IN THE
SUPREME COURT OF MISSOURI

CLETUS GREENE	)	
	)	
Appellant	)	
	)	
v.	)	**NO. SC96973**
	)	
STATE OF MISSOURI	)	
	)	
Respondent	)	

APPEAL TO THE SUPREME COURT OF MISSOURI
FROM THE MISSOURI COURT OF APPEALS, EASTERN DISTRICT
AND THE CIRCUIT COURT OF CAPE GIRARDEAU COUNTY
THIRTY-SECOND JUDICIAL CIRCUIT
THE HONORABLE MICHAEL E. GARDNER, JUDGE

APPELLANT'S SUBSTITUTE BRIEF

MATTHEW J. BELL
Missouri Bar No. 67241
Assistant Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
(314) 340-7662 (telephone)
(314) 340-7685 (facsimile)
matt.bell@mspd.mo.gov

ATTORNEY FOR APPELLANT

INDEX

TABLE OF AUTHORITIES

Cases

Constitutional and Other Authorities

JURISDICTIONAL STATEMENT

On December 2, 2014, following a jury trial in the Circuit Court of Cape Girardeau County, Cause No. 14CG-CR00840-01, the Appellant, Cletus Greene, was convicted as a persistent drug offender in Count I, possession of a controlled substance, in violation of section 195.202[1] [L.F. 43],[2] having previously pled guilty on Count II, possession of marijuana, in violation of section 195.202, on December 1, 2014 [L.F. 23]. On January 20, 2015, the Honorable Michael E. Gardner sentenced Greene to concurrent terms of ten (10) years imprisonment as to Count I, and 246 days (time served) county jail on Count II. [L.F. 47.]

Greene appealed his convictions to the Eastern District in Cause No. ED102598. That court affirmed the judgments and sentences, and issued its mandate on December 10, 2015. *See State v. Greene*, 476 S.W.3d 309 (Mo. App. E.D. 2015) (per curiam).

Greene timely filed his *pro se* motion for post-conviction relief on March 2, 2016, in Cause No. 16CG-CC00055, and the motion court appointed counsel. [PCR L.F. 4, 15.] Counsel filed an amended motion for post-conviction relief on

---

[1] All statutory references are to RSMo. 2000 unless otherwise indicated.

[2] Appellant will cite to the record as follows:

- ED102598 Direct Appeal Legal File: "[L.F.]," and Transcript: "[Tr.]"; and
- ED105282 Post-Conviction Legal File: "[PCR L.F.]."

June 2, 2016 [PCR L.F. 18], which the motion court accepted pursuant to *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991).[3] [PCR L.F. 28.] On December 30, 2016, the motion court denied Greene's post-conviction motion without an evidentiary hearing. [Id.]

Greene timely appealed the denial of his motion to the Eastern District in Cause No. ED105282. After briefing, that court issued its opinion affirming the decision of the motion court. Greene timely filed his Motion for Rehearing, or for Transfer to the Missouri Supreme Court, on that same date, which the Eastern District denied on January 30, 2018.

Greene timely filed his application for transfer to this Court on February 14, 2018, requesting the Court reexamine a portion of its prior holding in *State v. Carrawell*, 481 S.W.3d 833 (Mo. banc 2016). This Court granted Greene's application and transferred the case on April 3, 2018.

This Court has jurisdiction pursuant to article V, section 10 of the Missouri Constitution, and Rule 83.04.

[3] The motion court conducted an inquiry into the reason for the untimeliness of the amended motion, and concluded the delay was due to abandonment by appointed counsel, not any act or omission by Mr. Greene. [PCR L.F. 28-29.]

STATEMENT OF FACTS

While arresting Mr. Greene, officers removed a cigarette pack from his pocket. Over half an hour after he was securely under arrest and the pack had been separately secured in another area, officers opened it, allegedly discovering a controlled substance therein. At trial, counsel did not challenge this search in any way, a decision the motion court approved without holding an evidentiary hearing.

The Arrest and Search

On May 13, 2014, police officers working with a drug task force, responding to an anonymous tip regarding drug activity, arrived at the Townhouse Inn in Jackson, Missouri. [Tr. 123, 164, 199.] There, smoking a cigarette on the second floor balcony, they encountered Appellant Cletus Greene, along with witness Matthew Robinson. [Tr. 126-128.]

According to the officers' later trial testimony, Mr. Greene then gave the officers a false name. [Tr. 128-129.] In response, Detective Bobby Sullivan, who was personally familiar with Mr. Greene, called him by his real name and asked "do you have anything on you?" to which Mr. Greene allegedly replied, "Yes, I've got marijuana." [Tr. 129:15-18.]

According to Sullivan's trial testimony, before he could retrieve the marijuana from Mr. Greene's pocket, other officers noticed Robinson had a gun

on his person. [Tr. 129:20-24.] Sullivan "assisted" Mr. Greene to the ground. [Tr. 151.] He then removed some marijuana and a cigarette pack from Mr. Greene's pocket. [Tr. 152-155.] Officer Newton disagreed with Sullivan's timeline, testifying the search occurred "before they were placed on the ground after the gun was located." [Tr. 171:16-17.] The items were placed in an empty motel room, and the officers testified both the subjects (Greene and Robinson) and the room were secured at that time. [Tr. 144-145; 151:8-9.]

Between 30 and 45 minutes later, Officer Mike Alford retrieved the pack of cigarettes, and, looking inside, discovered what he believe to be a controlled substance. [Tr. 156:24; 205:19-206:11.]

Charges, Trial, and Direct Appeal

On June 23, 2014, Mr. Greene was charged by information with possession of a controlled substance and possession of marijuana. [L.F. 1.] The later-Amended Information charged Mr. Greene with Count I, possession of a controlled substance ("amphetamine"), a class C felony, and Count II, possession of marijuana, a class A misdemeanor, as to Count II. [L.F. 17-18.] The Amended Information further alleged Mr. Greene was a prior and persistent drug offender. [L.F. 17-18.]

Having pled guilty on Count II the day before [Tr. 8-14], Mr. Greene went to trial on Count I on December 2, 2014, before the Honorable William L. Syler.

[L.F. 6.] He was represented at trial by Assistant Public Defender Amanda Altman. [L.F. 1.] Counsel did not challenge the search of the cigarette pack.

The State presented the above-referenced testimony of Detective Bobby Sullivan, Officer Chris Newton, and Officer Mike Alford. [Tr. 123-224.] Mr. Greene presented testimony from Matthew Robinson. [Tr. 224-29.] Robinson testified that Mr. Greene was not smoking, that he did not admit to possessing marijuana, and that he was searched after being "slammed" to the ground. [Tr. 227-29.]

At the close of the State's case, and then at the close of all evidence, Mr. Greene requested judgments of acquittal, which were both denied. [Tr. 223; 252.] The jury returned a guilty verdict approximately one hour after the case was submitted. [Tr. 282:13-16.]

On December 22, 2014, trial counsel filed a Motion for Judgment of Acquittal or, in the Alternative, for a New Trial. [L.F. 44.] On December 31, 2014, due to Judge Syler's retirement, the Hon. Michael E. Gardner, having been elected Division I Circuit Judge, began to preside over the case. [L.F. 8.] On January 20, 2015, it was called for sentencing. [L.F. 8.] Trial counsel argued her Motion for Judgment of Acquittal or, in the Alternative, for a New Trial, which Judge Gardner denied. [Tr. 275-79.] The court proceeded to sentence Mr. Greene, as a persistent drug offender, to serve ten (10) years in the Missouri

Department of Corrections on Count I, and to time already served on Count II. [L.F. 47-49; Tr. 286-87.]

Mr. Greene appealed his convictions to the Eastern District in Cause No. ED102598. Appellate counsel, Ellen Flottman, agued two points on appeal: (1) that the trial court abused its discretion when it admitted the methamphetamine as an exhibit despite the broken chain of custody; and (2) that the evidence was insufficient to sustain the verdict. On November 17, 2015, the Eastern District issued its order denying both points and affirming the judgment. *See State v. Greene*, 476 S.W.3d 309. The mandate was handed down December 10, 2015.

Post-Conviction Motion and Appeal

On March 2, 2016, 83 days after the direct appeal mandate was issued, Mr. Greene timely filed a *pro se* motion for post-conviction relief under Rule 29.15. [PCR L.F. 4.] The motion court appointed the Missouri State Public Defender on March 2, 2016 [PCR L.F. 1]. On March 22, 2016, Srikant Chigurupati, Assistant Public Defender, entered his appearance as post-conviction counsel, and requested an additional 30 days to file an amended motion, which the motion court granted. [PCR L.F. 15-16.]

On June 2, 2016, PCR counsel filed Greene's amended motion to vacate, set aside, or correct the judgment or sentence, which included a request to consider the amended motion on its merits pursuant to *Sanders v. State*, 807 S.W.2d 493

(Mo. banc 1991). [PCR L.F. 018-027.] In the amended motion, Mr. Greene claimed trial counsel was ineffective for failing to challenge the search of the cigarette pack.[4] [Id.]

On December 30, 2016, the motion court entered its Findings of Fact, Conclusions of Law, and Judgment. [PCR L.F. 028-035.] Therein, the motion court found the amended motion's untimeliness was due to abandonment, and thus proceeded to consider the merits of the motion. [PCR L.F. 028-029.] The motion court then denied Mr. Greene's request for post-conviction relief on both points without an evidentiary hearing. [PCR L.F. 028-035.] Regarding the search, the motion court justified the officers' actions as a search incident to arrest, without comment regarding the timing and location where they actually opened the cigarette pack. [PCR L.F. 34.]

Mr. Greene appealed the motion court's order to the Eastern District Court of Appeals. In its opinion filed December 19, 2017, that court held that, "[a]t the time of Movant's arrest, officers seizing personal effects from an arrestee could search those items incident to arrest even if the effect was not in the arrestee's immediate control." Slip Opinion at 6-7. The court went on to cite this Court's

[4] In the amended motion, Greene also claimed ineffective assistance of appellate counsel for failure to raise the issue of a fatal variance between the charging document and the jury instructions. He does not bring that challenge in this proceeding.

decision in *State v. Carrawell*, noting that the Court limited its effect to searches and seizures conducted after the decision was handed down. *Id*. at 7-8.

After being denied rehearing or transfer by the Court of Appeals, Greene applied to this Court for transfer. Greene's "Question Presented" asked:

> Whether this Court should reexamine its exclusionary rule holding in *State v. Carrawell*, [and hold that,] at the time of the search complained of herein, *Arizona v. Gant* already rendered container searches outside of an arrestee's immediate control impermissible, thus making an officer's reliance upon contrary state appellate court precedent objectively unreasonable.

[Application for Transfer.] This Court granted transfer on April 3, 2018.

To avoid unnecessary repetition, additional facts may be set forth in the argument portion of the brief.

POINT RELIED ON

The motion court clearly erred when it denied Mr. Greene's motion for post-conviction relief without an evidentiary hearing, because trial counsel provided ineffective assistance by failing to file and argue a motion to suppress the evidence, violating Mr. Greene's rights to due process of law, a fair trial, and the effective assistance of counsel, in that the evidence against Mr. Greene was the result of a warrantless search without legal justification. Mr. Greene's potential Fourth Amendment claim was meritorious, in that officers ostensibly performed a search incident to arrest, even though the item searched was outside the area of Greene's immediate control at the time. This Court should reexamine its exclusionary rule holding in *State v. Carrawell*, and hold that, pursuant to United States Supreme Court precedent, the search was unreasonable at the time it was conducted, reasonable trial counsel would have challenged the search, and, the motion court clearly erred in denying Mr. Greene's post-conviction motion without an evidentiary hearing.

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

Arizona v. Gant, 556 U.S. 332, 338 (2009)

State v. Carrawell, 481 S.W.3d 833 (Mo. banc 2016)

U.S. Const. Ams. IV, XIV

Mo. Const., Art. I, §§ 10, 15

ARGUMENT

The motion court clearly erred when it denied Mr. Greene's motion for post-conviction relief without an evidentiary hearing, because trial counsel provided ineffective assistance by failing to file and argue a motion to suppress the evidence, violating Mr. Greene's rights to due process of law, a fair trial, and the effective assistance of counsel, in that the evidence against Mr. Greene was the result of a warrantless search without legal justification. Mr. Greene's potential Fourth Amendment claim was meritorious, in that officers ostensibly performed a search incident to arrest, even though the item searched was outside the area of Greene's immediate control at the time. This Court should reexamine its exclusionary rule holding in *State v. Carrawell*, and hold that, pursuant to United States Supreme Court precedent, the search was unreasonable at the time it was conducted, reasonable trial counsel would have challenged the search, and, the motion court clearly erred in denying Mr. Greene's post-conviction motion without an evidentiary hearing.

Standards of Review

a. Overturning the Motion Court

Under Rule 29.15, appellate courts are empowered to overturn a denial of post-conviction relief where "the findings of fact and conclusions of law are clearly erroneous." *Rotellini v. State*, 77 S.W.3d 632, 634 (Mo. App. E.D. 2002).

That standard is met "if, after a review of the entire record, the reviewing court is left with the definite and firm impression that a mistake has been made." *Id.*

b. Ineffective Assistance of Counsel

To prevail on a claim of ineffective assistance of counsel, a movant must demonstrate "(1) that trial counsel failed to exercise the customary skill and diligence of a reasonably competent attorney, and (2) that he was prejudiced in that a different outcome would have resulted but for trial counsel's errors." *Norville v. State*, 83 S.W.3d 112, 114 (Mo. App. S.D. 2002). *See also Strickland v. Washington*, 466 U.S. 668, 687 (1984). To establish that counsel's performance did not meet the standard of a reasonably competent attorney, a movant must further show that counsel's actions were not made "in the exercise of professional judgment." *Aaron v. State*, 81 S.W.3d 682, 686 (Mo. App. W.D. 2002) (internal quotations and citations omitted).

c. Fourth Amendment Ineffectiveness

Where counsel's alleged error arises from a failure to litigate a Fourth Amendment claim, a movant must demonstrate that "his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable evidence[.]" *Kimmelman v. Morrison*, 477 U.S. 365, 375 (1986).

d. Evidentiary Hearing

A motion court must grant an evidentiary hearing if, in the amended motion, a movant (1) alleges facts, not conclusions, that would entitle him to relief; (2) those facts are not directly refuted by the record; and (3) his claimed errors resulted in prejudice. *See Edgington v. State*, 869 S.W.2d 266 (Mo. App. W.D. 1994) (three-prong test for whether movant is entitled to an evidentiary hearing).

Preservation

The amended motion fully argued the issue presented in this Point, and it is thus fully preserved for review. *See Mouse v. State*, 90 S.W.3d 145, 152 (Mo. App. S.D. 2002) (claim preserved for appellate review if raised in amended post-conviction motion or tried by implicit consent of parties at evidentiary hearing).

Timing

Mr. Greene timely filed his *pro se* Rule 29.15 motion on March 2, 2016, 83 days after the direct appeal mandate was issued. [PCR L.F. 004.] The motion court appointed the Missouri State Public Defender on March 2, 2016 [PCR L.F. 001]. On March 22, 2016, Srikant Chigurupati entered his appearance as post-conviction counsel, and requested an additional 30 days to file an amended motion, which the motion court granted. [PCR L.F. 015-016.]

On June 2, 2016, post-conviction counsel filed the amended motion to vacate, set aside, or correct the judgment or sentence, which included a request to consider the amended motion on its merits pursuant to *Sanders v. State*, 807 S.W.2d 493 (Mo. banc 1991). [PCR L.F. 018-027.] On December 30, 2016, the Motion Court entered its Findings of Fact, Conclusions of Law, and Judgment, in which it found the Amended Motion's untimeliness was due to abandonment by counsel, and thus proceeded to consider the merits of the motion. [PCR L.F. 028-035.]

Argument

Trial counsel should have sought to suppress the evidence in this case. The corpus of the offense—the controlled substance allegedly found inside Mr. Greene's cigarette pack—was obtained pursuant to an unconstitutional search, as the opening and examination of the cigarette pack occurred after Mr. Greene and the pack itself had been separately secured for a substantial amount of time. Under long-established United States Supreme Court precedent, that search cannot be justified as a search incident to arrest. Counsel was ineffective for failing to seek suppression of its fruits, and the courts below clearly erred in excusing counsel's ineffectiveness.

In *State v. Carrawell*, this Court reaffirmed the limited scope of searches incident to arrest. But the Court declined to apply the exclusionary rule, noting

that, at the time of that search, Missouri appellate precedent allowed "personal effects" to be searched incident to arrest, even if they are located outside the area of the arrestee's immediate control. The Court should rethink that premise. Missouri's "personal effects" cases contravened the limits imposed by the United States Supreme Court, and were effectively abrogated by *Arizona v. Gant*, seven years before this Court's *Carrawell* decision. In the face of authoritative Supreme Court rulings, any reliance officers placed on the Missouri appellate cases cannot be considered "reasonable."

a. Searches Incident to Arrest

"[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment[,] subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357 (1967). While the United States Supreme Court has approved certain limited exceptions to the warrant requirement, "courts still retain their traditional responsibility to guard against police conduct which is over-bearing or harassing, or which trenches upon personal security without the objective evidentiary justification which the Constitution requires." *Terry v. Ohio*, 392 U.S. 1, 15 (1968). "When such conduct is identified, it must be

condemned by the judiciary and its fruits must be excluded from evidence in criminal trials." *Id*.

One exception to the warrant requirement—and the exception the Eastern District relied upon when it affirmed the motion court below—allows police to search an arrestee incident to a lawful arrest. In *Chimel v. California*, the Supreme Court sought to clearly-establish the permissible extent of that exception. 395 U.S. 752 (1969). In searching for the appropriate line, the Court determined that searches justified by some exception to the warrant requirement may only be considered "reasonable" if they are "strictly tied to and justified by the circumstances which rendered [their] initiation permissible." *Id*. at 762 (internal quotations and alterations omitted). As such, the reason an exception exists also "marks its proper extent." *Id*.

The search incident to arrest exception "derives from interests in officer safety and evidence preservation that are typically implicated in arrest situations." *Arizona v. Gant*, 556 U.S. 332, 338 (2009). Its scope is thus limited to searches designed to carry out that purpose—specifically, police may search "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." *Chimel*, 395 U.S. at 763. "That limitation, which continues to define the boundaries of the exception, ensures that the scope

of a search incident to arrest is commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy." *Gant*, 556 U.S. at 339. "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id*. "Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." *United States v. Chadwick*, 433 U.S. 1, 14 (1977).

b. Carrawell and the Exclusionary Rule

In *State v. Carrawell*, this Court considered the constitutionality of a warrantless search of a plastic grocery bag the arrestee had been holding prior to his arrest. 481 S.W.3d 833, 835 (Mo. banc 2016). Officers searched the bag after Carrawell was handcuffed and secured in the patrol vehicle. *Id*. at 836. Reiterating the general rule from *Chimel* and its progeny, the Court found the bag "was not within Carrawell's immediate control at the time of [the] search." *Id*. at 838. "However, the court of appeals has previously indicated that an arrestee's

personal effects (e.g. a purse or backpack) [could] be searched even when they are not within the immediate control of the arrestee because such a search qualifies as a search of the person—i.e. the personal effects are part of the person." *Id.* at 838-39.

But that exception to the general rule, the Court held, was "based on a misunderstanding of law[.]" *Id.* at 839. The Court noted the "general rule," first announced in *Chimel*, then further explained in *Chadwick*, held that searches incident to arrest must be limited to the person of the arrestee and the area of his or her immediate control. *Id.* "This principle was then reaffirmed by the Supreme Court in *Arizona v. Gant*." *Id.* "If there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.* (quoting *Gant*, 556 U.S. at 339).

This rule was not new, the Court noted, but was "just a reiteration of *Chimel* and *Chadwick*—that general rule applies to *all* searches incident to arrest[.]" *Id.* Those limitations were "well-established," *id.* at 840, and the *Chimel* rationales "are the only rationales for the search-incident-to-arrest exception." *Id.* at 844. "[A]llowing searches incident to arrest is grounded solely in the need to protect officer safety and prevent destruction of evidence." *Id.* "The court of appeals' distinction for purses and other similar personal effects is not consistent

with Supreme Court precedent." *Id*. at 841. Expanding the exception beyond those limits "untethers the search incident to arrest rule from the justifications underlying the *Chimel* exception and treats the ability to search an arrestee's personal effects as a police entitlement rather than as an exception justified by the twin rationales of *Chimel*." *Id*. at 844 (quoting *Gant*, 556 U.S. at 342-43) (internal quotations and alterations omitted). As such, whether the *Carrawell* bag was a "personal effect" was irrelevant—the fact that, at the time of the search, it was not on Carrawell's person, nor within the area of his immediate control, rendered that search illegal.

Despite its detailed recognition of the limits the Supreme Court had long placed on searches incident to arrest, this Court determined it would not apply the exclusionary rule. The Court quoted *State v. Johnson* for support, which held that, "[w]hen an officer conducts a search incident to arrest in ***objectively reasonable*** reliance on ***binding*** appellate court precedent that is later overturned, the exclusionary rule does not suppress the evidence obtained as a result of that search." 354 S.W.3d 627, 630 (Mo. banc 2011) (emphasis added). "[O]fficers 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*. at 633 (emphasis added). Because, the Court held, at the time of the search, decisions from this state's Court of Appeals authorized personal effects searches

that were outside the area of the arrestee's immediate control, "the exclusionary rule will not apply in this case." *Carrawell*, 481 S.W.3d at 846.

In *Johnson*, four consolidated cases each involved the search of the passenger compartment of a vehicle after the arrestee had already been secured away from that vehicle. 354 S.W.3d at 630. At the time of the searches, two relevant cases guided the officers' actions: the Supreme Court's decision in *New York v. Belton*, 453 U.S. 454 (1981), and this Court's interpretation of that decision in *State v. Harvey*, 648 S.W.2d 87 (Mo. banc 1983). *Harvey* interpreted *Belton* to authorize searches, incident to arrest, of the entire passenger compartment of a vehicle, regardless of whether the arrestee could conceivably regain access to it. *Harvey*, 648 S.W.2d at 89.

After the *Johnson* searches, though, but while the cases were still pending, the Supreme Court handed down its decision in *Arizona v. Gant*. *Johnson*, 354 S.W.3d at 630. *Gant* held that searching the passenger compartment after the arrestees were secured was unlawful, and reaffirmed the *Chimel* rule that searches incident to arrest must be limited to the person of the arrestee and the area of his or her immediate control. 556 U.S. at 339. Under that standard, this Court found the *Johnson* searches were unlawful. 354 S.W.3d at 630. It did not, though, apply the exclusionary rule.

The *Johnson* Court found the circumstances there directly mirrored *Davis v. United States*, 564 U.S. 229 (2011). *Id.* There, like the *Johnson* searches, officers performed a warrantless vehicle search after they had secured the vehicle's occupants in their patrol cars. *Davis*, 564 U.S. at 235. Like in *Johnson*, the Supreme Court decided *Gant* after the *Davis* searches were conducted, but while the case was still pending. *Id.* And, just as the *Johnson* officers had relied on *Harvey's* interpretation of *Belton*, the *Davis* officers relied on the Eleventh Circuit's similar *Belton* holding. *Id.*

The *Davis* Court characterized *Gant* as having announced a "new rule." *Id.* at 234-35. The search took place "a full two years before this Court announced its new rule in *Gant*." *Id.* at 235. Further, "[t]he search incident to Davis's arrest in this case followed the Eleventh Circuit's . . . precedent to the letter." *Id* at 239. "Although the search turned out to be unconstitutional under *Gant*, all agree that the officers' conduct was in strict compliance with then-binding Circuit law and was not culpable in any way." *Id.* at 239-40. As such, applying the exclusionary rule in that case would have no deterrent value, which is the rule's primary purpose. *Id.* at 240. The Supreme Court affirmed Davis's conviction, and held that "evidence obtained during a search conducted in reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.* at 241.

The *Johnson* Court followed *Davis*'s lead. *Johnson*, 354 S.W.3d at 630. "Accordingly, in light of *Davis*, this Court holds that 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." *Id*. at 627.

The searches in *Davis* and *Johnson*, though, were distinguishable from *Carrawell*'s, as well as Mr. Greene's. First, both *Davis* and *Johnson* rely upon the premise that *Gant* announced a "new rule." *Carrawell*, on the other hand, announced no new rule, but recognized the law ***as it already existed***. The Court viewed the rule as longstanding and unambiguous—announced in *Chimel* (a 1969 case), "made clear" in *Chadwick* (a 1977 case), and, finally, "reaffirmed" in *Gant* (a 2009 case). *See Carrawell*, 481 S.W.3d at 838-39. The Court further analysed two other Supreme Court cases—*United States v. Edwards*, 415 U.S. 800 (1974), and *United States v. Robinson*, 414 U.S. 218 (1973)—often cited by the personal effects cases. Contrary to those opinions, though, *Carrawell* held those cases must be understood in concert with *Chimel*, *Chadwick*, and *Gant*, and "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." *Id*. at 840. Finally, the Court, rather than hold the personal effects cases were *no longer* constitutional, instead

ruled that "[t]he court of appeals' distinction for purses and other similar personal effects is not consistent with Supreme Court precedent." *Id*. at 841. This characterization demonstrates the opinions objective and effect—to explain the law as it currently exists, not to erect new limits or carve out additional exceptions.

In another distinguishing factor between *Carrawell* and *Davis/Johnson*, the latter officers "acted in strict compliance with binding precedent" announced by the Supreme Court in *Belton*. *See Davis*, 564 U.S. at 239. No binding precedent or higher authority contradicted the officers' understanding of the *Belton* rule. The same cannot be said for the *Carrawell* search (and the search here), which occurred ***after*** *Gant*. Both searches' justifications relied upon a rule created by state appellate courts, a rule which this Court recognized "is not consistent with Supreme Court precedent." *Carrawell*, 481 S.W.3d at 841. In other words, the fact that *Gant* existed and was in force at the time of the *Carrawell* search makes the question of whether the officers were strictly following the law ambiguous at best.

Indeed, even if this Court's view of an unbroken rule is incorrect, and *Gant* did announce a "new rule" as *Davis* suggests, that rule was handed down—and ***went into effect***—in 2009, well before the searches here and in *Carrawell*. "[T]he United States Supreme Court is the final arbiter of the minimum requirements

found in the federal constitution." *State v. Blair*, 298 S.W.3d 38, 52 n.1 (Mo. App. W.D. 2009). Its decisions do not require ratification by state courts, but are binding and authoritative at the time they are handed down. And, in this Court's view, the court of appeals' personal effects cases were inconsistent with *Gant*. Those cases could not, then, have survived *Gant*, nor could similar cases, occurring after *Gant*, be considered authoritative.

Finally, unlike in *Davis* and *Johnson*, where officers relied on and strictly followed unambiguous case law, suppression in *Carrawell* (and here) would have actual deterrent value. As Judge Teitelman noted in his *Carrawell* concurrence/dissent, "[w]hile it is true that the exclusionary rule does not apply when a search is conducted in a manner permitted by existing case law, as the principal opinion demonstrates, the overwhelming weight of authority from the United States Supreme Court establishes that the search was illegal." *Carrawell*, 481 S.W.3d at 854 (Teitelman, J., concurring in part and dissenting in part). At best, the existence of contrary opinions from state appellate courts rendered the question ambiguous. The officers here and in *Carrawell* were not acting in strict compliance with binding precedent, but exercising a presumed entitlement built on shaky ground that *Gant* had—at least—called into question, and which went against "the overwhelming weight of authority from the United States Supreme Court[.]" *Id.*

Where such ambiguity exists, this Court should incentivize law enforcement officers not to push the boundaries of their already-considerable power, but "to err on the side of constitutional behavior." *United States v. Leon*, 468 U.S. 897, 955 (1984) (Brennan, J., dissenting). By automatically inferring good faith, the Court incentivizes the government to "justify illegal searches by parsing through volumes of court of appeals cases until locating an erroneously decided case supporting the desired result." *Carrawell*, 481 S.W.3d at 854 (Teitelman, J.). Such an incentive allows the "good faith exception" to swallow the exclusionary rule, and strips it of its deterrent value. "[T]he fact remains that the constitutional limitations on the government's authority to search and seize private property retain vitality only if those limits are applied rigorously and consistently." *Id*. at 854-55. This Court should reexamine its exclusionary rule holding in *Carrawell*, and apply the exclusionary rule—at least—to searches that occurred after *Arizona v. Gant*.

c. The Search in This Case

Where a post-conviction movant alleges ineffective assistance for counsel's failure to litigate a Fourth Amendment claim, the movant prevails by showing "his Fourth Amendment claim is meritorious and that there is a reasonable probability that the verdict would have been different absent the excludable

evidence[.]" *Kimmelman*, 477 U.S. at 375. The search of Mr. Greene's cigarette pack was unlawful, and his conviction could not have been obtained without the fruits of that search. Counsel was ineffective for failing to challenge that evidence, and the motion court clearly erred when it ruled otherwise.

According to the State's witnesses, the cigarette pack was removed from Mr. Greene's pocket during the course of his arrest. [Tr. 152-155.] Mr. Greene and the other suspects at the scene were placed under arrest and secured at that time, and the cigarette pack was secured in a motel room. [Tr. 144-145; 151:8-9.] The pack was not opened and examined until 30 to 45 minutes later. [Tr. 156:24; 205:19-206:11.] As the Eastern District observed, "the search of [Mr. Greene's] personal effects, particularly the cigarette pack found in [his] pocket which contained the methamphetamine, occurred when the effects were no longer in his immediate control." Slip Opinion at 7.

The motion court found, without further comment, that the search was justified as a search incident to arrest. [PCR L.F. 34.] The Eastern District agreed. The appellate court noted this Court's decision in *Carrawell*, characterizing that opinion as having announced a "rule" that abrogated the person effects cases and limited searches incident to arrest to the person of the arrestee and area within his immediate control. Slip Opinion at 7. Mirroring this Court's above holding, though, the Court of Appeals found the exclusionary rule would not

apply, because, "at the time of the search, 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." *Id*. "Thus, *Carrawell* only applies to those searches and seizures occurring after *Carrawell* was decided." *Id*.

The Eastern District's view that *Carrawell* announced a new rule is not consistent with the reasoning, language, or effect of this Court's opinion. *Carrawell* recognized the state of the law as it existed, up to and including the *Gant* decision in 2009. Indeed, an "overwhelming weight of authority" from the United States Supreme Court proved the personal effects cases did not reflect the actual scope of the Fourth Amendment in searches incident to arrest. As discussed in the previous section, this Court should not credit erroneous appellate court opinions that go against such weighty, and binding, Supreme Court authority.

By the time law enforcement officers opened the cigarette pack, that pack and Mr. Greene had been secured, in separate areas, for an extended period of time. [Tr. 204-05.] It was well outside the area of his immediate control. There was "no possibility [he] could reach into the area that law enforcement officers seek to search[.]" *Gant*, 556 U.S. at 339. The officers had "reduced [the pack] to their exclusive control, and there [was] no longer any danger that [Greene] might

gain access to the property to seize a weapon or destroy evidence." *Chadwick*, 433 U.S. at 14. As a result, "both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Gant*, 556 U.S. at 339. Those limitations had been in place long before this search occurred. Rather than excuse officers' unconstitutional behavior, this Court should hold that the exclusionary rule applies.

Mr. Greene's rights were violated by this search, and further by trial counsel's failure to raise the issue. A reasonably competent trial attorney would have challenged the search and attempted to suppress its fruits. By failing to do so, counsel failed to exercise the care and diligence a reasonably competent attorney would have exercised when faced with a meritorious Fourth Amendment claim.

Where trial counsel was ineffective for failing to raise a meritorious Fourth Amendment claim, the question of prejudice turns on whether there exists "a reasonable probability that the verdict would have been different absent the excludable evidence[.]" *Kimmelman*, 477 U.S. at 375 (1986). Of that, there can be no question in this case. Absent the methamphetamine obtained through the illegal search, the trial court would have had no choice but to grant a judgment of acquittal at the close of the State's evidence, as the fruits of the illegal search formed the entire basis of the charge. There is thus more than a reasonable

probability that the verdict would have been different had counsel litigated Greene's Fourth Amendment claim. As both the performance and prejudice prongs are met, the motion court clearly erred when it determined trial counsel was not ineffective in this regard. It further erred in doing so without holding an evidentiary hearing, as Mr. Greene's motion (1) alleged facts, not conclusions, that entitle him to relief; (2) those facts are not refuted—but are, indeed, supported—by the record; and (3) his claimed errors resulted in prejudice. See *Edgington*, 869 S.W.2d at 266.

Conclusion

"[T]he constitutional limitations on the government's authority to search and seize private property retain vitality only if those limits are applied rigorously and consistently." *Carrawell*, 481 S.W.3d at 854-55 (Teitelman, J.). The search-incident-to-arrest exception has, for decades, been expressly limited by its justifications of officer safety and evidence preservation. And at the time of this search, the United States Supreme Court had thus long-limited such searches to the person of the arrestee and the area of his or her immediate control. Given the "overwhelming weight of authority" demonstrating the search in *Carrawell* was illegal, this Court should not have inferred good faith, nor considered officers' actions "reasonable." The Court should instead have applied the exclusionary rule at that time, as it should do in this case. And given the merits of Mr.

Greene's Fourth Amendment claim, the Court should further find that counsel was ineffective for failing to litigate that claim, and that the motion court clearly erred in denying Mr. Greene's post-conviction motion without an evidentiary hearing. Failing to provide relief would violate Mr. Greene's rights to be free from unreasonable searches and seizures, to due process of law, to the effective assistance of trial counsel, and to a fair trial, as guaranteed by the Fourth, Fifth, Sixth, and Fourteenth Amendments to the United States Constitution, and article I, sections 10, 15, and 18(a) of the Missouri Constitution.

CONCLUSION

WHEREFORE, based on the arguments presented in the above Point, Appellant Cletus Greene requests that this Court vacate the motion court's denial of post-conviction relief, vacate Mr. Greene's conviction and sentence, and remand the case for a new trial absent the suppressible evidence; or, in the alternative, Mr. Greene requests the Court vacate the motion court's denial and remand the case to the motion court for further proceedings on Greene's post-conviction motion; and for such other relief as this Court deems just.

Respectfully submitted,

/s/ Matthew J. Bell

_____

MATTHEW J. BELL
Missouri Bar No. 67241
Assistant Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
(314) 340-7662 (telephone)
(314) 340-7685 (facsimile)
matt.bell@mspd.mo.gov

ATTORNEY FOR APPELLANT

CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 103.08, I hereby certify that on this 21st day of May, 2018, a true and complete copy of the foregoing was submitted to the Office of the Attorney General, P.O. Box 899, Jefferson City, Missouri 65102, shaun.mackelprang@ago.mo.gov, via the Missouri e-filing system, care of Mr. Shaun Mackelprang, Office of the Attorney General.

/s/ Matthew J. Bell

_____

Matthew J. Bell

CERTIFICATE OF COMPLIANCE

Pursuant to Missouri Supreme Court Rule 84.06(c), I hereby certify that this brief includes the information required by Rule 55.03 and that it complies with the page limitations of Special Rule 360. This brief was prepared with Microsoft Word for Windows, uses Book Antiqua 13-point font, and does not exceed the word and page limits for an appellant's brief in this court. The word-processing software identified that this brief contains 6,925 words, and 35 pages including the cover page, signature block, and certificates of service and of compliance. It is in searchable PDF form.

/s/ Matthew J. Bell

_____

MATTHEW J. BELL
Missouri Bar No. 67241
Assistant Public Defender
1010 Market Street, Suite 1100
St. Louis, Missouri 63101
(314) 340-7662 (telephone)
(314) 340-7685 (facsimile)
matt.bell@mspd.mo.gov

ATTORNEY FOR APPELLANT