

No. 18-\_\_\_\_\_

**In the Supreme Court of the United States**

DMITRI MEDVEDEV,

*Petitioner,*

—v—

HENRICO COUNTY,

*Respondent.*

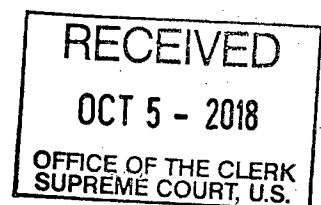
**On Petition for Writ of Certiorari to the  
Supreme Court of Virginia**

**PETITION FOR WRIT OF CERTIORARI**

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### QUESTION PRESENTED

Under *Terry v. Ohio*, 392 U.S. 1 (1968), a police officer can briefly detain a person based on reasonable suspicion that the person is involved in criminal activity. In the present case, a uniformed police officer received a dispatch report that a red Mazda SUV was driving erratically. The officer located a vehicle that matched the description parked in a public parking lot. Petitioner was observed sitting on a bench nearby. The officer requested that Petitioner accompany him to his patrol car and requested Petitioner's driver's license. The officer retained the license and extended Petitioner's detention until another officer arrived on scene. While waiting, the officer smelled alcohol. Ultimately, Petitioner was arrested for DUI.

QUESTION: When the officer took and retained Petitioner's license, did it constitute a seizure for Fourth Amendment purposes where reasonable suspicion did not exist that Petitioner had been driving while intoxicated?

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## OPINION BELOW

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below. The Final Order of conviction and sentence in the Henrico County Circuit, Virginia dated May 26, 2016 appears at App. 22a to this petition. The opinion of the Virginia Court of Appeals dated July 18, 2017 denying the Petition for Appeal appears at App.2a to this petition. The order of the Virginia Supreme Court, dated March 14, 2018, denying a petition for appeal is included below at App.1a. The order denying the petition of appeal of the state's highest court dated May 11, 2018 appears at App.16a and 20a, respectively. These orders were not designated for publishing.



## JURISDICTION

The date on which the state's highest court decided Petitioner's case was May 11, 2018, triggering the 90 day limitation period for seeking certiorari review. (App.54a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).



## CONSTITUTIONAL PROVISION INVOLVED

- U.S. Const. amend. IV

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.



### STATEMENT OF THE CASE

On October 9, 2015, Petitioner was arrested in Henrico County, Virginia for DUI. Prior to trial, Petitioner moved the Henrico County Circuit Court to suppress the evidence derived from the seizure of his person. After hearing evidence, the court denied the motion to suppress. Thereupon Petitioner entered a conditional guilty plea allowing him to appeal the denial of the motion to suppress. Following acceptance of the conditional guilty plea, the court found Petitioner guilty of DUI and sentenced him to six months in jail and suspended five months and 15 days of the sentence.

Petitioner appealed the denial of the motion to suppress to the Virginia Court of Appeals. The court accepted the case for review and affirmed the circuit court's ruling in an unpublished opinion dated July 18, 2017. *Medvedev v. Commonwealth*, Va. App. Record No. 0930-16-2 (July 18, 2017) (unpublished) (App.2a). Petitioner appealed to the Virginia Supreme Court, and the court denied the petition for appeal. A petition for rehearing was denied on May 11, 2018. (App.54a)

The Virginia Court of Appeals' unpublished opinion is the last reasoned decision in the state court. Since the evidence at this point is viewed in light most

favorable to the prevailing party below, the opinion contains the facts material to the consideration of the question presented, Petitioner will recite them for consistency:

On October 9, 2015, Officer Scott Phillips of the Henrico County Police received a "service call" from "dispatch." Dispatch reported that a citizen had been "following" a driver who was "operating a red Mazda SUV" that had arrived at the Jewish Community Center (JCC). The dispatcher further relayed that the driver was "all over the road" and "running off the road." Officer Phillips responded to the call as the "backup officer." Phillips testified that based on everything the dispatcher told him, he "fe[lt] like [he] was responding to an impaired driver."

When Officer Phillips arrived at the JCC, he drove through the parking lot and toward the main entrance without activating his emergency lights. He saw a red Mazda SUV matching the description issued by dispatch parked in a public space near the building. On the opposite side of the parking lane, Officer Phillips saw a man standing at the back of a different car. Phillips "pulled by" and looked at the red SUV. As he "slowed," he "looked over" at the man standing nearby. Upon "ma[king] eye contact," the officer "sort of pointed to the SUV," looked at the man again, and received "a positive response of a head nod."

Officer Phillips notice that no one was inside



the SUV, but he saw a man sitting on a bench just outside one of the entrances to the JCC. Someone who appeared to be a security officer was standing next to the man. Phillips parked his police car in front of the building, about twenty-five feet away from the bench. He did not activate any of the emergency lights on his vehicle. The officer got out of his car and walked up to the man, who was the [Petitioner].

Officer Phillips "asked" the [Petitioner] to "join" him by his police car in an effort to get the [Petitioner] "away from the front door of the school." The [Petitioner] stood up and walked with Phillip to the officer's car. Phillips then "asked" the [Petitioner] if he had his driver's license with him, and the [Petitioner] handed the officer his license. At about the same time that Officer Phillips received the [Petitioner's] license, he "detect[ed] an odor of alcoholic beverage about [the [Petitioner's] person]." Also, the [Petitioner] exhibited what Officer Phillips described as "an off-balanced posture." Once the primary officer assigned to the call arrived, he concluded various field sobriety tests and arrested the [Petitioner] for driving under the influence of alcohol.

Prior to the [Petitioner's] trial, he filed a motion to suppress the evidence. He contended that he was seized when Officer Phillips asked for his identification and that the officer lacked reasonable suspicion to detain him.

The prosecutor responded by "conced[ing]" that the [Petitioner] was "seized" when Officer Phillips received the [Petitioner's] driver's license. Nevertheless, he argued that the seizure was lawful because the officer had reasonable suspicion to detain the [Petitioner] for either driving under the influence (DUI) or public intoxication.

The circuit court ruled based on the totality of the circumstances that the encounter began as a consensual one and that the officer developed reasonable, articulable suspicion to justify a brief investigative detention. The judge determined that Officer Phillips, the only witness at the suppression hearing, was "very credible." He found that the officer went to the JCC, saw a red Mazda, and received "acknowledgment" from "someone in the parking lot" that "this was the car that [the citizen had] been following." In the "same parking lot," the officer saw the [Petitioner] seated next to a security guard. The judge concluded that Officer Phillips "had the right to go up to" the [Petitioner].

Additionally, the judge found that the officer asked the [Petitioner], "[W]ould you mind coming with me so we can get away from this entrance," and the [Petitioner] "agreed to do that." The judge further found that "at the same time" the officer asked for the [Petitioner's] driver's license, he smelled alcohol and saw the [Petitioner] "standing in the unusual ma[n]er that he . . . described."

The judge concluded that the Mazda had been driven "all over the road," combined with the odor of alcohol emanating from the [Petitioner] and the way he was standing, provided the officer with reasonable, articulable suspicion to detain the [Petitioner] for further investigation. [T]he circuit court denied the motion to suppress[.]"

*Medvedev v. Commonwealth*, Va. App. Record No. 0930-16-2, opinion at pages 2-4. (App.3a-5a).



#### REASONS FOR GRANTING THE PETITION

This case presents a Fourth Amendment seizure issue involving police-citizen contact that is of national importance beyond the particular facts and parties involved. Petitioner has argued to the state courts that he was seized the moment the officer took his license and retained it, and that the totality of the circumstances known to the officer at the time did not provide reasonable suspicion that he had been driving while intoxicated. Therefore, the evidence derived from the seizure of his person should have been suppressed. The Virginia Court of Appeals, by unpublished opinion, which is the state courts' last reasoned decision, has held that the seizure was reasonable because "the encounter began as a consensual one" and "by the time a seizure occurred, the officer had reasonable suspicion to believe that the [Petitioner] had been driving while intoxicated." *Medvedev v. Commonwealth*, Va. App. Record No. 0930-16-2, opinion at page 1. (App.3a).

## I.

The Fourth Amendment protects “the right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . .” U.S. Const. amend. IV. Searches and seizures conducted without a warrant are per se unreasonable, subject to the certain limited and well-defined exceptions. *See Minnesota v. Dickerson*, 508 U.S. 366, 372 (1983).

One such exception is the so-called *Terry* stop, which allows an officer to briefly detain a person when the officer has reasonable suspicion that criminal activity is afoot. *Terry v. Ohio*, 392 U.S. 1 (1968). Reasonable suspicion “exists when an officer is aware of specific articulable facts which, when considered with objective and reasonable inferences, form a basis for particularized suspicion.” *United States v. Montero-Camargo*, 208 F.3d 1122, 1129 (9th Cir. 2000) (en banc) (emphasis in original). “The proponent of a motion to suppress has the burden of establishing that his own Fourth Amendment rights were violated by the challenged search or seizure.” *Rakas v. Illinois*, 439 U.S. 128, 130 n.1 (1978) (citing *Simmons v. United States*, 390 U.S. 377, 389-390 (1968)). In the case of a warrantless search or seizure, however, the government bears the burden of proving by a preponderance of the evidence that one of the delineated exceptions to the warrant requirement applies. *See United States v. Huguez-Ibarra*, 954 F.2d 546, 551 (9th Cir. 1982).

## II.

This Court has long established that not every police-citizen contact rises to the level of a seizure.

*Florida v. Bostic*, 501 U.S. 429, 434 (1991). A consensual encounter, where an officer approaches an individual in a public place and merely asks a few questions, does not trigger Fourth Amendment scrutiny, provided that the officer does not imply that a response is obligatory. *See id.*; *Florida v. Royer*, 460 U.S. 491, 497 (1983). Only when an officer, "by means of physical force or show of authority, has in some way restrained the liberty of a citizen" does a seizure occur. *United States v. Mendenhall*, 446 U.S. 544, 552 (1980). With respect to a show of authority, as opposed to physical force, a seizure occurs only where the subject yields or submits to the assertion of authority. *See California v. Hodari D.*, 499 U.S. 621, 626 (1991).

In determining whether there has been a show of authority, courts must examine all the surrounding circumstances to determine whether a reasonable, innocent person would feel that "he was not at liberty to ignore the police and go about his business." *Florida v. Bostic*, 501 U.S. at 437 (citation omitted). Relevant circumstances include: (1) the time and place of the encounter, (2) the number of officers on the scene, (3) use of language or tone indicating that compliance with the officer's request might be compelled; (4) intimidating movements or authoritative manner; (5) physical touching or application of force; (6) whether the officer displayed a weapon or was in uniform; (7) restriction of the detainee's movements; and (8) whether the detainee was advised of his right to terminate the encounter. *See United States v. Mendenhall*, 446 U.S. at 554.

## III.

Applying Bostic's totality-of-the-circumstances test, with an eye towards the aforementioned factors, leads to the conclusion that Petitioner was seized when Officer Phillips took Petitioner's driver's license.

According to testimony at the motion to suppress hearing, Petitioner was sitting on a bench in a public place. A private security guard was standing next to Petitioner. Officer Phillips, who was in uniform, parked his marked police cruiser and approached the guard and Petitioner. Phillips did not recall speaking with the guard at that time. Phillips asked Petitioner to accompany him over to his cruiser, and Petitioner complied. Phillips then asked Petitioner if he had his driver's license with him. Petitioner produced his license, and there was no other conversation. Phillips admitted that he was not the primary officer and that at that point, he was just waiting for the primary officer to arrive. When asked why, Phillips responded, "Because if this turned into an intoxicated driver, citizen situation, it would have been [the primary officer's] case to handle. It wasn't my place to intercede with questioning."

It took the primary officer three to five minutes to arrive. While they waited, Phillips never witnessed Petitioner driving, and prior to taking Petitioner's license, Phillips did not notice anything unusual.

These undisputed facts are crucial because such a retention of a person's license by a uniformed officer indicates that the person is being seized by the officer for Fourth Amendment purposes. To be sure, the taking of Petitioner's driver's license suggests that some type of seizure has taken place. *See, e.g., United States*

*v. Dortch*, 194 F.3d 193, 198 (5th Cir. 1999) (“[W]hat began as a consensual encounter quickly became an investigative detention once the agents received [defendant’s] driver’s license and did not return it to him.” (quoting *United States v. Lambert*, 46 F.3d 1064, 1068 (10th Cir. 1995)), modified on denial of reh’g, 203 F.3d 883 (5th Cir. 2000).

When a law enforcement official retains control of a person’s identification papers, such as a vehicle registration documents or a driver’s license, longer than necessary to ascertain that everything is in order, initiates further inquiry while holding on to the needed papers, a reasonable person would not feel free to depart.

*United States v. Chan-Jimenez*, 125 F.3d 1324, 1326 (9th Cir. 1997).

Officer Phillips intended to detain Petitioner when he asked Petitioner to accompany him over to his cruiser and requested Petitioner’s license. At no time did Phillips tell Petitioner that he was free to leave after Petitioner produced his license. Officer Phillips retained Petitioner’s license while waiting for the primary officer to arrive. It was only while the officer retained Petitioner’s license that reasonable suspicion to believe that Petitioner had been driving while intoxicated arose.

#### IV.

Having established that Petitioner was seized when Officer Phillips took Petitioner’s license, the inquiry now turns to whether the seizure violated the Fourth Amendment. A seizure of a person is “justi-

fied[ied] under the Fourth Amendment if there is articulable suspicion that a person committed or is about to commit a crime. *Florida v. Royer*, 460 U.S. at 498. Without reasonable suspicion, a person “may not be detained even momentarily.” *Id.*

Reasonable suspicion is less than probable cause: “[i]t is merely ‘a particularized and objective basis’ for suspecting the person stopped of criminal activity.” *United States v. Tiong*, 224 F.3d 1136, 1140 (9th Cir. 2000) (quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996); see also *Terry v. Ohio*, 391 U.S. at 2 (explaining that, in determining whether an officer had reasonable suspicion, “due weight must be given, not to his inchoate and unparticularized suspicion or ‘hunch,’ but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.”).

Here, by the time Petitioner provided his license to Officer Phillips, the officer did not have reasonable suspicion that Petitioner had been driving while intoxicated. Phillips did not see the suspected SUV on the road. When he arrived, the SUV was parked in a parking lot. Nobody identified Petitioner as the individual behind the wheel when the SUV was reported driving erratically. When Phillip arrived, he saw that there was nobody inside the SUV. Phillips looked around and saw Petitioner sitting on a nearby public bench. Philips parked his cruiser, approached Petitioner, and asked that Petitioner accompany him to his cruiser where he took Petitioner’s license. At that point, Phillips did not say anything but intentionally delayed until the primary officer arrived.



The Fourth Amendment protects people from “unreasonable searches and seizures.” Officer Phillips breached that protection when he took Petitioner’s license without any evidence that Petitioner was engaged in a crime. *Delaware v. Prouse*, 440 U.S. 648, 663 (1979). Officer Phillips then deepened the breach when he prolonged the detention just to fish for evidence of wrongdoing. *Rodriguez v. United States*, 135 S.Ct. 1609, 1615-1616 (2015).



### CONCLUSION

All evidence derived from the seizure should have been suppressed. The state court’s ruling on this important Fourth Amendment seizure question is objectively unreasonable and should be reversed. The Petition for Writ of Certiorari to the Virginia Supreme Court should be granted.

Respectfully submitted,

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