NO. _____

In the

Supreme Court of the United States

RE'SHAUN LAMONTE WILBORNE,

***Petitioner*,**

v.

UNITED STATES OF AMERICA,

***Respondent*.**

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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I. QUESTION PRESENTED FOR REVIEW

The police violated the Fourth Amendment when they searched Wilborne's backpack and recovered a firearm that formed the basis of the indictment filed against him. Nevertheless, the district court denied Wilborne's motion to suppress the firearm, holding that the police would have inevitably discovered it during an inventory search either at the police station or the local jail when Wilborne was transported there. No written inventory search policy was produced, leaving the Government to rely on a police officer witness whose testimony was vague, patchy, and clear only in that he was certain he was entitled to search "[a]ll the property that is taken – taken with the person" when that person is arrested. The issue in this Petition is whether the inventory search doctrine can be invoked on such slight evidence.

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- *United States v. Wilborne*, Appeal No. 22-4452, U.S. Court of Appeals for the Fourth Circuit. Judgment entered on November 7, 2023.

V. OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit affirming Wilborne's conviction is unpublished and is attached to this Petition as Appendix A. The district court's written order denying Wilborne's motion to suppress is attached to this Petition as Appendix B. The judgment order is unpublished and is attached to this Petition as Exhibit C.

VI. JURISDICTION

This Petition seeks review of a judgment of the United States Court of Appeals for the Fourth Circuit entered on November 7, 2023. No petition for rehearing was filed. This Petition is filed within 90 days of the date the court's entry of its judgment. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 and Rules 13.1 and 13.3 of this Court.

VII. STATUTES AND REGULATIONS INVOLVED

The issue in this Petition requires interpretation and application of the Fourth Amendment to the United States Constitution, which provides, in pertinent part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .

VIII. STATEMENT OF THE CASE

A. Federal Jurisdiction

On July 21, 2021, a criminal complaint was filed in the Southern District of West Virginia charging Re'Shaun Lamonte Wilborne with possession of a firearm after sustaining a felony conviction, in violation of 18 U.S.C. §§ 922(g)(1) and 924(a)(2). JA007-010.[1] An indictment returned on September 22, 2021, charged the same offense. JA011-013. Because that charge constitutes an offense against the United States, the district court had original jurisdiction pursuant to 18 U.S.C. § 3231. This is an appeal from the final judgment and sentence imposed after Wilborne pleaded guilty to the indictment. JA180-182. A judgment order was entered on August 4, 2022. JA183-190. Wilborne timely filed a notice of appeal on August 12, 2022. JA191. The United States Court of Appeals for the Fourth Circuit had jurisdiction pursuant to 18 U.S.C. § 3742 and 28 U.S.C. § 1291.

B. Facts Pertinent to the Issue Presented

This case arises from Wilborne's arrest on an outstanding warrant at a Family Dollar store. Officers making the arrest eventually took custody of Wilborne's possessions, which had been left inside the store, and discovered a firearm in a black backpack. The issue in this Petition is whether the district court should have granted

[1] "JA" refers to the Joint Appendix filed in this appeal before the Fourth Circuit.

Wilborne's motion to suppress that firearm because the police violated his Fourth Amendment rights when they searched his backpack.

1. Officers arrest Wilborne and recover a firearm from his backpack.

On July 20, 2021, Wilborne walked into a Family Dollar in Charleston, West Virginia, with three bags. Two of them he deposited by the front door. The other, a black backpack, was stored behind the store counter. After purchasing some items, Wilborne retrieved the backpack and placed it with the others by the front door. JA163. At that point, police officers who had noticed Wilborne go into the store and confirmed that he was the subject of an active arrest warrant went inside and arrested him. JA163-164.

Officers took Wilborne outside and handcuffed him, but did not retrieve any of his belongings. The store clerk came out later and asked the officers to take Wilborne's bags. One officer collected the bags – a clear trash bag, a white tote bag, and the backpack – then "placed the backpack on the hood of the police car and searched it in front of Mr. Wilborne, asking him about the contents. The search produced a gun." JA164.

As a result of the search, Wilborne was charged, first by criminal complaint and then by indictment, with being a felon in possession of a firearm. JA007-013.

2. Wilborne moves to suppress the firearm.

Wilborne filed a motion to suppress the firearm, arguing that the search of his backpack violated the Fourth Amendment. JA014-017. Specifically, he argued that the search was not a proper search incident to a lawful arrest, given that he was

handcuffed and not in possession of the backpack when it was seized and searched. JA015-017. In response, the Government focused on another exception to the warrant requirement, the inventory search exception, to justify the seizure of the gun. JA018-025. The Government argued that the search outside the Family Dollar was a lawful inventory search and, in the alternative, that the gun inevitably would have been discovered by an inventory search done either when Wilborne was booked at the police station or at the regional jail where he was taken. JA022-024.

A hearing on Wilborne's motion to suppress was held on November 15, 2021. JA034-128. At the hearing the Government presented testimony from one witness, Charleston Police Department ("CPD") Detective Jordan Hilbert. JA038-101. Hilbert was one of the officers involved in Wilborne's arrest, but was not the one who searched the backpack. JA047-048. Hilbert testified that when someone is arrested by CPD "personal effects are transported to the station with the arrestee." JA164. Once there, an officer will perform various booking procedures, including "fill[ing] out property and evidence receipts, and inventory[ing] any items transported with the person." JA164-165. Arrestees are then "allowed to bring personal items with them to the jail," but "those items must be searched first." JA165.

Hilbert "conceded that the CPD does not have a detailed, written inventory search procedure." JA165. However, he testified that "every time an arrestee is processed by CPD, the arresting officer categorizes the arrestee's personal effects as either property, which can go with the arrestee to the jail, or evidence, which must remain in the station." JA168. He also "conceded that there is no policy dictating

which items are seized as an arrestee's personal effects and that had an appropriate third party been with Mr. Wilborne, he would have released Mr. Wilborne's personal items to that person." JA165.

Hilbert also testified that Wilborne's backpack was searched in preparation for his transportation to the police station, "looking for any weapons, anything potentially harmful to officers while transporting it." JA049. However, he also admitted that Wilborne was not transported with the bags (he was taken by a "transport officer" who arrived on the scene later) and that only the backpack, not the other two bags, was searched at the scene. JA052, JA064, JA091.

When asked about the "routine practice" regarding inventory searches, Hilbert testified that it "just depends on the time line." JA055. Asked specifically if he was "aware of what section in the CPD policy and procedures manual addresses booking procedures or booking searches?" Hilbert answered that he was not. JA057. On cross examination, when defense counsel stated she was "trying to figure out what the policy is of the Charleston Police Department," he answered, "I'm not sure what that policy states." JA077. After his recollection was refreshed, Hilbert remembered a section of the manual that addressed ways that the "custodial search of the arrestee's personal effects may be justified." JA057, JA138.[2] He could not recall any other policies on booking or inventory searches. JA068. When asked by the district court if the section he was shown only addressed vehicle searches, Hilbert answered, "I'm not

[2] The Charleston Police Department manual was not entered into evidence, but it was quoted by both the Government and Wilborne in post-hearing filings. JA138, 148.

sure." JA083. Nonetheless, Hilbert was certain that he was entitled to search "[a]ll the property that is taken – taken with the person" when that person is arrested. JA066.

Hilbert testified that, as the arresting officer, he was responsible for making sure Wilborne and his possessions had been searched before going to the jail, but admitted that he could not recall whether any of Wilborne's personal items were actually taken to the jail. JA060. He later testified that, according to the paperwork he filled out at the station, "I put on there for his mother could [sic] retrieve them." JA072. He clarified that referred to Wilborn's clothing, not the black backpack, explaining that the backpack was retained because it had "evidentiary value." *Ibid*. Finally, he admitted that "something that is seized along with an arrestee does not necessarily go with them" to the jail. *Ibid*.

Hilbert initially testified that he would not have released Wilborne's personal property to another person at the scene of the arrest. When asked if that was "Charleston Police Department policy?" he answered that "[f]or this incident I would have not" and agreed that it "depends on the incident." JA069. Asked what would have happened if Wilborn's mother had arrived at the scene of arrest, he explained that he would have given her Wilborne's clothing, but not the backpack because "it had already been inventoried." JA069-70. When asked what he would have done had the officers not already searched the backpack he testified "I'm not sure." JA070. Although he agreed that the officers "zeroed in on the backpack among all the other

possessions" he was "not sure" why, deferring to the officer who actually searched the backpack. JA071.

3. The district court denies Wilborne's motion to suppress the firearm.

The district court denied Wilborne's motion to suppress in a written order. JA163-168. The district court wrote that "as an initial matter, I must decide whether the officers properly seized the bags that Mr. Wilborne carried into the store with him," concluding "I find that they did." JA167. This was due to "the fact that the store clerk declined to take custody of the bags and identified them as Mr. Wilborne's, making it "reasonable for the officers to secure the bags to both protect Mr. Wilborne's property and to keep any potential contraband out of the hands of the public." *Ibid*. However, the search of the backpack "was not a proper search incident to arrest" because the backpack was not within Wilborne's control when searched and he was "restrained." *Ibid*. "Nor does the search fall immediately into the inventory search exception," the district court continued, because the "officers here made no effort to inventory the items in the bag, nor does the CPD have a policy of searching all bags before transporting them." *Ibid*. Therefore, "I must decide whether the inevitable discovery doctrine applies." *Ibid*.

The district court found that it did. JA167. The district court credited Hilbert's testimony that "every time an arrestee is processed by CPD, the arresting officer categorizes the effects as either property, which can go with the arrestee to the jail, or evidence, which must remain in the station" and that any item "that goes with the arrestee to the jail must be searched before it is allowed into the jail." JA168.

Therefore, the district court found, Wilborne's "backpack would have been searched and inventoried when his arrest was processed pursuant to CPD's standard procedure." *Ibid*. The district court also found that "such an inventory search would have been a reasonable administrative step to avoid sending contraband into the jail and avoid accusations of theft." *Ibid*.

Following the denial of Wilmore's motion to suppress, he entered into a conditional plea agreement with the Government. JA169-178. Wilmore agreed to plead guilty to the indictment, while maintaining his right to appeal the denial of his motion to suppress. JA173. The district court sentenced Wilmore to 37 months in prison, to be followed by a three-year term of supervised release. JA184-185.

4. The Fourth Circuit affirms Wilborne's conviction.

Wilborne appealed to the Fourth Circuit, challenging the district court's conclusion that the backpack would have inevitably been searched either at the police station or local jail following Wilborne's arrest. In an unpublished decision, the Fourth Circuit affirmed the denial of Wilborne's motion to suppress. *United States v. Wilborne*, 2023 WL 7319448 (4th Cir. 2023). The court concluded that the district court's finding that the backpack would have been searched at the police station was "clearly supported" by Hilbert's testimony, which was "without contradiction elsewhere in the record." *Id*. at *2. Thus, "even if the CPD had not searched Wilborne's backpack at the scene of his arrest, they still would have transported Wilborne and his personal effects to the police station" where it would have been

searched. *Ibid*. The court did not address whether the backpack would have also been inevitably searched when Wilborne was taken to the local jail.

IX. REASON FOR GRANTING THE WRIT

The writ should be granted to determine whether the inevitable discovery doctrine should apply when the only evidence that an arrestee's backpack would be inventory searched was testimony of a police officer that was vague, patchy, and only made clear that he believed he was entitled to search "[a]ll the property that is taken – taken with the person" when that person is arrested.

Performing an inevitable discovery analysis is akin to writing an alternate history story – by definition, you are dealing with things that might have, but did not, actually happen. Rather than asking "what if the Confederacy had won the Civil War?"[3] or "what if a Jewish state had been established in Alaska rather than the Middle East?"[4] the question is "what if the police had not violated the defendant's Fourth Amendment rights? Would they have then discovered the evidence in question in some other legitimate way?" The danger in such analysis is letting it be clouded by the fact that the evidence in question ***was actually found*** and, thus, concluding it was likely it would have been found via alternate, legitimate, means. Courts must not succumb to the fatalism that because the police found the evidence in the first place they would have inevitably found it anyway. *See Byars v. United States*, 273 U.S. 28, 29 (1927)(a search conducted "in violation of the Constitution is not made lawful by what it brings to light").

[3] Harry Turtledove, *How Few Remain* (1997).
[4] Michael Chabon, *The Yiddish Policemen's Union* (2007).

In this case the only evidence the Government presented to support a conclusion that Wilborne's backpack would inevitably have been searched was the testimony of Hilbert, one of the officers who arrested Wilborne. Hilbert could not identify any written policy for performing inventory searches. When asked to define various features of standard practice, Hilbert could not do so – testifying "I don't recall" or "I don't know" or that he was "not sure" about something more than a dozen times. JA059, JA060, JA063, JA064, JA067, JA068, JA069, JA070, JA071, JA077, JA088, JA090. As to a potential search when Wilborne arrived at the jail, Hilbert could only provide general testimony that the possessions of new inmates brought to the jail are searched, but could not elaborate on how such searches might be done. At any rate, Hilbert conceded that a person's possessions are not necessarily taken to the jail with him after arrest (and in this case they were not), so there was insufficient evidence that there would have been any search in the first place. At bottom, Hilbert's testimony suggests that what policies that did exist were vague and flexible, in order to allow officers to search what they wanted to search without regard to probable cause. Whether such slight evidence of meaningful standards for performing an inventory search, based on vague, inconsistent testimony, is sufficient to support applying the inevitable discovery doctrine is an important question of federal law that this Court should resolve. *See* Rules of the Supreme Court 10(c).

A. Wilborne's Fourth Amendment rights were violated because the search of his backpack was done without a warrant or probable cause and not pursuant to any exception to those requirements.

The Constitution protects the rights of citizens "to be secure in their persons,

houses, papers, and effects, against unreasonable searches and seizures." U.S. Const. amend. IV. The touchstone of the Fourth Amendment is reasonableness and when "law enforcement officials are searching for evidence of a crime, reasonableness requires probable cause and a warrant unless one of the exceptions to the warrant requirement applies." *Doe v. Broderick*, 225 F.3d 440, 451 (4th Cir. 2000); *see also United States v. Ferebee*, 957 F.3d 406, 418 (4th Cir. 2020)(a "warrantless search by the police is invalid unless it falls within one of the narrow and well-delineated exceptions to the Fourth Amendment's warrant requirement")(cleaned up). The Government bears the burden of proof in justifying a warrantless search or seizure. *United States v. Watson*, 703 F.3d 684, 689 (4th Cir. 2013).

Wilborne has never argued that his initial stop and arrest by police was improper. Likewise, the Government has never argued that the search of Wilborne's backpack was done pursuant to a warrant supported by probable cause. In his police report, Hilbert initially justified the search as incident to a lawful arrest, but the Government never seriously pursued that argument and the district court was correct to conclude it was not a valid arrest-related search. JA132, JA165; *see also United States v. Davis*, 997 F.3d 191, 197 (4th Cir. 2021). Instead, the Government argued that the search at the scene of Wilborne's arrest was a proper inventory search or, in the alternative, the backpack would have been searched pursuant to policies regarding inventory searches when he was transported to the police station or local jail, inevitably leading to the discovery of the firearm. JA022-024.

The district court was correct to conclude that the search of the backpack at

the scene of Wilborne's arrest was not a proper inventory search. JA167. As the district court found, the "officers here made no effort to inventory the items in the bag, nor does the CPD have a policy of searching all bags before transporting them." *Ibid*. However, the district court clearly erred by concluding that the inevitable discovery doctrine applied to rescue the warrantless search of Wilborne's backpack. The evidence presented by the Government, through Hilbert's testimony, which was contradictory and full of gaps in his knowledge of alleged policies, was insufficient to show that the firearm in Wilborne's backpack would have inevitably been discovered.

B. To prevail under inevitable discovery, the Government must show that the firearm could and would have been uncovered pursuant to a lawfully conducted inventory search.

"Generally, the government is prohibited from using evidence discovered in an unlawful search," although "this rule is subject to certain exceptions." *United States v. Seay*, 944 F.3d 220, 223 (4th Cir. 2019). One exception is the inevitable discovery doctrine, under which the Government may present evidence if it "can prove by a preponderance of the evidence that law enforcement would have ultimately or inevitably discovered the evidence by lawful means." *Ibid.* (cleaned up). Such "lawful means" include "searches that fall into an exception to the warrant requirement." *Ibid*. The "premise of the inevitable discovery doctrine is that the illegal search played no real part in discovery of incriminating evidence. Only then, if it can be shown that the taint did not extend to the second search, would the product of the second search be admissible." *United States v. Thomas,* 955 F.2d 207, 209 (4th Cir.1992).

"It is the government's burden to prove inevitable discovery." *United States v.*

Edwards, 666 F.3d 877, 887 (4th Cir. 2011). In order to prevail under the doctrine, the Government must prove "first, that police legally *could* have uncovered the evidence; and second, that police *would* have done so." *United States v. Alston*, 941 F.3d 132, 138 (4th Cir. 2019). The analysis of inevitable discovery "involves no speculative elements but focuses on demonstrated historical facts." *Nix v. Williams*, 467 U.S. 431, 444 n.5 (1984). At bottom, "the government must demonstrate, to a high degree of probability, that the evidence would have been discovered." *United States v. Almeida*, 434 F.3d 25, 29 (1st Cir. 2006).

The "lawful means" identified by the Government in this case is an inventory search performed either at the police station after Wilborne's arrest or at the local jail when he was taken there. For the inventory search exception to apply, the search must "be conducted according to standardized criteria, such as a uniform police department policy, and performed in good faith." *United States v. Matthews*, 591 F.3d 230, 235 (4th Cir. 2009)(cleaned up). The government can establish standardized criteria relating to inventory searches "by reference to either rules and regulations or testimony regarding standard practices." *Matthews*, 591 F.3d at 235; *see also United States v. Banks*, 482 F.3d 733, 739 (4th Cir. 2007)(standardized criteria are "often codified by a police department into a uniform inventory-search policy"). To justify a warrantless search, the standardized criteria must sufficiently limit a searching officer's discretion to prevent the search from becoming "a ruse for a general rummaging in order to discover incriminating evidence." *Florida v. Wells*, 495 U.S. 1, 4 (1990).

The Government's evidence regarding the inventory searches, all of it coming from Hilbert, fell short of that necessary to show they would have been proper under the Fourth Amendment. Hilbert's testimony, replete with contradictions and gaps in his understanding of procedures, did not show there was standardized criteria used by the CPD to guide inventory searches. As for a potential search at the jail, even if Wilborne's property had been transported to the jail, there was insufficient evidence to show it would have been searched in a manner that would have led to discovery of the firearm. Finally, the actual search performed here shows it was warrantless and without any kind of probable cause and cannot be said to have been undertaken in good faith, but rather was a "general rummaging" in search of evidence of a crime.

C. The evidence did not show that any search performed at the police station would have been done pursuant to any established policy of the Charleston Police Department.

The evidence did not show that any search performed after Wilborne and his possessions were taken to the police station would have been pursuant to any established policy or practice of the CPD. The only written policy, produced by the Government to refresh Hilbert's recollection when he could not remember whether there was one, JA057,[5] is less a policy setting out the parameters of inventory searches than a recognition that such searches might be a means to obtain evidence that otherwise could not be discovered consistent with the protections of the Fourth Amendment. Labelled "Booking Searches," the section states that a "custodial search

[5] While quoted in post-hearing pleadings, the Government did not actually admit the policy provision into evidence. JA083.

of the arrestee's personal effects ***may be justified*** as either a delayed search incident to arrest or as an inventory procedure." JA145 (emphasis added). It then goes on to explain that once "an officer has taken the property into his/her control, a further search is no longer incidental to arrest." *Ibid*. There is nothing in that section about how to perform an "inventory procedure" or what limitations are placed upon it. There is nothing that restricts the discretion of officers in a way that prevents such searches from turning "into a purposeful and general means of discovering evidence of crime." *Wells*, 495 U.S. at 4 (cleaned up).

Although a written policy is not a requirement for a valid inventory search, Hilbert's testimony did not provide a sufficient basis for demonstrating a non-discretionary policy-based inventory search would have occurred at the police station once Wilborne and his effects arrived there. When asked about "routine practice" for inventory searches, he testified that it "just depends on the timeline." JA055. While he first testified that he was not aware of any particular department policy addressing inventory search procedures, Hilbert later "conceded that the CPD does not have a detailed, written inventory search procedure." JA055, JA164. When defense counsel stated that she was "trying to figure out what the policy is of the Charleston Police Department," he answered, "I'm not sure what that policy states." JA077. Indeed, during his testimony, Hilbert testified "I don't recall" or "I don't know" or that he was "not sure" about something more than a dozen times. JA059, JA060, JA063, JA064, JA067, JA068, JA069, JA070, JA071, JA077, JA088, JA090. However, he was certain that he was entitled to search "[a]ll the property that is taken – taken

with the person." JA066.

The shifting nature of any CPD policies is most evident from Hilbert's testimony about how he might have proceeded had someone been at the scene of Wilborne's arrest to take possession of his property. If such a person was present it is unlikely that the inevitable discovery doctrine would apply. *See United States v. Rapada*, 546 F. Supp. 3d 889, 896 (N.D. Cal. 2021)(granting motion to suppress items found during search of defendant's possessions when taken into custody where there were "numerous on-the-scene family members" who would have taken possession of those items). Hilbert initially testified that he would not have released Wilborne's property to anyone else at the scene of the arrest. When asked if that was "Charleston Police Department Policy," he answered that "[f]or this incident I would have not" and agreed that it "depends on the incident." JA069. Asked more specifically what would have happened had Wilmore's mother arrived on the scene, he testified that he would have given her Wilborne's clothing, but not the backpack because "it had already been inventoried." JA069-070. When asked further what would have happened if she arrived before the backpack had been searched, he conceded that "I'm not sure." JA070. If there was some policy, albeit unwritten, in place for such situations there would have been an easy answer. Instead, Hilbert's testimony suggests that what policies there are in the Charleston Police Department are vague and flexible, to allow officers to search what they want to search without regard to probable cause.

To the extent that any search would have taken place while at the police station, it is unclear whether it could properly be considered an "inventory" search. The property report of the two other bags with Wilborne when he was arrested simply says they were "bags of clothes." JA136. Hilbert confirmed that as part of that process officers were "allowed to just write down the container and not the contents[.]" JA075. Such is not enough to constitute an inventory search. In *State v. Nye*, 468 P.3d 369 (Nev. 2020), the defendant was arrested for refusing to leave a casino and her backpack was placed in the trunk of the officers' patrol car. The backpack was searched at the police station, uncovering drugs. "Shortly thereafter, a jail booking deputy conducted an inventory search of Nye's backpack" in which they "listed 'bag' on the inventory sheet and did not produce an itemized inventory of the contents in the backpack." *Id*. at 370. The court held that such an underwhelming "inventory" was not an inventory at all, noting that "both the United States and Nevada Constitutions require an inventory search to yield an actual inventory." *Id*. at 371, *citing Wells*, 495 U.S. at 4 (the "policy or practice governing inventory searches should be designed to produce an inventory"). The evidence here shows that any "inventory" search done at the police station would have been as inadequate as the one found wanting in *Nye*.

D. There was insufficient proof to show that Wilborne's backpack would have been taken to the jail with him or searched there so as to discover the firearm.

While the Fourth Circuit did not address the possibility of Wilmore's backpack being searched when he was taken to the local jail, the district court did credit the

possibility. JA168. In its brief before the Fourth Circuit, the Government asserted that it "is well-known and accepted that arresting officers often perform inventory searches of an arrestee's property before booking the arrestee into jail." *United States v. Wilborne,* Appeal No. 22-4452, Dkt. No. 16 at 9. There is no dispute about that, but whether something happens "often" in the wider world is insufficient to answer whether in this particular case, in this particular situation, such a search would have inevitably taken place. In other words, "often" is not "always" and is therefore not "inevitable." Therefore, the record indicates that no such search would have inevitably taken place in this case.

The Government failed to prove that the firearm in Wilborne's backpack would have been discovered during a search at the jail for the simple fact that it did not prove that Wilborne's effects – including the backpack, had it not been searched and found to have "evidentiary" value – would ever have made it to the jail in the first place. Hilbert testified that he could not recall whether Wilborne's personal effects were taken to the jail. JA060. There was no reason for them to be, as Hilbert had filled out paperwork stating that they were being left at the police station to be picked up by Wilborne's mother. JA072. Thus, he was forced to admit that "something that is seized along with an arrestee does not necessarily go with them" to the jail. *Ibid*. By definition, if an event does not "necessarily" occur as a matter of course then it cannot be inevitable. There is thus no evidence of general practice, much less a written policy, that would have inevitably led to Wilborne's backpack being taken the jail and searched.

Even if it was inevitable that the backpack would have been taken to the jail with Wilborne, there was no evidence presented as to how thoroughly it would have been searched. Courts have recognized that the fact that an arrestee was taken to jail was not a sufficient condition to ensure that any particular piece of evidence would have been searched so as to uncover contraband. In *State v. Baker*, 395 P.3d 422 (Kan. 2017), Baker was arrested on outstanding warrants while in a retail store in possession of a backpack. He dropped the backpack as officers approached. *Id.* at 424. An officer then took the backpack and searched it, discovering methamphetamine inside two small containers. That officer testified that "the backpack was searched for evidence of crimes under investigation and collected for safekeeping as Baker's personal property." *Id.* at 425. The officer also testified that "the bag would have gone with Baker to the jail and been searched to inventory." *Ibid.* (cleaned up). The court held that was insufficient to show inevitable discovery, concluding that the officers "testified that a small bag or backpack would have been 'searched' or 'inventoried' at the arresting agency or jail – and nothing more." *Ibid.* The "failure to present any evidence of standardized criteria or an established routine governing the opening of closed containers during inventory searches is fatal to the State's inevitable discovery claim." *Ibid.* That is because "standardized criteria or an established routine must regulate the opening of containers found during inventory searches," with whatever procedure employed being permissible "so long as they are standardized and well established." *Id.* at 429. Similarly, in *State v. Mitnuiewicz*, 864 P.2d 1359, 1362 (Ore. Ct. App. 1993), the court concluded that a small amount of heroin contained in a

folded up piece of paper would not have been inevitably discovered pursuant to a jail inventory search because "there is no evidence that the inventory policy required the opening of any containers, including the piece of yellow paper." *See also State v. Redmond*, 834 P.2d 516, 519 (Ore. Ct. App. 1992)(same with regards to methamphetamine found in defendant's wallet); *compare Almeida*, 434 F.3d at 27-28 (crack defendant had secreted "between his legs" would have been discovered during strip search at jail, which testimony showed was routine). Hilbert's testimony does not support a conclusion that any of Wilborne's possessions, had they made it to the jail, would have been searched there in any particular manner that would have uncovered the firearm.

E. The search of Wilborne's backpack was a "general rummaging" of his belongings that was conducted as part of a criminal investigation.

"Standardized search procedures must be administered in good faith for their attendant searches to satisfy the Fourth Amendment." *United States v. Banks*, 482 F.3d 733, 739 (4th Cir. 2007)(cleaned up). In this vein, inventory searches cannot be conducted for the purpose of a criminal investigation. *Colorado v. Bertine*, 479 U.S. 367, 374 & n.6, 375-76 (1987). There is no good faith evident from the way Wilborne's property was searched. Hilbert admitted that the officers arresting Wilborne "zeroed in on the backpack among all the other possessions," although Hilbert was "not sure" why. JA071. What is evident is that the officers were arresting a person they knew to be a felon who had previously been in possession of a firearm and might have one in his possession again. Armed only with a vague department policy that a search of

an arrestee's possessions "may be justified" by multiple doctrines, the officers here engaged in the kind of "general rummaging" for which inventory searches cannot be used. *Wells*, 495 U.S. at 4; *see also Baker*, 395 P.3d at 429 (not applying inevitable discovery where there was "nothing in the record before us to establish that the search which occurred here was anything other than general rummaging").

Courts have recognized that the "premise of the inevitable discovery doctrine is that the illegal search played no real part in discovery of the incriminating evidence." *Thomas*, 955 F.2d at 209. The Government could not prove that the initial search of Wilborne's backpack, which violated the Fourth Amendment, played no real part in the discovery of the firearm. This is evident from Hilbert's testimony about whether he would have allowed Wilborne's mother to take his property if she had been present. He testified that he would not have allowed her to take the backpack once it had been searched. However, even when asked if he would have turned the backpack over had she had been there prior to the search, Hilbert would still be "not sure." That is because the fact that a firearm had already been discovered tainted all that came afterward. The lack of easily sourced and applied rules for inventory searches shows that the proffered explanations are the kind of *post hoc* rationalizations for searches that courts have frowned upon in the Fourth Amendment context. *See, e.g.*, *United States v. Foster*, 634 F.3d 243, 249 (4th Cir. 2011)("the Government cannot rely upon post hoc rationalizations to validate those seizures that happen to turn up contraband"); *United States v. Powell*, 666 F.3d 180, 183 (4th Cir. 2011)(collecting cases, then stating that "we once again are presented

with a case in which the Government has attempted to meet its burden under *Terry* by cobbling together a set of facts that falls far short of establishing reasonable suspicion").

X. CONCLUSION

For the reasons stated, the Supreme Court should grant certiorari in this case.

Respectfully submitted,

RE'SHAUN LAMONTE WILBORNE

By Counsel

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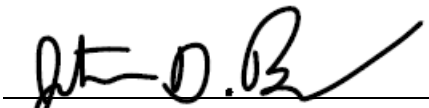
FEDERAL PUBLIC DEFENDER



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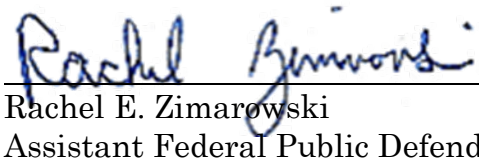

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