No. 03-5165

In the Supreme Court of the United States

MARCUS THORNTON

Petitioner,

v.

UNITED STATES,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF VIRGINIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Bill of Rights. The ACLU of Virginia is one of its statewide affiliates. This case involves the proper interpretation of *New York v. Belton*, 453 U.S. 454 (1981), which held that a valid arrest of an automobile occupant permits a contemporaneous search of the passenger compartment incident to arrest. Earlier this term, the ACLU filed an *amicus* brief in *Arizona v. Gant*, 72 U.S.L.W. 3280 (Oct. 20, 2003) (vacated and remanded in light of an intervening state court decision), which addressed whether *Belton*'s holding extended to a "recent occupant" of a vehicle. That brief proposed that the *per se* rule of *Belton* should be confined to cases where police *seize* a person inside the vehicle.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation founded in 1958 to ensure justice and due process for persons accused of crime; to foster integrity, independence, and expertise of the criminal defense bar; and to promote the proper and fair administration of criminal justice. NACDL filed *amicus* briefs in *Gant* (with its co-*amici* the ACLU), and *Florida v. Thomas*, 532 U.S. 774 (2001), which raised but did not ultimately resolve the *Belton* question that this case again presents.

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, its members or its counsel made a monetary contribution to the preparation or submission of this brief.

STATEMENT OF THE CASE

On July 21, 2003, Officer Deion Nichols of the Norfolk, Virginia police department was in uniform and driving an unmarked cruiser on Sewells Point Road when he observed a gold vehicle driving behind him. The officer's suspicions were aroused when the vehicle "wouldn't come all the way up to" his cruiser. JA 9. Nichols turned onto a side street so that the gold vehicle would pass him. When he returned to Sewells Point Road, Nichols saw a gold Lincoln Town Car and checked the license plate of that vehicle. Petitioner, Marcus Thornton, was the driver and sole occupant of the Lincoln. The check indicated that the license plate belonged to a 1982 Chevy two-door car rather than a Lincoln. Nichols intended to stop the Lincoln, but was unable to do so because the vehicle "pulled into [a] parking lot before [he] had a chance to do so." JA16.

According to Nichols, petitioner had "pulled into a parking lot, [and] exited his vehicle," JA 16, when the officer "pulled in behind him [and] exited" his cruiser. *Id.* The officer approached petitioner and asked to see his driver's license. After Nichols informed petitioner that the tags on his vehicle did not match the Lincoln, petitioner "appeared nervous, right way started rambling" and began "sweating." JA 10. For his own safety, Nichols asked petitioner if he had any weapons or narcotics on his person or in his vehicle, which petitioner denied. Nichols then requested and received petitioner's consent to perform a patdown frisk for weapons. When the officer felt a "bulge in [petitioner's] left front pocket," he asked petitioner if he had any illegal narcotics on his person. Petitioner replied that he had "a bag of weed," and gave the officer two bags of illegal narcotics. Petitioner was arrested, handcuffed and placed in Nichols' cruiser. JA 42. Nichols then searched the Lincoln and discovered a handgun under the driver's seat.

Petitioner was charged with narcotics and weapon offenses. Relying on *New York v. Belton*, 453 U.S. 454 (1981), the district court denied petitioner's motion to suppress the gun found inside the Lincoln. JA 30-37. After petitioner was convicted of narcotics and weapons offenses, he appealed the district court's refusal to suppress the gun found inside his car. The Court of Appeals affirmed. JA 61-75. Specifically, the appellate court rejected the argument that *Belton*'s *per se* rule applies only where "'the officer initiates contact with the defendant, either by actually confronting the defendant or by signaling confrontation ...while the defendant is still in the automobile.'" *Id.* at 68 (citation omitted). The court's conclusion was based on three primary concerns. First, in the Fourth Circuit's view, dicta from *Michigan v. Long*, 463 U.S. 1032 (1983) suggested "that an officer may search an automobile incident to arrest, even if the officer has not initiated contact while the arrestee was still in the automobile." JA 71. Second, the traditional justifications for the search incident to arrest rule, officer safety and preserving evidence, "continue to be concerns regardless of whether the arrestee exits the automobile voluntarily or because of confrontation with an officer." *Id.* at 72 (citations omitted). Finally, the court believed that petitioner's argument would endanger officer safety. The court imagined that a "contacts" test would force an undercover officer to reveal his identity if the "officer encounters the arrestee while conducting undercover surveillance in an area," and that "it [might] often be safer for [police] to wait until the suspect has exited a vehicle before signaling their presence, thereby depriving the suspect of any weapon he may have in his vehicle, the protective cover of the vehicle, and the possibility of using the vehicle itself as either a weapon or a means of flight." *Id.* Ultimately, the court ruled that the search was lawful because petitioner was in "close proximity" to his vehicle, both temporally and spatially, when Officer Nichols approached him. *Id.* at 74.

This Court granted *certiorari* on the following question: Is *Belton*'s bright-line rule confined to situations in which police initiate contact with the occupant of a vehicle while the person is in the vehicle?

SUMMARY OF ARGUMENT

In *Chimel v. California*, 395 U.S. 752 (1969), and *New York v. Belton*, this Court explained that although searches incident to arrest were an exception to the warrant requirement, an officer's authority to conduct a search incident to arrest "'must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'" *Chimel,* 395 U.S. at 762, quoting *Terry v. Ohio,* 392 U.S. 1, 19 (1968); *Belton,* 453 U.S. at 457, quoting *Terry*. The two traditional rationales for the search incident to arrest exception are officer safety and preserving evidence. *Knowles v. Iowa*, 525 U.S. 113, 116 (1998). *Chimel* announced that search incident to arrest permits a search of the arrestee's person, as well as "the area 'within his immediate control,'" for weapons or evidence. *Chimel,* 395 U.S. at 763. In *Belton*, noting that it was simply applying *Chimel*'s "immediate control" test to the "particular and problematic" context of arresting a car occupant, this Court held that a valid arrest of an automobile occupant permits a contemporaneous search of the passenger compartment incident to the arrest. *Belton,* 453 U.S. at 460, n.3.

The federal and state courts have divided over the applicability of *Belton*'s *per se* rule when police arrest a person who is a "recent occupant" of a vehicle. Attempting to resolve this issue, the lower courts have split over the workability and virtues of an "initiates contact" test. We propose a *per se* rule that complies with *Chimel*'s and *Belton*'s command that search incident to arrest authority be strictly tied to the need for officer safety and preserving evidence. Specifically, we submit that *Belton*'s holding should be confined to cases where police seize a person

inside a vehicle,[2] the suspect is arrested, and the vehicle is searched contemporaneous with the arrest. If a person was not seized while inside a vehicle, the scope of an officer's authority to search is governed by *Chimel*, not by *Belton*. Restricting *Belton* to cases where a person was seized while inside a car avoids case-by-case judgments regarding an arrestee's temporal or spatial proximity to the vehicle. Officers and judges need only decide whether a person was seized while an occupant of a car. When police seize a person inside a car and the person is subsequently arrested, the *per se* rule of *Belton* applies.

This Court should reverse the judgment below because it conflicts with *Chimel*'s and *Belton*'s mandate that search incident to arrest power be "strictly tied to and justified by" the circumstances calling for the search and because it is not a bright-line rule. The ruling below insisted that a "close proximity" or "positively linked" standard, *see* JA 74, "does not render [the *Belton*] rule limitless." *Id.* (footnote omitted). But a finding of "close proximity" or "positive linkage" "does not establish that the arrestee had an opportunity to access weapons or to conceal or destroy contraband, the foundation of the holdings in both *Belton* and *Chimel*." *Minnesota v. Robb*, 605 N.W. 2d 96, 101 (Minn. 2000). For example, one court has found that a person was in

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[2] Police have authority to seize a car and the motorist therein when they have reasonable suspicion or probable cause that the motorist has committed a crime or traffic offense. *See Delaware v. Prouse,* 440 U.S. 646, 653 (1979) ("stopping an automobile and detaining its occupants constitute a 'seizure' within the meaning of the Fourth Amendment"). *Cf. Colorado v. Bannister*, 449 U.S. 1, 4, n. 3 (1980) (*per curiam*) ("There can be no question that the stopping of a vehicle and the detention of its occupants constitute a 'seizure' within the meaning of the Fourth Amendment."). A *pedestrian* is "seized" under the Fourth Amendment only if a reasonable person would have believed that he was not free to leave the scene, or would not have felt "free to decline [an officer's] requests or otherwise terminate the encounter." *Florida v. Bostick*, 501 U.S. 429, 434, 436-37 (1991).

"close proximity" to his vehicle where police observed the person lawfully park his vehicle, exit the vehicle and walk toward a house on the other side of the street. *See Glasco v. Virginia*, 513 S.E. 2d 137, 142 (Va. 1999) (upholding search because the driver was "in close proximity to the vehicle" and thus "a recent occupant of the vehicle within the limits of the *Belton* rule"). Although the standard adopted below allows this search, the traditional rationales that justify the search incident to arrest exception – officer safety and preservation of evidence – do not.

More importantly, the judgment below will not promote clarity. If *Belton*'s *per se* rule is triggered whenever an arrestee is in "close proximity, both temporally and spatially," to his vehicle, JA 74, officers and judges will still be required to weigh temporal and spatial factors to determine when a vehicle search is permissible. If a "single familiar standard is essential to guide police officers" in this context, *see Belton*, 453 U.S. at 458, then this Court should reject any proposal that requires officers and judges to undertake case-by-case assessments of whether a car search is authorized incident to an arrest. Unlike the ruling below, our proposal avoids the particularized inquiry necessary under a "close proximity" standard.

Belton defined what constitutes "immediate control" under *Chimel* for the frequently occurring situation where police seize and arrest automobile occupants. Rather than forcing officers to make individualized assessments of a car occupant's "grabbing distance," *Belton* adopted a legal fiction to paper over the analytical absurdities that emerged when judges read *Chimel*'s "immediate control" test to permit vehicle searches in cases where there was no way an arrestee – handcuffed and sitting in a police cruiser – would have access to the contents of his vehicle. While there is significant tension between *Chimel* and *Belton*, a careful reading of *Belton* clarifies that *Belton*'s *per se* search rule

does not apply to every case involving a "recent occupant" of an automobile. *Belton* never defined or addressed who is a "recent occupant" for search incident to arrest purposes. Rather, the holding in *Belton* confirms that its bright-line rule only applies to arrestees who were "occupants" of an automobile when their vehicle was seized by the police. While it is true that an arrestee need not be inside his car when the police conduct the search, and that *Belton* itself used both the terms "occupant" and "recent occupant," *Belton*'s analytical focus was directed at an arrestee who was an occupant of a vehicle when the police seized it. The single use of the phrase "recent occupant" in *Belton* was a clear reference to the fact that Roger Belton had been seized while an occupant of an automobile, exited the vehicle, and was arrested shortly after leaving the vehicle.

ARGUMENT

I. THE BACKGROUND AND DEVELOPMENT OF *BELTON*'S *PER SE* RULE

Chimel sought to clarify the authority of the police to search incident to arrest.[3] For half a century prior to *Chimel*,

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[3] In resolving Fourth Amendment questions, this Court often considers common law rules to evaluate the reasonableness of a challenged police intrusion. *See, e.g., Wyoming v. Houghton,* 526 U.S. 295, 299-300 (1999). Generally speaking, the common law permitted searches incident to arrest. However, the legality of a search incident to arrest "has historically been formulated into two distinct propositions." *United States v. Robinson,* 414 U.S. 218, 224 (1973). The common law recognized an officer's power to seize weapons or stolen property from an arrestee's *person. See* Thomas Y. Davies, *Recovering the Original Fourth Amendment,* 98 MICH. L. REV. 547, 627 (1999). Searching the *area* within the arrestee's control, "while likewise conceded in principle, has been subject to differing interpretations as to the extent of the area which may be searched." *Robinson*, 414 U.S. at 224. To the extent that the common law "yields [an] answer," *Houghton,* 526 U.S. at 299, on the scope of an officer's authority to search the "area" within an arrestee's control, those sources do not support a broad interpretation of an officer's authority to search incident to arrest.

the scope of an officer's authority to search incident to arrest was "subject to shifting constitutional standards" and inconsistent statements from the Court. *Chimel*, 395 U.S. at 770 (White, J., dissenting). Prior to the *Chimel* ruling, the Court upheld extensive searches of private premises under the search incident to arrest rule. *See, e.g., United States v. Rabinowitz*, 339 U.S. 56 (1950), *Harris v. United States*, 331 U.S. 145 (1947). Under these precedents, a lawful arrest authorized a search of the entire area "considered to be in the 'possession' or under the 'control' of the person arrested." *Chimel*, 395 U.S. at 760. *Chimel* rejected that standard because it gave police too much power to conduct discretionary searches that were not justified by the historical rationales supporting the search incident to arrest exception. *Chimel* explained that although the Fourth Amendment's Warrant Clause requirements did not control search incident to arrest power, an officer's authority in this context would be judged by the same constitutional norms that governed other warrantless intrusions. Thus, the scope of an officer's

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At the time of the framing, legal authorities did not recognize an officer's power to search an arrestee's home incident to arrest. *See* William J. Cuddihy, *The Fourth Amendment: Origins and Original Meaning,* 602-1791, at 1183-84 (1990) (unpublished Ph.D. dissertation, Claremont Graduate School) (footnote omitted) ("The legal authors of 1761-1776 agreed that houses could be broken into to consummate the arrest process, but they did not also say that houses could be searched during that process. The assumption of most legal authorities, in other words, was that arrests and arrest warrants were not excuses to conduct general searches."). Professor Telford Taylor has asserted that "[t]here is little reason to doubt that search of an arrestee's person and *premises* is as old as the institution of arrest itself," Telford Taylor, TWO STUDIES IN CONSTITUTIONAL INTERPRETATION 28 (1969) (emphasis added), but the historical support for Taylor's conclusion on the scope of an officer's power to search an arrestee's home incident to arrest is extremely weak. *See* Davies, *supra,* at 646, n.276. Professor Davies has noted that "[t]he reported decisions regarding the allowable scope of search incident to arrest first became evident in court records during the late nineteenth century." *Id.* at 638, n.250. Thus, the common law, *at the time of the framing,* did not recognize broad powers of search incident to arrest.

authority to search incident to arrest "'must be "strictly tied to and justified by" the circumstances which rendered its initiation permissible.'" *Id.* at 762 (citation omitted). Put simply, an officer's search authority must be limited to the traditional interests that justify the search incident to arrest exception.

Chimel reaffirmed the two historical purposes served by a search incident to arrest: to secure any weapon that the arrestee might use to resist arrest or escape and to preserve the integrity of any evidence the arrestee might conceal or destroy. *Id.* at 763. Mindful that a warrantless intrusion must be strictly tied to the purposes of the search, *Chimel* announced that search incident to arrest authority permits the police to search for weapons or evidence on the arrestee's person, as well as "the area 'within his immediate control'– construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence." *Id.*

Chimel's holding was narrow. Given that the search of Chimel's home extended beyond his person and "grabbing distance," the evidence discovered by the police was suppressed. *Id.* at 768 ("The search here 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."). Thus, there was no need for the *Chimel* Court to address the question of "where the police *are allowed* to search" under the "grabbing distance" prong. Myron Moskovitz, *A Rule in Search of a Reason: An Empirical Reexamination of* Chimel *and* Belton, 2002 WIS. L. REV. 657, 659-60.

After the *Chimel* decision, some lower courts were "hesitant to apply the *Chimel* rationale to the search of vehicles incident to arrest." 2 Wayne R. LaFave, SEARCH AND SEIZURE, § 7.1 at 499 (1978). When occupants of automobiles were placed under arrest, some lower courts

applied *Chimel*'s "immediate control" rule in a manner that conflicted with the purposes and rationale of *Chimel*. As Professor LaFave explained in the first edition of his treatise on the Fourth Amendment:

> [C]ourts sometimes interpreted the *Chimel* ["immediate control" or "grabbing distance"] concept as if it were synonymous with possession; if the defendant had been driving the car immediately before his arrest, then the car was considered to be in his control and thus subject to a warrantless search. This approach quite clearly cannot be squared with *Chimel*, where the Court explicitly rejected the notion that it was reasonable to search a place merely because it was in the possession of the arrestee. Equally inconsistent with *Chimel* is the proposition, accepted by a few courts, that the part of the car's interior which the defendant could have reached at the time the vehicle was stopped by the police somehow remains a fixed area of "immediate control" even after the defendant has alighted from the automobile. Under *Chimel*, the question is not whether the defendant could have reached a certain area on a prior occasion; rather, it is whether the defendant can *presently* (i.e., at the moment of search) reach that area.

Id. at § 7.1 at 500-01 (footnotes and citation omitted).

Belton built directly on *Chimel*'s holding. *Belton* addressed the following narrow issue: "When the *occupant* of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile *in which he was riding*?" 453 U.S. at 455 (emphases added). In answering this question, the Court reaffirmed what *Chimel* had emphasized: a search incident to

arrest "'must be strictly tied to and justified by the circumstances which rendered its initiation permissible." *Id.* at 457 (citation and internal quotation marks omitted). The Court also sought a "'single familiar standard'" to guide police officers in determining "the proper scope of a search of the interior of an automobile incident to a lawful custodial arrest of its occupants." *Id.* at 458-59. *Belton* 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." *Id.* at 460 (footnotes omitted). The Court explained that its ruling "does no more than determine the meaning of *Chimel*'s principles in this particular and problematic context. It in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of search incident to lawful custodial arrests." *Id.* at 460, n.3.

While the *Belton* Court merely sought to resolve how *Chimel*'s "immediate control" test should be applied to occupants of automobiles, the means employed by the Court undermined *Chimel*'s intent to strictly confine search incident to arrest authority to "'the exigencies of the situation [that] made that course imperative.'" *Chimel*, 395 U.S. at 761, quoting *McDonald v. United States*, 335 U.S. 451, 456 (1948). A *per se* rule that authorized a search of a vehicle's passenger compartment was not compatible with the "immediate control" or "grabbing distance" test. When *Belton* was decided, it was standard police practice to have an arrestee secured and removed from a vehicle *prior* to the search. Thus, when an officer searches a car, the passenger compartment of the vehicle is not within the arrestee's "immediate control" or grabbing distance. In fact, most of the pre-*Belton* lower court rulings that applied *Chimel* to vehicles involved "situations in which the arrestee was outside of the vehicle at the time of the search." 2 LAFAVE, *supra* at § 7.1 at 501. Although judges upheld vehicle searches incident to

an arrest, many of these rulings were based upon "an assumption that the arrestee was 'possessed of the skill of Houdini and the strength of Hercules' and thus could readily enter the car notwithstanding his distance from it and the manner of his custody." *Id.*

Belton resolved the incompatibility between the "immediate control" test and a *per se* rule by adopting a legal fiction: "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].'" *Belton*, 453 U.S. at 460, quoting *Chimel*, 395 U.S. at 763. Although *Belton* denied that its holding was a retreat from *Chimel*, in a case like petitioner's, application of *Belton*'s legal fiction exposes a conflict between *Belton*'s determination to provide officers with a "workable rule," *id.* at 460 and *Chimel*'s goal to strictly confine an officer's search incident to arrest authority.[4]

A. The Factors Compelling *Belton*'s Bright-Line Rule

When police arrest a person inside a home, or a pedestrian on the street, *Chimel* permits a search of the arrestee's person, as well as a search of the area within the

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[4] The first substantive question asked during the oral argument in *Florida v. Thomas*, highlights the tension between *Belton*'s legal fiction and *Chimel*'s intent to strictly confine searches incident to arrest to those contexts where a weapon or evidence might be accessible to an arrestee: "QUESTION: And do you say that *Belton* allows the person outside the car to be taken away, secured, removed, and then the officers can go back and search the car?" Tr. Oral Arg. *Florida v. Thomas*, No. 00-391 at 4-5; *see also id.* at 6 (Justice Souter asking: "Well, [the search] may have been part of one ongoing transaction, but it - - that does not, I think, affect the fact that the moment of the search seems to have been totally untethered from the justifications for the *Belton* rule because, as I understand it, at the time the search was made, the defendant was in the house. The defendant couldn't reach into the car for weapons or for evidence.").

arrestee's "immediate control." When such an arrest occurs, deciding what constitutes an arrestee's "immediate control" depends on the particular facts of each case. *See* 3 Wayne R. LaFave, SEARCH AND SEIZURE, § 6.3 (c) at 305-12 (3d ed. 1996). In *Belton*, this Court recognized that determining the proper scope of a car search incident to arrest involves a "problematic" application of *Chimel's* "immediate control" rule. *Belton*, 453 U.S. at 460, n. 3. Applying *Chimel's* "immediate control" test in this context is problematic for both practical and doctrinal reasons.

As a practical matter, an officer cannot remove a motorist from a car, effectuate an arrest, secure the arrestee and search his "grabbing distance" in a single stroke. This dilemma is particularly vexing when a single officer encounters a multi-occupant vehicle, as was the case in *Belton*. When conducting the arrest of a motorist or passenger inside a car, an officer first secures an arrestee to protect his or her own safety. Then an officer exercises his authority to search the area within the arrestee's immediate control. In all but the most extraordinary case, when the officer begins a search, the arrestee is no longer inside the vehicle, *see United States v. Karlin*, 852 F.2d 968, 971 (7th Cir.1988), *cert. denied,* 489 U.S. 1021 (1989), just as a pedestrian will be secured before an officer searches a container or object within the grabbing distance of the pedestrian. *See, e.g., Draper v. United States,* 358 U.S. 307, 314 (1959) (search of a "zipper bag" that arrestee was carrying was valid search incident to arrest).

Chimel's "immediate control" rule thus created doctrinal problems when applied to occupants of automobiles. "Sometimes it was assumed that the *Chimel* holding did not carry over to the vehicle cases." 2 LAFAVE, at § 7.1 at 499. Even when courts applied *Chimel*'s holding to cars, the "immediate control" rule offered hazy answers for officers and the judiciary. The "immediate control" test produced inconsistent results when applied on a case-by-case

basis to the arrest of a car occupant, *see Belton*, 453 U.S. at 460-61, and lower court rulings often applied *Chimel*'s "immediate control" rule in a manner that conflicted with the intent of that decision. 2 LAFAVE, at § 7.1 at 500-01. Indeed, *Belton* acknowledged that "no straightforward rule ha[d] emerged from the litigated cases" regarding the extent of police authority to search a car incident to the arrest of an occupant. 453 U.S. at 459.

Accordingly, *Belton*'s legal fiction was designed to make it easier for police and judges to apply *Chimel*'s "immediate control" test to a person seized while occupying a car.

> [*Belton*] adopted a factual presumption that, if the arrestee is an occupant of the vehicle, the arrestee can reach in the vehicle and get a weapon or destroy evidence. Following *Belton*, a showing of the actual fact of occupancy would automatically provide the presumed fact of access to the passenger compartment which is required by *Chimel* as a prerequisite for a warrantless search of a vehicle incident to arrest.

Glasco v. Virginia, 513 S.E.2d 137, 144 (Va. 1999) (Lacy, J., concurring). Instead of police officers conducting individualized on-the-spot assessments of an automobile occupant's "grabbing distance," *Belton* established a bright line to resolve the ambiguities that arose when applying the "immediate control" test to an arrestee seized while inside a vehicle. For someone seized while an occupant of a car, *Chimel*'s "immediate control" test would be triggered at the moment the police seizure occurred, and would extend to the entire passenger compartment of the vehicle.

B. The Factors That Compelled *Belton's* Holding Are Absent When An Officer Seizes A Person Outside A Vehicle

The practical and doctrinal concerns that compelled *Belton*'s holding are absent when a suspect is seized outside a vehicle. When an officer arrests a pedestrian, he does not confront the practical quandary that arises when attempting to arrest a person seated inside a car: simultaneously removing a suspect from a vehicle, searching the arrestee's person for weapons or evidence, and searching his "grabbing distance" all in a single stroke. Consequently, the concerns that prompted *Belton* to adopt a legal fiction in order to give officers a *per se* rule are extraneous to an arrest and search not involving an automobile occupant. Instead, *Chimel* controls the scope of an officer's authority to search incident to arrest.

Similarly, when an officer seizes a person *outside* a vehicle before executing an arrest, there is no longer a need for a bright-line rule that defines the arrestee's "immediate control" *inside* the vehicle. "The objective and the virtue of the *Belton* decision was to obviate uncertainty in applying the *Chimel* 'lunge area' rule to automobile searches. *Belton* simplified the task of [police] and the courts by declaring that the entire passenger compartment would be deemed within the arrestee's reach, and thus subject to search, when a vehicle occupant is arrested." *Idaho v. Foster,* 905 P.2d 1032, 1038 (Idaho Ct. App.1995). When the seizure occurs outside a car, however, the ambiguity regarding an arrestee's "grabbing distance" inside the car is gone. As the District of Columbia Circuit has recognized, "[n]o such ambiguity exists...where the police come upon the arrestees outside of an automobile. Under such circumstances, the rationale for *Belton*'s bright-line rule is absent; instead, the normal framework of *Chimel* applies." *United Stated v. Fafowora,* 865 F.2d 360, 362 (D.C. Cir.), *cert. denied,* 493 U.S. 829 (1989). *See also People v. Stehman*, 783 N.E. 2d 1, 7 (Ill.

2002) ("where police first confront the arrestee outside his vehicle, the ambiguity which *Belton* seeks to avoid no longer exists, and the rationale for its bright-line rule is absent"). Indeed, a contrary rule is inconsistent with the holding of *Vale v. Louisiana*, 399 U.S. 30 (1970). *Vale* explained that "[i]f a search of a house is to be upheld as incident to an arrest, that arrest must take place *inside* the house, not somewhere outside – whether two blocks away, twenty feet away, or on the sidewalk near the front steps." *Id.* at 33-34 (citations omitted). If police cannot justify a house search as incident to an arrest of a "recent occupant" of that house, they should not be able to justify a car search simply because the arrestee is a "recent occupant" of that car, or in "close proximity" to the vehicle.

Belton's *per se* rule is not triggered merely because the arrestee is a "recent occupant" of a vehicle. A "recent occupant" addendum to *Belton* would permit an automatic and suspicionless search of an arrestee's car and the private possessions therein without the concerns that compelled *Belton*'s holding.[5] More importantly, if *Belton* is extended to a case where police seize an individual outside of a car, it is severed from its foundation in *Chimel*. As noted, both *Chimel* and *Belton* recognized that the scope of a search incident to arrest "'must be strictly tied to and justified by the circumstances which rendered its initiation permissible.'" *Chimel*, 395 U.S. at 762; *Belton*, 453 U.S. at 457. In practice, this means that searches incident to arrest must be

[5] In previous *amicus* briefs addressing the issue *sub judice*, the United States has asserted that "the *Belton* rule is also supported by the diminished expectation of privacy that an individual has in the circumstances giving rise to its application." U.S. Br. 10, n. 3, *Arizona v. Gant*, 72 U.S.L.W. 3280 (Oct. 20, 2003), No. 02-1019; U.S. Br.11, n. 4, *Florida v. Thomas*, 532 U.S. 774 (2001) No. 00-391 (same). *Belton*, however, explained that "the justification for the search [of a container found inside a car] is not that the arrestee has no privacy interest in the container, but that the lawful custodial arrest justifies the infringement of any privacy interest the arrestee may have." *Belton*, 453 U.S. at 461.

confined to "the arrestee's person and the area 'within his immediate control.'" *Chimel*, 395 U.S. at 763. If police are automatically permitted to search a recent occupant's car even though the vehicle is not "'within his immediate control,'" they are not obeying the rule announced in *Chimel*. "If there is no connection shown between a person's occupancy of a vehicle and his arrest, then extending the scope of the search incident to arrest to the vehicle is neither 'tied to' nor 'justified by' circumstances of the arrest." *Glasco v. Virginia,* 513 S.E.2d at 144 (Lacy, J., concurring). A "recent occupant" extension of *Belton* conflicts with *Chimel*'s rationale and purpose. Indeed, *Chimel* warned that a search incident to arrest provides no justification "for routinely searching any room other than that in which an arrest occurs – or, for that matter, for searching through all the desk drawers or other closed or concealed areas in that room itself." 395 U.S. at 763. Similarly, there is no comparable justification for automatically searching the vehicle of an arrestee who has been seized outside of his car. As the Minnesota Supreme Court aptly put it, "*Belton* does not permit searches of arrestees' vehicles; it permits searches of occupants' vehicles incident to lawful arrest." *Minnesota v. Robb,* 605 N.W. 2d 96, 101 (Minn. 2000).

II. *BELTON'S* HOLDING DOES NOT EXTEND TO ANY "RECENT OCCUPANT" OF AN AUTOMOBILE

In previous cases, the United States has argued that *Belton* makes no distinction between "occupants" and "recent occupants" of automobiles. U.S. Br at 11, *Arizona v. Gant* ("*Belton* applies as long as the arrestee is a 'recent occupant' of the vehicle"); U.S. Br at 12, *Florida v. Thomas* (same). The notion that *Belton*'s *per se* rule applies to any recent occupant of a vehicle misreads Justice Stewart's opinion. Moreover, extending *Belton* to "recent occupants," or to persons in "close proximity" to a car, will create greater

uncertainty regarding an officer's authority to search incident to arrest.

A. *Belton*'s *Per Se* Rule Applies Only When Police Seize A Person In A Car And The Person Is Subsequently Arrested

Belton's holding does not extend to any "recent occupant" of a car. As the nation's most prominent Fourth Amendment scholar has explained, "*Belton* applies only in the case of 'a lawful custodial arrest of the occupant' of the vehicle." 3 LAFAVE, *supra* § 7.1 (a) at 436 (footnotes omitted).

A judicious reading of *Belton* confirms that the Court's ruling only applies to an arrestee who was seized while an occupant of a car. First, the facts show that Roger Belton and three others were occupants of a car when their vehicle was seized for speeding. Although Belton had exited the vehicle before being placed under arrest, thus making him a "recent occupant," his status as a "recent occupant" was the direct result of the officer's authority to seize him while he was inside the car and to arrest him after detecting evidence of contraband within plain-view of the vehicle.

Next, when describing the precise issue before it, *Belton* indicates that the Court was focusing on arrestees who were occupants of automobiles – not "recent occupants" or persons in "close proximity" to cars. In the opening sentences of his opinion, Justice Stewart wrote: "When the *occupant* of an automobile is subjected to a lawful custodial arrest, does the constitutionally permissible scope of a search incident to his arrest include the passenger compartment of the automobile *in which he was riding*? That is the question at issue in the present case." 453 U.S. at 455 (emphases added).

Significantly, *Belton*'s holding is limited to situations where an arrestee was an "occupant" of a vehicle. The Court

stated: "[W]e hold that when a policeman has made a lawful custodial arrest of the *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." *Id.* at 460 (footnotes omitted) (emphasis added). Finally, when applying this holding to the facts, Justice Stewart explained that the defendant's "jacket was located inside the passenger compartment of the car in which [Belton] had been a passenger just before he was arrested," thus making the jacket "'within the arrestee's immediate control'" for purposes of *Chimel*. *Id.* at 462 (footnote omitted).

In sum, although it is true that an arrestee need not be inside a vehicle at the moment the officer conducts the search, and that *Belton* itself used both the terms "occupant" and "recent occupant," *see id.* at 460, *Belton*'s analytical focus was directed toward an arrestee who was an occupant of a car when seized by the police. The lone use of the term "recent occupant" in *Belton* was an obvious reference to an arrestee who had been seized by the police while he was an occupant of an automobile and was later arrested after exiting the vehicle. *Belton* never defined or addressed who is a "recent occupant" for search incident to arrest purposes. *See Texas v. Kelly,* 963 S.W.2d 866, 869 (Tex. App – San Antonio 1998) ("the 'bright-line' test [of *Belton*] does not address who is a 'recent occupant' for purposes of being subject to a *Belton*-type vehicular search rather than a *Chimel*-type search.").

B. The Terms "Recent Occupant" And "Close Proximity" Are Inherently Ambiguous

Extending *Belton* to cover persons who have exited their vehicles prior to being seized by the police will generate greater uncertainty and ambiguity regarding an officer's authority to search a vehicle incident to arrest. For example, several lower courts have noted that if *Belton* is extended to permit a search whenever police arrest a "recent occupant"

who was not seized while inside a car, the clarity of *Belton* will be diminished. As one court explained, if *Belton* "is stretched to encompass the search of a vehicle that was voluntarily vacated by a person before confrontation with the police began, the 'bright-line' rule becomes hazy and uncertain. [Police] would be left to wonder what combination of temporal and spatial proximity the arrestee must have to the vehicle at the time contact was initiated to allow the search without a warrant." *Michigan v. Fernengel,* 549 N.W.2d 362, 363 (Mich. App. 1996). If *Belton* is applied to every "recent occupant," police will have to make case-by-case determinations regarding whether an arrestee was a "recent" occupant of a vehicle and the arrestee's proximity to the vehicle at the time of arrest. *See Texas v. Kelly,* 963 S.W.2d at 869. When applied to a motorist who was not seized while inside a vehicle, the term "recent occupant" has various connotations, and invites subjective judgments regarding a person's connection to a vehicle.

Even courts that have adopted a "recent occupant" rule recognize that case-by-case assessments are still necessary to determine an officer's authority to search incident to arrest. For example, the Colorado Supreme Court extended *Belton* to cover a situation "where the occupant of a vehicle anticipates police contact and exits the vehicle immediately before that contact occurs." *Colorado v. Savedra,* 907 P.2d 596, 599 (1995) (*en banc*). By extending *Belton* in this context, the court acknowledged that the "issue of temporal proximity between the police encounter and the defendant's presence in the vehicle is the main factor courts consider in determining whether a person is a recent occupant of a vehicle for purposes of *Belton.*" *Id.* In practice, this means that the officer in the field will first have to decide whether the arrestee has been outside of a car for a significant period of time, subject to the second-guessing of judges.

Other line-drawing problems have emerged when courts extend *Belton* to an arrestee who was not physically occupying a car when seized by the police. In *United States v. Sholola,* 124 F.3d 803 (7th Cir. 1997), the Seventh Circuit concluded that the defendant was "'positively linked'" to a vehicle when, during a conversation with an officer he had "pointed to a vehicle, opened the front driver's side door with a set of car keys in his hand, and stated, 'See, it's my car.'" *Id.* at 817. Because the defendant was "positively linked" with an automobile, the Seventh Circuit ruled that *Belton* permitted a search of the car incident to arrest, even though the arrestee was neither an occupant nor a "recent occupant" of the vehicle. Judge Wood concurred in the judgment in *Sholola,* but warned that judges should be mindful "not to extend [*Belton*] too far beyond its facts." *Id.* at 823. Judge Wood feared that the majority's use of the phrase "positively linked" might "be misunderstood in a future case." *Id.*

Sholola's interpretation of *Belton* illustrates the dangers of extending *Belton*'s holding to arrestees who have been seized outside of their vehicles. Deciding whether a person is "positively linked" or in "close proximity" to a car when he or she is seized outside the car requires considering the particular facts of each case. *See Arizona v. Dean*, 76 P.3d 429, 436 (Ariz. 2003) (recognizing that under a "close proximity" test, "the appropriate inquiry focuses on the critical factors of *when* and *where* the custodial arrest took place"). Similarly, determining whether a person is a "recent occupant" requires a particularized assessment of the facts of each case. Moreover, extending *Belton* to cover "recent occupants" eviscerates *Chimel*. Judge Wood's criticisms of the "positively linked" test are equally pertinent to a "recent occupant" standard:

> [Some] "[recent occupants]" would plainly fall outside the scope of *Belton*. For example, the police could observe a suspect parking a car in an off-street legal parking lot, and then walking two

> blocks away from it, keeping both vehicle and suspect under constant surveillance. If they then arrested the suspect, in my view they would need something other than *Belton* to justify a search of the car, even though [the defendant] might be said to [be a "recent occupant" of the car].

Sholola, 124 F. 3d at 823 (Wood J., concurring).

The United States, in previous cases, has recognized that a "recent occupant" test is not a bright-line rule. *See* U.S. Br at 29, *Arizona v. Gant* (the term "recent occupant" "may require careful line-drawing in outlying cases"). Rather than proposing a solution, in its previous *amicus* briefs, the United States has essentially urged the Court to ignore the ambiguity associated with the term "recent occupant." For example, in *Gant*, the Solicitor General asserted that there was no reason not to apply *Belton* "to the more typical case," U.S. Br at 19, where police observe a suspect "exit his car and contacted him seconds later in the vicinity of the car he had just occupied." *Id.* at 18; *see also* U.S. Br at 21, *Florida v. Thomas* ("There is no doubt that an individual is the 'recent occupant' of a vehicle when, as here, the officer sees the individual get out of the car and contacts him moments later beside the car."). Finally, the Solicitor General has stated that "[i]n determining whether *Belton* authorizes a vehicle search in outlying cases, courts should assess the reasonableness of applying the *Belton* rule in light of the basic concerns underlying the search-incident-to-arrest doctrine and the facts and circumstances of the particular arrest and search at issue." U.S. Br at 28, *Arizona v. Gant*.

In *Gant* and *Thomas*, the Solicitor General avoided the difficult question of defining when an arrestee qualifies as a "recent occupant" by arguing that the facts in those cases showed that the defendants were clearly "recent occupants" and that those fact patterns represented "the more typical case." U.S. Br at 19, *Arizona v. Gant*. We anticipate that the

Solicitor General will make a similar argument here. The Solicitor General's past claims, however, that certain fact patterns symbolize the typical scenario for *Belton* searches has not been substantiated by the records in those cases and is contradicted by some of the cases cited by the United States. *See* U.S. Br at 19, n.5, *Gant*.

Furthermore, what the Solicitor General characterizes as "outlying cases," *id.* at 28, have generated a substantial amount of litigation in the lower courts regarding the proper scope of *Belton*'s automatic search rule. *See* 3 LAFAVE, *supra*, § 7.1(a) at 436-37, n. 25 & 26 (3d ed. 1996 & Supp. 2003) (citing cases illustrating split among lower courts on *Belton*'s applicability to arrestees who were recent occupants of vehicles); *Arizona v. Dean*, 76 P.3d at 434 (noting that "state and federal courts have struggled to find a workable definition of the term ['recent occupant']"); *United States v. Green*, 324 F. 3d 375, 378-79 (5th Cir. 2003) (same). If the Solicitor General's approach is followed, the workload of this Court and the state and federal courts will not be eased. Judges will still have to decide the applicability of *Belton* to cases where an arrestee was no longer near his vehicle. The "initiates contact" test developed because many courts recognized that *Belton*'s holding should not be extended to cases where police seize a person away from of his vehicle. *See People v. Stehman*, 783 N.E. 2d at 8 ("where searches occur beyond the scope of *Belton*'s bright-line intent, the factors in *Chimel* of officer safety and evidence preservation must be present in order for a search incident to arrest to be lawful") (citations omitted). The Solicitor General's proposed solution for these cases is a vague, standardless test. If bright lines are essential to guide officers and judges, then *Belton*'s holding should be left undisturbed and this Court should reject any proposals that require police officers to assess the totality of the circumstances – which is what the Solicitor General proposes – when determining whether to proceed with a car search incident to arrest.

The court below adopted a "close proximity" rule which also requires officers and judges to weigh temporal and spatial factors to determine when a vehicle search is permissible incident to a lawful arrest. *See also Arizona v. Dean*, 76 P. 3d at 437 (acknowledging that "concepts such as 'close proximity' and 'immediately after' are of course subject to factual analysis"). The analytical flaw with a "close proximity," "positively linked" or "immediate vicinity" rule is that it allows officers and judges to interpret *Chimel*'s "immediate control" test as if it were identical to a test of "possession." This type of reasoning recalls an era of this Court's search incident to arrest jurisprudence that permitted police to search the area considered to be in the "possession" or under the "control" of the arrestee. For example, in *Harris v. United States*, 331 U.S. 145 (1947), a five-hour search of a four-room apartment was upheld as a valid search incident to arrest because the arrestee "was in exclusive possession" of the premises. *Id.* at 152. *See also United States v. Rabinowitz,* 339 U.S. 56, 63 (1950) (relying on *Harris* to uphold an hour and a half search of defendant's office as a valid search incident to arrest). The logic that supported the results in *Harris* and *Rabinowitz* was firmly rejected in *Chimel*. Even before *Chimel*, the Court had discredited a "possession" or "close proximity" test. The arrestee in *Vale* was also in "close proximity" to his home; indeed, Vale was not only a "recent occupant" of his home, he was standing on the "front steps of the house" when arrested. *Vale*, 399 U.S. at 32. But that fact provided no justification for searching his home. If Fourth Amendment principles "preclude [] indulgence in the fiction that the recesses of a man's house are like the pockets of the clothes he wears at the time of his arrest," *Harris*, 331 U.S. at 164 (Frankfurter, J., dissenting), then those same principles preclude treating a man's vehicle as the equivalent of a shopping cart pushed by the arrestee at the time of this arrest.

C. A "Recent Occupant" Rule Is Not Required By This Court's Precedents

Michigan v. Long, 463 U.S. 1032 (1983) has not, directly or indirectly, decided the issue preserved in this case. The dicta in *Long* provides no basis for extending *Belton* to "recent occupants." In *Long,* police observed Long's car traveling erratically and speeding. After watching the car swerve into a ditch, the police stopped to investigate. "As [the officers] left their vehicle and walked forward, [Long]...left from the driver's seat side" of his vehicle and met the officers at the rear of the car. *People v. Long*, 288 N.W. 2d 629, 630 (Mich. App. 1980). Suspecting that Long was intoxicated, the officers asked to see his license. As Long walked toward the open door of his car, the officers observed a large hunting knife on the floor. After frisking Long, the police conducted a search of the passenger compartment for other weapons. Inside the car they found marijuana. *Long* held that a protective search of a passenger compartment is valid when reasonable suspicion exists that a car contains weapons potentially dangerous to police.

In dicta, this Court stated "if the officers had arrested Long for speeding or for driving while intoxicated, they could have searched the passenger compartment under *New York v. Belton*." *Long*, 463 U.S. at 1035, n.1; *see also id.* at 1049, n.14 ("[T]he 'bright line' that we drew in *Belton* clearly authorizes... a search whenever officers effect a custodial arrest."). Despite this dicta, the facts in *Long* are consistent with our analysis of *Belton*'s *per se* rule being limited to cases where police seize a person while he or she is an occupant of a car. Long was inside his car when the deputies stopped to investigate. *See* 288 N.W. 2d at 630. From that moment forward, Long was seized for Fourth Amendment purposes. *See Long*, 463 U.S. at 1051 (noting that during any investigative stop, police may detain person against his will). His ability to exit his vehicle before being ordered to do so by the police did not convert the

confrontation into a non-seizure nor negate the applicability of *Belton*'s *per se* rule. *See infra* Part III.

This Court has never held that application of *Belton*'s *per se* rule should have no factual predicate other than the lawful arrest of a recent occupant, as suggested by the court below, JA 71, or implied in *Long*'s dicta. Such a holding would constitute a radical departure from the standards announced in *Chimel* and *Belton*. Although in recent years this Court has greatly enlarged the automobile exception, searches under that doctrine are never "automatic." Such searches always require probable cause that contraband is inside a car. *See Wyoming v. Houghton,* 526 U.S. 295 (1999). Similarly, searches under *Long* require reasonable suspicion that a car's passenger compartment poses a threat to an officer's safety; *Long* does not authorize an "automatic" search. *See Long*, 463 U.S. at 1049, n.14 ("We stress that our decision does not mean that the police may conduct automobile searches whenever they conduct an investigative stop."). A "recent occupant" or "close proximity" test, however, allows an automatic and suspicionless search of an automobile. This Court has never announced such a holding. Since *Chimel*, this Court's search incident to arrest precedents have embraced Justice Frankfurter's view that "[a]uthority to arrest does not dispense with the requirement of authority to search." *Harris,* 331 U.S. at 165 (Frankfurter, J., dissenting).

III. *BELTON*'S *PER SE* RULE SHOULD BE RESTRICTED TO CASES WHERE A PERSON WAS SEIZED WHILE AN OCCUPANT OF A CAR

Although the "contacts" test seeks to promote the aims of *Chimel* and *Belton*, a more workable and efficient rule is available to resolve the tension between *Belton* and *Chimel*. The *per se* rule of *Belton* should be limited to cases where a person is seized while inside a car. If police arrest a

recent occupant of a vehicle who was not seized while inside a vehicle, the scope of an officer's authority to search incident to arrest is governed by *Chimel,* not *Belton.*[6] Our *per se* rule parallels *Belton*'s holding, is easily applied by police officers, and is consistent with analogous rules that govern an officer's authority to investigate and detain occupants of automobiles. Most importantly, our proposal satisfies *Chimel*'s mandate that an officer's search power be strictly tied to the traditional rationales for the search incident to arrest exception.

First, the facts and holding of *Belton* itself establish a *per se* rule only when a person is seized while an occupant of a car. Although Belton was ordered out of the car, thus making him a "recent occupant" of the vehicle, his status as a recent occupant was the direct consequence of the officer's lawful decision to seize Belton while he was an occupant of a vehicle. Under these circumstances, *Belton* held that "when a policeman had made a lawful custodial arrest of the *occupant* of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile." 453 U.S. at 460 (footnotes omitted) (emphasis added).

Second, confining *Belton*'s bright line to cases where a person was seized while inside a car produces a rule that is easily understood and followed by police officers. Well-trained officers know when they have the authority to seize an occupant of a vehicle. *See Delaware v. Prouse*, 440 U.S. 648 (1979) (random traffic stops are unconstitutional; police

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[6] The ruling below seems based on the premise that if *Belton*'s *per se* rule does not apply to "recent occupants," an officer lacks any authority to search incident to arrest. *See* JA 72-73. That analysis is wrong. The fact that *Belton*'s *per se* rule may not apply in a particular case does not preclude a search incident to arrest. *Chimel* provides the default rule in cases where *Belton* does not apply. And if *Chimel* does not authorize the challenged search, then, *ipso jure*, the search is unnecessary to promote officer safety or the preservation of evidence.

may seize a vehicle where probable cause or reasonable suspicion exists that a motorist has committed a traffic violation or other crime). Thus, whenever police detain a vehicle to investigate a traffic violation, as they did in *Belton* or *Long*, they have seized the vehicle and its occupants. If during the course of that seizure, probable cause to arrest develops, *Belton*'s *per se* rule applies regardless of whether the occupants of the vehicle remain seated in the car, have been removed from the car, or have exited the vehicle voluntarily.

Although petitioner had not been signaled for a traffic stop, JA 16, the court below, like a few other lower courts, thought *Belton* was applicable to remove the concern that officers might have to "race" to a suspect's vehicle to prevent the suspect from exiting from his or her car. JA 73; *see also, Nebraska v. Gonzalez*, 487 N.W.2d 567, 572 (Neb. App.1992) ("In order to conduct a valid search, police officers should not have to race from their vehicles to the arrestee's vehicle to prevent the arrestee from getting out of his or her vehicle."); *cf. Colorado v. Savedra,* 907 P.2d at 600 ("if *Belton* were read to preclude a search...where police contact occurred just after the suspect exited the vehicle, then knowledgeable suspects could effectively conceal evidence by stepping outside of their vehicle whenever they saw a police officer approaching"). Confining *Belton*, however, to cases where police seize a car occupant eliminates the concern that officers will have to "race" from their patrol cars to prevent an occupant from exiting his car. If police pull over or detain a vehicle while the suspect is inside, as they did in *Gonzalez*, 487 N.W.2d at 568, a suspect cannot "*Belton*-proof" the car by exiting the vehicle before the officer can vacate his cruiser. A "seizure" occurs "the moment [a motorist] was pulled over by" an officer. *Ohio v. Retherford*, 639 N.E. 2d 498, 506 (Ohio App. 1994); *cf. California v. Hodari D.*, 499 U.S. 621, 626 (1991) (explaining an "arrest requires *either* physical force... *or*,

where that is absent, *submission* to the assertion of authority"). Thus, even a suspect who voluntarily exits his vehicle during a traffic stop is still considered "seized" for Fourth Amendment purposes until the traffic stop is completed. *See New York v. Class*, 475 U.S. 108, 116 (1986) (noting that officers could effect the seizure of a motorist who voluntarily exited his car until "they completed their investigation"). Further, under our proposal, an officer will not have to inquire why a motorist exited his vehicle. Where a person is lawfully seized inside his vehicle and arrested, *Belton* applies regardless of why an arrestee exits his or her car.

Third, limiting *Belton* to cases where a person was seized while an occupant of a car produces a rule that is consistent with analogous Fourth Amendment rules governing an officer's power to investigate and detain occupants of automobiles. For example, *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (*per curiam*), held that during a traffic stop police may routinely order a driver out of his vehicle. *See also Maryland v. Wilson*, 519 U.S. 408, 415 (1997) (extending *Mimms*' holding to passengers). In reaching this conclusion, however, *Mimms* emphasized that it was not holding "that whenever an officer has an occasion to speak with the driver of a vehicle, he may also order the driver out of the car." *Mimms*, 434 U.S. at 111, n.6 (internal quotation marks omitted). *Mimms* and *Wilson* restrict forcible exit orders of car occupants to lawful seizures. A contrary rule would subject anyone in a car to an arbitrary intrusion. Likewise, if police have no basis for seizing an automobile occupant, that person's decision to exit his vehicle should not occasion an automatic search of his vehicle merely because the person is later arrested outside the vehicle. *Compare, Vale*, *supra* (a search of a home cannot be upheld as a valid search incident to arrest even if the arrest occurs on the front steps of the house).

The concern about undercover surveillance operations, expressed below, JA 72-73, provides no justification for extending *Belton*'s *per se* rule to scenarios that do not implicate the traditional rationales for the search incident to arrest exception. To be sure, an undercover officer might hesitate to confront a suspect while engaged in surveillance procedures. But an undercover officer's interest in maintaining his "cover" does not justify an automatic and suspicionless search of a vehicle if a suspect is later arrested outside his vehicle. For Fourth Amendment purposes, the undercover officer's situation is indistinguishable from the patrol officer who has a hunch, but not probable cause, that a suspect's vehicle might contain contraband or a weapon. A desire to search has never been the touchstone for constitutional reasonableness. As noted by one member of the Court the during oral argument in *Florida v. Thomas*, an officer's desire to search a vehicle "doesn't equate with the necessity to do so to protect himself or to protect any evidence that someone might grab during an arrest process that occurs as the person has distanced himself from the car." Tr. Oral Arg. *Florida v. Thomas*, No.00-391 at 33.

Finally, our proposal avoids the line-drawing problems inherent in the ruling below that has officers deciding whether an arrestee was in "close proximity, both temporally and spatially," JA 74, to a vehicle for search incident to arrest purposes. Officers and judges should only decide whether a person was seized while an occupant of a car. When police seize a person in a car, and the person is subsequently arrested, *Belton*'s *per se* search rule applies.

Under our proposal, the search of petitioner's vehicle was unreasonable because petitioner was not seized while an occupant of that vehicle.

CONCLUSION

For the reasons stated above, the judgment of the Court of Appeals for the Fourth Circuit should be reversed.

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