No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

DONTE J. CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

D. JOHN SAUER
Solicitor General
Counsel of Record
A. TYSEN DUVA
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
KEVIN J. BARBER
Assistant to the Solicitor General
ANDREW C. NOLL
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether perceptions of law enforcement that a court attributes to a particular racial group are a relevant factor in the Fourth Amendment analysis of whether a member of that group has been seized.

RELATED PROCEEDINGS

Superior Court of the District of Columbia:

United States v. *Carter*, No. 2020-CF2-7280 (Apr. 18, 2023) (amended judgment)

District of Columbia Court of Appeals:

Carter v. *United States*, No. 23-CF-388 (Aug. 28, 2025)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Constitution, statutes, regulations, and rule:

Statutes, regulations, and rule—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

No.

UNITED STATES OF AMERICA, PETITIONER

v.

DONTE J. CARTER

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The opinion of the District of Columbia Court of Appeals (App., *infra*, 1a-28a) is reported at 341 A.3d 1067. The oral findings and order of the Superior Court of the District of Columbia (App., *infra*, 29a-46a) are unreported.

JURISDICTION

The judgment of the District of Columbia Court of Appeals was entered on August 28, 2025. On November 17, 2025, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 26, 2025. On December 19, 2025, the Chief Justice further extended the time to and including

January 23, 2026. The jurisdiction of this Court is invoked under 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment of the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. Amend. IV.

INTRODUCTION

During an encounter with a group of people on a sidewalk, District of Columbia police officers observed an L-shaped bulge in respondent's pants. They frisked him, found a stolen gun, and arrested him. But his subsequent criminal convictions were vacated by the District of Columbia Court of Appeals (DCCA), on the theory that the police had violated the Fourth Amendment by seizing respondent before developing the necessary reasonable suspicion. The dispositive factor in the DCCA's analysis of when a seizure occurred was respondent's race.

Based on polls, social-science research, and academic commentary, the court of appeals concluded that black Americans like respondent are "especially distrustful of" and "cautious around" law enforcement. App., *infra*, 19a, 21a. It viewed members of that racial group as "less likely" than other people "to terminate a police encounter," and thus subject to seizure in circumstances

where members of other racial groups would not be. *Id.* at 21a.

The DCCA's decision is deeply flawed and warrants this Court's review. The test for a seizure under the Fourth Amendment is an "objective" inquiry into whether a "reasonable person would feel free to terminate the encounter." *United States* v. *Drayton*, 536 U.S. 194, 201-202 (2002). Accordingly, "the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Michigan* v. *Chesternut*, 486 U.S. 567, 574 (1988). Much less does it vary based on the state of mind that a court attributes to the individual based solely on his race.

In the equal-protection context, this Court has rejected, as an "impermissible racial stereotype[]," "the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike." *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993). Such a perception cannot be a permissible consideration, let alone a constitutional requirement, under the Fourth Amendment.

In deeming it to be such, the decision below starkly departs from well-established constitutional principles; conflicts with decisions of several federal circuits and a state supreme court; and threatens to seriously hinder law enforcement in the Nation's capital. This Court should grant certiorari and reverse.

STATEMENT

Following a bench trial in the Superior Court of the District of Columbia, respondent was convicted on one count of unlawfully possessing a firearm following a felony conviction, in violation of D.C. Code § 22-4503(a)(1); one count of carrying a pistol without a license, in violation of D.C. Code § 22-4504(a)(2); one count of pos-

sessing a large-capacity ammunition feeding device, in violation of D.C. Code § 7-2506.01(b); one count of possessing an unregistered firearm, in violation of D.C. Code § 7-2502.01(a); one count of unlawfully possessing ammunition, in violation of D.C. Code § 7-2506.01(a)(3); one count of receiving stolen property, in violation of D.C. Code § 22-3232(a) and (c)(2); one count of destruction of property, in violation of D.C. Code § 22-303; and one count of second-degree theft, in violation of D.C. Code §§ 22-3211, 22-3212(b). Am. Judgment 1-2. Respondent was sentenced to 14 months of imprisonment, to be followed by three years of supervised release. *Id.* at 1. The DCCA vacated respondent's convictions and remanded. App., *infra*, 1a-28a.

1. On July 16, 2020, respondent was in the Georgetown neighborhood of Washington, D.C., "looking for vehicles to break into." 2/23/23 Tr. 18 (Trial Tr.). He smashed the window of a car and stole a bag that belonged to an FBI agent. *Id.* at 17-18. Inside the bag were the agent's FBI badge and a Glock pistol. *Ibid.* Even though a prior Maryland burglary conviction prohibited him from possessing a firearm, respondent kept the gun. *Ibid.*; see D.C. Code § 22-4503(a)(1).

Two months later, on a September afternoon, officers in the District of Columbia Metropolitan Police Department's Gun Recovery Unit were patrolling a neighborhood in the District that had recently experienced "an uptick in shootings and sounds of gunfire." App., *infra*, 2a. The officers had tactical police vests, and carried "visible handcuffs, firearms, and other police equipment," but were otherwise wearing plain clothes. *Id.* at 3a; see *id.* at 30a. During the course of the afternoon, they parked their cars—which were unmarked, and had no lights or sirens—across the street from a group of

ten black men who were conversing on the sidewalk. *Id.* at 2a, 30a.

Four officers went up to the group, which was "split between three men 'sitting and standing near some planters,' and another seven men about fifteen feet away." App., *infra*, 2a. Two officers approached the group of three men near the planters, with one of those officers explaining in a "pretty chatty tone" that they were "checking for firearms." *Id.* at 31a; see *id.* at 3a. One of the three men, "without having been asked to do so," then "lifted his shirt" and "opened a small pack across his chest" to "show[] he had no contraband." *Id.* at 31a; see *id.* at 3a.

Two other officers walked toward the other seven men, one of whom was respondent. App., *infra*, 3a. Officer Anthony DelBorrell went up to respondent, who was leaning against the hood of a parked car. *Ibid.* As he did so, another man near respondent lifted his shirt without prompting. *Id.* at 3a, 32a-33a. Officer DelBorrell pointed a flashlight into the car's passenger window and asked respondent, "How are you doing, [m]an?" *Id.* at 32a. Respondent answered, "'how are you doing,'" or "'what's up?,'" *id.* at 3a, and then "look[ed] away unconcerned," *id.* at 32a.

Then, before Officer DelBorrell "could say anything else," respondent lifted his shirt to reveal his waistband. App., *infra*, 3a. As he did so, Officer DelBorrell asked, "hey champ, you not got nothing on you?" *Ibid.* (brackets omitted). Respondent answered "no" and then lifted his shirt again. *Ibid.* Officer DelBorrell then asked respondent, "do you mind hiking your pants for me real quick?" *Id.* at 3a-4a (brackets omitted). Respondent stood up and, in a "single quick motion, * * * hiked his pants up by holding them at the waistband with two

hands." *Id.* at 4a (brackets omitted). He also again lifted his shirt and put it back down. *Ibid.*

While respondent was hiking his pants, Officer Wilfredo Guzman was walking over after speaking with the men near the planters. App., *infra*, 4a. As he came over, Officer Guzman noticed an L-shaped bulge in respondent's groin area, which he believed to be a gun. *Ibid.* Officer Guzman requested that respondent "stand up" "one more time." *Ibid.* (brackets omitted). When respondent did so, Officer Guzman pointed to respondent's right groin area and remarked, "right there, brother, right there." *Ibid.* (brackets omitted).

Officer Guzman then patted down respondent's crotch with the flat of his hand and felt the metal of a gun. App., *infra*, 35a. After a brief scuffle, another officer removed a .40-caliber gun from between multiple pairs of compression shorts under respondent's pants. *Id.* at 4a, 35a-36a. The gun was later determined to be the one that had been stolen from the FBI agent in Georgetown. Trial Tr. 17.

2. A grand jury in the District of Columbia returned an indictment charging respondent with eight firearm and theft offenses. Indictment 1-3. Before trial, respondent moved to suppress all evidence recovered as a result of his interaction with police, as well as statements he made following his arrest, asserting "that they were the result of an unreasonable seizure in violation of the Fourth Amendment." App., *infra*, 4a.

The trial court denied the motion. App., *infra*, 29a-46a. As an initial matter, the court found that Officer Guzman had reasonable suspicion for a pat-down once he saw the L-shaped bulge in respondent's pants. *Id.* at 36a. The court therefore described the "central question" in the suppression motion to be whether Officer

DelBorrell's earlier request for respondent to "hike his pants," which had led to Officer Guzman's observation, had "amounted to a seizure" within the meaning of the Fourth Amendment. *Ibid.*

The trial court determined that it had not. App., *infra*, 36a. The court observed that the officers' testimony during a suppression hearing—which was "corroborated by body-worn camera footage," *id.* at 37a—established that the officers, who were outnumbered by the group of men on the sidewalk, had approached respondent in the daytime without blocking him in. *Id.* at 38a-39a. The court also observed that Officer DelBorrell began the interaction with a "greeting"—"'How are you doing?'"—and that neither respondent nor any of the other men "acted like they were concerned." *Id.* at 39a. And the court noted that respondent had lifted his shirt to expose his waistband without any prompting and then, when the officer asked him to hike his pants, had "lifted his sweatshirt again," something the officer "had not asked him to do." *Id.* at 39a-40a.

Summing up the totality of the circumstances, the trial court found that the "brief" encounter in "broad daylight" involved questioning that was "conversational and casual" rather than "accusatory," by officers who did not "surround[]," "hem[] in," touch, draw a weapon on, or "act in an intimidating fashion" toward respondent, who in turn was not "surprised," "fearful," or "nervous." App., *infra*, 44a-45a. And because it found that the encounter was "not aggressive," "coercive," or "intimidating," the court determined that the encounter did not amount to "a show of authority that would lead a reasonable, innocent person to believe that he must comply or satisfy the officer's demands." *Id.* at 44a.

Reserving the right to appeal the denial of his motion to suppress, respondent agreed to a stipulated-fact bench trial. Trial Tr. 2-4, 22-23, 26-27. The trial court found that the government had established the elements of each offense beyond a reasonable doubt, *id.* at 16-24, and subsequently sentenced respondent to 14 months of imprisonment, to be followed by three years of supervised release, Am. Judgment 1.

3. The DCCA reversed the trial court's denial of the motion to suppress, vacated respondent's convictions, and remanded. App., *infra*, 1a-28a.

a. The DCCA recognized that "[t]o determine whether a defendant was seized within the meaning of the Fourth Amendment," a court should examine "whether in view of all the circumstances surrounding the defendant's encounter with law enforcement, an objective and reasonable person in the defendant's shoes would have 'felt free to terminate' the interaction and 'go about their business.'" App., *infra*, 6a (brackets and citation omitted). The court then expressed the view that this was "a close case," in which factors that, in its view, "strongly suggest[ed]" that respondent had been seized before the officers developed reasonable suspicion were counterbalanced by other factors that pointed "in the opposite direction." *Id.* at 7a.

Factors that the DCCA deemed to favor a finding of a seizure included that the officers had "converged on [respondent's] group"; that Officer DelBorrell "approached [respondent] from behind" while carrying "an openly visible firearm" and asked respondent "whether he possessed a firearm"; and that Officer DelBorrell "continued to probe him by asking him to 'hike his pants up.'" App., *infra*, 10a-11a (brackets omitted); see *id.* at 16a-17a (also noting that "no member of [respondent's]

group left once the police arrived" and that Officer Del-Borrell did not request respondent's permission to speak with him). Factors that the court recognized as weighing against a seizure finding were that respondent "was not singled out on his own but rather as a member of a larger group" that outnumbered the officers; that "the interaction took place in broad daylight with nine potential witnesses"; that "the officers here did not restrict [respondent's] movement"; and that the officers "did not make any threatening gestures or orders, nor did they touch [respondent], so as to suggest that compliance was mandatory." *Id.* at 12a, 16a.

Although respondent had not raised the issue, the DCCA stated that "in addition to considering the coercive nature of the officers' conduct," its precedent "require[d]" it to "take into account the defendant's race" —specifically, "generalized lived experiences" of a person with respondent's "racial status." App., *infra*, 18a; see *Dozier* v. *United States*, 220 A.3d 933, 944 (D.C. 2019). And, principally citing polling data, law-review articles, and statistics on police use of force, the court concluded that black men, "generally speaking," are "more likely to comply with the demands of law enforcement" and that black Americans are "especially distrustful of law enforcement and are thus less likely to terminate a police encounter due to skepticism that any attempt to exercise their constitutional rights will be respected." App., *infra*, 19a, 21a; see *id.* at 19a-23a.

"Applying this understanding," the DCCA took the view that "many of the historical features of blue-on-black interaction" that make black men "especially apprehensive around police" were present in this case. App., *infra*, 23a-24a. It reasoned that respondent was "confronted in a predominantly Black area" by officers

who were "wearing tactical gear" and "visibly displaying their firearms." *Id.* at 24a. The court also asserted that the District's Gun Recovery Unit "has a 'reputation for aggression'" and for "selectively target[ing]" black people, and the court characterized Officer DelBorrell as having "accusatorily and repetitively questioned" respondent, which the court viewed as "compounding [an] already racially charged and coercive" interaction. *Id.* at 24a-25a (brackets and citation omitted).

"Accordingly, taking into account the coercive nature of the officers' conduct and factoring in the elevated effect that this would have had on an objective and reasonable Black man in [respondent's] shoes," the DCCA deemed respondent to have been seized without reasonable suspicion in violation of the Fourth Amendment. App., *infra*, 26a. It therefore vacated his convictions and remanded for further proceedings. *Ibid.*

b. Judge McLeese concurred in the judgment. App., *infra*, 27a-28a. Observing that the panel majority "appear[ed] to give dispositive weight" to the effect of respondent's race, Judge McLeese explained that he had previously "expressed uncertainty" as to whether a suspect's race "can permissibly be considered in assessing whether police conduct constitutes a seizure." *Ibid.* (citing *Dozier*, 220 A.3d at 950-951 (opinion concurring in the judgment)). But he understood DCCA precedent to hold that "race should be so considered," and therefore concurred in the judgment. *Id.* at 28a.

REASONS FOR GRANTING THE PETITION

In determining when respondent had been seized for Fourth Amendment purposes, the DCCA gave controlling weight to its assessment of how someone of respondent's race would view law enforcement. That race-specific approach, under which the same law-enforce-

ment conduct could be a seizure for someone of one race but not someone of another, conflicts with this Court's precedents and with decisions of several federal circuits and a state supreme court. It is also unworkable, and constitutes a serious impediment to efforts to combat crime and ensure public safety in the Nation's capital. This Court should grant a writ of certiorari and reverse.

A. The DCCA's Decision Is Incorrect

In determining when respondent was seized for purposes of the Fourth Amendment, the DCCA deemed itself bound to consider whether a "reasonable person sharing" the "generalized lived experiences" of a person with respondent's "racial status" would "have felt free to terminate the police encounter." App., *infra*, 18a. Consideration of such a factor cannot be reconciled with this Court's precedents, which do not allow for the definition of a seizure to vary by race, based on "generalized" assumptions about how members of a particular race think.

1. The test for a seizure is objective and focuses on the actions of law enforcement rather than the subjective views of individuals

In *Terry* v. *Ohio*, 392 U.S. 1 (1968), this Court held that the Fourth Amendment permits a warrantless investigatory seizure when law-enforcement officers have reasonable suspicion that criminal activity is afoot, as well as a warrantless frisk in circumstances where officers have reasonable grounds to believe that the individual may be armed and dangerous. See *id.* at 30-31; see also, *e.g.*, *Arizona* v. *Johnson*, 555 U.S. 323, 326-327 (2009). But reasonable suspicion is required only for encounters that rise to the level of a seizure. See, *e.g.*, *United States* v. *Drayton*, 536 U.S. 194, 201 (2002). And

many encounters between the police and citizens do not rise to that level.

"Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, ask for identification, and request consent to search" the person's effects without implicating the Fourth Amendment. *Drayton*, 536 U.S. at 201. A seizure occurs only if an officer applies physical force to restrain someone (whether or not the restraint is "ultimately unsuccessful"), *Torres* v. *Madrid*, 592 U.S. 306, 312 (2021) (quoting *California* v. *Hodari D.*, 499 U.S. 621, 626 (1991)), or if the officer successfully invokes his authority to stop someone, see *Hodari D.*, 499 U.S. at 626-627; *Brower* v. *County of Inyo*, 489 U.S. 593, 595-597 (1989). But because a show of authority is only a seizure if it is successful, in a case involving a show of authority without physical restraint, "there is no seizure without actual submission." *Brendlin* v. *California*, 551 U.S. 249, 254 (2007).

This Court has additionally recognized that "when an individual's submission to a show of governmental authority takes the form of passive acquiescence, there needs to be some test for telling when a seizure occurs in response to authority, and when it does not." *Brendlin*, 551 U.S. at 255. And the test that the Court has long employed is whether, "in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave." *Ibid.* (quoting *United States* v. *Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)). More specifically, "when a person has no desire to leave for reasons unrelated to the police presence," the test looks to "whether a reasonable person would feel free to decline the officers' requests or otherwise terminate the en-

counter." *Ibid.* (citation and internal quotation marks omitted).

That "reasonable person" inquiry "is objective," *Drayton*, 536 U.S. at 202, and focuses on the conduct of the police, not subjective perceptions. "The test's objective standard—looking to the reasonable man's interpretation of the conduct in question—allows the police to determine in advance whether the conduct contemplated will implicate the Fourth Amendment." *Michigan* v. *Chesternut*, 486 U.S. 567, 574 (1988). "Examples of circumstances that might indicate a seizure * * * would be the threatening presence of several officers, the display of a weapon by an officer, some physical touching of the person of the citizen, or the use of language or tone of voice indicating that compliance with the officer's request might be compelled." *Mendenhall*, 446 U.S. at 554 (opinion of Stewart, J.).

The objectivity of the "reasonable person" standard "ensures that the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached." *Chesternut*, 486 U.S. at 574 (internal quotation marks omitted). As Justice Brennan explained, "[t]his rule properly looks not to the subjective impressions of the person questioned but rather to the objective characteristics of the encounter which may suggest whether or not a reasonable person would believe that he remained free during the course of the questioning to disregard the questions and walk away." *INS* v. *Delgado*, 466 U.S. 210, 228 (1984) (opinion concurring in part and dissenting in part). That way, law enforcement can interact with the public under uniformly applicable standards, and all members of the public receive equivalent Fourth Amendment protection.

2. The DCCA erred in incorporating a race-based presumption about respondent's perceptions into its evaluation of whether he had been seized

In the decision below, the DCCA initially weighed the kinds of factors that this Court has considered relevant to whether a Fourth Amendment seizure has occurred, such as the encounter's public and daytime setting, the number of officers on the scene compared to the size of respondent's group, and the officers' demeanor and verbal exchanges with respondent. App., *infra*, 8a-17a. Deeming those factors inconclusive, the court then "look[ed] beyond the mere conduct of the officers" and whether that conduct had a "coercive nature." *Id.* at 18a. It added an additional factor: an assessment of whether someone with respondent's "generalized lived experiences arising out of their racial status would have felt free to terminate the police encounter." *Ibid.* In doing so, it committed legal error.

The "reasonable person" in the free-to-leave test is a generic reasonable person, not a person with particular "lived experiences" ascribed to him based on his membership in a certain racial group. While the test "is flexible enough to be applied to the whole range of police conduct in an equally broad range of settings, it calls for consistent application from one police encounter to the next, regardless of the particular individual's response to the actions of the police." *Chesternut*, 486 U.S. at 574. Just as "the scope of Fourth Amendment protection does not vary with the state of mind of the particular individual being approached," *ibid.*, it does not vary with a state of mind presumed from the individual's race—a state of mind the particular individual may not even have had.

If there were ever a demographic classification that should not affect the seizure inquiry, it would be race. "There is no uniform life experience for persons of color, and there are surely divergent attitudes toward law enforcement officers among members of the population." *United States* v. *Easley*, 911 F.3d 1074, 1082 (10th Cir. 2018), cert. denied, 587 U.S. 980 (2019). The Constitution does not tolerate, much less mandate, judicial presumptions about how people of a particular race think. As this Court has made clear, the Constitution's guarantee of equal protection rejects "racial stereotypes" that assume that "members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike." *Shaw* v. *Reno*, 509 U.S. 630, 647 (1993). Injecting such stereotypes into the Fourth Amendment puts that Amendment at cross-purposes with the equal-protection guarantee.

It also puts officers in the untenable and unworkable position of needing to rely on racial stereotyping in order to assess the legality of their conduct. Under the DCCA's approach, to avoid a potentially unlawful seizure, police officers interacting with a person on the street would be forced to ascertain the person's race, determine his racial group's putative perceptions of law enforcement, and calibrate their conduct accordingly. It is difficult to see how officers on the street are to make those determinations accurately, efficiently, or consistently. The DCCA, which raised the race issue sua sponte, relied on extrarecord opinion polls, social-science research, and academic commentary. App., *infra*, 19a-23a. Law-enforcement officers, however, cannot be expected to try to synthesize the universe of

available research and apply it at a microlevel to an infinite variety of street-level encounters.

That is particularly so because, even at a macrolevel, assessments of generalized racial views of the police defy uniformity. Not all sources support the conclusions that the DCCA drew. See, *e.g.*, Megan Brenan, *Racial Divide on Policing Narrows 5 Years After Floyd Death*, Gallup, Mar. 23, 2025 (polling suggesting that "[t]hree-quarters of Black adults in the U.S. think police in their area would treat them with courtesy and respect if they were to have an interaction"); Kiseong Kuen et al., *Do Black and White People Truly View the Police Differently? Findings from a Study of Crime Hot Spots in Baltimore, Maryland*, 50 Am. J. Crim. Just. 541, 556-557 (2025) (study in Baltimore suggesting that while black people "viewed the police more negatively" than white people, they "do not have different feelings of obligation to obey the police"); William J. Stuntz, *Local Policing After the Terror*, 111 Yale L.J. 2137, 2173 (2002) (discussing a study suggesting that black and Latino people were "likely to be less compliant in encounters with police than" white people).

Neither the courts nor the police should have to decide which studies to credit. As this Court has explained in the related context of assessing whether a suspect is "in custody" for purposes of *Miranda* v. *Arizona*, 384 U.S. 436 (1966), an "objective test avoids burdening police with the task of anticipating the idiosyncrasies of every individual suspect and divining how those particular traits affect each person's subjective state of mind." *J.D.B.* v. *North Carolina*, 564 U.S. 261, 271 (2011). The only individual-specific trait that this Court has allowed in the *Miranda* custody inquiry is the individual's youth—a trait with "universal" characteristics

that allow for "objective conclusions" of the sort that already permeate the many laws that differentiate by age. *Id.* at 273, 275.

Race, however, is very much the opposite: a trait without defining mental-state characteristics, from which no objective conclusions can be drawn, and whose stereotyped consideration is anathema to the law. A person's apparent race or ethnicity may sometimes bear on whether officers have reasonable suspicion to conduct an investigatory stop, see *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 886-887 (1975), just as any physical trait might contribute to (or detract from) reasonable suspicion depending on the circumstances. But that objective and limited consideration of race does not entail categorically imputing certain subjective views and attitudes to individuals based on their racial identities, as the DCCA's approach does.

Under the DCCA's approach, the exact same police conduct would constitute a seizure as applied to some people, but not to others, based on the color of their skin. And that would presumably be the case even when the police approached a single racially diverse group. The court's reasoning also opens the door to requiring the police to consider how any number of other personal characteristics, from gender to national origin to socioeconomic status, may affect individuals' attitudes toward law enforcement and their subjective impressions of their freedom to terminate a police encounter. Consideration of such traits, however, is the antithesis of the objective seizure inquiry described in this Court's precedents.

B. The Question Presented Warrants The Court's Review In This Case

The decision below warrants this Court's review. See Sup. Ct. R. 10. The DCCA's approach creates a conflict of authority with several federal circuits and a state supreme court on an issue of importance for law enforcement. And the decision below presents an ideal vehicle for correcting course.

1. The decision below is in conflict with circuit and state decisions

The decision below conflicts with decisions of other lower courts on the relevance of race to the definition of a Fourth Amendment seizure. Building on its prior decision in *Dozier* v. *United States*, 220 A.3d 933 (2019), the DCCA refused to limit its seizure analysis to the "conduct of the officers," and instead reasoned that it "must also take into account the defendant's race." App., *infra*, 18a; see *Dozier*, 220 A.3d at 944-945.

Every federal court of appeals that has considered the issue has rejected that approach. The Fourth, Tenth, and Eleventh Circuits have squarely rejected the permissibility of attempting to assess a racial group's perceptions of law enforcement in determining whether a seizure has occurred. See *Monroe* v. *City of Charlottesville*, 579 F.3d 380, 386-387 (4th Cir. 2009) (rejecting argument that a person's "subjective belief that he was not free to terminate the encounter was objectively reasonable because relations between police and minorities are poor"), cert. denied, 559 U.S. 992 (2010); *Easley*, 911 F.3d at 1081 (10th Cir.) ("[W]e reject [the defendant's] argument that we should consider subjective characteristics like race as part of our reasonable person analysis."); *United States* v. *Knights*, 989 F.3d 1281, 1288 (11th Cir.) ("We may not consider

race to determine whether a seizure has occurred."), cert. denied, 142 S. Ct. 709 (2021).

As those circuits have explained, whether a seizure has occurred "is an objective question" that turns on "[t]he circumstances of the *situation*," and "most personal characteristics, including race, do not lend themselves to objective conclusions." *Knights*, 989 F.3d at 1288. Even if "empirical research can provide evidence of how individuals of different demographics have interacted with or perceive the police," such "research also reinforces that perceptions vary within groups." *Ibid.*; see *Easley*, 911 F.3d at 1082. And even if courts could legitimately discern a "predominant" attitude among individuals of a particular race, there is "no workable method to translate general attitudes towards the police into rigorous analysis of how a reasonable person would understand his freedom of action in a particular situation." *Knights*, 989 F.3d at 1288-1289.

The Iowa Supreme Court has likewise rejected the notion that the Fourth Amendment seizure analysis should account for claims that a person's "minority status affects how they perceive police actions" or that a black person may be "less likely to feel free to leave" an encounter than a "white" person "under the same circumstances." *State* v. *Cyrus*, 997 N.W.2d 671, 680 (2023). The court questioned "the practical workability and predictability of a seizure test that depends on [such] individual characteristics" and "adhere[d] to" precedent that "examines the officer's conduct objectively, without varying the outcome based on" the person's "race" or other individual characteristics. *Id.* at 680-681.

2. The question presented is important

If left unchecked, the DCCA's approach threatens to seriously hinder day-to-day law enforcement in the District of Columbia. As this case illustrates, "consensual encounters" between the police and the public "are important tools of law enforcement" that play a critical role in detecting and preventing crime. *Johnson* v. *Campbell*, 332 F.3d 199, 205 (3d Cir. 2003); see, *e.g.*, *Florida* v. *Bostick*, 501 U.S. 429, 434 (1991); *Delgado*, 466 U.S. at 221. Under the DCCA's approach, however, an officer will have to account for the relevant person's race—which the officer may not even be able to accurately ascertain—and try to assess and account for that race's presumed generalized perceptions of law enforcement in determining what sorts of interactions might be deemed a seizure.

As explained above, officers have no workable way to take such race-based considerations into account. See pp. 15-17, *supra*; *Knights*, 989 F.3d at 1289; *Easley*, 911 F.3d at 1082. Nor can they be certain that a court will agree with any conclusions that they are forced to draw about how a person of a particular race would view a particular set of circumstances. The decision below threatens to transform routine police interactions with the public into Fourth Amendment seizures that require individualized reasonable suspicion, all based on a court's generalizations about the views and attitudes of distinct racial groups toward the police. Such indeterminacy—and the deterrent effect it has on officers in the field—jeopardizes public safety.

Those concerns are particularly acute in the District of Columbia. Consistent with the District's constitutional status as the seat of national government, see U.S. Const. Art. I, § 8, Cl. 17, maintaining public safety in the

District is a distinctly important governmental interest. See, *e.g.*, *Making the District of Columbia Safe and Beautiful*, Exec. Order No. 14,252, 90 Fed. Reg. 14,559 (Apr. 3, 2025); *Declaring a Crime Emergency in the District of Columbia*, Exec. Order No. 14,333, 90 Fed. Reg. 39,301 (Aug. 14, 2025). And by virtue of the D.C. courts' jurisdiction over local criminal offenses, see D.C. Code § 11-923, the DCCA has a major role in defining the powers of law enforcement in the District.

Yet the DCCA's decisions have exhibited a consistent disregard for fundamental Fourth Amendment principles. See, *e.g.*, *Dozier*, 220 A.3d at 944-945; *Mayo* v. *United States*, 315 A.3d 606, 631 n.16 (D.C. 2024) (en banc) (stating that "Black and Brown men in particular have reason to be apprehensive of police, and * * * this apprehension may be considered in assessing whether the actions the police observe provide reasonable articulable suspicion" for a *Terry* stop) (citation omitted). This Court has repeatedly granted certiorari when lower courts adopted rules that exceeded the requirements of the Fourth Amendment and threatened common law-enforcement practices. See, *e.g.*, *Drayton*, 536 U.S. at 200; *Bostick*, 501 U.S. at 433; *Chesternut*, 486 U.S. at 570-572. The same course is warranted here.

3. This case is an ideal vehicle for reviewing the question presented

This case squarely implicates the question presented and allows for clean review of the issue by this Court. The case has no factual disputes that might impede the Court's consideration of the question. The trial court made "extensive factual findings," which are corroborated by body-worn camera footage. App., *infra*, 2a. And the parties agree that the officers developed reasonable suspicion to detain and frisk respondent once

they saw the L-shaped bulge in his pants. *Id.* at 6a. The sole dispute is whether "the seizure began before then," when officers asked respondent to hike up his pants. *Ibid.*

In resolving that dispute, the DCCA made clear that its consideration of race was outcome-determinative. Viewing the circumstances as otherwise inconclusive, it reasoned that it needed to resolve the Fourth Amendment dispute by "look[ing] beyond the mere conduct of the officers" and "examin[ing] the impact of [respondent]'s race." App., *infra*, 18a. As the DCCA itself acknowledged, under that approach, "conduct that may not rise to the level of a seizure without consideration of race, may do so once the defendant's race and lived experiences are accounted for." *Id.* at 19a; see *id.* at 27a (McLeese, J., concurring in the judgment) (noting that "the opinion for the court appears to give dispositive weight" to respondent's status "as a Black man"). That approach is wrong, and it warrants review and reversal.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
A. TYSEN DUVA
Assistant Attorney General
ERIC J. FEIGIN
Deputy Solicitor General
KEVIN J. BARBER
Assistant to the Solicitor General
ANDREW C. NOLL
Attorney

JANUARY 2026

APPENDIX

TABLE OF CONTENTS

APPENDIX A

DISTRICT OF COLUMBIA COURT OF APPEALS

No. 23-CF-0388

DONTE J. CARTER, APPELLANT

v.

UNITED STATES, APPELLEE

Submitted: Apr. 18, 2024
Decided: Aug. 28, 2025

Appeal from the Superior Court of the
District of Columbia (2020-CF2-007280)
(Hon. Lynn Leibovitz, Trial Judge)

Before BECKWITH and MCLEESE, Associate Judges, and WASHINGTON,* Senior Judge.

Concurring opinion by Associate Judge MCLEESE at page 1080-81.

WASHINGTON, Senior Judge:

Appellant Donte Carter was conversing amongst a group of ten Black men on a sunlit sidewalk in Ward Four of the District. Despite not having raised any suspicion of engaging in criminal activity, the group was approached by four members of the Metropolitan Police

---

* Senior Judge Fisher was originally assigned to this case. Following his retirement on August 22, 2024, Judge Fisher was replaced by Senior Judge Washington.

Department's Gun Recovery Unit (GRU). One of the officers approached Mr. Carter from behind and asked whether he was carrying a firearm. Mr. Carter replied that he was not and twice lifted his shirt to demonstrate that nothing was hidden underneath. The officer then asked Mr. Carter to "hike" his pants up. In this appeal, we are asked to determine whether Mr. Carter was seized at this moment within the meaning of the Fourth Amendment. We hold that he was.

I. Background

Our articulation of the facts is based on both the trial court's extensive factual findings and footage from body-cameras worn by the officers. Neither party disputes these facts.

At some time between 3:00 and 4:00 pm on a sunny day in September 2020, five officers of the GRU[1] drove two unmarked vehicles into Ward Four of the District, an area that consists predominantly of Black Americans,[2] to conduct a firearm interdiction. They went there because of "an uptick in shootings and sounds of gunfire" in the area. The officers observed ten Black men conversing on a sidewalk and parked along the road opposite them. The group was split between three men "sitting and standing near some planters," and another seven men about fifteen feet away. Among the group

---

[1] The unit has since been renamed to the Violent Crime Impact Team (VCIT).

[2] Ward Four consists of approximately 44 percent Black Americans and 29 percent White Americans. *2020 Consensus Information & Data: Table 3*, D.C. Office of Plan., https://planning.dc.gov/publication/2020-census-information-and-data; https://perma.cc/ B6QF-C8YQ.

of seven men was appellant Mr. Carter, leaned up against a parked car and facing everyone else.

Four officers, Officers Sanders, Guzman, DelBorrell, and Keleman, emerged from the vehicles and approached the group. They wore tactical vests with "police" written on the back as well as visible handcuffs, firearms, and other police equipment. Officers Sanders and Guzman focused on the group of three and announced that they were "checking for firearms." Almost immediately, and without being prompted to, one of the men lifted his shirt to reveal his waistband seemingly to demonstrate that nothing was hidden underneath. Upon checking the man's waistband and a small bag he was carrying, Officers Sanders and Guzman continued toward the larger group.

Meanwhile, Officers DelBorrell and Keleman focused on Mr. Carter's group. Officer Keleman approached two individuals standing a few feet to Mr. Carter's left while Officer DelBorrell looped around the vehicle Mr. Carter was leaning on to approach him from behind. As Officer DelBorrell rounded the vehicle, another man approximately a foot ahead of Mr. Carter and several feet ahead of the officer also lifted his shirt to reveal his waistband. Within three to four feet of Mr. Carter, Officer DelBorrell asked how he was "doing," to which Mr. Carter briefly replied, "how are you doing" or "what's up" before turning away. Officer DelBorrell then moved closer to Mr. Carter but before he could say anything else, Mr. Carter also lifted his shirt to show his waistband and then lowered it. As Mr. Carter raised his shirt, DelBorrell asked, "[h]ey [c]hamp, you not got nothing on you?" Mr. Carter responded, "no" and lifted his shirt again. Unsatisfied, Officer DelBorrell re-

quested, "[d]o you mind hiking your pants for me real quick?" Mr. Carter complied. "[I]n a single quick motion, [Mr. Carter] hiked his pants [up] by holding them at the waistband with two hands." He "then lifted his shirt [again] and put it back down."

While this was happening, Officer Guzman had begun to approach Mr. Carter from the other group. When he was about six to ten feet away, he noticed a bulge in Mr. Carter's groin area. When Mr. Carter raised his pants in response to Officer DelBorrell's question, Officer Guzman, from approximately three to five feet away, saw that the bulge was an L-shape, which he believed to be a firearm. Officer Guzman then instructed Mr. Carter to "[s]tand up . . . one more time." Mr. Carter stood. Guzman then remarked, "[r]ight there, brother, right there," pointing to Mr. Carter's right groin area. Mr. Carter replied, "[t]his is my phone," pulling a phone from his right pocket. Officer Guzman subsequently frisked Mr. Carter and after a brief struggle in which the other officers on the scene joined, the officers recovered a firearm hidden in Mr. Carter's pants.

Based on this encounter, Mr. Carter was charged with eight offenses connected to the firearm. He moved to suppress the firearm as well as a statement he made following the incident on grounds that they were the result of an unreasonable seizure in violation of the Fourth Amendment. The trial court denied his motion. It rejected his argument that he was seized when Officer DelBorrell asked him to raise his pants and held that Mr. Carter was seized only after he pulled his pants up. The court held that by then, the officers had reasonable suspicion to seize him based on Officer Guzman's obser-

vation of an L-shaped bulge in his groin area that he made only *after* Mr. Carter raised his pants. Accordingly, the court held that the firearm and statement were not the product of an unreasonable seizure.

Mr. Carter was subsequently convicted on all eight counts following a trial on stipulated facts. He timely appealed.

II. Analysis

The Fourth Amendment to the United States Constitution protects against unreasonable searches and seizures. U.S. Const. amend. IV. Under the Fourth Amendment's prohibition against unreasonable seizures, law enforcement officers may not seize an individual unless they have reasonable suspicion or probable cause to believe that the person is engaged in criminal activity. *See Terry v. Ohio*, 392 U.S. 1, 27, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); *Robinson v. United States*, 76 A.3d 329, 335 (D.C. 2013). Mr. Carter's sole claim on appeal is that the trial court erroneously denied his motion to suppress. Contrary to the court's holding, he argues that the officers seized him within the meaning of the Fourth Amendment when Officer DelBorrell requested that he raise his pants. Because, according to Mr. Carter, the officers lacked reasonable suspicion or probable cause, such conduct violated his Fourth Amendment rights. Mr. Carter claims that the trial court therefore should have suppressed the fruits of that seizure—the firearm and his subsequent statement. *See Smith v. United States*, 283 A.3d 88, 98 (D.C. 2022) (explaining that a court must generally suppress any evidence "obtained as a direct result of" or "found to be a derivative of" an illegal search or seizure (quoting *Utah v. Strieff*,

579 U.S. 232, 237, 136 S. Ct. 2056, 195 L. Ed. 2d 400 (2016))).

For its part, the government admits that it lacked reasonable suspicion or probable cause to seize Mr. Carter when Officer DelBorrell asked him to raise his pants. It also concedes that if it did seize Mr. Carter at that moment, the firearm and statement were products of an unreasonable seizure and should have been suppressed. The government's sole argument on appeal is that it did not seize Mr. Carter until after Officer DelBorrell's request that Mr. Carter "hike" his pants up, when it did have reasonable suspicion to seize him. Mr. Carter does not deny that the officers had reasonable suspicion after Officer DelBorrell's question and simply argues that the seizure began before then.

Accordingly, the central question before us is whether Mr. Carter was seized when Officer DelBorrell requested that he raise his pants. We review this question de novo. *Sharp v. United States*, 132 A.3d 161, 166 (D.C. 2016) (holding that whether a defendant was seized within the meaning of the Fourth Amendment is a question of law, which we review de novo).

To determine whether a defendant was seized within the meaning of the Fourth Amendment, we ask whether in view of all the circumstances surrounding the defendant's encounter with law enforcement, an objective and reasonable person in the defendant's shoes would have "felt free to terminate" the interaction and "go about [their] business." *Jones v. United States*, 154 A.3d 591, 592 (D.C. 2017); *see Graham v. Connor*, 490 U.S. 386, 397, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989) (explaining that the test for reasonableness under the Fourth Amendment is an "objective one"). "Circumstances

that might signify a seizure include the 'presence of several officers, the display of a weapon by an officer, some physical touching of the [defendant], or the use of language or tone of voice indicating that compliance with the officer[s'] request[s] might [have been] compelled.'" *T.W. v. United States*, 292 A.3d 790, 795 (D.C. 2023) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554, 100 S. Ct. 1870, 64 L. Ed. 2d 497 (1980)). To that list, we have added factors such as whether (1) the officers asked the defendant questions of such an accusatory nature that an objective and reasonable person in the defendant's position would have felt "apprehensive" in failing to reply, *see Jones*, 154 A.3d at 596; (2) the officers continued to press the defendant with such questions "in the face of an initial denial," signaling that they "'refused to accept' the answer given," *T.W.*, 292 A.3d at 795 (quoting *Golden v. United States*, 248 A.3d 925, 938 (D.C. 2021)); (3) the encounter took place at night or the defendant was alone or secluded, *see Dozier v. United States*, 220 A.3d 933, 944 (D.C. 2019); and (4) "the officers . . . blocked the [defendant's] potential exit paths or 'means of egress' " so as to signal that the defendant was not free to leave, *T.W.*, 292 A.3d at 795 (quoting *Golden*, 248 A.3d at 939). In addition, we also consider the defendant's race and the role that it may have played in affecting their willingness to leave. *See Dozier*, 220 A.3d at 944.

A.

At the outset, we acknowledge that this is a close case. Whereas several aspects of Mr. Carter's interaction with the officers strongly suggest that he was seized, there are other features that sway us in the opposite direction.

Beginning with the case that favors Mr. Carter, we recognize that this case is not too dissimilar from *Golden*, in which we held that the defendant was seized. *See generally Golden*, 248 A.3d 925. In that case, the defendant, Brandon Golden, was walking alone along a sidewalk at night when four GRU officers in a pair of unmarked SUVs approached him from behind. *Id.* at 931. One of the SUVs stopped at a curb in front of Mr. Golden and the other parked several feet to the left. *Id.* With his window rolled down and his police badge, tactical vest, and firearm clearly visible, an officer in the first car, Officer Vaillancourt, asked Mr. Golden, "in a conversational tone . . . whether he had any weapons on him." *Id.* at 932. Mr. Golden replied that he did not. *Id.* Officer Vaillancourt then asked, "[c]an you just show me your waistband[?]" *Id.* (second alteration in original). Mr. Golden complied by pulling up the middle and left sides of his shirt but not the right. *Id.* Suspecting that Mr. Golden was attempting to conceal something underneath the right part of his shirt, Officer Vaillancourt continued to probe Mr. Golden about what he was hiding. *Id.* Eventually, Officer Vaillancourt exited the vehicle, frisked Mr. Golden, and discovered a firearm. *Id.* Mr. Golden was subsequently charged with various firearm-related offenses and sought to suppress the firearm on grounds that the officers seized him without reasonable suspicion or probable cause and that the firearm was a product of this unreasonable seizure. *Id.* at 931, 933. The trial court denied his motion and Mr. Golden was convicted. *Id.* at 933.

On appeal, we vacated Mr. Golden's conviction and remanded. *Id.* at 949. We held that the officers in the SUVs seized Mr. Golden the moment Officer Vaillan-

court requested to see his waistband. *Id.* at 936. Because the officers lacked reasonable suspicion or probable cause at that point, the seizure was unreasonable. *Id.* at 940. Accordingly, the trial court erred in failing to suppress the firearm. *Id.*

We arrived at the conclusion that Mr. Golden was seized by first recognizing that Mr. Golden's encounter with the officers was not merely one between "equals," which an objective and reasonable person would feel free to terminate, but rather "commenced with an impressive show of police authority." *Id.* at 936 (quoting *Jones*, 154 A.3d at 595). We observed that "[n]ot one but four police officers in two unmarked vehicles simultaneously converged on and partially surrounded [Mr. Golden], with one of the vehicles blocking his path by stopping directly in front of him[—]a visible signal that the police intended for him to stop." *Id.*

Second, we held that Officer Vaillancourt's immediate questioning of Mr. Golden as to whether he was carrying any weapons was of such an accusatory nature that it could not be viewed as merely "a simple request for information." *Id.* at 937; *cf. Florida v. Bostick*, 501 U.S. 429, 434, 111 S. Ct. 2382, 115 L. Ed. 2d 389 (1991) (holding that an officer does not seize someone merely by approaching them and "ask[ing] a few questions"). Rather, it indicated to Mr. Golden that he had been "singled . . . out" because the police "suspected *him* of being armed and committing a crime," thereby contributing to a "sense of powerlessness in an investigative confrontation by the police," one which he could relieve himself of only by demonstrating his innocence. *Golden*, 248 A.3d at 937 (second alteration in original).

Finally, we explained that Officer Vaillancourt's request that Mr. Golden reveal his waistband after Mr. Golden denied carrying a weapon took the interaction "beyond mere questioning," because it "implied" to Mr. Golden that the officers would continue to view him with "heightened suspicion if he attempted to end the encounter without first exposing his waist[band]." *Id.* We held that an objective and reasonable person in Mr. Golden's shoes "would not [have felt] free to frustrate the police inquiry" without first complying with Officer Vaillancourt's request in order to "allay [his] suspicions" and "get the confrontation over with." *Id.*

Here, Mr. Carter's interaction with the officers bore many of the same features that contributed to our finding that Mr. Golden was seized. First, like in *Golden*, two police vehicles simultaneously approached Mr. Carter and others in his group. Four officers then exited the vehicles and converged on the group, suggesting that the men were not simply free to continue conversing amongst themselves as they were previously. Officer DelBorrell also approached Mr. Carter from behind, which—in our view—would make any objective and reasonable person feel uneasy and intimidated, especially when faced with an openly visible firearm within close proximity.

Second, like Officer Vaillancourt, Officer DelBorrell immediately asked Mr. Carter whether he possessed a firearm. As we did in *Golden*, we view this question as one that suggested to Mr. Carter that he, alongside other members of the group, had been singled out as being suspected of criminal activity. An objective and reasonable person in his shoes would have felt apprehensive in refusing to respond to the officer's question.

See, e.g., *Mayo v. United States*, 315 A.3d 606, 628-29 (D.C. 2024) (en banc) (explaining that such a question is intimidating in part due to the "illegal[ity] [of] carry-[ing] a gun in the District without proper licensure and registration"); *T.W.*, 292 A.3d at 796-97 (explaining the coercive nature of a request for a weapon). They may have felt fearful that refusing to answer such a question would have suggested to "the suspicious officer[]" that they had "something to hide." *Guadalupe v. United States*, 585 A.2d 1348, 1360 (D.C. 1991).

Finally, despite Mr. Carter both denying carrying a firearm and raising his shirt not once but twice to reveal his waistband, Officer DelBorrell continued to probe him by asking him to "hik[e] [his] pants up." We see no appreciable difference between this request and that in *Golden* as both required the defendants to continue assuaging the officers' suspicions despite initially denying any wrongdoing. Indeed, both requests implied to the defendants that they would continue to be suspected of criminal activity until the officers stopped asking questions, thereby leaving them with little choice but to respond. *See T.W.*, 292 A.3d at 798 (seeing no meaningful difference between the officer's offer to pat down the defendant and Officer Vaillancourt's request to view Mr. Golden's waistband because both questions were asked after the defendants denied carrying a weapon).

While we recognize the similarities between this case and *Golden*, we also acknowledge two key differences that prevent us from holding that *Golden* controls the outcome here. Most notably, in *Golden*, we placed significant weight on the fact that Mr. Golden was approached at night by four officers in a secluded setting where there were no bystanders to witness the interac-

tion. *See Golden*, 248 A.3d at 936-37. This not only resulted in a more intimidating atmosphere, but it also heightened Mr. Golden's concern that he was being singled out for criminal activity and would need to comply to dispel that suspicion. *Id.* at 937. Here, in contrast, Mr. Carter was not singled out on his own but rather as a member of a larger group. This likely mitigated Mr. Carter's concern that he alone was being targeted by the police. Further, Mr. Carter was not outnumbered by four officers in a secluded setting at night. Less intimidating, the interaction took place in broad daylight with nine potential witnesses, all occupying the attention of just four officers.

Second, whereas the officers in *Golden* exerted significant control over Mr. Golden's movement by partially surrounding him, thereby signaling that he was not free to leave, the officers here did not restrict Mr. Carter's movement. Rather, as the trial court found in its suppression ruling, Mr. Carter "was not surrounded or hemmed in by the police" and was "more surrounded by those he had been hanging out with." Indeed, unlike in *Golden*, any restriction on Mr. Carter's movement was, at least in part, self-imposed, namely by his decision to lean against a car in the company of others.[3]

---

[3] We are unpersuaded by the government's additional attempts to distinguish *Golden*. Namely, the government argues that Officer DelBorrell's conduct toward Mr. Carter was less "intimidating" than Officer Vaillancourt's actions toward Mr. Golden. It points to Officer DelBorrell's casual tone, the fact that Mr. Carter did not seem to be bothered, and that Officer Vaillancourt requested that Mr. Golden "acquiesce in a public unveiling of part of his body" whereas Officer DelBorrell merely asked Mr. Carter to raise his pants.

We disagree with the government that Officer DelBorrell was less intimidating than Officer Vaillancourt. To begin, as we recognized in *Golden*, Officer Vaillancourt's tone was also "conversational." *Id.* at 932. Despite that, we held that his questions were still intimidating due to their accusatory nature. *Id.* at 937. Indeed, we have previously discouraged courts from "attach[ing] undue weight to a police officer's 'conversational' tone in speaking to a suspect." *T.W.*, 292 A.3d at 803 (quoting *Golden*, 248 A.3d at 935 n.26). "While a harsh and commanding tone could certainly convey to a person that their compliance is non-optional, a polite and conversational tone does little to dispel coercion that arises from the content of officers' inquiries, or in how they have approached the suspect." *Id.* at 803; *see also Guadalupe*, 585 A.2d at 1361 (explaining that police questioning does "not have to assume an intensity marking a shift from polite conversation to harsh words to create an intimidating atmosphere"). This is especially true when the officer's inquiries are accusatory in nature, as they were here.

Second, we disagree with the government's characterization of Mr. Carter as being "[un-]bothered." Almost immediately after Officer DelBorrell began questioning him, Mr. Carter raised his shirt up twice. If he were unbothered, we think it far more likely that he would ignore the officer's questions or at minimum verbally deny possessing a firearm, let alone take the more drastic step of revealing his waistband. In any case, we place little weight on Mr. Carter's subjective response to Officer DelBorrell's conduct as the Fourth Amendment seizure inquiry is an objective one—that is, whether an objective and reasonable person in Mr. Carter's shoes would feel free to terminate the encounter. *See Jackson v. United States*, 805 A.2d 979, 987 (D.C. 2002).

Finally, that Officer DelBorrell requested that Mr. Carter raise his pants whereas Officer Vaillancourt asked Mr. Golden to reveal his waistband is not legally significant for present purposes. Setting aside the fact that Mr. Carter had already raised his shirt twice before Officer DelBorrell called on him to raise his pants, our main point here in *Golden* was not that Mr. Golden was subject to a highly intrusive inquiry (though he was), it was that the officer indicated to him that he would not be free to leave until he fully satisfied the officer that he did not possess any weapons. *See*

See I.N.S. v. Delgado, 466 U.S. 210, 218, 104 S. Ct. 1758, 80 L. Ed. 2d 247 (1984) (holding that workers in a factory were not seized despite officers being stationed at the factory doors because the workers had already voluntarily limited their movement to the factory floor before the officers arrived).

B.

In addition to the differences between *Golden* and this case, we previously concluded in two cases—*Brown* and *Kelly*—that defendants in circumstances also not too dissimilar to those here were *not* seized within the meaning of the Fourth Amendment. *See generally Brown v. United States*, 983 A.2d 1023 (D.C. 2009); *Kelly v. United States*, 580 A.2d 1282 (D.C. 1990). In *Brown*, two officers approached a group of "five or six [people] standing on [a] sidewalk." 983 A.2d at 1024-25. One of the officers approached the defendant, Valerie Brown, and asked if she had "any guns, drugs, or narcotics on [her]." *Id.* at 1025. Ms. Brown replied that she was "not doing anything" and that she was just "counting [her] money." *Id.* The officer repeated her question and Ms. Brown "reached into her purse and handed the officer a brown pill bottle," which later tested positive for cocaine. *Id.*

We held that Ms. Brown was not seized despite the fact that the officer asked the same accusatory question twice. *Id.* at 1026. We relied on the fact that the officers were outnumbered by the group Ms. Brown was a part of, the fact that she was approached by only one

---

Golden, 248 A.3d at 937. Similarly here, by failing to take "'no' for an answer," Officer DelBorrell gave Mr. Carter the impression that he would have to respond to all his questions before being let go. *Id.* (alterations in original).

officer while the other was further away speaking to two other individuals, that the officers did not engage in behavior, "such as threatening gestures, orders, or intimidation, which might have caused the encounter to lose its consensual nature," and that other members of the group walked away unimpeded, suggesting that an objective and reasonable person in Ms. Brown's shoes would have felt free to leave. *Id.* at 1025-26. That the officer asked an accusatory question and that she repeated her question were insufficient to overcome the non-coercive nature of the other aspects of the interaction. *See id.*

In *Kelly*, two officers approached the defendant, James Kelly, at Union Station. *Kelly*, 580 A.2d at 1284. Both officers were in plain clothes and neither was visibly carrying a firearm or displaying their badge. *Id.* One of the officers asked Mr. Kelly if he "could speak with him" and Mr. Kelly replied, "yes." *Id.* Meanwhile, the other officer stood "about four feet in front of Kelly." *Id.* The questioning officer inquired about where Mr. Kelly was arriving from, where he lived, and how long he had lived there. *Id.* The officer then introduced himself as a member of the Narcotics Branch of the police department and asked if Mr. Kelly was "carrying any drugs." *Id.* Mr. Kelly replied, "no." *Id.* The officer then asked to search Mr. Kelly's bag, which Mr. Kelly permitted. *Id.*

Like in *Brown*, we held that Mr. Kelly was not seized despite being repeatedly asked an accusatory question. *Id.* at 1288. We explained that the officer "made no demands" of Mr. Kelly, never produced a weapon, and never touched Mr. Kelly. *Id.* at 1286. Further, we rejected Mr. Kelly's argument that the non-questioning

officer was impeding his movement as the officer was four feet away, did not brandish a weapon, or make any threatening gestures. *Id.* Finally, we emphasized that the questioning officer asked Mr. Kelly if he could speak with him, thereby implying to Mr. Kelly that he did not have to comply. *Id.*

Brown and *Kelly* suggest that we should similarly overlook the fact that Mr. Carter was repeatedly asked accusatory questions as the other aspects of the encounter were just as non-coercive as in those two cases. Like in *Brown*, Mr. Carter's group far outnumbered the officers who approached them. In fact, the number of non-officers to officers was approximately the same in both cases (five to two). Further, like in *Brown*, Mr. Carter was initially approached by one officer, Officer DelBorrell, while the others focused elsewhere. Indeed, at the time Officer DelBorrell requested that Mr. Carter raise his pants, Officer DelBorrell was the only officer in Mr. Carter's immediate vicinity. Officer Guzman, the next closest officer, was still several feet away. Finally, like in *Brown* and *Kelly*, the officers here did not make any threatening gestures or orders, nor did they touch Mr. Carter, so as to suggest that compliance was mandatory.

The government goes so far as to argue that considering the similarities, *Brown* and *Kelly* control the outcome in this case. While we certainly place analytical weight on both cases, we reject the government's claim that they are controlling. *Brown* is distinguishable for two reasons. First, unlike in *Brown*, no member of Mr. Carter's group left once the police arrived. To the contrary, not only did members of the group comply with the officers' requests, but some went further by raising

their shirts before they were even asked. Accordingly, unlike in *Brown*, the behavior of others surrounding Mr. Carter suggest that an objective and reasonable person in his shoes would not have felt free to leave. Second, what made the repetitive questioning less coercive in *Brown* was that Ms. Brown's first answer was nonresponsive to the officer's question. The officer asked whether she was carrying any contraband, and rather than replying "yes" or "no," Ms. Brown answered that she was simply counting her money. *Brown*, 983 A.2d at 1025. Thus, it was "entirely reasonable for the officer to ask her question again." *Gordon v. United States*, 120 A.3d 73, 82 (D.C. 2015) (differentiating *Brown* on grounds that the repetitive questioning in *Brown* was simply to seek clarification to a nonresponsive initial answer); *T.W.*, 292 A.3d at 801 (same). Here, in contrast, Mr. Carter explicitly denied carrying a weapon and raised his shirt twice when Officer DelBorrell questioned him. In the face of this denial, unlike in *Brown*, Officer DelBorrell implied that he was unsatisfied by asking Mr. Carter to raise his pants.

Kelly is also distinguishable. Namely, the officer there requested Mr. Kelly's permission to speak with him before questioning him, thereby indicating that cooperation was only optional. *Kelly*, 580 A.2d at 1284. An acknowledgement that an individual need not comply significantly reduces the coercive nature of a police encounter as it dispels doubt in an individual's mind that they must cooperate to terminate the interaction. Whereas the officer in *Kelly* effectively informed Mr. Kelly of his right to walk away by asking him if he could speak, the officers did not do so here. Officer DelBorrell simply approached Mr. Carter from behind and began asking if he was carrying any weapons.

* * *

In light of the similarities between this case and those in which we both found that the defendant was seized (*Golden*), and not seized (*Brown* and *Kelly*), we must look beyond the mere conduct of the officers to objectively determine whether Mr. Carter was seized. To do so, we examine the impact of the defendant's race. *Dozier*, 220 A.3d at 944. Indeed, in its suppression ruling, the trial court implicitly recognized the relevance of race to its Fourth Amendment seizure inquiry. It acknowledged that "in certain neighborhoods among certain demographics that are highly policed[,] the behavior of police can convey to a reasonable . . . person that they are compelled to allay [the] officers' suspicion by acceding to their wishes." The court went no further, however, and instead focused its analysis solely on the coercive nature of the officers' conduct. It did not delve further into how the officers' conduct might have uniquely impacted an objective and reasonable person sharing Mr. Carter's racial status as a Black man. Accordingly, in this next part, we conduct a more thorough inquiry.

C.

Dozier requires that in addition to considering the coercive nature of the officers' conduct in a Fourth Amendment seizure analysis, we must also take into account the defendant's race. *Id.* More specifically, we are to consider whether an objective and reasonable person sharing the defendant's generalized lived experiences arising out of their racial status would have felt free to terminate the police encounter. *See id.* at 944-45. Our consideration of the defendant's race recognizes that a Fourth Amendment seizure inquiry would be in-

complete, and indeed, incongruent with the objective reality that people of color face during interactions with law enforcement. *Id.* For people of color, and as relevant here, Black men, feel "especially apprehensive" around the police such that conduct that may not rise to the level of a seizure without consideration of race, may do so once the defendant's race and lived experiences are accounted for. *Id.* at 944.[4]

To inform our analysis as to the role that Mr. Carter's status as a Black man may have played here, it is first important to understand why Black men, generally speaking, are especially cautious around and more likely to comply with the demands of law enforcement. There are two central reasons. First, "[i]t is no secret" that Black Americans are disproportionately likely to be victims of violence at the hands of police officers, particularly during suspicionless investigatory inquiries like the one here. Bloom, *supra* at note 4, at 7 (quoting *Strieff*, 579 U.S. at 254, 136 S. Ct. 2056 (2016) (Sotomayor, J., dissenting)). In recent years, nationally, police officers have threatened or used non-fatal force in roughly three percent of encounters they initiated or which re-

---

[4] For a more thorough discussion as to why considering the defendant's race is consistent with the objective nature of the Fourth Amendment seizure inquiry, *see, e.g.,* Daniel S. Harawa, *Coloring in the Fourth Amendment*, 137 Harv. L. Rev. 1533 (2024); Aliza H. Bloom, *Objective Enough: Race is Relevant to the Reasonable Person in Criminal Procedure*, 19 Stan. J. C.R. & C.L. 1 (2023); Lindsey Webb, *Legal Consciousness as Race Consciousness: Expansion of the Fourth Amendment Seizure Analysis Through Objective Knowledge of Police Impunity*, 48 Seton Hall L. Rev. 403 (2018); Devon W. Carbado, *(E)Racing the Fourth Amendment*, 100 Mich. L. Rev. 946 (2002); Tracey Maclin, "*Black and Blue Encounters"—Some Preliminary Thoughts About Fourth Amendment Seizures: Should Race Matter*, 26 Val. U. L. Rev. 243 (1991).

sulted from a traffic accident. Nazgol Ghandnoosh & Celeste Barry, *One in Five: Disparities in Crime and Policing* 9 (2023), https://www.sentencingproject.org/app/uploads/2023/11/One-in-Five-Disparities-in-Crime-and-Policing.pdf; https://perma.cc/J367-HYVL. During these interactions, Black individuals were over twice as likely to be subject to force or threatened force as White individuals. *Id.* And with regard to fatal force, Black Americans were over twice as likely to be shot and killed by police officers as White Americans. *Id.* Twenty-one percent of Black adults have reported being victims of police violence on account of their race (compared to three percent of white adults) and nearly half have stated that they were at some point fearful for their life around law enforcement (compared to sixteen percent of white adults). Craig Palosky, *Poll: 7 in 10 Black Americans Say They Have Experienced Incidents of Discrimination or Police Mistreatment in their Lifetime, Including Nearly Half Who Felt Their Lives Were in Danger*, KFF (June 18, 2020), https://www.kff.org/racial-equity-and-health-policy/press-release/poll-7-in-10-black-americans-say-they-have-experienced-incidents-of-discrimination-or-police-mistreatment-in-lifetime-including-nearly-half-who-felt-lives-were-in-danger/; https://perma.cc/RR22-LDNJ.

Naturally, this statistical reality has led to the perception among Black Americans, and Black men in particular, that they are unsafe around law enforcement and that they must engage in "particular kinds of performances" around the police to "preempt" and mitigate the risks of "law enforcement discipline." Carbado, *supra* at note 4, at 966. Indeed, the inundation of countless stories of young and unarmed Black men being killed by police for their failure to comply and genera-

tions-worth of experience in dealing with the police within the Black community have led Black parents to give their children "'the talk'—instructing them to never run down the street; always keep [their] hands where they can be seen; [and to never] even think of talking back to . . . stranger[s]—all out of fear of how an officer with a gun will react to them." *Strieff*, 579 U.S. at 254, 136 S. Ct. 2056 (Sotomayor, J., dissenting); *see* Rod K. Brunson, *"Police Don't Like Black People": African-American Young Men's Accumulated Police Experiences*, 6 Crim. & Pub. Pol'y 71, 88 (2007) (finding that "violence at the hands of the police . . . happened enough to convince [Black youth] that it was a real possibility during *any* encounter with police officers"); Rayan Succar et al., *Understanding the Role of Media in the Formation of Public Sentiment Towards the Police*, Commc'ns Psych (2024) (describing the influential role of individual media stories of police brutality on perceptions about the police). Having been raised in this environment, and "being more vulnerable to police violence" than other demographic groups, Black men are more likely to comply with police demands rather than exercise their constitutional right to terminate a suspicionless police encounter. *Dozier*, 220 A.3d at 945.

Second, even setting aside the risk of provoking violence, Black Americans are especially distrustful of law enforcement and are thus less likely to terminate a police encounter due to skepticism that any attempt to exercise their constitutional rights will be respected. From slave patrols during the antebellum era to Black Codes post-Reconstruction to disparate charging and sentencing practices today, the criminal legal system has historically been used as a tool to undermine rather

than uphold the freedom and dignity of Black Americans. *See* Daniel S. Harawa, *Whitewashing the Fourth Amendment*, 111 Geo. L.J. 923, 940 (2023); *see generally* Michelle Alexander, *The New Jim Crow* (2010). Modern-day policing reflects this history with Black communities disproportionately subject to adverse police interactions. *See* Radley Balko, *There's Overwhelming Evidence that the Criminal Justice System is Racist: Here's the Proof*, Wash. Post (June 10, 2020), https://perma.cc/ND2K-SUGV (cataloging studies of racial bias in the criminal justice system, including 46 peer-reviewed studies demonstrating racial bias in policing and profiling over the prior five years). Black Americans are more likely to be subject to suspicionless stops and are more likely to be searched and detained during these stops. *Bloom, supra* at note 4, at 7, 13 (citing U.S. Dep't Justice, *Investigation of the Ferguson Police Department* 4 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson police department report.pdf; https://perma.cc/ZBT9-7BJP (concluding that Black drivers were "more than twice as likely as white drivers to be searched during vehicle stops even after controlling for non-race variables")). Black men in particular also tend to be questioned more accusatorily and aggressively —a product of both historical tension between law enforcement and the Black community and, as social science research suggests, stereotyping of Black men as being dangerous and criminally predisposed. Carbado, *supra* at note 4, at 982; Graham Cronogue, *Race and the Fourth Amendment: Why the Reasonable Person Analysis Should Include Race as a Factor*, 20 Tex. J. C.L & C.R. 61 (2015). That is, whereas a police officer's objective in questioning a White individual will

be to simply "check things out," they will often "need more time with and more information from the" Black individual given their perception that the Black individual is more likely to engage in criminal activity. Carbado, *supra* at note 4, at 982.

It should therefore come as "no surprise" that Black Americans "often perceive their interactions with law enforcement differently than other demographics." *State v. Spears*, 429 S.C. 422, 839 S.E.2d 450, 463 (2020) (Beatty, C.J., dissenting). Eighty-four percent of Black adults have said that in dealing with the police, Black Americans are generally treated less fairly than other demographic groups. Drew DeSilver et al., *10 Things we Know About Race and Policing in the U.S.*, Pew Rsch. Ctr. (June 3, 2020), https://www.pewresearch.org/short-reads/2020/06/03/10-things-we-know-about-race-and-policing-in-the-u-s/; https://perma.cc/RH4E-D3UA. Eighty-seven percent have said that the criminal legal system as a whole treats Black Americans less fairly. *Id.* Such distrust, sown both historically through the use of the criminal legal system to subjugate Black Americans and via biased modern police practices, has produced an objective reality in which Black Americans lack confidence that the police will respect the exercise of their rights. Maclin, *supra* at note 4, at 254. Rather, to avoid suffering physical abuse and criminal consequences during suspicionless police interactions, Black Americans, and Black men in particular, are often left with no other choice but to remain "calm" and "congenial" and comply with the requests of law enforcement. *Id.* at 278.

Applying this understanding as to why Black men are especially apprehensive around police, it is clear that

many of the historical features of blue-on-black interaction that have led to this perception were present in Mr. Carter's encounter. First, Mr. Carter was confronted in a predominantly Black area in a group consisting entirely of Black men by GRU officers who were wearing tactical gear and who were visibly displaying their firearms. This alone was likely sufficient to trigger the elevated fear that Black men experience around law enforcement not only because the officers were carrying openly visible firearms but also because their selective targeting reflected a pervasive understanding that the police target Black men and treat them unfairly. Moreover, the GRU (now the VCIT) has a "reputation for [aggression]." *Mayo*, 315 A.3d at 631; *Robinson*, 76 A.3d at 331-32, 339 (noting GRU's acknowledged "technique" of confronting people on the street, "ask[ing] people if they have a gun," and then "looking for a reaction," including people's "movements" in response to the question (internal quotation marks omitted)); *United States v. Gibson*, 366 F. Supp. 3d 14, 21 (D.D.C. 2018) (describing how the GRU "trawl[s]" certain "neighborhoods asking occupants who fit a certain statistical profile—mostly males in their late teens to early forties —if they possess contraband[ ] [d]espite lacking any semblance of particularized suspicion when the initial contact is made" (quoting *United States v. Gross*, 784 F.3d 784, 789 (D.C. Cir. 2015) (Brown, J., concurring))). It is also known to selectively target Black individuals. *See* Michael G. Tobin, *Metropolitan Police Department Narcotics and Specialized Investigations Division* 5, 20, 26, (2020), https://policecomplaints.dc.gov/sites/default/files/dc/sites/office% 20of% 20police% 20complaints/publication/attachments/National-PoliceFoundationMPDNSID%20Report%20September%202020%20Final.pdf;

https://perma.cc/S29N-PMF7 (reporting that between August 1, 2019 and January 31, 2020, Black individuals were the subject of over 87% of GRU stops, 91% of arrests, and 100% of use-of-force incidents). Given this background, it should not come as a shock that several of the men in Mr. Carter's group immediately capitulated to the police presence, including Mr. Carter, by raising their shirts despite not being asked to. Indeed, whereas any reasonable person would be fearful of failing to cooperate under these circumstances, a Black man would be especially cautious here so as to avoid potential physical retaliation.[5]

Second, compounding the already racially charged and coercive environment in which Mr. Carter's interaction with the police took place, Officer DelBorrell accusatorily and repetitively questioned him regarding whether he possessed a firearm. As explained above, Black men already widely believe that police officers disrespect their rights. We view it as likely that Officer DelBorrell's failure to accept Mr. Carter's initial denial triggered a fear that Officer DelBorrell would not permit Mr. Carter to terminate the encounter without

---

[5] The VCIT and similar police tactical units that engage in large-scale suspicionless investigations are generally distinguishable from those police units that are engaged in what many refer to as community policing activities. Generally speaking, community policing promotes the systematic use of partnerships and problem-solving techniques to proactively address the conditions that give rise to public safety issues. U.S. Dep't Justice, *Community Policing Defined* 1 (2014), https://portal.cops.usdoj.gov/resourcecenter/content.ashx/cops-p157-pub.pdf; https://perma.cc/9GU6-CNH7. Typically, police officers are assigned to particular communities where they get to know and work with community leaders and others to address the immediate conditions that give rise to public safety issues.

first dispelling his suspicions. To avoid prolonging the suspicion, Mr. Carter felt compelled to comply rather than attempt to exercise his constitutional rights.

III. Conclusion

Accordingly, taking into account the coercive nature of the officers' conduct and factoring in the elevated effect that this would have had on an objective and reasonable Black man in Mr. Carter's shoes, we hold that Mr. Carter was seized within the meaning of the Fourth Amendment when Officer DelBorrell requested that he raise his pants. The combination of the impressive show of authority reflected in the officers' initial approach and the accusatory and repetitive nature of Officer DelBorrell's questioning already resembled a scenario in which we held a seizure took place. Compounding the compulsive effect of the police tactics here was that they were used against a man for whom, by virtue of his race and lived experiences, it would have been objectively reasonable to be apprehensive around police officers. Given the facts of this case, we believe that such apprehension would have led an objective and reasonable Black man in Mr. Carter's shoes to feel as though he had to comply with the officers' demands rather than terminating the encounter. For this reason, we are satisfied that Mr. Carter was seized when Officer Delborrell disbelieved his initial response, and further requested that he raise his pants. Because this seizure was not based on reasonable suspicion or probable cause, it was unreasonable and violated the Fourth Amendment. The trial court thus erred in failing to suppress the fruits of the seizure—the firearm and Mr. Carter's later statement.

For the foregoing reasons, we vacate Mr. Carter's convictions and remand for further proceedings.

So ordered.

McLeese, Associate Judge, concurring in the judgment:

The opinion for the court holds that Mr. Carter was unlawfully seized. *Ante* at 1080. I respectfully concur in the judgment.

As the opinion for the court notes, the key facts are undisputed: (1) in public and during the daytime, a group of five officers approached a group of ten men that included Mr. Carter; (2) one of the officers asked Mr. Carter how he was doing; (3) Mr. Carter lifted his shirt to show his waistband; (4) the officer asked if Mr. Carter had "nothing" on him; (5) Mr. Carter responded no and lifted his shirt again; and (6) the officer asked if Mr. Carter "mind[ed] hiking [his] pants for me real quick?" *Ante* at 1068-70.

Describing the case as "close," *ante* at 1071-72, the opinion for the court appears to give dispositive weight to an additional consideration: that Mr. Carter as a Black man would reasonably be "especially apprehensive around police" and "especially distrustful of law enforcement," *ante* at 1078, 1079, and therefore would reasonably have felt obliged to comply with the officer's request to hike up his pants, *ante* at 1080.

In support of the conclusion that Mr. Carter's race is properly considered in determining whether Mr. Carter was seized, the opinion for the court relies on this court's decision in *Dozier v. United States*, 220 A.3d 933 (D.C. 2019). I concurred in the judgment in *Dozier*. *Id.* at 948-51 (McLeese, J., concurring in the judgment). Among other things, I expressed uncertainty as to whether the race of a suspect can permissibly be consid-

ered in assessing whether police conduct constitutes a seizure. *Id.* at 950-51 (citing conflicting authority on issue). The opinion for the court in *Dozier* held, however, that Mr. Dozier's race should be so considered. *Id.* at 943-45. That holding is binding on me. *E.g.*, *M.A.P. v. Ryan*, 285 A.2d 310, 312 (D.C. 1971).

Taking as a given that Mr. Carter's race may properly be considered, I agree with the conclusion of the opinion for the court that, although this is a close case, Mr. Carter was seized. *Ante* at 1071-72, 1080. I therefore respectfully concur in the judgment.

APPENDIX B

SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Criminal Action No. 2020 CF2 7280

UNITED STATES OF AMERICA, PLAINTIFF

v.

DONTE CARTER, DEFENDANT

Washington, DC
Feb. 10, 2023

The above-entitled action came on for a jury trial before the Honorable LYNN LEIBOVITZ, Associate Judge, in Courtroom Number 213, commencing at approximately 10:12 a.m.

* * * * *

[3]

* * * * *

So my findings of fact are as follows: On September 23rd—first of all, the defendant has filed a motion to suppress the gun recovered from his shorts on the date of his arrest and a statement made subsequent as the fruits. He has withdrawn any claim or never did make a claim that the statement itself was a Miranda or involuntariness violation.

And at the hearing, I did not take evidence on the giving of the statement. The government called two

witnesses at the hearing: Allorie Sanders and Wilfredo Guzman. The [4] defendant did not call any witnesses.

I find as follows: On September 23rd, 2020, at some time between 3:00 and 4:00 p.m. on a bright, sunny afternoon, five officers of the Metropolitan Police Department's Gun Recovery Unit drove into the 100 block of Kennedy Street Northwest. Their assignment was to conduct firearm interdiction, because in that neighborhood there had been an uptick in shootings and sounds of gunfire.

Officers arrived in two unmarked cars without lights or sirens. The officers themselves were wearing plainclothes over which they had on tactical vests with police written on the back and cuffs, firearms and other police equipment visible on the vests. It was clear that they were police to onlookers, though they were not in full uniform.

Investigators Allorie Sanders and Wilfredo Guzman each had body-worn cameras at the time. Each had been on the force at the time. And they have testified they have been on more or less for seven years. Investigator Guzman testified that he had had training in the appearance of persons possessing firearms.

The 100 block of Kennedy Street at that time had two opposing lanes of traffic and an additional two lanes for parked cars. On one side of the street was a group of persons divided into a group of three, sitting and standing [5] near some planters and a group of approximately 7 more who were about 15 feet down the sidewalk. I should say that all of this is depicted on the body-worn camera footage admitted in the hearing, which was body-worn camera footage from Officers Guzman, Sanders and also from a third, Officer DelBorrell, which de-

picted in great detail all of the events and the scene that I am describing.

Of the group of seven who were 15 feet down the sidewalk, at least two of the group were standing on the sidewalk itself such that anyone walking down the block would be impeded. Two additional were on the bench in the same place on the sidewalk. The defendant was first in front of and then leaning on a parked car on the passenger side of that car, on the same side as the group on the sidewalk. Another individual was on the driver's side of that same parked car and another individual was in front of the parked car.

Officers double parked their cars in the travel lane on the opposite side of the street from the group, leaving two full lanes in between which was approximately 30 feet from the group on the sidewalk. They did so having determined that members of the group were obstructing the sidewalk unlawfully. DC Code 22-1307 does make it a criminal offense for persons to crowd or obstruct the sidewalk. There was otherwise no apparent criminal [6] activity.

Officer Sanders—I am calling them officers, though they may have been investigators at the time. Maybe they are investigators now, so I should call them investigators. Investigator Sanders initially approached the group of three by the planters. Officer Guzman backed her and approached with her. Officer Sanders informed the three individuals in a pretty chatty tone that the officers were there checking for firearms. And one person in the group actually lifted his shirt and then opened a small pack across his chest showing he had no contraband without having been asked to do so.

Officer Kelemen approached the group of seven, which was 15 feet down the sidewalk from the group of three and specifically approached a person in that group, the one who was on the driver's side of the parked car and stayed in that location throughout almost all of the event I am describing. Officer DelBorrell got out of the car and went around the front of the car—no—the back of the car that the defendant was leaning on. No—the back of the car that the defendant was leaning on. He circled from the traffic lane around to the sidewalk. And then wound up on the passenger, front window side of that car. I lost track of where the third officer was. I never saw him on the body-worn camera. I don't believe he was anywhere in [7] relation to the defendant or the group of seven at any time in the body-worn camera. You all can correct me if I am wrong, but I didn't see him there.

At approximately 3:00 p.m. on the time stamps, Officer DelBorrell arrived at the front passenger window of the car that the defendant was leaning on. The defendant was leaning on the front right hood of the car. And Officer DelBorrell stopped, pulled his flashlight and looked into the passenger window. As he did so, he was about an arm's length from defendant at this point. The audio went on on the body-worn camera at this point, but I do find that no words were said other than what I am about to report.

Officer DelBorrell looked at the defendant as he is showing his flashlight into the car and says, "How are you doing, Man? The defendant says something along the lines of, how are you doing or what's up? And looks away unconcerned. There is another man standing on

a pole about an arm's length away. He lifts his shirt without prompting.

Officer DelBorrell says, "Hey, Champ, you not got nothing on you?" The defendant lifts his shirt, exposing about 2 inches of belly, some of the bands of his compression shorts and the top of his sweats and says, "No." And then puts his shirt back down.

As this is happening, Officer Guzman is approaching from 15 feet away where he has been with the 3 [8] by the planters and has seen the defendant lift his shirt the first time. And he has seen as he is walking closer what he described as a bulge in the defendant's front groin area from about 6 to 10 feet away. At this point, he could not say whether the bulge was a phone or a gun or anything else. As he continued to approach the defendant and DelBorrell, he pulled his flashlight to look further at the defendant who was focused at the time on interacting with Officer DelBorrell.

No other officer was standing near the defendant at that time. And at least two civilians who he had been standing with in the group of seven were within arm's length of the defendant. They actually were blocking Officer Guzman's approach to the defendant and Officer Guzman had to walk around them. The two others who were on the bench originally were still there about 5 feet away.

I would note though, I don't find much significance to this, that Officer Guzman's attention was initially drawn to the defendant when he first pulled up. He testified that the defendant was directly in front of the parked car at the time the officers pulled up and that he shifted to the sidewalk side where he was later seen on body-worn camera sitting on the right portion of the hood.

Officer Guzman noted it, because he was the only person who moved. And while I credit that statement, there wasn't that [9] much to glean from the fact that the defendant moved when the police arrived, other than that it caught Guzman's attention.

Almost immediately after the defendant lifted his shirt the first time, Officer DelBorrell said to him, "Do you mind hiking your pants for me real quick?" The defendant stood. And he had been sitting. It is correct that he stood. And in a single quick motion, hiked his pants by holding them at the waistband with two hands. And then lifted his shirt and put it back down. Officer DelBorrell said, "Just the pants, just the pants."

As of this point, Officer Guzman had been observing the interaction and had now reached a point closer to the defendant approximately 3 to 5 feet away. When the defendant lifted his shirt this second time and hiked his pants, I credit Officer Guzman's testimony that he then could see the bulge was an L-shaped item in the shape of a gun with the barrel pointing down and the handle across the defendant's front pelvis area on the right of his groin. I credit this point for a number of reasons including that the gun was later removed from that location on body-worn camera shortly after the pat down with no evidence that it had ever been moved and that it was a fat, large 40-caliber gun with a large butt that would have taken up a large space on the defendant's trim frame, that despite three pairs of [10] compression shorts, the pants over the shorts couldn't have fully concealed such a huge gun. And because it points in the body-worn camera, I can see with my own eyes the defendant's cell phone in his right pocket, which is closer to his hip and which is distinguishable from the location

of the gun. And though the body-worn camera is not detailed enough to see the bulge as the officer saw it, one can nevertheless see that the defendant's sweats do not lie flat on his right thigh, but appear to have something inside at that location. And it is below the location of the phone. There is corroboration of the timing of Guzman's observation of the L-shaped bulge in that he reacted pulling his flashlight, putting his hand on his hip to signal that he had seen the gun and intended to do a pat down and that he then looked at and pointed in a focused way at the defendant's crotch.

At the time the defendant lifted his shirt and hiked his pants, Officer Guzman did put his right hip area on body-worn camera. He testified that he was indicating without words that he intended to pat the defendant down. He also had pulled his flashlight before that to get a closer look at the bulge. When he got closer to the defendant, within arm's length, Officer Guzman then said, "Stand up for me one more time." The defendant stood. Guzman was looking at his crotch, in the location where he [11] said he had seen the L-shaped bulge.

The government—I'm sorry—Officer Guzman said, "Right there, brother, right there," pointing to the defendant's right groin area. The defendant said, "This is my phone," pulling a phone from his right pocket. Officer DelBorrell said, "What we are going to do—I am going to pat you down." At this time for the first time in the encounter, the officers touched the defendant. Officer Guzman held the defendant's left forearm or gripped it, I guess. And Officer DelBorrell took his right hand. Officer Guzman patted the defendant's crotch with the flat of his hand, felt the metal of the gun, gave a code indicating to other officers that he had de-

tected a gun, which was 1-800 and then there was a brief struggle.

Officer Sanders very shortly thereafter is shown on video sticking her hands down the defendant's front and removing from between his multiple pairs of compression shorts a fat, 40-caliber gun on the right side, barrel facing down. And the butt, handle facing his outer hip.

From the time of Officer DelBorrell's approach to the defendant with the flashlight in hand and looking in the window of the car—in other words, before any words are said to the uttering of 1-800, the code for discovering of the gun, the total time was 25 seconds. I find and credit that Officer Guzman observed the defendant at the time he [12] hiked his pants in response to DelBorrell's request and that he observed at that time the L-shaped bulge, that he at that time reasonably believed was a gun. I find that this observation gave rise to reasonable suspicion justifying the subsequent pat down, though that didn't happen immediately. And I find it further justified the recovery of the firearm from inside the defendant's shorts.

The central question I am answering here is whether the request of the defendant to hike his pants and the defendant's response to it by hiking his pants and lifting his sweatshirt a second time amounted to a seizure or was consensual. Because that was the act that provided to Guzman a view that—from which he developed reasonable suspicion.

I find that this act was consensual and the defendant was not seized within the meaning of the Fourth Amendment at that time. Because that was the act in which Guzman made his observation giving rise to reasonable suspicion. And because the defendant was not seized

at that time, I find that the seizure of the gun was lawful, whether or not subsequent statements by Officer Guzman could have been viewed as orders.

I credit Officers Guzman and Sander's testimony. Unlike many other cases, they are almost entirely corroborated by body-worn camera footage from the three [13] officers admitted at the hearing. The words uttered by the defendant and the officers are fully captured on tape. As to the facts not covered on tape, Guzman's observations and the timing of his development of reasonable suspicion, I find that these are corroborated by body-worn camera footage in ways I have already described.

Officer Guzman also acknowledged before this point that he had seen a bulge that could be anything, including a cell phone. He was not embellishing, I find, and was not testifying to facts that were more damning than those which existed. I credit under all of the circumstances and taking the body-worn camera footage into account that he made additional observations of the defendant as he got closer and the defendant hiked his pants that the bulge was what he reasonably believed was a gun.

The defendant argues that he was seized prior to the development of reasonable suspicion and specifically argues that the facts of this case are like the facts giving rise to reversal in Golden versus the United States, 248 A.3d 925, 2021. What this means is that he is saying that the interaction between DelBorrell and the defendant up to the moment and including the defendant's hike of his pants, were not a consensual encounter, but that a seizure did evolve. In Golden, a man walked alone at 9:41 p.m. in a dark block. Four police officers pulled up

in two cars [14] effectively blocking him in, one alongside the defendant, one perpendicular to the other, across the defendant's path. The defendant in that case froze in response. Other persons in the area dispersed. An officer asked Golden without interim discussion in a conversational tone whether he had any weapons on him. Golden said, "No." The officers said, "Can you just show me your waistband?" The defendant complied by raising his shirt from a tucked position under a sweatshirt he had tied around his waist. I would add that the officer is in his car at this time with the window rolled down.

The officer said, "I can't see your waistband because of the sweatshirt." The defendant then removed the sweatshirt and displayed it. The officer then got out of the car, approached the defendant and repeated that he couldn't see the waistband. Mr. Golden then was frisked and a gun was recovered. In Golden, the officer testified that he saw a bulge before the frisk, but never developed the belief that it was a gun, instead relying on what he called evasiveness by Golden and an apparent effort to shield the bulge with his sweatshirt to justify the pat down that ultimately yielded the gun.

First of all, here, reasonable suspicion was developed well before the pat down. Here, in broad daylight in the afternoon, cars were parked across two lanes, 30 feet [15] away from the defendant, in no way blocking him or others in. It was—there were at least seven persons in the defendant's area, six directly around him and then there were three more about 15 feet away. There were only five officers total. And as I said, I didn't see the fifth officer area anywhere in the body-worn camera. So the group of four officers interacting with all 10 of

these individuals were well outnumbered. Only two officers directly interacted with the defendant. And at that time, there were at least two persons within arm's length of them. And there were also two more 5 feet away on a bench.

Investigator Guzman did not even approach the defendant until after he initially raised his sweatshirt and as DelBorrell was asking him to hike his pants. DelBorrell's first acts were to look in the car with a flashlight, not directly at the defendant. In Golden the police started the encounter by asking the defendant if he had a gun. In this case, the officer first said, "How are you doing?" a greeting. And the defendant responded and then turned away from him, nonplussed. He did not freeze or appear surprised or nervous as in Golden. In fact, nobody in the group acted like they were concerned. Officer DelBorrell's then said to the defendant, "Hey, Champ, you not got nothing on you?" Before the defendant responded, the man closest to the defendant [16] leaning on a pole lifted his shirt and exposed his waistband without comment. The defendant lifted his sweatshirt exposing his stomach and the top of his sweats and some exposed bands of his compression shorts and said, "No." This was not at the request of the officer. This was a voluntary, consensual act.

At that time, he was wearing sweatpants with three pairs of compression shorts under them. The bands of those compression shorts showed above the sweats at the time that he was sitting on the car. Officer DelBorrell then said, "Do you mind hiking your pants up for me real quick?" This was—the defendant responded by standing and pulling up his pants, but also lifted his sweatshirt again, something DelBorrell had not asked

him to do in contrast with Golden. DelBorrell said, "Just the pants, just the pants." DelBorrell thus was not asking the defendant to expose any part of his body, was just asking him to hike his pants.

In Golden, the officer got out of his car after the initial interaction in which Golden did what he had been asked and then upped the level of confrontation and coercion by approaching him in person and asking further questions.

In this case, Guzman who had approached from 15 feet away, shielded and blocked by other civilians standing near the defendant had by this time pulled out his flashlight, seen the L-shape of the bulge and believed it [17] was a gun amounting to reasonable suspicion warranting a lawful pat down. In Golden the officer never developed reasonable suspicion until he did the pat down. And was basing his articulation of suspicion on evasiveness, not a belief that he saw a gun.

The Court in Golden concluded that pat down was conducted after the defendant had been unlawfully seized. Here the pat down occurred later. Reasonable suspicion was developed at a time when the encounter had not evolved into a seizure.

I would add that Guzman said additional things which could have been viewed as compulsory or orders, in other words, told the defendant to stand up again, that this occurred after reasonable suspicion was developed.

This case is sort of like a case called United States—Towles versus the United States, T-O-W-L-E-S, 115 A.3d 1222 but with fewer indicia of compulsion and seizure. In that case, a defendant was approached by four Gun Recovery Unit officers in one car in the evening

hours. He walked with one other person. The car actually followed him as he was walking. One officer got out of the car. And at that time, the defendant's companion peeled off. The officer asked in a normal tone of voice whether he had a gun on his right side. Towles moved his hand under his coat and gestured to a cell phone clipped there and said, it is just [18] a cell phone. At this point, the officer saw a heavy bulge in Towles' pocket that he believed to be a gun. The officer got closer to the defendant and even ordered him to look at him and then asked in a conversational tone, "Can I pat you down to make sure you don't have a gun?" Towles said, "Yeah" and put his head down. And then as the officer began patting him down said, "I got a gun."

The trial Court held the search was consented, and the Court affirmed, finding that the questioning and other circumstances did not cause the encounter to evolve into a seizure. Because there was no repeated haranguing and no direct order to do anything, such as remove hands from his pockets before asking for consent to the pat down. In addition, there was a question in that case as to whether the detention was unlawfully prolonged by the police. In their—in their request to pat him down. And the Court said no to that.

Here, the interaction was far less prolonged than in Towles. There was a greeting, a question whether he had anything on him and a request to hike up his pants. Defendant's compliance with that came in far less coercive or prolonged circumstances than in Towles and far less coercive or prolonged circumstances than the frisk in Golden.

In Golden, the Court distinguished the [19] circumstances in the Golden case from those in the Towles case

and another case, Kelly at 580 A.2d 1282. In other words, this case was worse than those cases—Golden was worse than those cases. Kelly was an interdiction case from 1990 in which an officer approached a person who had just gotten off a bus at Union Station, asked him if he was carrying any drugs in a shopping bag that he was carrying. Kelly said, "No." The officer asked if he would have a problem if he searched the shopping bag. And Kelly said, "No" opening the bag himself to expose its contents, from which the officer removed a brown paper bag containing drugs without further permission.

This search was held by the Court of Appeals to be conducted during a consensual encounter from which Kelly was courteously asked a few question about his travel and was carrying drugs and was free to depart at any time. The Court cited the Mendenhall factors and found no threatening presence of several officers, no display of weapons, no physical touching or use of language or tone of voice indicating that compliance with the officer's request might be compelled.

In Brown, 983 A.2d 1023, an officer approached a woman and asked if she had drugs or weapons. She said "No." The officer asked the same question again. Ms. Brown then took a vial of crack from her purse and gave it to the [20] officer. The Court of Appeals said this was not the product of a seizure. The officer did not assume an aggressive tone or stance, though she repeated her question clearly not accepting the first answer. In Jackson, 805 A.2d 979, though the Court of Appeals found ultimately that the pat down was unlawful, assume for purposes of its analysis that at first, the question did the defendant have any weapons, and next a request that he raise his arms coupled with the defend-

ant's compliance, were not yet a seizure and that it was after that that the defendant was seized after more compulsory interaction took place.

Here I find that defendant's encounter with the police was far less coercive than in Towles, was more like Kelly and Brown, did not reach the level of coercion or compulsion found in Golden. The Court stated in Golden, that as in cases like Kelly and Towles, "Brief inquiry in a non-hectoring conversational tone or casual manner unaccompanied by intimidating or coercive police conduct likely would not rise to the level of a seizure. Further, the Court stated, in contrast we have recognized that repeated or insistent and implicitly accusatory questions or requests designed to ferret out whether someone stopped on the street is in possession of weapons or contraband, particularly in conjunction with other intimidating or coercive circumstances can create a powerful impression to [21] any reasonable person that the police will not allow the suspect to terminate the inquiry and depart before satisfying the officer's concerns."

I find that this was not the latter case. I emphasize that I do not rely on the apparent familiarity with encounters like those of persons approached by police on Kennedy Street that day in this finding. I take seriously the holdings from the Court of Appeals that in certain neighborhoods among certain demographics that are highly policed that the behavior of police can convey to a reasonable, innocent person that they are compelled to allay officers' suspicion by acceding to their wishes, even when they are expressed in conversational tones. But Mendenhall has not been eradicated from our jurisprudence and the consent doctrine remains against the

backdrop of the holdings in these decisions. Here, I find that the circumstances of the defendant's encounters with the police, even in this neighborhood, even among those often subjected to police inquiry and presence, did not amount to a show of authority by police sufficient to effect a seizure when the defendant was asked to hike his pants and responded by lifting his shirt and pulling up his pants.

I found the encounter that gave rise to the development of reasonable suspicion was not aggressive, was not coercive, was not intimidating and was not a show of [22] authority that would lead a reasonable, innocent person to believe that he must comply or satisfy the officer's demands. The defendant's interaction with police was a consensual encounter through the point where he got up and hiked his pants in response to DelBorrell's request. He was not seized.

The encounter very well could have evolved into a seizure, if Officer Guzman had not been in a position to see the bulge in the defendant's groin upon his response to the request to hike his pants. If the next words from Guzman, "Stand up for me one more time," a more directed statement and one that would more reasonably be perceived as a command, following the other statements rather than a request had been uttered without his having seen the L-shaped bulge and developing the belief that it was a gun, could likely—likely would have evolved into a seizure upon the defendant's compliance with that second directive from Guzman.

Here, however, the encounter was brief before Guzman developed reasonable suspicion, questions were conversational and casual in both tone and wording. The defendant was not subjected to repeated accusatory

questions, was not surrounded or hemmed in by the police, indeed was more surrounded by those he had been hanging around with than by the police, had shown he was neither [23] surprised, nor fearful, nor nervous. It was broad daylight on a street busy with civilian activity. Officers had not touched him, had not drawn weapons or acted in an intimidating fashion. I would add that when DelBorrell asked the defendant to hike his pants, he was not asking the defendant to expose his body, which was a big point in Golden. He lifted his shirt, but that is not what he was asked to do. And the officer said, "Just the pants, just the pants." In that situation arguably, the officer was asking him to cover up more, not expose more.

I also have considered whether if the defendant fled immediately after hiking his pants in response to the officer's request, the flight would be provoked by illegality. And I find it would not have. There was no physical restraint or effort to restrain, no repeated accusatory questions or other police behavior that would have been found to have provoked flight at that moment.

Would a reasonable innocent person have felt free to leave, before the pants hiking or as of the time of the pants hiking? I find, yes. Here, unlike in Towles, the defendant didn't testify, so there is no record of his actual feelings. But in the circumstances and on the current record, it would be speculative to conclude that officers would have prevented the defendant from leaving or terminating the encounter or declining to hike his pants.

[24]

People comply with police requests for many reasons including but not limited to feelings of compulsion, as

our case law has amply recognized. People also comply because they choose to. Here, no party asked the witnesses what would have happened if the defendant had elected to terminate the encounter. And while we can guess cynically that the Gun Recovery Unit would not have let him go, they are savvy officers who seemed to know the law. They are talking conversationally out there rather than aggressively for a reason. And perhaps body-worn camera and the exclusionary rule sometimes have their desired effect.

In short, I do find that a reasonable, innocent person in the circumstances would have felt free to leave as of the time of the hiking of the pants. I will add that one of the defendant's challenges to Officer Guzman's credibility is his assertion that he saw an L-shaped object in defendant's right, front groin area. It took me a minute to understand that the argument here was if the gun was in the position it clearly was in, it would not be an L, it would be a 7. And the argument is that the gun was upside down, therefore not an L. I find that while one could be technical in the character one chooses, that what Officer Guzman testified to and meant was a gun with the barrel facing down. This gun was an L-shaped semiautomatic. It would be almost impossible for that gun to have been in the [25] pants with the butt of the gun at the bottom because of how heavy it would have been. And there is no suggestion that Officer Guzman was saying that is what he saw. The gun was big. It was L shaped. And it was, yes, right in the right front of the defendant's groin.

For all of these reasons, I deny the motion to suppress and therefore as to the statements, I also deny.

* * * * *