 (2009).

⁷*Belton*, 453 U.S. at 467–68 (Brennan, J., dissenting).

searches of passenger compartments of vehicles incident to the lawful arrests of even their recent occupants.⁸

In its 2009 opinion in *Arizona v. Gant*, the Court finally dismantled the *Belton* fiction, concluding that *Chimel* “continues to define the boundaries of the [search incident to a lawful arrest] exception” and that *Chimel* only authorizes the search of the passenger compartment of a vehicle “when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”⁹ The effect of this opinion on *Belton* and *Thornton* was clear: *Gant* explicitly overruled the predominating reading of *Belton* and rebuked *Thornton* as an application of *Chimel*.¹⁰ There was, however, a third post-*Chimel* Supreme Court opinion that also expanded the scope of searches incident to lawful arrests.¹¹ Defendants and appellants should be able to raise *Arizona v. Gant* to invalidate an important part of that opinion as well.¹²

In *Maryland v. Buie*, the Court held that as an incident to a lawful (home) arrest, officers can “as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”¹³ This holding was actually dictum, with the controlling portion of the Court’s opinion being that reasonable suspicion is required for protective sweeps beyond these spaces, such as the search conducted in *Buie*.¹⁴ Notwithstanding this fact, however, courts unequivocally have treated *Buie*’s dictum as gospel and universally found that it authorizes suspicionless searches of sufficiently large spaces not only in arrest rooms, but also in rooms immediately abutting arrest rooms and connected to arrest rooms by hallways.¹⁵ This Article argues that defendants and appellants should be able to raise both the *Arizona v. Gant* opinion and the reasoning within it to argue that the reaffirmation of *Chimel* and the destruction of the *Belton* fiction together invalidate the type of search authorized in *Buie*’s dictum. It also argues that, even without *Gant*, courts should have realized and should now conclude that they have grossly misconstrued the scope of

⁸See *Thornton*, 541 U.S. at 622.

⁹*Gant*, 129 S. Ct. at 1716, 1719.

¹⁰*Id.* at 1719.

¹¹See generally *Maryland v. Buie*, 494 U.S. 325 (1990).

¹²See *infra* Part IV.

¹³*Buie*, 494 U.S. at 334.

¹⁴*Id.*

¹⁵See *infra* Part III.

suspicionless *Buie* searches.

Section II tracks the ebbs and flows in the Supreme Court's treatment of the search incident to a lawful arrest, from its creation in *dictum* in *Weeks v. United States* to the Court's most recent explanation of the exception in *Gant*. Section III sets forth precedent establishing the unduly broad construction which courts have given to suspicionless *Buie* searches. Finally, Section IV argues that, before *Gant*, courts had stretched the scope of suspicionless *Buie* searches beyond the breaking point, and, after *Gant*, courts should find that such searches are unconstitutional.

II. THE CREATION AND DEVELOPMENT OF THE SEARCH INCIDENT TO A LAWFUL ARREST

A. Weeks, Carroll, and the Creation of the Search Incident to a Lawful Arrest Exception in *Dicta*

It is well established that warrantless searches are “*per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.”¹⁶ The Supreme Court’s 1914 opinion in *Weeks v. United States* is best known for birthing the main remedy for such unreasonable searches: the exclusionary rule.¹⁷ Before christening this rule, however, the Court had to find that the search before it did not fall under a specifically established exception, and *Weeks* is actually a literal case of the exception proving the rule.¹⁸ Before *Weeks*, the Supreme Court never mentioned the search incident to a lawful arrest as an exception to the search warrant requirement,¹⁹ but Justice Day’s opinion articulated such an exception solely to prove that the exception did not apply and that the exclusionary rule did.²⁰ According to Justice Day, the exclusionary rule applied because the subject search did not involve the right, “always

¹⁶ *Katz v. United States*, 389 U.S. 347, 357 (1967).

¹⁷ See 232 U.S. 383, 398 (1914) (holding that the use of illegally seized letters at trial was “prejudicial error”).

¹⁸ See Posting of Eugene Volokh to The Volokh Conspiracy, <http://www.volokh.com/posts/1241808692.shtml> (May 8, 2009, 14:51 EST) (noting that the phrase “the exception proves the rule” means “seeing the exception, and recognizing that it is an exception, confirms for us that there is a rule”).

¹⁹ See *Chimel v. California*, 395 U.S. 752, 755 (1969) (stating “[a]pproval of a warrantless search incident to a lawful arrest seems first to have been articulated by the Court in 1914 in *dictum* in *Weeks v. United States . . .*”).

²⁰ See *Weeks*, 232 U.S. at 392.

recognized under English and American law, to search the person of the accused when legally arrested, to discover and seize the fruits or evidences of crimes.”²¹

The Court’s next reference to the search incident to a lawful arrest also came in dictum in another opinion better known for something else.²² In its Prohibition-era opinion in *Carroll v. United States*, the Court addressed the constitutionality of a warrantless search of an Oldsmobile Roadster by federal prohibition agents which uncovered bonded whiskey and gin and which preceded the agents’ arrest of the car’s occupants.²³ The occupants claimed that the search was unconstitutional as it only could have been justified as an incident, and not as an antecedent, to a lawful arrest.²⁴ In his 1925 opinion, Chief Justice Taft agreed that the search could not be justified under the search incident to a lawful arrest exception laid out in *Weeks*, but in doing so, he expanded the proper scope of such a (still hypothetical) search beyond the person of the arrestee to objects within his control.²⁵ According to his opinion, “[w]hen a man is legally arrested for an offense, whatever is found upon his person or in his control which it is unlawful for him to have and which may be used to prove the offense may be seized and held as evidence in the prosecution.”²⁶ But while the occupants won the battle, they lost the war. Chief Justice Taft found that the agents had probable cause to believe that the Roadster contained intoxicating spirituous liquor and concluded that an exception to the search warrant requirement exists when an official has “reasonable cause . . . that the contents of [an] automobile offend against the law” (i.e., the automobile exception).²⁷

B. Agnello, Marron, and the Early, Uncertain Scope of Searches Incident to Lawful Arrests

Later that same year, the Court had its first opportunity to apply the search incident to a lawful arrest exception in a controlling portion of its

²¹ *Id.*

²² *Carroll v. United States*, 267 U.S. 132, 155 (1925).

²³ *Id.* at 134, 136 (referring to the syllabus).

²⁴ *Id.* at 158.

²⁵ See *id.*

²⁶ *Id.* (citing *Weeks*, 232 U.S. at 392).

²⁷ *Id.* at 158–59, 160.

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opinion.²⁸ In *Agnello v. United States*, agents were looking through the windows of Stephen Alba's house when they saw Frank Agnello apparently selling packages containing cocaine to an undercover agent.²⁹ Then, without a warrant, they rushed in and arrested Alba, Agnello, and two other men allegedly involved in a conspiracy to sell cocaine.³⁰ The agents seized packages from the table where the sale took place and seized from Alba the money the undercover agent had given him.³¹ Subsequently, some of the agents and a city policeman proceeded to Agnello's house and uncovered a can containing cocaine in his bedroom.³²

In upholding the searches at Alba's house but invalidating the search of Agnello's house, the Court again modified the proper scope of searches incident to lawful arrests.³³ Justice Butler's opinion articulated the scope of the search:

The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed, as well as weapons and other things to effect an escape from custody is not to be doubted.³⁴

Therefore, as an incident to a lawful arrest, arresting officers could now search not only for the "fruits or evidences of crimes," but also for weapons or other instrumentalities that the arrestee could use to escape from custody.³⁵

However, where those officers could search was less clear. While *Carroll* authorized a search of the arrestee and objects within his control,³⁶ *Agnello* approved a search of "the place where the arrest [wa]s made."³⁷ Was Justice Butler merely restating the proper scope of a valid search

²⁸ *Agnello v. United States*, 269 U.S. 20, 28 (1925).

²⁹ *Id.* at 28–29.

³⁰ *Id.* at 29.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 30.

³⁴ *Id.*

³⁵ *Id.*

³⁶ See *Carroll v. United States*, 267 U.S. 132, 158 (1924).

³⁷ *Agnello*, 269 U.S. at 30.

incident to a lawful arrest, or was he saying that officers arresting a suspect in the kitchen of his house could search the entire kitchen, or, indeed, the entire house?³⁸ The Court did not have to answer these questions because the packages on the table and the money seized from Alba were both clearly within the arrestees' control and part of the place where the arrest was made, and the can at Agnello's house was neither.³⁹

The Court's opinion two years later in *Marron v. United States*, also written by Justice Butler, was no more edifying on this issue.⁴⁰ Like *Carroll*, *Marron* was a Prohibition-era case, and a Prohibition agent properly procured a warrant authorizing a search for "intoxicating liquors and articles for their manufacture" at a saloon.⁴¹ Upon executing the warrant, agents discovered patrons being furnished intoxicating liquors and placed the bartender, Birdsall, under arrest.⁴² Subsequently, the agents combed the area next to the saloon's cash register and found a number of bills.⁴³ They also searched a closet in the saloon and seized not only large quantities of liquor, but also, *inter alia*, "a ledger showing inventories of liquors, receipts, [and] expenses, including gifts to police officers . . .".⁴⁴ The owner of the saloon thereafter moved for the return of the bills and the ledger, contending that their seizure was not authorized by the warrant.⁴⁵

The Supreme Court agreed that that the seizure of the bills and the ledger was not authorized under the warrant but found that they were properly searched and seized as an incident to a lawful arrest.⁴⁶ According to Justice Butler, the agents properly arrested Birdsall and "had a right without a warrant contemporaneously to search the place in order to find and seize the things used to carry on the criminal enterprise."⁴⁷ A few sentences later in the opinion, Butler, speaking with regard to the ledger,

³⁸ See James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1422 n.24 (2007) (noting that "[t]he Court did not specifically state how broadly 'the place where the arrest is made' should be interpreted").

³⁹ See *Agnello*, 269 U.S. at 28, 29.

⁴⁰ See generally 275 U.S. 192 (1927).

⁴¹ *Id.* at 193.

⁴² *Id.* at 194.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.* at 198–99.

⁴⁷ *Id.*

found that “while it was not on Birdsall’s person at the time of his arrest, it was in his immediate possession and control,” seemingly implying that *Agnello* did not widen the scope of a search incident to a lawful arrest.⁴⁸ In the very next sentence, however, Butler noted that “[t]he authority of officers to search and seize the things by which the nuisance was being maintained extended to all parts of the premises used for the unlawful purpose,” intimating that the search could have extended beyond the area of an arrestee’s literal possession and control.⁴⁹

C. Go-Bart, Lefkowitz, and the Narrow Construction of the Proper Scope of Searches Incident to Lawful Arrests

Just six years later, in *Go-Bart Importing Co. v. United States*, Justice Butler opted for the more restrictive reading of *Marron*.⁵⁰ *Go-Bart* was yet another Prohibition-era case, with prohibition agents executing an arrest warrant against defendants whom they believed were using a company to commit a nuisance against the United States by possessing, transporting, selling, and soliciting and receiving orders for intoxicating liquor in violation of the National Prohibition Act.⁵¹ Upon executing the arrest warrant at the defendants’ office, the agents arrested Phillip Gowen and William Bartles, neither of whom were committing illegal acts at the time of arrest.⁵² Despite not having a search warrant for the premises, the agents falsely informed the arrestees that they had such a warrant, searched the men, and recovered papers from both.⁵³ By threat of force, the agents also compelled Gowen to open a desk and safe, from which they recovered, *inter alia*, other papers, account books, and cancelled checks.⁵⁴

Gowen and Bartles subsequently moved for the suppression of the items seized after their arrests, and the prosecution countered that these items were properly searched and seized incident to their lawful arrests.⁵⁵ The Supreme Court unanimously agreed with Gowen and Bartles, concluding that “[p]lainly the case before [it w]as essentially different from *Marron*,”

⁴⁸ *Id.* at 199.

⁴⁹ See *id.*

⁵⁰ 282 U.S. 344, 358 (1931).

⁵¹ *Id.* at 349.

⁵² *Id.* at 349, 357.

⁵³ *Id.* at 349.

⁵⁴ *Id.* at 349–50.

⁵⁵ *Id.* at 350.

distinguishing *Marron* in two narrow respects.⁵⁶ First, whereas the agents arrested Gowen and Bartles while they were not committing illegal acts, the officers in *Marron* arrested “Birdsall who in pursuance of a conspiracy was actually engaged in running a saloon.”⁵⁷ Second, the Court noted that in *Marron*, agents “seized a ledger in a closet . . . and some bills beside the cash register” and concluded that these searches were proper because, unlike in *Go-Bart*, “[t]hese things were visible and accessible and in the offender’s immediate custody. There was no threat of force or general search or rummaging of the place.”⁵⁸

The Court reached a similar conclusion in its final Prohibition-era search incident to a lawful arrest opinion the following year, *United States v. Lefkowitz*, another unanimous opinion written by Justice Butler.⁵⁹ In *Lefkowitz*, a deputy marshal and three other Prohibition agents executed an arrest warrant at a one room apartment based upon probable cause that its occupants were conspiring “to sell, possess, transport, furnish, deliver, and take orders for intoxicating liquor contrary to the National Prohibition Act.”⁶⁰ As in *Go-Bart*, the officials arrested two individuals, neither of whom was committing illegal acts at the time of arrest.⁶¹ Also, as in *Go-Bart*, despite not having a search warrant, the officials proceeded to search the place of arrest, this time recovering items from desks, a towel cabinet, and baskets.⁶²

After the defendants moved to suppress these items, Butler again deemed the searches unconstitutional, drawing the same two distinctions between the case before him and *Marron*.⁶³ Butler again noted that the defendants in the present case were not committing illegal acts at the time of their arrests while *Marron* involved a search conducted after the arrest of “the bartender for crime openly being committed in their presence.”⁶⁴ And he again noted that the ledger and bills seized in *Marron* “being in plain view were picked up by officers as an incident of the arrest.”⁶⁵ Conversely,

⁵⁶ *Id.* at 358.

⁵⁷ *Id.* at 357–58.

⁵⁸ *Id.* at 358.

⁵⁹ See generally 285 U.S. 452 (1932).

⁶⁰ *Id.* at 458.

⁶¹ *Id.* at 462–63.

⁶² *Id.* at 459–60.

⁶³ *Id.* at 465.

⁶⁴ *Id.* at 459–60, 465.

⁶⁵ *Id.*

the items seized by the officials in *Lefkowitz* were not the fruits of a proper search incident to a lawful arrest because they were concealed and only uncovered as part of searches that “were exploratory and general . . .”⁶⁶

D. Post-Prohibition Precedent: The Expansion of the Scope of Searches Incident to Lawful Arrests in Harris and Rabinowitz

This restrictive reading of the proper scope of a valid search incident to a lawful arrest, however, died along with Prohibition. The Supreme Court next addressed the scope of a valid search incident to a lawful arrest in 1947 in *Harris v. United States*, but now with a completely different lineup of Justices.⁶⁷ In *Harris*, officials procured two arrest warrants for George Harris, who allegedly had violated both the Mail Fraud Statute and the National Stolen Property Act.⁶⁸ Five FBI agents then executed those warrants at Harris’ four room apartment and arrested him in the living room while he was not committing any illegal acts.⁶⁹ Then, despite not having a search warrant, the agents conducted a search of the living room and each of the apartment’s other three rooms for approximately five hours.⁷⁰ That search uncovered World War II draft cards, and Harris was eventually charged with “the unlawful possession, concealment and alteration of certain Notice of Classification Cards and Registration Certificates . . .”⁷¹

Harris thereafter moved to suppress the draft cards, but the Supreme Court, in a majority opinion penned by Chief Justice Vinson, found that the agents properly seized them as part of a valid search incident to a lawful arrest.⁷² The Court noted that it was undisputed that a search incident to a lawful arrest can extend to the area under the arrestee’s immediate control and then found no support “for the suggestion that [such a] search could not validly extend beyond the room in which the petitioner was arrested.”⁷³

In distinguishing the Court’s two previous opinions, Chief Justice Vinson concluded that “[t]he searches found to be invalid in the *Go-Bart*

⁶⁶ *Id.* at 464–65.

⁶⁷ See generally 331 U.S. 145 (1947), overruled in part by *Chimel v. California*, 395 U.S. 752 (1969).

⁶⁸ *Id.* at 148.

⁶⁹ See *id.*

⁷⁰ *Id.* at 149.

⁷¹ *Id.* at 146–47, 149.

⁷² *Id.* at 149, 153–54.

⁷³ *Id.* at 151–52.

and *Lefkowitz* cases were so held for reasons other than the areas covered by the searches.”⁷⁴ Instead, the majority construed those cases as ones “in which law enforcement officers ha[d] entered premises ostensibly for the purpose of making an arrest but in reality for the purpose of conducting a general exploratory search for merely evidentiary materials tending to connect the accused with some crime.”⁷⁵ Four dissenting justices disagreed with this characterization of *Go-Bart* and *Lefkowitz*.⁷⁶ Justice Frankfurter concluded that the majority was “throw[ing] to the winds the latest unanimous decisions of this Court on the allowable range of search without warrant incidental to lawful arrest.”⁷⁷ Justice Jackson found that the problem with the majority’s opinion was “that once the search is allowed to go beyond the person arrested and the objects upon him or in his immediate physical control, I see no practical limit short of that set in the opinion of the *Chief Justice*—and that means to me no limit at all.”⁷⁸

According to the majority opinion, however, the Court was not laying down a bright line rule that an arresting officer can always extend his search beyond the room in which a suspect is arrested.⁷⁹ Instead, Chief Justice Vinson claimed that he was upholding the subject search because Harris had control over the entire apartment and the “instrumentalities of the crimes charged in the warrants could easily have been concealed in any of the four rooms of the apartment.”⁸⁰ He cautioned that “[o]ther situations may arise in which the nature and size of the object sought or the lack of effective control over the premises on the part of the persons arrested may require that the searches be less extensive.”⁸¹

A mere year later, however, Chief Justice Vinson found himself on the wrong side of the Court’s next search incident to a lawful arrest opinion, which drastically, yet ultimately briefly, altered its application.⁸² In

⁷⁴ *Id.* at 152 n.16.

⁷⁵ *Id.* at 153.

⁷⁶ *Id.* at 167 (Frankfurter, J., dissenting); *id.* at 188 (Murphy, J., dissenting); *id.* at 197 (Jackson, J., dissenting).

⁷⁷ *Id.* at 167 (Frankfurter, J., dissenting).

⁷⁸ *Id.* at 197 (Jackson, J., dissenting) (emphasis in original).

⁷⁹ *Id.* at 152 (majority opinion) (stating that the courts must look to “the particular circumstances of the particular case”).

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² See generally *Trupiano v. United States*, 334 U.S. 699 (1948), overruled in part by *United States v. Rabinowitz*, 339 U.S. 56 (1950).

Trupiano v. United States, the Alcohol Tax Unit of the Bureau of Internal Revenue learned that the defendants sought to lease part of a farm and build and operate an illegal still on it.⁸³ The Unit continued to monitor the defendants' activities for the next four to five months, with one agent gathering information while working undercover on the farm as a "dumb farm hand."⁸⁴ Upon receiving a dispatch from the undercover agent that the defendants were about to ship alcohol, other agents conducted a warrantless raid of the farm.⁸⁵ After arresting one of the defendants, agents seized cans containing alcohol and distillery equipment such as large mash vats.⁸⁶

The defendants subsequently moved to suppress this evidence, and the Supreme Court, in a majority opinion written by Justice Murphy, agreed, concluding that "there must be something more in the way of necessity than merely a lawful arrest" for officers to be able to conduct a warrantless search.⁸⁷ In other words, according to the Court, "there must be some other factor in the situation that would make it unreasonable or impracticable to require the arresting officer to equip himself with a search warrant."⁸⁸ The problem for the prosecution was that the majority found that in the present case, "no reason whatever ha[d] been shown why the arresting officers could not have armed themselves during all the weeks of their surveillance of the locus with a duly obtained search warrant"⁸⁹ Instead, "[t]he agents of the Alcohol Tax Unit knew every detail of the construction and operation of the illegal distillery long before the raid was made."⁹⁰

Justice Murphy found no need to reconcile his majority opinion with the majority opinion in *Harris* because he saw the case before him as "relat[ing] only to the seizure of contraband the existence and precise nature and location of which the law enforcement officers were aware long before making the lawful arrest."⁹¹ Conversely, he found among other things that this "circumstance was wholly lacking in the *Harris* case, which was concerned with the permissible scope of a general search without a warrant

⁸³ *Id.* at 701.

⁸⁴ See *id.* at 701–02.

⁸⁵ *Id.* at 702–03.

⁸⁶ *Id.*

⁸⁷ *Id.* at 703, 708.

⁸⁸ *Id.* at 708.

⁸⁹ *Id.*

⁹⁰ *Id.* at 706.

⁹¹ *Id.* at 708.

as an incident to a lawful arrest.”⁹²

Chief Justice Vinson filed a dissenting opinion, joined by three other Justices, in which he claimed that the majority opinion was inconsistent with the “long line of decisions in th[e] Court recognizing as consistent with the restrictions of the Fourth Amendment the power of law-enforcement officers to make reasonable searches and seizures as incidents to lawful arrests.”⁹³ While Vinson’s opinion did not take the day, *Trupiano* remained on the books for less than two years, and Vinson’s construction of the search incident to a lawful arrest would thereafter rule the Fourth Amendment roost for almost two decades.⁹⁴

This sea change came in the Court’s 1950 opinion in *United States v. Rabinowitz*.⁹⁵ In *Rabinowitz*, government officers executed an arrest warrant at the office of Albert Rabinowitz, and, over his objection and without a search warrant, “searched the desk, safe, and file cabinets in the office for about an hour and a half.”⁹⁶ The searches uncovered, inter alia, stamps with forged overprints, and Rabinowitz was charged with selling, possessing, and concealing forged and altered obligations of the United States with intent to defraud.⁹⁷ Rabinowitz subsequently moved to suppress the stamps.⁹⁸ While Rabinowitz was convicted by the trial court, the court of appeals reversed, claiming that pursuant to *Trupiano*, the officers had to procure a search warrant before searching for the stamps.⁹⁹

The Supreme Court disagreed on the requirement of a search warrant:

A rule of thumb requiring that a search warrant always be procured whenever practicable may be appealing from the vantage point of easy administration. But we cannot agree that this requirement should be crystallized into a *sine qua non* to the reasonableness of the search.¹⁰⁰

⁹² *Id.* at 708–09.

⁹³ *Id.* at 710, 713–14 (Vinson, C.J., dissenting).

⁹⁴ See generally *United States v. Rabinowitz*, 339 U.S. 56 (1950) (overruling *Trupiano* in part), overruled in part by *Chimel v. California*, 395 U.S. 752 (1969).

⁹⁵ *Id.*

⁹⁶ *Id.* at 58–59.

⁹⁷ *Id.* at 59.

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 65.

Therefore, the Court held that “[t]o the extent that *Trupiano* . . . requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search after a lawful arrest, that case is overruled.”¹⁰¹

This conclusion led the Court to deny Rabinowitz’s motion to suppress because it deemed the searches of the desk, safe, and file cabinets reasonable for the same reasons proffered in *Harris*: it found *Go-Bart* and *Lefkowitz* to be cases “that condemned generally exploratory searches, which cannot be undertaken by officers with or without a warrant.”¹⁰² Thus, even though the stamps were not in plain view, they were reasonably seized because “[i]n the instant case the search was not general or exploratory . . .”¹⁰³

In a dissenting opinion, Justice Frankfurter claimed that the decisions cited as support for the majority’s opinion, starting with *Weeks*, did “not justify today’s decision. They merely prove how a hint becomes a suggestion, is loosely turned into dictum and finally elevated to a decision.”¹⁰⁴ It would be nineteen years before Justice Frankfurter’s opinion and the logic of *Go-Bart* and *Lefkowitz* would command the endorsement of the majority of the Court.¹⁰⁵

E. Return to Restrictive: *Chimel* and the Twin Rationales Test

In the interim, the Court nibbled around the edges of *Rabinowitz* without really taking a substantial bite.¹⁰⁶ Then, by reaching its landmark

¹⁰¹ *Id.* at 66 (citation omitted).

¹⁰² *Id.* at 62–63.

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 75 (Frankfurter, J., dissenting).

¹⁰⁵ See generally *Chimel v. California*, 395 U.S. 752 (1969).

¹⁰⁶ See *Dyke v. Taylor Implement Mfg. Co.*, 391 U.S. 216, 220 (1968) (invalidating the search of a car alleged to be incident to a lawful arrest because it “did not take place until petitioners were in custody inside the courthouse and the car was parked on the street outside”); *James v. Louisiana*, 382 U.S. 36, 36–37 (1965) (relying upon *Stoner* to invalidate the search of an arrestee’s home, which was more than two blocks away from the site of the arrest); *Preston v. United States*, 376 U.S. 364, 368 (1964) (finding that the search of an arrestee’s automobile long after his arrest “was too remote in time or place to have been made as incidental to the arrest”); *Stoner v. California*, 376 U.S. 483, 486, 490 (1964) (finding that the search of an arrestee’s hotel room two days before his arrest was unconstitutional because “a search can be incident to an arrest only if it is substantially contemporaneous with the arrest and is confined to the immediate vicinity of the arrest”); *United States v. Abel*, 362 U.S. 217, 235 (1960) (finding that the several cases on the search incident to a lawful arrest “cannot be satisfactorily reconciled,” but concluding that “[t]his

1968 ruling in *Terry v. Ohio*, the Supreme Court greased the wheels for the removal of *Rabinowitz* and *Harris* from Fourth Amendment doctrine.¹⁰⁷ *Terry* reinforced the principle that “the police must, whenever practicable, obtain advance judicial approval of searches and seizures through the warrant procedure.”¹⁰⁸ Of course, the Court only laid out this principle to establish that “necessarily swift action predicated upon the on-the-spot observations of [police] officer[s] on the beat . . . historically has not been, and as a practical matter could not be, subjected to the warrant procedure.”¹⁰⁹ The Court explained a police officer’s ability to search a person:

[W]here a police officer observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be armed and presently dangerous, where in the course of investigating this behavior he identifies himself as a policeman and makes reasonable inquiries, and where nothing in the initial stages of the encounter serves to dispel his reasonable fear for his own or others’ safety, he is entitled for the protection of himself and others in the area to conduct a carefully limited search of the outer clothing of such persons in an attempt to discover weapons which might be used to assault him.¹¹⁰

Because of the nature and extent of the governmental interests and the intrusion on individual rights in this context, the Court found that such stops and frisks could be justified on something less than probable cause: “specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant the intrusion,” i.e., reasonable suspicion.¹¹¹ *Terry* laid the table for the Court’s opinion the following year in *Chimel v. California*.¹¹²

is not the occasion to attempt to reconcile all the decisions, or to re-examine them”).

¹⁰⁷ See generally 392 U.S. 1 (1968).

¹⁰⁸ *Id.* at 20.

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 30.

¹¹¹ *Id.* at 20–21.

¹¹² See Thomas K. Clancy, *Protective Searches, Pat-Downs, or Frisks?: The Scope of Permissible Intrusion to Ascertain if a Detained Person is Armed*, 82 MARQ. L. REV. 491, 528 (1999) (“In so limiting the scope of a search incident to arrest, the *Chimel* Court explicitly relied

In *Chimel v. California*, three police officers went to Ted Chimel's three bedroom house to execute an arrest warrant for the burglary of a coin shop and arrested him at the entrance to his house.¹¹³ Then, without a search warrant and over Chimel's objection, the officers searched the entire house over the next forty-five minutes to an hour.¹¹⁴ During their search of the master bedroom and a sewing room, the officers directed Chimel's wife to open drawers and “physically move contents of the drawers from side to side so that [they] might view any items that would have come from [the] burglary.”¹¹⁵

Chimel moved to suppress coins that the officers found during their search, but the California state courts denied his motion on the ground that the officers' search of the entire house was a valid search incident to a lawful arrest in compliance with *Rabinowitz*.¹¹⁶ The Supreme Court later granted cert and began by tracing the history of the search incident to a lawful arrest from *Weeks* to *Rabinowitz*.¹¹⁷ In his majority opinion, Justice Stewart characterized *Harris* as throwing “[t]he limiting views expressed in *Go-Bart* and *Lefkowitz* . . . to the winds . . .”¹¹⁸ Moreover, he found that the doctrine of *Rabinowitz*, that arresting officers can search any area within the possession or under the control of the arrestee, “at least in the broad sense in which it was applied by the California courts in this case, can withstand neither historical nor rational analysis.”¹¹⁹ Instead, the Court concluded that *Rabinowitz* was “hardly founded on an unimpeachable line of authority” and endorsed Justice Frankfurter’s dictum dissent,¹²⁰ noting that “the approach taken in cases such as *Go-Bart*, *Lefkowitz*, and *Trupiano* was essentially disregarded by the *Rabinowitz* Court.”¹²¹

The Court then used *Terry* as the guiding light to redraw the lines of searches incident to lawful arrests. Justice Stewart noted that the Court had found in *Terry* that “[t]he scope of [a warrantless] search must be ‘strictly

on *Terry* for the proposition that ‘a search must be ‘strictly tied to and justified by’ the circumstances which rendered its initiation permissible.’”).

¹¹³ 395 U.S. 752, 753–54 (1969).

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 754.

¹¹⁶ *Id.* at 754–55.

¹¹⁷ *Id.* at 755–60.

¹¹⁸ *Id.* at 757–58.

¹¹⁹ *Id.* at 760.

¹²⁰ See *supra* note 104 and accompanying text.

¹²¹ *Chimel*, 395 U.S. at 760.

tied to and justified by' the circumstances which rendered its initiation permissible."¹²² He then analogized *Terry* stops and frisks to the case before him, concluding that "[a] similar analysis underlies the 'search incident to arrest' principle, and marks its proper extent."¹²³ According to the Court, there are twin rationales supporting searches incident to lawful arrests:

When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.¹²⁴

Based upon these twin rationales, the Court also found that "the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by a like rule."¹²⁵ The Court reached this conclusion because "[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."¹²⁶ Therefore, a search incident to a lawful arrest may only include "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."¹²⁷ Conversely, the Court concluded that "[t]here is no comparable justification . . . for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself."¹²⁸ Instead, "[s]uch searches, in the absence of well-recognized exceptions, may be made only under the authority of a search warrant."¹²⁹

Then, rather than distinguishing *Harris* and *Rabinowitz*, as the majority

¹²² *Id.* at 762 (quoting *Terry v. Ohio*, 392 U.S. 1, 19 (1969)).

¹²³ *Id.*

¹²⁴ *Id.* at 762–63.

¹²⁵ *Id.* at 763.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

opinions in those cases had done with *Go-Bart* and *Lefkowitz*, Justice Stewart declared them no longer good law.¹³⁰ Justice Stewart noted that Chimel “correctly point[ed] out that one result of decisions such as *Rabinowitz* and *Harris* is to give law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere.”¹³¹ While not necessarily agreeing with Chimel that the police deliberately arrested him at home so that they could search his house, Justice Stewart concluded that “the fact remain[ed] that had [Chimel] been arrested earlier in the day, at his place of employment rather than at home, no search of his house could have been made without a search warrant.”¹³²

Justice Stewart did acknowledge that it would be possible to distinguish these two cases because “*Rabinowitz* involved a single room, and *Harris* a four-room apartment, while in the case before us an entire house was searched.”¹³³ He found, however, that “such a distinction would be highly artificial,” agreeing with Justice Jackson’s dissenting opinion in *Harris* that “[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items.”¹³⁴ And while the *Harris* majority was not willing to lay down a bright line rule that an arresting officer can always extend his search beyond the room in which a suspect is arrested, the *Chimel* majority was willing to draw such a line in the opposite direction, deeming unconstitutional not only searches incident to lawful arrests that extend beyond the room of arrest but also searches within the arrest room but beyond the reach of the arrestee.¹³⁵ According to the Court, “[t]he only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other.”¹³⁶

¹³⁰ See *id.* at 768 (“It is time . . . to hold that on their own facts, and insofar as the principles they stand for are inconsistent with those that we have endorsed today, [*Harris* and *Rabinowitz*] are no longer to be followed”).

¹³¹ *Id.* at 767.

¹³² *Id.*

¹³³ *Id.* at 766.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

F. Robinson, Belton, and Bright Line Rules

The Supreme Court's next major search incident to a lawful arrest opinion, *United States v. Robinson*, made clear that this bright line rule applied both ways.¹³⁷ According to Justice Rehnquist's majority opinion, while the *Chimel* twin rationales mark the proper scope of a search incident to a lawful arrest, neither of those rationales need be established in any particular case for the search of an arrestee to be deemed constitutional.¹³⁸ In *Robinson*, Officer Richard Jenks arrested Willie Robinson, Jr. for operating a motor vehicle after the revocation of his operator's permit, a crime not especially likely to involve evidentiary items or an armed and dangerous subject (i.e., either of *Chimel*'s rationales).¹³⁹ Nonetheless, Jenks proceeded to search Robinson, uncovering fourteen gelatin capsules containing heroin.¹⁴⁰

The heroin was admitted into evidence, which led to Robinson's conviction in the district court. The United States Court of Appeals for the District of Columbia reversed, "suggesti[ng] that there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest."¹⁴¹ The Supreme Court then reversed the appellate court, rejecting "such a case-by-case adjudication."¹⁴² The Court found such a requirement impractical:

A police officer's determination as to how to and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search.¹⁴³

Thus, the validity of a search incident to a lawful arrest "does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the

¹³⁷ See 414 U.S. 218, 235 (1973).

¹³⁸ *Id.*

¹³⁹ *Id.* at 221, 227.

¹⁴⁰ *Id.* at 223.

¹⁴¹ *Id.* at 235.

¹⁴² *Id.*

¹⁴³ *Id.*

person of the suspect.”¹⁴⁴ Instead, when an arrest is lawful, “a search incident to the arrest requires no additional justification.”¹⁴⁵ This is because “[i]t is the fact of the lawful arrest which establishes the authority to search . . .”¹⁴⁶ This principle continues to guide Supreme Court precedent, with the Supreme Court recently recognizing in its 1998 opinion in *Knowles v. Iowa* that *Robinson* does not authorize searches incident to the lawful issuance of traffic citations,¹⁴⁷ thus “reaffirm[ing] its fealty to the *sine qua non* of arrest as a constitutional precondition to search incident authority.”¹⁴⁸

While *Robinson* established the bright line rule that an officer may always search an arrestee as an incident to his lawful arrest,¹⁴⁹ the Supreme Court’s 1981 opinion in *New York v. Belton* established that an arresting officer may always search the passenger compartment of an arrestee’s automobile for similar reasons.¹⁵⁰ In *Belton*, Trooper Douglas Nicot pulled over a speeding automobile on the New York Thruway, determined that none of the four occupants owned the vehicle or was related to its owner, smelled burned marijuana emanating from the car, and saw on the car’s floor an envelope marked “Supergold” that he associated with marijuana.¹⁵¹ Nicot then arrested the four men, including Roger Belton, split them into four separate areas of the Thruway, picked up the envelope and found that it contained marijuana, and searched the vehicle’s passenger compartment, recovering from the back seat Belton’s black leather jacket, which had cocaine in one of its pockets.¹⁵²

Belton thereafter moved to suppress the cocaine, but the Supreme Court found that the search was constitutional.¹⁵³ In Justice Stewart’s majority opinion, the Court began by citing to a law review article written in response to *Robinson*, which had concluded that “[a] highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ 525 U.S. 113, 117 (1998).

¹⁴⁸ Wayne A. Logan, *An Exception Swallows a Rule: Police Authority to Search Incident to Arrest*, 19 YALE L. & POL’Y REV. 381, 399 (2001).

¹⁴⁹ See *Robinson*, 414 U.S. at 235.

¹⁵⁰ 453 U.S. 454, 460 (1981).

¹⁵¹ *Id.* at 455–56.

¹⁵² *Id.* at 456.

¹⁵³ *Id.* at 456, 462–63.

drawing of subtle nuances and hairline distinctions . . . may be ‘literally impossible of application by the officer in the field.’”¹⁵⁴ According to Justice Stewart, this was why the Court in *Robinson* had “hewed to a straightforward rule, easily applied, and predictably enforced” for the search of an arrestee incident to his lawful arrest.¹⁵⁵ But the Court found that “no straightforward rule had emerged from litigated cases respecting . . . the question of the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants.”¹⁵⁶ In other words, the Court concluded that “courts ha[d] found no workable definition of the ‘area within the immediate control of the arrestee’ when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.”¹⁵⁷

Justice Stewart was, however, able to divine from these lower court opinions “the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are generally, if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’”¹⁵⁸ Therefore, “[i]n order to establish the workable rule this category of cases requires [the Court] read *Chimel*’s definition of the limits of the area that may be searched in light of that generalization.”¹⁵⁹ Justice Stewart thus concluded “that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.”¹⁶⁰

Moreover, Justice Stewart found that it followed “from this conclusion that the police may also examine the contents of any containers found within the passenger compartment, for if the passenger compartment is within the reach of the arrestee, so also will containers in it be within his reach.”¹⁶¹ This distinction allowed the Court to distinguish *Chimel*, which held that after an officer arrests a suspect at home, he may only search “drawers within the arrestee’s reach” and “could not search all the drawers

¹⁵⁴ *Id.* at 458 (quoting Wayne R. LaFave, “Case-By-Case Adjudication” Versus “Standardized Procedures”: The *Robinson* Dilemma, 1974 SUP. CT. REV. 127, 141 (1974)).

¹⁵⁵ *Id.* at 459.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 460.

¹⁵⁸ *Id.* (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

in an arrestee's house.”¹⁶² In other words, according to the Court, the rest of the house, and even much of the room of arrest, is not within the reach of a suspect arrested at home, but the entire passenger compartment of a car is within the reach of an arrested occupant, even if an officer has already removed him from the car.¹⁶³ Stewart claimed that the Court was merely “determin[ing] the meaning of *Chimel*'s principles” and “in no way alter[ing] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”¹⁶⁴

Conversely, according to Justice Brennan's dissenting opinion, the majority was making a mockery of *Chimel*.¹⁶⁵ Justice Brennan began by disparaging the majority's opinion as disregarding the twin *Chimel* rationales and “instead adopt[ing] a fiction—that the interior of a car is *always* within the immediate control of an arrestee who has recently been in the car.”¹⁶⁶ According to Justice Brennan, under the majority opinion, “the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car.”¹⁶⁷ Although Justice Brennan's reading of the majority's opinion was done disparagingly, his reading soon “predominated.”¹⁶⁸ It would be twenty-eight years before the Court finally decided to overrule this so-called *Belton* fiction.¹⁶⁹

G. Michigan v. Long and the Automobile Frisk

While, as noted, *Terry* led the Supreme Court to restrict the proper scope of searches incident to lawful arrests in *Chimel*, *Belton* was instrumental in the Court expanding the scope of a proper *Terry* frisk from the outer clothing of a suspect to the passenger compartment of a car in its 1983 opinion in *Michigan v. Long*.¹⁷⁰ In *Long*, Deputies Howell and Lewis observed a car traveling erratically and at an excessive speed before it

¹⁶² *Id.* at 461.

¹⁶³ *Id.* at 460–61.

¹⁶⁴ *Id.* at 460 n.3.

¹⁶⁵ See *id.* at 464 (Brennan, J., dissenting).

¹⁶⁶ *Id.* at 466 (emphasis in original).

¹⁶⁷ *Id.* at 468.

¹⁶⁸ See *Arizona v. Gant*, 129 S. Ct. 1710, 1718, 1719 (2009).

¹⁶⁹ *Id.*

¹⁷⁰ See generally 463 U.S. 1032 (1983).

swerved off into a shallow ditch.¹⁷¹ The deputies approached the car, and Howell asked its driver, David Long, to produce his driver's license, but Long did not respond until Howell repeated his request.¹⁷² Howell then made two requests for Long's registration, which merely led to Long, whom Howell thought appeared to be under the influence of something, turning from the deputies and walking toward the open door of his car.¹⁷³

The deputies followed Long and observed a large hunting knife on the floorboard of the driver's side of the car.¹⁷⁴ They then proceeded to conduct a fruitless *Terry* frisk of Long, followed by a search of the passenger compartment of the car, which uncovered marijuana.¹⁷⁵ Long moved to suppress the marijuana, with the Supreme Court of Michigan ultimately agreeing with him because “*Terry* authorized only a limited pat-down search of a *person* suspected of criminal activity” rather than a search of an area.”¹⁷⁶

The Supreme Court disagreed, noting that “[i]n two cases in which we applied *Terry* to specific factual situations, we recognized that investigative detentions involving suspects in vehicles are especially fraught with danger to police officers.”¹⁷⁷ One of those cases was *Pennsylvania v. Mimms*, where the Court adopted a bright line rule based on concerns about officer safety: “once a motor vehicle has been lawfully detained for a traffic violation, the police officers may order the driver to get out of the vehicle without violating the Fourth Amendment’s proscription of unreasonable searches and seizures.”¹⁷⁸ The other was *Adams v. Williams*, in which the Court cited to a study indicating that “approximately 30% of police shootings occurred when a police officer approached a suspect seated in an automobile.”¹⁷⁹

The Court then read *Mimms*, *Williams*, *Belton*, and *Terry* as indicating “that protection of police and others can justify protective searches when

¹⁷¹ *Id.* at 1035.

¹⁷² *Id.* at 1035–36.

¹⁷³ *Id.* at 1035.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

¹⁷⁶ *Id.* at 1036, 1045 (quoting *People v. Long*, 320 N.W.2d 866, 869 (Mich. 1982) (emphasis in original)).

¹⁷⁷ *Id.* at 1047.

¹⁷⁸ 434 U.S. 106, 111 & n.6 (1977).

¹⁷⁹ 407 U.S. 143, 148 n.3 (1972) (citing Allen P. Bristow, *Police Officer Shootings—A Tactical Evaluation*, 54 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 1, 93–94 (1963)).

police have a reasonable belief that the suspect poses a danger, that roadside encounters between police and suspects are especially hazardous, and that danger may arise from the possible presence of weapons in the area surrounding a suspect.”¹⁸⁰ The Court extended the holdings of these opinions to the case before it:

[T]he search of the passenger compartment of an automobile, limited to those areas in which a weapon may be placed or hidden, is permissible 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.¹⁸¹

H. Buie, Protective Sweeps, and Suspicionless Searches

Just as *Belton* begat the Court’s extension of the scope of protective searches from a suspect’s outer clothing to the passenger compartment of an automobile in *Michigan v. Long*, *Long* led to the Court expanding its scope still further and, in dictum, broadening the scope of searches incident to lawful arrests. In *Maryland v. Buie*, a man wearing a red running suit and another man robbed a Godfather’s Pizza restaurant.¹⁸² Police believed that the men were Jerome Buie and Lloyd Allen, and they obtained warrants for their arrests, which six or seven officers executed at Buie’s house.¹⁸³ Once inside Buie’s house, the officers fanned throughout it, with Corporal James Rozar shouting into the basement, ordering anyone in it to come out.¹⁸⁴ Buie responded to Rozar and eventually emerged from the basement, with Rozar arresting him at the top of the staircase to the basement.¹⁸⁵ Detective Joseph Frolich then “entered the basement ‘in case there was someone else’ down there” and “noticed a red running suit lying in plain view on a stack of clothing and seized it.”¹⁸⁶ Buie subsequently moved to suppress the red

¹⁸⁰ *Long*, 463 U.S. at 1049.

¹⁸¹ *Id.* (quoting *Terry v. Ohio*, 392 U.S. 1, 21 (1968)).

¹⁸² 494 U.S. 325, 328 (1990).

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*; see also *Buie v. State*, 580 A.2d 167, 171 (Md. 1990) (“Buie ascended the stairs at gunpoint and was immediately arrested.”), *rev’d*, 494 U.S. 325 (1990).

¹⁸⁶ *Buie*, 494 U.S. at 328.

running suit, and while the lower Maryland courts denied his motion, the Court of Appeals of Maryland reversed, finding that to justify a protective sweep of a home after an arrest, such as the one that Frolich conducted in the basement, arresting officers must have, and Detective Frolich did not have, probable cause to believe that a serious and demonstrable potentiality for danger exists.¹⁸⁷

The Supreme Court, however, reversed the Court of Appeals of Maryland by drawing a parallel between *Terry*, *Long*, and *Buie*. In the introduction to its opinion, the Court began by defining a “protective sweep” as “a quick and limited search of premises, incident to an arrest and conducted to protect the safety of police officers or others” that is “narrowly confined to a cursory visual inspection of those places in which a person might be hiding.”¹⁸⁸ Thereafter, the Court framed the issue before it as “what level of justification is required . . . before police officers . . . may conduct a warrantless protective sweep of all or part of the premises.”¹⁸⁹ Then, before the Court got into the body of its opinion, it previewed its decision:

We conclude that the Fourth Amendment would permit the protective sweep undertaken here if the searching officer “possesse[d] a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant[ed]’ the officers in believing,” that the area swept harbored an individual posing a danger to the officer or others.¹⁹⁰

Thereafter, in the body of its opinion, the Court explained why it could and had to rely on *Terry* and *Long* to reach its conclusion. It noted that because the arresting officers had “an arrest warrant and probable cause to believe that Buie was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might be found.”¹⁹¹ The problem for the arresting officers, however, was that once they found Buie, “there was no longer that particular justification for entering any rooms that had not yet been searched.”¹⁹² This is where *Terry* and *Long* came into

¹⁸⁷ *Id.* at 328–29.

¹⁸⁸ *Id.* at 327.

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* (quoting *Michigan v. Long*, 463 U.S. 1032, 1049–50 (1983)).

¹⁹¹ *Id.* at 332–33.

¹⁹² *Id.* at 333.

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According to the Court, the fact “[t]hat Buie had an expectation of privacy in those remaining areas of his house . . . d[id] not mean such rooms were immune from entry.”¹⁹³ The Court articulated the underlying rationale:

In *Terry* and *Long* we were concerned with the immediate interest of the police officers in taking steps to assure themselves that the persons with whom they were dealing were not armed with, or able to gain immediate control of, a weapon that could unexpectedly and fatally be used against them.¹⁹⁴

It then found that “[i]n the instant case, there is an analogous interest of the officers in taking steps to assure themselves that the house in which a suspect is being, or has just been, arrested is not harboring other persons who are dangerous and who could unexpectedly launch an attack.”¹⁹⁵

The Court’s parallel then extended to the risks faced by officers as it concluded that “[t]he risk of danger in the context of an arrest in the home is as great as, if not greater than, it is in an on-the-street or roadside investigatory encounter.”¹⁹⁶ This is because, “unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary’s turf,” with “[a]n ambush in a confined setting of unknown configuration . . . more to be feared than it is in open, more familiar settings.”¹⁹⁷

In reaching this conclusion, the Court likely relied upon similar arguments in the government’s brief and two amicus curiae briefs. In its brief, the government argued that protective sweeps are justified in part because “[a]n accomplice, lurking in another room, might take someone hostage or attack the officers or the arrestee as they are leaving the premises.”¹⁹⁸ Meanwhile, both amicus briefs cited Wayne LaFave’s treatise on Search and Seizure regarding the risk of unknown dangers:

It would make little sense to say that police may take

¹⁹³ *Id.*

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ Brief for Petitioner at 15, *Buie*, 494 U.S. 325 (No. 88-1369), 1989 WL 1127006.

protective measures against those known to be present, but that they may never stray beyond the room of the arrest to see if there are others present who, by virtue of their location, may be in an even more advantageous position to offer forcible resistance on behalf of the arrestee.¹⁹⁹

The Court did acknowledge “that entering rooms not examined prior to the arrest is [not] a *de minimis* intrusion that may be disregarded,” but it found that “arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, the arrest.”²⁰⁰ These conclusions prompted the Court to issue a two-part holding:

[A]s an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched. Beyond that, however, we hold that there must be articulable facts which, taken together with rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene.²⁰¹

Immediately after this two-part holding, the Court added that “[t]his is no more and no less than was required in *Terry* and *Long*, and as in those cases, we think this balance is the proper one.”²⁰² In the footnote accompanying this statement, the Court found that “[t]he State’s argument that no level of objective justification should be required because of ‘the danger that inheres in the in-home arrest for a violent crime . . .’ [wa]s rebutted by *Terry* . . . itself.”²⁰³ The State’s *Belton*-esque argument was that “[o]fficers facing the life threatening situation of arresting a violent criminal in the home should not be forced to pause and ponder the legal

¹⁹⁹ Motion for Leave to File Amicus Curiae Brief in Support of the State of Maryland, and Amicus Curiae in Support of the State of Maryland at 8, *Buie*, 494 U.S. 325 (No. 88-1369), 1989 WL 1127010; Brief Amici Curiae of Americans for Effective Law Enforcement, Inc. et al. in Support of Petitioner at 8, *Buie*, 494 U.S. 325 (No. 88-1369), 1989 WL 1127003.

²⁰⁰ *Buie*, 494 U.S. at 333–34.

²⁰¹ *Id.* at 334.

²⁰² *Id.*

²⁰³ *Id.* at 334 n.2. (citations omitted).

subtleties associated with a quantum of proof analysis.”²⁰⁴ The Court turned this argument aside, finding that “despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters.”²⁰⁵ Instead, “[e]ven in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires reasonable, individualized suspicion before a frisk for weapons can be conducted.”²⁰⁶ The Court then pronounced that it was applying this same, reasonable suspicion approach to the protective sweep of a house.²⁰⁷ According to the Court, the problem with requiring anything less is that, *inter alia*, “the existence of the arrest warrant implies nothing about whether dangerous third parties will be found in the arrestee’s house.”²⁰⁸

Thus, while the Court in *Buie* seemingly authorized two distinct types of post-arrest searches, it is clear that the Court’s recognition of the second type of search—the “protective sweep”—was its holding while its comments regarding the first type of search were merely dictum.²⁰⁹ What courts have since referred to as the first type of *Buie* search is the search of “closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”²¹⁰ As the Court indicated, this type of search is “incident to the arrest” and thus a search incident to a lawful arrest.²¹¹ And, as such, as the Court found with regard to the searches of arrestees in *Robinson*, such searches are automatically authorized by the arrest itself; the arresting officers need not have probable cause or even reasonable suspicion that an attack might be launched from the space to be searched.²¹²

²⁰⁴ *Id.* (quoting Brief for Petitioner at 23, *Buie*, 494 U.S. 325 (No. 88-1369)).

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ *Id.*

²⁰⁹ See, e.g., United States v. McQuagge, 787 F. Supp. 637, 655 (E.D. Tex. 1991) (“In *Buie*, the court noted, in *dicta*, that as an incident to an arrest, officers can ‘as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces from which an attack could be immediately launched.’” (quoting *Buie*, 494 U.S. at 334)).

²¹⁰ See, e.g., State v. Roberts, 957 S.W.2d 449, 454 (Mo. Ct. App. 1997) (noting that the first type of *Buie* search does not require reasonable suspicion).

²¹¹ *Buie*, 494 U.S. at 334.

²¹² *Id.*

What courts have since referred to as the second type of *Buie* search is a “protective sweep” of areas beyond the spaces covered by the first type of *Buie* search which might “harbor[] an individual posing a danger to those on the arrest scene.”²¹³ And, as the Court made clear, this protective sweep is not an automatic search incident to a lawful arrest but instead similar to *Terry* frisks. The Court was quick to point out that a protective sweep is “not a full search of the premises, but may extend only to a cursory inspection of those spaces where a person may be found.”²¹⁴ As such, the sweep must last “no longer than is necessary to dispel the reasonable suspicion of danger and in any event no longer than it takes to complete the arrest and depart the premises.”²¹⁵ By limiting the protective sweep in these regards, the Court was able to compare it to a *Terry* frisk and find that both “are permissible on less than probable cause only because they are limited to that which is necessary to protect the safety of officers and others.”²¹⁶

As noted, it is clear that the Court’s recognition of this second type of search—the “protective sweep”—was its holding. In the introduction to its opinion, the Court indicated that the question before it was what level of justification is required before arresting officers conduct “the protective sweep undertaken here,” and the answer was reasonable suspicion.²¹⁷ In the body of its opinion leading up to its two-part holding, the Court analogized the reasonable suspicion searches in *Terry* and *Long* to the case before it, and immediately after this holding, it noted that it was applying their logic, requiring “reasonable, individualized suspicion,” and rejecting the State’s argument that Detective Frolich needed “no level of objective justification” before searching the basement.²¹⁸ Later, the Court held that the type of search which it was authorizing was “decidedly not ‘automati[c],’ but may be conducted only when justified by a reasonable, articulable suspicion that the house is harboring a person posing a danger to those on the arrest scene.”²¹⁹ Finally, in its conclusion, the Court indicated that it was remanding to the Court of Appeals of Maryland so that it could determine whether Detective Frolich had the reasonable suspicion necessary to

²¹³ *Id.* at 335.

²¹⁴ *Id.*

²¹⁵ *Id.* at 335–36.

²¹⁶ *Id.* at 336 n.3.

²¹⁷ *Id.* at 327.

²¹⁸ See *id.* at 331–34, 334 n.2.

²¹⁹ *Id.* at 336.

conduct the subject search.²²⁰ Thus, there can be no doubt that the Court viewed Frolich's search as a protective sweep, the second type of *Buie* search, and not the first type of *Buie* search, a fact confirmed by the Court of Appeals of Maryland subsequent opinion on remand.²²¹

Indeed, the only reference that the Court made to the first type of *Buie* search was the first sentence in its two-part holding. The Court never explained why it was creating the first type of *Buie* search nor provided any grounds for its creation. Indeed, the brevity of the majority's conclusory assertion of the existence of this first type of *Buie* search made the several sentences Justice Brennan's dissenting opinion devoted to it comprehensive by comparison. After Brennan attacked the second type of *Buie* search, he found the majority's decision to "allow[] police officers without *any* requisite level of suspicion to look into 'closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched' . . . equally disquieting."²²² Brennan noted the plausibility of *Chimel*'s twin rationales but found them inapplicable in the present situation:

I find much less plausible the Court's implicit assumption today that arrestees are likely to sprinkle hidden allies throughout the rooms in which they might be arrested. Hence there is no comparable justification for permitting arresting officers to presume as a matter of law that they are threatened by ambush from "immediately adjoining" spaces.²²³

I. Thornton and Automobile Searches Incident to Lawful Arrests of Recent Occupants

While *Buie* thus expanded the scope of home searches conducted in connection with arrests, the Court's 2004 opinion in *Thornton v. United States* further expanded upon the scope of automobile searches incident to lawful arrests that went even beyond *Belton*. In *Thornton*, Officer Deion

²²⁰ *Id.* at 337.

²²¹ See 580 A.2d 167, 168 (Md. 1990). On remand, the Court of Appeals of Maryland did not make any reference to the first type of *Buie* search. *Id.* It addressed the subject search as the second type of *Buie* search and found that there was reasonable suspicion to conduct the protective sweep of the basement. *See id.* at 170.

²²² *Buie*, 494 U.S. at 342 n.6 (Brennan, J., dissenting) (citation omitted).

²²³ *Id.*

Nichols observed Marcus Thornton driving a Lincoln Town Car in a suspicious manner and ran a check on the car's license tags, which revealed that they were issued to a Chevy two-door.²²⁴ Before Nichols could pull Thornton over, however, Thornton pulled into a parking lot and exited his car.²²⁵ Nichols thus approached Thornton in the parking lot and eventually lawfully recovered drugs from Thornton, placed him under arrest, handcuffed him, and secured him in the back seat of his patrol car.²²⁶ Thereafter, Nichols searched the Lincoln Town Car and uncovered a BryCo 9-millimeter handgun from under the driver's seat.²²⁷

Thornton subsequently moved to suppress the handgun, claiming that *Belton* only applies "to situations where the officer initiated contact with an arrestee while he was still an occupant of the car."²²⁸ The Supreme Court, in an opinion by Chief Justice Rehnquist, disagreed, holding that "[i]n all relevant aspects, the arrest of a suspect who is next to a vehicle presents identical concerns regarding officer safety and the destruction of evidence as the arrest of one who is inside the vehicle."²²⁹ According to Rehnquist, the stress faced by an arresting officer "is no less merely because the arrestee exited his car before the officer initiated contact, nor is an arrestee less likely to attempt to lunge for a weapon or to destroy evidence if he is outside of, but still in control of, the vehicle."²³⁰

In finding that *Belton* applies to automobile searches incident to lawful arrests of even recent occupants, the majority both acknowledged and embraced *Belton*'s fiction:

To be sure, not all contraband in the passenger compartment is likely to be readily accessible to a "recent occupant." It is unlikely in this case that petitioner could have reached under the driver's seat for his gun once he was outside of his automobile. But the firearm and the passenger compartment in general were no more inaccessible than were the contraband and the passenger compartment in *Belton*. The need for a clear rule, readily

²²⁴ 541 U.S. 615, 617–18 (2004).

²²⁵ *Id.* at 618.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.* at 618, 619.

²²⁹ *Id.* at 621.

²³⁰ *Id.*

understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.²³¹

Meanwhile, Justice Scalia, along with Justice Ginsburg, concurred in the judgment.²³² Justice Scalia noted that in *Chimel*, the Court had set forth the twin rationales of searches incident to lawful arrests: protecting officer safety and preventing the concealment or destruction of evidence.²³³ According to Scalia, the majority stretched the scope of the search incident to a lawful arrest beyond its breaking point because the risk that Thornton, who was already handcuffed and in the patrol car, “would nevertheless ‘grab a weapon or evidentiary item’ from his car was remote in the extreme.”²³⁴

Scalia reached this conclusion by raising and rejecting “three reasons why the search in this case might have been justified to protect officer safety or prevent concealment or destruction of evidence.”²³⁵ The first defense of the search was that, “despite being handcuffed and secured in the back of a squad car, petitioner might have escaped and retrieved a weapon or evidence from his vehicle.”²³⁶ Scalia disparaged this reason, claiming that it called to mind the “mythical arrestee ‘possessed of the skill of Houdini and the strength of Hercules’” because the government could cite no examples of such a feat.²³⁷ The government did point to seven instances of handcuffed or formerly handcuffed arrestees attacking officers with weapons, but none of these instances involved an arrestee retrieving anything from his vehicle.²³⁸ According to Scalia, the elusive risk did not justify the search:

[T]he Government need not document specific instances in order to justify measures that avoid obvious risks. But the risk here is far from obvious, and in a context as frequently recurring as roadside arrests, the Government’s

²³¹ *Id.* at 622–23.

²³² *Id.* at 625–32 (Scalia, J., concurring in judgment).

²³³ *Id.* at 625.

²³⁴ *Id.*

²³⁵ *Id.*

²³⁶ *Id.* at 625–26.

²³⁷ *Id.* at 626 (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973)).

²³⁸ *Id.*

inability to come up with even a single example of a handcuffed arrestee's retrieval of arms or evidence from his vehicle undermines its claims. The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel*.²³⁹

The second defense was that because "the officer could have conducted the search at the time of arrest (when the suspect was still near the car), he should not be penalized for having taken the sensible precaution of securing the suspect in the squad car first."²⁴⁰ Scalia found fault with this defense because it assumed that the search must take place.²⁴¹ He noted that searches incident to lawful arrests are exceptions (to the search warrant requirement) rather than the rule and that "[i]f 'sensible police procedures' require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search."²⁴²

The third defense was the *Belton* fiction: "that, even though the arrestee posed no risk here, *Belton* searches in general are reasonable, and the benefits of a bright-line rule justify upholding that small minority of searches that, on their particular facts, are not reasonable."²⁴³ Scalia noted that "[t]he validity of this argument rests on the accuracy of *Belton*'s claim that the passenger compartment is 'in fact generally, even if not inevitably,' within the suspect's immediate control."²⁴⁴ And he found that if this claim were ever true, "it certainly is not true today."²⁴⁵ Instead, Scalia pointed out that reported cases upholding vehicle searches after officers handcuffed and secured their occupants were "legion," a point underscored by the government's own admission that a finding that officers cannot search an arrestee's vehicle after restraining him would "largely render *Belton* a dead

²³⁹ *Id.* at 626–27 (citation omitted).

²⁴⁰ *Id.* at 627.

²⁴¹ *Id.*

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Id.* (quoting *Belton v. New York*, 453 U.S. 454, 460 (1981)).

²⁴⁵ *Id.* at 628.

letter.”²⁴⁶ The popularity of such searches made sense to Scalia because, “[i]f *Belton* entitles an officer to search a vehicle upon arresting the driver despite having taken measures that eliminate any danger, what rational officer would not take those measures?”²⁴⁷ But the absence of danger in these searches made them indefensible to Scalia under *Chimel*.²⁴⁸

Instead, Scalia found that “[i]f *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.”²⁴⁹ He then noted that “[t]his more general sort of evidence-gathering search is not without antecedent,” pulling *Rabinowitz* and *Harris* from the scrap heap.²⁵⁰ Scalia found that the Court upheld the searches in those cases, not based upon either of the *Chimel* rationales, but instead based upon “a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.”²⁵¹ He proffered “[n]umerous earlier authorities,” which supported the types of searched conducted in *Rabinowitz* and *Harris*, and concluded that “[t]here is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested.”²⁵² Of course, Scalia also acknowledged that *Chimel* repudiated these two opinions and that its “narrower focus on concealment or destruction of evidence also has historical support.”²⁵³

As noted above, Scalia found that “*Belton* cannot reasonably be explained as a mere application of *Chimel*,” and he also found that *Rabinowitz* and *Harris* were not “so persuasive as to justify departing from settled law.”²⁵⁴ For Scalia, then, the solution was neither to revive *Rabinowitz* and *Harris* generally as defining the proper scope of searches incident to lawful arrests nor to continue to pile fiction upon fiction; instead, the answer was honesty. According to Scalia, “if we are going to continue to allow *Belton* searches on *stare decisis* grounds, we should at

²⁴⁶ *Id.*

²⁴⁷ *Id.* (emphasis in original).

²⁴⁸ See *id.*

²⁴⁹ *Id.* at 629.

²⁵⁰ *Id.*

²⁵¹ *Id.*

²⁵² *Id.*

²⁵³ *Id.* at 630.

²⁵⁴ *Id.* at 631.

least be honest about why we are doing so.”²⁵⁵ And honesty for Scalia would be the Court acknowledging that *Belton* “is a return to the broader sort of search incident to arrest that we allowed before *Chimel*—limited, of course, to searches of motor vehicles, a category of ‘effects’ which give rise to a reduced expectation of privacy and heightened law enforcement needs.”²⁵⁶ Under this reading of *Belton*, officers can conduct searches of vehicles incident to lawful arrests if, and only if, “it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.”²⁵⁷

J. Back to Reality: Arizona v. Gant and the Dismantling of the Belton Fiction

Five years later, the Court largely took Scalia up on his offer. In *Arizona v. Gant*, officers acted on an anonymous tip that a house was being used to sell drugs.²⁵⁸ Upon arrival, they knocked at the front door and spoke with Rodney Gant, who told them that he expected the homeowner to return later.²⁵⁹ The officers then left and conducted a records check, “which revealed that Gant’s driver’s license had been suspended and [that] there was an outstanding warrant for his arrest for driving with a suspended license.”²⁶⁰ The officers then returned to the house and arrested a man near the back of the house for providing a false name and a woman parked in a car in front of the house for possessing drug paraphernalia.²⁶¹

Subsequently, Gant returned to the house in his car, and officers arrested him for driving with a suspended license, handcuffed him, locked him in a patrol car, and searched his car, uncovering cocaine in the pocket of a jacket on the backseat.²⁶² Gant later moved to suppress the drugs, and the Supreme Court, in a majority opinion by Justice Stevens, agreed, finding that the search was unconstitutional.²⁶³ The Court began by noting that *Chimel* laid out the scope of a proper search incident to a lawful arrest: “the arrestee’s person and the area ‘within his immediate control’—construing

²⁵⁵ *Id.*

²⁵⁶ *Id.* (citation omitted).

²⁵⁷ *Id.* at 632.

²⁵⁸ 129 S. Ct. 1710, 1714 (2009).

²⁵⁹ *Id.* at 1714–15.

²⁶⁰ *Id.* at 1715.

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ *Id.* at 1715, 1724.

that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.”²⁶⁴ Justice Stevens found that this limiting language, “which continues to define the boundaries of the exception, ensures that the scope of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.”²⁶⁵ Conversely, “[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.”²⁶⁶

Justice Stevens found that the subject search fell into the latter category.²⁶⁷ He noted that Justice Brennan’s disparaging reading of *Belton* had “predominated,” with courts construing it as an entitlement condoning officers’ searches of vehicles after they had arrested and secured their occupants.²⁶⁸ According to Stevens, applying *Belton* in this manner “untether[s] the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it ‘in no way alters the fundamental principles established in the *Chimel* case . . .’”²⁶⁹ The Court thus “reject[ed] this reading of *Belton* and 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.”²⁷⁰

After this sweeping statement, however, the Court immediately noted that these were not the only circumstances under which officers can search the passenger compartment of an arrestee’s vehicle incident to his lawful arrest. Relying upon Justice Scalia’s *Thornton* concurrence, the Court found that, “[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.’”²⁷¹ The Court quickly

²⁶⁴ *Id.* at 1716 (quoting *Chimel v. California*, 395 U.S. 752, 763 (1969)).

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ *Id.* at 1719.

²⁶⁸ *Id.* at 1718.

²⁶⁹ *Id.* at 1719.

²⁷⁰ *Id.*

²⁷¹ *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004) (Scalia, J., concurring in

clarified that “[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.”²⁷² Indeed, Justice Stevens found that the present case was such a case because it involved an arrest for driving with a suspended license, making the subject search unconstitutional because Gant was also secured and not within reaching distance of his car’s passenger compartment.²⁷³

In reaching this conclusion, the Court also rejected the State’s contention “that *Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests . . . with an arrestee’s limited privacy interest in his vehicle.”²⁷⁴ On the one hand, Stevens found that “the State seriously undervalue[d] the privacy interests at stake.”²⁷⁵ He noted that “[a]lthough we have recognized that a motorist’s privacy interest in his vehicle is less substantial than in his home, the former interest is nevertheless important and deserving of constitutional protection.”²⁷⁶ Accordingly, the problem with the *Belton* fiction is that it gave “police the power to conduct . . . a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creat[ing] a serious and recurring threat to the privacy of countless individuals.”²⁷⁷

On the other hand, Stevens concluded that, “[c]ontrary to the State’s suggestion, a broad reading of *Belton* is also unnecessary to protect law enforcement safety and evidentiary interests.”²⁷⁸ Stevens reached this conclusion because “[o]ther established exceptions to the warrant requirement authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand.”²⁷⁹

Specifically, Stevens noted that “*Michigan v. Long* permits an officer to search a vehicle’s passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is ‘dangerous’ and

judgment)).

²⁷² *Id.*

²⁷³ *Id.*

²⁷⁴ *Id.* at 1720.

²⁷⁵ *Id.*

²⁷⁶ *Id.* (citations omitted).

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 1721.

²⁷⁹ *Id.*

might access the vehicle to ‘gain immediate control of weapons.’”²⁸⁰ Moreover, he found that under the automobile exception, officers with probable cause to believe that a vehicle contains evidence of criminal activity can search “any area of the vehicle in which the evidence might be found.”²⁸¹ Stevens also suggested that “there may be still other circumstances in which safety or evidentiary interests would justify a search,” citing *Buie* and its holding that “incident to arrest, an officer may conduct a limited protective sweep of those areas of a house in which he reasonably suspects a dangerous person may be hiding.”²⁸²

Ironically, while Justice Scalia’s *Thornton* concurrence was ostensibly the impetus for the majority opinion, Scalia begrudgingly concurred with the majority in *Gant* in an opinion that clearly showed his dissatisfaction with its central holding. Scalia, of course, agreed with the majority that officers should be able to search a vehicle’s passenger compartment incident to a lawful arrest when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.²⁸³ But according to Scalia, this adopted *Rabinowitz-Harris* evidence-gathering rationale is the only support for such a search, and the Court “should simply abandon the *Belton-Thornton* charade of officer safety and overrule those cases.”²⁸⁴

However, Chief Justice Roberts and Justices Alito, Kennedy, and Breyer were wholly unconvinced. In a dissenting opinion, Justice Alito criticized many of the majority’s conclusions, including its assertion that a broad reading of *Belton* was unnecessary to protect law enforcement safety.²⁸⁵ According to the dissenting Justices, the Court was insouciant to two situations where neither existing exceptions nor the Court’s construction of *Belton* would authorize a vehicle search despite safety concerns so demanding:

First, it is not uncommon for an officer to arrest some but not all of the occupants of a vehicle. . . . Second, there may be situations in which an arresting officer has cause to fear that persons who were not passengers in the car might attempt to retrieve a weapon or evidence from the car while

²⁸⁰ *Id.*

²⁸¹ *Id.* (citation omitted).

²⁸² *Id.*

²⁸³ *Id.* at 1725 (Scalia, J., concurring).

²⁸⁴ *Id.*

²⁸⁵ See *id.* at 1729 (Alito, J., dissenting).

the officer is still on the scene.²⁸⁶

III. THE BROAD READING OF SUSPICIOUSLESS *BUIE* SEARCHES

As previously noted, in *Maryland v. Buie* the Court authorized two types of searches. First, the Court in *Buie* found that “as an incident to [an] arrest the officers c[an], as a precautionary matter and without probable cause or reasonable suspicion, look in closets or other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”²⁸⁷ Second, *Buie* authorized “protective sweeps” beyond those spaces covered by the first type of search, but only when “there [are] articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area to be swept harbors an individual posing a danger to those on the arrest scene,”²⁸⁸ i.e., reasonable suspicion.

As noted, the Court’s creation of this second type of search was the controlling portion of its opinion while its reference to the first type of search was dictum. But while the Court merely made passing reference to this first type of search in dictum, as will be seen in the following paragraphs, federal and state courts across the country have treated it as gospel. Indeed, the fact that the first type of *Buie* search was dictum has only been mentioned in one opinion addressing the merits of *Buie*.²⁸⁹ In *State v. Dawson*, an appellant claimed that the first type of *Buie* search, like the second type of *Buie* search, should require reasonable suspicion because the conclusion in *Buie* that the former search did not require such suspicion was dictum.²⁹⁰ The Court of Appeals of Washington quickly disposed of this argument, concluding that “many federal and state cases cite *Buie* for both standards.”²⁹¹

Indeed, courts nationwide have read *Buie* as well as *Michigan v. Summers* and its progeny as authorization cases, permitting officers at

²⁸⁶ *Id.* at 1731 n.2.

²⁸⁷ *Maryland v. Buie*, 494 U.S. 325, 334 (1990).

²⁸⁸ *Id.*

²⁸⁹ *United States v. McQuagge*, 787 F. Supp. 637, 655 (E.D. Tex. 1991). In *United States v. McQuagge*, the United States District Court for the Eastern District of Texas noted that the Court’s recognition of the first type of search in *Buie* was dictum, but this finding was itself dictum as the court’s opinion addressed the constitutionality of the search of a van. *Id.*

²⁹⁰ No. 26360-6-III, 2008 WL 4411539, at *3 (Wash. Ct. App. Sept. 30, 2008).

²⁹¹ *Id.* at *3–4.

suspects' homes (and sometimes other locations) to conduct warrantless searches or seizures under certain circumstances.²⁹² In *Michigan v. Summers*, the Court concluded that a search warrant per se carries with it the limited authority for officers to detain the occupants of the premises while a proper search is conducted.²⁹³ Moreover, “[a]lthough *Summers* dealt with the execution of a search warrant, several courts have persuasively extended its application to the execution of arrest warrants, holding that the same law enforcement interests are applicable in both scenarios.”²⁹⁴ In other words, under *Summers* and its progeny, officers can per se seize other occupants while executing search or arrest warrants. Meanwhile, under the first type of *Buie* search, arresting officers can automatically search for and seize other occupants. And as cases from across the country make clear, courts have construed this latter entitlement broadly.

First, courts universally have held that arresting officers can conduct the first type of *Buie* search without even reasonable suspicion of danger and that such searches need not be limited to the boundary laid out in *Chimel*—the area from within which the arrestee might gain possession of a weapon or destructible evidence.²⁹⁵ For instance, in *United States v. Charles*, Chief Brannon Decou received an anonymous tip that Bernard Charles was storing narcotics in a storage facility.²⁹⁶ Decou then learned that Charles was the subject of several outstanding warrants, most for traffic violations, and proceeded with Sergeant Darryl Vernon and Chief Deputy Timothy Picard, without a search warrant, to Charles' storage unit to conduct surveillance.²⁹⁷ Charles eventually arrived, and just as he entered the storage unit, the officers identified themselves, prompting Charles to drop an envelope into an open convertible in the storage unit.²⁹⁸ The officers then arrested Charles on his outstanding warrants “just at the entrance to the

²⁹² See Daniel L. Rotenberg, *An Essay on the Unexpected Person Factor in Searches and Seizures*, 39 ST. LOUIS U. L.J. 505, 511–12 (1995).

²⁹³ See 452 U.S. 692, 705 (1981).

²⁹⁴ *United States v. Werra*, No. 06-10414-DPW, 2008 WL 4280035, at *7 (D. Mass. Sept. 11, 2008).

²⁹⁵ See, e.g., *United States v. McQuagge*, 787 F. Supp. 637, 655 (E.D. Tex. 1991). Interestingly, in *McQuagge*, the Eastern District of Texas found that the first type of *Buie* search only covers the arrest room and not any other room, but again, this was in dictum. *Id.*

²⁹⁶ 469 F.3d 402, 404 (5th Cir. 2006).

²⁹⁷ *Id.*

²⁹⁸ *Id.*

open storage unit, which measured approximately 10 feet wide and 25 feet deep.²⁹⁹ Specifically, the arrest was conducted with Charles being “ordered out of the unit onto the ground, where he was arrested without incident.”³⁰⁰

Then, “[a]s Charles was being read his *Miranda* rights and escorted to a police cruiser, Picard entered the unit and checked inside, under, and around the convertible to ensure that there were no other occupants in the unit.”³⁰¹ In the convertible, Picard noticed that the “now open” envelope contained crack cocaine.³⁰² Picard also uncovered “a partially disassembled firearm on top of a cardboard box in the corner of the storage unit.”³⁰³ Charles thereafter moved to suppress this evidence, claiming that the officers “could have had no ‘reasonable suspicion’ that any other individuals were present in the storage unit.”³⁰⁴ The district court disagreed, and the United States Court of Appeals for the Fifth Circuit affirmed, concluding that “[u]nder *Buie*, Officer Picard’s cursory sweep of the unit immediately adjacent to the site of the arrest was permissible, even without probable cause or reasonable suspicion.”³⁰⁵

Furthermore, courts have not limited the first type of *Buie* search to the arrest room. Instead, they universally have upheld searches of sufficiently large spaces in rooms immediately abutting arrest rooms and connected to arrest rooms by hallways.³⁰⁶ As an example, in *State v. Roberts*, Matthew Roberts’ neighbor called 911 and informed authorities that Roberts had been beating his dog and that he thought Roberts had killed the dog.³⁰⁷ Sergeant Schopfer and Officers Charles Iseman and Anthony Hunter arrived without a search warrant about three and a half hours later at Roberts’ duplex and arrested him in a rear bedroom, with Iseman

²⁹⁹ *Id.* at 405.

³⁰⁰ *Id.* at 404.

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.*

³⁰⁴ *Id.* at 405.

³⁰⁵ *Id.* at 406.

³⁰⁶ See, e.g., *United States v. Brookshire*, No. 1:07-CR-92-TS, 2009 WL 57530, at *6 (N.D. Ind. Jan. 8, 2009) (citing cases that exemplify this concept); *State v. Koziol*, No. 23188-7III, 2005 WL 2502177, at *4 (Wash. Ct. App. Oct. 11, 2005) (citing several cases for the proposition that “the immediately adjoining area may extend to a back bedroom in a small apartment, adjoining bedroom in a house, or mobile home bedroom”).

³⁰⁷ 957 S.W.2d 449, 450 (Mo. Ct. App. 1997).

handcuffing Roberts and Roberts admitting that his dog died while he was squeezing it.³⁰⁸ Thereafter, while Schopfer kept watch on Roberts, Iseman and Hunter searched a bathroom connected to the bedroom, a hallway closet, living room areas, and the kitchen that were about seven to fifteen feet away from the bedroom and connected to it by a hallway.³⁰⁹ These searches uncovered evidence connected to the death of the dog as well as a marijuana plant, and Roberts moved to suppress this evidence, claiming that there had been an unlawful search and seizure without a search warrant.³¹⁰

The trial court granted Roberts' motion, and the State appealed.³¹¹ The court found that the search could be constitutional as a type one *Buie* search if the spaces searched immediately adjoined the place of arrest and if the search was quick and limited to places where a person could be hiding.³¹² In resolving this issue in favor of the government, the court noted that “[a]lthough the phrase ‘immediately adjoining the place of arrest from which an attack could be immediately launched’ is not defined in *Buie*, other courts have interpreted the phrase as including rooms directly adjacent to the place of arrest.”³¹³

In two subsequent cases, other courts have come to similar conclusions. In *United States v. Lay*, Curtis Lay was arrested at the front door of his apartment, and the distance from the front door to his bedroom was fifteen feet, with the two being separated by the living room and a hallway.³¹⁴ The Fourth Circuit found that Lay's bedroom constituted a space adjoining the place of arrest, rendering constitutional an officer's warrantless entry into that bedroom and his suspicionless search of an internally partitioned locker, which uncovered crack cocaine and baggies.³¹⁵ In *United States v. Sanchez*, officers arrested and handcuffed Jaime Sanchez in his living room before searching “the adjoining kitchen, the three closets in the hallway off the living room, the bathroom, and the sole bedroom.”³¹⁶ In the last of the three closets, approximately fifteen feet from the place of arrest, an officer uncovered a shotgun which the United States District Court for the

³⁰⁸ *Id.* at 450–51.

³⁰⁹ *Id.* at 451, 454.

³¹⁰ *Id.* at 451.

³¹¹ *Id.* at 450.

³¹² *Id.* at 454.

³¹³ *Id.* at 453.

³¹⁴ No. 98-4300, 1999 WL 436431, at *1, *2 (4th Cir. June 29, 1999).

³¹⁵ *Id.*

³¹⁶ No. 98 CR. 1480(DLC), 1999 WL 138924, at *1 (S.D.N.Y. Mar. 15, 1999).

Southern District of New York refused to suppress, concluding that even though the officers lacked reasonable suspicion or a warrant, they only searched areas immediately adjoining the place of arrest.³¹⁷ Of course, the court also could have had several other cases in mind, including cases authorizing searches of locked rooms connected to arrest rooms by hallways.³¹⁸

Courts have even found that there is no problem with arresting officers searching the entirety of small houses or apartments as part of type one *Buie* searches. For instance, in *United States v. Thomas*, five Deputy U.S. Marshals executed an arrest warrant for Anthony Thomas at his apartment and arrested him in the hallway immediately inside the front door.³¹⁹ The Deputy Marshals then proceeded to search the rest of the apartment's rooms: a kitchen, bedroom, and bathroom which were all connected to the hallway.³²⁰ In the bedroom, which was fifteen feet from the entrance to the apartment, Deputy Marshal William Martin and a colleague searched an open closet and the space under a bed.³²¹ On the top shelf of the closet, on top of a stack of clothes, they uncovered a handgun and a shotgun shell, and, at the bottom of the closet, under a "big bulked up blanket or comforter" which was approximately three feet high and which Martin claimed "a person could easily have fit underneath," they uncovered an assault rifle and shotgun.³²² Thomas moved to suppress this evidence, claiming that the spaces immediately adjoining the place of arrest "included at most the living room, and the front hallway" because "[o]therwise, in a small apartment . . . the 'police would be entitled to sweep the entire premises without a showing of reasonable suspicion.'"³²³ The United States Court of Appeals for the District of Columbia disagreed:

If an apartment is small enough that all of it "immediately adjoin[s] the place of arrest" and all of it constitutes a space or spaces "from which an attack could be immediately launched," then the entire apartment is subject to a limited

³¹⁷ *Id.* at *1–2.

³¹⁸ See, e.g., *United States v. Robinson*, 775 F. Supp. 231, 232, 235 (N.D. Ill. 1991).

³¹⁹ 429 F.3d 282, 284–85 (D.C. Cir. 2005).

³²⁰ *Id.* at 285.

³²¹ *Id.* at 284–85.

³²² *Id.* at 285.

³²³ *Id.* at 285, 287.

sweep of spaces where a person may be found.³²⁴

In reaching this conclusion, the court found that “Thomas’ concept of the place of arrest [wa]s unreasonably narrow” and that he could “point[] to no case where the place of arrest has been defined more narrowly than the entirety of the room in which the arrest occurred.”³²⁵ Other courts also have found no problem with arresting officers searching entire houses or apartments during type one *Buie* searches.³²⁶

Indeed, litigants have been universally unable to point to precedent in which courts construed the “spaces immediately adjoining the place of arrest” as solely limited to spaces in the room where the arrest occurred. In *State v. Koziol*, Deputy Tom Manthei and Reserve Deputy Justin Brunson executed arrest warrants at the mobile home of Joseph Koziol, eventually arresting him in the living room.³²⁷ Thereafter, Manthei walked down a hallway that was approximately thirty-five feet long and searched the master bedroom and adjoining bathroom before returning to the living room and walking down a second hallway that was approximately ten feet long and searching a second bedroom.³²⁸ The searches uncovered a methamphetamine laboratory, and Koziol moved to suppress this evidence, claiming that the spaces immediately adjoining the place of arrest “should be limited to the room where the arrest occurred.”³²⁹ The trial court denied that motion, and, on Koziol’s appeal, the Court of Appeals of Washington affirmed, concluding that Koziol did “not provide any authority that support[ed] this position” and that “[t]he doctrine has not previously been applied this narrowly.”³³⁰

It is not surprising that Koziol was unable to point to any case that construed the “spaces immediately adjoining the place of arrest” as only those spaces in the room of arrest. This author was unable to locate a single case where a court has invalidated a search in rooms adjoining the arrest room, or connected to it by a hallway, as long as the officers only searched

³²⁴ *Id.* at 287–88 (quoting *Maryland v. Buie*, 494 U.S. 325, 334 (1990)).

³²⁵ *Id.* at 287.

³²⁶ See, e.g., *United States v. Brookshire*, No. 1:07-CR-92-TS, 2009 WL 57530, at *3, *6 (N.D. Ind. Jan. 8, 2009); *United States v. Williams*, No. 07-30029-01, 2008 WL 1712291, at *2, *4–5 (W.D. La. Feb. 5, 2008); *State v. Hicks*, 3 So. 3d 539, 546 (La. Ct. App. 2008).

³²⁷ No. 23188-7-III, 2005 WL 2502177, at *1 (Wash. Ct. App. Oct. 11, 2005).

³²⁸ *Id.* at *1, *2.

³²⁹ *Id.* at *2, *4.

³³⁰ *Id.* at *4.

spaces from which an attack could be immediately launched. Indeed, so well established is this broad construction of the first type of *Buie* search that many defendants and appellants have begun to not even dispute the government's ability to conduct them. For example, in *United States v. Mendoza*, four to five officers arrested Jose Mendoza in the living area of his home, and at least two of the officers then searched a bedroom in the adjoining hallway, in which they found an older couple sleeping, prompting them to conduct a protective sweep of the other bedrooms.³³¹ During the protective sweep, the officers found two rifles and ammunition.³³² Mendoza filed a motion to suppress, but that motion only addressed the alleged unconstitutionality of the officers' subsequent protective sweep of the other bedrooms; as the motion stated, "Mendoza d[id] not argue that police were not entitled to enter the first [bed]room."³³³ Similarly, other defendants and appellants have begun to concede that arresting officers can conduct suspicionless searches of rooms connected to arrest rooms by hallways.³³⁴

Litigants do continue to contend that officers executing the first type of *Buie* search exceed the scope of such a search by exploring spaces from which an attack could not be immediately launched, but they have been largely unsuccessful, as courts generally have defined such spaces broadly. As previously noted, in *United States v. Thomas*, the United States Court of Appeals for the District of Columbia saw no problem with a type one *Buie* search in which an arresting officer searched under a "big bulked up blanket or comforter," which was approximately three feet high.³³⁵ As another example, in *United States v. McLemore*, Police Officers John Miltotzky and John McDermott, as well as backup officers executed arrest warrants for Takiesha Haynes and Cartell McLemore at an apartment belonging to McLemore, eventually arresting and handcuffing Haynes in the living room.³³⁶ Then, despite Milotzky admittedly "not hear[ing] anything that would lead him to believe that someone else was in the apartment," a backup officer, McDermott, and he searched each room in the apartment,

³³¹ 333 F. Supp. 2d 1155, 1158, 1160 (D. Utah 2004).

³³² *Id.* at 1158.

³³³ *Id.* at 1160.

³³⁴ See, e.g., *United States v. Goree*, 365 F.3d 1086, 1090 (D.C. Cir. 2004) (noting that the appellant did not dispute that arresting officers properly searched rooms connected to the arrest room by hallways under the first type of *Buie* search).

³³⁵ 429 F.3d 282, 285, 287–88 (D.C. Cir. 2005).

³³⁶ No. 05-CR-266, 2006 WL 572353, at *2 (E.D. Wis. Mar. 7, 2006).

including a southwest bedroom connected to the living room by a hallway that “was approximately seven or eight feet away from where Haynes was placed under arrest in the living room.”³³⁷

In one corner of the southwest bedroom, there was a bowl-shaped chair, and in another corner, there was a pile of laundry, which Milotzky described as “approximately three feet high and two feet wide.”³³⁸ Milotzky searched the bedroom, including the pile of laundry and the area behind the chair, uncovering, among other things, a firearm.³³⁹ McLemore moved to suppress the evidence found during the search, and Milotzky claimed that someone could have been hiding behind the chair and that “it was possible for someone to conceal themselves with the pile of laundry.”³⁴⁰ McLemore countered, *inter alia*, “that Milotzky’s testimony that a person could have concealed themselves behind the bowl-shaped chair, or under the pile of laundry [wa]s implausible.”³⁴¹ Magistrate Judge Callahan, of the United States District Court for the Eastern District of Wisconsin, disagreed:

I can not [sic] say that it was unreasonable for the officers to believe that a person might have been hiding behind the bowl-shaped chair or under the pile of laundry. Indeed, the defendant’s argument that the officers need not look behind a chair, under a pile of laundry, or inside a closet does not comport with the underlying rationale for the protective sweep exception—that officers should be able to ensure their safety when lawfully entering a private dwelling.³⁴²

Other courts similarly have upheld *Buie* searches of relatively small spaces.³⁴³

Some courts have even held that both varieties of *Buie* searches “need not be incident to an arrest.”³⁴⁴ In *Clark v. Webster*, drug enforcement

³³⁷ *Id.* at *3, *6.

³³⁸ *Id.* at *2–4.

³³⁹ *Id.* at *3–4.

³⁴⁰ *Id.* at *1, *3, *8.

³⁴¹ *Id.* at *8.

³⁴² *Id.*

³⁴³ See, e.g., *United States v. Lauter*, 57 F.3d 212, 214, 217 (2d Cir. 1995) (upholding a *Buie* search of the three foot area between a mattress and a wall in a room that only contained the mattress and the nightstand).

³⁴⁴ *Clark v. Webster*, 384 F. Supp. 2d 371, 382 (D. Me. 2005).

agent Steven Webster suspected that Sara Clark was trafficking in marijuana and believed that his suspicion blossomed into probable cause when he went to Clark's condominium and questioned her at its doorway.³⁴⁵ Webster thereafter told Clark that he was securing the condo while he waited for a search warrant and gave her the option to stay outside or go inside with Officers Douglas Taft and Bernie King.³⁴⁶ Clark chose the latter option and proceeded to the couch in her living room.³⁴⁷ Thereafter, the officers searched not only the living room, but also the adjoining kitchen and the condo's closet, bathroom, bedroom, and laundry room, which were "all connected to the living room by a short hallway."³⁴⁸ The United States District Court for the District of Maine found these searches constitutional, citing three federal appellate court opinions for the proposition that *Buie* searches are permissible when exigent circumstances prompt the entry of police, even in the absence of an arrest.³⁴⁹

IV. *ARIZONA v. GANT* INVALIDATES SUSPICIONLESS *BUIE* SEARCHES

A. Introduction

As previously noted, *Chimel* marked the end of the nearly two decade reign of *Harris*, *Rabinowitz*, and the broad construction of the search incident to a lawful arrest.³⁵⁰ However, consistent with the inconsistent history of the exception, the Court soon began expanding the proper scope of searches incident to lawful arrests in its post-*Chimel* opinions in *Belton*, *Buie*, and *Thornton*.³⁵¹ In *Arizona v. Gant*, the Supreme Court reaffirmed *Chimel* as defining the proper scope of searches incident to lawful arrests, explicitly overruled the predominating reading of *Belton*, and rejected *Thornton* as an application of *Chimel*.³⁵² This section argues that defendants and appellants should be able to raise both the *Arizona v. Gant* opinion and the reasoning within it to argue that the reaffirmation of *Chimel*

³⁴⁵ *Id.* at 374–75.

³⁴⁶ *Id.* at 375.

³⁴⁷ *Id.*

³⁴⁸ *Id.* at 382–83.

³⁴⁹ *Id.* at 382 (citing United States v. Jimenez, 419 F.3d 34 (1st Cir. 2005); United States v. Martins, 413 F.3d 139 (1st Cir. 2005); United States v. Taylor, 248 F.3d 506 (6th Cir. 2001)).

³⁵⁰ See *supra* notes 113–36 and accompanying text.

³⁵¹ See *supra* notes 149–69, 182–257 and accompanying text.

³⁵² See *supra* notes 258–82 and accompanying text.

and the destruction of the *Belton* fiction together invalidate the first type of *Buie*'s search. This section also argues that, even without *Gant*, courts should have realized and should now conclude that they have grossly misconstrued the scope of the first type of *Buie* search.

B. How Courts Erred in Construing the Scope of Suspicionless Buie Searches

As will be noted *infra*,³⁵³ courts should read the Supreme Court's opinion in *Arizona v. Gant* as invalidating the first type of *Buie* search. Nevertheless, even if courts do not read *Gant* in this manner, it is clear even without *Gant* that courts have stretched the scope of this type of search incident to lawful arrest beyond its breaking point and need to correct their errors. As noted, the Court in *Maryland v. Buie* found that "as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."³⁵⁴ This passage prompted at least three questions: (1) Is an arrest an absolute prerequisite for a *Buie* search; (2) from what spaces can an attack immediately be launched; and (3) what spaces immediately adjoin the place of arrest. Some courts have erred in answering the first two questions while all courts have erred in answering the third.

1. *Buie* Searches Cannot Be Justified Unless Preceded by Lawful Arrests

In *Robinson*, the Court made clear that under the search incident to a lawful arrest exception, "[i]t is the fact of the lawful arrest which establishes the authority to search . . ."³⁵⁵ This opinion in turn explained the Court's subsequent conclusion in *Knowles v. Iowa* that a lawful arrest is, as the name of the exception makes clear, the *sine qua non* of a search incident to a lawful arrest.³⁵⁶ Indeed, with one exception, courts have

³⁵³ See *infra* Part IV.C.

³⁵⁴ 494 U.S. 325, 334 (1990).

³⁵⁵ *United States v. Robinson*, 414 U.S. 218, 235 (1973).

³⁵⁶ See 525 U.S. 113, 117–18 (1998).

respected this Supreme Court precedent.³⁵⁷ This one exception turns on courts' application of *Buie*. As noted, in *Clark v. Webster*, the United States District Court for the District of Maine relied on three federal appellate court opinions in deeming constitutional a type one *Buie* search that was conducted without an arrest.³⁵⁸ Under *Robinson* and *Knowles*, these opinions are indefensible, and courts in the future should respect Supreme Court precedent and find that any searches conducted without lawful arrests cannot be justified under *Buie*.

2. Spaces from Which an Attack Could Immediately Be Launched Only Include Spaces Large Enough to Conceal Persons

The Court made clear that type one *Buie* searches can only extend to "closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched."³⁵⁹ Earlier in its opinion, it had defined these spaces as "those places in which a person might be hiding."³⁶⁰ Reconciling the Court's language in *Buie* with the broad way that many courts have defined these spaces is difficult.

In *United States v. Lauter*, Special ATF agents arrested Phillip Lauter in a basement apartment but did not have a search warrant covering that apartment.³⁶¹ Agents arrested Lauter in the front room of the apartment, and Agent Graham eventually entered the apartment's small back room, which "contained only a nightstand and a queen-size mattress on a metal frame standing roughly three inches off the ground, with approximately three feet between the bed and the wall on either side of the bed."³⁶² Graham looked in an open drawer in the night stand and seized from it a bag of ammunition.³⁶³ He also looked to the left of the bed, saw the stock of a shotgun protruding from underneath the mattress, seized the shotgun,

³⁵⁷ See, e.g., *Menotti v. City of Seattle*, 409 F.3d 1113, 1153 (9th Cir. 2005) ("We decline to extend the doctrine of 'search incident to arrest' to give protection for a warrantless search or seizure when no arrest is made.").

³⁵⁸ 384 F. Supp. 2d 371, 382 (D. Me. 2005).

³⁵⁹ *Buie*, 494 U.S. at 334.

³⁶⁰ *Id.* at 327.

³⁶¹ 57 F.3d 212, 213 (2d Cir. 1995).

³⁶² *Id.* at 213–14.

³⁶³ *Id.* at 214.

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and looked under the bed.³⁶⁴ Lauter moved to suppress the evidence that Graham found in the room, but the Second Circuit denied his motion, finding that “[a]side from looking in the drawer, the fruits of which search were not introduced into evidence, Graham’s conduct was well within the scope of a permissible [type one *Buie* search]”³⁶⁵

This broad reading of *Buie* is consistent with some of the opinions already mentioned. As previously noted, in *United States v. McLemore*, the Eastern District of Wisconsin found no problem with a type one *Buie* search in which an officer searched, *inter alia*, under a pile of laundry which the officer himself described as “approximately three feet high and two feet wide.”³⁶⁶ Moreover, three appears to be the magic number because, as noted, in *United States v. Thomas*, the United States Court of Appeals for the District of Columbia found no problem with a Deputy Marshal’s search under a “big bulked up blanket or comforter” which was approximately three feet high.³⁶⁷ That court even implied that it might allow searches of smaller spaces:

If an apartment is small enough that all of it “immediately adjoin[s] the place of arrest” and all of it constitutes a space or spaces “from which an attack could be immediately launched,” then the entire apartment is subject to a limited sweep of spaces where a person may be found.³⁶⁸

Even taking the officers in these cases at their words and giving these courts every benefit of the doubt, the idea that a two by three foot pile of laundry or the three inch space under a mattress might constitute spaces in which persons could be hiding and ready to launch an immediate attack is unpalatable. Moreover, the Court in *Buie* noted that the type of search it was authorizing was “narrowly confined to a cursory visual inspection of those places in which a person might be hiding.”³⁶⁹ It is questionable that such a narrowly confined, cursory visual inspection would have uncovered the shotgun under the mattress in *Lauter*. Additionally, there appears to be no way that the courts in *McLemore* and *Thomas* could have concluded that the officers’ searches in those cases under the blanket and under the pile of

³⁶⁴ *Id.*

³⁶⁵ *Id.* at 217.

³⁶⁶ No. 05-CR-266, 2006 WL 572353, at *3, *6 (E.D. Wis. Mar. 7, 2006).

³⁶⁷ 429 F.3d 282, 285, 287 (D.C. Cir. 2005).

³⁶⁸ *Id.* at 287–88 (quoting *Maryland v. Buie*, 494 U.S. 325, 334 (1990)).

³⁶⁹ See *Maryland v. Buie*, 494 U.S. 325, 327 (1990).

laundry constituted narrowly confined, cursory visual inspections.

3. Rooms Connected to the Arrest Room by Hallways Do Not Immediately Adjoin the Place of Arrest

As previously noted, courts universally have construed the phrase “spaces immediately adjoining the place of arrest” as including sufficiently large spaces in rooms connected to arrest rooms by hallways.³⁷⁰ This reading is problematic for two reasons. First, as noted, the Court in *Buie* found that Detective Frolich’s search of the basement was a protective sweep, the second type of *Buie* search, and not a type one *Buie* search.³⁷¹ Frolich conducted this search after Corporal Rozar arrested Buie at the top of the staircase to the basement, with Frolich spotting the incriminatory red running suit in plain view.³⁷² If a basement connected to the arrest room by a staircase does not constitute a space immediately adjoining the place of arrest, how can courts construe rooms connected to arrest rooms by hallways as long as fifteen³⁷³ or even thirty-five feet³⁷⁴ as spaces immediately adjoining the place of arrest? Courts could potentially have good reasons for distinguishing hallways from staircases, but, as of yet, they have not articulated them.

Even if they could, however, the second problem with these readings of the phrase “immediately adjoining” is that they are inconsistent with the manner in which those same courts have construed the words “immediately adjoining” in other opinions. Courts most typically have construed the words “immediately adjoining” in opinions dealing with insurance policies. For instance, in *United States v. Great American Indemnity Co. of New York*, a customer fell in a building owned by the United States, which “required each individual tenant to secure insurance for the particular space occupied.”³⁷⁵ The building was “divided into two separate parts by a solid brick wall.”³⁷⁶ On the east side of the wall, on the ground floor, was a grocery store, and “in the west portion of the building on a mezzanine floor entirely separated from the stores occupying the street [wa]s a beauty

³⁷⁰ See *supra* notes 306–18 and accompanying text.

³⁷¹ See *Buie*, 494 U.S. at 327.

³⁷² *Id.* at 328.

³⁷³ See *supra* notes 309, 314, 317, 321 and accompanying text.

³⁷⁴ See *supra* note 328 and accompanying text.

³⁷⁵ 214 F.2d 17, 18 (9th Cir. 1954).

³⁷⁶ *Id.*

shop . . .”³⁷⁷ After patronizing the beauty shop, a customer went down a stairway to the ground floor, “left the building and fell on the sidewalk at a point two or three feet in front of the entrance to the mezzanine stairway,” “several feet west of the nearest corner of the grocery store” and “35 feet west of the nearest entrance to the grocery store . . .”³⁷⁸

The customer sued and recovered a judgment against the United States, prompting it to seek indemnity from the beauty shop and grocery store.³⁷⁹ The two businesses then brought motions for summary judgment, claiming that their insurance policies did not cover the site of the accident, and the district court granted their motions, leading to an appeal to the United States Court of Appeals for the Ninth Circuit.³⁸⁰ The beauty shop’s insurance policy provided as follows: “‘Premises—The unqualified word ‘premises’ wherever used in this policy shall mean the premises designated in Item 4 of the declarations including buildings and structures thereon and *the ways immediately adjoining.*’”³⁸¹ The grocery store’s policy was similar and contained the same “immediately adjoining” language, and the Ninth Circuit found that the customer’s “fall did not occur in any part of the premises occupied by the grocery store or the beauty shop.”³⁸² Therefore, the court found that it had to resolve whether the customer fell “on a way ‘immediately adjoining’ either or both premises[.]”³⁸³

In answering this question, the Ninth Circuit found “no necessity to invoke the familiar rule that ambiguities in an insurance policy must be resolved against the insurer.”³⁸⁴ The court explained its position:

The words “immediately adjoining” are unequivocal and have a definite and certain meaning. “Adjoining” used in its usual and ordinary sense means touching or contiguous, in contact with, as distinguished from lying near or adjacent. The words “adjacent” and “adjoining” are sometimes incorrectly used interchangeably to mean lying close to or near. But when “adjoining” is coupled with the

³⁷⁷ *Id.*

³⁷⁸ *Id.* at 18–19.

³⁷⁹ *Id.* at 18.

³⁸⁰ *Id.*

³⁸¹ *Id.* (emphasis in original).

³⁸² *Id.*

³⁸³ *Id.*

³⁸⁴ *Id.* at 18–19.

word “immediately”, unquestionably the word is used, as here, in its most restrictive sense.³⁸⁵

This meant that the grocery store’s insurance policy was inapplicable because “[t]he restrictive words ‘ways immediately adjoining’ embrace[d] at most that portion of the sidewalk abutting or touching the grocery store.”³⁸⁶ Thus, “[t]he place of the fall being several feet west of the nearest corner of the grocery store, it was not within the terms of the policy.”³⁸⁷ It also meant that the beauty shop’s insurance policy was inapplicable.³⁸⁸ According to the court, “[w]hile the entryway and the hall immediately outside the beauty shop may well be included in the phrase ‘ways immediately adjoining’, it would be totally unreasonable to say that coverage extended down the stairway and out onto the sidewalk.”³⁸⁹

Similarly, in *Rodriguez v. American Restaurant Ventures, Inc.*, Posa Posa operated a restaurant in a mall, which had rules and regulations requiring that tenants “keep [t]he outside areas immediately adjoining the premises . . . clean and free from snow, ice, dirt and rubbish. . . .”³⁹⁰ After Louis and Nancy Rodriguez ate dinner at this restaurant, “they left the restaurant and crossed a brick sidewalk, which r[an] along the front of the mall’s stores, to two steps leading down to the mall’s parking lot.”³⁹¹ Louis slipped and fell on the steps, and the couple sued, *inter alia*, Posa Posa, which moved for summary judgment.³⁹² The United States District Court for the Southern District of New York granted that motion, finding that “[t]he steps in question do not immediately adjoin the restaurant; instead, they are separated from the restaurant’s premises by the brick sidewalk, which is approximately eight to ten feet wide.”³⁹³ Moreover, other courts have similarly interpreted the phrase “immediately adjoining” in this narrow sense.³⁹⁴

³⁸⁵ *Id.* at 19 (citations omitted).

³⁸⁶ *Id.*

³⁸⁷ *Id.*

³⁸⁸ *Id.*

³⁸⁹ *Id.*

³⁹⁰ 923 F. Supp. 598, 600 (S.D.N.Y. 1996).

³⁹¹ *Id.*

³⁹² *Id.*

³⁹³ *Id.* at 601.

³⁹⁴ See, e.g., *Caribou Four Corners, Inc. v. Truck Ins. Exch.*, 443 F.2d 796, 800 (10th Cir. 1971).

In other words, in construing insurance policies, courts have construed the words “immediately adjoining” as covering, at most, spaces touching or contiguous with the insured premises. According to these courts, even spaces “several feet west” from insured premises or separated from such premises by an eight to ten foot sidewalk do not immediately adjoin those premises.³⁹⁵ Perhaps even more importantly, these courts have found these words to be unequivocal and unsusceptible to a broader reading.³⁹⁶

Amazingly, courts have read these exact same words in a directly antithetical manner in upholding type one *Buie* searches. Courts have upheld type one *Buie* searches even when they extend from the arrest room and down hallways as long as fifteen³⁹⁷ or even thirty-five feet³⁹⁸ into separate rooms, construing these rooms to be spaces immediately adjoining the place of arrest. Indeed, on several occasions, courts have even upheld type one *Buie* searches when they extend from arrest rooms down hallways, into separate rooms, and into closets³⁹⁹ and bathrooms⁴⁰⁰ adjoining those separate rooms. These rulings make no sense given that the first type of *Buie* search authorized the search of “closets and other spaces immediately adjoining the place of arrest . . .”⁴⁰¹ Even if rooms connected to arrest rooms could be considered spaces immediately adjoining the place of arrest, closets or bathrooms connected to those rooms would not be “spaces immediately adjoining” the place of arrest.

4. Suspicionless *Buie* Searches Were Never Meant to Extend Beyond the Arrest Room

Even if the words “immediately adjoining” by themselves did not unambiguously signal the invalidity of courts approving type one *Buie* searches extending down hallways and into other rooms, the *Buie* opinion itself clearly supports such a conclusion. Indeed, the *Buie* opinion makes clear that, contrary to what every court has since found, type one *Buie* searches cannot constitutionally extend beyond the arrest room and into any other room, whether it be a room connected to the arrest room by a hallway

³⁹⁵ See *supra* notes 387, 393 and accompanying text.

³⁹⁶ See *supra* notes 385, 393 and accompanying text.

³⁹⁷ See *supra* notes 309, 314, 317, 321 and accompanying text.

³⁹⁸ See *supra* note 328 and accompanying text.

³⁹⁹ See *supra* note 321 and accompanying text.

⁴⁰⁰ See *supra* note 328 and accompanying text.

⁴⁰¹ Maryland v. *Buie*, 494 U.S. 325, 334 (1990).

or a room that actually touches, or is contiguous with, the arrest room.

As previously noted, while the Court in *Buie* authorized two types of searches, its creation of the “protective sweep,” the second type of *Buie* search, was the controlling portion of its opinion.⁴⁰² To reiterate, the Court in *Maryland v. Buie* found that Detective Frolich’s post-arrest search of Buie’s basement was literally not warranted (under the arrest warrant) because once Buie “was found . . . the search for him was over, and there was no longer that particular justification for entering any rooms that had not yet been searched.”⁴⁰³ The Court then immediately noted, however, that the fact “[t]hat Buie had an expectation of privacy in those remaining areas of his house . . . d[id] not mean such rooms were immune from entry.”⁴⁰⁴ Subsequently, the Court acknowledged “that entering rooms not examined prior to the arrest is [not] a de minimis intrusion that may be disregarded,” but it found that “arresting officers are permitted in such circumstances to take reasonable steps to ensure their safety after, and while making, an arrest.”⁴⁰⁵

This analysis was followed by the Court’s two part holding. First, in dictum, the Court held “that as an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion, look in closets and other spaces immediately adjoining the place of arrest from which an attack could be immediately launched.”⁴⁰⁶ Second, in the controlling portion of its opinion, the Court found that “[b]eyond that . . . there must be articulable facts which, taken together with the rational inferences from those facts, would warrant a reasonably prudent officer in believing that the area swept harbors an individual posing a danger to those on the arrest scene.”⁴⁰⁷ The Court immediately made clear the fact that this second type of *Buie* search was the controlling portion of its opinion (and that the first type of *Buie* search was not) in the accompanying footnote, which rejected the State’s contention that Detective Frolich’s search required “no level of objective justification” and applied *Terry*’s requirement of reasonable suspicion “to the protective sweep of a house.”⁴⁰⁸

⁴⁰² See *supra* notes 209–21 and accompanying text.

⁴⁰³ See *Buie*, 494 U.S. at 333.

⁴⁰⁴ *Id.*

⁴⁰⁵ *Id.* at 333–34.

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.* at 334 n.2.

The Court's words compel the conclusion that the first type of *Buie* search can never extend beyond the arrest room and into any other room for a few reasons. First, the Court needed to create the second type of *Buie* search, the protective sweep, because, in the Court's own words, after the arrest, Detective Frolich no longer had "particular justification for entering any rooms that had not yet been searched."⁴⁰⁹ Moreover, the Court rejected the government's "no level of objective justification" argument and applied *Terry*'s reasonable suspicion requirement to protective sweeps based upon its acknowledgement "that entering rooms not examined prior to the arrest is [not] a de minimis intrusion that may be disregarded."⁴¹⁰ Because protective sweeps cover those areas "beyond" the scope of type one *Buie* searches, and because protective sweeps cover any rooms beyond the arrest room, it is clear that type one *Buie* searches can never extend beyond the arrest room.⁴¹¹

Second, the Court in *Buie* meant for the word "area" to be synonymous with the word "room." As noted, the Court held that the fact "[t]hat Buie had an expectation of privacy in those remaining areas of his house . . . d[id] not mean such rooms were immune from entry."⁴¹² By juxtaposing the phrases "remaining areas" and "such rooms" in this sentence, the Court made clear that it meant for the two words to be interchangeable. Then, by later finding that arresting officers can conduct the second type of *Buie* search beyond the spaces covered by the first type of *Buie* search when they have reasonable suspicion "that the area swept harbors an individual posing a danger to those on the arrest scene," the Court signaled that type one *Buie* searches cannot extend beyond the arrest room.⁴¹³ Moreover, by stating that type one *Buie* searches cover "spaces immediately adjoining the place of arrest" such as closets and spaces within the arrest room, the Court at least implied that these searches are limited to the arrest room.⁴¹⁴

Third, it is clear from Justice Brennan's dissenting opinion that he understood that the first type of *Buie* search could never extend beyond the arrest room. As noted, in his dissent, Justice Brennan challenged the

⁴⁰⁹ *Id.* at 333.

⁴¹⁰ *Id.* at 333–34.

⁴¹¹ See *id.* at 334.

⁴¹² *Id.* at 333.

⁴¹³ See *id.* at 334.

⁴¹⁴ See *id.*

Court's creation of the first type of *Buie* search by deeming relatively "[im]plausible the majority's assumption today that arrestees are likely to sprinkle hidden allies throughout the rooms in which they might be arrested."⁴¹⁵ This criticism only makes sense if Justice Brennan thought that type one *Buie* searches could never extend beyond the arrest room.

C. Raising Arizona: Arizona v. Gant Compels the Conclusion that Suspicionless Buie Searches Incident to Lawful Arrests Are Unconstitutional

The above analysis only remains relevant, however, if the first type of *Buie* search is still authorized after *Arizona v. Gant*. This section argues that it is not. There were three parts to *Arizona v. Gant*. First, the Court laid the *Belton* fiction to rest and reaffirmed that *Chimel v. California* generally "continues to define the boundaries of the [search incident to a lawful arrest] exception."⁴¹⁶ Second, the Court adopted Justice Scalia's *Thornton* concurrence and gave *Harris* and *Rabinowitz* renewed vitality based upon "circumstances unique to the automobile context . . ."⁴¹⁷ Third, the Court rejected the government's argument that "*Belton* searches are reasonable regardless of the possibility of access in a given case because that expansive rule correctly balances law enforcement interests, including the interest in a bright-line rule, with an arrestee's limited privacy interest in his vehicle."⁴¹⁸ Together, these conclusions similarly establish the invalidity of the first type of *Buie* search.

1. Suspicionless *Buie* Searches Cannot Be Defended Under *Chimel*

As noted, in *Chimel v. California*, the Court laid out the twin rationales undergirding searches incident to lawful arrests—protecting officer safety and preventing the concealment or destruction of evidence—and found that they defined the proper scope of such searches: "the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or

⁴¹⁵ *Id.* at 342 n.6 (Brennan, J., dissenting).

⁴¹⁶ *Arizona v. Gant*, 129 S. Ct. 1710, 1716 (2009).

⁴¹⁷ *Id.* at 1719.

⁴¹⁸ *Id.* at 1720.

destructible evidence.”⁴¹⁹ These rationales also defined its boundaries as they provided “no comparable justification . . . for routinely searching any room other than that in which an arrest occurs—or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself.”⁴²⁰ In other words, *Chimel* deemed unconstitutional not only searches incident to lawful arrests that extend beyond the room of arrest but also searches beyond the reach of the arrestee within the arrest room.⁴²¹ According to the Court, “[t]he only reasoned distinction is one between a search of the person arrested and the area within his reach on the one hand, and more extensive searches on the other.”⁴²²

Clearly, because *Gant* held that *Chimel* “continues to define the boundaries of the [search incident to a lawful arrest] exception,”⁴²³ courts can no longer approve type one *Buie* searches that extend beyond the arrest room, and thus beyond the area within the arrestee’s reach, unless, as will be addressed *infra*,⁴²⁴ some other justification applies. More importantly, however, the reaffirmation of *Chimel* as defining the boundaries of proper searches incident to lawful arrests means that type one *Buie* searches have been rendered obsolete in the absence of an alternate justification. As noted, on the one hand, under *Chimel*, courts cannot defend any type one *Buie* searches of spaces that are beyond the immediate control of an arrestee.⁴²⁵ On the other hand, assuming that there is a space in the arrest room and within the immediate control of the arrestee from which an attack could be immediately launched, that space would necessarily also be a space from which the arrestee might gain possession of a weapon or destructible evidence, meaning that *Chimel* would authorize the search and *Buie* would be unnecessary.⁴²⁶

⁴¹⁹ 395 U.S. 752, 763 (1969).

⁴²⁰ *Id.*

⁴²¹ *Id.*

⁴²² *Id.* at 766.

⁴²³ See *Gant*, 129 S. Ct. at 1716.

⁴²⁴ See *infra* notes 440–93 and accompanying text.

⁴²⁵ See *supra* note 422 and accompanying text.

⁴²⁶ Clearly, a space in which a person might be hiding would also be large enough to conceal a weapon or other evidentiary item.

2. *Harris* and *Rabinowitz* Now Only Apply to Automobile Arrests

Notwithstanding the Court's conclusion in *Gant* that *Chimel* generally "continues to define the boundaries of the [search incident to a lawful arrest] exception," the Court immediately thereafter relied upon Justice Scalia's *Harris* and *Rabinowitz*-reviving concurrence in *Thornton* to "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.'"⁴²⁷ As Justice Scalia noted in his *Thornton* concurrence, what makes the motor vehicle context unique is that automobiles are "a category of 'effects' which give rise to a reduced expectation of privacy and heightened law enforcement needs."⁴²⁸ In other words, "the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation"⁴²⁹ justifies this type of warrantless automobile search incident to a lawful arrest in the same way that it justifies the automobile exception.

Of course, a person does not have a reduced expectation of privacy in his home, meaning that this justification could not support a type one *Buie* search; instead, an individual's "expectation of privacy is at its highest" in his home.⁴³⁰ Indeed, *Gant* reaffirmed *Chimel*, which declared that *Harris* and *Rabinowitz* no longer laid the boundaries of proper searches incident to lawful home arrests, and the Court made clear that it was only reviving these latter two opinions for automobile searches incident to lawful arrests based upon the uniqueness of the motor vehicle context.⁴³¹ Therefore, there is no logical or precedential ground for arguing that type one *Buie* searches can be justified under *Harris* and *Rabinowitz*.

3. Suspicionless *Buie* Searches Are Not Necessary to Protect Law Enforcement Safety and Evidentiary Interests

If type one *Buie* searches continue to be constitutionally valid, their justification can then only lie in a rationale rejected by the Court in *Gant*:

⁴²⁷ *Gant*, 129 S. Ct. at 1716, 1719.

⁴²⁸ *Thornton v. United States*, 541 U.S. 615, 631 (2004) (Scalia, J., concurring in judgment) (citations omitted).

⁴²⁹ *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

⁴³⁰ *Polk v. District of Columbia*, 121 F. Supp. 2d 56, 66 (D.D.C. 2000) (construing *Wilson v. Layne*, 526 U.S. 604, 610–12 (1999)).

⁴³¹ See *Gant*, 129 S. Ct. at 1716; *Chimel v. California*, 395 U.S. 752, 766–68 (1969).

that the first type of *Buie* search is necessary “to protect law enforcement safety and evidentiary interests.”⁴³² In *Gant*, the Court found these interests insufficient to uphold the *Belton* fiction because it gave “police the power to conduct . . . a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creat[ing] a serious and recurring threat to the privacy of countless individuals.”⁴³³ Accordingly, law enforcement safety and evidentiary interests can only be sufficient to support type one *Buie* searches if the analysis is significantly different in the home arrest context. There are three relevant points of comparison between the two contexts: the arrestee’s expectation of privacy, the law enforcement safety and evidentiary interests, and the extent to which established search warrant exceptions ensure that officers may search when safety or evidentiary concerns demand.⁴³⁴

a. An Individual’s Expectation of Privacy Is at Its Highest in His Home

First, as previously noted, individuals have a “reduced expectation of privacy in an automobile, owing to its pervasive regulation.”⁴³⁵ Conversely an individual’s “expectation of privacy is at its highest” in his home, leading to the obvious conclusion that “the interior of an automobile is not subject to the same expectations of privacy that exist with respect to one’s home”⁴³⁶ This is not only “because the expectation of privacy with respect to one’s automobile is significantly less than that relating to one’s home or office,” but also because of the mobility of automobiles.⁴³⁷ These differences explain why less rigorous warrant requirements govern automobile searches.⁴³⁸ Indeed, the Court in *Gant* recognized “that a motorist’s privacy interest in his vehicle is less substantial than in his home”⁴³⁹ Therefore, this factor weighs strongly against type one *Buie* searches being defensible while the *Belton* fiction was not.

⁴³² *Gant*, 129 S. Ct. at 1721.

⁴³³ *Id.* at 1720.

⁴³⁴ *Id.* at 1720–21.

⁴³⁵ *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996).

⁴³⁶ *New York v. Class*, 475 U.S. 106, 114 (1986).

⁴³⁷ *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976).

⁴³⁸ See *id.*

⁴³⁹ *Gant*, 129 S. Ct. at 1720.

b. Law Enforcement Interests During Automobile and Home Arrests Are Not Meaningfully Different

The Supreme Court has stated the law enforcement safety and evidentiary interests implicated by arrests of the occupants of automobiles on several occasions.⁴⁴⁰ These interests are those of arresting officers in searching the passenger compartment of an arrestee's automobile to ensure that the arrestee does not access that compartment to conceal or destroy evidence or remove a weapon to resist arrest or effect his escape.⁴⁴¹ In his *Thornton* concurrence, Justice Scalia called these interests into question in cases in which arresting officers had already handcuffed and secured arrestees in the back of squad cars, noting that the government could cite no examples in which an arrestee had escaped and retrieved a weapon or evidence from his vehicle "despite being handcuffed and secured in the back of a squad car . . .".⁴⁴² Scalia further noted the absence of a high risk:

[T]he Government need not document specific instances in order to justify measures that avoid obvious risks. But the risk here is far from obvious, and in a context as frequently recurring as roadside arrests, the Government's inability to come up with even a single example of a handcuffed arrestee's retrieval of arms or evidence from his vehicle undermines its claims. The risk that a suspect handcuffed in the back of a squad car might escape and recover a weapon from his vehicle is surely no greater than the risk that a suspect handcuffed in his residence might escape and recover a weapon from the next room—a danger we held insufficient to justify a search in *Chimel*.⁴⁴³

While Scalia's reasoning did not carry the day in *Thornton*, the Court adopted it in *Gant* to dismantle the *Belton* fiction.⁴⁴⁴ Because individuals have a significantly higher expectation of privacy in their homes than they enjoy in their vehicles, the law enforcement safety and evidentiary interests would need to be significantly higher in the home arrest context for type

⁴⁴⁰ See *supra* notes 177–81 and accompanying text.

⁴⁴¹ See *supra* notes 177–81 and accompanying text.

⁴⁴² *Thornton v. United States*, 541 U.S. 615, 625–26 (2004) (Scalia, J., concurring in judgment).

⁴⁴³ *Id.* at 626–27.

⁴⁴⁴ See *Gant*, 129 S. Ct. at 1718–19.

one *Buie* searches to be even potentially defensible.

The first problem in this regard is that the Court mentioned no evidentiary interests in *Buie*. Instead, the Court defined the type of search it was authorizing, the protective sweep, as “a quick and limited search of premises incident to an arrest and conducted to protect the safety of police officers or others.”⁴⁴⁵ And while the Court did not explain the first type of *Buie* search in any detail, the fact that this type of search covers spaces “from which an attack could be immediately launched,” makes clear that such searches are defensible, if at all, solely based upon law enforcement safety interests and not upon evidentiary interests.⁴⁴⁶

With regard to the safety interests, the Court itself indicated in *Buie* that law enforcement safety interests do not justify suspicionless *Buie* searches any more than they justify suspicionless searches during on-the-street or roadside investigatory encounters.⁴⁴⁷ It is again important to keep in mind that the portion of the Court’s opinion in *Buie* creating the protective sweep was the controlling portion of its opinion while the portion creating the suspicionless, first type of *Buie* search was dictum.⁴⁴⁸ The footnote immediately following the Court’s two-part holding proves both this point and that the Court did not view the law enforcement safety interests in the non-home arrest context and the home arrest context as meaningfully different.⁴⁴⁹

As noted in that footnote, the Court rejected the State’s contention that Detective Frolich’s search required “no level of objective justification” because of “the danger that inheres in the in-home arrest for a violent crime” and applied *Terry*’s requirement of reasonable suspicion “to the protective sweep of a house.”⁴⁵⁰ The Court did so because “despite the danger that inheres in on-the-street encounters and the need for police to act quickly for their own safety, the Court in *Terry* did not adopt a bright-line rule authorizing frisks for weapons in all confrontational encounters.”⁴⁵¹ Indeed, the Court noted that “[e]ven in high crime areas, where the possibility that any given individual is armed is significant, *Terry* requires

⁴⁴⁵ Maryland v. *Buie*, 494 U.S. 325, 327 (1990).

⁴⁴⁶ *Id.* at 334.

⁴⁴⁷ *Id.* at 333.

⁴⁴⁸ See *supra* notes 209–21 and accompanying text.

⁴⁴⁹ *Buie*, 494 U.S. at 334 n.2.

⁴⁵⁰ *Id.*

⁴⁵¹ *Id.*

reasonable suspicion before a frisk for weapons can be conducted.”⁴⁵² These findings compel the conclusion that the Court did not view the law enforcement safety interests in the non-home arrest context and the home arrest context as meaningfully different.

At another point in its *Buie* opinion, the Court did find that “[t]he risk of danger in the context of an arrest in the home is as great as, if not greater than, it is an on-the-street or roadside investigatory encounter.”⁴⁵³ The above paragraph, however, establishes that this was merely idle speculation, with any difference in danger being insignificant.⁴⁵⁴ More importantly, the Court’s speculation in this regard was directed solely at the potential dangers associated with type two *Buie* searches, not type one *Buie* searches. The reason that the Court found that the risk of danger might be greater in the context of home arrests was because, “unlike an encounter on the street or along a highway, an in-home arrest puts the officer at the disadvantage of being on his adversary’s turf,” with “[a]n ambush in a confined setting of unknown configuration . . . more to be feared than it is in open, more familiar surroundings.”⁴⁵⁵

As noted, in reaching this conclusion, the Court likely relied upon the argument in the government’s brief that “[a]n accomplice, lurking in another room, might take someone hostage or attack the officers or the arrestee as they are leaving the premises”⁴⁵⁶ and the argument in two amicus briefs that it would make little sense to allow the police to protect themselves against known persons but to forbid them from searching for others who are potentially more dangerous.⁴⁵⁷ These arguments, as well as the Court’s conclusion, indicate that any increased risk of danger during home arrests is based upon the unknown configuration of the place of arrest and the possibility of accomplices hiding in other rooms. Because, as noted, a type one *Buie* search can never extend beyond the arrest room,⁴⁵⁸ this “home field advantage” argument has no relevance to this type of search.

Moreover, even if the Court was not idly speculating about increased

⁴⁵² *Id.*

⁴⁵³ *Id.* at 333.

⁴⁵⁴ See *supra* notes 450–53 and accompanying text.

⁴⁵⁵ *Buie*, 494 U.S. at 333.

⁴⁵⁶ See *supra* note 198 and accompanying text.

⁴⁵⁷ See *supra* note 199 and accompanying text.

⁴⁵⁸ See *supra* notes 409–15 and accompanying text.

risk, and even if this increased risk had relevance to type one *Buie* searches, the Court's conclusion in this regard would be subject to the same challenges that undid the *Belton* fiction. *Gant*'s destruction of the *Belton* fiction was based upon Justice Scalia's *Thornton* concurrence, which found that the problem with the *Belton* fiction was that the government could cite no examples in which an arrestee had escaped and retrieved a weapon or evidence from his vehicle "despite being handcuffed and secured in the back of a squad car"⁴⁵⁹ The same attack could be launched against the type one *Buie* search.

In his respondent's brief, *Buie* argued that "[t]he State ha[d] cited no statistical or historical evidence that officers inside residences are especially susceptible to ambush."⁴⁶⁰ Moreover, *Buie* cited to a study which collected data on police in five south central states in the early 1970s:

The assaults were classified according to type: general (unplanned attacks arising out of heated, emotional situations with much opportunity for interaction and communication between officer and assailant before the attack), robbery-related (attacks developed from sudden confrontations between police and offender in robbery situations), and ambush (sudden surprise attacks with no advance interaction between officer and assailant).⁴⁶¹

The assaults were also "classified according to other variables including the location of assault," and "of 264 assaults in private residences, 259 (98.1%) were general, 2 (0.7%) were robbery-related, and 3 (1.1%) were ambushes."⁴⁶² *Buie* noted that this data did "not show whether any of those three ambushes was a confederate's surprise attack meant to foil an arrest."⁴⁶³ However, based upon the fact that only 1.1% of the attacks were ambushes, he was able to conclude "that if a police officer can expect to be assaulted in a private home, it is not likely to be by the kind of ambush that

⁴⁵⁹ *Thornton v. United States*, 541 U.S. 615, 625–26 (2004) (Scalia, J., concurring in judgment).

⁴⁶⁰ Brief for Respondent at 14, *Maryland v. Buie*, 494 U.S. 325 (1990) (No. 88-1369), 1989 WL 1127011.

⁴⁶¹ *Id.* at 14–15 (construing C. K. Meyer et al., *A Comparative Assessment of Assault Incidents: Robbery-Related, Ambush, and General Police Assaults*, 9 J. POLICE SCI. & ADMIN. 1, 3 (1981)).

⁴⁶² *Id.* at 15.

⁴⁶³ *Id.*

a protective sweep is intended to prevent.”⁴⁶⁴ Instead, Buie claimed that “[t]here is simply no objective support for a heightened sense of danger in these situations.”⁴⁶⁵ As support for this last claim, Buie noted that “[a] second premise on which the State’s position depends, that arrests for violent crimes necessarily carry a greater potential for danger, has already been rejected by the Court.”⁴⁶⁶

Indeed, the Court in *Buie* agreed with this argument, finding that “the existence of [an] arrest warrant implies nothing about whether dangerous third parties will be found in the arrestee’s house.”⁴⁶⁷ The problem for Buie was that the Court reached this conclusion as part of its holding that a protective sweep can be justified, not solely based upon a lawful arrest, but based upon reasonable suspicion of danger in addition to a lawful arrest.⁴⁶⁸ However, the problem for the government should a defendant or appellant challenge a type one *Buie* search after *Gant* is that, in the words of Justice Scalia, the above language from *Buie* indicates that the risk of arresting officers being attacked by confederates during home arrests is “far from obvious.”⁴⁶⁹

Therefore, just as “the Government’s inability to come up with even a single example of a handcuffed arrestee’s retrieval of arms or evidence from his vehicle”⁴⁷⁰ proved fatal for the *Belton* fiction, the government’s inability (so far) to come up with even a single example of a confederate attacking an arresting officer from a space immediately adjoining the place of arrest⁴⁷¹ should prove fatal to the first type of *Buie* search. In fact, to defend type one *Buie* searches, the government would need to come up with (at the very least) an example of a confederate attacking an arresting officer from a space immediately adjoining the place of arrest when the officer lacked even reasonable suspicion of such an attack, because the existing search warrant exception for protective sweeps authorizes a search for such confederates when there is reasonable suspicion.⁴⁷² This leads into the final point of comparison between the automobile and home arrest contexts.

⁴⁶⁴ *Id.*

⁴⁶⁵ *Id.*

⁴⁶⁶ *Id.* at 15 n.6.

⁴⁶⁷ *Buie*, 494 U.S. at 334 n.2.

⁴⁶⁸ *Id.*

⁴⁶⁹ *Thornton v. United States*, 541 U.S. 615, 626 (2004) (Scalia, J., concurring in judgment).

⁴⁷⁰ *Id.*

⁴⁷¹ See *supra* notes 460–64 and accompanying text.

⁴⁷² *Buie*, 494 U.S. at 334.

c. *Established Exceptions Authorize Home Searches when Safety or Evidentiary Concerns Demand*

In *Gant*, the Court found that a broad reading of *Belton* was unnecessary to protect law enforcement safety and evidentiary interests because two established exceptions to the search warrant requirement “authorize a vehicle search under additional circumstances when safety or evidentiary concerns demand.”⁴⁷³ The first exception was the automobile exception, and the second exception was the *Michigan v. Long* automobile frisk.⁴⁷⁴ The Court also included a *cf.* citation to the *Buie* protective sweep as support for the proposition that “there may be still other circumstances in which safety or evidentiary interests would justify a search.”⁴⁷⁵

As the *cf.* citation makes clear, *Buie* does not apply to automobile searches, but the *Buie* protective sweep is one example of an established exception to the search warrant requirement for home arrests that renders type one *Buie* searches unnecessary to protect law enforcement safety interests. As previously noted, the *Buie* protective sweep is the home counterpart to the *Michigan v. Long* protective sweep of an automobile.⁴⁷⁶ In *Gant*, the Court held that “*Michigan v. Long* permits an officer to search a vehicle’s passenger compartment when he has reasonable suspicion that an individual, whether or not the arrestee, is ‘dangerous’ and might access the vehicle to ‘gain immediate control of weapons.’”⁴⁷⁷ Meanwhile, under the *Buie* protective sweep, arresting officers can search areas which they reasonably believe harbor individuals posing a danger to those on the arrest scene.⁴⁷⁸ Also, of course, *Chimel* still automatically authorizes arresting officers to search the area from within which arrestees might gain possession of weapons or destructible evidence.⁴⁷⁹

Together, these existing exceptions authorize home searches under additional circumstances when law enforcement safety and evidentiary interests demand at least to the same extent as *Michigan v. Long* authorizes automobile searches. Moreover, an additional exception provides more protection in the home arrest context. As noted, many courts have extended

⁴⁷³ *Arizona v. Gant*, 129 S. Ct. 1710, 1721 (2009).

⁴⁷⁴ *Id.*

⁴⁷⁵ *Id.*

⁴⁷⁶ See *supra* notes 202–08 and accompanying text.

⁴⁷⁷ *Gant*, 129 S. Ct. at 1721 (citation omitted).

⁴⁷⁸ See *Maryland v. Buie*, 494 U.S. 325, 334 (1990).

⁴⁷⁹ See *Chimel v. California*, 395 U.S. 753, 762–63 (1969).

the reasoning of *Michigan v. Summers* to find that an arrest warrant per se carries with it the limited authority for officers to detain the occupants of the premises while a proper arrest is conducted.⁴⁸⁰ Combined with *Chimel* and the protective sweep portion of *Buie*, this means that, even without the type one *Buie* search, officers conducting a home arrest could still detain arrestees and search the area within their immediate control, automatically detain any other occupants, and search for other occupants if they have reasonable suspicion that they are present and pose a danger to those on the arrest scene. Without the type one *Buie* search, arresting officers simply could not search for other occupants without reasonable suspicion.

Arresting officers cannot so protect themselves during automobile arrests. Of course, officers conducting an automobile arrest can detain arrestees and search the area within their immediate control, as well as the passenger compartment, when they have reasonable suspicion that an individual, whether or not the arrestee, is dangerous and might access the vehicle to gain immediate control of weapons.⁴⁸¹ But arresting officers have no analogous authority to detain other occupants of the automobile or bystanders without reasonable suspicion. Extending the analysis from the aforementioned *Pennsylvania v. Mimms*,⁴⁸² the Court in *Maryland v. Wilson* found that “an officer making a traffic stop may order passengers to get out of the car pending completion of the stop.”⁴⁸³ But the Court in *Wilson* also “express[ed] no opinion upon” the issue of whether an officer may forcibly detain a passenger for the entire duration of the stop.⁴⁸⁴ Since *Wilson*, only a few courts have authorized such detentions.⁴⁸⁵ Conversely, even after *Wilson*, most courts have found that their state constitutions forbid arresting officers from even ordering non-arrestee passengers out of vehicles.⁴⁸⁶

What this means is that, in the context of automobile arrests completed without reasonable suspicion of danger, no courts hold that arresting officers can detain bystanders; only a few courts hold that arresting officers can detain non-arrestee passengers, and a few (more) courts hold that

⁴⁸⁰ See *supra* note 294 and accompanying text.

⁴⁸¹ See *Gant*, 129 S. Ct. at 1719.

⁴⁸² 434 U.S. 106, 111 n.6 (1977).

⁴⁸³ 519 U.S. 408, 415 (1997).

⁴⁸⁴ *Id.* at 415 n.3.

⁴⁸⁵ See, e.g., *Williams v. Commonwealth*, No. 1827-00-3, 2001 WL 826525, at *2 (Va. Ct. App. July 24, 2001) (noting that police officers can detain passengers until the completion of a traffic stop).

⁴⁸⁶ See, e.g., *State v. Sprague*, 824 A.2d 539, 544 (Vt. 2003) (citing cases from several states).

arresting officers cannot even order non-arrestee occupants out of vehicles. This also means that officers completing an automobile arrest could be subject to unpreventable danger that is preventable during a home arrest. As Justice Alito noted in his dissent in *Gant*, the Court was insouciant to two situations where neither existing exceptions nor the Court's construction of *Belton* would authorize a vehicle search despite safety concerns so demanding:

First, it is not uncommon for an officer to arrest some but not all of the occupants of a vehicle. . . . Second, there may be situations in which an arresting officer has cause to fear that persons who were not passengers in the car might attempt to retrieve a weapon or evidence from the car while the officer is still on the scene.⁴⁸⁷

For instance, in *Gant*, if Gant had a passenger, and the arresting officers did not have reasonable suspicion that the passenger was dangerous, they could not have detained him while they arrested Gant. Moreover, while the officers in *Gant* did arrest a man and a woman outside the house in front of which Gant was arrested, if the officers did not have probable cause to arrest them or reasonable suspicion that they were dangerous, they could not have detained them while they arrested Gant. Conversely, if the officers arrested Gant in the house and came across any of these people inside the house before arresting Gant, they could have detained them under the way that many courts have interpreted *Michigan v. Summers*, even in the absence of a type one *Buie* search.

The second existing exception mentioned by the Court in *Gant* was the automobile exception, which holds that “[i]f there is probable cause to believe that a vehicle contains evidence of criminal activity,” officers can search “any area of the vehicle in which evidence might be found.”⁴⁸⁸ Of course, the counterpart in the home arrest context is the search warrant. Indeed, while it was short lived, the Supreme Court’s opinion in *Trupiano v. United States* briefly held that arresting officers could not conduct a search incident to a lawful home arrest if it was practicable for those officers to procure a search warrant before completing the arrest.⁴⁸⁹ While

⁴⁸⁷ Arizona v. Gant, 129 S. Ct. 1710, 1731 n.2 (2009) (Alito, J., dissenting).

⁴⁸⁸ *Id.* at 1721 (majority opinion).

⁴⁸⁹ 334 U.S. 699, 708 (1948), overruled in part by *United States v. Rabinowitz*, 339 U.S. 56

the Court's opinion in *Rabinowitz* largely discredited *Trupiano*, its subsequent opinion in *Chimel* revitalized *Trupiano* in spirit, if not in holding.⁴⁹⁰

The Court in *Chimel* repudiated *Rabinowitz* for a few reasons. One reason was that "the approach taken in cases such as *Go-Bart*, *Lefkowitz*, and *Trupiano* was essentially disregarded by the *Rabinowitz* Court."⁴⁹¹ Another reason was that *Rabinowitz* (and *Harris*) "gave law enforcement officials the opportunity to engage in searches not justified by probable cause, by the simple expedient of arranging to arrest suspects at home rather than elsewhere."⁴⁹² Type one *Buie* searches give law enforcement officials the opportunity to engage in home searches not justified by probable cause or even reasonable suspicion, and they do so when officers could, as noted in *Chimel*, simply arrest suspects at some other location if they believe that a home arrest might be dangerous.⁴⁹³ Therefore, the existing (search) warrant exceptions in the home arrest context, like the arrestee's expectation of privacy and the law enforcement evidentiary and safety interests, do not provide a basis for saving the type one *Buie* search from the fate that befell the *Belton* fiction.

V. CONCLUSION

In *United States v. Rabinowitz*, Justice Frankfurter dissented from the majority's opinion and its expansive reading of the search incident to a lawful arrest exception, concluding that the decisions supporting that opinion "merely prove[d] how a hint becomes a suggestion, is loosely turned into dictum and finally elevated into a decision."⁴⁹⁴ His words finally commanded a majority of the Court in its landmark decision in *Chimel v. California*. Nevertheless, despite *Chimel*'s limiting twin rationales, the Court soon found itself creating what would become the *Belton* fiction and then piling fiction upon (*Belton*) fiction in *Thornton*, with the only difference between *Rabinowitz* and *Belton* being that, with the latter opinion, a dissent and not dictum was elevated into a decision. By reaffirming *Chimel* as defining the proper boundaries of searches incident to

(1950).

⁴⁹⁰ See *Chimel v. California*, 395 U.S. 752, 762–63 (1969).

⁴⁹¹ *Id.* at 760.

⁴⁹² *Id.* at 767.

⁴⁹³ *Id.*

⁴⁹⁴ *United States v. Rabinowitz*, 339 U.S. 56, 75 (1950) (Frankfurter, J., dissenting).

lawful arrests, the Court in *Gant* erased the *Belton* fiction and repudiated *Thornton* as an extension of *Chimel*.

While not mentioned in *Gant*, the first type of *Buie* search is actually a more perfect example of the problem identified by Justice Frankfurter. In an opinion single-mindedly focused on establishing the validity of protective sweeps supported by reasonable suspicion, the Court in *Buie* inserted a single line that suggested in dictum that arresting officers might be able to search spaces immediately adjoining the place of arrest without the requirement of probable cause or reasonable suspicion.⁴⁹⁵ From this dictum, courts have stretched the scope of these suspicionless searches down hallways, into separate rooms, and even into every room of small apartments and houses. These opinions clearly stretched the scope of type one *Buie* searches beyond the breaking point, meaning that courts should have concluded even before *Gant* that they grossly misconstrued the scope of the first type of *Buie* search. After *Gant*, this conclusion still holds, but courts should also use the same reasoning used to dismantle the *Belton* fiction to put to rest suspicionless *Buie* searches.

⁴⁹⁵ See 494 U.S. 325, 334 (1990).