**V I R G I N I A : IN THE CIRCUIT COURT OF THE CITY OF NORFOLK**

**COMMONWEALTH OF VIRGINIA,**
**Plaintiff**

**v.**

**DOCKET NO: CR25-**

**Defendant**

**DEFENDANT'S SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO SUPPRESS**

COMES NOW the Defendant, by counsel, and respectfully submits this supplemental brief in support of his previously-filed motion to suppress. Following the evidentiary hearing on , 2025, the Commonwealth advanced three theories to justify the warrantless search of the Defendant's vehicle and backpack: (1) that the Defendant's statement about marijuana provided probable cause; (2) that the search was permissible as a protective sweep under Michigan v. Long, 463 U.S. 1032 (1983); and (3) that the Defendant consented. None withstands constitutional scrutiny.

**Statement of Facts**

On , 2024, Officers and stopped the Defendant on the sole basis of a tinted license plate cover. The Defendant pulled over immediately in an appropriate location. Though upset and vocal about the stop, he never threatened the officers, never made threatening gestures, and never attempted to flee. Officer 's own written report characterized his behavior as "passive resistance." Officers handcuffed the Defendant and placed him in their patrol vehicle. They ran his information which revealed he had no warrants, was not a felon, and possessed a valid driver's license.

Asked whether he had weapons, the Defendant forthrightly disclosed he had a firearm in a backpack in his trunk, adding: "I don't want you going in my trunk." While the Defendant remained handcuffed and locked in the patrol vehicle, Officer told him: "I'm going to go ahead and search your backpack. We do that in all cases where there is a gun in the vehicle just to make sure we run the serial number and see if the gun is stolen." Officer then asked: "Is there anything else I'm going to find in the backpack?" No *Miranda* warnings were given. Only after being told the search was inevitable and being interrogated while in custody did the Defendant disclose that there was marijuana in his backpack.

Officer searched the backpack, retrieving first the firearm, then manipulating and opening a separate black bag containing marijuana. When asked whether this continued search was still a protective sweep, Officer testified unambiguously: "This is now a narcotics investigation."

**I. The Defendant's Statement About Marijuana Was Obtained in Violation of Miranda and Cannot Support Probable Cause**

The Commonwealth points to the Defendant's admission that marijuana was in his backpack and suggests it provided probable cause. This statement was obtained in direct violation of Miranda v. Arizona, 384 U.S. 436 (1966), and cannot be used to justify the search. Evidence obtained through illegal government action is inadmissible as "fruit of the poisonous tree." Wong Sun v. United States, 371 U.S. 471, 484-85 (1963).

A. The Defendant was in custody

The Defendant was unquestionably in custody when interrogated. He was handcuffed and locked in a police vehicle. The Supreme Court of Virginia has held this exact manner of restraint compels the conclusion that a reasonable person would conclude that he was in police custody. Dixon v. Commonwealth, 270 Va. 34, 40-41 (2005). The United States Supreme Court has made clear that "if a motorist who has been detained pursuant to a traffic stop thereafter is subjected to treatment that renders him in custody for practical purposes, he will be entitled to the full panoply of protections prescribed by Miranda." Berkemer v. McCarty, 468 U.S. 420, 440 (1984). Handcuffed and locked in a patrol vehicle, the Defendant was indisputably in custody for *Miranda* purposes.

B. The officers engaged in interrogation

Officer 's question, "Is there anything else in that backpack I'm going to need to be worried about?," constituted interrogation. Under *Miranda*, interrogation includes "any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." Rhode Island v. Innis, 446 U.S. 291, 300-02 (1980).

This question was plainly designed to elicit incriminating information. Officer himself acknowledged the question served an investigatory purpose, testifying that he asks such questions as "an opportunity for anyone in that scenario" to disclose information relevant to "any potential criminal investigation." The question was calculated to produce exactly the response it received: an admission of criminal activity.

C. No *Miranda* warnings were given

Both officers confirmed no *Miranda* warnings were given. Officer testified he did not advise the Defendant of his rights. Officer similarly testified: "He had not been Mirandized, that's correct." Because the Defendant was subjected to custodial interrogation without *Miranda* warnings, his statement must be suppressed. Miranda, 384 U.S. at 444; Dickerson v. United States, 530 U.S. 428, 432 (2000). Without this statement, the Commonwealth has no probable cause to justify the search.

D. The statement was involuntary independent of *Miranda*

Even apart from the *Miranda* violation, the Defendant's admission was involuntary. Officer told the Defendant the search would occur regardless: "I'm going to go ahead and search your backpack. We do that in all cases where there is a gun in the vehicle." The Defendant disclosed the marijuana only after being told officers would discover it anyway. Admissions given under the impression that resistance is futile are not voluntary. Lynumn v. Illinois, 372 U.S. 528, 534 (1963). This was a capitulation to perceived inevitability, not a voluntary choice.

**II. The Protective Sweep Doctrine Does Not Apply**

After a traffic stop, "the Fourth Amendment permits police to conduct a pat down of a person and a protective sweep of his or her vehicle for weapons under certain circumstances." Bagley v. Commonwealth, 73 Va. App. 1, 13 (2021). A protective sweep of a vehicle is justified only where "the police officer possesses a reasonable belief, based on specific and articulable facts, which taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and may gain immediate control of weapons." McArthur v. Commonwealth, 72 Va. App. 352, 360 (2020) (emphasis added). A protective sweep is "limited to those areas in which a weapon may be placed or hidden." Long, 463 U.S. at 1049. The Commonwealth cannot establish either prong of this test.

**A. The record does not establish dangerousness**

The Defendant was stopped for a minor equipment violation. He pulled over promptly into an appropriate area. Both officers admitted he neither threatened nor physically confronted them. When asked directly whether the Defendant ever threatened him verbally, Officer testified: "I don't believe he made any threats of physical violence, no." Officer further confirmed the Defendant never raised his fists, clenched his fists, or made any indication he was "trying to go after [the officer] physically."

Most significantly, Officer 's own written report characterized the Defendant's behavior as "passive resistance" which is fatal to any claim of dangerousness. While the Defendant was upset and vocal, mere verbal protestations about the legality of a stop do not render an individual "dangerous" for Fourth Amendment purposes.

While handcuffed in the police vehicle, the Defendant answered officers' questions, provided identification, and forthrightly disclosed the presence and exact location of a firearm. Officers confirmed he was not a convicted felon, was validly licensed, and had no outstanding warrants. Nothing in this conduct suggests dangerousness. The lawful possession of a firearm does not establish dangerousness. "An individual has a fundamental constitutional right under the Second Amendment to bear arms, and the exercise of that right cannot, without more, establish probable cause for either a search or a seizure under the Fourth Amendment." Commonwealth v. Johnson, 2020 Va. App. LEXIS 124, at 12-13 (Va. Ct. App. 2020) (unpublished).

Most tellingly, both officers testified they retrieve firearms in every traffic stop where one is present, regardless of the circumstances. Officer stated unequivocally: "Every single situation or traffic stop where I've encountered a firearm in a vehicle, it has been removed." When Officer was asked whether he does this "anytime" he discovers a firearm during a traffic stop, he responded: "Absolutely." This blanket policy, untethered to any individualized assessment of danger, is precisely what the Fourth Amendment forbids. The protective sweep doctrine requires specific, articulable facts supporting a reasonable belief of danger in the particular case, not a one-size-fits-all policy applied regardless of circumstances.

**B. The Defendant could not gain immediate control of weapons**

Even if dangerousness could be established, the Commonwealth cannot satisfy the second required element: that the Defendant "may gain immediate control of weapons." At the time of the search, the Defendant was handcuffed and locked in a patrol vehicle. Officer explicitly acknowledged: "Currently in cuffs in the back of my vehicle he was not an active threat." When pressed on cross-examination, Officer conceded his concern was about future access after the stop concluded: "It wasn't so much your concern that when he is in cuffs he can get access to the firearm, right? It's more you're concerned about after the fact, when this thing is over?" Officer responded: "Correct."

Even assuming post-stop access can be a valid consideration, the facts here do not support a reasonable belief of danger warranting a search. The officers knew the Defendant was not a felon and had no disqualifying convictions. He was lawfully permitted to possess the firearm. He had been cooperative enough to disclose its exact location. The traffic investigation was complete, and at most a minor citation could be issued. Under these

circumstances, permitting a search would mean every traffic stop involving a disclosed firearm justifies a vehicle search. The Fourth Amendment requires individualized assessment, not blanket policy.

Moreover, the officers had less intrusive alternatives available. The Defendant never made any movements toward the firearm, never threatened the officers, and was never physically aggressive. He voluntarily disclosed the weapon's location and calmed down once secured in the patrol vehicle. The officers could have simply advised the Defendant not to access the firearm until after leaving the scene, or they could have monitored him as he reentered his vehicle. A generalized concern that any legally armed motorist might theoretically pose a threat upon release cannot satisfy the "specific and articulable facts" standard when the motorist's actual conduct demonstrates no threat.

**C. The scope of the search exceeded officer safety**

Even assuming, arguendo, that removing the firearm from the backpack could be justified for officer safety, the subsequent search of a separate black bag within the backpack clearly exceeded the permissible scope of a protective sweep. A protective sweep is confined to "areas in which a weapon may be placed or hidden." Long, 463 U.S. at 1049. Moreover, "the sole justification of [protective sweeps]...is the protection of the police officer." Gross v. Commonwealth, 79 Va. App. 530, 537 (2024).

After retrieving the firearm, Officer removed a separate black plastic bag. He testified he manipulated this bag, stating: "I was able to feel the bud shape of that marijuana substance within that bag." By plain feel, this bag did not contain a firearm or any other weapon. Opening it and examining its contents was plainly investigatory, not protective. Officer 's own testimony confirms the search exceeded any officer safety justification. When asked whether his continued search was "still a protective sweep or is this a narcotics investigation," Officer testified unambiguously: "This is now a narcotics investigation." By the officer's own admission, the search transformed from a purported safety measure into an evidence-gathering expedition.

The officers' body camera statements further undermine any claim the search was motivated purely by safety. Officer told the Defendant he intended to "run the serial number" on the firearm "to ensure that it's not stolen." This demonstrates the objective was evidence gathering, not officer protection. Protective sweeps cannot be used as a pretext to collect evidence.

**III. The Defendant Did Not Voluntarily Consent**

The United States Supreme Court has held that "the traditional definition of voluntariness" applies to consent for searches. Schneckloth v. Bustamonte, 412 U.S. 218, 229

(1973). The pertinent question is whether consent was "the product of an essentially free and unconstrained choice by its maker, or whether the maker's will was overcome and his capacity for self-determination critically impaired." Hill v. Commonwealth, 52 Va. App. 313, 319 (2008). Three factors compel suppression here.

A. The officers announced the search as inevitable

Officer told the Defendant: "I'm going to go ahead and search your backpack." He further explained this was standard practice: "We do that in all cases where there is a gun in the vehicle." These statements communicated one unmistakable message: the search would occur regardless of the Defendant's wishes. This was not a request for permission but an announcement of intention. A defendant's acquiescence to what he perceives as inevitable is not consent. Kyer v. Commonwealth, 45 Va. App. 473, 483 (2005) (consent invalid where suspect merely submitted to authority).

B. The Defendant previously asserted his privacy interest

Before the officers searched the backpack, the Defendant explicitly stated: "I don't want you going in my trunk." This unambiguous assertion of his privacy interest, made before any purported "consent," demonstrates his true wishes. That the officers proceeded anyway confirms they were not seeking consent but merely informing him of their intentions.

C. The coercive circumstances negate voluntariness

The exchange occurred while the Defendant was handcuffed and locked in a police vehicle, confronted by two armed officers who had just announced their intention to search regardless of his wishes. Under these inherently coercive circumstances, no reasonable person could view the Defendant's submission as voluntary consent.

**IV. Conclusion**

The Commonwealth's theory requires this Court to accept that any citizen who lawfully possesses a firearm and voices displeasure during a traffic stop automatically becomes "dangerous" for Fourth Amendment purposes. It requires the Court to sanction a policy where officers routinely search vehicles whenever firearms are present, without individualized suspicion, without immediate danger, and without regard to whether the detained person could possibly access the weapon. And it requires the Court to sanction custodial interrogation without *Miranda* warnings.

The Constitution demands more. Officer safety is a legitimate concern, but it does not justify transforming every traffic stop involving a lawfully possessed firearm into a warrantless search. The Defendant was cooperative enough to disclose the firearm's location. He was secured, identified, and cleared of warrants. The traffic investigation was complete. At that point, the officers' choice was clear: obtain a warrant or let him go. They chose a third option, search anyway. The Fourth Amendment does not permit that choice.

**V. Request for Relief**

For the foregoing reasons, the warrantless search of the Defendant's vehicle and backpack violated the Fourth and Fifth Amendments to the United States Constitution and Article I, § 10 of the Constitution of Virginia. The search cannot be justified as a protective sweep because the Defendant posed no danger and could not gain immediate control of any weapon while handcuffed in a patrol vehicle. The search was not based on voluntary consent, as the Defendant was told the search would occur regardless and had previously asserted his privacy interest. And the officers lacked probable cause because the only evidence they point to, the Defendant's statement about marijuana, was obtained through custodial interrogation without *Miranda* warnings.

Accordingly, the Defendant respectfully requests that this Court suppress all evidence recovered from the backpack, including both the firearm and the marijuana. In the alternative, if the Court finds that removing the firearm was permissible as a limited protective sweep, the Defendant requests that the marijuana be suppressed as evidence obtained outside the scope of that sweep and through an unlawful *Miranda* violation.

Respectfully submitted,

By: _____

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