With Little Guidance Comes Great Responsibility and How Bad Facts Make Bad Law: Examining How the Kansas Court Appeals Applied *Gant* to DUI and the Nature of DUI Offenses [*State v. Blanco*, No. 119,558, 2018 Kan. App. Unpub. LEXIS 1004, at *1 (Kan. App. 2018).]

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I. INTRODUCTION

Ten years ago, in *Arizona v. Gant*,[1] the United States Supreme Court established a new rule concerning when officers can search a vehicle incident to a valid arrest of a recent occupant. First, officers can search the passenger compartment of an arrestee's vehicle if the arrestee was "unsecured and within reaching distance of the passenger compartment at the time of the search."[2] Second, officers can search an arrestee's vehicle "when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'"[3]

Since *Gant*, courts have struggled with how to apply the second prong of the *Gant* analysis.[4] Two general tests have surfaced as courts try to determine when it will be "reasonable to believe" evidence of the crime committed will be found in the arrestee's vehicle.[5] Under the first test, known as the categorical test, courts look at the nature of the crime itself without looking at the facts of the particular case, to determine if the officers could search the arrestee's vehicle.[6] Other courts utilize a fact-specific test

1. 556 U.S. 332, 335 (2009).
2. Arizona v. Gant, 556 U.S. 332, 343 (2009). The U.S. Supreme Court has stated that this type of search is reasonable, primarily to ensure officer safety and the preservation of evidence. *Id.*
3. *Id.* at 333. The U.S. Supreme Court has rationalized this type of search based upon law enforcement's "general interest in gathering evidence related to the crime of arrest." Thornton v. United States, 541 U.S. 615, 629 (2004) (Scalia J., concurring).
4. *See* Geoffrey S. Corn, *Arizona v. Gant: The Good, The Bad, and the Meaning of "Reasonable Belief"*, 45 CONN. L. REV. 177, 181–82 (2012).
5. State v. Blanco, 432 P.3d 111, *4 (Kan. Ct. App. 2018) (unpublished).
6. Brown v. State, 24 So. 3d 671, 677–79 (Fla. Dist. Ct. App. 2009).

and examine the facts of each case to determine whether the officers reasonably believed they would find evidence of the crime in the vehicle.[7]

The Kansas Supreme Court has been silent on this issue for the most part and has left open whether the categorical or the fact-specific test is the correct test.[8] There is tension within the Kansas Court of Appeals concerning whether a driving under the influence ("DUI") offense by its nature allows officers to search a vehicle incident to a lawful arrest of a recent occupant.[9]

In *State v. Ewertz*,[10] the Kansas Court of Appeals stated, "like drug offenses, driving under the influence is likely within the category of crimes identified by the *Gant* Court as supplying a basis for searching a vehicle."[11] However, recently in *State v. Blanco*,[12] the Kansas Court of Appeals held that a DUI should not be one of the crimes that categorically allows officers to search the occupant's vehicle as a search incident to a lawful arrest.[13]

After taking a closer look at *Gant*, the cases that proceeded *Gant*, and the nature of DUI cases, it is apparent that a DUI should allow officers to search the recent occupant's vehicle as a valid search incident to a DUI arrest. Further, this issue needs to be resolved quickly, because DUI investigations are dependent on an officer's ability to investigate for evidence of intoxication. Officers desperately need clarity concerning this issue.

Part II of this Comment examines the unique factual situation present in *Blanco* and how this case got to the Kansas Court of Appeals. Part III of this Comment chronicles how the United States Supreme Court ended up adopting the *Gant* framework. Part IV examines the court of appeals decision in *Blanco* and scrutinizes the panel's legal analysis. Part V argues this panel of the Kansas Court of Appeals incorrectly applied the *Gant* test to DUI cases. Additionally, this part calls upon Kansas courts to resolve this issue, so an officer's DUI investigation is not hampered by inner appellate panel conflict.

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7. *See* United States v. Page, 679 F. Supp. 2d 648, 649 (E.D. Va. 2009).

8. *See* State v. Torres, 421 P.3d 733, 739 (Kan. 2018). In *Torres*, the Kansas Supreme Court acknowledges that the court has not chosen to identify which test it prefers. *Id.* at 739. Instead, the court explains that it is willing to make a decision, but it was unable to do so because the parties did not brief or argue about which test was the correct option. *Id.* This Comment will focus on the fact that under the Supreme Court's holding in *Gant*, regardless of the test chosen by the Kansas Supreme Court, when a court applies the second prong of *Gant* to DUI cases, officers should be able to search the vehicle incident to a lawful arrest based upon the nature of DUI cases.

9. *Compare Blanco*, 432 P.3d 111, at *16–17 (Kan. Ct. App. 2018) (unpublished), *with* State v. Ewertz, 305 P.3d 23, 27 (Kan. Ct. App. 2013).

10. 305 P.3d 23 (Kan. Ct. App. 2013).

11. *Ewertz*, 305 P.3d at 27.

12. 432 P.3d 111 (Kan. Ct. App. 2018) (unpublished).

13. *Blanco*, 432 P.3d 111, at *17.

II. CASE DESCRIPTION

In *Blanco*, the police received calls concerning a driver that appeared to be intoxicated; Officer Fitzpatrick discovered a vehicle matching this description and attempted to pull the vehicle over into a nearby parking lot.[14] The vehicle jumped the curb, hit a tree, and left the scene.[15] Because of the heavy traffic and Olathe Police Department policy, Officer Fitzpatrick did not follow the vehicle.[16] However, he did get a good look at the suspect's face before the vehicle left the scene.[17]

Ten minutes later, dispatch informed officers that the vehicle identified by Officer Fitzpatrick was in the same parking lot.[18] Two other officers reached the scene shortly thereafter, and saw a man, later identified as Jay Blanco; his car was about 20 yards away from him parked in the parking lot.[19] The officers tried to get Blanco's attention; however, Blanco ran away and got into his girlfriend's car.[20] The officers requested he get out of the vehicle, and he replied, "I'm wasted."[21] Blanco exhibited multiple signs of intoxication and refused the preliminary breath test.[22] The officers arrested Blanco for DUI.[23]

Before placing Blanco in the patrol car, the officers searched the vehicle as a search incident to arrest.[24] During the search, the officers found 155.3 grams of marijuana and a scale.[25] The state charged Blanco with distribution of marijuana, fleeing or attempting to elude a police officer, possession of drug paraphernalia, interference with law enforcement, and DUI.[26]

Blanco moved to suppress the evidence found in the vehicle, and the district court granted the motion.[27] The State of Kansas appealed this decision by arguing the search of the vehicle was a valid search incident to arrest.[28] The Kansas Court of Appeals affirmed the district court's ruling finding that, based upon Blanco's distance and time from the vehicle and the nature of DUI offenses, the officers did not have a reasonable belief that evidence relevant to the DUI would be in the vehicle.[29] The panel found

14. *Id.* at *1.
15. *Id.*
16. *Id.* at *1–2.
17. *Id.* at *1.
18. *Id.* at *2.
19. *Blanco*, 432 P.3d at *2.
20. *Id.*
21. *Id.*
22. *Id.* at *2–3.
23. *Id.* at *3.
24. *Id.*
25. *Blanco*, 432 P.3d at *3.
26. *Id.* at *3–4.
27. *Id.* at *4.
28. *Id.* at *10.
29. *Id.* at *19–20.

that DUI offenses should not fall within the set of crimes that always give officers a reasonable belief to search the vehicle.[30]

III. LEGAL BACKGROUND

The Fourth Amendment prohibits unreasonable searches and seizures.[31] Searches which are conducted without a warrant are per se unreasonable, unless the facts of the search fall within one of the well-established exceptions to the warrant requirement.[32] Exceptions to the warrant requirement include: consent, search incident to a lawful arrest, stop and frisk, probable cause to search with exigent circumstances, the emergency doctrine, an inventory search, plain view, and administrative searches.[33]

The United States Supreme Court first announced the traditional search incident to a lawful arrest rule in *Chimel v. California*.[34] In *Chimel*, the Court held that a lawful search incident to an arrest includes searching the "arrestee's person and the area 'within his immediate control' - meaning the area from within which he might gain possession of a weapon or destructible evidence."[35] However, after *Chimel*, courts had difficulty applying this rule to vehicular cases.[36] Thus, in *New York v. Belton*,[37] the Court attempted to clarify the rule as applied to vehicular cases and tried to establish a bright-line rule for officers.[38] The Court held that when an officer makes "a lawful custodial arrest of the *occupant* of an automobile, [the officer] may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile."[39] Although this rule was easy to apply, the *Belton* rule was criticized by lower courts and commentators alike, because it was seen as drastically decreasing individuals' rights against intrusive searches.[40]

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30. *Id.* at *20–21.
31. *See* U.S. CONST. amend. IV.
32. State v. Pollman, 190 P.3d 234, 238 (Kan. 2008).
33. State v. Vandevelde, 138 P.3d 771, 776 (Kan. 2006).
34. Chimel v. California, 395 U.S. 752, 762–63 (1969).
35. *Id.* In *Chimel*, the officers arrested Chimel in his house for a suspected burglary charge. *Id.* at 753. Officers did not have a warrant, but while conducting the arrest, officers searched multiple rooms within Chimel's house and found evidence linking Chimel to the alleged burglary. *Id.* at 753–54. The Supreme Court stated that the search of the house was unconstitutional and that officers were limited to searching Chimel's person and the area within his immediate control when being arrested. *Id.* at 762–63.
36. *See* New York v. Belton, 453 U.S. 454, 472 (1981).
37. 453 U.S. 454 (1981).
38. *Id.* at 460.
39. *Id.* (emphasis added).
40. *See* State v. Pierce, 642 A.2d 947, 955–56 (N.J. 1994) (rejecting the *Belton* rule as applied to the New York Constitution because the rule is overly intrusive and is a violation of an individual's right against unreasonable searches and seizures); State v. Hernandez, 410 So. 2d 1381, 1385 (La. 1982) (holding that the *Belton* rule was unconstitutional under its state constitution); State v. Brown, 588 N.E.2d 113, 115 (Ohio 1992) (stating that "[i]f *Belton* does stand for the proposition that a police officer

Courts throughout the nation began to apply the *Belton* rule and were upholding vehicular searches, even if the objects of the search were outside the reach of the arrestee, and the arrestee had been secured prior to the arrest.[41] Courts were also upholding vehicular searches incident to a valid arrest for traffic offenses.[42] Thus, in *Gant*, the United States Supreme Court took steps to limit *Belton*, and stated that "[c]onstruing *Belton* broadly to allow vehicle searches incident to any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis."[43] In an attempt to bring the search incident to a valid arrest exception back to its constitutional ties, the Court established the two-part *Gant* test.[44]

Under the first part of the *Gant* test, the Court constrained *Belton* back to the rule in *Chimel*, and held that officers can only search the vehicle incident to a lawful arrest if the vehicle was within his "immediate control" at the time of arrest.[45] The Court did not stop there, declaring that officers can search a vehicle incident to a valid arrest when they possess a reasonable belief that evidence of a crime would be found in the vehicle.[46] The "reasonable belief" rule adopted by the Court in *Gant*, was established by Justice Scalia in his concurrence in *Thornton v. United States*.[47]

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may conduct a detailed search of an automobile *solely* because he has arrested one of its occupants, *on any charge*, we decline to adopt its rule"); *see also* Catherine Hancock, *State Court Activism and Searches Incident to Arrest*, 68 VA. L. REV. 1085, 1128 (stating that *Belton* "is the kind of decision that should give pause to even the most deferential of state court judges"); Robert A Stern, Robbins v. California *and* New York v. Belton*: The Supreme Court Opens Car Doors to Container Searches*, 31 AM. U. L. REV. 291, 310–12 (1982) (arguing that *Belton* is inconsistent with prior Supreme Court precedent and inappropriately lowers motorists' privacy).

41. *See* Brown v. State, 24 So. 3d 671, 675–76 (Fla. Dist. Ct. App. 2009).

42. *See, e.g.*, State v. Landry, 543 So. 2d 314, 314 (Fla. Dist. Ct. App. 1989) (holding search of defendant's vehicle was lawful as a search incident to a lawful arrest for driving with a suspended license); State v. Irvin, 483 So. 2d 461, 462–63 (Fla. Dist. Ct. App. 1986) (stating search of vehicle was lawful based upon defendant's arrest for driving with a suspended license).

43. Arizona v. Gant, 556 U.S. 332, 347 (2009).

44. *Id.* at 335.

45. *Id.* (citing Chimel v. California, 395 U.S. 752, 763 (1969)). The Court found the reaching distance rule in *Chimel* had to establish the scope of a *Belton* search, because the basis for this type of search is to promote officer safety and to preserve evidence. *Id.* Once someone is handcuffed and placed in the back of a patrol car, it would appear that any search of the vehicle would not promote these objectives, because there is no possibility that the arrestee would be able to grab a weapon or destroy evidence while handcuffed in the back of the patrol car. *See Chimel*, 395 U.S. at 763.

46. *See* Corn, *supra* note 4, at 179–81.

47. *Gant*, 556 U.S. at 335 (citing Thornton v. United States, 451 U.S. 615, 629 (2004) (Scalia, J., concurring)). In *Thornton*, the majority upheld the *Belton* rule, and, if anything, expanded upon its holding: "*Belton* governs even when an officer does not make contact until the person arrested has left the vehicle." *Thornton*, 541 U.S. at 617. The Court did not seem concerned about the fact that this holding separated the *Belton* rule further away from the initial justification as established in *Chimel*. *See* Stern, *supra* note 40, at 310–11. It is hard to imagine a scenario where officer safety or the preservation of evidence would be at risk when the suspect has been handcuffed and in the back of the patrol car. *See id.*

In *Thornton*, Justice Scalia asserted that the *Belton* rule could not be justified as a way to protect officers and preserve evidence.[48] If a *Belton* type search was constitutional, it was not because it promoted officer safety or helped preserve evidence, but "because the car might contain evidence relevant to the crime for which [the occupant] was arrested."[49] Justice Scalia argued this justification was reasonable and that it was supported by Supreme Court precedent, specifically pre-*Chimel* cases.[50] In pre-*Chimel* cases, the Supreme Court embraced a police officer's ability to search the area surrounding an arrestee in order to obtain more evidence of the crime the individual was arrested for.[51] Justice Scalia would thus "limit *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[52]

The majority utilized this test and the pre-*Chimel* justification to establish the second prong of the *Gant* test.[53] Yet, the Court went further and briefly analyzed when officers would have a "reasonable belief" that evidence of the crime of arrest would be in the vehicle, thus allowing officers to search the vehicle.[54] The Court stated:

> In 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 . . . 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.[55]

Based upon the Court's new reasonable belief rule, searches of the vehicles in *Belton* and *Thornton* were reasonable, because the defendants were being arrested for drug offenses.[56] However, in *Gant*, the officers could not lawfully search Gant's vehicle because he was being arrested for

48. *Thornton*, 451 U.S. at 617 (Scalia, J., concurring). Instead, Justice Scalia stated the *Belton* rule could no longer be considered "a mere application of *Chimel*." *Id.* at 631. Thus, Justice Scalia would have "limited *Belton* searches to cases where it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle." *Id.* at 632.

49. *Id.* at 629.

50. *See id.* at 625–32; States v. Rabinowitz, 339 U.S. 56, 58–59 (1950).

51. *See Rabinowitz*, 339 U.S. at 61. In *Rabinowitz*, the police suspected Rabinowitz of forging stamps and obtained a warrant to arrest him. *Id.* at 58–59. The officers then went to Rabinowitz's place of business and arrested him; however, the officers also searched his business for evidence of the forgery charge. *Id.* Although the officers did not have a warrant, the Supreme Court held that this was a valid search incident to an arrest. *Id.* at 60–61. The Court stated that "[t]he right 'to search the place where the arrest is made in order to find and seize things connected with the crime . . . stemmed . . . from the longstanding practice of searching for other proofs of guilt within the control of the accused found upon arrest." *Id.* at 61.

52. *Thornton*, 541 U.S. at 632.

53. *Gant*, 556 U.S. at 335.

54. *Id.* at 343–44.

55. *Id.*

56. *Id.*

driving with a suspended license—a traffic offense.[57] Since *Gant*, courts have struggled to apply this rule and have created different tests to do so.[58]

IV. THE COURT'S DECISION IN *BLANCO*

First, the panel laid out the two types of tests that have emerged to determine whether officers possessed a reasonable belief evidence of the crime of arrest would be found in the vehicle.[59] The panel first explained the categorical test, which holds that certain crimes, by their very nature, allow officers to search the arrestee's vehicle as a search incident to a valid arrest.[60] The second test is a fact-specific test that requires a court to look at the facts of every case to determine whether the officers possessed a reasonable belief—the court equated this test to a reasonable suspicion standard.[61] After analyzing the two tests, the panel adopted the fact-specific test, believing that it was more in line with the court's holding in *Gant*.[62] The panel felt the categorical test could result in the same reduction in privacy that resulted from the Supreme Court's holding in *Belton*.[63]

Although the panel opined that the fact-specific test was more in line with *Gant*, the panel also stated that it did not believe that DUI should be within the category of crimes that always allow a vehicular search incident to a lawful arrest.[64] Yet, previously in *Ewertz*, the Kansas Court of Appeals insinuated that DUI, like drug cases, would fall into the category of cases that always allow for a vehicular search incident to a lawful arrest.[65] The court acknowledged this precedent, but stated "[o]ne Court of Appeals panel has the right to disagree with a previous panel of the same court."[66] The panel cited to Judge Malone's concurring opinion in *Ewertz*, which rejected placing a DUI arrest in the same category as drug offenses.[67]

The court focused on the particular facts of *Blanco*, to show that DUI arrests should not fall within the category of offenses that always allow for a vehicular search incident to a lawful arrest.[68] Particularly, the court focused on the fact that Blanco was twenty yards away from the vehicle when officers spotted him and that officers did not smell the odor of alcohol emanating from the vehicle.[69] Also, the court distinguished DUI cases from

57. *Id.* at 345.
58. *See* Corn, *supra* note 4, at 179–81.
59. *Blanco*, 432 P.3d 111, *4–5.
60. *Id.*
61. *Id.* at *5.
62. *Id.* at *18–19.
63. *Id.*
64. *Id.* at *19–20.
65. State v. Ewertz, 305 P.3d 23, 27 (Kan. Ct. App. 2013).
66. *Blanco*, 432 P.3d at *19–20.
67. *Ewertz*, 305 P.3d at 29 (Malone, J., concurring).
68. *Blanco*, 432 P.3d at *19–20.
69. *Id.* at *20.

drug cases, stating that "with drug possession [cases] other contraband is often found, whether it be paraphernalia to assist with drug consumption or weapons."[70] The court stated that there is a connection between drug cases and firearm possession, but with DUI cases there is no connection.[71] The court held that allowing officers to search the vehicle incident to a lawful DUI arrest is akin to a fishing expedition.[72]

V. ANALYSIS

In *Blanco*, the court attempted to apply the *Gant* two-part test because after arresting Blanco for DUI—Blanco was put in the back of the patrol car and his vehicle was subsequently searched for evidence.[73] The court correctly stated the "immediate control" prong of the *Gant* test was inapplicable because Blanco was away from the vehicle at the time of arrest and was secured in the back of the officer's patrol car.[74] However, the court's analysis under the "reasonable belief" rule was faulty.[75]

The court attempts to make the argument that DUI should not be the type of crime that categorically allows officers to search a vehicle incident to a lawful arrest.[76] The court suggests the factual situation in *Blanco* demonstrates this, because Blanco was arrested for DUI while not being "'next to' the vehicle upon contact with the officers . . . ."[77] However, this fact makes this case an inappropriate case to determine whether under *Gant*, DUI should be a crime that categorically allows for officers to search the vehicle incident to a lawful arrest.

At a basic level, no matter what test a court uses, officers can only search a vehicle incident to a lawful arrest if the arrestee was a "recent occupant" of the vehicle.[78] If an arrestee is not a recent occupant of a vehicle, then the search incident to a lawful arrest exception does not even apply, no matter what the crime of arrest is.[79] The court acknowledges this early in its opinion when it states:

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70. *Id.* at *20–21.
71. *Id.*
72. *Id.* at *21.
73. *Id.* at *4–5.
74. *Blanco*, 432 P.3d at *4–5.
75. *See id.* at *16–19.
76. *Id.* at *19–20.
77. *Id.* at *20.
78. *See* Davis v. United States, 564 U.S. 229, 234–35 (2011); Arizona v. Gant, 556 U.S. 332, 343–44 (2009); State v. Cantrell, 233 P.3d 178, 183 (Idaho Ct. App. 2010) ("[T]he *Gant* Court concluded that police may search a vehicle incident to a recent occupant's lawful arrest 'when it is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."'").
79. *See* Thornton v. United States, 541 U.S. 615, 622 (2004). In *Thornton*, the Court clarified the rule concerning when officers can search a vehicle as a search incident to a valid arrest. *See id.* at 617. The Court held that the exception applies to arrestees that were occupants or recent occupants of a vehicle. *See id.* Thus, if someone was not a "recent occupant" of the vehicle then the exception would not apply. *See id.* However, in *Thornton*, the Court ultimately concluded that Thornton was a "recent

> [t]he officers had not maintained watch over Blanco's vehicle, could not determine how long since he had exited, and were unaware whether anyone else had entered it. Blanco was standing 20 yards away talking to bar patrons. He was not a "recent occupant" or "suspect who [was] next to a vehicle" when officers initiated contact with him. Therefore, the search was unreasonable because the applicable warrant exceptions in *Thornton* and *Gant* do not apply.[80]

In *Thornton*, the Supreme Court stated that "an arrestee's status as a 'recent occupant' may turn on his temporal or spatial relationship to the car."[81] Here, it is odd that the court would determine that the search incident to lawful arrest exception would not apply because Blanco was not a recent occupant of the vehicle, and then utilize that fact to show DUI should not categorically allow officers to search a vehicle incident to a lawful arrest.[82] If Blanco was in fact not a recent occupant of his vehicle, then the officers could not have searched his vehicle under the search incident to a lawful arrest exception—no matter what crime he was arrested for.[83]

Further, the court's analysis concerning why DUI by its nature would not provide officers a reasonable belief that offense-related evidence would be found in the vehicle was faulty. The court appeared to focus too heavily on the particular facts of *Gant* to rule out the categorical test for DUI, particularly because Gant was away from his vehicle.[84] Instead, this focus would be more aptly applied to determine whether the vehicle search incident to a valid arrest exception applies in a given case.[85]

The court assumes that if any offense would categorically allow for officers to search the vehicle incident to a lawful arrest, it would be drug offenses.[86] The court states that drug possession cases would categorically allow officers to search a recent occupants vehicle because of the likelihood of finding other contraband, including drug paraphernalia and weapons in the vehicle.[87] However, this misconstrues the analysis because the calculous is not whether evidence of other crimes would be found in the vehicle, but whether additional evidence for the crime of arrest would be

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occupant" of the vehicle, and thus, the officers could search the vehicle as a search incident to a lawful arrest. *See id.* at 622–24.

80. *Blanco*, 432 P.3d 111, *14–15.

81. *Thornton*, 541 U.S. at 622.

82. *Blanco*, 432 P.3d at *20–21.

83. *See* Dawkins v. United States, 987 A.2d 470, 475–76 (D.C. 2010); *See* United States v. Caseres, 533 F.3d 1064, 1071 (9th Cir. 2008).

84. *See Blanco*, 432 P.3d at *20.

85. *Compare* Arizona v. Gant, 556 U.S. 332, 343–44 (2009) (arguing that drug cases by their nature allow officers to search a vehicle as a search incident to a valid arrest because it would be reasonable to find offense-related evidence in the vehicle), *with Dawkins*, 987 A.2d at 476 (stating that for the second prong of the *Gant* test to apply the arrestee must have been a recent occupant of the vehicle).

86. *Blanco*, 432 P.3d at *20–21.

87. *Id.*

found in the vehicle.[88] Although drug paraphernalia would be evidence related to the offense of arrest, drug possession, it is unclear how the increased likelihood of finding weapons in the vehicle would be evidence related to that crime.[89]

Nevertheless, the majority of courts utilizing the categorical test have found that DUI cases by their nature allow officers to search the arrestee's vehicle as a valid search incident to arrest.[90] In *Gant*, the Supreme Court stated that, in cases like *Belton* and *Thornton*, which involved drug possession, "the offense of arrest will supply a basis for searching the passenger compartment of an arrestee's vehicle and any containers therein."[91] Conversely, traffic offenses, like driving with a suspended license, will not provide officers with a reasonable belief that offense-related evidence will be found in the vehicle.[92]

DUI is more analogous to drug crimes than regular traffic offenses because, like drug offenses, a DUI is an evidence-dependent crime, and a majority of the evidence will be found through an investigation of the arrestee and the vehicle.[93] This relates back to the justification for these types of searches as articulated by Justice Scalia in *Thornton*.[94] Mainly, that in DUI cases, it is reasonable for officers to believe that evidence of the offense, primarily containers of alcohol and other evidence of alcohol use, "might be found in the vehicle."[95]

The court insinuates that, although the officers could not have searched Blanco's car as a search incident to a valid arrest, the officers could search Blanco's blood alcohol content, which they argue is more probative of DUI than physical evidence.[96] However, it is important to remember that a DUI investigation does not begin and end with the breathalyzer report.[97]

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88. *Gant*, 556 U.S. at 347. The Court states that for officers to search a defendant's vehicle for other crimes, separate from the crime of arrest, officers must have probable cause to do so. *Id.* The Court emphasizes that under the automobile exception, as discussed in United States v. Ross, 456 U.S. 798, 820–21 (1982), officers are allowed to search an individual's vehicle. *Gant*, 556 U.S. at 347. The Court also reiterates that a search under the automobile exception can be much more intrusive then a search incident to a valid arrest as allowed under *Gant*. *Id.*

89. *See Dawkins*, 987 A.2d at 476 (stating that once the arrestee was arrested for drug possession the officers could reasonably search the vehicle to find additional drugs or drug paraphernalia in the vehicle); *see also* State v. Torres, 421 P.3d 733, 740–41 (Kan. 2018) (stating that when officers arrested Torres for distribution of methamphetamine, officers could search his vehicle under the second-prong of the *Gant* test to discover evidence of the crime, namely, monetary proceeds).

90. *See* State v. Ewertz, 305 P.3d 23, 27 (Kan. Ct. App. 2013); State v. Cantrell, 233 P.3d 178, 185 (Idaho Ct. App. 2010); Thomas v. Plummer, 489 F. App'x 116, *121–22 (6th Cir. 2012); United States v. Oliva, No. C-09-341, 2009 U.S. Dist. LEXIS 57293, at *15–16 (S.D. Tex. July 1, 2009).

91. *Gant*, 556 U.S. at 343–44.

92. *Id.*

93. *See Cantrell*, 233 P.3d at 185.

94. *See* Thornton v. United States, 541 U.S. 615, 629 (2004) (Scalia, J., concurring).

95. *Gant*, 556 U.S. at 343–44 (quoting *Thornton*, 541 U.S. at 632 (Scalia, J., concurring)); *Cantrell*, 233 P.3d at 185.

96. *See* State v. Blanco, 432 P.3d 111, *20–21 (Kan. Ct. App. 2018).

97. *See Cantrell*, 233 P.3d at 185.

Although a breathalyzer report is extremely probative of DUI, the idea that officers could not search a DUI suspect's car, because more probative evidence is located elsewhere, impinges upon the justification for the reasonable belief rule.[98] DUIs occur in vehicles, thus by their nature, officers will generally find evidence of the crime in the vehicle, and, as a general rule, if officers find open or empty containers of alcohol, that evidence is highly probative.[99] Thus, DUI, even more so than a drug offense, by its very nature, requires officers to search the arrestee's vehicle to find more evidence of the crime.

VI. CONCLUSION

Since *Gant*, courts have struggled with how to apply the second prong of the *Gant* analysis. However, DUI arrests should allow officers to search the vehicle as a search incident to a valid arrest of a recent occupant. Bad facts make bad law, and the Kansas Court of Appeals should not have used the facts in *Blanco* to rule out the categorical test for DUI cases. Also, a DUI case is much more analogous to a drug case than to a traffic violation. DUI cases are extremely fact dependent and require officers to obtain evidence showing that a driver was intoxicated to obtain a conviction. Thus, Kansas courts should extend the categorical test to DUI offenses, and quickly, because officers desperately need clarity.

98. *See id*.
99. *Gant*, 556 U.S. at 347; United States v. Ross, 456 U.S. 798, 820–21 (1982).