Appeal No. 23-CF-859

DISTRICT OF COLUMBIA COURT OF APPEALS

DAVON C. JOHNSON,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

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

REDACTED BRIEF FOR APPELLANT

SAMIA FAM

JACLYN S. FRANKFURT

*SARAH MCDONALD

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001
Telephone: (202) 628-1200

*Counsel for Oral Argument

DISCLOSURE STATEMENT

Appellant Davon C. Johnson was represented at trial by Theodore Shaw of the Public Defender Service (PDS). The United States was represented at trial by Assistant United States Attorney Sarah Roessler. Mr. Johnson is represented on appeal by Samia Fam, Jaclyn S. Frankfurt, and Sarah McDonald of PDS.

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ISSUES PRESENTED

Whether there was probable cause to arrest Davon Johnson for firearm possession because he, along with four other men, was about to get into a parked car near a firearm in the seatback pocket, where there was no evidence to suggest that Mr. Johnson had been in the car previously, no reason to think that Mr. Johnson saw the firearm as he approached the car, no indication of a joint criminal enterprise, and nothing but Mr. Johnson's apparent intent to enter the car connecting him to the car or the guns found in it.

STATEMENT OF THE CASE AND JURISDICTION

Davon Johnson was charged by indictment with unlawful possession with intent to distribute a controlled substance (fentanyl), in violation of 48 D.C. Code § 904.01(a)(1). R. 170 (PDF) (Indictment p. 1).[1] On May 25, 2023, Mr. Johnson moved to suppress the tangible evidence obtained following his seizure. R. 84 (PDF) (Motion p. 1). The government filed an opposition to the motion on June 5, 2023, R. 96 (PDF) (Opp. p. 1), and Mr. Johnson filed a reply on June 7, 2023, R. 110 (PDF) (Reply p. 1). On June 9, 2023, the Honorable Andrea L. Hertzfeld held an evidentiary hearing and orally denied the motion. 6/9/23 at 83-87, 92-94.

After a three-day trial, a jury found Mr. Johnson guilty of the lesser-included offense of unlawful possession of a controlled substance. R. 554 (PDF) (Verdict p. 1). On September 29, 2023, Judge Hertzfeld sentenced Mr. Johnson to 180 days' incarceration. R. 557 (PDF) (Order p. 1); R. 558 (PDF) (Amended Order p.1). Mr. Johnson filed a timely notice of appeal on October 12, 2023. R. 559 (PDF) (Notice of Appeal p. 1).

This Court has jurisdiction under D.C. Code § 11-721(a)(1).

[1] Citations to "R. *" refer to the electronic page number of the record on appeal amassed by the Appeals Coordinator. Citations to "**/**/** at *" designate a particular month, day, year, and page from the trial transcripts.

STATEMENT OF FACTS

Introduction

This case arises from the warrantless arrest and incident search of Davon Johnson on April 10, 2023. Mr. Johnson was tried and convicted for possessing fentanyl pills that were found on him after he was placed under arrest and sitting in a Secret Service patrol car. He was in that patrol car on suspicion of possessing a firearm that had been found in a car that he was not in, but that he was about to enter as a back-seat passenger. He was never charged with possession of a firearm.

Around 1:40 a.m., Mr. Johnson and four other Black men walked toward an SUV parked on a downtown street. Uniformed Secret Service officers were surrounding the SUV, waiting for someone to enter it, because one of the officers had seen what he believed to be a gun in the seatback pocket. The officers handcuffed Mr. Johnson and the others as soon as they went to get into the car, despite having no information about where the men were coming from and no reason to think Mr. Johnson had been in the car before. A search of the car gave no further reason to connect Mr. Johnson to the car or its contents; the *sole* reason officers had for Mr. Johnson's arrest was the fact that he was one of five men getting into a car in which three guns were found, and none of the men claimed the guns. The trial court erred in denying Mr. Johnson's motion to suppress the pills forming the basis of his drug charge as the fruit of an illegal arrest.

Evidence at the Suppression Hearing

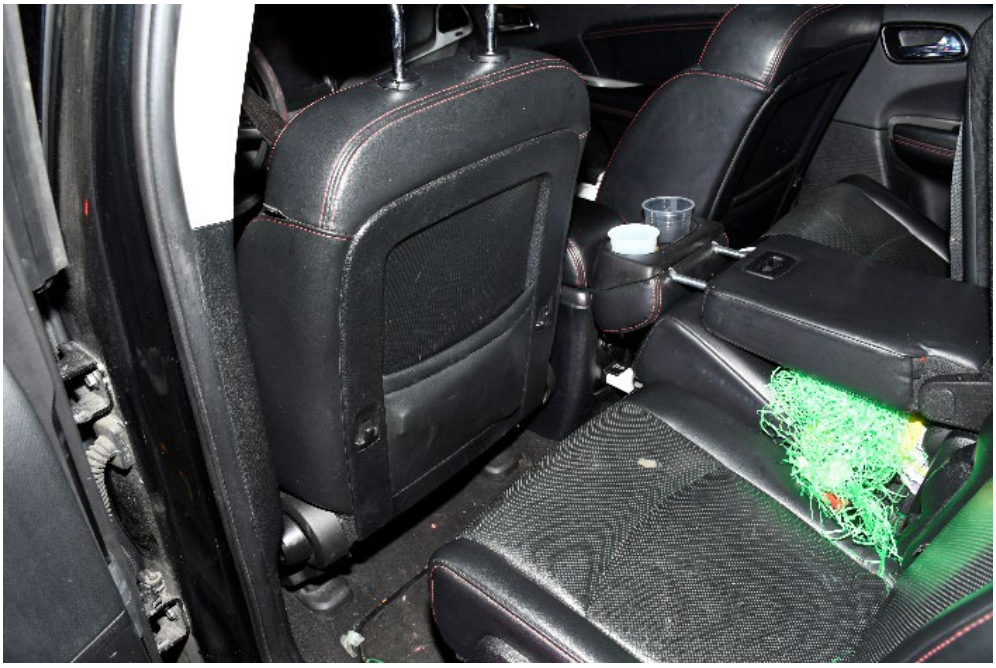
At the suppression hearing, the government called Antonio Capasso, an officer in the Foreign Missions Branch of the U.S. Secret Service, as its only witness.

6/9/23 at 5. Officer Capasso testified that in the early morning hours of April 10, 2023, he responded to a call that another Secret Service officer, Jordan Whitehair, had seen a "firearm in plain view in a vehicle" parked at 1050 17th Street NW. *Id.* at 5-6.

According to Officer Capasso's testimony, Officer Whitehair and Lieutenant Adam Quest were on routine foot patrol when Officer Whitehair noticed the vehicle, a Dodge Journey SUV. 6/9/23 at 40-41. It was around 1:10 a.m. when Officer Whitehair noticed the vehicle. *Id.* The government introduced no evidence indicating why the vehicle caught Officer Whitehair's attention. No one was in the SUV. *Id.* at 42. The officers had not seen anyone get out of the SUV. *Id.* at 48-49. There was no evidence that the SUV had expired tags or was illegally parked. *See id.* at 42. Nor was there any evidence that, upon first seeing the SUV, the officers had any reason to connect it to any person or any criminal activity.

Looking into the SUV from the outside, Officer Whitehair saw what he believed to be a gun in the "map pocket"—the pocket on the back of the driver's seat. 6/9/23 at 6-7, 14-15. There was no testimony about how close Officer Whitehair was to the SUV when he spotted the firearm, and no testimony about the lighting conditions by the SUV, including whether Officer Whitehair used a flashlight to look inside. The government introduced three photographs of the map pocket into evidence at the suppression hearing, all of which were taken later after crime scene technicians arrived at the scene. *Id.* at 14-16, 54-55. Two of these photographs—reproduced below—depicted, as Officer Capasso described them, "the imprint of a

magazine" in the pocket. *Id.* at 15, 57; App'x B (top; Gov't Exh. 2A); App'x C (bottom; Gov't Exh. 2B).



A third photograph, also reproduced below, showed a crime scene technician pulling the pocket open at the top to show the gun down in the pocket. App'x D (Gov't Exh. 2C).

Officer Capasso testified that, at the prosecutor's request, he spoke to Officer Whitehair about these crime scene photographs three days before the suppression hearing—the day after the government filed its opposition to the defense motion to suppress, in which it argued that the firearm was in "plain view" when Officer Whitehair observed it. 6/9/23 at 25-26, 52-53; R. 96-100 (PDF) (Opp. pp. 1-5). The two officers discussed the close-up photograph of the imprint in the map pocket, App'x C, and, according to Officer Capasso, Officer Whitehair "told [Officer Capasso] that he saw the sights of the firearm and the grip of the firearm through the slit of th[e] map pocket" when he looked into the car. 6/9/23 at 14-15. Officer Capasso understood this to mean that the pocket was open a bit at the top, so Officer

Whitehair could see down into the pocket through the slit from the outside of the car. *Id.* at 6-7, 14-15, 57.

Although the crime scene technicians took over 400 photographs of the scene, 6/9/23 at 55, Officer Capasso acknowledged that none of the photographs the government introduced at the suppression hearing showed the top of the firearm visible through the slit, *id.* at 15, 52-53, 56-57—except for the photograph depicting the pocket being held open by a crime scene technician, App'x D. In fact, Officer Capasso had made a note to himself to ask Officer Whitehair "about the plain-view photo" because he could see only an imprint, not the top of the gun, in the pictures. 6/9/23 at 52-53. Officer Capasso also acknowledged that there was no mention of anyone seeing the top of the gun through the slit in the pocket in any of the police paperwork, including the 20-page arrest report. *Id.* at 53. It was a fact that Officer Whitehair conveyed to Officer Capasso just three days before the suppression hearing, only after Officer Capasso initiated the conversation (on the prosecutor's suggestion) in preparation for his testimony, and only after the government had repeatedly asserted that the weapon was in plain view in opposing the motion to suppress. *Id.* at 25, 53; R. 96-100 (PDF) (Opp. pp. 1-5). When he told Officer Capasso for the first time about seeing the top of the gun, Officer Whitehair was not, to Officer Capasso's knowledge, referencing any notes he had taken around the time of the arrest. 6/9/23 at 53. The government did not call Officer Whitehair as a witness at the suppression hearing.

Officer Capasso testified that after Officer Whitehair saw what he believed to be a firearm, he requested a Washington Area Law Enforcement System (WALES)

check on the SUV and learned that it was registered to a Mia Smith. 6/9/23 at 46. Officer Whitehair also radioed for additional officers. *Id.* at 6. Officer Capasso was one of multiple Secret Service officers who joined Officer Whitehair and Lieutenant Quest in response to the radio call. *Id.* at 6-7, 43-44. The officers then waited around the SUV to see if anyone would approach the vehicle. *Id.* at 7, 46.

Half an hour later, five Black men, one of whom was Mr. Johnson, walked toward the SUV.[2] 6/9/23 at 8. They were "walking very close to each other and the same speed, and they all approached the vehicle at the same time." *Id.* As they approached the SUV, two of the men went toward one side of the car and the others went to the other side. *Id.* It looked to the officers like the men "were going to enter the vehicle," and the car's lights blinked to show that it was being unlocked. *Id.* at 9-10. Officer Capasso testified that Officer Whitehair saw Mr. Johnson open the back door on the driver's side, though Officer Capasso himself was on the other side of the SUV and could not see Mr. Johnson. *Id.* at 11. There was no evidence about whether anyone else was preparing to enter the door Mr. Johnson allegedly opened, even though two people would have had to go in one of the doors given that there were five men and the car had four doors. *See id.* at 8-11.[3]

The uniformed Secret Service officers were "surrounding the SUV" from "a bunch of different angles" as Mr. Johnson and the others approached the vehicle.

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[2] There was no evidence that the officers recognized or had any previous information about any of the men.

[3] When Officer Capasso testified that three men were approaching one side and two were approaching the other, he did not specify which side was which. 6/9/23 at 8.

6/9/23 at 43-44. When the men "got within arm's reach of the vehicle," the officers told them to stop and show their hands, which they all did. *Id.* at 10, 43-44. Mr. Johnson and the others were immediately handcuffed. *Id.* at 44. None of them tried to "flee or evade the police in any way." *Id.*

All five men were patted down after being handcuffed. 6/9/23 at 11-12. Officers found a key to the car on one of them, Keith Smith—who shared a last name with Mia Smith, the car's registered owner. *Id.* at 10, 47. The officers kept Mr. Johnson and the others handcuffed on the sidewalk as the crime scene technicians "performed a probable cause search of the vehicle" and took over 400 photographs. *Id.* at 12, 55-56. This process took "a long time." *Id.* at 55. During their search, the crime scene technicians recovered a gun from the map pocket, another gun from the closed glove box, and a third from the third-row seat, where the back of the seat had been completely folded down over the gun. *Id.* at 12, 19, 34; App'x E; App'x F. No drugs, money, or other contraband or indicia of criminality was found in the car, and nothing connected to Mr. Johnson was found in the car. 6/9/23 at 55-56.

After the crime scene technicians found the three firearms, the officers conducted a check to see if any of the men had licenses to carry firearms in the District. 6/9/23 at 20. None of them did, and none of the guns were registered to any of them. *Id*. According to Officer Capasso's testimony, an officer then asked the men "who the guns belonged to." *Id.* at 21, 27-28. Like the point about Officer Whitehair seeing the top of the gun through the map-pocket slit, however, Officer Capasso acknowledged that there had been no previous mention—not in his notes, or the 20-page police report—that any questioning about who owned the guns occurred on the

scene. *Id.* at 29-33. In any event, no one identified Mr. Johnson as the owner. *Id.* at 21, 27-28, 37-38. None of the men made *any* statements in response to the officers' alleged questioning about the guns. *See id.* at 21, 35-38.

All five men were then placed under formal arrest, and Mr. Johnson was put in the back of a police cruiser. 6/9/23 at 21. At this time, the only thing the officers had connecting Mr. Johnson to the SUV or the guns found in it was the fact that he was part of the group approaching the car. *Id.* at 51-52, 54. The guns in the car were the only basis for Mr. Johnson's arrest—a WALES check had turned up no outstanding warrants, and the pat-down had turned up no contraband. *Id.* at 54.

When Mr. Johnson was in the back of the police cruiser, however, Officer Whitehair saw him make a "quick movement," which caught the officer's attention and led the Secret Service to find fentanyl pills in Mr. Johnson's pants and on the floor of the police cruiser. 6/9/23 at 21-23. Mr. Johnson was charged with possession of those drugs, but not with any gun offenses.

Legal Arguments on the Legality of the Seizure Under the Fourth Amendment

The defense moved for suppression of the drugs found on Mr. Johnson as the fruit of an unlawful seizure. R. 84-89 (PDF) (Motion pp. 1-6). The defense first argued that the government had not met the elements of the "plain view" doctrine despite its repeated invocation of "plain view." R. 110 (PDF) (Reply p. 1); 6/9/23 at 63. Next, the defense argued that even if the court were to assume that officers saw a firearm in plain view, the police still lacked probable cause for Mr. Johnson's arrest because the only connection between Mr. Johnson and the guns was "mere proximity." 6/9/23 at 64; R. 110-13 (PDF) (Reply pp. 1-4). Defense counsel relied

on *In re T.H.*, 898 A.2d 908 (D.C. 2006), noting that in that case there was not probable cause for the seizure of passengers who were *inside of a car* containing contraband. 6/9/23 at 65-66, 75-76. Defense counsel argued that this fact—that Mr. Johnson was not in the car—was a significant one, and a basis on which to distinguish *Maryland v. Pringle*, 540 U.S. 366 (2003). 6/9/23 at 72-73.

Defense counsel emphasized that there was no evidence that Mr. Johnson had ever been in the SUV—no one had seen him in the car, no statements by any person connected him to the car, and nothing found in the SUV connected him to the car. 6/9/23 at 68. With no evidence that police knew "how long . . . the car had been parked" there, no evidence that police "knew where these individuals were coming from," and no evidence that police had seen anyone get out of the car earlier, the mere fact that Mr. Johnson and the others were approaching the SUV was "capable of too many innocent explanations" to establish probable cause. *Id.* at 72-73. For example, defense counsel pointed out, Mr. Johnson might have been "getting a ride home because Uber was too expensive that night." *Id.* at 73.

In response, the government argued that Mr. Johnson and the other men were "as good as in the car" when they were seized. 6/9/23 at 69, 80. The government contended that after the officers found three firearms "spaced out" in the vehicle, it was clear that someone sitting in any part of the car would have had access to a firearm. *Id.* at 69-70. And because "[t]he second you get in that car you can certainly see the firearm in the map pocket," it was reasonable for the officers to believe that "all of the men were possessing and knowledgeable about the firearms." *Id.* at 70-71. The government acknowledged that the men had not in fact gotten into the car,

but asserted that "they should have been able to see [the gun] from outside the car even if they weren't in it yet" because the gun was "in plain view." *Id.* at 80.

As to *T.H.*, the government argued that the facts here were distinguishable because in *T.H.* the contraband was not "inherently criminal on [its] face." 6/9/23 at 79. Here officers "s[aw] a firearm," which was "much different than fireworks" because it was "inherently illegal on its face, especially after a check has been run and none of the people there have a license to carry a firearm, the firearm is not registered anywhere." *Id.* Further, the government argued, no one in the group here had spoken up when officers asked who owned the weapons, suggesting a "conspiracy angle where it seems all of these people are sort of working together and have communal knowledge of what's in the car." *Id.* at 79-80.

Ruling on the Fourth Amendment

The trial court concluded that the officers had probable cause to believe that Mr. Johnson "possessed the firearm" found in the driver's side map pocket. 6/9/23 at 87. The trial court did not base its ruling on any finding that all of the men who were about to enter the SUV could reasonably be thought to jointly possess the three firearms in the car. Instead, the trial court focused on Mr. Johnson's proximity to the firearm in the map pocket. *See id.* at 86-87; *see also id.* at 92 ("I think the critical fact is that . . . Mr. Johnson had opened the door and was about to get into the vehicle in the very seat where the officers had just observed an extended magazine pistol in the map pocket.").

The trial court credited Officer Capasso's testimony that Officer Whitehair had been able to see the top of the firearm in the map pocket. 6/9/23 at 86. The trial

court acknowledged that the top of the firearm was not visible in the photographs, but concluded that the fact that Officer Whitehair had radioed for additional officers supported a finding that "he had actually seen what he believed to be a firearm." *Id.* From Officer Capasso's testimony about Officer Whitehair seeing the gun, the trial court drew the conclusion "that it was obvious to just a passerby of this car that there was a firearm in the back map pocket." *Id.* The court found it "of significant note that that was the exact seat [Mr. Johnson] was entering into." *Id.* The court also credited Officer Capasso's testimony that the "officers asked the five men who the guns belonged to" and none of the men claimed ownership. *Id.* at 85.[4]

The trial court agreed with the government that the facts here were "more akin to *Pringle*" than to *T.H.* 6/9/23 at 87. The trial court observed in this respect that "there was a disclaimer of the obvious contraband in *Pringle* as opposed to [*T.H.*] where it was less obvious contraband, and there was someone identified as the actual owner." *Id.* In the trial court's view, *T.H.* thus rested on different facts than *Pringle* "in terms of knowledge and intent to exercise dominion and control." *Id.* But the trial court made no specific findings about Mr. Johnson's knowledge of any firearm except to say that the map-pocket firearm had been perceptible to Officer Whitehair and that Mr. Johnson was going to enter the car near that firearm.

[4] The trial court's statement that "all five disclaimed ownership for the[] [guns]" cannot be understood as a finding that the men made any statements affirmatively disavowing ownership. 6/9/23 at 85. There was no such testimony (the only evidence being that none of the men took credit for the guns), and Officer Capasso specifically testified that Mr. Johnson made no statements. *Id.* at 21, 37-38.

Trial Evidence and Verdict

At trial, there was no real dispute that over 400 fentanyl pills were recovered from Mr. Johnson after his arrest. Officer Whitehair testified that after Mr. Johnson had been sitting in the back of the squad car for about ten minutes, the officer opened the car door and saw Mr. Johnson make "a quick movement to his left." 9/27/23 at 126. Officer Whitehair took Mr. Johnson, whose seatbelt was off and whose pants had been pulled partway down, out of the car because he thought Mr. Johnson had gotten out of his handcuffs. *Id.* at 126, 129-30. Officer Whitehair then noticed four small blue pills in the seat where Mr. Johnson had been sitting. *Id.* at 130. Officers found more blue pills inside the leggings Mr. Johnson was wearing under his jeans, some in a plastic baggie and some loose inside the leggings. *Id.* at 132, 159. Some of the pills were whole, but the officers also "found a lot of . . . broken up pieces." 9/28/23 at 25. In total, officers counted around 417 pills, though this total counted each broken pill fragment as one pill. *Id.* at 29, 36.

The trial focused on whether the government could show that Mr. Johnson had the intent to distribute those pills. The government's case for intent to distribute turned almost entirely on the number of pills.[5] The government presented testimony from Metropolitan Police Department officer Scott Brown, who was qualified as an expert in the appearance, use, and sale of narcotics in the District of Columbia. 9/28/23 at 69. Officer Brown testified that possession of over 400 fentanyl pills

[5] The government's expert also testified that storing drugs in a "sandwich bag" was indicative of distribution; users would normally store pills in a pocket for "[e]asy access." 9/28/23 at 76-78.

signaled to him "[t]hat it's for distribution," and that he would expect a mere user to have no more than ten pills on his person. *Id.* at 79-80. According to Officer Brown's testimony, 417 pills would be about a three-month supply for a user. *Id.* at 102-03.

The defense presented evidence of Mr. Johnson's addiction to painkillers, largely through the testimony of Mr. Johnson's older sister, Brianna Johnson. As Ms. Johnson testified, Mr. Johnson was shot in September 2017 and subsequently hospitalized for about two weeks. 9/28/23 at 114. He left the hospital "in pain" and "out of it." *Id.* at 115. Ms. Johnson testified that she could tell when her brother's prescription medication ran out, because he started asking for money for babysitting her kids, which he had previously been doing for free. *Id.* at 116. Ms. Johnson would see him taking painkillers—blue pills that he kept in a baggie in his pocket. *Id.* at 121, 148-49. She became concerned that he was not himself and that his behavior resembled their mother's behavior when she was on drugs during their childhood. *Id.* at 117. As the jury was instructed, the defense theory was that "Mr. Johnson ha[d] a long history of addiction to opioids and had the pills found on him for personal use." 9/29/23 at 44-45.

At the close of evidence, the trial court found that the defense was entitled to a lesser-included-offense instruction, 9/29/23 at 16, and instructed the jury on the elements of possession of fentanyl, *id.* at 41-43. The jury found Mr. Johnson not guilty of the charged offense of possession with intent to distribute and guilty of the lesser-included offense of unlawful possession. *Id.* at 58-59; R. 554 (PDF) (Verdict p. 1).

SUMMARY OF ARGUMENT

The drugs found on Mr. Johnson were the fruit of an unlawful arrest. Mr. Johnson was arrested on suspicion of constructively possessing a gun he was not carrying, stashed in a car that was not his and that he was not in. This arrest was made without any reasonable basis to believe that Mr. Johnson (1) knew that the firearm was in the car or (2) had the ability and intent to exercise dominion and control over the firearm, as is required for an arrest for constructive possession. The trial court placed great weight on the assertion that the firearm in the map pocket was "in plain view," but it made clearly erroneous findings in reaching that determination and, more fundamentally, failed to consider whether *Mr. Johnson* would have seen the firearm. In fact, the government adduced no evidence supporting a reasonable belief that Mr. Johnson saw the firearm. Moreover, the information available to the officers did not suggest that Mr. Johnson had the intent to control the firearm, especially because the officers found no evidence that Mr. Johnson had ever been in the car before. Finally, there was no reasonable basis to infer that Mr. Johnson was part of a common enterprise involving the guns. Neither Mr. Johnson's proximity to a gun nor his association with a likely owner of a gun could sustain his arrest, but that is all the officers had. The denial of the motion to suppress must be reversed.

ARGUMENT

THE TRIAL JUDGE ERRED BY FINDING THAT THERE WAS PROBABLE CAUSE TO ARREST MR. JOHNSON BASED ON HIS PROXIMITY TO A FIREARM IN A CAR MR. JOHNSON WAS NOT IN AND, FOR ALL THE POLICE KNEW, NEVER HAD BEEN.

When Davon Johnson was placed in the back of the police cruiser, undisputedly under arrest, the sole basis for his arrest was the presence of three firearms in a car he was about to enter. Mr. Johnson was not a passenger in the car and there was no information suggesting he ever had been. This Court has unequivocally held that "[a] suspect's mere presence in a vehicle containing contraband does not constitute probable cause for his arrest." *In re T.H.*, 898 A.2d 908, 913 (D.C. 2006). Here Mr. Johnson was not even present in the vehicle, and because he was immediately seized as soon as he opened the door to get in the car, there was no basis to think he was aware of the guns, much less intended to exercise dominion or control over them. But the trial court nevertheless found probable cause to arrest Mr. Johnson because no one identified the owner of the guns, Mr. Johnson appeared to know the people he was with as he approached the car, and an officer had seen what he believed to be a gun in the seatback pocket near where Mr. Johnson approached the car. This was error.[6]

The government failed to prove that there was probable cause that Mr. Johnson possessed a gun. *See Brown v. United States*, 590 A.2d 1008, 1013 (D.C. 1991) (prosecution bears burden of establishing probable cause for warrantless

[6] The existence of probable cause is a question of law that this Court reviews de novo. *Perkins v. United States*, 936 A.2d 303, 305 (D.C. 2007).

arrest). Probable cause may not be "predicated on a hunch," *id.*, or on "mere suspicion," *Blackmon v. United States*, 835 A.2d 1070, 1075 (D.C. 2003). Rather, the facts and circumstances within the officer's knowledge must be sufficient to warrant a reasonable belief that the particular suspect has committed or is committing an offense. *Butler v. United States*, 102 A.3d 736, 739 (D.C. 2014). Because an arrest is a "substantial intrusion upon an individual's liberty," the probable cause standard is "comparatively exacting." *Brown*, 590 A.2d at 1013. Probable cause requires "substantially" more than reasonable articulable suspicion. *Bennett v. United States*, 26 A.3d 745, 751 (D.C. 2011).

It is a bedrock principle of Fourth Amendment law that "probable cause must be 'particularized' with respect to the person to be searched or seized." *Butler*, 102 A.3d at 739-40 (quoting *Perkins v. United States*, 936 A.2d 303, 306 (D.C. 2007)); *cf. United States v. Cortez*, 449 U.S. 411, 418 (1981) (noting requirement that investigative detention must be based on "particularized suspicion" and reiterating that "[t]his demand for specificity in the information upon which police action is predicated is *the central teaching of this Court's Fourth Amendment jurisprudence*" (quoting *Terry v. Ohio*, 392 U.S. 1, 21 n.18 (1968))). Accordingly, "a person's mere propinquity" to contraband, criminal activity, or "others independently suspected of criminal activity does not, without more, give rise to probable cause to [arrest] that person." *Ybarra v. Illinois*, 444 U.S. 85, 91 (1979); *see, e.g.*, *United States v. Di Re*, 332 U.S. 581, 593-94 (1948) (no probable cause to arrest passenger in car with others who were buying and selling illegal counterfeit ration coupons); *Sibron v. New York*, 392 U.S. 40, 62-63 (1968) (no probable cause to arrest person for narcotics

possession after he was observed conversing and associating with known drug addicts over a period of eight hours); *T.H.*, 898 A.2d at 915 (no probable cause to arrest passenger in car with illegal fireworks); *Lyons v. United States*, 221 A.2d 711, 712 (D.C. 1966) (no probable cause to arrest passenger for narcotic vagrancy due to presence in car where illegal drugs found); *People v. Foster*, 788 P.2d 825, 829 (Colo. 1990) (no probable cause to arrest passenger in truck carrying stolen motorcycle); *State v. Jenison*, 442 A.2d 866, 874 (R.I. 1982) (no probable cause to arrest passenger in car driven by person suspected of drug activity and located at site of drug activity).

Consistent with its emphatic rejection of guilt by association, *see, e.g.*, *Bennett*, 26 A.3d at 751; *Mercer v. United States*, 724 A.2d 1176, 1185 (D.C. 1999), this Court has held that "[a] suspect's mere presence in a vehicle containing contraband does not constitute probable cause for his arrest." *T.H.*, 898 A.2d at 913. For police to have probable cause to arrest a person for possession of contraband in a car, there must be evidence that links the person to the contraband—particularized facts warranting an objectively reasonable inference that he was aware of the contraband and had the ability and intent to exercise dominion and control over it. *See Blackmon*, 835 A.2d at 1075 (elements of constructive possession). Such an inference becomes more attenuated with respect to a passenger, rather than a driver or owner, of a car, *T.H.*, 898 A.2d at 915 (emphasizing that defendant "was merely a passenger in the SUV" in finding no probable cause to arrest him based on proximity to illegal fireworks in rear compartment (citing *Blackmon*, 835 A.2d at 1075)), and more attenuated still when a person is apprehended outside a car there

is no evidence they were ever in, *Collins v. State*, 589 A.2d 479, 482 (Md. 1991) (emphasizing that "[n]o testimony suggested that [defendant] . . . had even been in the vehicle" in finding no probable cause to arrest him based on proximity to drug cannister in back seat).

At the time of Mr. Johnson's arrest, the officers here "knew nothing in particular about [Mr. Johnson]" other than his "mere propinquity" to contraband in the car. *Ybarra*, 444 U.S. at 91. They had no information that Mr. Johnson had ever been in the car. Nor did they have any information about Mr. Johnson's relationship with the other men who approached the car, or any information about where the men were coming from or where they were heading. All they knew was that Mr. Johnson was walking with the other men, that it appeared he was about to enter the car, and that he was *not* the driver or owner of the car.

At the outset, the government failed to establish any reasonable basis to believe that Mr. Johnson was aware of the presence of the firearms at the time of his arrest. The trial judge's probable cause finding rested at least in part on the purported obviousness of the firearm in the map pocket, from which she inferred Mr. Johnson's knowledge of its presence, but that was a factually and legally deficient basis for probable cause. Whether or not Officer Whitehair considered the weapon "in plain view" when he broadcast his initial request for backup (perhaps because he saw its outline in the map pocket), the government's suggestion at the hearing that the weapon was in "plain view" because the sights and grip were visible rested on unreliable hearsay contradicted by the objective photographic evidence. The judge's finding that the top of the weapon was visible was clearly erroneous. But even if this

Court were to accept that a Secret Service officer saw the firearm "in plain view,"[7] as the trial court asserted, 6/9/23 at 86, 94, the government failed to adduce facts supporting a reasonable belief that *Mr. Johnson* saw the firearm, which is the critical question for the probable cause analysis.

This Court must reject the trial court's finding that Officer Whitehair saw the top of the gun in the map pocket as clearly erroneous. The *only* evidence to suggest that the top of the gun was visible came from Officer Capasso's testimony that Officer Whitehair told him—three days before the suppression hearing, after the prosecutor prompted them to discuss the "plain view" issue—that he saw the top of the gun through the "slit" in the pocket. While the trial court was entitled to credit Officer Capasso's testimony about his conversation with Officer Whitehair, the hearsay evidence about what Officer Whitehair saw could not sustain a finding that the gun was in fact visible, given the entirety of the record evidence below.

Although "*[t]rustworthy* hearsay is admissible in a suppression hearing," this Court has made clear that the government proceeds at its peril when, "[i]nstead of offering the testimony of one of the officers . . . [with personal knowledge], it relie[s] exclusively on the hearsay testimony of . . . a witness who possessed no personal knowledge" of the critical facts. *In re K.H.*, 14 A.3d 1087, 1091 (D.C. 2011). In

[7] The phrase "in plain view" usually refers to a legal doctrine permitting officers to seize evidence observed in plain sight. *See Porter v. United States*, 37 A.3d 251, 256-57 (D.C. 2012). Whether the "evidence's incriminating character [was] immediately apparent" to a trained officer, such that it was "in plain view" for the purpose of conducting a search or seizure, *id.* at 256, was not the issue here; the question for the trial court was whether there was a reasonable inference that Mr. Johnson saw the contraband and recognized what it was.

seeking to establish that the gun could be seen through the slit in the map pocket, the government did not give the trial court the opportunity to evaluate the credibility of Officer Whitehair, the person who purportedly saw the top of the gun, while he testified under oath before the court. Instead, the government "relied exclusively on the hearsay testimony of [Officer Capasso]," *id.*, to establish what *Officer Whitehair* saw when he radioed in that he observed a gun "in plain view."[8]

Given the record before the court, Officer Capasso's testimony about Officer Whitehair's claim that he saw the top of the gun in the map pocket—an unsworn statement made two months after the fact—was insufficiently reliable to support the trial court's finding. There was zero corroboration of that point. Officer Capasso never testified that *he* saw the top of the gun, even though he too was waiting around the SUV before Mr. Johnson and the others arrived. And no notes or police reports documented this late-breaking claim.

There was, however, a great deal of contrary evidence. Although crime scene photographs are taken for the purpose of documenting the way evidence looks before it is disturbed,[9] the government put forth not a single photograph from which it

[8] The decision not to call Officer Whitehair (who testified at trial) at the suppression hearing is all the more striking given that Officer Whitehair was also the person who purportedly saw Mr. Johnson open the back door of the SUV, 6/9/23 at 11, and the person who, according to the officer's own trial testimony, noticed the pills in the patrol car, 9/27/23 at 130.

[9] *See, e.g.*, Metropolitan Police Academy, *Crime Scene Awareness and Management* 12-13 (Nov. 6, 2023), https://mpdc.dc.gov/sites/default/files/dc/sites/mpdc/publication/attachments/3.3%20Crime%20Scene%20-%20IA.pdf ("Crime scene photography is very important because it begins the documentation process of a scene. A photograph captures and preserves an image of evidence in the state it is in

seemed possible to see down into the map pocket to the top of the firearm. To the contrary, the photographs of the map pocket showed at most the outline of an object, and only when a crime scene technician pulled back the flap was it possible to see any portion of the firearm within. *See supra* pp. 5-6.

The trial court's finding that the top of the firearm was visible thus lacked evidentiary support. This Court can and should evaluate the photographs that were admitted at the suppression hearing for itself. *See Mayo v. United States*, 315 A.3d 606, 617 (D.C. 2024) (en banc); *T.W. v. United States*, 292 A.3d 790, 803 (D.C. 2023). In the face of this evidence, Officer Whitehair's unsworn claim, introduced through Officer Capasso's hearsay testimony,[10] cannot support the trial court's finding that Officer Whitehair saw the top of the firearm through the map-pocket "slit." Because the trial court's view of the evidence was not "plausible in light of the record viewed in its entirety," it is clearly erroneous. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573-74 (1985); *see also id.* at 573 ("[A] finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court

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at the time the photograph is taken."); Fed. Bureau of Investigation, U.S. Dep't of Justice, *Fundamental Principles and Theory of Crime Scene Photography* 2 (Feb. 22, 1995), https://www.ojp.gov/pdffiles1/Digitization/152997NCJRS.pdf (goal of crime scene photography is "that the conditions as portrayed in the pictures truly illustrate the original and uncontaminated features of the scene").

[10] Because the trial court could not evaluate Officer Whitehair's credibility in assessing the claim that he saw the top of the firearm, this Court is no more "constrained on review by an inability to assess 'factors that could only be ascertained after observing the witness testify'" than the trial court was. *Stringer v. United States*, 301 A.3d 1218, 1229 (D.C. 2023) (quoting *Caston v. United States*, 146 A.3d 1082, 1099 (D.C. 2016)).

on the entire evidence is left with the definite and firm conviction that a mistake has been committed." (quoting *United States v. U.S. Gypsum Co.*, 333 U.S. 364, 395 (1948))). It therefore should play no part in the probable cause calculus.

In any event, the question for purposes of the probable cause analysis is not whether Officer Whitehair saw the firearm, but whether Mr. Johnson saw the firearm. The photographic evidence shows, at the very least, that it was entirely possible to look directly at the map pocket without seeing any part of the gun. *See supra* pp. 5-6. And the government's emphasis on the visibility of the top of the firearm—rather than what the photographs showed—is a tacit recognition that, especially to a lay person, the imprint in the pocket would not be immediately recognizable as a firearm. The trial court's assertion that "it was obvious to just a passerby of this car that there was a firearm in the back map pocket," 6/9/23 at 86, was entirely untethered from the evidence. Officer Whitehair was not a mere passerby; he was a trained, on-duty Secret Service officer. And Officer Capasso never testified that the firearm was "obvious"—the photographs belie such a characterization.

If the arresting officers thought Mr. Johnson saw the gun, there is no such testimony in the record, and no facts to suggest that such a belief would be reasonable. The record includes no information about where Officer Whitehair was when he spotted the gun in the map pocket. How close was he to the car, and at what angle was he looking in? What was his height relative to Mr. Johnson's, and would that have affected his vantage point? It was nighttime, so what were the lighting conditions, and did Officer Whitehair use a flashlight? There is also no information

in the record about Mr. Johnson's approach toward the car, because Officer Capasso—the only person whose testimony the government chose to present—did not see it. 6/9/23 at 11. Was Mr. Johnson even looking at the car, or was his attention focused on the armed Secret Service officers surrounding him? Without information suggesting an answer to any of these questions, a court cannot determine that it was reasonable for the arresting officers to think Mr. Johnson was aware of the firearm.[11] The trial court erroneously "gauged the 'openness' of the [firearm] . . . from the perspective of the . . . [officer], rather than from the perspective of the accused whose knowledge and awareness of the [firearm] are at issue." *Moye v. State*, 796 A.2d 821, 831 (Md. 2002).

Courts recognize that a person's presence in a room with unconcealed contraband "in plain view" is insufficient to show the knowledge of the contraband that is necessary to supply probable cause in the constructive possession context. In *Moye v. State*, officers had seen Mr. Moye in a basement where they found drugs in an open drawer. 796 A.2d at 823-24. There was no evidence that Mr. Moye had an ownership or possessory interest in the basement and no evidence about his relationship with the basement tenant. *Id.* at 830, 832. Maryland's highest court held that Mr. Moye's presence in the basement was an insufficient "nexus" to the

[11] It is, of course, the government's burden to make such a record. *Butler*, 102 A.3d at 739 ("The government bears the burden of establishing probable cause."); *United States v. Milline*, 856 A.2d 616, 619 (D.C. 2004) ("A judge has the responsibility to make an independent assessment of the sufficiency of the basis for [a] stop, and to do so the judge must be 'apprised of sufficient facts to enable him [or her] to evaluate the nature and reliability of that information.'" (second alteration in original) (quoting *In re T.L.L.*, 729 A.2d 334, 341 (D.C. 1999))).

contraband, because there was no evidence about how long he was in the basement and therefore "nothing but speculation" as to whether he would have seen the drugs in the open drawer. *Id.* at 830-31, 834. In *In re H.L.S.*, H.L.S. was one of six people present in an apartment when officers found marijuana stems and seeds in plain sight in the living room while executing a search warrant. 774 N.W.2d 803, 805 (S.D. 2009). The officer who testified at the suppression hearing, who arrived at the apartment only after H.L.S. was handcuffed, offered no testimony about "where H.L.S. was in the living room at the time of the arrest" or "how long she had been in the apartment before the warrant was served." *Id.* at 809-10. The Supreme Court of South Dakota held that because it had not been presented with "the critical facts as to where H.L.S. was at the time the entry team officers entered the apartment," there was "nothing to support a finding of probable cause that H.L.S. had the requisite awareness of the presence and the character of the contraband" and therefore no lawful basis for her arrest. *Id.* at 810. Similarly, without any information about whether Mr. Johnson had been in the car before, the officers here could not reasonably infer that Mr. Johnson was aware of the firearm, whether or not it was in "plain view" as a legal matter.

The information officers did have—Mr. Johnson's behavior as he approached the SUV—suggested that he did not know that there was an illegal firearm in the map pocket. He made no furtive gestures, no attempt to distance himself from the vehicle, and no attempt to hide the firearm from the officers. Instead, he opened the car door, exposing the map pocket with the illegal firearm within, while surrounded by uniformed Secret Service officers. *Cf. T.H.*, 898 A.2d at 914 (no probable cause

to arrest passenger in car with illegal fireworks in part because "the fireworks were fully visible to any member of the public walking by, suggesting that whoever placed them there believed there was no need for concealment").

Even if the officers could reasonably have believed that Mr. Johnson saw the firearm as he opened the door, however, that would not establish an inference of constructive possession sufficient to justify Mr. Johnson's arrest. Awareness is only one element of constructive possession—an arrest for constructive possession also requires probable cause to believe that the suspect had the ability and intent to control the contraband. Here, Mr. Johnson was detained as soon as he opened the door. *See* 6/9/23 at 43-44. If he saw the gun, he had no time to decide whether to get into the car with the gun before he was handcuffed. This Court has recognized that, "[g]enerally speaking, a passenger's evident willingness to remain in a vehicle next to known contraband may be taken as some evidence that the passenger has at least a shared interest in it." *Perkins*, 936 A.2d at 309. Absent countervailing facts, the requisite intent to exercise dominion and control over the contraband can be inferred from the obviousness of the contraband and the choice to remain in a small, confined space with it. *See id.*[12] But unlike in *Perkins v. United States*, where the passenger

[12] The "strength of th[e] inference" that one who chooses to remain in a vehicle next to known contraband has a shared interest in the contraband "depend[s] on the type of contraband involved." *Perkins*, 936 A.2d at 309. When it comes to guns, this Court has recognized that "people harboring no evil intent of any kind may find themselves . . . riding with a gun in a car . . . for any number of innocent reasons—and, in doing so, they reasonably may perceive no necessity (let alone a legal obligation) to interrupt and discontinue their journey abruptly in order to make a premature exit just because there is a gun present." *Conley v. United States*, 79 A.3d 270, 285 (D.C. 2013).

had been riding in a car next to an open container of alcohol, 936 A.2d at 305, or *Maryland v. Pringle*, where the passenger had been riding in a car with a large quantity of drugs and cash, 540 U.S. 366, 368 (2003), Mr. Johnson never even got into the car.

Other courts have recognized that the probable cause analysis as to someone who is apprehended near—but not in—a car containing contraband is different than the analysis as to a passenger who has been riding in a car with contraband. In *State v. Neri*, two men were "walking away from an unlighted house late at night" in a neighborhood where "a number of burglaries had taken place" when an officer asked them for identification. 290 So. 2d 500, 501 (Fla. Dist. Ct. App. 1974). When Mr. Neri's companion went to his car to retrieve his identification, the officer saw marijuana in the glove box. *Id.* The court held that Mr. Neri, who was never seen inside the car, was arrested for possession of that marijuana without probable cause. *Id.* at 502. In *Collins v. State*, Mr. Collins was one of five Black men standing within five feet of a Mustang parked in the driveway of a closed car dealership at 3 a.m.—according to the self-identified driver of the vehicle, the men were "looking at the BMWs for sale." 589 A.2d at 480. An officer shined a flashlight into the Mustang and "observed a black plastic 35 mm film container," which the officer recognized as "a type of container used to conceal controlled dangerous substances." *Id.* One of the men attempted to conceal the contents of the container from the officers. *Id.* Maryland's highest court unanimously rejected the argument that Mr. Collins's "proximity to the car, in association with the other men," at least some of whom appeared aware of the presence of the contraband, "linked [Mr. Collins] . . . to the

car and to the drugs in the cannister which was in plain view in the back seat." *Id.* at 480-82. The court held that even if there was probable cause to arrest the driver or the man who attempted to conceal the drugs, there was not probable cause to arrest Mr. Collins, given that "[n]o testimony suggested that [Mr. Collins] arrived at the lot in the car, that he had even been in the vehicle, or that he knew the suspected cocaine was in the back seat of the car." *Id.* at 482. As in *Collins*, the lack of information "criminally link[ing] [Mr. Johnson] to either the car, or to [its contents]," *id.*, requires reversal here.

Moreover, even if it was reasonable to infer that Mr. Johnson knew there were guns in the car, the presence of a firearm in a vehicle is not "obviously criminal" in the same way as drugs or an open container of alcohol. *Compare T.H.*, 898 A.2d at 914 ("[T]he presence of fireworks in a vehicle—particularly within days of the Fourth of July—is not so 'obviously criminal' . . . ."), *and Di Re*, 332 U.S. at 593 (sale of counterfeit ration coupons did "not necessarily involve any act visibly criminal"), *with Perkins*, 936 A.2d at 309 ("[T]he presence in a vehicle of an alcoholic beverage in an open container is . . . clearly illegal."). As this Court recognized in 2013, "given the 'long tradition of widespread lawful gun ownership by private individuals in this country,' and the recent definitive recognition of a Second Amendment right to possess guns for self-protection, individuals (especially visitors from other jurisdictions) who do not happen to be well-versed in the intricacies of the District's firearms laws may not see anything wrong in the presence of a gun or realize that the local law may proscribe its possession or transportation." *Conley v. United States*, 79 A.3d 270, 285 (D.C. 2013) (footnotes omitted) (quoting

Staples v. United States, 511 U.S. 600, 610 (1994)) (citing *McDonald v. City of Chicago*, 561 U.S. 742 (2010), and *District of Columbia v. Heller*, 554 U.S. 570 (2008)).[13] This is even more true now than it was in 2013. *See, e.g.*, *Wrenn v. District v. Columbia*, 864 F.3d 650, 667 (D.C. Cir. 2017); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022).

Therefore, there were no grounds to infer that Mr. Johnson constructively possessed the firearm. As in *T.H.*, he was at most merely proximate to contraband that was "'not so obviously criminal' as to make the driver of the SUV 'unlikely to admit an innocent person with the potential to furnish evidence against him.'" 898 A.2d at 914 (quoting *Pringle*, 540 U.S. at 373). Unlike T.H.—a back-seat passenger whose proximity-based arrest for possession of illegal fireworks in the rear compartment of an SUV was unlawful even though he was in the car, closer to the fireworks at issue than any other car occupant, and knew the fireworks were in the car, *id.* at 910, 912-13—Mr. Johnson was, for all the police knew, getting into the SUV for the first time that night, with no idea he was near a firearm. Even once officers found additional firearms in the car, both of which were concealed, they still lacked any objectively reasonable belief that Mr. Johnson knew about the weapons, or had an intent or ability to control them.

Nor was the trial court correct to rely on *Pringle*, as there was no basis to believe that Mr. Johnson and the other men were involved in a joint enterprise

[13] As this Court recognized in *T.H.*, "the presumption that persons know the law . . . is more appropriately applied to hold those responsible who are in actual possession of contraband than to a determination of whether there is probable cause to believe that someone is in constructive possession of the contraband." 898 A.2d at 914 n.5.

involving the firearms. In *Pringle*, officers stopped a car for speeding around 3 a.m. and arrested all three occupants after finding $763 in cash in the glove box and five baggies of cocaine behind the back-seat armrest. 540 U.S. at 371-73. The Supreme Court held that Mr. Pringle's arrest was lawful because it was reasonable on those facts to "infer a common enterprise among the three men": the "quantity of drugs and cash in the car indicated the likelihood of drug dealing, an enterprise to which a dealer would be unlikely to admit an innocent person with the potential to furnish evidence against him." *Id.* at 373. But this Court has recognized that not all contraband gives rise to a "common enterprise" inference. In *Perkins*, this Court concluded that *Pringle*'s reasoning did not apply where officers found an open can of beer in the center console between the driver and the passenger-defendant, so probable cause would have to exist "for a different reason." 936 A.2d at 308; *id.* at 309 ("declin[ing] to infer that a driver with an open can of beer would be loath to admit an innocent passenger").

Indeed, this Court has suggested that a "common enterprise" inference would be justifiable only in cases—like *Pringle*—in which officers could reasonably suspect illicit dealing. *See T.H.*, 898 A.2d at 914 n.6 (concluding that an inference of a common enterprise "is not one fairly drawn in the case of fireworks, at least without testimony of an active, illicit market in their distribution"); 2 Wayne R. LaFave, *Search and Seizure* § 3.6(c) (6th ed. 2020) ("[I]t is important to keep in mind that in *Pringle* the Court found a 'common enterprise' inference justifiable only because the facts were deemed sufficient to show pending 'drug dealing' . . . ."). The government did not present any testimony about an illicit

market in firearms. And Officer Capasso never testified that the officers who arrested the men suspected a distribution enterprise, or any other kind of joint enterprise.

The trial court also put undue weight on the fact that no one was "singled out" as the owner of the firearms. A person's failure to implicate someone else in response to police questioning—especially when there is no reason to think that person knew about the contraband or who it belonged to—does not *create* an inference of a joint enterprise. Instead, it has been clear since *Di Re* that "singling out" is merely a fact that can *destroy* an otherwise-existing inference of constructive possession.

Di Re involved illicit dealing, and Mr. Di Re was found in the passenger seat of a car where an illegal sale of counterfeit ration coupons had taken place. 332 U.S. at 583. But because the government informant who was found with the coupons said he had obtained them from the driver, there was no basis to infer that Mr. Di Re had participated in the sale; the Supreme Court held that any inference of a conspiracy "must disappear if [a] Government informer singles out the guilty person." *Id.* at 594.[14] In *Pringle*, the Supreme Court held first that the circumstances made it reasonable "to infer a common enterprise among the [car's occupants]," and then noted that no "singling out" had occurred to destroy that inference. 540 U.S. at 373-74. Consistent with those decisions, in *T.H.*, where all occupants of an SUV told

[14] There was also no "information indicating that Di Re was in the car when [the informant] obtained ration coupons from [the driver]." 332 U.S. at 593. Even "[i]f Di Re had witnessed the passing of papers from hand to hand, it would not follow that he knew they were ration coupons, and if he saw that they were ration coupons, it would not follow that he would know them to be counterfeit." *Id.*

officers that the illegal fireworks in the back belonged to the (absent) driver, this Court held that the passengers' "willing[ness] to 'single out' the driver as the owner of the fireworks weigh[ed] against a theory that the three men were part of a conspiracy to use or distribute the contraband." 898 A.2d at 914-15, 915 n.8. And in *Perkins*, this Court described statements "singling out" the owner of contraband as a "countervailing fact[]" that might "dispel [an] inference of constructive possession." 936 A.2d at 308-09.[15] Here there was no inference of constructive possession to dispel.

In addition to being inconsistent with this Court's and the Supreme Court's treatment of "singling out," it would be untenable to infer a "conspiracy angle" from silence as the government urged the trial court to do. 6/9/23 at 79-80. Analogy to *Di Re* is instructive. In that case, the government had argued "that the officers could infer probable cause from the fact that Di Re did not protest his arrest" or "assert his innocence." 332 U.S. at 594. The Supreme Court roundly rejected any reliance on this factor, concluding that "[a]n inference of probable cause from a failure to engage in discussion of the merits of the charge with arresting officers is unwarranted." *Id.* at 594-95. It would be similarly troubling to "penalize" the failure to speak in response to police questioning by implicating one's companions. *Id.* at 594.

[15] In *Perkins*, each of the two occupants of a stopped vehicle told police that the open container of malt liquor in the center console belonged to the other person. 936 A.2d at 309. Those "self-serving, contradictory statements could not both have been true"—and might, this Court noted, "be taken as indicating at least one speaker's consciousness of guilt"—so "they did nothing to dispel the [already-existing] inference of constructive possession on the part of either declarant." *Id.*

Here, however, the inference is not only legally troubling but also factually unsupported. Without any reason to think Mr. Johnson knew about the guns, much less who owned them, his silence in response to police questioning cannot be taken as a sign of his consciousness of guilt or participation in a conspiracy. Nor can the *other* men's silence support an inference of "communal knowledge," as the government suggested, 6/9/23 at 80, or otherwise be used to show Mr. Johnson's consciousness of guilt.[16] A contrary holding would implicate the "dangerous principle" of "guilt by association." *Irick v. United States*, 565 A.2d 26, 30 (D.C. 1989). Such inferences are impermissible, as "it would be manifestly unfair to place an individual's right to be left alone in the hands of another person over whom he has no control." *People v. Thompson*, 8 N.Y.S.3d 185, 187 (N.Y. App. Div. 2015). The officers had no reasonable basis to infer Mr. Johnson's knowledge of the weapons and no entitlement to arrest him based on his companions' silence.

The officers' arrest of Mr. Johnson based solely on his proximity to firearms that neither he nor any of his companions claimed runs afoul of the bedrock Fourth Amendment principle prohibiting seizures lacking a particularized basis. Because Mr. Johnson was arrested without probable cause to believe he committed a crime, the trial court erred in denying the motion to suppress the physical evidence that was "come at by exploitation of that illegality." *Wong Sun v. United States*, 371 U.S. 471, 488 (1963) (quoting John MacArthur Maguire, *Evidence of Guilt* 221 (1959)).

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[16] Even if a court could infer that the driver had knowledge of the weapons and their provenance, it could not infer from his silence anything particularized about *Mr. Johnson's* knowledge.

CONCLUSION

For the reasons stated above, this Court should reverse the trial court's ruling denying Mr. Johnson's motion to suppress.

Respectfully submitted,

/s/ Samia Fam
Samia Fam
Bar No. 394445

/s/ Jaclyn S. Frankfurt
Jaclyn S. Frankfurt
Bar No. 415252

/s/ Sarah McDonald
*Sarah McDonald
Bar No. 90001349

PUBLIC DEFENDER SERVICE
633 3rd Street, NW
Washington, DC 20001
(202) 628-1200
Fax: (202) 824-2784

*Counsel for Oral Argument

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 Kolb, Chief, Appellate Division, Office of the United States Attorney, on this 19th day of August, 2024.

/s/ Sarah McDonald
Sarah McDonald