No. _____

In the Supreme Court of the United States

MICHAEL KEVIN ADAMS,
Petitioner,

v.

THE STATE OF TEXAS,
Respondent.

On Petition for Writ of Certiorari to the Fifth Court of Appeals of Texas at Dallas

PETITION FOR WRIT OF CERTIORARI

Robert N. Udashen
Counsel of Record
Brett Ordiway
Udashen Anton
2311 Cedar Springs Road
Suite 250
Dallas, Texas 75201
214-468-8100
214-468-8104 (fax)
rnu@udashenanton.com
brett@udashenanton.com

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

The warrantless impoundment of an arrested person's car must be in furtherance of "public safety" or "community caretaking functions." *South Dakota v. Opperman*, 428 U.S. 364, 368 (1976). Impoundment is thus generally impermissible if the person has been arrested for a minor offense (presumably, they'll be released quickly and can return to the car) and the car is parked legally and unobtrusively.

But can a police officer impound the unobtrusively parked car of a person arrested for a minor traffic offense if the officer hopes that the person will agree to a lengthy interrogation as to a more serious offense, and thus will be unable to quickly retrieve the car?

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioner Michael Kevin Adams respectfully petitions for a writ of certiorari to review the judgment of the Fifth Court of Appeals of Texas at Dallas.

OPINIONS BELOW

The Fifth Court of Appeals's opinion is unpublished but can be found at *Adams v. State*, 05-16-01361-CR, 2018 WL 2355280 (Tex. App.—Dallas May 24, 2018, pet. ref'd). It is also attached to this petition as Appendix A. The Texas Court of Criminal Appeals's October 31, 2018, order refusing review is unpublished but can be found on the court's website's "Case Search" page, case number PD-0637-18. It is also attached to this petition as Appendix B.

JURISDICTION

The Texas Court of Criminal Appeals, the highest court of Texas in which a decision could be had, refused Adams's petition for discretionary review on October 31, 2018. *See* PD-0637-18; Appendix B. This Court thus has jurisdiction pursuant to 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Fourth Amendment to the United States Constitution provides the right "to be secure . . . against unreasonable searches and seizures." U.S. Const. amend IV. The Fourteenth Amendment to the United States Constitution provides that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV.

STATEMENT OF THE CASE

In May of 2014, the State of Texas filed an indictment returned by a Collin County grand jury alleging that Adams murdered his ex-girlfriend, Nicole Leger. Appendix C. The indictment further alleged that Adams did so in an act of retaliation, thus making the crime a capital offense.[1] *Id.*; *see* Tex. Pen. Code § 19.03(a)(2). The State did not seek the death penalty.

Adams pleaded not guilty and, in advance of his jury trial, moved the trial court to suppress evidence obtained during the Frisco, Texas, police's warrantless inventory search of his truck—most notably, a screw that resembled one from a gun grip. At the hearing on the motion, the officer that impounded and inventoried Adams's truck testified that "(1) 'Frisco Police Department policy' allows police the discretion to 'either impound the vehicle or not' when an individual driving a vehicle is arrested, and (2) he 'typically' impounds vehicles when he makes an arrest . . ." *Adams*, 2018 WL 2355280 at *2. The officer additionally testified that there was no reason to believe the vehicle was involved in any crime apart from its lack of a front license plate. *Id.* Though the officer thus admitted that his typical practice was to impound every vehicle without discretion, the trial court nonetheless denied Adams's motion, and, after a

[1] Initially, the indictment also alleged that Adams murdered Leger in the course of committing burglary, but that allegation was later abandoned.

nine-day trial at which the State emphasized the screw as evidence that Adams was Leger's murderer, the jury found Adams guilty. Appendix D. The court sentenced Adams to life imprisonment without the possibility of parole, as required by Texas law. Appendix D; *see* Tex. Pen. Code § 12.31.

Adams filed notice of appeal on November 17, 2016, and, before Texas's Fifth Court of Appeals, argued, among other things, that the trial court abused its discretion by denying his motion to suppress the results of the inventory search of his vehicle. *Adams*, 2018 WL 2355280, at *1. The court disagreed, reasoning that, though Adams was only arrested for driving without a front license plate, Adams's detention was likely to be lengthy, because the arresting officer hoped Adams would agree to be interrogated about Leger's murder. *Id.* Adams's truck thus needed to be impounded. *Id.* Adams did not move the court to rehear the case.

On July 18, 2018, Adams filed a petition for discretionary review in the Texas Court of Criminal Appeals. *See Adams v. State*, PD-0637-18 (Tex. Crim. App. 2018). The petition alleged, among other things, that the trial and appellate courts erred in concluding that the impoundment was lawful. Petition for Discretionary Review at 29, *Adams*, PD-0637-18. On October 31, 2018, the Texas Court of Criminal Appeals announced that it refused to consider Adams's petition. Appendix B.

REASONS FOR GRANTING THE WRIT

Because the warrantless impoundment of an arrested person's vehicle must be in furtherance of "public safety" or "community caretaking functions," *Opperman*, 428 U.S. at 368 (internal citation omitted), "impoundment is generally impermissible where the driver has been arrested" for a minor offense and the car is parked legally and unobtrusively. Wayne R. LaFave, 3 Search and Seizure: A Treatise on the Fourth Amendment § 7.3(c) (5th ed. 2016). Despite this, the Texas court of appeals held that the police could impound and inventory Adams's truck, parked in a McDonald's parking lot, following Adams's arrest for driving without a front license plate. *Adams v. State*, 05-16-01361-CR, 2018 WL 2355280, at *17 (Tex. App.—Dallas May 24, 2018, pet. ref'd). Because the police hoped Adams would submit to a lengthy interrogation as to a murder in which he was a suspect, the court reasoned that officers could presume that Adams wouldn't return to his truck soon. *Id.*

Adams did not agree to be interviewed, and his immediate release from custody demonstrates why an officer's hopes, rather than the reality of the circumstances, cannot justify an impoundment and inventory search: if an officer's hopes are all that's needed, impoundment becomes totally divorced from public-safety and community-caretaking functions. Indeed, if an officer's hopes for a voluntary interrogation are all that's needed, a criminal suspect's minor traffic offense will always justify the impoundment and inventory of their vehicle, regardless of whether the vehicle is actually jeopardizing public safety or the efficient movement of vehicular traffic.

Because the police can impound a vehicle only in furtherance of public safety or community caretaking functions, *Opperman*, 428 U.S. at 368, Adams urges this Court to grant certiorari and vacate the Texas court of appeals's judgment.

I. The Texas court of appeals's decision is wrong. A police officer cannot impound the car of a person arrested for a minor traffic offense merely because the officer hopes the person will agree to a lengthy interrogation as to a more serious offense.

A. Frisco police impounded Adams's car because they impound every car.

Before trial, Adams moved the court to suppress evidence obtained from the Frisco police's warrantless inventory search of his truck. Clerk's Record, p. 3061. At the hearing on the motion, Texas Ranger Reuben Mankin testified that on the day after Nicole Leger's murder, Frisco police arrested Adams for driving without a front license plate. Tr. Tran. Vol. 2, p. 15. The traffic stop was admittedly pretextual—the goal was for Ranger Mankin to have an opportunity to question Adams about Leger's murder. Tr. Tran. Vol. 2, p. 15, 24–25. Concurrent with Adams's arrest, officers impounded his truck and conducted an inventory search. Tr. Tran. Vol. 2, p. 16–17. On the front floorboard, officers found a screw that resembled one from a gun grip. Tr. Tran. Vol. 2, p. 17, 20, 52.

Frisco Police Officer Bryan Sartain testified that the Frisco police impounded Adams's truck simply because "[d]epartment policy allows you when you arrest somebody driving a vehicle to either impound the

vehicle or not." Tr. Tran. Vol. 2, p. 50. Though Adams brought his truck to a stop in a McDonald's parking lot and was not impeding traffic, and nobody from the McDonald's or surrounding businesses asked that it be moved, Officer Sartain testified the location of the vehicle is irrelevant under Frisco police policy. Tr. Tran. Vol. 2, p. 30–31, 51, 55. Officer Sartain testified that every time he arrests a person in a vehicle, he impounds it, because he does not "want to accept the liability for anything that can occur." Tr. Tran. Vol. 2, p. 50.

Defense counsel argued that "[a]n automobile may be impounded [only] if the driver is removed from the automobile and placed under custodial arrest and no other alternatives are available to ensure the protection of the vehicle." Tr. Tran. Vol. 2, p. 75–76 (quoting *Benavides v. State*, 600 S.W.2d 810, 811 (Tex. Crim. App. 1980)). And here, both Ranger Mankin and Officer Sartain "confirm[ed] that the vehicle, where it was parked, was not impeding any flow of traffic," "was not a danger to public safety in any way," and "otherwise it was lawfully parked." Tr. Tran. Vol. 2, p. 75. "[N]obody from McDonald's or any other person with an ownership interest in the lot" said that the truck "needed to be removed"—in short, "it was okay to stay where it was." Tr. Tran. Vol. 2, p. 75.

The State's only response was that "[t]estimony revealed that the officer has discretion to impound a vehicle or not and that was exercised here." Tr. Tran. Vol. 2, p. 87. The court accepted this and denied Adams's motion to suppress because the search was "based on [the] inventory procedure of the Frisco Police Department." Tr. Tran. Vol. 2, p. 89. Ranger Mankin

then testified before the jury that officers found a screw in Adams's truck consistent with that from a gun grip. Tr. Tran. Vol. 7, p. 141–42. The State then emphasized the testimony in its closing argument. Tr. Tran. Vol. 11, p. 43.

B. The court of appeals approved of the impoundment on an alternative basis: the arresting officer's ultimately unrealized hopes.

In Adams's second ground on appeal, he urged Texas's Fifth Court of Appeals that the trial court abused its discretion in denying his motion to suppress. The impoundment of an automobile is a seizure within the meaning of the Fourth Amendment. *Soldal v. Cook County*, 506 U.S. 56, 61 (1992) (a seizure results if "there is some meaningful interference with an individual's possessory interests in that property."). And the Fourth Amendment proscribes warrantless searches and seizures by law enforcement officers as "per se unreasonable ... subject only to a few specifically established and well-delineated exceptions." *Katz v. United* States, 389 U.S. 347, 357 (1967)).

To be sure, one is the "community caretaking" exception. *See, e.g., United States v. McKinnon*, 681 F.3d 203, 207–08 (5th Cir. 2012). And under that exception, this Court has held that police may impound and inventory a vehicle. *Opperman*, 428 U.S. at 368. But it must be in furtherance of "public safety" or "community caretaking functions," such as removing "disabled or damaged vehicles" and "automobiles which violate parking ordinances, and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic." *Id.* (internal citation

omitted). It can't be on the basis of "suspicion of evidence of criminal activity," *Colorado v. Bertine*, 479 U.S. 367, 375 (1987); it must remain "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute." *Cady v. Dombrowski*, 413 U.S. 433, 441 (1973); *see also Florida v. Wells*, 495 U.S. 1, 4 (1990) ("[A]n inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."); *United States v. Sanders*, 796 F.3d 1241, 1244–45 (10th Cir. 2015) (warrantless impoundments are constitutional only if "required by the community-caretaking functions of protecting public safety and promoting the efficient movement of traffic"; they're unconstitutional if "justified by police discretion that is either exercised as a pretext for criminal investigation or not exercised according to standardized criteria.") (citing *Opperman*, 428 U.S. 364; *Colorado v. Bertine*, 479 U.S. 367 (1987)). The Frisco police's impound-whenever policy is thus plainly unlawful. And indeed, police liability—the stated justification for impound-whenever—is a reason to inventory a car that's *already* been impounded under the "community caretaking" or "public safety" function of the police. *United States v. Duguay*, 93 F.3d 346, 352 (7th Cir. 1996) ("While protection of the arrestee's property and municipal liability are both valid reasons to conduct an inventory after a legal impoundment, they do not establish the a priori legitimacy of the impoundment.") (citing *Opperman*, 428 U.S. at 368–69; *Bertine*, 479 U.S. at 372).

The State in response did not argue otherwise. But the State contended the impoundment was nonetheless reasonable because Adams—though under arrest only for driving without a front license plate—was likely to

be gone for a long time, because Ranger Mankin hoped Adams would agree to be interrogated about Leger's murder. *See, e.g., State v. Esparza*, 413 S.W.3d 81, 85 (Tex. Crim. App. 2013) (". . . a first-tier appellate court should reject an appellant's claim of reversible error on direct appeal so long as the trial court correctly rejected it 'on any theory of law applicable to the case,' even if the trial court did not purport to rely on that theory."). Though the State offered nothing to support this idea, not in case law or evidence—and, in fact, Adams bonded out so quickly that he arrived at his home at the same time as the police did to execute a search warrant; only later, accompanied by his attorney, did Adams speak to the police (Tr. Tran. Vol. 7, p. 144–45. Tr. Tran. Vol. 7, p.158–59)—the court of appeals rejected Adams's ground on this basis. *Adams*, 2018 WL 2355280, at *17. The court, like the State, cited nothing in support. *Id.*

C. The court of appeals's holding conflicts with this Court's and other states' high courts' holdings.

The court's failure to support its holding is to be expected. For, "almost without exception in evaluating alleged violations of the Fourth Amendment[,] [this] Court has first undertaken an objective assessment of an officer's actions in light of the facts and circumstances *then* known to him," *Scott v. United States*, 436 U.S. 128, 137 (1978) (emphasis added)—not as he hopes things will be later. Adams has not found another case where an officer impounded a vehicle based on their hopes for a lengthy voluntary interrogation. But in *Fair v. State*, the Supreme Court of Indiana addressed an impoundment where, though

the officer responded to gunshots and saw the defendant "placing a cylindrical object into the trunk of a car," the defendant was arrested only for public intoxication. 627 N.E.2d 427, 429 (Ind. 1993). The court held that impoundment was unlawful because, at the time the officer "resolved to impound [the defendant's] car," "he knew only that [the defendant] would be charged with public intoxication," making it likely that he "would have been released on his own recognizance or on nominal bond within a very brief time and would then have been able to reclaim his car." *Id.* Similarly, in *State v. Gauster*, 752 N.W.2d 496, 504–05 (Minn. 2008), the Minnesota Supreme Court confronted an impoundment where the officer would have been justified in impounding an arrestee's car if it had not moved in four hours. The court held that until those four hours passed, impoundment was unlawful:

> It might be the case that [the officer] could have impounded [the defendant's] vehicle 4 hours later if [the defendant] left it on the side of the road, but the question in this case is whether, *at the time of the impoundment*, [the officer] was authorized to impound [the defendant's] vehicle. We conclude he was not.

Id. (emphasis in original).

It makes sense not to credit an officer's hopes for the future. If a person under arrest for a minor traffic offense is a suspect in a more serious crime, surely arresting officers will always hope that the person will agree to a lengthy sit-down. If an officer's hopes are considered, then, rather than the objective reality of the situation, officers could impound and inventory the vehicle of every person arrested for a minor traffic

offense but suspected in a more serious crime. This would create a huge loophole in the requirement that impoundment must be in furtherance of "public safety" or "community caretaking functions" and encourage pretextual impoundments and inventory searches.

Objectively assessing the facts and circumstances then known to Adams's arresting officers—not as they hoped things would turn out—impoundment was plainly impermissible. Adams was arrested for a misdemeanor punishable by a fine not to exceed $200. *See* Tex. Transp. Code § 504.943. He could have quickly returned to his truck, parked at a McDonald's where it did not impede traffic. As Professor LaFave has explained, "[s]eizure is an appropriate course of action when the owner or manager of the parking facility asks that the car be removed, but otherwise is inappropriate, at least when the offense for which the arrest is made is so minor that the defendant's prompt release can be anticipated." Wayne R. LaFave, 3 Search and Seizure: A Treatise on the Fourth Amendment § 7.3(c) (5th ed. 2016). "Indeed, it would appear that impoundment is generally impermissible where the driver has been arrested for such a minor offense, at least until it appears that he will be unable to post collateral at the station or other appropriate place and thus will not be in a position to depart promptly with the car." *Id.* (collecting cases).

In *State v. Thirdgill*, 46 Or. App. 595, 613 P.2d 44 (1980), for example, the Oregon Court of Appeals found an impoundment unlawful when the defendant's car was legally parked outside the restaurant at which he failed to pay his bill. In *People v. Landa*, 30 Cal.App.3d 487 (1973), a California Court of Appeals held that the

police had no basis to impound the lawfully parked car of a man arrested on an outstanding traffic warrant. And in *Commonwealth v. Brinson*, 440 Mass. 609 (2003), the Supreme Court of Massachusetts determined that an impoundment following the defendant's drug arrest was unlawful because "the car was lawfully parked in a privately owned parking lot and there was no evidence that the car constituted a safety hazard or was at risk of theft or vandalism." *Id.* at 610. Cases holding similarly are a dime a dozen. *See, e.g., Fenton v. State*, 785 S.W.2d 443, 445 (Tex. App.—Austin 1990, no pet.) (holding that impoundment was not lawful where defendant was brought into custody only to "determine if his license was suspended" and "give an appearance bond" and evidence was undisputed that defendant possessed enough money to make bond payment); *United States v. Pappas*, 735 F.2d 1232, 1233 (10th Cir. 1984) (where police impounded the vehicle of a man arrested for possessing a firearm, pursuant to a policy "which require[d] the impounding of any vehicle whenever an arrest takes place, regardless of the circumstance," the court held that "there was no need for the impound and inventory search" because "the car was parked on private property," and one of the defendant's friends potentially could have taken it); *Sanders*, 796 F.3d 1241 (impoundment of car in store parking lot after arrest of driver nearby unlawful, as "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," lacking here); *Riley v. State*, 583 So.2d 1353 (Ala.Crim.App.1991) (impoundment improper where car parked in lounge

parking lot, as "there is no indication in the record that the impoundment of the vehicle was necessary to protect the vehicle from damage or to protect the police from liability"); *Tomlin v. State*, 869 P.2d 334 (Okl.Crim.App.1994) (impoundment improper where arrestee's car in convenience store parking lot and owner of lot did not ask that vehicle be removed, as "it was not necessary for performance of any 'community caretaking function,'" as "vehicle posed no traffic hazard and was situated on private property"); *Smith v. State*, 759 S.W.2d 163, 167 (Tex. App.—Houston [14th Dist.] 1988, pet. ref'd) (impoundment impermissible where suspect arrested next to his vehicle legally parked in private parking lot); *People v. Torres*, 188 Cal.App.4th 775 (2010) (impoundment unlawful when it was not performed "pursuant to [police's] community caretaking function" but rather "as a ruse for a criminal investigation"). Overwhelmingly, courts recognize that where, as here, the driver has been arrested for a minor offense and his car is unobtrusively parked, impoundment is generally impermissible. The Texas court of appeals's mistake of law in crediting the officer's hopes thus produced the wrong conclusion.

II. The conflict between the Texas court of appeals's holding and other states' high courts' holdings warrants this Court's review, and this case is an ideal vehicle to resolve the conflict.

As noted, Adams has not found any other case where a court has approved of an impoundment based on an officer's hopes for a lengthy voluntary interrogation. But at least two other states' high courts

have held that impoundments were unlawful where they were contingent on some future event that might or might not occur. *See Gauster*, 752 N.W.2d at 504–05 ("It might be the case that [the officer] could have impounded [the defendant's] vehicle 4 hours later if [the defendant] left it on the side of the road, but the question in this case is whether, at the time of the impoundment, [the officer] was authorized to impound [the defendant's] vehicle. We conclude he was not."); *Fair*, 627 N.E.2d at 429 (holding that impoundment was unlawful because, at the time the officer "resolved to impound [the defendant's] car," "he knew only that [the defendant] would be charged with public intoxication," making it likely that he "would have been released on his own recognizance or on nominal bond within a very brief time and would then have been able to reclaim his car."). This Court should thus grant this petition to resolve this conflict among state courts concerning the Fourth Amendment's guarantee of the right to be secure against unreasonable searches and seizures. *See Braxton v. United States*, 500 U.S. 344, 347 (1991) ("A principal purpose for which we use our certiorari jurisdiction, and the reason we granted certiorari in the present case, is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law."); U.S. Sup. Ct. R. 10(b) (in determining whether to grant certiorari, this Court will consider whether "a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals"). Indeed, this case presents an important Fourth Amendment question. As set forth in the preceding section, if an officer's hopes are considered, rather than the objective reality of the

situation, officers could impound and inventory the vehicle of every person arrested for a minor traffic offense but suspected in a more serious crime. Impoundment thus becomes totally divorced from its public-safety and community-caretaking purpose. *See Dombrowski*, 413 U.S. at 441 (requiring that impoundment must remain "totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.").

This case is also a particularly good vehicle for addressing the question presented. It comes to the Court on a direct appeal and thus does not present any of the complications that might arise in a collateral-review posture. The Texas court of appeals directly addressed and accepted the State's argument that impoundment was reasonable because Adams' arresting officers hoped Adams would agree to a lengthy interrogation. *Adams*, 2018 WL 2355280, at *17. And the question presented is almost certainly outcome-determinative in this case.

Under Texas law, the harm analysis for a trial court's erroneous denial of a motion to suppress and subsequent admission of evidence obtained in violation of the Fourth Amendment is whether the trial court's denial of a motion to suppress and subsequent admission of evidence was harmless beyond a reasonable doubt. *Hernandez v. State*, 60 S.W.3d 106, 108 (Tex. Crim. App. 2001). This was not a case of overwhelming evidence, as explained in the dissenting opinion in the Texas court of appeals that would have held that the evidence was insufficient to support a finding of guilt. *See Adams*, 2018 WL 2355280 at *1 ("The dissent contends appellant was convicted based

upon speculation, not evidence."). The State's case was wholly circumstantial, almost entirely dependent on Adams's motive, and the State relied heavily on the discovery of the screw. It was the only physical evidence that suggested Adams fired a gun, and the State emphasized it accordingly in its closing argument. Tr. Tran. Vol. 11, p. 43. There is thus a reasonable likelihood that the screw contributed to the jury's verdict. *See* Tex. R. App. P. 44.2(a) ("If the appellate record in a criminal case reveals constitutional error that is subject to harmless error review, the court of appeals must reverse a judgment of conviction or punishment unless the court determines beyond a reasonable doubt that the error did not contribute to the conviction…."). And this case is thus an ideal vehicle to resolve the question presented.

CONCLUSION

In affirming the trial court's denial of Adams's motion to suppress, the Texas court of appeals broke with other states' courts and held that impoundment is permissible, even where the driver has been arrested only for a minor offense, if the police hope the driver will agree to a lengthy voluntary interrogation. Because the Texas court's holding also conflicts with this Court's holdings requiring that warrantless impoundments be in furtherance of "public safety" or "community caretaking functions" and encourages pretextual impoundments and inventory searches, Adams urges this Court to grant certiorari and vacate the Texas court of appeals's judgment.

Respectfully submitted,

Robert N. Udashen
Counsel of Record
Brett Ordiway
Udashen Anton
2311 Cedar Springs Road, Suite 250
Dallas, Texas 75201
214-468-8100
214-468-8104 (fax)
rnu@udashenanton.com
brett@udashenanton.com

Counsel for Petitioner