

COURT OF APPEALS, STATE OF COLORADO Address: 2 E. 14th Ave. Denver, Colorado 80203 El Paso County District Court The Honorable Jill M. Brady, District Judge Case No. 23CR5603	DATE FILED May 19, 2026 9:43 PM
THE PEOPLE OF THE STATE OF COLORADO, <i>Plaintiffs-Appellee,</i> v. BRANDON BURNS, <i>Defendant-Appellant</i>	▲ COURT USE ONLY ▲
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REPLY BRIEF	

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/s/ 
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Argument

I. The Search Incident to Arrest Violated *Arizona v. Gant*

The People do not dispute the central premise of Mr. Burns's *Gant* argument: once Mr. Burns was handcuffed, secured, and separated from the vehicle, the first *Gant* rationale did not apply (Answer Br. at 12). The only question is whether the second rationale allowed officers to search the passenger compartment because it was reasonable to believe the vehicle contained evidence of the offense of arrest. *Arizona v. Gant*, 556 U.S. 332, 343 (2009). On this record, the People's argument fails because it treats the search as one continuous, lawful event while ignoring the sequence that matters: what officers knew, when they knew it, and when the search shifted from locating the reported firearm to searching for unrelated drug evidence.

The People's argument depends on collapsing the timeline, but the BWC shows the search began before the frisk was complete and continued after the gun was secured. The People's Answer Brief compresses the timeline in a way that obscures the constitutional problem. The People state that officers handcuffed Mr. Burns, patted him down, confirmed he had no weapons, moved him to a patrol car, and then searched the sedan. But the body-worn camera

(“BWC”) shows a less orderly sequence. Mr. Burns was handcuffed at approximately 3:12. While the frisk was still ongoing, Deputy Fleckenstein used Mr. Burns’s keys to unlock the vehicle at approximately 4:10, and by approximately 4:32, multiple vehicle doors were open, before the pat-down was complete. By approximately 5:20, Fleckenstein was already inside the vehicle searching, with all doors open. The handgun was not recovered until approximately 6:54. (Supp. EX Motions (Fleckenstein BWC - 29 min), at 3:12, 4:10, 4:32, 5:20, 6:54.)

That timing matters. *Gant* . does not authorize a general vehicle search whenever an arrestee has recently been in a car. It authorizes a limited search only if the arrestee can access the passenger compartment or if it is reasonable to believe the car contains evidence of the offense of arrest. *Id.* at 343. The first rationale was absent because Mr. Burns was handcuffed and secured. The second rationale, at most, permitted officers to look for the firearm reportedly used in the alleged menacing. Once that firearm was found under the driver’s seat and secured, the factual basis for continuing the search narrowed rather than expanded.

The BWC confirms that point. After the gun was recovered, Fleckenstein did not articulate that officers were searching for a second gun, ammunition, clothing, identity evidence, or any other specific evidence of menacing. Instead, around

13:00, he stated that he did not know how much they were going to tow or search the vehicle because he had already found the gun. Between approximately 13:25 and 13:53, he explained that he had secured the gun in his vehicle, had not touched anything else, and did not know what else they were looking at until he received more information. (Supp. EX Motions (Fleckenstein BWC - 29 min), at 13:00, 13:25-13:53.) Those statements are inconsistent with the People's post hoc theory that officers reasonably continued searching for additional menacing evidence.

The People blur separate warrant exceptions by treating “vehicle search incident to arrest” as though it authorizes a general vehicle search. It does not. The People repeatedly characterize this as a “vehicle search-incident-to-arrest doctrine.” That framing impermissibly dilutes the very limitation *Gant* . imposed. A search incident to arrest is not the automobile exception. It does not authorize officers to search every area of a vehicle where evidence or contraband might be found. Under *Gant*, once the arrestee-access rationale is gone, the search must remain tied to evidence of the offense of arrest. *Id.* at 343.

That distinction is critical here. The offense associated with the arrest was alleged felony menacing. The reported evidence of that offense was a firearm with a green laser. The People's argument quietly shifts from that limited justification to a broader assertion that once officers entered the car, they could keep searching the

passenger compartment and containers for anything that might be evidence of some crime. But that is not what *Gant* . holds. The second *Gant* rationale asks whether officers reasonably believed the vehicle contained evidence of the offense of the arrest - not whether a search might turn up evidence of another offense.

Nor does the later discovery of drug evidence retroactively justify the earlier search. The reasonableness of the search must be evaluated based on what officers knew at the time of the search. Before the search expanded beyond the firearm, officers had no information from witnesses, dispatch, or their own observations connecting Mr. Burns or the vehicle to drug distribution. Deputy Fleckenstein's own statements on BWC reflect uncertainty about whether to continue searching, not a particularized basis to believe evidence of drug distribution or additional menacing evidence would be found. The People's conflated approach would effectively convert *Gant* . into the very broad search authority the Supreme Court rejected.

***Kessler* does not allow officers to keep searching for unrelated evidence after the offense-related evidence has been found.** The People rely on *People v. Kessler*, 2018 COA 60, to argue that officers were not required to stop searching once they found the gun. But *Kessler* does not create a rule that officers may continue searching after finding some evidence regardless of the offense, the object

of the search, or the facts known to officers. *Kessler* involved a DUI arrest, and the continued search was for additional alcohol evidence directly related to that DUI offense. *Id.* at ¶¶ 28-30. There, the rationale remained tethered to the offense of arrest.

This case is different. Officers were investigating menacing, not drug distribution. The alleged menacing evidence was a gun with a green laser. Once officers found that gun under the driver's seat, the People must identify specific facts supporting a reasonable belief that additional evidence of menacing remained in the passenger compartment. They have not done so. There was no witness report of multiple guns. There was no dispatch information about ammunition, a second weapon, or other menacing-related physical evidence. And the BWC does not show officers articulating that they were continuing to search for such evidence. Instead, the search shifted into rummaging through bags and containers and ultimately cataloging cocaine, marijuana, scales, ziplocks, and baggies.

Kessler therefore helps Mr. Burns, not the People. It confirms that the search must remain connected to evidence of the offense of arrest. It does not permit officers to use a menacing arrest as a gateway to search zipped bags, a backpack, and a lunchbox for unrelated drug evidence after the reported firearm has already been recovered. Because the continued search was no longer tethered

to felony menacing, it exceeded the scope of *Gant* . and the trial court erred in denying suppression.

II. The Automobile Exception Did Not Justify the Warrantless Search

The People's automobile-exception argument has the same flaw as their *Gant* argument: it depends on treating a limited justification to search for a reported firearm as permission to conduct a general search for anything officers might find. The automobile exception permits a warrantless vehicle search only when officers have probable cause to believe the vehicle contains contraband or evidence of a crime, and the scope of the search is limited to places that may conceal the object of that probable cause. *California v. Acevedo*, 500 U.S. 565, 580 (1991); *People v. Zuniga*, 2016 CO 52, ¶ 20. The object of the search matters. Here, the facts known to officers supported, at most, probable cause to search for the gun allegedly used in the menacing. They did not supply probable cause to search for drugs, distribution evidence, or every closed container in the car.

Any probable cause was limited to evidence of menacing, not drugs. The People rely on the matching description of Mr. Burns, the vehicle, the direction of travel, and the reported gun with a green laser. Those facts may support the argument that officers had probable cause to believe the reported firearm was in the vehicle. But those facts do not support probable cause to believe the vehicle

contained drug evidence. The reported offense was felony menacing. Witnesses reported one firearm with a green laser. They did not report drugs, drug sales, distribution packaging, multiple firearms, ammunition, or any other evidence suggesting that the vehicle contained narcotics or drug-distribution evidence.

That distinction matters because probable cause is not a free-floating permission slip. It must be tied to the facts known to officers and the object of the search. The People’s Answer Brief repeatedly moves from “probable cause to search for a gun” to “probable cause to search for guns or drugs,” but the second phrase does not follow from the first. Nothing in the initial menacing report gave officers probable cause to search for drugs. Once the gun with the green laser was recovered under the driver’s seat, the People needed to identify specific facts supporting a fair probability that additional evidence of menacing—or independent evidence of drug crimes—would be found in the vehicle. They have not done so.

The BWC confirms the absence of such facts. After recovering the gun, Deputy Fleckenstein did not say that officers were searching for another firearm, ammunition, clothing, identity evidence, or drug evidence. Instead, he stated that he did not know how much they were going to tow or search the vehicle because he had already found the gun. He further explained that he had secured the gun, had not touched anything else, and did not know what else they were looking at

until he received more information. (Supp. EX Motions (Fleckenstein BWC - 29 min), at 13:00, 13:25-13:53.) Those statements undercut the People's after-the-fact claim that the continued search rested on particularized probable cause.

The Altoids tin did not supply probable cause for the later container search because the timing matters. The People's drug-probable-cause theory depends heavily on the Altoids tin found on Mr. Burns's person. But the tin cannot justify what had already happened. Officers had already opened the vehicle, begun searching it, found the gun, and continued discussing whether and how to search or tow the car before the People claim the Altoids tin supplied probable cause to search for drugs. The tin was first identified during the pat-down, when Fleckenstein asked, "What's in that?" and Mr. Burns responded, "Altoids." (Supp. EX Motions (Fleckenstein BWC - 29 min), at 4:41.) At that point, officers did not know the tin contained suspected cocaine. Yet the vehicle doors had already been opened, the search was underway by approximately 5:20, and the gun was recovered by approximately 6:54. (Supp. EX Motions (Fleckenstein BWC - 29 min), at 4:32, 5:20, 6:54.)

Even assuming the later search of the Altoids tin itself was lawful, its contents cannot retroactively justify the earlier vehicle search or the decision to keep searching after the gun was secured. Probable cause is judged based on the

facts known before and during the search, not by using later discoveries to validate earlier intrusions. *Zuniga*, 2016 CO 52, ¶ 20. The People cannot bootstrap the later discovery of suspected cocaine on Mr. Burns's person into probable cause for the earlier expansion of the vehicle search.

Nor did the Altoids tin automatically create probable cause to search every closed container in the vehicle. The tin was on Mr. Burns's person, not in the car. The People identify no witness report, officer observation, odor, visible contraband, drug transaction, statement, or other fact linking the vehicle itself to drug distribution before officers began opening containers. The People cite Mr. Burns's driving, his statement about the Altoids tin, and his admission that he had consumed alcohol or marijuana. But erratic driving and impairment evidence may support a traffic or DWAI investigation; they do not, without more, establish a fair probability that a zipped backpack, with a zipped lunchbox inside of a backpack, in the vehicle contains drug-distribution evidence.

The officers' own warrant discussion confirms that the continued search was not based on settled probable cause. The People are correct that, where the automobile exception applies, there is no separate exigency requirement. But that does not eliminate the probable-cause requirement or the scope limitation. The problem here is not merely that officers could have sought a warrant. The

problem is that their own discussion shows the continued search had become exploratory after the gun was found.

At approximately 11:56, officers were still discussing whether they were “just” going to search the car and whether there “might” be probable cause for menacing. Around 13:00, Fleckenstein indicated uncertainty about how much they were going to search or tow because he had already found the gun. Between approximately 13:25 and 13:53, he stated that he had secured the gun, had not touched anything else, and did not know what else they were looking for until he received more information. Later, officers discussed whether to get a search warrant and whether anything else might be in the vehicle. (Supp. EX Motions (Fleckenstein BWC - 29 min), at 11:56, 13:00, 13:25-13:53; Supp. EX Motions (Deputy Krzywonski BWC), at 16:20-16:45.)

That discussion is not dispositive because officers’ subjective uncertainty does not, in itself, resolve the Fourth Amendment question. But it is powerful record evidence of what the objective facts showed at the time: after the gun was found, officers lacked a particularized basis to believe the vehicle still contained evidence of menacing or drug distribution. The search continued not because the facts pointed to a specific object in a specific place, but because officers wanted to see what else might be there.

The automobile exception does not permit that. At most, the exception allowed officers to search areas of the vehicle where the reported firearm could reasonably be found. Once the firearm with the green laser was recovered and secured, probable cause to search for that object was exhausted. The later search for drugs and distribution evidence was unsupported by independent probable cause and exceeded the permissible scope of the automobile exception. The trial court therefore erred in denying suppression of the evidence discovered through that continued warrantless search.

III. The Search of Closed Containers Exceeded Constitutional Limits

The People's closed-container argument only works if the Court accepts their premise that officers had continuing authority to search the vehicle for both "guns or drugs." But that premise *is* the constitutional problem. The officers had, at most, authority to search for evidence of the alleged menacing—specifically, the reported firearm with a green laser. Once that firearm was located and secured, the People needed some independent basis to justify the later intrusion into zipped bags, a backpack, and a lunchbox. They did not have one.

Zipped bags and a lunchbox were not in plain view. The People argue that the later discovery of drug evidence did not undermine the search because officers are not required to ignore evidence they "plainly see" during an otherwise

lawful search. But that principle does not apply to evidence hidden inside closed containers. A zipped lunchbox inside a zipped backpack is not in plain view. Zipped bags are not in plain view. Drug packaging found only after officers opened and rifled through personal containers is not in plain view.

The distinction matters because “plain view” cannot justify the step that made the evidence visible. If officers had seen contraband sitting openly in the passenger compartment from a lawful vantage point, the People’s argument might be different. But here, the drug evidence was discovered only after officers expanded the search into closed personal effects. The People cannot characterize evidence as “plainly seen” when officers first had to open containers to see it.

Nor does the fact that officers were lawfully present near the vehicle automatically authorize every later intrusion. Even when officers may search a vehicle under a recognized exception, the permissible scope of that search is defined by the object of the search and the facts supporting probable cause. *California v. Acevedo*, 500 U.S. 565, 580 (1991). The relevant question is not whether officers eventually found incriminating evidence. It is whether, before opening the closed containers, they had a lawful basis to believe those containers held evidence they were entitled to search for.

The People’s “guns or drugs could be in containers” argument fails because officers had no probable cause to search for drugs and no specific basis to believe more guns existed. The People argue that firearms and drug evidence can be concealed in small containers, so officers could search the backpack, lunchbox, and other personal effects. But that argument skips the necessary first step: officers needed lawful authority to search for drugs or additional firearms in the first place. They had neither.

Before the container search, the reported offense was menacing. The reported evidence was a single firearm with a green laser. Officers found the firearm under the driver’s seat. Nothing in the witness reports, dispatch information, BWC, or Deputy Fleckenstein’s testimony established a reasonable basis to believe there were additional guns in the car. The trial court’s speculation about “maybe another gun” cannot substitute for facts known to officers before the search expanded. And nothing about the menacing report supplied probable cause to search for drugs.

The People’s argument reduces the scope analysis to physical possibility: because a gun or drugs could fit inside a backpack or lunchbox, officers could open them. But the Fourth Amendment requires more than a mere possibility. If physical possibility were enough, officers could open nearly every container in nearly every

car because nearly any container could theoretically conceal something incriminating. *Gant* and the automobile exception do not authorize that kind of general rummaging. They require a nexus between the facts known to officers, the object of the search, and the place searched.

The People's reliance on broad container-search cases does not change that. Those cases apply when officers have valid probable cause to search the vehicle for an object that may be concealed in containers. They do not eliminate the need for probable cause, nor do they allow officers to continue searching closed containers after the factual basis for the search has been exhausted. Here, once the gun was recovered, the People had to identify facts supporting a continued search for more menacing evidence or independent probable cause to search for drugs. They have not done so.

The container search was the point at which the investigation became a drug search, not a menacing search. The BWC shows the practical shift. After the gun was found, officers did not stop with the evidence of the alleged menacing. They continued into bags and containers, then began cataloging “cocaine, weed, scales, ziplocks, baggies” and discussing the vehicle as connected to drug distribution. That was no longer a search for evidence of menacing. It was a drug investigation.

That distinction is especially important because the drug-distribution evidence came from the expansion itself. The People cannot use the fruits of the container search to justify the decision to conduct the container search. Before officers opened the closed containers, there was no particularized probable cause to believe the vehicle contained distribution evidence. The search created the drug case; the drug case did not justify the search.

At a minimum, the container search exceeded the lawful scope of any search justified by the menacing investigation. Even if this Court concludes that officers could enter the vehicle and recover the firearm, the later search of zipped bags, the backpack, the lunchbox, and other closed personal effects required a separate lawful basis. Because the People did not establish one, the trial court erred in denying suppression of the narcotics, paraphernalia, scales, baggies, and other evidence discovered through the closed-container search.

IV. All Evidence Obtained Must Be Suppressed as Fruit of the Unlawful Search

The People's exclusionary-rule argument is mostly derivative of their merits argument: because they say the search was lawful, they say nothing must be suppressed. But if the continued vehicle search violated *Gant*, exceeded the automobile exception, or crossed the constitutional line when officers opened

closed containers, then the evidence discovered through that unlawful expansion must be suppressed. *Wong Sun v. United States*, 371 U.S. 471, 488 (1963); *People v. Null*, 233 P.3d 670, 675-76 (Colo. 2010)

The People also make a fallback argument. They contend that even if the continued search became unconstitutional after the gun was found, the gun and cocaine discovered before then were still admissible, and Mr. Burns's special offender and possession-with-intent convictions should still be affirmed. (Answer Br. at 24-25.) That argument does not cure the error. It simply confirms why the timing matters. Even accepting the People's fallback for purposes of this reply, the evidence discovered after the search expanded into closed containers was still the product of the unlawful search and should have been suppressed.

At minimum, the drug-distribution evidence must be suppressed even if the Court concludes the firearm was admissible. Mr. Burns's position remains that the warrantless search violated the Fourth Amendment for the reasons stated in the Opening Brief and above. But even if this Court concludes officers could lawfully enter the vehicle and recover the firearm, that would not authorize everything that followed. The later search of the backpack, lunchbox, zipped bags, and other personal effects produced additional narcotics, scales, baggies, packaging materials, and other evidence that the prosecution used to prove drug

distribution. That evidence was not discovered before the challenged expansion. It was discovered because officers continued searching after the reported firearm had already been found and secured.

The People's fallback therefore proves too little. The issue is not whether some evidence might remain admissible under a narrower ruling. The issue is whether the unlawfully discovered container evidence contributed to the convictions. It plainly did. The prosecution did not try this case as though it had only a firearm and an Altoids tin. It introduced evidence from the vehicle search, including the contents of the backpack, lunchbox, and other containers, to support the charged drug offenses and the distribution theory. Those fruits cannot be insulated from suppression merely because other evidence may have been discovered earlier.

Nor can the People avoid suppression by recasting the remaining evidence as sufficient. Suppression and harmlessness are different questions. Once unlawfully obtained evidence is admitted at trial, the question is whether the State can prove beyond a reasonable doubt that the error did not contribute to the verdict. *Hagos v. People*, 2012 CO 63, ¶ 11. The People have not made that showing. They assert that the convictions should stand because the gun and cocaine were discovered before the later container search, but they do not show beyond a reasonable doubt

that the unlawfully discovered drug-distribution evidence played no role in the jury's verdict.

The convictions dependent on the unlawful container search cannot stand. The jury acquitted Mr. Burns of felony menacing. The convictions at issue are drug convictions and related special-offender findings. Those convictions depended on the State's proof that Mr. Burns possessed controlled substances, possessed them with intent to distribute, and did so while armed. The unlawfully discovered container evidence was central to that proof. The scales, baggies, additional narcotics, and contents of the backpack and lunchbox were not marginal or cumulative; they were the evidence that converted this case from possession of a small amount of suspected cocaine into a distribution case.

At minimum, then, if this Court concludes the gun and the cocaine found on Mr. Burns's person remain admissible, the Court should still reverse the denial of suppression as to the evidence discovered during the continued vehicle and container search. Without that evidence, the prosecution's distribution theory and the convictions dependent on it cannot stand. The proper remedy is reversal of the suppression ruling, vacatur of the affected convictions and sentence, and remand for further proceedings without the unlawfully obtained evidence.

Conclusion For the reasons stated in the Opening Brief and above, the trial court erred in denying Mr. Burns's motion to suppress. The People's Answer Brief does not cure the central constitutional defect: once the firearm was recovered and secured, officers no longer had a reasonable basis under *Gant* or probable cause under the automobile exception to continue searching the vehicle, opening closed containers, and developing a drug-distribution case from evidence unrelated to the offense of arrest.

At minimum, even if this Court concludes that the firearm was admissible, the continued search into the backpack, lunchbox, zipped bags, and other closed containers exceeded constitutional limits. The narcotics, scales, baggies, packaging materials, and related evidence discovered through that unlawful expansion should have been suppressed. Because that evidence was central to the drug-distribution convictions and related special-offender findings, those convictions cannot stand.

Mr. Burns respectfully requests that this Court reverse the district court's order denying suppression, vacate the affected convictions and sentence, and remand for further proceedings consistent with this Court's ruling.

Dated and respectfully submitted this Tuesday, May 19th, 2026.

ROBINSON AND HENRY, P.C.

/s/ 

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CERTIFICATE OF SERVICE

I, the undersigned, hereby certify that on Tuesday, May 19th, 2026, a true and correct copy of the foregoing was presented to the Court via Colorado Court E-Filing System, and served on the following as follows:

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