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The United States Supreme Court's Ruling in *Arizona v. Gant*
Implications for Law Enforcement Officers

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On April 21, 2009, the United States Supreme Court decided *Arizona v. Gant*[1], in which it defined an officer's authority to conduct a search of the passenger compartment of a vehicle after arresting an occupant or a recent occupant. The Court ruled that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. This memorandum discusses the decision and its impact on law enforcement practices.

The Evolution of Searches Incident to Arrest

Chimel, Belton, and Thornton. The Supreme Court first established the search incident to arrest ("SIA") exception to the Fourth Amendment's warrant requirement in *Chimel v. California*, 395 U.S. 752 (1969). *Chimel* held that police may, incident to arrest, search the area within an arrestee's "immediate control," which is defined as the area from within which the arrestee might gain possession of a weapon or destructible evidence. The purposes of this exception are to protect arresting officers and safeguard evidence of the offense that an arrestee might conceal or destroy. In *New York v. Belton*, 453 U.S. 454 (1981), the Court was asked to determine what part of a *vehicle* officers may search incident to the arrest of one of its occupants. The *Belton* Court held that when an SIA of a vehicle is justified, the entire passenger compartment and any containers therein may be searched. This bright-line rule was created to avoid arguments about which areas inside a vehicle's passenger compartment were within an occupant's reach. In *Thornton v. U.S.*, 541 U.S. 615 (2004), the Court added that an SIA of a vehicle may be justified even if an occupant has gotten out of the vehicle, closed the door, and walked a short distance away before being arrested. The question remaining, however, was whether *Chimel*, *Belton* and *Thornton* authorized an SIA of a vehicle *regardless* of the arrestee's ability to access the passenger compartment following the arrest. *Arizona v. Gant* presented a perfect opportunity for the Court to answer that question.

Arizona v. Gant: The Facts and the Holding

Shortly after parking and exiting his vehicle, Gant was arrested for driving on a suspended license. He was handcuffed and locked in a patrol car before officers searched the passenger compartment of his car and found a firearm and cocaine. In his motion to suppress the evidence, Gant argued that because it was not possible for him to access the vehicle to gain

control of a weapon or evidence, the search of his vehicle was not a reasonable "search incident to arrest."

The Supreme Court agreed with Gant, emphasizing that *Chimel v. California* established the purposes and scope of searches incident to arrest. *Chimel* authorizes a search of the area from which an arrestee might gain control of a weapon or destructible evidence; it does not permit a search of areas outside the arrestee's reach. Thus, police are authorized to search the passenger compartment of a vehicle incident to arrest under *Chimel* only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search. With that said, the Court noted, "it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains." In such a rare case, however, an SIA of the passenger compartment would be reasonable under the Fourth Amendment.

In a seeming attempt to garner Justice Scalia's deciding vote, the majority adopted an additional search incident to arrest justification entirely apart from *Chimel*. In *U.S. v. Thornton*, Justice Scalia wrote a concurring opinion in which he argued that *Chimel* should not govern searches of vehicles incident to arrest because "sensible police procedures" will always prevent the arrestee from accessing the vehicle.[2] Instead, Justice Scalia advocated broader search authority, which would allow a search of the passenger compartment whenever it is "reasonable to believe evidence relevant to the crimes of arrest might be found" therein. While his opinion did not carry the day in *Thornton*, his search justification was adopted as part of the holding in *Gant*. Therefore, in addition to searches justified by the arrestee's ability to access the vehicle, officers may also search the passenger compartment following the arrest of a recent occupant when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.

Reading Between the Lines: The Current State of SIAs

Gant will have an immediate impact on the day-to-day operations of law enforcement officers in the field. It is important to ascertain the effect of the Court's opinion not only on vehicle searches, but other searches incident to arrest, as well. Unfortunately, the Court left many questions unanswered. Although *Gant* does not provide explicit guidance on some of the issues below, this article makes an attempt to bring current practice in line with the Court's expressed understanding of *Chimel*, *Belton*, and *Thornton*. Of course, officers should always consult their agency legal advisors to determine how they are to apply the law of their jurisdiction in accordance with agency policy.

Searches of the Arrestee's Person: No Change

"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. . . . 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."[3] "Authority to search the arrestee's own person is beyond question,"[4] and this authority does not require the officer to articulate any likelihood that weapons or evidence would

be found on the arrestee.[5] A custodial arrest supported by probable cause is sufficient justification.[6]

Searches of Containers Located on the Arrestee's Person: No Change

Containers on an arrestee's person, such as a wallet[7] or a cigarette pack[8], are within the arrestee's "immediate control" for purposes of a search incident to arrest and may be opened and examined.[9] *Belton* rejected the argument that the officer's seizure of an item removes it from the arrestee's immediate control and negates the justification to search it: "[U]nder this fallacious theory no search or seizure incident to a lawful custodial arrest would ever be valid; by seizing an article even on the arrestee's person, an officer may be said to have reduced that article to his 'exclusive control.'"[10]

Searches of the "Lunging Area" or "Wingspan" Following a Non-Vehicular Arrest: Justified If Arrestee Could Access the Area at the Time of the Search

For many years there has been inconsistency among federal and state jurisdictions regarding searches of a subject's "lunging area" following a custodial arrest. In most jurisdictions, arresting officers have been permitted to search the place of arrest and containers therein even after the arrestee has been secured or removed from the area, so long as the area was within the arrestee's control *at the time of the arrest.*[11] The minority approach, however, requires some showing that the area to be searched was accessible to the arrestee *at the time of the search.*[12] Furthermore, those minority jurisdictions require that "in determining if an object is 'conceivably accessible to the arrestee,' we are to assume that 'he was neither an acrobat [nor] a Houdini.'"[13]

The *Gant* Court did not specifically address non-vehicular SIAs. The majority, however, in its examination of *Chimel*, reiterated that the scope of the SIA exception is limited to serving the purposes of "protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy."[14] Therefore, "[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."[15] This language appears to strongly favor the minority "Houdini" analysis, which considers accessibility at the time of the search.

While the dissent attempts to restrict this interpretation of *Chimel* to arrests of "vehicle occupants and recent occupants,"[16] that does not seem to have been the majority's intent. The *Gant* Court addressed the meaning and scope of *Chimel* before undertaking any analysis of its application to vehicular searches. And rather than restricting its application, the Court reminded us that *Chimel* "continues to define the boundaries of the [SIA] exception."[17] Thus, one can make a persuasive argument that all searches incident to arrest under *Chimel* - whether of persons, places, or things - are reasonable *only* when circumstances give rise to a possibility that the arrestee might gain access to a weapon, evidence, or means of escape from the place to be searched.

Although it is unclear whether lower federal courts will begin to apply the law in this manner, officers in the field should expect the courts to begin scrutinizing their searches of an arrestee's non-vehicular lunging area incident to arrest. To prepare for such an inquiry, officers should focus on articulating the reasonableness of any such search based on the following facts and circumstances:

(1) **Distance**: The distance between the arrestee and the place to be searched;[18]

(2) **Restraints**: Whether the arrestee was handcuffed or otherwise restrained, what kind of restraints were used, and whether the arrestee was handcuffed in the front or back; [19]

(3) **Display of guns or other weapons by officers**: Whether the police had weapons drawn or pointed at the arrestee or other suspects;[20]

(4) **Positioning**: Whether the police were positioned so as to block the arrestee, suspects, and bystanders from the area to be searched;

(5) **Access**: The ease of access to the area or container itself, to include whether a container is open or closed, locked or unlocked;

(6) **Numbers**: The number of officers present versus the number of arrestees, suspects, or bystanders;

(7) **Arrestee's conduct**: Attempts made by the suspect before, during, or after the arrest to access the area to be searched.[21]

(8) **Reasonable change in circumstances**: Do police need to move the arrestee away from a dangerous environment into another private area,[22] or can police articulate a legitimate need to retrieve something such as the arrestee's shoes or clothing?[23]

Searches of a Vehicle Following Arrest of an Occupant or Recent Occupant: Two Potential Justifications

Arrestee could access the vehicle. *Gant* held that police may search a vehicle incident to arrest when the arrestee – an occupant or recent occupant of the vehicle - is unsecured and within reaching distance of the passenger compartment at the time of the search. The Court noted that "it will be the rare case in which an officer is unable to fully effectuate an arrest so that a real possibility of access to the arrestee's vehicle remains." In such a rare case, however, an SIA of the passenger compartment would be reasonable under the Fourth Amendment. Since this search is justified by *Chimel*, officers may search for weapons, any evidence of any crime, and means of escape.

Offense-related evidence might be in the vehicle. Even if the arrestee can no longer access the vehicle's passenger compartment, the Court held that an SIA will also be permitted "when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." In many cases, such as arrests for traffic violations or outstanding arrest warrants, there

will be no reasonable basis to believe that the vehicle contains relevant evidence of the crime. In other cases, however, such as arrests for possession of controlled substances, the basis of the arrest will supply an acceptable rationale for searching the arrestee's passenger compartment and any containers inside. In a case where the search is justified by the possibility of locating offense-related evidence in the vehicle, officers are limited to searching only those places in the passenger compartment where the offense-related evidence might be located.

How to define the "reasonable to believe" standard? Is it the same as probable cause, or is it something less? One must compare the search incident to arrest exception in *Gant* to another firmly established search warrant exception to find the most likely answer.

In *U.S. v. Carroll*, the Supreme Court established the mobile conveyance exception to the Fourth Amendment search warrant requirement.[24] Under this exception, an officer may search a readily mobile conveyance without a warrant upon probable cause that it contains evidence or contraband. Once this standard is met, the officer may search any area of the vehicle – to include the trunk compartment – if that area may contain the object(s) of the search. The rule in a *Gant* search incident to arrest, however, first requires a lawful custodial arrest of an occupant or recent occupant of a vehicle. A search of the *passenger compartment* incident to arrest is then justified by a reasonable belief that evidence of the crime of arrest might be in the car.[25]

If *Gant*'s "reasonable to believe" standard is equal to probable cause, then the Court has created an M.C. Escher-like puzzle.[26] An officer who has made a custodial arrest and has a reasonable belief (equated to probable cause) that evidence of the crime of arrest might be in the car could search only the passenger compartment. An officer who has made no arrest, but has probable cause to believe that evidence of *any* crime is in the car, could search the entire vehicle. In other words, the officer who meets the higher standard (custodial arrest + probable cause for particular evidence) gets to search less, but the officer who meets the lesser standard (probable cause for any evidence) can search more. At best, the Court would have created a new search warrant exception that is instantly swallowed by another that has existed for almost 85 years.

The better explanation is that reasonable means… reasonable. There is no need to equate "reasonable to believe" to a percentage or particular level of probability; in fact, the Supreme Court has stated that "the test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application."[27] Rather, as in issues regarding an officer's use of force, the proper application of the reasonableness standard "requires careful attention to the facts and circumstances of each particular case" and "must be judged from the perspective of a reasonable officer on the scene."[28] The ultimate question should be whether another reasonable officer, if confronted with the same facts and circumstances, could believe that evidence of the arrestee's crime might be found in the vehicle the arrestee recently occupied. Facts and circumstances leading to such a reasonable belief will include information about the offense and the offender, the age of the information, the nature of the crime at issue, the behavior of the arrestee before, during, and after the arrest, ownership and control of the vehicle, and results of questioning arrestees and occupants.

Is the "offense-related evidence" justification limited to vehicular SIAs? The short answer is: yes. *Gant* explicitly states that the offense-related evidence justification for an SIA is

based upon "circumstances unique to the automobile context."[29] The Court did not expound upon why it believed vehicles to be special in this context, but Justice Scalia's concurrence in *Thornton* – from which the language was taken – reminds us that motor vehicles are "a category of 'effects' which give rise to a reduced expectation of privacy and heightened law enforcement needs."[30] Therefore, it appears as though officers may not justify a search of an arrestee's *non-vehicular* lunging area based upon a reasonable belief that evidence of his crime might be found therein. Rather, they will have to articulate reason to believe that the arrestee could access the area at the time of the search.

Other Vehicle Search Exceptions Remain Available

If an officer cannot justify a search of a vehicle incident to arrest under *Gant*, or is uncertain whether an SIA is warranted, other established exceptions to the search warrant requirement remain available to safeguard evidence and protect the safety of officers.

(1) If an officer has a reasonable suspicion that a passenger or recent occupant of a vehicle – whether arrested or not – is dangerous and may gain access to a weapon, he may frisk the passenger compartment for weapons.[31] (This exception is known as a ***Terry* frisk** of the vehicle.)

(2) If the officer has probable cause that the vehicle contains evidence of criminal activity, the officer may conduct a thorough search of any area of the vehicle in which the evidence might be found.[32] (This exception is the aforementioned "mobile conveyance exception" or the ***Carroll* Doctrine**.)

(3) If an officer conducting an arrest reasonably suspects that a dangerous person is hiding in a nearby vehicle, he may conduct a **protective sweep** of the vehicle by looking in places where such a person might be concealed.[33]

(4) **Consent** will always allow an officer to search, as long as it is given voluntarily by one with actual or apparent authority to give it, and the officer stays within the boundaries of the consent given.[34]

(5) Although not permitted for use as a criminal search tool, an officer who effects a lawful impound of a vehicle may **inventory** its contents in accordance with standardized agency policy. If the inventory is performed lawfully, any evidence or contraband identified during the process may be seized and used as evidence in a criminal prosecution, and may provide justification for another warrant exception.[35]

Given the *Gant* Court's failure to define its "reasonable to believe" standard, one cannot be certain how lower courts will apply that portion of the decision. For that reason, officers may be well advised to consider the applicability of the other, well-established vehicle search exceptions *before* relying on an SIA.

In addition to teaching students both basic and advanced legal courses, Ms. Solari is the designated subject matter expert in the areas of Fourth Amendment (Search & Seizure) and Legal Aspects of Terrorism Investigations. She is also the Legal Division's point of contact for the Criminal Investigator Training Program (CITP).

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[1] 556 U.S. ___ (2009), 2009 U.S. LEXIS 3120. The text of the opinion is available at http://straylight.law.cornell.edu/supct/html/07-542.ZS.html.

[2] *Thornton v. United States*, 541 U.S. 615, 626-27 (2004) (Scalia, J., concurring in judgment).

[3] *Chimel v. California*, 395 U.S. 752, 762-63 (1969); *see also United States v. Pratt*, 355 F.3d 1119, 1121 (8th Cir. 2004) ("[I]f an officer has arrested an individual, the officer may search the individual's person incident to arrest and may reach into his pockets").

[4] *Thornton*, 541 U.S. at 626 (Scalia, J., concurring in judgment).

[5] *United States v. Pratt*, 355 F.3d 1119, 1121 (8th Cir. 2004), citing *United States v. Robinson*, 414 U.S. 218, 235-36 (1973) ("[O]fficers need not have any reason to think the individual is armed or that evidence of the crime will be found on his person. It is the fact of arrest that enables the officer to conduct a search, not a particularized suspicion as to the suspect's dangerousness").

[6] *New York v. Belton*, 453 U.S. 454 (1981), citing *United States v. Robinson*, 414 U.S. 218, 235 (1973).

[7] *United States v. Passaro*, 624 F.2d 938, 943-44 (9th Cir. 1980) (search incident to arrest doctrine allows search of arrestee's wallet).

[8] *United States v. Robinson*, 414 U.S. 218 (1973).

[9] "*Robinson* stands for the proposition that, after a proper custodial arrest has been made, it is unnecessary to obtain a warrant to search the arrestee's person and clothing because it is the arrest that constitutes the significant intrusion under the Fourth Amendment; the search of the person is incidental and does not require additional justification. *See Robinson*, 414 U.S. at 235. However, 'unlike searches of the person, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest'" but must be based upon the "exigencies of the situation." *United States v. Morgan*, 936 F.2d 1561, 1578 (10th Cir. 1991) (internal citations omitted).

[10] *Belton*, 453 U.S. at 462, n.5.

[11] Much of the case law authorizing this practice has applied *Belton* to non-vehicular arrests in an attempt to create a bright-line rule for law enforcement. *See, e.g. United States v. Palumbo*, 735 F.2d 1095, 1096-97 (8th Cir. 1984)(explaining, in a non-vehicular search context, that the *Belton* rule "defines the area generally which may be searched, and is not constrained because the arrestee is unlikely at the time of the arrest to actually reach into that area."); *United States v. Queen*, 847 F.2d 346, 352-54 (7th Cir. 1988) *(*citing numerous cases in upholding a search incident to an arrest where the arrestee was handcuffed behind his back inside of a residence, but failing to distinguish vehicular and non-vehicular cases under *Belton*)*; United States v. Silva*, 745 F.2d 840 (4th Cir. 1984) (applying *Belton* in a non-vehicular case to uphold the seizure of a zippered bag although the arrestee -- who was handcuffed behind his back -- was sitting on a bed in a motel room surrounded by armed FBI agents). *Belton*, however, is useful only to define that portion of a *vehicle* that may be searched when an SIA is justified, and is probably not generalizable to a non-vehicular context. *See United States v. Myers*, 308 F.3d 251, 269 (3rd Cir. 2002),

citing *Belton*, 453 U.S. at 460 n.3 ("In a further attempt to clarify that it was only applying the rule of *Chimel* to the unique circumstances of a post-arrest warrantless search of an automobile, the Court stated, 'our holding today does no more than determine the meaning of *Chimel's* principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrest.'").

[12] *See, e.g., United States v. Myers*, 308 F.3d 251, 267 (3d Cir. 2002) (finding that an arrestee who was handcuffed behind his back while lying face down on the floor and "covered" by two armed police officers while another officer searched his bag would have had to possess superhuman qualities to access to the bag at the time of the search).

[13] *Myers*, 308 F.3d at 267 (3d Cir. 2002), citing *United States v. Abdul-Saboor*, 85 F.3d 664, 669 (D.C. Cir. 1996).
[14] *Gant*, 556 U.S. ___ (2009), 2009 U.S. LEXIS 3120 at *11.

[15] *Id.*, 2009 U.S. LEXIS 3120 at *12.

[16] *Id.*, 2009 U.S. LEXIS 3120 at *54 ("The first part of the Court's new two-part rule -- which permits an arresting officer to search the area within an arrestee's reach at the time of the search -- applies, at least for now, only to vehicle occupants and recent occupants, but there is no logical reason why the same rule should not apply to all arrestees.")

[17] *Id.*, 2009 U.S. LEXIS 3120 at *11.

[18] Compare *United States v. Morgan*, 936 F.2d 1561, 1579 (10th Cir. 1991) (invalidating a search of a suspect's bag following his arrest where the bag was never closer than ten to fifteen feet behind the suspect during his arrest, it was not seized until he was handcuffed to a nearby fence, and it was not searched until several hours later at the police station) with *State v. Galpin*, 80 P.3d 1207 (Mont. 2003) (defendant's coat and duffel bag 4-6 feet from him at time of arrest lawfully searched incident to defendant's arrest notwithstanding fact he was "handcuffed and placed on his knees," as that placed him "in even closer proximity to his coat and duffel bag" and "a man leaning his body and reaching, even with his hands in cuffs, could potentially reach the articles within that range").

[19] *See, e.g. United States v. Jones*, 475 F.2d 723 (5th Cir. 1973) ("The record is unclear whether [the defendant's] hands were cuffed in front or behind his back and does not reveal the defendant's location in relation to the suitcase that the time of the search. Both of these facts are relevant to a determination of access to weapons or destructible evidence. . . in the Chimel analysis.") One might argue there is a possibility that officers might "leave[] a suspect unrestrained nearby just to manufacture authority to search." *Thornton*, 541 U.S. at 627 (2004) (Scalia, J., concurring in judgment). Justice Scalia anticipated this argument, however, and has opined that neglecting sensible police procedures solely to justify a search might render the search itself unreasonable. *Id.*

[20] *See United States v. McConney*, 728 F.2d 1195, 1207 (9th Cir. Cal. 1984) (en banc) ("The critical inquiry, then, is whether the search that produced [the defendant's] pistol was properly limited to the area within his immediate control at the time of his arrest. The number of persons being arrest[ed], the number of officers present, their physical positioning with regard to the arrestee and the place searched, the display of guns by the officers and, of course, the distance between the arrestee and the place searched are all factors to be weighed by the court.")

[21] *Compare United States v. Abdul-Saboor*, 85 F.3d 664, 670 (D.C. Cir. 1996) (area was within arrestee's immediate control because although arrestee was handcuffed, arrestee attempted to retrieve a loaded shotgun after police entered his room, and he specifically requested entry to the area to be searched); with *United States v. Lyons*, 227 U.S. App. D.C. 284, 706 F.2d 321, 300-31 (D.C. Cir. 1983) (search incident to arrest not justified where arrestee was handcuffed, the closet that was searched was several yards away, six police officers were in the room with arrestee, no weapons had yet been uncovered, and arrestee had collapsed and been revived before the search began). *See also United States v. Mitchell*, 64 F.3d 1105, 1110 (7th Cir. 1995) (Suspect's handcuffing did not destroy the officer's justification for searching the briefcase, where the officer had observed the suspect about to throw the briefcase out the window immediately before arresting him, had arrested the suspect after seeing a gun in his waistband, and had reason to fear that a confederate might come through the door at any moment and either grab for

the briefcase or create an opportunity for the suspect to grab for the briefcase, and the briefcase had been in the suspect's control when he was arrested and was lying near him when the officer picked it up.)

[22] *See, e.g., United States v. Roper*, 681 F.2d 1354, 1358-1359 (11th Cir. 1982) ("The obvious peril created by attempting to arrest a suspected drug dealer in a hallway where other arrests are taking place while bystanders looked on sufficiently established exigent circumstances to justify returning [the arrestee] to his room. In this situation, the officers were authorized to search the area within his control for weapons and evidence.")

[23] "The rule of *Chimel* does not permit the arresting officers to lead the accused from place to place and use his presence in each location to justify a search incident to arrest." *United States v. Whitten*, 706 F.2d 1000, 1016 (9th Cir. 1983). Where it is necessary to move an arrestee into another room in the house from where the arrest occurred to obtain clothing, however, a law enforcement officer will be justified in accompanying the arrestee. If the officer observes evidence in plain view, it may be seized. This is so even if the decision to move the arrestee was made by a law enforcement officer rather than the arrestee. *See, e.g. United States v. DiStefano*, 555 F.2d 1094, 1101 (2nd Cir. 1977); *United States v. Titus*, 445 F.2d 577, 579 (2nd Cir. 1971) (holding officers were justified in accompanying arrestee into home based upon duty to clothe the arrestee or permit arrestee to do so). Thus, an object not in the arrestee's control at the moment of arrest may later come into his control. *See, e.g. United States v. Ricks*, 817 F.2d 692 (11th Cir. 1987) (arrestee asked for his jacket, which was hanging in closet, so search of jacket pockets incident to arrest proper).

[24] *Carroll v. United States*, 267 U.S. 132 (1925); *see also Fernandez v. United States*, 321 F.2d 283, 286-287 (9th Cir. 1963) ("It is well-settled that a valid search of a vehicle moving on a public highway may be had without a warrant, if probable cause for the search exists, i.e., facts sufficient to warrant a man of reasonable caution in the belief that an offense is being committed") (citations omitted); *United States v. Patterson*, 140 F.3d 767, 773 (8th Cir), *cert. denied*, 525 U.S. 907 (1998)(A warrantless search of a vehicle is permissible where law enforcement officers have "probable cause to believe that contraband or evidence of criminal activity [will] be found").

[25] *Gant*, 556 U.S. ___ (2009), 2009 U.S. LEXIS 3120 at *20 (In some cases, "the offense of arrest will supply a basis for searching the *passenger compartment* of an arrestee's vehicles and any containers therein.") (emphasis added.)

[26] M.C. Escher is famous for his "impossible structure" illustrations, in which the viewer cannot tell where one aspect of the drawing ends and another begins.

[27] *Graham v. Connor*, 490 U.S. 386, 396 (1989), citing *Bell v. Wolfish*, 441 U.S. 520, 559 (1979).

[28] *Id.* at 396.

[29] *Gant*, 556 U.S. ___ (2009), 2009 U.S. LEXIS 3120 at *6; *see also id*. at *20 ("Although 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") (internal quotations omitted).

[30] *Thornton*, 541 U.S. at 641 (Scalia, J., concurring in judgment).

[31] *Michigan v. Long*, 463 U.S. 1032 (1983).

[32] *Carroll v. United States*, 267 U.S. 132 (1925).

[33] A protective sweep is lawful where 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." *Maryland v. Buie*, 494 U.S. 325, 334 (1990); *and cf. United States v. Jones*, 471 F.3d 868 (8th Cir. 2006) (upholding protective sweep of vehicle parked on public street during execution of search warrant at adjacent residence based upon officers' reasonable belief that vehicle could contain person who posed a danger to officers at the scene).

[34] Both "the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force." *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973). "A third party's consent to search is valid if that person has either the 'actual authority' or the 'apparent authority' to consent to a search of that property." *United States v. Kimoana*, 383 F.3d 1215, 1221 (10th Cir. 2004) (citations omitted).

[35] *See, e.g. Michigan v. Thomas*, 458 U.S. 259, 261-62 (1982) (per curiam) (an inventory of the car's glove compartment revealed marijuana, which provided probable cause for a more comprehensive, warrantless search. "[W]hen police officers have probable cause to believe there is contraband inside an automobile that has been stopped on the road, the officers may conduct a warrantless search of the vehicle, even after it has been impounded and is in police custody").

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CASE SUMMARIES

SUPREME COURT

Flores-Figueroa v. U.S., 2009 U.S. LEXIS 3305, May 4, 2009

Title 18 U. S. C. §1028A(a)(1), aggravated identity theft, imposes a mandatory consecutive 2-year prison term upon individuals convicted of certain other crimes *if*, during (or in relation to) the commission of those other crimes, the offender "*knowingly* transfers, possesses, or uses, without lawful authority, *a means of identification of another person.*" (emphasis added). To obtain a conviction under this statute, the government must prove that the defendant knew that the means of identification belonged to a real person.

Click **HERE** for the Court's opinion.

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Kansas v. Ventris, 2009 U.S. LEXIS 3299, April 29, 2009

Statements taken in violation of the Sixth Amendment right to counsel are inadmissible in the government's case in chief. However, once the defendant testifies inconsistently, denying the prosecution the traditional truth-testing devices of the adversary process is a high price to pay for vindicating the right to counsel at the prior stage. Therefore, statements suppressed because of a Sixth Amendment violation may be used to impeach the defendant's testimony.

Click **HERE** for the Court's opinion.

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Arizona v. Gant, 2009 U.S. LEXIS 3120, April 21, 2009

Please see the article by Senior Instructor Jenna Solari in this issue.

Click **HERE** for the Court's opinion.

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Corley v. U.S., 129 S. Ct. 1558, April 6, 2009

(Editor's note: This case pertains to federal prosecutions. See 18 U.S.C. §3501(c), and see *McNabb* v. *United States*, 318 U. S. 332 (1943) and *Mallory* v. *United States*, 354 U. S. 449 (1957), under which an arrested person's confession is inadmissible if given after an unreasonable delay in bringing him before a judge.)

Statements given before the initial appearance but within six hours of the arrest are admissible so long as they are otherwise voluntary and in compliance with *Miranda.*

If, in order to obtain a statement, the initial appearance is delayed to beyond six hours after arrest, such statements given more than six hours after arrest but before the appearance can be suppressed even if voluntary and in compliance with *Miranda*.

Statements given before the initial appearance but more than six hours after arrest may be admissible if the delay was not for the purpose of obtaining the statement, and the delay was otherwise reasonable and necessary.

Click **HERE** for the Court's opinion.

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CIRCUIT COURTS OF APPEALS

2nd CIRCUIT

U.S. v. Hertular, 2009 U.S. App. LEXIS 7156, April 06, 2009

For a threat to satisfy the force element of 18 U.S.C. § 111, there must be proof that the alleged threat would objectively inspire fear of pain, bodily harm, or death that is likely to be inflicted immediately. The government must prove that the defendant instilled (1) a reasonable apprehension of bodily harm (2) likely to be inflicted immediately. An implied threat to use force sometime in the indefinite future" is insufficient to support a § 111 conviction. Circumstances that certainly instill an objectively reasonable fear that homicidal threats are serious and real are not sufficient to establish that the agents were being threatened with immediate harm.

Click **HERE** for the court's opinion.

4th CIRCUIT

U.S. v. Madrigal-Valdez, 561 F.3d 370, April 01, 2009

18 U.S.C. § 1382 provides in relevant part:

> **Whoever, within the jurisdiction of the United States, goes upon any military, naval, or Coast Guard reservation, post, fort, arsenal, yard, station, or installation, for any purpose prohibited by law or lawful regulation;**
> **. . .**
> **Shall be fined under this title or imprisoned not more than six months, or both.**

To obtain a conviction under § 1382, the Government must prove that the defendant had notice that entry upon a military installation is prohibited.

The 1st, 9th, and 10th circuits agree (cites omitted.**).**

The sign, setting forth entrance requirements, cannot be placed in a location visible only if the person is already on the base. A person, who has previously entered the United States illegally does not violate 18 U.S.C. § 1382 or 8 U.S.C. § 1325(a) by subsequently entering a military installation *within the jurisdiction of the United States*.

Click **HERE** for the court's opinion.

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6th CIRCUIT

U.S. v. Abbey, 560 F.3d 513, April 03, 2009

For bribery under the Hobbs Act, 18 U.S.C. § 1951, the benefits received need not have some explicit, direct link with a promise to perform a particular, identifiable act when the illegal gift is given to the official. Instead, it is sufficient if the public official understood that he or she was expected to exercise some influence on the payor's behalf as opportunities arose. The public official need not even have any intention of *actually* exerting his influence on the payor's behalf because "fulfillment of the quid pro quo is not an element of the offense." The inquiry is whether the official extracted money through promises to improperly employ his public influence.

For bribery under 18 U.S.C. § 666, it is enough if a defendant corruptly solicits anything of value with the intent to be influenced or rewarded in connection with some transaction involving property or services worth $5000 or more. The statute does not require the government to prove that defendant contemplated a specific act when he received the bribe; the text says nothing of a quid pro quo requirement to sustain a conviction, express

or otherwise. While a *quid pro quo* of money for a specific . . . act is sufficient to violate the statute, it is not necessary.

Click **HERE** for the court's opinion.

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U.S. v. Jones, 2009 U.S. App. LEXIS 7897, April 16, 2009

***Brendlin v. California*, 551 U.S. 249 (2007) makes it clear that, generally, when a police officer pulls over a vehicle during a traffic stop, the officer seizes everyone in the vehicle, not just the driver. Yet, the *Brendlin* Court also observed, "there is no seizure without actual submission."**

Even though an occupant in a vehicle stopped by the police is generally deemed seized by virtue of the stopping of the vehicle, he is not thereby seized if he does not submit to the show of authority. When police vehicles hemmed in the already parked car, the driver and other passenger in the Nissan were, "seized" by virtue of their passive acquiescence – remaining in the car. But, by opening the car door and jumping out as though he wanted to run, defendant did not submit. He was not "seized" until he stopped at the command of the officer. Observations made by the officer after defendant got out but before he submitted may be used to justify the seizure.

Click **HERE** for the court's opinion.

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8th CIRCUIT

U.S. v. Barnum, 2009 U.S. App. LEXIS 8994, April 28, 2009

After a consent search of his person revealed a crack pipe and $305 in cash, the officer placed defendant under arrest. As a result, the officer could have properly searched defendant's rental vehicle, without his consent, for further evidence relevant to the drug offense for which defendant had been arrested. *See Arizona v. Gant*, 556 U.S. --- , April 21, 2009, authorizing a search of the passenger compartment of a vehicle incident to arrest of an occupant when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.

Click **HERE** for the court's opinion.

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(continued on next page)

10th CIRCUIT

U.S. v. Otero, 2009 U.S. App. LEXIS 9001, April 28, 2009

The modern development of the personal computer and its ability to store and intermingle a huge array of one's personal papers in a single place increases law enforcement's ability to conduct a wide-ranging search into a person's private affairs, and accordingly makes the Fourth Amendment particularity requirement that much more important. A warrant authorizing a search of "any and all information and/or data" stored on a computer is the sort of wide-ranging search that fails to satisfy the particularity requirement. Warrants for computer searches must *affirmatively limit* the search to evidence of specific federal crimes or specific types of material.

Click **HERE** for the court's opinion.

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11th CIRCUIT

U.S. v. Mitchell, 2009 U.S. App. LEXIS 8258, April 22, 2009

A seizure of a computer based on probable cause is unconstitutional if the police act with unreasonable delay in securing a warrant.

Computers are relied upon heavily for personal and business use. Individuals may store personal letters, e-mails, financial information, passwords, family photos, and countless other items of a personal nature in electronic form on their computer hard drives. Thus, the detention of the hard drive for over three weeks (21 days) before a warrant was sought constitutes a significant interference with possessory interest. The purpose of securing a search warrant soon after a suspect is dispossessed of a closed container reasonably believed to contain contraband is to ensure its prompt return should the search reveal no such incriminating evidence, for in that event the government would be obligated to return the container (unless it had some other evidentiary value). This consideration applies with even greater force to the hard drive of a computer, which is the digital equivalent of its owner's home, capable of holding a universe of private information.

Click **HERE** for the court's opinion.

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