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IN THE

SUPREME COURT OF VIRGINIA

Record No. 151277

RYAN AUSTIN COLLINS,

Appellant,

v.

COMMONWEALTH OF VIRGINIA,

Appellee.

BRIEF OF APPELLEE ON REMAND

MARK R. HERRING
Attorney General of Virginia

VICTORIA PEARSON
Deputy Attorney General

CHRISTOPHER P. SCHANDEVEL
(VSB #84412)
Assistant Attorney General

TOBY J. HEYTENS (VSB #90788)
Solicitor General

MATTHEW R. MCGUIRE
(VSB #84194)
Principal Deputy
Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786–7773
(804) 371–0200 (fax)
mmcguire@oag.state.va.us

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INTRODUCTION

The United States Supreme Court remanded this case after deciding that a police officer's warrantless search of a partially–covered motorcycle could not be justified under the automobile exception to the warrant requirement. The Court, however, did not decide two other questions: (1) whether another exception to the warrant requirement rendered the search constitutionally reasonable; or (2) whether suppression would be an appropriate remedy here even if the Fourth Amendment were violated.

The answer to the first question is yes. As the Court of Appeals held, the search was constitutionally reasonable because exigent circumstances existed when the officer acted—specifically, because probable cause existed to believe the motorcycle twice had been used to elude the police at dangerously high speeds, the officer could not have known whether anyone was inside the home, and the officer had reason to believe that a suspect was about to try to remove the motorcycle.

The answer to the second question is no. The United States Supreme Court has repeatedly emphasized that the exclusionary rule does not vindicate a personal constitutional right of the accused, and it

should be applied only when it can be expected to provide meaningful deterrence of future law enforcement conduct. In particular, the Court has held that exclusion is unwarranted when an officer's actions were justified under then–controlling judicial authority, even when that authority was later modified or overruled. Because Officer Rhodes' actions were supported by then–controlling authority from this Court and the Fourth Circuit, exclusion would be unwarranted even if those actions were later deemed to violate the Fourth Amendment.

The judgment of the Court of Appeals should be affirmed.

ASSIGNMENT OF ERROR

> 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.

STATEMENT

"When considering whether to affirm the denial of a pretrial suppression motion, an appellate court reviews not only the evidence presented at the pretrial [suppression] hearing but also the evidence

later presented at trial." *Commonwealth v. White*, 293 Va. 411, 414, 799 S.E.2d 494, 495 (2017). Accordingly, the Commonwealth relies on the evidence introduced at the suppression hearing and at trial.

1. In June 2013, Officer Matthew McCall of the Albemarle County Police Department was patrolling on Route 29 near the county line separating Albemarle County and the City of Charlottesville when he saw a driver on an orange–and–black motorcycle commit a traffic infraction. JA 161, 163, 166, 189. The driver was wearing a helmet, but Officer McCall noticed that he had a "full sleeve" tattoo on his left arm and dark skin. JA 163, 171. The driver also was wearing yellow Timberland–type boots. JA 163.

Officer McCall activated his lights. JA 166. In response, the motorcycle driver "took off" down the highway, eventually making multiple turns in an effort to elude the officer. JA 163, 166. McCall ultimately discontinued the pursuit. JA 163.

2. Several weeks later, Officer David Rhodes—who, like Officer McCall, is with the Albemarle County Police Department—was driving on the Route 250 bypass in his unmarked police cruiser when an orange–and–black Suzuki motorcycle approached him from behind "at a

very high rate of speed." JA 79, 84, 173–74, 189. Officer Rhodes activated his rear radar and clocked the motorcycle's speed at 100 mph in a posted 55–mph zone. JA 79, 83, 174.

The motorcycle slowed as it pulled up beside Rhodes, and Rhodes saw that the driver was wearing a helmet with a tinted shield, a gray hooded sweatshirt with long sleeves, jeans, and tan Timberland–type boots. JA 79–80, 84, 129. The motorcycle itself was "very unique," JA 99, 180, and "didn't look like a conventional motorcycle." JA 69. The motorcycle had chrome accents and chrome wheels. JA 69, 174. And it had been "stretched out," meaning the "rear end had been added on to make it longer," which normally indicates that a motorcycle is used for racing. JA 69, 180.

Officer Rhodes activated his emergency equipment. JA 80. But the driver "immediately took off at a very high rate of speed." *Id.* Rhodes tried to follow, but the motorcycle was driving too recklessly—reaching speeds exceeding 140 mph—and Rhodes eventually gave up the chase. JA 79–80. Rhodes did, however, manage to jot down the motorcycle's

license–plate number, and Rhodes's dash camera recorded video images of it. JA 84, 92.[1]

The license–plate number led Officer Rhodes to Eric Jones, who revealed that he had previously sold the motorcycle to defendant–appellant Ryan Austin Collins. JA 91–94, 156, 198, 200–01.[2] Jones admitted that the motorcycle lacked a title, so he assumed that it had been stolen. JA 157–58. Jones also said that he had told Collins that the motorcycle was stolen. JA 157.[3]

Officer Rhodes drove by the house where he believed Collins lived with his mother, but there were no vehicles at the home. JA 96–97, 209. Rhodes also drove through the neighborhood looking for the motorcycle, but he never saw it. JA 96–97, 209.

3. A couple months later, Officers Rhodes and McCall both heard Collins's name on their police radios in connection with an

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[1] A still photograph of an image of the motorcycle that was captured by the dash camera was admitted into evidence at the suppression hearing. JA 84–85, 129.

[2] Jones testified at trial that he had sold the motorcycle to Collins about one month before the first eluding incident. JA 145.

[3] At trial, Jones testified he had told Collins that the motorcycle did not have a title and that he assumed it had been stolen. JA 159.

incident at the Department of Motor Vehicles. JA 66, 161–62, 172–73. By that time, the officers had compared notes and had concluded it was likely that the same motorcycle had eluded both of them. JA 165, 170, 189.

Collins was still at the DMV when both officers arrived. JA 85, 102, 175. Collins was wearing shorts, flip flops, and a t–shirt, JA 78, and also had a "sleeve tattoo" on his left arm. JA 214. Officer McCall "kind of knew [Collins] was the person who was driving the motorcycle" that had eluded him, so McCall advised Collins of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), and told Collins about his suspicions. JA 162–63, 175. Collins told McCall that he was not the driver who had eluded him, he had not owned a motorcycle in months, and he had not even driven a motorcycle in months. JA 162–63, 175.

While Officer McCall was questioning Collins, Officer Rhodes accessed Collins's Facebook page and saw that Collins had posted a photograph showing a brick home with a driveway on the left side and a "clearly visible" orange–and–black motorcycle—resembling the one that had eluded him—parked in the driveway between two other vehicles. JA 66–69, 100, 125, 175, 191. As soon as Rhodes saw the Facebook

photograph of the motorcycle, he was "100% sure" it was the same one that had eluded him. JA 100. "It was very distinct and [Rhodes] knew, absolutely no question in [his] mind that [it] was the same motorcycle." JA 100.[4]

Officer Rhodes did not know where the house in the photographs was located, so he used his smart phone to take pictures of the photographs and returned to Collins to ask him about them. JA 70, 87, 175. Collins claimed that he did not know anything about the motorcycle, that he had never seen it before, and that he did not know where it was located. JA 70, 175–76. Collins added that he did not know the house where the motorcycle was parked either. JA 176. According to Collins, it had been "a long time" since he had ridden a motorcycle, perhaps "a few months." JA 71, 171.

After Collins left, Officer Rhodes learned from an informant that the house in the photographs on Collins's Facebook page was located on Dellmead Lane, about a block away from the county line. JA 70–71, 178. Along with several other officers, Rhodes and McCall drove to

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[4] Collins's Facebook page also contained a photograph showing a silver Acura parked in the street that matched the silver Acura that Collins was trying to register at the DMV. JA 68–69, 100, 124, 175.

Dellmead Lane and located the house. JA 71, 74, 164, 167, 178.[5] Rhodes also had received a tip that Collins recently had taken a motorcycle to a shop in Charlottesville to have new tires installed, so Rhodes asked McCall to drive to the shop to investigate. JA 75, 168.

As Rhodes drove up to the Dellmead property, he saw a motorcycle, partially obscured by a white "cover," parked in the driveway and "plainly" visible from the street. JA 72, 88–89, 178–79. The motorcycle appeared to be parked in the "exact same spot" and at the "exact same angle" as it was in the Facebook photographs. JA 179. Rhodes also saw that the covered motorcycle had the same silhouette as the stretched–out motorcycle that had eluded him, and he could see chrome on the portion of the front wheel that was uncovered. JA 72, 90, 167. Based on these observations, Rhodes concluded that the covered motorcycle was "the same motorcycle that [he] had attempted to stop and the one [he] was looking for." JA 72, 89.

Rhodes exited his vehicle and took a photograph of the covered motorcycle from the sidewalk. JA 73, 126, 179. The motorcycle was

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[5] Rhodes did not know who lived at the house. JA 102. Collins's girlfriend later testified that she had lived there at the time and that Collins had stayed there a couple nights a week. JA 103–04, 225–26.

parked "a car length or two" into the driveway in between a brick retaining wall on the left side and the side of the house on the right. JA 69, 90, 126. A silver Toyota 4–Runner was parked directly in front of the motorcycle. JA 179.

Realizing that the motorcycle could be evidence of a crime and that it was movable, Officer Rhodes walked up the driveway and removed the cover to locate the motorcycle's VIN and tag number. JA 74, 90, 97–98, 179. Rhodes's visual inspection confirmed "with 100% certainty" that the motorcycle was the same one that had eluded him. JA 180. The license plate had been changed since the eluding incident and was registered to a different motorcycle. JA 74, 91, 180. Rhodes ran the VIN and learned that the motorcycle had been stolen in New York. JA 81, 180–81. Rhodes then took a photograph of the motorcycle. JA 101, 127.

Believing that Collins likely was on his way to the property, Officer Rhodes left the residence and waited for Collins to arrive. JA 182.[6] A short time later, Rhodes returned to the residence and knocked

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[6] At the preliminary hearing, Officer Rhodes testified that "there was nobody at the residence at that time." JA 18. But Rhodes did not say that no one was home when he testified at the suppression hearing

on the front door. JA 77, 182.[7] Collins answered and stepped outside. JA 77, 182.[8] Even though the outside temperature was in the mid–90s, Collins was wearing a long–sleeved shirt, blue jeans, and tan Timberland–type work boots—having changed out of the more casual clothes he had been wearing at the DMV. JA 78, 182. Rhodes recognized the boots as "the same exact boots that the rider was wearing on the bypass the day [he had] tried to stop the motorcycle." JA 182.

Collins claimed that he did not know "anything about" the motorcycle parked in the driveway. JA 77, 183. As Rhodes continued to question him, Collins "changed his story several times," first claiming

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or at trial. Instead he stated that—after conducting the search—he believed that Collins likely was on his way to the residence. JA 182. Rhodes also testified at the preliminary hearing that he re–covered the motorcycle before leaving the property and then parked his vehicle on another street to wait for Collins. JA 18. Rhodes did not include these additional details when he testified at the suppression hearing or at trial.

[7] Rhodes later testified that "forty–five minutes to an hour" had elapsed between when he had spoken with Collins at the DMV and when he later had spoken to Collins at the Dellmead residence. JA 77.

[8] Rhodes testified at the preliminary hearing that he returned to the residence after spotting the vehicle Collins had left the DMV in and noticing that Collins was no longer in it. JA 18–19. Again, though, Rhodes did not provide these additional details when he testified at the suppression hearing or at trial.

that the motorcycle belonged to a friend before admitting that he had bought the motorcycle from Eric Jones. JA 77, 183. Collins claimed he had ridden the motorcycle from his mother's house to the Dellmead residence about a week earlier, but that he had not taken it anywhere else. JA 77, 183.

While Rhodes and Collins were still talking, Officer McCall returned from investigating the lead at the motorcycle shop. JA 76–77. McCall had obtained an invoice showing that Collins had new tires installed on the motorcycle eight days earlier. JA 75, 128, 183.[9] When Rhodes confronted Collins with this information, Collins admitted that he had ridden the motorcycle from his mother's house to the shop to have new tires put on it. JA 77–78, 183–84.

Having confirmed that the motorcycle was stolen, Officer Rhodes placed Collins under arrest for receiving stolen property and for a title violation. JA 78, 185. A search conducted incident to the arrest turned up a key to the motorcycle's ignition in Collins's pocket. JA 78–79, 185.

4. An Albemarle County grand jury indicted Collins for receiving stolen property valued at $200 or more, in violation of

[9] The VIN listed on the invoice was off by one digit. JA 75–76, 128.

Virginia Code §§ 18.2–108 and 18.2–95. JA 50.[10] Collins moved to suppress the evidence obtained from the Dellmead property. JA 52–53. At the suppression hearing, defense counsel argued that Officer Rhodes "could have sent Officer McCall to try to get a search warrant" instead of sending him to the motorcycle shop. JA 118. And even assuming Rhodes had probable cause to search the motorcycle, counsel continued, Rhodes was "trespassing on property for the purposes [sic] of doing a search," and therefore the evidence should be suppressed. JA 118.

The trial court disagreed. The court noted that Collins had denied any knowledge of the motorcycle, the motorcycle was plainly visible from the sidewalk, and Rhodes had probable cause to believe it was the same motorcycle that had eluded him. JA 119–21. Therefore, the court held that the search "was not an unreasonable governmental intrusion"

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[10] Collins was also indicted for altering or forging a certificate of title or registration (a felony), in violation of Virginia Code § 46.2–605, see Case No. CR13000673–00, and ultimately pleaded guilty to making a false statement to evade a motor vehicle tax (a misdemeanor), in violation of Virginia Code § 58.1–2402. Collins does not challenge that conviction in this appeal.

and denied the motion to suppress. JA 121.[11] Collins renewed his objection to the admission of evidence obtained as a result of the search of the motorcycle at trial, and the trial court again overruled it. JA 180–81.

5. The Court of Appeals affirmed, JA 274–86, concluding that "numerous exigencies justified both [Officer Rhodes's] entry onto the property and his moving the tarp to view the motorcycle and record its identification number." JA 280–81. In its view, Rhodes reasonably believed that the motorcycle could be removed or destroyed, especially given the prior eluding episodes. JA 281. Rhodes also knew that Collins "was aware that law enforcement was investigating incidents involving the motorcycle and where they might find it, but even more, he knew that [Collins] had an interest in concealing or destroying evidence in order to perpetuate his lies to law enforcement." JA 281. And when Rhodes located the house, "someone had placed a tarp over the motorcycle, indicating a possible attempt to conceal it." JA 281. Under these circumstances, the Court of Appeals held, "sufficient exigencies

[11] The prosecutor had argued earlier that, under the automobile exception to the warrant requirement, "[p]robable cause alone is enough to justify a search and a warrant is unnecessary." JA 115.

existed for Officer Rhodes to enter the property and examine the motorcycle." JA 282.[12]

6. This Court affirmed. *Collins v. Commonwealth*, 292 Va. 486, 506, 790 S.E.2d 611, 621 (2016). Whereas the Court of Appeals had relied on exigent circumstances, this Court concluded that "the facts necessary to resolve this case under the automobile exception to the warrant requirement of the Fourth Amendment were established in the record before the trial court." *Id.* at 506, 790 S.E.2d at 621. This Court explained that the United States Supreme Court had "never limited the automobile exception such that it would not apply to vehicles parked on private property" and had previously "held that there is no reasonable expectation of privacy in a vehicle parked on private property yet exposed to public view." *Id.* at 501–02, 790 S.E.2d at 619 (citing *Thims*, 218 Va. at 93, 235 S.E.2d at 447). This Court further noted that the Fourth Circuit had held in a "highly analogous case" that the automobile exception justified a search of a vehicle parked on a private

[12] The Court of Appeals also noted that this Court had "previously upheld a search where an officer walked up a defendant's driveway and recorded a stolen car's vehicle identification number." JA 282 (citing *Thims v. Commonwealth*, 218 Va. 85, 91, 235 S.E.2d 443, 446 (1977)).

driveway. *Id.* at 502–03, 790 S.E.2d at 619–20 (citing *United States v. Brookins*, 345 F.3d 231, 234, 237 (4th Cir. 2003)).

7. The United States Supreme Court reversed. *Collins v. Virginia*, 138 S. Ct. 1663 (2018). The Court held that "the automobile exception does not permit an officer without a warrant to enter a home or its curtilage in order to search a vehicle therein." *Id.* at 1675. The Court specifically "le[ft] for resolution on remand" the matter on which the Court of Appeals had based its holding—that is "whether Officer Rhodes' warrantless intrusion on the curtilage of Collins's house may have been reasonable on a different basis, such as the exigent circumstances exception to the warrant requirement." *Id.* The Court remanded the case to this Court "for further proceedings not inconsistent with [its] opinion." *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 this Court "review[s] de novo on appeal." *McCain v. Commonwealth*, 275 Va. 546, 551, 659 S.E.2d 512, 515 (2008). "In making such a determination," the Court "give[s] deference to the factual findings of

the circuit court" but "independently determine[s] whether the manner in which the evidence was obtained meets the requirements of the Fourth Amendment." *Id.* at 552, 659 S.E.2d at 515.

When the Commonwealth seeks to defend a trial court's judgment on alternative grounds, 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, 701 S.E.2d 437, 440 (2010). At the same time, "an appellate court's 'examination is not limited to the evidence mentioned by a party in trial argument or by the trial court in its ruling.'" *Perry v. Commonwealth*, 280 Va. 572, 580, 701 S.E.2d 431, 436 (2010) (citation omitted). "Rather, 'an appellate court must consider all the evidence admitted at trial that is contained in the record.'" *Id.* (citation omitted).

Contrary to Collins's contention, see Opening Br. 9, the burden does not shift to the Commonwealth to show that the record supports the alternative grounds for affirming. "At the initial hearing on a motion to suppress, the Commonwealth carries the burden of showing

that a warrantless search and seizure was constitutionally permissible." *Cole v. Commonwealth*, 294 Va. 342, 354, 806 S.E.2d 387, 393 (2017) (internal quotation marks omitted). But "on appeal, the defendant has the burden to show the denial of a motion to suppress evidence constitutes reversible error." *Weathers v. Commonwealth*, 32 Va. App. 652, 658, 529 S.E.2d 847, 850 (2000).

ARGUMENT

I. The motorcycle's demonstrated mobility, combined with other exigent circumstances, justified the warrantless search.

"The Fourth Amendment protects the people against unreasonable searches and seizures, but not those which are reasonable in the circumstances." *Verez v. Commonwealth*, 230 Va. 405, 410, 337 S.E.2d 749, 752 (1985). In particular, exigent circumstances "may justify as reasonable a warrantless entry into a dwelling, a search of the interior, a seizure of contraband, and an arrest of those found in possession of it." *Id.*; see also *Robinson v. Commonwealth*, 273 Va. 26, 39, 639 S.E.2d 217, 225 (2007) (affirming the trial court's denial of the defendant's motion to suppress where a police officer had "acted with probable cause and under exigent circumstances when he proceeded past the path

[from the driveway to the front door] and into the garage area and backyard without a warrant").

"While noting several relevant factors to consider," this Court has "traditionally disclaimed any effort 'to formulate a final and comprehensive list of all exigent circumstances which might justify a warrantless entry.'" *Evans v. Commonwealth*, 290 Va. 277, 283 n.5, 776 S.E.2d 760, 763 n.5 (2015) (citation omitted)). "Police officers find themselves in a myriad of situations with varied fact patterns," and "[n]o fixed legal definition fully captures the meaning of exigent circumstances." *Id.* at 283, 776 S.E.2d at 763. Instead, the "test for whether exigent circumstances were present is 'fact–specific.'" *Robinson*, 273 Va. at 41, 639 S.E.2d at 226 (citation omitted)). "The best that [a reviewing court] can do is to consider a few commonalities and then make a practical, commonsense judgment." *Evans*, 290 Va. at 283, 776 S.E.2d at 763.

Consideration of the relevant circumstances here compels the conclusion that Officer Rhodes's entry into the curtilage to search the motorcycle was reasonable. These circumstances include: the presence of a stolen motorcycle that twice had been used to elude the police at

dangerously high speeds; the possibility that someone was home; the likelihood that Collins would arrive soon to remove the motorcycle; and the risk that waiting to confront Collins would result in another dangerous—and potentially futile—high–speed chase. Under these circumstances,[13] Officer Rhodes reasonably concluded that he did not have time to obtain a search warrant, and this Court should affirm.

A. The motorcycle could have been uncovered and ridden away in a matter of seconds and had already proven to be dangerously elusive.

Several "relevant factors" courts have considered in previous exigent circumstances cases are relevant here, including "the degree of urgency involved," "the likelihood of escape if the suspects are not swiftly apprehended," and "the possibility of danger to others, including police officers left to guard the site." *Verez*, 230 Va. at 410–11, 337 S.E.2d at 753. In this case, Officer Rhodes searched the motorcycle without waiting to obtain a search warrant because the motorcycle was "movable" and because he believed that the motorcycle itself was contraband and evidence of a crime. JA 74, 97–98. Rhodes also had reason to believe that Collins had been driving the motorcycle in the

[13] No such circumstances were present in *Taylor v. United States*, 286 U.S. 1 (1932), which Collins cites at pages 15–16 of his brief.

two prior eluding incidents, and that if Collins managed to escape again, a third high–speed chase might ensue. JA 91–94, 100, 156, 165, 170, 189, 198, 200–01; see also JA 281 (Court of Appeals observing that "the same motorcycle had successfully eluded the police on two previous occasions, and could potentially have done so again here").

Collins does not deny that the motorcycle was readily movable and capable of moving quickly: Instead, he urges the Court to *ignore* those facts. In Collins's view, the United States Supreme Court rejected that rationale when it refused to apply the automobile exception, and any consideration of the motorcycle's mobility on remand would "improperly conflate[] the automobile exception and exigency." Opening Br. 18.

Not so. In declining to apply the automobile exception to the facts of this case, the Supreme Court simply held that the motorcycle's inherent mobility—"*without more*"[14]—could not justify a warrantless search of the curtilage. But the majority did not dispute Justice Alito's point in dissent "that the motorcycle, when parked in the driveway, was just as mobile as it would have been had it been parked at the curb."

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[14] *Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (per curiam) (emphasis added).

Collins, 138 S. Ct. at 1681 (Alito, J., dissenting). Nor did the Court ever state that this Court could not consider the motorcycle's *demonstrated* mobility in determining "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." *Id.* at 1675 (majority op.).

Collins insists that "Officer Rhodes' suspicion that the parked motorcycle had been involved in high–speed eluding incidents months earlier" simply "does not matter" because the fact "[t]hat an object of police interest is, in the abstract, 'easily removed, hidden, or destroyed' does not constitute exigent circumstances." Opening Br. 19 (citation omitted). But this specific motorcycle's demonstrated ability to reach dangerous rates of speed and elude police was far from an "abstract" concern for Officer Rhodes, who reasonably could have feared that waiting to obtain a warrant posed a "possibility of danger to others," including himself, other officers, and members of the public. *Verez*, 230 Va. at 410, 337 S.E.2d at 753; see also *Robinson*, 273 Va. at 43–44, 639 S.E.2d at 227 (citing the possibility that juveniles who had been drinking "and possibly other motorists could have been injured, in the

absence of immediate and direct action," as evidence of exigent circumstances).

B. Someone could have been home, and Rhodes had strong reason to believe Collins would try to flee on the motorcycle.

1. In assessing exigent circumstances, courts also consider "the officers' reasonable belief that contraband is about to be removed or destroyed," "information that the possessors of the contraband are aware that the police may be on their trail," and "whether the officers have strong reason to believe the suspects are actually present in the premises." *Verez*, 230 Va. at 410–11, 337 S.E.2d at 753.

Here, Officer Rhodes could not have known whether anyone was home at the time he conducted the search. In addition, based on the interaction at the DMV, Rhodes had strong reason to believe that Collins could arrive shortly to remove the motorcycle if he had not arrived already. He and Officer McCall both had just confronted Collins about the motorcycle, and Rhodes had shown Collins photographs of the motorcycle and the Dellmeade Lane residence taken from Collins's own Facebook page. JA 70–71, 85–86, 162–63, 175–76. In response Collins had lied repeatedly, falsely maintaining that he knew nothing about the motorcycle or the house in the photographs, and that he had not ridden

a motorcycle in months. JA 70–71, 175–76; see also JA 223–24 (defense counsel conceding that Collins lied to avoid being charged with eluding). For that reason, "Officer Rhodes had good reason to suspect that Collins would return from the DMV and speed away on the motorcycle in order to hide it and potentially remove the VIN." *Collins*, 292 Va. at 499, 790 S.E.2d at 618; see also *Covil v. Commonwealth*, 268 Va. 692, 696, 604 S.E.2d 79, 82 (2004) ("A false or evasive account is a circumstance, similar to flight from a crime scene, that a fact–finder may properly consider as evidence of guilty knowledge.").[15]

This Court recently relied on similar evidence to support the conclusion that exigent circumstances justified a warrantless entry into an apartment. In *Evans v. Commonwealth*, the defendant's mother told

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[15] See also *Evans*, 290 Va. at 285, 776 S.E.2d at 764 (finding exigent circumstances where the defendant's mother knew "that the investigating officers at her doorway smelled the marijuana" coming from inside her apartment, "which would naturally give her a potent incentive to destroy, discard, or hide the illegal drug (or ask others to do so) soon after she closed the door"); *Carratt v. Commonwealth*, 215 Va. 55, 58–59, 205 S.E.2d 653, 656 (1974) (holding that exigent circumstances justified a "no–knock" warrantless entry into a suspect's dwelling where the officers had reason to believe the suspect "had discovered that he was under surveillance" and that he was "most likely anticipating a search and prepared to destroy any incriminating evidence if given the time and opportunity").

officers "[a]in't nobody smoking weed in here" despite a "cloud of heavy and extremely strong marijuana odors" emanating from her apartment. 290 Va. at 285–86, 776 S.E.2d at 764. As the Court explained, the mother's "inept remark, followed by slamming the door, implied that [the defendant's] mother knew the police officers were aware that marijuana was present in the apartment, and she needed a little time and privacy to do something about the problem." *Id.* at 286, 776 S.E.2d at 764. Likewise here, Collins's obvious lies about the motorcycle and the residence depicted in the photographs taken from his Facebook page—followed by his leaving the DMV—"implied that [Collins] knew the police officers were aware" that he was associated with the stolen motorcycle, "and [Collins] needed a little time and privacy to do something about the problem." *Id.* at 286, 776 S.E.2d at 764.

Officer Rhodes also could reasonably have worried that someone other than Collins might remove the motorcycle. When Rhodes and the other officers arrived at the Dellmead Lane residence, Rhodes saw that the motorcycle was parked in the driveway behind a silver Toyota 4–Runner. JA 72, 88–89, 178–79. Based on the presence of the other vehicle, Officer Rhodes could reasonably have feared that someone

other than Collins might have been inside the residence and that Collins (who had been confronted about the motorcycle and had left the DMV before the officers) might have asked that other person to remove the motorcycle before the officers were able to obtain a search warrant.

This case is directly analogous to this Court's decision in *Thims v. Commonwealth*, 218 Va. 85, 91, 235 S.E.2d 443, 446 (1977). In *Thims*, the Court concluded that exigent circumstances justified a warrantless search of a vehicle parked in a private driveway at a residence that the Court referred to as "the Thims's residence." 218 Va. at 90–93, 235 S.E.2d at 446–47. Although the defendant and three other suspects "had been taken into custody the previous evening, along with what turned out to be the keys" to the vehicle in the driveway, the investigating officer "had no way of knowing who else might have keys to the vehicle," other people "might have had motives to remove it while [the officer] took the additional time to get a warrant," and the defendant "himself might have telephoned to a friend, relative, or confederate to remove the car, or he might have . . ., during [the

officer's] absence to obtain a warrant, removed the car himself." *Id.* at 91, 235 S.E.2d at 446.[16] All of that is true here as well.

2. In response, Collins relies heavily on Officer Rhodes's testimony at the preliminary hearing that "there was nobody at the residence" at that time. Opening Br. 1, 5, 13, 21 (citing JA 18). But the parties did not incorporate the preliminary–hearing evidence when they appeared in court for the suppression hearing, nor did defense counsel ever mention that testimony during the suppression hearing. JA 18. Cf. *Lanier v. Commonwealth*, 10 Va. App. 541, 552, 394 S.E.2d 495, 502

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[16] See also *Keeter*, 222 Va. at 142, 278 S.E.2d at 846 (finding a warrantless entry into a dwelling was justified by exigent circumstances, particularly given the officers' "chief concern" that two suspects who had left the residence would observe police activity at a separate location and "get word back to the residence to get rid of the incriminating evidence"); *Fore v. Commonwealth*, 220 Va. 1007, 1012–13, 265 S.E.2d 729, 732–33 (1980) (holding that even though the defendant was in custody when the search occurred, "exigent circumstances justified the officer's failure to obtain a search warrant" because the officer "could reasonably fear that [an accomplice], or [the defendant's] mother–in–law, or some confederate or friend, might appear at [the car dealership], pay the repair bill, and remove the car"); *Patty v. Commonwealth*, 218 Va. 150, 157, 235 S.E.2d 437, 441 (1977) ("Another car loaded with more of defendant's companions, one of whom may have had another key to the [vehicle's] ignition, could have arrived at any time, paid the repair bill, required [the store owner] to replace the ignition coil and driven the load of marijuana away.").

(1990) (noting that "the transcript of the preliminary hearing was made part of the record during the hearing on the suppression motion").

"When considering whether to *affirm* the denial of a pretrial suppression motion, an appellate court reviews not only the evidence presented at the pretrial [suppression] hearing but also the evidence later presented at trial." *White*, 293 Va. at 414, 799 S.E.2d at 495 (emphasis added). The reason for going outside the four corners of the suppression hearing in that situation is to prevent "a windfall reversal of [a defendant's] conviction," *United States v. Longmire*, 761 F.2d 411, 418 (7th Cir. 1985), in situations where the true facts are constitutionally "sufficient . . . to sustain the introduction of the [challenged] evidence." *Carroll v. United States*, 267 U.S. 132, 162 (1925). "In contrast, as an appellate basis for *reversing* a criminal conviction based on an erroneous pretrial ruling, evidence at trial becomes relevant only if the defendant renews his pretrial motion at trial." *White*, 293 Va. at 414 n.2, 799 S.E.2d at 495 n.2 (emphasis added).

The same logic necessarily applies to evidence offered only at a preliminary hearing. Such evidence may appropriately be considered on

appeal as a basis for *affirming* a trial court's ruling denying the defendant's motion to suppress. But if a witness's preliminary–hearing testimony goes unrepeated and unmentioned at the subsequent suppression hearing, a defendant whose motion to suppress is denied should not be permitted to rely on such testimony as a basis for reversing the trial court's ruling on appeal. To hold otherwise would place unreasonable burdens on trial court judges to remember evidence from earlier proceedings and permit precisely the sort of sandbagging that the contemporaneous–objection rule and similar doctrines are designed to prevent.

Here, because Officer Rhodes did not offer similar testimony at the suppression hearing, see JA 182, this Court should reject Collins's attempt to rely on testimony given solely at the preliminary hearing as a basis to reverse the trial court's decision.[17]

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[17] The Court also should reject Collins's attempt to rely on the Commonwealth's pretrial statement in a written pleading that "Officer Rhodes observed Collins come into the house." Opening Br. 6 (citing JA 55). Collins cites this representation as if it is a fact in evidence. See *id.* But Rhodes never said that he saw Collins enter the residence when he testified in court. Rhodes's testimony does not even establish whether Collins arrived at the residence before or after Rhodes had conducted his search. JA 77, 182. The Commonwealth may have predicted that Rhodes would testify that he saw Collins enter the residence. But

C. Officer Rhodes had probable cause to believe the motorcycle was evidence of a crime, and he reasonably concluded that he did not have time to obtain a warrant.

In determining whether exigent circumstances exist, courts also examine "whether there is, at the time of entry, a clear showing of probable cause" and "the time required to get a warrant." *Verez*, 230 Va. at 410–11, 337 S.E.2d at 753. Here, the existence of probable cause "at the time of entry" is so "clear" that Collins conceded the point in the United States Supreme Court. See Pet. Br. 5 n.3, *Collins v. Virginia*, 138 S. Ct. 1663 (2018) (No. 16–1027). Accordingly, that factor weighs in favor of finding exigent circumstances.

Collins argues that "Officer Rhodes could have secured a search warrant before or after arriving at Dellmead Lane." Opening Br. 16. But Rhodes may have been unsure whether he had probable cause to believe that the motorcycle would still be parked at the Dellmead residence until after he arrived there. And even if Officer Rhodes had probable cause sooner, "he was not thereby precluded from making the search." *Fore*, 220 Va. at 1011, 265 S.E.2d at 732. "As events develop and new information is received police officials are not required to

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Collins cannot rely on that prediction as if it were a fact in evidence in the absence of actual testimony to support it.

hasten to a magistrate when a minimal probable cause showing arguably might have been made." *Id.* at 1012, 265 S.E.2d at 732 (citation omitted)). "Nor need they make detours to a magistrate's office at the risk that events might pass them by." *Id.* (citation omitted).

Officer Rhodes also reasonably could have feared that if he had sent Officer McCall to apply for a search warrant rather than to the motorcycle shop, McCall might not have returned in time with a warrant. And without the information that McCall obtained from the motorcycle shop, Rhodes might not have had probable cause to arrest Collins for receiving stolen property.

And even if it had turned out that Officer Rhodes could have obtained a warrant in time, "[a] determination of whether exigent circumstances justify a warrantless entry is not based on an analysis of the circumstances considered in hindsight." *Robinson*, 273 Va. at 41, 639 S.E.2d at 226; accord *Keeter v. Commonwealth*, 222 Va. 134, 141, 278 S.E.2d 841, 846 (1981) ("officers are not required to possess either the gift of prophecy or the infallible wisdom that comes only with hindsight").

II. Alternatively, this Court should affirm because Officer Rhodes's actions were reasonable under then–existing binding precedent, and suppression would have no deterrent value.

Even if exigent circumstances had not justified the search, this Court still should affirm. Collins does not have "a personal constitutional right" to the exclusion of the evidence introduced against him. *Stone v. Powell*, 428 U.S. 465, 494 n.37 (1976).

1. The exclusionary rule is a "judicially created remedy," and its purpose "is not to redress the injury to the privacy of the search victim." *United States v. Calandra*, 414 U.S. 338, 347 (1974). Instead, "the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures." *Id.*

The "deterrent purpose of the exclusionary rule necessarily assumes that the police have engaged in willful, or at the very least negligent, conduct which has deprived the defendant of some right." *Michigan v. Tucker*, 417 U.S. 433, 447 (1974). "Police practices trigger the harsh sanction of exclusion only when they are deliberate enough to yield 'meaningfu[l]' deterrence, and culpable enough to be 'worth the price paid by the justice system.'" *Davis v. United States*, 564 U.S. 229,

240 (2011) (quoting *Herring v. United States*, 555 U.S. 135, 144 (2009)). "By refusing to admit evidence gained as a result of such conduct, the courts hope to instill in those particular investigating officers, or in their future counterparts, a greater degree of care toward the rights of an accused." *Tucker*, 417 U.S. at 447.

But where "the official action was pursued in complete good faith," the exclusionary rule's "deterrence rationale loses much of its force." *Tucker*, 417 U.S. at 447; see *United States v. Leon*, 468 U.S. 897, 919 (1984) (explaining that the exclusionary rule "cannot be expected, and should not be applied, to deter objectively reasonable law enforcement activity"). This is especially true in situations where "the police conduct[ed] a search in objectively reasonable reliance on binding judicial precedent." *Davis*, 564 U.S. at 239. "[W]hen binding appellate precedent specifically *authorizes* a particular police practice, well–trained officers will and should use that tool to fulfill their crime–detection and public–safety responsibilities," and "[a]bout all that exclusion would deter . . . is conscientious police work." *Id.* at 241. It follows, then, that "[e]vidence obtained during a search conducted in

reasonable reliance on binding precedent is not subject to the exclusionary rule." *Id.*

2. That principle is controlling here. At the time of Officer Rhodes' search, this Court's decision in *Thims* constituted binding appellate precedent specifically authorizing the official action that Collins challenges in this appeal. Because the facts of *Thims* so closely mirror those of this case, they are worth quoting at length:

> [Officer] Dwyer proceeded to the Thims residence, where he saw, from the street, a 1962 blue Thunderbird, bearing no license plates and no inspection sticker, in the driveway. Dwyer walked into the driveway, opened an unlocked door of the car, obtained the vehicle identification number, and tried to ascertain from the Division of Motor Vehicles the ownership of the automobile. It was reported to him that the car was not registered in Virginia, Maryland, or the District of Columbia.
>
> Believing that the car had been purchased with stolen and forged checks and was the fruit of a crime, that it may have been stolen, and that it contained stolen property, Dwyer seized the Thunderbird and made a limited inventory search during which he unlocked the trunk with the set of keys that had been taken from Thims and seized Phyllis Dorsey's Sony stereo which he found therein. As far as he knew Thims was in jail at this time. While Dwyer was in the driveway, Thims's mother came out of the house. She did not ask Dwyer to leave, and Dwyer did not ask her permission to search or remove the car. Upon completing his search, Dwyer had the Thunderbird towed to the police property yard.

Thims, 218 Va. at 88, 235 S.E.2d at 445. The defendant in *Thims* moved to suppress the evidence of the stolen stereo on Fourth Amendment grounds, the trial court denied the motion, and the defendant appealed. *Id.* at 87, 235 S.E.2d at 449.

This Court affirmed the trial court's decision on three separate bases. *First*, the Court held that the officer "had probable cause" and was "confronted for the first time with a vehicle which could be quickly moved." *Thims*, 218 Va. at 91, 235 S.E.2d at 446. Accordingly, the search was justified by "exigent circumstances." *Id.* at 91, 93, 235 S.E.2d at 446, 447.

Second, this Court held that because the officer "had probable cause to believe that the car was the fruit of a crime, that it might be stolen, and that it contained stolen property," the officer "had the right to enter the driveway and open the door to determine the identification number." *Thims*, 218 Va. at 91–92, 235 S.E.2d at 447. The Court concluded that the officer "seized the car when he opened the door," but still held that the existence of "probable cause to believe that the car was the fruit of the crime of larceny through Thims's use of a forged

check and that it contained the stolen stereo justified the seizure." *Id.* at 92, 235 S.E.2d at 447.

Third, this Court held that while "the vehicle was parked on private property," it also "was fully exposed to public view, so that there was no reasonable expectation of privacy as to it." *Thims*, 218 Va. at 93, 235 S.E.2d at 447. Accordingly, for this additional reason the Court held that the officer "had the right, without a warrant, to seize and search the car, as evidence of a crime." *Id.*

Thims was good law when Officer Rhodes walked up the driveway at the Dellmead residence and searched the stolen motorcycle that was parked there. Indeed, both this Court and the Court of Appeals cited *Thims* in affirming the trial court's decision denying Collins's motion to suppress. JA 282; *Collins*, 292 Va. at 501–02, 790 S.E.2d at 619.

Given the factual similarities between *Thims* and this case, Officer Rhodes acted "in objectively reasonable reliance on binding judicial precedent" when he entered the driveway and searched the stolen motorcycle without first obtaining a warrant. *Davis*, 564 U.S. at

239. As a result, the "[e]vidence obtained during [that] search . . . is not subject to the exclusionary rule." *Id.*[18]

The same goes for Officer Rhodes's reasonable reliance on prior case law regarding the automobile exception. As this Court noted in its opinion in this case, the "Supreme Court [had] never limited the automobile exception such that it would not apply to vehicles parked on private property." *Collins*, 292 Va. at 501, 790 S.E.2d at 619. And as this Court further observed, the federal court of appeals whose jurisdiction includes Virginia had likewise held in a "highly analogous case" that the automobile exception justified a search of a vehicle parked on a private driveway. *Id.* at 502–03, 790 S.E.2d at 619–20 (citing *United States v. Brookins*, 345 F.3d 231, 234, 237 (4th Cir. 2003)).

In short, any violation of the Fourth Amendment that occurred here was not "deliberate enough" for exclusion "to yield 'meaningfu[l]'

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[18] See also *United States v. Byrd*, No. 16–1509, 2018 U.S. App. LEXIS 22058, at *2 (3d Cir. Aug. 8, 2018) (affirming, on remand from the United States Supreme Court in a case argued the same day as *Collins*, on the "alternative ground" that the challenged search "was authorized by [Third Circuit] precedent at the time it was conducted" so "the good–faith exception to the exclusionary rule applies").

deterrence," nor was it "culpable enough to be 'worth the price paid by the justice system.'" *Davis*, 564 U.S. at 240; see also *Rivera v. Commonwealth*, 65 Va. App. 379, 391, 778 S.E.2d 144, 150 (2015) (refusing to apply the exclusionary rule where Supreme Court precedent "generally supported the warrantless search of [the defendant's] cell phone incident to his arrest," and persuasive authority from other jurisdictions had more specifically approved of such searches). For that reason, the Court should affirm the circuit court's order on the alternate ground that the exclusionary rule does not apply under the circumstances of this case.[19]

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[19] As this Court held in *Perry*, "[w]hen the trial court has reached the correct result for the wrong reason, but the record supports the right reason," a reviewing court will "assign the correct reason and affirm that result" in cases where, as here, no "additional factual presentation is necessary to resolve the newly–advanced reason." 280 Va. at 580, 701 S.E.2d at 436. Collins cites this Court's decision in *Ghameshlouy v. Commonwealth*, 279 Va. 379, 689 S.E.2d 698 (2010), for the proposition that the Commonwealth "has long since abandoned" any ground other than exigent circumstances "for avoiding suppression of the evidence here." Opening Br. 10. But *Ghameshlouy* pre–dates *Perry* and it stands for the unremarkable proposition that a party who participates in an appeal by filing or joining a brief waives any objection the party had to a "defect in the notice of appeal in not naming the proper appellee." *Ghameshlouy*, 279 Va. at 394, 689 S.E.2d at 706.

CONCLUSION

Officer Rhodes's actions were reasonable under the Fourth Amendment because exigent circumstances supported the decision not to seek a warrant. In addition, regardless of whether the Fourth Amendment was violated, suppression would be inappropriate here because Officer Rhodes acted in reasonable reliance on then–controlling appellate precedent. The judgment of the Court of Appeals should thus be affirmed.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA

By: *Matthew R. McGuire*

MATTHEW R. MCGUIRE (VSB #84194)
Principal Deputy Solicitor General

TOBY J. HEYTENS (VSB #90788)
Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786–7773
(804) 371–0200 (fax)
mmcguire@oag.state.va.us

MARK R. HERRING
Attorney General

VICTORIA PEARSON
Deputy Attorney General

CHRISTOPHER P. SCHANDEVEL
Assistant Attorney General

CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h) that on September 10, 2018, this brief was filed electronically with the Court, in Portable Document Format, and three printed copies were hand–delivered to the Clerk's Office in compliance with Rule 5:26(e). This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was electronically mailed to:

Matthew A. Fitzgerald
Brian D. Schmalzbach
Travis C. Gunn
MCGUIREWOODS LLP
800 East Canal Street
Richmond, Va. 23219
Phone: (804) 775–4716
Fax: (804) 698–2251
mfitzgerald@mcguirewoods.com
bschmalzbach@mcguirewoods.com
tgunn@mcguirewoods.com

Charles L. Weber, Jr.
ATTORNEY AT LAW
415 4th Street NE
Charlottesville, Va. 22902
Phone: (434) 977–4054
Fax: (434) 977–4235
cweber977@aol.com

Counsel for Appellant

s/ *Matthew R. McGuire*
Matthew R. McGuire