No.

In the Supreme Court of the United States

KENNETH M. ASBOTH, JR.,

Petitioner,

v.

STATE OF WISCONSIN,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court of Wisconsin

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The "community caretaking" exception to the Fourth Amendment's warrant requirement permits warrantless searches and seizures only where they are "totally divorced from the detection, investigation, or acquisition of evidence." *Cady* v. *Dombrowski,* 413 U.S. 433, 441 (1973). More particularly, this Court has authorized limited police discretion to seize vehicles without warrants for community caretaking purposes "so long as that discretion is exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Colorado* v. *Bertine*, 479 U.S. 367, 375 (1987). At least seven federal circuit courts and eight state high courts have applied *Bertine* to require standardized criteria that limit an officer's discretion to seize a vehicle without a warrant after its operator is taken into custody. Conversely, three federal circuit courts and three state high courts (including the court below, in acknowledged conflict with the majority view) have held that *Bertine* does not require standardized criteria. The question presented is:

Whether standardized criteria must guide police discretion to seize a vehicle without a warrant or probable cause after its operator has been taken into police custody.

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OPINIONS BELOW

The opinion of the Supreme Court of Wisconsin (App., *infra*, 1a–41a) is reported at 898 N.W.2d 541. The opinion of the Wisconsin Court of Appeals (App., *infra*, 42a–65a) is unreported. The opinions of the Circuit Court (App., *infra*, 66a–72a) are unreported.

JURISDICTION

The Supreme Court of Wisconsin issued its decision on July 6, 2017. On September 20, 2017, Justice Kagan extended the time within which to file a petition for a writ of certiorari to and including November 20, 2017. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

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."

STATEMENT

Police arrested petitioner for a probation violation while he was visiting an outdoor storage unit. Without seeking a warrant, the officers then seized petitioner's car, which was parked adjacent to the unit on the storage facility's private property. The officers acted pursuant to departmental policies granting officers unfettered discretion to seize and

impound any vehicle left unattended in any place as the result of any arrest. A subsequent inventory search of the seized car turned up evidence of a different offense for which police already suspected petitioner.

A divided Supreme Court of Wisconsin upheld the warrantless vehicle seizure. The court acknowledged, however, that "a split exists among the federal courts of appeals" and state high courts over whether standardized criteria must guide police discretion to perform warrantless vehicle seizures under "community caretaking" rationales. App., *infra*, 15a.

This case presents the opportunity to resolve that deep and widely recognized split. In *Colorado* v. *Bertine*, this Court held that police can seize arrestees' vehicles under the community caretaking exception to the Fourth Amendment's warrant requirement "so long as that discretion is exercised according to standard criteria." 479 U.S. 367, 375 (1987). *Bertine*'s holding has spawned "substantial debate and disagreement" and a "clear divide" among the circuits and state high courts over whether standardized criteria are in fact required. *United States* v. *Sanders*, 796 F.3d 1241, 1242, 1248 (10th Cir. 2015).

A. Factual Background

Police suspected petitioner, Kenneth M. Asboth, Jr., of an armed bank robbery that had occurred in early October 2012. App., *infra*, 2a. Four weeks later, acting on a tip, a Dodge County, Wisconsin, sheriff's deputy located petitioner next to his car parked in front of an open unit at a private storage facility. *Id.*

at 2a. The deputy called in officers from nearby Beaver Dam (where the bank robbery had occurred), and together they arrested petitioner on a probation violation. *Ibid.*

The Dodge County deputy and Beaver Dam officers then seized petitioner's car and had it towed to the Beaver Dam police station to be impounded and searched. App., *infra*, 3a–4a. The officers did not have a warrant or probable cause to seize or search the vehicle. *Id.* at 6a. Rather, they seized the car pursuant to the community caretaking exception to the Fourth Amendment's warrant requirement. *Ibid.* Once seized, the car was then subject to an automatic inventory search. *Id.* at 4a.

Dodge County and Beaver Dam afford their officers unfettered discretion to seize arrestees' vehicles without a warrant. App., *infra*, 3a–4a, 73a, 79a. Beaver Dam's policy states that officers "may" seize any vehicle in their "lawful custody." *Id.* at 73a. They are also granted the "option not to impound" should they so choose where there is a "reasonable alternative" to seizure. *Ibid*. Dodge County likewise authorizes its deputies to seize any vehicle "left unattended" when its driver is taken into custody; that policy also states that a "deputy always has the discretion to leave the vehicle at the scene and advise the owner to make proper arrangements for removal." *Id.* at 79a. In short, under either policy, anything goes when a driver is arrested.

At the time of petitioner's arrest, his car was parked between two storage units. App., *infra*, 2a. Although another vehicle would not have been able to park in front of the open unit nor one adjacent to it, the units were otherwise accessible. Other

vehicles could "maneuver around" petitioner's car and "drive through the alley." *Ibid.* A police photograph of the vehicle's location immediately before its seizure was introduced in support of petitioner's suppression motion, and is reproduced below:

See Def.'s Mot. for Recons. on Ruling 18 (Wis. Cir. Ct. Aug. 13, 2013); see also App. to Br. of Def.-Appellant-Pet'r 126 (Wis. Feb. 8, 2017).

The officers did not ask petitioner to arrange for the car to be moved. App., *infra*, 2a, 24a. Nor did they contact the storage facility owner to ask if he wanted the vehicle removed. *Id.* at 3a. And, after determining the car was registered to someone other than petitioner, officers did not contact that person

about relocating the car. *Ibid.*[1] Rather, officers seized the car and had it towed to the impound facility. *Ibid.*

Beaver Dam police conducted an inventory search of petitioner's car after impoundment. App., *infra*, 4a. That search turned up a pellet gun in the spare tire compartment under the floor of the trunk. *Ibid.* Police concluded that the pellet gun was similar to the weapon brandished during the armed robbery for which they suspected petitioner. *Ibid.*

B. Procedural Background

1. Petitioner was charged with armed robbery. App., *infra*, 5a. He moved to suppress the pellet gun found in his seized car. Petitioner initially argued that the inventory search of his vehicle was unconstitutional, but the trial court upheld the search. *Id.* at 72a. Petitioner moved for reconsideration, contending that the warrantless seizure of his vehicle was unconstitutional. *Id.* at 66a–69a. The trial court upheld the seizure under the community caretaking exception to the Fourth Amendment's warrant requirement. *Id.* at 69a. After the evidence was deemed admissible, petitioner pleaded no contest. *Id.* at 6a.[2]

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[1] Petitioner owned the vehicle, but neither he nor the previous owner had notified Wisconsin's Department of Transportation of the sale. App., *infra*, 3a n.1.

[2] See Wis. Stat. § 808.03(3)(b) (providing the right to appeal the denial of a suppression motion after a plea of no contest).

2. Petitioner appealed, arguing that the warrantless vehicle seizure had not been "conducted pursuant to a law enforcement policy setting forth standardized, sufficiently detailed guidelines limiting officer discretion" as required by this Court's decision in *Bertine*. App., *infra*, 45a–46a.

The Wisconsin Court of Appeals acknowledged that, "[a]s the State points out, federal courts of appeal are divided as to whether *Bertine* requires that seizure of a vehicle must be conducted in accordance with a standardized policy." App., *infra*, 51a; see also *id.* at 48a (reiterating that "the federal circuit courts of appeal are in conflict" on that question). The court observed that "*Bertine* can be read, but is not universally read, to describe a requirement that police exercise their discretion in light of standardized criteria set forth in a police policy." *Id.* at 48a (quoting *Bertine*, 479 U.S. 367, 375–76 (1987)).

The court of appeals assumed without deciding that *Bertine* established that police must follow standardized criteria when performing warrantless, community caretaking vehicle seizures. App., *infra*, 49a. It nevertheless affirmed by holding that this requirement was satisfied because one of the two police departments at the scene had "a written document that reflected standards governing seizure." *Id.* at 52a.

3. The Supreme Court of Wisconsin granted review, and a divided court affirmed. App., *infra*, 1a.

Like the court of appeals, the supreme court acknowledged that "a split exists" among the federal circuits and state high courts on "*Bertine*'s impact on

impoundments by officers performing community caretaker functions." App., *infra*, 15a. "Several circuits agree with [petitioner]," the court recognized, "that law enforcement officers may constitutionally perform a warrantless community caretaker impoundment only if standard criteria minimize the exercise of their discretion." *Ibid.* (citing decisions by the Seventh, Eighth, Ninth, Tenth, and D.C. Circuits).

"In contrast," the court explained, "three federal circuits do not afford dispositive weight to the existence of standardized criteria or to law enforcement officers' adherence thereto." App., *infra*, 16a (citing decisions by the First, Third, and Fifth Circuits). In those circuits, adherence to standardized criteria is "at most, one factor to consider when assessing the Fourth Amendment reasonableness of a warrantless community caretaker impoundment." *Ibid.*

The supreme court did not adopt the court of appeals' view that resolution of the conflict was unnecessary to resolve this case. Rather, the supreme court ultimately "agree[d]" with the minority position that does not require standardized criteria and rejected the other circuits' rule that "the absence of standard criteria * * * render[s] a warrantless community caretaker impoundment unconstitutional." App., *infra*, 18a. "*Bertine*," the court held, "does not mandate adherence to standard criteria" when an officer conducts a community caretaker impoundment. *Id.* at 1a.

The court then concluded the seizure of petitioner's car was reasonable because leaving it unattended would have "inconvenienced" the storage

facility's owner and customers and generated a risk of "vandalism or theft." App., *infra*, 11a–12a. The court also noted that the officers had discretion to decide whether to seize petitioner's vehicle under their departmental impoundment policies, which allowed them free reign to impound any vehicle left unattended incident to an arrest. *Id.* at 23a–24a. The court held that there had been "no sensible alternative" to seizure, even though, "[a]dmittedly, the officers did not offer [petitioner] the opportunity to make arrangements for moving his car after his arrest." *Ibid.*

Justice Ann Walsh Bradley, joined by Justice Shirley S. Abrahamson, dissented. Justice Bradley would have "follow[ed] the national trend" and "majority of federal and state appellate courts" by adopting "the well-reasoned approach of the Tenth Circuit." App., *infra*, 27a (citing *United States* v. *Sanders*, 796 F.3d 1241, 1248 (10th Cir. 2015)).

In *Sanders*, the dissent explained, the Tenth Circuit held that "impoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety" must be "justified by both a standard policy and a reasonable, non-pretextual community-caretaking rationale." App., *infra*, 27a (quoting *Sanders*, 796 F.3d at 1248). This approach, the dissent concluded, harmonized this Court's holdings in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976), and *Bertine*. App., *infra*, 31a. "*Opperman* establishe[d]" that warrantless community caretaking seizures are constitutional if performed to "protect[] public safety and promot[e] the efficient movement of traffic." *Ibid.* *Bertine* later established that warrantless

community caretaking seizures are unconstitutional if performed pretextually or without adherence to standardized criteria. *Ibid.*

The dissent also emphasized that a meaningful standardized criteria requirement for warrantless vehicle seizures incident to arrest is consistent with *Arizona* v. *Gant*, 556 U.S. 332 (2009). App., *infra*, 28a–30a. In *Gant*, the Court narrowed the circumstances in which warrantless vehicle *searches* incident to arrest are constitutional. *Id.* at 29a. The "national trend," the dissent concluded, is to similarly "limit[] police discretion regarding impoundments." *Id.* at 32a. By contrast, unfettered police discretion to impound a vehicle incident to every arrest raises "the specter that the [community caretaking] exception will be misused as a pretext" for investigative searches; "today's close call will become tomorrow's norm." *Id.* at 40a (quoting *State* v. *Pinkard*, 785 N.W.2d 592, 609–10 (Wis. 2010) (Bradley, J., dissenting)).

The dissent accordingly concluded "that the warrantless impoundment of petitioner's vehicle violated his Fourth Amendment rights" for two reasons. App., *infra*, 27a–28a.

First, the Beaver Dam and Dodge County impound policies "insufficiently limit[] officer discretion to impound vehicles from private lots." App., *infra*, 35a (quoting *Sanders*, 796 F.3d at 1250). Beaver Dam authorizes warrantless seizures "whenever officers have custody of a vehicle"—a "circular" directive without "any limitation at all." App., *infra*, 23a–24a. Dodge County, moreover, "limits police discretion only when a driver *is not* in custody," *id.* at 34a (emphasis in original), to

scenarios where, for example, a seizure is "in the interest of public safety because of fire, flood, storm, snow or other emergency reasons." *Id.* at 79a. When a driver *is* taken into custody and thus leaves his vehicle unattended, however, officers have unlimited discretion to seize the vehicle. *Ibid.*

Second, the dissent observed, petitioner's "vehicle neither obstructed traffic nor created an imminent threat to public safety." App., *infra*, 28a. The dissent was unconvinced by the "purely speculative" "proffered rationales" for the seizure in the absence of such exigencies. *Id.* at 37a. The dissent concluded that "the impoundment may have been a pretext for an investigatory police motive." *Id.* at 38a. "[T]he lack of a compelling public safety need to move [petitioner's] car suggests that the police were motivated by the investigation of the armed robbery in which he was a suspect." *Id.* at 39a.

REASONS FOR GRANTING THE PETITION

I. The Federal Courts Of Appeals And State High Courts Are Deeply Divided

The decision below acknowledged that "[a] split exists" over whether police must follow standardized criteria when invoking the Fourth Amendment's community caretaking exception to seize a vehicle after taking its operator into custody. App., *infra*, 15a. This question has "generated controversy" among the federal circuits and state high courts and resulted in a "clear divide." *United States* v. *Sanders*, 796 F.3d 1241, 1245, 1248 (10th Cir. 2015). The circuits are split at least 7–3 on the question presented, and state high courts are intractably divided as well. The majority of courts require that

standardized criteria guide police discretion to make community caretaking seizures of arrestees' vehicles. The minority of courts do not require such criteria.

A. At Least Seven Circuits And Eight State High Courts Require That Standardized Criteria Limit Discretion To Invoke The "Community Caretaking" Rationale To Seize A Vehicle After Arresting Its Operator

The Fourth, Sixth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits require that standardized criteria cabin an officer's discretion to seize a vehicle without a warrant after the vehicle's operator has been taken into custody. State high courts in Arkansas, Indiana, Iowa, Maine, Michigan, Missouri, North Dakota, and Oklahoma likewise impose that requirement pursuant to the Fourth Amendment.

The Tenth Circuit's decision in *United States* v. *Sanders* succinctly states the majority view: "[I]mpoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community-caretaking rationale." 796 F.3d 1241, 1248 (2015). This rule is rooted in *Bertine*, which "makes the existence of standardized criteria the touchstone of the inquiry into whether an impoundment is lawful." *Id.* at 1248–49.

In *Sanders*, police arrested the defendant and then seized his car from where it was "lawfully parked in a private lot" and not "impeding traffic or

posing a risk to public safety." 796 F.3d at 1242, 1250. Affirming the suppression of evidence gathered from a subsequent inventory search, the court of appeals held that the warrantless seizure was unlawful because "it was not guided by standardized criteria." *Id.* at 1243. The court rejected the police officers' rationale for the seizure—that the car was parked in a "high-crime area" and was a "likely target for a crime"—because those factors were not set forth in standardized criteria that meaningfully cabined officer discretion. *Ibid.*

In *United States* v. *Duguay,* the Seventh Circuit likewise held that the "circumstances in which a car may be impounded" "must be standardized." 93 F.3d 346, 351 (1996). The seizure in that case "violated the Fourth Amendment," the court concluded, because police lacked "a standardized impoundment procedure." *Ibid.* Rather, the impound policy authorized seizure of any vehicle incident to its operator's arrest. The court held that this policy did not provide police "sufficiently standardized" criteria to guide their discretion. *Id.* at 352. Furthermore, the court held that it is "irrational and inconsistent with 'caretaking' functions" to seize vehicles "based solely on an arrestee's status as a driver, owner, or passenger." *Id.* at 353. After all, the court emphasized, a warrantless "caretaker" seizure is constitutional only if it is "completely unrelated to an ongoing criminal investigation." *Id.* at 352.

At least five other circuits have recognized the same requirement. The Eighth Circuit held that "[s]ome degree of 'standardized criteria' or 'established routine' must regulate" warrantless vehicle seizures incident to an arrest. *United States*

v. *Petty*, 367 F.3d 1009, 1012 (2004) (quoting *Florida* v. *Wells*, 495 U.S. 1, 4 (1990)). The Eleventh Circuit also held that where "an arrestee's vehicle is not impeding traffic or otherwise presenting a hazard," police can seize it only "so long as the decision to impound is made on the basis of standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Sammons* v. *Taylor*, 967 F.2d 1533, 1543 (1992) (internal quotation marks omitted).

Likewise, the Ninth Circuit held that community caretaking seizures must be conducted "in conformance with the standardized procedures of the local police department and in furtherance of a community caretaking purpose, such as promoting public safety or the efficient flow of traffic." *United States* v. *Torres*, 828 F.3d 1113, 1118 (2016). "This requirement ensures that impoundments are conducted 'on the basis of something other than suspicion of evidence of criminal activity.'" *Ibid.* (citation omitted); see also *Miranda* v. *City of Cornelius*, 429 F.3d 858, 866 (9th Cir. 2005) ("The decision to impound must be guided by conditions which 'circumscribe the discretion of individual officers' in a way that furthers the caretaking purpose.") (quoting *Colorado* v. *Bertine*, 479 U.S. 367, 376 n.7 (1987)).

So too in the Sixth Circuit, which has explained that "[d]iscretion as to impoundment is permissible so long as that discretion is exercised according to standard criteria." *United States* v. *Hockenberry*, 730 F.3d 645, 658 (2013) (quoting *United States* v. *Jackson*, 682 F.3d 448, 454 (6th Cir. 2012)) (internal quotations omitted). And the Fourth Circuit has

likewise concluded that "*Bertine* requires standard criteria for impounding vehicles." *United States* v. *Cartrette*, 502 Fed. Appx. 311, 317 (2012).

The D.C. Circuit's approach is generally consistent with the majority view. That court has held that when "a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment." *United States* v. *Proctor*, 489 F.3d 1348, 1354 (2007); see also *ibid.* (declining the government's invitation to adopt the First Circuit's approach, which exemplifies the minority view, see, *infra*, p. 16).

Eight state high courts have also understood the Fourth Amendment to require that standardized criteria constrain police discretion to seize arrestees' vehicles without a warrant or probable cause.

The Supreme Court of Iowa held that *Bertine* required it to "look for the existence of reasonable standardized procedures and a purpose other than the investigation of criminal activity" in determining whether a warrantless vehicle seizure is permissible. *State* v. *Huisman*, 544 N.W.2d 433, 437 (Iowa 1996). Likewise, the Supreme Court of Arkansas held that "police may impound a vehicle and inventory its contents only if the actions are taken in good faith and in accordance with standard police procedures or policies." *Benson* v. *State*, 30 S.W.3d 731, 733 (Ark. 2000).

The Supreme Judicial Court of Maine similarly described "[t]he requirement of conformity to a standard practice, or policy" as "essential" when police determine whether to tow and inventory a vehicle. *State* v. *Fox*, 157 A.3d 778, 785 (Me. 2017)

(quoting *State* v. *Hudson*, 390 A.2d 509, 511 (Me. 1978)). North Dakota's Supreme Court also held that "[t]he impounding of a vehicle passes constitutional muster so long as the decision to impound is guided by a standard policy." *State* v. *Pogue*, 868 N.W.2d 522, 528 (N.D. 2015) (quoting *United States* v. *Le*, 474 F.3d 511, 514 (8th Cir. 2007)).

Courts of last resort in Indiana, Michigan, Missouri, and Oklahoma adopted similar rules after *Bertine*. See *Fair* v. *State*, 627 N.E.2d 427, 433 (Ind. 1993); *People* v. *Toohey*, 475 N.W.2d 16, 25 (Mich. 1991); *State* v. *Milliorn*, 794 S.W.2d 181, 186 (Mo. 1990); *McGaughey* v. *State*, 37 P.3d 130, 142–43 (Okla. Crim. App. 2001).[3]

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[3] Lower appellate courts in six other states have reached the same conclusion. See *Taha* v. *State*, 366 P.3d 544, 548–49 (Alaska Ct. App. 2016); *Patty* v. *State*, 768 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 2000); *People* v. *Ferris*, 9 N.E.3d 1126, 1137 (Ill. App. Ct. 2014); *People* v. *Watson*, 576 N.Y.S.2d 370, 371 (N.Y. App. Div. 1991); *State* v. *O'Neill*, 29 N.E.3d 365, 374 (Ohio Ct. App. 2015); *Commonwealth* v. *Hocutt*, No. 0104-15-2, 2015 WL 3877005, at *3 (Va. Ct. App. June 23, 2015). Both the Supreme Court of Idaho and the Minnesota Supreme Court have also held that, in cases where the operator was not arrested, warrantless vehicle seizures must be conducted pursuant to standardized criteria. *State* v. *Weaver*, 900 P.2d 196, 199–200 (Idaho 1995); *State* v. *Gauster*, 752 N.W.2d 496, 503 (Minn. 2008).

B. Three Circuits And Two Other State High Courts Do Not Require Standardized Criteria That Limit Seizure Discretion

In the decision below, the Supreme Court of Wisconsin "agree[d]" with the First, Third, and Fifth Circuits, and the highest courts of Massachusetts and Vermont, that standardized criteria are not necessary for vehicle seizures under the community caretaking exception to the Fourth Amendment's warrant requirement. App., *infra*, 18a.

In *United States* v. *Coccia*, the First Circuit concluded that standardized criteria were not necessary to uphold the warrantless seizure of a car from private property after its operator was taken into police custody. 446 F.3d 233, 235–38 (2006). The court explained that it did "not understand *Bertine* to mean that an impoundment decision made without the existence of standard procedures is per se unconstitutional." *Id.* at 238. A warrantless vehicle seizure can be "reasonable under the circumstances," the court explained, with or without standardized criteria or procedures cabining officer discretion to perform the seizure. *Id.* at 239 (citing *United States* v. *Rodriguez-Morales*, 929 F.2d 780, 786 (1st Cir. 1991)).

The Third Circuit adopted that approach in *United States* v. *Smith*, 522 F.3d 305 (2008). There, the court surveyed the "conflict" among the circuits to determine "which of the two lines of cases to follow." *Id.* at 312, 314. The Third Circuit ultimately joined the First Circuit in concluding that, while standardized criteria "may be desirable" and "tend to encourage the police to avoid taking arbitrary

action," they are not constitutionally required. *Id.* at 315.

The Fifth Circuit likewise held that "the reasonableness of [a] vehicle impoundment for a community caretaking purpose" can be determined "without reference to any standardized criteria." *United States* v. *McKinnon*, 681 F.3d 203, 208 (2012) (per curiam). Two state courts of last resort—now joined by the Supreme Court of Wisconsin—have endorsed the same approach. See *Commonwealth* v. *Oliveira*, 47 N.E.3d 395, 398 (Mass. 2016); *State* v. *Lizee*, 783 A.2d 445, 448 (Vt. 2001).[4]

II. The Decision Below Is Wrong

This Court's review is further warranted because the decision below is incompatible with this Court's prior decisions. The Supreme Court of Wisconsin disregarded this Court's requirements that community caretaking seizures be "totally divorced" from any investigatory purpose, and that the discretion to perform such seizures be guided by standardized criteria. The decision below also authorized a boundless exception to limits this Court has placed on vehicle *searches* incident to arrest.

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[4] Lower appellate courts in two other states have also adopted this approach. See *Cannon* v. *State*, 601 So. 2d 1112, 1114 (Ala. Crim. App. 1992); *Thompson* v. *State*, 995 A.2d 1030, 1041 (Md. Ct. Spec. App. 2010).

A. The Decision Below Undermines This Court's Limitations On Vehicle Seizures And Searches

1. The decision below cannot be squared with this Court's established line of community caretaking cases. In *Cady* v. *Dombrowski*, this Court held that police may seize and search a vehicle without a warrant or probable cause in the performance of what the Court called "community caretaking functions." 413 U.S. 433, 441, 447–48 (1973). Those functions, the Court emphasized, must be "*totally divorced* from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Id.* at 441 (emphasis added).

This Court next addressed the community caretaking exception in *South Dakota* v. *Opperman*, 428 U.S. 364 (1976). There, the Court observed that it was "beyond challenge" that police can seize vehicles that obstruct public thoroughfares or pose threats to public safety. *Id.* at 369. An inventory search of such a seized vehicle may also be conducted, the Court held, provided the search is made "pursuant to standard police procedures." *Id.* at 372. Adherence to standards, the Court explained, prevents an inventory search from turning into "a pretext concealing an investigatory police motive." *Id.* at 376; see also *Florida* v. *Wells*, 495 U.S. 1, 4 (1990).

And in *Colorado* v. *Bertine*, this Court applied *Opperman*'s requirement that standardized criteria govern inventory searches to the decision to seize a vehicle. 479 U.S. 367, 375 (1987). After a vehicle operator is arrested, the seizure of the vehicle for community caretaking reasons is valid only "so long

as [police] discretion is exercised *according to standard criteria* and on the basis of something other than suspicion of evidence of criminal activity." *Ibid.* (emphasis added). Such standard criteria, *Bertine* explained, will "circumscribe the discretion of individual officers" deciding whether to seize an arrestee's vehicle. *Id.* at 376 n.7. The Court ultimately upheld the seizure because police discretion had been "exercised in light of standardized criteria" and not "to investigate suspected criminal activity." *Id.* at 375–76.

The Supreme Court of Wisconsin's decision here is inconsistent with *Bertine* and its forebears. According to the decision below, "*Bertine* does *not* mandate adoption of or adherence to standard impoundment criteria." App., *infra*, 19a (emphasis added). Instead, following the First Circuit, the court read *Bertine* to hold that "standard criteria do not provide 'the sine qua non of a reasonable impoundment decision[.]'" *Id.* at 17a (quoting *United States* v. *Coccia*, 446 F.3d 233, 239 (1st Cir. 2006)). This conclusion, however, cannot be squared with *Bertine*'s command that nothing "prohibits the exercise of police discretion *so long as* that discretion is exercised according to standard criteria." 479 U.S. at 375 (emphasis added).

What is more, the decision below unmoors the community caretaking exception from its origins in *Cady*. The Supreme Court of Wisconsin held that police discretion is "sufficiently cabined[,]" even without standardized criteria, if a seizure is "based, *at least in part*, on a reasonable community caretaking concern and *not exclusively* on" criminal investigation. App., *infra*, 18a (quoting *Coccia*, 446

F.3d at 239) (emphasis added). Accordingly, a seizure need be based only *in part* on community caretaking—and so can, in other part, be premised on suspicion of criminal activity. That is a far cry from *Cady*'s clear holding that community caretaking searches and seizures must be "*totally divorced*" from criminal investigation. 413 U.S. at 441 (emphasis added).

2. The decision below also undermines this Court's decisions concerning warrantless vehicle *searches* incident to arrest. In *Arizona* v. *Gant*, this Court limited such searches to two scenarios: (1) when the arrestee is within reaching distance of the vehicle, and (2) when an officer believes the vehicle contains evidence of the offense of arrest. 556 U.S. 332, 346, 351 (2009).

In *Gant*, police officers stopped Gant for driving on a suspended license, arrested him, and secured him in a police car. 556 U.S. at 335. They then searched his vehicle and discovered a firearm and cocaine. *Id.* at 336. Relying on *New York* v. *Belton*, 453 U.S. 454 (1981), the state argued that a vehicle can be searched incident to every arrest. *Gant*, 556 U.S. at 344–45. This Court rejected that argument as "untether[ing]" the search incident to arrest exception to the warrant requirement from its officer safety and evidence preservation justifications. *Id.* at 339, 343.

The decision below, however, effectively revives the broad scope of vehicle searches incident to arrest. Police need only invoke a community caretaking function to justify a vehicle's warrantless seizure, which in turn authorizes a comprehensive inventory search. *Opperman*, 428 U.S. at 373. Indeed, under

the reasoning adopted below, a professed community caretaking rationale need only have been a "part" of what motivated an officer's exercise of his discretion to make a seizure; it is perfectly permissible for an officer also to possess an explicit investigatory purpose for the seizure. App., *infra*, 18a.

Such a rule cannot be reconciled with *Gant*. When limiting vehicle searches incident to arrest, the *Gant* Court recognized that a rule authorizing warrantless vehicle searches "whenever an individual is caught committing a traffic offense" would create "a serious and recurring threat to the privacy of countless individuals." *Gant*, 556 U.S. at 345. That threat would "implicate[] the central concern underlying the Fourth Amendment * * * [by] giving police officers unbridled discretion to rummage at will among a person's private effects." *Ibid.* Accordingly, limiting vehicle searches incident to arrest to specific circumstances prevents routine driver arrests from becoming a pretext for investigatory vehicle searches.

Standardless community caretaking seizures incident to a driver's arrest thus provide an easily traversed loophole by which to evade *Gant*. An officer need pay no mind to whether the arrestee is "within reaching distance of the vehicle" or whether the vehicle is believed to "contain[] evidence of the offense of arrest." *Gant*, 556 U.S. at 346. Instead, the officer need only purport to be acting "in part" pursuant to a community caretaking function that is triggered by the mere arrest of the vehicle's driver. App., *infra*, 18a.

The concern that the community caretaking rationale embraced below could invite investigatory

abuse of the doctrine is heightened by the fact that police may arrest drivers for even "minor criminal offense[s], such as a misdemeanor seatbelt violation punishable only by a fine." *Atwater* v. *City of Lago Vista*, 532 U.S. 318, 323 (2001). Thus, under the decision below, police who witness a criminal suspect's minor traffic violation may arrest the driver, seize his or her car for a community caretaking purpose, and then conduct an inventory search. That practice is precisely the type of search *Gant* was intended to limit.

B. Standardized Criteria Must Guide Police Discretion To Seize Arrestees' Vehicles Without A Warrant Or Probable Cause

1. Requiring standardized criteria prevents "[t]he 'grave danger' of abuse of discretion" by police. *Delaware* v. *Prouse*, 440 U.S. 648, 662 (1979) (quoting *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 559 (1976)). In *Prouse*, an officer conducted a "random spot check" of a driver's documents. 440 U.S. at 659. The Court held that "[t]his kind of standardless and unconstrained discretion is the evil the Court has discerned when in previous cases it has insisted that the discretion of the official in the field be circumscribed." *Id.* at 661. Whenever police can indiscriminately choose which vehicles to seize and search, the risk that there will be abuses of that discretion runs high.

This Court has repeatedly reaffirmed the basic principle that the community caretaking function "must not be a ruse for a general rummaging in order to discover incriminating evidence." *Florida* v.

Wells, 495 U.S. 1, 4 (1990). In *South Dakota* v. *Opperman*, for example, adherence to standardized criteria was required for police to search a vehicle's glove compartment during an inventory search. 428 U.S. 364, 374–76 (1976). In *Illinois* v. *Lafayette*, this Court permitted a stationhouse search of an arrestee's bag where it was conducted according to "[a] standardized procedure for making a list or inventory." 462 U.S. 640, 646 (1983). And in *Wells*, this Court suppressed evidence found during an inventory search conducted in the absence of standardized criteria governing whether police would open closed containers. 495 U.S. at 4–5. Without such standardized criteria, the Court explained, police have "so much latitude that inventory searches are turned into 'a purposeful and general means of discovering evidence of crime.'" *Id.* at 4 (quoting *Colorado* v. *Bertine*, 479 U.S. 367, 376 (1987) (Blackmun, J., concurring)).

The same concern arises with vehicle seizures, which often precede inventory searches. Accordingly, *Bertine* correctly recognized that "[n]othing in *Opperman* or *Lafayette* prohibits the exercise of police discretion *so long as that discretion is exercised according to standard criteria* and on the basis of something other than suspicion of evidence of criminal activity." 479 U.S. at 375 (emphasis added).[5]

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[5] Scholars too have recognized the importance of standardized policies in the Fourth Amendment context. Such policies "restrict severely the opportunities for undetected (and perhaps

2. According to the decision below, however, "[t]he absence of a standard criteria requirement does not * * * imbue law enforcement officers with 'uncontrolled' discretion to impound vehicles at will as a pretext for conducting investigatory inventory searches." App., *infra*, 18a. Instead, the court concluded that officer discretion was cabined because officers must "have 'an objectively reasonable basis for performing a community caretaker function.'" *Id.* at 19a (quoting *State* v. *Kramer*, 759 N.W.2d 598, 608 (Wis. 2009)). Such an objectively reasonable basis could be met so long as the "decision to impound [is] based * * * *not exclusively* on the suspicion of criminal activity." App., *infra*, 18a (quoting *United States* v. *Coccia*, 446 F.3d at 233, 239 (1st Cir. 2006)) (internal quotations omitted) (emphasis added).

Not so. To the contrary, the decision below illustrates how granting officers unfettered discretion to seize a vehicle after arresting its driver presents an effectively limitless exception to the warrant requirement.

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undetectable) subterfuge" *ab initio*. Wayne R. LaFave, *Controlling Discretion by Administrative Regulations: The Use, Misuse, and Nonuse of Police Rules and Policies in Fourth Amendment Adjudication*, 89 Mich. L. Rev. 442, 460 (1990); see also John Rappaport, *Second-Order Regulation of Law Enforcement*, 103 Cal. L. Rev. 205, 238–40 (2015) (providing evidence that preventive regulation, rather than *ex post* judicial sanctions, are more effective in remedying systemic abuses by law enforcement).

Both police departments on the scene of petitioner's arrest had policies that did not circumscribe officer discretion to seize any unattended vehicle upon the arrest of its operator. Here, petitioner was arrested on a probation violation, but was also the suspect in an armed robbery. App., *infra*, 2a. His car was seized on private property, without officers asking him to arrange for its removal or inquiring into whether the facility owner wanted it moved. *Id.* at 2a–3a. That exercise of discretion was not guided by any standardized criteria, raising the distinct likelihood that it was ultimately exercised to further the robbery investigation. *Id.* at 38a–39a. Indeed, a primary justification the majority below offered in support of the seizure was that not seizing the car could cause "inconvenience" to other users of the storage facility. *Id.* at 11a. Protecting potential customers of a private business from having to avoid a stationary object is a far cry from the legitimate moorings of the community caretaking exception.[6]

III. The Question Presented Is Recurring And Important, And This Case Presents An Ideal Vehicle For Review

Warrantless vehicle seizures occur frequently, and most frequently after an arrest. The absence of meaningful standards guiding officers' discretion in

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[6] And what is more, in at least one of these jurisdictions, the towing of abandoned vehicles on private property is explicitly *not* within the responsibility of officers. App., *infra*, 82a.

such a common occurrence presents a recurring harm to important Fourth Amendment principles recognized in cases like *Cady*, *Bertine*, and *Gant*. Additionally, vehicle seizures impose real-world consequences on arrestees—regardless of whether a resulting search yields evidence of criminal activity. There is no reason to wait to resolve this important issue; indeed, this case presents an ideal vehicle by which to do so.

A. The Question Presented Arises Frequently

It is beyond serious dispute that the question presented here affects police interactions with motorists on a daily basis. By way of example, in at least two major metropolitan areas, police departments seize more than 16,000 vehicles per year. See Tami Abdollah, *LA Cops Don't Have to Impound Unlicensed Drivers' Cars, Judge Rules*, NBC Los Angeles, Dec. 27, 2014, https://tinyurl.com/ y7rzd8kz; Mark Fazlollah & Dylan Purcell, *Too Many Times, Dangerous Drivers Stay On the Street Until They Hurt Someone*, The Philadelphia Inquirer, Dec. 14, 2014, https://tinyurl.com/yaskd4t7. Those seizures most often occur when the driver is arrested. See 3 Wayne R. LaFave, Search & Seizure: A Treatise on the Fourth Amendment § 7.3(c) (5th ed. 2016).

Unsurprisingly, the near-constant occurrence of vehicle seizures pursuant to arrest has resulted in scores and scores of lower court decisions on this issue. The breadth and depth of the split described above (*supra*, pp. 10–17) makes that fact plain.

But the split likely *understates* how often lower courts confront this question. Comprehensive data

are not available, but a snapshot of just one jurisdiction confirms that courts routinely wrestle with the community caretaking exception: In the past five years alone, district courts in the Eighth Circuit have examined the assertion of community caretaking rationales for warrantless vehicle seizures at least twenty-six times. App., *infra*, 98a–100a (listing cases). Police adherence to standardized criteria was squarely at issue in some, but not all, of those cases. In all events, though, conclusively resolving the question presented will undoubtedly guide the daily activities of law enforcement personnel and protect the rights of the drivers with whom they interact. Clear rules will beget certainty for police and reduce the corresponding burdens on the lower courts.

B. The Question Presented Is Important

In addition to the sheer frequency with which the question presented arises, it is tremendously important in at least two other respects. First, as explained above (*supra* pp. 18–25), the decision below does significant doctrinal damage to this Court's settled Fourth Amendment jurisprudence. *Cady*, *Bertine*, and *Gant* are all but disregarded by the vast expansion of the community caretaking doctrine endorsed below. It bears repeating, moreover, that community caretaking functions are a necessary *but limited* exception to the Fourth Amendment's warrant and probable cause bulwarks. The decision below—by authorizing the warrantless seizure on the ground that a parked car posed an "inconvenience" to a private storage facility—illustrates the perils of failing to provide meaningful

guidance for officers' invocation of that exception. This Court has repeatedly cautioned that the community caretaker exception must not be a license to further investigatory purposes, unconstrained by the safeguards of the Fourth Amendment. The decision below grants this license.

Second, the question presented reaches beyond concerns that manifest during suppression hearings. Warrantless vehicle impoundment imposes burdens and costs on citizens even when the resulting inventory search reveals no incriminating evidence. Petitioner, for example, incurred a $125 towing fee and a $25 per day storage fee because officers elected to seize and impound his car. For many, such unanticipated costs of a police encounter can touch off a series of cascading effects. Those who cannot afford steep impound fees may have to "choose between essentials and paying fees that would continue to accumulate and leave them without another essential, transportation." David Sheff, *If You Want To See Inequality In The US At Its Worst, Visit An Impound Lot*, Time, Aug. 26, 2014, http://tinyurl.com/oadm3zg. Loss of transportation often leads to loss of employment. See Alan M. Voorhees, et al., Motor Vehicles Affordability and Fairness Task Force: Final Report, at xii (2006), available at https://tinyurl.com/yas2wjxc (concluding that 42% of New Jersey residents surveyed who lost access to personal transportation as a result of a suspended license suffered unemployment). Condoning warrantless vehicle seizures without standardized criteria imposes significant real-world consequences.

C. This Case Presents An Ideal Vehicle For Deciding This Question

This case presents an ideal vehicle for resolving the deep and acknowledged split presented here. For starters, the issue was squarely presented below and extensively addressed by both the majority and dissenting opinions. App., *infra*, 2a. Resolution of the issue is also dispositive of petitioner's suppression motion; the Supreme Court of Wisconsin did not embrace a lower court's view that the issue could be avoided, and the two dissenting justices would have required standardized criteria and reversed on that ground. See *id.* at 41a.

Moreover, there is a full and well-developed record on the nature of petitioner's interaction with police, including images of the location and condition of the vehicle at the time it was seized. App., *infra*, 81a. There is no suggestion—nor could there be—that the vehicle posed any imminent threat to public safety or obstructed a public thoroughfare. And the parties agree that police made no effort to find an alternative to seizure, such as contacting the storage facility owner or asking petitioner to have someone retrieve the vehicle. *Id.* at 28a.

Finally, the law enforcement policies that authorized the seizure of petitioner's vehicle unabashedly grant unfettered discretion to officers. In both of the relevant jurisdictions, any unattended vehicle may be seized—or not seized—after the arrest of its driver. App., *infra*, 4a–5a. No guidance whatsoever is given as to when such a seizure is appropriate. As such, this case provides an excellent vehicle for deciding whether police discretion to seize

arrestees' vehicles without a warrant or probable cause must be meaningfully constrained.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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November 2017

APPENDIX

APPENDIX A

SUPREME COURT OF WISCONSIN

NO.: 2015AP2052-CR

STATE OF WISCONSIN : IN SUPREME COURT

State of Wisconsin,

Plaintiff-Respondent,

v.

Kenneth M. Asboth, Jr.,

Defendant-Appellant-Petitioner.

FILED JULY 6, 2017

Diane M. Fremgen, Clerk of Supreme Court

REVIEW of a decision of the Court of Appeals. *Affirmed*.

¶1 REBECCA GRASSL BRADLEY, J. Wisconsin courts have long applied a community caretaker exception to the warrant requirement under the Fourth Amendment to the United States Constitution. In this case, Kenneth M. Asboth, Jr., asks us to decide whether law enforcement officers' warrantless seizure of his car was a reasonable exercise of a bona fide community caretaker function. He also asks us to determine whether *Colorado* v. *Bertine*, 479 U.S. 367, 107 S. Ct. 738, 93 L. Ed. 2d 739 (1987), requires officers to follow "standard criteria" when conducting a community caretaker impoundment. We hold that *Bertine* does not mandate adherence to standard criteria, and because we

further conclude that officers reasonably effected a community caretaker impoundment of Asboth's car, we affirm the decision of the court of appeals.

I. BACKGROUND

¶2 Asboth was a wanted man in November 2012. He was a suspect in the armed robbery of a Beaver Dam bank, and there was an outstanding probation warrant for his arrest. When police received a tip that he was at a storage facility in Dodge County, outside the City of Beaver Dam, both the Dodge County Sheriff's Department and Beaver Dam Police responded by sending officers to the storage facility to apprehend him.

¶3 The sheriff's deputy arrived first and saw a person matching Asboth's description reaching into the back seat of a car parked between two storage sheds. Drawing his weapon, the deputy ordered the person to come out of the vehicle with his hands up. Asboth, complying with the command, confirmed his identity after the deputy arrested him. Officers from Beaver Dam soon arrived at the storage facility, and Asboth was placed in the back seat of a squad car until they could transport him for questioning.

¶4 After Asboth's arrest, his car remained parked at the storage facility. None of the arresting officers asked Asboth if he could arrange to have the car moved. Although the car sat in the middle of the alley between two storage sheds, space remained available for a vehicle to maneuver around it and drive through the alley. The car, however, entirely blocked access to one storage unit, and it impeded access to several others. When the officer ran a check

of the car's registration, it identified the car's owner as not Asboth but a different person with a City of Madison address.[1] Rather than abandoning the car on private property, or contacting the storage facility's owner about it, the officers chose to impound the car.

¶5 Both the Beaver Dam Police Department and the Dodge County Sheriff's Department had policies for officers to follow when deciding whether to impound a vehicle. The Beaver Dam policy provided:

> Any officer having a vehicle in lawful custody may impound said vehicle. The officer will have the option not to impound said vehicle when there is a reasonable alternative; however, the existence of an alternative does not preclude the officer's authority to impound.

The Dodge County policy provided more specific guidance:

> Deputies of the Dodge County Sheriff's Department are authorized to arrange for towing of motor vehicles under the following circumstances:
>
> When any vehicle has been left unattended upon a street or highway and is parked illegally

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[1] Subsequent investigation revealed that the registered owner sold the car to Asboth, but neither Asboth nor the former owner notified the Department of Transportation of the transfer. Because of this omission, the officers did not know at the time of the arrest that Asboth actually owned the car.

> in such a way as to constitute a definite hazard or obstruction to the normal movement of traffic;
>
> . . . .
>
> When the driver of a vehicle has been taken into custody by a deputy, and the vehicle would thereby be left unattended;
>
> . . . .
>
> When removal is necessary in the interest of public safety because of fire, flood, storm, snow or other emergency reasons;
>
> . . . .
>
> Unless otherwise indicated, the deputy always has the discretion to leave the vehicle at the scene and advise the owner to make proper arrangements for removal.

¶6 Because the impound lot at the Dodge County Sheriff's Department was full, the officers and deputies agreed to tow the car to the Beaver Dam police station. Consistent with police department procedures, officers conducted an inventory search of the seized vehicle at the police station. The search turned up several items that the department held for safekeeping: a video game system, a cell phone, an MP3 player, keys, and an orange water bottle containing green leafy material. In the spare tire compartment beneath a false floor in the trunk, officers also found a pellet gun, which resembled the handgun used in the Beaver Dam robbery.

¶7 The State charged Asboth with armed robbery,[2] and he filed a motion to suppress all evidence obtained from the seizure and search of the car. Asboth's motion initially challenged the constitutionality of the inventory search itself. After hearing testimony from four police officers and sheriff's deputies involved with Asboth's arrest and with the seizure and search of his car, the Dodge County Circuit Court[3] denied Asboth's motion. In its order denying the motion, the circuit court made findings relevant to the impoundment: "[t]he vehicle could not be left where it was and needed to be impounded"; "[t]he officers involved believed that the vehicle belonged to someone other than [Asboth]"; and "[i]t is undisputed that Beaver Dam police conducted the inventory search according to established procedures."

¶8 Asboth filed a motion for reconsideration. Relying on *State* v. *Clark*, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112, Asboth argued that the officers unconstitutionally seized the car from the storage facility. Following a hearing at which Asboth supplemented the record with testimony by more officers, the circuit court denied the motion and made additional findings:

> (1) Both the Dodge County Sheriff's Department and the Beaver Dam Police

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[2] *See* Wis. Stat. § 943.32(1)(b) and (2), § 939.50(3)(c), and § 939.62(1)(c) (2015-16).

[3] The Honorable John R. Storck, presiding.

> Department's written policies favor[ed] impoundment . . . .
>
> (2) The vehicle was parked on another individual's property, not legally parked on a public street.
>
> (3) The vehicle was blocking access to more than one of the business's storage lockers and impeding travel by other customers through the complex.
>
> (4) There were valuable items in the vehicle including electronics.
>
> (5) Defendant was arrested while in possession of the vehicle, and was actually observed reaching into the vehicle.

Asboth pled no contest, and the circuit court imposed sentence of 10 years initial confinement followed by 10 years extended supervision.

¶9 In the court of appeals, Asboth challenged the circuit court's denial of his suppression motion, but he limited his argument to the constitutionality of the seizure of the car. *State* v. *Asboth*, 2016 WI App 80, 372 Wis. 2d 185, 888 N.W.2d 23, 2016 Wisc. App. LEXIS 641 at *1 (Wis. Ct. App. Sept. 29, 2016). Specifically, Asboth argued that the warrantless seizure was unconstitutional because it was not conducted pursuant to sufficiently detailed standardized criteria or justified by a bona fide community caretaker purpose. *Id.* Assuming without deciding that *Bertine* requires law enforcement officers to follow standardized criteria when seizing a vehicle, the court of appeals concluded that the Dodge

County Sheriff's Department's policy applied and authorized the seizure. 2016 Wisc. App. LEXIS 641 at *7, *15. Turning to Asboth's community caretaker argument, the court of appeals first rebuffed Asboth's contention that an investigatory purpose negated the bona fide community caretaker justification for the seizure, then concluded that the public need to move the car outweighed Asboth's privacy interests. 2016 Wisc. App. LEXIS 641 at *16, *25. Accordingly, the court of appeals affirmed the circuit court's denial of the motion to suppress. 2016 Wisc. App. LEXIS 641 at *29. Asboth petitioned this court for review, again limiting his argument to the constitutionality of the seizure, and we granted his petition.

II. STANDARD OF REVIEW

¶10 We review an order granting or denying a motion to suppress evidence as a question of constitutional fact, which requires a two-step analysis. *State* v. *Matalonis*, 2016 WI 7, ¶28, 366 Wis. 2d 443, 875 N.W.2d 567, *cert. denied*, 137 S. Ct. 296, 196 L. Ed. 2d 215. "First, we review the circuit court's findings of historical fact under a deferential standard, upholding them unless they are clearly erroneous. Second, we independently apply constitutional principles to those facts." *Id.* (quoting *State* v. *Robinson*, 2010 WI 80, ¶22, 327 Wis. 2d 302, 786 N.W.2d 463).

III. DISCUSSION

¶11 The Fourth Amendment to the United States Constitution provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and

seizures, shall not be violated" and that "no Warrants shall issue, but upon probable cause." Article I, § 11 of the Wisconsin Constitution likewise provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated" and that "no warrant shall issue but upon probable cause." Because the Fourth Amendment and Article I, § 11 provide substantively identical protections, we have historically interpreted this section of the Wisconsin Constitution in accordance with United States Supreme Court interpretations of the Fourth Amendment. *State* v. *Dumstrey*, 2016 WI 3, ¶14, 366 Wis. 2d 64, 873 N.W.2d 502 (citing *State* v. *Arias*, 2008 WI 84, ¶20, 311 Wis. 2d 358, 752 N.W.2d 748).

¶12 "A seizure conducted without a valid warrant is presumptively unreasonable." *State* v. *Brereton*, 2013 WI 17, ¶24, 345 Wis. 2d 563, 826 N.W.2d 369 (citing *United States* v. *Ross*, 456 U.S. 798, 824-25, 102 S. Ct. 2157, 72 L. Ed. 2d 572 (1982)). "[B]ecause the ultimate touchstone of the Fourth Amendment is 'reasonableness,' however, "the warrant requirement is subject to certain exceptions." *Brigham City* v. *Stuart*, 547 U.S. 398, 403, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006). This court has recognized one such exception where a law enforcement officer is "serving as a community caretaker to protect persons and property." *State* v. *Pinkard*, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592.

¶13 Specifically, law enforcement officers may conduct a warrantless seizure without violating the Fourth Amendment when performing community

caretaker functions—those actions "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State* v. *Kramer*, 2009 WI 14, ¶¶19-20, 315 Wis. 2d 414, 759 N.W.2d 598 (quoting *Cady* v. *Dombrowski*, 413 U.S. 433, 441, 93 S. Ct. 2523, 37 L. Ed. 2d 706 (1973)). When evaluating a claimed community caretaker justification for a warrantless search or seizure, Wisconsin courts apply a three-step test, which asks

> (1) whether a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police were exercising a bona fide community caretaker function; and (3) if so, whether the public interest outweighs the intrusion upon the privacy of the individual such that the community caretaker function was reasonably exercised . . . .

Matalonis, 366 Wis. 2d 443, 496 (quoting *Pinkard*, 327 Wis. 2d 346, 364).

¶14 There is no dispute that a seizure of Asboth's car occurred within the meaning of the Fourth Amendment, so this case turns on the second and third steps of Wisconsin's community caretaker test. Asboth contends that the seizure satisfied neither the second nor the third steps because an overriding investigatory purpose negated the officers' bona fide community caretaker justification for moving the car, and the public interest in seizing his car did not outweigh his privacy interest in leaving it at the storage facility. Further, he insists that the seizure was not reasonable because it was not governed by standardized criteria sufficient to satisfy *Bertine*. We

therefore consider in turn the second and third steps of the community caretaker test.

A. Bona Fide Community Caretaker Function

¶15 The community caretaker exception to the warrant requirement accounts for the multifaceted nature of police work. *Kramer*, 315 Wis. 2d 414, 434. As this court has observed, "Police officers wear many hats: criminal investigator, first aid provider, social worker, crisis intervener, family counselor, youth mentor and peacemaker, to name a few. . . . They are society's problem solvers when no other solution is apparent or available." *Matalonis*, 366 Wis. 2d 443, 464 (quoting *Ortiz* v. *State*, 24 So. 3d 596, 607 n.5 (Fla. Dist. Ct. App. 2009) (Torpy, J., concurring and concurring specially)). Although a court assessing whether an officer acted for a bona fide community caretaker purpose "may consider [the] officer's subjective intent," this step of the test ultimately turns on whether the officer can "articulate[] an objectively reasonable basis" for exercising a community caretaker function. *Pinkard*, 327 Wis. 2d 346, 366 (quoting Kramer, 315 Wis. 2d 414, 436).

¶16 In *South Dakota* v. *Opperman*, 428 U.S. 364, 96 S. Ct. 3092, 49 L. Ed. 2d 1000 (1976), the United States Supreme Court noted that "automobiles are frequently taken into police custody" by officers engaged in community caretaker functions. at 368. The Court cited two non-exclusive examples of situations where police officers often take custody of vehicles: "[v]ehicle accidents," after which officers take custody of vehicles "[t]o permit the uninterrupted flow of traffic and in some circumstances to preserve evidence," and vehicles

that "violate parking ordinances," "thereby jeopardiz[ing] both the public safety and the efficient movement of vehicular traffic." *Id.* at 368-69. In short, "[t]he authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge" in the community caretaker context. *Id.* at 369.

¶17 Citing *Opperman*'s subsequent analysis of the constitutionality of an inventory search, the primary issue in that case, Asboth asserts that the officers' interest in investigating him as a potential suspect in the bank robbery predominated over any bona fide community caretaker function they performed by moving the car. Furthermore, focusing on *Opperman*'s examples—impoundment following an accident and impoundment following a parking ordinance violation—Asboth argues that the officers here did not have an objectively reasonable basis to tow his car from the storage facility to the police station.

¶18 For multiple reasons, we conclude that the officers possessed a bona fide community caretaker justification for impounding Asboth's car. First, if left unattended, the car would have inconvenienced a private property owner and customers at the storage facility by impeding the beneficial use of the property. *Cf. United States* v. *Brown*, 787 F.2d 929, 932-33 (4th Cir. 1986) (concluding that officers "could reasonably have impounded" arrestee's vehicle "because the car could have constituted a nuisance in the area in which it was parked"). Asboth's car obstructed the alley between the storage sheds, making it difficult

for larger vehicles to pass through. The car wholly or partially blocked several storage units, limiting access for customers seeking to access their stored belongings. Because the car was on a third-party's private property, any expense for removing the obstruction would have fallen to a private property owner uninvolved in the arrest. By removing the car, the officers immediately remedied a potential disruption created by Asboth's arrest at the private storage facility, thus limiting the inconvenience to the property owner and customers.

¶19 Second, because Asboth was a suspect in a crime who also allegedly violated the terms of his probation, he likely faced a lengthy detention, and the possibility of a concomitant lengthy abandonment of the car counseled in favor of its removal from the premises. *See United States* v. *Coccia*, 446 F.3d 233, 240 (1st Cir. 2006) (noting that "officers properly made arrangements for the safekeeping of the [arrestee's] vehicle" when they anticipated that he "would be indisposed for an indeterminate, and potentially lengthy, period"). Impounding rather than abandoning Asboth's car protected the vehicle and its contents from potential theft or vandalism in his absence. *See United States* v. *Kornegay*, 885 F.2d 713, 716 (10th Cir. 1989) (citing potential "vandalism or theft" as one factor supporting impoundment). Indeed, the impoundment's protective function undermines Asboth's argument that the officers could have towed the car somewhere other than the police station; his car likely would have faced greater risk of vandalism or theft if abandoned in a public place rather than on private property. Although the later-

discovered valuables were not in plain view at the time the officers towed the vehicle for impoundment, Asboth no doubt would have been upset to learn that his personal property was stolen from the car—regardless of whether officers decided to abandon it at the storage facility or in some other public place.

¶20 Finally, the registered owner of the car at the time of Asboth's arrest was someone other than Asboth. With no one else immediately present claiming ownership or otherwise available to take possession of the vehicle, the possibility existed that officers would need to make arrangements to reunite the car with its registered owner. Moreover, the protective function of impoundment described above carries no less force (and perhaps more) for an absent registered owner than it would if officers knew that Asboth owned the car.

¶21 Collectively, the functions of removing an obstruction inconveniencing the property's users and protecting an arrestee's property during his detention, combined with uncertainty regarding the true ownership of the vehicle, establish that the officers had a bona fide community caretaker purpose when impounding Asboth's car. Because we identify these objective justifications for the impoundment, our cases make clear that, even if the officers had an additional investigatory interest in conducting a subsequent inventory search, the officers' subjective interests do not render the warrantless seizure of the car unconstitutional. *See Kramer*, 315 Wis. 2d 414, 434 ("[T]he officer may have law enforcement concerns, even when the officer has an objectively reasonable basis for performing a community

caretaker function."). Consequently, we now proceed to the third step of the community caretaker test and assess the reasonableness of the seizure of Asboth's car.

B. Reasonableness of the Seizure

1. Standard Criteria

¶22 Before we consider the public interest in the impoundment along with Asboth's competing privacy interest, we first address Asboth's argument that the seizure of his car was unreasonable because it was not impounded according to standard criteria. In particular, he contends that in *Bertine* the United States Supreme Court established that an impoundment will be constitutionally valid only if governed by "standard criteria" set forth in law enforcement procedures. *See Bertine*, 479 U.S. at 375.

¶23 Asboth's argument turns on language at the end of the *Bertine* opinion. Although *Bertine* generally focused on the constitutionality of an inventory search of Bertine's van, the Court concluded by addressing Bertine's argument that "the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it in a public parking place." 479 U.S. at 375. Rejecting Bertine's argument, the Supreme Court explained: "Nothing in *Opperman* or [*Illinois* v. *Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983),] prohibits the exercise of police discretion so long as that discretion is exercised according to standard criteria and on the basis of

something other than suspicion of evidence of criminal activity." *Id.* (emphasis added).

¶24 A split exists among the federal courts of appeals regarding *Bertine*'s impact on impoundments by officers performing community caretaker functions. Several circuits agree with Asboth, to varying degrees, that law enforcement officers may constitutionally perform a warrantless community caretaker impoundment only if standard criteria minimize the exercise of their discretion. *See* United *States* v. *Sanders*, 796 F.3d 1241, 1248 (10th Cir. 2015) ("[I]mpoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community-caretaking rationale."); *Miranda* v. *City of Cornelius*, 429 F.3d 858, 866 (9th Cir. 2005) ("The decision to impound must be guided by conditions which 'circumscribe the discretion of individual officers' in a way that furthers the caretaking purpose." (quoting *Bertine*, 479 U.S. at 376 n.7)); *United States* v. *Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) ("Some degree of 'standardized criteria' or 'established routine' must regulate these police actions . . . ."); *United States* v. *Duguay*, 93 F.3d 346, 351 (7th Cir. 1996) ("Among those criteria which must be standardized are the circumstances in which a car may be impounded.").[4]

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[4] *See also People* v. *Torres*, 116 Cal. Rptr. 3d 48, 56 (Ct. App. 2010); *Patty* v. *State*, 768 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 2000); *State* v. *Weaver*, 900 P.2d 196, 199 (Idaho 1995); *People* v. *Ferris*, 9 N.E.3d 1126, 1137 (Ill. App. Ct. 2014); *Fair* v. *State*, 627 N.E.2d 427, 433 (Ind. 1993); *State* v. *Huisman*, 544 N.W.2d

Similarly, the District of Columbia Circuit has held that, "if a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment." *United States* v. *Proctor*, 489 F.3d 1348, 1349, 376 U.S. App. D.C. 512 (D.C. Cir. 2007).

¶25 In contrast, three federal circuits do not afford dispositive weight to the existence of standardized criteria or to law enforcement officers' adherence thereto, instead treating such criteria as, at most, one factor to consider when assessing the Fourth Amendment reasonableness of a warrantless community caretaker impoundment.[5] of the note The Fifth Circuit flatly rejects any need to consider standardized criteria as part of a reasonableness analysis. *See United States* v. *McKinnon*, 681 F.3d 203, 208 (5th Cir. 2012) ("Since *Opperman* and *Bertine*, we have focused our inquiry on the reasonableness of the vehicle impoundment for a community caretaking purpose without reference to any standardized criteria."). The Third Circuit has

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433, 437 (Iowa 1996); *State* v. *Fox*, 2017 ME 52, ¶¶23-26, 157 A.3d 778; *Commonwealth* v. *Oliveira*, 47 N.E.3d 395, 398 (Mass. 2016); *People* v. *Toohey*, 475 N.W.2d 16, 22-23 (Mich. 1991); *State* v. *Robb*, 605 N.W.2d 96, 104 (Minn. 2000); *State* v. *Milliorn*, 794 S.W.2d 181, 186 (Mo. 1990) (en banc); *People* v. *O'Connell*, 591 N.Y.S.2d 641, 642 (App. Div. 1992); *State* v. *O'Neill*, 2015-Ohio-815, ¶39, 29 N.E.3d 365 (Ct. App., 3d Dist.); *McGaughey* v. *State*, 2001 OK CR 33, ¶44, 37 P.3d 130.

[5] *See also People* v. *Shafrir*, 107 Cal. Rptr. 3d 721, 721-28 (Ct. App. 2010); *Cannon* v. *State*, 601 So. 2d 1112, 1115-16 (Ala. Crim. App. 1992).

expressly recognized that a law enforcement officer's "decision to impound a vehicle contrary to standardized procedures or even in the absence of a standardized procedure should not be a per se violation of the Fourth Amendment." *United States* v. *Smith*, 522 F.3d 305, 312 (3d Cir. 2008).

¶26 Most persuasively, the First Circuit explained in *United States* v. *Coccia*, 446 F.3d 233 (1st Cir. 2006), its reasons for "read[ing] *Bertine* to indicate that an impoundment decision made pursuant to standardized procedures will most likely, although not necessarily always, satisfy the Fourth Amendment." *Id.* at 238. After noting the established principle that "impoundments of vehicles for community caretaking purposes are consonant with the Fourth Amendment so long as the impoundment decision was reasonable under the circumstances," the court added that Fourth Amendment "reasonableness analysis does not hinge solely on any particular factor." *Id.* at 239. Like any other factor, standard criteria do not provide "the sine qua non of a reasonable impound decision":

> Virtually by definition, the need for police to function as community caretakers arises fortuitously, when unexpected circumstances present some transient hazard which must be dealt with on the spot. The police cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities. Rather, they must be free to follow "sound police procedure," that is to choose freely among the available options, so long as the option chosen is within the universe

> of reasonable choices. Where . . . the police have solid, non-investigatory reasons for impounding a car, there is no need for them to show that they followed explicit criteria in deciding to impound, as long as the decision was reasonable.

Id. (quoting *United States* v. *Rodriguez-Morales*, 929 F.2d 780, 787 (1st Cir. 1991)). The First Circuit then proceeded to assess the reasonableness of the challenged impoundment. *Id.* at 239-41.

¶27 We agree with the First, Third, and Fifth Circuits that in cases involving warrantless community caretaker impoundments the fundamental question is the reasonableness of the seizure. Accordingly, we hold that the absence of standard criteria does not by default render a warrantless community caretaker impoundment unconstitutional under the Fourth Amendment reasonableness standard. Nor does law enforcement officers' lack of adherence to standard criteria, if they exist, automatically render such impoundments unconstitutional.

¶28 The absence of a standard criteria requirement does not, as Asboth suggests, imbue law enforcement officers with "uncontrolled" discretion to impound vehicles at will as a pretext for conducting investigatory inventory searches. As the First Circuit observed in *Coccia*, under the reasonableness standard, "a police officer's discretion to impound a car is sufficiently cabined by the requirement that the decision to impound be based, at least in part, on a reasonable community caretaking concern and not exclusively on 'the suspicion of criminal activity.' *Coccia*, 446 F.3d at 239 (quoting *Bertine*, 479 U.S. at

375). The second step of Wisconsin's community caretaker test requires law enforcement officers to establish that the warrantless impoundment occurred pursuant to a bona fide community caretaker purpose. Far from leaving officers with unlimited discretion to impound, Wisconsin's test authorizes law enforcement officers to conduct such warrantless seizures only if they have "an objectively reasonable basis for performing a community caretaker function." *Kramer*, 315 Wis. 2d 414, 434.

¶29 Finally, our conclusion that *Bertine* does not mandate adoption of or adherence to standard impoundment criteria for all circumstances should not discourage law enforcement agencies from developing general impoundment procedures. "[A]doption of a standardized impoundment procedure . . . supplies a methodology by which reasonableness can be judged and tends to ensure that the police will not make arbitrary decisions in determining which vehicles to impound." *Smith*, 522 F.3d at 312. Indeed, adherence to sufficiently detailed standard criteria can enhance the reasonableness of an impoundment by limiting the exercise of discretion and encouraging compliant officers to identify and pursue the least-intrusive means of performing the community caretaker function. *See United States* v. *Sharpe*, 470 U.S. 675, 687, 105 S. Ct. 1568, 84 L. Ed. 2d 605 (1985) (noting that courts assessing law enforcement officers' actions must ask "not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it"). As we discuss further below, a Wisconsin court may consider the existence

of, and officers' adherence to, standard criteria as a relevant factor when assessing the reasonableness of a community caretaker seizure.[6]

2. Reasonableness Inquiry

¶30 Under the third step of Wisconsin's community caretaker test, we evaluate the reasonableness of the law enforcement officer's exercise of a bona fide community caretaker function by "balancing [the] public interest or need that is furthered by the officer's conduct against the degree of and nature of the restriction upon the liberty interest of the citizen." *Kramer*, 315 Wis. 2d 414, 438. We generally consider four factors:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility and effectiveness of alternatives to the type of intrusion actually accomplished.

Id., ¶41 (quoting *State* v. *Kelsey C.R.*, 2001 WI 54, ¶36, 243 Wis. 2d 422, 626 N.W.2d 777).

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[6] Although in this case we discuss the standard impoundment criteria while assessing the reasonableness of the seizure, nothing in this opinion forecloses Wisconsin courts from considering officers' adherence to standard criteria when determining whether officers exercised a bona fide community caretaker function.

¶31 Taking the third factor first, we note that evaluation of a car's impoundment necessarily involves an automobile. This factor enters the analysis because "[i]n some situations a citizen has a lesser expectation of privacy in an automobile." *State* v. *Anderson*, 142 Wis. 2d 162, 169 n.4, 417 N.W.2d 411 (Ct. App. 1987) (citing *New York* v. *Class*, 475 U.S. 106, 112-13, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986)). Although many of our recent community caretaker cases have raised questions regarding the appropriate scope of warrantless searches of homes, *see, e.g.*, *Matalonis*, 366 Wis. 2d 443, 448; *Pinkard*, 327 Wis. 2d 346, 349, this case involved Asboth's lesser privacy interest in his car. Therefore, law enforcement officers impounding a vehicle as community caretakers need not demonstrate the same extraordinary public interest necessary to justify a warrantless community caretaker entry into the home. *See Pinkard*, 327 Wis. 2d 346, 376 (observing that, as compared to an automobile, "one has a heightened privacy interest in preventing intrusions into one's home").

¶32 Turning to the public interest advanced by the impoundment, we circle back to the effect of Asboth's arrest on the storage facility's owner and customers: The public has a significant interest in law enforcement officers seizing from private property a vehicle that, if left unattended, would inconvenience the property's owner and users by impeding beneficial use of the property and creating a potential hazard—particularly when the officers are in lawful custody of the car. *See Brown*, 787 F.2d 929, 932-33. One of this court's decisions approving

limited warrantless home entry by officers performing a community caretaker function specifically contemplates the possibility of officers acting for the similar purpose of abating a nuisance. *See Pinkard*, 327 Wis. 2d 346, 358 (quoting with approval *United States* v. *Rohrig*, 98 F.3d 1506, 1522-23 (6th Cir. 1996), which held that "officers' 'failure to obtain a warrant [did] not render that entry unlawful' where officers entered defendant's home to 'abat[e] an ongoing nuisance by quelling loud and disruptive noise'" (alterations in original)). Although we reserve judgment on such a home-entry question for a future case, we do not hesitate to recognize that, even in the absence of the exigencies that often accompany community caretaker actions, the law enforcement officers here served a legitimate public interest by impounding an unattended vehicle that inconvenienced a private business and its customers and created a hazard by obstructing vehicle traffic through the storage facility.

¶33 The circumstances surrounding the impoundment also reflect the seizure's reasonableness. If abandoned by the officers, the car would have intruded on private property owned by a third party who had nothing to do with the arrest. And because Asboth was already under arrest at the time of the impoundment, officers did not make an improperly coercive show of authority to effect the seizure. *See Kramer*, 315 Wis. 2d 414, 439. To the contrary, the seizure actually complied with the terms of both the Beaver Dam and the Dodge County procedures

governing impoundments.[7] The Beaver Dam policy permitted officers to impound a vehicle held "in lawful custody," and the officers took possession of the car after lawfully arresting Asboth. Additionally, the policy permitted officers to decide against impoundment if a "reasonable alternative" existed, but there was no sensible alternative available here. Providing more targeted guidance, the Dodge County policy authorized deputies to tow a vehicle "[w]hen the driver of a vehicle has been taken into custody by a deputy, and the vehicle would thereby be left unattended." Again, officers lawfully arrested Asboth, and it was reasonable under the circumstances to infer that the person alone with the vehicle at the storage facility was its driver. The fact that the seizure did actually comply with the policies of the acting law enforcement agencies indicates that this impoundment was not an arbitrary decision but a reasonable exercise of discretion. *See Smith*, 522 F.3d at 312.

¶34 Notably, the fact that both policies actually cabined the officers' exercise of discretion also indicates that the officers acted reasonably when seizing Asboth's car. In Clark, the court of appeals disapproved of a policy permitting officers to tow a vehicle if "[the] vehicle is to be towed and the owner/driver is unable to authorize a tow." 265 Wis. 2d 557, 563. The court of appeals recognized that this policy was "wholly unhelpful" because it "offer[ed] no insight into why or when a vehicle may be seized,"

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[7] Because we conclude that the seizure complied with both departments' impoundment procedures, we need not decide which procedures actually governed.

instead essentially "stat[ing] that 'a vehicle is to be towed for safekeeping when a vehicle is to be towed.' *Id.*, 568. Here, the Beaver Dam and Dodge County policies avoided such circular reasoning by limiting impoundment to situations where officers had custody of, respectively, the vehicle itself or its driver. Rather than allowing officers to impound a vehicle at will any time the vehicle's driver was unavailable, as the policy in Clark authorized, both policies in this case permitted impoundment only as a natural consequence of law enforcement action that would otherwise result in the vehicle's abandonment.

¶35 Finally, the lack of realistic alternatives to impoundment further reinforces the reasonableness of the seizure. Asboth was alone at the storage facility, so he did not have a companion who could immediately take possession of the car. Admittedly, the officers did not offer Asboth the opportunity to make arrangements for moving his car after his arrest, but nothing required them to do so. *See United States* v. *Arrocha*, 713 F.3d 1159, 1164 (8th Cir. 2013) ("Nothing in the Fourth Amendment requires a police department to allow an arrested person to arrange for another person to pick up his car to avoid impoundment and inventory." (quoting *United States* v. *Agofsky*, 20 F.3d 866, 873 (8th Cir. 1994), which cited *Bertine*, 479 U.S. at 372)); *see also Rodriguez-Morales*, 929 F.2d at 786. In fact, given the uncertainty arising from the fact that Asboth was not the car's registered owner, taking possession of the car to investigate its ownership may have been more

reasonable than outright returning the car to Asboth.[8]

¶36 Considering all of these factors together, we conclude that law enforcement's removal of an unattended car that would otherwise create a potential hazard while also inconveniencing owners and users of private property[9] Asboth's lesser privacy interest in that car. Because the officers advanced that public interest in pursuit of a bona fide community caretaker function, we hold that the warrantless seizure of Asboth's car after his arrest

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[8] The clear absence of feasible alternatives to impounding Asboth's car further distinguishes this case from *State* v. *Clark*, 2003 WI App 121, 265 Wis. 2d 557, 666 N.W.2d 112, in which the court of appeals also held that the public interest in towing an unlocked vehicle from the Milwaukee streets did not outweigh the intrusion into the owner's privacy. *Id.*, ¶27. An officer investigating shots fired in the area ordered the legally parked but unlocked vehicle towed "to ensure that the vehicle itself and any property inside the vehicle would not be stolen." *Id.*, ¶23. The court of appeals held that the community caretaker exception did not apply because the officer could have "(1) locked the vehicle and walked away; [or] (2) attempted to contact the owners of the vehicle in light of his belief that the vehicle or its contents may be stolen." *Id.*, ¶27.

[9] The array of factors demonstrating the reasonableness of the officers' decision to impound Asboth's car defeats any argument that this opinion delineates a per se rule "justify[ing] the seizure of every vehicle after its driver has been arrested." Dissent, ¶76. As with any warrantless community caretaker search or seizure, law enforcement officers acting as bona fide community caretakers may impound an arrested person's vehicle without a warrant only if the facts establish a countervailing public interest in conducting the seizure that outweighs any infringement on the arrested person's liberty interest.

was constitutionally reasonable under the Fourth Amendment.

IV. CONCLUSION

¶37 "The touchstone of the Fourth Amendment is reasonableness." *State* v. *Tullberg*, 2014 WI 134, ¶29, 359 Wis. 2d 421, 857 N.W.2d 120 (quoting *Florida* v. *Jimeno*, 500 U.S. 248, 250, 111 S. Ct. 1801, 114 L. Ed. 2d 297 (1991)). Applying Wisconsin's test for the community caretaker exception to the Fourth Amendment's warrant requirement, we conclude that law enforcement officers acted reasonably when seizing Asboth's vehicle for impoundment. Although we conclude that the officers here complied with both relevant departmental impoundment policies, we also hold that Bertine does not mandate such adherence to satisfy the Fourth Amendment's reasonableness standard. Accordingly, we affirm the decision of the court of appeals.

By the Court.—The decision of the court of appeals is affirmed.

¶38 ANN WALSH BRADLEY, J. (*dissenting*). The majority bucks the nationwide trend when it determines that the Fourth Amendment to the United States Constitution does not require that police follow standardized procedures during a community caretaker impoundment. Adopting the minority rule followed by three federal circuits, it reasons that standardized procedures are unnecessary because police discretion is sufficiently limited by the requirement that impoundments be based on a reasonable community caretaker concern.

¶39 Compounding its misdirection, the majority further errs by expanding an already bloated community caretaker exception to the Fourth Amendment's warrant requirement. It appears that yet again this court's "expansive conception of community caretaking transforms [it] from a narrow exception into a powerful investigatory tool." *State* v. *Matalonis*, 2016 WI 7, ¶106, 366 Wis. 2d 443, 875 N.W.2d 567 (Prosser, J., dissenting).

¶40 Contrary to the majority, I would follow the national trend as illustrated by the well-reasoned approach of the Tenth Circuit in *U.S.* v. *Sanders*, 796 F.3d 1241 (2015). It determined that "impoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community-caretaking rationale." *Sanders*, 796 F.3d at 1248.

¶41 Applying the *Sanders* test, I conclude that the warrantless impoundment of Asboth's vehicle

violated his Fourth Amendment rights. His vehicle neither obstructed traffic nor created an imminent threat to public safety. Additionally, the standardized policies here fail to place any meaningful limits on police discretion and the asserted rationale for the community caretaker impoundment is unreasonable.

¶42 Accordingly, I respectfully dissent.

I

¶43 The Fourth Amendment to the United States Constitution provides that "[t]he 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. . . ." Community caretaker impoundments are an exception to the Fourth Amendment's warrant requirement. *State* v. *Pinkard*, 2010 WI 81, ¶14, 327 Wis. 2d 346, 785 N.W.2d 592. Given the importance of the privacy interests involved, this exception should be narrowly construed. *See Arizona* v. *Gant*, 556 U.S. 332, 345 (2009) (instructing that a motorist's privacy interest in his vehicle is "important and deserving of constitutional protection.").

¶44 In *Gant*, the United States Supreme Court expanded motorists' privacy rights when it narrowed its prior decision in *New York* v. *Belton*, 453 U.S. 454 (1981). *Belton* had previously been read so broadly as to authorize a vehicle search incident to every arrest of any occupant of a vehicle. *See Gant*, 556 U.S. at 343.

¶45 The *Gant* court explained that "[c]onstruing Belton broadly to allow vehicle searches incident to

any arrest would serve no purpose except to provide a police entitlement, and it is anathema to the Fourth Amendment to permit a warrantless search on that basis." *Id.* at 347. Accordingly, *Gant* limited searches incident to arrest to two circumstances: either when the arrestee is unsecured and within reaching distance of the passenger compartment at the time of the search or when it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. *Id.* at 343.

¶46 In order to address the same concerns in the context of vehicle impoundments, the national trend has been to adopt a two-part test that resembles *Gant*'s narrowing of *Belton*. This test, like the test adopted in *Gant*, prioritizes motorists' privacy rights over deference to police discretion. It limits police discretion regarding impoundments by requiring both a standardized policy governing impoundment and a "reasonable, non-pretextual community-caretaking rationale." *Sanders*, 796 F.3d at 1248.

¶47 The question of whether a community caretaker impoundment of a vehicle must be governed by a standardized policy is an issue of first impression in Wisconsin. However, the United States Supreme Court has instructed that the exercise of police discretion must be "exercised according to standard criteria and on the basis of something other than suspicion of evidence of criminal activity." *Colorado* v. *Bertine*, 479 U.S. 367, 375 (1987).

¶48 A majority of federal and state appellate courts that have addressed this issue have concluded that a warrantless community caretaker impoundment is constitutional only if there exists

standardized criteria limiting police discretion. *See, e.g.*, *United States* v. *Sanders*, 796 F.3d 1241, 1248 (10th Cir. 2015); *United States* v. *Proctor*, 489 F.3d 1348, 1353–54, 376 U.S. App. D.C. 512 (D.C. Cir. 2007); *Miranda* v. *City of Cornelius*, 429 F.3d 858, 866 (9th Cir. 2005); *United State* v. *Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004); *United States* v. *Duguay*, 93 F.3d 346, 351 (7th Cir. 1996); Patty v. State, 768 So. 2d 1126, 1127 (Fla. Dist. Ct. App. 2000); *State* v. *Weaver*, 900 P.2d 196, 199 (Idaho 1995); *People* v. *Ferris*, 9 N.E.3d 1126, 1137 (Ill. Ct. App. 2014); *Fair* v. *State*, 627 N.E.2d 427, 433 (Ind. 1993); *State* v. *Huisman*, 544 N.W.2d 433, 437 (Iowa 1996); *Com.* v. *Oliveira*, 47 N.E.3d 395, 398 (Mass. 2016); *State* v. *Robb*, 605 N.W.2d 96, 104 (Minn. 2000); *State* v. *Milliorn*, 794 S.W.2d 181, 186 (Mo. 1990); *State* v. *Filkin*, 494 N.W.2d 544, 549 (Neb. 1993); *People* v. *O'Connell*, 188 A.D.2d 902, 903 (N.Y. App. Div. 1992); *State* v. *O'Neill*, 29 N.E.3d 365, 374 (Ohio Ct. App. 2015); *McGaughey* v. *State*, 37 P.3d 130, 142–43 (Okla. Crim. App. 2001).

¶49 Yet, the majority follows the minority view of three federal circuits, determining that in cases involving warrantless community caretaker impoundments that standardized policies are not necessary. *United States* v. *McKinnon*, 681 F.3d 203, 208 (5th Cir. 2012); *United States* v. *Smith*, 522 F.3d 305, 312 (3d Cir. 2008); *United States* v. *Coccia*, 446 F.3d 233, 238 (1st Cir. 2006). It reasons that standardized procedures are unnecessary because police discretion is sufficiently limited by the requirement that impoundments be based on a reasonable community caretaker concern.

¶50 According to the majority, "the fundamental question is the reasonableness of the seizure." Majority op., ¶27. It contends that the absence of standard criteria does not "imbue law enforcement officers with 'uncontrolled' discretion to impound vehicles at will as a pretext for conducting investigatory searches." Majority op., ¶28. However, as set forth in more detail below, that is exactly what happened here.

¶51 The Tenth Circuit's decision in *Sanders* is illustrative of the national trend. In *Sanders*, for "reasons not articulated in any policy, [police] impounded a vehicle lawfully parked in a private lot after arresting its driver as she exited a store." *Id.* at 1242. The police made "no meaningful attempt to allow the driver, her companion, or the owner of the parking lot to make alternative arrangements." *Id.*

¶52 Sanders acknowledged that "[t]he authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge." *Id.* at 1244 (quoting *South Dakota* v. *Opperman*, 428 U.S. 364, 368–69 (1976)). It further explained that *Opperman* and *Bertine* establish "two different, but not inconsistent, rules regarding when impoundments are constitutional." *Id.* at 1245. *Opperman* establishes that warrantless impoundments required by the community caretaking functions of protecting public safety and promoting the efficient movement of traffic are constitutional. *Id. Bertine* establishes that warrantless impoundments are unconstitutional if justified by either a "pretext for a criminal

investigation or not exercised according to standardized criteria" that limits police discretion. *Id.*

¶53 After surveying United States Supreme Court and federal circuit precedent, Sanders concluded that "impoundment of a vehicle located on private property that is neither obstructing traffic nor creating an imminent threat to public safety is constitutional only if justified by both a standardized policy and a reasonable, non-pretextual community-caretaking rationale." *Id.* at 1248.

¶54 Deviating from the nationwide trend, the majority limits motorists' privacy rights. Contrary to the majority, I would follow the national trend protecting motorists' privacy rights under the Fourth Amendment and require both a standardized policy that limits police discretion and a reasonable community caretaker rationale.

A

¶55 Applying the test set forth above, I turn to the question of whether the policies in this case sufficiently limited officer discretion to impound vehicles from private lots.[1]

¶56 The Beaver Dam Police Department policy provides no limitations. In essence, it states that any officer having a vehicle in lawful custody may impound that vehicle:

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[1] The parties disagree regarding which policy governed the impoundment, but as set forth below, this issue is not dispositive to my analysis because neither policy sufficiently limits police discretion.

> Any officer having a vehicle in lawful custody may impound said vehicle. The officer will have the option not to impound said vehicle when there is a reasonable alternative; however, the existence of an alternative does not preclude the officer's authority to impound.

¶57 Likewise, the Dodge County Sheriff's Department policy governing impoundment provides that deputies are authorized to tow when "the driver . . . has been taken into custody by a deputy, and the vehicle would thereby be left unattended." Additionally, it states that unless otherwise indicated, "the deputy always has the discretion to leave the vehicle at the scene and advise the owner to make proper arrangements for removal."[2]

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[2] The sheriff's department policy states in relevant part:

Deputies of the Dodge County Sheriff's Department are authorized to arrange for towing of motor vehicles under the following circumstances:

When any vehicle has been left unattended upon a street or highway and is parked illegally in such a way as to constitute a definite hazard or obstruction to the normal movement of traffic;

...

When the driver of a vehicle has been taken into custody by a deputy, and the vehicle would thereby be left unattended;

...

When removal is necessary in the interest of public safety because of fire, flood, storm, snow or other emergency reasons;

...

Unless otherwise indicated, the deputy always has the discretion to leave the vehicle at the scene and advise the owner to make proper arrangement for removal.

¶58 Having determined that standardized policies are not constitutionally required, the majority nevertheless considers the policies in the context of whether the seizure was reasonable.

¶59 According to the majority, both policies cabined the officers' discretion because they limit impoundment "to situations where officers had custody of, respectively, the vehicle itself or its driver." Majority op., ¶34. After concluding that the standardized policies in this case are sufficient, the majority determines that "[t]he fact that the seizure did actually comply with the policies of the acting law enforcement agencies indicates that this impoundment was not an arbitrary decision but a reasonable exercise of discretion." Majority op., ¶33.

¶60 The majority errs because neither policy limits police discretion. First, it is unclear how the Beaver Dam policy, which allows impoundments whenever officers have custody of a vehicle, provides any limitation at all. How can the police impound a vehicle without having custody of it? The policy's directive is circular.

¶61 Second, the majority errs because the Dodge County policy limits police discretion only when a driver *is not* in custody. The Fourth Amendment's protections against warrantless seizures of property continue to apply after a driver has been arrested. Indeed, the question of whether standardized procedures are required has arisen in such seminal cases as *Bertine* only after the defendant has been arrested. *See, e.g.*, *Bertine*, 479 U.S. at 368–369.

¶62 The majority misses the point because the question in this case is whether the policies limit police discretion in determining whether to impound a vehicle after a defendant has been arrested. Both policies give the police unfettered discretion to impound a vehicle when a driver such as Asboth has been arrested.

¶63 The purpose of standardized criteria is to establish why or when a vehicle may be taken into custody, but here neither policy offers any guidance on this question. In *State* v. *Clark*, the court of appeals addressed the Milwaukee Police Department towing policy, explaining that when a policy offers no insight into why or when a vehicle may be seized, it is "wholly unhelpful." 2003 WI App 121, ¶15, 666 N.W.2d 112.

¶64 Neither policy limits officer discretion "in deciding whether to impound a vehicle, leave it at the scene, or allow the arrestee to have it privately towed." *Sanders*, 796 F.3d at 1250. In contrast, the policy in *Bertine* "related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it." *Bertine*, 479 U.S. at 378. No such detail governs officer discretion here.

¶65 Accordingly, the policies in this case, as in *Sanders*, "insufficiently limited officer discretion to impound vehicles from private lots." *Sanders*, 796 F.3d at 1250.

B

¶66 Having determined that the impoundment was not done in accordance with constitutionally sufficient standardized policies, I could end my

analysis here because a community caretaker impoundment is unconstitutional without standardized procedures that limit police discretion. The majority, however, concludes that the police reasonably effected a community caretaker impoundment of Asboth's car. Majority op., ¶1. Accordingly, I turn now to the question of whether the police conduct in this case was a valid exercise of the community caretaker authority.

¶67 The majority concludes that there are a number of "objective justifications for the impoundment" that establish the police had a bona fide community caretaker purpose. Majority op., ¶21. Initially, it contends that if left unattended, Asboth's car would have "inconvenienced a private property owner and customers at the storage facility by impeding the beneficial use of the property." Majority op., ¶18. Yet, the hearing testimony demonstrates that it was possible to "drive around" Asboth's vehicle, contradicting this rationale. Beneficial use of the property was not impeded because Asboth's vehicle was not blocking traffic through the storage facility.

¶68 Because of the lack of evidence that the vehicle was obstructing traffic at the storage facility, the majority offers a number of additional rationalizations. First, it advances that "any expense for removing the obstruction would have fallen to a private property owner uninvolved in the arrest." Majority op., ¶18. Next, it asserts that the police protected the vehicle and its contents from theft and that "Asboth no doubt would have been upset to learn that his personal property was stolen from the car."

Majority op., ¶19. Finally, it contends that because the registered owner of the vehicle was someone other than Asboth, police were faced with the possibility of needing to make arrangements to return the vehicle to its registered owner. Majority op., ¶20.

¶69 The hearing testimony demonstrates that each of these proffered rationales is purely speculative. None of the officers contacted the storage facility to see whether the owner wanted the car removed nor did they contact the registered owner of the vehicle. Additionally, none of the officers recalls speaking with Asboth about whether he could arrange to have someone move the vehicle.

¶70 After dispensing with the majority's speculative justifications for its conclusion that this was a bona fide community caretaker function, I turn now to examine the reasonableness of the warrantless impoundment. A reasonableness analysis calls for consideration of both "the degree of public interest and the exigency of the situation." *State* v. *Pinkard*, 2010 WI 81, ¶41, 327 Wis. 2d 346, 785 N.W.2d 592 (quoting *In re Kelsey C.R.*, 2001 WI 54, ¶36, 243 Wis. 2d 422, 626 N.W.2d 777).

¶71 In its analysis of reasonableness, the majority repeats the same justifications offered as support for its conclusion that the impoundment was a bona fide community caretaker function. Essentially, it contends that the public has a significant interest in impounding a vehicle that would "inconvenience the property's owner and users by impeding beneficial use of the property and creating a potential hazard." Majority op., ¶32.

¶72 Even if the majority could sufficiently explain how Asboth's vehicle posed a potential hazard to public safety, it errs in stating that it need not consider the exigency of the situation. *Id.* Acknowledging that this was not an emergent situation, the majority simply omits this consideration from its analysis. *Id.* Instead, it considers only the public interest, which does not justify the seizure because Asboth's vehicle was parked on private property and there was testimony that there was room to drive around it.

¶73 Finally, I turn to the majority's argument that "the lack of realistic alternatives to impoundment further reinforces the reasonableness of the seizure." Majority op., ¶35. As set forth above, however, no alternatives to impoundment were considered so there is no evidence as to whether there were realistic alternatives to impoundment. Again, this is pure speculation on the part of the majority.

¶74 Considering the facts of this case, it appears that the impoundment may have been a pretext for an investigatory police motive. *See, e.g.*, *Sanders*, 796 F.3d at 1245 (explaining that *Bertine* establishes that impoundment is unconstitutional where police discretion is "exercised as a pretext for criminal investigation.").

¶75 Just before the vehicle was impounded, Asboth was arrested on a probation warrant. The car was towed to a city police impound lot, where it was subsequently searched. During the search, police removed and held all items of apparent value, including a pellet gun that was found in the vehicle. The officers conducting the search testified that they

considered it to be an inventory search, and conducted it according to their inventory search procedures. However, one officer conducting the search filled out a form indicating that it was done to obtain "evidence," rather than the other possible purposes listed on the form, including "abandoned," "parked in traffic" or "safekeeping."

¶76 Contrary to the majority, I conclude that the lack of a compelling public safety need to move Asboth's car suggests that the police were motivated by the investigation of the armed robbery in which he was a suspect. Not only are the rationales offered by the majority hypothetical, but they could be applied to virtually any vehicle, parked anywhere, at any time. In *Clark*, this court rejected a policy that "might lead to the police towing every unlocked vehicle on the street." 265 Wis. 2d 557, ¶16. Likewise, the majority's conclusion may justify the seizure of every vehicle after its driver has been arrested.

¶77 Thus, I conclude that the impoundment of Asboth's vehicle was unconstitutional. His vehicle was parked on private property, was not obstructing traffic and posed no imminent threat to public safety. Under such circumstances, in order to survive constitutional scrutiny, the impoundment must be justified by both a standardized policy that limits police discretion and a reasonable, non-pretextual community-caretaking rationale. Here there was neither.

II

¶78 Ultimately, I comment on what I and other members of this court have repeatedly warned: a

broad application of the community caretaker doctrine "raises the specter that the exception will be misused as a pretext to engage in unconstitutional searches that are executed with the purpose of acquiring evidence of a crime." *Pinkard*, 327 Wis. 2d 346, ¶75.

¶79 I have previously voiced the concern that "today's close call will become tomorrow's norm." *Id.*, ¶66. Over the years, that is exactly what has happened. In case after case, this exception to the Fourth Amendment's warrant requirement has expanded well beyond the limits of a bona fide community caretaker function that is "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *State* v. *Kramer*, 2009 WI 14, ¶23, 315 Wis. 2d 414, 759 N.W.2d 598 (internal quotes and citations omitted).

¶80 With today's decision, community caretaking has again become an end in itself, justifying warrantless impoundments so long as the police can articulate "a hypothetical community need." *Matalonis*, 366 Wis. 2d 443, ¶106 (Prosser, J., dissenting). The majority embraces the State's hypothetical. It reasons that the police served a legitimate public interest by impounding a vehicle that inconvenienced a private business and its customers and created a hazard by obstructing vehicle traffic through the storage facility. Majority op., ¶32.

¶81 Not only has the majority opinion lowered the floor by deviating from the national trend requiring standardized criteria, it also has opened a

trap door so that the community caretaker exception may become bottomless. If the community caretaker impoundment of Asboth's vehicle parked on private property can be justified due to inconvenience, would any warrantless seizure be unreasonable in this context? When an exception to the Fourth Amendment becomes the rule, the privacy rights of motorists do not receive the constitutional protections they deserve.

¶82 Accordingly, I respectfully dissent.

¶83 I am authorized to state that Justice SHIRLEY S. ABRAHAMSON joins this dissent.

APPENDIX B

COURT OF APPEALS

DECISION

DATED AND FILED

September 29, 2016

Diane M. Fremgen

Clerk of Court of Appeals

Appeal No. 2015AP2052-CR

Cir. Ct. No. 2012CF384

STATE OF WISCONSIN

IN THE COURT OF APPEALS

DISTRICT IV

State of Wisconsin,

Plaintiff-Responded,

v.

Kenneth M. Asboth, Jr.,

Defendant-Appellant.

APPEAL from a judgment of the circuit court for Dodge County: JOHN R. STORCK, Judge. *Affirmed.*

Before Lundsten, Sherman, and Blanchard, JJ.

¶1 BLANCHARD, J. Kenneth Asboth appeals a judgment of conviction for armed robbery, challenging the circuit court's denial of his motion to suppress evidence. Police lawfully took Asboth into custody at a private storage unit facility, then had a car associated with Asboth towed to a police facility, where police conducted an inventory search of the car. The inventory search revealed evidence that Asboth seeks to suppress, but no aspect of the inventory search itself is at issue in this appeal. Instead, Asboth argues exclusively that police violated the Fourth Amendment in initially seizing the car. The seizure was unconstitutional, Asboth contends, for two reasons: it was not conducted pursuant to a law enforcement vehicle seizure policy with standardized, sufficiently detailed criteria, and it was not justified as an exception to the Fourth Amendment warrant requirement under the bona fide community caretaker doctrine. We disagree and accordingly affirm.

BACKGROUND

¶2 Following evidentiary hearings, the circuit court made findings of fact that include the following, none of which are disputed by either party on appeal.

¶3 A Dodge County Sheriff's Department deputy lawfully arrested Asboth on a probation warrant while he was by himself at a private facility that maintains storage units. At the time of his arrest, Asboth was a suspect in a recent armed robbery in Beaver Dam.

¶4 Shortly before the arrest, police observed Asboth reaching into a car parked at the storage

facility. The officers involved in the arrest learned that the car was registered to a person with a Madison address. At the time of the arrest, the car blocked access to multiple storage units and impeded potential vehicle travel through at least one area of the facility.

¶5 The storage facility was located within the jurisdiction of the Dodge County Sheriff's Department and outside the jurisdiction of the Beaver Dam Police Department. The sheriff's deputy who arrested Asboth made a mutual aid request to city police for assistance in connection with Asboth's arrest, apparently because the deputy thought that he needed immediate backup not available from his own department. Because the sheriff's department lacked storage space to hold the car, the car was towed to a city police impound lot, as opposed to a sheriff's department facility. The car was held at the police department lot and subsequently searched.[1]

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[1] Briefly explaining our use of terminology, it appears that there is a lack of uniformity in what various legal authorities mean in referring to the "impoundment" of a vehicle. For this reason, we generally do not use the term "impoundment," but instead use the following Fourth Amendment terms:

- "seizure," to refer to police initially taking temporary possession of a vehicle and having the vehicle moved to a place used to temporarily hold seized vehicles, and
- "search," or "inventory search," to refer to a police search of a seized car after it has been moved to temporary police storage.

We quote authorities using the term "impoundment" when we believe that its meaning is sufficiently clear for current purposes.

During the course of the inventory search, police removed and held for safekeeping all items of apparent value, whether or not the items appeared to be related to the armed robbery.[2]

¶6 Asboth moved to suppress evidence obtained in the search, alleging, as pertinent to this appeal, that the initial seizure of the car violated the Fourth Amendment. The circuit court denied Asboth's motion to suppress and his subsequent motion for reconsideration. As pertinent to this appeal, the court concluded that the State carried its burden of showing that the warrantless seizure of the car did not violate the Fourth Amendment. We supply additional facts as necessary to discussion below.

DISCUSSION

¶7 This court reviews the denial of a motion to suppress under a two-part standard of review. *State* v. *Popp*, 2014 WI App 100, ¶13, 357 Wis. 2d 696, 855 N.W.2d 471. We uphold a circuit court's findings of fact unless they are clearly erroneous, but determine whether those facts warrant suppression under a de novo review. *Id.*

¶8 As noted above, Asboth exclusively challenges the seizure of the car as a Fourth

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[2] It is not important to any argument raised on appeal to know what particular items were recovered in the inventory search. However, for context we note that police found a gun that they suspected had been used in the recent Beaver Dam armed robbery in which Asboth was a suspect. This is the evidence that Asboth seeks to have suppressed.

Amendment violation. On this ground, Asboth argues that evidence obtained during the inventory search must be suppressed. More specifically, Asboth argues that seizure of the car was unreasonable under the Fourth Amendment for two reasons: (1) it was not conducted pursuant to a law enforcement policy setting forth standardized, sufficiently detailed guidelines limiting officer discretion in seizing vehicles; and (2) even if conducted pursuant to a standardized, sufficiently detailed policy, the seizure was not justified as an exception to the Fourth Amendment warrant requirement under the bona fide community caretaker doctrine.[3]

¶9 Before discussing Asboth's arguments in turn, we summarize basic legal principles in this area. Police do not violate the Fourth Amendment if they seize a vehicle pursuant to the community caretaker doctrine, that is, if the seizure is consistent with the role of police as "caretakers" of the streets. *See South Dakota* v. *Opperman*, 428 U.S. 364, 370 (1976); *State* v. *Clark*, 2003 WI App 121, ¶20, 265 Wis. 2d 557, 666 N.W.2d 112. More specifically, *Opperman* describes common situations in which police may reasonably seize vehicles in the role of

[3] The State does not suggest on appeal that, at the time police seized the car, police had: obtained a warrant authorizing seizure of the car; obtained consent from anyone with apparent authority to allow the car to be moved; possessed facts supporting probable cause justifying seizure of the car; or observed contraband or a dangerous weapon in "plain view" in the car at the time of the arrest. Also, the State does not argue that Asboth lacks standing to make a Fourth Amendment claim regarding seizure of the car.

community caretakers, consistent with the commands of the Fourth Amendment:

> In the interests of public safety and as part of what the Court has called "community caretaking functions," automobiles are frequently taken into police custody. Vehicle accidents present one such occasion. To permit the uninterrupted flow of traffic and in some circumstances to preserve evidence, disabled or damaged vehicles will often be removed from the highways or streets at the behest of police engaged solely in caretaking and traffic-control activities. Police will also frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic. *The authority of police to seize and remove from the streets vehicles impeding traffic or threatening public safety and convenience is beyond challenge*.

Opperman, 428 U.S. at 368-69 (emphasis added) (footnote and quoted source omitted). This approach derives in part from the traditional "distinction between automobiles and homes or offices in relation to the Fourth Amendment." *Id.* at 367. While automobiles are protected by the Fourth Amendment, "warrantless examinations of automobiles have been upheld in circumstances in which a search of a home or office would not." *Id.* (citing authority that includes the seminal community caretaking case, *Cady* v. *Dombrowski*, 413 U.S. 433, 442 (1973), which discusses the "ambulatory character" of vehicles).

¶10 These concepts were later refined in *Colorado* v. *Bertine*, 479 U.S. 367, 375-76 (1987). In *Bertine*, the Court concluded that seizure and an inventory search of Bertine's van, after he was arrested and taken into custody, qualified as community caretaking activity because police followed "standardized procedures" and because there was no showing that police "acted in bad faith" or "for the sole purpose of investigation." *Bertine*, 479 U.S. at 367, 372.

¶11 While on the subject of *Bertine*, we now briefly introduce a topic that we will discuss more fully below, namely, a potential complication regarding application of the community caretaker doctrine in the context of vehicle seizures. There is no dispute under U.S. Supreme Court and Wisconsin appellate court precedent that police act unreasonably in seizing a vehicle without a recognized Fourth Amendment justification, such as community caretaking activity. However, the federal circuit courts of appeal are in conflict as to whether *Bertine* establishes a specific requirement that police must follow a standardized policy in seizing a vehicle when acting as community caretakers, and as discussed below Wisconsin appellate precedent does not appear to impose such a requirement. That is, *Bertine* can be read, but is not universally read, to describe a requirement that police exercise their discretion "in light of standardized criteria" set forth in a police policy. *Bertine*, 479 U.S. at 375-76.[4] We

[4] Asboth's arguments in this regard are tied to the following language from *Colorado* v. *Bertine*, 479 U.S. 367, 375-76 (1987), in particular the phrases we now emphasize:

need not resolve whether *Bertine* imposes a standardized criteria requirement. Rather, as explained further below, we will assume without deciding that there is a requirement that police must follow standardized criteria. Acting on this assumption, we first address whether the car was seized pursuant to a standardized policy and later turn to other aspects of the community caretaker doctrine.

1. Vehicle Seizure Pursuant to a Police Policy

¶12 Operating from the position that police had to follow a standardized policy in seizing the car here, Asboth makes arguments related to the specific policies of the sheriff's department (the "county's policy") and the police department (the "city's policy") related to vehicle seizures. Asboth argues that the

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> Bertine ... argues that the inventory search of his van was unconstitutional because departmental regulations gave the police officers discretion to choose between impounding his van and parking and locking it [and leaving it] in a public parking place.... [W]e reject [this argument]. Nothing in *Opperman* or [*Illinois* v. *Lafayette*, 462 U.S. 640 (1983)] prohibits the exercise of police discretion *so long as that discretion is exercised according to standard criteria* and on the basis of something other than suspicion [that the vehicle contains] evidence of criminal activity. Here, the discretion afforded the ... police *was exercised in light of standardized criteria*, related to the feasibility and appropriateness of parking and locking a vehicle rather than impounding it. There was no showing that the police chose to impound Bertine's van in order to investigate suspected criminal activity.

(Emphasis added.)

specific law enforcement policy that was applied in seizing the car was the city's policy, not the county's policy. He further argues that, whichever policy applied here, neither the county's policy nor the city's policy contained standardized criteria that provided sufficient guidance to justify seizure under the community caretaker doctrine. Some additional factual background regarding the policies themselves is necessary before we return to these specific arguments and pertinent legal standards.

¶13 The county's policy authorized deputies to seize vehicles in various scenarios. As pertinent here, this included the following scenario: (1) the driver of a vehicle is taken into police custody; and (2) as a result, that vehicle would be left unattended. The city's policy articulated a different standard on this topic. However, for reasons we now explain, the content of the city's policy does not matter to any issue raised on appeal, because we conclude that the seizure was conducted pursuant to the county's policy.

¶14 In support of his argument that law enforcement followed the city's policy, rather than the county's policy, Asboth points to the undisputed facts that the car was towed to the city police department and that city officers conducted the inventory search. Based on these facts, Asboth asserts that "it was the [city's] police [who] took the car." However, Asboth does not challenge factual findings of the circuit court, summarized above, regarding the seizure, which we conclude are more pertinent. To repeat, the court found that a sheriff's deputy arrested Asboth, that the storage facility where Asboth was arrested

was outside of the jurisdiction of the city police department, and that, after making the mutual aid request, the sheriff's department asked the police department to temporarily house the car only because the sheriff's department lacked storage space for the car. Under these circumstances, we conclude that this was a seizure generated, and primarily directed, by the sheriff's department and therefore the county's policy is the applicable policy.

¶15 Asboth argues that, even if the seizure was conducted pursuant to the county's policy, that policy was insufficient to justify seizure under the community caretaker doctrine. As referenced above, Asboth's argument is based on a passage from *Bertine*, quoted above, which could be read to require that a police seizure under the community caretaker doctrine must be conducted pursuant to "standardized criteria." *Bertine*, 479 U.S. at 376.

¶16 This brings us back to the potential complication, referenced above, regarding the meaning of *Bertine* and standardized criteria. As the State points out, federal courts of appeals are divided as to whether *Bertine* requires that seizure of a vehicle must be conducted in accordance with a standardized policy, regardless of other facts that might justify a seizure under the community caretaker doctrine.[5] In addition, the State points to

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[5] *Compare, e.g.*, *United States* v. *Petty*, 367 F.3d 1009, 1012 (8th Cir. 2004) (vehicle "impoundments" must be regulated by "[s]ome degree of 'standardized criteria' or 'established routine'") (quoted source omitted), *with United States* v. *McKinnon*, 681 F.3d 203, 208 (5th Cir. 2012) ("[W]e have focused our inquiry on the reasonableness of the vehicle impoundment for a community

the fact that this court, in an opinion that postdates *Bertine*, expressly elected to analyze whether a seizure qualified as community caretaking even after concluding that police in that case had *not* followed a department policy with standardized criteria. *See Clark*, 265 Wis. 2d 557, ¶¶18-20 (having determined that a pertinent police policy was not followed, the court nevertheless proceeded to determine whether seizure of vehicle satisfied the community caretaker doctrine; "we must only determine, absent any police department policies, whether the seizure satisfied the reasonableness standard of the Fourth Amendment ....").

¶17 We conclude that we do not need to resolve here any conflict that there might be between *Bertine* and *Clark* on the issue of whether a vehicle seizure can satisfy the community caretaker doctrine when police do not follow a department policy with standardized criteria. This is because we conclude that, even applying the requirement that a standardized policy must be followed, the seizure here met that requirement. The county's policy was a written document that reflected standards governing seizure, and law enforcement followed those standards in seizing the car here.

¶18 Asboth argues that reliance on the county's policy would not have been reasonable, because the policy was not "sufficiently standardized," as Asboth submits is required by

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caretaking purpose without reference to any standardized criteria.").

Bertine, in that it provided "no 'conditions circumscrib[ing] the discretion of individual officers.'" In particular, Asboth notes that, under the county's policy, deputies were permitted to tow a vehicle when the driver had been arrested and as a result the vehicle would be left unattended at least for a time, while at the same time the policy separately provided that "unless otherwise indicated" deputies "always [had] discretion to leave the vehicle at the scene and advise the owner to make proper arrangements for removal." However, as quoted above, *Bertine* suggests that a policy may give police broad discretion, explaining that "[n]othing ... prohibits the exercise of police discretion," as long as it is exercised according to some set of standardized criteria and is not exercised solely for an investigative purpose. *Bertine*, 479 U.S. at 375. Put differently, Asboth fails to persuade us that the county's policy was so vague or loose that it could not be considered a standardized policy under *Bertine*. *See also*, *United States* v. *Cartwright*, 630 F.3d 610, 614-15 (7th Cir. 2010) (holding that a "towing and impoundment policy" permitting the seizure of vehicles "'operated by a non-licensed or suspended driver' or 'by [a] person under custodial arrest for any charge'" is "sufficiently standardized") (quoted source omitted).

¶19 In fact, if anything, the policy viewed with favor by the Court in *Bertine* appears to have provided *fewer* restrictions on police seizures of vehicles than the county's policy here. The county's policy, like that under review in *Bertine*, provided that seizure of a vehicle would be appropriate not merely when the driver has been taken into custody,

but the county's policy provided the additional restriction that such a seizure is appropriate only when the vehicle would also be left unattended as a result of the arrest. *See Bertine*, 479 U.S. at 368 n.1.

¶20 In sum, based on the undisputed facts, assuming without deciding that it is necessary to evaluate whether the seizure was conducted pursuant to a policy with standardized criteria, we conclude that the county's policy applies and that the seizure of the car here was authorized under that policy.

2. Community Caretaker Generally

¶21 Asboth correctly observes, consistent with our summary of the legal standards above, that even if police seize a vehicle pursuant to a policy with standardized criteria, the State is obligated to show that the seizure was reasonable under the community caretaker doctrine. *See Opperman*, 428 U.S. at 368-69; *Clark*, 265 Wis. 2d 557, ¶14 ("compliance with an internal police department policy does not, in and of itself, guarantee the reasonableness of a search or seizure"; "the constitutionality of each search or seizure will, generally, depend upon its own individual facts.")

¶22 We use a three-step test to determine whether police conduct, including seizure of a vehicle, was a valid exercise of the community caretaker authority: (1) whether "'a seizure within the meaning of the Fourth Amendment has occurred; (2) if so, whether the police conduct was bona fide community caretaker activity; and (3) if so, whether the public need and interest outweigh the intrusion upon the

privacy of the individual.'" *Clark*, 265 Wis. 2d 557, ¶21 (quoting *State* v. *Anderson*, 142 Wis. 2d 162, 169, 417 N.W.2d 411 (Ct. App. 1987)).

¶23 Regarding the first step, the parties agree that police seized the car here within the meaning of the Fourth Amendment when they moved it from the storage facility to the police facility. *See Anderson*, 142 Wis. 2d at 169.

Bona fide community caretaker activity

¶24 Turning to the second step, Asboth makes no serious argument that seizure of the car pursuant to the county's policy was not bona fide community caretaker activity—if one removes from the equation a police motive to search the car for evidence. Asboth's single argument is that the seizure was not community caretaker activity because police had a subjective investigatory motive to search the car, namely, the suspicion that a search of the car might reveal evidence that Asboth had committed an armed robbery. We reject this argument because it rests on an incorrect proposition of law.

¶25 Asboth acknowledges that our supreme court has held that "when under the totality of the circumstances an objectively reasonable basis for the community caretaker function is shown, that determination *is not negated by* the officer's subjective law enforcement concerns." *See State* v. *Kramer*, 2009 WI 14, ¶30, 315 Wis. 2d 414, 759 N.W.2d 598 (emphasis added). However, Asboth asserts that "the analysis is different in the case of impoundment," under U.S. Supreme Court precedent. We disagree.

¶26 First, we note that Asboth does little to attempt to develop an argument in this regard, merely citing two opinions without explanation, and we could reject this argument on that basis.

¶27 Second, the two Supreme Court cases that Asboth cites as purported support for his argument do not support it. *See Opperman*, 428 U.S. 364; *Whren* v. *United States*, 517 U.S. 806 (1996). To the contrary, as we now briefly explain, United States Supreme Court precedent matches the "not negated by" formulation of the Wisconsin Supreme Court in *Kramer*.

¶28 Asboth's argument is apparently based on the statement in *Opperman* that "there is no suggestion whatever" that in following a "standard procedure, essentially like that followed throughout the country," police in that case conducted an inventory search of a seized vehicle as "a pretext," in order to "conceal[] an investigatory police motive." *Opperman*, 428 U.S. at 376. Asboth suggests that this "no suggestion whatever" language from *Opperman*, and similar language in *Whren*, means that seizures such as the one here are invalid when police have any investigatory motive.

¶29 However, the Court in *Bertine* removed any potential ambiguity on this point, upholding a vehicle seizure and inventory search because "as in *Opperman* ..., there was no showing that the police, who were following standardized procedures, acted in bad faith or *for the sole purpose of* investigation." *Bertine*, 479 U.S. at 372 (emphasis added); *see id.* at 375 ("Nothing in *Opperman* or [*Illinois* v. *Lafayette*, 462 U.S. 640 (1983)] prohibits the exercise of police

discretion so long as that discretion is exercised ... on the basis of something other than suspicion [that the vehicle contains] evidence of criminal activity."); *Whren*, 517 U.S. at 811 ("in *Colorado* v. *Bertine*, ... in approving an inventory search, we apparently thought it significant that there had been 'no showing that the police, who were following standardized procedures, acted in bad faith or for the sole purpose of investigation.'") (quoted source omitted). Thus, an otherwise valid seizure of a vehicle under the justification of the community caretaker doctrine is not rendered invalid by the fact that police appear to have an investigatory motive—even a strong investigatory motive—in seizing the vehicle.

¶30 As for the facts here, Asboth gives us no reason to upset the implicit factual finding of the circuit court that the police did not seize the car, in the terms used in *Bertine*, "'for the sole purpose of investigation.'"[6] Asboth notes that the inventory form prepared by the officers who conducted the search "indicates that the car was impounded as 'evidence.'" However, in testimony apparently credited by the circuit court, the officer who completed the form testified that he indicated on the form that recovered items were "evidence" because an officer who assisted

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[6] Asboth points out that the circuit court did not explicitly find that in seizing the car, as opposed to conducting the inventory search, police did not act for the sole purpose of investigation. However, it appears that the court strongly implied a finding to this effect in the course of addressing Asboth's exclusive challenge to the seizure, and Asboth gives us no reason to conclude otherwise.

with the inventory search told the first officer that the gun they found in the car was probably used in the armed robbery. The officers' recognition that an item found during the inventory search appeared to have evidentiary value does not mean that the car was initially seized in bad faith or for the sole purpose of investigation.

¶31 On this basis, we reject the only argument Asboth makes that the seizure here does not satisfy the second step of the test under the community caretaker doctrine.

Public need and interest weighed against privacy intrusion

¶32 In the third step of the test, as applied in Wisconsin, balancing the public need and interest in seizure against the intrusion on individual privacy, we weigh four factors:

> (1) the degree of the public interest and the exigency of the situation; (2) the attendant circumstances surrounding the seizure, including time, location, the degree of overt authority[,] and force displayed; (3) whether an automobile is involved; and (4) the availability, feasibility[,] and effectiveness of alternatives to the type of intrusion actually accomplished.

Clark, 265 Wis. 2d 557, ¶21 (citing *Anderson*, 142 Wis. 2d at 169-70 (footnotes omitted)). The third factor obviously favors the State. Asboth argues that the first and fourth factors weigh in his favor, without advancing any argument regarding the second factor.

¶33 The State argues that the public need and interest in removing the car from the storage facility, where it was blocking storage units and potentially impeding vehicle movement, outweighs any intrusion on Asboth's privacy interest in the car. Asboth does not challenge the factual findings of the circuit court on these points.

¶34 Asboth concedes that there may have been "*some* 'public need and interest'" in moving the car to permit access to storage units. However, Asboth makes two related arguments about what the police needed to do in order to effectuate a reasonable seizure. First, Asboth argues that the police need to remove the car from the facility was not driven by any degree of exigency, and, second, he argues that even if police did need to move the car, there was no legitimate need to tow it to a police facility.

¶35 Addressing the degree of exigency, it appears to us that Asboth may confuse the exigency factor under the balancing test with the need for police to be presented with an emergency. Our supreme court has explained that the "community caretaker exception does not require the circumstances to rise to the level of an emergency to qualify as an exception to the Fourth Amendment's warrant requirement." *State* v. *Pinkard*, 2010 WI 81, ¶26 n.8, 327 Wis. 2d 346, 785 N.W.2d 592 (citation omitted). In any case, we conclude that there was an appreciable degree of exigency here, in the sense of necessity.

¶36 Turning to the topic of potential alternatives to the seizure as conducted by the police here, Asboth relies on the explanation in *Clark* that,

in balancing the public interest in a seizure against the privacy of an individual in community caretaker analysis, "we must compare the availability and effectiveness of alternatives with the type of intrusion actually accomplished." *See Clark*, 265 Wis. 2d 557, ¶25; *see also Kramer*, 315 Wis. 2d 414, ¶45 (rejecting alternatives to seizure suggested by Kramer, and concluding "that the manner in which [the law enforcement officer] performed his community caretaker function was more reasonable than any suggested by Kramer.").[7] As we now explain, we conclude that the police conduct here passes muster under *Clark* and Kramer, consistent with *State* v. *Callaway*, 106 Wis. 2d 503, 317 N.W.2d 428 (1982).

¶37 We begin the potential alternatives topic with a clarification regarding potentially pertinent facts. The record does not reflect evidence that Asboth volunteered to law enforcement officers at the

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[7] As the State correctly observes, *Bertine* states that the Fourth Amendment does not require that police consider whether less intrusive alternatives existed at the time of a seizure otherwise justified under the community caretaker doctrine. Rather, the Court explained, the Fourth Amendment inquiry hinges on whether the activity of the police was reasonable under the circumstances: "The reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means." *Bertine*, 479 U.S. at 373-74 (quoting *Illinois* v. *Lafayette*, 462 U.S. 640, 647 (1983)). Nonetheless, following *State* v. *Kramer*, 2009 WI 14, ¶30, 315 Wis. 2d 414, 759 N.W.2d 598, and *State* v. *Clark*, 2003 WI App 121, ¶25, 265 Wis. 2d 557, 666 N.W.2d 112, we address Asboth's contention that there existed more reasonable alternatives than the one chosen by law enforcement.

time of his arrest that he could, or wanted to try to, make alternative arrangements with a responsible third party for safekeeping of the car that would obviate the need for seizure, nor evidence that officers asked Asboth about the possibility of any potential alternative arrangements.

¶38 With that clarification, we now summarize *Clark*. Like *Bertine* and the instant case, *Clark* involved a Fourth Amendment challenge to the seizure of a vehicle that the defendant had driven. *Clark*, 265 Wis. 2d 557, ¶1. However, in *Clark*, police discovered the vehicle at issue undamaged and legally parked on the street, although it was unlocked. *Id.*, ¶4. Instead of simply locking the vehicle and leaving it where it was, police had the vehicle towed to a police impound lot for safekeeping. *Id.* The police department had two separate policies addressing vehicle seizures that could have been applied. *Id.*, ¶12. On appeal, the court examined each of the police policies and concluded that, even assuming the reasonableness of the policies, police failed to comply with either one in having the vehicle towed. *Id.*, ¶¶15-17. Despite our conclusion in *Clark* that police conducted the seizure without following either of the potentially applicable policies, we proceeded to analyze whether the seizure was reasonable in accordance with the community caretaker doctrine, ultimately concluding that the seizure was unreasonable because it did not satisfy the community caretaker doctrine. *Id.*, ¶¶ 18-20, 27. To repeat, then, in *Clark* the police seized the car at issue after finding it legally parked on a public street, whereas in this case, the car associated with Asboth

blocked several storage units and movement of vehicles on the property of a private third party. *See id.*, ¶7.

¶39 Granted, the car associated with Asboth may or may not have been parked illegally, given the practical realities of allowing customers to have routine access to units at the storage facility. Asboth emphasizes testimony that there were not any "no parking" signs at the storage facility. Whatever the significance might be of a lack of such signage, it would have been objectively reasonable for law enforcement to see the car as likely creating problems for managers of the storage facility and visitors to the facility if left unattended for any length of time.

¶40 Moreover, Asboth fails to establish that the seizure decision here was not "more reasonable" than any alternative he now suggests. *See Kramer*, 315 Wis. 2d 414, ¶45. To state the obvious, Asboth's arrest prevented Asboth himself from moving the car from a location in which it appeared to interfere with private property rights and to represent a risk of loss or damage, and prevented him from doing so for an indeterminate length of time. *See generally id.*, ¶¶4, 43, 45 (seizure was more reasonable than suggested alternatives where driver had pulled over and parked on the side of the road on the crest of a hill, a potentially dangerous location).

¶41 It does not help Asboth that, as noted above, police knew that the car was not registered to Asboth, but instead to a person with a Madison

address.[8] We take judicial notice of the fact that the Madison area is a somewhat long drive from the Beaver Dam area. Asboth does not dispute that there was no other responsible person at the scene of his arrest and that the registered owner was likely a somewhat long drive away. Based on these facts, Asboth's suggested alternative that the officers could have asked Asboth to see if some reasonable third party could pick up the car does not carry much weight, because it would have been reasonable for police at the pertinent time to anticipate that officers would have been waiting for some indeterminate period for the owner or another responsible party to arrive, assuming that police could track down the owner or another responsible party in a timely fashion. *Cf. Clark*, 265 Wis. 2d 557, ¶¶4, 26 (suggesting that when a vehicle is registered to someone with an address in close proximity to the vehicle's location it may be reasonable to attempt to contact vehicle owner seeking consent to tow).

¶42 We are also not persuaded by Asboth's suggestion that police were obligated under these circumstances to move the car either to another spot at the storage facility or to a spot on a nearby street. Regarding the first suggestion, the circuit court made

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[8] Asboth points out that, roughly two months after the seizure of the car, police learned that title to the car apparently had not been appropriately transferred to Asboth by the time of his arrest, but that Asboth had actually owned the car at the time of his arrest. However, Asboth fails to explain why this later-discovered information should matter to the analysis of potential alternatives to seizure that officers on the scene of the arrest had, and we see no reason why it should matter.

the reasonable observation that "when the police arrest a person who has driven a vehicle onto private property other than their own, leaving that vehicle behind and making its removal the property owner's problem is unreasonable." Asboth fails to explain why police were required to move the car to a different location within the storage facility complex—a private facility owned by someone other than Asboth and thus over which Asboth could exercise no control—requiring the facility's owner to track down the vehicle's owner or arrange for the car to be moved.

¶43 As for the proposition that police were obligated under these circumstances to move the car to a street parking spot, the record is silent as to whether there were available, long-term, legal parking spots nearby. Moreover, even if we assume the existence of a legal parking spot on a street near the storage facility, our supreme court has suggested that it is ordinarily objectively reasonable for police to consider it "necessary and reasonable" to move to a police facility any vehicle that would otherwise be left unattended on a public street for an indeterminate amount of time, in order to avoid vandalism, theft, or damage to the vehicle. *See Callaway*, 106 Wis. 2d 503, 513-14 (concluding that the seizure and subsequent inventory search of a vehicle was reasonable under the Fourth Amendment when driver was taken into police custody following his arrest on an outstanding warrant and his vehicle left unattended) (if police had left car "unattended on the street, there is more than a possibility that it could have been vandalized or struck by another vehicle in

which case it is not unlikely that the owner would claim that the police department was negligent in some manner.... [W]e have concluded the impounding of the vehicle was necessary and reasonable because of the need to protect the vehicle from damage, theft or vandalism ....").

¶44 In sum, we conclude that the State has met its burden of showing that the decision to seize the car was reasonable under the circumstances here and that Asboth fails to convince us that any of the alternatives that he suggests would have been available and also more reasonable than the decision made here. Given the circumstances of the seizure and inventory search, and the factual findings of the circuit court as described above, we conclude that the seizure was valid under the community caretaker doctrine.

CONCLUSION

¶45 For the foregoing reasons, we conclude that the circuit court properly denied Asboth's motion to suppress evidence.

By the Court.—Judgment affirmed.

Not recommended for publication in the official reports.

APPENDIX C

STATE OF WISCONSIN

CIRCUIT COURT – BRANCH II

DODGE COUNTY

STATE OF WISCONSIN, Plaintiff

v.

KENNETH M. ASBOTH, JR., Defendant

Case No. 12 CF 384

Filed in the Circuit Court
Mar. 24, 2014

Dodge County, WI
Lynn M. Hron, Clerk of Courts

MEMORANDUM DECISION AND ORDER

Defendant was arrested on November 10, 2012, by members of the Dodge County Sheriff's Department on an outstanding DOC warrant. He was also suspected of involvement in a recent armed robbery in Beaver Dam.

At the time of his arrest, Defendant was located at a storage facility outside of the Beaver Dam city limits. The deputy conducting the arrest contacted the Beaver Dam Police Department to retrieve Defendant's vehicle from the scene. The vehicle was transported to the Beaver Dam impound

lot, where it was subsequently searched per law enforcement procedures.

In a June 2013 Memorandum Decision & Order, the Court denied Defendant's suppression motion regarding the inventory search of his vehicle, finding that:

> (1) The arresting deputy was alone and made a reasonable mutual aid request.
>
> (2) The officers involved believed that the vehicle belonged to someone other than the Defendant.
>
> (3) It is undisputed that Beaver Dam police conducted the inventory search according to established procedures.
>
> (4) The firearm was found in plain view during the inventory search.
>
> (5) The inventory search continued after the firearm was found.
>
> (6) Several items of property unrelated to the robbery were taken from the vehicle and held for safekeeping.

In short, the Court found the search was not performed "for the sole purpose of investigation" under *Colorado* v. *Bertine*, 479 U.S. 367, 371–72, 107 S. Ct. 738; 93 L. Ed. 2d 739 (1987).

Defendant has now filed a motion for reconsideration, arguing that the initial ***seizure*** of his vehicle was improper. Defendant cites *State* v. *Clark*, 2003 WI App 121, 256 Wis.2d 557, 666 N.W.2d 112, which held that police ***seizure*** of the defendant's

vehicle was improper where it was legally parked on a public street.

After reviewing Defendant's submissions and the State's response, the Court concludes that Clark is distinguishable from the facts of this case, to wit:

> (1) Both the Dodge County Sheriff's Department and the Beaver Dam Police Department's written policies favor impoundment in this scenario. (The Court agrees with the State's analysis of those policies.)
>
> (2) The vehicle was parked on another individual's property, not legally parked on a public street.
>
> (3) The vehicle was blocking access to more than one of the business's storage lockers and impeding travel by other customers through the complex.
>
> (4) There were valuable items in the vehicle including electronics.
>
> (5) Defendant was arrested while in possession of the vehicle, and was actually observed reaching into the vehicle.

In light of these facts, the Court agrees with the State that, "when the police arrest a person who has driven a vehicle onto private property other than their own, leaving that vehicle behind and making its removal the property owner's problem is unreasonable." The Court finds that removal under these circumstances is a valid community caretaker function.

THEREFORE, the motion for reconsideration is hereby DENIED.

Dated this 24th day of March, 2014.

BY THE COURT:

/s/

Hon. John R. Storck

Circuit Court Judge, Branch II

Dodge County, Wisconsin

APPENDIX D

STATE OF WISCONSIN

CIRCUIT COURT – BRANCH II

DODGE COUNTY

STATE OF WISCONSIN, Plaintiff

v.

KENNETH M. ASBOTH, JR., Defendant

Case No. 12 CF 384

Filed in the Circuit Court
June 26, 2013

Dodge County, WI
Lynn M. Hron, Clerk of Courts

MEMORANDUM DECISION AND ORDER

Defendant was arrested on November 10, 2012, by members of the Dodge County Sheriff's Department on an outstanding DOC warrant. He was also suspected of involvement in a recent armed robbery in Beaver Dam.

At the time of his arrest, Defendant was located at a storage facility outside of the Beaver Dam city limits. The deputy conducting the arrest contacted the Beaver Dam Police Department to retrieve Defendant's vehicle from the scene. The vehicle was transported to the Beaver Dam impound

lot, where it was subsequently searched per law enforcement procedures.

Defendant has filed a motion to suppress the fruits of that search. He contends that the involvement of the Beaver Dam Police Department invalidates this as a constitutional inventory search. This matter was heard by the Court on May 30, 2013, and briefs were subsequently submitted by both sides.

Inventory searches of impounded vehicles are deemed reasonable under the Fourth Amendment, and require neither probable cause nor a warrant. *See Colorado* v. *Bertine,* 479 U.S. 367, 371–72, 107 S. Ct. 738; 93 L. Ed. 2d 739 (1987). Such searches "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.* at 372. The *Bertine* court noted that cases upholding such searches have been free from showings that police acted in bad faith or "for the sole purpose of investigation." *Id.* Defendant argues that the Beaver Dam Police Department's involvement in investigating the armed robbery suggests that the primary purpose of the search was actually investigation of his possible role therein.

Although investigation of Defendant's role in the armed robbery was clearly one component of this inventory search, review of the record has convinced the Court that this inventory search was not conducted "for the sole purpose of investigation." The Court makes that finding for several reasons, including:

(1) The vehicle could not be left where it was and needed to be impounded.

(2) The arresting deputy was alone and made a reasonable mutual aid request.

(3) The officers involved believed that the vehicle belonged to someone other than the Defendant.

(4) It is undisputed that Beaver Dam police conducted the inventory search according to established procedures.

(5) The firearm was found in plain view during the inventory search.

(6) The inventory search continued after the firearm was found.

(7) Several items of property unrelated to the robbery were taken from the vehicle and held for safekeeping.

THEREFORE, the motion to suppress is hereby DENIED.

Dated this 26th day of June, 2013.

BY THE COURT:

/s/

Hon John R. Storck

Circuit Court Judge, Branch II

Dodge County, Wisconsin

APPENDIX E

City of Beaver Dam Policy

Searches, Seizures; Motor Vehicle Inventories

* * * * *

Sec. 4-3-2 Seizure of Motor Vehicles

(a) Classes of Vehicles Coming into Policy Custody.

(1) Seizures for forfeiture.

(2) Seizures as evidence.

(3) Prisoner's property.

(4) Traffic impoundments.

(5) Abandonments.

(6) Other non-criminal impoundments.

POLICY:

(a) lmpoundment Generally. Any officer having a vehicle in lawful custody may impound said vehicle. The officer will have the option not to impound said vehicle when there is a reasonable alternative; however, the existence of an alternative does not preclude the officer's authority to impound.

(b) Seizures for Forfeiture – Vehicle Used Illegally: When Permitted.

(1) When an officer has probable cause to believe that a vehicle has been used to transport a substantial amount of intoxicating liquors illegally.

(2) When an officer has probable cause to believe that a vehicle has been used to transport for sale or receipt controlled substances in violation of the Uniform Controlled Substances Act.

(3) When an officer has probable cause to believe that the vehicle has been used in the unlawful manufacture or commercial transfer of gambling devices.

(4) When an officer has probable cause to believe that the vehicle has been used in the commission of a felony or to violate a *Federal* law which provides for forfeiture following violation, as in the case of illegally transporting weapons, narcotics, or contraband liquor, the vehicle shall be seized regardless of the amount of contraband involved or the prior record of the owner or occupant and the officer shall then contact the supervisor for further instructions.

NOTE: No seizure for forfeiture shall be made without the approval of the Officer in Charge.

(c) Seizures as Evidence.

(1) Whenever an officer has probable cause to believe that a vehicle has been stolen, used in a crime or is otherwise connected with a crime, the officer may take the vehicle into custody and classify it as "seizure as evidence."

(2) A vehicle involved in a minor traffic offense shall not be seized as evidence merely because it was used to commit the traffic offense.

(3) A vehicle seized as evidence shall be completely inventoried accordingly, as soon as it is practicable after its arrival at the police facility. Vehicles seized as evidence shall not be released to any person until the appropriate official has signed a release.

(d) Miscellaneous Inventory Concerns.

(1) An officer may conduct an inventory of a vehicle on the side of the road as long as the vehicle is taken into police custody.

(2) Whenever an officer is authorized to inventory a motor vehicle, the officer may examine the passenger compartment, the glove box, and the trunk, whether or not locked.

(3) If an unlocked vehicle is impounded, the impounding officer shall remove items of value which are likely to be tampered with or stolen. All such containers shall be sealed to insure the security of their contents. All such property shall be inventoried and placed in evidence. The officer shall prepare a written record of the contents of the vehicle.

(4) Any officer conducting an inventory search shall search all items and containers, locked or unlocked, in the vehicle. This serves to prevent careless handling or theft of items of personal property and safekeeping of dangerous instrumentalities, such as razor blades, drugs, or explosives that might be concealed within innocent-looking articles.

(5) Any officer conducting an inventory search shall complete a written inventory list of all the property recovered in the vehicle.

(6) Upon completion of the inventory, if possible, all windows will be rolled up and secured. The trunk and doors shall be locked.

(7) An inventory search of a vehicle should be conducted as soon as practical.

(8) An inventory search should be conducted by the Officer assigned to investigate the initial complaint whenever possible. However, it is permissible to have the inventory search conducted by an assisting Officer, an evidence technician, a property custodian, or other personnel qualified to handle hazardous materials when the circumstances justify it.

PROCEDURES:

(a) Entering the Vehicle. Entry should be made to all areas of the vehicle, whether locked or unlocked; however, entry should not be made to an area if it means causing damage to the vehicle to gain access. In that event, entry should be made at the time the vehicle is released with a key provided by the person claiming the vehicle.

(b) Inventory. Any contraband or evidence found during the course of an inventory search of a vehicle will be removed from the vehicle and placed on property inventory, in accordance with regular inventory procedures.

(c) Disposition of Vehicles. When an Officer makes a decision to tow a vehicle, the following guidelines apply to its ultimate disposition:

(1) ***Secure (Short-Term).*** Exceptional cases may require temporary, indoor storage (police garage) for processing.

(2) ***Long-Term.*** Vehicles may be hauled to the City Garage Yard for off-site storage until final disposition. It shall be the practice of this Department to return vehicles to owners as soon as possible. The long-term storage of vehicles is discouraged, with the Department objective being to return the vehicle to its owner, or to dispose of it in accordance with City ordinances and State Statutes.

(d) Stolen Vehicles.

(1) Vehicles wanted by this agency will be processed for any type of evidence and searched.

(2) Vehicles that are recovered and determined to be stolen or otherwise wanted for investigation by other agencies should be secured and the agency notified.

(3) This Department will make arrangements to tow these vehicles to the Police Department Garage for safekeeping at the request of the reporting agency.

(4) An inventory search will be made on stolen vehicles reported by other agencies when the outside agency indicates it will not process the vehicle for evidence. This procedure will be followed to protect the Department and employees from alleged claims of missing or damaged property.

* * * * *

APPENDIX F

DODGE COUNTY SHERIFF'S DEPARTMENT

* * * * *

WRECKER REQUESTS / TOWING OF VEHICLES

I. PURPOSE

To ensure provision of necessary towing services in accident or similar situations within Dodge County;

To establish responsibility for determination of proper action, including determination of an appropriate wrecker service, in special situations;

To set forth procedures for towing of motor vehicles when justified, under specified circumstances.

II. POLICY

Deputies of the Dodge County Sheriff's Department are authorized to arrange for towing of motor vehicles under the following circumstances:

When any vehicle has been left unattended upon a street or highway and is parked illegally in such a way as to constitute a definite hazard or obstruction to the normal movement of traffic;

When a vehicle is found being driven upon the street or highway and it is not in proper condition to be driven;

When a vehicle has been left unattended upon a street or highway continuously for more than 48 hours and may be presumed to be abandoned;

When the driver of a vehicle has been taken into custody by a deputy, and the vehicle would thereby be left unattended;

When the driver of a vehicle has been issued a citation by a deputy and the driver is then not allowed to drive the vehicle;

When removal is necessary in the interest of public safety because of fire, flood, storm, snow or other emergency reasons;

When a vehicle is found parked in a properly-marked "no parking" zone designated by a governmental authority;

When a driver's condition is, in deputy's opinion, such that it renders him/her incapable of safely operating the vehicle (examples: physically incapable, mentally impaired, very confused, apparently impaired by alcohol, drugs, medication or a combination thereof, etc.)

Unless otherwise indicated, the deputy always has the discretion to leave the vehicle at the scene and advise the owner to make proper arrangements for removal.

III. PROCEDURES

A. REQUESTING PRIVATE TOWING SERVICES

1. When it is apparently necessary to request towing services for a citizen whose vehicle has been involved in an accident or other incident, deputy on the scene will:

a. Ask dispatcher to call the towing service requested by the vehicle driver, owner or occupants, as long as the request is reasonable.

b. If the driver, owner or occupants do not have a preference as to a towing service, dispatcher will contact an appropriate towing service from a list of such services.

2. Dispatcher will maintain proper documentation on such calls.

3. The sheriff's department is not responsible for paying towing service costs.

B. TOWING AND IMPOUNDMENT OF VEHICLES IN SPECIFIED SITUATIONS

1. Vehicles involved in apparent crimes and vehicles involved in fatal or serious injury accidents, in which charges are made or are likely to be requested, will be towed to a designated impound area when appropriate.

2. If a vehicle is thought to be abandoned or stolen, deputy will query a records check (TIME System records check) and check to determine the status of the operator and vehicle.

a. Deputy will determine if the vehicle is to be held for evidentiary purposes.

b. If the vehicle is stolen, deputy will have vehicle towed to an impoundment area or to another location designated by the law enforcement agency from whose jurisdiction the vehicle was stolen.

c. If the vehicle is not being held for evidentiary purposes, deputy will attempt to contact the owner. If

owner can be reached, ask about plans for removal of the vehicle. If such plans are not forthcoming or owner cannot be reached, deputy may arrange for towing of vehicle by an authorized towing service.

3. A deputy will make out an evidence form for each vehicle impounded.

4. A deputy will conduct an inventory search, including any closed containers, of every vehicle impounded and complete a Vehicle lmpoundment and Inventory Record form document #DOSO104(2/00) documenting such search. Property for safekeeping will be stored in inventory containers.

5. Impounded vehicles that are considered evidence can only be released upon the direction of the Dodge County District Attorney's Office, the patrol captain or an officer following evidentiary guidelines.

C. TOWING OF MOTOR VEHICLES FOR TRAFFIC OR PARKING OR HAZARD REASONS

1. If a motor vehicle meets any other criteria listed in the above policy statement for towing, deputy may have such vehicle towed away.

2. If deputy deems a vehicle a traffic hazard, he or she will photograph such vehicle before having it towed.

3. In situations where a citation is issued for OMVWI, No Valid Driver's License, or Revocation/Suspension of License, deputy may, with the permission of the driver, allow a responsible, licensed passenger to drive the vehicle elsewhere. In such case, deputy will initially determine whether the other driver is licensed and not impaired.

4. Vehicles previously tagged by the Dodge County Sheriff's Department allowing the owner forty eight (48) hours to remove the vehicle may be towed in accordance with Procedure A of this policy upon expiration of the 48 hour limit or when other conditions deem such towing necessary (e.g., weather, road, other conditions).

NOTE: Responding deputies will advise drivers that the sheriff's department does not pay towing costs.

D. VEHICLES ON PRIVATE PROPERTY

1. If a vehicle is on private property (i.e. abandoned, trespassing or suspicious), deputies will investigate the situation.

2. If property owner requests removal of such vehicle, deputy will advise the property owner that it is his/her responsibility to have the vehicle removed and to pay for towing expenses.

E. EXERCISE OF JUDGMENT

The above procedural steps do not preclude sheriff's department staff members from exercising good judgment in any emergency situations.

* * * * *

APPENDIX G

Eighth Circuit Cases Addressing Community Caretaking Vehicle Seizures, 2012–2017

1. *United States* v. *Morris*, No. CR16-4096-LTS, 2017 U.S. Dist. LEXIS 129317 (N.D. Iowa Aug. 15, 2017).
2. *United States* v. *Simpson*, No. 16-00201-01-CR-W-BP, 2017 U.S. Dist. LEXIS 70246 (W.D. Mo. May 9, 2017).
3. *United States* v. *Everett*, No. 4:16-CR-00110-1-BCW, 2017 U.S. Dist. LEXIS 45229 (W.D. Mo. Mar. 28, 2017).
4. *United States* v. *Moody*, No. 16-00115-01-CR-W-HFS, 2017 U.S. Dist. LEXIS 81633 (W.D. Mo. Mar. 20, 2017).
5. *Rohde* v. *City of Blaine*, No. 14-4546 (JRT/TNL), 2017 U.S. Dist. LEXIS 7129 (D. Minn. Jan. 18, 2017).
6. *United States* v. *McDaniel*, No. 15-00240-01-CR-W-GAF, 2017 U.S. Dist. LEXIS 17807 (W.D. Mo. Jan. 10, 2017).
7. *United States* v. *Green*, No. 15-00249-01-CR-W-DGK, 2017 U.S. Dist. LEXIS 33022 (W.D. Mo. Jan. 4, 2017).
8. *United States* v. *Maple*, No. 15-00127-01-CR-W-GAF, 2016 U.S. Dist. LEXIS 181403 (W.D. Mo. Dec. 14, 2016).
9. *United States* v. *Gilmore*, No. S1-4:15 CR 509 SNLJ / DDN, 2016 U.S. Dist. LEXIS 156240 (E.D. Mo. Oct. 21, 2016).

10. *United States* v. *Perez-Trevino*, No. CR15-2037, 2016 U.S. Dist. LEXIS 49621 (N.D. Iowa Apr. 12, 2016).

11. *United States* v. *Davis*, No. 4:14-CR-00348-01-BCW, 2015 U.S. Dist. LEXIS 74097 (W.D. Mo. June 9, 2015).

12. *United States* v. *Stinnett*, No. 13-00393-01-CR-W-DGK, 2015 U.S. Dist. LEXIS 52210 (W.D. Mo. Jan. 29, 2015).

13. *United States* v. *Hickman-Smith*, No. 8:14CR367, 2015 U.S. Dist. LEXIS 22885 (D. Neb. Jan. 15, 2015).

14. *United States* v. *Shackleford*, No. 14-00097-01-CR-W-GAF, 2014 U.S. Dist. LEXIS 176173 (W.D. Mo. Dec. 5, 2014).

15. *Butler* v. *City of Richfield*, No. 14-281 ADM/SER, 2014 U.S. Dist. LEXIS 114315 (D. Minn. Aug. 18, 2014).

16. *United States* v. *Long*, No. 13-00405-01-CR-W-GAF, 2014 U.S. Dist. LEXIS 75588 (W.D. Mo. May 15, 2014).

17. *United States* v. *Sanchez*, No. 14-13 ADM/JJK, 2014 U.S. Dist. LEXIS 53365 (D. Minn. Apr. 17, 2014).

18. *Williams* v. *Walski*, No. 12-2954 (SRN/JSM), 2014 U.S. Dist. LEXIS 130405 (D. Minn. Apr. 14, 2014).

19. *United States* v. *Himes*, No. CR13-3034-MWB, 2013 U.S. Dist. LEXIS 181970 (N.D. Iowa Dec. 30, 2013).

20. *United States* v. *Contreras*, No. 4:12CR3125, 2013 U.S. Dist. LEXIS 64431 (D. Neb. Apr. 8, 2013).

21. *United States* v. *Evans*, No. 12-00280-01-CR-W-DW, 2012 U.S. Dist. LEXIS 184254 (W.D. Mo. Dec. 17, 2012).

22. *United States* v. *Cervantes-Perez*, No. 12CR133 (DSD/TNL), 2012 U.S. Dist. LEXIS 113028 (D. Minn. July 21, 2012).

23. *United States* v. *Harris*, No. 11-00118-01-CR-W-DGK, 2012 U.S. Dist. LEXIS 95265 (W.D. Mo. June 18, 2012).

24. *Philpott* v. *Weaver*, No. 10-2061, 2012 U.S. Dist. LEXIS 38081 (W.D. Ark. Feb. 14, 2012).

25. *United States* v. *Chivers*, No. 10-00224-01-CR-W-DW, 2012 U.S. Dist. LEXIS 30123 (W.D. Mo. Feb. 10, 2012).

26. *United States* v. *Scott*, No. 10-00162-06-CR-W-FJG, 2012 U.S. Dist. LEXIS 14053 (W.D. Mo. Jan. 6, 2012).