No. 08-33

IN THE
Supreme Court of the United States

DEVON MONROE SMITH,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Third Circuit

REPLY BRIEF FOR PETITIONER

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The government does not dispute that the question whether the Fourth Amendment requires warrantless impoundments for community caretaking purposes to be made in accordance with standardized procedures is an important and recurring one in the criminal justice system. The government argues, however, (1) that no "direct conflict" exists on the issue; (2) that this is not a suitable case for addressing it; and (3) that the Third Circuit correctly held that no such standardized decision making is necessary is correct. None of these contentions withstands scrutiny.

1. The government argues, notwithstanding the Third Circuit's acknowledgment that its decision contributes to a "conflict" among the circuits, Pet. App. 17a, 21a, that no real split exists. The government is incorrect.

The Seventh Circuit and the Indiana Supreme Court have held that warrantless impoundments violate the Fourth Amendment when police officers order them in the absence of standardized criteria. *See United States v. Duguay,* 93 F.3d 346, 351-52 (7th Cir. 1996); *Fair v. State,* 627 N.E.2d 427 (Ind. 1993). The government asserts that the Seventh Circuit's decision "largely focused" on other matters and that the Indiana Supreme Court's decision similarly cited additional indicia that the impoundment in that case was suspect. BIO 15. The decisions, however, speak for themselves. And despite the government's attempts at glossing them over, the fact remains that both interpreted this

Court's precedent to require the very rule that the Third Circuit rejected here.

In addition, the D.C. Circuit, the Idaho Supreme Court, and the Minnesota Supreme Court (after the petition for certiorari was filed in this case) have held that police officers violate the Fourth Amendment when they impound a car in contravention of standardized procedures. *See United States v. Proctor,* 489 F.3d 1348, 1353-55 (D.C. Cir. 2007); *State v. Weaver,* 900 P.2d 196, 199-200 (Idaho 1995); *State v. Gauster,* 752 N.W.2d 496 (Minn. July 10, 2008). The necessary premise of those decisions – explicitly stated in each – is that a standardized procedure "must govern the decision to impound." *Proctor,* 489 F.3d 1353; *see also Weaver,* 900 P.2d at 199 (decision to impound must be made "according to standard criteria"); *Gauster,* 752 N.W .2d at 503 ("Impoundment of a motor vehicle must also be conducted pursuant to standardized criteria."). Otherwise, it would not matter whether officers abided by such criteria. Accordingly, despite the government's protestations, the Third Circuit was correct in acknowledging that its holding cannot be squared with the rule in the D.C. Circuit (and, by implication, the law of the Idaho and Minnesota Supreme Courts).

Contrary to the government's suggestion, nothing in this Court's recent decision in *Virginia v. Moore,* 128 S. Ct. 1598 (2008), alleviates the conflict with this latter batch of cases. *Moore* merely reaffirmed the longstanding principle that violating a state or local law restricting police investigatory authority does not violate the Fourth Amendment.

Moore did not even mention the *Wells* line of cases, much less call any of those cases into question. That was because, as *the government itself* recognized in expressly distinguishing *Wells* and *Proctor* from *Moore,* officers that impound and inventory vehicles for community caretaking reasons are, by definition, not performing investigations based on individualized suspicion. Rather, they are conducting suspicionless searches and seizures, for which the Fourth Amendment requires some "protection against arbitrariness." Br. for United States as *Amicus Curiae* at 12 n.3, *Virginia v. Moore,* 128 S. Ct. 1598 (2008). This Court in *Wells* held that that protection must come in the form of standardized criteria. Accordingly, it is not officers' violations of local inventory or impoundment laws that *Wells* and *Proctor* deem unreasonable; it is the officers' failure to follow any protocol that constrains their discretion as to when they may dispense with the ordinary rules that govern investigatory searches and seizures.

2. The government also is incorrect in suggesting that this case is an inadequate vehicle for resolving the question presented. The Third Circuit – at the government's urging – squarely decided the issue, and the Third Circuit's holding is the sole basis for rejecting petitioner's Fourth Amendment argument. *See* Pet. for Cert. 17.

The government notes the district court found that the police *did* follow a standardized procedure in this case. BIO 16. But as petitioner has explained, the district court had no basis in evidence for making that assertion. Pet. for Cert. 3, 17. Even the

government does not offer any defense of it. That is hardly surprising, given that the arresting officer himself admitted that he was unaware of any standardized criteria governing impoundments and that "this vehicle was impounded by my discretion." Pet. App. 10a.

In short, it clearly falls to this Court to decide whether impounding a car without a warrant and in the absence of any standardized criteria violates the Fourth Amendment. If it does, the Third Circuit's decision should be reversed and remanded.

3. The government's defense of the merits of the Third Circuit's decision is equally devoid of substance. The government acknowledges, as it must, that this Court unanimously has held that police officers may not conduct warrantless inventory searches for community caretaking reasons unless they act "pursuant to 'standardized criteria or established routine.'" BIO 9 (quoting *Florida v. Wells*, 495 U.S. 1, 4 (1990). So the Fourth Amendment permits the police to conduct warrantless *impoundments* for community caretaking reasons in the absence of standardized procedures only if the impoundment stage of "impoundments and inventory searches" is somehow different than the inventory stage.

Yet the government does not even advance any contention in this respect. Instead, the government simply argues that the Fourth Amendment permits suspicionless impoundments whenever the "objective facts" and circumstances make such action

reasonable. BIO 12.[1] But that is precisely the argument that this Court's inventory jurisprudence rejects. And this Court already has indicated in *Colorado v. Bertine*, 479 U.S. 367, 375-76 (1987), that that argument does not carry any more force in the context of suspicionless impoundments. Although the government is surely correct that *Bertine* does not "definitively resolve" this case, this Court can safely deduce, in the absence of any governmental contention that impoundments raise different constitutional issues than inventories, that the *Wells* requirement of standardized criteria should apply equally to impoundments.

Lest there be any doubt, overwhelming pragmatic considerations favor requiring warrantless impoundments to be conducted according to standardized criteria. Not only is a standardization requirement necessary to maintain consistency with inventory jurisprudence, but it offers exactly what the government says is essential "to guide the officer in the field when a recent occupant of a vehicle is arrested": a "bright-line" and easily administered rule. Br. for United States as Amicus Curiae at 7, *Arizona v. Gant,* No. 07-542. The government's

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[1] Instead of focusing on the two officers' asserted reasons (internally contradictory though they are) for impounding the vehicle at issue here, *see* Pet. for Cert. 3, the government advances yet a third purported reason why the officers impounded the vehicle – namely, that the vehicle supposedly was blocking traffic and a bus stop. BIO 12. These shifting *post hoc* rationales exemplify why this Court in *Wells* held that the constraining effect of standardized procedures is necessary to deter officers from taking investigatory measures under the pretext of their community caretaking function. *See* 495 U.S. at 4; Pet. for Cert. 23-24.

totality-of-the-circumstances approach, by contrast, would make every impoundment turn "on the facts of [the] particular case"; offer "little practical guidance"; and improperly "introduce uncertainty and line-drawing difficulties" into officers' professional decision making. *Id.* at 7, 8. This Court should grant review to ensure that does not happen.

CONCLUSION

For the foregoing reasons, as well as those in the petition for a writ of certiorari, the petition for writ of certiorari should be granted.

Respectfully submitted,

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