Searches Incident to Arrest

Every arrest must be presumed to present a risk of danger to the arresting officer.[1]

Taking a suspect into custody is an extremely "tense and risky undertaking."[2] This is especially so when the crime was a felony because many of today's felons are not only violent and well armed, they are often desperate. After all, they know they may be facing a lengthy prison term thanks to the various sentencing enhancements for felonies in California, including the three strikes law.

But even when the crime was not a high-stakes felony, there is always a threat of violence because people who are about to lose their freedom—even for a short time—may act impulsively and "attempt actions which are unlikely to succeed."[3] Taking note of this, the United States Supreme Court pointed out that "[t]here is no way for an officer to predict reliably how a particular subject will react to arrest or the degree of the potential danger."[4] Or, as the Ninth Circuit aptly observed, "It is a difficult exercise at best to predict a criminal suspect's next move."[5]

To help reduce these dangers, and also to make it harder for arrestees to destroy evidence, the U.S. Supreme Court ruled that officers who have made a custodial arrest may, as a matter of routine, conduct a type of search known as a search incident to arrest. Said the Court:

> 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. It is the fact of the lawful arrest which establishes the authority to search.[6]

Writing on this subject a few years ago, we happily mentioned in passing that this was an area of the law in which the courts had provided officers and prosecutors with rules that were easy to understand and apply. We had no idea that a sudden and dramatic upheaval was looming.

From Clarity To Perplexity

Because the circumstances surrounding most arrests are fluid, unpredictable, and dangerous, the courts have long understood that the rules pertaining to searches incident to arrest needed to be "easily applied and predictably enforced."[7] And so, in 1969 the United States Supreme Court ruled in the landmark case of *Chimel* v. *California* that officers who have made a custodial arrest may, as a matter of routine, search those places and things over which the suspect had "immediate control."[8]

The Court also broadly defined the term "immediate control" to encompass "the area from within which [the arrestee] might gain possession of a

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[1] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7.
[2] *State* v. *Murdock* (Wis. 1990) 155 Wis.2d 217, 231.
[3] *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[4] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7.
[5] *U.S.* v. *Reilly* (9th Cir. 2000) 224 F.3d 986, 993.
[6] *United States* v. *Robinson* (1973) 414 U.S. 218, 235. Edited. ALSO SEE *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7 ["an arresting officer's custodial authority over an arrested person does not depend upon a reviewing court's after-the-fact assessment of the particular arrest situation"]; *United States* v. *Chadwick* (1977) 433 U.S. 1, 15 [officers are not required "to calculate the probability that weapons or destructible evidence may be involved"]; *U.S.* v. *Osife* (9th Cir. 2004) 398 F.3d 1143, 1145 ["[C]ourts are *not* to decide on a case-by-case basis whether the arresting officers' safety is in jeopardy or whether evidence is in danger of destruction."]. **NOTE**: In some older California cases the courts ruled that officers could conduct a search incident to arrest only if they had probable cause to believe they would find a weapon or evidence. See, for example, *People* v. *Flores* (1979) 100 Cal.App.3d 221, 229. Those rulings were abrogated by Proposition 8. See *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1247.
[7] *New York* v. *Belton* (1981) 453 U.S. 454, 459. ALSO SEE *Dunaway* v. *New York* (1979) 442 U.S. 200, 213-14 [officers need "[a] single, familiar standard"].
[8] (1969) 395 U.S. 752, 763. ALSO SEE *Michigan* v. *Long* (1983) 463 U.S. 1032, 1049, fn.14 ["[P]art of the reason to allow area searches incident to an arrest is that the arrestee, who may not himself be armed, may be able to gain access to weapons to injure officers or others nearby, or otherwise to hinder legitimate police activity."].

weapon or destructible evidence."[9] (Today, this searchable area has become popularly known as "grabbing space" or "grabbing radius."[10]) In explaining why it decided not to restrict these searches to explorations of the arrestee's person, the Court pointed out that "[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."

In the following years, many of the lower courts reached the conclusion that it would be unwise to strictly interpret the terms "immediate control" and "grabbing" space to cover only those places and things to which the arrestee had actual control at the time of the search. This was because such an interpretation would produce two troublesome situations.

First, an arrestee who did not want officers to search a place or thing in his immediate control when officers sought to arrest him would be given a powerful incentive to break away from the officers and separate himself from it, even a short distance. Second, officers who have arrested a suspect will often have significant safety reasons for restraining the arrestee or moving him a short distance away before searching those things that were under his control when he was arrested. For this reason, the courts would consistently rule that it would be imprudent to require that officers choose between conducting a search and taking reasonable safety precautions. Thus, comments such as the following would regularly appear in the cases:

- "[I]t does not make sense to prescribe a constitutional test that is entirely at odds with safe and sensible police procedures."[11]
- "[I]t makes no sense to condition a search incident to arrest upon the willingness of police to remain in harms way while conducting it."[12]
- "[I]f the police could lawfully have searched the defendant's grabbing radius at the moment of arrest, he has no legitimate complaint if, the better to protect themselves from him, they first put him outside that radius."[13]

But one type of arrest situation remained problematic: searches of vehicles incident to the arrest of the driver or other occupant. The problem was that these arrestees were almost always restrained in some manner outside the vehicle before the search began; e.g., handcuffed, surrounded by officers, locked in a patrol car. Consequently, some courts would rule that officers could not search the passenger compartment in these situations, while others would rule they could because, again, if something could have been searched legally one minute, it seems irrational to rule it could not be searched a few seconds later because the officers had taken reasonable safety precautions.

This dilemma was finally resolved by the United States Supreme Court in 1981. In its landmark decision in the case of *New York* v. *Belton,*[14] the Court noted that these vehicle-search cases had become "problematic" because the lower courts had failed to provide officers with "a set of rules which, in most instances, makes it possible to reach a correct determination" of what places and things they may search. So, after noting that weapons and evidence inside "the relatively narrow compass of the passenger compartment" of an automobile are "in fact generally, even if not inevitably" within the arrestee's

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[9] (1969) 395 U.S. 752, 763.

[10] See *U.S.* v. *Tejada* (7th Cir. 2008) 524 F.3d 809, 811 [officers can search "the area within grabbing distance"]; *U.S.* v. *Hudson* (9th Cir. 1996) 100 F.3d 1409, 1420 ["grab area"]; *U.S.* v. *Goodwin-Bey* (8th Cir. 2009) 584 F.3d 1117, 1119 ["reaching area"]. ALSO SEE *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["And 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."].

[11] *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607. ALSO SEE *People* v. *Pressley* (1966) 242 Cal.App.2d 555, 560 [although "the arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away," the process of arrest "had begun at the door"]; *People* v. *Williams* (1967) 67 Cal.2d 226, 229 ["Of no legal significance is the fact that defendant, through his efforts to escape, succeeded in separating himself from the car by a distance of about one block."]; *U.S.* v. *Nohara* (9th Cir. 1993) 3 F.3d 1239, 1243 ["the officers here did not make the search unreasonable by handcuffing Nohara, seating him in the hallway, and searching the black bag within two to three minutes of his arrest"].

[12] *People* v. *Rege* (2005) 130 Cal.App.4th 1584, 1590 [quoting from *People* v. *Summers* (1999) 73 Cal.App.4th 288, 295 (conc. opn. of Bedsworth, J.).

[13] *U.S.* v. *Tejada* (7th Cir. 2008) 524 F.3d 809, 812.

[14] (1981) 453 U.S. 454.

reach at some point, the Court announced the following "bright line" rule: Officers who have made a custodial arrest of an occupant of a vehicle may search the passenger compartment—regardless of whether the arrestee had physical access to the vehicle when the search occurred.

Consequently, it soon became standard police procedure throughout the country that if officers could conduct the search immediately after the arrest, they should do so. But if there were matters that needed their attention beforehand, they could address them so long as there was no unnecessary delay. Here are two examples of circumstances that were found to justify searches of places and things that were not within the arrestee's immediate control at the time of the search:

- Officers delayed searching the arrestee's car until it had been towed from the scene of the arrest because "gunfire and subsequent crash of [their] car had attracted a crowd so large that extra policemen had to be summoned [to control] the mob that was forming."[15]
- Officers delayed searching the arrestee's car because they were dispatched to a priority auto accident.[16]

In contrast, a search would not be deemed contemporaneous with an arrest if the delay was not reasonably necessary; e.g., officers delayed the search for 30-45 minutes in order to question the arrestee.[17]

Arizona v. *Gant*: Back to uncertainty

For almost 30 years, *Chimel* and *Belton* provided officers and the courts with a coherent set of rules that clearly defined the parameters of these searches. But that changed in 2009 when a bare majority of the Supreme Court announced its opinion in the case of *Arizona* v. *Gant*. (Although *Gant* technically upended only those rules pertaining to vehicle searches, as we will discuss shortly, it effectively dismantled the entire structure of this area of the law and left it in a "confused and unstable" state.[18]) Stripped of all its verbiage and dissembling (and there was a lot of both), the Court's decision in *Gant* prohibited all vehicle searches unless they occurred at a time when the arrestee was both unrestrained and sufficiently close to the vehicle that he might have been able to reach inside.

Because the *Gant* justices were presumably aware that officers never turn their backs on unrestrained arrestees—and not under any circumstances while preoccupied with a search—they must also have been aware that their decision would effectively abolish *Belton* searches and render *Belton* a nullity. And yet, for some curious reason they felt compelled to engage in blatant subterfuge and claim they had no intention of overturning *Belton*, even though they must have known that no one would believe them.[19] As Justice Alito observed in his dissenting opinion: "Although the Court refuses to acknowledge that it is overruling *Belton*," there "can be no doubt that it does so."

While there is much to criticize about *Gant*, there is no escaping the fact that *Belton* and *Chimel* were occasionally producing strange results that were taxing the credibility of the courts. For instance, judges would sometimes uphold searches of places and things that were nowhere near the arrestee when the search occurred, so long as there was a theoretical—sometimes fanciful—possibility that he might have been able to reach it. In one such case, *United States* v. *Tejada*, the court ruled that although the arrestee was "[h]andcuffed, lying face down on the floor and surrounded by police," and although it was unlikely that he would be able to make a "successful lunge" at anything, a search of the room in which he was arrested was warranted because the officers "did not know how strong he was, and he seemed desperate."[20]

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[15] *People* v. *Webb* (1967) 66 Cal.2d 107, 125.
[16] *People* v. *McBride* (1969) 268 Cal.App.2d 824, 829.
[17] *U.S.* v. *Vasey* (9th Cir. 1987) 834 F.2d 782, 787.
[18] *Arizona* v. *Gant* (2009) __ U.S. __ [129 S.Ct. 1710, 1731 (dis. opn. of Alito, J.).
[19] **NOTE**: The *Gant* majority also claimed that its decision was necessary because the lower courts had been grossly misinterpreting *Chimel* and *Belton*. This, too, was disingenuous, especially considering these two opinions were broadly interpreted for almost 30 years without even a hint of reproval from the Supreme Court.
[20] (7th Cir. 2008) 524 F.3d 809, 812. ALSO SEE *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 769 [search of upstairs bedroom was permissible even though the suspect was "at the bottom of the stairs at the time of the search" and was being held by other officers].

As a result of such rulings, some courts started to express concern that this area of the law had become untethered. One of them pointed out that "where there is no threat to the officers because the suspect has been immobilized, removed, and no one else is present, it makes no sense that the place he was removed from remains subject to search merely because he was previously there."[21] Another observed that, "[a]s with most other legal doctrines, that of *Chimel* can be reduced to logical absurdity if one is so disposed."[22]

True enough. But instead of fixing this particular problem, the Court in *Gant* effectively overturned or at least cast into doubt a wealth of thoughtful legal analysis—spanning nearly three decades—in which the lower courts had sought to balance the safety needs of officers and the privacy rights of arrestees.

Gant's unresolved issues

Before we discuss the law as it exists today in the wake of *Gant*, it is necessary to address three issues that the Court neglected to address, issues that cannot be ignored in this article because they will be critical in determining the lawfulness of all four types of searches incident to arrest.

IS *GANT* LIMITED TO VEHICLE SEARCHES? Although *Gant* technically restricts only vehicle searches incident to the arrest of an occupant, it is hard to avoid the conclusion that it will be interpreted as restricting all of the other types of searches incident to arrest, such as containers near the arrestee and homes in which the arrest occurred.[23] That is because the privacy expectations in homes and many closed containers are significantly greater than those in the passenger compartments of cars.[24] To put it another way, if something in a car cannot be searched because it was inaccessible to the arrestee, it is difficult to imagine a court ruling that a similarly inaccessible item could be searched if it were located in the arrestee's home.[25] Again quoting Justice Alito, "[T]here is no logical reason why the same rule [that applied to the arrests of vehicle occupants] should not apply to all arrestees."

Furthermore, the Court in *Gant* phrased its ruling in sweeping terms that are flatly inconsistent with such a restricted interpretation. Here is an example: *If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, [the] justifications for the search-incident-to-arrest exception are absent and the rule does not apply*. In fact, there is already a California case—*People* v. *Leal*—in which the California Attorney General conceded that *Gant* applies equally to searches of homes.[26] (In another case, it was argued that *Gant* even applied to pat searches; i.e., that officers should not be permitted to pat down any part of the suspect's body unless they could prove it was immediately accessible to the arrestee. This silly argument was, however, rejected.[27])

HOW MUCH ACCESS IS REQUIRED? Because officers need to have some idea of how much access is necessary before they can search an item near the

[21] *People* v. *Summers* (1999) 73 Cal.App.4th 288, 290-91. ALSO SEE *U.S.* v. *Weaver* (9th Cir. 2006) 433 F.3d 1104, 1107 ["Here, where the arrestee was handcuffed and secured in a patrol car before police conducted the search, the rational underpinnings of *Belton*—officer safety and preservation of evidence—are not implicated. We are hardly the first to make this observation. We respectfully suggest that the Supreme Court may wish to re-examine this issue."]; *U.S.* v. *Queen* (7th Cir. 1988) 847 F.2d 346, 3545 ["Indeed, the Supreme Court—as well as several courts of appeal, including our own—have upheld searches incident to arrest where the possibility of an arrestee's grabbing a weapon or accessing evidence was at least as remote as in the situation before us."].

[22] *People* v. *Mendoza* (1986) 176 Cal.App.3d 1127, 1132.

[23] See *U.S.* v. *Perdoma* (8th Cir. 2010) __ F.3d __ [2010 WL 3528579] ["the explanation in *Gant* of the rationale for searches incident to arrest may prove to be instructive outside the vehicle-search context in some cases"].

[24] See *Wyoming* v. *Houghton* (1999) 526 U.S. 295, 303 ["Passengers, no less than drivers, possess a reduced expectation of privacy with regard to the property they transport in cars"]; *Cardwell* v. *Lewis* (1974) 417 U.S. 583, 590 ["One has a lesser expectation of privacy in [car] because its function is transportation and it seldom serves as one's residence or as the repository of personal effects."].

[25] **NOTE**: It is especially unlikely that searches of homes would be exempt from *Gant* because, as we discuss in the accompanying article, officers who reasonably believe there is someone on the premises who poses a threat to them can conduct a protective sweep.

[26] (2009) 178 Cal.App.4th 1051, 1064 ["For their part, the People acknowledge that the search in this case would have violated the Fourth Amendment if it had taken place after the decision in *Gant*."]. ALSO SEE *U.S.* v. *Perdoma* (8th Cir. 2010) __ F.3d __ [2010 WL 3528579] [*Gant* applied to search of suitcase in a bus depot]; *U.S.* v. *Shakir* (3d Cir. 2010) __ F.3d __ [2010 WL 3122808] [*Gant* applied to search of gym bag at a hotel].

[27] *U.S.* v. *Vinton* (D.C. Cir. 2010) 594 F.3d 14, 24, fn.3 ["We decline to read *Gant* so expansively."]

arrestee, it might be assumed that the *Gant* Court would have provided some guidance. Instead, in the span of just a few pages it announced a test that was subsequently rendered unintelligible by a second test. And then it propounded a third test that differed somewhat from the first two. Specifically, at one point it said the test is *access*; i.e., a search is permitted if the arrestee had "access" to his car. Then it changed its mind and announced a more restrictive test: a search is permitted only if the arrestee was within actual "reaching distance" of the passenger compartment. And then it proclaimed that access and reaching distance were not enough—that the arrestee must also have been *unsecured*, which presumably meant that he must not have been handcuffed and otherwise restrained.

One of the first courts that tried to make sense of this gibberish was the Third Circuit which, having given up in its attempt to discern the correct test from the Court's words, was forced to resort to a "close reading" of the text. And after having done so, it formulated the following hypothesis:

> [T]he Court's reference to a suspect being "unsecured" and being "within reaching distance" of a vehicle are two ways of describing a single standard rather than independent prongs of a two-part test. In later formulations of its holding, the *Gant* Court omitted any reference to whether Gant was secured or unsecured, and looked instead simply to Gant's ability to access his vehicle.[28]

Thus, the court interpreted *Gant* as prohibiting searches of places and things if there was "no reasonable possibility" the arrestee might access it.

HOW STRICTLY WILL *GANT* BE INTERPRETED? The last—and most uncertain—question is whether the courts will engage in "an aggressive reading of *Gant*"[29] and ignore the large body of law—some of it from the Supreme Court itself—in which searches were upheld when they were "roughly" or "substantially" contemporaneous with the arrest.[30]

A related question is whether the courts will invalidate searches because there was some uncertainty as to whether the arrestee did, in fact, have access. In addressing this issue, it is hoped that the courts will take into account the D.C. Circuit's observation that, because custodial arrests are dangerous, "the police must act decisively and cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."[31] It should be noted that three courts have already refused to apply *Gant* in a hypertechnical manner, having ruled that it did not prohibit a vehicle search when, although the arrestee had been restrained, there were other suspects who had immediate access to the vehicle.[32]

One last thing: On November 1, 2010, the Supreme Court decided to review the case of *Davis* v. *U.S.* in which it is expected to determine whether *Gant* must be applied retroactively.

Requirements

Having reviewed the state of the law, we will now examine the requirements for conducting these types of searches. Although there are four distinct searches incident to arrest, they all have the same basic requirements, as follows:

(1) **Lawful arrest**: The suspect must have been lawfully arrested.
(2) **Custodial arrest**: The arrest must have been custodial in nature.
(3) **Contemporaneous search**: The search must have been contemporaneous with the arrest.

It should be noted that the first two requirements were not affected by *Gant,* which means they are fairly easy to understand. It was the third requirement—contemporaneousness—that is uncertain.

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[28] See *U.S.* v. *Shakir* (3d Cir. 2010) __ F.3d __ [2010 WL 3122808] ["[W]e understand *Gant* to stand for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it."].
[29] *U.S.* v. *Shakir* (3rd Cir. 2010) __ F3 __ [2010 WL 3122808].
[30] See *Shipley* v. *California* (1969) 395 U.S. 818, 820 ["substantially contemporaneous"]; *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33 ["substantially contemporaneous"]; *People* v. *Adams* (1985) 175 Cal.App.3d 855, 861 ["substantially contemporaneous"]; *U.S.* v. *Smith* (9th Cir. 2004) 389 F.3d 944. 951 ["roughly contemporaneous"].
[31] *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 330.
[32] See *U.S.* v. *Davis* (8th Cir. 2009) 569 F.3d 813, 817; *U.S.* v. *Goodwin-Bey* (8th Cir. 2009) 584 F.3d 1117; *U.S.* v. *Shakir* (3rd Cir. 2010) __F3 __ [2010 WL 3122808] [court noted that the officers "had reason to believe that one or more of Shakir's accomplices was nearby"].

Lawful arrest

In the context of searches incident to arrest, an arrest is deemed "lawful" if officers had probable cause to arrest the suspect.[33] This rule has several practical consequences.

SEARCH BEFORE ARREST: If officers had probable cause, some searches (especially pat downs) may be deemed incident to an arrest even though the suspsect had not yet been arrested.[34] As the Court of Appeal explained, "Once there is probable cause for an arrest it is immaterial that the search preceded the arrest."[35]

OFFICERS UNSURE ABOUT PROBABLE CAUSE: If a court determines that the officers had probable cause, the "lawful arrest" requirement is satisfied even if they were unsure that it existed. "It is not essential," said the court in *People* v. *Le*, "that the arresting officer at the time of the arrest or search have a subjective belief that the arrestee is guilty of a particular crime . . . so long as the objective facts, when fully determined, afford probable cause."[36]

For example, in *People* v. *Loudermilk*[37] two Sonoma County sheriff's deputies detained a hitchhiker at about 4 A.M. because he matched the description of a man who had shot another man about an hour earlier in nearby Healdsburg. When the hitchhiker, Loudermilk, claimed he had no ID, one of the deputies started searching his wallet and, just as he found some, Loudermilk spontaneously exclaimed, "I shot him. Something went wrong in my head." Loudermilk contended that his admission should have been suppressed because it was prompted by the search of his wallet which, he contended, did not qualify as a search incident to arrest because one of the deputies testified he didn't think he had probable cause to arrest Loudermilk for the shooting. The court said it didn't matter what the deputy thought—what counts is what the court thought. And it thought the deputy had it.

ARREST FOR "WRONG" CRIME: If a court rules that officers arrested the suspect for a crime that was not supported by probable cause, the arrest will nevertheless be deemed "lawful" if there was probable cause to arrest him for some other crime.[38] As the Tenth Circuit put it, "[T]he probable cause inquiry is not restricted to a particular offense, but rather requires merely that officers had reason to believe that a crime—any crime—occurred."[39]

For example, in *In re Donald L.*[40] a Martinez police officer detained a minor, Donald, at about 9 P.M. because he resembled a person who was suspected of having just cased a house for a burglary. The

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[33] See *Virginia* v. *Moore* (2008) 553 U.S. 164, 177 ["we have equated a lawful arrest with an arrest based on probable cause"].

[34] See *Rawlings* v. *Kentucky* (1980) 448 U.S. 98, 111 ["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."]; *People* v. *Limon* (1993) 17 Cal.App.4th 524, 538 ["An officer with probable cause to arrest can search incident to the arrest before making the arrest."]; *People* v. *Mims* (1992) 9 Cal.App.4th 1244, 1251 ["[T]he fact that the search preceded the formal arrest is of no consequence."]; *People* v. *Avila* (1997) 58 Cal.App.4th 1069, 1076 ["[I]t is unimportant whether a search incident to an arrest precedes the arrest or vice versa"]. **NOTES**: This rule is especially important to prosecutors when a consent search, pre-arrest pat down, or other warrantless search is ruled unlawful as the search may be upheld as a search incident to arrest if there was probable cause. Also note that in *People* v. *Superior Court (Hawkins)* (1972) 6 Cal.3d 757 the California Supreme Court ruled that probable cause to arrest was not enough, that officers must actually inform the suspect he is under arrest before they may conduct a search incident to arrest. This rule was nullified by California's Proposition 8. See *People* v. *Trotman* (1989) 214 Cal.App.3d 430.

[35] *In re Jonathan M.* (1981) 117 Cal.App.3d 530, 536.

[36] (1985) 169 Cal.App.3d 186, 193.

[37] (1987) 195 Cal.App.3d 996.

[38] See *People* v. *White* (2003) 107 Cal.App.4th 636, 641 ["[A]n officer's reliance on the wrong statute does not render his actions unlawful if there is a right statute that applies to the defendant's conduct."]; *In re Justin K.* (2002) 98 Cal.App.4th 695, 699 ["[The officer's] subjective understanding of the statutory scheme respecting stoplamps is not dispositive [s]o long as his conduct was objectively reasonable"]; *People* v. *Clark* (1973) 30 Cal.Ap.3d 549, 557-58 [arrest for burglary was made without probable cause, but there was probable cause to arrest for prowling]; *U.S.* v. *Wallace* (9th Cir. 2000) 213 F.3d 1216 ["That [the officer] had the mistaken impression that all front-window tint is illegal is beside the point. [The officer] was not taking the bar exam. The issue is… whether he had objective, probable cause to believe that these windows were, in fact, in violation."]; *U.S.* v. *Eckhart* (10th Cir. 2009) 569 F.3d 1263, 1272 ["An officer need not be able to quote statutes, chapter and verse. Some confusion about the details of the law may be excused"].

[39] *U.S.* v. *Turner* (10th Cir. 2009) 553 F.3d 1337, 1345.

[40] (1978) 81 Cal.App.3d 770.

officer also noticed that Donald was carrying a "club type" instrument, so he patted him down and discovered rings, watches, and necklaces. Thinking it was loot from a recent break-in, the officer arrested him for burglary. Although it was later determined that the jewelry had, in fact, just been stolen from a nearby home, Donald contended that the search could not be upheld as incident to his arrest because the officer did not have probable cause to arrest him for burglary, at least before the jewelry was discovered. Even if that were true, said the court, it wouldn't matter because the officer "had probable cause to arrest [Donald] for unlawful possession of a 'billy' or 'blackjack.'"

Custodial arrest

The second requirement—that the arrest must have been "custodial"—means that the officers must have decided to transport the arrestee to jail, a police station, or other place of confinement or treatment; i.e., he will not be cited and released. This requirement was imposed because the main justification for these searches is the increased danger that necessarily results from the "extended exposure which follows the taking of a suspect into custody" and the "attendant proximity, stress and uncertainty."[41]

For these reasons, an arrest will be deemed custodial regardless of whether the crime was "minor,"[42] or that officers were aware that the suspect would immediately post bail or would otherwise be released after a short stay.[43] For example, in *People* v. *Sanchez*[44] the defendant argued that a search of his pocket was unlawful because he had been arrested for merely being drunk in public. In summarily rejecting the argument, the court pointed out that "the officer testified he fully intended to book appellant into jail; he did not plan to release appellant."

Because an arrest becomes "custodial" when officers decide to transport the arrestee, a search will also be permitted if officers had decided to take him to a detox facility, mental health facility, or hospital.[45] Similarly, the arrest of a minor is custodial if he will be taken to school, home, a curfew center; or if he will be taken into protective custody.[46]

On the other hand, an arrest will not be deemed custodial if officers had decided not to transport the suspect or if they had not yet decided what to do. For example, in *U.S.* v. *Parr*[47] an officer in Portland, Oregon searched Parr after learning he was driving on a suspended license. Although the officer found stolen mail in the course of the search, and although he also had probable cause to arrest Parr for driving on a suspended license, he released him, having decided to submit the case to prosecutors. After Parr was charged with possessing stolen mail, he argued the search could not be upheld as a search incident to arrest because the officer did not take him into custody and, moreover, there was no evidence to suggest that he ever intended to do so. The court agreed, saying "it is not clear that the police action taken here is the type of 'custodial arrest' necessary to support a search incident to arrest."

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[41] *United States* v. *Robinson* (1973) 414 U.S. 218, 234 (fn.5), 235.

[42] See *Atwater* v. *City of Lago Vista* (2001) 532 U.S. 318 [seatbelt violation]; *Washington* v. *Chrisman* (1982) 455 U.S. 1 [minor in possession of alcohol]; *Gustafson* v. *Florida* (1973) 414 US 260 [unlicensed driver]; *U.S.* v. *Robinson* (1973) 414 U.S. 218 [revoked driver's license]; *People* v. *Hamilton* (2002) 102 Cal.App.4th 1311, 1317 [displaying false registration tags]; *People* v. *Sanchez* (1985) 174 Cal.App.,3d 343, 349 [drunk in public]; *People* v. *McKay* (2002) 27 Cal.4th 601, 619-25 [riding bicycle in wrong direction].

[43] See *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1228 ["Whether the offense is bailable is not determinative."].

[44] (1985) 174 Cal.App.3d 343. ALSO SEE *People* v. *Humberto O.* (2000) 80 Cal.App.4th 237, 244 [the officer "planned to" transport the minor]; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 650 [the reasonableness of a search incident to arrest "depends on what actually happens rather than what could have happened."].
People v. *Hunt* (1990) 225 Cal.App.3d 498, 507 ["No evidence supports defendant's speculation that the officer would not have bothered completing the booking process [for Pen. Code § 148.9] had no contraband been found."].

[45] See Pen. Code § 647(g) [person arrested for plain drunk "shall be taken" into civil protective custody]; *People* v. *Boren* (1987) 188 Cal.App.3d 1171, 1177 [drunk in public]. **NOTE**: Proposition 8 nullified the rule of *People* v. *Longwill* (1975) 14 Cal.3d 943 that a person arrested for public drunkenness cannot be searched incident to arrest until it was determined that he would not be released after sobering up. See *People* v. *Castaneda* (1995) 35 Cal.App.4th 1222, 1228-29.

[46] See *In re Demetrius A.* (1989) 208 Cal.App.3d 1245, 1248 [curfew violator transported home]; *In re Charles C.* (1999) 76 Cal.App.4th 420, 424 [curfew violator transported home]; *People* v. *Humberto O.* (2000) 80 Cal.App.4th 237 [truant transported to school]; *In re Ian C.* (2001) 87 Cal.App.4th 856, 860 [transport to curfew center]; *People* v. *Breault* (1990) 223 Cal.App.3d 125, 132 [protective custody].

[47] (9th Cir. 1988) 843 F.2d 1228.

It should be noted that several California statutes require or authorize a custodial arrest depending on the nature of the crime and other circumstances. For example, the law requires that officers book every person who was arrested for a felony or certain misdemeanors such as DUI, and misdemeanors that were reasonably likely to continue.[48]

What if officers transported the arrestee even though they were not authorized to do so by statute? In the case of *Atwater* v. *City of Lago Vista* the U.S. Supreme Court ruled that such an arrest is nevertheless "custodial" because it is the decision to transport the arrestee—not the statutory authority to do so—that justifies the search.[49]

For example, in *People* v. *McKay*[50] a Los Angeles County sheriff's deputy stopped McKay for riding a bicycle in the wrong direction on a street. Although McKay had verbally identified himself and also provided his date of birth, he had no ID in his possession so the deputy decided to take him into custody. He then conducted a search incident to the arrest and found a baggie of methamphetamine in one of McKay's socks. On appeal to the California Supreme Court, McKay argued that the search could not qualify as a search incident to arrest because he had, in fact, satisfactorily identified himself and, therefore, the officer was required by state law to cite and release him. But the court ruled the search was lawful, saying, "[S]o long as the officer has probable cause to believe that an individual committed a criminal offense, a custodial arrest—even one effected in violation of state arrest procedures—does not violate the Fourth Amendment."

This should not be interpreted to mean that the courts are encouraging officers to transport arrestees in violation of California state law. On the contrary, the California Supreme Court has said "we in no way countenance violations of state arrest procedure,"[51] and the United States Supreme Court noted that such conduct may demonstrate "extremely poor judgment."[52]

Contemporaneous Search

The third requirement for a search incident to arrest is that the arrest and search must have been contemporaneous. Although the word "contemporaneous" in common usage refers to situations in which two acts occur at about the same time, the courts have consistently ruled that the circumstances surrounding most arrests are much too erratic and unpredictable to require a strict succession of events. Instead, the United States Supreme Court ruled on two occasions that the arrest and search need only be "substantially" contemporaneous.[53]

And yet, as noted earlier, the Court in *Gant* seemed to downplay the importance of temporal proximity as it looked mainly to the physical proximity between the unrestrained arrestee and the place or thing that was searched. So the question arises: How will the lower courts resolve the apparent inconsistency between the established and somewhat-flexible requirement of "substantial" contemporaneousness and the seemingly rigid test imposed in *Gant*? Here are some thoughts.

SUBSTANTIAL PHYSICAL PROXIMITY: In determining whether an arrestee had sufficient access to the place or thing that was searched, it seems likely that the courts will continue to apply the following rules which, apart from making good sense, are consistent with the Court's "substantiality" principle:

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[48] See Pen. Code §§ 849, 853.6(i)(7); Veh. Code § 40302(d).

[49] (2001) 532 U.S. 318, 354. ALSO SEE *Virginia* v. *Moore* (2008) 553 U.S. 164, 174 ["A State is free to prefer one search-and-seizure policy among the range of constitutionally permissible options, but its choice of a more restrictive option does not render the less restrictive ones unreasonable, and hence unconstitutional."]; *People* v. *Gomez* (2004) 117 Cal.App.4th 531, 539 [because the officer had probable cause to cite for a seatbelt] violation, "[h]e thus had probable cause to arrest defendant on that basis"]; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 650 ["police may make full custodial arrests for fine-only offenses"].

[50] (2002) 27 Cal.4th 601.

[51] *People* v. *McKay* (2002) 27 Cal.4th 601, 618.

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

[53] See *Shipley* v. *California* (1969) 395 U.S. 818, 820 ["substantially contemporaneous"]; *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33 ["substantially contemporaneous"]. ALSO SEE *U.S.* v. *McLaughlin* (9th Cir. 1999) 170 F.3d 889, 892 ["roughly contemporaneous"]; *US* v. *Smith* (9C 2004) 389 F3 944. 951 ["roughly contemporaneous"]; *U.S.* v. *Fleming* (7th Cir. 1982) 677 F.2d 602, 607 ["absolute" contemporaneousness is not required].

- LUNGING DISTANCE VS. GRABBING DISTANCE: While the area that is accessible to an arrestee is sometimes called "grabbing distance,"[54] it should not be limited to places and things that were literally within his "wingspan."[55] Instead, it appears likely that the courts will continue to permit officers to search places and things that were within the arrestee's "lunging" distance.[56]
- EXPECT IRRATIONALITY, NOT ACROBATICS: In determining whether something was within lunging distance, officers should be permitted to consider that arrestees may act irrationally—that their fear of incarceration may motivate them to attempt to reach places some distance away.[57] As the D.C. Circuit observed, "A willful and apparently violent arrestee, faced with the prospect of long-term incarceration, could be expected to exploit every available opportunity."[58] Still, the place or thing "must be conceivably accessible to the arrestee—assuming that he was neither an acrobat nor a Houdini."[59]

UNCERTAINTY AS TO ARRESTEE'S ACCESS: In the wake of *Gant*, it seems likely that one of the the most hotly contested issues will be whether a search should be invalidated because there was some uncertainty as to whether the arrestee did, in fact, have unfettered access to the place or thing that was searched. We hope, however, that the courts which face this issue will take into account that arrests are inherently dangerous and, to repeat the words of the D.C. Circuit, officers in the midst of making an arrest "cannot be expected to make punctilious judgments regarding what is within and what is just beyond the arrestee's grasp."[60]

For example, in the post-*Gant* case of *United States* v. *Shakir*[61] officers arrested Shakir on a warrant for bank robbery when he arrived in the lobby of a casino in Atlantic City. After handcuffing him, they searched a gym bag at his feet and found money that he had taken in another of his bank robberies. Shakir argued that the money should have been suppressed because he did not have actual access to the bag when it was searched. But the Third Circuit ruled the search was lawful, saying, "Although it would have been more difficult for Shakir to open the bag and retrieve a weapon while handcuffed, we do not regard this possibility as remote enough to render unconstitutional the search incident to arrest."

IF THE ARRESTEE FLED: Before *Gant*, if the arrestee fled when officers tried to arrest him, most courts would rule that the officers could search places and things that were under his immediate control when they attempted to arrest him, plus places and things under his immediate control when he was taken into custody. They reasoned that it was not in the public interest to provide arrestees with a way to impede or prevent the discovery of incriminating evidence by defying or fighting with officers and thereby forcibly distancing themselves from it. Altlhough it appears these searches would not be permitted under a strict interpretation of *Gant,* the courts might find that *Gant* did not repudiate the

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[54] See *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["And 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."]; *U.S.* v. *Tejada* (7th Cir. 2008) 524 F.3d 809, 811 [officers can search "the area within grabbing distance"].

[55] See *U.S.* v. *Ingram* (N.D.N.Y. 2001) 164 F.Supp.2d 310, 314 ["The scope of the search is not limited to the suspect's person, but extends to the suspect's 'wingspan,' or "the area from within which the arrestee might gain possession of a weapon or destructible evidence."].

[56] See *Thornton* v. *United States* (2004) 541 U.S. 615, 621 ["nor is an arrestee less likely to attempt to lunge for a weapon"].

[57] *U.S.* v. *Abdul-Saboor* (D.C. Cir. 1996) 85 F.3d 664, 670.

[58] See *Washington* v. *Chrisman* (1982) 455 U.S. 1, 7 ["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."]; *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207 ["*Chimel* does not require the police to presume that an arrestee is wholly rational."]; ; *U.S.* v. *Han* (4th Cir. 1996) 74 F.3d 537, 542 ["Since *Chimel*, the Supreme Court has interpreted broadly both the area under "immediate control' and the likelihood of danger or destruction of evidence."]; *US* v. *Palumbo* (8C 1984) 735 F2 1095, 1097 ["[A]ccessibility, as a practical matter is not the benchmark. The question is whether the cocaine was in the area within the immediate control of the arrestee"]; *State* v. *Murdock* (Wis. 1990) 455 N.W.2d 618, 626 ["[W]e cannot require an officer to weigh the arrestee's probability of success in obtaining a weapon or destructible evidence hidden within his or her immediate control."].

[59] *U.S.* v. *Queen* (7th Cir. 1988) 847 F.2d 346, 353.

[60] See *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 330.

[61] (3rd Cir. 2010) __ F.3d __ [2010 WL 3122808].

conventional wisdom upon which the earlier opinions were based.[62]

EMERGENCIES: As noted earlier, before *Gant* was decided the courts would usually uphold a search that was not contemporaneous with an arrest if officers needed to delay the search because of exigent circumstances. To date, the courts in three post-*Gant* cases have applied a variation of this principle and ruled that, although the arrestee did not have immediate access to the thing that was searched, the search was lawful because there were other unrestrained suspects who did.[63] But this, too, has become a murky area of the law as the result of *Gant*.

Types of Searches

Officers who have made a lawful custodial arrest may, depending on the circumstances, conduct one or more of the following types of searches incident to arrest: (1) a search of the arrestee's person, (2) a search of things within the arrestee's immediate control, and (3) a limited search of the home in which the arrest occurred. Furthermore, if the arrest occurred inside a home, they may conduct a hybrid search that consists of a protective sweep of the area immediately adjoining the place of arrest. Finally, they may (albeit rarely) search the vehicle in which the arrestee was an occupant.

Searching the arrestee

When officers make an arrest, the first thing they will normally do is search the arrestee. This type of search should not be affected by *Gant* because the arrestee will necessarily have immediate control over everything on his person. While it might be argued that *Gant* would not permit a search if the arrestee had been handcuffed, such an argument would be fallacious because the handcuffs will necessarily be removed at some point. Furthermore, as the Fifth Circuit observed, "Albeit difficult, it is by no means impossible for a handcuffed person to obtain and use a weapon concealed on his person or within lunge reach."[64]

Although the United States Supreme Court vaguely described the scope of these intrusions as "full" searches,[65] the courts have interpreted the term as encompassing the following:

PAT SEARCH: Officers may, of course, pat search the arrestee, a procedure which the Supreme Court described as follows: "The officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and entire surface of the legs down to the feet."[66]

SEARCHES OF CLOTHING: The Court also ruled that officers may conduct a "relatively extensive exploration" of the arrestee's clothing, including his pockets.[67] And because of the threat resulting from syringes, the Court of Apeal ruled that, before conducting the search, officers may ask the arrestee whether there are any needles or other sharp objects in his pockets or anywhere else on his person.[68]

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[62] See, for example, *People* v. *Pressley* (1966) 242 Cal.App.2d 555, 559-60 ["[T]he actual arrest was not made until defendant was under restraint and that his flight and struggle had carried him some 100 feet away. But we do not think that this is controlling. The process of arrest had begun at the door"]; *People* v. *Williams* (1967) 67 Cal.2d 226, 229 ["Of no legal significance is the fact that defendant, through his efforts to escape, succeeded in separating himself from the car by a distance of about one block."].

[63] See *U.S.* v. *Davis* (8th Cir. 2009) 569 F.3d 813, 817 ["Although Davis had been detained, three unsecured and intoxicated passengers were standing around a vehicle redolent of recently smoked marijuana."]; *U.S.* v. *Goodwin-Bey* (8th Cir. 2009) 584 F.3d 1117 [officers had reasonable suspicion to believe that one of the occupants had recently displayed a firearm]; *U.S.* v. *Shakir* (3rd Cir. 2010) __ F3 __ [2010 WL 3122808] [court noted that the officers "had reason to believe that one or more of Shakir's accomplices was nearby"].

[64] *U.S.* v. *Sanders* (5th Cir. 1993) 994 F.2d 200, 209. ALSO SEE *U.S.* v. *Shakir* (3d Cir. 2010) __ F.3d __ [2010 WL 3122808] ["handcuffs are not fail-safe"].

[65] *Gustafson* v. *Florida* (1973) 414 U.S. 260, 264 [officers may "conduct a full search of the arrestee incident to a lawful custodial arrest"]; *People* v. *Dennis* (1985) 172 Cal.App.3d 287, 290 [a "full" search "is a greater intrusion than [a] pat-down"].

[66] *Terry* v. *Ohio* (1968) 392 U.S. 1, 17, fn. 13.

[67] *United States* v. *Robinson* (1973) 414 U.S. 218, 227. ALSO SEE *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["it is reasonable for the arresting officer to search the person arrested" for weapons and evidence]; *U.S.* v. *Brewer* (8th Cir. 2010) __ F.3d __ [2010 WL 4117368] [search of pants pocket].

[68] See *People* v. *Cressy* (1996) 47 Cal.App.4th 981, 988 ["Officers are sometimes required to do dangerous things. They should not, however, be required to do the foolhardy."].

SEARCHING CONTAINERS: Officers may search containers that the arrestee was carrying when the search occurred, such as a wallet, purse, backpack, pockets, cigarette box, pillbox, envelope.[69]

NO EXTREME SEARCHES: Officers may not conduct strip searches or any other exploration that is "extreme or patently abusive."[70] Furthermore, in the unlikely event that it becomes necessary to remove some of the arrestee's clothing in order to conduct a full search, officers must do so with due regard for the arrestee's legitimate privacy interests.[71]

Searching things nearby

In the past, officers could search all containers and other things that were within grabbing distance of the arrestee *when the arrest occurred*.[72] Although *Gant* still permits officers to search things near the arrestee, these searches must now be limited to items that were reasonably accessible to him *when the search occurred*. That was the situation in *U.S.* v. *Shakir*, noted earlier, in which the court ruled that officers did not violate *Gant* when they searched a gym bag at the feet of the defendant because, "[a]lthough he was handcuffed and guarded by two policemen, Shakir's bag was literally at his feet, so it was accessible if he had dropped to the floor."[73]

In determiing whether a place or thing was reasonably accessible to the arrestee at the time of the search, the following pre-*Gant* law is consistent with *Gant* and should still be valid:

CONTAINERS UNDER OFFICERS' CONTROL: Because an arrestee has no control over a container at the moment that officers are searching it, it might be argued that all searches of containers are prohibited as the result of *Gant*. But the Supreme Court flatly rejected this "fallacious" theory in *New York* v. *Belton*[74] (which, as noted earlier, it did not overturn) and there is nothing in *Gant* to suggest that it intended to impose such an extreme rule.

CONTAINERS "IMMEDIATELY ASSOCIATED": Nor is there anything in *Gant* to suggest that the Court was overturning another of its longstanding rules: that officers may search a container that was not under the arrestee's immediate control if it was the type of property that is "immediately associated with the person of the arrestee"; e.g., purses.[75]

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[69] See *US* v. *Robinson* (1973) 414 U.S. 218, 223 [cigarette package]; *Gustafson* v. *Florida* (1973) 414 U.S. 260, 262 [cigarette package]; *People* v. *Limon* (1993) 17 Cal.App.4th 524, 538 ["hide-a-key" box]; *People* v. *Methey* (1991) 227 Cal.App.3d 349, 358-59 [wallet]; *People* v. *Loudermilk* (1987) 195 Cal.App.3d 996, 1005-6 [wallet]; *People* v. *Baker* (1970) 12 Cal.App.3d 826, 841 [handbag]; *People* v. *Ingham* (1992) 5 Cal.App.4th 326, 331 [purse]; *People* v. *Brocks* (1981) 124 Cal.App.3d 959, 964 [change purse]; *People* v. *Flores* (1979) 100 Cal.App.3d 221, 230 [shoulder bag]; *Northrop* v. *Trippett* (6th Cir. 2001) 265 F.3d 372, 379 [duffle bag that the arrestee removed from his shoulder when officers approached]; *In re Humberto O.* (2000) 80 Cal.App.4th 237, 243-44 [backpack]; *People* v. *Sims* (1993) 5 Cal.4th 405, 451 [bank bag]; *People* v. *Gutierrez* (1984) 163 Cal.App.3d 332, 335 [small cardboard box]; *People* v. *Gonzales* (1989) 216 Cal.App.3d 1185 ["cylindrical rolled up clear plastic baggy"]; *People* v. *Brown* (1989) 213 Cal.App.3d 187, 192 [pill bottle]; *U.S.* v. *Nohara* (9th Cir. 1993) 3 F.3d 1239, 1243 [bag]; *U.S.* v. *Holzman* (9th Cir. 1989) 871 F.2d 1496, 1504 [address book]; *U.S.* v. *Porter* (4th Cir. 1983) 738 F.2d 622, 627 [carry-on bag]; *U.S.* v. *Stephenson* (8th Cir. 1986) 785 F.2d 214, 225 [briefcase].

[70] *United States* v. *Robinson* (1973) 414 U.S. 218, 236. ALSO SEE *People* v. *Laiwa* (1983) 34 Cal.3d 711, 726 ["When, as often occurs, the arrest takes place on the street or in some other public setting, it is plainly wrong to say that a thorough search of the booking type performed at that location is not a grater invasion of personal privacy than the same search held in the relatively sequestered milieu of the property room of a police station."]; *Schmidt* v. *City of Lockport* (N.D. Ill. 1999) 67 F.Supp.2d 938, 944 [the search "went beyond the full search authorized by the Court in *Robinson*"]; *U.S.* v. *Ford* (E.D. Va. 2002) 232 F.Supp.2d 625, 631 [officer violated the Fourth Amendment when he "shoved his gloved hand into defendant's buttocks"].

[71] See *Illinois* v. *Lafayette* (1983) 462 U.S. 640, 645 ["[T]he interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street"]; *U.S.* v. *Williams* (7th Cir. 2000) 209 F.3d 940, 944 ["Williams was never disrobed or exposed to the public. The search occurred at night, away from traffic and neither officer saw anyone in the vicinity."]; *U.S.* v. *McKissick* (10th Cir. 2000) 204 F.3d 1282, 1297, fn.6 ["Officer Patten testified he did not remove Mr. Zeigler's clothes during the search, but he might have unzipped Mr. Zeigler's pants after discovering a lump in Mr. Zeigler's crotch area that was inconsistent with his genitals."]; *U.S.* v. *Dorlouis* (4th Cir. 1997) 107 F.3d 248, 256 [the search "took place in the privacy of the police van"].

[72] See *Chimel* v. *California* (1969) 395 U.S. 752, 763 [the dangerousness of an item does not depend on who owns it].

[73] (3rd Cir. 2010) __ F.3d __ [2010 WL 3122808].

[74] (1981) 453 U.S. 454, 462, fn.5 ["But under 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.'"].

[75] See *United States* v. *Edwards* (1974) 415 U.S. 800, 805; *United States* v. *Chadwick* (1977) 433 U.S. 1, 15; *People* v. *Belvin* (1969) 275 Cal.App.2d 955, 959.

CONTAINERS TO GO: If the arrestee wants to take an item with him (e.g., a jacket), and if officers permit it, *Gant* would not restrict their ability to search it even if it was not under the arrestee's immediate control when he was arrested or when the search occurred. This is because the item would presumably be returned to him at some point.[76] Officers may not, however, compel an arrestee to take a certain item, then search it on the theory the search was incident to the arrest or was necessary for officer safety.[77]

SEARCHING PAGERS, CELL PHONES: Because so many arrestees carry pagers and cell phones nowadays, the question has frequently arisen: Can these searches be upheld as an incident to an arrest? Although it is questionable in light of *Gant* (mainly because there is no officer-safety justification[78]) they might be upheld under two other theories. First, they might fall under the Supreme Court's warrant exception for containers that are "immediately associated with the person of the arrestee."[79] In fact, the California Supreme Court is currently reviewing a case in which it may resolve this issue.[80] Second, a search of cell phones and such things might be upheld under an exigent circumstances theory if (1) officers had probable cause to believe that telephone numbers, text messages, or other data stored in the device are evidence of a crime; and (2) officers reasonably believed that the data might be lost unless a search was conducted immediately; e.g., digitally-stored data might be automatically deleted as new calls are received.[81]

Searching vehicles

As discussed earlier, the Supreme Court in *Gant* ruled that officers may not search the passenger compartment of a vehicle incident to the arrest of an occupant unless there was a reasonable possibility that the arrestee had access to the passenger compartment when the search occurred.[82] In those rare cases in which these types of searches are permitted, it appears that officers may search the entire passenger compartment, including all containers (regardless of whether the container was open or closed);[83] and all storage areas, such as the glove box, console, and map holder.[84] Officers may not, however, search the trunk or damage the car in the course of the search.[85]

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[76] See *People* v. *Topp* (1974) 40 Cal.App.3d 372, 378 [ok to search "the jacket that defendant indicated he wished to take with him to jail."]: *U.S.* v. *Lyons* (D.C. Cir. 1983) 706 F.2d 321, 331 [ok to search jacket "for weapons before giving it to him"].

[77] See *People* v. *Ingham* (1992) 5 Cal.App.4th 326, 331-33.

[78] See *U.S.* v. *Quintana* (M.D. Fla. 2009) 594 F.Supp.2d 1291, 1300 ["The search of the contents of Defendant's cell phone had nothing to do with officer safety or the preservation of evidence related to the crime of arrest."]. BUT ALSO SEE *U.S.* v. *Finley* (5th Cir. 2007) 477 F.3d 250, 260 [officers were "therefore permitted to search Finley's cell phone pursuant to his arrest"]; *U.S.* v. *Thomas* (3d Cir. 1997) 114 F.3d 404, 404, fn.2 [search of pager in arrestee's possession "falls within an exception to the warrant requirement as a lawful search incident to arrest"]; *U.S.* v. *Chan* (N.D. Cal. 1993) 830 F.Supp. 531, 536 ["[T]he general requirement for a warrant prior to the search of a container does not apply when the container is seized incident to arrest. The search conducted by activating the pager's memory is therefore valid."].

[79] See *United States* v. *Edwards* (1974) 415 U.S. 800; *U.S.* v. *Murphy* (4th Cir. 2009) 552 F.3d 405, 412 [under *Edwards*, "once the cell phone was held for evidence, other officers and investigators were entitled to conduct a further review of its contents"].

[80] *People* v. *Diaz* (2008) 85 Cal.Rptr. 3d 693. **NOTE**: On October 5, 2010, the California Supreme Court heard arguments in *Diaz*, which means a decision can be expected by early January 2011.

[81] See *People* v. *Bullock* (1990) 226 Cal.App.3d 380, 388 ["danger existed that the incoming telephone numbers would be lost unless quickly retrieved by the officer"].

[82] (2009) __ U.S. __ [129 S.Ct. 1710, 1719]. ALSO SEE *U.S.* v. *Maddox* (9th Cir. 2010) __ F.3d __ [2010 WL 3169397] [search of vial in arrestee's car was unlawful because the arrestee had been "handcuffed in the backseat of the patrol car"]; *U.S.* v. *Gonzalez* (9th Cir. 2009) 578 F.3d 1130, 1132 [search unlawful "because Gonzalez was handcuffed and secured in a patrol vehicle at the time of the search"]; *U.S.* v. *Caseres* (9th Cir. 2008) 533 F.3d 1064, 1072 [Caseres was handcuffed and arrested a full block and a half away from his car"]; *U.S.* v. *Vinton* (D.C. Cir. 2010) 594 F.3d 14, 25 [search unlawful "because Vinton was handcuffed at the time"]; *U.S.* v. *McCane* (10th Cir. 2009) 573 F.3d 1037 [search unlawful because arrestee was handcuffed and restrained in a patrol car].

[83] See *New York* v. *Belton* (1981) 453 U.S. 454, 461.

[84] See *New York* v. *Belton* (1981) 453 U.S. 454, 460, fn.4.

[85] See *New York* v. *Belton* (1981) 453 U.S. 454, 460, fn.4.

Searching homes (*Chimel* searches)

The term "*Chimel* search" refers to a search of a place or thing inside a residence that was within the grabbing or lunging area of the arrestee. Prior to *Gant*, the courts ordinarily interpreted this to mean that officers could search places and things that were within this area at the time of the search. But, as we will now discus, that is likely to change.

POST-*GANT* LAW: For reasons discussed earlier, it is likely that the courts will rule that, pursuant to *Gant*, the search must be limited to places and things that were within the arrestee's grabbing distance when the search occurred. For example, officers would be permitted to search under a bed on which the arrestee was lying,[86] inside a duffel bag at the foot of a bed on which the arrestee was lying,[87] under a sofa cushion that was two feet away from the unhandcuffed arrestee when the search occurred.[88]

Although there is authority for permitting a search of a place or thing that was not within the arrestee's immediate control when there was good reason to move him away before starting the search,[89] this authority appears to have been undermined by *Gant*.[90]

PRE-*GANT* LAW CONSISTENT WITH *GANT*: While the following rules predate *Gant,* they are probably still good law:

ARRESTS OUTSIDE THE RESIDENCE: A *Chimel* search will not be permitted if the arrest occurred outside the premises.[91] As the United States Supreme Court observed, "If a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house, not somewhere outside—whether two blocks away, twenty feet away, or on the sidewalk near the front steps."[92]

SEARCHING OTHER ROOMS: Even before *Gant* was decided, the courts would rule that officers may not routinely search beyond the room in which the arrest occurred.[93] There is, however, an exception to this rule that will probably not be affected by *Gant*: if the arrestee requests permission to go into another room to, for example, obtain clothing or identification, officers may, in the words of the Supreme Court, stay "literally at [his] elbow at all times."[94] Furthermore, if officers have permitted the arrestee to enter another room, they may search places and things in that room that are within his grabbing area. This is because, as the California Supreme Court pointed out, an

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[86] See *People* v. *King* (1971) 5 Cal.3d 458, 463; *People* v. *Spencer* (1972) 22 Cal.App.3d 786, 797.
[87] See *People* v. *Arvizu* (1970) 12 Cal.App.3d 726, 729.
[88] *U.S.* v. *McConney* (9th Cir. 1984) 728 F.2d 1195, 1207.
[89] See *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 767 ["critical time for analysis is the time of the arrest and not the time of the search"].
[90] See *People* v. *Leal* (2009) 178 Cal.App.4th 1051, 1061-62 [search under clothing near place of arrest was unlawful because the arrestee had been handcuffed and removed from the premises].
[91] See *Shipley* v. *California* (1969) 395 U.S. 818, 819 [search of home not justified by arrest that occurred as the arrestee was exiting his car]; *People* v. *Baldwin* (1976) 62 Cal.App.3d 727, 742 ["The search of the house cannot be justified as incident to the arrest of Martinez, as he was arrested outside the house."].
[92] *Vale* v. *Louisiana* (1970) 399 U.S. 30, 33-34.
[93] See *Chimel* v. *California* (1969) 395 U.S. 752, 763 ["There is no comparable justification, however, for routinely searching any room other than that in which an arrest occurs"]; *Dillon* v. *Superior Court* (1972) 7 Cal.3d 305, 314 [the "mere possibility of additional persons in the house" will not warrant a search of other rooms]; *People* v. *Jordan* (1976) 55 Cal.App.3d 965, 967 ["Routine searches cannot extend beyond the room in which the suspect is arrested, but the facts and circumstances of the case may nevertheless permit entry of other parts of the house."]; *Guidi* v. *Superior Court* (1973) 10 Cal.3d 1, 7 [kitchen was not within arrestee's immediate control when he was arrested in the living room]; *People* v. *Block* (1971) 6 Cal.3d 239, 243 [cannot search upstairs when arrest occurred downstairs].
[94] *Washington* v. *Chrisman* (1982) 455 U.S. 1, 6. ALSO SEE: *People* v. *Breault* (1990) 223 Cal.App.3d 125, 133 ["*Chrisman* does not require a showing of exigent circumstances."]; *Curry* v. *Superior Court* (1970) 7 Cal.App.3d 836, 849 [search permitted because arrestee was given permission to enter the room to obtain a dress]; *U.S.* v. *Nascimento* (1st Cir. 2007) 491 F.3d 25, 50 ["[I]t was not inappropriate for the police to escort Nascimento to his bedroom in order that he might get dressed."]; *U.S.* v. *Garcia* (7th Cir. 2004) 376 F.3d 648, 651 ["It would have been folly for the police to let [the arrestee] enter the home and root about [for identification] unobserved."]. ALSO SEE: *U.S.* v. *Scroggins* (5th Cir. 2010) 599 F.3d 433, 442 ["it would be strange indeed to hold that the Constitution *requires* police to deny a citizen's reasonable request to enter her residence and put on less revealing clothing before being taken into custody"].

arrestee's request to move to another room might be "a ruse to permit him to get within reach of a weapon or destructible evidence."[95] But such a search would not be permitted if officers compelled the arrestee to enter the room without good cause.[96]

Vicinity sweeps of homes

A vicinity sweep is a type of search incident to arrest that is limited to a cursory inspection of spaces "immediately adjoining the place of arrest from which an attack could be immediately launched."[97] It is apparent that vicinity sweeps will not be affected by *Gant* because the threat presented by hidden friends or associates in the vicinity will exist regardless of whether the arrestee had been handcuffed or removed from the immediate area.[98] To put it another way, an officer's act of moving the arrestee from the arrest site will not reduce the threat caused by any lurking companions

Vicinity sweeps are similar to *Chimel* searches in that both may be conducted as a matter of routine, meaning that officers will not be required to prove there was reason to believe that any dangerous people were nearby.[99] There are, however, two important differences. First, the sole objective of a vicinity sweep is to locate people, not weapons or evidence. Consequently, officers may search only those places and things in which "unseen third parties" might be hidden;[100] e.g., officers are not permitted to open drawers or look under rugs.

Second, there is a difference in scope between grabbing area and spaces "immediately adjoining the place of arrest." Although both cover a fairly small amount of territory, the area "immediately adjoining" the place of arrest will usually extend well beyond the arrestee's grabbing distance. This is because an arrestee can only grab so far; while a friend, relative, or accomplice might be able to launch a sneak attack from any hidden space in the immediate vicinity.[101] (In reality, an accomplice could launch an attack from virtually anywhere on the premises. But, like many types of warrantless searches, vicinity sweeps represent an imperfect compromise between the safety interests of officers and the privacy interests of others.)

For example, in *U.S.* v. *Curtis*[102] officers in Washington, D.C. lawfully arrested Curtis and Melvin in the living room of their two-bedroom apartment. While two officers guarded the arrestees, two other officers looked inside a living room closet, the adjoining kitchen, and two bedrooms located "down the hall." In the course of the sweep, they found drugs in the bedrooms. While the court had no problem with the officers looking into the closet and the kitchen, it ruled that the search of the bedrooms was unlawful because "[t]here was no justification for a sweep of such remote areas." POV

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[95] *Mestas* v. *Superior Court* (1972) 7 Cal.3d 537, 541, fn.2.

[96] See *Shipley* v. *California* (1969) 395 U.S. 818, 820 [the area that can be searched cannot be expanded "without reasonable justification."]; *People* v. *Mendoza* (1986) 176 Cal.App.3d 1127, 1132 ["Mendoza was taken from the bathroom into the presence of the shoulder bag. If the *Chimel* rule could be so easily satisfied, the officers would only have to force the defendant to accompany them while they proceeded to examine the entire contents of the premises."]; *Eiseman* v. *Superior Court* (1971) 21 Cal.App.3d 342, 350 ["The police should not be allowed to extend the scope of [the search] by having a person under arrest move around the room at their request."].

[97] *Maryland* v. *Buie* (1990) 494 U.S. 325, 334.

[98] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 336 ["the justification for the search incident to arrest considered in *Chimel* was the threat posed by the arrestee, not the safety threat posed by the house, or more properly by unseen third parties in the house"].

[99] See *Maryland* v. *Buie* (1990) 494 U.S. 325, 334 [as "an incident to the arrest the officers could, as a precautionary matter and without probable cause or reasonable suspicion [conduct a vicinity sweep]"]; *US* v. *Ford* (D.C. Cir. 1995) 56 F.3d 265, 269 ["[The vicinity sweep] requires no probable cause or reasonable suspicion"]; *U.S.* v. *Archibald* (6th Cir. 2009) 589 F.3d 289 [sweep inside residence not permitted when arrest occurred at the threshold].

[100] *U.S.* v. *Gandia* (2nd Cir. 2005) 424 F.3d 255, 262 ["[A] 'protective sweep' seems clearly to refer to a search that focuses not on the threat posed by the arrestee, but the safety threat posed by the house, or more properly by unseen third parties in the house."]; *U.S.* v. *Ford* (D.C. Cir. 1995) 56 F.3d 265 [under a mattress and behind a window shade were not places in which a person might be hiding].

[101] See *U.S.* v. *Lemus* (9th Cir. 2009) 582 F.3d 958, 963 [search of living room was lawful because the suspect "was only partially outside the living room when he was arrested"]; *In re Sealed Case* (D.C. Cir. 1998) 153 F.3d 759, 767 ["The defendant was arrested while standing next to a chair in the bedroom. The drugs were found on that chair, and the gun was found beside it."].

[102] (D.C. Cir. 2002) 239 F.Supp.2d 1.