exhibit CA)

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7706

JAMES W. CAMPBELL,

Petitioner - Appellant,

v.

TAMMY BROWN, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. Michael F. Urbanski, Chief District Judge. (7:18-cv-00277-JLK-RSB)

Submitted: July 23, 2020 Decided: July 27, 2020

Before WILKINSON, MOTZ, and RICHARDSON, Circuit Judges.

Dismissed by unpublished per curiam opinion.

James W. Campbell, Appellant Pro Se. Katherine Quinlan Adelfio, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

James W. Campbell seeks to appeal the district court's order denying relief on his 28 U.S.C. § 2254 (2018) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. *See* 28 U.S.C. § 2253(c)(1)(A) (2018). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2018). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists could find the district court's assessment of the constitutional claims debatable or wrong. *See Buck v. Davis*, 137 S. Ct. 759, 773-74 (2017). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Gonzalez v. Thaler*, 565 U.S. 134, 140-41 (2012) (citing *Slack v. McDaniel*, 529 U.S. 473, 484 (2000)).

We have independently reviewed the record and conclude that Campbell has not made the requisite showing. Accordingly, we deny a certificate of appealability and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

 Exhibit CA5

FILED: October 27, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7706
(7:18-cv-00277-JLK-RSB)

JAMES W. CAMPBELL

Petitioner - Appellant

v.

TAMMY BROWN, Warden

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wilkinson, Judge Motz, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX (B)

FILED: July 27, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7706
(7:18-cv-00277-JLK-RSB)

JAMES W. CAMPBELL

Petitioner - Appellant

v.

TAMMY BROWN, Warden

Respondent - Appellee

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

FILED: August 18, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7706
(7:18-cv-00277-JLK-RSB)

JAMES W. CAMPBELL

Petitioner - Appellant

v.

TAMMY BROWN, Warden

Respondent - Appellee

MANDATE

The judgment of this court, entered July 27, 2020, takes effect today.

This constitutes the formal mandate of this court issued pursuant to Rule 41(a) of the Federal Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

Exhibit (B)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES W. CAMPBELL, SR.,	)	
	)	
Petitioner,	)	CASE NO. 7:18CV00277
	)	
v.	)	ORDER
	)	
TAMMY BROWN,	)	By: Hon. Jackson L. Kiser
	)	Senior United States District Judge
Respondent.	)	

In accordance with the accompanying memorandum opinion, it is hereby

ADJUDGED AND ORDERED

that Respondent's motion to dismiss [ECF No. 14] is **DENIED**, and Respondent is **DIRECTED** to respond to Petitioner's claims within 30 days from the entry of this order.

ENTERED this 28th day of May, 2019.

SENIOR UNITED STATES DISTRICT JUDGE

EXHIBIT (B) (K)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES W. CAMPBELL, SR., Petitioner,	)	CASE NO. 7:18CV00277
v.	)	MEMORANDUM OPINION
TAMMY BROWN, Respondent.	)	By: Hon. Jackson L. Kiser Senior United States District Judge

Petitioner James W. Campbell, Sr. ("Campbell" or "Petitioner"), a Virginia inmate proceeding pro se, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging criminal convictions in Amherst County on August 26, 2015 (Case No. CR15015213-00), and on November 9, 2015 (Case No. CR15015307-00). The matter is presently before me on the respondent's Motion to Dismiss and Campbell's response thereto. After a full review of the record, for the reasons set forth below, I will grant the Motion and dismiss Campbell's petition.

I.

Both convictions arise from Campbell's arrest on August 6, 2014, for the manufacture of methamphetamine in violation of Virginia Code § 18.2-248, following execution of a search warrant for his home and curtilage.[1] Campbell waived preliminary hearing on the charge, and on February 10, 2015, the Grand Jury issued an indictment charging that Campbell "did unlawfully and feloniously, manufacture, distribute or possess with the intent to sell, give or distribute a controlled substance . . . methamphetamine, in violation of § 18.2-248" on August 6, 2014. (Appendix in Case No. 15015213-00, hereafter "App. 1", p. 3.) Campbell filed a motion to

[1]The factual allegations in this section are drawn from the pleadings and attachments thereto filed by the parties in this case [ECF Nos. 1 & 14], and from the paper and electronic records from the Virginia Court of Appeals and from the Virginia Supreme Court in both state cases, on file with the Clerk.

suppress the evidence, alleging that the search warrant and supporting affidavit had never been filed in the clerk's office as required by Virginia Code § 19.2-54, and that the search violated his rights under the United States Constitution.

Less than a week before trial, the Clerk's office located the misfiled search warrant, but the second page of the supporting affidavit was not there. On April 2, 2015, Campbell filed an amended motion to suppress and a motion for relief from waiver (based on late discovery of the misfiled search warrant), renewing his challenge to the validity of the search warrant under Virginia Code § 19.2-54 and under the Fourth Amendment to the United States Constitution. Specifically, he alleged that an essential portion of the affidavit in support of the search warrant had never been filed in the Clerk's office. Indeed, the second page of the affidavit, containing all the information on which probable cause was based, was never found in the clerk's office or court files, apparently due to a malfunction of the fax machine. See Commonwealth v. Campbell, 807 S.E.2d 735, 737 (Va. 2017), cert. denied, 139 S. Ct. 421 (2018), reh'g denied, 139 S. Ct. 1244 (2019).

On April 3, 2015, the parties appeared for hearings on the motion to suppress and for trial. Campbell was arraigned, entered a plea of "not guilty," and said he was ready to go forward with the trial that day, electing to be tried by the judge without a jury. (App. 1, pp. 20–24.) The court ruled that a violation of Virginia Code § 19.2-54 was a procedural matter that did not require suppression of the evidence. (Id. at 36.) Before the evidentiary hearing on the Fourth Amendment issues, Campbell requested a continuance to be better prepared for the hearing and its procedural requirements. (Id. at 43.) The court granted the continuance and directed defense counsel to file a full motion by May 1, setting forth all issues he wished to raise. (Id. at 48.) As instructed, Campbell filed a second amended motion to suppress.

The evidentiary hearing on the second amended motion to suppress was scheduled for June 3, 2015. On that date, Investigator James Begley of the Amherst County Sheriff's Office testified that he applied for a search warrant from the magistrate's office on August 6, 2014. He provided three copies of the supporting affidavit to the magistrate, one for the magistrate to file with the court, one for the officer, and one for the target of the investigation. He testified that the magistrate asked him to make some clerical changes to the affidavit, which he handwrote on the form. The magistrate then signed the search warrant, keeping his copy and giving the other two to Begley. Begley then left the magistrate's office to execute the search warrant.

As required by Virginia Code § 19.2-54, the magistrate faxed the affidavit, warrant, and blank inventory to the clerk of court. Unfortunately, the clerk received four pages, but not the *correct* four pages. The pages the clerk received and filed contained only the first page of the affidavit (with only the numbers 4, 5, and 6 from the second page superimposed on the first page), two copies of the search warrant, and the blank inventory page. The Commonwealth offered Investigator Begley's copy of the affidavit, signed by the magistrate, to the court, but his copy had handwritten changes on the first page of the affidavit that were not on the copy filed in the clerk's office, and the clerk's office had handwritten changes that were not on Begley's copy. Therefore, the judge did admit Begley's copy to prove the basis for the search warrant, because he could not say that there were not handwritten changes on page two of the affidavit that never reached the clerk's office. (App. 1, pp. 105–106.)

Following the evidentiary hearing, the trial judge entered an order granting Campbell's motion to suppress and giving the Commonwealth until June 12, 2015, to advise the court of its intent to proceed to trial or dismiss the case. (Id. at 61.) On June 8, the Commonwealth elected to go forward with trial and filed a motion for reconsideration of the suppression order, arguing for

the first time that the search of the property was justified by probable cause and exigent circumstances, an exception to the search warrant requirement. (Id. at 109–118.) The hearing on motion for reconsideration and the trial were both set for June 17, 2015, in order to preserve Campbell's speedy trial rights. (Id. at 119.)

On June 9, 2015, the Grand Jury issued a new indictment (Case No.15015307-00) charging Campbell with possession of methamphetamine with intent to distribute on August 6, 2014, in violation of Virginia Code § 18.2-248. (Appendix in Case No. 15015307-00, hereafter "App. 2", p. 1.) On June 12, 2015, the court appointed counsel for Campbell on the new charge (the same attorney already representing him on the first indictment), and the case was then placed on the docket "to be tried or set for trial" on June 17, 2015, five days later. (Id. at 8.)

On June 17, 2015, the court held another evidentiary hearing on the suppression issues. Although the judge affirmed his earlier ruling regarding the invalidity of the warrant, he deferred decision on the "exigent circumstances" argument, stating he would rule after hearing the evidence at trial. (Id. at 153–156.) He then arraigned Campbell again on the first indictment, and Campbell again tendered a plea of "not guilty." The court started to arraign him on the second indictment, but counsel objected on the grounds that he had been appointed only five days earlier and was not prepared to go forward at that time. (App. 1, pp. 158–159.) The second case was postponed, to be set at or before the August grand jury date. After taking care of that administrative matter, Campbell proceeded to trial on the first indictment before the judge, without a jury.

The uncontradicted trial evidence established that a paid informant had contacted Investigator Begley about a possible "meth cook" at Campbell's house in Amherst County. For about a week, the informant advised Begley that Campbell was unable to secure enough pseudoephedrine to proceed with the "cook", but on August 6, 2014, in the early afternoon, he

advised that Campbell had been able to procure Sudafed (pseudoephedrine) and that Campbell planned to cook meth later that evening. Begley asked the informant to keep him apprised of the situation, and he began to coordinate manpower with his supervisors and contacted the narcotics team at the Virginia State Police ("VSP"). Throughout the afternoon and early evening, the informant called Begley with updates on the activities at the shed on Campbell's property, including that Campbell was crushing Sudafed and that two others were rolling up balls of aluminum foil.

While the VSP and other officers from Amherst County set up near Campbell's property, Begley applied for and obtained a search warrant. He signed the application for search warrant at 10:30 p.m., and the magistrate issued the warrant at 10:47 p.m. Investigator Brandon Hurt, a sniper with the Amherst Sheriff's Office, took a position in the trees, approximately 25 to 30 yards from Campbell's shed, where he remained for approximately 45 minutes before the law enforcement team entered the property to serve the search warrant. While in that position, Hurt observed a woman take aluminum foil into the shed and another person take a short piece of hose into the shed. Just before the team moved in to execute the warrant, Hurt saw smoke coming from inside the shed and heard people talking either inside or in front of the shed. As law enforcement vehicles entered the property, occupants of the shed began to run, but they were caught and detained by the police and identified as Campbell and a codefendant, Timothy Birch. Later, when VSP Special Agent Phillips entered the shed to remove environmental hazards, he found Campbell's adult daughter (another codefendant) hiding inside.

At Campbell's trial, both Begley and Phillips testified as experts about the hazards of methamphetamine production. Begley noted that the process uses volatile chemicals that are highly combustible. Further, the manufacturing process can produce phosphine and chlorine,

carcinogenic gasses that can sometimes be fatal. Phillips testified that the one-pot method used on Campbell's premises that evening is the least hazardous method of manufacturing the product, but still has significant risks. For example, both lithium strips and organic solvents are used to separate the Sudafed. Lithium strips react with water, and the moisture of a humid day or residual moisture in Coleman fuel can spark fire from the lithium strips, triggering an explosion, like a plume or fireball. The process also produces ammonia gas, which can cause respiratory distress, blindness, or even death if inhaled in sufficient quantities. Ammonia gas can also cause glass containers to explode.[2]

Campbell did not introduce any evidence on his own behalf. The trial judge found that the Commonwealth proved both probable cause and exigent circumstances sufficient to justify a warrantless search of Campbell's property, and denied Campbell's motion to exclude the evidence obtained as a result of the search. He then found the evidence sufficient to convict Campbell of the charge, noting that, "[T]he nature and the quantity of this process would lead the court to believe that there was an intent to sell, give, or distribute the substance that was involved." (App. 1, p. 333). He entered a conviction order the same date, reflecting a conviction for manufacturing methamphetamine in violation of Virginia Code § 18.2-248. On August 26, 2014, the court sentenced Campbell to twenty-five years in prison, with fourteen years of the sentence suspended. Campbell noted his appeal to the Virginia Court of Appeals.

While the appeal of the first case was still pending, the parties scheduled a trial date for the second indictment. Campbell then filed a motion to dismiss, alleging that the second indictment was barred by the Fifth Amendment's Double Jeopardy Clause and by Virginia Code § 19.2-294,

[2] Other witnesses testified against Campbell at the trial, including the informant and Campbell's daughter, but the substance of their testimony is not relevant to determination of the issues in this proceeding.

and a motion to suppress, arguing the same grounds relied upon in the first case. On November 9, 2014, after incorporating the record of the first case into the record for the second case, the court overruled both motions. Campbell then entered a plea agreement with the Commonwealth, preserving his right to appeal both motions pursuant to Virginia Code § 19.2-254. Campbell pled guilty and, pursuant to the plea agreement, the court sentenced him to eleven years in prison, to run concurrently with the sentence in the first case, followed by two years of post-release supervision. Once again, Campbell perfected an appeal to the Virginia Court of Appeals.

On October 25, 2016, the Court of Appeals reversed Campbell's conviction on the first indictment, finding that failure to file timely and properly the second page of the search warrant affidavit as required by Virginia Code § 19.2-54 required suppression of the evidence. Campbell v. Commonwealth, 791 S.E.2d 351 (Va. Ct. App. 2016), rev'd, 807 S.E.2d 735 (Va. 2017), cert. denied, 139 S. Ct. 421 (2018), reh'g denied, 139 S. Ct. 1244 (2019). Holding that the statute provided broader protection than the Fourth Amendment, the court held that the Fourth Amendment became "irrelevant" once the warrant was struck on state law grounds. Id. at 356 n.2. Further, because police obtained a warrant, the search was not a warrantless search, so exceptions to the search warrant requirement did not apply. Id.

The Virginia Supreme Court reversed the decision of the Court of Appeals and reinstated Campbell's conviction on December 14, 2017. Commonwealth v. Campbell, 807 S.E.2d at 740. The Court assumed without deciding that the search warrant was invalid under Virginia Code § 19.2-54, but held that invalidity of the search warrant under the statute (or under the Fourth Amendment) did not preclude a valid warrantless search if the Commonwealth met the burden of proving an exception to the warrant requirement. Id. at 738. Campbell's subsequent requests for rehearing and appeal were denied.

While the first case was pending review in the Virginia Supreme Court, the Court of Appeals stayed proceedings in the second case. Once the Virginia Supreme Court reinstated the first conviction, the Court of Appeals followed its decision as the "law of the case," affirming the trial court's denial of Campbell's motion to suppress in the second case. Campbell v. Commonwealth, 817 S.E.2d 663, 667 (Va. Ct. App. 2018). The Court of Appeals also affirmed the conviction, finding no statutory or double jeopardy bar to the second proceeding because Campbell's request to continue trial of the second charge was a consent to two trials and a voluntary waiver of any double jeopardy objection. Id. at 668–70. The Virginia Supreme Court declined to hear Campbell's appeal from the Court of Appeals. Campbell did not file a state habeas petition.

On June 19, 2018, Campbell filed a Petition for Writ of Habeas Corpus, pursuant to 28 U.S.C. § 2254, in this court. In his petition, Campbell raises five challenges:

1. That the state court erred in permitting admission of evidence under the exigent circumstances exception to the search warrant requirement when the state's search warrant was invalid under Virginia Code § 19.2-54;

2. That the state court erred in allowing admission of evidence under the exigent circumstances exception to the search warrant requirement when the search warrant was invalid under the Fourth Amendment and the "good faith exception" was not applicable;

3. That the state court erred in finding the existence of exigent circumstances to justify a warrantless search;

4. That the state court erred in failing to dismiss the second indictment under Virginia Code § 19.2-294; and

5. That the state court erred in failing to dismiss the second indictment for violating his constitutional right against double jeopardy.

[ECF No. 1, p. 20.]

II.

A federal court may grant a petitioner habeas relief from a state court judgment "only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. § 2254 (a). "It is not the province of a federal habeas court to reexamine state-court determinations on state-law questions." Estelle v. McGuire, 502 U.S. 62, 67–68 (1991). The Virginia Supreme Court's decision that a violation of Virginia Code § 19.2-54 does not preclude admission of evidence under the exigent circumstances exception to the Fourth Amendment search warrant requirement is a claim that rests solely on the interpretation of Virginia statutes and case law, and as such, it is not cognizable on federal habeas review unless petitioner alleges that the state court's application of the statute is a cognizable violation of the federal constitution. See, e.g., Wright v. Angelone, 151 F.3d 151, 158 (4th Cir. 1998). Campbell alleges that the state court decisions violate the Fourth Amendment of the U.S. Constitution, and I address those allegations in the next section, but Campbell's first claim is based only on the Virginia statute and, therefore, must be dismissed.

III.

If a state prisoner had the opportunity for full and fair litigation of a Fourth Amendment claim, he is not entitled to federal habeas relief on the ground that the evidence obtained in an unconstitutional search or seizure was introduced at his trial. Stone v. Powell, 428 U.S. 465, 494 (1986). This is because the social costs of the exclusionary rule are high. Id. at 490. The evidence that a defendant seeks to exclude is usually reliable and is often the most compelling evidence of guilt. Id. Application of the exclusionary rule cripples the "truthfinding process" and sometimes allows the guilty to go free. Id. Despite these costs, the Supreme Court and others have found it necessary for society to pay this cost in order to deter police misconduct and promote respect for

Fourth Amendment values. Id. at 490–91. Once a defendant has had the opportunity to raise his Fourth Amendment challenges before a trial court and at least one appellate court, however, there is little deterrent benefit in allowing further litigation of the issue, and even less benefit to reversing a conviction because evidence is suddenly deemed inadmissible, even though at least two prior courts had the opportunity to consider the constitutionality of the search from which evidence was obtained. Id. at 491. The decreasing deterrent value of continued efforts to exclude evidence no longer outweighs the social costs of the exclusionary rule when a case has reached this stage. Id. at 491–93.

When considering a petitioner's Fourth Amendment claims, then, a federal district court's first inquiry is whether the petitioner had an opportunity to raise his Fourth Amendment claim in the highest state court. Doleman v. Muncy, 579 F.2d 1258, 1265 (4th Cir. 1978). If such an opportunity was afforded to the petitioner, and nothing in the claim or in the record suggests that the prisoner's opportunity to fully and fairly litigate his claim was impaired, then the court need look no further into the Fourth Amendment claims.

In the present case, Campbell had several opportunities to litigate his Fourth Amendment claims, and he took full advantage of each opportunity. He argued before the trial court that the search warrant was invalid under the Fourth Amendment because the probable cause statement was missing in the affidavit filed with the clerk's office. The trial court agreed with him and further agreed that the "good-faith exception" for officer reliance on the warrant, recognized in United States v. Leon, 468 U.S. 1250 (1984), did not apply. But the trial court also found that the exigent circumstances exception to the warrant requirement applied. Campbell appealed to the Court of Appeals, where his argument was adopted and the trial court's ruling was reversed. Then, the Virginia Supreme Court heard the merits of the case and reinstated the conviction. The United

States Supreme Court denied certiorari. In short, Campbell fully and capably litigated the Fourth Amendment issue before three different state tribunals. The Virginia courts provided Campbell a full and fair opportunity to litigate the Fourth Amendment claims he raised, both that the exigent circumstances exception did not apply if the police relied on an invalid warrant and that the Commonwealth failed to establish exigent circumstances. Accordingly, Stone precludes habeas relief on Campbell's second and third claims.

IV.

Like his first claim, Campbell's claim that his trial on the second indictment violated Virginia Code § 19.2-294 arises solely under state law and is not cognizable on habeas review under 28 U.S.C. § 2254 (a) and Estelle v. McGuire, 502 U.S. 62 (1991). Thus, his fourth claim must also be dismissed.

V.

Resolution of Campbell's fifth claim, that the second indictment was barred by principles of double jeopardy, requires more complex analysis. Under § 2254, a very deferential standard of review applies to state court decisions that have adjudicated a petitioner's claims on the merits. In such a case, habeas relief shall not be granted unless the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1).

In this case, the Virginia Court of Appeals clearly addressed Campbell's double jeopardy claim. Campbell v. Commonwealth, 817 S.E.2d 663 (Va. Ct. App. 2018). The Virginia Supreme Court summarily denied Campbell's petition for further appeal. The United States Supreme Court has held that such denials are presumed to be decisions on the merits of the claim. Harrington v. Richter, 562 U.S. 86, 99 (2011). Further, a federal court on habeas review is to "look through" the

summary decision to the last court decision providing a rationale for the merits decision and to presume that the state high court adopted the same reasoning. Wilson v. Sellers, 138 S. Ct. 1188, 1192 (2018).

Having determined that Virginia courts addressed the Campbell's claim, the next issue is whether the Court of Appeals opinion is contrary to, or involves an unreasonable application of, clearly established Supreme Court law. The threshold question is whether there is any "clearly established Federal law, as determined by the Supreme Court." Lockyer v. Andrade, 538 U.S. 63, 71 (2003). In order to be clearly established law, the position urged by the habeas petitioner must have been pronounced by the Supreme Court in its holding (not dictum), and the Court's holding must have been announced before the state court's final decision on the merits. Williams v. Taylor, 529 U.S. 362, 412 (2000).

The Virginia Court of Appeals based its decision on a recent Supreme Court decision, Currier v. Virginia, 138 S. Ct. 2144 (2018). In Currier, the defendant was charged in a single indictment with burglary, grand larceny, and unlawful possession of a firearm by a convicted felon, arising from a single course of conduct. Id. at 2148. As alleged by the Commonwealth, the defendant had broken into a home and stolen a safe containing cash and guns; because of his prior felony conviction, he could not legally possess any firearm, much less a stolen one. Concerned that a jury might be prejudiced against him by learning of his prior felony conviction, the defendant moved to sever the firearm charge from the other two. At the first trial, limited to the burglary and grand larceny charges, the jury acquitted the defendant. He then moved to preclude the second trial on double jeopardy grounds. Id. at 2148–2149. Assuming without deciding that double jeopardy would normally apply to a successive prosecution for the firearm charge, the Supreme Court held that "there is no violation of the Double Jeopardy Clause when [the defendant] elects to have the

. . . offenses tried separately and persuades the trial court to honor his election." Id. at 215 (quoting Jeffers v. United States, 432 U.S. 137, 152 (1977)). Accordingly, the state court denied Campbell's double jeopardy claim.

I cannot conclude the Virginia court's decision is "contrary to" federal law. A state decision can be contrary to Supreme Court precedent in only one of two ways: (1) by reaching a conclusion opposite to the Supreme Court's decision or (2) by reaching the opposite result from the Court on facts that are materially indistinguishable from the facts in the Court's case. Williams, 529 U.S. at 405 (O'Connor, J., concurring). The Virginia Court did not reach an opposite result or conclusion from the Supreme Court's decision in Currier.

Admittedly, Currier is distinguishable from the present case in one significant way: Campbell's charges were not initiated in a single indictment, and the second indictment issued only five days before the trial date scheduled for the first indictment. The Virginia court did not consider this distinction significant. Even if I were to believe that the Virginia Court of Appeals decided the issue erroneously, that is not sufficient for a grant of habeas relief. When the state court decision is not contrary to Supreme Court precedent, a federal habeas court must find the state decision to be an "unreasonable application" of Court precedent in order to grant relief. Lockyer, 538 U.S. at 75. A decision is an "unreasonable application" of Court precedent only if the state court's ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility of fairminded disagreement." Harrington, 562 U.S. at 103. Where the trial court, appeals court, and presumptively, the state high court all agreed that Campbell's request for a later trial date removed double jeopardy concerns, I cannot say that no fair-minded jurists could agree with the decision, especially in the absence of any

precedent involving separate indictments such as those herein.[3] As the Court has noted, when its cases give no clear answer to the exact question presented, let alone an answer favorable to the petitioner, "it cannot be said that the state court 'unreasonabl[y] appli[ed] clearly established Federal law.'" Wright v. Van Patten, 552 U.S. 120, 126 (2008) (citations omitted). Accordingly, I will dismiss Campbell's fifth and final claim.

VI.

In accordance with the foregoing, I will grant the respondent's Motion to Dismiss. An appropriate Order will enter this day.

The Clerk is directed to send copies of this Memorandum Opinion and accompanying Order to petitioner and to counsel of record for the respondent.

ENTERED this 24th day of October, 2019.

SENIOR UNITED STATES DISTRICT JUDGE

[3] Even had I reached the substance of Campbell's double jeopardy argument rather than deciding that he had waived the issue, his constitutional claim would fail on the merits. The Double Jeopardy Clause prohibits a second prosecution for the same offense after either acquittal or conviction; whether an offense is the "same offense" when a single act or transaction gives rise to two different charges, however, is determined by the Blockburger test, recognized in the seminal case Blockburger v. United States, 284 U.S. 299 (1932). That test focuses on whether each offense requires proof of a fact which the other does not. Id. at 304. If so, then double jeopardy does not bar the second prosecution. In this case, Campbell's first conviction was for manufacturing methamphetamine, which requires proof that he knowingly made the unlawful substance; possession with intent to distribute does not require that the defendant make the substance, just that he have it. His second conviction, possession with intent to distribute methamphetamine, required proof of the specific intent to distribute, which is not required for a conviction of manufacturing. Because each offense required proof of an element that the other did not, the second charge did not violate the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution. Cf. Logan v. Commonwealth, 600 S.E.2d 133, 133–35 (Va. Ct. App. 2004) (holding that convictions for possession of marijuana and delivering marijuana to a prisoner, both made illegal by the same section of the Virginia Code, did not violate the defendant's Double Jeopardy rights). This rule applies even when the same act violates two clauses of the same statute. See, e.g., United States v. Randall, 171 F.3d 195, 209 (4th Cir. 1999).

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

JAMES W. CAMPBELL, SR.,	)	
	)	
Petitioner,	)	CASE NO. 7:18CV00277
	)	
v.	)	FINAL ORDER
	)	
TAMMY BROWN,	)	By: Hon. Jackson L. Kiser
	)	Senior United States District Judge
Respondent.	)	

In accordance with the accompanying Memorandum Opinion, it is hereby

ADJUDGED AND ORDERED

that the Motion to Dismiss [ECF No. 25] is **GRANTED**, the petition for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254, is **DISMISSED**, and this action is stricken from the active docket of the court.

Further, finding that petitioner has failed to make a substantial showing of the denial of a constitutional right as required by 28 U.S.C. § 2253(c)(1), a certificate of appealability is **DENIED**.

ENTERED this 24th day of October, 2019.

SENIOR UNITED STATES DISTRICT JUDGE

Exhibit (E)

FILED: August 20, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7706
(7:18-cv-00277-JLK-RSB)

JAMES W. CAMPBELL

Petitioner - Appellant

v.

TAMMY BROWN, Warden

Respondent - Appellee

ORDER

The court denies the motion for extension of time to file a petition for rehearing without prejudice to refiling the extension motion accompanied by the proposed petition for rehearing on or before 09/21/2020.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

FILED: October 27, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7706
(7:18-cv-00277-JLK-RSB)

JAMES W. CAMPBELL

Petitioner - Appellant

v.

TAMMY BROWN, Warden

Respondent - Appellee

ORDER

The court denies the petition for rehearing.

Entered at the direction of the panel: Judge Wilkinson, Judge Motz, and Judge Richardson.

For the Court

/s/ Patricia S. Connor, Clerk

Exhibit (E)

FILED: September 4, 2020

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-7706
(7:18-cv-00277-JLK-RSB)

JAMES W. CAMPBELL

Petitioner - Appellant

v.

TAMMY BROWN, Warden

Respondent - Appellee

ORDER

Upon consideration of appellant's motion to stay the mandate, construed as a motion to recall the mandate and extend the time for filing a petition for rehearing, the court grant's the motion. This court's mandate issued 08/18/20, is recalled for the limited purpose of considering the petition for rehearing.

For the Court--By Direction

/s/ Patricia S. Connor, Clerk

APPENDIX "B" (2)

PRESENT: All the Justices

COMMONWEALTH OF VIRGINIA

v. Record No. 161676

JAMES WILLIS CAMPBELL, SR.

OPINION BY
JUSTICE STEPHEN R. McCULLOUGH
December 14, 2017

FROM THE COURT OF APPEALS OF VIRGINIA

We consider in this appeal whether evidence of a search must be suppressed under Code § 19.2-54 because a magistrate incorrectly faxed only portions of a search warrant to the clerk of the circuit court. The Court of Appeals concluded that this delivery defect meant that the search warrant did not satisfy the requirements of Code § 19.2-54 and, as a consequence, the warrant, and the search made under the authority of that warrant, were invalid. We will assume that the magistrate's incomplete faxing rendered the search warrant invalid under Code § 19.2-54, but we will reverse on the alternate ground that the search was justified as a warrantless search under the exigent circumstances exception to the warrant requirement.

BACKGROUND

I. A TIP ARRIVES ABOUT AN IMMINENT METHAMPHETAMINE "COOK."

For over a week in early August 2014, Sheriff's Office Investigator James Begley had been in contact with a paid informant about a possible "meth cook" at James Campbell's house. A "cook" refers to the process for making methamphetamine. Initially, Campbell's efforts were thwarted because he could not locate sufficient quantities of pseudoephedrine to proceed. Finally, on August 6, 2014, Investigator Begley received multiple phone calls from the informant, who told him "it looked like . . . there was going to be a cook at Mr. Campbell's house." The informant, who was present at the scene, described to Investigator Begley what was

occurring on Campbell's property in anticipation of the "cook," such as rolling up aluminum foil and crushing Sudafed.

Begley told the informant to keep him "apprised." He then contacted a specialized team at the State Police as well as his superiors within the Sheriff's Office. As Investigator Begley was making his preparations, the informant told Begley that Campbell was "preparing the stuff now in the shed." While other law enforcement officers were positioning themselves near Campbell's shed, Begley applied for and obtained a search warrant. Investigator Begley signed his copy of the application for the search warrant at 10:30 p.m. The warrant reflects that the magistrate issued the warrant at 10:47 p.m. Investigator Brandon Hurt was able to observe the activity on Campbell's property for between 45 minutes to an hour before the team executed the warrant.

Law enforcement officers drove to a location near Campbell's property and assembled in the woods to observe. The "cook" was to take place in a small shed on Campbell's property. Begley estimated the shed's dimensions were, at most, 10 feet by 12 feet. Campbell's trailer is located near the shed, and a driveway separates Campbell's trailer from the shed. Another mobile home is located 25 to 30 yards from the shed. Investigator Brandon Hurt with the Sheriff's Office took a position approximately 25 to 30 yards from the shed. He watched for approximately 45 minutes to an hour. Four persons were present at Campbell's home: the defendant, his daughter, Timothy Birch, and the informant. Investigator Hurt could see a woman taking a roll of aluminum foil from the trailer to the shed. He also observed a man taking a short piece of hose into the shed. Hurt could see "a lot of smoke" coming from inside the shed and he could hear people talking "either in front of the shed or inside the shed."

Special Agent Glen Phillips of the Virginia State Police explained that the manufacture of methamphetamine presents a significant fire hazard. In addition, manufacturing methamphetamine employs and creates toxic substances, including ammonia gas, which can cause respiratory difficulties or blindness and even death. Investigator Begley, who has experience with methamphetamine investigations and who has been trained on the subject, testified that methamphetamine is manufactured with volatile chemicals that are highly combustible. It can produce an "extremely carcinogenic" gas, including phosphine gas and chlorine gas. Investigator Begley acknowledged he did not know what the "blast radius" would be for the type of methamphetamine "cook" that occurred at the shed.

The informant, who was present at the scene, stepped aside to call Investigator Begley on his cell phone and plead with him, "where y'all at, where y'all at, they're starting to make this thing, man." Police executed the search warrant around 11:52 p.m., approximately an hour after Investigator Begley submitted his search warrant application to the magistrate. Police recovered methamphetamine and precursors to methamphetamine during the search.

II. THE SUPPRESSION MOTION, TRIAL AND APPEAL.

Code § 19.2-54 imposes a number of requirements for search warrants. As relevant here, it requires a judicial officer issuing a warrant, usually a magistrate, to file the affidavit submitted in support of the warrant by law enforcement personnel with the clerk of the circuit court of the city or county where the search is to take place, either in person, by mail, or electronically, within seven days. The final paragraph of Code § 19.2-54 provides as follows:

> Failure of the officer [here, a magistrate] 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.

Investigator Begley explained that the magistrate ordinarily asks for three copies of the warrant affidavit: one for the police officer, one for the target of the investigation, and one for the magistrate who will file it with the clerk of court. In this instance, Begley handed the magistrate one copy and left with the remaining two.

Due to a faxing error or problem, the clerk of court never received a complete affidavit. The magistrate submitted four pages to the clerk of court by fax. The first page consists of the affidavit for the search warrant. The second page is the search warrant itself. The third page is a duplicate of the search warrant. The final page is a blank copy of the search inventory and return. The affidavit page the clerk received included a description of the offense, a paragraph describing the place to be searched, and another paragraph listing the things or persons to be searched. The second, missing page, contained a paragraph describing the basis for probable cause and another paragraph setting forth the fact that the information came from an informant and setting forth the basis for the officer's belief that the informant was credible or reliable.

Campbell was charged with manufacturing methamphetamine, in violation of Code § 18.2-248. Seizing on the fax problem, Campbell moved to suppress the evidence. Relying on Code § 19.2-54, he argued that the magistrate's failure to timely file the required application and affidavit with the clerk's office rendered the warrant invalid. The Commonwealth responded, among other things, that even without a warrant, the search was justified by exigent circumstances. The trial court ultimately agreed that the warrant was defective, but denied the suppression motion, concluding that the search was justified by exigent circumstances. Campbell was convicted and sentenced to serve twenty-five years in prison, with fourteen years suspended.

Campbell appealed to the Court of Appeals. A panel of that court reversed the trial court's decision, reasoning that Code § 19.2-54 rendered the fruits of the search categorically inadmissible as a matter of state law. *Campbell v. Commonwealth*, 66 Va. App. 677, 791 S.E.2d 351 (2016). The Court rejected the Commonwealth's alternative arguments on the basis that the admissibility of the search under the Fourth Amendment was irrelevant because, "[a]s a matter of state law, the evidence was inadmissible." *Id.* at 688, 791 S.E.2d at 356. We granted the Commonwealth an appeal from that decision.

ANALYSIS

I. CODE § 19.2-54 DOES NOT APPLY IF A SEARCH IS JUSTIFIED AS A WARRANTLESS SEARCH.

Initially, we conclude that Code § 19.2-54 does not impose any bar to the admissibility of the fruits of *warrantless* searches. This statute governs search warrants. It provides in relevant part that the

> [f]ailure of the officer [here, a magistrate] *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.

(Emphases added.) Code § 19.2-54 addresses the possible invalidity of a search made "under the warrant" as a consequence of the failure of the magistrate to file the warrant with the clerk of the circuit court. Whatever the scope of inadmissibility contemplated by Code § 19.2-54 for searches made under a defective warrant, nothing in the plain language of this statute compels the exclusion of evidence obtained in the course of a search that is justified on grounds other

than a warrant.[1] We will assume that the search warrant was invalid under Code § 19.2-54. We turn next to the question of whether the search was justified as a warrantless search under the exigent circumstances doctrine.

II. EXIGENT CIRCUMSTANCES JUSTIFIED A WARRANTLESS SEARCH.

The Fourth Amendment generally requires police to obtain a search warrant before entering a home. *See, e.g., Commonwealth v. Robertson*, 275 Va. 559, 564, 659 S.E.2d 321, 324 (2008). Despite the absence of a warrant, however, police may lawfully enter a home, and outbuildings like a shed, if they have probable cause coupled with exigent circumstances. *Kirk v. Louisiana*, 536 U.S. 635, 638 (2002) (per curiam). The exigent circumstances exception to the warrant requirement "applies when 'the exigencies of the situation make the needs of law enforcement so compelling that [a] warrantless search is objectively reasonable under the Fourth Amendment.'" *Kentucky v. King*, 563 U.S. 452, 460 (2011) (quoting *Mincey v. Arizona,* 437 U.S. 385, 394 (1978)) (some internal quotation marks omitted).

The United States Supreme Court has not squarely addressed whether a search under a defective warrant can nevertheless be upheld on an independent ground such as exigent circumstances.[2] We conclude, as have a number of other courts, that the procurement of a

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[1] In addition to expressing no opinion concerning the existence or scope of any suppression remedy under Code § 19.2-54, we also need not reach the Commonwealth's alternate argument that an implicit statutory good faith exception can salvage the fruits of a search even if the warrant is defective under Code § 19.2-54.

[2] In *Groh v. Ramirez*, 540 U.S. 551, 558 (2004), the Court observed that "the warrant was so obviously deficient that we must regard the search as 'warrantless' within the meaning of our case law." However, the Court found the search unjustified as a warrantless search as well. *Id.* at 565. Similarly, in *Coolidge v. New Hampshire*, 403 U.S. 443, 453 (1971), the Court stated that "the seizure and search of the Pontiac automobile cannot constitutionally rest upon the warrant issued. . . . [T]he search stands on no firmer ground than if there had been no warrant at all. If the seizure and search are to be justified, they must, therefore, be justified on some other theory." Again, however, the Court concluded that none of the exceptions could justify the

defective warrant does not require suppression if the search is nonetheless justified on an alternate ground.[3]

First, as a conceptual matter, it is the ultimate reasonableness of the search that matters under the Constitution. *See Ohio v. Robinette*, 519 U.S. 33, 39 (1996) ("[T]he touchstone of the Fourth Amendment is reasonableness.") (citation omitted). "Reasonableness, in turn, is measured in objective terms by examining the totality of the circumstances." *Id.* Furthermore, the Supreme Court has "consistently eschewed bright-line rules, instead emphasizing the fact-specific nature of the reasonableness inquiry." *Id.* If the search was objectively reasonable under an independent ground, there is no reason to order the suppression of evidence. Because the test for exigent circumstances is an objective one, *King*, 563 U.S. at 460, 464, the fact that a diligent and conscientious officer acting under time-pressure actually succeeds in obtaining a

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seizure of the car under the facts of that case. *Id.* at 473. At a minimum, these statements are not antithetical to the approach we adopt.

[3] *See Graves v. Mahoning Cnty.*, 821 F.3d 772, 775 (6th Cir. 2016) (reasoning, in a § 1983 case, that "[t]he plaintiffs may not prevail merely by showing that they were arrested with a defective warrant; they must show that they were unreasonably seized" and that the Fourth Amendment "prohibits 'unreasonable searches and seizures,' not warrantless ones"); *United States v. Poole*, 718 F.2d 671, 675 (4th Cir. 1983) (upholding search on the basis of exigent circumstances despite defects in the search warrant); *United States v. Clark*, 559 F.2d 420, 426 (5th Cir. 1977) (noting that "[i]t is well established that evidence gained by a search conducted under authority of a defective search warrant may still be admissible if an exception to the warrant requirement is present" and upholding the search under the automobile exception); *White v. United States*, 448 F.2d 250, 254 (8th Cir. 1971) ("While the defendant has attacked the validity of the search warrant in this case, we do not find it necessary to pass on this question, because we believe that the search can be justified as a warrantless search."); *State v. Tomah*, 586 A.2d 1267, 1268-69 (Me. 1991) ("Because these officers could have searched defendant's vehicle without a warrant, they should not be penalized because they attempted to get a warrant [that turned out to be defective]."); *Adkins v. State*, 717 S.W.2d 363, 365-66 (Tex. Ct. App. 1986) ("[T]he actual procuring of a warrant does not preclude the use of exigent circumstances to justify a search, should the warrant fail."); *State v. Bradley*, 227 S.E.2d 776, 779 (Ga. Ct. App. 1976) ("[T]he fact that a defective warrant has issued between the time of the seizure and the search will not destroy the validity of that search as a 'reasonable' warrantless search.").

warrant does not mean that another officer under the same pressure is objectively unreasonable for responding without seeking a warrant. Therefore, we conclude that the existence of a technically defective warrant does not require suppression of evidence if the search may be justified on an independent ground.[4]

Of course, when the government has obtained evidence based on a warrantless search, the burden rests with the government to prove probable cause and exigent circumstances. *Verez v. Commonwealth*, 230 Va. 405, 410, 337 S.E.2d 749, 753 (1985).

The issue comes down to this: if Investigator Begley had not obtained a warrant under the circumstances he faced, and had instead assembled the law enforcement team and raced to the scene of the "meth cook" that was either on the cusp of, or actually was, taking place, would such a warrantless search be justified under the exigent circumstances exception to the warrant requirement? We conclude the answer is "yes."

In *Verez*, 230 Va. at 410-11, 337 S.E.2d at 753, we set forth a non-exclusive list of factors relevant to a determination of exigent circumstances:

> (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.

[4] We note parenthetically that any defect in the validity of the warrant under state law does not, of itself, invalidate the warrant under the United States Constitution. *See, e.g., Virginia v. Moore*, 553 U.S. 164, 171 (2008).

First, as to probable cause, Investigator Begley received a detailed series of tips from a known reliable informant about a "meth cook" that was about to take place. Police officers personally observed conduct consistent with the informant's tips. The existence of probable cause is not in doubt here.

Second, the officers were aware of the dangers inherent in the manufacture of methamphetamine. Investigator Begley and Special Agent Phillips both testified about the highly toxic nature of the chemicals employed in the process and the grave danger that exposure to these substances can present. They also explained the serious risk of fire or explosion that inheres in the enterprise. Many courts have pointed to the dangers associated with the manufacture of methamphetamine in upholding a finding of exigent circumstances. *See, e.g., United States v. Walsh*, 299 F.3d 729, 734 (8th Cir. 2002) ("The potential hazards of methamphetamine manufacture are well documented, and numerous cases have upheld limited warrantless searches by police officers who had probable cause to believe they had uncovered an on-going methamphetamine manufacturing operation.") (collecting cases). In the present case, the officers could hear the voices of individuals either inside or immediately outside of the shed where the "meth cook" was allegedly taking place, and they knew that multiple persons were in danger of fire, explosion, or toxic exposure.[5] As it turns out, nobody was injured. But at the time Investigator Begley received the last in a series of tips from the informant, he did not have the benefit of hindsight.

Third, the degree of urgency involved is also a relevant consideration. The informant told Investigator Begley that a "meth cook" was about to occur – not that it would occur the next

[5] We reject Campbell's argument that those present had assumed the risk of death or serious injury, and that this assumption of the risk defeats exigent circumstances. The exigency arising from the need to protect human life extends to the guilty as well as the innocent.

day or the week after. Although Investigator Begley was able to quickly obtain a warrant, the facts confronting him would have justified a decision to proceed immediately to the scene. When Investigator Begley received a series of increasingly agitated tips about the impending "meth cook," time was of the essence.

Fourth, the gravity of the offense is a relevant consideration when examining the presence of exigent circumstances. *Welsh v. Wisconsin*, 466 U.S. 740, 750-52 (1984). In *Welsh*, the Court concluded that exigent circumstances were not present when the offense at issue was "extremely minor," such as a non-jailable traffic violation. *Id.* at 753. In contrast, the manufacture of methamphetamine can in no way be deemed to be "minor"; rather, it is a felony that carries a punishment range of five to forty years, and even longer sentences in some circumstances. *See* Code § 18.2-248. One of those circumstances, which calls for a mandatory minimum sentence of five years and a maximum sentence of life in prison, is the manufacture of ten grams or more of methamphetamine. Code § 18.2-248(C)(4).

Finally, the disposability of evidence and the risk of flight are also relevant considerations. As the trial court noted, the ingredients needed to make methamphetamines could be readily "hidden, poured out, [or] disposed of." In addition, because the search in this case took place at night, it would have been easier for one or more of the perpetrators to escape under cover of darkness. Both of these circumstances further support a finding of exigent circumstances.

CONCLUSION

For the foregoing reasons, we will reverse the judgment of the Court of Appeals, reinstate the trial court's order of conviction, and enter final judgment for the Commonwealth.

Reversed and final judgment.

Exhibit (B)(CJ)

COURT OF APPEALS OF VIRGINIA

Present: Judges Humphreys, Chafin and Senior Judge Clements
Argued at Lexington, Virginia

PUBLISHED

JAMES WILLIS CAMPBELL, SR.

v. Record No. 1923-15-3

COMMONWEALTH OF VIRGINIA

OPINION BY
JUDGE TERESA M. CHAFIN
AUGUST 21, 2018

FROM THE CIRCUIT COURT OF AMHERST COUNTY
J. Michael Gamble, Judge

Robert C. Goad, III (Shrader & Goad, on brief), for appellant.

Katherine Quinlan Adelfio, Assistant Attorney General (Mark R. Herring, Attorney General, on brief), for appellee.

Following a bench trial, James Willis Campbell, Sr., was convicted of possession with the intent to distribute methamphetamine, in violation of Code § 18.2-248.[1] On appeal, Campbell challenges the trial court's denial of his motion to suppress evidence obtained from a police search of his property. He further assigns error to the trial court's denial of his motion to dismiss the indictment for possession with intent to distribute and the trial court's ruling that the case was not barred by double jeopardy principles or by Code § 19.2-294. For the reasons that follow, we affirm the decision of the trial court.

[1] Campbell was also convicted of manufacturing methamphetamine in violation of Code § 18.2-248 in a separate proceeding. On appeal, this Court reversed his manufacturing conviction on October 25, 2016. See Campbell v. Commonwealth, 66 Va. App. 677, 791 S.E.2d 351 (2016). The Commonwealth appealed to the Supreme Court of Virginia. On December 14, 2017, the Supreme Court reversed the Court of Appeals decision, reinstating Campbell's manufacturing conviction. See Commonwealth v. Campbell, 294 Va. 486, 807 S.E.2d 735 (2017). The instant appeal was held in abeyance by this Court pending the Supreme Court's decision in the manufacturing case.

Background

On August 6, 2014, Kevin Lockhart, a confidential informant, contacted Investigator James Begley to inform him that a "meth cook" was going to happen in a shed on Campbell's property. Begley told Lockhart to keep him "apprised" of the situation. Begley then made preparations in advance of receiving word from Lockhart that "the cook" was underway. He contacted the Virginia State Police to inform the tactical team of the impending situation. Begley informed his supervisors at the sheriff's office that he would need additional officers on the scene. While Begley was still in the process of making preparations, Lockhart informed Begley that Campbell had acquired all the essential components needed to make methamphetamine and was preparing the ingredients in a shed on his property.

Begley drafted an affidavit and made three copies – (1) a copy to retain; (2) a copy to attach to the search warrant once obtained; and (3) a copy to leave with the magistrate to file with the clerk's office. The magistrate instructed Begley to add "Madison Heights" to the affidavit in order to clarify the location. He only made the addition on the magistrate's copy. Begley retained two copies of the affidavit, the original search warrant which he gave to the Virginia State Police, and a copy of the search warrant. Begley's affidavit stated as follows:

> A confidential, reliable informant has observed a methamphetamine lab in a shed within the curtilage, beside the residence listed in paragraph 2 [of the affidavit] within the past 72 hours. The confidential, reliable informant is familiar with how methamphetamine is manufactured and is familiar with the precursors used to manufacture methamphetamine. The confidential, reliable informant has observed both the precursors and the residents processing the precursors to make the methamphetamine product in the shed beside [redacted] Drive. This officer knows that manufacturing methamphetamine is in violation of the Code of Virginia and that it is a felony offense listed under [Code § 18.2-248].

The officers arrived at Campbell's residence prior to executing the search warrant. Investigator Brandon Hurt positioned himself between twenty-five and thirty yards from

Campbell's shed. He observed the scene for nearly an hour before the execution of the warrant. During that time, Hurt heard people talking and witnessed Campbell's daughter as well as another individual transport aluminum foil and a short hose to the shed. He also observed a significant amount of smoke coming from the shed.

Once the ingredients had been mixed in bottles, Lockhart called Begley. Lockhart testified that the strong fumes forced Campbell to open the door to the shed. Approximately a minute and a half later, the police drove up Campbell's driveway. Campbell and the other individuals hid or ran, but were apprehended by law enforcement within the hour. The officers recovered evidence from the methamphetamine "cook," including rolled up aluminum foil in the bottom of a two-liter bottle; a roll of aluminum foil; muriatic acid; pseudoephedrine; a coffee filter; camping fuel; Drano; lye; dry ice; "sludge from a . . . meth cook in [a] plastic pipe;" and "two different containers containing liquid, both of which field tested [positive] for the presence of methamphetamine."

Begley, who was qualified as an expert witness in the field of methamphetamine production, testified that the process of making methamphetamine used highly combustible, volatile chemicals that, if "cooked" for an extended period of time, could produce carcinogenic and potentially lethal gases.

Virginia State Police Special Agent Glen Phillips, who was also qualified as an expert on the subject of manufacturing methamphetamine, testified that the manufacture of methamphetamine posed a fire hazard and explosion risk. He further stated that Campbell had completed the process of manufacturing methamphetamine.

On February 10, 2015, Campbell was indicted for the felonious manufacture of methamphetamine. Campbell filed a motion to suppress all evidence recovered pursuant to the search warrant. He argued that the search warrant was defective pursuant to Code § 19.2-54

because the clerk of court never received a complete affidavit due to a faxing error or malfunction. The affidavit page received by the clerk of court via fax "included a description of the offense, a paragraph describing the place to be searched, and another paragraph listing the things or persons to be searched." Commonwealth v. Campbell ("Campbell I"), 294 Va. 486, 491-92, 807 S.E.2d 735, 737 (2017). The second page was missing from the fax. It contained a description of the basis for probable cause and an explanation that the information came from an informant and the basis for which the officer believed that the informant was credible. Ultimately, the trial court denied Campbell's suppression motion. While the trial court agreed that the warrant was defective, it concluded that the search was justified by exigent circumstances based on expert testimony and Lockhart's communications with Begley. Id.

On June 9, 2015, Campbell was indicted for feloniously possessing methamphetamine with the intent to distribute it. On June 17, 2015, both the manufacturing and possession with intent to distribute cases were set for trial. By counsel, Campbell requested a continuance on the possession with intent to distribute charge due to the fact that he had only been indicted on that charge less than two weeks earlier. The Commonwealth did not object, and the possession with intent to distribute case was scheduled for August 19, 2015. The trial on the manufacturing charge proceeded on June 17, 2015, and the trial court found Campbell guilty of that charge. Campbell appealed to this Court. On October 25, 2016, this Court reversed the trial court's ruling to admit evidence obtained pursuant to the search warrant and reversed Campbell's conviction. See Campbell v. Commonwealth, 66 Va. App. 677, 791 S.E.2d 351 (2016). The Commonwealth appealed to the Supreme Court of Virginia. The Supreme Court reversed the ruling of the Court of Appeals and affirmed the reasoning and decision of the trial court. Thus, Campbell's conviction was reinstated. See Campbell I, 294 Va. at 497, 807 S.E.2d at 740.

manufacturing case (Campbell I), as well as the appeal of the constitutional double jeopardy and Code § 19.2-294 issues. Campbell now appeals to this Court in the possession with intent to distribute case.

Analysis

I. Law of the Case

Campbell argues on appeal that the exigent circumstances exception to the warrant requirement could not save a violation of Code § 19.2-54. He next contends that the affidavit for the search warrant was constitutionally insufficient and that the good faith exception to the exclusionary rule did not apply. Thirdly, Campbell contends that exigent circumstances were not present in this case to justify the entry and search of his property without a valid search warrant.

Campbell's first three assignments of error are identical to the assignments of error presented in his appeal of the manufacturing methamphetamine conviction. See Campbell I, 294 Va. 486, 807 S.E.2d 735. The facts are the same in this appeal as in Campbell I, and the evidence Campbell seeks to suppress is identical. In that case, Campbell appealed his manufacturing conviction to this Court. We reversed the trial court's decision. The Commonwealth then appealed to the Supreme Court. The Supreme Court reversed the Court of Appeals decision and reinstated the trial court's order of conviction for the manufacturing of methamphetamine charge. Id. at 497, 807 S.E.2d at 740. Specifically, the Supreme Court held that, even assuming the search warrant was insufficient under the requirements of Code § 19.2-54, the search was nonetheless justified as a warrantless search pursuant to the exigent circumstances doctrine. Id. at 495, 807 S.E.2d at 739.

Therefore, assignments of error 1, 2, and 3 are controlled by the "law of the case" doctrine. It is well-established that

> [when] there have been two appeals in the same case, between the same parties, and the facts are the same, nothing decided on the

On October 25, 2015, Campbell filed a motion to dismiss the possession with intent to distribute charge. He contended that prosecution of the possession with intent to distribute charge would violate Code § 19.2-294 and constitutional double jeopardy principles. He also filed a motion to suppress on the same day, repeating his argument that the affidavit filed with the search warrant did not comply with Code § 19.2-54. The Commonwealth responded that Campbell had not been subjected to double jeopardy because the manufacturing and possession with intent to distribute offenses contained different elements, each requiring proof of a fact that the other did not. Further, the Commonwealth contended that Campbell could be tried separately for each of the "pots" that had been "cooked." Finally, the Commonwealth argued that because the possession with intent to distribute case was continued on Campbell's request, Code § 19.2-294 did not bar the subsequent prosecution of that charge.

During argument on Campbell's motions, Campbell argued for the first time that the "onus" was on the Commonwealth to move to join the charges pursuant to Rule 3A:6(b) and that scheduling the possession with intent to distribute trial on June 17, 2015 violated Rule 3A:10 because he did not have enough time to prepare.

The trial court ruled that the indictments did indeed charge separate offenses, and thus, double jeopardy was not violated. Further, the trial court ruled that Campbell waived any challenge because both the manufacturing and possession with intent to distribute cases were scheduled to be tried the same day. Campbell asked that they be tried separately. As to the suppression issue, the trial court held that its rulings on the matter in Campbell I controlled, indicating that the search warrant was invalid, but exigent circumstances justified a warrantless search.

Campbell entered a conditional guilty plea, "subject to the court's ruling on the suppression motion in this case, which is basically going to be determined by the appeal" in the

> first appeal can be re-examined on a second appeal. Right or wrong, it is binding on both the trial court and the appellate court, and is not subject to re-examination by either. For the purpose of that case, though only for that case, the decision on the first appeal is the law.

Miller-Jenkins v. Miller-Jenkins, 276 Va. 19, 26, 661 S.E.2d 822, 826 (2008) (quoting Steinman v. Clinchfield Coal Corp., 121 Va. 611, 620, 93 S.E. 684, 687 (1917)). Therefore, we will not address Campbell's first three assignments of error.

II. Constitutional Double Jeopardy

On appeal, Campbell contends that the trial court erred by denying his motion to dismiss the possession with intent to distribute indictment and ruling that the case was not barred by constitutional double jeopardy principles. "In reviewing a double jeopardy claim, or a claim based on statutory interpretation, this Court shall conduct a *de novo* review." Davis v. Commonwealth, 57 Va. App. 446, 455, 703 S.E.2d 259, 263 (2011). This Court "examine[s] the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter[s]." Davis v. Commonwealth, 63 Va. App. 45, 52, 754 S.E.2d 533, 537 (2014) (quoting Jones v. Commonwealth, 217 Va. 231, 233, 228 S.E.2d 127, 129 (1979)).

"The origin and history of the Double Jeopardy Clause are hardly a matter of dispute." United States v. Scott, 437 U.S. 82, 87 (1978). "The constitutional provision had its origin in the three common-law pleas of *autrefois acquit*, *autrefois convict*, and pardon." Id. "These three pleas prevented the retrial of a person who had previously been acquitted, convicted, or pardoned for the same offense." Id. The principle of double jeopardy was a "universal maxim of the common law of England, that no man is to be brought into jeopardy of his life more than once for the same offense." United States v. Wilson, 420 U.S. 332, 340 (1975) (quoting 4 W. Blackstone, Commentaries on the Laws of England 335-336 (1769)). However, the common-law pleas merely prohibited "repeated 'prosecution for the same identical act *and*

crime,' not the retrial of particular issues or evidence." Currier v. Virginia, 138 S. Ct. 2144, 2153 (2018) (quoting 4 W. Blackstone at 330). English and early American cases demonstrate that line of reasoning.

> In Turner's Case, 30 Kel. J. 30, 84 Eng. Rep. 1068 (K. B. 1663), for example, a jury acquitted the defendant of breaking into a home and stealing money from the owner. Even so, the court held that the defendant could be tried later for the theft of money "stolen at the same time" from the owner's servant. [Id.] In Commonwealth v. Roby, 29 Mass. 496 [(12 Pick. 496)] (Mass. 1832), the court, invoking Blackstone, held that "[i]n considering the identity of the offence, it must appear by the plea, that the offence charged in both cases was the same *in law* and *in fact*." Id., at 509. The court explained that a second prosecution isn't precluded "if the offences charged in the two indictments be perfectly distinct in point of law, *however nearly they may be connected in fact*." [Id.] (emphasis added). Another court even ruled "that a man acquitted for stealing the horse hath yet been arraigned and convict for stealing the saddle, tho both were done at the same time." 2 M. Hale, [The History of the Pleas of the Crown, ch. 31, p. 246 (1736 ed.)].

Id. Turner's Case and Roby, in addition to various other cases with similar rulings, "demonstrate that early courts . . . expressly rejected the notion that the Double Jeopardy Clause barred the relitigation of issues or facts." Id.

In more modern double jeopardy cases, "the courts apply today much the same double jeopardy test they did at the founding." Id. (citing Blockburger v. United States, 284 U.S. 299, 304 (1932)). The Blockburger Court held that "where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." Blockburger, 284 U.S. at 304. The Blockburger test (or the same-elements test) places the focus of the analysis on the proof necessary to prove the statutory elements of each offense, instead of the actual evidence to be presented at trial. Id. If each statute requires proof of a fact that the other does not, they constitute separate offenses, "notwithstanding a substantial overlap

acquitted of the robbery of one victim. The Supreme Court concluded that a second trial violated the Double Jeopardy Clause.

> [T]he Court reasoned [that], because the first jury necessarily found that the defendant "was not one of the robbers," a second jury could not "rationally" convict the defendant of robbing the second victim without calling into question the earlier acquittal. In these circumstances, the Court indicated, any relitigation of the issue whether the defendant participated as "one of the robbers" would be tantamount to the forbidden relitigation of the same offense resolved at the first trial.

Currier, 138 S. Ct. at 2149 (quoting Ashe, 397 U.S. at 445-46) (internal citations omitted). It is important to note, however, that Ashe "forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial." Id. at 2150. The Court in Currier observed a "critical difference" between Currier and Ashe – Currier *consented* to a second trial. Id. Accordingly, Ashe cannot be applied to Campbell's case, as he also consented to a second trial.

The Supreme Court notes that Jeffers v. United States, 432 U.S. 137 (1977), is instructive in this exact situation. Currier, 138 S. Ct. at 2150. In Jeffers, as in Currier and the present case, the defendant requested separate trials for each of the counts against him in order to "reduce the possibility of prejudice." Id. The defendant was acquitted of a lesser-included offense. He then argued that double jeopardy barred a trial for the greater offense.

> In any other circumstance the defendant likely would have had a good argument. Historically, courts have treated greater and lesser-included offenses as the same offense for double jeopardy purposes, so a conviction on one normally precludes a later trial on the other. Jeffers, 432 U.S. at 150-151 (plurality opinion); Brown v. Ohio, 432 U.S. 161, 168-169 (1977) (collecting authorities). But, Jeffers concluded, it's different when the defendant consents to two trials where one could have done. If a single trial on multiple charges would suffice to avoid a double jeopardy complaint, "there is no violation of the Double Jeopardy Clause when [the defendant] elects to have the . . . offenses tried

> separately and persuades the trial court to honor his election." [Brown], 432 U.S. at 152.

Id.

In the present case, Campbell's manufacturing and possession with intent to distribute charges were to be tried concurrently on June 17, 2015. However, Campbell requested a continuance in the possession with intent to distribute case, arguing that he had been indicted on that charge less than two weeks prior and needed more time to prepare. He made no objection to the possession with intent to distribute charge itself. The continuance was granted by the trial court. The manufacturing trial proceeded, and Campbell was found guilty. Campbell filed a motion to dismiss the possession with intent to distribute charge, contending that the second trial would violate double jeopardy principles.

"[Campbell's] consent [to a second trial] dispels any specter of double jeopardy abuse that holding two trials might otherwise present." Id. at 2151. Campbell's request to sever the charges pending against him and have two separate trials was a voluntary, strategic choice. "[D]ifficult strategic choices like these are 'not the same as no choice,' and the Constitution 'does not . . . forbid requiring' a litigant to make them." Id. at 2152 (citations omitted). The Double Jeopardy Clause, "which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice." Id. at 2151 (quoting Scott, 437 U.S. at 99).

Thus, the trial court did not err in denying Campbell's motion to dismiss the possession with intent to distribute indictment and ruling that the case was not barred by constitutional double jeopardy principles.

III. Statutory Double Jeopardy – Code § 19.2-294

Campbell argues that the trial court erred in ruling that his indictment and conviction of possession with the intent to distribute were not barred by Code § 19.2-294. He contends that

the proceedings in the manufacturing case (Campbell I) and the instant possession with intent to distribute case were "successive" because he was indicted on different dates and the cases were not tried in a single, concurrent evidentiary hearing. Therefore, he argues, he was subjected to multiple prosecutions for the same act.

Code § 19.2-294 states in pertinent part:

> If the same act be a violation of two or more statutes, or of two or more ordinances, or of one or more statutes and also one or more ordinances, conviction under one of such statutes or ordinances shall be a bar to a prosecution or proceeding under the other or others.

Even though Code § 19.2-294 does not explicitly state that it provides a defense of former jeopardy, "it amounts to such a defense in purpose and desired effect." Epps v. Commonwealth, 216 Va. 150, 155, 216 S.E.2d 64, 68 (1975) (citation omitted). Code § 19.2-294 precludes the Commonwealth from "subjecting an accused to the hazards of vexatious, multiple prosecutions." Hall v. Commonwealth, 14 Va. App. 892, 899, 421 S.E.2d 455, 460 (1992) (*en banc*). "Code § 19.2-294 does not bar multiple convictions for the same act when those convictions are obtained in a single trial." Id. at 894, 421 S.E.2d at 457.

Our holding that the possession with intent to distribute trial did not violate constitutional double jeopardy principles also applies here. Although Campbell argues that the manufacturing charge and the possession with intent to distribute charge should have been prosecuted together in a single trial, Campbell voluntarily requested to continue the possession with intent to distribute charge and have two trials. "[Campbell's] consent [to a second trial] dispels any specter of double jeopardy abuse that holding two trials might otherwise present." Currier, 138 S. Ct. at 2151. Campbell waived any right to challenge the decision of the trial court to proceed with the second trial.

The Commonwealth did not "subject" Campbell to "vexatious, multiple prosecutions," which is the primary concern of Code § 19.2-294. Hall, 14 Va. App. at 899, 421 S.E.2d at 460. Rather, Campbell requested two separate trials. Therefore, we find that this argument is without merit.

Conclusion

For the foregoing reasons, we hold that the Supreme Court's ruling in the manufacturing case controls the outcome of Campbell's assignments of error 1, 2, and 3. The search warrant has been held invalid. However, the warrantless search was justified based on exigent circumstances. We further hold that constitutional and statutory double jeopardy principles were not violated in the prosecution of the possession with intent to distribute methamphetamine. We therefore affirm Campbell's conviction for possession with the intent to distribute methamphetamine pursuant to Code § 18.2-248.

Affirmed.

Humphreys, J., concurring in the judgment.

I join entirely in the analysis and judgment of my colleagues that the recent decision of the Supreme Court of the United States in Currier v. Virginia, 138 S. Ct. 2144 (2018), is dispositive with respect to Campbell's fifth assignment of error—that his prosecution in this case constituted a violation of the Double Jeopardy Clause of the Fifth Amendment. I also join in the analysis and judgment of my colleagues that the same logic applicable in Currier is dispositive of his fourth assignment of error—that Campbell's motion for separate trials constitutes a waiver of the application of Code § 19.2-294.

However, regarding Campbell's first three assignments of error, I join my colleagues only in affirming the judgment in this case. As to Campbell's first assignment of error, I do so because I must, since, as my colleagues also correctly note, our Supreme Court's decision in Commonwealth v. Campbell ("Campbell I"), 294 Va. 486, 489, 807 S.E.2d 735, 736 (2017), is binding upon us and controls the disposition of that assignment of error.[2]

[2] Campbell's second and third assignments of error assert constitutional infirmities based entirely upon the failure of the magistrate to properly deliver the search warrant and affidavit to the clerk of the circuit court. He reasons that because the warrant was not properly filed, it is a constitutional nullity and therefore no probable cause existed to support a search. Given our Supreme Court's holding in Campbell I, those assignments of error are now moot, and we need not decide them, however I note that the Fourth Amendment's exclusionary rule is not a strict-liability sanction. It is a prophylactic remedy and to the extent it is relevant to the first assignment of error, I respectfully suggest that its purpose is *not* to deter the malfunctioning of a fax machine as apparently occurred here. See, e.g., Matthews v. Commonwealth, 65 Va. App. 334, 347, 778 S.E.2d 122, 129 (2015) ("To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system." (quoting Herring v. United States, 555 U.S. 135, 144 (2009))).

Where police have acted reasonably and conscientiously, as in this case where they obtained and properly executed a search warrant invalidated only by the magistrate's failure to transmit it and its accompanying affidavit to the clerk of the circuit court, the Fourth Amendment's exclusionary rule is inapplicable and only the statutory sanction of Code § 19.2-54 could affect the admissibility of the evidence seized from the execution of the search warrant.

Regarding the current appeal with respect to Campbell's conviction for possession with the intent to distribute methamphetamine, Campbell moved to suppress the evidence seized on the same grounds he argued in his earlier trial and appeal for manufacture of methamphetamine. Thus, for the reasons stated by the majority, Campbell I is binding and controls the outcome of this assignment of error and renders two others moot. I write separately to explain why I believe that decision to be flawed and to point out the mischief I believe it will now cause.

The analysis and judgment of our Supreme Court in Campbell I raise several concerns in my mind. First of all, I respectfully suggest that an inescapable inference from even a cursory review of its analysis in Campbell I is that our Supreme Court has concluded that it is fundamentally unfair to bar the use of evidence due to an apparent mechanical failure of a fax machine when police have acted responsibly and appropriately in securing a search warrant and gathered the evidence Campbell sought to suppress in total conformity with the Fourth Amendment. However, as much I, or any judge, might personally agree with that conclusion, it has no place in any legal analysis. An essential requirement of our judicial role, stemming from the constitutional division of power among the three branches of government, is that our subjective opinion regarding the policies embodied in statutes ought to have no bearing on any legal analysis of those statutes. In short, whatever our private opinions of them, it is not for the courts to nullify or undermine the policy decisions of the legislative branch so long as they are constitutional.[3]

Moreover, our Supreme Court's decision in Campbell I ignored the basic constitutional tenet that the Fourth Amendment of the United States Constitution is a floor, not a ceiling. In Cooper v. California, 386 U.S. 58 (1967), the United States Supreme Court held that the states

Appendix C

[3] I have also observed over the years that the surest way to obtain the modification or repeal of a "bad" law by a legislature is to strictly enforce it.

remain free "to impose higher standards on searches and seizures than required by the Federal Constitution." Id. at 62. Reversing our Supreme Court in Virginia v. Moore, 553 U.S. 164 (2008), the United States Supreme Court repeated that states may provide "additional protections exclusively as matters of state law." Id. at 171. In other words, the various states may enact statutes that go beyond the minimum requirements imposed by the Fourth Amendment if they choose. The Commonwealth has occasionally done so. Moore dealt with whether evidence must be suppressed when it was recovered as part of a search incident to arrest when the arrest, constitutional under the Fourth Amendment, nevertheless violated Code § 19.2-74, which requires the issuance of a summons rather than a physical arrest for certain misdemeanor offenses. The United States Supreme Court held in Moore that the Fourth Amendment's exclusionary rule applied only to violations of the Fourth Amendment itself and the existence of any exclusionary remedy for violation of a state procedural statute must be found in state law. See id. at 178. "[H]istorically, searches or seizures made contrary to provisions contained in Virginia statutes provide no right of suppression *unless the statute supplies that right*." Troncoso v. Commonwealth, 12 Va. App. 942, 944, 407 S.E.2d 349, 350 (1991) (emphasis added); see also Thompson v. Commonwealth, 10 Va. App. 117, 122, 390 S.E.2d 198, 201 (1990); Hall v. Commonwealth, 138 Va. 727, 733-34, 121 S.E. 154, 156 (1924).

The statute at the heart of Moore, Code § 19.2-74, contained no exclusionary remedy. However, Code § 19.2-54, the statute at the center of both this case and Campbell I, clearly does so. In enacting Code § 19.2-54, the General Assembly imposed a mandatory filing requirement on every judicial officer issuing a search warrant, ordinarily a magistrate. The statutory requirement is both straightforward and draconian. Code § 19.2-54 *requires* that the magistrate deliver or transmit a copy of the search warrant and the supporting affidavit to the clerk of the circuit court of the city or county where the search is to take place, within seven days. This

statute clearly specifies that the failure of the magistrate to do so prohibits the use of any evidence obtained until a "reasonable time" after the warrant and affidavit are filed, provided that such is done within "30 days." The clear implication is that a failure to file is not curable after 30 days.

Specifically, the final paragraph of Code § 19.2-54 provides that the

> [f]ailure of the officer [here, a magistrate] 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). While inartfully drafted, this statute implicitly provides that evidence seized "under the warrant" is inadmissible if the failure to file the required affidavit continues beyond 29 days. In essence, Code § 19.2-54 establishes a more stringent standard for the admissibility of evidence obtained through search warrants than those required by the Fourth Amendment and also provides a statutory mandate for exclusion of the evidence obtained for non-compliance after 29 days. At least it did until our Supreme Court neutered this statute by "assum[ing]" it was violated but nevertheless holding that, contrary to the United States Supreme Court's decisions in Cooper and Moore, a less stringent constitutional standard trumps a more restrictive statutory requirement and therefore, apparently the *only* criteria for admitting evidence obtained pursuant to a search warrant in the Commonwealth going forward, is compliance with the Fourth Amendment.

I reach the conclusion that our Supreme Court effectively rendered the General Assembly's exclusionary sanction in this statute a nullity in Campbell I, because of that Court's holding that "[w]hatever the scope of inadmissibility contemplated by Code § 19.2-54 for searches made under a defective warrant, nothing in the plain language of this statute compels

the exclusion of evidence obtained in the course of a search that is justified on grounds *other than a warrant*." Campbell I, 294 Va. at 493, 807 S.E.2d at 738 (emphasis added). In my view, this statement ignores both the right of the General Assembly to impose "additional protections . . . as matters of state law" as restated in Moore and it also ignores the plain language of the statute that its exclusionary remedy expressly applies to "any search made under the warrant." In Campbell I and in this case, a search warrant was obtained, executed, and evidence seized pursuant to it. Given that the police in this case obtained a constitutionally valid search warrant from a magistrate, executed that warrant properly, and obtained evidence expressly within the scope of, and authority granted by, the warrant, the holding that the search in this case and in Campbell I was not conducted "under the warrant" is so much in conflict with the facts in the record as to amount to a legal fiction without saying so.

Moreover, to reach this logically strained result, our Supreme Court set aside another basic tenet of appellate review with problematic consequences going forward. After assuming that the warrant was invalid under Code § 19.2-54, our Supreme Court nevertheless concluded that it need not determine if the sanction in that statute applied because the search was justified by the exigent circumstances exception to the normal constitutional requirement that a warrant be obtained prior to a search.

Judicial restraint commands that courts decide cases "on the best and narrowest ground available." Commonwealth v. Swan, 290 Va. 194, 196, 776 S.E.2d 265, 267 (2015) (quoting McGhee v. Commonwealth, 280 Va. 620, 626 n.4, 701 S.E.2d 58, 61 n.4 (2010)). "A fundamental and longstanding precept of this doctrine is that 'unnecessary adjudication of a constitutional issue' should be avoided." Id. (quoting Bell v. Commonwealth, 264 Va. 172, 203, 563 S.E.2d 695, 715 (2002)).

Instead of adhering to its own jurisprudence in this regard, our Supreme Court conducted an entirely unnecessary constitutional analysis expressly to *avoid* construing the statute.[4] While I am confident that sowing confusion in the jurisprudence of the Commonwealth for this Court and the trial courts was not intended, among the consequences of Campbell I going forward are that no statutory requirement that expands upon the minimum protections of the Constitution is effective in the Commonwealth and also that the courts of the Commonwealth no longer need refrain from deciding constitutional issues, if doing so will avoid the enforcement of a statute we regard as overly unforgiving.

Additionally, and even more troubling to me, is that in its entirely unnecessary constitutional analysis in Campbell I, our Supreme Court applied Fourth Amendment exigent circumstances criteria clearly inconsistent with the jurisprudence on the subject from the Supreme Court of the United States. Exigent circumstances, in the most basic sense, is quite simply a situation where probable cause exists but it is not practical or reasonable for a law enforcement officer to obtain a search warrant. The United States Supreme Court has repeatedly stressed that to constitute exigent circumstances sufficient to provide an exemption from the constitutional requirement that a warrant be secured prior to a search, police must be faced with a "now or never" situation." Riley v. California, 134 S. Ct. 2473, 2487 (2014) (quoting Missouri v. McNeely, 569 U.S. 141, 153 (2013)); see also Roaden v. Kentucky, 413 U.S. 496, 505 (1973).

The Fourth Amendment guarantees the right of liberty against unreasonable searches and seizures by providing:

> 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

[4] I note that Campbell does not challenge the validity of the search warrant at issue based upon a lack of probable cause, upon any deficiency in the manner or scope of its execution by police, or any ground other than purported constitutional consequences flowing from the magistrate's failure to adhere to Code § 19.2-54.

> probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

Before a search occurs, "a warrant must generally be secured." Kentucky v. King, 563 U.S. 452, 459 (2011); see also Coolidge v. New Hampshire, 403 U.S. 443, 454-55 (1971) ("[S]earches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable[.]"). However, "this presumption may be overcome in some circumstances because '[t]he ultimate touchstone of the Fourth Amendment is "reasonableness."'" King, 563 U.S. at 459 (quoting Brigham City v. Stuart, 547 U.S. 398, 403 (2006)). The exceptions to the Fourth Amendment's warrant requirement "are few in number and carefully delineated." Katz v. United States, 389 U.S. 347, 357 (1967). "[I]n general, they serve the legitimate needs of law enforcement officers to protect their own well-being and preserve evidence from destruction." United States v. United States Dist. Court, 407 U.S. 297, 318 (1972).

The presence of "exigent circumstances" is one such exception to the warrant requirement. As correctly noted by our Supreme Court in Campbell I, the exigent circumstances exception "applies when the exigencies of the situation make the needs of law enforcement so compelling that [a] *warrantless* search is objectively reasonable under the Fourth Amendment." Campbell I, 294 Va. at 493, 807 S.E.2d at 738 (quoting King, 563 U.S. at 460) (some internal quotation marks omitted) (emphasis added). Essentially, it "allows a *warrantless* search when an emergency leaves police *insufficient time to seek a warrant*." Birchfield v. North Dakota, 136 S. Ct. 2160, 2173 (2016) (referencing Michigan v. Tyler, 436 U.S. 499, 509 (1978)) (emphasis added); see also Schmerber v. California, 384 U.S. 757, 771 (1966) (upholding a warrantless search when "there was no time to seek out a magistrate and secure a warrant"). However, after

correctly stating the definition of exigent circumstances, our Supreme Court in Campbell I then misapplied that definition by ignoring the fact that the key phrase in all of these cases is "*warrantless* search."

The United States Supreme Court has recognized many common situations where obtaining a search warrant is objectively unreasonable. "Our decisions have recognized that a warrantless entry by criminal law enforcement officials may be legal when there is compelling need for official action *and no time to secure a warrant*." Tyler, 436 U.S. at 509 (emphasis added).

These situations include the so called "emergency aid exception," where "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury." Brigham City, 547 U.S. at 403. The hot pursuit exception recognizes "the right of police, who had probable cause to believe that an armed robber had entered a house a few minutes before, to make a warrantless entry to arrest the robber and to search for weapons." United States v. Santana, 427 U.S. 38, 42 (1976). And, perhaps most on point in this case, is the exception permitting "a warrantless entry onto private property . . . to prevent the imminent destruction of evidence." Brigham City, 547 U.S. at 403. There are numerous other examples of exigent circumstances but what every single one of them has in common is that they are situations where it would not be objectively reasonable for the police to take the time to obtain a warrant.[5]

[5] See, e.g., Warden v. Hayden, 387 U.S. 294 (1967) (warrantless entry of house by police in hot pursuit of armed robber); Ker v. California, 374 U.S. 23 (1963) (warrantless and unannounced entry of dwelling by police to prevent imminent destruction of evidence); N. Am. Cold Storage Co. v. Chicago, 211 U.S. 306 (1908) (warrantless seizure of unwholesome food); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (warrantless compulsory smallpox vaccination); Compagnie Francaise v. Bd. of Health, 186 U.S. 380 (1902) (warrantless health quarantine).

In all of these cases, the overarching principle expressed by the United States Supreme Court is that if there is a "compelling need for official action and *no time to secure a warrant*," the warrant requirement may be excused. See Tyler, 436 U.S. at 509 (emphasis added).

No such excuse existed in either Campbell I or this case. According to our Supreme Court as reaffirmed in Campbell I, the factors relevant to an exigent circumstances determination include, but are not limited to:

> (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.

Campbell I, 294 Va. at 495, 807 S.E.2d at 739-40 (quoting Verez v. Commonwealth, 230 Va. 405, 410-11, 337 S.E.2d 749, 753 (1985)). These factors are to be considered "as they reasonably appeared to trained law enforcement officers to exist *when the decision to enter was made*." Verez, 230 Va. at 411, 337 S.E.2d at 753 (emphasis added).

I have several problems with the application of the Verez factors to the facts found in both Campbell I and this case. Initially, I note that in this case as in Campbell I, none of the Verez factors were likely the subject of any consideration at all by the police "when the decision to enter was made" since they had obtained and were executing, what they believed to be, and at the time actually was, a valid *search warrant*. Additionally, I am troubled by our Supreme Court's determination that four of the Verez factors favored a finding of exigent circumstances. Clearly, as they noted, "[t]he existence of probable cause is not in doubt here" but probable cause

is a requirement for *any* search and is not a factor in determining whether the requirement to obtain a warrant is excused. Campbell I, 294 Va. at 496, 807 S.E.2d at 740; see also Welsh v. Wisconsin, 466 U.S. 740, 753 (1984) ("[N]o exigency is created simply because there is probable cause to believe that a serious crime has been committed[.]").

The manufacture of methamphetamine is undoubtedly dangerous to "cooks" and bystanders alike and is certainly a serious offense. However, our Supreme Court's reliance on two other Verez factors—the degree of urgency and the "disposability of evidence[,]" as characterized in Campbell I—are not supported by the record. As described by our Supreme Court, "[w]here there are exigent circumstances in which a reasonable police action literally must be 'now or never' to preserve the evidence of the crime, it is reasonable to *permit action without prior judicial evaluation*." Smith v. Commonwealth, 56 Va. App. 592, 598, 696 S.E.2d 211, 214 (2010) (quoting Wright v. Commonwealth, 222 Va. 188, 193, 278 S.E.2d 849, 853 (1981)) (emphasis added). However, unlike in Smith and Wright, in Campbell I and in this case, the record establishes that police obviously had the time to secure the judicial evaluation of probable cause and formal authorization to search for and seize evidence of criminal activity that the Fourth Amendment prefers. It seems axiomatic to me that the fact that they did so, pretty conclusively establishes that this was *not* a situation where the degree of urgency and the "disposability of evidence" made it necessary to act in the absence of such prior judicial evaluation and authorization.

Moreover, in reaching its holding that the police here need not have bothered to obtain a search warrant, our Supreme Court deviated from the Fourth Amendment jurisprudence of the United States Supreme Court by considering "the degree of urgency involved and the time required to get a warrant" as just one factor in an exigent circumstances analysis that may be outweighed by others when, in fact, it is the *overriding* factor. Since they went to the trouble of

actually complying with the letter of the Fourth Amendment, the police officers in these cases clearly did not share our Supreme Court's various *ex post facto* conclusions that there was a likelihood of evidence being removed or destroyed, that the "cooks" knew that they were being watched by the police or by an informant, or that there was any "risk of flight" if they took the time necessary to secure a warrant. Instead, the record is clear that law enforcement officers were on the scene of the "cook," conducting surveillance well before executing the search warrant. Under the facts of this case, the fact that police actually obtained a constitutionally valid search warrant categorically contradicts any suggestion that this was a "now or never" situation where officers believed that the methamphetamine would be destroyed or removed if they took the time to do what they did – obtain a search warrant.

In summary, where police actually secure a search warrant, the factors mentioned in Verez to determine if it was reasonable for police to *not* obtain a warrant become irrelevant because exigent circumstances to justify a *warrantless* search cannot exist as a matter of law if there has been sufficient time for police to actually obtain the search warrant the Fourth Amendment ordinarily requires.

To be clear, there is no violation of the Fourth Amendment in this case any more than there was in Campbell I and the search warrant issued in this case was entirely valid at the time of its execution. It is only the subsequent failure of a magistrate to comply with a purely statutory requirement that rendered inadmissible the evidence obtained in the search. My view is simply that there was no need for our Supreme Court to construct a retroactive and very problematic constitutional rationale to justify a warrantless search that was actually based upon a constitutionally valid search warrant, other than to circumvent the will of the General Assembly as expressed in a presumptively constitutional, though apparently unpalatable statute.

Although I am bound to apply its judgment to this case, for the reasons discussed above, I respectfully disagree with the analysis of our Supreme Court in Campbell I, but nevertheless join my colleagues in affirming the judgment below.

08/21/2018	8	NOTICE of Appearance by Katherine Quinlan Adelfio on behalf of Tammy Brown (Adelfio, Katherine)
09/14/2018	9	MOTION for Extension of Time to File Answer re 6 Order of Prisoner Service (2254) by Tammy Brown.Motions referred to Judge Robert S. Ballou. (Adelfio, Katherine)
09/18/2018	10	ORDER granting 9 MOTION for Extension of Time to File Answer re 6 Order of Prisoner Service (2254) Tammy Brown answer due 10/2/2018.Entered by Magistrate Judge Robert S. Ballou on 9/18/2018. (tvt)
09/25/2018	11	State Court Records from Court of Appeals of Virginia. (2 file folders) (ck)
10/01/2018	12	*Rule 5 Answer* RESPONSE to 1 Petition for Writ of Habeas Corpus by Tammy Brown.(Adelfio, Katherine)
10/01/2018	13	MOTION to Dismiss by Tammy Brown. (Adelfio, Katherine)
10/01/2018	14	Brief / Memorandum in Support re 13 MOTION to Dismiss . filed by Tammy Brown. (Attachments: # 1 Exhibit A, # 2 Exhibit B, # 3 Exhibit C, # 4 Exhibit D)(Adelfio, Katherine)
10/02/2018	15	Roseboro Notice re 13 MOTION to Dismiss Deadline set for 10/26/2018. (slt)
10/10/2018	16	Response re 13 MOTION to Dismiss . filed by James W. Campbell. (slt)
10/11/2018	17	State Court Records from Supreme Court of Virginia.(1 volume) (ck)
10/12/2018	18	State Court Records from Amherst County Circuit Court located in the clerk's office. (1 volume/box) (slt)
11/09/2018	19	Pursuant to STANDING ORDER 2018–9, the U.S. Magistrate Judge Joel C. Hoppe is referred to this case. Magistrate Judge Robert S. Ballou no longer assigned to the case. (aab)
05/28/2019	20	MEMORANDUM OPINION. Signed by Senior Judge Jackson L. Kiser on 5/28/2019. (slt)
05/28/2019	21	ORDER denying 13 Motion to Dismiss, and Respondent is DIRECTEDto respond to Petitioner's claims within 30 days from the entry of this order. (Order and/or Opinion mailed to Pro Se Party). Signed by Senior Judge Jackson L. Kiser on 5/28/2019. (slt)
06/04/2019	22	Letter requesting case status/legal advice by James W. Campbell (ck)
06/04/2019	23	Response re 22 Letter. (ck)

Exhibit CD)

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-7706

James W. Cambell
Petitioner - Appellant

v.

Tammy Brown, Warden
Respondent - Appellee

MOTION TO STAY

COMES NOW, Petitioner and respectfully moves this court pursuant to FRAP 41(d) to stay Mandate issued August 18, 2020 in the above styled case in order to review Petition for Re-hearing (d)(1)(I) For good cause shown.

I. Petition presents Federal question that has never been answered decided by the United states Court of appeals and is first impression.

Respectfully Submitted
Petitioner - Appellant
James W. Cambell
8/24/2020

Exhibit CC)

IN THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 19-7706

James W. Campbell

Petitioner-Appellant

v.

Tawny Brown, Warden

Respondent-Appellee

PETITION FOR REHEARING

Pursuant to FRAP 40(a)(2) CC)

REASON FOR REHEARING:

I. Petitioner avers case presents Federal Question never addressed by court of appeals.

(A) QUESTION PRESENTED

The main issue is whether exigent circumstances can validate an otherwise invalid search under a defective search warrant?

(B) This is an issue that has never been squarely addressed by the United States Supreme Court.

(C) I direct your attention to Page (4) and Footnote (2) of the opinion of the Virginia Supreme Court.

(D) Does ruling violate the U.S. Const?

(E) Does exigent circumstances used to cure a defective warrant for search violate U.S. Const?

Ex-C)

CONCLUSION

1. Petitioner avers For issue to go un-decided by the Federal court this issue would result in egregious acts by the police to violate citizens constitutional rights guaranteed by the U.S. Const. secured by the 14th Amendt.
2. Petitioner avers in case of bar there has already been a great travisty of justice.

WHEREFORE, Petitioner prays petition for re-hearing be granted.

Respectfully Submitted
Petitioner-Appellant
James W. Combs II
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21660 Deerfield Drive
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3/24/2020