

No. __

IN THE
Supreme Court of the United States

BRUCE DILLARD,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Sixth Circuit**

PETITION FOR A WRIT OF CERTIORARI

MARK A. WHITT
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939

Counsel for Petitioner

QUESTIONS PRESENTED

1. Does a person abandon Fourth Amendment standing to challenge the warrantless search of a locked briefcase by dropping it after being ordered by armed police officers “put your hands up,” and by subsequently resisting arrest?

2. Does the constitutionally permissible scope of a search incident to arrest extend to a locked briefcase that is broken into and searched after the arrestee is handcuffed and removed from the area where the search occurs?

3. May a district court find that the contents of a locked briefcase would have been inevitably discovered during an inventory search when there is no evidence that the briefcase would have been inventoried?

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OPINIONS BELOW

The decisions of the Court of Appeals affirming the district court's denial of Dillard's motion to suppress (Pet. App. 1a-29a) and order denying petition for rehearing *en banc* (*id.* at 30a-31a) are unreported. Partial transcripts of proceedings containing the district court's findings of fact and conclusions of law are included in the appendix. *Id.* at 32a-40a.

JURISDICTION

The judgment of the Court of Appeals was issued on October 20, 2003, and a petition for rehearing *en banc* was denied on December 3, 2003. This Court has jurisdiction over this petition under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States 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." U.S. Const., Amend. IV.

STATEMENT

This case arises from the warrantless search of Petitioner Bruce Dillard's locked briefcase, which Dillard dropped after being ordered by police to "put your hands up" as he left a private residence. After Dillard was handcuffed and removed from the arrest scene, officers broke into his briefcase to search for evidence. Dillard was convicted of a drug crime based upon evidence found in the briefcase and sentenced to life in prison.

1. On May 26, 1999, police arrived at a two-story apartment house to execute a search warrant for the upper unit. Pet. App. 2a. Seven officers approached the side door of the apartment while three additional officers stationed

themselves around the house for security. *Id.* As the police approached, they observed Dillard and another individual leaving through the side door. *Id.* Dillard was carrying a locked briefcase. *Id.* at 2a. As Dillard and his companion reached the driveway, an officer announced, “Police, search warrant,” or “Police, put your hands up.” *Id.* Dillard immediately dropped his briefcase, which landed about four feet away. *Id.* As officers apprehended Dillard, he began to struggle and pulled a handgun from his waistband. *Id.* Within forty-five seconds to a minute, the police subdued Dillard, removed the handgun, and placed him in handcuffs. *Id.*

2. After Dillard was handcuffed and escorted from the arrest scene, officers recovered his locked briefcase. *See* Pet. App. 2a-3a, 26a, 42a. There was no testimony that officers had probable cause to believe that the briefcase contained contraband. An officer pried off the latches with a pair of pliers because “what I really wanted to determine was whether or not it needed to be photographed.” *Id.* at 41a. Approximately 3.5 ounces of crack cocaine and related drug paraphernalia were found inside the briefcase, along with personal items such as toiletries. *See id.* at 2a, 14a, 28a.

3. On June 30, 1999, a federal grand jury indicted Dillard on three counts: (1) possession with the intent to distribute approximately 3.5 ounces of cocaine base (crack), in violation of 21 U.S.C. § 841; (2) using, carrying and brandishing a firearm in relation to a drug trafficking crime, in violation of 18 U.S.C. § 924(c)(1); and (3) possession of a firearm by a convicted felon, in violation of 18 U.S.C. § 922(g)(1). Pet. App. 3a.

4. Dillard moved to suppress the evidence found in his briefcase. The district court held an evidentiary hearing on November 18, 1999. Pet. App. 3a, 32a-36a. The district court denied the motion. “[T]he reason the motion is denied is because there was a lawful search incident to arrest of that briefcase [sic]. And inevitably, what was in there would

have been found.” *Id.* at 34a. The district court also found: “I think there is—certainly there is more evidence than not that he discarded that briefcase. But quite frankly, I’m not even going to decide the standing issue. I know that courts are supposed to decide that first, but I don’t even—I think if I have to decide it, I think the government has the stronger argument that he discarded it.” *Id.* at 35a.

5. Dillard filed a renewed motion to suppress on February 18, 2000, which the district court denied for the same reasons as the original motion. Pet. App. 3a. After Dillard’s March 3, 2000 jury trial, the district court declared a mistrial because of the accidental inclusion of a search warrant affidavit in exhibits provided to the jury. *Id.* at 4a.

6. On May 30, 2000, the government brought a superseding indictment charging Dillard with the same three counts, plus two additional counts of distribution of cocaine base, in violation of 21 U.S.C. § 841. Pet. App. 3a. Dillard filed a renewed motion to suppress. The district court overruled the motion, stating, in part: “I do not believe the defendant has standing to object because the evidence showed that the defendant had abandoned that briefcase by throwing it away prior to his being apprehended. That’s the evidence I found and I made those findings last November, and I believe they were correct.” *Id.* at 3a-4a, 39a.

7. A second jury trial commenced on November 27, 2000, which also resulted in a mistrial when, after the first day of trial, the police found a razor blade in the briefcase that had not previously been discovered. Pet. App. 4a.

8. A third jury trial began on February 26, 2001. Pet. App. 4a. On March 1, 2001, the jury returned guilty verdicts on all five counts charged in the superseding indictment. *Id.* Dillard was sentenced to life without parole for the conviction under Count Three, and to a consecutive seven year term for the conviction under Count Four. *Id.*

9. Dillard timely appealed his convictions. Pet. App. 4a. In an unreported decision, the Court of Appeals for the Sixth

Circuit affirmed Dillard's convictions on all counts. *Id.* at 1a-29a. Judge Clay filed a dissenting opinion concerning the admission of evidence seized from the briefcase.

10. The majority determined that Dillard lacked Fourth Amendment standing to challenge the search of his briefcase because he abandoned it. The majority conceded that merely dropping an item when confronted by police does not constitute abandonment. "[T]here would be serious potential for abuse if police could compel an arrestee to 'abandon' property on his person, which would then be fair game for a warrantless search." Pet. App. 9a. But the majority concluded that because Dillard dropped his briefcase "so as to place himself in a better position to attack police officers," Dillard's privacy interest in the briefcase was not reasonable, and he forfeited standing to challenge the subsequent search. *See id.* at 9a-10a, n.1. The dissent reasoned that Dillard did not abandon his briefcase because he never disclaimed ownership, nor did he discard it while fleeing police. "He apparently dropped it in what appears to have been a reflexive reaction or an attempt at compliance with the officers' orders to raise his hands." *Id.* at 22a (Clay, J., dissenting). The dissent noted that even if Dillard dropped the briefcase to facilitate resisting arrest, such an act does not mean that he also intended to abandon the briefcase. *Id.* at 24a, n.3.

11. The majority alternately determined that even if Dillard did not abandon his briefcase, the search was lawfully conducted incident to his arrest, because the briefcase was within Dillard's exclusive control immediately prior to the arrest and the search occurred at the arrest scene. *See* Pet. App. 12a. The dissent reasoned that after Dillard was arrested, handcuffed and taken into custody, "all the officers (of which there were many at the scene) had to do was place the briefcase in a squad car or place it with the other evidence to be collected. There is no conceivable exigency that would reach a protective sweep of a locked briefcase." *Id.* at 27a (Clay, J., dissenting).

12. The majority also determined that the evidence found in the briefcase inevitably would have been discovered during a hypothetical inventory of Dillard's possessions that "in all likelihood" would have occurred after Dillard was taken to the police station. *See* Pet. App. 14a. The majority conceded, "[t]here is no evidence in the record on this point." *Id.* The dissent found that the lack of any evidence "tending to show that the briefcase's contents would inevitably have been catalogued pursuant to an established inventory procedure" precluded any finding that the evidence in the briefcase inevitably would be discovered. *Id.* at 29a (Clay, J., dissenting).

13. Dillard timely filed a petition for rehearing *en banc* pertaining solely to the admission of evidence from the briefcase. Pet. App. 30a-31a. The court denied the petition on December 3, 2003. *Id.*

REASONS FOR GRANTING REVIEW

Law enforcement officers have confronted persons carrying briefcases, shoulderbags, and similar items of luggage since the beginning of law enforcement. This simple and recurring scenario raises three significant Fourth Amendment questions for which the Court's precedent does not yield clear answers, and which have confused and divided the lower courts. The Court should grant *certiorari* to answer these questions.

First, when law enforcement officers encounter a person carrying a briefcase or similar item of luggage, and order that person, "Stop in the name of the law, and put your hands up!" it is clear that the person does not "abandon" Fourth Amendment standing to challenge a warrantless search of his briefcase by merely dropping it. But if the arrestee denies that the briefcase is his, or flees the authorities and discards his briefcase in a public area, that person has objectively manifested an intent to abandon any expectation of privacy in his briefcase. The question presented is whether a person abandons his briefcase by dropping it and *not* fleeing or

disclaiming ownership, but by resisting arrest. The Court's decisions in *Hester v. United States*, 265 U.S. 57 (1924) and *Smith v. Ohio*, 494 U.S. 541 (1990) (*per curiam*), establish guiding principles, but their application to these facts does not yield a clear answer. No other courts have expressly considered this issue.

Next, assuming the arrestee retains standing, the lower courts are divided about whether the fact of the arrest entitles the police to search the arrestee's briefcase incident to that arrest. The Court expressly declined to address this question in *Arkansas v. Sanders*, 442 U.S. 753 (1979), and has not addressed it since. Although the principles articulated in *Chimel v. California*, 395 U.S. 752 (1969), *United States v. Chadwick*, 433 U.S. 1 (1977) and *New York v. Belton*, 453 U.S. 454 (1981) are clear, the lower courts have struggled with their application. *Chimel* established that police may search the area of an arrestee's "immediate control" following an arrest in order to prevent the arrestee from obtaining a weapon or destroying evidence. *Chadwick* clarified that the area of an arrestee's immediate control did not extend to a locked footlocker reduced to the exclusive control of police. And in *Belton*, the Court defined *Chimel*'s area of immediate control to include the entire interior of an automobile, and any container found therein, upon arrest of the occupants. But none of these cases directly answers the recurring question of whether police may search an arrestee's luggage incident to the arrest when an automobile is not involved. The lower courts are divided about whether *Belton* modified *Chimel*'s area of "immediate control" to permit such searches. The Court has recognized the uncertainty arising from *Belton* by granting *certiorari* in *United States v. Thornton*, 325 F.3d 189 (4th Cir.), *cert. granted*, ___ U.S. ___, 124 S. Ct. 463 (2003). The question in *Thornton* is whether a *Belton* search of an automobile is permitted when the arrestee was not an occupant of the vehicle. The Court should grant *certiorari* in the present case to address whether *Belton* or its underlying rationale

applies at all when the property searched is not found in an automobile. Alternatively, a hold or summary disposition order for the Sixth Circuit to reconsider its decision in light of *Thornton* would be appropriate.

The final question is whether evidence obtained during a search that is not justified by any other exception to the warrant requirement is nevertheless admissible under the “inevitable discovery” doctrine recognized in *Nix v. Williams*, 467 U.S. 431 (1984). There is no clear consensus among the lower courts. Most that have addressed the issue have concluded that if illegally obtained evidence would have been discovered during a subsequent inventory of the arrestee’s possessions, the evidence is not barred by the exclusionary rule, even though it was obtained illegally. The Court of Appeals for the District of Columbia has declined to extend *Nix* in this manner, recognizing that the practical consequences would promote warrantless searches, and moot this Court’s precedent concerning exceptions to the warrant requirement. If the courts that have extended *Nix* to inventory searches were correct, all warrantless searches would be excused by simply pointing to an inventory policy that the police could have followed, but chose not to. The consequences of such a rule are obvious, and the importance of this issue cannot be overstated. The Court should immediately clarify that the inevitable discovery doctrine does not extend to hypothetical inventory searches.

The questions presented require an application of constitutional principles to a recurring fact pattern, and are not simply abstract questions involving pure factual determinations. The answers to these questions are of tremendous practical significance to the lower courts, law enforcement and criminal defendants. The Court should grant *certiorari* and answer these questions.

I. THE COURT SHOULD GRANT CERTIORARI TO ANSWER UNRESOLVED QUESTIONS CONCERNING THE ABANDONMENT EXCEPTION TO THE FOURTH AMENDMENT

The Court has endeavored to resolve many questions concerning the people, places and things subject to Fourth Amendment protection against warrantless searches. Many of these cases have focused on the concept of standing, which depends “upon whether the person who claims the protection of the [Fourth] Amendment has a legitimate expectation of privacy in the invaded place.” *Rakas v. Illinois*, 439 U.S. 128, 143 (1978) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)). Far fewer cases have addressed when standing to invoke the Fourth Amendment is lost by “abandoning” property. The Court has yet to confront the issue of whether a suspect is deemed to have abandoned property for Fourth Amendment purposes by dropping it in the course of a spontaneous encounter with police and subsequently resisting arrest.

A. The Court Has Articulated Principles Underlying The Abandonment Exception, But These Principles Do Not Answer Directly The Question Presented.

The Court has recognized three principles relevant to answering the question presented. First, physical relinquishment of property must be a voluntary act. In *Hester v. United States*, 265 U.S. 57 (1924), the defendant, upon noticing revenue officers approaching, fled through an open field, discarding a moonshine bottle along the way. *Id.* at 57. The Court found that the defendant had abandoned the bottle by voluntarily discarding it in an open field during flight. *Id.* at 58. “It would have been quite different, of course, if the revenue agent had shouted, ‘Stop and give us those bottles, in the name of the law!’ and the defendant and his accomplice had complied.” *Brower v. County of Inyo*,

489 U.S. 593, 597 (1989) (discussing *Hester* in context of when “seizure” occurred for Fourth Amendment purposes).

The second principal is that a person who attempts to prevent a search or seizure of property has not abandoned that property. In *Smith v. Ohio*, 494 U.S. 541 (1990) (*per curiam*), the defendant threw a bag onto the hood of his car after being ordered by officers to “come here a minute.” *Id.* at 542 (quotation omitted). The officer asked the defendant what was in the bag, to which the defendant did not answer. *Id.* As the officer reached for the bag, the defendant placed his hand over it. *See id.* The officer moved the defendant’s hand and looked in the bag, discovering marijuana. *See id.* The Ohio Supreme Court had concluded:

We do not adhere to the view taken by the lower courts to the effect that appellant had “abandoned” the bag when he threw it on the car and thus no longer retained any reasonable expectation of privacy with regard to it. Appellant was, at most, only two steps away from the bag at any time, and the evidence presented at the suppression hearing is clear that appellant physically attempted to prevent Officer Thomas from seizing the bag. Thus, in our view, appellant had not “voluntarily discarded, left behind, or otherwise relinquished his interest in the property in question so that he could no longer retain a reasonable expectation of privacy with regard to it at the time of the search.”

State v. Smith, 45 Ohio St. 3d 255, 263, n.6, 544 N.E.2d 239, 246 (1989) (citation, emphasis and internal quotation omitted). This Court agreed, stating: “[A] citizen who attempts to protect his private property from inspection, after throwing it on a car to respond to a police officer’s inquiry, clearly has not abandoned that property.” *Smith*, 494 U.S. at 543-44 (citing *Rios v. United States*, 364 U.S. 253, 262, n.6 (1960)). The Court reversed the Ohio Supreme Court’s determination that the search was lawful incident to the defendant’s arrest. *Id.* at 543.

Hester and *Smith* also establish a third principal: physical relinquishment alone does not constitute abandonment. See *Hester*, 265 U.S. at 58; see also *Rios*, 364 U.S. at 262, n.6 (“A passenger who lets a package drop to the floor of a taxicab in which he is riding can hardly be said to have ‘abandoned’ it.”); *United States v. Thomas*, 864 F.2d 843, 846, (D.C. Cir. 1989) (“The law obviously does not insist that a person assertively clutch an object in order to retain the protection of the fourth amendment.”).

B. The Decision Below Is Inconsistent With The Limited Authority From The Court That Has Addressed The Abandonment Exception.

The central issue in an abandonment analysis requires courts to “focus on the intent of the person who is alleged to have abandoned the place or object.” *Thomas*, 864 F.2d at 846 (citing *United States v. Anderson*, 663 F.2d 934, 938 (9th Cir. 1981)). “To demonstrate abandonment, the government must establish by a preponderance of the evidence that the defendant’s voluntary words or conduct would lead a reasonable person in the searching officer’s position to believe that the defendant relinquished his property interests in the item searched or seized.” *United States v. Basinski*, 226 F.3d 829, 836 (7th Cir. 2000) (citing *United States v. Stephens*, 206 F.3d 914, 917 (9th Cir. 2000)).

While leaving a private residence, Dillard encountered armed police officers, who ordered, “put your hands up.” Pet. App. 2a. Dillard dropped the briefcase, which landed four feet away. *Id.* Dillard neither fled the area nor disclaimed ownership of the briefcase. Thus, Dillard did not exhibit an objective manifestation of intent to abandon his briefcase. See *United States v. Garzon*, 119 F.3d 1446, 1452 (10th Cir. 1997) (“Every case in which we have found abandonment involved a situation where the defendant either (1) explicitly disclaimed an interest in the object, or (2)

unambiguously engaged in physical conduct that constituted abandonment.”).

Dillard’s subsequent struggle with officers led the Sixth Circuit to determine that Dillard dropped his briefcase to facilitate resisting arrest or “to place himself in a better position to attack police officers.” Pet. App. 9a-10a, n.1. Notably, the district court had made no such findings. *See id.* at 32a-40a. The Sixth Circuit concluded that Dillard’s privacy interest in the briefcase was not reasonable and therefore not subject to Fourth Amendment protection. *See id.* at 9a-10a, n.1.

The decision below is at odds with this Court’s precedent in at least three respects. First, Fourth Amendment standing is predicated on whether society is prepared to recognize a privacy interest in the item subjected to search. *See Rakas v. Illinois*, 439 U.S. 128, 143 (1978). The owner of a locked briefcase has a legitimate privacy interest in its contents. *See United States v. Schleis*, 582 F.2d 1166, 1170 (8th Cir. 1978), *overruled on other grounds by United States v. Morales*, 923 F.2d 621 (8th Cir. 1991) (quoting *United States v. Chadwick*, 433 U.S. 1, 11 (1977)) (“By placing his personal effects inside a combination locked briefcase, Schleis clearly, in the language of *Chadwick*, ‘manifested an expectation that the contents would remain free from public examination’.”). The initial standing inquiry thus focuses on the nature of item searched; that is, whether it is an item in which society recognizes a privacy interest. It does not follow that the privacy interest in the contents of a locked briefcase is forfeited at the instant a person resists arrest or commits an unlawful act.

Second, *Hester*, as further explained in *Brower*, teaches that relinquishing an item in response to a police show of authority is not a voluntary act. Dillard was ordered to “put your hands up.” The district court recognized that Dillard’s actions were in the nature of a “reflexive reaction” to the officers’ command. “[Y]ou are not likely going to fool

anyone by throwing a briefcase away in the presence of five or six officers, people often do something quickly out of instinct without doing a lot of thinking.” Pet. App. 35a; *see also* Pet. App. 22a (“[Dillard] apparently dropped it in what appears to have been a reflexive reaction or an attempt at compliance with the officers’ orders to raise his hands.”) (Clay, J., dissenting). Whether Dillard also harbored a subjective desire to resist officers does not alter the fact that Dillard’s actions immediately followed, and were consistent with, the officers’ command. *See id.* at 24a, n.3.

Third, the *Smith* Court recognized that an attempt to protect property from search mitigates *against* any finding of abandonment. *Smith*, 494 U.S. at 543-44 (“[A] citizen who attempts to protect his private property from inspection . . . clearly has not abandoned that property.”). The Sixth Circuit sought to distinguish *Smith* because Dillard dropped the briefcase and struggled with officers, rather than comply with the officers’ instructions. *See* Pet. App. 8a-9a. That distinction is unfounded. In *Smith*, the defendant initially complied with instructions to “come here a minute,” but subsequently “physically attempted to prevent Officer Thomas from seizing the bag.” *State v. Smith*, 45 Ohio St. 3d 255, 263, n.6, 544 N.E.2d 239, 246 (1989).

The Court has never considered whether a person abandons property by resisting arrest. Nor has any other court, except the Sixth Circuit in the decision below. The decision below is inconsistent with *Hester* and *Smith* and should not stand as the sole authority on this issue. The Court should resolve the questions unanswered by prior cases and establish a clear standard for the lower courts and law enforcement.

II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE LOWER COURTS CONCERNING WHETHER THE PERMISSIBLE SCOPE OF A SEARCH INCIDENT TO ARREST EXTENDS TO AN ARRESTEE'S LOCKED LUGGAGE

As an alternative basis for affirming the admission of evidence taken from the briefcase, the Sixth Circuit found that the search was lawful incident to Dillard's arrest. "[W]hen a container is within the immediate control of a subject at the beginning of an encounter with law enforcement officers; and when the officers search the container at the scene of the arrest; the Fourth Amendment does not prohibit a reasonable delay, such as the one in this case, between the elimination of the danger and the search." Pet. App. 12a (quoting *United States v. Han*, 74 F.3d 537, 543 (4th Cir. 1996)). The dissent relied on *Chimel v. California*, 395 U.S. 752 (1969) and *United States v. Chadwick*, 433 U.S. 1 (1977), and their application in *United States v. Calandrella*, 605 F.2d 236 (6th Cir. 1979), to conclude that the search was unconstitutional because there were no exigent circumstances justifying it. Pet. App. 25a-27a (Clay, J., dissenting). The Sixth Circuit's differing views on proper application of the search incident to arrest exception mirrors a deep and persistent division among the lower courts.

A. The Court's Precedent Leaves Unanswered Questions Concerning The Constitutionality Of Warrantless Searches Of Personal Luggage When An Automobile Is Not Involved.

The "search incident to arrest" exception was recognized in *Chimel v. California*. Police arrived at the defendant's house to arrest him pursuant to a warrant. 395 U.S. at 753. Following the arrest, the police searched the defendant's house to look for evidence of criminal activity. *Id.* at 753-54. The Court held that the defendant's arrest did not justify

the further intrusion of searching his home as an incident of that arrest. The scope of a proper search incident to arrest is limited to a “search of the arrestee’s person and the area ‘within his immediate control’—constructing that phrase to mean the area from within which he might gain possession of a weapon or destructible evidence.” *Id.* at 763. The rationale for allowing such a search is the protection of law enforcement officers and the preservation of evidence. *Id.* Consequently, a search incident to arrest “must be strictly tied to and justified by the circumstances which rendered its initiation permissible.” *Id.* at 762 (internal quotations omitted).

United States v. Chadwick applied *Chimel* to the context of a 200 pound locked footlocker seized from the defendant’s car and searched an hour later at the police station. 433 U.S. at 4-5. In expounding on the “immediate control” test of *Chimel*, the Court stated: “Once law enforcement officers have reduced luggage or other personal property not immediately associated with the person of the arrestee to their exclusive control, and there is no longer any danger that the arrestee might gain access to the property to seize a weapon or destroy evidence, a search of that property is no longer an incident of the arrest.” *Id.* at 15 (citation omitted). The defendant did not forfeit his expectation of privacy in the locked container simply because he was under arrest. “With the footlocker safely immobilized, it was unreasonable to undertake the additional and greater intrusion of a search without a warrant.” *Id.* at 13.

New York v. Belton, 435 U.S. 454 (1981) applied *Chimel* to the context of property found in an automobile during a search contemporaneous with the arrest of its occupants. Following the arrest, the officer searched the passenger compartment, noticed a jacket, unzipped it, and discovered cocaine. *Id.* at 456. The Court held that police officers who have lawfully arrested the occupant of an automobile may search the passenger compartment of the automobile, and any containers therein, but excluding the trunk. *Id.* at 459-

60, n.3. The Court sought to articulate a “single familiar standard” to guide law enforcement in the “particular and problematic context” of automobile searches. *Id.* at 458, 460. The decision “[i]n no way alters the fundamental principles established in the *Chimel* case regarding the basic scope of searching incident to lawful custodial arrests.” *Id.* at 460, n.3.

In *United States v. Robinson*, 414 U.S. 218 (1973), the Court held that following an arrest, police may search an arrestee and objects “immediately associated” with him. *Id.* at 236. *Chadwick* specifically rejected application of the *Robinson* doctrine to personal possessions, such as luggage. *Chadwick*, 433 U.S. at 16, n.10 (“Unlike searches of the person, searches of possessions within an arrestee’s immediate control cannot be justified by any reduced expectation of privacy caused by the arrest.”) (citations omitted).

In *Arkansas v. Sanders*, 442 U.S. 753 (1979), the Court applied *Chadwick* to hold that a warrantless search permitted under the automobile exception did not extend to luggage in the trunk of an automobile. *Id.* at 763-64. *Sanders* limited its inquiry to the validity of the search under the automobile exception, and expressly declined to consider “the constitutionality of searches of luggage incident to the arrest of its possessor.” *Id.* at 764, n.11.

Sanders was effectively overruled in *California v. Acevedo*, 500 U.S. 565 (1991), where the Court held that police may search a container within an automobile where they have probable cause to believe that the container contains contraband or evidence. *Id.* at 580. The concurring and dissenting opinions acknowledged the absence of clear rules for containers *not* carried in automobiles, resulting in “anomalous” decisions. *See id.* at 593 (Stevens, J., dissenting) (“[A]s I read the opinion, the Court assumes that the police could not have made a warrantless inspection of the bag before it was placed in the car.”); *see also id.* at 581

(Scalia, J., concurring) (“I agree with the dissent that it is anomalous for a briefcase to be protected by the ‘general requirement’ of a prior warrant when it is being carried along the street, but for that same briefcase to become unprotected as soon as it is carried into an automobile.”).

Thus, a custodial arrest allows the police to search a person and objects immediately associated with the person (*Robinson*), but not including luggage that has been removed from the arrestee and transported to the police station (*Chadwick*). Officers may also search the area within the arrestee’s immediate control (*Chimel*), which includes the interior of an automobile, but excluding the trunk (*Belton*), and any containers located anywhere in a vehicle (including the trunk) that police have probable cause to believe to contain contraband (*Acevedo*). These cases do not directly answer the question of whether a search incident to arrest is permissible in the simple context of person carrying a briefcase when an automobile is not involved.

B. The Lower Courts Are Divided On The Question Of Whether *Belton* Re-defines *Chimel*’s Area Of “Immediate Control” To Permit Searches Of Briefcases And Similar Containers Incident To An Arrest.

Some Courts of Appeals have reasoned that because the jacket searched in *Belton* was within the officer’s exclusive control at the time of the search, *Belton* stands for the broad proposition that *Chimel*’s area of “immediate control” means an arrestee’s area of control immediately prior to the arrest, and not at the time of the search. These circuits have thus extended *Belton* to conclude that any container in the possession of an arrestee immediately prior to a police encounter may be searched without regard to whether the *Chimel* factors justify the search. Other Courts of Appeals have declined to extend *Belton* beyond automobiles and have found the rationale underlying *Chimel* and *Chadwick* dispositive; that is, whether the search was necessary to

prevent the arrestee from procuring a weapon or destroying evidence. State courts of last resort are also divided. *See, e.g., Vasquez v. Wyoming*, 900 P.2d 476, 483 (Wyo. 1999) (collecting and discussing cases); *State v. Pierce*, 136 N.J. 184, 201-02; 642 A.2d 947, 955-56 (1995) (same).

1. Fourth, Seventh, Eighth And District Of Columbia Circuits

The Courts of Appeals for the Fourth, Eighth and the District of Columbia Circuits have expressly relied on *Belton* to conclude that if a container is within the arrestee's immediate control at the time of the arrest, a search conducted contemporaneously with the arrest is valid *per se*. In *United States v. Litman*, 739 F.2d 137 (4th Cir. 1984) (*en banc*), the defendant challenged the warrantless search of a shoulderbag that he dropped immediately prior to arrest, and that the police searched while the defendant was detained at gunpoint. *See id.* at 138. The Fourth Circuit relied upon *Belton* in determining that the search was permissible because "the seizure of the shoulderbag was contemporaneous with the defendant's arrest and frisk and search followed instantly." *Id.* at 139. Two judges concurred separately to emphasize that the search was justified by what they viewed as exigent circumstances, "not from what I regard as an unsound reading of *Belton*." *Id.* (Murnaghan and Winter, JJ., concurring).

The Eighth Circuit changed course on the search incident to arrest exception as a direct result of *Belton*. In *United States v. Schleis*, 582 F.2d 1166 (8th Cir. 1978) (*en banc*), the court held that the search of the defendant's briefcase at a police station violated the Fourth Amendment, because "[o]nce the officers obtain exclusive control the requirement for a warrant under *Chadwick* is triggered." *Id.* at 1172. The *Schleis* court found that officers obtained exclusive control of the briefcase by seizing it at the time of arrest. *Id.* But in *United States v. Morales*, 923 F.2d 621 (8th Cir. 1991), the Eighth Circuit upheld the warrantless search of a duffel bag

taken from the defendant at arrest and searched at the scene, reasoning, in part, that “*Belton* . . . abolishes the exclusive control distinction of *Chadwick* when the search is contemporaneous with the arrest.” *Id.* at 627. The *Morales* court overruled *Schleis* and another case “to the extent that they held that a police officer’s ‘exclusive control’ is enough to trigger the warrant requirement” *Id.*

The District of Columbia Circuit has also extended *Belton* beyond the automobile context. *See United States v. Abdul-Saboor*, 85 F.3d 664, 665 (D.C. Cir. 1996) (“To the extent that *Belton* might be thought only to apply to automobiles, however, we have already rejected that interpretation.”) (citation omitted). The Seventh Circuit appears to favor an extension of *Belton* as well. *See, e.g., United States v. Queen*, 847 F.2d 346, 354 (7th Cir. 1988) (citing *Belton* along with non-vehicular cases in affirming search of bag located in house where defendant arrested); *United States v. Fleming*, 677 F.2d 602, 607 (7th Cir. 1982) (citing *Belton* in upholding warrantless search of defendant’s bag five minutes after defendant arrested and in handcuffs; item searched was within arrestee’s immediate control at time of arrest and search immediately followed).

2. Second, Third And Fifth Circuits

In *United States v. Myers*, 308 F.3d 251 (3d Cir. 2002), the Third Circuit expressly rejected the Fourth Circuit’s extension of *Belton* beyond automobiles. The police searched a suspect’s school bag while the suspect was face-down on the floor, handcuffed, and guarded by two police officers. *Id.* at 253-54. The Third Circuit reversed the district court’s order denying the defendant’s suppression motion, because there was no likelihood that the suspect could access the bag to obtain a weapon or destroy evidence. *Id.* at 271. Commenting on the Fourth Circuit’s *Litman* decision, decided on similar facts, the court stated: “[T]he *Litman* court concluded that *Belton* controlled its analysis without even acknowledging that *Belton* was an automobile

search. The *Litman* court therefore read far more into *Belton* than the Supreme Court intended.” *Id.* *But see id.* at 284-86 (Alarcon, J., dissenting) (citing cases that had relied upon *Belton* and *Litman* as justifying the search).

The Fifth Circuit has also strictly construed *Belton*, finding its rationale inapplicable to the search of a briefcase located six to eight feet from the defendant at the time of search. *United States v. Johnson*, 16 F.3d 69, 73 (5th Cir.), *clarified on rehearing*, 18 F.3d 293 (1994) (“We decline the government’s request to extend *New York v. Belton* to office searches. *Belton* make clear that its holding is limited to its facts and merely serves as an explication of *Chimel* with respect to interior searches of an automobile.”). The Second Circuit has not specifically addressed *Belton* in the context of luggage searches, but has reached results consistent with the Third and Fifth Circuits. *See United States v. Gorski*, 852 F.2d 692, 695 (2d Cir. 1988) (warrantless search of bag was not incident to arrest where bag was searched at arrest scene after defendant handcuffed; affirming district court finding that “[t]here was neither a risk of a defendant getting to a weapon in the bag nor a risk of a defendant destroying or absconding with evidence from the bag.”).

3. Ninth and Tenth Circuits

The Ninth and Tenth Circuits have extended *Belton* to searches not involving automobiles in some cases, but not others. In a decision rendered shortly after *Belton*, the Ninth Circuit stated: “Any extension beyond the exact limits set by *Belton* (objects within the passenger compartment of the vehicle) would open a new set of temporal and spacial uncertainties, as well as increase the likelihood of unjustified invasion of the privacy of individuals.” *United States v. Vaughan*, 718 F.2d 332, 333-34 (9th Cir. 1983) (affirming suppression of evidence taken from warrantless search of briefcase). More recently, the Ninth Circuit expressly adopted the Seventh Circuit’s decision in *Fleming*, which in turn had relied in part upon *Belton*. *United States v. Turner*,

926 F.2d 883, 888 (9th Cir. 1991) (relying on *Fleming* in affirming warrantless search of bag after defendant handcuffed and taken to another room).

Similarly, in *United States v. Herrera*, 810 F.2d 989 (10th Cir. 1987) (*per curiam*), postal inspectors arrested the defendant as he walked out of the building where he worked, seized his briefcase, and conducted a warrantless search that yielded incriminating documents. *Id.* at 989. Citing *Belton*, the Tenth Circuit stated: “It is difficult to see how there could be a search and seizure during the course of a lawful arrest if a scenario such as this is not upheld.” *Id.* at 990. However, in a subsequent decision, the Tenth Circuit rejected the application of *Belton* to the search of a jewelry box that occurred at a police station after an arrest. *United States v. Butler*, 904 F.2d 1482, 1484-85 (10th Cir. 1990).

C. A Clear Rule Is Needed To Guide Law Enforcement And The Courts.

Chimel and *Chadwick* support an argument that police cannot search closed luggage incident to an arrest unless the exigencies of the situation demand it. *See, e.g., Johnson*, 16 F.3d 69; *Myers*, 308 F.3d 251; *Gorski*, 852 F.2d 692. *Belton* supports an argument that an arrest justifies the additional intrusion of a search, provided that the luggage was in the arrestee’s possession immediately preceding the encounter with law enforcement. *See, e.g., Morales*, 923 F.2d 621; *Litman*, 739 F.2d 137; *Turner*, 926 F.2d 883. The lower courts do not agree about which rule governs. “When a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority.” *Belton*, 453 U.S. at 459-60.

The *Sanders* Court noted that “an apparently small difference in the factual situation frequently is viewed as a controlling difference in determining Fourth Amendment rights.” 442 U.S. at 757. The Court’s observation applies

equally in the present case. The debate about *Belton*'s application beyond automobile searches, and how the decision should be construed with *Chimel* and *Chadwick*, is analogous to the debate concerning the "automobile exception" that persisted prior to *California v. Acevedo*, 500 U.S. 565, 580 (1991). The Court in *Acevedo* recognized, "[u]ntil today, this Court has drawn a curious line between the search of an automobile that coincidentally turns up a container and the search of a container that coincidentally turns up in an automobile. The protections of the Fourth Amendment must not turn on such coincidences." *Id.* at 580. Justice Scalia's concurring opinion recognized that the Court's precedent seemingly precludes the police from stopping an individual on the street and demanding to see the contents of a briefcase reasonably believed to contain contraband. *See id.* at 584 (Scalia, J., concurring). That question has never been squarely answered.

III. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE LOWER COURTS CONCERNING APPLICATION OF THE INEVITABLE DISCOVERY DOCTRINE TO INVENTORY SEARCHES

The Sixth Circuit determined that the contents of Dillard's briefcase inevitably would have been discovered during a hypothetical inventory search that "in all likelihood" would have eventually occurred, but which the court acknowledged did not occur. *See* Pet. App. 14a; *see also id.* at 4a (second mistrial resulted when police found razor blade in briefcase that was not previously discovered).

The "inevitable discovery" doctrine allows illegally procured evidence to be admitted against a defendant "[i]f the prosecution can 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. 431, 444 (1984).

Although distinct from the “independent source” exception (see *Murray v. United States*, 487 U.S. 533, 538-39 (1988)), the inevitable discovery doctrine encompasses an independent source requirement. In *Nix*, incriminating statements obtained in violation of the Sixth Amendment led police to the location of a murder victim’s body. The Court held that the Sixth Amendment violation did not warrant suppression of evidence concerning the body, because a large search party led by different officers, called off only when police obtained the illegal confession, would have inevitably discovered the body absent the confession. See 467 U.S. at 448-450. The controlling factor in *Nix* was that a search party had in fact been assembled and was actively looking for the body. See *id.* at 448-50. The decision would have been decided differently if the government had merely claimed that a hypothetical search party would have been assembled at some point in the future. See *id.* at 444-45, n.5 (“[I]n inevitable discovery involves no speculative elements but focuses on demonstrated historical facts capable of ready verification or impeachment. . .”).

A number of lower courts have extrapolated *Nix* for the proposition that if evidence obtained during an unlawful search would have been discovered later during an inventory, the exclusionary rule does not bar admission of the evidence. These courts ignore the independent source requirement, reasoning that because a hypothetical inventory search was permissible, the evidence inevitably would have been discovered if the police had followed lawful inventory procedures. See, e.g., *United States v. Mendez*, 315 F.3d 132, 138 (2d Cir. 2002) (gun and drugs found in glovebox during roadside search would have been discovered during subsequent inventory of vehicle); *United States v. Haro-Salcedo*, 107 F.3d 769, 773 (10th Cir. 1997) (drug evidence seized during unlawful inventory search by DEA agents would inevitably have been discovered during subsequent inventory by local police); *United States v. Woody*, 55 F.3d 1257, 1270 (7th Cir. 1995) (even if roadside search of

glovebox was unlawful, stolen checks would have inevitably been discovered during subsequent inventory of the car); *United States v. George*, 971 F.2d 1113, 1121-22 (4th Cir. 1992) (inevitable discovery exception applied to evidence seized from truck; remanding for determination of whether inventory would invariably have occurred). These courts require record evidence that an inventory of the arrestee's possessions would in fact have been conducted in accordance with lawful inventory procedures. *See id.*; *see also United States v. Gorski*, 852 F.2d 692, 696 (2d Cir. 1988) (reversing denial of suppression motion where no evidence presented that bag containing drugs would have been inventoried).

The court in *United States v. \$639,558*, 955 F.2d 712 (D.C. Cir. 1992) recognized the consequences of ignoring the independent source requirement. Police searched a train passenger's bags without a warrant. *Id.* at 74. The court rejected application of the inevitable discovery doctrine and affirmed suppression of money and evidence found in the luggage, stating:

If the evidence stemming from the violation is nevertheless admissible on the basis that the bags inevitably would have been opened when they were later inventoried, the practical consequence is apparent. In the vast run of cases, there would be no incentive whatever for police to go to the trouble of seeking a warrant (or, we should add, of waiting for a lawful inventory to occur during normal processing).

Id. at 720-21.

The Sixth Circuit acknowledged that “[t]here is no evidence in the record” of whether the police would have inventoried Dillard's possessions, but that “in all likelihood” such an inventory would have occurred. Pet. App. 14a. The possibility that an inventory would have occurred was deemed sufficient to render the discovery of the evidence in the briefcase “inevitable.” The Sixth Circuit's decision was

erroneous even under the authorities that have ignored *Nix*'s independent source requirement. See *Woody*, 55 F.3d at 1270 (remanding for determination of whether inventory would have occurred); *Gorski*, 852 F.2d at 692 (same).

This issue deserves the Court's immediate attention. That police may be entitled to inventory an arrestee's possessions at the station house to protect themselves against claims of lost property cannot justify a warrantless, arrest-scene search conducted solely to gather evidence. If the fruits of a warrantless search are admissible whenever an inventory could have been conducted, there simply is never any need for police to obtain a warrant before opening an arrestee's locked luggage. Warrantless arrest-scene searches would be excused in all instances where the police can establish that they have an inventory policy that they could have followed, but chose not to. *Belton* and *Chadwick* would never have been decided. Left unchecked, the next logical extension of the inevitable discovery doctrine is that evidence obtained from a warrantless search will be admitted where police had probable cause to seek a search warrant, and a magistrate "inevitably" would have issued one if the police had bothered to ask. The Court must immediately halt the further and unwarranted extension of the inevitable discovery doctrine.

CONCLUSION

For these reasons, the petition for a writ of *certiorari* should be granted.

Respectfully submitted,

MARK A. WHITT
JONES DAY
North Point
901 Lakeside Avenue
Cleveland, Ohio 44114
(216) 586-3939
Counsel for Petitioner

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