

VIRGINIA:  
IN THE CIRCUIT COURT OF THE COUNTY OF  
ARLINGTON

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IN THE MATTER OF:	:	CR21000511-00
	:	CR21000512-00
COMMONWEALTH OF VIRGINIA	:	CR21000513-00
	:	CR21000514-00
VS.	:	CR21000515-00
	:	CR21000516-00
FRANCIS ROSE	:	CR21000517-00
	:	CR21000738-00
DEFENDANT.	:	

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Wednesday,  
February 23, 2022

Arlington, Virginia

The request to remove case from trial  
docket and hearing re motion to suppress  
commenced at 10:04 a.m.

BEFORE:

THE HONORABLE WILLIAM T. NEWMAN, JR., JUDGE

**APPEARANCES:****ON BEHALF OF THE COMMONWEALTH OF  
VIRGINIA:**

KATHERINE L. MILANE, ESQ.  
Assistant Commonwealth's Attorney  
Office of the Commonwealth's  
Attorney for Arlington County and  
the City of Falls Church  
1425 N. Courthouse Road  
Suite 5200  
Arlington, VA 22201  
(703) 228-4410

**ON BEHALF OF DEFENDANT ROSE:**

MOLLY NEWTON, ESQ.  
Newton Turner PLLC  
2111 Wilson Boulevard  
8th Floor  
Arlington, VA 22201  
(703) 677-8614

## C-O-N-T-E-N-T-S

## Opening Statements

Molly Newton, Esq. . . . . 5

Witnesses	DIR	CROSS	REDIR	RECROSS
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Officer Patrick Bane	8	14	23	
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Cpl. Anthony Gatto	24			
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## Closing Arguments

Molly Newton, Esq. . . . . 30

Katherine Milane, Esq. . . . . 35

1 P-R-O-C-E-E-D-I-N-G-S

2 10:04 a.m.

3 MS. MILANE: Good morning, Your Honor.

4 MS. NEWTON: Good morning, Your Honor.

5 THE COURT: Yes, ma'am. Yes, ma'am.

6 MS. NEWTON: Your Honor, we attempted  
7 to remove this case from the trial docket. I  
8 filed that motion yesterday around 11:00. I must  
9 have forgotten, or else I just didn't hit send, to  
10 the C-12 copy.

11 We're asking the Court to let the jury  
12 go. We have a motion to suppress, it's  
13 dispositive one way or the other. It will just  
14 take about 30 minutes.

15 MS. MILANE: No objection from the  
16 Commonwealth, Your Honor. That was my  
17 understanding of how we were going to proceed with  
18 this case.

19 THE COURT: All right. We'll remove it  
20 from the jury, and we'll have the suppress motion  
21 at the conclusion.

22 MS. MILANE: All right. Thank you.

1 MS. NEWTON: Thank you, Your Honor.

2 (A SHORT RECESS WAS TAKEN.)

3 THE COURT: All right. I'm going to  
4 take just a five-minute break and then we'll get  
5 started.

6 MS. MILANE: Yes, Your Honor.

7 (A SHORT RECESS WAS TAKEN.)

8 MS. MILANE: Our first witness will be  
9 Officer Bane.

10 MS. NEWTON: I would like to make a  
11 short opening, at least to frame the issues, and  
12 Mr. Rose is not here yet.

13 THE COURT: He's not here?

14 MS. NEWTON: I mean, he's not on the  
15 screen. He'll be here in a moment.

16 THE COURT: All right, Mr. Francis Rose  
17 is present.

18 MS. NEWTON: It is, Your Honor. Thank  
19 you. I just wanted to do a brief opening just to  
20 frame the issue for the Court. The facts really  
21 aren't going to be in dispute, as you're going to  
22 hear.

1 Francis, Mr. Rose, was a passenger in  
2 a car that was legally pulled over for the driver,  
3 the registered owner. His license was suspended.  
4 Officers approached the car and they immediately  
5 smelled an odor of marijuana coming out of the  
6 car.

7 At the time, they were allowed to  
8 search the car for the odor of marijuana, so  
9 that's what they did. They got Mr. Rose out, they  
10 got the driver out, put them on the curb, and  
11 searched the car.

12 When Mr. Rose was being taken out of  
13 the car, Your Honor, Officer Bane directed him to  
14 leave his he had a cross-body bag on. It was on  
15 his lap, the strap was around his shoulder. The  
16 officers directed him to leave that in the car at  
17 that point, Your Honor.

18 The car was searched, the bag was  
19 searched, a gun was recovered from the cross-body  
20 bag. Mr. Rose was placed under arrest and then  
21 searched incident to arrest, and cocaine and  
22 Fentanyl were found in his pocket, Your Honor.

1                   We certainly don't contest the fact  
2                   that the police had probable cause to search the  
3                   car, pursuant to the automobile exception. We  
4                   also understand that the law is very clear that  
5                   they may search any container that's in the car,  
6                   Your Honor. But our argument is that the bag, and  
7                   a court of appeals has, which we will be arguing,  
8                   has defined what the scope of the term person  
9                   means in a probable cause search.

10                   And a person includes a bag that's  
11                   appended to him, one that's connected to him or  
12                   intimately connected to him, is considered to be  
13                   on his person, Your Honor.

14                   It's our position that the automobile  
15                   exception authorizes a search of the car but not  
16                   the search of the person, and I don't think  
17                   anybody disputes that, either.

18                   So the question, then, for the Court  
19                   is, was that bag on his person? And since it was,  
20                   in fact, on his person, did the police have  
21                   authority, then, to search that bag?

22                   I understand it's now in the vehicle.

1 But the probable cause was to search the vehicle,  
2 and not the person. And the bag was his person.

3 That is going to be our argument, Your  
4 Honor.

5 THE COURT: All right.

6 THE CLERK: Officer Bane. Please raise  
7 your right hand.

8 WHEREUPON,

9 PATRICK BANE  
10 WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE  
11 COMMONWEALTH, AND AFTER HAVING FIRST BEEN DULY  
12 SWORN, ASSUMED THE WITNESS STAND AND WAS EXAMINED  
13 AND TESTIFIED AS FOLLOWS:

14 DIRECT EXAMINATION

15 BY MS. MILANE

16 Q Good morning, Officer. Could you  
17 please state your name?

18 A My name is Patrick Bane.

19 Q How are you employed?

20 A Police officer, Arlington County.

21 Q How long have you been employed at the  
22 Arlington County Police Department?



1           A       Since September, 2019.

2           Q       Were you so employed on October 17,  
3       2020?

4           A       Yes, ma'am.

5           Q       Were you on duty and displaying your  
6       badge of authority?

7           A       Yes, ma'am.

8           Q       On that date, did you observe a black  
9       Chevrolet Camaro in the 2300 block of Richmond  
10       Highway?

11          A       Yes, ma'am.

12          Q       Is that Arlington County?

13          A       Yes, ma'am.

14          Q       What initially drew your attention to  
15       the vehicle?

16          A       Initially, while sitting at the  
17       intersection, I typically run all registrations  
18       while stopped at red lights, to conduct checks of  
19       registrations, warrant checks, all that sort of  
20       stuff. Ran that tag through NCIC and the  
21       registered owner returned suspended.

22          Q       Okay. Based on that information, what

1 did you do?

2 A I conducted a traffic stop in the 2300  
3 block of Crystal Drive.

4 Q Okay. Did you approach the vehicle?

5 A Yes, ma'am.

6 Q How many occupants were in the vehicle?

7 A Two.

8 Q Do you see any of those occupants  
9 today?

10 A Yes, ma'am.

11 Q Could you please identify them by  
12 article of clothing?

13 A Mr. Rose is wearing a black mask and  
14 blue top, on the right side of the screen.

15 Q Please let the record note the  
16 identification.

17 THE COURT: The Court would note the  
18 identification.

19 BY MS. MILANE

20 Q Thank you, Your Honor. Where was the  
21 Defendant seated in the vehicle?

22 A The front right passenger seat, ma'am.

1           Q       Upon approach, what, if anything, did  
2 you initially observe?

3           A       Upon approach, I identified the driver,  
4 immediately smelled a strong odor, the smell of  
5 marijuana coming from inside the vehicle. I also  
6 observed a blue and black bag sitting on Mr.  
7 Rose's lap.

8           Q       Did you request the occupants exit the  
9 vehicle?

10          A       After fully identifying them and other  
11 officers arriving on scene, yes, ma'am.

12          Q       Where was the Defendant's bag when he  
13 was exiting the vehicle?

14          A       It was on his lap. Once we asked him  
15 to exit the vehicle, I told him to leave  
16 everything in the car and he placed it on the  
17 seat.

18          Q       Why did you ask him to leave it in the  
19 vehicle?

20          A       For officer safety reasons. That bag  
21 being an unknown, we don't know what's inside of  
22 it, could contain weapons.

1           Q       Okay.  What, if anything, did Mr. Rose  
2           indicate to you when he exited the vehicle?

3           Did he make any statements?

4           A       I don't remember.

5           Q       Okay.  Did you have occasion to search  
6           the vehicle?

7           A       Yes, ma'am.

8           Q       What, if anything, did you locate in  
9           that vehicle?

10          A       We located in the vehicle, inside that  
11          black and blue handbag which was on Mr. Rose's  
12          lap, was a loaded Glock 27 handgun with a 20Z  
13          round magazine in the mag well.  That magazine  
14          contained 21 .40-caliber round bullets with one  
15          round in the chamber.

16                   Also located in the vehicle was a  
17          baggie of marijuana which was in a purse in the  
18          back seat area.

19          Q       Okay.  Did you have the occasion to  
20          search Mr. Rose's person?

21          A       Yes, ma'am.

22          Q       What, if anything, was found?

1           A       In his front right change pocket I  
2 found a small baggie, approximately two and a half  
3 grams of a white powdery substance, which he  
4 admitted to be Fentanyl.

5                   Also located seven small baggies of a  
6 white rock-like substance, which Mr. Rose admitted  
7 to be crack, and also three additional small  
8 baggies of a white powdery substance which also  
9 was admitted to be Fentanyl.

10                   Also, I located \$453 in cash.

11           Q       Did you field test the white rock-like  
12 substance?

13           A       Yes, ma'am.

14           Q       What test did you use?

15           A       These are 904 reagent kit for cocaine  
16 salts and base, which tested positive for cocaine.

17           Q       Is that a test that's been approved by  
18 the Department of Forensic Science?

19           A       Yes, ma'am.

20           Q       Moving back to that firearm for a  
21 moment. In your time with the ACPD, have you had  
22 any firearms training?

1           A       Yes, ma'am.

2           Q       Can you please explain that for the  
3 Court?

4           A       Yes, ma'am. I've had --

5                   MS. NEWTON: Your Honor, we'll  
6 stipulate it was an -- for purposes of the motion  
7 to suppress --

8                   THE COURT: All right.

9                   MS. NEWTON: It was an operable  
10 firearm.

11                  MS. MILANE: Nothing further at this  
12 time, then, Your Honor.

13                   CROSS-EXAMINATION

14                   BY MS. NEWTON

15           Q       Good morning, Officer Bane. Who was  
16 the driver?

17           A       The driver was Ms. Luisa Alazar.

18           Q       When you approached the car, did she  
19 and Mr. Rose roll down their windows?

20           A       I approached on the driver's side.  
21 Officer Gatto approached on the passenger side.  
22 Both windows, I do believe, went down. Officer

1 Gatto identified the passenger.

2 Q Then you immediately smelled an odor of  
3 marijuana coming from the car, correct?

4 A From the car itself.

5 Q Can you describe, you said it was a  
6 black and blue bag. Are we talking about a men's  
7 purse, or are we talking about a bag?

8 A Yes, ma'am. It was like a handbag, or  
9 like a man's purse sort of bag.

10 Q And it had a strap, correct?

11 A From what I remember, Yes, ma'am.

12 Q And we're going to call it a cross-body  
13 bag. Is that a fair characterization of it? And  
14 the strap was in fact around Mr. Rose, correct?

15 A I do not remember, ma'am.

16 Q All right. Quick indulgence.

17 When you got the driver out of the car,  
18 did you smell marijuana on her?

19 A Directly from her person?

20 Q Yes.

21 A I do not remember, ma'am.

22 Q Do you remember testifying at the

1 preliminary hearing about that.

2 A Yes, ma'am.

3 Q Do you remember testifying that she did  
4 in fact smell of marijuana?

5 A I do not remember, ma'am.

6 Q Okay. What about Mr. Rose? Did he  
7 smell of marijuana?

8 A I do not remember, ma'am.

9 Q Do you remember testifying that he did  
10 not smell of marijuana?

11 A At the preliminary?

12 Q Yes.

13 A I do not remember.

14 Q All right. You said that you told him  
15 to leave his cross-body bag in the car for officer  
16 safety, is that correct:

17 A Yes, ma'am.

18 Q At the time that you got the driver and  
19 Mr. Rose out, you didn't have probable cause to  
20 search their person, did you?

21 A Search their person?

22 Q Yes.



1           A        At that time, we were going to conduct  
2           a probable cause search of the vehicle. That's  
3           kind of the direction that we were going at that  
4           time. Their person was not of concern, other than  
5           the vehicle at that point.

6           Q        But my question was, because you didn't  
7           have probable cause at that time to search their  
8           person, correct?

9           A        I do not believe so.

10          Q        All right. When you said that you ask  
11          that he leave the bag in the car for officer  
12          safety reasons, correct? That doesn't mean that  
13          you have to search it, though, does it?

14          A        The reason why the bag was searched was  
15          because it was inside the vehicle, which the smell  
16          of marijuana had originated from inside the  
17          vehicle.

18                    Due to this, any container inside the  
19          vehicle could have contained that marijuana, so  
20          every container was searched inside the vehicle.

21          Q        I understand, but you said that you  
22          told him to leave the bag in the car because of

1 officer you were testifying on direct that you  
2 did that for officer safety reasons.

3 A Yes, ma'am.

4 Q But that doesn't mean, officer safety  
5 reasons, you didn't have to search that bag,  
6 correct?

7 A It was in the vehicle where the smell  
8 of marijuana was coming form, so we did search the  
9 bag.

10 Q I understand, but my question is, as  
11 you testified, you told him to leave the bag for  
12 officer safety reasons, correct?

13 A Yes, ma'am.

14 Q But for officer safety reasons, you  
15 would not have had to search that bag, correct?

16 A For officer safety reasons?

17 Q Yes.

18 A No.

19 Q You could have secured it in your  
20 police car.

21 A We asked him to leave it in the car and  
22 he did.

1           Q       I understand, but my question is, you  
2 had for officer safety reasons, you have other  
3 options, correct?

4           MS. NEWTON:  Objection, Your Honor.  
5 Asked and answered.

6           THE COURT:  It's cross exam.

7           BY MS. NEWTON

8           Q       You had other options.  You could have  
9 asked him to, you could have put it in your police  
10 car and not searched it, correct? For officer  
11 safety reasons.

12          A       I understand what you're asking.  Where  
13 we are trained, everything that was in the vehicle  
14 at the start of the stop, once we remove them from  
15 the vehicle everything is left in the vehicle,  
16 that is how we were trained, for officer safety  
17 reasons, taking that bag and taking custody of it,  
18 putting it in the car was not a solution we did  
19 that night.

20          Q       I understand.  But does that contrary  
21 to your police training?

22          A       To my training? I was taught to ask to

1 leave everything in the vehicle, and leave it in  
2 the vehicle, we can start in the vehicle.

3 Q You would agree that that bag was on  
4 his person at the time?

5 A It was on his lap, Yes, ma'am.

6 Q And that there was a purse that was in  
7 the back seat of the car.

8 A Yes, ma'am.

9 Q And that purse was searched and that's  
10 where the marijuana was, correct?

11 A Yes, ma'am.

12 Q Mr. Rose never gave you consent to  
13 search that bag, correct?

14 A No, ma'am.

15 Q And you never asked him for it, is that  
16 right?

17 A No, ma'am.

18 Q When Mr. Rose and the driver were both  
19 taken out, neither of them were patted down,  
20 correct?

21 A I did not pat Ms. Luisa Alazar down,  
22 from what I remember.

1 Q Okay.

2 A I do not know if Mr. Rose was patted  
3 down.

4 Q And neither of them were handcuffed.

5 A No, ma'am. Not immediately.

6 Q And they were just instructed to sit on  
7 the side while you conducted the search of the  
8 car, is that right?

9 A Once additional officers arrived, yes,  
10 ma'am.

11 Q All right. At that juncture, at least  
12 with the driver, you had no reason to even pat her  
13 down, correct?

14 A I guess not.

15 Q You had no information about either of  
16 these people being armed and dangerous, correct?

17 A Correct.

18 MS. NEWTON: Court's indulgence.

19 BY MS. NEWTON

20 Q Maybe I asked you this already, but  
21 when, I think I asked you this in the beginning,  
22 when Mr. Rose was taken out of the car, you didn't

1 smell marijuana on him.

2 A I did not take him out of the car.

3 Q Okay. When you went over to search  
4 him, did you smell marijuana on him?

5 A I cannot remember, ma'am.

6 Q Do you remember testifying at the  
7 prelim that you didn't smell marijuana on him when  
8 you were searching him?

9 A I do not remember.

10 Q You don't remember testifying to that.  
11 Okay. Because if you all had smelled marijuana,  
12 that would have given you probable cause to search  
13 him, correct?

14 A Search the vehicle?

15 Q No, the question is, if you had smelled  
16 marijuana on

17 A On his person, separately from the  
18 vehicle?

19 Q Yes.

20 A Yes, but the vehicle was the primary  
21 concern to search in the beginning.

22 Q I understand. But my question is, if

1 you had smelled marijuana on Mr. Rose, you could  
2 have searched him. You had probable cause to  
3 search him at that point.

4 A Yes, ma'am.

5 Q He was not searched. You found the  
6 gun, he was placed under arrest, and then his  
7 person was searched, incident to arrest. Correct?

8 A Yes, ma'am.

9 MS. NEWTON: All right. Thank you. I  
10 don't have any other questions, although I would  
11 like him to remain subject to recall.

12 THE COURT: All right.

13 REDIRECT EXAMINATION

14 BY MS. MILANE

15 Q Officer Bane, did Mr. Rose object to  
16 leaving his bag in the car?

17 A No, ma'am.

18 Q Did he ever object to you searching the  
19 bag?

20 A No, ma'am.

21 Q Thank you, Your Honor. Nothing  
22 further.

1 THE COURT: All right. You may step  
2 down.

3 A Thank you, Your Honor.

4 MS. MILANE: Could we call Officer  
5 Gatto, please?

6 WHEREUPON,

7 ANTHONY GATTO

8 WAS CALLED FOR EXAMINATION BY COUNSEL FOR THE  
9 COMMONWEALTH, AND AFTER HAVING FIRST BEEN DULY  
10 SWORN, ASSUMED THE WITNESS STAND AND WAS EXAMINED  
11 AND TESTIFIED AS FOLLOWS:

12 THE WITNESS: Good morning, Your Honor.

13 THE COURT: Good morning.

14 MS. MILANE: Good morning, Officer.

15 THE WITNESS: Good morning.

16 DIRECT EXAMINATION

17 BY MS. MILANE

18 Q Please state your name and occupation.

19 A Corporal Anthony Gatto, with the  
20 Arlington County Police Department.

21 Q How long have you been employed with  
22 the department?



1           A       Approximately six years.

2           Q       On October 17, 2020, were you still  
3 employed, on duty, and displaying your badge of  
4 authority?

5           A       Yes.

6           Q       On that day, were you on patrol?

7           A       Yes.

8           Q       Was someone else riding with you?

9           A       Yes.

10          Q       Who else was that?

11          A       Officer Bane.

12          Q       Why were you riding together?

13          A       I was just field training officer that  
14 day.

15          Q       On that day, did you observe a black  
16 Chevrolet Camaro in the 2300 block of Richmond  
17 Highway?

18          A       Yes.

19          Q       In Arlington County?

20          A       Yes.

21          Q       Did you and Officer Bane conduct a  
22 traffic stop?

1           A       We did.

2           Q       Did you approach the vehicle with  
3 Officer Bane?

4           A       Yes.

5           Q       How many occupants were in the vehicle.

6           A       Two.

7           Q       And do you see any of those occupants  
8 here today?

9           A       Yes.

10          Q       Could you please identify them by  
11 article of clothing?

12          A       He's wearing a blue shirt with a black  
13 mask.

14                   MS. MILANE: Please let the record note  
15 the identification, Your Honor.

16                   THE COURT: The record reflects what it  
17 will, but I will not the identification.

18                   BY MS. MILANE

19          Q       Thank you, Your Honor. Where was Mr.  
20 Rose seated in the vehicle?

21          A       He was in the passenger seat, the front  
22 passenger seat.

1           Q       And upon approach of the vehicle, what,  
2 if anything, did you initially observe?

3           A       I observed an odor of marijuana coming  
4 from inside the vehicle.

5           Q       Okay. Did you observe anything about  
6 Mr. Rose, particularly?

7           A       Yes. He was sitting in the front  
8 passenger seat, and there was a dark-colored bag  
9 on his lap.

10          Q       Did you request the occupants exit the  
11 vehicle?

12          A       Yes.

13          Q       What, if anything, did Mr. Rose  
14 indicate to you when he exited the vehicle? Did  
15 you recall?

16          A       I don't recall.

17          Q       Did you have occasion to search the  
18 vehicle?

19          A       Yes.

20          Q       What, if anything, was located?

21          A       I located a black firearm inside the  
22 dark blue bag.

1           Q       Did you have the occasion to Mirandize  
2 Mr. Rose?

3           A       Yes.

4           Q       Did he indicate that he understood his  
5 rights?

6           A       Yes.

7           Q       What, if anything, did he tell you  
8 about the firearm that you located?

9           A       That it belonged to him.

10          Q       Okay. Did he indicate to you whether  
11 he had previously been convicted of a felony?

12          A       Yes, he did.

13          Q       What was his answer? Had he or had he  
14 not?

15          A       He said he was a convicted felon.

16                   MS. MILANE: Nothing further.

17                   CROSS-EXAMINATION

18                   BY MS. NEWTON

19          Q       Officer Gatto, the purse had a strap on  
20 it, correct?

21          A       Correct.

22          Q       And the strap was around his shoulder,

1 correct?

2 A I don't recall.

3 Q Do you remember testifying at the  
4 preliminary hearing?

5 A Yes.

6 Q Do you remember testifying then that  
7 the purse, the strap was around him?

8 A I don't recall.

9 Q When you approached the car and smelled  
10 marijuana, it was coming from the vehicle,  
11 correct?

12 A Correct.

13 Q And when you got Mr. Rose out of the  
14 car, you were not able to localize the smell of  
15 marijuana to his person, correct?

16 A Correct.

17 MS. NEWTON: All right. Thank you. I  
18 don't have any other questions.

19 THE COURT: And redirect?

20 MS. MILANE: No, Your Honor.

21 THE COURT: All right. Thank you.

22 THE WITNESS: Thank you, Your Honor.

1 MS. NEWTON: Your Honor, I'm just going  
2 to ask Mr. Rose one question. We can have him  
3 sworn, please.

4 THE COURT: Okay.

5 (THE DEFENDANT WAS SWORN.)

6 DIRECT EXAMINATION

7 BY MS. NEWTON

8 Q Mr. Rose, the cross-body bag that we  
9 have been talking about, was the strap around your  
10 neck when they asked you to leave it in the car?

11 A It was around my neck like this. It  
12 was a Louis Vuitton bag and the strap was around  
13 my neck. The bag hanged down to the side.

14 MS. NEWTON: All right. Thank you. I  
15 don't have any other questions.

16 MS. MILANE: No questions, Your Honor.

17 THE COURT: All right. Any questions  
18 with the testimony?

19 MS. NEWTON: No, Your Honor.

20 MS. MILANE: No, Your Honor.

21 THE COURT: All right. I'll hear  
22 arguments.

1 MS. NEWTON: Your Honor, as I told the  
2 Court the facts are contested. The law, to some  
3 extent, is not contested. We don't dispute the  
4 fact that the officers at that time, in October of  
5 2019, again, they wouldn't have that same probable  
6 cause now, but at the time they did in fact have  
7 probable cause to search the vehicle.

8 And so our analysis starts, and I think  
9 everybody agrees to that, and I also think  
10 everybody would also agree, because it's black  
11 letter law, consistent in the cases, that having  
12 probable cause to search the vehicle does not give  
13 you probable cause to search the occupants.

14 Otherwise, any time a vehicle is  
15 stopped, you had a reason to search and everybody  
16 would be searched, and that's not black letter  
17 law. Even the officer conceded that they didn't  
18 have probable cause at that point to search Mr.  
19 Rose.

20 The question then becomes, is the fact  
21 that, it's our argument that the bag was part of  
22 his person. We also agree that they can search

1 containers in a vehicle. That's again, well-  
2 established black letter law. Everybody knows  
3 that you can search everywhere you think the drugs  
4 might be.

5 So there's really only one issue in  
6 this case, Your Honor. Was the bag part of Mr.  
7 Rose's person? Because if it was part of his  
8 person, they had no right to search it.

9 I understand officer safety reasons.  
10 They could have not searched the bag. They could  
11 have secured it in a police car. They had other  
12 ways to accomplish that mission. But apparently,  
13 according to Officer Bane, their training is to  
14 tell everybody to leave everything in the car.

15 That is absolutely contrary to the idea  
16 of the vehicle exception, because if you have  
17 something on your person and you're asked to leave  
18 it in the car, that's not in the vehicle. That's  
19 on your person. And maybe the Court is thinking  
20 this is too fine of a distinction, and that's why  
21 I want to point the Court's attention to Edwards  
22 v. Commonwealth. I have a copy up here for the



1 Court.

2 Edwards was a consent search case, but  
3 it defined the scope of the term, person. And  
4 there's some important points in there, Your  
5 Honor.

6 First of all, when they're talking  
7 about the person, human anatomy does not naturally  
8 contain pockets, pouches, or other places in which  
9 personal objects can be conveniently carried. To  
10 remedy this anatomical deficiency, clothing  
11 contains pockets.

12 In addition, many individuals carry  
13 purses or shoulder bags to hold objects which they  
14 wish to have with them.

15 Containers such as those appended to  
16 the body are so closely associated with the person  
17 that they are identified and included within the  
18 concept of one's person, Your Honor.

19 That case was a consent search case.  
20 However, the court went on to analogize it to a  
21 search warrant case, a probable cause case, where  
22 what the police have to do is define and determine

1 what their authority is to search that person  
2 under the type of search that they're doing.

3 The automobile exception cases, they  
4 analogize them to search warrant cases. As the  
5 magistrate, you have the same authority that you  
6 would have if you had a search warrant issued from  
7 a magistrate, to search that car. Not to search  
8 the person, Your Honor.

9 With respect to the determination of  
10 what's within the scope of the person, in that  
11 case, Your Honor, they found that the bag, in that  
12 case it was a bag of socks that was just on the  
13 person's lap, they found that the bag was appended  
14 to him or intimately connected with his person.

15 And when that person gave consent to  
16 search his person, he therefore gave consent to  
17 search the bag, Your Honor.

18 And the language in Edwards that allows  
19 this court to, and I understand that that was a  
20 consent case, but the court does say, does talk  
21 about this in the course of a probable cause  
22 search, which this was, Your Honor.

1           Although the case we find persuades on  
2           the issue before us were decided in the context of  
3           a search pursuant to a search warrant, and not  
4           pursuant to consent. We find nothing in the  
5           reasoning or the holdings of the court deciding  
6           the issue that suggests the analogy is inapt.

7           Indeed, the circumstances requiring a  
8           definition of a person in the conduct of  
9           conducting a search pursuant to a search warrant,  
10          which is analogous to the automobile exception,  
11          are comparable to those cases which they enact.

12          In both instances, the officers had to  
13          determine whether the scope of the permitted  
14          search, one permitted on a base of a search  
15          warrant of a person; the other pursuant to consent  
16          to consent of a person, included bags, and other  
17          such items closely appended.

18          In both instances, the acting officer  
19          was presented the need to determine whether the  
20          authority granted to search the person extended to  
21          such items, Your Honor.

22          So that case defines what a person is

1 in the context of a probable cause search. It's  
2 irrelevant that it was a consent search or a  
3 search warrant case, because the US Supreme Court,  
4 and I have a case, US v Ross, but it analogized  
5 the probable cause search of a car to having a  
6 search warrant by a magistrate.

7 So in this instance, Your Honor, I  
8 certainly understand the need for officer safety,  
9 but the officers had other options that they could  
10 do. I believe that their training is, that this  
11 is a policy of the Arlington County Police  
12 Department, it is not one that is grounded in law,  
13 that they had no probable cause.

14 It would be a different story, Your  
15 Honor, if they had smelled marijuana on Mr. Rose.  
16 The search then could have allowed them to have  
17 probable cause to search this person. And if the  
18 bag had been on his person, they could have  
19 searched at that point.

20 But that's not this case. They  
21 instructed him to leave it in there. They didn't  
22 have to search it. They had other options. It

1 was on his person, and they had no right at that  
2 point. They had no probable cause to search his  
3 person. And that bag, because it was appended to  
4 him, was part of his person.

5 And so for those reasons, Your Honor,  
6 we're asking the Court to grant the motion to  
7 suppress.

8 MS. MILANE: Thank you, Your Honor.

9 Your Honor, the Commonwealth would not  
10 disagree with counsel's calculus if we were  
11 talking about a situation where Mr. Rose was  
12 standing on a street holding a bag, and there's no  
13 odor of marijuana or anything else to justify a  
14 search of him.

15 In that case, absolutely they would not  
16 be justified in searching his person or his bag,  
17 as an extension of that. But I would direct the  
18 Court to Wyoming v. Houghton, and I have a copy  
19 here if the Court would like to see it.

20 Your Honor, in that case, the court  
21 held that police officers with probable cause to  
22 search a car may inspect passengers' belongings

1 found in the car, capable of concealing the object  
2 of the search. In that case, it was a traffic  
3 stop, the driver had visible drug paraphernalia  
4 and admitted to using.

5 They searched the car, they found two  
6 items that appeared to be a female passenger's,  
7 which then contained drugs and paraphernalia.

8 The court found that it was fine for  
9 them to have searched those items because they  
10 were in the car, it was properly subject to a  
11 probable cause search, and were capable of  
12 containing drug paraphernalia or the object of the  
13 search.

14 In this case, we had a legitimate stop.  
15 No one's contesting that. Because of the odor of  
16 marijuana at the time, the officers had probable  
17 cause to search the vehicle. They had probable  
18 cause to believe that contraband, mainly  
19 marijuana, would be found in the vehicle.

20 And the bag that was on Mr. Rose's lap  
21 squarely qualifies as passenger's belongings for  
22 the analysis under Wyoming v. Houghton. It was

1 found in the car, it was capable of concealing the  
2 object of the search, which would be marijuana.

3 Your Honor, it's irrelevant that the  
4 police asked Mr. Rose to leave the bag in the car.  
5 Even if he had carried it out of the car with him,  
6 it is still a bag that was in the car at the time  
7 the probable cause was established. If you were  
8 to take the bag out of the car, he doesn't get to  
9 then absorb it onto his person to evade having  
10 that search.

11 THE COURT: I think the question here  
12 is whether or not it was actually appended to him.

13  
14 MS. MILANE: Your Honor, I don't think  
15 it really matters whether it was appended to him  
16 or not, for the purpose of this calculation,  
17 because at the time, even if it's across his body  
18 in the car, it's still in the car when the  
19 probable cause is established.

20 So even though it's on his lap or  
21 across his chest, that bag is still the subject of  
22 the probable cause search of the items within the

1 vehicle. It's not relevant whether it's on his  
2 lap or not at that time

3 Again, I agree that if he had been  
4 standing on the side of the road and the police  
5 wanted to search his bag, they would have to have  
6 probable cause to search him and the bag by  
7 extension of his person

8 But just because the bag is on his  
9 person in the car, doesn't change the fact that  
10 that is an item that is then subject to the  
11 probable cause search for the marijuana based upon  
12 the odor of marijuana.

13 If we were to adopt that rule then a  
14 defendant could seek to evade the search of any  
15 item by saying, it was on my person, now I'm  
16 getting out of the car. And I don't think that's  
17 the way that the automobile exception and this  
18 line of cases about searching items within the car  
19 is intended to work.

20 It's indented to give police the  
21 ability to search the entire vehicle, including  
22 belongings, for whatever it is that they believe



1 is in the vehicle.

2 Your Honor, also, I mentioned *Bond v.*  
3 Commonwealth in my brief. That was a situation  
4 where there was a third-party consent that was  
5 given. The court found that applied to all items  
6 in the car, even those belonging to the defendant,  
7 even though he wasn't the giver of the consent.

8 And, you know, this isn't a consent  
9 case. That case talked a little bit about if a  
10 defendant did not object to the search of a bag,  
11 which Mr. Rose also did not, he would have been  
12 deemed to waive his right to object to that  
13 search.

14 So even if the court does find that Mr.  
15 Rose would have had some standing to object to the  
16 search of his bag, under *Bond v. Commonwealth*, by  
17 not objecting when he knew it was going to be  
18 searched he has waived that right to object to the  
19 search of the bag.

20 I really don't think the Court needs to  
21 get that far, because again, this is a bag that's  
22 in a vehicle that's subject to a probable cause

1 search. Regardless of where it is in the vehicle,  
2 it is properly subject to search for the  
3 contraband.

4 THE COURT: And what is your response  
5 to that last issue?

6 MS. NEWTON: Words have meaning. It's  
7 not in the vehicle, it's on his person. If the  
8 Court is going to find that, the Court is going to  
9 have to disregard the holdings in Edwards, where  
10 it defines what, for a probable cause search, what  
11 does on the person mean?

12 Let's contrast the bag that's on his  
13 person. We're now talking about, we shouldn't  
14 even be saying bag on his person. We're talking  
15 about Mr. Rose. They didn't tell him to leave his  
16 pants in the car. There could have been drugs in  
17 his pants.

18 We need to contrast that with the  
19 search of the driver's purse that was in the back  
20 seat of the car. There's absolutely no problem  
21 with that search. That was her purse. It wasn't  
22 on her person, she voluntarily left it there, and

1 then they searched it.

2 But the search that we're talking about  
3 now is the search of Mr. Rose's person, because of  
4 the way that the court of appeals defines the  
5 scope of the term person.

6 I understand just because we've done it  
7 this way for a long time doesn't make it right.  
8 And I'm not disputing the need for officer safety,  
9 as I said before, but there's other ways to  
10 accomplish this. This is an end around of being  
11 able to search. Because had Mr. Rose had that bag  
12 on his person, they had no probable cause to  
13 search him, Your Honor.

14 They had no probable cause to search  
15 him. There was no smell of marijuana. Officer  
16 Gatto said that. There was no smell of marijuana  
17 localized to him. The smell of it in a vehicle  
18 does not then give them the authority, or they  
19 would have. They would have patted him down.

20 He could have been searched at that  
21 point, and it wasn't until they found the  
22 contraband, found the gun, that then they did have

1 the authority, pursuant to arrest, and that's when  
2 the drugs were found. But at that instant, that  
3 purse is his person. Francis Rose was sitting in  
4 the car at that point, and they had no probable  
5 cause, they had no authority to search, and we'd  
6 ask that you grant our motion.

7 THE COURT: Motion is granted.

8 MS. NEWTON: All right. Thank you,  
9 Your Honor.

10 MS. MILANE: Thank you, Your Honor.

11 THE COURT: What color was that purse?

12 MS. NEWTON: Pardon me?

13 THE COURT: What color was the purse?

14 MS. NEWTON: Black and blue. Do you  
15 have one similar?

16 THE COURT: I do.

17 MS. NEWTON: You have good taste, Mr.  
18 Rose.

19 THE DEFENDANT: It was black and gray.

20 MS. NEWTON: Oh, black and gray, excuse  
21 me.

22 THE COURT: That's exactly right. It's

1 Louis Vuitton?

2 MS. NEWTON: Yes.

3 THE DEFENDANT: Louis Vuitton, yes.

4 MS. NEWTON: All right. Thank you,  
5 Your Honor.

6 Mr. Rose, I'm going to come and see  
7 you, okay?

8 THE DEFENDANT: Okay.

9 MS. MILANE: Your Honor, at this time  
10 the Commonwealth would move to nolle pros the  
11 charges.

12 MS. NEWTON: No objection.

13 THE COURT: All right. It will be  
14 nolle pros'd, without objection.

15 MS. MILANE: Thank you, Your Honor.

16 MS. NEWTON: Thank you, Your Honor.

17 (WHEREUPON, AT 11:31 O'CLOCK A.M., THE  
18 PROCEEDINGS IN THE ABOVE-ENTITLED MATTER WERE  
19 CONCLUDED.)

20

21

22

A	B	C	
<p>a.m 1:17 4:2 45:17  <b>ability</b> 40:21  <b>able</b> 29:14 43:11  <b>ABOVE-ENTITLED</b>  45:18  <b>absolutely</b> 32:15 37:15  42:20  <b>absorb</b> 39:9  <b>accomplish</b> 32:12  43:10  <b>ACPD</b> 13:21  <b>acting</b> 35:18  <b>addition</b> 33:12  <b>additional</b> 13:7 21:9  <b>admitted</b> 13:4,6,9 38:4  <b>adopt</b> 40:13  <b>agree</b> 20:3 31:10,22  40:3  <b>agrees</b> 31:9  <b>Alazar</b> 14:17 20:21  <b>allowed</b> 6:7 36:16  <b>allows</b> 34:18  <b>analogize</b> 33:20 34:4  <b>analogized</b> 36:4  <b>analogous</b> 35:10  <b>analogy</b> 35:6  <b>analysis</b> 31:8 38:22  <b>anatomical</b> 33:10  <b>anatomy</b> 33:7  <b>answer</b> 28:13  <b>answered</b> 19:5  <b>Anthony</b> 3:5 24:7,19  <b>anybody</b> 7:17  <b>apparently</b> 32:12  <b>appeals</b> 7:7 43:4  <b>APPEARANCES</b> 2:1  <b>appeared</b> 38:6  <b>appended</b> 7:11 33:15  34:13 35:17 37:3  39:12,15  <b>applied</b> 41:5  <b>approach</b> 10:4 11:1,3  26:2 27:1  <b>approached</b> 6:4 14:18  14:20,21 29:9  <b>approved</b> 13:17  <b>approximately</b> 13:2  25:1  <b>area</b> 12:18  <b>arguing</b> 7:7  <b>argument</b> 7:6 8:3 31:21  <b>arguments</b> 3:7 30:22  <b>Arlington</b> 1:2,12 2:5,7  2:12 8:20,22 9:12  24:20 25:19 36:11  <b>armed</b> 21:16  <b>arrest</b> 6:20,21 23:6,7</p>	<p>44:1  <b>arrived</b> 21:9  <b>arriving</b> 11:11  <b>art</b> 17:5  <b>article</b> 10:12 26:11  <b>asked</b> 11:14 18:21 19:5  19:9 20:15 21:20,21  30:10 32:17 39:4  <b>asking</b> 4:11 19:12 37:6  <b>Assistant</b> 2:4  <b>associated</b> 33:16  <b>ASSUMED</b> 8:12 24:10  <b>attempted</b> 4:6  <b>attention</b> 9:14 32:21  <b>Attorney</b> 2:4,5  <b>authority</b> 7:21 9:6 25:4  34:1,5 35:20 43:18  44:1,5  <b>authorizes</b> 7:15  <b>automobile</b> 7:3,14 34:3  35:10 40:17</p>	<p>26:12 27:21 31:10,16  32:2 44:14,19,20  <b>block</b> 9:9 10:3 25:16  <b>blue</b> 10:14 11:6 12:11  15:6 26:12 27:22  44:14  <b>body</b> 33:16 39:17  <b>Bond</b> 41:2,16  <b>Boulevard</b> 2:11  <b>break</b> 5:4  <b>brief</b> 5:19 41:3  <b>bullets</b> 12:14</p>	<p><b>Chevrolet</b> 9:9 25:16  <b>Church</b> 2:6  <b>CIRCUIT</b> 1:1  <b>circumstances</b> 35:7  <b>City</b> 2:6  <b>clear</b> 7:4  <b>CLERK</b> 8:6  <b>closely</b> 33:16 35:17  <b>Closing</b> 3:7  <b>clothing</b> 10:12 26:11  33:10  <b>cocaine</b> 6:21 13:15,16  <b>color</b> 44:11,13  <b>come</b> 45:6  <b>coming</b> 6:5 11:5 15:3  18:8 27:3 29:10  <b>commenced</b> 1:17  <b>Commonwealth</b> 1:5 2:2  4:16 8:11 24:9 32:22  37:9 41:3,16 45:10  <b>Commonwealth's</b> 2:4,5  <b>comparable</b> 35:11  <b>concealing</b> 38:1 39:1  <b>conceded</b> 31:17  <b>concept</b> 33:18  <b>concern</b> 17:4 22:21  <b>CONCLUDED</b> 45:19  <b>conclusion</b> 4:21  <b>conduct</b> 9:18 17:1  25:21 35:8  <b>conducted</b> 10:2 21:7  <b>conducting</b> 35:9  <b>connected</b> 7:11,12  34:14  <b>consent</b> 20:12 33:2,19  34:15,16,20 35:4,15  35:16 36:2 41:4,7,8  <b>considered</b> 7:12  <b>consistent</b> 31:11  <b>contain</b> 11:22 33:8  <b>contained</b> 12:14 17:19  38:7  <b>container</b> 7:5 17:18,20  <b>containers</b> 32:1 33:15  <b>containing</b> 38:12  <b>contains</b> 33:11  <b>contest</b> 7:1  <b>contested</b> 31:2,3  <b>contesting</b> 38:15  <b>context</b> 35:2 36:1  <b>contraband</b> 38:18 42:3  43:22  <b>contrary</b> 19:20 32:15  <b>contrast</b> 42:12,18  <b>conveniently</b> 33:9  <b>convicted</b> 28:11,15  <b>copy</b> 4:10 32:22 37:18  <b>Corporal</b> 24:19</p>
	<p style="text-align: center;"><b>B</b></p>	<p style="text-align: center;"><b>C</b></p>	
<p><b>back</b> 12:18 13:20 20:7  42:19  <b>badge</b> 9:6 25:3  <b>bag</b> 6:14,18,20 7:6,10  7:19,21 8:2 11:6,12  11:20 15:6,7,9,13  16:15 17:11,14,22  18:5,9,11,15 19:17  20:3,13 23:16,19 27:8  27:22 30:8,12,13  31:21 32:6,10 34:11  34:12,13,17 36:18  37:3,12,16 38:20 39:4  39:6,8,21 40:5,6,8  41:10,16,19,21 42:12  42:14 43:11  <b>baggie</b> 12:17 13:2  <b>baggies</b> 13:5,8  <b>bags</b> 33:13 35:16  <b>Bane</b> 3:5 5:9 6:13 8:6,9  8:18 14:15 23:15  25:11,21 26:3 32:13  <b>base</b> 13:16 35:14  <b>based</b> 9:22 40:11  <b>beginning</b> 21:21 22:21  <b>BEHALF</b> 2:2,9  <b>believe</b> 14:22 17:9  36:10 38:18 40:22  <b>belonged</b> 28:9  <b>belonging</b> 41:6  <b>belongings</b> 37:22 38:21  40:22  <b>bit</b> 41:9  <b>black</b> 9:8 10:13 11:6  12:11 15:6 25:15</p>	<p><b>back</b> 12:18 13:20 20:7  42:19  <b>badge</b> 9:6 25:3  <b>bag</b> 6:14,18,20 7:6,10  7:19,21 8:2 11:6,12  11:20 15:6,7,9,13  16:15 17:11,14,22  18:5,9,11,15 19:17  20:3,13 23:16,19 27:8  27:22 30:8,12,13  31:21 32:6,10 34:11  34:12,13,17 36:18  37:3,12,16 38:20 39:4  39:6,8,21 40:5,6,8  41:10,16,19,21 42:12  42:14 43:11  <b>baggie</b> 12:17 13:2  <b>baggies</b> 13:5,8  <b>bags</b> 33:13 35:16  <b>Bane</b> 3:5 5:9 6:13 8:6,9  8:18 14:15 23:15  25:11,21 26:3 32:13  <b>base</b> 13:16 35:14  <b>based</b> 9:22 40:11  <b>beginning</b> 21:21 22:21  <b>BEHALF</b> 2:2,9  <b>believe</b> 14:22 17:9  36:10 38:18 40:22  <b>belonged</b> 28:9  <b>belonging</b> 41:6  <b>belongings</b> 37:22 38:21  40:22  <b>bit</b> 41:9  <b>black</b> 9:8 10:13 11:6  12:11 15:6 25:15</p>	<p><b>C-12</b> 4:10  <b>C-O-N-T-E-N-T-S</b> 3:1  <b>calculation</b> 39:16  <b>calculous</b> 37:10  <b>call</b> 15:12 24:4  <b>CALLED</b> 8:10 24:8  <b>Camaro</b> 9:9 25:16  <b>capable</b> 38:1,11 39:1  <b>car</b> 6:2,4,6,8,11,13,16  6:18 7:3,5,15 11:16  14:18 15:3,4,17 16:15  17:11,22 18:20,21  19:10,18 20:7 21:8,22  22:2 23:16 29:9,14  30:10 32:11,14,18  34:7 36:5 37:22 38:1  38:5,10 39:1,4,5,6,8  39:18,18 40:9,16,18  41:6 42:16,20 44:4  <b>carried</b> 33:9 39:5  <b>carry</b> 33:12  <b>case</b> 1:15 4:7,18 32:6  33:2,19,19,21,21  34:11,12,20 35:1,22  36:3,4,20 37:15,20  38:2,14 41:9,9  <b>cases</b> 31:11 34:3,4  35:11 40:18  <b>cash</b> 13:10  <b>cause</b> 7:2,9 8:1 16:19  17:2,7 22:12 23:2  31:6,7,12,13,18 33:21  34:21 36:1,5,13,17  37:2,21 38:11,17,18  39:7,19,22 40:6,11  41:22 42:10 43:12,14  44:5  <b>certainly</b> 7:1 36:8  <b>chamber</b> 12:15  <b>change</b> 13:1 40:9  <b>characterization</b> 15:13  <b>charges</b> 45:11  <b>checks</b> 9:18,19  <b>chest</b> 39:21</p>	<p><b>back</b> 12:18 13:20 20:7  42:19  <b>badge</b> 9:6 25:3  <b>bag</b> 6:14,18,20 7:6,10  7:19,21 8:2 11:6,12  11:20 15:6,7,9,13  16:15 17:11,14,22  18:5,9,11,15 19:17  20:3,13 23:16,19 27:8  27:22 30:8,12,13  31:21 32:6,10 34:11  34:12,13,17 36:18  37:3,12,16 38:20 39:4  39:6,8,21 40:5,6,8  41:10,16,19,21 42:12  42:14 43:11  <b>baggie</b> 12:17 13:2  <b>baggies</b> 13:5,8  <b>bags</b> 33:13 35:16  <b>Bane</b> 3:5 5:9 6:13 8:6,9  8:18 14:15 23:15  25:11,21 26:3 32:13  <b>base</b> 13:16 35:14  <b>based</b> 9:22 40:11  <b>beginning</b> 21:21 22:21  <b>BEHALF</b> 2:2,9  <b>believe</b> 14:22 17:9  36:10 38:18 40:22  <b>belonged</b> 28:9  <b>belonging</b> 41:6  <b>belongings</b> 37:22 38:21  40:22  <b>bit</b> 41:9  <b>black</b> 9:8 10:13 11:6  12:11 15:6 25:15</p>

**correct** 15:3,10,14  
 16:16 17:8,12 18:6,12  
 18:15 19:3,10 20:10  
 20:13,20 21:13,16,17  
 22:13 23:7 28:20,21  
 29:1,11,12,15,16  
**COUNSEL** 8:10 24:8  
**counsel's** 37:10  
**County** 1:1 2:5 8:20,22  
 9:12 24:20 25:19  
 36:11  
**course** 34:21  
**court** 1:1 4:5,11,19 5:3  
 5:13,16,20 7:7,18 8:5  
 10:17,17 14:3,8 19:6  
 23:12 24:1,13 26:16  
 29:19,21 30:4,17,21  
 31:2 32:19 33:1,20  
 34:19,20 35:5 36:3  
 37:6,18,19,20 38:8  
 39:11 41:5,14,20 42:4  
 42:8,8 43:4 44:7,11  
 44:13,16,22 45:13  
**Court's** 21:18 32:21  
**Courthouse** 2:6  
**Cpl** 3:5  
**CR21000511-00** 1:4  
**CR21000512-00** 1:5  
**CR21000513-00** 1:5  
**CR21000514-00** 1:6  
**CR21000515-00** 1:6  
**CR21000516-00** 1:7  
**CR21000517-00** 1:7  
**CR21000738-00** 1:8  
**crack** 13:7  
**cross** 3:4 19:6  
**cross-body** 6:14,19  
 15:12 16:15 30:8  
**CROSS-EXAMINATI...**  
 14:13 28:17  
**Crystal** 10:3  
**curb** 6:10  
**custody** 19:17

---

**D**


---

**dangerous** 21:16  
**dark** 27:22  
**dark-colored** 27:8  
**date** 9:8  
**day** 25:6,14,15  
**decided** 35:2  
**deciding** 35:5  
**deemed** 41:12  
**defendant** 1:8 2:9 10:21  
 30:5 40:14 41:6,10  
 44:19 45:3,8  
**Defendant's** 11:12  
**deficiency** 33:10

**define** 33:22  
**defined** 7:8 33:3  
**defines** 35:22 42:10  
 43:4  
**definition** 35:8  
**department** 8:22 13:18  
 24:20,22 36:12  
**describe** 15:5  
**determination** 34:9  
**determine** 33:22 35:13  
 35:19  
**different** 36:14  
**DIR** 3:4  
**direct** 8:14 18:1 24:16  
 30:6 37:17  
**directed** 6:13,16  
**direction** 17:3  
**Directly** 15:19  
**disagree** 37:10  
**disagree** 37:10  
**displaying** 9:5 25:3  
**dispositive** 4:13  
**dispute** 5:21 31:3  
**disputes** 7:17  
**disputing** 43:8  
**disregard** 42:9  
**distinction** 32:20  
**docket** 1:16 4:7  
**doing** 34:2  
**drew** 9:14  
**Drive** 10:3  
**driver** 6:2,10 11:3 14:16  
 14:17 15:17 16:18  
 20:18 21:12 38:3  
**driver's** 14:20 42:19  
**drug** 38:3,12  
**drugs** 32:3 38:7 42:16  
 44:2  
**Due** 17:18  
**DULY** 8:11 24:9  
**duty** 9:5 25:3

---

**E**


---

**Edwards** 32:21 33:2  
 34:18 42:9  
**either** 7:17 21:15  
**employed** 8:19,21 9:2  
 24:21 25:3  
**enact** 35:11  
**entire** 40:21  
**Esq** 2:4,10 3:3,8,8  
**established** 32:2 39:7  
 39:19  
**evade** 39:9 40:14  
**everybody** 31:9,10,15  
 32:2,14  
**exactly** 44:22  
**exam** 19:6  
**EXAMINATION** 8:10,14

23:13 24:8,16 30:6  
**EXAMINED** 8:12 24:10  
**exception** 7:3,15 32:16  
 34:3 35:10 40:17  
**excuse** 44:20  
**exit** 11:8,15 27:10  
**exited** 12:2 27:14  
**exiting** 11:13  
**explain** 14:2  
**extended** 35:20  
**extension** 37:17 40:7  
**extent** 31:3

---

**F**


---

**fact** 7:1,20 15:14 16:4  
 31:4,6,20 40:9  
**facts** 5:20 31:2  
**fair** 15:13  
**Falls** 2:6  
**far** 41:21  
**February** 1:10  
**felon** 28:15  
**felony** 28:11  
**female** 38:6  
**Fentanyl** 6:22 13:4,9  
**field** 13:11 25:13  
**filed** 4:8  
**find** 35:1,4 41:14 42:8  
**fine** 32:20 38:8  
**firearm** 13:20 14:10  
 27:21 28:8  
**firearms** 13:22  
**first** 5:8 8:11 24:9 33:6  
**five-minute** 5:4  
**Floor** 2:12  
**FOLLOWS** 8:13 24:11  
**Forensic** 13:18  
**forgotten** 4:9  
**form** 18:8  
**found** 6:22 12:22 13:2  
 23:5 34:11,13 38:1,5  
 38:8,19 39:1 41:5  
 43:21,22 44:2  
**frame** 5:11,20  
**Francis** 1:7 5:16 6:1  
 44:3  
**front** 10:22 13:1 26:21  
 27:7  
**fully** 11:10  
**further** 14:11 23:22  
 28:16

---

**G**


---

**Gatto** 3:5 14:21 15:1  
 24:5,7,19 28:19 43:16  
**getting** 40:16  
**give** 31:12 40:20 43:18  
**given** 22:12 41:5

**giver** 41:7  
**Glock** 12:12  
**grams** 13:3  
**grant** 37:6 44:6  
**granted** 35:20 44:7  
**gray** 44:19,20  
**grounded** 36:12  
**guess** 21:14  
**gun** 6:19 23:6 43:22

---

**H**


---

**half** 13:2  
**hand** 8:7  
**handbag** 12:11 15:8  
**handcuffed** 21:4  
**handgun** 12:12  
**hanged** 30:13  
**He'll** 5:15  
**hear** 5:22 30:21  
**hearing** 1:16 16:1 29:4  
**held** 37:21  
**Highway** 9:10 25:17  
**hit** 4:9  
**hold** 33:13  
**holding** 37:12  
**holdings** 35:5 42:9  
**Honor** 4:3,4,6,16 5:1,6  
 5:18 6:13,17,22 7:6  
 7:13 8:4 10:20 14:5  
 14:12 19:4 23:21 24:3  
 24:12 26:15,19 29:20  
 29:22 30:1,16,19,20  
 31:1 32:6 33:5,18  
 34:8,11,17,22 35:21  
 36:7,15 37:5,8,9,20  
 39:3,14 41:2 43:13  
 44:9,10 45:5,9,15,16  
**HONORABLE** 1:22  
**Houghton** 37:18 38:22  
**human** 33:7

---

**I**


---

**idea** 32:15  
**identification** 10:16,18  
 26:15,17  
**identified** 11:3 15:1  
 33:17  
**identify** 10:11 26:10  
**identifying** 11:10  
**immediately** 6:4 11:4  
 15:2 21:5  
**important** 33:4  
**inapt** 35:6  
**incident** 6:21 23:7  
**included** 33:17 35:16  
**includes** 7:10  
**including** 40:21  
**indented** 40:20

**indicate** 12:2 27:14  
28:4,10  
**individuals** 33:12  
**indulgence** 15:16 21:18  
**information** 9:22 21:15  
**initially** 9:14,16 11:2  
27:2  
**inside** 11:5,21 12:10  
17:15,16,18,20 27:4  
27:21  
**inspect** 37:22  
**instance** 36:7  
**instances** 35:12,18  
**instants** 44:2  
**instructed** 21:6 36:21  
**intended** 40:19  
**intersection** 9:17  
**intimately** 7:12 34:14  
**irrelevant** 36:2 39:3  
**issue** 5:20 32:5 35:2,6  
42:5  
**issued** 34:6  
**issues** 5:11  
**item** 40:10,15  
**items** 35:17,21 38:6,9  
39:22 40:18 41:5

**J**

**JR** 1:22  
**JUDGE** 1:22  
**juncture** 21:11  
**jury** 4:11,20  
**justified** 37:16  
**justify** 37:13

**K**

**Katherine** 2:4 3:8  
**kit** 13:15  
**knew** 41:17  
**knows** 32:2

**L**

**L** 2:4  
**language** 34:18  
**lap** 6:15 11:7,14 12:12  
20:5 27:9 34:13 38:20  
39:20 40:2  
**law** 7:4 31:2,11,17 32:2  
36:12  
**leave** 6:14,16 11:15,18  
16:15 17:11,22 18:11  
18:21 20:1,1 30:10  
32:14,17 36:21 39:4  
42:15  
**leaving** 23:16  
**left** 19:15 42:22  
**legally** 6:2  
**legitimate** 38:14

**Let's** 42:12  
**letter** 31:11,16 32:2  
**license** 6:3  
**lights** 9:18  
**line** 40:18  
**little** 41:9  
**loaded** 12:12  
**localize** 29:14  
**localized** 43:17  
**locate** 12:8  
**located** 12:10,16 13:5  
13:10 27:20,21 28:8  
**long** 8:21 24:21 43:7  
**Louis** 30:12 45:1,3  
**Luisa** 14:17 20:21

**M**

**ma'am** 4:5,5 9:4,7,11,13  
10:5,10,22 11:11 12:7  
12:21 13:13,19 14:1,4  
15:8,11,15,21 16:2,5  
16:8,17 18:3,13 20:5  
20:8,11,14,17 21:5,10  
22:5 23:4,8,17,20  
**mag** 12:13  
**magazine** 12:13,13  
**magistrate** 34:5,7 36:6  
**man's** 15:9  
**marijuana** 6:5,8 11:5  
12:17 15:3,18 16:4,7  
16:10 17:16,19 18:8  
20:10 22:1,4,7,11,16  
23:1 27:3 29:10,15  
36:15 37:13 38:16,19  
39:2 40:11,12 43:15  
43:16  
**mask** 10:13 26:13  
**MATTER** 1:4 45:18  
**matters** 39:15  
**mean** 5:14 17:12 18:4  
42:11  
**meaning** 42:6  
**means** 7:9  
**men's** 15:6  
**mentioned** 41:2  
**Milane** 2:4 3:8 4:3,15,22  
5:6,8 8:15 10:19  
14:11 23:14 24:4,14  
24:17 26:14,18 28:16  
29:20 30:16,20 37:8  
39:14 44:10 45:9,15  
**minutes** 4:14  
**Mirandize** 28:1  
**mission** 32:12  
**Molly** 2:10 3:3,8  
**moment** 5:15 13:21  
**morning** 4:3,4 8:16  
14:15 24:12,13,14,15

**motion** 1:16 4:8,12,20  
14:6 37:6 44:6,7  
**move** 45:10  
**Moving** 13:20

**N**

**N** 2:6  
**name** 8:17,18 24:18  
**naturally** 33:7  
**NCIC** 9:20  
**neck** 30:10,11,13  
**need** 35:19 36:8 42:18  
43:8  
**needs** 41:20  
**neither** 20:19 21:4  
**never** 20:12,15  
**NEWMAN** 1:22  
**Newton** 2:10,11 3:3,8  
4:4,6 5:1,10,14,18  
14:5,9,14 19:4,7  
21:18,19 23:9 28:18  
29:17 30:1,7,14,19  
31:1 42:6 44:8,12,14  
44:17,20 45:2,4,12,16  
**night** 19:19  
**nolle** 45:10,14  
**note** 10:15,17 26:14

**O**

**O'CLOCK** 45:17  
**object** 23:15,18 38:1,12  
39:2 41:10,12,15,18  
**objecting** 41:17  
**objection** 4:15 19:4  
45:12,14  
**objects** 33:9,13  
**observe** 9:8 11:2 25:15  
27:2,5  
**observed** 11:6 27:3  
**occasion** 12:5,19 27:17  
28:1  
**occupants** 10:6,8 11:8  
26:5,7 27:10 31:13  
**occupation** 24:18  
**October** 9:2 25:2 31:4  
**odor** 6:5,8 11:4 15:2  
27:3 37:13 38:15  
40:12  
**Office** 2:5  
**officer** 3:5 5:9 6:13 8:6  
8:16,20 11:20 14:15  
14:21,22 16:15 17:11  
18:1,2,4,12,14,16  
19:2,10,16 23:15 24:4  
24:14 25:11,13,21  
26:3 28:19 31:17 32:9  
32:13 35:18 36:8 43:8  
43:15  
**officers** 6:4,16 11:11  
21:9 31:4 35:12 36:9  
37:21 38:16  
**once** 11:14 19:14 21:9  
**one's** 33:18 38:15  
**opening** 3:2 5:11,19  
**operable** 14:9  
**options** 19:3,8 36:9,22  
**originated** 17:16  
**owner** 6:3 9:21

**P**

**P-R-O-C-E-E-D-I-N-G-S**  
4:1  
**pants** 42:16,17  
**paraphernalia** 38:3,7  
38:12  
**Pardon** 44:12  
**part** 31:21 32:6,7 37:4  
**particularly** 27:6  
**passenger** 6:1 10:22  
14:21 15:1 26:21,22  
27:8  
**passenger's** 38:6,21  
**passengers'** 37:22  
**pat** 20:21 21:12  
**Patrick** 3:5 8:9,18  
**patrol** 25:6  
**patted** 20:19 21:2 43:19  
**people** 21:16  
**permitted** 35:13,14  
**person** 7:8,10,13,16,19  
7:20 8:2,2 12:20  
15:19 16:20,21 17:4,8  
20:4 22:17 23:7 29:15  
31:22 32:7,8,17,19  
33:3,7,16,18 34:1,8  
34:10,14,15,16 35:8  
35:15,16,20,22 36:17  
36:18 37:1,3,4,16  
39:9 40:7,9,15 42:7  
42:11,13,14,22 43:3,5  
43:12 44:3  
**person's** 34:13  
**personal** 33:9  
**persuades** 35:1  
**placed** 6:20 11:16 23:6  
**places** 33:8  
**please** 8:6,17 10:11,15  
14:2 24:5,18 26:10,14  
30:3  
**PLLC** 2:11  
**pocket** 6:22 13:1  
**pockets** 33:8,11  
**point** 6:17 17:5 23:3  
31:18 32:21 36:19  
37:2 43:21 44:4  
**points** 33:4



**police** 7:2,20 8:20,22  
 18:20 19:9,21 24:20  
 32:11 33:22 36:11  
 37:21 39:4 40:4,20  
**policy** 36:11  
**position** 7:14  
**positive** 13:16  
**pouches** 33:8  
**powdery** 13:3,8  
**prelim** 22:7  
**preliminary** 16:1,11  
 29:4  
**present** 5:17  
**presented** 35:19  
**previously** 28:11  
**primary** 22:20  
**probable** 7:2,9 8:1  
 16:19 17:2,7 22:12  
 23:2 31:5,7,12,13,18  
 33:21 34:21 36:1,5,13  
 36:17 37:2,21 38:11  
 38:16,17 39:7,19,22  
 40:6,11 41:22 42:10  
 43:12,14 44:4  
**problem** 42:20  
**proceed** 4:17  
**PROCEEDINGS** 45:18  
**properly** 38:10 42:2  
**pros** 45:10  
**pros'd** 45:14  
**pulled** 6:2  
**purpose** 39:16  
**purposes** 14:6  
**purse** 12:17 15:7,9 20:6  
 20:9 28:19 29:7 42:19  
 42:21 44:3,11,13  
**purses** 33:13  
**pursuant** 7:3 35:3,4,9  
 35:15 44:1  
**put** 6:10 19:9  
**putting** 19:18

---

**Q**


---

**qualifies** 38:21  
**question** 7:18 17:6  
 18:10 19:1 22:15,22  
 30:2 31:20 39:11  
**questions** 23:10 29:18  
 30:15,16,17  
**Quick** 15:16

---

**R**


---

**raise** 8:6  
**Ran** 9:20  
**reagent** 13:15  
**reason** 17:14 21:12  
 31:15  
**reasoning** 35:5

**reasons** 11:20 17:12  
 18:2,5,12,14,16 19:2  
 19:11,17 32:9 37:5  
**recall** 23:11 27:15,16  
 29:2,8  
**RECESS** 5:2,7  
**record** 10:15 26:14,16  
**recovered** 6:19  
**RECROSS** 3:4  
**red** 9:18  
**REDIR** 3:4  
**redirect** 23:13 29:19  
**reflects** 26:16  
**Regardless** 42:1  
**registered** 6:3 9:21  
**registrations** 9:17,19  
**relevant** 40:1  
**remain** 23:11  
**remedy** 33:10  
**remember** 12:4 15:11  
 15:15,21,22 16:3,5,8  
 16:9,13 20:22 22:5,6  
 22:9,10 29:3,6  
**remove** 1:15 4:7,19  
 19:14  
**request** 1:15 11:8 27:10  
**requiring** 35:7  
**respect** 34:9  
**response** 42:4  
**returned** 9:21  
**Richmond** 9:9 25:16  
**riding** 25:8,12  
**rights** 28:5  
**road** 2:6 40:4  
**rock-like** 13:6,11  
**roll** 14:19  
**Rose** 1:7 2:9 5:12,16  
 6:1,9,12,20 10:13  
 12:1 13:6 14:19 15:14  
 16:6,19 20:12,18 21:2  
 21:22 23:1,15 26:20  
 27:6,13 28:2 29:13  
 30:2,8 31:19 36:15  
 37:11 39:4 41:11,15  
 42:15 43:11 44:3,18  
 45:6  
**Rose's** 11:7 12:11,20  
 32:7 38:20 43:3  
**Ross** 36:4  
**round** 12:13,14,15  
**rule** 40:13  
**run** 9:17

---

**S**


---

**safety** 11:20 16:16  
 17:12 18:2,4,12,14,16  
 19:2,11,16 32:9 36:8  
 43:8

**salts** 13:16  
**saying** 40:15 42:14  
**scene** 11:11  
**Science** 13:18  
**scope** 7:8 33:3 34:10  
 35:13 43:5  
**screen** 5:15 10:14  
**search** 6:8 7:2,5,9,15  
 7:16,21 8:1 12:5,20  
 16:20,21 17:2,7,13  
 18:5,8,15 20:13 21:7  
 22:3,12,14,21 23:3  
 27:17 31:7,12,13,15  
 31:18,22 32:3,8 33:2  
 33:19,21 34:1,2,4,6,7  
 34:7,16,17,22 35:3,3  
 35:9,9,14,14,20 36:1  
 36:2,3,5,6,16,17,22  
 37:2,14,22 38:2,11,13  
 38:17 39:2,10,22 40:5  
 40:6,11,14,21 41:10  
 41:13,16,19 42:1,2,10  
 42:19,21 43:2,3,11,13  
 43:14 44:5  
**searched** 6:11,18,19,21  
 17:14,20 19:10 20:9  
 23:2,5,7 31:16 32:10  
 36:19 38:5,9 41:18  
 43:1,20  
**searching** 22:8 23:18  
 37:16 40:18  
**seat** 10:22 11:17 12:18  
 20:7 26:21,22 27:8  
 42:20  
**seated** 10:21 26:20  
**secured** 18:19 32:11  
**seek** 40:14  
**send** 4:9  
**separately** 22:17  
**September** 9:1  
**seven** 13:5  
**shirt** 26:12  
**short** 5:2,7,11  
**shoulder** 6:15 28:22  
 33:13  
**side** 10:14 14:20,21  
 21:7 30:13 40:4  
**similar** 44:15  
**sit** 21:6  
**sitting** 9:16 11:6 27:7  
 44:3  
**situation** 37:11 41:3  
**six** 25:1  
**small** 13:2,5,7  
**smell** 11:4 15:18 16:4,7  
 16:10 17:15 18:7 22:1  
 22:4,7 29:14 43:15,16  
 43:17

**smelled** 6:5 11:4 15:2  
 22:11,15 23:1 29:9  
 36:15  
**socks** 34:12  
**solution** 19:18  
**sort** 9:19 15:9  
**squarely** 38:21  
**STAND** 8:12 24:10  
**standing** 37:12 40:4  
 41:15  
**start** 19:14 20:2  
**started** 5:5  
**starts** 31:8  
**state** 8:17 24:18  
**statements** 3:2 12:3  
**step** 24:1  
**stipulate** 14:6  
**stop** 10:2 19:14 25:22  
 38:3,14  
**stopped** 9:18 31:15  
**story** 36:14  
**strap** 6:15 15:10,14  
 28:19,22 29:7 30:9,12  
**street** 37:12  
**strong** 11:4  
**stuff** 9:20  
**subject** 23:11 38:10  
 39:21 40:10 41:22  
 42:2  
**substance** 13:3,6,8,12  
**suggests** 35:6  
**Suite** 2:7  
**suppress** 1:16 4:12,20  
 14:7 37:7  
**Supreme** 36:3  
**suspended** 6:3 9:21  
**sworn** 8:12 24:10 30:3  
 30:5

---

**T**


---

**T** 1:22  
**tag** 9:20  
**taken** 5:2,7 6:12 20:19  
 21:22  
**talk** 34:20  
**talked** 41:9  
**talking** 15:6,7 30:9 33:6  
 37:11 42:13,14 43:2  
**taste** 44:17  
**taught** 19:22  
**tell** 28:7 32:14 42:15  
**term** 7:8 33:3 43:5  
**test** 13:11,14,17  
**tested** 13:16  
**testified** 8:13 18:11  
 24:11  
**testifying** 15:22 16:3,9  
 18:1 22:6,10 29:3,6

testimony 30:18  
**Thank** 4:22 5:1,18  
 10:20 23:9,21 24:3  
 26:19 29:17,21,22  
 30:14 37:8 44:8,10  
 45:4,15,16  
**third-party** 41:4  
**three** 13:7  
**today** 10:9 26:8  
**told** 11:15 16:14 17:22  
 18:11 31:1  
**top** 10:14  
**traffic** 10:2 25:22 38:2  
**trained** 19:13,16  
**training** 13:22 19:21,22  
 25:13 32:13 36:10  
**trial** 1:15 4:7  
**Turner** 2:11  
**two** 10:7 13:2 26:6 38:5  
**type** 34:2  
**typically** 9:17

**U**

**understand** 7:4,22  
 17:21 18:10 19:1,12  
 19:20 22:22 32:9  
 34:19 36:8 43:6  
**understanding** 4:17  
**understood** 28:4  
**unknown** 11:21  
**use** 13:14

**V**

**v** 32:22 36:4 37:18  
 38:22 41:2,16  
**VA** 2:7,12  
**vehicle** 7:22 8:1 9:15  
 10:4,6,21 11:5,9,13  
 11:15,19 12:2,6,9,10  
 12:16 17:2,5,15,17,19  
 17:20 18:7 19:13,15  
 19:15 20:1,2,2 22:14  
 22:18,20 26:2,5,20  
 27:1,4,11,14,18 29:10  
 31:7,12,14 32:1,16,18  
 38:17,19 40:1,21 41:1  
 41:22 42:1,7 43:17  
**Virginia** 1:1,5,12 2:3  
**visible** 38:3  
**voluntarily** 42:22  
**VS** 1:6  
**Vuitton** 30:12 45:1,3

**W**

**waive** 41:12  
**waived** 41:18  
**wanted** 5:19 40:5  
**warrant** 9:19 33:21 34:4

34:6 35:3,9,15 36:3,6  
**wasn't** 41:7 42:21 43:21  
**way** 4:13 40:17 43:4,7  
**ways** 32:12 43:9  
**weapons** 11:22  
**wearing** 10:13 26:12  
**Wednesday** 1:10  
**well-** 32:1  
**went** 14:22 22:3 33:20  
**white** 13:3,6,8,11  
**WILLIAM** 1:22  
**Wilson** 2:11  
**windows** 14:19,22  
**wish** 33:14  
**witness** 5:8 8:12 24:10  
 24:12,15 29:22  
**Witnesses** 3:4  
**Words** 42:6  
**work** 40:19  
**wouldn't** 31:5  
**Wyoming** 37:18 38:22

**X**

**Y**

**years** 25:1  
**yesterday** 4:8

**Z**

**0**

**1**

**10:04** 1:17 4:2  
**11:00** 4:8  
**11:31** 45:17  
**14** 3:5  
**1425** 2:6  
**17** 9:2 25:2

**2**

**2019** 9:1 31:5  
**2020** 9:3 25:2  
**2022** 1:10  
**20Z** 12:12  
**21** 12:14  
**2111** 2:11  
**22201** 2:7,12  
**228-4410** 2:8  
**23** 1:10 3:5  
**2300** 9:9 10:2 25:16  
**24** 3:5  
**27** 12:12

**3**

**30** 3:8 4:14  
**35** 3:8

**4**

**40-caliber** 12:14  
**453** 13:10

**5**

**5** 3:3  
**5200** 2:7

**6**

**677-8614** 2:13

**7**

**703** 2:8,13

**8**

**8** 3:5  
**8th** 2:12

**9**

**904** 13:15

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This is to certify that the foregoing transcript

In the matter of: Virginia v. Francis Rose

Before: The Honorable William T. Newman Jr., Judge

Date: 02-23-22

Place: Arlington, Virginia

was duly recorded and accurately transcribed under my direction; further, that said transcript is a true and accurate complete record of the proceedings.



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Court Reporter

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