No. 11-_____

In The Supreme Court of the United States

COMMONWEALTH OF VIRGINIA,

Petitioner,

v.

GUY ANTHONY BANKS,

Respondent.

On Petition For A Writ Of Certiorari To The Court Of Appeals Of Virginia

PETITION FOR WRIT OF CERTIORARI

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February 27, 2012

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QUESTION PRESENTED

Whether the Fourth Amendment requires suppression of evidence that police officers found a pistol in a coat belonging to a suspect properly arrested for a felony, when the officers took control of the coat solely for the purpose of giving it to the suspect to protect him from the elements, and when the trial court expressly found that the officers acted in good faith, and that the search of the coat was conducted for the officers' safety and not for the purpose of obtaining evidence of criminal activity.

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Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of the Commonwealth of Virginia, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the Supreme Court of Virginia in this case.

INTRODUCTION

This Petition concerns whether the Fourth Amendment requires suppression of evidence discovered when a police officer seizes an item of clothing for an arrestee prior to transporting him to jail. When confronted with this situation, the majority of the States and federal Courts of Appeals have held that securing appropriate clothing for an arrestee prior to transporting him to jail does not require suppression of evidence discovered coincidentally. Instead, in this situation, most courts have recognized a so-called "clothing exigency," which permits an arresting officer to seize clothing or shoes for an arrestee. However, a minority of courts have agreed with the holding below that absent consent or some additional exigent circumstance, an arresting officer may not secure clothing or shoes for an arrestee. Under this holding, when an arresting officer seizes clothing without a warrant or the express consent of the arrestee, the Fourth Amendment requires suppression of evidence recovered incident to that seizure. Put another way, they hold an arresting officer's effort to ensure the arrestee's safety triggers suppression under the United States Constitution.

Significantly, the courts below reached this conclusion without conducting any review on the deterrent effect suppression would have in this case and whether any deterrence outweighed the costs visited on society by suppressing the evidence.

This Petition presents an excellent vehicle for this Court to resolve a mature conflict among the lower courts concerning a recurring issue. Hence, certiorari should be granted.

OPINIONS BELOW

The decisions of the Supreme Court of Virginia were by unpublished order *Commonwealth v. Banks*, Record No. 110970 (Va. Nov. 29, 2011) and (Va. Sept. 9, 2011). These orders denying the appeal and the petition for rehearing are reprinted in the Appendix at 42-43. The decision of the Court of Appeals of Virginia, *Banks v. Commonwealth*, 2011 Va. App. UNP 3059083 (Va. Ct. App. Apr. 26, 2011), is also unpublished. It is reprinted in the Appendix at 1-17.[1]

[1] The opinion challenged in this petition was issued on remand from an earlier appeal. When the Court of Appeals of Virginia first addressed this case, it held that Banks' request for his jacket constituted consent for the officer to seize it; thus, the Fourth Amendment was not implicated. *Banks v. Commonwealth*, 2009 Va. App. UNP 3059083 (Va. Ct. App. Nov. 10, 2009). (App. 26-32). On appeal, the Supreme Court of Virginia held that there was an unresolved conflict in the

(Continued on following page)

JURISDICTION

The decision of the Supreme Court of Virginia was issued on November 29, 2011. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition concerns application of the following constitutional provision:

1. The Fourth Amendment of the Constitution of the United States, U.S. Const. amend. IV, provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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evidence regarding whether Banks had requested the jacket and, therefore, the Court of Appeals erred in holding Banks consented to the seizure of the jacket. *Banks v. Commonwealth*, 701 S.E.2d 437, 441 (Va. 2010). Therefore, the case was remanded to consider whether the circumstances justified the seizure of the jacket. *Id.*

STATEMENT OF THE CASE

Lynchburg Police Officers Mitchell, Clements and Blodgett arrested Banks on the afternoon of November 15, 2007, pursuant to valid warrants for attempted robbery, malicious wounding by shooting and use of a firearm in committing those crimes. (App. 47, 54-55, 63). The arrest occurred in the doorway to the bedroom of the residence where Banks had been staying. (App. 55-58, 63, 99). At that time, it was 45 degrees outside and wind gusts had reached 20 to 25 miles per hour. (App. 64, 100). Banks was wearing only mesh shorts and a thin long-sleeve t-shirt; he wore neither shoes nor socks. (App. 55-56, 61, 64, 73, 100). Given the weather conditions, Officer Mitchell asked Banks "if he wanted to grab his shoes or a jacket." (App. 56). When Banks responded affirmatively, the officers walked him back into his room so he could retrieve those items. (App. 56, 62). Once in the bedroom, however, Banks told Officer Mitchell "his shoes were in his car outside." (App. 56, 73). Officer Mitchell took Banks outside to get his shoes, while Officer Clements remained in the bedroom and asked Banks' fiancée, "if he had a coat there." (App. 56, 64, 72, 73). In response, she pointed to a jacket "that was hanging on the top of the closet door," approximately six feet from where Banks had been arrested. (App. 64-65, 68-69, 100). Officer Clements intended the jacket for Banks. (App. 64, 68-69, 100).

Before giving Banks the jacket, however, Officer Clements checked the pockets to ensure nothing

dangerous was inside. (App. 65, 101). As soon as Officer Clements put his hand in the right pocket of the jacket, he discovered a gun. (App. 66, 101). In light of this discovery, the officers did not give Banks the jacket; instead, they locked "the jacket still containing the weapon" in the trunk of the police car. (App. 66, 101, 105).

Banks moved to suppress the jacket and revolver, claiming they were the fruits of an illegal search and seizure. (App. 47, 110-111). The trial court heard evidence on the motion to suppress on September 9, 2008. (App. 37-38, 44). At the conclusion of the hearing, Banks argued that the revolver was the fruit of an illegal search and seizure because his arrest in the doorway did not permit the officers to search the bedroom. (App. 74-77). Banks further contended that the search incident to arrest doctrine did not apply because there was no search, but instead an impermissible seizure of the jacket. (App. 77-78). Banks also argued that, even if he had requested the jacket, the seizure was improper because Officer Clements was unaware of the request. (App. 78).

After holding Banks had standing to contest the seizure of his jacket, the trial court declined to apply the inevitable discovery doctrine or the search incident to arrest doctrine. (App. 93-94). In doing so, the trial court held the search incident to arrest exception did not apply because

> that wasn't what the police were doing in this case. They weren't attempting to search the area.

> They arrested the defendant and were merely trying to get clothes or shoes for his safety incident to the arrest.
>
> * * *
>
> The officers in this case were not trying to search Mr. Banks' house. They were just merely retrieving a jacket to protect him for transportation to the jail. . . . And what they discovered in the jacket was purely coincidental.

(App. 94-97). The trial court also expressly rejected Banks' argument and authorities addressing warrantless searches of homes incident to arrests effected outside the home, finding they were not "applicable to the facts in this case." (App. 95). The trial court instead concluded that the Fourth Circuit's holding in *United States v. Gwinn*, 219 F.3d 326 (4th Cir. 2000),[2] was "the closest case to the facts in this case" and, therefore, found it persuasive. (App. 96-97). Upon application of the Fourth Circuit's five-factor test, the trial court found that the officers' entry into the bedroom was not pretextual; rather, the officers were concerned with Banks' well-being.

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[2] In *Gwinn*, the question the court addressed was whether the police violated the defendant's Fourth Amendment rights by making a warrantless reentry into his home to retrieve his shoes and a shirt. 219 F.3d at 329. There, the defendant had neither requested those items nor had the officers inquired whether he wanted them. *Id.* at 332. In concluding no Fourth Amendment violation had occurred, the court formulated a five-part test for assessing the reasonableness of the police action. *Id.* at 333-34.

(App. 97). In addition, the trial court found the discovery of the gun was purely coincidental to the effort to protect Banks' safety. (App. 97). Accordingly, the trial court overruled the motion to suppress and proceeded with the bench trial, at the conclusion of which, the trial court convicted Banks of the single count of possession of a firearm by a convicted violent felon and sentenced him to five years' imprisonment. (App. 33-39, 98).

Banks appealed to Virginia's intermediate appellate court. A unanimous three-judge panel affirmed by unpublished opinion, holding that Banks' agreement that he wanted his jacket and shoes constituted consent for the officers to seize the jacket. Accordingly, the officers' actions were reasonable and there was no basis to suppress the jacket. *Banks*, 2009 Va. App. UNP 3059083. (App. 29-31).

Banks appealed to the Supreme Court of Virginia, arguing that the Court of Appeals of Virginia had erred in finding that the seizure of the jacket was lawful under the Fourth Amendment because he had consented. That tribunal, by unanimous opinion, held that the Court of Appeals erred in finding that Banks had consented to seizure of his jacket. *Banks*, 701 S.E.2d 437. Specifically, the Supreme Court of Virginia concluded that the Court of Appeals of Virginia erred in finding consent because the trial court had not resolved the factual dispute regarding whether Banks had requested his jacket from the officers or "indicated how it weighed or credited the contradicting testimony as to whether

Banks asked for a jacket." *Banks*, 701 S.E.2d at 440. The Supreme Court of Virginia then remanded the case to the Court of Appeals to determine "whether the circuit court erred in holding that Banks' state of undress presented an exigency justifying the officers' seizure of the jacket." *Id.* at 441.

On remand, the Court of Appeals held that "the trial court erred in holding the officers' need to obtain a jacket for Banks constituted an exigency justifying the warrantless seizure" of Banks' jacket.[3] *Banks*, 2011 Va. App. UNP 3059083. (App. 16). Accordingly, the Court of Appeals reversed the trial court's judgment and vacated Banks' conviction. *Id.* (App. 16-17).

The Commonwealth timely noted an appeal to the Supreme Court of Virginia, which refused the petition and subsequent petition for rehearing. This Petition follows.

REASONS FOR GRANTING THE PETITION

When, as here, an arrestee is not adequately dressed or is without shoes, most courts that have considered the issue have recognized a "clothing exigency" to permit a warrantless entry or reentry

[3] The Court of Appeals found it "unnecessary to decide whether a 'clothing exigency exception' should be created in Virginia." *Banks*, 2011 Va. App. UNP 3059083. (App. 16).

into the arrestee's home and a seizure of his clothing or shoes. *See, e.g.*, *United States v. Clay*, 408 F.3d 214, 218 (5th Cir. 2005). The so-called "clothing exigency" rests on the recognition that "the potential of a personal safety hazard to the arrestee places a duty on law enforcement officers to obtain appropriate clothing." *United States v. Wilson*, 306 F.3d 231, 241 (5th Cir. 2002), *overruled on other grounds*, *United States v. Gould*, 364 F.3d 578, 586 (5th Cir. 2004) (*en banc*); *Gwinn*, 219 F.3d at 333 (troopers had a duty "to look after the reasonable safety requirements of persons in their custody."). It follows then, as a majority of courts have found, that a limited seizure of an arrestee's clothing or shoes to fulfill that duty does not offend the Fourth Amendment.

At issue here is whether the Fourth Amendment requires the suppression of evidence when the police discover that evidence while securing clothes or shoes for an arrestee. The Court of Appeals of Virginia held that it does, and is joined by the Sixth Circuit in that conclusion. Six federal courts of appeals and three state supreme courts have reached the directly opposite conclusion. Certiorari is warranted to resolve this conflict over a recurring and important issue of constitutional law.

I. THE DECISION BELOW CONFLICTS WITH NUMEROUS DECISIONS OF FEDERAL COURTS OF APPEALS AND STATE SUPREME COURTS.

The Second, Fourth, Fifth, Eighth, Ninth, Tenth, and District of Columbia Circuits, as well as the highest state courts in Minnesota, Missouri and Rhode Island have concluded that the Fourth Amendment does not require the suppression of evidence discovered when an arresting officer secures clothing or shoes for the arrestee or accompanies the arrestee or a third party in securing clothing or shoes.

Federal Cases:

- *Clay*, 408 F.3d at 218 (holding the need to "procure footwear" for barefoot arrestee constituted exigent circumstances justifying reentry into bedroom); *see also Wilson*, 306 F.3d at 241 (holding police permitted to enter home to get clothes for arrestee who was wearing only boxer shorts);

- *United States v. Fisher*, 150 F. App'x 674, 676, 2005 U.S. App. LEXIS 21801, at *3-4 (9th Cir. Oct. 6, 2005) (holding police were permitted to enter hotel room of arrestee, who was naked, to retrieve clothing);[4]

[4] In *United States v. Whitten*, 706 F.2d 1000, 1016 (9th Cir. 1983), the Ninth Circuit held the police improperly entered defendant's hotel room after he was arrested in the doorway, notwithstanding he was wearing only underwear at the time of

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- *United States v. DeBuse*, 289 F.3d 1072, 1074 (8th Cir. 2002) (holding an arresting "officer [may] accompan[y] the arrestee into his residence to obtain clothing.");

- *Gwinn*, 219 F.3d at 333 (holding officer had a duty to get shoes and shirt for arrestee; therefore, officer could enter home to retrieve those items even in the absence of a request for them);

- *United States v. Butler*, 980 F.2d 619, 621-22 (10th Cir. 1992) (holding that officer could enter the home with arrestee to get shoes and that it was immaterial that it was the officer who determined the arrestee needed shoes);

- *United States v. Di Stefano*, 555 F.2d 1094, 1101 (2d Cir. 1977) (holding that officers had a duty to find clothing for arrestee, who was wearing a nightgown and bathrobe, or permit arrestee to do so); *see also United States v. Titus*, 445 F.2d 577, 579 (2d Cir. 1971) (holding that arresting officers were duty-bound to find clothing for nude arrestee).

- *United States v. Mason*, 523 F.2d 1122, 1126 (D.C. Cir. 1975) (holding officers permitted to search area within arrestee's reach when he stated he wanted,

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his arrest. The Ninth Circuit has since recognized, however, that entry is permitted to "accommodate" an arrestee, including to obtain clothing or identification. *United States v. Brown*, 951 F.2d 999, 1005 (9th Cir. 1991).

and reached to retrieve, a jacket from the bedroom closet).

State Cases:

- *State v. Wise*, 879 S.W.2d 494, 505 (Mo. 1994) (holding no Fourth Amendment violation where police accompany third party into arrestee's apartment to retrieve shoes, coat and cigarettes), *overruled in part on other grounds*, *Joy v. Morrison*, 254 S.W.3d 885, 889 (Mo. 2008);

- *State v. Payano*, 528 A.2d 721, 725 (R.I. 1987) (holding police were permitted to follow third party into bedroom to find shoes for arrestee);

- *State v. Griffin*, 336 N.W.2d 519, 521, 524 (Minn. 1983) (holding officers were permitted to enter arrestee's room in boardinghouse to retrieve jacket defendant had requested and shoes, although defendant had not requested the shoes).

The reasoning of these courts is exemplified by the decision in *Gwinn*, the case the trial court below actually relied on in determining that the evidence at issue was not subject to suppression. In *Gwinn*, officers went to the defendant's home in response to a call of a domestic dispute in which he was brandishing a handgun. 219 F.3d at 329. The officers placed the defendant in custody outside his home. *Id.* At the time of his arrest, the defendant was wearing only blue jeans. *Id.* The officers went into the home, spoke to the victim and performed a protective sweep,

looking for the handgun Gwinn had brandished. *Id.* at 329-30. Although the officers did not find the handgun, they did find a loaded shotgun under the couch. *Id.* at 330. After locking the shotgun in the trunk of the police car, an officer reentered the house to get shoes and a shirt for the defendant. *Id.* While the victim went to retrieve a shirt for the defendant, she directed the officer to the defendant's boots, which the officer seized. *Id*. Inside one of the boots, the officer found the handgun the defendant had brandished. *Id.* On appeal, the defendant contended the seizure of his boots containing the handgun was illegal. *Id.* at 330-31. The Fourth Circuit rejected this contention and held that "an officer is authorized to take reasonable steps to address the safety of the arrestee," including reentering the arrestee's home to obtain shoes or clothing. *Id.* at 333.

The Minnesota Supreme Court reached the same conclusion in *Griffin*. In that case, police officers arrested the defendant for robbery in the common hallway of the boarding house where he lived. 336 N.W.2d at 521. After providing a *Miranda* warning, the officers asked the defendant which room was his, so that they could get him shoes and a coat. *Id.* When the officers entered the room, they saw items they believed to be fruits of the recent robbery, including a ladies' purse, which they seized. *Id.* In reviewing Griffin's efforts to have those fruits suppressed, the Supreme Court of Minnesota aptly summarized the issue presented: "The real issue in this case is whether the police had a valid reason for crossing the

threshold of defendant's room without a warrant after validly arresting him in the common hallway of the building." *Id.* at 523. Finding that the police "had to enter the room eventually in order to get the shoes and coat" no Fourth Amendment violation occurred—irrespective of whether an officer entered the room before or after they made the decision to secure a coat and shoes for the defendant. *Id.* at 524. In other words, the need to secure a coat and shoes justified both entering the room and collecting those personal items. *Id.*

In contrast, the Sixth Circuit and the court below have concluded that unless an arrestee affirmatively requests an article of clothing or shoes, the arresting officers must have some independent basis for collecting such personal items for him. In *United States v. Kinney*, 638 F.2d 941 (6th Cir. 1981), officers went to the apartment Kinney shared with his girlfriend, pursuant to a valid arrest warrant. *Id.* at 942-43. Ultimately, officers pulled Kinney through the front door of his apartment and arrested him on the porch. *Id.* at 943. Because a crowd began to gather and because Kinney's shirt was open, however, the arresting officers took him back into the apartment. *Id.* On review, the Sixth Circuit held that Kinney's state of dress did not authorize entry into the apartment. "The defendant did not request permission to secure additional clothing and did not consent to an entry of his home. Entry cannot be justified on these grounds." *Id.* at 945. Similarly, the court below held that because the defendant was not

undressed and the Commonwealth had not adduced evidence of a specific threat to his health or safety, seizure of the jacket for his transport to jail was improper. *Banks*, 2011 Va. App. UNP 3059083. (App. 11, 15-16). The Court further held that the only other circumstance that would justify seizure of the jacket would be the defendant's express consent. *Id.* (App. 7, 16 n.9). Thus, evidence that the trial court expressly found fit within the test established by the Fourth Circuit in *Gwinn* to permit seizure of articles of clothing, was ordered suppressed by the court below. *Id.* (App. 16-17).

The need to resolve this conflict among the lower courts is especially pressing because there is now a direct conflict between Virginia's highest courts and the United States Court of Appeals with jurisdiction over the Commonwealth. This Court has explained that "[a] principal purpose for which we use our certiorari jurisdiction . . . is to resolve conflicts among the United States courts of appeals and state courts concerning the meaning of provisions of federal law." *Braxton v. United States*, 500 U.S. 344, 347 (1991). The practical difficulties and arbitrariness created by such conflicts are manifest. Now when a Virginia law enforcement officer retrieves clothing for an arrestee, whether any evidence discovered incident to the clothing's seizure is suppressed depends on which sovereign prosecutes. If the Commonwealth prosecutes, the arrestee can successfully argue that the evidence must be suppressed on constitutional grounds; if the United States prosecutes, however, the

evidence would not be subject to suppression. *See Gwinn*, 219 F.3d at 333.

This case provides the Court with an excellent vehicle through which to resolve this conflict among the lower courts. First, it was undisputed that the officers in this case were not gathering evidence of a crime; indeed, the trial court found there was no search. (App. 94-95, 97). Instead, the officers acted solely for the arrestee's safety. (App. 94-97). Second, it is clear that the Virginia Court of Appeals' decision below was based exclusively on federal law. *See* (App. 7) ("the Commonwealth is advocating the creation of an exception . . . allowing police to determine that an arrestee's Fourth Amendment rights should give way to his interests in being provided with what the police deem as appropriate clothing."); *see Michigan v. Long*, 463 U.S. 1032, 1040 (1983) (affirming federal jurisdiction over state court decisions "where there is strong indication . . . that the federal constitution as judicially construed controlled the decision below" (internal quotation marks omitted)). Finally, there is no benefit to allowing further development in the lower courts. Most of the federal courts of appeals and a number of States have already spoken on the issue; the conflict will not disappear. Indeed, the decision below only serves to expand the divide.

II. THE DECISIONS OF THE VIRGINIA COURTS AND OF THE SIXTH CIRCUIT ARE FUNDAMENTALLY FLAWED APPLICATIONS OF THE REMEDY OF SUPPRESSION.

A. Excluding Evidence Discovered Coincidentally to the Officer's Discharge of his Duty to an Arrestee Serves no Deterrent Purpose.

This Court has stressed repeatedly in recent opinions that suppression of evidence should be a "last resort," rather than a "first impulse." *Hudson v. Michigan*, 547 U.S. 586, 591 (2006); *accord Davis v. United States*, 131 S. Ct. 2419, 2427 (2011); *Herring v. United States*, 555 U.S. 135, 140 (2009). This rule of last resort applies because excluding competent evidence exacts "substantial social costs," including the release of dangerous criminals. *Hudson*, 547 U.S. at 591 (internal quotation marks omitted).[5] Thus, even where a Fourth Amendment violation has occurred, that determination is merely the beginning point of a three-part analysis.

In addition to finding that a Fourth Amendment violation in fact occurred, this Court has made clear the reviewing court must also determine whether excluding evidence would result in "appreciable

[5] It is worth noting that Banks was a previously convicted violent felon who was being arrested on warrants for still more violent felonies.

deterrence" of the offending police conduct. *Herring*, 555 U.S. at 141 (internal quotation marks omitted). Finally, "[r]eal deterrent value is a necessary condition for exclusion, but it is not a sufficient one. The analysis must also account for the substantial social costs generated by the [exclusionary] rule." *Davis*, 131 S. Ct. at 2427 (internal citations and quotations marks omitted); *see Hudson*, 547 U.S. at 591. "For exclusion to be appropriate, the deterrence benefits of suppression must outweigh its heavy costs." *Davis*, 131 S. Ct. at 2427; *see Herring*, 555 U.S. at 143-44 (there must be some "culpable" police action to trigger exclusion).

Stated differently, the once "reflexive" application of the exclusionary rule has yielded to a "rigorous," case-specific weighing of the costs and benefits of suppressing evidence. *Davis*, 131 S. Ct. at 2427. In conducting this required cost-benefit analysis, the focus of the inquiry is on the "flagrancy of the police misconduct at issue." *Id.* (quoting *United States v. Leon*, 468 U.S. 897, 909, 911 (1984)). Thus, police practices trigger the "harsh sanction" of exclusion ***only*** when they are deliberate enough to yield meaningful deterrence, ***and*** culpable enough to be worth the price paid by the justice system. *Id.* at 2427-28.

B. The Virginia and the Sixth Circuit's Minority View Decisions Are Fundamentally Flawed.

The Court of Appeals of Virginia and the Sixth Circuit incorrectly applied this Court's jurisprudence.[6]

In light of the inherent danger and volatility of a custodial arrest, the arresting officer is permitted wide latitude in exercising his custodial authority over the arrestee. *See Washington v. Chrisman*, 455 U.S. 1, 7 (1982). Allowing this flawed decision to stand would have the "perverse effect" of penalizing the officer for his act of kindness in attempting to ensure the arrestee had a coat. *Id.* at 8. "Moreover, it ignores the fundamental premise that the Fourth Amendment protects only against unreasonable intrusions into an individual's privacy." *Id.* Perhaps most tellingly, courts that have had the opportunity to revisit the clothing exigency issue have joined the majority view, citing this Court's holding in *Chrisman*. *See Butler*, 980 F.2d at 621-22; *Fisher*, 150 F. App'x at 676. Notwithstanding both the weight of contrary authority and the clear trend toward recognizing the validity of the actions the police took in this case, the court below found the officer's simple act of courtesy to be constitutionally unreasonable.

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[6] While the Sixth Circuit's *Kinney* decision pre-dates this Court's holding in *Chrisman*, so too do the Second and District of Columbia Circuits precedents.

After wrongly concluding a Fourth Amendment violation had occurred, the Court of Appeals of Virginia failed to address the deterrent value of suppressing the evidence and certainly did not weigh any deterrent benefit against the high societal costs suppression would generate in this case. Indeed, suppressing the evidence here exacts a particularly high societal cost because the officer's efforts to protect the arrestee will result in a windfall to a violent felon. *Davis* clarified that neither the Fourth Amendment nor the exclusionary rule compels this result.

The trial record makes plain that the police did not engage in misconduct. *See Gwinn*, 219 F.3d at 335 (stressing lack of pretext or bad faith when officer reentered home and seized boots); *Butler*, 980 F.2d at 621 (holding that where officer's concern for arrestee's welfare was not pretextual, "the police action was not done in bad faith"). The officers did not enter the bedroom "to try to look for weapons or anything else." (App. 94-97). Indeed the trial court found there was no search at all. (App. 94). Rather, Officer Clements "merely retriev[ed] a jacket to protect [Banks] for transportation to the jail." (App. 97). The discovery of the gun "was purely coincidental." (App. 97). In other words, the officer's actions were neither "culpable" nor pretextual. *Herring*, 555 U.S. at 144; *Hudson*, 547 U.S. at 591. To the contrary, the officers were interested in Banks' well-being and were not functioning in a law enforcement role when they secured his jacket and

shoes because they "weren't really looking for anything incident to the crime" but were "merely trying to get clothes or shoes for his safety incident to the arrest." (App. 94-95, 97).

The officers good-faith effort to properly discharge the duty they owed to an individual in their custody by retrieving his coat and shoes before taking him to jail simply should not trigger suppression of evidence found coincidentally. There was no systematic or deliberate effort to violate Banks' Fourth Amendment rights. The trial court explicitly found the officers were not acting on a pretext; that Officer Clements acted merely for Banks' safety. (App. 94, 97). Under these circumstances, the deterrent value of suppressing the evidence is non-existent. The countervailing societal cost, however, is exceptionally high because a violent felon would be discharged from liability for a crime he certainly committed.

Moreover, in *Davis* this Court refused to suppress evidence where "the officers' conduct was in strict compliance with then-binding Circuit law." 131 S. Ct. at 2428. Here, the established case law of the Fourth Circuit made clear the officers' conduct was proper in this case. Although not binding on the trial court, in the absence of any clear precedent by a Virginia appellate court to the contrary, the trial court reasonably evaluated the officers' conduct in light of the Fourth Circuit's precedent. Moreover, given that the question involved one solely of federal constitutional law, there was no reason for the trial court to suppose the Court of Appeals of Virginia

would reach a contrary conclusion. Therefore, *Davis* is directly on point and should control the outcome of this case.

The Court of Appeals imposed the "bitter pill" of suppression without conducting *any* cost-benefit analysis and the Supreme Court of Virginia permitted this flawed decision to stand, despite this Court's clear instruction in *Davis* that such analysis is required in every case before suppression is ordered.

CONCLUSION

For the reasons stated above, the Petition for a Writ of Certiorari should be **GRANTED**.

Respectfully submitted,

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February 27, 2012