RECORD NO. 20-1547

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL WALKER,
Plaintiff - Appellant,

v.

B.E. DONAHOE, individually,
Defendant - Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA
AT HUNTINGTON

PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC*

John H. Bryan
Attorney at Law
PO Box 366
Union, WV 24983
304-772-4999
jhb@johnbryanlaw.com
Counsel for Plaintiff-Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATEMENT REQUIRED BY RULES 35 AND 40(b)

Appellant respectfully requests panel rehearing pursuant to FRAP 40, and that this Court rehear this appeal *en banc* pursuant to FRAP 35. *En banc* rehearing is necessary to secure or maintain uniformity of the Court's decisions, and this appeal involves questions of exceptional importance. Pursuant to FRAP 35(a)(2): (1) the Panel decision conflicts with United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013), as well as United States v. Curry, 965 F.3d 313 (4th Cir. 2020); and (2) this appeal involves one or more questions of exceptional importance, namely the uniform and equal application of the Fourth Amendment to all individuals in the context of suspicionless seizures of law-abiding gun owners.

ARGUMENT

A. The Panel's Decision contradicts United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013), as well as United States v. Curry, 965 F.3d 313 (4th Cir. 2020), which forbid the suspicionless seizures of individuals based on improper or insufficient non-particularized and general assumptions by police officers.

The Court has previously denounced police officers seizing individuals based on non-particularized, general assumptions about suspects, which may be based on irrational, speculative, or otherwise improper fears, biases or falsehoods. Unlike Nathaniel Black from United States v. Black, 707 F.3d 531, 540 (4th Cir. 2013) or Billy Curry, Jr., from United States v. Curry, 965 F.3d 313 (4th Cir. 2020), the Appellant herein, Michael Walker, has been vilified as a potential mass murderer of children, based on improper factors under existing Fourth Circuit precedent. Allowing the Panel Opinion to stand effectively creates a two-tiered system of reasonable suspicion, which discriminates between suspect's appearance and neighborhood,

which is in direct contravention of both the spirit and the letter of the holdings in Black and Curry.

Nor does the presence of an AR-15 style rifle result in a diminished application of Black's holding. Black did not limit its holding to pistols, but rather lawful firearms under the laws of the particular state, and thus the seizure of Michael Walker fits exactly within the holding of Black, given the presence of an individual in a public place who is unknown to law enforcement, who was lawfully in possession of a firearm, who had not committed - nor who was alleged to have committed - a single criminal violation. No crime was alleged to have occurred, period. Moreover, Curry made clear that even where an investigatory stop is conducted with the safety of both the officers and the public in mind, "if that alone could invoke a Fourth Amendment exception and eliminate the individualized suspicion requirement, then the requirement would be rendered moot. United States v. Curry, 965 F.3d 313, 330 (4th Cir. 2020); *quoting* Florida v. J.L. , 529 U.S. 266, 272, 120 S.Ct. 1375, 146 L.Ed.2d 254 (2000) ("Firearms are dangerous, and extraordinary dangers sometimes justify unusual precautions. Our decisions recognize the serious threat that armed criminals pose to public safety; Terry 's rule, which permits protective police searches on the basis of reasonable suspicion rather than demanding that officers meet the higher standard of probable cause, responds to this very concern.").

The Panel acknowledges the holding of Black, but effectively swallows the rule with an exception, interpreting "without more" to re-define reasonable suspicion as any subjective suspicion of a police officer, however speculative, generalized, stereotypical or irrational. Black held that "to be reasonable under the Fourth Amendment, a search ordinarily must be based on *individualized* suspicion of wrongdoing." Black at 540 (emphasis original). Black applied state

law to the reasonable suspicion analysis, rather than subjective generalizations made by law enforcement officers:

> Third, it is undisputed that under the laws of North Carolina, which permit its residents to openly carry firearms, (citations omitted), Troupe's gun was legally possessed and displayed. The Government contends that because other laws prevent convicted felons from possessing guns, the officers could not know whether Troupe was lawfully in possession of the gun until they performed a records check. Additionally, the Government avers it would be "foolhardy" for the officers to "go about their business while allowing a stranger in their midst to possess a firearm." We are not persuaded.
>
> Being a felon in possession of a firearm is not the default status. More importantly, where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention. Permitting such a justification would eviscerate Fourth Amendment protections for lawfully armed individuals in those states. United States v. King, 990 F.2d 1552, 1559 (10th Cir.1993). Here, Troupe's lawful display of his lawfully possessed firearm cannot be the justification for Troupe's detention. (citations omitted). That the officer had never seen anyone in this particular division openly carry a weapon also fails to justify reasonable suspicion. From our understanding of the laws of North Carolina, its laws apply uniformly and without exception in every single division, and every part of the state. Thus, the officer's observation is irrational and fails to give rise to reasonable suspicion. To hold otherwise would be to give the judicial imprimatur to the dichotomy in the intrusion of constitutional protections.
>
> Additionally, even if the officers were justified in detaining Troupe for exercising his constitutional right to bear arms, reasonable suspicion as to Troupe does not amount to, and is not particularized as to Black, and we refuse to find reasonable suspicion merely by association.

Black at 540. Thus, the government in Black made the same arguments asserted by Deputy Donahoe, who claimed that he was entitled to stop and "ID" any individual he observed with a firearm, so as to determine whether they might be a felon in possession of a firearm, which is expressly forbidden by Black.

Donahoe's words establish the lack of both objective and subjective reasonable suspicion:

> I don't know whether you can, or can't, but it is my right to figure out whether you can, or can't have one . . . . I can check anybody in the world. If I see you have a gun, I can run

> your name, check you, and see whether you can possess it or not, and don't tell me that I can't either, because I do it every day, and I arrest people every day for it.

(See J.A. 209 - Video of Incident). Mr. Walker asked Deputy Donahoe, "Am I suspected of not being legal to carry a firearm?" Donahoe then said, "Listen to me; have you ever committed any crime that would keep you from carrying a firearm?" Walker said, "No. Do you have suspicion that I have committed a crime that would keep me from carrying a firearm?" Donahoe replies:

> Everybody in the world that I deal with, that has a gun, I check and see whether they have committed a crime that would keep them to carry possess a gun. It will only take a minute. If you have not, you're kicked on down the road.

There was no reasonable suspicion justifying the detainment of Michael Walker. Like the officers in Black, Deputy Donahoe articulated only an irrational and non-particularized fear of an individual who was merely exercising their rights to possess a firearm. (*See* Black at 540 ("Thus, the officer's observation is irrational and fails to give rise to reasonable suspicion. To hold otherwise would be to give the judicial imprimatur to the dichotomy in the intrusion of constitutional protections.")). Black rejected the seizing officer's mistaken knowledge of the law from the reasonable suspicion analysis, finding it irrelevant that the officer had never observed someone openly carry a firearm. Here, however, the Panel accepted and legitimized the officer's purported irrational speculations. Moreover, Black did not limit its holding to any specific type of firearm, but rather applied it to "lawfully possessed" firearms under state law. To allow the Panel Opinion to stand is to effectively overturn Black's important pronouncement that police cannot utilize mere uninformed speculation about individuals being prohibited persons, in order to investigate whether they are prohibited persons.

In United States v. Curry, 965 F.3d 313 (4th Cir. 2020), this Court sitting *en banc* cautioned that fear held by law enforcement officers based on their subjective knowledge of past shootings - even within the relevant geographic area - does not provide the officers with the type of specific information that would be necessary to justify a suspicionless seizure, even when combined with other pertinent facts:

> [T]he government makes much of the fact that there were several shootings in the Creighton Court area in the weeks leading up to the incident in question. Although this fact is certainly relevant to our analysis, it did not provide the officers with the type of specific information that would be necessary to justify a suspicionless seizure, even when combined with the other pertinent facts. *See supra* Part III.B. Moreover, for the same reason a person's presence in a high-crime area cannot alone create reasonable suspicion to justify a Terry stop, *see* Illinois v. Wardlow , 528 U.S. 119, 124, 120 S.Ct. 673, 145 L.Ed. 2d 570 (2000) ; Brown , 443 U.S. at 52, 99 S.Ct. 2637, we refuse to give this fact any special weight in determining whether the officers faced exigent circumstances. To do so would deem residents of Creighton Court—or any other high-crime area—less worthy of Fourth Amendment protection by making them more susceptible to search and seizure by virtue of where they live. Such an approach "risk[s] treating members of our communities as second- class citizens," *see* Utah v. Strieff , —— U.S. —— , 136 S. Ct. 2056, 2069, 195 L.Ed.2d 400 (2016) (Sotomayor, J., dissenting), and we emphatically reject it here. As we have said in the past:
>
> In our present society, the demographics of those who reside in high crime neighborhoods often consist of racial minorities and individuals disadvantaged by their social and economic circumstances. To conclude that mere presence in a high crime area at night is sufficient justification for detention by law enforcement is to accept carte blanche the implicit assertion that Fourth Amendment protections are reserved only for a certain race or class of people. We denounce such an assertion. Black , 707 F.3d at 542.

Id. at 331. Yet here, the Panel specifically contradicted Curry in this regard.

The Appellant was subjected to diminished Fourth Amendment protections just by virtue of his general location. Black denounced and rejected such activity by law enforcement. Speculative, generalized, irrational suspicions that an individual may commit a crime does not satisfy the Fourth Amendment. Geographic generalizations and stereotypes do not provide

adequate individualized suspicion. As this Court noted in Curry, "Faced with a concern about a particular person having a gun that might be used to inflict harm against investigating officers or others, the Supreme Court drew the line at reasonable, individualized suspicion." Id. at 330. To allow otherwise, unravels the important protections provided by Black, which should equally apply to Michael Walker, irrelevant of his appearance, or the officer's subjective opinions about his locale.

Thus, the alleged articulation of suspicious facts set forth by the government in both Black and Curry were rejected by this Court as too general and potentially discriminatory. Mr. Walker indisputably broke no law and was merely exercising his lawful rights. He was not a school shooter. Yet has been forever accused as a prospective mass murderer of children, based solely on the post-hoc, irrational and reckless speculations of a police officer, who during the detainment flew into a rage, calling Mr. Walker a "cocksucker" three times. Had the Court adopted the Walker approach in Black and Curry, allowing the officers to utilize subjective general suspicions, rather than specific information, both defendants would remain convicted.

The Panel cited the cases set forth by the Appellee discussing a baseball bat (United States v. DeJear, 552 F.3d 1196, 1201 (9th Cir. 2009)) and a golf club (United States v. Ivy, 224 F.App'x 461, 464 (6th Cir. 2007)), respectively, for the proposition that legal items to possess can nevertheless be utilized in the reasonable suspicion analysis. However, neither case justifies the existence of reasonable suspicion based on mere possession of those objects. In DeJear the officer noticed the suspect acting in a "very nervous state" and erratically stuffing his hands down the back seat of the car, which the Court indicated was a potential safety threat. The baseball bat was not the focus of the detainment, but rather there was a multitude of other factors

in addition to the bat, including the vehicle being parked at a house known for suspected gang activity. In Ivy, the suspect possessed not only a golf club, but also a pill bottle, which the officer observed to contain crack cocaine. Moreover, the suspect was located on a property which he knew possessed a history of illegal behavior, such as drug use, prostitution, loitering and panhandling. The Court failed to address or mention the golf club specifically as a component of reasonable suspicion. Thus, neither DeJear, nor Ivy, support the Panel's holding that Deputy Donahoe possessed reasonable suspicion.

If the Panel Opinion remains, Black is meaningless, because there will always be "more" available to any police officer. Even if an individual has violated no law, they will be subject to detainment based on any speculative crime which generally could be committed by any anonymous person. A man walking in the direction of any woman might be a rapist, given that he would appear to have the physical ability to carry out a rape. Any driver of a car heading in the direction of any other human being might be a potential murderer, because they appear to have the physical ability to run-over people, should they so choose. The analogies could go on and on because, like the Michael Walker case, these scenarios are all generalized, rather than based on individualized reasonable suspicion.

Deputy Donahoe did, and claims to have done numerous other times, exactly that which Black forbade: to assume that being a felon in possession of a firearm was the default status; that, without more, he could detain and ID anyone he saw with a firearm. He admitted that he had no information that Walker may have been a prohibited person. (J.A. 162:5-8). Donahoe admitted under oath that had no indications that Mr. Walker was a threat to anyone, nor appeared to have any ill intentions (J.A. 167:1-4). Donahoe told Mr. Walker at the beginning of the stop, "At this

point, I have the absolute right to see whether you're legal to carry that gun or not." (*See* J.A. 209 - Video of Incident).

The District Court acknowledged that "where a state permits individuals to openly carry firearms, the exercise of this right, without more, cannot justify an investigatory detention." Black, 707 F.3d at 540 (J.A. 326). There was no "more." Walker had committed no crime. He wasn't observed committing a crime. Not a single person alleged that a crime was committed by Michael Walker. To allow a police officer's subjective fear of AR-15s, or of theoretical copycat crimes, to be utilized as "more," effectively swallows the rule. This opens the door to racial profiling, and so on. To allow the Panel Opinion to stand is to unravel Black, and important civil rights protections.

CONCLUSION

The Panel's decision conflicts with this Court's precedent and unfairly diminishes Fourth Amendment protections to some individuals, such as Michael Walker. It warrants *en banc* review and/or panel rehearing.

Respectfully submitted,

/s JOHN H. BRYAN
John H. Bryan (WV Bar No. 10259)
JOHN H. BRYAN, ATTORNEY AT LAW
411 Main Street
P.O. Box 366
Union, WV 24983
(304) 772-4999
Fax: (304) 772-4998
jhb@johnbryanlaw.com
Counsel for Michael Walker

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing PETITION FOR REHEARING AND PETITION FOR REHEARING *EN BANC* of Appellant has been electronically filed with the Clerk of the Court this 20th day of July, 2021, by using the CM/ECF system which will send notice of electronic filing to all parties of record.

/s JOHN H. BRYAN
John H. Bryan (WV Bar No. 10259)
JOHN H. BRYAN, ATTORNEY AT LAW