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Constitutional Law - Search and Seizure: The North Dakota Supreme Court Considers Whether an Officer May Search a Non-Arrested Person's Purse Incident to the Arrest of Another Person in the Same Vehicle - State v. Tognotti

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CONSTITUTIONAL LAW—SEARCH AND SEIZURE: THE NORTH DAKOTA SUPREME COURT CONSIDERS WHETHER AN OFFICER MAY SEARCH A NON-ARRESTED PERSON'S PURSE INCIDENT TO THE ARREST OF ANOTHER PERSON IN THE SAME VEHICLE

State v. Tognotti, 2003 ND 99, 663 N.W.2d 642

I. FACTS

At about 10:15 p.m. on April 24, 2002, Officer Todd Wahl of the Fargo Police Department stopped a vehicle for driving without headlights after dark.[1] Jessica Tognotti was the driver of the vehicle.[2] Tognotti's husband, young daughter, and friend, Wendell Decoteau, were all passengers in the car at the time of the stop.[3] Officer Wahl requested Tognotti's driver's license, registration, and insurance information.[4] He asked Tognotti's husband and Decoteau to produce identification as well.[5]

When Officer Wahl ran a routine check for outstanding arrest warrants, he learned that a warrant had been issued for Decoteau's arrest for failure to pay child support.[6] Officer Wahl arrested Decoteau, and then asked Tognotti and her husband to step out of the vehicle so he could search the passenger compartment incident to the arrest.[7] While searching the car, he searched Tognotti's purse, "which was lying on the driver's side of the front seat."[8] Officer Wahl found a sunglasses case in her purse that contained

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1. State v. Tognotti, 2003 ND 99, ¶ 3, 663 N.W.2d 642, 643. In North Dakota, driving a vehicle without headlights at night is a non-criminal traffic violation. N.D. CENT. CODE §§ 39-06.1-05, 39-21-01 (2003). A person who commits the offense may be fined but cannot receive any jail time. *Id.* § 39-06.1-05.

2. *Tognotti*, ¶ 3, 663 N.W.2d at 643.

3. *Id.*

4. Appellee's Brief at 3, State v. Tognotti, 2003 ND 99, 663 N.W.2d 642 (No. 20030015).

5. *Id.*

6. *Tognotti*, ¶ 3, 663 N.W.2d at 643-44.

7. *Id.* at 644.

8. *Id.* Before the suppression hearing in district court, the parties stipulated that the record of facts was to come from Officer Wahl's report and Tognotti's affidavit in support of the motion to suppress. Appellant's Brief at 2, State v. Tognotti, 2003 ND 99, 663 N.W.2d 642 (No. 20030015). Neither the report nor the affidavit contained any information regarding whether the officer directed Tognotti to leave her purse in the vehicle. *Id.* However, in its order to suppress, the district court made a finding of fact that "Ms. Tognotti left her purse on the driver's seat, at the officer's direction." *Id.* On appeal to the North Dakota Supreme Court, the parties disagreed over whether the district court correctly found this fact. *Compare id. with* Appellee's Brief at 5, *Tognotti* (No. 20030015). In its brief, the State claimed that there was no basis for the district court's finding in the facts agreed to by the parties. Appellant's Brief at 2, *Tognotti* (No.

various items of drug paraphernalia, "including a syringe, a spoon, three ends of what appeared to be a tied baggie, and a small amount of what appeared to be methamphetamine residue."[9] Tognotti was then arrested and charged with a Class C felony, possession of drug paraphernalia.[10]

Before trial, Tognotti filed a motion to suppress the evidence obtained through the search of her purse,[11] claiming the search was unreasonable under the Fourth Amendment of the United States Constitution.[12] On December 11, 2002, the District Court of Cass County granted Tognotti's motion and suppressed the items of drug paraphernalia that Officer Wahl had discovered in her purse.[13] The district court reasoned that the search of the vehicle incident to the arrest of the driver should not have included Tognotti's purse because Tognotti was a non-arrested occupant of the vehicle.[14] The State appealed to the North Dakota Supreme Court, which reversed the district court's ruling and found that searching Tognotti's purse incident to the arrest of the driver would be permissible if Tognotti voluntarily left the purse in the vehicle.[15]

II. LEGAL BACKGROUND

The Fourth Amendment of the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."[16]

20030015). However, Tognotti argued the finding was correct because she offered several times to testify at trial that "the officer told her to leave [the] purse in the car." Appellee's Brief at 3, *Tognotti* (No. 20030015). Ultimately, the North Dakota Supreme Court held that there was no factual basis for the finding, and remanded for an evidentiary hearing to determine whether Officer Wahl instructed Tognotti to leave her purse in the vehicle. *Tognotti*, ¶ 22, 663 N.W.2d at 650.

9. *Tognotti*, ¶ 3, 663 N.W.2d at 644.

10. *Id.* The North Dakota Century Code defines the offense of unlawful possession of drug paraphernalia as:

> A person may not use or possess with intent to use drug paraphernalia to plant, propagate, cultivate, grow, harvest, manufacture, compound, convert, produce, process, prepare, test, analyze, pack, repack, store, contain, conceal, inject, ingest, inhale, or otherwise introduce into the human body a controlled substance in violation of chapter 19-03.1. Any person violating this section is guilty of a class C felony if the drug paraphernalia is used, or possessed with intent to be used, to manufacture, compound, convert, produce, process, prepare, test, inject, ingest, inhale, or analyze a controlled substance, other than marijuana, classified in schedule I, II, or III of chapter 19-03.1. Otherwise, a violation of this section is a class A misdemeanor.

N.D. CENT. CODE § 19-03.4-03 (2003).

11. Appellant's Brief at 2, *Tognotti* (No. 20030015).

12. *Tognotti*, ¶ 4, 663 N.W.2d at 644.

13. Appellant's Brief at 2, *Tognotti* (No. 20030015).

14. *Tognotti*, ¶ 4, 663 N.W.2d at 644. The district court based its ruling on a previous decision of the North Dakota Supreme Court, State v. Gilberts, 497 N.W.2d 93 (1993). *Id.*

15. *Id.* ¶¶ 21-22, 663 N.W.2d at 650.

16. U.S. CONST. amend. IV.

As a general rule, the United States Supreme Court has expressed a preference for searches conducted under a search warrant issued by a neutral and detached magistrate and supported by probable cause.[17] However, the Court has also recognized a number of exceptions to the warrant requirement, allowing warrantless searches in certain circumstances.[18] One of these recognized exceptions is a search incident to a lawful arrest.[19] At this point, a basic overview of the United States Supreme Court's jurisprudence regarding search incident to lawful arrest, as well as an examination of one crucial North Dakota Supreme Court decision on the issue, will be helpful.

A. DEVELOPMENT OF SEARCH INCIDENT TO LAWFUL ARREST AS AN EXCEPTION TO THE WARRANT REQUIREMENT

Prior to 1969, the United States Supreme Court decisions involving the permissible scope of a search incident to arrest lacked a coherent guiding principle.[20] The Court's decision in *Chimel v. California*[21] marked a turning point in Fourth Amendment law governing searches incident to arrest.[22] Twelve years later, *New York v. Belton*[23] set forth a new bright-line rule for searches incident to the arrest of an occupant of a vehicle.[24]

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17. *E.g.*, Johnson v. United States, 333 U.S. 10, 13-14 (1948) (stating that the warrant process is preferred because a neutral judge reviews law enforcement action). The language of the Fourth Amendment reads, "[N]o Warrants shall issue, but upon probable cause supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized." U.S. CONST. amend IV. Justice Jackson famously stated,

> The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime.

Johnson, 333 U.S. at 13-14.

18. *See, e.g.*, California v. Carney, 471 U.S. 386, 390 (1985) (recognizing an automobile exception to the search warrant requirement); Schneckloth v. Bustamonte, 412 U.S. 218, 219 (1973) (recognizing an exception to the search warrant requirement when the person subject to the search has given valid consent).

19. *See, e.g.*, Chimel v. California, 395 U.S. 752, 755-56 (1969) (recognizing an exception for searches incident to arrest); New York v. Belton, 453 U.S. 454, 460 (1981) (recognizing a special exception for searching the passenger compartment of a vehicle incident to the arrest of an occupant).

20. Chimel v. California, 395 U.S. 752, 755 (1969). *See also* 3 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT 299-300 (3d ed., West Publishing Co. 1996) (1978) (summarizing pre-*Chimel* United States Supreme Court decisions concerning the permissible scope of a search incident to arrest).

21. 395 U.S. 752 (1969).

22. *Chimel*, 395 U.S. at 768.

23. 453 U.S. 454 (1981).

24. *Belton*, 453 U.S. at 460.

1. *Permissible Scope of a Search Incident to Arrest Pre-*Chimel

By the United States Supreme Court's own admission, the law governing the permissible scope of searches incident to arrest was, at best, unclear in the thirty-five years prior to *Chimel*.[25] The Court first mentioned search incident to arrest in dictum in *Weeks v. United States*,[26] approving the right to "search the person of the accused when legally arrested to discover and seize the fruits or evidences of crime."[27] Eleven years later, the Court's dictum in *Carroll v. United States*[28] extended the proper scope of a search incident to arrest to "whatever is found upon [the arrestee's] person or in his control."[29] Just a few months after *Carroll*, the Court again extended the scope language in *Agnello v. United States*,[30] to include both the person of the arrestee and the place where the arrest occurred.[31]

Beginning with the 1927 decision of *Marron v. United States*,[32] the Court's jurisprudence in this area became even more unpredictable.[33] In *Marron*, federal agents arrested the manager of an establishment selling alcoholic beverages and then searched the premises beyond the scope of the search warrant.[34] The Court upheld the search, finding that the arrest on the premises gave the agents the right to conduct a warrantless search of "all parts of the premises used for the unlawful purpose."[35]

Several years later, the Court seemed to change its approach in *Go-Bart Importing Company v. United States*.[36] In that case, federal agents arrested several people in an office and then searched the entire office, including a locked safe.[37] The Court found the search unlawful, emphasizing that the result differed from *Marron* because the agents in this case did not procure

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25. *Chimel*, 395 U.S. at 755. Justice Stewart, writing for the *Chimel* majority, observed that the Court's decisions in this area "have been far from consistent, as even the most cursory review makes evident." *Id. See also* LAFAVE, *supra* note 20, at 299 (stating that the first thirty-five years of United States Supreme Court cases on search incident to arrest involved many "twists and turns").

26. 232 U.S. 383 (1914).

27. *Weeks*, 232 U.S. at 392.

28. 267 U.S. 132 (1925).

29. *Carroll*, 267 U.S. at 158.

30. 269 U.S. 20 (1925).

31. *Agnello*, 269 U.S. at 30.

32. 275 U.S. 192 (1927).

33. *See* Chimel v. California, 395 U.S. 752, 756-59 (1969) (summarizing the United States Supreme Court's pre-*Chimel* search incident to arrest decisions).

34. *Marron*, 275 U.S. at 193-94.

35. *Id.* at 199.

36. 282 U.S. 344 (1931).

37. *Go-Bart Imp. Co.*, 282 U.S. at 349-50.

a warrant even though they had time to do so.[38] Likewise, in *United States v. Lefkowitz*,[39] law enforcement officers searched the desk drawers and a cabinet in the room where an arrest occurred, and the Court determined the scope of the search violated the Fourth Amendment.[40]

In 1947, the Court in *Harris v. United States*[41] seemed to completely ignore *Marron* and *Lefkowitz*, approving the search of a person's entire four-bedroom apartment incident to his arrest inside it.[42] However, just one year later in *Trupiano v. United States*,[43] the Court found that federal agents had unreasonably searched the premises of a distillery after arresting its operators on site.[44] The *Trupiano* majority found that the arrests alone were not enough to justify the search of the entire premises and held the search was unreasonable because the agents had time to obtain a search warrant but failed to do so.[45]

In 1950, the Supreme Court rejected *Trupiano* in *United States v. Rabinowitz*[46] and held that a search warrant is not required just because it may be practicable to obtain; rather, the inquiry is whether the search incident to arrest was reasonable under all the circumstances.[47] The *Rabinowitz* majority upheld an hour-long search of the arrestee's office, including his desk, safe, and file cabinets, incident to his arrest there.[48] The Court affirmed the continuing vitality of *Harris*,[49] and approved the principle that an arrest gives law enforcement the right "to search the place where the arrest is made in order to find and seize things connected with the crime as its fruits or as the means by which it was committed . . . ."[50]

After 1950, the United States Supreme Court applied the *Harris-Rabinowitz* rule to cases involving searches incident to arrest.[51]

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38. *Id.* at 358. Professor LaFave notes that the *Go-Bart* majority distinguished *Marron* on two additional grounds: (1) the agents in *Marron* had a search warrant, and (2) the saloon manager there committed a crime in the agents' presence. LAFAVE, *supra* note 20, at 299-300.

39. 285 U.S. 452 (1932).

40. *Lefkowitz*, 285 U.S. at 458-59, 467.

41. 331 U.S. 145 (1947).

42. *Harris*, 331 U.S. at 149-51.

43. 334 U.S. 699 (1948).

44. *Trupiano*, 334 U.S. at 702-03.

45. *Id.* at 705, 708.

46. 339 U.S. 56 (1950).

47. *Rabinowitz*, 339 U.S. at 66.

48. *Id.* at 59.

49. *Id.* at 63.

50. *Id.* at 61 (quoting Agnello v. United States, 269 U.S. 20, 30 (1925)).

51. *See* Chimel v. California, 395 U.S. 752, 760 n.4 (1969) (stating that the Court had applied the "abstract doctrine" of *Rabinowitz* to subsequent cases); *see also* Ker v. California, 374 U.S. 23, 41-42 (1963) (citing to *Harris* and *Rabinowitz*); Abel v. United States, 362 U.S. 217, 235-36 (1960) (explaining the applicability of the *Harris-Rabinowitz* rule).

Significantly, the *Harris-Rabinowitz* rule imposed minimal limitations on the search incident to arrest exception; it seemed to allow a search of the entire premises where a person was arrested.[52] The Court did limit the scope of the search somewhat, at least as to duration and intensity, based on the type of items law enforcement was seeking during the search.[53] But in cases where law enforcement arrested a vehicle occupant, *Harris-Rabinowitz* generally allowed a full search of the vehicle, including the trunk.[54] After almost two decades of purporting to adopt and apply the *Harris-Rabinowitz* rule, the Court ultimately rejected it in *Chimel*, finding that it could "withstand neither historical nor rational analysis."[55]

2. *Permissible Scope of a Search Incident to Arrest Under Chimel v. California*

In 1969, the United States Supreme Court dramatically changed its approach to searches incident to arrest in *Chimel*.[56] In that case, three law enforcement officers obtained a warrant to arrest Chimel for the burglary of a local coin shop.[57] When the officers went to Chimel's home to arrest him, he was not there.[58] However, Chimel's wife allowed the officers to wait in the house, and Chimel arrived about ten to fifteen minutes later.[59] After showing him the arrest warrant, the officers sought consent to search the house, which Chimel refused.[60] The officers told Chimel that they were allowed to search the house anyway as a result of his arrest and then searched the entire house, "including the attic, the garage, and a small workshop."[61] The officers seized various coins and other objects during the

52. *See Abel*, 362 U.S. at 235 (stating "*Harris* and *Rabinowitz* set by far the most permissive limits upon searches incidental to lawful arrests"). *See also* LAFAVE, *supra* note 20, at 300 (explaining the impact of the *Harris-Rabinowitz* rule).

53. *See* Harris v. United States, 331 U.S. 145, 152-53 (1947) (stating that the type of thorough search required to find two canceled checks would not be reasonable to find a stolen car or an illegal still).

54. *See* LAFAVE, *supra* note 20, at 433 (explaining the manner in which courts applied the *Harris-Rabinowitz* rule).

55. *Chimel*, 395 U.S. at 760. In *Chimel*, Justice Stewart noted that even the United States Supreme Court had difficulty applying the "abstract" *Harris-Rabinowitz* doctrine, and its cases under the rule produced "divergent results." *Id.* at n.4. LaFave argues that the Court's abandonment of the *Harris-Rabinowitz* rule was proper because it was never supported by a convincing rationale. LAFAVE, *supra* note 20, at 302.

56. *Chimel*, 395 U.S. at 768.

57. *Id.* at 753.

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

course of the search.[62] The United States Supreme Court found that the officers had exceeded the permissible scope of a search incident to arrest, making the search unreasonable under the Fourth Amendment.[63]

In reaching its decision, the *Chimel* majority focused on two primary justifications for allowing a search incident to arrest under the Fourth Amendment: officer safety and preservation of evidence.[64] In terms of safety, the Court stated that it would be reasonable for an officer to search the arrested person for weapons.[65] Likewise, an officer could reasonably search the arrested person for evidence to prevent its destruction.[66] Moving beyond the search of the person, the Court then reasoned that any weapons or evidence in the surrounding area within the reach of the arrestee would be a danger as well.[67] Based on this logic, the Court determined that the permissible scope of a search incident to arrest extended to "a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence."[68]

Applying this rule to the facts of the case, the majority determined that the search of Chimel's entire house incident to his arrest was unreasonable under the Fourth Amendment.[69] The extensive search did not serve the underlying purposes of a search incident to arrest because Chimel could not have had access to the weapons or evidence in his entire house.[70] The Court concluded that "[t]here was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area" of Chimel's immediate control.[71]

Although the facts of *Chimel* involved the search of an arrestee's residence incident to arrest, *Chimel*'s rationale was still clearly applicable to

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62. *Id.*

63. *Id.* at 768. At trial, Chimel claimed that the items taken during the search were obtained in violation of the Fourth Amendment. *Id.* at 754. The state trial court found that the evidence was admissible, and Chimel was convicted of two burglary charges. *Id.* His conviction was affirmed twice on appeal before reaching the United States Supreme Court. *Id.*; People v. Chimel, 439 P.2d 333, 334 (1968).

64. Chimel v. California, 395 U.S. 752, 762-63 (1969); *see also* LAFAVE, *supra* note 20, at 433-34 (explaining the *Chimel* Court's rationale).

65. *Chimel*, 395 U.S. at 763.

66. *Id.*

67. *Id.*

68. *Id.* The United States Supreme Court expressly overruled its previous decisions in Harris v. United States, 331 U.S. 145 (1947), and United States v. Rabinowitz, 339 U.S. 56 (1950), to the extent that the two decisions were inconsistent with the principles of *Chimel*. *Id.* at 768.

69. *Id.* at 768.

70. *Id.*

71. *Id.*

vehicle searches incident to arrest.[72] However, some lower courts resisted applying *Chimel*'s principles to vehicle searches, and in those courts that attempted to apply *Chimel*, the results were anything but uniform.[73] Ultimately, *Chimel*'s "immediate control" language became far less important in the context of vehicle searches, when the Court announced a new rule for searches incident to the lawful custodial arrest of a vehicle occupant in *New York v. Belton*.[74]

3. *Creation of a Bright-Line Rule for Search Incident to the Arrest of a Vehicle Occupant Under New York v. Belton*

In *Belton*, decided twelve years after *Chimel*, the United States Supreme Court further defined the permissible scope of a search incident to arrest in the specific context of vehicle searches.[75] In that case, a police officer pulled over a speeding vehicle on the highway; four people were in the vehicle, including Belton.[76] When he approached the car to obtain driver's license and registration information, the officer noticed the smell of burning marijuana and saw an envelope labeled "Supergold," which he knew related to marijuana use.[77] The officer arrested and searched all four men incident to arrest, including Belton, and then began searching the passenger compartment of the vehicle.[78] He also searched Belton's jacket, which had been left in the car, and found cocaine in one of the pockets.[79]

After being charged with criminal drug possession, Belton moved to suppress the cocaine, which he claimed was obtained through an unreasonable search.[80] The United States Supreme Court held that the officer had the right to search Belton's jacket during the search of the vehicle incident to arrest.[81]

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72. LAFAVE, *supra* note 20, at 434. In reaching this conclusion, LaFave observes the *Chimel* Court's reference to *Preston v. United States*, 376 U.S. 364 (1964), which involved a vehicle search. *Id.*

73. *Id.* at 434-35.

74. New York v. Belton, 453 U.S. 454, 460 (1981).

75. *Belton*, 453 U.S. at 455.

76. *Id.*

77. *Id.* at 455-56.

78. *Id.* at 456.

79. *Id.*

80. *Id.* The trial court ruled that the cocaine was admissible, and Belton plead guilty, reserving the right to appeal the suppression issue. *Id.* Belton's first appeal to the Appellate Division of the New York Supreme Court was unsuccessful. People v. Belton, 416 N.Y.S.2d 922, 925 (N.Y. App. Div. 1979). On his second appeal, the New York Court of Appeals reversed, finding that the search of Belton's jacket was unreasonable, and suppressed the cocaine. People v. Belton, 407 N.E.2d 420, 423 (N.Y. 1980). His second appeal also generated a strong dissent. *Id.* at 423.

81. New York v. Belton, 453 U.S. 454, 462-63 (1981). *Belton* was a 5-4 decision, with Justice Stewart writing the majority opinion for the Court. *Id.* at 455.

In reaching its decision, the Court relied heavily on the notion that *Chimel* did not create a straightforward rule for determining the proper scope of vehicle searches incident to arrest.[82] The majority reasoned that "[a] single familiar standard is essential to guide police officers, who have only limited time and expertise" to assess the circumstances around them.[83] Evaluating the lower court decisions on the issue, the Court determined that the *Chimel* "immediate control" test was too difficult to apply on a case-by-case basis in vehicle situations.[84]

In response to this perceived difficulty, the *Belton* majority decided a new bright-line rule to govern searches incident to the arrest of a vehicle occupant.[85] In formulating this rule, the Court worked from the assumption that any items inside the passenger compartment of a vehicle "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 [item].'"[86] Under the Court's reasoning, this generalization brought the entire passenger compartment of the vehicle within the proper limits of *Chimel*, while still providing a workable rule for law enforcement.[87]

In *Belton*, the Court announced its new bright-line rule.[88] When an officer makes a lawful custodial arrest of a vehicle occupant, the officer can search the passenger compartment of that vehicle incident to the arrest.[89] However, the Court explicitly excluded the trunk of the vehicle from the permissible scope of the search.[90] In addition, the officer would be allowed

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82. *Id.* at 460.

83. *Id.* at 458 (quoting Dunaway v. New York, 442 U.S. 200, 213-14 (1979)).

84. *Id.* at 459. LaFave argues that the *Belton* majority overstated the difficulty of applying *Chimel* to vehicle searches, and that "the *Chimel* rationale is in many respects easier in automobile cases than in in-premises cases because the police can, and typically do, immediately remove the arrestee from the vehicle." LAFAVE, *supra* note 20, at 455. After the arrested person is out of the vehicle, it should be easier to control his access to weapons or evidence. *Id.* He concludes that any disarray in the lower courts "has been more a product of the police seeing how much they could get away with . . . than their being confronted with inherently ambiguous situations." *Id.*

85. *Belton*, 453 U.S. at 460.

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

87. *Id.*

88. *Id.* The *Belton* majority emphasized that its holding did not change the "fundamental principles" of *Chimel*, but rather just "determine[d] the meaning of *Chimel*'s principles in this particular and problematic context." *Id.* at n.2.

89. *Id.* at 460. The United States Supreme Court recently refined the meaning of a vehicle "occupant" under *Belton*'s bright-line rule in *Thornton v. United States*, 541 U.S. 615, 617 (2004). In *Thornton*, the suspect, who had been driving when he first saw the police officer, parked and exited his vehicle before the officer could stop him. *Id.* The Court held that Thornton was a "recent" occupant of a vehicle, and therefore, the officer could search his vehicle incident to the arrest. *Id.* at 620-23.

90. *Belton*, 453 U.S. at 461 n.4. Justice Brennan's dissent in *Belton* points out that in some vehicles the trunk area may be reached through the passenger compartment, such as a station

to search any open or closed containers found in the passenger compartment.[91] The Court noted that the term "container" meant "any object capable of holding another object," including the glove compartment, boxes, bags, and clothing.[92] Because the right to search any containers in the passenger compartment is justified by the arrest alone, the probability of finding weapons or evidence in a particular container is irrelevant.[93]

Turning to the facts of the case, the majority determined that the search of Belton's jacket was reasonable under its newly announced bright-line rule.[94] Belton was a passenger in a vehicle at the time of his arrest,[95] so the search incident to arrest could extend to the entire passenger compartment of the vehicle, including any containers.[96] Belton's jacket was a "container" within the passenger compartment; therefore, the officer rightfully searched it incident to his arrest.[97]

Since the decision came down in 1981, *Belton* has had its share of critics.[98] In his dissenting opinion, Justice Brennan argued that the Court was adopting a legal fiction to support its bright-line rule because the entire passenger compartment is not always within the reach of the arrestee.[99] Another criticism is that *Belton*'s bright-line rule leaves many unanswered questions, and that *Chimel*'s "immediate control" test is actually easier to apply.[100] Finally, it has been argued that the *Belton* bright-line rule has the

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wagon. *Id.* at 470 (Brennan, J., dissenting). The majority does not discuss how the *Belton* bright-line rule should be applied in such a case. *Id.*

91. *Id.* at 460-61.

92. *Id.* at 461 n.4.

93. *Id. See also* LAFAVE, *supra* note 20, at 452-53 (stating that the *Belton* majority's emphasis on a bright-line approach "strongly suggests the Court did not want to compel the police to make case-by-case judgments as to where weapons or evidence might be located.").

94. *Belton*, 453 U.S. at 462-63.

95. *Id.* at 462. Belton did not challenge the lawfulness of the custodial arrest. *Id.* at 460 n.2.

96. *Id.* at 460-61.

97. *Id.* at 462-63.

98. *See id.* at 464-66 (Brennan, J., dissenting) (arguing *Belton* fails to reflect the policy justifications for a search incident to arrest offered in *Chimel*); *id.* at 472 (White, J., dissenting) (objecting to the search of containers in the vehicle without any particularized suspicion). Five of the current United States Supreme Court justices recently criticized *Belton* in Thornton v. United States, 541 U.S. 615, 624-36 (2004). In her concurrence, Justice O'Connor expressed dissatisfaction with *Belton* and its "shaky foundation." *Id.* at 624 (O'Connor, J., concurring). Justice Scalia's concurrence stated that the Court's jurisprudence in this area is not logically consistent, because "*Belton* cannot reasonably be explained as a mere application of *Chimel*." *Id.* at 631 (Scalia, J., dissenting). Justices Stevens and Souter argued that *Belton* is wrongfully being applied to cases beyond its bright-line. *Id.* at 640 (Stevens, J., dissenting).

99. *Belton*, 453 U.S. at 466 (Brennan, J., dissenting). *See also* LAFAVE, *supra* note 20, at 455 (agreeing that there are many cases in which an arrestee could not reach the interior of the vehicle, such as when he is moved to a patrol car, handcuffed, or restrained by an officer).

100. *Belton*, 453 U.S. at 469-71 (Brennan, J., dissenting). Professor LaFave agrees that *Belton*'s rule leaves unanswered questions on some critical issues, but also claims that it is "not as ambiguous as the dissenters in that case assert." LAFAVE, *supra* note 20, at 454.

potential to be abused by law enforcement, as officers now have an incentive to make arrests they otherwise would not in order to perform a search.[101]

In light of these criticisms, some state courts have declined to apply *Belton* under their state constitutions, choosing instead to apply the more restrictive test of *Chimel* to determine the permissible scope of a vehicle search incident to arrest.[102] The North Dakota Supreme Court, however, has embraced the *Belton* bright-line rule and continues to apply it in cases involving the arrest of a vehicle occupant.[103]

B. THE NORTH DAKOTA SUPREME COURT CONSIDERS THE APPLICABILITY OF *BELTON* TO NON-ARRESTED VEHICLE OCCUPANTS

In *State v. Gilberts*,[104] the North Dakota Supreme Court was presented with the question of whether the *Belton* bright-line rule allows an officer to search an item in the passenger compartment belonging to a non-arrested vehicle occupant incident to the arrest of another person in that vehicle.[105] In that case, Gilberts was the front-seat passenger in a car that was stopped for speeding on the highway.[106] The officer arrested the driver after discovering that he had a suspended driver's license.[107] The officer placed the driver in his patrol vehicle and then asked Gilberts to get out of the car so he could search it incident to the arrest.[108] When Gilberts exited the car, the officer noticed a jacket that had been draped around Gilberts' shoulders was left inside and offered it to him because the weather was cold.[109] Gilberts told the officer that it was his jacket.[110] When the officer handed it to Gilberts, he noticed a large amount of cash in one of the pockets.[111] The officer removed the cash and a small box from the pocket.[112] Inside the

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101. LAFAVE, *supra* note 20, at 457.

102. *Id.* at 436 n.24. States that have rejected *Belton* under their state constitutions or statutes include Kansas, Louisiana, Massachusetts, New Jersey, New York, Oregon, Pennsylvania, and Washington. *Id.*

103. *E.g.*, State v. Haverluk, 2000 ND 178, ¶ 8, 617 N.W.2d 652, 655 (stating that the Court applies the *Belton* rule to searches incident to the arrest of a vehicle occupant); State v. Wanzek, 1999 ND 163, ¶ 8, 598 N.W.2d 811, 813-14 (applying the *Belton* rule).

104. 497 N.W.2d 93 (1993).

105. *Gilberts*, 497 N.W.2d at 96-97.

106. *Id.* at 94.

107. *Id.*

108. *Id.* at 95.

109. *Id.*

110. *Id.*

111. *Gilberts*, 497 N.W.2d at 95.

112. *Id.*

box, the officer found a scale with white power residue, which Gilberts admitted he had used to weigh cocaine.[113]

Gilberts was then arrested and charged with unlawful possession of cocaine.[114] He moved to suppress the cocaine, claiming the search of his jacket was unreasonable under the Fourth Amendment.[115] The North Dakota Supreme Court held that the search of the vehicle incident to the driver's arrest could not reasonably include Gilberts' jacket.[116]

In *Gilberts*, the court affirmed its adherence to *Belton*'s bright-line rule, acknowledging that the officer was authorized to search the passenger compartment of the car incident to the driver's arrest.[117] However, the court also noted that *Belton* involved a slightly different factual scenario.[118] In *Belton*, all four occupants of the vehicle were arrested.[119] In this case, Gilberts was a non-arrested occupant in the car, and only the driver was arrested.[120] Based on this difference, the court determined that the *Belton* search was limited as to Gilberts because of the "individualized nature of the protections afforded to each person by the Fourth Amendment."[121]

In support of its reasoning, the court cited *Ybarra v. Illinois*,[122] a case in which officers searched all of the patrons in a bar while conducting a search of the premises under a search warrant.[123] The officers found drugs on Ybarra and arrested him.[124] The United States Supreme Court ruled that the pat down search of Ybarra was unreasonable because the officers did not have any individualized suspicion to think that he was armed or dangerous.[125]

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113. *Id.*

114. *Id.*

115. *Id.* The trial court denied Gilberts' suppression motion, and he entered a conditional guilty plea. *Id.* at 94.

116. *Id.* at 97. The court resolved two other issues in the case on appeal. First, Gilberts claimed that the officer had unreasonably ordered him to get out of the car in violation of the Fourth Amendment. *Id.* at 95. The Court rejected this argument, finding that the officer had the right to request that Gilberts exit the car. *Id.* at 95-96. Second, the State argued that the search of Gilberts' jacket was supported by probable cause to believe that Gilberts was involved in drug activity and that the jacket would contain contraband. *Id.* at 96. The court disagreed and found that the officer did not have any reason to think Gilberts was involved with drugs until after he searched the jacket. *Id.* at 98-99.

117. *Gilberts*, 497 N.W.2d at 96.

118. *Id.* at 96-97.

119. *Id.*

120. *Id.*

121. *Id.*

122. 444 U.S. 85 (1979).

123. *Ybarra*, 444 U.S. at 88-89.

124. *Id.* at 89.

125. *Id.* at 93.

Following this rationale in *Gilberts*, the North Dakota Supreme Court found it was significant that the officer knew the jacket belonged to Gilberts, the non-arrested passenger, before he searched it.[126] Under these facts, the court determined that the *Belton* bright-line rule alone was not enough to justify the intrusion into Gilberts' privacy, and therefore, the search of Gilberts' jacket had to be independently supported by particularized probable cause or reasonable suspicion.[127] Ultimately, the court determined that the officer did not have sufficient suspicion to search Gilberts' jacket, and his conviction was overturned.[128]

In a concurring opinion, Chief Justice VandeWalle disagreed with the majority's application of *Ybarra* to the facts of the case, arguing that it unnecessarily blurred the bright-line rule of *Belton*.[129] Under *Belton*, an officer may search the passenger compartment of a vehicle and any containers therein incident to the lawful custodial arrest of a vehicle occupant.[130] *Belton*'s definition of a container includes clothing.[131] Therefore, Chief Justice VandeWalle reasoned, *Belton* and *Ybarra* should be read together to stand for the proposition that "the officer is entitled to search any clothing in the automobile that is not actually being worn by the passenger."[132] However, the Chief Justice "reluctantly" concurred in the result because the facts indicated that the officer had seen the jacket draped around Gilberts before conducting the search.[133]

C. THE UNITED STATES SUPREME COURT ADDRESSES THE PROPRIETY OF SEARCHING A NON-ARRESTED VEHICLE OCCUPANT'S BELONGINGS

Six years after *Gilberts* in *Wyoming v. Houghton*,[134] the United States Supreme Court discussed whether law enforcement has the right to search a non-arrested passenger's personal items while searching a vehicle during a probable cause search.[135] In that case, Houghton was a passenger in a vehicle that was stopped for speeding.[136] The officer approached the car in order to speak with the driver, and during their conversation, he noticed a

126. State v. Gilberts, 497 N.W.2d 93, 97 (1993).
127. *Id.*
128. *Id.* at 99.
129. *Id.* (VandeWalle, C.J., concurring).
130. New York v. Belton, 453 U.S. 454, 460 (1981).
131. *Id.* at 461 n.4.
132. State v. Gilberts, 497 N.W.2d 93, 99 (1993) (VandeWalle, C.J., concurring).
133. *Id.*
134. 526 U.S. 295 (1999).
135. *Houghton*, 526 U.S. at 302-03.
136. *Id.* at 297-98.

syringe in the driver's front shirt pocket.[137] The driver admitted that he used the syringe to inject drugs.[138] The officers at the scene then removed Houghton and the other passenger from the car and searched the car's interior for any other illegal items.[139]

One of the officers found a purse in the vehicle, and Houghton told him that it belonged to her.[140] The officer searched the purse and found a small brown pouch inside containing drug paraphernalia, a syringe, and methamphetamine.[141] Houghton argued that this search was unreasonable under the Fourth Amendment, and therefore, the drugs and drug paraphernalia should be suppressed.[142] The United States Supreme Court disagreed, finding that Houghton's purse was properly within the scope of the officer's probable cause search of the vehicle.[143]

The Court in *Houghton* began by acknowledging that there was clearly probable cause for the officers to search the car based on the syringe found on the driver and his admission that he had used it to take drugs.[144] Turning to whether the probable cause search should have extended to Houghton's purse, the Court reasoned that an officer does not need particularized probable cause in order to search each separate container in a vehicle.[145] Rather, when an officer has probable cause to search the car, that is enough to search any containers therein, even those of a passenger. "A passenger's belongings, just like the driver's belongings or containers attached to the car like a glove compartment, are 'in' the car."[146] The *Houghton* majority reasoned that creating an exception to the probable cause search for "passenger's property" would seriously impede law enforcement and lead

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137. *Id.* at 298.

138. *Id.*

139. *Id.*

140. *Houghton*, 526 U.S. at 298.

141. *Id.*

142. *Id.* at 299. The trial court denied Houghton's suppression motion, and she was convicted of felony possession of methamphetamine. *Id.* at 298-99. The Wyoming Supreme Court reversed, holding that the officer should not have searched Houghton's purse because he knew it belonged to her, and she was "not suspected of criminal activity." Houghton v. State, 956 P.2d 363, 372 (Wyo. 1998). Because there was no individualized probable cause to believe contraband would be found in the purse, the search was unreasonable. *Id.* at 371-72.

143. Wyoming v. Houghton, 526 U.S. 295, 302 (1999).

144. *Id.* at 300. This is known as the "automobile exception" to the warrant requirement, which originated in *Carroll v. United States*, 267 U.S. 132, 153 (1925). If an officer has probable cause to believe contraband will be found in a vehicle, she may search any part of the vehicle or any containers within "that may conceal the object of the search." United States v. Ross, 456 U.S. 798, 825 (1982).

145. *Houghton*, 526 U.S. at 302.

146. *Id.*

to a litany of cases contesting who actually owned the property searched.[147] Based on these principles, the Court held that the search of Houghton's purse was reasonable, because it was in the car at the time of the probable cause search and could have concealed other evidence of drug use.[148]

In a concurring opinion, Justice Breyer noted the importance of the fact that Houghton's purse was left in the car, rather than remaining on her person.[149] He viewed purses as "special containers" that are "repositories of especially personal items that people generally like to keep with them at all times."[150] Justice Breyer reasoned that if a woman's purse were somehow attached to the person, it should be treated as "outer clothing" that would require particularized probable cause to search.[151] Because Houghton was separated from her purse, it was properly searched as part of the probable cause search of the vehicle.[152]

D. STATE COURTS CONSIDER WHETHER A NON-ARRESTED VEHICLE OCCUPANT'S BELONGINGS MAY BE SEARCHED INCIDENT TO THE ARREST OF A VEHICLE OCCUPANT

After the United States Supreme Court's decision in *Houghton*, several state courts applied its principles regarding passenger's belongings in the context of vehicle searches incident to arrest.[153] In *State v. Lopez*,[154] an Arizona appellate court determined that even though *Houghton* involved a probable cause search, its principles logically extended to searches incident to the arrest of a vehicle occupant.[155] Therefore, the court held that law enforcement had the right to search all containers in the passenger compartment of a vehicle, regardless of ownership, incident to the arrest of

147. *Id.* at 305. *See also* LAFAVE, *supra* note 20, at Supp. 131 (agreeing that requiring individualized probable cause for each container in a vehicle would hinder law enforcement because "circumstances often will be very confusing as to what containers belong to what persons"). For the most part, however, LaFave is highly critical of the United States Supreme Court's reasoning in *Houghton*. *Id.* at 130-31.

148. *Houghton*, 526 U.S. at 306-07.

149. *Id.* at 308 (Breyer, J., concurring).

150. *Id.*

151. *Id.*

152. *Id.* at 307-08.

153. *See* State v. Lopez, 10 P.3d 1207, 1211 (Ariz. Ct. App. 2000) (citing to *Houghton* for the principle that all containers in the passenger compartment may be searched incident to the arrest of a vehicle occupant); State v. Ray, 620 N.W.2d 83, 89 (Neb. 2000) (finding *Houghton* leads to the conclusion that a search incident to arrest includes all items in the passenger compartment, including those of a non-arrested occupant); State v. Steele, 2000 SD 78, ¶ 17, 613 N.W.2d 825, 829-30 (holding passenger's belongings in the car may be searched incident to arrest under *Houghton*).

154. 10 P.3d 1207 (Ariz. Ct. App. 2000).

155. *Lopez*, 10 P.3d at 1211.

a vehicle occupant.[156] Likewise, in *State v. Ray*,[157] the Nebraska Supreme Court applied the reasoning of *Houghton* in the case of a search incident to arrest and upheld the search of a non-arrested occupant's backpack that had been left in the passenger compartment of the vehicle.[158] In reaching this conclusion, the court reasoned that the scope of a vehicle search incident to arrest includes all containers in the passenger compartment, even those containers belonging to a non-arrested occupant.[159] The South Dakota Supreme Court also relied on *Houghton* in *State v. Steele*,[160] and determined that a non-arrested passenger's purse was properly searched incident to the arrest of the driver because it was "in the car."[161]

While some state courts have relied heavily on *Houghton* in resolving this issue, other state courts have looked at the importance of upholding the *Belton* bright-line rule.[162] A California appellate court in *People v. Mitchell*[163] held that law enforcement had the right to search a non-arrested vehicle occupant's belongings during the search of the passenger compartment incident to arrest.[164] In its reasoning, the court noted that requiring officers to ascertain the ownership of containers in the vehicle would "inject confusion" into the *Belton* bright-line rule.[165] Similarly, the Colorado Supreme Court in *People v. McMillon*[166] relied on the *Belton* rationale in determining that law enforcement properly searched a non-arrested vehicle occupant's purse left in the passenger compartment.[167] The court stated that the arrest of a vehicle occupant "justifies the reasonable infringement on any privacy interest that another passenger in the automobile may have in that container."[168] Courts in Florida and Washington reached the same

156. *Id.*

157. 620 N.W.2d 83 (Neb. 2000).

158. *Ray*, 620 N.W.2d at 89.

159. *Id.*

160. 2000 SD 78, 613 N.W.2d 825.

161. *Steele*, ¶ 17, 613 N.W.2d at 829-30.

162. *See* People v. Mitchell, 42 Cal. Rptr. 2d 537, 539 (Cal. Ct. App. 1995) (finding *Belton*'s bright-line rule authorizes officer's search of a passenger's purse incident to the arrest of the driver); People v. McMillon, 892 P.2d 879, 884 (Colo. 1995) (allowing a search of a passenger's purse incident to the arrest of another person in the vehicle under *Belton*); State v. Moore, 619 So. 2d 376, 377 (Fla. Dist. Ct. App. 1993) (holding that an officer could search a passenger's purse incident to arrest of driver under *Belton*); State v. Parker, 944 P.2d 1081, 1084-85 (Wash. Ct. App. 1997) (allowing a search of non-arrested passenger's purse incident to arrest of the driver based on *Belton*).

163. 42 Cal. Rptr. 2d 537 (Cal. Ct. App. 1995).

164. *Mitchell*, 42 Cal. Rptr. 2d at 538.

165. *Id.* at 540.

166. 892 P.2d 879 (Colo. 1995).

167. *McMillon*, 892 P.2d at 884.

168. *Id.*

conclusion regarding passenger's property based on the importance of retaining the *Belton* bright-line rule, and upheld the search of a non-arrested passenger's purse that had been left in the passenger compartment of the vehicle.[169]

E. SUMMARY OF LEGAL BACKGROUND

Prior to 1969, the United States Supreme Court's search incident to arrest jurisprudence was inconsistent and unpredictable.[170] However, in *Chimel*, the Court formulated a new standard, holding that the scope of a search incident to arrest could extend to a search of the "arrestee's person and the area 'within his immediate control.'"[171] Unsatisfied with the application of *Chimel* in the specific context of vehicle searches, the Court in *Belton* announced a bright-line rule for vehicle searches incident to arrest.[172] When a vehicle occupant has been arrested, an officer may search the passenger compartment of the vehicle and any containers found therein.[173]

Although the North Dakota Supreme Court generally followed *Belton*, it determined in *Gilberts* that *Belton*'s principles did not apply to the belongings of a non-arrested vehicle occupant.[174] Rather, the court found that particularized probable cause or reasonable suspicion was necessary to search an item that officers knew belonged to a non-arrested person, even if it had been left in the vehicle.[175] Six years after *Gilberts*, the United States Supreme Court in *Houghton* held that officers conducting a probable cause search of a vehicle could search a non-arrested passenger's belongings that were left in the vehicle.[176] Several state courts found the *Houghton* rationale applicable to vehicle searches incident to arrest, and held that law enforcement may search the property of a non-arrested person during a search of the passenger compartment incident to the arrest of a vehicle occupant.[177]

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169. State v. Moore, 619 So. 2d 376, 377 (Fla. Dist. Ct. App. 1993); State v. Parker, 944 P.2d 1081, 1084-85 (Wash. Ct. App. 1997).

170. Chimel v. California, 395 U.S. 752, 755 (1969).

171. *Id.* at 763.

172. New York v. Belton, 453 U.S. 454, 459-60 (1981).

173. *Id.* at 460-61.

174. State v. Gilberts, 497 N.W.2d 93, 96-97 (1993).

175. *Id.* at 97-98.

176. Wyoming v. Houghton, 526 U.S. 295, 302 (1999).

177. *See* State v. Lopez, 10 P.3d 1207, 1211 (Ariz. Ct. App. 2000) (applying *Houghton* in the case of a search incident to arrest); State v. Ray, 620 N.W.2d 83, 89 (Neb. 2000) (relying on *Houghton* to determine that a non-arrested vehicle occupants belongings may be searched); State v. Steele, 2000 SD 78, ¶ 17, 613 N.W.2d 825, 829-30 (applying *Houghton* to search incident to arrest).

III. ANALYSIS

The North Dakota Supreme Court issued a unanimous decision in *Tognotti* with Justice Maring writing for the court.[178] Ten years after *Gilberts*, the *Tognotti* court reconsidered whether *Belton*'s bright-line rule allows an officer to search any items in the passenger compartment of a vehicle incident to the arrest of a vehicle occupant, even if they belong to a non-arrested occupant.[179] In its reasoning, the court relied heavily on the United States Supreme Court's decision in *Wyoming v. Houghton* and the decisions of other state courts.[180] Ultimately, the Court overruled *Gilberts* in favor of a more categorical approach to the search of containers in a vehicle incident to the arrest of a vehicle occupant.[181]

A. REAFFIRMANCE OF *BELTON*'S VITALITY IN NORTH DAKOTA

The *Tognotti* court began by reaffirming its adherence to the *Belton* bright-line rule for determining the scope of vehicle searches incident to the lawful custodial arrest of an occupant.[182] The court emphasized the twin purposes of *Belton*, namely, to create a workable rule for law enforcement in vehicle searches and to eliminate the need for courts to assess reasonableness on an ad hoc basis.[183] In light of the need for a clear standard governing the scope of vehicle searches, the court reasoned that its decision in *Gilberts*, which required officers to determine the ownership of containers in a vehicle before allowing a search, "unnecessarily dim[med] the bright-line as announced by *Belton*."[184]

B. NEED FOR A BRIGHT-LINE RULE REINFORCED IN *HOUGHTON*

In further support of the proposition that a bright-line rule is necessary for vehicle searches, the court cited the United States Supreme Court's decision in *Houghton*.[185] Although *Houghton* involved a warrantless search supported by probable cause under the "automobile exception" rather than a search incident to a custodial arrest, the court still found its principles helpful in resolving the issue before it in *Tognotti*.[186] The court quoted with approval passages from *Houghton* regarding the difficulty that law

178. State v. Tognotti, 2003 ND 99, ¶ 1, 663 N.W.2d 642, 643.
179. *Id.* ¶ 6, 663 N.W.2d at 644.
180. *Id.*, ¶¶ 11-13, 663 N.W.2d at 646-48.
181. *Id.* ¶ 11, 663 N.W.2d at 646.
182. *Id.* ¶ 10.
183. *Id.* (citing State v. Wanzek, 1999 ND 163, ¶ 15, 598 N.W.2d 811, 815).
184. *Tognotti*, ¶ 11, 663 N.W.2d at 646.
185. *Id.* at 646-47.
186. *Id.*

enforcement and the courts would encounter if there were a special exception for passenger's property in vehicle searches.[187] Following the reasoning of *Houghton*, the court anticipated that officers would be forced to make determinations of ownership before searching containers in a vehicle, and criminal defendants would later contest these determinations in lawsuits.[188] Ultimately, the court found that a special rule "based upon ownership of containers or other articles inside the vehicle" was inconsistent with the bright-line approach necessary for effective law enforcement.[189]

C. NEED FOR A BRIGHT-LINE RULE REAFFIRMED IN STATE COURT DECISIONS

In addition to drawing from the principles of *Houghton*, the court reviewed how other state courts had decided the issue in the time following *Gilberts*.[190] The court observed that a number of state courts, including California, Colorado, Florida, and Washington, had already decided prior to *Houghton* that the *Belton* bright-line rule allows officers to search containers belonging to a non-arrested vehicle occupant that are found in the passenger compartment.[191] Furthermore, the court noted that several more recent state court decisions, including Arizona, Nebraska, and South Dakota, had relied on the United States Supreme Court's reasoning in *Houghton* to determine that the permissible scope of a vehicle search incident to arrest includes a non-arrested vehicle occupant's containers in the passenger compartment.[192] The *Tognotti* court stated that it found the reasoning of these state court decisions to be "persuasive," and then announced its holding: "[A]n arresting officer's search of a purse belonging to a nonarrested occupant which is voluntarily left in the vehicle is a valid search incident to the arrest of a passenger in the vehicle."[193]

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187. *Id.* at 647 (quoting Wyoming v. Houghton, 526 U.S. 295, 305-06 (1999)).

188. *Id.*

189. *Id.* at 646.

190. *Id.* ¶¶ 11-13, 663 N.W.2d at 647-48.

191. *Id.* ¶ 13, 663 N.W.2d at 648 (citing People v. Mitchell, 42 Cal. Rptr. 2d 537, 539 (Cal. Ct. App. 1995); People v. McMillon, 892 P.2d 879, 884 (Colo. 1995); State v. Moore, 619 So. 2d 376, 377 (Fla. Dist. Ct. App. 1993); State v. Parker, 944 P.2d 1081, 1084 1085 (Wash. Ct. App. 1997)).

192. *Id.* ¶ 11, 663 N.W.2d at 647 (citing State v. Lopez, 10 P.3d 1207, 1211 (Ariz. Ct. App. 2000); State v. Ray, 620 N.W.2d 83, 89 (Neb. 2000); State v. Steele, 2000 SD 78, ¶ 17, 613 N.W.2d 825, 829-30).

193. *Id.* ¶¶ 13-14, 663 N.W.2d at 648.

D. LIMITATIONS ON THE BRIGHT-LINE RULE AS TO NON-ARRESTED VEHICLE OCCUPANTS

Having clearly affirmed its adherence to a bright-line rule for vehicle searches, the court was careful to indicate the limitations of its holding as well.[194] First, the court noted that the *Belton* bright-line allows a search of the passenger compartment of the vehicle and any containers therein incident to arrest, but it does not allow the search of a non-arrested occupant's person.[195] Rather, the court stated that particularized probable cause or reasonable suspicion is still required to conduct a search or pat down of a non-arrested person.[196]

Second, when an item is something as personal as the non-arrested occupant's purse or billfold, the court reasoned that law enforcement cannot force the non-arrested occupant to leave it in the vehicle.[197] In reaching this conclusion, the court looked first to Justice Breyer's concurrence in *Houghton*, which expressed the idea that purses are "special containers" that should receive special protection if attached to the person.[198] The court also cited to state courts in Idaho, Kansas, and Washington in support of the proposition that an officer violates the Fourth Amendment by ordering a non-arrested passenger to leave her purse in the car, so that it can be searched incident to arrest.[199] In its survey of relevant state court decisions, the court observed that only South Dakota has held that an officer may force a non-arrested occupant to leave her purse in the vehicle and then search it incident to the arrest of another occupant.[200] After considering the cases imposing this special limitation for personal items like purses, the court determined that "the Fourth Amendment is violated when an officer directs that a purse be left in the vehicle and then proceeds to search the purse incident to the arrest of another passenger."[201]

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194. *Id.* ¶¶ 16-17, 663 N.W.2d at 648-49.

195. *Id.* ¶ 16, 663 N.W.2d at 648.

196. *Id.* at 648-49.

197. *Id.* ¶ 20, 663 N.W.2d at 650.

198. *Id.* ¶ 17, 663 N.W.2d at 649 (citing Wyoming v. Houghton, 526 U.S. 295, 308 (1999) (Breyer, J., concurring)).

199. *Id.* ¶ 17, 663 N.W.2d at 649 (citing State v. Newsom, 979 P.2d 100, 102 (Idaho 1998); State v. Boyd, 64 P.3d 419, 427 (Kan. 2003); State v. Seitz, 941 P.2d 5, 8 (Wash. Ct. App. 1997).

200. *Id.* ¶ 17, 663 N.W.2d at 649 (citing State v. Steele, 2000 SD 78, ¶ 19, 613 N.W.2d 825, 830).

201. *Id.* ¶ 20, 663 N.W.2d at 650.

E. TOGNOTTI'S HOLDING

Ultimately, the court held that an officer has the right, incident to the lawful arrest of a vehicle occupant, to search a non-arrested occupant's purse that is voluntarily left in the passenger compartment.[202] However, in order to protect citizens from abuse of discretion by police officers, the court also held that an officer violates the Fourth Amendment if he directs a non-arrested occupant to leave her purse in the vehicle and then searches the purse incident to arrest.[203] Finally, the court expressly overruled its decision in *Gilberts* to the extent that its rationale is contrary to *Tognotti*.[204]

Turning to the facts of the case before it, the court determined that there was not sufficient evidence in the record to make a finding regarding whether Tognotti voluntarily left her purse in the car or whether Officer Wahl had directed her to do so.[205] The court therefore reversed the suppression order and remanded for a limited evidentiary hearing to determine this dispositive factual issue.[206]

IV. IMPACT

Perhaps the most obvious impact of *Tognotti* was that it brought North Dakota in line with a growing number of decisions reinforcing the *Belton* bright-line and allowing an officer to search any containers in the passenger compartment of a vehicle incident to arrest of an occupant, regardless of ownership.[207]

However, the question remains whether *Tognotti* does in fact create a bright-line rule that is easy for law enforcement to apply when searching

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202. *Id.* ¶ 14, 663 N.W.2d at 648.

203. *Id.* ¶ 20, 663 N.W.2d at 650.

204. *Id.* ¶ 1, 663 N.W.2d at 643.

205. *Id.* ¶ 22, 663 N.W.2d at 650.

206. *Id.* ¶ 23.

207. *See, e.g.*, State v. Lopez, 10 P.3d 1207, 1211 (Ariz. Ct. App. 2000) (reasoning that *Houghton*'s principles can be applied to determine that all containers in the passenger compartment may be searched incident to arrest of a vehicle occupant); People v. Mitchell, 42 Cal. Rptr. 2d 537, 540 (Cal. Ct. App. 1995) (finding the *Belton* bright-line rule authorizes an officer's search of a passenger's purse incident to the arrest of the driver); People v. McMillon, 892 P.2d 879, 884 (Colo. 1995) (allowing a search of a passenger's purse incident to the arrest of another person in the vehicle under *Belton*); State v. Moore, 619 So. 2d 376, 377 (Fla. Dist. Ct. App. 1993) (holding that the officer could search a passenger's purse incident to the arrest of the driver under *Belton*); State v. Ray, 620 N.W.2d 83, 89 (Neb. 2000) (finding that *Houghton* leads to the conclusion that a search incident to arrest includes all items in a passenger compartment, even those of a non-arrested occupant); State v. Steele, 2000 SD 78, ¶ 17, 613 N.W.2d 825, 829-30 (holding that the passenger's belongings in the car may be searched incident to arrest under *Houghton*); State v. Parker, 944 P.2d 1081, 1085 (Wash. Ct. App. 1997) (allowing a search of a non-arrested passenger's purse incident to the arrest of the driver based on *Belton*); State v. Matejka, 2001 WI 5, ¶ 43, 621 N.W.2d 891, 899 (allowing a warrantless search of a passenger's jacket based on the driver's consent to search the vehicle based on principles of *Houghton*).

vehicles incident to arrest.[208] Although the principles of *Tognotti* seem straightforward at first blush, there are some ambiguities. Much of the Court's reasoning focused on the special nature of a purse and the fact that "it logically carries for its owner a heightened expectation of privacy, much like the clothing the person is wearing."[209] What the court does not make clear is whether this voluntariness requirement extends to any belongings of a non-arrested vehicle occupant other than a purse or billfold.[210]

Perhaps the non-arrested person does not use a purse, but instead carries a backpack. Would the non-arrested person then be entitled to take the backpack out of the vehicle with her, thus preventing the officer from searching it? Would the answer hinge on whether the person keeps in the backpack the same type of things that would normally be found in a purse, such as a driver's license, credit cards, and car keys? *Tognotti* does not answer these questions. Presumably, a defendant in the future will be able to contest these issues, claiming a heightened expectation of privacy in items that may be analogous to a purse in order to extend the scope of the voluntariness requirement.

Since *Tognotti* was decided in June 2003, the North Dakota Supreme Court has cited it several times in other opinions, but not for its major search incident to arrest principles.[211] An Illinois appellate decision has since cited *Tognotti* with approval, agreeing with North Dakota's reliance on *Houghton* for the principle that law enforcement officers do not have to determine the ownership of the containers in a passenger compartment before searching them incident to the arrest of a vehicle occupant.[212]

V. CONCLUSION

In *Tognotti*, the North Dakota Supreme Court overruled the principles of its previous decision *State v. Gilberts* regarding the search of a non-

208. *See* State v. Tognotti, 2003 ND 99, ¶ 11, 663 N.W.2d 642, 646-47 (explaining that maintenance of a "clear and workable rule for police searches" is one of the primary justifications for a bright-line rule regarding vehicle searches incident to arrest).

209. *Id.* ¶ 20, 663 N.W.2d at 650.

210. *Id.*

211. *See* State v. Parizek, 2004 ND 78, ¶ 14, 678 N.W.2d 154, 160 (citing *Tognotti* for the proposition that an officer must have reasonable suspicion to conduct a pat down frisk of a non-arrested person); State v. Guscette, 2004 ND 71, ¶ 5, 678 N.W.2d 126, 128 (citing *Tognotti* for the appellate standard of review on a motion to suppress); State v. Bollingberg, 2004 ND 30, ¶ 13, 674 N.W.2d 281, 284 (same); State v. Waltz, 2003 ND 197, ¶ 8, 672 N.W.2d 457, 460 (citing *Tognotti* for the proposition that a warrantless search is invalid unless it falls within an exception to the warrant requirement).

212. *See* People v. Morales, 799 N.E.2d 986, 992-93 (Ill. App. Ct. 2003) (reaching the same decision as *Tognotti* on similar facts, as defendant was a non-arrested passenger who left his jacket in the vehicle).

arrested vehicle occupant's belongings incident to the arrest of another person in the vehicle.[213] The court held that an officer has the right to search a non-arrested occupant's purse incident to the arrest of another person in the vehicle, provided that the purse was in the vehicle at the time of the arrest, and the non-arrested occupant left it in the passenger compartment voluntarily.[214] However, the court also held that an officer violates the Fourth Amendment if he orders a non-arrested occupant to leave her purse in the vehicle so he can search it incident to arrest.[215]

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213. *Tognotti*, ¶ 1, 663 N.W.2d at 643.
214. *Id.*
215. *Id.* ¶ 20, 663 N.W.2d at 650.

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