Appeal No. 24-CF-688

DISTRICT OF COLUMBIA COURT OF APPEALS

DEMANN SHELTON

Appellant,

v.

UNITED STATES OF AMERICA.

Appellee.

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

BRIEF FOR APPELLANT

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DISCLOSURE STATEMENT

At trial, Mr. Shelton was represented by Emily R. Sufrin, Emma Mlyneic, and Leo W. Alley. Assistant United States Attorneys Cadene R. Brooks, Luke Albi, and Leah Paisner represented the government. PDS attorneys Jaclyn Frankfurt, Shilpa Satoskar, and Areeba Jibril represent Mr. Shelton on appeal.

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[*]An asterisk denotes an authority upon which Mr. Shelton chiefly relies.

ISSUE PRESENTED

Whether the trial court reversibly erred when it responded to the jury's note asking if multiple people could have joint possession of an item by instructing it that joint constructive possession was a potential theory of conviction in this case, thus allowing it to find that Mr. Shelton (the sole back seat passenger) and one or more of the other two occupants of the car had joint constructive possession of the firearm inside a jacket containing Mr. Shelton's ID that was in the back seat compartment of the car, where the government argued and presented evidence that Mr. Shelton alone possessed the firearm; the defense raised multiple reasons to doubt the government's case, including by suggesting that another occupant of the car displayed behavior more consistent with hiding the firearm in the jacket; there was no evidence from which the jury could infer that Mr. Shelton and another occupant of the car worked together to jointly possess the firearm; and the jury was deadlocked on the firearms counts prior to the court's response, suggesting that jurors did not believe that Mr. Shelton had sole possession of the firearm.

STATEMENT OF THE CASE AND JURISDICTION

On March 11, 2020, Demann Shelton was indicted on two counts of Possession with Intent to Distribute a Controlled Substance While Armed, D.C. Code, § 22-4502; two counts of Possession of Firearm During Crime of Violence, D.C. Code § 22-4504(b) ("PFCV"); Unlawful Possession of a Firearm (prior felony), D.C. Code § 22-4503(a)(1); Carrying a Pistol Without a License, D.C. Code § 22-4504(a)(1) ("CPWL"); Possession of a Large Capacity Ammunition Feeding Device, D.C. Code § 7-2506.01(b) ("PLCFD"); Possession of Unregistered Firearm, D.C. Code § 7-2502.01(a) ("UF"); Unlawful Possession of Ammunition, D.C. Code, § 7–2506.01 ("UA"); and Possession of Drug Paraphernalia, D.C. Code § 48–1103(a). R. 192-196.[1] On April 12, 2024, the government amended the drug counts to Attempted Possession with Intent to Distribute a Controlled Substance While Armed. 4/12/24 Tr.; R. 52. As such, the PFCV charge was also dismissed. *Id.* The government also dismissed the PLCFD charge. 4/12/24 Tr. 5.

Pre-trial litigation began in front of the Honorable Robert D. Okun on December 20, 2019, but the case was transferred to the Honorable Lynn Leibovitz on December 30, 2021. A jury trial commenced before Judge Leibovitz on April 24, 2024. On May 1st, 2024, the jury convicted Mr. Shelton of Unlawful Possession of a Firearm, CPWL, UF, UA, and Possession of Drug Paraphernalia, R. 852, and acquitted him of both counts of Attempted Possession with Intent to

[1] The PWID, PFCV, Unlawful Possession of a Firearm, PLCFD, and CPWL charges were enhanced as offenses committed during release. D.C. Code 23-1328(a)(1).

Distribute a Controlled Substance While Armed. On July 12th 2024, Judge Leibovitz sentenced Mr. Shelton to an aggregate term of 14 months in prison. R. 875.

Mr. Shelton timely noted an appeal on July 22, 2024. R. 873-74. This Court has jurisdiction under D.C. Code § 11-721(a)(1).

STATEMENT OF FACTS

Demann Shelton was convicted of firearm possession, related firearms charges, and possession of drug paraphernalia after the Metropolitan Police Department's Gun Recovery Unit searched a car, in which he was a passenger, that was parked in a no-parking zone. The car had three occupants – Marquis Payne, the driver; Antonio Smith, the front seat passenger; and Mr. Shelton, who sat in the back seat behind the driver. 4/24/24 Tr. 98. As multiple officers approached the vehicle, they saw Mr. Smith and Mr. Payne frantically moving around, *id.* at 111, and saw Mr. Smith moving his arms down and anywhere within reach. *Id.* at 161, 103-104. After ignoring police commands to open his door, Mr. Smith eventually fled from the car, assaulting a police officer as he ran. *Id.* at 103-04, 107. Officers later found alleged narcotics (a "white rock-like substance in small zips") on Mr. Smith. *Id.* at 155. Mr. Shelton, on the other hand, remained in the back seat as the officers approached, was never seen making furtive gestures or evasive movements, and did not flee. *Id.* at 111-12. Upon searching the vehicle, officers found a firearm inside the glove box in the front passenger area, *id.* at 154, and

another firearm in a jacket that was on the floor of the back seat area behind the front passenger's seat. *Id.* at 157. The jacket also contained alleged narcotics ("52 zips of a white rock like substance" and "20 suboxin strips")[2], a digital scale, Mr. Shelton's photo ID, and mail addressed to him. *Id.* at 177-78. After searching Mr. Shelton, officers found $2,442 in cash in his pocket. *Id.* at 48-49.

The government's theory at trial was that Mr. Shelton alone constructively possessed the contraband found in the jacket. 4/29/24 Tr. 31. It never suggested that the other occupants of the car had anything to do with the jacket or its contents. *Id.* at 42. The defense maintained that although the jacket belonged to Mr. Shelton, the items inside did not. *Id.* at 43. Defense counsel pointed to multiple reasons to doubt that the firearm belonged to Mr. Shelton. Unlike Mr. Smith and Mr. Payne, Mr. Shelton had not panicked or made any suspicious movements inside the car as police approached, but officers had rushed to pin the firearm in the jacket on him without sufficient investigation. *Id.* at 48. There was no DNA or fingerprint evidence connecting the firearm to Mr. Shelton and the government had not even called to the stand the officer who initially found and searched the jacket and who had most closely observed Mr. Smith's frantic movements. *Id.* at 57, 59. Defense counsel pointed out that Mr. Smith's behavior, in particular, raised reasonable doubt about the government's case against Mr. Shelton, because it suggested that he could have hidden the firearm in the jacket before he fled the vehicle. *Id.* at 22-23.

[2] "Suboxin" and "buprenephrone" were used interchangeably. 4/24/24 Tr. 19.

During deliberations, the jury sent a note stating that it was deadlocked on all counts other than the drug paraphernalia count and asking about a new theory that the government had never pressed: "Can two or more people have joint possession of an item?" R. 843; 4/30/24 Tr. 2. Over defense objection, the court told the jury that the law recognizes joint constructive possession of property and instructed it on the elements of joint constructive possession. 5/1/24 Tr. 27.[3] Roughly an hour and 45 minutes later, the jury returned with a verdict, finding Mr. Shelton guilty of unlawful possession of a firearm and related firearms charges. *Id.* at 31.

The Evidence at Trial

At trial, the government did not call Officer Laury, who had searched the jacket and found the contraband inside and had first interacted with front-seat passenger Mr. Smith. Instead, the government presented testimony from Officer Justin Rogers, who was one of six officers who effectuated the stop of the car and its occupants, but had not searched the car or the jacket; Officer Sherman Anderson, who arrived on the scene later to gather and process evidence; Officer Scott Brown, an expert witness on drug distribution; and Officer Christian Valdez, who testified that the firearm was not registered to Mr. Shelton.

On December 18, 2019, at approximately 12:30 pm, Officer Justin Rogers, a Metropolitan Police Department officer with the Gun Recovery Unit ("GRU"), was part of a team of six officers on "routine patrol" in the area around 90 L Street N.W. in Washington, D.C. 4/24/24 Tr. 76, 29-30. The officers were divided into

[3] The court accepted the jury's verdict of guilty on the count of possession of drug paraphernalia. 5/1/24 Tr. 25-27.

two unmarked cars. *Id.* at 72. Officer Rogers was in one car with Officer Laury, who was driving, and Officer Choi. Officers Hiller, Torres, and McCaw were in the vehicle behind his. *Id.* at 30-31, 100. The officers were dressed in plain clothes and tactical vests labeled with "police" on the front and officer name and badge number on the back. *Id.* at 30, 84. They were armed with guns, ASP batons, and pepper spray, *id.* at 97.

According to Officer Rogers, the main goal of the GRU, which had been disbanded by the time of trial, was to recover guns. GRU officers worked independently to look for guns in a variety of neighborhoods. 4/24/24 Tr. 70-72. That day, although there had not been a report of suspicious activity, the officers focused their attention on a black Honda parked in a parking lot. *Id.* at 73-74. Officer Rogers testified that he "believed the vehicle to be illegally parked" because it was "parked away from the other vehicles and it was under a no parking sign and it was backed in." *Id.* at 81-82.

Officer Rogers testified that as they pulled into the lot, he heard Officer Laury say that the front passenger, Mr. Smith, looked panicked and was moving his arms frantically. 4/24/24 Tr. 100-04. As the officers approached, they saw both people in the front of the car making furtive movements, but not Mr. Shelton, who was in the back seat. *Id.* at 111. The officers were suspicious of Mr. Smith because of his frantic and panicked behavior, which they thought indicated he could be hiding something suspicious. *Id.* at 106.

With their car stopped face-to-face with the parked Honda, 4/24/24 Tr. at 100, Officer Rogers got out of the car with Officers Laury and Choi and ran to the

vehicle, *id.* at 83. He heard Officer Choi say "something to the effect of he's reaching down" when observing Mr. Smith's movements as they approached the car. *Id.* at 161. Officer Laury went straight to the front passenger's door, and Officer Rogers was close behind her with his ASP baton extended by the time he arrived at the car. *Id.* at 83, 98. Officer Laury knocked repeatedly on the front passenger door, yelling at Mr. Smith to "open the door." *Id*. at 106-07; Def. Ex. 101, 17:37:20 – 31.[4] Officer Rogers heard her yell at Mr. Smith to open the door five times, and saw her banging on his window and pulling on the door handle. *Id.* at 106-07. Instead of complying with officer directions, Mr. Smith was moving his arms frantically, in and around his immediate vicinity, anywhere in reaching distance. *Id.* at 103-04. Officer Rogers did not see Mr. Smith open or put anything inside the glove compartment, nor in his pants, and neither did any of the other officers. *Id.* at 161.

When Mr. Smith finally opened the door, he pushed Officer Laury out of his way and took off running at a full sprint. 4/24/24 Tr. 107-08. Officer Rogers, Officer Torres, and other officers chased him as he attempted to thwart the officers by shoving a shopping cart in the path of Officer Torres. *Id.* at 109. Officer Torres ultimately caught up to Mr. Smith and he and Officer Rogers handcuffed him. *Id.* at 109-10. Upon searching Mr. Smith, who was wearing a jacket, they found white, rock-like narcotics in small zips. *Id.* at 155.

[4] The bodyworn camera footage was timestamped using "Zulu time" which is military time. *Id.* at 185. A time stamp for 17:55:35 indicated that it was 15:55:35 in D.C. *Id.*

In contrast to Mr. Smith, Mr. Shelton made no furtive movements, did not try to run away, and did not behave aggressively. 4/24/24 Tr. 111-12. Officer Rogers did not see Mr. Shelton moving frantically inside the car, reaching anywhere inside the car, or shoving anything into a jacket, nor did any other officer mention seeing Mr. Shelton doing so. *Id.*

Officer Laury searched the front passenger area of the car and found a loaded gun in the glove compartment located in front of the seat where Mr. Smith had been sitting. 4/24/24 Tr. 154. Officer Rogers testified that Officer Laury removed a black jacket from behind the front passenger seat and searched it. *Id.* at 112-113, 115. He saw the black jacket on the ground about five minutes after it had been searched, and observed that "one of the pockets was open on it," *id.* at 40, 114, and that the "tan and black firearm" was located "in the jacket pocket." *Id*. at 42. The officers arrested Mr. Shelton and searched him. *Id.* at 117. Mr. Shelton did not have any guns, drugs, or other contraband on his person, *id.*, but had $2,442 in cash in one of his pockets, *id.* at 48.

Officer Rogers never saw Mr. Shelton wearing the jacket, holding it, touching it, or putting anything inside it, and no other officer reported having seen him do so. 4/24/24 Tr. 114-15. He noted that despite the cold, only Mr. Smith was wearing a jacket.[5] *Id.* at 115. Officer Rogers acknowledged that though an eyewitness had been present on the scene and had been seen talking to Mr. Smith at his window,

[5] Officer Rogers initially testified that Mr. Payne and Mr. Smith were both wearing jackets, but later amended his testimony to clarify that Mr. Payne was not wearing a jacket either. *Id.* at 115-116.

no officer questioned the witness about what she saw and he could not recall any officer attempting to speak with her at all. *Id.* at 124-25.

Officer Rogers's credibility was impeached on multiple grounds. First, he had far less personal knowledge about the relevant events than Officer Laury, who did not testify. He had not searched the jacket or even witnessed its search, 4/24/24 Tr. 113, and he had not seen as much of Mr. Smith's furtive behaviors, testifying only to the other officer's observations. *Id.* at 100-07. Second, he had ample reason to stay in the good graces of the police department. Between 2015 and 2019, he had been cited by MPD divisions for various offenses, including violations for "causing a preventable accident," *id.* at 130, failure to activate body worn camera, *id*., negligently losing MPD equipment, *id.*, sustained findings of harassment, including an unfounded threat to arrest and use of insulting, demeaning or humiliating conduct or language against a civilian, *id.* at 131, and failure to appear at a mediation concerning a complaint, *id.* at 131. Finally, cross-examination revealed his participation in problematic behavior by the GRU. *Id.* at 132-35. Officer Rogers was captured in a photograph with other GRU officers posing in front of a GRU banner with a graphic of a skull and cross bones with a bullet hole through the forehead. 4/24/24 Tr. 134-35; Def. Ex. 106; Def. Ex. 107. Directly above the skull and cross bones, were two handguns and on both sides were handcuffs. Def. Ex. 106; Def. Ex. 107. The motto on the banner read "vest up, one in the chamber," which referred to the tactical vest that GRU members wore while on patrol. 4/24/24 Tr. 135.

Officer Sherman Anderson, another member of the GRU, responded to the scene at around 12:48 p.m. to assist with the recovery of evidence. 4/24/24 Tr. 163-64. He did not participate in the initial stop of the vehicle or its search. *Id.* When he arrived, other officers had "several individuals detained" and he was alerted to "the recovery of evidence [] includ[ing] firearms and narcotics." *Id.* at 164. Officer Anderson observed Mr. Shelton on the scene, standing a little away from the car, and described him as wearing a hoodie and not a jacket. *Id.* at 166.

The doors of the car were open when Officer Anderson arrived. 4/24/24 Tr. 166. While processing the scene, Officer Anderson recovered a gun that had been found in the glove box by Officer Laury, 4/25/24 Tr. 16, and cash that was found on Mr. Shelton's person. *Id.* at 17. Inside the car, there was "a lot of stuff" in the back seat area behind the front passenger seat, including a child's car seat, a purse, and at least one cell phone, *id.* at 67-69; Def. Ex. 206, which the officer described as "a good amount of stuff back there," 4/25/24 Tr. 68. He did not collect any of the objects in the back seat area behind the front passenger seat, but did not know who owned these items. *Id*. at 69. He knew that cellphones had been collected from the scene. *Id.* Officer Anderson testified that "[t]here's no partition or divider" that would prevent someone on one side of the back seat from accessing the other side of the back seat. *Id.* at 5-6.

The jacket had already been removed from the car when Officer Anderson arrived and was on the ground by the rear passenger side of the car. 4/25/24 Tr. 32. Officer Laury, who had found and searched the jacket before him, *id.* at 31-32, directed his attention to its "right front pocket," which was open and unzipped. *Id.*

at 9, 33. In that "external right jacket pocket," *id.* at 59, he found a tan .40 caliber Glock firearm loaded with ammunition. 4/24/24 Tr. 169, 172.[6] In the "right inside jacket pocket," 4/24/24 Tr. 173; 4/25/24 Tr. 59, he recovered 52 zips of a white rock-like substance and 20 suboxin strips. 4/24/24 Tr. 177; 4/25/24 Tr. 84. From the rest of the jacket, he recovered "some mail in the name of Mr. Shelton along with a bank card with his name on it and a photo ID" and a digital scale, one that he said was "typically used to weigh narcotics." 4/24/24 Tr. at 178. The items were spread out throughout the jacket, with the gun found in the outside right jacket pocket, narcotics in the right inside jacket pocket, and the mail, ID, and digital scale in a third pocket. 4/25/24 Tr. 85.[7] Officer Anderson took the evidence back to the station to be processed. *Id.* at 16. He photographed the weapon, *id.* at 16, and dusted it for fingerprints, but did not recover any, *id.* at 18. He also swabbed it for DNA, but was not the one who tested the swabs. *Id.* at 18.

Officer Scott Brown, who was not on the scene the day of the arrest, was called by the government as an expert witness to testify about the distribution of narcotics in D.C. 4/25/24 Tr. 95-96. The government elicited testimony from Officer Brown

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[6] During Officer Anderson's testimony about the jacket pockets, the government showed the jury part of his bodyworn camera footage showing him searching the jacket. Gov. Ex. 304. Defense counsel also played a portion of his bodyworn camera footage showing Officer Laury holding the right exterior pocket open so he could take a picture of the firearm inside. Def. Ex. 201.

[7] Officer Anderson initially testified that the mail, narcotics, and ID were all found in the right inside jacket pocket, 4/25/24 Tr. 12, 63, but later clarified that the narcotics and the paperwork addressed to Mr. Shelton were not in the same pocket. *Id.* at 85.

regarding the crack cocaine and buprenorphine found in the jacket and whether the quantity found was consistent with drug dealing rather than personal use.[8] The jacket contained 20 strips of buprenorphine and 52 small zips of crack cocaine, which Officer Brown testified was not consistent with personal use. *Id.* at 109, 137.[9] He testified that users typically purchased these drugs with cash and that the amount of money found on Mr. Shelton was more than the amount of cash that a user would have. *Id.* at 113-14.[10] Finally, he testified that the presence of the digital scale and firearm was consistent with drug distribution, *id.* at 115-16, but acknowledged that the scale did not have batteries and therefore could not be used, *id.* at 144.

During Officer Brown's testimony, the prosecution attempted to elicit testimony regarding "how common is it for multiple drug dealers to be in a . . .," but the judge intervened and asked counsel to approach the bench. 4/25/24 Tr. 118. Recognizing that there had been no suggestion or allegation of joint drug dealing in this case, the judge disallowed the question, explaining that, "I don't think there's relevance to multiple drug dealers or the conspiracy thing." *Id.* at 118.[11]

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[8] Buprenorphine is also referred to as suboxin strips. *Id.* at 105.

[9] He testified that a typical user would have between one to five doses of crack cocaine and buprenorphine. *Id.* at 108-09.

[10] Officer Brown testified that the cost of a dose of crack cocaine was between $10-$20 and buprenorphine was between $5– $20. *Id*. at 113-114. He noted that the bills found on Mr. Shelton were not crumpled up and were split up in multiple denominations, including hundreds, twenties, fives, and ones. *Id.* at 133-34.

[11] The final witness the government called was Officer Christian Valdez, who testified that the firearm was not registered to Mr. Shelton. 4/25/24 Tr. at 155. He

(Footnote Cont'd on Following Page)

Closing Arguments

In closing, the government argued that the gun and drugs found in the jacket were in the sole possession of Mr. Shelton. The prosecutor told the jury that it was "important[]" that Mr. Shelton "was sitting in the back seat by himself that day when officers approached" and that a "black jacket … chock-full of evidence" was found in the back seat compartment. 4/29/24 Tr. 30. The prosecutor emphasized that the jacket belonged to Mr. Shelton and that it was Mr. Shelton alone "who put [the gun and drugs] in the jacket, who was in possession of those items as the jacket sat in the back seat" with him. *Id.* at 40. The jacket contained "two forms of [Mr. Shelton's] photo ID" and paperwork addressed to him, *id.* at 40-41, and Mr. Shelton was not wearing a jacket at the time he was arrested, despite stating that he was cold, *id.* at 33, 35. Further, the prosecutor argued, the large amount of cash in Mr. Shelton's possession indicated he was selling the narcotics in the jacket. *Id.* at 38-39.

The prosecutor emphasized that the jacket was "not suddenly in possession of the car as a whole" because it had been "set down next to [Mr. Shelton]. 4/29/24 Tr. 31. Rather, the prosecutor argued, after Mr. Shelton "placed that black jacket in the back seat with him," the jacket and its contents were "still [his] stuff in [his] possession" because he had "the power and intent to control the items that we now know were in that black jacket." *Id.* at Tr. 31. According to the prosecutor, if the

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also testified that there was no record of Mr. Shelton having a concealed carry permit as of December 18, 2019. *Id*. at 158. Officer Valdez did not check to see whether the gun was registered to Mr. Smith or Mr. Payne. *Id.* at 162.

jury believed "this jacket belong[ed] to [Mr. Shelton], then beyond a reasonable doubt everything inside of it [was] his." *Id.* at 73-74.

The prosecutor further argued that the other occupants of the car had nothing to do with the jacket or its contents. Mr. Smith's frantic movements "were focused forward in the glove box area," 4/29/24 Tr. 33, and his attempted escape could be explained by a fear of being caught with the drugs on his person and the gun in the glove box, *id.* at 32. The prosecutor noted that "none of that [] speaks to the back seat," *id.* at 32-33, and that no officer had testified "that Mr. Smith had turned around behind him and was trying to conceal something in the back seat," *id.* at 33. Going further, he emphasized the absurdity of the suggestion that Mr. Smith could have placed the items in the jacket: "Truly, that is an impressive reach for someone to be facing forward and manage to not only put guns and drugs in separate jacket pockets, zip them up[12] and do all of that while rifling through a glove box with a second set of hands." 4/29/24 Tr. 68-69. The government argued, "That's not logical. You can't make an inference as to that." *Id.* at 69.

The prosecutor concluded by reiterating that it was clear beyond a reasonable doubt that the jacket, and the items in it, were in the sole possession of Mr. Shelton:

> [W]ho put that gun, those drugs, that digital [scale] in that black jacket? Who was in possession of that stuff? And the answer in this case is clear: It was the *only person* who was in the back seat sitting

[12] No officer testified that any of the pockets were zipped, and Officer Anderson testified that the firearm was found in an unzipped pocket. 4/25/24 Tr. at 9, 33

> next to it, the defendant. It was the *only person* who had $2443 in cash in their pocket that day, the defendant. It was the *only person* who left enough photo ID to take out a mortgage or an auto loan in the jacket with the evidence, the defendant. And the *only person* who left forward-looking live paperwork in the jacket with the evidence, the defendant.

Id. at 41-42 (emphases added).

Defense counsel, in turn, argued that there was plenty of reasonable doubt about who constructively possessed the items in the jacket and that the government had not met its burden to prove that Mr. Shelton was guilty. Although counsel acknowledged that the jacket itself belonged to Mr. Shelton, she asserted that, under the circumstances, Mr. Shelton's presence in the back seat near the jacket did not prove that he had constructive possession of the gun or the drugs that were inside the jacket. 4/29/24 Tr. 59. When officers approached the car, Mr. Shelton had not made frantic or evasive movements. *Id.* at 48. In contrast, Mr. Smith and Mr. Payne, who was the driver and owned the car with the gun in the glove box, were moving around and panicking at the sight of police. *Id.* at 50. Defense counsel argued that Mr. Smith's and Mr. Payne's actions, compared to Mr. Shelton's calm demeanor, raised reasonable doubt that the items in the jacket were Mr. Shelton's. *Id.* at 48. Counsel argued that Mr. Smith, in particular, had panicked because "he knew that he had a gun and he had drugs and he needed somewhere to hide them fast." *Id.* at 42. She suggested that Mr. Smith had kept "the window rolled up and the door locked long enough that he [could have] grab[bed] a jacket, shove[d] whatever he [could] into the pockets and stash[ed] it behind his seat" before taking off running and assaulting an officer as he ran. *Id.* at 43, 47. And, she

reminded the jury, no officer had seen Mr. Smith touch or open the glove box where the other gun was found. *Id.* at 47. Despite Mr. Shelton's lack of suspicious behavior compared to the other men in the car, defense counsel argued, the police jumped to the conclusion that the items in the jacket must be his, and did not undertake a careful, quality investigation. *Id.* at 50-52. This was because, defense counsel argued, the "Gun Recovery Unit was more interested in getting it done than getting it right," *id.* at 43, and its officers "[we]re going to do what it [took] to make arrests and recover guns by any means necessary, even if some innocent people [got] swept up," *id.* at 51. And Officer Rogers's disciplinary history gave him added incentive to please his superiors by making arrests. *Id.* For all of these reasons, defense counsel argued, jurors should have reasonable doubt about the government's case.

Jury Instructions, Deliberations, and Verdict

After closing arguments, around 2:19 pm, the trial court read its instructions to the jury and instructed jurors on the elements of constructive possession. 4/25/2024 Tr. 80, 97. The judge explained that "a person may exercise control over property not in his or her physical possession if that person has both the power and the intent at a given time to control the property." *Id.* at 97. The judge clarified that "[m]ere presence near something or mere knowledge of its location, however, is not enough to show possession. To prove possession of an item against the defendant in this case, the Government must prove beyond a reasonable doubt that he had either actual or constructive possession of it." *Id.* at 97-98. The jury was then released to deliberate.

The next day at 4:20 pm, after having deliberated for a total of approximately eight hours, the jury sent a note. 4/30/24 Tr. 2. The jury informed the judge that it had a verdict on Count 7 (unlawful possession of drug paraphernalia), but was "deadlocked on all other counts," and asked a question: "Can two or more people have joint possession of an item?" 4/30/24 Tr. 2; R. 843. Defense counsel objected to an additional instruction on joint possession because "it would be manifestly unfair to Mr. Shelton, when the defense never had the chance to counter that argument at trial because the [g]overnment never made it." *Id.* at 4. Defense counsel suggested the jury be instructed that the "[g]overnment's theory at trial was that Mr. Shelton alone possessed the items in the jacket" and therefore, that in order to find Mr. Shelton guilty, the jury "must find that the [g]overnment proved beyond a reasonable doubt that Mr. Shelton actually or constructively possessed each item in question." *Id.*

Defense counsel subsequently submitted a written motion regarding joint constructive possession and the next day the judge heard argument on the appropriate response to the jury's question. Defense counsel explained that the government had argued this as a sole possession case and had maintained that Mr. Smith's furtive gestures had nothing to do with the gun in the jacket. 5/1/24 Tr. 11. There was no evidence that Mr. Shelton had willingly accepted the gun from Mr. Smith (and the government explicitly disavowed that scenario) or that he had otherwise acted jointly with another occupant of the car to possess it. *Id.* at 11-12. Counsel emphasized that just because the defense had raised reasonable doubt

about the government's case-in-chief based on Mr. Smith's behavior, such doubt did not amount to evidence of joint possession. *Id.* at 13.

The government argued that the jury could find joint constructive possession on this record because this was "a three-people-in-a-car case," which it argued was "naturally much more in the realm of the traditional joint constructive [possession]." 5/1/24 Tr. 6-7. The trial court dismissed this argument as speculation that because there were three people in the car, "they must be up to something bad together." *Id.* at 7. In response, the government argued that "the car was registered to another person besides [Mr. Shelton]," and that Mr. Smith had engaged in "furtive gestures" which "perhaps, those furtive gestures included the stashing of the [gun in jacket] as officers approached." *Id.* at 8.

The trial court ruled that the jury could find joint constructive possession "on the facts of this case." 5/1/24 Tr. 14. While the court acknowledged that the government had "proceed[ed] on a theory of sole possession," *id*., it concluded that the jury could find joint constructive possession based on "all of the evidence presented in the case" and was "not required to accept, either, in a binary fashion, the defense position or the [g]overnment's position as to the facts," *id.* at 15. The court noted that the defense had "offer[ed] evidence of the front-seat passenger's actions" in order to argue reasonable doubt based on "an inference that the front-seat passenger was the source of the gun that wound up in Mr. Shelton's jacket." *Id.* at 14.

The court reasoned that "[t]his [wa]s not a case where either the front-seat passenger possessed the gun or [Mr. Shelton] possessed the gun, and there's no

evidence in the record that both could be true." 5/1/24 Tr. 16. According to the court, the jury "saw in video that [the] gun was found deep in a pocket, that it was difficult to get things in and out of the pockets of the jacket," and that "the items were in different pockets throughout the jacket." *Id*. at 15.[13] The court stated that the gun was not just "loosely wrapped up or concealed in the jacket," in "a manner consistent with its having been solely deposited there by the front-seat passenger, and that is evidence that . . .is before the jury and it is evidence that they may consider." *Id.* It concluded that if the jurors were "making potentially factual findings that the gun may well have been deposited in the jacket by the front-seat passenger or handed back to [Mr. Shelton] by the front-seat passenger, and because all we have are these gestures that the defense has asked the jury to infer mean that the front-seat passenger somehow got the gun to the back and location it was in," the jurors were "permitted to infer that [Mr. Shelton] played a role in accepting the gun, in placing it in the back in the jacket pocket where it was located" and "to find joint constructive possession." *Id.* at 15-16.[14]

Accordingly, the court responded to the jury's note as follows:

> The law recognizes the possibility that two or more individuals can jointly have property in their constructive possession. Two or more persons have property in their joint constructive possession when they

[13] The court did not specify which video it relied on in its ruling.

[14] The court added: "I do, though, want to make sure that they know that they can't just decide Mr. Shelton – you know, that the front-seat passenger basically tossed the gun back to him and Mr. Shelton was sort of good with it and had to accept it but didn't really intend to exercise dominion and control." *Id.* at 16.

> each have both the power and the intent at a given time to control the property.
>
> I instruct you that if you consider joint constructive possession, in order for you to find the defendant possessed an item, notwithstanding the role of the front seat passenger, the Government must still prove beyond a reasonable doubt all of the elements of each offense and that the defendant voluntarily and on purpose had the power and intent to control the item.

Id. at 27.

Approximately one hour and forty-five minutes after receiving this answer to its question, the jury returned with a verdict. It acquitted Mr. Shelton of the remaining drug charges (attempted possession of cocaine with intent to distribute and attempted possession of buprenorphine with intent to distribute), but found him guilty of the firearms charges (unlawful possession of a firearm, CPWL, UF, and UA).[15]

[15] The jury had previously rendered a guilty verdict on unlawful possession of drug paraphernalia.

SUMMARY OF ARGUMENT

The trial court committed reversible error when it answered the jury's question whether "two or more people can have joint possession of an item" by telling the jury that joint constructive possession was a potential theory of conviction in this case, allowing it to convict Mr. Shelton of jointly possessing, along with one or both of the other two occupants of the car, the firearm inside a jacket found in the car's back seat area, despite insufficient evidence of joint constructive possession. At trial, the government argued that because the jacket was in the back of the car, where Mr. Shelton sat alone, and because it contained Mr. Shelton's ID, Mr. Shelton alone possessed the jacket and the gun inside it. Defense counsel maintained that the gun did not belong to Mr. Shelton and raised multiple reasons to doubt the government's theory, including by arguing that the actions of the front seat passenger, Mr. Smith, suggested that he, not Mr. Shelton, had hidden the gun in the jacket before fleeing the car. After about eight hours of deliberations over two days, the jury sent a note explaining that it was deadlocked on most charges, including the gun charges, and seeking clarification on whether it could convict if the firearm was jointly possessed.

The trial court's response to the jury's question was erroneous because there was insufficient evidence in the record from which the jury could infer beyond a reasonable doubt that Mr. Shelton and Mr. Smith (or Mr. Payne, the driver) engaged in a concert of action with each having the intent and ability to exercise dominion and control over the gun in the jacket. The defense's reasonable doubt

argument that Mr. Smith's actions were more consistent with hiding the gun in the jacket did not constitute evidence – let alone proof beyond a reasonable doubt – that Mr. Smith had passed the gun to the back seat. And even if there had been such evidence, the record was devoid of facts from which a jury could infer that Mr. Shelton had assisted Mr. Smith (or Mr. Payne) in hiding the gun with the intent to jointly exercise control over it. Nor was there evidence showing that the occupants of the car were engaged in a larger conspiracy encompassing firearm possession or even that they had spent more than a few minutes together.

The government cannot show the erroneous response to the jury's question was harmless. The jury's note strongly suggested that jurors did not credit (or at least were uncertain about) the government's account that Mr. Shelton alone possessed the gun in the jacket and were considering a verdict based on a joint possession theory. Once the court answered the note with a joint constructive possession instruction, the jury returned a guilty verdict on the firearms charges in approximately one hour and forty-five minutes. Because the court's erroneous response created an impermissible risk on these facts that the jury resolved its uncertainty about the government's sole possession case by convicting Mr. Shelton of joint constructive possession of the gun, despite a lack of sufficient evidence, reversal is required.

ARGUMENT

THE TRIAL COURT COMMITED REVERSIBLE ERROR WHEN IT ANSWERED THE JURY'S QUESTION BY INSTRUCTING IT THAT IT COULD CONVICT MR. SHELTON OF JOINT CONSTRUCTIVE POSSESSION OF A WEAPON, WHERE THERE WAS NO EVIDENCE THAT MR. SHELTON JOINTLY POSSESSED THE WEAPON IN THE JACKET WITH ANY OTHER OCCUPANT OF THE CAR.

A. There was Insufficient Evidence to Prove Beyond a Reasonable Doubt that Mr. Shelton and any Other Person Jointly Possessed the Weapon.

The trial court erred by responding to the jury's question by instructing the jury that it could convict Mr. Shelton of joint constructive possession of contraband even though there was insufficient evidence in the record to support a conclusion beyond a reasonable doubt that Mr. Shelton and one or both of the other occupants of the car had joint constructive possession of the gun in the jacket. At trial, the government sought to prove that Mr. Shelton *alone* constructively possessed the firearm that was in a jacket containing his ID, which was found on the back seat of the car, behind the front passenger seat, while Mr. Shelton sat behind the driver's seat. The defense maintained that the gun was not his and argued to the jury that there were many reasons to doubt the government's case, including the discrepancy in behavior between the three men in the car – Mr. Shelton (who was not seen moving or engaging in furtive gestures as police approached); Mr. Payne (the driver, who was seen making furtive movements as police approached); and Mr. Smith (the front seat passenger, who looked panicked and made furtive gestures all around him within reaching distance, before fleeing from the car, suggesting that he could have put the gun in the jacket); the lack of fingerprints or

DNA on the gun; the minimal investigation into alternative suspects; and the paucity of credible, first-hand information from the scene. Neither party argued, nor presented evidence, suggesting that Mr. Shelton and Mr. Smith and/or Mr. Payne *jointly* possessed the firearm.

After the jury had deliberated for approximately eight hours, it sent the judge a note stating that it was deadlocked on all counts except possession of drug paraphernalia, and asking whether "two or more people can have joint possession of an item." 4/30/24 Tr. 2; R. 843. Over defense objection, the trial court answered the question by telling the jury that joint possession was a valid theory of conviction and instructing it on joint constructive possession. According to the court, the jury could find joint constructive possession from "all the evidence presented in the case" and was "not required to accept either, in a binary fashion, the defense position or the Government's position." 5/1/24 Tr. 15. Rather, the court reasoned, the jury could find "that the gun may well have been deposited in the jacket by the front-seat passenger or handed back to the defendant by the front-seat passenger" and "that the defendant played a role in accepting the gun, in placing it in the back in the jacket pocket where it was located." *Id.* at 15-16.

The judge's ruling and joint constructive possession instruction were erroneous on this record because the evidence could not support a conclusion beyond a reasonable doubt that Mr. Shelton and Mr. Smith (or Mr. Payne) jointly possessed the firearm. *See Thomas v. United States*, 806 A.2d 626 (D.C. 2002) (reversing where trial court answered "yes" to jury's question whether "more than one person [can] have constructive possession," despite lack of sufficient evidence to support

finding that defendant and another man, who each threw an object down, jointly possessed gun found on the ground).

A joint constructive possession instruction is warranted only where there is sufficient evidence to support a finding that two or more people *both* had constructive possession of contraband. *Thomas*, 806 A.2d at 629. To prove constructive possession, the prosecution is required to show that the accused had knowledge of the contraband's location and that he had both the ability and the intent to exercise dominion or control over it. *Rivas v. United States*, 783 A.2d 125, 129 (D.C. 2001) (en banc). Physical proximity is not enough to establish the intent to exercise dominion and control, particularly when there is "more than one person with access to contraband." *Rivas*, 783 A.2d at 145 (Ruiz, J., concurring). *Cf. United States v. Bethea*, 442 F.2d 790, 793 (1971) ("Merely showing that appellant was a passenger in the car and in proximity to the heroin is, without more, insufficient to support a finding of possession") (citations omitted). This Court has cautioned that "the need to accurately identify those who properly should be held criminally responsible" on a theory of constructive possession "is particularly acute" where multiple people are "in proximity to, but not in actual possession, of contraband." *Rivas*, 783 A.2d at 139 (Ruiz, J., concurring).

Joint constructive possession requires proof that "*each* appellant knowingly had both the power and the intention at a given time to exercise dominion or control over the [contraband]." *Bernard v. United States*, 575 A.2d 1191, 1195 (D.C.1990) (internal citations omitted) (emphasis added). *See also Thomas*, 806 A.2d at 629 (insufficient evidence of joint constructive possession where government did not

prove that "both" appellants "knowingly had . . . power and intention to exercise dominion or control over the gun") (internal quotation marks omitted); *Roy v. United States*, 652 A.2d 1098, 1107 (D.C. 1995) (sufficient evidence of joint constructive possession where "two men had the requisite ability and intention jointly to exercise dominion and control over the weapon and to guide its destiny" via their "associat[ion] together in an ongoing venture centering around the possession of [gun]"). In evaluating the sufficiency of evidence of joint constructive possession, this Court looks for evidence that individuals worked together in a concert of illegal action, as "[c]ircumstances indicating a concert of illegal action obviously tend to dispel the natural fear that the doctrine of constructive possession is casting too wide a net." *Curry v. United States*, 520 A.2d 255, 264 (D.C.1987) (insufficient evidence that Ms. Curry jointly possessed a firearm found in a bedroom nightstand, along with women's clothes, in an apartment that she used temporarily and intermittently, where others lived in or had access to the apartment, her fingerprints were not found on the firearm, and there was no evidence "linking [her] to a concert of criminal activity of which the loaded pistol was a part").

This Court's decision in *Thomas* shows the error of the trial court's supplemental instruction here. In *Thomas*, officers who were approaching a group of four men standing near each other saw one man (Mr. Parker) throw down a small unknown object and another man (Mr. Thomas) throw a silver metal object to the ground. 806 A.2d at 628. Officers then spotted a silver gun on the ground and a handgun on the side of Mr. Parker's pants, leading to the arrest of both men.

At Mr. Thomas's trial, the prosecution sought to prove that Mr. Thomas alone had constructive possession of the silver gun on the ground, while defense counsel made a reasonable doubt argument that the gun could have actually been tossed by one of the other individuals on the scene, directing the jury's attention to Mr. Parker, who had also thrown an object. *Id.* at 628. The jury was instructed on actual and constructive possession. During deliberations, it sent a note asking "Can more than one person have constructive possession of a thing?" The judge answered "yes." *Id.* This Court reversed, holding that the trial court's answer to the jury's question was erroneous because "the government did not prove that *both* Mr. Thomas and Mr. Parker knowingly had power and intention to exercise dominion or control" over the gun on the ground. *Id*. at 629 (emphasis added). The Court noted that "the facts of this case contain none of the requisite 'circumstances indicating a concert of illegal action [that] obviously tend[s] to dispel the natural fear that the doctrine of constructive possession is casting too wide a net." *Id.* (quoting *Brown v. United States*, 546 A.2d 390, 397 (D.C.1987)). And the judge's answer to the jury's question contained "an implicit assumption" – "entirely unsupported by the evidence" – that "Mr. Thomas could be convicted if Mr. Parker, or one of the others, threw down the gun." *Id.*

Here, as in *Thomas*, the trial court erred in telling the jury it could convict Mr. Shelton of joint constructive possession of the gun in the jacket where there was no evidence of a "concert of illegal action" between Mr. Shelton and Mr. Smith or Mr. Payne. *Thomas*, 806 A.2d at 629. Like Mr. Thomas's jury, Mr. Shelton's jury had before it evidence of sole possession and potential reasons to doubt, but no

evidence from which it could find beyond a reasonable doubt that Mr. Shelton was working together with someone else to jointly possess the gun. The jury could conclude based on the evidence at trial either that Mr. Shelton had sole possession of the items in the jacket, as the government consistently argued, or that there was a reasonable doubt that he possessed them, as the defense argued. Just as the government in *Thomas* presented evidence that Mr. Thomas had thrown a silver object to the ground just before a silver gun was found there, the prosecutors at Mr. Shelton's trial presented evidence from which a jury could find that Mr. Shelton was tied to the firearm in the jacket. Mr. Shelton was sitting alone, not wearing a jacket, in the back seat compartment where the jacket was found. 4/24/24 Tr. 157, 166. In addition to the gun and alleged drugs, the jacket's pockets contained Mr. Shelton's ID and mail in his name. 4/25/24 Tr. 11, 59, 85. The government contended that because the jacket belonged to Mr. Shelton – a fact the defense did not dispute – the contraband inside it was also his and his alone. 4/29/24 Tr. 41-42. To bolster its argument, the government pointed to the over $2000 that was found on Mr. Shelton's person, arguing that this money was the proceeds from selling drugs. *Id.* at 64. If the jury believed the prosecution, it could have inferred from this evidence that he alone possessed the gun.

On the other hand, the jury could have agreed with the defense on any of the many reasons to doubt the government's case that Mr. Shelton alone possessed the gun, leading it to acquit Mr. Shelton. Just as the defense in *Thomas* argued reasonable doubt based on Mr. Parker's actions, here, the defense argued reasonable doubt based on Mr. Smith's and Mr. Payne's actions, as well as the

lackluster investigation and the dearth of witnesses at trial with credible, firsthand knowledge of the search. The record showed that Mr. Smith, the front seat passenger, and Mr. Payne, the driver and owner of the car, had both panicked as officers approached the vehicle. 4/24/24 Tr. 111. Mr. Smith moved his arms frantically inside the car, refused to follow police commands to open his door, and eventually assaulted an officer as he fled from the vehicle. *Id.* at 106-110. Mr. Shelton, by contrast, engaged in no furtive, evasive, or aggressive behavior. *Id.* at 112. Both Mr. Smith's and Mr. Payne's behavior (contrasted with Mr. Shelton's) raised reasonable doubt about whose gun ended up in the jacket pocket. Mr. Smith's actions, in particular, suggested that he could have placed the gun in the jacket, either by dropping the gun into the jacket in the back seat or by hiding it in the jacket before dropping the jacket in the back seat.[16] Defense counsel argued that the officers nevertheless had rushed to judgment on Mr. Shelton instead of conducting a thorough investigation. 4/29/24 Tr. 43-44.

As *Thomas* makes clear, however, what the jury could not conclude beyond a reasonable doubt on this record was that Mr. Shelton jointly possessed the gun along with Mr. Smith (or Mr. Payne). Here, as in *Thomas*, there was no evidence that Mr. Shelton was working together with Mr. Smith or Mr. Payne in a "concert of action," 806 A.2d at 629, or that they were involved in some greater joint scheme or conspiracy with respect to the gun. In fact, the trial court itself

[16] The government argued, on the other hand, that Mr. Smith's behavior was related to the gun that was found in the glove box, in front of his seat, and the drugs he had on his person when he was apprehended. 4/29/24 Tr. 32.

disavowed any suggestion that the occupants were involved in a greater conspiracy. Though the prosecution had attempted to elicit testimony regarding "multiple drug dealers", the judge refused to allow the question, recognizing that there had been no suggestion or allegation of joint drug dealing in this case. 4/25/24 Tr. 118 (judge stating, "I don't think there's relevance to multiple drug dealers or the conspiracy thing"). And though Mr. Shelton was in the car with two other people, like Mr. Thomas with standing with other men, there was no information in the record about their relationship or how long they were in the car together. *Thomas*, 806 A.2d at 629. Rather, in both cases, the jury saw only a "snapshot – a frozen instant in time and space, crystalized but devoid of explanatory context." *Rivas*, 783 A.2d at 134.

The jury's question about joint possession indicated that jurors either did not believe, or were uncertain about, the government's theory that Mr. Shelton alone possessed the gun, just as in *Thomas*. Instead, to hedge against this uncertainty, the jury, like Mr. Thomas's jury, asked if it could convict on a *joint* constructive possession theory. And as in *Thomas*, the trial court's instruction here that the jury could convict Mr. Shelton of joint possession of the gun was "entirely unsupported by the evidence," which "contained none of the requisite circumstances indicating a concert of illegal action" and allowed the jury to convict Mr. Shelton even if jurors believed that Mr. Smith (or Mr. Payne) had hidden the gun in his jacket. 806 A.2d at 629.

The record here was nothing like the record of concerted action in cases where this Court has affirmed a conviction of joint constructive possession of contraband.

In *Logan v. United States*, 489 A.2d 485, 491-92 (D.C.1985), for example, this Court held that there was sufficient evidence to convict the driver and two passengers in a two-door car of joint constructive possession of a firearm that had been tossed out of the car. After the driver of the vehicle repeatedly violated traffic laws and ignored police sirens, a high-speed police chase ensued. *Id.* During the chase, officers observed the car slow down and the right door open. As the door was held steady, an officer saw a hand from the rear discard an object which turned out to be a firearm. *Id.* at 487-88. Another gun was found under the front passenger seat. *Id.* at 488. This Court held that the jury could find beyond a reasonable doubt that the three occupants of the car had joint constructive possession of the gun tossed from the car because the evidence established that the occupants of the car had "acted in concert" to dispose of the gun: the driver by slowing the car down, the front passenger by holding the right-side door open, and the back seat passenger by tossing the firearm out of the car. *Id.* at 492.

Similarly, in *McDaniels v. United States*, 718 A.2d 530 (D.C. 1998), this Court held that there was sufficient evidence to prove that Mr. McDaniels, and the other occupants of the car he was driving, jointly possessed a loaded AK-47 automatic rifle. 718 A.2d at 532. Mr. McDaniels, the owner of the car, sped from police as they chased the car. When the car stopped, he and the three other occupants fled on foot. *Id.* at 531. Officers subsequently found the loaded assault rifle on the ground a foot from the open rear door. *Id.* This Court held that the jury could infer that there was an ongoing criminal venture linking Mr. McDaniels and the other occupants of the car to joint possession of the firearm because he owned and

operated the car, he and the other occupants fled from the car together and abandoned it, and the large and "highly visible" weapon would have been too difficult to conceal from anyone in the vehicle. *Id.* at 531-32. In stark contrast to *Logan* and *McDaniels*, here there was no evidence from which the jury could have inferred beyond a reasonable doubt that Mr. Shelton and Mr. Smith (or Mr. Payne) acted together with the intent to jointly exercise dominion and control over the gun in Mr. Shelton's jacket. They did not flee together and were not seen acting in concert in any way with respect to the gun or the jacket. And there were no facts from which the jury could infer a joint criminal enterprise connecting multiple occupants of the car with the firearm.

The trial court's contrary ruling was based on faulty reasoning. According to the trial court, the jury could find that Mr. Shelton and Mr. Smith had worked together to hide the gun in the jacket based on (1) the defense's argument that Mr. Shelton's furtive movements and evasive behavior suggested that he could have put his gun in the jacket, and (2) the judge's belief that the gun's specific location inside the jacket pocket showed that Mr. Shelton would have had to assist in hiding the gun. 5/1/24 Tr. 14-15. The trial court was wrong on both counts.

First, the trial court confused the defense's argument about reasonable doubt with evidence meeting the government's burden to prove guilt beyond a reasonable doubt. The judge's reasoning that the defense's reasonable doubt argument about Mr. Smith's movements allowed the jury to make "factual findings" that Mr. Smith "deposited" the gun in the jacket "or handed [it] back" to Mr. Shelton was flawed

because it failed to account for the different burdens that the government and defense bear during trial. 5/1/24 Tr. 15-16.

There is an enormous difference between the amount of evidence the government must present to carry its burden of proving guilt beyond a reasonable doubt and the amount of evidence that permits the defense to make the reasonable doubt argument that someone else might have committed the offense. "The reasonable doubt standard of proof requires the factfinder 'to reach a subjective state of near certitude of the guilt of the accused." *Rivas*, 783 A.2d at 133 (quoting *Jackson v. Virginia*, 443 U.S. 307, 315 (1979). "This requirement means more than that there must be some relevant evidence in the record in support of each essential element of the charged offense." *Id.* at 134. In contrast, where the defense seeks to raise reasonable doubt by arguing that someone else could have committed the charged offense, it need only proffer evidence that is relevant. Mr. Shelton pointed the finger at Mr. Smith as an alternative possibility for how the gun came to be found in the jacket, in order to raise reasonable doubt. That suggestion of an alternative explanation did not create a "subjective state of near certitude" that Mr. Smith had hidden the firearm in the jacket.[17] And it certainly did not create a "subjective state of near certitude" that *Mr. Shelton had assisted him* in hiding it. The defense's articulated reasons to doubt, provided no evidence – let alone proof beyond a reasonable doubt – that Mr. Shelton and Mr. Smith were working in

[17] To the contrary, Officer Rogers testified that Mr. Smith's movements were concentrated toward the front, where another gun was found in the glove box. Officer Rogers testified that he heard Officer Choi say "something to the effect of he's reaching down" not towards the back of the car. 4/24/24 Tr. 161.

concert, and they certainly did not open another avenue for conviction. If the jury credited the articulated reasons to doubt the government's case that Mr. Shelton had sole possession of the gun, it was bound to acquit outright.

Second, the trial court's hypothesis that the location of the gun proved that Mr. Shelton and Mr. Smith had worked together to hide it was entirely unsupported by the record. The court reasoned incorrectly that the jury could infer that Mr. Smith had passed the gun back to Mr. Shelton, and also that Mr. Shelton had "played a role in accepting the gun, in placing it in the back in the jacket pocket where it was located," 5/1/24 Tr. 15-16, because the gun was purportedly shown in an unspecified "video" to be "deep in a pocket" and "it was difficult to get things in and out of the pockets of the jacket," suggesting that it could not have been "solely deposited there by the front-seat passenger," *id.* at 15. But the judge's comments that the gun was "deep inside one of the jacket pockets" and was "difficult" to get in and out, *id.* at 15, were not based on any evidence in the record. No witness testified about how deep the firearm was in the jacket pocket or that it was difficult to get anything out of the pockets. To the extent there was testimony about the pocket, it was only Officer Anderson's testimony that the gun was in an "external right jacket pocket," 4/24/24 Tr. 59, that was open and unzipped, 4/25/24 Tr. 33, suggesting just the opposite. And although the court referred to an unnamed "video," there was no video or photo evidence that showed how "deep" in the pocket the gun was when it was placed there. To the contrary, all the video and photo evidence depicted the jacket and firearm only after they had been removed

from the car and manipulated by officers.[18] The record contained no facts about the location of the gun that could support an inference that Mr. Shelton would have had to assist Mr. Smith in hiding the gun in the jacket pocket. Thus, there was no evidence to support the judge's reasoning that the jury could find beyond a reasonable doubt *either* that Mr. Smith had passed the gun back to Mr. Shelton or that Mr. Shelton had assisted him in hiding it in the jacket in some sort of concerted action with joint intent to exercise dominion and control over it.[19] And as the court itself acknowledged, conviction would be improper if the jury found only that "the front-seat passenger basically tossed the gun back to him" in such a way that Mr. Shelton "had to accept it" but took no action showing he intended to exercise joint dominion and control over it. 5/1/24 Tr. at 16.

Nor did the government present any other facts from which the jury could infer the individuals in the car were working in concert, such as a joint scheme to sell drugs that included jointly possessing guns. *Cf. Roy v. United States*, 652 A.2d 1098, 1107 (D.C. 1995) (sufficient evidence of joint constructive possession of

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[18] Bodyworn camera footage showed Officer Laury looking inside the pocket of the jacket while it was on the ground outside of the car, Gov. Ex. 302, and showed Officer Anderson taking the firearm out of the jacket, which was on the ground outside the car. Gov. Ex. 304; *see also*, Gov. Ex. 202. Officer Laury did not testify. And not much can be gleaned from the footage showing Officer Anderson pulling out the gun. In part because he was wearing a black glove, and the jacket is also black, the video does not show how deep his hand is reaching into the jacket pocket, nor does it show him struggling to remove the gun. *See* Gov. Ex. 304.

[19] Officer Rogers testified that he had not seen Mr. Shelton moving or reaching anywhere inside the car, or putting anything into the jacket. 4/24/24 Tr. 111-112. Instead, the officers saw movement only in the front compartment of the car. *Id.* at 111.

firearm where defendant and associate "were associated 'in an ongoing venture centering around the possession of [an unlicensed] pistol.'").[20] To the contrary, Mr. Smith and Mr. Shelton's actions on the scene indicated that they were *not* working together. While Mr. Smith was engaged in evasive actions to hide contraband and run from the police, 4/24/24 Tr. 103-104; 107, Mr. Shelton was not engaged in any such actions, whether in assistance of Mr. Smith or Mr. Payne, or to hide his own belongings, *id.* at 111-12. And while Mr. Smith assaulted an officer while fleeing from the vehicle, *id*. at 107, Mr. Shelton stayed calmly seated in the back of the car and followed police directions, *id.* at 111-12.

Without evidence of a concert of action, the judge's answer to the jury's question invited jurors, who had expressed uncertainty about the government's theory that Mr. Shelton alone possessed the firearm, to address their uncertainty by speculating that Mr. Smith and Mr. Shelton jointly possessed the firearm. On this record, the jury could have reached a conclusion that Mr. Shelton and Mr. Smith had joint constructive possession of the gun only by engaging in the type of "irrational or bizarre reconstruction of the facts of the case" that this Court forbids. *Brooks v. United States.*, 599 A.2d 1094, 1099 (D.C. 1991) (quoting *Anderson v. United States*, 490 A.2d 1127, 1130 (D.C. 1985). Because there was no evidentiary basis for instructing the jury that it could convict Mr. Shelton of joint constructive possession of the firearm, the trial court erred by answering the jury's question by instructing it on joint constructive possession, thereby telling it that joint

[20] In fact, the judge had admonished the prosecution not to draw to such an inference in front of the jury. 4/25/24 Tr., 118.

constructive possession was a viable avenue for convicting Mr. Shelton. *Thomas,* 806 A.2d at 630.

B. The Government Cannot Show that the Trial Court's Erroneous Response to the Jury's Note was Harmless Where the Note Indicated that the Jury had Doubts About the Government's Sole Possession Theory and was Considering a Theory of Joint Possession, and the Court's Response Allowed it to Convict Mr. Shelton of Joint Possession Without Sufficient Evidentiary Support.

The government cannot show that the trial court's erroneous response to the jury note was harmless because the note revealed that the jury was struggling to reach a full verdict and was focused on whether it could find joint constructive possession, and the court's response allowed jurors to convict Mr. Shelton of joint possession despite insufficient evidence in the record to do so. Approximately eight hours into deliberations in a case in which the government had argued in closing that Mr. Shelton had *sole* possession of the gun in the jacket, the jury told the court that it was deadlocked on nearly all the charges and asked whether it could convict Mr. Shelton of *joint* possession of the gun. It delivered a guilty verdict on the gun charges approximately an hour and forty-five minutes after the judge answered its question in the affirmative. 5/1/24 Tr. 3. Under these circumstances, it is impossible to find, "with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error." *Kotteakos v. United States*, 328 U.S. 750, 765 (1946).

The jury's message that it was deadlocked on most charges, including the firearm charges, paired with its question – "Can two or more people have joint possession of an item"?, 4/30/24 Tr. 2; R. 843 – showed that it was unconvinced by (or, at least, unsure about) the government's theory that Mr. Shelton *alone* possessed the items in the jacket. *See Evans v. United States*, 304 A.3d 211, 231 (D.C. 2023) (jury note asking whether self-defense justification extended to possession of gun for reasonable period of time after defensive shooting showed that jury "pretty clearly did not buy [government's] account" that defendant had gun for months after shooting); *Gray v. United States*, 79 A.3d 326, 337 (D.C. 2013 (jury's question whether defendant could be guilty of aiding and abetting for participation after the crime occurred "strongly implied they were not eager to credit" evidence of defendant's participation in crime itself). The jury's question strongly "suggested that [the jury] was considering a verdict based on joint constructive possession." *Thomas*, 806 A.2d at 630 (internal citations omitted) (referring to jury's question whether "more than one person [can] have constructive possession of a thing").

The jury's uncertainty about the government's case that Mr. Shelton had sole possession of the gun, and its focus on an alternative theory of conviction via a finding of joint possession, was not surprising given the shortcomings in the government's case. The government failed to call to the stand the officer who had found the gun in the jacket, 4/29/24 Tr. 57, and presented no DNA or fingerprint evidence linking Mr. Shelton to the gun. *Id.* at 59-60. Instead, the government presented testimony from Officer Rogers, just one of the six officers at the scene,

who had a more limited vantage point, had been reprimanded for his police work repeatedly between 2015 and 2019, 4/24/24 Tr. 130-131, and whose credibility was further damaged by his admission that he posed in a photograph with other GWU officers displaying a banner with a graphic of a skull and cross bones with a bullet hole through the forehead, flanked by two handguns as well as handcuffs. 4/24/24 Tr. 133-135; Def. Ex. 106. The evidence that was presented at trial established that Mr. Shelton was the only occupant of the car who had *not* engaged in panicked and furtive movements as police approached. 4/24/24 Tr. 111-12. Indeed, he had not been seen moving at all. *Id.* at 111-112. Mr. Smith and Mr. Payne, in contrast, were both moving frantically as officers approached, *id.* at 111, and Mr. Smith was moving his arms around within reaching distance before he fled from the car and assaulted one of the officers in the process. 4/24/24 Tr. 103-04, 107.

In light of the jury's obvious doubts about the government's case and its relatively prompt return of a guilty verdict on the gun charges after the court answered that joint constructive possession was a valid theory on which to convict, it is clear that the judge's erroneous response created an impermissible risk that the jury resolved its uncertainty by convicting on joint possession despite the lack of sufficient evidence. The erroneous joint constructive possession instruction offered the government an illegitimate path to conviction – one that relied on jury speculation rather than proof beyond a reasonable doubt and served as a murky and more forgiving alternative for the jury to fall back on in the face of reasonable doubt about Mr. Shelton's guilt.

This Court's reversal in *Thomas* is on point. Mr. Thomas was convicted of possession of a firearm (and related charges) based on a theory that he constructively possessed a gun found on the ground after he and another man were each seen throwing a different object to the ground. *Thomas*, 805 A.2d at 627-28. After concluding that the trial court had erroneously answered "yes" to the jury's question whether "more than one person [can] have constructive possession of a thing," despite insufficient record evidence of joint constructive possession of a gun found on the ground, *id.* at 628-29, this Court held that the error was not harmless. It explained that "the jury's note to the trial court suggested that it was considering a verdict based on joint constructive possession," and that, despite the lack of supporting evidence, "the court's response did not disabuse them of the availability of that theory on the facts of this case." *Id.* at 630. The Court therefore "agree[d]" with Mr. Thomas "that the trial court's supplemental instruction may have encouraged Mr. Thomas's conviction on a theory unsupported by the evidence, and, and that in these circumstances he must be given a new trial." *Id.* at 629. *See also id.* at 630 ("The judge's response to the jury's inquiry left the jury to assume that joint constructive possession was a proper theory under which to convict.").

Here, as in *Thomas*, the error cannot be deemed harmless. The jury's question here – "Can two or more people have joint possession of an item"? – was nearly identical to the question the jury posed in *Thomas*. 805 A.2d at 628 ("Can more than one person have constructive possession?"). As in *Thomas*, the jury's question here "suggested that it was considering a verdict based on joint constructive

possession" and the trial court's answer "did not disabuse them of the availability of that theory on the facts of this case," despite the lack of sufficient evidence of joint possession, *id.* at 630, and therefore "may have encouraged [Mr. Shelton's] conviction on a theory unsupported by the evidence," *id*. at 629.

Indeed, the impermissible risk of conviction without sufficient evidence that the trial court's error created here was much greater than the risk that led this Court to reverse in *Thomas*. Here, the jury made clear that it was struggling to reach a verdict when it informed the trial court that it was deadlocked on the gun charges after deliberating for approximately eight hours over two days. It then returned a guilty verdict approximately one hour and forty-five minutes hours after the judge's supplemental instruction on joint possession. *See Evans*, 304 A.3d at 231 (holding that court's response to jury note was not harmless where jury returned verdict less than an hour after receiving judge's response). And the government's insistence that it was entitled to the joint possession instruction, despite its consistent argument to the jury that Mr. Shelton alone possessed the items in the jacket, underscores how valuable to securing a conviction the instruction was, even in the government's eyes. *See Garris v. United States*, 390 F.2d 862, 866 (D.C. Cir. 1968) ("[A prosecutor's] own estimate of his case, and of its reception by the jury at the time, is, if not the only, at least a highly relevant measure [] of the likelihood of prejudice."). Even more so than in *Thomas*, the government cannot show that the verdict against Mr. Shelton was not substantially swayed by the trial court's error. Reversal is required.

CONCLUSION

For the reasons set out above, Mr. Shelton's firearms convictions should be reversed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing motion has been served electronically via the Appellate E-Filing System, upon Chrisellen Kolb, Esq., Chief, Appellate Division, Office of the United States Attorney on this 18th day of August, 2025.

/s/ Areeba Jibril

Areeba Jibril