No. 09-102

NOV 3 - 2009

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

REPLY BRIEF OF PETITIONER

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REPLY BRIEF FOR PETITIONER

I. LOWER COURTS ARE DIVIDED IN THEIR APPROACH TO *TERRY* STOPS IN HIGH-CRIME NEIGHBORHOODS.

Although no two cases are exactly alike, most lower courts consistently have upheld *Terry*[1] stops on facts that are highly similar to those found in the case at bar: a police officer, while on patrol in an area plagued by crime, observes unusual behavior by a suspect, including furtive gestures, the suspect is parked in an unusual location, and leaves the area at the arrival of the police. *See, e.g., United States v. Dawdy,* 46 F.3d 1427 (8th Cir. 1995) and *United States v. Brown*, 209 Fed. Appx. 450 (5th Cir. 2006) (*per curiam*). However, some courts have reached contrary results on very similar facts. *See United States v. Hernandez*, 149 Fed. Appx. 705, 706 (9th Cir. 2005) and *California v. Perrusquia*, 58 Cal. Rptr. 3d 485 (Cal. Ct. App. 2007). Pet. 9-14.

The respondent attempts to distinguish this case from the many other cases where courts have upheld *Terry* stops based on similar facts. *See* Pet. 9-13. He notes that in some of the cases, the businesses were closed, whereas the gas station here was open, and, further, many of these stops occurred later than the one here. Resp. Br. 16. *Terry* itself refutes this argument. The stop in *Terry* occurred at 2:30 in the afternoon and circumstances indicated that the store

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[1] *Terry v. Ohio*, 392 U.S. 1 (1968).

was open. 392 U.S. at 6, 28. The shopping center here had been plagued by robberies as well as burglaries. If a store is closed and no customers are around, there is no possibility of a robbery. The fact that a business is closed may be germane if the officer suspects a burglary but not if the danger is that customers or the business itself might be robbed.

The respondent further contends that this case differs from cases cited by the Commonwealth because the area here "was not a prototypical high-crime area." Resp. Br. 17. The evidence unequivocally established that the specific shopping center where the stop took place had been the subject of "a lot of break-ins and robberies" that had prompted "a lot of extra patrol and a lot of overtime." *App.* 23. Clearly, this was a defined area that presented a heightened danger to the public. The violent crime specifically associated with this particular shopping center constituted an important contextual factor that informed the officer's suspicion at least as much as an amorphous description of an area as a high-crime neighborhood.[2] *United States v. Briggman*, 931 F.2d

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[2] In fact, the specificity of the area targeted by criminals, a particular shopping center, makes this contextual factor more significant than an amorphous description of a "high-crime area." *Cf. United States v. Montero-Camargo*, 208 F.3d 1122, 1138 (9th Cir. 2000) (*en banc*) (Courts "must be particularly careful to ensure that a 'high-crime' factor is not used with respect to entire neighborhoods or communities in which members of minority groups regularly go about their daily

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705, 707 (11th Cir. 1991) (officer's awareness of larcenies and robberies in a specific shopping center constituted a circumstance that supported the stop). The respondent's argument is without merit.

Finally, the respondent notes that the repeated furtive gestures the officer observed took place before the suspects noted the presence of the police, in contrast to some other cases where the furtive gestures took place after the suspects became aware of a police presence. Resp. Br. 17-18. It is true that in some cases, suspects made furtive gestures in apparent response to the arrival of the police. *See, e.g., United States v. Brown*, 209 Fed. Appx. 450 (5th Cir. 2006) (*per curiam*). The furtive gestures here, in context, were also suspicious. They took place inside an unusually parked car, with no lights on, at night, in an area that was plagued by robberies. The fact that an innocent explanation might exist for these gestures does not rule out the possibility that the suspects might be retrieving weapons or masks, commonly concealed under the seat, in anticipation of a robbery. The officer properly took note of these furtive gestures in his reasonable suspicion calculus.

The decision of the court below contrasts markedly with the holdings of other courts. Pet. 9-13. Because the police make *Terry* stops with great frequency, particularly as they seek to restore high-crime

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business, but is limited to specific, circumscribed locations where particular crimes occur with unusual regularity.").

areas to normalcy, it is of vital importance that law enforcement and the courts know what is permissible and what is out of bounds. The Court should grant certiorari to provide needed clarity in the law.

II. SPECIFIC, ARTICULABLE FACTS KNOWN TO THE OFFICER JUSTIFIED A BRIEF DETENTION TO DETERMINE WHETHER CRIMINAL ACTIVITY MAY BE AFOOT AND THE COURT ERRED IN HOLDING OTHERWISE.

The shopping center where the stop took place was specifically targeted by the police because it had "experienced a significant rise in criminal activity." *App.* 11. As a consequence, police had "beefed up a lot of extra patrol and a lot of overtime" to combat the "break-ins and robberies" that were occurring there. *App.* 23. The officer observed an unusually parked car: it was not in a parking space, although parking spaces were available. *App.* 24. It was parked in the back of the gas station, in a low traffic area. The officer knew that customers did not use the back door at night. *App.* 24, 25.[3] The officer observed furtive movements: the occupants of the car "bent down a

[3] The officer learned after the stop that the back door to the gas station is locked at night. However, he knew from observation at the time he made the stop that "no one enters" the "back of the building at nighttime." Tr. 07/26/06 at 34. Instead, customers "go through the front door." *Id.* at 35.

couple of times" and it "looked like they were reaching for stuff." *App.* 24. Finally, when the officer circled around in his marked police cruiser towards the suspect vehicle, the suspects began to drive away. *App.* 25.

None of these facts establish *conclusively* that the defendants were about to engage in criminal activity, but that is not what the Fourth Amendment requires. A stop is proper if the officer possesses *articulable facts*, rather than mere hunches, that criminal activity may be afoot. *United States v. Sokolow*, 490 U.S. 1, 7 (1989); *United States v. Arvizu*, 534 U.S. 266, 273-74 (2002). The reasonable suspicion standard "requires a showing considerably less than preponderance of the evidence." *Illinois v. Wardlow*, 528 U.S. 119, 123 (2000). The defendant's departure, just as the officer was circling his patrol car around the building and back toward the suspect car, may have been either an innocent coincidence or a desire to elude the police. Perhaps the defendant and his companion were repeatedly bending down inside the automobile because they could not find something rather than to retrieve concealed items such as weapons. *App.* 26. Perhaps they parked in an unusual location to avoid being seen or perhaps that is simply where they chose to park. The entire point of *Terry* stops is to enable the police to make a brief stop to maintain the status quo and gather more

information. *Adams v. Williams*, 407 U.S. 143, 146 (1972).[4]

The respondent finds it significant that the officer observed the activity inside the car for "only a few seconds." Pet. Br. 12. This argument is a red herring. It is the quantum of articulable facts that matters, not the duration of the officer's observations. The officer observed the defendant's head move down and back up several times in a car with its lights off. In isolation, that fact may not be particularly significant, but when coupled with the odd manner the car was parked, the robberies that had taken place in that specific shopping center, and the fact that the vehicle drove away just as the officer was circling back toward the suspect vehicle, all of these facts combined rose to the level of reasonable suspicion.

The respondent also contests the statement by the majority opinion in the Court of Appeals of Virginia that the car was positioned in a manner "well-suited for a quick getaway." *App.* 26. He notes that there was a speed bump directly in the path of the vehicle. Resp. Br. 11. However, as the

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[4] The respondent suggests that, because the suspect automobile was leaving, any threat had "dissipated." Resp. Br. 14. Of course, nothing prevents the suspects from returning to the location once the officer is gone. Furthermore, if leaving the scene terminated the reasonable suspicion needed for a stop, sudden flight would dissipate suspicion rather than heighten it. That is not the law. *Wardlow*, 528 U.S. at 125.

photographic exhibits show, the painted speed bump strip is very low to the ground and would have presented no obstacle to a quick getaway.

The respondent dismisses as an "assumption" the argument that the officer suspected a robbery was about to take place. Resp. Br. 12.[5] In context, the officer's motivation for the stop is clear: he mentioned the "break-ins" and "robberies" that had taken place in the area, and after observing the defendant moving around inside the car, he decided to "look inside the building" to "make sure everything was fine." Tr. 07/26/06 at 17. Although unstated, the obvious reason for looking inside was to ensure that no robbery was taking place. The officer's motivation for making the stop was not some inchoate suspicion but rather a concern that a robbery was unfolding or was about to take place.

Finally, the respondent argues that "there is no evidence that [respondent] left the lot in response to [the officer's] presence." Resp. Br. 12. There will seldom be direct evidence that the suspect's departure was caused by the police. The timing of the suspect vehicle's departure, just as the marked police vehicle was circling back, is a factor the officer could consider, along with the other facts: the vehicle was oddly parked, at night, in an area that had

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[5] At the preliminary hearing, the officer expressly testified that "maybe they had – they were trying to rob the [gas station.]." That transcript is in the record. Tr. 03/10/06 at 5.

experienced robberies and other crime, and the suspects were making strange movements within the car. *See Briggman*, 931 F.2d at 707 (timing of defendant's departure from parking lot, just as officer was approaching in his vehicle, was suspicious); *United States v. Dawdy*, 46 F.3d 1427, 1428 (8th Cir. 1995) (same).

The decision below will needlessly thwart the crucial police function of investigating and preventing crime before citizens are victimized by criminals. As an unprecedented coalition of Virginia's law enforcement groups explain in their amicus brief, the decision in this case "presents serious practical difficulties for Virginia law enforcement officers" and "injects uncertainty and confusion into the daily activities of law enforcement officers." *See* Amicus brief filed by the Virginia Association of Commonwealth's Attorneys, Virginia Association of Chiefs of Police, Virginia Sheriff's Association, Virginia State Police Association and Fraternal Order of Police of Virginia at 6. Given the recurring nature of factual scenarios such as the one at issue here, as well as the inconsistent outcomes in the lower courts, this Court should grant the petition and correct the error below.

III. A PATTERN OF DECISIONS THAT RAISES THE FOURTH AMENDMENT BAR ABOVE WHAT THIS COURT REQUIRES DESERVES THIS COURT'S REVIEW.

The Commonwealth well understands that this Court is not a court of error correction. However, in addition to the reasons mentioned above, review is warranted here to correct a recent stream of erroneous Fourth Amendment decisions. In these decisions, the Supreme Court of Virginia, often by a bare majority, effectively and consistently has raised the bar above and beyond what this Court has required. Pet. 19-28.[6] The respondent does not contest this development. Instead, the respondent makes two largely irrelevant points. First, the respondent contends that the court below has correctly *articulated* the standard in a number of *Terry* stop decisions. Second, the respondent notes that the court below correctly upheld a *Terry* stop in 2003 and in 1998.

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[6] In one of those decisions, Virginia was able to obtain redress in this Court: *Virginia v. Moore*, 128 S. Ct. 1598, 1608 (2008) (arrest proper under the Fourth Amendment when it is based on probable cause; Constitutional standard does not rise based on additional limitations provided by state law). More recently, Virginia failed to garner the necessary votes for certiorari. *See Harris v. Virginia*, 668 S.E.2d 141 (Va. 2008) (holding, contrary to majority of courts, that traffic stop was improper based on anonymous tip of drunk driving because officer failed to observe erratic driving) (*cert. denied,* U.S. Oct. 20, 2009) (No. 08-1385) (Roberts, C.J., joined by Scalia, J., dissenting from denial of certiorari).

First, paying lip service to the appropriate standard from this Court does not matter if the application of the standard plainly departs from this Court's Fourth Amendment decisions. In recent decisions such as *Grandison v. Virginia*, 645 S.E.2d 298 (Va. 2007) and *Snell v. Virginia*, 659 S.E.2d 510 (Va. 2008) (*per curiam*), the court properly cited the correct standard, and proceeded to ignore it. In *Grandison* and *Snell*, the court held that a distinctive "apothecary fold" of currency, commonly used to conceal drugs, was insufficient to give rise to probable cause. *Grandison* and *Snell* simply cannot be squared with *Texas v. Brown*, 460 U.S. 730 (1983) (plurality decision) (distinctively tied balloon commonly used to conceal narcotics provided probable cause). In *McCain v. Virginia*, 659 S.E.2d 512 (Va. 2008), the court held that police officers who had observed a suspected drug transaction, around 3:00 a.m., in a high-crime neighborhood, and who had made a proper stop of the vehicle, could not perform a pat-down for officer safety. This holding cannot be reconciled with *Terry*, 392 U.S. at 21, 27 (pat down for safety permitted if officer reasonably believes suspects are armed and dangerous).

Second, the respondent offers two correctly decided decisions from the Supreme Court of Virginia upholding *Terry* stops. *See Whitfield v. Virginia*, 576 S.E.2d 463 (Va. 2003); *Parker v. Virginia*, 496 S.E.2d 47 (Va. 1998). Relying on these cases, the respondent argues that the court below has correctly decided *Terry* stop cases. The Commonwealth does not

dispute that those cases, one decided six years ago and the other ten years ago, were correctly decided. The problem for Virginia law enforcement is the more recent but consistent pattern whereby the court below imposes a higher standard than what the Fourth Amendment requires. *Terry* stops are but the latest area of Fourth Amendment law to fall to the trend of a new and improperly heightened standard.

Certiorari is warranted to ensure that this Court's judgments are not consistently disregarded.

CONCLUSION

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

Respectfully submitted,

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