IN THE
SUPREME COURT OF MISSOURI

SC96973

CLETUS GREENE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Circuit Court of Cape Girardeau County, Missouri
The Honorable Michael E. Gardner
Case No. 16CG-CC00055

Brief of American Civil Liberties Union of Missouri as Amicus Curiae in Support of Appellant Filed with Consent

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Jurisdictional Statement

Amicus adopts the jurisdictional statement as set forth in Appellant's brief.

Interest of Amicus Curiae and Authority to File

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with over 1.75 million members dedicated to defending the principles embodied in the Constitution and our nation's civil rights laws. The ACLU of Missouri is one of the ACLU's statewide affiliates with over 19,000 members. The ACLU and the ACLU of Missouri have long fought to ensure that the all Missourians have the right to be free from illegal searches and for the consistent and proper application of the exclusionary rule.

This amicus brief is filed with consent of the parties.

Statement of Facts

Amicus adopts the statement of facts as set forth in Appellant's Brief.

Argument

"The criminal goes free, if he must, but it is the law that sets him free." *Mapp v. Ohio*, 367 U.S. 643, 659 (1961). "Nothing can destroy a government more quickly than its failure to observe its own laws, or worse, its disregard of the charter of its own existence." *Id.* "'Our government is the potent, the omnipresent teacher.'" *Id.* (quoting *Elkins v. United States*, 364 U.S. 206, 218 (1960)). "'For good or for ill, it teaches the whole people by its example.'" *Id.* (quoting *Elkins*, 364 U.S. at 218). "If the government becomes a lawbreaker, it breeds contempt for the law; it invites every man to become a law unto himself; it invites anarchy.'" *Id.* (quoting *Elkins*, 364 U.S. at 218).

This Court's holding in *State v. Carrawell*, 481 S.W.3d 833 (Mo. banc 2016), that the exclusionary rule does not apply to cases in which the unlawful search of an arrestee occurred after *Arizona v. Gant*, 556 U.S. 332 (2009), but before *Carrawell*, must be revisited. While the *Carrawell* decision correctly relied on *Gant* to clarify the existing law in Missouri and found that searches incident to arrest of personal items not within an arrestee's immediate control are illegal, it incorrectly found that the exclusionary rule does not apply to searches predating *Carawell*. That finding was based upon this Court's conclusion that, before *Carrawell*, officers in Missouri performing searches incident to arrests had relied on "objectively reasonable" precedent that allowed searches of personal items that were no longer within an arrestee's immediate control. *See Carrawell*, 481 S.W.3d at 846. However, in light of *Gant* and because the line of cases referenced as the binding precedent are distinguishable for a variety of reasons, reliance on existing precedent was not objectively reasonable under the circumstances here. Moreover, any

decision that ignores the importance of the exclusionary rule or places further limitations on its application erodes a crucial constitutional protection and further perpetuates racial injustices in policing.

I. The search of Cletus Greene's pack of cigarettes was illegal, and it was not objectively reasonable for the police officers to rely on existing precedent, particularly after *Gant.*

Cletus Greene was arrested in May 2014 by drug task force officers responding to an anonymous tip. *Greene v. Missouri*, ED105282, 2017 WL 6459982, at *1 (Mo. App. E.D. Dec. 19, 2017). After Greene, who was standing on a second-floor balcony when officers approached, told the officers that he had marijuana on him, he was handcuffed and searched. *Id.* In his pocket, the officers found—and seized—marijuana and a pack of cigarettes. *Id.* The seized items were then taken to an adjacent room and secured. *Id.* Sometime later, Greene's pack of cigarettes was searched by an officer—not the arresting officer—who discovered methamphetamine taped to the top of the cigarette pack. *Id.* Greene was charged and convicted of felony drug possession and sentenced to 10 years in prison. *Id.* at *1–2. In his post-conviction proceeding, Greene has claimed that his trial counsel was ineffective for failing to file a motion to suppress evidence. *Id.* at *1.

In finding that Greene's counsel was not ineffective because a motion to suppress would not have succeeded on the merits, the Eastern District believed that the search of Greene was lawful because he was "searched incident to his arrest." *Id.* at *3 (citing *State v. Waldrup*, 331 S.W.3d 668, 676 (Mo. banc 2011)). Citing to and quoting *Waldrup*, 331 S.W.3d at 676, a Missouri Supreme Court case that relied on *Chimel v. California*, 395 U.S. 752, 763 (1969), the Eastern District noted that "a search may be performed of the

arrestee's person, as well as the area 'within his immediate control,' which has been defined as the area from which he might gain possession of a weapon or destructible evidence." *Greene*, 2017 WL 6459982, at *3. Then, relying on *State v. Greene*, 785 S.W.2d 574, 577 (Mo. App. W.D. 1990), and *State v. Ellis*, 355 S.W.3d 522, 524 (Mo. App. E.D. 2011), the Eastern District found that, at the time of Greene's arrest and search of the pack of cigarettes, existing precedent allowed "officers seizing personal effects from an arrestee [to] search those items incident to arrest even if the effect was not in the arrestee's immediate control." *Greene*, 2017 WL 6459982, at *3. And, while the Eastern District noted that the *Greene* and *Ellis* decisions were later "clarified" in 2016 by *Carawell*, 481 S.W.3d at 838, to mean that searches incident to arrest of a person and things within his immediate control are "limited … to only the area from within which he might gain possession of a weapon or destructible evidence," the Eastern District erroneously held that, despite this, the evidence found on Green should not be excluded because legal precedent at the time of the search permitted it. *Greene*, 2017 WL 6459982, at *4 (citing *State v. Hughes*, ED104884, 2017 WL 4782226, at *3 (Mo. App. E.D. Oct. 24, 2017)).

In other words, the Eastern District thought that because the search of Greene occurred before the decision in *Carrawell*, the reasoning of that case did not apply and the evidence seized after the search of an item that was no longer in the arrestee's immediate control did not have to be excluded. *Id. Carrawell*, it found, applies only to searches and seizures that occur after that case was decided on January 12, 2016.

In *Carrawell*, while the search was deemed unlawful, this Court found that the exclusionary rule did not apply because, "'when an officer conducts a search incident to arrest in "objectively reasonable reliance" on binding appellate precedent that is later overturned, the exclusionary rule does not suppress the evidence obtained as a result of that search.'" *Carrawell*, 481 S.W.3d at 846 (quoting *State v. Johnson*, 354 S.W.3d 627, 630 (Mo. banc 2011)). This Court noted further in *Carrawell* that, "'officers act in good faith when they objectively rely on binding directives from the judiciary and the legislature even though these directives may be later overturned.'" *Id.* The two cases this Court referenced as precedent that was purportedly reasonable for the officers to rely on at the time of Greene's search are: *State v. Greene*, 785 S.W.2d 574, 577 (Mo. App. W.D. 1990), and *State v. Ellis*, 355 S.W.3d 522, 524 (Mo. App. E.D. 2011). However, reliance on these prior Missouri decisions, particularly in light of *Gant*, was not objectively reasonable.

A. The holding in *Gant* applies to all searches incident to arrest and was binding precedent when the search of Cletus Greene occurred.

The facts and holding in *Gant* are straight forward. "After Rodney Gant was arrested for driving with a suspended license, handcuffed, and locked in the back of a patrol car, police officers searched his car and discovered cocaine in the pocket of a jacket on the backseat." 556 U.S. at 335. In noting its agreement with the conclusion of the Arizona Supreme Court, the Supreme Court of the United States held that, "[b]ecause Gant could not have accessed his car to retrieve weapons or evidence at the time of the search, … the search-incident-to-arrest exception to the Fourth Amendment's warrant

requirement, as defined in *Chimel v. California*, 395 U.S. 752 (1969), and applied to vehicle searches in *New York v. Belton*, 453 U.S. 454 (1981), did not justify the search in this case." *Id.*

While both *Gant* and *Belton* dealt with searches incident to the arrest of a recent occupant of a vehicle, and the case at issue in this appeal did not, that fact alone is not dispositive of the issue because both cases also rely on *Chimel*, the case that defines the search-incident-to-arrest exception. And *Chimel* was not a vehicle-search case. In *Chimel*, a man was arrested in his home for the alleged burglary of a coin shop. 395 U.S. at 753 (noting that the police did have an arrest warrant).[1] On the sole basis of the arrest and without a search warrant, the officers proceeded to search the man's entire three-bedroom home, "including the attic, the garage, and a small workshop." *Id.* at 753–54 (noting that in two rooms, the police also looked inside drawers). The items seized in the search were later used against the defendant at trial and he was convicted of burglary. *Id.* The Court began its analysis by noting that "[a]pproval of warrantless search incident to lawful arrest seems first to have been articulated by the Court in 1914 as dictum in *Weeks v. United States*, 232 U.S. 383 [(1914)]." *Id.*

[1] While it was not an issue before the Supreme Court, the arrest warrant in *Chimel* was invalid because of deficiencies in the supporting affidavit. 395 U.S. at 754. However, the state courts found that the good-faith exception applied and the Supreme Court proceeded "on the hypothesis that the California courts were correct in holding that the arrest of the petitioner was valid under the Constitution." *Id.* at 755.

After a thorough discussion of the search-incident-to-arrest exception between 1914—where it was first articulated by the Court as dicta in *Weeks v. United States*, 232 U.S. 383 (1914)—and 1969, the *Chimel* Court noted:

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items, of course, be governed by a like rule. A gun on a table or in a drawer in front of one who is arrested can be as dangerous to the arresting officer as one concealed in the clothing of the person arrested. There is ample justification, therefore, for 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.

Id. at 762–63. The *Chimel* Court noted further that there is no justification for a search anywhere beyond the room in a home where a person is arrested or even all desk drawers or other closed or concealed areas in the very room of the arrest. *Id.* at 763. Searches that go beyond the exception set forth in *Chimel*, "may be made only under the authority of a search warrant." *Id.*

Chimel provided further support for its limited ruling regarding the exception when it noted:

> The rule allowing contemporaneous searches is justified, for example, by the need to seize weapons and other things which might be used to assault an office or effect an escape, as well as by the need to prevent the destruction of evidence *of the crime*—things which might easily happen where the weapon or evidence is on the accused's person or under his immediate control.

Id. (emphasis added) (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). "'But these justifications are absent where a search is remote in time or place from the arrest.'" *Id.* (quoting *Preston*, 376 U.S. at 367).

And, as the Court aptly noted, under "an unconfined analysis" that would allow for the search of a person's home incident to their arrest, "Fourth Amendment protection in this area would approach the evaporation point." *Id.* "It is not easy to explain why, for instance, it is less subjectively 'reasonable' to search a man's house when he is arrested on his front lawn—or just down the street—than it is when he happens to be in the house at the time of the arrest." *Id.* at 765. Thus, "[n]o consideration relevant to the Fourth Amendment suggests any point of rational limitation, once the search is allowed to go beyond the area from which the person arrested might obtain weapons or evidentiary items." *Id.* at 766.

While it cannot be disputed that the reasoning set forth in *Chimel* for searches incident to an arrest was later interpreted in a manner that greatly expanded an officer's ability to search when it was applied to vehicle searches in *New York v. Belton*, 453 U.S. 454 (1981), it also cannot be disputed that this expansion of search authority was revisited and again limited (reiterating the reasoning in *Chimel*) in *Gant*. And *Gant* limits all authority to conduct a search incident to an arrest, not just in the vehicle context. To find otherwise would be nonsensical given that nothing in *Gant* indicates that its ruling is so limited and the very case setting forth the standard for searches incident to arrests, relied on in both *Gant* and *Belton*, was *Chimel*, a case that had nothing to do with vehicle searches. And, while *Belton* specifically discussed vehicle searches and *Gant* limited

Belton's holding, the discussion of *Chimel* and the constitutional limits of searches incident to arrest in both *Belton* and *Gant* have been applied in all a variety of contexts. *See, e.g.*, *Greene*, 785 S.W.2d at 576–77 (relying on *Chimel* and *Belton* and finding an officer's search of a woman's purse in the non-vehicle context was proper because it was "well within the area of her immediate control").

As *Gant* notes at the outset, "[u]nder *Chimel*, police may search incident to arrest only the space within an arrestee's 'immediate control,' meaning 'the area from within which he might gain possession of a weapon or destructible evidence.'" *Gant*, 556 U.S. at 335 (emphasis added) (quoting *Chimel*, 395 U.S. at 763). Relying on *Chimel*, the *Gant* Court held that the safety and evidentiary justifications for a search incident to an arrest do not "authorize a vehicle search incident to a recent occupant's arrest after the arrestee has been secured and cannot access the interior of the vehicle." *Gant*, 556 U.S. at 335.

In concluding that *Belton* took the *Chimel* exception too far, the *Gant* Court said: "To read *Belton* as authorizing a vehicle search incident to every recent occupant's arrest would thus untether the rule from the justifications underlying the *Chimel* exception—a result clearly incompatible with our statement in *Belton* that it 'in no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searches incident to lawful custodial arrests.'" *Id.* at 343 (quoting *Belton*, 453 U.S. at 460 n.3). *Gant* further explained its decision to limit the holding in *Belton* by noting that "[a] rule [giving] police the power to conduct such a search whenever an individual is caught committing a traffic offense, when there is no basis for believing evidence of the offense might be found in the vehicle, creates a serious and recurring threat to the privacy of

countless individuals." *Id.* at 345. "Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Id.* Moreover, as the Court noted, "[a]lthough it appears that the State's reading of *Belton* has been widely taught in police academies and that law enforcement officers have relied on the rule in conducting vehicle searches during the past 28 years, many of these searches were not justified by the reasons underlying the *Chimel* exception." *Id.* at 349.

Thus, in rejecting *Belton*'s expansive interpretation of the search-incident-to-arrest exception, the Court noted "that the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id.* at 343. The Court noted further that, "[a]lthough it does not follow from *Chimel*, we also conclude that circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* (quoting *Thornton v. United States*, 541 U.S. 615, 632 (2004)). The fact that the Court specifically noted that there are circumstances "unique to the vehicle context" that do not follow directly from *Chimel* further supports a conclusion that the Court intended for the reasoning in *Gant*—not specified as applying only to vehicle searches—to apply to all searches incident to arrest.

B. Any reliance on the Missouri line of cases referenced below and in *Carrawell* was not objectively reasonable under the circumstances.

Here, as in *Carrawell*, it appears that the line of cases that the court of appeals found it was reasonable to rely on and from which it based its holding that the exclusionary rule should not apply to Greene are: *State v. Waldrup*, 331 S.W.3d 668 (Mo. banc 2011), *State v. Ellis*, 355 S.W.3d 522 (Mo. App. E.D. 2011), *State v. Greene*, 785 S.W.2d 574 (Mo. App. W.D. 1990), and *State v. Rattler*, 639 S.W.2d 277 (Mo. App. E.D. 1982). In reaching its conclusion that the exclusionary rule should not apply, the Eastern District noted that because this existing "legal precedent authorized the officer to search an arrestee's personal effects as a search incident to arrest even if the effects were not in the immediate control of the arrestee." *Greene*, 2017 WL 6459982, at *4 (referring to the existing law as the "*Greene* line of cases").[2] An examination of these cases, however, demonstrates that reliance on this precedent was not objectively reasonable at the time of the search in this case, particularly in light of the fact *Gant* was decided prior to the search.

In *State v. Greene*, 785 S.W.2d 574 (Mo. App. W.D. 1990), a woman was observed shoplifting at Wal-Mart and police were called after she refused to let the store employees search her purse for the allegedly stolen items. *Id.* at 575–76. After the officer

[2] *Rattler* was not cited by the Eastern District in the decision below. However, it was cited in *Carrawell* in this Court's discussion of cases that have been misconstrued by some courts to allow searches of an arrestee's personal effects (e.g., a purse or bag) even when those items are no longer in the person's control. As this Court concluded, "[t]his reasoning is based on a misunderstanding of law and should no longer be followed." 481 S.W.3d at 838–39.

arrived, the woman handed her purse over to the officer and was told "that she was under arrest." *Id.* at 576 (internal quotation marks omitted). The officer then searched the purse and discovered a pipe with marijuana and two black film canisters. *Id.* The film canisters were not searched at this time and the purse itself was not searched any further at this time. *Id.* It was not until later at the police station that the purse was more thoroughly searched. *Id.* Additional drugs were found and the woman was charged and convicted of stealing as well as possession of cocaine, diazepam, marijuana, and drug paraphernalia. *Id.* at 575–76. On appeal, relying on *Chimel* and *Belton*, the court found that initial search of her purse was lawful as a search incident to an arrest because the purse was "well within the area of her immediate control." *Id.* at 576–77.

The officer's continued search at the police station was justified in *Greene* based upon the contention that a person's purse was more like an arrestee's clothing than luggage. *Compare United States v. Edwards*, 415 U.S. 800, 803 (1974) (allowing the search of "certain clothing taken from respondent Edwards while he was in custody at the city jail approximately 10 hours after his arrest"), *with United States v. Chadwick*, 433 U.S. 1, 15 (1977) (excluding evidence found in luggage when the search occurred more than an hour after officers had the item in their exclusive control). In upholding the search at the police station under the reasoning in *Edwards*, the Western District also relied on *State v. Woods*, 637 S.W.2d 113, 116 (Mo. App. E.D. 1982), a decision that it

believed supported the conclusion that a purse is more akin to an arrestee's clothing than other personal property like luggage.[3]

Relying on *Greene* to uphold the search in the present case is not objectively reasonable. In *Greene*, unlike in the present case, the woman's purse was first searched at a time when it was "well within the area of her immediate control." 785 S.W.2d at 576. Nothing in *Greene* indicates that the woman had been handcuffed or that her purse was taken to an adjacent room, only that she had been informed she was under arrest. Thus, the facts are distinguishable from the present case where, here, Cletus Greene was handcuffed and placed under arrest and the pack of cigarettes had been secured in an adjacent room before it was searched. Moreover, as noted, *supra* note 3, there is no

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[3] *Woods* does not support the court's conclusion in *Greene v. State*, 2017 WL 6459982. The key fact in *Woods* was that the purse searched at the police department after an arrest was "not so clearly distant from [the arrestee] at the police station as to make it impossible for her to gain access to it." *State v. Woods*, 637 S.W.2d 113, 116 (Mo. App. E.D. 1982). Thus, while the *Woods* court did cite to some general dicta in *Edwards* and noted that a purse is more like a person's clothing than luggage, its ruling was based on a finding that the search could be upheld as one incident to the defendant's arrest. *Id.*

More important for this appeal, however, is the fact that the underlying decision here makes no reference to *Edwards*, *Chadwick*, or *Woods*. There is no suggestion by the appellate court that the officers believed a pack of cigarettes is comparable to a person's clothing or that they could have reasonably held that belief based on precedent. Moreover, even had the suggestion been made, this issue was also addressed in *Carrawell*. Thus, while it is not relevant to this appeal, this Court has clarified that the holding in *Edwards* was very narrow, courts had mistakenly been relying on a dicta statement taken out of context, and "[i]n light of *Chimel*, *Chadwick*, and *Gant*, . . . the Supreme Court's decision in *Edwards* should not be read to authorize the search of all personal effects incident to arrest regardless of whether the item searched is still within the immediate control of the arrestee at the time of the search." *Carrawell*, 481 S.W.3d at 838–40. And, while this clarification came in *Carrawell*, if it were at issue, given several subsequent, yet pre-*Carrawell*, decisions, any reliance on *Edwards* or like cases was not objectively reasonable.

argument—or basis for the argument for that matter—in this case that a pack of cigarettes is more like an arrestee's clothing than a personal item.

Rattler is equally distinguishable and not a reasonable source of precedent in this case. In *Rattler*, not only did that court rely on *Edwards* to justify the search of what they referred to as "a personal effect intimately associated with her person and in her immediate possession at the time of her arrest," but it also notes that "[t]he purse's contents were inventoried at the police station." *Rattler*, 639 S.W.2d at 278. As noted, there is no argument in the present case that Greene's pack of cigarettes should be viewed as the defendant's clothing was in *Edwards*. Thus, it was not objectively reasonable for an officer to rely on the holding in *Rattler* as the basis for the search in the present case.

In *Waldrup*, the defendant was arrested in 2006 after the car he was a passenger in was stopped at a driver's license checkpoint. 331 S.W.3d at 670–71. Because the officers at the checkpoint observed Waldrup exhibit "unusual" and "abnormal" behavior in the vehicle, and after discovering that the driver's license was suspended, Waldrup was asked to exit the vehicle at which time a *Terry* frisk was performed to check for weapons. *Id.* Still concerned about safety, an officer staying with Waldrup while another officer ran his name to check for warrants. *Id.* at 671. After warrants were discovered, Waldrup "was immediately arrested, handcuffed, and given a full-body search." *Id.* The search revealed money in Waldrup's sock and cocaine-base "stuffed between the cushion and sole of Mr. Waldrup's right shoe." *Id.* The vehicle Waldrup arrived in was also searched. *Id.*

Waldrup filed a motion to suppress the cocaine-based found in his shoe, "arguing that once [the officer] issued a ticket to [the driver] and released him, the purpose of the

checkpoint stop had been fulfilled" and any continued detention of Waldrup, including running his name to check for warrants, was not justified. *Id.* Waldrup argued that, because the further detention was not authorized, any evidence seized should also be excluded. *Id.* On appeal, this Court first noted that "reasonable suspicion supported an investigatory [i.e., *Terry*] stop of Mr. Waldrup." *Id.* at 674. Based on the circumstances, this Court then found that the detention of Waldrup did not exceed what is allowed under *Terry*. *Id.* at 675–76. This Court concluded that the Waldrup's arrest was valid based upon confirmation of an outstanding warrant, and "[p]ursuant to a lawful arrest, a search may be performed 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.'" *Id.* at 676 (quoting *Gant*, 556 U.S. at 339).

In finding that the search of Waldrup was valid, this Court relied on *Gant*'s reasoning. *Waldrup* did not determine whether the search of the car was justified. The car search was not an issue in the motion for suppression or on appeal, so this Court applied *Gant* to the search of a recent vehicle occupants but not to the search of the vehicle itself. *Waldrup* was decided on March 1, 2011. The officers here could not reasonable rely on *Waldrup* to justify the search of Greene's pack of cigarettes that were secured in an adjacent room. The search in *Waldrup* was of his clothing and shoes at the time of his arrest. Nothing in the case suggests that the police removed Waldrup's shoes, secured them, and *then* searched them. Thus, not only are the facts distinguishable, but *Waldrup* also recognized that *Gant* was binding precedent at the time of Greene's search.

The final case this Court references in *Carrawell* was not reasonable to rely on because it was an Eastern District case that involved a search that occurred on October 31, 2009, after both *Waldrup* and *Gant* had been decided, yet the decision ignored those binding precedents.

In *Ellis*, the defendant was initially arrested and charged with resisting arrest. 355 S.W.3d at 522–23. After he was handcuffed and patted down, his backpack was seized and separated from him as he was placed in the back of the police car. *Id.* at 523. After Ellis was secured in the back of the police car (with the door closed and locked), his bag was searched. *Id.* The officers found two tablets of ecstasy, and Ellis was found guilty of possession. *Id.* at 522–23. Ellis argued that the search of his backpack was illegal under *Gant*. *Id.* at 524. Without reaching the issue of whether *Gant* applies outside of the vehicle context, the Eastern District found that the good-faith exception applied because "[a]t the time of the search in this case, binding judicial precedent allowed police officers to search, as part of the search *of a person* incident to a lawful custodial arrest, the personal effects on the person of an arrestee at the time of the arrest." *Id.* Among the cases cited in support of this conclusion, the Eastern District cited to *Edwards*, *Greene*, *Rattler*, and *Woods*.

What the Eastern District overlooked, however, was that *Gant* was already binding precedent and there was a Missouri Supreme Court case—*Waldrup*—applying *Gant* to a non-vehicle search. *Ellis* does not even mention of *Waldrup*. Reliance on the holding in *Ellis* to support the search in the underlying case here was not objectively reasonable.

Even if *Waldrup* had not applied *Gant*, *Gant* unquestionably applied to non-vehicle searches at the time Ellis's backpack was searched.[4]

In their search of Greene's pack of cigarettes, the officers were not "acting in 'objectively reasonable reliance' on binding appellate precedent." *Johnson*, 354 S.W.3d at 634 (quoting *Davis v. United States*, 564 U.S. 229, 249 (2011). To hold otherwise would ignore that *Gant* was unequivocal and binding precedent when the underlying search took place, *Gant* had altered the existing law related to all searches incident to arrest, and any reliance on cases that allowed searches beyond the limitations of *Gant* is not objectively reasonable. Moreover, *Gant* had been applied to a non-vehicle search in *Waldrup*, further demonstrating that it was unreasonable to rely on Court of Appeals cases that had been abrogated.

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[4] Other courts have also found that *Gant* is not limited to the automobile context, including the federal court for the Eastern District of Missouri. *See, e.g.*, *United States v. Taylor*, 656 F. Supp. 2d 998, 1000–02 (E.D. Mo. 2009) ("The Court is not persuaded that *Gant* should be limited to the automobile context."). In concluding that *Gant* extends beyond automobiles, district court noted "that the *Gant* decision itself does not indicate that it is strictly limited to the automobile context." *Id.* "Rather, the Supreme Court merely states that it rejects the broad reading of *Belton* that would authorize a vehicle search incident toe very recent occupant's arrest." *Id.* at 1002. The district court noted further that "[m]any cases outside of the automobile context rely on *Belton* to uphold a search incident to an arrest, and it stands to reason that those decisions are subject to reexamination in light of *Gant*." *Id.* (citing, as an example of such a case, *United States v. Palumbo*, 735 F.2d 1095, 1097 (8th Cir. 1984)). The court also pointed out that the cases relied on by the government in that case (as in this case) are distinguishable. *Id.* The Third Circuit and several state courts have also recognized that *Gant* is not limited to searches in the automobile context. *See, e.g., United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010); *State v. Johnson*, 93 N.E.3d 1261, 1269–70 (Ohio Ct. App. 2017); *State v. Pederson*, 339 P.3d 1194, 1198 (Idaho Ct. App. 2014); *State v. Granville*, 423 S.W.3d 399, 413–17 (Tex. Crim. App. 2014); *Smallwood v. State*, 113 So. 3d 724, 734–36 (Fla. 2013).

II. The exclusionary rule is critical to protecting civil liberties, and its application is particularly important in the search context to prevent the burden of unlawful searches from shifting to communities of color.

The Fourth Amendment of the United States Constitution protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." The rule related to the suppression of evidence in violation of this constitutional protection, the exclusionary rule, "is a 'prudential' doctrine, created by this Court to 'compel respect for the constitutional guarantee.'" *Davis*, 564 U.S. at 236 (quoting *Penn. Bd. of Probation and Parole v. Scott*, 524 U.S. 357, 363 (1998), and *Elkins*, 364 U.S. at 217). "The philosophy of each Amendment and of each freedom is complementary to, although not dependent upon, that of the other in its sphere of influence—the very least that together they assure in either sphere is that no man is to be convicted of unconstitutional evidence." *Mapp*, 367 U.S. at 657.

"[I]n extending the substantive protections of due process to all constitutionally unreasonable searches—state or federal—it was logically and constitutionally necessary that the exclusion doctrine—an essential part of the right to privacy—be also insisted upon as an essential ingredient of the right . . . ." *Mapp*, 367 U.S. at 655–56. This is because "the purpose of the exclusionary rule 'is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.'" *Id.* at 656 (quoting *Elkins*, 364 U.S. at 217); *see also Davis*, 564 U.S. at 236–37 (noting that the sole purpose "is to deter future Fourth Amendment violations" and "[w]hen the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth Amendment rights, the deterrent value of exclusion is strong and tends to

outweigh the resulting costs" (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009))).

In *Mapp*, the Court emphasized the importance of requiring states to apply the exclusionary rule just as federal courts had already been required to do for nearly half a century when it noted that without application of the rule, "[t]he ignoble shortcut to conviction left open to the State tends to destroy the entire system of constitutional restraints on which the liberties of the people rest." *Id.* at 660. "Having once recognized that the right to privacy embodied in the Fourth Amendment is enforceable against the States, and that the right to be secure against rude invasions of privacy by state officers is, therefore, constitutional in origin, we can no longer permit that right to remain an empty promise." *Id.* "Because it is enforceable in the same manner and to like effect as other basic rights secured by the Due Process Clause, we can no longer permit it to be revocable at the whim of any police officer who, in the name of law enforcement itself, chooses to suspend its enjoyment." *Id.* "Our decision, founded on reason and truth, gives to the individual no more than that which the Constitution guarantees him, to the police officer no less than that to which honest law enforcement is entitled, and, to the courts, that judicial integrity so necessary in the true administration of justice." *Id.*

And while there is a good-faith exception to the application of the exclusionary rule, it should be used sparingly because it excuses the government's violation of the Fourth Amendment by illegally obtaining evidence. As an example of the importance of the exclusionary rule, one need not look further that *Dickerson v. United States*, 530 U.S. 428 (2000), in which the Court declined to overrule *Miranda v. Arizona*, 384 U.S. 436

(1966), and noted that "[w]hile we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings, we do not believe that this has happened to the *Miranda* decision." *Dickerson*, 530 U.S. at 443 (citation omitted). Noting further that "[i]f anything, our subsequent cases have reduced the impact of the *Miranda* rule on legitimate law enforcement while reaffirming the decision's core ruling that unwarned statements may not be used as evidence in the prosecution's case in chief." *Id.* at 443–44. Additionally, in the context of an invalid search warrant, this Court has also recently reaffirmed that the proper remedy when evidence is seized in violation of the Fourth Amendment is suppression. *See State v. Douglas*, SC95719, 2018 WL 830306, at *11–12 (Mo. banc Feb. 13, 2018).

Proper application of the exclusionary rule is critical to combat racially discriminatory policing. In Missouri, persons of color are both arrested and searched far more than white people. Thus, while application of the exclusionary rule requires all of society to shoulder the burden for police officers' violation for the Fourth Amendment (by suppressing evidence of a crime), failure to apply the exclusionary rule disproportionately shifts the burden for illegal searches to communities of color.

Missouri law enforcement has a racial profiling problem. As the Missouri Attorney General Josh Hawley has said: "When a person is stopped or searched or arrested only because of his race, the rule of law suffers." Missouri Attorney General Josh Hawley, 2016 Annual Report, *Missouri Vehicle Stops – Executive Summary*, http[]://ago.mo.gov/home/vehicle-stops-report, at 4 (hereinafter "2016 AGO Report"). "Racial profiling threatens that fairness and impartiality the rule of law demands." *Id.*

"And it badly undermines the vital trust between everyday citizens and the law enforcement officers who risk their lives to protect them." *Id.*

As the 2016 AGO Report notes, it summarizes data from 601 law enforcement agencies, and with 60 agencies reporting no traffic stops, this represents 96.9% of the total 682 agencies in Missouri. *Id.* at 7. The numbers reported provided insight into the disturbingly unequal policing practices. In 2016, whites accounted for 78% of all 2016 traffic stops. *Id.* at 6–7 (noting further that whites make up an estimated 82.8% of the driving-age population). When one compares the white population to the number of whites stopped, the disparity index is .94; in other words, "[w]hites were stopped … at slightly below the rate expected based on their fraction of the driving-age population from the 2010 census." *Id.* at 7. Sadly, "[t]he same is not the case for several other groups." *Id.* "African-Americans represent 10.9% of the driving-age population but 18.0% of all traffic stops, for a disparity-index value of 1.65." *Id.* Thus, "African-Americans were stopped at a rate 65% greater than expected based solely on their proportion of the driving-age population." *Id.* "In other words, accounting for their respective proportions of Missouri's driving-age population, African-Americans were stopped at a rate 75% higher than Whites." *Id.* While startling standing alone, these disparities become even more problematic when one takes into account the search statistics.

When we talk about searches in Missouri, we are disproportionally talking about searches of people of color. In the 2016 AGO Report, "[t]he 'search rate' reflects the percentage of stopped drivers whose person or vehicles were searched as part of the

stop." *Id.* at 8. "The search rate for all motorists who were stopped in 2016 was 6.17%." *Id.* "African-Americans and Hispanics were searched at rates above the average for all motorists who were stopped." *Id.* "African-Americans were 1.57 times more likely to be searched than whites[, and] Hispanics were 1.52 times more likely than whites to be searched." *Id.* Interestingly, and perhaps not surprisingly for those who are aware of these existing disparities, contraband was found during the searches of African-Americans and Hispanics at lower rates than it was found during searches of whites. *Id.* In other words, "on average searches of African-Americans and Hispanics are less likely than searches of whites to result in the discovery of contraband." *Id.* at 8–9. In addition to being searched more often than whites, African-Americans and Hispanics are arrested more often as well. *Id.* at 9.

A specific and stark example of racial disparities in policing that exist in Missouri was exposed by the Department of Justice's report following its investigation into the Ferguson Police Department. *See Investigation of the Ferguson Police Department*, U.S. DEP'T OF JUSTICE, Civil Rights Division, March 4, 2015, https[]://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf (hereinafter "Ferguson Report"). That investigation "revealed a pattern or practice of unlawful conduct within the Ferguson Police Department that violates the First, Fourth, and Fourteenth Amendments to the United States Constitution, and federal statutory law." *Id.*

The investigation uncovered significant problems relating to the police department's focus on generating revenue over public safety needs, an approach to law

enforcement that "reflects and reinforces racial bias, including stereotyping," and a lack of trust between the police department and "a significant portion of Ferguson's residents, especially African Americans." *Id.* at 2–6. The report further noted that misconduct within the Ferguson Police Department "in the area of stops and arrests disproportionately impacts African Americans." *Id.* at 16. The report found that "discriminatory intent is part of the reason for" the "racial disparities that adversely impact African Americans." *Id.* at 2.

In finding that "Ferguson's law enforcement practices overwhelmingly impact African Americans," it noted that data "from 2012-2014 shows that African Americans account for 85% of vehicle stops, 90% of citations, and 93% of arrests made by FPD officers, despite comprising only 67% of Ferguson's population." *Id.* at 4. Moreover,

> African Americans are more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race based variables such as the reason the vehicle stop was initiated, but are found in possession of contraband 26% less often than white drivers, suggesting officers are impermissibly considering race as a factor when determining whether to search.

Id. "African Americans are more likely to be cited and arrested following a stop regardless of why the stop was initiated and are more likely to receive multiple citations during a single incident." *Id.* The racial disparities continue with the use of force in that "[n]early 90% of documented force used by FPD officers was used against African Americans." *Id.* at 5. The report noted further that

> evidence of bias and stereotyping, together with evidence that Ferguson has long recognized but failed to correct the consistent racial disparities caused by its police and court practices, demonstrates that the discriminatory effects

> of Ferguson's conduct are driven at least in part by discriminatory intent in violation of the Fourteenth Amendment.

Id.

And, although the Department of Justice focused on Ferguson, its conclusions implicated other municipal police departments in St. Louis County as well. *See id.* at 22–23 (describing the "wanteds" system used by "FPD and other law enforcement agencies in St. Louis County" to purposefully circumvent the court system and finding evidence that the use of wanted "has resulted in numerous unconstitutional arrests in Ferguson"), 79 n.54 ("Although beyond the scope of this investigation, it appears clear that individuals' experiences with other law enforcement agencies in St. Louis County, including with the police departments in surrounding municipalities and the County Police, in many instances have contributed to a general distrust of law enforcement.").

Courts must be careful not to interpret case law in a manner that further perpetuates racial disparities. African Americans are stopped, arrested, and searched at higher rates that whites in Missouri. If existing law is interpreted to further limit the application of the exclusionary rule, the impact of that interpretation will have a disparate impact on Missouri's minority population.

Conclusion

Gant was legally binding precedent when Cletus Greene's pack of cigarettes was unlawfully searched by police and its holding and reasoning apply to all searches, not just vehicle searches. Reliance on any other existing precedent in Missouri to find that the search was not unlawful at the time is not objectively reasonable. Proper application of the exclusionary rule is critical to deter unconstitutional police conduct and to maintain fairness. Racial disparities in policing clearly exist and further support a finding that properly protections the application of the exclusionary rule. This Court should reverse the trial court and find that Greene's counsel was ineffective for failing to file a motion to suppress the evidence found during the unlawful search.

Respectfully submitted,

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Certificate of Service and Compliance

The undersigned hereby certifies that on May 18, 2018, the foregoing amicus brief was filed electronically and served automatically on the counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 7,262 words (excluding the cover, signature block, and this certificate of service and compliance), as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that the electronically filed brief was scanned and found to be virus-free.

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