DON'T GET CAUGHT HOLDING THE BAG IN ILLINOIS: ANALYZING THE COURT'S DECISION IN *PEOPLE V. CREGAN*, 2014 IL 113600

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I. INTRODUCTION

"I hope they are not here for you," whispered a woman to greet the man she had been waiting for at the train station.[1] The officers, who had received a tip about when the man would arrive, immediately approached to arrest him.[2] Despite being a documented gang member, the man did not fight the three officers when they handcuffed him or when they searched his bag and found the cocaine he had been carrying.[3]

The Fourth Amendment provides 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 . . . ."[4] The terms of the Fourth Amendment make it clear that not all searches require a warrant.[5] These "warrantless searches" are powerful tools that enable police to gather evidence for prosecution of crimes.[6] In *People v. Cregan*, the Illinois Supreme Court broadened the scope of one of these recognized warrantless searches.[7]

The *Cregan* court's decision stated that any object possessed by an individual at the time of the person's arrest is "immediately associated" with the arrestee's person and can be searched incident to the arrest.[8] In creating this rule, the court was influenced significantly by the desire to prevent confusion about when an item "immediately associated" with a

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1. People v. Cregan, 2014 IL 113600, ¶ 7, 10 N.E.3d 1196, 1198.
2. *Id.* ¶¶ 4–6, 10 N.E.3d at 1198.
3. *Id.* ¶¶ 4–8, 10 N.E.3d at 1198.
4. U.S. CONST. AMEND. IV.
5. Arizona v. Gant, 556 U.S. 332, 338 (2009).
6. *See* State v. Hayes, 188 S.W.3d 505, 511 (Tenn. 2006).
7. *Cregan*, 2014 IL 113600, ¶ 73, 10 N.E.3d at 1223 (Burke, J., dissenting).
8. *Id.* ¶ 51, 10 N.E.3d at 1207 (majority opinion).

defendant may be searched.[9] The legitimacy of this rule, however, has been questioned.[10]

This Note will examine the court's analysis that led to the creation of its "rule of possession." It will argue the majority's analysis was incorrect, and that instead the court should have used an analysis more consistent with that used by other courts scrutinizing similar questions. Section II of this Note will provide an overview of the law governing the various interpretations of the search incident to arrest exception, and will look at many of the cases discussed in *Cregan*. Section III will discuss the facts and history of *Cregan*, as well as the specifics of the court's analysis. Section IV will discuss why the majority analysis was incorrect, how other courts are closely examining similar issues, and how the *Cregan* court's approach was not consistent with the analytical direction the United States Supreme Court appears to be taking the search incident to arrest exception.

II. LEGAL BACKGROUND

The test the *Cregan* court used to determine whether an item can be searched is straight forward: if an arrestee is in physical possession of an item at the time of arrest, the item is immediately associated with the arrestee and can be searched.[11] This search is permissible as a warrantless search of the person incident to arrest.[12]

Warrantless searches are unreasonable *per se* under the Fourth Amendment, unless the search falls within an exception.[13] One of these exceptions is the search incident to arrest exception.[14] Therefore, only after examining the origin of the search incident to arrest exception can one understand the significance of the rule that is promulgated in *Cregan*.

A. Warrantless Search Incident to Arrest Exceptions to the Fourth Amendment

One of the principle cases on the search incident to arrest exception is the 1969 decision in *Chimel v. California*.[15] The *Chimel* Court dealt with "basic questions concerning the permissible scope under the Fourth

9. *Id.* ¶¶ 49–50, 10 N.E.3d at 1206–07.
10. *Id.* ¶ 74, 10 N.E.3d at 1210–11 (Burke, J., dissenting).
11. *Id.* at ¶ 51, 10 N.E.3d at 1207 (majority opinion).
12. *Id.*
13. *Id.* at ¶ 25, 10 N.E.3d at 1201.
14. *Id.*
15. *See* Wayne A. Logan, *An Exception Swallows a Rule: Police Authority To Search Incident to Arrest*, 19 YALE L. & POL'Y REV. 381, 391–92 (2001).

Amendment of a search incident to a lawful arrest" after the defendant was arrested at his house, pursuant to an arrest warrant for burglary.[16]

Without a search warrant, police searched Chimel's entire house and seized items later used as evidence against him at his trial.[17] The defendant was subsequently convicted at trial despite his claim that the items were unconstitutionally seized.[18] That judgment was affirmed by the California Supreme Court.[19]

When the case reached the United States Supreme Court, that Court noted its preference for warrants authorizing searches and seizures, as well as the necessity for the search to be both justified and limited by the facts that caused it to be initiated.[20] The Court declared that after an arrest, it was reasonable for an officer to search the arrestee for weapons and evidence in order to ensure officer safety and to prevent evidence concealment or destruction.[21] In addition, the officer could search the area within that person's immediate control from which the arrestee could access a weapon or items of evidence.[22] Applying these rules to the scope of the warrantless search in the case before it, the Court held that the search exceeded these limits and was therefore constitutionally unreasonable.[23] The Court then reversed the defendant's conviction.[24]

In 1973, in *United States v. Robinson*, the United States Supreme Court examined the permissible scope of the search of an arrestee's person that occurred at the time of arrest.[25] The *Robinson* Court held that the full search of a person based on a lawful arrest was both a reasonable search under the Fourth Amendment and an exception to its warrant requirement.[26] Although the Court stated this authority was justified by the need to discover and preserve evidence and disarm a defendant being taken into custody, this authority was not limited by what a court might later determine was the probability of these items actually being found on the suspect.[27] Because the arrest of a defendant based on probable cause is a "reasonable intrusion under the Fourth Amendment," this type of search was also reasonable and does not require further justification.[28]

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16. Chimel v. California, 395 U.S. 752, 753 (1969).
17. *Id.* at 754.
18. *Id.*
19. *Id.*
20. *Id.* at 762.
21. *Id.* at 762–63.
22. *Id.* at 763.
23. *Id.* at 768.
24. *Id.*
25. United States v. Robinson, 414 U.S. 218, 219–20 (1973).
26. *Id.* at 235.
27. *Id.* at 234–35.
28. *Id.* at 235.

The defendant in *Robinson* was stopped by police after an officer had reason to believe the defendant was operating a vehicle without a license.[29] After stopping and arresting the defendant based on probable cause for the license violation, the officer searched him.[30] While patting down the defendant's jacket, the officer discovered a cigarette package.[31] Because he was suspicious about the contents inside, he opened the package, removed the items, and found fourteen gelatin capsules containing white powder later deemed to be heroin.[32] The heroin was later used as evidence at the trial of the defendant, which resulted in his conviction.[33]

B. Various Interpretations of the Search Incident to Arrest Exception

Robinson was a key decision in establishing a categorical rule allowing police to search incident to the arrest of a person based solely on the fact of a lawful arrest.[34] Over the years courts have had countless occasions to expand on this rule.

1. The Search of a Person Incident to Arrest and Items Immediately Associated With the Person

The United States Supreme Court in 1977 stated that warrantless searches of luggage or other items seized at the time of an arrest cannot be classified as incident to the arrest when the search is removed in time or place from the arrest, or when exigent circumstances are absent.[35] In *United States v. Chadwick*, the Court explained that after officers reduce property not "immediately associated with the person of the arrestee to their exclusive control," and no threat exists that an arrestee can remove a weapon or destroy evidence from the property, a search of that property can no longer be deemed incident of the arrest.[36]

In *Chadwick*, federal agents seized a 200-pound footlocker that contained marijuana at the time of the suspects' arrest.[37] The suspects had placed the footlocker in the rear of a car and were standing by it just prior to their arrest.[38] After taking the footlocker to headquarters, the agents

29. *Id.* at 220.
30. *Id.* at 220–22.
31. *Id.* at 223.
32. *Id.* at 223.
33. *Id.*
34. Logan, *supra* note 15, at 394.
35. United States v. Chadwick, 433 U.S. 1, 15 (1977).
36. *Id.*
37. *Id.* at 3–5.
38. *Id.* at 4.

searched it without a warrant.[39] The Court held that the search could not be viewed as incident to the suspects' arrest since the search was conducted more than an hour after they gained custody of the footlocker, and long after the suspects had been secured.[40] The Court therefore held a search warrant was required for the search.[41]

In 1984, in *People v. Hoskins*, the Illinois Supreme Court, relying on *Robinson*, ruled that a warrantless search of a defendant's purse incident to arrest was valid since the purse was immediately associated with the defendant's person.[42] The defendant's purse had been recovered by police after it was either dropped or thrown by the defendant during a foot chase, and after she was handcuffed.[43] The search of the purse resulted in the arresting officers finding narcotics.[44]

The trial court had suppressed the purse's contents based on *Chadwick*.[45] The Illinois Supreme Court, however, reasoned that a purse differed from a footlocker in its size, qualities, and its ability to be easily transported by a person.[46] The *Hoskins* court believed that a purse was immediately associated with the arrestee's person, while a footlocker "understandably was not."[47] The *Hoskins* court then reasoned that *Robinson* authorized the warrantless search of the purse because it was immediately associated with the defendant's person, and characterized it as a search of the defendant's person incident to arrest.[48]

2. Notable Recent Interpretations of the Search of Incident to Arrest Exception

In 1981, in *New York v. Belton*, the United States Supreme Court held that when police make a lawful custodial arrest of an automobile's occupant, police could search the passenger compartment of the vehicle as a "contemporaneous incident of arrest."[49] The *Belton* Court further explained that police could also examine the contents of containers found inside the passenger compartment as well because if the compartment was within the reach of the arrestee, so too are the containers.[50]

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39. *Id.* at 4–5.
40. *Id.* at 15.
41. *Id.* at 15–16.
42. People v. Hoskins, 461 N.E.2d 941, 945 (Ill. 1984).
43. *Id.* at 942.
44. *Id.*
45. *Id.* at 943.
46. *Id.* at 944.
47. *Id.*
48. *Id.* at 945.
49. New York v. Belton, 453 U.S. 454, 460 (1981).
50. *Id.*

In *Belton*, the defendant and other occupants of a vehicle were removed from a vehicle and arrested for possession of marijuana.[51] Subsequent to the arrest, the officer searched the compartment of the vehicle and found cocaine in Mr. Belton's jacket.[52] The Court held that the search of the jacket was a valid search incident to a lawful arrest because the jacket had been within the area of the arrestee's immediate control inside of the passenger compartment.[53]

In 2004, the United States Supreme Court in *Thornton v. United States* decided that police could search the passenger compartment of a vehicle incident to an arrest of either occupants or recent occupants of a vehicle.[54] The defendant in *Thornton* was contacted by police after he exited his vehicle, at which time he was arrested after narcotics were located on his person.[55] After the defendant was handcuffed and placed in a patrol car, the defendant's vehicle was searched and a handgun was found under the driver's seat.[56]

Despite the defendant's attempt to suppress the gun as evidence obtained in an unconstitutional search, the district court denied Mr. Thornton's motion to suppress and held that *Belton* allowed the search of the vehicle.[57] Although the United States Supreme Court affirmed the lower courts' decisions,[58] Justices raised concerns about the scope of power that was being expanded by the Court.[59]

In 2009, in *Arizona v. Gant*, the United States Supreme Court changed the rules of automobile searches incident to arrest.[60] In *Gant*, the defendant was arrested for a traffic offense and outstanding warrant after he was contacted outside his vehicle.[61] After Mr. Gant was locked in the backseat of a patrol car, officers searched his vehicle and found a handgun, as well as cocaine inside a jacket pocket on the backseat.[62] Mr. Gant argued the evidence should be suppressed because *Belton* did not authorize the search since he was arrested for a traffic offense and related evidence of that offense could not be found in the car.[63] Additionally, he argued his being restrained in the back of the patrol car prevented him from being a threat to

51. *Id.* at 455–56.
52. *Id.* at 456.
53. *Id.* at 462–63.
54. Thornton v. United States, 541 U.S. 615, 622 (2004).
55. *Id.* at 617–18.
56. *Id.* at 618.
57. *Id.* at 618-19.
58. *Id.* at 619.
59. *Id.* at 624–25 (O'Connor, J., concurring); *id.* at 631-32 (Scalia, J., concurring).
60. Barbara E. Armacost, Arizona v. Gant: *Does It Matter?* 2009 SUP. CT. REV. 275, 275–77.
61. Arizona v. Gant, 556 U.S. 332, 336 (2009).
62. *Id.*
63. *Id.*

officers.[64] The Arizona Supreme Court later held the search of the vehicle was unreasonable because the search could not be justified under *Chimel's* rationale.[65]

The *Gant* Court ultimately rejected a liberal reading of *Belton* that would authorize a vehicle search incident to every occupant's arrest because this would "untether the rule from the justifications underlying the *Chimel* exception."[66] However, the Court held that police could search a vehicle incident to arrest pursuant to *Chimel* when "the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search."[67] The Court concluded a search could also be conducted when there was a reasonable belief evidence of the crime for which the arrest was made could be discovered in the vehicle.[68] Accordingly, because neither of these justifications were present in this case, the search was unreasonable.[69]

In sum, the law regarding the warrantless search incident to arrest exception was expanded by the decisions between *Chimel* and *Thornton*.[70] However, the United States Supreme Court's decision in *Gant* appears to have reset search incident to arrest analysis standards to the *Chimel* rationale.[71]

Justice Burke's dissent in *Cregan* relied heavily on a 2010 Third Circuit Court of Appeals decision in *United States v. Naim Nafis Shakir*.[72] In *Shakir*, the court considered the permissibility of a warrantless search incident to arrest in light of the United States Supreme Court's decision in *Gant*, and suggested that *Gant's* reach is not limited to vehicles.[73]

The *Shakir* court held a search incident to arrest is permissible when, based on the totality of the circumstances, there exists a "reasonable possibility" an arrestee has access to a weapon or destructible evidence in the container or place being searched.[74] This standard "requires something

64. *Id.*
65. *Id.* at 337–38.
66. *Id.* at 343.
67. *Id.*
68. *Id.*
69. *Id.* at 344.
70. James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1442.
71. Angad Singh, Note, *Stepping Out of the Vehicle*: *The Potential of* Arizona v. Gant *to End Automatic Searches Incident to Arrest Beyond the Vehicular Context*, 59 AM. U.L. REV. 1759, 1778 (2010).
72. *See* People v. Cregan, 2014 IL 113600, ¶¶ 130–139, 10 N.E.3d 1196, 1221–24 (Burke, J., dissenting).
73. *See* United States v. Naim Nafis Shakir, 616 F.3d 315, 318 (3d Cir. 2010).
74. *Id.* at 321.

more than the mere theoretical possibility" that the arrestee could access the items, although the standard remains lenient.[75]

In *Shakir*, after the defendant's arrest on a warrant for armed robbery, the defendant's bag was searched after he was handcuffed.[76] During the search of the bag at the defendant's feet, evidence relating to the armed robbery was located.[77] The defendant's motion to suppress the evidence in the bag was denied, and he was subsequently convicted at trial.[78] The *Shakir* court applied its holding and determined that police permissibly searched the defendant's bag since it was at his feet at the time of the search.[79]

In 2014, the United States Supreme Court decided in *Riley v. California* that police could not search a cell phone incident to an arrest.[80] In *Riley*, the defendant was arrested and his phone was seized during a search incident to his arrest.[81] The phone was subsequently searched, and police observed information that was used later to convict him of charges that included attempted murder.[82] When the *Riley* Court analyzed the issue, the Court noted *Robinson's* justifications for a search incident to arrest—concerns about officer safety and evidence preservation raised in *Chimel*—was presumed to exist for every custodial arrest.[83] However, the *Riley* Court noted these risks were absent when digital data was searched.[84] The Court further noted that *Robinson's* opinion that the privacy interests retained by an individual post-arrest were diminished based on the arrest was at odds with the "vast quantities of personal information" located on a cell phone.[85] Therefore, a search of a cell phone's contents was unlike the quick physical search done in *Robinson*.[86] Because of this, the *Riley* Court rejected expanding *Robinson* to include searches for information on cell phones, and held a search warrant was required to perform this type of search.[87]

In line with *Gant*, the *Riley* Court analyzed a warrantless search based on *Chimel*, which resulted in limiting the reach of a type of warrantless search.[88]

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75. *Id.*
76. *Id.* at 316–17.
77. *Id.* at 317.
78. *Id.*
79. *Id.* at 321.
80. Riley v. California, 134 S. Ct. 2473, 2494 (2014).
81. *Id.* at 2480.
82. *Id.* at 2480–81.
83. *Id.* at 2484–85.
84. *Id.* at 2485.
85. *Id.*
86. *Id.*
87. *Id.*
88. *See id.* at 2484–85.

III. EXPOSITION OF THE CASE

In *People v. Cregan*, the Illinois Supreme Court considered whether the warrantless search of the defendant's bags was reasonable under the search incident to arrest exception.[89] The *Cregan* court held that because the defendant's bags were in his actual possession at the time of his arrest, the bags were immediately associated with his person and the officers' search of the bags was a permissible search of the person incident to arrest.[90]

A. Facts and Procedural Posture

The defendant Carlos Cregan exited a train and was arrested by officers who had received a tip he had a warrant for his arrest.[91] When the officers contacted him, the defendant had two bags with him.[92] During this entire process, officers learned the defendant was a documented gang member.[93] When the officers searched both of the defendant's bags, the handcuffed defendant did not resist arrest or attempt to gain access to the luggage.[94] Inside one of the bags, the officers located a jar of hair gel.[95] Although the jar's appearance was not noteworthy, the officers opened it and found a bag containing powder cocaine.[96]

At trial, the defendant was charged with unlawful possession of less than fifteen grams of cocaine.[97] The defendant moved to suppress the evidence, arguing the search of his bags leading to the discovery of the cocaine was an unreasonable search under the Fourth Amendment.[98] The Circuit Court of McLean County denied the defendant's motion.[99] The circuit court ruled the defendant's bags were in his control at the time of his arrest and said that his status as a gang member played a role in the officers' apprehension about what may be in the area of his immediate control.[100] The trial court identified the search of the bags as an inventory search that was conducted incident to the defendant's arrest.[101] The

89. People v. Cregan, 2014 IL 113600, ¶ 13, 10 N.E.3d 1196, 1199.
90. *Id.* at ¶ 60, 10 N.E.3d at 1209.
91. *Id.* at ¶¶ 3–4, 10 N.E.3d at 1198.
92. *Id.* at ¶ 4, 10 N.E.3d at 1198.
93. *Id.*
94. *Id.*
95. *Id.* at ¶ 8, 10 N.E.3d at 1199.
96. *Id.*
97. *See* at *id.* ¶¶ 1–3, 10 N.E.3d at 1197–98.
98. *See* at *id.* ¶ 3, 10 N.E.3d at 1197–98.
99. *Id.* at ¶ 1, 10 N.E.3d at 1197.
100. *Id.* at ¶ 8, 10 N.E.3d at 1199.
101. *Id.*

defendant was convicted and sentenced to five and one-half years in prison.[102]

After the defendant's conviction, he appealed, and argued the search of his bags was an invalid search incident to arrest.[103] The appellate court ruled that because the bags were "immediately associated with his person," which was similar to the defendant's purse in *Hoskins*, the search incident to his arrest was valid.[104] The appellate court affirmed the circuit court's judgment.[105] The Illinois Supreme Court then granted the defendant's petition for leave to appeal.[106]

B. Majority Opinion

On appeal, the Illinois Supreme Court analyzed whether the warrantless search of the defendant's bags incident to his arrest was reasonable under that exception to the Fourth Amendment.[107] The defendant's primary argument rested on *Gant*, because he was handcuffed and therefore unable to reach into the bags to get a weapon or to remove evidence.[108] Consequently, Mr. Cregan argued that this search of the bags could not qualify as a search incident to arrest.[109]

1. Determining the Correct Search Incident to Arrest Analysis

The court initially noted that warrantless searches are, unless they fall within a few exceptions, *per se* unreasonable.[110] The court acknowledged one of these exceptions is for searches incident to arrest.[111]

The court then noted the appellate court's holding that the search of the luggage was valid incident to arrest under *Hoskins*.[112] The *Cregan* court stated that it held the search in *Hoskins* valid incident to arrest according to the United States Supreme Court's decision in *Robinson*.[113] The court then examined the justifications for a search of the person versus a search of the area within the arrestee's immediate control.[114]

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102. *Id.* at ¶ 9, 10 N.E.3d at 1199.
103. *Id.*
104. *Id.* at ¶ 10, 10 N.E.3d at 1199.
105. *Id.*
106. *Id.* ¶ at 11, 10 N.E.3d at 1199.
107. *Id.* at ¶ 13, 10 N.E.3d at 1199.
108. *Id.*
109. *Id.*
110. *Id.* at ¶ 25, 10 N.E.3d at 1201.
111. *Id.*
112. *Id.* at ¶ 27, 10 N.E.3d at 1201.
113. *Id.*
114. *Id.* at ¶¶ 28–29, 10 N.E.3d at 1201–02.

2. Addressing the Defendant's Gant *Defense*

The court then turned its attention to the defendant's assertion that *Hoskins* was no longer valid after *Gant*.[115] The defendant asserted the reasoning of *Gant* should apply to all searches that occur incident to arrest, and not only to searches involving a vehicle because *Gant* reaffirmed the *Chimel* rationale for searches of an area within an arrestee's immediate control.[116] In addition, the defendant asserted that *Hoskins*, which held that "items immediately associated with an arrestee's person" can be searched with no additional justification, was no longer tenable.[117] Due to this, the defendant concluded the appellate court was wrong to affirm the search of his bags based on the *Hoskins*' rule.[118]

The court rejected the defendant's assertions, stating essentially he read *Gant* to have too broad of a reach.[119] Ultimately, the court believed *Gant* did not apply to searches of the arrestee's person incident to arrest or items immediately associated with the arrestee's person.[120] The search in these circumstances remains controlled by the decision in *Robinson*, and thus, *Hoskins*.[121]

3. Does Hoskins *Apply in the Present Case*

After determining that *Hoskins* survived *Gant's* decision, the *Cregan* court examined *Hoskins* further, on the basis of *Chadwick*.[122] *Chadwick* held the search of the footlocker could not be justified as a search of the area under the defendant's control.[123] The court emphasized *Chadwick* had not considered whether the footlocker could have been justified as a search of the person incident to arrest.[124] Of additional importance to the court's analysis was that *Chadwick* was the only time the United States Supreme Court used the words "immediately associated" about the search incident to arrest.[125]

The Illinois Supreme Court reasoned that *Chadwick* means that a footlocker seized at the time of an arrest, and searched at a later place and

115. *See id.* at ¶ 31, 10 N.E.3d at 1202.
116. *Id.*
117. *Id.*
118. *Id.*
119. *Id.* at ¶¶ 32–34, 10 N.E.3d at 1202–03.
120. *Id.* at ¶ 34, 10 N.E.3d at 1203.
121. *Id.*
122. *Id.* at ¶ 37, 10 N.E.3d at 1203.
123. *Id.*
124. *Id.* at ¶ 40, 10 N.E.3d at 1204.
125. *Id.* at ¶ 41, 10 N.E.3d at 1204.

time, is not immediately associated with a defendant.[126] It stated *Chadwick's* rule now means a search of the person incident to arrest can extend only to items immediately associated with them.[127]

The *Cregan* court then noted that *Hoskins* and other cases had determined smaller items of personal property were "immediately associated" with an arrestee's person and were therefore searchable.[128] The court then addressed the kind of association necessary for a bag or container, not small enough to fit in clothing or a purse, to be "immediately associated" with an arrestee's person and thus, searchable.[129] The court stated that defining "immediately associated" by the type of object instead of the defendant's connection to the object at the time of arrest "results in an unworkable rule and produces unpredictable results."[130]

The court ultimately concluded that it was best to determine whether an object is "immediately associated" with a defendant by examining the defendant's connection to the object at the time of arrest.[131] Personal items, like "cigarette packs" or "purses," are not to be searched incident to arrest because they are "particularly personal" to the arrestee.[132] Instead, the items can be searched because of their close proximity to the arrestee at the time of arrest.[133] The court then stated the test to determine whether an object of various types was "immediately associated" with a defendant was whether the defendant was in actual physical possession of the item at the time of arrest.[134] Based on this test, if the item is possessed by the defendant at the time of arrest, it is covered under the search of the person incident to arrest exception.[135] The court further stated that to be consistent with *Hoskins*, an item could be searched if the arrestee dropped the item at the sight of approaching officers.[136] When the "rule of possession" was applied to the search of the defendant's bag, the search was legal.[137]

C. Justice Burke's Dissenting Opinion

Justice Burke believed that the United States Supreme Court's decision in *Gant* focused a court's attention on an arrestee's ability to grab weapons or destroy evidence at the time a search incident to arrest was

126. *Id.*
127. *Id.* at ¶ 41, 10 N.E.3d at 1204–05.
128. *Id.* at ¶ 42, 10 N.E.3d at 1205.
129. *See id.* at ¶ 43, 10 N.E.3d at 1205.
130. *Id.*
131. *Id.* at ¶ 50, 10 N.E.3d at 1207.
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.* at ¶ 51, 10 N.E.3d at 1207.
136. *Id.* at ¶ 59 n.4., 10 N.E.3d at 1209 n.4.
137. *Id.* at ¶ 53, 10 N.E.3d at 1207.

performed.[138] Based on that standard, she felt that the circuit court was wrong to deny the defendant's motion to suppress because the State failed to show the defendant's bags were within his reaching distance when the bags were searched, and thus, the defendant's conviction should be reversed.[139]

Justice Burke disagreed with the majority's holding "sua sponte" that any item possessed by an arrestee at the time of arrest was part of the arrestee's person and could be searched under the rule from *Robinson*.[140] In her view, this "possession rule" had been rejected by the United States Supreme Court, was at odds with Illinois' caselaw, and was without support from other sources.[141]

Justice Burke noted first that *Chimel* rejected the idea that the scope of a lawful search incident to arrest was determined by an arrestee's possession of an object at the time of arrest.[142] Justice Burke then analyzed the majority's interpretation of *Robinson's* search of the person rule and its extension to any object possessed by an arrestee at the time of arrest, but stated this reading was rejected by the United States Supreme Court in *Chadwick*.[143] The holding in *Chadwick*, Justice Burke explained, was that a custodial arrest does not automatically negate the arrestee's expectation of privacy in objects possessed at the time of arrest or justify a search of those objects.[144] In addition, Justice Burke noted the "majority's possession rule also has the effect of negating the Supreme Court's decision in *Gant*."[145]

Justice Burke then noted the *Cregan* majority's rule essentially overruled *Hoskins* by disregarding the factors used by the *Hoskins* court to determine the proper scope of a search incident to arrest.[146] Further, the *Hoskins* court's comprehension of what is allowed under *Robinson's* search of a person rule is supported by treatise identifications of what items are, and are not, intimately connected with a person and searchable.[147] Justice Burke then noted the majority's possession rule has not been adopted by any other court, and said that the support the majority believes it has actually supports the opposite conclusion.[148]

Justice Burke also believed the "possession rule" was vague because it allowed a search of an object incident to arrest when the object was in

138. *Id.* at ¶ 138, 10 N.E.3d at 1223 (Burke, J., dissenting).
139. *Id.*
140. *Id.* at ¶¶ 73–74, 10 N.E.3d at 1210–11.
141. *Id.* at ¶ 74, 10 N.E.3d at 1210-11.
142. *Id.* at ¶ 80, 10 N.E.3d at 1212.
143. *Id.* at ¶¶ 86–87, 10 N.E.3d at 1213.
144. *Id.* at ¶ 95, 10 N.E.3d at 1215.
145. *Id.* at ¶ 100, 10 N.E.3d at 1216.
146. *Id.* at ¶ 105, 10 N.E.3d at 1217.
147. *Id.* at ¶ 106, 10 N.E.3d at 1217–18.
148. *Id.* at ¶¶ 108–115, 10 N.E.3d at 1218-19.

"close proximity" to the person at the time of arrest, but did not explain what "close proximity" meant.[149] If the majority meant "reaching distance," then Justice Burke believed the majority had dismissed the distinction between searches of an arrestee's person and searches within that person's area of control, which would be incorrect based on cases like *Robinson*.[150]

Finally, Justice Burke stated she believed the majority went too far.[151] She felt the search of the bag should not be permitted as a search of the person under *Robinson*, and could not be lawful as a search of the area under the person's control.[152] Justice Burke then explained an analysis of the search of the area under the person's control pursuant to *Shakir* was relevant.[153] Ultimately, using *Shakir's* standard, she would have reversed Mr. Cregan's conviction.[154]

IV. ANALYSIS

The majority's analysis in *Cregan* was incorrect. The court's analysis led to the creation of a new rule which expanded an exception to the Fourth Amendment at a time when the United States Supreme Court seems to be limiting the government's power to use that same exception. As a result, the court's overall analytical process was out of sync with other courts that have dealt with similar issues. The court should have recognized that *Gant's* rationale based on *Chimel* was applicable to the facts of the case, and should have engaged in a completely different analysis than it did.

A. The Wrong Analysis From the Beginning

The *Cregan* court should have stepped back when it decided to determine what type of association was required between a bag and an arrestee that permitted the search of the bag incident to the person's arrest.[155] *Robinson's* circumstances involved a search of an arrestee's jacket pocket.[156] *Hoskins'* circumstances involved a search of a purse that was later held to be a search of an item that was immediately associated with the arrestee's person.[157] *Cregan's* situation involved the search of a

149. *Id.* at ¶¶ 116–118, 10 N.E.3d at 1219.
150. *Id.* at ¶ 118, 10 N.E.3d at 1219.
151. *Id.* at ¶ 124, 10 N.E.3d at 1220.
152. *Id.* at ¶¶ 124–126, 10 N.E.3d at 1220.
153. *Id.* at ¶ 130, 10 N.E.3d at 1221–22.
154. *See id.* ¶ 138, 10 N.E.3d at 1223.
155. *Id.* at ¶¶ 42–43, 10 N.E.3d at 1205 (majority opinion).
156. United States v. Robinson, 414 U.S. 218, 220–23, 236 (1973).
157. People v. Hoskins, 461 N.E.2d 941, 944–45 (1984).

laundry bag and a wheeled luggage bag.[158] The search of the wheeled bag was held to be a search of an item immediately associated with the arrestee's person incident to arrest.[159] From where the *Cregan* court stands in relation to the *Robinson* Court, the area the *Robinson* Court intended to be searched as part of the "person" appears unrecognizable.[160] Although Justice Burke does not mention this reasoning, she notes the interpretive extension of *Robinson* "to every object in an arrestee's possession at the time of arrest" has already been rejected by *Chadwick*.[161]

The *Cregan* majority extended *Robinson's* rationale too far and contradicted *Chimel* when it proclaimed the "rule of possession" was sufficient to justify its search incident to arrest theory.[162] Despite its age, the *Chimel* rationale for searches incident to arrest remains the United States Supreme Court's guidepost for limiting that exception.[163] The *Cregan* majority disregarded these limits by creating a "rule of possession" that allowed the search of an item either possessed by[164] or in close proximity[165] to an arrestee at the time of arrest.[166] *Cregan* collapses the two areas delineated by the rule in *Chimel* into one, but because both justifications are not necessarily present in any given situation, they may sometimes be an incompatible combination.[167]

Negating *Chimel's* rule essentially adopts Justice Scalia's statements in *Thornton* about returning to a broader search incident to arrest rule that was permissible prior to *Chimel*.[168] The possibility of this type of search being permitted by the United States Supreme Court seems unlikely, since *Chimel's* rule has guided the important search incident to arrest cases over forty years.[169]

Based on the vagueness of its rule,[170] the *Cregan* court appears to have returned to this pre-*Chimel* era. This is because there are no limits for the

158. *Cregan*, 2014 IL 113600, ¶¶ 59–60, 10 N.E.3d at 1209.
159. *Id.* at ¶ 60, 10 N.E.3d at 1209.
160. *Robinson*, 414 U.S. at 235.
161. *Cregan*, 2014 IL 113600, ¶¶ 86–87, 10 N.E.3d at 1213.
162. *Id.* at ¶¶ 50-53, 10 N.E.3d at 1207.
163. Arizona v. Gant, 556 U.S. 332, 339 (2009).
164. *Cregan*, 2014 IL 113600, ¶ 51, 10 N.E.3d at 1207.
165. *Id.* at ¶ 59 n.4, 10 N.E.3d at 1209 n.4.
166. *See id.* at ¶¶ 50–51, 10 N.E.3d at 1207.
167. Chimel v. California, 395 U.S. 752, 762–63 (1969). (explaining a search of the person is justified to remove weapons and prevent the destruction of evidence, which governs the area an arrestee *might* reach as well); *See also Cregan*, 2014 IL 113600, ¶ 118, 10 N.E.3d at 1219 (Burke, J., dissenting) (arguing the majority's rule is vague, and if close proximity means "reaching distance," "*cases such as Robinson"* forbid this).
168. Thornton v. United States, 541 U.S. 615, 631 (2004).
169. United States v. Robinson, 414 U.S. 218, 225–26 (1973); *Thornton*, 541 U.S. at 620; New York v. Belton, 453 U.S. 454, 459–60 (1981); Arizona v. Gant, 556 U.S. 332, 338-39 (2009).
170. *Cregan*, 2014 IL 113600, ¶¶ 116-121, 10 N.E.3d at 1219–20 (Burke, J., dissenting).

"rule of possession" based on the court's own language in its analysis.[171] The *Cregan* court explained that the true measure of whether an *object* can be searched is whether the arrestee possessed the *object* at the time of arrest.[172] While the court explains that it makes no difference if the item is a "cigarette pack or a suit case," or whether a bag is in a grannie cart, the court never expressly limited in any way how the rule could be applied.[173] This absence of language that limited the rule was noticed by Justice Burke,[174] and the *Cregan* majority left the question open by its disregard for factors such as "size, shape, materials, function, or some other attribute of an object, its proximity to the defendant, or some combination of these factors that determines whether it is 'immediately associated' with the defendant's person."[175] Based on this open-ended language, an argument could be made that a search of a room was permissible due to an arrestee's holding, or nearly holding, onto the door knob of the room at the time of his arrest. Although this would be impermissible under *Chimel*,[176] it might not be impermissible under the *Cregan* majority's rule.

The *Cregan* majority's lack of a limiting principle is evidenced by the inclusiveness allowed by the rule of possession.[177] As noted by Justice Burke, the rule of possession allows items merely in close proximity of an arrestee to be searched.[178] The majority explained that this was to keep the rule from being "untenable" by rendering a search of an arrestee's bag impermissible if the arrestee dropped the bag at the sight of approaching officers.[179] Again, however, the limiting principle is missing since nowhere does the majority explain what would happen if the arrestee dropped the bag and was unaware of the approaching officers or his impending arrest.[180] This very real possibility opens the door to the kind of confusion the majority sought to avoid when it decided to adopt the rule of possession.[181]

B. Analyzing a *Gant* Defense Does Not Require Expanding an Exception to the Fourth Amendment

Had the *Cregan* majority not ruled the bags were "immediately associated" with the defendant's person and stretched the holding of

171. *Id.* at ¶¶50–51, 10 N.E.3d at 1207 (majority opinion).
172. *Id.*
173. *Id.*
174. *Id.* at ¶98, 10 N.E.3d at 1216. (Burke, J., dissenting).
175. *Id.* at ¶ 49, 10 N.E.3d at 1206–07 (majority opinion).
176. Chimel v. California, 395 U.S. 752, 762-63 (1969).
177. *Cregan*, 2014 IL 113600, ¶ 59 n.4, 10 N.E.3d at 1209 n.4.
178. *Id.* at ¶ 73, 10 N.E.3d at 1210 (Burke, J., dissenting).
179. *Id.* at ¶ 59 n. 4, 10 N.E.3d at 1209 n.4 (majority opinion).
180. *Id.*
181. *Id.* at ¶¶ 49–53, 10 N.E.3d at 1206–07.

Robinson,[182] caselaw suggests other ways of analyzing the search of the bag in light of *Gant*.[183] A suitable guide in this case would have been the rule adopted by other courts that allows a search after a suspect's arrest when under the totality of the circumstances, there remains a reasonable possibility the arrestee might gain access to weapons or evidence in the area or container being searched.[184] This rule is essentially the *Chimel* rule that governs the area within the arrestee's immediate control and thus remains faithful to *Chimel's* principles.[185]

As noted by Justice Burke, the *Shakir* court's analysis is illustrative of how *Gant*, using *Chimel's* principles, should be applied.[186] Had the *Cregan* majority decided to analyze the search of Mr. Cregan's bag in a similar fashion, it would have examined the location of the bag at the time of the search.[187] Although the location of the bags in relation to Mr. Cregan at the time of the search is unclear,[188] this analysis is consistent with *Chimel's* rule.[189] An added benefit of this analysis is that it makes it unnecessary to determine the type of association between the bag and the defendant that renders a bag "immediately associated" and searchable,[190] and negates the need for a rule "rule of possession."[191] Moreover, an analysis relying on *Chimel* would presumably be received favorably by the United States Supreme Court since its decisions in *Gant* and *Riley* also relied on *Chimel*.[192]

This approach, adopted by other courts, permits an analysis that avoids the pitfalls of the "rule of possession," such as immediately contradicting other caselaw.[193] Unlike the "rule of possession," the rule adopted by other courts allows for a flexible analysis that is not pre-determined based on the nature of the rule.[194] Because of this flexibility,

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182. *Id.* at ¶ 60, 10 N.E.3d at 1209.
183. *See* United States v. Naim Nafis Shakir, 616 F.3d 315, 319 (3d Cir. 2010) (analyzing whether the warrantless search of the defendant's bag was permissible under *Gant*); United States v. Casper, No. 3:14cr32 2014 U.S. Dist. LEXIS 104228, (E.D. Va. July 29, 2014) (applying *Gant* to circumstances outside the context of a vehicle search).
184. *Naim Nafis Shakir*, 616 F.3d at 321; *Casper*, No. 3:14cr32 2014 U.S. Dist. LEXIS 104228.
185. Chimel v. California, 395 U.S. 752, 762–63 (1969).
186. *See Cregan*, 2014 IL 113600, ¶ 130, 10 N.E.3d at 1221–22 (Burke, J., dissenting).
187. *Naim Nafis Shakir*, 616 F.3d at 321.
188. *Cregan*, 2014 IL 113600, ¶ 7, 10 N.E.3d at 1198-99 (majority opinion).
189. *Chimel*, 395 U.S. at 762-63.
190. *Cregan*, 2014 IL 113600, ¶¶ 42–43, 10 N.E.3d at 1205.
191. *Id.* at ¶¶ 50-53, 10 N.E.3d at 1207.
192. *See* Arizona v. Gant, 556 U.S. 332, 351(2009); *see* Riley v. California, 134 S. Ct. 2473, 2484–85 (2014).
193. *Cregan*, 2014 IL 113600, ¶¶ 99–100, 10 N.E.3d at 1216 (Burke, J., dissenting); *Riley*, 134 S. Ct. at 2485 (declining to extend *Robinson* to search of a cell phone's data incident to arrest).
194. *Compare* United States v. Naim Nafis Shakir, 616 F.3d 315, 321 (3d Cir. 2010) (ruling the defendant's bag could be searched because it could be accessed at the time of the search), *with* United States v. Casper, No. 3:14cr32 2014 U.S. Dist. LEXIS 104228, (E.D. Va. July 29, 2014)

the rule permits the analysis to account for the *Chimel* Court's concerns regarding preventing access to weapons and of evidence destruction post-arrest.[195] Comparatively, the sole focus of the rule of possession is whether the defendant possessed the item at the time of arrest.[196] More importantly, the other courts' rule is based on precedent,[197] as opposed to the *Cregan* majority's creation of precedent.[198]

C. The *Cregan* Majority Says Expand, the United States Supreme Court Says Contract

Examining the trend of United States Supreme Court decisions regarding search incident to arrest issues suggests that Court is concerned with limiting that exception's reach.[199] Looking at *Cregan's* rule,[200] it appears the United States Supreme Court and the Illinois Supreme Court are headed in opposite directions.

The United States Supreme Court's decision in *Belton* was seen as an expansion of the search incident to arrest theory.[201] Twenty-four years later when the Court decided *Thornton*, the Justices' statements demonstrated their concern about *Belton's* extension of *Chimel* increasing the government's reach.[202] In contrast, the statements made by the *Cregan* majority analysis suggest an absence of any concern about greatly expanding on the rule in *Hoskins*.[203] The problem with this lack of concern is that the analysis leading to the "rule of possession" in *Cregan* is similar to Justice O'Connor's statement about treating an exception as a "police entitlement rather than as an exception justified by the twin rationales of *Chimel*."[204] Further, Justice Scalia's statements about stretching *Belton*

(ruling the defendant's bag could *not* be searched because it could not be accessed at the time of the search).

195. Chimel v. California, 395 U.S. 752, 762–63 (1969).
196. *Cregan*, 2014 IL 113600, ¶¶ 50–51, 10 N.E.3d at 1207.
197. *Naim Nafis Shakir*, 616 F.3d at 319; *Casper*, No. 3:14cr32 2014 U.S. Dist. LEXIS 104228.
198. *Cregan*, 2014 IL 113600, ¶ 73, 10 N.E.3d at 1210 (Burke, J., dissenting).
199. *Compare* New York v. Belton, 453 U.S. 454, 460 (1981) (holding as a contemporaneous incident of a vehicle occupant's arrest, a search of the passenger compartment of the vehicle may be made); *with* Thornton v. United States, 541 U.S. 615, 623–24 (2004) (holding when an arrestee was a recent occupant of a vehicle, a search of the passenger compartment may be made, but with concurring opinions noting concerns of Justices O'Connor, *id.* at 624, and Scalia, *id*. at 625) *and* Arizona v. Gant, 556 U.S. 332, 343 (2009) (rejecting a broad reading of *Belton* and holding searches of vehicles incident to recent occupant's arrest should be consistent with *Chimel's* rationale).
200. *Cregan*, 2014 IL 113600, ¶¶ 50–51, 10 N.E.3d 1196, 1207 (majority opinion).
201. James J. Tomkovicz, *Divining and Designing the Future of the Search Incident to Arrest Doctrine: Avoiding Instability, Irrationality, and Infidelity*, 2007 U. ILL. L. REV. 1417, 1432.
202. *See Thornton* 541 U.S. at 624–25.
203. *Cregan*, 2014 IL 113600, ¶ 42–43, 10 N.E.3d at 1205.
204. *Thornton*, 541 U.S. at 624.

beyond its limits appear on point when the majority in *Cregan* explained what is permitted under the rule of possession.[205] The *Cregan* majority supplied an illustrative example when it stated that a "duffle bag" or items in a "grannie cart" can be justified as a search of the arrestee's person incident to arrest as long as it is possessed by the arrestee at the time of arrest.[206]

Any doubt about the direction of the United States Supreme Court compared to the *Cregan* majority can be dismissed when examining the analysis in *Gant* that came just five years after *Thornton*.[207] Specifically, this is evidenced by the poignant statement in the United States Supreme Court's analysis rejecting a broad reading of *Belton* because it "untether[s]" the justifications of *Chimel*.[208] An analogous circumstance can be seen in *Cregan* extending the rationale of *Robinson* and *Hoskins* for the possession rule.[209] *Robinson's* justification for a search of the person incident to arrest was based on a lawful arrest, which required the arrestee to be searched for evidence or weapons, regardless of the likelihood that either would be found.[210] *Hoskins'* justification for a search of the purse was that it was immediately associated with the defendant's person, because a purse could always be carried with the person. [211] *Cregan's* justification for the search of an object—without regard for its size—was that it was immediately associated with the arrestee's person because the item was possessed by the person at the time of arrest.[212] Based on this rationale, much like *Belton* became untethered from *Chimel*, it appears that *Cregan* has been untethered from *Robinson*.[213]

The *Riley* Court's analysis demonstrated the United States Supreme Court's current commitment to closely examining the rationale behind the application of the search incident to arrest doctrine.[214] "Rather than requiring the 'case-by-case adjudication' that *Robinson* rejected . . . we ask instead whether application of the search incident to arrest doctrine to this particular category of effects would 'untether the rule from the justifications underlying the *Chimel* exception.'"[215] Additionally, although dealing with information in a cell phone, *Riley* provides other relevant insight about the

205. *Cregan*, 2014 IL 113600, ¶ 51, 10 N.E.3d at 1207.
206. *Id.*
207. Arizona v. Gant, 556 U.S. 332, 343–44 (2009).
208. *Id*. at 343.
209. *Cregan*, 2014 IL 113600, ¶¶ 42–43, 10 N.E.3d at 1205.
210. United States v. Robinson, 414 U.S. 218, 234–35 (1973).
211. People v. Hoskins, 461 N.E.2d 941, 943–45 (1984).
212. *Cregan*, 2014 IL 113600, ¶ 51, 10 N.E.3d at 1207.
213. *See id.* at ¶¶ 42–43, 10 N.E.3d at 1205.
214. *See* Riley v. California, 134 S. Ct. 2473, 2485 (2014).
215. *Id.*

Court's analysis of possible extensions of the *Chimel* rule.[216] While observing that lower courts applying *Robinson* and *Chimel* have approved searches involving "personal items carried by an arrestee" like a wallet, billfold, or purse, the Court rejected the government's argument that a search of a cell phone's content was no different from searching those sorts of objects.[217] Because the *Cregan* court's analysis essentially followed an extension that the *Riley* Court rejected,[218] it appears the two courts are headed in analytically opposite directions.

V. CONCLUSION

The majority's analysis in *Cregan* was incorrect. *Cregan's* "rule of possession" expands the government's reach under the search incident to arrest rule at a time when the United States Supreme Court is scrutinizing related questions and reaching results that limit the government's power.

The Illinois Supreme Court determination that *Robinson* could be expanded to include a search of the defendant's bags was incorrect because it defies common sense and negates longstanding caselaw. Based on recent United States Supreme Court decisions in this area, the Court would be unlikely to consider a laundry bag and wheeled luggage bag as things "immediately associated" with the arrestee. Had the Illinois Supreme Court not analyzed the circumstances as a search of the person and expanded on that exception, the court could have analyzed the facts as a search of an item the arrestee could access. The court then could have followed in the wake of other courts that have tried to apply *Chimel* by way of *Gant*, perhaps using the *Shakir* court's rule as a guide. The Illinois Supreme Court should not have engaged in an analysis that created the "rule of possession" in the face of the United States Supreme Court's recent decisions that favor limits on this type of expansion.

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216. *Id.* at 2488–89.
217. *Id.* at 2488.
218. *Cregan*, 2014 IL 113600, ¶¶ 42–43, 10 N.E.3d at 1205.