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Fourth Amendment--Toward Police Discretion in Determining the Scope of Administrative Searches

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FOURTH AMENDMENT—TOWARD POLICE DISCRETION IN DETERMINING THE SCOPE OF ADMINISTRATIVE SEARCHES

Florida v. Wells, 110 S. Ct. 1632 (1990)

I. INTRODUCTION

In *Florida v. Wells*,[1] a unanimous Supreme Court held that if the police do not have a policy governing the opening of closed containers encountered during an inventory search, then the opening of such a container during the inventory search of an impounded automobile violates fourth amendment protections against unreasonable searches and seizures.[2]

The decision requires scrutiny for two reasons. First, *Wells* is notable primarily for its dicta regarding police discretion in determining the scope of inventory searches, and, as such, changes the law very little. It is therefore questionable whether this decision adequately resolves the split in the circuits over how to apply precedent to inventory search cases. Second, the dicta of the opinion suggests that the next time the Court hears an inventory search case, it will change the law to conform to the dicta in *Wells*; in so doing, the Court will grant the police a measure of discretion to determine the scope of inventory searches. This Note anticipates this sequence of events, and therefore also evaluates the "new" law to determine its effects on the rights of the individual motorist.

This Note concludes that the Court did act to resolve a split in the circuit courts over the application of *Colorado v. Bertine*,[3] a landmark decision concerning inventory searches. Yet, there seems to be no answer for why the Court chose to address the split through the facts of *Wells*, which do not present the issue in controversy.

According to dicta in this decision, the Court seems prepared to

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1 110 S. Ct. 1632 (1990).

2 *Id.* at 1635.

3 479 U.S. 367 (1987). *See infra* notes 61-68 and accompanying text for an indepth discussion of this case.

move toward excluding less evidence by granting police a measure of discretion to open closed containers. This Note concludes, however, that such a law probably will not have that effect on the amount of evidence courts admit. This result would be true even if the Court accepts a standard allowing absolute police discretion to determine the scope of the search.

II. BACKGROUND

A. FACTS

Martin Leslie Wells drove his friend's BMW on State Highway 207, near Palatka, Florida,[4] on the night of February 11, 1985.[5] Florida State Trooper Rodney Adams observed the car travelling sixty-one miles per hour in a fifty miles per hour zone and pulled Wells over.[6] Nothing else about the movement of the car attracted notice.[7] According to Trooper Adams, Wells conducted himself as a total gentleman upon getting out of the car.[8] Adams noticed the smell of alcohol on Wells' breath[9] and administered roadside sobriety tests.[10] After conducting these tests, Trooper Adams informed Wells that he was under arrest for driving under the influence of alcohol and would be transported to the station for a breathalizer test.[11] Wells commented that he was cold and that he wanted to go to the car to get his jacket.[12] To protect himself, Trooper Adams accompanied Wells to the BMW and visually surveyed the interior of car.[13] The officer saw money, totalling three thousand dollars, scattered on the floorboard.[14] Upon inquiry, Wells made several contradictory statements about the origin and his knowledge of the cash.[15]

Trooper Adams requested to view the contents of the trunk, and Wells consented.[16] However, neither Wells nor Adams suc-

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4 Joint Appendix at 33, Florida v. Wells, 110 S. Ct. 1632 (1990) (No. 88-1835) [hereinafter Joint Appendix].

5 *Id.* at 1.

6 *Id.* at 34.

7 *Id.*

8 *Id.* at 35.

9 *Id.* at 36.

10 *Id.* at 37.

11 *Id.* at 57.

12 *Id.* at 58.

13 *Id.*

14 *Id.* at 60.

15 *Id.* at 78. He first claimed the money came from selling the car; then he denied knowing about the money at all.

16 *Id.* at 92.

ceeded in opening the lock.[17] A wrecker towed the car to a local garage, where Trooper Adams finally succeeded in opening the trunk.[18] Adams spoke with his corporal about whether to perform an inventory search, and the corporal responded that he [Adams] should do what he thought best.[19] The garage attendant testified that Trooper Adams wanted to run a "real good" inventory search of the car, because he believed it contained drugs.[20] Trooper Adams proceeded to search the car thoroughly, looking in the glove compartment, the ashtrays, underneath the seats, and in the crack between the seats.[21] He found two roachclips in the ashtray but was unable to determine their age.[22] Adams then went back to the car's trunk and removed a suitcase which felt as though it contained something.[23] Using "a couple of knives," he pried the suitcase open.[24] The garage attendant further testified that Trooper Adams felt sure the suitcase contained drugs.[25] Adams assumed that opening the suitcase came under the authority of the inventory search; however, after discovering eighteen pounds of marijuana inside the suitcase, he questioned whether he should have obtained a warrant.[26]

B. PROCEDURAL HISTORY

On August 2, 1985, Wells filed an amended motion to suppress all evidence seized on February 12, 1985.[27] The motion was denied.[28] The defendant thereafter entered a plea of *nolo contendere* to the charge of possession of a controlled substance, but specifically reserved the right to appeal the ruling on the motion to suppress.[29] The State of Florida stipulated that the outcome of the motion to suppress would determine the outcome of the case.[30]

On August 21, 1986, Florida's Fifth District Court of Appeals

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17 *Id.* at 67.

18 *Id.*

19 *Id.* at 88. Trooper Adams was not required to get the corporal's permission to run the search. Apparently, he only sought advice from a superior because he was not clear on the proper procedure. *See id.* at 115.

20 *Id.* at 141.

21 *Id.* at 69.

22 *Id.* at 70.

23 *Id.* at 72.

24 *Id.*

25 *Id.* at 145.

26 *Id.* at 83. Apparently, Trooper Adams asked the garage attendants. Only Adams and the two garage attendants were present during the search. *Id.* at 68.

27 *Id.* at 1.

28 *Id.* at 22.

29 *Id.* at 235.

30 *Id.* at 23.

ruled that Trooper Adams' search of the closed suitcase violated fourth amendment guarantees against unreasonable searches and reversed the trial court's judgment.[31] The Supreme Court of Florida affirmed the decision, holding that the search of the suitcase violated the fourth amendment on both consent search and inventory search theories.[32] The State of Florida petitioned for a rehearing, which the Florida Supreme Court granted.[33] The court again held the search to be unconstitutional.[34]

The Florida Supreme Court, at the rehearing of *State v. Wells*,[35] decided three issues of law. First, the court held that the defendant's consent to the search of the trunk did not authorize Trooper Adams to open and search the locked suitcase.[36] Second, it held that the state troopers acted properly in impounding the car, rendering admissible into evidence the two roachclips found in the ashtray.[37] Finally, the court, on the authority of *Colorado v. Bertine*,[38] ruled that opening the suitcase violated fourth amendment protections.[39] The only issue presented to the United States Supreme Court on certiorari was the third issue; namely, whether opening the locked suitcase during the automobile inventory search violated the fourth amendment guarantees against unreasonable searches and seizures.[40]

The Florida Supreme Court found the application of law to the facts straightforward. The United States Supreme Court had held in *Bertine* that the admission into evidence of narcotics found in a backpack during a standard inventory search of an automobile did not violate constitutional protections.[41] In *Bertine*, Chief Justice Rehnquist, writing for the majority, emphasized in a footnote that police department procedures required the opening of closed containers and the listing of their contents.[42] The Florida Supreme

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31 Wells v. State, 492 So. 2d 1375 (Fla. Dist. Ct. App. 1986).

32 Joint Appendix, *supra* note 4, at 266, 271. The consent search theory questioned whether Wells' grant of permission to Trooper Adams to look in the trunk justified Adams' opening the locked suitcase found in the trunk. *Id.* at 271.

33 *Id.* at 248.

34 State v. Wells, 539 So. 2d 464, 468 (Fla. 1989).

35 539 So. 2d 464 (Fla. 1989).

36 *Id.* at 467.

37 *Id.* at 469. The court held that the money lying in the car justified impoundment and described the impoundment as "reasonable." *Id.*

38 479 U.S. 367 (1987).

39 *Wells*, 539 So. 2d at 469. *See infra* notes 61-68 and accompanying text for a discussion of *Bertine*.

40 Petition for Writ of Certiorari to the United States Supreme Court at 1, Florida v. Wells, 110 S. Ct. 1632 (1990) (No. 88-1835).

41 479 U.S. at 369.

42 *Wells*, 539 So. 2d at 468 (citing *Bertine*, 479 U.S. at 374 n.6.). The complete text of

Court quoted the language in the footnote as part of its holding, adding emphasis to the words "mandated the opening of closed containers and the listing of their contents."[43] The Florida court then quoted Justice Blackmun's *Bertine* concurrence: "[I]t is permissible for police officers to open closed containers in an inventory search *only if they are following standard police procedures that mandate the opening of such containers in every impounded vehicle.*"[44]

The Florida court concluded that since the State Patrol followed no mandatory policy concerning the opening of closed containers, Trooper Adams search of the suitcase violated the *Bertine* rule.[45] The opinion then stated, "the police under *Bertine* must mandate either that all containers will be open during an inventory search or that no containers will be opened. There can be no room for discretion."[46]

C. RELEVANT PRECEDENT

Inventory searches involving automobiles lend themselves to a limited number of scenarios. Officers may or may not impound a car for objectively justifiable reasons. Similarly, the officers may or may not search the car according to procedure. If the trial court finds that the officers justifiably impounded the car and searched it in accordance with established police procedures, then evidence obtained during these warrantless searches is admissible under the fourth amendment. The Supreme Court has applied this rule since at least 1976.[47] The cases since 1976 have helped to develop the simple rule later articulated concerning *Bertine*: "inventory searches conducted pursuant to standard criteria are reasonable *per se*."[48]

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footnote six states, "[W]e emphasize that, in this case, the trial court found that the Police Department's procedures mandated the opening of closed containers and the listing of their contents. Our decisions have always adhered to the requirement that inventories be conducted according to standardized criteria." 479 U.S. at 374 n.6.

43 *Wells*, 539 So. 2d at 469.

44 *Id.* (quoting *Bertine*, 479 U.S. at 374 (Blackmun, J., concurring)) (emphasis added by the Florida Supreme Court). Justices Powell and O'Connor joined Justice Blackmun in his *Bertine* concurrence. The Florida court also noted that these three justices concurred in the majority opinion and specifically cited footnote six as a reason for doing so. Therefore, the Florida court stated that "[a]s a ground upon which a majority of the Court agreed, the 'no discretion' requirement constitutes a clear holding of the *Bertine* Court." *Id.* at 469 n.5.

45 *Id. But see infra* notes 85 and 131 for a discussion of what constitutes a mandatory policy.

46 *Id.*

47 South Dakota v. Opperman, 428 U.S. 364, 367 (1976).

48 Note, *The Automobile Inventory Search Exception: The Supreme Court Disregards Fourth Amendment Rights in Colorado v. Bertine—The States Must Protect the Motorists*, 62 Notre Dame L. Rev. 366, 371-72 (1987) [hereinafter Note, *The Automobile Inventory Search Exception*]; *see*

In *South Dakota v. Opperman*,[49] the Court held that a routine, warrantless inventory search of an illegally parked car, which had been impounded by the police, did not violate the fourth amendment prohibition against unreasonable searches and seizures; accordingly, the marijuana found in the unlocked glove compartment constituted admissible evidence.[50] Chief Justice Warren Burger, writing for the majority, noted that cars retain a lesser degree of fourth amendment protection than houses for two reasons: first, the mobile nature of the automobile; and second, the lessened expectation of privacy.[51] Since the car in question had been abandoned temporarily and was not in danger of disappearing, Chief Justice Burger primarily addressed the issue of reduced expectations of privacy. He articulated three reasons for the lessened privacy expectations. First, law enforcement officers during routine activity frequently have contact with automobiles. Second, automobiles are subject to extensive government regulation and inspection. Third, travel by automobile is public by nature.[52] He ultimately justified the warrantless search through this lessened expectation of privacy.

Interestingly, Chief Justice Burger noted precedent which declared unconstitutional administrative searches of buildings when no warrant had been obtained.[53] He also elaborated on the fact that since the automobile inventory search was non-criminal, the warrant requirement which presupposed probable cause did not apply.[54] However, he noted these propositions in footnotes and did not address the seeming contradiction.

Justice Marshall, in his dissent, wrote that the police must first specifically determine that a car is to be inventoried, and second must exhaust efforts to find the owner to get permission before an inventory search may take place.[55]

In *Illinois v. Lafayette*, the Court held the inventory search of a

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also Wells, 539 So. 2d at 471 (Shaw, J., dissenting). Justice Shaw believed that since Trooper Adams followed his standard operating procedure, the search was constitutional under *Bertine*. Therefore, Justice Shaw and the other dissenters thought that the search had been sufficiently regulated. However, the Highway Patrol Manual was not in effect at the time of the search. This lack of a manual later assumed a significant role in the United States Supreme Court's determination of whether Trooper Adams' inventory search was significantly regulated. *See infra* note 85. *See also infra* note 131 for discussion of what constitutes standard operating criteria.

49 428 U. S. 364 (1976).

50 *Id.* at 367.

51 *Id.*

52 *Id.* at 369.

53 *Id.* at 367 n.2 (citing Camara v. Municipal Court, 387 U.S. 523 (1967)).

54 *Id.* at 370 n.5.

55 *Id.* at 393 (Marshall, J., dissenting).

handbag at the time of arrest met constitutional requirements.[56] In *Lafayette*, police arrested an individual involved in a protest and took him to the station for routine processing. While listing the contents of his handbag pursuant to standard procedure, drugs were found.[57] Although this search did not involve a car, it is relevant to *Wells* for two reasons. First, instead of determining whether the object of the inventory search has a reduced expectation of privacy, the Court focused on whether probable cause was required, given the exigent circumstances. If probable cause was not required, then as a matter of law, the need to acquire a warrant is obviated.[58] Second, the Court stated that a possibility of less intrusive means did not render the search unreasonable.[59] Chief Justice Burger noted that the purpose of Supreme Court review was to pass on the constitutionality of a particular search rather than to give instructions on the best way to conduct routine administrative duties.[60] This case shifted the focus of the Court away from the reduced expectation of privacy rationale to concerns over the police's need for efficiency in conducting inventory searches.

In *Bertine*, the Court held that during the routine inventory search of an impounded vehicle, the opening of a container found inside the vehicle did not violate the fourth amendment if it occurred in accordance with established procedures.[61] In *Bertine*, the police conducted an inventory search on a van which had been properly impounded after the arrest of the owner for driving while intoxicated. While listing all items in the van, the police opened a closed backpack to list its contents and found illegal drugs.[62] Chief Justice Rehnquist concluded that the *Opperman* and *Lafayette* principles governed the facts at hand, because *Bertine* also presented a reasonable police regulation concerning administrative searches applied in good faith.[63] He extended these principles to add that during a valid search, asking police to make subtle distinctions between compartments in the car must give way to completion of the task at hand.[64] Chief Justice Rehnquist, in response to the defendant's argument, ruled that the discretion to allow the officer to im-

56 Illinois v. Lafayette, 462 U.S. 640, 643 (1983).

57 *Id.*

58 *Id.*

59 *Id.* at 647.

60 *Id.* at 648.

61 Colorado v. Bertine, 479 U.S. 367, 369 (1987).

62 *Id.*

63 *Id.* at 374, 376.

64 *Id.* at 375 (citing United States v. Ross, 456 U.S. 798, 821 (1982)).

pound the car had not been precluded by precedent.[65] Justice Blackmun concurred, arguing that the police did not have discretion to determine the scope of the search.[66] Justice Marshall, in his dissent, continued to advocate balancing the government's interest against the individual's expectation of privacy.[67] *Bertine* suggests, however, that inventory searches of automobiles completed pursuant to standard criteria serve a government interest which outweighs an individual's privacy interest.[68]

III. UNITED STATES SUPREME COURT OPINIONS

The Supreme Court unanimously held unconstitutional Trooper Adams' search and affirmed the Florida Supreme Court's holding that the evidence obtained through the inventory search must be suppressed.[69] Thus, the conviction was thrown out.[70] Chief Justice Rehnquist, writing the majority opinion, was joined by Justices White, O'Connor, Scalia, and Kennedy. Justice Brennan filed a concurring opinion in which Justice Marshall joined. Justices Blackmun and Stevens each filed separate concurring opinions.

A. MAJORITY OPINION

Writing for the majority, Chief Justice Rehnquist began by reviewing the Florida court's facts, reasoning, and precedent.[71] Although he affirmed the lower court ruling,[72] Chief Justice Rehnquist began his analysis by distinguishing the law applied by the Florida court from the law of *Bertine*.[73] He stated that the Florida court's reasoning missed the heart of both the opinion and the concurrence in *Bertine*.[74] Quoting *Bertine*, he wrote "nothing [in the controlling cases] prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and the basis of something other than suspicion of evidence of criminal activity."[75] The need for standard criteria,[76] he continued, came from

65 *Id.* at 375.

66 *Id.* at 374 (Blackmun, J., concurring).

67 *Id.* at 377 (Marshall, J., dissenting).

68 *See supra* note 48 and accompanying text.

69 Florida v. Wells, 110 S. Ct. 1632, 1635 (1990).

70 Joint Appendix, *supra* note 4, at 23. The state of Florida had stipulated that this motion to suppress evidence was dispositive of the case. *Id.*

71 *Wells*, 110 S. Ct. at 1634.

72 *Id.* at 1635.

73 *Id.*

74 *Id.*

75 *Id.* (quoting Colorado v. Bertine, 479 U.S. 367, 375 (1987)).

76 The Court has used the phrase "standard criteria" to mean a policy or procedure which must be followed during the search and which controls the actions of the police

the desire to prevent inventory searches from turning into general searches for evidence of criminal activity.[77]

The Court then squarely disagreed with the Florida court's statement that inventory searches must be restricted to either opening all or none of the closed containers discovered during the search.[78] After noting the policy reasons for conducting inventory searches,[79] Chief Justice Rehnquist maintained that a police officer must be allowed sufficient latitude to make judgments which arise from the nature of these searches.[80] Chief Justice Rehnquist further stated that if a state's policy allowed officers to open closed containers the contents of which were not apparent from the exterior, such a policy would not violate fourth amendment protections; instead, it would be rationally related to the purpose of an inventory search.[81] The Court then affirmed the judgment of the Florida Supreme Court.

B. JUSTICE BRENNAN'S CONCURRENCE

Justice Brennan, joined by Justice Marshall, concurred in the judgment. Justice Brennan first noted that this search would be found unconstitutional under any reading of precedent.[82] He interpreted the law to require that inventory searches must be regulated to ensure no police discretion to meet constitutional standards.[83]

Indeed, Justice Brennan feared that insufficiently regulated inventory searches would turn into broad evidence searches.[84] To demonstrate this fear, he began by rejecting the state of Florida's contention that the State Trooper's Highway Patrol Manual provided sufficient regulatory guidelines.[85] He noted, for instance, that

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officer conducting the search. Supreme Court cases have not defined the term as applied to inventory searches. *See infra* note 131 for a discussion of how lower courts determine whether the police have adhered to standard criteria.

77 *Wells*, 110 S. Ct. at 1635 (citing *Bertine*, 479 U.S. at 376 (Blackmun, J., concurring)).

78 *Id.*

79 *Id.* "[I]nventory procedures serve to protect an owner's property while it is in the custody of the police, to insure against claims of lost, stolen, or vandalized property, and to guard the police from danger." *Id.* (quoting *Bertine*, 479 U.S. at 372).

80 *Id.* The Court referred to decisions made to further the taking of an inventory, such as when to look inside a closed container. *Id.*

81 *Id.*

82 *Id.* (Brennan, J., concurring).

83 *Id.* at 1636 (Brennan, J., concurring) (citing South Dakota v. Opperman, 428 U.S. 364, 384 (1976) (Powell, J., concurring)). Justice Powell had written in *Opperman*: "[N]o significant discretion is placed in the hands of the individual officer: he usually has no choice as to the subject of the search or its scope." 428 U.S. at 384.

84 *Id.* at 1636 (Brennan, J., concurring).

85 *Id.* (Brennan, J., concurring). While the Florida Supreme Court may have believed that guidelines were in effect, oral argument before the Supreme Court revealed that no

Trooper Adams made several discretionary judgments, including the decisions to impound the car, to perform an inventory search, and to open the suitcase.[86] Justice Brennan further questioned whether an inventory search took place at all, as neither an inventory sheet nor testimony that any objects were recorded elsewhere was admitted into evidence.[87] Rather, the testimony only established that the search served the purpose of looking for drugs.[88] The record is replete with evidence of Trooper Adams' determination to find drugs in the car.[89]

Justice Brennan next assessed the majority opinion. He agreed with the majority's holding to the extent that it affirmed the Florida Supreme Court's ruling that total police discretion to open a locked container during an inventory search violated fourth amendment guarantees.[90] However, Justice Brennan disagreed with the suggestion that a state may adopt a policy granting the police some discretion.[91] Not only did the statement constitute pure dicta, but Justice Brennan argued it misrepresented the reasoning and the holding of *Bertine*.[92]

To support this argument, Justice Brennan reviewed the Florida Supreme Court's analysis of the *Bertine* decision. First, he reiterated that only an inventory search procedure which limits police discretion may be characterized as reasonable.[93] Next, he emphasized that footnote six of *Bertine* constituted part of the applicable law.[94] In response to Chief Justice Rehnquist's suggestion that a state may grant police some discretion, he noted that the language in *Bertine* relied on by the Chief Justice, specifically that "nothing in

written guidelines actually existed until after the search. The State of Florida argued instead that the search was controlled by "standard operating procedures" which were later incorporated into the Highway Patrol Manual. Transcript of Oral Argument at 17, 30-31. *See infra* note 131 for a discussion of what constitutes standard criteria.

86 *Id.* (Brennan, J., concurring). Concerning the actual decision to force open the suitcase, Trooper Adams testified, "Well, I had to take my chances." Joint Appendix, *supra* note 4, at 83.

87 *Wells*, 110 S. Ct. at 1635 (Brennan, J., concurring).

88 *Id.* (Brennan, J., concurring).

89 *Id.* at 1636-37 (Brennan, J., concurring). The garage attendant had testified, "[Trooper Adams] wanted to inventory the car real good because he felt sure there was drugs in it." "There ain't nobody runs around with that kind of money on the floorboard unless they're dealing drugs or something like that." "[Adams] had a strong suspicion there was drugs in the car and it was probably in the suitcase." On discovering the marijuana, Adams said "There it is." Joint Appendix, *supra* note 4, at 141-42, 145, 147.

90 *Wells*, 110 S. Ct. at 1637 (Brennan, J., concurring).

91 *Id.* (Brennan, J., concurring).

92 *Id.* (Brennan, J., concurring).

93 *Id.* (Brennan, J., concurring).

94 *Id.* *See supra* note 42 for the text of footnote six.

Opperman . . . prohibits police discretion so long as that discretion is exercised according to standard criteria," responded to an argument that because the police had discretion whether to impound the car, the search was unconstitutional.[95] Justice Brennan concluded, therefore, that this portion of *Bertine* did not apply to the question at hand. Quoting Justice Blackmun's *Bertine* concurrence, Justice Brennan reasserted that opening suitcases during an inventory search conformed with the fourth amendment only if the police officer followed a policy that mandated opening such containers in every impounded car.[96]

Finally, Justice Brennan reiterated his dissenting position in *Bertine*, which stated that because opening a closed container constitutes a great invasion of privacy, only consent and exigency ought to justify doing so.[97] He concluded that "[i]f the Court wishes to revisit [*Bertine*], it must wait for another case. Attempting to cast doubt on the vitality of the holding in *Bertine* in this otherwise easy case is not justified."[98]

C. JUSTICE BLACKMUN'S CONCURRENCE

Justice Blackmun filed a separate concurring opinion. Justice Blackmun agreed that a police officer should not have complete discretion to open closed containers during an inventory search.[99] He refrained from joining the majority opinion, however, because rather than ruling on the facts at hand, Chief Justice Rehnquist offered an opinion on the extent to which an officer *may* be given discretion.[100]

Justice Blackmun agreed with Chief Justice Rehnquist that a state need not impose an all-or-nothing requirement on opening closed containers.[101] For example, a state could require the opening of all containers over a certain size.[102]

Allowing an individual officer discretion to determine which containers to open was an entirely different matter, however.[103] Justice Blackmun believed that the majority did more than refute the

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95 *Id.* at 1637 (Brennan, J., concurring).

96 *Id.* (Brennan, J., concurring).

97 *Id.* (citing Colorado v. Bertine, 479 U.S. 367, 387 (1987) (Marshall, J., joined by Brennan, J., dissenting)). *See* Arkansas v. Sanders, 442 U.S. 753 (1979), and United States v. Chadwick, 433 U.S. 1 (1977), for criminal search cases which use this analysis.

98 *Wells*, 110 S. Ct. at 1638 (Brennan, J., concurring).

99 *Id.* (Blackmun, J., concurring).

100 *Id.* (Blackmun, J., concurring) (emphasis in original).

101 *Id.* at 1639 (Blackmun, J., concurring).

102 *Id.* (Blackmun, J., concurring).

103 *Id.* (Blackmun, J., concurring).

Florida Supreme Court's all-or-nothing standard; it conjectured about an important constitutional question not addressed by this case.[104]

D. JUSTICE STEVENS' CONCURRENCE

Justice Stevens filed an opinion concurring in the judgment. After noting his approval of Justice Blackmun's legal analysis, he immediately raised the question of why this case merited a grant of certiorari.[105] While conceding that the Florida Supreme Court opinion contained a minor flaw, namely requiring an all-or-nothing standard, Justice Stevens stated that this did not justify exercising jurisdiction.[106]

Justice Stevens restated Justice Blackmun's belief that, not content to correct the Florida Court's error, the majority "plunge[d] ahead with . . . one of its own."[107] He observed that if a state granted an officer discretion to open a container after viewing its exterior, nothing would be left of "standard criteria."[108]

Justice Stevens concluded by characterizing the majority's dicta concerning a state granting a degree of discretion to police as "unabashed judicial activism."[109]

IV. ANALYSIS

A. HOW *FLORIDA V. WELLS* AFFECTS THE LAW OF INVENTORY SEARCHES

Since 1976, inventory searches carried out according to a standard policy have satisfied fourth amendment standards.[110] It is only when the police do not have procedures governing the opening of a closed container discovered during a search and the recording of its contents that a new question is posed.[111] The new, pressing question addresses what procedure the state may allow rather than what the individual officer may do.[112] *Wells* suggested an answer to this

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104 *Id.* (Blackmun, J., concurring).

105 *Id.* (Stevens, J., concurring).

106 *Id.* (Stevens, J., concurring). He argued that the extra protection granted to Florida citizens did not hamper law enforcement.

107 *Id.* (Stevens, J., concurring).

108 *Id.* (Stevens, J., concurring).

109 *Id.* (Stevens, J., concurring).

110 *See supra* note 48.

111 *See* Colorado v. Bertine, 479 U.S. 367 (1987). If a procedure exists, such as requiring that the container be opened and the contents listed, then the issues remain the same.

112 *Wells*, 110 S. Ct. at 1637 (Brennan, J., concurring).

question, but only in dicta. Specifically, the majority suggests that the police should be granted discretion to determine the scope of an administrative inventory search on a case-by-case basis. This solution would obviously create an unprecedented amount of police discretion.

The facts of the various Supreme Court cases on this matter have been quite similar. For example, *Opperman* involved an illegally parked, apparently abandoned car.[113] The police conducted an inventory search according to standard criteria and found marijuana in the unlocked glove compartment. Although the Court upheld the search because of a reduced expectation of privacy, the search still conformed to established department procedures. Regardless, the marijuana was admitted into evidence.[114] Similarly, the police in *Bertine* conducted an inventory search of an impounded vehicle; since the search of the backpack conformed with established police procedures, it too was declared constitutional.[115] *Wells* concerned an impounded car which was searched, but no standard criteria existed to guide the search of the suitcase. Police found marijuana in the locked suitcase in the trunk; however, the evidence was not admitted because the search was declared unconstitutional.[116] The existence of standard criteria for the search appears to be the only tenable distinction between these cases, especially because Wells gave Trooper Adams permission to look in the trunk.[117]

Since no factual distinction other than the absence of standard criteria can be made between *Opperman*, *Bertine*, and *Wells*, *Wells* does not change the law substantially. Since *Wells* rules against the state and is the first of this line of cases to do so, *Wells* does limit *Bertine*, but the limitation is modest. *Bertine* established the proposition that regulated inventory searches which required police to open closed containers found in the automobile were constitutional.[118] *Wells* simply holds that the opening of a suitcase found in the automobile pursuant to a policy with no requirement concerning closed containers is not constitutional.[119]

However, this explicit requirement of standard criteria is overshadowed by the dicta regarding discretion. The case merits atten-

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113 South Dakota v. Opperman, 428 U.S. 364 (1976). *See supra* notes 49-55 and accompanying text for a detailed discussion of *Opperman*.

114 *Id.*

115 *Bertine*, 479 U.S. at 369. *See supra* notes 61-68 and accompanying text for a discussion of *Bertine*.

116 *Wells*, 110 S. Ct. at 1635.

117 *Id.* at 1634.

118 Colorado v. Bertine, 479 U.S. 367, 369 (1987).

119 *Wells*, 110 S. Ct. at 1632.

tion more for Chief Justice Rehnquist's analysis of the Florida court's opinion than for its outcome. The Supreme Court unanimously held that the Florida court correctly decided the case.[120] Justice Brennan claimed the *Wells* search to be unconstitutional under any reading of precedent.[121] Yet, Chief Justice Rehnquist claimed that the Florida court, although it reached the proper result, misstated the law.[122] He believed that the Constitution does not require, as the Florida court believed it did, an all-or-nothing policy for opening closed containers discovered during an inventory search.[123] The dicta of Chief Justice Rehnquist's opinion did not discuss whether this search met constitutional requirements; rather, it discussed to what extent a state may grant police latitude during a search.[124] Justice Rehnquist contended that the state may grant the police a degree of latitude commensurate with the purpose of inventory searches.[125] Such an idea has not been contemplated or suggested in any previous Supreme Court decision other than Justice Blackmun's concurrence in *Bertine*, where he demanded that the police have no discretion.[126] All of the concurring opinions in *Wells* voiced concern over Chief Justice Rehnquist's statement because it indicates a significant change in the law.

Even taking into account the *Wells* decision, the law concerning inventory searches has changed very little since 1976. The law has changed only to allow the opening of closed containers pursuant to standard criteria in *Bertine*.[127] Justice Rehnquist's discussion of police discretion in *Wells* indicates that the next case concerning inventory searches may very well bring a new change in the law; namely, that a state may grant its police a degree of discretion in determining the scope of a non-criminal, administrative inventory search. For the first time, it is possible that such a search will be upheld as constitutional.

B. THE APPLICATION OF *WELLS* BY LOWER COURTS

The circuits and states have applied *Bertine* to inventory searches in differing manners. Two general interpretations emerge: some courts follow the Florida Supreme Court interpretation as ar-

120 *Id.* at 1635.
121 *Id.* (Brennan, J., concurring).
122 *Id.*
123 *Id.*
124 *Id.*
125 *Id.* For a listing of those purposes, see *supra* note 79.
126 Colorado v. Bertine, 479 U.S. 367, 377 (1987) (Blackmun, J., concurring).
127 *Id.* at 369.

ticulated in its *Wells* decision, while other courts follow a more liberal interpretation of *Bertine*, which coincides with Chief Justice Rehnquist's dicta in *Wells*. The split does not center on whether an all-or-nothing rule must control the opening of containers during searches; rather, it focuses on the question of whether the police have a measure of discretion to open a container. Florida is among the jurisdictions which read *Bertine* to eliminate all police discretion.[128] Other jurisdictions, however, read *Bertine* to allow discretion in keeping with the goals of the inventory search, as does the dicta in *Wells*.[129] The *Wells* Court's attempt to address this issue through dicta may affect future Supreme Court cases, but it will not unify the circuits immediately.

Florida does not stand alone in its preclusion of police discretion. The Eighth Circuit, in *United States v. Porter*,[130] reached a similar result. In *Porter*, police forced open a locked briefcase found in a car's trunk during an inventory search. The briefcase contained drugs. Testimony established that police had conducted the search pursuant to local and federal policies requiring that the car be inventoried thoroughly.[131] The Eighth Circuit affirmed the district court's admission of the drugs as evidence, in part because the officers had no discretion in conducting the search.[132]

A Utah court also read *Bertine* to preclude discretion. In *State v. Shamblin*,[133] the court held that opening a shaving kit during an inventory search violated the fourth amendment, because no procedures existed to regulate the opening of closed containers.[134] The only procedure in existence at the time of the search simply stated that "a written record shall be made of the contents of the vehi-

128 *See, e.g.*, State v. Wells, 539 So. 2d 464, 468 (Fla. 1989).

129 *See, e.g.*, United States v. Judge, 864 F.2d 1144, 1146 (5th Cir. 1989).

130 859 F.2d 83, 85 (8th Cir. 1988) (per curiam).

131 *Id.* Underlying these findings that standard criteria have or have not been adhered to is a question which is rarely (and then inconsistently) answered. Must the standard criteria be in the form of a written, official document or will an informal policy suffice? Decisions cover the spectrum of possibilities. The Third Circuit in United States v. Frank, 864 F. 2d 992, 1004 (3d Cir. 1988), stated that no written policy was needed. The Eighth Circuit in *Porter* simply accepted the trial court's determination that procedure had been followed without inquiring into how the determination was made. *Porter*, 859 F.2d at 85. The United States Supreme Court in *Wells* noted that written policies were not in effect during the search and did not accept the state's argument that standard procedure governed the search. Florida v. Wells, 110 S. Ct. 1632, 1636 (1990) (Brennan, J., concurring). Yet, the *Wells* decision did not hold that the policy must be in writing. This question seems to be another well-suited for certiorari. Presently, trial courts make this determination as an issue of fact without Supreme Court guidance.

132 *Porter*, 859 F.2d at 85.

133 763 P.2d 425 (Utah App. Ct. 1988).

134 *Id.* at 427.

cle."[135] The court concluded that this did not satisfy the standard of *Bertine*, which requires a policy specifically addressing closed containers.[136]

On the other hand, some jurisdictions interpret *Bertine* to comport generally with Chief Justice Rehnquist's dicta in *Wells* concerning discretion. The Third Circuit in *United States v. Frank*[137] held that a formalized standard for the scope of the search was met automatically when the policy calls for an inventory, since an inventory means a listing of all items.[138] *Bertine*, the court held, only required explicit criteria to determine *when* an inventory must take place.[139] This reasoning validates all evidence found in a properly authorized inventory search, since everything must be listed by the officer. Every single item in the car is *ipso facto* within the scope of a constitutionally permissible search.

Similarly, the Fifth Circuit in *United States v. Judge*[140] held that a DEA agent used *permissible discretion* in determining that a bag was a "container;" therefore, the use of evidence found in the bag did not violate the fourth amendment.[141] The court's analysis began by stating that drug enforcement agents have authorization to open containers and inventory the contents.[142] The agent must, therefore, exercise discretion to determine what object is a container and whether to impound the object of the inventory.[143] The court then analyzed whether that discretion had been exercised in a way consistent with the inventory or with a view toward gaining evidence. To make this determination, the court applied an "objective standard" equivalent to determining whether an arrest had been the pretext to a search.[144] The court found that the agent had used appropriate discretion in opening a bag in Judge's car and that the $65,000 found therein was admissible.

Wells did not address the issue of how much discretion an officer may use; it only ruled that one officer acting with total discretion had too much. The dicta of the ruling, although it appears to en-

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135 *Id.*
136 *Id.*
137 864 F.2d 992 (3d Cir. 1988), *cert. denied*, 109 S. Ct. 2442 (1989).
138 *Id.* at 1004.
139 *Id.* (emphasis added).
140 864 F.2d 1145 (5th Cir. 1989), *cert. denied*, 110 S. Ct. 1946 (1990).
141 *Id.* at 1146.
142 *Id.* at 1145.
143 *Id.*
144 *Id.* at 1146 n.3. The court cited "pretext search" cases which have applied an objective standard. *See, e.g.*, United States v. Causey, 834 F.2d 1179, 1182 (5th Cir. 1987) (en banc); United States v. Miller, 821 F.2d 546, 549 (11th Cir. 1987); United States v. Hawkins, 811 F.2d 210, 213 (3d Cir.), *cert. denied*, 484 U.S. 833 (1987).

dorse the Fifth Circuit approach, does little to unify the various jurisdictions. *Wells* most likely will have minimal effect on the lower courts' application of *Bertine*, because these courts simply may choose to ignore the dicta and apply older, lower court rulings which are on point. If the Court wanted to clarify the law concerning the extent to which an officer may or may not exercise discretion in such a search, then it should have selected a case which addressed the issue. For example, the Court could have granted certiorari to the *Judge* decision, which held that an officer may use discretion in an inventory search; resolution of the constitutionality of this procedure would have solved the conflict in the circuits.[145]

C. THE EFFECT OF PROBABLE FUTURE LAW ON THE RIGHTS OF MOTORISTS

The *Wells* dicta suggests that when a state grants discretion to a police officer to determine the scope of the inventory search, the search will not violate the Constitution. While the *Wells* decision held that unregulated inventory searches in which an officer opened a closed container were unconstitutional as a matter of law, the majority's dicta seemed to espouse the Fifth Circuit's decision in *Judge*. Recall that *Judge* held that if the facts surrounding the decision to open a container indicated that the decision was made to further the taking of the inventory rather than merely to obtain evidence of criminal activity, then the search does not violate the Constitution.[146] The Fifth Circuit thus adopted an objective test to regulate the officer's discretionary decisions. Specifically, "we must ask whether the agent's action, when viewed from an objective standpoint, can reasonably be said to have an administrative or safety motivation as opposed to an evidence seeking one."[147] To answer this inquiry, the court reviews objective criteria such as the facts sur-

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[145] The Supreme Court recently has explained that decisions are binding until expressly overturned, despite contradictory reasoning in newer cases. *See* Rodriguez de Quijas v. Shearson/American Express Inc., 109 S. Ct. 1917, 1921 (1989). The *de Quijas* Court, with the same five justices which composed the majority in *Wells*, reversed the Fifth Circuit for not following a Supreme Court decision which was directly on point. Although more recent cases have used reasoning which undermined this precedent, the Court emphasized that the lower courts must follow those cases which control the facts before them and leave to the Supreme Court the decision to overrule. Since *Wells* did not actually address how much discretion police may exercise, this jurisprudence compels lower courts to ignore Chief Justice Rehnquist's dicta and to apply direct precedent.

[146] *Judge*, 864 F.2d at 1146. *See supra* notes 140-144 and accompanying text for a discussion of *Judge*.

[147] *Id.* *See* Delaware v. Prouse, 440 U.S. 648 (1979), for a discussion of the objective standard in related areas of law.

rounding the search rather than to the subjective intent of the officer.

If the discretionary standard[148] becomes the law, the intrusiveness of inventory searches could be increased greatly, as the change to an objective standard may lead to unjustifiable searches. Yet, after evaluating the *Judge* and *Bertine* holdings, it appears that the discretionary standard will not be more intrusive. In fact, under *Bertine*, more containers would be opened than under the discretionary standard, in part because *Bertine* upheld police discretionary decisions to impound the car, thereby necessitating the inventory search.[149] The discretionary standard, then, already constitutes the only barrier between the motorist and the police in jurisdictions which apply the *Bertine* rule.

By comparing *Judge*'s objective standard (which is also the discretionary standard) to the two standards applied respectively in *Bertine* and *Wells*, the objective standard appears less invasive than the *Bertine* standard. This comparison can be made by examining a single set of facts—the facts of *Wells*—and applying the three standards to it. Recall that in *Wells*, a state trooper stopped Wells for speeding, noticed the smell of alcohol on his breath, administered roadside sobriety tests, and then arrested Wells for driving under the influence of alcohol. Upon peering into the car, the trooper noticed a large amount of cash. The officer had the car towed to a local garage where he ran an inventory search. Upon finding roach-clips in the ashtray, he intensified his efforts, now convinced he would find illegal drugs. The officer made several statements confirming this intent. He found a locked suitcase in the trunk, surmised it contained drugs, and forced it open.[150]

Applying the *Wells* standard, the police may open containers

148 This Note refers to the actual holding of *Wells* as the "*Wells* standard" and to the standard espoused in the *Wells* dicta as the "discretionary standard," which is also the status of the law in the Fifth Circuit per the *Judge* decision.

149 *See supra* text accompanying note 65. Statistics regarding the pervasiveness of inventory searches shed little light on how often evidence is obtained. For example, the Chicago Police Department Annual Report lists only total inventories and not the number of searches which produce evidence. The 1988 Report stated that Chicago Police made over 110,000 inventories that year in connection with an arrest. 1988 CHICAGO POLICE DEPARTMENT ANNUAL REPORT 14 [hereinafter ANNUAL REPORT]. The number of inventories also refers to planned arrests done with a proper warrant when firearms, for example, are seized as evidence. In addition, Chicago Police impounded over 120,000 automobiles in 1988. ANNUAL REPORT, this note, at 16. This number includes both cars towed in connection with a crime as in *Wells* and abandoned vehicles as in *Opperman*. These two statistics describe different events, but either may give rise to an inventory search, as these cases illustrate.

150 *See supra* text accompanying notes 5-26.

only when a policy directly mandates it; since Florida did not have a policy concerning closed containers, the court suppressed the evidence acquired as a result of opening the closed container. Only two facts are important under the *Wells* standard to the determination of the constitutionality of the search. First, no policy exists for the opening of closed containers discovered during the inventory search. Second, the container was opened.

Under the second standard, the *Judge* discretionary standard, the confiscated drugs would be admissible if the officer's actions objectively served the purpose of creating an inventory rather than finding evidence. The defendant had been arrested for driving under the influence of alcohol. The officer observed money on the floorboard. These facts demanded an inventory search since the property must be accounted for during the defendant's detention. Valuable property also may have been inside the suitcase, so it needed to be accounted for in the inventory. An officer could have concluded that it contained more money. The officer's subjective intent upon finding the suitcase is irrelevant, however. Under the objective standard for pretext searches, the expectation of finding evidence does not invalidate an otherwise lawful search.[151] Hence, under the objective standard of discretion, the evidence may be admissible.

Finally, under the *Bertine* standard, police may open closed containers only if a policy directly mandates doing so in every case. Assume that the state has enacted a policy requiring every container to be opened and its contents listed. In this scenario, the police would be required to open every closed container in the car. Thus, the illegal drugs would constitute admissible evidence.

These examples demonstrate that the *Bertine* standard allows greater intrusion by the state than does the discretionary standard, because *Bertine* allows officers to open small, innocuous items like shaving kits, change purses, and duffel bags with impunity. Opening a shaving kit or a first aid kit under the objective standard would be difficult to explain. The *Bertine* standard would also allow more evidence to be admitted, since everything found in the car or in a container would be admissible. The objective standard, however, limits the scope of the search; officers cannot open containers which serve no administrative or safety purpose. Evidence taken from these containers would be suppressed.

The debate over whether discretion to impound the automobile as upheld in *Bertine* also extends to the scope of inventory searches

151 *See* Wagner v. Higgins, 754 F.2d 186, 189-90 (6th Cir. 1985).

overlooks an important point. Justice Brennan and those who agree with him argue that allowing the police this discretion is dangerous, since they may abuse it and subject citizens to pretext searches for evidence of criminal activity; accordingly, "no discretion" regarding the scope of the search is needed to protect fully individual rights. Yet, according to *Bertine*, police may decide whether to impound the car (and therefore whether to run an inventory search) as long as the decision is made for administrative rather than evidence related-reasons.[152] The test developed in *Bertine* to regulate police decisions is exactly the same test advocated by the discretionary standard to regulate the scope of the inventory search.[153] Any argument about the danger of abuse loses its force when one considers that police have been exercising discretion over whether to impound the car (and necessitate an inventory search) since at least 1987.

Further, discretion to impound may be more important than the discretion to determine the scope of the search. After all, an inventory search cannot be conducted unless the car is impounded. For example, if a trooper desires to search a car because he believes it contains illegal drugs, he or she may create a pretext to impound the car in order to search it. If the officer can hide illicit motives behind that discretion, then limiting the scope of the search would offer sparse protection. This is especially true in a jurisdiction like Colorado where officers are instructed to open every container.

In short, because *Bertine* already has granted states authority to require the opening of every container during an inventory search and to allow officers discretion to impound (and therefore to inventory) the car, a ruling which allows states to grant discretion to officers to determine the scope of the search would not erode civil liberties.[154]

V. Conclusion

Wells poses two issues. First, did the Court act properly in hearing and deciding the case to solve the current split in the circuits regarding the application of *Bertine*? Second, does the law regarding the admissibility of evidence obtained through inventory searches

152 Colorado v. Bertine, 479 U.S. 367, 375 (1987).

153 Recall that the Florida Supreme Court held that the police acted properly in impounding the vehicle, and that the roachclips were admissible evidence. State v. Wells, 539 So. 2d 464, 469 (Fla. 1989). The court cited money in the car as a reasonable ground for impoundment. This is an "objective standard."

154 For a critical discussion of whether *Bertine* itself erodes civil liberties, see Note, *The Automobile Inventory Search Exception*, *supra* note 48.

strike the proper balance between state and individual interests? To both questions this Note gives a qualified "yes."

Even a cursory reading of cases in the various jurisdictions shows division on the interpretation of *Bertine*. The more perplexing aspect of this question is why the Court chose to address the division through *Wells* rather than another case. The facts in *Wells* did not present the Court with an opportunity to address the question of whether a government agent may exercise discretion during an inventory search. Nonetheless, Chief Justice Rehnquist chose to address the question in dicta. Unfortunately, the use of dicta is not an effective solution to the existing problem.

Regarding the second issue, the granting of discretion to officers during an inventory search does not tip the scales too far in favor of the state. First, the police already have discretion whether to impound the car and, therefore, whether to run an inventory. There does not appear to be any reason why the police, who currently exercise discretion fairly, would exercise it unfairly when the discretion is extended to include the scope of the search. Second, inventory searches are exhaustive by their nature.[155] Allowing police discretion to open suitcases will extend state intrusion a small degree in jurisdictions like Florida, where no containers presently may be opened, but not at all in jurisdictions like Colorado, where all containers discovered during a search are presently opened.

Florida v. Wells is notable because it portends the new shape of fourth amendment law, but it does not threaten the rights of the individual motorist.

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155 *See* United States v. Frank, 864 F.2d 992, 1004 (3d Cir. 1988).