No. 20-____

IN THE

Supreme Court of the United States

RAYMOND MARLING,

Petitioner,

v.

WARDEN OF WABASH VALLEY CORRECTIONAL FACILITY,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Florida v. Wells*, 495 U.S. 1 (1990), this Court held that a warrantless search of a closed container found in an impounded vehicle is permissible under the inventory search exception to the Fourth Amendment's warrant requirement only if the search is conducted pursuant to "standardized criteria" that sufficiently limit a searching officer's discretion to open the closed container. *Id.* at 4. The Court explained that officer discretion must be limited to ensure that the "inventory search" is not "a ruse for a general rummaging in order to discover incriminating evidence." *Id.*

The question presented is: Does a police department's policy sufficiently limit officer discretion during an inventory search if it enables an officer to choose to open a closed container based on the prospect that incriminating evidence may be found inside?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The parties to the proceeding below were Petitioner Raymond Marling and Respondent Warden of Wabash Valley Correctional Facility. While the proceeding below was pending, Richard Brown, who had been Warden, left the position. While the position of Warden was vacant, Frank Littlejohn served as Deputy Warden. Frank Vanihel is now Warden. There are no nongovernmental corporate parties requiring a disclosure statement under Supreme Court Rule 29.6.

RELATED PROCEEDINGS

State of Indiana v. Raymond Ryan Marling, No. 40C01-1305-FA-7, Jennings County Circuit Court. Judgment entered Feb. 20, 2014.

Raymond Marling v. State of Indiana, No. 40A01-1403-CR-109, Court of Appeals of Indiana. Judgment entered Sept. 30, 2014.

Raymond Marling v. State of Indiana, No. 40A01-1403-CR-109, Supreme Court of Indiana. Order entered Jan. 6, 2015.

Raymond Marling v. State of Indiana, No. 40C01-1504-PC-001, Jennings County Circuit Court. Judgment entered Nov. 6, 2017.

Raymond Marling v. State of Indiana, No. 40A01-1711-PC-2620, Court of Appeals of Indiana. Judgment entered May 25, 2018.

Raymond Marling v. State of Indiana, No. 40A01-1711-PC-2620, Supreme Court of Indiana. Order entered Oct. 15, 2018.

Raymond Marling v. Richard Brown, No. 2:19-cv-2-JRS-DLP, U.S. District Court for the Southern District of Indiana. Judgment entered Sept. 24, 2019.

Raymond Marling v. Richard Brown, No. 19-3077, U.S. Court of Appeals for the Seventh Circuit. Judgment entered July 13, 2020.

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INTRODUCTION

This case presents a circuit split on an important issue: How a court should distinguish between a constitutionally permissible inventory search and a constitutionally impermissible warrantless search of an individual's private personal property. The Fourth Amendment's reasonableness requirement typically forbids searches of an individual's personal effects in the absence of a warrant issued based on probable cause that the search will uncover evidence of a crime. When officers conduct a routine and standardized inventory search following a lawful vehicle impound, however, they do not run afoul of the Constitution. *See, e.g.*, *Colorado v. Bertine*, 479 U.S. 367, 371–72 (1987). Because a warrantless search for evidence may easily be passed off as an inventory search, it is essential that courts not allow the exception to sweep too broadly. A yawning "inventory search" exception would give police cover to evade the warrant and probable-cause requirements whenever a driver is arrested and his vehicle taken into custody.

To address this issue without requiring scrutiny of individual officer motives, the Court has focused on police department policies and practices for inventory searches. Where the search in question is consistent with a department's standardized procedure for inventorying *any* property taken into custody, the concern that inventory searches may be "turned into 'a purposeful and general means of discovering evidence of crime'" is alleviated. *Florida v. Wells*, 495 U.S. 1, 4 (1990) (quoting *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring)). But the circuit courts have split 2–2 over whether, and to what extent, a police department's policy or practice must include limitations on officer

discretion in order for a search to fall within the "inventory search" exception. The Third and Fourth Circuits hold that the governing policy must limit officers' discretion to open closed containers in a way that constrains them from embarking on a generalized search for evidence. In contrast, the Fifth Circuit, joined here by the Seventh Circuit, holds that the inventory search exception applies even if the governing policy includes no such limitation. Because the disparate approaches have significant consequences for the privacy and security of individuals' effects, the Court should grant review to clarify that the inventory search exception does not apply based on a fig leaf of a policy that leaves officers at liberty to search for evidence.

"Inventory searches" of the contents of vehicles in police custody have long been recognized as an exception to the Fourth Amendment's warrant requirement. *See South Dakota v. Opperman*, 428 U.S. 364, 369–73 (1976). The Court has explained that this exception is justified because inventory searches serve three governmental interests: protecting an owner's property while it is in police custody; insuring against claims of lost, stolen, or vandalized property; and guarding the police from danger. *See Bertine*, 479 U.S. at 372.

The Court has held that inventory searches may involve the opening of closed containers found in the vehicle. *Id.* at 374–75. In *Bertine*, a three-Justice concurrence emphasized "the importance of having such inventories conducted only pursuant to standardized police procedures" that "ensure[] that inventory searches will not be used as a purposeful and general means of discovering evidence of crime." *Id.* at 376

(Blackmun, J., concurring). In *Wells*, the Court confirmed that "uncanalized discretion to police officers conducting inventory searches" is "forbidd[en]," and that "standardized criteria or established routine must regulate the opening of containers found during inventory searches." *Wells*, 495 U.S. at 4 (citations omitted). The Court therefore affirmed the Florida Supreme Court's decision requiring suppression of evidence found inside a locked suitcase that was forced open during an inventory search where the department "had no policy whatever with respect to the opening of closed containers encountered during an inventory search." *Id.* at 4–5.

Unsurprisingly, the Third and Fourth Circuits have understood *Wells* to require not just any "inventory search" policy but a policy that constrains a searching officer from choosing to open a closed container based on the possibility that incriminating evidence will be found inside. *See, e.g.*, *United States v. Bradley*, 959 F.3d 551, 558 (3d Cir. 2020); *United States v. Matthews*, 591 F.3d 230, 236–38 (4th Cir. 2009).

But the Fifth Circuit and, now, the Seventh Circuit disagree. In the Seventh Circuit's view, under *Wells*, "the validity of an inventory search depends on the police department having *a* policy about when to take inventories." App. 3a (emphasis added). To the Fifth and Seventh Circuits, "[w]hat matters is that there be *some* policy," even if the substance of the policy is just "'exercise discretion'" in opening containers. App. 5a; *United States v. Como*, 53 F.3d 87, 91–92 (5th Cir. 1995) (upholding inventory search where governing department procedures gave officers complete

"discretion to decide whether a locked container should be opened").

The circuit disagreement goes to a fundamental question about the scope of the "inventory search" exception: whether courts must ensure that a purported "inventory search" really is not "a ruse for a general rummaging in order to discover incriminating evidence," or whether, in the absence of a specific and substantiated accusation of bad faith on the part of the searching officer, it is enough to determine that there is *some* policy. *Wells*, 495 U.S. at 4. Indeed, here the split was likely outcome-determinative. In this case, 33 years of Petitioner Raymond Marling's 38-year Indiana sentence are attributable to a "possession of cocaine with intent to deliver" charge that was based on 0.51 grams of cocaine (approximately one-quarter of a teaspoon) that an officer found inside a locked combination lockbox that he took from the trunk of Marling's car and pried open with a screwdriver. App. 22a, 27a, 146a–50a. The officer came across the lockbox while searching the car before it was impounded following Marling's arrest, which occurred during a traffic stop. App. 46a–48a. When Marling's trial counsel moved to suppress this evidence as the fruit of an unconstitutional warrantless search, the prosecution argued that the officer had broken open the lockbox as part of an "inventory search" and produced a written police department policy governing "inventory searches." App. 118–19a. In his federal habeas petition, which the district court granted, Marling contended that his trial counsel rendered deficient performance by failing to rebut that argument. App. 14a. The Seventh Circuit, however, interpreted

the department's policy as granting the searching officer essentially unconstrained discretion to deem any potential damage "reasonable" and force open the locked container. App. 6a. The Seventh Circuit held that "[t]h[is] policy is valid under *Wells*" and that therefore Marling had no meritorious suppression argument. *Id.* On this ground, the Seventh Circuit reversed the district court's grant of habeas relief. App. 7a.

The policy at issue provided that officers "should avoid" opening a closed or locked container if doing so would involve "unreasonable potential damage" to property. App. 68a. Crucially, however, nothing in the policy constrained a searching officer from finding damage to a locked container reasonable *based on the prospect of finding incriminating evidence inside*. The Seventh Circuit nevertheless held that the inventory search exception applied, explaining that even a bare instruction to "'exercise discretion'" would suffice. App. 5a. Had Marling's habeas case been heard in the Third or Fourth Circuit, such a policy would not have been upheld as "valid under *Wells*." App. 6a. And, in all likelihood, the district court's decision granting Marling's habeas petition would have been affirmed.

The question presented is important. Police search the contents of impounded vehicles day in and day out, and the Fourth Amendment should not apply differently in this context in Indiana (Marling's case), or in Texas (*Como* (5th Cir.)), than it does in Pennsylvania (*Bradley* (3d Cir.)) or Virginia (*Matthews* (4th Cir.)). What's more, permitting the lower courts to continue without this Court's guidance (let alone allowing two circuits to take a hands-off, expansive ap-

proach to the "inventory search" exception) undermines the Fourth Amendment's protections and public confidence in the administration of justice. The facts of this case illustrate that an overbroad inventory search exception has vexing consequences for the security and privacy of personal property.

This case cleanly presents a circuit split on an important constitutional question. The Court should grant review to resolve it.

OPINIONS BELOW

The court of appeals' opinion (App. 1a–7a) is reported at 964 F.3d 667. The district court's opinion (App. 8a–19a) is available at 2019 WL 4674039.

JURISDICTION

The court of appeals entered judgment on July 13, 2020, App. 1a–7a, and denied rehearing and rehearing en banc on August 17, 2020, App. 60–61a. By order of March 19, 2020, this Court extended the deadline for all petitions for writs of certiorari due on or after the date of the Court's order to 150 days from denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

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

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

> place to be searched, and the persons or things to be seized.

The Sixth Amendment to the U.S. Constitution provides, in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right … to have the Assistance of Counsel for his defence.

The Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) provides, in relevant part:

> **(a)** The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.
>
> …
>
> **(d)** An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> > **(1)** resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > **(2)** resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254.

The North Vernon Police Department General Order 49, governing vehicle impoundment, is reproduced at App. 62a–72a.

STATEMENT

This case presents the question whether the "inventory search" exception to the Fourth Amendment's warrant requirement applies if a governing police department policy enables a searching officer to choose to open a closed container in an impounded vehicle based on the prospect that evidence may be found inside. The Seventh Circuit, to reverse the district court's grant of habeas relief, held that a court need not scrutinize whether a policy constrains an officer's discretion to open a closed container to search for incriminating evidence—instead, *Wells* requires only "that there be *some* policy." App. 5a.

This holding was likely outcome-determinative. The district court rested its grant of Marling's habeas petition on the conclusion that Marling's trial counsel rendered constitutionally deficient and prejudicial performance by failing to rebut the State's assertion that police broke open the lockbox as part of a valid inventory search. App. 17a. The Seventh Circuit, however, held that the search of Marling's lockbox did not violate the Fourth Amendment because "[t]he [department] policy is valid under *Wells*." App. 6a. And because it found that Marling had no meritorious argument for suppressing evidence of the lockbox's contents, the Seventh Circuit reversed the district court's grant of habeas relief. App. 7a.

1. Legal Background

a. 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" and guarantees that "no Warrants shall issue, but upon probable cause." U.S. Const. amend. IV.

The Founders "crafted the Fourth Amendment as a 'response to the reviled "general warrants" and "writs of assistance" of the colonial era, which allowed British officers to rummage through homes in an unrestrained search for evidence of criminal activity.'" *Carpenter v. United States*, 138 S. Ct. 2206, 2213 (2018) (quoting *Riley v. California*, 573 U.S. 373, 403 (2014)). At the Founding, general warrants were "not grounded upon a sworn oath of a specific infraction by a particular individual, and thus not limited in scope and application." *Maryland v. King*, 569 U.S. 435, 466 (2013) (Scalia, J., dissenting).

Because a vehicle "is an 'effect'" under the Fourth Amendment, *United States v. Jones*, 565 U.S. 400, 404 (2012), automobile searches must meet the reasonableness standard, *United States v. Chadwick*, 433 U.S. 1, 12 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565, 576 (1991). Reasonableness usually requires a warrant or, if a vehicle is "readily mobile," "probable cause … to believe it contains contraband." *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam); *Riley*, 573 U.S. at 382. The warrant requirement is subject to certain exceptions, but these exceptions are to be "few," "well delineated," and "jealously and carefully drawn." *Coolidge v. New Hampshire*, 403 U.S. 443, 455 (1971) (quoting *Katz v. United States*, 389 U.S. 347, 357 (1967), and *Jones v. United States*, 357 U.S. 493, 499 (1958)).

When the purpose of a search is entirely divorced from criminal investigation, the search may be permissible despite the absence of either a warrant or probable cause. *See, e.g.*, *Camara v. Municipal Ct.*, 387 U.S. 523, 538 (1967) (searches of businesses to enforce regulatory schemes require only "reasonable legislative or administrative standards," not probable cause); *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 653 (1995) (upholding public school's random urinalysis drug testing of student athletes as a "special needs" search requiring neither probable cause nor a warrant). But "[i]f the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply." *Michigan v. Tyler*, 436 U.S. 499, 508 (1978) (internal citations omitted); *see also Carpenter*, 138 S. Ct. at 2221 ("warrantless searches are typically unreasonable where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing'" (quoting *Vernonia*, 515 U.S. at 652–53)).

b. Inventory searches of lawfully impounded vehicles are one recognized exception to the warrant and probable cause requirements. *Cady v. Dombrowski*, 413 U.S. 433 (1973). In *Cady*, this Court held that officers did not violate the Fourth Amendment when, without a warrant or probable cause, they searched the trunk of a car that had been towed after an accident. Officers had been looking for a service weapon belonging to the driver (a police officer), but they uncovered evidence connecting the driver to a murder. *Id.* at 437–38. Noting that police "engage in what … may be described as community caretaking functions" that are "totally divorced from the detection, investigation,

or acquisition of evidence" of a crime, the Court rejected the driver's argument that the evidence should be suppressed. *Id.* at 441. Searching the trunk, the Court determined, was "standard procedure" in the police department, to "protect the public from the possibility that a revolver would fall into untrained or perhaps malicious hands." *Id.* at 443. Because the search was done for caretaking purposes—not criminal investigation—it was reasonable under the Fourth Amendment.

Three years after *Cady*, the Court again approved the constitutional reasonableness of an inventory search in *South Dakota v. Opperman*, 428 U.S. 364 (1976). In that case, officers conducted a routine inventory search after towing an illegally parked car. *Id.* at 366. An officer found marijuana in the unlocked glove compartment. *Id.*

Again invoking the "community caretaking function[]," the Court explained that routine inventory searches conducted without a warrant or probable cause serve "three distinct needs": (1) "the protection of the owner's property while it remains in police custody," (2) "the protection of the police against claims or disputes over lost or stolen property," and (3) "the protection of the police from potential danger." *Id.* at 368–69. When officers follow "standard police procedures" to serve any of these underlying purposes, the search is reasonable. *Id.* at 376. In particular, the Court noted, "standard inventories often include an examination of the glove compartment, since it is a customary place for documents of ownership and registration … as well as a place for the temporary storage of valuables." *Id.* at 372.

Probable cause was unnecessary, the Court explained, because that standard is "peculiarly related to criminal investigations, not routine, noncriminal procedures." *Id.* at 370 n.5. Unless there is an argument "that the protective procedures are a subterfuge for criminal investigations," probable cause has no place in the reasonableness analysis of administrative searches. *Id.* Likewise, a warrant was not needed because "the policies underlying the warrant requirement … are inapplicable" to inventories "[i]n view of the noncriminal context of inventory searches." *Id.*

c. Having established that "inventory searches are … a well-defined exception to the warrant requirement of the Fourth Amendment," the Court next confirmed that this exception extends to searches of closed containers found within a vehicle during an inventory search. *Bertine*, 479 U.S. at 370–71. In *Bertine*, officers had arrested a man for drunk driving, impounded his vehicle, and then searched a closed backpack found in the car. Inside, the officers found drugs and cash. *Id.* at 369. Upholding the search, the Court concluded that the justifications articulated in *Opperman* applied in "nearly the same" way to the search in *Bertine*: it "protected the property," "helped guard against claims of theft, vandalism, or negligence," and "helped to avert any danger to police or others that may have been posed by the property." *Id.* at 372–73.

In *Bertine*, the Court also emphasized the importance of standardized criteria or routine procedure in limiting whether and how an inventory search occurs. *Id.* at 375–76 & n.7. The Court said that officers may exercise discretion in making the decisions that lead to the search (for example, the choice between impounding a vehicle and locking it in a public parking

place) "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Id.* at 375.

In *Florida v. Wells*, 495 U.S. 1 (1990), the Court held that an inventory search of a closed and locked container found in an impounded vehicle "was *not sufficiently regulated to satisfy the Fourth Amendment*" where the searching officers' department "had no policy whatever with respect to the opening of closed containers encountered during an inventory search." *Id.* at 4–5 (emphasis added). The Court therefore affirmed the Florida Supreme Court's suppression of drug evidence found in a locked suitcase that officers forced open during an inventory search of the impounded car of a man arrested for drunk driving. *Id.* at 2, 5. The Court explained that "standardized criteria or established routine must regulate the opening of containers found during inventory searches." *Id.* at 4 (citations omitted). "[U]ncanalized discretion" is "forbid[den]," and "[t]he individual police officer must not be allowed so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" *Id.* (quoting *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring)).

The Florida Supreme Court had reasoned that "[t]here can be no room for discretion" in an inventory search, and that the inventory search exception applies to the search of a closed container only if a policy "mandate[s] … that all containers will be opened." *State v. Wells*, 539 So. 2d 464, 469 (Fla. 1989). In dicta, this Court's majority opinion disapproved that "all or nothing" rule. *Wells*, 495 U.S. at 4. Because "[t]he allowance of the exercise of judgment based on concerns

related to the purposes of an inventory search does not violate the Fourth Amendment," the Court reasoned, the inventory search exception may apply even if a policy gives officers some "latitude to determine whether a particular container should or should not be opened in light of the nature of the search and characteristics of the container itself." *Id.*

Four Justices concurred in the judgment but disagreed with the majority opinion's dicta "suggest[ing] that a State may adopt an inventory policy that vests individual police officers with *some* discretion to decide whether to open [closed] containers [found during an inventory search]." *Id.* at 8 (Brennan, J., concurring, joined by Marshall, J.); *see also id.* at 11 (Blackmun, J., concurring) ("The exercise of discretion by an individual officer, especially when it cannot be measured against objective, standard criteria, creates the potential for abuse of Fourth Amendment rights our earlier inventory-search cases were designed to guard against."); *id.* at 12 (Stevens, J., concurring) (providing "additional criticism" of the majority's dicta).

After addressing the inventory search exception in several cases between 1973 and 1990, the Court has not returned to the exception for thirty years.

The question presented here is whether a police department's policy sufficiently regulates the opening of containers if it enables a searching officer to choose to open a closed container based on the prospect that incriminating evidence may be found inside.

2. Factual and Procedural Background

a. North Vernon, Indiana police officers stopped Petitioner Raymond Marling's car to ask Marling if he

knew the whereabouts of an acquaintance, who was a suspect in the case of a missing girl. App. 82a–86a. (Police later discovered that the girl had run away, and she was found unharmed. App. 95a.) After Marling stopped, the officers ordered him out of the car. App. 98a–99a. They noticed a handgun between the driver's seat and console. App. 47a. Marling admitted he had no license for the gun, and the officers arrested him. App. 47a–48a.

After Marling was taken to jail, Officer Craig Kipper decided to impound Marling's car and search its contents. App. 157a. The search turned up several items, including a locked metal combination lockbox, which was found in the trunk. App. 10a, 27a, 158a–159a.

Under a written department policy, North Vernon police were not to inventory the contents of a closed or locked container if doing so would require "extreme measures" or entail "unreasonable potential damage to property." App. 68a. In such situations, the policy instructs that officers "should avoid opening the container" and "document why the container was not opened." *Id.* The policy also directs officers to "make an inventory of the contents" of an impounded vehicle using "the police department Impounded Vehicle Inventory Report as well as the State Impounded Vehicle Report." App. 67a.

Officer Kipper decided to pry open the metal lockbox. Using a screwdriver, he broke open the combination lock and then "inventoried" the contents, including a plastic baggie containing approximately one-quarter of a teaspoon (or about 0.51 grams) of cocaine, mixed with a non-controlled substance called benzocaine, four corner-cut baggies with white residue, a

bottle of over-the-counter joint supplements, and one Clonazepam pill. App. 47a–48a, 158–59a. Photographs from the scene show that, before the search, the latch was straight and closed. App. 73a. After the search, however, the latch was askew, apparently useless. App. 16a, 73a.

Rather than complete the inventory report forms required by the department policy, Officer Kipper filled out a "Property Record." App. 160a–65a. This form fails to list many of the belongings recovered from Marling's car, including obviously valuable property (a set of pearls and antique knives). *Id.*; ECF Doc. 23 at 65, *Marling v. Brown*, 964 F.3d 667 (7th Cir. 2020) (No. 19-3077). Instead, the only items listed on the Property Record form were items that the police apparently considered suspicious. App. 160a–65a.

b. Prosecutors charged Marling with eight counts based on the evidence found through the search, including possession of cocaine with intent to deliver and possession of cocaine and a firearm. App. 48a–49a. A jury convicted Marling of all but one of the counts, and Marling was sentenced to 38 years' imprisonment. App. 49a–50a. The portion of the sentence based on the cocaine found in the lockbox accounted for 33 of those 38 years. App. 148a–50a.

Before trial, Marling moved to suppress the evidence found in the lockbox. His attorney filed a one-page motion with a single, two-sentence bullet about the constitutionality of the lockbox search, arguing only that: "Once the officer opened the trunk and found a box, he was not permitted to open it with a screwdriver. A warrant should have been obtained. *See* George v. State (Ind. Ct. App. 2009) 901 N.E.2d 590." App. 74a–75a.

Opposing suppression, the State relied on the written inventory policy. The State argued that "[t]he officers have to be following a procedure by their department and that's what [the officer] did in this case." App. 119a. In reply, Marling's counsel did not argue that officers had failed to follow the policy or otherwise rebut the State's argument that the department policy made the search lawful. Instead, Marling's counsel—who failed to question Officer Kipper *at all*—argued the police had no authority to open any closed container found in the car. App. 79a, 121a–23a.

The trial court denied the motion to suppress. App. 43a. The court did not address (let alone analyze) whether Officer Kipper was following the department policy because Marling's counsel never made the argument. App. 40a–43a.

On direct appeal, Marling's counsel likewise failed to argue that Officer Kipper's search deviated from policy. App. 136–39a. Appellate counsel later stated that he had "not consider[ed] challenging the admission of the cocaine based on the State's failure to follow its own written procedures for conducting an inventory search," adding that, had he considered it, he "would have raised the issue." App. 31a. The Indiana Court of Appeals upheld Marling's conviction, and the Indiana Supreme Court denied Marling's petition to transfer. App. 12a.

b. On state post-conviction review, Marling argued that both trial and appellate counsel had provided ineffective assistance by failing to argue that North Vernon police violated internal police procedures by opting to break open the lock with a screwdriver, even though this subjected his property to an unreasonable risk of damage. App. 21a.

The Jennings Circuit Court disagreed. Although it recognized that Officer Kipper took "extreme measures" in opening the locked container, which the North Vernon policy generally prohibits, it reasoned that this was "justified" because Marling had been "armed" and "was a person of interest in [a] missing person report." App. 22a. The court therefore held that Marling had not shown that the failure to raise these arguments resulted in prejudice.

The Indiana Court of Appeals also rejected Marling's claim, though for different reasons. Without acknowledging the photograph of Marling's broken lockbox, it held that Marling had not shown any actual damage to his property, and thus that there was no evidence his attorneys had a viable suppression argument to make. App. 36a–37a. The Indiana Supreme Court denied Marling's petition to transfer. App. 38a–39a.

3. Marling then filed a pro se petition for a writ of habeas corpus in the U.S. District Court for the Southern District of Indiana. 28 U.S.C. §§ 2241(d), 2254. The district court granted the petition. App. 8a–19a.

The district court first held that the state appellate court's opinion hinged on an unreasonable finding of fact: that Officer Kipper's actions had not resulted in any damage to Marling's property. App. 15a. That finding, the district court explained, was "rebutted by clear and convincing evidence," most notably the photograph of the lockbox showing "a damaged (and likely inoperable) latch." App. 15a–16a. Having concluded that the state court's decision rested on "an unreasonable determination of the facts" under 28 U.S.C.

§ 2254(d)(2), the district court went on to analyze the merits of Marling's claim. App. 17a.

On the merits, too, the district court found that Marling had cleared the high bar for relief. Specifically, the district court held that the failure to argue that the lockbox was opened in violation of the inventory policy was both deficient and prejudicial, resulting in a violation of Marling's Sixth and Fourteenth Amendment rights. *Id.* First, the district court determined that trial counsel's "fail[ure] to raise the obvious rejoinder" to the State's argument was an unreasonable lapse of professional judgment. *Id.* Next, the district court determined that there was a reasonable probability the trial court would have granted Marling's motion to suppress absent that lapse. *Id.* Specifically, the district court found "a reasonable probability that the state trial court could have disagreed with" the argument that using a screwdriver to pry open a latch was "hardly an extreme measure or one that would foreseeably cause 'unreasonable potential damage.'" *Id.* The district court noted that the trial court on post-conviction review had *itself* characterized the lockbox's opening as an extreme measure. *Id.*

Finding constitutional error, the district court granted Marling's petition and ordered the State to announce its intent to retry Marling, reopen state court proceedings, or release Marling as to the relevant counts of conviction within 90 days of judgment. App. 18a.

4. a. The Seventh Circuit reversed. It held that, even if the state court made a factual mistake, Marling is not "in custody in violation of the Constitution or laws or treaties of the United States." App. 2a–6a (quoting 28 U.S.C. § 2254(a)). The court reasoned that

Marling's counsel did not render ineffective assistance by failing to argue that breaking open the lockbox violated department policy. App. 6a. As the court saw it, that argument would not have been a basis for requiring suppression of the evidence found inside the lockbox. App. 3a–6a.

The court reached this conclusion on the ground that, to "make[] the inventory something other than a search based on belief that it will turn up evidence of a crime," *Wells* merely required the existence of "*some* policy." App. 5a. Even a policy that just said "exercise discretion" in opening containers would be valid. *Id.* The court reasoned that, so long as a policy existed in Marling's case, the Fourth Amendment did not require the suppression of evidence found inside the lockbox, even if Officer Kipper did "unreasonable" damage in forcing open the box. *Id.* If the damage was "unreasonable," the court remarked, "that could have been the basis for a tort claim" but "not a basis for a conclusion that the Fourth Amendment required the suppression of incriminating evidence." App. 7a.

The court then concluded that the North Vernon inventory policy was sufficient under *Wells*. The court interpreted the North Vernon inventory policy as "combin[ing] a presumptive rule of opening everything with a discretionary ('should') exception when the damage would be 'unreasonable' in the officer's judgment." App. 6a. Even though the policy did not include any constraints on an officer's determination whether the property damage from opening a container would be "unreasonable," the court concluded that "[t]he policy is valid under *Wells*." *Id.* "And," the court went on, "because the policy is valid, the search is valid too." *Id.*

Notably, neither the Warden nor the governing state court decision had suggested that the North Vernon policy gave the searching officer broad discretion to determine whether potential damage involved in opening a container would be "unreasonable." Nor had they suggested any reason that suppression would not have been required if Officer Kipper had opened the lockbox in violation of department procedure. To the contrary, the Warden disputed only whether Marling had shown "unreasonable potential damage" from using a screwdriver to open the lockbox—and conceded that, if that damage were predictable, the inventory policy would have been violated. App. 33a. The Seventh Circuit was able to conclude that it "d[id] not see a violation of the local policy" only because it construed the policy as giving the searching officer essentially unlimited discretion as to whether the potential damage from opening a container is "unreasonable." App. 6a.

b. On August 17, 2020, the court of appeals denied Marling's petition for rehearing. App. 60a–61a.

This petition follows.

REASONS FOR GRANTING THE PETITION

I. The courts of appeals are divided.

Because *Wells* concerned a search by officers whose department had no policy at all with respect to when closed containers could be opened, it left unanswered how a court should determine whether a policy sufficiently regulates officers' discretion to open containers during an inventory. In the thirty years since, a split has developed. Specifically, the circuits are divided 2–2 on the question whether an inventory policy sufficiently regulates the search of a closed container

found within an impounded vehicle if the policy does not forbid an officer from making a discretionary choice to open the container based on the prospect that it may contain incriminating evidence. There is no sign the split will resolve itself, and it can determine whether searches that are largely or entirely left to officer discretion—creating a high risk that they are undertaken to search for evidence—are nonetheless categorically sanctioned as permissible "inventory searches."

A. The Third and Fourth Circuits demand a policy that constrains a searching officer from choosing to open a container based on the prospect that evidence may be found.

The Third and Fourth Circuits have understood *Wells* to require not just any "inventory search" policy but a policy that constrains a searching officer from choosing to open a closed container based on a hunch that incriminating evidence may be found inside.

1. In *Bradley*, the Third Circuit held that, to assess the validity of an inventory search, it is not enough that there be *some* policy or procedure—knowing the substance of the policy, and whether it sufficiently limited officer discretion, is essential. 959 F.3d at 558. The court addressed an "inevitable discovery" argument—i.e., that "the police would have discovered … in an inventory search" cocaine that was inside a backpack in the trunk of a car driven by a man with a suspended license. *Id.* The Third Circuit determined that a court could not conclude as much just from evidence that, if the car had been impounded, "there would have been an inventory search consistent with standard procedures." *Id.* at 557–58. It explained that

a "final determination" on whether the cocaine would have been inevitably discovered during an inventory search could not be reached without knowing the department's "protocols for the conduct of an inventory search" and, specifically, its "protocols for … the scope of an officer's discretion during such a search." *Id.* at 558. In remanding to the district court to take further evidence, the Third Circuit explained that "[p]olice have discretion to inventory a closed container … but *only* where there is evidence of a policy or regulation *sufficiently limiting the scope of that discretion*." *Id.* (emphasis added).

Bradley reaffirmed a longstanding Third Circuit rule that "standardized criteria or routine[s]" that "curtail[] [the searching officer's] authority to embark on a generalized search for incidents of crime" are an essential feature of a valid inventory policy. *United States v. Mundy*, 621 F.3d 283, 291–92 (3d Cir. 2010) (citation omitted). In *Mundy*, the Third Circuit upheld a search of a closed container found in the trunk of an impounded vehicle. In holding that the policy at issue adequately regulated the officer's discretion, the Third Circuit looked to the limitations the policy set on the treatment of closed containers. *See id.* at 291. Although the policy required the officer to inventory "any … personal property of value left in the vehicle …[,] including the trunk area if accessible," it instructed that "[n]o locked areas, including the trunk area, will be forced open while conducting an inventory." *Id.* at 290. The Third Circuit acknowledged that a policy "may adequately regulate the opening of closed containers discovered during inventory searches without using the words 'closed container' [or by] predict[ing] every conceivable scenario an officer

may happen upon … and … provid[ing] a formulaic directive for each and every one." *Id.* But the policy must nonetheless have criteria that "curtail[] [the officer's] authority to embark on a generalized search for incidents of crime." *Id.* at 291–92.

In *United States v. Salmon*, 944 F.2d 1106 (3d Cir. 1991), *abrogated on other grounds by United States v. Caraballo-Rodriguez*, 726 F.3d 418 (3d Cir. 2013), the Third Circuit found that an inventory search policy was insufficient because the record lacked evidence of "criteria or established routine regarding the scope of an inventory search." *Id.* at 1121. If a policy does not "limit an officer's discretion regarding the *scope* of an inventory search, particularly with respect to the treatment of closed containers," then searching officers "ha[ve] impermissible discretion." *Id.* at 1120–21 (emphasis in original).

2. Consistent with the Third Circuit's scrutiny of inventory procedures for discretion-curtailing guardrails, the Fourth Circuit in *Matthews* stated that "[a] policy must provide officers [with] discretion *only to the extent necessary to effectuate the purposes of an inventory search*—namely, to 'protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger.'" 591 F.3d at 238 (quoting *Bertine*, 497 U.S. at 372) (emphasis added). In *Matthews*, the Fourth Circuit held that a department's inventory policy provided sufficiently "standardized criteria for the opening of [closed containers]" where examination of the policy showed that it *required* a searching officer to open any closed container in which "a valuable may be located." *Id.* at 236–38.

Although the policy gave officers "discretion to determine whether a valuable may be located within a container," it "sufficiently limit[ed] that discretion" in three ways: by requiring officers to (1) search particular areas of the car, (2) lock all valuables in the trunk (or otherwise secure them), and (3) complete and file an inventory form. *Id.* at 238. The substance of the policy, the Fourth Circuit reasoned, was thus consistent with the policy's stated purpose—to protect the owner's property while in police custody from "loss or theft"—and helped ensure that police did not have discretionary authority to open closed containers in search of evidence. *Id.* at 237–38; *see also, e.g.*, *United States v. Banks*, 482 F.3d 733, 739 (4th Cir. 2007) ("For such a policy to be valid, it must curtail the discretion of the searching officer.").

B. The Fifth and Seventh Circuits have held that the inventory search exception applies even when a policy would allow officers the option to open a container in search of evidence.

At odds with the Third and Fourth Circuits, the Fifth and Seventh Circuits hold that the presence of *some* policy is enough—even if it does not channel officers' discretion in opening closed containers (meaningfully or at all).

1. In *Como*, the Fifth Circuit held that a search conducted under a policy that gave officers unlimited discretion to open locked containers was presumptively valid. The "[d]epartment procedures" in *Como* "g[a]ve the officers discretion to decide … whether to search the locked trunk of the vehicle." 53 F.3d at 92. The defendant argued that this policy did not sufficiently regulate the search because it gave officers

"complete discretion to determine when and how to conduct [inventory] searches." *Id.* at 91. The Fifth Circuit rejected that argument, holding that this policy of complete discretion was permissible so long as "there is no showing of bad faith or [that the closed container was opened] for the sole purpose of investigation." *Id.* at 92.

2. The Seventh Circuit here joined the Fifth Circuit in holding that sufficient regulation was provided by a policy that (under the Seventh Circuit's interpretation) effectively granted officers unchecked discretion to open any closed or locked container. The Seventh Circuit held that the North Vernon policy was "valid under *Wells*" even though it set no limitations on how an officer should judge whether potential property damage is "unreasonable," and even though nothing in the written policy forbids officers from choosing to open containers based on the possibility that incriminating evidence may be inside. The policy does not, for example, state that the purpose of searches thereunder is to protect property rather than to obtain evidence. *See* App. 62a–72a. To the contrary, where the policy references removal of articles for safekeeping, it simultaneously references seizure of unlawful articles—including items such as stolen property and untaxed cigarettes—"for property storage as evidence." App. 69a. It is only natural that an officer acting under this policy would be far more inclined to deem property damage "reasonable" if a forcible opening might uncover evidence of a crime. Indeed, the officer here showed little interest in safekeeping, as he did not record valuable but non-incriminating items that he found. App. 160a–65a; ECF Doc. 23 at 65, *Marling v. Brown*, 964 F.3d 667 (7th Cir. 2020) (No. 19-3077)

(describing valuable items present in the vehicle that were not inventoried). Yet the Seventh Circuit expressed no reservation about the policy's failure to channel officer discretion to effectuate the purposes of an inventory search. Indeed, the panel's sweeping rationale was that a policy would be permissible even if it just said "exercise discretion." App. 5a.

Thus, unlike the Third and Fourth Circuits, the Fifth and Seventh Circuits do not require an inventory policy to constrain officers from choosing to open closed containers in search of evidence.

II. The Fifth and Seventh Circuits are wrong.

This Court has been clear: When officers conduct inventory searches, they cannot exercise "uncanalized discretion," lest an inventory serve as "a ruse for a general rummaging in order to discover incriminating evidence." *Wells*, 495 U.S. at 4. If an officer is "allowed [too] much latitude," it is too easy to pass off a search for evidence as an inventory. *Id.*

The approach of the Seventh Circuit here and the Fifth Circuit in *Como* misunderstands the Court's precedent, misapplies Fourth Amendment principles, and threatens the security and privacy of individuals' personal property by allowing officers free rein to single out individuals for intrusive vehicle searches—stem to stern, forcing open locked containers on the way—with no warrant, no probable cause, and nothing to limit the scope of the search.

A. Start with *Wells*. Although the Court stated in dicta that *some* discretion in the conduct of an inventory search is compatible with the Fourth Amendment (that is, a policy need not require that either "all containers" or "no containers" be opened), it emphasized

that officers' discretion cannot be unlimited. *Id.* The Court's dicta also explained what sort of discretion in a policy would be permissible: the "allowance of the exercise of judgment *based on concerns related to the purposes of an inventory search*," the Court stated, does not itself violate the Fourth Amendment. *Id.* (emphasis added). Here, the Seventh Circuit took that dicta and ran with it, supposing that the "principal holding" of *Wells* was "that discretion about inventory searches is compatible with the Fourth Amendment." App. 7a.

But a policy instructing only that officers "exercise discretion" in opening closed containers, App. 5a, is indistinguishable from the "uncanalized discretion" that the Court held the Fourth Amendment forbids. *Wells*, 495 U.S. at 4. So too is the policy at issue here, which directs the searching officer to decide whether or not to open closed or locked containers based on a judgment as to whether opening the container would involve "unreasonable" potential damage. Unreasonable, based on what considerations? The policy does not say. Nor did the Seventh Circuit. Inspection of the written policy shows that nothing in it channels the discretionary judgment whether potential damage would be "reasonable" or not such that the bases for the judgment are limited to the objectives of a true inventory search—protecting property in police custody, preventing claims of damage, loss, or theft, or ensuring officer safety. *See Bertine*, 479 U.S. at 367. Instead, the officer is free to decide that, for example, breaking the latch of a locked metal lockbox with a screwdriver is not "unreasonable" in view of the possibility that incriminating evidence may be found inside. This open-ended discretion is a far cry from the limited, objective

judgments approved in *Wells*. *See Wells*, 495 U.S. at 4 (stating in dicta that a policy of "opening … closed containers whose contents officers determine they are unable to ascertain from examining the containers' exteriors" could be valid).

Consider the facts of *Wells* side by side with the facts in this case. In *Wells*, the car was also impounded after a driver was arrested during a traffic stop. *Id.* at 2. Officers also conducted an "inventory search" of the car, albeit without making a complete list of the property inside. *Id.* at 5–6 (Brennan, J., concurring); *supra* pp. 15–16. The search turned up, among other items, a locked container (in *Wells*, a locked suitcase; here, a locked lockbox). 495 U.S. at 2. At that point, an officer made the choice to "force[] open" the locked container. *Id.* In *Wells*, it took officers "[s]ome ten minutes" to "pry open the suitcase with a knife." *State v. Wells*, 539 So. 2d at 466. Here, there is no telling how long Officer Kipper spent taking the "extreme measure[]" of prying open the latch with a screwdriver. App 22a. But in neither case did a standard policy "regulate the opening of [that] container[]" in any meaningful way, given that the North Vernon policy—as interpreted by the Seventh Circuit—leaves the question whether potential damage is "reasonable" entirely to the officer's discretion. *Wells*, 495 U.S. at 4; App. 6a. On that interpretation, the existence of the North Vernon policy is a distinction without a difference from *Wells*. Yet—because of that policy—the court found that Marling had no meritorious argument for suppressing the fruit of this dubious "inventory search." App. 6a–7a.

B. Requiring that officers' discretion to open containers encountered in the course of an inventory search be cabined also accords with broader Fourth

Amendment principles. This Court has long recognized the "'grave danger' of abuse of discretion" by law enforcement officers. *Delaware v. Prouse*, 440 U.S. 648, 662 (1979) (citation omitted). Unlimited discretion in making vehicle stops, the Court has said, "would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches." *Id.* at 661 (quoting *Terry v. Ohio*, 392 U.S. 1, 22 (1968)). And "unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed." *Id.*; *see also United States v. Ortiz*, 422 U.S. 891, 896 (1975) (finding officers' "substantial degree of discretion in deciding which cars to search" at a highway checkpoint "not consistent with the Fourth Amendment").

In particular, the Court has described "unbridled discretion to rummage at will among a person's private effects" as the "central concern underlying the Fourth Amendment." *Arizona v. Gant*, 556 U.S. 332, 345 (2009). In *Gant*, the Court curbed the "search incident to arrest" exception to the warrant requirement from expanding to the search of the arrestee's vehicle. *Id.* at 335. The same principle should apply equally in the "inventory search" context, particularly given that inventory searches of vehicles often follow a driver's arrest, providing a tempting means of circumventing the limitation imposed in *Gant*.

C. Finally, the Fifth and Seventh Circuits' acceptance of inventory policies that give unbridled discretion in opening containers would allow police departments to evade the Fourth Amendment rule that "warrantless searches are typically unreasonable

where 'a search is undertaken by law enforcement officials to discover evidence of criminal wrongdoing.'" *Carpenter*, 138 S. Ct. at 2221 (quoting *Vernonia*, 515 U.S. at 652–53).

In *Bertine*, the Court made clear that, so long as police are "following standardized [caretaking] procedures," they can open closed containers inside an impounded car, without any requirement that the individual's interests be weighed against the government's interests. 479 U.S. at 372–74. This categorical treatment of "inventory searches" as exempt from any probable cause or warrant requirement makes it crucial for courts to refrain from endorsing "standardized procedures" that allow the government to pass off searches for evidence as "inventories."

What's more, an inventory search does not happen in a vacuum. To the contrary, it is often the product of a series of highly discretionary judgments. An officer has discretion to conduct a traffic stop whenever probable cause exists to believe a traffic violation has occurred, regardless of his subjective motivation. *Whren v. United States*, 517 U.S. 806, 813 (1996). The officer then has discretion to arrest the driver, even if the violation is not punishable by a jail term. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). And then, if department policy allows, the officer may engage in a thorough search of the vehicle and its contents. *Bertine*, 479 U.S. at 375. At each stage, the officer may be acting on an "inarticulate hunch[]," *Prouse*, 440 U.S. at 661, that incriminating evidence may be found within the car. Yet the Fifth and Seventh Circuits would allow such officers to force open locked containers inside the car, even if department policy left that decision entirely to the officer's discretion.

As the facts of this case illustrate, there will be no check on the pernicious overbreadth of the "inventory search" exception if courts do not scrutinize the *substance* of a policy's treatment of closed containers. Such scrutiny is necessary to determine whether the policy actually curtails officers' discretion to search for evidence by limiting their judgments to "standard criteria and on the basis of something other than suspicion of [incriminating] evidence." *Bertine*, 479 U.S. at 375.

* * *

The Court's inventory search precedent, the fundamental Fourth Amendment principle that unfettered police discretion must be avoided, and the practical consequences for the security and privacy of personal property all point to the same conclusion: The Third and Fourth Circuits have it right, and the Fifth and Seventh Circuits have it wrong. Courts must ensure that officers, under cover of a department policy, do not have free rein to single out individuals for intrusive vehicle searches without a warrant, probable cause, or any safeguard against their rummaging for incriminating evidence.

III. The question presented is important.

Police officers make tens of thousands of traffic stops across the nation every single day. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report: Contacts Between Police and the Public, 2015, at App'x Tbl. 1 (Oct. 2018) (estimating over 19 million traffic stops per year, or over 50,000 traffic stops each day). Any stop could result in an impounded vehicle and an inventory search. *See supra* pp. 31–32. Vehicles regularly enter police custody in other ways too,

such as when a car is found abandoned, when a car is involved in an accident and the driver hospitalized, when a stolen car is recovered and cannot promptly be returned, or when a vehicle is seized as evidence of a crime or pursuant to a forfeiture statute. *See* App. 63a–67a. When an inventory search is challenged through a suppression motion, it is important that courts across the country follow a consistent rule for determining whether the "inventory search" exception applies to those searches.

Without the Court's intervention, there will be ongoing disparities. Similar searches conducted pursuant to similar policies will be held constitutional in some circuits and unconstitutional in others. These disparities matter because they set the course of many criminal cases and because the Constitution should protect the privacy and security of individuals' personal possessions to the same degree, regardless of jurisdiction.

Police departments also need guidance. The present doctrinal uncertainty means that some departments may programmatically conduct inventory searches under policies that do not sufficiently regulate officers' discretion in opening closed containers. Those searches wrongly intrude on the privacy and security of personal property, whether or not incriminating evidence is found. Guidance from this Court will protect the rights of individuals while clarifying the extent to which departments must constrain how their officers conduct inventory searches.

IV. This case is an excellent vehicle.

This case is an excellent vehicle for resolving the question presented. The crux of the court of appeals'

decision to reverse the district court's grant of Marling's habeas petition was its determination that "because the policy [wa]s valid, the search [wa]s valid too," leaving Marling's counsel without a meritorious suppression argument. App. 6a. And in determining that the North Vernon inventory policy was "valid," the Seventh Circuit asked only whether it included "*some* policy" as to the treatment of containers, without considering whether the policy constrained officers from choosing to open a container based on the prospect that evidence might be inside. App. 5a.

Under the Third and Fourth Circuits' rule, however, the inventory policy would be "valid under *Wells*" only if it "curtailed [the officer's] authority to embark on a generalized search for incidents of crime." *Mundy*, 621 F.3d at 291–92. Far from curtailing officers' authority, the North Vernon policy *enables* officers to open locked containers in search of evidence (damaging property in the process) because, under the Seventh Circuit's interpretation, the decision whether potential harm to property is "reasonable" is left, without further instruction, in the hands of the searching officer. Thus, if this Court agrees with the rule in the Third and Fourth Circuits, then the half-gram of cocaine recovered from inside the lockbox—the basis for 33 years of Mr. Marling's 38-year sentence—was unconstitutionally obtained.

If this Court reverses and remands, the Seventh Circuit may then decide the merits of Marling's claim for habeas relief based on his trial counsel's unconstitutionally deficient performance, which the district court found meritorious, without treating a highly discretionary policy as a shield against *any* scrutiny of the underlying (and suspect) search. In all likelihood,

if the Seventh Circuit could not lean on the inventory policy, as it did in dismissing out of hand the suppression argument that Mr. Marling's counsel failed to make, it would affirm the district court's decision granting the habeas petition.

The fact that this case is a habeas proceeding under 28 U.S.C. § 2254 presents no obstacle to the Court's review. As the district court determined and the court of appeals did not dispute, the state court's denial of Marling's claim was based on an unreasonable determination of fact under § 2254(d)(2). The Seventh Circuit's decision here therefore was based on the conclusion that, under *de novo* review of the merits, Marling was not "in custody in violation of the Constitution or laws or treaties of the United States." App. 2a (quoting 28 U.S.C. § 2254(a)). The Court need only review the Seventh Circuit's *de novo* determination that the North Vernon inventory policy "is valid under *Wells*," App. 6a, and leave the ultimate determination on Marling's habeas claim to be resolved by the Seventh Circuit on remand.

* * *

The question presented is ripe for review, and this case is an excellent vehicle. Lower courts need this Court's guidance, and the Fourth Amendment should apply no differently to inventory searches in Indiana or Texas than it does in Pennsylvania or Virginia.

CONCLUSION

The Court should grant the petition for writ of certiorari.

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