No. 20-7210

IN THE

SUPREME COURT OF THE UNITED STATES

TESFA CONNELL,

Petitioner,

v.

NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE STATE OF NEW YORK,
APPELLATE DIVISION, SECOND JUDICIAL DEPARTMENT

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Tesfa Connell's petition for certiorari should be denied, because the decision of the New York state intermediate appellate court in this case -- holding that Connell's car was properly impounded when he was arrested for driving with a suspended license, when no one else who could have taken possession of the car was present at the time of the arrest, and when the car was parked on a public street at a location that was subject to parking restrictions for street cleaning -- does not present an important question of federal law that needs to be settled by this Court or that conflicts with any decision of this Court.

PARTIES TO THE PROCEEDING

The petitioner in this Court is Tesfa Connell, who was convicted after trial in a New York state court of seven counts of criminal possession of a forged instrument. The respondent is the State of New York, which is represented in this case by Eric Gonzalez, the District Attorney of Kings County, New York.

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RESPONDENT'S BRIEF IN OPPOSITION

The State of New York requests that this Court deny Tesfa Connell's petition for a writ of certiorari, in which he seeks review of an order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, that affirmed Connell's judgment of conviction for seven counts of criminal possession of a forged instrument.

OPINION AND ORDER BELOW

The opinion of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, is reported at 185 A.D.3d 1048, 126 N.Y.S.3d 372 (App. Div. 2020). That opinion is reproduced in the appendix to the petition for certiorari. The order of a judge of the New York Court of Appeals denying Connell's application for permission to appeal to that court is reported at 36 N.Y.3d 928, 135 N.Y.S.3d 325 (2020), and is reproduced in the appendix to the petition for certiorari.

JURISDICTIONAL STATEMENT

The order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department, was entered on July 29, 2020. The order of a judge of the New York Court of Appeals, denying Connell permission to appeal to that court, was entered on November 19, 2020. The petition for certiorari was timely filed in this Court on February 17, 2021. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourth Amendment:

> 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.

New York Vehicle and Traffic Law § 511-b(1):

> Upon making an arrest or upon issuing a summons or an appearance ticket for the crime of aggravated unlicensed operation of a motor vehicle in the first or second degree committed in his presence, an officer shall remove or arrange for the removal of the vehicle to a garage, automobile pound, or other place of safety where it shall remain impounded, subject to the provisions of this section if: (a) the operator is the registered owner of the vehicle or the vehicle is not properly registered; or (b) proof of financial security is not produced; or (c) where a person other than the operator is the registered owner and, such person or another properly licensed and authorized to possess and operate the vehicle is not present. The vehicle shall be entered into the New York statewide police information network as an impounded vehicle and the impounding police department shall promptly notify the owner and the local authority that the vehicle has been impounded.

STATEMENT OF THE CASE

Introduction

Shortly before 1:00 a.m. on Wednesday, November 28, 2012, in Brooklyn, New York, police officers observed a car driven by Tesfa Connell ("defendant") proceed through a red light. The officers stopped the car. During the traffic stop, the police discovered that defendant's license to drive had been suspended. Defendant was arrested, and his car was impounded. During an inventory search at the precinct, the police recovered numerous forged credit cards from the trunk of the car. Defendant was indicted on

multiple counts of criminal possession of a forged instrument (N.Y. Penal Law § 170.25).

The Motion to Suppress Physical Evidence

Defendant moved to suppress the items recovered from the trunk of his car. The New York Supreme Court, Kings County, conducted a hearing on the suppression motion. One of the police officers who conducted the car stop, Koren Stewart, was the only prosecution witness at the hearing. Defendant testified on his own behalf and called no other witnesses.

Officer Stewart's hearing testimony showed that on November 28, 2012, at 12:53 a.m., Officer Stewart, accompanied by a police lieutenant, was driving in a marked police car on Atlantic Avenue, in Brooklyn. As the police car approached the intersection with Grand Avenue, the traffic light was green. Just before the police car reached the intersection, a white 2008 Mercedes Benz, driving on Grand Avenue, crossed the intersection in front of the officers' car, forcing Officer Stewart to brake (41a, 48a, 49a, 52a [5-7, 35-36, 38-39, 51]).[1] Officer Stewart turned onto Grand Avenue to follow the Mercedes and activated her lights and siren. The

[1] Numbers in parentheses followed by the letter "a" refer to pages of the appendix filed in this Court. Numbers in brackets refer to the original pagination of the suppression hearing transcript, which is included in the appendix at pages 40a to 65a.

Mercedes pulled over into a parking spot on the left side of Grand Avenue, near the intersection of Pacific Street (41a, 49a, 50a-51a [8, 40, 44-45]). Photographs of the area where the car was pulled over, which were introduced by the defense (60a-61a [84-85]), showed that parking was prohibited at that location on Tuesdays and Fridays from 11:30 a.m. to 1:00 p.m. for street cleaning (see 89a [Defendant's Appellate Division brief at 16]).

Defendant was driving the car, and no one else was in it. Officer Stewart and the lieutenant approached defendant's car. Defendant produced the registration and an insurance card, but he was unable to produce a driver's license. After checking the status of defendant's license, the officers learned that it was suspended. Defendant was arrested (42a-43a, 52a [9, 11-13, 51-52]).

Officer Stewart drove defendant's car back to the precinct to voucher it for safekeeping (44a [19]). She did not ask defendant whether he wanted to try to get someone to come to pick up the car (54a [58]). Officer Stewart explained that she would not have left defendant's car parked on the street because "[a]nything could happen to it" (51a [48]). She believed that the New York Police Department's Patrol Guide required her to safeguard the vehicle or property of any person placed under arrest. Every time that Officer Stewart had arrested someone who was driving a car, and who was the owner of the car, she had impounded the car (51a-52a [48-50]).

At the precinct, Officer Stewart conducted an inventory search of defendant's car pursuant to the guidelines specified in the Patrol Guide. During the inventory search, Officer Stewart recovered, from the trunk of the car, approximately twenty credit cards, a South Carolina driver's license in the name of "Sean Brown" but bearing defendant's photograph, and $14,907 in cash (44a-45a, 53a, 54a [19-24, 54, 58, 60]).

At the suppression hearing, defendant testified that the traffic light was "[g]reen turning to yellow" when he crossed Atlantic Avenue, and that Officer Stewart and the lieutenant searched his car at the scene (60a, 62a, 63a [82-83, 89-90, 94-96]). Defendant testified that he had wanted to have the car left where it was parked, but he acknowledged that he had not said that to the police (64a [99]).

After the hearing, defense counsel claimed that the prosecution had not met their burden of showing that the impoundment of defendant's car was reasonable. Counsel argued that the police should have left the vehicle where it was legally parked (12a-25a). The prosecution acknowledged that the Patrol Guide did not address the seizure of vehicles, but argued that courts have held that the seizure of vehicles was reasonable when, as in this case, the defendant was arrested for driving with a suspended license and there was no one available who could drive the car away (27a).

In an oral decision on July 30, 2014, the court denied defendant's motion to suppress the items recovered from his car. The court credited Officer Stewart's testimony in its entirety (34a, 37a). The court found that the officers had probable cause to arrest defendant for driving without a license (34a). As to the propriety of impoundment, the court noted that defendant could not have driven the car and that there was no other licensed driver available at the scene (34a). The court concluded that requiring police officers to leave a Mercedes Benz on a Brooklyn street after midnight without a request to do so would be "patently unreasonable," because: (1) photographs in evidence showed that the location where the car was parked was subject to "alternate side of the street parking" restrictions, and the police could not be required "to go back and move the car to make sure the street cleaners can come through"; (2) the car could be towed for violating the parking rules if it were not moved; and (3) the car could be broken into or stolen (34a-35a). The court therefore found that the police had properly impounded the car (35a-36a). The court further found that the inventory search of the car was conducted in conformity with the Patrol Guide procedure and was reasonable (36a).

The Trial and the Sentence

On April 27, 2015, after a jury trial, defendant was convicted of seven counts of criminal possession of a forged instrument in

relation to seven of the credit cards recovered during the inventory search of his car, and he was also convicted of one count of failure to obey a traffic control device.

On June 23, 2015, defendant was sentenced, as a second felony offender, to concurrent terms of imprisonment of three and one-half to seven years on each forged instrument count and time served on the traffic infraction count.

The Appeal

Defendant appealed from his judgment of conviction to an intermediate appellate court, the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. On that appeal, defendant claimed, in relevant part, that the evidence recovered from his car should have been suppressed because the prosecution failed to establish that the New York Police Department had a policy of impounding the vehicle of every arrested driver and because, even if such a policy existed, the impoundment of defendant's car was not reasonable under the circumstances (95a-108a).

On July 29, 2020, the Appellate Division affirmed defendant's judgment of conviction (2a-3a). People v. Connell, 185 A.D.3d 1048, 126 N.Y.S.3d 372 (App. Div. 2020). The Appellate Division upheld the denial of defendant's suppression motion, concluding that "police officers properly impounded the defendant's vehicle after

his arrest for driving with a suspended license since there was no other licensed driver present who could take possession of the vehicle" (3a). 185 A.D.3d at 1050, 126 N.Y.S.3d at 373.

In an order dated November 19, 2020, a judge of the New York Court of Appeals denied defendant's application for permission to appeal to that court from the order affirming the judgment of conviction (1a). People v. Connell, 36 N.Y.3d 928, 135 N.Y.S.3d 325 (2020).

REASONS WHY THE PETITION SHOULD BE DENIED

In his petition for certiorari, defendant contends that the decision of the Appellate Division in this case was incorrect and that it contributes to a split of authority on the question of whether the Fourth Amendment requires that police impoundment of a vehicle be governed by standardized criteria when the vehicle poses no safety hazard or traffic nuisance.

Defendant's petition for certiorari should be denied for three reasons. First, this case does not squarely present the question of whether an impoundment must be governed by standardized criteria when the vehicle poses no safety hazard or traffic nuisance, because, in this case: (a) the impoundment was upheld in part on the ground that the vehicle, if it had remained where it was parked, would have become a traffic nuisance, because it would have violated parking restrictions and impeded street cleaning, and (b) in any event, the impoundment was consistent with standardized criteria set forth in a state statute. Second, even if there had been no standardized criteria that were applicable to the impoundment of the vehicle in this case, the Appellate Division's decision would be correct, because the constitutionality of an impoundment should depend on whether the impoundment was reasonable under the totality of the circumstances, regardless of whether it was governed by standardized criteria. Third, the Appellate Division's decision

does not conflict with cases holding that an impoundment must be governed by standardized criteria.

I. This Case Does Not Squarely Present the Question of Whether an Impoundment Must Be Governed by Standardized Criteria When the Vehicle Poses No Safety Hazard or Traffic Nuisance.

Contrary to the premise of defendant's petition for certiorari (Petition at 22 n.5), this case, for two reasons, does not "squarely present" the question of whether the Fourth Amendment requires that standardized criteria govern a police officer's decision to impound a legally and safely parked car.

First, this case does not squarely present that question because defendant's car, if not moved, would have created a traffic nuisance. In South Dakota v. Opperman, 428 U.S. 364 (1976), this Court noted that police, pursuant to their community caretaking functions, "frequently remove and impound automobiles which violate parking ordinances and which thereby jeopardize both the public safety and the efficient movement of vehicular traffic." Id. at 369. The Court stated 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. In Opperman, the Court upheld the constitutionality of an impoundment under those circumstances, without requiring that the impoundment be governed by standardized criteria. See United States v. Sanders,

796 F.3d 1241, 1249 (10th Cir. 2015) ("Opperman establishes that if a vehicle is obstructing or impeding traffic on public property, it can be impounded regardless of whether the impoundment is guided by standardized procedures").

As the hearing court noted in its decision denying the motion to suppress, defendant's car, if left where defendant had parked it, would have violated parking rules relating to street cleaning, and the police could not have been expected "to go back and move the car to make sure the street cleaners can come through" (34a-35a). Defendant was arrested early on a Wednesday morning (see 41a [6] [date of arrest was November 28, 2012]), and photographs in evidence at the suppression hearing showed that defendant's car, if not moved, would have violated parking restrictions starting at 11:30 a.m. that Friday (see 89a, 105a). The police had no reason to expect that defendant -- who could not legally drive a car because his license to do so was suspended -- would have been able to make arrangements to move his car prior to that time.

In this case, of course, in contrast to Opperman, the car was not illegally parked at the time when it was impounded, and thus the car could not have been properly impounded solely on the basis of the expectation that, two and a half days later, the car would be illegally parked and would obstruct street cleaning. Nevertheless, if defendant's car had remained where it was parked,

it would have obstructed street cleaning and would thereby have "imped[ed] traffic or threaten[ed] public safety and convenience." See Opperman, 428 U.S. at 369. Insofar as Opperman holds that an impoundment of vehicles "impeding traffic or threatening public safety and convenience" need not be governed by standardized criteria, such criteria -- even if required in other cases in which the vehicle is not illegally parked or otherwise creating a traffic nuisance -- might not be required in a case, like this one, in which the impoundment was justified in part by the prospect that the vehicle, if not moved, would become illegally parked and create a traffic nuisance in the near future. See United States v. Lyle, 919 F.3d 716, 731 (2d Cir. 2019) (defendant was arrested for driving with a suspended license, and officers could not be certain how long car would be unattended; by impounding the car, officer ensured that it "was not left on a public street . . . where it could have become a nuisance . . . and could have become illegally parked the next day" [citing Opperman]), cert. denied, 140 S. Ct. 846 (2020).

Because defendant's car, if not moved, would have obstructed street cleaning, and would have thereby impeded traffic and threatened public safety and convenience, the Appellate Division's decision does not present the question of whether an impoundment must be governed by standardized criteria when no traffic nuisance or threat to public safety or convenience is present.

The second reason why this case does not squarely present the question of whether the Fourth Amendment requires that standardized criteria govern an impoundment decision is that there were relevant standardized criteria in this case. Thus, even if a requirement of standardized criteria were applicable to the impoundment in this case, that supposed requirement was satisfied.

New York Vehicle and Traffic Law § 511-b regulates the police impoundment of vehicles in New York in connection with arrests for the unlicensed operation of a motor vehicle. As the parties noted in their briefs to the Appellate Division (see 100a, 142a-44a), that statute requires an officer to impound a vehicle, upon making an arrest for the crime of aggravated unlicensed operation of a motor vehicle in the first or second degree that was committed in the officer's presence, when, among other circumstances, the driver is the registered owner of the vehicle (as was the case here [44a (19)]). N.Y. Veh. & Traf. Law § 511-b(1).

When an arrest is for a lesser degree of the crime of unlicensed operation of a motor vehicle -- such as defendant's arrest in this case, which was for aggravated unlicensed operation of a motor vehicle in the third degree (N.Y. Veh. & Traf. Law § 511[1]) (see 53a [56]; Petition at 25 n.7) -- the statute effectively leaves the impoundment decision in the police officer's discretion. Given that the statute requires an officer to impound a vehicle when the driver

is arrested for a higher degree of unlicensed operation of a motor vehicle -- and given that the purpose of the statute was to prevent unlicensed drivers from getting access to their cars until they obtained a license (see 143a-44a) -- the statute authorizes an officer to decide that impoundment is warranted when, as in this case, the driver is arrested for a lesser degree of that crime.

Because Vehicle and Traffic Law § 511-b provided standardized criteria that were applicable to the determination whether to impound the car in this case, the Appellate Division's decision does not present the question of whether an impoundment must be governed by standardized criteria, but rather, at most, presents the question of whether, assuming that standardized criteria are required, the standardized criteria set forth in that statute would satisfy any such requirement.[2]

Consequently, the question of whether an impoundment must be governed by standardized criteria when the vehicle poses no safety hazard or traffic nuisance is not squarely presented by this case, both because the impoundment in this case was justified in part by the prospect that the car would become a traffic nuisance (by

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[2] As explained below (see infra at 18-19), the criteria set forth in Vehicle and Traffic Law § 511-b are comparable to the standardized criteria addressed by this Court in upholding the constitutionality of the impoundment in Colorado v. Bertine, 479 U.S. 367 (1987). Thus, the criteria set forth in that statute would satisfy any applicable requirement of standardized criteria.

violating parking restrictions and impeding street cleaning), and because the impoundment decision was governed by standardized criteria. Therefore, this case does not warrant review by this Court.

II. The Decision of the Appellate Division Is Correct.

The Fourth Amendment "prohibits only 'unreasonable searches and seizures.'" Opperman, 428 U.S. at 372-73 (quotation marks and citation omitted; emphasis in Opperman). And, "[t]he test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application." Bell v. Wolfish, 441 U.S. 520, 559 (1979). This test "cannot be fixed by per se rules; each case must be decided on its own facts." Opperman, 428 U.S. at 373 (quotation marks and citation omitted). Reasonableness "is measured in objective terms by examining the totality of the circumstances." Ohio v. Robinette, 519 U.S. 33, 39 (1996).

Nevertheless, relying on this Court's opinion in Colorado v. Bertine, 479 U.S. 367 (1987), defendant argues that a police officer's decision to impound a vehicle is per se unconstitutional absent an affirmative showing that the impoundment was conducted pursuant to standardized criteria (Petition at 27-34). But Bertine held no such thing. In Bertine, the defendant challenged the constitutionality of an inventory search of his van, and this

Court's analysis focused primarily on the circumstances of the inventory search itself. See Bertine, 479 U.S. at 371-75; id. at 376-77 (Blackmun, J., concurring); see also United States v. Coccia, 446 F.3d 233, 238 (1st Cir. 2006) (Bertine "was concerned primarily with the constitutionality of an inventory search"), cert. denied, 549 U.S. 1149 (2007). The defendant in Bertine also argued that the inventory search was unconstitutional because police department regulations gave officers discretion to choose between impounding his van and parking and locking it in a public location. 479 U.S. at 375. This Court rejected that argument, noting that neither Opperman nor 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 of evidence of criminal activity," and the Court concluded that the impoundment in Bertine satisfied both of those conditions. 479 U.S. at 375-76.

Defendant points to that language in Bertine as the basis for his conclusion that discretionary impoundments are permitted only when exercised according to standardized criteria (Petition at 11-12, 27-28). However, neither Opperman nor Lafayette had occasion to decide when an item may properly be taken into custody for community caretaking purposes, because, in each case, the authority of the police to seize the item in question apparently was not in

dispute. See Lafayette, 462 U.S. at 641-42 (the item whose contents were inventoried was a shoulder bag that defendant was carrying when he was arrested and was taken to the police station); Opperman, 428 U.S. at 365 (vehicle was "lawfully impounded"). Therefore, neither case stood for the proposition that the seizure of a vehicle pursuant to the community caretaking function of the police must satisfy standardized criteria, and, by extension, Bertine's invocation of those cases could not have advanced such a proposition.

Moreover, the criteria upheld by this Court in Bertine were comparable to the criteria that were applicable in this case. Critically, the police department's directive in Bertine did not actually limit the ability of police officers to impound vehicles; instead, the directive limited only an officer's ability to leave the vehicles parked, permitting officers to impound vehicles under any circumstances. See Bertine, 479 U.S. at 375-76 & n.7; id. at 379-81 (Marshall, J., dissenting). Here, New York Vehicle and Traffic Law § 511-b generally requires officers to impound vehicles of drivers arrested for first- and second-degree unlicensed operation of a motor vehicle, but effectively leaves officers with discretion whether to impound vehicles of drivers arrested for other offenses, much as the police regulations in Bertine left officers with the discretion whether to impound cars that were eligible to be parked and locked. Thus, insofar as Bertine may have established

any kind of standardized criteria requirement, that requirement was met here.

Furthermore, the per se rule proposed by defendant -- that police officers may not impound a vehicle unless they do so under standardized criteria (Petition at 30) -- is neither practicable nor warranted. The need for police to function as community caretakers arises "when unexpected circumstances present some transient hazard which must be dealt with on the spot," and the police "cannot sensibly be expected to have developed, in advance, standard protocols running the entire gamut of possible eventualities." United States v. Rodriguez-Morales, 929 F.2d 780, 787 (1st Cir. 1991), cert. denied, 502 U.S. 1030 (1992); see also United States v. Smith, 522 F.3d 305, 315 (3d Cir.) ("the requirement that a community caretaking impoundment be made pursuant to a standard police procedure could lead to untoward results" because, among other reasons, "the standards might not deal with all the situations that could arise"), cert. denied, 555 U.S. 993 (2008); United States v. Petty, 367 F.3d 1009, 1012 (8th Cir. 2004) ("It is not feasible for a police department to develop a policy that provides clear-cut guidance in every potential impoundment situation, and the absence of such mechanistic rules does not necessarily make an impoundment unconstitutional").

Thus, the constitutionality of a decision to impound a vehicle should depend on an evaluation of whether the impoundment was reasonable, based on the totality of the circumstances. See United States v. Lyle, 919 F.3d 716, 731 (2d Cir. 2019) ("in line with the First, Third, and Fifth Circuits, we conclude that 'whether a decision to impound is reasonable under the Fourth Amendment is based on all the facts and circumstances of a given case'" [quoting Coccia, 446 F.3d at 239]). This approach is more consistent with this Court's Fourth Amendment precedent, which generally focuses on an objective evaluation of the reasonableness of a state agent's conduct in order to determine its constitutionality. See, e.g., Ashcroft v. al-Kidd, 563 U.S. 731, 736 (2011) (Fourth Amendment reasonableness "is predominantly an objective inquiry," which is "whether the circumstances, viewed objectively, justify the challenged action" [quotation marks, citations, and brackets omitted]).

Contrary to defendant's assertion, such an approach would not leave citizens "vulnerable to indiscriminate official interference" (Petition at 11 [quotation marks and citation omitted]), because a decision to impound a vehicle must be reasonable under the Fourth Amendment, and a determination of whether an impoundment is reasonable depends on "'the facts and circumstances of each case.'" Opperman, 428 U.S. at 375 (quoting Cooper v. California, 386 U.S.

58, 59 [1967]). Factors relevant to that determination may include: whether the driver had a valid license; whether there were other licensed drivers present who could have taken immediate custody of the vehicle; whether the vehicle was legally parked; and whether the driver requested that the vehicle remain parked. See United States v. Del Rosario-Acosta, 968 F.3d 123, 126-27 (1st Cir. 2020). A court, when evaluating whether an impoundment is justified under a community caretaking rationale, can determine whether the impoundment satisfied the Fourth Amendment in light of the totality of the circumstances, regardless of whether the impoundment decision was governed by standardized procedures. See, e.g., id. at 127-29 (holding, under totality of the circumstances, that vehicle impoundment violated Fourth Amendment).

Moreover, in light of the rationale for the rule that an inventory search must be conducted according to standardized criteria, it does not follow -- as defendant contends that it does -- that a requirement of standardized criteria should also apply to a decision to impound a vehicle. The requirement that standardized criteria govern inventory searches "is based on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence." Florida v. Wells, 495 U.S. 1, 4 (1990). The use of an established policy regarding inventory searches provides some assurance that a particular search

is in fact "designed to produce an inventory" and is not "turned into 'a purposeful and general means of discovering evidence of crime.'" Id. (quoting Bertine, 479 U.S. at 376 [Blackmun, J., concurring]). Thus, with respect to an inventory search, standardized criteria can guide how the search is to be conducted -- addressing such matters as whether to open closed containers and what record to make of the contents of the vehicle -- to help assure that the search is "limited in scope to the extent necessary to carry out the caretaking function." Opperman, 428 U.S. at 374-75. The decision whether to impound a vehicle pursuant to the community caretaking function of the police, by contrast, consists of a binary choice of whether or not to take custody of the vehicle, and a decision to impound can be evaluated for reasonableness based on all of the circumstances, without a constitutional requirement of standardized criteria to guide the decision.

In this case, the state courts correctly found that the impoundment of defendant's car complied with the Fourth Amendment. Defendant was arrested for driving with a suspended license, no one else who could have taken possession of the car was present at the time of the arrest, the car was parked on a public street in an "alternate side of the street" parking location, which made the car a potential impediment to street cleaning and created a risk that the car would be towed, and defendant never asked the police to

leave the car on the street. In light of all of the circumstances, the decision to impound the car was reasonable within the meaning of the Fourth Amendment.

In any event, a state statute provided standardized criteria that were applicable to the decision whether to impound the car, and the impoundment was consistent with those criteria (see supra at 14-15). Consequently, the impoundment would be constitutional even if standardized criteria were required.

Thus, the decision of the Appellate Division is correct and does not warrant review by this Court.

III. The Decision of the Appellate Division Does Not Conflict with Cases Holding that an Impoundment Must Be Governed by Standardized Criteria.

Defendant's petition should be denied for the additional reason that the decision of the Appellate Division in this case does not conflict with the decisions, cited by defendant, of federal courts of appeals or of state appellate courts regarding whether the police can lawfully impound a vehicle pursuant to the community caretaking exception to the Fourth Amendment in the absence of standardized criteria. See Sup. Ct. R. 10(c).

First, because New York Vehicle and Traffic Law § 511-b provided standardized criteria that were applicable to the decision whether to impound the car in this case (see supra at 14-15), the

Appellate Division's decision does not conflict with any cases that hold that, to comply with the Fourth Amendment, an impoundment must be governed by standardized criteria.

Furthermore, there are additional reasons why defendant is incorrect in asserting that cases cited in his petition conflict with the Appellate Division's decision in this case. In six of the cases that defendant cites as purportedly conflicting with the Appellate Division's decision, the car was parked on private property when it was impounded. Thus, all six of those cases are distinguishable from defendant's case, in which the car was parked on a public street. See United States v. Sanders, 796 F.3d 1241, 1242, 1249 (10th Cir. 2015) (impounded vehicle was lawfully parked "in a private lot"; court referred to "[o]ur requirement that standardized criteria guide impoundments on private property"); Miranda v. City of Cornelius, 429 F.3d 858, 864-66 (9th Cir. 2005) (citing fact that impounded vehicle was parked in owners' driveway as basis for holding that impoundment was not justified under community caretaking doctrine); United States v. Petty, 367 F.3d 1009, 1011 (8th Cir. 2004) (impounded vehicle was parked in privately owned parking lot); People v. Allen, 450 P.3d 724, 727 (Colo. 2019) (impounded car was parked in hotel parking lot); State v. Huisman, 544 N.W.2d 433, 436 (Iowa 1996) (impounded car was parked in motel parking lot); McGaughey v. State, 37 P.3d 130, 134,

142-43 (Okla. Crim. App. 2001) (impounded car "was parked on private property"; "a car on private property cannot be impounded absent a request from the property owner or other specific authorization").

In another case cited by defendant as allegedly conflicting with the Appellate Division's decision -- United States v. Proctor, 489 F.3d 1348 (D.C. Cir. 2007) -- the D.C. Circuit did not hold that standardized criteria were constitutionally required in order to impound vehicles under the community caretaking exception. Instead, the D.C. Circuit held only that "if a standard impoundment procedure exists, a police officer's failure to adhere thereto is unreasonable and violates the Fourth Amendment." Id. at 1354 (emphasis added).

Defendant also cites the case of State v. Leak, 47 N.E.3d 821 (Ohio 2016), as purportedly conflicting with the Appellate Division's decision, but in that case, the Ohio Supreme Court, too, did not hold that a vehicle impoundment would be unconstitutional in the absence of standardized criteria. Rather, in Leak, standardized criteria regarding impoundment of vehicles were set forth in a state statute and in a local ordinance, but the Ohio Supreme Court held that the impoundment in that case was unlawful because those provisions did not authorize the impoundment and because the officer testified that the sole reason for the impoundment was that he was looking for evidence of a

crime. Id. at 827-30. Indeed, in the case that was cited in Leak as the controlling authority -- City of Blue Ash v. Kavanagh, 862 N.E.2d 810 (Ohio 2007), cited in Leak, 47 N.E.3d at 828-30 -- the Ohio Supreme Court rejected the defendant's contention that Bertine barred the impoundment at issue, explicitly stating that "Bertine requires standardized procedures with regard to inventory searches, not impoundment." Kavanagh, 862 N.E.2d at 813. Thus, the position of the Ohio Supreme Court on the question of whether an impoundment must be governed by standardized criteria is actually contrary to the position advocated by defendant.

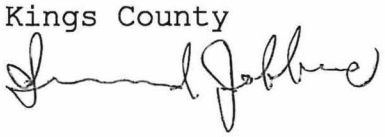
Consequently, the decision of the Appellate Division in this case does not conflict with any of the cases cited by defendant. In the absence of any such conflict, this case does not warrant review by this Court.

CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

ERIC GONZALEZ
District Attorney
Kings County



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