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STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2018AP1209-CR

STATE OF WISCONSIN,

Plaintiff-Respondent,

v.

MOSE B. COFFEE,

Defendant-Appellant-Petitioner.

ON APPEAL FROM A DECISION OF THE COURT OF APPEALS AFFIRMING A JUDGMENT OF CONVICTION ENTERED IN THE WINNEBAGO COUNTY CIRCUIT COURT, THE HONORABLE JOHN A. JORGENSEN, PRESIDING

BRIEF OF PLAINTIFF-RESPONDENT

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ISSUE PRESENTED

Did the search of Defendant-Appellant-Petitioner Mose B. Coffee's vehicle incident to his arrest for operating a motor vehicle while intoxicated violate his Fourth Amendment right against unreasonable searches?

The circuit court answered, "No."

The court of appeals affirmed in a unanimous, published decision. *State v. Coffee*, 2019 WI App 25, 387 Wis. 2d 673, 929 N.W.2d 245.

This Court should affirm.

STATEMENT ON ORAL ARGUMENT AND PUBLICATION

As this Court has accepted review of this case, oral argument and publication are appropriate.

INTRODUCTION

> There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging. Moreover, it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended.

Thornton v. United States, 541 U.S. 615, 630 (2004) (Scalia, J., concurring).

The Fourth Amendment to the United States Constitution protects individuals from unreasonable searches and seizures. While it has long been understood that warrantless searches are generally unreasonable within the

meaning of the Fourth Amendment, courts also acknowledge a body of exceptions to that rule. One such exception is a search incident to a person's lawful arrest.

For years, courts justified vehicle searches incident to an occupant's arrest on the twin grounds of officer safety and evidence preservation. Over time, however, the practice of searching vehicles incident to arrest stretched beyond the breaking point of the practice's underlying rationales. In many cases, police were searching vehicles following occupants' arrests without needing to for safety or evidence preservation reasons.

In *Arizona v. Gant*, 556 U.S. 332 (2009), the United States Supreme Court harmonized the law. The Court clarified that while vehicle searches incident to an occupant's arrest were justifiable on officer safety and evidence preservation grounds, an additional rationale also existed. The Court held that "circumstances unique to the vehicle context justify a search incident to lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* at 343 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

In the decade since the Court decided *Gant*, states have labored to implement its holding. Two main lines of cases have emerged: those using the "categorical" approach and those using the "circumstantial" approach. Under the categorical approach, courts determine the constitutionality of a vehicle search incident to arrest based on the nature of the offense of arrest. Under the circumstantial approach, courts instead review the specific circumstances of the arrest to determine the constitutionality of a search.

In this case, the court of appeals effectively adopted the categorical approach to *Gant*. In reviewing the constitutionality of the search of Coffee's vehicle incident to his arrest for operating a motor vehicle while intoxicated (OWI), the court held that "when an officer lawfully arrests a driver for OWI . . . a search of the interior of the vehicle, including any containers therein, is lawful because it is reasonable to believe evidence relevant to the offense of OWI might be found." *Coffee*, 387 Wis. 2d 673, ¶ 13.

This Court should adopt the court of appeals' position. Contrary to Coffee's argument, the categorical approach to *Gant* is not unique or unprecedented. Rather, it represents the most logical reading of *Gant* in the context of the facts of that case and those that preceded it. And the bright line represented by the categorical approach provides clear guidance to law enforcement and courts alike that will promote the fair and efficient administration of justice.

However, even if this Court adopts the circumstantial approach to *Gant*, it still should conclude that the circuit court properly denied Coffee's motion to suppress. It is simply not true that no facts supported a search of Coffee's vehicle—the facts supporting his arrest for OWI also supported the search. No additional facts, beyond those supporting the arrest, are necessary to justify a search incident to arrest. And given the impermanent nature of intoxication, it is perfectly reasonable for police to believe that an intoxicated person might have intoxicants nearby.

The holding in *Gant* and the development of the law since that decision are clear that the search that took place in this case was constitutional. This Court should affirm.

STATEMENT OF THE CASE

On the evening of August 30, 2017, Officer Timothy Skelton was on patrol in Oshkosh when he saw a vehicle, driven by Coffee, without a front license plate displayed. (R. 43:6–7.) Skelton stopped Coffee's car in the parking lot of a nearby bar. (R. 43:7.) As Skelton talked to Coffee, he noticed multiple indications that Coffee was intoxicated, including an odor of alcohol, bloodshot and glassy eyes, and slurred speech. (R. 43:9–10.) Based on Coffee's performance on multiple field sobriety tests, Skelton concluded that Coffee had been operating his car under the influence of intoxicants and administered a preliminary breath test, which returned a blood alcohol content result of .14 g/100mL. (R. 43:21–22.) Skelton arrested Coffee, handcuffed him, and placed him in the back of the squad car. (R. 43:22.)

During the traffic stop, Officer Brendon Bonnett arrived on the scene to serve as backup, if necessary. (R. 43:62.) After Skelton arrested Coffee and secured him in a squad car, Bonnett began to search Coffee's car for "any substance in the vehicle that could impair a driver's ability to operate the motor vehicle safely," including "prescription medication, nonprescription medication, alcohol, illegal drugs, or even up to possibly an inhalant such as Dust-Off." (R. 43:62–63.) Bonnett found a cloth bag behind the driver's seat that held mason jars containing flakes of marijuana. (R. 43:64–65.) After Bonnett discovered the mason jars, another officer searched the trunk of the car, where he found almost one kilogram of marijuana packed in vacuum-sealed bags. (R. 1:4–5; 43:78–79.)

The State charged Coffee with four counts: (1) possession with intent to deliver THC, (2) possession of drug paraphernalia, (3) second offense operating a motor vehicle while intoxicated, and (4) second offense operating

with a prohibited alcohol concentration. (R. 6:1–2.) Coffee moved to suppress the results of the search of his car incident to arrest, relying heavily on the court of appeals' unpublished opinion in *State v. Hinderman*[1] to argue that the search violated his Fourth Amendment rights. (R. 14:1–3.)

At a hearing on January 3, 2018, the Winnebago County Circuit Court, the Honorable John A. Jorgensen, presiding, denied Coffee's motion. (R. 43:93–94.) The court reasoned that Coffee "could easily put his hand behind the seat of the car to conceal something," so the scope of the search incident to Coffee's arrest was reasonable. (R. 43:92.) Coffee then pleaded no contest to the possession with intent to distribute and OWI charges. (R. 43:96–97.) The circuit court sentenced Coffee to ten days in jail for the OWI and withheld sentence on the possession charge subject to Coffee's successful completion of two years of probation. (R. 43:106–07.)

Coffee appealed, again relying on *Hinderman*, and the court of appeals affirmed. The court noted that the *Hinderman* decision "ultimately relied upon the wrong standard, as Coffee does in this appeal." *Coffee*, 387 Wis. 2d 673, ¶ 9. The court stated that, under *Gant*, the correct standard for determining the constitutionality of a vehicle search incident to arrest was not "whether there was 'a reasonable belief that evidence relating to the crime of OWI *would* be found,'" but whether it was "'reasonable to believe evidence relevant to the crime of arrest *might* be found.'" *Id.* Under the correct standard, the court held "as a matter of law that when an officer lawfully arrests a driver for OWI, . . . a search of the interior of the vehicle, including any containers

[1] *State v. Hinderman*, No. 2014AP1787-CR, 2015 WL 569134 (Wis. Ct. App. Feb. 12, 2015) (unpublished).

therein, is lawful because it is reasonable to believe evidence relevant to the offense of OWI might be found." *Id.* ¶ 13.

Coffee petitioned this Court for review, and after a response by the State, this Court granted review.

STANDARD OF REVIEW

This Court employs a two-step process in reviewing a circuit court's denial of a motion to suppress on constitutional grounds. First, the court reviews the circuit court's factual findings and upholds them "unless they are clearly erroneous." *State v. Dearborn*, 2010 WI 84, ¶ 13, 327 Wis. 2d 252, 786 N.W.2d 97 (citation omitted). Second, the court applies constitutional principles to those facts de novo. *Id.*

ARGUMENT

The search of Coffee's car was constitutional.

A. A vehicle search incident to a recent occupant's arrest does not require a warrant if "it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle."

The Fourth Amendment to the United States Constitution states, "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated." U.S. Const. amend IV. Article I, Section 11 of the Wisconsin Constitution contains a nearly identical prohibition on unreasonable searches and seizures.[2] Generally speaking,

[2] "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated." Wis. Const. art. I, § 11. This Court has regularly held that the protections afforded by this section of

warrantless searches "are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967) (footnotes omitted).

Two years after *Katz*, the Supreme Court recognized the search incident to arrest as an exception to the warrant requirement in *Chimel v. California*, 395 U.S. 752 (1969). In *Chimel*, police obtained an arrest warrant for Chimel on suspicion of burglary. *Id.* at 753. They went to Chimel's home and waited there for him; when he arrived, they handed him the arrest warrant and asked his permission to "look around." *Id.* Chimel objected, but the police searched his entire home regardless, seizing multiple items of evidentiary value. *Id.* at 754.

The Court began by reviewing the history of the search incident to arrest, which it traced to its own jurisprudence in 1914 and an acknowledgment of "the right on the part of the Government, always recognized under English and American law, to search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime." *Id.* at 755 (quoting *Weeks v. United States*, 232 U.S. 383 (1914)). The Court held, however, that while the search incident to arrest was an exception to the warrant requirement, the search of Chimel's home violated the Fourth Amendment because the scope of a search incident to arrest must be limited to the area

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the Wisconsin Constitution are identical to those created by the Fourth Amendment, except in extremely limited cases related to defective no-knock search warrants. *See, e.g.*, *State v. Dearborn*, 2010 WI 84, ¶ 14, 327 Wis. 2d 252, 786 N.W.2d 97. Coffee has not made an argument that this Court should interpret the Wisconsin Constitution differently than the United States Constitution in this case.

where the suspect could reach a weapon or evidence—the area within his "immediate control." *Chimel*, 395 U.S. at 768.

Twelve years after *Chimel*, the Supreme Court ruled that a recent arrestee's vehicle was within his "immediate control" within the meaning of *Chimel*. *New York v. Belton*, 453 U.S. 454, 462 (1981). In *Belton*, a police officer stopped a car for speeding. *Id.* at 455. When the officer approached the car, he smelled burnt marijuana and saw an envelope on the floor of the car marked with a name he associated with marijuana. *Id.* at 455–56. The officer arrested the four occupants of the vehicle, read them the *Miranda*[3] warnings, and searched the passenger compartment of the car. *Id.* at 456. In a jacket owned by Belton on the back seat of the car, the officer discovered cocaine. *Id.*

The Court noted that "[a]lthough the principle that limits a search incident to a lawful custodial arrest may be stated clearly enough, courts have discovered the principle difficult to apply in specific cases." *Id.* at 458. It pointed to a circuit split as evidence that "courts [had] found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." *Id.* at 460. The Court concluded that "articles inside the relatively narrow compass of the passenger compartment of an automobile are in fact generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary ite[m].'" *Id.* (citing *Chimel*, 395 U.S. at 763) (alteration in original). Therefore, the Court ruled, "when a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous

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

incident of that arrest, search the passenger compartment of that automobile." *Id.* (footnotes omitted).

In the decades following *Belton*, courts nationwide interpreted the holding therein as permitting a vehicle search whenever an occupant had been arrested. These *Belton* searches, however, still relied on the officer safety and evidence preservation rationales discussed in *Chimel*, even when the arrestees had been secured in the back of a squad car or otherwise prevented from accessing a weapon or evidence. In 2004, the Court began to confront this dissonance.

Thornton involved the stop of a car displaying registration that did not match the vehicle. *Thornton*, 541 U.S. at 618. The driver of the car—Thornton—had pulled over and gotten out of the car before police could initiate a traffic stop. *Id.* An officer approached Thornton and asked for his identification. *Id.* Thornton appeared nervous, so the officer conducted a pat-down search to check for weapons, during which Thornton produced bags of marijuana and crack cocaine from his pocket. *Id.* The officer arrested Thornton and secured him in a squad car, then searched Thornton's car and discovered a handgun. *Id.* Thornton moved to suppress the search, but the trial court denied his motion and a jury convicted him of possession of a firearm by a felon. *Id.* at 618–19.

On appeal, the Supreme Court addressed the constitutionality of the search in light of Thornton's placement in the squad car and inability to access his vehicle and any weapons or evidence therein. *Id.* at 619. The Court commented that the situation was similar to that in *Belton*. *Id.* at 620–21. It reasoned that police should not have to choose between safely securing an arrestee in a squad car and searching the arrestee's vehicle, and therefore held that the

fact of arrest did not undermine the rationale of the vehicle search. *Id.* at 621–22.

Justice Scalia, joined by Justice Ginsburg, concurred in the result. *Id.* at 625 (Scalia, J., concurring). Justice Scalia expressed concern at the Court's stretching of the officer safety rationale to situations where a defendant is secured away from his vehicle and clearly poses no threat to officers. *Id.* at 625. Instead, Justice Scalia wrote, vehicle searches incident to arrest are lawful "not because the arrestee might grab a weapon or evidentiary item from his car, but simply because the car might contain evidence relevant to the crime for which he was arrested." *Id.* at 629. In support of this position, he commented, "There is nothing irrational about broader police authority to search for evidence when and where the perpetrator of a crime is lawfully arrested. The fact of prior lawful arrest distinguishes the arrestee from society at large, and distinguishes a search for evidence of *his* crime from general rummaging." *Id.* at 630. He continued, "it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended." *Id.*

In describing the limiting factors for vehicle searches incident to arrest, Justice Scalia pointed to two cases where there was "no reasonable basis to believe relevant evidence might be found in the car." *Id.* at 632 (citing *Atwater v. Lago Vista*, 532 U.S. 318 (2001); *Knowles v. Iowa*, 525 U.S. 113 (1998)). *Atwater* involved an arrest for a violation of Texas's seatbelt law, *Atwater*, 532 U.S. at 323–324, while *Knowles* considered Iowa's "search incident to citation" law and involved a search following a citation for speeding without an arrest. *Knowles*, 525 U.S. at 118. Because cases like *Atwater* and *Knowles* would not support a vehicle search, Justice Scalia stated, he "would therefore limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the

crime of arrest might be found." *Thornton*, 541 U.S. at 632 (Scalia, J. concurring).

Finally, the Court confronted the problematic underpinnings of *Belton* head-on in *Arizona v. Gant*. In *Gant*, police responded to a tip that a certain house was being used to sell drugs. *Gant*, 556 U.S. at 335. Police knocked on the door of the house and Gant answered, identified himself, and told police that the owner would return later. *Id.* at 335–36. The officers ran a records check, which revealed that Gant had a suspended driver's license and that there was a warrant out for his arrest for driving on his suspended license. *Id.* at 336. Later that evening, police returned to the house and arrested two other people. *Id.* As that occurred, Gant returned to the house driving his car. *Id.* He parked about 30 feet away from the officers, got out of his car, and shut the door. *Id.* The officers arrested Gant, handcuffed him, and placed him in the back of a squad car. *Id.* Officers then searched Gant's car, which revealed a gun and a bag of cocaine. *Id.*

Gant moved to suppress the evidence, claiming that the search of his car was not constitutional under *Belton* "because he posed no threat to the officers after he was handcuffed in the patrol car and because he was arrested for a traffic offense for which no evidence could be found in his vehicle." *Id.* When asked at the suppression hearing about the reason for the search of Gant's car, an officer replied, "Because the law says we can do it." *Id.* at 337. After protracted state court proceedings, the Arizona Supreme Court ruled that the evidence must be suppressed, reasoning that *Belton* did not address a situation where the scene is already secure. *Id.*

The United States Supreme Court affirmed. The Court acknowledged that after *Belton*, courts began 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*." *Id.* at 342 (quoting *Thornton*, 541 U.S. at 624 (O'Conner, J., concurring in part)). It took issue with this treatment: "To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule of the justifications underlying the *Chimel* exception . . . ." *Gant*, 556 U.S. at 343. The Court therefore held "that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.*

However, the Court explained that apart from the *Chimel* rationale, "circumstances unique to the automobile context justify a search incident to arrest when it is reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id.* at 335. It determined that in certain circumstances "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Id.* at 344. The search of Gant's car was unreasonable, however, "[b]ecause police could not reasonably have believed . . . that evidence of the offense for which [Gant] was arrested might have been found" in Gant's car. *Id.*

So, under *Gant*, the search-incident-to-arrest doctrine allows police to search a vehicle in two situations: "if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest." *Gant*, 556 U.S. at 351. "When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies." *Id.*

In other words, the *Gant* Court identified and affirmed a rationale for a vehicle search incident to arrest not reliant on officer safety or evidence preservation for justification. Instead, such a search is allowed for purposes of evidence collection. The standard necessary to permit such a search is that it must be "reasonable to believe that evidence of the offense of arrest might be found in the vehicle." *Id.* at 335. And while drug offenses provide a basis for a vehicle search, other infractions—such as speeding and seatbelt violations—do not. *Id.* at 343–44 (citing *Atwater*, 532 U.S. at 324; *Knowles*, 525 U.S. at 118; *Belton*, 453 U.S. 454; *Thornton*, 541 U.S. 615). The focus is on "the offense of arrest." *Id.* at 344.

B. Under the categorical approach to *Gant*, OWI is an offense that provides a reasonable basis for a vehicle search incident to the driver's arrest, justifying the search of Coffee's car.

The parties agree that police had probable cause to arrest Coffee for OWI. The parties further agree that Coffee was secured in the back of a squad car when police began the search of his car. Therefore, the parties agree that the constitutionality of the search of Coffee's car is governed by the second part of *Gant*: a vehicle search incident to an occupant's arrest is constitutional "when it 'is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Gant*, 556 U.S. at 343 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)).

Since *Gant*, courts around the nation have confronted what it means for it to be "reasonable to believe evidence relevant to the crime of arrest might be found" in an arrestee's vehicle. Two major approaches have emerged. *See generally* 3 Wayne R. LaFave, Search And Seizure: A Treatise on the Fourth Amendment § 7.1(d) (5th ed. 2019). "Some courts have

concluded or implied that whether it is reasonable to believe offense-related evidence might be found in a vehicle is determined solely by reference to the nature of the offense of arrest, rather than by reference to the particularized facts of the case." *People v. Evans*, 133 Cal. Rptr. 3d 323, 333 (Cal. App. 2011). The State refers to this as the "categorical approach." Other courts, however, "have required some level of particularized suspicion, based at least in part on the facts of the specific case." *Id.* The State refers to this as the "circumstantial approach."

1. The categorical approach to *Gant* is the proper approach for courts to use when analyzing the constitutionality of a vehicle search incident to arrest.

The court of appeals effectively adopted the categorical approach to *Gant* when it declared "as a matter of law that when an officer lawfully arrests a driver for OWI, . . . a search of the interior of the vehicle, including any containers therein, is lawful because it is reasonable to believe evidence relevant to the offense of OWI might be found." *Coffee*, 387 Wis. 2d 673, ¶ 13. Far from blazing some previously uncontemplated trail through the fields of Fourth Amendment jurisprudence, the court of appeals' holding fit squarely within the categorical approach to the *Gant* decision. That approach represents the better reading of *Gant* for at least two reasons.

First, the categorical approach finds support in the language and analysis of *Gant* itself. As the Court stated, in certain cases, "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Gant*, 556 U.S. at 344. The Court's focus on "the offense of arrest" rather than the factual specifics of a particular stop is telling. It strongly indicates that the Court was less concerned with limiting searches to

certain factual scenarios and more focused on curtailing searches in certain egregious cases.

The *Gant* decision supports this view by distinguishing *Atwater* and *Knowles* (cases involving seatbelt and speeding violations) from *Belton* and *Thornton* (drug cases). The Court explained that "[i]n many cases, as when a recent occupant is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains relevant evidence." *Gant*, 556 U.S. at 343 (citing *Atwater*, 532 U.S. at 324; *Knowles*, 525 U.S. at 118). "But in others, including *Belton* and *Thornton*, the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein." *Id.* at 344. The nature of Gant's offense of arrest provided the Court's basis for distinguishing Gant's case from *Belton* and *Thornton*. "Whereas Belton and Thornton were arrested for drug offenses," the Court explained, "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." *Id.* In other words, because the defendants in *Belton* and *Thornton* "were arrested for drug offenses," their "offense of arrest . . . suppl[ied] a basis for searching the passenger compartment" of their cars. *Id.*

The Court's explicit adoption of Justice Scalia's concurrence in *Thornton* further supports the correctness of the categorical approach. In *Thornton*, Justice Scalia twice quoted a treatise for the proposition that "[t]he officer who arrests a man on a criminal charge should consider the nature of the charge" before conducting a search. *Thornton*, 541 U.S. at 630 (Scalia, J., concurring) (quoting 1 J. Bishop, Criminal Procedure § 211, p. 127 (2d ed. 1872)). Justice Scalia's invocation of this line provides insight into what he believed his preferred rule—the rule the Court explicitly adopted in *Gant*—meant.

Professor LaFave notes that multiple courts around the country have interpreted *Gant* as "only intend[ing] to cut back on *Belton* with respect to the most egregious subterfuge arrest situations, where a mere traffic violation previously provided the basis needed to make a full search of a vehicle." 3 Search & Seizure § 7.1(d). Among those courts are the Ninth Circuit, *United States v. Ruckes*, 586 F.3d 713 (9th Cir. 2009) ("'no likelihood' of finding evidence of defendant's driving on suspended license"), the Sixth Circuit, *United States v. Lopez*, 567 F.3d 755 (6th Cir. 2009) ("arrest for speeding, 'no reason to think that the vehicle contains evidence of the offense of arrest'"), and Kentucky, *Rose v. Commonwealth*, 322 S.W.3d 76 (Ky. 2010) ("no basis for search where arrest was on arrest warrant 'issued for traffic fines'"). 3 Search & Seizure § 7.1(d) n.204.

Second, the categorical approach fits within existing Fourth Amendment jurisprudence better than the circumstantial approach. The Court's use of "reasonable to believe" language in *Gant* calls to mind the use of that phrase as an analog for the probable cause standard. *See* 3 Search & Seizure § 7.1(d). But there already exists an automobile exception to the Fourth Amendment—an officer may search a vehicle when he has probable cause that the vehicle contains evidence of a crime. *See, e.g.*, *State v. Pozo*, 198 Wis. 2d 705, 710, 544 N.W.2d 228 (Ct. App. 1995). To read *Gant* as requiring probable cause that the vehicle contains evidence of the crime of arrest would render the entire opinion superfluous.

Indeed, the *Gant* Court noted that it was adopting a test that was narrower than the automobile exception. *Gant*, 556 U.S. at 346–47. It explained that when police have probable cause that a vehicle contains evidence of a crime, they may search "for evidence relevant to offenses other than the

offense of arrest, and the scope of the search authorized is broader." *Id.* at 347.

Under the circumstantial approach, *Gant* requires something less than probable cause but more than just an arrest for certain categories of crime, perhaps akin to a reasonable suspicion standard. In addition to having no basis in the text of *Gant*, this position suffers from the same flaw described above. It is difficult to conceive of a situation in which an officer, having lawfully arrested a person for a crime, develops reasonable suspicion—but *not* probable cause—that the person's vehicle contains evidence of the crime of arrest.

Coffee cites multiple cases that illustrate this problem. For example, he offers *Thornton* and *Belton* as examples of "case-specific facts—odor of marijuana, admissions by the occupant, furtive movements, drugs and drug packaging in plain view—that gave rise to the reasonable belief that there was evidence of the crime of arrest (drug possession) in the car." (Coffee's Br. 21.) The facts in these cases rose to the level of probable cause, not just reasonable suspicion, which is why the defendants in those cases were arrested.[4] Cases involving the police noticing open alcohol containers in a car—Coffee's proffered requirement for conducting a search—have the same problem: an officer who spots an open container has probable cause to believe a violation of Wis. Stat. § 346.935—Wisconsin's open container statute—has occurred. In that

[4] Notably, the *Belton* Court did not reach the question of whether the vehicle search in that case was constitutional under the automobile exception to the warrant requirement. *New York v. Belton*, 453 U.S. 454, 462 n.6 (1981) ("Because of this disposition of the case, there is no need here to consider whether the search and seizure were permissible under the so-called 'automobile exception.'").

situation, the automobile exception would permit police to search the car.

To hold out cases like *Belton*, *Thornton*, and others as illustrating the facts necessary for a vehicle search incident to an arrest would effectively read the second prong of *Gant* out of existence. It is true that the *Gant* Court cited *Belton* and *Thornton* as examples of an "offense of arrest" providing a basis for a search, but the Court's emphasis on the "offense of arrest" makes clear that it did not intend to delineate the facts of those cases as the threshold necessary for a search. *Gant*, 556 U.S. at 344.

Coffee argues that the Constitution disfavors categorical rules in the Fourth Amendment realm. As support, he offers multiple OWI cases involving blood draws. (Coffee's Br. 9.) But the factual differences between blood draws and vehicle searches are apparent, and the reasoning underlying the requirements in blood draw cases does not apply in the vehicle search context. In *McNeely*, for example, the Court wrote that a blood draw involves "a compelled physical intrusion beneath [the defendant's] skin and into his veins to obtain a sample of his blood for use as evidence in a criminal investigation. Such an invasion of bodily integrity implicates an individual's 'most personal and deep-rooted expectations of privacy.'" *Missouri v. McNeely*, 569 U.S. 141, 148 (2013) (quoting *Winston v. Lee*, 470 U.S. 753, 760 (1985)). Vehicles, on the other hand, carry an inherently reduced expectation of privacy owing to "the pervasive regulation of vehicles capable of traveling on the public highways." *California v. Carney*, 471 U.S. 386, 392 (1985). It is therefore unsurprising that in the same factual scenario, a vehicle search would be constitutional while a more invasive search like a blood draw might be forbidden.

In fact, the Supreme Court has recently rejected an argument identical to Coffee's. In that case, the Court explained that "the legality of a search incident to arrest must be judged on the basis of categorical rules." *Birchfield v. North Dakota*, 136 S. Ct. 2160, 2179 (2016). The Court distinguished *McNeely*, a blood-draw case, because "*McNeely* concerned an exception to the warrant requirement—for exigent circumstances—that always requires case-by-case determinations." *Id.* at 2180.

Yet Coffee argues that "[r]equiring police to have articulable facts that form their basis for a reasonable belief that there is evidence of the crime of arrest in the car not only protects against abusive policing, but also this requirement makes the decision to search reviewable by a court." (Coffee's Br. 18–19.) That argument misunderstands how the search-incident-to-arrest doctrine works. Again, this doctrine relies on categorical, bright-line rules so that police have clear guidance. As the Supreme Court explained in one important decision on this doctrine, a police officer's decision to search a person incident to arrest does not require "a case-by-case adjudication" of "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." *United States v. Robinson*, 414 U.S. 218, 235 (1973). So, "[t]he authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, *does not depend on what a court may later decide* was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* (emphasis added). The existence of a lawful arrest creates the authority to search the person, period. *Id.* at 235–36; *see also Birchfield*, 136 S. Ct. at 2179–80 (discussing *Robinson*'s categorical approach).

Similar reasoning supports the categorical approach to *Gant*. Just as *Robinson* does not require a police officer to have articulable facts indicating that an arrestee possesses a weapon or evidence, *Gant* does not require an officer to have articulable facts suggesting that an arrestee's vehicle has evidence of the offense of arrest. Under *Robinson*, the fact of a lawful arrest "establishes the authority to search" an arrestee's person. *Robinson*, 414 U.S. at 235. And under *Gant*, a lawful arrest creates the authority to search an arrestee's car if evidence of the offense of arrest might be found in the car. *Gant*, 556 U.S. at 343–44. Contrary to Coffee's view of the Fourth Amendment, the Supreme Court has a "general preference to provide clear guidance to law enforcement through categorical rules." *Riley v. California*, 573 U.S. 373, 398 (2014). *Gant* provided that guidance by adopting a categorical rule.

Specifically, the Supreme Court created a rule in *Gant* permitting a vehicle search when a recent occupant has been arrested even if the arrestee is secured away from his vehicle. That rule is subject to limitations—it has to be reasonable to believe that evidence of the offense of arrest might be found, and the arrest must be lawful. But the Court's holding, as interpreted by multiple courts throughout the country, does not require that the same totality-of-circumstances test that applies in a blood-draw case also apply to the search of a vehicle. The emphasis on the "offense of arrest" indicates that it is permissible for courts to determine the constitutionality of a vehicle search incident to arrest based on the nature of the offense itself, rather than through the lens of some ill-defined less-than-probable-cause-but-more-than-a-hunch test. This Court should join those that have concluded the same and announce the categorical approach to *Gant* as the correct approach for courts to use when reviewing the constitutionality of vehicle searches incident to arrest.

2. The search of Coffee's car was constitutional because OWI is a category of offense where it is reasonable to believe evidence might be found in a vehicle.

An OWI in Wisconsin is an offense where it is categorically reasonable to believe evidence might be found in the arrestee's vehicle. The facts of this case illustrate why. According to the criminal complaint, Officer Skelton arrested Coffee for "Operating While Intoxicated" after Coffee failed multiple field sobriety tests and registered a .14 positive alcohol result on a preliminary breath test. (R. 1:3.) The relevant statute for this offense is Wis. Stat. § 346.63(1).

Wisconsin Stat. § 346.63(1) prohibits the driving or operation of a vehicle in any of several circumstances:

- While the driver is "[u]nder the influence of an intoxicant, a controlled substance, a controlled substance analog or any combination of an intoxicant, a controlled substance and a controlled substance analog";
- While the driver is "under the influence of any other drug to a degree which renders him or her incapable of safely driving";
- While the driver is "under the combined influence of an intoxicant and any other drug to a degree which renders him or her incapable of safely driving"; or
- While the driver "has a detectable amount of a restricted controlled substance in his or her blood."

The statute expressly contemplates the combination of multiple drugs or of drugs and alcohol as a violation. The presence of any individual or combination of a wide catalog of intoxicating substances in a person's system can thus serve as an element of an OWI offense.

It is no great leap to understand that the presence of any of these substances in an arrestee's vehicle may serve as relevant circumstantial evidence that the arrestee has that substance in his or her system. *See* Wis. Stat. § 904.01 ("'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."). For example, the presence of a restricted controlled substance in a person's vehicle tends to make it more probable that the person consumed that substance before or while driving.

Nothing in *Gant* or any of the cases interpreting it suggests that the "evidence relevant to the crime of arrest" contemplated by the Court must be *conclusive* evidence. Without more, for example, a baggie of opioid painkillers would not be enough to establish a person's guilt on an OWI charge. But that does not mean that the presence of the drugs in a person's vehicle would not be relevant evidence. The presence of the drugs—particularly when combined with the driver's performance on standard field sobriety tests, the arresting officer's observations, and the results of any blood testing performed—may reasonably lead a jury to conclude that a defendant operated a motor vehicle with "a detectable amount of a restricted controlled substance in his or her blood." Wis. Stat. § 346.63(1)(am). The presence of drugs in the car may support the results of the blood testing, for example, if the defendant challenged the results at trial.

The relevance of this type of evidence also is apparent even when it is not clear to an arresting officer that a specific substance may be involved. If, for example, an officer arrests a driver on suspicion of OWI after having identified, among other things, the odor of alcohol as a sign of intoxication,

evidence of other drug use is no less relevant to the State's case in prosecuting the OWI. It may be that the driver's BAC turns out to be below .08, but he was still intoxicated due to the use of other drugs. Or it may be that his intoxication was caused by "a potpourri of substances." *Coffee*, 387 Wis. 2d 673, ¶ 11. Whatever the situation, when making its case against an OWI defendant, the State is not limited to evidence related to the first substance detected on the driver's breath or in his eyes.

What, then, is "evidence relevant to the crime of arrest," *Gant*, 556 U.S. at 343, when the crime of arrest is an OWI in Wisconsin? It might be drugs. It might be alcohol. It might be evidence of the use of either, such as empty bottles or cans, pill bottles, or other paraphernalia. It might be, as the court of appeals commented, a receipt showing recent drink purchases at a bar or restaurant. The important point is that *all of these* might be evidence of an OWI, even when the first or strongest substance detected is alcohol.

Coffee contends that "it is more unusual for intoxicated driving to be caused by a 'potpourri of substances' than for it to be caused by alcohol alone." (Coffee's Br. 23.) This misses the point. The use of illegal drugs may be less common than the use of legal intoxicants like alcohol, but the OWI statute covers both. And, in any event, 5.9 million of the 27.7 million people who drove under the influence of alcohol in 2014—over 21 percent—"drove under the simultaneous influence of alcohol and illicit drugs." *The CBHSQ Report*, (Dec. 2016) *available at* http:// www.samhsa.gov/data/sites/default/files/report_2688/ShortReport-2688.html. One in five intoxicated drivers being under the influence of both drugs and alcohol

might not qualify as a common occurrence, but neither is it exceedingly rare.[5]

In arguing against the categorical approach to *Gant*, Coffee claims that the State has all the evidence it needs for an OWI prosecution once a suspect has been arrested, including blood evidence. (Coffee's Br. 15–16.) As an initial matter, Coffee is wrong to suggest that a blood draw—let alone chemical analysis of a blood sample—always (or even usually) occurs *before* an OWI suspect is arrested. When a police officer decides to search a car incident to an OWI suspect's arrest, the officer will have no way of knowing whether the suspect's blood will be drawn, what the blood-test results will reveal, and whether the results will be admissible in court.

In any event, *Gant* does not forbid an otherwise lawful search just because police might already have "enough" evidence to convict a defendant. The court of appeals has aptly rejected a defendant's similar argument that *Gant* does not allow a vehicle search if police already have "enough evidence on which to arrest him." *State v. Smiter*, 2011 WI App 15, ¶ 16, 331 Wis. 2d 431, 793 N.W.2d 920. "*Gant* expressly permits searches for evidence relevant to the crime of arrest and does not require police to stop that search once *some* evidence is found." *Id.*

In short, it is reasonable to believe that a vehicle search incident to an arrest for OWI might reasonably be expected to uncover evidence of the OWI. The court of appeals was

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[5] In another study conducted in 2016, researchers found that roughly half of the subject OWI arrestees in Dane County whose blood alcohol content tested above .10g/100mL also tested positive for illegal drugs. Lorrine D. Edwards, Katherine L. Smith, and Theodore Savage, *Drugged Driving in Wisconsin: Oral Fluid Versus Blood*, 41 Journal of Analytical Toxicology 523, 523 (2017).

therefore correct under the categorical approach to *Gant* when it held "as a matter of law that when an officer lawfully arrests a driver for OWI, . . . a search of the interior of the vehicle, including any containers therein, is lawful because it is reasonable to believe evidence relevant to the offense of OWI might be found." *Coffee*, 387 Wis. 2d 673, ¶ 13. The search of Coffee's vehicle was constitutional, and this Court should affirm.

C. Alternatively, under the circumstantial approach to *Gant*, the facts leading to Coffee's arrest for OWI supported the search of Coffee's car.

Even if this Court concludes that the circumstantial approach to *Gant* is the correct approach, it still should affirm the court of appeals' decision on these independent grounds. Under the circumstantial approach, the question is whether the circumstances of Coffee's arrest warranted a vehicle search—that is, whether the facts leading to Coffee's arrest gave police a reasonable belief that Coffee's car contained drugs or alcohol. They did.

It is reasonable to believe that an intoxicated person might have intoxicants nearby. This is true whether the person is at a restaurant, at home, or driving on a highway. It is true regardless of whether the person is under the influence of drugs, alcohol, or both. As Justice Scalia commented, "it is not illogical to assume that evidence of a crime is most likely to be found where the suspect was apprehended." *Thornton*, 541 U.S. at 630 (Scalia, J., concurring). This is particularly true when the crime involves intoxication, which is a temporary state. And, to reiterate, the standard under *Gant* is not that it is reasonable to believe that the vehicle *does* contain evidence of the offense of arrest, only that it *might* contain such evidence. *Gant*, 556 U.S. at 343.

Coffee contends that only a small percentage of OWI cases also involve a citation for an open container. (Coffee's Br. 17.) It is unclear how accurately his statistics reflect the reality of OWI prosecutions. There are situations, for example, where police do not issue a citation for an open container when they arrest an individual for OWI despite the presence of an open container in the vehicle.[6] Coffee's review of CCAP entries also does not cover charges for possession of other intoxicants and instead focuses only on open container violations. And alcohol containers are not the only relevant evidence of OWI that police might find in a suspect's car. As the court of appeals noted, for example, a receipt of a recent alcohol purchase would be relevant evidence in an OWI case.

It is also important to note that regardless of the approach used under *Gant*, once police have met the constitutional standard necessary to permit a search, that search may include "the passenger compartment of [the] arrestee's vehicle and any containers therein." *Gant*, 556 U.S. at 344. It is therefore irrelevant whether the jar containing marijuana flakes was reachable from the driver's seat of Coffee's car or buried below other items. (Coffee's Br. 24–25.)

Ultimately, it was reasonable for police to believe that Coffee's car might contain evidence of an OWI offense. Under the categorical approach, this is so because of the nature of

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[6] This Court recently heard oral argument in one such case. In *State v. Neill*, the State charged the defendant, Charles Neill, IV, with his third OWI offense. *State v. Neill*, 2019 WI App 4, ¶ 8, 385 Wis. 2d 471, 922 N.W.2d 861. However, despite officers observing "an open bottle of Bud Light between [a] child's car seat and the front seat, as well as a six pack—with four bottles of Bud Light remaining—in the passenger seat," Neill was not cited for a violation of Wis. Stat. § 346.935. *Id.* ¶ 6. *See also* Wisconsin Circuit Court Access, Milwaukee County Case Number 2016CF002997, *available at* https://wcca.wicourts.gov/caseDetail.html?caseNo=2016CF002997&countyNo=40&index=0&mode=details.

OWI evidence. Under the circumstantial approach, it is so because of Coffee's intoxication and his presence in his vehicle. Under either approach, this Court should affirm.

CONCLUSION

This Court should affirm the decision of the court of appeals.

Dated this 9th day of December 2019.

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CERTIFICATION

I hereby certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b) and (c) for a brief produced with a proportional serif font. The length of this brief is 7,689 words.

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I hereby certify that:

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Dated this 9th day of December, 2019.

_____
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