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 REPLY BRIEF

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JURISDICTIONAL STATEMENT

Appellant incorporates by reference the Jurisdictional Statement contained in his original Substitute Brief as if fully set out herein.

STATEMENT OF FACTS

Appellant incorporates by reference the Statement of Facts contained in his original Substitute Brief as if fully set out herein.

POINT RELIED ON

Appellant incorporates by reference the Point Relied On contained in his original Substitute Brief as if fully set out herein.

ARGUMENT

Appellant incorporates by reference the Point Relied On contained in his original Substitute Brief as if fully set out herein.

Standards of Review, Preservation, and Timing

Appellant incorporates by reference the statements on Standards of Review, Preservation, and Timing, contained his original Substitute Brief as if fully set out herein.

Argument

a. The Exclusionary Rule

In his opening brief, Mr. Greene asked this Court to reexamine its exclusionary rule holding in *State v. Carrawell*, 481 S.W.3d 833 (Mo. banc 2016). He argued that the law surrounding searches incident to arrest had been clarified by the United States Supreme Court in *Arizona v. Gant*, 556 U.S. 332, 338 (2009), preventing the conclusion that officers acting contrary to *Gant*'s holding could have acted in objective, good faith reliance on binding law "even though these directives may be later overturned." *See State v. Johnson*, 354 S.W.3d 627, 630 (Mo. banc 2011). Because the law prevented searches incident to arrest of items outside the area of the arrestee's immediate control, and that law went into effect, at the very latest, with 2009's *Gant* decision, *Carrawell* wrongly concluded that officers could reasonably rely on contradictory state appellate court rulings.

The State's Response points out that one post-*Gant* Eastern District case, *State v. Ellis*, 355 S.W.3d 522 (Mo. App. E.D. 2011), approved the unlimited search-incident-to-arrest of any personal effects, even after the arrestee is secured and the items are outside the area of their immediate control. *Ellis* reasoned that, even though *Gant* had been decided before that case, it only "applied to vehicle searches and the seizure of items in vehicles that are not immediately associated with the person of the arrestee." 355 S.W.3d at 525. The State goes on to represent the *Carrawell* holding as a "change in the law" that neither officers, at the time of the search, nor Mr. Greene's trial counsel, at the time she decided not to file a motion to suppress evidence, could have predicted. [Sub. Resp. Br. at 16.]

The State's response fails to account both for the content of the *Gant* decision and the effect of a United States Supreme Court ruling on constitutional law in every state. First, *Gant*, by its own plain language, simply did not limit its application to "vehicle searches and the seizure of items in vehicles that are not immediately associated with the person of the arrestee." Instead, as this Court recognized in *Carrawell*, *Gant* restated the law as it already existed – that: (1) searches carried out under some exception to the warrant requirement must be limited in scope to adhere to the purposes of that exception, and (2) searches incident to arrest, whose purpose is to protect officer safety and safeguard

evidence from concealment or destruction, must therefore be limited to the "the arrestee's person and the area . . . from within which he might gain possession of a weapon or destructible evidence." *Gant*, 556 U.S. at 339 (quoting *Chimel v. California*, 395 U.S. 752 (1969)). Nothing in this holding limited those rules, announced in *Chimel* and its progeny, to the vehicle context. [1]

In *Carrawell*, then, this Court correctly observed that *Gant*'s rule was not new, but was merely a "reiteration" of the rule as it existed since *Chimel*. *Carawell*, 481 S.W.3d at 839. The limits described in *Gant* were applicable "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*. 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*."

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[1] The only portion of *Gant* that was limited to the vehicle context was a *third* potential justification – that when the area officers seek to search is a vehicle, officers may search when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle. *Id*. at 343. That rule does not apply here, nor would it have applied in *Ellis*.

Id. at 844 (quoting *Gant*, 556 U.S. at 342-43) (internal quotations and alterations omitted).

This discussion of the scope and effect of *Gant*, and this Court's own description of its decision in *Carrawell*, belie the conclusions that (1) *Gant* was limited to the vehicle context, and (2) that *Carrawell* announced a "new rule." Instead, 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. Neither the searching officers nor Mr. Greene's trial attorney needed to divine some future change in the law in order to know the limits of searches incident to arrest – those limits were unambiguously stated in *Gant*.

The State further relies, though, on the fact that *Ellis* was decided after *Gant*. As a result, at the time of this search and the search in *Carrawell*, the State avers *Ellis*'s misinterpretation of the law "represented the controlling precedent in Missouri[.]" [Sub. Resp. Br. at 16.] This view, though, simply cannot be reconciled with this Court's understanding of *Gant* (discussed above), nor with the effect of decisions by the United States Supreme Court. "[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). The State contends that officers need not "anticipate changes in the law that

Missouri courts have not adopted." [Sub. Resp. Br. at 18.] But the United States Supreme Court's decisions do not require ratification by state courts – they are binding and authoritative at the time they are handed down. If *Gant* is to be taken at face value, *Ellis* was incorrect in refusing to apply it. Indeed, if *Gant* is as clear as this Court held it to be, the State's argument – that *Ellis* was the law of the land because it came after *Gant* – necessarily requires the Court to accept that a state appellate court may *overrule* the United States Supreme Court on matters of federal constitutional law. State appellate courts simply do not possess that power.[2]

Judge Teitelman's understanding of the precedent in this case, as tacitly acknowledge by the Court's principle *Carrawell* opinion, was accurate. "While it is true that the exclusionary rule does not apply when a search is conducted in a manner permitted by existing case law," he wrote, "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). The officers who conducted this search cannot have acted in good faith when the "binding precedent" they relied upon manifestly

[2] The Court may also note that this issue may have been resolved with *Ellis*, had the appellant in that case elected to seek transfer or *certiorari* in that case. Ellis did not.

contradicted that authority. "[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.

b. The State's Response: Personal Effects

In addition to responding to Mr. Greene's request to apply the exclusionary rule, the State requests this Court reverse its substantive holding in *Carrawell* and reinstate Missouri's exception for searches of personal effects. The State's arguments – (1) that "personal effects" searches have never been expressly forbidden by the United States Supreme Court, and (2) that allowing such searches "strikes the correct balance between individual privacy interests and the legitimate interests of law enforcement" – mischaracterize the search incident to arrest rule and downplay the enormous scope and importance of the category of property sought to be searched.

For its first contention, the State relies primarily on *United States v. Robinson*, 414 U.S. 218 (1973). There, the United States Supreme Court permitted the search of a cigarette pack incident to arrest. The Court reasoned that the right to search the person of the arrestee was an historical part of the right for law enforcement to arrest individuals, and thus was "reasonable" under the

Fourth Amendment. *Id*. at 225. It further held that the cigarette pack obtained and examined during that arrest and search was simply a part of that search of "the person." *Id*. at 236.

Two problems arise from a blind adherence to *Robinson*'s reasoning. First, the *Robinson* Court, and now the State, argue that the volatility and unpredictability of an arrest situation must allow for a categorical rule, rather than a "case-by-case" adjudication. [Sub. Resp. Br. at 29.] Unless this Court allows for the unrestrained search of personal effects, the State argues, *Chimel* and its progeny would operate so 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." *Robinson*, 414 U.S. at 235. Thus, an officer's authority to search incident to arrest would "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.*

This contention thoroughly misconstrues the *Chimel* rule. *Chimel* and its progeny *do not require* a case-by-case adjudication of the "probability" that the arrestee has a weapon or contraband. Instead, the United States Supreme Court recognized that, categorically and as a matter of law, all arrests carry the danger that an arrestee may harm an officer or destroy contraband. That is why *Chimel* permits officers to search an arrestee and the area within his immediate control

in every arrest, without exception. *Chimel*'s limits do not decide *whether* an officer may search someone incident to arrest – officers may *always* do so.

But that search, like every exception to the warrant requirement, must be tethered to and limited by the justification for the exception. The risks *Chimel* identified cannot logically be said to extend to areas outside the arrestee's immediate control. And those risks, logically, are never still present after the arrestee has been secured and the items sought to be searched are within law enforcement's exclusive control. So, *Chimel* and its progeny hold, when those things happen, the search is no longer permissible. In other words, it is the scope of the search, not the probability that the arrestee has a weapon or contraband, which must be examined.

Second, *Robinson*'s permission to search items closely associated with the person of the arrestee is very likely *dicta*, as that search would certainly have been permissible under the *Chimel* line of cases. The *Robinson* search involved a cigarette pack taken from the defendant at the time of arrest. During the course of the arrest—*not* after the arrest was complete – the officer felt a crumpled up cigarette pack during a standard pat-down. *Robinson*, 414 U.S. at 222. The officer removed it, at which time he felt unidentifiable objects inside. *Id*. At that time – still standing "face-to-face" with the arrestee – the officer opened the package and found contraband. *Id*. at 223. These facts do not require a categorical rule

separate from *Chimel*'s – at the time of the search, the cigarette pack was still within the area of the arrestee's immediate control.[3]

The State next attempts to rationalize unlimited personal effects searches, arguing that the categorical rule it proposes would "strike the correct balance between privacy interests and the interests of law enforcement." [Sub. Resp. Br. at 33.] First, the State argues, not allowing unlimited searches of personal effects would require officers to perform searches before it is safe to do so. The State points to Mr. Greene's case, specifically, in that, given the number of people at the scene and the particular volatility of the situation, "it was reasonable for officers to focus first on securing the scene and the various individuals who might have posed a threat to the officers" before searching the cigarette pack. [Sub. Resp. Br. at 33.] Applying *Chimel*'s restrictions to such a circumstance would unwisely "suggest that, if officers want to search items found on an arrestee's person, the officer must do so before securing the arrestee." [Sub. Resp. Br. at 33.]

This argument necessarily assumes that the *only way* officers may search items taken from an arrestee is if the search occurs incident to arrest. In fact, the

[3] Note that, in contrast, at the time of the search, here, Mr. Greene was secured, with the cigarette pack separately secured and reduced to the complete control of law enforcement officers.

standard manner in which the Constitution permits officers to search – obtaining a warrant – would still be very much available. Rather than encourage officers to search while the scene is still unsafe, "if officers want to search items found on an arrestee's person, [the officer must simply obtain a warrant.]"

The State next attempts to balance law enforcement's interests against what it suggests is a minimal intrusion into the arrestee's privacy. To the State, the intrusion of an unrestricted search of all personal effects, whether justified or not, is "subsumed within the greater intrusion of a full custodial search." [Sub. Resp. Br. at 33.] The fact of an arrest, though – or the fact that this particular case involves a mere pack of cigarettes – must not obscure the size and scope of the entitlement the State asks this Court bestow on law enforcement. "Personal effects" are not trivial, but constitute one of the most basic, universally recognized forms of property – so much so that they are specifically listed in the Fourth Amendment. *See* U.S. Const. Am. IV (defining the right to be free from unreasonable search and seizure as deriving from "[t]he right of the people to be secure in their persons, houses, papers, and effects[.]") And that category of property includes a multitude of items which any reasonable person may legitimately wish to keep from the prying eyes of strangers.

Our wallets, for example, often include multiple identification and membership cards, along with our entire financial lives. Many people carry

items therein which hold particular personal significance – pictures of children; good luck charms, like a two dollar bill, passed along by someone important; small bits of poetry or love notes from significant others; business cards and folded-up cocktail napkins with names and phone numbers of people we meet (or may wish to meet again). No less personally significant, too, are the items carried in a typical purse, briefcase, or shoulder bag. In addition to our wallets, the bags we carry may hold the keys to our cars and homes; medications for conditions we do not want anyone to know about; other items we tend not to put on public display, like sexual prophylactics and feminine hygiene products. We may have unpaid bills, financial records, pay stubs, and receipts inside. In short, by looking through our "personal effects," a stranger may learn so much information we reasonably prefer to keep to ourselves, from the organizations to which we belong, to our financial histories, sexual proclivities, medical conditions, where we have been, who we have met, what items we have bought, and what our families look like.

In light of the intimate nature of items necessarily included in the category of "personal effects," it is no surprise the State argues they are "immediately associated" with the person. But such "immediate association" does not, in itself, give rise to any justification for an exception to the warrant requirement. At the time of the searches the State wishes the Court to authorize, those personal

effects are not *physically* associated with the person (otherwise, they would be searchable pursuant to *Gant*). The searches occur *after* any danger these effects may create, and any likelihood that the arrestee might destroy evidence contained in them, has passed (otherwise, again, they would be searchable under *Gant*).

Indeed, the only fair reading of the phrase "immediately associated with the person," is less tangible, but much more significant. Our wallets and bags and any other items we carry with us are associated with our persons in that they are a part of us. They are associated with our persons because our personal effects get us through the day. And they are so often attached to those aspects of our lives which we would not share with strangers.

That we would not have a strong, legitimate, reasonable privacy interest in these items is absurd. The State brushes that interest aside, averring that the fact of the arrest alone, even though the arrest is *over* and the dangers inherent in that arrest have *passed*, should grant the State's agents complete authority to intrude so deeply into our private lives by rifling through the intimate items we carry. These are not minimal intrusions, subsumed into the already-significant intrusion of the arrest itself. People have a strong, legitimate, reasonable expectation of privacy in their personal effects. "If it is clear that a practice is unlawful, individuals' interest in its discontinuance clearly outweighs any law

enforcement 'entitlement' to its persistence." *Gant*, 556 U.S. at 349. While courts must necessarily balance privacy interests against the need for officer safety and to prevent the destruction of evidence, once those dangers necessarily no longer exist, those interests cease to balance.

Conclusion

This Court should reaffirm that searches incident to arrest may not include searches of "personal effects" which occur outside the scope of the limitations and rationales laid out in *Chimel* and its progeny. It should further hold that the search complained of herein was not permissible, and, upon reexamination of its holding in *Carrawell*, that the exclusionary rule should apply. Further, given the merits of Mr. Greene's Fourth Amendment claim, the Court should find 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 such 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 his original Substitute Brief and 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

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CERTIFICATE OF SERVICE

Pursuant to Missouri Supreme Court Rule 103.08, I hereby certify that on this 22nd day of August, 2018, a true and complete copy of the foregoing was submitted to Shaun Mackelprang, Assistant Attorney General, at shaun.mackelprang@ago.mo.gov, via the Missouri e-filing system.

/s/ Matthew J. Bell

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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. This brief was prepared with Microsoft Word for Windows, uses Book Antiqua 13-point font, and does not exceed the word limits for an appellant's substitute reply brief under Rule 84.06(b). The word-processing software identified that this brief contains 3,592 words, including the cover page, signature block, and certificates of service and of compliance. It is in searchable PDF form.

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