No.

In the Supreme Court of the United States

WILLIAM BEMBURY,

Petitioner,

v.

COMMONWEALTH OF KENTUCKY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE COMMONWEALTH OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

AARON REED BAKER
ASSISTANT PUBLIC ADVOCATE
5 Mill Creek Park, Section 100
Frankfort, KY 40601

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599

RICHARD A. SIMPSON
COUNSEL OF RECORD
ELIZABETH E. FISHER
WILEY REIN LLP
2050 M Street NW
Washington, DC 20036
(202) 719-7314
rsimpson@wiley.law

Counsel for Petitioner

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QUESTION PRESENTED

Does the exception to the Fourth Amendment's warrant requirement for searches incident to arrest permit a warrantless search of a backpack, purse, luggage, or other external container in the arrestee's possession at the time of arrest, if, at the time of the search, the container is separated from the person and there is no reasonable possibility the arrestee could access the container to obtain a weapon or destroy evidence?

RULE 14(B) STATEMENT

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *Kentucky v. Bembury*, No. 2022-SC-0018-DG, Kentucky Supreme Court. Judgment entered Aug. 24, 2023.

- *Bembury v. Kentucky*, No. 2020-CA-1429-MR, Kentucky Court of Appeals. Judgment entered Dec. 21, 2021.

- *Kentucky v. Bembury*, No. 19-CR-1326, Commonwealth of Kentucky, Fayette Circuit Court, Criminal Branch, Third Division. Judgment entered Mar. 20, 2020.

TABLE OF CONTENTS

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner William Bembury respectfully petitions for a writ of certiorari to review the judgment of the Kentucky Supreme Court.

OPINIONS BELOW

The opinion of the Kentucky Supreme Court (Pet. App. 1a-66a) is reported at 677 S.W.3d 385 (Ky. 2023). The opinion of the Court of Appeals of Kentucky (Pet. App. 67a-77a) is unreported but available at 2021 WL 5856104, and the opinion of the Fayette Circuit Court is unreported (Pet. App. 78a-83a).

JURISDICTION

The Kentucky Supreme Court entered its judgment on August 24, 2023. Pet. App. 46a. On October 25, 2023, Justice Kavanaugh granted an extension of time to file this petition until January 21, 2024. *See Bembury v. Kentucky*, No. 23A371 (S. Ct.). The court has jurisdiction under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

STATEMENT OF THE CASE

1. Under the Fourth Amendment, applicable to the states by virtue of the Fourteenth Amendment, warrantless searches and seizures are prohibited, with certain narrow exceptions. *Chimel v. California*, 395 U.S. 752, 763, 768 (1969). One of those exceptions is for searches incident to arrest. This case presents the issue of whether that exception extends to backpacks, purses, luggage, and other external containers in the arrestee's possession at the time of arrest, if, at the time of the search, the container is separated from the person and there is no reasonable possibility the arrestee could access the container to obtain a weapon or destroy evidence.

In *Chimel*, this Court ruled that the search incident to arrest exception permits a warrantless search of both the arrestee's person and the space within his "immediate control." *Id.* at 763. The Court emphasized that the justifications for this exception are safety and the preservation of evidence, given that an arrestee may have a weapon or evidence concealed on his person or in the nearby area. *Id.*

The Court defined the area within the arrestee's "immediate control" as "the area from within which he might gain possession of a weapon or destructible evidence" (*i.e.*, the "grab area"). *Id.* Under this rubric, the Court held that a warrantless search of the arrestee's three-bedroom home was far outside the bounds of his "person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him" and so violated the Fourth Amendment. *Id.* at 768.

In *United States v. Robinson*, 414 U.S. 218 (1973), the Court reaffirmed that the search incident to arrest exception to the warrant requirement applies to searches of both the person and the area within the arrestee's immediate control. *Id.* at 224. The Court noted that searches incident to arrest are always permitted in custodial arrests, without any need for the government to show that the officers subjectively believed "in a particular arrest situation that weapons or evidence would in fact be found upon the person of the suspect." *Id.* at 235.

In *Robinson*, however, the Court did not address the contours of what constituted "immediate control" for purposes of the exception. There, the officers had patted down the arrestee, felt an object in his left breast pocket, pulled it out, and discovered it was a cigarette pack. *Id.* at 223. The officers then opened the pack and found fourteen capsules of heroin inside. *Id.* The Court held that this was a lawful search of the arrestee's person, and thus, did not reach the question of what constitutes "immediate control" under the exception. *Id.* at 235-36.

Several years later, in *United States v. Chadwick*, 433 U.S. 1 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991), the Court confirmed that officers need not demonstrate any "probable cause" in a particular arrest to believe that the arrestee may have a weapon or is about to destroy evidence to justify a search of the person of the arrestee and the grab area. *Id.* at 14-15. At the same time, however, the Court emphasized that searches of the grab area are different from searches of the person because, "[u]nlike searches of the person," searches of the grab area "cannot be justified by any reduced

expectations of privacy caused by the arrest." *Id.* at 16 n.10.

Applying that principle, the *Chadwick* Court held that a warrantless search of a 200-pound footlocker, which the government conceded was not part of the arrestee's person, violated the Fourth Amendment. *Id.* It explained 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 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)). The Court also clarified that its holding in *Robinson* is limited to "personal property . . . immediately associated with the person of the arrestee." *Id.* *Chadwick* relied in part on the fact that the search occurred more than an hour after the officers had gained exclusive control of the property and "long after [the arrestees] were securely in custody," highlighting that "there [was] no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." *Id*.

In *Arizona v. Gant*, 556 U.S. 332 (2009), this Court again addressed the limits of the search incident to arrest exception. There, police officers conducted a warrantless search of a jacket in the arrestee's car after he had been handcuffed and secured in a police vehicle. The Court held that the search incident to arrest exception did not apply where "there is no possibility that an arrestee could reach into the area that law enforcement officers seek to search." *Id.* at 339. Because the area within the arrestee's immediate control is defined as the area from which he might gain weapons or destroy evidence, there

must be some reasonable possibility the arrestee could actually access items in the area searched in order for officers to conduct a search without a warrant; otherwise, the case cannot come within the limits of the "immediate control" prong of the search incident to arrest exception.

The Court explained that this limitation on 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." *Id.* at 339 (citing *Chimel*, 395 U.S. at 763). Applying that principle, the Court concluded 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.

More recently, in *Riley v. California*, 573 U.S. 373 (2014), the Court explained that the scope of the search incident to arrest exception depends on a balance of law enforcement interests and individual interests in privacy. *Id.* at 382. In particular, the Court stated that it "generally determine[s] whether to exempt a given type of search from the warrant requirement 'by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.'" *Id.* at 374 (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300 (1999)). On that basis, the Court held that a warrantless search of data stored on a cell phone seized from a person during an arrest could not

be justified under the search incident to arrest exception. *Id.* at 403.

2.a. On August 14, 2019, two police officers observed Joseph Napier give money to William Bembury while they were sitting together at a picnic table. Pet. App. 2a-3a. Bembury placed the money in his backpack, "which was on the table in front of him." Pet. App. 3a. Bembury then reached into his backpack, grabbed a rolling paper, sprinkled a "substance" into it, "rolled it into a joint," and handed it to Napier, who took the joint and walked away. *Id.*

Leaving Bembury and his backpack unattended, the officers followed Napier. *Id.* The officers stopped Napier, explained what they had observed and asked him to turn over the joint. *Id.* Napier complied, stating that he paid Bembury about five dollars for it. *Id.* Based on his experience, one of the police officers believed that the substance was "synthetic marijuana." *Id.*

At that point, the officers split up: one stayed with Napier, while the other returned to Bembury, who was "still sitting at [the] picnic table." *Id.* The officer approached Bembury, told him that he was under arrest, and immediately placed him into handcuffs with his hands behind his back. Pet. App. 69a.

After Bembury was handcuffed, the officer "performed a cursory 'look through' of Bembury's backpack." Pet. App. 3a. Rather than search the bag himself, the officer waited for the other officer to arrive. During the entire wait, the backpack stayed on the table in front of Bembury, whose hands remained cuffed behind his back. Pet. App. 69a.

Once the second officer arrived, he conducted a search of the backpack, which uncovered a golf ball-sized bag of synthetic marijuana, a pack of rolling papers, and seven dollars. *Id.*

From the time the officers first observed Bembury to when the search was performed, Bembury's backpack remained on the picnic table in front of him. *Id.* The backpack was not on Bembury's body at any point. And Bembury never consented to the search. Pet. App. 4a.

Bembury was charged with trafficking in synthetic drugs. Pet. App. 69a. On January 28, 2020, he filed a motion to suppress the evidence recovered from his backpack, arguing that the warrantless search violated the Fourth Amendment of the United States Constitution. Pet. App. 4a. The Kentucky Circuit Court denied Bembury's motion, holding that the search was lawful as a search incident to Bembury's arrest because the officers "had a reasonable belief the backpack contained evidence of the offense of arrest." Pet. App. 82a.

Bembury pleaded guilty to one count of possession of synthetic drugs on the condition that he could appeal the denial of his motion to suppress evidence recovered from his backpack. Pet. App. 67a.

b. The Kentucky Court of Appeals held that the warrantless search of Bembury's backpack violated the Fourth Amendment. Pet. App. 68a. Applying this Court's precedents defining the scope of the search incident to arrest exception, the appeals court held that Bembury's backpack was not "immediately associated with" his person, like the cigarette packet in *Robinson* had been but instead was more akin to

the footlocker in *Chadwick*. It noted that, at the time of the search, Bembury's hands were cuffed behind his back, and there was no possibility that he could access the contents of the backpack to endanger the safety of the police officers or destroy evidence. Consequently, the court held that the search incident to arrest exception did not apply, and the warrantless search violated the Fourth Amendment. Pet. App. 72a.

c. A divided Kentucky Supreme Court reversed. Pet. App. 46a-47a. After discussing this Court's leading precedents, the majority noted that "the U.S. Supreme Court has not yet directly opined" on whether items like a backpack or a purse may be searched incident to an arrest and that, "[u]nsurprisingly, there is little uniformity to speak of in the manner in which our nation's courts have addressed this issue." Pet. App. 22a-23a.

The court then adopted the so-called "time of arrest" rule articulated by the Washington Supreme Court and several courts in other jurisdictions, pursuant to which a container in the arrestee's possession at or immediately preceding the time of arrest is considered to be part of the arrestee's person in all cases, and so subject to a warrantless search without any need to analyze whether the arrestee could have gained access to a weapon or destroyed evidence in the container at the time of the search. Pet. App. 23a-24a (discussing *Washington v. Byrd*, 310 P.3d 793 (Wash. 2013)). Acknowledging that the Tenth Circuit had rejected the time of arrest rule in *United States v. Knapp*, 917 F.3d 1161 (10th Cir. 2019), the Kentucky court concluded that "until the U.S. Supreme Court speaks on the matter, the time of arrest rule is a well-reasoned and common-sense way

to determine whether a container is considered part of an arrestee's person and therefore subject to being searched." Pet. App. 44a.

Justice Keller, joined by Justice Thompson, dissented. At the outset, Justice Keller noted that "[f]ederal circuit courts of appeals as well as state courts that have addressed this issue are split." Pet. App. 51a. The dissent argued that, under this Court's decision in *Riley*, a court must balance "the governmental interests at stake" with the individual's privacy interests. *Id.* Justice Keller opined that the arrestee's "privacy interests are much higher in the contents of a backpack than they are in the contents of the pockets of an arrestee's clothing when he is taken into custody," and could include "things as personal as journals containing a person's innermost convictions, medications indicating one's physical health history or even mental health diagnoses, hygiene products, or checkbooks and other financial records evincing one's political, religious, and other personal affiliations." Pet. App. 58a-59a. He concluded that the individual's privacy interests outweighed the governmental interest in performing a warrantless search, agreeing with the Tenth Circuit that "[a] holding to the contrary would erode the distinction between the arrestee's person and the area within her immediate control." *Knapp*, 917 F.3d at 1167.

Justice Thompson issued a separate dissent in which he lamented "the majority's wholesale repeal of all reasonable limits on warrantless baggage searches incident to arrest" and urged "a return to the standards elucidated in [*Chimel* and *Gant*], which prohibit searches of containers that are no longer

accessible to arrestees." Pet. App. 62a. While noting that his analysis applies to all citizens, Justice Thompson expressed special concern for homeless persons, who are compelled to carry all their physical belongings with them and so may carry in an external container all "'the privacies of life' which for another citizen might be stored in a house." Pet. App. 66a (citing *Riley*, 573 U.S. at 403).

REASONS FOR GRANTING THE PETITION

1. The Court should grant review to resolve a deep split in the lower courts regarding the scope of the search incident to arrest exception.

Under the decision below and decisions of the Supreme Courts of Washington, Illinois, and North Dakota, as well as the Texas Court of Criminal Appeals and the United States Court of Appeals for the First Circuit, a backpack, purse, luggage, or other external container in the arrestee's possession is conclusively considered to be part of the arrestee's person and thus always subject to a warrantless search, regardless of whether the container was in the grab area such that the arrestee could have accessed the container to gain a weapon or destroy evidence at the time of the search. These courts permit a warrantless search of the container even if it is separated from the arrestee and even if the search is conducted after the arrestee has been restrained.

In contrast, under decisions of the United States Courts of Appeals for the Third, Fourth, Seventh, and Tenth Circuits, as well as the Supreme Courts of New Mexico and Missouri, such a container may not be searched without a warrant, unless on the specific facts of the case, the container is reasonably

considered to be within the grab area, requiring an assessment of whether there is a reasonable possibility the arrestee could access the container. These courts do not permit a warrantless search of a container if the totality of circumstances show there is no reasonable possibility the arrestee could have gained access to the container at the time of the search.

At the core of the split is how this Court's precedents regarding the exception apply to searches of backpacks and other containers. The lower courts fundamentally disagree regarding the proper interpretation of *Robinson*, *Chadwick*, and *Gant* in this context, including whether *Gant* applies outside the vehicle context to searches of external containers in all custodial arrests.

2. Review is also warranted because the Kentucky Supreme Court's decision is inconsistent with this Court's precedents. A backpack or other external container in an arrestee's possession is not part of the arrestee's person, and, therefore, an arrest does not automatically justify a warrantless search of the bag. Rather, under *Chimel* and its progeny, a warrantless search is only permitted if the container is within the arrestee's immediate control, such that there is a reasonable possibility that he could access the container at the time of the search. Consequently, a search incident to arrest is unjustified when, as in this case, it occurs after the arrestee no longer has access to the bag, in large part because his hands were cuffed behind his back, and he was separated from the backpack at the time of the search. The Kentucky Supreme Court thus erred by dispensing with the

Fourth Amendment's warrant requirement under the circumstances.

3. The issue presented is an important and recurring one, as arrests of people possessing an external container happen all over the country many times every day. This case presents an ideal vehicle for resolving the issue. The facts are undisputed, and the State did not argue below that there was a reasonable possibility Bembury could have accessed the backpack such that it was within his immediate control.

I. The Kentucky Supreme Court's decision exacerbates a deep split among federal and state lower courts regarding how the search incident to arrest exception applies to containers, like backpacks and purses, in the arrestee's possession.

As the Kentucky Supreme Court acknowledged, federal and state courts disagree about how to apply the search incident to arrest exception to containers, like backpacks, purses, and luggage, in the arrestee's possession. Some courts have adopted the so-called "time of arrest" rule under which such containers may be searched without a warrant as part of the arrestee's person in all cases. Other courts have expressly rejected that rule, holding that containers in the arrestee's possession may be searched without a warrant only if they are reasonably considered to be within the grab area at the time of the search, requiring an assessment of whether the arrestee could reasonably access the container at the time of the search.

The disagreement among the lower courts has produced irreconcilable decisions. Searches under identical circumstances violate the Fourth Amendment under the law in some jurisdictions but not in others. Indeed, the majority opinion in this case acknowledged the split among the lower courts and emphasized the absence of any authority directly on point from this Court, as have other courts within the split. Moreover, decisions within both sides of the split have sparked strong disagreements, further highlighting the uncertainty and confusion regarding the scope of the search incident to arrest exception in this context, which comes up commonly and repeatedly as virtually every arrest includes a search incident to arrest.[1]

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[1] Cases considering the proper scope of the search incident to arrest exception as applied to external containers are so common that this Petition could not begin to address them all. For a small sample of other cases, see *Colorado v. Marshall*, 289 P.3d 27, 31 (Co. 2012) (en banc) (approving a warrantless search where the arrestee was carrying a backpack and placed it at his feet at the time of arrest); *New York v. Brown*, 36 A.D.3d 931, 932 (N.Y. App. Div. 2007) (approving, without analysis, the search of a knapsack in the arrestee's possession at the time of arrest); *United States v. Vinton*, 594 F.3d 14, 25-26 (D.C. Cir. 2010) (holding that a warrantless search of a briefcase in the backseat of an arrestee's car was permitted, based largely on circumstances "unique to the vehicle context" (quoting *Gant*, 556 U.S. at 343)); *United States v. Johnson*, 846 F.2d 279, 283-84 (5th Cir. 1988) (holding a warrantless search of a briefcase was permitted because it was within reaching distance of the arrestee); *United States v. Perdoma*, 621 F.3d 745, 753 (8th Cir. 2010) (holding that a warrantless search of luggage was permissible because the arrestee was not secured in the same manner as the arrestee in *Gant*, even though he was handcuffed); *id.* at 753-57 (Bye, J., dissenting) (concluding that *Gant* controls and the warrantless search of luggage violated the Fourth Amendment because there was only an "extremely remote possibility" the arrestee could

1. The Kentucky Supreme Court in this case, three other state supreme courts, and the Texas Court of Criminal Appeals have expressly adopted the time of arrest rule, holding that containers in an arrestee's possession at the time of arrest are immediately associated with the arrestee's person and so always subject to warrantless search. In a recent decision, the United States Court of Appeals for the First Circuit in substance adopted the time of arrest rule, although it did not use the term "time of arrest" and relied on earlier precedent from within that Circuit.

A deeply divided Washington Supreme Court articulated the time of arrest rule in *Washington v. Byrd*, 310 P.3d 793 (Wash. 2013). In a 5-4 decision, the court held that a search of an arrestee's person may include "those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest." *Id.* at 799. According to the majority opinion, the purse on the arrestee's lap while she sat in her car at the time of arrest was "unquestionably an article 'immediately associated'" with her person and could be searched without any need to assess whether the arrestee could have accessed the container at the time of the search. *Id.* It thus concluded that—like the cigarette pack concealed in the arrestee's breast pocket in *Robinson*—the purse was effectively part of the arrestee's person and so subject to a warrantless search, without considering whether the arrestee

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have accessed the luggage after he was handcuffed). Because the specific issue in this case is whether the time of arrest rule is the appropriate test, the Petition focuses on cases that expound on that rule.

reasonably could have accessed the purse at the time of the search.

Justice Fairhurst, joined by three other justices, dissented, asserting that "[w]e must remember that the search incident to arrest exception to the warrant requirement is born of, and should be limited to, necessity." *Id.* at 803. He then explained that there was no need for the officer to search Byrd's purse. The officer had removed the purse from Byrd's car after he arrested her, when he could have left the purse in the car with no threat to the safety of the officer or the general public and with no risk of loss of any evidence. Justice Fairhurst concluded that by sweeping with such a broad brush, "the majority has needlessly divorced the exception from its justifications and limits." *Id.* at 804.

In *Illinois v. Cregan*, 10 N.E.3d 1196 (Ill. 2014), the Illinois Supreme Court likewise adopted the time of arrest rule, holding that "a search of the person incident to his arrest may extend only to those items that are 'immediately associated' with him." *Id.* at 1204-05. According to that court, "[t]he true measure of whether an object, whether it is a cigarette pack or a suitcase, is 'immediately associated' with an arrestee is whether he is in actual physical possession of the object at the time of his arrest," rejecting tests that would instead turn on the nature or character of the object in question. *Id.* at 1207. The court therefore held that items in an arrestee's actual possession are *per se* subject to a warrantless search because they are effectively part of his person. On that basis, the majority held that no warrant was required to search a laundry bag and wheeled luggage cart in the actual possession of the arrestee, including

a container of hair gel concealed within the arrestee's bags.

Justice Burke, joined by Justice Freeman, dissented, asserting that the "majority's possession rule has been expressly rejected by the United States Supreme Court" in *Chadwick*. *Id.* at 1210-11.

In *North Dakota v. Mercier*, 883 N.W.2d 478 (N.D. 2016), the North Dakota Supreme Court also relied on the time of arrest rule, citing *Byrd* and *Cregan*, in holding that a warrantless search of the arrestee's backpack did not violate the Fourth Amendment because it was in his actual and exclusive possession at the time of the arrest and was thus "immediately associated" with the arrestee such that it was part of his person. *Id.* at 490. The court reached this result notwithstanding that the police had retrieved the backpack from the arrestee's house at his request during the stop, and he was secured in the back of the squad car at the time of the search. *Id.* at 482.

Justice Kapsner, joined by Justice Crothers, dissented, arguing that even if officers could satisfy the time of the arrest rule by placing the backpack in the arrestee's possession during the course of the stop, the justifications for a search incident to arrest (safety and evidence preservation) nevertheless are absent when the arrestee is handcuffed and secured in the back of a squad car. *Id.* at 497-99. Accordingly, they concluded that the search incident to arrest exception did not apply.

The Texas Court of Criminal Appeals has also followed the time of arrest approach. In *Price v. Texas*, 662 S.W.3d 428 (Tex. Crim. App. 2020), that court upheld a warrantless search of two rolling suitcases in

the arrestee's possession on the ground that they were part of the arrestee's person. The court reasoned that where "an arrestee is in actual possession of a receptacle at the time of, or reasonably contemporaneously to, his custodial arrest, and that receptacle must inevitably accompany him into custody, a warrantless search of that receptacle . . . . requires no greater justification than the fact of the lawful arrest itself." *Id.* Because it considered the container to be part of the arrestee's person, the court did not consider whether the arrestee reasonably could have accessed it at the time of the search.

In dissent, Justice Newell, joined by Justice Hervey, asserted that "*Chadwick* is dispositive," and that the Texas court should have considered whether the arrestee could have accessed the container at the time of the search, although he noted that "the Supreme Court may need to revisit *Chadwick* in light of some of its more recent holdings."[2] *Id.* at 441-42.

After the Kentucky Supreme Court's decision below, the United States Court of Appeals for the First Circuit issued a decision implicitly adopting the time of arrest rule, holding that external container searches are treated as searches of the person, not items in the arrestee's immediate control. *United States v. Perez*, 89 F.4th 247 (1st Cir. 2023). The First Circuit relied on its own earlier decision in *United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975), rejecting the argument that *Chadwick* and *Gant* cast doubt on that decision. *Id.* at 254-56. As a result, the

[2] The dissent went on to express the view that "[u]ltimately, any confusion or inconsistency emanates from the Supreme Court's precedent and it's up to that Court to fix it." *Price*, 662 S.W.3d at 443.

court held that a backpack in the arrestee's possession is treated the same as the cigarette pack in Robinson's shirt pocket, without any need to assess whether there was any reasonable possibility the arrestee could have accessed the backpack during the search. *Id.* at 261.

In dissent, Judge Montecalvo would have held that the backpack search violated the Fourth Amendment, based largely on this Court's decisions in *Chadwick* and *Gant*. *Id.* at 263-65. Judge Montecalvo emphasized that the search incident to arrest exception is limited in scope to ensure it remains "'commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that an arrestee might conceal or destroy.'" *Id.* at 264-65 (quoting *Gant*, 556 U.S. at 339). The dissent argued that it is highly relevant to the Fourth Amendment analysis that the arrestee was handcuffed and not within reaching distance of the container at the time of the search. *Id.* at 269.

2. In direct conflict with these decisions adopting the time of arrest rule, five federal courts of appeals and two state supreme courts have held that the search incident to arrest exception does not extend to containers in the arrestee's possession, such as backpacks, purses, and luggage, unless, at the time of the search, they are within the grab area and thus fall in the "immediate control" prong of the exception.

In *United States v. Knapp*, 917 F.3d 1161 (10th Cir. 2019), the Tenth Circuit held that the search incident to arrest exception did not justify a warrantless search of an arrestee's purse sitting next to her when she was arrested. *Id.* at 1167. The court of appeals explained that a permissible search of the person is limited to the person's clothing and containers concealed under

or within the arrestee's clothing, emphasizing that "the animating reasons supporting arresting officers' 'unqualified authority' to search an arrestee's person are less salient in the context of visible, handheld containers such as purses" that are not concealed on a person's body or within her clothing and can be easily separated from the arrestee. *Id.* at 1166 (quoting *United States v. Robinson*, 414 U.S. 218, 225 (1973)).

Noting that the exception to the warrant requirement is justified to preserve evidence and protect safety, the court concluded that those concerns are not generally implicated by external, visible containers that are easily separated from the person. Accordingly, the court distinguished such items from the cigarette pack concealed on the arrestee's person in *Robinson*, ruling that such external, visible containers are not encompassed within the search incident to arrest exception for a search of the person. It particularly noted that treating external containers as part of the person "would erode the distinction between the arrestee's person and the area within her immediate control." *Id.* at 1167.

The *Knapp* court identified the following factors for assessing whether an external container is subject to a warrantless search: "(1) whether the arrestee is handcuffed; (2) the relative number of arrestees and officers present; (3) the relative positions of the arrestees, officers, and the place to be searched; and (4) the ease or difficulty with which the arrestee could gain access to the searched area." *Id.* at 1168-69 (citing *United States v. Parra*, 2 F.3d 1058, 1066 (10th Cir. 1993)). In *Knapp*, the arrestee's hands were cuffed behind her back, three officers were on the scene, the purse was closed and positioned several feet

behind her, and the officers had exclusive possession of the purse. The Tenth Circuit concluded that the warrantless search violated the Fourth Amendment because there was no concern the arrestee could reasonably access the purse to gain a weapon or destroy evidence.

In *United States v. Davis*, 997 F.3d 191 (4th Cir. 2021), the Fourth Circuit reached a similar result in holding that a warrantless search of an arrestee's backpack violated the Fourth Amendment. The court acknowledged that different exigency rules apply to searches of vehicles but held that the rationale of this Court's decision in *Gant* nonetheless applies outside the vehicle context to the search of a container in the arrestee's possession. *Id.* at 197. Noting that the *Gant* Court held that the warrantless search of the arrestee's jacket located in a car was unreasonable because the arrestee was handcuffed and secured in a police car prior to the search, the Fourth Circuit reasoned that the same principle applies to any search incident to any lawful arrest because the rationale for permitting an exception to the Fourth Amendment's warrant requirement—safety and the preservation of evidence—applies with respect to all arrests. *Id.* at 196-97. The court accordingly held that "police officers can conduct warrantless searches of non-vehicular containers incident to a lawful arrest 'only when the arrestee is unsecured and within reaching distance of the [container] at the time of the search.'" *Id.* at 197 (quoting *Gant*, 556 U.S. at 343).

The Third, Seventh, Ninth, and Tenth Circuits have similarly applied *Gant* outside the vehicle context to hold that the search incident to arrest exception justifies warrantless searches of containers

in the arrestee's possession only where "under all the circumstances, there remains a reasonable possibility that the arrestee could access a weapon or destructible evidence in the container or area being searched." *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010) (finding "no plausible reason" to limit *Gant's* application to automobile searches).[3] *Accord, United States v. Salazar*, 69 F.4th 474, 477-78 (7th Cir. 2023) (relying on *Gant* to assess the "totality of the circumstances" to determine whether the search of a jacket draped over a chair next to the arrestee was lawful); *United States v. Cook*, 808 F.3d 1195, 1199 n.1, 1200 (9th Cir. 2015) (relying on *Gant* to analyze the "totality of the circumstances," including the arrestee's "position at the time of the search" as "a highly relevant fact," in assessing whether the search incident to arrest exception justifies a warrantless search of a backpack); *Knapp*, 917 F.3d at 1168 (reading *Gant* as "focusing attention on the arrestee's ability to access weapons or destroy evidence at the time of the search . . . regardless of whether the search involved a vehicle" and assessing numerous factors to determine the applicability of the search incident to arrest exception).

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[3] *Shakir* provides a good example of circumstances in which a court rejecting the time of arrest rule nonetheless permitted a warrantless search. In that case, the arrest took place in a hotel lobby, the arrestee's bag was at his feet, a suspected accomplice had been detained in the lobby by two unarmed security guards, and the police had reason to be concerned another accomplice might be in the lobby. *Shakir*, 616 F.3d at 319. The Third Circuit held that, under the totality of circumstances, a warrantless search of the bag was justified because, in part, "he was arrested in a public area near some 20 innocent bystanders, as well as at least one suspected confederate who was guarded only by unarmed hotel security officers." *Id.* at 321.

The New Mexico Supreme Court recently followed the same approach in *New Mexico v. Ortiz*, 539 P.3d 262 (N.M. 2023), holding that the search incident to arrest exception did not permit the warrantless search of a purse worn by the person arrested at the time of arrest. Expressly adopting the Tenth Circuit's rationale in *Knapp*, the New Mexico court held that the purse was not part of the arrestee's person because it could be and was removed when she was arrested. *Ortiz*, 539 P.3d at 267. It emphasized that, in holding otherwise, "the district court ignored an important difference between pockets and a purse—the latter could be removed from Defendant and kept safely away from her." *Id.*

As to whether the purse was in the area within the arrestee's immediate control, the court reasoned that this Court in *Chimel* and *Gant* limited that area to "the area from within which [the arrestee] might gain possession of a weapon or destructible evidence." *Id.* at 268 (quoting *Birchfield v. North Dakota*, 579 U.S. 438, 471 (2016)). Because the State presented no evidence that the purse was in that area, the search violated the Fourth Amendment. *Id.* (noting that "there is limited evidence in the record as to the location of the purse at the time of arrest, whether it was secured, its distance from [the arrestee], how she was handcuffed such that she would be able to access the purse, and whether and why the officers had concerns for their own safety or the destruction of evidence").

Likewise, in *Missouri v. Carrawell*, 481 S.W.3d 833 (Mo. 2016) (en banc), the Missouri Supreme Court held that a warrantless search of a plastic bag the arrestee was holding at the time of his arrest violated

the Fourth Amendment. The court held that because the arrestee had been handcuffed and locked in the back of a police car when the search was conducted, "[i]t matters not whether this bag was more akin to luggage or more akin to a purse. Neither is part of the person." *Id.* at 845. Like the decision in *Knapp,* the court's ruling thus turned on whether the arrestee reasonably could have accessed the container such that it was within his immediate control when the search was conducted. *Id.* In reaching its conclusion, the Missouri Supreme Court overruled several lower court decisions holding that searches of personal effects necessarily qualify as searches of the person, as a result of which no warrant is required. *Id.* at 839.

Justice Wilson concurred, writing separately to express disagreement with the majority's conclusion that the lawfulness of a search depends on the circumstances present at the time of the search instead of the time of arrest. *Id.* at 849-50 (Wilson, J., concurring).

3. This deep conflict between lower court decisions (including strong disagreements within courts on both sides of the split) demonstrates substantial uncertainty and confusion about whether the exception to the warrant requirement for a search incident to arrest necessarily extends to backpacks, purses, luggage, and other external containers in the arrestee's possession at the time of arrest or, instead, whether such containers may be searched without a warrant only if necessary to protect people or preserve evidence because the arrestee could access the container at the time of the search. This Court should grant review to resolve that important issue.

II. The decision below is inconsistent with this Court's precedents and creates further confusion regarding the proper application of the search incident to arrest exception.

1. The Kentucky Supreme Court extended the search incident to arrest exception to allow warrantless searches of any external containers in the arrestee's possession, in all custodial arrests, even if at the time of the search there was no reasonable possibility the arrestee could access the container to gain a weapon or destroy evidence. In doing so, the court made two fundamental errors. First, the court wrongly treated a backpack or other external container as part of the person of the arrestee instead of assessing whether it was an item within the arrestee's grab area. Second, the court incorrectly evaluated the lawfulness of the search based on the circumstances at the time of arrest as opposed to the circumstances at the time of the search. By permitting a warrantless search of all containers in an arrestee's possession in all cases, the Kentucky Supreme Court extended the search incident to arrest exception far beyond its constitutional limits.

a. In developing the search incident to arrest exception, this Court has drawn a distinction between searches of the person who has been arrested and searches within the arrestee's grab area. The arrest alone justifies a search of the person because it justifies the seizure of the person, and the search of the person is only a "minor additional intrusion." *Riley*, 573 U.S. at 392. That rationale does not necessarily extend to items in the nearby area because an arrest itself does not permit an intrusion into the

Fourth Amendment interests regarding those items. To qualify a search for the exception, officers must demonstrate a reasonable possibility the arrestee could have accessed the container at the time of the search.

An external container such as a backpack, purse, or luggage is not part of the body of a person as is an arrestee's clothing or an item—such as the cigarette packet in *Robinson*—held within a pocket in the arrestee's clothing. Instead, an external container typically has the potential for being easily and safely separated from the arrestee, in a way that clothing or items concealed within clothing cannot, especially when, as here, the container is not even being carried by the arrestee at the time of arrest. The distinction is particularly important because the arrestee has a reduced expectation of privacy in his person but not in the items in the grab area. *Chadwick*, 433 U.S. at 16 n.10.

Concluding that external containers are necessarily part of the arrestee's person artificially fails to consider the arrestee's important privacy expectations and automatically expands the search incident to arrest exception beyond the limited justifications established by this Court for bypassing the Fourth Amendment's warrant requirement. Contrary to the Kentucky Supreme Court's holding below, an arrest justifies a warrantless search of a container only if there is a reasonable possibility the arrestee could access it at the time of the search.

b. The Kentucky Supreme Court also erred by holding that the legality of a search should be evaluated based on the circumstances at the time of the arrest instead of at the time of the search. Justice

Scalia refuted this exact point in his concurrence in the judgment in *Thornton v. United States*, 541 U.S. 615 (2004). In rejecting the view that, if a search could be made incident to arrest, it also could be made later once the arrestee is secured, Justice Scalia cogently explained:

> The weakness of this argument is that it assumes that, one way or another, the search must take place. But conducting a *Chimel* search is not the Government's right; it is an exception—justified by necessity—to a rule that would otherwise render the search unlawful. If "sensible police procedures" require that suspects be handcuffed and put in squad cars, then police should handcuff suspects, put them in squad cars, and not conduct the search.

Id. at 627.

The whole point of permitting a warrantless search incident to arrest is that the arrestee may be able to "gain possession of a weapon or destructible evidence" that is either concealed on his person or reasonably within his reach. *Chimel*, 395 U.S. at 763. That rationale does not apply when the police have already safely effectuated an arrest, restrained the arrestee, and secured the item out of the arrestee's reach. In that circumstance, the concerns about safety and/or the preservation of evidence that might have justified a warrantless search no longer apply, and accordingly, the government must obtain a warrant before searching the item.

The Court recognized this point in *Chadwick* by holding unlawful a warrantless search of a footlocker conducted more than an hour after the officers had gained exclusive control of the property. There, the Court explained that the search incident to arrest exception did not apply in part because "there [was] no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence."[4] *Chadwick*, 433 U.S. at 15.

This Court relied on similar reasoning in *Gant*. In that case, the Court held that the search incident to arrest exception did not justify a warrantless search of a jacket located in an arrestee's car after the arrestee had been handcuffed and secured in a police vehicle. The reasoning of both *Chadwick* and *Gant* makes clear that the time of arrest rule is analytically flawed because it artificially permits a warrantless search when the justification for not getting a warrant no longer applies. Permitting a warrantless search incident to arrest based only on considerations at the time of arrest expands the exception in a way that is "untether[ed]" from its justification. *Riley*, 573 U.S. at 386.

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[4] To be sure, the search in *Chadwick* took place more than an hour after the officer had taken possession of the footlocker, while the search in this case occurred closer in time to the arrest. But the difference in the *amount* of time between the arrest and the search is not dispositive. The critical point is that in both *Chadwick* and this case, the search did not occur contemporaneously with the arrest but rather was conducted after the police had secured the arrestee and obtained possession of the container. In both cases, therefore, the lapse of time meant that there was no exigency justifying a warrantless search.

c. The Kentucky Supreme Court should have applied the test this Court articulated in *Riley,* pursuant to which courts balance the arrestee's interest in privacy against the government's interest in assuring safety and preserving evidence. Applying that test demonstrates that the search incident to arrest exception should not be extended to searches of external containers conducted after the arrestee has been restrained and the container secured.

An arrestee has a significant expectation of privacy in the contents of a backpack, purse, or luggage that is not automatically comparable to the reduced expectation of privacy he may have in his person with respect to a search incident to arrest. *See Chadwick*, 433 U.S. at 16 n.10. Indeed, as the dissents below highlighted, containers of that sort may contain highly personal items, and in some cases even all of a person's worldly possessions. Pet. App. 58a-59a (Keller, J., dissenting) ("People carry all kinds of personal items in their backpacks of which they do not intend the public to have knowledge and to which they do not intend the public to have access."); Pet. App. 65a-66a (Thompson, J., dissenting) (noting that, for some citizens, "such possessions may contain all 'the privacies of life' which for another citizen might be stored in a house" (quoting *Riley*, 573 U.S. at 403)).

On the other side of the ledger, the government has a minimal interest in conducting a warrantless search of a bag that the arrestee can no longer access. In that circumstance, an immediate warrantless search is no longer necessary to assure safety or evidence preservation. The government's minimal interest in conducting a warrantless search thus does not overcome the arrestee's interest in the privacy of the

contents of his bag. It likewise does not justify expanding the search incident to arrest exception to permit warrantless searches of containers that—at the time of the search—the arrestee can no longer access.

2. A straightforward application of these principles demonstrates that the warrantless search of Bembury's backpack violated the Fourth Amendment. At the time of the search, there was no reasonable possibility that Bembury could have accessed the backpack. Bembury was handcuffed, seated at a table, and supervised by two officers. The record contains no suggestion that he was agitated or otherwise causing potential danger. In fact, the arresting officer left the backpack on the table while he waited for the second officer to return before conducting the search, which refutes any notion that exigent circumstances justifying an immediate warrantless search existed.[5] Indeed, the State never even argued below that the search of Bembury's backpack was necessary for safety or the preservation of evidence.

Because the backpack was not in Bembury's grab area at the time of the search and there were no other

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[5] Although it may have been theoretically possible for Bembury to have escaped his handcuffs and overwhelmed two officers, the exception does not assume that an arrestee is "possessed of the skill of Houdini and the strength of Hercules." *Thornton*, 541 U.S. at 625-26 (Scalia, J., concurring in the judgment) (quoting *United States v. Frick*, 490 F.2d 666, 673 (5th Cir. 1973)). As the courts rejecting the time of arrest rule have held, the exception applies only when there is a reasonable possibility that the arrestee can access the container to obtain a weapon or destroy evidence.

exigent circumstances, the officers were required under the Fourth Amendment to obtain a warrant before searching the backpack.

III. The issue presented is exceptionally important and this case presents an ideal vehicle to resolve it.

The Fourth Amendment's protection against unreasonable searches and seizures is one of the most fundamental constitutional rights. It "was in large part a reaction to the general warrants and warrantless searches that had so alienated the colonists and had helped speed the movement for independence," and it was adopted in response to "a history of 'abuses so deeply felt by the Colonies as to be one of the potent causes of the Revolution.'" *Chimel*, 395 U.S. at 761 (quoting *United States v. Rabinowitz*, 339 U.S. 56, 69 (1950)). To protect our Fourth Amendment rights, this Court has determined that warrantless searches are *per se* unreasonable, unless one of a few exceptions, including the one for a search incident to arrest, applies. *Gant*, 556 U.S. at 338. The issue of whether police officers may conduct a warrantless search of external containers associated with an individual at the time of arrest thus strikes at one of the most fundamental principles of our democracy.

The historical concerns underlying the Fourth Amendment directly apply to searches of bags and other containers. *Id.* at 345 ("Indeed, the character of that threat implicates the central concern underlying the Fourth Amendment—the concern about giving police officers unbridled discretion to rummage at will among a person's private effects."). In modern American society, the use of purses, backpacks, and

other bags is ubiquitous, and it is commonplace for an arrestee to have some sort of container in his possession at the time of the arrest. Such arrests undoubtedly happen many times every day all over the country. This case accordingly presents an important and recurring issue, and the low bar for warrantless searches adopted by the Kentucky Supreme Court and other courts endorsing the time of arrest rule poses profound real-world consequences for any individual who carries a bag.

This case presents an ideal vehicle for resolving the deep split pervading lower state and federal courts on a critically important issue. The undisputed facts establish that Bembury could not have accessed his backpack at the time of the search; indeed, the State never even argued to the contrary.

As a result, this case cleanly presents an important and recurrent issue, urgently needing clarification by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

AARON REED BAKER
ASSISTANT PUBLIC ADVOCATE
5 Mill Creek Park, Section 100
Frankfort, KY 40601

F. ANDREW HESSICK
160 Ridge Road
Chapel Hill, NC 27599

RICHARD A. SIMPSON
Counsel of Record
ELIZABETH E. FISHER
WILEY REIN LLP
2050 M Street, NW
Washington, DC 20036
(202) 719-7000
rsimpson@wiley.law

JANUARY 19, 2024

Counsel for Petitioner

APPENDIX

TABLE OF APPENDICES

Page

APPENDIX A — OPINION OF THE SUPREME COURT OF KENTUCKY, DATED AUGUST 24, 2023

SUPREME COURT OF KENTUCKY.

2022-SC-0018-DG

COMMONWEALTH OF KENTUCKY,

Appellant,

v.

WILLIAM BEMBURY,

Appellee.

August 24, 2023

ON REVIEW FROM COURT OF APPEALS,
CASE NO. 2020-CA-1429-MR, FAYETTE
CIRCUIT COURT NO. 19-CR-01326

OPINION OF THE COURT BY JUSTICE LAMBERT

William Bembury (Bembury) entered a guilty plea to one count of possession of synthetic drugs on the condition that he could appeal the Fayette Circuit Court's denial of his motion to suppress evidence recovered from his backpack. Before the Court of Appeals, Bembury asserted that his backpack was searched in violation of his rights against unlawful search and seizure under the Fourth Amendment of the United States Constitution[1] and

1. U.S. Const. amend. IV.

Section Ten of Kentucky's Constitution.[2] A split Court of Appeals panel reversed and held that no exception to the rule requiring that searches be supported by a warrant applied. The Commonwealth now appeals that ruling. After thorough review, we reverse the Court of Appeals and reinstate the circuit court's order denying Bembury's motion to suppress.

I. FACTS AND PROCEDURAL BACKGROUND

The facts of this case are not in dispute. On August 14, 2019, Officer Adam Ray (Officer Ray) was assigned to the Bureau of Special Operations, Bicycle Unit, with the Lexington Police Department. His assignment was to patrol the downtown entertainment district. At approximately 6 p.m. he and an Officer Kennedy observed an individual named Joseph Napier (Napier) approach Bembury on a sidewalk near Phoenix Park. Officer Ray was familiar with Bembury from his experience patrolling that area. He also knew Bembury to be an individual that sold synthetic marijuana based on complaints from security personnel at the Lexington Public Library as well as statements from individuals who had been arrested for possession of synthetic marijuana and reported to police that they had purchased the substance from Bembury.

Bembury and Napier had a brief conversation and then began walking away from the area together. This raised the officers' suspicions, so they followed the pair to the courtyard of the Chase Bank building down the street.

2. Ky. Const. § 10.

Officer Kennedy watched Bembury and Napier as they sat at a picnic table in the courtyard while Officer Ray positioned himself in the first level of a parking garage next to the courtyard. Officer Ray had an unobscured view of Bembury and Napier, although they were sitting with their backs to him. Officer Ray could not recall if he used binoculars to observe them, but testified it was his habit to do so. He watched Napier give Bembury an unknown amount of U.S. currency. Bembury then placed the money in his backpack, which was on the table in front of him. Next, Bembury took a white rolling paper out of his backpack and reached back into his backpack and took out a substance that he sprinkled into the rolling paper, rolled into a joint, and handed to Napier. Napier then put the joint into his backpack and walked away.

The officers followed and stopped Napier. They told him they had just watched his transaction with Bembury and asked him to give them the joint. Napier complied with the Officers' request and told them he had paid Bembury about five dollars for it. During the summer months, Officer Ray encountered synthetic marijuana almost every day. Based on his experience, in particular the odor and appearance of the substance in the joint, he believed it was synthetic marijuana. At that point, Officer Kennedy stayed with Napier while Officer Ray rode back to Bembury who was still sitting at a picnic table in the courtyard of the bank building. Officer Ray told Bembury he was under arrest and placed him in handcuffs. The officer then performed a cursory "look through" of Bembury's backpack, but he stopped the search and decided to wait for Officer Kennedy to arrive

before conducting a more thorough search. When Officer Kennedy arrived, Officer Ray filled out paperwork while Officer Kennedy searched Bembury's backpack. During the search, Officer Kennedy found a baggie of synthetic marijuana that was approximately the size of a golf ball, a pack of rolling papers, and seven one-dollar bills. Until it was moved to perform the search, Bembury's backpack remained on the picnic table in front of him. He did not consent to the search.

On January 28, 2020, Bembury filed a motion to suppress the evidence recovered from his backpack. He argued that the warrantless search of his backpack violated the Fourth Amendment of the U.S. Constitution and Section Ten of Kentucky's Constitution. During the suppression hearing that followed, Officer Ray was the Commonwealth's only witness, and his testimony recounted the facts as stated above. Following supplemental memoranda from both parties, the circuit court entered an opinion and order denying Bembury's motion to suppress. The circuit court reasoned that

> [i]n [*Arizona v. Gant*],[3] the Supreme Court held a search incident to a lawful arrest encompasses the search of a vehicle and any containers found within the vehicle "when the arrestee is within reaching distance of the vehicle ***or it is reasonable to believe the vehicle contains evidence of the offense of arrest***."

3. 556 U.S. 332, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009).

The court then relied on an unpublished Court of Appeals opinion, *Agee v. Commonwealth*,[4] which applied *Gant* and upheld a warrantless search of a backpack under factually similar circumstances because the officers had a reasonable basis to believe the bag contained evidence of Agee's crime of public intoxication. Based on *Gant* and *Agee*, the circuit court found that the search of Bembury's backpack was lawful as a search incident to his lawful arrest because the officers "had a reasonable belief the backpack contained evidence of the offense of arrest."

The Court of Appeals disagreed with the circuit court's ruling and reversed.[5] The court noted that warrantless searches made incident to arrest are divided into two categories: searches of the arrestee's person and searches of the area within the arrestee's control.[6] And, that the latter category of warrantless search must be justified on the grounds of ensuring the arresting officer's safety and to prevent the destruction of evidence.[7] The court further acknowledged that in *Gant*, the U.S. Supreme Court created an independent justification for the warrantless search of an arrestee's vehicle when the arresting officer

4. 2010-CA-001122-MR, 2014 WL 3795492 (Ky. App. Aug. 1, 2014).

5. *Bembury v. Commonwealth*, 2020-CA-1429-MR, 2021 WL 5856104, at *1 (Ky. App. Dec. 10, 2021).

6. *Id.* at *2 (citing *United States v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973)).

7. *Bembury*, 2021 WL 5856104, at *2 (citing *Gant*, 556 U.S. at 339, 129 S.Ct. 1710).

has a reasonable belief that the vehicle contains evidence of the crime of arrest.[8]

However, the court held that the search of Bembury's backpack could not be upheld as a search of the area within his immediate control because at the time of the search he was handcuffed and therefore did not have the ability to destroy evidence or pose a threat to the officers' safety.[9] Moreover, it held that the *Gant* exception allowing warrantless searches in order to recover evidence of the crime of arrest applies only to vehicle searches due to the "circumstances unique to the vehicle context."[10]

The Court of Appeals next addressed whether the search of Bembury's backpack could be upheld as a search of his person, noting that the "authority to search the arrestee's actual person without a warrant has been extended to include 'personal property ... immediately associated with the person of the arrestee[.]'"[11] The court agreed with Bembury's assertion that his backpack was more akin to the 200 lbs. double locked footlocker that the U.S. Supreme Court held could not be searched without a warrant in *United States v. Chadwick* than other items

8. *Id.* at *2.

9. *Id.*

10. *Id.* (quoting *Gant*, 556 U.S. at 343, 129 S.Ct. 1710).

11. *Bembury*, 2021 WL 5856104, at *3 (quoting *United States v. Chadwick*, 433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991)).

on an arrestee's person that the Supreme Court and lower federal courts have held can be searched incident to arrest such as a cigarette packet, a billfold and address book, a wallet, and a purse.[12] The court reasoned that although "the backpack was portable and Bembury had control over it throughout the time he was observed by the police ... a backpack is functionally distinguishable from a cigarette packet, wallet, address book or even a purse" because "[l]ike luggage, it is intended as a repository of personal effects ... and is likely to contain many more items of a personal nature than the small items recovered directly from the person of an arrestee."[13]

Finally, the Court of Appeals held that there was insufficient evidence presented at the suppression hearing to nevertheless allow the evidence to be admitted under the inevitable discovery doctrine.[14] Under this doctrine, "[e]vidence unlawfully obtained by police is nevertheless admissible if the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means."[15] The court reasoned that the Commonwealth did not raise its inevitable discovery argument until after the suppression hearing in its supplemental memorandum, and that Officer Ray testified

12. *Bembury*, 2021 WL 5856104, at *3.

13. *Id.* (internal quotation marks omitted).

14. *Id.* at *4.

15. *Id.* (quoting *Dye v. Commonwealth*, 411 S.W.3d 227, 238 (Ky. 2013)) (internal quotation marks omitted).

that he did not know if an inventory search of the backpack was conducted by the detention center and that it was likely returned to Bembury after the synthetic marijuana, rolling papers, and money were removed from it.[16] Judge Taylor concurred only with the court's result without separate opinion, and Judge Larry Thompson dissented without separate opinion.[17]

The Commonwealth now challenges the Court of Appeals' ruling before this Court.

II. ANALYSIS

The Commonwealth contends that the Court of Appeals' decision directly conflicts with *Agee*, the opinion relied upon by the circuit court, and that it improperly extends the U.S. Supreme Court's holding in *Chadwick*. The Commonwealth further asserts that the search of Bembury's backpack was justifiable as a search incident to his lawful arrest. In the alternative, the Commonwealth argues that the evidence was admissible under the inevitable discovery doctrine.

In response, Bembury agrees that the Court of Appeals' ruling conflicts with *Agee* but argues that *Agee* was wrongly decided. He asserts that *Chadwick* is dispositive and requires this Court to hold that the search of his backpack violated his Fourth Amendment rights. He further contends that there was insufficient

16. *Bembury*, 2021 WL 5856104, at *4.

17. *Id.* at *5.

evidence presented by the Commonwealth to hold that the inevitable discovery doctrine applies.

A. Standard of Review

When reviewing a trial court's ruling on a defendant's motion to suppress, an appellate court applies different standards of review to its findings of fact and conclusions of law, respectively. In accordance with those well-established standards, we must first determine whether the trial court's findings of fact were supported by substantial evidence,[18] or, "evidence that a reasonable mind would accept as adequate to support a conclusion and evidence that, when taken alone or in the light of all the evidence ... has sufficient probative value to induce conviction in the minds of reasonable men."[19] If the trial court's fact findings are supported by substantial evidence, then they are conclusive, and we must then "conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law."[20] *De novo* review affords "no deference to the trial court's application of the law to the established facts."[21]

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18. *See, e.g.*, *Payton v. Commonwealth*, 327 S.W.3d 468, 471 (Ky. 2010).

19. *Moore v. Asente*, 110 S.W.3d 336, 354 (Ky. 2003) (defining "substantial evidence") (internal quotation marks omitted).

20. *Payton*, 327 S.W.3d at 471–72.

21. *Horn v. Commonwealth*, 240 S.W.3d 665, 669 (Ky. App. 2007).

As noted, the facts of this case are uncontested. In denying Bembury's motion to suppress, the court made the following pertinent findings of fact: the investigating officers had reason to believe Bembury had previously trafficked synthetic marijuana; they observed what they believed to be a hand-to-hand synthetic marijuana transaction between Napier and Bembury that occurred in a public area; during the transaction, they saw Bembury reaching into his backpack to access the illicit substance; they stopped Napier and confirmed that the substance sold to him was synthetic marijuana based on their experience; and they arrested Bembury and searched his backpack immediately following his arrest. We hold these facts are supported by substantial evidence and now turn to the questions of law presented.

B. The search of Bembury's backpack was a search of his person incident to his lawful arrest and did not violate his rights against unlawful search and seizure.

The Fourth Amendment to the U.S. Constitution provides that

> [t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

In a similar manner, Section 10 of the Kentucky Constitution states that

> [t]he people shall be secure in their persons, houses, papers and possessions from unreasonable search and seizure; and no warrant shall issue to search a place, or seize any person or thing, without describing them as nearly as may be, nor without probable cause supported by oath or affirmation.

For over a century, this Court has recognized that "there is no substantial difference between the wording of the clause in the federal and state Constitutions," and that it is therefore appropriate to look to U.S. Supreme Court precedent for guidance in construing Section 10.[22]

It is well-established under both Kentucky and U.S. Supreme Court jurisprudence that "all searches without a valid search warrant are unreasonable unless shown to be within one of the exceptions to the rule that a search must rest upon a valid warrant."[23] Accordingly, in order for us to hold that Bembury's Fourth Amendment rights were

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22. *Youman v. Commonwealth*, 189 Ky. 152, 224 S.W. 860, 862 (1920).

23. *Commonwealth v. Reed*, 647 S.W.3d 237, 243 (Ky. 2022) (quoting *Cook v. Commonwealth*, 826 S.W.2d 329, 330 (Ky. 1992)). *Accord Katz v. United States*, 389 U.S. 347, 357, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967) ("[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.").

violated by the search of his backpack, we must find that the officers' actions constituted a search, that they acted without a warrant or consent, and that no established exception to the warrant requirement applies.[24] It is not disputed that the officer's actions constituted a search and that the search was conducted without a warrant or Bembury's consent. The dispositive question is therefore whether an exception to the warrant requirement applies. More specifically, whether the search was justifiable as being incident to Bembury's lawful arrest.

Recently, in *Riley v. California*,[25] which addressed whether cell phone data can be searched incident to arrest, the U.S. Supreme Court discussed the history of its cases involving the search incident to arrest exception. It began its discussion with *Chimel v. California*,[26] which it credited for "[laying] the groundwork for most of the existing search incident to arrest doctrine."[27] In *Chimel*, police officers arrested Chimel in his home and then, acting without a search warrant, proceeded to search the entirety of his three-bedroom home, including his garage and attic.[28] In addressing Chimel's appeal, the Court crafted the following rule for determining the reasonableness of a search incident to arrest:

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24. *See Reed*, 647 S.W.3d at 243.

25. 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014).

26. 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969).

27. *Riley*, 573 U.S. at 382-83, 134 S.Ct. 2473.

28. *Id.* at 383, 134 S.Ct. 2473.

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.... There is ample justification, therefore, for a search of the arrestee's person and the area 'within his immediate control'—construing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.[29]

The Court held that the search of Chimel's home was unlawful "because it was not needed to protect officer safety or to preserve evidence."[30]

The *Riley* Court next discussed that four years after *Chimel*, in *United States v. Robinson*,[31] the Court applied *Chimel*'s analysis within the context of a search of an arrestee's person incident to arrest.[32] In *Robinson*, a police officer arrested Robinson for driving with a revoked

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29. *Id.* (quoting *Chimel*, 395 U.S. at 762-63, 89 S.Ct. 2034).

30. *Riley*, 573 U.S. at 383, 134 S.Ct. 2473.

31. 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973).

32. *Riley*, 573 U.S. at 383, 134 S.Ct. 2473.

license, conducted a pat down search, and felt an object he could not identify in Robinson's coat pocket.[33] The officer removed the object, a crumpled cigarette packet, and discovered several heroin capsules inside.[34] The Court of Appeals held that the officer's search of Robinson was unreasonable "because Robinson was unlikely to have evidence of the crime of arrest on his person," and because "it could not be justified as a protective search for weapons."[35] The *Riley* Court said the following of the *Robinson* decision to reverse the Court of Appeals:

> This Court reversed, rejecting the notion that "case-by-case adjudication" was required to determine "whether or not there was present one of the reasons supporting the authority for a search of the person incident to a lawful arrest." As the Court explained, "[t]he 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." Instead, 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 thus concluded that the search of Robinson was reasonable even though there was no concern about

33. *Id.*

34. *Id.*

35. *Id.* at 383-34, 134 S.Ct. 2473.

the loss of evidence, and the arresting officer had no specific concern that Robinson might be armed. In doing so, the Court did not draw a line between a search of Robinson's person and a further examination of the cigarette pack found during that search. It merely noted that, "[h]aving in the course of a lawful search come upon the crumpled package of cigarettes, [the officer] was entitled to inspect it." A few years later, the Court clarified that this exception was limited to "personal property ... immediately associated with the person of the arrestee." *United States v. Chadwick*, 433 U.S. 1, 15, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977) (200–pound, locked footlocker could not be searched incident to arrest), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991).[36]

The Court clarified that *Robinson* is its only decision that applies *Chimel* to the search of an item found on an arrestee's person.[37] Nevertheless, it went on to note that "[l]ower courts applying *Robinson* and *Chimel* ... have approved searches of a variety of personal items carried by an arrestee,"[38] including a billfold and address book,[39] a wallet,[40] and a purse.[41] The Court unequivocally disagreed

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36. *Id.*

37. *Id.* at 392.

38. *Id.*

39. *United States v. Carrion*, 809 F.2d 1120 (5th Cir. 1987).

40. *United States v. Watson*, 669 F.2d 1374 (11th Cir. 1982).

41. *United States v. Lee*, 501 F.2d 890 (D.C. Cir. 1974).

with the government's argument that "a search of all data stored on a cell phone is 'materially indistinguishable' from searches of these sorts of physical items," stating: "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse."[42]

Finally, the *Riley* Court discussed *Gant*, which it identified as the final case in the "search incident to arrest trilogy."[43] *Gant* addressed the circumstances under which an arrestee's vehicle may be searched incident to his or her arrest.[44] The *Gant* Court concluded "that *Chimel* could authorize police to search a vehicle 'only when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search.'"[45] However, the *Gant* Court added "an independent exception for a warrantless search of a vehicle's passenger compartment [and any containers therein] when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle."[46] This exception did not flow from *Chimel* and is specific to vehicle searches due to the "circumstances unique to the vehicle context."[47]

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42. *Riley*, 573 U.S. at 393, 134 S.Ct. 2473.

43. *Id.* at 384, 134 S.Ct. 2473.

44. *Id.*

45. *Id.* at 385, 134 S.Ct. 2473.

46. *Id.* (internal quotation marks omitted).

47. *Id.*

From the foregoing discussion, we discern that the U.S. Supreme Court distinguishes between and applies different standards to: (1) a search of an arrestee's person; (2) a search of the area within the arrestee's immediate control; and (3) a search of an arrestee's vehicle and the containers therein.

When an arrestee's person is searched pursuant to a valid arrest, "a search incident to the arrest requires no additional justification" because "[a] custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment," and "[i]t is the fact of the lawful arrest which establishes the authority to search[.]"[48] Stated differently, an officer may search an arrestee's person following a lawful arrest without needing to justify the search by showing it was necessary to ensure the officer's safety or to prevent the destruction of evidence because those concerns are inherent in every custodial arrest. In contrast, when an arresting officer searches the area within the arrestee's immediate control without a warrant, the search must be limited to an area from which the arrestee could either obtain a weapon or destroy evidence.[49] Finally, police may search an arrestee's vehicle if the arrestee is unsecured and can access the vehicle or

48. *Robinson*, 414 U.S. at 235, 94 S.Ct. 467.

49. *Chimel*, 395 U.S. at 768, 89 S.Ct. 2034 ("The search here went far beyond the petitioner's person and the area from within which he might have obtained either a weapon or something that could have been used as evidence against him. There was no constitutional justification, in the absence of a search warrant, for extending the search beyond that area.").

if the officer has a reasonable belief that the vehicle may contain evidence of the crime of arrest.

Pertinent to this case, and as noted by the *Riley* Court, the search of an arrestee's "person" includes personal property immediately associated with the person of the arrestee so long as the search is not "remote in time or place from the arrest."[50] This was the rule established by *Chadwick*, upon which the Court of Appeals' opinion below relies.

In *Chadwick*, Amtrak railroad officials in San Diego observed Gregory Machado and Bridget Leary load a 200 lbs. double locked footlocker onto a train bound for Boston.[51] The trunk raised suspicions due to its unusually heavy weight and because it was leaking talcum powder, a substance used to mask the smell of marijuana.[52] When the footlocker arrived in Boston, federal agents observed Machado and Leary claim the footlocker and later watched as Machado and Joseph Chadwick loaded it into the trunk of Chadwick's car while Leary waited in the car.[53] Before the suspects closed the trunk, the agents arrested Machado, Leary, and Chadwick.[54]

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50. *Chadwick*, 433 U.S. at 15, 97 S.Ct. 2476.

51. *Id.* at 3, 97 S.Ct. 2476.

52. *Id.*

53. *Id.* at 4, 97 S.Ct. 2476.

54. *Id.*

The arrestees were then transported to the Federal Building in Boston while agents followed in Chadwick's car with the footlocker.[55] The footlocker remained under the exclusive control of the officers at all times following the arrests and was ultimately placed in the Federal Building.[56] The warrantless search of the trunk was not conducted by the officers until an hour and a half after the arrests; a large amount of marijuana was found.[57] Chadwick, Machado, and Leary were charged with possession of marijuana with intent to distribute and conspiracy and moved to suppress the evidence found in the footlocker.[58] The district court granted the motion, and the Court of Appeals affirmed on the basis that the search was not justified as a search incident to lawful arrest.[59]

The U.S. Supreme Court affirmed.[60] The Court began by rejecting the government's contention that the Fourth Amendment Warrant Clause only protects an individual's home.[61] The Court reiterated its previous tenet that "the Fourth Amendment protects people, not places[.]"[62]

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55. *Id.*

56. *Id.*

57. *Id.* at 4-5, 97 S.Ct. 2476.

58. *Id.*

59. *Id.* at 5-6, 97 S.Ct. 2476.

60. *Id.* at 6, 97 S.Ct. 2476.

61. *Id.* at 6-7, 97 S.Ct. 2476.

62. *Id.* at 7, 97 S.Ct. 2476 (quoting *Katz*, 389 U.S. at 351, 88 S.Ct. 507) (internal quotation marks omitted).

Specifically, "it protects people from unreasonable government intrusions into their legitimate expectations of privacy."[63] The Court held that

> [b]y placing personal effects inside a double-locked footlocker, respondents manifested an expectation that the contents would remain free from public examination. No less than one who locks the doors of his home against intruders, one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant Clause. There being no exigency, it was unreasonable for the Government to conduct this search without the safeguards a judicial warrant provides.[64]

The Court also rejected the Government's argument "that the Constitution permits the warrantless search of any property in the possession of a person arrested in public, so long as there is probable cause to believe that the property contains contraband or evidence of crime," and that the search of the footlocker was reasonable because it was seized contemporaneously with the arrests and was searched as soon as "practicable" thereafter.[65] The Court opined that "the reasons justifying search in a custodial arrest are quite different" because "there is always some danger that the person arrested may seek

63. *Chadwick*, 433 U.S. at 7, 97 S.Ct. 2476.

64. *Id.* at 11, 97 S.Ct. 2476.

65. *Id.* at 14, 97 S.Ct. 2476.

to use a weapon, or that evidence may be concealed or destroyed."[66] Accordingly,

> [s]uch searches may be conducted without a warrant, and they may also be made whether or not there is probable cause to believe that the person arrested may have a weapon or is about to destroy evidence. **The potential dangers lurking in all custodial arrests make warrantless searches of items within the "immediate control" area reasonable without requiring the arresting officer to calculate the probability that weapons or destructible evidence may be involved**. *United States v. Robinson*, 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973) ... However, 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. **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**.[67]

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66. *Id.*

67. *Id.* at 14-15, 97 S.Ct. 2476 (internal citations and quotation marks omitted) (emphasis added).

The Court held that "[h]ere the search was conducted more than an hour after federal agents had gained exclusive control of the footlocker and long after respondents were securely in custody; the search therefore cannot be viewed as incidental to the arrest[.]"[68]

With the foregoing precedents in mind, the issue now before this Court is whether the search of Bembury's backpack was justifiable as a search incident to his lawful arrest. To resolve this issue, we must decide, as a matter of first impression, whether Bembury's backpack was an item of "personal property ... immediately associated with [his] person,"[69] or whether it was "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."[70] If the backpack is properly considered part of Bembury's "person," then the search was lawful as no additional justification for the search other than it being incident to his arrest was needed. However, if the backpack was instead "the area within his immediate control," we would then need to address whether the search of the backpack was justified based on officer safety or the preservation of evidence.

As the U.S. Supreme Court has not yet directly opined on this issue, lower federal and state courts have been left to our own devices in determining how to draw the

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68. *Id.* at 15, 97 S.Ct. 2476.

69. *Id.*

70. *Riley*, 573 U.S. at 383, 134 S.Ct. 2473 (quoting *Chimel*, 395 U.S. at 762-63, 89 S.Ct. 2034).

line between what constitutes a "*Robinson* search" of an arrestee's person and a "*Chimel* search" of the area within an arrestee's immediate control when a portable container capable of carrying items—purses, backpacks, suitcases, briefcases, gym bags, computer bags, fanny packs, etc.—are concerned. Unsurprisingly, there is little uniformity to speak of in the manner in which our nation's courts have addressed this issue. Indeed, many have not yet parsed the issue in those exact terms. One test, however, has gained some traction in a handful of jurisdictions and we believe its adoption in this Commonwealth will provide uniformity and clear authority for our bench, bar, and law enforcement in determining when such items may lawfully searched incident to arrest.

The test, as coined by the Washington Supreme Court, is known as the "time of arrest" rule. Washington's highest court explicitly adopted this test in *State v. Byrd*.[71] In that case, Lisa Byrd was a passenger in a stolen vehicle that was stopped by the police.[72] An officer arrested Byrd while she was sitting in the passenger seat with her purse on her lap.[73] Before removing her from the vehicle, the officer took her purse and sat it on the ground nearby.[74] The officer then placed Byrd in his cruiser, and returned to the purse within moments to search it; methamphetamine was found therein.[75] The trial court granted Byrd's

71. 178 Wash.2d 611, 310 P.3d 793 (2013).

72. *Id.* at 795.

73. *Id.*

74. *Id.*

75. *Id.*

motion to suppress the evidence found in her purse, and the Court of Appeals affirmed.[76] Relying on *Gant*, the Court of Appeals held that the search was not incident to her arrest "[b]ecause Byrd was restrained and could not obtain a weapon from or destroy evidence in her purse when [the officer] searched it[.]"[77]

The Washington Supreme Court reversed. It began by discussing that unlike searches of an arrestee's surroundings or "grab area," "[t]he authority to search an arrestee's person and personal effects flows from the authority of a custodial arrest itself."[78] Moreover, it noted that "exigencies are *presumed* when an officer searches an arrestee's person," and that "[t]he search incident to arrest rule respects that an officer who takes a suspect into custody faces an unpredictable and inherently dangerous situation and that officers can and should put their safety first."[79] And, nothing in *Gant* "requires case-specific showings of officer safety or evidence preservation to justify the search of an arrestee's person," as that case only concerned "searches of the area immediately around the arrestee, not the arrestee's person."[80]

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76. *Id.*

77. *Id.*

78. *Id.* at 796 (quoting *Robinson*, 414 U.S. at 232, 94 S.Ct. 467 (noting "[t]he peace officer empowered to arrest must be empowered to disarm. If he may disarm, he may search, lest a weapon be concealed[.]")).

79. *Byrd*, 310 P.3d at 797.

80. *Id.*

The Court then turned to the issue of whether Byrd's purse was part of her person at the time of her arrest.[81] It cited language from *Chadwick* that "[requires] *Chimel* justification only for searches of 'personal property *not* immediately associated with the person of the arrestee,'" and noted the time of arrest rule can be used "to draw a bright line between [the] two prongs of the search incident to arrest exception."[82] It explained:

> Under this rule, an article is "immediately associated" with the arrestee's person and can be searched under *Robinson*, if the arrestee has actual possession of it at the time of a lawful custodial arrest.... The time of arrest rule reflects the practical reality that a search of the arrestee's "person" to remove weapons and secure evidence must include more than his literal person. In *United States v. Graham*, 638 F.2d 1111, 1114 (7th Cir. 1981), the court explained that "[t]he human anatomy does not naturally contain external pockets, pouches, or other places in which personal objects can be conveniently carried." When police take an arrestee into custody, they also take possession of his clothing and personal effects, any of which could contain weapons and evidence. The time of arrest rule recognizes that the same exigencies that justify searching an arrestee prior to placing him into custody extend not just to the arrestee's clothes, however we might

81. *Id.*

82. *Id.* at 798.

> define them, but to all articles closely associated with his person.[83]

Importantly, the Court went on to

> caution that the proper scope of the time of arrest rule is narrow, in keeping with this "jealously guarded" exception to the warrant requirement. **It does not extend to all articles in an arrestee's constructive possession, but only those personal articles in the arrestee's actual and exclusive possession at or immediately preceding the time of arrest.... Searches of the arrestee's person incident to arrest extend only to articles "in such immediate physical relation to the one arrested as to be in a fair sense a projection of his person."** *United States v. Rabinowitz*, 339 U.S. 56, 78, 70 S.Ct. 430, 94 L.Ed. 653 (1950) (Frankfurter, J., dissenting) (describing the historical limits of the exception). Extending *Robinson* to articles within the arrestee's reach but not actually in his possession exceeds the rule's rationale and infringes on territory reserved to *Gant*[.][84]

Relying on this rule, the Court held that "because Byrd's purse was on her lap at the time of her arrest, it was an article on her person."[85]

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83. *Id.* (internal citation omitted).

84. *Id.* at 799 (internal citations omitted) (emphasis added).

85. *Id.* at 800. *See also*, *State v. MacDicken*, 179 Wash.2d 936, 319 P.3d 31 (2014) (applying the time of arrest rule and upholding

Two years after *Byrd*, the Washington Supreme Court clarified what is meant by "immediately preceding the time of arrest" in *State v. Brock*.[86] In *Brock*, an officer observed Antoine Brock trespassing in a park bathroom and waited for him to exit.[87] When Brock emerged from the bathroom the officer had Brock remove the backpack he was carrying and conducted a *Terry*[88] stop and frisk.[89] The officer then had Brock walk with him to his vehicle so that he could run the identification information Brock gave him through a database.[90] For safety reasons, the officer carried Brock's backpack and placed it on the passenger seat of his vehicle while Brock stood 12-15 feet away from the truck on a curb.[91]

After determining that Brock had given him false information, the officer placed him under arrest but did not handcuff him.[92] The officer left Brock standing on the curb and returned to his vehicle to search his backpack; the

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search of a laptop bag and rolling duffel bag that were in the possession of the arrestee when he was stopped by law enforcement).

86. 184 Wash.2d 148, 355 P.3d 1118 (2015).

87. *Id.* at 1119.

88. *See Terry v. Ohio*, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968).

89. *Brock*, 355 P.3d at 1120.

90. *Id.*

91. *Id.*

92. *Id.*

officer found marijuana and methamphetamine inside.[93] The officer then walked back over to Brock, handcuffed him, and placed him in his vehicle.[94] The entire encounter, from initial contact to arrest, lasted about 10 minutes.[95]

The trial court denied Brock's motion to suppress the evidence found in his backpack, but the Court of Appeals reversed based on its conclusion that "Brock did not have actual, exclusive possession of the backpack 'immediately preceding' arrest."[96] In addressing the meaning of "immediately preceding arrest" the *Brock* Court noted that, pursuant to *Byrd*:

> [t]he time of arrest rule reflects the practical reality that a search of the arrestee's "person" to remove weapons and secure evidence must include more than his literal person.... When police take an arrestee into custody, they also take possession of his clothing and personal effects, any of which could contain weapons and evidence.[97]

The Court therefore rejected Brock's argument that his physical separation from the backpack eliminated

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93. *Id.*

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.* at 1121-22.

any safety or evidence preservation concerns associated with the backpack because he could no longer reach it.[98] It reasoned:

> When [a] personal item is taken into custody as a part of the arrestee's person, the arrestee's ability to reach the item during the arrest and search becomes irrelevant.
>
> Rather, the safety and evidence preservation exigencies that justify this "time of arrest" distinction stem from the safety concerns associated with the officer having to secure those articles of clothing, purses, backpacks, and even luggage, that will travel with the arrestee into custody. Because those items are part of the person, we recognize the practical reality that the officer seizes those items during the arrest. From that custodial authority flows the officer's authority to search for weapons, contraband, and destructible evidence.[99]
>
> [...]
>
> Although we must draw these exceptions to the warrant requirement narrowly, we do not draw them arbitrarily; the exception must track its underlying justification. **Because the search incident to arrest rule recognizes**

98. *Id.* at 1122.

99. *Id.*

> **the practicalities of an officer having to secure and transport personal items as part of the arrestee's person, we draw the line of "immediately preceding" with that focus. The proper inquiry is whether possession so immediately precedes arrest that the item is still functionally a part of the arrestee's person. Put simply, personal items that will go to jail with the arrestee are considered in the arrestee's "possession" and are within the scope of the officer's authority to search.**[100]

The Court held that the search of the backpack was a lawful search incident to Brock's arrest, reasoning that "[o]nce the arrest process had begun, the passage of time prior to the arrest did not render it any less a part of Brock's arrested person."[101]

The Supreme Courts of Illinois and North Dakota, as well as the Texas Court of Criminal Appeals have adopted identical rules in determining when the search of a container constitutes a search of an arrestee's person.

In *People v. Cregan*, the Supreme Court of Illinois upheld the search of a laundry bag and a wheeled luggage bag.[102] The arrestee was carrying both bags when officers stopped him, arrested him, and placed him

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100. *Id.* at 1123 (emphasis added).

101. *Id.*

102. 381 Ill.Dec. 593, 10 N.E.3d 1196 (2014).

in handcuffs.[103] The officers then searched both bags and found cocaine in one of them.[104] The *Cregan* Court declined to define " 'immediately associated' in terms of the nature or character of the object rather than in terms of the defendant's connection to the object at the time of arrest" as it felt it would result in "an unworkable rule and [produce] unpredictable results."[105] Instead, it held that

> personal items such as cigarette packs found in pockets, wallets, or purses may be searched incident to arrest not because they are by their very nature particularly personal to the individual, but because they are in such close proximity to the individual at the time of his arrest. In these cases, the personal nature of the object is merely a proxy for its presence in the individual's possession. The true measure of whether an object, whether it is a cigarette pack or a suitcase, is "immediately associated" with an arrestee is whether he is in actual physical possession of the object at the time of his arrest.
>
> Under this test if the arrestee is, at the time of his arrest, in actual physical possession of a bag, it is immediately associated with the arrestee and is searchable, whether it is a bag of groceries being carried or wheeled in

103. *Id.* at 1198.

104. *Id.* at 1199.

105. *Id.* at 1205.

> a "grannie cart," a duffle bag slung over one shoulder, or a nylon bag being pulled behind him on wheels. The use to which the bag is being put—as luggage for a traveler or to haul dirty clothing to a laundromat—is irrelevant. The sole consideration is whether he is in actual physical possession of the object. If it is not in his actual physical possession, like the footlocker in *Chadwick*, a warrantless search may be justified on some other basis, but not as a search of the person incident to his arrest.[106]

Similarly, in *State v. Mercier*, the Supreme Court of North Dakota adopted the time of arrest rule and upheld the search of an arrestee's backpack.[107] In *Mercier*, police responded to an attempted robbery call and stopped Claude Mercier because he matched the description provided by the victim.[108] When asked, Mercier told the officers that his identification was in his backpack at a house across the street.[109] When an officer retrieved the backpack, an individual at the home told him "This is [Mercier's]."[110] When the officer returned with the backpack Mercier confirmed that it was his, but refused

106. *Id.* at 1207 (internal citations omitted).

107. 883 N.W.2d 478 (N.D. 2016).

108. *Id.* at 482.

109. *Id.*

110. *Id.*

to let the officers search it.[111] Instead, the officers allowed Mercier to go through the backpack slowly to retrieve his identification.[112] After running Mercier's identification through dispatch, the officers discovered that he had an active arrest warrant, arrested him, and placed him in the back of a squad car.[113] The officers then searched the backpack and found several items that had been reported stolen, methamphetamine, and drug paraphernalia.[114]

The North Dakota Supreme Court upheld the trial court's denial of Mercier's motion to suppress. Citing *Byrd*, *Brock*, and *Cregan*, it concluded that whether a personal item should be considered part of an arrestee's person "turns on whether the arrestee had 'actual and exclusive possession at or immediately preceding the time of arrest.'"[115] The court held that "Mercier had the backpack in his immediate possession prior to being restrained because the officers were allowing him to search through it to obtain his identification."[116] The court further noted that "[h]aving no other place to store it, Mercier would have had to bring the backpack along with him into custody."[117] It reasoned that

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* at 490.

116. *Id.* at 492.

117. *Id.*

> [i]t would be illogical to require police officers to leave the backpack on the public street without checking it, posing a threat to the public and the possibility of its being stolen. Similarly, it would be illogical for the officers to take it with them to the correctional center or police station without checking it, posing a threat to themselves, the arrestee, and the public. The officers would have been entitled—and expected—to do an inventory search on the backpack upon its arrival at the police station or correctional center. *See Illinois v. Lafayette*, 462 U.S. 640, 648, 103 S.Ct. 2605, 77 L.Ed.2d 65 (1983) ("[I]t is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, in accordance with established inventory procedures."). Such an inventory search would have uncovered the contraband found in Mercier's backpack.[118]

The Court held: "[b]ecause Mercier had the backpack in his actual possession immediately preceding his lawful arrest, we conclude a search thereof was reasonable."[119]

Finally, a plurality of Texas' highest court for criminal cases has explicitly adopted the time of arrest rule, and the Indiana Court of Appeals has at least impliedly done the same. In *Price v. State*, the Texas Court of Appeals,

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118. *Id.* at 492-93.

119. *Id.* at 493.

citing and discussing *Cregan*, *MacDicken*, *supra*, and *Mercier*, held

> at least where—as in the instant case—an arrestee is in actual possession of a receptacle at the time of, or reasonably contemporaneously to, his custodial arrest, and that receptacle must inevitably accompany him into custody, a warrantless search of that receptacle at or near the time of the arrest is reasonable under the Fourth Amendment as a search incident to the arrestee's person. Such a search requires no greater justification than the fact of the lawful arrest itself. Application of this principle does not turn on the specific nature or character of the receptacle, as the court of appeals believed, but merely on whether it was in the arrestee's possession at the time of arrest, and whether it would inevitably accompany him into custody.[120]

In *State v. Crager*, citing, but not discussing, *Mercier*, *Brock*, and *Cregan*, the Indiana Court of Appeals held:

> The record reveals that Crager was wearing the backpack at the time [the officer] stopped him and initiated an arrest. [The officer] asked Crager to place the backpack he was wearing on the ground. [The officer] searched the backpack at the time or very near to the time of Crager's arrest. We also note [the officer's] testimony

120. 662 S.W.3d 428, 438 (Tex. Crim. App. 2020).

> that he could not have left the backpack with the motorcycle because it was his responsibility to protect Crager's property and secure his possessions. We conclude that the backpack was immediately associated with Crager and that the search was reasonable under the circumstances and did not violate Crager's rights under the Fourth Amendment.[121]

The dissent argues that the time of arrest rule provides "absolutely no limit to the items police can search as an extension of the arrestee's person. The only safeguard is that the item must be something that the police will not leave at the site of the arrest." This argument is not a fair representation of the rule's requirements and is clearly contradicted by *State v. Alexander*.[122]

In *Alexander*, the Washington Court of Appeals reversed the trial court's denial of Heather Alexander's motion to suppress based on its determination that "the State failed to establish that Alexander had actual and exclusive possession of [a] backpack at or immediately preceding her arrest[.]"[123] An officer responding to a trespassing report approached Alexander and a male individual, Delane Slater, while they were sitting in a field marked with "no trespass" signs.[124] After the officer

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121. 113 N.E.3d 657, 663-64 (Ind. Ct. App. 2018).

122. 10 Wash.App.2d 682, 449 P.3d 1070 (2019).

123. *Id.* at 1071.

124. *Id.*

informed the pair that they were trespassing he conducted a record's check on Alexander and discovered she had an active Department of Corrections (DOC) warrant, but Slater did not.[125]

While speaking to Alexander, the officer noticed a pink backpack sitting directly behind Alexander which she indicated belonged to her.[126] Based on Alexander's DOC warrant, the officer placed her under arrest.[127] As Slater was free to leave, he offered to take her backpack with him, and she indicated to the officer that she wanted him to take it.[128] The officer would not let him take the backpack and stated that it would be searched incident to Alexander's arrest and therefore had to remain with her.[129] The officer walked Alexander and the backpack to his patrol vehicle and searched the backpack while it was on the top of the truck after placing Alexander in the back seat of the vehicle and found a controlled substance in it.[130]

The Washington Court of Appeals held that the search of the backpack was not a search of Alexander's person incident to her arrest.[131] The court noted that unlike the

125. *Id.* at 1072.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

facts of *Byrd*, *MacDicken*, and *Brock*, where the arrestee's were each seen carrying or holding the container at issue, "Alexander's backpack was merely sitting behind her at the time of her arrest. The State points to no evidence that Alexander was holding, wearing, or carrying the backpack at any time during her contact with [the officer]."[132] Moreover, "[the officer] himself testified that no one had reported seeing Alexander carrying the backpack at an earlier time."[133] Therefore, the trial court's findings established "*at most*, that Alexander could immediately have reduced the backpack to her actual possession, i.e., that Alexander had dominion and control—and thus *constructive* possession—over the backpack."[134] In addition, the State had not shown that the backpack was an item that would *necessarily* travel with Alexander to jail:

> Slater, about whom [the officer] expressed no safety concerns, offered to take the backpack, and Alexander desired that Slater take it. Under these circumstances, Alexander's backpack was not an item immediately associated with her person that would *necessarily* travel to jail with her. Rather, the only reason the backpack traveled to jail with Alexander was because [the officer] decided that it would. But the scope of the arrestee's person is determined by what must *necessarily* travel with an arrestee to jail, not what an officer *decides* to take to jail.[135]

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132. *Id.* at 1075.

133. *Id.*

134. *Id.*

135. *Id.* at 1076.

[...]

> In short, the trial court expanded the arrestee's person to include any item in proximity to and owned by the arrestee if it is reasonable for the arresting officer to take the item to jail. But as discussed, the arrestee's person is limited to those items that are within the arrestee's actual and exclusive possession at or immediately preceding the time of arrest, and the State cites no authority for the proposition that proximity and ownership alone constitute actual and exclusive possession.[136]

We therefore disagree with the dissent's assertion, as the time of arrest rule requires both that an arrestee have actual and exclusive, as opposed to constructive, possession at or immediately preceding the time of arrest and that that the item must necessarily travel with them to jail.

One of the only courts to expressly reject the time of arrest rule is the Federal Court of Appeals for the Tenth Circuit in an opinion cited by the dissent: *United States v. Knapp*.[137] The *Knapp* Court rejected the rule based on its conclusion that, under *Robinson*, a search of an arrestee's person can never include any item not found within the arrestee's clothing:

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136. *Id.* at 1077.

137. 917 F.3d 1161 (10th Cir. 2019).

> To the extent the government suggests a construction that includes more than the arrestee's immediate person, worn clothing, or containers concealed within her clothing, we decline to adopt it.... The better formulation, we believe, would be to limit *Robinson* to searches of an arrestee's clothing, including containers concealed under or within her clothing. Accordingly, visible containers in an arrestee's hand such as Ms. Knapp's purse are best considered to be within the area of an arrestee's immediate control — thus governed by *Chimel* — the search of which must be justified in each case.

Respectfully, we cannot agree that what constitutes an arrestee's person should be limited in this manner. We again acknowledge that the U.S. Supreme Court has not yet spoken on the issue, which of course means there is no holding from that Court stating that an arrestee's person *cannot* include loose containers carried outside an arrestee's clothing. And several statements from the Court, albeit in dicta, strongly suggest that it would consider the search of an arrestee's "person" to include loose containers carried outside of an arrestee's clothing.

In addition to the excerpt from *Riley* quoted below, *Chadwick* provides that the search of property is no longer incident to arrest "once law enforcement officers have reduced **luggage or other personal property not immediately associated with the person of the arrestee** to their exclusive control[.]"[138] This statement implies that

138. *Chadwick*, 433 U.S. at 15, 97 S.Ct. 2476 (emphasis added).

personal property, such as luggage, that is immediately associated with an arrestee could be searched incident to arrest. Most recently, in *Birchfield v. North Dakota*, the Court noted that

> [o]ne Fourth Amendment historian has observed that, prior to American independence, "[a]nyone arrested could expect that not only his surface clothing but his body, **luggage, and saddlebags** would be searched and, perhaps, his shoes, socks, and mouth as well." W. Cuddihy, The Fourth Amendment: Origins and Original Meaning 602–1791, p. 420 (2009).
>
> No historical evidence suggests that the Fourth Amendment altered the permissible bounds of arrestee searches.[139]

Additionally, we do not believe that the Court would find an arrestee's privacy interests in such containers to be significant enough that a search would constitute more than a minor additional intrusion in relation to the arrest itself. As discussed, searches of an arrestee's "person" pursuant to his or her lawful arrest is an exception to the warrant requirement that does not require justification based on officer safety or the preservation of evidence. That is, unless "privacy-related concerns are weighty enough" that the search constitutes are more than a "minor additional [intrusion] compared to the substantial government authority exercised in taking [an arrestee]

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139. 579 U.S. 438, 458, 136 S.Ct. 2160, 195 L.Ed.2d 560 (2016) (emphasis added).

into custody."[140] Previous instances of a search being "a substantial invasion beyond the arrest itself"[141] were the top to bottom search of a house in *Chimel* and the search of two arrestees' cellphones in *Riley*. In contrast, in *Maryland v. King*, the Court held that the "the need of law enforcement officers in a safe and accurate way to process and identify persons and possessions taken into custody" outweighed an arrestee's privacy interest in his own DNA.[142]

We therefore disagree with the dissent's argument that the search of an unlocked backpack should be considered on par with the privacy interests in cases like *Chimel* and *Riley* such that an exception to the warrant requirement is trumped. As the U.S. Supreme Court said itself in *Riley*:

Robinson is the only decision from this Court applying *Chimel* to a search of the contents of an item found on an arrestee's person. In an earlier case, this Court had approved a search of a zipper bag carried by an arrestee, but the Court analyzed only the validity of the arrest itself. *See Draper v. United States*, 358 U.S. 307, 310–311, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959). Lower courts applying *Robinson* and *Chimel*, however, have approved searches of a variety of personal items carried by an arrestee. *See,*

140. *Riley*, 573 U.S. at 391-92, 134 S.Ct. 2473.

141. *Id.* at 392, 134 S.Ct. 2473.

142. 569 U.S. 435, 438, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013) ("The government interest is not outweighed by respondent's privacy interests.").

e.g., United States v. Carrion, 809 F.2d 1120, 1123, 1128 (C.A. 5 1987) (billfold and address book); *United States v. Watson*, 669 F.2d 1374, 1383–1384 (C.A. 11 1982) (wallet); *United States v. Lee*, 501 F.2d 890, 892 (C.A.D.C. 1974) (purse).

The United States asserts that a search of all data stored on a cell phone is "materially indistinguishable" from searches of these sorts of physical items. That is like saying a ride on horseback is materially indistinguishable from a flight to the moon. Both are ways of getting from point A to point B, but little else justifies lumping them together. **Modern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse. A conclusion that inspecting the contents of an arrestee's pockets works no substantial additional intrusion on privacy beyond the arrest itself may make sense as applied to physical items**, but any extension of that reasoning to digital data has to rest on its own bottom.[143]

Accordingly, we simply cannot agree that the search of an unlocked backpack that was part of an arrestee's person at the time of arrest constitutes such a substantial invasion beyond the arrest itself that a warrant is required to search it. On that front, it is important to highlight that, contrary to the dissent's assertion that, "based on the Majority rule, any container, regardless of ... whether it is locked" may be searched incident to arrest is not at issue in

143. *Id.* at 392-93, 134 S.Ct. 2473 (emphasis added).

the case now before us. While we agree that in accordance with *Chadwick*, the fact that a container is locked may result in a heightened privacy interest, the container at issue in this case was not locked. In addition, the fact that the footlocker in *Chadwick* was locked was only part of the Supreme Court's basis for invalidating the search. The Court's primary holding was 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**[.]'"[144] Whereas the search of Bembury's backpack occurred immediately after, and in the same location as, his arrest. Additional consideration must also be given to the fact that, in this case, Bembury was pulling illegal items out of his backpack in a public place and in the plain view of the officers.

Based on the foregoing discussion, we conclude that a container capable of carrying items, such as a backpack, can be considered part of an arrestee's "person" for the purposes of a search incident to lawful arrest. And, until the U.S. Supreme Court speaks on the matter, the time of arrest rule is a well-reasoned and common-sense way to determine whether such a container is considered part of an arrestee's person and therefore subject to being searched. Accordingly, we hold that to be considered part of an arrestee's person, a container must be in the arrestee's actual and exclusive possession, as opposed to constructive possession, at or immediately preceding the time of arrest such that the item must necessarily accompany the arrestee into custody.

144. *Chadwick*, 433 U.S. at 15, 97 S.Ct. 2476 (emphasis added).

In accordance with this standard, we hold that the Bembury's backpack was part of his person at the time of his arrest. Although we assume that Bembury was carrying his backpack when the officers initially spotted him, the trial court's fact findings are silent in that regard. However, the trial court's findings do state that the officers "observed Napier hand [Bembury] U.S. Currency in an unknown amount, which [Bembury] placed inside his backpack. Officer Ray then observed [Bembury remove] a white paper from his backpack, sprinkle a substance inside it, roll it up and hand it to Napier." Like the arrestee in *Mercier*, Bembury's actions in putting items into and taking items out of the backpack established his actual and exclusive, rather than constructive, possession of it. There was no suggestion that the backpack belonged to anyone other than Bembury, and it was still with him when Officer Ray returned to the courtyard to arrest him. Furthermore, as the officers could not have simply left Bembury's backpack in the courtyard, it was an item that necessarily and inevitably would have accompanied him to jail. And of course, we should not, and cannot, expect officers to either leave behind, or blindly transport within their vehicles, potentially dangerous or deadly contraband.

The Court of Appeals was therefore incorrect in holding that the search of Bembury's backpack was an impermissible search of the area within his immediate control and in holding that the search was a substantial invasion of privacy rather than a minor additional intrusion, and we reverse. But, to clarify, although we hereby reinstate the circuit court's order denying Bembury's motion to suppress we do so for different

reasons.[145] The circuit court relied upon the *Gant* rule that allows a vehicle to be searched incident to arrest without a warrant "if it is reasonable to believe the vehicle contains evidence of the offense arrest"[146] to hold that the search of Bembury's backpack was lawful because the officers had such reasonable belief. But that holding applies exclusively to vehicle searches and not searches of an arrestee's person. But, as we have explained, the search was nevertheless lawful because it was the search of a container that was in Bembury's actual and exclusive possession immediately preceding his arrest which would necessarily have to accompany him to jail.

Because we hold that the search was a lawful search incident to Bembury's arrest, we decline to address the parties' arguments regarding the inevitable discovery doctrine.

III. CONCLUSION

For the foregoing reasons, the Court of Appeals decision is hereby reversed and the Fayette Circuit Court's order denying Bembury's motion to suppress is reinstated.

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145. *See, e.g.*, *Wells v. Commonwealth*, 512 S.W.3d 720, 721–22 (Ky. 2017) ("Even if a lower court reaches its judgment for the wrong reason, we may affirm a correct result upon any ground supported by the record.").

146. *Gant*, 556 U.S. at 351, 129 S.Ct. 1710.

Bisig, Conley, Keller, Lambert, Nickell and Thompson, JJ.; sitting. Bisig, Conley, and Nickell, JJ; concur. Nickell, J., concurs by separate opinion.

Keller, J., dissents by separate opinion in which Thompson, J., joins.

Thompson, J., dissents by separate opinion. VanMeter, C.J., not sitting.

NICKELL, J., CONCURRING.

While I fully concur with the majority's well-reasoned opinion, I write separately to emphasize my position that Bembury's use of his backpack as a public dispensary for synthetic marijuana obviated the requirement for a search warrant under the plain view exception.

"The Fourth Amendment protects legitimate expectations of privacy rather than simply places." *Illinois v. Andreas*, 463 U.S. 765, 771, 103 S.Ct. 3319, 77 L.Ed.2d 1003 (1983). "What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection." *Florida v. Riley*, 488 U.S. 445, 449, 109 S.Ct. 693, 102 L.Ed.2d 835 (1989) (quoting *Katz v. United States*, 389 U.S. 347, 351, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967)). Similarly, in *Arkansas v. Sanders*, 442 U.S. 753, 764 n. 13, 99 S.Ct. 2586, 61 L.Ed.2d 235 (1979), the Supreme Court explained:

> Not all containers and packages found by police during the course of a search will deserve the full protection of the Fourth Amendment. Thus, some containers (for example a kit of burglar tools or a gun case) by their very nature cannot support any reasonable expectation of privacy because their contents can be inferred from their outward appearance. Similarly, in some cases the contents of a package will be open to "plain view," thereby obviating the need for a warrant.

"The plain view doctrine is grounded on the proposition that once police are lawfully in a position to observe an item first-hand, its owner's privacy interest in that item is lost; the owner may retain the incidents of title and possession but not privacy." *Andreas*, 463 U.S. at 771, 103 S.Ct. 3319. In other words, "courts will allow a search of a container following its plain view seizure only 'where the contents of a seized container are a foregone conclusion.'" *United States v. Williams*, 41 F.3d 192, 197 (4th Cir. 1994). To determine "whether the contents of a container are a foregone conclusion, the circumstances under which an officer finds the container may add to the apparent nature of its contents." *Id.*

The rationale of the *Andreas* and *Williams* decisions applies equally to the present appeal. After the officers observed Bembury complete the drug transaction in full public view such that the officers were justified in effecting his immediate arrest, it was a foregone conclusion that the backpack used to facilitate the transaction contained the fruits of the same illegal activity. This unambiguous knowledge was based on the officers' first-hand, contemporaneous observations as opposed to mere suspicion or subjective belief. Thus, the present situation is distinguishable from those where police merely happen upon a closed container during the course of a lawful arrest or search. Accordingly, this Court should not countenance Bembury's assertion of a legitimate expectation of privacy where, as the majority noted, he "was pulling illegal items out of his backpack in a public place and in the plain view of the officers."

Inasmuch as reasonableness is the touchstone for any Fourth Amendment analysis, "[w]hen all else is said and done, common sense must not be a stranger in the house of the law." *Cantrell v. Kentucky Unemployment Ins. Comm'n*, 450 S.W.2d 235, 237 (Ky. 1970). "[R]equiring police to obtain a warrant once they have obtained a first-hand perception of contraband, stolen property or incriminating evidence generally would be a 'needless inconvenience,' ... that might involve danger to the police and public." *Texas v. Brown*, 460 U.S. 730, 739, 103 S.Ct. 1535, 75 L.Ed.2d 502 (1983). In the present appeal, upon witnessing the public perpetration of a crime, the officers were justified to search and seize the instrumentality of the offense without a warrant. Therefore, I concur with the majority and would further hold that Bembury waived any legitimate expectation of privacy by opening the illegal contents of his backpack to public view.

Appendix A

KELLER, J., DISSENTING:

I agree with much of the Majority's well-written Opinion. I disagree with the Majority, however, on a critical point: what constitutes personal property "immediately associated with the person" of the arrestee. As the Majority notes, this is a question that the Supreme Court of the United States has yet to answer but that we are directly confronted with today. Federal circuit courts of appeals as well as state courts that have addressed this issue are split. We now have, not only an opportunity, but an obligation to weigh in on this important issue. In doing so, we are reminded that "the right of privacy [is] one of the unique values of our civilization" and must be protected as such. *McDonald v. United States*, 335 U.S. 451, 453, 69 S.Ct. 191, 93 L.Ed. 153 (1948).

To make this determination, I believe that we must undertake the balancing test described in *Riley v. California*, 573 U.S. 373, 385, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014) (quoting *Wyoming v. Houghton*, 526 U.S. 295, 300, 119 S.Ct. 1297, 143 L.Ed.2d 408 (1999)). On the one hand, we must weigh the governmental interests at stake, as informed by the justifications for the search incident to arrest exception to the warrant requirement as described in *Chimel v. California*, 395 U.S. 752, 762–63, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969). On the other hand, we must weigh the individual's privacy interests. I believe that in the situation before us, the individual's privacy interest outweighs the governmental interest in searching personal property without a warrant.

Relying on decisions from several other state courts, the Majority, however, sets forth the following rule: "[T]o be considered part of an arrestee's person, a container must be in the arrestee's actual and exclusive possession ... at or immediately preceding the time of arrest such that the item must necessarily accompany the arrestee into custody." As *State v. Mercier* explains, "[p]ut simply, personal items that will go to jail with the arrestee are considered in the arrestee's 'possession' and are within the scope of the officer's authority to search." 883 N.W.2d 478, 491 (N.D. 2016) (quoting *State v. Brock*, 184 Wash.2d 148, 355 P.3d 1118, 1123 (2015)). The *Mercier* court justified extending the search of an arrestee's person to the items that will go to jail with him by explaining,

> It would be illogical to require police officers to leave the backpack on the public street without checking it, posing a threat to the public and the possibility of its being stolen. Similarly, it would be illogical for the officers to take it with them to the correctional center or police station without checking it, posing a threat to themselves, the arrestee, and the public.

Id. at 492–93.

At first glance, this reasoning appears sound; however, upon closer inspection, it falls apart. This rule and its corresponding justification provide absolutely no limit to the types of items police can search as an extension of an arrestee's person. The Majority seems to admit as much. The only safeguard is that the item must be something

that is in the arrestee's possession and that the police will not leave at the site of the arrest. I do not see why the 200-pound, double-locked footlocker at issue in *United States v. Chadwick* would not fall within this rule, had police stopped the arrestees before they reached the car in which they placed the footlocker. 433 U.S. 1, 97 S.Ct. 2476, 53 L.Ed.2d 538 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 111 S.Ct. 1982, 114 L.Ed.2d 619 (1991). The footlocker was in the possession of the arrestees, and police would not have left it in the middle of a train station parking lot. Thus, it would have been subject to search under the Majority's rule as an extension of the person of the arrestees despite the clear "manifest[ation of] an expectation that the contents would remain free from public examination." *Id.* at 11, 97 S.Ct. 2476. Even though "one who safeguards his personal possessions in this manner is due the protection of the Fourth Amendment Warrant clause" "[n]o less than one who locks the doors of his home against intruders," a double-locked footlocker would be subject to a warrantless search if it was in the arrestee's actual possession at or immediately preceding his arrest. *Id.* This cannot be what the United States Supreme Court intended when it set forth the search incident to arrest exception to the warrant requirement.

The state courts cited by the Majority, as well as the Majority itself in this case, all fail to undertake the balancing test as **required** by *Riley v. California*, 573 U.S. at 385, 134 S.Ct. 2473. Under that test, we must weigh " 'on the one hand, the degree to which [a search] intrudes upon an individual's privacy and, on the other, the degree

to which it is needed for the promotion of legitimate governmental interests.'" *Id.* (quoting *Houghton*, 526 U.S. at 300, 119 S.Ct. 1297). For the reasons set forth below, I believe that a weighing of these interests results in the necessity of obtaining a warrant in a case such as the one at bar. I further note, as will be more fully addressed below, **that the existence of probable cause to search an item does not eliminate the warrant requirement.**

I believe that to answer the critical question of what is personal property immediately associated with the person, we must look to the original justifications underlying the search of a person incident to his or her arrest. The Supreme Court of the United States explained,

> When an arrest is made, it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape. Otherwise, the officer's safety might well be endangered, and the arrest itself frustrated. In addition, it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction.

Chimel, 395 U.S. at 762–63, 89 S.Ct. 2034. Thus, "[t]he rule allowing contemporaneous searches is justified ... by the need to seize weapons and other things which might be used to assault an officer or effect an escape, as well as by the need to prevent the destruction of evidence of the crime." *Id.* at 764, 89 S.Ct. 2034 (quoting *Preston*

v. United States, 376 U.S. 364, 367, 84 S.Ct. 881, 11 L.Ed.2d 777 (1964)). More recently, the Supreme Court has acknowledged that "[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." *Arizona v. Gant*, 556 U.S. 332, 339, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009) (citation omitted).

In evaluating how these justifications apply, I am cognizant of the fact that the United States Supreme Court has rejected a case-by-case evaluation of the application of the search of the person incident to his arrest exception to the warrant requirement in favor of a categorical approach. That Court has explained,

> 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. 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. It is the fact of the lawful arrest which establishes 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.

United States v. Robinson, 414 U.S. 218, 235, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Thus, the lawfulness of a search incident to arrest of the person of the arrestee does not depend on the reasonableness of a particular search under particular circumstances but instead depends on whether the category of thing to be searched (such as the clothes the arrestee is wearing or the backpack he is carrying) is exempt from the warrant requirement.

With this in mind, I must determine whether these justifications apply to a backpack (or, based on the Majority rule, any container, regardless of size, weight, or whether it is locked) that is in the actual possession of an arrestee at the time of, or immediately preceding, his arrest. After a thorough review of the law, I do not believe they do. I believe that to apply "the search incident to arrest doctrine to this particular category of effects would 'untether the rule from the justifications underlying the *Chimel* exception.'" *Riley*, 573 U.S. at 386–87, 134 S.Ct. 2473 (quoting *Gant*, 556 U.S. at 343, 129 S.Ct. 1710).

In order to determine whether *Chimel*'s justifications for a search incident to arrest apply to a backpack and thus exempt a search of the backpack from the warrant requirement, we must undertake the balancing test required by *Riley.* 573 U.S. 373, 134 S.Ct. 2473. In doing so, we weigh " 'on the one hand, the degree to which [the search] intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of

legitimate governmental interests.'" *Id.* at 385, 134 S.Ct. 2473 (quoting *Houghton*, 526 U.S. at 300, 119 S.Ct. 1297). "On the government interest side, *Robinson* concluded that the two risks identified in *Chimel*—harm to officers and destruction of evidence—are present in all custodial arrests." *Id.* at 386, 134 S.Ct. 2473. With this premise, I agree. However, *Robinson*

> also quoted with approval then-Judge Cardozo's account of 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. at 391–92, 134 S.Ct. 2473 (emphasis added) (quoting *Robinson*, 414 U.S. at 232, 94 S.Ct. 467 (quoting *People v. Chiagles*, 237 N.Y. 193, 142 N.E. 583, 584 (1923))).

The gravity of the governmental interests at stake in a search incident to arrest is tied closely to the height of the risks of harm to officers and destruction of evidence which justify the exception to the warrant requirement. Integral to my opinion that a backpack is not an item immediately associated with the person of an arrestee is the fact that a backpack can easily be separated from the person of the arrestee without degradation in a way that clothing cannot. As the Tenth Circuit Court of Appeals explained, "Because of an arrestee's ability to always access weapons concealed in her clothing or pockets, an officer must necessarily search those areas because it would be

impractical (not to mention demeaning) to separate the arrestee from her clothing." *United States v. Knapp*, 917 F.3d 1161, 1166–67 (10th Cir. 2019) (citing *United States v. Edwards*, 415 U.S. 800, 803, 94 S.Ct. 1234, 39 L.Ed.2d 771 (1974)). Conversely, once a backpack is separated from the person of the arrestee, "there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence." *Chadwick*, 433 U.S. at 15, 97 S.Ct. 2476. Thus, the justifications of the search incident to arrest exception to the warrant requirement no longer apply, and the governmental interests at stake are low.

On the individual privacy side of the equation lies the fact that "any privacy interests retained by an individual after arrest [are] significantly diminished by the fact of the arrest itself." *Riley*, 573 U.S. at 386, 134 S.Ct. 2473. However, "[t]he fact that an arrestee has diminished privacy interests does not mean that the Fourth Amendment falls out of the picture entirely .... [W]hen 'privacy-related concerns are weighty enough' a 'search may require a warrant, notwithstanding the diminished expectations of privacy of the arrestee.'" *Id.* at 392, 134 S.Ct. 2473 (quoting *Maryland v. King*, 569 U.S. 435, 463, 133 S.Ct. 1958, 186 L.Ed.2d 1 (2013)).

I assert that the privacy interests are much higher in the contents of a backpack than they are in the contents of the pockets of an arrestee's clothing when he is taken into custody. Like the contents of luggage, the contents of a backpack "are not open to public view," and backpacks are "intended as a repository of personal effects." *Chadwick*, 433 U.S. at 13, 97 S.Ct. 2476. People

carry all kinds of personal items in their backpacks of which they do not intend the public to have knowledge and to which they do not intend the public to have access. These items could include things as personal as journals containing a person's innermost convictions, medications indicating one's physical health history or even mental health diagnoses, hygiene products, or checkbooks and other financial records evincing one's political, religious, and other personal affiliations. The possibilities are limitless, because, under the Majority's rule, the size or type of container does not matter. By placing items in an opaque, zipped-up backpack, individuals have a reasonable expectation that those items will remain private.

After weighing the governmental interest against an individual's privacy interest, it is clear to me that the individual's privacy interest is more significant. Additionally, as the United States Supreme Court held in *Chadwick*, "[W]hen no exigency is shown to support the need for an immediate search, the Warrant Clause places the line at the point where the property to be searched comes under the exclusive dominion of police authority." *Id.* at 15, 97 S.Ct. 2476. As the Tenth Circuit concluded, "[A] holding to the contrary would erode the distinction between the arrestee's person and the area within her immediate control." *Knapp*, 917 F.3d at 1167. Therefore, I would hold that a backpack is not personal property immediately associated with the person of the arrestee such that police could search it without a warrant. Accordingly, I would affirm the Court of Appeals.

The police in this case could have and should have obtained a warrant to search Bembury's backpack. They certainly had probable cause to do so, but the existence of probable cause does not eliminate the warrant requirement. We must remember "that the warrant requirement is 'an important working part of our machinery of government,' not merely 'an inconvenience to be somehow "weighed" against the claims of police efficiency.'" *Riley*, 573 U.S. at 401, 134 S.Ct. 2473 (quoting *Coolidge v. New Hampshire*, 403 U.S. 443, 481, 91 S.Ct. 2022, 29 L.Ed.2d 564 (1971)). As the Supreme Court explained in *Johnson v. United States*,

> The point of the Fourth Amendment ... is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a **neutral and detached** magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime .... When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or Government enforcement agent.

333 U.S. 10, 13–14, 68 S.Ct. 367, 92 L.Ed. 436 (1948) (emphasis added) (footnote omitted).

I note that if the police had reason to believe an exigency existed that justified an immediate, warrantless search of the backpack, they could have conducted such a search. However, whether an exigency exists must be determined

on a case-by-case basis and not through a categorical exception to the warrant requirement. *See Riley*, 573 U.S. at 388, 134 S.Ct. 2473 ("To the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." (citation omitted)). In this case, the Commonwealth did not argue that any exigency existed to justify the warrantless search of Bembury's backpack, and there was no testimony regarding any exigency.

Finally, I note that it is more likely than not that Bembury's backpack would have been searched and the content inventoried upon his booking into the local jail. During this search, the evidence at issue would have been discovered, implicating the inevitable discovery exception to the exclusionary rule. However, this record is completely void of any of the aforementioned testimony, and therefore, I cannot hold that the evidence would have been inevitably discovered.

Thompson, J., joins.

Thompson, J., DISSENTING.

I respectfully dissent from the majority's wholesale repeal of all reasonable limits on warrantless baggage searches incident to arrest and urge a return to the standards elucidated in *Chimel v. California*, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed. 2d. 685 (1969), and *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 1719, 173 L. Ed. 2d 485 (2009), which prohibit searches of containers that are no longer accessible to arrestees.

Bembury was arrested for the sale of a $5.00 cigarette which officers could only assume contained synthetic marijuana. *After* he was arrested, handcuffed, and placed in the back of a police car, officers searched his backpack and found a small quantity of what they again suspected was synthetic marijuana, some cigarette rolling papers, a total of seven one-dollar bills, and his life's possessions. Bembury entered a plea of guilty to a charge of possession of synthetic drugs, second offense, and received a sentence of two years and one day – all for a five-dollar transaction.

The warrantless search of Bembury's backpack constituted an unlawful search under the Fourth Amendment of the United States Constitution and Section Ten of Kentucky's Constitution. The majority's opinion is a clear departure not only from precedent but from the tide of jurisprudence which seeks to ensure the same rights from intrusive government action for the impoverished as it does the wealthy who are more financially able to secure their personal effects. A warrant could have, and should have, been acquired prior this search.

Appendix A

The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. Its "ultimate touchstone ... is 'reasonableness.'" *Brigham City v. Stuart*, 547 U.S. 398, 403, 126 S.Ct. 1943, 164 L.Ed.2d 650 (2006). "In the absence of a warrant, a search is reasonable only if it falls within a specific exception to the warrant requirement." *Riley v. California*, 573 U.S. 373, 381–82, 134 S. Ct. 2473, 2482, 189 L. Ed. 2d 430 (2014).

All citizens clearly have an interest in the privacy of the contents of their luggage, briefcases, handbags or any other containers that conceal private papers and effects from public scrutiny. The majority opinion upholds the search of Bembury's backpack as reasonable as part of his search incident to arrest. The United States Supreme Court has clearly set forth the limits of the search-incident-to-arrest exception, emphasizing that it is "reasonable" for arresting officers to search the person being arrested and ***only*** the area within his reach (1) "in order to remove any weapons that the [arrestee] might seek to use in order to resist arrest or effect his escape" and (2) "in order to prevent [the] concealment or destruction" of evidence. *Chimel*, 395 U.S. at 763, 89 S.Ct. at 2040. The Court also concluded the area "within [arrestee's] immediate control," only meant the area from within which he might gain possession of a weapon or destructible evidence." *Id.* at 763, 89 S.Ct. 2034.

In *Gant*, 556 U.S. at 343, 129 S. Ct. at 1719, the United States Supreme Court upheld the continued importance

of *Chimel* prohibiting any search incident to arrest of an area beyond the arrestee's immediate control, holding 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."[147]

In *United States v. Davis*, 997 F.3d 191, 198 (4th Cir. 2021), the Fourth Circuit had to decide whether a backpack was properly searched incident to arrest. Davis had fled from police on foot while carrying his backpack but dropped it just before he lay down and surrendered. His backpack was not searched until he was already under arrest, handcuffed with his hands behind his back, and lying on his stomach. The Court ruled that the warrantless search of the backpack was not justified as a search incident-to-arrest under the Fourth Amendment because the arrestee could not access his backpack at the time of the search. *Davis*, 997 F.3d at 197-98.

Similarly, in *United States v. Knapp*, 917 F.3d 1161 (10th Cir. 2019), the Court determined that a search of a purse carried by arrestee at time of her arrest does not qualify as search of the arrestee's person incident-to-arrest for Fourth Amendment purposes since, being

147. *Gant* contains a second holding for which it is more commonly cited, that "circumstances unique to the vehicle context justify a search incident to a lawful arrest when it is 'reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" 556 U.S. at 343, 129 S. Ct. at 1719 (quoting *Thornton v. United States*, 541 U.S. 615, 632, 124 S.Ct. 2127, 2137, 158 L.Ed.2d 905 (2004) (Scalia, J., concurring in judgment)).

under arrest and restrained, the purse was no longer in "an area within her immediate control," stating that, "[t]o the extent the government suggests a construction that includes more than the arrestee's immediate person, worn clothing, or containers concealed within her clothing, we decline to adopt it." *Id.* at 1167.

I agree with the reasoning in *Davis* and *Knapp* as being an accurate interpretation of what our Constitution requires. Once separated from his backpack by the officers, I cannot agree with the legal fiction that the backpack remained a part of Bembury's "person" subject to search without a warrant.

Without the justification of a search incident to arrest, there is no acceptable basis for searching Bembury's backpack. At the time of the search, Bembury had been arrested, handcuffed and was in custody in the back of a police car. Any exigency had vanished by that time. Further, no contraband was in plain sight; all subsequently discovered evidence being secured inside the backpack. Here, Bembury's backpack could certainly be seized incident to arrest *but not searched*, without a warrant.

While this discussion would apply to all citizens equally, I am especially cognizant that there are some people who, as a result of circumstances, are compelled to carry all their physical belongings along with them and the conveyances in which they transport such items are indeed "repositories of personal effects."[148] Such persons

148. The record is not entirely clear as to whether Bembury was homeless or simply had limited means.

do not have the luxury of fences, doors, and locks found in traditional residences wherein they can secure their possessions and are dependent upon suitcases, backpacks, grocery carts and even garbage bags to secure their personalty. For these citizens, such possessions may contain all "the privacies of life" which for another citizen might be stored in a house. *Riley*, 573 U.S. at 403, 134 S. Ct. at 2494-95 (quoting *Boyd v. United States*, 116 U.S. 616, 630, 6 S.Ct. 524, 29 L.Ed. 746 (1886)). Our protections against warrantless searches are not supposed to end at the doorstep of a home. I assert that our most vulnerable are the most deserving of protection from unconstitutional intrusion.

Accordingly, I would affirm the Court of Appeals' determination that the warrantless search of Bembury's backpack was impermissible and the evidence obtained therefrom should have been suppressed.

APPENDIX B — OPINION OF THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY, FILED DECEMBER 21, 2021

COMMONWEALTH OF KENTUCKY
COURT OF APPEALS

NO. 2020-CA-1429-MR

WILLIAM BEMBURY,

Appellant,

v.

COMMONWEALTH OF KENTUCKY,

Appellee.

APPEAL FROM FAYETTE CIRCUIT COURT
HONORABLE LUCY ANNE VANMETER, JUDGE
ACTION NO. 19-CR-01326

OPINION
REVERSING

BEFORE: CLAYTON, CHIEF JUDGE; TAYLOR AND L. THOMPSON, JUDGES.

CLAYTON, CHIEF JUDGE: William Bembury appeals from a Fayette Circuit Court judgment following his plea of guilty to one count of possession of synthetic drugs. The plea was conditioned on his right to appeal the denial of his motion to suppress the evidence underlying

his conviction. Having reviewed the record and the applicable law, we reverse.

At the suppression hearing, Lexington police officer Adam Ray, a member of a bicycle unit that patrols the entertainment district in downtown Lexington, testified that he knew Bembury because he saw him at least once a week while patrolling. Officer Ray had received complaints from security staff at the Lexington Public Library that Bembury was trafficking in synthetic marijuana and he had also received information from individuals caught with synthetic marijuana that they had purchased it from Bembury.

At around 6:00 p.m. on a summer evening, Ray and a fellow officer observed a man, identified as Joseph Napier, approach Bembury on the sidewalk outside the courthouse on Main Street. Bembury and Napier walked together to an open courtyard outside a nearby bank building and sat at a table. The officers followed the two men. Officer Ray rode his bike to the upper level of a parking garage where he had an unobstructed view of Bembury and Napier from above. He saw Napier hand Bembury some cash but he could not see the amount. Bembury placed the cash in his backpack. Officer Ray then saw Bembury remove a small piece of white paper and an unknown substance from the backpack. Bembury sprinkled the substance onto the paper, which he then rolled and licked into a cigarette and handed to Napier.

As Napier walked away from the courtyard, the police officers stopped and questioned him. He handed

the officers the cigarette and told them he paid Bembury about $ 5 for it. Officer Ray testified that, based on his training and experience, he was confident the cigarette contained synthetic marijuana.

Officer Ray returned to the courtyard, where Bembury was still sitting with the backpack on the table. He arrested Bembury for trafficking in synthetic drugs and placed his hands in handcuffs behind his back. Officer Ray conducted a cursory search of the backpack but did not find any contraband. He began completing the arrest paperwork and the backpack remained on the table in front of Bembury. The other police officer then joined him and conducted a more thorough search of the backpack. He found $ 7 in one-dollar bills, cigarette rolling papers, and a baggie of what appeared to be synthetic marijuana about the size of a golf ball. A lab test later confirmed it was synthetic marijuana. According to Officer Ray, the police kept the cash, rolling papers, and marijuana recovered from the backpack. Ray testified that the backpack was probably returned to Bembury before he was booked into the detention center. Officer Ray did not know if an inventory of the backpack was performed.

Bembury was indicted and charged with trafficking in synthetic drugs, first offense, and being a persistent felony offender in the first degree (PFO I). He filed a motion to suppress the evidence seized from his backpack. Following a hearing and the submission of supplemental memoranda, the trial court entered an order denying the motion. Bembury thereafter entered a plea of guilty to an amended charge of possession of synthetic drugs, second

offense, conditioned on his right to appeal the denial of the suppression motion. The PFO I charge was dismissed. He received a sentence of two years and one day. This appeal followed.

Our standard when reviewing a trial court's denial of a motion to suppress "requires that we first determine whether the trial court's findings of fact are supported by substantial evidence. If they are, then they are conclusive. Based on those findings of fact, we must then conduct a *de novo* review of the trial court's application of the law to those facts to determine whether its decision is correct as a matter of law." *Commonwealth v. Neal*, 84 S.W.3d 920, 923 (Ky. App. 2002) (footnotes omitted).

The Fourth Amendment to the United States Constitution and Section 10 of the Kentucky Constitution guarantee the right to be free from unreasonable governmental searches and seizures. *Lydon v. Commonwealth*, 490 S.W.3d 699, 701-02 (Ky. App. 2016). "When an individual 'seeks to preserve something as private,' and his expectation of privacy is 'one that society is prepared to recognize as reasonable,' we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." *Bolin v. Commonwealth*, 592 S.W.3d 305, 310-11 (Ky. App. 2019) (quoting *Carpenter v. United States*, U.S. , 138 S. Ct. 2206, 2213, 201 L. Ed. 2d 507 (2018)). Warrantless searches are presumed unreasonable, "subject only to a few specifically established and well-delineated exceptions." *Katz v. United States*, 389 U.S. 347, 357, 88 S. Ct. 507, 514, 19 L. Ed. 2d 576 (1967). In denying

Bembury's suppression motion, the trial court relied on the exception to the warrant requirement available for searches incident to a lawful arrest. Bembury does not challenge the lawfulness of his arrest.

There are two distinct types of warrantless searches which may be made incident to arrest: (1) a search of the person of the arrestee, and (2) a search of the area within the control of the arrestee. *United States v. Robinson*, 414 U.S. 218, 224, 94 S. Ct. 467, 471, 38 L. Ed. 2d 427 (1973).

For purposes of the second type of search, the United States Supreme Court has delineated what constitutes the "area within the control of the arrestee." In a series of opinions, it has addressed the permissible bounds of a search of an arrestee's residence, *see Chimel v. California*, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969), and vehicle, *see New York v. Belton*, 453 U.S. 454, 101 S. Ct. 2860, 69 L. Ed. 2d 768 (1981), and *Arizona v. Gant*, 556 U.S. 332, 129 S. Ct. 1710, 173 L. Ed. 2d 485 (2009).

This type of warrantless search is justified on the grounds of protecting the arresting officers and safeguarding any evidence of the offense an arrestee might conceal or destroy. *Gant*, 556 U.S. at 339, 129 S. Ct. at 1716. Consequently, the search must be confined to "the area from within which [an arrestee] might gain possession of a weapon or destructible evidence." *Id.* at 335, 129 S. Ct. at 1714 (quoting *Chimel*, 395 U.S. at 763, 89 S. Ct. at 2040). Additionally, in *Gant*, the Court created an independent exception for a warrantless search of a vehicle's passenger compartment which applies when it

is "reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle.'" *Id.* at 343, 129 S. Ct. at 1719 (citation omitted).

The warrantless search of Bembury's backpack cannot be upheld as a search of the area within the arrestee's immediate control because at the time of the search, his hands were cuffed behind his back and there was no possibility that he could access the contents of the backpack in order to endanger the safety of the police officers or destroy evidence. The aforementioned exception in *Gant*, which permits a search in order to recover evidence of the crime for which the arrestee is being detained, applies only to automobile searches due to the "circumstances unique to the vehicle context[.]" *Gant*, 556 U.S. at 343, 129 S. Ct. at 1719.

The foregoing limitations, premised on officer safety, the preservation of evidence, and, in the case of the automobile exception, the recovery of evidence, do not apply to the other type of search incident to arrest, that of an arrestee's actual person. "Instead, 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." *Riley v. California*, 573 U.S. 373, 384, 134 S. Ct. 2473, 2483, 189 L. Ed. 2d 430 (2014) (internal quotation marks and citation omitted). It is a longstanding rule that "the mere fact of the lawful arrest" justifies a "full search of the person" and "does not depend on whether a search of a *particular* arrestee is likely to protect officer safety or evidence." *Birchfield v. North*

Dakota, 579 U.S. 438, 136 S. Ct. 2160, 2176, 195 L. Ed. 2d 560 (2016) (citations omitted).

This authority to search the arrestee's actual person without a warrant has been extended to include "personal property . . . immediately associated with the person of the arrestee[.]" *United States v. Chadwick*, 433 U.S. 1, 15, 97 S. Ct. 2476, 2485, 53 L. Ed. 2d 538 (1977), *abrogated by California v. Acevedo*, 500 U.S. 565, 111 S. Ct. 1982, 114 L. Ed. 2d 619 (1991).

Thus, the removal and search of the contents of a crumpled cigarette packet from an arrestee's pocket was upheld as reasonable, "even though there was no concern about the loss of evidence, and the arresting officer had no specific concern that [the arrestee] might be armed." *Riley*, 573 U.S. at 384, 134 S. Ct. at 2483 (citing *Robinson*, 414 U.S. at 236, 94 S. Ct. at 477). Similar searches approved by the lower federal courts include personal items carried by an arrestee, such as a billfold and address book, a wallet, and a purse. *Id.* at 392-93, 134 S. Ct. at 2488 (citing *United States v. Carrion*, 809 F.2d 1120, 1123, 1128 (5th Cir. 1987) (billfold and address book); *United States v. Watson*, 669 F.2d 1374, 1383-1384 (11th Cir. 1982) (wallet); *United States v. Lee*, 501 F.2d 890, 892, 163 U.S. App. D.C. 330 (D.C. Cir. 1974) (purse)).

Bembury argues, in reliance on *Chadwick, supra*, that his backpack was more akin to luggage, which is entitled to greater privacy protections than items such as a wallet. In *Chadwick*, suspected drug traffickers placed a double locked, 200-pound foot locker on a train in San Diego.

When the train arrived in Boston two days later, it was reclaimed by the suspects. Federal agents arrested the suspects and took them and the foot locker to the federal building. The agents searched the foot locker without a warrant about two hours later. The search was held to violate the Fourth Amendment, because the luggage was not personal property "immediately associated with the person of the arrestee" and consequently, once it was reduced to the exclusive control of the law enforcement officers and there was "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 [was] no longer an incident of the arrest." *Chadwick*, 433 U.S. at 14-15, 97 S. Ct. at 2485.

Allowing the search of the person of the arrestee rests "not only on the heightened government interests at stake in a volatile arrest situation, but also on an arrestee's reduced privacy interests upon being taken into police custody." *Riley*, 573 U.S. at 391, 134 S. Ct. at 2488. Thus, in the case of the cigarette packet recovered from the arrestee's pocket, a pat-down of his clothing and inspection of the cigarette packet in his pocket "constituted only minor additional intrusions compared to the substantial government authority exercised in taking [him] into custody." *Id.* at 392, 134 S. Ct. at 2488.

But "[t]he fact that an arrestee has diminished privacy interests does not mean that . . . every search is acceptable solely because a person is in custody." *Riley*, 573 U.S. at 392, 134 S. Ct. at 2488 (internal quotation marks omitted). The search of Bembury's backpack was a substantial

invasion of his privacy, not a "minor additional intrusion." Admittedly, the backpack was portable and Bembury had control over it throughout the time he was observed by the police, unlike the footlocker in *Chadwick*. But a backpack is functionally distinguishable from a cigarette packet, wallet, address book or even a purse. Like luggage, it "is intended as a repository of personal effects[,]" *Chadwick*, 433 U.S. at 13, 97 S. Ct. at 2484, and is likely to contain many more items of a personal nature than the small items recovered directly from the person of an arrestee.

In *Riley, supra*, a cell phone, a small item recovered directly from the person of the arrestee, was nonetheless deemed to contain so much personal information that its warrantless search violated the Fourth Amendment. Although a backpack does not have the immense storage capacity of a cell phone, the type of personal items that may be stored in it also implicate significant privacy interests.

The Commonwealth has relied on the reasoning of an opinion of the Supreme Court of North Dakota which upheld the warrantless search of a backpack of a lawfully-arrested defendant. *See State v. Mercier*, 2016 ND 160, 883 N.W.2d 478 (N.D. 2016). At the time the backpack was searched, the defendant, Mercier, had already been arrested and placed in the back of a squad car. The North Dakota Court approved the warrantless search on two grounds: first, because the backpack was in Mercier's possession immediately before his arrest, it would have to accompany him to jail when he was taken into custody and could therefore pose a safety threat. "It would be

illogical to require police officers to leave the backpack on the public street without checking it, posing a threat to the public and the possibility of its being stolen. Similarly, it would be illogical for the officers to take it with them to the correctional center or police station without checking it, posing a threat to themselves, the arrestee, and the public." *Id.* at 492-93. Second, the officers would have been entitled and expected to perform an inventory search of the backpack, in accordance with established inventory procedures, when it arrived at the police station or correctional center. "Such an inventory search would have uncovered the contraband found in Mercier's backpack." *Id.* at 493.

In reaching this conclusion, the North Dakota Court acknowledged "the central concern underlying the Fourth Amendment [is] the concern about giving police officers unbridled discretion to rummage at will among a person's private effects." *Id.* (quoting *Gant*, 556 U.S. at 345, 129 S. Ct. at 1720). Hence, the court cautioned that its holding was "narrowly tailored and applies only when an individual has been validly arrested and the property or items searched as part of the arrestee incident to the arrest invariably must be transported along with him or her to the jail or the police station." *Id.*

At the suppression hearing in Bembury's case, Officer Ray testified that he did not know if an inventory of the backpack was done. He stated that the backpack was "probably" given to Bembury to be booked into the detention center. He testified that the police kept the cash, rolling papers, and marijuana and anything else was returned to Bembury. There was no evidence that

the police were concerned about the safety of transporting the backpack, nor was any evidence placed in the record as to where Bembury was taken after the arrest or about inventory procedures at that facility. Thus, the justification underpinning the holding in *Mercier* does not have an evidentiary basis in Bembury's case.

Similarly, no evidence was elicited to justify the search of Bembury's backpack on the grounds of inevitable discovery. "[E]vidence unlawfully obtained by police is nevertheless admissible '[i]f the prosecution can establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means[.]'" *Dye v. Commonwealth*, 411 S.W.3d 227, 238 (Ky. 2013) (quoting *Nix v. Williams*, 467 U.S. 431, 444, 104 S. Ct. 2501, 2509, 81 L. Ed. 2d 377 (1984)). In its memorandum submitted to the trial court following the suppression hearing, the Commonwealth for the first time raised the doctrine of inevitable discovery, arguing that the contraband in Bembury's backpack would inevitably have been recovered at the detention center. But no evidence was elicited at the hearing to support this conclusion, beyond Officer Ray's testimony that the backpack was probably returned to Bembury.

For the foregoing reasons, the final judgment of the Fayette Circuit Court is reversed.

TAYLOR, JUDGE, CONCURS IN RESULT ONLY.

THOMPSON, L., JUDGE, DISSENTS AND DOES NOT FILE SEPARATE OPINION.

APPENDIX C — OPINION OF THE COMMONWEALTH OF KENTUCKY, FAYETTE CIRCUIT COURT, CRIMINAL BRANCH, THIRD DIVISION, FILED MARCH 20, 2020

COMMONWEALTH OF KENTUCKY
FAYETTE CIRCUIT COURT
CRIMINAL BRANCH
THIRD DIVISION

19-CR-1326

COMMONWEALTH OF KENTUCKY,

Plaintiff,

v.

WILLIAM ALFONZO BEMBURY,

Defendant.

OPINION AND ORDER

*** *** ***

The Court conducted an evidentiary hearing on February 11, 2020 on Defendant's Motion to Suppress. Defendant was represented by Hon. Herb West. The Commonwealth was represented by Hon. Amanda Parker. The Commonwealth presented testimony from Officer Adam Ray.

Appendix C

Defendant filed a supplemental memorandum on February 25, 2020. The Commonwealth filed a Response on March 10, 2020. Defendant filed a Reply on March 16, 2020. The Court having considered the memoranda of the parties, the applicable law and being otherwise sufficiently advised, hereby issues the following Opinion and Order denying Defendant's Motion to Suppress.

FINDINGS OF FACT

Adam Ray is an Officer with the Lexington Police Department. He was assigned to the Bureau of Special Operations, Bicycle Unit, on August 14, 2019 and was working the downtown entertainment district. On that date, at approximately 6:00 p.m., he observed a subject, now known as Joseph Napier, approach Defendant on the sidewalk near the Circuit Courthouse. Defendant was known to Officer Ray as someone who trafficks in synthetic marijuana.

Officer Ray and his partner, Officer Kennedy, followed Defendant and Napier as they walked east on Main Street towards the Chase Bank courtyard. Officer Kennedy kept eyes on Defendant while Officer Ray rode into the adjacent parking garage and positioned himself in such as way that he could observe Defendant interact with Napier. Officer Ray cannot specifically recall whether he used binoculars, but he testified it would have been his habit to do so.

Officer Ray observed Napier hand Defendant U.S. Currency in an unknown amount, which Defendant placed *inside his backpack.* Officer Ray then observed Defendant

removed a white paper *from his backpack,* sprinkle a substance inside it, roll it up and hand it to Napier. Officer Ray observed Napier place the rolled-up cigarette in a pouch on Napier's backpack.

Following these observations, Officer Ray and Officer Kennedy approached Napier and made it clear they had observed his transaction with Defendant. Napier retrieved the white cigarette from the pouch on his backpack and handed it to the officers. Napier acknowledged he paid $5.00 to Defendant in exchange for the white cigarette. Officer Ray testified he believes the white cigarette to be synthetic marijuana based upon its odor and his training and experience, but this has not been lab verified. Napier was cited for possession of synthetic marijuana.

Officer Ray and Officer Kennedy then returned to Defendant who was still seated in the Chase Bank courtyard. Officer Ray arrested Defendant and placed him in handcuffs. Officer Ray performed an initial search of the backpack which he described as "look through" and asked Officer Kennedy to perform a more thorough inspection. This search yielded seven one-dollar bills and a baggie containing a substance confirmed to be synthetic marijuana.

CONCLUSIONS OF LAW

Defendant argues the evidence found in his backpack should be suppressed because the backpack was searched without a warrant.

Appendix C

It is a "basic rule that 'searches 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.' Among the exceptions to the warrant requirement is a search incident to a lawful arrest." *Arizona v. Gant,* 556 U.S. 332, 338 (2009). In *Gant,* the Supreme Court held a search incident to a lawful arrest encompasses the search of a vehicle and any containers found within the vehicle "when an arrestee is within reaching distance of the vehicle *or it is reasonable to believe tile vellicle contains evidence of tile offense of arrest." Id.* at 345

The Kentucky Court of Appeals has held this rule extends to the search of a backpack when there is reason to believe the backpack contains evidence of the offense:

> [E]ven if the backpack was outside of the area of Agee's immediate control, *Gant* permits a search incident to arrest in cases where the arrestee is secured if it was 'reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle.' In *Gant,* the Supreme Court noted that a person retains a significant privacy interest in personal effects within the passenger compartment of her vehicle. Since Agee's backpack was not within the vehicle, her expectation of privacy to its contents was somewhat less than if it had been. Indeed, *when the officers arrested Agee, the backpack was simply unsecured and out in the open.*

> Moreover, Agee had been carrying the backpack at the time she emerged from the restroom and was stopped by the officers. She placed the backpack on the lid of her car trunk after leaving the restaurant. Under the circumstances, *we conclude that the officers had a reasonable basis to believe that the backpack contained evidence of Agee's public intoxication, and that its search and seizure was necessary to preserve that evidence.* Therefore, the trial court properly denied Agee's motion to suppress the evidence found inside the backpack.

Agee v. Commonwealth, No. 2010-CA-001122-MR, 2014 WL 3795492, at *5-6. (Ky. App. Aug.-1, 2014) (emphasis added, internal citations omitted).

In this instance, there was a reasonable basis for the officers to believe that the backpack contained evidence of a crime. Officer Ray 1) observed a hand to hand drug transaction involving Defendant, a known synthetic marijuana trafficker; 2) Officer Ray observed Napier hand Defendant U.S. Currency in an unknown amount, which Defendant placed *inside his backpack;* and 3) Officer Ray observed Defendant removed a white paper *from his backpack,* sprinkle a substance inside it, roll it up and hand it to Napier.

Under these circumstances, the Court concludes the search of the backpack was lawful because the officers had a reasonable belief the backpack contained evidence of the offense of arrest.

Appendix C

Order

For the reasons set out herein, the Court hereby DENIES Defendant's Motion to Suppress.

Dated this 17 day of March, 2020.

/s/_____
Lucy A. VanMeter
Judge, Fayette Circuit Court