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## ARRESTED DEVELOPMENT: *ARIZONA v. GANT* AND ARTICLE I, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION

Jacob R. Brown

*Abstract:* In *Arizona v. Gant*,<sup>1</sup> the United States Supreme Court held that the search of a vehicle incident to arrest is permissible in only two situations: (1) when the arrestee is unsecured and within reaching distance of the passenger compartment; or (2) when it is reasonable to believe that evidence relevant to the crime of arrest may be found in the vehicle. Because *Gant* expressed a standard more protective than that established by the Washington State Supreme Court, *Gant* induced a state of confusion in Washington, where it has long been maintained that article I, section 7 of the Washington State Constitution offers broader protections than those available under the Fourth Amendment. Since *Gant*, the Court has twice attempted to redefine the search of a vehicle incident to arrest under article I, section 7. In *State v. Patton*,<sup>2</sup> and subsequently in *State v. Valdez*,<sup>3</sup> the Washington State Supreme Court adopted a standard closely resembling the first *Gant* prong. However, neither decision expressly adopted or rejected the second. Because the second prong is supported by historical Washington case law, the Washington State Supreme Court should adopt a modified version of the *Gant* rule, with an added proscription on the opening of any locked containers located during the search. Such a modification would satisfy the heightened privacy protections of article I, section 7.

### INTRODUCTION

For more than eighty years, Washington courts have struggled to define the constitutionally authorized preconditions of the search of a vehicle incident to arrest. Following a peripatetic path between the Fourth Amendment of the United States Constitution and article I, section 7 of the Washington State Constitution, Washington jurisprudence regarding the search of a vehicle incident to arrest reveals little in the way of constancy or predictability.<sup>4</sup> Never has this been more

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1. 556 U.S. \_\_\_, 129 S. Ct. 1710 (2009).

2. 167 Wash. 2d 379, 219 P.3d 651 (2009).

3. 167 Wash. 2d 761, 224 P.3d 751 (2009).

4. *See* *State v. Hughlett*, 124 Wash. 366, 214 P. 841 (1923) (holding an officer may search a vehicle incident to arrest for evidence that tends to prove the crime of arrest if the vehicle is under the control of the arrestee); *State v. Deitz*, 136 Wash. 228, 239 P. 386 (1925) (holding search of a vehicle incident to arrest need not be for evidence relevant to the crime of arrest); *State v. Miller*, 151 Wash. 114, 275 P. 75 (1929) (predicating the valid search of a vehicle incident to arrest solely upon the occurrence of a lawful arrest); *State v. Cyr*, 40 Wash. 2d 840, 246 P.2d 480 (1952) (allowing the search of a vehicle incident to arrest when it was parked reasonably close to the scene

apparent than in the wake of the United States Supreme Court's imposition of new guidelines for the search of a vehicle incident to arrest as announced in *Arizona v. Gant*.<sup>5</sup> Because Washington courts have long provided that article I, section 7 of the Washington State Constitution offers broader protections than those available under the Fourth Amendment,<sup>6</sup> *Gant* has left judges and lawyers in Washington scrambling to redetermine this already contentious issue.<sup>7</sup> A recent oral argument before the Washington Court of Appeals is particularly illustrative—hardly had the deputy prosecutor taken the podium before a perhaps playfully exasperated judge implored, “I hope you can clear this up!”<sup>8</sup>

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of the arrest, and the officers were looking for evidence relevant to crime of the arrest); *State v. Michaels*, 60 Wash. 2d 638, 374 P.2d 989 (1962) (permitting the search of a vehicle incident to arrest for evidence of the crime or tools which would aid in the arrested person's escape, so long as the vehicle is within the arrestee's immediate environs). In *State v. Ringer*, 100 Wash. 2d 686, 674 P.2d 1240 (1983), the Washington State Supreme Court overruled this line of cases and held that a search of a vehicle incident to arrest could only be justified by the presence of certain exigencies, determined by a totality of the circumstances test. This test was subsequently overturned by *State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986), which adopted a bright-line rule for the search of a vehicle incident to arrest with the added requirement under article I, section 7 that an officer not open locked containers. However, *Stroud* was then overturned by *State v. Valdez*, 167 Wash. 2d 761, 777, 224 P.3d 751, 759 (2009), which held that “after an arrestee is secured and removed from the automobile . . . the arrestee's presence does not justify a warrantless search under the search incident to arrest exception [and] *Stroud*'s expansive interpretation to the contrary . . . is overruled.”

5. 556 U.S. \_\_\_, 129 S. Ct. 1710, 1719 (2009).

6. See, e.g., *State v. Stroud*, 106 Wash. 2d 144, 148, 720 P.2d 436, 439 (1986) (“[Article I, section 7 of the] Washington State Constitution affords individuals greater protections against warrantless searches than does the Fourth Amendment.”).

7. See Audio Recording of Oral Argument, *State v. Wright*, \_\_ P.3d \_\_, (Wash. Ct. App. 2010) (No. 62142-4-I), <http://www.courts.wa.gov/content/OralArgAudio/a01/20091104/2.%20State%20v.%20Wright%20%20%2062142-4.wma> [hereinafter Wright Oral Argument] (debating the post-*Gant* preconditions for the search of a vehicle incident to arrest under article I, section 7); Respondent's Response to Motion for Reconsideration at 5, *Wright*, \_\_ P.3d \_\_, (No. 62142-4-I) (arguing that the second *Gant* exception, allowing an officer to search the passenger compartment incident to arrest when it is reasonable to believe that it contains evidence of the crime of arrest, applies in Washington); Appellant's Motion for Reconsideration at 4–6, *Wright*, \_\_ P.3d \_\_, (No. 62142-4-I) (arguing that *Gant* precludes any search of a vehicle incident to arrest when the arrestee has been secured away from the scene of the search); see also Brief of Respondent at 68, *State v. Jordan*, No. 62076-2-I (Wash. Ct. App. filed Aug. 21, 2009) (arguing that the *Gant* rule allowing officers to search a car when it is reasonable to believe that evidence relevant to the crime of arrest may be found inside the vehicle is permitted by article I, section 7 of the Washington State Constitution); Brief of Appellant at 36, *Jordan*, No. 62076-2-I (Wash. Ct. App. filed June 9, 2009) (arguing that the second *Gant* rule does not exist under article I, section 7).

8. Wright Oral Argument, *supra* note 7. Additionally, at an oral argument in February of 2010, Division I of the Washington Court of Appeals allowed counsel for the appellant and respondent to speak for nearly a combined hour and a half on the question of *Gant*'s impact on the search of a vehicle incident to arrest under article I, section 7. Audio Recording of Oral Argument, *State v. Mills*, No. 62732-5 (Wash. Ct. App. argued Feb. 23, 2010), <http://www.courts.wa.gov/content/>

The lack of clarity lamented by the court of appeals results from the interaction between article I, section 7, and the new standard contained in *Gant*. At the time of *Gant*'s announcement, the prevailing understanding among federal courts was that *New York v. Belton*<sup>9</sup> provided a bright-line standard, authorizing an officer to search the passenger compartment of a vehicle incident to a recent occupant's arrest irrespective of any concerns for the officer's safety or the preservation of evidence.<sup>10</sup> Washington State courts adhered to a similar bright-line standard under *State v. Stroud*,<sup>11</sup> with the added protection, as required by article I, section 7, that an officer could not open any locked containers during the search.<sup>12</sup>

The *Gant* Court rejected a broad, bright-line reading of *Belton*, and reduced the applicability of the search incident to arrest exception to two situations. First, reasserting concerns expressed earlier in *Chimel v. California*,<sup>13</sup> the Court held that an officer may search a vehicle incident to arrest when the arrestee is unsecured and within reaching distance of the passenger compartment.<sup>14</sup> Second, deriving from Justice Scalia's concurring opinion in *Thornton v. United States*,<sup>15</sup> an officer may search a vehicle incident to arrest when it is reasonable to believe that evidence relevant to the crime of arrest may be found in the passenger compartment.<sup>16</sup> The *Gant* Court therefore established a rule under the Fourth Amendment that was *more protective* than the bright-line standard previously held permissible under *Stroud* and article I, section 7 of the Washington State Constitution. Given Washington's long-held judicial maxim that article I, section 7 provides greater protections than the Fourth Amendment, *Gant* thrust Washington law into uncertain

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OralArgAudio/a01/20100223/5.%20State%20v.%20Mills%20%20%2062732-5.wma.

9. 453 U.S. 454 (1981).

10. *See Gant*, 129 S. Ct. at 1718.

11. 106 Wash. 2d 144, 720 P.2d 436 (1986), *overruled by* *State v. Valdez*, 167 Wash. 2d 761, 777, 224 P.3d 751, 759 (2009).

12. *Id.* at 152, 720 P.2d at 441; *see also* *State v. Vrieling*, 144 Wash. 2d 489, 492–93, 28 P.3d 762, 765 (2001) (citing *Stroud* for the proposition that officers may search a vehicle incident to arrest irrespective of concerns for officer safety or the preservation of evidence); *State v. Patterson*, 112 Wash. 2d 731, 735, 774 P.2d 10, 12 (1989) (citing *Stroud* and noting that “concerns for the safety of officers and potential destructibility of evidence do outweigh privacy interests and warrant a bright-line rule permitting limited searches”).

13. 395 U.S. 752, 768 (1969) (limiting a search incident to arrest to the “person and the area from within which [an arrestee could obtain] either a weapon or something that could have been used as evidence against [the arrestee]”).

14. *Gant*, 129 S. Ct. at 1719.

15. 541 U.S. 615, 625 (2004) (Scalia, J., concurring).

16. *Gant*, 129 S. Ct. at 1719.

territory. Since *Gant*, the Washington State Supreme Court has twice attempted to reconcile the search of a vehicle incident to arrest under article I, section 7, with the Fourth Amendment: first in *State v. Patton*,<sup>17</sup> and later in *State v. Valdez*.<sup>18</sup>

Part I of this Comment reviews the development of federal law on the search of a vehicle incident to arrest, specifically with respect to the *Chimel-Belton* rule and “relevant evidence rule”<sup>19</sup> contained in *Gant*. Part II reviews the history of Washington jurisprudence on the search of a vehicle incident to arrest and the relationship between article I, section 7 and the Fourth Amendment. Part III examines the Washington State Supreme Court’s efforts in *Patton* and *Valdez* to craft a post-*Gant* standard in line with both article I, section 7 of the Washington State Constitution and the Fourth Amendment. Finally, Part IV of this Comment argues that, should the Washington State Supreme Court be faced with a case that squarely implicates *Gant*’s relevant evidence rule, it should adopt a modified version of the rule that contains an added proscription on the opening of locked containers.

## I. THE FOURTH AMENDMENT PERMITS THE SEARCH OF A VEHICLE INCIDENT TO ARREST UNDER TWO CONDITIONS

The standard for the search of a vehicle incident to arrest under the Fourth Amendment has fluctuated throughout its modern history.<sup>20</sup> Cases in the second half of the twentieth century led to the development

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17. 167 Wash. 2d 379, 219 P.3d 651 (2009).

18. 167 Wash. 2d 761, 224 P.3d 751 (2009).

19. This Comment uses the term “relevant evidence rule” to refer to the rule articulated by Justice Scalia in his concurring opinion in *Thornton*, and adopted by the United States Supreme Court in *Gant*. The rule provides that an officer may search a vehicle incident to arrest when it is reasonable to believe that evidence relevant to the crime of arrest may be found in the vehicle. *Gant*, 129 S. Ct. at 1719 (citing *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

20. See, e.g., Edwin J. Butterfoss, *Bright Line Breaking Point: Embracing Justice Scalia’s Call for the Supreme Court to Abandon an Unreasonable Approach to Fourth Amendment Search and Seizure Law*, 82 TUL. L. REV. 77, 80 (2007) (noting the “checkered history” of the search of a vehicle incident to arrest exception under the Fourth Amendment); Jason Hermele, Comment, *Arizona v. Gant: Rethinking the Evidence-Gathering Justification for the Search Incident to Arrest Exception, and Testing a New Approach*, 87 DENV. U. L. REV. 175, 175 (2009) (noting the “inconsistent history” of the search of a vehicle incident to arrest exception under the Fourth Amendment); Kirsten M. Sjue, Comment, *Constitutional Law—Search and Seizure: The North Dakota Supreme Court Considers Whether an Officer May Search a Non-Arrested Person’s Purse Incident to the Arrest of Another Person in the Same Vehicle*, 81 N.D. L. REV. 377, 393 (2005) (noting that the United States Supreme Court’s search incident to arrest jurisprudence prior to 1969 was “inconsistent and unpredictable”).

of two main doctrines that provide alternative bases for the search of a vehicle incident to arrest. The first of these is the *Chimel-Belton* rule, which authorizes the search of a vehicle incident to arrest in order to protect officer safety or preserve evidence.<sup>21</sup> The second is the relevant evidence rule, which permits an officer to search the passenger compartment of a vehicle when it is reasonable to believe that it contains evidence relevant to the crime of arrest.<sup>22</sup> The present incarnation of both doctrines appears in *Gant*, which clarified the *Chimel-Belton* rule and formally adopted the relevant evidence rule.<sup>23</sup>

A. *The Chimel-Belton Rule Authorizes the Search of a Vehicle Incident to Arrest in Order to Protect Officer Safety or Preserve Evidence*

The *Chimel-Belton* rule<sup>24</sup> derives from two flagship federal cases decided in 1969<sup>25</sup> and 1981<sup>26</sup> respectively, although its modern roots are detectable as early as 1964.<sup>27</sup> Interpretations of the *Chimel-Belton* rule, which predicates the search of a vehicle incident to arrest upon certain prerequisite concerns, varied from narrow to expansive over the years until finally clarified in *Gant*.<sup>28</sup>

The *Chimel-Belton* rule authorizes the search of a vehicle incident to arrest in order to protect officer safety or to preserve evidence.<sup>29</sup> The rule arises from the Fourth Amendment, which states:

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21. See *Gant*, 129 S. Ct. at 1719 (construing *Belton* and *Chimel* to authorize the search of a vehicle incident to arrest “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search”).

22. See *id.*

23. *Id.*

24. For examples of the usage of this term, see *United States v. Vasey*, 834 F.2d 782, 787 (9th Cir. 1987), referring to a “*Chimel/Belton* doctrine” and *United States v. Monclavo-Cruz*, 662 F.2d 1285, 1288 (9th Cir. 1981), referring to a “*Chimel/Belton*” search.

25. *Chimel v. California*, 395 U.S. 752 (1969).

26. *New York v. Belton*, 453 U.S. 454 (1981).

27. See *Preston v. United States*, 376 U.S. 364, 367 (1964).

28. See *infra* Part I.C (discussing *Gant*’s clarification of the *Chimel-Belton* rule).

29. See *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S. Ct. 1710, 1719 (2009) (construing *Belton* and *Chimel* to authorize the search of a vehicle incident to arrest “only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search”); see also *Belton*, 453 U.S. at 460 (construing *Chimel* to authorize the rule that, when an officer has lawfully arrested an occupant of a vehicle, he may search the passenger compartment of that vehicle incident to arrest); *Chimel*, 395 U.S. at 762–68 (noting an officer may search an arrestee incident to arrest in order to protect officer safety or preserve evidence, but such a search must be limited to the arrestee’s person or the area from within which he or she might obtain a weapon or something that could be used as evidence against him or her); *Preston*, 376 U.S. at 367 (1964) (noting a search

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.<sup>30</sup>

As far back as 1925, the Supreme Court held that the warrantless search of a vehicle may meet the criterion of reasonableness under the Fourth Amendment.<sup>31</sup> Although a warrantless search is generally unreasonable,<sup>32</sup> the Court developed an exception to the warrant requirement for valid searches incident to arrest.<sup>33</sup>

The beginnings of the modern development of the *Chimel-Belton* rule are illustrated by the 1964 case *Preston v. United States*.<sup>34</sup> In *Preston*, the United States Supreme Court required proximity in “time or place” for a valid search of a vehicle incident to arrest.<sup>35</sup> The case arose when officers arrested and removed the passengers of a car, drove it to police headquarters, and then searched the car and found drug paraphernalia.<sup>36</sup> The Court ruled that the search did not constitute a valid search incident to arrest because such searches are justified by the need to protect officer safety and preserve destructible or concealable evidence, and must therefore be proximate to the arrest in both time and place.<sup>37</sup>

In 1969, *Chimel* further limited the search incident to arrest exception to the area within the arrestee’s immediate control.<sup>38</sup> *Chimel* stemmed from a situation in which officers confronted a suspect and executed an arrest warrant against him in his home.<sup>39</sup> The officers searched the entire house incident to arrest and seized numerous items, which were admitted against the defendant at trial.<sup>40</sup> The California Supreme Court upheld the defendant’s resulting conviction and the admission of evidence because

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incident to arrest is justified by the need to protect officer safety or preserve evidence of the crime of arrest and extends to the arrestee’s person and area within his immediate control).

30. U.S. CONST. amend. IV.

31. *Carroll v. United States*, 267 U.S. 132, 153 (1925).

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

33. *Weeks v. United States*, 232 U.S. 383, 392 (1914).

34. 376 U.S. 364 (1964).

35. *Id.* at 367.

36. *Id.* at 365–66.

37. *Id.* at 367–68.

38. 395 U.S. 752, 763 (1969).

39. *Id.* at 753.

40. *Id.* at 753–54.

“the search of the petitioner’s home had been justified . . . [as] incident to a valid arrest,”<sup>41</sup> but the United States Supreme Court reversed.<sup>42</sup> Drawing on its reasoning in *Preston*,<sup>43</sup> the Court reasoned that, although the arrest itself was valid,

[t]he search . . . went far beyond the petitioner’s person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area.<sup>44</sup>

The Court reaffirmed the Fourth Amendment principle that a search incident to arrest must remain limited to the area within the arrestee’s “immediate control,” defined as “the area from within which he might gain possession of a weapon or destructible evidence.”<sup>45</sup>

In 1981, *Belton* extended the *Chimel* “immediate control” test to the search of an automobile incident to arrest.<sup>46</sup> In that case, an officer removed multiple suspects from a vehicle, arrested them for possession of marijuana, and secured them in separate locations.<sup>47</sup> The officer then searched each suspect individually, as well as the passenger compartment of the vehicle, where he found a jacket containing cocaine.<sup>48</sup>

The United States Supreme Court ruled the search constitutional.<sup>49</sup> The Court referred to its reasoning in *Chimel*, noting that “a lawful custodial arrest creates a situation which justifies the contemporaneous search without a warrant of the person arrested and of the immediately surrounding area.”<sup>50</sup> The Court stated further that “[s]uch searches have long been considered valid because of the need ‘to remove any weapons that [the arrestee] might seek to use in order to resist arrest or effect his escape’ and the need to prevent the concealment or destruction of evidence.”<sup>51</sup>

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41. *Id.* at 754–55.

42. *Id.* at 768.

43. *Id.* at 763–64 (citing *Preston v. United States*, 376 U.S. 364, 367 (1964)).

44. *Id.* at 768.

45. *Id.* at 763.

46. 453 U.S. 454, 460 (1981).

47. *Id.* at 455–56.

48. *Id.* at 456.

49. *Id.* at 462–63.

50. *Id.* at 457 (citing *Chimel*, 395 U.S. at 763).

51. *Id.* (quoting *Chimel*, 395 U.S. at 763).

However, the Court was unable to find within existing case law “[any] workable definition of ‘the area within the immediate control of the arrestee’ when that area arguably includes the interior of an automobile and the arrestee is its recent occupant.”<sup>52</sup> Instead, the Court found that case law “suggest[ed] the generalization that articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within ‘the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].’”<sup>53</sup> Accordingly, the Court held that “when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile,” including “the contents of any containers found within the passenger compartment.”<sup>54</sup> Importantly, the Court further noted that its holding “in no way alter[ed] the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”<sup>55</sup>

Finally, in applying its reasoning to the arrestee’s case, the Court held that, because “the jacket was located inside the passenger compartment of the car,” it was “‘within the arrestee’s immediate control.’”<sup>56</sup> The search of the jacket, the Court found, was therefore a search incident to a lawful custodial arrest.<sup>57</sup>

Notably, *Belton* allowed the search incident to arrest of the passenger compartment of a vehicle, even after the arrestees had been secured and removed from the vehicle.<sup>58</sup> This generated confusion among the lower courts,<sup>59</sup> and fostered expansive interpretations of the *Chimel-Belton* rule—i.e. that *Belton* loosened the preconditions for the search of a vehicle incident to arrest to the point where an officer could permissibly search the passenger compartment of a vehicle, completely irrespective

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52. *Id.* at 460 (citations omitted).

53. *Id.* (quoting *Chimel*, 395 U.S. at 763).

54. *Id.*

55. *Id.* at 460 n.3.

56. *Id.* at 462 (quoting *Chimel*, 495 at 763).

57. *Id.* at 462–63.

58. *Id.* at 456.

59. See *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S. Ct. 1710, 1718 & n.2 (2009) (reviewing lower court treatment of the *Belton* rule).

of the location of the arrestee.<sup>60</sup> Not until *Gant* did the Court address and sharply correct this apparent drift.<sup>61</sup>

*B. The Relevant Evidence Rule Permits an Officer to Search the Passenger Compartment of a Vehicle When It Is Reasonable to Believe It Contains Evidence Relevant to the Crime of Arrest*

The relevant evidence rule provides an alternative basis for the search of a vehicle incident to arrest under the Fourth Amendment, one that does not depend upon the justifications of protecting officer safety or preserving evidence.<sup>62</sup> Justice Scalia first articulated this rule in his concurring opinion in *Thornton v. United States*,<sup>63</sup> in which he argued that searches of a vehicle incident to arrest are instead justified by the reasonable belief that evidence relevant to the crime of arrest may be found in the passenger compartment of the vehicle.<sup>64</sup> This Section reviews Justice Scalia's reasoning in *Thornton*.

*Thornton* addressed the question of whether *Belton* allowed officers to search a vehicle incident to arrest even when the arrestee was not first contacted until *after* leaving the vehicle.<sup>65</sup> The majority held that *Belton* did permit such a search, providing that “[s]o long as an arrestee is [a]

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60. *Id.* at 1718 (“*Belton*] has been widely understood to allow a vehicle search incident to the arrest of a recent occupant even if there is no possibility the arrestee could gain access to the vehicle at the time of the search.”)

61. *See infra* Part I.C. It should also be noted that the *Gant* Court split on the issue of whether the first prong contained in that opinion represented the re-narrowing of an exception that had been misinterpreted by lower courts or the promulgation of a new standard altogether. The lead opinion, written by Justice Stevens, and joined by justices Scalia, Souter, Thomas, and Ginsburg, treated the first prong as a clarification of *Chimel-Belton* searches—i.e., a course correction for an exception that had steadily expanded beyond its roots. *See Gant*, 129 S. Ct. at 1719 (“[W]e reject this [broad] reading of *Belton* and hold that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant’s arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.”). Although he joined the majority, Justice Scalia also wrote separately and cautioned that the lead opinion had mischaracterized the reality of the development of the search incident to arrest exception under the Fourth Amendment. *Id.* at 1724 (Scalia, J., concurring). Instead, Justice Scalia argued that *Belton* and *Thornton* really had stated broad rules, allowing precisely the type of non-present arrestee searches that *Gant* was now characterizing as historically impermissible. *Id.* (“[T]he rule set forth in [*Belton*] and [*Thornton*]” is actually that “arresting officers may always search an arrestee’s vehicle in order to protect themselves from hidden weapons.” (citations omitted)).

62. *Gant*, 129 S. Ct. at 1719 (adopting the relevant evidence rule from Justice Scalia’s concurring opinion in *Thornton*, and noting that it does not follow from *Chimel*); *Thornton v. United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring) (noting that evidence relevant to the crime of arrest provides an alternative basis for a search incident to arrest).

63. 541 U.S. 615 (2004).

64. *Id.* at 632 (Scalia, J., concurring).

65. *Id.* at 617 (majority opinion).

‘recent occupant’ of a vehicle . . . officers may search that vehicle incident to the arrest.”<sup>66</sup> In reaching this conclusion, the majority cited two primary justifications: first, that recent occupants presented “identical concerns” to officer safety and the destruction of evidence;<sup>67</sup> and second, that law enforcement needs justified a bright line rule, such as that provided by *Belton*.<sup>68</sup>

Justice Scalia found the Court’s application of the *Chimel-Belton* rule misguided.<sup>69</sup> First, Justice Scalia noted that at the time of the officer’s search of the vehicle, the suspect was secured in the officer’s patrol car.<sup>70</sup> The suspect was therefore “neither in, nor anywhere near, the passenger compartment of the vehicle,” and “[t]he risk that he would nevertheless ‘grab a weapon or evidentiary ite[m]’ from his car was remote in the extreme.”<sup>71</sup>

Justice Scalia then enumerated three possible justifications for applying the *Chimel-Belton* rule to the instant case, in spite of its apparent inappropriateness, and rejected each in turn.<sup>72</sup> He concluded that, “[i]f *Belton* searches are justifiable, it is not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested.”<sup>73</sup> Justice Scalia explained:

This more general sort of evidence-gathering search is not without antecedent. For example, in *United States v. Rabinowitz*,

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66. *Id.* at 623–24 (emphasis added).

67. *Id.* at 621.

68. *Id.* at 622–23 (“The need for a clear rule, readily understood by police officers and not depending on differing estimates of what items were or were not within reach of an arrestee at any particular moment, justifies the sort of generalization which *Belton* enunciated.”).

69. *Id.* at 625 (Scalia, J., concurring) (“The Court’s effort to apply [the *Chimel-Belton* rule] to this search stretches it beyond its breaking point . . .”).

70. *Id.*

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

72. The first possible justification was that the suspect could escape his handcuffs, and grab something from the car. *Id.* at 625–26 (Scalia, J., concurring). Justice Scalia rejected this justification on the grounds that the government had not demonstrated that this was an appreciable risk. *Id.* at 626–27. The second was that limiting the search of a vehicle incident to arrest to settings in which a suspect is still in the car at the time of arrest would force police to leave suspects in a dangerous position in order to search the vehicle. *Id.* at 627. Justice Scalia dismissed this explanation because it is not the *right* of the police to search a vehicle without a warrant. *Id.* The third justification was that *Belton* searches are generally reasonable and that the benefits of a bright-line rule justify upholding the minority of searches that are not (especially because the practice of securing suspects is so prevalent that finding a search in such situations unreasonable would largely render *Belton* moot). *Id.* at 627–28. Justice Scalia rejected this final justification on principle, stating that the need for clarity cannot be held to outweigh constitutional requirements. *Id.* at 628–29.

73. *Id.* at 629.

we upheld a search of the suspect's place of business after he was arrested there. We did not restrict the officers' search authority to "the area into which [the] arrestee might reach in order to grab a weapon or evidentiary ite[m]," and we did not justify the search as a means to prevent concealment or destruction of evidence. Rather, we relied on a more general interest in gathering evidence relevant to the crime for which the suspect had been arrested.<sup>74</sup>

Justice Scalia then cited multiple federal cases, English cases, and treatises, dating back to the mid-nineteenth century.<sup>75</sup> According to Justice Scalia, these authorities established an approach "referring to the general interest in gathering evidence related to the crime of arrest with no mention of the more specific interest in preventing its concealment or destruction."<sup>76</sup> "Only in the years leading up to *Chimel*," he asserted, "did we start consistently referring to the narrower interest in frustrating concealment or destruction of evidence."<sup>77</sup> Ultimately, Justice Scalia conceded that both the narrow approach contained in *Chimel*, and the broader approach contained in *Rabinowitz*, were "plausible accounts of what the Constitution requires."<sup>78</sup> He nevertheless concluded that "*Belton* [could not] reasonably be explained as a mere application of *Chimel*."<sup>79</sup> Instead, *Belton* marked "a return to the broader sort of search incident to arrest that [was] allowed before *Chimel*—limited . . . to searches of motor vehicles, a category of 'effects' which give rise to a reduced expectation of privacy, and heightened law enforcement needs."<sup>80</sup> In this context, according to Justice Scalia, the only thing that

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74. *Thornton*, 541 U.S. at 629 (citations omitted). Justice Scalia relied here upon *United States v. Rabinowitz*, 339 U.S. 56 (1950), despite the fact that its search incident to arrest doctrine was disapproved by the United States Supreme Court in *Chimel*, 395 U.S. 752, 760 (1961) ("[The *Rabinowitz*] doctrine . . . can withstand neither historical nor rational analysis."). *Id.* However, Justice Scalia's point in his *Thornton* concurrence was simply that because the facts of the case did not present the concerns that justified a *Chimel-Belton* search—i.e., officer safety or preservation of evidence—something else must have justified the search: the relevancy of the evidence sought. "[I]f we are going to continue to allow *Belton* searches on stare decisis grounds," wrote Justice Scalia, "we should at least be honest about why we are doing so." *Thornton*, 541 U.S. at 631 (Scalia, J., concurring) (citations omitted). Justice Scalia further sought to rehabilitate the *Rabinowitz* doctrine on the grounds that it was "'not general or exploratory for whatever might be turned up' but reflected a reasonable belief that evidence would be found." *Id.* at 632 (quoting *Rabinowitz*, 339 U.S. at 62–63).

75. *Id.* at 629–30.

76. *Id.* at 629.

77. *Id.* at 630 (citing, inter alia, *Preston v. United States*, 376 U.S. 364 (1964)).

78. *Id.* at 631.

79. *Id.*

80. *Id.* (internal citations omitted).

could rationally justify the search of a vehicle incident to arrest was the relevancy of the evidence sought to the crime of arrest.<sup>81</sup> Thus, the relevant evidence rule was born, but was not adopted as a majority rule until 2009 in *Gant*.<sup>82</sup>

C. *In Gant, the United States Supreme Court Clarified the Chimel-Belton Rule and Adopted the Relevant Evidence Rule*

With its 2009 ruling in *Gant*, the Supreme Court corrected the steady expansion of the *Chimel-Belton* rule beyond its original justifications and adopted Justice Scalia's relevant evidence rule.<sup>83</sup> In so doing, the Court announced two rules that provide the sole permissible preconditions for the search of a vehicle incident to arrest under the Fourth Amendment.<sup>84</sup> The first rule, arising from *Chimel* and *Belton*, allows an officer to search a vehicle incident to arrest when the arrestee is unsecured and within reaching distance of the passenger compartment.<sup>85</sup> The second, drawing upon Justice Scalia's concurring opinion in *Thornton*, provides that an officer may search a vehicle incident to arrest when it is reasonable to believe that evidence relevant to the crime of arrest may be found in the vehicle.<sup>86</sup>

1. *Gant Clarifies the Chimel-Belton Rule*

The expansive interpretation of the *Chimel-Belton* rule that proliferated in the wake of *Belton* was sharply set aside by *Gant*. Like *Belton*, *Gant* involved the search of a vehicle incident to the arrest of a suspect arrested for driving with a suspended license and securely

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81. *Id.*

82. In the meantime, lower courts took notice of Justice Scalia's reasoning. The Sixth Circuit, for example, discussed Justice Scalia's adoption of a relevant evidence standard in an unpublished opinion, but noted that the question was "not open for lower courts . . . to consider." *United States v. Jones*, 155 F. App'x 204, 208 (6th Cir. 2005). In another unpublished opinion in the First Circuit, a district court noted the rule, but cautioned that "[t]he standards for Justice Scalia's proposed rule [in *Thornton*] have not been fully developed." *United States v. Walston*, No. CR. 04-78-B-W, 2005 WL 757592, at \*3 n.3 (D. Me. Mar. 14, 2005). Similarly, Judge Gibson of the Eighth Circuit, citing Justice Scalia's concurrence in *Thornton*, noted that "some have expressed concern with the soundness of the entire *Belton* framework." *United States v. Hrasky*, 453 F.3d 1099, 1107 n.5 (8th Cir. 1006) (Gibson, J., dissenting).

83. *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S. Ct. 1710, 1719 (2009) (rejecting a broad reading of *Belton* and adopting the relevant evidence standard for the search of a vehicle incident to arrest from Justice Scalia's concurring opinion in *Thornton*, even though it does not follow from *Chimel*).

84. *Id.*

85. *Id.*; see also *supra* note 21.

86. *Gant*, 129 S. Ct. at 1719.

handcuffed in the back of a patrol car at the time of the search.<sup>87</sup> The officers searched Gant's car, finding a gun and a bag of cocaine in the pocket of a jacket in the backseat.<sup>88</sup>

At Gant's trial for narcotics charges stemming from evidence located in his vehicle, the Arizona trial court ruled that the search of Gant's car was valid incident to arrest, and he was convicted.<sup>89</sup> The Arizona Supreme Court reversed, ruling that the bright-line rule contained in *Belton* referred only to the *scope* of the search of a vehicle incident to arrest and did not authorize such a search unless the exigencies contained in *Chimel* existed as *preconditions* to the search.<sup>90</sup>

The United States Supreme Court agreed with the Arizona Supreme Court's narrow reading of *Belton*.<sup>91</sup> The Court concluded:

To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it “in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.”<sup>92</sup>

Because officers searched Gant's vehicle after he had been removed and secured, *Chimel*'s twin concerns of officer safety and preservation of evidence were not implicated, and the search of Gant's car was therefore unreasonable.<sup>93</sup>

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87. *Id.* at 1715.

88. *Id.*

89. *Id.*

90. *Id.* at 1715–16.

91. *Id.* at 1719.

92. *Id.* at 1719 (quoting *New York v. Belton*, 453 U.S. 454, 460 n.3 (1981)). Though the Court in *Belton*, quoted here in *Gant*, used the word “scope,” this Comment assumes that the *Belton* Court meant to express that its ruling did not alter the *preconditions* necessary for the search of a vehicle incident to arrest (i.e., that even under *Belton*, an arrestee would still have to present concerns for officer safety or the preservation of evidence, hence the *Gant* Court's requirement that an arrestee be unsecured and within reaching distance of the passenger compartment). The Court's use of the word “scope” in *Belton*—and as understood by the *Gant* Court—was informal and colloquial, and, given the likely confusion presented here with the legal term of art as it applies to searches, an unfortunate coincidence.

93. *Id.* at 1719.

## 2. *Gant Adopted the Relevant Evidence Rule*

After clarifying the *Chimel-Belton* rule, the Supreme Court proceeded to adopt the relevant evidence rule.<sup>94</sup> Citing Justice Scalia's concurring opinion in *Thornton*, but without any further analysis, the *Gant* Court provided that "[a]lthough it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"<sup>95</sup> Even under this standard, the search of *Gant*'s car was unreasonable under the Fourth Amendment, because "[w]hereas *Belton* and *Thornton* were arrested for drug offenses, *Gant* was arrested for driving with a suspended license—an offense for which police could not expect to find evidence in the passenger compartment of *Gant*'s car."<sup>96</sup> In other words, the search of *Gant*'s car was unreasonable under the Fourth Amendment for two reasons: first, at the time of the search, *Gant* was safely secured in the back of a patrol car and thus posed no threat to officer safety or evidentiary preservation; and second, police could not have reasonably expected to find any evidence in *Gant*'s vehicle relevant to the crime of driving without a license. Thus, the Court created a new two-prong approach to determining reasonableness of searches incident to arrest under the Fourth Amendment.

## II. THE SEARCH OF A VEHICLE INCIDENT TO ARREST EXCEPTION IN WASHINGTON STEMS FROM BOTH ARTICLE I, SECTION 7 AND FOURTH AMENDMENT LAW

The case law regarding the search of a vehicle incident to arrest in Washington dates back to the 1920s,<sup>97</sup> but its underlying rationale is rooted in the adoption of article I, section 7 of the Washington State Constitution in 1889,<sup>98</sup> and English common law.<sup>99</sup> The present

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

95. *Id.* (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

96. *Id.*

97. *See, e.g.*, *State v. Hughlett*, 124 Wash. 366, 370, 214 P. 841, 843 (1923) (allowing a warrantless search incident to arrest of a vehicle and suitcases therein).

98. THE JOURNAL OF THE WASHINGTON STATE CONSTITUTIONAL CONVENTION 1889, at 497 (Beverly P. Rosenow ed., 1962) [hereinafter JOURNAL].

99. *See, e.g.*, *State ex rel. Murphy v. Brown*, 83 Wash. 100, 106, 145 P. 69, 71 (1914). The Washington State Supreme Court cited *Weeks v. United States*, 232 U.S. 383, 392 (1914), for the proposition that "the right to search the person of one under legal arrest . . . has always been recognized under English and American law, and has been uniformly maintained in many cases." *Brown*, 83 Wash. at 106, 145 P. at 71 (citing *Weeks*, 232 U.S. at 392).

controversy over the search incident to arrest is best understood as the function of a complicated interplay between federal and Washington law, as old as the exception itself. Early on, Washington courts concentrated their analysis of the exception to the warrant requirement under a combination of article I, section 7 and common law jurisprudence.<sup>100</sup> As the century progressed, the courts turned increasingly to the Fourth Amendment, before refocusing on article I, section 7 in the 1980s.<sup>101</sup> Now, after *Gant*, Washington courts are again faced with the challenge of recalibrating Washington law in light of the Fourth Amendment.

Despite its length and complexity, the pre-*Gant* law of vehicle searches incident to arrest in Washington may be broadly divided into five developmental stages. The Washington State Supreme Court has recognized three initial stages during which Washington courts turned increasingly from article I, section 7 and common law toward federal law.<sup>102</sup> In a self-declared return to Washington law, the case of *State v. Ringer*<sup>103</sup> marks a brief fourth stage, which allowed the search of a vehicle incident to arrest only under certain exigent circumstances.<sup>104</sup> A fifth stage began with *State v. Stroud*, which promulgated a bright-line standard for the search of a vehicle incident to arrest.<sup>105</sup> This standard survived until 2009, when *Gant* generated the present uncertainty.

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100. See *State v. Ringer*, 100 Wash. 2d 686, 690–94, 674 P.2d 1240, 1243–1244 (1983) (noting that Washington courts defined the search of a vehicle incident to arrest exception in the early days of its fashioning in light of article I, section 7 and common law).

101. See *id.* at 699, 674 P.2d at 1247 (“We choose now to return to the protections of our own constitution and to interpret them consistent with their common law beginnings.”); see also *State v. Stroud*, 106 Wash. 2d 144, 146, 720 P.2d 436, 438 (1986) (noting the Court’s intention “to define more precisely the scope of the automobile exception to the warrant requirement implied in article I, section 7 of the Washington Constitution”).

102. See *Ringer*, 100 Wash. 2d at 698, 720 P.2d at 1247 (“We perceive three stages in the prior development of the search incident to arrest exception to the warrant requirement.”).

103. *Id.* at 699, 674 P.2d at 1247 (1983) (announcing a return to article I, section 7 of the Washington State Constitution in order to define the search of a vehicle incident to arrest).

104. *Id.* at 698–702, 674 P.2d at 1247–49; see also *State v. Parker*, 139 Wash. 2d 486, 514, 987 P.2d 73 (1999) (“[I]n *Ringer*, we . . . adopted a case-by-case ‘totality of the circumstances’ test to determine whether the exigencies in fact supported a warrantless search [incident to arrest] in any given case.” (emphasis added) (citations omitted)).

105. 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986) (“During the arrest process, including the time immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.”).

A. *Washington's Early Understanding of a Search Incident to Arrest Was Rooted in Article I, Section 7, as Informed by Common Law*

Early incarnations of the search incident to arrest exception in Washington allowed an officer to search the person of an arrestee for evidence “which the officer reasonably believes to be connected with the supposed crime.”<sup>106</sup> This understanding derived from article I, section 7 and the common law.<sup>107</sup> Therefore, a proper historical analysis of the search incident to arrest exception in Washington begins with these sources.

The Washington State Constitutional Convention adopted article I, section 7 in 1889,<sup>108</sup> as follows:

No person shall be disturbed in his private affairs, or his home invaded, without authority of law.<sup>109</sup>

Significantly, records show that the constitutional convention considered text identical to the Fourth Amendment, but rejected it in favor of the wording adopted for article I, section 7.<sup>110</sup> Courts and scholars have interpreted this choice to demonstrate the framers' intent that article I, section 7 offers citizens greater protections than those available under the Fourth Amendment.<sup>111</sup>

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106. State *ex rel.* Murphy v. Brown, 83 Wash. 100, 105, 145 P. 69, 71 (1914).

107. See State v. Valdez, 167 Wash. 2d 761, 773, 224 P.3d 751, 757 (2009) (In order to define the search incident to arrest exception, “[the Washington State Supreme Court] look[s] at the constitutional text, the origins and law at the time [the Washington] constitution was adopted, and the evolution of that law and its doctrinal development.”); *Stroud*, 106 Wash. 2d at 149, 720 P.2d at 439 (determining the search of a vehicle incident to arrest exception in Washington solely on independent state grounds, i.e., in light of article I, section 7); *id.* at 153–54, 720 P.2d at 441–42 (Durham, J., concurring) (noting that defining the automobile search incident to arrest exception requires an interpretation of article I, section 7); *Ringer*, 100 Wash. 2d at 690, 720 P.2d at 1242–43 (recounting the history of the search of a vehicle incident to arrest in Washington through the lens of article I, section 7).

108. See JOURNAL, *supra* note 98, at 497.

109. WASH. CONST. art. I, § 7.

110. See *Ringer*, 100 Wash. 2d at 690, 720 P.2d at 1243 (citing JOURNAL, *supra* note 98, at 51, 497).

111. See, e.g., State v. Moore, 161 Wash. 2d 880, 885, 169 P.3d 469, 471 (2007) (“[T]he search incident to arrest exception to the warrant requirement is narrower’ under article I, section 7 than under the Fourth Amendment.” (quoting State v. O’Neil, 148 Wash. 2d 564, 584, 62 P.3d 489, 501 (2003))); *Stroud*, 106 Wash. 2d 144, 148, 720 P.2d 436, 439 (“[Article I, section 7 of the] Washington State Constitution affords individuals greater protections against warrantless searches than does the Fourth Amendment.”); State v. Myrick, 102 Wash. 2d 506, 510, 688 P.2d 151, 153 (1984) (“[T]he unique language of [article I, section 7] provides greater protection to persons under the Washington Constitution than [the Fourth Amendment] provides to persons generally.” (citing State v. Jackson, 102 Wash. 2d 432, 688 P.2d 136 (1984))); State v. Chrisman, 100 Wash. 2d 814, 676 P.2d 419 (1984); see also JONATHAN BECHTLE & MICHAEL REITZ, TO PROTECT AND

The Washington State Supreme Court first expressed the common law search incident to arrest doctrine in *State ex rel. Murphy v. Brown*.<sup>112</sup> In that case, an officer seized evidence from the person of a suspect upon making a warrantless arrest.<sup>113</sup> The Court discussed the officer's authority to search and seize the papers without a warrant in dicta:

The general rule is that, where a person is legally arrested, the arresting officer has a right to search such person, and take from his possession money or goods which the officer reasonably believes to be connected with the supposed crime, and discoveries made in this lawful search may be shown at the trial in evidence.<sup>114</sup>

In discussing this authority, the *Brown* Court cited the principle expressed in *Weeks v. United States*,<sup>115</sup> that “such [a] right has always been recognized under English and American law, and has been uniformly maintained in many cases.”<sup>116</sup> Thus, the early interpretation of search incident to arrest under article I, section 7 appeared to derive directly from English and American common law.

### *B. The Search of a Vehicle Incident to Arrest Exception Fluctuated Between 1923 and 1962*

The preconditions under Washington's search incident to arrest exception fluctuated between 1923 and 1962.<sup>117</sup> In the beginning of this

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MAINTAIN INDIVIDUAL RIGHTS: A CITIZEN'S GUIDE TO THE WASHINGTON CONSTITUTION, ARTICLE I, at 23 (2008) (noting that cases interpreting article I, section 7 of the Washington State Constitution grant individuals greater protections than the Fourth Amendment); ROBERT F. UTTER & HUGH D. SPITZER, THE WASHINGTON STATE CONSTITUTION: A REFERENCE GUIDE 20–22 (2002) (noting instances in which the Washington State Supreme Court has declared article I, section 7 to offer greater protections than those available under the Fourth Amendment).

112. 83 Wash. 100, 145 P. 69 (1914); see also *Ringer*, 100 Wash. 2d at 693, 720 P.2d at 1244 (“The earliest expression of the common law ‘search incident to arrest’ doctrine in Washington is found in [*Brown*].”).

113. *Brown*, 83 Wash. at 101–02, 145 P. at 69–70.

114. *Id.* at 105–06, 145 P. at 71.

115. 232 U.S. 383 (1914).

116. *Brown*, 83 Wash. at 106, 145 P. at 71 (quoting *Weeks*, 232 U. S. at 392).

117. The cases discussed in this section—*State v. Hughlett*, 124 Wash. 366, 370, 214 P. 841, 843 (1923), allowing a search incident to arrest for offense-relevant evidence at the time of arrest and in the area under an arrestee's control; *State v. Deitz*, 136 Wash. 228, 230–31, 239 P. 386, 387 (1925), holding a search of a vehicle incident to arrest need not be for evidence relevant to the crime of arrest; *State v. Miller*, 151 Wash. 114, 115, 275 P. 75, 75 (1929), predicating the valid search of a vehicle incident to arrest solely upon the occurrence of a lawful arrest; *State v. McCollum*, 17 Wash. 2d 85, 89 136 P.2d 165, 167 (1943), upholding the search of a home incident to the arrest of a non-present arrestee; *State v. Cyr*, 40 Wash. 2d 840, 844–45, 246 P.2d 480, 484 (1952), allowing the search of a vehicle incident to arrest when it was parked reasonably close to the scene of the arrest,

period, the Washington State Supreme Court required both that the arrestee be physically proximate to the scene of the search and that the evidence sought be relevant to the crime of arrest.<sup>118</sup> In the following years, the Court alternatively employed standards that lacked any such relevant evidence requirement<sup>119</sup> and that increasingly relaxed the physical proximity requirement, eventually rendering it effectively nominal.<sup>120</sup>

Washington's first application of the search incident to arrest exception to the automobile context<sup>121</sup> came in 1923 with *State v. Hughlett*.<sup>122</sup> There, the Court required both physical proximity of the arrestee to the location of the search and limited the scope of the search to evidence relevant to the crime of arrest.<sup>123</sup> The Court upheld the search of the suspect's car and suitcase contained therein and the seizure of bootleg whiskey found in both.<sup>124</sup> The justices reasoned:

It has always been held that a peace officer, when he makes a lawful arrest, may lawfully, without a search warrant, search the person arrested and take from him any evidence tending to prove the crime with which he is charged. From this it seems to us to follow logically that a similar search, under the same circumstances, may be made of the automobile of which he has possession and control at the time of his arrest. This is true because the person arrested has the immediate physical possession, not only of the grips or suit cases which he is carrying, but also of the automobile which he is driving and of which he has control.<sup>125</sup>

Just two years after *Hughlett*, the Court abandoned the requirement that the evidence sought be relevant to the crime of arrest. In *State v.*

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and the officers were looking for evidence relevant to crime of the arrest; and *State v. Jackovick*, 56 Wash. 2d 915, 917, 355 P.2d 976, 977 (1960), allowing officers to search incident to arrest the area where the arrest is made—were overruled “to a greater or lesser degree” in 1983 by *State v. Ringer*, 100 Wash. 2d 686, 699, 720 P.2d 1240, 1247 (1983).

118. See, e.g., *Hughlett*, 124 Wash. at 370, 214 P. at 843–44.

119. See, e.g., *Deitz*, 136 Wash. at 231, 239 P. at 387.

120. See, e.g., *Cyr*, 40 Wash. 2d at 844, 246 P.2d at 483–84.

121. In one earlier case, the Washington State Supreme Court refused to apply the search incident to arrest exception to the warrantless search and seizure of contraband from the arrestee's automobile because the arrest itself was invalid. *State v. Gibbons*, 118 Wash. 171, 182–83, 203 P. 390, 394 (1922). The Court did not discuss whether the search incident to arrest exception would have applied, and by what criteria, had the arrest been lawful. *Id.*

122. 124 Wash. 366, 214 P. 841 (1923).

123. *Id.* at 370, 214 P. at 843–44.

124. *Id.* at 371, 214 P. at 844.

125. *Id.* at 370, 214 P. at 843–44.

*Deitz*,<sup>126</sup> officers searched a car and seized evidence from it after observing *Deitz* driving without proper license plates and with defective lights.<sup>127</sup> The Court upheld the search as incident to arrest, holding that even though *Deitz* was arrested for a traffic violation whereas the search was for contraband, the lack of relevance of the evidence seized to the crime of arrest did not warrant suppression.<sup>128</sup>

Between 1929 and 1962, the Washington State Supreme Court decided several cases that relaxed, if not effectively abandoned, the requirement of an arrestee's physical presence at the location of a search incident to arrest.<sup>129</sup> In *State v. Miller*,<sup>130</sup> the Court upheld the search of the arrestee's car for contraband solely on the basis that the officers had made a valid warrantless arrest, and gave no weight to the arrestee's presence at the time of the search.<sup>131</sup> Later, in *State v. McCollum*,<sup>132</sup> a case that did not involve a vehicle, the Court upheld a search incident to arrest of the arrestee's home conducted when the arrestee was hospitalized.<sup>133</sup> In *State v. Cyr*,<sup>134</sup> the Court upheld the search of a vehicle as valid incident to arrest, even though the arrestee was not present at the time of the search, because the automobile itself was "parked reasonably close" to the place of arrest, and the officer had "good reason" to believe that evidence pertinent to the charge would be

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126. 136 Wash. 228, 239 P. 386 (1925).

127. *Id.* at 228–29, 239 P. at 386–87. Notably, the officers seized evidence from the *trunk* of the arrestee's car, not the passenger compartment. *Id.* at 229, 239 P. at 387. However, it appears that, rather than abandoning the requirement that the arrestee be physically proximate to the search, the Court considered the trunk to be an area within the arrestee's control. *See id.* at 231, 239 P. at 387 (noting police may search an arrestee's person or the area within his control incident to arrest (citing *Carroll v. United States*, 267 U.S. 132, 158 (1925))).

128. *Deitz*, 136 Wash. at 231, 239 P. at 387.

129. *See State v. Miller*, 151 Wash. 114, 115, 275 P. 75, 75 (1929) (predicating the valid search of a vehicle incident to arrest solely upon the occurrence of a lawful arrest); *State v. McCollum*, 17 Wash. 2d 85, 89, 136 P.2d 165, 167 (1943) (upholding the search of a home incident to the arrest of a non-present arrestee); *State v. Cyr*, 40 Wash. 2d 840, 844–45, 246 P.2d 480, 484 (1952) (allowing the search of a vehicle incident to arrest when it was parked reasonably close to the scene of the arrest and the officers were looking for evidence relevant to crime of the arrest); *State v. Jackovick*, 56 Wash. 2d 915, 917, 355 P.2d 976, 977 (1960) (allowing a search incident to arrest to encompass "the area where the arrest was made."); *see also State v. Ringer*, 100 Wash. 2d 686, 696, 674 P.2d 1240, 1246 (1983) ("After [the *Miller* decision in 1929], this court even abandoned the presence of the arrestee at the place of the search as a necessary predicate to its validity.").

130. 151 Wash. 114, 275 P. 75 (1929).

131. *Id.* at 117–18, 275 P. at 76.

132. 17 Wash. 2d 85, 136 P.2d 165 (1943).

133. *Id.* at 89–90, 136 P.2d at 167.

134. 40 Wash. 2d 840, 246 P.2d 480 (1952).

found in the vehicle.<sup>135</sup> Finally, the Court once again upheld the search of a vehicle incident to the arrest of a non-present arrestee in *State v. Jackovick*,<sup>136</sup> on grounds that officers may permissibly search “the area where the arrest is made.”<sup>137</sup>

This trend of relaxation ended in 1962, when, in *State v. Michaels*<sup>138</sup> the Court strengthened its rule regarding the requirement of an arrestee’s physical presence at the scene of the search (while maintaining its requirement that such searches is for evidence of the crime of arrest).<sup>139</sup> In *Michaels*, the Court examined the search of a car for contraband after the driver had been arrested for a simple traffic violation.<sup>140</sup> The Court found the search unlawful,<sup>141</sup> and stated the rule that “an officer may take into custody a person who commits a misdemeanor in his presence, and upon making the arrest, may search the person and his immediate environs *for evidence of the crime or tools which would aid in the arrested person’s escape.*”<sup>142</sup> While the Court invalidated the search on the grounds that the evidence sought was not relevant to the offense of arrest,<sup>143</sup> the Court’s strong language regarding physical proximity—that a search incident to arrest may only encompass the arrestee’s “immediate environs”<sup>144</sup>—expressed a standard far more stringent than in previous decisions.<sup>145</sup>

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135. *Id.* at 844, 246 P.2d at 483.

136. 56 Wash. 2d 915, 355 P.2d 976 (1960).

137. *Id.* at 917, 355 P.2d at 977.

138. 60 Wash. 2d 638, 374 P.2d 989 (1962).

139. *Id.* at 642–43, 374 P.2d at 991; *see also* *State v. Ringer*, 100 Wash. 2d 686, 696, 720 P.2d 1240, 1246 (1983) (“Finally, in [*Michaels*], this court began to impose restrictions on the authority of police to make searches pursuant to arrest.” (citation omitted)).

140. *Michaels*, 60 Wash. 2d at 639–40, 374 P.2d at 990.

141. *Id.* at 645, 374 P.2d at 993 (“The evidence in this case conclusively shows that the arrest was made for the sole purpose of searching the automobile to ascertain whether it contained any contraband property. It was a mere pretext for the search and was therefore unlawful. Consequently, the defendant’s motions to suppress should have been granted.”).

142. *Id.* at 642–43, 374 P.2d at 991.

143. *Id.* at 645, 374 P.2d at 993.

144. *Id.* at 643, 374 P.2d at 991.

145. *Id.*; *cf.* *State v. Jackovick*, 56 Wash. 2d 915, 917, 355 P.2d 976, 977 (1960) (allowing a search incident to arrest to encompass “the area where the arrest was made”); *State v. Cyr*, 40 Wash. 2d 840, 844, 246 P.2d 480, 483 (1952) (allowing the search incident to arrest of a vehicle that was parked “reasonably close” to the scene of the arrest).

C. *Washington Turned to the Fourth Amendment for Almost Twenty Years before Announcing a Return to Article I, Section 7 in 1983*

In the years after *Michaels*, the Washington State Supreme Court turned away from article I, section 7 and looked to federal jurisprudence to determine the limits of searches of vehicles incident to arrest.<sup>146</sup> In 1983, however, in *State v. Ringer*,<sup>147</sup> the Washington State Supreme Court conducted a sweeping review of the evolution of the search of a vehicle incident to arrest exception in Washington, and explicitly identified three stages of development therein, before announcing the beginning of a fourth stage.<sup>148</sup> The Court found that the search incident to arrest exception had been allowed to expand beyond its initial purpose<sup>149</sup> and professed to “return to the protections of [the Washington] constitution and to interpret them consistent with their common law beginnings.”<sup>150</sup> The Court provided:

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146. *State v. Ringer*, 100 Wash. 2d 686, 697, 720 P.2d 1240, 1246 (1983) (“In the years immediately following *Michaels*, this court disregarded the plethora of cases interpreting [article I, section 7] and began instead to rely on federal cases interpreting [the Fourth Amendment].”). In *Ringer*, the Washington State Supreme Court identified several instances in which the court turned to the Fourth Amendment in order to interpret the search of a vehicle incident to arrest. In *State v. Riggins*, for example, the Court looked extensively to the United States Supreme Court’s decision in *Preston v. United States*, 376 U.S. 364 (1964), and found the Supreme Court’s interpretation of the Fourth Amendment controlling with respect to the search of a vehicle incident to arrest in Washington. See *Ringer*, 100 Wash. 2d at 697, 720 P.2d at 1246–47 (citing *Riggins*, 64 Wash. 2d 881, 886, 395 P.2d 85, 89–90 (1964)). Similarly, in *State v. Johnson*, the Washington State Supreme Court “continued to rely on federal precedent,” but also “continued to require that a search incident to arrest be for evidence of the crime for which the defendant was arrested.” *Ringer*, 100 Wash. 2d at 697–98, 720 P.2d at 1247 (citing *Johnson*, 71 Wash. 2d 239, 243, 427 P.2d 705, 707 (1967)). Finally, in *State v. Simpson*, the Court invalidated a search incident to arrest “because the [arrestee] was not in the truck when arrested and had already been removed from the area when the search of the truck took place,” but did so using federal precedent. *Ringer*, 100 Wash. 2d at 698, 720 P.2d at 1247 (quoting *Simpson*, 95 Wash. 2d 170, 191, 622 P.2d 1199, 1212 (1980)).

147. 100 Wash. 2d 686, 674 P.2d 1240 (1983).

148. *Id.* at 698–99, 720 P.2d at 1247 (“We perceive three stages in the prior development of the search incident to arrest exception to the warrant requirement. The exception began as a narrow rule intended solely to protect against frustration of the arrest itself or destruction of evidence by the arrestee. This was the scope of the exception when [article I, section 7] was adopted. In the early 20th century, however, both the federal courts and the courts of this state, with little or no reasoned analysis, expanded the exception until it threatened to swallow the general rule that a warrant is required. From 1964, when *Preston v. United States* was decided, until 1981, when it decided *New York v. Belton*, the United States Supreme Court interpreted the search incident to arrest exception in a manner consistent with its common law origins. In those years we neglected our own state constitution to focus instead on protections provided by [the Fourth Amendment]. . . . We choose now to return to the protections of our own constitution and to interpret them consistent with their common law beginnings.” (citations omitted)).

149. *Id.* at 698, 720 P.2d at 1247.

150. *Id.* at 699, 720 P.2d at 1247.

Based on our understanding of [article I, section 7], we conclude that, when a lawful arrest is made, the arresting officer may search the person arrested and the area within his immediate control. A warrantless search in this situation is permissible *only to remove any weapons the arrestee might seek to use in order to resist arrest or effect an escape and to avoid destruction of evidence by the arrestee of the crime for which he or she is arrested.*<sup>151</sup>

The Court therefore announced that, in keeping with its declared return to article I, section 7, the search incident to arrest exception would be narrowed to the arrestee's person and area within his immediate control, and authorized only for the purposes of protecting officer safety and the integrity of the arrest, or to preserve evidence of the crime of arrest.<sup>152</sup> In doing so, the Court also overturned prior cases that had expanded the exception.<sup>153</sup>

#### D. *Washington Abandoned Ringer for a Bright-Line Rule in Stroud*

A mere three years after deciding *Ringer*, the Washington State Supreme Court overturned it in favor of a bright-line rule.<sup>154</sup> In *State v. Stroud*, the Court departed dramatically from its narrow *Ringer* approach.<sup>155</sup> In *Stroud*, two law enforcement officers arrested two defendants next to a parked car after observing them apparently attempting to rob a vending machine.<sup>156</sup> The officer searched the car,

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151. *Id.*, 720 P.2d at 1248 (emphasis added) (citations omitted).

152. *Id.*, 720 P.2d at 1248; see also UTTER & SPITZER, *supra* note 111, at 4 (explaining that with *Ringer*, the Court announced an approach to analyzing searches incident to arrest by interpreting article I, section 7 “by reference to the common law of search and seizure as it existed when the Washington Constitution was adopted”).

153. *Ringer*, 100 Wash. 2d at 699, 720 P.2d at 1247 (“[W]e find it necessary to overrule several of our previous cases. To a greater or lesser degree, [*Hughlett, Deitz, Miller, McCollum, Cyr, and Jackovick*] are all without historic foundation and are inconsistent with traditional protections against the ability of law enforcement officers to make warrantless searches and seizures.”); see also *supra* Part II.B.

154. *State v. Stroud*, 106 Wash. 2d 144, 151–52, 720 P.2d 436, 440–41 (1986), *overruled by State v. Valdez*, 167 Wash. 2d 761, 777, 224 P.3d 751, 759 (2009). However, *Ringer* was discussed favorably by the Washington State Supreme Court in the years between 1983 and 1986. See, e.g., *State v. Williams*, 102 Wash. 2d 733, 742 n.6, 689 P.2d 1065, 1070 n.6 (1984) (“In *Ringer*, this court declined to follow federal precedents governing the Fourth Amendment and searches incident to arrest. Relying on [article I, section 7], we limited police officers’ right to search incident to an arrest to those circumstances when police are *confronted by emergencies and exigencies* which do not permit reasonable time and delay for a judicial officer to evaluate and act upon probable cause applications for warrants by police officers.”).

155. 106 Wash. 2d at 151, 720 P.2d at 440.

156. *Id.* at 145, 720 P.2d at 437.

finding a weapon and various drug paraphernalia.<sup>157</sup> The car was then impounded, and police seized additional items during an inventory search.<sup>158</sup>

After their conviction, the defendants appealed on the basis that the trial court should have suppressed items seized during the warrantless search of the vehicle.<sup>159</sup> The court of appeals certified the question to the Washington State Supreme Court, which affirmed the conviction.<sup>160</sup> In doing so, the Court sought explicitly to “define more precisely the scope of the automobile exception to the warrant requirement implied in Article 1, Section 7 of the Washington Constitution.”<sup>161</sup>

The Court first noted that federal cases, such as *Belton*, had recently “enlarged the narrow exceptions to the prohibition in the Fourth Amendment against warrantless searches.”<sup>162</sup> If decided under the Fourth Amendment, the Court reasoned, the search of the car in *Stroud* would easily be upheld as incident to the defendants’ lawful arrests.<sup>163</sup> However, the Court declined to decide the case on Fourth Amendment grounds because the “Washington State Constitution affords individuals greater protections against warrantless searches than does the Fourth Amendment.”<sup>164</sup>

Although the Court applied “the more protective standards of Article I, Section 7,” it “nevertheless [held] the search of defendants’ car lawful.”<sup>165</sup> In doing so, the Court was forced to overturn the part of *Ringer* requiring “actual exigent circumstances,”<sup>166</sup> determined by “the totality of the circumstances”<sup>167</sup> on a “case-by-case basis.”<sup>168</sup> The Court justified its decision on the basis that “[t]he *Ringer* holding [made] it virtually impossible for officers to decide whether or not a warrantless search would be permissible,” and added that “[w]eighing the ‘totality of circumstances’ [was] too much of a burden to put on police officers who must make a decision to search with little more than a moment’s

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157. *Id.* at 146, 720 P.2d at 437.

158. *Id.*, 720 P.2d at 438.

159. *Id.*

160. *Id.*

161. *Id.*

162. *Id.* at 147, 720 P.2d at 438.

163. *Id.* at 148, 720 P.2d at 439.

164. *Id.*, 720 P.2d at 439.

165. *Id.* at 150, 720 P.2d at 440.

166. *Id.* at 152, 720 P.2d at 441.

167. *Id.* at 150, 720 P.2d at 440.

168. *Id.* at 151, 720 P.2d at 440.

reflection.”<sup>169</sup> The Court buttressed this argument by pointing to the reasoning of the United States Supreme Court in *Belton* but declined to reach *Belton*’s conclusion, stressing the heightened privacy requirements of article I, section 7.<sup>170</sup> The Court instead concluded:

During the arrest process, including the time immediately subsequent to the suspect’s being arrested, handcuffed, and placed in a patrol car, officers should be allowed to search the passenger compartment of a vehicle for weapons or destructible evidence. However, if the officers encounter a locked container or locked glove compartment, they may not unlock and search either container without obtaining a warrant.<sup>171</sup>

The *Stroud* bright-line rule resembled the *Belton* rule, but with the added limitation that police could not open locked containers or a locked glove compartment without first obtaining a warrant, an imposition necessary to satisfy the heightened privacy requirements of article I, section 7.<sup>172</sup> This resemblance to *Belton* notwithstanding, the *Stroud* Court carefully stated that “[w]e wish to make clear that our . . . determination in this case is not based on prior federal case law, and that we decide this case solely on independent state grounds.”<sup>173</sup> *Stroud* thus established a rule especially conscious of the pragmatic concerns of law enforcement under article I, section 7 that would remain intact until the United States Supreme Court announced *Gant* in 2009.

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169. *Id.* The type of concerns expressed here by the *Stroud* Court continue to be articulated by law enforcement officers. Since *Gant*, for example, officers of the Seattle Police Department have reported that the concept of an arrestee being “unsecured” and “within reaching distance” of the passenger compartment is too vague to be workable in the field. Telephone Interview with Scott Bachler, Lieutenant, Seattle Police Dep’t (Feb. 17, 2010). Under what exact conditions is an arrestee considered “unsecured”? What exact area is considered “within reaching distance” of the passenger compartment? These sort of ad hoc determinations, required by the first prong of *Gant*, implicate the *Stroud* Court’s criticism of a rule requiring officers to make a snap determination of whether a search would be permissible, with little in the way of guidance. In contrast, the relevant evidence rule at least provides officers with some form of functional guidance. *Id.* The determination that evidence relevant to the crime of arrest may be found in the passenger compartment is one that officers can safely and effectively make in the field. *Id.*

170. 106 Wash. 2d at 151–52, 720 P.2d at 440; see also *supra* Part I.A (discussing *Belton*).

171. *Id.* at 152, 720 P.2d at 441.

172. *Id.*

173. *Id.* at 149, 720 P.2d at 439.

### III. THE WASHINGTON STATE SUPREME COURT HAS REVISITED THE SEARCH OF A VEHICLE INCIDENT TO ARREST EXCEPTION POST-*GANT*

In its first major post-*Gant* decisions,<sup>174</sup> the Washington State Supreme Court examined the search of a vehicle incident to arrest in *State v. Patton*<sup>175</sup> and *State v. Valdez*.<sup>176</sup> *Patton* required that either a concern for officer safety or the preservation of relevant evidence exist at the time of the search for a search incident to arrest to be valid.<sup>177</sup> Two months later, the *Valdez* Court—without mentioning *Patton*—affirmed a near-identical standard.<sup>178</sup> *Patton* and *Valdez* brought Washington law in line with the clarified *Chimel-Belton* rule contained in *Gant*'s first prong. However, neither case explicitly adopted or excluded *Gant*'s second prong—the relevant evidence rule—under article I, section 7.

#### A. *Patton* Required that Concerns for Either Officer Safety or the Preservation of Crime-Relevant Evidence Exist at the Time of the Search

In *Patton*, deputies observed a suspect with an outstanding felony arrest warrant rummaging around in his vehicle and arrested him after he fled the vehicle for a nearby trailer.<sup>179</sup> The deputies secured him in a patrol car and searched his vehicle, where they located methamphetamine.<sup>180</sup> The trial court “conclud[ed] that the search was *not* incident to arrest because Patton was not arrested until he was taken into physical custody in the trailer,” and the court of appeals agreed.<sup>181</sup> The Washington State Supreme Court granted review in order to determine “whether the search incident to arrest exception [to article I, section 7] applie[d] in these circumstances.”<sup>182</sup>

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174. *Patton* and *Valdez* are the only such decisions at the time of publication. The Washington State Supreme Court did, however, hold oral argument in *State v. Adams* regarding warrantless vehicle searches incident to arrest in early 2010. Video Recording of Oral Arguments, *State v. Adams*, No. 82210-7 (Wash. argued Feb. 23, 2010), <http://www.tvw.org/media/mediaplayer.cfm?evid=2010020008A&TYPE=V&CFID=6066626&CFTOKEN=68122957&bhcp=1>.

175. 167 Wash. 2d 379, 219 P.3d 651 (2009).

176. 167 Wash. 2d 761, 224 P.3d 751 (2009).

177. 167 Wash. 2d at 394–95, 291 P.3d at 658.

178. 167 Wash. 2d at 777, 224 P.3d at 759.

179. *Patton*, 167 Wash. 2d at 384, 219 P.3d at 653.

180. *Id.* at 385, 219 P.3d at 653.

181. *Id.*, 219 P.3d at 653 (emphasis added).

182. *Id.*

The Court determined that it did not.<sup>183</sup> Citing *Ringer*, *Stroud*, and subsequent cases interpreting *Stroud*,<sup>184</sup> the Court determined that the bright-line rule contained in *Stroud* referred only to the *scope* of a search incident to arrest; it did not define the *preconditions* that would authorize such a search.<sup>185</sup> With respect to those preconditions, the Court provided:

[T]he search of a vehicle incident to the arrest of a recent occupant is unlawful absent a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed, and that these concerns exist at the time of the search.<sup>186</sup>

The Court did not, however, explain the extent to which its decision was influenced by *Gant*.<sup>187</sup> Indeed, *Gant* was decided after the *Patton* Court had already concluded oral argument.<sup>188</sup> Without requesting any additional briefing on *Gant*, and without holding any additional oral argument,<sup>189</sup> the Washington State Supreme Court in *Patton* simply asserted via footnote that its decision was “consistent with . . . *Gant*.”<sup>190</sup>

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183. *Id.* at 395, 219 P.3d at 658 (“Under a proper understanding of the search incident to arrest exception, the circumstances here simply do not involve a search *incident* to arrest.”).

184. *Id.* at 392–94, 219 P.3d at 656–57.

185. *Id.* at 393, 219 P.3d at 657 (identifying *Stroud* and its progeny as creating a “bright line rule as to the scope of the area that may be searched”).

186. *Id.* at 394–95, 219 P.3d at 658.

187. The *Patton* Court referred to *Gant* as “a necessary course correction” for the broad application of *Chimel* that proliferated in the wake of *Belton*, *id.* at 394, 219 P.3d at 658, but maintained that its holding represented an interpretation of article I, section 7, *id.* at 385 n.3, 219 P.3d at 653 n.3. Concurring, Justice James Johnson found the majority’s claim unconvincing and unnecessary: “[*Gant*] has decided this case for us, while this court was agonizing for a year over the analysis. . . . Since the relevant facts are identical, the [*Gant*] holding must be applied. . . . The majority engages in extensive dicta [regarding article I, section 7] unnecessary to the decision to suppress the evidence. . . .” *Id.* at 396–97, 219 P.3d at 659 (Johnson, J., concurring).

188. The record indicates that oral argument for *Patton* concluded on May 29, 2008. See Washington Courts, Appellate Court Case Summary for Case Number 805181, [http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=805181%20%20%20&searchtype=aName&crt\\_itl\\_nu=A08&filingDate=2007-08-21](http://dw.courts.wa.gov/index.cfm?fa=home.casesummary&casenumber=805181%20%20%20&searchtype=aName&crt_itl_nu=A08&filingDate=2007-08-21) [hereinafter Appellate Court Case Summary] (last visited Mar. 17, 2010). This was nearly a year before *Gant* was decided on April 21, 2009.

189. The record contains no indication of additional briefing or oral argument on the *Gant* issue. Appellate Court Case Summary, *supra* note 188.

190. *Patton*, 167 Wash. 2d at 396 n.9, 219 P.3d at 658 n.9.

B. *Valdez Independently Required that Concerns for Officer Safety or the Perseveration of Crime-Relevant Evidence Exist at the Time of the Search*

The Washington State Supreme Court again addressed the post-*Gant* future of the search of a vehicle incident to arrest exception in *Valdez*, but this time the Court did analyze the exception in the context of *Gant*.<sup>191</sup> The Court addressed the question of “whether an automobile search incident to arrest, *where the arrestee was handcuffed and secured prior to the search of the automobile*, was constitutional under article I, section 7 of the Washington State Constitution and/or the Fourth Amendment to the United States Constitution.”<sup>192</sup> In *Valdez*, an officer pulled over a suspect for a traffic violation and discovered an outstanding warrant for his arrest.<sup>193</sup> The officer arrested and secured the suspect in a patrol car, searched the suspect’s vehicle and noticed loose panels.<sup>194</sup> He called in a canine unit, which discovered methamphetamine.<sup>195</sup>

Applying *Gant*, the Washington State Supreme Court ruled that the search violated the Fourth Amendment because the arrestee was secured at the time of the search, and the State had not shown that it was reasonable to believe evidence relevant to the crime of the arrest might be found in the vehicle.<sup>196</sup> Without citing any authority, but applying a rule similar to the one announced in *Patton*,<sup>197</sup> the Court held that the search violated article I, section 7 because it “was not necessary to remove any weapons the arrestee could use to resist arrest or effect an escape, or to secure any evidence of the crime of the arrest that could be concealed or destroyed.”<sup>198</sup> The Court thus rejected the search under both the Fourth Amendment *Gant* rules and article I, section 7. The Court did not, however, discuss whether the second *Gant* rule—the relevant evidence rule—applied under article I, section 7.

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191. 167 Wash. 2d 761, 768, 224 P.3d 751, 754 (2009) (“Due to a recent opinion of the United States Supreme Court [in *Gant*], we are required to consider the previous decisions of the United States Supreme Court and this court in light of that decision.” (citations omitted)).

192. *Id.* at 765, 224 P.3d at 753 (emphasis added).

193. *Id.* at 766, 224 P.3d at 753.

194. *Id.*

195. *Id.*

196. *Id.* at 778, 224 P.3d at 759.

197. Interestingly, the majority in *Valdez* did not cite *Patton* once in its entire opinion.

198. *Valdez*, 167 Wash. 2d at 778, 224 P.3d at 760.

C. *Patton and Valdez Adopt a Standard Similar to Gant's Clarified Chimel-Belton Rule, but Neither Accepts nor Rejects the Relevant Evidence Rule*

Because *Patton* and *Valdez* both premise the search of a vehicle incident to arrest upon concerns for officer safety or the preservation of evidence,<sup>199</sup> both cases adopt a standard similar to *Gant's* clarified *Chimel-Belton* rule. *Patton* requires that an officer possess “a reasonable basis to believe that the arrestee poses a safety risk or that the vehicle contains evidence of the crime of arrest that could be concealed or destroyed,” and that “these concerns exist at the time of the search.”<sup>200</sup> The *Chimel-Belton* rule is based on the same two justifications: protecting officer safety and preserving evidence.<sup>201</sup> As clarified by *Gant*, this rule further requires that the concerns exist “at the time of the search.”<sup>202</sup> The *Patton* holding mirrors this reasoning precisely.<sup>203</sup>

*Valdez*, which considered *Gant* more extensively than did *Patton*, also expresses a rule that requires concerns for officer safety or the preservation of evidence,<sup>204</sup> and further demonstrates that Washington has adopted a rule similar to the *Chimel-Belton* rule. While the majority in *Valdez* makes no reference to *Patton*, *Valdez* nevertheless presents a nearly identical version of the first *Gant* prong.<sup>205</sup>

The Court's analysis in *Valdez* begins with noting that *Gant* binds the Court to consider Fourth Amendment jurisprudence in redefining the permissible preconditions for the search of a vehicle incident to arrest under article I, section 7.<sup>206</sup> After tracing the development of the *Chimel-Belton* rule and discussing the history of its Washington analog,<sup>207</sup> the Court concluded:

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199. *State v. Patton*, 167 Wash. 2d 379, 394–95, 219 P.3d 651, 658 (2009); *Valdez*, 167 Wash. 2d at 778, 224 P.3d at 759.

200. *Patton*, 167 Wash. 2d at 395, 219 P.3d at 658.

201. *See supra* Part I.A.

202. *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S. Ct. 1710, 1719 (2009).

203. *Patton*, 167 Wash. 2d at 395, 219 P.3d at 658.

204. *Valdez*, 167 Wash. 2d at 777, 224 P.3d at 759.

205. Note that whereas *Valdez* discussed both *Gant* prongs under the Fourth Amendment, the Court did not state whether the second *Gant* prong exception (the relevant evidence rule) applied under article I, section 7. *See id.* at 768–71, 224 P.3d at 754–56.

206. *Id.* at 768, 224 P.3d at 754.

207. *Id.* at 768–71, 224 P.3d at 754–56 (Fourth Amendment analysis); *id.* at 771–77, 224 P.3d at 756–59 (article I, section 7 analysis).

[A]fter an arrestee is secured and removed from the automobile, he or she poses no risk of obtaining a weapon or concealing or destroying evidence of the crime of arrest located in the automobile, and thus the arrestee's presence does not justify a warrantless search under the search incident to arrest exception.<sup>208</sup>

As in *Patton*, this reasoning closely resembles *Gant*'s clarified *Chimel-Belton* rule: if the arrestee has been secured away from the vehicle, the concerns of the *Chimel-Belton* rule are not implicated and do not authorize a search of the vehicle incident to arrest.

While both *Patton* and *Valdez* consider *Gant*—to different degrees—neither case explicitly accepts or rejects the relevant evidence rule.<sup>209</sup> The *Patton* Court merely stated via footnote that its decision was consistent with *Gant*, but did not indicate whether the relevant evidence rule was permissible under article I, section 7.<sup>210</sup> The *Valdez* Court treated *Gant* more extensively than *Patton*, but, like *Patton*, did not announce the relevant evidence rule's permissibility.<sup>211</sup> The Court noted that it requested additional briefing on *Gant*,<sup>212</sup> and discussed the application of the relevant evidence rule<sup>213</sup> under the Fourth Amendment,<sup>214</sup> but did not declare whether that rule applied under article I, section 7.

#### IV. THE WASHINGTON STATE SUPREME COURT SHOULD ADOPT A MODIFIED RELEVANT EVIDENCE RULE

If and when the Washington State Supreme Court considers a case that squarely implicates the relevant evidence rule, it should adopt a relevant evidence rule modified in scope to reflect the heightened privacy requirement of article I, section 7. Such an approach would best satisfy *Gant* and preserve the purpose of that provision because

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208. *Id.* at 775–76, 224 P.3d at 759 (overruling *State v. Stroud* to the extent it is inconsistent with the *Valdez* opinion).

209. One possible explanation for this omission is that neither *Valdez* nor *Patton* presented the Court with facts squarely implicating the relevant evidence rule. In both cases, the Court considered arrests due to outstanding warrants, stemming from offenses that did not present a reasonable basis to believe that relevant evidence might be found in the vehicles. *See State v. Patton*, 167 Wash. 2d 379, 395, 219 P.3d 651, 658 (2009); *Valdez*, 167 Wash. 2d at 778, 224 P.3d at 759.

210. *Patton*, 167 Wash. 2d at 396 n.9, 219 P.3d at 658 n.9.

211. *Valdez*, 167 Wash. 2d at 768–71, 778, 224 P.3d at 754–56, 759–60.

212. *Id.* at 768 n.2, 224 P.3d at 754 n.2.

213. The Court did not use this term in referring to the rule in *Valdez*.

214. *Valdez*, 167 Wash. 2d at 771, 778, 224 P.3d at 756, 759.

Washington historical case law supports a search based on the preconditions for the relevant evidence rule, and the Washington State Supreme Court has already defined the permissible scope of the search of a vehicle incident to arrest.

*A. Patton and Valdez Support the Adoption of a Rule That Embraces the Relevant Evidence Rule's Preconditions*

The Washington State Supreme Court in both *Patton* and *Valdez* did not explicitly reject or adopt *Gant*'s relevant evidence rule, but the Court did give analytic weight to the relevancy of evidence sought during the search, suggesting that such relevance does figure into an analysis of vehicle searches incident to arrest under article I, section 7 of the state constitution. Additionally, *Valdez* suggests that something other than an arrestee's presence at the scene of the search may act as a justification for the search—further supporting the notion that relevancy matters.

*1. Both Patton and Valdez give Analytic Weight to the Relevance of the Evidence Sought*

It is significant that, since *Gant*, the Court has reintroduced a relevant evidence requirement via *Patton* and *Valdez*. In finding the search in *Patton* invalid under article I, section 7, the Court noted that “[n]o connection existed between [the arrestee], the reason for his arrest warrant, and the [search of the] vehicle.”<sup>215</sup> Because the arrestee's outstanding warrant was for an unrelated past offense, “there was no basis to believe evidence relating to [his] arrest would have been found in the car.”<sup>216</sup> This language bears a strong resemblance to the relevant evidence rule, which allows an officer to search a vehicle incident to arrest “when it is ‘reasonable to believe that evidence relevant to the crime of arrest will be found in the vehicle.’”<sup>217</sup>

*Valdez* also gives analytic weight to the relevance of the evidence sought to the crime of arrest.<sup>218</sup> Specifically, the Court pronounced that a search incident to arrest is invalid when there is no showing of concern for officer safety, or that “evidence related to the crime of arrest [may be] concealed or destroyed.”<sup>219</sup> In other words, if a search incident to

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215. *Patton*, 167 Wash. 2d at 395, 219 P.3d at 658.

216. *Id.* at 395, 219 P.3d at 658.

217. *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S. Ct 1710, 1719 (2009) (quoting *Thornton v. United States*, 541 U.S. 615, 629 (2004) (Scalia, J., concurring)).

218. *Valdez*, 167 Wash. 2d at 779, 224 P.3d at 760.

219. *Id.* (emphasis added).

arrest under *Valdez* is to be justified on the basis of preventing the concealment or destruction of evidence, that evidence must be relevant to the crime of arrest.

Admittedly, the inclusion of a relevant evidence requirement in both *Patton* and *Valdez* does not conclusively demonstrate, on its own, the permissibility of a rule that would allow vehicle searches incident to arrest for relevant evidence in the absence of *Chimel-Belton*-like concerns.<sup>220</sup> It is possible that the Washington State Supreme Court has simply crafted a hybrid rule from *Gant*, one that preserves the exigencies of the *Chimel-Belton* standard, combined with the relevancy requirement of the relevant evidence rule.<sup>221</sup> However, given that neither *Patton* nor *Valdez* explicitly discussed the issue one way or the other, the exact implications of *Patton*'s and *Valdez*'s relevancy requirement are not immediately clear. Consequently, the permissibility of the relevant evidence rule under article I, section 7 remains an open question.

2. *Valdez Suggests Something Other Than an Arrestee's Mere Presence at the Scene of a Search Might Justify a Search Incident to Arrest*

*Valdez* suggests that something other than an arrestee's mere presence—and the entailed concerns for officer safety or the destruction or concealment of evidence—might justify a search.<sup>222</sup> *Valdez* states that once an arrestee has been secured, and in accordance with the *Chimel-Belton* rule contained in *Gant*, the arrestee's presence no longer justifies the search of a vehicle incident to arrest.<sup>223</sup> However, *Valdez* also provides that even where the circumstances of the search do not implicate the concerns of officer safety or the preservation of evidence, a warrantless search may still be tolerated if it “fall[s] under another

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220. See *Gant*, 129 S. Ct. at 1719 (citing Justice Scalia's concurrence in *Thornton* and noting that the rule contained therein does not follow from *Chimel*).

221. It is further possible that the Washington State Supreme Court drew upon prior Washington decisions, rather than *Gant*, in reintroducing a relevant evidence requirement, although the timing of *Patton* and *Valdez* suggests otherwise. Such a requirement is found in Washington cases from the 1960s. See, e.g., *State v. Johnson*, 71 Wash. 2d 239, 242–43, 427 P.2d 705, 707 (1967) (requiring that a search incident to arrest be for evidence of the crime of arrest); *State v. Michaels*, 60 Wash. 2d 638, 644, 374 P.2d 989, 992 (1962) (same). These cases provide a potential alternative basis for the Court's reasoning, although they were overruled “to a greater or lesser degree” by *State v. Ringer*, 100 Wash. 2d 686, 699, 720 P.2d 1240, 1247 (1983), overruled by *State v. Stroud*, 106 Wash. 2d 144, 151, 720 P.2d 436, 439 (1986), overruled by *State v. Valdez*, 167 Wash. 2d 761, 777, 224 P.3d 751, 759 (2009).

222. *Valdez*, 167 Wash. 2d at 777, 224 P.3d at 759.

223. *Id.*

applicable exception.”<sup>224</sup> Whether the Court, by this statement, intended to allude to the possibility of an alternative justification for the search of a vehicle incident to arrest—or another type of warrantless search altogether—is unclear.<sup>225</sup> However, the statement leaves room for the argument that the relevance of the evidence sought, in accordance with the rationale of the relevant evidence rule, might serve as such an alternative justification.

*B. A Modified Relevant Evidence Rule Is Consistent with Article I, Section 7 of the Washington State Constitution*

The Washington State Supreme Court should adopt a version of the relevant evidence rule modified to include a proscription on the opening of locked containers. Such an approach would be consistent with article I, section 7 because Washington common law possesses a history of such searches, analogous to the alternative line of common law relied upon by *Gant* and *Thornton*, and because the Washington State Supreme Court has already defined the heightened privacy protections required by article I, section 7 with respect to vehicle searches.

*1. Washington Historically Allowed the Search of a Vehicle Incident to Arrest for Relevant Evidence Irrespective of the Arrestee’s Location*

Like the alternative line of Fourth Amendment cases relied upon by Justice Scalia in *Thornton* and the United States Supreme Court in *Gant*, Washington possesses a line of cases under article I, section 7 that supports the permissibility of the relevant evidence rule.<sup>226</sup> Historically, searches incident to arrest conducted after an arrestee has been secured and removed from the site of a search have been allowed under article I,

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224. *Id.*

225. The Washington State Supreme Court has also recognized the warrantless search of a vehicle when, for example, the officers are presented with certain exigent circumstances. These circumstances may include hot pursuit, a fleeing suspect, danger to an arresting officer or the public, mobility of a vehicle, and mobility or destruction of evidence. *State v. Counts*, 99 Wash. 2d 54, 60, 659 P.2d 1087, 1089–90 (1983). Although they share some commonalities, “the search incident to arrest exception should be distinguished from the exigent circumstances exception to the warrant requirement.” *State v. Patton*, 167 Wash. 2d 379, 386 n.5, 219 P.3d 651, 654 n.5 (2009). The Washington State Court of Appeals also recently upheld the search of a vehicle incident to arrest based upon presumptively valid interpretations of constitutional law later declared unconstitutional by *Gant*. *State v. Riley*, No. 62418-1, 2010 WL 427118, at \*1 (Wash. Ct. App. Feb. 8, 2010).

226. *See supra* note 129–37 and accompanying text.

section 7.<sup>227</sup> Cases decided between 1929 and 1962 allowed searches incident to the arrest of a non-present arrestee—either because the Court paid no heed to the arrestee’s presence, or because it relaxed the physical proximity requirement so far as to render it effectively nominal.<sup>228</sup>

More recently, the Washington State Supreme Court has spoken emphatically against such searches,<sup>229</sup> but never in a way that undermines the justifications for the relevant evidence rule. In *Patton*, for example, the Court noted that while it had previously “upheld searches incident to arrest conducted after the arrestee has been secured,”<sup>230</sup> it would now “expressly disapprove of this expansive application of the narrow search incident to arrest exception.”<sup>231</sup> But in doing so, the Court relied on the *Chimel-Belton*-like reasoning contained in *Ringer*, requiring concerns for officer safety or the destruction of evidence.<sup>232</sup> *Valdez* similarly relied heavily on *Ringer*, from a *Chimel-Belton*-like standpoint.<sup>233</sup> Neither of these cases directly addressed the alternative reasoning that justifies the relevant evidence rule, a rule that depends simply on the relevance of the evidence sought and does not implicate the officer safety or destruction of evidence concerns that underlie the *Chimel-Belton* rule.<sup>234</sup> The Washington State Supreme Court’s disapproval of these cases in the *Ringer/Chimel-Belton* context does not therefore necessitate a disapproval of the searches they contain in the relevant evidence rule context.

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227. See *supra* note 129–37 and accompanying text; see also *State v. Ringer*, 100 Wash. 2d 686, 696, 720 P.2d 1240, 1246 (1983) (noting that the Washington State Supreme Court previously allowed searches incident to arrest after the suspect had been secured away from the place of arrest at the time of the search), *overruled on other grounds by* *State v. Stroud*, 106 Wash. 2d 144, 720 P.2d 436 (1986).

228. See *supra* note 129–37 and accompanying text.

229. See, e.g., *State v. Valdez*, 167 Wash. 2d 761, 774–77, 224 P.3d 751, 757–59 (2009); *State v. Patton*, 167 Wash. 2d 379, 395, 219 P.3d 651, 658 (2009); *Ringer*, 100 Wash. 2d at 699, 720 P.2d at 1247.

230. *Patton*, 167 Wash. 2d at 395, 219 P.3d at 658.

231. *Id.* at 395, 219 P.3d at 658.

232. *Id.* at 389, 219 P.3d at 655 (citing *Ringer*, 100 Wash. 2d at 699–700, 674 P.2d at 1248)).

233. See *Valdez*, 167 Wash. 2d at 774, 224 P.3d at 758 (citing *Ringer*, 100 Wash. 2d at 699, 674 P.2d at 1247–48, for the proposition that prior Washington cases departed from the principles upon which the search incident to arrest exception was based).

234. See *Arizona v. Gant*, 556 U.S. \_\_\_, 129 S. Ct. 1710, 1719 (2009) (providing that an officer may search a vehicle incident to arrest for evidence relevant to the crime of arrest, “[a]lthough it does not follow from *Chimel*”).

2. *Modifications to the Scope of the Relevant Evidence Rule Would Satisfy Article I, Section 7's Heightened Privacy Protections*

While the Washington State Supreme Court has long held that article I, section 7 protects greater privacy interests in vehicles than does the Fourth Amendment,<sup>235</sup> these interests are not without definition, and the relevant evidence rule may be modified accordingly. In *Stroud*, the Washington State Supreme Court defined the additional protections required by article I, section 7 by adopting a standard nearly identical to the Fourth Amendment, with the added requirement that an officer not open a locked glove box or any locked containers found during the search of a vehicle incident to arrest without first obtaining a warrant.<sup>236</sup> While the bright-line rule contained in *Stroud* has since been disapproved as a precondition to a search incident to arrest,<sup>237</sup> the Washington State Supreme Court has never declared the formula for offering greater protections than the Fourth Amendment, articulated in *Stroud*, to be defunct. In this sense, the *Stroud* Court's formula for modifying a Fourth Amendment standard into something permissible under article I, section 7 should still be considered good law; thus, a modified version of the relevant evidence rule, including a proscription on the opening of any locked containers or a locked glove box, would be consistent with article I, section 7.<sup>238</sup>

## CONCLUSION

Following a turbulent history of complex interplay between Washington and federal law, the search of a vehicle incident to arrest exception under article I, section 7 continues to occupy a state of

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235. See *State v. Bello*, 142 Wash. App. 930, 936, 176 P.3d 554, 558 (2008) (“[A]rticle 1, section 7 provides greater protection of the privacy interest in a vehicle and its contents than does the Fourth Amendment.”).

236. *State v. Stroud*, 106 Wash. 2d 144, 152, 720 P.2d 436, 441 (1986); see also *supra* Part II.D.

237. See *Patton*, 167 Wash. 2d at 394, 219 P.3d at 657 (“We cannot presume that *every time* a car is present at the scene of an arrest, a search of the car falls within the scope of *Stroud*'s bright line rule.” (emphasis added)); see also *Valdez*, 167 Wash. 2d at 777, 224 P.3d at 759 (overturning *Stroud*'s bright-line rule with respect to the scope of a vehicle search incident to arrest).

238. The Washington State Supreme Court has also provided that, pursuant to the heightened privacy protections of article I, section 7, a valid search incident to arrest may not extend to the search of items belonging to a vehicle's nonarrested passenger, unless the state has made a showing of “the existence of any articulable, objective suspicion that [the] nonarrested passenger was armed or dangerous or had secreted contraband obtained from the arrestee.” *State v. Parker*, 139 Wash. 2d 486, 504, 987 P.2d 73, 84 (1999). Such a further limitation of scope may also be considered in adopting the relevant evidence rule under article I, section 7.

regrettable uncertainty. The United States Supreme Court in *Arizona v. Gant* reinterpreted the search of a vehicle incident to arrest under the Fourth Amendment and threw Washington law into disarray. The resultant confusion is attributable both to the unsteady history of Washington jurisprudence concerning the search of a vehicle incident to arrest and Washington's long-held maxim that article I, section 7 provides greater protections than the Fourth Amendment.

While the Washington State Supreme Court adopted *Gant*'s articulation of the federal *Chimel-Belton* standard in *Patton* and *Valdez*, requiring concern for officer safety or the preservation of evidence in order to conduct the search of a vehicle incident to arrest, it remains to be seen whether Washington will adopt the second standard contained in *Gant*—the relevant evidence rule. Unrelated to *Chimel-Belton*, the relevant evidence rule authorizes the search of a vehicle incident to arrest when it is reasonable to believe that it contains evidence relevant to the crime of the arrest—irrespective of the location of the arrestee at the time of the search. Such a search finds support in alternative lines of both Fourth Amendment and article I, section 7 jurisprudence.

The Washington State Supreme Court should adopt a modified relevant evidence rule containing an added proscription on the opening of locked containers, because the concerns that led the *Gant* Court to adopt the logic of Justice Scalia's concurring opinion in *Thornton* apply equally in Washington; because Washington common law also possesses a history of searches for relevant evidence; and because the Washington State Supreme Court has already defined the heightened protections required by article I, section 7 in the search of a vehicle incident to arrest context. Thus, a modified relevant evidence rule would be wholly consistent with article I, section 7.