No. 09-102

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

DEMETRES J. RUDOLPH,

Respondent.

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

BRIEF AMICI CURIAE OF THE VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS, VIRGINIA ASSOCIATION OF CHIEFS OF POLICE, VIRGINIA SHERIFFS' ASSOCIATION, VIRGINIA STATE POLICE ASSOCIATION, AND FRATERNAL ORDER OF POLICE OF VIRGINIA, IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

JOEL R. BRANSCOM
Virginia Association of
Commonwealth's Attorneys
P.O. Box 4
Fincastle, Virginia 24090
(540) 473-8227

Counsel of Record
for Amici Curiae

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

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QUESTION PRESENTED

Did the Supreme Court of Virginia err when, in conflict with the decisions of other courts, it invalidated a *Terry* stop by an officer who observed suspicious conduct in an area plagued by crime?

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STATEMENT OF AMICI CURIAE INTEREST

Virginia's prosecutor and law enforcement organizations share a growing concern about the erosion of the rule of *Terry v. Ohio* in the Commonwealth, as signaled by the Supreme Court of Virginia decision in this case.

The Virginia Association of Commonwealth's Attorneys (VACA), established in 1939, is a voluntary association of Virginia's 120 independently-elected Commonwealth's Attorneys and approximately 700 Assistant Commonwealth's Attorneys.[1] VACA has among its purposes advancing the efficient and fair administration of the laws of the Commonwealth, and promoting uniformity in methods of procedure in the trials and appeals of criminal cases arising in the courts of the Commonwealth. The Association previously has appeared as amicus curiae in litigation before this Court and the Supreme Court of Virginia.

The Virginia Association of Chiefs of Police (VACP), formed in 1926, is a non-profit association of more than 600 members including active and retired federal, state, local and private law enforcement and

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[1] The parties have consented to the filing of this brief. The parties were notified ten days prior to the due date of this brief of the intention to file.

No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae, their members, or their counsel made a monetary contribution to its preparation or submission.

criminal justice agency executives, administrators and managers. The purpose of the VACP is to promote the professional development of all executive and management personnel within duly constituted law enforcement agencies in the Commonwealth of Virginia; to encourage close cooperation of all law enforcement agencies in the prevention of crime, detection of crime and the apprehension of those responsible for the commission of crimes; to promote the highest standards of the police profession through selection and training of law enforcement officers and generally pledge and strive for the highest degree of respect for law and order throughout the Commonwealth of Virginia.

The Virginia Sheriffs' Association (VSA) is a private non-profit corporation representing the interest of the sheriffs and deputy sheriffs throughout the Commonwealth of Virginia. The VSA currently has all 123 Virginia sheriffs as members and 7,800 deputy sheriff members. The primary interest of the VSA is to promote public safety in the Commonwealth of Virginia.

The Virginia State Police Association, founded in 1974, counts as members approximately 2000 sworn and non-sworn current employees and retirees of the Virginia Department of State Police. Its membership includes both management and non-management personnel, and is dedicated to mutual assistance within the Virginia State Police family and other Virginia law enforcement communities.

The Fraternal Order of Police was founded in 1915 in Philadelphia, Pennsylvania by two police officers. Since then the FOP has grown to an organization of over 328,000 members nationwide. The Fraternal Order of Police of Virginia has over 8000 members dedicated to the service and protection of the citizens of the Commonwealth of Virginia. The Fraternal Order of Police is a support organization for its members and the community.

ARGUMENT

THE DECISION OF THE SUPREME COURT OF VIRGINIA IS AN ERRONEOUS APPLICATION OF THIS COURT'S PRECEDENTS THAT UNNECESSARILY RESTRICTS REASONABLE INVESTIGATIVE STOPS.

The "difficult and troublesome issues" concerning the reach of the Fourth Amendment in police-citizen encounters during investigations of suspicious circumstances were squarely presented to this Court in *Terry v. Ohio*, 392 U.S. 1, 9 (1968). The Court recognized a legitimate societal interest in crime detection and prevention that supported permitting law enforcement officers to reasonably investigate suspicious conduct. At the same time, the Court stressed every citizen's interest against unreasonable governmental intrusions on personal liberty. The Court's ruling established a balancing process to accommodate these interests by reference to the Fourth Amendment's touchstone of reasonableness on

the facts of each case. The rule in *Terry* has proved to be remarkably robust given the seriousness of the issues presented to the Court in 1968. *Terry*'s central holding has remained essentially untouched, and periodically reaffirmed largely without fundamental disagreements, for more than forty years.

The balance between the public interest in crime prevention and the individual's right to personal security allows police to conduct brief investigative stops at a level of suspicion less than probable cause to arrest, if the officer "observes unusual conduct which leads him reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry*, 392 U.S. at 30. The reasonableness of the officer's conduct is assessed by the totality of the circumstances. Still, police "must be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Id.* at 21. It is these "specific and articulable facts" that a court weighs in determining the reasonableness of the intrusion against an objective standard: "would the facts available to the officer ... warrant a man of reasonable caution in the belief that the action taken was appropriate?" *Id.* at 21-22 (internal punctuation omitted).

Amici curiae herein do not suggest any request to expand or redefine the holding in *Terry* in any way in this case. Rather, the rule stated in *Terry*, properly applied, satisfactorily balances the law enforcement and individual citizen interests involved and

validates the investigative stop at issue. The concern here is that the Virginia Supreme Court's tinkering with the *Terry* standard in recent decisions has departed from an established Fourth Amendment standard, as established by *this* Court's precedents, such that a higher standard now is required to support actions by Virginia's law enforcement officers.

The particular facts of Rudolph's case present a straightforward showing of reasonable suspicion of criminal conduct, and indeed that was the conclusion of the trial court, a majority of the Virginia Court of Appeals panel reviewing the trial court's decision, and the three dissenting justices of the Virginia Supreme Court. During a nighttime patrol of a Virginia Beach shopping center, a police officer noticed a car parked in an unusual manner and location behind a convenience store. That specific area was receiving extra police patrols at the time because of a recent increase in burglaries and robberies at that shopping center. The officer paused behind the car and watched two occupants in the front seat moving as if reaching for something from the floor. The car lights were not on. As the officer circled around the car and the building, the car began to drive away. The officer then stopped the car to investigate further. A bag of marijuana was observed on the floor as Rudolph left his car, and he was charged with possession of the drugs. (Pet. App. 2, 23-26).

The Virginia Supreme Court majority, however, found that these facts available to the officer failed to

meet the *Terry* standard. *Rudolph v. Commonwealth*, 277 Va. 209, ___ S.E.2d ___, 2009 WL 485134 (2009). As the Attorney General demonstrates in the petition for writ of certiorari, the Virginia Supreme Court's ruling in Rudolph's appeal, and other recently decided *Terry* stop cases, reflects an unwarranted departure from this Court's Fourth Amendment precedents by imposing a higher standard than *Terry* demands for Virginia investigative stops. (Pet. at 15-27). The Virginia Supreme Court's new view of *Terry* stops rejects findings of a reasonable suspicion based on ambiguous or even possibly "innocent" circumstances, apparently insisting instead on an observed factual basis of actual or perhaps even specific criminal conduct. This is plainly at odds with this Court's precedents. *United States v. Arvizu*, 534 U.S. 266, 277 (2002); *Illinois v. Gates*, 462 U.S. 213, 243 n. 13 (1983).

This new Fourth Amendment standard for Virginia *Terry* investigative stops, if left uncorrected, presents serious practical difficulties for Virginia law enforcement officers. It injects uncertainty and confusion into the daily activities of law enforcement officers as they carry out their public safety responsibilities; it removes legitimate police investigative methods from service in preventing and detecting crime; and it unnecessarily risks greater danger for our law enforcement officers and the public at large.

As police carry out the public interest in deterrence and prevention of crime they rely on this Court's precedents. The *Terry* rule now has guided

the work of several generations of Virginia police officers. Virginia's law enforcement officers receive instruction on the differing concepts within the Fourth Amendment – the preference for a warrant, the meaning of probable cause to arrest, and the principles and requirements of a valid investigative stop – as this Court's precedents have described.[2] Every law enforcement officer in Virginia should be familiar with *Terry*, but the new line being drawn by the state court will produce even more uncertain results in the application of *Terry*'s requirements.

The law enforcement function is not limited to responding to and investigating completed crimes. As *Terry* recognized, "[o]ne general interest is of course that of effective crime prevention and detection." *Terry*, 392 U.S. at 22. Regular police patrols remain a foundation of law enforcement efforts in virtually every jurisdiction and provide an effective vehicle for preventing and detecting criminal activity. On a daily basis, Virginia's police officers and sheriff's deputies patrol their communities to protect the safety of Virginia's citizens on the highways, in their homes and at workplaces. Police patrols provide an

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[2] Virginia law mandates training for law enforcement officers, Virginia Code § 9.1-114, and the Virginia Department of Criminal Justice Services is charged with establishing compulsory training standards. Virginia Code § 9.1-102(2)-(6). "Performance Outcomes, Training Objectives, Criteria and Lesson Plan Guides for Compulsory Minimum Training for Law Enforcement Officers" are available on line: www.dcjs.virginia.gov/standardsTraining/compulsoryminimumtraining/officers.cfm.

immediate and visible public disincentive to criminal behavior, and significantly enhance the opportunity for prompt interdiction and active deterrence of criminal conduct. The investigative stop has been shown to be an effective tool for patrol officers. The demonstrated experience of the last 40 years of reasonable investigative stops is that significant criminal activity has been detected and prevented, and illegal drugs and weapons have been kept off the streets.

Terry granted law enforcement the authority to use the reasonable investigative stop in the prevention and detection of crime: "it is this interest which underlies the recognition that a police officer may in appropriate circumstances and in an appropriate manner approach a person for purposes of investigating possibly criminal behavior even though there is no probable cause to make an arrest." *Terry*, 392 U.S. at 22.

This authority serves an obvious public purpose by advancing investigation to an early stage where it has the benefit of interrupting preparation for criminal activity. More importantly, it gives law enforcement an intermediate option between arrest and doing nothing:

> The Fourth Amendment does not require a policeman who lacks the precise level of information necessary for probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape. On the contrary, *Terry* recognizes

> that it may be the essence of good police work to adopt an intermediate response.

Adams v. Williams, 407 U.S. 143, 145-146 (1972). *See Terry*, 392 U.S. at 23 ("It would have been poor police work indeed for an officer of 30 years' experience in the detection of thievery from stores in this same neighborhood to have failed to investigate this behavior further.").

The Virginia Supreme Court's ruling potentially eliminates many otherwise valid investigative stops to obtain clarifying information, by insisting on a greater degree of specificity in the factual basis considered by the officer. As the dissenting justices recognized, this ruling "appears to have applied a more exacting legal standard than the Fourth Amendment permits, declaring legitimate police activity unconstitutional and upsetting the delicate balance between individual privacy and community safety." (Pet. App. 16-17).

> [T]his heightened requirement forecloses a vast range of legitimate investigatory practices, authorized by *Terry*, that result in only "minimal intrusion." Far from allowing officers the limited ability to request clarification when confronted with ambiguous circumstances, it places a weighty and unwarranted burden of proof on police to postpone any encounter until criminal culpability, or at the very least probable cause to suspect a crime is underway, can be conclusively established. This is not the holding of *Terry* or the cases that have

> followed it, and the majority's implementation of this foreign requirement, which is implicit in its resolution of this case, is error.

(Pet. App. 18-19).

The unavoidable cost in restricting the availability of the reasonable investigative stop is the increased risk to the public and law enforcement officers. The public safety is jeopardized by reducing police use of an effective and constitutional law enforcement practice. Further, because the authority of officers to conduct limited pat-downs during an investigative stop is based in large part on the same considerations that permit the *Terry* stop, limiting the authority of an officer to reasonably investigate uncertain suspicious conduct may well bleed over to limit the officer's justifications for the pat-downs now permitted to insure his safety. These risks are unnecessary under *Terry*, and intolerable because they flow from deliberately less effective policing mandated only in order to comply with an overly restrictive local application of the Fourth Amendment standard.

Virginia's prosecutor and law enforcement organizations believe that unnecessary and unauthorized restrictions on the existing *Terry* rule present a genuine concern about the general application of controlling Fourth Amendment precedents worthy of this Court's consideration.

CONCLUSION

The petition for a writ of certiorari to the Supreme Court of Virginia should be granted.

Respectfully Submitted,

JOEL R. BRANSCOM

Counsel of Record
for Amici Curiae

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