No. SC96973

IN THE

Supreme Court of Missouri

CLETUS W. GREENE,

Appellant,

v.

STATE OF MISSOURI,

Respondent.

Appeal from the Cape Girardeau County Circuit Court
Thirty-second Judicial Circuit
The Honorable Michael A. Gardner, Judge

RESPONDENT'S SUBSTITUTE BRIEF

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STATEMENT OF FACTS

Mr. Greene appeals the denial of his Rule 29.15 motion, in which he alleged, *inter alia*, that trial counsel was ineffective for failing "to file a motion to suppress the evidence . . . on the grounds that any incriminating evidence that was seized from [Mr. Greene] was unlawfully seized" (PCR L.F. 19). The motion court denied Mr. Greene's motion without an evidentiary hearing (PCR L.F. 28-35).

* * *

A jury found Mr. Greene guilty of possession of a controlled substance. *State v. Greene*, 476 S.W.3d 309 (Mo.App. E.D. 2015) (per curiam order). In a light favorable to the verdict, the evidence at trial included the following.

On May 13, 2014, at around 11:30 a.m., drug task force officers Bobby Sullivan and Chris Newton, along with other officers, went to the Townhouse Inn in Jackson, Missouri (Tr. 124-25, 164-66). The officers had information that narcotics transactions were occurring there (Tr. 125, 166). The officers observed two men, Mr. Greene and Matthew Robinson, standing on the second floor balcony (Tr. 127-28, 166-67). Mr. Greene was smoking a cigarette (Tr. 130-31). Officers Sullivan and Newton approached the men and asked Mr. Greene his name (Tr. 128). He gave a false name (Tr. 128). Officer Sullivan was familiar with Mr. Greene, so he knew that he had given a false name (Tr. 129). Officer Sullivan asked Mr. Greene if he had "anything" on

him; Mr. Greene said that he had marijuana and motioned down to his left front pocket (Tr. 129). Other officers found a firearm on Mr. Robinson (Tr. 129-30). The officers handcuffed both men (Tr. 130).

While Mr. Greene and Mr. Robinson were being detained, the motel room door behind them was slammed closed (Tr. 172). An officer knocked on the door several times, announcing that they were police and requesting that the people inside open the door (Tr. 172). Although the officers heard noises inside the room, there was no response to the officer's request (Tr. 172). The officers obtained a key, entered the room ("Room One"), and detained the people inside (Tr. 172).

While other officers were handling Room One, Officers Sullivan and Newton remained with Mr. Greene and Mr. Robinson (Tr. 135, 169-71). Officer Sullivan took property out of Mr. Greene's left front pocket: a small bud of marijuana, a pack of cigarettes, and some change (Tr. 131-32). The cigarettes were Kool brand, in a green box (Tr. 132, 142). Officer Sullivan also took a gold-colored ring from Mr. Greene's other pocket (Tr. 132, 169). Officer Newton observed Officer Sullivan remove this property from Mr. Greene (Tr. 169). Mr. Robinson was searched; he did not have a pack of cigarettes on him (Tr. 237). Officer Sullivan took Mr. Greene's hat and placed Mr. Greene's property in the hat (Tr. 131). The officers had the hotel open a nearby empty room, and they placed Mr. Greene's hat containing his property on the

dresser of that room ("Room Two") (Tr. 131). Only property that belonged to Defendant and Mr. Robinson was placed in Room Two (Tr. 216, 221).

Drug Task Force Officer Mike Alford arrived at the Townhouse Inn after Mr. Greene and Mr. Robinson had already been detained (Tr. 199, 201). The officers intended to search the individuals in Room One, but some of the individuals were female, so Officer Alford contacted a female police officer to do those searches (Tr. 202-03). The searches of the female suspects were conducted in the bathroom of Room Two (Tr. 202-03). The female suspects were accompanied by the female police officer the entire time they were in Room Two (Tr. 139). Besides these female suspects, Officers Alford, Sullivan, and Newton saw no other non-officer enter Room Two (Tr. 143, 181, 204).

Officer Newton searched Room One for suspicious items (L.F. 175). The items found in Room One were placed in bags and put in Officer Newton's vehicle; none of the items from Room One were placed in Room Two (L.F. 176-77, 180).

Officer Larry Miller, a Jackson police officer, stood outside Room Two to make sure no one tampered with the property inside (Tr. 131, 204-05). To Officer Alford's knowledge, Officer Miller "never left that front doorway or the front of the deck of that doorway" to Room Two (Tr. 204-05). Officer Sullivan testified that, to the best of his knowledge, the Jackson officer was standing at Room Two the entire time (Tr. 141-42). At some point while Mr. Greene

was detained, he asked Officer Sullivan for a cigarette (Tr. 147-48).

About 30 minutes after Officers Sullivan and Newton had detained Defendant, Officer Alford examined the property in Room Two (Tr. 194, 205). Officer Alford opened the cigarette box and noticed that something "appeared to be either secured or taped to the top of the flip top on the inside," which turned out to be "a plastic baggie with an off white substance" (Tr. 205-06). The substance appeared to be methamphetamine (Tr. 206). Officer Alford asked where the cigarette box came from (Tr. 207). Officer Sullivan identified the green Kool brand cigarette box as belonging to Mr. Greene (Tr. 146, 222).

Officer Alford gave the suspected methamphetamine to Officer Newton, who was the seizing officer for this investigation (Tr. 208). Officer Newton field tested the substance; it field tested positive for the presence of methamphetamine (Tr. 182). Officer Newton placed the methamphetamine into a bag and transported it to the police department (Tr. 182). At the police department, Officer Newton weighed the methamphetamine, put it into an evidence bag, and sealed and signed the bag (Tr. 189). Officer Newton then sent the bag to the crime lab (Tr. 189). The crime lab tested the contents of the bag and concluded that "[t]he crystal material weighing .028, plus or minus .05 grams contain[ed] methamphetamine" (Tr. 190).

On direct appeal, the Court of Appeals affirmed the trial court's judgment. *Greene*, 476 S.W.3d 309. The Court of Appeals issued its mandate

on December 10, 2015.

On March 2, 2016, Mr. Greene timely filed a *pro se* motion pursuant to Rule 29.15 (PCR L.F. 1, 4). That same day, the motion court appointed the public defender to represent Mr. Greene (PCR L.F. 1), making an amended motion due by May 2, 2016. *See* Rule 29.15(g); Rule 44.01(a). The motion court later granted a thirty-day extension of time (PCR L.F. 16), making the amended motion due by June 1, 2016.[1]

On June 2, 2016, Mr. Greene filed an untimely amended motion (PCR

[1] In cases where the motion court has granted an extension of time, the Court of Appeals has issued conflicting opinions regarding the manner in which the due date for an amended motion should be calculated. The Southern District has stated that the due date is calculated by simply adding the extension to the original sixty days available under the rule (*i.e.*, if there is a thirty-day extension, the amended motion is due on the ninetieth day). *See Duke v. State*, 545 S.W.3d 358, 361 n. 4 (Mo.App. S.D. 2018). The Eastern District, by contrast, has stated that the sixty-day deadline must first be calculated, and that the extension must then be added. *See Edwards v. State*, 514 S.W.3d 68, 70 (Mo.App. E.D. 2017). The two methods can return different results if, for instance, the original sixty-day deadline falls on a Saturday. Respondent has followed the Eastern District's approach here.

L.F. 18). The motion court conducted an abandonment inquiry and concluded that "the delay in filing the Amended Motion was due to abandonment by appointed counsel" (*see* PCR L.F. 29). Accordingly, the motion court permitted the untimely filing pursuant to *Sanders v. State*, 807 S.W.2d 493 (Mo. 1991) (PCR L.F. 28-29).

In his amended motion, Mr. Greene alleged, *inter alia*, that trial counsel was ineffective for failing "to file a motion to suppress the evidence . . . on the grounds that any incriminating evidence that was seized from [Mr. Greene] was unlawfully seized" (PCR L.F. 19).

On December 30, 2016, the motion court denied Mr. Greene's motion without an evidentiary hearing (PCR L.F. 28-35). In brief, the motion court concluded that trial counsel was not ineffective because Mr. Greene was lawfully detained, he admitted he had marijuana in his pocket, and the officers could therefore search him incident to arrest (PCR L.F. 33-34).

ARGUMENT

I.

The motion court did not clearly err in denying Mr. Greene's claim that trial counsel was ineffective for failing to file a motion to suppress the methamphetamine that was found in the cigarette pack that was taken from his pocket.

Mr. Greene asserts that the motion court clearly erred in denying his claim that trial counsel was ineffective for failing to file a motion to suppress the methamphetamine that was found in the cigarette pack that was taken from his pocket (App.Sub.Br. 14). He asserts that the evidence was obtained through "a warrantless search without legal justification," "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" (App.Sub.Br. 14).[2]

A. The standard of review

"Appellate review of the denial of a post-conviction motion is limited to

[2] In his brief in the Court of Appeals, Mr. Greene also asserted in his Point Relied On that he was "unreasonable detained" (App.Br. 14). He does not assert that aspect of his claim here; thus, respondent will not discuss that aspect of the motion court's findings and conclusions.

a determination of whether the findings of fact and conclusions of law of the motion court are clearly erroneous." *Moss v. State*, 10 S.W.3d 510, 511 (Mo. 2000). "Findings and conclusions are clearly erroneous if, after a review of the entire record, the court is left with the definite and firm impression that a mistake has been made." *Id.*

To be entitled to an evidentiary hearing, a movant must allege facts, not conclusions, that would warrant relief if true. *Barnett v. State*, 103 S.W.3d 765, 769 (Mo. 2003). The alleged facts must raise matters not refuted by the record and files in the case, and the matters complained of must have resulted in prejudice to the movant. *Id.*

B. Mr. Greene failed to allege facts warranting relief

To prevail on a claim of ineffective assistance of counsel, a movant must "show that counsel's representation fell below an objective standard of reasonableness." *Strickland v. Washington*, 466 U.S. 668, 688 (1984). The movant must also show prejudice from counsel's alleged error. *Id.* at 694. To show prejudice, the movant "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.*

In denying Mr. Greene's claim that trial counsel was ineffective, the motion court observed that the evidence presented at trial showed that "law enforcement officers received information that drug transactions were being

conducted at the Town House Inn in Jackson, Missouri" (PCR L.F. 33). The motion court observed that the "[o]ffiers arrived at the hotel and encountered [Mr. Greene] and another man, Matthew Robinson, standing on the balcony" (PCR L.F. 33). The motion court observed that the evidence showed that Mr. Greene gave the officers a false name (PCR L.F. 33). The motion court observed that the evidence showed that, when asked if he had anything, Mr. Greene "replied that he had marijuana in his pocket" (PCR LF. 33). The motion court observed that the evidence showed that the officers searched Mr. Greene and found "the marijuana and a cigarette pack that contained the methamphetamine at issue" (PCR L.F. 33).

The motion court concluded that a motion to suppress would have been denied (PCR L.F. 34). The motion court observed that officers can briefly detain a person to investigate when the officers have "reasonable suspicion" that illegal activity is occurring (PCR L.F. 34). The motion court concluded that the officers had reasonable suspicion (PCR L.F. 34). The motion court also concluded that, after Mr. Greene admitted he had marijuana, "the search [of Mr. Greene's person] was justified as a search incident to arrest" (PCR L.F. 34). The motion court concluded that counsel "was not ineffective in not filing a motion to suppress because such a motion would have been denied as the methamphetamine was lawfully seized" (PCR L.F. 34).

The motion court did not clearly err in denying Mr. Greene's claim of

ineffective assistance of counsel. Under the Fourth Amendment to the United States Constitution and Article I, section 15 of the Missouri Constitution, the people have a right to be free from unreasonable searches and seizures. *State v. Hosier*, 454 S.W.3d 883, 892 n. 6 (Mo. 2015). The Missouri provision is coextensive with the Fourth Amendment, and the same analysis applies under both provisions. *Id.*

"Warrantless searches are *per se* unreasonable under the Fourth Amendment, unless an 'established and well-delineated' exception applies." *State v. Carrawell*, 481 S.W.3d 833, 838 (Mo. 2016). "One such exception is a search incident to a lawful arrest." *Id.*

The search of an arrestee incident to a lawful arrest has long been held to be a reasonable search under the Fourth Amendment. In *United States v. Robinson*, 414 U.S. 218, 235 (1973)—in upholding the search of a cigarette pack found on the arrested person—the United States Supreme Court stated, "A custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." The Court continued, "It is the fact of the lawful arrest which established the authority to search, and we hold that in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that

Amendment." *Id*.

The search of a person incident to arrest has, in many instances, been held to permit a search of "the personal effects on the person of an arrestee at the time of the arrest." *See State v. Ellis*, 355 S.W.3d 522, 524-25 (Mo.App. E.D. 2011) (listing cases). In *Ellis*, the Court of Appeals pointed out that courts have also held that "a search and seizure that could have been made at the time of the arrest may also be conducted when the arrestee arrives at a place of detention[,]" and that "[a] search of the person at the place of detention likewise includes a search of the property that had been on the arrestee's person." *Id*. The Court of Appeals observed that "[t]he accessibility of the property to an arrestee while the property is being searched has not been the benchmark." *Id*. at 525. The Court of Appeals explained, "The reason that property on a person, such as a purse, wallet, or backpack, may be searched as part of a search of a person is that such property is more 'immediately associated' with the 'person' of the arrestee than other personal property." *Id*.

The Court of Appeals also observed that, while *Arizona v. Gant*, 556 U.S. 332 (2009), had been decided before the search in *Ellis*, *Gant* "applied to vehicle searches and the seizure of items in vehicles that are not immediately associated with the person of an arrestee." *Ellis*, 355 S.W.3d at 525. The Court of Appeals further noted that the defendant had cited to no "published

appellate opinion, much less one having precedential value in Missouri and decided prior to [the search], that extends *Gant* to a search of the personal effects on the person of an arrestee during a search of a person." *Id.*

About five years after *Ellis* was decided, however, in *State v. Carrawell*, this Court expressly applied the holding of *Gant* to the search of a personal effect that the defendant had been holding in his hand at the time of his arrest. The Court explained that, when a personal item (*e.g.*, a bag) is no longer within an arrestee's area of immediate control, the item cannot be searched incident to arrest. The Court observed that, at the time the police searched the defendant's bag while "outside the police car," the defendant "had already been handcuffed and placed into the back of the police car." 481 S.W.3d at 838. The Court held that, under those circumstances, the "bag was not with [the defendant's] immediate control." *Id.* In short, the Court applied the same limit that had been applied in *Gant* to the search of vehicle incident to arrest to the search of a personal effect that was on the arrestee's person at the time of the arrest.

The Court recognized, however, that prior Missouri precedent would have permitted the search of the bag, stating that "[a]t the time of [the officer's] search, there was court of appeals precedent authorizing officers to search an arrestee's personal effects as a search incident to arrest, even if such items were not within the arrestee's immediate control." *Id.* at 846.

Accordingly, the Court held that the officer's search had been conducted in good faith and that the exclusionary rule should not be applied. *Id*.

Here, even assuming the rule in *Carrawell* should apply to the search of the cigarette pack taken from Mr. Greene's pocket, *Carrawell* had not been decided at the time of Mr. Greene's trial, which occurred in 2014. Thus, in deciding whether to file a motion to suppress, trial counsel could not have relied on *Carrawell* or the change in the law wrought by that case. Rather, at that time, *Ellis* represented the controlling precedent in Missouri, and trial counsel would have reasonably concluded that the search of Mr. Greene's personal effects incident to arrest was lawful.

"In reviewing an ineffective assistance of counsel claim, counsel's conduct is measured by what the law is at the time of trial." *Glass v. State*, 227 S.W.3d 463, 472 (Mo. 2007). "Counsel will generally not be held ineffective for failing to anticipate a change in the law." *Id*.; *see Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) ("The reasonableness of counsel's performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential."). In short, in light of *Ellis* and the various cases cited therein, it cannot be said that counsel's performance fell below an objective standard of reasonableness.

Moreover, even if trial counsel had—like the defendant in *Carrawell*—

prevailed in asserting that the search was illegal, that would not have resulted in suppression of the evidence. As in *Carrawell*, the officers in Mr. Greene's case—who conducted their search in 2014—acted in good-faith reliance on prior Missouri precedent. *See Carrawell*, 481 S.W.3d at 846 (citing *State v. Johnson*, 354 S.W.3d 627, 630 (Mo. 2011); and *Davis v. United States*, 564 U.S. 229 (2011)). Thus, as in *Carrawell*, the methamphetamine found in Mr. Greene's cigarette pack would not have been suppressed. *See id*. Accordingly, there is no reasonable probability that filing a motion to suppress would have affected the outcome of Mr. Greene's trial (*i.e.*, Mr. Greene failed to allege facts showing *Strickland* prejudice).

Mr. Greene urges this court to reconsider whether the exclusionary rule should have been applied in *Carrawell*. He argues that the rule announced in *Carrawell* was "not new" (App.Sub.Br. 21). He discusses *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Chadwick*, 433 U.S. 1 (1977), *Arizona v. Gant*, 556 U.S. 332 (2009), and, ultimately, *Carrawell* to assert that this court merely "reaffirmed the limited scope of searches incident to arrest" (*see* App.Sub.Br. 17, 19-22). He asserts that this Court in *Carrawell* indicated that its holding "was 'just a reiteration of *Chimel* and *Chadwick* . . . ." (App.Sub.Br. 21). Thus, he asserts that "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" (App.Sub.Br. 21). Accordingly, he asserts that the exclusionary rule should have been applied in *Carrawell* because "any reliance officers placed on the Missouri appellate cases cannot be considered 'reasonable' " (App.Sub.Br. 18).

But while the Court in *Carrawell* drew upon and reiterated principles outlined in *Chimel*, *Chadwick*, and *Gant*, the rule announced in *Carrawell* was plainly a change in Missouri law and an extension of those principles into a new category of cases, namely, cases involving personal effects found on the arrestee's person at the time of the arrest. *See Carrawell*, 481 S.W.3d at 839 (citing *Ellis*, *supra*, and *State v. Rattler*, 639 S.W.2d 277 (Mo.App. E.D. 1982), and stating that the mistaken reasoning in those cases "should no longer be followed"). Thus, because the Court announced a new rule for these types of cases, the Court correctly concluded that the officers were justified in relying on contrary controlling Missouri precedent at the time of the search.

Mr. Greene's argument that the Court should reconsider its holding that the exclusionary rule did not apply ultimately rests on his assertion that *Gant* effectively (but not explicitly) overruled Missouri's "personal effects" cases, and that law enforcement officers' reliance on those "personal effects" cases was, therefore, unreasonable (*see* App.Sub.Br. 21-28). But the Court should not expect officers to anticipate changes in the law that Missouri courts have not adopted. Moreover, here, controlling Missouri precedent in

2011 (*Ellis*) had expressly stated that no precedential cases had "extend[ed] *Gant* to a search of the personal effects on the person of an arrestee during a search of a person." *Ellis*, 355 S.W.3d at 525.

In addition, when the Court decided *Carrawell*, the question of whether the search was lawful was the divisive issue—not whether the exclusionary rule should have applied. Only one member of the Court opined that the search was unlawful and that the exclusionary rule should have applied. *See Carrawell*, 481 S.W.3d at 854-55 (Teitelman, J., concurring and dissenting). Six members of the Court concurred in the final outcome of the case (*i.e.*, that the evidence should not have been suppressed), but three members disagreed with the primary analysis of the Court and would have held that the search of Mr. Carrawell's personal effects (the bag) was a lawful search incident to arrest. *See Carrawell*, 481 S.W.3d at 847-54 (Wilson, J., concurring).

There are substantial reasons not to treat searches of personal effects taken from an arrestee's person like searches of vehicles or other items that are not closely associated with the arrestee's person. The three concurring judges who disagreed with the primary analysis in *Carrawell* identified compelling reasons to uphold the lawfulness of the search, and, in light of the categorical rule found in *Robinson*, *supra*, and additional authorities from other jurisdictions that have considered this issue, respondent respectfully suggests that the Court should reexamine the holding of *Carrawell* and hold

instead that a search of personal effects found on an arrestee's person is lawful, regardless of whether the arrestee has been secured and the personal effects removed to another location.

In *United States v. Robinson*, 414 U.S. at 224, the Court observed that searches incident to arrest fall within two categories. First, "a search may be made of the *person* of the arrestee by virtue of the lawful arrest." *Id.* (emphasis added) Second, "a search may be made of the *area within the control* of the arrestee." *Id.* (emphasis added).

As to the first category—searches of the person—the Court observed that "[t]he validity of the search of a person incident to a lawful arrest has been regarded as settled from its first enunciation[.]" *Id.* The Court explained that "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.* at 235. Thus, the Court held that the search of a cigarette package found on the arrestee's person was lawful. *Id.* at 236 ("Having in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it[.]"). In short, the search of a *person* incident to an arrest (as opposed to an *area* that the arrestee had access to) "requires no additional justification." It requires no additional justification because the search is subsumed within the greater intrusion of the arrest itself.

The United States Supreme Court has never overruled *Robinson*. But in *Carrawell*, a majority of the Court nevertheless concluded that *Robinson*'s categorical rule regarding the search of an item found on the person of the arrestee has been supplanted or modified by the decisions in *Chadwick*, 433 U.S. 1, and *Gant*, 556 U.S. 332, so that "if the item searched [incident to the arrest] is not within the arrestee's reaching distance (or 'immediate control') at the time of the search, the justifications for a search incident to arrest are absent and there is no valid search incident to arrest." 481 S.W.3d at 839. This modification of *Robinson*'s categorical rule, however, does not find support in either *Chadwick* or *Gant*, as neither of those cases considered the search of an item found on an arrestee's *person* at the time of the arrest.

In *Chadwick*, which was decided a few years after *Robinson*, the Supreme Court considered whether a foot locker that the arrestees had loaded into the trunk of a vehicle immediately before their arrest could be searched incident to arrest more than an hour after the arrest. Acknowledging that the footlocker was not within the arrestees' "immediate control" at the time of the arrest, the government argued, *inter alia*, that the search was lawful "because the footlocker was seized contemporaneously with [the arrestees'] arrests and was searched as soon thereafter as was practicable." 433 U.S. at 14.

In rejecting this argument, the Court briefly outlined when officers can

search "the 'immediate control' area" of an arrestee and pointed out that "warrantless searches of luggage or other property seized at the time of an arrest cannot be justified as incident to that arrest either if the 'search is remote in time or place from the arrest,' . . . or no exigency exists." *Id.* at 15. The Court then made plain that it was analyzing the case in terms of the "area within the control" of the arrestee and not in terms of the arrestee's *person*: "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." *Id.* (emphasis added).

In other words, when dealing with property that the arrestees did not have on their persons at the time of the arrest (*i.e.* when dealing with property that is, instead, within an "area" of control), the relevant inquiry was whether the arrestees "might gain access to the property to seize a weapon or destroy evidence." *Id.* Had the Court been confronted with a search of an item "immediately associated with the person of the arrestee," however, the rule in *Robinson* would have permitted the officers to conduct the search.

Likewise, in *Gant*, the Court considered the search incident to arrest of

an *area*—a vehicle—that the arrestee had recently occupied. The Court observed that a search incident to arrest justifies 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.' " 556 U.S. at 339 (quoting *Chimel*, 395 U.S. at 763). The Court then pointed out that, when analyzing the search of an *area*, "[i]f 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*. (emphasis added) Thus, the Court limited searches of vehicles incident to arrest and held that "the *Chimel* rationale authorizes police to search a vehicle incident to a recent occupant's arrest only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search." *Id*. at 343.

In short, neither *Chadwick* nor *Gant* examined the search of an item found on the arrestee's *person* at the time of arrest. As the Court more recently observed in *Riley v. California*, 134 S.Ct. 2473, 2488 (2014), *Robinson* was the only decision in the preceding forty-five years that had applied "*Chimel* to a search of the contents of an item found on an arrestee's person." Thus, in *Carrawell*, in holding that the search of the bag taken from the arrestee's hand was unlawful, the majority derived a rule from *Chadwick*

and *Gant* that the United States Supreme Court has not applied to searches of items found on an arrestee's *person* incident to a lawful arrest.

Moreover, the United States Supreme Court made plain in *Riley* that it was *not* abrogating *Robinson* insofar as physical searches of items taken from an arrestee's person were concerned. In *Riley*, a police officer seized a "smart phone" from the arrestee and accessed information on the phone. 134 S.Ct. at 2480. About two hours later, at the police station, another officer examined the contents of the phone. *Id*. at 2481. In analyzing whether the search of the *data* on the phone was lawful, the Court reviewed its holdings in *Chimel*, *Robinson*, *Chadwick*, and *Gant*. *Id*. at 2483-84. The Court did not suggest that the holding in *Robinson* had ever been abrogated or abandoned, but it observed that it had "clarified" in *Chadwick*, that the rule announced in *Robinson* "was limited to 'personal property . . . immediately associated with the person of the arrestee.' " *Id*. at 2484.

The Supreme Court then turned to the question of "how the search incident to arrest doctrine applies to modern cell phones"—devices "based on technology nearly inconceivable just a few decades ago, when *Chimel* and *Robinson* were decided." *Id*. And because "digital data" was not a weapon and was not susceptible to destruction by the arrestee after the phone was taken, and, additionally, because a modern cell phone places "vast quantities of personal information literally in the hands of individuals" (*i.e.*, privacy

interests are greatly increased), the Court concluded that the rule in *Robinson* should not be *extended* to searches of *data* contained within a cell phone. *Id*. at 2485.

The Supreme Court did not, however, abandon or abrogate *Robinson* with regard to physical searches of items found on the arrestee's person. To the contrary, the Court stated that "*Robinson*'s categorical rule [permitting physical searches] strikes the appropriate balance in the context of physical objects[.]" *Id*. at 2484. Thus, the Court observed that, under its holding in *Riley*, "[l]aw enforcement officers remain free to examine the physical aspects of a phone to ensure that it will not be used as a weapon—say, to determine whether there is a razor blade hidden between the phone and its case." *Id*. at 2485.

In short, the Supreme Court confirmed the holding of *Robinson* and pointed out that an arrestee has "reduced privacy interests upon being taken into police custody." *Id*. at 2488. The Court further observed that, while *Robinson* focused on "the heightened government interests at stake in a volatile arrest situation," *Robinson* also relied on "the historical basis for the search incident to arrest exception: 'Search of the person becomes lawful when grounds for arrest and accusation have been discovered, and the law is in the act of subjecting the body of the accused to its physical dominion.' " *Id*. (quoting *Robinson*, 414 U.S. at 232).

In other words, the search of the arrestee's person and items in the arrestee's possession "constituted only minor additional intrusions compared to the substantial government authority exercised in taking [the arrestee] into custody." *Id*. Thus, contrary to the majority's suggestion in *Carrawell*, *see* 481 S.W.3d at 844-45, *Riley* does not support the conclusion that the United States Supreme Court has adopted a wholesale application of *Gant* to searches of items seized from an arrestee during an arrest. The Supreme Court's declining to extend *Robinson*'s categorical rule into new, previously-unconsidered territory of cell phone *data*, did not abrogate or change *Robinson*'s rule regarding the physical search of items found on an arrestee's person. Such searches are lawful incident to the arrest and "require no additional justification." *Robinson*, 414 U.S. at 235.

Consistent with *Robinson*'s categorical rule regarding the search of items found on the person, courts in other jurisdictions have held that the rule announced in *Gant* does not apply to searches of personal items that are found on the arrestee's person at the time of arrest. In *State v. Byrd*, 310 P.3d 793, 796 (Wash. 2013),[3] the Washington Supreme Court analyzed a factual scenario that was similar to the facts in *Carrawell* and reached a result that

[3] This case was quoted in the concurring opinion in *Carrawell*. 481 S.W.3d at 852.

was directly contrary to *Carrawell*. In *Byrd*, a police officer determined that a vehicle had stolen license plates. *Id.* at 795. The defendant and a companion drove away in the vehicle, and the officer initiated a traffic stop. *Id.* The officer arrested and secured the driver, and the driver claimed that the car belonged to the defendant. *Id.* The officer then returned to the vehicle and arrested the defendant for possession of stolen property. *Id.* At the time of the arrest, the defendant had a purse on her lap, and before the officer removed her from the car, he seized the purse and set it on the ground nearby. *Id.* The officer secured the defendant in a patrol vehicle and then "returned to the purse within 'moments' to search it for weapons or contraband." *Id.* Inside, the officer found methamphetamine. *Id.*

The defendant argued for an application of *Gant* because, when the purse was searched, she had been secured inside the police vehicle. The Washington Supreme Court rejected the argument and observed that, under *Robinson*, " 'a search may be made of the *person* of the arrestee by virtue of the lawful arrest.' " *Id.* at 796. The court concluded that "[t]he authority to search an arrestee's person and personal effects flows from the authority of a custodial arrest itself." *Id.* The Court, thus, held that *Gant* was not applicable to "personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." *Id.* at 798-99.

The Supreme Court of Illinois reached a similar result in *People v.*

Cregan, 10 N.E.3d 1196 (Ill. 2014). There, the evidence showed that the defendant was placed under arrest, handcuffed, and in the presence of two police officers when the officers took two bags from him and searched them incident to arrest. *Id*. at 1198-99. The defendant argued that, because he had been secured, *Gant* made it unlawful to search his bags. *Id*. at 1202. The Illinois court observed that it could not find "any portion of the *Gant* decision that indicates abrogation of *Robinson*'s holding on search of the *person* incident to arrest." *Id*. at 1203. (emphasis added). The court concluded, "*Gant* does not apply to a search incident to arrest of the defendant's person or items immediately associated with the defendant's person." *Id*.

The Colorado Supreme Court reached the same conclusion in *People v. Marshall*, 289 P.3d 27, 30-31 (Colo. 2012). In *Marshall*, two police officers were waiting at the defendant's residence to arrest him for indecent exposure. 289 P.3d at 28. The defendant arrived home and stepped out of his vehicle carrying a backpack. *Id*. The officers asked him to put the backpack on the ground, and the defendant complied. *Id*. The officers arrested the defendant, handcuffed him, and found marijuana on his person. *Id*. After the defendant had been further secured in a police vehicle, one of the officers searched the backpack and found more marijuana. *Id*. After a trial court applied *Gant* and suppressed the marijuana found in the backpack, the Colorado Supreme Court reversed, concluding that "*Gant* does not support

such an expansive view." *Id.* at 30. The Court compared *Gant* with *Robinson* and concluded that "the exigencies relied upon by the majority in *Gant* are not implicated by the search of a person, and articles on or near that person, after a lawful arrest." *Id.* at 31. *But see United States v. Perdoma*, 621 F.3d 745, 751-52 (8th Cir. 2010) (rejecting "the notion that an officer's exclusive control of an item necessarily removes the item from the arrestee's area of immediate control," but distinguishing *Gant* factually by finding that the arrestee in that case had not been "secured" to the same degree as the arrestee in *Gant*); *United States v. Shakir*, 616 F.3d 315, 317-21 (3rd Cir. 2010) (applying *Gant* to the search of a bag taken from an arrestee).

Upholding *Robinson*'s categorical rule that permits a physical search of items found on the arrestee's person strikes the correct balance between individual privacy interests and the legitimate interests of law enforcement. In *Robinson*, the Court observed that the rule permitting the search of an arrestee's person has "been repeatedly affirmed in the decisions of this Court since *Weeks v. United States*," which was decided in 1914. *See* 414 U.S. at 226 (citing *Weeks v. United States*, 232 U.S. 383 (1914)). The Court also rejected a lower court's suggestion that "there must be litigated in each case the issue of whether or not there was present one of the reasons supporting the authority for a search of the person incident to arrest." *Id.* at 235. The Court stated, "We do not think the long line of authorities of this Court dating back to

Weeks, or what we can glean from the history of practice in this country and in England, requires such a case-by-case adjudication." *Id.*

The Court explained that "[a] police officer's determination as to how and where to search the person of a suspect whom he has arrested is necessarily a quick ad hoc judgment which the Fourth Amendment does not require to be broken down in each instance into an analysis of each step in the search." *Id.* The Court continued, "The authority to search the person incident to a lawful custodial arrest, while based upon the need to disarm and to discover evidence, does not depend on what a court may later decide was the probability in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* Rather, "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment; that intrusion being lawful, a search incident to the arrest requires no additional justification." *Id.* Accordingly, the Court held that "in the case of a lawful custodial arrest a full search of the person is not only an exception to the warrant requirement of the Fourth Amendment, but is also a 'reasonable' search under that Amendment." *Id.*

This categorical rule provides a bright-line test for law enforcement officers who must make quick decisions in potentially volatile situations. And given the need for administrable rules that protect officer safety, a categorical rule is superior to a case-by-case adjudication of whether the

search was justified by some other circumstance. *See generally Virginia v. Moore*, 553 U.S. 164, 175 (2008) ("In determining what is reasonable under the Fourth Amendment, we have given great weight to the 'essential interest in readily administrable rules.' ").

In the context of searches incident to arrest, a categorical rule also makes sense, in part, because it protects the government's "legitimate and weighty" interest in officer safety. *See generally Pennsylvania v. Mimms*, 434 U.S. 106, 110-111 (1977). The facts in Mr. Greene's case provide an apt illustration of the types of potentially dangerous situations that can exist at the time of an arrest.

As outlined above, two drug task force officers, Bobby Sullivan and Chris Newton, along with other officers, went to the Townhouse Inn in Jackson, Missouri, based on information that narcotics transactions were occurring there (Tr. 124-25, 164-66). The officers observed two men, Mr. Greene and Matthew Robinson, standing on the second floor balcony (Tr. 127-28, 166-67). Officers Sullivan and Newton approached the men and asked Mr. Greene his name (Tr. 128). He gave a false name (Tr. 128-29). Officer Sullivan asked Mr. Greene if he had "anything" on him; Mr. Greene said that he had marijuana and motioned down to his left front pocket (Tr. 129). Other officers found a firearm on Mr. Robinson (Tr. 129-30). The officers handcuffed both men (Tr. 130).

While Mr. Greene and Mr. Robinson were being detained, the motel room door behind them was slammed closed (Tr. 172). An officer knocked on the door several times, announcing that they were police and requesting that the people inside open the door (Tr. 172). Although the officers heard noises inside the room, there was no response to the officer's request (Tr. 172). The officers obtained a key, entered the room ("Room One"), and detained the people inside (Tr. 172).

While other officers were handling Room One, Officers Sullivan and Newton remained with Mr. Greene and Mr. Robinson (Tr. 135, 169-71). Officer Sullivan took property out of Mr. Greene's left front pocket: a small bud of marijuana, a pack of cigarettes, and some change (Tr. 131-32). Officer Sullivan took Mr. Greene's hat and placed Mr. Greene's property in the hat (Tr. 131). The officers had the hotel open a nearby empty room, and they placed Mr. Greene's hat containing his property on the dresser of that room ("Room Two") (Tr. 131).

Eventually, after an additional officer was brought to the scene, Room One was searched, the people in Room One were searched, and Mr. Greene's property in Room Two was searched (*see* Tr. 175, 194, 202-03, 205-06). The search of Mr. Greene's property occurred about thirty minutes after he had been arrested (Tr. 194, 205).

It would have been lawful under *Robinson* for Officer Sullivan to search

the cigarette pack immediately after he arrested Mr. Greene. However, due to the number of people present at the scene, the presence of one armed individual, and the possibility of drug activity, it was reasonable for the officers to focus first on securing the scene and the various individuals who might have posed a threat to the officers. In such cases, it is not sensible to suggest that, if officers want to search items found on an arrestee's person, the officer must do so before securing the arrestee.

A bright-line rule permitting a search of items on the arrestee's person is also reasonable in light of *Robinson*'s other rationale for permitting a search of an arrestee's person, namely, that the intrusion of a physical search is subsumed within the greater intrusion of a full custodial arrest. *See Riley*, 134 S.Ct. at 2488. As the Court stated in *Riley*, "*Robinson*'s categorical rule strikes the appropriate balance in the context of physical objects[.]"*Id.* at 2484.

In short, as the Supreme Court held in *Robinson* and later confirmed in *Riley*, a bright-line or categorical rule permitting a physical search of items taken from the person of an arrestee is appropriate and reasonable under the Fourth Amendment, in that it strikes the correct balance between privacy interests and the interests of law enforcement. This Court should, therefore, reexamine its holding in *Carrawell* and hold that the search of Mr. Greene's cigarette pack was a permissible search incident to arrest.

In sum, the motion court did not clearly err in denying Mr. Greene's claim that trial counsel was ineffective for failing to file a motion to suppress the methamphetamine found in his cigarette pack. At the time of Mr. Greene's trial, *Carrawell* had not been decided, and counsel cannot be found ineffective for failing to anticipate the change in Missouri law that was wrought by that case. In addition, even if counsel had filed a motion to suppress, the evidence would not have been suppressed in light of the officers' good-faith reliance on pre-*Carrawell* case law. Alternatively, the Court should reexamine its holding in *Carrawell* and hold here that the motion court did not clearly err in concluding that the search of the cigarette pack was a lawful search incident to arrest. This point should be denied.

CONCLUSION

The Court should affirm the denial of Mr. Greene's Rule 29.15 motion.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached substitute brief complies with Rule 84.06(b) and contains 7,760 words, excluding the cover, this certification, and the signature block, as counted by Microsoft Word; and that pursuant to Rule 103.08, the brief was served upon all other parties through the electronic filing system.

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