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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 OPENING BRIEF ON REMAND

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NATURE OF THE CASE

A police officer walked up a home's driveway, into the curtilage, and removed the tarp covering a motorcycle. The officer had no warrant. His actions violated the Fourth Amendment and any evidence found by those unconstitutional searches should be suppressed.

The Court of Appeals of Virginia ruled the search constitutional. It relied on the exigent circumstances exception to the warrant requirement. The exigency ruling was wrong, and this Court declined to adopt it when this case was last here. This Court affirmed citing *solely* the separate automobile exception to the warrant requirement. The Supreme Court of the United States has now ruled out the automobile exception.

This Court has ordered briefing to address the Court of Appeals' exigent circumstances holding. There was no exigency here and the Commonwealth cannot carry its "heavy burden" to show an emergency supporting this warrantless intrusion.

Officers here were investigating months-old traffic crimes. This was no hot pursuit: the officers chased nobody, they did not activate their lights or sirens, and instead they took their time to get to the home where they sought Ryan Collins' motorcycle. Nobody was at the home when the officers arrived. Instead, the officers saw a motorcycle parked next to the house, under a cover. A third officer

made a detour on his way to the scene, not to apply for a warrant, but to run down a lead at a local auto shop. The absence of any emergency here is clear.

Nor does the Court of Appeals' novel theory support a finding of exigency. It cannot be that merely questioning a suspect creates an instant exigency at his house across town. Such a rule would create a giant exception to the warrant requirement any time a suspect learns he may be the target of a police investigation. That rule would contravene the Constitution and, before the decision below, has not been adopted in this Commonwealth or elsewhere.

This Court should hold that exigent circumstances did not exist.

ASSIGNMENT OF ERROR

1. The trial court erred in denying Collins' motion to suppress the evidence related to the motorcycle because the officer illegally trespassed onto private property for purpose of conducting a search in violation of his Fourth Amendment right to be free of unreasonable searches and seizures. The Court of Appeals of Virginia erred in upholding the judgment of the trial court and finding that the officer acted lawfully under the Fourth Amendment in entering the property and searching the motorcycle.

App. 287.

FACTS AND MATERIAL PROCEEDINGS

Facts. In July 2013, a motorcycle sped towards Officer David Rhodes' unmarked cruiser on a bypass road. App. 79. The motorcyclist's clothing made it impossible to identify him. App. 79-80. Officer Rhodes noted that the motorcycle had a black and orange stretched out frame with chrome wheels. App. 174. Officer Rhodes turned on his emergency equipment and the motorcycle sped away. App. 80. During the chase he recorded the motorcycle's license plate number, which was linked to Eric Jones. App. 174. Officer Rhodes broke off his pursuit once they reached the interstate. App. 80.

Officer Rhodes later learned that Officer Matthew McCall was involved in a similar incident the prior month. App. 189. The officers believed the same motorcycle eluded them. App. 165-66. Officer Rhodes developed Ryan Collins as a suspect in the eluding incidents from an informant (who was not Jones). App. 198. Officer Rhodes admitted he lacked probable cause to believe Collins was the driver who eluded him. App. 98. In fact, on the day of the first eluding incident involving Officer McCall, Collins wore a court-issued ankle bracelet and appeared in court. App. 108-09, 232-34.

In September 2013, Collins went to the Charlottesville DMV to register an Acura. App. 11-12. The Acura's title had been incorrectly tagged as stolen out of New Jersey, and the DMV called the police. App. 9-10, 26-27. Officers Rhodes and McCall responded and went to the DMV to question Collins about the eluding

incidents. App. 85-86. Three or four officers questioned Collins about the Acura. App. 10-15. Among those questions, Officer Rhodes asked Collins about the eluding incidents. App. 11-12, 84-86. Collins denied eluding the police. App. 163, 190-92.

Officer Rhodes then accessed Collins' Facebook page, where he saw photographs of vehicles parked at a home's driveway, including "a motorcycle that looked identical to the one" from the eluding incidents. App. 11-12, 66-69. Officer Rhodes showed Collins the photographs and Collins responded that "he didn't know anything about" the motorcycle "or where it was located." App. 70.

Collins continued to talk to the police about the Acura and his experience with motorcycles. App. 71. A short time later, Collins wanted to leave the DMV. App. 15. The officers allowed Collins to leave and he caught a ride with his brother. App. 15, 18. Officer Rhodes used an informant and his knowledge of the area to determine the Facebook pictures were of a house on Dellmead Lane. App. 71, 88. After Collins left, Officer Rhodes instructed Officer McCall to visit an auto shop where Collins might have taken a motorcycle. App. 75-76. Officer McCall would later meet Officer Rhodes at Dellmead Lane after running down this lead but before Collins was arrested. App. 76-77.

Meanwhile, Officer Rhodes and a third officer took about thirty minutes to drive to the Dellmead Lane house. App. 71, 74. Officer Rhodes did not know who lived at the home. App. 102. From the road, Officer Rhodes could see a motorcycle

covered by a tarp parked alongside the house. App. 72, 178-79. The motorcycle "appeared to be" the same one from the eluding incidents. App. 72-73.

Nobody was home. App. 18 (Officer Rhodes testifying that "there was nobody at the residence" until *after* he searched the motorcycle). Having parked, and "before [he] did anything" else, Officer Rhodes stood on the sidewalk and "took a photograph with [his] phone of what the motorcycle looked like while [he] was standing on the sidewalk." App. 179. He then walked up the driveway and to the parking pad where the motorcycle was located. App. 73, 90. This "partially enclosed section of the driveway . . . . is properly considered curtilage." *Collins v. Virginia*, 138 S.Ct. 1663, 1671 (2018).

Still taking photographs, Officer Rhodes removed the tarp covering the motorcycle. App. 73, 179. "In physically intruding on the curtilage of Collins' home to search the motorcycle, Officer Rhodes . . . invaded Collins' Fourth Amendment interest in the curtilage of his home." *Collins*, 138 S.Ct. at 1671. With the tarp removed, Officer Rhodes could see the license plate and obtained the VIN number. App. 74. Officer Rhodes ran the VIN number and learned that the motorcycle had been stolen out of New York years earlier. App. 81.

Officer Rhodes put the tarp back on the motorcycle and returned to his vehicle. App. 18. Officer Rhodes was "[h]oping" Collins would come to the residence, and so drove away and "parked on another street" to wait. App. 18, 182. A short time later Officer Rhodes saw the vehicle in which Collins had left the

DMV, but Collins was not in it. App. 18-19. Back at Dellmead Lane, "Officer Rhodes observed Collins come into the house." App. 55 (some capitalization removed from the Commonwealth's brief). Officer Rhodes knocked on the front door and Collins answered. App. 77, 214. In their conversation Collins admitted he bought the motorcycle from Jones. App. 183. Officer Rhodes arrested Collins for receiving stolen property. App. 78. Performing a search incident to arrest, Officer Rhodes recovered a key to the motorcycle from Collins' pocket. App. 78-79. About an hour had passed since Officer Rhodes saw Collins at the DMV. App. 77.

Proceedings. Collins moved to suppress the evidence because Officer Rhodes searched curtilage and the motorcycle without a warrant. App. 110-15. The Commonwealth responded that the automobile exception justified Officer Rhodes' conduct. App. 115-17.

The circuit court reasoned that the legal standard was "what is a reasonable expectation of privacy." App. 119. The circuit court found "that there was probable cause for the search and therefore it was not an unreasonable governmental intrusion." App. 121. The court found probable cause based solely on Officer Rhodes' experience in the eluding incident, his talk with Collins at the DMV, and the covered motorcycle he spotted at the Dellmead Lane house. App. 119-21. The circuit court thus denied Collins' motion to suppress and later found Collins guilty of receiving stolen property. App. 268-71. Collins appealed. App. 272-73.

The Court of Appeals affirmed. *Collins v. Commonwealth*, 65 Va. App. 37, 52 (2015). That court held Officer Rhodes had probable cause, assumed he had intruded onto curtilage, and ruled that exigent circumstances excused the lack of a warrant. *Id.* at 44-48. Thus, the searches were constitutional. *Id.* at 48.

Collins appealed. This Court granted his petition, but affirmed. *Collins v. Commonwealth*, 292 Va. 486, 506 (2016). Rather than addressing exigency, the Court held that Officer Rhodes' warrantless searches were constitutional under the automobile exception. *Id.* at 496-505. Collins appealed that decision, and the United States Supreme Court reversed. *Collins v. Commonwealth*, 138 S. Ct. 1663, 1675 (2018) (rejecting the automobile exception within the curtilage of a home). The Court remanded this case to determine whether Officer Rhodes' conduct was constitutional on grounds other that the automobile exception. *Id*.

STANDARD OF REVIEW

"A defendant's claim that evidence was seized in violation of the Fourth Amendment presents a mixed question of law and fact that an appellate court must review de novo on appeal." *Commonwealth v. Robertson*, 275 Va. 559, 563 (2008). This Court "must give deference to the factual findings of the circuit court and give due weight to the inferences drawn from those factual findings," but will "determine independently whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment." *Id*.

Had the circuit court decided this case on exigency, Collins would have the "burden to show that, considering the evidence in the light most favorable to the Commonwealth, the circuit court's denial of his suppression motion was reversible error." *Id.* at 564. But the circuit court did not rule on exigent circumstances. It held that "the issue" was "what is a reasonable expectation of privacy" and found "there was probable cause for the search and therefore it was not an unreasonable governmental intrusion." App. 119-21. That holding was error. *See, e.g.*, *Robinson v. Commonwealth*, 273 Va. 26, 40 (2007) (probable cause without exigency could not justify warrantless entry into curtilage).

The Commonwealth has never tried to justify Officer Rhodes' warrantless conduct on the specific grounds stated by the circuit court. The Commonwealth instead asked the appellate courts to affirm on alternative grounds: the automobile exception, plain view, and exigency. *See generally Perry v. Commonwealth*, 280 Va. 572, 580 (2010) (discussing the right result for the wrong reason doctrine). Because the Commonwealth seeks to "defend its judgment" on alternative grounds, it must show that the "factual record is complete" to support those grounds on appeal. *See id.* at 581. "[T]he standard of review is whether the record demonstrates that all evidence necessary to the alternative ground for affirmance was before the circuit court." *Banks v. Commonwealth*, 280 Va. 612, 618 (2010) (error to affirm on alternative grounds when facts supporting those grounds "were in conflict" and "the circuit court neither resolved the dispute nor indicated how it

weighed or credited the contradicting testimony"). Applying the standard of review to the proposed alternative grounds of exigent circumstances, the Commonwealth bears the "heavy burden" to show that the record proves "justification by exigent circumstances." *Verez v. Commonwealth*, 230 Va. 405, 410 (1985).

ARGUMENT

I. <u>The only remaining issue is exigent circumstances.</u>

The United States Supreme Court remanded for "further proceedings" about "whether Officer Rhodes' warrantless intrusion on the curtilage of Collins' house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement." *Collins*, 138 S. Ct. at 1675. That order directs the focus on remand. *E.g.*, *Lovelace v. Commonwealth*, 258 Va. 588, 592 (1999) ("Pursuant to the remand order issued by the Supreme Court of the United States, we must consider the constitutionality of the search of Lovelace's person in light of the Supreme Court's decision in *Knowles*.").

Previously, the Commonwealth offered this Court only three reasons why Officer Rhodes' warrantless searches were reasonable: exigent circumstances, the automobile exception, and plain view. 2016 Appellee Br. at 18-35. The United States Supreme Court held that the plain view and automobile exceptions could not justify Officer Rhodes' warrantless search. *Collins*, 138 S. Ct. at 1672-73, 1675. Those issues are no longer outstanding. *In re Commonwealth of Virginia*, 278 Va. 1, 10 (2009) ("[A] mandate is controlling as to matters within its compass.").

Therefore, the sole unresolved, preserved issue is exigency. *See* Rule 5:28(d); *John Crane, Inc. v. Hardick*, 283 Va. 358, 376 (2012), modified by 284 Va. 329 (2012). The Commonwealth has long since abandoned any other ground for avoiding suppression of the evidence here. *See, e.g.*, *Ghameshlouy v. Commonwealth*, 279 Va. 379, 394 (2010) (appellee's arguments presented after submitting initial brief were waived); *see also United States v. Ardley*, 242 F.3d 989, 990 (11th Cir. 2001) ("In the absence of any requirement to the contrary . . . in the order remanding this case [from the Supreme Court], we apply our well-established rule that issues and contentions not timely raised in the briefs [prior to Supreme Court remand] are deemed abandoned."). The only issue remaining is exigent circumstances.

II. <u>The Commonwealth must bear a "heavy burden" to show exigency supporting this warrantless search into the curtilage of a home.</u>

"[W]hen it comes to the Fourth Amendment, the home is first among equals." *Florida v. Jardines*, 569 U.S. 1, 6 (2013). "At the very core" of the Fourth Amendment "stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion." *Silverman v. United States*, 365 U.S. 505, 511 (1961). To protect the "practical value" of this right, the "area immediately surrounding and associated with the home"—known as the curtilage—is treated "as part of the home itself." *Jardines*, 569 U.S. at 6. "The protection afforded the curtilage is essentially a protection of families and personal

privacy in an area intimately linked to the home, both physically and psychologically, where privacy expectations are most heightened." *California v. Ciraolo*, 476 U.S. 207, 212-13 (1986).

Collins' motorcycle sat on a part of the driveway directly beside his home and off the path a visitor would take to reach the front door. App. 126. The "driveway enclosure where Officer Rhodes searched the motorcycle . . . is properly considered curtilage." *Collins*, 138 S. Ct. at 1671. In effect, the Fourth Amendment treats Officer Rhodes' intrusion onto curtilage the same as if Officer Rhodes entered the home's side window. *See id.* at 1671-73 ("[a]pplying the relevant legal principles" to the "factual scenario" where the "motorcycle [is] parked inside the living room of a house, visible through a window to a passerby on the street," and coming to the same result in that hypothetical and the facts here).

Officer Rhodes' warrantless search is "presumed to be unreasonable." *Verez*, 230 Va. at 410 (discussing "warrantless entries into dwellings, followed by searches, seizures, and arrests therein"). While "[w]arrantless searches are per se unreasonable and violative of Fourth Amendment rights," Officer Rhodes' warrantless activity "may be justified under exigent circumstances, such as the risk that evidence will be lost or destroyed." *Keeter v. Commonwealth*, 222 Va. 134, 140-41 (1981) (discussing "warrantless entries into residences"). But the Commonwealth bears the "heavy burden of proving justification by exigent circumstances." *Verez*, 230 Va. at 410.

The question on exigency is whether the "officers had probable cause at the time of their warrantless entry to believe that cognizable exigent circumstances were present." *Keeter*, 222 Va. at 141. "The test . . . is fact-specific." *Robinson*, 273 Va. at 41. To guide this inquiry, this Court has identified "the following factors" as "relevant:"

> (1) the degree of urgency involved and the time required to get a warrant; (2) the officers' reasonable belief that contraband is about to be removed or destroyed; (3) the possibility of danger to others, including police officers left to guard the site; (4) information that the possessors of the contraband are aware that the police may be on their trail; (5) whether the offense is serious, or involves violence; (6) whether officers reasonably believe the suspects are armed; (7) whether there is, at the time of entry, a clear showing of probable cause; (8) whether the officers have strong reason to believe the suspects are actually present in the premises; (9) the likelihood of escape if the suspects are not swiftly apprehended; and (10) the suspects' recent entry into the premises after hot pursuit.

Id. at 41-42. And when the concern is about the preservation of evidence, this Court has stated that exigent circumstances are those "in which police action literally must be 'now or never' to preserve the evidence of the crime." *Wright v. Commonwealth*, 222 Va. 188, 193 (1981).

III. <u>The exigent circumstances factors establish that no exigency existed.</u>

Many factors that go into the exigency circumstances analysis are relevant here and confirm that exigent circumstances did not justify Officer Rhodes' warrantless intrusion onto curtilage.

A. Nobody was home.

The "degree of urgency," the officers' "reasonable belief that contraband is about to be removed or destroyed," and "whether the officers have a strong reason to believe the suspects are actually present" are all relevant to determining exigency. *Robinson*, 273 Va. at 41-42. But none of these factors are present—and there was no exigency—if Officer Rhodes had no probable cause to believe that anyone was home or that anyone nearby might remove or destroy the motorcycle. *See, e.g.*, *United States v. Carter*, 360 F.3d 1235, 1241 (10th Cir. 2004) (destruction of evidence exigency did not apply to warrantless search of the garage when all known individuals were outside); *Moore v. State*, 551 S.W.2d 185, 189 (Ark. 1977) (after defendant arrested at parent's home, "to assume [the parents] would willingly become accessories after the fact to such a crime is not a fact upon which one is entitled to rely as justification for" a warrantless search of the home).

The Commonwealth cannot carry its "heavy burden" to show exigency because Officer Rhodes testified that nobody was home at the time of his search. *See Verez*, 230 Va. at 410. Thus, there was no imminent threat to the evidence. *See, e.g.*, *United States v. Lewis*, 231 F.3d 238, 241 (6th Cir. 2000) (when officers had no reason to believe anyone was inside the home, "the belief that any evidence . . . inside the house was in danger of imminent destruction is unfounded")

When Officer Rhodes arrived at Dellmead Lane, "there was nobody at the residence." App. 18. Officer Rhodes did not think Collins was home. App. 182.

Officer Rhodes took his time at the scene—around fifteen to thirty minutes—and photographed what he saw from the sidewalk and as he walked into the curtilage. App. 72-73, 77, 179. Officer Rhodes did not testify that he or his fellow officers observed any activity at the home during this time.

Because the facts "indicated" to Officer Rhodes "that there was no one present," no exigency justified intruding into the curtilage to protect the evidence. *Robertson*, 275 Va. at 565. Similarly, no facts suggested that confederates might conceal or destroy the motorcycle. *Contra Fore v. Commonwealth*, 220 Va. 1007, 1012-13 (1980) (exigency to preserve evidence when known confederates had unmonitored access to crime-related vehicle).

B. Officer Rhodes had the time and resources to secure a search warrant.

Whether an officer has a "meaningful opportunity . . . to obtain a warrant before proceeding further" is another factor in the exigency analysis. *Robinson*, 273 Va. at 43. Officer Rhodes had the time and resources to secure a search warrant, underscoring the lack of exigency. *See id*.

Officer Rhodes first suspected that the motorcycle would be at the Dellmead Lane house after viewing the Facebook photographs at the DMV and talking with his informant. App. 70-71, 120. Either Officer Rhodes, or one of the several other officers at the DMV, could have applied for a search warrant. Instead, Officer Rhodes directed Officer McCall to investigate whether Collins recently had a motorcycle serviced at a local repair shop. App. 75. Nor did Officer Rhodes do

anything to obtain a search warrant later, when he arrived at Dellmead Lane and saw the motorcycle under its cover. *United States v. Patino*, 830 F.2d 1413, 1416 (7th Cir. 1987) (the "one fact alone" showing "the lack of exigent circumstances" justifying the warrantless entry into a home was an officer waiting thirty minutes for backup but "[i]nexplicably" not arranging to secure a search warrant during that time). As in *Patino*, Officer Rhodes spent the better part of an hour driving to Dellmead Lane and prowling the premises without seeking a warrant. App. 72, 77.

The record does not suggest getting a warrant would have been impractical or dangerous to officers at the scene. *Robinson*, 273 Va. at 41. For example, no evidence suggests that Officer Rhodes and his partner (and Officer McCall who arrived later, after running down his lead but still before Collins was arrested) "might be overpowered" if an officer "had been dispatched for a search warrant." *Lugar v. Commonwealth*, 214 Va. 609, 613 (1974); *see also State v. White*, 399 So.2d 172, 176 (La. 1981) (warrantless search of a home not justified to preserve evidence when several officers present even though "the house was unlocked and defendant's relatives lived next door").

These facts are not meaningfully different from *Taylor v. United States*, 286 U.S. 1 (1932). In that case, federal agents suspected that a particular home was the site of illegal alcohol-related activity. *Id.* at 5. When they arrived, the odor of whisky wafting out of a garage confirmed the agents' suspicions. *Id*. Thinking this good enough, the agents "broke the fastening upon a door, entered, and found"

illegal whiskey. *Id*. The United States Supreme Court held these warrantless actions "inexcusable and the seizure unreasonable." *Id.* at 6. The Court emphasized that "the agents had made no effort to obtain a warrant for making a search" despite having "had abundant opportunity to do so and to proceed in an orderly way even after the odor had emphasized their suspicions." *Id*.

As in *Taylor*, Officer Rhodes could have secured a search warrant before or after arriving at Dellmead Lane. *Id.* at 5-6. He declined those opportunities even though he had resources that would not have impeded his continued investigation. And like *Taylor*, Officer Rhodes found only the object of his investigation—the motorcycle—at the home. *Id.* at 5. The mere presence of that object did not create an exigency excusing Officer Rhodes' decision to forgo the opportunity to secure a warrant. *See id.* at 6; *Vale*, 399 U.S. at 34. Simply, the Commonwealth cannot carry its "heavy burden" to prove exigency because Officer Rhodes had the time and resources to secure a search warrant. *See Verez*, 230 Va. at 410.

C. Officers were not investigating ongoing or soon-to-occur crimes.

The exigent circumstances analysis also considers *when* the crimes being investigated occurred. *Robinson*, 273 Va. at 42 ("the likelihood of escape" and "hot pursuit" are factors to consider). Officer Rhodes was investigating traffic incidents that occurred seven and fourteen weeks earlier. App. 85. This fact deflates any supposed exigency. *See City of Kodiak v. Samaniego*, 83 P.3d 1077, 1086 (Alaska 2004) (no exigency to detain a witness when the crime being investigated was not

"an ongoing or recently committed unsolved crime").

This case is thus far different from those in which the timing of the crime favored exigency. *E.g.*, *Commonwealth v. Campbell*, 294 Va. 486, 496 (2017) (probable cause to believe that a dangerous meth cook "was about to occur" helped establish exigency); *Burns v. Commonwealth*, 261 Va. 307, 322-24 (2001) (exigent circumstances justified roadblock designed to investigate a specific murder in the area a day or two earlier); *Wright*, 222 Va. at 193 (tip that a crime would occur in 30 minutes created exigency for officer to reach the scene at or before the crime). None of these circumstance were present here.

When Officer Rhodes went to the DMV to question Collins, he testified that his "sole purpose in life" was to ask about those eluding incidents. App. 82. As Officer Rhodes explained, at that time the motorcycle was evidence only to help determine who had driven it away from the police months earlier. App. 99-100. The nature of the investigation cuts against the Commonwealth carrying its "heavy burden" to show exigent circumstances. *See Verez*, 230 Va. at 410; *Robertson*, 275 Va. at 565 (no exigency when no hot pursuit).

IV. <u>This Court should reject the Court of Appeals' exigency rationales.</u>

The Court of Appeals wrongly held that "numerous exigencies justified both" Officer Rhodes' "entry onto the property and his moving the tarp to view the motorcycle and record its identification number." *Collins*, 65 Va. App. at 46. This Court should reject the Court of Appeals' reasoning used to justify that holding.

A. Ready mobility, inherent in all vehicles, did not create exigency.

The Court of Appeals remarked that exigency existed because "a motorcycle is readily movable" and Officer Rhodes believed the motorcycle at Collins' home was capable of moving quickly. *Collins*, 65 Va. App. at 46. That rationale does not establish exigency.

First, that holding improperly conflated the automobile exception and exigency. Virtually all vehicles are readily mobile. "The 'ready mobility' of vehicles [thus] served as the core justification for the automobile exception for many years." *Collins*, 138 S. Ct. at 1669. The Court of Appeals simply gave the automobile exception a different label ("readily movable") and considered it exigent circumstances. But the automobile exception and exigent circumstances are "separate and distinct exceptions" to the rule that a warrant is required. *Robertson*, 275 Va. at 564 (discussing exigent circumstances and protective sweeps); *see Collins*, 292 Va. at 497 (recognizing these are different exceptions).

By rejecting the automobile exception in this case, the United States Supreme Court held that the "ready mobility" justification categorically fails to support a warrantless search of curtilage. *Collins*, 138 S. Ct. at 1671 ("Nothing in our case law . . . suggests that the automobile exception gives an officer the right to enter a home or its curtilage to access a vehicle without a warrant."). Allowing the "rationales underlying the automobile exception"—including ready mobility—to authorize an officer's warrantless entry onto curtilage would "render hollow the

core Fourth Amendment protection the Constitution extends to the house and its curtilage." *Id.* at 1672. Accepting the Court of Appeals' reasoning would subvert the United States Supreme Court's holding. *See In re Commonwealth of Virginia*, 278 Va. at 10.

Second, Officer Rhodes' suspicion that the parked motorcycle had been involved in high-speed eluding incidents months earlier does not matter. *See Collins*, Va. App. at 46. That an object of police interest is, in the abstract, "easily removed, hidden, or destroyed" does not constitute exigent circumstances. *Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970) (rejecting the idea that easily-flushed illegal drugs should categorically permit warrantless entries). The United States Supreme Court recognized as much. "Had Officer Rhodes seen illegal drugs through the window of Collins' house, for example, assuming no other warrant exception applied, he could not have entered the house to seize them without first obtaining a warrant." *Collins*, 138 S. Ct. at 1672.

B. A suspect learning of a police investigation into a past crime does not create an immediate exigency at his home across town.

The Court of Appeals also held that exigency existed because Officer Rhodes "knew that [Collins] was aware that law enforcement was investigating incidents involving the motorcycle and where they might find it," and "that [Collins] had an interest in concealing or destroying evidence in order to perpetuate his lies to law enforcement." *Collins*, 65 Va. App. at 47. That rationale

cannot work either. Simply put, that is often true, and exigency cannot be so broad.

The fact that a suspect may have learned of a police investigation cannot create an exigency to race across town and ransack the suspect's home and curtilage. Exigency cannot be a strategy—there must be an *immediacy* in both the timing and location of the threat. *Verez*, 230 Va. at 411-12 (holding that the "consequences" must be "imminent"); *Wright*, 222 Va. at 193 (exigency to preserve evidence where "police action literally must be 'now or never'").

Holding otherwise "would result in the evaporation" of Fourth Amendment rights, in that "if a man were [told about an investigation while] in New York, it would be perfectly reasonable to search his home in California to prevent [his or] his wife's destruction of evidence." *United States v. Davis*, 423 F.2d 974, 979 (5th Cir. 1970) (rejecting a similar argument made in the context of searches incident to arrest). Because the Court of Appeals' "reasoning provides no logical temporal or spatial limitations," it is incompatible with the Fourth Amendment. *Id*.

This Court has recognized this principle by noting "that a mere knock by police on the door of a suspect's residence, by itself, does not constitute exigent circumstances." *Evans v. Commonwealth*, 290 Va. 277, 290-91 & n.6 (2015) (collecting cases where exigency arose *after* the knock, when police developed knowledge of suspects having immediate motive and capability to destroy evidence in private). Additional facts must show that the individual who learned about the investigation will immediately conceal or destroy the evidence. *Id*.; *see*

Bristol v. Commonwealth, 272 Va. 568, 576 (2006) (no exigency when "blood alcohol content might dissipate," as that "possibility" exists in every situation).

Here, the interview of Collins at the DMV was simply one of many steps in an ordinary police investigation. After all, talking to Collins left the police without probable cause to arrest him for any offense. Officer Rhodes "told him he was fine he could leave" the DMV and then watched him go. App. 15, 18.

Rather than having someone tail Collins, Officer Rhodes directed Officer McCall to investigate a lead at a nearby auto repair shop. App. 75. For his part, Officer Rhodes went to the house where the photograph of the motorcycle had been taken. Officer Rhodes took thirty minutes to drive about 4.6 miles from the DMV to the Dellmead Lane home.[1] App. 72, 74. Once there, Officer Rhodes and another officer spent about fifteen to thirty minutes with the motorcycle in view—all while nobody was home. App. 18, 71-74, 77. During that time Officer Rhodes monitored the motorcycle, saw nobody racing to conceal or destroy it, and felt no need to secure the motorcycle to avoid such a fate. *See* App. 18, 71-74.

These are not the rushed circumstances of a now or never emergency. *Welsh v. Wisconsin*, 466 U.S. 740, 753 (1984) (no hot pursuit exigency if no "immediate or continuous pursuit of the [defendant] from the scene of a crime").

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[1] These locations are in the record. The Court can take judicial notice of distance. *E.g.*, *Omohundro v. Palmer*, 158 Va. 693, 697 (1932) (taking judicial notice "that Louisa Court house is comparatively a short distance from Goochland county").

C. After-the-search facts are irrelevant, and in any event, do not reflect any need for an urgent warrantless search.

To bolster its exigency holding, the Court of Appeals used Collins' clothing and that he had a key on his person when arrested as "further speak[ing] to the reasonableness of Officer Rhode[s'] belief that [Collins] might attempt to relocate the motorcycle." *Collins*, 65 Va. App. at 47. Officer Rhodes knew about these facts only after he intruded on the curtilage. App. 77-79.

Those facts are not part of the exigent circumstances analysis. Officers "must be judged by their reaction to circumstances as they reasonably appeared to trained law enforcement officers to exist *when the decision to [search] was made*." *Keeter*, 222 Va. at 141 (emphasis added). This Court should reject the lower court's evaluation of after-the-search facts to justify the warrantless search.

To the extent such facts are relevant, what happened later only further proves that Officer Rhodes had the situation at Dellmead Lane well in hand. After his search, Officer Rhodes waited for Collins to return, then knocked at the door, talked to Collins, and arrested him. App. 77-78. There was no chase. There was no violence. The evidence the police were after weighed hundreds of pounds and remained under a cover at the time. *See* App. 71-74. Nothing about what happened suggests that Collins planned to jump on the (again, still covered) motorcycle and escape in the teeth of the police. To the extent courts even consider what happened

later, it only proves that the evidence would have been adequately preserved had the officers simply staked it out and waited for a warrant.

CONCLUSION

Exigency did not justify Officer Rhodes' warrantless intrusion onto the curtilage. Collins asks this Court to reverse the Court of Appeals' judgment, suppress the evidence obtained after Officer Rhodes' search, and afford all other appropriate relief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

Under Rule 5:26, the undersigned counsel hereby certifies:

(1) The foregoing Remand Brief of Appellant fully complies with the Rules of this Court, including Rules 5:26 and 5:27;

(2) The Appellant is Ryan Austin Collins;

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(6) On this 15th day of August, 2018:

(a) Three copies of the foregoing Appellant's Opening 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).

(b) An electronic copy of the foregoing Appellant's Opening 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).

(c) A copy of the foregoing Appellant's Opening Brief on Remand was served on counsel for the Appellee by email.

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