arrest was present.[78] The Arizona Supreme Court affirmed.[79] Once again, the case made its way to the Supreme Court, which granted *certiorari* in February 2008 on the question:

> [whether the Fourth Amendment requires] law enforcement officers to demonstrate a threat to their safety or a need to preserve evidence related to the crime of arrest in order to justify a warrantless vehicular search incident to arrest conducted after the vehicle's recent occupants have been arrested and secured.[80]

*Arizona v. Gant* was argued on October 7, 2008.[81] Oral argument largely turned on the question of whether the two-pronged justification for search incident to arrest could support the bright-line rule established twenty-seven years earlier in *New York v. Belton*.[82] Thirty-three states submitted *amicus* briefs in support of the state,[83] and several Justices, including Scalia, Stevens, Ginsberg, and Souter, expressed disbelief that the officer safety rationale made sense as the justification for *Belton*, particularly given the facts involved in *Gant*.[84] Justices Breyer, Alito, and Chief Justice Roberts were the only justices to actively engage the respondent and make the case for continuing Belton's bright-line rule.[85]

The decision that the Court handed down in April 2009 reflected the Justices' positions revealed during oral argument. Justice Stevens wrote the opinion of the Court and was joined in a 5-4 decision by Justices Souter, Ginsberg, and Thomas, [86] with Justice Scalia writing a separate concurrence.[87] Justice Breyer wrote a dissent,[88] and Justice Alito wrote a dissent in which Justice Kennedy and Chief Justice Roberts joined, and Justice Breyer joined in part.[89]

Justice Stevens was the only justice remaining from the Court that decided *New York v. Belton*, and his opinion in *Gant* is hinted at in his dissent in *Thornton v. United States,* in which he questioned the rationale of *Belton*.[90] Stevens viewed *Belton* as being "swollen" beyond its original intent when it was used to allow an officer to search the passenger compartment of a vehicle in which the arrestee had been merely a "recent occupant."[91] He accepted the use of the automobile exception if there was probable cause to search, but was troubled by the way that *Belton* had been contorted into a generally applicable tool for police to search a vehicle's passenger compartment without consideration for the legal basis for that search.[92]

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[78] State v. Gant, 143 P.3d 379, 382-83 (Ariz. Ct. App. 2006).
[79] State v. Gant, 162 P.3d 640, 646 (Ariz. 2007).
[80] Arizona v. Gant, 552 U.S. 1230, 1230 (2008).
[81] Transcript of Oral Argument, Arizona v. Gant, 129 S. Ct. 1710 (2009) (No. 07-542), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/07-542.pdf.
[82] *Id.*
[83] Brief for State of Florida et al. as Amici Curiae Supporting Petitioner, Arizona v. Gant, 129 S. Ct. 1710 (2003) (No. 02-1019), 2003 WL 21648701; Brief for State of Florida et al. as Amici Curiae Supporting Petitioner, Arizona v. Gant, 129 S. Ct. 1710 (2003) (No. 07-542), 2008 WL 2151707.
[84] Transcript of Oral Argument, Arizona v. Gant, 129 S. Ct. 1710 (No. 07-542).
[85] *Id.* at 39-45.
[86] Arizona v. Gant, 129 S. Ct. 1710, 1710 (2009).
[87] *Id.* at 1724-25 (Scalia, J., concurring).
[88] *Id.* at 1725-26 (Breyer, J., dissenting).
[89] *Id.* at 1726-32 (Alito, J., dissenting).
[90] Thornton v. United States, 541 U.S. 615, 633-36 (2004) (Stevens, J., dissenting).
[91] *Id.* at 636.
[92] *Id.*; *see also, e.g.*, California v. Acevedo, 500 U.S. 565, 599 (1991) (Stevens, J., dissenting) ("Even accepting *Belton's* application to a case like this one, however, the Court's logic extends its holding to a container placed in the trunk of a vehicle, rather than in the passenger compartment. And the Court makes this extension without any justification whatsoever other than convenience to law enforcement."); Wyoming v. Houghton, 526 U.S. 295, 313 (2001) (Stevens, J., dissenting) ("Instead of applying ordinary Fourth Amendment principles to this case, the majority extends the automobile warrant exception to allow searches of passenger belongings based on the driver's misconduct. Thankfully, the Court's automobile-centered analysis limits the scope of its holding. But it does not justify the outcome in this case.").

Stevens began the Court's decision in *Gant* by confronting the shortcomings of returning to the original rationales for search incident to arrest. He argued that the primary purpose of the search was for officer safety and to ensure that the arrestee could not gain access to weapons.[93] The "reaching-distance" rule of *Chimel* as applied to vehicles did not support the search of Gant's vehicle after he had been handcuffed and placed in the back seat of the patrol car.[94] Moreover, the second rationale for searches incident to arrest also did not apply, as a search for evidence related to the crime could only be used when it was reasonable to assume that evidence supporting the arrest might be found in the vehicle.[95] Given that Gant was arrested for driving under a suspended license, this was not reasonable.[96]

*Belton* had been expanded in such a way that it was disconnected from its original rationale. Stevens quoted Justice O'Connor's concurrence in *Thornton*, in which she stated, "lower court decisions seem now to treat the ability to search a vehicle incident to the arrest of a recent occupant as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*."[97] Even the officer who searched Gant's vehicle noted that he conducted the search "because the law says we can do it."[98] The bright-line rule in *Belton* was designed to provide officers with maximum efficiency in conducting their work, yet it did so by disregarding the constitutional rationale for the search in the first place.[99] Stevens challenged the *Thornton* holding that allowed police to search the vehicle recently occupied by an arrestee, even though "most of the time the vehicle would not be within the arrestee's reach at the time of the search."[100] He rejected the broad reading of *Belton*, and held that *Chimel v. California* provides the proper standard for vehicle searches incident to arrest.[101] 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."[102]

In order to gain the crucial fifth vote for a majority, Stevens acceded to Justice Scalia's desire to allow a search of a vehicle under the circumstances when "it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[103] This would not permit a search in cases like Gant's where the arrest was for a minor traffic violation, but it would have supported the searches in *Belton* and in *Thornton* where the initial arrests were drug-related; thus, it would be reasonable for officers to conclude that further evidence of that crime might be found in the passenger compartment.

In his concurring opinion, Justice Scalia rejected Stevens' reliance on *Chimel* and argued that the only rationale for a vehicle search incident to arrest is where it is reasonable to believe evidence related to the crime of arrest would be found.[104] Scalia believed that the officer safety rule left too much room for manipulation by officers.[105] Yet, because no other member of the Court shared his view about *Chimel*, Scalia chose to join the majority in order to avoid what he

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[93] Arizona v. Gant, 129 S. Ct. 1710, 1716 (2009).
[94] *Id.* at 1719.
[95] *Id.*
[96] *Id.* ("Whereas 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.").
[97] *Gant,* 129 S. Ct. at 1718 (quoting Thornton v. United States, 541 U.S. 615, 624 (2004) (O'Connor, J., concurring in part)).
[98] *Id.* at 1715.
[99] *Id.* at 1723 (citing Mincey v. Arizona, 437 U.S. 385, 393 (1978)).
[100] *Id.* at 1719.
[101] *Id.*
[102] *Id.*
[103] *Id*. (citing Thornton v. United States, 541 U.S. 615, 632 (2004) (Scalia, J., concurring)).
[104] *Id.* at 1724-25 (Scalia, J., concurring).
[105] *Id.*

viewed as "plainly unconstitutional searches" under the *Belton* standard.[106] While the two pronged ruling that emerged – permitting searches of the defendant's "reaching distance" when not secured or full passenger compartment searches when it is reasonable to believe that the search will yield further evidence of the crime of arrest – is more accommodating to police than Stevens' sole opinion would have been, the Stevens/Scalia rationale places significant limits on the police to conduct vehicle searches incident to a legal arrest.

Writing in dissent, Justice Alito argued that the majority had in fact overruled *Belton* even though it claimed only to be modifying it.[107] Alito challenged the majority for abandoning *stare decisis* in an area of the law in which there has been substantial reliance by law enforcement on the rule set forth in *Belton*, stating, "[t]he *Belton* rule has been taught to police officers for more than a quarter century."[108] This was also the stated rationale for Justice Breyer's dissent, in which he acknowledged Stevens' concerns about the problems of unconstitutional searches but believed that great weight had to be given to the *Belton* precedent that had been recently reaffirmed in *Thornton* and had been relied on for the past twenty-eight years.[109]

Alito further argued that *Belton* has been a workable rule, and there have been no circumstances that have occurred which would bring the decision's rationale into question.[110] He challenged the Court's claim that the reasoning in *Belton* was flawed, arguing that the reliance on *Chimel* is flawed, and that the *Belton* Court could not have assumed that the search would occur before the arrestee was placed in custody.[111] It was enough for Alito that at the time of the arrest the suspect was near their vehicle, the suspect would then be secured, and the search could proceed safely.[112] Alito also questioned Justice Scalia's "reasonable to believe" standard, wondering why a "reasonableness" standard would be used, rather than a probable cause standard.[113]

## III. THE IMPLICATIONS OF *GANT* FOR THE FUTURE OF VEHICLE SEARCHES

*Arizona v. Gant* could fundamentally reshape the law of search incident to arrest. The bright-line rule from *New York v. Belton* seems to have been abandoned. Officers may no longer search the passenger compartment of a vehicle incident to arrest unless they have reason to believe that the arrestee will be able to gain access to the vehicle at the time of the search.[114] In that instance, the "reachable-distance" rule of *Chimel v. California* determines the scope of a permissible search.[115] A search can also be conducted if the officer has reasonable belief that the vehicle contains further evidence of the crime for which the suspect was arrested.[116] For arrests stemming from minor traffic violations, this precludes a vehicle search.[117] The reaction from the law enforcement community, at least as evidenced by such publications as the *FBI Law Enforcement Bulletin*[118] and *Police Chief*,[119] suggests that *Gant* is perceived as a significant ruling for day-to-day law enforcement operations.

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[106] *Id.* at 1725.
[107] *Id.* at 1726 (Alito, J., dissenting).
[108] *Id.* at 1728 (Alito, J., dissenting).
[109] *Id.* at 1725-26 (Breyer, J., dissenting).
[110] *Id.* at 1729 (Alito, J., dissenting).
[111] *Id.* at 1730-31.
[112] *Id.*
[113] *Id.* at 1731.
[114] *Id.* at 1723-24.
[115] *Id.* at 1723.
[116] *Id.*
[117] *Id.* at 1719.
[118] Richard G. Schott, *The Supreme Court Reexamines Search Incident to Lawful Arrest,* 78 FBI Law Enforcement Bulletin 22 (2009).
[119] Lisa A. Judge, *Bye-Bye* Belton*? Supreme Court Decision Shifts Authority for Vehicle Searches from Automatic to Manual,* POLICE CHIEF MAG., June 6, 2009, *available at*

For twenty-eight years, the bright-line rule from *Belton* governed searches incident to arrest occurring in the context of a traffic stop. In many ways, Justice O'Connor's comments in *Thornton* were accurate in that police have viewed the tool of search incident to arrest as an entitlement. Pretextual stops were an essential tool in the war on drugs and in many other types of criminal investigations. Police officers knew that all they had to do was to establish probable cause for an illegal act based on whatever information they had. They could then stop a suspect's vehicle on the pretext of a minor traffic offense, place the driver under arrest, and proceed to conduct a complete search of the passenger compartment. Thus, the decision in *Gant* represents what could be a paradigm shift for law enforcement, at least with regard to automobile searches.

A few months after the *Gant* decision, both the *FBI Law Enforcement Bulletin*[120] and *Police Chief*[121] had articles focusing on the implications of the decision. The Federal Law Enforcement Training Center issued a ten-page report on the decision to educate law enforcement officers on how the decision changed protocol in the context of investigatory traffic stops.[122] Perhaps more importantly, the article provided a list of five vehicle search exceptions that officers can use in specific circumstances and still comply with the strictures of the Fourth Amendment.[123] First, if there is reasonable suspicion that a passenger or recent occupant is dangerous and might be able to gain access to the vehicle, the officer can "frisk the passenger compartment for weapons."[124] This suggests that the search would be permissible even if the driver is secured and under arrest if other recent occupants are not under the control of the officer. Second, an officer may search a vehicle if he has reasonable belief that "the vehicle contains evidence of criminal activity."[125] Such a search is implied by Justice Scalia's reasonable belief standard of finding evidence of criminal activity related to the arresting offense. Third, an officer can conduct a protective sweep of a vehicle if he or she has reasonable suspicion that a dangerous person is hiding therein.[126] This search would be limited to looking in places where such a person might be hiding, but it would not allow a full search of all containers in the vehicle.[127] Fourth, the officer can search the vehicle if he or she gains consent to do so.[128] Finally, if the officer chooses to lawfully impound the vehicle after an arrest, this would enable an inventory search for administrative purposes; if performed legally, an inventory search would permit any contraband to be seized.[129] These same "tips" were reproduced in the June 2009 issue of *Police Chief*.[130]

Of these exceptions, consent and inventory searches are particularly important. Many police officers believe they can convince almost anyone to consent to a search; thus, it is a logical implication of *Gant* that officers will seek to obtain consent to search in cases in which they could previously conduct a search incident to arrest. As long as consent is given voluntarily, the Court has held that a consent search is legal.[131] Consent for a search does not require the officer to arrest the individual.[132] For example, when someone is issued a summons for failure to

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http://policechiefmagazine.org/magazine/index.cfm?fuseaction=print_display&article_id=1811&issue_id=6 2009.

[120] Schott, *supra* note 118.

[121] Judge, *supra* note 119.

[122] Jennifer G. Solari, *The United States Supreme Court's Ruling in* Arizona v. Gant*: Implications for Law Enforcement Officers*, FED. LAW ENFORCEMENT INFORMER, May 2009, at 3, 3-8.

[123] *Id.* at 8.

[124] *Id.*

[125] *Id.*

[126] *Id.*

[127] *Id.*

[128] *Id.*

[129] *Id.*

[130] *See* Judge, *supra* note 119.

[131] Schneckloth v. Bustamonte, 412 U.S. 218, 248 (1973).

[132] *Id.* at 277.

show proof of insurance, the police officer could simply ask the driver to consent to a search of the vehicle. However, if for the same offense the officer placed the driver under arrest and then asked the arrestee to search the vehicle as a condition of releasing him, a court would likely interpret this behavior as coercive, thus invalidating the voluntariness of consent.

The last search exception discussed in the Federal Law Enforcement Training Center report is the inventory search.[133] An inventory search is an administrative search conducted when a vehicle has been lawfully impounded.[134] The purpose of this type of search is to inventory the contents of a vehicle and protect the police from claims that valuable items in the vehicle were stolen when it was in the impound system.[135] If in the course of inventorying a vehicle, the police discover illegal contraband or evidence of a crime, that evidence is admissible in court.[136] As the report suggests, if the law permits the use of impoundment, this may be a way to accomplish a full vehicle search.[137] It is unclear how the Court would respond to this back-door method to circumvent *Gant's* restrictions, but the Court has been willing to limit the scope of inventory searches in the past.[138] As Chief Justice Rehnquist said in his majority opinion affirming the suppression of evidence in *Florida v. Wells,* "[o]ur view that *standardized criteria* . . . must regulate the opening of containers found during inventory searches is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."[139] Thus, if an agency has a standing policy to impound any vehicle where an arrest occurs on the street, then it is likely that this exception would be acceptable. But if an agency rarely or never impounds vehicles as a matter of practice, then the shift to impoundment in light of *Gant* might be viewed as an attempt to violate the spirit of the decision.

## IV. THE JUDICIAL IMPACT OF *ARIZONA V. GANT*

The impact of the *Gant* decision on law enforcement search practices will only become clear once time has passed for lower courts to flesh out their interpretations of the decision. Additionally, it will take time for law enforcement to adapt their practices to the new rules. While any examination of the impact of *Arizona v. Gant* after one year is by its very nature preliminary, there are important indicators present that suggest that the Court's decision is significant.

### A. RESEARCH METHOD

In order to consider the impact of the *Gant* decision, every lower federal court decision citing *Gant* in *Shepard's Citations* from April 22, 2009, through September 30, 2010, was read and analyzed. The decisions were read and coded to present a quantitative picture of the issues that have been raised in the year following the ruling and to examine the substantive impact of the decision in terms of the resolution of cases. *Shepard's* was used as the primary means of identifying lower court decisions responding to the *Gant* decision because it is the most comprehensive data source available to identify court decision citations to pre-existing cases.[140]

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[133] Solari, *supra* note 122, at 8.
[134] *See* Florida v. Wells, 495 U.S. 1, 4-5 (1990); Colorado v. Bertine, 479 U.S. 367, 372 (1988); South Dakota v. Opperman, 428 U.S. 364, 369-70 (1976).
[135] *Bertine*, 479 U.S. at 372; *Opperman*, 428 U.S. at 369.
[136] *Opperman*, 428 U.S. at 371-73.
[137] Solari, *supra* note 122, at 8.
[138] *See Wells*, 495 U.S. at 4.
[139] *Id.* (emphasis added).
[140] THOMAS G. HANSFORD & JAMES F. SPRIGGS, II, THE POLITICS OF PRECEDENT ON THE U.S. SUPREME COURT 45–50 (Princeton Univ. Press 2008) (2006) (finding that LEXIS *Shepard's Citations* is a reliable and valid tool for judicial impact studies).

For the analysis conducted here, all cases that were listed by Shepard's as "followed by" federal courts or state courts were examined. In addition, the seventy-two Federal cases that were listed as "distinguished by" in *Shepard's* were examined separately. Cases that only cited *Gant*, and provided no analysis, were excluded. Tables 1 and 2 provide a detailed breakdown for the courts that rendered these decisions.

Content analysis was conducted after reading each decision. Cases were coded for whether the state or defendant won in the ruling, the presence of inventory searches, consent searches, the reason for the arrest, and the rationale for the decision. For the reason for the arrest, cases were coded as either minor traffic violation, driving with suspended license, drug arrest, warrant, possession of firearm, and other. The rationale for the decision was coded under the two prongs of the *Gant* ruling, including cases in which there was no justification for a search (e.g., minor traffic offenses, driving under a suspended/revoked license, warrants for failure to appear for minor offenses) and cases where a search was justified by a reasonable search for further evidence of the crime for which the arrest was made. These included drug arrests, officer safety claims based on the presence of firearms or weapons, and other reasons where courts believed it reasonable for further evidence to be found through a search. In addition, cases were coded if they were justified by the automobile exception, valid consent search, or a good faith exception to *Gant*.

### B. RESULTS

Shepard's Citations reports that in the eighteen months since *Gant* was decided, the case has been cited by 814 lower federal and state courts. The number of cases making reference to *Gant* has increased by approximately forty cases each month. Of the cases in which Shepard's indicated there was "analysis", 242 cases have followed the decision, 138 have distinguished it, and three have criticized it.[141] The sheer number of citations to *Gant* in such a short time period is significant. A separate analysis of citations to Supreme Court search and seizure cases since 1953 shows that *Gant* is ranked forty-second among all search and seizure cases in terms of the number of citations by lower courts.[142]

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[141] Arizona v. Gant, 129 S. Ct. 1710 (available at LEXIS, *Shepardize*, original search and *shepardization* of cases citing completed Oct. 22, 2010).

[142] The author *shepardized* all 298 search and seizure opinions found in the Supreme Court database and ranked these decisions by total number of lower court citations. As of Sept. 2010, *Gant* ranks among the top fifteen percent of all search and seizure cases decided since 1953. Michael C. Gizzi, William R. Wilkerson, and R. Craig Curtis, *What Makes a Landmark Case or Major Opinion? Examining Citation Patterns in Search and Seizure Cases* (Apr. 2011) (unpublished manuscript, presented at the annual meeting of the Midwest Political Science Association) (on file with author).

## Table 1. Followed and Distinguished Cases in Federal Court April 22, 2009 – September 30, 2010[143]

| | Followed Cases | | | Distinguished Cases | |
|---|---|---|---|---|---|
| **Circuit** | Court of Appeals | District Court | | Court of Appeals | District Court |
| 1 | 0 | 1 | | 0 | 0 |
| 2 | 0 | 7 | | 0 | 2 |
| 3 | 2 | 9 | | 0 | 3 |
| 4 | 4 | 8 | | 3 | 12 |
| 5 | 0 | 5 | | 2 | 4 |
| 6 | 4 | 21 | | 2 | 9 |
| 7 | 0 | 8 | | 2 | 5 |
| 8 | 6 | 18 | | 0 | 8 |
| 9 | 9 | 10 | | 1 | 9 |
| 10 | 1 | 3 | | 0 | 3 |
| 11 | 1 | 6 | | 1 | 6 |
| DC | 2 | 0 | | 0 | 0 |
| **Total** | 29 | 96 | | 11 | 61 |

[143] SOURCE: *Shepard's Citations, compiled by the authors.*

## Table 2. Followed Decisions in State Courts April 22, 2009 – September 30, 2010[144]

| State | Lower Court | Supreme Court | Total |
|---|---|---|---|
| California | 1 | 0 | 1 |
| Colorado | 1 | 2 | 3 |
| District of Columbia | 2 | 0 | 2 |
| Florida | 4 | 0 | 4 |
| Georgia | 3 | 0 | 3 |
| Idaho | 2 | 1 | 3 |
| Illinois | 3 | 1 | 4 |
| Indiana | 3 | 0 | 3 |
| Kansas | 5 | 1 | 6 |
| Kentucky | 3 | 2 | 5 |
| Louisiana | 3 | 1 | 4 |
| Maryland | 1 | 0 | 1 |
| Michigan | 2 | 0 | 2 |
| Missouri | 3 | 0 | 3 |
| North Carolina | 3 | 0 | 3 |
| New York | 3 | 0 | 3 |
| Ohio | 12 | 0 | 12 |
| Oklahoma | 1 | 0 | 1 |
| South Carolina | 1 | 0 | 1 |
| Tennessee | 1 | 0 | 1 |
| Texas | 11 | 0 | 11 |
| Utah | 2 | 1 | 3 |
| Virginia | 5 | 0 | 5 |
| Washington | 25 | 4 | 29 |
| Wisconsin | 3 | 1 | 4 |
| Total | 103 | 14 | 117 |

[144] SOURCE: *Shepard's Citations, compiled by the authors.*

### 1. Federal Court Decisions

Of the 125 "followed by" cases in Federal Court, the defendant had a positive result (defined as either having a search suppressed or a ruling favorable to their position) in 29.6 percent of the cases (n=37). Seventeen cases involved instances where the defendant was arrested for driving without a license or with a suspended license. For example, in one Fourth Circuit case,

> [the defendant] was handcuffed and secured in the patrol car when Officer Czernicki searched the Cadillac and found the drugs. Thus, the Cadillac's passenger compartment was not "within [the defendant's] reach at the time of the search." Moreover, the officer would not have had a reasonable basis to believe he would find evidence of [the defendant's] license suspension – the offense of arrest – within the Cadillac's passenger compartment.[145]

One case had evidence suppressed because the initial arrest was for reckless driving.[146] There were another six cases where the court found no reasonable basis for a search for evidence of the crime of arrest, including a minor warrant,[147] and one case where the suspect was arrested on a warrant for domestic abuse.[148]

One search was invalidated because the arrest was for resisting arrest and battery upon a peace officer.[149] The court argued that,

> [i]n this case, neither the officer safety nor the evidentiary preservation justifications for a search incident to arrest supports the search of [the defendant's] car. At the time of the search, [the] defendant . . . had fled from the car, eluded police offices, and jumped over a fence. He was nowhere near the car after he fled the scene and jumped the fence . . . . [E]ven if [the defendant] had returned to the vicinity of the car, he would not have had access to the backpack or the gun as it was under [another person's] 'dominion and control.' Moreover, akin to traffic-related offenses, it is generally unlikely that an officer could reasonably expect to find evidence of the crimes of battery upon an officer or resisting arrest within a car.[150]

In two cases, the defendant won because courts found that an invalid inventory search was conducted by officers, who failed to follow the Supreme Court's requirements that agencies employing inventory searches have standardized procedures.[151] For example, in one case it was argued,

> [i]t was never established that the Spink County training of its law enforcement officers suggested or required that their standard practice should be to open any closed containers as a part of an inventory search. There was no standardized procedure in this regard in Spink County and the written policy does not state that closed containers should be opened during the inventory search.[152]

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[145] United States v. Majette, 326 F. App'x 211, 212-13 (4th Cir. 2009).
[146] United States v. Lopez, 567 F.3d 755, 756 (6th Cir. 2009).
[147] United States v. Westerman, No. 1:09-cr-8-WSD, 2009 U.S. Dist. LEXIS 123601, at *3-5 (N.D. Ga. Oct. 1, 2009) (finding no basis for a search incident to arrest when the defendant was stopped for a minor traffic infraction and was subsequently arrested based on an outstanding warrant for probation violation).
[148] United States v. Megginson, 340 Fed. App'x 856, 857 (4th Cir. 2009).
[149] United States v. Chavez, No. 2:09-cr-0033, 2009 U.S. Dist. LEXIS 116924, at *13-14 (E.D. Cal. Nov. 24, 2009).
[150] *Id.*
[151] United States v. Jackson, No. 1:07-CR-016, 2010 U.S. Dist. LEXIS 1699, at *9 (S.D. Ohio Jan. 11, 2010); United States v. Sullivan, No. CR 09-40043, 2009 U.S. Dist. LEXIS 59934, at *1-3 (D.S.D. July 13, 2009).
[152] *Sullivan*, 2009 U.S. Dist. LEXIS 59934, at *1.

In one case, questioning done as part of an inventory search was ruled to be a violation of the defendant's *Miranda* rights:

> Although a question concerning the possession of "valuables" may have been proper for inventory purposes, the trooper should have known that inquiring about a "large amount of U.S. currency and/or guns" was reasonably likely to elicit an incriminating response from a suspect . . . .[153]

Finally, in two cases, courts allowed plea agreements that were made prior to the *Gant* decision to be revoked so questions of invalid searches could be considered.[154]

The government won in eighty-three cases where *Gant* was followed. Here there were several interesting findings. Almost half of the cases involved arrests for drug offenses. In twenty cases, the defendant was arrested for drug-related offenses, and vehicle searches were justified by the "reasonable evidence of the crime" prong under *Gant*. For example, in the case of *United States v. Bell,* the court found,

> [t]he police could reasonably believe that evidence of Bell's drug offense was in the car. Bell had apparently sold the drugs inside the car, and had driven the car to and from the sale site. Under *Gant*'s second prong, the authority to search extends to containers in the passenger compartment if the police reasonably believe that evidence of the suspected crime may be found therein.[155]

Two cases involved drug paraphernalia or illegal weapons found during the search of the person incident to arrest, which justified the search of the vehicle.[156] Eight cases were won by the state where the officer obtained consent for a search, and the courts ruled that consent was properly obtained.[157]

Eighteen cases involved application of the automobile exception due to the existence of probable cause that contraband was in the car.[158] For example, in a case where the suspect was arrested for possession of illegal firearms, the district court ruled that "because the officers had probable cause to believe that [the defendant's] car contained evidence of crimes, the well-recognized automobile exception to the warrant requirement alleviates any Fourth Amendment concerns."[159] In another automobile exception case, the district court used the automobile exception to make the argument,

> [c]onsidering the totality of the circumstances, including the officers' prior knowledge of Defendant, the presence of numerous air fresheners, Defendant's unusual behavior, and [the drug dog's] positive alert, the Court concludes that probable cause existed to search Defendant's vehicle for evidence of narcotics possession and/or trafficking.[160]

In this case, the defendant was arrested on an outstanding warrant for a traffic violation.[161]

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[153] United States v. Vega, No. C-09-064, 2009 U.S. Dist. LEXIS 49614, at *13 (S.D. Tex. June 11, 2009).
[154] United States v. Amos, No. 3:08-CR-145, 2010 U.S. Dist. LEXIS 515, at *21 (E.D. Tenn. Jan. 5, 2010); United States v. Avendano, 373 Fed. App'x 683 (9th Cir. Apr. 1, 2010).
[155] 343 Fed. App'x 72, 74 (6th Cir. 2009).
[156] *See* United States v. Hunter, 333 Fed. App'x 920, 925-26 (6th Cir. 2009); United States v. Garibay, 334 Fed. App'x 91, 93 (9th Cir. 2009).
[157] *See id.*
[158] Another 12 automobile exception cases were included among the 72 federal cases that Shepard's identified as "distinguishing."
[159] United States v. Cowart, No. 1:08-cr-10119, 2009 U.S. Dist. LEXIS 49366, at *38 (W.D. Tenn. June 5, 2009).
[160] United States v. Toliver, No. 09-20503, 2010 U.S. Dist. LEXIS 6442, at *11-12 (E.D. Mich. Jan. 27, 2010).
[161] *Id.* at *2.

Two circuits established a "good faith" exception for cases in which the searches occurred before the decision in *Gant* was handed down. In *United States v. McCane*,[162] the Tenth Circuit used the precedent of *United States v. Leon*[163] to establish a good faith exception for *Belton* searches conducted before the ruling in *Gant*. The Eleventh Circuit established a good faith exception in March 2010 in *United States v. Mitchell.*[164] In the months immediately following the *Gant* decision, the Eighth Circuit refused to consider a good faith exception,[165] but in December 2009, an Eighth Circuit District Court in Nebraska used the good faith exception to uphold a search.[166] The Tenth Circuit decision in *McCane* has created a circuit conflict with the Ninth Circuit, which rejected a good faith exception claim in *United States v. Gonzalez*.[167] In *United States v. Casper,* the Fifth Circuit remanded a case to the District Court for an evidentiary hearing on inevitable discovery, but did not rule on the government's claim of a good faith exception.[168] One District Court in the Fourth Circuit used a good faith exception to invalidate a pro-defendant ruling[169] The Supreme Court has recently granted certiorari on the issue of good faith exceptions to the exclusionary rule in cases where searches were authorized by precedent at the time of the search, but later invalidated.[170]

Finally, there were twenty-five cases the government won that raised issues involving inventory searches. There were two cases where courts ruled that inventory searches were invalid for failure of the agency to demonstrate routine practice or policy.[171] There were an additional three cases where an invalid inventory search was not viewed as sufficient to suppress evidence, due to outside factors including exigent circumstances involving concerns for officer safety during transportation of property, the use of the automobile exception, and consent provided for a search.[172] In examining inventory search cases, the record only indicated one case where a magistrate-judge actually reviewed department policies to make the determination of whether officers were entitled to impound vehicles and conduct inventory searches.[173] There were also cases where it was unclear from the record whether an inventory search occurred, but where the court accepted an "inevitable discovery" argument. For example, the Seventh Circuit stated,

> [O]bviously, the arresting officers would not have allowed the truck to just sit on the street after [the driver] was carted away. What they would have done, in all likelihood, was impound the truck and have it towed away. An inventory search would have naturally followed; the evidence would have been inevitably discovered.[174]

### 2. STATE COURT DECISIONS

[162] 573 F.3d 1037, 1042 (2009).
[163] 468 U.S. 897, 922-23 (1984).
[164] 374 Fed. App'x 859, 867 (11th Cir. 2010).
[165] United States v Hrasky, 567 F.3d 367, 369 (11th Cir. 2009).
[166] United States v. Gray, No. 4:09CR3089, 2009 U.S. Dist. LEXIS 113436, at *15-16 (D. Neb. Dec. 7, 2009).
[167] 578 F.3d 1130, 1133 (9th Cir.2009).
[168] 332 Fed. App'x 222, 223 (5th Cir. 2009).
[169] United States v. Southerland, No. 7:09-CR-68-1FL, 2009 U.S. Dist. LEXIS 119851, at *10 (E.D.N.C. Nov. 13, 2009).
[170] Davis v. United States, 131 S. Ct. 502 (2010) (oral argument scheduled for March 21, 2011).
[171] United States v. Jackson, No. 1:07-CR-016, 2010 U.S. Dist. LEXIS 1699, at *7, 11 (S.D. Ohio Jan. 11, 2010); United States v. Sullivan, No. CR 09-40043, 2009 U.S. Dist. LEXIS 59934, at *1-2 (D.S.D. July 13, 2009).
[172] United States v. Morillo, No. 08 CR 676 (NGG), 2009 U.S. Dist. LEXIS 94396, at *21-23 (E.D.N.Y. Oct. 9, 2009); United States v. Mitan, No. 08-760-1/08-760-2, 2009 U.S. Dist. LEXIS 63890, at *39-40 (E.D. Pa. July 23, 2009); United States v. Scott, No. 09 CR 331 (HB), 2009 U.S. Dist. LEXIS 52431, at *28-34 (S.D.N.Y. June 8, 2009).
[173] United States v Sprecht, No. 8:09CR101, 2009 U.S. Dist. LEXIS 99759, at *3 (D. Neb. Oct. 26, 2009).
[174] United States v. Stotler, 591 F.3d 935, 940 (7th Cir. 2010).

There have been 117 cases in which *Gant* was followed by state courts. Nine state supreme courts have handed down fourteen decisions that involved *Gant* issues in the past year. There were 103 lower court decisions in twenty-five state courts. Unlike federal court, where defendants won in 29 percent of cases, in state courts, defendants won in 56.4 percent (n = 66) of all cases.[175] While cases have been decided in twenty-five states, almost 40 percent of existing decisions were from three states: Washington (n=29), Ohio (n=12), and Texas (n=11). The defendant won in 21 of 29 (72.4 percent) cases in Washington, 50 percent in Ohio, and 36 percent of cases in Texas. Yet, even with those cases removed from the database, the defendant won in 51 percent of all other state court decisions.

State supreme court rulings in nine states ruled for the defendant in 11 of 14 cases (78.5 percent). Perhaps the most interesting of the decisions by state supreme courts is *State v. Henning*, in which the Kansas Supreme Court ruled that the state's search incident to arrest law was unconstitutional under *Gant*.[176] Two state supreme courts have considered good faith exceptions for *Gant* cases. The Colorado Supreme Court rejected a good faith exception.[177] The Utah Supreme Court established a good faith exception in *State v. Baker*, but excluded evidence of the vehicle search for other reasons.[178] The Court ruled that a vehicle search that would be unconstitutional under *Gant* was protected by good faith exception of *Leon*, but because the officers lacked "reasonable articulable suspicion that the passengers posed a threat to their safety at the time they conducted the pat-down search," the evidence was suppressed.[179] The District of Columbia Court of Appeals also considered a good faith exception for *Gant* cases, but rejected it.[180] The Illinois and Washington Supreme Courts handed down decisions favorable to the defendant under *Gant.*[181] The Delaware and Kentucky Supreme Courts have decided *Gant* cases favorable to the state: Delaware used the automobile exception to justify a search,[182] while Kentucky used the "reasonable evidence" prong.[183]

When examining state court decisions involving *Gant*, there are several interesting findings. First, there were more cases where the arrest began with a minor traffic offense than in Federal Court. Fifteen cases involved arrests for offenses where it was not reasonable to believe further evidence of the crime would be found in a search. These included seventeen arrests for driving under a suspended license, two active warrants, and one for violation of a protective order. Two searches were suppressed for invalid inventory searches, where there were no standard operating procedures in place. Two cases involved frisks that were ruled unreasonable searches, and two courts ruled that there was no plain view of evidence of a crime. Four cases were ruled to be unreasonable seizures, where there was no articulable suspicion for the initial detention. Another four cases were remanded to lower courts for hearings consistent with *Gant*.

In the forty-eight lower state court cases where searches were upheld, the majority were for instances in which it was reasonable to believe that a search would reveal further evidence of the crime. These included fourteen cases where drugs or drug paraphernalia were in plain view, or where the defendant admitted to drug use. Two cases involved arrests for DUI,[184] and there were four additional cases that fell under the second prong of *Gant,* including cases where weapons were found and where stolen items were in plain view.[185] Four appeals were

[175] A full comparison of the differences between federal and state courts is the subject of on-going research by the authors, but is beyond the scope of this paper.
[176] 209 P.3d 711, 720 (Kan. 2009).
[177] Perez v. People, 231 P.3d 957, 962 (Colo. 2010).
[178] 229 P.3d 650, 663 (Utah 2010).
[179] *Id.* at 668.
[180] United States v. Debruhl, 993 A.2d 571, 573 (D.C. 2010).
[181] People v. Bridgewater, 918 N.E.2d 553, 557-58 (Ill. 2009); State v. Patton, 219 P.3d 651, 658 (Wash. 2009).
[182] Hall v. State, 981 A.2d 1106, 1112-13 (Del. 2009).
[183] Owens v. Commonwealth, 291 S.W.3d 704, 708 (Ky. 2009).
[184] State v. Cantrell, 233 P.3d 178 (Idaho Ct. App. 2010); People v. Mason, 935 N.E.2d 130 (2010).
[185] *See, e.g.*, Bishop v. State, 308 S.W.3d 14 (Tex. App. 2009).

rejected as improvidently granted, due to the defendant not raising a suppression motion in the original action. Courts in five states issued rulings establishing a good faith exception, although one has been overruled by the state supreme court.[186] While one court in Washington established a good faith exception,[187] other Washington state courts ruled on *Gant* issues in another twenty-one cases.

## V. CONCLUSION

The review of lower court decisions involving *Gant* issues in the year following the decision provide evidence that the case is having an impact on police vehicle search practice. Out of 125 federal cases where *Gant* was the controlling factor, almost 30 percent resulted in rulings favorable to defendants. Defendants fared even better in state court decisions, where courts ruled in their favor 56 percent of the time. While it is difficult to compare the number of cases in which a defendant won prior to *Gant*, given that the *New York v. Belton* "bright line rule" permitted vehicle searches after all arrests made in a vehicle, it is highly unlikely that defendants would have evidence suppressed after a vehicle search, and even less likely that they would prevail, since the success rate currently sits between 30 and 50 percent. As Justice O'Connor pointed out in *Thornton*,[188] police viewed *Belton* as an entitlement, and there is ample evidence to demonstrate that law enforcement agents routinely use pretextual traffic stops as a means to execute a vehicle search after making a minor arrest. For these cases, where individuals are arrested for driving under a suspended license, driving without proof of insurance, and a host of other offenses where there is no reasonable basis for arguments of officer safety or the need to find additional evidence of the crime, it is likely that police will be forced to find other methods.

*Gant* leaves officers with several alternatives in these types of cases. First, they can try to obtain consent to conduct a search. If they can demonstrate that consent is obtained voluntarily and there is no evidence of coercion, it is likely to pass constitutional muster. Yet, even here, officers need to be careful in how they proceed. Out of nine consent cases included in this study, two searches were ruled improper by lower courts. Second, the automobile exception remains a viable search option where officers can demonstrate probable cause of evidence of criminal activity.[189] That can be obtained under the plain view doctrine (e.g., smelling alcohol or marijuana, viewing open bottles in the back seat) or through use of a K-9 unit to conduct a dog sniff.[190]

As the review of decisions demonstrates, the automobile exception (present in seven federal and one state decision) is still a viable option for officers. Third, when officers can legitimately make officer safety claims or demonstrate reasonable suspicion of the presence of weapons, officers may be able to search the vehicle to do a protective sweep. While only three cases in this review involved such facts, it is by no means prohibited.

When departments have written policies or established routine practices, they can impound vehicles and then conduct an inventory search. Of the available options, this is perhaps the most suspect because the purpose of an inventory search should not be a fishing expedition to find criminal activity. Adding further support to the idea that suspect motives may be behind inventory searches, the author of the *FBI Bulletin*'s advice regarding inventory searches stated that the purpose behind the advice was to find a way "around" *Gant*.[191] Yet, as the review of cases here suggests, courts may be unwilling to invalidate the use of inventory

[186] People v. Chamberlain, 229 P.3d 1054, 1058 (Colo. 2010).
[187] State v. Riley, 225 P.3d 462 (Wash. Ct. App. 2010).
[188] Thorton v. United States, 541 U.S. 615, 624 (O'Connor, J., concurring in part).
[189] *See* United States v. Ross, 456 U.S. 798 (1982).
[190] In most states, suspicionless dog searches are permitted at any traffic stop. *See generally* Illinois v. Caballes, 543 U.S. 405 (2005) (holding such a search does not violate the Fourth Amendment).
[191] Schott, *supra* note 118.

searches except in rare circumstances. And while the issue of inventory searches viewed in light of *Gant* may ultimately make it to the Supreme Court, it is uncertain how the Court would rule. It is possible that the Supreme Court would reject the strategy of using inventory searches if it is clear that the impoundment is merely a pretext for a search without probable cause. Yet, as long as police are careful to make sure that there is an "innocent" explanation of their behavior, the chances are that the Court will allow it. The future use of inventory searches by police is deserving of further research.

### A. DOES GANT REPRESENT A FUNDAMENTAL SHIFT IN CRIMINAL PROCEDURE?

*Arizona v. Gant* certainly sent shock waves through law enforcement in the first few months after it was handed down. The case undid almost thirty years of police practice, and it has the potential to force law enforcement to find new ways to conduct criminal investigations. Only time will tell how great the change may be. Yet, what *Gant* does not appear to be is a fundamental shift in the Court's overall crime control jurisprudence. While *Gant* places limits on police practice, there are few signs within the decision that the case truly represents a paradigm shift. Much of the criticism of *Belton* in the opinions of Justices Stevens and Scalia focus more on the logical flaws in the argument underlying *Belton's* bright-line rule. The Court did not focus on the rights of the accused in the same way as many dissents by Justices Marshall and Brennan in earlier crime control decisions.[192]

*Gant* also stands alone in recent search and seizure cases. In recent years, most of the Court's criminal procedure decisions have been squarely on the side of crime control. For example, in *Virginia v. Moore*, the Court unanimously ruled that the Fourth Amendment was not violated when police arrested someone for an offense for which state law only permitted a summons, and refused to suppress the evidence of drugs found in the subsequent search incident to arrest.[193] In *Arizona v. Johnson*, the Court reaffirmed the holdings of *Terry v. Ohio*[194] and *Brendlin v. California*,[195] and further held that an officer's questioning about matters unrelated to the original stop does not change the encounter into something other than a lawful seizure.[196] In another 2009 decision, the Court held in *Herring v. United States* that the good-faith exception to the exclusionary rule applied when an officer made an arrest based on an outstanding warrant in another jurisdiction, even though that warrant was invalid.[197] Indeed, with the exception of *Gant*, there have been few criminal procedure decisions in recent years that would indicate a shift in the Court's general approach to the Fourth Amendment. More recently, that trend has continued in the Court's decision in *Berghuis v. Thompkins*, which narrowed the

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[192] See, e.g., Justice Brennan's dissent in *Belton v. New York*, 453 U.S. 454, 468 (1981), *overruled by Arizona v. Gant*, 129 S. Ct. 1710 (2008):

> Under the approach taken today, the result would presumably be the same even if Officer Nicot had handcuffed Belton and his companions in the patrol car before placing them under arrest, and even if his search had extended to locked luggage or other inaccessible containers located in the back seat of the car.

See also Marshall's dissents in South Dakota v. Opperman, 428 U.S. 364, 384-96 (1976), and United States v. Peltier, 422 U.S. 531, 544-62 (1975). In *Peltier*, Marshall bitterly states,

> If a majority of my colleagues are determined to discard the exclusionary rule in *Fourth Amendment* cases, they should forthrightly do so, and be done with it. This business of slow strangulation of the rule, with no opportunity afforded parties most concerned to be heard, would be indefensible in any circumstances.

*Peltier*, 422 U.S. at 561-62.

[193] 553 U.S. 164 (2008).

[194] 392 U.S. 1 (1968).

[195] 551 U.S. 249, 256-57 (2007) (holding that the driver and all passengers of a vehicle are considered seized for the duration of a lawful traffic stop).

[196] Arizona v. Johnson, 129 S. Ct. 781, 788 (2009).

[197] 555 U.S. 135; 129 S. Ct. 695, 701 (2009).

applicability of *Miranda* advisements by requiring defendants to explicitly invoke their right to remain silent.[198]

It is also unclear how the Court will decide similar cases in the future. *Gant* was a 5-4 decision, and two members of the majority, Justices Souter and Stevens, have since left the court. While it is not likely that Justice Sotomayor would join with the dissenters to overrule *Gant*, any predictions about how she will vote are certainly premature. Further, while Justice Sotomayor represents a question mark on the Court, the appointment of Elena Kagan to replace Justice Stevens raises even more questions due to her virtually non-existent record on criminal procedure issues.

Regardless of what *Gant* means for the long term future of the meaning of the Fourth Amendment, in the short term, police officers will need to adapt to the decision. Anecdotal evidence certainly indicates that officers and prosecuting attorneys are taking this matter seriously and that it will have an impact on the ability of police to use pretextual stops as a tool in the ongoing effort to limit traffic in illegal drugs. As new cases come to the Court, the extent to which *Gant* marks a sea change will become more apparent. The decision has had an immediate impact on law enforcement, and further research of the decision's reach on police practice and the use of vehicle searches is merited.

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[198] 130 S. Ct. 2250 (2010), *reh'g denied*, Berghuis v. Thompkins, 131 S. Ct. 33 (2010).

## BOOK REVIEW

# An Interrupted Life: Experiences of Incarcerated Women in the United States[1]

By Rickie Solinger, Paula C. Johnson, Martha L. Raimon, Tina Reynolds, and Ruby C. Tapia, eds.

Book Review by Kris Miccio, Sturm College of Law, University of Denver

AN INTERRUPTED LIFE is a compilation of essays on the experiences of women inmates which brings home to practitioner, advocate, scholar, and educator what life is like for women behind U.S. prison walls. Much of the literature, as well as popular culture, on prison life is passed through the prism of male experience, and thus gives short shrift to the complicated lives that woman lead in prison. Solinger et. al have presented a compendium of essays which address the issues faced by mothers and women of color as they cope with life behind bars and life after prison.

The authors have used storytelling, poetry, and first person accounts to bring to life how women create families behind the walls and sustain families outside prison. An interesting fact which emerges from this book is that the majority of women inmates are mothers of minor children. AN INTERRUTED LIFE gives insight into how these women maintain their role as mother as well as what they face if that role is interrupted due to their child's placement in foster care. What comes through is that inmates still feel a connection to their children which transcends the bars and the regulated – and at times isolated – life that these incarcerated mothers face.

We also learn how some inmates attempt to reproduce familial units within the prison by becoming involved as mothers to younger inmates, lovers to others, and sisters to sisters. What develops is an intricate system of sisterhood which serves to protect all members of the family structure. Such units also provide the women with sexual intimacy, if that is what they choose, and for some it recasts previous beliefs about sexuality, resulting in a redefinition which can fall outside cultural boundaries.

One interesting aspect of the book is how women inmates resist the oppression that is part of prison life and the loss of privacy that follows a life behind bars. While some resort to violence, many women choose poetry, prayer, or spirituality as a means of refusing the categorization that accompanies prison life. What is clear is that these women use writing, poetry, and spirituality as more than a survival tool but as instruments to redefine themselves and to rise above the grinding life imposed by the state.

AN INTERRUPTED LIFE is not an easy read because it deals with both facts and raw emotion. However, it is an important book for any scholar, lawyer, advocate, or educator who wishes to gain insight into what women inmates face. And it is an interesting counterpoint to those who would find such lives expendable and unworthy of concern. AN INTERRUPTED LIFE is an important book for those of us in the Academy who teach criminal law because it gives insight into the consequences of a system which places human lives outside the ambit of compassion and care. And finally, it is an essential read because it reminds us that the dignity of the human spirit can rise up even behind the walls of U.S. prisons.

[1] Rickie Solinger, Paula C. Johnson, Martha L. Raimon, eds. *An Interrupted Life: Experiences of Incarcerated Women in the United States*, University of California Press (2010).

# SIXTH AMENDMENT RISING: THE NEWLY EMERGING CONSTITUTIONAL CASE FOR TRIAL BY JURY IN CRIMINAL SENTENCING

Robert Hardaway[1]

"*(We must) remain true to the principles that emerged from the framer's "fears' that the jury right could be lost not only by gross denial, but by erosion…(A jury must try) all facts necessary to constitute a statutory offense…*"
-Justice Stevens writing for the majority in *Apprendi v. New Jersey* (2000)[2]

## I. INTRODUCTION

The right to trial by jury in criminal cases is enshrined in Article III, Section 2, Clause 3 of the U.S. Constitution which provides that "[t]he Trial of all Crimes, except in Cases of Impeachment, shall be by Jury."[3] Although this appears to render superfluous the Sixth Amendment guarantee that, "[i]n all criminal prosecutions, the accused shall enjoy the right to a…trial by an impartial jury,"[4] the repeat of this right in the Bill of Rights serves to highlight its importance in the minds of the framers.

Likewise, in civil suits at common law where the amount in controversy exceeds twenty dollars, the Seventh Amendment provides that "the right to trial by jury shall be preserved…"[5]

The Seventh Amendment, unlike the Sixth,[6] has never been found to be an essential element of due process, and thus has never been applied to the states via incorporation into the Due Process Clause of the Fourteenth Amendment.[7] Nevertheless, the Supreme Court has been meticulous in enforcing its provisions to the letter in the federal courts, holding that civil

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[1] Professor of Law, University of Denver Sturm College of Law. The views expressed herein are my own and do not necessarily reflect the views of any of my colleagues at the Sturm College of Law. I also wish to acknowledge and give credit to Judge Morris B. Hoffman, District Judge for the Second Judicial District of Colorado. I have borrowed liberally from his excellent article in the Duke Law Journal which was published in 2003 and entitled The Case for Jury Sentencing, 52 DUKE L.J. 951 (2003). Although that article focused primarily on the historical, empirical and policy case for jury sentencing, his seven page constitutional case for jury sentencing set forth the most articulate constitutional case for jury sentencing in the aftermath of *Apprendi*, and provided the seeds and basis for what is essentially my 2003-2010 update to his constitutional case.

[2] Apprendi v. New Jersey, 530 U.S. 466, 483-84 (2000).

[3] U.S. CONST. art. III § 2, cl.3. However, unlike the 6th amendment, art. III § 2, cl. 3 does not state that it applies to "all criminal prosecutions." U.S. CONST. amend. VI.

[4] U.S. CONST. amend. VI; Skilling v. U.S., 130 S. Ct. 2896, 2912-13 (2010); Berghuis v. Smith, 130 S. Ct. 1382, 1396 (2010) (Thomas, J. concurring); Ring v. Arizona, 536 U.S. 584, 597 n. 3 (2002); Harris v. U.S., 536 U.S. 545, 549 (2002); Apprendi v. New Jersey, 530 U.S. 466, 476-77 (2000); U.S. v. Rodriguez- Moreno, 526 U.S. 275, 278 (1999); Lewis v. U.S., 518 U.S. 322, 325 (1996); U.S. v. Gaudin, 515 U.S. 506, 509-10 (1995); Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).

[5] U.S. CONST. amend. VII; Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424, 445 (2001) (Ginsburg, J. dissenting); Ortiz v. Fibreboard Corp., 527 U.S. 815, 846 n.22 (1999); City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999).

[6] Duncan v. Louisiana, 391 U.S. 145, 149 (1968).

[7] Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996) (citing Walker v. Sauvinet, 92 U.S. 90, 92 (1876)); *Id.* at n. 14; *See also* Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951, n. 72 (2003).

litigants in suits at common law have a right to a jury in both phases of the civil trial. Specifically, civil litigants have a right to have a jury determine both the defendant's liability, as well as the amount of damages to which a plaintiff is entitled if liability is determined.[8]

Given the court's scrupulous upholding and enforcement of the Seventh Amendment's right to a jury in all phases of civil cases involving complaints for money, it is all the more surprising that in criminal cases, where an accused faces loss of liberty or even death, many courts -- indeed, most courts -- routinely deny an accused the right to jury in the most critical phase of the criminal trial, namely the sentencing phase.[9] While courts routinely accord an accused a right to a jury in the guilt or innocence phase,[10] an accused's actual sentence is routinely left to the mercy of an individual judge who, depending on his mood or predilection, has the broadest discretion in imposing a sentence. Not surprisingly, such a sentence may range anywhere from no punishment at all, punishment that is suspended along with probation, to life imprisonment.[11]

Inexplicably, most legislative attempts to address this kind of unbridled judicial discretion have come not in the form of simply requiring judicial adherence to the Sixth Amendment, but rather by promulgating so-called "sentencing guidelines."[12] The success of such guidelines is unclear however; specifically such success is unclear in light of judicial attempts in some lower courts to undermine or bypass this type of limitation on judicial discretion.[13] In fact, higher courts have also attempted to bypass these limitations; leading these courts into thickets of legal obfuscation so dense that one senses desperation on their part in later cases to somehow find a way out of them.[14]

Interestingly, if a federal court today held that the right to a jury in civil cases extended only to the *first half* of a civil trial and then denied the right of a plaintiff to have his damages determined by a jury, there would be an explosion of outrage. Such outrage would reflect a blatant denial of the rights guaranteed by the Seventh Amendment, not only on the part of the trial bar, but by the general citizenry—and rightly so. What is the explanation, then, for such general acquiescence to the right of men and women being marched into captivity based on

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[8] *See*, Markman v. Westview Instruments, Inc., 517 U.S. 370 (1996); Chauffeurs v. Terry, 494 U.S. 558 (1990); Colgrove v. Battin, 413 U.S. 149 (1973); Ross v. Bernhard, 396 U.S. 531 (1970); Katchen v. Landy, 382 U.S. 323 (1966); Dairy Queen, Inc. v. Wood, 369 U.S. 469 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); I.L.C. v. IBM, 458 F. Supp. 423 (N.D. Cal. 1978). Judge Morris Hoffman, in his Duke Law Review article "The Case for Jury Sentencing" has set forth in comprehensive detail the high court cases which have attempted to distinguish the Sixth and Seventh Amendments and explain why a civil litigant is accorded a right to jury in both phases of a civil trial, but an accused only has a right to jury in the first phase of a criminal trial. See e.g., Morris B. Hoffman, *The Case for Jury Sentencing*, 52 DUKE L.J. 951 (2003). Accordingly, no attempt is made to treat that subject here.

[9] Hoffman, *supra* note 7, at 4; Ark. Code Ann. § 5-4-103 (1987); Mo. Ann. Stat. § 557.036 (West 1999); Okla. Stat. Ann. tit. 22, §§ 926.1, 927.1 (West Supp. 2003); Tex. Code Crim. Proc. Ann. art. 37.07(2)(b) (West 2006); Va. Code Ann. § 19.2-295 (West 2007).

[10] Libretti v. United States, 516 U.S. 29, 49 (1995); United States v. Gaudin, 515 U.S. 506, 509-10 (1995); Sullivan v. Louisiana, 508 U.S. 275, 277 (1993).

[11] Hoffman, *supra* note 7, at 987, 994-95; U.S. v. Booker, 543 U.S. 220, 233 (2005) (citing Apprendi v New Jersey, 530 U.S. 466, 481 (2000); Williams v. New York, 337 U.S. 241, 246 (1949)); *See also* Apprendi, 530 U.S. 466, 547-48 (2000) (O'Connor, J. dissenting).

[12] 18 U.S.C.A. § 3553; USSG; 28 U.S.C.A. § 994 (describing Sentencing Commission's duties); Booker 543 U.S. at 245; Jackson Jones, *The United States Sentencing Guidelines are not Law!: Establishing the reasons "United States Sentencing Guidelines" and "Ex Post Facto Clause" Should Never be used in the Same Sentence*, 32 U. La Verne L. Rev. 7, 14-17 (2010) (describing the history and purposes of the federal sentencing guidelines).

[13] *See e.g.* United States v. Carty, 520 F.3d 984, 994-95 (9th Cir. 2008); United States v. Bowers, 242 Fed. Appx. 558, 559-60 (10th Cir. 2007); United States v. Burdex, 100 F.3d 882, 884-86 (10th Cir. 1996).

**[14]** *See e.*g Cunningham v. California, 549 U.S. 270 (2007); Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004); Walton v. Arizona, 497 U.S. 639 (1990); McMillan v. Pennsylvania, 477 U.S. 79 (1986); Patterson v. New York, 432 U.S. 197, 210 (1977).

the decision of a single man or woman? More pointedly, was this what the framers had in mind when they promulgated the Sixth Amendment command to provide an accused the right to a trial by jury in all criminal cases? And if it was not, what is the explanation for how the Sixth Amendment right to a jury trial came to be so diluted during the same period of American judicial history when the Seventh Amendment came to be so meticulously and scrupulously adhered to?

The public policy arguments in favor of jury sentencing can already be found in scholarly literature. Notably, Chief Justice William Rehnquist has remarked that "[i]ndividual sentencing juries are, by design, better suited than courts to evaluating and giving effect to the complex societal and moral considerations that inform the selection of publicly acceptable criminal punishments."[15]

Standing in stark contrast to the current sentencing norms, military courts feature a court panel (analogous to the jury in civilian courts) which decides both guilt as well as punishment, if necessary. As a JAG officer, I practiced in these latter courts and I was always impressed by the fairness of sentences imposed by the jury. Also impressive was the procedure under which an accused was able to present his own extenuation and mitigation evidence without fear that a heavily bureaucratized probation department would attempt to influence the court with reports featuring hearsay and other uncross-examined sources.[16]

Currently a handful of states provide its accused with the right to a jury trial during sentencing.[17] However, following the lead of Chief Justice Rehnquist, there have been a number of scholars who have made an empirical and public policy case for jury sentencing in criminal cases.[18] In fact, one of the more persuasive and eloquent public policy cases for jury sentencing has been recently set forth by Yale law student Adriana Lamni in a Note in the Yale Law Journal[19] -- which garnered praise from Denver District Court Judge Morris Hoffman as the "first article in eighty-one years to call for a return to jury sentencing."[20]

With the Chief Justice's public policy case for jury sentencing foundationally in mind, along with the 2000 Supreme Court decision in *Apprendi v. New Jersey*,[21] and also Judge Hoffman's remarkable article[22] in the Duke Law Journal, this article will focus on the constitutional case for jury sentencing in criminal cases.

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[15] Atkins v. Virginia, 536 U.S. 304, 324 (2002) (Rehnquist, J. dissenting).

[16] *See* 57 C.J.S. *Generally* § 580 (2010); 57 C.J.S. *Deliberations and Voting* § 585 (2010)

[17] ARK. CODE ANN. § 5-4-103 (West 1997); MO. ANN. STAT. § 557.036 (West 1999); OKLA. STAT. ANN. tit. 22, §§ 926.1, 927.1 (West 2011); TEX. CODE CRIM. PROC. CODE ANN. art. 37.07(2)(b) (Vernon 1981); VA. CODE ANN. § 19.2-295 (West 2000) (as cited in Hoffman, *supra* note 7, at 953 n.1as the only five states that allow for jury sentencing for noncapital offenses); Hoffman, *supra* note 7, at 954 n.4 ("Of the thirty-eight states with capital punishment, twenty-nine leave the sentencing decision to the jury. At least before *Ring v. Arizona*, 536 U.S. 584 (2002), only five states--Arizona, Colorado, Idaho, Montana, and Nebraska--gave the trial court judge, or a panel of judges, the exclusive power to decide the capital punishment issue.").

[18] Hoffman, *supra* note 7; Adriann Lanni, *Jury Sentencing in Noncapital Cases: An Idea Whose Time Has Come (Again)?,* 108 YALE L.J. 1775 (1999).

[19] Lanni, *supra* note 18.

[20] Hoffman, *supra* note 7, at 951 n.d1.

[21] Apprendi v. New Jersey, 530 U.S. 466, 483-84 (2000).

[22] Hoffman, *supra* note 7, at 968-85.

## II. HISTORY

Although the phrase "shall be preserved" regarding the right to jury trial is found only in the Seventh Amendment,[23] and not the Sixth, it follows that the right to jury trial in criminal cases was likewise meant to preserve the right to jury in criminal cases as it existed at the time that both Section III and the Sixth Amendment were ratified. As Judge Hoffman has noted, judges at common law had almost no discretion in imposing sentences at the relevant time since "[m]ost offenses had mandatorily set punishments."[24] Accordingly, the judge's role in sentencing was largely perfunctory and formalistic, and was, therefore, "simply to announce the mandatory punishment."[25] Because these juries effectively imposed punishment by the simple expedient of deciding what crime the accused was guilty of, it was inconceivable at that time that the judge would in any way interfere with the jury's constitutional power to impose a sentence.

Although "judges sentenced in name only,"[26] an illusion was nevertheless created in the minds of future jurists that judges had actually been imposing sentences all along rather than simply ritualistically announcing the sentence for the record. As the common law practice of jury sentencing as it existed at ratification receded in the collective judicial memory, judges began a gradual usurpation of the traditional common law jury function of imposing sentences in criminal cases.[27] Such gradual usurpations were created, in large part, by the muddling of the waters by legislative promulgations that created the "indeterminate sentence."[28] Such legislative promulgations created an indisputably visible spectacle of a present day judge confidently announcing a sentence -- even mechanistically -- from the bench and would eventually have far reaching consequences for constitutional analysis.

It was not long before the common law practice in effect at the time of constitutional ratification became totally lost in the collective judicial memory. As a consequence of such memory loss, judges began a lengthy and effective usurpation of the constitutional function of the criminal jury without serious constitutional challenge.[29] In fact, it was not until the modern era that serious constitutional challenges to the usurpation of the jury function in criminal cases were raised, a number of which arose in death penalty cases.[30] In 1984, *Spaziano v. Florida,*[31] for

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[23] City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 708 (1999); Gasperini v. Ctr. for Humanities, Inc., 518 U.S. 415, 432 (1996) (citing Byrd v. Blue Ridge Rural Elec. Cooperative, Inc., 356 U.S. 525, 537 (1958)); Markman v. Westview, 517 U.S. 370, 376 (1996); Tull v. U.S., 481 U.S. 412, 425-26 (1987) (quoting Colgrove v. Battin, 413 U.S. 149, 157 (1973)); Colgrove, 413 U.S. at 153 (1973); *Id.* at 171 (Marshall, J., dissenting).

[24] Hoffman, *supra* note 7, at 962.

[25] *Apprendi*, 530 U.S. at 479 (quoting John H. Langbein*, The English Criminal Trial Jury on the Eve of the French Revolution, in* THE TRIAL JURY IN ENGLAND, FRANCE, GERMANY 1700-1900, pp. 36-37 (Antonio Padoa Schioppa ed. 1987)) ("Thus, with respect to the criminal law of felonious conduct, 'the English trial judge of the later eighteenth century had very little explicit discretion in sentencing. The substantive criminal law tended to be sanction-specific; it prescribed a particular sentence for each offense. The judge was meant simply to impose that sentence ….'"); Hoffman, *supra* note 7, at 962.

[26] Hoffman, *supra* note 7, at 963.

[27] *See* Hoffman, *supra* note 7, at 964-65; John H. Langbein, *On the Myth of Written Constitutions: The Disappearance of Criminal Jury Trial,* 15 HARV. J. L. & PUB. POL'Y 119, 119-21 (1992); Chris Kemmitt, *Function over Form: Reviving the Criminal Jury's Historical Role as a Sentencing Body*, 40 U. MICH. J.L. REFORM 93, 95-96 (2006); Ronald Wright, *Rules for Sentencing Revolutions*, 108 YALE L.J. 1355, 1374-75 (1999) ("Enthusiasm for sentencing juries grew out of an American passion for juries as the institution that best enabled citizens to participate in their own government. This conviction was never stronger than during the early nineteenth century. It was early in the twentieth century when states started to limit or abandon jury sentencing and to give judges the power to set the initial sentence in every case.").

[28] Hoffman, *supra* note 7, at 1001.

[29] *See* sources cited *supra* n. 26.

[30] *Ring v. Arizona*, 536 U.S. 584 (2002);; *Walton v. Arizona*, 497 U.S. 639 (1990);; *Spaziano v. Florida*, 468 U.S. 447 (1984). See also such non death penalty cases as *Blakely v. Washington*, 542 U.S. 296

example, featured an accused who was sentenced to death by a judge despite a jury recommendation of a life sentence. Although the accused appealed his sentence primarily on Eighth Amendment grounds, the court was blindsided by a secondary claim that the judge had violated the accused's Sixth Amendment rights by usurping the jury sentence. In addressing this claim, an apparently non-plussed majority could not muster a single case in suppor of its dictum that "[t]he Sixth amendment has never been *thought* to guarantee a right to a jury determination of that [death penalty] issue."[32]

The court's tentative dictum that the right to a jury trial in criminal sentencing has not been "thought" to be a Sixth Amendment right appears far removed from an outright assertion, with authority, that that there is no Sixth Amendment right to a jury in the second phase of a criminal trial. Additionally, it should be kept in mind that *Spaziano*, and presumably its feeble dictum, was undermined by a 2002 decision, *Ring v. Arizona*, in which the Court held that it was a violation of the Sixth Amendment for a judge to decide whether there were aggravating factors justifying execution.[33] In fact, the concurring opinion in *Ring* went even further, concluding that the Constitution requires "jury sentencing in capital cases…"[34]

Judicial resistance to acknowledgment of a Sixth Amendment right to jury sentencing however still exists and is often attributed to dictum in such cases as the 1986 case, *McMillan v. Pennsylvania* ("There is no Sixth Amendment right to jury sentencing…"),[35] though *Ring* could muster only the later discredited *Spaziano* case in support of this contention.

In any case, any dictum regarding a Sixth Amendment right to sentencing which was handed down prior to 2000 must now be reevaluated in the aftermath of Apprendi and its progeny, initiating an evolution in Sixth Amendment jurisprudence comparable in scope to the evolution of Fifth Amendment jurisprudence which occurred in the aftermath of Miranda v. Arizona .[36]

## III. APPRENDI V. NEW JERSEY

In the 2000 Supreme Court case *Apprendi v. New Jersey,*[37] the accused fired several shots into the home of an African American couple and was subsequently charged with second degree possession of a weapon for an unlawful purpose which carried a 5-10 year term, but was notably not charged with violation of a separate hate crime statute. After the defendant pled guilty to the firearms charge, however, the judge found by a preponderance of the evidence that the shooting was racially motivated, a factor which if found enhanced punishment under the statute, and sentenced the accused to a 12-year term. The accused appealed on grounds

(2004)(kidnapping); *Apprendi v. New Jersey*, 530 U.S. 466 (2000)(possession of firearm and antipersonnel bomb); *McMillan v. Pennsylvania*, 477 U.S. 79 (1986)(possession of firearm during commission of enumerated felony).

[31] *Spaziano*, 468 U.S. at 449.

[32] *Id.* at 459 (emphasis added).

[33] *Ring*, 536 U.S. at 609.

[34] *Id.* at 614 (Breyer, J. concurring). Interestingly, this assertion of a constitutional right to sentencing in capital cases was based on the Eighth rather than Sixth Amendment. This is somewhat curious as the Eighth Amendment has generally been applied in the context of the nature of the punishment itself rather than the procedures under which the punishment was imposed. *See, e.g.*, *Ring*, 536 U.S. at 610 (Scalia, J. concurring) (quoting *Garder v. Florida*, 430 U.S. 349, 371 (1977) (Rehnquist, J. dissenting) "[T]he prohibition of the Eighth Amendment relates to the character of the punishment, and not to the process by which it is imposed").

[35] McMillan v. Pennsylvania, 477 U.S. 79, 80 (1986).

[36] Miranda v. Arizona, 384 U.S. 436 (1966). See also cases that came after Miranda, such as Maryland v. Shatzer, 130 S.C. 1213 (2010); U.S. v. Patane, 542 U.S. 630 (2004); Dickerson v. U.S., 530 U.S. 428 (2000); Edwards v. Arizona , 451 U.S. 477 (1981); Rhode Island v. Innis, 446 U.S. 291 (1980).

[37] Apprendi v. New Jersey, 530 U.S. 466, 469 (2000).

that the Due Process clause requires that any fact that increases the penalty for the crime beyond the statutory minimum, other than the fact of a prior conviction, must be submitted to a jury and proved beyond a reasonable doubt.[38]

Because the trial judge had enhanced the punishment of the defendant based on his own personal factual finding of racial motivation rather than on any jury finding of racial motivation, the Court held that New Jersey's practice violated the accused's due process rights. Specifically, the Court held that, except for the fact of a prior conviction: "... *any fact* that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."[39] The Court went on to make clear that "[i]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed."[40] It cited with approval a common law doctrine which holds that:

> [w]here a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. If, then, "upon an indictment under the statute, the prosecutor prove the felony to have been committed, but fail in proving it to have been committed under the circumstances specified in the statute, the defendant shall be convicted of the common-law felony only."[41]

Thus, with one fell swoop, the Court cast away many of the fine distinctions that theretofore had been made between the need for jury determination of facts which were "elements" of a crime, and facts which were merely "factors" in determining mitigation of punishment[42], holding that, regardless of classification as an element or "sentencing factor," " [o]ther than the fact of a prior conviction, *any* [emphasis added] fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury. . . ." [43]The

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[38] *Id*. at 476-77(quoting *U.S. v. Gaudin*, 515 U.S. 506, 510 (1995).

> At stake in this case are constitutional protections of surpassing importance: the proscription of any deprivation of liberty without "due process of law," and the guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury," Taken together, these rights indisputably entitle a criminal defendant to "a jury determination that [he] is guilty of every element of the crime with which he is charged, beyond a reasonable doubt [citiatoins omitted].

[39] *Id.* at 490 (emphasis added).

[40] *Id.* (quoting *Jones v. U.S.*, 526 U.S. 227, 252-53 (1999) (Stevens, J. concurring); see also *Jones*, 526 U.S. at 253 (Scalia, J. concurring).

[41] *Apprendi*, 530 U.S. at 480-81 (quoting 2 M. Hale, *Pleas of the Crown*, in turn cited in J. Archbold, *Pleading and Evidence in Criminal Cases*, 15th ed. 44, 51 (1862)).

[42] *See, e.g.*, Patterson v. New York, 432 U.S. 197, 210 (1977).

> We thus decline to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused. Traditionally, due process has required that only the most basic procedural safeguards be observed; more subtle balancing of society's interests against those of the accused have been left to the legislative branch. We therefore will not disturb the balance struck in previous cases holding that the Due Process Clause requires the prosecution to prove beyond a reasonable doubt all of the elements included in the definition of the offense of which the defendant is charged. Proof of the nonexistence of all affirmative defenses has never been constitutionally required; and we perceive no reason to fashion such a rule in this case and apply it to the statutory defense at issue here. This view may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes. But there are obviously limits beyond which the States may not go in this regard.

[43] Apprendi, 530 U.S. at 490.

dissent in *Apprendi*, transparently horrified at the implications of the majority opinion, noted that while "all facts necessary to constitute a statutory offense"[44] must be tried by a jury – the majority opinion "casts aside our traditional cautious approach and instead embraces a universal and seemingly bright-line rule limiting the power of congress and state legislatures to define criminal offenses and the sentences that follow from convictions thereunder."[45] Uncontrovertibly, the dissent recognized that the Court had set forth an "extraordinary rule."[46]

But just how extraordinary?

If the only implication of the majority decision was to set forth yet another judicial guideline for applying the legislature's federal sentencing guidelines, there would be little cause for alarm on the part of those who fear its logical extension—namely, that the accused has a Sixth Amendment right to a jury not just in the first phase of a criminal trial, but also in the second, and more critical phase, of sentencing.

## IV. BREAKING THE DOCTRINAL DEADLOCK

As early as 2003, Judge Hoffman made the case that in a pair of post-*Apprendi* cases, *Ring v. Arizona*[47] and *Harris v. U.S.*,[48] the Court appeared to have dug itself into a doctrinal conundrum from which the only escape was recognition of the original premise of the Sixth Amendment: to provide to an accused the right of trial by jury in all phases of the criminal trial.[49]

Hoffman's constitutional case for jury sentencing began by recalling that while *Apprendi* required that "any fact other than a prior conviction that increases the maximum penalty for a crime" must be tried by jury, it left open the question of whether the Sixth Amendment also required that any fact that increased the minimum requirement also be tried by a jury.[50]

Hoffman noted that in the 2002 case of *Ring v. Arizona,*[51] the Court cleanly applied the *Apprendi* doctrine in striking down, on Sixth Amendment grounds, an Arizona statute which permitted a judge to determine the aggravating factors for imposition of the death penalty. In *Harris v. U.S.,*[52] however, decided the same day as *Ring,* the Court upheld a statute which mandated a seven-year minimum sentence upon a judicial finding that the accused had brandished a gun. This pair of cases , taken together, therefore appeared to answer the question left open by *Apprendi* by holding that judicial findings of facts that might increase a *maximum* sentence are necessarily to be considered as "elements" of a crime regardless of whether they are labeled as elements or sentencing factors by a legislature, and must be decided by a jury; but those judicial findings which required imposition of a *minimum* sentence, and legislatively determined to be mere "sentencing factors," pass Sixth Amendment muster if decided by a judge alone.

Judge Hoffman recognized the conundrum posed by these two cases, pointing out that they have created an "impossibly difficult saddle point:"

> If the Sixth Amendment means anything, it must mean that legislatures cannot deprive criminal defendants of their right to jury trial by the simple artifice of labeling elements as "sentencing factors"; yet there seems to be no principled basis upon which to distinguish elements from sentencing factors. This dilemma is so sharp that the slightest change of

[44] *Id*. at 483.
[45] *Id.* at 525.
[46] *Id.*
[47] Ring v. Arizona*,* 536 U.S. 584 (2002).
[48] Harris v. U.S*,* 536 U.S. 545 (2002).
[49] Hoffman, *supra* note 7, at 982.
[50] *Id* at 981.
[51] Hoffman, *supra* note 7, at 980 (describing *Ring v. Arizona*, 536 U.S. 584 (2002)).
[52] *Harris*, 536 U.S. at 552.

> perspective or wording by one or two Justices seems to have a magnified effect on outcomes in these cases.[53]

Contrary to Judge Hoffman's observation, however, the *Ring-Harris*[54] pair did provide a basis for distinguishing between "elements" which must be decided by a jury, and "sentencing factors" which may be tried by a judge—namely, that factors which increase the maximum must be treated as "elements" regardless of legislative labeling, while factors which increase the minimum *may* be treated as sentencing factors if labeled as such legislatively.

The conundrum, therefore, is not to be found in any ambiguity in the setting forth of the principle, but rather in the doctrinal soundness of the principle itself, and perhaps this is what Judge Hoffman meant in his assertion that *Ring-Harris* set forth no "principled" basis for distinguishing between elements and sentencing factors. It should also be noted, however, that Hoffman's claim that legislatures now have a free path to bypass *Apprendi* by the simple expedient of "increasing maximum sentences to accommodate what would otherwise have been an enhanced sentence and then imposing higher and/or mandatory minimum sentences to reflect the enhancement" was thoroughly addressed in *Apprendi* by Justice Stevens who opined that if legislatures attempted any such course, the Court would consider whether it was constitutional by falling back on such pre-*Apprendi* decisions as *Patterson* [55] and *Mullaney*.[56] [57]

Nevertheless, the post-*Apprendi* cases decided up to and including those decided through 2010 which have attempted to tread the ultimately hapless doctrinal path through the *Ring-Harris* thicket[58] do support Judge Hoffman's conclusion, first articulated in 2003 in the aftermath of that pair of cases, that the only principled way for the court to escape the current doctrinal morass is to hold that under the Sixth Amendment "judges will not … be able to impose any sentences."[59]

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[53] Hoffman, *supra* note 7, at 982.

[54] *See* 536 U.S. 584, 604-06 n.5, 609(2002); 536 U.S. 545, 557-561 (2002).

[55] Patterson v. New York, 432 U.S. 197 (1977).

[56] Mullaney v. Wilbur, 421 U.S. 684 (1975).

[57] Apprendi v. New Jersey, 530 U.S. 466, 490 n.16 (2000) ("The principal dissent would reject the Court's rule as a "meaningless formalism," because it can conceive of hypothetical statutes that would comply with the rule and achieve the same result as the New Jersey statute. *Post,* at 2388-2390. While a State could, hypothetically, undertake to revise its entire criminal code in the manner the dissent suggests, *post,* at 2389-extending all statutory maximum sentences to, for example, 50 years and giving judges guided discretion as to a few specially selected factors within that range-this possibility seems remote. Among other reasons, structural democratic constraints exist to discourage legislatures from enacting penal statutes that expose *every* defendant convicted of, for example, weapons possession, to a maximum sentence exceeding that which is, in the legislature's judgment, generally proportional to the crime. This is as it should be. Our rule ensures that a State is obliged "to make its choices concerning the substantive content of its criminal laws with full awareness of the consequences, unable to mask substantive policy choices" of exposing all who are convicted to the maximum sentence it provides. Patterson v. New York, 432 U.S., at 228-229, n. 13, (Powell, J., dissenting). So exposed, "[t]he political check on potentially harsh legislative action is then more likely to operate." *Ibid.* In all events, if such an extensive revision of the State's entire criminal code were enacted for the purpose the dissent suggests, or if New Jersey simply reversed the burden of the hate crime finding (effectively assuming a crime was performed with a purpose to intimidate and then requiring a defendant to prove that it was not, *post,* at 2390), we would be required to question whether the revision was constitutional under this Court's prior decisions. See *Patterson,* 432 U.S., at 210, 97 S.Ct. 2319; Mullaney v. Wilbur, 421 U.S. 684, 698-702, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975)").

[58] *See, e.g.,* Dillion v. United States, 130 S.Ct. 2683, 2692 (2010); United States v. O'Brien, 130 S.Ct. 2169, 2173-2175 (2010); Oregon v. Ice, 129 S.Ct. 711, 716-18 (2009); Rita v. United States, 551 U.S. 338, 352-55 (2007); Cunningham v. California, 549 U.S. 270, 282-89 (2007); United States v. Booker, 543 U.S. 220, 230-38 (2005); Shepard v. United States, 544 U.S. 13, 24-27 (2005); Blakely v. Washington, 542 U.S. 296, 301-06 (2004); Schriro v. Summerlin, 542 U.S. 348, 353-56 (2004).

[59] Hoffman, *supra* note 7, at 985.

## V. CONCLUSION

The central holding of *Apprendi* that the Sixth Amendment requires that "all facts necessary to constitute a statutory offense" must be "tr(ied) to a jury"[60] has laid the foundation for establishing the principle originally envisioned by the framers of establishing a wide barrier between an accused and the vast power of the state.[61] The gradual judicial usurpation of the accused's right to a jury during the second critical phase of the criminal trial confirms the Sixth Amendment framers' fear "that the jury right could be lost not only by gross denial, but by erosion."[62] Such judicial usurpation also stands in dire contrast to the continued and meticulous judicial recognition of the right to a jury in all phases of the civil trial under the Seventh Amendment.[63]

There exists no precedential or stare decisis barriers to recognition of a Sixth Amendment guarantee to an accused's right of trial by jury in the most critical sentencing phase of his trial, either in the unsupported dictum of the pre-*Apprendi* cases[64] or in dictum in post-*Apprendi* cases referring to pre-*Apprendi* cases.

Only a full recognition of the rights guaranteed by the Sixth Amendment can resolve the current doctrinal mass of cases, particularly those cases that have become entangled in attempting to reconcile both state and federal cases applying sentencing guidelines.[65]

Although the doctrinal leap from the *Apprendi* holding to one recognizing a Sixth Amendment right to jury sentencing would be a relatively small one, the practical implications would be significant for the criminal justice system. Notably though, the court in recent years has not hesitated to make similar dramatic doctrinal expansions in the criminal justice field. For example, in the 2004 case of *Crawford v. Washington,*[66] the Supreme Court did not hesitate to abandon the holding of *Roberts v. Ohio*, which had held that the Sixth Amendment Confrontation clause could be satisfied without physical confrontation of a witness in court by a showing that a witness was unavailable and that his out of court statement satisfied a "firmly rooted" hearsay exception.[67] In that case, the court discarded many decades of judicial precedent, and instead relied upon common law practice as it existed in 1791.[68]

Additionally, and as recently as June of 2010, the Supreme Court, examining practice and legislative history from 1791, overturned 70 years of precedent and a consensus of circuit cases[69] to hold that the Second Amendment was an individual rather than collective right.[70]

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[60] *Apprendi*, 530 U.S. at 483.

[61] *Id.* at 477 (quoting JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 540-41 (4th ed. 1873)).

[62] *Id.* at 483 (quoting Jones v. United States, 526 U.S. 227, 248 (1999)).

[63] *See, e.g.*, Markman v. Westview Instruments, Inc., 517 U.S. 370, 376-83 (1996); Chauffeurs, Teamsters and Helpers, Local No. 391 v. Terry, 494 U.S. 558, 564-67 (1990); Colgrove v. Battin, 413 U.S. 149, 152-64 (1973); Ross v. Bernhard, 396 U.S. 531 (1970); Katchen v. Landy, 382 U.S. 323, 336-40 (1966); Dairy Queen, Inc. v. Wood, 369 U.S. 469, 471-79 (1962); Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); ILC Peripherals Leasing Corp. v. IBM, 458 F. Supp. 423, 444-49 (N.D. Cal. 1978).

[64] McMillan v. Pennsylvania, 477 U.S. 79, 93 (1986); Spaziano v. Florida, 468 U.S. 447, 459 (1984). Discussed *supra* p. 6.

[65] *See, e.g.*, Dillon v. United States, 130 S. Ct. 2683 (2010); United States v. O'Brien, 130 S. Ct. 2169 (2010); Oregon v. Ice, 555 U.S. 160 (2009); Rita v. United States, 551 U.S. 338 (2007); Cunningham v. California, 549 U.S. 270 (2007); United States v. Booker, 543 U.S. 220 (2005); Blakely v. Washington, 542 U.S. 296 (2004).

[66] Crawford v. Washington, 541. U.S. 36 (2004).

[67] Ohio v. Roberts, 448 U.S. 56, 66 (1980).

[68] 541 U.S. at 54-59.

[69] *See, e.g.*, Lewis v. United States, 445 U.S. 55, 65 n.8 (1980) ("The second amendment guarantees no right to keep and bear a firearm that does not have 'some reasonable relationship to the preservation or efficiency of a well regulated militia.'") (quoting United States v. Miller, 307 U.S. 174, 178 (1939)); United States v. Chavez, 204 F.3d 1305, 1313 n.5 (11th Cir. 2000); United States v. Baker, 197 F.3d 211, 216 (6th Cir. 1999); San Diego Cnty. Gun Rights Comm. v. Reno, 98 F.3d 1121, 1124-25 (9th Cir. 1996); Hickman v. Block, 81 F.3d 98, 100-01 (9th Cir. 1996); Quilici v. Morton Grove, 695 F.2d 261, 270-71 (7th Cir. 1982); United States v.

Nevertheless, any future judicial attempts to make such a doctrinal leap will doubtless become mired in the conceptual sinkholes opened up by such post-*Apprendi* cases as *U.S. v. Booker* (which can be read as requiring application of *Apprendi* only in the context of mandatory sentencing guidelines, and leaves open the possibility of judge sentencing in a non-mandatory sentencing regime)[71], and *Oregon v. Ice*[72] (which held that the Sixth Amendment does not inhibit a judge from finding facts relevant to whether consecutive rather than concurrent sentences should be imposed.)

It is therefore submitted that only a clean doctrinal leap in the form of a clear cut holding that a defendant in a criminal case has a Sixth Amendment right to have his sentence determined by a jury can extricate the courts from the current doctrinal morass while at the same time serving both the spirit and letter of the constitutional right to jury in both phases of the criminal trial.

As has already occurred in Fifth Amendment[73] and Confrontation[74] jurisprudence, half a loaf, and even three quarters of a loaf, must inevitably give way to a full one.

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Oakes, 564 F.2d 384, 387 (10th Cir. 1977); United States v. Wilbur, 545 F.2d 764, 767 (1st Cir. 1976); Cases v. United States, 131 F.2d 916, 921-23 (1st Cir. 1942); *see also* Robert Hardaway, *The Inconvenient Militia Clause of the Second Amendment: Why the Supreme Court Declines to Resolve the Debate over the Right to Bear Arms,* 16 ST. JOHN'S J. LEGAL COMMENT. 41, 43 n.12 (2002) (providing a more extensive list of supporting cases).

[70] District of Columbia v. Heller, 554 U.S. 570, 595 (2010).

[71] Booker, 543 U.S.at 334 ( Breyer, J. dissenting)

> Thus, as far as the federal *statutes* are concerned, the federal system, unlike the state system at issue in *Blakely,* provides a defendant with no guarantee that the jury's finding of factual elements will result in a sentence lower than the statutory maximum. Rather, the statutes put a potential federal defendant on notice that a judge conceivably might sentence him anywhere within the range provided by *statute*-regardless of the applicable Guidelines range. Hence as a practical matter, they grant a potential federal defendant less assurance of a lower Guidelines sentence than did the state statutes at issue in *Blakely.*

[72] ICE, 129 S.Ct. at 718

> In light of this history, legislative reforms regarding the imposition of multiple sentences do not implicate the core concerns that prompted our decision in *Apprendi*. There is no encroachment here by the judge upon facts historically found by the jury, nor any threat to the jury's domain as a bulwark at trial between the State and the accused. Instead, the defendant-who historically may have faced consecutive sentences by default-has been granted by some modern legislatures statutory protections meant to temper the harshness of the historical practice.

[73] Miranda v. Arizona, 384 U.S. 436 (1966).

[74] Crawford v. Washington, 541 U.S. 36 (2004).