NOT YET SCHEDULED FOR ORAL ARGUMENT

22-CF-0960

IN THE DISTRICT OF COLUMBIA
COURT OF APPEALS

TRAVANION WARD-MINOR,

Appellant,

v.

UNITED STATES,

Appellee.

On Appeal From The Superior Court
Of The District Of Columbia

OPENING BRIEF FOR APPELLANT TRAVANION WARD-MINOR

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DISCLOSURE STATEMENT

Appellee in this Court is the United States. Counsel who appeared for the United States before the Superior Court were Assistant U.S. Attorneys Jeffrey Poulin, Anita J. La Rue, Amy J. Thomas, Ariel Dean, Kristian Hinson (Henson), Brian Yang, Niki E. Holmes, Christopher Macomber, Raha Mokhtari, Stephanie Dinan, Bonnie Lindemann, and Kraig Ahald.

Defendant in the Superior Court and Appellant in this Court is Travanion Ward-Minor. Counsel who appeared for Mr. Ward-Minor before the Superior Court was Randy McDonald. Appellate counsel now appearing before this Court is Richard P. Goldberg of Goldberg & Goldberg, PLLC.

RULE 28(A)(5) STATEMENT

This appeal is from a final order or judgment that disposes of all of the parties' claims at issue.

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ISSUES PRESENTED

1. The defendant was the passenger in a car that was stopped by police for the alleged infraction of excessive window tint. He was ordered to exit the car, ordered not to move, and then handcuffed behind his back. He was then, while still handcuffed, "asked" if it was "cool" for police to search him "real quick." Could consent to such a search while still seized be voluntary?

2. The defendant sought to support his claim that police engaged in racial bias by selectively targeting black motorists for traffic-law enforcement with a demand that the government produce racial-bias data in its custody. When he sought to compel the government to disclose this information, the trial court denied the motion to compel. Later, at the hearing, the trial court denied his motion to dismiss, citing a lack of data. Was the trial court abuse of discretion in denying the motion to compel, the resulting prejudice at the hearing, permissible?

STATEMENT OF THE CASE

Travanion Ward-Minor was indicted for Carrying a Pistol Without a License, in violation of D.C. Code § 22-4504(a), A.2; Possession of an Unregistered Firearm, in violation of D.C. Code § 7-2502.01(a), A.2; and Unlawful Possession of Ammunition, in violation of D.C. Code § 7-2506.01(3), A.3.[1] The charge stemmed from an encounter with police in which Mr. Ward-Minor was a passenger of a car that police stopped, allegedly due to excessive window tint. Prior to trial, the defense moved to compel the government to produce certain data on racial bias, to support the defendant's planned motion to dismiss under the Equal Protection Clause. A.6. That motion was denied. A.40. The defense nonetheless moved to dismiss under the Equal Protection Clause. A.61. The defense also moved to suppress the gun recovered at the stop during a patdown under the Fourth Amendment. A.48. After the conclusion of a hearing on both issues, A.72, the trial court denied the Mr. Ward-Minor's motion to dismiss citing a lack of data, A.196; and the court denied his motion to suppress the gun, finding that the search was consensual, A.197; A.206-07. At the conclusion of the trial court's decisions, the defense requested specific findings, A.207, which the court made, A.208-14.

Following these findings and the court's decision at the hearing, the Mr. Ward-Minor entered into a conditional plea, A.220-21, in which he pleaded guilty to the charges while reserving his appellate rights with respect to his

[1] Citations to the appendix are in the form, "A.[page number]"; citations to the hearing transcript (included in the Appendix) are in the form "Tr. [page number]."

motions to suppress and dismiss, to which the trial court consented. A.214. After Mr. Ward-Minor pleaded guilty, A.216, he was sentenced under the Youth Act, A.238, as follows: (1) for the CPWL charge, 6 months incarceration, suspended as to all; 3 years of supervised probation, suspended as to all; and a fine to the victims of violent crime fund of $100; (2) for the UF charge, 3 months incarceration, suspended as to all; 6 months supervised probation; and a VVCA fine of $50; (3) for the UA charge, 3 months incarceration, suspended as to all; 6 months supervised probation; and a VVCA fine of $50. A.240-41; A.243.

Having filed a timely notice of appeal, A.4, Mr. Ward-Minor now appeals the court's decisions on his motions to dismiss and suppress, and his resulting conviction.

STATEMENT OF FACTS

The motions to dismiss and suppress evidence were filed in writing but argued at a hearing before a judge. The government put on only one witness: Lieutenant James Chatmon. Tr. 7. Lieutenant Chatmon was actually the passenger in the police car; his partner, Lieutenant Modl, was driving, Tr. 9. but she did not testify, Tr. 143. Lieutenant Chatmon testified that by the time of the hearing, he had worked for the D.C. Metropolitan Police Department for 18 years. Tr. 7. Four years earlier, when he encountered Mr. Ward-Minor, he was a sergeant working in the Gun Recovery Unit. Tr. 8.

A. Police seize Mr. Ward-Minor when they stop the car in which he was a passenger, after which they order him out and handcuff him.

Lieutenant Chatmon testified that at the time of the incident, his partner, Lieutenant Modl was driving, with then-Sergeant Chatmon in the passenger seat.

Tr. 9. Lieutenant Chatmon testified that his partner decided to pull over the car when she spotted it driving in the opposite direction and apparently determined that the windows were too-dark. Tr. 13; *see* Tr. 20 (police "did a U-turn and got behind the vehicle"). Lieutenant Chatmon did not make the decision to pull over the car, nor did he see the tinted windows until after he they had pulled over the car. Tr. 90. Rather, Lt. Modl, according to Lt. Chatmon, stated, "Hey, I'm going to stop this vehicle. The windows are too dark on it." Tr. 20. Lieutenant Chatmon testified that he did not know whether Lt. Modl, before they stopped the car, could see the passengers inside the car. Tr. 20-21. Nor did Lt. Chatmon know whether the windows were actually too dark under D.C. law. Tr. 21-26.

Once the car was stopped, Lt. Chatmon testified, Lt. Modl ordered the driver to roll down the windows. Once that had happened, Lt. Chatmon testified, he could smell burnt marijuana. Tr. 13-14. Lieutenant Chatmon testified that he did not have any recollection whether "actual smoke" came from the car; rather, there was "the smell of [burnt] marijuana." Tr. 86-87. With the aid of footage from his body camera, Lt. Chatmon testified that he asked Mr. Ward-Minor to step out of the vehicle, and Mr. Ward-Minor complied. Tr. 15. Lieutenant Chatmon also testified that once stopped, Mr. Ward-Minor had admitted to possessing marijuana. Tr. 15. Lieutenant Chatmon testified that Mr. Ward-Minor was "moving around kind of antsy, which further aroused my suspicion." Tr. 15.

Lieutenant Chatmon testified that both he and Lt. Modl, when they stopped the car and ordered Mr. Ward-Minor out, were armed with guns. Tr. 36. He also testified that he commanded Mr. Ward-Minor to roll down his window. Tr. 36-37.

Lieutenant Chatmon confirmed that Mr. Ward-Minor did not really have a choice in the matter. "I mean, he did, but he didn't. He complied and let the window down." Tr. 37. He further explained that had Mr. Ward-Minor not rolled down the windows, "I probably would have opened the door." Tr. 37. Lieutenant Chatmon also testified that Lt. Modl told Mr. Ward-Minor to put his hands up. Tr. 37. At the time, Mr. Ward-Minor was not free to leave: "That was a traffic stop, so no." Tr. 38. When Lt. Chatmon told Mr. Ward-Minor to open his door, Tr. 38, and in fact pulled the door open as Mr. Ward-Minor began to open it, Mr. Ward-Minor also had no choice in the matter, Tr. 39.

Lieutenant Chatmon testified that he ordered Mr. Ward-Minor to put his hands straight up. Tr. 39. According to Lt. Chatmon and the video, upon being ordered out of the car, Mr. Ward-Minor said that he did not feel safe. Tr. 39-40. Lieutenant Chatmon testified that upon existing the car, Mr. Ward-Minor "moved his hands towards his waistband area. Tr. 41. But upon replaying of the video during cross examination, in which defense counsel suggested that the hand movement was just Mr. Ward-Minor pushing himself off the car as he tried to exit, Lt. Chatmon stated that he could not see Mr. Ward-Minor's hand. Tr. 42. Defense counsel asked, "So you're not saying that [Mr. Ward-Minor] was reaching for something; you just needed to see his hand then?" Lieutenant Chatmon answered, "I did need to see his hands." Tr. 42. Lieutenant Chatmon then testified that he grabbed Mr. Ward-Minor's hand:

Defense Counsel: Okay. And you stopped him because he was not being compliant with the way in which you told him to get out of the car, right?

Lt. Chatmon: Again, like I said, his nervousness, and when he put his hand back, I wasn't sure what he was—what he was—what he was doing. It looked like he—like I said, he moved his hand back towards where his, you know, waistband area is. You saying it could be to get leverage, but I don't know what it is. Everybody is not right-handed, and when he put his left hand there, he could have a weapon on his left-hand side.

Defense Counsel: All right. And as he's—you grabbed his wrist, right?

Lt. Chatmon: That's correct.

Defense Counsel: And then you told him not to move, right? You said, "Don't move."

. . .

Lt. Chatmon: Correct.

Tr. 43-44.

Lieutenant Chatmon, after agreeing that he needed to have control of the situation, testified that he handcuffed Mr. Ward-Minor behind his back. Tr. 44. Lieutenant Chatmon confirmed again that Mr. Ward-Minor had no choice in the matter. Tr. 44. Lieutenant Chatmon further testified that he made Mr. Ward-Minor turn his back to be handcuffed, and then turn around to face him afterward. Tr. 44-45. He also testified that he made Mr. Ward-Minor "stop moving." Tr. 45. Lieutenant Chatmon stated that Mr. Ward-Minor was "very nervous, and he was moving around a lot, which, based on my experience, is indicative of someone who has weapons and/or either some other type of contraband, which is why I put the handcuffs on him." Tr. 45. He explained that his suspicion was further aroused Mr. Ward-Minor, asked "if he had anything on him other than marijuana," looked at his crotch area. Lieutenant Chatmon further explained the

basis of his hunch: "in my past experience, whenever I asked individuals previously if they had anything on them, they look to where the object is that they are not supposed to have. It's just—*I don't know why it happens*, but it happens like that *quite often*." Tr. 46. He described this as "an indication." Tr. 47 (emphasis added).

Questioned by the judge, Lt. Chatmon stated that in his career he had made at least one thousand arrests—a "ridiculous number of arrests." Tr. 47. (No evidence was introduced on that point. *See id.*) As a result, he explained, his experience "does help me read body language and those types of things. That's what I based that on. I mean, his nervousness; his hesitancy to get out of the car; when I asked that question, him looking at his crotch area, I took all of those things, put them together, and, you know, that made me feel like there was something more there." Tr. 47.

Defense counsel questioned Lt. Chatmon about what made him think Mr. Ward-Minor was nervous. Lieutenant Chatmon explained that he saw Mr. Ward-Minor, when he put his hands on the dashboard, was trembling. Yet, he conceded, this did not appear on video. "[Y]ou may not be able to see it to the degree that I saw it that day because the camera may not pick up his hands trembling." Tr. 48. Questioned about why he earlier had testified that the video was a fair and accurate representation of the encounter, but later that he did not capture the details of the encounter that he could perceive, he explained that he could also see Mr. Ward-Minor's heart rate: "You can't pick up breathing on that, but I can pick up the breathing. *His heart rate* or his chest rising and falling, you

won't be able to see that on a video, but I can see that." Tr. 48-49 (emphasis added). Lieutenant Chatmon then insisted that the video *did* pick up Mr. Ward-Minor trembling:

> Look at his thumbs. You can see his fingers. His hands are trembling. If you slow it back—go back and play it, you can see his thumbs, you'll see his hands trembling. You'll also see him start to do this with his hands because he's nervous. He's nervous. I can tell he's nervous.

Tr. 49.

Asked whether, in all of the arrests he had accumulated, people are "just generally nervous when they meet police," Lt. Chatmon conceded, "Some people are nervous. There are some people, but that's why you go a little bit more, the investigative tool. You know, some people just get nervous when they get around the police, absolutely true." Tr. 50. Asked, "And so nervousness isn't necessarily indicative of guilt of anything, right?", Lt. Chatmon responded in the affirmative: "Which is why he wasn't under arrest for being nervous." Tr. 50.

B. Immediately after ordering Mr. Ward-Minor out of the car and handcuffing him, Lt. Chatmon searches him.

Lieutenant Chatmon testified that he said to Mr. Ward-Minor, who was still in handcuffs, "I'm going to check you real quick," "if that's cool." Tr. 51-52; *see* Tr. 135. (judge finding that Lt. Chatmon asked, "Is that cool?"). Lieutenant Chatmon further testified that Mr. Ward-Minor nodded." Tr. 52. Lieutenant Chatmon maintained that the subsequent search was therefore consensual: "I asked him to search him, and I assumed that he was saying yes for that particular reason." Tr. 52. He did not, he testified, inform Mr. Ward-Minor that he would be searching in the crotch area, but just that "I was going to pat him down." Tr. 52;

Tr. 53 ("I'm going to check you real quick."); Tr. 60 (Lt. Chatmon testifying that he did not inform Mr. Ward-Minor that he would search in his crotch, between his inner thighs, and around his genitals). There was no indication in the testimony that Lt. Chatmon informed Mr. Ward-Minor that he could refuse the search, be released from handcuffs, or leave the scene. After Lt. Chatmon "felt around his genitals," he testified, he found a gun. Tr. 55.

C. Lieutenant Chatmon testifies that most of his stops are of black people, due to the area he is generally directed to work in.

Defense counsel extensively questioned Lt. Chatmon about the number of times that he had stopped black versus white motorists. Tr. 61-68. Lieutenant Chatmon stated that he recalled at least once making a stop of a white person that went to court, though he could not remember the name of the case or anything about it. Tr. 62. But otherwise, Lt. Chatmon explained, that so many of his stops are of people who are black, "[p]robably the bulk of the time, because of the area we work in." Tr. 62. He further stated, "It's the demographics of that particular area." Tr. 62.

Lieutenant Chatmon also explained that the fact that most of his stops are of black people is largely dictated by the areas to which he is assigned, Tr. 62-24, and the decision about where he was assigned was largely controlled by those above him in MPD, Tr. 67-70; Tr. 69 ("It's passed down to us from, like, our commander, captains. Lieutenants at that particular time, because at that time I was a sergeant."). On the day he encountered Mr. Ward-Minor, Lt. Chatmon did not recall why he was in the area. Tr. 73. However, when asked, "based on the area that you're in and the type of car, [is it] fair to say that you know you're going

to stop a black person?", Lt. Chatmon answered, "I would say yes because of the demographics of that particular area that we patrol in. . . . people of color tend to live in those areas right now" Tr. 75 (describing them as "low economic areas," which "tend to be the ones that have more violent crimes.").

When asked how many of the people that he had searched in his career were black, Lt. Chatmon answered "[a] lot" but could not provide a number. Tr. 77-78. He did, however, admit that most were black." Tr. 78. When asked for further details, Lt. Chatmon did not know statistics about how many people stopped by MPD or the Gun Recovery Unit were black. Tr. 81-84.

C. The trial court makes findings of fact and conclusions of law and denies the defense motions to dismiss the charges and to suppress the gun.

With regard to the motion to suppress, the trial court addressed two issues: whether the seizure and search of Mr. Ward-Minor was supported by articulable suspicion, and whether the search was consensual. It determined that it could not find that the search was supported by reasonable, articulable suspicion, but that regardless the Mr. Ward-Minor had consented to the search. With regard to the motion to dismiss, the trial court found that it lacked sufficient evidence to dismiss the charges for racial bias based on the evidence in the record.

1. The trial court denies the motion to suppress.

The trial court found that Lt. Chatmon was an experienced officer, having made thousands of arrests and stops. Tr. 126. As to whether the initial traffic stop was legal, the court found that it was, based on the assertion that the windows were too dark, in violation of the District's tint law. Tr. 127.

The court also found that there was a smell of "fresh smoke," though Lt. Chatmon had only testified that he smelled burnt marijuana. *Compare* Tr. 128 (court's conclusion that there was a strong smell of smoke—of fresh smoke) *with* Tr. 13-14 (smell of burnt marijuana) *and* Tr. 86-87 (smell of burnt marijuana). The court did not find that there was any smoke in the car or coming from the car. Tr. 128.

The court found that Mr. Ward-Minor "indicate[d] some resistance" to being required to exit the car, because he had nothing to do with the tint violation.[2] Tr. 128. It found that although Mr. Ward-Minor appeared nervous, "I wouldn't say it was, like, anything unusual." Tr. 128. In fact, the court found, "I didn't notice him shaking, and I didn't notice his hands necessarily. I mean, I did see a couple of finger movements, but I didn't see like I've seen in other cases where somebody actually, physically their bodies are shaking." Tr. 128. Instead, the court found, Mr. Ward-Minor's demeanor "was kind of [an] appropriate response to being pulled over by the police. You know, you're a little bit nervous but nothing unusual." Tr. 128-29. As a matter of law, the trial court found, ordering Mr. Ward-Minor out of the car was constitutional. Tr. 129.

The court then addressed whether it was lawful to put Mr. Ward-Minor in handcuffs:

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[2] The court later clarified that by "resistance" it did not mean "active resistance here he was fighting with officers" but rather that Mr. Ward-Minor "was reluctant because I think he felt he had a right not to get out of the car, and so he was like, well, wait, why am I being asked to get out of the car when I'm just a passenger[?] I think it was a reasonable question for him to ask." Tr. 138.

> And it's in the process of trying to get him out of the car that Officer Chatmon, he's sensing, according to his testimony, he appears nervous, he seemed to be—I saw him look somewhere, that made my radar go up; his hand went back, that made my radar go up. And at some point, those—all these different, you know, very subtle signals to Officer Chatmon, who is, of course, a trained Gun Recovery Unit officer, he felt that, okay, I better put this kid in handcuffs. So he says, "Hold on a second, hold on, stop. Turn around, let me have your hands," and he puts him in handcuffs after enough signs to him—not necessarily to an untrained person—that, you know, let's not take any chances here, let's just be safe, get you out of the car. So he puts him in handcuffs. I think that that is still okay under the circumstances of officer's safety and all that. He's allowed to get him out of the car.

Tr. 130. The court then added, "I don't know whether it goes—rises to the level of a reasonable articulation suspicion that he's got a gun." Tr. 130. Rather, the trial court found, the officer merely had a hunch: "I think the officer probably had a hunch he might have a gun." Tr. 130. The trial court explained further that Mr. Ward-Minor's actions were not *objectively* indicative of illegal or dangerous activity: "Because there is also innocent explanations for a lot of what was going on like when Mr. Ward-Minor puts his hand down, it certainly did appear that he was just putting his hand on the seat so that he could . . . to get out of the car, which I think everyone does every single day when they get out of a vehicle." Tr. 131.

The court further found that Mr. Ward-Minor's movements were likely the result of confusing orders from Lt. Chatmon: "[H]e gets Mr. Ward-Minor out of the car. As [Mr. Ward-Minor is] standing up [Lt. Chatmon is] saying turn this way and turn that and then he says, "What are you moving so much for?" Tr. 131. "[T]he officer was telling him to turn one way and then saying, well, stop moving, like, stop moving, but move; move, but stop moving." Tr. 131. "And that's when,

again, Officer Chatmon says, 'You got something on you? Is there something going on here that you're being'—'you're just jumpy and you're moving too much,' seeming to want to elicit some kind of incriminating statement to admit that he had something on him. But, in any case, [Mr. Ward-Minor] doesn't. He denies having anything." Tr. 131-32.

The trial court then recognized that "the linchpin of this whole thing is whether or not there was consent freely given, right, because at that point Officer Chatmon says, I'm going to pat you down—or 'I'm going to check you. Is that okay?' So it's a statement and a question together, and this is right after Officer Chatmon had said get out of the car." Tr. 132. The court then determined that Mr. Ward-Minor's response "appears to be an affirmative response." Tr. 132 (also finding that it *may* have been verbal). The court continued, explaining that "on top of that, Mr. Ward-Minor seems to help or assist in getting ready for the search by saying, 'Yeah, I know I got to spread my legs here,' *like he understands the routine*." Tr. 132-33 (emphasis added).

The trial court reasoned that Mr. Ward-Minor, based on his earlier reticence to exit the car when commanded, could have asserted his rights not to be searched:

> He certainly wasn't shy about asserting his rights at that time, and now here's an opportunity to assert his rights one more time. One, he could have said, no, it's not okay, I didn't do anything, you don't have a right to touch me; or he could have said nothing instead of giving an affirmative response, and just sort of like—or saying do what you're going to do, man, I'm not consenting to anything; but the response was affirmative.

Tr. 133.

At that point, the trial court recognized that Lt. Chatmon had not "*articulated* a sufficient basis to search." "If Mr. Ward-Minor had said no, you can't search me . . . I don't know whether this officer had sufficient basis to proceed any further, and *he didn't say whether he did*." Tr. 133 (emphasis added).

As a matter of law, the trial court found, the test of "voluntariness of a consent to search is a question of fact to be determined from all of the circumstances." It continued, "The test is subjective, focusing specifically on the consenting person's characteristics and subjective understanding, and on whether the consent was freely given." Tr. 133-34.

As a result, the trial court determined, "the record in this case is that Mr. Ward-Minor was asked, 'I'm going to check you. Is that cool?' And he said—either nodded or said, okay or all right, and then actually got in the position and said 'I know I got to spread them.' Like, he had went a little bit further by setting himself up to be searched by the officer, which to me would indicate to sort of a voluntariness." Tr. 135. The court noted that with regard to "reasonable articulable suspicion . . . I don' know how I would have come out on that. It does appear to have some issues with whether there's reasonable articulable suspicion, to do it without consent." Tr. 136. But regardless, it found that the search was voluntary and denied the motion to suppress on that basis. Tr. 136.

2. The trial court denies the motion to dismiss under the Equal Protection Clause.

During the hearing, defense counsel had explained the basis of his written motion: "Narrowly speaking, Your Honor, it is somewhat about tint stops, but more broadly speaking it's about pretextual stops—MPD making pretextual stops

of black men mostly and applying the law only to those individuals." Tr. 81. Earlier in the case, the defense had sought to compel information about police stops from the government, A.6, and the court had denied a defense motion to compel its disclosure, A.40.

The court responded, "Okay. I don't know how you're going to get that information." Tr. 81. Defense counsel explained further, "I would have had the Court not denied my motion, and I would have hired an expert who would have been able to testify about the statistics, which I was unable to do because the Court denied my motion." Tr. 81. But the trial court demurred: "We're not here to relitigate a motion that's already been ruled on. We're here to litigate the motion before the Court." Tr. 82.

Defense counsel had argued that not only the stops themselves, but the areas to which MPD is directed cause mostly black people to be stopped by police. Tr. 113-16. In the end, the trial court made clear, "I don't have any evidence in order to support—you're making the argument that somehow this is an Equal Protection argument, but I don't have any evidence that would suggest that either." Tr. 123. For that reason, the court held, "[b]ased on the record we have here, there's just not sufficient evidence on this record to find that there was selective enforcement going on," Tr. 125, and the court denied the motion to dismiss, Tr. 126.

D. At the request of the defense, the trial court makes specific factual findings.

After the trial court's decision to deny the motion to suppress, defense counsel requested specific findings. Tr. 136. Regarding whether Mr. Ward-Minor's hands were shaking, the trial court found, "I didn't see shaking. . . . "I'm

not saying that the officer was—what he said was incorrect. I'm just saying I didn't see it on the tape. . . . I saw some movement, but I don't know whether I would characterize it as shaking." Tr. 137. Asked again specifically to find whether Mr. Ward-Minor's hands were shaking, the trial court refused to do so, stating that it did not see shaking in the video, and it could not find the fact one way or another. Tr. 137-38.

With regard to why Mr. Ward-Minor had looked down after Lt. Chatmon asked him if he was carrying contraband, *see* Tr. 108-09, the court was asked to find whether Mr. Ward-Minor "looked down at any other time other than when he moved his phone off his lap," but it was unable to do so—though it noted, "I did see him look down at his lap, but, you know, his phone was in his lap." Tr. 138. It also clarified that "what appeared to be in the video" was that "when he looked down, he also moved his phone off his lap." Tr. 139.

Asked to make a finding that Lt. Chatmon searched around or near Mr. Ward-Minor's genitals, the court found that he did. Tr. 139-40. Asked to find whether Mr. Ward-Minor's apparent consent to a patdown included a search of his genitals, the trial court found, "It's whatever—you know, yeah, unless he revokes that consent." Tr. 140; Tr. 142 ("I don't know what she knows, but she certainly had probable cause to pull the car over for a tint violation").

The trial court also found that the tint of the windows appeared to provide probable cause of a tint violation. Tr. 141. However, it at first stated it could not find that Lt. Modl knew the law regarding tint at the time, Tr. 141 ("I don't know"); but after a contentious back and forth, the court stated that it could make

such a finding, Tr. 142. Still, when asked whether it could make a finding that Officer Modl could or could not see into the vehicle, the court stated, "I don't have any information on that." Tr. 142. Furthermore, on whether Lt. Modl could tell the races of the car's occupants, the court responded, "I don't know. She didn't testify." Tr. 143.

E. Mr. Ward-Minor enters into a conditional guilty plea, with the trial court's consent, preserving his appellate rights.

Ater court's decision at the hearing, the Mr. Ward-Minor entered into a conditional plea, A.220-21, in which he pleaded guilty to the charge while reserving his appellate rights with respect to his motions to suppress and dismiss, to which the trial court consented. A.214. Mr. Ward-Minor then pleaded guilty, A.216. This appeal followed.

STANDARD OF REVIEW

"Whether a seizure has occurred for Fourth Amendment purposes is a question of law which this court reviews de novo, deferring to the trial court's factual findings, unless clearly erroneous." *Jackson (Louis) v. United States*, 805 A.2d 979, 984 (D.C. 2002) (citing *In re J.M.*, 619 A.2d 497, 500 (D.C. 1992)).

Although this Court defers to the trial court's findings of fact unless they are clearly erroneous, it "do[es] not regard the trial court's determination that [an] encounter was consensual as a factual finding that [the defendant] voluntarily complied with [an [o]fficer[]'s request, but rather as a *legal conclusion* subject to *de novo review*." *Sharp v. United States*, 132 A.3d 161, 166 (D.C. 2016) (emphasis added) (citing *Jackson (Louis)*, 805 A.2d at 985-86); *Turner v. United States*, 116 A.3d 894, 915 (D.C. 2015); *Miller v. United States*, 14 A.3d 1094,

1122 (D.C. 2011); *see also Hawkins v. United States*, 663 A.2d 1221, 1231 (D.C. 1995) (King, J., dissenting) ("As is often the case, the line between fact-finding and determinations of the law can be blurred so that the ultimate conclusion is one based upon a mixture of fact and law."). Of course, other "legal conclusions on Fourth Amendment issues, including whether [an action] was justified by reasonable articulable suspicion, are legal questions that [this Court] review[s] de novo." *Henson v. United States*, 55 A.3d 859, 863 (D.C. 2012). "The trial court's determination that appellant consented voluntarily is a factual finding that [this Court] will affirm unless it is clearly erroneous." *Henderson v. United States*, 276 A.3d 484, 489 (D.C. 2022).

This Court "review[s] the denial of a motion to compel discovery for abuse of discretion resulting in prejudice. *Franco v. District of Columbia*, 39 A.3d 890, 896 (D.C. 2012) (citing *So v. 514 10th St. Assocs., L.P.*, 834 A.2d 910, 914 (D.C. 2003)).

ARGUMENT SUMMARY

This Court should reverse the trial court's failure to suppress the gun because the Supreme Court's decision in *Arizona v. Johnson* makes clear that a passenger in a car at a traffic stop is seized from the moment the stop begins, and the seizure does not end until he is free to leave. A person who is being actively questioned by police, as the stop continues, and he remains in handcuffs, cannot give voluntarily consent.

This Court should *not* find that reasonable, articulable suspicion supported the search for weapons. Lieutenant Chatmon relied upon impermissible factors,

highly questionable "body language" that this Court has previously condemned (plus the apparent ability to discern a person's heart rate from a distance), to cover what was essentially a hunch. And a hunch cannot support a search for weapons under *Terry v. Ohio*. And in any event, such a legal determination has been foreclosed by the trial court's many factual findings that would prevent it—including that the police officer failed to articulate a sufficient basis for the search.

For these reasons, this Court should suppress the illegally obtained evidence and reverse Mr. Ward-Minor's convictions. But if it declines to do so, it should *still* reverse Mr. Ward-Minor's convictions for another reason: because the trial court impermissibly abused its discretion when it denied him the ability to compel the government to disclose information that would have supported his motion to dismiss under the Equal Protection Clause, as a result of racial bias in traffic stops. As the trial court made clear, it denied his motion to dismiss on the basis of insufficient data—data that the court should earlier have compelled the government to disclose.

ARGUMENT

As a general matter, "the decision to stop an automobile is reasonable where the police have probable cause to believe that a traffic violation has occurred. *Whren v. United States*, 517 U.S. 806, 810 (1996). Likewise, an officer may "ask [read: *direct*] the driver of the vehicle to step out of the car and off onto the shoulder of the road where the inquiry may be pursued with greater safety to both. *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1997). In *Mimms*, the Supreme Court reasoned that the "intrusion into the driver's personal liberty occasioned . . . by the

order to get out of the car . . . "can only be described as *de minimis*." *Id.* The Supreme Court also held, in *Maryland v. Wilson*, that "an officer making a traffic stop may order *passengers* to get out of the car pending completion of the stop." 519 U.S. 408, 415 (1997) (emphasis added). The Court's reasoning in *Wilson* hinged on two prongs. First, it held that the "only change in [the passengers'] circumstances which will result from ordering them out of the car is that they will be outside of, rather than inside of, the stopped car." *Id.* at 414. Second, the Court relied upon the increase in safety of the police officer: "Outside of the car, the passengers will be denied access to any possible weapon that might be concealed in the interior of the passenger compartment." *Id.* The passenger, the Supreme Court has held, may be ordered out of the car even "without reasonable suspicion that the passenger poses a safety risk." *Brendlin v. California*, 551 U.S. 249, 258 (2007) (citing *Wilson*, 519 U.S. at 414-15).

A traffic stop is unquestionably a seizure of *all* those stopped. "[A] seizure occurs if 'in view of all of the circumstances surrounding the incident, a reasonable person would have believed that he was not free to leave.'" *Brendlin v. California*, 551 U.S. 249, 255 (2007) (quoting *United States v. Mendenhall*, 446 U.S. 544, 554 (1980)). The Supreme Court held in *Brendlin* that "any reasonable passenger [in a traffic stop] would [understand] the police officer to be exercising control to the point that no one in the car [i]s free to depart without police permission." *Id.* at 257. It also held that not only is a passenger thus seized "*from the moment* [the] car came to a halt on the side of the road," but that the passenger thereafter may challenge his seizure under the Fourth Amendment. *Id.* at 263 (emphasis added).

The Supreme Court confirmed that the constitutional limitations of a "stop-and-frisk" set forth in *Terry v. Ohio*, 392 U.S. 1 (1968), apply at a traffic stop to drivers *and* passengers in *Arizona v. Johnson*, 555 U.S. 323, 327 (2009). The Court explained that "in a traffic-stop setting, the first *Terry* condition—a lawful investigatory stop—is met whenever it is lawful for police to detain an automobile and its occupants pending inquiry into a vehicular violation." *Id.* The Court also held that police required independent suspicion for a search of the car's occupants: "To justify a patdown of the driver or a passenger during a traffic stop, however, just as in the case of a pedestrian reasonably suspected of criminal activity, the police must harbor reasonable suspicion that the person subjected to the frisk is armed and dangerous." *Id.*

The Court in *Johnson* went further, because the government had argued that Johnson (the passenger) had *consented* to the patdown. *Id.* at 332. It agreed with the trial court, that "'consensual' is an 'unrealistic' characterization" of the interaction at a traffic stop, noting that the "encounter took place within minutes of the stop" and "the patdown followed within mere moments of Johnson's exit from the vehicle." *Id.* at 333 (cleaned up). The Court concluded that it was "*beyond genuine debate*" that once ordered out of the car and before he was in handcuffs, "the point at which Johnson could have felt free to leave had not yet occurred."[3] *Id.* (emphasis added).

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[3] In fact, the officer in *Johnson* had testified that she believed the passenger "could have 'refused to get out of the car' and 'to turn around for the patdown.'" 555 U.S. at 332.

As a result, the Supreme Court made clear in *Johnson* that a "lawful roadside stop begins when a vehicle is pulled over for investigation of a traffic violation . . . [and] [t]he temporary seizure of driver and passengers ordinarily continues . . . *for the duration of the stop*." *Id.* at 333 (emphasis added). The Court concluded, "[n]ormally the stop ends when the police have no further need to control the scene, and inform the driver and passengers that they are free to leave." *Id.* "In sum . . . a traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with police and move about at will." *Id.* Surely handcuffs do the same.

I. The search of Mr. Ward-Minor was not consensual.

It is well-settled that a seizure has occurred where an "officer, by means of physical force *or show of authority*, has in some way restrained someone's liberty." *Gordon v. United States*, 120 A.3d 73, 78-79 (D.C. 2015) (quoting *Terry*, 392 U.S. at 19 n.16) (emphasis added; internal quotation marks omitted). Therefore, "the test for determining whether a person has been seized is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business—in other words, that he was not free to leave." *Id*. (quoting *Florida v. Bostick*, 501 U.S. 429, 436-37 (1991); *id*. at 436; *United States v. Mendenhall*, 446 U.S. 544, 554 (1980) (opinion of Stewart, J.)) (internal quotation marks and citations omitted).

The Supreme Court has explained that where police do not have reasonable, particularized suspicion that an individual possesses dangerous weapons, "the

validity of the search depend[s] on [the suspect]'s purported consent. . . . [and] where the validity of a search rests on consent, the [government] has the burden of proving that the necessary consent was obtained and that it was freely and voluntarily given, a burden that is not satisfied by showing a mere submission to a claim of lawful authority." *Florida v. Royer*, 460 U.S. 491, 497 (1983).

The Supreme Court and this Court have identified numerous factors to determine whether consent was given voluntarily, including "the threatening presence of several officers, the display of a weapon by an officer, [and] some physical touching of the person of the citizen." *Guadalupe v. United States*, 585 A.2d 1348, 1354 (D.C. 1991) (quoting *Mendenhall*, 446 U.S.at 554 (Powell, J.)). Furthermore, this Court has repeatedly identified another factor: whether the suspect was "informed that he did not have to consent to the searches." *Guadalupe*, 585 A.2d at 1359; *see also Mendenhall*, 446 U.S. at 558 (It was "especially significant that the respondent was twice expressly told that she was free to decline to consent to the search, and only thereafter explicitly consented to it.").[4]

[4] This Court has also made clear that the question whether an officer has displayed a weapon is not meant to encompass only the *brandishing* of a weapon, but also merely the visible *carrying* of a weapon, including a gun in a holster *See Gordon*, 120 A.3d at 76; *Jackson (Louis)*, 805 A.2d at 987-88. And police may effect a show of authority even when their weapons are not visible, simply by surrounding a suspect and adopting a posture that displays authority. *See Hawkins*, 663 A.2d at 1223 (two police officers approached a suspect's car from either side) (opinion of Mack, J.).

* * *

In the context of a traffic stop, however, these details need not be weighed. Rather, once a traffic stop has commenced, it ordinarily does not end until "police have no further need to control the scene, and inform the driver and passengers that they are free to leave." *Johnson*, 555 U.S. at 333. "[A] traffic stop of a car communicates to a reasonable passenger that he or she is not free to terminate the encounter with police and move about at will." *Id.*

So it was here. Once the traffic stop began, Mr. Ward-Minor had been seized. *Id.* He was then given a series of orders—to get out of the car, to put his hands behind his back to be handcuffed, and to move and then stop moving. Tr. 131. And *immediately* thereafter—after having been reticent, as the trial court found, to exit the car, but told he was required to do so, he was "asked" for consent to be searched—while he was still in handcuffs. Tr. 51-52.

Nothing about this situation would have communicated to a reasonable person that he was free to leave. The encounter took place within moments of the stop. And the patdown followed within mere moments of Mr. Ward-Minor's exit from the vehicle. Describing this submission to authority as "consensual" is unrealistic. Mr. Ward-Minor *was still in handcuffs*. There was *no* indication that the seizure had ended, because it had not ended. It is therefore beyond genuine

debate that the point at which Mr. Ward-Minor could have felt free to leave had not yet occurred.[5] *See Johnson*, 555 U.S. at 333.

As a result, the trial court's finding that Mr. Ward-Minor's consent to be searched was voluntary This finding, contrary to the Supreme Court's explicit command to the contrary, was clearly erroneous.

II. The search of Mr. Ward-Minor violated the Fourth Amendment because it was not based on reasonable, articulable suspicion that he was presently armed and dangerous.

Terry v. Ohio commands that "in determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27.

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[5] In any event, the fact that Mr. Ward-Minor was detained, handcuffed behind his back, rendered any purported consent involuntary. As this Court has held, "The critical test for determining whether a seizure has occurred within the meaning of the Fourth Amendment is whether, taking into account all of the circumstances surrounding the encounter, the police conduct would have communicated to a reasonable person that he was not at liberty to ignore the police presence and go about his business." *Jackson (Louis)*, 805 A.2d at 985 (quoting *In re J.M.*, 619 A.2d at 499-500) (internal quotation marks omitted). "The other separate inquiry, whether a person voluntarily consented to a search, focuses specifically upon the individual involved, taking into account the person's subjective understanding." *Id*. (citing *In re J.M.*, 619 A.2d at 500). No reasonable person who has been ordered out of a car and not to move, then handcuffed behind his back, would believe he was free to decline the search. And Mr. Ward-Minor, having attempted to assert his rights and been told he was required to submit, should not and could not have believed that he could refuse. Lieutenant Chatmon's repeated insistence at the hearing that had Mr. Ward-Minor refused any of his other orders, he would have forced compliance, should remove any doubt in the matter.

Mr. Ward-Minor's purported "consent," therefore, was not freely given, and police needed articulable suspicion of a crime *and* that he likely was carrying a dangerous weapon in order to search him. But they did not have it. At most, they had the fact that he had admitted to smoking marijuana. But he had not even admitted to smoking it in a car; so his admission was not to a crime. Nor could police have been investigating a charge of driving under the influence, as Mr. Ward-Minor was a passenger, not the driver.

Lieutenant Chatmon's *articulated* suspicion rested on his testimony of the following: **(1)** that he could smell burnt marijuana, Tr. 13-14, and Mr. Ward-Minor had admitted to possessing marijuana, Tr. 15; **(2)** that Mr. Ward-Minor was "moving around kind of antsy, which further aroused my suspicion," Tr. 15, and that Mr. Ward-Minor moved his hand toward his waistband; **(3)** that Mr. Ward-Minor as excessively nervous, Tr. 45; **(4)** that Mr. Ward-Minor was hesitant to get out of the car, Tr. 47; and **(5)** that when Lt. Chatmon asked Mr. Ward-Minor if he had anything on him other than marijuana, Mr. Ward-Minor looked at his crotch area (while seated), and that Lt. Chatmon believed that when he asks people if they have contraband and they look in a particular area, that area is where thing is they are not supposed to have is located (though he did not know why that was true), Tr. 46. None of these factors, alone or taken together, amount to reasonable articulable suspicion.

1. This Court has repeatedly rejected a conclusion that the presence of drugs indicates the presence of a weapon.

This Court has held that the presence of drugs, or having recently used drugs, does not indicate the presence of a weapon. In fact, even where police have

a warrant for a particular place where they believe marijuana is being sold *and consumed*, this does not provide reason, "much less probable cause, to believe that there were any weapons" there. *Bingman v. United States*, 267 A.3d 1084, 1087 (D.C. 2022). As a result, "the act of searching [a person] for weapons must *separately be justified* upon a showing that under a totality of the circumstances the police reasonably believed he was armed and dangerous at the time of the search. *Id.* (even the defendant's presence where police believe drugs are being consumed and his *possession of a knife* "do not support a reasonable determination that he was armed and dangerous.") (emphasis added).

The fact that marijuana had previously been smoked,[6] or that Mr. Ward-Minor may have had drugs on his person, is insufficient to justify a physical search *for weapons*. "Although we have recognized that 'drugs and weapons go together,' that connection standing alone is insufficient to warrant a police officer's reasonable belief that a suspect is armed and dangerous, and we have never so held." *Upshur v. United States*, 716 A.2d 981, 984 (D.C. 1998) (citing *Griffin v. United States*, 618 A.2d 114, 124 (D.C. 1992)). As this Court explained in *Upshur*, "to hold that the officers were justified in grabbing appellant merely

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[6] D.C. law specifically prohibits using the smell of burnt marijuana as the basis for articulatable suspicion for a search. D.C. Code § 48-921.02a(a)(1). And although the law includes an exception for police investigation of "whether a person is operating or in physical control of a vehicle . . . while intoxicated, under the influence of, or impaired by alcohol or a drug," D.C. Code § 48-921.02a(b), Mr. Ward-Minor was not the driver, and there was no indication that he was operating anything. As the trial court noted, the smell of marijuana would have given police reason to investigate only whether "*the driver* is driving under the influence." Tr. 121 (emphasis added). Nor did Lt. Chatmon articulate any such investigation.

because they suspected he had exchanged money for drugs would undermine the *Terry* requirement that frisks be undertaken only where the officers have a reasonable articulable suspicion that the suspect may be armed and presently dangerous." *Id.*

Notably, the trial court's finding of fact that there was "fresh smoke," Tr. 128, was clearly erroneous. Lieutenant Chatmon had testified that he smelled burnt marijuana, Tr. 13-14, but that he did not have any recollection whether "actual smoke" came from the car, Tr. 86-87. In any event, the presence of drugs will not support a reasonable inference of the presence of weapons, as *Terry* requires. *See Upshur*, 716 A.2d at 984.

2. Mr. Ward-Minor's alleged movements were insufficient to indicate the presence of a weapon.

Mr. Ward-Minor's alleged movement cannot support reasonable, articulable suspicion for a search, for two key reasons: (i) ambiguous movement susceptible to innocent explanation does not give rise to a reasonable inference that a person is armed and therefore is not a legitimate factor for a *Terry* search; and (ii) the trial court found, as a matter of fact, that Lt. Chatmon exaggerated *and in some ways caused* Mr. Ward-Minor's movement.

First, this Court has repeatedly found that excessive movement is not a legitimate factor in assessing reasonable, articulable suspicion. *Robinson v. United States*, 76 A.3d 329, 337 (D.C. 2013) (back-and-forth and side-to-side movement over a person's chest does not indicate a concealed weapon); *see Jackson (Tyrone) v. United States*, 56 A.3d 1206, 1211 (D.C. 2012) (noting the "importance of

identifying a link between the nature of a particular gesture and a likelihood that the person making the gesture is armed").

In fact, not only is a hand motion vaguely near a person's waistband insufficient to provide reasonable suspicion, this Court concluded in *In re A.S.* that the appellant's "stuffing motion with his right hand into [his] waistband area" was susceptible to too many perfectly innocent explanations (including "tucking in his shirt, scratching his side, pulling up his pants, arranging his underwear, pager, cell phone, or walkman, etc.") to provide reasonable, articulable suspicion to justify a seizure, even in a high-crime area around midnight." 827 A.2d 46, 46-48 (D.C. 2003); *see also In re D.J.*, 532 A.2d 138, 142-43 (D.C. 1987) (modified on other grounds by *Allison v. United States*, 623 A.2d 590 (D.C. 1993)) (rejecting the government's argument that appellant's act of "putting his hands in his pockets" "raised sufficient cause for suspicion to justify a *Terry* stop").

Nothing about Mr. Ward-Minor's hand movement was suggestive that he was armed. As the trial court found, there were "innocent explanations" for Mr. Ward-Minor's hand movements, "like when [he] puts his hand down, it certainly did appear that he was just putting his hand on the seat so that he could . . . have some leverage to get out of the car, which I think everyone does every single day when they get out of a vehicle." Tr. 131. This factual finding, alone, negated the use of Mr. Ward-Minor's hand movement as indicative of the presence of a weapon. And as this Court held in *Duhart v. United States*, such hand gestures are therefore "capable of too many innocent explanations," to provide much if any support for a reasonable, articulable suspicion that Mr. Ward-Minor

was armed or otherwise engaged in criminal activity. 589 A.2d 895, 899 (D.C. 1991) (internal quotation marks omitted).

Second, after reviewing the video, the trial court expressly found—as a matter of fact—that Mr. Ward-Minor was *not* moving excessively, and that his movement was well-explained by Lt. Chatmon's contradictory orders: "[H]e gets Mr. Ward-Minor out of the car. As he's standing up he's saying turn this way and turn that and then he says, "What are you moving so much for?" Tr. 131. "[T]he officer was telling him to turn one way and then saying, well, stop moving, like, stop moving, but move; move, but stop moving." Tr. 131. To the trial court, it appeared that the entire episode of demanding that Mr. Ward-Minor "stop moving" was just a ruse—a pretext to get him to make an incriminating statement, to confess to something—and had nothing to do with the movement at all. Tr. 131-32 (trial court finding that that Lt. Chatmon's statements about Mr. Ward-Minor's movements showed that he was "seeming to want to elicit some kind of incriminating statement to admit that he had something on him.).

Lieutenant Chatmon had no reason to believe that Mr. Ward-Minor's movement had anything to do with whether he had a weapon and therefore could not support reasonable, articulable suspicion that he was presently armed.

3. Nervousness is insufficient to indicate the presence of a weapon, and the trial court found that Mr. Ward-Minor did not act unreasonably nervous.

This Court has explicitly rejected the proposition that *displaying nervousness* is a sufficient factor to factors to demonstrate a reasonable and articulable suspicion "that criminal activity was afoot . . . and that appellant was

armed and dangerous." *In re R.M.C.*, 719 A.2d 491, 496 (D.C. 1998); *Golden v. United States*, 248 A.3d 925, 946 (D.C. 2021) ("nervousness during the encounter [] is excessively ambiguous and of little objective significance"). As Lt. Chatmon himself admitted, "[s]ome people are nervous. . . . You know, some people just get nervous when they get around the police, absolutely true."[7] Tr. 50.

In any event, as the trial court explicitly found—as a matter of fact—Mr. Ward-Minor was not acting *unusually* nervous. Tr. 128. "I wouldn't say it was, like, anything unusual. . . . I thought it was kind of appropriate response to being pulled over by the police. You know, you're a little bit nervous but nothing unusual." Tr. 128-29. As a result, Mr. Ward-Minor's alleged nervousness—usual in any police encounter, as both the officer and the trial court concluded—cannot be used as a factor in whether Lt. Chatmon articulated reasonable suspicion that Mr. Ward-Minor was armed.

4. An attempt to assert constitutional rights is insufficient to indicate the presence of a weapon.

Lieutenant Chatmon claimed that Mr. Ward-Minor's not only did the trial court not find that Mr. Ward-Minor's "hesitancy to get out of the car" "made me feel like there was something more there. Tr. 47. Yet the trial court did not find this factor to be indicative of the presence of a weapon: It *praised* his attempted assertion of his rights, noting that "he knew his rights about—or what he thought was his rights about not having to get out of the car. He certainly wasn't shy about

[7] Asked, "And so nervousness isn't necessarily indicative of guilt of anything, right?" Lt. Chatmon answered in the affirmative: "Which is why he wasn't under arrest for being nervous." Tr. 50.

asserting his rights at that time, Tr. at 132-33, which showed "that he had the capacity and the intelligence to challenge the officer when he was first asked to step out of the vehicle, so it's not like he is a shrinking violet," Tr. at 135.

Moreover, Mr. Ward-Minor, exhibiting the usual nervousness that one would feel in a police encounter, barely hesitated—after telling Lt. Chatmon that "he didn't feel safe," Tr. 40—and relented when Lt. Chatmon told him that "the Supreme Court says in the traffic stop you've got to get out of the car, Tr. 42-43. In other words, Mr. Ward-Minor, nervous for his safety, paused only to assert his rights, and relented after he was told that the law required him to get out of the car.[8]

5. Lieutenant Chatmon's purported experience in "body language" could not provide sufficient evidence that Mr. Ward-Minor was armed.

Finally, there is Lt. Chatmon's observation that when he asked Mr. Ward-Minor if he had anything on him other than marijuana, he looked at his crotch area, and his parallel assertion that based on his "past experience," "when I ask someone if they have anything on them that they're not supposed to have on them, *a lot of times* they'll look exactly where that item that they're not supposed to have on them is." Tr. 119 (emphasis added).

The question is whether Lt. Chatmon's observation about what happens "a lot of times" meets the Supreme Court's command in *Terry* that "in determining whether the officer acted reasonably in such circumstances, due weight must be

[8] Notably, during a discussion of his safety during the police stop and why he was being cautious and keeping his hands on the dashboard, Mr. Ward-Minor chimed in: "I'm black." Tr. 120.

given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific *reasonable inferences* which he is entitled to draw from the facts in light of his experience." *Terry*, 392 U.S. at 27. The answer, as the trial court recognized, was that if anything is a hunch, this was.

Lieutenant Chatmon's inchoate observation not about Mr. Ward-Minor in particular, but about the ability to "read body language" that made him "feel like there was *something more* there," Tr. 47, is *exactly* the kind of hunch upon which the Supreme Court expressly forbade reliance. "'[T]here are limits to the inference that an experienced reasonable police officer can rationally draw' to justify a *Terry* stop and frisk." *Robinson*, 76 A.3d at 340 (quoting *Duhart*, 589 A.2d at 899). Here, Lt. Chatmon did not profess to be able to identify that *there was a weapon* there, only that there was "something more." Tr. 47.

Notably, as in *Robinson*, there is nothing to indicate that Lt. Chatmon asked Mr. Ward-Minor if he "had anything" because the officer had a hunch he was armed, later "confirmed" by an almost supernatural ability to "read" body language. *See Robinson*, 76 A.3d at 338 ("Officer Katz did not ask Mr. Robinson if he had a gun because Officer Katz had even a hunch that Mr. Robinson was carrying a firearm. According to Officer Katz, he put this question to everyone he encountered out on patrol."). As in *Robinson*, Mr. Ward-Minor's glance at his phone in his lap was neither an affirmative or inculpating non-verbal answer, nor was it a physical admission; nor did Mr. Ward-Minor's glance at his phone suggest concealment of a guilty fact. *Id.* at 338. As in *Robinson*, the officer asked Mr. Ward-Minor whether he had anything on him not because he had a suspicion

that Mr. Ward-Minor was armed, but "because that's his job. He's a gun recoverer." *Id.* at 334.

Lieutenant Chatmon could not even articulate *the reasons* behind his observation, nor *how often* it is true. "I don't know why that happens, but it happens like that quite often." Tr. 46. Had Lt. Chatmon considered all of the times that he asked suspects about contraband and they looked places where nothing was, or had he recalled situations where there were weapons and then remembered that people had glanced to their location? The government presented no evidence one way or the other to show his body-language interpretation was anything other than a cover for a hunch.

The trial court speculated that probably Lt. Chatmon "had a hunch he might have a gun." Tr. 130. But the meaningfulness of this hunch, if it is to have meaning at all, is belied by the trial court's specific finding of fact that when Mr. Ward-Minor looked down at his crotch, the court could see that he was looking at his phone in his lap. Tr. 139; *see* Tr. 108-09 (context about looking down). "I did see him look down at his lap, but, you know, his phone was in his lap." Tr. 138. "[W]hen he looked down, he also moved his phone off his lap." Tr. 139 (specific finding of fact).

This Court has specifically chastened the government for this mind-reading argument. In *Robinson v. United States*, the police officer—also a member of D.C.'s Gun Recovery Unit—testified that he believed his job was "about observations," specifically "how people react to [the Gun Recovery Unit]." *Robinson*, 76 A.3d at 332 (alteration original). The assertion is now familiar: "In

particular, '[w]hen [Officer Katz] ask[s] people if they have a gun, [he is] looking for a reaction—based on [their] movements after that question." *Id.* (alterations original). In *Robinson*, the trial court had determined that "at the end of the day, a reasonable . . . suspicion has been articulated because [t]he officer was able to articulate what his suspicion was." *Id.* at 334 (punctuation omitted). "The [trial] court grounded this determination in its assessment of Mr. Robinson's hand gestures." *Id.* Yet as this Court noted, there as "nothing inherently suspicious or threatening about such movements"; there was no testimony that the defendant was "making an effort to retrieve an item" or that he had a 'bulge' on his person that required concealing." *Id.* at 337. "In short, nothing about these hand motions alone reasonably signaled to the police that Mr. Robinson might be armed." *Id.* at 334.

In light of the trial court's specific factual finding that as Mr. Ward-Minor looked down at his crotch area, he was likely looking at his phone in his lap, Tr. 138, Lt. Chatmon's assertion that when he has asked people "if they had anything on them, they look to where *the object* is that they are not supposed to have," Tr. 46, "did not fill the 'logical gap'" between Mr. Ward-Minor's gaze toward his lap and "the suspicion that he might be armed and dangerous." *Robinson*, 76 A.3d at 338 (citing *Jackson (Tyrone)*, 56 A.3d at 1212); *see also In re A.S.*, 827 A.2d at 48 (noting that "if the behavior of a suspect is capable of too many innocent explanations, then the intrusion cannot be justified").

In other words, even if Lt. Chatmon's *hunch* is perfectly accurate—that when he asks people if they have "*anything* on them" they look to where *the thing*

is located—there is no indication in the record or anywhere else that *the thing* they look at will be *a weapon*. At most, Lt. Chatmon could testify that when he asks people "if they have *anything on them* that they're *not supposed to have*, a lot of times they'll look exactly where *that item* that they're not supposed to have on them is." Tr. 46 (emphasis added). In other words, Lt. Chatmon could not even testify that when he asks a person about what they have, they will look to *where a weapon is* hidden. So if this Court were to believe in his mindreading trick, the best he could do would be to identify the location of some kind of contraband. But that is *not* what *Terry* requires. *Terry* ultimately requires reasonable, articulable suspicion that the person is *armed*—that the contraband is *a weapon*. And that is what Lt. Chatmon failed to articulate, because he had no way to know one way or the other.

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The presence of marijuana—by then, legal in the District—even having been smoked, could not support reasonable, articulable suspicion that a weapon was present. *Bingman*, 267 A.3d at 1087; *Upshur*, 716 A.2d at 984. Mr. Ward-Minor's movement, much of it intentionally caused by police instructions, could not support reasonable, articulable suspicion. *Robinson*, 76 A.3d at 337; *In re A.S.*, 827 A.2d 46-48. Nor could Mr. Ward-Minor's alleged nervousness, both because this Court has depricated its use, *In re R.M.C.*, 719 A.2d at 496, and the trial court found as a matter of fact that Mr. Ward-Minor was not especially nervous, Tr. 128-29. Nor could Mr. Ward-Minor's assertion of his rights, which the trial court praised, Tr. 132-35 provide reasonable, articulable suspicion, *see, e.g.*, *Brown v.*

United States, 590 A.2d 1008, 1019 (D.C. 1991) ("To say that a citizen is free to leave without responding to the officer's questions is meaningless if the exercise of that freedom generates authority for a seizure where none previously existed.") (citation omitted).

Nor did police identify any of the other common factors this Court has identified—flight, presence in a high-crime area, "furtive" hand movements, an informant's tip, a person's reaction to questioning, a report of criminal activity or gunshots, or viewing of an object or bulge indicating a weapon. *Posey v. United States*, 201 A.3d 1198, 1201-02 (D.C. 2019); *see Robinson*, 76 A.3d at 337 (defining "furtive" as with "excessive stealth") (citing Webster's Third New International Dictionary, Unabridged (1981) ("furtive").

Rather, Lt. Chatmon relied on inchoate hunches and assumptions about body behavior that, even in his telling, do not indicate the presence of a weapon, but just *something* a person is not supposed to have. All of this violated the requirements the Supreme Court set forth in *Terry v. Ohio* and therefore the Fourth Amendment.

Moreover, although the trial court did not find whether police had articulable suspicion that Mr. Ward-Minor was *armed and dangerous*, it found more than sufficient facts *to negate* any such finding. *First*, the trial court found that Lt. Chatmon "probably had a hunch [Mr. Ward-Minor] might have a gun." Tr. 130. A mere hunch, of course, is the *anthesis* of articulable suspicion. *Second*, the trial court found that Mr. Ward-Minor's actions were not objectively indicative of illegal or dangerous activity: "[T]here is also innocent explanations for a lot of what was going on like when Mr. Ward-Minor puts his hand down, it certainly did

appear that he was just putting his hand on the seat so that he could . . . to get out of the car, which I think everyone does every single day when they get out of a vehicle." Tr. 131. *Third*, the trial court found that Mr. Ward-Minor's purportedly *nervous* movements were likely the result of confusing orders from Lt. Chatmon: "[H]e gets Mr. Ward-Minor out of the car. As he's standing up he's saying turn this way and turn that and then he says, 'What are you moving so much for?' . . . [T]he officer was telling him to turn one way and then saying, well, stop moving, like, stop moving, but move; move, but stop moving." Tr. 131. To the trial court, this was not evidence of a crime; it was all pretext: "And that's when, again, Officer Chatmon says, 'You got something on you? Is there something going on here that you're being'—'you're just jumpy and you're moving too much,' seeming to want to elicit some kind of incriminating statement to admit that he had something on him. But, in any case, he doesn't. He denies having anything." Tr. 131-32. And in any event, the trial court found, again, as a matter of fact, that Mr. Ward-minor was not unusually nervous for a police encounter. Tr. 128.

Finally, the trial court found that Lt. Chatmon had failed to "articulate[] a sufficient basis to search." "If Mr. Ward-Minor had said no, you can't search me . . . I don't know whether this officer had sufficient basis to proceed any further, and *he didn't say whether he did*." Tr. 133 (emphasis added).

As a result, Lt. Chatmon's testimony, combined with the trial court's findings of fact, preclude a determination that Lt. Chatmon had the required reasonable, articulable suspicion that Mr. Ward-Minor was armed and dangerous that could justify a search for weapons under *Terry v. Ohio*. Therefore, this Court

should not find this as an alternative ground to affirm the ruling below, and it should not remand for additional findings that would contradict the trial court's existing findings.

III. Mr. Ward-Minor was prejudiced by the trial court's abused of discretion in improperly declining to grant the motion to compel racial-bias data.

The Supreme Court has made quite clear that "the Constitution prohibits selective enforcement of the law based on considerations such as race . . [and] the constitutional basis for objecting to intentionally discriminatory applications of laws is the Equal Protection Clause." *Whren*, 517 U.S. at 813 (emphasis removed). As a result, leading up to trial, Mr. Ward-Minor attempted to compel disclosure of information from the government about racial bias in application of the District's traffic laws; he then filed a motion to compel the government to produce the information. A.6.

The decision whether to grant a motion to compel discovery is left to the trial court's sound discretion. *Franco*, 39 A.3d at 896. However, "[j]udicial discretion must," of course, "be founded upon correct legal principles, and a trial court abuses its discretion when it rests its conclusions on incorrect legal standards." *In re J.D.C.*, 594 A.2d 70, 75 (D.C. 1991). Here, the trial court misinterpreted the law governing whether Mr. Ward-Minor could use statistical evidence to prove up his Equal Protection claim. And he was thereby prejudiced, when a different judge in the trial court later denied his motion to dismiss, citing an insufficient record of bias.

1. The trial court abused its discretion when it denied Mr. Ward-Minor's motion to compel racial-bias data

D.C. Criminal Rule 16 states that "[u]pon a defendant's request, the government must . . . [disclose] documents [and] data . . . if the item is within the government's possession, custody, or control and (1) the item is material to preparing the defense."[9] D.C. R. Crim. P. 16(a)(1)(E)(i). As Mr. Ward-Minor made clear in his motion to compel, MPD is *required* to compile the information he requested by virtue of the 2016 Neighborhood Engagement Achieves Results (NEAR) Act, which demands that officers "record demographic and other relevant data for every stop." D.C. Code § 5-113(a). The motion to compel could not be more clear: "The data fields that the NEAR Act requires officers to complete, laid out in Section 5-113(a) (4B), mirror the discovery requests made in this case and include categories such as the race or ethnicity of the person stopped, approximate duration of the stop, traffic violation alleged to have been committed that led to the stop, whether a search was a conducted, whether officers used force, [and] whether an arrest was made." A.11 (Mot. to Compel). And even before the NEAR act was enacted, MPD already collected much of the requested data. *See* A.11-13.

The trial court's decision shows that the data Mr. Ward-Minor requested was unquestionably material to his motion to dismiss. But this should have been clear long before the hearing. As this Court held in *Koonce v. District of*

[9] Nor is the data exempt by virtue of any other part or Rule 16. For instance, the data does not consist of "internal government documents made by an attorney for the government or other government agent *in connection with investigating or prosecuting the case*." D.C. R. Crim. P. 16(a)(2) (emphasis added).

Columbia, "[u]nder Rule 16, the threshold showing of materiality is not a high one; the defendant need only establish a reasonable indication that the requested evidence will either lead to other admissible evidence . . . or be useful as impeachment or rebuttal evidence." 111 A.3d 1009, 1013 (2015) (quoting *Tyer v. United States*, 912 A.2d 1150, 1164 (D.C. 2006)) (quotation marks omitted).

As the motion to compel made clear, the information was requested as "impeachment or rebuttal evidence" of officers at the hearing, including on bias, *see Coates v. United States*, 113 A.3d 564, 572-73 (D.C. 2015), *and* to present extrinsic evidence of prejudice, *see In re C.B.N.*, 499 A.2d 1215, 1218 (D.C. 1985). The defense argued that the data would be used "as the basis of an independent motion to dismiss." A.14 (Mot. to Compel). As the defense argued, statistical evidence of racially selective law enforcement—by individual officers, by the Gun Recovery Unit, and by the department—has "at least some tendency" to suggest that they harbor racial bias and would therefore be material under Rule 16.[10] *See Hunter v. United States*, 980 A.2d 1159, 1164 (D.C. 2009).

This approach to proving an Equal Protection violation has been endorsed by no less than the U.S. Supreme Court. In *Whren v. United States*, the Court made clear that "the constitutional basis for objecting to intentionally discriminatory application of laws is the Equal Protection Clause, not the Fourth Amendment." 517 U.S. at 813. Just as important, the data may be *Brady* material,

[10] Importantly, the defense did not argue that such statistical data was sufficient to prove an Equal Protection violation, only that the data was necessary—and without it, the defense would fail, as the trial court's decision on the motion eventually proved.

as it is both "favorable and material." *Vaughn v. United States*, 93 A.3d 1237, 1244 (D.C. 2014) ("Under *Brady v. Maryland*, the government has a constitutionally mandated obligation to disclose to the defense, prior to trial, information in the government's actual or constructive possession that is favorable and material.") (citing *Brady v. Maryland*, 373 U.S. 83 (1963)) (citations omitted); *Biles v. United States*, 101 A.3d 1012, 1020 (D.C. 2014) ("[T]he suppression of material information can violate due process under *Brady* if it affects the success of a defendant's pretrial suppression motion.").

In its order denying the defense motion to compel, the trial court relied upon the standard for selective prosecution. A.42-44 (Order at 3-5). Yet that standard was inapposite. This was clearly before the trial court, as the defense made clear at the time:

> Unlike the "hard-to-meet test for 'selective prosecution' discovery developed by the Supreme Court in *United States v. Armstrong* . . . the law supports greater flexibility when the discretionary decisions of law enforcement rather than those of prosecutors are targeted by a defendant's request for discovery." *United States v. Washington*, 869 F.3d 193, 197 (3d Cir. 2017) (emphasis added); *see also United States v. Sellers*, 906 F.3d 848, 855 (9th Cir. 2018) (same); United States v. Davis, 793 F.3d 712 (7th Cir. 2015) (en banc) (same); *c.f. United States v. Hare*, 820 F.3d 93, 101 (4th Cir. 2016) (describing the holdings of *Davis* and *Washington* as "well-taken") .

A.20 (Mot. to Compel). The trial court's error—substituting the potential subjective bias of *police* with the potential bias of *prosecutors* —continued into the court's *Brady* analysis. *See* A.44-45 (Order at 5-6).

The trial court, asserting that this Court had not issued sufficient guidance on selective *enforcement* claims, went on to adopt the rule used by the D.C.

District Court in *United States v. Dixon*, 469 F. Supp 2d 40 (D.D.C. 2007), which had adopted the selective *prosecution* standard for selective *enforcement* claims in *United States v. Armstrong*, 517 U.S. 456 (1996). A.46-47 (Order at 7-8). But inasmuch as *this Court* has not settled the issue, and the decision of a federal trial court is not binding in this jurisdiction, this Court may now address the issue directly.

To be clear, a number of courts in other states have been willing to entertain suppression of evidence based statistical proof of on an Equal Protection violation. *See, e.g.*, *Commonwealth v. Lora*, 886 N.E.2d 688, 699-70 (Mass. 2008) ("[I]f a defendant can establish that a traffic stop is the product of selective enforcement predicated on race, evidence seized in the course of the stop should be suppressed unless the unconstitutional stop by police and the discovery of the challenged evidence has become so attenuated as to dissipate the taint.") (internal citations omitted); *State v. Lee*, 920 A.2d 80, 87 (N.J. 2007) ("The defendants sought discovery as part of their effort to establish an unlawful profiling stop to suppress the drugs found in their vehicle. . . . defendant is entitled to discovery in an effort to support his racial profiling claim."); *State v. Soto*, 734 A.2d 350 (N.J. Super. Ct. Law. Div. 1996) (trial court suppressed evidence against black defendants who established, through statistical evidence, that police disproportionately stopped black motorists on the turnpike).

It is fundamental that the trial court's exercise of discretion must not be erroneous. *Johnson (James) v. United States*, 398 A.2d 354, 365 (D.C. 1979). Here it was erroneous, not only substituting the standard for selective *prosecution*

for the proper standard for selective *enforcement* in violation of the Equal Protection Clause, but also in misapprehending the "relevant factors pertaining to the pending decision," *Johnson (James)*, 398 A.2d at 365, including that the material would be essential for impeachment, *see Koonce*, 111 A.3d at 1013, and that it would directly "affect[] the success of a defendant's pretrial suppression motion, *see Biles*, 101 A.3d at 1020.

2. The trial court's failure to compel production of racial-bias data prejudiced Mr. Ward-Minor, because the court declined to grant his motion to dismiss citing the lack of that very data.

At the hearing on suppression and Equal Protection, the defense argued that the D.C. Metropolitan Police Department "makes stops based upon race," in violation of the Constitution's Equal Protection Clause. Tr. 79. As defense counsel clarified, this assertion was about "MPD, the Gun Recovery Unit, and this officer and his partner on that day." Tr. 79.

In response, the government argued that "there is absolutely no evidence in the record that this was anything other than a traffic stop because the windows were tinted." Tr. 119. And although the government further argued that Lt. Chatmon testified he could not see who was in the car, Lt. Modl, who decided to make the stop, was not called to testify by the government. As the defense argued, "The question is whether Officer Modl could see them. She's the person that makes the decision, so we haven't heard from her. And, again, could she see the race because she's coming right down the street and she makes the decision." Tr. 123.

The trial court held that there was insufficient evidence in the record to support the defense Equal Protection argument. "I don't have any evidence that would suggest that either." Tr. 123. As a result, it was clear—to the defense and to the judge—that the demanded information was required for Mr. Ward-Minor to make out an Equal Protection claim in his motion to dismiss. The prejudice here, then, was obvious: Without the evidence the trial court had denied him, he could not succeed on his motion to dismiss. And he was thereby prejudiced by the abuse. *See Franco*, 39 A.3d at 896.

That is to say, this was an abuse of discretion, but it was not *just* an abuse of discretion. The trial court precluded this defendant from obtaining evidence for his defense, and then it denied his motion to dismiss because he failed to introduce that very evidence. It offends notions of justice and fairness, not to mention the Sixth Amendment, to hold that a trial court may deny a defendant the means for compulsory process for obtaining witnesses and then deny a motion to dismiss the charges against him because that very evidence he attempted to obtain was not presented to the court. If this Court declines to suppress the gun evidence, it should remand, order the trial court grant the motion to compel, and order a new hearing (and, if necessary, a trial), at which Mr. Ward-Minor can introduce evidence of selective enforcement because he is black, in violation of the Equal Protection Clause.

CONCLUSION

This Court should reverse the trial court's finding at the suppression hearing, vacate Appellant's conviction, and remand to the trial court for new trial or

dismissal. If it declines to do so, it should order the trial court on remand to grant the motion to compel; and after the data is turned over, to hold a new hearing at which Mr. Ward-Minor's motion to dismiss for violation of the Equal Protection Clause may be decided anew.

October 12, 2023

Respectfully submitted,

s/ Richard P. Goldberg

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CERTIFICATE OF SERVICE

I hereby certify that on October 12, 2023, I caused the foregoing to be served via the Court's electronic filing and service system, upon all counsel of record.

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