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IN THE SUPREME COURT OF THE UNITED STATES

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MARYLAND, :

Petitioner :

v. : No. 02-809

JOSEPH JERMAINE PRINGLE :

- - - - -X

Washington, D. C.

Monday, November 3, 2003

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:02 a.m.

APPEARANCES:

GARY E. BAIR, ESQ., Baltimore, Maryland; on behalf of the Petitioner.

SRI SRINIVASAN, ESQ., Assistant to the Solicitor General, Department of Justice; as amicus curiae, supporting the Petitioner.

NANCY S. FORSTER, ESQ., Baltimore, Maryland; on behalf of the Respondent.

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1 P R O C E E D I N G S

2 (11:02 a.m.)

3 CHIEF JUSTICE REHNQUIST: We'll hear argument
4 next in No. 02-809, Maryland v. Joseph Jermaine Pringle.

5 Mr. Bair.

6 ORAL ARGUMENT OF GARY E. BAIR

7 ON BEHALF OF THE PETITIONER

8 MR. BAIR: Mr. Chief Justice, and may it please
9 the Court:

10 When the officer stopped the car respondent was
11 riding in and found drugs packaged for distribution in the
12 rear seat armrest, and then also found a large amount of
13 cash in the glove compartment -

14 QUESTION: What - the rear seat armrest was
15 pushed up -

16 MR. BAIR: Yes, Your Honor.

17 QUESTION: - and then the drugs were behind the -
18 the armrest?

19 MR. BAIR: Yes, Mr. Chief Justice. The rear seat
20 armrest was pushed up against the rear seat. The officer
21 merely folded it down and then the drugs appeared, and
22 these are drugs that were packaged in five separate
23 individual packages that were packaged for distribution at
24 \$20 a bag. The officer also found \$763 in a rolled-up
25 ball of cash in the glove compartment, and there - at that

1 time there was individualized probable cause that focused
2 on all three people in that car, and this is so for three
3 principal reasons. First -

4 QUESTION: At the end of the day, what happened?

5 MR. BAIR: At the end of the day, all three were
6 arrested, respondent confessed, and said the -

7 QUESTION: And respondent was a front seat
8 passenger?

9 MR. BAIR: Yes, Justice O' Connor.

10 QUESTION: He's the one who confessed?

11 MR. BAIR: Yes.

12 QUESTION: And was found ultimately guilty of -

13 MR. BAIR: He was found -

14 QUESTION: - some drug-related offense?

15 MR. BAIR: He was found guilty both of possession
16 and possession with intent to distribute.

17 QUESTION: And the other two?

18 MR. BAIR: The other two were not charged
19 formally after respondent confessed. The officer made a
20 discretionary decision not to charge the other two at the
21 station house after respondent confessed to this crime.

22 QUESTION: Do you say that there was probable
23 cause for the arrest of all three at the time they were
24 found?

25 MR. BAIR: Yes, Your Honor.

1 QUESTION: Was there probable cause sufficient to
2 support charges at a preliminary hearing -

3 MR. BAIR: I think there would have been.

4 QUESTION: - against all three?

5 MR. BAIR: I - yes, Justice O'Connor, I think
6 there would have been. I think, given the circumstances
7 of this arrest, the mere fact that one of the three
8 confessed doesn't ultimately determine that the other two
9 were not culpable.

10 QUESTION: Is there any additional requirement
11 for establishing probable cause at a preliminary hearing
12 above and beyond what's needed for the arrest, or are they
13 identical, in your opinion?

14 MR. BAIR: I would say they're identical, Your
15 Honor.

16 QUESTION: So - so under - under that view,
17 assume no confession, hypothetical case, under that view,
18 these people, all of the three could have been bound over
19 for trial?

20 MR. BAIR: I believe so. I believe so.

21 QUESTION: And under that view, any motion to
22 dismiss prior to trial would have to be denied?

23 MR. BAIR: I believe there would have been
24 probable cause to charge and to take the cases to trial.

25 QUESTION: And I suppose what happens in that

1 case is the judge says, and I want to tell you right up
2 front I think this is a very skimpy case, you'd better
3 come up with something - I guess that's the way it works -
4

5 MR. BAIR: I think so -

6 QUESTION: But there's - but the - as Justice
7 O'Connor said, it's probable cause and it's the same
8 standard - excuse me - it's the same standard to bind over
9 on arraignment as it is for the officer to arrest?

10 MR. BAIR: My understanding from the case law,
11 Your Honor, is that probable cause is probable cause, be
12 it to search, to arrest, or it - I think it's a fluid
13 concept, obviously depending on the exact context, and I'm
14 not saying that a prosecutor would not exercise discretion
15 as would a police officer in a given case not to take a
16 case forward.

17 QUESTION: Well, a preliminary hearing is largely
18 a matter of Maryland law, isn't it, or State law?

19 MR. BAIR: It is and -

20 QUESTION: I mean, is there any - any
21 constitutional requirement that there be a preliminary
22 hearing before a criminal case is tried?

23 MR. BAIR: Not that I know of, Your Honor, no.

24 QUESTION: Well, I take it even under the
25 Constitution, if it's a Federal case, both the indictment

1 and the - or the information shows simply probable cause,
2 that's enough to bind over?

3 MR. BAIR: I believe so, Justice Kennedy, I
4 believe so. Now, in this case, of course, there was -

5 QUESTION: But if you say it's fluid, that - that
6 concerns me. I was somewhat puzzled by what the
7 Government said in its brief, page 26 to 28, it says,
8 well, you know, it's fluid, the prosecutor takes a second
9 look and it - it sounds as if the prosecutor has a greater
10 burden, but I - I'm not sure that that's the law.

11 MR. BAIR: I'm not sure it's a greater burden. I
12 think the prosecutor's decision, of course, is looking
13 forward to trial where they know that they have to prove
14 the case beyond a reasonable doubt. They know they have
15 to get past a motion for judgment of acquittal. The
16 police officer on the scene is making the same type of
17 decision vis-a-vis probable cause but it's in a very
18 different context. I think that's the difference.

19 QUESTION: In your view, is this very fact-
20 specific so that it might come out differently if the
21 money and the drugs had been located in some little pocket
22 next to the driver as opposed to some rear seat passenger
23 or other passenger?

24 MR. BAIR: I think one factor that would
25 significantly change the totality of the circumstances

1 here would be, for instance, if the drugs had been found
2 on the person of one of the passengers.

3 QUESTION: No, that wasn't my question. What if
4 -

5 MR. BAIR: If it had been -

6 QUESTION: - they were found very close to the
7 driver, you know, sometimes there's a little pocket right
8 next to -

9 MR. BAIR: In the door?

10 QUESTION: - on the door, on the driver's side.
11 Suppose it were there but you had a passenger in the front
12 and in the rear. Any different result?

13 MR. BAIR: Not in this case, no. I think - I
14 think if - if the drugs are found in a common area of the
15 passenger compartment of the car -

16 QUESTION: How about the trunk?

17 MR. BAIR: I think the trunk changes things a
18 little bit, but of course you have to look at the totality
19 of the circumstances, Justice Ginsburg.

20 QUESTION: Why a little bit? I thought this
21 whole case was predicated - your whole case was predicated
22 on those drugs between the armrest and the backseat were
23 accessible to all three people in that car.

24 MR. BAIR: That's -

25 QUESTION: Now, if you have something in a locked

1 trunk, it truly is not accessible to the passengers.

2 MR. BAIR: It certainly is not as accessible, and
3 of course it's not as immediately accessible, but, for
4 instance, if there had been a large quantity of drugs in
5 the trunk or if there had been a dead body in the trunk, I
6 think then there is a - the calculus changes in terms of
7 totality of the circumstances, and I think if it were that
8 situation, even though that particular evidence was in the
9 trunk, I think there's still a - a strong inference that
10 could be drawn that everyone in the car knew about it,
11 because who would take the chance in terms of taking along
12 innocent passengers -

13 QUESTION: Well, let's stick to the five - these
14 five bags that were stuck in a Ziploc bag. The Ziploc bag
15 is in the trunk, not a dead body.

16 MR. BAIR: I understand. I think in that case
17 there would be a much closer case, it would be a much more
18 difficult case vis-a-vis all three occupants of the car.

19 QUESTION: But under -

20 QUESTION: Okay, what about the -

21 QUESTION: - under - under your view, if - if the
22 car is in a high crime area and some mother gets a ride
23 from her son who she perhaps doesn't know has been
24 involved in drugs, then if drugs are found anywhere in
25 that car, she's subject to arrest and - and sufficient for

1 charge?

2 MR. BAIR: Not - not -

3 QUESTION: I mean, suppose it's at - in the
4 middle of the day and she's going to the grocery store, we
5 don't have it at 3:00 a.m. in an area where drugs are
6 frequently sold. Does that enter into the calculus?

7 MR. BAIR: I think it does, Your Honor. I think,
8 obviously with - with - with the totality of the
9 circumstances, anytime you change - and, of course, some
10 of these are going to have more minor impact, some are
11 going to have more major impact. But in this case you
12 had, of course, 3:16 in the morning, three men who were
13 roughly of the same age who appeared to be intimately
14 connected with one another, you had the drugs and the
15 money. I think here's a very strong case, but I agree,
16 Justice O' Connor -

17 QUESTION: What if there had been four people in
18 the car?

19 MR. BAIR: I don't know that four people would
20 change things.

21 QUESTION: How about six?

22 MR. BAIR: I think within the -

23 QUESTION: Or what if it was a minivan and there
24 were eight in the minivan?

25 (Laughter.)

1 MR. BAIR: I'm not sure it changes it
2 significantly, Your Honor. I think that the most
3 significant -

4 QUESTION: You think with eight people in the
5 minivan you could arrest all eight and hold them over for
6 trial?

7 MR. BAIR: I think if you have identical
8 circumstances to these in terms of the time, how well-
9 acquainted they all appeared, the fact there was money,
10 the fact that there were drugs packaged for distribution.
11 It appeared to the officer, a reasonable inference, that
12 there was a drug distribution common enterprise.

13 QUESTION: But the distribution, as I understand
14 it, was just enough to take care of a big party. There
15 was no evidence that they were for sale, was there?

16 MR. BAIR: Well, the evidence, at the time the
17 officer made the arrest, I think he could draw an
18 inference that there was cash proceeds perhaps of former
19 drug sales, prior drug sales, and there were five
20 individually packaged crack - hits of crack cocaine.

21 QUESTION: And the charge was possession with
22 intent to distribute, wasn't it?

23 MR. BAIR: Yes, it was both simple possession and
24 possession with intent to distribute, and he was
25 convicted.

1 QUESTION: How about if it had been a bus? Now,
2 we've gone from the sedan to the minivan, how about the
3 bus?

4 MR. BAIR: I think a bus is different, Your
5 Honor. I think a bus changes things significantly in the
6 - in the context of, of course, the numbers of people are
7 much greater, and then there's -

8 QUESTION: Are you talking about a public bus or
9 you're talking about a chartered bus?

10 (Laughter.)

11 MR. BAIR: I think that would affect obviously
12 the totality of circumstances as well.

13 QUESTION: What - what is - what is the rule that
14 you're - there's the restatement hypotheticals -
15 Restatement of Torts, where there's the dead body, two
16 people are each accusing the other, and add - I don't know
17 how the hypothetical would work - but add to the mix that
18 only one could have done it. Can you arrest both?

19 MR. BAIR: I think you can, Your Honor. I think
20 both the Restatement of Torts, the Model Code of Pre-
21 Arraignment Procedure, and just the - the nature of
22 probable cause would permit that, because we're talking
23 about -

24 QUESTION: The Model Code of Pre-Arraignment
25 Procedure just talks again about probable cause?

1 MR. BAIR: Same situation where you have, say,
2 two people, only one of whom could be guilty of the crime.
3 You could still have - you still would have probable cause
4 to arrest both.

5 QUESTION: But that's two people and here you've
6 got three.

7 QUESTION: What about three? I was going to ask,
8 what about three?

9 MR. BAIR: I think three is - is -

10 QUESTION: You can arrest all three?

11 MR. BAIR: I think so.

12 QUESTION: What about five? You're going to
13 arrest all five? Even - I mean, you know, it gets worse
14 and worse -

15 MR. BAIR: Well, of course.

16 QUESTION: - 10 percent chance, there are 10 of
17 them now -

18 MR. BAIR: And - and -

19 QUESTION: - so the chance that any individual
20 one did it is 10 percent. That's still enough?

21 MR. BAIR: I think we can't draw - the Court in
22 Gates said that you cannot quantify probable cause. You
23 have to - in those circumstances -

24 QUESTION: It doesn't mean probable.

25 MR. BAIR: No, it does not mean probable.

1 Clearly -

2 QUESTION: Why do we call it probable cause?

3 MR. BAIR: I'm not - I think there's a bit of a
4 misnomer there, but clearly from the case law of this
5 Court, it means a fair probability, it means something
6 greater than reasonable suspicion under Terry -

7 QUESTION: But if you had to reduce it to a
8 percentage figure, what would you call the percentage
9 required for probable cause?

10 MR. BAIR: I don't know that I could, Your Honor.
11 I really don't know that it's useful to -

12 QUESTION: But it's less than 50, though, I
13 gather?

14 MR. BAIR: Yes. Your - the cases of this Court
15 has said -

16 QUESTION: So that takes care of the two people
17 in the room, but when you get down to 33-1/3 with three
18 people?

19 MR. BAIR: I think - I think three people clearly
20 would be -

21 QUESTION: And with four people it would be 25
22 percent. Is that enough?

23 MR. BAIR: Probably, probably.

24 QUESTION: Probably.

25 (Laughter.)

1 QUESTION: You - you agree - you agree that at
2 some point the probability is - when the numbers of people
3 present keep increasing, at some point the probability is
4 going to be too slim?

5 MR. BAIR: Yes, I agree with that. I agree with
6 that, but again, in Illinois v. Gates, this Court said we
7 will not, we cannot, it's not useful to try to quantify
8 probable cause in that way, we still have to look at the
9 totality of the circumstances beyond whether there are two
10 people or three people or whatever.

11 QUESTION: And one is -

12 MR. BAIR: Of course, on the Government's theory
13 I don't think it would matter, because they say you can
14 infer a conspiracy, and I suppose then the whole bus could
15 be in the conspiracy, but if it's an individual approach,
16 which I think you're taking, then the number of people
17 might make a difference.

18 MR. BAIR: I think so. Now, of course, it would
19 depend on - on the crime that the probable cause was going
20 to. In this particular crime, of course, drugs can be
21 jointly and constructively possessed, so clearly in this
22 particular car, all three of the people could be guilty of
23 the crime, not just one.

24 QUESTION: Do you accept Justice Stevens'
25 suggestion that your position might differ from the

1 Government here?

2 MR. BAIR: I don't know that it does. I think
3 our positions are basically the same.

4 QUESTION: So - so you do think a conspiracy can
5 generally - can be inferred as to all people in these - in
6 the instance like this?

7 MR. BAIR: In our case, absolutely, absolutely.
8 In our case, clearly -

9 QUESTION: But if one of them -

10 QUESTION: But you didn't argue the - excuse me -
11 you didn't argue the conspiracy theory in the State
12 court, I don't think, did you?

13 MR. BAIR: Well, I think we did, Your Honor. I
14 think we argued in the State court that because drugs can
15 be jointly and constructively possessed, that any one,
16 two, or three of the individuals in the car were - were
17 guilty of this crime.

18 QUESTION: If you know nothing more than what you
19 know here - I mean, I take it that if - if it were
20 undisputed that one of the three was a hitchhiker, you -
21 you would not make the argument with respect to the
22 hitchhiker?

23 MR. BAIR: I think if - if it's undisputed, and
24 of course, that's going to be a difficult situation to -
25 to know that there's no actual connection -

1 QUESTION: That's the wonderful thing about being
2 on the Supreme Court.

3 MR. BAIR: If it's -

4 QUESTION: You can make those assumptions.

5 MR. BAIR: If it's undisputed, then I think that
6 significantly changes, because I think a lot - a core
7 concept here is this notion of common enterprise, that
8 when you have people in a car together, particularly a
9 small passenger car, there's an inference, I think in this
10 case a very strong inference, that all three of these
11 people were engaged in a common enterprise. So -

12 QUESTION: But do you have - do you need the -

13 QUESTION: What if the car - what if the car
14 included a driver and two hitchhikers and the drugs were
15 found exactly as they were here, and there's obviously no
16 common enterprise, would there be probable cause?

17 MR. BAIR: I guess it would be - of course, that
18 would be a more difficult case because you had the money
19 in the glove compartment of the car and the drugs in the
20 backseat of the car, so that -

21 QUESTION: I'm not sure the money really adds
22 anything to the analysis, to tell you the truth.

23 MR. BAIR: I think it adds -

24 QUESTION: Because there's certainly nothing
25 illegal about carrying money in the glove compartment,

1 where it is illegal to carry drugs in the - behind the
2 seat - the armrest.

3 MR. BAIR: Well, certainly the money without the
4 drugs would be a - a different case than the drugs without
5 the money.

6 QUESTION: But you -

7 QUESTION: The hitchhiker - the hitchhiker
8 example poses a question for the arresting officer,
9 because does he have to accept the declaration of someone
10 that I'm just a hitchhiker here?

11 MR. BAIR: No, and - and that, of course, goes
12 back to whether it's undisputed in some way, I don't know
13 quite how it would be undisputed. You've always got the -
14 the officer who on the scene is making a reasonable
15 judgement from all the facts and circumstances, and one of
16 those is, I don't have to believe the criminal or
17 criminals in this car. I know there are drugs in the car,
18 we have a known crime here being committed in the presence
19 of the officer, possession or possession with intent to
20 distribute drugs.

21 QUESTION: Well, I'm still curious about the
22 answer to my question. Assume the officer did accept the
23 truth of the representation they were two - two
24 hitchhikers picked up at different times, and maybe he was
25 following the car, for instance, so he knew that was true,

1 and then there's the driver and then there are drugs in
2 the backseat just as there are here. Would there be
3 probable cause in that case?

4 MR. BAIR: Two - two answers to that, Justice
5 Stevens. One, of course, is you would measure the
6 probable cause by an objective standard and not by the
7 subjective standard of that particular police officer.
8 The other is -

9 QUESTION: But what is the answer?

10 MR. BAIR: The other is, it could be that -

11 QUESTION: I thought you were going to say the
12 two answers were yes and no.

13 (Laughter.)

14 MR. BAIR: It could be, Your Honor, that the -
15 the driver knew the hitchhikers and that's why he picked
16 them up. I mean, a lot of times people -

17 QUESTION: No, no, no. I'm just assuming the
18 only relevant facts are that it's undisputed they were two
19 - two unrelated - they're three unrelated people, they're
20 just entirely different backgrounds, one doesn't even
21 speak English and one doesn't speak Spanish, but there are
22 three of them in the car and the drugs are found exactly
23 under the circumstances here. What I'm trying to say - if
24 there were no conspiracy theory, would there be probable
25 cause?

1 MR. BAIR: I think so, yes. Yes, I think there
2 would be.

3 QUESTION: You - you have - you really have to
4 say that based on the dead victim hypothetical that you
5 answered earlier.

6 MR. BAIR: I think so, I think so, that - that if
7 the, again, one - the other inference among the - the -
8 the indicators of a common enterprise would be, I think
9 it's unusual that several people are going to be taking a
10 chance driving around, either with evidence of a murder or
11 evidence of a drug conspiracy. They're not simply as a
12 matter of reasonable inferences that an officer can draw,
13 take the chance of having innocent people along.

14 Unless there are any further questions, I - I'd
15 reserve the remainder of my time.

16 QUESTION: Very well, Mr. Bair.

17 Mr. Srinivasan, we'll hear from you.

18 ORAL ARGUMENT OF SRI SRINIVASAN

19 ON BEHALF OF THE UNITED STATES AS AMICUS CURIAE

20 SUPPORTING THE PETITIONER

21 MR. SRINIVASAN: Thank you, Mr. Chief Justice,
22 and may it please the Court:

23 The totality of the circumstances apparent to
24 the officer at the scene established probable cause for
25 respondent's arrest. Of particular significance, the

1 officer uncovered drugs that were packaged for
2 distribution and that were concealed in the location in
3 which they were readily discoverable by the other
4 passengers.

5 QUESTION: Your brief reads to me - at about page
6 15 - to suggest that you're proposing a broad rule that
7 probable cause exists to arrest all occupants of a car
8 anytime commercial quantities of narcotics are found in
9 the passenger portion of the car.

10 MR. SRINIVASAN: It's - we don't intend -

11 QUESTION: Is that your position?

12 MR. SRINIVASAN: We don't intend to suggest a
13 broad rule, Justice O'Connor.

14 QUESTION: Do you agree that it is a totality of
15 the circumstances test?

16 MR. SRINIVASAN: Yes, it's a totality of the
17 circumstances test, and it will turn on contextual factors
18 that are present in any particular case.

19 QUESTION: Well, you do say at page 15, beginning
20 of the first full paragraph, for these reasons, the
21 discovery of an amount of narcotics suitable for
22 distribution in the passenger compartment supports an
23 inference that all of the car's occupants were aware of,
24 and hence, involved with the drugs. That's a sweeping
25 statement.

1 MR. SRINIVASAN: Well, what - what we intend to
2 say is that ordinarily when drugs that are packaged for
3 distribution are found in a location in which they're
4 readily discoverable by the other passengers, a reasonable
5 officer can fairly conclude that there's a fair
6 probability that each passenger is - is aware of the
7 drugs, but of course in particular cases -

8 QUESTION: But it - it might - wouldn't different
9 factors enter into it? Suppose it's a young child -

10 MR. SRINIVASAN: Absolutely, Justice O'Connor.

11 QUESTION: - in the vehicle, and it's in the
12 middle of the day and they're dropping the child off at
13 school or something. Are you suggesting there would
14 nonetheless be this inference and the child could be
15 hauled up and sent to the juvenile court?

16 MR. SRINIVASAN: No. The inference is tethered
17 to the particular facts of this case. In cases that
18 present different facts, for example, if a child was in
19 the car of - if, as was earlier discussed, a hitchhiker
20 were in the car, the probable - probable cause calculus
21 would be different. But in this case there was no reason
22 to suspect that any of the individuals was uninvolved in
23 the possession of the cocaine. In fact, what's
24 particularly significant in this case in our view is the
25 location in which the drugs were found, because they were

1 found wedged behind the rear seat armrest, which
2 apparently is the type of armrest that's adjustable in an
3 up or down position. The very purpose of that type of
4 armrest is to give the passenger an option according to
5 his preference whether the position - the armrest in one
6 position or the other, so it's highly -

7 QUESTION: The only evidence that supports the
8 notion that some were uninvolved is that as soon as one of
9 them confessed, the police immediately dismissed the
10 charge against the other two, and therefore abandoned the
11 notion that it was a common enterprise.

12 MR. SRINIVASAN: Well, I - it - there's a - I
13 think there's a different question concerning whether
14 there was probable cause for an arrest and the
15 determination by an officer whether to proceed with
16 charges. Just because the officer -

17 QUESTION: You'd think if the - if the backseat
18 person or whoever it was that confessed had confessed
19 while the officer was arresting him, there would have
20 remained the probable cause as to the other two? Could he
21 have said, I don't believe you, I'll take all three of you
22 in anyway?

23 MR. SRINIVASAN: There might well have been,
24 Justice Stevens, because an officer's not required to
25 believe the version of events that's given to him by

1 people on the scene. It might well be the case that they
2 have a coordinated plan in advance to pin the blame on a
3 particular person as opposed to the other two, and an
4 officer can take into account the totality of
5 circumstances in making that type of assessment.

6 QUESTION: May I - may I clarify whether you are
7 indeed relying on common enterprise? I thought the view
8 was it may or may not be a common enterprise, but here is
9 a situation, drugs equally accessible, drugs accessible to
10 any one of the three. We can't say whether all three or
11 which one, so looking at the three, and we say, well, it's
12 not more - not more likely the driver than the front seat
13 passenger, who's there behind the money, or the backseat
14 passenger, because any one of them could have pulled down
15 that armrest. I thought that was your theory, not a - not
16 necessarily a common enterprise.

17 MR. SRINIVASAN: That's correct, Justice
18 Ginsburg. It's not necessarily a common enterprise. It
19 could be any one of the three or it could be all of them
20 or some combination of the three of them, and the
21 combination of those various scenarios rose to the level
22 of a fair probability that respondent was involved with
23 the cocaine. And as I was - as I was saying, that's
24 particularly the case because they were concealed behind
25 the armrest, which is a type of instrument that

1 affirmatively invites manipulation by a passenger, so if
2 one of the occupants of the vehicle alone were responsible
3 for carrying cocaine, it seems quite unlikely that he
4 would have chosen the area behind the armrest as a place
5 to conceal it from the other passengers.

6 QUESTION: Do - do we demand the same standard
7 from the arresting officer as we do from the district
8 attorney who decides whether or not to proceed to
9 preliminary hearing?

10 MR. SRINIVASAN: The probable cause standard
11 works the same. In both situations the question would be
12 whether there's a fair probability. Now -

13 QUESTION: But - but do we demand a higher
14 standard -

15 MR. SRINIVASAN: Well, it's -

16 QUESTION: - from either of them in making that
17 assessment?

18 MR. SRINIVASAN: It's often the case that
19 prosecutors will have more rigorous standards as a matter
20 of internal - matter of internal guidelines. And for
21 example, in the U. S. Attorney's manual, it dictates that
22 prosecutors in the Federal system need to ensure that it's
23 likely that they'll be able to obtain a conviction on -

24 QUESTION: Well isn't - isn't that - that means
25 the - the probable cause standard is the same, but the

1 prosecutor has an obligation to try to find out more and
2 get more evidence before he goes forward. Isn't that the
3 difference?

4 MR. SRINIVASAN: Right. The nature of the
5 application of the probable cause standard is different in
6 the prosecutorial stage because the prosecutor is
7 identifying a particular offense, laying out the facts to
8 support that offense, and the -

9 QUESTION: But the - but the standard - the
10 standard that determines the - the - the degree of
11 likelihood of inference, that is the same standard,
12 whether we're talking about the police officer or whether
13 we're talking about the district attorney later?

14 MR. SRINIVASAN: Correct. That remains constant
15 in both scenarios.

16 QUESTION: I - I'm not sure what you're saying.
17 You're saying it - it can get to the jury with no more
18 than probable cause and should not be thrown out by the
19 court?

20 MR. SRINIVASAN: There's a different - there's a
21 different question whether the evidence is sufficient to
22 convict as presented by the prosecutor and whether the
23 prosecutor has enough to go forward with the charges.

24 QUESTION: No, but you're saying the prosecutor
25 does not have an obligation to refrain from bringing a

1 prosecution where he plainly on the face of it doesn't
2 have enough evidence to convict?

3 MR. SRINIVASAN: As long as there's probable
4 cause to go forward, the prosecutor can go forward with
5 the charges.

6 QUESTION: To say plainly on the face of it is
7 something that a - a prosecutor is seldom confronted with.
8 I mean, you've got different people telling different
9 stories usually and it's usually a question of who's
10 believed.

11 MR. SRINIVASAN: That's correct, Mr. Chief
12 Justice, and -

13 QUESTION: Well, I'm assuming he has three people
14 in the car and the chance for each of them is 33-1/3
15 percent -

16 MR. SRINIVASAN: Well, he could go -

17 QUESTION: - and he prosecutes one of them and he
18 has nothing else. That's all he has, three people in the
19 car, stuff in the back seat -

20 MR. SRINIVASAN: Well, that's -

21 QUESTION: - and he picks the passenger and
22 brings a prosecution. The passenger, it could have been
23 me, it could have been the other two, 33-1/3 percent.

24 MR. SRINIVASAN: Well, that's - that's different
25 from the facts of this case, but even assuming that it

1 were an equal likelihood that each of them independently
2 were involved in the offense, the prosecutor could go
3 forward in that situation, but it's highly unlikely that
4 he would go forward in that situation because - because
5 he's unlikely to obtain to a verdict in his favor. So
6 there's institutional incentives -

7 QUESTION: And the district court probably would
8 not let the case go to the jury if the motion was made at
9 the end of the prosecution's case and this was all you
10 had?

11 MR. SRINIVASAN: That's correct, Justice Kennedy.

12 QUESTION: The prosecution should - the
13 prosecutor should bring cases which clearly will not be
14 able to go to the jury?

15 MR. SRINIVASAN: No, not should bring cases -

16 QUESTION: May, may.

17 MR. SRINIVASAN: May, under the Constitution.

18 QUESTION: Okay, that's not my understanding of
19 the prosecutor's -

20 MR. SRINIVASAN: And that's why, I think,
21 prosecutors typically enforce upon themselves a more
22 rigorous obligation than the probable cause standard.

23 QUESTION: But we have no case saying that they
24 may not proceed?

25 MR. SRINIVASAN: No, there's no case that I'm

1 aware of that says that they can't proceed where there's
2 probable cause.

3 QUESTION: But you just said the manual
4 instructed them not to bring cases to trial.

5 MR. SRINIVASAN: In - in the Federal system -

6 QUESTION: Yes.

7 MR. SRINIVASAN: - there's Federal guidelines
8 that spell out when Federal prosecutors are supposed to
9 bring cases to trial, but I'm not aware that that's
10 required by Federal law or by the Constitution. Each
11 prosecutor's office might have their own -

12 QUESTION: Do you have readily at hand the - the
13 citation to the manual?

14 MR. SRINIVASAN: I don't - I don't have the
15 particular provision.

16 QUESTION: Of course, the - the manual wouldn't
17 in any way bind Maryland authority.

18 MR. SRINIVASAN: That's correct. Each
19 prosecutor's office might have different standards.

20 QUESTION: If - if the Federal manual binds
21 anyone.

22 MR. SRINIVASAN: Right. Well, the deficiencies
23 in the Maryland court's probable cause analysis, we think,
24 are particularly are apparent when one considers the
25 implications for officers at the scene in circumstances

1 like this case, because apparently the up-shot is that
2 officers either could arrest no one or that they could
3 arrest the driver alone, and the latter situation seems
4 unsound because perhaps the least likely scenario in
5 circumstances like this case is that - that the driver was
6 acting alone and carrying the contraband in the car,
7 because if the driver in fact were acting alone, one might
8 expect that he would conceal the contraband in a location
9 in which it was not so readily discoverable by the other
10 passengers.

11 QUESTION: What about the respondent's position
12 that your position means two innocent people may be locked
13 up in jail, because suppose Pringle hadn't fessed up, and
14 he exercised his right to remain silent. Then you might
15 have a prolonged periods, assuming they couldn't make
16 bail, three people stuck in the brig and two of them are
17 innocent.

18 MR. SRINIVASAN: Yes, Justice Ginsburg, it's
19 possible that innocent persons will be arrested and bound
20 over in circumstances like in this case, but the probable
21 cause standard accepts that possibility as the cost of
22 ensuring the effective enforcement of the criminal laws.
23 In fact, this Court reiterated in *Wardlow* recently that
24 the probable cause standard accepts that innocent persons
25 may be arrested on occasion. That's simply the cost of a

1 functioning criminal justice system.

2 QUESTION: Thank you, Mr. Srinivasan.

3 MS. Forster, we'll hear from you.

4 ORAL ARGUMENT OF NANCY S. FORSTER

5 ON BEHALF OF THE RESPONDENT

6 MS. FORSTER: Mr. Chief Justice, and may it
7 please the Court:

8 This is a unique case with highly unusual facts,
9 and the reason it is unique is because of the facts - not
10 because of the facts that exist so much in this case, but
11 because of those that do not exist here. There was no
12 testimony whatsoever in this case that Mr. Pringle had
13 control over or knowledge of the drugs hidden in the back
14 seat of the car -

15 QUESTION: Ms. Forster, when you say testimony,
16 you're not referring to any scheduled hearing or formal
17 hearing, are you?

18 MS. FORSTER: Well, Your Honor, what the court in
19 Maryland reviews on appeal is the motion to suppress
20 hearing, and at that hearing there was no evidence
21 presented whatsoever that the officer in this case noticed
22 any furtive movements by Mr. Pringle, any furtive
23 gestures, that he said anything suspicious at the scene,
24 or that he acted in any unusually nervous manner. All we
25 have here -

1 QUESTION: Well, I thought we were considering
2 this on the basis offered, which is the three people at
3 3:30 a.m. in a high crime neighborhood in a sedan where
4 there were a certain quantity of drugs behind the armrest
5 and money in the glove compartment.

6 MS. FORSTER: A few corrections, if I may,
7 Justice O'Connor -

8 QUESTION: Three people in the car.

9 MS. FORSTER: This is - 3:00 a.m. is accurate,
10 3:16 a.m. It is in a residential area. This was not in
11 fact a high crime area. And I think that under the
12 totality of circumstances we have to put that in context,
13 and the context is this, that it's 3:00 a.m. on a Saturday
14 night with a car of three young men in their twenties in a
15 residential area, and I think that anyone who has children
16 of that age knows that often their Saturday night does not
17 even begin until 10:00 or 11:00 p.m.

18 QUESTION: Well, a lot of people wouldn't refer
19 to children as being in their twenties, I think.

20 (Laughter.)

21 MS. FORSTER: Young adult children, Your Honor.

22 QUESTION: You - you make an interesting opening
23 statement that this is a highly unusual - we've - a lot of
24 us read a lot of these cases. It seems to me this happens
25 all the time, that drugs in the car, the person says, it's

1 not mine. It seems to me that that's commonplace.

2 MS. FORSTER: But what we have here with respect
3 to Mr. Pringle is simply presence and nothing more. We
4 have no further -

5 QUESTION: But isn't there - isn't there
6 something more than presence here? Isn't the significance
7 - isn't the significant evidence of this case something
8 that appears when you contrast it with Houghton from a
9 couple of years ago? Houghton, you had evidence that the
10 driver of the car was a recreational, a personal drug
11 user. We don't, I think, in this society, at least
12 certainly today, assume that everyone who is in the
13 company of a recreational drug user is also a drug user or
14 an accessory to the first person's drug use. Here,
15 however, what the police officer had was evidence, not
16 merely of the time, but of - of three people in a
17 relatively small car with commercial quantities of drugs,
18 an amount of money that was enough to suggest that drug
19 dealing was going on, and I think a - an inference was
20 possible that someone in that car was dealing in the
21 drugs.

22 And it seems to me that the different inference
23 that can be drawn about the others here as distinct from
24 the inference in the Houghton case is, most drug dealers
25 do not go around in their place of business, the car, with

1 people who are totally innocent of drug activity -

2 MS. FORSTER: If I -

3 QUESTION: - and isn't that the basic difference
4 between this and Houghton and doesn't that inference
5 support - amount to probably cause?

6 MS. FORSTER: Your Honor, if I - if I may, with
7 respect to this being packaging - the drugs packaged that
8 is indicative of sale or for distribution, there was
9 absolutely no evidence in this record that this was
10 anything inconsistent with personal use.

11 QUESTION: Five - five crack cocaine hits?

12 MS. FORSTER: Yes, Your Honor. In fact, I think
13 that there are a lot of crack cocaine addicts for which
14 that is a small amount of personal use.

15 QUESTION: But is -

16 QUESTION: How about a big roll of money?

17 MS. FORSTER: And, Your Honor, also, there's a
18 problem with the record in this respect with regard to
19 money -

20 QUESTION: Well, you pointed it out, but I think
21 it - I thought, and tell me if I'm wrong here, I thought
22 that it was - it was - the evidence was, regardless of how
23 he first described the quantity that he saw, I thought the
24 evidence came out that there was 700 and some odd dollars
25 in it, so I think the judge could infer that it was fairly

1 - a fairly sizable roll of bills.

2 MS. FORSTER: Justice Souter, the actual amount
3 did not come out until the trial. That never came out at
4 the motion to suppress hearing, and in fact, the amount of
5 money was never characterized at the motion to suppress
6 hearing by the officer who testified, other than to say he
7 saw the sum of money, that's all.

8 QUESTION: And what is in - and it was in the
9 glove compartment?

10 MS. FORSTER: It was concealed in the glove
11 compartment?

12 QUESTION: And it was open, it wasn't in a wallet
13 or something like that?

14 QUESTION: A roll of bills.

15 MS. FORSTER: We don't - we don't know. In fact,
16 the officer who - Officer Snyder, when he testified at the
17 motion to suppress hearing, simply said that when Mr.
18 Parlo, the driver of the automobile, went to retrieve his
19 license and registration from the glove box, that is when
20 I saw the money.

21 QUESTION: So it's reasonable -

22 QUESTION: But he - he must have seen it in the
23 form of a - a roll of bills or something, rather than, as
24 Justice Souter said, just not in a wallet.

25 MS. FORSTER: The record is unclear.

1 QUESTION: Well, but, I mean, you - you don't
2 have to have been born yesterday to decide that.

3 MS. FORSTER: Well, the - Your Honor, I guess the
4 point is, is that all that was before the trial - the
5 trial judge at the motion to suppress hearing - there was
6 never any characterization of the denomination, the
7 amount, nothing, just the only thing that was said was the
8 money.

9 QUESTION: Do you have a roll of bills exposed in
10 your glove compartment?

11 MS. FORSTER: At times I do, Your Honor.

12 QUESTION: You do?

13 MS. FORSTER: Yes.

14 QUESTION: You better be careful if you do.

15 (Laughter.)

16 MS. FORSTER: I might also point out that at the
17 actual trial, the expert who did testify for the State
18 with regard to the - whether or not this was an intent to
19 distribute - testified that without Mr. Pringle's
20 confession and this statement, he could not in fact say
21 that this was consistent with an intent to distribute
22 based solely -

23 QUESTION: So it was at least possession. So
24 would you concede that a crime - in the officer's presence
25 there was evidence of the commission of a crime?

1 MS. FORSTER: Yes.

2 QUESTION: Then - so the officer says, I know
3 that a crime has been committed. In the whole world there
4 are only three possible people who could do it. What
5 instruction would you give to the officer on the scene who
6 knows that a crime has been committed, there are three
7 possible people, but he can't say which? Is it the answer
8 that he can make no arrest?

9 MS. FORSTER: No, that's not the answer.

10 QUESTION: What arrest can he make?

11 MS. FORSTER: Justice Ginsburg, in this case, the
12 officer could arrest Mr. Parlo, the driver of the
13 automobile, because I think it is universally accepted
14 that we can impute the driver owner of an automobile with
15 the knowledge that he knows what is in his car and he has
16 exclusive control over that which is in his car. So the
17 officer here should have arrested Mr. Parlo.

18 QUESTION: And no one else?

19 MS. FORSTER: Your Honor, I would suggest that
20 perhaps - I mean, and of course, this is not the issue
21 before the Court, that perhaps because of Mr. Smith, the
22 backseat occupant, may also have been arrested given that
23 the nature of an arrest is not really a normal repository
24 that one would place personal items in -

25 QUESTION: So maybe - definitely the driver,

1 maybe the backseat passenger -

2 MS. FORSTER: Maybe Mr. Smith.

3 QUESTION: - but not the one who in fact -

4 MS. FORSTER: But definitely -

5 QUESTION: - who in fact committed the crime.

6 MS. FORSTER: Definitely not Mr. Pringle, but of
7 course, if we're going to use Mr. Pringle's confession in
8 determining in hindsight, we need not have -

9 QUESTION: If this were - if this were a bus or a
10 tavern or a theater or some of the examples, then it
11 certainly would unreasonable to assume that the front seat
12 passenger could reach back to the last row of the theater.
13 But here, this was a small car. It isn't hard for
14 somebody in the front seat to turn around and push down
15 the armrest.

16 MS. FORSTER: Justice Ginsburg, I agree with that
17 - that perhaps it would not be difficult, given the
18 compact nature of this car. However, there was no
19 testimony that in fact that anyone saw Mr. Pringle do
20 that, number one, and number two -

21 QUESTION: Well, that's because they - they
22 didn't have a buy committed in the presence of the officer
23 at the scene.

24 MS. FORSTER: Well, I - I understand that, Your
25 Honor.

1 QUESTION: I mean, I don't know why that counts
2 against -

3 MS. FORSTER: Well, my second response would be
4 this, that I think that it would be highly unreasonable
5 that Mr. Smith, the backseat passenger, would allow Mr.
6 Pringle to turn around and store the drugs in the armrest
7 right next to him.

8 QUESTION: Why?

9 QUESTION: Ms. Forster, the Maryland Court of
10 Appeals, which ruled in your favor, says, during the
11 search Officer Snyder seized \$763 from the glove
12 compartment, so they are - they accepted that as a fact.

13 MS. FORSTER: Your Honor, the Maryland - with all
14 due respect, the Maryland Court of Appeals made a mistake
15 in this case because what they said in their opinion -

16 QUESTION: Well, but no, we take the facts as the
17 lower court found them. I mean, I don't think it will do
18 to say that the court of appeals is wrong on the facts.

19 MS. FORSTER: Your Honor, what the court of
20 appeals incorrectly did in this case was - and they
21 dropped a footnote to suggest that it was unclear to them
22 whether or not there was a separate motion to suppress
23 hearing or whether there was a combined motion to suppress
24 trial proceeding. In fact, that's incorrect. There was a
25 separate motion to suppress hearing.

1 QUESTION: But the - but they nonetheless say
2 that Office Snyder seized \$763.

3 MS. FORSTER: That's true, Your Honor, and for
4 purposes of Mr. Pringle's position, the fact that that
5 money is concealed, really it makes no difference the
6 amount. However, if the - as the petitioner and the U.S.
7 Solicitor find the amount to be significant, I think we
8 should have a clearer record.

9 QUESTION: Why - why did you say the driver, I
10 mean, on your theory? I think it would be harder for the
11 driver who's driving along to put the bags back in the
12 backseat than it would be for the passengers.

13 MS. FORSTER: Well, Justice Breyer, that assumes
14 that the driver did not put it there before he picked up
15 his passengers.

16 QUESTION: Well, if he put it there before,
17 wouldn't they all know it was there?

18 MS. FORSTER: I don't think so, Your Honor. If
19 it's - if it's sandwiched between the armrest as it's
20 pushed up against the seat, no, I don't.

21 QUESTION: But the driver consented to have the
22 car searched, so one might think, my goodness, if he knew
23 there were drugs there, why did he say yes when he could
24 have said no?

25 MS. FORSTER: Justice Ginsburg, I can tell you as

1 a criminal defense lawyer that defendants consent all the
2 time when they have a car full of drugs and they know the
3 drugs are there. It's not unusual and it -

4 QUESTION: This is not like the - one of the
5 cases that you relied on is the Di Re case. Your answer
6 to me was, arrest the driver. There, the informer had
7 fingered the driver, so the police knew that they had the
8 right man when they arrested the driver. Here, it isn't
9 at all like Di Re because the driver may or may not have
10 been the right person.

11 MS. FORSTER: Except that - how this case is
12 similar to Di Re is that in Di Re this Court held that if
13 the act - the criminal activity, the ongoing criminal
14 activity, is not visible to the occupants, the mere
15 presence is not enough on which to have probable cause to
16 arrest. And here we have concealed drugs and nothing more
17 than Mr. Pringle's presence in the front seat.

18 QUESTION: But there - there's - there's another
19 difference. The drugs are not locked up in the trunk.
20 They are at a place where the backseat person could push
21 it down. There wasn't a serious attempt to hide those
22 drugs securely.

23 MS. FORSTER: Yes, Justice Ginsburg, I agree with
24 that. But however, that would only point more closely to
25 Mr. Smith, the backseat person sitting directly next to

1 the armrest, not to Mr. Pringle, the front seat passenger.

2 QUESTION: Well, except if - if you accept the
3 proposition that the - that there probably was a roll of
4 bills visible in the glove compartment, Mr. Pringle was
5 within easy reach, not even arm's reach of the rolled
6 bills.

7 MS. FORSTER: Well, Justice Souter, the - the
8 problem with that, of course, it's pure speculation, but
9 we don't even know if this glove compartment was locked or
10 unlocked. What we know is that it was opened by the
11 driver at the time he was asked to retrieve his license
12 and registration. Whether he had to unlock that glove
13 compartment is not clear at all for the record.

14 QUESTION: Well, we - we don't know that and we
15 don't know whether the armrest had come down during the
16 time the backseat passenger was there. There are lots of
17 things at a probable cause stage that one does not know,
18 but the very fact - if - if we're going to talk - if we're
19 going to find it significant that something is within
20 reach of one of the passengers or not, I would have
21 supposed that for probable cause purposes, the fact that
22 the money was in reach was a relevant fact.

23 MS. FORSTER: But, Your Honor, I - I think that
24 if we want to speculate that perhaps then we could say
25 that that would be enough, but probable cause requires far

1 more than speculation. It requires a fair probability, at
2 least of complicity, and we simply don't have the facts in
3 this case that would support that fair probability with
4 respect to Mr. Pringle, because all the record shows is
5 that Mr. Pringle was present in a car where drugs were
6 found hidden.

7 And if I may address the common enterprise
8 theory that both the petitioner and the U. S. Solicitor
9 relies on in this case, the problem with the common
10 enterprise theory is that the cases that they cite in
11 support of that involved ongoing criminal activity that
12 was conducted in plain view. You have the Ulster County
13 case, where the Court found that the weapons, one of which
14 was described as as large as a cannon, that was in plain
15 view of all of the occupants of the car. `And in the
16 Houghton case - so it was reasonable in the Ulster County
17 case, or if that had in fact been the issue in that case,
18 which it was not -

19 QUESTION: Those I just think that - look, it
20 just doesn't strike me as plausible that when you have
21 three people in a car, one of them would stuff some drugs
22 behind an armrest where they're very easy to find, unless
23 he thought the other two were in on it, I mean, unless you
24 thought the other two at least didn't care, and if they
25 didn't care they're out there transporting the drugs with

1 them.

2 MS. FORSTER: Well -

3 QUESTION: So - so how - I don't even know, I
4 mean, what I'm struggling for is, that seems like a
5 reasonable inference so how - how do I know, I mean, I'm
6 making this kind of inference. How do I know whether I
7 should or not?

8 MS. FORSTER: Justice Breyer, the inference that
9 the backseat passenger may stuff the drugs in the armrest
10 -

11 QUESTION: Any of the three, I mean, any of them
12 might, and why would they? Why - you'd have to be crazy
13 to be stuffing crack into a car like that without thinking
14 your friends are - have - don't give a damn at the very
15 least -

16 MS. FORSTER: But certainly -

17 QUESTION: - and probably are in on it.

18 QUESTION: But certainly, I think that even if
19 they - he does that in the view of Mr. Pringle, that - so
20 that Mr. Pringle has knowledge that the drugs were shoved
21 in the armrest - that certainly does not also go to the
22 next level, which is that Mr. Pringle possesses those
23 drugs. I may see one - a passenger -

24 QUESTION: Would - would - would the - the
25 officer at that point then be able to say, ah, but, in any

1 case I could arrest the other two because they're
2 harboring a felon? In other words, you said that you
3 could maybe arrest the ones who sitting next to the - the
4 other, since the drugs are barely concealed?

5 MS. FORSTER: Well, no, Your Honor, I - perhaps I
6 - I was not clear.

7 QUESTION: Here's what she's thinking, and there
8 might be a million different crimes. You say to the front
9 seat passenger, everything's the same, but you say to the
10 front seat passenger, Mr. Front Seat Passenger, did you
11 know that there were drugs down there in the armrest? And
12 he says yes, and that's all he says. I would imagine he
13 could be arrested then, couldn't he?

14 MS. FORSTER: No, Your Honor, I -

15 QUESTION: You couldn't arrest him then?

16 MS. FORSTER: I don't think he could be arrested.

17 QUESTION: For transporting the drugs or helping
18 to transport them or being an accessory or doing
19 something?

20 MS. FORSTER: Well, certainly if he's the front
21 seat passenger and not the driver he's - he's along for
22 the ride. He's not necessarily the person transporting -
23

24 QUESTION: Well, he doesn't say anything. We
25 don't know anything about it. He just says, sure I knew

1 there were drugs back there, that's all.

2 MS. FORSTER: Under those circumstances, Your
3 Honor, I think you'd have a much closer case.

4 QUESTION: No, no, but - but no, look, either
5 there is a crime of being in a car knowing that or there
6 isn't. Is there or not? I don't know.

7 MS. FORSTER: Well, the crime of possession
8 requires not just knowledge, but it also requires the
9 intent to exercise dominion and control over the drug.

10 QUESTION: All right, so - so you'd have to then
11 make an inference that a person who says, yes, I knew the
12 drugs were there, was also going to help later on.

13 MS. FORSTER: Yes. That would -

14 QUESTION: All right. But that's -

15 MS. FORSTER: - there would have to be some
16 reasonable inference -

17 QUESTION: And you think that's not reasonable
18 either?

19 MS. FORSTER: I think it is not just on those
20 facts alone.

21 QUESTION: Okay.

22 QUESTION: Am I right in assuming that the other
23 two people in the car didn't testify at the suppression
24 hearing?

25 MS. FORSTER: No, they did not, Your Honor.

1 QUESTION: Or at the trial?

2 MS. FORSTER: No, Your Honor, nor at the trial.
3 Only Officer Snyder testified at the motion to suppress
4 hearing for the State.

5 If I may go back to the common enterprise
6 theory, as I said, the cases that the State and the U.S.
7 Solicitor rely on here involved criminal activity
8 conducted in plain view, and - which, from which an
9 officer could reasonably infer, I think, a common
10 nefarious enterprise. We have a - less than one gram of
11 cocaine in this case that is hidden, hidden, concealed in
12 the backseat armrest, and secondly, again, with respect to
13 this being a commercial quantity of drugs, there is simply
14 nothing in the record that supports that. This was -

15 QUESTION: Well, it was in separate little
16 packets, right?

17 MS. FORSTER: Yes, it was, but that, again -

18 QUESTION: A kind that people would buy for a
19 single dose?

20 MS. FORSTER: That, again, your Honor, is not
21 inconsistent with personal use, and certainly I should
22 think that if this police -

23 QUESTION: Yeah, and one of their charges was
24 possession, was it not? I mean, we're not dealing only
25 with intent to distribute but -

1 MS. FORSTER: That - that is correct. The charge
2 was possession -

3 QUESTION: Pure possession is what -

4 MS. FORSTER: - and possession with intent.

5 QUESTION: Well, to say it's not inconsistent
6 with personal use, I don't think gets your client totally
7 off the hook, because something can be both consistent
8 with personal use and consistent with commercial intent.
9 You know, something can - you can infer both ways.

10 MS. FORSTER: However, Justice Rehnquist, here
11 this amount is not indicative of an operation that
12 requires the participation of more than one person. This
13 is an amount that, if it's for sale, it's for sale -

14 QUESTION: But - but how about the combination of
15 that with the - with the \$763 roll in the glove
16 compartment?

17 MS. FORSTER: Well, Your Honor, I think then it
18 would still require speculation on the part of this police
19 officer to assume that one was connected to the other. I
20 think that the only common enterprise that reasonably
21 could have been inferred from the facts of this case is a
22 common enterprise to go from one destination to another
23 and nothing more than that, and given the concealed nature
24 of the drugs in this case, the lack of any suspicious
25 activities on Mr. Pringle's part, and the lack of, I

1 think, any reasonable inference pointing to complicity
2 that he possessed the hidden drugs, the Maryland Court of
3 Appeals in this case correctly held that there was no
4 probable cause to arrest Mr. Pringle, and this ruling
5 should be affirmed.

6 QUESTION: Thank you, Ms. Forster.

7 MS. FORSTER: Thank you.

8 QUESTION: Mr. Bair, you have 4 minutes
9 remaining.

10 REBUTTAL ARGUMENT OF GARY E. BAIR
11 ON BEHALF OF THE PETITIONER

12 MR. BAIR: Thank you, Your Honor. I just wanted
13 to first clarify any record inconsistencies or - or
14 clarifications that might be in order. I believe that the
15 court of appeals' opinion, which is at appendix page 3A to
16 the petition for cert, makes very clear that the court of
17 appeals, the highest court in Maryland, construed the
18 record as the officer seeing a large amount of money
19 rolled up in the glove compartment, and it totaled \$763.
20 That is clearly stated in the court of appeals' opinion,
21 and I would direct the Court's attention to the trial
22 transcripts at pages 83 to 84. It is not in the joint
23 appendix but it is in the record in the case, the trial
24 transcript pages 83 to 84 from the trial on April 10th of
25 2000. The police officer who arrested respondent

1 testified at the trial that he saw a large roll of money
2 in the glove compartment and that it totaled \$763, so
3 clearly there is record support and the court of appeals
4 so found.

5 With regard to the glove compartment being
6 closed or locked, there's nothing in the record ever
7 indicating that the glove compartment was locked. I think
8 the only natural inference from this record is that it was
9 closed at the time the car was stopped. The officer saw
10 the drug - excuse me - saw the money in the glove
11 compartment when the driver went to retrieve his vehicle
12 registration, and then after the officer obtained consent
13 to search the car, he then opened the glove compartment
14 again and seized the money.

15 I think it's ironic that the rule that is being
16 suggested by respondent is the bright line rule that the
17 driver should always be arrested. I think that's
18 absolutely inconsistent with this Court's Fourth Amendment
19 law. In closing, unless the Court has any questions -

20 QUESTION: Yeah, I do have one -

21 MR. BAIR: Yes.

22 QUESTION: - which is, I think she said, look,
23 there are three possible inferences. One is that the
24 passenger had nothing to do with it, didn't know about it.
25 Two is, everybody knew about it but that's all. And

1 three, they knew about it and wanted to help sell the
2 drugs. All right. Now, she says, one plus two are so
3 great that three isn't probable cause, but about, at least
4 two.

5 MR. BAIR: Your Honor, I think all - the nature
6 of probable cause is that the officer is entitled to
7 accept under the totality of the facts any of those
8 inferences. I think any - any -

9 QUESTION: Two - two isn't a crime, I mean, if
10 they just all knew about it?

11 MR. BAIR: Under Maryland law, they have to have
12 an intent to exercise control over the drugs. If they
13 simply knew about it, that would not be enough for a
14 conviction, but I think -

15 QUESTION: It has to be all three - it has to be
16 three is great enough, so despite one plus two - okay.

17 MR. BAIR: Yes, but I think for probable cause
18 purposes, clearly that would be sufficient. Thank you,
19 Your Honor.

20 CHIEF JUSTICE REHNQUIST: Thank you, Mr. Bair.
21 The case is submitted.

22 (Whereupon, at 11:52 a.m., the case in the
23 above-entitled matter was submitted.)

24
25