Appeal No. 19-CF-143

DISTRICT OF COLUMBIA COURT OF APPEALS



D.W.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

# SUPPLEMENTAL BRIEF FOR APPELLANT

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## DISCLOSURE STATEMENT

Appellant D.W. was represented at trial by Amanda Rogers of the Public Defender Service for the District of Columbia (PDS). On appeal, D.W. was previously represented by Dennis Martin and KC Bridges, and is currently represented by Victoria Hall-Palerm, Mikel-Meredith Weidman, and Samia Fam, all of PDS. Appellee the United States was represented at trial by Assistant United States Attorneys Amy Joy Thomas and Julia Cosans. On appeal, the United States is represented by Mark Hobel and Chrisellen R. Kolb of the United States Attorney's Office for the District of Columbia.

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## INTRODUCTION

This Court's recent decision in *Mayo v. United States*, 315 A.3d 606 (D.C. 2024) (en banc), confirms what prior precedent already made clear: First, *Wardlow* and *Terry* require specific, relevant information about the frequency and type of crime in a defined area—rather than conclusory assertions of "high crime" based on general reputation—for locational crime evidence to support an officer's reasonable articulable suspicion. Second, where an individual flees from police after they have communicated an intention to stop him, officers must have particularized reason to believe that the individual's flight suggests consciousness of guilt, rather than an innocuous (and understandable) desire to avoid invasive contact with police officers, for the flight to contribute to reasonable articulable suspicion.

Under *Mayo*, this Court must reverse the decision below. Here, seven uniformed members of the Metropolitan Police Department's Crime Suppression Team ("CST") targeted the Geraldine Apartments for aggressive proactive searching. The officers were not responding to a call, nor investigating a hunch, nor looking for anything or anyone in particular. They were instead proactively patrolling an area that they had deemed "high crime"—based solely on their own judgments and the area's general reputation—looking to drum up evidence of wrongdoing. As the officers sprang from their vehicles en masse, Geraldine residents, accustomed to the CST's frequent and unprovoked searches, reacted in a number of ways (all of which the officers had seen before): some raised their shirts to show their waistbands; some prepared for a frisk, lifting their arms into a T shape; and some fled at the sight of seven officers in tactical gear pulling up to their home.

D.W. was among the men who fled. The officers chased him and seized him, grabbing him by his pants leg as he attempted to jump a fence. From this seized position, D.W. dropped a pistol, which the officers recovered. The trial court, relying solely on D.W.'s flight from police and the CST's bare assertion that the Geraldine Apartments represent a "high crime area," upheld the legality of the search. On appeal, the government has offered this same talismanic invocation of the "high crime area" and D.W.'s flight as justifications for the seizure.

Even before *Mayo*, this Court's precedents required suppression of the firearm because the CST seized D.W. without reasonable articulable suspicion. These cases have made clear that flight in an area dubbed "high crime," without concrete supporting evidence, does not per se give rise to reasonable suspicion. Rather, under the fact-specific analysis set forth in *Illinois v. Wardlow*, 528 U.S. 119 (2000), "flight cannot imply consciousness of guilt in all cases," *Miles v. United States*, 181 A.3d 633, 641 (D.C. 2018) (quoting *Duhart v. United States*, 589 A.2d 895, 900 (D.C. 1991)). Because the "demand for specificity in the information upon which police action is predicated is *the central teaching of [the Supreme] Court's Fourth Amendment jurisprudence*," officers must offer specific, "particularized and objective" facts undergirding their suspicion. *United States v. Cortez*, 449 U.S. 411, 417–18 (1981) (emphasis in original) (quoting *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968)); *see also Posey v. United States*, 201 A.3d 1198, 1201–02 (D.C. 2019). But that particularized supporting evidence is wholly missing here, replaced instead by conclusory and generalized assumptions.

*Mayo* reinforces the holdings of *Miles* and *Posey*, reaffirms *Wardlow*'s context-specific test, and confirms that suppression is required here. The *Mayo* Court, analyzing a Gun Recovery Unit ("GRU") stop remarkably similar to the one conducted here, stressed that unprovoked flight is not per se evidence of consciousness of guilt, but rather must be coupled with other facts that make "'the character of [the] flight . . . seem[] particularly incriminating' under the circumstances." *Mayo*, 315 A.3d at 628 (quoting *Miles*, 181 A.3d at 644). Repeating its prior admonitions not to "over-rel[y] on th[e] amorphous term" of high-crime "to support reasonable articulable suspicion to effect a seizure," it held that "courts should no longer give weight to a bare 'high-crime area' label in assessing the validity of a *Terry* stop." *Id.* at 633–34 (quoting *Dozier v. United States*, 220 A.3d 933, 943 n.12 (D.C. 2019)). Rather, courts must follow *Wardlow*'s lead, placing "the exclusive focus in assessing general locational crime information . . . on the *particular details* that make *an individual's actions* more or less suspicious when viewed in context." *Id.* at 634 (emphases added).

*Mayo* made plain what *Wardlow* and this Court's cases had already stated: the reasonable articulable suspicion analysis is context-dependent and turns on a constellation of specific, particularized facts and the permissible logical inferences that may be drawn from them, not on the rote repetition of buzzwords. Here, the government offered only the "bare 'high-crime area' label," *id.*, no information linking the only crime the officers could specifically recall (a stabbing three years prior) to D.W. or his behavior that day, and no facts showing that D.W.'s flight was motivated by guilt rather than by a legitimate desire to "avoid having [his] liberty

suspended and [his] dignity compromised" by a police team with a history of aggressive tactics, *id.* at 626. The stop was therefore unlawful and the firearm should be suppressed.

## ARGUMENT

### I. This Court's En Banc *Mayo* Decision.

In *Mayo v. United States*, 315 A.3d 606 (D.C. 2024) (en banc), this Court made clear that "weak general locational crime evidence" and the mere fact of flight fall short of the specific, particularized evidence of wrongdoing necessary to establish reasonable articulable suspicion for a *Terry* stop. *Id.* at 637. In *Mayo*, three GRU officers were patrolling the Kenilworth area in tactical gear and two unmarked police cars. *Id.* at 611. Although officers testified that they had recovered "multiple weapons" from the area, recalling "over 10" or "about 10" guns over the preceding three years, officers were not responding to any call for the police or acting on any tip. *Id.* at 612–13. As the officers pulled into an alley where five men were congregated, Mr. Mayo "immediately disengage[d]" and began to walk away; officers followed him, calling out that they "just want[ed] to talk" and asking if he had "any guns," and Mr. Mayo fled. *Id.* at 613. Officers seized him and recovered a handgun and marijuana. *Id.* at 613–14. Mr. Mayo moved to suppress the evidence, arguing that the police lacked reasonable articulable suspicion to seize him. The government asserted that "Mr. Mayo's 'unprovoked flight' in a '[h]igh crime area,' . . . gave the GRU officers" reasonable suspicion to stop him. *Id.* at 615.

This Court, reviewing de novo, *see id.* at 616–17, held that the officers lacked reasonable articulable suspicion under "the totality of 'the facts available to the

officer at the moment of the seizure,'" *id.* at 620 (quoting *Terry*, 392 U.S. at 21–22). On flight, the Court reaffirmed its prior case law applying *Wardlow* that treated flight as one factor among many in the totality of the circumstances—a factor that might contribute to reasonable suspicion depending on context, rather than through any mechanical or automatic inference. *See id.* at 624–26 (citing, *inter alia*, *Miles*, 181 A.3d at 641, 644; *Posey*, 201 A.3d at 1204; and *Duhart*, 589 A.2d at 900). This flexible, fact-dependent inquiry, the *Mayo* Court reiterated, was consistent with both *Wardlow*'s rejection of any bright-line rule in favor of "commonsense judgments and inferences about human behavior," *id.* at 626 (quoting *Wardlow*, 528 U.S. at 124–25), and the Supreme Court's subsequent applications of *Wardlow*, *id.* at 627 (citing *Missouri v. McNeely*, 569 U.S. 141, 158 (2013); *Kansas v. Glover*, 589 U.S. 376, 383 (2020); and *District of Columbia v. Wesby*, 583 U.S. 48, 59 (2018)).[1] In assessing "to what degree Mr. Mayo's flight, considered in context, could have been reasonably interpreted as consciousness of guilt," the Court first noted the lack of additional particularized facts present in other cases (i.e., an opaque bag, knowledge

[1] This Court emphasized that its approach was consistent with both *Wardlow* and subsequent Supreme Court cases recognizing "that *Wardlow* did not articulate a rigid rule that all flight, regardless of context, supports a reasonable articulable suspicion calculus." *Id.* at 627. It acknowledged that two of its prior cases, *Wilson v. United States*, 802 A.2d 367 (D.C. 2002), and *Henson v. United States*, 55 A.3d 859 (D.C. 2012), "interpreted flight as inculpatory without examining whether an individuals' flight evinced consciousness of guilt under the particular circumstances of the case." *Mayo*, 315 A.3d at 627. It explained, however, that as *Miles* and *Posey* had "sub silentio . . . recognized," *Wilson* and *Henson* were irreconcilable with *Wardlow*'s binding command to consider the totality of the evidence and the reasonable articulable suspicion analysis's "central concern . . . to discern whether a defendant's behavior reasonably indicates a guilty mind." *Id.*

of a bustling narcotics trade, or the smell of marijuana), and stressed that the "officers had no reason to believe they would find any criminal activity in the alley and observed none." *Id.* at 627–28.

The Court also observed that Mr. Mayo fled only after officers approached in a "coercive" manner and "took a series of actions that they should have reasonably understood to communicate to a person in Mr. Mayo's position that they planned to stop him." *Id.* at 628. They got out of their car "wearing tactical gear," singled out Mr. Mayo by following him, and called out to ask if he had any guns. These actions "would be startling and possibly frightening to many reasonable people," *id.* (quoting *Miles*, 181 A.3d at 644), particularly in a "highly policed communit[y]," where "some individuals . . . might fear over-aggressive police conduct," *id.* at 630. Although the GRU officers "did not, in so many words, direct Mr. Mayo to stop," "their actions" as a whole "communicated . . . that they did not intend to allow him to leave without engaging with them." *Id.* at 628. Because the officers knew that they routinely policed Kenilworth using aggressive techniques, they should have been aware that "the aggressive nature of a police presence in a community makes flight simply to avoid police interactions a plausible response." *Id.* at 631–32. On these facts, the Court concluded, the officers could not reasonably perceive Mr. Mayo's flight as clearly reflecting consciousness of guilt.

The Court then considered the officers' assertion that Kenilworth was a "high-crime area." While it agreed that "locational evidence about criminal activity presented by the government can be a relevant consideration," it stressed that *Wardlow*'s central inquiry was whether "the *relevant* characteristics of a location"

contributed meaningfully to the officers' analysis. *Id.* at 632–33 (emphasis added) (quoting *Wardlow*, 528 U.S. at 124). In *Wardlow*, the specific information was that the area was known for "heavy narcotics trafficking" and that the officers specifically anticipated finding "drug customers and individuals serving as lookouts." *Id.* at 633 (quoting *Wardlow*, 528 U.S. at 121–22, 124). The Supreme Court's passing reference to a generalized high-crime area, meanwhile, was shorthand for the specific facts contained in the record—*not* blanket approval of any search in an area vaguely deemed prone to criminal activity. *See id.*; *see also Dozier*, 220 A.3d at 943 & n.12 (rejecting "over-reliance on this amorphous term"); *Maye v. United States*, 260 A.3d 638, 647 (D.C. 2021) (requiring "specifics," rather than just bare invocation of "high-crime area").

*Mayo* applied *Wardlow* to hold that "courts should no longer give weight to a bare 'high-crime area' label in assessing the validity of a *Terry* stop," and instead must "exclusive[ly] focus . . . on the particular details that make an individual's actions more or less suspicious when viewed in context." *Mayo*, 315 A.3d at 634. Any "general evidence about crime in a location must be *relevant* to the conduct at issue"—prior drug activity might bear on suspected drug activity, where prior car jackings wouldn't—and "conclusory assertions will not suffice" and rather must be supported by "specific evidence." *Id.* (emphasis added). Courts considering police testimony about the nature of a "high-crime area" must conduct a "fact-intensive inquiry" that "turn[s] on the quality and specificity of the information, with particular focus on the frequency, recency, and geographic proximity of the relevant criminal activity." *Id.* at 635. Applying that test, the Court held that the officers'

testimony about Kenilworth was too "vague" and "weak" to support reasonable articulable suspicion, as it "lacked meaningful specificity" and relied on scant numbers of prior crimes. *Id.* at 636 ("three to four guns . . . without a basis of comparison . . . add[ed] little to the contextual consideration of a location").

The Court reversed the seizure because, considering both the area and the flight together, there was no reasonable suspicion: the officers saw no criminal activity afoot, the officers "should have known that individuals might fear their aggressive tactics," and the prior seizure of ten guns from an undefined area over three years was too flimsy to generate reasonable suspicion. *Id.* at 637. "Mr. Mayo's seizure, based on little more than his flight from the GRU and weak general locational crime evidence, was not a lawful *Terry* stop." *Id.* at 637–38.

II. *Mayo* Confirms that Suppression Is Required.

a. The government's bare invocation of "high-crime area" does not support D.W.'s seizure.

*Mayo* requires reversal. As D.W. argued in his initial brief, the government has never supported its assertion that the Geraldine Apartments are a "high crime area" with any of the concrete "relevant characteristics" bearing on the precise wrongdoing suspected, as *Mayo* requires. *Id.* at 633 (quoting *Wardlow*, 528 U.S. at 124). Instead, CST officers relied entirely on the Geraldine's "reputation," their unfettered judgment, and a single stabbing to justify their "conclusory assertions" and apply the "bare 'high-crime area' label" to the Geraldine Apartments. *Id.* at 634. Because *Mayo* expressly rejected such a conclusory invocation of the "high crime"

label as insufficient to contribute meaningfully to reasonable articulable suspicion, that factor does not support the stop here.

Even before *Mayo*, this Court repeatedly "cautioned against overreliance on th[e] amorphous term" of "high-crime area" "to support reasonable, articulable suspicion to effect a seizure." *Dozier*, 220 A.3d at 943 n.12; *see also Robinson v. United States*, 76 A.3d 329, 340 n.23 (D.C. 2013) (rejecting "talismanic litany, without a great deal more" (quoting *Duhart*, 589 A.2d at 900)). And *Mayo* squarely rejected precisely the kind of reliance on "high crime area" demonstrated in this case: the "conclusory assertion" that an area is dangerous, without "meaningful specificity," a "basis of comparison," or any "relevant characteristics" bearing on the precise wrongdoing suspected. *See supra* pp. 6–8. Below, the court wrongly "g[a]ve weight to a bare 'high-crime area' label in assessing the validity of a *Terry* stop," which *Mayo* makes clear is not permissible. 315 A.3d at 634.

Even more so than in *Mayo*, the officers' testimony here was vague, conclusory, and utterly devoid of "the particular details that make an individual's actions more or less suspicious when viewed in context." *Id.* Officer Bewley "d[id] not know" how many crimes had occurred at the Geraldine Apartments in the preceding year, 10/15/18 Tr. at 99, and could recall only one specific criminal incident in recent memory—a homicide in which a woman was stabbed, *id.*; *see also id.* at 172, 174. Officer Ewing offered even less, conceding that he "d[id]n't know" how many violent crimes the Geraldine had seen in the last year. *Id.* at 167. He disclaimed reliance on "any statistical basis" or concrete facts, offering instead "[his] own judgment." *Id.* at 166. These vague and conclusory "judgments" about what

kinds of areas are high in crime, unsupported by any "meaningful specificity," cannot withstand the Court's requirements in *Mayo. See* 315 A.3d at 634.

Moreover, as in *Mayo*, the officers' testimony about the kind of crime they might have suspected, or its frequency, was "weak tea at best." *Id.* at 636. The officers testified that the area was "known for" a sundry array of crimes—among them drug trafficking, sales, gun violence, assaults, and homicides, *see* 10/15/18 Tr. at 11—but provided no information on how frequently those crimes arose. These flimsy, dragnet assertions are too vague to pass muster under this Court's precedents. *See Mayo*, 315 A.3d at 636 (recovery of multiple handguns over three-year period, without meaningful comparison, was too vague); *Maye*, 260 A.3d at 641–42, 646–47 (encountering multiple individuals with guns or drugs over five-year period was insufficient to contribute to reasonable suspicion); *see also State v. Goldsmith*, 277 A.3d 1028, 1040–41 (N.J. 2022) (officer's testimony that a particular block had been site of unknown number of shootings and five to ten drug transactions was too vague) (cited approvingly in *Mayo*, 315 A.3d at 636). And as the officers freely conceded, on the day they stopped D.W. they were not responding to calls of any particular criminal activity, nor did they have any suspicion that they might encounter a specific type of crime. *See* 10/15/18 Tr. at 12 (officers were looking for "any type of illegal activity"); *id.* at 120 (officers "weren't looking for anything in particular"). *Contra Wardlow*, 528 U.S. at 124 (noting that the area was specifically "known for heavy narcotics trafficking" and that officers were specifically "investigat[ing] drug transactions").

The most specific support the officers could muster was one homicide in the preceding two years. 10/15/18 Tr. at 99. But an isolated homicide every two years hardly renders an entire apartment complex "high crime," particularly without any relevant comparators. *Cf. Mayo*, 315 A.3d at 636 ("three to four guns" recovered per year "without a basis for comparison . . . adds little to the contextual consideration of location"). And more to the point, that isolated event was not "relevant to the conduct at issue," as *Mayo* requires: the homicide was a stabbing, rather than a gun-related incident. Just as the *Mayo* Court recognized that a "spate of carjackings will not help a reasonable police officer assess whether that individual's ambiguous conduct gives rise to reasonable articulable suspicion that they are selling drugs," *id.* at 634, a solitary stabbing does not provide any additional contextual reason to suspect that residents of the Geraldine Apartments are carrying firearms. In sum, the officers' testimony regarding the Geraldine Apartments utterly lacked the specificity *Mayo* requires, resting instead on the "bare 'high-crime area' label" this Court has rejected. *Id.* Without the missing specifics, the evidence failed to provide reasonable articulable suspicion to justify D.W.'s seizure.

b. D.W.'s flight does not, without more, support D.W.'s seizure.

The government's evidence regarding flight also fails to establish the necessary reasonable articulable suspicion for the stop. Given "the specific facts and corroborating circumstances of [this] case," *Mayo*, 315 A.3d at 625 (quoting *Posey*, 201 A.3d at 1204), including the "coercive nature" of the CST's tactics, the officers' awareness of the reactions they engendered in residents of the Geraldine Apartments,

and the similar evasive actions undertaken by other innocent bystanders that day, the officers could not infer consciousness of guilt from D.W.'s flight.

First, the CST's tactics were just as coercive as the tactics employed by the GRU in *Mayo*. Mr. Mayo fled after "the GRU officers exited their vehicle wearing tactical gear," followed him, and called out to ask whether he had any guns; the Court noted that these actions "would be startling and possibly frightening to many reasonable people." *Id.* at 628 (quoting *Miles*, 181 A.3d at 644). The CST's conduct was equally startling and frightening here. Two squad cars concurrently approached the Geraldine Apartments to block off entry or exit at two different points, and seven officers in tactical gear unloaded en masse. R144, ¶ 4; R143, ¶ 2; 10/15/18 Tr. at 72–73, 139–40. The officers conducted invasive and humiliating searches on their targets immediately, exposing and touching intimate body parts, handcuffing people face-down on the ground, and detaining them for up to an hour. 10/15/18 Tr. at 55–56, 60, 69–70. This is precisely the kind of "over-aggressive police conduct" that the *Mayo* Court recognized "individuals in highly policed communities might fear," and which offers an equally—if not more—plausible rationale for D.W.'s flight. *Mayo*, 315 A.3d at 630.

Second, the officers testified that they frequently employed these same tactics at the Geraldine Apartments and were accustomed to the types of reactions they elicited on the day in question. The officers testified that the CST had visited and searched people at the Geraldine Apartments "many times." 10/15/18 Tr. at 45–46. Officer Bewley conceded that officers often used much the same tactics at the Geraldine Apartments, pulling up to the apartments, opening the doors while the car

was still in motion, and then jumping out essentially as soon as the car came to a halt. *Id.* at 71–73. Indeed, he had engaged in precisely that approach at the Geraldine Apartments before. *Id.* at 73. And he agreed that the CST's treatment of another Geraldine resident, who was publicly searched, handcuffed, and forced to sit on the ground for thirty minutes in full view of the entire apartment complex, was "pretty typical at the Geraldine Complex." *Id.* at 69. This "flashbang" policing, "'approaching and questioning a subject' after 'jump[ing] out of halting vehicles," is precisely the type of method this Court has deemed almost "'designed to produce' such fear, which could lead either to 'temporary paralysis or flight.'" *Mayo*, 315 A.3d at 629 (alteration in original) (quoting *T.W. v. United States*, 292 A.3d 790, 803 (D.C. 2023)). In the face of this "over-aggressive police conduct," *id.* at 630, D.W.'s flight cannot contribute to the officers' reasonable suspicion of his guilt.

This is all the more true given that the officers themselves *knew* that innocent individuals often submitted promptly to the officers' authority in an attempt to avoid confrontation. In this case, other men reacted by immediately yielding to the officers' authority, raising their arms out wide to prepare for a frisk, preemptively lifting their shirts to expose their waists—or running away. *See* 10/16/18 Tr. at 232. The officers conceded that these reactions were typical. *See* 10/15/18 Tr. at 79 ("Q: He's exposing himself, his body? A. Yes. . . . Q. And is it typical when you are at the Geraldine Complex for individuals, men, to have that reaction to you too? A. Yes."); *see id.* at 79–80 (agreeing that other reactions to police presence might be to put arms in a T, lift shirts, *or run away*). This testimony alone shows that "a reasonable [CST] officer 'on the scene,'" "would have understood" that their

aggressive presence "makes flight simply to avoid police interactions a plausible response," even for those who have done nothing wrong, and thus that D.W.'s "flight cannot automatically be understood as a manifestation of consciousness of guilt." *Mayo*, 315 A.3d at 631–32.

Indeed, in this case—unlike in *Mayo*—the record established that identically situated individuals not committing any crimes would have legitimate and innocent cause to flee the police, just as D.W. did. Testimony at the hearing showed that, in addition to D.W., a man wearing a blue shirt took off running when the police approached. 10/16/18 Tr. at 232. The officers promptly caught, handcuffed, and searched the man in the blue shirt, only to uncover nothing. 10/15/18 Tr. at 54–60. Just like D.W., the officers had not seen the man in the blue shirt do anything suspicious before running—and just like D.W., he ran almost immediately upon seeing seven uniformed officers spring from two police cars. This contemporaneous evidence provides a useful comparison to show that "the character of [D.W.]'s flight" was not "'particularly incriminating' under the circumstances." *Mayo*, 315 A.3d at 628 (quoting *Miles*, 181 A.3d at 644); *see also In re T.L.L.*, 729 A.2d 334, 340–42 (D.C. 1999) (flight did not give rise to reasonable articulable suspicion where an "entire group of young men," including "the innocent as well as the possibly guilty" dispersed).

The conduct of the man in the blue shirt makes clear that the coercive actions of the CST had plainly "communicated to" *all* the members of the group, even without singling out any particular member, "that they did not intend to allow [them] to leave without engaging with them." *Mayo*, 315 A.3d at 628. Their clear intention

was to stop and search everyone, as all the men understood; and the officers had on prior occasions made their invasive and aggressive tactics well known. D.W.'s flight was therefore just as likely out of desire to "avoid having [his] liberty suspended and [his] dignity compromised." *Id.* at 626. In light of "the coercive nature of the GRU officers' approach," "their actions" as a whole, and their history of aggressive policing in the area, which undoubtedly conveyed to D.W. that he was going to be subjected to an unwelcome and invasive search, the officers could not reasonably infer that D.W.'s flight was indicative of wrongdoing. *Id.* at 628. His flight therefore does not shed light on the reasonable suspicion calculus and cannot justify the officers' decision to seize D.W.

III. *Mayo* Confirms that the Exclusionary Rule Applies.

The government argued for the first time in its answering brief on appeal that, even if the CST's seizure was not supported by reasonable suspicion, the exclusionary rule ought not apply because of what they assert was the "officers' objectively reasonable reliance on *Wardlow.*" (Gov't Br. at 39). Leaving aside the fact that this argument is waived, this contention ignores the fact that *Mayo*—along with the many decisions of this Court before *Mayo*—confirms that *Wardlow* requires a fact-intensive inquiry into *all* the circumstances surrounding a police seizure and has never blessed (far less mandated) a bright-line rule authorizing *Terry* stops based on flight and a bare, conclusory assertion of "high crime area."

As a preliminary matter, any argument that binding pre-*Mayo* caselaw would have warranted application of the good-faith exception to the exclusionary rule is waived. The government's opposition to D.W.'s suppression motion argued only

that the officers had reasonable articulable suspicion to seize D.W., not that the officers reasonably relied on binding appellate precedent that authorized the search. *See* R154–55. "[A]rguments not made in the trial court are deemed waived on appeal." *Hollins v. Fed. Nat. Mortg. Ass'n*, 760 A.2d 563, 572 (D.C. 2000); *accord Blackson v. United States*, 979 A.2d 1, 8 n.6 (D.C. 2009) ("declin[ing] to consider" government argument "not raised below"); *Hunter v. United States*, 606 A.2d 139, 144 (D.C. 1992) ("[P]oints not asserted with sufficient precision [at the trial court level] to indicate distinctly the party's thesis will normally be spurned on appeal." (quotation marks omitted)). For this reason alone, this Court should decline to entertain the government's untimely arguments.[2]

But the Court should reject the government's belated arguments for the more fundamental reason that *Mayo* makes clear neither *Wardlow* nor any other precedent from this Court authorized the search in this case as a matter of "binding appellate precedent." As this Court has recognized, the Supreme Court's narrow exception to the exclusionary rule for "searches conducted in objectively reasonable reliance on binding appellate precedent," *Davis v. United States*, 564 U.S. 229, 232 (2011),

[2] Although the government argues that this Court's cases undermining the validity of this search were decided after D.W.'s arrest, by the time the government filed its opposition to D.W.'s suppression motion (on September 25, 2018, *see* R152), this Court had already issued its decisions in *Miles*, 181 A.3d at 640, and *Gordon v. United States*, 120 A.3d 73, 84 (D.C. 2015), which the government's earlier appellate brief cast as diverging from both *Wardlow* and prior binding decisions of this Court (Gov't Br. at 36–37). Had the government wished to argue that *Wilson* and *Wardlow* were binding appellate precedent upon which the CST reasonably relied to conduct the search, that argument was perfectly available to it. In choosing not to do so, it waived the argument.

applies *only* to "binding appellate precedent" under *M.A.P. v. Ryan*, 285 A.2d 310 (D.C. 1971)—meaning decisions that "passed upon the precise question" and dealt with the same "material facts," *United States v. Debruhl*, 38 A.3d 293, 298–99 (D.C. 2012). *Mayo* confirms, as case after case from this Court and the Supreme Court have stressed, that *Wardlow* has only ever been a totality of the circumstances analysis. *See, e.g.*, *Mayo*, 315 A.3d at 626 (noting that *Wardlow* "declined . . . to adopt a bright-line rule"); *McNeely*, 569 U.S. at 158 (plurality opinion) (describing *Wardlow* as "fact-intensive, totality of the circumstances analysis" not performed "according to categorical rules"); *Glover*, 589 U.S. at 386 (reasonable suspicion "takes into account the totality of the circumstances—the whole picture"); *Miles*, 181 A.3d at 641, 644 (holding that flight "*can* be a relevant factor in the reasonable suspicion analysis" but that all facts must be considered); *Posey*, 201 A.3d at 1204 ("Flight is not merely a box that, once checked, automatically justifies a stop," but rather must be "viewed in the context of the specific facts and corroborating circumstances of each individual case."); *Henson*, 55 A.3d at 867 ("In determining whether this standard has been met, a court must consider the totality of the circumstances."); *Duhart*, 589 A.2d at 900 (considering "the circumstances of a suspect's" actions under *Wardlow*); *Washington v. State*, 287 A.3d 301, 334 (Md. 2022) (noting that facts like flight depend on "the nature and circumstances surrounding" those facts).

The government's exclusionary rule argument relies on the same erroneous interpretation of *Wardlow* rejected in a line of cases including *Mayo*, *Miles*, and *Posey*. Its attempt to cast *Wardlow* as *binding* courts to consider flight and "high

crime" as automatically giving rise to reasonable articulable suspicion is legally incorrect. And the government compounds its error by wrongly presuming not only that *Wardlow* mandated such a bright-line rule (it didn't), but that it *also mandated* that a police officer's conclusory assertions sufficiently establish that an area is "high crime." As the *Mayo* Court correctly recognized, *Wardlow* held no such thing, and the government's exclusionary rule argument thus fails.

The government's reading of *Wardlow* was ultimately incorrect, as *Mayo* reaffirmed, and the good faith exception cannot give it a second bite at the apple. This is no different from the mine run of cases in which officers erroneously conclude they have reasonable articulable suspicion for a stop. The government must therefore suffer the consequences of wrongfully invading D.W.'s liberty and depriving him of his constitutional protections.

## CONCLUSION

For the foregoing reasons, this Court should reverse with instructions that the trial court grant D.W.'s motion to suppress.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing brief has been served electronically via the Appellate E-Filing System upon Chrisellen R. Kolb and Mark Hobel, of the U.S. Attorney's Office for the District of Columbia, on this 2nd day of August, 2024.

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