BRIEF FOR APPELLEE

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-859

DAVON C. JOHNSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

Cr. No. 2023-CF2-2165

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
NICHOLAS P. COLEMAN
SARAH E. ROESSLER
MARK LEVY
* DAVID B. GOODHAND
D.C. Bar #438844
Assistant United States Attorneys

* Counsel for Oral Argument
601 D Street, NW, Room 6.232
Washington, D.C. 20530
David.Goodhand2@usdoj.gov
(202) 252-6829

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

Cases

* Authorities upon which we chiefly rely are marked with asterisks.

Statutes

ISSUE PRESENTED

Whether Secret Service officers had probable cause to arrest the five men (including Johnson) who were about to enter an SUV, which, the officers knew, contained three readily accessible illegal firearms, including one with an extended magazine stored in the driver's-side, middle-row map pocket, i.e., precisely where Johnson was preparing to sit before the officers intervened?

DISTRICT OF COLUMBIA
COURT OF APPEALS

No. 23-CF-859

DAVON V. JOHNSON, Appellant,

v.

UNITED STATES OF AMERICA, Appellee.

APPEAL FROM THE SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
CRIMINAL DIVISION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

After Secret Service officers arrested appellant, Davon Johnson, they found over 400 fentanyl pills on him. A D.C. Superior Court grand jury thus charged him with possession with intent to distribute, in violation of D.C. Code § 48-904.01(a)(1) (Record on Appeal (R.) 70 (PDF) (Indictment p.1)). Following a trial before the Honorable Andrea L. Hertzfeld, a jury convicted Johnson of the lesser-included offense of possession of a controlled substance (R.554 (PDF) (Verdict p.1)). On

September 29, 2023, Judge Hertzfeld sentenced Johnson to 180 days' imprisonment (R.557 (PDF) (Order p.1). Johnson timely appealed on October 12, 2023 (R.559 (PDF) (Notice p.1)).

Johnson's Suppression Motion

Before trial, Johnson moved to suppress the fentanyl pills the police found on him, contending that, when police officers seized him early in the morning of April 10, 2023, they "did not have probable cause nor reasonable suspicion to believe that [he] was involved in any criminal activity" (R.94 (PDF) (Motion p.5)). The government opposed (R.96-101 (PDF) (Opposition pp.1-6)), and the court held an evidentiary hearing (see 6/9/023:5-94).

The Suppression Hearing

At about 1:10 a.m. on April 10, U.S. Secret Service Officer Antonio Capasso responded to a radio call from Officer Jordan Whitehair, who (along with his partner) was on foot patrol in the area of 1050 17th Street, NW (6/9/23:5-6, 40-41). Officer Whitehair had reported that he'd seen a "firearm in plain view in the vehicle" (*id.* at 6). Specifically, when looking through the window of a parked four-door SUV (a Dodge Journey), Officer

Whitehair "saw a firearm in the vehicle in the back map pocket. And he said he could see in clear view through the slit of the map pocket of the [sic] firearms sights and grip." (*Id.* at 6-7.)[1] Officer Capasso went to the SUV's location and waited with Officer Whitehair and his partner to see if anyone returned to it (*id.* at 7).

At about 1:40 a.m., five men – who were "walking very close to each other and the same speed" – approached the SUV from the "same direction" (6/9/23:8; *id.* at 60 ("[T]hey were all walking close together from the same direction[.]")).[2] As the men – including Johnson – walked toward the SUV, its lights "blinked as in it [sic] was being unlocked" by

---

[1] See also 6/9/23:7 (Capasso: the map-pocket slit was "open, and so [Officer Whitehair] could see through the window into the slit"); *id.* at 14 (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.")). The court admitted photographs of the SUV and the gun that Officer Whitehair saw (*id.* at 13-16; Exhs. 1A-C (photos of SUV), 2A-C (photos of gun)). As Officer Capasso explained at the suppression hearing, Exhs. 2A and 2B show "the magazine imprinted on the map pocket" (6/9/23:15; see also *id.* at 57 ("I saw the imprint of a magazine in the print of [Exh. 2B]"); *id.* at 59 ("I see [in Exh. 2B] the butt of a magazine pressed up [on] the map [pocket] -- and it's an L-shape firearm")).

[2] "No one else tried to enter the [SUV]" in the 30-minute interim (6/9/23:60).

one of the men (Keith Smith) (*id.* at 10).[3] "Two of the individuals approached the vehicle on one side of the vehicle, and the other individuals approached on the other side of the vehicle like they were about to enter the vehicle" (*id.* at 8). Though Officer Capasso himself could not see Johnson because Capasso was "positioned" on the SUV's passenger side, Officer Whitehair later reported to Capasso that Johnson "open[ed] up the car door where the weapon was" (i.e., the rear driver's-side door) (*id.* at 11).

Because Johnson and the other four men were about to get into an SUV that the officers knew contained at least one gun, they "stopped the men" before they could enter the SUV (6/9/23:10-11). The officers handcuffed and detained the men on the sidewalk (*id.* at 11-12). Officer Whitehair then radioed for crime-scene officers "to retrieve the firearm" (*id.* at 12).

The crime-scene officers "performed a probable cause search" of the SUV and found two guns in addition to the map-pocket firearm

[3] Police later recovered the SUV's key fob on Mr. Smith and a subsequent computer check revealed that the SUV was registered to a Mia Smith (6/9/23:10, 46-47).

(6/9/23:12). The officers found one of these additional guns in the SUV's closed glove compartment (*id.*). Like the map-pocket gun, this one had a serial number (*id.* at 16, 18; Exhs. 3A-D (photos of second gun)). The officers found another gun beneath a third-row seat that had been "pushed all the way down" (6/9/23:12-13, 19; Exhs. 4A-D (photos of third gun)). This third gun was a "ghost gun," meaning it did not have a serial number and had been "personally manufactured" (6/9/23:19-20).[4] When the officers asked the men who the guns belonged to, no one "took credit" for them (*id.* at 21). The officers then placed the men – including Johnson –under arrest "for the firearms" (*id.* at 21, 54).[5]

---

[4] After the crime-scene officers found the three guns, a firearm check revealed that none of the five men had a license to carry a firearm in the District of Columbia (6/9/23:20). Additionally, none of the men had a registration for the two guns with serial numbers (*id.*; see also *id.* at 79 (government closing argument: "At the time that the five people are being arrested for [firearms offense], that's information that the officers are well aware of."); *id.* at 80 (government closing: "all of this evidence of carrying a pistol without a license came to light while the officers were on the scene")).

[5] When the officers placed Johnson in a patrol car, he unsuccessfully attempted to discard the fentanyl pills he possessed (6/9/23:21-22). Ultimately, via a "more thorough" search, officers discovered 417 fentanyl pills on and around Johnson (*id.* at 22; Exhs. 5A-H (photos of pills)). Johnson's subsequent jury trial focused only on law enforcement's post-arrest discovery of his fentanyl pills (see, e.g., 4/27/23:124-40 (Officer Whitehair testimony); *id.* at 146-60 (Officer Capasso testimony)).

The parties' arguments and the court's ruling

Johnson argued there was "no probable cause for [his] arrest" (6/9/23:63). He asserted the government had failed to show his knowledge of the guns, contending the "[c]ourt saw from the Government's own evidence that these are not firearms that are exposed to the public if one was to walk past th[e] SUV" (*id.* at 67-68). And, even if the court concluded that that map-pocket gun was plainly visible, the government had only shown his proximity to it and "mere proximity is not enough for probable cause to arrest" (*id.* at 68-69).

Relying on Exhibit 2B ("the [c]ourt saw the photo"), the prosecutor countered that the map-pocket gun was in "plain view" and "any passenger in that car would certainly be able to see that firearm" (6/9/23:71). Further, the prosecutor explained, this case was like *Maryland v. Pringle*, 540 U.S. 366 (2003): "[D]ue to where the three firearms were located, no matter which row of the vehicle [Johnson] intended to sit in (front passenger seat, second row, or third row), there would have been a firearm he would easily have been able to access" (R.100 (PDF) (Opposition p.5); see also 6/9/23:70).

Pringle, Johnson responded, did "not get the Government where they need to be for probable cause" (6/9/23:71). *Pringle*, he maintained, was "distinguishable" because, "upon pulling the vehicle over," the police "observe[d] three occupants in the vehicle," which is a "much different situation from a group of people getting close to an SUV[,] within arm's reach" (*id.* at 71-72; see also *id.* at 72 (fact that *Pringle* "occupants [we]re in the car at the moment the stop occur[red]" is "significant").

Crediting Officer Capasso's testimony and considering the photos, the trial court denied Johnson's suppression motion (6/9/23:83-87). Though the court opined that the officers "probably" did not have proof beyond a reasonable doubt, "the standard at this stage is probable cause," which the officers had (*id.* at 87). Officer Whitehair "observed in plain view" a gun in the map pocket (*id.* at 84). As the court explained, in addition to the fact that Officer Whitehair told Officer Capasso that he had seen the gun's sights and grip "through the slit in the map pocket," one "can see from the pictures the imprint" of the gun on the map-pocket's soft surface (*id.* at 84, 86; see also *id.* at 84 (court: "the imprint of the gun

was visible on the . . . surface of the map pocket")).[6] "That says to the Court that it was obvious to just a passerby of this car that there was a firearm in the back map pocket, and I think it's of significant note that that was the exact seat [Johnson] was entering into when he got into the car" (*id.* at 86). Accordingly, Judge Hertzfeld concluded, "this is a situation more akin to *Pringle* and so I do find that a prudent officer would have sufficient knowledge to warrant a reasonable belief that [Johnson] possessed the firearm" (*id.* at 87).

SUMMARY OF ARGUMENT

The Secret Service officers had reasonable grounds to believe that the five men (including Johnson) entering the parked SUV were engaged in a common – illegal – enterprise. At the time the officers arrested the men, they knew the SUV contained three unregistered guns – including one with an extended magazine and a ghost gun – distributed throughout the passenger compartment. At least one illegal gun was thus accessible

[6] As the court additionally noted, Officer Whitehair's plain-view sighting was corroborated by the fact that he "radioed for the additional officers to come in, because he had actually seen what he believed to be a firearm" (6/9/23:86).

to the persons sitting in each of the SUV's three rows. Further, the officers knew that Johnson in particular had been about to sit on the driver's side of the middle row, where – the crime-scene photos showed – the map pocket plainly revealed the imprint of an extended-magazine pistol. Finally, when questioned, none of the men identified the guns' owners. On these facts, the officers could reasonably conclude that the driver would have been "unlikely to admit an innocent person [to the SUV] with the potential to furnish evidence against him." *Pringle*, 540 U.S. at 373. The officers thus properly arrested all five men based on the reasonable inference of a common enterprise to possess illegal handguns.

ARGUMENT

Probable Cause Supported Johnson's Arrest.

Johnson claims (at 17-36) the "government failed to prove that there was probable cause that [he] possessed a gun." He is mistaken.

A. Governing Legal Principles and Standard of Review

"Probable cause . . . is not a high bar: It requires only the kind of fair probability on which reasonable and prudent [people,] not legal technicians act." *Kaley v. United States*, 571 U.S. 320, 338 (2014) (cleaned

up). As the trial court correctly recognized (see 6/9/23:87), "the substance of all the definitions of probable cause is a reasonable ground for belief of guilt, and that the belief of guilt must be particularized with respect to the person to searched or seized." *Pringle*, 540 U.S. at 371 (cleaned up). Probable cause "does not require officers to establish the elements of the offense with a level of certainty as though trial-level proof must exist at the side of the road." *United States v. Brooks*, 982 F.3d 1177, 1180 (8th Cir. 2020).

"Whether the police had probable cause on a given set of historical facts is a question of law subject to *de novo* review on appeal." *Perkins v. United States*, 936 A.2d 303, 305 (D.C. 2007). "Of course, the facts and all reasonable inferences therefrom must be viewed on appeal in favor of sustaining the trial court's ruling, and findings of historical fact may not be disturbed unless the appellate court determines them to be clearly erroneous." *Id.* at 305 n.1.

B. Following the Officers' Lawful Search of the SUV and Their Discovery of Three Illegal Guns Distributed Throughout the Passenger Compartment, the Officers Had Probable Cause To Arrest Johnson.

1. The plain-view sighting of the map-pocket gun justified the subsequent SUV search.

As the government explained below – and Johnson does not now contest – *if* the map-pocket gun was in plain view, the Secret Service officers "had probable cause to search the rest of the vehicle for other weapons" (R.99 (Opposition p.4)). *See*, *e.g.*, *Zanders v. United States*, 75 A.3d 244, 248 (D.C. 2013); *Beachum v. United States*, 19 A.3d 311, 319 (D.C. 2011); *Tucker v. United States*, 421 A.2d 32, 35 (D.C. 1980). Instead of challenging the legal basis for the officers' search, Johnson claims (at 20-24) the trial court's "finding that the top of the weapon was visible was clearly erroneous." But the court's plain-view finding did not depend solely on Officer Whitehair's sighting of the "top of the weapon." And, even if it did, the court did not plainly err in crediting Officer Capasso's testimony about Officer Whitehair's out-of-court description of his sighting.

Officer Whitehair told Officer Capasso that, while on foot patrol, "he saw a firearm in the vehicle in the back map pocket. And he said he could see in clear view through the slit of the map pocket of the [sic] firearms sights and grip." (6/9/23:6.) Based on this sighting, Officer Whitehair radioed for backup, explaining that he had "found a firearm in plain view in a vehicle" (*id.*). At the suppression hearing, Officer Capasso confirmed that the map-pocket gun was plainly visible, twice explaining that the map-pocket photograph (Exhibit 2B) showed "the butt of a magazine pressed up [on] the map [pocket] -- and it's an L-shape firearm" (6/9/23:59).[7] And, in concluding that that gun was plainly visible, the court agreed, finding that "you can see from the pictures the imprint" (*id.* at 86; see also *id.* at 84 (court: "the imprint of the gun was visible on the -- I'll say the surface of the map pocket")). Thus, while the trial court also "credit[ed] [Officer Capasso's] testimony that Officer Whitehair saw" the "top of the firearm" through the map-pocket's slit (*id.* at 86), the court's plain-view finding did not depend on that testimony. Rather, the court

[7] Q: And just looking at this photo [Exh. 2B] now, what do you see in the picture?

A: I see the magazine imprinted on the map pocket. (6/9/23:15.)

explained, either Officer Capasso's first-hand description of the gun's imprint or his description of Officer Whitehair's sighting supported such a finding: "According to the testimony, the sights and the grip were visible through the slit in the map pocket, *and* the imprint of the gun was visible on the . . . surface of the map pocket" (*id.* at 84 (emphasis added)).[8]

In any event, contrary to Johnson's claim (at 23), the court's "finding that the top of the firearm was visible" does not "lack[ ] evidentiary support." The court properly credited Officer Capasso's testimony that he had recently spoken with Officer Whitehair, who said "he could see in clear view through the slit of the map pocket of the [sic] firearm's sights and grip" (6/9/23:6; see *id.* at 86). "[R]eliable hearsay" is admissible at a suppression hearing, *Mitchell v. United States*, 368 A.2d 514, 518 (D.C. 1977), and, the court correctly reasoned, Officer Whitehair's statement qualified as such because "it stands to reason"

[8] Johnson does not now challenge either the trial court's finding that "the imprint of the gun was visible" on the map-pocket's "surface" or Officer Capasso's testimony that the crime-scene photograph captured "an L-shape firearm" (6/9/23:59, 84). And, in the trial court, Johnson only asked Judge Hertzfeld "to ignore" the "information about the impressions" "because that's something that's after the fact" (*id.* at 67), a claim he does not repeat on appeal.

that his sighting of the firearm's "top" was "why he would have radioed for the additional officers" (6/9/23:86). Accordingly, although the court recognized it wasn't "clear from the *photographs* whether or not that you could see the top of the firearm" (*id.* (emphasis added)), Officer Whitehair's radio call and the officers' subsequent stakeout of the SUV corroborated his sighting. Moreover, Officer Capasso explained that he had recently spoken to Officer Whitehair – i.e., a person with "personal knowledge" of what he had seen – and it was thus clear that Capasso's "account" did not "involve[ ] multiple levels of hearsay." *In re K.H.*, 14 A.3d 1087, 1092 (D.C. 2011). Further, Officer Capasso could – and did – provide a "reasonably accurate account" of what Officer Whitehair had told him, one that was anything but "vague and unenlightening." *Id.* Certainly, the court did not *plainly* err in crediting or relying on Officer Capasso's description of Officer Whitehair's out-of-court statement, which is the applicable standard of review given Johnson's failure to raise his present hearsay objection in the trial court.[9]

---

[9] Though Johnson now asserts (at 21-23) "Officer Capasso's hearsay testimony" about "Officer Whitehair's unsworn claim" was "insufficiently reliable to support the trial court's finding," he didn't make this claim below (see 6/9/23:6, 14 (no objections to Capasso's testimony relating (continued . . .)

In sum, ample evidence supported the trial court's finding that "it was obvious to just a passerby of this car that there was a firearm" in the driver's-seat map pocket (6/9/23:86). Most prominently, as the trial court found ("you can see from the pictures"), Exhibits 2A and 2B reveal the gun's imprint (*id.*). Further, Officer Capasso, whom the court properly credited, confirmed that he could "see the magazine imprinted on the

---

hearsay)). Instead, Johnson argued only that the court couldn't "credit" Officer Capasso's testimony "about what Officer Whitehead said *given* that there's . . . nothing on this record" but a "conclusory" description of "Officer Whitehair's training" (*id.* at 81 (emphasis added)). Because Johnson "did not raise the hearsay objection at the suppression hearing," this Court's review is thus restricted to "plain error." *Fleming v. United States*, 923 A.2d 830, 835 (D.C. 2007). And Johnson has not shown such plain error. As explained in the text, this case is nothing like *In re K.H.*, Johnson's primary authority (at 21-22). In contrast to *In re K.H.*, Officer Capasso explained that he had recently spoken to Officer Whitehair, *viz.*, the person with first-hand knowledge of the plain-view sighting. Officer Capasso thus could provide a specific description of Officer Whitehair's sighting, *viz.*, while looking through the SUV's window, Whitehair saw the gun's sights and grip via the slit at the top of the map pocket.

Finally, to the extent that Johnson is arguing instead that the trial court simply erred in attributing significant *weight* to Officer Whitehead's hearsay report, "unless the evidence is wholly lacking in probative value, its weakness and reliability are factors to be considered by the fact finder in determining the weight to be accorded the testimony." *See United States v. Brannon*, 404 A.2d 926, 930 (D.C. 1979). In short, the trial judge, "as fact finder, ha[d] the right to make credibility determinations, weigh the evidence, and draw reasonable inferences of fact." *Joiner-Die v. United States*, 899 A.2d 762, 764 (D.C. 2006) (en banc).

map pocket" (6/9/23:15, 83; see also *id.* at 59 ("it's an L-shape firearm")). The photos and Officer Capasso's testimony alone support the trial court's plain-view finding. *See Dorsey v. United States*, 60 A.3d 1171, 1205-06 (D.C. 2013) (where "there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous").[10] Moreover, on top of this evidence, there was Officer Whitehair's trustworthy hearsay statement that he saw the gun's sights and grip while walking his beat on 17th Street.

2. Because the SUV's driver would've been unlikely to admit the other men if they were innocent passengers, the officers had probable cause to believe the SUV's would-be occupants were engaged in a common – unlawful – enterprise.

The trial court also properly concluded the officers had probable cause to arrest Johnson for unlawful gun possession. "'Individualized suspicion' can, under certain circumstances, be based on an inference of a 'common enterprise.'" *Santopietro v. Howell*, 73 F.4th 1016, 1027 (9th

[10] *Compare Hawkins v. United States*, 248 A.3d 125, 131 (D.C. 2021) ("Because *neither* the BWC footage nor the witness's credited testimony supports a finding that Hawkins consented to the warrantless search ... the government failed to meet its burden.") (emphasis added).

Cir. 2023) (quoting *Pringle*, 540 U.S. at 372-73). Numerous features of the early-morning April 10 interaction demonstrate a reasonable ground for belief that all five men (including Johnson) were involved in a common criminal enterprise.

First, the circumstances obviously suggested that the five men knew one another. It was early in the morning (1:40 a.m.) on an otherwise deserted 17th Street when the officers saw the group of men "walking very close to each other" as they approached the SUV – which the officers knew contained at least one firearm – at the "same time" (6/9/23:8). And, after one of the men used his key fob to unlock the SUV, Johnson "open[ed] up the car door where the [map-pocket] weapon was found" (*id.* at 11). In such circumstances, the officers could reasonably infer a "community of conduct" on the group's part. *United States v. Myers*, 986 F.3d 453, 458 (4th Cir. 2021) ("contextual facts revealed clearly that Myers and the driver knew each other, or at least had a preexisting arrangement").

Second, if not for the officers' understandable intervention,[11] Johnson and the four other men would have entered a "relatively small automobile." *Pringle*, 540 U.S. at 373. The presence of a passenger in a car is different from, for example, a bar patron: "'a car passenger – unlike the unwitting tavern patron in *Ybarra* – will often be engaged in a common enterprise with the driver, and have the same interest in concealing the fruits or evidence of the wrongdoing.'" *Id.* (quoting *Wyoming v. Houghton*, 526 U.S. 295, 304-05 (1999)); *compare Ybarra v. Illinois*, 444 U.S. 85 (1979); *see also People v. Ortiz*, 823 N.E.2d 1171, 1184-85 (Ill. Ct. App. 2005) ("*Pringle* teaches that the choice of co-

[11] Because the officers knew the SUV contained at least one readily accessible firearm, they had to intervene before any of the five men could get in the SUV, which was parked roughly four blocks from the White House. To the extent that Johnson is implying (see Br. 27) that the officers would have had grounds to arrest Johnson and his companions only after they got into the vehicle and had ready access to the firearms therein, nothing in this Court's or the Supreme Court's caselaw suggests that the police must take such an inordinate risk. *Cf. Cousart v. United States*, 618 A.2d 96, 101 (D.C. 1992) (en banc) ("As a society, we routinely expect police officers to risk their lives in apprehending dangerous people. We should not bicker if in bringing potentially dangerous situations under control they issue commands and take precautions which reasonable men are warranted in taking.") (quoting *Bailey v. United States*, 389 F.2d 305, 315 (D.C. Cir. 1967) (Leventhal, J., concurring)).

occupants of a vehicle to travel together in close proximity constitutes the 'more' in the [*Ybarra*] holding that 'a person's propinquity to others independently suspected of criminal activity does not, without more, give rise to probable cause to search that person'") (quoting *Ybarra*, 444 U.S. at 911); *cf. Belote v. State*, 20 A.3d 143, 150 (Md. Ct. Spec. App. 2011) ("an apartment bedroom lacks the features that make an automobile a literal and figurative vehicle of its occupants' criminal enterprise").

Third, the guns were the type of contraband that is so "obviously criminal" as to make the SUV's driver "unlikely to admit an innocent person with the potential to furnish evidence against him." *Pringle*, 540 U.S. at 373. In particular, the two guns most accessible to Johnson were the map-pocket firearm with an extended magazine and the "ghost gun" under the third row's middle seat. See 6/9/23:92 (court: Johnson was "about" to sit in SUV's middle row where "officers had just observed an extended magazine pistol"). A reasonable officer could conclude that, unlike such relatively innocuous items as an "open container of malt liquor," *Perkins*, 936 A.2d at 308, or a "box of fireworks," *In re T.H.*, 898 A.2d 908, 914 (D.C. 2006), such obviously criminal items as a ghost gun and an extended-magazine pistol would've caused the SUV's driver to

decline to admit Johnson as a passenger unless one of the illegal guns was Johnson's or, at the least, Johnson jointly possessed the guns. *See Pringle*, 540 U.S. at 372 (where police recovered $763 from closed glove compartment and five cocaine baggies hidden between armrest and back seat, "it was an entirely reasonable inference from the facts that any or all three of the occupants had knowledge of, and exercised dominion and control over, the cocaine"; a "reasonable officer" thus "could conclude that there was probable cause to believe Pringle committed the crime of possession of cocaine, either solely or jointly").[12]

Fourth, in contrast to *Pringle,* where the cocaine and cash were in fact "hidden," *Perkins*, 936 A.2d at 308, the map-pocket gun – with its extended magazine – was "in plain view" (6/9/23:86). The Secret Service

[12] Implausibly, Johnson asserts (at 29-30) the three guns (including the one with an extended magazine and the ghost gun without a serial number) are analogous to the fireworks in *In re T.H.* and thus "'not so obviously criminal' as to make the driver of the SUV 'unlikely to admit an innocent person'" (quoting *In re T.H.*, 898 A.2d at 914). The would-be occupants' possession of the three guns violated as many as five different laws. *See* D.C. Code § 22-4504(a) (CPWL); *id.* § 7-2502.01(a) (UF); *id.* § 7-2506.01(3) (UA); *id.* § 2506.01(b) (extended magazine); *id.* § 7-2502.02(a)(8) (ghost gun). Moreover, unlike fireworks, any reasonable officer would know such guns are inherently deadly and often used to protect other contraband.

officers could thus infer that – had they not interrupted Johnson's entry into the SUV's middle row – Johnson would've immediately seen the illegal gun in the map pocket that he would have been directly facing. This inference naturally strengthens the conclusion that Johnson was involved in a common enterprise, otherwise the driver would've been unlikely to admit him.[13]

Finally, like *Pringle,* none of the five men took "credit for the guns" when the officers asked them "who the guns belonged to" (6/9/23:21; *see Pringle*, 540 U.S. at 374 ("none of the three men provided information with respect to the ownership of the cocaine"). And "[b]ecause the three occupants in *Pringle* denied ownership of drugs that were found in the automobile, the officer was justified in inferring that all three men were involved in illegal conduct, justifying their arrest." *Myers*, 986 F.3d at

[13] Johnson asserts (at 24) that the "question for purposes of the probable cause analysis is not whether Officer Whitehair saw the firearm, but whether [*he*] saw the firearm" (emphasis added). As *Pringle* makes clear, however, the common-enterprise inference does not depend on whether Johnson would've necessarily seen the gun once seated in the SUV. Rather, the reasonableness of that inference depends on whether it was "unlikely" that the driver would've otherwise "admit[ted]" Johnson to the SUV's close confines unless Johnson already knew of the guns stored throughout the passenger compartment. *Pringle*, 540 U.S. at 373.

458. In like fashion, "[w]hile the role of each occupant [of the SUV] was not known to the [Secret Service] officer[s], [they] well could conclude that the community of conduct suggested by the circumstances particularized the suspicion as to all [five] and thus justified their arrest." *Id.*[14]

---

[14] Citing *United States v. Di Re*, 332 U.S. 581 (1948), Johnson asserts (at 32-34) that 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, Johnson maintains, "'singling out' is merely a fact that can *destroy* an otherwise-existing inference of constructive possession." *See*, *e.g.*, *Di Re*, 332 U.S. at 594 ("Any inference that everyone on the scene of a crime is a party to it must disappear if the Government informer singles out the guilty person."). We agree that, if one or more of a car's occupants identifies another occupant as responsible for the contraband, this may foreclose lawful arrest of *all* the occupants based on a common-enterprise inference. Accordingly, we do not cite the SUV's occupants' silence in the face of police questioning as affirmative proof of a common enterprise. Instead, consistent with *Pringle*, we simply note that "*without such a singling out*, the officer[s] could reasonably infer 'that any or all [five] of the occupants had knowledge of, and exercised dominion and control over, the [guns].'" *Callahan v. Unified Gov't of Wyandotte Cnty.*, 806 F.3d 1022, 1029 (10th Cir. 2015) (emphasis added; quoting *Pringle*); *see also State v. Ortega*, 770 N.W.2d 145, 151 (Minn. 2009) ("Unlike *Pringle*, the evidence in this case does not indicate that Sorg and Ortega were engaged in drug dealing. However, when combined with the odor of burnt marijuana, [Officer] Mills' discovery of the cocaine-laced dollar bill in an unconcealed location that was accessible to both Sorg and Ortega would cause a person of ordinary care and prudence to entertain an honest and strong suspicion that Ortega constructively possessed the cocaine jointly with Sorg. *Sorg's*

(continued . . .)

In these circumstances, it was thus reasonable for the officers to infer a common enterprise amongst the driver and his passengers (including Johnson). S*ee Brooks*, 982 F.3d at 1180 ("may be reasonable to infer that occupants of a stolen car – at least one of whom conspicuously fails to comply with police commands – hold shared knowledge as to an illegal enterprise"); *United States v. Reed*, 443 F.3d 600, 603-05 (7th Cir. 2006) (finding probable cause to arrest based on "common enterprise to conceal the proceeds of illegal activity" where, inter alia, police found "two bundles of cash wrapped in pink cellophane" – totaling $93,981 – concealed in a horse trailer being hauled by a three men in a pickup truck); *United States v. Jimenez*, 421 F. Supp. 2d 1008, 1010-14 (W.D. Tex. 2006) (finding probable cause to arrest based on common enterprise to conceal and transport currency in excess of $10,000 outside the United States where, inter alia, police found 19 bundles of cash "wrapped in black electrical tape" in hidden compartment of SUV driven by two men and "no one person . . . could be singled out as the guilty party"); *People v Hatcher*, 2024 WL 1753883 **5-6 (Ill. Ct. App. April 24, 2024) (finding

---

statements to Mills did not dispel this rational inference because her statements did not single out the guilty person." (emphasis added)).

probable cause to arrest based on common enterprise to commit bank fraud where, inter alia, police observed one of car's three occupants – but not the defendant – engage in "suspicious behavior at two nearby banks" and officers ultimately found "two pieces of evidence of bank fraud" in the car: "at the time of defendant's arrest, police knew that defendant was a passenger in a vehicle they had probable cause to believe was being used to commit bank fraud").

Though Johnson asserts (at 31) "a common enterprise inference would be justifiable only in cases – like *Pringle* – in which officers could reasonably suspect illicit dealing," this is not accurate. "The inference that a defendant was a participant in a common criminal enterprise because that defendant was in close association with other individuals at a certain time and place under certain circumstances does *not* depend upon whether the common criminal enterprise, the possession of contraband, for instance, is for personal use and enjoyment or is for commercial profit." *Cerrato-Molina v. State*, 115 A.3d 785, 793 (Md. Ct. Spec. App. 2015) (emphasis added) (citing *Larocca v. State*, 883 A.2d 296 (Md. 2005)). Whether the circumstances indicate a common criminal enterprise instead depends on factors such as "the nature of the

premises" (e.g., "a small or exclusive space increases probable cause to suspect criminal association among those present") and "the nature of the evidence discovered" (e.g., "the presence of items that exceed the capacity of one person to possess"). *Belote*, 20 A.3d at 148-49; *see also* cases cited at pp. 23-24 & n.14 supra (*Brooks*, *Reed*, *Jimenez*, *Hatcher*, and *Ortega*).

As the trial court thus correctly determined, the Secret Service officers had reasonable grounds to believe Johnson was involved in a common criminal enterprise with the other men entering the SUV. The quantity of firearms (three), the fact that at least two of them were obviously illegal to possess, and their locations in the "relatively small" SUV (one in each of the front, middle, and back rows) suggested that the four would-be passengers were "engaged in a common enterprise with the driver and ha[d] the same interest 'in concealing . . . the evidence of their wrongdoing.'" *Pringle*, 540 U.S. at 373 (quoting *Houghton*, 526 U.S. at 304-05). Indeed, the officers knew, Johnson was about to sit in the very seat that faced the "map pocket, and the imprint of the gun was visible on the . . . surface of the map pocket" (6/9/23:84 (trial court finding)). "Given the reasonable inference that [Johnson] was engaged in a common and unlawful enterprise with the driver, he was not arrested due to his

mere presence in the car," *United States v. Gary*, 790 F.3d 704, 707 (7th Cir. 2015), and this is thus not a case where "mere propinquity to others independently suspected of criminal activity" is advanced as the basis for probable cause, *Ybarra*, 444 U.S. at 91.

CONCLUSION

WHEREFORE, the government respectfully submits that the judgment of the Superior Court should be affirmed.

Respectfully submitted,

MATTHEW M. GRAVES
United States Attorney

CHRISELLEN R. KOLB
NICHOLAS P. COLEMAN
SARAH E. ROESSLER
MARK LEVY
Assistant United States Attorneys

/s/
DAVID B. GOODHAND
D.C. Bar #438844
Assistant United States Attorney
601 D Street, NW, Room 6.232
Washington, D.C. 20530
David.Goodhand2@usdoj.gov
(202) 252-6829

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have caused a copy of the foregoing to be served by electronic means, through the Court's EFS system, upon counsel for appellant, Sarah McDonald, Esq., smcdonald@pdsdc.org, on this 21st day of October, 2024.

/s/
DAVID B. GOODHAND
Assistant United States Attorney