Appeal No. 20-CF-73

Regular Calendar: October 31, 2023

DISTRICT OF COLUMBIA COURT OF APPEALS

MAURICE MITCHELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the Superior Court of the District of Columbia
Criminal Division

REPLY BRIEF FOR APPELLANT

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[*] Asterisks denote authorities upon which Mr. Mitchell chiefly relies.

ARGUMENT

I. Mr. Mitchell was seized as soon as he stopped in response to the officers' show of authority.

The government does not contest that the police made a show of authority when they exited their car and approached Mr. Mitchell as he was on his way into the building where he lived. Nor does it contest that Mr. Mitchell submitted to that show of authority, effecting a seizure. The only dispute is *when* Mr. Mitchell submitted: Mr. Mitchell contends that he was seized as soon as he stopped and stayed put in response to the officers' show of authority, while the government argues (at 17) that Mr. Mitchell "was seized only when he finally raised his left hand," a couple of seconds later. This dispute affects only the question whether the totality of the circumstances for reasonable suspicion includes the officers' observation that, after Mr. Mitchell stopped, he "shielded a portion of his body and raised only his left hand." Gov't Br. at 20. *See id.* at 28 ("[T]he inquiry focuses on the facts known to the officers at the time of the stop[.]"). As explained below, the officers lacked reasonable suspicion to stop Mr. Mitchell either at the moment he stopped or seconds later when he raised his hand.

Mr. Mitchell submitted to the officers' show of authority when he stopped "walking and rolling his [bike] towards the door" and turned back to face the officers rather than enter his apartment building. Tr. at 53. Stopping one's movement in response to a show of authority is classic submission. *See* Appellant's Br. at 17–19. The government does not quarrel with that principle. Instead, it mischaracterizes the facts, stating that Mr. Mitchell "had *effectively* come to a stop by the time the officers

encountered him," and misconstrues Mr. Mitchell's position, claiming that he argues "that a suspect making eye contact with police . . . constitutes a seizure under these circumstances." Gov't Br. at 16–17 (emphasis added). As the government itself acknowledges, however, Mr. Mitchell was not at a standstill when the officers made their show of authority: instead, he was "trying to gain entry to the apartment building." *Id.* at 17; *see also* Tr. at 53 (Officer Phillip agreeing that "Mr. Mitchell was still walking and rolling his [bike] towards the door" and that he "stopped" only after the officers jumped out of their car). Thus, unlike the bus passenger that was "already stopped" at a red light in *Hood v. United States*, 268 A.3d 1241, 1248 (D.C. 2022) (cited at Gov't Br. 17), Mr. Mitchell could—and did—submit to the officers' show of authority by stopping his movement. Stopping at the entrance to the apartment building—not "making eye contact with police"—was the act of submission. *See, e.g.*, *United States v. Johnson*, 620 F.3d 685, 691 (6th Cir. 2010) ("[F]or a person who is moving, to 'yield' most sensibly means to stop."); *Schulz v. Long*, 44 F.3d 643, 647 (8th Cir. 1995) ("[O]ne becomes seized when the officer's show of authority has the effect of stopping his movement.").

Mr. Mitchell's brief delay in raising his left hand did not negate his submission. As an initial matter, the record reveals that Mr. Mitchell stopped moving, and therefore submitted, *before* the officers commanded him to show his hands: by the time the audio activated on Officer Phillip's body-worn camera, recording the "hands" command, Mr. Mitchell had already stopped. *See* Appellant's Br. at 18; *Golden v. United States*, 248 A.3d 925, 938 n.35 (D.C. 2021) ("Later acts

of noncompliance do not negate a defendant's initial submission[.]" (quoting *United States v. Brodie*, 742 F.3d 1058, 1061 (D.C. Cir. 2014)).[1]

Even assuming that the officers commanded Mr. Mitchell to show his hands before he stopped trying to enter his apartment building, Mr. Mitchell submitted and was seized at the moment he stopped. That is so because "[a] person is seized by the police . . . when the officer, by means of physical force or show of authority, terminates or restrains his freedom of movement." *Brendlin v. California*, 551 U.S. 249, 254 (2007) (internal quotation marks omitted). This Court and others have repeatedly applied that fundamental principle to hold that a person is seized by a show of authority once his movement has been stopped, even if he does not at first comply with additional commands. *See Williamson v. United States*, 607 A.2d 471, 473 & n.7 (D.C. 1992) (rejecting government's argument that "appellant was not seized until he finally put his hands up as ordered" and explaining that "[a]ppellant was seized when the car he occupied was stopped by a show of authority"); *see also United States v. Gamble*, 77 F.4th 1041, 1048 (D.C. Cir. 2023) (Srinivasan, C.J., concurring) ("[O]nce Gamble stayed in place in response to the officer's show of authority, he was seized, regardless of whether he had also complied with the demand to accede to a search by showing his waistband."); *United States v. Lowe*, 791 F.3d 424, 433–34 (3d Cir. 2015) (holding that Mr. Lowe was seized when he froze and stayed put in response to show of authority, and "reject[ing] the

[1] At the conclusion of the hearing, the trial court orally found that Mr. Mitchell did not "show his hands immediately," Tr. at 144, but the court never addressed, in either the oral or the written findings of fact, whether the officers commanded Mr. Mitchell to show his hands before or after he had stopped moving.

Government's contention that, because Lowe did not comply with the officers' order to show his hands, he failed to 'submit'"). Because Mr. Mitchell stopped trying to enter his building in response to the show of authority, he was seized at the moment he stopped, regardless of what happened next.[2]

II. The officers lacked reasonable articulable suspicion to stop Mr. Mitchell.

Whether Mr. Mitchell was seized at the point that he stopped trying to enter his building, or seconds later when he raised his left hand, the seizure lacked the particularized and objective basis for suspicion that the Fourth Amendment demands. Even assuming that the officers had reliable information leading them to believe that a gunshot had been fired nearby (they did not, at least as far as the record shows), it was unreasonable for them to suspect that Mr. Mitchell was the shooter. They had *no* information about a potential suspect's appearance or mode or direction of travel, and they saw Mr. Mitchell biking at a time and place that does not reasonably arouse suspicion: it was only 10:50 p.m., and Mr. Mitchell was just

[2] The government's citation of *Plummer v. United States*, 983 A.2 323 (D.C. 2009) does not support its argument (at 17) that Mr. Mitchell "was seized only when he finally raised his left hand." As Mr. Mitchell explained, *see* Appellant's Br. at 18 n.11, he and Mr. Plummer were not similarly situated. Mr. Plummer was standing in place before the show of authority, *Plummer*, 983 A.2d at 326, whereas Mr. Mitchell was "walking and rolling his [bike] towards the door," Tr. at 53, and "trying to gain entry to the apartment building," Gov't Br. at 17. *See Brendlin*, 551 U.S. at 262 ("[W]hat may amount to submission depends on what a person was doing before the show of authority[.]"). And unlike Mr. Mitchell, who stopped and stood still in response to the show of authority, Mr. Plummer did not stop moving when the officers ordered him to show his hands—instead, he "reach[ed] towards his waist several times in a motion that appeared as if he was attempting to pull something out of his pants." *Plummer*, 983 A.2d at 326 (internal quotation marks omitted).

around the corner from Rhode Island Avenue, with multiple businesses, residences, and a metro station nearby. Mr. Mitchell's appearance and behavior did not give rise to particularized suspicion, either: flinching at the sight of an oncoming police car, wearing a black sweatshirt and mask on a rainy September night, and pedaling faster up an incline are all unremarkable behaviors typical of countless innocent people.

The government relies heavily on Mr. Mitchell's mere proximity to the possible gunshot as a justification for the stop. *See* Gov't Br. at 18–20, 23–24, 25–28. But unless the person stopped matches some description of a potential suspect, proximity to a suspected crime will rarely support a stop: after all, "*particularized* suspicion" is "the bedrock Fourth Amendment requirement . . . to conduct a *Terry* stop." *Bennett v. United States*, 26 A.3d 745, 751 (D.C. 2011) (emphasis added). The government's attempt to equate proximity with particularity misunderstands the size and significance of the "relevant universe of potential suspects" in this case. *Armstrong v. United States*, 164 A.3d 102, 110 (D.C. 2017); *In re T.L.L.*, 729 A.2d 334, 341 (D.C. 1999) ("[T]he relevant universe will be determined primarily by the size of the area within which the offender might be found . . . and the number of people about in that area." (internal quotation marks omitted)).

Contrary to the government's argument (at 27), the relevant universe of potential suspects here was expansive. In the approximately five minutes between the purported gunshot and the stop, a bicyclist could have traveled one mile in any direction, *see Mitchell v. United States*, 234 A.3d 1203, 1210 n.10 (D.C. 2020),

creating a search area of roughly three square miles.[3] That is three times the size of the "large search area" that contributed to a lack of particularized suspicion in *Armstrong*, where police stopped a car three minutes after the lookout and four blocks from the reported crime. 164 A.2d at 112, 113. But the operative search area in this case was actually even larger than three square miles. Because the officers had no information about a suspect's mode of travel, the search area extended to any place that a suspect might have reached by car or by catching a train at the nearby metro station. *See id.* at 111 ("[F]leeing in a vehicle has the ability to encompass the entire District into the relevant universe in a matter of minutes.").

The universe of potential suspects within that large search area was vast. There was no lookout description to limit the people or vehicles for officers to investigate. Nor was the area remote or unpopulated: officers saw Mr. Mitchell about a block away from Rhode Island Avenue, "a major road" that provides access to a nearby metro station, shopping center, and many other businesses and residences. Tr. 66; Def. Exh. 2. The time of night did not meaningfully limit the universe of potential suspects, either: as Mr. Mitchell argued in his opening brief (at 24), and as the government does not contest, 10:50 p.m. was not an unusually late time for law-abiding people to be in the area. That alone is a critical distinction between this case and many of the cases on which the government relies.[4]

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[3] The equation to calculate the area of a circle is $A=\pi r^2$. A circle with a radius of one mile therefore has an area of approximately 3.14 square miles.

[4] *See Funderburk v. United States*, 260 A.3d 652, 654 (D.C. 2021) (stop at 2:20 a.m., where "[t]he streets were otherwise deserted"); *United States v. Rickmon*, 952 F.3d 876, 884 (7th Cir. 2020) ("[I]t was 4:45 a.m. and there was no other traffic."); *United*

The government makes two related attempts to minimize the importance of the expansive universe of potential suspects here, but both are misguided. First, it emphasizes that when "officers first observed Mitchell, they did not see anybody else on the street." Gov't Br. at 28; *see also id.* at v. But given the context in which it was made, that observation bears little weight in the totality of the circumstances. When the officers set out to investigate the ShotSpotter alert, they were parked in an alley behind the north side of Forman Mills. Tr. at 76, 108. The entrance to the alley and the entrance to the ramp up to the Edgewood building are directly adjacent on 4th Street: both are almost directly across from Channing Street, Tr. at 34, 108, and they are so close together that the trial court, when looking at a map, confused the ramp with the alley, Tr. at 76. As the officers exited the alley, they saw Mr. Mitchell as he was passing Channing Street going north on 4th Street, Tr. at 13, 90—meaning that the only area they had observed *before* seeing Mr. Mitchell was the "quiet" alley

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States v. Brewer, 561 F.3d 676, 677 (7th Cir. 2009) (officer heard gunshots coming from apartment complex at 2:30 a.m., and stopped "the only vehicle on the road" "on the only street by which one can enter or leave" the apartment complex); *United States v. McCargo*, 464 F.3d 192, 197 (2d Cir. 2006) (officers responded to 911 call made at nearly 1:00 a.m. in high-crime area), *United States v. Brown*, 334 F.3d 1161, 1162 (D.C. Cir. 2003) (officers arrived on scene at 1:45 a.m. after 911 caller reported that her window was shattered by gunfire); *United States v. Moore*, 817 F.2d 1105, 1106 (4th Cir. 1987) (stop made around 11:45 p.m. in "deserted" area); *Bell v. United States*, 280 F.2d 717, 718 (D.C. Cir. 1960) ("officers heard screams for help at 4:30 a.m. and at once saw appellant running near the point from which the cries came"); *State v. Maya*, 493 A.2d 1139, 1141, 1143 (N.H. 1985) (stop occurred at 12:57 a.m. in an area that was "virtually deserted"). The government's only case from this Court involving a lawful stop at a time similar to the stop in this case is *In re D.A.D.*, 763 A.2d 1152 (D.C. 2000). Mr. Mitchell's opening brief already explained (at 34–35) why *D.A.D.* is inapposite. The government does not respond to that point.

where they had gone to eat in peace. Tr. at 9. *After* the officers saw Mr. Mitchell, they turned right onto 4th Street, Tr. at 38, but because Mr. Mitchell turned up the ramp, they immediately made a U-turn to follow him off 4th Street and up the ramp that dead-ends at the Edgewood Apartments. Tr. at 49, 92. The officers had scarcely any time to scan for other people on 4th Street, let alone the nearby Rhode Island Avenue or any of the other streets in the area where people might have been—and, in fact, were—out and about.[5]

Second, the government asserts that "[t]he officers could have reasonably presumed that Mitchell had not been traveling the entire time at a constant high speed." Gov't Br. at 27. But as this Court already explained, the more reasonable inference was that "Mr. Mitchell's pace and his proximity to the suspected gunshot, when taken together, [we]re more exculpatory than inculpatory." *Mitchell*, 234 A.3d at 1210. And in any event, the particularized suspicion analysis did not turn solely on "whether it was reasonable to think the [suspects] might be in th[e] area," but also on whether it was reasonable to infer that Mr. Mitchell, as opposed to anyone else who might have been present in the large search area, was connected to the purported gunshot. *Armstrong*, 164 A.3d at 113. The latter inference was not reasonable. Even

[5] As this Court previously explained, the trial court's finding that other people were out in the area "reflect[s] that officers came upon Mr. Mitchell before surveying the surrounding area . . . and . . . undermines a potential inference . . . that other people were not outside in the area at that time." *Mitchell*, 234 A.3d at 1206 n.3. The officers' failure to survey the surrounding area in this case stands in contrast to the police investigation in *United States v. Jones*, 1 F. 4th 50 (D.C. Cir. 2021), where officers saw Mr. Jones walking alone but did not pursue him until they had checked the block for victims, confirming that no one else was around in the area. *Id.* at 51.

granting the government's unfounded premise that Mr. Mitchell "had not been traveling the entire time at a constant high speed," it was unremarkable that officers saw him at a time and place where one would expect to see law-abiding pedestrians, bicyclists, drivers, and metro riders.

The preceding discussion of proximity assumes that the record "enable[d] [the trial court] to evaluate the nature and reliability" of the information that a shot had been fired nearby in the first place. *T.L.L.*, 729 A.2d at 341, but it did not. It was the government's burden to show that the warrantless stop was "based on facts that could bring it within certain recognized, limited exceptions to the warrant requirement." *Bennett*, 26 A.3d at 751 (internal quotation marks omitted). And whether the government could meet its burden here depended "upon both the content of information possessed by police *and its degree of reliability*." *Alabama v. White*, 496 U.S. 325, 330 (1990) (emphasis added). But the government presented no evidence regarding ShotSpotter's degree of reliability or even the application's basic method for identifying gunshots. Without any such evidence, the information from ShotSpotter could not contribute to reasonable suspicion. *T.L.L.*, 729 A.2d at 341 ("[I]nformation . . . can contribute to the articulable suspicion calculus *only* if the judge has been apprised of sufficient facts to enable him to evaluate the nature and reliability of that information." (emphasis added)).[6]

[6] The government's argument (at 22) that Mr. Mitchell "failed to preserve his claim . . . that ShotSpotter technology is unreliable" is without merit. The government bore the burden of proving that the warrantless seizure was lawful; Mr. Mitchell had no burden to show that ShotSpotter technology was unreliable. Mr. Mitchell therefore need not have attacked ShotSpotter's reliability in particular in order to make his claim that the police did not have reasonable suspicion to stop him. And in support

Funderburk and the other ShotSpotter cases that the government cites (at 23–24) are not to the contrary. To start, the relevant question here is whether the government apprised the judge "of sufficient facts to enable him to evaluate the nature and reliability" of information from ShotSpotter. *T.L.L.*, 729 A.2d at 341. The government does not even contend that it did so. Instead, citing *Funderburk* and a handful of cases from other courts, it generally asserts that police "may reasonably rely on the ShotSpotter technology to investigate criminal activity." Gov't Br. at 23. But *Funderburk* did not decide that question. No one contested ShotSpotter's reliability in that case—in part because the officers there also personally heard gunshots, *see Funderburk*, 260 A.3d at 654–55—so the Court had no occasion to consider, let alone resolve, the matter. *See Hobson v. United States*, 686 A.2d 194, 198 (D.C. 1996) ("[A] point of law merely assumed in an opinion, not discussed, is

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of that claim, he can argue on appeal that the government failed to present sufficient evidence for the ShotSpotter information to contribute to reasonable suspicion, just as he can make any other argument about the weight this Court should assign to information relied on by the government for reasonable suspicion. *See, e.g.*, *West v. United States*, 710 A.2d 866, 868 n.3 (D.C. 1998) ("[O]nce a . . . claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments made below." (quoting *Yee v. Escondido*, 503 U.S. 519, 534 (1992)). In any event, Mr. Mitchell *did* question ShotSpotter's reliability below: trial counsel cross-examined Officer Phillip about the facts that "sometimes ShotSpotter detects [a] sound that isn't actually a gunshot[]" and that "[s]ometimes you all get reports of gunshots when, in fact, it's fireworks," Tr. at 26–27, and argued that "Officer Phillip testified that a possible gunshot may not be a gunshot at all" and that "neither officer testified to personally hearing the possible gunshot," R.29 at 2. Contrary to the government's argument (at 22–23), counsel did not concede ShotSpotter's reliability simply by pointing out that the officers had not even gone to the location where they thought a shot had been fired. *See* Tr. At 130, 134.

not authoritative[.]").[7] *Rickmon*, where the appellant did "take[] issue with ShotSpotter's reliability," 952 F.3d at 879 n.2, appears to be the only case that addresses the appropriate weight of ShotSpotter information in a reasonable suspicion analysis; the Seventh Circuit "conclude[d] it is analogous to an anonymous tipster." *Id.* at 882. Under *T.L.L.*, though, the record here did not support giving ShotSpotter even the minimal weight afforded to anonymous tips.

However, Mr. Mitchell's claim on appeal does not depend on assigning zero weight to the ShotSpotter information. Assuming the ShotSpotter alert functioned as an anonymous tip, it lacked the requisite corroboration to support a stop. *See Miles v. United States*, 181 A.3d 633, 638 (D.C. 2018) ("[F]or a tip to justify a *Terry* stop, there must be corroborating circumstances that show that the 'tip [is] reliable *in its assertion of illegality*.'" (quoting *Florida v. J.L.*, 529 U.S. 266, 272 (2000) (emphasis added)). Contrary to the government's argument (at 24), the radio message from the CIC did not corroborate the ShotSpotter alert—rather, the CIC call was itself based on the same ShotSpotter alert. *See* Tr. at 26–27. Nor did "the totality of circumstances" corroborate the ShotSpotter's "assertion" that a gunshot had been fired. Unlike the police in *Funderburk*, *Jones*, and *Rickmon*, the police who stopped Mr. Mitchell neither heard a gunshot nor received any 911 calls about gunfire.[8] Nor

[7] Similarly, ShotSpotter's reliability was not in dispute in either *State v. Nimmer*, 975 N.W.2d 598 (Wi. 2022), or *United States v. Jones*, 1 F.4th 50 (D.C. Cir. 2021). *See Nimmer*, 975 N.W.2d at 600; *Jones*, 1 F.4th at 53.

[8] *See Funderburk*, 260 A.3d at 654 ("officers heard gunshots and commotion" prior to receiving ShotSpotter alert); *Jones*, 1 F.4th at 51 (after officers received ShotSpotter alert, "dispatcher reported over their radio that citizens on neighboring

did they see a bulge or anything else indicating that Mr. Mitchell had a gun. *See Miles*, 181 A.3d at 638 (explaining that to stop someone based on an anonymous tip about the use of a gun, police "must typically see [or hear] something that confirms the presence of a gun" (internal quotation marks omitted)).

Even if the uncorroborated ShotSpotter information had been reliable, it gave the officers no clues about a suspected shooter.[9] And given the expansive universe of potential suspects, Mr. Mitchell's innocuous appearance and behavior did not give the police an objective, particularized basis to stop him. *See Armstrong*, 164 A.3d at 110 ("[C]ourts essentially weigh facts that contract the relevant universe of potential suspects against facts that expand it[.]"). The government asserts that Mr. Mitchell was wearing "conspicuously unseasonable clothing" that "reasonably aroused the officers' suspicions." Gov't Br. at 21 (citing, *inter alia*, *United States v. Dortch*, 868 F.3d 674, 680 (8th Cir. 2017)). But *Dortch* supports Mr. Mitchell's point that wearing a hooded sweatshirt in September did *not* reasonably arouse suspicion. The clothing in *Dortch* was "a winter coat worn in June," which the Eighth Circuit noted "is significantly stranger—that is, significantly less likely to be 'shared by countless, wholly innocent persons'—than a hoodie in September." 868 F.3d at 680 (quoting *United States v. Jones*, 606 F.3d 964, 967 (8th Cir. 2010) (holding that wearing

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blocks were calling 911 to report gunshots heard" on same block); *Rickmon*, 952 F.3d at 882 (911 calls "independently confirmed" ShotSpotter alert).

[9] That is another key difference between this case and *Rickmon*, where the officer "had a good idea of what to be on the lookout for" based on information from the 911 calls. 952 F.3d at 882–83.

sweatshirt in September added nothing to reasonable suspicion)).[10] This Court has similarly held that there is "nothing inherently suspicious, or suggestive of a desire for concealment," about "wearing an ordinary sweatshirt outside on a warm night." *Golden*, 248 A.3d at 943. Mr. Mitchell's attire on a rainy night in September similarly added nothing to reasonable suspicion.[11]

That Mr. Mitchell flinched, "began pedaling faster[,] and look[ed] over his shoulder upon being tailed by the police car" also "add[ed] little to the calculus," as this Court already recognized. *Mitchell*, 234 A.3d at 1210. Officer Phillip testified that the police car braked at the exit of the alleyway to avoid colliding with Mr. Mitchell. *See* Tr. at 13; *see also* Gov't Br. at 5 (noting that the officers "stopped their vehicle as they did not want to collide with the bicycle"). Any bicyclist would flinch upon suddenly seeing a car coming out of an alley and braking to avoid a collision. Similarly, bicyclists "routinely look over their shoulders in order to monitor the traffic behind them." *Mitchell*, 234 A.3d at 1210. And as Mr. Mitchell pointed out in his opening brief (at 30), "apparent nervousness" carries "very little weight" given

[10] All of the other cases the government cites about "conspicuously unseasonable clothing" similarly deal with heavy winter coats, not sweatshirts, which are worn throughout the year. *See United States v. Key*, 621 F. App'x 321, 322 (6th Cir. 2015) ("heavy coats in the middle of summer"); *United States v. Hood*, 774 F.3d 638, 643 (10th Cir. 2014) ("winter jacket" on "a warm day"); *United States v. Bowden*, 45 F. App'x 61, 63 (2d Cir. 2002) ("unseasonably heavy jacket").

[11] Under those circumstances, the mask that Mr. Mitchell wore—which did not conceal his face, Tr. At 98—was not suspicious, either. It had been raining that night, Tr. at 141, and the officers periodically used their windshield wipers just before stopping Mr. Mitchell. *See* Phillip BWC at 0:44, 1:08, 1:31. As defense counsel pointed out, "it is not abnormal for a person on a bike to have on a hood or even a mask to keep themselves dry. They're not biking with an umbrella." Tr. at 132.

the "numerous cases doubting the probative value in the reasonable suspicion analysis of nervousness in the presence of police." *Golden*, 248 A.3d at 945.

Singleton v. United States, 998 A.2d 295 (D.C. 2010), which the government cites (at 20), shows how little nervousness matters in this context. The Court held that there was reasonable suspicion for the stop in *Singleton* based on: (1) an officer observing a bulge consistent with a gun; (2) Mr. Singleton's "awkward walk and hand movement," which the officer recognized as telltale indicators of carrying a gun; and (3) Mr. Singleton's "apparent nervousness" as he "repeatedly looked over his shoulder at the officer." 998 A.2d at 301–02. But this Court cautioned in *Singleton* that "the objective evidence in this case is close to the minimum required to pass constitutional muster." *Id.* at 302. And it made clear that the presence of a bulge was the most significant fact creating reasonable suspicion, contrasting Mr. Singleton's case with *In re R.M.C.*, 719 A.2d 491 (D.C. 1998), where the Court "held that there was no reasonable articulable suspicion where [the] suspect . . . acted nervously, clutched or protected one of his sides, but [the] officer had not received report of criminal activity and 'saw no bulge.'" *Singleton*, 998 A.2d at 302 n.6 (quoting *R.M.C.*, 719 A.2d at 496). Reiterating that distinction, the Court in *Golden* emphasized that "Mr. Golden's purported nervousness might have some corroborative value if, as in *Singleton*, it was linked to some objective evidence that he was carrying a firearm, but it is not." *Golden*, 248 A.3d at 946. Here, too, Mr. Mitchell's apparent nervousness was not connected to any objective evidence that he was carrying a gun: unlike in *Singleton* or *Pridgen v. United States*, 134 A.3d 297 (D.C. 2016), officers saw no bulge or telltale posture suggesting a gun. "Without

such a connection, [Mr. Mitchell's] uneasiness (like his other conduct) was capable of too many innocent explanations and too ambiguous to be of much help to the reasonable suspicion analysis." *Golden*, 248 A.3d at 946.

As it did in its briefing in the 2020 stay pending appeal litigation in this case, the government continues to "characterize[] Mr. Mitchell's behavior after seeing the officers' patrol car as 'flight.'" *Mitchell*, 234 A.3d at 1210; *see* Gov't Br. at 20, 29. But "that descriptor is ill-fitting." *Mitchell*, 234 A.3d at 1210. This Court explained then that it "reject[ed] the notion that a person who is merely continuing on their way could be described as fleeing in any meaningful sense of the word." *Id*. As the Court elaborated, "[n]o matter what direction Mr. Mitchell went after coming upon the officers—forward or backward, left or right—would have meant traveling away from the officers because they were in the same place." *Id*. And Mr. Mitchell "pedaled faster" after seeing the officers, R.32 at 3, because he had reached the uphill ramp to the Edgewood Apartments. *See* Tr. at 110 (Officer Pantaleon agreeing that "a person bicycling . . . might have to put in more effort to bicycle up the hill"). Moreover, the officers knew the area, including that the ramp up to Edgewood led to "a dead end." Tr. at 49, 92. That knowledge further undermined any inference that Mr. Mitchell's turn up the ramp was evasive, and instead reinforced that he was "merely continuing on [his] way." *Mitchell*, 234 A.3d at 1210; *see also United States v. Alvarez*, 40 F.4th 339, 351 (5th Cir. 2022).

Finally, the government argues (at 20) that the totality of circumstances includes the fact that "Mitchell shielded a portion of his body and raised only his left hand." As explained above, that conduct occurred *after* Mr. Mitchell had already

been seized, making it irrelevant to the reasonable suspicion analysis. *See supra* pp. 1–4. But even assuming that Mr. Mitchell was not seized until he raised his left hand, his behavior in the brief seconds leading up to that moment made no difference for reasonable suspicion. Mr. Mitchell was straddling his bicycle and walking toward the apartment building door when the police approached him from behind and to his left. Any innocent person likely would have turned left in response to the advancing police, as he did; performing a complete about-face while straddling the bicycle would have been awkward and unnatural. And the fact that Mr. Mitchell may have imperfectly complied with the officers' commands at first was not suspicious, particularly where the commands were "part of [a] quick moving event," Gov't Br. at 17, he was holding up a bicycle, and the compliance was prompt. *See Golden*, 248 A.3d at 944–45 (holding that where officer commanded "show me your waistband," the fact that Mr. Golden showed only left side was "of little or no significance" and "could [not] reasonably be viewed as suspiciously evasive or defiant").

Funderburk, on which the government relies, does not support affirmance here. The universe of potential suspects there was drastically smaller than the one here. Police in *Funderburk* personally heard gunshots and an argument coming from a nearby alley at around 2:20 a.m. 260 A.3d at 654. They stopped Mr. Funderburk in that alley "thirty seconds later" as he was walking away from the direction of the argument. *Id.* at 654–55. In holding that the stop was lawful, this Court emphasized that officers responded to the location of the gunshots "immediately," and found Mr. Funderburk "*at the crime scene*," "exactly where they thought the shots originated." *Id.* at 657 (emphasis in original). The "immediacy" of the officers' response "limited

the universe of potential suspects to those at a particular location," and also "limit[ed] the possibility that the culprit (or culprits) could have fled before the officers arrived." *Id.*[12] That immediacy was lacking here: Mr. Mitchell was stopped several minutes after the purported gunshot—long enough that the relevant search area had expanded to roughly three square miles, at least. And officers encountered him not "exactly where they thought the shots originated," but on a nearby street that was around the corner from a major road, businesses, and residences. Moreover, in *Funderburk*, "officers were not relying on a tip of doubtful veracity," as they had personally "heard several gunshots and a commotion" prior to the ShotSpotter alert. *Id.* at 657. Here, by contrast, officers did not hear any gunshot themselves.

III. The stop was not justified under the narrowly circumscribed authority to detain eyewitnesses under exigent circumstances.

The Court should reject the government's belated attempt to justify the stop under "[t]he eyewitness exception" articulated in *Williamson v. United States*, 607 A.2d 471 (D.C. 1992). *See Bennett*, 26 A.3d at 756–57 (referring to *Williamson*'s rationale as "[t]he eyewitness exception" to the rule that a stop must be based on reasonable suspicion of criminal activity).[13] The Court has repeatedly cautioned that

[12] Similarly, in *Rickmon*, Mr. Rickmon was stopped "on the same block of the shooting" in a car that was "driving away from the site of the shooting on the only street leading from it." 952 F.3d at 883–84.

[13] By failing to raise the eyewitness exception in the trial court, the government forfeited its opportunity to defend the seizure on that basis. *See Williams v. United States*, 283 A.3d 101, 104 & n.3 (D.C. 2022) (declining to consider whether police had probable cause to search car where government argued in trial court that evidence from car would have been inevitably discovered, but failed to argue that officers had probable cause to search car); *Robinson v. United States*, 76 A.3d 329, 341 n.24 (D.C. 2013) ("government forfeited its opportunity to defend its seizure

"the authority to detain witnesses 'is much more narrowly circumscribed than the authority to stop suspects'" and that the eyewitness exception "does not permit police officers to detain someone simply because they believe the person is a potential witness to a crime." *Id.* at 757 (quoting *Hawkins v. United States*, 663 A.2d 1221, 1226 (D.C. 1995)). Rather, the exception allows "the brief detention of potential witnesses" in limited situations so that "an officer coming upon the scene of a recently committed crime can freeze the situation and obtain identifications and an account of the circumstances from the persons present." *Williamson*, 607 A.2d at 476 (internal quotation marks omitted). The exception applies only "where no other methods of investigation are readily available." *Bennett*, 26 A.3d at 757.

Williamson—one of only two cases where this Court has upheld a seizure based on the eyewitness exception—illustrates the unique and limited circumstances where the exception applies. There, an officer personally heard "several gun shots" fired just across the street. *Id.* at 472. He then immediately saw one car speed away, while a second car, in which Mr. Williamson was a passenger, "began to back quickly out of a gas station parking lot" where the shots had been fired. *Id.* A majority of the panel upheld the stop of the second car under the rationale that it was

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and search of Mr. Robinson based on" theory advanced for first time on appeal); *Bennett*, 26 A.3d at 757 & n.13 (summarily rejecting argument made by government for first time on appeal that "immediate safety" exception to *Terry* justified stop). Moreover, because the government did not raise the eyewitness exception theory below, the trial court did not determine whether there were "other methods of investigation [that were] readily available." *Bennett*, 26 A.3d at 757. "[I]t is not [this Court's] function to decide issues of fact," and "it would be particularly inappropriate for this court to decide an essentially factual question raised for the first time on appeal[.]" *Evans v. United States*, 122 A.3d 876, 884 (D.C. 2015).

reasonable "to believe [Mr. Williamson] had knowledge about a shooting that occurred *only yards from him seconds earlier*," *id.* at 477 n.15 (emphasis added), and that "[s]hort of the stop of [his] vehicle, there was no reasonable way in which the officer could obtain information about the shooting," *id.* at 477. [14]

There was no such connection between Mr. Mitchell and the potential gunshot that could justify stopping him as an eyewitness. Unlike in *Williamson*, where police knew that a shooting had "occurred only yards from [Mr. Williamson] seconds earlier," *id.* at 477 n.15, the officers here did not see Mr. Mitchell at the place where they thought a gun might have been fired. Based on where they saw him, the officers did not know whether Mr. Mitchell had come from the site of the purported gunshot, or if he had instead turned onto 4th Street from Rhode Island Avenue or another street. And because it was only 10:50 p.m. in a heavily trafficked area with many homes and businesses nearby, Mr. Mitchell's presence alone did not suggest that he would have known something about the noise that ShotSpotter picked up on. Relatedly, there was no reason to think that an eyewitness to the purported gunshot would have left the scene on the route that Mr. Mitchell took. Any witness (just like any suspect) could have turned south on 4th Street and joined other pedestrians, bicyclists, and cars on Rhode Island Avenue. Or a witness could have gone some

[14] The only other case applying the exception, *Trice v. United States*, 849 A.2d 1002 (D.C. 2004), also involved facts giving rise to a strong inference that the individual who was stopped was closely connected to the crime. There, officers saw Mr. Trice walking with a person named Castle who matched the description of a suspect in a recent nearby stabbing. *See id.* at 1008 (explaining that "Trice appeared to be the companion of a potentially violent, fleeing criminal" and "given the recency of the crime, it was reasonable to think that if Castle committed it, his companion Trice likely was aware of that fact and was a witness if not also an accomplice").

other way—as the government agreed below, "there are plenty of different ways somebody from 2316 Fourth Street could exit that location. There's literally thousands[.]" Tr. At 137–38. Just as it was pure speculation to think that Mr. Mitchell's proximity linked him to the possible gunshot as a suspect, it was pure speculation to think that his proximity made him a witness.

Moreover, even assuming there was some objective basis to suspect that Mr. Mitchell was a witness, the record does not support a finding that there were "no other methods of investigation . . . readily available." *Bennett*, 26 A.3d at 757. The officers here could have gone around the corner to the address indicated by the ShotSpotter to find evidence or witnesses—indeed, had they done so, they would have found other "people in the area" and "no apparent emergency." R.32 at 3. And once the officers' pursuit of Mr. Mitchell up a dead-end ramp ended at the entrance of his apartment building, "there was no danger that the police would lose the opportunity to question" him absent a warrantless seizure. *Bennett*, 26 A.3d at 758. At that point, instead of seizing Mr. Mitchell by a show of authority, the officers could have simply asked Mr. Mitchell if he would speak with them. And if he refused and continued into the building, the officers "would have been able to locate him for further questioning if necessary." *Id.* In short, the officers lacked *both* a reasonable basis to believe that Mr. Mitchell was a witness *and* the required necessity to detain him for questioning rather than pursuing other means of investigation.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing reply brief has been served, through the Court's electronic filing system, upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney, and Valerie Tsesarenko, Esq., Office of the United States Attorney, this 12th day of October, 2023.

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District of Columbia
Court of Appeals

REDACTION CERTIFICATE DISCLOSURE FORM

Pursuant to Administrative Order No. M-274-21 (amended May 2, 2023), this certificate must be filed in conjunction with all briefs submitted in all criminal cases designated with a "CF" (criminal felony), "CM" (criminal misdemeanor), "CT" (criminal traffic), and "CO" (criminal other) docketing number. Please note that although briefs with above designations must comply with the requirements of this redaction certificate, criminal sub-case types involving child sex abuse, cruelty to children, domestic violence, sexual abuse, and misdemeanor sexual abuse will not be available for viewing online.

If you are incarcerated, are not represented by an attorney (also called being "pro se"), and not able to redact your brief, please initial the box below at "G" to certify you are unable to file a redacted brief. Once Box "G" is checked, you do not need a file a separate motion to request leave to file an unredacted brief.

I certify that I have reviewed the guidelines outlined in Administrative Order No. M-274-21, amended May 2, 2023, and Super. Ct. Crim. R. 49.1, and removed the following information from my brief:

A. All information listed in Super. Ct. Crim. R. 49.1(a) has been removed, including:

(1) An individual's social-security number
(2) Taxpayer-identification number
(3) Driver's license or non-driver's' license identification card number
(4) Birth date
(5) The name of an individual known to be a minor as defined under D.C. Code § 16-2301(3)
(6) Financial account numbers

(7) The party or nonparty making the filing shall include the following:

(a) the acronym "SS#" where the individual's social-security number would have been included;
(b) the acronym "TID#" where the individual's taxpayer-identification number would have been included;
(c) the acronym "DL#" or "NDL#" where the individual's driver's license or non-driver's license identification card number would have been included;
(d) the year of the individual's birth;
(e) the minor's initials;
(f) the last four digits of the financial-account number; and
(g) the city and state of the home address.

B. Any information revealing the identity of an individual receiving mental health services and/or under evaluation for substance-use-disorder services. *See* DCCA Order No. M-274-21, May 2, 2023, para. No. 2.

C. All pre-sentence reports (PSRs); these reports were filed as separate documents and not attached to the brief as an appendix.

D. Information about protection orders, restraining orders, and injunctions that "would be likely to publicly reveal the identity or location of the protected party," 18 U.S.C. § 2265(d)(3) (prohibiting public disclosure on the internet of such information); *see also* 18 U.S.C. § 2266(5) (defining "protection order" to include, among other things, civil and criminal orders for the purpose of preventing violent or threatening acts, harassment, sexual violence, contact, communication, or proximity) (both provisions attached).

E. Any names of victims of sexual offenses except the brief may use initials when referring to victims of sexual offenses.

F. Any other information required by law to be kept confidential or protected from public disclosure.

Initial here	**G. I certify that I am incarcerated, I am not represented by an attorney (also called being "pro se"), and I am not able to redact this brief. This form will be attached to the original filing as record of this notice and the filing will be unavailable for viewing through online public access.**

Paul Maneri
Signature

No. 20-CF-73
Case Number(s)

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