SCV: Submitted on 06-26-2017 14:58:01 EDT for filing on 06-26-2017

In The

Supreme Court of Virginia

RECORD NO: 161676

COMMONWEALTH OF VIRGINIA,

Appellant,

v.

JAMES WILLIS CAMPBELL, SR.,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF VIRGINIA
CASE NO. 1404-15-3

OPENING BRIEF OF APPELLEE & ASSIGNMENTS OF CROSS-ERROR

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ASSIGNMENTS OF CROSS-ERROR[1]

I. The Court of Appeals erred in not ruling that the trial court committed error in denying a motion to suppress evidence obtained from police entry and search of the appellee's property and outbuilding where the affidavit for search warrant was constitutionally insufficient, the resulting search warrant was invalid, and the good faith exception to the exclusionary rule did not apply because of exigent circumstances. (Preserved by the appellee's Court of Appeals Brief at 11-16).

II. The Court of Appeals erred in not ruling that the trial court committed error in denying a motion to suppress evidence by holding that exigent circumstances were present to justify the entry and search of the appellee's property by the police without a valid search warrant. (Preserved by the appellee's Court of Appeals Brief at 16-21).

STATEMENT OF THE CASE

James W. Campbell, Sr., ("Campbell") agrees with the appellant's description under the headings "Statement of the Case" and "Material Proceedings in the Circuit Court." However, Campbell filed his Second Amended Motion to Suppress on April 30, 2015, not April 30, 2016. (App. 50-53).

STATEMENT OF FACTS

On August 6, 2014, a search warrant was issued for the residence and outbuildings of Campbell. (App. 92). The magistrate who issued the search

[1] Counsel for appellee does not believe that the Court of Appeals erred in its disposition of the appeal below. Once it determined the case as a matter of state law, the Court had no need to inquire further. However, counsel for appellee feels compelled to assign cross-error to the Court of Appeals failure to decide the case on the additional grounds asserted in these assignments, to preserve those arguments for review. *See Wells v. Shoosmith*, 245 Va. 386, 388 n.1, 428 S.E.2d 909, 910 n.1 (1993).

warrant transmitted the affidavit for the search warrant to the Clerk of the Circuit Court by electronically transmitted facsimile. (App. 152).

The documents filed by the magistrate consisted of 4 pages. (App. 152). Page 1 was the first page of the affidavit for search warrant, page 2 was the search warrant, page 3 was a duplicate of the search warrant, and page 4 was the blank copy of the search inventory and return. (App. 152). The complete second page of the affidavit for search warrant was never filed of record in the Clerk's Office. (App. 152). The Commonwealth produced a copy of the second page of the affidavit for search warrant to the trial court. (App. 151) However, this affidavit did not show when it had been certified to the Clerk, when the original was delivered to the Clerk, or that it had been filed in the Clerk's Office. (App. 151-152).

Further, page 1 of the affidavit for search warrant that was filed in the Clerk's Office was different from page 1 of the affidavit that was produced by the Commonwealth. (App. 54, 152). Additions had been made to the Clerk's version that were not shown on the Commonwealth's version, and there were changes correcting spellings in different locations on the two versions. (App. 54, 152).

On August 6, 2014, Investigator Begley ("Begley") was contacted about midday by Kevin Lockhart ("Lockhart") about a methamphetamine cook that was going to take place at Campbell's residence later that evening.

(App. 163, 165, 167, 184, 189). Lockhart had been monitoring Campbell for the past several weeks and had told Begley that he had a lead on a possible meth cook approximately one month prior. (App. 164, 235).

The cook took place in the shed on Campbell's property where Campbell slept. (App. 173, 274). Close by was Campbell's trailer, and another home is located 25 to 30 yards from the shed. (App. 174). There were no children present. (App. 190). There were two to three people in Campbell's trailer, but their presence on scene was only discovered after the search warrant was executed. (App. 190-191). Police were unaware of the presence of anyone in the home located 25-30 yards from the shed. (App. 192). The next closest house was 75 to 100 yards away. (App. 192). Timothy Birch and Ashley Campbell, two co-defendants, were present. (App. 172, 174-175, 189).

Lockhart arrived at Campbell's shed sometime between 2:00 p.m. and sunset, and stayed there until the police arrived. (App. 206, 225). At one point, Lockhart left the scene and contacted Begley, and Begley asked Lockhart to return to the scene if he could. (App. 206). Lockhart said he could and returned to the shed. (App. 206). Lockhart left a second time approximately 20 minutes later and contacted Begley to ask where he was. (App. 206-207). Begley told Lockhart to "get back down there," and Lockhart

did so. (App. 207). When Lockhart returned to the shed this time, the cook was underway. (App. 207). At one point, the shed started filling up with fumes and could have ignited. (App. 208-209). The door was then opened, and a minute to a minute and a half later the police arrived. (App. 209). The police came down the drive with their lights on, talking over their loud speakers. (App. 209). By the time the co-defendants realized that the police were there, "it was too late." (App. 209).

After Investigator Begley received information that the methamphetamine cook was going to take place, he contacted the State Police tactical team and notified his supervisor at the sheriff's office. (App. 165). Forty-five minutes to one hour prior to the execution of the search warrant, but after the search warrant was issued, one investigator and one sniper from the Virginia State Police were deployed to the woods to observe the shed. (App. 172, 192). During this time, the sniper saw a female take aluminum foil from the trailer to the shed and a male take a piece of hose to the shed. (App. 250-251). The search warrant was presented to Sergeant Bob Shupe of the State Police who then handed it off to Sergeant Edwards of the State Police. (App. 173). The State Police and Amherst County law enforcement officers then geared up at the Amherst County Sheriff's Office and traveled in a motorcade to Campbell's residence. (App. 173). There

were at least four vehicles in the motorcade (App. 184). The officers deployed on scene, executed the search warrant, and Campbell was taken into custody. (App. 173, 189). Subsequently, certificates of analysis were produced by the Department of Forensic Science showing the materials found contained methamphetamine and precursor to methamphetamine. (App. 244, 247).

At trial, Investigator Begley did not know how large a blast radius a methamphetamine cook of the type discovered would produce. (App. 192). Special Agent Glenn Philips testified that the production method used by the defendants in this case were “the most benign” type of methamphetamine production, that the dangers of such a production method were blindness and an inhalation hazard to the person making it, and there was an additional danger of a plume of fire, or fireball. (App. 303)

ARGUMENT

I. The Court of Appeals correctly held that Va. Code Ann. § 19.2-54 required suppression.

This Court applies a *"de novo* standard of review when addressing a question of statutory construction." *Courtney v. Commonwealth*, 281 Va. 363, 366, 706 S.E.2d 344, 345 (2011) (citation omitted). "The primary objective of statutory construction is to ascertain and give effect to legislative intent." *Commonwealth v. Zamani*, 256 Va. 391, 395, 507 S.E.2d 608, 609 (1998).

Furthermore, "[this] Court presumes that the legislature has purposefully chosen the precise statutory language, and [it is] bound by those words when [it] appl[ies] the statute." *David v. David*, 287 Va. 231, 240, 754 S.E.2d 285, 290-91 (2014) (internal quotation marks and citations omitted).

Va. Code Ann. § 19.2-54 provides in pertinent part, as follows:

> *Failure of the officer issuing such warrant to file the required affidavit shall not invalidate any search made under the warrant unless such failure shall continue for a period of 30 days.* If the affidavit is filed prior to the expiration of the 30-day period, nevertheless, evidence obtained in any such search shall not be admissible until a reasonable time after the filing of the required affidavit. (Emphasis added).

The purpose of Va. Code Ann. § 19.2-54 is to give the defendant reasonable opportunity to determine that the affidavit on file is the same one upon which the determination of probable cause was based. *Garza v. Commonwealth*, 228 Va. 559, 566-67, 323 S.E.2d 127, 131 (1984) (citing *Quintana v. Commonwealth*, 224 Va. 127, 136, 295 S.E.2d 643, 646-47 (1982)). The “required affidavit” as described in Va. Code Ann. § 19.2-54 “means the affidavit required to support issuance of a search warrant.” *Quintana,* 224 Va. at 136, 295 S.E.2d at 646. Under the Fourth Amendment warrant requirement, the contents of that affidavit must be sufficient to support a finding of probable cause by a neutral and detached magistrate. *Id.* at 136, 295 S.E.2d at 646-47. Additionally, the

requirements of Va. Code Ann. § 19.2-54 are, in substance, the same as those contained in the Fourth Amendment. *Kirby v. Commonwealth*, 209 Va. 806, 808, 167 S.E.2d 411, 412 (1969).

The Supreme Court has plainly rejected strict construction of Va. Code Ann. § 19.2-54 where the purpose of the statute has been met. *Garza*, 228 Va. at 566, 323 S.E.2d at 131. "That purpose is to give the defendant reasonable opportunity to determine that the affidavit on file is the same one upon which the determination of probable cause was based." *Id.*

The holdings of *Quintana* and *Garza* point to the general proposition that violations of state procedural statutes are looked upon with disfavor, but are not grounds for the suppression of evidence where "no deprivation of the defendant's constitutional rights occurred." *West v. Commonwealth*, 16 Va. App. 679, 692, 432 S.E.2d 730, 739 (1993). *West*, however, explicitly states that "searchers or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression *unless the statute supplies that right*." *Id.* at 692, 432 S.E.2d at 739. The last paragraph of Va. Code Ann. § 19.2-54 supplies such a right.

In this case, the Court of Appeals correctly held that Va. Code Ann. § 19.2-54 required suppression. Unlike *Quintana* and *Garza,* the notice requirement embodied in Va. Code Ann. § 19.2-54 was not fulfilled. There

was no way for Campbell to tell that the affidavit that had been sworn to before the magistrate was the same that was on file in the Clerk's Office. The affidavit that was filed in the clerk's office only contained page 1, and it contained no information regarding the material facts constituting probable cause, a statement of nexus, or the basis for the affiant's knowledge of the material facts that constitute probable cause. (App. 152). Further, there is no showing that the affidavit on file was signed by the affiant or acknowledged by the magistrate. (App. 152). Certainly, the "required affidavit" as contemplated by Va. Code Ann. § 19.2-54 was not filed in the Clerk's Office.

Indeed, the trial judge ruled that the search warrant was defective because of the insufficient affidavit on file. (App. 152-154). However, the trial court's error was not suppressing the evidence outright and allowing exigent circumstances to save the defective search warrant. This was in error because Va. Code Ann. § 19.2-54 clearly provides a statutory right of suppression. It contains no provision that the evidence should be suppressed unless the search is saved by an exception to the Fourth Amendment's warrant requirement. Additionally, the language of the statute discusses any search *under the warrant.* Here, a search was executed and a return made under a warrant. (App. 46-47). By allowing the issue to go forward on the issue of

exigent circumstances, the trial court added language to the statute and violated Campbell's statutory right to suppression of the evidence. Thereafter, the Court of Appeals correctly reversed the trial courts error.

II. The Court of Appeals erred in not ruling that the trial court committed error in denying a motion to suppress evidence obtained from police entry and search of the appellant's property and outbuilding where the affidavit for search warrant was constitutionally insufficient, the resulting search warrant was invalid, and the good faith exception to the exclusionary rule did not apply because of exigent circumstances.

Whether the good faith exception applies to a particular set of facts is a legal conclusion this Court reviews *de novo*. *Adams v. Commonwealth*, 275 Va. 260, 268, 657 S.E.2d 87, 91 (2008). If the application of this exception involves disputed facts arising from the motion to suppress, the Court gives the findings of the trial court deference. *Jones v. Commonwealth*, 277 Va. 171, 177 (2009).

"The Fourth Amendment protects the 'right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,' but 'contains no provision expressly precluding the use of evidence obtained in violation of its commands, *Ariz. v. Evans*, 514 U.S. 1, 10, 115 S. Ct. 1185, 131 L. Ed. 2d 34 (1995).'" *Herring v. United States*, 555 U.S. 135, 139, 129 S. Ct. 695, 172 L. Ed. 2d 496 (2009). However, the Supreme Court of the United States has "established a rule

that forbids the government from using improperly obtained evidence at trial." *Freeman v. Commonwealth*, 65 Va. App. 407, 778 S.E.2d 519 (2015).

"Accordingly, when the police discover evidence during an unreasonable search or seizure, the exclusionary rule generally prohibits the use of such evidence at trial." *Id.* However, the United States Supreme Court has "rejected indiscriminate application of the [exclusionary] rule, and [has] held it to be applicable only where its remedial objectives are thought most efficaciously served - that is, where its deterrence benefits outweigh its substantial social costs." *Hudson v. Michigan*, 126 S. Ct. 2159, 2163, 165 L. Ed. 2d 56 (2006). Suppression of the evidence should only occur "in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *United States v. Leon*, 468 U.S. 897, 918, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984). "The exclusionary rule is designed to deter police misconduct rather than to punish the errors of judges and magistrates." *Janis v. Commonwealth*, 22 Va. App. 646, 653, 472 S.E.2d 649, 653, *aff'd* en banc, 23 Va. App. 696, 24 Va. App. 207, 479 S.E.2d 534 (1996).

The Fourth Amendment has been held to require the affidavit supporting the search warrant to contain specific information. It requires the affiant state material facts constituting probable cause, and provide the basis for the affiant's knowledge of those facts. *Wiles v. Commonwealth*, 209 Va. 282, 284-85, 163

S.E.2d 595, 597 (1968). It requires a nexus between the object, thing, or person searched and the commission of the crime. *Anzualda v. Commonwealth*, 44 Va. App. 764, 777, 607 S.E.2d 749, 755 (2005). If any of these are missing from the affidavit, then the search warrant is defective, and the search thereunder is unlawful. *Wiles*, 209 Va. at 287, 163 S.E.2d at 599; *Anzualda,* 44 Va. App. at 779, 607 S.E.2d at 756-57.

In this case, there is no second page of the affidavit on file in the Clerk's Office. (App. 153, 336). Consequently, there are no material facts constituting probable cause; there is no statement of nexus between the object, thing, or person searched and the commission of the crime; and there is no explanation of the affiant's basis of knowledge of the material facts constituting probable cause. Therefore, the warrant is defective. The analysis then turns to the exclusionary rule, as well as the good faith exception to that rule.

The exclusionary rule should be applied "only in those unusual cases in which exclusion will further the purposes of the exclusionary rule." *Leon*, 468 U.S. at 918. Specifically, the rule should be applied when the application of the rule will deter police misconduct. *Janis*, 22 Va. App. at 653, 472 S.E.2d at 653. The exclusionary rule is applicable when there has been actual police misconduct, or if upholding a search under a defective search warrant

would encourage, rather than deter, police misconduct. *Id.* Here, to uphold the search where no second page of the affidavit has been filed, with the resulting deficiencies, could provide a precedent under which an officer could skirt the Fourth Amendment's requirements for search warrants.

The good faith exception to the exclusionary rule is available "where an officer, acting in objective good faith, obtains a search warrant from a magistrate and acts within the scope of the warrant." *Derr v. Commonwealth*, 242 Va. 413, 422, 410 S.E.2d 662, 667 (1991). The good faith exception is unavailable

> (1)Where the magistrate was misled by information in the affidavit which the affiant knew was false or should have known was false, (2) the issuing magistrate totally abandoned his judicial role, [or] (3) the warrant was based on an affidavit "so lacking in indicia of probable cause" as to render official belief in its existence unreasonable….

Robinson v. Commonwealth, 19 Va. App. 642, 647, 453 S.E.2d 916, 918 (1995).

The situations listed above all apply in this case. First, there is no way for Campbell to discern whether the affiant knew or should have known that the affidavit that was presented to the magistrate was false. If there is no way to challenge the veracity of the affiant due to the complete lack of the second page of the affidavit, the court should resolve the question in favor of

the appellant. To do otherwise would provide an avenue for the issuance of general warrants through police misconduct.

Second, the issuing magistrate totally abandoned his judicial role. The magistrate's role is to ensure that the Fourth Amendment requirements are met prior to the issuance of a search warrant and to certify and file the affidavit with the Clerk of the Circuit Court. Where only the first page of the affidavit is filed, it is clear that the magistrate totally abandoned his judicial role. Specifically, he failed to provide a version of the full affidavit that supported the issuance of the search warrant for the defendant's review and notice of the basis for such search. Alternatively, if there was no second page of the affidavit prior to the issuance of the search warrant, then to issue a search warrant without that information also constituted a complete abandonment of the magistrate's judicial role.

Third, the affidavit, as it was maintained in the office of the Circuit Court Clerk, was "so lacking in indicia of probable cause" as to render official belief in its existence unreasonable. In this case, the affidavit on file contained no information that would constitute probable cause. While there was another affidavit presented to the trial court, it was not admitted into evidence, and the trial court rejected it as it was not certified, not filed with the Clerk, and had hand changes that were different from the changes on the first page of

the affidavit on file with the Clerk. (App. 152). As such, Begley's belief in probable cause, based solely on the affidavit, was objectively unreasonable. *See Janis*, 22 Va. App. at 653-654, 472 S.E.2d at 653.

It is unclear from the record whether the trial court ruled in favor of Campbell on the issue of the defective affidavit invalidating the search under the exclusionary rule. (App. 100-101, 153-184) The trial court implied that the invalid search warrant could result in the suppression of the evidence because of the inapplicability of the good faith exception to the search warrant. If the trial court did not invalidate the search on Fourth Amendment grounds, it should have for the foregoing reasons. Further, the trial court erred in allowing the search to be validated by the exigent circumstances exception to the warrant requirement.

The issue of whether the exigent circumstances exception can validate an otherwise invalid search warrant based off of a defective affidavit for search warrant has not been decided by the Supreme Court of Virginia. The United States Supreme Court discussed the issue of exigent circumstances in light of a defective search warrant in *Coolidge v. N.H.*, 403 U.S. 443, 91 S. Ct. 2022 (1971). In Coolidge, however, the court did not explicitly address whether exigent circumstances can validate a defective search warrant, because it held that there were no exigent circumstances present. *Id.* There

are two reasons why the Court should not hold that exigent circumstances can validate an otherwise defective search warrant.

First, the purpose of the exigent circumstances exception is to validate searches where no warrant can reasonably be obtained without the risk of a suspects' escape or the loss of evidence. *McCary v. Commonwealth*, 228 Va. 219, 229, 321 S.E.2d 637, 642 (1984); *Evans v. Commonwealth*, 776 S.E.2d 760, 763 (Va. 2015). Therefore, where an officer is able to secure and execute a search warrant, arrest the suspect and retrieve the evidence, the purpose of the exigent circumstances exception is not needed. Second, to allow exigent circumstances to validate a search under a defective search warrant would add a supplementary basis to the good faith exception that is not found elsewhere in Virginia jurisprudence.

Courts should not allow exigent circumstances to save a defective search warrant, because to do so would cut against the main purpose of the exigent circumstances exception. The exigent circumstances exception to the Fourth Amendment's warrant requirement is based on the need for the police to act quickly, when there is no time to obtain a warrant. When an officer has obtained and executed a search warrant, and the search warrant is later found to be defective, the purpose underlying the exigent circumstances exception is obviously not needed to bring the search within

what is considered reasonable under the Fourth Amendment. Put another way, if an officer had the time to obtain a search warrant, then the circumstances were not exigent.

Even if the evidence should not have been suppressed under Va. Code Ann. § 19.2-254, it should have been suppressed pursuant to the exclusionary rule. The trial court erred in finding exigent circumstances validated the search after it ruled that the search was invalid and the exclusionary rule applied. In turn, the Court of Appeals erred in not finding that the trial court committed error when it found exigent circumstances validated the invalid search. Had the trial court not gone forward on the issue of exigent circumstances, the Commonwealth would have been left with no evidence at all, and Campbell would not have been found guilty.

III. The trial court erred in denying a motion to suppress evidence by holding that exigent circumstances were present to justify the entry and search of the appellant's property by the police without a valid search warrant.

"On the appeal of a denial of a motion to suppress, [the appellate court] view[s] the evidence and all reasonable inferences flowing from the evidence in a light most favorable to the Commonwealth, the party prevailing below." *Robinson v. Commonwealth*, 47 Va. App. 533, 540, 625 S.E.2d 651, 654 (2006). The appellate court reviews the trial courts application of the law *de novo*, but defers to the trial court's findings of fact unless those findings are

plainly wrong or unsupported by the evidence. *Malbrough v. Commonwealth*, 275 Va. 163, 169, 655 S.E.2d 1, 3 (2008). Additionally, the appellant carries the burden of showing that the trial court's ruling denying a suppression motion, when the evidence is taken in a light most favorable to the Commonwealth, constituted reversible error. *Whitfield v. Commonwealth*, 265 Va. 358, 361, 576 S.E.2d 463, 464 (2003).

Probable cause coupled with exigent circumstances is an exception to the Fourth Amendment's warrant requirement. *Verez v. Commonwealth*, 230 Va. 405, 410, 337 S.E.2d 749, 752 (1985). Factors that give rise to exigent circumstances are:

> (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 410-11, 337 S.E.2d at 753. This list is neither a final nor comprehensive list, but merely shows relevant factors in the determination of whether exigent circumstances exist. *Id.* at 411-12, 337 S.E.2d at 753. Further, when

"determining whether exigent circumstances were sufficient to overcome the presumption of unreasonableness and justify a warrantless entry, the court must examine the circumstances as they reasonably appeared to the law enforcement officers on the scene" at the time the entry was made. *Id.* at 411, 337 S.E.2d at 753.

The first factor is clearly not present in this case, because the officers did in fact get a warrant. (App. 90) The warrant was obtained and reviewed by members of the Virginia State Police, and the executing officers found the exact items they were seeking. (App. 173, 244, 247, 304-312).

The second factor is also not present in this case. Rather, the deliberate planning, staging, and execution of the search warrant showed that no one thought contraband was about to be removed from the location. (App. 173). Further, there could be no reasonable belief that the contraband would be removed because there were officers observing the scene for up to an hour before the tactical team and motorcade arrived. (App. 172-192).

There was little possibility of danger to others. The trial testimony showed officers only knew of three individuals present prior to the execution of the search warrant, not counting the confidential informant. (App. 172, 174-175, 189). These three individuals were the three individuals making the methamphetamine, so they assumed the risk. (App. 172, 174-175, 189).

The police cannot claim that the presence of the confidential informant created a danger to others, because they themselves created this danger. Lockhart was present on scene as a paid informant of the Amherst County Sheriff's Office. (App. 163, 165, 184, 189). Lockhart left the scene at least two times, and on the last time, Begley explicitly told him to get back to the shed. (App. 163, 165, 184, 189). The closest buildings besides Campbell's own trailer were thirty yards away, and there was no evidence that the police knew of anyone present in those buildings. (App. 174, 190-191). Begley was unable to give an estimate of how large an explosion a "shake and bake" operation could produce, and Special Agent Phillips could only state that the chemical reaction would only produce inhalation problems and any explosion would be on the scale of a fireball, not an explosion. (App. 192, 302-303).

There is no evidence that Campbell or his co-defendants knew officers were on their trail. Despite two officers being positioned with a view of the shed, the co-defendants were still seen taking aluminum foil and piping to and from the shed. (App. 250-251). According to the Commonwealth's own witness, none of the codefendants fled the scene until the motorcade was on Mr. Campbell's property and using the loudspeaker system, and no codefendant escaped. (App. 163, 165, 184, 173-189).

It is conceded that manufacturing methamphetamine is a serious offense. However, there was no evidence showing that the charged crime involved violence or that the defendants were armed. It is also conceded that Begley had received enough evidence from Lockhart to establish probable cause that a crime was being committed. Begley also had a strong reason to believe that the suspects were located on the premises because he was receiving information from Lockhart. (App. 163, 165).

There was no likelihood that the suspects would have escaped if they were not swiftly apprehended. Rather, the evidence showed that Campbell did not have a car, had to get rides from others, and was so immobile that he had to have others purchase the household materials necessary for the production of methamphetamine. (App. 267-269). There was also no evidence of officer's hot pursuit of the defendants onto the premises.

While some of the factors listed in *Verez* were present as the motorcade made its way onto Campbell's property, they are not enough to constitute exigent circumstances. These factors become much weaker when reviewed based on the "'circumstances as they reasonably appeared to trained law enforcement officers to exist *when the decision to enter was made'.*" *Id.* (emphasis added). Reviewing the factors at the time the decision to enter the property was made, the evidence becomes even weaker.

Begley received information that methamphetamine would be produced well in advance of the actual production. (App. 163, 165, 184, 189). Begley was alerted of the cook as early as the day before. After being so alerted, Begley had time to assemble a tactical unit and other specialists, alert his supervisors, organize a motorcade, have the search warrant reviewed by at least two individuals with State Police, deploy a sniper to the scene, and travel to the site. (App. 172, 173, 184, 192). Based on these actions, the decision to enter the property was made well before the motorcade and officers entered onto the curtilage.

Further, Begley did, in fact, obtain a warrant. Had there been the risk of loss of evidence or an appearance of danger, the officers would have rushed to secure the scene and attempt to save life or limb. Instead, they engaged in a very deliberate, calculated, and time consuming process.

Even if the evidence should not have been suppressed under Va. Code Ann. § 19.2-54 or the exclusionary rule, the evidence adduced in the trial court failed to give rise to exigent circumstances that would excuse the requirement of a valid search warrant. Therefore the trial court's ruling that exigent circumstances existed was error. In turn, the Court of Appeals erred in not finding that the trial court committed error when it found exigent circumstances existed

CONCLUSION

WHEREFORE, the appellee respectfully requests that The Supreme Court deny the appellant's petition for appeal; and for such other and further relief as the court deems necessary and proper.

Respectfully Submitted,

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CERTIFICATE

I hereby certify, pursuant to Rule 5:26(h), that on this 26th day of June, 2017, I electronically filed the foregoing Opening Brief of Appellee and Assignments of Cross-Error via VACES, with the required paper copies set to be delivered within the prescribed one business day. I further certify that on the same date, the Brief was served, via e-mail, upon the following:

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Exclusive of the portions exempted by Rule 5:26(h), this brief does not exceed 5,061 words and/or 25 pages

Counsel does not wish to waive oral argument.

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