In The

Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DAVID LEE MOORE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Virginia

PETITION FOR A WRIT OF CERTIORARI

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State Solicitor General

WILLIAM C. MIMS
Chief Deputy Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the Commonwealth of Virginia

February 1, 2007

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

BLANK PAGE

QUESTION PRESENTED

Does the Fourth Amendment require the suppression of evidence obtained incident to an arrest that is based upon probable cause, where the arrest violates a provision of state law?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

BLANK PAGE

PETITION FOR A WRIT OF CERTIORARI

Virginia Attorney General Robert F. McDonnell, on behalf of the Commonwealth of Virginia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

INTRODUCTION

This Petition concerns whether the Fourth Amendment requires suppression of evidence obtained when a police officer makes an arrest based on probable cause, but violates state law in making the arrest. When confronted with this situation, the overwhelming majority of the States and federal Circuits have held that a failure to follow state law in making an arrest does not require suppression. In other words, a violation of a state statute does not implicate the United States Constitution. However, a minority of courts, including the Supreme Court of Virginia in the decision below, have held that when an officer arrests with probable cause but violates state law, the Fourth Amendment requires suppression of evidence seized incident to that arrest. Put another way, they hold a violation of a state statute triggers suppression under the United States Constitution.

This Petition presents an ideal vehicle for this Court to resolve a deep and mature conflict among the lower courts concerning a recurring issue. Certiorari should be granted.

OPINIONS BELOW

The decision of the Supreme Court of Virginia is published as *Moore v. Commonwealth*, 636 S.E.2d 395 (Va. 2006). It is reprinted in the Appendix at 1. The *en banc* decision of the Court of Appeals of Virginia is published. *See Moore v. Commonwealth,* 622 S.E.2d 253 (Va. App. 2006) (*en banc*). It is reprinted in the Appendix at 12. Finally, the panel decision of the Court of Appeals of Virginia is also published as *Moore v. Commonwealth*, 609 S.E.2d 74 (Va. App. 2005). That decision can be found in the Appendix at 35.

JURISDICTION

The decision of the Supreme Court of Virginia was issued on November 3, 2006. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns the following constitutional and statutory provisions:

1. The Fourth Amendment of the Constitution of the United States, U.S. Const. amend. IV, 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.

2. *Virginia Code* § 19.2-74 provides, in pertinent part:

> A. 1. Whenever any person is detained by or is in the custody of an arresting officer for any violation committed in such officer's presence which offense is a violation of any county, city or town ordinance or of any provision of this Code punishable as a Class 1 or Class 2 misdemeanor or any other misdemeanor for which he may receive a jail sentence, except as otherwise provided in Title 46.2, or § 18.2-266, or an arrest on a warrant charging an offense for which a summons may be issued, and when specifically authorized by the judicial officer issuing the warrant, the arresting officer shall take the name and address of such person and issue a summons or otherwise notify him in writing to appear at a time and place to be specified in such summons or notice. Upon the giving by such person of his written promise to appear at such time and place, the officer shall forthwith release him from custody. However, if any such person shall fail or refuse to discontinue the unlawful act, the officer may proceed according to the provisions of § 19.2-82.
>
> Anything in this section to the contrary notwithstanding, if any person is believed by the arresting officer to be likely to disregard a summons issued under the provisions of this subsection, or if any person is reasonably believed by the arresting officer to be likely to cause harm to himself or to any other person, a magistrate or other issuing authority having jurisdiction shall proceed according to the provisions of § 19.2-82.

STATEMENT OF THE CASE

1. Two police detectives stopped David Lee Moore after they observed him driving on a suspended license in Portsmouth, Virginia. *App.* 1. Under state law, driving on a suspended license is a Class 1 misdemeanor, which carries a maximum punishment of one year in jail and a $2,500 fine. *Virginia Code* §§ 18.2-11, 18.2-272. Moore was arrested and, shortly thereafter, was searched incident to the arrest. The search yielded 16 grams of crack cocaine and $516 in cash. Moore was charged with possession of cocaine with the intent to distribute. Prior to his trial, his attorney filed a motion to suppress, alleging, among other things, that his rights under the United States Constitution were violated. *App.* 2.

2. At the suppression hearing, Moore conceded that the traffic stop itself was proper, but argued that under Virginia law he should have been released on a summons rather than being subjected to a full custodial arrest. Moore contended that, because he should not have been arrested under Virginia law, any evidence derived from the search incident to arrest should have been suppressed. The trial court denied the motion, holding that the search did not violate the United States Constitution or any Virginia law governing misdemeanor arrests. *App.* 2. Moore was convicted and sentenced to serve five years in prison, with one year and six months of that sentence suspended. *App.* 2.

3. Moore appealed to Virginia's intermediate appellate court. A divided three-judge panel reversed. The panel majority observed that under *Virginia Code* § 19.2-74, the officers should have issued a summons for the misdemeanor offense instead of effecting a full custodial arrest.

Since state law precluded a custodial arrest and required the issuance of a summons, the search incident to the arrest was improper. *App.* 38-39. The panel observed that, although *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001) (violation of seat belt law did not preclude full custodial arrest) and *Knowles v. Iowa*, 525 U.S. 113 (1998) (where traffic citation issued, doctrine of search incident to arrest did not apply because interests that justified search incident to arrest were not present) did not compel this outcome, suppression was "a logical and necessary extension of the decision in *Knowles*." *App.* 44. A dissenting judge, however, reasoned that "[b]ecause Moore's arrest was based on probable cause that he committed the offense of driving on a suspended license, the arrest did not violate the Fourth Amendment to the United States Constitution." *App.* 49. The dissent further concluded that "it is clear that the Fourth Amendment to the United States Constitution is not violated as a result of a state law violation." *App.* 49.

4. Virginia obtained a rehearing *en banc* by the intermediate appellate court. By a vote of 7-4, the *en banc* court affirmed the conviction. The *en banc* court concluded that the constitutional legitimacy of an arrest under the National Constitution hinged on whether the officers had probable cause. *App.* 20. Moore's arrest was unquestionably based on probable cause. *App.* 20-21. The court reasoned that the presence of probable cause is an issue that must be "determined separate and apart from whether an arrest violates a state statute." *App.* 22. Finally, the *en banc* court held that the suppression of the evidence was unwarranted, since the Fourth Amendment did not compel suppression for the mere violation of a state statute. *App.*

25-26. The dissenting judges reiterated the reasoning set forth in the panel decision. *App.* 27-34.

5. Moore appealed to the Supreme Court of Virginia, arguing that "the Court of Appeals [of Virginia] *en banc* erred in holding that his 'arrest and search did not violate the Fourth Amendment.'" *App.* 3. That tribunal, by unanimous opinion, held that the search of the defendant, based upon a constitutionally unassailable arrest, nevertheless "was not consistent with the Fourth Amendment." *App.* 11. The Supreme Court of Virginia began by examining this Court's decisions in *Knowles* and *Atwater* as well as *Lovelace v. Virginia*, 522 S.E.2d 856 (Va. 1999), a decision interpreting the United States Constitution. The Virginia Supreme Court observed that *Virginia Code* § 19.2-74, unlike the statutory provision at issue in *Atwater*, did not authorize the officers to make a custodial arrest of Moore. *App.* 7. After analyzing the cases, the lower court concluded that

> the officers were authorized to issue only a summons to Moore for the offense of operating a vehicle on a suspended license since none of the exceptions in Code § 19.2-74 were present. Thus, under the holding in *Knowles*, the officers could not lawfully conduct a full field type search. We find *Knowles* and *Lovelace* controlling and hold that the search of Moore was not consistent with the Fourth Amendment.

App. 11. In other words, the Supreme Court of Virginia held that the Fourth Amendment compelled suppression of the evidence because of the violation of a state statute. This Petition follows.

REASONS FOR GRANTING THE PETITION

"In conformity with the rule at common law, a warrantless arrest by a law officer is reasonable under the Fourth Amendment where there is probable cause to believe that a criminal offense has been or is being committed." *Devenpeck v. Alford,* 543 U.S. 146, 152 (2004) (citing *United States v. Watson*, 423 U.S. 411, 417-424 (1976) and *Brinegar v. United States*, 338 U.S. 160, 175-176 (1949)). Once there is probable cause to arrest and an arrest has occurred, the defendant can constitutionally be searched incident to that arrest. *United States v. Robinson*, 414 U.S. 218 (1973). Officers may arrest even for a "very minor criminal offense." *Atwater*, 532 U.S. at 354. In other words, officers act reasonably under the United States Constitution if they arrest upon probable cause. This standard rests on the text of the Fourth Amendment, historical practice and the jurisprudence of this Court.

Supplementing the probable cause standard, States have enacted a wide range of procedural statutes that govern the authority of police officers to arrest. A number of States have enacted statutes similar to *Virginia Code* § 19.2-74. *See Iowa Code* § 805.16 (mandating release on a summons for certain offenses); *Ohio Rev. Code* § 2935.26 (same); *Kentucky Rev. Stat.* § 431.015 (same); *Nebraska Rev. Stat.* § 29-435 (same); *New Mexico Stat.* § 66-8-123 (same). It is also common for some States to restrict the authority of certain types of investigators to make arrests. *See, e.g., Ohio v. Droste*, 697 N.E.2d 620, 623 (Ohio 1998) (discussing restricted authority of liquor control investigators). Most States set territorial limits for an officer's authority to arrest. *See, e.g., Colorado v. Hamilton*, 666 P.2d 152, 157 (Colo. 1983) (addressing whether evidence seized by police outside the territorial limit of their authority

should be suppressed); *Maine v. Jolin*, 639 A.2d 1062, 1064 (Me. 1994) (same); *Michigan v. Hamilton*, 638 N.W.2d 92, 97-98 (Mich. 2002) (same). Finally, States have enacted a wide variety of procedural requirements that govern arrests. *See, e.g.*, *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1144-46 (Mass. 1986) (addressing whether violation of state procedural statute that afforded defendant an opportunity to appear and contest the arrest warrant requires suppression).

Because the Fourth Amendment to the United States Constitution imposes one standard for arrests and state law frequently provides for additional strictures, it is not unusual for state and federal courts to be confronted with the situation where a police officer has probable cause to arrest as required by the Fourth Amendment, but violates a state law governing arrests. At issue here is whether the Fourth Amendment requires the suppression of evidence when that occurs. The Virginia Supreme Court held that it does, and is joined by the Ninth Circuit in that conclusion. Five federal courts of appeals and four state supreme courts have reached the directly opposite conclusion. Certiorari is warranted to resolve this conflict over a recurring and important issue of constitutional law.

I. THE VIRGINIA SUPREME COURT'S DECISION CONFLICTS WITH NUMEROUS DECISIONS OF FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS.

The Fourth, Fifth, Sixth, Eighth and Tenth Circuits, as well as highest state courts in California, Massachusetts, North Carolina and Ohio, have concluded that the Fourth Amendment does not require the suppression of evidence seized incident to an arrest founded upon probable

cause when the arrest was conducted in violation of a state statute governing arrests.

Federal Cases:

- *United States v. Van Metre*, 150 F.3d 339, 347 (4th Cir. 1998) (confessions were admissible even though the arrest violated Tennessee law, which required police to obtain a fugitive of justice warrant; at the time of the arrest the officers had three valid warrants);

- *United States v. Bell*, 54 F.3d 502, 504 (8th Cir. 1995) (arrest for operating a bicycle without a headlight violated Iowa law but not the United States Constitution because it was based on probable cause);

- *United States v. Wright*, 16 F.3d 1429, 1437 (6th Cir. 1994) (stricter requirements of Tennessee law for warrantless arrests irrelevant where officers had probable cause; therefore, suppression of drug evidence seized from defendant's rental car not required);

- *United States v. Walker,* 960 F.2d 409, 415-17 (5th Cir. 1992) (methamphetamine need not be suppressed if officers had probable cause to arrest; whether arrest violates Texas law irrelevant for purposes of constitutional analysis);

- *United States v. Miller*, 452 F.2d 731, 733 (10th Cir. 1971) (under state law, officers should not have arrested defendant for a misdemeanor that did not occur in the officers' presence; however, since arrest was founded upon probable cause, suppression of sawed-off shotgun was not required).

Federal courts have reached similar results in the strongly analogous context of certain actions under 42 U.S.C. § 1983. In each case, the court rejected the plaintiff's argument that an arrest that was improper under state law rendered the arrest unconstitutional under the Fourth Amendment. *See Knight v. Jacobson,* 300 F.3d 1272, 1276 (11th Cir. 2002) (arrest for misdemeanor assault that did not occur in officer's presence violated state law but not federal law; § 1983 lawsuit was dismissed because "[t]here is no federal right not to be arrested in violation of state law."); *Vargas-Badillo v. Diaz-Torres*, 114 F.3d 3, 6 (1st Cir. 1997) (§ 1983 relief unwarranted because officers acted with probable cause; Puerto Rico rule of court prohibiting arrest for misdemeanors that do not occur in the officer's presence did not affect constitutional standard); *Gordon v. Degelmann*, 29 F.3d 295, 301 (7th Cir. 1994) (fact that defendant was entitled to a hearing under Illinois law to challenge his removal as a trespasser was irrelevant; officers did not face § 1983 liability when their arrest was made with probable cause); *Anderson v. Haas*, 341 F.2d 497, 498-99 (3rd Cir. 1965) (in civil rights action, district court erroneously concluded that validity of officer's arrest hinged on state law).

State Cases:

- *California v. McKay*, 41 P.3d 59, 65-72 (Cal. 2002) (defendant's arrest for riding a bicycle in the wrong direction on a residential street violated state law, but because arrest was based on probable cause it did not violate the United States Constitution);

- *Droste*, 697 N.E.2d at 623 (liquor control officers lacked statutory authority to arrest in this specific situation but suppression was unwarranted because officers had probable cause to arrest);

- *Massachusetts v. Lyons*, 492 N.E.2d 1142, 1144-46 (Mass. 1986) (defendant's arrest was improper under state law because he was not provided with notice to challenge misdemeanor complaint; however, suppression of witness's identification must be denied because the arrest was made with probable cause);

- *North Carolina v. Eubanks*, 196 S.E.2d 706, 709 (N.C. 1973) (misdemeanor offense of driving under the influence did not occur in officer's presence and, therefore, violated state law; nevertheless, suppression was not warranted because the officer acted with probable cause and thereby satisfied the National Constitution).

The reasoning of these courts is exemplified by the decision in *Bell,* a case almost identical to the case at bar. In *Bell*, the defendant was arrested for riding a bicycle without a headlight. The search incident to arrest yielded cocaine. *Bell,* 54 F.3d at 503. The district court granted the defendant's motion to suppress, reasoning that the arrest contravened Iowa law. An Iowa statute required the issuance of a citation for such offenses, rather than a custodial arrest. *Id.* The Eighth Circuit reversed. The court reasoned that "states may impose rules for arrests, searches and seizures that are more restrictive than the Federal Constitution," but these "state law violations do not necessarily offend the Federal constitution." *Id.* at 504. In the context of arrests, the court observed that "an arrest by state officers is reasonable in the Fourth Amendment sense if it is based on probable cause." *Id.*

Therefore, the district court erred when it looked to a state statute in assessing the Constitutional validity of the defendant's arrest. *Id.*

The California Supreme Court reached the same conclusion in *McKay*. In *McKay*, the defendant was arrested for operating a bicycle in the wrong direction on a residential street. 41 P.3d at 63. The search incident to that arrest yielded a baggie of methamphetamine. *Id.* The defendant sought the suppression of this evidence, contending that it violated California law. *Id.* After an extensive analysis of this Court's decisions, the California Supreme Court concluded that this Court had never held that a violation of state law rendered an arrest illegal under the United States Constitution. *Id.* at 66-68. The Court further observed that "[c]onstitutionalizing the myriad of technical state procedures that govern arrests would not only trivialize Fourth Amendment protections but would discourage states from even enacting such rules." *Id.* at 69. Finally, the Court noted the strong consensus of opinion from other courts that have examined this issue. *Id.* at 68-69.

In contrast, the Ninth Circuit and the court below have concluded that when an arrest violates state law, the Constitution requires suppression. In *United States v. Mota*, 982 F.2d 1384, 1387 (9th Cir. 1992), the Ninth Circuit held that counterfeit currency obtained during a search incident to arrest must be suppressed because arrest for operating a business without a license was impermissible under California law. The court concluded that this Court's prior decisions, particularly *United States v. Di Re*, 332 U.S. 581 (1948) and *Michigan v. DeFillippo*, 443 U.S. 31, 36 (1979), compelled suppression of the evidence. The court acknowledged that its decision conflicted with that of

other circuits. *Id.* at 1387-88. The court nonetheless held that the violation of California law rendered the defendant's arrest "unreasonable, and thus unlawful, under the Fourth Amendment." In 2003, in *Bingham v. City of Manhattan Beach*, 341 F.3d 939, 950 (9th Cir. 2003), the Ninth Circuit affirmed the ongoing validity of *Mota*.

The need to resolve this conflict among the lower courts is especially pressing because in Virginia and California there is a direct conflict between the States' highest courts and the federal courts of appeals with jurisdiction over those States. This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). The practical difficulties and arbitrariness created by such conflicts are manifest. For example, when a California law enforcement officer has probable cause to arrest a suspect but violates a California statute in the process, whether the evidence seized incident to arrest is suppressed depends on which Sovereign prosecutes. If the United States prosecutes, the suspect can successfully argue that the evidence must be suppressed on constitutional grounds; if California prosecutes, the evidence would be admitted. *See Mota*, 982 F.2d at 1387; *McKay*, 41 P.3d 65-72.

The Ninth Circuit explicitly recognized this possibility in *United States v. Campos*, 105 Fed. Appx. 184 (9th Cir. 2004) (unpublished). While ordering evidence suppressed because the defendant's arrest for driving on a suspended license violated California law, the court of appeals acknowledged that, under the California Supreme Court's decision in *McKay*, the evidence would not have been

suppressed if the prosecution had been brought in state court. *Id.* In Virginia, the situation is the reverse. The evidence would be suppressed in state court under the decision below, but would be admitted in a federal prosecution. *See Van Metre*, 150 F.3d at 347.

This case provides the Court with an ideal vehicle through which to resolve this conflict among the lower courts. First, it was undisputed that the officers in this case had probable cause to conclude that respondent had committed a crime, and that the evidence at issue was seized incident to the arrest for that crime. Therefore, subtracting *Virginia Code* § 19.2-74 from the equation, the arrest would have been proper under settled federal law. Second, it is clear that the Virginia Supreme Court's decision below was based exclusively on federal law. *See App.* 11 ("the search of the defendant was not consistent with the Fourth Amendment"). Although the lower court discussed a state case, *Lovelace,* that case centered exclusively on the United States Constitution. Indeed, in *Lovelace*, the Court concluded that "the search of Lovelace violated his Fourth Amendment rights." *Lovelace*, 522 S.E.2d at 857. Finally, there is no benefit to allowing further development in the lower courts. Most of the federal courts of appeals and a number of States have already spoken on the issue; the conflict will not disappear.

II. THE DECISIONS OF THE VIRGINIA SUPREME COURT AND OF THE NINTH CIRCUIT ARE FUNDAMENTALLY FLAWED.

A. This Court Should Clarify that a Search Incident to Arrest is Valid Under the United States Constitution if the Arrest is Based on Probable Cause.

This Court has "never taken the position that an arrest made on probable cause violates the Fourth Amendment merely because a taking of custody was deemed unnecessary (as a matter of state law or otherwise)." 1 Wayne R. LaFave, *Search and Seizure*, § 1.5(b) (4th ed. 1996). It follows that, if the arrest is valid, the search incident to that arrest is also constitutionally valid, regardless of any additional strictures of state law. However, the lower court and the Ninth Circuit seem to believe that the Constitution requires both probable cause and a strict compliance with any applicable state laws.

This view conflicts with this Court's holdings in *Elkins v. United States*, 364 U.S. 206 (1960), and *California v. Greenwood*, 486 U.S. 35 (1988). In *Elkins*, the Court examined the admissibility of wiretap evidence obtained by state officers. 364 U.S. at 206-07. The Court concluded that, whether the officers who illegally seize evidence are state or federal officers, "the test is one of federal law, neither enlarged by what one state court may have countenanced, nor diminished by what another may have colorably suppressed." 364 U.S. at 223-24. In *Greenwood*, this Court rejected the defendant's argument "that his expectation of privacy in his garbage should be deemed reasonable as a matter of federal constitutional law because the warrantless search and seizure of his garbage was impermissible as a matter of California law." 486 U.S.

at 43. This Court acknowledged that States could impose more stringent constraints on the police than those imposed by the United States Constitution, but noted that it "had never intimated, however, that whether or not a search is reasonable within the meaning of the Fourth Amendment depends on the law of the particular State in which the search occurs." *Id.*

As the Sixth Circuit observed, "it would be incongruous to use state law to determine whether the exclusionary rule should apply to a search incident to arrest, but to use federal law to determine whether the exclusionary rule should apply to all other searches." *Wright*, 16 F.3d at 1436. Adopting the majority view on the issue presented in this case would thus preserve the consistency of this Court's Fourth Amendment jurisprudence.

Furthermore, the probable cause standard, unfettered by further state law requirements, has the virtue of simplicity and clarity. *Texas v. Brown,* 460 U.S. 730, 742 (1983) (noting that "probable cause is a flexible, commonsense standard."); *Brinegar,* 338 U.S. at 176 ("The rule of probable cause is a practical, nontechnical conception affording the best compromise that has been found for accommodating these often opposing interests. Requiring more would unduly hamper law enforcement.").

Constitutionalizing the myriad state rules governing arrests would needlessly inject another layer of complexity to the constitutional law of arrest. In contrast to the straightforward probable cause standard, the application of the holding below will be difficult to apply in practice. It will not always be clear under state misdemeanor summons statutes whether the crime at issue is a misdemeanor or a felony. For example, under Virginia law, theft

of an item worth more than $200 is a felony, *Virginia Code* § 18.2-95, for which an officer may effect a full custodial arrest. On the other hand, theft of an item valued at less than $200 is petit larceny, a Class 1 misdemeanor, *Virginia Code* § 18.2-96, for which a summons is presumptively required under state law. *Virginia Code* § 19.2-74. The value of an item may not be immediately apparent to the arresting officer. Or an officer may be mistaken about the scope of one of the exceptions to the misdemeanor summons rule and improperly arrest a suspect under state law. Finally, statutes linking the power to arrest to jurisdictional boundaries within a State often have their own complexities. *See, e.g.*, *Virginia Code* § 19.2-250 (officers' jurisdiction extends to one mile beyond their jurisdictional boundary, "except that such jurisdiction of the corporate authorities of towns situated in counties having a density of population in excess of 300 inhabitants per square mile, or in counties adjacent to cities having a population of 170,000 or more, shall extend for 300 yards beyond the corporate limits of such town or, in the case of the criminal jurisdiction of an adjacent county, for 300 yards within such town."). For investigations that cross state lines, officers would have to determine which State's law of arrest should govern.

In *Atwater*, this Court reiterated the value of the bright line rule governing arrests, noting that

> we have traditionally recognized that a responsible Fourth Amendment balance is not well served by standards requiring sensitive, case-by-case determinations of government need, lest every discretionary judgment in the field be converted into an occasion for constitutional review.

532 U.S. at 347. The probable cause standard also has the virtue of uniformity in all state and federal courts. It would be anomalous for the scope of National Constitutional protection to evolve with jurisdictional boundaries. There is also no reason why federal prosecutions should be made to depend on the fortuity of the arrest locale.

B. The Exclusionary Rule Should Not be Extended, as a Matter of Constitutional Law, to Vindicate State Statutes.

The court below and the Ninth Circuit appear to believe that the Constitution requires the exclusion of evidence whenever police officers make a mistake under a state law that governs arrests. In other words, those tribunals elevate a violation of state law into a constitutional violation which in turn triggers the suppression remedy.

This view of the exclusionary rule is mistaken. "[T]he exclusionary rule was created to discourage violations of the Fourth Amendment, not violations of state law." *Walker*, 960 F.2d at 415. *See generally Mapp v. Ohio*, 367 U.S. 643 (1961). Absent the state statute at issue, Moore's arrest would have been proper under settled constitutional law. *Atwater*, 532 U.S. at 354-55. Moore conceded at trial that the traffic stop was proper and that he had a suspended license. The officers unquestionably had probable cause to arrest for the misdemeanor offense of driving on a suspended license. Requiring suppression under such circumstances would inappropriately expand the scope of the exclusionary rule beyond its doctrinal foundation of vindicating federal rather than State interests.

This Court recently noted that suppression of evidence should be a last resort, not a first impulse. *Hudson v. Michigan*, 126 S. Ct. 2159, 2613 (2006). Among other things, the exclusionary rule exacts "substantial social costs," including the release of dangerous criminals. *Id.* at 2163. Here, in addition to the habitual costs of the exclusionary rule, expanding the rule to vindicate state statutes that may never have contemplated exclusion would impose additional costs to the citizenry at large: such a rule would ultimately discourage state legislatures from enacting measures, such as *Virginia Code* § 19.2-74, that benefit the public at large. A state legislature may enact a statute as a guideline for law enforcement rather than with any intent to trigger the suppression of probative evidence. A State's imposition of a jurisdictional boundary on a police officer's arrest power, for example, is not likely to stem from a desire to assist criminals in avoiding prosecution by suppressing relevant evidence. More likely, the state legislature simply seeks to ensure amicable relations between neighboring jurisdictions.

States, consistent with our federal scheme of government, are free to impose additional strictures upon their officers. However, the interpretation and remedies for violating those strictures should be left to the States that created these measures. If a State wishes to require the suppression of evidence seized outside of an officer's jurisdictional boundary, it can so provide.[1] If a State

[1] The probable cause standard and other constitutional due process requirements provide substantial protection to the citizenry, regardless of additional protections found in state law. Furthermore, as this Court noted in *Atwater*, the Nation is not "confronting anything like an epidemic of unnecessary minor-offense arrests" owing, in part, to the "good sense" of law enforcement who have neither the desire nor the

(Continued on following page)

concludes that suppression is the appropriate remedy for an officer's failure to release a suspect on a summons, the State can so declare. *See Minnesota v. Martin*, 253 N.W.2d 404, 405-06 (Minn. 1977); *New Mexico v. Bricker*, 134 P.3d 800, 805-808 (N.M. App.), *cert. granted*, 136 P.3d 569 (N.M. 2006). A State may conclude that suppression is the appropriate remedy, that a civil lawsuit or an administrative proceeding is the proper remedy, or that no remedy is required. The State that drafted the statute should have the prerogative of assessing the gravity of the violation of its own law and the appropriateness of a particular remedy. The sledgehammer of suppression is not constitutionally compelled when officers violate a state law governing arrests.

Our Constitution recognizes the distinct sovereignty of State and federal governments. If "state law can transform constitutional police conduct into its opposite," it would "unravel our federal system, since treating a state law as a violation of the Constitution 'is to make the federal government the enforcer of state law.'" *McKay*, 41 P.3d at 65 (quoting *Archie v. City of Racine*, 847 F.2d 1211, 1217 (7th Cir. 1988)).

Furthermore, it is difficult to see why suppression should automatically follow for a violation of state statutes when suppression is not automatically triggered by violations of federal statutes, treaties, or regulations. *See Sanchez-Llamas v. Oregon*, 126 S. Ct. 2669, 2679-82 (2006) (suppression not an appropriate remedy for a violation of the Vienna Convention); *United States v. Donovan*, 429

---

resources to make full custodial arrests in every possible instance. 532 U.S. at 353.

U.S. 413, 432 n.22 (1977) (denying exclusion for violation of wiretapping statute); *United States v. Caceres*, 440 U.S. 741, 755 (1979) (violation of I.R.S. eavesdropping regulation did not require suppression).

To be sure, the *application* of federal constitutional law standards intersects in a number of contexts with state law. For example, a particular act may constitute a crime in one State but not in another. Therefore, an officer who has probable cause to believe that a suspect has violated a particular statute may properly arrest in the State that has enacted the statute, but may not arrest in a State where that statute does not exist. State law operates as a factual backdrop to the application of the standard mandated by the United States Constitution. However, the probable cause standard itself is a creature of the United States Constitution rather than of state law. Another illustration of this phenomenon are the cases under *Jackson v. Virginia*, 443 U.S. 307 (1979). Under *Jackson*, state law defines the crime, but the Due Process standard flows from the Constitution itself. That standard, derived independently of the underlying law, is "whether, after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Id.* at 319.

C. The Virginia Supreme Court and the Ninth Circuit's Minority View Decisions are Fundamentally Flawed.

The Virginia Supreme Court and the Ninth Circuit incorrectly applied this Court's jurisprudence. The decision of the Virginia Supreme Court relied on this Court's decisions in *Atwater* and *Knowles*. However, those cases

did not resolve the question presented in this case. In *Atwater*, this Court held that a full custodial arrest for a seatbelt violation did not violate the United States Constitution. 532 U.S. at 354-55. While the Texas statute at issue authorized the officer to make a full custodial arrest, the decision did not turn on that fact. *Id.* at 354. Given the background of state law in *Atwater*, the issue presented in the case at bar was not present. Similarly, in *Knowles*, this Court held that the Constitution could not support a search incident to citation, because the concerns underlying the search incident to arrest – officer safety and the need to preserve evidence for trial – do not apply to a situation where the officer issued a citation. 525 U.S. at 118-19. In the case at bar, however, the officers were not issuing a citation; they made a full custodial arrest.

As noted above, the Ninth Circuit's decision in *Mota,* 982 F.2d at 1387-88, erroneously relied on *Di Re*, 332 U.S. 581 and *DeFillippo*, 443 U.S. 31. Neither decision, when examined carefully, lends support to the view that suppression is required if an officer arrests upon probable cause, but the arrest violates a state statute.

In *Di Re*, this Court reversed a federal conviction because it was based on evidence obtained in a warrantless arrest that was illegal under state law. Because "[n]o act of Congress lays down a general federal rule for arrest without warrant for federal offenses," this Court adopted as a governing rule "the law of the state where an arrest without warrant takes place determines it." *Id.* at 589. The Court drew from a federal statute, since amended, which provided that an arrest by judicial process for a federal offense must be made "agreeably to the usual mode of process against offenders in such State." *Id.* at 589-90. The Court reasoned that if federal statutory law

required compliance with state law for arrests *with a warrant*, federal courts should logically turn to state law to determine the validity of arrests *without a warrant*. *Id.* at 589-90. Since the arrest in *Di Re* was invalid under New York law, this Court held that the fruits of the search incident to arrest should be suppressed. *Id.* at 593-95.

First, as the text of *Di Re* shows, and as a number of courts have concluded, the decision was grounded not in the United States Constitution but on the supervisory power of this Court to exclude evidence under circumstances deemed improper but not unconstitutional. *See Wright*, 16 F.3d at 1435; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67. *See also* LaFave, *supra* at § 1.5 ("a close inspection of the *Di Re* decision indicates that the use of state law there was 'based on non-constitutional considerations'"). Second, as several appellate courts have recognized, the holding in *Di Re* is no longer valid in light of the Court's subsequent holdings in *Elkins*, 364 U.S. 206, and *Greenwood*, 486 U.S. 35. *See Wright*, 16 F.3d at 1434-36; *Walker*, 960 F.2d at 416; *McKay*, 41 P.3d at 66-67.

DeFillippo is also inapposite. Although this Court ultimately held that even if an ordinance is later held unconstitutional, an officer can reasonably rely on it to make an arrest, 443 U.S. at 40, it nonetheless stated, "whether an officer is authorized to make an arrest ordinarily depends, in the first instance, on state law." *Id.* This statement is unremarkable, inasmuch as state law "is relevant to the validity of the arrest and search only as it pertains to the 'facts and circumstances' we hold constituted probable cause for arrest." *Id.* In other words, probable cause is the constitutional standard, but state law defines the crime for which the officer must have probable cause. *Accord Ryan v. County of DuPage*, 45 F.3d

1090, 1093 (7th Cir. 1995). Moreover, the statement in *DeFillippo* is dicta, because the defendant did "not contend that the arrest was not authorized by Michigan law." *DeFillippo*, 443 U.S. at 36.

Ultimately, *Di Re* and *DeFillippo* are entirely consistent with the rule – adopted by most of the lower courts – that an arrest that is founded on probable cause but is otherwise problematic under state law does not violate the United States Constitution. However, certain statements from those cases can act as a snare for lower courts. This Petition affords the Court the opportunity to clarify its jurisprudence on this important, recurring issue.

The standard for the constitutional validity of an arrest should be whether the officer has probable cause to believe that a crime has been committed. "State law neither adds nor subtracts from these constitutional rules." *Gordon*, 29 F.3d at 300.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

ROBERT F. MCDONNELL
Attorney General of Virginia

WILLIAM E. THRO
State Solicitor General
Counsel of Record

STEPHEN R. MCCULLOUGH
Deputy State
Solicitor General

WILLIAM C. MIMS
Chief Deputy
Attorney General

MARLA GRAFF DECKER
Deputy Attorney General

LEAH A. DARRON
Senior Assistant
Attorney General

OFFICE OF THE ATTORNEY
GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for the
Commonwealth of Virginia

February 1, 2007

BLANK PAGE