

No. 21-124607-A

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In the  
Court of Appeals of the  
State of Kansas

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**State of Kansas**  
Plaintiff-Appellee

vs.

**Miles Loren Martin, Sr.**  
Defendant-Appellant

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**Brief of Appellant**

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Appeal from the District Court of Geary County, Kansas  
The Honorable Ryan W. Rosauer, Judge  
District Court Case No. 2019-CR-000667

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### **Nature of the Case**

A jury convicted Miles Loren Martin of possession of methamphetamine and possession of methamphetamine without a drug tax stamp. Mr. Martin appeals his convictions and sentence.

### **Statement of Issues**

**Issue 1: The district court erred in refusing to suppress the search of the pill bottle.**

**Issue 2: Possession of methamphetamine is an included offense of possession of methamphetamine with no tax stamp. A person cannot be convicted of a crime and an included offense.**

### **Statement of Facts**

On September 15, 2019, Geary County Sheriff's Deputy Cayla Da Giau stopped Miles Loren Martin, Sr. for a tag light violation. (R. 12, 6). When the Deputy activated her emergency equipment, Mr. Martin complied as quickly as possible by turning into the first safe place, which happened to be the entryway to one of the parking lots of a high school. (R. 12, 7).

When Deputy Da Giau contacted Mr. Martin, she observed an open container of alcohol in the backseat of his truck. (R. 12, 8). After a second officer arrived, Deputy Da Giau ordered Mr. Martin to get out of his truck in order to search it. (R. 12, 8). When Mr. Martin got out of his truck, the officers observed a "long fixed blade knife in a sheath" hanging from his shorts. (R. 12, 8). The officers removed the knife and conducted a pat-down search, removing a small pocket knife from his front, right pocket. (R. 12, 8).

Deputy Da Giau then directed Mr. Martin to sit on the curb while she began searching his vehicle. (R. 12, 9). During this initial search, the Deputy found a glass cup containing ice and a light brown liquid, a straw with an unknown white powdery residue, and a butane lighter. (R. 12, 9).

After locating these items, Deputy Da Giau paused her search because she heard Mr. Martin state that he was hot. (R. 12, 10). The Deputy offered that Mr. Martin could sit in one of the patrol cars, which had air conditioning running. (R. 12, 10). Deputy Da Giau told Mr. Martin “that we’d just do a check real quick to make sure he didn’t have anything on him...since he was sitting in the back of my patrol car.” (R. 12, 10). In response to this, Mr. Martin removed several items from his pockets, and Deputy Da Giau took them. (R. 12, 10). The Deputy then “asked him if he had anything else on his person.” (R. 12, 10). In response, Mr. Martin took a pill bottle out his pocket. (R. 12, 10).

The Deputy took that pill bottle and held it until Mr. Martin was inside of the patrol car. (R. 12, 11). Then, the Deputy opened the bottle. (R. 12, 11). Inside, she found a white crystalline substance that she believed to be methamphetamine. (R. 12, 11).

The substance in the pill bottle was later determined to weigh 17.51 grams. (R. 3, 11). The state charged Mr. Martin with one count of possession of methamphetamine with intent to distribute, with an enhancement for being within 1000 feet of a school zone, a severity level 1 drug felony. (R. 1, 23). In the same complaint, the state charged Mr. Martin with possession of methamphetamine without a tax stamp, a severity level 10 nonperson felony. (R. 1, 23).

Mr. Martin moved to suppress the methamphetamine discovered in the pill bottle, arguing that the warrantless search was unconstitutional. (R. 1, 88-93). The state argued that because Deputy Da Giau had probable cause to arrest Mr. Martin at the time of the search, she could search him and search inside the pill bottle; alternatively, the state argued that Mr. Martin had no expectation of privacy in the pill bottle because he had “voluntarily” surrendered it to the Deputy. (R. 1, 129-32). The district court denied the motion because officers had probable cause for arrest, and because Deputy Da Giau “already knew that she was going to place [Mr. Martin] under arrest” when she opened the pill bottle. (R. 1, 148). Neither the state nor the court identified the exception to the warrant requirement that their reasoning rested upon.

Mr. Martin also moved to dismiss the school zone enhancement on count one of the complaint. (R. 1, 84-87). The court denied this motion, but this issue is moot on appeal because Mr. Martin was acquitted of that offense. (R. 1, 231).

At the trial held on July 14, 2021, the court granted the request of the defense for a continuing objection based upon the motion to suppress. (R. 17, 75). Mr. Martin testified in his own defense, admitting that the pill bottle was his, but that the quantity was for personal use and that he had no intent to distribute or transfer that methamphetamine to any person. (R. 17, 150-52).

On count one, the jury returned a verdict of guilty on the lesser included offense of simple possession of methamphetamine only. (R. 1, 231). The jury also returned a guilty verdict on count two, no drug tax stamp. (R. 1, 231). The district court adopted those

findings, convicting Mr. Martin of possession of methamphetamine and possession of methamphetamine without a drug tax stamp. (R. 17, 183).

At sentencing on November 8, 2021, the court found Mr. Martin to have a criminal history score of “E,” and that special rule 9 applied, permitting the court to sentence Mr. Martin to prison rather than the presumption of probation (R. 19, 8). The district court sentenced him to the mid-box guideline range of 20 months on count one, and 6 months on count 2, concurrent to the 20 months on count one. (R. 19, 8). Mr. Martin timely appealed. (R. 1, 248).

### **Arguments and Authorities**

#### **Issue I: The district court erred in refusing to suppress the search of the pill bottle.**

Deputy Da Giau did not have a warrant to search or open the pill bottle. The district court’s holding did not identify an exception to the warrant requirement that would permit the search. To the extent that the district court’s decision may be interpreted as relying upon the search incident to arrest exception, however, the search of the pill bottle was not a valid search incident to arrest because (1) it preceded the intended arrest, and (2) it exceeded the permissible scope for a search incident to arrest.

#### *Standard of Review*

An appellate court applies a two-part standard of review to a district court’s decision on a motion to suppress. *State v. Hanke*, 307 Kan. 823, 827, 415 P.3d 966 (2018). The appellate court reviews factual findings by the district court to determine if they were supported by substantial competent evidence. But the appellate court reviews the district

court's legal conclusions de novo. When the facts relating to the motion to suppress are undisputed, the question of whether to suppress is a question of law subject to unlimited review. 307 Kan. at 827.

### *Preservation*

Mr. Martin preserved this issue for review by filing a motion to suppress that stated facts showing that the search was unlawful. (R. 1, 88-93); *see* K.S.A. 22-3216(2). Through counsel, Mr. Martin litigated the motion before the district court, including arguing against the state's theories for justifying the search. (R. 12, 41-45). At trial, the district court granted a continuing objection based upon the motion to suppress. (R. 1, 210; R. 17, 75).

If this Court finds that Mr. Martin has failed in any way to preserve this issue, then this Court can still reach this issue for the first time on appeal because it involves only a question of law arising on proved or admitted facts. *See State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010). Mr. Martin does not contest the factual findings related to the district court's decision on the motion to suppress, and as noted above, review of legal conclusions regarding a motion to suppress is de novo.

### *Analysis*

The federal and Kansas constitutions prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Kan. Const. Bill of Rights, § 15. When a defendant files a motion to suppress, the state bears the burden of proving the search and seizure were lawful. *State v. Doelz*, 309 Kan. 133, 140, 432 P.3d 669 (2019). Warrantless searches are per se unreasonable unless they fall within one of the exceptions to the warrant requirement. 309 Kan. at 140.

The recognized exceptions to the Fourth Amendment warrant requirement are consent; search incident to a lawful arrest; stop and frisk; probable cause plus exigent circumstances; the emergency doctrine; inventory searches; plain view or feel; and administrative searches of closely regulated businesses.” 309 Kan. at 140.

The district court denied the motion to suppress, stating in its written opinion that “Detective DaGiau testified that before she opened and looked inside the pill bottle, she already knew that she was going to place the Defendant under arrest.” (R. 1, 148). This rationale reflected the language of the state’s argument in Part I of its response to the motion to suppress. (R. 1, 130). Notably, the district court did *not* identify the search of the pill bottle as a search incident to arrest. Having a plan to arrest someone in the future, even when an officer has probable cause to do so, is not a recognized exception to the warrant requirement. The analysis should end there, and this court should order the evidence seized from the pill bottle suppressed and reverse Mr. Martin’s convictions.

If, however, the district court’s unspecific ruling is interpreted to rest upon the search incident to arrest exception, it erred in doing so because the search of the pill bottle was not a valid search incident to arrest. The search incident to arrest exception has long been recognized to permit the warrantless search of the person of an arrestee and the area within the control of the arrestee. *U.S. v. Robinson*, 414 U.S. 218, 224, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). Such searches are allowed for two purposes: first, to protect the safety of arresting officer(s); second, to discover and seize evidence of the crime. 414 U.S. at 224-25.

There are two issues with applying this exception in the present case: first, a search incident to arrest must actually be *incident to* an arrest; a theoretical future arrest does not suffice. Deputy Da Giau's search not only occurred before Mr. Martin was arrested, but before the point that the Deputy even started the process of arresting Mr. Martin. Second, the permissible scope of a search incident to arrest should not extend to a closed, sealed container of a pill bottle that is not in danger of holding a weapon or being destroyed.

A. The search was not a valid search incident to arrest because it was not conducted immediately prior to the planned arrest.

The timeframe in which a search incident to arrest is conducted is not unlimited, but a search is also not strictly limited to occurring after an arrest, so long as “(1) a legitimate basis for the arrest existed before the search, and (2) the arrest followed shortly after the search.” *United States v. Anchondo*, 156 F.3d 1043 (10th Cir.1998); see *Rawlings v. Kentucky*, 448 U.S. 98, 111, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980). The first point is an expression of the fruit of the poisonous tree doctrine; a search incident to arrest cannot be supported by a later arrest that is itself dependent upon evidence discovered during the preceding search. The second point bears elaboration.

In *Rawlings*, police entered a home to execute an arrest warrant for another individual named Lawrence Marquess. While searching for Marquess, officers smelled marijuana, and some left to seek a search warrant while other officers detained Rawlings and four other occupants of one of the rooms. 448 U.S. at 100. When officers obtained the search warrant for the house, they ordered one of the other occupants to empty the contents of her purse, which she did, revealing a large quantity of controlled substances. 448 U.S. at 100-01. The

woman then told Rawlings “to take what was his,” and Rawlings claimed ownership of the drugs. 448 U.S. at 101. An officer searched Rawlings and found a large amount of currency and a knife on his person, and then placed Rawlings under formal arrest. 448 U.S. at 101. Rawlings moved to suppress the knife and cash, arguing that the search occurred prior to his arrest, and so the search could not be a search incident to arrest. 448 U.S. at 110-11. The Court, reasoning that probable cause to arrest already existed based upon Rawlings claiming ownership of the drugs, held that “[w]here the formal arrest followed quickly on the heels of the challenged search of petitioner's person, we do not believe it particularly important that the search preceded the arrest rather than vice versa.” 448 U.S. at 111.

The Kansas Supreme Court held similarly in *State v. Barnes*, 220 Kan. 25, 551 P.2d 815 (1976). There, police recognized the defendant based on a detailed description of the suspect in three robberies in recent days, including descriptions of tattoos and a gold tooth. 220 Kan. at 26-27. They confronted him in a parking lot and first frisked him, finding money in his pocket which they then returned. 220 Kan. at 27. Officers then handcuffed him, *Mirandized* him, and conducted a second, more thorough search. 220 Kan. at 27. Upholding the searches, the court recognized that “a search of an accused's person incidental to arrest may either precede or follow the formal arrest if the events closely follow.” 220 Kan. at 29.

But this general principle that a search incident to arrest may precede or follow the formal arrest is not without limitation. In *State v. Conn*, the defendant was stopped for a traffic violation, and arrested for driving without a license. 278 Kan. 387, 388, 99 P.3d 1108 (2004). He told officers that he had a valid driver's license issued by Texas, but dispatch

advised that there was no record of this. 278 Kan. at 388. Officers searched his vehicle for proof of identification, and found methamphetamine and drug paraphernalia. 278 Kan. at 388. Conn was eventually booked into jail for the offense of obstruction, but this occurred three hours after the search. 278 Kan. at 394. Conn moved to suppress the evidence seized from the vehicle. 278 Kan. at 388.

The Kansas Supreme Court held that the search could not be justified under the search incident to arrest exception (though it upheld it under the automobile exception). 278 Kan. at 394, 396. The Court held that the search could not be justified as being incident to the arrest for no license because the applicable Kansas statute only permitted a search incident to arrest to seek the “fruits, instrumentalities, or evidence of” the crime of arrest. 278 Kan. at 391-92. Because a driver’s license in the car would not be such a fruit, instrumentality, or evidence of the crime—it would be, if anything, evidence disproving the crime—police could not search the vehicle for that reason. 278 Kan. at 392. That rationale relied upon a statute, K.S.A. 22-2501, that has since been repealed and is not relevant in the current case.

But what is relevant to this case is that the Court then addressed an alternative argument by the state that the search incident to arrest could be justified by the later, eventual arrest of Conn for obstruction. 278 Kan. at 393-94. The court noted the rule in *Rawlings* that a search incident to arrest could occur prior to arrest. 278 Kan. at 393-94. But, the court reasoned, there was no evidence that Conn was arrested at that time for obstruction; at best, the court observed that he was booked into jail for obstruction, but this

did not occur until three hours later. 278 Kan. at 394. “*Barnes* requires that the arrest follow shortly after the search, and that did not happen here.” 278 Kan. at 394.

Other jurisdictions have recognized the danger in permitting a search incident to arrest where the individual is not arrested until much later, or is never arrested. To permit such a search “would sever this exception from its justification” and “would, in effect, create a wholly new exception for a ‘search incident to probable cause to arrest.’ ” *Commonwealth v. Washington*, 449 Mass. 476, 482, 869 N.E.2d 605 (2007). The United States Supreme Court has also held that when a lawful arrest is possible, but law enforcement has culminated the encounter by issuing a ticket, that there can be no “search incident to citation.” *Knowles v. Iowa*, 525 U.S. 113, 116, 119 S.Ct. 484, 142 L.Ed.2d 492 (1998).

In this case, the district court permitted the search simply because the Deputy had probable cause to arrest, and testified that she planned to in fact arrest Mr. Martin. But when she searched Mr. Martin, she was not arresting him at that time. Rather, Deputy Da Giau testified she had paused her search of the vehicle in part because of Mr. Martin’s complaints about the heat, and was offering him the opportunity to sit in one of the air conditioned patrol cars. (R. 12, 10). Deputy Da Giau testified that “I stated that he could go to the back of my patrol vehicle. I didn’t order him in any way, sir.” (R. 12, 24).

Mr. Martin was “comfortable” and was not under arrest when Deputy Da Giau opened the pill bottle. (R. 12, 11). It is not clear when he was actually arrested. There was no testimony at the motions hearing that Mr. Martin was actually placed under arrest. Deputy Da Giau’s testimony at the preliminary hearing about arresting Mr. Martin primarily focused

on what he was arrested for. The Deputy did respond affirmatively to the question “At that point, did you place Mr. Martin under arrest,” but it is unclear when, exactly “that point” is referring to, other than that it was some time after the Deputy had the pill bottle. (R. 3, 22-23).

In sum, Deputy Da Giau intended to pause her search, make Mr. Martin more comfortable from the heat, return to the vehicle and finish her search, and then at some point in the future arrest him based on what she had found in the vehicle. It clearly was *not* Deputy Da Giau’s plan, when she paused her search and offered to allow Mr. Martin to sit in the back of a patrol, to immediately arrest him. Her original plan was accelerated by the discovery of the contents of the pill bottle, and the actual arrest was directly caused by that discovery. The state thus cannot use this immediate arrest in order to justify the search that revealed the evidence that caused it.

Nor should the state be allowed to rely upon the prospect of a speculative future arrest to justify the search. There is no way of knowing how much time would have passed or what intervening circumstances may have changed the Deputy’s purported decision to arrest Mr. Martin. During that time, she and her backing officer would have had the opportunity to talk to Mr. Martin without having to issue *Miranda* warnings to him. *See Berkemer v. McCarty*, 468 U.S. 420, 433, 440, 104 S.Ct. 3138, 82 L.Ed. 2d 317 (1984) (holding that “persons temporarily detained pursuant to [ordinary traffic] stops are not ‘in custody’ ” for *Miranda* purposes). They may even have held out the hope of *not* being arrested to Mr.

Martin in order to coax more information out of him. It is possible that Mr. Martin would never have ended up being arrested at all.

Deputy Da Giau's search of Mr. Martin occurred before Mr. Martin was arrested, and before the Deputy even started the *process* of arresting him. The state cannot rely on the arrest that occurred after this search because that arrest was only triggered to occur at that time because of what was found in the search.

B. The search was not a valid search incident to arrest because it exceeded the permissible scope.

While the search incident to arrest exception has long been recognized, the scope of the permissible search incident to arrest has morphed over time. The exception has generally been understood to apply to two categories: searches of the arrestee's person, and searches of the area within the arrestee's possession or control. But the meaning of these two categories, and thus the permissible scope and extent of a valid search incident to arrest, has changed over time.

1. *Early 20th-century search incident to arrest jurisprudence and Chimel.*

In *Chimel v. California*, Justice Stewart, delivering the opinion of the Court, traced the metronomic history of the search incident to arrest doctrine up to that date. 395 U.S. 752, 768, 89 S. Ct. 2034, 23 L. Ed.2d 685 (1969). The exception was first described in the 20th century in dicta in *Weeks v. United States*, though this description lacked any reference to a search incident to arrest extending to the area around the arrestee. See *Weeks v. United States*, 232 U.S. 383, 34 S.Ct. 341, 58 L.Ed. 652 (1914); *Chimel*, 395 U.S. at 755. Eleven years later, *Carroll* first added that such a search could extend to whatever was on the arrestee's person

“or in his control.” See *Carroll v. United States*, 267 U.S. 132, 158, 45 S.Ct. 280, 69 L.Ed. 543 (1925); *Chimel*, 395 U.S. at 755-56.

The doctrine expanded still further in *Agnello*, which allowed, though in dictum, a search of the “place” where the arrest was made. See *Agnello v. United States*, 269 U.S. 20, 30, 46 S.Ct. 4, 70 L.Ed. 145 (1925); *Chimel*, 395 U.S. at 756. Then, in *Marron*, dictum became dictate, as the Court upheld seizure of a ledger—which was not authorized to be seized by the warrant being executed—on the rationale that a lawful arrest had been made. *Marron v. United States*, 275 U.S. 192, 77, 48 S.Ct. 74, 72 L.Ed. 231 (1927); *Chimel*, 395 U.S. at 756.

Then the scope of the exception contracted, and the Court held searches of arrestees’ offices in one case, and desk drawers and a cabinet in another case, unlawful despite those searches occurring incident to arrests. See *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 51 S.Ct. 153, 75 L.Ed. 374 (1931); *United States v. Lefkowitz*, 285 U.S. 452, 52 S.Ct. 420, 76 L.Ed. 877 (1932); *Chimel*, 395 U.S. at 757.

“The limiting views expressed in *Go-Bart* and *Lefkowitz* were thrown to the winds, however, in *Harris v. United States*, 331 U.S. 145, 67 S.Ct. 1098, 91 L.Ed. 1399 (1947).” *Chimel*, 395 U.S. at 757-58. Based upon an arrest of the defendant in the living room of his four-room apartment, officers searched his entire apartment, discovering private papers in a sealed envelope within a desk drawer, which led to charges for violating the Selective Training and Service Act. *Chimel*, 395 U.S. at 758. The *Harris* court sustained the search as a search incident to arrest. *Chimel*, 395 U.S. at 758.

Back the other direction the pendulum swung, and the court refused to permit the seizure of an illegal liquor still based upon a contemporaneous arrest, emphasizing that the agents could have and should have obtained a warrant. *See Trupiano v. United States*, 334 U.S. 699, 68 S.Ct. 1229, 92 L.Ed. 1663 (1948); *Chimel*, 395 U.S. at 758-59.

A search or seizure without a warrant as an incident to a lawful arrest has always been considered to be a strictly limited right. It grows out of the inherent necessities of the situation at the time of the arrest. But there must be something more in the way of necessity than merely a lawful arrest.

*Trupiano*, 334 U.S. at 705.

But then in *Rabinowitz*, the Court returned to permitting such searches, in an opinion that came “to stand for the proposition, *inter alia*, that a warrantless search ‘incident to a lawful arrest’ may generally extend to the area that is considered to be in the ‘possession’ or under the ‘control’ of the person arrested.” *Chimel*, 395 U.S. at 760; *United States v. Rabinowitz*, 339 U.S. 56, 70 S.Ct. 430, 94 L.Ed. 653 (1950).

In *Chimel* itself, the government sought to rely on *Rabinowitz* to justify the warrantless search of an entire house as a “search incident to arrest.” *Chimel*, 395 U.S. at 766. The court recognized that it was possible to draw a bright line, to distinguish between a search of a single room or an apartment on the one hand, and the search of the entire house on the other; but the Court declined to do so. 395 U.S. at 766. Instead, the Court overruled those past precedents, and made clear that a search incident to arrest could not extend to a person’s home. 395 U.S. 768. What had seemed an exception nearly without limit once more returned to emphasizing that exceptions are in fact exceptional, and that law enforcement must obtain a warrant whenever possible.

2. Robinson and Belton expand the doctrine and create bright-line rules.

In *United States v. Robinson*, decided a few years after *Chimel*, the Court addressed the issue of whether courts must determine whether the concerns of officer safety and preservation of evidence justified the scope of particular search incident to arrest. 414 U.S. 218, 94 S.Ct. 467, 38 L.Ed.2d 427 (1973). In *Robinson*, an officer named Jenks arrested Robinson for driving after his license was revoked, and during a pat-down search Jenks felt something that he could not identify. 414 U.S. at 220-23. The item turned out to be a crumpled up cigarette package, and as Jenks manipulated it with his hands, he could tell that it contained something other than cigarettes. 414 U.S. at 223. Upon opening it, Jenks discovered capsules containing heroin, and Robinson was later prosecuted for possessing them. 414 U.S. at 223.

The lower court had held that an arrest alone did not justify a full search of the arrestee, and instead would have allowed only an external frisk for safety purposes when there would be no evidence of the crime of arrest to be found, as was the case with an arrest for driving while revoked. 414 U.S. at 227. The Supreme Court rejected this, however, distinguishing searches of the person of the arrestee, which it did not limit, from searches of the wider area in the possession or control of the arrestee, which had been limited in *Chimel*. 414 U.S. at 229. In sum, the *Robinson* Court concluded that if an arrest of the individual was reasonable, a search incident to arrest was no more intrusion and was therefore also reasonable. 414 U.S. at 235.

Then, in *New York v. Belton*, the Court upheld a search of a vehicle when the arrestees had been removed from the car, not yet handcuffed, and were free to move about on the side of the road. 463 U.S. 454, 455-56, 101 S.Ct. 2860, 69 L.Ed.2d 768 (1981). Because the arrestees were free to move about and because evidence of the crime of arrest—drug possession—might be found in the vehicle, the Court permitted the warrantless search of the vehicle, and a jacket within the vehicle, as a search incident to arrest. 463 U.S. at 462-63.

3. *Gant and Riley limit the scope of a search incident to arrest.*

Much like the pre-*Chimel* “area of control” case law, the pendulum swung back against the seemingly blank check of *Robinson*. In *Arizona v. Gant*, the petitioner was arrested for driving on a suspended license and locked in a patrol car. 556 U.S. 332, 336, 129 S.Ct. 1710, 173 L.Ed.2d 485 (2009). Officers then searched his vehicle, despite there being no way for him to access the vehicle, and there being no reason to believe evidence of the crime of arrest might be present in the vehicle. 556 U.S. 336-37. The Supreme Court rejected this search, holding that there must at least be a justification of the possibility of access to the vehicle, or a likelihood of discovering offense-related evidence in the search in order for a search incident to arrest to extend to the vehicle. 556 U.S. at 344. *Gant* reined in the too-wide interpretation, by some lower courts, that *Robinson* and *Belton* created a categorical rule that a search incident to arrest could always search the entire vehicle. Instead, *Gant* made clear that a search incident to arrest must still, somehow, be justified by the original rationales that permit a search incident to arrest.

The pendulum did not stop swinging back with *Gant*: in *Riley v. California*, the Court determined that there were in fact limits even to a search of an arrestee’s person, and even when there was a likelihood that such a search might reveal evidence of the crime of arrest. 573 U.S. 373, 134 S.Ct. 2473, 189 L.Ed.2d 430 (2014). In two consolidated cases, the petitioners—Riley and Wurie—had each had cell phones seized from their person upon arrest. 573 U.S. at 378-81. Police proceeded to search those phones in order to, and did, discover evidence used to further the prosecution of each, and each moved to suppress the evidence. 573 U.S. at 378-81.

The Court explained that digital data stored on a cell phone presented neither *Chimel* risk to officer safety, nor the destruction of evidence. 573 U.S. at 387-91. It also explained that the search incident to arrest exception relied upon the fact that, the arrest of the individual already being a valid arrest, the additional imposition of a physical search incident to that arrest would be minimal. 573 U.S. at 391-92. However, the search of the contents of a cell phone—which could be voluminous and even stored remotely—constituted a far greater invasion of privacy than a physical search. 573 U.S. at 393-98.

Lastly, the Court also emphasized that *seizing* a cell phone was still permissible during a search incident to arrest, and once seized, a warrant could be obtained to search the phone. 573 U.S. at 401. The Court observed that in the modern era where cell phones had become ubiquitous, the government was also able to use that sort of technology to “[make] the process of obtaining a warrant itself more efficient,” including by emailing warrant requests to judges’ iPads and receiving a response in less than 15 minutes. 573 U.S. at 401.

4. *Deputy Da Giau should have sought a warrant to inspect the pill bottle's contents.*

The history of the search incident to arrest exception may have numerous dramatic twists and turns, but the key fundamental truth is that it is an *exception* to the warrant requirement. Exceptions require exceptional justifications. In 1981, the ability to obtain a warrant to inspect the inside of a container may not have been feasible, but in the forty years since then, that has changed. Even in the few years since *Riley*, the technology-assisted process of obtaining warrants in mere minutes has become more and more widespread.

These developments undermine the evidence rationale for an unlimited physical search incident to arrest of the person of the arrestee. When such a search incident to arrest reveals a sealed container such as the pill bottle in this case, an officer is able to physically secure that container and thereby prevent any possible destruction of evidence. The officer can then quickly and easily seek a warrant from a magistrate. This process should be the default, and its ready availability should cause a reassessment of the permissible scope of a search incident to arrest.

Even without reassessing that scope, however, the present case can be likened more to *Riley* than *Robinson*. In *Robinson*, the item discovered was a crumpled cigarette package, the contents of which could easily have spilled out just in the grabbing and holding of the package. The additional intrusion on privacy involved in such simple manipulation was minimal. Here, the pill bottle had a cap, no doubt with a standard safety mechanism to prevent accidental opening, or opening by a child. The more-secure container means a greater privacy interest by the owner, since the contents would be less likely to be seen by

happenstance or accident. Hence, while the privacy interest intruded upon here may not be as high as the privacy interest in a cell phone at issue in *Riley*, it is still greater than the privacy interest that is necessarily intruded upon by virtue of an arrest alone.

Further, because the pill bottle had already been removed from Mr. Martin's possession, there was no danger to officer safety or destruction of evidence. As in *Gant*, Mr. Martin was separated from the searched area—in *Gant*, the vehicle; here, the interior of the pill bottle—long before Deputy Da Giau initiated an arrest. Once the pill bottle was separated and secured from Mr. Martin, and in the possession of Deputy Da Giau, none of the rationales for an unlimited search incident to arrest applied, and such a search should not be allowed as an exception to the warrant requirement.

### *Conclusion*

Mr. Martin respectfully requests this Court to hold that Deputy Da Giau's search of the pill bottle was not justified by the search incident to arrest exception to the warrant requirement. A plan to arrest a person sometime in the future should not be allowed to justify a search long before that arrest begins, and an arrest that is *accelerated* because of what an officer discovers during that search should not be able to be used to retroactively justify the search. Further, in light of the modern ability of law enforcement to quickly obtain warrants, the scope of a search incident to arrest should not extend to the warrantless search of a sealed container that an officer could easily obtain a warrant for. This Court should reverse Mr. Martin's convictions, order the evidence obtained in the search of the pill bottle suppressed, and remand to the district court.

**Issue 2: Possession of methamphetamine is an included offense of possession of methamphetamine with no tax stamp. A person cannot be convicted of a crime and an included offense.**

K.S.A. 21-5109(b) and the double jeopardy clauses of the United States and Federal constitutions prohibit multiplicitous convictions. The district court entered convictions of Mr. Martin for both possession of methamphetamine without a tax stamp and the included offense of simple possession of methamphetamine. These convictions are multiplicitous, and this Court should reverse the conviction for the included offense.

*Preservation and Standard of Review*

“Whether convictions are multiplicitous is a question of law subject to unlimited review.” *State v. Schoonover*, 281 Kan. 453, 462, 133 P.3d 48 (2006). The court may reach this issue for the first time on appeal because it “involves only a question of law arising on proved or admitted facts and is determinative of the case.” *State v. Dukes*, 290 Kan. 485, 488, 231 P.3d 558 (2010).

*Analysis*

The United States and Kansas constitutions both prohibit a defendant from being “twice put in jeopardy.” *See* U.S. Const. amend. V; Kan. Const. Bill of Rights, § 10; *Schoonover*, 281 Kan. at 493. “In part, these clauses prohibit a court from imposing multiple punishments under different statutes for the same conduct in the same proceeding when the legislature did not intend multiple punishments.” *State v. Hensley*, 298 Kan. 422, 435, 313 P.3d 814 (2013).

K.S.A. 21-5109(b) enacts this constitutional guarantee by prohibiting a defendant from being convicted for both a crime and a lesser included crime based upon the same conduct. The statute includes in the definition of a lesser-included crime “a crime where all elements of the lesser crime are identical to some of the elements of the crime charged.” K.S.A. 21-5109(b)(2). There is necessarily a two-step analysis here: first, was the conduct underlying each conviction in fact the same conduct; and second, is one conviction a lesser-included crime of the other.

In *State v. Hensley*, the Kansas Supreme Court applied K.S.A. 21-5109(b), at that time enacted at K.S.A. 21-3107(b), in a case where the appellant had been convicted of possession of marijuana and possession of marijuana without a tax stamp. 298 Kan. at 437. The Court of Appeals panel had determined that the former was not a lesser included offense because the latter required that a person be a “dealer.” 298 Kan. at 437. However, as the Supreme Court noted, a “dealer” includes “any person” who “in any manner acquires or possesses” the relevant substance. K.S.A. 79-5201(c); 298 Kan. at 437. Consequently, every element of the offense of possession of marijuana was included in possession of marijuana without a tax stamp, and thus the former was a lesser included offense of the latter. 298 Kan. at 437-38.

Regarding the first step of the analysis, the conduct in this case is clearly the same conduct for both of Mr. Martin convictions: possession of the contents of the pill bottle. For the second step, the same logic and analysis in *Hensley* applies to this question. The substance at issue is different, but this does not meaningfully alter the analysis; possession of

methamphetamine is a lesser-included offense of possession of methamphetamine without a drug tax stamp.

*Conclusion*

For the foregoing reasons, Mr. Martin requests that this Court reverse his conviction for possession of methamphetamine, and vacate the 20-month sentence on that count.

**Conclusion**

Mr. Martin respectfully requests this Court to order the evidence seized from the pill bottle suppressed, reverse his convictions, vacate the sentences, and remand this case to the district court. Alternatively, he requests this Court to reverse his conviction for possession of methamphetamine and vacate the 20-month sentence on that count.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that the above and foregoing Appellant's brief was served on the Geary County District Attorney, by notice of electronic filing pursuant to Kansas Supreme Court Rule 1.11(b); and by e-mailing a copy to Derek Schmidt, Attorney General, at [ksagappealsoffice@ag.ks.gov](mailto:ksagappealsoffice@ag.ks.gov) on the 17<sup>th</sup> day of June, 2022.

/s/ Bryan Cox

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