IN THE

SUPREME COURT OF VIRGINIA

RECORD NO. 092561

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

COREY TAYVON SMITH,

Appellee.

BRIEF OF THE COMMONWEALTH

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STATEMENT OF THE CASE

Upon a conditional guilty plea under Virginia Code § 19.2-254, Corey Tayvon Smith was convicted of felon firearm possession in violation of Code § 18.2-308.2 in the Circuit Court of the City of Richmond. The date of the offense in this matter was September 18, 2007. On April 15, 2008,

Smith was sentenced to serve two years in prison. (App. 4-5). In proof of the predicate prior felony, the Commonwealth relied upon two previous convictions on June 21, 2007 for felon firearm possession and possession of cocaine with intent to distribute in violation of Code § 18.2-248. The offense date in the felon firearm possession case was October 18, 2006, while the offense date in the cocaine possession with intent case was March 13, 2007. (App. 55-57).

On October 10, 2008, the Court of Appeals of Virginia awarded Smith an appeal on the question of whether the police had reasonable suspicion that Smith was engaged in criminal activity and was armed and dangerous. On October 6, 2009, the Court of Appeals reversed Smith's felon firearm possession conviction. Smith v. Commonwealth, 55 Va. App. 30, 683 S.E.2d 316 (2009). The Court of Appeals held that Richmond police unlawfully frisked Smith in reliance on an alert placed in the Richmond police computer database, known as "PISTOL" (Police Information System Totally on Line). The alert said Smith was probably armed and a narcotics seller or user. Id. at 34, 683 S.E.2d at 318.

The Court of Appeals concluded that no reasonable police officer would have relied on the PISTOL alert to conduct a protective frisk because

the alert was grounded on prior arrest warrants that were "stale" and "nonspecific." [1]

Additionally, while characterizing reliance on the PISTOL alert by Richmond Police as an "honest, but erroneous legal conclusion," the Court of Appeals further concluded that "despite the breadth" of some of the United States Supreme Court's language in Herring v. United States, 129 S. Ct. 695 (2009), the good faith exception did not apply "beyond the bounds previously defined." Smith, 55 Va. App. at 52, 683 S.E.2d at 327. Thus, under the exclusionary rule, the Court held that suppression of the firearm recovered from Smith's pocket was necessary to deter future police misconduct. Id.

This Court awarded an appeal on July 27, 2010.

ASSIGNMENTS OF ERROR

I. IN RULING THAT POLICE MUST HAVE A "CONTEMPORANEOUS INDICATION" SMITH WAS ARMED AND DANGEROUS IN ADDITION TO THE DATABASE ALERT BASED ON TWO EARLIER ARREST WARRANTS FOR FELON FIREARM POSSESSION AND DISTRIBUTION OF CRACK COCAINE, THE COURT OF

[1] The Commonwealth also relied on these convictions in this case to prove Smith's prior felony. (App. 55-57).

APPEALS MISAPPLIED THE TEST OF SUFFICIENT SUSPICION TO FRISK REQUIRED UNDER TERRY v. OHIO, 392 U.S. 1 (1968).

II. IN EVALUATING THE REASONABLENESS OF SMITH'S TERRY FRISK, THE COURT OF APPEALS FAILED TO BALANCE THE PUBLIC'S INTEREST IN OFFICER SAFETY AGAINST SMITH'S RIGHT TO BE PROTECTED FROM AN UNWARRANTED FRISK.

III. THE COURT OF APPEALS ERRED BY FAILING TO GIVE DEFERENCE TO THE TRIAL COURT'S FINDING THAT THE DATABASE INFORMATION WAS RELIABLE AND THAT POLICE COULD VALIDLY RELY UPON IT FOR OFFICER SAFETY.

IV. IN HOLDING THAT TRESPASSING IS A MINOR OFFENSE AND TRESPASSERS ARE UNLIKELY TO BE ARMED, THE COURT OF APPEALS CONDUCTED A TOTALITY OF THE CIRCUMSTANCES ANALYSIS WITHOUT EVALUATING A PROPER BALANCE BETWEEN THE DANGER TO POLICE AND THE INTRUSION UPON SMITH.

V. THE COURT OF APPEALS ERRED BY LIMITING IMPUTATION OF COLLECTIVE KNOWLEDGE PRINCIPLES UNDER UNITED STATES v. HENSLEY, 469 U.S. 221 (1985) TO THE INFORMATION KNOWN TO THE POLICE OFFICER ENTERING THE INFORMATION INTO THE POLICE DATABASE.

VI. THE COURT OF APPEALS ERRED BY RULING THAT AN ELEVEN-MONTH-OLD OFFENSE DATE FOR FELON FIREARM POSSESSION COUPLED WITH A SIX-MONTH-OLD OFFENSE DATE FOR POSSESSING COCAINE WITH INTENT TO DISTRIBUTE WAS TOO STALE TO JUSTIFY A PROTECTIVE FRISK BY POLICE.

VII. THE COURT OF APPEALS ERRED BY RULING THAT PRINCIPLES CONCERNING THE EXCLUSIONARY RULE UNDER HERRING v. UNITED STATES, 129 S.CT. 695 (2009) DO NOT APPLY IN A PROTECTIVE FRISK CONTEXT.

STATEMENT OF FACTS

On September 18, 2007, Richmond Police Officers Robert Hedman and Steven Moore were on duty patrolling Hillside Court, a public housing property owned by the Richmond Redevelopment and Housing Authority. The officers were assigned to the RRHA property to "enforce trespassing laws." (App. 13).

The officers pulled over a black Chevy Impala without a brake light. (App. 45). At the time of the stop, there were "several passengers in the car." (App. 45). Corey Tayvon Smith, the defendant, was the back seat passenger on the driver's side. (App. 12).

At the suppression hearing on February 21, 2008, Officer Hedman testified that police collected identification from everyone in the car, including Smith, and ran it through the Richmond police database, PISTOL. (App. 14). Accessed from a Richmond police patrol car, the PISTOL

database revealed an “alert” for Smith. Officer Hedman testified that the alert was a warning to any Richmond police officer encountering Smith that he was “probably armed and a known narcotics seller or user.” (App. 13).

Detective Timothy Neville testified at the suppression hearing that the source of the alert pertaining to Smith was a warrant he had obtained from the magistrate for Smith on another felon firearm possession violation on October 18, 2006. (App. 21). Neville explained that he “gave the probable cause and took out the warrant” on the October 18, 2006 offense, but that Officer Harris entered the information into the PISTOL database when he arrested Smith on the warrants. (App. 20). The arrest date was not established by the record and Officer Harris did not testify at the suppression hearing.

Officer Hedman further testified that Richmond police rely on the PISTOL database as an “officer safety issue.” (App. 13). He explained that Richmond police officers encounter “people who are probably armed [and] narcotics sellers/users” and that they enter “all that information” into the PISTOL database. (App. 13). Once Officers Hedman and Moore were apprised from the PISTOL alert that Smith was probably armed and a narcotics seller or user,

> we immediately addressed that, because, as I stated, for officer safety issues, we have to get out [alive]. And our attention was drawn to [Smith] because of the weapon. It was more of an officer safety issue rather than a brake light being out.

(App. 16).

After receipt of the PISTOL alert, Officer Moore asked Smith to get out of the car and Smith complied. (App. 14). The officer asked Smith if he had a weapon. (App. 14). In response, Smith said he did not have a "weapon or drugs." (App. 14). Officer Moore then said he would pat Smith down to "make sure," but Smith refused, stating, "You're not going to search me." (App. 14).

During the frisk, Officer Moore felt what he thought was a gun in Smith's front left pocket. (App. 14). Smith claimed it was a lighter, but Moore pulled a "two-shot Derringer" out of it. (App. 14-15; 45).

Defense counsel first objected to police reliance on the PISTOL database to justify the protective frisk because it "has to be reasonable suspicion of present criminal activity." (App. 27). If the officer had "put out the bulletin and on there saying, I just saw him get in the car with a gun, I don't think I would have the same argument." (App. 27).

In response, the prosecutor explained that the PISTOL database "is the [Richmond] police's own system. You know, there is inherent [reliability] to that [and] that they should be able to rely on [PISTOL] when they are out in the field, doing their work." (App. 26).

Expanding on the prosecutor's point, the trial judge observed "And that [Richmond police] should be able to rely on [PISTOL], not for the purposes of suspecting necessarily that there is criminal activity, but in order to protect themselves." (App. 26).

In denying the motion to suppress the firearm on March 12, 2008, the trial court ruled thusly:

> The Court believes that under the circumstances of the search, the stop being appropriate, and there not being any challenge to the stop, and the officer receiving information with regards to the fact that the person had been known to carry firearms, did not act impermissibly in conducting a pat-down in the search, and the same was appropriate for purposes of the officer's safety.

(App. 34).

ARGUMENT

THE COURT OF APPEALS ERRED BY HOLDING THAT THE PISTOL DATABASE ALERT WARNING RICHMOND POLICE OFFICERS SMITH WAS PROBABLY ARMED AND A NARCOTICS SELLER OR

USER WAS INSUFFICIENT TO JUSTIFY A PROTECTIVE FRISK.

In reversing Smith's conviction for felon firearm possession, the Court of Appeals sustained Smith's argument at trial that the weapons frisk by police was illegal because the PISTOL alert was "put on there from an incident a year ago." (App. 23). The Court of Appeals agreed that to uphold Smith's Terry frisk, would be to allow police to frisk anyone "that's been convicted of a firearm offense within a certain period of time without any other indication of suspicion." (App. 23).

The Court of Appeals also ruled that the PISTOL alert was based on "vague" as well as "stale arrest information" that was "nonspecific." Absent some "contemporaneous indication" Smith was armed and dangerous, the PISTOL alert alone was insufficient to permit a reasonable officer to conduct a protective frisk. Smith, 55 Va. App. at 328, 683 S.E.2d at 37-38.

This ruling by the Court of Appeals wrongly disregards the danger posed to Richmond Officers Hedman and Moore as they went about their duty to protect residents of Hillside Court from trespassers. Based on this flawed view of the record and a misapplication of Terry v. Ohio, the Court of

Appeals has imposed a much heavier burden on police to justify a protective frisk than warranted by the Fourth Amendment.

In the landmark case of Terry v. Ohio, 392 U.S. 1 (1968), the Supreme Court held that courts must measure the reasonableness of a weapons frisk, incident to a lawful investigatory stop, by the objective standard of a reasonably prudent person. Importantly, the inferences and deductions made by a trained officer "might well elude an untrained person." United States v. Cortez, 449 U.S. 411, 418 (1981). And, this "process does not deal with hard certainties, but with probabilities." Id. Law enforcement officers, like jurors, are permitted to "formulate certain common-sense conclusions about human behavior." Id.

It is "too plain for argument" that the public's interest in officer safety "is both legitimate and weighty." Pennsylvania v. Mimms, 434 U.S. 106, 110 (1997). See also Maryland v. Wilson, 519 U.S. 408, 413 (1997) (noting the "weighty interest in officer safety"). In particular, "roadside encounters between police and suspects are especially hazardous." Michigan v. Long, 463 U.S. 291, 298 (1983).

The "danger to an officer from a traffic stop is likely to be greater when there are passengers in addition to the driver in a stopped car."

Wilson, 519 U.S. at 414. Traffic stops are "especially fraught with danger to police officers." Arizona v. Johnson, 129 S.Ct. 791, 786 (2009). See also United States v. Stanfied, 109 F.3d 976, 978 (4th Cir.1997) ("Law enforcement officers literally risk their lives each time they approach occupied vehicles during the course of investigative stops"); United States v. Bullock, 510 F.3d 342, 349 (D.C. Cir. 2007) ("Statistics show that traffic stops continue to be extraordinarily dangerous to the police officers who risk their lives to protect the public"); United States v. Holmes, 385 F.3d 786, 791 (D.C. Cir. 2004) ("approaching a stopped car-particularly when there is reason to believe the driver or occupants may be armed—is one the more perilous duties imposed on law enforcement officials"); United States v. Moorefield, 111 F.3d 10, 13 (3d Cir. 1997) ("traffic stops are dangerous encounters that result in assaults and murders of police officers").

> Every traffic stop . . . is a confrontation. The motorist must suspend his or her plans and anticipates receiving a fine or perhaps even a jail term. That expectation becomes even more real when the motorist or passenger knows there are outstanding warrants or current criminal activities that may be discovered during the course of the stop. Resort to a loaded weapon is an increasingly plausible option for many motorists to escape those consequences, and the officer, when stopping a car on a routine traffic stop, never knows in advance which

> motorists have that option by virtue of possession of a loaded weapon in the car.

United States v. Holt, 264 F.3d 1215, 1223 (10th Cir. 2001) (*en banc*).

Significantly, in evaluating the objective reasonableness under the totality of the circumstances analysis under Terry, the Court of Appeals never acknowledged, much less considered, the public's "legitimate and weighty" interest in officer safety.

Further, the Court's observation that trespassing is only a "minor offense," along with the point that nothing in the record supports an "inference indicating trespassers in general or trespassers on this property, in particular, were likely to be armed," shows a misunderstanding of the circumstances in which the officers acted and a failure to recognize that all traffic stops are dangerous. Id. at 42, 683 S.E.2d at 322. See Foley v. Connelie, 435 U.S. 291, 298 (1978) (noting the "number of police officers wounded or killed in the process of making inquiry into borderline, seemingly minor violation situations" involving traffic infractions). Short of suggesting that Officers Hedman and Moore should have been "especially cautious in their dealings with Smith" after the alert, the Court of Appeals

did not identify any other protective measures the officers might have taken. Smith, 55 Va. App. at 328, 683 S.E.2d at 38.

A recent Supreme Court case, Arizona v. Johnson, 129 S.Ct. 781 (2009) confirms the reasonableness of Smith's frisk by the officers for weapons. Significantly, the Supreme Court stated at the outset that Terry v. Ohio is still the "leading decision" to test sufficient suspicion that an individual is armed and presently dangerous. Johnson, at 784. Further, the Supreme Court ruled that police, following a lawful traffic stop, "need not have, in addition, cause to believe any occupant of the vehicle is involved in criminal activity" before conducting a lawful protective frisk. Id.

Like Smith, Johnson was a backseat passenger in a car lawfully stopped after a license plate check revealed that the car's registration had been suspended for an "insurance-related violation." Id. Johnson, like Smith, was compliant when police asked him to step out of the car. Neither man was jittery, nervous, or evasive.

In talking to Johnson, the officer noticed he was wearing a blue bandana typical of clothing signifying Crips gang membership. Johnson said he was from Eloy, Arizona, which was known to the officer as a Crips gang home base, and that he had "served time in prison for burglary and

had been out about a year." Id. at 785. Suspecting Johnson was armed, the Arizona officer patted Johnson down and felt the butt of a gun. At that point, Johnson struggled and was handcuffed. Like Smith, he was charged and convicted of felon firearm possession. Id. at 698.

In reversing the Arizona Court of Appeals's ruling that Johnson had been illegally subjected to a weapons frisk, the Supreme Court remanded the matter to the Arizona Court of Appeals to consider the question of whether there was sufficient suspicion to frisk, but observed that the Arizona officer "surely was not constitutionally required to give Johnson an opportunity to depart the scene after he exited the vehicle without first ensuring that, in so doing, [the officer] was not permitting a dangerous person to get behind her." Id. at 788.

On May 21, 2009, on remand from the Supreme Court, the Arizona Court of Appeals considered the indicators noted by the Supreme Court justifying the protective frisk and concluded there was sufficient suspicion.

> Here, [Officer] Trevizo had encountered an admitted felon carrying a police scanner, who was dressed in clothing consistent with membership in a particular gang, in an area where the gang was active. These facts, combined with her knowledge that gang members often carry firearms and that police scanners are used to evade police, justified Trevizo's conclusion that Johnson might have been armed and

> dangerous. Thus, her pat down search of Johnson was proper under the Fourth Amendment.

State v. Johnson, 220 Ariz. 551, 556, 207 P.3d 804, 809 (2009). After that, the Supreme Court of Arizona denied review by order on February 4, 2010. (Record No. CR-09-0256-PR).

The facts in this case are as strong as those in Johnson. Specifically, rather than reliance on information from Smith himself about his criminal history or a tipster that Smith habitually carried a gun and sold cocaine, the PISTOL alert was derived from Detective Neville's own dealings with Smith in Richmond for felon firearm possession and cocaine use and distribution. Noteworthy is that Smith does not challenge the accuracy of the information obtained by Detective Neville in obtaining the warrants or its sufficiency to establish probable cause.

In other words, the record shows that the PISTOL alert was not the result of Smith's reputation in the community for carrying a gun and using cocaine, but was grounded on two arrest warrants for felon firearm possession and cocaine possession with intent to distribute, necessarily based on probable cause.

Further, Johnson's disclosure to police that he had spent time in prison for burglary and had been out a year, is less probative of Johnson being armed and dangerous than the more objectively credible PISTOL alert that Smith was probably armed and a narcotics seller or user generated by arrest warrants. The "right to frisk for weapons during a permissible investigatory stop is frequently automatic where a police officer has a specific and objectively credible reason to believe that the suspect is armed." See State v. Valentine, 636 A.2d 505, 545 (1994) (citing Adams v. Williams, 407 U.S. 143, 146-147 (1972)).

Further, in its analysis of the totality of the circumstances to justify the frisk, the Court of Appeals's observation that Officers Hedman and Moore did not know whether Smith would later be convicted on the warrants is simply legally irrelevant. Smith, 55 Va. App. at 44, 683 S.E.2d at 323. Under Terry, a police officer "need not be absolutely certain that the individual is armed; the issue is whether a reasonably prudent man in the circumstances would be warranted in the belief that his safety or that of others was in danger." 392 U.S. at 27.

In its totality of the circumstances analysis, the Court of Appeals wrongly disregarded the fact that the source of the PISTOL alert was an

arrest warrant for felon firearm possession in combination with that of cocaine distribution. See United States v. Bustos-Torres, 396 F. 3d 935, 943 (8th Cir. 2005) ("weapons and violence are frequently associated with drug transactions"); United States v. Trullo, 809 F.2d 108, 114 (1st Cir. 1987) ("concealed weapons are part and parcel for the drug trade"); State v. Richardson, 456 N.W. 2d 830, 836 (1990) ("drug dealers and weapons go hand in hand"). Here, the Court of Appeals certainly set the test of sufficient suspicion to frisk too high.

STALENESS

In ruling that the eleven-month-old arrest for felon firearm possession and the six-month-old prior arrest for cocaine possession with intent to distribute were too stale to justify a protective frisk, the Court of Appeals substituted its judgment of Smith's dangerousness for that of Officers Hedman and Moore. Smith, 55 Va. App. at 47, 683 S.E.2d at 325.

The issue of staleness of information typically arises in the context of whether an affidavit established probable cause for the issuance of a search warrant. Even under that considerably more demanding standard than the reasonable suspicion test established under Terry, this Court has repeatedly recognized there is no fixed period beyond which information is

stale as a matter of law. See, e.g., Johnson v. Commonwealth, 259 Va. 654, 670-671, 529 S.E.2d 769, 778 (2000); Huff v. Commonwealth, 213 Va. 710, 715-716, 194 S.E.2d 690, 695 (1973).

In the instant case, the officers needed reasonable suspicion Smith was armed and dangerous, not probable cause, and certainly did not have to know he was carrying a weapon beyond a reasonable doubt. Considering that the PISTOL alert was based on the same crime in which the officers were confronted at the time, coupled with a cocaine possession with intent charge, the chances were excellent Smith was armed and dangerous on September 18, 2007 in Hillside Court.

The Eighth Circuit's reasoning in United States v. Maxim, 55 F.3d 394 (8th Cir. 1995), bears upon this issue. There, the Court upheld the defendant's convictions for felon firearm possession and illegal possession of a machine gun, rejecting his claim that the information contained in the affidavit was too stale to provide probable cause for the search of his house.

> Maxim accurately points out that the information provided by [one informant] in support of the affidavit was three years old, and that the information provided by [a second informant] was at least four months old. We do not, however, view this delay factor and issue as dispositive. 'A delay in executing a search

> warrant may make probable cause fatally stale. But the lapse of time is not always the controlling factor. Other factors must also be considered, including the nature of the criminal activity involved and the kind of property subject to the search.' 'There is no bright-line test for determining when information is stale.' Probable cause 'cannot be quantified by simply counting the number of days between the occurrence of the facts supplied and the issuance of the affidavit. Time factors must be examined in the context of a specific case and the nature of that crime under investigation.'
>
> Several factors in this case minimize the importance of the lapse of time between the observations supporting the affidavit and the issuance of the warrant. The nature of Maxim's criminal activities alone makes the date of [the first informant's] information less significant, [the federal statutes under which the defendant was convicted] are both continuing offenses because the 'federal gun control statute punishes the possession and not merely the acquisition of a firearm.'
>
> The nature of the evidence sought in this case also minimizes the importance of the time lapse. The affidavit was also supported by Special Agent Wactor's statement that, based on his professional experience, survivalists and other firearm enthusiasts such as Maxim tended to hold onto their firearms for long periods of time, often as long as ten or twenty years.

55 F.3d at 397. See also United States v. Pierre, 484 F.3d 75, 83 (1st Cir. 2007) (in evaluating a claim of staleness, courts do not measure timeliness of information by counting number of days, but assess the nature and characteristics of the suspected criminal activity, and the likely endurance of the information).

IMPUTATION OF COLLECTIVE POLICE KNOWLEDGE

While the Court of Appeals properly ruled that imputation of collective knowledge principles under United States v. Hensley, 469 U.S. 221 (1985) apply in a protective frisk context, the Court of Appeals wrongly limited that imputed knowledge to that of the officer who actually executed the arrest warrants and entered that information into the PISTOL alert database. According to the Court of Appeals, Detective Neville's knowledge in obtaining the warrant for Smith's felon firearm possession on October 18, 2006 could not be lawfully imputed to Officers Hedman and Moore. Smith, 55 Va. App. at 43, 683 S.E.2d at 323.

Nothing in the case law supports the view that collective knowledge by police officers, especially those working in the same police department, must be limited in this way. See Whiteley v. Warden, 401 U.S. 560, 568 (1971) (in finding probable cause for defendant's arrest, "police were entitled to act on the strength of [a] radio bulletin" from other officers); United States v. Perkins, 994 F.2d 1184 (1993) ("This court recognizes the general rule that 'probable cause for arrest may emanate from collective police knowledge . . . ."); United States v. Edwards, 885 F.2d 377, 383 (1989) ("We need not decide whether either [officer] had sufficient

knowledge alone to arrest Edwards because the concept of imputed knowledge means that [the officers] could rely upon the information they possessed as a team in executing the arrest of Edwards"); United States v. Lomas, 706 F.2d 886, 892 (1983) ("An individual officer in a coordinated investigation need not have personal knowledge of all the relevant facts to effect an arrest. It is sufficient if the pool of objective data possessed by the group of agents acting in concert supplies the requisite probable cause").

Moreover, Hensley considered whether a flyer justified a Terry stop, while the issue here concerns a protective frisk following a lawful Terry stop. Noteworthy is that the Hensley flyer was not based on an arrest warrant, but on a report from police in a neighboring jurisdiction that an aggravated robbery had been committed and Hensley was involved. The flyer described Hensley, gave the date and location of the crime, and cautioned police to use caution as Hensley "was armed and dangerous." Hensley, 469 U.S. at 223. Collective knowledge of the police officers acting on the flyer was not limited to the person who entered the "wanted flyer" into the teletype stating that Hensley was wanted for questioning and investigation.

Thus, not only was a Terry stop, rather than a frisk, at issue in Hensley, the information in the flyer was not based on an arrest warrant, nor was the collective knowledge from the flyer arbitrarily restricted to information contributed by one officer. If a Terry stop may be justified under the facts and circumstances of Hensley, then surely a protective frisk, based on a PISTOL database alert by officers to officers in the same department, is likewise justified.

Applicability of the Exclusionary Rule Under Herring v. United States

Finally, in addition to holding that the PISTOL alert was based on an arrest warrant for felon firearm possession that was too stale to justify a frisk, as well as limiting imputation of collective police knowledge about Smith's dangerousness to the officer who executed the arrest warrants and entered the information into the PISTOL database, the Court of Appeals characterized the action taken by Officers Hedman and Moore in conducting the frisk as "honest," but "erroneous." Smith, 55 Va. App. 52, 683 S.E.2d at 327.

Nevertheless, in conflict with the Supreme Court's recent holding in Herring v. United States, 129 S.Ct. 695 (2009), the Court of Appeals decided that the exclusionary rule applied to suppress the firearm

recovered from Smith's pocket because the frisk was "unreasonable" conduct absent "contemporaneous" corroboration of Smith's dangerousness. Id. at 54, 683 S.E.2d at 328.

Under Herring, the sole justification for exclusion of evidence improperly obtained by police is to deter "flagrant and deliberate" violations of rights by police. "[T]he exclusionary rule is not an individual right and applies only where it results in appreciable deterrence [of police misconduct]." 129 S. Ct. at 700. Since the trial court ruled that Officers Hedman and Moore did act reasonably in relying on the PISTOL alert to "protect themselves," this "principled disagreement" by the Court of Appeals "militates against the conclusion" that Officers Hedman and Moore's conduct was blameworthy, or even unreasonable. See Logan v. Commonwealth, 53 Va. App. 520, 527, 673 S.E.2d 496, 499 (2009) ("We can hardly expect law enforcement officers to predict which contesting jurist view will ultimately prevail and become binding precedent").

Additionally, the Court of Appeals decided, in part, that Herring was also not applicable in the instant case because the Supreme Court did not find any good-faith exception in Arizona v. Gant, 129 S.Ct. 1710 (2009). In that case, the Supreme Court rejected a traditionally broad view of New

York v. Belton, 453 U.S. 454 (1981) that permitted a search of a car even when the recent occupant was handcuffed and sitting in a police patrol car.

Importantly, Arizona prosecutors never raised the applicability of the good-faith exception in either the United States Supreme Court or the Supreme Court of Arizona. Specifically, the Supreme Court of Arizona held "The State has advanced no alternative theories justifying the warrantless search of Gant's car, and we note that no other exception to the warrant requirement appears to apply." State v. Gant, 162 P.3d 640, 646 (2007).[2]

Applying the exclusionary rule in this case would have no deterrent effect. At the time Officers Hedman and Moore frisked Smith, their objective was to "get out" of Hillside Court and the encounter with Smith without being shot. (App. 16). The PISTOL alert was generated from other Richmond officers encountering Smith for the same crime, felon firearm possession. Nothing in the record shows the information was entered into the database either mistakenly or negligently. In fact, the record shows just the opposite. It was specific and objectively credible.

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[2] See also Armstead v. Commonwealth, 56 Va. App. ___, ___, n.2, 695 S.E.2d 561, 564, n.2 (2010) (noting that Gant did not mention the good faith exception because no litigant in Gant raised the issue of good faith immunity).

In this case, the officers were confronted with circumstances that required an instantaneous decision. If a good-faith exception applies when officers conduct a search in good faith reliance on a warrant, see United States v. Leon, 468 U.S. 897 (1984), or a statute later deemed unconstitutional, see Illinois v. Krull, 480 U.S. 340 (1987), it should apply even more strongly in this protective frisk context.

CONCLUSION

For these reasons, the Court of appeals judgment should be reversed and the judgment of the Circuit Court of the City of Richmond affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA
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CERTIFICATE OF TRANSMISSION AND SERVICE

On September 7, 2010, the required number of copies of this brief, paper and electronic, were hand-delivered to the Clerk of this Court and three copies were mailed to Jessica M. Bulos, Esquire, Office of the Capital Defender, Central Region, 1602 Rolling Hills Drive, Suite 212, Henrico, VA 23229, and emailed to jbulos@idc.virginia.gov, counsel for the appellee. The undersigned certifies that the brief, excluding the cover page, table of contents, table of authorities and certificate, contains 4,933 words.

The Commonwealth desires to present oral argument in this case.

_____
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