No. 07-542

In The Supreme Court of the United States

STATE OF ARIZONA,

Petitioner,

vs.

RODNEY JOSEPH GANT,

Respondent.

On Writ Of Certiorari To The Arizona Supreme Court

PETITIONER'S REPLY BRIEF ON THE MERITS

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SUMMARY OF ARGUMENT

Gant misconstrues *Belton*'s bright-line rule by ignoring the fact that a search incident to arrest need only be a "contemporaneous incident" of the arrest. This Court's case law makes clear that although the search incident to arrest exception to the Fourth Amendment's probable cause and warrant requirements is premised upon the twin concerns of officer safety and preservation of evidence, neither exigency need exist in a particular case. The exigencies are subsumed in the search incident to arrest exception. Gant's strained construction of *Belton* to require that one of the exigencies exist at the precise moment that a law enforcement officer conducts a search incident to arrest is inconsistent with this Court's holdings, as well as with the holding of virtually every other court that has construed and applied *Belton*.

This Court should reject Gant's and his amici's suggestion that the Court should limit or overrule *Belton*. *Belton's* generalization is reasonable, sound, and far more workable and predictable than the totality of the circumstances analysis applied below by the Arizona Supreme Court. Moreover, *stare decisis* principles counsel against overruling *Belton*.

This Court should reject amicus National Association of Criminal Defense Lawyer's (NACDL) dangerous suggestion that *Belton* be limited to searches incident to arrest for nontraffic offenses only. Every full custody arrest presents a significant danger to the arresting officer. It is impossible to

predict how a person will react to being deprived of his freedom by being arrested, regardless of the basis for the arrest. This Court has repeatedly refused to accept the assertion that arrests for traffic offenses present less danger to arresting officers than arrests for more serious offenses.

Amicus National Association of Federal Defenders' (NAFD) statistical surveys comparing the number of assaults committed against law enforcement officers in states that follow *Belton's* bright-line rule to states that have rejected *Belton* on independent state-law grounds are unpersuasive and inconclusive. There are too many variables involved to give the statistics any credence. Rather, this Court should accept the avowals of the law enforcement amici that *Belton* has made officers safer in conducting their dangerous work on behalf of the citizens of this nation.

ARGUMENT

I. GANT MISCONSTRUES *BELTON'S* BRIGHT-LINE RULE BY IGNORING THE FACT THAT A SEARCH INCIDENT TO ARREST NEED ONLY BE A "CONTEMPORANEOUS INCIDENT" OF THE ARREST.

Gant asserts that the State of Arizona (Arizona) and its amici "propose a radical departure from this Court's Fourth Amendment jurisprudence." (Resp. Br. 1.) To the contrary, Arizona and its amici propose

maintaining a bright-line rule that this Court announced more than twenty-seven years ago in *New York v. Belton*, 453 U.S. 454 (1981). The *Belton* rule has provided consistent guidance to law enforcement and the public and has struck an appropriate balance between the exigencies arising from an arrest and competing privacy interests.

Gant maintains that the bright-line rule that this Court articulated in *Belton* and recently reaffirmed in *Thornton v. United States*, 541 U.S. 615 (2004), is not as bright as Arizona, its amici, and virtually every court that has applied *Belton* believe it to be. Rather, he contends that *Belton* merely holds that law enforcement officers may search the passenger compartment of a vehicle incident to the arrest of its recent occupant only if "any part of the car is arguably within the immediate control of its recent occupant" when the search is conducted. (Resp. Br. 15) (initial capitals altered to lower case).[1] This interpretation, however, incorrectly divorces the search from the arrest and dispenses with the requirement that the search need only be contemporaneous with the arrest.[2]

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[1] Gant effectively jettisons the Arizona Supreme Court majority's "totality of the circumstances" analysis. (*See* J.A. 165-66.) He asserts that *his* reading of *Belton* assures that "specific exigent circumstances exist." (Resp. Br. 10) (capitals altered to lower case).

[2] Gant repeatedly stresses the fact that the search of his car was "warrantless," asserting that Arizona's burden to justify the

(Continued on following page)

A. Pre-*Chimel* Cases Made Clear That A Search Incident To Arrest Need Only Be "Substantially Contemporaneous" With The Arrest.

Gant emphasizes that in *Chimel v. California*, this Court relied upon the twin rationales of officer safety and preservation of evidence in holding that a "search incident to arrest" may constitutionally be conducted only on "the arrestee's person and the area 'within his immediate control,'" 395 U.S. 752, 762-63 (1969). (Resp. Br. 11-12.) While this Court "construe[ed] that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence," *Chimel*, 395 U.S. at 763, it did not address the issue of the search's contemporaneity with the arrest. It was not necessary for the Court to

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search is somehow heightened by the lack of a warrant. (*See* Resp. Br. 10-15 & n.4.) However, a warrant is *never* required to search an automobile. *See, e.g., Maryland v. Dyson*, 527 U.S. 465, 466-67 (1999) (per curiam) (police need not obtain a warrant to search an automobile because "under our established precedent, the 'automobile exception' has no separate exigency requirement"); *California v. Carney*, 471 U.S. 386, 391 (1985) ("Even in cases where an automobile was not immediately mobile, the lesser expectation of privacy resulting from its use as a readily mobile vehicle justified application of the vehicular exception [to the warrant requirement]."). Under the "automobile exception" to the warrant requirement, only probable cause is required to search an automobile. *See, e.g., Dyson*, 527 U.S. at 466-67; *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam). Thus, to the extent that Gant relies upon law grounded on the Fourth Amendment warrant requirement, his reliance is misplaced.

do so in that case because the scope of the search far exceeded the area of Chimel's "immediate control." *Id.* at 768. The arresting officers "looked through the entire three-bedroom house, including the attic, the garage, and a small workshop." *Id.* at 754.

Although the Court did not address the contemporaneity issue in *Chimel*, it had previously made clear that a search incident to arrest need only be "substantially contemporaneous with the arrest and . . . confined to the immediate vicinity of the arrest." *Stoner v. California*, 376 U.S. 483, 486 (1964) (search of hotel room in California two days before arrest in Nevada not "incident to . . . arrest"); *see also Preston v. United States*, 376 U.S. 364, 367-68 (1964) (search of car after arrestees were transported to the police station and car was towed to a garage "was too remote in time or place to have been made as incidental to the arrest"). Indeed, the same day that this Court decided *Chimel*, it reaffirmed the "substantially contemporaneous" standard for searches incident to arrest. *See Shipley v. California*, 395 U.S. 818, 819-20 (1969) (per curiam) (quoting *Stoner*, 376 U.S. at 486). And only a year before this Court decided *Belton*, it held that a search incident to arrest could actually precede the arrest. *See Rawlings v. Kentucky*, 448 U.S. 98, 111 (1980) ("Where the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.").

B. The Exigencies Of Officer Safety And Preservation Of Evidence Underlying The Search Incident To Arrest Exception Need Not Exist In Any Given Case.

In *United States v. Robinson*, a police officer arrested Robinson for driving on a revoked license and searched his clothing incident to the arrest, finding heroin in his coat pocket. 414 U.S. 218, 220-23 (1973). The lower court held that the search of Robinson's clothing incident to his arrest was not justified because no "evidence or fruits" of the offense of driving on a revoked license could be found on Robinson and the officer had no reason to believe that he was armed. *Id*. at 233-34. This Court reversed, stating that it had a "fundamental disagreement" with the lower court's "suggestion 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." *Id*. at 235. This Court made clear that "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id*. In other words, the exigencies discussed in *Chimel* are subsumed in the search incident to arrest exception to the Fourth Amendment's probable cause and warrant requirements. *See id*. "It is the fact of the

lawful arrest which establishes the authority to search. . . ." *Id.*[3]

C. Neither *Chadwick* Nor *Sanders* Is Relevant.

In an attempt to drive a wedge between an arrest and a contemporaneous search incident to that arrest, Gant relies upon snippets of dicta from *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991), and *Arkansas v. Sanders*, 442 U.S. 753 (1979), *abrogated by California v. Acevedo*, 500 U.S. 565 (1991). (Resp. Br. 13-15.) In *Chadwick*, the Court wrote that "the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." 433 U.S. at 15. In fact, the search occurred after police took Chadwick, his associates, and the footlocker to a federal building. *Id*. at 4. Thus, *Chadwick* is simply inapposite.

In *Sanders*, police stopped a taxi in which Sanders and an associate were passengers. 442 U.S. at

[3] Gant relegates *Robinson* to a footnote, claiming that it "was limited to searches of the arrestee's person." (Resp. Br. 13 n.5.) While it is true that *Robinson* involved the search of a person incident to arrest, *Belton* clearly applied the principles in that case to automobile searches incident to arrest. 453 U.S. at 458-61. *Robinson* cannot be so easily dismissed.

755. At the request of the police, the taxi driver opened the trunk of the vehicle where police found and opened a green suitcase that contained marijuana. *Id*. This Court held that the search violated the Fourth Amendment because the police had failed to obtain a warrant to search the suitcase. *Id*. at 763-64. In a footnote, the Court stated that it had *not* considered "the constitutionality of searches of luggage incident to the arrest of its possessor." *Id*. at 763 n.11. The Court then remarked, "The State has not argued that respondent's suitcase was searched incident to his arrest, and it appears that the bag was not within his 'immediate control' at the time of the search." *Id*. The trunk of an automobile does *not* fall within *Belton's* bright-line rule. *Belton*, 453 U.S. at 460 n.4. Like *Chadwick, Sanders* is inapposite.

Finally, both *Chadwick* and *Sanders* predated this Court's pronouncement of its bright-line rule in *Belton*. And in *Belton*, this Court specifically rejected the New York Court of Appeals' reliance upon *Chadwick* and *Sanders*, pointing out that "neither of those cases involved an arguably valid search incident to a lawful custodial arrest." 453 U.S. at 461-62.

D. *Belton* Clearly Holds That A Search Need Only Be A "Contemporaneous Incident" Of An Arrest.

Having misconstrued the framework that underlies a search incident to a lawful arrest by artificially divorcing the search from the arrest itself, Gant

asserts that "*Belton* merely created the legal fiction that if some part of the passenger compartment is within a recent occupant's reach, then all of it is within his reach, including any containers therein." (Resp. Br. 17.) He maintains that in *Belton*, this Court required that two "conditions" (or "triggers") be met before a law enforcement officer may conduct a search of the passenger compartment of a vehicle incident to a lawful arrest: (1) "the car [was] arguably within the arrestee's immediate control" at the precise moment of the search; and (2) the arrestee was a "recent occupant" of the vehicle. (*Id.* 18-19.) Gant asserts that the first condition was met in *Belton* because "the arrestees stood unrestrained, next to the car during the search and thus the car was conceivably accessible to them when the officer searched it." (*Id.* 17.) That assertion is at odds with how this Court and the New York Court of Appeals viewed the vehicle's accessibility at the time that the officer made the arrests, then searched the vehicle.

In its decision finding that the search violated the Fourth Amendment, the New York Court of Appeals wrote that "[t]he car was in a secure place where it could have been easily guarded, its occupants under arrest and *safely away from the vehicle*, their removal to the police station imminent." *People v. Belton*, 407 N.E.2d 420, 423 (N.Y. 1980), *rev'd by New York v. Belton*, 453 U.S. 454 (1981) (emphasis added). This Court wrote that after arresting Belton and the other recent occupants of the vehicle, the officer "patted down each of the men and 'split them

up into four separate areas of the Thruway at this time so they would not be in physical touching area of each other,'" then searched the vehicle's passenger compartment. *Belton*, 453 U.S. at 456. In his dissent, Justice Brennan pointed out that neither Belton nor any of the other recent occupants could "possibly reach" the vehicle at the time of the arrest and subsequent search. 453 U.S. at 466 (Brennan, J., dissenting). In fact, Justice Brennan wrote that "[u]nder the approach taken today, 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 . . . ." *Id.* at 468 (Brennan, J., dissenting).

Furthermore, this Court clearly stated its holding: "[W]e hold that when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, *as a contemporaneous incident of that arrest*, search the passenger compartment of that automobile." *Id.* at 460 (emphasis added). This Court subsequently stated in *Michigan v. Long* that "the 'bright line' that we drew in *Belton* clearly authorizes [the search of a passenger compartment of an automobile] *whenever* officers effect a custodial arrest." 463 U.S. 1032, 1049 n.14 (1983) (emphasis added). In *Florida v. Thomas*, this Court wrote that in *Belton,* "we established a 'bright-line' rule permitting a law enforcement officer who has made a lawful custodial arrest of the occupant of a car to search the passenger compartment of that car *as a contemporaneous incident of the arrest*." 532 U.S. 774, 776 (2001)

(emphasis added). In *Thornton*, this Court reaffirmed its bright-line rule and made clear that the search need only be a contemporaneous incident of the arrest:

> The need for a clear rule, readily 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. Once an officer determines that there is probable cause to make an arrest, it is reasonable to allow officers to ensure their safety and to preserve evidence by searching the entire passenger compartment.

541 U.S. at 622-23 (emphasis added).

Finally, courts across the country have fully understood *Belton*'s bright-line rule to require only that the search of a vehicle's passenger compartment incident to arrest be substantially contemporaneous with the arrest of the vehicle's recent occupant and have been virtually unanimous in upholding such searches where the arrestee is handcuffed and placed in a patrol car prior to the search of the vehicle. (*See* Pet. Cert. 15-17; U.S. Br. 19-20 & n.1; States' Br. 8-14 & n.3.) The fact that a search need only be "substantially contemporaneous" with the arrest, *Stoner*, 376 U.S. at 486, or "a contemporaneous incident of that arrest," *Belton*, 453 U.S. at 460, cannot simply be read out of this Court's case law governing searches incident to arrest.

II. THIS COURT SHOULD DECLINE GANT'S INVITATION TO OVERRULE *BELTON*.

The crux of Gant's and his amici's argument is that *Belton* should be limited or overruled. (Resp. Br. 32.) Gant alleges three "special justifications" for overruling *Belton*: (1) *Belton's* generalization is empirically false; (2) *Belton's* bright-line rule does not eliminate line-drawing inquiries; and (3) vehicle searches incident to arrest are not per se reasonable. (Resp. Br. 32, 35, 38, 42.)

A. *Belton's* Generalization That The Passenger Compartment Of An Automobile Is Within The Immediate Control Of A Recent Occupant Is Reasonable.

1. Bright-Line Rules Are Desirable In Regulating Police Conduct, Particularly When Officer Safety Is At Risk.

Gant asserts that *Belton's* "bright-line rule is an anomaly in this Court's Fourth Amendment jurisprudence." (Resp. Br. 36.) Not so. This Court has traditionally rejected the adoption of bright-line rules concerning Fourth Amendment issues that necessarily turn upon the specific facts of a given case, such as the voluntariness of a person's consent to search, *Ohio v. Robinette*, 519 U.S. 33, 39 (1996), and whether a seizure has occurred, *United States v. Drayton*, 536 U.S. 194, 201 (2002). Those issues by their very nature are not amenable to per se rules. However, this Court has adopted bright-line rules

governing police conduct, particularly where officer safety is at risk. *See, e.g., Wyoming v. Houghton*, 526 U.S. 295, 304-07 (1999) (adopting bright-line rule permitting search of a passenger's belongings found in car even though probable cause to search relates only to the driver); *Maryland v. Wilson*, 519 U.S. 408, 413-15 (1997) (adopting bright-line rule allowing police to order all passengers out of a stopped vehicle, regardless of whether they pose a risk of danger); *Michigan v. Summers*, 452 U.S. 692, 702-05 (1981) (adopting bright-line rule permitting police to detain the occupants of a premises while search warrant is being executed); *Robinson*, 414 U.S. at 235 (adopting bright-line rule authorizing a search incident to arrest, regardless whether there is any reason to believe that person is armed or possesses evidence). (*See also* U.S. Br. 24-26.)

In *Belton*, which relied in large part on *Robinson* in adopting its bright-line rule, this Court wrote that "[i]n short, '[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" 453 U.S. at 458 (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). And just recently, in *Virginia v. Moore*, this Court wrote that "[i]n determining what is reasonable under the Fourth Amendment, we have given great weight to the 'essential interest in readily administrable rules.'" 128 S. Ct. 1598, 1606 (2008) (quoting

Atwater v. City of Lago Vista, 532 U.S. 318, 347 (2001)).

While it is true that bright-line rules are not suitable in many Fourth Amendment contexts, they are desirable – indeed, essential – in determining the scope of the search of a vehicle incident to the arrest of its recent occupant. *See Washington v. Chrisman*, 455 U.S. 1, 7 (1982) ("Every arrest must be presumed to present a risk of danger to the arresting officer."); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (arresting automobile occupants presents "inordinate risk" to law enforcement officers); *Robinson*, 414 U.S. at 234 n.5 ("The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty . . . ."). In addition to the paramount concern for officer safety, "[t]his Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances." *Oliver v. United States*, 466 U.S. 170, 181 (1984). This Court has "traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review." *Atwater*, 532 U.S. at 347.

2. *Belton's* Generalization Is Sound.

Gant asserts that the generalization upon which this Court based *Belton's* bright-line rule is empirically false. (Resp. Br. 35.) His assertion is premised on his refusal to accept that a search incident to arrest need only be "a contemporaneous incident of that arrest," *Belton*, 453 U.S. at 460. (*See* Resp. Br. 37-38.) However, as previously discussed, a search incident to arrest cannot be divorced from the arrest itself. The search is part and parcel of the arrest. This Court made clear in *Belton* that its "generalization" is that the passenger compartment of an automobile is "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][,]' " so 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." 453 U.S. at 460 (quoting *Chimel*, 395 U.S. at 763) (emphasis added).

Moreover, whether an arrestee is "secured" is simply a matter of degree. Is the arrestee sufficiently secured if he is handcuffed but in close proximity to the automobile when the search incident to arrest is conducted? Is the arrestee sufficiently secured if he is handcuffed and positioned twenty feet from the automobile when the search incident to arrest is conducted? Is the arrestee sufficiently secured if he is handcuffed and placed in a patrol car when the search incident to arrest is conducted? What if there

are other recent occupants that police have no justification to secure? *Belton* sought to avoid these "'sorts of ifs, ands, and buts requiring the drawing of subtle nuances and hairline distinctions'" by adopting "a straightforward rule, easily applied and predictably enforced." 453 U.S. at 458, 459 (quoting Wayne R. LaFave, *"Case-By-Case Adjudication" Versus "Standardized Procedures": The* Robinson *Dilemma*, 1974 S. Ct. Rev. 127, 141).

Even when an arrestee is handcuffed and secured in the back seat of a police car, danger still exists. In 2007 alone there were at least ninety-three reported instances of handcuffed arrestees escaping after being secured in the back seat of a police car. *See* Okl. Highway Patrol, *Trooper Trap: 2007 – Publicized Escapes*, http://www.oktrooper.com/examples-2007.html (2008).[4] While securing an arrestee in a police car certainly reduces the risk that the arrestee could access his vehicle to obtain a weapon or destroy evidence, it does not eliminate the risk. A *Belton* search *does* eliminate the risk.

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[4] "Trooper Trap," a manufacturer of prisoner seatbelt alarms, compiled the escape summaries and accompanying news links on the Oklahoma Highway Patrol web site. Trooper Trap is neither endorsed by, nor affiliated with, the Oklahoma Highway Patrol. The number of escapes (ninety-three) reflects only those instances where it can be determined through the incident summary that the arrestee was *handcuffed* and secured in the *back* seat of a police car. The actual number of such escapes is likely greater.

At bottom, the generalization upon which this Court based *Belton* remains sound. "A custodial arrest is fluid and '[t]he danger to the police officer flows from *the fact of the arrest*, and its attendant proximity, stress, and uncertainty . . . .'" *Thornton*, 541 U.S. at 621 (quoting *Robinson*, 414 U.S. at 234-35 & n.5); *see also Chrisman*, 455 U.S. at 7 ("Every arrest must be presumed to present a risk of death to the arresting officer."); *Mimms*, 434 U.S. at 110 ("We think it too plain for argument that the State's proffered justification – the safety of the officer – is both legitimate and weighty.").

3. *Chimel* Is Based Upon A Similar Generalization.

Gant asserts that "[t]he commonplace practice of securing the arrestee in a police cruiser plainly puts the passenger compartment beyond the arrestee's 'immediate control.'" (Resp. Br. 37.) Justice Scalia expressed the same view in his concurring opinion in *Thornton*. *See* 541 U.S. at 627-28 (Scalia, J., concurring in the judgment). However, as discussed in the Opening Brief, *Chimel* is based upon a similar generalization. (Pet. Br. 41-43.) Gant and his amici fail to address that conundrum.

Just as this Court had no occasion in *Chimel* to discuss the issue of contemporaneity, it likewise had no occasion to discuss the issue of restraint of the arrestee during the course of a search incident to arrest. *See* 395 U.S. at 762-68. Nevertheless, it is

difficult to imagine that this Court believed that police officers would leave an arrestee unsecured while searching the area under the arrestee's "immediate control." It stands to reason that a police officer would necessarily secure an arrestee *before* searching the area under his immediate control. *See Thornton*, 541 U.S. at 627 (Scalia, J., concurring in the judgment) ("If '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."); *see also* Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 Wis. L. Rev. 657, 665 (citing police training materials that included the following statements: "[t]horoughly search the suspect after applying the handcuffs" and "[a] search should not be initiated in arrest situations until the individual is handcuffed and incapacitated as much as possible."). Lower courts have treated *Chimel* as a bright-line rule, upholding searches incident to a lawful arrest even after the arrestee has been secured and could not feasibly access the "immediate control" area.[5]

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[5] *See, e.g., United States v. Abdul-Saboor*, 85 F.3d 664, 670-71 (D.C. Cir. 1996) (room in which arrestee was handcuffed and seated in chair prior to search was within his "immediate control"); *United States v. Queen*, 847 F.2d 346, 349, 352-54 (7th Cir. 1988) (arrestee guarded by two armed officers, hands cuffed behind his back, prior to search of closet three feet away); *Davis v. Robbs*, 794 F.2d 1129, 1130-31 (6th Cir. 1986) (arrestee handcuffed and placed in squad car prior to seizure of rifle in

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Should this Court determine that *Belton* was wrongly decided because the generalization underlying its bright-line rule is not sound, that determination necessarily would undermine *Chimel's* rationale as well. *See Moskovitz*, 2002 Wis. L. Rev. at 677 ("The problem [with *Belton's* generalization] can be traced back to the flaw in *Chimel* itself."). If *Chimel* is undermined, this Court would have to reexamine the proper scope of searches incident to arrest in all contexts, an issue with which this Court had struggled for fifty years before *Chimel*. 395 U.S. at 755-62.

B. The *Belton* Rule Is More Workable And Predictable Than A Case-By-Case Totality Of The Circumstances Analysis.

Gant asserts that the *Belton* rule "does not eliminate line drawing," and he cites lower court cases that have reached inconsistent conclusions concerning determinations of "recent occupant," *Thornton*, 541 U.S. at 622, and whether a search is a

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house); *United States v. Silva*, 745 F.2d 840, 847 (4th Cir. 1984) (arrestees handcuffed and guarded by agents prior to search of room); *United States v. Palumbo*, 735 F.2d 1095, 1096-97 (8th Cir. 1984) (arrestee surrounded by several officers and handcuffed prior to search of room); *United States v. Roper*, 681 F.2d 1354, 1357-59 (11th Cir. 1982) (arrestee handcuffed in hallway of motel and escorted inside room by agents prior to search of briefcase); *see also Moskovitz*, 2002 Wis. L. Rev. at 690 ("Arguably, like it or not, to be faithful to *Chimel*, lower courts must adopt the 'time of arrest' approach.").

"contemporaneous incident of th[e] arrest," *Belton*, 453 U.S. at 460. (Resp. Br. 39-41 & n.20.) While no bright-line rule can totally eliminate inconsistencies in application, the *Belton* rule is far more workable and predictable than a "totality of the circumstances" analysis conducted on a case-by-case basis. (J.A. 165-66.) *See also Oliver*, 466 U.S. at 181 ("This Court repeatedly has acknowledged the difficulties created for courts, police, and citizens by an ad hoc, case-by-case definition of Fourth Amendment standards to be applied in differing factual circumstances."). Determining whether someone is a "recent occupant" of a vehicle and whether the search is "contemporaneous" with the arrest involves an assessment of terms that are commonly understood by law enforcement officers and the general public. Any possible confusion regarding those terms pales in comparison to the difficulty that would ensue in making a case-by-case totality of the circumstances analysis of the exigencies of a particular arrest. To the extent this Court believes that lower courts require further guidance, it can provide such guidance without abandoning *Belton*, thereby leaving police officers and citizens lost at sea in determining the scope of Fourth Amendment protection. *See Belton*, 453 U.S. at 459-60 ("When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.").

C. The Search Of An Automobile As A Contemporaneous Incident Of The Arrest Of A Recent Occupant Is Reasonable.

Gant asserts that the search of an automobile as a contemporaneous incident of the arrest of a recent occupant is "not *per se* reasonable." (Resp. Br. 42) (initial capitals altered to lower case). That is simply not true. This Court has held that a search incident to arrest "is not only an exception to the warrant requirement of the Fourth Amendment, but it is also a 'reasonable' search under that Amendment." *Robinson*, 414 U.S. at 235. "It is the fact of the lawful arrest which establishes the authority to search . . . ." *Id.*; *see also Belton*, 453 U.S. at 461 ("'A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification.'") (quoting *Robinson*, 414 U.S. at 235). Therefore, a search of the passenger compartment of an automobile as a contemporaneous incident of the lawful arrest of its recent occupant is "*per se* reasonable." *See Thornton*, 541 U.S. at 620 ("'[W]hen 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.'") (quoting *Belton*, 453 U.S. at 460). In adopting a bright-line rule permitting the search of the passenger compartment of an automobile incident to the arrest of a recent occupant, this Court properly

balanced an arrestee's significantly reduced expectation of privacy in the automobile against the paramount interest of officer safety and the interest in preserving evidence. (*See* Pet. Br. 23-27; U.S. Br. 27-28.)

Gant attacks this Court's conclusion by asserting that "this Court expressly has recognized that an automobile search entails 'a *substantial* invasion of privacy.'" (Resp. Br. 42 [quoting *United States v. Ortiz*, 422 U.S. 891, 896 (1975)]) (emphasis supplied by Gant). However, in *Ortiz,* this Court wrote that "[a] search, *even of an automobile*, is a substantial invasion of privacy." 422 U.S. at 896 (emphasis added). The Court then noted that "[t]he degree of the invasion of privacy in an automobile search may vary with the circumstances, as there are significant differences between 'an automobile and a home or office.'" *Id*. n.2 (quoting *Chambers v. Maroney*, 399 U.S. 42, 48 (1970)). Thus, in *Ortiz*, this Court noted that one's expectation of privacy in an automobile is "significant[ly]" less than it is in a home or office. *Id*. Furthermore, Gant's reliance upon *Chadwick* (Resp. Br. 43) is misplaced because in *Chadwick*, "the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest or as justified by any other exigency." 433 U.S. at 15. Moreover, this Court held that a *search warrant* was required to search the footlocker. *Id*. at 15-16.

As Arizona and the United States have discussed, a person retains a "limited" expectation of privacy in the automobile in which he was a recent occupant. (Pet. Br. 23-24; U.S. Br. 27-30.) And that limited expectation of privacy is "diminished further when the occupants are placed under custodial arrest." *Robbins v. California*, 453 U.S. 420, 431 (1981) (Powell, J., concurring in the judgment), *overruled on other grounds by United States v. Ross*, 456 U.S. 798 (1982). That minimal expectation of privacy pales in comparison to the paramount interest in officer safety, coupled with the interest in preserving evidence. *See id*. This Court struck the proper balance in *Belton* by pronouncing the bright-line rule that police may search the passenger compartment of an automobile as a contemporaneous incident of the arrest of an occupant or recent occupant. Gant provides no valid rationale for this Court to revisit that determination.

D. *Stare Decisis* Principles Warrant Affirmance Of *Belton* And *Thornton*.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). Therefore, overruling precedent requires "'special justification.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)). And a party who asks this Court "to reconsider not one but two prior decisions

bears a heavy burden of supporting such a change in [the Court's] jurisprudence." *Walker v. Armco Steel Corp*., 446 U.S. 740, 749 (1980).

Arizona and its fellow states have thoroughly discussed the prudential and pragmatic reasons that this Court should refuse to overrule *Belton* and *Thornton*. (Pet. Br. 37-43; States' Br. 6-24.) In a nutshell, *Belton's* bright-line rule (1) is workable and predictable; (2) promotes the safety of law enforcement officers and the public at large; (3) has been relied upon by law enforcement in training and in the field to the point that it has become routine police practice; (4) has been enshrined as part of state law[6] in the overwhelming majority of states; and (5) has not been called into question by changed circumstances warranting its reconsideration. An arrestee's minimal expectation of privacy in the passenger compartment of an automobile in which he was a recent occupant pales in comparison to these compelling reasons to preserve *Belton's* bright-line rule.

[6] Of particular significance is the fact that several states have seen fit to adopt *Belton's* bright-line rule in interpreting their own state constitutional search and seizure provisions. (States' Br. 14.)

III. THIS COURT SHOULD REJECT NACDL'S SUGGESTION TO LIMIT *BELTON* SEARCHES INCIDENT TO ARREST TO NONTRAFFIC OFFENSES.

Gant's amicus, National Association of Criminal Defense Lawyers (NACDL), suggests that this Court limit *Belton* searches to nontraffic arrests. This Court should reject this suggestion out of hand.

"Every arrest must be presumed to present a risk of danger to the arresting officer." *Chrisman*, 455 U.S. at 7. This Court has "recognized that '[t]he danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress, and uncertainty, and *not from the grounds for arrest*.'" *Knowles v. Iowa*, 525 U.S. 113, 117 (1998) (quoting *Robinson*, 414 U.S. at 234 n.5) (emphasis added). "[P]otential dangers lurk[ ] in *all* custodial arrests . . . ." *Chadwick*, 433 U.S. at 14-15 (emphasis added). This Court has "expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations." *Mimms*, 434 U.S. at 110 (citing *Robinson*, 414 U.S. at 234).

NACDL's reliance upon *Knowles* is misplaced. (*See* NACDL Br. 24.) Knowles was stopped and cited (*not* arrested) for speeding, and the arresting officer "conducted a full search of the car[,]" finding contraband. 525 U.S. at 114. This Court refused to expand *Robinson's* (and *Belton's*) "'bright-line rule,' which was based on the concern for officer safety and

destruction or loss of evidence, but which did not depend in every case upon the existence of either concern," to a "search incident to citation." *Id*. at 118-19. This Court wrote that "the concern for officer safety" still existed "in the case of a routine traffic stop" even when an arrest was not made, and that officers could order the driver and passengers out of the vehicle, conduct a "'*Terry* patdown'" of the driver, the passengers, and the passenger compartment of the vehicle if necessary, "and even conduct a full search of the passenger compartment, including any containers therein, pursuant to a custodial arrest." *Id*. at 117-18 (citing *Belton*, 453 U.S. at 460). This Court went on to point out that Iowa had not "shown the second justification for the authority to search incident to arrest – the need to discover and preserve evidence." *Id*. at 118. This Court noted that evidence of "excessive speed" could not be found on Knowles' person "or in the passenger compartment of the car." *Id*.

In *most* arrests for traffic-related offenses, the preservation of evidence justification for a search incident to arrest will not exist.[7] However, the paramount

[7] That is *not* true in this case. Under Arizona law, a person is guilty of driving on a suspended license only if "the driver knew or should have known that the license has been suspended." *State v. Williams*, 698 P.2d 732, 734 (Ariz. 1985); *see also State v. Cifelli*, 155 P.3d 363, 366-69 (Ariz. App. 2007). Officer Griffith testified that "[l]icense paperwork from the court system" could possibly be found in the vehicle. (J.A. 73-74.) Officer Reed testified that it would not be unusual to find

(Continued on following page)

concern for officer safety exists in "[e]very arrest." *Chrisman*, 455 U.S. at 7. Indeed, in *Knowles* this Court made clear that the danger to law enforcement officers flowed "'from the fact of the arrest . . . and not from the grounds for arrest.'" 525 U.S. at 117 (quoting *Robinson*, 414 U.S. at 234 n.5). A person being subjected to a full custody arrest for a traffic-related offense (i.e., driving under the influence, reckless driving, driving on a suspended or revoked license) is just as likely to react unpredictably to being deprived of his freedom as would a career burglar or thief who might view an arrest as simply a cost of doing business. "There is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger." *Chrisman*, 455 U.S. at 7.

This Court has recently reiterated that "[t]he interests justifying search are present *whenever* an officer makes an arrest." *Moore*, 128 S. Ct. at 1607 (emphasis added). In *Moore*, police officers arrested Moore for driving on a suspended license, searched him incident to arrest, and found cocaine and cash. *Id*. at 1601-02. Under state law, the arrest was illegal and Moore should have only been issued a summons.

"notification from Motor Vehicle Division that [Gant's] license had been suspended" or "a citation for a suspended license that would show that he had knowledge that his driver's license was suspended" in the vehicle. (J.A. 111.) Thus, Gant's assertion that the "officers had no reason to believe that 'evidence relevant to the crime of arrest might be found' in [his] car" (Resp. Br. 47) is inaccurate.

Id. at 1602. In rejecting Moore's assertion that the search incident to arrest violated the Fourth Amendment, this Court wrote that "[t]he state officers *arrested* Moore, and therefore faced the risks that are 'an adequate basis for treating all custodial arrests alike for purposes of search justification.'" *Id*. at 1608 (quoting *Robinson*, 414 U.S. at 235).

This Court should reject NACDL's dangerous suggestion that *Belton* searches be limited to arrests for nontraffic offenses.

IV. NAFD'S STATISTICAL SURVEYS ARE UNPERSUASIVE.

Gant's amicus, National Association of Federal Defenders (NAFD), presents this Court with statistical surveys from states that have rejected *Belton's* bright-line rule on independent state-law grounds. It concedes that the statistics are "not definitive." (NAFD Br. 7.) Nevertheless, it maintains that the statistics do not demonstrate that police officers face a higher risk of assault in states that have rejected *Belton's* bright-line rule. (*Id.*) Even then, it acknowledges that "the data do not distinguish between the effects of the prohibition against automatic vehicle searches and the effects of a multitude of other factors on the number of assaults against police officers." (*Id.* at 11.)

There are simply too many variables involved to give any credence to NAFD's statistical surveys.

Rather, this Court should accept the avowal of the law enforcement amici – Americans for Effective Law Enforcement, the International Association of Chiefs of Police, the International Sheriff's Association, The Arizona Law Enforcement Legal Advisors' Association, and the Arizona Association of Chiefs of Police – that *Belton's* bright-line rule "has made officers more *effective* and *safe* by allowing a fleeting window of authority that minimally impacts the privacy interests of arrested persons." (AELE et al. Br. 11.)

CONCLUSION

This Court should reverse the judgment of the Arizona Supreme Court and hold that the search of the passenger compartment of Gant's vehicle was a valid search incident to his arrest.

Respectfully submitted,

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