APPENDIX

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APPENDIX A

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 22-1121 [Filed: 12/28/2023]

UNITED STATES,

Appellee,

v.

GILBERT PEREZ,

Defendant, Appellant.

APPEAL FROM THE UNITED STATES
DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. D. Brock Hornby, U.S. District Judge]

Before

Barron, Chief Judge,
Howard and Montecalvo, Circuit Judges

Jamesa J. Drake, with whom Drake Law LLC was on brief, for appellant.

Brian S. Kleinbord, Assistant United States Attorney, with whom Darcie N. McElwee, United States Attorney, was on brief, for appellee.

December 28, 2023

BARRON, **Chief Judge**. Gilbert Perez seeks to vacate his federal drug conviction on the ground that the United States District Court for the District of Maine wrongly denied his motion to suppress the fruits of a warrantless search of his backpack. The District Court rested the denial on our decision in *United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975), which upheld a similar warrantless search under the search-incident-to-arrest exception to the warrant requirement of the Fourth Amendment to the U.S. Constitution, *id.* at 609-11. Because we reject Perez's contention that intervening decisions of the Supreme Court of the United States have stripped *Eatherton* of controlling force, we affirm the judgment of conviction.

I.

When reviewing the denial of a motion to suppress evidence, "'we recite the facts as found by the district court, consistent with record support,' including the testimony from the motion hearing." *United States v. Tom*, 988 F.3d 95, 97 (1st Cir. 2021) (quoting *United States v. Soares*, 521 F.3d 117, 118 (1st Cir. 2008) (cleaned up)). Massachusetts State Trooper Jason Conant was conducting a patrol on the evening of August 30, 2019, when he saw a pickup truck with Maine license plates stop in a McDonald's parking lot in Lawrence, Massachusetts. The driver was later identified as Perez.

Perez exited the truck, donned a backpack, and walked towards a residential area near the parking lot. Conant became suspicious of the out-of-state truck, as well as Perez's behavior, and alerted other state troopers in the area to watch for Perez.

Minutes after Perez left the parking lot, a second Massachusetts state trooper, Shawn McIntyre, saw Perez exiting a taxi on a nearby street. McIntyre watched Perez start to walk in the direction of the McDonald's where the truck was parked.

McIntyre stopped the taxi and saw large quantities of cash at the feet of the taxi's passenger. McIntyre then radioed Conant, informing him of the cash and the suspicion that Perez had participated in a drug transaction with the taxi's passenger.

Perez, still wearing the backpack, returned to the McDonald's parking lot. Conant pulled his (unmarked) car into the parking lot and exited the car. Roughly simultaneously, Conant began to yell "state police," and Perez began to run from the parking lot. Conant gave chase.

About twenty yards from the parking lot, Perez tripped and fell. Conant caught up to Perez after his fall and pinned him to the ground. A third state trooper, Ryan Dolan, pulled up in a patrol car.

Conant removed the backpack from Perez as Dolan was handcuffing Perez's hands behind his back. Dolan then sat Perez on the pavement.

After Perez was handcuffed, Conant placed the backpack on Dolan's car and opened and searched the backpack. Perez was not in reaching distance of the backpack when the search of the backpack took place.

Conant discovered fentanyl and cocaine in the backpack. Perez was then searched and formally arrested.

Perez was indicted on March 12, 2020, on a federal drug-related charge. He moved to suppress

the drugs, contending that the backpack's search violated the Fourth Amendment.[1]

The government opposed the motion on the ground that the search was constitutional under *Eatherton*. The government also argued that, in any event, the search was conducted in good-faith reliance on *Eatherton*. *See Davis v. United States*, 564 U.S. 229, 232 (2011) (holding that "[police] searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule").

The District Court denied Perez's motion without reaching the good-faith issue. *See United States v. Perez*, Crim. No. 2:20-CR-39-DBH-01, 2021 WL 2953671 (D. Me. July 14, 2021). The District Court found that "[t]he police had probable cause to arrest Perez when they handcuffed him," and it "treat[ed] [the police] as having effectively arrested him then," although the District Court also found that it was only later that Perez was "formally" arrested. *Id.* at *2. The District Court separately found, moreover, that Perez's handcuffing occurred "as" Conan "ripped the backpack off" of Perez. *Id.* With that factual predicate in place, the District Court reasoned that the search of the backpack was lawful because, when there is probable cause for an arrest, *Eatherton* allows for the warrantless "search [of] a container found on a person being arrested," *id.* at *3, and our Court had not "'unmistakably' cast *Eatherton* 'into disrepute,'" *id.* at *4 (quoting *Eulitt ex rel. Eulitt v. Me., Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004)).

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[1] Perez challenged several other aspects of his arrest in the District Court but raises none of those issues on appeal.

Perez entered a conditional guilty plea, which preserved his right to appeal his conviction based on the District Court's *Eatherton*-based denial of his motion to suppress. He then filed this timely appeal. We review the District Court's "factual findings for 'clear error'" and its "legal conclusions . . . de novo." *United States v. Rodríguez-Pacheco*, 948 F.3d 1, 6 (1st Cir. 2020) (quoting *United States v. Camacho*, 661 F.3d 718, 723-24 (1st Cir. 2011)).

II.

The Fourth Amendment protects "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures" by providing that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV. Our focus is on the exception to the Fourth Amendment's warrant requirement for a search incident to an arrest. *See United States v. Robinson*, 414 U.S. 218 (1973).

Perez does not dispute that the exception covers his backpack's search if *Eatherton* remains good law. He contends only that *Eatherton* does not because of either *United States v. Chadwick*, 433 U.S. 1 (1977), or *Arizona v. Gant*, 556 U.S. 332 (2009), or both together.

Under the law of the circuit doctrine, newly constituted panels must follow the rulings of preceding panels that are "directly (or even closely) on point," *United States v. Guzman*, 419 F.3d 27, 31 (1st Cir. 2005), "even where the succeeding panel disagrees with the prior one," *United States v. Guerrero*, 19 F.4th 547, 552 (1st. Cir 2021). The doctrine recognizes an exception, however, when "[a]n existing panel decision [is] undermined by

controlling authority, subsequently announced, such as an opinion of the Supreme Court, an en banc opinion of the circuit court, or a statutory overruling," *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995), or when an "authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind," *United States v. Barbosa*, 896 F.3d 60, 74 (1st Cir. 2018) (quoting *Williams*, 45 F.3d at 592).

The latter exception is very limited, as it applies only when the new authority "provides a clear and convincing basis" to conclude that the prior panel would have changed its mind. *Guerrero*, 19 F.4th at 552. For that reason, we have described cases that trigger this exception as "hen's-teeth-rare." *San Juan Cable LLC v. P.R. Tel. Co.*, 612 F.3d 25, 33 (1st Cir. 2010).

We begin by reviewing *Eatherton* and describing its rationale. We then explain why we conclude that *Eatherton* still controls.

A.

The defendant in *Eatherton* was Gilbert Eatherton. 519 F.2d. at 605. A suspected bank robber, he was walking down a street while carrying a briefcase when agents of the Federal Bureau of Investigation ("FBI") spotted him. *Id.* at 609.

The FBI agents called for Eatherton to come to their car, and he did so. *Id.* When he was "close to the vehicle the agents told him he was under arrest [and] instructed him to drop the briefcase and [lie] spread eagle on the ground." *Id.* He complied with the

commands, and the FBI agents "thoroughly frisked" him, handcuffed him, and placed him in the back of their vehicle. *Id.* The FBI agents then picked up the briefcase, opened it, and found a loaded gun and three brown ski masks, all of which were later admitted as evidence at trial. *Id.*

Eatherton did not dispute that there was probable cause to arrest him, and he "concede[d] that the agents could have seized the briefcase consonant with the [F]ourth [A]mendment." *Id.* at 610. But he argued that the agents "should have obtained a search warrant before investigating [the briefcase's] contents," and that, because the agents did not, the search of his briefcase violated the Fourth Amendment. *Id.* He thus argued that the fruits of the search of the briefcase had to be suppressed because that search could not be justified merely by the fact of his arrest and the right to search his person that his arrest entailed. *Id.*

Eatherton relied chiefly on the Supreme Court's decision in *Chimel v. California*, 395 U.S. 752 (1969). There, the Court held that the bare fact that an arrest occurred inside a home did not justify a warrantless search of the entirety of the premises. *Id.* at 763. The Court also held that although a warrantless search of the area of the home within the "immediate control" of the arrestee was reasonable if justified "by the need to seize weapons and other things which might be used to assault an officer or effect an escape" or "by the need to prevent the destruction of evidence of the crime," these "justifications are absent where a search is remote in time or place from the arrest." *Id.* at 764 (quoting *Preston v. United States*, 376 U.S. 364, 367 (1964)).

Eatherton argued based on *Chimel* that the briefcase's search violated the Fourth Amendment because "any urgency to inspect the interior of the briefcase was completely removed once he had been subdued and the [brief]case removed from his possession and beyond his possible reach." *Eatherton*, 519 F.2d at 610. But, although the *Eatherton* panel acknowledged that there was "some logical cogency" to the contention, *id.*, the panel held that the search of the briefcase's interior was reasonable.

The *Eatherton* panel first pointed out that *Chimel* had cited "with apparent approval *Draper v. United States*, in which a search virtually identical to that at issue [in *Eatherton*] was upheld." *Id.* (citation omitted). *Draper* involved a criminal defendant who had evidence admitted against him at his trial that was obtained from the warrantless search of a bag that he was carrying when he was arrested. 358 U.S. 307, 310 (1959).

The *Eatherton* panel next explained that other courts of appeals "had little apparent difficulty" rejecting *Chimel*-based arguments for prohibiting warrantless "searches identical to that contested" by *Eatherton*. 519 F.2d at 610. Notably, in each of those cases, as in *Draper*, the warrantlessly-searched container was similar in size to the briefcase in *Eatherton*. *See United States v. Maynard*, 439 F.2d 1086, 1087 (9th Cir. 1971) (rejecting the argument that a warrantless search of a suitcase the defendant was carrying when arrested was unconstitutional because the search was "incident to the lawful arrest of its carrier"); *United States v. Mehciz*, 437 F.2d 145, 146-48 (9th Cir. 1971) (relying on *Draper* to reject the contention that *Chimel* governed a warrantless search of a suitcase carried at the time of arrest);

United States ex rel. Muhammad v. Mancusi, 432 F.2d 1046, 1047-48 (2d Cir. 1970) (rejecting as "frivolous" a *Chimel*-based challenge to the post-arrest search at a police station of a briefcase in the "immediate possession" of the defendant at the time of the arrest when the defendant conceded that the search "would have been proper if [it] had been conducted at the time [and place] of his arrest").

The *Eatherton* panel then addressed three Supreme Court decisions that post-dated both *Chimel* and the other circuits' rulings that had upheld searches like the search of Eatherton's briefcase: *Robinson*, 414 U.S. at 218; *Gustafson v. Florida*, 414 U.S. 260 (1973); and *United States v. Edwards*, 415 U.S. 800 (1974). The *Eatherton* panel explained that this trio showed that the *Chimel*-based challenge could not "be sustained." *Eatherton*, 519 F.2d at 610.

In *Robinson*, the Court held that the warrantless search of a "crumpled up cigarette package" found in the "breast pocket of the heavy coat [the arrestee] was wearing" at the time of his arrest did not violate the Fourth Amendment, even though the arresting officer had neither "any subjective fear of the [arrestee]" or any "susp[icion] that the [arrestee] was armed." 414 U.S. at 222-23, 236. The Court explained that because the "custodial arrest of a suspect based on probable cause is a reasonable intrusion under the Fourth Amendment[,]" a search "of the person" of an arrestee incident to that arrest is per se reasonable. *Id.* at 235. *Robinson* thus rejected the contention that a more limited pat-down – such as the limited frisk permitted in *Terry v. Ohio*, 392 U.S. 1 (1968) – was all that was allowed for a search incident to the arrest. *See Robinson*, 414 U.S. at 235. And the Court then explained that "[h]aving in the course of a

lawful search come upon the crumpled package of cigarettes, [the officer who had conducted the search of the arrestee's person] was entitled to inspect [the package,] and when his inspection revealed the heroin capsules, he was entitled to seize them as 'fruits, instrumentalities, or contraband' probative of criminal conduct." *Id.* at 236 (quoting *Harris v. United States*, 331 U.S. 145, 154-55 (1947)).

Robinson relied on the rationales for the search-incident-to-arrest exception to the warrant requirement to justify the ruling that the warrantless search of the cigarette package was reasonable. Those rationales are rooted in a concern for officer safety, the governmental interest in the preservation of evidence, and the diminished privacy interest of an arrestee due to the dominion over their person effected by the arrest itself. *See Robinson*, 414 U.S. at 226; *see also Riley v. California*, 573 U.S. 373, 386 (2014) ("*Robinson* regarded any privacy interests retained by an individual after arrest as significantly diminished by the fact of the arrest itself.").

In *Gustafson*, which was decided the same day as *Robinson*, the Court went a step further than it had in *Robinson*. It held that a warrantless search of a cigarette box found in the "front coat pocket of the coat [the arrestee] was wearing" during a search of the arrestee's person at the time of his arrest, 414 U.S. at 262, was per se reasonable under *Robinson* even though the search of the cigarette box occurred after the arrestee had been placed "in the back seat of the squad car," *id.* at 262 n.2, and even though there was no "subjective fear of the [arrestee]" or "susp[icion] that the [arrestee] was armed," *id.* at 266.

The defendant in *Eatherton* tried to distinguish *Robinson* and *Gustafson* based on the relatively large size of his briefcase and the fact that it was not concealed in his pocket but held in his hand at the time of the arrest. But the *Eatherton* panel concluded that "[t]he line which [Eatherton] attempts to draw placing the briefcase beyond the search of his 'person' which *Robinson* and *Gustafson* expressly approve is one requiring gossamer distinctions." *Eatherton*, 519 F.2d at 610. And *Eatherton* went on to state that "[t]here is no indication that the result in those cases would have been any different had the cigarette packages been in the defendants' hands rather than in their pockets or if they had been dropped to the ground in response to [a] police command." *Id.* Moreover, *Eatherton* explained, "[w]hile a briefcase may be a different order of container than a cigarette box, it is not easy to rest a principled articulation of the reach of the [F]ourth [A]mendment upon the distinction." *Id.*

The *Eatherton* panel also noted that the defendant's argument was "not unlike" Justice Marshall's in "his dissent to *Gustafson* and *Robinson*." *Id.* The *Eatherton* panel then cited to the portion of that dissent that relied on *Chimel* to dispute the majority's decision to uphold the warrantless search of the container in that case. *Id.* (citing *Robinson*, 414 U.S. at 256-58 (Marshall, J., dissenting)). While the argument advanced in that portion of Justice Marshall's dissent "may have analytical appeal," the *Eatherton* panel concluded, the view set forth there "does not presently represent the law." *Id.*

The *Eatherton* panel wound up its analysis by invoking *Edwards*, which was decided the year after

Robinson and *Gustafson*. The Court held in *Edwards* that the Fourth Amendment permitted the warrantless search of clothing that an arrestee was wearing at the time of his arrest even though the search of the clothing occurred the day after the arrest and while the arrestee was in jail. *Edwards*, 415 U.S. at 808-09. *Edwards* reasoned that "the legal arrest of a person" reduces the arrestee's expectation of privacy in items "*in his immediate possession, including his clothing*." *Id.* at 805, 808 (emphasis added) (quoting *United States v. DeLeo*, 422 F.2d 487, 493 (1st Cir. 1970)).

The *Eatherton* panel observed that the Court in *Edwards*, "after noting that the courts of appeals have generally permitted searches of both 'the person and the property in his immediate possession,'" stated that "it is difficult to perceive what is unreasonable about the police examining and holding as evidence those personal effects of the accused that they already have in their lawful custody as the result of a lawful arrest." *Eatherton*, 519 F.2d at 610 (first quoting *Edwards*, 415 U.S. at 803; then quoting *Edwards*, 415 U.S. at 806). The search in *Edwards* had been made "in the station house after an arrest," *Eatherton* acknowledged. But *Eatherton* explained that there was no reason to "doubt that [those observations from *Edwards*] apply equally to searches in the field immediately incident to the arrest." *Id.* *Eatherton* thus held that, as the defendant in the case before it had "conceded the agents properly seized the briefcase as . . . incident to his arrest . . . any expectation of privacy which he held with regard to the briefcase was taken out of 'the realm of protection from police interest in

weapons, means of escape, and evidence.'" *Id.* at 610-11 (quoting *Edwards*, 415 U.S. at 808-09).

B.

As this extended review of *Eatherton* reveals, the panel in that case did more than determine that the rule set forth in *Robinson*, *Gustafson*, and *Edwards* rather than the rule set forth in *Chimel* controlled the briefcase's search. The panel also made clear that it based that determination on the considered judgment that, for purposes of the rule laid down in *Robinson* and *Gustafson*, a search of a container (at least of the "order" of a briefcase, *see Eatherton*, 519 F.2d at 610) in the hands of an arrestee at the time of the arrest was no different from a search of a container in the pocket of an arrestee at that time.[2] As *Eatherton* put it, a "line which [would] plac[e] the briefcase beyond the search of [the] 'person' which *Robinson* and *Gustafson* expressly approve is one requiring gossamer distinctions." 519 F.2d at 610. And, to that point, the *Eatherton* panel explained that, although a briefcase was of "a different order of container from a cigarette box," it would not be "easy" to make any such distinction for the relevant Fourth Amendment purposes in a "principled" manner. *Id.* *Eatherton* then reasoned that, as a result, *Edwards*

[2] We understand *Eatherton*'s statement that "[t]here is no indication that the result in [*Robinson* and *Gustafson*] would have been any different had the cigarette packages been . . . dropped to the ground in response to police command," 519 F.2d at 610, to mean only that the determination of whether an item is "of the person" of the arrestee or in the arrestee's "area of immediate control" is unaffected by post-arrest, police-ordered conduct. After all, at the same time that the FBI agents told Eatherton to drop the briefcase, they also told him he was under arrest. *Id.* at 609.

required the conclusion that the briefcase's search was reasonable, given that *Edwards* concluded that the search of the personal property found on the person of the arrestee in that case was reasonable. In that regard, *Eatherton* concluded based on *Edwards* that because "the agents properly seized the briefcase . . . incident to [Eatherton's] arrest . . . any expectation of privacy which he held with regard to the briefcase was taken out of 'the realm of protection from police interest in weapons, means of escape, and evidence.'" *Id.* at 610-11 (quoting *Edwards*, 415 U.S. at 808-09).

Perez does not suggest that there is any relevant difference between his backpack and the briefcase in *Eatherton* or that the backpack was not on his back when the District Court found that he was arrested, notwithstanding that the District Court found that he was "formally" arrested only thereafter. He thus accepts that his appeal lacks merit if *Eatherton* controls. His sole contention, therefore, is that *Eatherton* does not control due to post-*Eatherton* developments.

C.

The post-*Eatherton* developments that Perez has in mind are two Supreme Court precedents: *Chadwick* and *Gant*. He contends that, whether separately or together, they undermine (even if they do not overrule) *Eatherton*'s holding that a briefcase in the hands of an arrestee at the time of arrest is no different from the cigarette containers involved in *Robinson* and *Gustafson*. But we cannot agree – even if we account for post-*Chadwick* and post-*Gant* out-of-circuit precedent that is at odds with *Eatherton*.

Thus, we conclude that *Eatherton* remains binding on us as a panel.[3]

1.

We start with Perez's arguments about *Chadwick*, which was decided two years after *Eatherton*. Perez contends that *Chadwick* is a significant intervening precedent because *Eatherton*'s rationale depended on the determination that there was "no indication" that the result in either *Robinson* or *Gustafson* "would have been any different had the cigarette packages been in the defendants' hands rather than in their pockets or if they had been dropped to the ground in response to police command." *Eatherton*, 519 F.2d at 610. Yet, Perez asserts, *Chadwick* shows that is not so.

The Supreme Court held in *Chadwick* that the warrantless search of an arrestee's "double-locked, 200-pound footlocker" violated the Fourth Amendment when the search of that container was conducted beyond "the area from within which [the arrestees] might gain possession of a weapon or

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[3] Neither Perez nor the government addresses whether, even if *Eatherton* does not control the outcome of this case, it is controlled by our post-*Chadwick* ruling in *United States v. Maldonaldo-Espinosa*, 968 F.2d 101, 104 (1st Cir. 1992) (rejecting an argument that the search of a bag "on the table next to [the handcuffed defendant] and within reach" could be justified only by an exigency because "government agents, when arresting a person, may constitutionally search an arrested person's nearby . . . bag, without a warrant . . . whether or not [the agents] have reason to fear that the carry-on bag contains a weapon, another threat to their safety, or destructible evidence"). Because we conclude that *Eatherton* controls here, we need not evaluate the search of Perez's backpack under *Maldonaldo-Espinosa*.

destructible evidence," *Chadwick*, 433 U.S. at 5 (quoting *Chimel*, 395 U.S. at 763), and was not "justified by any other exigency," *id.* at 15. But nothing in *Chadwick* disturbs either *Robinson*'s ruling upholding the warrantless search of a cigarette container in the pocket of an arrestee at the time of the lawful arrest or *Gustafson*'s ruling upholding such a search even when it is performed after the cigarette container has been removed from the arrestee's immediate area of control.

In that regard, *Chadwick* expressly states that, "[u]nlike searches of the person [under] *United States v. Robinson* [and] *United States v. Edwards*, searches of possessions within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." 433 U.S. at 16 n.10 (emphasis added) (citations omitted). We do not read that passage, in expressly reaffirming *Robinson* and *Edwards*, to be silently rejecting the parts of their holdings that blessed the searches of the personal property in those cases that was found on the person of the defendants. Nor do we read that passage, in reaffirming those two cases without mentioning *Gustafson*, to be silently rejecting *Gustafson*'s extension of *Robinson*'s rule regarding a search of personal property on the person of the arrestee at the time of the arrest to cover the search of such property even after that property was no longer in the arrestee's area of immediate control.

Moreover, nothing in *Chadwick* purports to address how to treat a container that an arrestee has in hand at the time of arrest relative to a container that an arrestee has in a pocket at that time. In fact, *Chadwick* had no reason to address that question because the arrestee was not holding the container in

Chadwick. Nor, for that same reason, did *Chadwick* have reason to address whether the arrestee's dropping of such a container in response to a police command upon arrest would change the calculus. So, not surprisingly, *Chadwick* does not purport to address that scenario either.

True, *Chadwick* does state that "[o]nce 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 the property is no longer an incident of the arrest." 433 U.S. at 15 (emphasis added). But the emphasized language shows that *Chadwick*'s "immediate area of control" rule does not apply to "personal property . . . immediately associated with the person of the arrestee," *id*., and so merely operates in parallel to the holdings in *Robinson*, *Gustafson*, and *Edwards*. Thus, because *Chadwick* does not address what, if any, personal property carried or worn by the arrestee at the time of the arrest beyond the cigarette packages in *Robinson* and *Gustafson* and the clothing in *Edwards* constitutes "personal property . . . immediately associated with the person of the arrestee," *Chadwick* does not address whether a held briefcase like the one in *Eatherton* is to be treated the way that the personal property in those three cases was. As a result, *Chadwick* gives no "indication that the result in [*Robinson* and *Gustafson*] would have been any different had the cigarette packages been in the defendants' hands rather than in their pockets or if they had been dropped to the ground in

response to police command." *Eatherton*, 519 F.2d at 610.

Simply put, *Eatherton* was concerned about drawing distinctions between types of containers in an arrestee's "immediate possession," *Eatherton*, 519 F.2d at 610 (quoting *Edwards*, 415 at 803), at the time of arrest – a problem that is hardly trivial given the range of containers people may carry beyond cigarette packages, from holsters to purses to backpacks. But, as *Chadwick* had no reason to address that line-drawing problem, it cannot offer any insight into how to resolve that problem. We thus do not see how *Chadwick* undermines *Eatherton*'s rationale for upholding the search of the briefcase in *Eatherton*.

2.

Perez does argue that *Gant* undermines *Eatherton* even if *Chadwick* does not. But here, too, we disagree.

Gant relied on *Chimel* in holding that courts had wrongly interpreted *New York v. Belton*, 453 U.S. 454 (1981), to have held that all personal property in an automobile was categorically searchable incident to an occupant's arrest. *Gant*, 556 U.S. at 348-52. Perez contends that it follows from *Gant* that the search of his backpack is no different from the car search in that case.

But, *Gant*, like *Chadwick*, said nothing about whether the rule of *Robinson* (as applied in *Gustafson* and *Edwards*) governs a container that an arrestee is carrying at the time of the arrest (or that is dropped in response to police command at that time). Indeed, *Gant* did not address carried personal

property at all, because it concerned only whether a car may be searched incident to a lawful arrest of an occupant of the car. Thus, *Gant* is no different from *Chadwick* in the relevant respect, and so provides no basis for our concluding that *Eatherton* has been stripped of its controlling force. For, like *Chadwick*, *Gant* has literally nothing to say about where the line should be drawn in searches incident to arrest when it comes to things an arrestee carries at the time of the arrest.[4]

D.

The dissent appears to accept that neither *Chadwick* nor *Gant* directly overrules *Eatherton*. The dissent nonetheless contends that we still can be confident that if the panel in *Eatherton* knew what we do in consequence of *Chadwick* and *Gant*, that panel would have abandoned its hard line about the difficulty of drawing hard lines. As the dissent sees it, the panel in that event would have "centered its analysis around 'immediate control' rather than shoehorning the search of a closed container into being 'of the [arrestee's] person.'" Dissent at 49. But

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[4] Perez does at points argue that, under *Gant*, the location of a container "relative to the arrestee at the time of arrest is irrelevant" when determining whether the container can be searched without a warrant, because all such searches should be evaluated based on the container's location at the time of its search. But, as *Gustafson* and *Edwards* show, the application of *Robinson*'s categorical rule depends, as to at least some personal property, on the property's location at the time of the arrest and not at the time of the search. And, as we have explained, there is nothing in *Gant* that undermines *Robinson*, *Gustafson*, or *Edwards*. We thus do not see how Perez's time-of-the-search contention, insofar as it is meant to address all containers, can be reconciled with *Robinson* as it was applied in *Gustafson* and *Edwards*.

we see no "clear and convincing" case for that conclusion. *Guerrero*, 19 F.4th at 552.

Chadwick does make clear that no per se rule establishes that "luggage" within the "immediate area of control" of an arrestee at the time of the arrest may be warrantlessly searched. *See Chadwick*, 433 U.S. at 16 n.10. Thus, *Chadwick* does prompt the question of why it would be per se reasonable to search a briefcase that is held (or dropped upon police command) by an arrestee at the time of the arrest.

But *Chadwick* applied the "immediate control" test to a container that was not carried by the arrestee at the time of the arrest. By contrast, the *Eatherton* panel was addressing only how to treat a container that an arrestee was carrying at that time, so the *Eatherton* panel did not purport to suggest that the *Robinson* rule would apply to nearby containers not carried by the arrestee at the time of the arrest. As a result, *Chadwick* fails to provide a clear and convincing reason for us to conclude that the *Eatherton* panel would have reversed course had it known about *Chadwick*.

That is especially so given that *Chadwick*, in a passage that the dissent mentions but otherwise ignores, expressly distinguishes searches of personal property "immediately associated" with the person of the arrestee (like the personal property at issue in *Robinson*, *Gustafson*, and *Edwards*) from searches of personal property of the arrestee that is merely within the "immediate control" of the arrestee. *Id.* at 15. For, because of that distinction, *Chadwick* did not address whether principled lines could be drawn in this context between types of containers that are carried by the arrestee at the time of arrest –

whether those types of containers are cigarette packs, wallets, purses, fanny packs, holsters, or briefcases. Yet *Eatherton*'s clearly expressed concern was that such lines could not be drawn. *See Eatherton*, 519 F.2d at 610.

Gant similarly offers no relevant insight into the proper way to resolve the line-drawing problem that troubled the *Eatherton* panel. Because *Gant* addresses only searches of automobiles, it says nothing about what distinctions might be tenable when it comes to containers that an arrestee is carrying at the time of the arrest.

We thus fail to see how we could be confident that *Chadwick* or *Gant* – or even the two taken together – would have led the *Eatherton* panel to "center" its analysis of the briefcase on the "immediate control" question. Were the panel to have done so, it would have been forced to draw the very distinctions between the types of carried containers that it concluded were too "gossamer" to make. *Eatherton*, 519 F.2d at 610. But not a word in either *Chadwick* or *Gant* would give the *Eatherton* panel reason to think that, contrary to the panel's initial assessment, distinctions of substance as to such containers could be made in a "principled" manner. *See id.*

Of course, the dissent is right that, in the wake of *Chadwick* and *Gant*, other circuits have drawn the kinds of distinctions that *Eatherton* refused to make. *See United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019) (holding that the search of a purse was governed by the *Chimel* standard because the purse "was not concealed under or within [the defendant's] clothing" and "was easily capable of separation from her person"); *United States v.*

Shakir, 616 F.3d 315, 321 (3rd Cir. 2010) ("[A] search is permissible incident to a suspect's arrest when, 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."). But post-*Eatherton* precedent is not uniformly at odds with *Eatherton*, as even the dissent acknowledges in describing how other circuits reacted to *Chadwick* – at least prior to *Gant*. *See* Dissent at 39.

Indeed, some circuits after *Chadwick* but before *Gant* appeared to follow *Eatherton*'s lead in categorizing certain carried items as "of the person." Two months after *Chadwick* was decided, for example, the Fourth Circuit assumed that warrantless searches of objects carried in an arrestee's hands were permissible as searches "of the person incidental to an arrest." *United States v. Wyatt*, 561 F.2d 1388, 1391 (4th Cir. 1977) (search of a notebook that arrestee retrieved from his car after being arrested). And four years later, in *United States v. Graham*, the Seventh Circuit explained that a "shoulder purse carried by a person at the time he is stopped lies within the scope of a warrant authorizing the search of his person." 638 F.2d 1111, 1114 (7th Cir. 1981).

Although the question in *Graham* was whether the purse was "of the person" for purposes of a search warrant authorizing a search of the person, and there was no issue of a warrantless search incident to an arrest, the Seventh Circuit's reasoning nevertheless aligns neatly with *Eatherton*'s. As the Seventh Circuit explained, "[c]ontainers . . . while appended to the body, are so closely associated with the person that they are identified with and included within the

concept of one's person. To hold differently would be to narrow the scope of a search of one's person to a point at which it would have little meaning." *Id.* And almost two decades later, the Eighth Circuit followed the Seventh Circuit's lead and explained that a purse, for purposes of the search-incident-to-arrest exception, was an object "immediately associated" with one's person, even though the purse in that case was also within the arrestee's area of "immediate control." *Curd v. City Court*, 141 F.3d 839, 843-44 (8th Cir. 1998). Indeed, the Eighth Circuit agreed "with the general view" of other courts that "concluded that a purse, like a wallet, is an object 'immediately associated' with the person." *Id.* (citations omitted).[5]

Thus, to the extent that post-*Chadwick* precedents from sister circuits may shed light on what the *Eatherton* panel would have done with the benefit of them, we do not see how the pre-*Gant* precedents of that ilk do. Even though some of those post-*Chadwick* but pre-*Gant* precedents adopt the dissent's position, these precedents are, as a group, too varied to justify application of the second exception to the law-of-the-circuit doctrine.

The dissent does also cite to post-*Gant* sister-circuit cases that extend *Gant* to non-vehicle contexts. *See*, *e.g.*, *United States v. Davis*, 997 F.3d

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[5] To be sure, four months later, the Eighth Circuit approved a backpack search because "the search of his person and backpack was lawful as a search incident to arrest," seemingly distinguishing "person" from "backpack" and citing a case for the idea that possessions within "immediate control" can be searched. *United States v. Oakley*, 153 F.3d 696, 698 (8th Cir. 1998).

191, 193 (4th Cir. 2021) ("*Gant* applies beyond the automobile context to the search of a backpack."); *United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019) ("[A]lthough *Gant* specifically addressed the search of an automobile, its principles apply more broadly."); *United States v. Cook*, 808 F.3d 1195, 1199 n.1 (9th Cir. 2015) ("We do not read *Gant*'s holding as limited only to automobile searches because the Court tethered its rational [sic] to the concerns articulated in *Chimel*, which involved a search of an arrestee's home."); *Shakir*, 616 F.3d at 318 ("[T]he Government contends that the rule of *Gant* applies only to vehicle searches. We do not read *Gant* so narrowly."). But these out-of-circuit cases also fail to show what is required to justify applying the second exception to the law-of-the-circuit doctrine.

Even after *Gant*, the Supreme Court recognized in *Riley v. California* that "[l]ower courts applying *Robinson* and *Chimel* . . . have approved searches of a variety of personal items carried by an arrestee" and cited to a case where the D.C. Circuit upheld the search of a purse incident to the arrest of its owner. 573 U.S. 373, 392-93 (2014) (citing, *inter alia*, *United States v. Lee*, 501 F.2d 890, 892 (D.C. Cir. 1974)). And *Riley* repeatedly described *Gant* as a case involving automobile searches without in any way suggesting that *Gant* had worked a reformation of *Robinson*'s rule for searches of at least some personal property on the person of the arrestee at the time of the arrest. *See* 573 U.S. at 398 ("But *Gant* relied on 'circumstances unique to the vehicle context'" (quoting *Gant*, 556 U.S. at 343)); *id.* at 385 ("*Gant* added . . . an independent exception for a warrantless search of a vehicle's passenger compartment . . . .

That exception stems not from *Chimel* . . . but from 'circumstances unique to the vehicle context.'" (quoting *Gant*, 556 U.S. at 343)). Thus, the post-*Gant* cases from sister circuits do not show in a clear and convincing way that the *Eatherton* panel – with the benefit of *Gant* – would have ruled the same way that those circuits had.

We note, too, that *Riley* made its observation about how other circuits had applied *Robinson* post-*Chadwick* while addressing whether the rule of *Robinson* extends to the search of the data on an arrestee's carried cellphone. *Riley*, 573 U.S. at 392-93. Yet, in doing so, the Court both expressly reaffirmed that *Robinson* survived *Chadwick* as to at least some personal property on the person of the arrestee at the time of arrest, *id.* at 384, 394, and highlighted the fact that *Chadwick* expressly exempted from its "immediate control" test "personal property . . . immediately associated with the person of the arrestee[,]" *id.* at 384 (first alteration in original) (quoting *Chadwick*, 433 U.S. at 15).

Finally, although *Riley* carefully explained that the officer-safety, evidence-collection, and diminished-privacy rationales for Robinson's rule did not apply to a cell phone's data, the Court said nothing in doing so that "clear[ly] and convincing[ly]" indicates, *Guerrero*, 19 F.4th at 552, that *Robinson*'s rule has no application to a container that is of the same "order" as a briefcase, *Eatherton*, 519 F.2d at 610. *Riley* does suggest that, based on those rationales, a 200-pound double-locked storage trunk may fall outside *Robinson*'s rule even if the arrestee happens to be dragging the trunk along behind him. *See Riley*, 573 U.S. at 394. But *Eatherton* did not itself suggest otherwise. Rather, *Eatherton* held only

that a briefcase that the arrestee was carrying at the time of the arrest fell within *Robinson*'s rule because the distinction between such a container when held in hand and a cigarette package when carried in a pocket was "gossamer" and because it was "not easy to rest a principled articulation of the reach of the [F]ourth [A]mendment upon the distinction." *Eatherton*, 519 F.2d at 610.

We note, too, that *Riley*'s comment about the potential exclusion of the dragged trunk from *Robinson*'s rule was based on the notion that "[m]ost people cannot lug around" a trunk containing "every piece of mail . . . every picture . . . or every book or article they have read" and on the observation that "nor would they have any reason to attempt to do so." *Id.* at 393-94. Yet, of course, most people can carry a briefcase and often have reason to do so. Indeed, Perez himself does not argue that *Riley* is the case that would have led the *Eatherton* panel to rule other than it did, as he contends only that *Riley* merely excluded digital content from *Robinson*'s rule.

E.

We close by addressing what may be our key point of disagreement with our dissenting colleague – the proper scope of the second exception to the law-of-the-circuit doctrine. As we see it, the whole point of the doctrine is to ensure that individual panels of our court do not – in an ad hoc way – second-guess prior circuit precedents just because the panels are convinced that those precedents are wrong. Thus, the determination of whether a prior panel decision binds a future panel cannot depend on whether there are sound reasons to conclude that the prior panel got it wrong. Yet, the post-*Eatherton* body of precedent

that the dissent invokes shows, in our view, that there are merely reasons of that sort when it comes to *Eatherton*, as that body of caselaw fails to provide "a clear and convincing basis to believe that the [*Eatherton*] panel would have decided the issue differently." *Guerrero*, 19 F.4th at 552.

A comparison of this case with *Guerrero* – which is our most recent case to find the second exception to the law-of-the-circuit doctrine to be satisfied – underscores the point. In finding the second exception to the doctrine applicable there, we relied on an unbroken string of intervening Supreme Court precedents. *Id.* at 555-57. Those precedents, we explained, each had made sweeping statements that contradicted the very rationale that the prior panel had relied on in ruling that a warrantless search had to be subjectively and not just objectively aimed at addressing an exigency to be lawful. *See id.*, 19 F.4th at 554. And while we acknowledged that none of those precedents directly overruled the prior panel decision, we pointed out that one of them rejected the application of a subjective test with respect to a home search, notwithstanding that the prior panel had applied that test to a search of an automobile. *See id.* at 555-56 (citing *Maryland v. Buie*, 494 U.S. 325 (1990)). We thus explained that, given the heightened privacy interests at stake in home searches, it would be most strange to conclude that the prior panel would stick with its position that a subjective test had to be used for a search of a car if that panel had the benefit of the intervening Supreme Court precedent. *See id.* at 557.

Here, by contrast, the relevant intervening Supreme Court precedents are *Chadwick* and *Gant* – neither of which even addresses a search of personal

property carried by an arrestee at the time of the arrest, let alone whether and how to distinguish between types of such personal property, at least as between briefcases and cigarette packages. We thus do not see how we could reason from either of those precedents to the determination that there is a clear and convincing basis on which to conclude that the *Eatherton* panel would have decided differently with the benefit of knowing what we now do. And the fact that sister circuits have relied on *Chadwick* and *Gant* to chart a different course than *Eatherton* cannot provide the required clarity, as the second exception to the law-of-the-circuit doctrine does not apply just because several other circuits have chosen not to follow one of our prior rulings.

Accordingly, we conclude that, under the law-of-the-circuit doctrine, the en banc process supplies the proper means for our Court to reconsider *Eatherton* in light of all that has transpired in its wake. Through that process, the Court as a whole rather than this single panel can examine *Eatherton* and the question of whether *Eatherton*'s line-drawing concern justifies its decision to treat an openly carried container like a briefcase the way that the Supreme Court treated the cigarette containers in *Robinson* and *Gustafson* and the clothing in *Edwards*. And so, until then, the rule laid down in *Eatherton* controls this case about the things we carry, as Perez makes no argument that *Eatherton* can be distinguished on the facts.[6]

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[6] We do recognize that a determination that a Fourth Amendment precedent of our court remains binding may well bear on whether the good-faith exception to the warrant requirement applies. *See Davis*, 564 U.S. at 232 ("[P]olice . . .

III.

For the reasons set out above, the District Court's judgment of conviction is ***affirmed***.

-Dissenting Opinion Follows-

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searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule."). But, given the vital role that the law-of-the-circuit doctrine plays in ensuring the orderly process of lower court adjudication, that fact provides no reason for us to be less strict in applying the law-of-the-circuit doctrine than we have long been.

MONTECALVO, Circuit Judge, dissenting.

I view *United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975), differently than the majority, particularly as to how the exception to the law-of-the-circuit doctrine applies here. Further, applying modern Supreme Court precedent, I would find that the search of Perez's backpack violated his Fourth-Amendment rights. I would also find that the good-faith exception is not applicable here. Accordingly, and for the reasons that follow, I would reverse the decision of the district court on Perez's motion to suppress and vacate the judgment of conviction.

I. The Law-of-the-Circuit Doctrine

This appeal arises from the denial of a motion to suppress the warrantless search of the backpack Perez was wearing at the time of his arrest. As the majority notes, that search should be viewed through the scope of "the 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.'" *Arizona v. Gant*, 556 U.S. 332, 338 (2009) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967)). One such exception is that of the search incident to arrest. *Id.* There are two grounding principles to that exception: (1) to protect officer safety and (2) to preserve evidence. *Id.*

The development of this exception has evolved over decades of caselaw, both in the Supreme Court and this Circuit. To that end, as to our prior decisions, we are bound by the law-of-the-circuit doctrine. *United States v. Barbosa*, 896 F.3d 60, 74 (1st Cir. 2018). However, there are exceptions to that

doctrine, as it is "neither a straightjacket nor an immutable rule." *Id.* (quoting *Carpenters Local Union No. 26 v. U.S. Fid. & Guar. Co.*, 215 F.3d 136, 142 (1st Cir. 2000)). One exception is "when the holding of a previous panel is contradicted by subsequent controlling authority, such as a decision by the Supreme Court, an en banc decision of the originating court, or a statutory overruling." *Id.* Another exception exists "when 'authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind.'" *Id.* (quoting *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir. 1995)).

The majority's opinion rests on a case decided by a panel of this court nearly half a century ago: *United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975). Admittedly, should *Eatherton* remain good law, it is controlling here. In my view, however, the second exception to the law-of-the-circuit doctrine, delineated above, is applicable under these circumstances. In light of the major developments to the search-incident-to-arrest exception postdating *Eatherton*, including modern binding and persuasive precedent on the propriety of warrantless searches incident to arrest, I think that the *Eatherton* panel would have come to a different conclusion. To justify this conclusion, an analysis of *Eatherton* itself and a brief history of the developments following *Eatherton*'s publication is necessary.

A. *Eatherton*

As described in the majority opinion, *Eatherton* involved the warrantless search of a briefcase that

the arrestee was holding when first approached by law enforcement. 519 F.2d at 609. After the arrestee was frisked and placed in the back of a police vehicle, the officers searched the briefcase, and the contents were later admitted at trial. *Id.* The defendant challenged the search of his briefcase as violative of his Fourth-Amendment rights. *Id.* at 609-10.

The *Eatherton* panel noted that the appellant's strongest support for his Fourth-Amendment challenge laid in *Chimel v. California*, 395 U.S. 752 (1969); however, the panel recognized that *Chimel* cited with approval to *Draper v. United States*, 358 U.S. 307 (1959), a case involving a "virtually identical" search to the one at issue in *Eatherton*, 519 F.2d at 610. The *Eatherton* panel then cited to a number of cases from our sister circuits that, applying *Chimel*, upheld similar searches of closed containers carried by the arrestee. 519 F.2d at 610 (citing *United States v. Maynard*, 439 F.2d 1086 (9th Cir. 1971); *United States v. Mehciz*, 437 F.2d 145 (9th Cir. 1971), *cert. denied*, 402 U.S. 974, (1971); *United States ex rel. Muhammad v. Mancusi*, 432 F.2d 1046 (2d Cir. 1970), *cert. denied*, 402 U.S. 911, (1971)). Lastly, the *Eatherton* panel noted that the Supreme Court's then-recent decisions in *United States v. Robinson*, 414 U.S. 218 (1973); *Gustafson v. Florida*, 414 U.S. 260 (1973); and *United States v. Edwards*, 415 U.S. 800 (1974), offered further guidance on the Fourth-Amendment issue. 519 F.2d at 610.

Relying on this case law, the *Eatherton* panel determined that differentiating between the cigarette packages in *Robinson* and *Gustafson* and the briefcase in *Eatherton* "requir[ed] gossamer distinctions." *Id.* at 610. The panel further held that

"[w]hile a briefcase may be a different order of container from a cigarette box, it is not easy to rest a principled articulation of the reach of the [F]ourth [A]mendment upon the distinction." *Id.* Relying on *Edwards*, the *Eatherton* panel emphasized that once the briefcase was "properly seized" as "incident to [the defendant's] arrest" any expectation of privacy the defendant held was diminished. *Id.* at 610-11.

B. *Chadwick*

After *Eatherton*, the Supreme Court decided *United States v. Chadwick*, 433 U.S. 1 (1977). In *Chadwick*, the Court examined the search of a 200-pound footlocker stowed in the trunk of the defendant's car at the time of arrest. 433 U.S. at 3-4. Officers subsequently seized the footlocker, transported it to a federal building, and then, an hour and a half later and without a warrant, searched the footlocker. *Id.* at 4. The officers had no reason to believe the footlocker held inherently dangerous items or contained evidence that could lose value over time. *Id.* Examining the nature of the footlocker, the Court noted that "[l]uggage contents are not open to public view . . . nor is luggage subject to regular inspections and official scrutiny on a continuing basis." *Id.* at 13. "[L]uggage is [also] intended as a repository of personal effects." *Id.*

Chadwick reiterated that "[t]he 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." 433 U.S. at 14-15. But *Chadwick* importantly clarified 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 (cleaned up). Finally, the *Chadwick* Court concluded that "[o]nce law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest." *Id.* Put another way, "when 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.*

C. Cases Postdating *Chadwick*

After *Chadwick*, several of our sister circuits addressed situations involving items that an arrestee was holding or carrying at the time of arrest and questioned the breadth of *Chadwick*, reaching mixed results. *See United States v. Han*, 74 F.3d 537, 543 (4th Cir. 1996) (finding that, after *Chadwick*, "[t]he determinative question appears to be whether the time and distance between elimination of the danger and performance of the search were reasonable" and holding that "when a container is within the immediate control of a suspect at the beginning of an encounter with law enforcement officers; and when the officers search the container at the scene of the arrest; the Fourth Amendment does not prohibit a reasonable delay ... between the elimination of danger and the search"); *see also United States v. Garcia*, 605 F.2d 349, 356-57 (7th Cir. 1979) (noting

the "less than uniform" application of *Chadwick* across the circuits).

In *United States v. Calandrella*, 605 F.2d 236 (6th Cir. 1979), *cert. denied*, 444 U.S. 991 (1979), the Sixth Circuit examined a briefcase seized from the person at the time of arrest. That court, examining *Chadwick*, noted that "the primary [F]ourth [A]mendment interest [is] in the privacy of the contents of [a container], not in the simple possession of the receptacle." *Id.* at 249. Therefore, the defendant had an increased privacy interest in the briefcase, like the footlocker in *Chadwick*, the "very purpose [for which] is to transport papers and other items of an inherently personal, private nature." *Id.* (internal quotations omitted). Ultimately, the *Calandrella* court found that under *Chadwick*, "once the agents had seized the item and reduced it to their exclusive control there was no further danger that the defendant would secure therefrom either a weapon or an instrumentality of escape, or would destroy evidence contained in the briefcase." *Id.* at 249, 251-52 (expressly overturning its prior line of cases upholding searches of suitcases "even after the item has been seized and the suspect subdued" and citing to courts that had made similar decisions prior to *Chadwick*, including *Eatherton*).

Several other circuits also recognized the applicability of *Chadwick* to cases involving carried containers. *See United States v. Berry*, 571 F.2d 2, 3 (7th Cir. 1978) (holding that "until *Chadwick*, there was no reason for law enforcement officials to believe that attache cases were not among those personal effects which, under [*Robinson*], could be seized as part of a 'full search of the person' incident to a lawful arrest, and which, under [*Edwards*], could be

searched several hours after the suspect had been taken into custody"); *see also United States v. Stewart*, 595 F.2d 500, 503 (9th Cir. 1979) (finding that if *Chadwick* was applicable, "it would require suppression of the contents of the attache case"); *United States v. Myers*, 308 F.3d 251, 273 (3d Cir. 2002) (examining the search of a "school bag" under the immediate control analysis and citing *Chadwick*'s rationale).

D. *Gant*

Later, in *Arizona v. Gant*, 556 U.S. 332 (2009), the Court revisited the search-incident-to-arrest exception. The Court once again emphasized that the limitation on that 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. Relying on the principles articulated in *Chimel*, the Court reiterated that "[i]f there is no possibility that an arrestee could reach into [an] area that law enforcement officers seek to search, both justifications for the search-incident-to-arrest exception are absent and the rule does not apply." *Id.*

E. Cases Postdating *Gant*

The decision in *Gant* has been instrumental in the understanding and application of the Fourth Amendment and the search-incident-to-arrest doctrine. After *Gant*, circuit courts applied that precedent and the immediate control analysis to containers outside of the vehicle context. *See United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010), *cert. denied*, 562 U.S. 1116 (2010) (examining the search of a gym bag under the "narrowed" scope of

the search-incident-to-arrest doctrine under *Gant*); *United States v. Cook*, 808 F.3d 1195, 1199 (9th Cir. 2015) (applying the immediate control analysis to a backpack); *United States v. Davis*, 997 F.3d 191, 193 (4th Cir. 2021) (holding that "*Gant* applies beyond the automobile context to the search of a backpack"); *United States v. Knapp*, 917 F.3d 1161, 1168-70 (10th Cir. 2019) (considering whether the search of an arrestee's purse was justified under *Chimel* and *Gant*); *see also United States v. Hill*, 818 F.3d 289, 295 (7th Cir. 2016) (applying immediate control analysis to bag); *United States v. Matthews*, 532 Fed. Appx. 211, 217-19 (3d Cir. 2013) (finding that the search of a backpack could not be justified under the immediate control analysis of the search-incident-to-arrest doctrine); *cf. United States v. Perdoma*, 621 F.3d 745, 750-51 (8th Cir. 2010), *cert. denied*, 563 U.S. 992 (2011) (upholding the warrantless search of a "small bag" where "the search of the bag occurred in close proximity to where [the arrestee] was restrained" and the arrestee had already run from officers once; but holding that a closer application of *Gant* was not necessary under the circumstances). Many of these cases are instructive as to how *Gant* must be applied to cases involving carried containers.

In *Shakir*, the Third Circuit was faced with the warrantless search of a gym bag initially held by an arrestee. 616 F.3d at 316. The defendant there argued that the search of his bag was in violation of his Fourth-Amendment rights because he was already handcuffed at the time of the search and could not have accessed the bag. *Id.* at 317. In response, the government cited several cases upholding searches conducted while an arrestee was handcuffed. *Id.* However, the Third Circuit noted that

the government relied solely on pre-*Gant* cases. *Id.* at 318. The court emphasized "*Gant* as refocusing [its] attention on a suspect's ability (or inability) to access weapons or destroy evidence at the time a search incident to arrest is conducted." *Id.* Thus, the *Shakir* court was "left to consider, under *Gant* and other relevant precedents, whether [the defendant] retained sufficient potential access to his bag to justify a warrantless search." *Id.* at 319.

In considering that question, our sister circuit "underst[ood] *Gant* to stand for the proposition that police cannot search a location or item when there is no reasonable possibility that the suspect might access it." *Id.* at 320. In accordance with that principle, it held that "a search is permissible incident to a suspect's arrest when, 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." *Id.* at 321. Applying this legal standard to the facts there, the Third Circuit concluded that the search was justified because there was a "sufficient possibility" that the arrestee could have gained access to the bag. *Id.* The court found this even though the arrestee was handcuffed because the bag was at his feet, he was in a public area surrounded by approximately twenty bystanders, and there was at least one suspected confederate in the area. *Id.* at 316, 321.

The Ninth Circuit confronted similar questions in assessing the validity of a warrantless backpack search in *Cook*. 808 F.3d at 1199-1200. There, the arrestee was wearing a backpack at the time the officers approached him. *Id.* at 1197. While the arrestee was handcuffed on the ground, but within

one to two minutes of his arrest, officers picked up the arrestee's backpack, which was right next to the arrestee, and conducted a twenty- or thirty-second cursory search. *Id.* The officers then took the arrestee to a more secluded area several blocks away and performed a more thorough search of the backpack. *Id.* The arrestee only challenged the validity of the first cursory search of his backpack immediately following his arrest. *Id.* at 1198. Relying on *Gant*, our sister circuit found that "[t]he brief and limited nature of the [initial] search, its immediacy to the time of arrest, and the location of the backpack ensured that the search was 'commensurate with its purposes of protecting arresting officers and safeguarding any evidence of the offense of arrest that [the arrestee] might conceal or destroy.'" *Id.* at 1200 (quoting *Gant*, 556 U.S. at 339).

In *Davis*, the Fourth Circuit examined the history of the search-incident-to-arrest exception and how *Gant* altered its understanding of that exception. 997 F.3d at 195-200. The *Davis* court found that *Gant*'s first holding, "that police can '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'" – a holding derived from *Chimel* – applies outside of the automobile context. *Id.* at 197 (quoting *Gant*, 556 U.S. at 343).

After establishing *Gant*'s applicability outside of the automobile search context, the Fourth Circuit analyzed whether the warrantless search of a backpack was permissible under *Gant*. *Id.* at 198. In *Davis*, the arrestee fled from officers while carrying his backpack but ultimately became bogged down in a swamp with knee-high water. *Id.* An officer drew his

weapon and ordered the arrestee out of the swamp. *Id.* The arrestee complied and dropped his backpack on the ground; he then laid down and was handcuffed. *Id.* Two other officers arrived at the scene, and the officers searched the backpack that was not within the arrestee's reaching distance. *Id.*

The Fourth Circuit then held that the warrantless search of the backpack was unlawful, reasoning that there was "no doubt that [the arrestee] was secured and not within reaching distance of his backpack when [the officer] unzipped and searched it." *Id.* At the time of the search, the arrestee was face down and handcuffed, he was outnumbered by officers three to one, and the events had occurred in a residential area with no other people present; the court thus had "no difficulty" in determining that the arrestee was secured. *Id.* The court also emphasized that the arrestee was not within reaching distance of the backpack at the time of the search. *Id.*

F. The Impact of Modern Authority on *Eatherton*

In examining the above cases carefully, I agree with the majority that we do not have a Supreme Court opinion that is "directly on point contradicting our precedent" in *Eatherton*. *United States v. Wurie*, 867 F.3d 28, 34 (1st Cir. 2017). However, I remain convinced that the "less common exception" to the law-of-the-circuit doctrine forecloses our present reliance on *Eatherton*. The authorities discussed above, "although not directly controlling, offer[ ] a sound reason for believing that the [*Eatherton*] panel would change its collective mind." *Id.* "A Supreme Court opinion need not be directly on point to undermine one of our opinions." *United States v.*

Holloway, 630 F.3d 252, 258 (1st Cir. 2011). Further, a decision of the Supreme Court "can extend through its logic beyond the specific facts of its case." *Id.* (quoting *Los Angeles Cnty. v. Humphries*, 562 U.S. 29, 38 (2010)).

Unlike the district court, who must apply our "precedent unless it has unmistakably been cast into disrepute by supervening authority," the exceptions to the law-of-the-circuit doctrine provide us with "modest" flexibility in the application of our own precedents. *Eulitt ex rel. Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004), *abrogated on other grounds by Carson as next friend of O.C. v. Makin*, 596 U.S. 767 (2022). The majority decision stresses that the second exception to the law-of-the-circuit doctrine "cannot depend on whether there are sound reasons to conclude that the prior panel got it wrong." However, the scope of the exception applied here is not based on whether I believe there are sound reasons to conclude that the *Eatherton* panel was wrong, but rather whether there are sound reasons for believing that the *Eatherton* panel would have changed its collective mind. And this "sound reason" standard has been reiterated by this court. *See e.g.*, *Lewis*, 963 F.3d at 23; *United States v. López*, 890 F.3d 332, 340 (1st Cir. 2018); *Wurie*, 867 F.3d at 34.

Given that scope, in my view, had the *Eatherton* panel had the benefit of both *Chadwick* and *Gant*, that panel would have changed its collective mind as to its interpretation of the search-incident-to-arrest doctrine. As our sister circuits have concluded, *Chadwick* and, perhaps even more so, *Gant* have unquestionably altered our understanding of the search-incident-to-arrest doctrine and "provide a clear and convincing basis" to determine that the

Eatherton panel too would have come to a different conclusion on the issue. *See Guerrero*, 19 F.4th at 552.

Chadwick made a nuanced distinction between the reduced expectation of privacy an arrestee has of their person as compared to possessions within their immediate control at the time of arrest. 433 U.S. at 16 n.10. Further, *Chadwick*'s analysis did not hinge on whether the possession was held by the arrestee or was elsewhere in their vicinity. Instead, *Chadwick* focused on the nature of containers as "repositor[ies] of personal effects."[7] *Id.* at 13. Thus, although the

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[7] Indeed, the Supreme Court seems to agree that the result in *Chadwick* would not have been different had the arrestee been "drag[ging] [the trunk] behind them." *Riley v. California*, 573 U.S. 373, 394 (2014) (acknowledging the difference between the trunk in *Chadwick* – which could hold a large number of personal items and required a warrant to search – and "a container the size of [a] cigarette package" at issue in *Robinson*). In my view, *Riley* lends support for the very line-drawing about different carried containers that *Eatherton* believed it was unable to make. The majority appears to suggest that *Riley* distinguishes between personal property that is difficult to carry, either due to its size or weight, and personal property that is commonly carried, such as a briefcase. *See* Majority at 253. I do not think this was the *Riley* Court's intent. *Riley* notes that "[m]ost people cannot lug around every piece of mail they have received for the past several months, every picture they have taken, or every book or article they have read – nor would they have any reason to attempt to do so." *Id.* at 393-94. But, the *Riley* Court then states that the only way for a person to carry personal property like that (prior to the existence of cell phones) would be to "drag behind them a trunk of the sort held to require a search warrant in *Chadwick*." *Id.* at 394. In my view, the *Riley* Court was differentiating between certain containers that may be receptacles for other personal property and small containers like those the size of a cigarette package, while emphasizing that a container like the trunk in *Chadwick*

Eatherton panel was understandably influenced by the then-recent cases of *Edwards*, *Robinson*, and *Gustafson* when assessing an arrestee's privacy interests, *Chadwick* would have provided the additional context that "*possessions* within an arrestee's immediate control cannot be justified by any reduced expectations of privacy caused by the arrest." 433 U.S. at 16 n.10 (emphasis added).

Given this understanding and *Gant*'s refined framework for "immediate control" searches, the *Eatherton* panel would have centered its analysis around "immediate control" rather than shoehorning the search of a closed container into being "of the person." Specifically, I believe this modern authority would have led the *Eatherton* panel to the conclusion, under *Chadwick* and *Gant*, that searches of visible containers held or carried by an arrestee – like the briefcase in *Eatherton* – must be treated as "immediate control" searches. *See Knapp*, 917 F.3d at 1167 (limiting *Robinson* searches to "searches of an arrestee's clothing, including containers concealed under or within her clothing" and holding that "visible containers in an arrestee's hand ... are best considered to be within the area of an arrestee's immediate control").

Further, the parties here have not identified any post-*Gant* published circuit opinions that adopted the same approach taken in *Eatherton*. Indeed, we have found the opposite: circuits that once took an *Eatherton*-like approach to cases involving carried containers now applying the "immediate control" analysis in similar circumstances. *Cf. United States*

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would have required a search warrant just as a cell phone would. *Id.* at 394.

v. Lewis, 963 F.3d 16, 24 (1st Cir. 2020) (adhering to the law-of-the-circuit doctrine where three sister circuits retained allegiance to this Circuit's reasoning despite a recent Supreme Court decision); *Sanchez v. United States*, 740 F.3d 47, 57 (1st Cir. 2014) (finding that just two circuits' decisions contrary to our precedent "hardly paint a picture of a rush to the exit so as to allow us to overrule our own controlling precedent"). In short, the continued application of *Eatherton* simply "runs counter to the strong modern trend in the caselaw." *United States v. Guerrero*, 19 F.4th 547, 557 (1st Cir. 2021).

Accordingly, I find "that the gloss added by the Supreme Court" to the search-incident-to-arrest exception requires a different approach than that taken by the *Eatherton* panel. *United States v. Rodriguez*, 527 F.3d 221, 225 (1st Cir. 2008). Had the *Eatherton* panel had the benefit of viewing that case "through the prism of" *Chadwick* and *Gant*, I believe that they would have come to a different result. *Id.* at 226; *see Guerrero*, 19 F.4th at 559 ("The bottom line [ ] is that given the Supreme Court cases in vogue after [our prior decision], we believe [that] panel would (if it had the chance) reverse its view of the ... issue 180 degrees.").

For these reasons, I would find that *Eatherton* is no longer the law of the circuit. Instead, the appropriate rule under *Chadwick* and *Gant* is that the searches of visible, closed containers held or carried by an arrestee should be analyzed as "immediate control" searches.

II. Fourth-Amendment Violation

Because I would hold that *Eatherton* is no longer the law of the circuit and that the search of the

backpack here should be treated as an immediate control search, the next step is to determine whether the search was nonetheless justified under the circumstances presented. Appropriate factors to be considered in that inquiry are: "(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; ... (4) the ease or difficulty with which the arrestee could gain access to the searched area"; and (5) "the degree to which arresting officers have separated an article from an arrestee at the time of the search." *Knapp*, 917 F.3d at 1168-69.

The district court made the necessary factual findings to support a conclusion that the search of Perez's backpack was violative of his Fourth-Amendment rights. The district court found that "Perez was secured in handcuffs on the ground under [one officer's] supervision as [another officer] was searching the backpack on the hood or roof of [one of the officer's] vehicle, not within reaching distance of Perez, so destruction of evidence or access to weapons was not at stake."[8] Accordingly, I would find that under the immediate control analysis, the search of

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[8] The government has argued before us that the backpack was near Perez at the time of the search and that "there was a reasonable possibility that he could access the bag," and the search was therefore justified under the immediate control analysis. However, it has not pointed us to any support to find that the district court's determinations regarding Perez's inability to reach the backpack at the time of the search were clearly erroneous. *See United States v. Oquendo-Rivas*, 750 F.3d 12, 16 (1st Cir. 2014) ("We assess questions of fact ... for clear error."). I also do not surmise any support in the record to find a clear error in the district court's factual findings.

Perez's backpack was in contravention with the warrant requirement of the Fourth Amendment and did not fall within the search-incident-to-arrest exception.

III. Good Faith

Finding that the search of Perez's backpack violated the Fourth Amendment, however, is not the end of the inquiry. The Fourth Amendment "says nothing about suppressing evidence obtained in violation of [its] command." *Davis v. United States*, 564 U.S. 229, 236 (2011). I must thus determine if the exclusionary rule is applicable here. "The rule's sole purpose ... is to deter future Fourth[-]Amendment violations" and not to redress prior violations. *Id.* at 236-37. "Our cases have thus limited the rule's operation to situations in which this purpose is 'thought most efficaciously served.'" *Id.* at 237 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)).

"When the police exhibit 'deliberate,' 'reckless,' or 'grossly negligent' disregard for Fourth[-]Amendment rights, the deterrent value of exclusion is strong and tends to outweigh the resulting costs." *Id.* at 238 (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)). On the other hand, "when the police act with an objectively reasonable good-faith belief that their conduct is lawful ... or when their conduct involves only simple, isolated negligence[,] ... the deterrence rationale loses much of its force, and exclusion cannot pay its way." *Id.* (internal quotations omitted). "The government bears the burden of showing that its officers acted with objective good faith." *United States v. Sheehan*, 70 F.4th 36, 51 (1st Cir. 2023)

(quoting *United States v. Brunette*, 256 F.3d 14, 17 (1st Cir. 2001)).

The good-faith exception may be triggered "when the police conduct a search in objectively reasonable reliance on binding judicial precedent." *Davis*, 564 U.S. at 239. But importantly, this "exception is available only where the police rely on precedent that is clear and well-settled." *United States v. Sparks*, 711 F.3d 58, 64 (1st Cir. 2013) (cleaned up). "[W]here judicial precedent does not clearly authorize a particular practice, suppression has deterrent value because it creates an 'incentive to err on the side of constitutional behavior.'" *United States v. Bain*, 874 F.3d 1, 20 (1st Cir. 2017) (quoting *Sparks*, 711 F.3d at 64).

Had this case fallen within the first exception to the law-of-the-circuit doctrine – where "the holding of a previous panel is contradicted by subsequent controlling authority" – the good-faith exception would plainly not apply. *See Barbosa*, 896 F.3d at 74. For example, imagine a scenario where, post-*Gant*, officers searched a vehicle incident to a recent occupant's arrest after the occupant was secured and not within reaching distance of the passenger compartment and without probable cause that the vehicle contained evidence of the offense of arrest. Regardless of whether prior circuit law allowed this practice, that search would be unlawful post-*Gant*, and the officers could not rely on good faith.

Admittedly, when the second exception to the law-of-the-circuit doctrine applies, as I believe it does here, there is a much closer question as to whether the good-faith exception applies. Ultimately, given the deterrent value of enforcing a regime where

officers err on the side of constitutional conduct in the face of unclear or eroded precedent, I would not permit good faith to bar exclusion in this case.

First and foremost, for the same reasons that I find the second exception to the law-of-the-circuit doctrine applies here, I am of the view that *Eatherton* was not the kind of "clear and well-settled" precedent that officers could reasonably rely on. *See Sparks*, 711 F.3d at 64. At the very minimum, *Gant* – a landmark case in our Fourth-Amendment jurisprudence – called into question the continued vitality of *Eatherton*. It would be untenable to require that Supreme Court holdings address virtually identical factual scenarios before we consider our circuit precedent undermined and reject application of the good-faith exception. Such a requirement would be contrary to the requirement that the precedent officers rely upon "be unequivocal" when shielding unlawfully obtained evidence from exclusion. *Sparks*, 711 F.3d at 64.

Second, this conclusion aptly aligns with the very purpose of the exclusionary rule: to deter future Fourth-Amendment violations. *Davis*, 564 U.S. at 236-37. If we do not strip precedent that falls within the second exception to the law-of-the-circuit doctrine of its weight as forcefully as we do in cases under the first exception, officers would be encouraged to adhere to shaky precedent (no matter how potentially abrogated) until those cases are formally and explicitly overruled. Because suppression is intended to create the "incentive to err on the side of constitutional behavior," I think the appropriate conclusion is that when opinions authored by the Supreme Court, particularly landmark cases like *Gant*, call into question our prior precedent, officers

must conform their conduct to the more protective reading of the Fourth Amendment laid out by the Supreme Court. *See Bain*, 874 F.3d at 20 (quoting *Sparks*, 711 F.3d at 64).

Finally, this is not a case where "the police engage[d] in conduct that complie[d] with existing precedent, and the law later change[d]." *United States v. Baez*, 744 F.3d 30, 33 (1st Cir. 2014). *Gant* was decided a decade before the search at issue here occurred, and *Chadwick*'s guidance on closed containers has been binding precedent for over forty years. *Cf. Sparks*, 711 F.3d at 67 (finding good faith applied where the applicable Supreme Court case came out three years after the search at issue occurred); *United States v. Moore-Bush*, 36 F.4th 320, 359 (1st Cir. 2022) (mem.) (Barron, C.J., concurring) (concurring opinion finding that good faith applied when the applicable Supreme Court decision was published over one year after the search began). Given my view of the impact of these cases on *Eatherton*, the officers were required to follow the logic supplied by *Gant* and *Chadwick*.

For these reasons, I would conclude that the good-faith exception is not available under the circumstances and suppression is the proper outcome to deter future Fourth-Amendment violations.

IV. Conclusion

For the above stated reasons, I would abrogate *Eatherton* to the extent it is inconsistent with this analysis, reverse the district court's decision on the motion to suppress, vacate the judgment of conviction, and remand for further proceedings consistent with this opinion.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

UNITED STATES OF AMERICA,	)	[FILED 7/14/2021]
v.	)	
GILBERT PEREZ,	)	CRIM. NO.
Defendant.	)	2:20-CR-39-DBH-01

DECISION AND ORDER ON DEFENDANT'S MOTION TO SUPPRESS EVIDENCE

In this drug trafficking prosecution, the defendant Gilbert Perez has moved to suppress all the evidence resulting from his encounter with Massachusetts State Police on August 30, 2019. After a testimonial hearing on June 17, 2021, and later briefing on the motion, these are my findings of fact and conclusions of law. Only the troopers testified at the hearing, not the defendant. There are no disputed facts, only minor inconsistencies in the descriptions of what occurred.

FINDINGS OF FACT

1. On the summer evening of Friday, August 30, 2019, around 6:00 p.m. it was still light in Lawrence, Massachusetts. Members of the Massachusetts State Police North Shore Gang Task Force were doing a routine patrol in the area bordering Methuen. They had no target and no particular information. They

were simply looking to interdict any drug or gang related information they came across.

2. What they did have was their knowledge gained from experience: that Lawrence was a hub for drug distribution into northern New England, including Maine and New Hampshire; that the area they were patrolling was frequently the location of drug deals and was very close to I-495, an interstate route to those states; and that drug deals there often took place in taxis so that law enforcement could not see them and could not track the registration of the participants' vehicles.[1]

3. Around 6:10 p.m., Sergeant Jason Conant saw a dark-colored pickup truck with Maine license plates pull into a McDonald's parking lot. He learned by computer that the truck was registered to someone who lived in Acton, Maine, about 1-1/2 hours away. The driver was a white male; the passenger female.

4. Sergeant Conant saw the driver get out of the truck while wearing a distinctive blaze orange cap, don a backpack, and walk around the rear of the truck to talk to the passenger through the passenger window. Then the driver proceeded to walk, not into McDonald's, but away from the restaurant to a nearby bordering residential area. As he walked, he was talking on his cellphone.

5. Sergeant Conant radioed this information to the other two members of his unit but soon lost sight of the male with the blaze orange hat.

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[1] The evidence was that law enforcement had all this information, not that the defendant had it.

6. Within 3 to 5 minutes, Trooper Shawn McIntyre saw the white male with the blaze orange hat getting out of a taxi on Montgomery Street a couple of blocks away which, given the location and the time, he believed reflected a ride of less than a block. The male was headed back toward the truck. McIntyre radioed that information to his colleagues and Sergeant Conant instructed him to stop the cab and investigate further. McIntyre did so.

7. Trooper McIntyre saw large quantities of cash, appearing to be in the thousands of dollars, on the floor of the cab in front of a passenger. The passenger denied the cash belonged to him. The cab driver told McIntyre the man in the blaze orange cap had flagged him down. Trooper McIntyre communicated all this information to his colleagues and instructed Trooper Ryan Dolan to go to Sergeant Conant to assist him because he was concerned that a large amount of drugs had been exchanged for the large amount of cash.

8. Soon Sergeant Conant saw the man in the blaze orange cap returning to the vicinity of his truck. Given the location, the Maine-registered vehicle, the driver's behavior, the use of the cellphone, the use of the cab, and the large quantity of cash in the cab of which the passenger denied knowledge, Sergeant Conant believed a drug deal had just occurred.

9. Sergeant Conant pulled his vehicle into a parking lot parking spot as the man in the blaze orange cap crossed the front of the vehicle, and the Sergeant got out. Although he was in plain clothes, he had a police identification medallion around his

neck. As soon as Sergeant Conant got out of his vehicle, the man in the blaze orange cap started to run away even as Sergeant Conant was yelling "state police."[2]

10. After about twenty yards the man in the blaze orange cap tripped and fell to the ground, and his cellphone skittered away. Sergeant Conant ran up to him and held him on the ground, face down, with one hand on the backpack and one hand on the man's shoulder. Trooper Dolan pulled up, got out of his vehicle and, as Sergeant Conant ripped the backpack off the man, Dolan handcuffed him behind his back, then sat him up on the pavement.

11. Sergeant Conant began to open the backpack on the hood or roof of Dolan's vehicle and, as he did so, the man told him "the stuff's not his, the stuff in the bag isn't his, he was kind of forced to come down and—and pick it up." No one was questioning him at the time. The man was not within reaching distance of the backpack.

12. Sergeant Conant discovered a quantity of illegal drugs (fentanyl and cocaine) in the backpack.

13. Eight or nine minutes had transpired from the time Sergeant Conant lost sight of the man until he apprehended him.

14. Law enforcement also searched the man. The parties stipulated that law enforcement discovered and seized currency and a cellphone as a result.

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[2] There is no evidence about what the defendant perceived or thought, just what Sergeant Conant did.

Stipulation (ECF No. 125). They also seized the cellphone that the man had dropped earlier. *Id.*

15. Trooper Dolan saw the female passenger leave the Maine truck and he followed her into McDonald's. He persuaded her to exit the restaurant and brought her over to where the man was handcuffed.

16. Dolan then administered *Miranda* warnings to both of them. The man continued to talk, without being asked a question, saying in substance he was made to do it and was just going to pick something up for a friend, whom he named, and that the friend was the one they really wanted. The woman warned him to stop talking until he had a lawyer.

17. The troopers then formally arrested the man, but not the woman. The man turned out to be Gilbert Perez, the defendant. The police proceeded to search the truck. The parties stipulated that they discovered and seized currency in the truck. (ECF No. 125).

18. The officers had no particular reason to believe that Perez was armed, only their general knowledge that drug transactions were often accompanied by weapons.

19. There was no evidence regarding the female passenger's right, ability, or intent to drive the Maine-registered truck.

CONCLUSIONS OF LAW

A. Probable Cause for the Arrest

The police had probable cause to arrest Perez when they handcuffed him, and I treat them as having effectively arrested him then. Perez had

arrived in a Maine-registered truck in an area where drug trafficking occurred, close to I-495 and access to Maine. He parked his Maine truck next to a McDonald's but did not go in, instead donning a backpack and walking away while talking on his cellphone. He quickly got into and out of a taxicab nearby, a cab he had flagged down. After he left the cab, a large quantity of cash was seen on the floor, of which the passenger claimed no knowledge. Perez was then seen returning to the Maine truck. When Sergeant Conant, wearing his police medallion, got out of his vehicle, Perez immediately started to run even as Conant yelled "state police." Under the circumstances, the police could reasonably conclude that Perez had just engaged in an illegal transaction.[3]

According to the First Circuit: "[P]robable cause exists where 'police officers, relying on reasonably trustworthy facts and circumstances, have information upon which a reasonably prudent person would believe the suspect committed or was committing a crime.' It does not require law enforcement officers to have 'an ironclad case . . . on the proverbial silver platter.' Instead, '[i]t suffices if . . . a prudent law enforcement officer would reasonably conclude that the likelihood existed that criminal activities were afoot, and that a particular suspect was probably engaged in them.'" *United States v. Centeno-González*, 989 F.3d 36, 45 (1st Cir. 2021) (citations omitted). That is the case here. Are

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[3] I emphasize that the issue is what information the troopers had, not what the defendant was thinking when he ran; there is no evidence about the latter.

there other possible explanations? Perhaps for individual items, like the decision to park at McDonald's without going inside, walking while talking on a cellphone, wearing a backpack. Possibly there could have been another white male with a blaze orange hat (the troopers saw only the one) and possibly the cab the police stopped was not the cab that Perez exited. But when all the factors are combined, including Perez's very brief cab ride and the presence of a large amount of cash on the cab floor, the conclusion of an illegal transaction is irresistible.

I therefore do not address whether there were grounds for a *Terry* stop before the handcuffing. I treat the handcuffing as a de facto arrest.

B. Search of Perez's Backpack

The search of Perez's backpack without a warrant is the critical issue in the case. Perez's backpack is where the illegal drugs were found.

The First Circuit ruled on this issue of whether a warrant is required to search a container found on a person being arrested in *United States v. Eatherton*, 519 F.2d 603 (1st Cir. 1975). In that case, law enforcement opened, without a warrant, a briefcase the defendant had been carrying, but not until after they had handcuffed the defendant and placed him in the police car. The defendant argued that although there was probable cause to arrest him, a warrant was required to examine the briefcase's contents. The court agreed that the defendant's argument had "some logical cogency," 519 F.2d at 610, but concluded that the Supreme Court decisions of *Chimel*, *Robinson*, *Gustafson*, and *Edwards* did not

support requiring a warrant. Instead, probable cause for the arrest alone supported a warrantless search of his person and the property in his immediate possession, even after law enforcement had removed it from his immediate possession. *Id.* at 610-11.

Perez argues that in *Arizona v. Gant*, 556 U.S. 332 (2009), the Supreme Court changed the law on this issue so that now a warrant is generally required for a search of property once it is no longer under the defendant's control.[4] He says that the Third, Fourth, Seventh, Ninth, and Tenth Circuits and the District of New Hampshire agree, applying *Gant* to non-vehicular containers. Def.'s Post-Hr'g Mem. at 18 & n.3; *see United States v. Davis*, 997 F.3d 191, 195-200 (4th Cir. 2021); *United States v. Knapp*, 917 F.3d 1161, 1168 (10th Cir. 2019); *United States v. Hill*, 818 F.3d 289, 295 (7th Cir. 2016); *United States v. Cook*, 808 F.3d 1195, 1199 n.1 (9th Cir. 2015); *United States v. Shakir*, 616 F.3d 315, 318 (3d Cir. 2010); *United States v. Wilson*, No. 18-cr-180-1-SM, 2019 U.S. Dist. LEXIS 212524, at *6-11 (D.N.H. Dec. 10, 2019).

The government says those courts "have erroneously interpreted *Gant* to mean that incidental searches of containers or items found on the person of

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[4] Gant said: "we . . . hold 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*" and 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.'" 566 U.S. 332, 343 (2009) (emphasis added).

the arrestee must be justified on a case-by-case basis by a specific need to prevent the destruction of evidence or the access to weapons at the time of the search." Gov't's Post Hr'g Br. at 19. Here, Perez was secured in handcuffs on the ground under Dolan's supervision as Conant was searching the backpack on the hood or roof of Dolan's vehicle, not within reaching distance of Perez, so destruction of evidence or access to weapons was not at stake. But the government maintains that other Circuits continue to allow warrantless searches of containers found on the arrestee's person as a categorical rule, *id.* at 23, and cites cases accordingly.

In any event, the First Circuit has not revisited its holding in *Eatherton* since *Gant*. In *Carson v. Makin*, 401 F. Supp. 3d 207, 211 (D. Me. 2019), I addressed "my role as a federal trial judge" in such circumstances:

> As a federal trial judge, I must follow any decision from the Court of Appeals for the First Circuit directly on point, except in limited circumstances: "Until a court of appeals *revokes* a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has *unmistakably been cast into disrepute* by supervening authority."

(quoting *Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir. 2004)).

The First Circuit has not revoked *Eatherton*.[5] On the facts in this case, I might be inclined to follow the Third, Fourth, Seventh, Ninth, and Tenth Circuits and the District of New Hampshire in their interpretation of *Gant* as now requiring a warrant under the circumstances here, but I cannot say that *Gant* "unmistakably" cast *Eatherton* "into disrepute." That is for the First Circuit to decide. Given *Eatherton*, I conclude that the warrantless search of the backpack here was appropriate and its contents should not be suppressed.

The parties have stipulated that "the Court's determination of the lawfulness of the search of Defendant's backpack is dispositive" as to other seized items. "Defendant agrees that if the Court denies the motion to suppress with respect to the items found in Defendant's backpack, the above-referenced currency and cellular telephones should not be suppressed." (ECF No. 125).[6] I therefore do not address the legal issues associated with those seizures, but conclude simply that they should not be suppressed.

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[5] The defendant argues that the First Circuit has cited *Eatherton* with approval only once and that the case doing so was later abrogated. Def.'s Post-Hr'g Mem. at 16 (ECF No. 134). Those cases—*United States v. Klein*, 522 F.2d 296, 300 (1st Cir. 1975); *Swain v. Spinney*, 117 F.3d 1, 8 (1st Cir. 1997), had nothing to do with container searches, and do not undermine *Eatherton*'s holding on that issue.

[6] Conversely, "the government agrees that if the Court grants the motion to suppress the items found in Defendant's backpack, the government will not seek to admit the above-referenced currency and cellular telephones in its case-in-chief." Stipulation (ECF No. 125).

C. Statements pre-Miranda

As Sergeant Conant ripped the backpack off Perez and before *Miranda* warnings had been given, Perez said the stuff's not his, the stuff in the bag isn't his, he was kind of forced to come down and pick it up. These statements were not in response to any questions. Perez argues that they must be excluded as the product of the illegal search of the backpack. They do not qualify for exclusion because I have not found the backpack search illegal. In any event, they were not the product of questioning; they occurred before Conant uncovered what was in Perez's backpack and if Conant had stopped his search of the backpack at that time, Perez's statements were already uttered, so they were not fruit of the warrantless search. Perez seems to have been irrepressible in his utterances (see next section) and I find that once the police seized him, he was going to say these things regardless.

D. Statements post-Miranda

After the *Miranda* warnings, Perez continued to talk without being questioned. He said in substance that he was made to do it, was just going to pick something up for a friend, whom he named, and that the friend was who the police really wanted. Perez argues that these statements are a product of the illegal backpack search. I disagree both because the backpack search was not illegal and because Perez knew he had been caught and, whether the backpack was searched then or later, he was going to explain. Even his female companion had to tell him to stop talking.

As a result, the defendant's motion to suppress is **DENIED**.

SO ORDERED.

DATED THIS 14TH DAY OF JULY, 2021

/s/ D. Brock Hornby
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS
For the First Circuit

No. 22-1121

UNITED STATES,

Appellee,

v.

GILBERT PEREZ,

Defendant, Appellant.

Before

Barron, Chief Judge,
Howard, Kayatta, Gelpi, Montecalvo,
Rikelman, and Aframe, Circuit Judges

ORDER OF THE COURT

Entered: August 23, 2024

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the case be heard en banc, it is ordered that the petition for rehearing and the petition for rehearing en banc be denied.

BARRON, Chief Judge, with whom KAYATTA, Circuit Judge, GELPÍ, Circuit Judge, MONTECALVO, Circuit Judge, RIKELMAN,

Circuit Judge, and AFRAME, Circuit Judge, join, statement on denial of rehearing en banc. Under binding Supreme Court precedent, the search incident to arrest exception to the Fourth Amendment categorically allows not only the seizure but also the warrantless search of the contents of certain physical containers that are "of the person" of the arrestee. *See United States v. Robinson*, 414 U.S. 218, 235-36 (1973) (crumpled cigarette package in a coat pocket); *Gustafson v. Florida*, 414 U.S. 260, 262, 266 (1973) ("cigarette box" in a coat pocket); *United States v. Edwards*, 415 U.S. 800, 804-05 (1974) (clothing). There remains great uncertainty, however, about the kinds of containers that are subject to that categorical rule.

In *United States v. Eatherton*, this court acknowledged the uncertainty but held that the categorical rule applies to a briefcase held by an arrestee because distinctions between a briefcase in hand and a cigarette container in a pocket were too "gossamer" to justify drawing a line. 519 F.2d 603, 610 (1st Cir. 1975). This petition for rehearing en banc asks us to reconsider that nearly half-century-old precedent in the context of a backpack that the arrestee was wearing at the time of his arrest.

In denying the petition, our Court decides not to do so, at least in the context of this specific case. But cases that ask courts to decide whether *Robinson*'s categorical rule applies to containers that implicate arguably more substantial privacy interests than the cigarette pack in *Robinson* are numerous. We no doubt have not seen the last of our share of them.

The Supreme Court, however, has offered scant guidance about the types of items to which *Robinson*'s categorical rule applies since it first announced the rule shortly before *Eatherton* was decided. Indeed, *Robinson* itself said very little about why the item there could not only be seized but also warrantlessly searched even after it had been secured by law enforcement and the arrestee likely no longer could have grabbed it, *see* 414 U.S. at 235-36; *see also Riley v. California*, 573 U.S. 373, 387 (2014) ("Once an officer gained control of the pack, it was unlikely that Robinson could have accessed the pack's contents."). Moreover, in *Gustafson* the defendant did not challenge the search based on its having occurred only after he had been put in the back of the squad car, *see* 414 U.S. at 262 n.2, 263-66. And *Edwards* justified the search of the clothing seized from the arrestee in that case by relying at least in part on the authority to search incident to detention, 415 U.S. at 804 & n.6, though the Court also noted that "[seizing and searching Edward's clothes at the jailhouse] was and is a normal incident of a custodial arrest" because "the normal processes incident to arrest and custody had not been completed when Edwards was placed in his cell," *id.* at 804, 805.

Against this backdrop, lower courts have adopted disparate approaches to how *Robinson*'s categorical rule applies to physical items other than cigarette packs. Some have suggested that the rule applies to any item in "the arrestee's actual and exclusive possession." *E.g.*, *Commonwealth v. Bembury*, 677 S.W.3d 385, 406 (Ky. 2023) (applying *Robinson* to warrantless search of backpack). Others have taken a

more nuanced approach. *See United States v. Knapp*, 917 F.3d 1161, 1166-68 (10th Cir. 2019) (declining to apply *Robinson* to warrantless searches of "visible, handheld containers such as purses" that are "easily dispossessed"). There also is our contribution, *Eatherton*, which adopts a categorical rule at least to items comparable to a briefcase. 519 F.2d at 610. The concrete results, too, have varied, with identical items being deemed subject to *Robinson*'s categorical rule by some courts but not subject to it by others. *Compare United States v. Lee*, 501 F.2d 890, 892 (D.C. Cir. 1974) (upholding warrantless search of purse under *Robinson* without further discussion), with *Knapp*, 917 F.3d at 1168 (holding warrantless search of purse fell outside of the *Robinson* rule and was unlawful); *and compare Bembury*, 677 S.W.3d at 406 (upholding warrantless search of backpack under *Robinson*), with *United States v. Davis*, 997 F.3d 191, 198 (4th Cir. 2021) (holding warrantless search of backpack fell outside of the *Robinson* rule and was unlawful); *see also United States v. Perez*, 89 F.4th 247, 264-66 (1st Cir. 2023) (Montecalvo, J., dissenting) (cataloguing the "mixed results" in lower courts that have addressed warrantless searches of items held or carried by an arrestee).

The Supreme Court last addressed the question of how far *Robinson*'s categorical rule extends over a decade ago in *Riley*. But that case concerned a rather special circumstance: whether the data in cell phones were subject to the rule. *See* 573 U.S. at 385-86.

Riley did make clear that the categorical rule does not apply to such data. *Id.* at 386. It did not have occasion, however, to clarify how the rule should be applied in the context of physical objects. *Riley*

noted that *Arizona v. Gant*, 556 U.S. 332 (2009), pulled back on the search incident to arrest exception in the context of one physical item – an automobile. 573 U.S. at 384-85. But, of course, an automobile is not itself an item "of the person" of the arrestee. And while *Riley* appeared to suggest that *Robinson* does not extend to a container as big as the 200-pound footlocker that was involved in *United States v. Chadwick*, 433 U.S. 1 (1977), *see Riley*, 573 U.S. at 393-94, *Riley* also noted that *Robinson* had been held by lower courts to extend to, respectively, a billfold and address book, a wallet, and a purse without stating one way or the other whether each of those holdings was correct. *See id.* at 392-93. The *Riley* Court merely assumed each holding was correct for purposes of its analysis of the question concerning cellphone data that was at issue there. *Id.*

A Fourth Amendment issue as basic as this one – concerning as it does when the things that people commonly carry may be warrantlessly searched incident to an arrest – seems especially poorly suited to circuit-by-circuit and state-by-state resolution. Yet, for more than fifty years, that has been how this issue has been decided, with no consensus yet emerging. Although the question addressed in *Riley* concerning cellphone data was a novel and important one, there is no shortage of more workaday questions about the reach of *Robinson*'s categorical rule that would benefit from similar consideration. We thus urge the Supreme Court, having held many decades ago that the container at issue in *Robinson* was subject to the categorical rule, to consider *Robinson*'s applicability to those questions. A ruling by the Supreme Court that addressed the search incident to

arrest exception and *Robinson* in the more mundane context of wallets, purses, briefcases, backpacks, or other commonly carried containers would do much to help bring about a measure of uniformity to an area of law that has long been lacking it.

By the Court:

Maria R. Hamilton, Clerk

cc:
Donald E. Clark
Benjamin M. Block
Nicholas M. Scott
Brian Scott Kleinbord
Jamesa J. Drake
Gilbert Perez