No. 09-_____

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

PETITION FOR A WRIT OF CERTIORARI

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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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Virginia Attorney General William C. Mims, 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.

INTRODUCTION

Police officers are called upon on a daily basis to patrol businesses and residential areas plagued by crime. Such patrols are necessary to ensure that the residents and businesses located in these areas can live and work in peace. Beginning with *Terry v. Ohio*,[1] this Court has recognized that the Fourth Amendment permits officers who have observed objectively suspicious conduct to act proactively, and to temporarily detain suspects to determine if a crime has been, or is about to be, committed. Most lower courts have faithfully applied this Court's *Terry* stop jurisprudence and uphold stops made by a police officer who observes suspicious activity while on patrol in a high crime area. A handful of lower courts, however, like the court below, effectively have rewritten this Court's jurisprudence and imposed a higher standard. Given the enormous practical significance of *Terry* stops to law enforcement and to the citizenry, the Court should grant certiorari to provide guidance to the lower courts.

[1] 392 U.S. 1 (1968).

OPINIONS BELOW

The decision of the Supreme Court of Virginia is published as *Rudolph v. Virginia*, 277 Va. 209, ___ S.E.2d ___, 2009 WL 485134 (2009). It is reprinted in the Appendix at 1-20. The decision of a panel of the Court of Appeals of Virginia is unpublished, *Rudolph v. Virginia,* Record No. 0240-07-1 (Va. Ct. App. Feb. 28, 2008). It is reprinted in the Appendix at 21-60.

JURISDICTION

The Supreme Court of Virginia issued its decision on February 27, 2009, and that court denied rehearing on April 24, 2009. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

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.

STATEMENT OF THE CASE

1. The Cypress Point Plaza Shopping Center, in the City of Virginia Beach, experienced "a lot of break-ins and robberies." *App.* 23. This crime wave prompted the police to provide extra patrols. *App.* 23. On January 23, 2006, around 8:00 p.m., a police officer was on patrol at Cypress Point. A Citgo gas station is located in the parking lot of that shopping center. *App.* 24. The officer, who was familiar with the problems in this area, noticed a vehicle parked parallel to, and in the rear of, the gas station. The car was parked in a dark area. *App.* 2, 24, 26. As shown in a photographic exhibit that was introduced at trial, the car was parked just past one of the speed bumps, and was positioned in a traffic lane rather than a parking space. The gas pumps are situated in the front of the gas station. *App.* 33. The gas station was open for business and there was a rear entrance. However, the officer knew that customers do not use that entrance in the nighttime. *App.* 24.[2]

The patrol officer noticed two persons in this unusually parked car. *App.* 24. The officer observed both occupants of the vehicle bending down several times, apparently reaching for something. *App.* 24. However, there were no lights on inside the car, nor were the car's headlights turned on. The officer decided to drive around to take a closer look. He first

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[2] The officer later learned that the back door is locked at night. *App.* 24.

decided to "take a look inside the building" to "make sure everything was fine." Tr. 07/26/06 at 17. As he continued to circle around the building, he noticed that the suspects were driving away. *App.* 2, 24. The officer then stopped the suspect vehicle. *App.* 2, 25. When the defendant stepped out of the vehicle, the officer noticed marijuana in plain sight on the floor of the car, where the defendant's leg had been. *App.* 2.

2. Rudolph was charged with possession of marijuana with the intent to distribute. *App.* 1. He filed a motion to suppress, contending among other things that the stop was improper under the Fourth Amendment. *App.* 1. The trial court denied the motion, and Rudolph entered a conditional guilty plea that allowed him to appeal the ruling on his suppression motion. *App.* 1, 21. The trial court sentenced him to serve five years in prison, with four years suspended. *App.* 63-64. Rudolph appealed to Virginia's intermediate appellate court, the Court of Appeals of Virginia.

3. A panel of that court affirmed by an unpublished opinion. *App.* 31. The court reasoned that:

> [s]everal of the circumstances that [the police officer] articulated point to the reasonable inference that the vehicle's occupants were preparing to rob the gas station. The gas station was in the parking lot of a shopping center that had recently been subject to several burglaries and robberies. Rudolph was parked in a dark, low-traffic area in a manner well-suited for a quick getaway. He

> and the passenger were bending over and reaching around the floorboard, but did not turn on the vehicle's interior lights. When Rudolph saw [the officer's] patrol car pull past him, he promptly attempted to drive away.

App. 25-26. The court found it reasonable under the circumstances for the officer to suspect "that criminal activity might be afoot," and, therefore, the officer's "stop of Rudolph's vehicle to investigate further did not violate the Fourth Amendment." *App.* 31. One judge dissented. In his view, the facts did not rise to the level of reasonable articulable suspicion. *App.* 32-60. Responding to this point, the panel majority wrote that the dissent erred by analyzing "each circumstance in isolation instead of viewing all of the circumstances together." *App.* 29. The correct analysis, the majority noted, is the "totality of the circumstances." *App.* 30.

4. The Supreme Court of Virginia granted Rudolph's appeal, and by a vote of 4-3 reversed. The court set forth the applicable standard as follows: "[i]n order to conduct an investigatory stop, a police officer need not have probable cause, he must have a reasonable suspicion, based on objective facts, that the person ***is involved*** in criminal activity." *App.* 3 (emphasis added). Further, "to establish reasonable suspicion, an officer must be able to articulate more than an unparticularized suspicion or 'hunch' that criminal activity ***is*** afoot." *App.* 3 (emphasis added). Finally, "[a] court must consider the totality of the

circumstances when determining whether a police officer had a particularized and objective suspicion that the person stopped ***was involved*** in criminal activity." *App.* 3 (emphasis added). The court concluded "that the circumstances and actions observed by [the police officer] were not enough to create a reasonable articulable suspicion that criminal activity ***was afoot.***" *App.* 4 (emphasis added). Therefore, the court held that Rudolph was stopped in violation of his "rights under the Fourth Amendment," and his suppression motion should have been granted. *App.* 4.

5. Three Justices wrote a vigorous dissent. In their view, the majority

> misapplied the law relating to investigatory stops under the Fourth Amendment, both in discounting the cumulative effect of the circumstances encountered by the police officer here, and in misconstruing the degree of suspicion required to justify such stops under *Terry v. Ohio* in a way that imposes a much heavier burden on the police than the constitution warrants.

App. 5. The dissent observed that stops based on reasonable suspicion require only "some minimal level of objective justification" for making the stop. *App.* 7 (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984)). Furthermore, the dissent noted, this Court has "often reemphasized the significant difference between the low threshold of 'reasonable suspicion' on the one hand, and the considerably more demanding

requirements of 'probable cause' and other standards." *App.* 7. In the view of the dissenting Justices, the majority failed to evaluate the "collective weight of the totality of the circumstances." *App.* 11.

Finally, the dissent argued that the majority employed an incorrect legal standard. The dissenting Justices noted that under *Terry,* a stop is proper if the officer "observes unusual conduct which leads him reasonably to conclude that criminal activity '***may*** be afoot.'" *App.* 17 (quoting *Terry*, 392 U.S. at 30). Other cases rely on this conditional language. *App.* 17 (citing *United States v. Arvizu*, 534 U.S. 266, 273 (2002)). Although a number of cases use the "may be afoot" formulation, the dissent observed, other decisions from this Court "have included more definitive language, suggesting that circumstances must indicate that criminal activity *is* afoot." *App.* 17 (citing *Brown v. Texas*, 443 U.S. 47, 51 (1979), *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000) ("criminal activity is afoot")). Acknowledging that "there may be little theoretical difference between the two constructions," the dissent noted that "semantic differences can come to acquire great practical importance over time." *App.* 18.

> The more definite language of the latter line of cases could be easily misconstrued as a requirement that police officers have some certainty that criminal activity in fact is about to commence, is already underway, or has recently concluded. *Terry* and its progeny

> do not go so far, but the conclusion reached by the majority here suggests that it has.

App. 18.

If the majority is correct, the dissent reasoned, "this heightened requirement forecloses a vast range of legitimate investigatory practices, authorized by *Terry*, that result in only 'minimal intrusion.'" *App.* 18.

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for two reasons. First, the lower courts are divided on the propriety of *Terry* stops in a scenario that occurs with great frequency. When an area or type of business has experienced ongoing criminal activity, law enforcement officers are called upon to prevent future crimes and restore stability to the area or to protect these businesses. While on patrol, police frequently will encounter behavior that is suspicious, but that nevertheless falls short of conclusive proof of criminal activity. Most courts, consistent with the balance this Court struck in *Terry*, uphold an officer's spur of the moment decision, based on objective facts, to detain a suspect briefly to determine if a crime has occurred or is about to occur. For these courts, an objective manifestation that crime *may be* afoot is sufficient to merit a brief detention. A small number of courts, however, impose a more stringent standard for such stops. Law enforcement as well as lower courts would

greatly benefit from this Court's guidance concerning where the boundaries lie.

Second, certiorari should be granted to ensure that lower courts do not consistently ignore this Court's precedents. In a series of decisions, of which the case at bar is but one example, a narrow majority of the Supreme Court of Virginia effectively has displaced the standards established by this Court in the context of *Terry* stops and substituted its own more rigorous Fourth Amendment standard. Were this decision an aberration, Virginia likely would not seek certiorari. Virginia seeks redress in this Court because of the recurring nature of the problem and its harmful practical consequences for law enforcement in the Commonwealth.

I. THE LOWER COURTS ARE DIVIDED IN THEIR APPROACH TO *TERRY* STOPS INVOLVING POLICE PATROLS IN AREAS PLAGUED BY ELEVATED LEVELS OF CRIMINAL ACTIVITY.

A. Although lower courts vary in their approach to *Terry* stops in high crime neighborhoods, a majority of courts do not take an unduly restrictive approach.

Most courts would uphold a stop based on the facts of this case. In *United States v. Edmonds*, 240 F.3d 55 (D.C. Cir. 2001), around 7:00 p.m., police officers were driving an unmarked car to patrol an

area wracked by extensive criminal activity. *Id.* at 57. Although unmarked, the vehicle was readily identifiable as a police cruiser and when an individual noticed the car, he immediately pivoted and began walking away towards a van. *Id.* The van was parked in the parking lot of a nearby closed elementary school. *Id.* As the officer approached the van, with his badge on display, he could observe the defendant in the van making furtive movements. *Id.* The officer then seized the defendant by asking for his driver's license. *Id.* On appeal, the court concluded that the stop was justified based on the combination of (1) a high crime area; (2) the way the car was parked, in this instance at a school that was closed; (3) the presence of "furtive" gestures, particularly at the approach of the police; and (4) the fact that the defendant retreated to the van at the approach of the police officer. The facts in *Edmonds* closely mirror those at issue here. The principal difference is that the school was closed in *Edmonds*, whereas the gas station here was open. But the defendant here parked in a darkened area of the parking lot, in a lane of travel suitable for a getaway. Moreover, the fact that the Citgo gas station was open does not alter the equation because the officer here was on alert for robberies.

In *United States v. Brown*, 209 Fed. Appx. 450 (5th Cir. 2006) (*per curiam*), the Fifth Circuit concluded that a *Terry* stop was proper when officers observed, around 8:30 p.m., a car parked in an apartment complex that was experiencing problems with crime,

and the suspects were seen making furtive gestures inside the car as the officers approached.

Similarly, in *United States v. Dawdy,* 46 F.3d 1427 (8th Cir. 1995), the Eighth Circuit concluded that the *Terry* stop was justified when the officers observed, around 10:00 p.m., a parked car with no lights on behind a closed pharmacy that had received several false burglary alarms in the past. In addition, the fact that the defendant drove away when the police were approaching his vehicle was an additional circumstance that supported the propriety of the stop. *See also United States v. Watson*, 953 F.2d 895 (5th Cir. 1992) (officers made a proper investigative stop when they observed defendant pull into parking lot of abandoned gas station, around 3:30 a.m., in a high crime area, turn off engine and lights, and officers observed the defendant reaching down for something after making eye contact with the police officers); *United States v. Briggman*, 931 F.2d 705 (11th Cir. 1991) (suspicion reasonable and stop proper where car was parked in commercial lot in high crime area at 4:00 a.m., and defendant began to leave when police entered the parking lot); *United States v. Rickus*, 737 F.2d 360 (3rd Cir. 1984) (stop proper when officer observed defendants traveling at a slow speed through a closed business district at 3:30 a.m., and then turned into a residential area that the officer knew had been victimized by a spate of burglaries, and continued their slow and "apparently aimless course" for several more minutes before being stopped); *Ohio v. Bobo,* 524 N.E.2d 489 (Ohio 1988)

(*Terry* stop proper based on (1) high crime nature of the area; (2) the time of night, 11:20 p.m.; and (3) the officer's observation of the defendant's head bobbing up and down at the approach of the police); *Ohio v. Freeman*, 414 N.E.2d 1044 (Ohio 1980) (stop proper when suspect seen sitting alone in a parked car for 20 minutes, with the engine turned off, in a motel parking lot at 3:00 a.m., and the officer was aware of criminal activity in the motel parking lot where suspect was stopped). The approach taken in these cases contrasts sharply with the approach taken by the Supreme Court of Virginia.

The Fourth Circuit's cases fall within the mainstream approach. In *United States v. Swain*, 2009 WL 1178522 (4th Cir.), *cert. denied*, 2009 WL 1342428 (2009) (unpublished *per curiam*), the court upheld a stop and frisk based on the fact that the suspect, upon sighting the police, immediately attempted to leave the area, the area was known for its high crime, the suspect appeared nervous, and he repeatedly put his hands in his pockets despite the officer's request that he not do so. In *United States v. Diggs*, 267 Fed. Appx. 225, 226-27 (4th Cir.) (*per curiam*), *cert. denied*, 128 S. Ct. 2520 (2008), the court upheld a stop where two individuals (1) were in a high crime neighborhood; (2) were loitering with no obvious purpose; (3) at the approach of the officers, the individuals split up to go separate directions; and (4) when the officer asked one of the suspects where he was going, he stated that he was going home but pointed in the opposite direction from where he had

been walking. In *United States v. Mayo*, 361 F.3d 802, 805-08 (4th Cir. 2004), the court found sufficient reasonable suspicion that criminal activity was afoot based on the following facts: (1) the encounter occurred in a high crime area; (2) after seeing the officers, the defendant put his hand in his pocket and appeared to be supporting something heavy; (3) the defendant turned away from the officers and headed in another direction; and (4) the defendant displayed nervous behavior. The Fourth Circuit's jurisprudence clearly differs from the Supreme Court of Virginia's decision here.

B. A few lower courts have taken the restrictive approach embraced by the Supreme Court of Virginia.

In an unpublished opinion, the Ninth Circuit held that the following facts did not suffice for a *Terry* stop: the defendant was in a vehicle late at night, in an area notorious for drug activity, at the portion of a convenience store that was closed, and he made a "hasty and nervous exit" from the vehicle when the officer shined a spotlight in the car. *United States v. Hernandez*, 149 Fed. Appx. 705, 706 (9th Cir. 2005). Judge Rawlinson dissented, contending that those facts were sufficient to justify the stop. *Id.* at 707.

The Court of Appeals of California also found that facts quite similar to the case at bar did not justify a *Terry* stop. In *California v. Perrusquia*, 58 Cal. Rptr. 3d 485 (Cal. Ct. App. 2007), the police

engaged in additional patrols of 7-Eleven convenience stores in Anaheim because six of these stores had been robbed. *Id.* at 487. The robber was described as a Black or Hispanic male in his late 20's. *Id.* While on patrol, an officer observed a car in the parking lot of a 7-Eleven around 11:26 p.m. *Id.* The car engine was idling, and the car was not parked in a regular parking space, even though there were parking spaces available closer to the store's entrance. *Id.* The occupant of the car, a Black or Hispanic male in his late 20's, was "crouched low in the driver's seat" and "leaning against the glass." *Id.* When the officers approached the car, they noticed that the defendant was "fumbling" and the officers heard a "thud." *Id.* When the suspect noticed the officers in his rear view mirror, he shut off the engine, exited the vehicle and began to walk briskly past the officers. *Id.* The Court of Appeals of California held that the stop was invalid under the Fourth Amendment, characterizing the officer's actions as based on a mere "hunch." *Id.* at 491.

A member of the panel vigorously dissented, noting that the brief detention was justified by the totality of the facts known to the police. *Id.* at 495. The dissent observed that "[r]esolving the ambiguity my colleagues see in these circumstances is the whole point of detentions." *Id.*

C. Knowing where the precise boundaries lie for *Terry* stops is of critical importance to law enforcement officers who make such stops on a daily basis.

The government has a vital interest in preventing crime, particularly violent crimes such as robberies. When the police are called upon to protect the physical safety of citizens and their property in areas victimized by crime, it is of critical importance that the police know what is and is not permissible. The decisions of the Supreme Court of Virginia, the Ninth Circuit, and the Court of Appeals of California cannot be reconciled with precedent from many other courts, including the Fourth Circuit, the Fifth Circuit, the Eighth Circuit, the D.C. Circuit, and the Supreme Court of Ohio. The Court should grant certiorari to provide guidance to law enforcement in an area that is of great practical significance.

D. The decision below is erroneous under this Court's precedent.

The decision below requires an officer to be able to point to objective facts showing that a suspect "***is*** involved in criminal activity." *App.* 3 (emphasis added). However, this Court has made it clear that "the police can stop and briefly detain a person for investigative purposes if the officer has a reasonable suspicion supported by articulable facts that criminal activity 'may be afoot,' even if the officer lacks probable cause." *United States v. Sokolow*, 490 U.S. 1, 7 (1989) (quoting *Terry*, 392 U.S. at 30).

The Fourth Amendment does not impose a "more likely than not" standard, either for probable cause or for reasonable articulable suspicion. Probable cause does not "deal with hard certainties, but with probabilities," nor does it demand that an officer's reasonable belief of possible criminal activity "be correct or more likely true than false." *Texas v. Brown*, 460 U.S. 730, 742 (1983) (plurality opinion). "Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the probable-cause decision." *Maryland v. Pringle*, 540 U.S. 366, 371 (2003) (citation and internal brackets omitted). Not even a "prima facie showing" of criminality is required. *Illinois v. Gates*, 462 U.S. 213, 235 (1983). Instead, probable cause "requires only a probability or substantial chance of criminal activity, not an actual showing of such activity." *Id.* at 243 n.13. "[R]easonable suspicion is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence." *Wardlow*, 528 U.S. at 123. A *Terry* stop is reasonable where police harbor "a minimal level of objective justification." *Id.*

In sum,

> [t]he 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. . . . A brief stop of a suspicious individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be most reasonable in light of the facts known to the officer at the time.

Adams v. Williams, 407 U.S. 143, 145-46 (1972).

The fact that the suspicious conduct might be innocent does not preclude the officers from acting. "[I]nnocent behavior frequently will provide the basis for a showing of probable cause; to require otherwise would be to *sub silentio* impose a drastically more rigorous definition of probable cause than the security of our citizens' demands." *Gates*, 462 U.S. at 243 n.13. "In making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Id.* Likewise with the lower standard of reasonable suspicion, the "determination that reasonable suspicion exists, however, need not rule out the possibility of innocent conduct." *Arvizu*, 534 U.S. at 277.

The holding of the Supreme Court of Virginia contravenes these principles. The *Terry* stop was proper here, for the reasons noted by the Court of Appeals of Virginia: (1) "the gas station was in the parking lot of a shopping center that had recently been subject to several burglaries and robberies;" (2)

the defendant "was parked in a dark, low-traffic area in a manner well suited for a quick getaway;" (3) the defendant "and the passenger were bending over and reaching around the floorboard, but did not turn on the vehicle's interior lights;" and (4) "[w]hen Rudolph saw [the officer's marked] patrol car pull past him, he promptly attempted to drive away." *App.* 25-26. In other words, at the sight of the police cruiser, he decided to leave the area. These facts justified the minimally intrusive step of a brief detention to "maintain the status quo" to confirm or dispel the officer's suspicions. *Adams*, 407 U.S. at 146. That other explanations for the defendant's behavior might be devised is irrelevant. The officer's actions were based on concrete and objective facts.

Indeed, the facts available to the officer in the present case compare favorably to those in *Terry*. In *Terry*, an experienced officer observed two individuals repeatedly pacing in front of a store, in broad daylight, peering into the window, and conferring with each other. 392 U.S. at 5-6. At one point, as the two men were conferring, a third man approached them and began speaking with them. *Id.* at 6. The officer suspected they might be casing the store to rob it. *Id.* The court upheld the stop. The court acknowledged that these acts may have been innocent in isolation, but taken together they warranted further investigation. *Id.* at 22. The facts observed by the officer here are at least as suggestive of potential criminal activity as those observed by the officer in *Terry*.

II. THE COURT SHOULD GRANT CERTIORARI TO RECTIFY WHAT HAS BECOME A PATTERN OF ERRONEOUS FOURTH AMENDMENT DECISIONS THAT NEEDLESSLY CURTAILS POLICE ACTIVITY IN VIRGINIA.

The division in the lower courts' application of *Terry* principles warrants certiorari. An additional reason for granting certiorari, however, is the fact that the Supreme Court of Virginia on an ongoing basis has imposed a higher Fourth Amendment standard than required by this Court's precedents. This Court's precedents mean nothing if they can be consistently ignored. Furthermore, the Supreme Court of Virginia's rebalancing of Fourth Amendment interests creates grave practical problems for Virginia law enforcement.

A. The Supreme Court of Virginia has raised the bar in Fourth Amendment cases in contravention of this Court's precedents.

The Supreme Court of Virginia has held that the protections afforded by the Virginia Constitution regarding searches and seizures are coextensive with those afforded by the Fourth Amendment. *See, e.g.*, *El-Amin v. Virginia,* 607 S.E.2d 115, 116 n.3 (Va. 2005). Furthermore, the court has long rejected the application of the exclusionary rule to searches or seizures that occurred in violation of the Virginia Constitution. *Hall v. Virginia*, 121 S.E. 154 (Va.

1924). Therefore, suppression motions in Virginia hinge on whether the police action violated a provision of the United States Constitution.

In a series of sharply divided 4-3 decisions, a majority of the court has adopted an expansive version of the Fourth Amendment that is contrary to this Court's jurisprudence. Last year, in *McCain v. Virginia*, 659 S.E.2d 512 (Va. 2008), the court, by a vote of 4-3, held that a *Terry* pat-down was improper under the Fourth Amendment. In *McCain*, a police officer observed two occupants of a vehicle walk up to a house and, in less than a minute, return to their vehicle. *Id.* at 514. This brief foray occurred around 3:00 a.m. *Id.* at 518. The officer observing the suspects "was familiar with the house because he was involved in a transaction 'months' earlier in which an informant made a controlled purchase of cocaine there." *Id.* at 514. In addition, the officer, who had patrolled this neighborhood for five years, was well aware that this particular neighborhood is "known for the drugs, known for shots fired, being called [in] all the time[,] . . . probably at least once a night shift." *Id.* at 515. Observing a traffic violation shortly after the vehicle drove off, the officer stopped the car. *Id.* The officer soon discovered that the driver's licenses of both the defendant and the driver of the vehicle were suspended and, therefore, the vehicle would need to be towed. *Id.* The officer then asked the defendant if he could perform a pat-down for the officer's safety. When the defendant refused, the officer nevertheless proceeded with a pat-down. *Id.*

The officer discovered an illegal gun, and the defendant was arrested. *Id.* The trial court and the Court of Appeals of Virginia upheld the officer's decision to conduct a frisk. *Id.* at 514.

A bare majority of the Supreme Court of Virginia overturned the trial court and the Court of Appeals of Virginia, concluding that the *Terry* pat-down performed during the traffic stop was invalid under the Fourth Amendment. *Id.* at 517-18. The court acknowledged that the stop itself was proper. *Id.* at 516. The court dismissed the defendant's quick entrance and exit, in less than a minute, from a house that previously had been the subject of a controlled buy of illegal drugs. The court was not swayed by the fact that the stop occurred in the early hours of the morning in a neighborhood known for its drug activity and violence—violence that was reported on a daily basis to the police. The majority characterized the objective facts as a "hunch" that did not rise to the level of reasonable articulable suspicion. *Id.* at 517.

The three dissenting Justices concluded that the officer had pointed to "specific and articulable" facts showing the suspects likely involvement in a drug transaction. *Id.* at 518. The dissenters wrote that "the confrontation between the police and the defendant occurred near 3:00 a.m., in a high crime and high drug area of the City of Danville where the police receive reports of 'shots fired . . . at least once a night shift.' [The officer who frisked the defendant for weapons] had participated months before in a

controlled drug buy in the very house he saw the defendant [and the person who accompanied him] . . . enter and within one minute return to their vehicle." *Id.* at 518. The dissent, citing to *Terry*, also stressed the imperative of officer safety in dangerous situations. *Id.* at 519.

It may be that the defendant merely was making a brief social call—to a drug house in a high crime neighborhood at 3:00 a.m. However, the officer was not unreasonable in concluding that the defendant likely was involved in a drug transaction.[3] Furthermore, the officer, who properly stopped the defendant's car, clearly was not unreasonable in performing a frisk for his own safety. *See United States v. Bustos-Torres*, 396 F.3d 935, 943 (8th Cir. 2005) ("it is reasonable for an officer to believe a person may be armed and dangerous when the person is suspected of being involved in a drug transaction"), and *United States v. Grogins*, 163 F.3d 795, 799 (4th Cir. 1998) ("the connection between illegal drug operations and guns in our society is a tight one").

Before that, in *Grandison v. Virginia*, 645 S.E.2d 298 (Va. 2007), the Supreme Court of Virginia, again voting 4-3, invalidated the fruits of a pat-down on

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[3] *See also Washington v. Doughty*, 201 P.3d 302 (Wash. Ct. App. 2009) (officers made a proper *Terry* stop after seeing the defendant enter a known drug house at 3:20 a.m. and leave after two minutes).

Fourth Amendment grounds.[4] The defendant was stopped around 5:00 a.m. because he was traveling in a car that had been reported stolen. *Id.* at 299. The stop occurred in a high crime area that was known for illegal drug activity. *Id.* Concerned for his safety, the officer conducted a pat-down for weapons. When the officer looked down, he noticed two things protruding from one of the defendant's pockets, in plain sight: first there was a drinking straw that had been cut, and second, a distinctively folded one-dollar bill. *Id.* The dollar bill was folded in an "apothecary fold."[5] The officer testified that he was familiar with the packaging and storage of drugs from his training and extensive experience as a police officer. Indeed, he was qualified as an expert in the packaging of drugs. In this capacity, the officer explained that "an apothecary fold is a method commonly used to conceal and carry contraband." The officer seized the dollar bill. *Id.* Upon laboratory testing, the substance found inside the bill proved to be cocaine. *Id.*

The Supreme Court of Virginia concluded that the officer lacked probable cause to seize the item, in violation of the Fourth Amendment. *Id.* at 299, 301. The court reasoned that the defendant

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[4] In the Court of Appeals of Virginia, a unanimous panel had upheld the search. *Grandison v. Virginia*, 630 S.E.2d 358 (Va. Ct. App. 2006).

[5] The officer described an apothecary fold as a dollar bill "folded three times lengthwise with the material, whatever it is that you're trying to hide on the inside, and then the two ends are folded over toward the middle." *Id.*

> had legal currency in his possession when [the police officer] made a *Terry* pat-down for weapons. At the time, all the officer saw was one-half of a folded dollar bill protruding from Grandison's watch pocket. . . . [T]he folded dollar bill was legal material with a legitimate purpose, even though [the officer], based on his experience, knew that dollar bills folded in a similar manner are often used as containers for drugs.

Id. at 300.

Three Justices dissented. Among other cases, the dissent cited *Texas v. Brown*, 460 U.S. 730 (1983) (plurality decision). *Grandison*, 645 S.E.2d at 322. In *Brown*, following a stop, police observed the defendant holding an opaque party balloon, knotted one-half inch from the tip. *Brown*, 460 U.S. at 733. In upholding the seizure of the item, this Court relied on the testimony of the police officer that "balloons tied in the manner of the one [in this case] were frequently used to carry narcotics." *Id.* at 743. This Court concluded that "the distinctive character of the balloon itself speaks volumes as to its contents—particularly to the trained eye of the officer." *Id.* The only difference between *Brown* and *Grandison* is that *Grandison* involved a distinctive "apothecary fold" of currency, whereas *Brown* involved a distinctive opaque balloon. In each instance, an experienced officer immediately recognized the item in plain view as indicative of drug possession. Notwithstanding the dissent and the Commonwealth's reliance on *Brown*, the majority opinion in *Grandison* does not discuss

Brown at all. And the majority simply ignored the cut straw, of the type commonly used to consume cocaine, that was found next to the folded dollar bill.[6] *Grandison*, 645 S.E.2d at 300-01.

In the wake of *Grandison*, the Supreme Court of Virginia, again by a 4-3 vote, decided *Snell v. Virginia*, 659 S.E.2d 510 (Va. 2008) (*per curiam*). In *Snell*, police lawfully detained a juvenile suspected of being a runaway. *Id.* at 510. During the detention, the police noticed and seized a dollar bill which was folded in a similar manner to the bill in *Grandison*. *Id.* Overturning the Court of Appeals of Virginia, the Supreme Court of Virginia held that *Grandison* controlled and the folded bill was insufficient to justify its seizure. *Id.* at 511. Writing for the three dissenting Justices, Justice Lemons noted that he personally examined the dollar bill at issue. *Id.* "It is tightly folded into a square measuring 1 inch by ¾ inch. By virtue of its compact folding, its thickness is significant. It is folded in a manner that would keep any powdered contents inside and unable to leak out because the fold encompasses all four sides." *Id.* The dissent criticized the majority for employing an incorrect heightened standard to invalidate the seizure. *Id.*

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[6] The Court of Appeals of Virginia, in affirming the propriety of the officer's actions, had noted that the cut straw was a further indication of drug use. *Grandison,* 630 S.E.2d at 363.

It is possible that the distinctively folded dollar bills in *Snell* and *Grandison* were innocent origami projects that just happened to be fashioned in the way that is commonly used to conceal drugs. It may also be that the suspects in *Terry*—who repeatedly walked up to a store window, looked inside, and then walked away—were merely hesitant shoppers. 392 U.S. at 6. However, as this Court repeatedly has made clear, the Fourth Amendment does not require certainty, nor does it require the police to exclude all possible hypotheses that the conduct is innocent before they can take action.

B. The current jurisprudence of the Supreme Court of Virginia stands in stark contrast to recent decisions from the Fourth Circuit.

In *Rudolph*, *McCain*, *Grandison,* and *Snell,* the Supreme Court of Virginia effectively raised the Fourth Amendment bar to a level that thwarts legitimate law enforcement activity and adversely impacts public safety. The Supreme Court of Virginia now precludes *Terry* stops or frisks if some innocent explanation can be devised for the suspect's conduct. These holdings are contrary to this Court's jurisprudence.

The Fourth Circuit, in contrast, repeatedly has stressed that "reasonable suspicion need not rule out all innocent explanations; it need only be a suspicion, albeit a reasonable one." *United States v. Black*, 525 F.3d 359, 365 (4th Cir. 2008) (upholding frisk for weapon). *See also United States v. McCoy*, 513 F.3d

405 (4th Cir.), *cert. denied*, 128 S. Ct. 2492 (2008) ("[R]easonable suspicion may exist even if each fact standing alone is susceptible to an innocent explanation. . . . Indeed, if, as the Supreme Court has stated, 'innocent behavior frequently will provide the basis for a showing of probable cause,' innocent behavior will frequently provide the basis for reasonable suspicion, a much less demanding standard, all the more.") (citation omitted); *United States v. Perkins*, 363 F.3d 317, 327 (4th Cir. 2004) ("[T]he mere fact that particular conduct may be susceptible of an innocent explanation does not establish a lack of reasonable suspicion."). Clearly, the Fourth Circuit has not embraced the heightened standard that is on display in the Supreme Court of Virginia's recent jurisprudence. This difference in approaches to *Terry* stops, if left uncorrected, will lead to forum shopping and to different outcomes based on the same or very similar facts.

C. The higher standard imposed by the Supreme Court of Virginia creates grave practical problems for law enforcement.

Virginia is not urging this Court to examine an arcane or infrequently litigated point of law. *Terry* stops are a critical tool for law enforcement. The proper articulation of the standard is vital not only to ensure that the laws are enforced and citizens are protected, but also to ensure the safety of the officers.

As the dissent pointed out below, the higher standard imposed by the Supreme Court of Virginia

> forecloses a vast range of legitimate investigatory practices. . . . 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, 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.

App. 18-19.

Although States are free to "impose higher standards on searches and seizures than required by the Federal Constitution," this must be accomplished by State law, *Virginia v. Moore*, 553 U.S. ___, ___, 128 S. Ct. 1598, 1604 (2008), not by ignoring the Fourth Amendment balance struck by this Court.

CONCLUSION

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

Respectfully submitted,

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