No. 22-_____

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IN THE

SUPREME COURT OF THE UNITED STATES

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HEATHER NICOLE TROGDON, *Petitioner*,

v.

UNITED STATES OF AMERICA, *Respondent*.

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On Petition for Writ of Certiorari to
the Eighth Circuit Court of Appeals

# PETITION FOR WRIT OF CERTIORARI

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## QUESTION PRESENTED

Does the inevitable discovery doctrine apply when it is based on the expectation that an inventory search of an arrestee's backpack will occur at the county jail when the Government fails to produce any evidence of the existence of a standardized inventory policy at the jail?

## LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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CONSTITUTIONAL PROVISIONS

## PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

## OPINIONS BELOW

The panel decision of the court of appeals appears at Appendix A, page 1a to the petition and is unpublished, *United States v. Trogdon*, 2022 U.S. App. LEXIS 15860, 2022 WL 2093858 (8th Cir. June 9, 2022).

The denial of rehearing and rehearing en banc appears at Appendix B, page 6a and is unpublished.

The district court's order on suppression motion appears at Appendix C, page 8a and is unpublished.

## JURISDICTION

The panel of the Eighth Circuit Court of Appeals entered judgment on June 9, 2022.

The court of appeals denied a timely petition for rehearing and rehearing en banc on July 15, 2022.

This Court has jurisdiction under 28 U.S.C. section 1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

**Fourth Amendment to the United States Constitution:**

> 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.

**18 U.S.C. § 922(g):**

It shall be unlawful for any person—

> **(1)** who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year;

to ship or transport in interstate or foreign commerce, or possess in or affecting commerce, any firearm or ammunition; or to receive any firearm or ammunition which has been shipped or transported in interstate or foreign commerce.

**18 U.S.C. § 924(2)**

Whoever knowingly violates subsection . . . (g) . . . of section 922 shall be fined as provided in this title, imprisoned not more than 10 years, or both.

## STATEMENT OF THE CASE

### A. Material Facts

Police officers Steven Young and Jessamyn McVey responded to a report of shoplifting at Mills Fleet Farm in Ankeny, Iowa. Pet. App. 3a. Officer Young called out to the suspect (later identified as Heather Trogdon) when he saw her in the parking lot. Pet. App. 3a. Trogdon set down the backpack she had been carrying and approached him. Pet. App. 3a. Officer McVey patted her down, while Young retrieved the backpack. Pet. App. 3a. The officers then escorted her to the store's loss prevention office. Pet. App. 3a.

Officer Young set the backpack on the office floor, near his feet. Pet. App. 3a. Trogdon acknowledged that she had carried a jacket out of the store and claimed that she merely had forgotten to pay for it. Pet. App. 3a. She also was wearing a stolen belt. Pet. App. 3a. Trogdon told Officer Young that her name was Stormy Breece. Pet. App. 3a. She said that there was nothing illegal in the backpack and did not

consent to its search. Dispatch reported to Officer Young that Stormy Breece was not a valid name. Pet. App. 3a.

Officer Young picked up the backpack, placed it on the desk, and began searching it. Pet. App. 3a. He discovered a loaded handgun in the main compartment. Officer Young then handcuffed Trogdon and disabled the firearm. Pet. App. 3a. He later found her driver's license, which identified her as Heather Trogdon, and learned that there was a warrant for her arrest. Pet. App. 3a. Trogdon's backpack was not transported to the jail. Pet. App. 3a. The officers released the backpack to her boyfriend. Pet. App. 3a.

**B. Proceedings Below.**

On June 27, 2020, a grand jury in the Southern District of Iowa returned a one-count indictment charging Trogdon with possessing a firearm as a felon of 18 U.S.C. sections 922(g)(1) and 924(a)(2). (R. Doc. #2). Trogdon filed a motion to suppress challenging the warrantless search of her backpack. (R. Docs. #30, #35). On November 2, 2020, the district court held an evidentiary hearing at which Officer Young testified, and the parties provided argument. Pet. App. 11a. On December 4, 2020, the court entered an order denying Trogdon's motion to suppress based on backpack search. Pet. App. 19a. Citing Eighth Circuit precedent, the district court ruled that the warrantless search was allowed under the search-incident-to-arrest exception. Pet. App. 15a-18a (citing *United States v. Perdoma*, 621 F.3d 745 (8th Cir. 2010)).

Trogdon entered a conditional guilty plea to being a felon in possession of a firearm. Pet. App. 2a. On June 9, 2022, the court of appeals affirmed Trogdon's conviction. Pet. App. 2a-5a. Invoking the inevitable-discovery doctrine, the court of appeals found that "the handgun inevitably would have been discovered during a lawful inventory search" at the jail. Pet. App. 4a.

## REASONS FOR GRANTING THE WRIT

### I. The Eighth Circuit's application of the inevitable discovery doctrine premised on a future inventory search once at jail is manifestly incorrect absent evidence of an established policy

The Fourth Amendment to the United States Constitution protects persons against "unreasonable" searches and seizures. U.S. Const. amend IV. A warrantless search is per se unreasonable under the Fourth Amendment unless it falls within one of the well-delineated exceptions to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967). One such exception, the inevitable discovery doctrine, "allows for the admission of evidence that would have been discovered even without the unconstitutional source." *Utah v. Strieff*, 579 U.S. 232, 238 (2016). For the inevitable discovery doctrine to apply, the Government must "establish by a preponderance of the evidence that the information ultimately or inevitably would have been discovered by lawful means." *Nix v. Williams*, 467 U.S. 432, 444 (1984). The Government may not fulfill this burden by mere "speculative elements," but must instead rely on "demonstrated historical facts capable of ready verification or impeachment." *Id.* at 444 n.5.

The court of appeal's invocation of the inevitable discovery rule flows from its view that Trogdon's backpack would have been the subject of an inventory search at

the jail following her arrest. To be sure, "it is not 'unreasonable' for police, as part of the routine procedure incident to incarcerating an arrested person, to search any container or article in his possession, *in accordance with established inventory procedures*." *Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) (emphasis added). But, where a law enforcement agency "ha[s] no policy whatever with respect to the opening of closed containers encountered during an inventory search," the search is "not sufficiently regulated to satisfy the Fourth Amendment." *Florida v. Wells*, 495 U.S. 1, 4-5 (1990). The requirement of standardized procedures serves to remove the inference that the police have used inventory searches as "a purposeful and general means of discovering evidence of crime." *Colorado v. Bertine*, 479 U.S. 367, 376 (1987)(Blackmun, J., concurring). The requirement that standardized criteria or established routine exist as a precondition to a valid inventory search "is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." *Wells*, 495 U.S. at 4. "Stated another way, the police may not raise the inventory-search banner in an after-the-fact attempt to justify what was, as in the present case, in fact purely and simply a search for incriminating evidence." *United States v. Marshall*, 986 F.2d 1171, 1175 (8th Cir. 1993).

The Eighth Circuit's reliance on the inevitable discovery doctrine necessarily hinges on whether the hypothetical inventory search would have constituted a valid inventory search. And, the Government bears the burden to produce evidence that inventory procedures were in place and that law enforcement complied with those

procedures. *Mincy v. Arizona*, 437 U.S. 385, 390 (1978). Here, the Government presented no evidence that the police department or county jail maintained a standard procedure related to inventory searches of inmate property – let alone that it would have been followed. The only evidence that comes close is Officer Young's wholly unsupported assertion that "the jail would have searched [Trodgon's personal belongings] at the jail." (11/02/20 Suppression Hr'g Tr. at 16-17). Absent such evidence, the Government failed to demonstrate that the inventory search exception applies.

Moreover, warrantless inventory searches are not allowed if done "in order to investigate suspected criminal activity." *Bertine*, 479 U.S. at 376. At the suppression hearing, Officer Young testified that he searched Trogdon's backpack to look for evidence related to the alleged theft:

> Q. Why didn't you *Mirandize* the defendant when you first brought her into the loss prevention office?
> A. When we first got her in the loss prevention office, *my main focus was to search the bag to find evidence*, property of Mills Fleet Farm, and meanwhile the defendant continued to talk. The defendant was very talkative at that point, and that kind of delayed things, so that's why we didn't have a chance to *Mirandize* her right away.
>
> * * *
>
> Q. Officer Young, I want to pick up on one of the last questions you answered. Did I understand your testimony right that when you got into the loss prevention office, your priority was to search the bag?
> A. Yes. We wanted to search the backpack to find property that belonged to Mills Fleet Farm.
>
> Q. Okay. So is it fair to say that when you were walking back to the loss prevention office, it was your intent to search the bag when you got there?

MS. BENSON TUBBS: Objection, Your Honor. Relevance.
THE COURT: Overruled. He can answer.

A. Part of the objection -- or part of the objective, yes.

(11/02/20 Suppression Hr'g Tr. at 16-17)(emphasis added). Because the record contains no evidence of an inventory policy that would have been followed at the jail and because Officer Young's search was motivating by his intent to gather evidence, the inevitable discovery doctrine premised on a future inventory search cannot not apply.

## II. The Eighth Circuit's decision squarely conflicts with this Court's decision in *Florida v. Wells* along with decisions from several other courts

The Eighth Circuit's finding that an inventory search was inevitable without proof of a jail policy that allowed a search into an arrestee's backpack cannot be squared with this Court's decision in *Florida v. Wells*. There, officers stopped the defendant for speeding and subsequently arrested him for driving while intoxicated. *Wells*, 495 U.S. at 2. During an inventory search of the vehicle, officers discovered two marijuana cigarette butts in the ashtray along with a locked suitcase in the trunk. *Id.* The officers opened the suitcase and found a large amount of marijuana. *Id.* This Court held that the drugs should be suppressed because, unlike in *Bertine*, there was no evidence in the record of any inventory policy allowing officers to look into or open closed containers. *Id.* at 4-5; *see also People v. Williams*, 973 P.2d 52, 65 (Cal. 1999) ("This rule may require the prosecution to prove more than the existence of some general policy authorizing inventory searches; when relevant, the prosecution must also prove a policy or practice governing the opening of closed containers

encountered during an inventory search"); *State v. Hathman*, 604 N.E.2d 743, 746 (Ohio 1992) ("some articulated policy must also exist which regulates the opening of containers found during the authorized inventory search").

At least two state courts of appeals have refused to apply the inevitable discovery doctrine when the proffered inventory search was not supported with proof of an established policy. For example, in *Briscoe v. State*, 30 A.3d 870 (Md. 2011), the defendant sought to suppress a handgun found in the locked glove compartment following a search of his vehicle following his arrest. *Id.* at 389. The Maryland Court of Appeals refused to allow the purported inventory search because the "lack of evidence in the record of a Baltimore City Police Department policy concerning the opening of locked containers." *Id.* at 399. Taking it a step further, the court also rejected the state's reliance on the inevitable discovery rule because "the record before us is devoid of evidence demonstrating that the vehicle's locked glove compartment would have been inventoried according to departmental policy, once it was towed to the impound lot." *Id.* at 400. "Without such evidence in the record," the court was "unable to conclude that the handgun would have been discovered inevitably, in a later inventory search of the locked glove compartment." *Id.*; *citing United States v. Mendez*, 315 F.3d 132, 137-38 (2d Cir. 2022) (explaining that for the inevitable discovery doctrine to apply to inventory searches, the government must prove: "(1) that the police had legitimate custody of the vehicle . . . so that an inventory search would have been justified; (2) that when the police in the police agency in question conducted the inventory searches, they did so pursuant to 'established' or

'standardized' procedures; and (3) that those inventory procedures would have 'inevitably' led to the 'discovery' of the challenged evidence").

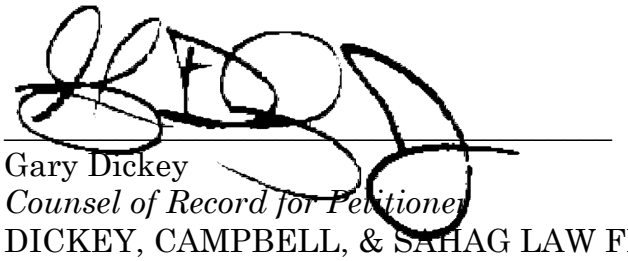
The decision in *State v. Baker*, 395 P.2d 422 (Kan. 2017), is even more on point. In *Baker*, the defendant dropped a backpack he was carrying when police officers approached to arrest him on an outstanding warrant. *Id.* at 424. An officer searched the backpack at the scene and discovered needles inside a video game case. *Id.* at 425. He searched the backpack again in an evidence room and found a bag of methamphetamines inside a cell phone carrier. *Id.* The Kansas Supreme Court refused to find that the contraband would have been inevitably discovered through a valid inventory of the defendant's backpack because the state failed "to present any evidence of standardized criteria or an established routine governing the opening of closed containers during inventory searches. *Id.* at 592-94. The officers' testimony at the suppression hearing that "a small bag or backpack would have been 'searched' or 'inventoried' at the arresting agency or jail—and nothing more" was not sufficient to support application of the inevitable discovery doctrine. *Id.* at 592. As the court explained, "producing *no* evidence of a policy with respect to the opening of container—as occurred here—does not pass constitutional muster." *Id.* at 594 (citing *Wells*, 495 U.S. at 4-5).

What was true in *Wells*, *Briscoe*, and *Baker*, is also true for Trogdon. The Government's failure to produce any evidence concerning the Polk County Jail's inventory policy is "fatal to [its] inevitable discovery claim." *Baker*, 395 P.2d at 593. An unsupported assertion that the jail would have searched Trogdon's personal

belongings at the jail is not sufficient. *Id.* at 592-93. Accordingly, the Eighth Circuit's opinion below is in direct conflict with clearly established principles set forth in *Wells* and its progeny. For this reason, further review is urgently required.

## CONCLUSION

For the foregoing reasons, petitioner Heather Trogdon respectfully requests that the Petition for a Writ of Certiorari be granted, the judgment of the Eighth Circuit Court of Appeals vacated, and the case be remanded to the district court.



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## RULE 33.2(b) CERTIFICATE OF COMPLIANCE

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As required by Supreme Court Rule 33.2(b), I, Gary Dickey, certify that the Petition for Writ of Certiorari in the foregoing case contains 10 pages.

Executed on October 13, 2022.

I declare under penalty of perjury that the foregoing is true and correct.