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In the

Supreme Court of Virginia

At Richmond

Record No. 151277

RYAN AUSTIN COLLINS,

Appellant,

– v. –

COMMONWEALTH OF VIRGINIA,

Appellee.

APPELLANT'S REPLY BRIEF ON REMAND

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ARGUMENT

I. <u>The Commonwealth cannot show alternative grounds to affirm.</u>

The standard of review deserves particular attention here. The Commonwealth takes the position that Collins must bear the burden to *disprove* the Commonwealth's alternative ground for affirmance. On top of this, the Commonwealth suggests this Court can ignore parts of the record that undermine its proposed alternative ground. Neither argument works. The burden of proof belongs to the Commonwealth.

The Commonwealth does not defend the circuit court's ruling on the sole grounds stated by the circuit court: that probable cause alone sufficed to permit Officer Rhodes to trespass into curtilage and conduct searches. App. 121. That reasoning finds no support in Fourth Amendment doctrine and was error. *Robinson v. Commonwealth*, 273 Va. 26, 40 (2007) (probable cause alone did not justify warrantless entry into curtilage). The question here is whether a *different* rationale can justify the trial court's judgment.

The Commonwealth thus "seeks to defend a trial court's judgment on alternative grounds." Appellee Br. 16. The standard of review is "whether the record demonstrates that all evidence necessary to the alternative ground for affirmance was before the circuit court and, if that evidence was conflicting, how it resolved the dispute, or weighed or credited contradicting testimony." *Banks v. Commonwealth*, 280 Va. 612, 618 (2010). The Commonwealth must show that the record supports those alternative grounds newly raised on appeal. *Commonwealth v. Blaxton*, 283 Va. 518, 520-21 (2012) (rejecting alternative argument to affirm because appellee could not show the

facts satisfied his burden to prove the alternative grounds). That means the Commonwealth here has the "heavy burden" to show the record proves "justification by exigent circumstances." *Verez v. Commonwealth*, 230 Va. 405, 410 (1985).

Nor can the Commonwealth pick and choose which *parts* of the record the Court should review. *Contra* Appellee Br. 26-28. This Court reviews "the record" to see if it can support the judgment on alternative grounds. *Perry v. Commonwealth*, 280 Va. 572, 579 (2010). The Commonwealth cites no authority suggesting it can ignore inconvenient parts of the record when it argues that the record as a whole supports a new alternative ground for affirmance.

Also, the right-result-wrong-reason doctrine cannot apply when "the appellant was not on notice in the trial court that he might be required to present evidence to rebut" the so-called right reason. *Rives v. Commonwealth*, 284 Va. 1, 3 (2012). But that's what the Commonwealth argues here. It never raised exigency in the trial court—and without notice, Collins saw no need at trial to re-raise, reiterate, and retread exigency-relevant evidence from the preliminary hearing. The Court cannot affirm here. *See, e.g.*, *Whitehead v. Commonwealth*, 278 Va. 105, 115-16 (2009) (refusing alternative theory to affirm conviction because defendant lacked notice allowing him "to present [rebuttal] evidence"), overruled on other grounds, *Perry*, 280 Va. at 479-81.

The Commonwealth has proposed an alternative ground: exigency. Having raised it on appeal, the Commonwealth must prove it using the entire record, including the parts it would rather the Court ignore.

II. <u>There was no exigency.</u>

At least ten factors inform the "fact-specific" exigent circumstances analysis. *Robinson*, 273 Va. at 41-42. The Commonwealth's argument boils down to just three points: maybe someone was home; the motorcycle was readily mobile and had eluded officers before; and probable cause was clear. None of these arguments work.

The idea that "someone could have been home" contradicts specific testimony from the officer on the scene. That the Commonwealth must work so hard to manufacture uncertainty about whether someone was home proves the weakness of its exigency case. The Commonwealth cites no case finding exigency when no one was around except police officers—and this should not be the first.

"Ready mobility" simply retreads arguments that the United States Supreme Court rejected in this very case. Any vehicle can be driven away in seconds, yet this was not enough to support warrantless vehicle searches on curtilage.

Finally, that probable cause existed does not move the needle to favor exigency. If anything, clear probable cause to believe the motorcycle was the one that had eluded him in traffic simply shows that Officer Rhodes could have readily gotten a warrant.

A. Officer Rhodes testified that nobody was home.

To show exigency, the Commonwealth must surmount a tremendous hurdle: the fact that no one was home. To do this, the Commonwealth speculates, contrary to officer testimony, that maybe someone *was* home after all. This argument fails.

The Commonwealth states that the "true facts" must inform the Fourth Amendment analysis. Appellee Br. 27. The truth from Officer Rhodes, under oath: "there was nobody at the [Dellmead Lane] residence" when officers arrived from the DMV. App. 18. The Court can and should consider this testimony to determine whether the record supports the Commonwealth's alternative argument. *Perry*, 280 Va. at 579.

In fact, Officer Rhodes confirmed at the suppression hearing and trial that he did not think anyone was home when he conducted his warrantless searches. He testified that he spent about thirty minutes at the Dellmead Lane residence. App. 71-72, 77. Officer Rhodes took his time at the residence: he took photographs, stood in the open with fellow officers, and saw no activity at the home. App. 71-74, 77, 179.

Officer Rhodes never acted with concern about anyone being home. The photographs he took showed a covered motorcycle blocking in the only other vehicle parked at the home. App. 126. No other vehicles were there, particularly not the car Collins had left the DMV in. App. 72, 178-79. Officer Rhodes testified that after he searched the motorcycle, he then "waited for [Collins] to arrive at the residence." App. 182. Officer Rhodes did not think Collins was home and never suggested that he believed anyone else was, either.

Despite all of this, the Commonwealth theorizes that "[s]omeone could have been home," conjuring unknown confederates. Appellee Br. 22-25. The Constitution does not allow warrantless intrusions into the home and curtilage based on "could have" speculation. Officer Rhodes needed "probable cause . . . to believe that it [was]

necessary to prevent destruction of evidence." *Keeter v. Commonwealth*, 222 Va. 134, 141 (1981). Officer Rhodes did not have probable cause on this record to believe someone was home and ready to break the law.

A vehicle parked in a driveway, with no other signs of activity for almost thirty minutes, is not probable cause to believe persons are home. *Commonwealth v. Robertson*, 275 Va. 559, 565 (2008). Nor does it show reason to believe anyone home would interfere with an investigation. *Walls v. Commonwealth*, 2 Va. App. 639, 648-49 (1986) (no exigency with wife in home after defendant's arrest), overruled on other grounds, *Commonwealth v. Jones*, 267 Va. 532, 535 (2004).

The reality of the situation "indicated" to Officer Rhodes "that there was no one present," and no exigency existed. *Robertson*, 275 Va. at 565. This was not "literally" a "now or never" circumstance when someone home was going to hide the parked motorcycle. *See Wright v. Commonwealth*, 222 Va. 188, 193 (1981). And these are not the facts of the cases the Commonwealth invokes to argue exigency. Appellee Br. 25-26 & n.16. There was no "movement in the house" that put officers on alert. *Contra Keeter*, 222 Va. at 142. Officer Rhodes did not know of actual confederates who could access the motorcycle without his knowledge. *Contra Fore v. Commonwealth*, 220 Va. 1007, 1012-13 (1980) (known confederates could access car at a public lot without officers present); *Thims v. Commonwealth*, 218 Va. 85, 88, 91 (1977) (defendant's mother watched lone police officer as he stood in driveway with at-issue vehicle).

B. Inherently mobile evidence does not create an exigency in the curtilage.

Next, the Commonwealth dusts off its collapsed argument for the automobile exception and tries to repaint it as an exigency. This Court should reject that effort.

Vehicles are inherently mobile. Within seconds, most vehicles can be turned on and driven away. That mobility is one "core justification" for the automobile exception. *Collins*, 138 S. Ct. at 1669. Yet the Supreme Court ruled out that exception here. *Id.* at 1671-73. The controlling holding is that the mobility inherent in vehicles does not permit warrantless searches in the curtilage of a home. *Id.* at 1672-73 (to allow the "ready mobility" justification to permit officers "to gain entry into a house or its curtilage for the purpose of conducting a vehicle search" would "render hollow the core Fourth Amendment protection the Constitution extends to the house and its curtilage").

The Commonwealth tries to get out from under this holding by suggesting that *this* motorcycle was special because it had been used, months earlier, to evade police. Appellee Br. 20-22. There are several flaws in this argument.

First, exigency does not attach to *objects*—it arises in certain *situations*. Nearly any motorcycle can be driven fast and dangerously. Yet ones that have been so driven do not carry exigency with them. Even Evel Knievel's motorcycle would have no exigency if parked in a quiet garage at midnight. Nor would it have an exigency if parked in the curtilage of a home, in broad daylight, under a cover, with no one but police officers around. Officer Rhodes's belief that he would not be able to catch this

motorcycle operated by the right driver on the open highway, says nothing about how he should treat it when it is covered, next to a home, with nobody around.

Nor did Officer Rhodes have probable cause to believe the motorcycle itself was contraband. He was not investigating a stolen vehicle. App. 78, 82-83, 97-98. Officer Rhodes testified "no" when asked whether he suspected the motorcycle was contraband. App. 98. The Commonwealth admits that Officer Rhodes "learned that the motorcycle had been stolen in New York" only after his warrantless searches. Appellee Br. at 9. Officer Rhodes learned this information after running the VIN number. App. 81.

But even if Officer Rhodes *had* probable cause to believe the motorcycle was stolen, that creates no exigency either. Illegal drugs—inherent contraband—are a good example. Nearly fifty years ago the Supreme Court held that the mere fact that an object inside a home can be readily destroyed, like easily-flushed drugs, does not allow warrantless entry into the home. *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970) (rejecting warrant exception for entry into the home to look for "narcotics, which are easily removed, hidden, or destroyed"). And this was when officers had just watched an addict ingest drugs, showing ready mobility of the exact drugs in question. *See id.* at 32-33.

It simply cannot be that any object used in a crime—be it an eluding-police crime, or a crime more dangerous than that—carries with it an exigent circumstance wherever it goes. If that were true, police would never need a warrant for any home or curtilage to search for cars that had evaded police. Or to search for weapons used in violent crimes. Or to search for evidence that could be quickly destroyed, including most illegal

drugs. *See id.* at 34-35 (holding no exigency even when easily destroyed drugs were present inside the home).

Second, even if exigency *could* attach to objects, it could not last for weeks beyond the crime being investigated. Officers had been eluded seven and fourteen weeks earlier, by an unknown driver who they believed had been riding the motorcycle they found on Dellmead Lane. This was not "literally" a "now or never" situation investigating those months-passed crimes. *Wright*, 222 Va. at 193. Officer Rhodes had no probable cause to believe similar dangerous driving "was about to occur." *See Commonwealth v. Campbell*, 294 Va. 486, 496 (2017) (exigency when informant told police about imminent "meth cook"). And if a recently committed crime could create an exigency, these months-old crimes do not fit the bill. *See Burns v. Commonwealth*, 261 Va. 307, 322-24 (2001) (road block was constitutional because it was "specifically designed to investigate a particular murder that had recently occurred in the area").

C. Probable cause simply means Officer Rhodes could have sought a warrant.

The Commonwealth points out that Officer Rhodes had probable cause to search the motorcycle when he arrived at Dellmead Lane and saw it under cover. But "no amount of probable cause can justify a warrantless search or seizure, absent exigent circumstances." *Thims*, 218 Va. at 89.

Opportunity to obtain a warrant strongly favors a finding of no exigency. *See Robinson*, 273 Va. at 42-43 (noting the importance of this factor). Officer Rhodes had ample opportunity to get one. Opening Br. 14-15, 21. He "had abundant opportunity"

to (at least) send another officer to apply for a warrant while keeping the scene secure. *Taylor v. United States*, 286 U.S. 1, 5-6 (1932).

On spotting the motorcycle up the driveway under its cover, Officer Rhodes could have sought a warrant to access and search it. Officer Rhodes had at least one other officer with him, and had Officer McCall investigating at an auto shop. App. 74-76. Officer Rhodes could have directed either officer to apply for a warrant. Or he might have been able to apply for a warrant remotely. *See* Code § 19.2-54; *Missouri v. McNeely*, 569 U.S. 141, 154-55 (2013). Nothing would have threatened anyone at Dellmead Lane under any of these options. *See Lugar v. Commonwealth*, 214 Va. 609, 613 (1974). And if a warrant was issued, Officer Rhodes could then appropriately intrude into curtilage and search the motorcycle.

Meanwhile, if Officer Rhodes was concerned about the scene while waiting for a warrant, the Fourth Amendment permitted him to take other, commonsense action. He could park his cruiser at the driveway's end, far from curtilage, to block the motorcycle. *Florida v. Jardines*, 569 U.S. 1, 6 (2013). And he could have "knocked and talked" to see if anyone was home. *See Kentucky v. King*, 563 U.S. 452, 169-70 (2011).

While Officer Rhodes waited for a fellow officer to get a warrant, the scene would not change if Collins (or anyone else) arrived at the Dellmead Lane home. Collins had shown himself willing to talk to police "about a whole gamut of things." App. 188-89. Officer Rhodes had no cause to believe Collins would act differently now. Stopping Collins before he reached the home to ask a few questions would be perfectly

constitutional. *Florida v. Bostick*, 501 U.S. 429, 434 (1991). So would waiting until Collins went inside and then knocking at the front door. *Kentucky*, 563 U.S. at 169-70.

And if Officer Rhodes truly faced the potential for evidence to be removed or destroyed while he waited for a warrant, further action was at his disposal. When officers are actively applying for a warrant, the Supreme Court has approved "securing a dwelling, on the basis of probable cause, to prevent the destruction or removal of evidence." *Segura v. United States*, 468 U.S. 796, 810 (1984). Specifically *because* officers are applying for a warrant, securing the scene "is not itself an unreasonable seizure of either the dwelling or its contents" (like a motorcycle parked in curtilage), and it avoids any warrantless searches that infringe on constitutionally protected privacy interests. *Id*. at 809-10.

Ultimately, Officer Rhodes spent almost an hour driving to and surveilling Dellmead Lane with probable cause in hand. App. 72, 77. He had plenty opportunity to apply for a warrant and to control the scene while waiting for it. No sudden emergencies arose while he and fellow officers lingered at the home, investigating months-old traffic crimes. No exigency justified Officer Rhodes' warrantless searches. *United States v. Patino*, 830 F.2d 1413, 1416 (7th Cir. 1987) (officer who simply waited at a home for backup when he could have arranged to secure a warrant did not face exigency).

D. Knowledge about a remote police investigation is not an emergency.

The Commonwealth suggests that Collins lied at the DMV to hide his connection to the motorcycle, so the officers suspected he would race home to hide it. Appellee Br.

22-24. But even if that is true and can be supported by the trial court's findings, *contra* App. 98, 120, it is too attenuated to create exigency thirty minutes later several miles away—especially here, because when officers arrived at Dellmead Lane they faced no frantic race to the parked and covered motorcycle.

Exigency exists when the adverse "consequences" of inaction are "imminent," *Verez v. Commonwealth*, 230 Va. 405, 412 (1985), and officers face "now or never" circumstances. *Wright*, 222 Va. at 193. Such a situation does not arise, as the Commonwealth argues, when a suspect learns of an investigation directed across town. Appellee Br. 23-24. That rule "would result in the evaporation" of the Fourth Amendment's core protection of the home. *See United States v. Davis*, 423 F.2d 974, 979 (5th Cir. 1970). There must be immediacy in time and place, with probable cause that someone with access to the evidence has motive to conceal it. *See, e.g.*, *Evans v. Commonwealth*, 290 Va. 277, 290-91 (2015). That is not this record.

Moreover, what Officer Rhodes *certainly* knew about Collins is that he was willing to talk to police and had not behaved in a confrontational manner, even when shown pictures of the motorcycle on his own Facebook page. App. 66-71, 173-76. Suspecting that Collins may eventually turn up at Dellmead Lane to check on or move that motorcycle may be reasonable police work. But it did not create any wild race across town—no officer suggested great urgency in this investigation. And when the officers arrived at Dellmead Lane, no one else was there.

The Commonwealth would essentially have the routine practice of questioning witnesses, without more, create an emergency at some other location where the investigation is focused. The Commonwealth does not deny it, but simply analogizes the circumstances to an emergency that is instantly occurring in front of the officer, behind closed doors. Appellee Br. at 23-24. The more appropriate analogy for this race-across-town hypothetical is hot pursuit—but lacking both the hot ("immediate or continuous") and the pursuit. *See Welsh v. Wisconsin*, 466 U.S. 740, 743 (1984).

III. <u>Any argument about remedies is waived and, even so, is wrong.</u>

A. The Commonwealth waived any argument about remedies.

In circuit court, the Court of Appeals, this Court, and the United States Supreme Court, the parties have disputed whether Officer Rhodes violated Collins' constitutional rights. The Commonwealth now raises a novel reason to affirm Officer Rhodes' actions: the good faith exception to the exclusionary rule. Appellee Br. 31-37. This argument about Collins' remedies "is a separate, analytically distinct issue" from whether Officer Rhodes acted constitutionally. *Davis v. United States*, 564 U.S. 229, 238, 243 (2011).

This is the first time anyone is hearing that the Commonwealth thinks Collins is not entitled to a remedy for Officer Rhodes' unconstitutional actions. While the Commonwealth cited before the case it uses to make this argument—*Thims v. Commonwealth*, 218 Va. 85 (1977)—it was in passing and for other reasons. 2016 Appellee Br. 15, 22, 26. It's too late to assert this remedies argument for the first time.

If the Commonwealth wanted to argue Collins was not entitled to suppressed evidence, it could and should have done so before now—and no later than when it was last here. Rule 5:28(d) (appellee must include all arguments in its brief). It instead litigated this case in four tribunals without questioning that exclusion should result if Officer Rhodes violated Collins' rights. *See Collins*, 138 S. Ct. at 1675 (remanding to determine the outstanding issue of only whether Officer Rhodes' actions were constitutional). The Commonwealth cannot raise new arguments now that the sun is setting on this litigation. *E.g.*, *Hill v. Hill*, 227 Va. 569, 579 (1984) (disregarding argument that "was never presented in the trial court, nor in the appellees' brief, but was raised here on oral argument for the first time"); *State v. Mell*, 182 P.3d 1, 19 (Kan. Ct. App. 2008) (failure to include good faith argument on brief before appellate tribunal waives that argument); *see also United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) (remand from the Supreme Court does not change waiver rules about untimely arguments).

B. The good faith exemption does not apply here.

The *Davis* good faith rule is based on officers having acted under (and complying with) "binding precedent." 564 U.S. at 239-40.[1] The Commonwealth says *Thims* is the

[1] Reliance on *nonbinding* authority cannot satisfy *Davis*. *Contra* Appellee Br. 36-37. Even if it could, whether the automobile exception permitted officers to enter curtilage was "a significant unresolved issue" throughout the Nation before the Supreme Court weighed in. *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011). Conflicting, at-best persuasive authority did not specifically authorize Officer Rhodes' actions.

binding precedent that specifically authorized Officer Rhodes' conduct. That argument is wrong for two reasons.

First, *Thims* is not about curtilage. It is about a vehicle "in the driveway" of a residence. *Thims*, 218 Va. at 88. The Court reasoned that the driveway where the vehicle was parked compared to public property and property open to the public. *See id.* at 91-92. That part of the driveway was not curtilage. *See Jardines*, 569 U.S. at 6-7.

Unlike *Thims*, this case has everything to do with curtilage. *Collins*, 138 S. Ct. at 1670. But for curtilage, the automobile exception would have authorized Officer Rhodes' actions. *See id.* at 1672-73.

No reasonable officer could read *Thims* to mean Officer Rhodes could crawl into a home's side window to search a vehicle inside. *See id.* 1671 (rejecting this very hypothetical to confirm "that this is an easy case"). Yet that is effectively what Officer Rhodes did by intruding upon curtilage, which is treated "as part of the home itself for Fourth Amendment purposes." *Jardines*, 569 U.S. at 6. Nor does the Commonwealth argue that Officer Rhodes made an objectively reasonable mistake about whether the motorcycle was in curtilage. *See Heien v. North Carolina*, 135 S. Ct. 530, 536 (2014). Because Officer Rhodes intruded on curtilage, acting under no reasonable misunderstanding about that location's import, *Thims* cannot be read to have "*specifically authorize[d]*" Officer Rhodes' actions. *Davis*, 564 U.S. at 241.

Second, until right now, the Commonwealth never argued that *Thims* controlled this case—and neither this Court nor the Court of Appeals saw it as answering the

question. *Thims* involves exigency based on known and present confederates, which are different facts from what Officer Rhodes faced. 218 Va. at 91. It also involves doctrines since modified years ago. *Thims* speaks of plain view in terms of inadvertence, but plain view no longer requires inadvertence as "a necessary condition." *Horton v. California*, 496 U.S. 128, 130 (1990). And the exigent circumstances analysis in *Thims*, based on a lone officer without access to modern technology, could not account for how modern technologies expedite the warrant process and thus narrow when exigency arises. *See McNeely*, 569 U.S. at 154-55. It is unreasonable for an officer to act solely on *Thims* while ignoring all other developments in the law.

Simply, *Thims* did not specifically authorize Officer Rhodes' intrusion into curtilage to search a motorcycle. And it remains good law if it speaks about the automobile exception in public places. *Thims*, 218 Va. at 93. These are not the circumstances where *Davis* applies: when an appeal (usually the current case) overturns the prior case law that specifically authorized the unconstitutional conduct. *Contra, e.g.*, *Davis*, 564 U.S. at 235-36 (officers followed Eleventh Circuit precedent "to the letter," later overturned two years after the search); *United States v. Byrd*, 2018 U.S. App. LEXIS 22058, at *6-7 (3d Cir. Aug. 8, 2018) (officers followed Third Circuit precedent that the Supreme Court overturned on appeal).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on September 24, 2018, three copies of the foregoing Appellant's Reply Brief on Remand were hand delivered to the Clerk's Office of the Supreme Court of Virginia for filing as required by Rule 5:26(e). An electronic copy of the foregoing Appellant's Reply Brief on Remand was filed through VACES with the Clerk's Office of the Supreme Court of Virginia for filing as required by Rule 5:26(e).

On this same date, a copy of the foregoing was sent via email to:

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