

No. 21-30251

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MARKANTHONY SAPALASAN

Defendant-Appellant.

On Appeal From The United States District Court
For The District Of Alaska
3:18-cr-00130-TMB

**BRIEF OF AMICI CURIAE NINTH CIRCUIT DEFENDERS IN SUPPORT
OF PETITION FOR REHEARING AND REHEARING EN BANC**

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INTEREST OF AMICI CURIAE

The Ninth Circuit Federal and Community Defender Organizations provide representation to accused persons who lack financial means to hire private counsel in this Circuit under 18 U.S.C. § 3006A. The Defenders' core mission encompasses protecting the constitutional rights of their clients and safeguarding the integrity of the federal criminal justice system. This mission includes upholding the protections afforded by the warrant requirement of the Fourth Amendment and resisting expansion of the carefully-delineated warrant exceptions, including the inventory search exception. The Defenders also have an interest in assuring that courts properly allocate the burden of proof in Fourth Amendment litigation and do not deem legal arguments waived except based on the voluntary, knowing, and intelligent renunciation of constitutional positions. This brief supports Judge Hawkins' dissent and Mr. Sapalasan's position that the search in this case exceeded the limited inventory exception to the Fourth Amendment's warrant requirement.¹

¹ No party or party's counsel or any person other than employees of amici curiae authored any part of this brief or contributed money to fund preparing or submitting the brief. All parties have consented to the filing of this brief.

SUMMARY OF REASONS FOR PANEL REHEARING AND REHEARING EN BANC

The Court should grant rehearing because the panel's published opinion allowing an inventory of personal property to be conducted after the person under arrest has been released is inconsistent with basic Supreme Court precedent:

- Under *Illinois v. Lafayette*, 462 U.S. 640 (1983), and its progeny, the exception to the warrant requirement for a jail inventory search applies when police have custody over the belongings of a person who is about to be jailed, but Mr. Sapalasan was not about to be jailed.
- Under *Arizona v. Gant*, 556 U.S. 332 (2009), exceptions to the warrant requirement are bounded by the underlying rationale for the exception, but the inventory here did not serve the purposes of the inventory exception.
- Under *Lafayette* and *South Dakota v. Opperman*, 428 U.S. 364 (1976), the validity of an inventory search is measured by compliance with local law, but the inventory here violated state law and the local inventory policy.

Further, the Court should not defer to the concurring opinion's discussion of waiver, which fails to recognize the distinction between claims and arguments. Once a claim is preserved, parties are free to raise on appeal new arguments in support of those claims. *Hemphill v. New York*, 595 U.S. 140, 149 (2022). In the suppression context, precluding reliance on new case law at the appellate level is particularly inappropriate under *Coolidge v. New Hampshire*, 403 U.S. 443, 454-55 (1971), which places the burden squarely on the government to establish exceptions to the warrant requirement.

In any event, the Court should grant rehearing because the panel’s reasoning is superseded by the intervening decision in *United States v. Anderson*, No. 20-50345, 2024 WL 1920298 (9th Cir. May 2, 2024) (en banc).

A. The Panel Majority Opinion Deviates From The Rules Established In *Lafayette* And Other Supreme Court Precedent For Jail Inventory Searches.

The purpose of an inventory search is to create an account of a jailed person’s seized Fourth Amendment “effects.” By creating an inventory of the property at the outset of a seizure, the inventory protects property owners against loss of their items and protects the property custodian against false claims and dangerous items. In *Lafayette*, the Supreme Court approved inventory searches of an individual’s possessions only “incident to booking *and jailing the suspect*,” when those rationales are implicated. 462 U.S. at 643 (emphasis added). The panel majority here expanded the inventory exception as defined in *Lafayette*, failed to restrict the inventory exception to its underlying rationales, and ignored the purported inventory’s non-compliance with determinative local rules.

1. *Lafayette*’s Description Of A Legitimate Inventory Search Requires Imminent Incarceration.

In the present case, the majority applied the *Lafayette* exception to Mr. Sapalasan even though he was not in custody and did not face imminent incarceration. *United States v. Sapalasan*, 97 F.4th 657, 659 (9th Cir. 2024) (the

police may constitutionally conduct an inventory search “even after the individual has been released.”). The Court should reject this unprecedented expansion of police power over personal property both to maintain uniformity with the Supreme Court’s constitutional precedent and to address a question of exceptional importance regarding individual rights. Fed. R. App. P. 35(a).

On every page of its opinion, the Court in *Lafayette* articulated the inventory exception to the warrant requirement in terms of the property owner’s imminent incarceration. 462 U.S. at 644 (“preceding incarceration”); at 645 (“prior to being placed in confinement”); at 646 (“property found on the person or in the possession of an arrested person who is to be jailed”); at 647 (“prior to his incarceration”); at 648 (“part of the routine procedure incident to incarcerating an arrested person”). Allowing an inventory in that context makes sense because the jail will retain the person’s property for the unknown duration of their incarceration. By allowing a jail inventory of personal property *after* a former suspect has already been released, when the property no longer needs to be retained, the majority opinion initiates an unprecedented expansion of the Supreme Court’s “few specifically established and well-delineated exceptions” to the warrant requirement. *Katz v. United States*, 389 U.S. 347, 357 (1967).

Expansion of the *Lafayette* exception violates the cardinal rule of Fourth Amendment analysis that a search and its justification must occur at the same time. As an example of that principle, probable cause to conduct a search or seizure can dissipate with the passage of time. *United States v. Lopez*, 482 F.3d 1067, 1073 (9th Cir. 2007) (“As a corollary . . . of the rule that the police may rely on the totality of facts available to them in establishing probable cause, they also may not disregard facts tending to dissipate probable cause.”) (quoting *United States v. Ortiz-Hernandez*, 427 F.3d 567, 574 (9th Cir. 2005)). Similarly, a search incident to arrest must not be “remote in time or place from the arrest.” *United States v. Chadwick*, 433 U.S. 1, 15 (1977), *abrogated on other grounds by California v. Acevedo*, 500 U.S. 565 (1991); *see also United States v. Maddox*, 614 F.3d 1046, 1048-49 (9th Cir. 2010) (officers could not search closed container incident to arrest for a traffic violation when the driver had already been handcuffed and secured in a squad car).

Here, the initial justification for the police to retain custody of the backpack, and thus the need to inventory its contents, was premised on Mr. Saplasan’s arrest. The backpack could not be returned to him while he was in custody. But the justification to retain the backpack had dissipated by the time the purported inventory occurred, which was *after* Mr. Sapalasan was released. At that point,

returning the backpack to Mr. Sapalasan – not rummaging through its contents – was the only legitimate state action. The supposed inventory search was simply an unconstitutional invasion of private property, untethered from the Supreme Court’s approved exception to the warrant requirement.

2. *Lafayette* And *Gant* Require That Warrant Exceptions Must Be Bounded By Their Rationales.

The Supreme Court has made clear that a valid inventory search requires a nexus between law enforcement’s authority to retain possession of personal property and the administrative rationales inventory policies advance. An inventory search is not an “independent legal concept but an incidental administrative step,” dependent on law enforcement’s continued lawful retention over the belongings of a person being taken into custody, not someone already released. *Lafayette*, 462 U.S. at 644. That is why the Court in *Lafayette* remanded for further factfinding on whether the defendant was to be jailed. 462 U.S. at 648 n.3, 649.

The plain meaning of *Lafayette* and the cases implementing its rule do not apply where property need not be retained because its owner has been released. The absence of the *Lafayette* rationale in the present case is strongly supported by *Gant*, where the Court clarified that the boundaries of the search incident to arrest

exception to the warrant are defined by the exception's underlying rationale. 556 U.S. at 342-44.

The defendant in *Gant* was arrested, removed from his vehicle, and placed in a police car while handcuffed. Although the Court had held in *New York v. Belton*, 453 U.S. 454 (1981), that police may search an arrestee's vehicle incident to arrest, the Court distinguished *Belton* based on the absence of the twin rationales for searches incident to arrest: officer safety and preservation of evidence. Because Mr. Gant was secured at the time of the search, those rationales did not apply, so neither did the search incident to arrest exception for the warrant requirement. 556 U.S. at 344.

Similarly, in the present case, the majority and concurring opinions go astray by untethering the inventory exception from its rationales. An inventory presupposes that police have authority to *retain* custody over the seized object. That is, the rationales supporting an inventory only make sense when police have an ongoing obligation to safeguard another's lawfully seized property and to protect themselves from dangerous items or from false claims, as when a person is arrested or a vehicle is impounded. Here, even if Mr. Sapalasan's backpack was lawfully taken at the outset, by the time the purported inventory occurred, the officer had no reason to retain it; Mr. Sapalasan had already been released. At that

point, the police could only return the backpack absent probable cause and a warrant. *See United States v. Baker*, 58 F.4th 1109, 1118 (9th Cir. 2023) (defendant retained possessory and privacy interests in item the officer removed from his possession without his consent where he neither “disclaimed any ownership or possessory interest” or “voluntarily relinquish[ed] possession”).

Listing the contents rather than returning the backpack would neither assure the security of Mr. Sapalasan’s property nor protect the state from false claims or dangerous items, as *Lafayette* stated were the reasons for the exception. 462 U.S. at 646. Contrary to *Gant*, the panel majority opinion would improperly allow an inventory search where the rationales justifying the inventory search exception had dissipated.

3. *Lafayette* And *Opperman* Require That Inventory Searches Adhere To Applicable State Standards.

The panel majority opinion also fails to follow *Lafayette*’s incorporation of the requirement of compliance with state norms that assure the intrusion is limited to an administrative function, not an investigative purpose. *Opperman*, 428 U.S. at 375. The failure of police to follow state law on inventory searches results in suppression of evidence uncovered during the search. *United States v. Ramos-Oseguera*, 120 F.3d 1028, 1036 (9th Cir. 1997); *United States v. Johnson*, 936 F.2d 1082, 1084 (9th Cir. 1991). In other words, the measure of Fourth Amendment

reasonableness for inventory searches is compliance with state law. *United States v. Wanless*, 882 F.2d 1459, 1463 (9th Cir. 1989) (“Under Washington [common] law, State troopers may not conduct a routine inventory search following lawful impoundment of a vehicle without first asking the owner, if present, if he will consent to the search.”).

Here, the officer’s purported inventory of Mr. Sapalasan’s backpack violated both the local police policy and state decisional law governing inventories. The inventory policy required that the items be enumerated *immediately* upon seizure, although it allowed officers to delay logging the inventoried items until the end of their shift. Here, the officer did not conduct the inventory when he seized the backpack. Instead, he began the purported inventory six hours later, after Mr. Sapalasan had been released. Further, the officer apparently stopped upon finding contraband to obtain a warrant, suggesting that inventorying the contents of the backpack was not the officer’s true motive.

The purported inventory conducted after Mr. Sapalasan’s release also violated Alaska state decisional law, which prohibits inventories of an arrestee’s personal belongings when the suspect does not face imminent incarceration. *Zehrung v. State*, 569 P.2d 189 (Alaska 1977) (invalidating warrantless inventory search of arrestee who could avoid incarceration by posting bail); *Gray v. State*,

798 P.2d 346 (Alaska 1990) (same); *Reeves v. State*, 599 P.2d 727, 737-38 (Alaska 1979) (“[A] pre-incarceration [inventory] search thus limited both adequately protects the reasonable interests of the state and appropriately respects an arrestee’s reasonable expectation of privacy.”).

Thus, the majority opinion is inconsistent with *Opperman* and its progeny in upholding an inventory conducted in violation of established local procedures and state law.

B. The Concurring Opinion On Waiver Fails To Distinguish Between Claims And Arguments In Support Of Claims, And It Misplaces The Burden Of Proving Exceptions To The Warrant Requirement.

The concurrence asserted that “Sapalasan waived any reliance on *Zehrung v. Alaska*, 569 P.2d 189 (Alaska 1977), by failing to address it below.” 97 F.4th at 662 (Nelson, J., concurring), *see also id.* at 664 (citing *United States v. Guerrero*, 921 F.3d 895 (9th Cir. 2019)). But “it is claims that are deemed waived or forfeited, not arguments.” *Allen v. Santa Clara Cnty. Corr. Peace Officers Ass’n*, 38 F.4th 68, 71 (9th Cir. 2022). “Once a federal claim is properly presented, a party can make any argument in support of that claim.” *Hemphill*, 595 U.S. at 149. Appellants are “not limited to the precise arguments they made below.” *Allen*, 38 F.4th at 71; *see also United States v. Studhorse*, 883 F.3d 1198, 1203 n.3 (9th Cir. 2018) (allowing new argument on appeal in support of preserved claim); *accord*

United States v. Walton, 881 F.3d 768, 771 (9th Cir. 2018); *United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004).

The concurring opinion asserted that “new suppression arguments” are waived if raised for the first time on appeal. 97 F.4th at 664 (citing *Guerrero*, 921 F.3d at 898). The concurrence’s reliance on *Guerrero* is misplaced. *Guerrero* addressed a new Fourth Amendment claim that would have required new facts to be adduced. The defendant in *Guerrero* initially asserted that the car stop was unlawful because the driver had signaled before turning. 921 F.3d at 896. Then, for the first time on appeal, the defendant claimed that, under a California traffic law, the driver had no need to signal because no other vehicle would be “affected by the movement.” *Id.* This Court held that, under Federal Rule of Criminal Procedure 12(c), the Court could not address the factually distinct theory raised for the first time on appeal absent a showing of “good cause” for omitting the theory from his pretrial motion, which had not been made. *Id.* at 898; see *United States v. Hawkins*, 249 F.3d 867, 872 (9th Cir. 2001) (unfair surprise to present a claim on which the litigants “had no opportunity to introduce evidence.”).

In contrast to *Guerrero*, here the defendant did not raise a new, factually-distinct theory of suppression on appeal. His claim throughout has been that the search of the backpack was not a valid inventory. Mr. Sapalasan has consistently

argued that the search of the backpack “cannot be upheld under the inventory search exception to the warrant requirement because Anchorage police lacked authority to retain custody of Mr. Sapalasan’s personal property.” ER-38.

Mr. Sapalasan further argued that the police were not “entitled to conduct an administrative search of property belonging to someone who was not under arrest” and could not “retain possession of the backpack after Mr. Sapalasan was released from custody.” ER-39. Nothing in *Guerrero* addresses the Supreme Court and Ninth Circuit authority that distinguishes claims from arguments, nor does the case suggest that a mere failure to cite authority supporting the claim limits what arguments can be raised on appeal.

In the present case, *Zehrung* properly supported the claim raised below: that the search of Mr. Sapalasan’s backpack did not fall within the inventory exception to the warrant requirement. The failure to specifically cite *Zehrung* in the district court did not waive, forfeit, or otherwise limit the clearly-stated claim that the inventory search was invalid. *See Elder v. Holloway*, 510 U.S. 510, 512 (1994) (holding that courts of appeals must consider “all relevant precedents, not simply those cited to, or discovered by, the district court”). Indeed, this Court has recognized that “[a]n argument is typically elaborated more articulately, with more extensive authorities, on appeal than in the less focused and frequently more time

pressured environment of the trial court, and there is nothing wrong with that.”

Puerta v. United States, 121 F.3d 1338, 1341-42 (9th Cir. 1997). No new facts are required for consideration of the applicable Alaska law, which merely confirmed Mr. Sapalasan’s argument that the inventory search was unlawful where there was no dispute that the suspect was not facing incarceration.

Moreover, in the Fourth Amendment context, requiring that a defendant invoke all case law establishing the invalidity of a search improperly shifts the burden of establishing an exception to the warrant requirement to the defense, when it should lie squarely with the government:

[T]he most basic constitutional rule in this area is that “searches conducted outside the judicial process, without prior approval by judge or magistrate, are per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well delineated exceptions.” . . . “(T)he burden is on those seeking the exemption to show the need for it.”

Coolidge, 403 U.S. at 454-55 (footnotes omitted). Under the facts of this case, the prosecutor had just as much of an obligation as the defense to present the case law relevant to the validity of inventory searches in the absence of imminent incarceration.

In any event, to the extent the Court addresses the concurring opinion, the Court should also reconsider how *Guerrero, United States v. Keese*, 358 F.3d 1217 (9th Cir. 2004), and their antecedents have conflated the timing purpose of

Rule 12(c) – whether to allow an untimely motion – with preservation of error for appellate review. The “waiver” discussion in *Guerrero* and *Keese* traces back to *United States v. Restrepo-Rua*, 815 F.2d 1327 (9th Cir. 1987).² *Restrepo-Rua* demonstrates that error preservation for appeal is distinct from limitations on the timing of motions. In that case, the defendant sought to raise a new Fourth Amendment issue after trial, and the Court found no abuse of discretion in the district court deciding it was untimely. 815 F.2d at 1329. But in a later opinion, the Court in *United States v. Wright*, 215 F.3d 1020 (9th Cir. 2000), relied on *Restrepo-Rua* to hold that the defendant’s failure to preserve a particular issue in favor of suppression constituted a “waiver” of that issue on appeal. 215 F.3d at 1026.

Subsequent opinions conflated non-compliance with the timing rule with “waiver” of issues for appeal, even after Rule 12 was amended to no longer label untimely defenses as “waived.” *Guerrero*, 921 F.3d at 898; *see also* Report of the Advisory Committee on Criminal Rules 4-5 (May 2013) (explaining that the Committee eliminated the term “waiver” “to avoid possible confusion” with the

² *See Guerrero*, 921 F.3d. at 897 (citing *Keese*, 358 F.3d at 1220; *Restrepo-Rua*, 815 F.2d at 1329, and *United States v. Wright*, 215 F.3d 1020, 1026-27 (9th Cir. 2000)); *Keese*, 358 F.3d at 1220 n. 5 (citing *Wright*, 215 F.3d. at 1026); *Wright*, 215 F.3d at 1026 (citing *Restrepo-Rua*, 815 F.2d at 1329).

term's ordinary meaning, which refers to "the intentional relinquishment of a known right."). But Rule 12(c)(3) is not a rule of appellate procedure; it does not purport to state the standard for preserving an issue for appellate review, nor does it circumscribe this Court's discretion to review an unpreserved error. Rather, Rule 12(c)(3) states the circumstances under which a district court may exercise its discretion to consider an untimely pretrial motion. Whether an issue is preserved for appellate review should be determined according to developed circuit precedent, not by reference to a trial court procedural rule.

In the present case, the standards governing preservation were easily met. The defense squarely placed the burden on the government to establish that its warrantless rummaging of personal property fit into the well-defined *Lafayette* exception to the warrant requirement, which requires imminent incarceration and compliance with state law. The *Zehrung* argument was never waived.

C. In Any Event, The Intervening En Banc Decision In *Anderson* Supersedes The Panel Majority Opinion's Reasoning.

This Court's precedent requires deference to a related intervening opinion where the reasoning or theory of the higher authority is inconsistent with the earlier opinion. *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc). Under *Miller*, where the reasoning, theory, or mode of analysis of an earlier case is clearly

irreconcilable with that intervening higher authority, the later authority controls. *Id.* at 899-900.

After the panel opinion in this case, the Court en banc addressed the inventory search exception to the warrant requirement in the context an impounded vehicle in *United States v. Anderson*, No. 20-50345, 2024 WL 1920298 (9th Cir. May 2, 2024) (en banc). Although the issues differ somewhat, several clear statements of law in *Anderson* supersede the analysis employed here by the panel’s majority:

- As argued here and absent from the majority opinion, *Anderson* held that the government bears the burden of establishing that “the Fourth Amendment is satisfied and the criteria for the inventory-search exception are met.” *Id.* at *6.
- Unlike the claims in the present case involving the backpack, for which there was no basis for continued police possession, *Anderson* held that “the inventory-search exception applies ‘where the process is aimed at securing or protecting the car and its contents.’” *Id.* (quoting *Opperman*, 428 U.S. at 373).
- As is missing in the present case, *Anderson* held that the inventory must serve its purpose of producing an inventory of items “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.* at *7 (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990)).
- Contrary to the present case, the *Anderson* opinion rejected non-compliance with a local policy that undermines the search’s administrative purpose: “[T]here is a limit to how far an officer can stray from a standard procedure that is adopted to serve the recognized administrative purposes underlying the inventory-search

exception and still justify the search as a good-faith, administrative action.” *Id.*

Neither the majority nor concurring opinions survive the first point: The government utterly failed to carry its burden of proving that the search fell within the *Lafayette* exception for inventory searches, and the burden falls on the government, not the defense, to establish an inventory search’s compliance with state law. The grant of rehearing should incorporate the analytical structure provided by the intervening *Anderson* opinion.

Conclusion

For the foregoing reasons and those stated in Judge Hawkins’ dissent and the petition for rehearing and rehearing en banc, the Court should vacate the panel opinion and grant rehearing or rehearing en banc.

Respectfully submitted this 20th day of May 2024.

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