No. 11-1071

# 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**

## REPLY BRIEF OF THE PETITIONER


KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
*Counsel of Record*

ALICE T. ARMSTRONG
Assistant Attorney General

MICHAEL H. BRADY
Assistant Attorney General

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

G. MICHAEL FAVALE
Deputy Attorney General

STEVEN T. BUCK
Senior Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-7240
Facsimile: (804) 371-0200
dgetchell@oag.state.va.us

*Counsel for the Commonwealth of Virginia*


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COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

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Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of the Commonwealth of Virginia, respectfully offers this reply to the brief in opposition to its petition for a Writ of Certiorari to review the judgment of the Virginia Court of Appeals in this case.

## THE VIRGINIA COURT OF APPEALS DECISION CONFLICTS WITH THE CLOTHING EXIGENCY RECOGNIZED BY THE FEDERAL COURTS OF APPEALS.

Although "[i]t is a basic principle of Fourth Amendment law, . . . that searches and seizures inside a home without a warrant are presumptively unreasonable," this Court has also "recognized that this presumption may be overcome in some circumstances because [t]he ultimate touchstone of the Fourth Amendment is reasonableness. . . . the warrant requirement is subject to certain reasonable exceptions." *Kentucky v. King*, 131 S. Ct. 1849, 1856 (2011) (internal citations and quotation marks omitted). This petition cleanly presents two issues not addressed by this Court, arising out of a conflict of opinion among numerous federal Courts of Appeals and state high courts: whether a clothing exigency exception is one of the "reasonable exceptions" to the warrant requirement and, if so, whether cold weather is a "circumstance" that constitutes an exigency.

The Virginia Court of Appeals improperly held, in conflict with the weight of authority from the federal Courts of Appeals and other state high courts, that the Fourth Amendment requires suppression of evidence happened upon by an officer when seizing the arrestee's jacket, although the officer acted in good faith to provide additional clothing reasonably believed to be necessary to protect the arrestee against the elements, and not to discover evidence of crime. Petitioner, joined by 16 States[1] who share its concern about accommodating arrestees' health and privacy interests as well as officers' safety, urges this Court to clearly establish that a "clothing exigency" justifies the non-pretextual warrantless seizure of clothing for an arrestee when the officer reasonably believes the arrestee lacks adequate clothing, thereby affirming that "reasonableness" is aligned with common decency.

The officers apprehended Banks, already a convicted felon, on a valid warrant for attempted robbery, malicious wounding by shooting, and use of a firearm in the commission thereof. (App. 28, 47, 54-55, 63). The date was mid-November, the temperature was 45 degrees, a chilly day in the Commonwealth, and it was windy, with gusts approaching 25 miles per hour. (App. 51-52, 53, 63-64). At the time of arrest, Banks was barefoot,

[1] *See* Brief of Amici Curiae State of Michigan and 15 Other States for Petitioner filed on March 30, 2012.

wearing a long-sleeve shirt and mesh athletic shorts. (App. 56, 64). Banks indicated he wanted shoes and a jacket, so while one officer escorted him to his car, where his shoes were (App. 56, 62, 73), another officer still inside the residence requested a jacket for Banks "knowing it was cold outside and that [Banks] was . . . inappropriately dressed" for the weather. (App. 56, 64, 68-69, 72, 73, 100). In searching Banks' jacket for "anything dangerous," the officer discovered a revolver, which he left in the jacket. Neither of these items was provided to Banks. (App. 65, 101-02, 105).

The trial court found that, in obtaining the jacket, the officers were not seeking evidence of crime or otherwise acting on a pretext, but seized the jacket for "the safety of the arrestee," the gun's discovery being "purely coincidental." (App. 95, 97). It further found: "the necessity to retain clothing for the defendant was the exigent circumstance" justifying the seizure. (App. 97). Ultimately, the Virginia Court of Appeals reversed that holding, concluding instead that, even if it existed, the clothing exigency exception recognized by the Fourth Circuit Court of Appeals and others was not implicated because there was not a "substantial need for additional clothing" or "any need to protect Banks from a substantial risk of injury." *Banks v. Commonwealth*, 2011 Va. App. UNP 3059083, at *16 (Va. Ct. App. Apr. 26, 2011) (quotation marks omitted). That court allowed, however, that an arrestee's request or consent could justify such a seizure. *Banks*, 2011 Va. App. UNP 3059083, at

*16-17 n.19. No mention was made of whether the purposes of the exclusionary rule were served by its application to the undisputedly good faith conduct of the officers in this case.

The federal Courts of Appeals and state high courts that have considered the issue generally agree a clothing exigency exists, *see* (Cert. Pet. 10-12), and also agree that an officer may reasonably conclude that the arrestee's health and comfort require additional clothing and so act to obtain the clothing, including by independently re-entering a home without a warrant, a request, or even consent. *See, e.g.*, *Gwinn v. United States*, 219 F.3d 326, 332-34 (4th Cir. 2000); *Clay v. United States*, 408 F.3d 214, 217-18 (5th Cir. 2005); *United States v. Butler*, 980 F.2d 619, 621-22 (10th Cir. 1992); *State v. Griffin*, 336 N.W.2d 519, 524 (Minn. 1983).

In claiming that the Virginia Court of Appeals' decision is not in conflict with that of other courts, Banks states that the Virginia court concluded, assuming there was a clothing exigency exception "in Virginia," no exigency existed here. *Banks*, 2011 Va. App. UNP 3059083, at *16. The *Banks* Court opined that no particularized showing had been made of a "risk of injury," at least not one above and beyond that normally inhering where a person is wearing inadequate clothing on a cold day. *See Banks*, 2011 Va. App. UNP 3059083, at *16 n.18. But in doing so the Virginia Court of Appeals ignored the basis and the scope of the meaning ascribed "exigency" by the federal Courts of Appeals. This holding effectively

precludes application of the clothing exigency exception in instances of cold weather, an exigency other federal Courts of Appeals have recognized on circumstances indistinguishable from those here. Allowing these "varied results [to stand would] be inconsistent with the idea of a unitary system of law." *Ornelas v. United States*, 517 U.S. 690, 697 (1996).

The Fourth Circuit in *Gwinn*, recognizing that there must be a "substantial need for the clothing," rejected an arrestee's argument that the Fourth Amendment required suppression of evidence seized by the police after his arrest and in a subsequent warrantless re-entry of his dwelling "without either his permission or a warrant" made, however, without "pretext or . . . for any purpose other than securing clothing for Gwinn." 219 F.3d at 332. Although the only evidence of danger was that "the date was May 10, the time was sometime shortly after 8:30 p.m., and the weather was cloudy," *id.* at 329, 332, the Fourth Circuit, "rely[ing] on the exigencies created by the substantial risk of injury to Gwinn were he to be transported and processed . . . without shoes and a shirt," held that "the increasing chill during the evening hours of an early May day" supported a finding of exigency to justify the search and seizure of clothing for Gwinn. *Id.* at 333. In doing so, the Fourth Circuit reversed the district court's finding that because "Gwinn was 'wearing enough clothing to satisfy standards of public decency, and the defendant was arrested on May 10, 1998, when it certainly is possible to go outside without a shirt or shoes,'" no

exigency existed. *Id.* at 332. It also rejected the contention "that the government is required . . . to present specific weather forecasts to justify its concern for Gwinn's safety and well-being." *Id.* at 333-34 (citing the "objective need to protect Gwinn against the substantial risk of injury to his feet and *of chill in the absence of a shirt*" (emphasis added)); *but see Banks*, 2011 UNP 3059083, at *16 n.18 ("[T]hat it was forty-five degrees outside and windy does not, alone, establish that Banks . . . had a 'substantial need' for additional clothing to protect him. . . .").

Courts have found a clothing exigency where there is a reasonable need for the clothing and, like *Gwinn*, have rejected any requirement that heightened danger flowing from that particular circumstance of partial undress be shown. *See Clay*, 408 F.3d at 217-18 (holding that where an arrestee was barefoot, the officer could, without request or consent, re-enter an arrestee's bedroom to obtain shoes, as "the need to procure footwear for [the arrestee] constituted exigent circumstances"); *United States v. Wilson*, 306 F.3d 231, 240 (5th Cir. 2002), *overruled in part on other grounds*, *United States v. Gould*, 364 F.3d 578, 586 (5th Cir. 2004) (*en banc*) (holding that officers had a duty "to obtain appropriate clothing" for an arrestee detained outside his residence in underclothing, and could enter the arrestee's residence without request or permission to obtain clothing to protect "against the possibility of personal injury to their charge" that was threatened

"to the . . . exposed areas of the body" "by the hazards of public sidewalks and streets").

Effectively adopting the Sixth Circuit's minority interpretation, the Virginia Court of Appeals found no exigency, and a Fourth Amendment violation, when the officer acts without pretext to provide clothing to an arrestee who he reasonably concluded was inadequately clad for the elements. *See United States v. Kinney*, 638 F.2d 941, 945 (6th Cir. 1981) (holding that an arrestee's want of clothing cannot justify a warrantless entry "to secure additional clothing" where no request for clothing was made or consent given, and rejecting on that record "that 'March' weather justified taking the defendant back into his house"). This split amongst the circuits and other courts, its duration, and its deepening nature, militates in favor of awarding a writ of certiorari. For, as it now stands, "a person cannot know how a court will apply a settled principle to a recurring factual situation, that person cannot know the scope of his constitutional protection, nor can a policeman know the scope of his authority." *New York v. Belton*, 453 U.S. 454, 459-60 (1981). This uncertainty is all the more real in Virginia, where evidence discovered by an officer when obtaining clothing for an arrestee in good faith to protect against the elements will be admitted into evidence or will be suppressed as unconstitutionally obtained depending on whether the federal or state government prosecutes.

The Virginia Court of Appeals' "'reflexive'" application of the exclusionary rule to a non-pretextual seizure of clothing for arrestee health, without

considering whether that served "[t]he [exclusionary] rule's sole purpose[:] to deter future Fourth Amendment violations," *Davis v. United States*, 131 S. Ct. 2419, 2426, 2427 (2011), or considering whether the "substantial social costs" imposed by its application are "outweigh[ed]" by "the benefits of deterrence," *Herring v. United States*, 555 U.S. 135, 141 (2009), also merits review.

## CONCLUSION

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

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
*Counsel of Record*

ALICE T. ARMSTRONG
Assistant Attorney General

MICHAEL H. BRADY
Assistant Attorney General

CHARLES E. JAMES, JR.
Chief Deputy
Attorney General

G. MICHAEL FAVALE
Deputy Attorney General

STEVEN T. BUCK
Senior Assistant
Attorney General

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-7240
Facsimile: (804) 371-0200
dgetchell@oag.state.va.us

*Counsel for the*
*Commonwealth of Virginia*

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