

The Supreme Court Must Rein in the District of Columbia Court of Appeals

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KEY TAKEAWAYS

The District of Columbia Court of Appeals' departure from settled constitutional principles has seriously affected public safety throughout the District.

The Supreme Court should therefore exercise its certiorari jurisdiction when the DCCA departs from settled Fourth or Sixth Amendment doctrine.

Such review would ensure that the DCCA performs that role within the constitutional hierarchy. The rule of law demands no less.

Introduction

The Supreme Court of the United States serves as the ultimate guardian of constitutional rights and the uniformity of federal law. Yet its oversight of criminal cases originating from D.C.'s highest court, the District of Columbia Court of Appeals (DCCA), is alarmingly rare.¹

Earlier this year, in a terse but consequential six-page, 7-to-2 *per curiam* decision, the Supreme Court reversed the D.C. Court of Appeals for improperly dissecting the facts in isolation rather than assessing the totality of the circumstances when determining whether an officer had reasonable articulable suspicion under the Fourth Amendment to seize a criminal defendant.

This *Legal Memorandum* argues that the Supreme Court should grant review of more criminal law cases

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from the DCCA, particularly because of the DCCA's repeated failure or unwillingness to follow Supreme Court mandates. Without robust Supreme Court engagement, the unique structure of the District of Columbia—a federal enclave with its own criminal justice system—risks perpetuating a lack of accountability and divergence from constitutional standards that could result in higher crime rates.

Prosecutions and Appeals in the District of Columbia

Unlike any other jurisdiction in the United States, most local felony criminal prosecutions in the District of Columbia Superior Court are handled by the United States Attorney's Office for the District of Columbia (USAODC) instead of by the local city attorney, the District of Columbia Office of Attorney General.² Appeals from the Superior Court are heard by the DCCA, the District's highest local court.³ The Supreme Court's review of DCCA decisions is discretionary and exceedingly rare, leaving DCCA decisions largely unchecked by the nation's highest court.

In fact, since 1970, when the DCCA was created by statute, the United States Supreme Court has taken only nine cases from the DCCA, eight of which were criminal cases, but only one involved the Fourth Amendment,⁴ and none involved the issue of constructive possession of a weapon or drugs or the extent of the Sixth Amendment right to a jury trial. It is in these areas of criminal law where the DCCA has lost its way.

This prosecutorial arrangement, coupled with the infrequency of Supreme Court review, places an outsized burden on the DCCA to adhere faithfully to Supreme Court precedent. However, the absence of regular oversight has fostered a system in which deviations from Supreme Court mandates occur routinely. The result: fewer successful prosecutions and higher crime rates.

Search and Seizure Law. The Fourth Amendment's Searches and Seizures Clause prohibits the government from conducting unreasonable searches and seizures. The operative language is: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated."

The threshold question under the Fourth Amendment is whether a government search or seizure has occurred.⁵ A person's property is "seized" when the government meaningfully interferes with a person's possessory interest in his property.⁶ This happens when the government takes a suspect's property from him, forces a person out of his or her home, or takes a package or letter out of the course of delivery.⁷ A person is "seized" under

the Fourth Amendment when the government terminates or restrains his freedom of movement through means intentionally applied.⁸ That happens when a government official places a suspect under arrest.⁹ Likewise, a seizure happens when the government temporarily detains a person in circumstances in which a reasonable person would not feel free to terminate the encounter and leave.¹⁰

As the Supreme Court recently said in a case overturning a decision by the DCCA, “[w]hen an officer makes a ‘brief investigatory sto[p] of persons or vehicles that fall[s] short of [a] traditional arrest,’ the Fourth Amendment ‘is satisfied if the officer’s action is supported by reasonable articulable suspicion to believe that criminal activity “‘may be afoot.”’¹¹

In assessing whether an officer has reasonable articulable suspicion, a reviewing court must “‘look at the totality of the circumstances’ of each case,” an analysis that precludes the “evaluation and rejection of...factors in isolation from each other.”¹² Reasonable articulable suspicion “‘depends on the factual and practical considerations of everyday life on which *reasonable and prudent men*, not legal technicians, act.”¹³ The Fourth Amendment of the Constitution “requires...that a court ‘slosh [its] way through’ a ‘fact-bound morass.’”¹⁴ Although “[t]here may be no ‘easy-to-apply legal test’ or ‘on/off switch’ in this context...one thing is clear: The ‘totality of the circumstances’ requires courts to consider ‘the whole picture.’”¹⁵

The Law of Unlawful Possession. Before explaining how the DCCA has deviated from Supreme Court caselaw, it is helpful to get back to basic black-letter law with respect to unlawful possession of a substance or thing (usually a gun in D.C.).

There are two types of possession under the law: actual and constructive. A person who knowingly has direct physical control over a thing at a given time is then in actual possession of it. A person who, although not in actual possession, knowingly has both the power and the intention at a given time to exercise dominion or control over a thing, either directly or through another person or persons, is then in constructive possession of it. The law also recognizes that possession may be sole or joint.¹⁶

In assessing whether someone is in actual or constructive possession of a thing at any given time, courts should use common sense, taking into consideration the surrounding circumstances. When it comes to possession cases, however, the DCCA artfully avoids applying common sense and ignores the surrounding circumstances that accompany the gritty reality of inner-city life.

Troubling DCCA Decisions

Every single day in our nation's capital, law enforcement officers detain individuals whom they believe, based on reasonable articulable suspicion, have committed a crime. In many instances, individuals are caught red-handed while they are committing crimes: carrying a pistol without a license, illegal drug dealing, driving a stolen vehicle, or myriad other crimes.

Well-trained officers know, based on their training and experience, what to look for when patrolling the streets of D.C. They are taught, first in the academy and later during routine continuing professional education, what a legal concept like “reasonable articulable suspicion” requires and how to satisfy that standard when temporarily detaining individuals. Judgment, maturity, and experience guide officers as they work to keep the crime-ridden neighborhoods and streets of Washington safe.

In recent years, the DCCA has handed down opinions that deviate from Supreme Court precedent and directly impact the ability of officers to make arrests and prosecutors to file charges in gun and drug cases. The effect has been devastating, inuring to the benefit of criminals, and has caused drug and gun crimes to continue to proliferate in the city.

District of Columbia v. R.W. In a pithy six-page, 7-to-2 *per curiam* decision earlier this year, the Supreme Court overturned the DCCA in a criminal case where the issue was whether a law enforcement officer lacked reasonable articulable suspicion sufficient to justify a seizure of the defendant. In reversing the DCCA, the Court found that the DCCA “departed” from the principles required of appellate courts to look at the totality of the circumstances and abstain from an “‘evaluation and rejection’ of ‘factors in isolation from each other.’”¹⁷

The Supreme Court held that Officer Clifford Vanterpool's brief investigatory stop of R.W. comported with the Fourth Amendment because the totality of the circumstances supplied ample reasonable suspicion that criminal activity was afoot. Responding at 2:00 a.m. to a report of a suspicious vehicle at a specific address, Vanterpool observed two occupants fleeing unprovoked as his marked cruiser entered the lot, leaving a car door open while the driver immediately attempted to back away with the rear door still ajar. Rather than assess those facts in isolation and dismiss each as individually innocuous, as the District of Columbia Court of Appeals had done, the Constitution required the court to consider their cumulative weight through the practical lens of a trained police officer. Taken together, the late hour, targeted dispatch, sudden flight, hurried departure, and highly

unusual circumstances readily justified a brief stop to investigate; accordingly, the Court reversed the DCCA's judgment.

It is hard to overstate the significance of this decision on several levels.

First, the decision was a *per curiam* decision. There was no oral argument by counsel for either side, and there were only two amicus briefs, each urging the Court to grant certiorari review. The first brief was from the National Fraternal Order of Police (FOP). The second was filed by the State of Oklahoma on behalf of 27 additional states. Their amici are illustrative of the problem with the DCCA's approach to the Fourth Amendment and, in particular, reasonable articulable suspicion.

The FOP's amicus brief states in part that "[t]he decision below imposes an unworkable and dangerous constraint on law enforcement by forbidding officers to consider the very contextual cues that their training, experience, and safety demand they assess."¹⁸ The brief notes that the DCCA's approach requires officers to "disregard [such] critical information...as dispatch reports or the flight of companions," forcing officers "into an artificial, piecemeal analysis that contradicts both *Terry v. Ohio* and decades of precedent endorsing the 'totality-of-the-circumstances' approach."¹⁹ The crux of their argument hits hard: "Real-world policing does not occur in a vacuum. Officers rely on their training and judgment to synthesize multiple sources of information—often within seconds and under life-threatening pressure, in tense and rapidly evolving circumstances where hesitation can have grave consequences."²⁰

Similarly, the amicus brief filed by the State of Oklahoma and 27 other states argued that the DCCA's, and a minority of jurisdictions "isolationist approach is contrary" to the Supreme Court's precedents and "misguided for several reasons beyond that, including practicality and common sense."²¹ They advanced three reasons for this assertion.

- The DCCA's isolationist approach "hamstrings law enforcement in deciding whether to initiate a *Terry* stop, forcing them to weigh each circumstance alone to determine whether it is capable of innocent explanation and preventing them from considering certain circumstances at all." As a result, "officers initiate fewer *Terry* stops and that, in turn, leads to reduced rates of preventing and detecting crime. As such, the isolationist approach threatens public safety."²²
- The DCCA's approach is "divorced from how humans—here, law enforcement officers—make decisions in dangerous, time-pressured situations." Humans do not "methodically parse available information

to determine whether each piece of the puzzle on its own is worthy of consideration, nor do they necessarily scrutinize each factor for potential innocent explanations.”²³

- The District of Columbia’s “intra-jurisdictional split...on this issue is not unique. Similar conflicts arise whenever law enforcement must operate under a state’s totality-of-the-circumstances framework in criminal cases yet face a federal circuit court’s isolationist framework for purposes of 42 U.S.C. § 1983 liability—and vice versa.”²⁴

The facts of the case are illuminating. Early on a winter morning, Officer Vanterpool received a radio dispatch call that directed him to check out a suspicious vehicle in a high-crime area. He drove his marked patrol car to the address and reached it at 2:00 a.m. As he turned his vehicle into the parking lot, he saw two people immediately flee from the back door of a parked car, leaving the door open as they fled. They did so even though nothing had happened except for the arrival of the patrol car.

The driver of the vehicle (later identified as the defendant), began to back his car out of the parking space with the rear door still open. Officer Vanterpool parked his car directly behind the defendant’s car, left his vehicle, ordered the defendant out of the car, ordered him to put his hands up, and drew his service weapon.

When the officer reached the driver’s door, he saw the defendant behind the wheel. In response to a series of questions, R.W. told the officer that the car was “just sitting there,” that it was a “smoking car,” and that he was in the car to smoke. R.W. said he didn’t have identification and that he was only 15 years old. Vanterpool asked R.W. to exit the vehicle. He examined the inside of the car and saw that the ignition had been “punched,” or damaged in a manner consistent with car theft. Vanterpool and other officers, who had arrived, ran the car’s license plate number and discovered that the car had been reported stolen. The District of Columbia charged R.W. as a juvenile with unauthorized use of a motor vehicle, felony receipt of stolen property, unlawful entry of a motor vehicle, and operating a vehicle in D.C. without a permit.

Before trial, R.W.’s defense moved to suppress all evidence obtained after Officer Vanterpool told him to put his hands up, contending that the officer seized him without reasonable articulable suspicion in violation of the Fourth Amendment.

The trial court denied the motion, relying on four relevant facts: Officer Vanterpool had received a call regarding a suspicious vehicle at a specified

address; the officer saw two persons fleeing from a vehicle; it was almost 2:00 a.m.; and as Officer Vanterpool approached the car, the defendant began to back out of the parking space while the rear driver's side door was still open.

The trial court found R.W. delinquent on all counts and gave him one year's probation with conditions. R.W. appealed.

The DCCA reversed, holding that Officer Vanterpool did not have reasonable articulable suspicion sufficient to justify the seizure of R.W. The court acknowledged that their review of a trial court's denial of a motion to suppress was *de novo* and that they had to "defer to the trial court's findings of fact 'unless they are clearly erroneous.'"²⁵ Additionally, the court noted that it must review the facts of a denial of a motion to suppress in the light most favorable to the prevailing party.

After getting the law right, the DCCA twisted the application of the relevant facts to the law. The DCCA noted that the trial court "arguably assigned" the most weight to the radio dispatch received by Officer Vanterpool and then inexplicably held that the trial court "erred in considering the radio dispatch" and that it should "have played no role in the trial court's analysis."²⁶ The DCCA wrote that they were bound to "discount the dispatch" for two reasons.

First, they were bound by a previous holding of their court that required the officer to be able to "evaluate the nature and reliability" of the information contained within the radio dispatch.²⁷ The DCCA, citing itself, wrote that "an officer may rely on a police lookout only to the extent that the lookout itself is based on reasonable suspicion."²⁸

Second, the DCCA noted that "even if *T.L.L.* did not control...the content of the dispatch...was so broad as to be useless."²⁹ The government below argued that "it was reasonable to infer that the suspicious vehicle reported through the radio dispatch was the vehicle that R.W. was operating"³⁰ and that "an imperfect description, coupled with close spatial and temporal proximity between the reported crime and seizure, can justify a *Terry* stop."³¹

The DCCA found the government's arguments unpersuasive, writing that *T.L.L.* held that a "dispatch is irrelevant to the Fourth Amendment analysis absent information allowing the trial court to evaluate its basis and reliability."³² Furthermore, the DCCA held that this case is factually distinguishable from those relied upon by the government, and the trial court "erred by weighing the radio dispatch when assessing whether the seizure was supported by reasonable suspicion."³³

After evaluating that factor in isolation—a constitutional no-no—the DCCA isolated and explored the issue of the two individuals' flight from

R.W.'s back seat, "the next most important consideration relied on by the trial court."³⁴ The DCCA wrote that "the trial court suggested that the flight of these individuals cast suspicion onto R.W."³⁵ and noted that "the Courts in the District of Columbia have rejected the articulable suspicion arguments based upon guilt by association."³⁶

Noting that R.W. and the government agreed that "'flight of one person from authority may imply the guilt of another' in limited circumstances—specifically when 'circumstances indicate that the two were engaged in a joint venture,'"³⁷ the DCCA dismissed the government's suggestion that it was "highly unlikely that the vehicle's driver had no association with his passengers."³⁸

After suggesting that the government's arguments conflict with D.C. Court of Appeals decisions, the DCCA concluded its isolated analysis by claiming that the "only fact associating R.W. and the other two occupants of the vehicle at the time of the seizure was their altogether mundane presence in the same car," artfully eliding the fact that the duo fled from the backseat of a car at 2:00 a.m. and left the door open, at which point the defendant backed his car up to escape the scene.

Supreme Court Reverses DCCA. In their *per curiam* decision reversing the DCCA, the Supreme Court wrote that "this case reveals the perils of reviewing facts piecemeal and without context,"³⁹ observing that "the whole is often greater than the sum of its parts—especially when the parts are viewed in isolation."⁴⁰

The Court noted that here, the "whole picture" includes the fact that "[a]fter watching two people flee from a suspicious car, a reasonable officer surely would question the driver's next move. Why would the driver hurriedly back up the car without even closing a car door left open by his fleeing companions?"⁴¹

The Court further noted that Officer Vanterpool, having been alerted via a late-night dispatch about a "suspicious vehicle," saw every person, except the defendant, "respond strangely to an approaching police car. Two people took off running. We have observed that 'unprovoked flight upon noticing the police...is certainly suggestive' of wrongdoing."⁴² To the Court, a reasonably prudent person, and certainly an officer of the law, would find those actions odd indeed, allowing the Court to conclude that Officer Vanterpool "clearly had reasonable suspicion to stop R.W."⁴³

The Court remanded the case for further proceedings not inconsistent with their opinion.

In her dissent, Justice Ketanji Brown Jackson tried to defend the DCCA, writing that she was "not sure why our Court sees fit to intervene in this

case,” as the DCCA “grasped the correct inquiry” and applied the totality-of-the-circumstances test correctly.⁴⁴

But that is belied by the fact that the DCCA wrote the following: “Once we excise the radio dispatch and the conduct of R.W.’s companions from the analysis, we conclude that the lateness of the hour and the slight movement of the car did not give rise to reasonable articulable suspicion that R.W. was involved in criminal activity.”⁴⁵ Justice Jackson argued that the DCCA’s use of the word “excised” was merely a “poor word choice” and that “I do not think that word choice reflects a methodological error.”⁴⁶

That, however, is exactly what it demonstrates.

The DCCA’s own opinions in *R.W.*, and other cases (see below), prove beyond any doubt that they take a divide-and-conquer approach (or worse) to facts when analyzing whether an officer has reasonable articulable suspicion to stop someone. When analyzing the radio dispatch in *R.W.*, the DCCA held that “the trial court erred by weighing the radio dispatch when assessing whether the seizure was supported by reasonable suspicion.”⁴⁷ When analyzing the flight of the two individuals from the back of the defendant’s car, the DCCA held that “the trial court erred by weighing the flight of *R.W.*’s two companions against *R.W.* in its reasonable-suspicion analysis.”⁴⁸ In other words, the trial court should have “excised” those two factors, not, as Jackson suggested, merely decided how much weight to give those factors.

The DCCA’s opinion and methodological approach in *R.W.* is not an outlier; it is just the latest example of their divide-and-conquer approach to the totality-of-the-circumstances test for Fourth Amendment analysis.

Mayo v. United States. In 2022, the majority in a three-judge panel of the DCCA used the same divide-and-conquer approach to overturn the conviction of Landon Mayo instead of properly applying the totality-of-the-circumstances test. In *Mayo v. United States*,⁴⁹ officers who were part of the Gun Recovery Unit (GRU) were driving in an unmarked vehicle and patrolling a high-crime neighborhood. All were wearing tactical vests and badges identifying them as police. In the preceding three years, the GRU recovered narcotics and 10 or more guns from the area.

As Judge Roy McLeese wrote, in essence: As their cruiser came upon a group of males, Sergeant Jose Jaquez focused on Mayo, who was in the group. Mayo walked over to a man in a wheelchair, faced away from Jaquez, and made a movement that caused his shoulders to move up and down. Jaquez could not see Mayo’s hands but believed Mayo was making adjustments to the area in his front waistband. After a few seconds, Mayo left the man in the wheelchair and started walking away from the police toward another person who was in a walkway near an alley. Three GRU officers got out of their vehicle and

walked toward Mayo. One of the officers said to Mayo, “Hey, we just want to talk. We just want to talk to you. Do you have any guns?”⁵⁰ Mayo began to run, but Jaquez tripped him. Mayo got up and ran away but was caught by a second car of GRU officers a short distance away, and the officers later found a gun and drugs they believed him to have discarded or handed off to others in flight.

Before trial, the defense moved to suppress the gun and drugs, arguing that officers did not have reasonable articulable suspicion to seize Mayo when they tripped him and that the Fourth Amendment therefore prohibited the admission of the drugs and gun. After first granting the motion, the trial judge reversed himself and denied the motion to suppress, concluding that the government was correct that the GRU officers in the second car lawfully seized and searched Mayo.

On appeal, Mayo argued that he was seized when the police tripped him, that the seizure was not supported by reasonable articulable suspicion and therefore did not constitute a valid *Terry* stop, and that the gun and drugs should be suppressed.⁵¹ By a vote of 2-to-1, the DCCA agreed.

As it did in *R.W.*, the DCCA majority paid lip service to governing Supreme Court precedent while evading its command. Rather than assess the totality of the circumstances—the familiar, practical test that requires courts to consider how facts interact and reinforce one another—the majority dissected the government’s evidence into isolated pieces and declared each to be inadequate, discounting Mayo’s “ambiguous movements, observed by GRU officers,” his “initial provoked flight from three GRU officers,” and his presence in an area of undefined size where GRU officers had recovered roughly ten firearms over three years.⁵²

The majority then concluded that those facts “did not, either singly or in combination, give the GRU officers reasonable, articulable suspicion to seize Mr. Mayo.”⁵³ That formulation is no harmless turn of phrase. “Or in combination” is a fig leaf—language chosen to mimic constitutional analysis without actually performing it. A true totality-of-the-circumstances inquiry asks whether the facts, viewed together through the lens of common sense and police experience, created a particularized and objective basis for suspicion. The DCCA instead treated the evidence as a collection of independent boxes to be checked and rejected and then repackaged that atomized analysis as a cumulative one.

By refusing to employ the Supreme Court’s straightforward test—and by substituting its weaker, self-fashioned formula—the majority once again twisted both law and fact toward its preferred outcome. The result is not merely analytical imprecision; it is a dilution of settled Fourth Amendment doctrine disguised as fidelity to it.

Judge McLeese, who clerked for the late Supreme Court Justice Antonin Scalia, dissented on several grounds. First, according to McLeese, the majority “repeatedly relies on evidence that was introduced at trial to undermine the court’s pretrial suppression ruling.”⁵⁴ That was problematic for several reasons. Precedent from the DCCA dictates that “on appeal, we must evaluate the trial court’s decision from its perspective when it had to rule and not indulge in review by hindsight.”⁵⁵ Not only did the majority ignore precedent of its own court by relying on trial testimony, but it also made up facts that were neither presented at the pretrial motion nor adduced during the trial and then put its spin on those made-up facts in favor of the defendant.

For example, the dissent pointed out that the majority “describes officers as ‘orchestrating the encounter so that Mr. Mayo had nowhere to go’ and ‘cutting off’ Mr. Mayo’s movements.”⁵⁶ Not only did the trial court not make those findings, but “the evidence at the suppression hearing indicated only that three officers in tactical vests got out of an unmarked cruiser, walked toward Mr. Mayo (one somewhat to the side of the other two), indicated that they wanted to speak with him, and asked him if he had a gun.”⁵⁷ The evidence, according to the dissent, did not “support the court’s description of Mr. Mayo as fleeing because he knew he was surrounded and trapped by police officers.”⁵⁸ And even though there was evidence at the suppression hearing that another marked cruiser was driving on a nearby street, there was “not evidence at the suppression hearing...that Mr. Mayo perceived that cruiser or even was in a position to do so.”⁵⁹

The majority “relie[d] on trial evidence indicating that (1) the officer who had moved to the side of the other two officers did so in an effort to prevent Mr. Mayo from escaping past that officer; and (2) at the time Mr. Mayo fled, the other unmarked cruiser was parked on a nearby street and could see what was happening in the alley.”⁶⁰

McLeese noted in his dissent that even if it was permissible to rely on trial evidence (which it was not), the additional trial evidence “did not support a conclusion that Mr. Mayo fled because he knew he was surrounded and trapped. To the contrary, for example, the evidence at trial indicated that the officers in the other unmarked cruiser were still inside the cruiser at the other end of the alley when Mr. Mayo started to flee.”⁶¹ And to put an even finer point on how the majority misrepresented the trial facts, McLeese wrote that “there appears to be no direct evidence that Mr. Mayo noticed the unmarked cruiser, much less that he somehow inferred that it was occupied by police officers who were surrounding and trapping him.”⁶²

After losing 2-to-1 in a holding by a division of the DCCA, the government sought *en banc* review, which the court granted.⁶³ In a 6-to-1 decision, the

full court, unsurprisingly given the DCCA's history, agreed with the division decision and held that the officer did not have reasonable articulable suspicion for a *Terry* stop. And just like the majority below, the *en banc* majority misread a key Supreme Court case, misrepresented trial facts, dismissed key evidence, and failed to identify one comparable case where another court held the stop to be illegal.

Once again, Judge Roy McLeese was the sole dissenter. His 20-page dissent exposes the many ways in which his colleagues misconstrued the law and facts to the detriment of the government and in favor of the defendant.

With respect to the officer's initial observations of Mayo, the majority held that Mayo's actions before he fled from the officers "do not provide any appreciable support for the government's argument that they had a lawful basis to stop him."⁶⁴ Noting that their court has "repeatedly held that hand movements that have been directly observed and are consistent with mundane behavior do not meaningfully contribute to reasonable, articulable suspicion,"⁶⁵ the majority excised that fact from their analysis. McLeese dissented, noting that hand movements that are consistent with mundane behavior "can contribute to reasonable, articulable suspicion, when considered in the context of the totality of the other circumstances of a given case."⁶⁶

As Judge McLeese noted throughout his dissent, the seminal Supreme Court case on reasonable articulable suspicion is *Illinois v. Wardlow*. There, Chief Justice William Rehnquist, writing for the majority, held that law enforcement officers did not violate the Fourth Amendment when they stopped Wardlow after he fled unprovoked from them in a high-crime area.

Rehnquist wrote that "presence in an area of heavy narcotics trafficking that aroused the officers' suspicion" and "unprovoked flight upon noticing the police" were relevant factors in determining whether an officer had reasonable articulable suspicion to conduct a *Terry* stop.⁶⁷ And "headlong flight—wherever it occurs—is the consummate act of evasion" and, while "not necessarily indicative of wrongdoing...is certainly suggestive of such."⁶⁸

McLeese noted that the *en banc* court deviated from the proper approach to flight evidence in two important respects.

First, the *en banc* court "does not acknowledge the well-settled principle that *Terry* stops can permissibly be based on police observations of actions that might have an innocent explanation, so long as those actions, considered as a whole, are sufficiently suspicious...so the mere fact that flight from the police might in some circumstances be lawful and innocent does not preclude flight's consideration as part of the totality of circumstances bearing on whether a *Terry* stop was permissible."⁶⁹

Second, the majority discussed at length the many reasons why Mayo's flight from the officers might have been completely innocent and not indicative of a consciousness of guilt, concluding that "the officers could not reasonably perceive Mr. Mayo's flight as clearly reflecting consciousness of guilt; rather it is more consistent with the 'apprehensiveness that would naturally be felt' by a person...in his situation."⁷⁰

The problem with their approach here is that even if a reasonable officer should have concluded that Mayo's flight reflected an innocent fear of the police "rather than any consciousness of guilt, it does not follow that Mr. Mayo's flight should be given little weight in determining whether the totality of the circumstances supported a conclusion of reasonable suspicion in this case."⁷¹ Pointing out the perils of the *en banc's* divide-and-conquer analysis of each factor, McLeese wrote that "reasonable, articulable suspicion can exist even if all of the relevant factors, taken together, are not clearly—or even not more likely than not—incriminating."⁷²

Next, the majority's description of the GRU officers' conduct seemed to indicate that they viewed Mayo's flight as provoked by the officer simply because they drove into the area where Mayo and others were hanging out. McLeese found this to be problematic for both factual and legal reasons.

Evidence adduced at the suppression hearing showed that GRU officers drove into a high-crime area, three officers got out of their cruiser and walked toward Mayo, one officer asked Mayo whether he had a gun, and Mayo fled. McLeese wrote that on that record, there was no evidence that the officer's conduct, as the majority wrote in their opinion, "would have signaled to Mr. Mayo that the officers 'did not intend to allow [Mr. Mayo] to leave' and instead 'planned to stop him' rather than merely speaking with him."⁷³ The majority simply jumped to that conclusion.

From a legal standpoint, McLeese wrote that the majority did not cite one case with similar facts that supported their conclusion that Mayo's flight added little to reasonable, articulable suspicion. Given the fact that the Supreme Court in *Wardlow* gave substantial weight to flight, "lower courts therefore are not free to treat such general considerations as rendering flight evidence of little significance."⁷⁴

With respect to high-crime evidence in general, the majority wrote that "the inquiry should turn on the quality and specificity of the information, with particular focus on the recency, frequency, and geographic proximity of the relevant criminal activity."⁷⁵ But as McLeese noted in his dissent, the Supreme Court described the general locational crime evidence in *Wardlow* as officers "converging on an area...known for heavy narcotics trafficking."⁷⁶ The Supreme Court did not impose any particularity or temporal

requirement whatsoever yet still gave general locational crime evidence substantial weight.

To make matters worse, McLeese noted that the *en banc* court mischaracterized the locational evidence in *Wardlow* itself, writing that Wardlow was present “at a particular location where...drug activity was anticipated.”⁷⁷ The Supreme Court majority opinion did no such thing and noted only that the officer saw Wardlow in “an area [of Chicago] known for heavy narcotics trafficking.”⁷⁸

With respect to the high-crime evidence introduced in the suppression hearing, Sergeant Jaquez testified that in the previous three years, the GRU had recovered narcotics and ten or more guns from the Kenilworth area, which was “one of the higher amounts” compared to other sections of the city.⁷⁹ That description of the high-crime area had more specificity than the area in *Wardlow*, yet the *en banc* court concluded that his testimony was not “objectively useful,” that it “lacked meaningful specificity,” and that it was not “sufficiently specific or well-grounded to place Mr. Mayo’s innocuous conduct in a different light or make his flight more indicative of consciousness of guilt.”⁸⁰ McLeese disagreed, writing that his “testimony seems to me plainly relevant and by no means so conclusory or lacking in meaningful specificity as to warrant outright rejection as not being objectively useful.”⁸¹

McLeese noted that the *en banc* court “cites no decision from any other court holding that testimony comparable to that of Sergeant Jaquez had no value in determining whether there was reasonable, articulable suspicion” and that the court therefore “departed from the path of commonsense, nontechnical’ reasoning that the Supreme Court has directed us to follow.”⁸²

Finally, with respect to the totality of the circumstances in this case, the *en banc* court engaged in several misstatements of fact and law. First, the *en banc* court held that “this case is nothing like *Wardlow*.”⁸³ They described that case as one in which Wardlow was present “at a particular location where...drug activity was anticipated.”⁸⁴ But as McLeese wrote in his dissent and as discussed above, the Supreme Court did not say that, which led McLeese to quip sardonically that “I do not view that description as accurate.”⁸⁵

Next, the *en banc* court noted in its majority opinion that Wardlow was holding an opaque bag when officers came upon him and suggested that the Supreme Court relied on that additional fact to establish reasonable, articulable suspicion. But the high court did no such thing. Their holding relied on two reasons for its decision: (1) unprovoked flight from (2) a high-crime area. McLeese wrote that it is not “permissible for a lower court to take the view that the Supreme Court’s holding rests also on a third reason

that the Supreme Court did not identify as such and thus necessarily did not justify as a reason.”⁸⁶ In fact, noted McLeese, the DCCA previously held that Wardlow’s possession of the opaque bag “played no part in the Court’s reasoning.”⁸⁷

Dozier v. United States. *Dozier v. United States* matters not simply because it defines the point at which a police encounter becomes a Fourth Amendment seizure, but because it exposes a deeper threat to principled appellate judging: the temptation to decide consequential constitutional questions on facts not found below, arguments not raised by the parties, and issues unnecessary to the judgment.⁸⁸ Judge Roy McLeese’s separate opinion is a bracing reminder that courts safeguard the rule of law not by reaching every difficult social question before them, but by exercising disciplined restraint—deciding only the case the record actually presents.

When judges supply their own factual premises and constitutionalize disputes that have not been tested through the adversarial process, they cease to apply law to facts and begin to make law from assumptions. That is why *Dozier* is important: It is a cautionary tale about how even a seemingly routine suppression case can become a vehicle for untethered judicial policymaking.

Officers Kristopher Smith and Shannon Strange of the Metropolitan Police Department were assigned to foot patrol at night in an area of Washington, D.C., known for prostitution and drug activity. Two other officers, Brittany Gerald and Richard Willis, gave Smith and Strange a ride to the area in their marked patrol car. At 8:45 p.m., as all four officers were still in the patrol car, they observed Dozier at the mouth of an alley, walking out of the alley with another person. Dozier was wearing all black clothing, which the officers found “odd.”⁸⁹

Officers drove their police vehicle to the alley and parked it. Their blue lights were turned on, identifying the vehicle as a police cruiser. Smith and Strange got out of the vehicle, and from about 20 feet away, Strange asked Dozier, “hey man, can I talk to you?”⁹⁰ Dozier didn’t respond and kept walking. The officers got closer to Dozier, and Strange asked him again, “hey man, can I talk to you?”⁹¹ This time, Dozier replied, saying, “yeah, you can talk to me.”⁹²

Smith asked Dozier whether he had “any illegal weapons on him.”⁹³ Dozier said “no” and also lifted up his jacket to show his waistband. Strange asked Dozier whether he could pat Dozier down for “any weapons,” and Dozier said, “yes, you can check me.”⁹⁴ Strange asked Dozier whether he would voluntarily place his hands on the alley wall, and Dozier complied.

Strange began the pat-down and when he reached Dozier’s ankle felt a bulge inside his sock, which, based on his training and experience, felt like

a ball of money. When Strange asked Dozier what the bulge was, Dozier tensed, pushed off the wall, and ran away.

The four officers ran after Dozier. Dozier ran through an alley to a nearby gas station. When he got there and realized that there was nowhere to go, he turned to face the officers, removed an item from his sock, and threw it over a fence. The officers recovered the plastic bag and found that it contained smaller plastic bags with a white rock-like substance that was tested and found to be cocaine.

Dozier was charged with possession with intent to distribute cocaine. He moved to suppress all of the evidence observed and recovered in the case. The trial judge denied Dozier's motion.

The DCCA held that Dozier was seized by the time he complied with the officer's request to put his hands on the wall, the seizure was not justified by reasonable articulable suspicion, the evidence should have been suppressed, and the conviction should be reversed.

On the surface, this was in keeping with the DCCA's other holdings, but once again, Judge Roy McLeese chastised his colleagues for deciding a Fourth Amendment issue not before the court and pointed out how the record below did not support the court's factual premises.

McLeese concurred in the judgment but declined to join the court's opinion. The majority reasoned that "even the innocent person we posit in our Fourth Amendment analysis might well fear that he is perceived with particular suspicion by hyper-vigilant police officers expecting to find criminal activity in a particular area."⁹⁵ In the majority's view, that perceived scrutiny helped to transform the encounter into a seizure.

McLeese challenged both the factual foundation and the legal significance of that conclusion. In determining when Dozier was seized, the court considered it relevant that he was "an African American man who would have known" that the location was patrolled by "hyper-vigilant" officers expecting to uncover criminal activity.⁹⁶

But nothing in the suppression hearing record or the trial testimony established that the officers were in fact "hyper-vigilant." Nor did the evidence show that a reasonable person familiar with that particular block would have been unusually fearful of encountering the police there. The majority, McLeese suggested, had supplied a critical factual premise that the record itself did not support.

Even if the record had supported that premise, McLeese sharply criticized the court for unnecessarily considering Dozier's race and prior experiences with law enforcement. As he explained, "many other fundamental principles of appellate adjudication counsel against deciding in this

case whether a suspect's race" and past encounters with police are relevant to determining whether a seizure occurred.⁹⁷

Courts should decide constitutional questions only when the record is adequate, the issue has been properly presented, and its resolution is necessary to decide the case. None of those conditions was satisfied here.

McLeese identified six separate defects in the majority's approach: (1) the issue had not been raised in the trial court; (2) the trial court had not decided it; (3) the parties had not briefed it; (4) deciding the question was unnecessary because the police conduct constituted a seizure regardless of Dozier's race, experiences, or beliefs about law enforcement; (5) the issue was constitutional in character, heightening the judiciary's obligation to avoid an unnecessary ruling; and (6) the question was both important and difficult, and the majority's resolution was "certainly not free from doubt."⁹⁸ Taken together, those deficiencies made the court's decision not merely premature, but inconsistent with the traditional limits of appellate adjudication.

McLeese also acknowledged that competing arguments and authorities bear on whether a suspect's race and prior experiences with law enforcement should inform the seizure analysis. He did not dismiss those considerations out of hand, but because the issue had not been developed below, briefed by the parties, or shown to be necessary to the judgment, he declined to "express a definite view" on its ultimate merits.⁹⁹ Thus, because the majority had neither adequately explained nor defended its reasoning, he could not join the court's opinion.¹⁰⁰

United States v. Donte J. Carter. On June 22, 2026, the Supreme Court denied the government's petition for a writ of certiorari in *United States v. Donte J. Carter*.¹⁰¹ The facts of the case were unremarkable. The remarkable aspect of the case, as Justice Samuel Alito noted in his dissent from the denial of certiorari, was the fact that the DCCA said that the question of whether a person counts as seized for Fourth Amendment purposes may turn on the person's race.

The legal standard, according to the DCCA, was "whether an objective and reasonable person sharing the defendant's generalized lived experiences arising out of their racial status would have felt free [as a black man] to terminate the police encounter."¹⁰² The DCCA cited its own opinion in *Dozier v. United States* for the proposition that the court should consider the suspect's race and past experiences with, or beliefs about, law enforcement as relevant factors in determining whether a police encounter with a suspect is a seizure.¹⁰³

The facts in *Carter* are straightforward. On a September afternoon in Washington, D.C., several plain-clothes officers approached a group of black

men hanging out in a high-crime area. Carter was one of the men in the group. When an officer approached Carter and asked him whether he was carrying a weapon, Carter said “no.” The officer asked Carter, “do you mind hiking your pants for me real quick?” Carter complied, and another officer saw an L-shaped object in Carter’s pants. The officer pointed to the object, to which Carter said it was his cellphone. When the officer frisked Carter, he found a stolen handgun in Carter’s compression shorts.

After Carter was charged with firearm and theft offenses, he moved to suppress a statement he made to the police and the gun, claiming that he was “seized” when the officer directed him to hike his pants and that the officer lacked reasonable articulable suspicion or probable cause. The trial judge denied the motions, and Carter was convicted.

The DCCA reversed the conviction, acknowledging that it was “a close case” because “several aspects of Mr. Carter’s interaction with the officers strongly suggest that he was seized [yet] there are other features that sway us in the opposite direction.”¹⁰⁴

After discussing the factual similarities and differences between Carter’s case and three cases previously decided by the DCCA, the court, citing *Dozier*, wrote that “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.”¹⁰⁵ The court noted that its Fourth Amendment seizure inquiry “would be incomplete, and indeed, incongruent with the objective reality that people of color face during interactions with law enforcement” and that “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.”¹⁰⁶

The court then dedicated three paragraphs to cherry-picking from surveys, articles, and publications, each of which asserted in some form or another that black Americans are disproportionately likely to be victims of violence at the hands of police.¹⁰⁷ The court concluded that “it would have been objectively reasonable to be apprehensive around police officers” and that, “[g]iven 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.”¹⁰⁸

Once again, Judge McLeese took issue with the majority opinion, although he concurred in the judgment, noting that *Dozier* is “binding on me.” McLeese noted that 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 and therefore would reasonably have felt obliged to comply with the officer's request to hike up his pants."¹⁰⁹

Noting that the court relied on its own decision in *Dozier* to justify taking into account the defendant's race, McLeese cautioned that in his concurrence in *Dozier*, he "expressed uncertainty as to whether the race of a suspect can permissibly be considered in assessing whether police conduct constitutes a seizure."¹¹⁰ In other words, McLeese once again was calling out his colleagues for engaging in inappropriate, legally dubious justifications that, once again, inured to the benefit of the defendant.

The Sixth Amendment Right to a Jury Trial. The Sixth Amendment reads in part, "In all criminal prosecutions, the accused shall enjoy the right to a...trial by an impartial jury."¹¹¹ The original Sixth Amendment guaranteed a right to a jury trial in federal court but said nothing about a right to a jury in state courts.¹¹²

All of the original 13 colonies and later the states included the jury trial right for serious offenses and summary jurisdiction (trial by judge alone) for minor offenses.¹¹³ In 1968, the United States Supreme Court held that the Fourteenth Amendment's Due Process Clause "incorporated" the right to a jury trial and made it applicable to the states.¹¹⁴ The Court has interpreted the scope of the jury trial right as applying to criminal prosecutions for "serious offenses."¹¹⁵ Criminal prosecutions for petty offenses may be tried by a judge without violating the Sixth Amendment.¹¹⁶

In *Baldwin v. New York*, the Supreme Court set out the parameters of what constitutes a "serious" offense under the Sixth Amendment, noting that a state's determination of a crime as a misdemeanor or felony is not the constitutional dividing line, as some misdemeanors are by their very nature serious.¹¹⁷

In *Blanton v. City of North Las Vegas*, the Supreme Court addressed the issue of how to determine whether a particular offense punishable by incarceration for six months or less is "serious," triggering the constitutional right to a jury trial, or a petty crime, thus only requiring adjudication by a judge. The Court stated that an offense with a maximum period of incarceration of six months is "presumptively petty."¹¹⁸ That presumption can be overcome if the accused "can demonstrate that any additional statutory penalties, viewed in conjunction with the maximum authorized period of incarceration, are so severe that they clearly reflect a legislative determination that the offense in question is a 'serious' one."¹¹⁹

Bado v. United States. The District of Columbia Court of Appeals' cavalier treatment of settled law is not confined to misstating facts, relying on

matters outside the record, or atomizing the evidence instead of evaluating the totality of the circumstances as the Fourth Amendment requires. It has gone further still—manufacturing a jury-trial right for an illegal alien charged with a misdemeanor merely because a conviction may carry the collateral consequence of deportation. That is not faithful adjudication. It is judicial invention: the substitution of the court’s preferred policy judgment for the law enacted by the legislature and the constitutional limits that bind the judiciary.

Pastor Jean Baptiste-Bado entered the United States in 2005 from Burkina Faso and sought asylum, alleging that he was prosecuted and tortured for his political and religious beliefs. While that petition remained pending, the United States Attorney’s Office for the District of Columbia charged him in D.C. Superior Court with three counts of misdemeanor sexual abuse of a minor or child under D.C. Code § 22-3010.01. District law could not be clearer: Misdemeanors are tried by a judge, not a jury. Yet the D.C. Court of Appeals treated the possibility of removal—an immigration consequence collateral to the criminal prosecution—as a license to rewrite that settled rule and confer a constitutional entitlement that the law does not provide.¹²⁰

The majority invoked *Blanton* as though it supplies a disciplined constitutional test but then stretched that test beyond its stated boundaries. *Blanton* begins with a straightforward rule: Offenses carrying no more than six months’ imprisonment are presumptively petty, and that presumption may be overcome only by additional statutory penalties so severe that they unmistakably reflect a legislative judgment that the offense is serious. In *Blanton*, even the combined burdens of jail, a fine, license suspension, mandatory education, and publicly identifying community-service clothing were insufficient.

The Supreme Court ruled the same way in another drunk driving case. In *United States v. Nachtigal*, the Court reinforced the same point: Probation and a substantial fine did not approximate the loss of liberty associated with imprisonment exceeding six months.¹²¹

The majority nevertheless treats deportation as the decisive additional penalty. To get there, it makes several logical leaps. It moves from penalties imposed by the criminal statute to a collateral consequence administered under federal immigration law; from legislative judgments embodied in a criminal sentencing scheme to generalized judicial observations about deportation’s harshness; and from consequences necessarily faced by the defendant at sentencing to future removal proceedings that may involve separate decisions, procedures, and contingencies. None of those moves

follows naturally from *Blanton*'s narrow inquiry into the maximum penalties authorized for the charged offense.

The majority's humanitarian concerns are understandable, but sympathy is not constitutional analysis. By cataloging family separation, economic hardship, detention, poverty, violence, and persecution abroad, the opinion substitutes an open-ended assessment of real-world consequences for *Blanton*'s administrable statutory test.

If deportation qualifies because it may be more burdensome than six months in jail, countless other collateral consequences could be characterized the same way. The majority thus claims to apply *Blanton* while quietly transforming it—turning a rule anchored in legislative penalties into a free-ranging judicial inquiry about the possible downstream hardships of conviction.

The dissent in *Bado* is worth mentioning because, just as Judge Roy McLeese exposes the constitutional and factual flaws in the cases cited above, Judge John Fisher does the same in *Bado*.¹²² His dissent lays bare the majority's fundamental error. Under its holding, a citizen charged with misdemeanor sexual abuse of a child has no Sixth Amendment right to a jury trial, while a noncitizen charged with the identical offense does. Nothing in the Constitution, *Blanton*, or common sense supports that indefensible disparity. The majority does not apply Supreme Court precedent; it departs from it.

Blanton establishes a categorical, offense-based inquiry. A crime punishable by no more than six months' imprisonment is presumptively petty, and that presumption may be overcome only by additional statutory penalties so severe that they unmistakably reflect the enacting legislature's judgment that the offense is serious. The inquiry therefore turns on the punishment attached to the offense—not on consequences arising from the defendant's idiosyncratic status.

As Fisher points out, removal is not part of the criminal sentence, is not imposed by the legislature that defined the local offense, and is administered through a separate civil process. However consequential it may be, it cannot alter the constitutional character of the underlying crime.

Fisher's reasoning is not merely persuasive; it is compelled by the need for a coherent and administrable constitutional rule. If collateral consequences can transform a petty offense into a serious one, the jury-trial right will vary by defendant identity as opposed to category of offense. The same misdemeanor could require a jury for a noncitizen facing removal but not for a citizen facing the loss of employment, housing, professional licensure, or other severe consequences. The Sixth Amendment cannot sensibly mean

one thing for one defendant and something else for another who committed the same offense.

The Supreme Court should put an end to this doctrinal confusion. It should hold unequivocally that the seriousness of an offense is determined by the penalties the legislature has prescribed for that offense, not by collateral civil consequences flowing from an accused's individual circumstances. Removal may be grave, but it does not convert a presumptively petty crime into a serious one. A definitive ruling would vindicate *Blanton*, restore equal treatment under the Sixth Amendment, and prevent the constitutional right to a jury from turning on the identity rather than the offense of the accused.

T.W. v. United States. The majority in *T.W. v. United States* reversed T.W.'s firearms convictions on the ground that police had unlawfully seized him before he consented to a pat-down.¹²³ Although the officers never touched him, threatened him, displayed their weapons, blocked every avenue of departure, or used anything other than a conversational tone when asking T.W. whether he had a gun on his person, the court concluded that the encounter's cumulative circumstances—two marked cruisers, several uniformed officers, the officers' approach from both sides, and repeated questions about whether T.W. possessed a gun—would have caused a reasonable person to believe he was not free to leave.

Because the government conceded that the officers lacked reasonable suspicion at that point, the majority treated T.W.'s consent as the fruit of an unconstitutional seizure, suppressed the loaded firearm recovered from his waistband, and reversed his convictions.

The opinion labors mightily to bring the encounter within the factual universe of those in *Golden* and *Dozier*, repeatedly insisting that every factual distinction only strengthens T.W.'s claim.¹²⁴ But its analysis transforms a brief, cordial, 10-second encounter into a constitutional violation by piling inference upon inference: Parked cruisers become a "box,"¹²⁵ officers walking toward a suspect become a "pincer maneuver,"¹²⁶ and a request for consent becomes an implicit command.

The majority plainly has the dissent, written by Judge Phyllis Thompson, on its mind; indeed, substantial portions of the opinion read less like a straightforward application of settled Fourth Amendment law than a sustained effort to answer her common-sense objections. That effort is revealing but ultimately unpersuasive. Despite the majority's considerable rhetorical exertions, it never convincingly explains why a consensual encounter became a seizure before T.W. voluntarily agreed to the pat-down.

Judge Thompson's dissent in *T.W. v. United States* is a clear-eyed defense of settled Fourth Amendment law and the proper role of an appellate court

reviewing a suppression ruling. T.W. voluntarily agreed to a pat-down during a brief, cordial encounter with police. That lawful pat-down revealed a handgun in his waistband, loaded with 29 rounds, along with a large-capacity magazine capable of holding 31 rounds.

The trial judge, after hearing testimony and assessing the body-worn-camera footage, found no unlawful seizure and denied suppression. The majority nevertheless reversed, concluding that T.W. had been seized before he consented.

Judge Thompson methodically exposes the majority's central error: Instead of viewing the facts and all reasonable inferences in the light most favorable to sustaining the trial court's ruling, Judges Joshua Deahl and Catharine Easterly repeatedly recast the record in the light most favorable to finding a constitutional violation. As noted, two officers walking at an ordinary pace become a "pincer maneuver."¹²⁷ In addition, a calm, seconds-long conversation becomes "abrupt and fast-moving,"¹²⁸ and a simple question—"You sure?"¹²⁹—followed by a request for consent becomes an implicit command.

Thompson does not minimize the Fourth Amendment; she insists that courts apply it to the facts that actually occurred, not to a more coercive encounter constructed through loaded language and selective inference. Her treatment of *Golden* and *Dozier* is especially persuasive. Those cases involved materially different circumstances: blocked paths, secluded settings, persistent or escalating demands, and conduct that unmistakably communicated that the citizen was the target of police authority.

Here, by contrast, the encounter occurred in daylight and in an open area; no officer displayed a weapon, touched T.W. before the pat-down, activated lights or sirens, issued a command, or blocked every avenue of departure. T.W. was asked two short questions and then agreed to a pat-down, extending his arms without being told to do so. The majority's attempt to force these facts into the mold of *Golden* and *Dozier* does not faithfully apply precedent; it drains those precedents of their limiting facts and transforms ordinary police questioning into a seizure.

Judge Thompson also correctly emphasizes that the constitutional inquiry turns on what a reasonable innocent person would have understood—not on the subjective uncertainty of a defendant who knew he was carrying an unlawfully loaded, high-capacity firearm. The Fourth Amendment does not convert every police encounter into a detention merely because an officer asks a follow-up question or seeks voluntary cooperation. Her dissent respects the line between a consensual encounter and a show of authority; the majority blurs that line by treating police presence and polite questioning as inherently coercive.

That approach is regrettably consistent with the majority's misguided reasoning in *Mayo v. United States*, in which Judges Deahl and Easterly likewise departed from disciplined Fourth Amendment analysis in favor of a defendant-protective narrative untethered from the governing standard of review. In both cases, the methodology is the same: Characterize ambiguous facts in the most coercive terms, discount the trial court's findings, invent doctrinal glosses that constitutional text and precedent do not require, and then announce that the desired result is compelled.

Judge Thompson deserves credit for refusing to participate in that exercise. Like Judges Fisher and McLeese, she stands out on the D.C. Court of Appeals as a jurist willing to follow the record, respect the trial court, and apply constitutional requirements as written rather than manufacture facts or invent new tests to reach a preferred outcome.

Her dissent is not merely the better reading of the evidence; it is the more faithful account of the judicial duty. Courts protect liberty by enforcing the Constitution—not by rewriting encounters, disregarding inconvenient facts, or turning every reasonable police request into a constitutional violation. Thompson understood that principle. The majority did not.

Conclusion

The Supreme Court has both an institutional interest and a constitutional obligation to ensure that its mandates are applied uniformly in every jurisdiction—including the District of Columbia.

The District is not a constitutional island, and the District of Columbia Court of Appeals is not free to dilute controlling doctrine through interpretations that would be untenable elsewhere. By granting certiorari in appropriate DCCA criminal cases, the Supreme Court can restore accountability, vindicate the supremacy of federal law, and protect the constitutional rights of all who live, work, and serve in the nation's capital.

The dissents of Judges McLeese and Fisher in the Fourth and Sixth Amendment cases discussed above reveal the depth of the problem. Their opinions demonstrate that the DCCA has departed from settled constitutional principles and, in doing so, has lost its way in the constitutional forest. That departure is not an abstract doctrinal error confined to the pages of the official reporter. It imposes immediate and serious consequences on policing, charging decisions, trial-court adjudication, and public safety throughout the District.

On the street, officers must decide in real time whether observed facts amount to reasonable, articulable suspicion. When the governing appellate

standard is distorted or unpredictably applied, officers will hesitate even where the same facts would justify a lawful investigatory stop in nearly every other jurisdiction. Predictably, lawful stops will be forgone, offenders will evade investigation, and firearms and other evidence of crime will remain beyond the reach of legitimate police action.

The distortion then compounds itself. When officers detain a suspect, conduct a lawful frisk, and recover a weapon, the case must still survive review by Assistant United States Attorneys in the District’s “papering” process where prosecutors decide whether or not to file charges in a particular case.

As long as those prosecutors are bound to anticipate the DCCA’s warped application of the Fourth Amendment, otherwise valid cases will die on the vine before charges are filed. And when charges are brought, Superior Court judges may suppress evidence—not because the Constitution requires that result, but because they reasonably expect reversal if they deny the defendant’s motion. Error at an appellate level thus becomes embedded throughout the criminal process. Judges notice, prosecutors notice, beat cops notice, and of course, so do criminals. The only ones who might not notice before it is too late are the victims.

Only the Supreme Court can authoritatively arrest that drift. More frequent reviews of suitable DCCA criminal cases would correct erroneous constitutional interpretations, deter future departures from controlling precedent, and reestablish a single national baseline for the enforcement of fundamental rights.

Such review would not intrude upon the DCCA’s legitimate role; it would ensure that the court performs that role within the constitutional hierarchy. The rule of law demands no less. The Supreme Court should therefore exercise its certiorari jurisdiction when the DCCA departs from settled Fourth or Sixth Amendment doctrine and, by doing so, return the District’s criminal jurisprudence to the straight and narrow path marked by the Constitution and the Court’s precedents.

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Endnotes

1. Since 1970 when the District of Columbia Court of Appeals was created, the United States Supreme Court has granted certiorari in nine cases from the District of Columbia Court of Appeals. See *District of Columbia v. R.W.*, 608 U.S. 22 (2026); *Artis v. District of Columbia*, 583 U.S. 71 (2018); *Turner v. United States*, 582 U.S. 313 (2017); *United States v. Dixon*, 509 U.S. 688 (1993); *Jones v. United States*, 463 U.S. 354 (1983); *Tuten v. United States*, 460 U.S. 660 (1983); *Whalen v. United States*, 445 U.S. 684 (1980); *Swain v. Pressley*, 430 U.S. 372 (1977); and *Palmore v. United States*, 411 U.S. 389 (1973).
2. This office functions primarily as the District's city attorney, which historically (along with corporation counsel or some variation) was the name for the position within the District. The position was not renamed as Attorney General until 2004, and it was not an elected position until 2014. See Editor's Notes to D.C. Code § 1-301.111 (repealed), <https://code.dccouncil.gov/us/dc/council/code/sections/1-301.111> (accessed October 16, 2026). The age of majority in the District of Columbia is 18 years of age. Under local District of Columbia law, certain juveniles who are charged with specific violent crimes can be prosecuted as adults by the United States Attorney's Office for the District of Columbia. Most juvenile offenders, however, are held to account by the Office of Attorney General in juvenile court. See D.C. Code § 16-2307 (2023), <https://code.dccouncil.gov/us/dc/council/code/sections/16-2307> (accessed October 16, 2026).
3. The District of Columbia Court of Appeals and the Superior Court for the District of Columbia were established by Congress in 1970 under the District of Columbia Court Reorganization Act of 1970. See Pub. Law 91-358, § 11-101(2)(A) and (B) (Jul. 29, 1970), <https://www.govinfo.gov/content/pkg/STATUTE-84/pdf/STATUTE-84-Pg473.pdf> (accessed October 16, 2026). See also *The District of Columbia Courts: A Brief Introduction*, Congressional Research Service (Nov. 13, 2023), https://www.congress.gov/crs_external_products/IF/PDF/IF12531/IF12531.1.pdf (accessed October 16, 2026).
4. See *District of Columbia v. R.W.*, 146 S.Ct. 1069 (Apr. 20, 2026).
5. See Orin Kerr, Essay No. 166, *The Unreasonable Searches and Seizures Clause*, Amend. 4, The Heritage Guide to the Constitution, Fully Revised Third Edition (2025), p. 625, at <https://constitution.heritage.org/essays/amdt-4-a/>.
6. *Id.* See also *United States v. Jacobsen*, 466 U.S. 109 (1984).
7. *Id.* See also *United States v. Van Leeuwen*, 397 U.S. 249 (1970).
8. *Id.* See also *Brendlin v. California*, 551 U.S. 249 (2007).
9. *Id.* See also *Dunaway v. New York*, 442 U.S. 200 (1979).
10. *Id.* See also *United States v. Drayton*, 536 U.S. 194 (2002).
11. See *R.W.*, 608 U.S. at 23–24, quoting *United States v. Arvizu*, 534 U.S. 266, 273 (2002) (quoting *United States v. Sokolow*, 490 U.S. 1, 7 (1989)).
12. See *Arvizu*, 534 U.S. at 273–74.
13. See *R.W.*, 608 U.S. at 25, quoting *Kansas v. Glover*, 589 U.S. 376, 380 (2020) (quoting *Prado Navarette v. California*, 572 U.S. 393, 402 (2014)) (emphasis in original).
14. *Id.* at 27, quoting *Barnes v. Felix*, 605 U.S. 73, 80 (2025) (quoting *Scott v. Harris*, 550 U.S. 372, 383 (2007)).
15. *Id.* at 28, quoting *Barnes*, 605 U.S. at 80 (quoting *Scott*, 550 U.S. at 382–83).
16. See Possession, Black's Law Dictionary, Fifth Edition, p. 1047 (1979). See also *Henderson v. U.S.*, 575 U.S. 622, 626 (2015).
17. *R.W.*, 608 U.S. at 24, quoting *Arvizu*, 534 U.S. at 273–74.
18. See Brief of the National Fraternal Order of Police as Amicus Curiae in Support of Petitioner District of Columbia, Larry H. James, Counsel of Record, *District of Columbia v. R.W.*, No. 25-248, at 2, https://www.supremecourt.gov/DocketPDF/25/25-248/379206/20251009102118092_25-248_Amicus%20Brief.pdf (accessed October 16, 2026).
19. *Id.*
20. *Id.*
21. See Brief of Oklahoma and 27 Other States as Amici Curiae in Support of Petitioner, Garry M. Gaskins, II, Solicitor General, Counsel of Record, *District of Columbia v. R.W.*, No. 25-248, at 5, https://www.supremecourt.gov/DocketPDF/25/25-248/379794/20251016130739035_25-248%20Brief.pdf (accessed October 16, 2026).
22. *Id.*
23. *Id.* at 5–6.
24. *Id.* at 6.
25. See *In re R.W.*, 334 A.3d 593, 560 (D.C. 2025).
26. *Id.*
27. See *In re T.L.L.*, 729 A.2d 334, 341 (D.C. 1999).
28. See *R.W.*, *supra* note 25 at 600, citing *Jenkins v. United States*, 152 A.3d 585, 590 (D.C. 2017).

29. *Id.* at 601 (emphasis in original).
30. *Id.* The government relied on language from *Armstrong v. United States*, 164 A.3d 102, 113 (D.C. 2017).
31. *Id.*, referencing *Terry v. Ohio*, 392 U.S. 1 (1968).
32. *Id.*
33. *Id.*
34. *Id.*
35. *Id.*
36. *Id.*, quoting (*John*) *Smith v. United States*, 558 A.2d 312, 315 (D.C. 1989) (en banc).
37. *Id.* at 602, quoting *Black v. United States*, 810 A.2d 410, 413 (D.C. 2002).
38. *Id.*
39. *See R.W.*, 608 U.S. at 27.
40. *Id.*, quoting *District of Columbia v. Wesby*, 583 U.S. 48, 60–61 (2018).
41. *Id.*
42. *Id.* at 26, quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000).
43. *Id.*
44. *Id.* at 29.
45. *See R.W.*, *supra* note 25 at 597.
46. *R.W.*, 608 U.S. at 29–30.
47. *See R.W.*, *supra* note 25 at 600.
48. *Id.* at 603 (emphasis in original).
49. *See Mayo v. United States*, 266 A.3d 244 (2022).
50. *Id.*
51. After the trial on the merits and the parties initially briefed the case to the DCCA, the United States Supreme Court granted certiorari in *Torres v. Madrid*, 592 U.S. 306 (2021). The question presented in *Torres* was whether an unsuccessful attempt to detain a suspect by use of physical force is a seizure within the meaning of the Fourth Amendment or whether physical force must be successful in detaining a suspect to constitute a seizure. Because this was an issue in the case, the government moved to hold the appeal in abeyance pending a decision in *Torres*. The Supreme Court held in *Torres* that application of physical force to the body of a person with intent to restrain is a seizure even if the person does not submit and is not subdued. Chief Justice Roberts wrote for the 5-to-3 majority. Justice Gorsuch dissented, joined by Justices Thomas and Alito. The dissent opened with the following line: “The majority holds that a criminal suspect can be simultaneously seized and roaming at large. On the majority’s account, a Fourth Amendment ‘seizure’ takes place whenever an officer ‘merely touches’ a suspect. It’s a seizure even if the suspect refuses to stop, evades capture, and rides off into the sunset never to be seen again. That view is as mistaken as it is novel.” *See id.* at 325.
52. *Mayo*, *supra* note 49.
53. *Id.*
54. *Id.*
55. *Id.*
56. *Id.*
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.*
61. *See Mayo v. United States*, 315 A.3d 606, 611 (D.C. 2024).
62. *Id.*
63. *Id.*
64. *Id.* at 644.
65. *Id.*
66. *Id.* at 644.

67. *Wardlow*, 528 U.S. at 124.
68. *Id.*
69. *See Mayo*, *supra* note 61 at 644–45.
70. *Id.* at 645.
71. *Id.*
72. *Id.*
73. *Id.* at 647.
74. *Id.* at 649.
75. *Id.* at 635.
76. *Id.* at 652, quoting from *Wardlow*, 528 U.S. at 121.
77. *Id.* at 633.
78. *See Wardlow*, 528 U.S. at 121.
79. *See Mayo*, *supra* note 61.
80. *Id.* at 653.
81. *Id.*
82. *Id.* at 654, quoting *Ornelas v. United States*, 517 U.S. 690, 695 (1996).
83. *See Mayo*, *supra* note 61 at 627.
84. *Id.* at 633.
85. *Id.* at 655.
86. *Id.*
87. *Id.*, quoting from *Wilson v. United States*, 802 A.2d 367, 371 (2002).
88. *See Dozier v. United States*, 220 A.3d 933 (DC 2019).
89. *Id.* at 937.
90. *Id.* at 938.
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 944.
96. *Id.* at 948.
97. *Id.* at 949.
98. *Id.*
99. *Id.* at 951.
100. *Id.*
101. *See United States v. Donte J. Carter*, 608 U.S. ____ (2026). *See also Donte J. Carter v. United States*, 341 A.3d 1067 (2025).
102. *Carter*, 341 A.3d at 1076.
103. *See Dozier*, *supra* note 88.
104. *See Carter*, 341 A.3d at 1071.
105. *Id.* at 1076.
106. *Id.* at 1076–77.
107. The Court cited the following in these paragraphs: 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> (accessed October 20, 2026); 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/>

(accessed October 20, 2026); 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), and Rayan Succar et al., *Understanding the Role of Media in the Formation of Public Sentiment Towards the Police*, Commc’ns Psych (2024); Daniel S. Harawa, Whitewashing the Fourth Amendment, 111 Geo.L.J. 923 (2023); Michelle Alexander, *The New Jim Crow* (2010); Radley Balko, *There’s Overwhelming Evidence that the Criminal Justice System Is Racist: Here’s the Proof*, WASH. POST (June 10, 2020), <https://www.washingtonpost.com/graphics/2020/opinions/systemic-racism-police-evidence-criminal-justice-system/> (accessed October 20, 2026) (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); 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); 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/> (accessed October 20, 2026). See also 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%20Police%20Foundation%20MPD%20NSID%20Report%20September%202020%20Final.pdf> (accessed October 20, 2026) (reporting that between August 1, 2019, and January 31, 2020, black individuals were the subject of over 87 percent of GRU stops, 91 percent of arrests, and 100 percent of use-of-force incidents).

108. *Carter*, 341 A.3d at 1080.

109. *Id.* at 1081.

110. *Id.*, citing *Dozier*, 220 A.3d at 950–51.

111. See Judge Kurt D. Engelhardt, Ian Brinton Hatch, & Greta Gieseke, Essay No. 176, *The Jury Trial Clause*, Amend. 6, The Heritage Guide to the Constitution, Fully Revised Third Edition (2025), p. 662, <https://constitution.heritage.org/essays/amdt-6-c/>.

112. *Id.* at p. 663.

113. See generally Felix Frankfurter and Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guaranty of Trial by Jury*, 39 Harv.L.Rev. 917 (1926). Frankfurter dispels the myth that the modern institution of trial by jury derives from Magna Carta: “Magna Carta neither granted nor guaranteed trial by jury. The forms of the modern jury had not taken shape by 1215, although the principles from which they were to evolve found expression after the Norman Conquest.” *Id.* at 924. By the 14th century, it had become an “ancient prerogative” in England for 12 layman to “stand between him and the vengeance of the king in a criminal prosecution of any kind, whether the charge were tippling at the inn or murder.” *Id.* at 923. Over the centuries, the use of juries to adjudicate minor crimes became burdensome, and eventually, justices of the peace or the like sat in judgment of those cases. See also Stephen A. Siegel, *The Constitution on Trial: Article III’s Jury Trial Provision, Originalism, and the Problem of Motivated Reasoning*, 52 Santa Clara L.Rev. 373 (2012). See also Stephen A. Siegel, *Textualism on Trial: Article III’s Jury Trial Provision, the “Petty Offense” Exception, and Other Departures from Clear Constitutional Text*, 51 Hous. L. Rev. 89 (2013).

114. See Engelhardt, Hatch, & Gieseke, *supra* note 111 at 663. See also Nathan S. Chapman & Michael W. McConnell, Essay No. 195, *The Due Process Clause*, Amend. 14, § 1, The Heritage Guide to the Constitution, Fully Revised Third Edition (2025), pp. 744–49, <https://constitution.heritage.org/essays/amdt-14-sl-d/>.

115. See *Duncan v. Louisiana*, 391 U.S. 145, 157–58 (1968).

116. *Id.* See also *District of Columbia v. Colts*, 282 U.S. 63 (1930), which required the Court to look at the nature of the offense itself to determine whether it was serious.

117. *Baldwin v. New York*, 399 U.S. 66, 72–74 (1999).

118. *Blanton v. City of North Las Vegas*, 489 U.S. 538, 541–42 (1989).

119. *Id.* at 543.

120. See *Jean-Baptiste Bado v. United States*, 186 A.3d 1243 (D.C. 2018).

121. See *United States v. Jerry J. Nachtigal*, 507 U.S. 1 (1993).

122. See *Bado*, *supra* note 120 at 1271–75.

123. See *T.W. v. United States*, 292 A.3d 790 (D.C. 2023).

124. See *Golden v. United States*, 248 A.3d 925 (2021). See also *Dozier*, *supra* note 88.

125. See *T.W.*, *supra* note 123 at 796.

126. *Id.*

127. *Id.*

128. *Id.* at 811.

129. *Id.* at 812.